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

DR. HORST REINECCIUS, CLAIMANT (CLAIM NO. 1)

FIRST EAGLE SOGEN FUNDS, INC., CLAIMANT (CLAIM NO. 2)

MR. PIERRE MATHIEU AND LA SOCIÉTÉ HIPPIQUE DE LA CHÂTRE,

CLAIMANTS (CLAIM NO. 3)

-VERSUS-

BANK FOR INTERNATIONAL SETTLEMENTS, RESPONDENT

PARTIAL AWARD
ON THE LAWFULNESS OF THE RECALL OF THE PRIVATELY HELD SHARES ON 8 JANUARY 2001 AND THE APPLICABLE STANDARDS FOR VALUATION OF THOSE SHARES

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to inform the Tribunal, in its Memorial and at the Hearing, of its view of the scope of possible consequences of a finding of unlawfulness of the recall program.

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

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

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

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

106. For these reasons the parties to the treaty chose to adopt a model whereby pursuant to the treaty obligation Switzerland undertook to grant the Constituent Charter of the Bank and thereby create the company. At the same time, however, the parties made clear that, even though the Charter, as an Annex to the treaty, was also issued under Swiss law, the company could not be subjected to Swiss law. This complicated system does not exclude the applicability of Swiss law for formalities, for instance as to the procedure for general meetings of the Bank, where this is not in conflict with the relevant instruments of international law.

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

108. The Constituent Instruments confirm that the Bank was established under international law in conformity with a treaty between the Governments of Germany,

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

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

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

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

> La convention concernant la banque des règlements internationaux distingue entre les dispositions conventionnelles proprement dites et la charte constitutive de la banque, qui est réputée constituer un acte de droit interne suisse . . . . Par les premières, la Suisse s'engage à promulguer la charte constitutive et à ne pas la modifier sans le consentement des Etats signataires; en outre, la mise en vigueur et la durée du traité s'y trouvent

[49] See *supra* fn. 3.

[50] See also Constituent Charter, at para. 5.

[51] See Counter-Memorial, at para. 36, fn. 22.

> réglées; enfin, il est prévu, pour le règlement de tous différends survenant entre les Etats contractants, une instance arbitrale . . . . Le contenu de la charte, qui doit être accordée par la Suisse, se trouve intégralement dans la convention. La charte octroie à la banque la personnalité juridique du droit suisse, sanctionne ses statuts nonobstant toute contradiction avec les dispositions impératives de ce droit, et énonce ses privilèges fiscaux et administratifs . . . .[52]

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

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

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

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

113. Moreover, the functions of the Bank were quintessentially public international in their character. Auboin, one of the first managing directors of the BIS, has written:

> After the first world war, however, and especially during the currency stabilizations of the period 1922-1930, the principal central banks frequently joined forces for the purpose of granting special "stabilization credits" either in connection with the reconstruction work undertaken by

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[52] Feuille fédérale de la Confédération suisse, Vol. 1, p. 87 (1930).

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

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

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

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

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

115. The Bank has cited a number of international instruments that explicitly recognize the Bank as an international organization:[55] the Headquarters Agreement with Switzerland of 1987,[56] the Host Country Agreement Between the Bank and the People's Republic of China of 1998,[57] and the Host Country Agreement with Mexico of 2002.[58]

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

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

[56] Accord entre le Conseil fédéral suisse et la Banque des Règlements internationaux en vue de déterminer le statut juridique de la Banque en Suisse (Agreement between the Swiss Federal Council and the Bank for International Settlements to determine the Bank's legal status in Switzerland), 10 February 1987, SR 0.192.122.971.3 (Bank's LA-16).

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

[58] Art. 2, para. 1 (Legal Personality and Capacity) reads: "The State acknowledges the international legal personality and the legal capacity of the Bank with the State." Host Country Agreement between the Bank for International Settlements and the United Mexican States Relating to the Establishment and Status

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

117. Nor is First Eagle correct in stating that because the Bank performs some commercial activities common to private sector banks, it cannot be an international organization. Any international organization may have to engage in some private sector activities in pursuit of its public functions and does not automatically and *pro tanto* lose its public international legal character because of them. The fact that international organizations use many of the same accounting techniques as private entities tells us nothing, for these are methods for control and efficiency which are required, in one form or another, in any large scale collaboration. Nor is the Bank the only international organization that shows a profit. But even if the Bank were singular in this regard, or its profits far exceeded those of other international organizations, First Eagle itself acknowledges that there is a difference between a profit-making and a profit-maximizing entity. In the declaration by the Swiss Federal Council (Swiss Federal Government), which was considered earlier,[60] it was noted that

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

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

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of a Representative Office of the Bank for International Settlements in Mexico, Diario Oficial de la Federación, 20 June 2002, at 3 (Bank's LA-18).

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

[60] See *supra* para. 109.

[61] Feuille fédérale de la Confédération suisse, *supra* fn. 52, at p. 95.

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

B. SECOND PRELIMINARY ISSUE: THE APPLICABLE LAW WITH RESPECT TO QUESTION 1

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

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

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

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

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

[62] Mémoire en Demande, at pp. 5-6; Transcript, at p. 89, lines 18-27.

[63] Counter-Memorial, at para. 48.