FINAL AWARD ON THE CLAIMS FOR COMPENSATION FOR THE SHARES FORMERLY HELD BY THE CLAIMANTS, INTEREST DUE THEREON AND COSTS OF THE ARBITRATION AND ON THE COUNTERCLAIM OF THE BANK AGAINST FIRST EAGLE SOGEN FUNDS, INC., DECISION OF 19 SEPTEMBER 2003

SENTENCE DÉFINITIVE CONCERNANT LES DEMANDES D'INDEMNISATION POUR LES ACTIONS ANCIENNEMENT DÉTENUES PAR LES DEMANDEURS, LES INTÉRÊTS DUS EN CONSÉQUENCE ET LES FRAIS D'ARBITRAGE ET CONCERNANT LA DEMANDE RECONVENTIONNELLE FORMÉE PAR LA BANQUE CONTRE FIRST EAGLE SOGEN FUNDS, INC., DÉCISION DU 19 SEPTEMBRE 2003

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

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CHAPTER I – INTRODUCTION

1. On 22 November 2002, the Tribunal Concerning the Bank for International Settlements (hereafter the "Tribunal") unanimously rendered a Partial Award (hereafter "Partial Award") in the cases concerning Dr. Horst Reineccius (hereafter "Dr. Reineccius" or "Claimant No. 1"), First Eagle SoGen Funds, Inc. (hereafter "First Eagle" or "Claimant No. 2") and Mr. Pierre Mathieu and the Société de Concours Hippique de La Châtre (hereafter collectively "Mr. Mathieu" or "Claimant No. 3") against the Bank for International Settlements (hereafter the "Bank" or "BIS"). In that Partial Award, the Tribunal rendered the following decisions:

> 1. DETERMINES that the amendment of the Statutes of the Bank for International Settlements of 8 January 2001 to the effect that private shareholders are excluded as shareholders of the Bank was lawful;
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> 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%;
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> 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;
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> 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;
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> 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;
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> 6. DETERMINES that it will issue one or more Procedural Orders with respect to the conduct of the next phase of the arbitration concerning the matters mentioned in Decision No. (5) after consultation with the Parties.[1]

[1] Partial Award, at para. 209.

CHAPTER II – PROCEDURAL HISTORY

2. Upon receipt of the Partial Award, the Parties agreed upon an exchange of documents and a schedule of written submissions addressed to the matters still before the Tribunal: the Counterclaim of the Bank against First Eagle, the value of the Bank's buildings and their contents (hereafter the "real estate"), the amount still owed to each private shareholder, the issues of interest, costs and expenses of the Arbitration,[2] and any related matters.[3] In the second phase of the Arbitration, Dr. Reineccius, First Eagle and the Bank agreed that, if the Tribunal used the 7 September 2000 exchange rate, the proper NAV per share was CHF 33,936.[4]

3. The Parties notified the Tribunal of their agreement regarding the procedural schedule for the second phase of the Arbitration which the Tribunal confirmed on 31 January 2003 in Procedural Order No. 9 (Order on Consent with Respect to the Schedule for Documents, and Appointment of An Expert in the Second Phase) (hereafter "Procedural Order No. 9 (On Consent)").

4. Pursuant to the terms of the Partial Award, the Tribunal received: (1) an Application dated 17 January 2003 from First Eagle for the Production of Documents from the Bank, (2) an Application dated 17 January 2003 from the Bank for the Production of Documents from First Eagle, (3) a Revised Application dated 21 January 2003 from First Eagle for Documents from the Bank, (4) First Eagle's Objections to the Bank's Application dated 28 January 2003, (5) the Bank's Response and Objections to First Eagle's Application dated 28 January 2003, (6) a Reply of the Bank dated 30 January 2003 to First Eagle's Objections, and (7) First Eagle's Reply dated 4 February 2003 to the Objections of the Bank. The Bank and First Eagle were unable to agree on:

(i) First Eagle's request for documents relating to the formation of the Tribunal,

(ii) First Eagle's request for documents which would permit the calculation of the Bank's NAV on 8 January 2001, and

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[2] See also, Order on Costs (5 October 2001). The full text of all of the referenced Procedural Orders can be found at www.pca-cpa.org.

[3] Partial Award, at para. 209(5).

[4] The Tribunal noted in para. 203 of the Partial Award that the J.P. Morgan Report arrived at a Net Asset Value ("NAV") of the Bank of US$ 10,072,000,000 or US$ 19,034 (CHF 33,820) per share. As both the Bank and First Eagle agree (see First Eagle's Memorial Pursuant to Partial Award ("FE Memorial Part. Award"), at para. 59), "this was presumably a clerical error, as it actually reflects the data from only one of the three months from which J.P. Morgan calculated an average NAV amount. The conclusion in the report is that: 'J.P. Morgan has derived the net asset value of BIS of US$ 19,099 (CHF 33,936) per share ....' J.P. Morgan Valuation Report 21 (7 Sept. 2000) (the J.P. Morgan Report (Ex. 54))." Counter-Memorial Pursuant to Partial Award ("BIS Counter-Memorial Part. Award"), at para. 2, fn. 2. Claimant No. 1 also used this value in his prayer for relief. Transcript, at p. 386, ln. 29; see also *infra* para. 19. Claimant No. 3 used the CHF 33,936 figure in his Reply Memorial. Mathieu Mémoire en Duplique sur la Seconde Phase de l'Arbitrage ("Mathieu Mémoire en Duplique Seconde Phase"), at p. 5.

(iii) the Bank's request for documents relating to First Eagle's decision to sue the Bank and documents relating to communications between First Eagle and its shareholders or public officials concerning the exclusion transaction.[5]

5. The Tribunal considered the submissions of the Parties and issued Procedural Order No. 10 deciding that

First Eagle's Application in (i) above disregards the schedule agreed between the Parties for a phase within which jurisdictional or lack of independence objections were to be lodged. Requesting documents relating to the formation of the Tribunal in this phase of the arbitration, after the Parties' explicit acceptance[6] of the jurisdiction and independence of the Tribunal, is untimely.

The Tribunal deferred a decision upon First Eagle's request in (ii) above to a later date "should the Tribunal hold that the 8 January 2001 date be used to calculate the U.S. dollar/Swiss franc exchange rate in determining the amount to be paid to claimants."[7]

6. The Tribunal granted the Bank's Application in (iii) above, for documents relating to the Bank's claim that First Eagle violated Article 54(1) of the Statutes of the Bank for International Settlements of 20 January 1930; text as amended on 8 January 2001 (hereafter "Statutes of the Bank" or "Bank's Statutes"). First Eagle was ordered to produce to the Bank:

a. All non-privileged documents relating to First Eagle's decision to sue the Bank in the United States and the conduct of such suit ("First Eagle's United States Litigation"), other than briefs, affidavits and other materials filed by First Eagle with the United States courts;

b. All documents created on or after 11 September 2000 (the public announcement of the Bank's intention to amend its Statutes to exclude private shareholders) and before 31 August 2001 (the date of First Eagle's Notice of Arbitration) reflecting communications among First Eagle and any shareholder (or purported shareholder) of the Bank (including any advisor of such shareholder) regarding (i) the transaction by which the Bank withdrew its shares held by persons other than central banks (the "exclusion transaction") and (ii) First Eagle's United States Litigation;

c. All communications among First Eagle and its own shareholders concerning (i) the exclusion transaction and (ii) First Eagle's United States Litigation; and

d. All documents reflecting First Eagle's communications with public officials in the United States (other than courts) seeking to block the exclusion transaction.[8]

7. Further, the Tribunal confirmed the appointment of the Zurich office of C.B. Richard Ellis, the firm proposed by the Parties, to appraise the Bank's buildings in Basle and their contents pursuant to the Parties' stipulation of their selection of the Ellis firm subject to the requirement that the appraiser provide a statement of its independence in the matter.[9] The Secretary requested a proposal and fee estimate for the appraisal from the Ellis firm that

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[5] Procedural Order No. 10 (9 March 2003) ("Procedural Order No. 10").

[6] Procedural Order No. 3 (Terms of Submission) (5 March 2002), at para. 1, recorded the Parties' statements at the 26 February 2002 meeting of the Parties with the Tribunal to establish the Terms of Reference that "they have no jurisdictional objections."

[7] Procedural Order No. 10, at para. B.

[8] *Id.*, at para. C.

[9] *Id.*, at para. D.

was provided and circulated to the Parties on 5 April 2003. The Parties confirmed their acceptance of the Ellis firm's proposal.

8. The Parties exchanged documents pursuant to Procedural Order No. 9 (On Consent) and the rulings in Procedural Order No. 10. The Tribunal received from Dr. Reineccius a letter, dated 24 January 2003, stating his arguments and the relief he requested, referencing his letters of 27 November 2002 and 3 January 2003. The Tribunal received from Claimants Nos. 2 and 3: (1) a Memorial dated 28 February 2003 from First Eagle, (2) a Memorial on its Counterclaim dated 28 February 2003 from the Bank, (3) a Memorial dated 3 March 2003 from Mr. Mathieu, (4) a Counter-Memorial dated 21 April 2003 from First Eagle, (5) a Counter-Memorial dated 21 April 2003 from the Bank, (6) a Reply from First Eagle dated 16 May 2003, (7) a Reply from Mr. Mathieu dated 16 May 2003, and (8) a Reply from the Bank dated 16 May 2003.

9. The Tribunal issued Procedural Order No. 11 (On Consent) on 16 May 2003 (hereafter "Procedural Order No. 11") which recorded that:

> [T]he Tribunal received from the expert its statement of independence in this matter as required by the Parties on 7 April 2003, and the expert, accompanied by the Secretary of the Tribunal, inspected all of the properties on 16 April 2003, and then provided on 28 April 2003 a Certificate of Valuation and underlying Valuation Reports which were circulated to, and accepted by, the Parties ....
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> ....
>
> B. The Tribunal will use the value of CHF 168,094,000 (One hundred and sixty-eight million, ninety-four thousand Swiss Francs), as determined by the expert, for the purpose of valuing as of 7 September 2000 the Bank's buildings and their contents as required by the 22 November 2002 Partial Award.[10]

In addition, the Tribunal confirmed the agenda for oral argument.

10. On 25 May 2003 the Tribunal issued Procedural Order No. 12 (On Consent) (Re: Proposed New Exhibit 104) granting First Eagle's application to file new Exhibit 104.

11. The Tribunal issued Procedural Order No. 13 (On Consent) on 27 May 2003 granting Dr. Reineccius' application to file a one-page bank statement as Exhibit 1.

12. Public Hearings in the final phase of the Arbitration pursuant to Article XV of the Agreement regarding the Complete and Final Settlement of the Question of Reparations, signed at The Hague on 20 January 1930 (hereafter the "1930 Hague Agreement") and Article 20 of the Rules for Arbitration were held in the Great Hall of Justice at the Peace Palace in The Hague from 28-29 May 2003. At the request of the Parties, their

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[10] Claimants Nos. 1 and 2 objected during the 28 May 2003 Hearings to the value that the expert determined. See also *supra* paras. 7 and 9, and *infra* fn. 17 and paras. 18, 19(ii), and 32. The Bank requested that the Tribunal abide by the determination in the Partial Award that one expert would determine the value of the real estate and the Parties' explicit selection of the Ellis firm to determine the value. Transcript, at pp. 604-605.

separate claims were heard in parallel with some integration for efficiency and the convenience of the Parties. First Eagle was represented, throughout the Hearings, by Mr. Donald Francis Donovan and Mr. Dietmar W. Prager of the Debevoise & Plimpton firm. Mr. Mathieu was represented by Mr. Elie Kleiman and Mr. Guillaume Tattevin of the Freshfields Bruckhaus Deringer firm. The Bank was represented by Mr. Jonathan I. Blackman, Mr. Laurent Cohen-Tanugi and Ms. Claudia Annacker of the Cleary, Gottlieb, Steen & Hamilton firm. Prof. Dr. Mario Giovanoli and Dr. James Freis were also present on behalf of the BIS Secretariat. Dr. Reineccius appeared *pro se* on 28 May.

13. In accordance with the Convention respecting the Bank for International Settlements of 20 January 1930 (hereafter the "1930 Hague Convention"), simultaneous translations in English, French and German were provided for the Hearings.

CHAPTER III – THE PARTIES' CLAIMS

A. CLAIMANT NO. 1, DR. REINECCIUS

1. Arguments

a. CALCULATION OF COMPENSATION

14. In his 27 November 2002 letter, Dr. Reineccius requested that the Tribunal decide that CHF 33,820[11] plus the proportional amount of the Bank's real estate be paid to him in Swiss francs. Dr. Reineccius had indicated at the Hearings in August of 2002[12] that he would stipulate that the J.P. Morgan calculations of the NAV were correct for the purpose of calculating the additional payment to private shareholders. In his letter of 24 January 2003, Dr. Reineccius again requested that the Tribunal award him CHF 33,820 pursuant to paragraph 209(5) of the Partial Award plus the amount determined by the expert for the buildings' value.

b. INTEREST

15. He requested interest on that amount at a minimum of 3¼% per annum which he analogized to the CHF-*Geldmarktzins* prior to 17 September 2001. He noted that the rate was lower after September 2001 but maintained that valuation prior to that time was appropriate.[13]

c. COSTS OF THE ARBITRATION

16. In his 3 January 2003 letter, Dr. Reineccius requested that the Tribunal direct reimbursement by the Bank of his deposits for the costs of the Arbitration.

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[11] See *supra* fn. 4, but see *infra* para. 19(i).
[12] Transcript, at p. 331.
[13] *Id.*, at p 388.

d. SUBMISSIONS

17. Dr. Reineccius, in his letter of 24 January 2003, notified the Tribunal of his intention to participate in the Hearings on 28-29 May 2003. He approved the schedule of submissions in Procedural Order No. 9 (On Consent) and requested that copies be sent to him of: (1) documents exchanged by the Parties pursuant to Procedural Order No. 9, paragraphs 5-8, and (2) the written submissions set forth in the Order.

e. STIPULATIONS

18. Dr. Reineccius indicated his willingness to stipulate to the J.P. Morgan calculation of the NAV of the Bank as described in paragraph 2 *supra.* Regarding the valuation of the real estate pursuant to paragraph 205 of the Partial Award, Dr. Reineccius wrote on 27 November 2002:

> Ich überlasse es First Eagle, in ihrem und in meinem Namen einen Vorschlag für die Benennung eines Immobilien-Experten und seinen Zeitplan für die Bewertung zu machen.[14]

First Eagle stipulated to the appointment of an expert.[15]

2. Relief Requested

19. Dr. Reineccius requested the Tribunal to find that:

(i) as decided by the Tribunal in para. 209(3) of the Partial Award, he should be paid a proportion of the J. P. Morgan Report NAV of the Bank which he calculated to be CHF 33,936 per share compensation for his compulsorily recalled shares;[16]

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

(iii) the Bank must pay him interest at a minimum of 3¼% per annum from 8 January 2001 to the date of payment on the above compensation;[18]

(iv) his costs of the Arbitration (the deposits he made to the BIS Tribunal Account), *i.e.* EUR 1,852.64 should be reimbursed and compensation should be paid to him for his expense and his efforts (*Bemühungen*) in bringing his case to the Tribunal;[19]

(v) a specific date for payment of this compensation including interest is ordered;[20]

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[14] I leave it up to First Eagle to make a proposal in their and my name as to the nomination of a real estate expert and the schedule for the valuation. [Translation provided by the Tribunal.]

[15] See *infra* para. 32.

[16] Transcript, at p 386.

[17] *Id.*, at p. 387. At the Hearings on 28 May 2003, Dr. Reineccius requested that the Tribunal substitute the value for which the Bank's real estate was insured for the value determined by the expert. See also *supra* paras. 7, 9, and fn. 10, and *infra* para. 32.

[18] Transcript, at p. 388.

[19] Letter from Dr. Reineccius to Secretary to the Tribunal (27 November 2002).

[20] Transcript, at p. 387.

(vi) the Tribunal should "expressly forbid the Bank from making upcoming payments dependent on signing a waiver".[21]

B. CLAIMANT NO. 2, FIRST EAGLE

1. Arguments

a. CALCULATION OF COMPENSATION

20. First Eagle maintained that, pursuant to the Partial Award, it is entitled to an award of CHF 7,755.20 (excluding the real estate value) on each of the 9,110 shares it owned,[22] with "interest at a rate of at least 7%[23] compounded monthly[24] . . . from 8 January 2001 through the date of payment,"[25] plus the costs, fees, and expenses it incurred in this proceeding.[26]

21. First Eagle argued in its submissions of 28 February 2003 and 16 May 2003 that the Bank's NAV for the purposes of determining the base award of First Eagle's damages must be set at CHF 33,936 per share, the value calculated by J.P. Morgan in its report of 7 September 2000.[27]

> [T]his result is compelled by the parties' stipulation at the August 2002 hearing accepting J.P. Morgan's calculation of the Bank's NAV. By so stipulating, the parties agreed to accept as conclusive a September 2000 valuation analysis ... in the event that the January 2001 exchange rate were to be used, the NAV would have to be recalculated as of that date as well.[28]

Without such a recalculation, First Eagle would be forced to "bear the downside effect of changing currency conversion rates . . . without calculating the offsetting increase in the Bank's NAV as of the later date."[29]

22. First Eagle characterized the Bank's argument that the date of Swiss franc to U.S. dollar exchange should be 8 January 2001, not 7 September 2000, as "an attempt to deny First Eagle the compensation to which the Partial Award entitles it."[30] First Eagle asserted that the Bank's actual use of the J.P. Morgan Report in the exclusion transaction relied upon J.P. Morgan's Swiss franc calculations.

> In the exclusion transaction out of which First Eagle's claim arises, the Bank first, on 10 September 2000, fixed a redemption price in Swiss francs. It did so in reliance on the J.P. Morgan Report, which used exchange rates prevailing in September 2000 ....

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[21] *Id.*, at p. 388.
[22] First Eagle's Reply Memorial Pursuant to Partial Award ("FE Reply Memorial Part. Award"), at para. 186(a).
[23] *Id.*, at para. 154.
[24] *Id.*, at para. 162.
[25] *Id.*, at paras 151 and 186(e).
[26] *Id.*, at para. 186(d) and (e).
[27] FE Memorial Part. Award, at para. 10; FE Reply Memorial Part. Award, at para. 4.
[28] FE Reply Memorial Part. Award, at para. 5.
[29] FE Memorial Part. Award, at para 70.
[30] FE Reply Memorial Part. Award, at para. 3.

> The Bank then, on 8 January 2001, committed to pay (and subsequently did pay) that same redemption price in Swiss francs.[31]

23. First Eagle argued that the Bank's past share issuance practice was irrelevant but nonetheless supported reliance on J.P. Morgan's September 2000 Swiss franc NAV:[32]

> [P]ast share practices were of little or no significance compared to the Bank's actual practice in the exclusion transaction, which was to set a purchase price in Swiss francs in September 2000, based on the then-prevailing exchange rates, and to hold that price constant over the entire period of the share repurchase.[33]

24. First Eagle dismissed the Bank's argument[34] that three documents proved it had been monitoring post-September 2000 exchange rate fluctuations as irrelevant, because the Bank did not take any action as a result.[35] Further, First Eagle observed, when J.P. Morgan updated its entire valuation analysis, the documents "show that the Bank itself did not apply post September 2000 exchange rates to the September 2000 NAV .... [T]he Bank recalculated the NAV at the same time it recalculated the exchange rate, rather than apply new exchange rates to the September NAV...."[36]

b. COSTS OF THE ARBITRATION AND EXPENSES

25. First Eagle asserted:

> First Eagle is also entitled to reimbursement from the Bank of the costs of the arbitration and its legal fees and expenses. *First*, as the prevailing party, First Eagle is entitled to its costs and fees in order to be fully compensated for the Bank's refusal to pay lawful compensation at the time it was due. *Second*, because this proceeding was necessary to correct the otherwise unlawful compensation paid by the Bank, and hence to ensure that the transaction met the requirements of international law, First Eagle's costs, fees, and expenses constitute a component of the transaction costs necessary to put into effect the exclusion transaction. *Finally*, at a minimum, because First Eagle's efforts have substantially benefitted all the Bank's excluded shareholders, those shareholders should share, pro rata, in First Eagle's expenses.[37]

c. INTEREST

26. First Eagle maintained it was entitled to interest from 8 January 2001 "on the outstanding compensation payment, as well as [on] its costs, fees, and expenses, at a rate of at least 7% compounded monthly."[38] First Eagle reasoned that 7% interest

> reflects the minimum return First Eagle would have expected to earn on alternative investments of the same risk had it received full compensation when it was due. If

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[31] FE Memorial Part. Award, at para. 76.
[32] FE Reply Memorial Part. Award, at para. 83.
[33] *Id.*
[34] The Bank "actively monitored movements in the market exchange rate of Swiss francs and U.S. dollars up until the EGM decision." BIS Counter-Memorial Part. Award, at para. 77.
[35] FE Reply Memorial Part. Award, at para. 79.
[36] *Id.*, at para. 80.
[37] *Id.*, at para. 9.
[38] *Id.*, at para. 12.

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

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

d. DECLARATORY JUDGMENTS

27. First Eagle opposed the Bank's request for a final Award declaring that "the Tribunal has exclusive jurisdiction over any claims against the Bank arising out of or in connection with the validity, procedures and amount of compensation provided in the 8 January 2001 [compulsory repurchase]".[41] First Eagle argued that the Tribunal cannot render "an advisory opinion on matters outside its jurisdiction."[42]

28. First Eagle further argued it was entitled to an award ordering the Bank to pay compensation and interest due on all 9,110 shares claimed by First Eagle, both those registered to First Eagle and those held by a custodian. On 8 January 2001, First Eagle was the registered owner of 5,250 shares in the Bank.[43] However, First Eagle claimed compensation for 9,110 shares of the Bank. First Eagle indicated that the 3,860 shares for which First Eagle claims compensation, but is not the registered owner,

> were held by two custodians in whose names the shares were registered . . . . Serving as the Swiss subcustodian for the Bank of New York, Credit Suisse First Boston . . . held 3655 shares, and serving as the Swiss subcustodian for J.P. Morgan Chase, UBS held 205 shares . . . . For purposes of this proceeding, each of the Bank of New York and J.P. Morgan Chase has confirmed that, if any compensation is paid to them rather than First Eagle on the shares they held as custodian, they will pay that compensation over to First Eagle.[44]

First Eagle further explained that it had

> earlier claimed in this proceeding for 9085 shares, or 25 shares less than the total for which it now claims . . . in January 2001, a prospective trade was pending . . . [which] was cancelled after the exclusion transaction prevented it from settling . . . . It now seeks the additional compensation due on those shares as well.[45]

e. FIRST EAGLE'S DEFENSE TO THE BANK'S COUNTERCLAIM

29. First Eagle asserted it had the right to litigate in the U.S. District Court on both its securities law claims and the dispute over arbitral jurisdiction; it requested the Tribunal to deny the Bank's claim for damages for breach of Article 54(1) of the Bank's Statutes since those claims did not fall within the agreement to arbitrate.

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[39] *Id.*, at para. 13.
[40] *Id.*
[41] Memorial ("BIS Memorial"), at para. 70.
[42] FE Reply Memorial Part. Award, at para. 14.
[43] FE Memorial Part. Award, at paras. 28-29.
[44] *Id.*, at paras. 30-31.
[45] *Id.*, at paras. 32-33.

30. First Eagle alleged that the bulk of the litigation in the United States concerned the securities law claims [46] and "arose from First Eagle's application for interim measures." [47] First Eagle defended its recourse to the District Court as action that did not breach Article 54(1) because municipal jurisdictions in general do not give the arbitrator the right to rule first on jurisdiction.[48] Therefore, First Eagle asserted, it had the right to litigate "both the securities law claims and the dispute over arbitral jurisdiction, and because the fees the Bank incurred . . . resulted only from litigating those two matters, the Bank's claim for breach of Article 54(1) must be denied."[49]

31. First Eagle also argued that Article 54 was unenforceable. When First Eagle filed suit in the United States, the Tribunal did not yet exist and "the appointment of each of the members after the dispute arose by governments with an interest in the dispute – did not comport with basic principles of public policy."[50]

f. STIPULATIONS

32. First Eagle stated during the Hearings that it was prepared to stipulate, if the Bank also so stipulated, that the NAV of the Bank is as determined by J.P. Morgan in Exhibits in Support of First Eagle's Memorial (hereafter "FE Ex.") 43. Regarding a stipulation concerning the value of the Bank's real estate, First Eagle stated:

> In their 7 January 2003 stipulation the parties agreed that they would "attempt to resolve by agreement the value of the real estate of the Bank and, failing agreement on the value, seek to propose an agreed process and schedule by which the question might be determined." The parties have since agreed to the Tribunal's retention of an appraiser to value the real estate.[51]

First Eagle, with the other Parties, proposed that the Zurich office of the firm of C.B. Richard Ellis be appointed by the Tribunal to determine the value of the Bank's buildings and their contents whose valuation would be final and would be added to the NAV.[52]

2. Applicable Law

33. In its Memorial, First Eagle stated that general principles of international law govern this dispute and that it, as well as the Bank, agrees that "the rules of general public international law apply to the interpretation of

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[46] Transcript, at pp. 533-534.

[47] First Eagle's Counter-Memorial in Opposition to Counterclaim ("FE Counter-Memorial Counterclaim"), at para. 77.

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

[49] *Id.*, at para. 97.

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

[51] FE Memorial Part. Award, at para. 58.

[52] See also Procedural Order No. 9 (On Consent); Partial Award, at para. 205; Mémoire en Demande sur la Seconde Phase de l'Arbitrage ("Mathieu Mémoire en Demande Seconde Phase"), at p. 4; Transcript, at pp. 329-331.

the Statutes and hence to the determination of the excluded shareholders' property interest in the Bank."[53]

34. First Eagle challenged the *lex specialis* basis for the Tribunal's jurisdiction. First Eagle stated that while it had clearly submitted to the Tribunal's jurisdiction, that consent formed the basis for the jurisdiction, not the *lex specialis*. It cited *Siemens AG v. Dutco Constr. Co.*[54] in support of its claim that it was entitled to seek a ruling on the validity of the arbitration agreement in a domestic court. As further support for its argument that Article 54 was unenforceable, First Eagle relied[55] upon the New York Convention because "the composition of the arbitral authority ... was not in accordance with the agreement of the parties."[56]

3. Relief Requested

35. First Eagle requested in its Reply Memorial that the Tribunal issue a final award ordering the Bank to:

> a) pay First Eagle additional compensation of CHF 7755.20 per share (equal to 70% of NAV of CHF 33,936 per share less the CHF 16,000 per share compensation already received) for each of the 9110 shares held by First Eagle, or a total of CHF 70,649,872;
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> b) pay First Eagle its share of the value of the Bank's real estate;
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> c) pay First Eagle its costs of the arbitration, which currently amount to $546,913.40, or, at a minimum, the share of such costs in excess of First Eagle's share of the total amount of the shares subject to the exclusion transaction;
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> d) pay First Eagle its legal fees and expenses in an amount to be fixed after the May 2000 [sic] hearing in this matter in a manner to be directed by the Tribunal or, at a minimum, the share of such legal fees and expenses in excess of First Eagle's share of the total amount of the shares subject to the exclusion transaction;
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> e) pay First Eagle interest at a rate of at least 7% compounded monthly and running, as to the additional compensation, from 8 January 2001 through the date of payment of such compensation and, as to First Eagle's costs and fees, from the date of payment by First Eagle through the date of reimbursement by the Bank;
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> f) deny all relief requested by the Bank, BIS CM2 p. 91; and

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[53] First Eagle's Memorial ("FE Memorial"), at para. 205.

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

[55] Transcript, at p. 520.

[56] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, Art. V(1)(d), 21 UST p. 2517, 330 UNTS p. 38 ("New York Convention").

g) provide First Eagle such other and further relief as the Tribunal may deem just and proper.[57]

C. CLAIMANT NO. 3, MR. MATHIEU

1. Arguments

a. CALCULATION OF COMPENSATION

36. Mr. Mathieu asked the Tribunal to calculate the additional compensation owed to the former private shareholders pursuant to the 22 November 2002 Partial Award utilizing the 6 September 2000 rate of exchange:

> Dire que la date devant être retenue pour déterminer le taux de change applicable en vue de la conversion en francs suisses de l'actif net réévalué de la BRI libellé en dollars américains a d'ores et déjà été fixée par le Tribunal au 6 septembre 2000.[58]

37. Mr. Mathieu argued that the Bank's proposed substitution of the 8 January 2001 date contradicted the Parties' stipulation to the NAV in the J.P. Morgan Report.[59] Further, Mr. Mathieu argued, the Bank's claims that its past practice justified the use of the 8 January exchange rate were irrelevant to the compulsory repurchase:

> [L]a BRI a en effet soutenu dans son Contre-mémoire que le calcul de l'indemnité doit se faire sur la base de son procédé habituel de calcul des montants en matière d'émission d'actions nouvelles. Cependant, cet usage n'a aucun titre à être appliqué à l'instance. La BRI fait en réalité une interprétation contestable du raisonnement du Tribunal dans la Sentence partielle. Qui plus est, la méthode proposée n'est pas adaptée à la situation du retrait forcé.[60]

38. If the Tribunal were to use the 8 January 2001 date proposed by the Bank, the NAV of the Bank must be recalculated, by an expert of the Tribunal's choosing, at the Bank's expense:

> A titre subsidiaire, si le Tribunal devait décider qu'il convient de retenir le taux de change applicable au 8 janvier 2001, dire que l'actif net de la BRI devra être réévalué à cette même date et désigner à cette fin, aux frais de la BRI, tel expert indépendant qu'il plaira au Tribunal de nommer . . . .[61]

b. DATE UPON WHICH EXCHANGE RATE IS SET

39. Mr. Mathieu argued that 6 September 2000 is the date, consistent with the Partial Award and the J.P. Morgan valuation, to set the exchange rate for the additional compensation to be paid to the former shareholders:

> La différence est en effet significative : en appliquant le taux de change ayant cours au 6 septembre 2000, à savoir 0,5628 dollar américain pour un franc suisse, une action de la banque évaluée à 19.034 dollars américains se convertit à la somme de 33.820

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[57] FE Reply Memorial Part. Award, at para. 186; on 22 May 2003, First Eagle made a further deposit in respect of the costs of arbitration of US$ 259,173.00, bringing its total contribution to the costs of the arbitration to US$ 806,086.40.

[58] Mathieu Mémoire en Duplique Seconde Phase, at p. 15.

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

[60] *Id.*, at p. 3.

[61] *Id.*, at p. 15.

> francs suisses. Si, comme le soutient la Banque, le taux de change devant être retenu était celui applicable au 8 janvier 2001, à savoir 0,6256 dollar américain pour un franc suisse, la contre-valeur en francs suisses de cette même action ne serait plus que de 30.425,80. La controverse porte donc sur un enjeu d'un montant de 3.394,20 francs suisses par action. Ce montant correspond, pour la Banque, à l'économie qu'elle espère réaliser sur l'indemnisation que le droit international lui impose de verser en contrepartie des actions, dont elle conserve pour l'avenir la propriété et les espérances de plus values qui leur sont attachées – ne serait-ce qu'en considération de la décote de 30% sur la valeur d'actif net retenue aux termes de la Sentence.[62]

c. INTEREST

40. Mr. Mathieu requested that interest should be paid on the additional amount to be paid to the private shareholders from 8 January 2001.[63]

41. Mr. Mathieu further requested that he be paid interest on the CHF 16,000 which the Bank had offered as compensation but which Mr. Mathieu had declined to accept until after the Tribunal's 22 November 2002 Partial Award.

> Le Demandeur, dans son Mémoire en demande du 13 mai 2002, développe ainsi trois moyens: (i) l'illégalité de la résolution amendant les statuts, (ii) l'illicéité de l'opération de rachat forcé des actions et (iii) l'insuffisance de l'indemnité accordée aux actionnaires privés.
>
> Le Demandeur aura par conséquent, du premier jour du litige jusqu'à la Sentence du 22 novembre 2002, toujours soutenu que l'opération de rachat forcée était illégale et qu'en raison de cette illégalité, il possédait toujours sa qualité d'actionnaire de la Banque. Il n'est dès lors pas surprenant que ce dernier se soit toujours opposé à percevoir l'indemnité qui lui était proposée, afin de rester cohérent dans sa démarche à l'encontre de la Banque. L'on ne saurait, en effet, demander une chose et son contraire.[64]

42. Mr. Mathieu requested that the Tribunal award 7% compound interest by reference to the J.P. Morgan Report that stated the Bank's cost of capital to be in the 6.7-7% range.[65] Compound interest should be paid in keeping with the requirements of international law and modern commercial practice:

> Le principe de réparation intégrale exige enfin que les intérêts soient capitalisés. En effet les intérêts à percevoir contribuent à former un capital et doivent donc eux-mêmes être porteurs d'intérêts, ainsi que l'exige une jurisprudence établie en droit international. Conformément aux usages du commerce international, ces intérêts seront capitalisés sur une base mensuelle.[66]

d. COSTS OF THE ARBITRATION AND EXPENSES

43. Mr. Mathieu argued that the Bank as the losing Party should pay the costs of the Arbitration including their legal expenses. However, if the Tribunal does not decide to have the Bank bear the cost of the Arbitration, then the expenses of the Arbitration and Claimants' legal

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[62] Mathieu Mémoire en Demande Seconde Phase, at p. 5 (internal citations omitted).
[63] Mathieu Mémoire en Duplique Seconde Phase, at pp. 11-12.
[64] Mathieu Mémoire en Demande Seconde Phase, at p. 14.
[65] *Id.*, at p. 15.
[66] *Id.*, at p. 16.

fees should be apportioned among all the private shareholders. Such apportionment is equitable because the expenses were incurred in actions that conferred a benefit upon the entire group of former private shareholders. Mr. Mathieu stated that his costs and expenses should be paid by the Bank and interest paid thereon equal to the rate of interest awarded for the additional payment. Mr. Mathieu further requested payment of the expenses and disbursements he and his lawyers incurred during the course of the Arbitration, EUR 4,321.67.[67]

e. DECLARATORY JUDGMENT

44. Further, Mr. Mathieu argued that the Tribunal should not grant the Bank's request for a ruling that the Award in this Arbitration be final and binding upon all Parties and dispositive of any potential claims.[68]

f. STIPULATIONS

45. Mr. Mathieu indicated that he joined the other Claimants in the stipulations described in paragraph 32 *supra* regarding the use of the NAV as determined in the J.P. Morgan Report (FE Ex. 43) with the addition of the value of the Bank's real estate.[69]

2. Applicable Law

46. Mr. Mathieu argued that the constituent instruments of the Bank and general international law were applicable in deciding the rights of the shareholders. Further, Mr. Mathieu argued that the international public policy of both Switzerland and The Netherlands should be respected as the place of Arbitration and the place of potential enforcement.[70]

3. Relief Requested

47. Mr. Mathieu, in his submission of 16 May 2003, requested the following relief:

> Le Demandeur requiert qu'il plaise au Tribunal Arbitral de:
>
> Dire que la date devant être retenue pour déterminer le taux de change applicable en vue de la conversion en francs suisses de l'actif net réévalué de la BRI libellé en dollars américains a d'ores et déjà été fixée par le Tribunal au 6 septembre 2000;
>
> A titre subsidiaire, si le Tribunal devait décider qu'il convient de retenir le taux de change applicable au 8 janvier 2001, dire que l'actif net de la BRI devra être réévalué à cette même date et désigner à cette fin, aux frais de la BRI, tel expert indépendant qu'il plaira au Tribunal de nommer;
>
> Dire que les intérêts dus par la BRI au Demandeur ont couru, à compter du 8 janvier 2001, et à titre subsidiaire à compter du 14 février 2001, tant sur le complément d'indemnité en cours de détermination et ce jusqu'à parfait paiement, que sur la somme

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[67] *Id.*, at p. 18; see *infra* para. 48.

[68] Mathieu Mémoire en Duplique Seconde Phase, at p. 13.

[69] Transcript, at p. 330; see *supra* para. 18 and *infra* para. 67; Mathieu Mémoire en Demande Seconde Phase, at p. 4.

[70] Mémoire en Demande ("Mathieu Mémoire"), at pp. 7-8.

de 16.000 francs suisses entre le 8 janvier 2001 et le 9 janvier 2003 par la BRI, au taux minimum de 7%; ordonner la capitalisation des intérêts sur une base mensuelle;

Dire que la BRI supportera seule l'intégralité des frais liés au présent arbitrage; à titre subsidiaire, dans l'hypothèse où le Tribunal déciderait du contraire, donner acte au Demandeur de l'engagement de la BRI de supporter en toute hypothèse la moitié des frais d'arbitrage, et dire que toute partie de ces frais qui ne sera pas mise à la charge de la BRI sera répartie entre la totalité des actionnaires privés de celle-ci proportionnellement au nombre d'actions dont chacun de ces actionnaires était propriétaire au 8 janvier 2001 rapporté au nombre total de 74.952 [sic] actions; réserver la justification des frais (pour mémoire);

Dire que des intérêts sont dus par la BRI sur les frais d'arbitrage à compter de la date du déboursement effectif de ces sommes jusqu'à parfait paiement par la BRI, au taux minimum de 7% avec capitalisation sur une base mensuelle;

Condamner, en toute hypothèse, la BRI à régler au Demandeur la totalité des honoraires d'avocat encourus dans le cadre du présent arbitrage (pour mémoire);

Enfin, rectifier dans la sentence finale le nom de la Société de Concours hippique de La Châtre.[71]

48. Mr. Mathieu further requested reimbursement of his expenses, EUR 4,436.75, and reimbursement of the amounts he deposited for the costs of the Arbitration, EUR 760.25.[72]

D. RESPONDENT, THE BANK FOR INTERNATIONAL SETTLEMENTS

1. Arguments

a. COUNTERCLAIM

49. The Bank argued that First Eagle's suit in the United States[73] which challenged (1) the Bank's right to carry out the redemption and (2) the amount of compensation provided by Article 18A of the Bank's Statutes, seeking money damages "in the amount of the full value of plaintiffs' proportionate interest in the Bank,"[74] breached Article 54. "As a result of this breach, the Bank incurred direct economic damages in excess of US$ 587,000 defending First Eagle's lawsuit, as well as wasted internal legal and management resources."[75]

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

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[71] Mathieu Mémoire en Duplique Seconde Phase, at pp. 15-16.

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

[73] *First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements*, No. 01 Civ. 0087(RO), 2001 WL 1150323 (S.D.N.Y., 28 September 2001)

[74] Reply Memorial Pursuant to Partial Award ("BIS Reply Memorial Part. Award"), at para. 4 (internal citations omitted).

[75] *Id.*, at para. 2.

[76] FE Counter-Memorial Counterclaim, at para. 38.

[77] *Id.*, at para. 5.

breach of contract and breach of fiduciary duty . . . that would not somehow excuse First Eagle from its obligation to arbitrate the latter under Article 54."[78]

51. The Bank cited the text of Article 54(1):

> If any dispute shall arise between the Bank, on the one side, and any central bank, financial institution, or other bank referred to in the present Statutes, on the other side, or between the Bank and its shareholders, with regard to the interpretation or application of the Statutes of the Bank, the same shall be referred for final decision to the Tribunal provided for by the Hague Agreement of January, 1930.[79]

The Bank alleged:[80]

> First Eagle tried to avoid its duty to arbitrate these issues under Article 54 by pretending that the shares recall was a voluntary tender offer rather than a mandatory redemption. But this did not fool the District Court, which found that "[p]laintiff's only real issue is with the price and method of valuation."[81] . . . Nor did it fool the Court of Appeals, which recognized that "[i]ndeed, the primary complaint advanced by First Eagle appears to be that the valuation methods employed by J.P. Morgan and Arthur Andersen undervalued the privately held shares."[82]

Article 54(2) specifically provides that the Tribunal has "power to decide all questions [concerning the terms of submission under Article 54(1)] (including the question of its own jurisdiction)" ... [and] Article 16(1) of the Tribunal's Rules of Procedure, which provides that "[t]he Tribunal shall have the power to decide the question as to its own jurisdiction ...."[83] All questions of jurisdiction in disputes between the Bank and its shareholders with regard to the interpretation or the application of the Statutes must therefore be raised exclusively before the Tribunal.[84]

52. The Bank distinguished the legal authorities cited by First Eagle as assuming the existence of "an agreement to arbitrate entered into upon the election of the parties, or a specific arbitral regime that explicitly or implicitly provides for recourse to national judiciaries."[85]

53. The Bank argued that the rules which bind it, including those concerning its dispute-resolution forum, are not the subject of private agreement.

> The obligation of the Bank and its shareholders to refer questions of arbitrability exclusively to the Tribunal is ... an obligation created by the treaty mechanism establishing the Bank, which provides its own exclusive mechanism for resolving internal disputes over "the interpretation or application of the Statutes of the Bank."

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[78] BIS Reply Memorial Part. Award, at para. 5.

[79] *Id.*, at para. 10.

[80] *Id.*, at para. 14.

[81] Exhibits to Memorial ("BIS Ex.") 25 (*First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements*, No. 01 Civ. 0087 (RO), 2001 WL 66321, at p. *3 n. 6 (S.D.N.Y., 26 January 2001)).

[82] BIS Ex. 50 (*First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements*, 252 F.3d p. 604, at p. 607 (2d. Cir. 2001)).

[83] BIS Legal Authorities, at 39.

[84] BIS Reply Memorial Part. Award, at para. 21.

[85] *Id.*, at para 22.

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

54. The Bank denied "First Eagle's assertion that there is a universal principle that parties to an arbitration may seek interim measures from a court".[87] The Bank quoted the United Nations Commission on International Trade Law ("UNCITRAL") Working Group for Arbitration and Conciliation, in paragraph 22 of its Note on Preparation of Uniform Provisions on Interim Measures of Protection of January 2002:

> Other laws provide that the authority to issue interim relief is vested exclusively in the arbitral tribunal and the courts do not have the power to issue interim measures in support of arbitration. The court's lack of jurisdiction may be the result of provisions that oust the jurisdiction of the court where there is an arbitration agreement.[88]

55. The Bank further distinguished the legal authorities cited by First Eagle as indicating that in the context of a commercial arbitration agreement, the right of a party to seek interim measures from a court exists where the rules governing the arbitration or the parties' agreement reserve that option. The Bank argued that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID")[89] treaty regime provides a closer analogy.

> [T]he Rules of Procedure for Arbitration Proceedings, Arbitration Rules under the 1965 Convention on the Settlement of Investment Disputes provides that a party can apply to a non-ICSID forum for provisional relief only if the arbitration agreement permits such applications.[90]

56. The Bank argued that First Eagle's arguments regarding the validity of Article 54 were raised unsuccessfully in the United States and were abandoned by First Eagle in the proceedings before the Tribunal.[91]

57. The Bank pointed out that:

> [M]embers of international courts and tribunals, including courts and tribunals that decide disputes between the states concerned and private parties, are usually appointed by governments. The role of national governments in appointing members of international courts and tribunals has never been considered incompatible with the independence of members of international courts and tribunals. As regards internal disputes of international organizations, such disputes are typically referred to internal courts or arbitration. From an organizational point of view, the courts or tribunals established by or within the framework of an international organization are organs of the organization concerned. As a result, the organization or the governments of its member states, rather than the parties to the dispute, exercise rights in respect of the tribunal's composition, competence and procedure that are not reserved to the tribunal itself. The European Court of Human Rights confirmed in *Waite and Kennedy v. Germany* that the dispute settlement procedure provided for in the European Space Agency (the "ESA") Convention, which subjects disputes between the Agency and its

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[86] *Id.*, at para. 23 (internal citations omitted).
[87] *Id.*, at para. 34.
[88] *Id.*, at para. 35.
[89] Washington, 18 March 1965, TIAS p 6090, 575 UNTS p. 159.
[90] BIS Reply Memorial Part. Award, at para. 35.
[91] *Id.*, at para. 54.

> staff members and former staff members to the ESA's Appeals Board, satisfies the standards of the European Convention on Human Rights.[92]

58. First Eagle did not, the Bank observed, complain that the appointment procedures in any way led to bias or prejudice with respect to any party.[93]

59. The Bank stated that its expenses in litigating arbitrable claims in the U.S. court are compensable and that it should receive the full measure of the costs and legal fees it claimed.[94]

b. THE BANK'S POSITION REGARDING THE CALCULATION OF COMPENSATION

60. The Bank answered the Claimants' arguments regarding the calculation of the sum owed the former private shareholders:

> The Bank believed [its stipulation at the August Hearings regarding the J.P.Morgan NAV calculation] this to be an agreement to the accuracy of the J.P. Morgan-calculated NAV of U.S. $19,099 and nothing more .... Consistent with the Tribunal reasoning in adopting the NAV minus 30% formula and the underlying principle of equal treatment of all shareholders (both central bank and former private shareholders), that formula should be applied to the NAV calculated by J.P. Morgan in the same manner as the Bank has consistently applied it to the pricing of shares for central bank subscriptions. Under a consistent application of the NAV minus 30% formula to the withdrawn shares, as illustrated in Part III.A.2 *infra*, the total amount of additional compensation would be CHF 4,494 per share.
>
> Alternatively, if instead of following past practice the Tribunal were simply to take the J.P. Morgan-calculated NAV and apply it to the statutory obligation that arose on the 8 January 2001 share withdrawal under Article 18A to pay compensation in Swiss francs for the private shareholders interest in that NAV, the most straightforward method of converting the discounted U.S. dollar NAV to the amount of Swiss franc compensation would be to use the 8 January 2001 exchange rate. This would result in additional compensation of CHF 5,458 per share.[95]

c. DATE UPON WHICH EXCHANGE RATE IS SET

61. The Bank argued that the J.P. Morgan-calculated NAV should be adjusted by reference to the January 2001 Swiss franc/U.S. dollar exchange rate. The Bank maintained

> that its balance sheet is effectively in US dollars (its official unit of account for the period at issue was the gold franc, which had a fixed parity of US$ 1.94149) and that its consistent past practice in applying the discounted NAV formula has been for the board of directors to decide on a share issuance, at a fixed gold franc price, with payments in hard currencies to be made applying the exchange rate of the date of payment; hence, the discounted NAV stated in US dollars in the J.P. Morgan report should be converted to Swiss francs as of the 8 January 2001 date of withdrawal of the privately owned shares, rather than applying the 6 September 2000 exchange rate stated in the J.P. Morgan report ...[96]

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[92] *Id.*, at para. 58 (internal citations omitted).
[93] *Id.*, at para. 59.
[94] *Id.*, at para. 47.
[95] BIS Counter-Memorial Part. Award, at paras. 2-3 (internal citations omitted).
[96] Procedural Order No. 9 (On Consent).

d. THE BANK'S REQUEST FOR A DECLARATORY JUDGMENT

62. The Bank requested, and First Eagle opposed, a ruling from the Tribunal that it has "exclusive jurisdiction over any claims against the Bank arising out of or in connection with the validity, procedures and amount of compensation provided in the 8 January 2001 redemption of the Bank's privately held shares".[97]

e. INTEREST

63. The Bank contended:

> 1. neither international law nor special rules applicable to the BIS require the Tribunal to award interest to the Claimants in these proceedings;
>
> 2. should the Tribunal nevertheless determine to award interest on the additional amount of the compensation, it should be at no more than the Swiss franc market rate for the period between 8 January 2001 and the date of the final award;
>
> 3. there is no basis for awarding compound interest; and
>
> 4. in the case of First Eagle and M. Mathieu, no interest should be awarded at all.[98]

64. The Bank offered to pay interest, if the Tribunal were to decide "that interest is due on the additional compensation to be awarded to former private shareholders . . . from the date when the right to initial compensation arose, *i.e.* 8 January 2001, to the date on which the Tribunal renders its final award."[99] The Bank justified the choice of the date of the final Award by analogy to the payments decided 8 January 2001. Interest had not been paid then on the time between 8 January and the actual payment to shareholders.

65. The Bank argued[100] further that First Eagle's claim for interest on its costs and legal fees from the date on which those costs and fees were paid[101] was without legal authority. The Bank reasoned that any liability to pay costs or expenses incurred by First Eagle, if such existed, would not accrue until the date of the Tribunal's decision.

f. COSTS OF THE ARBITRATION AND EXPENSES

66. The Bank asserted that the *lex specialis* of the Bank precludes an award of costs and fees.

> These claims have no basis in the *lex specialis* of the Bank, which the Tribunal determined to be the governing law of these proceedings. Under the *lex specialis*, consisting of the Bank's Statutes and the treaties under which they were enacted, the costs of the Tribunal are required to be divided equally between Claimants and the Bank; the Tribunal has the power to allocate the Claimants' portion of these costs among the various Claimants, but not to impose that portion on the Bank. The *lex*

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[97] FE Counter-Memorial Counterclaim, at para. 140; BIS Reply Memorial Part. Award, at para. 70(a).
[98] BIS Counter-Memorial Part. Award, at para. 114.
[99] *Id.*, at para. 138.
[100] *Id.*, at para. 147.
[101] FE Memorial Part. Award, at para. 163.

specialis also expressly requires each party to bear its own expenses, which includes legal expenses.[102]

g. STIPULATIONS

67. The Bank indicated it agreed to the use of the J.P. Morgan Report calculations for any finding regarding NAV.[103] The Bank joined the other Parties in proposing that the Tribunal appoint the Zurich Office of the C.B. Richard Ellis firm to value the Bank's real estate.

h. IDENTITY OF RECIPIENTS OF PAYMENT

68. The Bank resisted First Eagle's demand that First Eagle be paid for 9,110 shares.

> The BIS does not register shares in the name of a "nominee" acting as holder of record for an unidentified beneficial owner . . . . Article 18 [of the Bank's Statutes] conclusively establishes that First Eagle has a valid and enforceable interest in only those shares registered in the Bank's books under its name. The Bank share register shows that on 8 January 2001 First Eagle owned 5,250 shares, and not the 9,110 shares First Eagle has claimed to have owned . . . . Any beneficial interest First Eagle may purport to have had in the shares as a result of contractual relations with third parties is invalid, irrelevant to and unenforceable against the Bank.[104]

2. Applicable Law

69. In its Counter-Memorial Pursuant to Partial Award, the Bank argued that "the rights of shareholders in the BIS are governed by the BIS's constituent instruments and applicable general public international law".[105] In doing so, the Bank countered First Eagle's assertion that the Bank is a private organization, and asserted the importance of an international organization being governed by public international law. Relying on its status as an international organization, the Bank also objected to First Eagle's argument that municipal law should apply, stating that "[t]here is no basis to apply municipal corporate law to these issues, and attempts to impose municipal law ... on the significantly different legal regime established by the Statutes of the Bank should be rejected."[106]

3. Relief Requested

70. The Bank requested that the Tribunal render an award:

> (a) declaring that the Tribunal has exclusive jurisdiction over any claims against the Bank arising out of or in connection with the validity, procedures and amount of compensation provided in the 8 January 2001 redemption of the Bank's privately held shares;
>
> (b) finding that First Eagle violated Article 54(1) of the Statutes by suing the Bank in the United States courts on claims committed to the Tribunal's exclusive jurisdiction;

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[102] BIS Counter-Memorial Part. Award, at para 6.
[103] Transcript, at p. 331.
[104] BIS Counter-Memorial Part. Award, at paras. 159-161.
[105] Counter-Memorial ("BIS Counter-Memorial"), at para. 51.
[106] *Id.*

(c) granting the Bank damages from First Eagle in an amount of US$ 587,413.49 in reimbursement of direct legal expenses and additional relief the Tribunal deems appropriate for First Eagle's breach of Article 54(1) of the Statutes[;][107]

[d] declaring that the Tribunal's award is final and binding on the parties and that payment of additional compensation of CHF 4,494 per share to Claimants for each share registered in their own names on the books of the Bank on 8 January 2001 discharges the Bank from any obligation towards Claimants in connection with the compulsory recall of its former privately held shares;

[e] dismissing Claimants' requests for legal fees and costs;

[f] dismissing Claimants' requests for interest, or alternatively awarding interest at the Swiss franc market rate from 8 January 2001 to the date of the final award; and

[g] granting the Bank further relief as the Tribunal deems just and proper.[108]

CHAPTER IV - THE AWARD

A. DETERMINATION OF THE EXACT AMOUNT OWED BY THE BANK FOR INTERNATIONAL SETTLEMENTS PER SHARE

71. The J.P. Morgan Report (7 September 2000) stated its view of the amount to be paid to the shareholders in the Bank's compulsory repurchase of private shares.[109] The Report indicated the amount in U.S. dollars, followed parenthetically by the equivalent amount, as of the date of the Report, in Swiss francs. Claimants pray for the value of the supplementary payment—which the Partial Award determined was owed by the Bank—in Swiss francs at the U.S. dollar/Swiss franc exchange rate that obtained on 7 September 2000. The Bank prays for a calculation of the amount of the supplementary payment at the U.S. dollar/Swiss franc exchange rate that obtained on 8 January 2001, the date of the implementation of the compulsory share repurchase or, in the alternative, for a calculation at the U.S. dollar/Swiss franc exchange rate that obtains on the date of payment set in the final award. Because the value of the Swiss franc in relation to the U.S. dollar increased approximately 10% between 7 September 2000 and 8 January 2001, the disposition of this matter by the Tribunal will have an appreciable effect on the amount owed by the Bank.

72. Procedural Order No. 9 (On Consent) provided in pertinent part:

Whereas the Parties are agreed that the Bank's net asset value (NAV) in US dollars for purposes of the final award shall be as stated in the J.P. Morgan report (with the addition of the value of the real estate), but

(a) the Bank takes the position that its balance sheet is effectively in US dollars (its official unit of account for the period at issue was the gold franc, which had a fixed parity of US $1.94149) and that its consistent past practice in applying the discounted NAV formula has been for the board of directors to decide on a share issuance, at a fixed gold franc price, with payments in hard currencies to be made

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[107] BIS Memorial Part. Award, at para. 70.
[108] BIS Counter-Memorial Part. Award, at Relief Requested.
[109] See *supra* fn. 4.

applying the exchange rate of the date of payment; hence, the discounted NAV stated in US dollars in the J.P. Morgan report should be converted to Swiss francs as of the 8 January 2001 date of withdrawal of the privately owned shares, rather than applying the 6 September 2000 exchange rate stated in the J.P. Morgan report, while

(b) [First Eagle takes] the position that the Tribunal should award the net asset value in Swiss francs stated in the J.P. Morgan report (as noted in paragraph 209(3) of the Partial Award), but that if the US dollar value were converted as of 8 January 2001 (which it should not be) instead of as in the J.P. Morgan report, the Bank's net asset value should be reassessed as of that date to take account of the impact of the change in the conversion rate on the Bank's nondollar denominated assets, and hence on its net asset value, as well as of any retained earnings since the J P. Morgan valuation date.

73. While the parties argued extensively over the meaning of the stipulation in the Procedural Order No. 9 (On Consent), the Tribunal does not find it dispositive, as the Order merely states, in pertinent part, that "the Parties are agreed that the Bank's net asset value (NAV) in US dollars for purposes of the final award shall be as stated in J.P. Morgan Report ...." That agreement does not resolve the question before the Tribunal and, indeed, the rest of the quoted section of Procedural Order No. 9 proceeds to state precisely the issue in controversy here. Nor does the Tribunal find dispositive the Bank's submission that:

> Consistent with the Tribunal's reasoning in adopting the NAV minus 30% formula and the underlying principle of equal treatment of all shareholders (both central bank and former private shareholders), that formula should be applied to the NAV calculated by J.P. Morgan in the same manner as the Bank has consistently applied it to the pricing of shares for central bank subscriptions. Under a consistent application of the NAV minus 30% formula to the withdrawn shares, as illustrated in Part III.A.2 infra, the total amount of additional compensation would be CHF 4,494 per share.
>
> Alternatively, if instead of following past practice the Tribunal were simply to take the J.P. Morgan-calculated NAV and apply it to the statutory obligation that arose on the 8 January 2001 share withdrawal under Article 18A to pay compensation in Swiss francs for the private shareholders' interest in that NAV, the most straightforward method of converting the discounted U.S. dollar NAV to the amount of Swiss franc compensation would be to use the 8 January 2001 exchange rate. This would result in additional compensation of CHF 5,458 per share.[110]

Nor is assistance to be found in the dividend payment practice of the Bank, as the transaction under review here is not a dividend payment, but a compulsory repurchase of shares.

74. In its Partial Award, the Tribunal found the Bank's practice in pricing tranches of newly issued shares indicative of the Bank's and the new shareholders' valuation of each share in the Bank, i.e. what the Bank and the central banks deemed the shares to be worth.[111] But the Tribunal finds no comparable assistance in the procedures by which the central bank purchasers could pay for the newly issued shares, for that involved an entirely consensual transaction in which, moreover, the times of payment for the purchase could,

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[110] BIS Counter-Memorial Part. Award, at paras. 2-3.

[111] Partial Award, at para. 201.

within certain limits, be decided by the purchaser. That consensual transaction is quite different from the compulsory repurchase procedure of Article 18A of the Statutes.

75. That said, the Tribunal finds the practice of the Bank with respect to the pricing and exchange rate mechanism which the Bank itself put in place for the compulsory repurchase program dispositive of this issue. As will be recalled, the Bank adopted a valuation method on 7 September 2000 which it implemented in its decision on 8 January 2001; the amount which had been determined in Swiss francs on 7 September 2000, was paid in Swiss francs on 8 January 2001, without regard to the change in value relative to other convertible currencies. In its Partial Award, the Tribunal held that the recall itself was a valid exercise of the Bank's power and that the procedures followed in the recall of the privately held shares were lawful.[112] It was only the valuation method for the compulsorily repurchased shares which the Bank applied that was incorrect. But the fact is that the Bank paid on 8 January 2001 the amount it had determined in Swiss francs at the U.S. dollar/Swiss franc conversion rate that had obtained on 7 September 2000. As noted above, in the interval between 7 September 2000 and 8 January 2001, the value of the Swiss franc had increased relative to the U.S. dollar, such that if the Bank had applied the payment theory it now proposes to the Tribunal, it would have recalculated the conversion rate of dollars to francs on 8 January 2001 and paid the private shareholders approximately 10% less than they would have received on 7 September 2000. In fact, the Bank did not do this. Rather than taking advantage of the decline of the U.S. dollar in the exchange rate and obtaining benefits from a currency exchange, the Bank paid the shareholders the per share Swiss franc amount that had been determined in the 7 September 2000 report. The Bank is not a for-profit institution,[113] but it is by its very character a profit-maximizer with, moreover, fiduciary duties to all of its shareholders. If the Bank had believed that it was legally entitled to benefit from a change in currency values, it would have been legally obliged to do so and would have done so.

76. As stated, the Partial Award held that the Bank's compulsory share repurchase program was lawful, but that an incorrect valuation method was applied: the Bank should have paid per share a proportionate amount of the Bank's NAV, discounted by 30%, and the Tribunal has ordered the Bank to do so. But the Tribunal found no fault with the rest of the payment structure and procedure which the Bank had established and followed. Accordingly, the per share valuation of 7 September 2000 must now be replaced by a per share valuation of NAV (as determined by the J.P. Morgan Report and stipulated by the parties) discounted by 30%, and the difference between what was paid on 8 January 2001 and what was lawfully required must now be paid. In these circumstances, the same procedure which the Bank followed on 8 January 2001 should, *mutatis mutandis*, be replicated.

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[112] *Id.*, at paras. 142-158.

[113] This is not to say that it may not realize profits, as was observed by the Swiss Federal Council in 1930 See Partial Award, at para. 117.

77. In this regard, the Tribunal notes the fact that the Bank itself took for granted that this would be the exchange rate for fulfilling the Partial Award. On 25 November 2002, *i.e.* three days after the publication of the Partial Award, the Bank issued a press release in which it summarized the Tribunal's principal holding and then stated, "[a]s a consequence, the Bank will be called upon to make an additional payment of about half of the amount already paid...."[114] The Bank's projection on 25 November of what was owing was clearly based on the assumption that the U.S. dollar/Swiss franc conversion date was 7 September 2000.

78. Hence, the amount which was owed in Swiss francs to the private shareholders for the compulsory purchase of their shares is the per share value of the Bank's NAV, as calculated by the J.P. Morgan Report, discounted by 30%, plus the per share value of the Bank's real estate, discounted by 30%. As noted, Dr. Reineccius, First Eagle and the Bank agreed that, if the Tribunal were to use the 7 September 2000 exchange rate, the value, per share, was CHF 33,936.[115] That sum must be discounted by 30%, as determined in the Partial Award, producing a remainder of CHF 23,755. As the Bank had paid each private shareholder CHF 16,000, the Bank owes each of the Claimants (subject to certain qualifications which are set out below), a supplementary payment of CHF 7,755.20 per share. To this sum must be added 70% of the per share value of the real estate, a matter to which the Tribunal will return below.

B. IDENTITY OF RECIPIENTS

79. First Eagle requested[116] that the Tribunal order the Bank to pay the additional compensation due under the Partial Award to First Eagle in accord with First Eagle's records that it owns 9,110 shares, either outright or through a custodian.[117] The Bank prefers to make the payment from the Bank's books recording share ownership, as it did with the payment of the compensation approved at the 8 January 2001 Extraordinary General Meeting.[118] Because Article 18 of the Statutes of the Bank provides that "[t]he registration of the name of a shareholder in the books of the Bank establishes the title to ownership of the shares so registered" (which, moreover, First Eagle recognized),[119] the Tribunal holds that the Bank is entitled to pay only the shareowners of record as they are inscribed in the Bank's share register.

C. INTEREST: APPLICABILITY AND RATE

80. Dr. Reineccius claimed interest on the additional compensation due under the Partial Award, reasoning that on 8 January 2001 he had become "a

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[114] BIS Press Release, *Hague Arbitral Tribunal decision regarding the repurchase of privately held shares of the Bank for International Settlements* (25 November 2002).

[115] See *supra* fn. 4.

[116] FE Memorial Part Award, at paras 28-33; Transcript, at p. 371.

[117] See *supra* para. 19.

[118] BIS Counter-Memorial Part. Award, at paras. 159-161.

[119] Transcript, at p. 371.

creditor of the Bank. Therefore, the compensation due to me has to carry interest . . . the money market interest in Swiss francs on that particular date . . ."[120] which he quantified as no less than 3¼% per annum.[121] First Eagle maintained it was entitled to interest from 8 January 2001 on the outstanding compensation payment, as well as on its costs, fees, and expenses, at a rate of at least 7% compounded monthly. Mr. Mathieu also requested a minimum of 7% interest with "la capitalisation des intérêts sur une base mensuelle".[122] First Eagle and Mr. Mathieu base their claim for interest on the principle of full compensation. As Mr. Mathieu contended:

> En tout état de cause, les intérêts ayant pour fonction d' *"(. . .) indemniser un créancier de l'absence, pendant un certain temps, des fonds qui lui sont dus (. . .)*", le Demandeur a droit aux intérêts portant sur la somme qui *aurait dû* être versée le 8 janvier 2001.[123]

81. First Eagle and Mr. Mathieu argued that the measure of interest should be the return the Bank would have received on the retained funds. First Eagle also reasoned that 7% interest reflects the minimum return First Eagle would have expected to earn on alternative investments of the same risk had it received full compensation when it was due. First Eagle argued that were it paid less than 7% interest, the Bank would earn a windfall from the compensation withheld and thereby be unjustly enriched. First Eagle asserted:

> A reasonable rate of interest should first and foremost reflect the fact that the Bank retained part of the compensation payment due the private shareholders and had the funds available for its own use as equity.[124]

82. Similarly, Mr. Mathieu stated:

> Le Tribunal tiendra également compte du fait que la Banque a réalisé une économie substantielle en retenant le complément d'indemnité dû aux actionnaires évincés et qu'elle a pu faire libre usage de ce capital obtenu sans rien débourser entre la date de rachat forcé et la date où elle devra effectivement verser le complément d'indemnité.[125]

83. First Eagle and Mr. Mathieu claimed alternatively that the interest rate should be the rate used by J.P. Morgan to discount future dividend payments in its Dividend Perpetuity Model[126] analysis, because payment of interest is analogous in this case to a dividend payment.[127]

84. Mr. Mathieu also claimed interest on the original payment of compensation from 8 January 2001.[128]

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

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[120] *Id.*, at p. 387.
[121] *Id.*
[122] Mathieu Mémoire en Demande Seconde Phase, at p. 19.
[123] *Id.*, at p. 10 (internal citations omitted).
[124] FE Memorial Part. Award, at para 166.
[125] Mathieu Mémoire en Demande Seconde Phase, at p. 15.
[126] Partial Award, at para. 171.
[127] FE Memorial Part. Award, at para. 170; Mathieu Mémoire, at pp. 14-15.
[128] Mathieu Mémoire en Demande Seconde Phase, at p. 10.

the Arbitration, nor, argued the Bank, was it mandated under international law. However, if the Tribunal should award interest on the additional compensation due under the Award, the Bank took the view that it should pay simple interest at the three-month Swiss franc LIBOR (London Interbank Offered Rate) on the additional compensation the Bank has agreed to pay to all the former private shareholders.

86. The Bank argued:

> [T]he Bank's *lex specialis* does not speak directly to the question of interest. However, Article 18A of the Statutes clearly provides that compensation after the 8 January 2001 share recall will be paid to former private shareholders only after they present their share certificates to the Bank and does not provide for the accrual or payment of interest during the open-ended period for presentation of share certificates, verification by the Bank and payment of the recall price. Nor is an award of interest required under general principles of international law. Should the Tribunal nonetheless make such an award with respect to the additional amount of compensation, it should be made at the Swiss (non-compounded) market rate, since the compensation is payable in Swiss francs and Switzerland is the place where payment is due.[130]

87. Further, the Bank addressed the Claimants' argument that interest should be determined by reference to the rate of return on its investments stated in the Morgan Report:

> [A]ny other argument that the former private shareholders should receive interest that is in any way linked to the profits or returns of the Bank, is fundamentally inconsistent with the Tribunal's decision upholding the lawfulness of the shares withdrawal. While shareholders, they did have a claim on the profits of the Bank (in the attenuated form of dividends, as declared by the Board of Directors under Article 51), but on 8 January 2001 that property right was transformed into something different, i.e., a statutory claim for compensation not in any way related to the earnings or profits of the Bank.[131]

88. With respect to Mr. Mathieu's claim for interest on the original offer of compensation from the Bank, the Bank contended that no interest at all should be due. The Bank pointed out that receipt of the original compensation had been within the control of Mr. Mathieu. His refusal to tender his shares should not make the Bank liable for interest.

89. As indicated above, the Claimants have proposed rates of interest varying from 3¼% to 7%, based upon different theories of public international law (including theories of unjust enrichment), international commercial law and Swiss practice. The Tribunal also heard extensive arguments on recent international arbitral decisions awarding compound interest and on the extent to which it may or may not have become customary international law.

90. Neither the 1930 Hague Agreement, nor the 1907 Hague Convention,[132] nor the Statutes of the Bank prescribes, *expressis verbis*, a rate

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[129] Transcript, at p. 427.

[130] BIS Counter-Memorial Part. Award, at para. 7.

[131] *Id.*, at para. 133.

[132] Convention (II) for the Pacific Settlement of International Disputes, The Hague, 18 October 1907 ("1907 Hague Convention").

of interest for any purpose, let alone for a compulsory repurchase of privately held shares. Yet, as it stated in the Partial Award, the Tribunal is of the opinion that interest is due,[133] for it is a general rule that interest is owed where payments are to be made on a specific date but are not made. The Tribunal has found that this rule also applies to the Bank as far as its relations with its shareholders are concerned. The question is the proper rate of interest.

91. International law does not prescribe a specific rate of interest, but several other legal systems, which do so, could be relevant. In circumstances in which the laws of several different legal systems could be applied to a particular transaction or event, it is a frequent practice to select the law of the legal system with which the question to be decided has, in the specific case, the closest contacts. In this regard, the Tribunal notes that Article 2 of the Statutes of the Bank designates Basle, Switzerland, as the place where the registered office of the Bank shall be situated and that Switzerland has consistently been the siège and operational center of the activities of the Bank. In addition, the Bank has made dividend payments in Swiss francs, and the currency in which interest must be paid is the Swiss franc. Moreover, the private shareholders dealt with the Bank in Switzerland, and their dividends were paid in Swiss francs. These reciprocal relationships between the Bank and its shareholders constitute elements of practice. All of these facts, extending over more than seven decades of continuous operation of the Bank, indicate that the Swiss legal system is the one having the closest contacts with this question.

92. In the view of the Tribunal, these facts make it appropriate to refer to Swiss law[134] for guidance on the rate of interest. Article 73 of the Code of Obligations provides:

> 1. Celui qui doit des intérêts dont le taux n'est fixé ni par la convention, ni par la loi ou l'usage, les acquitte au taux annuel de 5 pour cent.
>
> 2. La répression des abus en matière d'intérêt conventionnel est réservée au droit public.

Article 104 (*intérêt moratoire*) of the Code provides:

> 1. Le débiteur qui est en demeure pour le paiement d'une somme d'argent doit l'intérêt moratoire à 5 pour cent l'an, même si un taux inférieur avait été fixé pour l'intérêt conventionnel.
>
> 2. Si le contrat stipule, directement ou sous la forme d'une provision de banque périodique, un intérêt supérieur à 5 pour cent, cet intérêt plus élevé peut également être exigé du débiteur en demeure.
>
> 3. Entre commerçants, tant que l'escompte dans le lieu de paiement est d'un taux supérieur à 5 pour cent, l'intérêt moratoire peut être calculé au taux de l'escompte.

Swiss law thus applies a 5% simple rate for moratory interest.

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[133] Partial Award, at para. 204

[134] Code des obligations (Loi fédérale complétant le Code civil suisse, Livre cinquième: Droit des obligations du 30 mars 1911).

93. As is apparent, the decision to apply Swiss moratory interest is the result of the application of a number of factors with respect to the practice of the Bank and the preponderance of contacts with Swiss law. It is not based upon any assumption of subjection of the Bank to Swiss law. Nor should the Tribunal's decision be taken as indicating any position for or against recent trends with respect to the application of compound interest in contemporary international law; that is a question that does not arise in this case, in view of the dispositive effect of the Bank's practice and the preponderance of contacts with the Swiss legal system insofar as interest in the present case is concerned.

94. Accordingly, the Tribunal decides that the rate of interest to be paid by the Bank is 5% simple interest.

D. TIME FROM WHICH INTEREST IS TO BE PAID

95. First Eagle argued that interest be calculated for the period between the date payment should have been made, or 8 January 2001, and the date it is actually made.[135] Dr. Reineccius[136] and Mr. Mathieu[137] also requested interest from 8 January 2001 until the date payment is made. Mr. Mathieu further requested interest on the CHF 16,000 payment for the time between 8 January 2001 and 9 January 2003 when he presented his shares for payment.[138]

96. The Bank proposed that interest be paid, if the Tribunal should find interest due on the additional compensation, from 8 January 2001 until the date of the final Award. The Bank further proposed that the Bank should not pay post-Award interest unless it failed to make payment of the additional compensation within a reasonable time period that could be established by the Tribunal.[139]

97. Moratory interest under Swiss law is to be paid from the time at which the debt becomes due until the time the debtor tenders payment. With respect to the Bank's compulsory repurchase of private shares, the word "debt" has a number of component references. For all Claimants, there is a debt owing from the Bank for the supplementary payment which results from the difference between what the Bank paid on 8 January 2001 and the application of the formula of NAV minus 30% which the Tribunal determined in its Partial Award to be the lawful standard for valuing individual shares. Accordingly, 5% simple interest is calculated for all Claimants with respect to that supplement from 8 January 2001 until the date of this Award.

98. In contrast to Claimant No. 1, Dr. Reineccius, who presented his sharesto the Bank in accordance with the decision of the Extraordinary General Meeting (reserving his right to the additional payment to which he was entitled) and was paid, Claimants Nos. 2 and 3 did not present their shares

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[135] Transcript, at pp. 373-375.
[136] *Id.*, at p. 388.
[137] Mathieu Mémoire en Demande Seconde Phase, at p. 19.
[138] Transcript, at pp. 395-396.
[139] *Id.*, at pp. 432-433.

until later dates, whereupon the Bank paid them the amount fixed on 8 January 2001. Claimant No. 3 has claimed interest on this amount from 8 January 2001 until the date upon which he presented his shares for payment.

99. The predicate of moratory interest is that the debtor has withheld payment; moratory interest is not owing in circumstances in which the debtor indicates willingness and capacity to pay, but delay in payment is due solely to refusal or failure of the creditor to take the steps necessary to receive payment. With respect to Claimant No. 3, the debtor in this context, the Bank, was prepared to make payment from 8 January 2001 and, moreover, to respect any reservations of rights concerning the valuation of shares. Hence moratory interest is not owing to Claimant No. 3 for the period from 8 January 2001 until the shares were presented for payment and timely paid.

E. VALUATION OF THE REAL ESTATE

100. The NAV computation in the J.P. Morgan Report to which all the parties, as noted in paragraphs 18, 32, 45, and 67 supra, stipulated their agreement did not include a current valuation of the real estate of the Bank. In paragraph 205 of the Partial Award, the Tribunal stated that the valuation of the real estate would be made by an expert, whose identity, terms of reference and timetable would be determined by the Tribunal after consultation with the Parties. As the Parties could not resolve by agreement the value of the real estate, in accordance with paragraph 209(5) of the Partial Award, the Parties notified the Tribunal of their selection of the Zurich office of C.B. Richard Ellis to determine the value of the real estate. The Tribunal confirmed to the Parties its appointment of the Ellis firm in Procedural Order No. 10. The Tribunal received from the expert the statement of independence as required by the Parties, and the expert, accompanied by the Secretary of the Tribunal, inspected all of the properties and provided a Valuation Report on 28 April 2003, whereupon the Secretary of the Tribunal circulated copies of the Report to the Parties, with an invitation for comments. None were forthcoming. On 16 May 2003, in Procedural Order No. 11 (On Consent), the Tribunal stated:

> The Tribunal will use the value of CHF 168,094,000 (...), as determined by the expert, for the purpose of valuing as of 7 September 2000 the Bank's buildings and their contents as required by the 22 November 2002 Partial Award.

101. At the Hearings in May 2003, Dr. Reineccius and First Eagle raised, for the first time, certain objections to the Ellis Report.[140] As agreement to the Report had been stipulated by the Parties and, that notwithstanding, a further and ample opportunity had been afforded to the Parties to comment upon the Report before the Procedural Order No. 11 (On Consent) of 16 May 2003 was issued, the Tribunal holds the objections raised at the hearing out of time and inadmissible and confirms the Ellis Report as final.

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[140] See *supra* para. 31.

102. The per share value of CHF 168,094,000 is CHF 317.66 which when discounted by 30%[141] results in an additional payment to the Claimants of CHF 222.36 per share. This amount will be added to the sum set out in paragraph 78 *supra*, CHF 7,755.20 per share.

F. CONCLUSIONS WITH RESPECT TO COMPUTATIONS

103. The Tribunal concludes that the Bank must pay each claimant an additional CHF 7,977.56 per share. That sum represents 70% of the comprehensive per share NAV of the Bank, *i.e.* the sum of CHF 33,936 per share (J.P. Morgan Report calculation of per share NAV[142]) and CHF 317.66 per share (the value of the Bank's real estate[143]), discounted by 30%, minus the CHF 16,000 per share already paid by the Bank to each private shareholder. Moratory interest is to be paid on this sum from 8 January 2001 until the date of this Award at 5% simple interest.

G. COUNTERCLAIM

104. The Bank claimed that First Eagle's suit in the United States[144] which (1) challenged the Bank's right to carry out the redemption and the amount of compensation provided by Article 18A of the Bank's Statutes, and (2) sought money damages "in the amount of the full value of plaintiffs' proportionate interest in the Bank," breached Article 54 of the Statutes of the Bank.[145]

> As a result of this breach, the Bank incurred direct economic damages in excess of U.S. $587,000 defending First Eagle's lawsuit, as well as wasted internal legal and management resources.[146]

105. The Bank challenged First Eagle's representation that First Eagle's "attempt to enjoin the shares recall"[147] was intended to obtain disclosure,[148] and its refusal to arbitrate was intended "to determine the validity" of its "agreement" to arbitrate under Article 54.[149] Instead, the Bank argued, First Eagle had "disregarded Article 54, and sued the Bank in the United States for a judgment [and] . . . money damages in the amount of the full value of plaintiff's proportionate interest in the Bank, together with interest thereon".[150] The Bank argued that even if the "securities claims had been independent of First Eagle's claims for conversion, breach of contract

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[141] Partial Award, at para. 209(2) and (3).
[142] See *supra* fn. 4.
[143] See *supra* paras. 99-101.
[144] *First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements*, No. 01 Civ. 0087(RO), 2001 WL 1150323 (S.D.N.Y., 28 September 2001).
[145] BIS Reply Memorial Part. Award, at para. 1.
[146] *Id.*, at para. 2.
[147] *Id.*, at para. 3.
[148] FE Counter-Memorial Counterclaim, at para. 38.
[149] *Id.*, at para 5.
[150] BIS Reply Memorial Part. Award, at para. 4 (internal citations omitted).

and breach of fiduciary duty . . . that would not somehow excuse First Eagle from its obligation to arbitrate the latter under Article 54."[151]

106. The Bank argued that First Eagle's second defense (that it had invoked the jurisdiction of the U.S. courts "to determine the validity and applicability of [its] agreement to arbitrate"[152] was "doubly false":

> [L]egally, because Article 54 is not a private commercial "agreement to arbitrate," but an integral part of a self-contained legal regime that excludes the competence of national courts with respect to the "interpretation or application of the Statutes of the Bank," including issues of the Tribunal's jurisdiction; and factually, because First Eagle in any case did not seek a declaration regarding the validity of Article 54, but sued the Bank for damages in breach of that Article.[153]

The Bank pointed out that it is an international organization:[154]

> governed . . . by a self-contained statutory legal regime, created by the 1930 Hague Agreement, the Convention and the Constituent Charter of the Bank. Under that regime, the rights and duties of its shareholders *vis à vis* the Bank, including their rights and duties under Article 54, must be resolved by reference to the Bank's constituent instruments. *See* Partial Award ¶¶173-74 . . . . National courts do not have the competence to adjudicate the organic disputes of an international organization, unless that competence is specifically and affirmatively provided for in the organization's governing instruments . . . Article 55(1) of the Statutes confirms the Bank's *immunity* from national court jurisdiction, subject only to the narrow (and inapplicable) exceptions provided therein.[155]
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> Article 54(2) specifically provides that the Tribunal has "power to decide all questions [concerning the terms of submission under Article 54(1)] (including the question of its own jurisdiction)" ... [and] Article 16(1) of the Tribunal's Rules of Procedure, which provides that "[t]he Tribunal shall have the power to decide the question as to its own jurisdiction". All questions of jurisdiction in disputes between the Bank and its shareholders with regard to the interpretation or the application of the Statutes must therefore be raised exclusively before the Tribunal.[156]

107. The Bank reasoned that "the nature of the Bank as an international organization" requires that issues "be determined on a uniform and consistent basis." The probability of inconsistencies inherent in decision-making by individual national courts requires "that disputes implicating an international organization's internal law are entrusted to internal courts or tribunals or arbitration."[157]

108. As to First Eagle's assertion that it was free to seek interim measures from a municipal court, the Bank argued that the *lex specialis* of the Bank's Statutes provides for interim measures of protection:

> Before giving a final decision and without prejudice to the questions at issue, the President of the Tribunal, or, if he is unable to act in any case, a member of the Tribunal to be designated by him forthwith, may, on the request of the first party

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[151] *Id.*, at para 5.
[152] FE Counter-Memorial Counterclaim, at para. 59.
[153] BIS Reply Memorial Part. Award, at para. 17
[154] *Id* , at para. 19.
[155] *Id.*, at paras. 19-20 (some internal citations omitted).
[156] *Id.*, at para. 21 (internal citations omitted).
[157] *Id.*, at para. 24.

applying therefor, order any appropriate provisional measures in order to safeguard the respective rights of the parties.[158]

109. The Bank continued that this power to grant provisional measures is not "concurrent with the jurisdiction of municipal courts. On the contrary, Article 55 confirms the Bank's immunity from municipal jurisdiction, subject to very narrow and specific exceptions."[159] The Bank stated that Article 54 does not contain any exception to this immunity although, as Article 55 demonstrates, the States Parties to the 1930 Hague Agreement could have provided for such an exception.

110. First Eagle asserted that it had the right to litigate in the U.S. District Court on both its securities law claims and the dispute over arbitral jurisdiction; it requested the Tribunal to deny the Bank's claim for damages for breach of Article 54(1) of the Bank's Statutes. First Eagle sought to distinguish its claims under U.S. securities law arguing that both the Bank and the U.S. District Court acknowledged that those claims did not fall within the agreement to arbitrate. First Eagle argued that when the Bank asked the District Court to rule on the merits of the securities law claims, it "confirmed that First Eagle's securities law claims did not fall within the scope of Article 54(1)."[160]

111. First Eagle alleged that the bulk of the litigation in the United States concerned the securities law claims and "arose from First Eagle's application for interim measures."[161] In addition, First Eagle cited a number of authorities[162] to support its contention that "[u]nder all arbitration laws the parties to an arbitration agreement may apply to the court for provisional relief without getting in conflict with the arbitration agreement."[163] Further, First Eagle provided citations to authorities examining the relation of the New York Convention to suits before national courts.[164]

112. First Eagle defended its recourse to the District Court as action that did not breach Article 54(1) because "courts are entitled to review the existence and validity of the arbitration agreement on which the arbitrators' jurisdiction is based ...."[165] Thus, First Eagle asserted, it had the right to litigate "both the securities law claims and the dispute over arbitral jurisdiction, and because the fees the Bank incurred ... resulted only from litigating those two matters, the Bank's claim for breach of Article 54(1) must be denied."[166]

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[158] *Id.*, at para. 31 (quoting Bank's Statutes, Art. 54(3)).
[159] *Id.*, at para. 32.
[160] FE Counter-Memorial Counterclaim, at para. 64.
[161] *Id.*, at para. 77.
[162] *Id.*, at paras. 85-88.
[163] Klaus Peter Berger, INTERNATIONAL ECONOMIC ARBITRATION 331 (1993).
[164] FE Counter-Memorial Counterclaim, at paras. 91-93.
[165] FOUCHARD, GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶667 (E. Gaillard & J. Savage eds., 1999).
[166] FE Counter-Memorial Counterclaim, at para. 97.

113. The Tribunal notes at the outset that the *lex specialis* of the Bank for International Settlements is comprised of the 1930 Hague Convention, the Constituent Charter of the Bank for International Settlements (20 January 1930) (hereafter "Constituent Charter"), and the Statutes of the Bank. These are international instruments, a characteristic that is particularly important when assessing the relation between them and municipal law. Article 54(1) of the Statutes provides:

> If any dispute shall arise between the Bank, on the one side, and any central bank, financial institution, or other bank referred to in the present Statutes, on the other side, or between the Bank and its shareholders, with regard to the interpretation or application of the Statutes of the Bank, the same shall be referred for final decision to the Tribunal provided for by the Hague Agreement of January, 1930.

Article 55(1) of the Statutes provides:

> The Bank shall enjoy immunity from jurisdiction, save:
>
> a) to the extent that such immunity is formally waived in individual cases by the President, the General Manager of the Bank, or their duly authorized representatives; or
>
> b) in civil or commercial suits, arising from banking or financial transactions, initiated by contractual counter-parties of the Bank, except in those cases in which provision for arbitration has been or shall have been made.

114. The regime that emerges is quite unique. Article 55 of the Statutes is, besides being part of the international legal structure of the Bank, a bilateral commitment that operates parallel to Article 54 and Article 17. By accepting the Statutes pursuant to Article 17, shareholders also accept Article 54 and thus the jurisdiction of a Tribunal established under the 1930 Agreement, and agree not to pursue actions within the jurisdiction of such a Tribunal before national courts. The regime that emerges from these provisions makes clear that disputes between, *inter alia*, the Bank and its shareholders with regard to the interpretation or application of the Statutes were to be referred to a Tribunal established in accordance with the 1930 Hague Agreement. Such a Tribunal was empowered to decide "all questions (including the question of its own jurisdiction)" and, in addition, to "order any appropriate provisional measures in order to safeguard the respective rights of the parties."[167] Article 55 underlines the exclusive character of a Tribunal's jurisdiction by establishing the immunity of the Bank from other national jurisdictions, with two explicit exceptions, neither of which is relevant to the case at bar.

115. A private shareholder of the Bank could not be a formal party to the 1930 Hague Agreement. But a private shareholder, purchasing shares, acquired a special and equally binding type of privity with respect to the dispute resolution regime described above. Article 17 of the Bank's Statutes states that "[o]wnership of shares of the Bank implies acceptance of the Statutes of the Bank." Each share certificate carried the same notice. The Prospectus for shares stated the exclusive jurisdictional regime. A Declaration

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[167] Bank's Statutes, Art. 54(2) and (3).

of Acceptance of Shares included an agreement to accept the dispute resolution regime. In sum, private actors, purchasing shares, accepted, through manifold instruments whose multiplicity and reiteration belie any possibility of misunderstanding, the dispute resolution regime, including the immunity of the Bank from national courts and the competence of a Tribunal formed under the 1930 Hague Agreement and the Statutes to decide its own jurisdiction and to issue provisional measures. The Tribunal would emphasize the critical factor of *acceptance* of the regime. With respect to the question of the competent jurisdiction, private shareholders accepted the international legal status of the Bank unconditionally.

116. Much attention was directed to national practice with respect to the application of Article II of the New York Convention. The Tribunal need not enter into the question of whether, the explicit language of Article II of that instrument notwithstanding, there is a general right under that treaty to test in the national courts of States Parties the validity of an agreement to arbitrate beyond confirmation of whether the agreement "is null and void, inoperative or incapable of being performed."[168] Nor, indeed, need the Tribunal take up the question of whether an arbitration award under the 1930 Hague Agreement even falls under the purview of the New York Convention. The question before the Tribunal is much more narrowly focused. A procedure to test the validity of an arbitral agreement may be available in the United States to putative parties to that agreement. But even if it is, it is not a legal imperative, which requires resort to that procedure. It is a power or option, but not an obligation. A power or option provided by U.S. law cannot be used to justify violation of a commitment that operates on the level of international law. In trying to exercise an option that may have been available to it under U.S. law, First Eagle violated the obligations it had assumed in the Statutes of the Bank and, in particular, with respect to Article 54.

117. Nor does the Tribunal find persuasive the contention that the Tribunal did not exist at the time of First Eagle's attempt to divert its dispute into a U.S. court. Many arbitration tribunals are not standing, but have to be constituted after a dispute arises. As long as there was a workable mechanism for establishing the Tribunal, the action by First Eagle violated its obligations under the Bank's Statutes. The *Siemens AG v. Dutco Constr. Co.* case,[169] relied upon by Claimants Nos. 2 and 3, does not teach otherwise. Dutco concerned parties disputing a private contractual agreement to arbitrate. This Tribunal's jurisdiction arises from the 1930 Hague Agreement, the Constituent Charter and the Statutes of the Bank, an international framework accepted by the private shareholders when they purchased shares.

118. First Eagle has contended that some of its claims before a U.S. court were not within the jurisdiction of this Tribunal and were only available in an appropriate U.S. court. The Bank argued that those claims were only

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[168] *Supra* fn. 56, at Art. II.
[169] *Supra* fn. 55.

pretexts, a conclusion to which the U.S. courts in question appear to have come. In any case, both parties acknowledged that the issues were intertwined. What is beyond doubt is that key critical issues were within the exclusive jurisdiction of the Tribunal.

119. For the above reasons, the Tribunal finds that in pursuing its claims against the Bank in a U.S. court, First Eagle violated its obligations under the Bank's Statutes and unlawfully required the Bank to expend a considerable amount in defending its rights under the Statutes, giving the Bank a right to reparation. Accordingly, First Eagle must reimburse the Bank for the Bank's expenses in the U.S. litigation. The US$ 587,413.49 claimed by the Bank, which the Tribunal finds to be reasonable, may be set off by the Bank at the U.S. dollar/Swiss franc exchange rate obtaining on the date of this award against sums owing to First Eagle as a consequence of this award.

H. REQUEST FOR DECLARATORY RELIEF

120. As part of its Counterclaim, the Bank has requested the following declaratory relief.

> For all of the foregoing reasons, the Bank requests that the Tribunal render an award:
>
> a. declaring that the Tribunal has exclusive jurisdiction over any claims against the Bank arising out of or in connection with the validity, procedures and amount of compensation provided in the 8 January 2001 redemption of the Bank's privately held shares . . .[170]

121. Dr. Reineccius requested in his prayer for relief that the Tribunal "expressly forbid the Bank from making upcoming payments dependent on signing a waiver" of rights to resort to ordinary courts to obtain a more favorable judgment.[171]

122. First Eagle opposed the Bank's request for the declaratory Award proposed above.[172] First Eagle argued that the Tribunal cannot render an advisory opinion "on matters outside its jurisdiction." Further, First Eagle continued, the Tribunal should not impose any conditions on the excluded shareholders' receipt of their rightful payments.[173]

123. The Tribunal is confronted with a request for a declaratory judgment and must ascertain if the Bank has demonstrated a specific interest that the Tribunal must address. Because Claimant No. 2 has clearly contemplated return to another forum,[174] and Claimant No. 1 has apparently not excluded such a possibility,[175] that requirement is satisfied.

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[170] BIS Memorial, at para. 70
[171] Transcript, at p. 388.
[172] FE Reply Memorial Part Award, at paras. 170-175.
[173] *Id.*, at para. 173
[174] Transcript, at pp. 590-600.
[175] *Id* , at p. 388

124. It is in the nature of an award, as a *res judicata* between the parties, that it declares the law that obtains with respect to the matter being arbitrated as between the parties to an arbitration. As between the Parties to this Arbitration, this decision is final and binding; no other remedy is available to the Parties *inter se* with respect to the issues determined in the present Arbitration. Moreover, a tribunal must interpret the instruments invoked by the parties in the exercise of its jurisdiction. By virtue of the exclusive jurisdiction which this Tribunal has concerning the interpretation and application of the Statutes of the Bank, its holdings with respect to the meaning of the Statutes in regard to the issues before it represent the authoritative interpretation of the Statutes. Therefore, the holdings of the Tribunal interpreting the Statutes with respect to jurisdiction in this matter, with respect to the validity of the procedures followed by the Bank in the compulsory recall of privately held shares in its decision of 8 January 2001, and with respect to the proper standard for valuation of the recalled shares represent the authoritative interpretation of the Statutes of the Bank applicable to all those who are subject thereto.

I. EXPENSES OF THE PARTIES

125. The Tribunal now turns to the expenses of the Parties. The Tribunal notes that Claimants Nos. 1, 2, and 3 have requested that they be paid their expenses, and Claimant No. 2 has requested payment of its legal fees. The Tribunal notes that the Arbitration Annex XII to the 1930 Hague Agreement provides that each party shall pay "its own expenses". The Tribunal is of the view that this provision must be interpreted and applied in light of the principle of effective access to justice, as outlined earlier in the specific context of a suit between private shareholders and the Bank.

126. In the *Waite* case,[176] the European Court of Human Rights held that a correlative of the immunity of international organizations is an obligation to provide for fair access to justice. In the view of the Tribunal, that holding is consonant with a general principle of law. The Bank indicated its appreciation of the fact that the costs of access to justice must be regulated in such a way that access to justice is not effectively rendered impossible for single shareholders who lack the resources of major corporate bodies. Claimants Nos. 1 and 3 are individual claimants with limited financial resources. Claimant No. 1 was not represented by counsel. Claimant No. 3 was represented *pro bono* by the Paris office of the Freshfields Bruckhaus Deringer law firm.[177] Therefore, it is only necessary for the Bank to pay the expenses, EUR 4,436.75, incurred by Claimant No. 3.[178] The Tribunal notes with satisfaction that the Bank, fully recognizing the principle of effective access to justice, has from the beginning made clear its willingness to accept the competence of the Tribunal to allocate the costs of access to justice for

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[176] *Waite & Kennedy v. Germany*, App. No. 26083/94, 30 ECHR p. 261 (1999).

[177] Transcript, at p. 477.

[178] Mathieu Mémoire en Demande Seconde Phase, at p. 18; letter from Mr. Mathieu to the Secretary to the Tribunal, copy to the Bank (27 August 2003).

individual claimants in such a way as not to chill their formal procedural opportunities. Therefore, the expenses (EUR 4,436.75) of Claimant No. 3 will be borne by the Bank and reimbursed by it directly to Claimant No. 3.

127. Claimant No. 2 is a corporate entity with substantial financial resources, and has, moreover, been assured of substantial additional payments of compensation by the Bank through its success in these proceedings. The Tribunal also notes that the Bank, for its part, has prevailed in the Counterclaim procedure. As to the question whether expenses and legal fees should be paid by the Bank to Claimant No. 2, the Tribunal first notes that effective access to justice was not at issue for First Eagle in defending its claims. Indeed, First Eagle first brought costly proceedings in the United States before turning to this Tribunal.

128. The Tribunal is of the opinion that it is within its discretion to award expenses and fees also to Claimant No. 2 where either the principle of effective access to justice or any other principle concerning the fairness of the Arbitration procedure would so require. The Tribunal is not of the view that any such principle applies here. The Tribunal has noted the argument by Claimant No. 2 that this procedure has been beneficial to many other shareholders. However, Claimant No. 2, being the former owner of one of the largest private shareholdings, was defending its own rights and interests. First Eagle should therefore pay its own expenses.

129. As to the expenses of the Bank, the Tribunal is of the view that there are no reasons to depart from the rule according to which each party bears its own expenses. Therefore, the Bank shall pay its expenses and legal fees.

130. Subject to the special circumstances set out in *supra* paragraph 126, each Party will accordingly bear its own attorney's fees.

J. COSTS OF THE ARBITRATION

131. The Tribunal now turns to the costs of the Arbitration.[179] The Tribunal notes that Annex XII ("Arbitration. Rules of Procedure") of the 1930 Hague Agreement [180] provides: "In particular Article 85 of the Hague Convention shall apply to these proceedings, and each Party shall pay its own expenses and an equal share of those of the Tribunal." Article 85 of the 1907 Hague Convention reads: "Each Party pays its own expenses and an equal share of the expenses of the Tribunal."

132. The provisions referred to above are clearly binding on the Tribunal for interstate proceedings or proceedings between a State and the

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[179] Article 33 of the Rules of Procedure provides that:

> The Tribunal shall fix the costs of arbitration in its award. The term 'costs' includes: (a) The fees of the Tribunal to be fixed by the Tribunal itself; (b) The travel and other expenses incurred by the arbitrators; (c) The costs of expert advice and of other assistance required by the Tribunal; (d) [T]he fees and expenses of the Secretary of the Tribunal and the International Bureau.

[180] 1930 Hague Agreement, Annex XII, at para 1.

Bank as envisaged in Article XV of the 1930 Hague Agreement. The question arises, however, whether the rules for governmental entities enshrined in the cited Articles are fully applicable for disputes between the Bank and other private shareholders. All shareholders are covered by the arbitration provision in Article 54 of the Statutes of the Bank, but proceedings involving non-State shareholders are not distinguished in the Arbitration Annex or in the 1907 Hague Convention.

133. In applying the obligations of Article 54(1) to private shareholders as well as central banks, the drafters clearly intended to establish a regime that would enable, rather than prevent, private shareholders to exercise that right. Hence, the Tribunal is of the view that Article 54 of the Bank's Statutes[181] providing for Arbitration between shareholders and the Bank must be interpreted in a way which makes access to justice for every shareholder not only theoretically possible but, in reality, feasible. This has been recognized by the Bank from the very beginning of these proceedings. [182] The reference to Article 85 of the 1907 Hague Convention must be applied in the light of this principle of effective access to justice which is fully recognized in present-day human rights law. Even if this rule was not fully developed in 1930, international law has evolved and the Tribunal must apply the law in its contemporary acceptance.

134. In its 31 August 2001 Procedural Order Concerning R. Howe, the Tribunal stated:

> H. With respect to the allocation of deposits and costs: does the Tribunal have the legal competence or "equitable discretion" to allocate deposits and costs to take account of the circumstances of any particular claimant?
>
> H.1. The 1930 Agreement and the 1907 Convention contemplated an equal division of the costs of an arbitration between the parties. As the context of those instruments was inter-state arbitration and not arbitration between a state or an international organization, on the one hand, and individual claimants on the other, that system of equal allocation was consistent with the notion of the sovereign equality of states and may have provided a formula that was likely to achieve equity in specific cases.
>
> H.2. Article 54 of the Statutes of the Bank extended the jurisdiction of the Tribunal to disputes between the Bank and individual shareholders. In this form of privity, the equal division of costs that was, not unreasonably, prescribed for inter-state arbitration could create inequities and even restrain or "chill" the access of individuals to arbitration. In this regard, the Tribunal takes note of the statement of the Bank in its letter of August 23, 2001, that "[t]he Bank does not wish that costs alone should serve to prohibit individual former private shareholders from arbitrating a claim."

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[181] Under Article 54(1):

> If any dispute shall arise between the Bank, on the one side, and any central bank, financial institution, or other bank referred to in the present Statutes, on the other side, or between the Bank and its shareholders, with regard to the interpretation or application of the Statutes of the Bank, the same shall be referred for final decision to the Tribunal provided for by the Hague Agreement of January, 1930.

[182] See *infra* para. 134, H.5.

Wholly aside from the Bank's expression of its wish, an interpretation of a provision in one of the instruments of the Tribunal's regime that had the effect of prohibiting individuals entitled to arbitrate from doing so could hardly be lawful. As will be recalled, Article 9(1) of the Tribunal's Rules provides that

> Subject to these Rules and the Agreement and Convention under which it operates, the Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.

An allocation of deposits and costs that had the effect of not providing a party with a "full opportunity of presenting its case" would not meet the test of Article 9(1).

H.3. The "Rules for Arbitration Between the Bank for International Settlements and Private Parties," which were adapted on the basis of the authority in the 1930 Agreement to regulate arbitrations between the Bank and private shareholders, empower the Tribunal in Article 33 to "fix" the costs, a term which, in the context of this form of arbitration, includes the competence to allocate the costs in ways that further the shared objectives of the parties to the arbitration in order to achieve a fair process and a just outcome, consistent with law.

H.4. Hence, the Tribunal has the competence with respect to arbitrations under Article 54 of the Statutes of the Bank to allocate costs in ways that conduce to the optimum use of the arbitration as contemplated by the Article 54 and justice and fairness in the process of each arbitration.

H.5. The Tribunal takes note of the statement of the Bank in its letter of August 23, 2001 which says in relevant part that:

> [I]t is the Bank's understanding of Article 33 of the Tribunal's Rules that the Tribunal has equitable discretion to apportion costs as it sees fit, including awarding them to a successful claimant. We also understand that any advance deposit of costs under Article 34 could be subject to similar equitable allocation, which could appropriately take account of the circumstances of any particular claimant . . . It remains, however, for the Tribunal to determine how any advance deposits should be apportioned based on the total number of claims ultimately filed and all the other facts and circumstances regarding such claims.

H.6. Given the case-by-case and contextual imperative of any equitable allocation, the Tribunal cannot decide, in advance, the allocation of costs, all the more insofar as such an allocation is to "appropriately take account of the circumstances of any particular claimant." But even without knowing those circumstances in cases that have yet to advance or even to be filed, the Tribunal takes note of the Bank's statement that "[i]t is certainly not the Bank's understanding that multiple claimants, collectively, must bear more than half the Tribunal's costs . . . ."

H.7. The foregoing observations also apply *mutatis mutandis* to the deposits for the arbitration as provided for by Articles 33 and 34 of the Rules of the Tribunal.

H.8. Accordingly, the Tribunal has the legal competence and equitable discretion to allocate costs in ways that contribute to access to the arbitral procedure provided for in Article 54 of the Statutes, that ensure the fairness of the procedure and that secure a meaningful award.

It will be recalled that the Bank, for its part, stated in H.5. *supra*: "it is the Bank's understanding of Article 33 of the Tribunal's Rules that the Tribunal has equitable discretion to apportion costs as it sees fit, including awarding them to a successful claimant."

135. For a case between two States, or a State and the Bank, the quoted Articles provide for an equal distribution between the parties. For the Bank, an international organization with significant financial assets, such a distribution would cause no impediment to justice. In contrast, were this provision applied to individual claimants, requiring them to pay half of the costs of the Tribunal, it would make their access to justice illusory. Considering all of these circumstances, including the fact that the Bank lost in important parts of the dispute, though successful in some others, and including the agreement between the parties with respect to the Tribunal's competence to exercise an equitable discretion to apportion costs as it sees fit, the Tribunal holds that the Bank will bear the full costs of the Arbitration.

136. The costs of the Arbitration, as defined by Article 33 of the Rules of Arbitration, shall be fully borne by the Bank as follows: the Bank shall reimburse directly to Claimant No. 1 EUR 1,852.64; the Bank shall reimburse directly to Claimant No. 2 US$ 806,086.40; the Bank shall reimburse directly to Claimant No. 3 EUR 760.25.

137. In its discretion, the Tribunal denies the Claimants' requests[183] for interest on the sums paid for the costs of the Arbitration.

CHAPTER V - DECISIONS

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

1. DETERMINES that the amount now to be paid to each Claimant is CHF 7,977.56 per share.

2. DETERMINES that with respect to the shares claimed by Claimant No. 2 (First Eagle) that are not registered in its name, the Bank is entitled to pay the above amount only to the share owners of record as they are inscribed in the Bank's share register.

3. DETERMINES that Claimant No. 2 (First Eagle) must reimburse the Bank US$ 587,413.49, the Bank's costs in defending the law suit brought by Claimant No. 2 (First Eagle) in the United States, which the Bank may set off against the sums owing to Claimant No. 2 (First Eagle) as a consequence of this Award.

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[183] See *supra* paras. 26, 35(e), 43, and 47.

4. DETERMINES that 5% simple interest is to be paid to all of the Claimants on the amount in paragraph 138(1) *supra* from 8 January 2001 until the date of this Award.

5. REJECTS the claim of Claimant No. 3 (Mr. Mathieu) for interest on the amount set by the Extraordinary General Meeting on 8 January 2001 under Article 18A of the Statutes of the Bank.

6. DETERMINES that the Bank shall reimburse directly to Claimant No. 3 (Mr. Mathieu) EUR 4,436.75 for expenses. The Tribunal also determines that Claimant No. 2 (First Eagle) shall bear its own attorneys' fees and other expenses.

7. DETERMINES that the costs of the Arbitration shall be fully borne by the Bank as follows: the Bank shall reimburse directly to Claimant No. 1 (Dr. Reineccius) EUR 1,852.64; the Bank shall reimburse directly to Claimant No. 2 (First Eagle) US$ 806,086.40; the Bank shall reimburse directly to Claimant No. 3 (Mr. Mathieu) EUR 760.25.

8. REJECTS the Claimants' requests for interest on the sums paid for the costs of the Arbitration.

9. DETERMINES that all of the above amounts are to be paid within 90 days.

10. DETERMINES that no other remedy is available to the Parties *inter se* with respect to the issues determined in the present Arbitration.

11. DISMISSES all other relief inconsistent with the foregoing Decisions.

Done at the Peace Palace, The Hague, this 19th day of September 2003,

(*Signed*)
Professor W. Michael Reisman

(*Signed*)
Professor Dr. Jochen A. Frowein

(*Signed*)
Professor Dr. Mathias Krafft

(*Signed*)
Professor Dr. Paul Lagarde

(*Signed*)
Professor Dr. Albeit Jan van den Berg

(*Signed*)
Phyllis P. Hamilton, Secretary