

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**MARFIN INVESTMENT GROUP HOLDINGS S.A., ALEXANDROS BAKATSELOS AND
OTHERS**

Claimants

and

REPUBLIC OF CYPRUS

Respondent

ICSID Case No. ARB/13/27

AWARD

Members of the Tribunal

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David A. O. Edward QC, Arbitrator
Daniel M. Price, Arbitrator

Secretary of the Tribunal

Martina Polasek

Assistant to the Tribunal

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Date of dispatch to the Parties: 26 July 2018

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I. THE PARTIES

1. The present dispute has been submitted to arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") on the basis of the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus, signed on 30 March 1992 and which entered into force on 26 February 1993¹ (the "BIT" or the "Treaty").

CLAIMANTS

2. Marfin Investment Group Holdings Société Anonyme ("MIG") is a limited company holding and managing investments, having its registered seat and headquarters at 67 Thisscos Avenue, 14671 Kifissia, Greece, and registered with the General Commercial Registry under No. 3467301000 (formerly S.A. reg. no. 16836/06/B/88/06);²
3. Moschopoulos, Nikiforos is a Greek national, residing at [REDACTED]
4. Rigas, Matthaïos is a Greek national, residing at [REDACTED]
5. Topouzoglou, Efstathios is a Greek national, residing at [REDACTED]
6. Vgenopoulos, Andreas is a Greek national, residing at [REDACTED]
7. Bakatselos, Alexandros is a Greek national, residing at [REDACTED]

¹ Exhibit C-1.

² Certificate of registration of Marfin Investment Group Holdings S.A., 9 April 2013 (Exhibit C-2.A).

³ Civil registry certificate, 19 July 2013 (with English translation) (Exhibit C-9.A).

⁴ Civil registry certificate, 3 July 1995 (with English translation of extract) (Exhibit C-10.A).

⁵ Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-11.A).

⁶ Civil registry certificate, 18 July 2006 (with English translation) (Exhibit C-8.A). Mr. Vgenopoulos passed away during the pendency of these proceedings (See, Claimants' Email to the Tribunal, 7 November 2016).

⁷ Civil registry certificate, 23 July 2013 (with English translation) (Exhibit C-12.A). Mr. Bakatselos passed away during the pendency of these proceedings (See, Claimants' Letter to the Tribunal, 17 October 2016).

8. Bakatselos, Georgios is a Greek national, residing at [REDACTED]
9. Bakatselos, Nikolaos is a Greek national, residing [REDACTED]
10. Bakatselou, Polytimi is a Greek national, residing at [REDACTED]
11. Delfini Holdings Société Anonyme (“Delfini S.A.”) is a company having its registered seat and headquarters at 8 Dodekanissou Str., 54626 Thessaloniki, Greece, and registered with the Registry of Sociétés Anonymes under No. 15254/62/B87/0074 and General Commercial Registry under No. 057923904000;¹¹
12. Theocharaki, Anna-Maria is a Greek national, residing at [REDACTED]
13. Theocharaki, Despina is a Greek national, residing at [REDACTED]
14. Theocharaki, Marina is a Greek national, residing at [REDACTED]
15. Theocharakis, Nikolaos is a Greek national, residing at [REDACTED]
16. Theocharakis, Vasileios is a Greek national, residing at [REDACTED]
17. Chevellas Cars and Machinery Commercial and Industrial Société Anonyme (“Chevellas S.A.”) is a company having its registered seat and headquarters at 76 Kifissou Ave., 12132

⁸ Civil registry certificate, 23 July 2013 (with English translation) (Exhibit C-14.A).

⁹ Civil registry certificate, 23 July 2013 (with English translation) (Exhibit C-15.A).

¹⁰ Civil registry certificate, 23 July 2013 (with English translation) (Exhibit C-13.A). The Bakatselos Claimants (Bakatselos, Georgios, Bakatselos, Nikolas and Bakatselou, Polytimi) are appearing on their own behalf and as testamentary successors to Bakatselos, Alexandros, who passed away in August 2016.

¹¹ Certificate of registration of Delfini Holdings S.A., 24 July 2013 (Exhibit C-3.A.).

¹² Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-16.A).

¹³ Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-17.A).

¹⁴ Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-18.A).

¹⁵ Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-19.A).

¹⁶ Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-20.A).

Petisteri, Greece, and registered with the General Commercial Registry under No. 001724101000;¹⁷

18. Lion Hellas Commercial and Industrial Société Anonyme (“Lion Hellas S.A.”) is a company having its registered seat and headquarters at 138-140 Kifissou Ave., 12131 Peristeri, Greece, and registered with the Registry of Sociétés Anonymes under No. 16678/01/B/88/109;¹⁸

19. Nik I Theocharakis Société Anonyme, Commercial Touristic Construction and Industrial Car, Tyres and Parts Company (“Nik I Theocharakis S.A.”) is a company having its registered seat and headquarters at 169 Athinon Ave., 10447 Athens, Greece, and registered with the General Commercial Registry under No. 044315007000;¹⁹

and

20. Theodomi Industrial Construction Société Anonyme (“Theodomi S.A.”) is a company having its registered seat and headquarters at 138-140 Kifissou Ave., 12131 Peristeri, Greece, and registered with the General Commercial Registry under No. 121760101000,²⁰

collectively referred to as “Claimants”.

21. Claimants are represented in this arbitration by their duly authorized attorneys and counsel mentioned at page (i) above.

RESPONDENT

22. Respondent is the Republic of Cyprus (“Cyprus” or “Respondent”).

23. Respondent is represented in this arbitration by its duly authorized attorneys and counsel mentioned at page (i) above.

24. Claimants and Respondent are jointly referred to as the “Parties” and individually as a “Party”.

¹⁷ Certificate of registration of Chevellas S.A., 2 September 2013 (Exhibit C-4.A.)

¹⁸ Announcement of registration of Lion Hellas SA in the Registry of Sociétés Anonymes (Limited Companies), 10 February 1988, published in the Official Gazette of 16 February 1988, and Announcement of registration in the Registry of Sociétés Anonymes of data of Lion Hellas SA, 16 July 2012, published in the Official Gazette of 20 July 2012 (Exhibit C-5.A1).

¹⁹ Certificate of registration of Nik I Theocharakis SA, 30 August 2013 (Exhibit C-7.A).

²⁰ Certificate of registration of Theodomi SA, 30 August 2013 (Exhibit C-6.A).

[REDACTED]

III. THE PARTIES' REQUESTS FOR RELIEF

178. Claimants request that the Tribunal:

- “(a) DECLARE that Cyprus has breached the Treaty;
- (b) ORDER Cyprus to compensate the Claimants for its breaches of the Treaty, in the aggregate principal amount of €1,041.1 million, plus interest accruing from 26 October 2011 to the date of full and effective payment of compensation;
- (c) ORDER Cyprus to compensate MIG, in the amount of €50 million, and Mr Vgenopoulos, in the amount of €10 million, for the moral and reputational harm caused by Cyprus’ breaches of the Treaty;
- (d) ORDER Cyprus to pay the costs incurred by MIG and Mr Vgenopoulos in defending against and responding to the proceedings and investigations instituted or preserved by Cyprus;
- (e) ORDER Cyprus to make a formal and unqualified apology to Mr Vgenopoulos, MIG and MIG’s staff, for the unjustified, vexatious and oppressive proceedings, including decisions, orders and other acts of the Cypriot courts and administrative authorities;
- (f) ORDER Cyprus to pay all of the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, the fees and expenses of any experts appointed by the

Tribunal and the Claimants, the fees and expenses of the Claimants' legal representation in respect of this arbitration, and any other costs of this arbitration; and

(g) AWARD such other relief as the Tribunal considers appropriate."²⁴

179. For its part, Respondent requests that the Tribunal render an award:

"(a) declaring that it lacks jurisdiction to determine the claims presented in the Claimants' Request for Arbitration, Memorial and Reply;

(b) in the alternative, rejecting all of the Claimants' claims on the merits;

(c) in the further alternative, declaring that the Claimants have failed to prove any loss and are not entitled to any compensation or damages;

(d) directing the Claimants, on a joint and several basis, to pay all costs of and associated with this arbitration including Cyprus's attorneys' fees and expenses, experts' fees and expenses, witnesses' expenses, and the fees and expenses of the Tribunal and the Centre, together with interest (including pre- and post-award interest) on all such costs so awarded; and

(e) granting such other relief as the Tribunal considers appropriate."²⁵

IV. THE FACTUAL BACKGROUND OF THE DISPUTE

180. The dispute concerns a series of events surrounding the failure of the second largest bank in Cyprus, Marfin Popular Bank.

A. Dramatis personae

181. Marfin Popular Bank Public Co. Ltd. ("Laiki", the "Bank" or "MPB") was one of Cyprus' two systemic banks and the second largest bank in the country. It was founded in 1901 as a local savings bank in Limassol, Cyprus. Laiki had a commercial presence in Cyprus, the United Kingdom, Australia, Serbia and Greece. Before 4 December 2006²⁶ and after 28 February 2012,²⁷ the Bank operated under the name Cyprus Popular Bank.

²⁴ Reply, at 387.

²⁵ Rejoinder, at 547.

²⁶ Certificate of Change on Name, 4 December 2006 (Exhibit C-0099).

²⁷ MPB, BoD Minutes, 28 February 2012 (Exhibit C-0339).

182. MIG is an international investment holding company incorporated in Greece, with headquarters in Athens and listed on the Athens Stock Exchange. Before 18 April 2007, MIG was named Marfin Financial Group Holdings (“MFG”).²⁸
183. Marfin Egnatia Bank (“MEB”) was the result of a merger between Egnatia Bank, Marfin Bank and Laiki Hellas. MEB was Laiki’s Greek subsidiary until 31 March 2011. From 1 April 2011, MEB became a branch of Laiki in Greece.
184. The Dubai Financial Group (“DFG”) was the majority shareholder in Laiki with an 18.69% stake in the Bank as of 24 March 2011.²⁹
185. The CBC is the Cypriot independent regulatory body responsible for the supervision and licensing of banks.³⁰
186. The Cyprus Securities and Exchange Commission (“CySEC”) is the Cypriot authority empowered to exercise effective supervision so as to ensure investor protection and the healthy development of the securities market.³¹
187. The Bank of Cyprus (the “BoC”) was one of Cyprus’ two systemic banks and the largest bank in the country.
188. Andreas Vgenopoulos was the Non-Executive Chairman of Laiki’s Board of Directors from February 2010 until November 2011. At all times relevant to this arbitration, Mr. Vgenopoulos was the Chairman of the Board of MIG.³²
189. Efthimios Bouloutas was the Chief Executive Officer of Laiki between 14 February 2008 and 5 December 2011. Since 10 January 2012, Mr. Bouloutas has been the Chief Executive Officer of MIG.³³
190. Athanasios Orphanides was the Governor of the CBC from May 2007 until May 2012.
191. Panicos Demetriades was the Governor of the CBC beginning in May 2012.
192. Demetris Christofias was the President of Cyprus during the period 2008-2013.

²⁸ MIG, Annual Report, 2007 (Exhibit C-0101).

²⁹ MPB, Annual Report, 2010 (Exhibit C-0166).

³⁰ CBC Laws of 2002-2007 (Exhibit CL-0143).

³¹ Law Regulating the Structure, Responsibilities, Powers, Organisation of the Securities and Exchange Commission and other related issues, 2009-2015 (Exhibit RL-0091).

³² Vgenopoulos First Witness Statement, at 1.

³³ Bouloutas First Witness Statement, at 1.

193. Nikos Anastasiades has been the President of Cyprus since 28 February 2013.
194. Kikis Kazamias was Minister of Finance of Cyprus during the period August 2011-March 2012.
195. Vassos Shiarly was the Minister of Finance of Cyprus during the period March 2012-February 2013.

[REDACTED]

V. APPLICABLE LEGAL FRAMEWORK

511. The Tribunal considers it useful, before any presentation of the Parties' respective positions, to quote below the legal provisions invoked by the Parties and which are relevant to the Tribunal's analysis.

512. The Preamble to the ICSID Convention reads in relevant part as follows:

"Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

[...]

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with".

513. Article 25(1) of the ICSID Convention, which is found within Chapter II entitled "Jurisdiction of the Centre", provides in relevant part:

[REDACTED]

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

514. Article 42(1) of the ICSID Convention, which is found within Chapter IV, Section 3 entitled “Powers and Functions of the Tribunal”, provides:

“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”.

515. Article 53(1) of the ICSID Convention, in Chapter V, Section 6 entitled “Recognition and Enforcement of the Award” provides:

“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

516. Article 54(1) of the ICSID Convention reads:

“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”

517. Article 1 of the BIT (“Definitions”) reads:

“For the purposes of this Agreement:

1. “Investment” means every kind of asset and in particular, though not exclusively, includes:

a) movable and immovable property and any other property rights such as mortgages, liens or pledges,

b) shares in and stock and debentures of a company and any other form of participation in a company,

c) claims to money or any other contractual claim having financial value,

d) intellectual property rights, goodwill, technological processes and know how,

e) business concessions conferred by law or under contract, including concessions to explore, cultivate, extract or exploit natural resources,

f) goods, which on the basis of a financial lease are placed at the disposal of a lessee in the territory of the Contracting Party in accordance with the latter's laws and regulations.

2. "Returns" means the amount yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, goodwill, royalties and other fees.

3. "Investor" shall comprise with regard to either Contracting Party:

a) natural persons having the nationality of that Contracting Party in accordance with its law,

b) legal persons constituted in accordance with the law of that Contracting Party and having their seat within its territory.

4. "Territory" means in respect of either Contracting Party, the territory under its sovereignty as well as the territorial sea and submarine areas, over which that Contracting Party exercises, in conformity with international law, sovereign rights or jurisdiction."

518. Article 2 of the Treaty ("Promotion and Protection of Investments") reads:

"1. Each Contracting Party promotes in its territory, investments by investors of the other Contracting Party and admits such investments in accordance with its legislation and its policy regarding foreign investments.

2. Investments by investors of a Contracting Party in the territory of the other Contracting Party shall at all times be accorded fair and equitable treatment and full protection and security. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other Contracting Party, are not impeded in any way by unjustifiable or discriminatory measures.

3. A possible change in the form in which the investments have been made does not affect their substance as investments, provided that such a change does not contradict the laws, regulations and the policy regarding foreign investments of the relevant Contracting Party.

4. Returns from investments and, in cases of approved re-investments, the income ensuing therefrom enjoy the same protection as initial investments."

519. Article 3 of the Treaty ("Most Favoured Nation and National Treatment Provisions") stipulates:

"1. Neither Contracting Party shall subject investments in its territory owned in whole or in part by investors of the other Contracting Party to treatment less favourable than that which it accords to investments of its own investors or to investments of investors of any third State.

2. Neither Contracting Party shall subject investors of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

3. Such treatment shall not relate to privileges or advantages which either Contracting Party accords to investors of any third State:

a) on account of its membership of, or association with, a customs or economic union, a common market, a free trade area or similar institutions.

b) on the basis of any double taxation agreement or other agreements regarding matters of taxation.

4. Each Contracting Party has the right to maintain, in accordance with its laws, regulations and its policy regarding foreign investments, exceptions from the national treatment of paragraphs 1 and 2 of this Article.”

520. Article 4 of the Treaty (“Expropriation”) provides:

“Investments by investors of either Contracting Party shall not be expropriated, nationalised, or subjected to any other measure which would be tantamount to expropriation or nationalisation in the territory of the other Contracting Party except under the following conditions:

a) the measures are taken in the public interest and under due process of law,

b) the measures are clear and non-discriminatory,

c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall be equivalent to the market value of the investment affected immediately before the date on which the measures, mentioned in this paragraph, were taken or made publicly known.

Compensation shall be paid immediately after the completion of legal procedure for expropriation and shall be transferred in freely convertible currency. If the Contracting Party delays payment of compensation, it is liable to pay interest calculated on the basis of the 6-month London Interbank Offered Rate for the relevant currency. The extent of compensation is subject to review under due process of law.”

521. Article 9 of the Treaty (“Settlement of dispute between an Investor and a Host State”) reads:

“1. Any dispute between a Contracting Party and an investor of the other Contracting Party concerning investments or the expropriation or nationalization of an investment shall, as far as possible, be settled by the disputing parties in an amicable way.

2. If such dispute cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either:

- to the competent Court of the Contracting Party, or
- to the “International Centre for the Settlement of Investment Disputes” which was founded by the “Convention on the Settlement of Investment Disputes between States and National [sic] of other States, opened for signature on March 18 1965 [sic].

With this Agreement, the Contracting Parties declare that they accept this arbitration procedure.

3. The arbitral award is binding and not subject to recourse other than what is provided for in the aforementioned convention. The award is to be enforced in accordance with national law.

4. During the arbitration or the enforcement procedure, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an insurance contract in respect of all or part of the damage.”

522. Article 59 of the Vienna Convention on the Law of Treaties (the “VCLT”) reads:

“1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and:

(a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.”
[emphasis added]

523. Article 30 of the VCLT provides:

“1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of State parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

C. The Tribunal's analysis

576. Before examining whether the jurisdictional conditions included in the Treaty and the ICSID Convention are satisfied, the Tribunal will first analyze whether Respondent's jurisdictional objections have any merit.

1. Objection No. 1: Whether the Tribunal Lacks Jurisdiction because the BIT has been Terminated or Superseded by Later EU Treaties

577. The Tribunal has taken note of the Parties' arguments put forward in favor of upholding or denying jurisdiction as a result of the succession in time between the BIT and the EU treaties. The Tribunal has noted in particular the Parties' helpful submissions concerning the impact of the CJEU's judgment in *Achmea* on the question of jurisdiction.

578. At the outset, the Tribunal dismisses Claimants' argument pursuant to which Respondent is estopped from raising this objection due to its decision to permit Laiki to invoke the same Treaty in the arbitration against Greece. The Tribunal is of the view that Respondent's jurisdictional objection raises important issues of public international law that may not properly be waived. Further, pursuant to ICSID Arbitration Rule 41(2), the Tribunal may on its own initiative examine the question of its own jurisdiction, including whether the BIT has been terminated or superseded by later EU treaties.

579. Having carefully considered the Parties' arguments and the evidence before it, the Tribunal has reached the conclusion that Respondent's jurisdictional objection must be dismissed. The Tribunal will explain its finding in more detail in the paragraphs below.

580. The Parties appear to agree that the *Achmea* judgment is not strictly binding upon this Tribunal.⁴³⁹ As correctly pointed out by Claimants, the Tribunal is called upon to apply the provisions of the Treaty and customary international law in order to determine if Respondent has breached its international obligations. The Tribunal's reasoning and decision in this Award are in fact based on the BIT and applicable principles of customary international law. In reaching its ultimate conclusions, the Tribunal has not examined and, more importantly, has not applied principles of EU law. The Tribunal nevertheless observes that, pursuant to Article 42(1) of the ICSID Convention, second sentence, the law of Cyprus and public international law are both applicable to this dispute.

⁴³⁹ C-Ach, at 13; R-Ach, at 33.

581. The Tribunal further observes that the CJEU based its judgment exclusively on EU law. The CJEU did not examine the issues of the intra-EU BITs' possible termination or inapplicability as a result of the application of rules of international law. These analyses are to be carried out on the basis of the facts of each individual case, by arbitral tribunals seized with claims for breaches of these treaties.
582. In the case before the Tribunal, it is not disputed by the Parties that the Treaty has not been terminated by Greece or Cyprus pursuant to Article 12 of the Treaty. As of the date of the present Award, neither Contracting Party to the BIT has notified the other of its intent to be freed from its obligations thereunder.
583. Instead, Respondent focuses its jurisdictional objection on the question of the application of successive treaties in time. In so doing, Respondent argues that either the BIT has been terminated pursuant to the terms of Article 59 of the VCLT, or that the arbitration clause included in Article 9(2) of the Treaty has been displaced by the TFEU pursuant to Article 30 of the VCLT. Both Claimants and Respondent agree that it is these provisions of the VCLT that will provide the answer to the question of whether the Treaty and/or the arbitration clause still produce effects and whether the Tribunal still has jurisdiction.⁴⁴⁰
584. The Tribunal finds that neither Article 59, nor Article 30 of the VCLT applies in this case.
585. The Tribunal notes that both Article 59 and Article 30 of the VCLT apply only when the two successive treaties (in this case, the BIT and the EU treaties) relate to the "same subject-matter".
586. The Parties debate whether this condition is satisfied in connection with the Treaty and the TFEU, as modified by the Treaty of Lisbon. Claimants contend that the condition can only be satisfied if the overall objective of the successive treaties is identical and if the treaties share a degree of general compatibility, while Respondent is of the view that such a definition is too narrow and that the Tribunal should instead determine whether there is any operational or purposive conflict between the treaties. In particular, Respondent considers that the test is met if either (i) certain facts attract the application of both treaties or (ii) the treaty provisions cannot be applied together without offending a provision or the object and purpose of one of the treaties.
587. The Tribunal, similarly to the *EURAM v. Slovakia* tribunal,⁴⁴¹ considers that a good faith interpretation of Articles 59 and 30 of the VCLT, in accordance with the ordinary meaning

⁴⁴⁰ C-Ach, at 6; R-Ach, at 24.

⁴⁴¹ *European American Investment Bank AG (Austria) v. Slovak Republic* (PCA Case No. 2010-17), Award on Jurisdiction, 22 October 2012 (Exhibit RL-0190) ("*EURAM v. Slovakia*")

of the terms employed, seen in their context and in light of the object and purpose of the VCLT, does not support the conclusion that two successive treaties deal with the same subject-matter if they may apply simultaneously to the same set of facts. Two different treaties (for instance, a treaty on trade and a treaty on labor rights) may apply simultaneously to the same set of facts without them having the same subject matter. Further, if two treaties have the same goal (for instance, reducing atmospheric pollution) but approach the achievement of that goal from two different perspectives (for instance, by banning the use of certain types of fuels and by regulating the use of fertilizers), the treaties do not have the same subject-matter. The Tribunal also considers that Respondent conflates the question of whether treaties have the same subject-matter with the question of whether treaties are compatible with each other. For purposes of an analysis under Articles 59 and 30 of the VCLT, these are distinct inquiries and the question of compatibility only arises if and when it has been determined that the treaties have the same subject-matter. This Tribunal agrees with the *EURAM v. Slovakia* tribunal that the subject-matter of a treaty refers to the issues with which its constituent provisions deal, its topic or substance.⁴⁴²

588. Turning now to the question of whether the Treaty and the EU treaties have the same subject-matter, the Tribunal finds that they do not. Moreover, the Tribunal sees no reason to depart from consistent case law finding that intra-EU BITs and the EU treaties deal with different subject matters.⁴⁴³
589. The Tribunal, similarly to the *Oostergetel v. Slovakia* and *EURAM v. Slovakia* tribunals, considers that the EU treaties' objective is to create a common market between the Member States, whereas the objective of BITs (including the Treaty) is to provide for specific guarantees in order to encourage the international flows of investment into particular States. Further, the Tribunal is not persuaded that the substantive protections afforded to a foreign investor under the Treaty are comparable or of the same nature as those offered under the EU treaties. As the *Eureko v. Slovakia* tribunal concluded, the protections afforded by BITs under the FET standard are not exhausted by the existing EU law provisions prohibiting discrimination. Further, the Tribunal is not persuaded that the Treaty's FET standard is coextensive with the fundamental EU freedoms or that EU law specifically forbids treatment that is not fair and equitable. In any event, Respondent has not carried its burden of making this demonstration. Further, while EU law may condition expropriatory takings to public interest and fair compensation requirements, Respondent has not established that it offers comparable protections to those available under the Treaty in the case of indirect expropriations, or that it applies to "every kind of asset". In any event, the Tribunal is not convinced that the relevant provisions of EU law guaranteeing

⁴⁴² *Id.*, at 172.

⁴⁴³ *See*, *Eureko v. Slovakia*, at 247-263; *Eastern Sugar v. The Czech Republic*, at 159-164; *Oostergetel v. Slovakia* Decision on Jurisdiction, at 74-79; *EURAM v. Slovakia*, at 178-184.

the fundamental freedoms or prohibiting discrimination have the same topic or substance as the substantive protections offered under the Treaty.⁴⁴⁴ Their potential simultaneous application to the same set of facts is not, as demonstrated above, conclusive proof that the BIT and the EU treaties have the same subject matter.

590. Further, the Tribunal is not persuaded that this conclusion is affected by the entry into force of the Treaty of Lisbon and, with it, the extension of the European Union's competence to cover FDI. The Tribunal does not question the European Union's capacity to enter into international trade agreements in its own name, as it has done in the case of the CETA or the more recent trade agreements concluded with Singapore and Vietnam. However, the Tribunal understands that this competence extends to the conclusion of agreements between the European Union as a whole and third States. In other words, this competence does not appear to concern intra-EU investments, where the rules of the Internal Market continue to govern. The Tribunal therefore does not consider that the entry into force of the Treaty of Lisbon produced the result that the EU treaties and, in particular, the TFEU, have the same subject-matter as intra-EU BITs more generally, or the Treaty in particular.
591. Consequently, the Tribunal finds that, since the Treaty and the EU treaties do not have the same subject-matter, neither Article 59, nor Article 30 of the VCLT apply to this case. Respondent's arguments pertaining to the alleged intent of Cyprus and Greece to terminate the BIT, or to the purported incompatibility between the Treaty and its various provisions and EU law, do not thus require further examination by the Tribunal.
592. The Tribunal recalls in this context that its jurisdiction derives not only from the Treaty, but also from the ICSID Convention. It is thus the Tribunal's duty to give effect to this legal instrument and, in particular, to one of its cornerstone principles established in Article 25(1), second sentence: "[w]hen the parties have given their consent, no party may withdraw that consent unilaterally". This principle is also referred to in the Report of the Executive Directors:

11. The present Convention would offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply. It would provide facilities for conciliation and arbitration by specially qualified persons of independent judgment carried out according to rules known and accepted in advance by the parties concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.

[...]

⁴⁴⁴ See, *Eureko v. Slovakia*, at 250-262.

23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).” [emphasis added]

593. In the case of Respondent, consent to arbitration under the ICSID Convention was given through its offer to arbitrate disputes with Greek investors included in Article 9 of the Treaty. This standing offer to arbitrate implies not only Cyprus’ willingness to take part in arbitral proceedings under the auspices of the ICSID Convention, but also its commitment to give effect to any ensuing award as if it were a final judgment of its national courts, as per Articles 53(1) and 54(1) of the Convention. Further, pursuant to the unambiguous terms of the ICSID Convention’s Article 25(1), once this consent has been given and has been accepted by an investor through the initiation of arbitral proceedings, this consent may not be withdrawn unilaterally by Respondent, particularly by implication. The Tribunal considers that the principle of legal certainty entitles investors to legitimately rely upon a State’s written consent to arbitrate disputes as long as that consent has not been withdrawn through the proper procedures included in the underlying treaty.
594. The Tribunal notes in this regard that Article 12 of the Treaty establishes a clear procedure that Greece and Cyprus must follow if they want to be released from their obligations under the BIT. Article 65 of the VCLT likewise sets up a procedure if a party to a treaty invokes “a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation”. In the view of the Tribunal, these provisions clearly establish that, if seeking to be released from their BIT obligations, both Cyprus and Greece must follow specific procedures that are intended to ensure compliance with the principle of legal certainty. There can be no implied termination or invalidation of the Treaty to the detriment of investors who legitimately relied upon the Treaty’s protections.
595. Respondent refers to the *Eureko v. Slovakia* award as support for its contention that, following the entry into force of the EU treaties and, now, the issuance of the *Achmea* judgment, the arbitration clause in the Treaty must be deemed to have been displaced by EU law pursuant to Article 30(3) of the VCLT. The Tribunal cannot endorse this conclusion. As mentioned above, Article 30 of the VCLT does not apply in the present case, since the Treaty and the EU treaties do not have the same subject-matter. Further, the section of the *Eureko v. Slovakia* award cited by Respondent contains an observation made by that tribunal *obiter*. In other words, it does not form part of that tribunal’s reasoning and, in any event, that reasoning is not binding upon this Tribunal.
596. The Tribunal has taken note of the Parties’ arguments with respect to the difficulties that may arise if and when this Award is presented for enforcement. It may well be correct that the enforcement of the present Award will give rise to problems in the territories of the EU Member States. However, the jurisdiction of this Tribunal is not determined by the various

national rules governing the enforceability of arbitral awards, but by this Treaty and international law. It will be up to the courts at the enforcement stage to draw the necessary consequences from the *Achmea* judgment and their national laws with respect to the enforceability of this Award.

597. For the reasons identified above, the Tribunal finds that the Treaty remains in force and the arbitration clause included in Article 9 of the Treaty continues to be applicable. Therefore, Respondent's jurisdictional objection is hereby dismissed.

2. **Objection No. 2: The Tribunal Lacks Jurisdiction over Claimants' Investment that is Domestic to Greece**

598. After having carefully examined the Parties' submissions on this point, the Tribunal finds that Respondent's objection lacks legal merit.

599. The Tribunal notes that Respondent does not dispute that Claimants' ownership of shares in Laiki, a bank with its seat in Cyprus, is a protected investment under the Treaty pursuant to Article 1(1)b ("every kind of asset and in particular ... b) shares in and stock and debentures of a company and any other form of participation in a company"). Respondent does not appear to dispute, moreover, that the location of Laiki's seat in Cyprus satisfies the territoriality condition included in Articles 2 through 4 of the Treaty.

600. What Respondent is arguing is that the satisfaction of these conditions is not sufficient to grant the Tribunal jurisdiction over some of the claims made by Claimants. In Respondent's view, the Tribunal also needs to verify the location of Claimants' investments and only uphold jurisdiction over those investments that were not located in Greece.

601. The Tribunal finds no support in the Treaty for Respondent's interpretation. Respondent is conflating Claimants' investment (their shares in Laiki, a Cypriot bank) with the investments made by Laiki itself. In this respect, Articles 2 through 4 of the Treaty refer to "investments" – as that term is defined in Article 1(1) of the BIT – "in [the host State's] territory" (Article 2(1)), to "investments ... in the territory of the other Contracting Party" (Article 2(2)), "investments in its territory" (Article 3(1) and (2)) and to "[i]nvestments by investors of either Contracting Party ... in the territory of the other Contracting Party" (Article 4). In other words, pursuant to the express terms of the Treaty, it is the "investment" itself that must be located in the territory of Cyprus, i.e., the shares must be in a company with its seat in Cyprus. The Treaty does not require that Laiki's investments also be located in Cyprus.

602. The Tribunal recalls in this context that, pursuant to a well-established principle of international law, shareholders are distinct from the companies in which they hold shares. As a corollary, shareholders do not have rights over a company's assets. In other words, the fact that Laiki invested in States other than Cyprus is irrelevant for purposes of this Tribunal's jurisdiction, as Laiki's shareholders are not deemed thereby to have invested outside the territory of Cyprus.

603. For these reasons, the Tribunal hereby dismisses Respondent's jurisdictional objection.

§

604. Having dismissed Respondent's jurisdictional objections, the Tribunal will analyze below whether the jurisdictional conditions included in the ICSID Convention and the Treaty are satisfied.

605. The Tribunal recalls that, pursuant to Article 25(1) of the ICSID Convention:

"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

606. *First*, the Tribunal finds that the present dispute is a "legal dispute", as per Article 25(1) of the ICSID Convention. Claimants are alleging, and Respondent is disputing, that Cyprus breached several provisions of the Treaty and international law and should pay damages as a result.

607. *Second*, the Tribunal notes that the dispute opposes Cyprus, a Contracting State to both the ICSID Convention and the Treaty, and Claimants, nationals of Greece, another Contracting State to the ICSID Convention and the Treaty.

608. In this respect, the Tribunal observes that Article 1(3) of the Treaty defines "investors" as:

"3. 'Investor' shall comprise with regard to either Contracting Party:

a) natural persons having the nationality of that Contracting Party in accordance with its law,

b) legal persons constituted in accordance with the law of that Contracting Party and having their seat within its territory."

609. Article 25(2) of the ICSID Convention provides:

“(2) ‘National of another Contracting State’ means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

610. Six of the Claimants (MIG, Delfini S.A., Chevellas S.A., Lion Hellas S.A., Nik I Theocharakis S.A. and Theodomi S.A.) are legal persons constituted in Greece and with their seat located in Greece. They therefore meet the requirements of Article 1(3)b) of the Treaty.

611. In addition, these Claimants meet the requirements of Article 25(2)(b) of the ICSID Convention:

- MIG was constituted in Greece 10 March 1988 and remained incorporated in Greece on 9 September 2013, the date of the filing of the Request for Arbitration (“the date on which the parties consented to submit such dispute to ... arbitration”);⁴⁴⁵
- Delfini S.A. was constituted in Greece in 1987 and remained incorporated in Greece on the date of the filing of the Request for Arbitration;⁴⁴⁶
- Chevellas S.A. was constituted in Greece in 1994 and remained incorporated in Greece on the date of the filing of the Request for Arbitration;⁴⁴⁷
- Lion Hellas S.A. was constituted in Greece on 12 February 1988 and remained incorporated in Greece on the date of the filing of the Request for Arbitration;⁴⁴⁸

⁴⁴⁵ Certificate of registration of Marfin Investment Group Holdings S.A., 9 April 2013 (Exhibit C-2.A).

⁴⁴⁶ Certificate of registration of Delfini Holdings S.A., 24 July 2013 (Exhibit C-3.A).

⁴⁴⁷ Certificate of registration of Chevellas S.A., 2 September 2013 (Exhibit C-4.A).

⁴⁴⁸ Announcement of registration of Lion Hellas SA in the Registry of Sociétés Anonymes (Limited Companies), 10 February 1988, published in the Official Gazette of 16 February 1988, and Announcement of registration in the Registry of Sociétés Anonymes of data of Lion Hellas SA, 16 July 2012, published in the Official Gazette of 20 July 2012 (Exhibit C-5.A1).

- Nik I Theocharakis S.A. was constituted in Greece on 17 March 1966 and remained incorporated in Greece on the date of the filing of the Request for Arbitration,⁴⁴⁹ and
- Theodomi S.A. was constituted in Greece in 1994 and remained incorporated in Greece on the date of the filing of the Request for Arbitration.⁴⁵⁰

612. The remaining thirteen Claimants (Andreas Vgenopoulos, Alexandros Bakatselos, Georgios Bakatselos, Nikolaos Bakatselos, Polytimi Bakatselou, Nikiforos Moschopoulos, Matthaios Rigas, Anna-Maria Theocharaki, Despina Theocharaki, Marina Theocharaki, Nikolaos Theocharakis, Vasileios Theocharakis and Efstathios Topouzoglou) are natural persons and Greek nationals.⁴⁵¹ Claimants possessed Greek nationality at the time the Request for Arbitration was filed.

613. The Tribunal notes that Messrs. Alexandros Bakatselos and Andreas Vgenopoulos passed away during the pendency of the arbitral proceedings.⁴⁵² Claimants represented before this Tribunal that the claims of these Claimants are continued for the benefit of their successors. According to Claimants, Mr. Alexandros Bakatselos is succeeded in this claim, by way of testamentary succession, by [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] With regard to Mr. Vgenopoulos, Claimants represented that [REDACTED]
[REDACTED]

614. The Tribunal observes that Claimants have not provided any evidence in support of their submissions above. Moreover, Claimants have not requested the replacement of Messrs. Alexandros Bakatselos and Andreas Vgenopoulos as Parties to this arbitration with their successors. For these reasons, the Tribunal must find that Messrs. Alexandros Bakatselos

⁴⁴⁹ Certificate of registration of Nik I Theocharakis SA, 30 August 2013 (Exhibit C-7.A).

⁴⁵⁰ Certificate of registration of Theodomi SA, 30 August 2013 (Exhibit C-6.A).

⁴⁵¹ See, Civil registry certificate, 19 July 2013 (with English translation) (Exhibit C-9.A); Civil registry certificate, 3 July 1995 (with English translation of extract) (Exhibit C-10.A); Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-11.A); Civil registry certificate, 18 July 2006 (with English translation) (Exhibit C-8.A); Civil registry certificate, 23 July 2013 (with English translation) (Exhibit C-12.A); Civil registry certificate, 23 July 2013 (with English translation) (Exhibit C-14.A); Civil registry certificate, 23 July 2013 (with English translation) (Exhibit C-15.A); Civil registry certificate, 23 July 2013 (with English translation) (Exhibit C-13.A); Certificate of registration of Delfini Holdings S.A., 24 July 2013 (Exhibit C-3.A); Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-16.A); Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-17.A); Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-18.A); Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-19.A); Civil registry certificate, 30 August 2013 (with English translation) (Exhibit C-20.A).

⁴⁵² See, Claimants' Letter to the Tribunal, 17 October 2016; Claimants' Email to the Tribunal, 7 November 2016.

⁴⁵³ Claimants' Letter to the Tribunal, 13 April 2017, p. 2.

⁴⁵⁴ *Id.*

and Andreas Vgenopoulos do not meet the requirements of Article 1(3)a) of the Treaty and Article 25(2)(a) of the ICSID Convention. Their claims are therefore dismissed.

615. The Tribunal further notes that Messrs. Topouzoglou and Rigas requested that the arbitral proceedings be discontinued in their regard. The Tribunal recalls that, following Respondent's objection and pursuant to ICSID Arbitration Rule 44, on 3 March 2017, the Tribunal dismissed this request.
616. The Tribunal therefore finds that Georgios Bakatselos, Nikolas Bakatselos, Polytimi Bakatselou, Nikiforos Moschopoulos, Matthaios Rigas, Anna-Maria Theocharaki, Despina Theocharaki, Marina Theocharaki, Nikolaos Theocharakis, Vasileios Theocharakis and Efstathios Topouzoglou satisfy the requirements of Article 1(3)a) of the Treaty and Article 25(2)(a) of the ICSID Convention.
617. *Third*, the Tribunal holds that Claimants made an investment, consisting of shares in Laiki, which meets the requirements of Article 25(1) of the ICSID Convention and of Article 1(1) of the BIT, the latter providing that:

"1. "Investment" means every kind of asset and in particular, though not exclusively, includes:

- a) movable and immovable property and any other property rights such as mortgages, liens or pledges,
 - b) shares in and stock and debentures of a company and any other form of participation in a company,
 - c) claims to money or any other contractual claim having financial value,
 - d) intellectual property rights, goodwill, technological processes and know how,
 - e) business concessions conferred by law or under contract, including concessions to explore, cultivate, extract or exploit natural resources,
 - f) goods, which on the basis of a financial lease are placed at the disposal of a lessee in the territory of the Contracting Party in accordance with the latter's laws and regulations."
- [emphasis added]

618. In this respect, the Tribunal finds that, between 2007 and 2011, MIG purchased 152,910,580 shares in Laiki.⁴⁵⁵ MIG owned these shares at the time when the alleged breaches of the Treaty began and continues to own them to this day.
619. Delfini Holdings S.A. owned at the time of the relevant events and currently owns 1,512,057 shares in Laiki.⁴⁵⁶

⁴⁵⁵ "Notes to the Consolidated Financial Statements – 48. Shareholders with more than 5% of share capital", Laiki Bank Group, Annual Report, 2011, p 157 (extract) (Exhibit C-0002.B.5); Kaczmarek First Expert Report, at 44.

⁴⁵⁶ Statement of shares held by Delfini Maritime and Touristic Companies SA, issued by Axon Securities SA, 23 July 2013 (with English translation) (Exhibit C-0003.B.1); Kaczmarek First Expert Report, Appendix 5.1.

620. Chevellas S.A. owned at the time of the relevant events and currently owns 1,006,621 shares in Laiki.⁴⁵⁷
621. Lion Hellas S.A. owned at the time of the relevant events and currently owns 327,675 shares in Laiki.⁴⁵⁸
622. Teodomi S.A. owned at the time of the relevant events and currently owns 5,937,282 shares in Laiki.⁴⁵⁹
623. Nik I Theocharakis S.A. owned at the time of the relevant events and currently owns 3,938,514 shares in Laiki.⁴⁶⁰
624. Nikiforos Moschopoulos owned at the time of the relevant events and currently owns 1,369,620 shares in Laiki.⁴⁶¹
625. Matthaïos Rigas submitted as evidence of his shareholding in Laiki several order confirmation slips attesting that a company called [REDACTED] owns 9,273,701 shares in Laiki, as well as evidence that the totality of the shares in [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] The Tribunal deems this evidence sufficient to demonstrate that Mr. Rigas indirectly owns 9,273,701 shares in Laiki. The Tribunal

⁴⁵⁷ Ownership of Shares in Laiki: Statements of shares held by Chevellas SA, issued by Egnatia Finance and Investment Bank of Greece, 30 July 2013 (with English translation) (Exhibit C-0004.B); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁵⁸ Ownership of Shares in Laiki: Statements of shares held by Lion Hellas SA, issued by Egnatia Finance and Investment Bank of Greece, 30 July 2013 (with English translation) (Exhibit C-0005.B); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁵⁹ Ownership of Shares in Laiki: Statements of shares held by Teodomi SA, issued by Egnatia Finance, 30 July 2013; Statements of shares held by Teodomi SA, issued by Investment Bank of Greece, 30 July 2013 and 31 December 2012 (with English translation) (Exhibit C-0006.B); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁶⁰ Ownership of Shares in Laiki: Statements of shares held by Nik I Theocharakis, issued by Egnatia Finance and by Investment Bank of Greece, 30 July 2013 (with English translation) (Exhibit C-0007.B); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁶¹ Share transaction slips issued by Investment Bank of Greece, 4 September 2006 to 9 January 2007 (with English translation) (Exhibit C-0009.B.1); Letter from Piraeus Bank (N. Chatjioannou) to N. Moschopoulos confirming shareholding, 9 August 2013 (with English translation) (Exhibit C-0009.B.2); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁶² Share transaction slips issued by Investment Bank of Greece, 9 to 18 February 2011 (Exhibit C-0010.B.1);
[REDACTED]
[REDACTED]
[REDACTED]

⁴⁶³ [REDACTED] Exhibit C-0010.B.4).

considers that, absent explicit language in the Treaty, its protections extend to investments made both directly and indirectly. Consequently, Mr. Rigas' indirect ownership of shares in Laiki satisfies the requirements of Article 25(1) of the ICSID Convention and Article 1(1) of the BIT.

- 626. Efstathios Topouzoglou owned at the time of the relevant events and currently owns 1,750,000 shares in Laiki.⁴⁶⁴
- 627. Polytimi Bakatselou owned at the time of the relevant events and currently owns 1,555,847 shares in Laiki.⁴⁶⁵
- 628. Georgios Bakatselos owned at the time of the relevant events and currently owns 51,592 shares in Laiki.⁴⁶⁶
- 629. Nikolaos Baktselos owned at the time of the relevant events and currently owns 51,592 shares in Laiki.⁴⁶⁷
- 630. Anna Maria Theocharaki directly owned at the time of the relevant events and currently directly owns 1,343,276 shares in Laiki.⁴⁶⁸ Ms. Theocharaki also owns 30% of the shares in [REDACTED] a company holding 15,329,975 shares in Laiki.⁴⁶⁹
- 631. Despina Theocharaki directly owned at the time of the relevant events and currently directly owns 1,343,268 shares in Laiki.⁴⁷⁰ Ms. Theocharaki also owns 10% of the shares in [REDACTED] a company holding 15,329,975 shares in Laiki.⁴⁷¹

⁴⁶⁴ Share transaction slips issued by Investment Bank of Greece, 9 and 10 February 2011 (with English translation) (Exhibit C-0011.B.1); E-mail from Cyprus Popular Bank (L. Batis) to E. Topouzoglou, confirming shareholding, 20 August 2013 (with English translation) (Exhibit C-0011.B.2); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁶⁵ Ownership of Shares in Laiki: Statement of shares issued by Axon Securities, 23 July 2013 (with English translation) (Exhibit C-0013.B); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁶⁶ Ownership of Shares in Laiki: Statement of shares issued by Axon Securities, 23 July 2013 (with English translation) (Exhibit C-0014.B); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁶⁷ Ownership of Shares in Laiki: Statement of shares issued by Axon Securities, 23 July 2013 (with English translation) (Exhibit C-0015.B); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁶⁸ Ownership of shares held by A. M. Theocharaki: Statements of shares issued by Egnatia Finance and Investment Bank of Greece, 30 July 2013 (with English translation) (Exhibit C-0016.B.1); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁶⁹ [REDACTED]

632. Marina Theocharaki directly owned at the time of the relevant events and currently directly owns 381,593 shares in Laiki.⁴⁷² Ms. Theocharaki also owns 30% of the shares in [REDACTED] a company holding 15,329,975 shares in Laiki.⁴⁷³
633. Nikolaos Theocharakis owned at the time of the relevant events and currently owns 1,666,843 shares in Laiki.⁴⁷⁴
634. Vasileios Theocharakis directly owned at the time of the relevant events and currently directly owns 2,370,266 shares in Laiki.⁴⁷⁵ Mr. Theocharakis also owns 30% of the shares in [REDACTED] a company holding 15,329,975 shares in Laiki.⁴⁷⁶
635. *Fourth*, the Tribunal finds that the dispute currently before it arises directly out of Claimants' investment, i.e., their shareholding in Laiki.
636. *Fifth*, the Tribunal holds that the Parties to this dispute consented to submit it to ICSID arbitration: Cyprus, by its offer to arbitrate such disputes included in Article 9 of the Treaty, and Claimants, by filing the Request for Arbitration with ICSID.
637. Finally, the Tribunal considers that Claimants have complied with the requirement, included in Article 9(2) of the Treaty, to seek to negotiate with Cyprus an amicable settlement of their dispute. In this respect, MIG notified Respondent of its claims on 23 January 2013, while the remaining Claimants did so on 14 and 25 June 2013. It is not disputed that the six-month deadline provided in Article 9(2) of the BIT had expired with

[REDACTED]

⁴⁷⁴ Ownership of Shares in Laiki: Statements of share transactions, issued by Pegasus Securities SA, 26 July 2013 (with English translation of extract) (Exhibit C-0019.B); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁷⁵ Ownership of shares held by V. Theocharakis: Statements of shares issued by Egnatia Finance and Investment Bank of Greece, 30 July 2013 (with English translation) (Exhibit C-0020.B.1); Kaczmarek First Expert Report, Appendix 5.1.

⁴⁷⁶ [REDACTED]

respect to MIG's claims at the time of the filing of the Request for Arbitration (9 September 2013). The Tribunal finds that, in light of Respondent's lack of engagement with the other Claimants' notices of dispute, the requirement of Article 9(2) is also satisfied in their regard.

638. For these reasons, the Tribunal finds that it has jurisdiction to hear the present dispute.

VII. ATTRIBUTION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. The Tribunal's analysis

670. At the outset, the Tribunal notes the Parties' agreement that the conduct of the Cyprus State organs is attributable to Respondent pursuant to ILC Article 4, which reads:

"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."⁵³⁴

671. The Tribunal agrees with Claimants that such organs include: the President of the Republic, the Attorney General and the Deputy Attorney General, the CBC, the CySEC, the Cypriot courts, the Minister of Finance and the Cypriot Parliament. Consequently, any and all acts committed by these organs are attributable to Respondent pursuant to ILC Article 4.

672. Before examining the Parties' arguments with respect to the possible attribution to Respondent of the acts and omissions of Laiki, its Board of Directors or of its Special

[REDACTED]

⁵³⁴ International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries" [2001-II(2)] Yearbook of the International Law Commission 30 (Exhibit CL-0082).

Administrator, the Tribunal wishes to clarify at the outset the test applicable under ILC Article 8 in order to attribute to a State the conduct of a private entity.

673. The Tribunal recalls that ILC Article 8 reads:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” [emphasis added]

674. The Tribunal agrees with the *Hamester v. Ghana* tribunal that a “very demanding threshold” must be met for purposes of attribution under ILC Article 8, requiring “both general control of the State over the entity, and specific control of the State over the particular act in question”.⁵³⁵ This has been clearly established by International Court of Justice (the “ICJ”) in the *Nicaragua v. United States* case.⁵³⁶ In the *Genocide* case, the ICJ made the following clarifications with respect to the test applicable under ILC Article 8:

“399. This provision must be understood in the light of the Court’s jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the *contras* were to be equated with organs of the United States because they were ‘completely dependent’ on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself ‘directed or enforced the perpetration of the acts’ contrary to human rights and humanitarian law alleged by the applicant State’ (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

‘For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.’ (*Ibid.*, p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of ‘complete dependence’ on the respondent State; it has to be proved that they acted in accordance with that State’s instructions or under its ‘effective control’. It must however be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations

⁵³⁵ *Hamester v. Ghana*, at 179.

⁵³⁶ Case Concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* [1986] ICJ Reports 14 <http://www.icj-cij.org/> (Exhibit CL-0110) (“*Nicaragua v. United States*”).

occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.⁵³⁷ [emphasis added]

675. The Tribunal notes that arbitral jurisprudence has consistently upheld the standard set by the ICJ.⁵³⁸ The Tribunal sees no reason to depart from this *jurisprudence constante*.
676. In the paragraphs below, the Tribunal will analyze the substance of Claimants' arguments on attribution, beginning with the conduct of Laiki and its Board, and then turning to the conduct of the Special Administrator of Laiki.

Laiki and its Board of Directors

677. After having considered both Parties' arguments and the evidence in the record, the Tribunal has come to the conclusion that Laiki's conduct during the relevant period in this arbitration cannot be attributed to Respondent pursuant to ILC Article 8.
678. On a preliminary basis, the Tribunal notes that Claimants challenge the following acts carried out by Laiki's management, which they contend are attributable to Cyprus: (i) the commencement of an excessive number of audits designed to find fault with the Bouloutas-led management; (ii) the excessive reliance on external consultants and reluctance to make decisions; (iii) the failure to manage existing loans; (iv) the taking of unreasonable provisions on existing loans; (v) the failure to attract private investors to the Bank; and (vi) the failure to spin-off Laiki's Greek operations.⁵³⁹
679. However, Claimants have not demonstrated with evidence that these *specific* acts that they challenge were directed or controlled by Respondent. The evidence put forward by Claimants attempts to show Respondent's overall control over Laiki, but does not contain instructions or directions emanating from the Cypriot Government that Laiki and/or its Board of Directors adopt a specific conduct. For this reason alone, Claimants' case on attribution under ILC Article 8 must fail.
680. Nevertheless, even if the Tribunal were to adopt a less stringent test for attribution under ILC Article 8 – a test which this Tribunal does not endorse – this would not assist Claimants' case.
681. *First*, the Tribunal finds that the record does not support Claimants' contention that Cyprus directed or controlled the conduct of Laiki during the period December 2011 – June 2012.

⁵³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007, at 399, 400, I.C.J. Reports 2007 (Exhibit RL-0012) (the "Genocide case").

⁵³⁸ See, *Jan de Nul v. Egypt*, at 173; *Hamester v. Ghana*, at 198; *White Industries v. India*, at 8.1.10, 8.1.18.

⁵³⁹ See, *Reply*, at 270-304.

682. The Tribunal recalls that, during this period of time, the Bank remained under private ownership and under the general control of its shareholders and of its Board of Directors. At least formally, the State's role was confined to that of ensuring regulatory supervision. The exercise of this supervision led to the removal of Messrs. Vgenopoulos and Bouloutas.
683. The Tribunal considers that the evidence in the record does not support the conclusion that the CBC or other agencies of the Cypriot Government directed or controlled the conduct of Laiki and/or of its Board of Directors in choosing their replacements.
684. In particular, at the Board of Directors meeting of 12 December 2011, Mr. Sarris was elected as Non-Executive Director by nine votes to two, with Messrs. Hiliadakis and Foros voting against the proposal. Mr. Kounnis, affiliated with Claimants, and Mr. Fadel Al Ali of the DFG voted in favor. At the same meeting of the Board of Directors, following a proposal by Mr. Mylonas, Mr. Sarris was also elected as the Chairman of the Board beginning with 1 January 2012 by nine votes to two. Messrs. Kounnis and Ali voted in favor of the proposal.⁵⁴⁰ In other words, both appointments enjoyed the support of the overwhelming majority of the members of Laiki's Board.
685. The Tribunal understands that the election of Mr. Sarris by the Board of Directors followed a recommendation made by the Governor of the CBC.⁵⁴¹ However, the Tribunal is not persuaded that the Board of Directors had no choice but to vote in favor of this recommendation or that, in other words, the Bank was directed or instructed by the CBC to elect Mr. Sarris. The evidence in the record certainly does not support such an inference. To the Tribunal, it is not sufficient for the Board of Directors to elect an executive who enjoyed the trust of the regulator in order to establish attribution under ILC Article 8. The Tribunal considers that, to the contrary, such a decision was not surprising at a time of considerable financial difficulty, when obtaining the continued financial support of the CBC through ELA was deemed crucial for the Bank's survival. The Tribunal also recalls that this appointment followed the removal of two senior managers of the Bank by the CBC. Consequently, the Tribunal finds that Laiki's Board of Directors acted in what it perceived was the Bank's best interest when it appointed a Chairman of the Board that the Governor of the CBC trusted. For this reason, the Tribunal concludes that the record does

⁵⁴⁰ MPB, BoD Minutes, 12 December 2011 (Exhibit C-0307).

⁵⁴¹ See, Testimony of M. Sarris before the Pikis Commission, 25 July 2013 (Exhibit C-0670); A. Orphanides, Statement before the Pikis Commission, 23 August 2013 (Exhibit C-0619). The Tribunal places less weight on the accuracy of the testimony of Mr. Patsalides, who testified before the Pikis Commission that Mr. Sarris was appointed by the Governor of the CBC (Testimony of C. Patsalides before the Pikis Commission, 19 April 2013 (Exhibit C-0671)). The Tribunal considers that this testimony is inaccurate, as the Governor of the CBC did not have the authority to make such an appointment, and, more importantly, since the Minutes of Laiki's Board of Directors meeting clearly show that the appointment was made by the Board following a voting procedure (MPB, BoD Minutes, 12 December 2011 (Exhibit C-0307)).

not support Claimants' argument that Respondent directed and controlled Laiki with regard to the appointment of Mr. Sarris.

686. Further, the Tribunal is not persuaded that the replacement of other directors or senior managers of the Bank was conducted pursuant to any instructions from the CBC or from the Cypriot Government. In Section IX.C.3 below, the Tribunal has explained that these replacements were made by the Board of Directors following what appears to be a normal voting procedure. The record also disproves Claimants' contention that Messrs. Foros and Kounnis were sidelined after these replacements. To the contrary, they kept their senior positions until June 2012 and were involved in a number of key decisions of the Bank.⁵⁴² Certainly, the evidence proffered by Claimants is not sufficient to show a degree of interference from Respondent that would establish attribution on the basis of ILC Article 8.

687. The Tribunal further finds that any coordination in strategies between Laiki and Cyprus as regards the financial crisis likewise does not support Claimants' contention that Respondent had complete control over the Bank. The Tribunal recalls that, in November 2011, Laiki (then under the Bouloutas management) had inquired with the Ministry of Finance about the possibility that the Government guarantee a proposed share capital increase pursuant to the then draft Management of Financial Crises Law.⁵⁴³ In January 2012, the Bank's Board began considering a recapitalization plan and engaged consultants in order to determine the extent of the Bank's financial needs. The recapitalization plan was then submitted to the CBC with a view to obtaining financial assistance from the State for the purpose of recapitalization.⁵⁴⁴ Contemporaneous evidence dating from this time shows that the Bank was consistently following up on a plan to obtain Government financial support for the recapitalization. Beginning with March 2012, the Bank began discussing with the Government the various options available for recapitalization. During this time, the consistent response of the Government was that it would intervene only as a last resort, and only to the extent that the Bank had not succeeded in attracting private capital.⁵⁴⁵ The record shows that, to the extent there was any coordination in strategies between Laiki and Cyprus, this was due to the Bank's interest in obtaining the State's support for its upcoming recapitalization. Respondent's demonstrable reluctance to commit

⁵⁴² See, MPB, Board Minutes, 17 January 2012 (Exhibit C-0321); MPB, BoD Minutes, 29 May 2012 (Exhibit R-0174); MPB, BoD Written Resolution, 7 March 2012 (Exhibit R-0151); MPB, BoD Minutes, 2 April 2012 (Exhibit R-0470); MPB, BoD Minutes, 7 May 2012 (Exhibit R-0163).

⁵⁴³ Letter from MPB (E. Bouloutas) to the Ministry of Finance (K. Kazamias), 22 November 2011 (Exhibit C-0289).

⁵⁴⁴ MPB, Board Minutes, 17 January 2012 (Exhibit C-0321); MPB, BoD Minutes, 8 February 2012 (Exhibit C-0332); MPB, BoD Minutes, 28 February 2012 (Exhibit C-0339).

⁵⁴⁵ See, Email from C. Stylianides to A. Trokkos and the Governor of the CBC, 5 March 2012 (Exhibit C-0788); Letter from PwC (██████████) to MPB (M. Sarris), 20 March 2012 (Exhibit C-0348); Letter from Laiki (C. Stylianides) to the Ministry of Finance (K. Kazamias) and the CBC (A. Orphanides), 21 March 2012 (Exhibit R-0464); Letter from Laiki (C. Stylianides) to the Ministry of Finance (V. Shiarly), 11 April 2012 (Exhibit R-0159).

funds to the Bank prior to the exhaustion of other funding avenues is irreconcilable, in the view of the Tribunal, with Claimants' contention that Respondent controlled the minutiae of the Bank's recapitalization strategy.

688. The Tribunal considers that the evidence relied upon by Claimants to show otherwise does not assist its case. The email written by the Bank to ADIA in February 2012 in order to inquire about a possible partnership does not demonstrate that the Government was controlling the Bank's response to the financial crisis.⁵⁴⁶ In this letter, Mr. Sarris attempted to persuade the Abu Dhabi investor that the Bank had become more financially stable as a result of a change in strategy that benefitted from the Government's endorsement. In other words, this email was part and parcel of the Bank's efforts to obtain the support of the Government for its recapitalization. Nothing in the letter shows that the Government had issued directions to Laiki with respect to its recapitalization strategy.

689. Likewise unhelpful is the email sent by Mr. Sarris to the Prime Minister of Greece in order to obtain access to the HFSF.⁵⁴⁷ Contrary to Claimants' reading of this document, Mr. Sarris did not urge the Greek Prime Minister to consider the interests of Cyprus when assessing Laiki's application, but was attempting to persuade the Greek Government that it should favorably consider the Bank's application for HFSF funding. Indeed, the email only refers to Laiki's precarious financial condition and the measures being considered in order to improve it:

"Attached please find emails I sent to Poul [sic] Thomsen and Marco Buti. The situation for Laiki Bank is becoming critical. We will likely proceed with some kind of underwriting cum warrants and put option, but under current conditions some sort of managing the downside risk of the Greek portfolio remains critical.

I would be grateful for your views. These are extraordinary times calling for the best in collaboration between Greece and Cyprus."⁵⁴⁸

690. *Second*, the Tribunal finds that the record does not support Claimants' contention that Cyprus directed and controlled the conduct of Laiki during the period June 2012 – March 2013, *i.e.*, after the Bank was recapitalized and the Cypriot Government became its largest shareholder.

691. At the outset, the Tribunal recalls that the mere ownership of shares in Laiki by the Cypriot Government, along with the powers that this ownership entails, does not establish attribution under ILC Article 8. Claimants remain bound by the obligation to demonstrate

⁵⁴⁶ Letter from MPB (M. Sarris) to Abu Dhabi Investment Authority (A. Khaldi) regarding the latter's interest in a possible partnership, 11 February 2012 (Exhibit R-0142).

⁵⁴⁷ Letter from M. Sarris to G. Chardouvelis, 12 May 2012 (Exhibit C-0359).

⁵⁴⁸ *Id.*

that the challenged conduct was carried out under the instructions, direction or control of Cyprus:

“Questions arise with respect to the conduct of companies or enterprises which are State-owned and controlled. If such corporations act inconsistently with the international obligations of the State concerned the question arises whether such conduct is attributable to the State. In discussing this issue it is necessary to recall that international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the ‘corporate veil’ is a mere device or a vehicle for fraud or evasion. The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5. [...] On the other hand, where there was evidence that the corporation was exercising public powers, or that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State.”⁵⁴⁹ [internal citations omitted] [emphasis added]

692. In other words, Cyprus’ ownership of 84% of Laiki’s share capital is not, in and of itself, sufficient to establish attribution for purposes of ILC Article 8. Claimants’ reference to the Banking Law or the Underwriting Decree, which establish Respondent’s powers as majority shareholder and underwriter of Laiki’s recapitalization, likewise are not sufficient to demonstrate that Respondent “was using its ownership interest in or control of [Laiki] specifically in order to achieve a specific result”.⁵⁵⁰ Claimants have not put forward evidence showing that, during this period of time, Respondent directed and controlled the challenged conduct of the Bank.
693. The Tribunal notes that, in any event, in Section X.C below, the Tribunal has found that the challenged acts do not constitute a breach of the Treaty, so the question of attribution to Respondent of Laiki’s acts post-dating June 2012 on the basis of ILC Article 8 does not need to be addressed in more detail hereunder.

The Special Administrator of Laiki

694. In Section X.C below, the Tribunal has found that Respondent did not breach the provisions of the Treaty through its conduct in the various administrative, civil and criminal proceedings initiated against Claimants. For this reason, and in the spirit of judicial

⁵⁴⁹ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP: 2002), p. 112 (Exhibit RL-0216).

⁵⁵⁰ *Id.*

[REDACTED]

[REDACTED]

C. The Tribunal's analysis

730. In Sections IX-XIII below, the Tribunal has found that the evidentiary record supports the following conclusions: (i) Mr. Vgenopoulos' resignation following pressure from the CBC and the CBC's removal of Mr. Bouloutas were based on objective reasons and were the culmination of a lengthy process through which the regulator attempted to persuade the Bank's management to take corrective actions in order to address the Bank's financial crisis; (ii) Cyprus did not set out to nationalize Laiki and such purported intent did not inform its strategy during the Eurozone Summit; (iii) Cyprus did engage with Claimants' various recapitalization proposals circulated in the spring of 2012 and was not interested in obtaining majority ownership of Laiki; and (iv) in March 2013, Cyprus decided to resolve Laiki and save the BoC.

731. The Tribunal will not reiterate here the bases for these findings. For purposes of the present analysis, it is sufficient for the Tribunal to refer to these conclusions and, accordingly, hold that the record only supports one of Claimants' requested inferences, namely that, in March 2013, Cyprus decided to resolve Laiki and save the BoC.

[REDACTED]

[REDACTED]

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[REDACTED]

C. The Tribunal's analysis

822. Article 4 of the Treaty ("Expropriation") provides:

"Investments by investors of either Contracting Party shall not be expropriated, nationalised, or subjected to any other measure which would be tantamount to expropriation or nationalisation in the territory of the other Contracting Party except under the following conditions:

- a) the measures are taken in the public interest and under due process of law,
- b) the measures are clear and non-discriminatory,
- c) the measures are accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall be equivalent to the market value of the investment affected immediately before the date on which the measures, mentioned in this paragraph, were taken or made publicly known.

Compensation shall be paid immediately after the completion of legal procedure for expropriation and shall be transferred in freely convertible currency. If the Contracting

[REDACTED]

Party delays payment of compensation, it is liable to pay interest calculated on the basis of the 6-month London Interbank Offered Rate for the relevant currency. The extent of compensation is subject to review under due process of law.”

823. In the view of the Tribunal, in order for the challenged measures to fall under the sphere of application of Article 4 of the Treaty, it is necessary to establish that the measures deprived Claimants of the economic use and enjoyment of their rights.⁷⁵² In other words, the interference with Claimants’ property rights has to be sufficiently restrictive to support a conclusion that the property was substantially taken from them.

824. The Parties do not dispute and the Tribunal considers it to be uncontroversial that expropriations can occur not only by means of a single, direct, expropriatory act, but also by means of a series of acts which, individually, do not deprive the investor of its investment, but which, when taken together and analyzed over the course of a period of time, produce such an effect. In the words of the *Metalclad v. Mexico* tribunal:

“[E]xpropriation [...] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”⁷⁵³

825. The Tribunal notes Claimants’ position, pursuant to which the alleged expropriation of their investment “was not the result of a single event, but instead was a ‘creeping expropriation’ – that is, a series of measures forming a composite expropriatory act”⁷⁵⁴ beginning with Cyprus’ response to PSI+, continuing with the removal of Messrs. Vgenopoulos and Bouloutas, as well as of several Greek managers, and culminating with the dilution of their shareholding in the Bank following Laiki’s recapitalization.⁷⁵⁵ Respondent counters that the only protected investments were Claimants’ rights derived from their shareholding in the Bank, which were not in any way affected by the challenged measures. Respondent adds that, in any event, in removing Messrs. Vgenopoulos and Bouloutas from their posts and recapitalizing Laiki, Cyprus acted in the legitimate exercise of the State’s police powers and the challenged conduct cannot give rise to an expropriation claim. Claimants dispute that the conditions for the application of the police powers doctrine are met in the present case.

⁷⁵² See, *Vivendi II*, at 7.5.29.

⁷⁵³ *Metalclad v. Mexico*, at 103.

⁷⁵⁴ Reply, at 69.

⁷⁵⁵ In their post-hearing submission, Claimants also argued that “[t]he removal and replacement of Laiki’s Chairman and CEO standing alone constitute[d] expropriatory acts in breach of Article 4 of the Treaty” (C-PHS, at 18).

826. The Tribunal considers that the economic harm consequent to the non-discriminatory application of generally applicable regulations adopted in order to protect the public welfare do not constitute a compensable taking, provided that the measure was taken in good faith, complied with due process and was proportionate to the aim sought to be achieved.
827. In this respect, the Tribunal notes that Article 4 of the Treaty is drafted in broad terms and does not include any exception for the exercise of a State's regulatory powers. However, the provisions of the Treaty must be interpreted in accordance with Article 31(3)(c) of the VCLT, i.e., in light of "[a]ny relevant rules of international law applicable in the relations between the parties". These rules include customary international law.
828. While every application of a regulation that causes some economic damage to an investor could be seen as giving rise to a duty to compensate, under customary international law, a distinction exists between the reasonable *bona fide* exercise of police powers, which does not amount to a compensable taking, and indirect expropriation. The Tribunal thus aligns itself with the long line of arbitral awards⁷⁵⁶ finding that the characterization of a measure as expropriatory depends on the nature and purpose of the State's action. In this respect, "[i]t is ... established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare".⁷⁵⁷
829. The Tribunal further subscribes to the view that, "in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken *bona fide* for the purpose of protecting the public welfare, must be non-discriminatory and proportionate".⁷⁵⁸
830. After having carefully examined the facts of this case, the Tribunal has reached the conclusion that the measures challenged by Claimants, either cumulatively or individually, do not constitute a compensable taking. The Tribunal is not persuaded that Respondent was motivated by the intent to nationalize Laiki or that it acted in furtherance of a plan to obtain control over the Bank. In actuality, Laiki was in a precarious financial condition and the State had no incentive to take control over it. Further, Cyprus' refusal to renegotiate PSI+ and to opt out of the EBA capital exercise, as well as its reluctance to seek prompt international financial assistance from the Troika, were not motivated by intent to cause financial harm to Laiki in order to facilitate its eventual expropriation, but by the desire to

⁷⁵⁶ See, *Saluka v. Czech Republic*, *Teemed v. Mexico*, *de Levy v. Levi*, *Invesmart v. Czech Republic*, *Philip Morris v. Uruguay*.

⁷⁵⁷ *Saluka v. Czech Republic*, at 255.

⁷⁵⁸ *Philip Morris v. Uruguay*, at 305.

avoid the conditionality that would automatically attach to any financial assistance program from the Troika (1.). The Tribunal also finds that the removal of Messrs. Vgenopoulos and Bouloutas from the management of Laiki (2.) and the Bank's recapitalization (3.) were non-discriminatory, proportional measures taken in good faith in the exercise of Cyprus' regulatory powers in the pursuit of a legitimate public policy objective – the protection of the health of Cyprus' financial system during a time of profound economic crisis.

831. The Tribunal will address each one of these conclusions in more detail below.

1. Whether there was a plan to nationalize the Bank

832. The crux of Claimants' expropriation case rests on its allegation that Cyprus conceived and executed a plan to nationalize the Bank by taking advantage of the Eurozone crisis and the PSI+ program. However, Claimants have not put forward any convincing reason, backed up by evidence, which could explain why Cyprus would want to take control over the Bank. It is not at all clear to the Tribunal, and Claimants have failed to establish, what Respondent stood to gain by nationalizing the Bank. The Tribunal finds that, to the contrary, the record demonstrates that Laiki was in a very difficult financial position and bringing it under State control would have harmed the interests of Respondent.

833. First, the record establishes that Laiki was heavily exposed to GGBs. The Tribunal does not take any position on the reasonableness of Laiki's decision to invest in these instruments and to continue holding them for as long as it did. This is immaterial. What is relevant is that, in November 2010, Laiki's GGB portfolio was valued at EUR 2.9 billion and that the Bank decided not to unload the GGBs when the possibility to do so was offered by Cyprus, deeming that the risk posed by these instruments was too remote.⁷⁵⁹ As it was ultimately revealed, that assessment was incorrect and, in the summer of 2011, Laiki announced that it intended to participate in the PSI program with GGBs worth EUR 2.6 billion in nominal value.⁷⁶⁰ In other words, Laiki acknowledged that losses would have to be recorded with respect to its GGB portfolio.

834. Second, the record establishes that the quality of Laiki's loan portfolio was particularly poor. In effect, even Laiki's Internal Audit Report for 2010 noted the "unusually high percentage of non-repayment of loans".⁷⁶¹ Beginning with August 2010, in correspondence with Laiki, the CBC began raising concerns with regard to a series of loans granted by the Bank for the purchase of shares during MIG's share capital increase in June and July

⁷⁵⁹ Extraordinary General Meeting of MPB, 18 November 2010 (Exhibit R-0413).

⁷⁶⁰ MPB BoD Minutes, 30 August 2011 (Exhibit C-0256).

⁷⁶¹ Laiki, Audit Committee Minutes, 20 April 2011 (Exhibit R-0422).

2007.⁷⁶² Those concerns were reiterated during the first half of 2011 and were later laid out in more detail in the CBC's supervisory on-site audit report with respect to MEB.⁷⁶³ The Tribunal considers that the concerns raised by the regulator in its supervisory on-site audit of MEB showed the very serious nature of the problems faced by the Bank. In particular, the Bank's practices of granting loans with "balloon payments", of taking insufficient collateral, coupled with the often inadequate assessment of borrowers' repayment ability and the low interest charged created significant pressure on the Bank's liquidity and assets. The Tribunal finds it particularly significant that, among the "balloon payment" loans with low pricing and inadequate security, one can find the loans granted for the purpose of purchasing shares during MIG's share capital increase. Even more worrying was the fact that a considerable proportion of these loans had matured in July 2010 without having been repaid. As the CBC explained in its report, the poor quality of these loans demanded the taking of substantial provisions, of about EUR 500 million, amount which could be increased by more than EUR 200 million over the course of 2012. In its response to the regulator, despite contesting other findings in the report, Laiki acknowledged that the taking of such provisions was necessary.⁷⁶⁴ As it was later revealed, the provisions demanded by the CBC were ultimately not sufficient: subsequent due diligence by Houlihan Lokey established that Laiki needed to record increased provisions between EUR 1.52 billion and EUR 2.199 billion for the full year 2011 for its Greek portfolio.⁷⁶⁵

835. Third, the CBC's on-site supervisory audit report also highlighted other areas of grave concern that affected the performance and operations of the Bank, such as the significant concentration of deposits and numerous instances of preferential treatment afforded to a number of customers to the detriment of the interests of the Bank. Of note were the relationship with MIG and the undisclosed legal assistance offered by the law firm of Mr. Vgenopoulos in exchange for income from shipping loans. A further reason for concern was Laiki's failure to timely respond to the regulator's concerns. Indeed, it was only after two months had elapsed since the release of the audit report and after the CBC had given the Bank a firm deadline, that Laiki eventually submitted its answer.

836. In the Tribunal's view, in its letter dated 27 October 2011,⁷⁶⁶ Laiki did not offer convincing responses to the regulator's concerns. In particular, Laiki disputed that it had not adequately assessed the repayment ability of borrowers or that balloon payment loans were not accompanied by adequate security. Laiki even argued that the extension of the loans

⁷⁶² Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 3 August 2010 (Exhibit C-0837).

⁷⁶³ Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 9 November 2010 (Exhibit C-0839); Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 8 April 2011 (Exhibit C-0841); [REDACTED]

[REDACTED] Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 24 August 2011 (Exhibit C-0255).

⁷⁶⁴ Letter from MPB (E. Bouloutas) to the CBC (K.S. Poullis), 27 October 2011 (Exhibit R-0113).

⁷⁶⁵ Houlihan Lokey, "Project Midas – Final Due Diligence Report", 24 February 2012 (Exhibit R-0147).

⁷⁶⁶ Letter from MPB (E. Bouloutas) to the CBC (K.S. Poullis), 27 October 2011 (Exhibit R-0113).

granted for the purchase of MIG shares, which had not been repaid at maturity, did not denote the borrowers' inability to pay, but an extension of the "initial investment duration".⁷⁶⁷ Equally unconvincingly, Laiki attempted to argue that its internal documents "inadvertently" showed that the entirety of its shipping loans cases had been assigned to Vgenopoulos & Partners.

837. Fourth, at the time of the alleged expropriatory conduct, the Bank was increasingly relying on ELA, drawing EUR 2.5 billion in order to be able to comply with the regulatory liquidity requirements.⁷⁶⁸ Claimants have not offered a satisfactory explanation why Respondent, on the one hand, would support the Bank with ever increasing liquidity assistance, and at the same time, would wish to harm the Bank through PSI+ in order to facilitate its eventual nationalization.
838. On these bases, the Tribunal concludes that Claimants have not demonstrated with convincing evidence that Respondent would have benefitted from its purported plan to nationalize Laiki. As will be demonstrated in more detail below, the Tribunal finds that Claimants have also failed to establish that Respondent concocted a plan to nationalize the Bank. To the contrary, the evidence in the record demonstrates that Respondent's conduct can be better understood by a desire to avoid the conditionality that attached to any international financial assistance program from the Troika rather than by a desire to harm Laiki in order to bring it under State control.
839. Claimants rely upon the following key pieces of evidence in support of their argument that Cyprus had a plan to nationalize Laiki: (i) the Cabinet minutes dated 25 October 2011, on the eve of the Eurozone summit of 26 October 2011;⁷⁶⁹ (ii) Mr. Kazamias' testimony at the hearing; (iii) the Secret Report; and (iv) Mr. Vgenopoulos' note to DFG dated 12 December 2011.⁷⁷⁰ The Tribunal will address each one of these pieces of evidence and will explain why, in its view, they do not support Claimants' contention of an overarching communist plot to obtain control over the Bank.

The Cabinet minutes and Mr. Kazamias' testimony at the hearing

840. After having carefully examined the Cabinet minutes of 25 October 2011, the Tribunal has reached the conclusion that a fair reading of the document does not support a finding that the Cypriot Government was discussing a plan to nationalize the Bank. In the Tribunal's view, the minutes only reflect a discussion of the options available to the Government

⁷⁶⁷ *Id.*

⁷⁶⁸ Laiki, ELA Operations with Central Bank of Cyprus (Exhibit R-0277).

⁷⁶⁹ Minutes of the Meeting of the Council of Ministers, CM 36/2011, 25 October 2011 (Exhibit C-0269).

⁷⁷⁰ Email from A. Vgenopoulos to F. Al Ali, 12 December 2011 (Exhibit C-0771).

under the then draft of the Management of Financial Crises Law for intervention in troubled banks upon the latter's request.

841. In this respect, the Tribunal notes that, at the request of the Minister of Finance at the time, Mr. Kikis Kazamias, the draft of the Management of Financial Crises Law was discussed with priority in Cabinet. The Minister of Finance explained that the approval of the law was urgent so that the Government could quickly assist distressed banks. The minutes record the Minister of Finance informing the President on the extent of the Cypriot banks' exposure to Greek debt, as well as on the risk that a default of the banks could activate the State's obligation to guarantee insured deposits, a risk for which the State was not prepared:

"Minister of Finance: [...] I would suggest that matters under no. 2, 3 and 4 pre-occupy us today and if you wish, due to some community obligations existing, I will see whether from a management point of view, we could not deposit it. If, god forbid, something happens in the week in between, at least we would have it approved in order to submit it to the House of Representatives where a discussion may be made and any amendment thereof, if anything arises [...]

President of the Republic: [...] This issue does not refer explicitly to Cyprus, it refers to Greece and it has to do with the side effects of the Greek debt.

Minister of Finance: Indeed but to our banks as well.

President of the Republic: In any case, will our banks pull through even if we approve it?

Minister of Finance: We will be ready to intervene immediately.⁷⁷¹ [emphasis added]

"Minister of Finance: The matter under number 2 is the Management of Financial Crises. There must be immediate action for safeguarding the financial stability. There should be an institutional and legal framework, such that our State would be in a position, in case the need arises – this is why we said we should be prepared – to intervene and support the financial system. [...] I would like to remind that under the present circumstances, the State is a guarantor to all depositors for the deposits they have in financial institutions, up to €100.000 [sic] in each bank.⁷⁷² [emphasis added]

"Minister of Education and Culture: My question is the following: how is the plain depositor, the plain citizen, safeguarded if the Council of Ministers does not take this Decision, although it will do so? I want to understand this clearly.

Minister of Finance: As regards the depositor, he is not safeguarded when the bank collapses and from then on, this comes which will safeguard him, that is, he will apply legally also against the guarantor who is the State which secures a maximum amount of €100.000. [...] We are talking about wild things, there is no such case, that is, the presence of the State as a guarantor, in my opinion, only exists in theory under the existing circumstances.

President of the Republic: Kikis, when the state gives the bank €2 billion, it's assumed that that's the amount needed, let's say that the bank will continue its normal business. Therefore, the people are guaranteed. The problem is to find the money. We will appeal to the European Central Bank to get a loan.

⁷⁷¹ Minutes of the Meeting of the Council of Ministers, CM 36/2011, 25 October 2011 (Exhibit C-0269), pp. 2, 3.

⁷⁷² *Id.*, p. 6.

Minister of Finance: We have already engaged into informal contacts with the special fund, what we all hear as the EFSF.

President of the Republic: We are not alone, in any case. We are in the least miserable situation. There are others who are much worse.

Minister of Finance: We are in the worst situation in terms of percentages, based on our size and the engagement of our banks in the Greek market and the Greek Government Bonds. But in terms of absolute numbers, there are others who sleep less than us.⁷⁷³
[emphasis added]

842. During the Cabinet meeting, the Minister of Finance also reported to the President about the resistance encountered within the banking sector with respect to the draft of the Management of Financial Crises Law:

“Minister of Finance: A campaign has already begun against these bills by a specific bank. You should know that.

President of the Republic: I realize what is happening, it’s about Marfin Laiki, the State cannot subsidize any gentleman or any bank. There are countries that have nationalized the banks, because they could not provide other guarantees.

Minister of Finance: If it is not passed, President, it is as if we are doing a favor to the specific individual, I answer this matter because it was raised. The first one to be relieved if we do not pass it, will be the specific individual”.⁷⁷⁴

843. During the hearing, Mr. Kazamias clarified that the bank which had voiced its opposition against the draft law was Laiki and that the specific individual referenced in the meeting was Mr. Vgenopoulos. Mr. Kazamias testified that Mr. Vgenopoulos was opposed to any State intervention in the banks on the terms of the draft law:

“Q. [...] Who is the specific individual at Marfin Laiki Bank who will be relieved if the state does not pass a law that allows for intervention in banks?

A. It’s Mr Vgenopoulos.”⁷⁷⁵

844. The Tribunal has decided to accept this testimony as it is corroborated by other evidence in the record. Indeed, the record evidences that a vigorous debate took place in the Cypriot Parliament concerning the terms of the draft law, and that a number of comments and observations in that regard were made by the Association of Cyprus Banks, of which Laiki was a member. These comments illustrate that, while the Association of Cyprus Banks generally supported the adoption of this legislation, it was concerned with the precise terms of the State intervention and sought to ensure the protection of shareholders’ interests.⁷⁷⁶

⁷⁷³ *Id.*, pp. 9, 10.

⁷⁷⁴ *Id.*, p. 4.

⁷⁷⁵ *Tr.*, Day 2, 158: 12-16.

⁷⁷⁶ *See*, Minutes of the House of Representatives, 14 December 2011 (Exhibit C-0310); Letter from the ACB (M. Kammas) to the Ministry of Finance (C. Patsalides), 25 October 2011 (Exhibit C-0268).

845. During the hearing, Mr. Kazamias was also taken to the section in the Cabinet minutes wherein the President and the Minister of Finance discussed the possibility of nationalizing the banks as a result of the application of the new law. Because the import of this discussion is the subject of considerable debate, the Tribunal considers it useful to render below the entirety of the exchange on the matter between the Minister of Finance and the President.
846. The exchange begins with the Minister of Finance presenting the options available under the draft law for State intervention in failing banks: the granting of Government loans, the provision of Government guarantees, the provision of capital funds “against the acquisition of equal participation in the ownership structure” of banks, the purchase of banking assets and the acquisition of a part or all of the issued capital. The Minister of Finance explained that these modalities for State intervention were largely based on existing legislation in other EU Member States:

“President of the Republic: Kikis, there is no need to explain to us for the need, explain to us the conditions of this story. How do we support the banks and under what conditions the State supports the banks? Or our own State will support the banks, if there is any need?
Minister of Finance: The proposed legislation provides the Council of Minister [sic] with the power for immediate action. In what ways? It may grant government loans to financial organisations or provide government guarantees for borrowing or provide capital funds against the acquisition of equal participation in the ownership structure of such institutions. Or buy assets or acquire part or all of their issued share capital. The contradictions which exist, which you should have in mind, are mainly in this last power granted to the State to demand the acquisition of part or all of the issued share capital.
President of the Republic: But this is how the entire world operates.
Minister of Finance: Exactly, because this is what is done in the entire world, we also adopt all these which we are being prepared by all the States of the Eurozone and not only, so that we are prepared from then onwards.”⁷⁷⁷ [emphasis added]

847. Following the Minister of Finance’s introduction, the President intervened in order to discuss the implications of a significant State investment in a failing bank:

“President of the Republic: We need to ‘sell’ this thing to the common people. The common people will tell you, ‘You’re not helping me but you give a €2 billion assistance to a bank. And you will tell him: ‘I’m helping this bank based on certain prerequisites and I might even come to the point where I may even buy it, essentially I will nationalize it’.
Minister of Finance: Yes, it is essentially, nationalisation. The management leaves, you put those that you deem fit to represent you hoping to save it because they say that wherever the State is involved, there is no positive result. Some fear that they will be completely expelled and this is the most normal thing because essentially, those who led the situation to that direction with their tolerance or their choices cannot have the trust of the State. We are talking about more than a billion.
President of the Republic: Will the ‘protectors’ of the banks, Nicolas and Averof, accept this point?

⁷⁷⁷ Minutes of the Meeting of the Council of Ministers, CM 36/2011, 25 October 2011 (Exhibit C-0269), pp. 6, 7.

Minister of Finance: I told you that, already, since yesterday afternoon, huge efforts are made in all directions. I consider now, that they will apply to all the political party directions in order to convince by relative arguments according to whom they speak to, at least this last point should be deleted.

Minister of Interior: One clarification. At paragraph 4(a)(iii) 'The provision of capital against the acquisition of equal participation in the ownership structure', alright, the (v) may be full acquisition. Does (iii) imply that it can participate?

Minister of Finance: This is when you put a percentage, but if you put a percentage, if this percentage is small, you appreciate that you cannot have control. We may, however, deem that with a smaller participation we may save it, however, in this way, you will have the percentage which any shareholder may have.

Minister of Interior: Therefore, there is no difference with part acquisition?

Minister of Finance: No.⁷⁷⁸ [emphasis added]

848. In the view of the Tribunal, the exchange rendered above does not evidence the intent to nationalize Cypriot banks, including Laiki, by removing top management, as was alleged by Claimants. The exchange referred to the situation in which the State would be called by a distressed bank to support it with a significant investment (the example being discussed is a EUR 1 or 2 billion investment), in exchange for which the State would obtain majority or full ownership of the bank and appoint new management. The Tribunal notes in this respect that both the President and the Minister of Finance referred in their interventions to capital injections of more than EUR 1 or 2 billion.

849. The Tribunal recalls here that Mr. Kazamias was questioned at the hearing with respect to the choice of the term "nationalization" to describe State intervention. The Tribunal does not find that Mr. Kazamias' testimony with respect to the use of the term in the sense of "statification" was particularly enlightening. Nevertheless, the Tribunal notes that Mr. Kazamias is not a lawyer, which can suggest that the usage of the term "nationalization" should be viewed with at least some circumspection. The Tribunal is moreover satisfied by reading the entirety of the minutes of the Cabinet meeting that the usage of the term "nationalization" was not in its strict legal sense. In light of the particular situation discussed by the President and the Minister of Finance, i.e., State support for a distressed bank, in an amount exceeding EUR 1/2 billion, the Tribunal finds that the discussion did not refer to outright nationalizations, or expropriations, but to the change in the ownership structure of a bank as a result of State intervention. This injection of funds would have followed from a request from the distressed bank itself, and not on account of a unilateral decision by the relevant State authorities. It is also noteworthy to point out that, at the time, no Cypriot bank, including Laiki, had requested or obtained State support. In November 2012, during the Bouloutas management, Laiki made inquiries regarding the possibility to obtain State support under the Management of Financial Crises Law. The Bank filed a

⁷⁷⁸ *Id.*, pp. 7, 8.

formal request for support on 2 May 2012.⁷⁷⁹ For its part, the BoC made such a request on 29 June 2012.⁷⁸⁰

850. The fact that the Cypriot Government was considering obtaining a stake in the banks in exchange for financial intervention, and not an outright nationalization, is also supported by the exchange with the Minister of Interior during the Cabinet meeting. In this exchange, the Minister of Finance confirmed that, when the State did not put up significant funds, the State would not obtain control.

851. The Tribunal also notes that the Minister of Finance also stated during the same meeting:

“Minister of Finance: I should tell you that even now –this concerns also the first matter – the first effort which is being made is the pressure on the banks themselves to increase their capital base either with the existing shareholders or by finding new ones. The second effort is the intervention of the State wherever is needed.”⁷⁸¹ [emphasis added]

852. When questioned by the Tribunal at the hearing with regard to his reference in the minutes to “huge efforts” made “in all directions”, Mr. Kazamias clarified that he was referring to the lobbying for the removal of the provision empowering the State to remove management subsequent to its intervention:

“MR PRICE: [...] The President is asking you about particular individuals in the political opposition, and you are offering him assurance of some sort that ‘huge efforts are made in all directions’. Are these efforts by you? Were you talking to politicians in the Greek Parliament?

A. No. I’m not trying to reassure the President. On the contrary, I am informing him about the fact that there was a lobby consisting of political personalities aiming not to include in the new legislation this right of the government to change the management, et cetera, in case, of course, the state was called upon to intervene.

It was not a reassurance. I was simply informing the President that this bank lobby was trying to influence politicians in order to delete this provision during the discussion of the new bill that the government would submit.

So I was not reassuring him. To the contrary, I was informing the President about the movements that unfortunately were taking place. Actually, the position of various members of the Parliament and of the banks’ association, testified to this.”⁷⁸²

853. Minister Kazamias was asked several times during the hearing whether the Cabinet was considering at its 25 October 2011 meeting the removal of Messrs. Vgenopoulos and

⁷⁷⁹ See, Letter from MPB (E. Bouloutas) to the Ministry of Finance (K. Kazamias), 22 November 2011 (Exhibit C-0289); Letter from Laiki (C. Stylianides) to the CBC (P. Demetriades), 8 May 2012 (Exhibit R-0476).

⁷⁸⁰ Letter from BoC (A. Artemis) to the CBC (P. Demetriades), 29 June 2012 (Exhibit R-0494).

⁷⁸¹ Minutes of the Meeting of the Council of Ministers, CM 36/2011, 25 October 2011 (Exhibit C-0269), pp. 11, 12.

⁷⁸² Tr., Day 2, 178: 5-25; 179: 1-5.

Bouloutas.⁷⁸³ Even though the Tribunal has reservations as to the reliability of Mr. Kazamias' evidence, after assessing the totality of his testimony on the subject matter of the Cabinet meeting of 25 October 2011, and comparing it to the content of the Cabinet minutes that are contemporaneous to these events, the Tribunal is persuaded that the discussion in Cabinet surrounding the removal of management in assisted banks did not concern Laiki or any Cypriot bank in particular, but any future bank that would require State assistance under the terms of the then draft Management of Financial Crises Law. Mr. Kazamias' testimony at the hearing was consistent with the declarations made during the Cabinet meeting that offering substantial State intervention, in the realm of EUR 1-2 billion, could not be explained to Cypriot taxpayers if the Government did not subsequently to its intervention replace the previous management with people having the trust of the State.

854. While the Tribunal considers that Mr. Kazamias' testimony on this issue is credible, seeing as it is corroborated by documentary evidence contemporaneous to the relevant events, the same conclusion does not apply with regard to his declarations made during the hearing that he lacked prior knowledge with regard to Mr. Orphanides' intent to remove Messrs. Vgenopoulos and Bouloutas. The Tribunal considers that it strains credulity to believe that the Minister of Finance, at a time of grave economic and political turmoil for the country, was not being kept abreast by the Governor of the CBC with regard to his intention to remove top management of one of the two systemic banks in the country. Nevertheless, the Tribunal does not infer from this advance knowledge the existence of an elaborate plan to nationalize the Bank. In the Tribunal's view, Mr. Kazamias' lack of opposition to the decision of the CBC Governor to proceed with the removals cannot be equated with the existence of a conspiracy to expropriate the Bank between two top officials in the country. The Tribunal will give additional observations with regard to the removals of Messrs. Vgenopoulos and Bouloutas in the Section IX.C.3 below.
855. For these reasons, the Tribunal finds that the Cabinet minutes and Mr. Kazamias' testimony at the hearing do not support a finding of an overarching plan to nationalize Laiki.

The Secret Report

856. Another key piece of evidence relied upon by Claimants as support for their contention that Respondent had a plan to nationalize the Bank is the so-called Secret Report.
857. The Tribunal notes that the Secret Report was prepared at the request of President Anastasiades, the successor of President Christofias. Indeed, the document opens with a

⁷⁸³ Tr., Day 2, 159: 12-18, 24, 25; 160: 1, 2, 6-25; 161: 1-25; 162: 1-8; 170: 1-21; 171:20-25; 172: 2-14, 20-25; 173: 1-3.

statement that “[t]his study [was] carried out following the instructions by the President of the Republic of Cyprus, Nicos Anastasiades with the aim of tracking down the causes which led the Cypriot economy to the brink of collapse”.⁷⁸⁴

858. Regardless of its official character however, after having examined its contents, the Tribunal has decided that the Secret Report has low probative value.

859. In this respect, the Tribunal observes that the Secret Report makes the bold claim that “Kazamias had prepared, on behalf of the government, a plan for nationalizing Laiki Bank and worked together with the CBC Governor Orphanides, for its implementation”.⁷⁸⁵ As support for this claim, the Secret Report refers to the drafting process for the Management of Financial Crises Law, which involved both Minister Kazamias and CBC officials, to the minutes of the Cabinet meeting of 25 October 2011 and the 2011 CBC Annual Report.⁷⁸⁶

860. On this evidentiary predicate, the Secret Report reaches a second conclusion:

“The next day (26.10.2012), Christofias attended the Council summit and agreed without any objection to the Greek debt haircut, knowing that the banks in Cyprus would need additional capital, however, this he might considered as an opportunity to nationalize Laiki bank.”⁷⁸⁷ [emphasis added]

861. The Tribunal has already determined that the Cabinet minutes of 25 October 2011 do not evidence the intent of the Cypriot Government to nationalize the banks in general or Laiki, in particular. Additionally, the Tribunal finds nothing objectionable in the participation, by the CBC, in the drafting process of the Management of Financial Crises Law. As a result, and on the same basis, the Tribunal has decided not to accept the findings of the Secret Report with respect to the existence of a plan to nationalize Laiki.

Mr. Vgenopoulos' 12 December 2011 note to DFG

862. The Tribunal is not persuaded that Mr. Vgenopoulos' email to DFG, dated 12 December 2011,⁷⁸⁸ is in any way capable of demonstrating that the Cypriot Government intended to nationalize the Bank. It is not disputed that Mr. Vgenopoulos, a witness in this arbitration, held the view that the Cypriot Government was intent on expropriating Laiki. However, the impressions of Mr. Vgenopoulos at the time, however well intended they may have been, cannot attest to the intent of the Government of Cyprus.

⁷⁸⁴ Secret Report, p. 1.

⁷⁸⁵ *Id.*, p. 7.

⁷⁸⁶ *Id.*, pp. 7-10.

⁷⁸⁷ *Id.*, p. 10.

⁷⁸⁸ Email from A. Vgenopoulos to F. Al Ali, 12 December 2011 (Exhibit C-0771).

863. For these reasons, the Tribunal finds that the evidentiary record does not support a conclusion that Respondent conceived and then executed a plan to nationalize the Bank.
864. In light of Claimants' position that it was the pursuit of the plan to nationalize the Bank that connects the seemingly disparate acts challenged in this arbitration into a composite act that breaches the Treaty, and of the Tribunal's finding that the record does not support a finding that such a plan ever existed, the Tribunal concludes that Respondent's acts do not constitute a composite act that is capable of breaching the Treaty's Article 4.
865. However, that is not the end of the analysis. In the sections that follow, the Tribunal will examine individually each one of the acts challenged by Claimants.
866. The Tribunal will address the question of whether Cyprus' failure to seek an exemption from PSI+, to negotiate better terms at PSI+, to opt out of the EBA recommendation or to seek Troika support for its banking sector immediately following the Eurozone summit could be seen as expropriatory.

2. Cyprus' response to PSI+

867. Claimants' case with respect to PSI+ is connected with their submissions that Cyprus intended to nationalize Laiki and that this intent was established at the latest upon the meeting of the Cabinet on 25 October 2011. The Tribunal has already found that the Cabinet minutes do not support a finding that Respondent intended to nationalize Laiki. However, during the hearing, Claimants clarified that Cyprus' lack of response to PSI+ represents in and of itself a breach of the Treaty due to the failure to follow the "rules of the road" established at the Eurozone summit:

"MR PRICE: You have asserted that one of the elements of your composite breach theory, as you've just elaborated here, was the failure of Cyprus to seek to get a better deal in PSI+; correct?"

DR PETROCHILOS: To seek any form of mitigation or support.

[...]

MR PRICE: Here's my question: what if they had sought better terms of the haircut, but failed?

DR PETROCHILOS: It's an excellent question.

MR PRICE: Would we have a breach of treaty?

DR PETROCHILOS: We probably would not.

[...]

MR PRICE: So your argument is: it was legally obligated by the BIT to seek and obtain [EFSF] support for its banks?

DR PETROCHILOS: If so required, and in the context it was required.

MR PRICE: So it was not open to Cyprus to say: 'You know what? I don't want the conditionality; not worth it?'

DR PETROCHILOS: Not in terms of the rules of the road for the Eurozone. It went out of the reservation.

SIR DAVID: Excuse me. To what extent are you relying on the motive for which this was done; in other words, that this step was not taken because the true intention was to nationalise Laiki?

DR PETROCHILOS: Thank you, sir. We are relying on the motive only in the sense that it explains the conduct. The conduct that is problematic is how Cyprus fails to recapitalise the bank in the way that the Eurozone decision provides it will do it. We call that the 'rulebook'. So that is the offensive conduct, and it's our third factual submission.

It is not a political claim; it is a legal claim. The investors have certain legitimate expectations, and Cyprus has certain obligations."⁷⁸⁹

868. The Tribunal notes that Claimants' clarifications pertain to the issue of whether Respondent frustrated their legitimate expectations, an analysis more properly made when seeking to determine whether Cyprus breached Article 2 of the Treaty. However, since an investor's legitimate expectations are also relevant within the framework of an expropriation analysis, the Tribunal will examine in the paragraphs below whether the lack of any attempt by Cyprus to negotiate a better outcome for the State and/or its banking system at the Eurozone summit was expropriatory.

869. The Tribunal wishes to emphasize at the outset that any such analysis will be limited in scope:

"[A] ... tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections."⁷⁹⁰

870. The Tribunal endorses this view. It is not up to an arbitral tribunal constituted under an investment treaty to sit in judgment over difficult political and policy decisions made by a State, particularly where those decisions involved an assessment and weighing of multiple conflicting interests and were made based on continuously developing threats to the safety and soundness of the financial system. Unless the measure at issue is shown to be arbitrary, capricious and unrelated to a rational policy, or manifestly lacking even-handedness, a tribunal should not intervene.

871. The Tribunal is persuaded that, in the case before it, Cyprus faced one such difficult political decision on the occasion of the Eurozone summit.

⁷⁸⁹ Tr., Day 1, 54: 14-18; 55: 14-18; 60: 14-25; 61: 1-10.

⁷⁹⁰ *S.D. Myers, Inc. v The Government of Canada* (UNCITRAL) First Partial Award, 13 November 2000, at 261 (Exhibit CL-0165) ("*S.D. Myers v. Canada*").

872. At the time, Eurozone leaders were attempting to find consensus at a very difficult turning point for the continent, when the possibility of Greece's disorderly default and an exit from the Eurozone were discussed and, possibly, when the future of the entire Eurozone was at stake. The Tribunal has found particularly enlightening the following passages from the Metrick-Landau First Expert Report describing the events surrounding the Eurozone summit:

"167. The 21 July 2011 announcement failed to calm financial markets, however, as the summer was marked by significant market volatility and continued increases in Greek CDS prices. This market volatility reflected at least in part the strong disagreement that persisted between Eurozone countries regarding the policy response to the crisis. France and Germany disagreed over the proper crisis management mechanism.

[...]

168. [...] France, together with a few other Eurozone countries, favored a very powerful fund that could massively intervene to stabilize government bond markets. That so-called 'big bazooka' approach was discreetly supported by the US and United Kingdom. [...]

169. Germany, together with another group of countries, was adamantly opposed to this approach. Their opposition grew even stronger when France floated the idea of creating new Special Drawing Rights (SDRs) to finance an expanded mechanism. [...]

170. The other main area of disagreement within the Eurozone related to the nature of macroeconomic adjustment measures that countries such as Greece, Italy, and Ireland were expected to adopt to gain international financial assistance. [...] Countries such as Greece and Italy resisted the need for painful austerity measures, however, in part because of concerns about the effects of austerity on economies that were already in deep recessions. [...] On 5 August 2011, the ECB President and the Governor of the Bank of Italy sent a letter to the Italian Prime Minister that was subsequently leaked to the public. This letter outlined in very harsh terms the adjustment measures requested by the ECB, which were a condition for the ECB to continue supporting the stability of the Italian government bond market through massive purchases of government bonds. [...]

171. It was in this context that EU and Eurozone leaders held summit meetings in Brussels on 26 October 2011. [...]

172. Of all the decisions announced that day, only the two last ones (the PSI+ and the bank recapitalization) truly reflected a broad consensus among European policy makers and would be implemented effectively. The awkward compromise on the EFSF would collapse a few days later at the Cannes Summit, and changes in the governments of Greece and Italy would be necessary for the economic reforms to take place.

173. [...] On 31 October 2011, Prime Minister Papandreou announced a referendum that took everybody, including the Eurozone leaders, by surprise. Many were outraged as the move threatened to compromise the whole effort to restore calm to financial markets.

174. The Italian Prime Minister faced similar difficulties, as the reform package negotiated with the ECB was encountering strong resistance in the Italian Parliament, and there was a distinct possibility that he would lose a vote of confidence. Spreads in sovereign bond markets in Italy once again increased [...].

175. The Cannes G20 Summit, chaired by the French President, opened on 3 November 2011. [...] Prime Minister Papandreou was invited to explain his referendum proposal and faced open hostility and subsequently announced that the referendum had been cancelled. On 9 November, he resigned as Prime Minister and a technocratic government was appointed under the new Prime Minister, Lucas Papademos, a former ECB Vice President, to implement the Troika program.

176. Similar treatment was accorded to Italian Prime Minister Berlusconi. [...] On 11 November, the Italian Senate adopted the reform package after 'weeks of bitter political fights'. On 12 November, Mr. Berlusconi resigned as Prime Minister and was replaced by Mr. Monti, who headed up a technocratic government.

177. At Cannes, the discussion about the financial support mechanism also resumed. The US and French Presidents joined forces, pressuring Germany to accept the SDR plan. Subsequent accounts of the meeting corroborated rumors about the tense atmosphere. [...]

178. [...] [N]o agreement was reached on expanding the EFSF financing mechanism. These plans were never revived or successfully implemented.

179. In sum, in less than two weeks, the Eurozone leaders forced the Greek government to give up its projected referendum, leading to the collapse of the coalition government and the resignation of the Prime Minister. They also pressured Italy, the third largest economy in the Eurozone, to accept a very strict adjustment program that led to the resignation of the Prime Minister. They went through a very contentious G20 Summit in Cannes where Europe had been lectured by other advanced and emerging economies on its inability to manage the crisis. [...] Massive political uncertainty was hanging over the future of macroeconomic policies in the Eurozone. One element on which there seemed to broad [sic] consensus was the strategy for strengthening the banking system by recapitalizing banks."⁷⁹¹ [internal citations omitted]

873. As the evidence has made clear, in terms of percentages, Cyprus' economy, heavily reliant on its banking sector, was the most exposed to Greece out of all the Eurozone economies. It was therefore in Cyprus' interest to seek to minimize any impact. Nevertheless, a failure to reach an agreement that would have restructured the Greek debt risked leading to a disorderly default of Greece with even more disastrous implications for Cyprus.⁷⁹² In such a scenario, not only would the economic consequences have been much worse, but also Cyprus could have alienated its European partners in the process. In other words, there were no easy choices for Cyprus on the occasion of the Eurozone summit. Additionally, the Tribunal notes that the agreement reached at the Eurozone summit was a political

⁷⁹¹ Metrick-Landau First Expert Report, at 167-179.

⁷⁹² See, Morrison: "Yes, a disorderly default by Greece would have been catastrophic for the whole of Europe, including Cyprus" (Tr., Day 3, 10:22, 23).

direction, not a source of binding obligations. A potential veto by Cyprus would have had a dubious effectiveness.⁷⁹³

874. The Tribunal therefore finds nothing arbitrary, capricious or unreasonable in Cyprus' lack of attempt to negotiate for itself either an exemption or a mitigation of the PSI+ program.
875. Equally, the Tribunal is not persuaded that Cyprus acted arbitrarily in not negotiating an exemption from the EBA capital exercise, as suggested by Claimants. The Parties have offered the conflicting testimonies of Prof. Morrison, on the one hand, and Professors Landau and Metrick, on the other. While Prof. Morrison took the view that Laiki's weak capital position was public knowledge and had already been factored in by the markets, Prof. Landau expressed the opinion that a failure to announce prompt compliance with the EBA recommendation would have sent a signal of weakness to the markets and would have triggered a bank run. The Tribunal is not in a position and is not mandated by the Treaty to decide whether or not Cyprus' decision to not seek an exemption from the EBA capital exercise was the best course of action to be taken under the circumstances. What matters is that BITs do not hold States to an obligation to act following international best practices. Moreover, it is not at all clear to the Tribunal which of the two options would have been in line with such practices, particularly considering that the only country to have sought such an exemption was Greece. In light of these considerations, the Tribunal finds that Cyprus' decision to follow the EBA recommendation was not arbitrary, capricious or unreasonable.
876. This holds all the more true for Cyprus' decision not to apply immediately for financial assistance from the EFSF. It is not debated by the Parties and it is clear from the record that applying for such assistance would have required Cyprus to enter into a conditionality program that entailed the reduction of its public expenses through painful austerity measures. In other words, Cyprus had to make a political decision and choose whether to protect its banking sector immediately through Troika assistance, with the attendant stabilization of its banking system but at enormous costs to its citizens, or to protect its citizens from unpopular and difficult public spending cuts and attempt to find alternative solutions for its banks. The Tribunal finds nothing unreasonable, arbitrary or capricious in Cyprus' decision not to seek EFSF funding immediately. It is certainly not up to the Tribunal to decide how the Cypriot Government should have elected to spend public funds.
877. Further, the Tribunal is not persuaded that the "rules of the road" referred to by Claimants represent binding legal obligations, seeing as they were incorporated in the Eurozone Summit statement, which is a political document. In any event, as will be demonstrated in more detail in Section X.C.6 below, Cyprus in effect did follow the principles laid out in the Eurozone Summit statement.

⁷⁹³ See, Morrison First Expert Report, at 135.

878. For these reasons, the Tribunal finds that Cyprus' response to PSI+ was not expropriatory and did not breach Article 4 of the Treaty.

3. The removal of management

879. The heart of Claimants' expropriation claim is their allegation that the removal of Messrs. Vgenopoulos and Bouloutas by the CBC represented the means through which Cyprus obtained the *de facto* control over Laiki and prepared it for the formal nationalization in June 2012. Respondent objects to this characterization of the CBC's decision, arguing instead that Cyprus acted in the legitimate exercise of the State's police powers. The Tribunal finds no Treaty or factual basis in the record that could prompt it to second-guess the CBC's decision to remove management.

The removal of Mr. Vgenopoulos

880. The Tribunal observes that the Parties dispute whether Mr. Vgenopoulos was removed by the CBC or resigned of his own volition.

881. The Tribunal considers that the evidence in the record unequivocally demonstrates that Mr. Vgenopoulos stepped down following a request from the CBC. In fact, the former Governor of the CBC declared in no uncertain terms before a Parliamentary Committee in 2016:

"It was not me who brought Mr Vgenopoulos in Cyprus. I did not provide cover to him [but instead] I ousted him when I could, using the law."⁷⁹⁴ [emphasis added]

882. However, the analysis does not end there. Indeed, whatever misgivings Mr. Vgenopoulos may have had before stepping down from Laiki's Board of Directors and from his position of Non-Executive Chairman, on 4 November 2011, he took a conscious decision to tender his resignation. Had Mr. Vgenopoulos wished to resist the pressure of the CBC, he would have been within his rights to refuse to resign and force the CBC to initiate a formal, written process for this removal, as Mr. Bouloutas in fact did a few weeks later.

883. Claimants argue that Mr. Vgenopoulos' resignation was due to the pressure applied by Mr. Orphanides on members of Laiki's Board of Directors and shareholders. The Tribunal

⁷⁹⁴ "Orphanides: I ousted Vgenopoulos from Cyprus when I could", *Fileleftheros*, 6 September 2016 (Exhibit C-0831), *See also*, "Frontal attack by Orphanides", *ANTI*, 30 April 2012 (Exhibit C-0353); Interview of A Orphanides, available at <http://www.youtube.com/watch?v=PWRhLZy5G-M#t=119>, 30 April 2012 (Exhibit C-0354).

considers that that may well have been the case. Nevertheless, it does not amount to a breach of the Treaty.

884. First, the CBC was within its rights to request the removal of Mr. Vgenopoulos. Section 30 of the Banking Law explicitly conferred this power upon the regulator.

885. Second, the evidence in the record does not support a finding that the CBC abused its power when it ousted Mr. Vgenopoulos. Claimants have not put forward any evidence from any individual in direct contact with the CBC, whom the CBC purportedly asked to have Mr. Vgenopoulos removed. Claimants argue that the CBC used the threat of withdrawing ELA so as to force Mr. Vgenopoulos to step down. However, this is not supported by the record. In effect, the evidence relied upon by Claimants in support of this argument is the following statement by Mr. David:

“Nevertheless, in the immediate future we anticipated that we could not continue functioning in the way that we had been unless market conditions dramatically improved. During this period we updated the CBC almost daily on our position, as the CBC had asked us to do in light of the economic circumstances. I alerted the CBC on several occasions that they should be ready to provide ELA to us, because there was an increasingly high probability that Laiki would need it on account of the massive deposit flight. In a telephone conversation in mid-2011, Mr Poullis, who was the Senior Manager of the Division for Regulation and Supervision of Banking Institutions, told me that the CBC would not be prepared to provide funds to Laiki. Instead, he told me mockingly, Laiki should look to Mr Vgenopoulos and his friends to put some of their own money into the bank.”⁷⁹⁵ [emphasis added]

886. The Tribunal observes that Mr. David is referring to a conversation having allegedly taken place in the middle of 2011, before the CBC actually took any decision to support Laiki through ELA (“the CBC would not be prepared to provide funds to Laiki”). Whatever conversation Mr. David may have had with Mr. Poullis, the record establishes that the CBC did in fact provide Laiki with ELA upon its request, and that this happened a few months after this conversation, on 27 September 2011. This form of support continued to be offered to the Bank up until it was decided that it would be placed in resolution. In any event, Mr. David has not appeared before the Tribunal at the hearing for questioning and the Tribunal was not satisfied with the reasons invoked for his decision not to appear. As a result, the Tribunal has decided that Mr. David’s testimony is not corroborated by the evidence in the record and has low probative value.

887. Further, had the CBC somehow pressured Laiki’s Board or shareholders to remove Mr. Vgenopoulos, they could have refused to be co-opted. Indeed, after Mr. Orphanides removed Mr. Bouloutas, a unanimous Board requested Mr. Orphanides to reconsider,

⁷⁹⁵ David First Witness Statement, at 30.

invoking their support for the former Chief Executive Officer. It is unclear from the record if the members of the Board and/or the shareholders contacted by Mr. Orphanides shared his concerns with regard to Mr. Vgenopoulos. What is clear is that these members of the Board and/or shareholders did not officially request Mr. Orphanides to re-evaluate his views with regard to Mr. Vgenopoulos.

888. For these reasons, the Tribunal finds that the resignation of Mr. Vgenopoulos, whether as a result of formal pressure or of his personal decision not to oppose the wishes of the CBC, does not form part of any expropriatory conduct by Respondent.

The “Cypriotization” of Laiki

889. The Tribunal finds no support in the record for Claimants’ contention that Cyprus removed a number of Claimants-affiliated directors and senior managers, and replaced them with Cypriot nationals that were unqualified for their jobs. In effect, the record shows that the Bank, through its constituent internal organs, elected the new members of the Board and senior management. Had the Bank deemed them to be unqualified, it was at liberty to elect other representatives.

890. More precisely, Mr. Christos Stylianides, one of the two Deputy CEOs of the Bank (together with Mr. Kounnis) prior to Mr. Bouloutas’ removal, was elected as CEO by the Board of Directors of the Bank on 5 December 2011. Even if Claimants were correct that Mr. Orphanides had met with Mr. Stylianides in order to “handpick”⁷⁹⁶ him as successor to Mr. Bouloutas, what is ultimately relevant is that the unanimous Board of Directors elected him as CEO. This included Messrs. Foros and Theocharakis (affiliated with Claimants) and Mr. Fadel Al Ali, the representative of Laiki’s largest shareholder, DFG. In other words, Mr. Stylianides was the preferred choice of the Bank.⁷⁹⁷ The Tribunal considers that it is not surprising that, at a time of grave financial difficulty, when obtaining the continued financial support of the CBC through ELA was deemed crucial for the Bank’s survival, Laiki’s Board of Directors appointed a CEO that the Governor of the CBC trusted.

891. Further, on 12 December 2011, the Board of Directors of Laiki elected Messrs. Michael Sarris and Chris Pavlou as Non-Executive Directors by nine votes to two, with Messrs. Hiliadakis and Foros voting against the proposal. Mr. Kounnis, affiliated with Claimants, and Mr. Fadel Al Ali voted in favor of the proposal. At the same meeting, Mr. Mylonas, the then Chairman of the Board, recommended the election of Mr. Sarris as the new

⁷⁹⁶ C-PHS, at 45.

⁷⁹⁷ MPB, BoD Minutes, 5 December 2011 (Exhibit R-0129).

Chairman of the Board from 1 January 2012. Mr. Sarris was elected by nine votes to two. Again, Messrs. Kounnis and Al Ali voted in favor of the proposal.⁷⁹⁸

892. It is true that some directors and managers affiliated with Claimants no longer served on the Board. However, the record shows that this was due to their voluntary decision to resign. In effect, the Board of Directors of Laiki met on 17 January 2012 *inter alia* in order to decide the constitution of the new Board, of Board Committees and of the Group Executive Committee. The minutes of the meeting record that Messrs. Mageiras, Karatzenis and Constantinides had tendered their resignations, which required the appointment of successors. At the same meeting, Messrs. Lysandrou and Mylonas were elected as Vice Chairmen of the Board.⁷⁹⁹
893. Messrs. Foros and Kounnis, affiliated with Claimants, kept their senior positions in the Bank until June 2012. The Tribunal finds no support in the record for Claimants' contention that its representatives were sidelined. In effect, Mr. Foros was appointed to Laiki's Nomination Committee and Risk Management Committee in May 2012.⁸⁰⁰ Mr. Foros also signed a number of decisions taken by the Board, such as approving Laiki's participation in PSI+,⁸⁰¹ the appointment of advisors⁸⁰² and the submission of a request to the Cypriot Government for the underwriting of its share issue.⁸⁰³ In any event, the Tribunal considers it unlikely that, if the removals had been dictated by Cyprus, as Claimants allege, any director affiliated with Claimants would have been allowed to remain on the Board.
894. For all these reasons, the Tribunal concludes that there is no factual support for Claimants' contention that Respondent followed a policy of "Cypriotization" of Laiki's Board of Directors and senior management.

The removal of Mr. Bouloutas

895. After having carefully examined the record and the Parties' submissions, the Tribunal has reached the conclusion that Respondent's removal of Mr. Bouloutas was carried out in the legitimate exercise of Cyprus' police powers and was not expropriatory.
896. Before setting out the reasons for its decision, the Tribunal will first establish the proper standard of review that is applicable to the analysis of the CBC's actions.

⁷⁹⁸ MPB, BoD Minutes, 12 December 2011 (Exhibit C-0307).

⁷⁹⁹ MPB, Board Minutes, 17 January 2012 (Exhibit C-0321).

⁸⁰⁰ MPB, BoD Minutes, 29 May 2012 (Exhibit R-0174).

⁸⁰¹ MPB, BoD Written Resolution, 7 March 2012 (Exhibit R-0151).

⁸⁰² MPB, BoD Minutes, 2 April 2012 (Exhibit R-0470).

⁸⁰³ MPB, BoD Minutes, 7 May 2012 (Exhibit R-0163).

897. In this respect, the Tribunal notes with approval the *Invesmart v. Czech Republic* tribunal's ruling with respect to a banking regulator's decision to revoke a bank's license:

"A decision to revoke a bank's licence, which takes place within a detailed national legal framework that includes administrative and judicial remedies, is not reviewed at the international law level for its 'correctness', but rather for whether it offends the more basic requirements of international law. Numerous tribunals have held that when testing regulatory decisions against international law standards, the regulators' right and duty to regulate must not be subjected to undue second-guessing by international tribunals. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions."⁸⁰⁴ [emphasis added]

898. The Tribunal aligns itself with the finding of the *Saluka v. Czech Republic* tribunal that a banking regulator's decision to place a bank in forced administration is entitled to some discretion and that "[i]n the absence of clear and compelling evidence" that the bank regulator had "erred or acted otherwise improperly in reaching its decision", a tribunal must accept the reasons given by the regulator for its decision.⁸⁰⁵ It cannot therefore be that this Tribunal is tasked to determine whether the CBC's decision to remove Mr. Bouloutas from his post as CEO was correct.

899. The Tribunal must also be mindful of the fact that a central bank acts as a regulator of a highly technical and sophisticated economic sector, that it has intimate knowledge of the underlying data and is best placed to assess whether one course of action is preferable to another. It is not up to the Tribunal to substitute its judgment on the advisability of measures taken by the CBC, so a certain level of deference to the judgment of the banking regulator must indeed exist.

900. Nevertheless, the Tribunal considers that such deference must not impede its task to verify whether international law was complied with. If there is any evidence that a decision taken by a regulator was abusive, did not afford due process or was a pretense of form designed to conceal improper ends, a tribunal must find a breach of international law.

901. In the paragraphs below, the Tribunal will set out the reasons for its findings that the removal of Mr. Bouloutas was an exercise of regulatory powers (i) taken in order to protect the public welfare (ii), a proportionate (iv) and non-discriminatory measure taken in good faith (iii).

⁸⁰⁴ *Invesmart v. Czech Republic*, at 501.

⁸⁰⁵ *Saluka v. Czech Republic*, at 272, 273.

(i) *An exercise of regulatory powers*

902. The Banking Law relied upon by the CBC when it removed Mr. Bouloutas is a statute of general application, which predated Claimants' investment in Laiki. Its Section 30 reads as follows:

"30. (1) The Central Bank may take all or any of the following measures where a bank fails to comply with any of the provisions of this Law, or of any Regulation issued under this Law or with the conditions of its licence, or in the opinion of the Central Bank the liquidity and character of its assets have been impaired or there is a risk that the ability of the bank to meet promptly its obligations may be impaired, or where this is considered necessary for the safeguarding of the interests of depositors or creditors –

- (a) require the bank forthwith to take such action as the Central Bank may consider necessary to rectify the matter or to restrict the operations of a bank by imposing conditions on its licence as it thinks desirable;
- (b) Without prejudice to the generality of paragraph (a) above, impose conditions under this section and in particular:
 - (i) require the bank to take certain steps or to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way;
 - (ii) impose limitations on the bank on the acceptance of deposits, the granting of credit or the making of investments;
 - (iii) prohibit the bank from soliciting deposits, either generally or from specified persons or class of persons;
 - (iv) prohibit the bank from entering into any other transaction or class of transactions;
 - (v) require the removal of any director, chief executive or manager of a bank;
 - (vi) oblige the bank to hold own funds in excess of the minimum level laid down pursuant to the provisions of section 21;
 - (vii) require the reinforcement of the arrangements, processes, mechanisms and strategies of the bank implemented to comply with subsections (2) and (3) of section 19 and section 19A;
 - (viii) to require the bank to apply a specific provisioning policy or treatment of assets in terms of capital requirements;
 - (ix) restrict or limit the business, operations or network of banks; and
 - (x) require the reduction of the risk inherent in the activities, products and systems of banks.

[...]

(2) The Central Bank shall, before taking any measure under paragraph (a) or (b) of subsection (1), furnish a report to the bank inviting its comments thereon within a specified period which should not be less than three days from the date of the delivery of the report.”⁸⁰⁶

903. While the removal of Mr. Bouloutas was not a regulatory measure having general application, it was carried out pursuant to one such regulation. In the view of the Tribunal, this fact alone invites the applicability of the police powers doctrine, subject of course to the other conditions being met. In other words, the Tribunal does not find the distinction drawn by Claimants between on the one hand generally applicable regulations, and on the other hand, the application of those regulations to a specific set of facts, to be significant as far as the application of the police powers doctrine goes. The Tribunal notes that this is consistent with arbitral practice. In *Saluka v. Czech Republic*, the challenged measure was the act of placing a bank under forced administration pursuant to the banking laws of the Czech Republic. In *Invesmart v. Czech Republic*, the tribunal assessed the compliance with the applicable treaty of a decision to revoke a bank’s license. In *de Levi v. Peru*, at issue was the intervention of the banking regulatory authority which resulted in the dissolution and liquidation of a bank.

(ii) *Taken in order to protect the public welfare*

904. Further, the Tribunal considers that the CBC’s intervention was taken in order to protect the public welfare.

905. In this respect, the Tribunal finds that Section 30 of the Banking Law is a *bona fide* regulation aimed at protecting the public welfare, i.e., the health and optimal operation of the banking system in Cyprus, the protection of depositors and clients, and ultimately, the protection of taxpayers. This is explicitly spelled out in the text of the provision. Indeed, Section 30 applies to situations in which there is “a risk that the ability of the bank to meet promptly its obligations may be impaired, or where this is considered necessary for the safeguarding of the interests of depositors or creditors”.

906. As was acknowledged by Prof. Morrison in his expert testimony, many States have similar regulations on their books: according to a World Bank survey of 143 countries, 92% of all jurisdictions conferred the power to suspend or to remove managers upon the relevant authorities.⁸⁰⁷

⁸⁰⁶ Republic of Cyprus, Banking Laws of 1997-2013 (Exhibit CL-0138).

⁸⁰⁷ Morrison First Expert Report, at 233, referring to Martin Cihac, Asl Demirgu-Kunt, Maria Soledad Martinez Peria & Amin Mohseni-Cheraghloou, *Bank Regulation and Supervision around the World – A Crisis Update 4* (The World Bank, Policy Research Working Paper No. 6286, Dec. 2012).

907. The Tribunal also observes that, in his decision ordering the removal of Mr. Bouloutas, the CBC did in fact refer to the objectives of the Banking Law, i.e., protecting the banking system and the interests of depositors. In particular, after invoking management's imprudent loan policy, the Bank's continuing failure to comply with minimum liquidity requirements, its continued reliance on ELA and management's failure to take remedial measures, the Governor of the CBC decided to remove Mr. Bouloutas:

"In view of what is mentioned above and, particularly, in consideration of the on-going risk of further deterioration of the liquidity situation, in order to secure the interests of the depositors, the Central Bank, in accordance with article 30(1) of the Banking Law 1997 to (No. 2) 2011 [...]."⁸⁰⁸ [emphasis added]

908. The Tribunal acknowledges that Claimants dispute that the CBC did in fact act in the pursuit of the legitimate public welfare objectives it invoked in its decision. The Tribunal considers that, however, an inquiry into whether the CBC was motivated by other considerations is properly made when assessing Respondent's good faith. For purposes of the present analysis, it is sufficient to note that the CBC took the measure so as to protect the Bank, the banking system and the interests of depositors, i.e., in order to protect the public welfare.

(iii) *A non-discriminatory measure taken in good faith*

909. The Tribunal finds that the decision to remove Mr. Bouloutas was taken by the CBC in good faith and in a non-discriminatory manner.

910. Before setting out the reasons for this finding, the Tribunal wishes to make a few remarks with regard to the testimonies of the Parties' banking experts.

911. First, the Tribunal notes that Prof. Morrison is of the view that "regulators should remove bank directors during a crisis only when doing so is likely to improve the bank's position",⁸⁰⁹ and specifically, its liquidity. He adds that "a rapid replacement of bank directors [might] unsettle markets and worsen liquidity problems" and that such an effect should be "risky" "only if there is clear evidence that markets would be still more unsettled if the existing team of directors was retained".⁸¹⁰

912. In other words, Prof. Morrison puts forward a very strict test for determining the circumstances in which a central bank may remove the management of a bank during a time of crisis: when there is "clear evidence" that doing so is likely to improve liquidity.

⁸⁰⁸ Letter from CBC (A. Orphanides) to MPB (E. Bouloutas), 29 November 2011 (Exhibit C-0294).

⁸⁰⁹ Morrison Second Expert Report, at 141.

⁸¹⁰ Morrison First Expert Report, at 241.

Quite apart from the question of whether such circumstances may ever exist in times of financial crises, the Tribunal observes that Prof. Morrison has admitted at the hearing that he did not quote to any relevant literature as support for his opinion, that he did not cite to any legal authority, that he had not read any academic paper on the subject of central banks' removal of bank management, that he has had no relevant experience in this regard and that he has never worked for a central bank.⁸¹¹

913. The Tribunal therefore finds little support for its analysis in Prof. Morrison's testimony.
914. Second, the Tribunal observes that Claimants strongly contest the reliability of Professors Landau's and Metrick's testimonies. In their view, Respondent's experts "fundamentally changed their evidence at the hearing by abandoning their mismanagement allegations" and "invented" new grounds that would justify the CBC's decision to remove Mr. Bouloutas, in particular an alleged "presumption that you should remove managers if there is a huge public support asked from the taxpayer", a ground purportedly not relied upon in their written expert reports.⁸¹²
915. The Tribunal does not share Claimants' point of view.
916. In this respect, the Tribunal observes that, in their First Expert Report, Professors Landau and Metrick took the position that the CBC's decision to remove Mr. Bouloutas was reasonable for the following reasons: (i) Laiki's senior management bore responsibility for its strategic decisions and risk management failures;⁸¹³ (ii) the CBC lost confidence in Laiki's senior management due to its failure to address its worsening liquidity position and the Bank's increasing reliance on central bank financing;⁸¹⁴ (iii) the correspondence between Laiki and the CBC during October and November 2011 "reveal[ed] how the CBC viewed Laiki's management and the extent to which the CBC had lost confidence in Mr. Vgenopoulos and Mr. Bouloutas";⁸¹⁵ (iv) Laiki's senior management itself argued that a new board would benefit Laiki;⁸¹⁶ and (v) CBC's ouster of Laiki senior management was consistent with its treatment of senior management at other institutions.⁸¹⁷ In other words, Laiki's reliance on ELA was mentioned as one of the grounds that allegedly justified the removal of management.

⁸¹¹ Tr., Day 3, 4: 5-25; 5: 1-7.

⁸¹² C-PHS, at 27.

⁸¹³ Metrick-Landau First Expert Report, at 419.

⁸¹⁴ *Id.*, at 422.

⁸¹⁵ *Id.*, at 426.

⁸¹⁶ *Id.*, at 433, 434.

⁸¹⁷ *Id.*, at 436.

917. In their Second Expert Report, Professors Landau and Metrick reiterated their reasoning above.⁸¹⁸ In response to Prof. Morrison's testimony that central banks should remove a bank's management only where there is a strong indication that this would lead to an improvement in liquidity, Professors Landau and Metrick took the view that "crises require strong government intervention and public financial support and this strengthens the case for a swift removal of managers".⁸¹⁹ As support for their position, Professors Landau and Metrick referred to the EU Banking Communication, and provided a series of reasons why it is common to see a bank's management removed during financial crises if there is public support given to the bank. Several examples from European countries were offered. Further, Professors Landau and Metrick explained that Laiki's large ELA exposure "required maximum transparency from the bank and full cooperation from the management" and "the CBC had no reason to believe Laiki's existing management would meet those conditions".⁸²⁰
918. The Tribunal therefore finds that the arguments put forward by Respondent's experts in their written reports were in line with the arguments provided at the hearing.
919. Third, the Tribunal notes that Claimants also criticize the testimony of Professors Landau and Metrick for having defended the CBC's actions based not on the CBC's framework and reasons, but on their own framework. Additionally, Claimants take exception to Prof. Metrick's statement that the assessment of the reasonableness of the CBC's decision was based on the outcome achieved and not the reasoning or process which preceded it.⁸²¹
920. The Tribunal bears these criticisms in mind in its analysis below.

§

921. Claimants base their theory that the CBC acted in bad faith when it removed Mr. Bouloutas on the following arguments: (a) it was motivated by the goal to nationalize Laiki; (b) the correspondence between Laiki and the CBC does not reveal any legitimate reason to remove Mr. Bouloutas; and (c) the process followed for the removal of Mr. Bouloutas lacked due process and was not transparent. For its part, Respondent disputes all three of these contentions.
922. The Tribunal will address each one in turn below.

⁸¹⁸ Metrick-Landau Second Expert Report, at 152.

⁸¹⁹ *Id.*, at 143.

⁸²⁰ *Id.*, at 156.

⁸²¹ C-PHS, at 27, 28, 52, 63.

923. (a) Intent to nationalize. The Tribunal has already found in Section IX.C.1 above that the record does not support Claimants' argument that Respondent had a plan to nationalize Laiki. In that section of its analysis, the Tribunal focused primarily on the members of the Cypriot Government, and in particular the President and the Minister of Finance. The Tribunal will now address Claimants' argument, pursuant to which Mr. Orphanides removed Laiki's management only after he had political support from Cabinet.

924. The evidence Claimants are relying upon are two statements made by Minister Kazamias and Governor Orphanides on separate occasions.

925. For his part, Minister Kazamias made the following statement to the newspaper Kathimerini on 6 January 2013:

"When in December 2011 the then Governor of the CBC requested his removal from the [Board] of Marfin Laiki, in the context of his dispute with the Governor, Mr Vgenopoulos sought to find out from me as the Minister of Finance and, on the same day, from the President of the Republic, our positions for the Governor's action against him. When obviously, he deemed that the President and the Minister did not offer him any cover as against the Governor, he announced his resignation on the same day."⁸²² [emphasis added]

926. While not taking any views with regard to the accuracy of this statement, the Tribunal understands Mr. Kazamias' declaration to refer to efforts made by Mr. Vgenopoulos to elicit political support from the President of Cyprus and the Minister of Finance against the Governor of the CBC. Mr. Vgenopoulos was of course at liberty to seek such political support. Nevertheless, that support was not forthcoming, because ultimately Mr. Vgenopoulos chose to resign. This statement, in other words, does not demonstrate an intent by Mr. Orphanides to remove Mr. Vgenopoulos or Mr. Bouloutas for political reasons.

927. The second statement Claimants refer to was made by Mr. Orphanides in an interview and concerns the removal of Mr. Vgenopoulos:

"Q: Why did the decision for the removal of this specific businessman take that long?

Mr. Orphanides: If there was stronger political support, this would have been a risk which the regulator could have taken."⁸²³

928. Claimants argue that this statement demonstrates the political nature of Mr. Orphanides' decision to remove Messrs. Vgenopoulos and Bouloutas. The Tribunal considers that Mr. Orphanides' statement is open to other, less nefarious, interpretations.

⁸²² K. Kazamias, "Signing of Memo as soon as possible", *Kathimerini*, 6 January 2013 (Exhibit C-0434).

⁸²³ Interview of A Orphanides, available at <http://www.youtube.com/watch?v=PWRhLZy5G-M#t=119>, 30 April 2012 (Exhibit C-0354); *See also*, Tr., Day 2, 148: 12-17.

929. As Claimants correctly point out, the CBC is a regulatory body that is statutorily independent. However, it does not act entirely outside of the political process. The Governor of the CBC is appointed by the President and the Vice-President of Cyprus⁸²⁴ and is required to submit annual reports to the President and the House of Representatives.⁸²⁵ The Governor of the CBC may also be asked to appear before committees of the House of Representatives in order to report on matters within the competence of the CBC.⁸²⁶ Further, the auditors of the CBC are required by law to present their audit report not only to the CBC Board, but also to the Minister of Finance.⁸²⁷
930. More importantly, the CBC decides whether to grant liquidity support to banks in times of emergency (ELA). As Professors Landau and Metrick have indicated in their testimony, and Claimants have not disputed, this support is a quasi-fiscal responsibility of the State. If ELA is not repaid and the value of the collateral provided by the bank is inadequate, the CBC would suffer losses which would ultimately be borne by taxpayers. In other words, were a bank to be unable to repay ELA, the CBC would have made a fiscal expenditure, which falls under the authority of Parliament.⁸²⁸ The CBC also has the power to take decisions which may fundamentally affect the banks under its supervision, such as the removal of management. The Tribunal considers that it is natural that the CBC's ability to take appropriate measures in times of financial crisis would hardly be possible to sustain without some form of support from the political branches.
931. In the present case, had the CBC's removal of Messrs. Vgenopoulos and Bouloutas not been based on objective considerations, the Tribunal may well have found a breach of the Treaty obligation. Nevertheless, after a careful assessment of the record, the Tribunal is not persuaded that the CBC acted principally on political, rather than prudential, considerations.
932. In this respect, the Tribunal notes that, at the time of Mr. Vgenopoulos' resignation, the ELA extended by the CBC to Laiki totaled EUR 2.5 billion⁸²⁹ (approximately 12 percent of Cyprus' 2011 GDP).⁸³⁰ Making a decision to continue extending ELA to Laiki and eventually increasing that amount necessarily meant that the CBC was taking on the risk that the debt would not be repaid and would have to be borne by Cypriot taxpayers. The

⁸²⁴ Section 18(1) of Republic of Cyprus, Central Bank of Cyprus, Laws of 2002-2007, www.centralbank.gov.cy (Exhibit CL-0143).

⁸²⁵ *Id.*, Section 55(1).

⁸²⁶ *Id.*, Section 55(2).

⁸²⁷ *Id.*, Section 60(b).

⁸²⁸ Metrick-Landau First Expert Report, at 75, 76, 91, 94; Metrick-Landau Second Expert Report, at 156.

⁸²⁹ Laiki, ELA Operations with Central Bank of Cyprus (Exhibit R-0277).

⁸³⁰ *See*, Metrick-Landau First Expert Report, at 75, 76, 91, 94; Metrick-Landau Second Expert Report, at 156.

Tribunal is persuaded that a decision to grant liquidity in these proportions necessarily required some form of consensus between the CBC and the Cabinet.

933. Further, as will be detailed below, the Tribunal is of the view that the record does not support a conclusion that the CBC clearly acted arbitrarily or failed to afford due process when removing Laiki senior management.
934. On these bases, the Tribunal is not prepared to infer from the one-line statement of Mr. Orphanides the existence of a conspiracy between the CBC and the Minister of Finance and/or the Cypriot Cabinet for the purpose of nationalizing Laiki.
935. (b) No legitimate reason for the removal. After having considered the evidence before it, the Tribunal has reached the conclusion that there is no “clear and compelling evidence” that the CBC “erred or acted otherwise improperly” when it removed Mr. Bouloutas.⁸³¹
936. The Tribunal agrees with Claimants that the lawfulness of a State’s conduct under its domestic law cannot excuse that State’s breach of international law. The Tribunal also agrees that an international arbitral tribunal is not held to apply the standard of review that a Cypriot court would have applied when assessing a decision of the CBC taken under the Banking Law.
937. As mentioned above, the Tribunal’s task under the Treaty is to verify if there is “clear and compelling evidence” that the CBC “erred or acted otherwise improperly in reaching its decision”.⁸³² What the Tribunal is not called to do is to verify if the CBC’s decision to remove Mr. Bouloutas was the best possible decision that it could have taken under the circumstances or whether that decision was correct. The Tribunal will not sit in appeal on the CBC’s judgment.
938. Bearing this mind, the Tribunal notes that the Banking Law relied upon by the CBC as support for its decision had been in existence in Cyprus since before Claimants made their investment. It provides that the CBC may, *inter alia*, decide to remove managers from one of the banks it supervises:

“where a bank fails to comply with any of the provisions of this Law, or of any Regulation issued under this Law or with the conditions of its licence, or in the opinion of the Central Bank the liquidity and character of its assets have been impaired or there is a risk that the ability of the bank to meet promptly its obligations may be impaired.”⁸³³ [emphasis added]

⁸³¹ Saluka v. Czech Republic, at 272, 273.

⁸³² *Id.*

⁸³³ Section 30(1) of Republic of Cyprus, Banking Laws of 1997-2013, www.centralbank.gov.cy (Exhibit CL-0138).

939. The Tribunal considers that this provision in the Banking Law is similar to banking statutes in other developed economies and follows established principles in the matter.
940. As Claimants' expert Prof. Morrison has set out in his First Expert Report, the Spanish central bank (Banco de España) may remove senior management of a bank when "a credit institution fails to meet or for objective reasons it is reasonably likely to be unable to meet, requirements on solvency, liquidity, organisational structure or internal control".⁸³⁴ Similarly, the Bank of Portugal, the Banque de France and the National Bank of Belgium may remove a bank's management when the liquidity of the bank is impaired or it places the interests of customers in jeopardy.⁸³⁵
941. The Tribunal also notes that the Basel Committee on Banking Supervision "Guidelines: Corporate governance principles for banks" emphasize the extensive powers banking regulators should be given in order to be able to realize their function of protecting the banking system:

"Supervisors should have a range of tools at their disposal to address governance improvement needs and governance failures. They should be able to require improvement steps and remedial action, and assure accountability for the corporate governance of a bank. These tools may include the ability to compel changes in the bank's policies and practices, the composition of the board of directors or senior management, or other corrective actions. They should also include, where necessary, the authority to impose sanctions or other punitive measures. The choice of tool and the time frame for any remedial action should be proportionate to the level of risk the deficiency poses to the safety and soundness of the bank or the relevant financial system(s)."⁸³⁶

942. Likewise, the EBA "Guidelines on the assessment of the suitability of members of the management body and key function holders" recommend:

"It is important to ensure that credit institutions and competent authorities intervene effectively in cases where a member of the management body is not considered to be suitable. [...] The appropriate corrective measures will depend on the circumstances taking into account measures already taken. Measures can range from ordering actions ... to ... temporary ban or replacement of single members of the management body."⁸³⁷

⁸³⁴ Morrison First Expert Report, at 234, citing from Article 6 of Spanish Law 9/2012 of 14 November 2012 on credit institution restructuring and resolution.

⁸³⁵ *Id.*, at 234-238.

⁸³⁶ Metrick-Landau Second Expert Report, at 138, quoting from Basel Committee on Banking Supervision, "Corporate governance principles for banks", October 2014, at 167.

⁸³⁷ *Id.*, quoting from EBA "Guidelines on the assessment of the suitability of members of the management body and key function holders", 22 November 2012, at 19.

943. According to Claimants, the correspondence between the CBC and Laiki during October 2010-December 2011 “does not reveal any legitimate reason to remove Mr Bouloutas”.⁸³⁸ The Tribunal disagrees.
944. Before setting out the reasons for this finding, the Tribunal considers it useful to reproduce below the full content of the CBC’s letter removing Mr. Bouloutas:

“As has been mentioned in our previous letters, such as, inter alia, our letter of 7 November 2011, the group’s management has proceeded to imprudent handlings, such as, for instance, the irrational granting of loans without the use of prudent banking practice. It is noted that this irrational granting of loans took place during periods of loss of deposits from the group, especially in Greece. The above has deprived the bank of considerable liquidity, leading to the bank’s non-compliance with the minimum required limits required in accordance with the provisions of its directives as per the Calculation of Prudential Liquidity in Euro, Directive 2008, R.A.A 250/2008, as subsequently amended, and as per the Calculation of Prudential Liquidity in Foreign Currencies, Directive 2008, R.A.A. 360/2008, as subsequently amended. As a result of the significant deterioration of the liquidity situation, the bank has so far received a total of €4.6 bil of Emergency Liquidity Assistance. Nevertheless, in your letter of 23 November 2011, you insist on arguing that the bad liquidity situation into which the bank has fallen, as well as the deterioration of the situation that is being observed, is due exclusively to extrinsic factors. Indeed, the ongoing economic crisis has contributed to the economic environment. You should have, however, avoided actions, such as the irrational granting of loans without the use of prudent banking practice which have rendered the group vulnerable to adverse developments, and promptly taken those applicable measures which would have shielded the bank and enabled it to face the existing extremely alarming situation which has arisen, something which you have not done, this putting at risk the security of the depositors’ interests and the group’s good reputation.”

Among the extrinsic factors that you mention in your letter of 23 November 2011 is the downgrade of the group from the credit rating agency Moody’s by three grades on 8 November 2011. In this regard, it is emphasized that the downgrade of the Marfin Popular Bank Public Co Ltd group was by three grades, as opposed to the downgrade of other Cypriot banking groups which also have presence in Greece and, as such, are facing similar challenges and was only by one single grade. The above recent downgrade indicates that the degree of deterioration of the Marfin Popular Bank Public Co Ltd group’s state and the level of concern which exists in the markets, is significantly higher compared to the above other Cypriot banking groups. The relatively greater downgrade of your group also refers to the responsibilities of your group’s management, as well as to the untimely implementation of satisfactory corrective measures.

What is also particularly alarming is that the loss of deposits continues at high rates. In particular, according to the information before me, from 7 November 2011 until 25 November 2011, the group lost deposits of a total of €598 m., an amount which is much larger than your predictions, as well as compared to other Cypriot banking groups which are also active in the Greek area.

⁸³⁸ C-PHS, at 47.

Having in mind the above and all the relevant issues that have arisen in our previous correspondence, the reinstatement of the credibility and the good reputation of the bank is a matter of urgency, as is the reinstatement of the depositors' trust towards the group, which the current management of the bank has still not achieved.

The role of the directors of banks' boards of directors is of great importance as they have the responsibility for the prudent functioning of the bank and the control of its business, and for the implementation of which the said role and responsibility lies with the chief executive officer.

In view of what is mentioned above and, particularly, in consideration of the on-going risk of further deterioration of the liquidity situation, in order to secure the interests of the depositors, the Central Bank, in accordance with article 30(1) of the Banking Law 1997 to (No.2) 2011, requires your immediate removal from Marfin Popular Bank Public Co Ltd.⁸³⁹ [emphasis added]

945. The Tribunal finds that this letter shows that the CBC was prompted to remove Mr. Bouloutas by a multitude of reasons:
- (i) Management's "irrational granting of loans without the use of prudent banking practice ... during periods of loss of deposits from the group";
 - (ii) The consequent non-compliance of the Bank with the regulatory minimum liquidity levels in euros and foreign currency;
 - (iii) The Bank's reliance on ELA, in the amount of EUR 4.6 billion;
 - (iv) Management's refusal to acknowledge that the Bank's precarious condition, while significantly affected by the economic crisis, was also due to managerial failures, in particular its imprudent banking practices and its failure to promptly take remedial measures;
 - (v) The loss of market confidence in management, reflected in the Bank's three-notch downgrade by Moody's, in contrast to the one-notch downgrade of other Cypriot banks similarly affected by the crisis;
 - (vi) The alarming rate of deposit loss, which was higher than that of other Cypriot banks;
 - (vii) The urgency of reinstating "the credibility and the good reputation of the bank" and of "the depositors' trust towards the group"; and
 - (viii) The need to protect depositors' interests.
946. The Tribunal cannot agree with Claimants' contention that, since Laiki's new management did not take other remedial actions beyond those proposed by Mr. Bouloutas and Laiki's liquidity did not improve following his removal, the CBC's reliance on the Bank's ongoing liquidity issues was arbitrary.

⁸³⁹ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 29 November 2011 (Exhibit C-0294).

947. First, the Tribunal has already explained that the CBC's decision was not based exclusively on Laiki's failure to comply with the regulatory liquidity ratios. A significant reason for the regulator's decision was also the loss of trust in management both at the regulator's level, due to management's refusal to acknowledge some responsibility for the Bank's situation, and at the market level, which was reflected in the Bank's three-notch downgrade by Moody's and the exponential loss of deposits in comparison to other Cypriot banks.
948. Second, Claimants' arguments refer to events post-dating the CBC's decision. The Tribunal considers that it would be unfair to assess the banking regulator's decision based on developments that were posterior to it and, to some extent, were outside of its sphere of control. The banking regulator had to use its best judgement and expertise in order to identify the most suitable decision based on the facts that existed before it at that moment in time.
949. Third, Claimants' arguments are more aptly described as a challenge against the effectiveness, the advisability or the correctness of the CBC's decision. As mentioned earlier, these are not issues properly before the Tribunal. In any event, while the Tribunal takes no position with regard to whether the decision of the CBC was the best decision that it could have taken under the circumstances, or whether it was correct, it does observe that the CBC's decision was based on a concrete set of objective facts and that those facts were among those explicitly listed in Section 30(1) of the Banking Law as grounds for removing management.
950. The Tribunal will not quote here in full the abundant correspondence between the CBC and Laiki during the period October 2010-December 2011. That has been done under Section IV above. However, the Tribunal will briefly reiterate what it considers to be the main points arising from that correspondence.
951. Laiki's failure to comply with the minimum liquidity ratio of 20% began in October 2010, when the CBC alerted the Bank that the liquidity ratios of MEB were below 20%, while those of MPB were "marginally within the limits" set by the CBC.⁸⁴⁰ The CBC requested the Bank to take remedial measures. On 12 January 2011, the CBC wrote again, observing that MPB's liquidity had dropped to 16.55% on 7 January 2011 and reiterating its request for remedial measures.⁸⁴¹ The request was repeated on 11 April 2011, after the Bank's liquidity dropped to 9.55% despite the recent increase in its share capital by EUR 488 million in February 2011 and the sale of its Australian subsidiary.⁸⁴² On 16 May 2011, Laiki's liquidity dropped further to 5.23%. The Governor of the CBC alerted the Bank that,

⁸⁴⁰ Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 11 October 2010 (Exhibit C-0206).

⁸⁴¹ Letter from the CBC (C. Fanopoulos) to MPB (P. Kounnis), 12 January 2011 (Exhibit C-0219).

⁸⁴² Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 11 April 2011 (Exhibit C-0227); Letter from MPB (E. Bouloutas) to the CBC (K.S. Poullis), 13 April 2011 (Exhibit C-0228).

since 2009 and 2010, a significant decrease in deposits had been observed coupled with an increase in loans, and counseled the Bank to adopt a “conservative policy in order to avoid the creation of an exposure in the liquid assets ratio”.⁸⁴³

952. On 17 August 2011, the CBC requested that Laiki reconsider its strategy on liquidity in order to account for possible negative implications due to developments in the domestic and European markets. In particular, the CBC requested that Laiki submit before 30 September 2011 (i) a revised strategy for the management of liquidity risk and the financing strategy in Euro and in foreign currency, including the plan to respond to liquidity crisis situations; (ii) a financing plan for the following year; (iii) a description of the actions the Bank intended to take in order to prolong the maturity profile of the deposits; (iv) a description of the actions the Bank intended to take in order to ensure the stability of the financing resources, particularly the deposits; and (v) a strategy for the increase of the liquidity reserves.⁸⁴⁴
953. On 24 August 2011, the CBC released its on-site supervisory audit of Laiki’s branch in Greece. The CBC expressed serious concerns with regard to Laiki’s pricing and loan policies, the concentration of its deposits and numerous situations of conflicts of interest. The CBC ordered Laiki to take additional provisions for loans of approximately EUR 500 million and noted that the Bank’s liquidity ratios had dropped to 5.2% for its Greek operations and to 7.19% for its Cypriot operations on 20 June 2011.⁸⁴⁵ Two days later, the CBC notified Laiki that, on 24 August 2011, its liquid foreign currency assets had also dropped below the regulatory minimum of 70%, to 48.05%.⁸⁴⁶
954. On 27 September 2011, Laiki requested ELA in an amount of EUR 300 million. This amount increased to EUR 1.5 billion on 5 October 2011, EUR 2.5 billion on 20 October 2011, EUR 3.3 billion on 15 November 2011 and EUR 3.5 billion on 6 December 2011.⁸⁴⁷
955. On 20 October 2011, Laiki’s liquidity ratios in EUR dropped to 4.90% and in foreign currency to 5.43%. This included the ELA obtained from the CBC, without which the ratios would have been negative.⁸⁴⁸
956. Subsequent to the receipt of ELA, Laiki sent weekly liquidity updates to the CBC. The Tribunal notes that these updates regularly underestimated the amount of ELA required by

⁸⁴³ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 26 May 2011 (Exhibit C-0231).

⁸⁴⁴ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 17 August 2011 (Exhibit C-0254).

⁸⁴⁵ Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 24 August 2011 (Exhibit C-0255).

⁸⁴⁶ Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 26 August 2011 (Exhibit R-0099).

⁸⁴⁷ Laiki, ELA Operations with the Central Bank of Cyprus (Exhibit R-0277). The Tribunal notes that ELA spiked to EUR 4.6 billion on 17 November 2011 due to the downgrade of Laiki’s covered bond, but dropped again to EUR 3.3 billion when the bond obtained its rating from Moody’s.

⁸⁴⁸ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 31 October 2011 (Exhibit C-0275).

the Bank. For instance, Laiki's 28 September 2011 update estimated using an additional EUR 700 million of ELA until 15 October 2011.⁸⁴⁹ That actual amount was closer to EUR 1.8 billion (on 17 October).⁸⁵⁰ Laiki's 4 October 2011 liquidity update estimated that ELA would amount to EUR 757 million by the end of October and would drop to EUR 401 million by the end of the year in the base case scenario. In the stress case scenario, Laiki estimated to require EUR 1.196 billion by the end of October 2011 and EUR 1.451 billion by the end of December 2011.⁸⁵¹ In actuality, Laiki used EUR 2.5 billion by 20 October and EUR 3.5 billion by the end of December 2011.⁸⁵²

957. On each occasion the CBC requested that the Bank take remedial measures, the Bank promised to comply. However, a number of the remedial measures promised by Laiki were repeatedly postponed. For instance, Laiki's plan to issue covered bonds for commercial claims amounting to EUR 1 billion was initially announced for the end of September 2011,⁸⁵³ then postponed for January 2012,⁸⁵⁴ and then "early 2012".⁸⁵⁵
958. The Tribunal also notes that Laiki sent its liquidity plan on 3 October 2011, three days later than requested by the CBC. The measures suggested by Laiki included: (i) efforts to retain and attract deposits; (ii) securitization and other transactions to generate medium-term wholesale financing in an amount of approximately EUR 750 million; (iii) deleveraging, in an amount of approximately EUR 246 million; (iv) plans to create additional collateral eligible for Eurosystem financing through the issuance of Cypriot covered bonds, in an amount of approximately EUR 1.25 billion; and (v) obtaining eligible collateral for the purpose of emergency financing from the CBC and the ECB, for financing estimated at EUR 5.67 billion and USD 2.15 billion.⁸⁵⁶ The Tribunal cannot fail to observe that the majority of the liquidity that Laiki was planning to obtain was emergency assistance from the CBC and the ECB.
959. Following the submission of Laiki's liquidity plan, the Bank and the CBC had a lengthy correspondence addressing the adequacy of management's handling of the liquidity crisis. The CBC complained on 14 October 2011 about Laiki's liquidity plan, stating that "the data you provide are incomplete, to a great extent, vague, and completely inadequate to respond to the Central Bank's concerns" and requesting a new plan with "specific measures ... within specific timelines in order for the Group to improve its liquidity position and its

⁸⁴⁹ Laiki Group Liquidity Position Update, 28 September 2011 (Exhibit R-0102).

⁸⁵⁰ Laiki, ELA Operations with the Central Bank of Cyprus (Exhibit R-0277).

⁸⁵¹ Laiki Group Liquidity Position Update, 4 October 2011 (Exhibit R-0105).

⁸⁵² Laiki, ELA Operations with the Central Bank of Cyprus (Exhibit R-0277).

⁸⁵³ Letter from MPB (P. Kounnis) to the CBC (K.S. Poullis), 14 January 2011 (Exhibit C-0220).

⁸⁵⁴ Laiki Group Liquidity Position Update, 4 October 2011 (Exhibit R-0105).

⁸⁵⁵ Laiki Group Liquidity Position Update, 1 December 2011 (Exhibit R-0128).

⁸⁵⁶ Letter from MPB (E. Bouloutas) to the CBC (A. Orphanides), 3 October 2011 (Exhibit C-0261).

capital adequacy”.⁸⁵⁷ For his part, Mr. Bouloutas accused the CBC of being “unfair”,⁸⁵⁸ maintained that the Bank’s liquidity plan was the result of a “thorough and comprehensive analysis” and followed a “strict timeline”, but stressed that a strict compliance with the plan could not be guaranteed due to the continued deterioration of the economic environment in Europe and Greece.⁸⁵⁹ The tone of the correspondence between the regulator and the Bank worsened over the following weeks, with the CBC stating on a number of occasions that Laiki’s management had failed to take corrective measures in order to address the liquidity situation, had failed to address its loans portfolio and had failed to submit a liquidity plan which would reduce its dependence on ELA,⁸⁶⁰ and management countering that its worsening liquidity outlook was exclusively due to the economic crisis in Greece and Europe.

960. The Tribunal is mindful of the fact that the Parties’ experts disagree as to the appropriate circumstances in which a banking regulator may dismiss a bank’s management. While that debate is of interest to this analysis, the Tribunal does not consider it dispositive. The Tribunal considers that, even if the CBC had not complied with best standards in the industry, that fact alone would not have established a Treaty breach. In any event, the Tribunal has already indicated that it has reservations with regard to the standard put forward by Prof. Morrison for the removal of managers.
961. The Tribunal does not find it necessary for the purposes of the present analysis to conclusively establish whether Laiki’s liquidity crisis was exclusively due to the difficult economic environment in Greece and Europe or whether, in conjunction with this, the decisions taken by Laiki’s management had also played a part.
962. What is relevant to the Tribunal’s analysis is that the CBC relied on objective facts for its conclusion that Laiki’s management bore at least some responsibility for the Bank’s liquidity crisis, such as: Laiki’s loan policy; management’s failure to address the problem of liquidity, despite repeated encouragements, since January 2011; and Laiki’s three-notch downgrade by Moody’s, as opposed to the one-notch downgrade of its competitors. In addition, the Tribunal notes that the due diligence of the Bank performed by external consultants (Houlihan Lokey and PwC) in 2012 eventually confirmed the CBC’s assessment with regard to the quality of Laiki’s loan portfolio. Houlihan Lokey’s due diligence assessment indicated a total balance sheet provisions range for the global loan portfolio of between EUR 2,096 million and EUR 3,158 million. According to Houlihan

⁸⁵⁷ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 14 October 2011 (Exhibit C-0263).

⁸⁵⁸ Letter from MPB (E. Bouloutas) to the CBC (A. Orphanides), 18 October 2011 (Exhibit C-0266).

⁸⁵⁹ Letter from MPB (E. Bouloutas) to the CBC (A. Orphanides), 27 October 2011 (Exhibit C-0766).

⁸⁶⁰ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 31 October 2011 (Exhibit C-0275); Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 7 November 2011 (Exhibit C-0280); Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 18 November 2011 (Exhibit C-0287).

Lokey, the major provisions related to the Bank's Greek portfolio, and they ranged from EUR 1,520 million to EUR 2,199 million.⁸⁶¹ During the 28 February 2012 Board of Directors meeting, Laiki's consultants explained that the Bank required increased provisions due to the worsening economic outlook in Greece, the reduction in value of its collaterals and due to specific problematic loans in Greece. The consultants explained that, as a consequence of the latter, Laiki required increased provisions compared to the BoC.⁸⁶²

963. Further, it is not the task of the Tribunal to determine what remedial measures would have been appropriate or advisable at that time in order to improve Laiki's liquidity. It is certain that management did make efforts to improve liquidity, but they proved to be ineffective. Further, its plans to obtain more liquidity appeared to be at odds with the regulator's demand that reliance on central bank funding should be limited. While the CBC was not particularly forthcoming with respect to what it expected management to do, the evidence does establish that it must have been clear to management that the CBC expected Laiki to gradually reduce its reliance on ELA, to make improvements with regard to its Greek loans portfolio and to adopt a conservative policy going forward.⁸⁶³
964. To conclude, the record establishes Laiki's longstanding non-compliance with regulatory liquidity ratios and the ineffectiveness of management's efforts to address that situation. The record also establishes that, against this background, Laiki became increasingly reliant on ELA from the CBC. Moreover, rightly or wrongly, management never acknowledged any responsibility for the Bank's liquidity situation. The regulator and management disagreed on the advisability of taking measures to address the Bank's Greek loans portfolio. All of these reasons were relied upon by the CBC when it removed Mr. Bouloutas. These reasons were also among the reasons included in Section 30 of the Banking Law as grounds for removing management.
965. On this basis, the Tribunal finds that the evidence in the record does not clearly and compellingly establish that the CBC erred when removing Mr. Bouloutas from his post.
966. (c) Absence of due process. The Tribunal further finds that the record does not establish that the CBC failed to afford Claimants due process when removing Mr. Bouloutas.
967. In this respect, the Tribunal notes that, while the CBC had shown concern with regard to Laiki's liquidity since October 2010 without challenging management's decisions, starting

⁸⁶¹ Houlihan Lokey, "Project Midas – Final Due Diligence Report", 24 February 2012 (Exhibit R-0147).

⁸⁶² MPB, BoD Minutes, 28 February 2012 (Exhibit C-0339).

⁸⁶³ The Tribunal notes in this regard that subsequent due diligence of the Bank by Houlihan Lokey established that the Bank needed to record increased provisions totaling EUR 1.52 billion for the full year 2011 for its Greek portfolio (Houlihan Lokey, "Project Midas – Final Due Diligence Report", 24 February 2012 (Exhibit R-0147)).

from 14 October 2011, the CBC began expressing its frustrations with respect to management's handling of the liquidity crisis.

968. Indeed, on 14 October 2011, the CBC took issue with Laiki's liquidity plan.⁸⁶⁴ On 31 October 2011, the CBC first notified Laiki that it was considering taking measures on the basis of Section 30 of the Banking Law. Within this letter, Mr. Orphanides referred to the correspondence between the Bank and the CBC from 2010 and 2011, and expressed his frustration that "the bank's management did not take, in time, the necessary corrective measures so as to remedy the situation."⁸⁶⁵ As part of this notification, the CBC attached a report of the Bank Supervision and Regulation Department entitled "Prudential liquidity of Marfin Popular Bank Public Co Ltd". The report referred to Laiki's failure to comply with the minimum liquidity ratios in euros since 7 January 2011 and in foreign currency since 18 August 2011. In relevant part, that report read:

"The management of Marfin Popular Bank group followed an irrational management of liquidity (for example, granting of a large number of investment loans with a large repayment amount on maturity – the letter of the Central Bank dated 24 August 2011 is relevant, regarding the local regulatory inspection of the bank's branch in Greece) and did not proceed to the appropriate actions which would lead to the improvement of the situation and to compliance with the provisions of the relevant Directives. [...]

As a result of the serious liquidity problem faced by Marfin Popular Bank group, it is possible that it is unable to ensure that its current needs shall be immediately and timely met. [...] Judging from the continuous aggravation of the situation of the liquidity of Marfin Popular Bank group which, beyond the international economic crisis, is the result of the wrong choices and the imprudent policy followed by the group's management, it becomes apparent that the latter is unable to take the necessary measures required for the improvement of the situation and for safeguarding the smooth exercise of the services and the good reputation of the group. Whereas the bank could have submitted, as it was requested to do, a detailed plan with the specific measures which it would take at specific time frames so that the group would cease to depend on the Emergency Liquidity Assistance and improve its position as regards the liquidity, nevertheless it failed to do so. On the contrary, by its letter dated 27 October 2011, the bank's management does not seem to understand the seriousness of the matter so as to proceed to the immediate planning for resolving the problems which it has created."⁸⁶⁶ [emphasis added]

969. The Tribunal considers that this report clearly sets out the very serious concerns of the regulator about management's handling of the liquidity crisis engulfing the Bank. What is striking from this letter is the almost complete loss of confidence in management and in its ability to grasp the seriousness of the matter and properly address it. The CBC did not refer solely to management's liquidity plan, which it had deemed inadequate, but also to longstanding issues that had emerged throughout that year: the results of the audit of the Greek branch which revealed serious inadequacies in the Bank's loan policies, as well as

⁸⁶⁴ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 14 October 2011 (Exhibit C-0263).

⁸⁶⁵ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 31 October 2011 (Exhibit C-0275).

⁸⁶⁶ *Id.*

management's continuous failure to take corrective measures in order to improve liquidity. The CBC was particularly alarmed at what it deemed to be management's failure to understand "the seriousness of the matter so as to proceed to the immediate planning for resolving the problems which it ha[d] created".⁸⁶⁷

970. Subsequent to this letter, Mr. Orphanides met with Mr. Vgenopoulos and Mr. Bouloutas on 4 November 2011, and Mr. Vgenopoulos tendered his resignation.

971. Following his departure, the CBC continued to express its concerns with regard to management's performance. In the CBC's letter to the Bank dated 7 November 2011, Mr. Orphanides again expressed the view that, up to that moment, Laiki had not put forward a satisfactory plan for addressing liquidity and that, apart from the damaging effects of the ongoing economic crisis on the Bank, "liquidity [had been] negatively affected to a great extent by non prudent actions of the Management of the Bank".⁸⁶⁸ The CBC disagreed with Laiki with respect to the effects on liquidity of the Bank's policies. In this respect, Mr. Orphanides referred to: (i) the release of blocked deposits so that depositors could participate in the share capital increase of the Bank; and (ii) the granting of investment loans with balloon payments and of financing for investment purposes in the form of current accounts without a specific repayment schedule. The CBC imposed nine conditions on the Bank's operations and recorded its expectation that "the investment policy of the Marfin Popular Bank Group [be] prudent and ... consistent with the liquidity condition of the Group" and that management would take "additional measures for the immediate improvement of the situation" aiming to restore compliance with the regulatory liquidity ratios.⁸⁶⁹

972. Subsequent to this letter from the regulator, Laiki submitted two liquidity updates, dated 14 November 2011 and 17 November 2011, notifying the CBC that it expected to require EUR 1.35 billion of additional ELA following the downgrade by three notches of the Cypriot covered bond to below investment grade by Moody's. Laiki indicated that it expected the bond's eligibility for ECB financing to be restored within a month, as it was in the process of obtaining an investment grade from Fitch.⁸⁷⁰

973. On 18 November 2011, the CBC reverted to Laiki notifying it that it was considering taking further measures on the basis of Section 30 of the Banking Law:

"[A]s it is mentioned in the above letter dated 7 November 2011, the Central Bank expected that the management of Marfin Popular Bank Public Co Ltd Group would take additional

⁸⁶⁷ *Id.*

⁸⁶⁸ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 7 November 2011 (Exhibit C-0280).

⁸⁶⁹ *Id.*

⁸⁷⁰ Laiki Group Liquidity Position Update, 14 November 2011 (Exhibit R-0120); Laiki Group Liquidity Position Update, 17 November 2011 (Exhibit R-0443).

measures for the immediate improvement of the situation aiming to achieve compliance with the Legislation and the Directives of the Central Bank.

Instead, it is noted that the management of the bank has not taken the necessary measures for the immediate improvement of the liquidity position of the Marfin Popular Bank Public Co Ltd. In particular, based on the information available to me, the liquidity position of the Bank not only it has not improved, but on the contrary it has significantly worsened. As a result, and in order to address its immediate liquidity needs, the Group requested and received during the period 9 November – 17 November 2011, i.e. after the above mentioned letter of the Central Bank dated 7 November 2011, additional financing from the Central Bank in the form of emergency liquidity assistance totaling €2.1 Billion. Consequently the total amount of the financing which the Marfin Popular Bank Public Co Ltd Group received from the Central Bank of Cyprus in the form of emergency liquidity assistance has reached €4.6 Billion. In addition, based on the data which Marfin Popular Bank Public Co Ltd sends to the Central Bank, it is expected that in the immediate future, i.e. until the 21st of December 2011, the Group will need additional financing in the form of emergency liquidity assistance of about €650 million, exceeding €5.2 billion. Consequently, the taking of immediate measures, which the present management has not as yet taken, for the improvement of the situation and bringing back the credibility and good name of the Group is urgent.

Before taking any further decision in accordance with article 30(1) of the Banking Laws of 1997 to (No. 2) 2011, I would like to ask you to submit in writing any comments, views and explanations on the above until Wednesday 23 November 2011.⁸⁷¹ [emphasis added]

974. Claimants argue that the CBC's letter of 18 November 2011 could not have served as a notice to the Bank for the removal of Mr. Bouloutas because the CBC did not explicitly indicate that it was considering taking this measure and did not provide a report with its notification. The Tribunal disagrees.
975. The Tribunal notes that Section 30(2) of the Banking Law required that the regulator, before taking any measure provided in Section 30(1), should "furnish a report to the bank inviting its comments thereon within a specified period which should not be less than three days from the date of the delivery of the report".⁸⁷² The Tribunal observes that the CBC provided a report on Laiki's liquidity on 31 October 2011, when it first notified the Bank of its intent to take measures pursuant to Section 30 of the Banking Law. When the CBC imposed operating conditions on Laiki, on 7 November 2011, it expressly reserved its right to amend those conditions or to take additional measures. It is not clear to the Tribunal whether Cypriot law required the CBC to furnish additional reports whenever it amended the operating conditions or took additional measures pursuant to Section 30 of the Banking Law on the basis of the same problems encountered by the Bank, or whether it was sufficient to provide one report when the CBC took a series of measures on the basis of the same concerns and factual matrix. However, the Tribunal does not find this issue to be

⁸⁷¹ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 18 November 2011 (Exhibit C-0287).

⁸⁷² Republic of Cyprus, Banking Laws of 1997-2013 (Exhibit CL-0138).

crucial to its determination, as the Tribunal is not called upon to apply the Cypriot Banking Law. The Tribunal has to apply the Treaty and international law. Under the Treaty and international law, Respondent was required to provide reasonable notice and reasons for its decision. The Tribunal considers that Respondent complied with this requirement.

976. The Tribunal finds that the CBC gave Laiki sufficient notice. Indeed, judging from its previous correspondence with the CBC, management was amply aware that the regulator was deeply dissatisfied with its performance in handling the liquidity crisis and particularly with its reluctance to accept some responsibility for the Bank's financial situation. The letter of 18 November 2011, while not reiterating these concerns, did record the regulator's dissatisfaction with management's failure to take any additional measures that would have improved liquidity, coupled with the deterioration of the Bank's liquidity situation and increased reliance on central bank financing. The letter expressly referenced Section 30 of the Banking Law, which empowered the CBC to take a number of measures, including the removal of management. While the CBC could have been clearer and expressly indicate that it was contemplating removing the CEO, the Tribunal cannot agree with Claimants that this imprecision led to a situation where the Bank was completely surprised by the CBC's decision. The Tribunal considers that management certainly understood the CBC's concerns: Mr. Bouloutas' letters of 22 November 2011⁸⁷³ and 23 November 2011⁸⁷⁴ took exception to the CBC's position with respect to the causes of Laiki's liquidity problems and sought to establish that management was diligently monitoring and addressing the liquidity crisis. In addition, Laiki was given three business days to respond to the CBC's letter, from Friday, 18 November 2011, until Wednesday, 23 November 2011, and exercised its right to provide comments
977. The Tribunal has also found that the CBC gave reasons for its decision to remove Mr. Bouloutas.
978. For these reasons, the Tribunal finds that the record does not establish that the CBC failed to afford Claimants due process when it removed Mr. Bouloutas.
979. The Tribunal therefore concludes that Claimants have not satisfied their burden of demonstrating that the challenged measure was not taken in good faith.
980. Further, the Tribunal considers that the removal of Mr. Bouloutas was not discriminatory. At the time Mr. Bouloutas was removed there was no other bank in Cyprus that was receiving ELA from the CBC.⁸⁷⁵ The BoC began requesting ELA from the CBC in November 2012, one year after Mr. Bouloutas' departure. The Tribunal therefore finds

⁸⁷³ Letter from MPB (E. Bouloutas) to the CBC (A. Orphanides), 22 November 2011 (Exhibit C-0290).

⁸⁷⁴ Letter from MPB (E. Bouloutas) to the CBC (A. Orphanides), 23 November 2011 (Exhibit C-0291).

⁸⁷⁵ BoC, ELA Operations within CBC, undated (Exhibit R-0529).

that, if any discrimination were to have occurred, it could only have been established by a preferential treatment accorded to the BoC subsequent to the removal of Messrs. Vgenopoulos and Bouloutas. In any event, as the Tribunal has established in Sections X.C.7 and XII.C below, Respondent did not treat the BoC more favorably than Claimants' investment.

(iv) *A proportionate measure*

981. Finally, the Tribunal finds that the CBC's decision to remove Mr. Bouloutas was proportionate.

982. The Tribunal agrees with the *Tecmed v. Mexico* tribunal that:

“[T]he Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not.”⁸⁷⁶ [internal citations omitted, emphasis added]

983. In other words, in order to determine whether the removal of management was a legitimate exercise of the State's regulatory powers, the Tribunal must weigh the competing interests at stake: on the one hand, the State's legitimate interest to protect the public welfare and, on the other hand, the investor's legitimate interest to continue managing its investment.

984. In the case before the Tribunal, the competing interests at stake were Cyprus' interest in protecting the safety and soundness of its banking sector, the interests of depositors and of taxpayers at large against the risk that one of the two systemic banks in the country would be unable to meet its financial commitments and would become bankrupt, and Claimants' interest to continue managing Laiki. The Tribunal finds that the removal of management satisfies the condition of proportionality and that Claimants were not made to bear an excessive burden. Claimants were not deprived of the ownership of their shares in the

⁸⁷⁶ *Tecmed v. Mexico*, at 122.

Bank, of their right to have representatives as members of the Board of Directors (Messrs. Foros, Theocharakis and Kounnis continued to serve on the Board until Laiki's recapitalization) or of their attendant right to vote in the General Shareholders' meeting or to collect dividend, if such were to be distributed. The limitation imposed on their ownership rights was thus proportionate to the aim sought to be achieved, i.e., the protection of depositors against the disorderly bankruptcy of Laiki and of the taxpayers against the risk of insolvency of the State were the State to be called upon to support guaranteed deposits.

985. For the reasons set out in the paragraphs above, the Tribunal concludes that the removal of Messrs. Vgenopoulos and Bouloutas by the CBC represented a legitimate exercise of Respondent's regulatory powers and was not expropriatory.
986. The Tribunal has already established in Section VII.C above that the acts of the new Laiki management, between December 2011 and June 2012, are not attributable to Cyprus. Moreover and in any event, Claimants have not established with evidence that it was the acts of the new Laiki management, as opposed to the acts of prior management or the financial crisis, that led to the need for the Bank to be recapitalized. To the contrary, the record demonstrates that it was the Claimants-appointed management, under Mr. Bouloutas, who first broached the subject of recapitalization with the Ministry of Finance, on 22 November 2011. The amount envisaged at the time was between EUR 1.5 and EUR 2 billion.⁸⁷⁷ In other words, the Bank required recapitalization in an amount roughly equal to that requested in May 2012 even before Messrs. Vgenopoulos and Bouloutas were removed. As a result, the Tribunal finds that the record does not support Claimants' contention that, between December 2011 and June 2012, the management of Laiki laid the ground for its expropriation.

4. Laiki's recapitalization

987. After having examined the record and the Parties' submissions, the Tribunal finds that Laiki's recapitalization was a legitimate exercise of Cyprus' regulatory powers and was not expropriatory.
988. In the paragraphs below, the Tribunal will explain in detail the reasons for its conclusion. The Tribunal will address the following questions: (i) whether Respondent shunned Claimants' 22 November 2011 recapitalization plan; (ii) whether Respondent intentionally delayed clarifying the terms of its support for Laiki's recapitalization in order to discourage

⁸⁷⁷ Letter from MPB (E. Bouloutas) to the Ministry of Finance (K. Kazamias), 22 November 2011 (Exhibit C-0289).

private investors; and (iii) whether the recapitalization framework chosen by Respondent was intended to deter private investment in Laiki.

Whether Respondent shunned Claimants' 22 November 2011 recapitalization plan

989. The Tribunal finds that Respondent did not shun Claimants' 22 November 2011 recapitalization plan, but instead advised Claimants of the various steps that would need to be taken prior to the State supporting the Bank's recapitalization.
990. The Tribunal notes that, contrary to Claimants' contention, Mr. Kazamias did not issue a one-line rejection letter, but explained to Mr. Bouloutas that there was no guarantee in the Management of Financial Crises Law, then in draft form, that the State would be able to guarantee the share capital increase of the Bank in its entirety. The Minister of Finance explained that the Government would first have to decide whether intervention in a troubled bank was necessary and then make a decision on the precise manner in which it would intervene. This decision would be based on the recommendation of the CBC and on an analysis of two criteria: ensuring financial stability and minimizing the cost to the Cypriot taxpayer.⁸⁷⁸ In other words, the Ministry of Finance did not reject Laiki's recapitalization plan, but simply set out the operational framework for offering State support.
991. The Tribunal does not consider that there was anything arbitrary or discriminatory in the Ministry's representation that, before the examination of Laiki's request for support, the Government would require a due diligence of the Bank by category and subcategory of assets, country of activity and an assessment of possible losses. The Tribunal considers that such due diligence would have been required in order for the State to understand the financial condition of the Bank and assess the extent of the support that was needed. Claimants argue that this type of assessment was no longer requested by Cyprus following the removal of Messrs. Vgenopoulos and Bouloutas. The Tribunal disagrees. Following the appointment of the new Chairman of the Board and CEO, Laiki engaged a number of external consultants that carried out a due diligence of the Bank (Houlihan Lokey and PwC). Moreover, the Tribunal notes that when Cyprus was considering supporting both Laiki and the BoC with funds from the Troika, both banks had to go through an in-depth analysis by PIMCO before a decision on funding could be made.
992. Finally, the Tribunal notes that the Minister of Finance expressed its willingness to continue discussing with Laiki. It was then up to the Bank to commence the legal process for obtaining State support under the Management of Financial Crises Law.

⁸⁷⁸ Letter from the Ministry of Finance of Cyprus (K. Kazamias) to MPB (E. Bouloutas), 5 December 2011 (Exhibit C-0300).

Whether Respondent intentionally delayed clarifying the terms of State support for Laiki

993. The Tribunal holds that the record does not support a finding that Cyprus delayed clarifying the terms of its support for Laiki, which delay then acted as a deterrent to private investors. The Tribunal finds instead that any delays in the Bank's recapitalization with State funds were due to the Bank's efforts to attract private capital. Further, while Respondent's delay in clarifying the terms of its support may have played a part in the investors' reluctance to invest in the Bank, the record establishes that the main concern of private investors, which proved fatal to Laiki, was the Bank's exposure to Greece.
994. In this respect, beginning with January 2012, Laiki and the CBC started discussing the Bank's Capital Plan, which would have allowed it to meet the 9% CTI ratio recommended by EBA by the 30 June 2012 deadline. Laiki submitted its draft Capital Plan to the CBC on 20 January 2012.⁸⁷⁹ Several meetings between Laiki and the CBC ensued in February 2012.⁸⁸⁰ On 28 February 2012, Laiki's Board of Directors discussed the preliminary financial statements for 2011. At that time, management estimated that the Bank would suffer losses of EUR 1.969 billion due to the GGB haircut and that it would require approximately EUR 1.5 billion in additional capital in order to comply with the CTI ratio of 9% recommended by the EBA.⁸⁸¹ During this time, the Minister of Finance and the Governor of the CBC were also discussing the possibility that the State would support the two systemic banks, Laiki and the BoC. On 2 March 2012, the Minister of Finance confirmed to the Governor of the CBC that the Cypriot Government would support both Laiki and the BoC under the 2011 Management of Financial Crises Law if their recapitalization through private sources was not entirely successful.⁸⁸²
995. On 5 March 2012, Laiki sent a Discussion Paper to the Ministry of Finance and the CBC. The Discussion Paper examined two scenarios for State intervention: (i) where no significant interest by existing or new shareholders was shown and the intervention of the Cypriot Government would be necessary for the full amount of the required capital; and (ii) where a strategic investor showed serious interest, but was reluctant to invest due to the Bank's exposure to the Greek economy.⁸⁸³
996. No answer to Laiki's Discussion Paper appears to have been sent. However, the Ministry of Finance and the CBC did discuss the options for the recapitalization of the Bank shortly thereafter. Indeed, on 14 March 2012, the Minister of Finance requested the Governor of

⁸⁷⁹ MPB, Board Minutes, 17 January 2012 (Exhibit C-0321); MPB, BoD Minutes, 8 February 2012 (Exhibit C-0332); Confidential memorandum from Central Bank of Cyprus to ECB, Note on ELA and Eurosystem borrowing for Marfin Popular Bank Co Ltd, 23 January 2012 (Exhibit C-0782).

⁸⁸⁰ MPB, BoD Minutes, 8 February 2012 (Exhibit C-0332).

⁸⁸¹ MPB, BoD Minutes, 28 February 2012 (Exhibit C-0339).

⁸⁸² Letter from Ministry of Finance (K. Kazamias) to the CBC (A. Orphanides), 2 March 2012 (Exhibit R-0150).

⁸⁸³ Email from C. Stylianides to A. Trokkos and the Governor of the CBC, 5 March 2012 (Exhibit C-0788).

the CBC to establish a meeting in order to evaluate the implementation of Laiki's and the BoC's capital reinforcement plans and the underwriting of the share issue. In his letter, the Minister of Finance mentioned that "the first choice of the Government [was] the effective confrontation of the matter of capitalisation of the banks through private sector solutions."⁸⁸⁴ This meeting took place on 16 March 2012.⁸⁸⁵

997. A further meeting was held on 20 March 2012 at the Ministry of Finance between representatives of the Ministry, the Bank and the Bank's auditors, PwC. During this meeting, Laiki represented that, due to the poor results in the previous financial year, PwC intended to include a reservation in the financial statements, mentioning that there was significant uncertainty as to whether the Bank could continue operating as a going concern. Laiki therefore requested that the Cypriot Government issue a written statement committing itself to supporting the Bank. During this meeting, Laiki was formally told to submit a written request for State intervention to the Minister of Finance and the CBC "indicating clearly the size of the requested support" and the measures the Bank undertook to implement.⁸⁸⁶
998. However, the Tribunal notes that the first time Laiki submitted a firm request for support which indicated the amount needed was on 2 May 2012.
999. Before that, a number of letters were circulated, but Laiki did not firmly request State support. For instance, on 21 March 2012, Laiki wrote to the Minister of Finance seeking State support, but did not indicate the amount that it required and moreover added that its priority remained to attract private investors. In this letter, Laiki described the efforts it was making in order to obtain private funds but noted that interest was low due to the deteriorating situation in Greece.⁸⁸⁷ Likewise, Laiki's letter of 11 April 2012 to the Ministry of Finance was not a firm request for State support. Instead, it was an exploratory letter ("we return to examine afresh the possibility of an underwriting by the Republic of Cyprus") that did not specify in any way the extent of State support needed ("either entirely or for the total unallocated amount").⁸⁸⁸ Laiki mentioned that it was working on determining the terms of the capital issue and added that its "efforts for the attraction of private capital [were] in full progress" but that the probabilities for success were extremely limited.⁸⁸⁹ Further, in an internal Laiki email of 22 April 2012, which reported on discussions held with potential investors in London, management expressed the view that

⁸⁸⁴ Letter from the Minister of Finance (K. Kazamias) to the CBC (A. Orphanides), 14 March 2012 (Exhibit R-0154).

⁸⁸⁵ Agenda of meeting between the Minister of Finance and the CBC Governor, 16 March 2012 (Exhibit R-0462).

⁸⁸⁶ Internal Ministry of Finance Note, 3 April 2012 (Exhibit R-0474).

⁸⁸⁷ Letter from Laiki (C. Stylianides) to the Ministry of Finance (K. Kazamias) and the CBC (A. Orphanides), 21 March 2012 (Exhibit R-0464).

⁸⁸⁸ Letter from Laiki (C. Stylianides) to Ministry of Finance (V. Shiarly) entitled "Recapitalisation of Laiki Bank", 11 April 2012 (Exhibit R-0159).

⁸⁸⁹ *Id.*

the Bank needed to “start seriously talking to the government technocrats ... in order to quickly finalize this solution to be market friendly”.⁸⁹⁰

1000. Following these letters, several meetings took place between Laiki and the Ministry of Finance.⁸⁹¹ On 24 April 2012,⁸⁹² the Ministry of Finance formally requested the Cypriot Cabinet to approve a letter committing the State to offer support to the Bank in the event its efforts to obtain private capital were not successful. The Ministry of Finance issued the letter on 27 April 2012, specifying that the “Cyprus Government [was] committed to provide the necessary support to the Bank in order to address any liquidity and capital adequacy problems in order to continue as a going concern”.⁸⁹³
1001. The Tribunal considers that, while there may have been delays on the part of the Cypriot Government to respond to Laiki’s letters, once the Bank firmly requested State support, Respondent reacted promptly to offer it.
1002. The Tribunal notes that it was on 2 May 2012 that Laiki first requested State support, specified the amount that it estimated needing (EUR 1.8 billion) and attached a concrete proposal.⁸⁹⁴ Claimants contend that, following the receipt of this letter, the Minister of Finance “simply directed Laiki to contact the CBC”.⁸⁹⁵ In effect, the Minister of Finance replied the following day, indicating that the Management of Financial Crises Law required that Laiki’s request be accompanied by a recommendation from the CBC and suggesting that Laiki set up a meeting with the Minister in order to discuss the Bank’s letter.⁸⁹⁶
1003. It was only on 7 May 2012 that Laiki’s Board of Directors authorized management to continue discussing with the Government in order to obtain an underwriting of the rights issue for up to EUR 1.8 billion.⁸⁹⁷ That same day, Laiki met with the Governor of the CBC in order to discuss the underwriting and, on 8 May 2012, Laiki formally submitted a request for State support to the CBC.⁸⁹⁸ On 11 May 2012, a further meeting took place between representatives of Laiki, the Ministry of Finance and the CBC.⁸⁹⁹ Between 11 May 2012 and 15 May 2012, several meetings took place between representatives of Laiki and the Ministry of Finance, during which Laiki submitted its comments on a draft of the

⁸⁹⁰ Email from ██████████ 23 April 2012 (Exhibit C-0666).

⁸⁹¹ Letter from Laiki (C. Stylianides) to the CBC (P. Demetriades), 8 May 2012 (Exhibit R-0476).

⁸⁹² Proposal to the Cabinet, 24 April 2012 (Exhibit R-0475).

⁸⁹³ Letter from the Ministry of Finance (V. Shiarly) to Laiki (BoD), 27 April 2012 (Exhibit R-0161).

⁸⁹⁴ Letter from Laiki (C. Stylianides) to the CBC (P. Demetriades), 8 May 2012 (Exhibit R-0476).

⁸⁹⁵ C-PHS, at 72.

⁸⁹⁶ Letter from Laiki (C. Stylianides) to the CBC (P. Demetriades), 8 May 2012 (Exhibit R-0476).

⁸⁹⁷ MPB, BoD Minutes, 7 May 2012 (Exhibit R-0163).

⁸⁹⁸ Letter from Laiki (C. Stylianides) to the CBC (P. Demetriades), 8 May 2012 (Exhibit R-0476).

⁸⁹⁹ Letter from MPB (M. Athanasiou) to the Ministry of Finance (A. Trokkos), 12 May 2012 (Exhibit R-0478).

Underwriting Decree.⁹⁰⁰ On 15 May 2012, the CBC issued its recommendation that the Cypriot Government accept the Bank's proposal for the underwriting of its share capital issue of EUR 1.8 billion.⁹⁰¹

1004. Subsequent to the CBC's recommendation, on 16 May 2012, the CBC and the Ministry of Finance sought the approval of the European Commission's Directorate General for Competition for the underwriting.⁹⁰² On 17 May 2012, the Cypriot Parliament took into discussion and then approved the Underwriting Decree. The Underwriting Decree was published on 18 May 2012 in the Official Gazette.⁹⁰³

1005. The Tribunal considers that, despite some initial delays which could reasonably be explained in light of Laiki's efforts to attract private capital, Respondent reacted promptly when Laiki formally requested State support. Further, the Tribunal also finds that there is no support in the record for Claimants' contention that Respondent's delays were caused by its intent to sabotage Laiki's recapitalization and bring the Bank firmly under State control. To the contrary, the Minister of Finance expressly stated in a letter dated 14 March 2012 to the Governor of the CBC that the Government's first choice was that banks should be recapitalized with private capital.⁹⁰⁴ An internal Ministry of Finance note dated 20 March 2012 and discussing Laiki's request for a letter confirming State support explicitly mentioned that, while the State was open to support the banks, it would do so only as a last resort.⁹⁰⁵ This was reiterated in the Ministry of Finance's proposal to the Council of Ministers dated 24 April 2012.⁹⁰⁶

1006. Further, while the delay in the clarification of the terms of State support may have been one reason for investors' reluctance to invest in Laiki, nevertheless, the predominant reason at this time for their lack of interest was the Bank's exposure to Greece.

1007. The Tribunal notes that this reluctance was apparent to Laiki's management from the very beginning. In this respect, in its Discussion Paper, Laiki represented that, if a strategic investor was found, "existing shareholders [would] most likely be encouraged to contribute

⁹⁰⁰ [REDACTED]

⁹⁰¹ Letter from the CBC (P. Demetriades) to the Ministry of Finance (V. Shiaryl), 15 May 2012 (Exhibit R-0167).

⁹⁰² Letter from CBC (P. Demetriades) to EC's Directorate General for Competition (A. Italianer), 16 May 2012 (Exhibit R-0168); Emails between DG Competition ([REDACTED]) and Ministry of Finance ([REDACTED]) 6 May 2012 (Exhibit R-0481).

⁹⁰³ Minutes of the Meeting of the Parliamentary Committee on Financial and Budgetary Affairs, 17 May 2012 (Exhibit C-0363); Republic of Cyprus, Decree 182/2012 (Management of Financial Crises Laws of 2011 to (No 2) 2012) 18 May 2012 (Exhibit CL-0146).

⁹⁰⁴ Letter from the Minister of Finance (K. Kazamias) to the CBC (A. Orphanides), 14 March 2012 (Exhibit R-0154).

⁹⁰⁵ Internal Ministry of Finance Note, 3 April 2012 (Exhibit R-0474).

⁹⁰⁶ Proposal to the Cabinet, 24 April 2012 (Exhibit R-0475).

to an equity raising” and the Government would only step in for part of the required capital. However, if no strategic investors were found by the end of June 2012, management took the view that “it [was] rather unlikely that existing shareholders [would] be willing to contribute to an equity raising” and the Government would probably be asked to put up the entire amount. Significantly, the Discussion Paper recorded that the strategic investors that had expressed an interest in the Bank were worried about “the perceived legacy Risks [sic] associated with Greece”. In consideration of that, the two scenarios examined in the Discussion Paper involved either no significant interest from a strategic or existing investor, or interest from a strategic investor, but coupled with the reluctance to invest due to the Bank’s exposure to Greece.⁹⁰⁷

1008. PwC’s letter to the Bank concerning its financial statements for 2011 also recorded that there was “significant uncertainty as to the ability of the Bank to raise the required capital from existing shareholders” and “no confirmed participation from new investors”.⁹⁰⁸

1009. Further, in its 21 March 2012 letter to the Minister of Finance and the Governor of the CBC, Laiki mentioned that two to three strategic investors had shown interest in the Bank but had not committed to participate in the capital increase. Laiki noted that “[i]nvestor interest impinge[d] on the risks resulting from a future deterioration of the situation in Greece”.⁹⁰⁹ A bleak outlook for finding private investors was also recorded in Laiki’s letter to the Minister of Finance dated 11 April 2012, where Mr. Stylianides expressed the view that the likelihood of the Bank attracting private capital was considered limited due to the direction of the macroeconomic environment in Greece and the Bank’s exposure to Greece.⁹¹⁰

1010. In his report to Messrs. Sarris and Stylianides following a meeting with potential investors in London, Mr. [REDACTED] specified that:

“3. They ALL stated that the problem is Greece and the uncertainty that it creates for them. They were very blunt in saying that They [sic] would not touch anything with such a significant exposure in Greece, UNLESS, something is done with our operations there. The issue of ring fencing was raised and discussed as a possible solution along with other measures.”⁹¹¹

1011. While Mr. Athanasiou expressed his view that money could be raised from those investors under certain conditions, those conditions included the “proper and bullet proof ring fencing of Greece”, in addition to a “non-dilutive, guarantee, first loss” Government

⁹⁰⁷ Email from C. Stylianides to A. Trokkos and the Governor of the CBC, 5 March 2012 (Exhibit C-0788).

⁹⁰⁸ Letter from PwC ([REDACTED]) to MPB (M. Sarris), 20 March 2012 (Exhibit C-0348).

⁹⁰⁹ Letter from Laiki (C. Stylianides) to the Ministry of Finance (K. Kazamias) and the CBC (A. Orphanides), 21 March 2012 (Exhibit R-0464).

⁹¹⁰ Letter from Laiki (C. Stylianides) to the Ministry of Finance (V. Shiarly), 11 April 2012 (Exhibit R-0159).

⁹¹¹ Email from [REDACTED] 23 April 2012 (Exhibit C-0666).

participation in the share capital increase.⁹¹² Claimants have acknowledged in their submissions before this Tribunal that obtaining any State support on this type of terms was extremely unlikely.⁹¹³

1012. The Tribunal agrees with Claimants that Laiki's letter of 2 May 2012 expressly mentioned that the delay in clarifying the terms of the State's participation in the share capital increase "prevent[ed] any investors' interest", so that "investor interest in participating in the capital increase of the Bank would be non-existent if intentions and the terms and conditions of a possible participation of the State [were] not fully known."⁹¹⁴ However, Laiki's 8 May 2012 letter to the Minister of Finance again referred to the situation in Greece as the main reason behind investors' lack of interest in the Bank. According to management, "the interest of investors to participate in the planned capital issue [would] be significantly limited up to non-existent, especially after the escalation of negative developments in Greece." Mr. Stylianides also reported that the Board of Directors of Laiki was convinced that "it [was] not possible to raise capital from existing and new shareholders" and that the underwriting of the rights issue by the State would increase the participation of private capital. Mr. Stylianides mentioned that the Bank had received "indications from investors, whose main concern are [sic] the potential negative developments in Greece" that the put option included in the Bank's proposal for underwriting would increase their chances of participating in the issue.⁹¹⁵

1013. [REDACTED]

1014. The Tribunal also observes that, at this time, the Bank was making efforts to ring fence its Greek operations, through the absorption of MEB into the Investment Bank of Greece, a subsidiary of the Group. However, those efforts did not come to fruition due to the outcome of the Greek elections in May 2012.

1015. For these reasons, the Tribunal is not persuaded that private investors were mainly deterred from investing in the Bank due to the delay in the clarification of the terms of State support. Instead, the Tribunal is of the view that a much more significant consideration for private investors was the uncertainty surrounding Greece and the Bank's significant exposure thereto. The Tribunal also recalls that, at the time the Bank was seeking to attract private capital in order to meet the EBA recommendation of a 9% CT1 capital ratio, so did all

⁹¹² *Id.*

⁹¹³ C-PHS, at 85(e).

⁹¹⁴ Letter from Laiki (C. Stylianides) to the CBC (P. Demetriades), 8 May 2012 (Exhibit R-0476).

⁹¹⁵ *Id.*

⁹¹⁶ [REDACTED]

other banks in the European Union. There was therefore fierce competition on the market for attracting private capital.

1016. Further, the Tribunal is not persuaded that Claimants had expressed a serious interest in purchasing Laiki's Greek operations or in participating in the share capital increase in proportion to their ownership stake.

1017. In this respect, the Tribunal notes that Claimants have relied on the witness testimony of Mr. Vgenopoulos⁹¹⁷ as well as on the Board minutes of MIG dated 13 September 2012⁹¹⁸ as support for their contention that MIG was seriously pursuing the purchase of the Bank's Greek operations when it was shunned by Laiki's management.

1018. The Tribunal has already set out at Section VII.C above that the acts and omissions of Laiki's new management between December 2011 and June 2012 are not attributable to Respondent. Therefore, the Bank was at liberty to pursue the options that it deemed best for the raising of private funds and, as a corollary, not to pursue options that it did not find satisfactory. This has no implications with regard to Respondent's international responsibility.

1019. Further and in any event, the Tribunal considers that the evidentiary record does not support Claimants' contentions. According to the evidence relied upon by Claimants, on 22 February 2012, Mr. Vgenopoulos and Mr. Bouloutas had a meeting in Athens with Laiki management, during which they offered to purchase Laiki's Greek operations. At that point in time, Laiki showed an interest in the offer, but was not certain whether it wished to sell only the Greek loan portfolio or the entirety of its Greek operations. According to Mr. Vgenopoulos, despite his repeated requests that Laiki clarify this point, management never reverted with an answer.

1020. The Tribunal has no reason to doubt the veracity of Mr. Vgenopoulos' testimony in this regard. Nevertheless, the Tribunal is not persuaded that these talks were more than exploratory talks or that they reflected the serious interest of MIG to invest. MIG's Board of Directors minutes of 13 September 2012, relied upon by Claimants, appear to suggest that the talks with Laiki's management had not been disclosed to the Board of MIG up until that very moment:

“Mr. Vgenopoulos referred to the Company's alternatives for investment or activation in the financial services sector through takeover of medium and small Greek banks seeking to cover their capital needs or purchase of assets of Greek and Cypriot banks. Among other things, it was mentioned that what is really needed right now in order to achieve the goal

⁹¹⁷ Vgenopoulos First Witness Statement, at 80; Vgenopoulos Fourth Witness Statement, at 63.

⁹¹⁸ MIG, BoD Minutes, 13 September 2012 (Exhibit C-0406).

is having strong allies rather than substantial capital. Furthermore, discussion took place regarding the feasibility of hiring 2-3 ex-employees of the Bank in Greece for materializing any endeavor in this regard.

Mr. ██████████ expressed his surprise and wondered how this can be materialized given the failure of Cyprus Popular Bank. Moreover, he mentioned that at this point primary engagement of the management of the Company should be enhancing its underlying companies. Furthermore, he stated his opposition to hiring ex bank employees and granting bonuses to the OA team.

Mr. Vgenopoulos replied that he was deprived of the right to fight for the rescue of the Bank, which eventually remained in the hands of people with no knowledge or with other agenda. Several officers have left the Bank either because they were overpaid or due to their being associated to MIG. Management has held 4 meetings with bank representatives as to whether MIG was interested to buy the Greek business, but the bank never came back to specify what exactly was for sale.”⁹¹⁹ [emphasis added]

1021. The Tribunal also notes that Claimants have not disclosed any Board minutes of MIG where a decision was taken committing the company to purchase Laiki’s Greek operations. It appears that, in effect, MIG never made a decision to proceed with this purchase. According to a press announcement made by MIG on 27 November 2012:

“‘MARFIN INVESTMENT GROUP HOLDINGS SA’ (‘the Company’) hereby announces that it has become in the past the recipient of exploratory contacts on a possible interest for the takeover of the Greek operations of ‘CYPRUS POPULAR BANK PUBLIC CO LTD’. The Company has not so far received any concrete proposal and has not therefore officially expressed its interest nor discussed or taken any relevant decision.”⁹²⁰

1022. Consequently, Claimants’ contention that their serious interest in purchasing Laiki’s Greek operations was shunned by the newly appointed management is not supported by the record.

1023. Further, the Tribunal is not persuaded that the record supports Claimants’ submission that they would have participated in Laiki’s recapitalization.

1024. Claimants refer to two statements made by Mr. Vgenopoulos in November 2011⁹²¹ as support for their assertion that MIG was ready and willing to participate in the recapitalization of the Bank. The Tribunal notes however that these statements were made prior to the removal of Mr. Bouloutas from the Board and prior to the finalization of the terms of PSI+.

⁹¹⁹ *Id.*

⁹²⁰ MIG Announcement, 27 November 2012 (Exhibit C-0417).

⁹²¹ Andreas Vgenopoulos Announcement, 4 November 2011 (Exhibit C-0278); Statement by Andreas Vgenopoulos, “MARFIN POPULAR BANK will come out of this crisis stronger”, 17 November 2011 (Exhibit C-0286).

1025. Laiki's Discussion Paper expressly recorded that the Bank's existing shareholders would be "encouraged" to participate in the capital increase if a strategic investor was found. However, if this attempt was unsuccessful, "it [was] rather unlikely that shareholders [would] be willing to contribute to an equity raising and thus MPB [would] have no option but to seek government help, probably for the whole €1.35 - €1.8 bn". The Discussion Paper also mentions that "existing major shareholders have expressed their intention to minimise and if possible avoid dilution, however, under the circumstances; this might not be realistically possible as the required additional funds may not be available to them".⁹²² In other words, Laiki's existing shareholders, including MIG and DFG, were only interested in investing in the Bank if a strategic private investor was found first.
1026. The reluctance of existing investors to commit funds was also confirmed by Laiki's auditors, PwC. In their letter to management dated 20 March 2012, PwC noted that, due to market circumstances, there was "significant uncertainty as to the ability of the Bank to raise the required capital from existing shareholders".⁹²³ Further correspondence from the Bank to the Ministry of Finance and the CBC revealed the same bleak situation: no serious interest shown by any private investor.
1027. On 26 June 2012, MIG's Executive Committee issued a recommendation that the company should not participate in the recapitalization of the Bank. MIG's Executive Committee referred to the following: (i) the nationalization of the Bank in light of the lack of investor appetite to participate in the share capital increase; (ii) the market price of Laiki's shares, of below EUR 0.09; (iii) the uncertainty as to whether the capital increase would be the last, in light of market circumstances; (iv) the administrative reform of Laiki, leading to the appointment of Board Members by the Ministry of Finance; (v) the financial situation and prospects of the Cypriot economy; and (vi) the impact of the eventual dilution of MIG's shareholding after the completion of the share capital increase.⁹²⁴
1028. The Tribunal will address in Sections IX.C.4 (iii) and IX.C.4 (iv) below the issue of the corporate governance provisions in the Underwriting Decree and their effect on the likelihood of a successful private recapitalization of Laiki. For purposes of the present analysis however, the Tribunal notes that the main concerns behind MIG's decision not to participate in the recapitalization were the lack of a strategic investor (as per the Discussion Paper), the uncertainty surrounding the capital that the Bank would actually require in order to meet the EBA recommendation and the likelihood that MIG would be diluted despite participating in the capital raising exercise.

⁹²² Email from C. Stylianides to A. Trokkos and the Governor of the CBC, 5 March 2012 (Exhibit C-0788).

⁹²³ Letter from PwC () to MPB (M. Sarris), 20 March 2012 (Exhibit C-0348).

⁹²⁴ Internal Memorandum to MIG Executive Committee () "Exercise of pre-emption rights in the Share Capital Increase of Cyprus Popular Bank", 26 June 2012 (Exhibit C-0381).

1029. The Tribunal therefore finds that Claimants either did not have the funds or the willingness to invest in Laiki and assume the risk that their capital contribution would not be sufficient in order to avoid dilution. The Tribunal does not consider that the testimony of Mr. Bouloutas or the evidence of Mr. Rosen, seeking to establish that MIG and other Claimants had the funds to participate in the recapitalization, is sufficient. What matters is that the record contemporaneous to the events does not support a conclusion that Claimants had shown actual, serious interest in the recapitalization.

1030. The Tribunal will now address the issue of the recapitalization framework and its impact on Laiki's recapitalization.

Whether the recapitalization framework chosen by Respondent was expropriatory

1031. Claimants argue that Cyprus structured the recapitalization framework in such a way as to effectively deter any private investment in the Bank and to bring it under State control. Respondent disputes this theory, and counters that the recapitalization framework adopted by Cyprus was the best that it could offer under the circumstances, considering the lack of investor interest and the limitations imposed by the European Commission. According to Respondent, Laiki's recapitalization was a legitimate exercise of the State's regulatory powers.

1032. The Tribunal agrees with Respondent.

1033. First, the Tribunal notes that the Treaty does not establish an obligation for the Contracting States to offer financial support to investments experiencing serious financial difficulties. The Treaty only mandates that such investments not be expropriated, either directly or indirectly, and that they should not be subjected to treatment falling below certain standards.

1034. Second, the Tribunal reiterates that its analysis does not seek to establish whether Cyprus' chosen recapitalization method was the best possible choice that Respondent could have made under the circumstances. The Tribunal "need not be satisfied that [it] would have made precisely the same decision as the regulator in order for [it] to uphold such decisions".⁹²⁵

1035. Third, and as a corollary to the above, the Tribunal will not substitute its own judgment to that of the Cypriot regulatory authorities that drafted the recapitalization framework. Both

⁹²⁵ *Invesmart v. Czech Republic*, at 501.

the Management of Financial Crises Law and the Underwriting Decree were drawn up by several Cypriot regulatory authorities, including the Ministry of Finance and the CBC. These public entities are entitled to a certain degree of discretion in making their choice of a recapitalization framework. The Tribunal's assessment is therefore limited to verifying whether there was abuse, a lack of due process or a pretense of form designed to conceal improper ends.

1036. After having carefully examined the Parties' submissions and the evidence in the record, the Tribunal finds that the recapitalization framework chosen by Respondent was not expropriatory, but represented a legitimate exercise of Cyprus' regulatory powers. While certain features of the recapitalization framework (and, in particular, the corporate governance principles selected) did not reflect international best practices, this is not sufficient in order to find a breach of the Treaty.

1037. The Tribunal holds that Claimants have not satisfied their burden of showing that the features of the recapitalization framework were arbitrary or irrational choices. To the contrary, the record establishes that the recapitalization process was initiated following an express request from the Bank. It is also established that Laiki's auditors, PwC, were of the view that recapitalization was necessary in order for the Bank to be able to continue operating as a going concern.⁹²⁶ According to PwC, absent a confirmation from the Cypriot Government that it would continue to support Laiki in its efforts to meet capital adequacy and liquidity requirements, the auditors could not have certified the Bank's financial statements for 2011 and would have included a reservation regarding the Bank's viability. The Tribunal has no doubt that such a course of events would have sent a strong signal of weakness to the markets and would have led to massive deposit flight. Further, recapitalization also allowed the CBC to certify to the ECB that the Bank was viable and thus ensure that it could continue to benefit from ELA. The Tribunal considers that, without the continued financial support in the form of ELA, Laiki would in all probability have failed. In other words, recapitalization was necessary in order to ensure the Bank's very survival. Finally, some limitations on normal corporate governance rights were necessary so as to ensure that, after receiving financial support from the State, Laiki would not pursue business policies that could threaten further its depositors and other taxpayers.

1038. The Tribunal will set out in more detail below the reasons behind its findings.

(i) *An exercise of regulatory powers*

1039. The Parties do not dispute that the Management of Financial Crises Law is a regulatory measure.

⁹²⁶ Letter from PwC (██████████) to MPB (M. Sarris), 20 March 2012 (Exhibit C-0348).

1040. Claimants dispute however that this characterization applies to the Underwriting Decree, arguing that it was an individual act adopted solely for the recapitalization of Laiki. The Tribunal does not find this distinction to be dispositive. The Underwriting Decree was enacted on the basis of Sections 6, 7 and 14 of the Management of Financial Crises Law. In other words, the Underwriting Decree was the measure through which a general regulation was applied to a set of facts, i.e., the recapitalization of Laiki.

1041. On this basis, the Tribunal finds that the police powers doctrine may be equally applied to the Underwriting Decree, provided that the other conditions are satisfied.

(ii) *Taken in order to protect the public welfare*

1042. The Tribunal considers that both the Management of Financial Crises Law and the Underwriting Decree were enacted in order to protect the Cypriot banking sector and the economy at large from the risk of the disorderly failure of the systemic banks. Moreover, both Parties agree that Laiki required recapitalization in order to make up for the impact of PSI+ and to achieve on 30 June 2012 the 9% CT1 ratio recommended by the EBA.⁹²⁷ In other words, Laiki's recapitalization was necessary in order to protect it from failing.

(iii) *A non-discriminatory measure taken in good faith*

1043. The Tribunal notes that, while the focus of Claimants' Memorial was the Management of Financial Crises Law, that focus shifted in the Reply, at the hearing and in their post-hearing submission to the Underwriting Decree. Nevertheless, because Claimants have not explicitly dropped their claim that the Management of Financial Crises Law also represents an expropriatory measure, the Tribunal will first address these contentions and then proceed to its analysis concerning the Underwriting Decree.

1044. The Management of Financial Crises Law. The Tribunal finds no support in the record for Claimants' allegations that the Management of Financial Crises Law was part and parcel of Cyprus' overarching plan to nationalize Laiki, that it was enacted in haste, or that it served no legitimate purpose. To the contrary, the record supports the conclusion that the Management of Financial Crises Law was enacted following a transparent and comprehensive consultation process, which was respectful of Claimants' due process rights, and was non-discriminatory. Further, the record demonstrates that the law was intended to ensure that Cyprus could rapidly intervene in order to support banks in financial distress, and was not part of any plan to bring Laiki under State control.

⁹²⁷ C-PIIS, at 64; R-PIIS, at 59.

1045. The Tribunal has already established that the record does not support the conclusion that there was an overarching “communist” plan to nationalize the Bank. The Tribunal will not revisit this conclusion here.
1046. The Tribunal also finds that the Management of Financial Crises Law was adopted following a process of extensive public consultation, which included, among others, the ECB, Laiki as well as various associations of banks in Cyprus.
1047. The principles underpinning the Management of Financial Crises Law were initially set out in a 2008 bill entitled “A Law to amend the Management of Revenues and Expenditure and of the Accounting System of the Republic and other Related Matters Laws of 2002 and 2004”.⁹²⁸ This bill was intended to provide a framework for State recapitalization of Cypriot banks if such measures were needed in the future and was initially intended to be an amendment to existing legislation. The bill was submitted on 16 January 2009 by the Cypriot Ministry of Finance to the ECB for comments. The ECB’s overarching view was that the bill should contain more specific provisions with regard to the terms and conditions of accessing State support, as well as the parameters of the State’s intervention. The ECB also issued a number of recommendations with respect to the provisions of the bill.⁹²⁹
1048. Respondent stipulates that, following the receipt of the ECB’s comments, the bill went through the normal legislative process and was considered on 1 February 2010 by the Cypriot House of Representatives. Respondent adds that, sometime in 2011, the Ministry of Finance and the CBC reassessed the idea of implementing the 2008 bill as an amendment to existing legislation and instead supported enacting it as standalone legislation. Concurrently, a draft law providing for the establishment of a new Cypriot financial stability fund was enacted.⁹³⁰
1049. On 18 October 2011, the two bills were circulated by the Ministry of Finance to a number of Cypriot banking associations, including the Association of Cyprus Banks (of which Laiki was a member), the Association of International Banks in Cyprus, and the Cyprus Financial Services Firms Association.⁹³¹ The draft Management of Financial Crises Law was sent to Laiki on 21 October 2011.⁹³²

⁹²⁸ Bill entitled “A Law to amend the Management of Revenues and Expenditure and of the Accounting System of the Republic and other Related Matters Laws of 2002 and 2004” (Exhibit RL-0088).

⁹²⁹ European Central Bank, “Opinion at the request of the Cypriot Ministry of Finance on a draft law amending the Laws of 2002 and 2004 on the management of revenues and expenditure and on the accounting system of the Republic and related matters”, (CON/2009/12), 9 February 2009 (Exhibit C-0135).

⁹³⁰ Counter-Memorial, at 317-319.

⁹³¹ Letter from Ministry of Finance (██████████) to various parties, 18 October 2011 (Exhibit R-0107); Letter from the Ministry of Finance (██████████) to various parties, 18 October 2011 (Exhibit R-0108).

⁹³² Email from CBC (██████████) to MPB (██████████) attaching “EN The law for management of financial crises 20 Oct 2011”, 21 October 2011 (Exhibit R-0111).

1050. On 20 October 2011, the two draft bills were submitted by the Ministry of Finance to the ECB for an opinion.⁹³³ The Tribunal has already seen at Section IX.C.1 above, that, on 25 October 2011, the draft law was debated by the Cypriot Cabinet, when it was decided to proceed with the immediate registration of both bills for public debate at the House of Representatives. Following registration, the bills were debated by the Parliamentary Committee on Finance and Budget between 1 November and 6 December 2011, with the participation of the relevant banking associations.⁹³⁴ A further meeting to discuss the two bills was held on 4 November 2011 at the Ministry of Finance.⁹³⁵
1051. The revised bill was also sent to the ECB for an opinion on 9 November 2011.⁹³⁶ The ECB issued its opinion on 15 November 2011. In general, the ECB's feedback was positive. The ECB noted the following with regard to the corporate governance provisions in the draft law:

"Sections 7 to 10 of the draft law on financial crisis management provide for a number of powers vested in the Cypriot Minister for Finance to be exercised when the measures laid down in Section 4(1)(a) are taken, and by way of derogation from the Law on Companies and the Law on cooperative credit institutions. These powers include (i) restrictions in the exercise of the voting rights attaching to shares or the voting rights possessed by the shareholders of the beneficiary financial institution; (ii) appointment of the majority of the members of the Board of Directors of the beneficiary financial institution; and (iii) increase of the share capital of the beneficiary financial institution. The ECB notes that, unlike the measures set out in Section 4 of the draft law, the above measures may be 'recovery and resolution measures', to be taken by the resolution authority in the context of a comprehensive bank recovery and resolution regime. The ECB understands that the inclusion of these measures in the draft law is temporary, until such time as an operational recovery and resolution framework has been established in Cyprus, and that the consulting

⁹³³ Letter from the Ministry of Finance (K. Kazamias) to the ECB (J.C. Trichet), 20 October 2011 (Exhibit R-0109); Letter from the Ministry of Finance (K. Kazamias) to the ECB (J.C. Trichet), 20 October 2011 (Exhibit R-0110).

⁹³⁴ Transcript of the Minutes of the Parliamentary Committee on Financial and Budgetary Affairs Meeting, dated 1st November 2011 concerning the Bills referred to in the attached Annex, 1 November 2011 (Exhibit R-0114); Transcript of the Minutes of the Parliamentary Committee on Financial and Budgetary Affairs Meeting of 21 November 2011 for the Discussion of the following Bills (a) "The Imposition of a Special Tax on Credit Institutions (Amendment) (No. 2) Law of 2011, (b) The Financial Crisis Management Law of 2011 and (c) The Establishment and Operation of an Independent Stability Fund Law of 2011, 21 November 2011 (Exhibit R-0121); Transcript of the Minutes of the Parliamentary Committee on Financial and Budgetary Affairs Meeting dated 30 November 2011 for the Discussion of the following Bills: "The Imposition of a Special Tax on Credit Institutions (Amendment) (No. 2) Law of 2011, The Financial Crisis Management Law of 2011" and "The Establishment and Operation of an Independent Stability Fund Law of 2011", 30 November 2011 (Exhibit R-0127); Transcript of the Minutes of the Parliamentary Committee on Financial and Budgetary Affairs Meeting, dated 6 December 2011 concerning the Bills referred to in the attached Annex, 6 December 2011 (Exhibit R-0130).

⁹³⁵ Transcript of the Minutes of the Parliamentary Committee on Financial and Budgetary Affairs Meeting of 21 November 2011 for the Discussion of the following Bills (a) "The Imposition of a Special Tax on Credit Institutions (Amendment) (No. 2) Law of 2011, (b) The Financial Crisis Management Law of 2011 and (c) The Establishment and Operation of an Independent Stability Fund Law of 2011, 21 November 2011 (Exhibit R-0121).

⁹³⁶ ECB, Opinion on the management of financial crises and the setting up of an independent financial stability fund (CON/2011/93), 15 November 2011 (Exhibit C-0284).

authority will reconsider in the future their interplay with the recovery and resolution framework that is to apply, in the future, to financial institutions operating in Cyprus, and on which the ECB expects to be consulted.”⁹³⁷ [emphasis added]

1052. In other words, the ECB did not express a critical view of the corporate governance provisions. In effect, it seems that the ECB had a different understanding with respect to the application of these provisions (i.e., as recovery and resolution measures), which does not appear to be their stated purpose pursuant to the text of the law.
1053. Following the meetings with the stakeholders, the receipt of their comments and the opinion of the ECB, the bill was amended and recirculated to stakeholders on 10 November 2011.⁹³⁸ On 24 November 2011, the CBC sent an English translation of the draft law to Laiki by email.⁹³⁹ On the same day, a meeting took place between CySEC and representatives of Laiki, the BoC and other banks in order to discuss the draft law.⁹⁴⁰
1054. The Management of Financial Crises Law was enacted on 30 December 2011.
1055. The Tribunal considers that this consultation process, which involved a number of regulatory bodies, banking associations as well as the affected banks (including Laiki), respected Claimants’ due process rights.
1056. Further, the Tribunal finds that the Management of Financial Crises Law served a legitimate purpose: it conferred upon Cyprus the power to intervene and support a bank in financial difficulty, upon the latter’s request, and avoid negative systemic effects on its economy. While the corporate governance provisions included in the Management of Financial Crises Law possibly did not reflect international best practices, nevertheless they do not constitute “clear and compelling evidence” that Respondent erred or acted otherwise improperly.⁹⁴¹
1057. Claimants’ main criticisms refer to the provisions of Section 7(2) of the law, pursuant to which:

⁹³⁷ ECB, Opinion on the management of financial crises and the setting up of an independent financial stability fund (CON/2011/93), 15 November 2011 (Exhibit C-0284).

⁹³⁸ Email from the Ministry of Finance (██████████) to ACB (██████████) and others, 10 November 2011 (Exhibit R-0119).

⁹³⁹ Email from CBC (██████████) to MPB (██████████) 24 November 2011 (Exhibit R-0123).

⁹⁴⁰ Letter from CySEC (██████████) to Ministry of Finance (██████████) CBC (██████████) Bank of Cyprus (██████████) Chryssafinis and Polyviou LLC (██████████) Hellenic Bank (██████████) MPB (██████████) Demetriades & Ioannides LLC (██████████) and Commercial Banks Association (██████████) entitled “Proposed Amendment of the Companies Law - Meeting dated 24 November 2011”, 25 November 2011 (Exhibit R-0125).

⁹⁴¹ *Saluka v. Czech Republic*, at 273.

“(2) In the case of adoption of one or more of the support measures provided for in sub-paragraph (a) of paragraph (1) of article 4, the Minister may, with the concurring opinion of the Central Bank and notwithstanding the provisions of the Companies Law, the Co-operative Societies Law, the Law on Public Takeover Bids and the Investment Services and Activities and Regulated Markets Law as well as any other law –

(a) restrict the exercise of the voting rights attached to shares or voting rights held by the shareholders of the beneficiary financial institution, in relation to all or part of the issues for which voting rights are exercised;

It is provided that the shareholders retain the right of sale, disposition, transfer or other way of alienation of the shares they hold;

(b) appoint the majority of the members of the Board of Directors or the majority of the Commissioners of the beneficiary financial institution with the concurring opinion of the Finances and Budget Parliamentary Committee of the House of Representatives, and determine the provisions of the Companies Law or the Co-operative Societies Law, as well as the terms of the articles of association or of the special regulations of the beneficiary financial institution with regard to directors or Commissioners, that shall apply to the directors or Commissioners who are appointed by virtue of this article;

It is provided that, in the event that provisions of this article are applied in conjunction with the support measures provided for in points (iii) of sub-paragraph (a) of paragraph (1) of article 4, the powers of the Minister shall not derive from the participation of the Republic in the ownership structure of the beneficiary financial institution but shall derive directly from the provisions of this Law;

(c) impose any terms on the financial institutions, including limitations on the availability of financial products to the market or in the expansion of their activities.⁹⁴² [emphasis added]

1058. The limitations above could be imposed by the Minister of Finance in those situations in which the State offered support in one of the forms specified in Section 4(1)(a) of the law: (i) the granting of government loans to financial institutions; (ii) the granting of government guarantees for loans and/or for the issue of bonds; and (iii) the provision of capital in return for equivalent participation in the ownership structure of the financial institution.

1059. The Tribunal agrees that these provisions depart from generally accepted corporate governance principles, which align equity participation with governance rights. Nevertheless, the Tribunal does not consider that this lack of alignment is in and of itself sufficient to support a finding that the provisions served no legitimate purpose. The Tribunal bears in mind that the very premise for the application of the Management of Financial Crises Law was the existence of a financial crisis, during which the liquidity or solvency problems of a bank threatened to provoke “systemic disturbances in the financial

⁹⁴² Republic of Cyprus Law No 200(I)/2011 (Management of Financial Crises), 30 December 2011 (Exhibit C-0045).

system” (Section 3 of the law). The Tribunal accepts that the exceptional considerations extant during a financial crisis, which mandate the protection of the banking system as a whole, of depositors and taxpayers, may justify the temporary imposition of extraordinary measures that could permit the State to intervene in order to safeguard these interests.

1060. In any event, the Tribunal notes that Claimants did not consider these limitations to be a strong deterrent for private investment. Indeed, Laiki’s 22 November 2011 recapitalization proposal was based on the provisions of this law, then in draft form.
1061. The Tribunal further finds that the Management of Financial Crises Law was not discriminatory. Its enactment ensured the participation of a number of stakeholders, including the banks potentially affected by Section 7. There is no question that the provisions of the law were of general applicability.
1062. For these reasons, the Tribunal finds that the Management of Financial Crises Law was a non-discriminatory measure taken in good faith.
1063. The Underwriting Decree. After carefully examining the record and the Parties’ submissions, the Tribunal finds that there is no compelling evidence that Respondent erred or acted otherwise improperly by enacting the Underwriting Decree.⁹⁴³ To the contrary, the Tribunal holds that the Underwriting Decree was a non-discriminatory measure, taken in good faith, which – despite its limitations and flaws – permitted Laiki to survive.
1064. First, the Tribunal is of the view that the Underwriting Decree served a legitimate purpose: Laiki was recapitalized and, as a result, could continue operating as a going concern.
1065. In this respect, the Tribunal reiterates that the Treaty does not impose upon the Contracting Parties any obligation to inject funds into banks in financial difficulty. It is up to the Contracting Parties to decide how to allocate the limited budgetary resources at their disposal and whether they should be directed towards supporting banks or towards other economic or social sectors. Such a decision is inherently political in nature and cannot be second-guessed by a tribunal constituted under an investment treaty.
1066. It is also important to note that Respondent’s intervention to recapitalize Laiki followed from the Bank’s application to this effect. The recapitalization, with its attendant reduction of Claimants’ shareholding and the subsequent changes in management, was not a unilateral intervention by the Cypriot Government intended to oust Claimants from their investment. The recapitalization was prompted by the very difficult financial condition of the Bank, when the injection of private funds had proved to be impossible. Moreover, the

⁹⁴³ Saluka v. Czech Republic, at 273.

recapitalization was intended to avoid the profound effects the failure of one of Cyprus' two systemic banks would have had on its economy.

1067. Further, Laiki's recapitalization permitted the Bank to continue operating as a going concern. Due to the perspective of the forthcoming recapitalization, Laiki's auditors could certify its financial statements for 2011 and not include a reservation with regard to the viability of the Bank. The prospect of State support for the recapitalization also permitted the CBC to certify to the ECB that Laiki was viable and thus ensure that it could continue to benefit from ELA. Moreover, Laiki's recapitalization protected the interests of depositors and taxpayers, as it prevented the activation of the Deposit Guarantee Fund, with the attendant loss in deposits and taxpayer money. The Tribunal is persuaded that, had the recapitalization not been accomplished in June 2012, Laiki would have been confronted with massive deposit flight that could have threatened its ability to continue benefiting from ELA. Without the support of ELA, it would have been very likely that Laiki would have failed.
1068. The Tribunal is not persuaded that the ultimate insufficiency of the funds injected into Laiki affects the conclusion that the Underwriting Decree served a legitimate purpose. The funds provided by the Cypriot Government reflected the amount that the Bank itself had estimated as necessary in order to ensure compliance with the minimum CT1 ratio of 9% recommended by the EBA. In any event, when it became clear that Laiki would need a second recapitalization, Cyprus attempted to secure funds from the EFSF for this purpose.
1069. Second, the Tribunal does not share Claimants' view that the Underwriting Decree evidences the intent of the Cypriot Government to deter private investment and obtain control over Laiki. To the contrary, the record shows that Respondent acted in good faith when it recapitalized the Bank.
1070. The Tribunal has already established above that any delay by the Cypriot Government in clarifying the terms of its support for Laiki was not due to a supposed intent to discourage private investment. Instead, this delay was due to Laiki having submitted its request for State assistance relatively late, after having first attempted – unsuccessfully – to secure private investment. In addition, the Tribunal found that, while the Cypriot Government committed to support the Bank, it was only interested to do so as a measure of last resort, after the Bank had first sought private funds.
1071. The Tribunal is not persuaded that there was any change in Respondent's point of view at the time of issuing the Underwriting Decree.

1072. In this respect, the Tribunal does not consider that the statement of President Christofias during the Cabinet meeting of 17 May 2012 supports Claimants' theory of an overarching plan to nationalize the Bank. In effect, President Christofias declared:

“Before closing the matter I want to say regarding the three persons that we will appoint that I wish and hope that are [sic] not representatives of the banking capital that supposedly know these issues. They must be economists, they must be persons that understand these issues, but also persons devoted to the Government and not to the banking capital. We should pay attention to that when examining names.”⁹⁴⁴ [emphasis added]

1073. It is clear from this intervention that President Christofias was referring to the three members of Laiki's Board of Directors that the Minister of Finance was entitled to appoint under the then draft Underwriting Decree.⁹⁴⁵ Indeed, on 17 May 2012, the Cypriot Government had not been called to purchase the unsubscribed shares of Laiki's offering. Subject to its analysis with respect to the corporate governance terms in the Underwriting Decree, the Tribunal is of the view that the Cypriot Government was entitled to appoint persons of trust on Laiki's Board, who could effectively safeguard that the interests of depositors and taxpayers would not be eschewed by a Board potentially under private control.

1074. Further, the Tribunal is not persuaded that the minutes of the 17 May 2012 meeting of the Parliamentary Committee on Financial and Budgetary Affairs reveal that Respondent was intent on deterring private investment into Laiki.⁹⁴⁶ In the Tribunal's view, these minutes support the opposite conclusion – that there was an initial reluctance on the part of Parliament to support the Bank, that Parliament was eventually persuaded to support to Bank in order to avoid systemic risks and that both Parliament and the Ministry of Finance considered (rightly or wrongly) that the chosen recapitalization framework ensured that there would be private participation in Laiki's recapitalization and the State's involvement would be minimized.

1075. In this respect:

“CHAIRMAN: [...] Why this specific bank should be supported at this stage, what are the side-effects if it is not supported and what are these specific economic facts we have before us which are also important as regards our own decisions.

[...]

MINISTER OF FINANCE: [...] What is the consequence if we do not proceed with such issue? It shall possibly mean – and this can be confirmed also by the people of Laiki Bank

⁹⁴⁴ Extract from the Minutes of the Meeting of the Council of Ministers, 17 May 2012 (Exhibit C-0611).

⁹⁴⁵ Subsequently, the draft was amended so that the Minister of Finance could appoint five members of Laiki's Board (Section 11(1) of the Underwriting Decree).

⁹⁴⁶ Minutes of the Meeting of the Parliamentary Committee on Financial and Budgetary Affairs, regarding the Bill of Law “The Management of Financial Crises (Amending) (No. 2) Law of 2012”, 17 May 2012 (Exhibit C-0363).

– that since they are not in a position to proceed with the specific plan and given that nothing else specific is being planned which would assist the recapitalisation of the bank, then possibly, a statement by the specific bank that they cannot satisfy the condition of recapitalisation will be submitted [...] and the Central Bank of Cyprus thereafter shall apply to the Ministry of Finance in order to move for the recapitalisation of the bank pursuant to the law.

Given that the state is unable, at this stage, to find these resources for the recapitalisation, what will happen is that, very soon, the state shall be called to start negotiations with the European authorities, the EFSF, in order to secure the relevant amount, something which will lead, almost certainly, to the accession of Cyprus to the support mechanism with all negative conditions and implications which may exist upon the state.

[...] Going towards this direction and the proposal which is before you, apart from the fact that the capability and possibility is created that some money would be secured from investors, existing investors and/or new investors which shall reduce the state's exposure from €1.8 billion to a smaller number, it gives the potential to the state to proceed with some investigating efforts which are being made now in order to secure financing from a third country. [...]

REPRESENTATIVE OF THE CENTRAL BANK OF CYPRUS: [...] [T]he underwriting of this plan shall give the potential to more investors to participate in the issue, therefore, in essence, in case where the state would have to intervene and the Cypriot taxpayer would be burdened, the account for the Cypriot taxpayer shall be lower, precisely because there is the assurance of the underwriting by the state.

We should also emphasize that Laiki Bank is the second largest bank in Cyprus and has systemic importance. This means that any problems which the bank may have, if not recapitalized, will create systemic risks for all the system with very negative consequences for the entire Cypriot economy. An example which we could give is that, if we need to compensate the depositors, on the basis of the Deposit Guarantee Fund and the relevant regulations of the European Union which we also apply, the depositors should be compensated up to €100,000 maximum for each deposit they hold. In such case, with the latest data we have, we should pay – essentially, the state – over €7.5 billion in order to compensate the depositors.”⁹⁴⁷ [emphasis added]

1076. As further support for their contention that Respondent was intent on sabotaging the Bank's efforts to find private investors, Claimants refer to a statement made by Mr. Sarris, the Non-Executive Chairman of the Board of Laiki. The Tribunal however is not persuaded that this was the essence of Mr. Sarris' statement:

“We have indications from investors that if [there is] some kind of support from the state and indeed other additional things which could possibly strengthen the interest from investors..., in this way the possible provision of assistance by the state is decreased. [...] [W]e believe that the proposal before you is a proposal which gives us at least, a chance to raise capital from the private sector and also it is done in a manner which shall protect two elements, the stability of the financial system which we should not forget because we believe that Laiki's fate is connected also with the fates of the other banks in Cyprus. And the second one, to the extent possible, whereas the shareholder is most strictly punished,

⁹⁴⁷ *Id.*, pp. 11-13, 15, 16.

the depositor is protected, as well as the taxpayer who is also a citizen of the Republic of Cyprus.”⁹⁴⁸ [emphasis added]

1077. Mr. Sarris’ statement with respect to the Underwriting Decree’s effect on shareholders is questionable at best. However, the Tribunal considers that it is unlikely that Mr. Sarris, in the same breath, attempted to maximize private investor participation (“strengthen the interest from investors”, “gives us ... a chance to raise capital from the private sector”) while at the same time attempting to punish those same investors. The only reasonable conclusion that the Tribunal can draw from this statement is that Mr. Sarris meant to reassure disquieted members of Parliament that the State would not be asked to support the Bank with a substantial amount without obtaining in return some control over the Bank so that it could protect the depositors and taxpayers, if needed.
1078. Whatever the meaning of Mr. Sarris’ statement may have been, the Tribunal does not consider it to be dispositive. Indeed, Mr. Sarris was not speaking as a Government agent, but as a representative of Laiki, a private entity. The Tribunal has concluded at Section VII.C above that the acts of Laiki’s management during the period December 2011 to June 2012 are not attributable to Respondent. Further, the minutes of this session do not record officials of Cyprus taking a similar stance.
1079. The Tribunal therefore concludes that the record does not support Claimants’ position that, through the Underwriting Decree, Respondent intended to deter private investment in Laiki.
1080. Third, the Tribunal finds that the adoption of the Underwriting Decree ensured Claimants’ due process rights. Indeed, the Tribunal has already established that Laiki was consulted in the drafting process of the Underwriting Decree. In addition, Laiki’s input was reflected in the final draft of the Underwriting Decree.
1081. In this respect, Laiki’s Discussion Paper envisaged the following funding options for the State in the eventuality that no significant interest would be expressed by existing or new shareholders: (i) the Government would apply to the EFSF in order to obtain the necessary funds; (ii) the Government would obtain a bilateral loan from a “friendly country” at reasonable rates below market; and (iii) the Government would issue a bond to Laiki in exchange for common equity/CoCos. With respect to the latter option, Laiki expressed the view that, because the bonds would not provide liquidity, it would be more appropriate for the Government to receive CoCos rather than common equity. Laiki accepted that if the State injected funds in exchange for common equity, this meant that the State would obtain

⁹⁴⁸ *Id.*, pp. 32, 33.

a 70%+ stake in the Bank and private shareholders would be “effectively almost ‘wiped-out’”.⁹⁴⁹

1082. The record establishes that the Cypriot Government attempted to secure a loan from China and/or Russia both in the attempt to finance State expenses and to recapitalize the Bank. However, these attempts failed in June 2012 and Cyprus sought EFSF funding.⁹⁵⁰

1083. Further, the Tribunal finds that Laiki’s 2 May 2012 proposal to the Ministry of Finance⁹⁵¹ (with the clarifications sent on 12 May 2012)⁹⁵² was reflected in the Underwriting Decree. In effect, Laiki’s proposal envisaged that the size of the rights issue would be EUR 1.8 billion and the State would fully underwrite it. In order to incentivize private participation in the share issue, Laiki proposed that the Government offer incentives in the form of warrants to existing shareholders and participating investors and, possibly, a put option.

1084. While Respondent had to [REDACTED] at the demand of the European Commission’s Directorate General for Competition,⁹⁵³ at Laiki’s request, Respondent did include the share warrants and reduced the price for their exercise from 12% annually to 9%. Respondent also lowered the fee for the underwriting from 3% of the total amount of the issue to 2%.⁹⁵⁴

1085. Fourth, the Tribunal finds that the Underwriting Decree was not a discriminatory measure. At the time of its issuance, Laiki was the only Cypriot bank that had asked for State assistance. In March 2012, the BoC successfully completed a capital increase of EUR 160 million and a EUR 432 million voluntary conversion of Convertible Enhanced Capital Securities into ordinary shares. The BoC only applied for State support on 29 June 2012, almost two months after the Underwriting Decree was issued.⁹⁵⁵ On this basis, the Tribunal considers that, if any discrimination were to have occurred, it could only have been established through a preferential treatment accorded to the BoC subsequent to Laiki’s recapitalization. The Underwriting Decree was not as a result discriminatory. In any event,

⁹⁴⁹ Email [REDACTED] attaching Laiki’s Discussion Paper, “Recapitalising Marfin Popular Bank: The Prospective Role of the Cyprus Government, 5 March 2012 (Exhibit C-0788).

⁹⁵⁰ See, Letter from the CBC (P. Demetriades) to the ECB (M. Draghi), 15 June 2012 (Exhibit C-0375); J. Wilson, D. Dombey, P. Spiegel, “Cyprus requests Eurozone bailout”, *Financial Times*, 25 June 2012 (Exhibit C-0379).

⁹⁵¹ Letter from Laiki (C. Stylianides) to the CBC (P. Demetriades), 8 May 2012 (Exhibit R-0476).

⁹⁵² Email from Laiki [REDACTED] to Ministry of Finance [REDACTED] attaching Underwriting Proposal to the Republic of Cyprus, 12 May 2012 (Exhibit R-0478).

⁹⁵³ [REDACTED]

⁹⁵⁴ Email from Laiki [REDACTED] to Ministry of Finance [REDACTED] at 5:56, 15 May 2012 (Exhibit R-0479);

Email from Laiki [REDACTED] to Ministry of Finance [REDACTED] at 7:25, 15 May 2012 (Exhibit R-0480).

⁹⁵⁵ Letter from the BoC [REDACTED] to the CBC (P. Demetriades), 29 June 2012 (Exhibit R-0494).

the Tribunal has found at Sections X.C.7 and XII.C below that the BoC was not treated more favorably than Laiki.

1086. For all these reasons, the Tribunal finds that the recapitalization framework chosen by Respondent for Laiki was a non-discriminatory measure taken in good faith.

(iv) *A proportional measure*

1087. Finally, the Tribunal holds that the recapitalization framework chosen by Respondent complied with the requirement of proportionality.

1088. The Management of Financial Crises Law. On a preliminary basis, the Tribunal notes that this discussion appears to no longer be of interest to Claimants, as in their recent submissions, they have focused their pleadings on the Underwriting Decree. Nevertheless, the Tribunal considers that the adoption of the Management of Financial Crises Law was a proportionate measure which gave Respondent the tools to intervene in order to support distressed banks and avoid systemic risks to its banking system and economy.

1089. The Tribunal finds that the limitations imposed on shareholders' rights through Section 7 of the law were limited in scope, as they only applied in circumstances where State intervention was accomplished through one of the following means: (i) the granting of government loans to financial institutions; (ii) the granting of government guarantees for loans and/or for the issue of bonds; and (iii) the provision of capital in return for equivalent participation in the ownership structure of the financial institution. The Tribunal is of the view that the limitations provided for in Section 7 were meant to ensure that, subsequent to the State's financial intervention in a troubled bank, the bank at issue did not abuse the support given and pursue policies that contravened the interests of depositors and taxpayers.

1090. When weighed against the public interest sought to be protected, *i.e.*, the safety and soundness of the financial system, the Tribunal considers that the limitations imposed by means of Section 7 of the law were not excessive, so as to effectively deter private investment. Indeed, the evidence suggests that the law did not impede investor interest. Claimants' 22 November 2011 recapitalization plan expressly requested the application of the law, then in draft form, to Laiki's recapitalization. The BoC successfully recapitalized in March 2012 while the law was in force. Laiki's efforts to identify a strategic investor in February-May 2012 did not reveal that potential investors were discouraged due to the provisions of the law, but due to the Bank's exposure to Greece.

1091. The Underwriting Decree. Claimants argue that the corporate governance provisions included in the Underwriting Decree imposed disproportionate limitations on their

investment and deterred the participation of private investors in Laiki's recapitalization. Respondent counters that, at the time the Underwriting Decree was issued, it was virtually a guaranteed fact that the State would become the majority shareholder of the Bank due to the lack of investor interest and, as a result, the limitations did not materialize.

1092. For the reasons that will be outlined in the paragraphs below, the Tribunal considers that the corporate governance provisions included in the Underwriting Decree, despite not being in conformity with international best practices, nevertheless do not fall foul of the Treaty on grounds of proportionality. While the governance provisions may have played a role in discouraging private investment, the Tribunal is not persuaded that it was those provisions alone that led to the weak interest in the Bank from the private sector. The Tribunal recalls that, at the time of the issuance of the Underwriting Decree, Laiki was in a precarious financial condition and had unsuccessfully attempted to attract strategic investors. Such investment was not forthcoming mainly due to the Bank's heavy exposure to Greece. The Underwriting Decree was issued following Laiki's application for State support and was intended to permit the Bank to continue operating as a going concern. The recapitalization thus avoided a disorderly collapse of the Bank and disastrous effects on the Cypriot economy. Further, and in any event, the evidence in the record does not support Claimants' contention that the attraction of private investment would have somehow avoided the dilution of their shareholding. To the contrary, it is much more likely that, due to the substantial amount of capital needed to recapitalize the Bank, any strategic private investor would have demanded to obtain control. Thus, the Tribunal finds that, on balance, while the Underwriting Decree was far from perfect, it did not place an excessive burden on Claimants whilst attempting to secure the Bank's survival and the safety and soundness of the Cypriot financial system and economy at large.

1093. The Tribunal will explain these findings in more detail in the paragraphs below.

1094. At the outset, the Tribunal considers that it is important to establish a point of reference for its analysis under the proportionality rubric. Indeed, what is relevant is whether the corporate governance provisions included in the Underwriting Decree imposed an excessive burden on Claimants' investment, as that investment existed on 18 May 2012. This includes an analysis into whether Claimants' rights to exercise their pre-emption rights in order to maintain their equity stake in the Bank were excessively burdened by the corporate governance provisions in the Underwriting Decree. The proportionality analysis may not rest upon the potential effects of the corporate governance provisions on potential private investors that would have injected funds into Laiki. Even assuming those investments were a certainty, they are not protected under the Treaty.

1095. In its assessment of whether the challenged measures imposed a disproportionate, excessive burden on Claimants, the Tribunal has weighed the competing interests at stake.

1096. On the one hand, the Tribunal considers that Cyprus had a legitimate interest to attach certain conditions to the support it provided to the Bank. Considering that Respondent underwrote the entirety of Laiki's share issue, and that it assumed the risk of having to subscribe the full amount of EUR 1.8 billion, Cyprus could legitimately demand that some restrictions be placed on the Bank so as to protect the interest of taxpayers and the stability of the financial sector. The Tribunal considers that this interest is reflected in the final two sentences of Section 11 of the Underwriting Decree:

"Provided that the Ministry, upon consultation with the Central Bank, has the right to impose stricter terms of conduct for purposes of implementing the Restructuring Plan and enforcing the Law and the current Decree."⁹⁵⁶

Provided further that, the power of the Minister to set terms and conditions arise directly from the provisions of the Law and cease to be valid upon repurchase of the bank of the new shares acquired by the Republic or sold to third parties."⁹⁵⁷ [emphasis added]

1097. The minutes of the Parliamentary Committee on Financial and Budgetary Affairs' session of 17 May 2012 also show that Respondent was concerned that the Bank would misuse the assistance given and/or take decisions against the interests of taxpayers. This concern also applied to the time period between the issuance of the Underwriting Decree and the recapitalization:

"REPRESENTATIVE OF THE MINISTRY OF FINANCE: [...] In that period, the three directors to be appointed by the government shall have the right to veto all the decisions of the Board of Directors therefore any actions of the board which are against the interests of the taxpayer and of the need to safeguard the financial stability in the Cypriot economy, may be deterred."⁹⁵⁸

1098. On the other hand, Claimants had a legitimate interest that their shareholding should continue to entitle them to participate in the decision-making processes of the Bank in a proportion that reflected, though perhaps not necessarily mirrored, their equity contribution.

1099. In reaching its finding that the limitations included in Section 11 of the Underwriting Decree did not impose an excessive burden on Claimants' investment, the Tribunal has considered the extent of the burden imposed, as well as the circumstances extant on 18 May 2012. The Tribunal has also accepted Ms. Bertin's testimony that the Underwriting

⁹⁵⁶ The Tribunal notes that in the Greek version of the text the symbol used at the end of this sentence is ":", not "''".

⁹⁵⁷ Republic of Cyprus, Decree 182/2012 (Management of Financial Crises Laws of 2011 to (No 2) 2012), 18 May 2012 www.centralbank.gov.cy (Exhibit CL-0146).

⁹⁵⁸ Minutes of the Meeting of the Parliamentary Committee on Financial and Budgetary Affairs, regarding the Bill of Law "The Management of Financial Crises (Amending) (No. 2) Law of 2012", 17 May 2012, p. 42 (Exhibit C-0363).

Decree did not reflect international best practice and has taken due note of her testimony below:

“MR PRICE: Are you aware of any other country which has adopted such a decree with similar governance provisions that, in your view, are not friendly to investors?”

A. Just to be sure I understand the question, you are asking me whether I am aware of another situation where a country adopted a similarly investor-unfriendly decree?

MR PRICE: Correct.

A. I’m not aware of [sic].”⁹⁵⁹

1100. In determining the extent of the burden imposed on Claimants’ investment by Section 11 of the Underwriting Decree, the Tribunal observes that there were two types of limitations involved:

“11. (1) The Minister with the concurring opinion of the Central Bank and the Committee on Financial and Budgetary Affairs of the House of Representatives appoints from the date of publication of this Decree, up to five members on the Board of Directors of the bank.

(2) With the concurring opinion of at least two of the five members of the Board of Directors, appointed by the Minister, a right of veto is exercisable with respect to all decisions of the Board of Directors.

(3) Upon the acquisition of the new shares by the Republic, the Minister with the concurring opinion of the Central Bank and the Parliamentary Committee on Financial Affairs of the House of Representatives, may appoint the majority on the Board of Directors, irrespective of the amount of the Republic’s participation in the ownership structure of the bank.

[...]

(6) No decision of the General Meeting of the shareholders of the bank is enforced without the approval of the Minister.”⁹⁶⁰

1101. First, as of the date of the publication of the Underwriting Decree, the Minister of Finance was entitled to appoint five members on Laiki’s Board, two of whom could exercise a right of veto over any decision of the Board. Second, if the State were to acquire shares in the Bank, the State would be entitled to appoint the majority of the members of Laiki’s Board and to effectively veto decisions of the General Meeting of Shareholders.

1102. The Tribunal agrees with Claimants that the powers granted to the Cypriot Government were substantial and unusual in terms of the burden imposed on existing shareholders. However, these powers were limited in time.

⁹⁵⁹ Tr., Day 3, 99: 4-12.

⁹⁶⁰ Republic of Cyprus, Decree 182/2012 (Management of Financial Crises Laws of 2011 to (No 2) 2012), 18 May 2012 www.centralbank.gov.cy (Exhibit CL-0146).

1103. In particular, the powers granted to Respondent regardless of the subscription of shares lasted from 18 May 2012 until 30 June 2012, i.e., less than two months.
1104. The Tribunal also finds that the powers given to Respondent in consideration of the subscription of shares were likewise limited: they lasted until the State's exit from the shareholding.
1105. At the hearing, substantial attention was devoted to determining whether there was an end-date to the terms and conditions set out in Section 11. In particular, the Parties focused their attention on the final sentences of Section 11:

“(13) The bank undertakes any cost that may arise from the involvement of the Republic in the underwriting of the whole pre-emption rights issue of the bank or from the subsequent participation of the Republic in the ownership structure of the Bank:

Provided that the Ministry, upon consultation with the Central Bank, has the right to impose stricter terms of conduct for purposes of implementing the Restructuring Plan and enforcing the Law and the current Decree”

Provided further that, the power of the Minister to set terms and conditions arise [sic] directly from the provisions of the Law and cease to be valid upon repurchase of the bank of the new shares acquired by the Republic or sold to third parties.”⁹⁶¹

1106. The Tribunal cannot accept Claimants' position that the two provisos at the end of Section 11 are connected with, and qualify only, paragraph (13). It appears to the Tribunal that the final sentences refer to restrictions imposed on the Bank's business (“the right to impose stricter terms of conduct”), whereas paragraph (13) does not address such conduct in any way, but simply answers the question of who bears the costs arising out of the underwriting or of the Government's participation in the Bank's ownership. Further, the Tribunal considers that the final two sentences of Section 11 are two sides of the same coin: the first sentence empowered the Ministry of Finance to impose stricter measures so as to ensure compliance with the Bank's Restructuring Plan; the second sentence provided that the Minister's powers under Section 11 ended automatically (“the power of the Minister ... cease [sic] to be valid upon repurchase”) when the State exited the Bank.
1107. The Tribunal therefore finds that the corporate governance provisions in Section 11 of the Underwriting Decree, while affording the Government substantial powers, were not unlimited in time. Instead, they ended upon the State's exit from the Bank.

⁹⁶¹ *Id.*

1108. Turning now to the circumstances present at the moment of the enactment of the Underwriting Decree, the Tribunal reiterates its finding that, as of 18 May 2012, Laiki was in a precarious financial condition and had not succeeded in attracting private investment due to the extent of its exposure to Greece.
1109. Laiki's Discussion Paper, dated 5 March 2012 and relied upon by Claimants, explicitly envisaged that, even if a strategic investor were to be found, that investor would be reluctant to commit significant funds due to the uncertainty surrounding Greece and the Bank's Greek portfolio. Moreover, the Discussion Paper expressly mentioned that existing investors would probably not commit funds into the recapitalization if no strategic investor could be identified. In this scenario, Laiki estimated that the State would end up with a shareholding in the Bank exceeding 70%.⁹⁶²
1110. Subsequent correspondence between Laiki, the Ministry of Finance and the CBC, internal Laiki emails, as well as correspondence with potential investors revealed that, as the deadline for the Bank's recapitalization approached, the likelihood of finding a strategic investor diminished. The 22 April 2012 internal Laiki email reporting on meetings with potential investors in London is further evidence that there was a strong reluctance in the market to invest in a Bank so heavily exposed to Greece:

"3. They ALL stated that the problem is Greece and the uncertainty that it creates for them. They were very blunt in saying that They [sic] would not touch anything with such a significant exposure in Greece, UNLESS, something is done with our operations there. The issue of ring fencing was raised and discussed as a possible solution along with other measures.

4. It is my conviction, following these meetings, that money can be raised if we have an investment proposal for these investors that addresses fully the following (i) [sic] proper government participation (non-dilutive, guarantee, first loss) that they can evaluate. (ii) proper and bullet proof ring fencing of Greece (iii) that no further capital needs will be required in the very near future. They ALL said That [sic] they would consider such a proposal once available."⁹⁶³

1111. The Tribunal agrees with Professors Landau and Metrick, and notes that Claimants also appear to acknowledge, that the conditions demanded by the prospective investors before committing funds (non-dilutive, guarantee, first loss government participation) were too onerous for the State to be deemed reasonable.⁹⁶⁴

⁹⁶² Email [REDACTED] attaching Laiki's Discussion Paper, "Recapitalising Marfin Popular Bank: The Prospective Role of the Cyprus Government, 5 March 2012 (Exhibit C-0788).

⁹⁶³ Email from [REDACTED] 23 April 2012 (Exhibit C-0666).

⁹⁶⁴ C-PIIS, at 85 (e); Metrick-Landau Second Expert Report, at 174-177.

1112. The challenge to find private investors was compounded when, following the Greek legislative elections in May 2012, no parliamentary majority could be formed and the markets were concerned that Greece may not accept the conditionality program agreed with the Troika, default on its obligations and exit the Eurozone. Laiki's 11 May 2012 letter to the CBC recorded management's fear that, due to the situation in Greece, the risk of a "possible mass bank run from depositors" should be tackled.⁹⁶⁵

1113. The minutes of the Parliamentary Committee on Financial and Budgetary Affairs' session of 17 May 2012 record the CEO of Laiki, Mr. Stylianides, make the following declaration:

"A. KYPRIANOU:

You are bankers. Have you made an estimate of how much would the private investment be? Out of the €1.8 billion based on your specific proposal. I am sure that you have talked with investors, with states etc. Tell us, what is your estimate of what the investment of the private sector will be?

[...]

CHIEF EXECUTIVE OFFICER LAIKI BANK GROUP:

I shall tell you some very rough estimates. With the existing current facts, we do not estimate that this will be over 50%. This is the only thing I can tell you. [...]

Mr. Chairman, I would like to say something. I did not say '50%'. 'Under no circumstances it is over 50%'. Therefore, if you want me to be fully covered because I know what I am saying, it is from 0% up to 50%."⁹⁶⁶

1114. Another relevant circumstance present on 18 May 2012 is that, up until that time, existing shareholders had not firmly indicated that they wanted to participate in the recapitalization. Their tentative interest to avoid dilution was recorded in Laiki's Discussion Paper, but with the caveat that funds might not be available. Further, the same Discussion Paper mentioned that existing shareholders would in all likelihood not invest if no strategic investor were to be found. In effect, no such investor ever materialized, so it is reasonable to infer that, as of 18 May 2012, it had become clear both to Laiki's management and to Respondent that neither the existing shareholders, nor other third-party investors would commit to invest in the Bank, at least to an extent that would avoid a situation in which the State obtained majority ownership.

1115. In any event, even if private investment had been found, Claimants have not discharged their burden of proving that this would have avoided the dilution of their shareholding. The Tribunal is of the view that, to the contrary, in light of significant funds necessary to

⁹⁶⁵ Letter from MPB (C. Stylianides) to CBC (V. Shiarily), 11 May 2012 (Exhibit C-0793).

⁹⁶⁶ Minutes of the Meeting of the Parliamentary Committee on Financial and Budgetary Affairs, regarding the Bill of Law "The Management of Financial Crises (Amending) (No. 2) Law of 2012", 17 May 2012, pp. 75, 76 (Exhibit C-0363).

recapitalize the Bank, it is unlikely that a potential investor would have agreed to a shareholding structure that did not accurately reflect their financial outlay.

1116. It therefore remains to be determined whether, after State support was announced, the corporate governance provisions in the Underwriting Decree excessively burdened Claimants' existing corporate governance rights and deterred them from exercising their pre-emption rights in order to avoid dilution. Whether those same corporate governance provisions deterred other, private investors, is of no interest to this analysis. In such an eventuality, Claimants would have suffered from the same dilution and the same limitations as in the situation in which no private investors were found.

1117. The Tribunal considers relevant in this respect that, on 25 October 2011, when Claimants were considering various proposals in order to strengthen the capital position of the Bank, including recapitalization, Government guarantees and the redemption of assets, the issue of the State's veto right emerged. Indeed, Claimants' proposal envisaged that, if the Cypriot Government were to cover all or any part of the share capital increase corresponding to a proportion higher than 20%/25% of the share capital, the Government would have a

[REDACTED]

1118. Further, on 22 November 2011, in their recapitalization proposal under the Management of Financial Crises Law, Claimants suggested that Cyprus should appoint the majority of the Board of Directors if it obtained a shareholding greater than 50% in the share capital of the Bank, or, if its participation interest was less than 50%, that it should appoint a number of directors that was proportionate to its interest. In the latter scenario, the State would maintain the right of veto for important strategic matters.⁹⁶⁸

1119. In other words, Claimants appeared to accept that, once State funds were injected into the Bank, the Cypriot Government had a legitimate interest to ensure that the Bank did not pursue policies at odds with the interests of depositors and taxpayers and could veto any decision to this effect.

1120. Further, the Tribunal considers that the recommendation of MIG's Executive Committee that the company not exercise its pre-emption rights is noteworthy.⁹⁶⁹ The Tribunal observes that, while the appointment of Board members by the Ministry of Finance is mentioned as a reason not to commit funds, the majority of the reasons listed were entirely

⁹⁶⁷ [REDACTED]

⁹⁶⁸ Letter from MPB (E. Bouloutas) to the Ministry of Finance (K. Kazamias), 22 November 2011 (Exhibit C-0289).

⁹⁶⁹ Internal Memorandum to MIG Executive Committee [REDACTED]

[REDACTED] "Exercise of pre-emption rights in the Share Capital Increase of Cyprus Popular Bank", 26 June 2012 (Exhibit C-0381).

unrelated to the corporate governance provisions in the Underwriting Decree. Instead, MIG was more concerned with the inevitable dilution of its investment following an injection of funds and the uncertainty of being able to maintain even a diluted shareholding. MIG anticipated that it would lose control over the Bank definitively, as the Government was probably going to be the new majority shareholder. No explicit mention was made of the Government's veto right with respect to decisions of the Board or of the general meeting of the shareholders.

1121. An additional circumstance that is relevant to the Tribunal's assessment is that, to the Cypriot Government, ensuring that the Bank duly implemented its restructuring plan was a priority, as it would have enhanced the likelihood of exiting the Bank and of recuperating taxpayer funds.
1122. For all these reasons, the Tribunal considers that the Underwriting Decree, while containing corporate governance provisions that could be perceived as harsh on private investors, nevertheless did not fall foul of the Treaty on grounds of proportionality.
1123. Respondent's use of an unfunded State bond to recapitalize Laiki does not affect this conclusion. The Tribunal is mindful of the ECB's opinion that recapitalization through State bonds risked being regarded by the markets as lacking credibility due to the fact that they did not provide banks with liquidity.⁹⁷⁰ However, the Tribunal also notes that the ECB considered that bank-resolution tools would have been more appropriate for Laiki's solvency problems:

"In view of the fact that the support measures under the Ministerial Decree aim to address solvency problems at a financial institution, the ECB considers that the objectives pursued by the support measures may be better achieved through bank resolution tools. A fully-fledged bank resolution regime, comprising tools such as bridge banks, asset separation and transfers of business would offer legally sound means of resolving institutions on the brink of insolvency, safeguarding financial stability, whilst addressing stakeholder rights."⁹⁷¹ [internal citations omitted] [emphasis added]

1124. The Tribunal further notes that the State bond was counted towards Laiki's CT1 capital ratio in order to bring the Bank into compliance with the EBA recommendation. As the Tribunal has already found in the paragraphs above, recapitalization permitted Laiki to continue operating as a going concern. It was solely due to the prospect of a State-backed recapitalization that Laiki's auditors could certify its financial statements for 2011 and not include a reservation with regard to the viability of the Bank. Equally, the CBC could certify to the ECB that Laiki was viable and thus ensure that it could continue to benefit

⁹⁷⁰ European Central Bank, "Opinion on the recapitalisation of the Cyprus Popular Bank", (CON/2012/50), 2 July 2012 (Exhibit C-0386).

⁹⁷¹ *Id.*

from ELA. The Tribunal is persuaded that, if Laiki had not been recapitalized by the State in June 2012, it risked not being able to continue receiving ELA. In the absence of this form of support, it would have been very likely that Laiki would have failed.

1125. Moreover, the Tribunal has already found that the Treaty does not impose on Cyprus an obligation to seek international financial assistance in order to support banks in difficulty. Respondent was therefore not held by an obligation to resort to the EFSF in order to inject liquidity into the Bank. In any event, Respondent continued to offer liquidity to Laiki in the form of ELA. The Tribunal also notes that, at the time the Underwriting Decree was issued, the bond could have been used to raise liquidity through ECB refinancing operations. The bond only became ineligible for ECB refinancing on 25 June 2012, when Fitch downgraded Cyprus to “BB+”, outlook negative.⁹⁷²
1126. For all these reasons, the Tribunal concludes that the Bank’s recapitalization in 2012 was not expropriatory.

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1127. For all the reasons set out in Section IX.C above, the Tribunal finds that Claimants’ expropriation claim is without merit.
1128. Before proceeding with a presentation of the Parties’ arguments with respect to the remaining alleged breaches of the Treaty, the Tribunal observes that, in their Reply, Claimants have made the following clarification:

“Cyprus begins this effort by arguing that the events complained of between 2007 and 2009 did not violate the FET standard. The Claimants never argued otherwise, but only identified these events as a prologue to contextualize the treatment that ensued. By October 2011, the long pattern of hostility to Greek ownership of Laiki was in full view and ultimately led to the decimation of the Claimants’ investments.”⁹⁷³

1129. The Tribunal understands Claimants’ statement to mean that they are no longer maintaining their claims for breach of the Treaty for any events which occurred during the period 2007-2009, and specifically:
- (i) Cyprus’ alleged violation of the FET standard as a result of its failure to engage in dialogue in 2009, which Claimants argued was inconsistent, arbitrary, unreasonable, oppressive, not transparent and in bad faith (Memorial, at 412-418);

⁹⁷² Fitch cuts Cyprus to ‘BB+’, Outlook Negative”, *Reuters*, 25 June 2012 (Exhibit C-0378); J. Cotterill, “A Cyprus liquidity switch”, *Financial Times*, 26 June 2012 (Exhibit C-0380).

⁹⁷³ Reply, at 90.

[REDACTED]

C. The Tribunal's analysis

1210. Article 2 of the Treaty ("Promotion and Protection of Investments") reads:

"1. Each Contracting Party promotes in its territory, investments by investors of the other Contracting Party and admits such investments in accordance with its legislation and its policy regarding foreign investments.

2. Investments by investors of a Contracting Party in the territory of the other Contracting Party shall at all times be accorded fair and equitable treatment and full protection and security. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other Contracting Party, are not impeded in any way by unjustifiable or discriminatory measures.

3. A possible change in the form in which the investments have been made does not affect their substance as investments, provided that such a change does not contradict the laws, regulations and the policy regarding foreign investments of the relevant Contracting Party.

4. Returns from investments and, in cases of approved re-investments, the income ensuing therefrom enjoy the same protection as initial investments."

[REDACTED]

1211. The Parties do not dispute that the FET standard is breached by conduct that is arbitrary, discriminatory, in bad faith, that fails to afford due process or to ensure appropriate levels of transparency. The Parties also agree that some proportionality inquiry must factor into a tribunal's analysis under the FET standard.
1212. The Parties disagree however on how to appropriately determine proportionality. Claimants put forward that the Tribunal should seek to determine whether the challenged measures were "appropriately tailored to the pursuit of [a] rational policy with due regard for the consequences imposed on investors".¹¹³¹ Claimants consider that this requires the Tribunal to ascertain, *inter alia*, whether the challenged measure is the least restrictive means available to achieve the stated goal pursued by a State. Respondent takes exception to this reading of the FET standard, arguing that it is not supported by arbitral jurisprudence. Respondent considers that such a reading of the FET standard would transform the Tribunal's inquiry into a *de novo* review of the correctness and suitability of the challenged measures, which is impermissible. In Respondent's view, the Tribunal should recognize that States enjoy a "margin of appreciation" when taking measures in the public interest, such as the protection of public health or the stability of the financial system as a whole.
1213. The Tribunal does not consider it necessary to determine whether the theory of the "margin of appreciation", which was developed in international human rights jurisprudence, is equally applicable in investor-State arbitration. The Tribunal has already concluded in Section IX.C.2 above, in the context of its expropriation analysis, that it is not the role of an international arbitral tribunal to evaluate the substantive correctness of economic and policy choices made by a State. This same conclusion is equally valid in the context of an FET analysis. In the words of the *S.D. Myers v. Canada* tribunal, the FET standard does not create an "open-ended mandate to second-guess government decision-making".¹¹³² On the facts of this case, the Tribunal should not determine, with the benefit of hindsight, whether the challenged measures were the best solution that could have preserved the investors' interests and could have achieved the legitimate policy goal being pursued. Instead, the Tribunal will limit its analysis of the challenged measures' proportionality to determining whether the measures "bea[r] a reasonable relationship to some rational policy"¹¹³³ and were appropriately tailored so as not to impose an excessive burden on an investor.
1214. The Tribunal wishes to make some preliminary remarks with respect to Claimants' submission that Cyprus breached their legitimate expectations. Claimants refer in

¹¹³¹ *Micula v. Romania*, at 525.

¹¹³² *S.D. Myers v. Canada*, at 261.

¹¹³³ *Invesmart v. Czech Republic*, at 454.

particular to: (i) an expectation that Cyprus would conduct itself in accordance with the principles of impartiality, regularity and proportionality; and (ii) an expectation that Cyprus would follow the “rules of the road” agreed at the Eurozone summit.

1215. First, the Tribunal is of the view that the breach of an expectation that a State would conduct itself impartially, regularly and reasonably does not represent a separate legal basis for finding a breach of the FET standard. The FET standard, in and of itself, establishes such an obligation. There is therefore no need to place this legal construct under the legitimate expectations rubric.
1216. Second, the Tribunal notes that, while Claimants seek to demonstrate that the “rules of the road” agreed at the Eurozone Summit were the basis of their legitimate expectations protectable under the Treaty, Claimants also challenge Cyprus’ failure to demand better terms during the Eurozone Summit, thus disputing the very outcome of the summit, of which the “rules of the road” were one. Claimants have not adequately explained this contradictory stance.
1217. For the reasons that will be developed in the subsections below, the Tribunal has reached the conclusion that the record does not support Claimants’ claim that Respondent breached the obligation to accord their investments fair and equitable treatment.

1. Whether Cyprus’ response to PSI+ breached the FET standard

1218. The Tribunal has concluded at Section IX.C.2 above that Cyprus’ handling of PSI+ and its purported failures to seek to negotiate an exemption from the EBA capital exercise or to seek financial assistance from the EFSF were not expropriatory. The Tribunal based this finding on its conclusion that Respondent’s conduct was not arbitrary, capricious, unrelated to a rational policy or manifestly lacking in even-handedness. Consequently, and for the same reasons that the Tribunal found that Cyprus’ response to PSI+ was not expropriatory, it now also finds that this conduct did not breach the FET standard.

2. Whether Cyprus shunned Laiki’s November 2011 recapitalization plan

1219. The Tribunal has found at Section IX.C.4 above that Cyprus did not fail to engage with the Bank’s November 2011 recapitalization plan, but instead advised Claimants of the steps that needed to be followed in order to obtain State support. The Tribunal also held that Respondent’s demand for a due diligence of the Bank prior to a grant of State financial support was reasonable under the circumstances, as it would have allowed Cyprus to understand the financial condition of the Bank and the extent of the financial support

needed. Further, the Tribunal concluded therein that, contrary to Claimants' submission, a similar demand was made following the removals of Messrs. Vgenopoulos and Bouloutas in 2012, and again in 2013, when Cyprus was considering whether to support both Laiki and the BoC with funds from the Troika. For these same reasons, the Tribunal concludes that Respondent did not breach the FET standard through its handling of Claimants' recapitalization plan.

3. Whether Cyprus failed to quell rumors about Laiki

1220. The Tribunal holds that Respondent did not breach the FET standard on this basis and the record does not support Claimants' contention that the CBC was the source of rumors concerning the Bank's liquidity and ultimate viability.

1221. The contemporaneous documents referred to by Claimants in support of their claim are email chains that state as follows:

- On 30 September 2011, a Laiki employee notified management that two accounts, one belonging to a CBC employee and a second to their mother, had been closed prior to maturity.¹¹³⁴
- Sometime prior to 18 October 2011, a CBC employee closed a deposit of EUR 270,000 before maturity, stating that they wanted to transfer the amount to the BoC's private banking division. However, that employee continued to maintain with Laiki a deposit of USD 109,000.¹¹³⁵
- Sometime prior to 26 October 2011, another CBC employee withdrew approximately EUR 200,000 and announced an intention to close a deposit of her daughter's, of EUR 37,000, citing "discussions in her working environment".¹¹³⁶

1222. In other words, the evidence proffered by Claimants shows that three CBC employees, who are unnamed and otherwise unidentified, closed their deposits with Laiki prior to maturity. The Tribunal has not been offered any information about these employees, where they ranked in the hierarchical structure of the regulator and what type of information they had access to as a result of their work with the CBC. The Tribunal cannot conclude from the simple fact of their employment affiliation that they had access to sensitive financial information pertaining to Laiki and made financial decisions on this basis. It is equally likely that these three individuals, like other depositors with the Bank, were informed

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through other sources (such as the press) about Laiki's difficult financial position. The capital markets had already factored in the Bank's precarious position, as evidenced by the continued decline of Laiki's share price at the time. Moreover, these events were taking place at a time of continued worsening of the Greek financial crisis and it was public knowledge that Laiki was heavily exposed to the Greek financial market.

1223. The testimonies of Messrs. Kounnis and Bouloutas do not provide any more clarity as to the identity and/or position of these CBC employees. Further, the Tribunal finds Mr. Kounnis' speculative assertion that "it [had] always [been] [his] sentiment that the rumours originated within the CBC itself" and particularly with Mr. Orphanides, who "resorted to this tactic as a means of undermining Mr Vgenopoulos",¹¹³⁷ to strain credulity. The Tribunal finds it highly implausible that the Governor of the CBC, whose main responsibility was to guarantee the stability of the financial system, orchestrated a bank run in order to put pressure on Mr. Vgenopoulos, all the while offering substantial liquidity assistance to that same Bank through ELA.
1224. Finally, the Tribunal is not persuaded that the withdrawal of a few deposits by CBC employees demonstrates the existence of rumors with regard to the financial health of the Bank.
1225. For these reasons, the Tribunal finds that Claimants' claim that Respondent breached the FET standard by failing to quell rumors about Laiki have no merit.

4. Whether the removal of Claimants-led management breached the FET standard

1226. In its analysis under Section IX.C.3 above, the Tribunal concluded that the removal of Mr. Vgenopoulos was not expropriatory, but the result of his personal decision not to oppose the wishes of the CBC. The Tribunal also found that the record does not support Claimants' contention that the CBC threatened to withdraw ELA in order to force Mr. Vgenopoulos to resign or that the members of Laiki's Board of Directors were pressured. For these same reasons, the Tribunal concludes that the removal of Mr. Vgenopoulos does not fall foul of the Treaty's FET standard.
1227. With regard to the purported removal of managers and directors affiliated with Claimants, the Tribunal found in Section IX.C.3 above that it was the Bank, through its constituent legal organs and following due procedures, who elected new members of the Board and senior management. The Tribunal also concluded that the record did not support Claimants' contention that directors and managers affiliated with them were excluded or sidelined. For

¹¹³⁷ Kounnis Witness Statement, at 12.

these same reasons, the Tribunal now finds that there is no evidentiary support for the purported policy of “Cypriotization” of Laiki, and that no breach of the FET standard can arise therefrom.

1228. Finally, in Section IX.C.3 above, the Tribunal held that the removal of Mr. Bouloutas was carried out in a good faith effort to protect the public welfare, that it was non-discriminatory, complied with due process and was proportional. The Tribunal found that there were objective facts that supported the CBC’s decision to remove Mr. Bouloutas, such as the Bank’s longstanding non-compliance with regulatory liquidity ratios, its increasing reliance on central bank financing and the ineffectiveness of management’s efforts to improve the Bank’s finances. The Tribunal expressed the view that it was not necessary to determine with precision the causes of the Bank’s financial problems or what remedial measures would have been best to address them. It was sufficient to establish that the CBC did not act arbitrarily, abusively or with improper motives to conclude that the challenged conduct was not expropriatory. For these same reasons, the Tribunal now also concludes that the removal of Mr. Bouloutas did not violate the FET standard in Article 2(2) of the Treaty.

5. Whether the management of Laiki post-December 2011 breached the FET standard

1229. The Tribunal has found at Section VII.C above that the conduct of Laiki and of its Board is not attributable to Respondent. For this reason, no breach of Article 2(2) of the Treaty can arise from the conduct of Laiki’s management post-December 2011.

1230. The Tribunal finds that, in any event, Claimants have not carried their burden of proving that it was the reforms put in place by Laiki’s new management as well as its performance during this period that caused the Bank’s financial troubles. The Tribunal notes that, to the contrary, the record supports the opposite conclusion. Laiki began experiencing financial difficulties long before Messrs. Vgenopoulos and Bouloutas were replaced. A lengthy correspondence with the CBC dating back to October 2010 shows that Laiki’s liquidity position consistently deteriorated. An on-site audit report of MEB released in August 2011¹¹³⁸ showed additional grave problems affecting the Bank’s loan portfolio, deposits and internal governance. Soon thereafter, the Bank began receiving ELA which ballooned in December 2011 to EUR 3.3 billion.¹¹³⁹ PwC, the Bank’s auditors, could not certify the financial statements for 2011 – when Laiki was still managed by Claimants – due to uncertainty over its ability to continue as a going concern.¹¹⁴⁰

¹¹³⁸ Letter from the CBC (K.S. Poullis) to MPB (E. Bouloutas), 24 August 2011 (Exhibit C-0255).

¹¹³⁹ Laiki Group Liquidity Position Update, 1 December 2011 (Exhibit R-0128).

¹¹⁴⁰ Letter from PwC (██████████) to MPB (M. Sarris), 20 March 2012 (Exhibit C-0348).

1231. Further, the Tribunal has concluded at Section IX.C.4 above that private investors were reluctant to invest in the Bank due to its heavy exposure to Greece. While the efforts made by Laiki's new management could have been amplified, the record does not support Claimants' contention that it was due to the insufficiency of such efforts that no private investor was found. The overwhelming reason cited by investors throughout this time was the Bank's exposure to Greece. Moreover, as held in Section IX.C.4 above, the record does not support Claimants' contention that MIG expressed a serious interest in purchasing Laiki's Greek operations.
1232. For all these reasons, the Tribunal concludes that the management of Laiki subsequent to December 2011 did not represent a breach of Article 2(2) of the Treaty.

6. Whether Cyprus intentionally deterred private investment in Laiki in breach of the FET standard

1233. In Section IX.C.4 above, the Tribunal has found that the record does not support Claimants' contention that Cyprus delayed clarifying the terms of its support for Laiki in an attempt to sabotage the Bank's chances of finding private sources of capital. To the contrary, the evidence shows that the most important factor that discouraged private investors from showing an interest in the Bank was its substantial exposure to Greece. Within the same section of the present Award, the Tribunal concluded that the recapitalization framework chosen by Cyprus, while containing terms that were not in conformity with international best standards, was not arbitrary, discriminatory or disproportionate. These conclusions are equally applicable here, in the context of an FET analysis.
1234. The Tribunal has taken note of Claimants' submission that the following statement included in Annex 2 to the Eurozone Summit statement set out "the rules of the road" that Eurozone Governments were meant to follow when offering assistance to distressed financial institutions:

"Banks should first use private sources of capital, including through restructuring and conversion of debt to equity instruments. Banks should be subject to constraints regarding the distribution of dividends and bonus payments until the target has been attained. If necessary, national governments should provide support, and if this support is not available, recapitalisation should be funded via a loan from the EFSF in the case of Eurozone countries."¹¹⁴¹

¹¹⁴¹ Euro Summit Statement, 26 October 2011 (Exhibit C-0272).

1235. The Tribunal does not consider it necessary to determine whether the principles set out in “the rules of the road” could represent a source of Claimants’ legitimate expectations. It is sufficient to conclude, for purposes of the present analysis, that, even if Claimants could derive such expectations from Annex 2, those expectations have not been breached by Respondent. Indeed, Respondent’s approach to Laiki’s recapitalization followed the same steps as those set out in Annex 2 to the Eurozone Summit statement. In an initial stage, Respondent indicated to the Bank that it would intervene only as a last resort, and only to the extent that the Bank could not find alternative sources of capital. When Laiki’s attempts to find private investment failed, Cyprus offered to underwrite the Bank’s share issue and eventually purchased the majority of the new shares. When it became apparent that Laiki would require a second recapitalization, Cyprus applied to the EFSF for funding.
1236. For all these reasons, the Tribunal concludes that Respondent did not breach Article 2(2) of the Treaty through its recapitalization of Laiki in the first half of 2012.

7. Whether Cyprus discriminated against Claimants’ investment

1237. At the outset, the Tribunal notes that its conclusions below are limited to determining whether Respondent discriminated against Claimants’ investment, in breach of Article 2(2) of the Treaty. In other words, its observations and findings will be limited to determining whether, in the words of *Saluka v. Czech Republic*, “(i) similar cases [were] (ii) treated differently (iii) and without reasonable justification”.¹¹⁴² The Tribunal’s findings with respect to Claimants’ claim that Respondent discriminated against them on the basis of their Greek nationality are set out in Section XII below.
1238. In the case *sub judice*, Claimants complain that Respondent discriminated against their investment through the following conduct: (i) the majority of Laiki’s management was removed beginning with November 2011, whereas the entire BoC management was allowed to stay on for another year, when only a fraction of the board was removed; (ii) the CBC used ELA as a tool in order to blackmail Laiki and force the resignation of Mr. Vgenopoulos, but adopted a much more lenient approach with respect to the BoC; (iii) Laiki’s recapitalization was unusually harsh to private investors, whereas the BoC was allowed to recapitalize by absorbing the “good part” of Laiki, while the “bad part” of the Bank was wound down. It is not entirely clear to the Tribunal whether Claimants maintain their claim that they were also discriminated against through the sale of Laiki’s Greek operations. However, out of an abundance of caution, the Tribunal has decided to address this issue.

¹¹⁴² *Saluka v. Czech Republic*, 313.

1239. After having carefully examined the evidence in the record and the Parties' submissions in this regard, the Tribunal concludes that Respondent did not breach Article 2(2) of the Treaty by discriminating against Claimants' investment.
1240. First, the Tribunal finds that, contrary to Respondent's submission, the inquiry under Article 2(2) of the BIT mandates that the Tribunal look not only to the treatment of Claimants' shareholding as such, but also to the treatment of Laiki in comparison to the BoC. In other words, it is equally relevant for a discrimination analysis under Article 2(2) of the BIT if Laiki was subjected to discriminatory treatment, as that treatment could directly impact Claimants' shareholding.
1241. Second, the Tribunal finds that Laiki and the BoC were in similar circumstances. The banks were comparable in size as the second largest and the largest bank in Cyprus. Both banks were systemically important for the health of the country's financial system. Both banks were exposed to the Greek market – although perhaps not to the same extent. Both banks were registered in Cyprus, traded on the Cyprus Stock Exchange and were subject to the same regulatory framework. Finally, both banks required recapitalization, according to the EBA capital exercise updated to 30 September 2011¹¹⁴³ and to their own requests for State support in May 2012,¹¹⁴⁴ June 2012¹¹⁴⁵ and October 2012.¹¹⁴⁶ The fact that the financial conditions of the two banks were different is not a sufficient ground to disprove that the banks were in similar circumstances.
1242. Third, the Tribunal finds that no difference in treatment existed between Laiki and the BoC with respect to the removal of management or the grant of ELA by the CBC.
1243. With regard to the removal of management, the Tribunal recalls that the CBC removed Messrs. Vgenopoulos and Bouloutas in November 2011 following Laiki's failure to comply with the minimum regulatory liquidity ratios, its ever more increased reliance on ELA and the ineffectiveness of management's efforts to address the Bank's financial problems. Other replacements on Laiki's Board of Directors and senior management were made by the Bank itself, following normal corporate procedures.¹¹⁴⁷
1244. The Tribunal notes that, in the case of the BoC, management was not removed in November 2011. However, at that time, the BoC was not receiving emergency financial assistance

¹¹⁴³ European Banking Authority, Marfin Popular Bank "Composition of capital as of 30 September 2011 (CDR3 rules)", undated (Exhibit C-0574); European Banking Authority, Bank of Cyprus "Composition of capital as of 30 September 2011 (CDR3 rules)", undated (Exhibit C-0572).

¹¹⁴⁴ Letter from Laiki (C. Stylianides) to the CBC (P. Demetriades), 8 May 2012 (Exhibit R-0476).

¹¹⁴⁵ Letter from BoC (██████████) to CBC (P. Demetriades), 29 June 2012 (Exhibit R-0494).

¹¹⁴⁶ CPB, Announcement, 3 October 2012 (Exhibit C-0411).

¹¹⁴⁷ See, Section IX.C.3 *supra*.

from the CBC.¹¹⁴⁸ The BoC first requested and obtained ELA on 15 November 2012.¹¹⁴⁹ Soon thereafter, on 4 December 2012, the CBC made a formal request to the BoC that members of its Board of Directors who had served continuously for more than nine years should resign.¹¹⁵⁰ The reasons cited by the CBC were the financial difficulties faced by the bank and the need for a fresh approach in view of an impending restructuring. On 17 December 2012, the BoC formally reported that five members of its Board of Directors, who had served for more than nine consecutive years, had resigned following the regulator's recommendation.¹¹⁵¹

1245. In other words, in the case of both Laiki and the BoC, management was removed by the CBC after emergency financial assistance was offered by the State in the form of ELA. The Tribunal concludes that no breach of Article 2(2) occurred in this instance.

1246. With regard to the grant of ELA, the Tribunal recalls its finding in Section IX.C.3 above that Laiki was offered emergency assistance immediately upon its request. The evidence in the record does not support Claimants' contention that the CBC used the threat of withdrawing ELA in order to orchestrate the removal of Mr. Vgenopoulos. To the contrary, Laiki continued to receive ELA until its resolution, in March 2013.¹¹⁵² Consequently, there is no basis to conclude that the BoC was treated more favorably than Laiki with respect to the grant of ELA. No discrimination of Claimants' investment has thus occurred in this regard.

1247. Fourth, the Tribunal finds that, following Laiki's resolution and the BoC's recapitalization in March 2013, Claimants' shareholding in the Bank was subject to the same treatment as the shareholding of existing investors in the BoC, both of which were completely wiped out. The difference in treatment between Laiki and the BoC, consisting of the former's resolution and the latter's recapitalization, was based on a reasonable justification and, in any event, had a *de minimis* impact on Claimants' investment that does not amount to a breach of Article 2(2) of the Treaty.

1248. The Tribunal will explain its conclusion in the paragraphs below.

1249. The Tribunal recalls that, contrary to Claimants' submission, Respondent did not dismiss out of hand Laiki's request for State support, made in November 2011, but considered it and ultimately, in May 2012, acceded to it.¹¹⁵³ Equally, the Tribunal finds no basis in the

¹¹⁴⁸ See, BoC, ELA Operations with the CBC (Exhibit R-0529).

¹¹⁴⁹ *Id.*

¹¹⁵⁰ Letter from the CBC (P. Demetriades) to Bank of Cyprus (██████████) 4 December 2012 (Exhibit R-0211).

¹¹⁵¹ Letter from the Bank of Cyprus (██████████) to CBC (P. Demetriades), 17 December 2012 (Exhibit R-0213).

¹¹⁵² Laiki, ELA Operations with Central Bank of Cyprus (Exhibit R-0277).

¹¹⁵³ See, Section IX.C.4 *supra*.

record that can substantiate Claimants' contention that only Laiki was required to submit to an assessment of its assets and liabilities prior to obtaining State support. The record clearly establishes that, following its own request for State support, the BoC was subject to an in-depth diagnostic by PIMCO. The same diagnostic was applied to Laiki, who, at the time, made a second request for State support.

1250. Laiki was recapitalized in June 2012 on the basis of the Underwriting Decree, with all the attendant limitations this placed on normal corporate governance principles.¹¹⁵⁴ At the time this occurred, the BoC had made no request for State financial support. In the first half of 2012, the BoC successfully raised EUR 594 million on the capital markets¹¹⁵⁵ and declared that it would be able to raise sufficient funds from private sources in order to comply with the EBA CTI capital recommendation by the 30 June 2012 deadline. It was only in late June 2012 that the BoC revealed that it would not be able to raise sufficient funds.¹¹⁵⁶ Thus, on 29 June 2012, the BoC formally applied for State support in the form of a non-equity capital injection of EUR 500 million.¹¹⁵⁷ In other words, the BoC was not subject to provisions similar to those included in the Underwriting Decree because at the time it had not made a request for State support.
1251. In October 2012, Laiki revealed that it had a remaining capital shortfall of EUR 1,125 million as of 30 June 2012 and would need additional State support.¹¹⁵⁸ In November 2012, press reports began circulating that the CBC had second thoughts about the approach it had adopted during Laiki's recapitalization and was debating whether to use in the case of the BoC "co-co bonds so that the participation of current shareholders [would] not [be] compressed".¹¹⁵⁹ Ultimately, Respondent did not go through with this approach for the BoC's recapitalization.
1252. Ultimately, the proposals for the recapitalization of both Laiki and the BoC were put before the Troika, as part of Cyprus' application for financial assistance from the EFSF. As part of this process, both banks' capital needs were assessed by PIMCO. Following two Eurozone summits and multiple rounds of negotiations between Cyprus and the Troika, on 25 March 2013, it was decided that Respondent would receive no financial assistance from the EFSF to recapitalize either Laiki or the BoC. It was further decided that Laiki would be resolved "with full contribution of equity shareholders, bond holders and uninsured depositors"¹¹⁶⁰ and split into a "good bank" and a "bad bank". The "good bank" would be

¹¹⁵⁴ See, Section IX.C.4 *supra*.

¹¹⁵⁵ BoC Announcement, 20 March 2012 (Exhibit R-0463).

¹¹⁵⁶ Letter from CBC (P. Demetriades) to Bank of Cyprus (██████████) entitled "Recapitalisation Plan for the Bank of Cyprus Public Company Ltd", 26 June 2012 (Exhibit R-0187).

¹¹⁵⁷ Letter from BoC (██████████) to CBC (P. Demetriades), 29 June 2012 (Exhibit R-0494).

¹¹⁵⁸ CPB, Announcement, 3 October 2012 (Exhibit C-0411).

¹¹⁵⁹ "Second Thoughts of the Central Bank for state banks", *Stockwatch*, 5 November 2012 (Exhibit C-0413).

¹¹⁶⁰ Eurogroup Statement on Cyprus, 25 March 2013 (Exhibit C-0449).

absorbed into the BoC, while the “bad bank” would be resolved. For its part, the BoC would be recapitalized through “a deposit/equity conversion of uninsured deposits with full contribution of equity shareholders and bond holders”.¹¹⁶¹ In other words, both Laiki’s and the BoC’s existing shareholders and bondholders would be completely wiped out, while uninsured depositors would suffer a reduction in the case of the BoC, and would be wiped out in the case of Laiki. Finally, it was decided that, as a condition of offering financial support to Cyprus, the Greek branches of Cypriot banks would have to be sold off for a price to be determined by the European Commission.¹¹⁶²

1253. On the basis of the above, the Tribunal finds that there was no difference in treatment between existing BoC shareholders and existing Laiki shareholders, including Claimants: they were both completely wiped out.

1254. The Tribunal also finds that, even if Cyprus had accepted the initial bailout package proposed by the Troika on 15-16 March 2013, the evidence in the record suggests that the effect on Claimants’ shareholding (as well as on the shareholding of the original shareholders in the BoC) would have been the same: complete dilution. The statement released after the close of the Eurogroup meeting of 15-16 March 2013 mentioned that the Troika’s explicit purpose was to downsize the Cypriot banking sector:

“The current fragile situation of the Cypriot financial sector linked to its very large size relative to the country’s GDP will be addressed through an appropriate downsizing, with the domestic banking sector reaching the EU average by 2018, thereby ensuring its long-term viability and safeguarding deposits.

[...]

Against this background, the Eurogroup considers that – in principle – financial assistance to Cyprus is warranted to safeguard financial stability in Cyprus and the euro area as a whole by providing a financial envelope which has been reduced to up to EUR 10bn. The Eurogroup would welcome a contribution by the IMF to the financing of the programme.”¹¹⁶³

1255. The terms required to be fulfilled by Cyprus in order to access the reduced bailout package available were the following: (i) the introduction of a one-off stability levy of 6.7% applicable to resident and non-resident deposits of under EUR 100,000 and 9.9% on deposits over EUR 100,000; (ii) the increase of the withholding tax on capital income; (iii)

¹¹⁶¹ *Id.*

¹¹⁶² Internal Ministry of Finance Note, 15 May 2013 (Exhibit R-0514); CBC Note to the Institutions Committee, 28 May 2013 (Exhibit R-0515); Letter from CBC (P. Demetriades) to the Institutions Committee (D. Syllouris), 3 June 2013 (Exhibit R-0516); *Ekathimerini.com*, “EU dictated sale of Greek branches of Cypriot banks”, 26 May 2013 (Exhibit R-0243).

¹¹⁶³ Eurogroup Summit Statement, 16 March 2013 (Exhibit C-0445).

the restructuring and recapitalization of banks; (iv) the increase in statutory corporate income tax; and (v) the bail-in of junior bondholders.¹¹⁶⁴

1256. In other words, no funds were made available for the recapitalization of Laiki and the BoC even under the first Troika bailout package. The banks were to be recapitalized through the full contribution of equity shareholders, junior bondholders and, to the extent of the levies, depositors. Consequently, even if Cyprus had accepted the initial bailout package proposed by the Troika, Claimants would still have suffered a complete dilution of their shareholding, as would have the BoC's shareholders.

1257. The Tribunal notes that an element of difference between the treatment afforded to Laiki and the treatment afforded to the BoC by Cyprus existed: the latter survived, while the former was resolved. There is considerable debate between the Parties on who decided to resolve Laiki and save the BoC. To the Tribunal, this is not outcome-determinative. What matters is that Cyprus, as a sovereign State, agreed and, by implication, decided, that the BoC would continue to exist while Laiki would be resolved.

1258. The Tribunal accepts that this decision was taken in circumstances where the Troika was requesting that both Laiki and the BoC be resolved:

"Doros Ktorides expressed concern that there is pressure from Troika to resolve both Laiki and Bank of Cyprus".¹¹⁶⁵

"During the [14 March 2013 Euro Working Group] meeting, the IMF reiterated its position that the effective solution of the Cyprus banking sector problems, and the sustainability of the public debt, should be achieved through the resolution of the two big banks."¹¹⁶⁶

"Along the same lines, intense were the consultations with representatives of the Troika, who, after the rejection of the first decision, insisted that the only possible solution, with the new, clearly worse conditions created in the economy, was the dissolution of the two systemic banks through the application of a so-called resolution of banking institutions, for which procedure a legislative framework process did not exist until then, but apparently it was ready and presented at that time before the government."¹¹⁶⁷

1259. The Tribunal is persuaded that there was a reasonable justification for the difference in treatment between Laiki and the BoC in March 2013: the different financial conditions of

¹¹⁶⁴ *Id.*; Ministry of Finance Announcement, Agreement for a Financial Assistance to the Republic of Cyprus, 18 March 2013 (Exhibit R-0229).

¹¹⁶⁵ Laiki, BoD Minutes, 22 March 2013 (Exhibit R-0509).

¹¹⁶⁶ Statement of President of the Republic, Nikos Anastasiades, before the Investigation Committee for the Economy, Chronological Review of Events from 1 March 2013 until the First Eurogroup, 27 August 2013 (Exhibit R-0246).

¹¹⁶⁷ *Id.* See also, Olli Rehn Statement on Cyprus in the European Parliament, 17 April 2013 (Exhibit R-0513): "[T]he two largest Cypriot banks were allowed to build up by far too concentrated risk exposures. It was the problems in these banks that caused the troubles for the sovereign and the economic decline of Cyprus – not the other way round".

the two banks, which made it impossible for both of them to survive. According to the PIMCO Report, in the adverse scenario, Laiki would have required EUR 3.835 billion for its recapitalization, while the BoC would have needed EUR 3.96 billion.¹¹⁶⁸ Nevertheless, in the case of Laiki, the EUR 3.835 billion required for the Bank's second recapitalization would have been in addition to the EUR 1.8 billion that Cyprus had already injected in June 2012.

1260. The Tribunal notes that Laiki's dire financial condition brought it close to the point of collapse on two instances, in November 2012 and, more importantly, on 21 March 2013:

"10. On 18 November 2012, the CBC announced its own agreement with the Troika regarding the programme for the financial sector. Since no subsequent agreement with the government was reached regarding fiscal matters, the Troika left Cyprus and on 22 November 2012 Laiki Bank came under unprecedented pressure due to massive deposit outflows.

11. The prompt recommendation of the CBC Governor to the government to announce its intention to sign a Memorandum of Understanding (MoU) averted the risk of collapse of Laiki Bank, the second largest and systemic bank in Cyprus, which would have led to the collapse of the entire financial system. However, a final agreement on the MoU could not be signed before the completion of the independent diagnostic checks of Cypriot banks by PIMCO, which were aimed at identifying the capital needs of Cypriot banks, a condition stipulated in the MoU.

12. When the findings of PIMCO were submitted in January 2013, the country was already in a pre-election period. Hence, the Troika deliberately abstained from any action that could serve or be interpreted as a political intervention. Consequently, at the end of January 2013, the ECB's Board of Directors extended the deadline of ELA to Laiki Bank until 21 March 2013. In making its decision, the ECB's Board of Directors indicated that this decision was taken in accordance with the Terms of Reference of the Eurogroup, in order to urge the new government of the Republic of Cyprus to finalise the agreement for the support programme soon after the elections of February 2013. This decision was announced by the CBC Governor to the new president of the Republic of Cyprus in a letter dated 4 March 2013.

13. This was followed by the first Eurogroup decision on 16 March 2013 for a general 'haircut' on deposits of all banks operating in Cyprus. On 19 March 2013, Parliament rejected the government's bill to implement this decision.

14. On 21 March, the ECB's Board of Directors implemented its decision to cease the provision of ELA to Laiki Bank, with a requirement to repay on 26 March 2013. The implementation of this decision would have led to a disorderly bankruptcy of Laiki Bank and to an immediate activation of the Deposit Protection Scheme, which had only €125 million in funds. This would have resulted in an obligation for the Republic of Cyprus to

¹¹⁶⁸ PIMCO, Independent Due Diligence Report of the Banking System of Cyprus, 1 February 2013 (Exhibit C-0437).

repay the €6,4 billion of insured deposits in Laiki Bank, which would have caused the bankruptcy of the country itself.¹¹⁶⁹ [emphasis added]

1261. The President of Cyprus, Nikos Anastasiades, confirmed this in his testimony before the Piki Commission:

“On Thursday the 21st of March 2013, shortly after noon, the Central Bank informed the government and the leaders of the parties, that Laiki Bank would collapse within the next few hours, due to final exhaustion of liquidity. Obviously cash machines and possibly electronic transactions, had led to the exhaustion of physical cash.”¹¹⁷⁰

1262. The Tribunal also recalls that, in March 2013, the BoC’s total ELA consumption stood at EUR 2.3 billion, while Laiki’s at EUR 9.1 billion.¹¹⁷¹

1263. The Tribunal accepts that, if Cyprus had agreed to the resolution of both systemic banks, this decision would have had substantial and lasting economic ramifications on the vast majority of depositors and on the economy at large.¹¹⁷² The Tribunal does not consider it unreasonable for Cyprus to have wanted to maintain the healthier of the two systemic banks of the country and thus to seek to minimize the impact of the measures proposed by the Troika.

1264. Moreover, because both Laiki’s and the BoC’s existing shareholders were completely wiped out, the Tribunal finds that the difference in treatment between Laiki and the BoC only had *de minimis* implications as regards Claimants’ investment. Considering that no EFSF funds were made available for the recapitalization of either bank, even if Laiki had been allowed to survive and would have been recapitalized through a similar method as the BoC, Claimants’ shareholding would have been entirely wiped out.

1265. The Tribunal wishes to add that, in any event, Claimants have not demonstrated that the reason for treating Laiki and the BoC differently was improper.

1266. Finally, the Tribunal finds that Laiki and the BoC were treated in the same manner as regards their Greek branches, since all Greek branches of Laiki, the BoC (and Hellenic Bank) were sold to Piraeus Bank.¹¹⁷³

¹¹⁶⁹ CBC, Press Release, “Rescue Programme for Laiki Bank”, 30 March 2013 (Exhibit C-0458).

¹¹⁷⁰ Statement of President of the Republic, Nikos Anastasiades, before the Investigation Committee for the Economy, Chronological Review of Events from 1 March 2013 until the First Eurogroup, 27 August 2013 (Exhibit R-0246).

¹¹⁷¹ Laiki, ELA Operations with the Central Bank of Cyprus (Exhibit R-0277); BoC, ELA Operations within CBC (Exhibit R-0529).

¹¹⁷² See, Statement of President of the Republic, Nikos Anastasiades, before the Investigation Committee for the Economy, Chronological Review of Events from 1 March 2013 until the First Eurogroup, 27 August 2013 (Exhibit R-0246).

¹¹⁷³ *Ekathimerini.com*, “EU dictated sale of Greek branches of Cypriot banks”, 26 May 2013 (Exhibit R-0243).

1267. For these reasons, the Tribunal considers that the difference in treatment between Laiki and the BoC in March 2013 does not represent a breach of Article 2(2) of the Treaty.

8. **Whether Cyprus breached the FET standard through a failure to provide due process to Claimants' investment**

1268. After examining the submissions made by the Parties and the evidence in the record, the Tribunal finds that Cyprus did not breach Article 2(2) of the Treaty by failing to provide due process to Claimants' investment.

1269. The Tribunal notes that Claimants' arguments are threefold. First, Claimants contend that Respondent denied them justice in the Nicosia proceedings. Second, Claimants argue that Respondent failed to afford them due process and engaged in arbitrary and abusive conduct in the criminal proceedings initiated against its witnesses in this arbitration, as well as in the CySEC, Paphos and Limassol proceedings. Third, Claimants complain that Respondent breached Article 2(2) of the Treaty through a public campaign of vilification and harassment against them and their investment. The Tribunal shall examine these arguments in turn.

1270. The Nicosia proceedings. Claimants criticize the Nicosia proceedings in particular for the court's decision to award Laiki a worldwide freezing order of a "[m]anifestly irrational amount" and against "[m]anifestly inadequate security" despite there being "[n]o real risk of dissipation".¹¹⁷⁴ Further, Claimants argue that the freezing order was not reasoned and that there were undue delays in the proceedings. Claimants do not dispute that they have not exhausted local remedies, but contend instead they have exhausted all "effective"¹¹⁷⁵ remedies in Cyprus. In their submission, following the enforcement abroad of the worldwide freezing order, there is no remedy in Cyprus for the "business and reputational harm to those subject to the [worldwide freezing order], nor for the fees that they have already incurred in resisting the Greek and English enforcement proceedings".¹¹⁷⁶

1271. Respondent counters that the freezing order is not final and can still be challenged in the Cypriot courts. Further, in its view, the harm allegedly suffered by Claimants in the enforcement proceedings can be compensated by an award of damages in the Cypriot courts. For these reasons, Respondent is of the view that local remedies have not been exhausted and no denial of justice could have occurred.

¹¹⁷⁴ C-PHS, at 124 (emphasis omitted).

¹¹⁷⁵ Reply, at 121.

¹¹⁷⁶ *Id.*

1272. For its part, the Tribunal is of the view that “it is not enough to have an erroneous decision or an incompetent judicial procedure” for a finding of denial of justice, but there must be “clear evidence of ... an outrageous failure of the judicial system or a demonstration of systemic injustice or that the impugned decision was clearly improper and discreditable”.¹¹⁷⁷ The Tribunal aligns itself with other tribunals finding that “a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself”.¹¹⁷⁸ Further, the Tribunal agrees with Respondent that the exhaustion of local remedies is not, in the case of a denial of justice claim, a mere pre-condition to arbitration, but a constituent element of the delict:

“Denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole.”¹¹⁷⁹ [emphasis added]

1273. It is **not** disputed by the Parties that Claimants have not exhausted local remedies against the decisions taken by the Nicosia court. The issue to be determined is thus whether it would have been obviously futile for Claimants to seek to challenge the impugned decisions before raising the claim before this Tribunal.

1274. In this regard, the Tribunal aligns itself with the *Apotex v. United States* tribunal, which found:

“[U]nder established principles, the question whether the failure to obtain judicial finality may be excused for ‘*obvious futility*’ turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief.”¹¹⁸⁰ [emphasis in original]

1275. In other words, what is required is “an actual unavailability of recourse, or recourse that is proven to be manifestly ineffective – which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued”.¹¹⁸¹

1276. The Tribunal finds that Claimants have not made such a demonstration. Claimants have not proven that they could not request an award of damages from the Cypriot courts to compensate them for the business and reputational harm allegedly suffered on account of the enforcement proceedings commenced abroad. Likewise, Claimants have not demonstrated that the fees and expenses incurred to defend against these proceedings are

¹¹⁷⁷ Philip Morris v. Uruguay, at 500 (internal citations omitted) (emphasis omitted).

¹¹⁷⁸ Apotex v. United States, at 282.

¹¹⁷⁹ Pantechniki v. Albania, at 96.

¹¹⁸⁰ Apotex v. United States, at 276.

¹¹⁸¹ *Id.*, at 284 (internal citations omitted).

not recoverable in Cyprus. Further, Claimants have not demonstrated that the remedies available under Cypriot procedural law would not have permitted them to challenge what they perceive as the manifestly wrongful decisions of the Nicosia court. Respondent maintains that these remedies exist and are available under Cypriot law.¹¹⁸²

1277. This failure to exhaust local remedies is sufficient, from the Tribunal's point of view, to warrant a dismissal of Claimants' denial of justice claims pertaining to the Nicosia proceedings.

1278. The Tribunal however wishes to make some additional remarks.

1279. Claimants complain of the significant delays incurred throughout the Nicosia proceedings. However, the Tribunal notes that at least some of these delays were due to requests and applications from Claimants, while others followed motions from Laiki.¹¹⁸³ Moreover, the Tribunal considers that, due to the complexity of the issues examined in the Nicosia proceedings and the number of parties involved, some delays should have been expected. The mere existence of delays in complex proceedings is not sufficient to establish a denial of justice.

1280. Claimants also challenge some of the decisions taken by the Nicosia court, in particular their purported lack of reasoning, the amounts involved in the freezing order, its extraterritorial effect or the court's alleged lack of jurisdiction. The Tribunal is not a court of appeal, and its role is not to verify whether the Nicosia court correctly applied Cypriot law to the facts when deciding the various applications before it. It is not up to this Tribunal to decide whether or not the Nicosia court was the competent forum for bringing the request for a freezing order, or whether the amounts frozen were correct.

1281. The Tribunal holds that, contrary to Claimants' submission, the court did provide reasons for its decision.¹¹⁸⁴ The Tribunal agrees with Claimants that the amounts involved in the freezing order were undoubtedly significant. One may even argue that they were extreme. However, the court made reasonable allowances for living expenses (EUR 20,000 per month in the case of Messrs. Bouloutas and Vgenopoulos and EUR 10,000 per month in the case of Mr. Mageiras) as well as legal costs (EUR 100,000 per month). The Tribunal also bears in mind that, due to the magnitude of the Bank's involvement in the Cypriot economy and the impact of its downfall, the sums sought in these proceedings would necessarily have been of a considerable magnitude. Had it not been for these latter considerations, and had the freezing order not been challengeable to the higher court,

¹¹⁸² Rejoinder, at 485.

¹¹⁸³ Respondent's Rejoinder to the Claimants' Application for Provisional Measures, Annex 1.

¹¹⁸⁴ *Cyprus Popular Bank Public Co Ltd, of Nicosia v. Andreas Vgenopoulos and other Defendants*, District Court of Nicosia, Judgment regarding preservation orders dated 29 April 2013, 23 May 2014 (Exhibit CL-0230).

serious questions of a possible Treaty breach would have been raised. However, these are not the circumstances of this case. Consequently, the Tribunal finds that Respondent did not deny Claimants justice in the Nicosia proceedings.

1282. The Paphos, Limassol and CySEC proceedings. The Tribunal notes that the Paphos and Limassol proceedings are suspended or have been dismissed at the time of this Award, with no findings having been made against Claimants. No breach of Article 2(2) can therefore arise in this regard.
1283. The Tribunal likewise finds that Respondent did not breach Article 2(2) of the Treaty through its handling of the CySEC proceedings.
1284. In this respect, the Tribunal finds that, in all CySEC proceedings within the ambit of this arbitration, the individuals under investigation were given the opportunity to present their views on the findings of this administrative body. The evidence in the record also shows that the proceedings were not targeted at Claimants: with the exception of the First CySEC investigation, all other six investigations involved multiple individuals, many of whom were not affiliated with Claimants. The First CySEC investigation concerned only one individual, Mr. Bouloutas, as it was based on his individual conduct, consisting of a statement made to the press. In those instances in which CySEC imposed fines, the possibility to challenge the relevant decision before the Supreme Court was available and made use of. Moreover, CySEC imposed fines not only on Laiki, Claimants or their affiliates, but also on individuals not affiliated with Claimants.¹¹⁸⁵
1285. Claimants complain that, on 26 January 2014, four months before the completion of the Second CySEC investigation, the President of this institution declared to a newspaper that she was optimistic that criminal proceedings could be brought against former managers of Laiki.¹¹⁸⁶ Respondent counters that the CySEC President was misquoted in the press and, upon noticing this, she requested a correction, which was duly published. In this correction, the statement read that CySEC was optimistic about “the completion of the investigations as soon as possible and not ... their result”.¹¹⁸⁷ To this, Claimants respond that the journalist who published the initial article confirmed in an affidavit the accuracy of the initial statement.¹¹⁸⁸ The Tribunal has not had the opportunity to examine neither the President of CySEC, nor the journalist who published the initial version of her statement. Under these circumstances, it is not possible for the Tribunal to determine with any degree of accuracy what statement was made by the President of CySEC. Consequently, the Tribunal must conclude that Claimants have not carried their burden of demonstrating that

¹¹⁸⁵ Respondent's Rejoinder to the Claimants' Application for Provisional Measures, Annex 1.

¹¹⁸⁶ T. Agathokleus, “New investigations commenced for Laiki”, *Alitheia*, 26 January 2014 (Exhibit C-0506).

¹¹⁸⁷ [REDACTED]

¹¹⁸⁸ Affidavit of [REDACTED] (Exhibit C-0539).

the President of CySEC made the statement initially attributed to her. In any event, the Tribunal notes that the Second CySEC investigation did not result in a criminal investigation being opened against Claimants, as that initial quoted statement seemed to suggest.

1286. The Tribunal notes further that Claimants also criticize CySEC for taking “an unreasonably selective approach to the evidence it chose to take into consideration” or for making “a number of substantive errors in arriving at its final decision”.¹¹⁸⁹ The Tribunal recalls that it is not a court of appeal and it may not review the decisions taken by the administrative and judicial authorities in Cyprus for correctness. Having concluded that CySEC conducted the proceedings in compliance with principles of due process, the Tribunal’s analysis of the CySEC proceedings must end there.

1287. The criminal proceedings. During the course of this arbitration, the Parties have debated at length on the nature, purpose, appropriateness, conduct and effects of the criminal proceedings initiated against some of the Claimants and their witnesses. At the interim measures stage, the Tribunal stated:

“States have the sovereign right to investigate and prosecute potential criminal conduct committed on their territory. The ICSID Convention does not grant investors immunity from criminal prosecution by virtue of having filed a request for arbitration.”¹¹⁹⁰

1288. This holding is as valid for the interim measures stage of the arbitration as it is for the merits. The mere initiation of criminal proceedings against a party to the arbitration and/or witnesses of that party is not sufficient, in and of itself, for a finding that an investment treaty has been breached. This is accepted by Claimants, who state that “Cyprus is ... free to investigate potential wrongdoing”.¹¹⁹¹

1289. The main criticisms raised by Claimants with respect to the criminal proceedings initiated against Messrs. Bouloutas, Foros, Vgenopoulos and Mageiras pertains to the issuance of arrest warrants against them during the pendency of this arbitration and the alleged selectivity of the criminal prosecutions.

1290. Considerable time and effort have been expended in this arbitration in order to determine the effects of the arrest warrants issued against Messrs. Bouloutas, Foros, Vgenopoulos and Mageiras on Claimants’ investment and the assertion of their rights in this arbitration. The Tribunal does not consider it useful to reiterate herein the multiple and complex considerations which prompted it to recommend that Cyprus suspend the enforcement of

¹¹⁸⁹ Memorial, at 329.

¹¹⁹⁰ Procedural Order No. 6, at 219.

¹¹⁹¹ C-PHS, at 128.

these warrants¹¹⁹² or the considerations which, following the defendants' refusal to appear for their committal hearings, determined the Tribunal to recommend that Messrs. Bouloutas, Foros, Vgenopoulos and Mageiras appear for their committal hearings.¹¹⁹³ For the purposes of the present analysis, it is sufficient to note that, at the interim measures stage, the Tribunal was not persuaded that the state of the evidentiary record at that time supported a conclusion that the criminal proceedings had been initiated abusively, with the intent to harass Claimants or to gain a tactical advantage in this arbitration.¹¹⁹⁴ This conclusion was then confirmed by the subsequent conduct of the criminal defendants and of the Cyprus prosecutorial authorities, as well as by the now complete evidentiary record. Indeed, following the issuance of Procedural Orders Nos. 7 and 8, and the appearance of Messrs. Bouloutas and Foros for their committal hearings, the arrest warrants issued against them¹¹⁹⁵ were withdrawn and bail was set in terms comparable to those imposed for various BoC officials. Messrs. Bouloutas and Foros could thus travel freely without fear of arrest. Following Respondent's request to cross-examine him, Mr. Bouloutas also appeared at the hearing. For his part, Mr. Mageiras refused to appear for his committal hearing, even when expressly invited by the Tribunal and when guarantees of release upon his appearance at the committal hearing were offered. The Tribunal notes that, in any event, in June 2017, the arrest warrant issued against Mr. Mageiras was withdrawn.¹¹⁹⁶ Moreover, on 14 June 2018, the Cyprus Supreme Court confirmed that Messrs. Bouloutas and Foros' initial election to appear for their committal hearings through counsel did not constitute contempt of court and did not justify the issuance of arrest warrants.¹¹⁹⁷ In other words, the Cypriot courts gave Claimants' witnesses their time in court and ultimately sided with them on these procedural issues.

1291. The Tribunal thus maintains its provisional finding that the criminal proceedings were initiated by Respondent as a result of the legitimate application of Cyprus criminal laws, and not abusively, for tactical reasons or with the intent to harass Claimants. Moreover, any impediment that affected some of Claimants' witnesses as a result of the issuance of arrest warrants was short-lived, as Cyprus suspended their enforcement and subsequently withdrew them. For these reasons, the Tribunal finds no breach of the Treaty as a result of the issuance of arrest warrants against Messrs. Bouloutas, Foros, Vgenopoulos and Mageiras.

1292. As support for their contention that Respondent selectively targeted them when bringing the 2015 Criminal prosecution, Claimants have referred to the unanimous nature of the

¹¹⁹² See, Procedural Order No. 6, at 230-246, 253-257.

¹¹⁹³ See, Procedural Order No. 7, at 60-95.

¹¹⁹⁴ See, Procedural Order No. 6, at 220, 223, 229, 231-237.

¹¹⁹⁵ Mr. Vgenopoulos passed away before his committal hearing scheduled for 1 December 2016.

¹¹⁹⁶ Claimants' Letter to the Tribunal, 22 June 2017.

¹¹⁹⁷ Claimants' Letter to the Tribunal, 19 June 2018.

decision taken by the Laiki Board of Directors to postpone impairing the goodwill of the Bank's Greek operations. Claimants argue that "Cyprus has never substantiated its selective prosecution" and, months after the completion of the interim phase of the arbitration, "has still offered no evidence to justify its selective prosecution".¹¹⁹⁸ The Tribunal recalls that, according to established principles governing the burden of proof, it is up to Claimants to demonstrate that the 2015 Criminal prosecution was arbitrary, retaliatory, targeted or discriminatory. In any event, the Tribunal recalls that, at the provisional measures hearing, the Attorney General of Cyprus, Mr. Clerides, provided the following explanation for Cyprus' decision to prosecute only four members of Laiki's Board of Directors:

"THE WITNESS: [W]e have decided in this case to prosecute only persons of the members of the Board who had some knowledge in the subject matter of the criminal investigation, persons who had participated in one way or another. [...] Who had knowledge of the facts which create this offence, because without *mens rea*, you cannot secure a prosecution or prosecute anybody.

ARBITRATOR PRICE: [O]ther than the fact that one was chair of the audit committee, how is it that you picked these four and no others? What was the distinguishing feature of these four?

THE WITNESS: One was the CEO, the other was the acting CEO, the other one was participating in the audit commission. They had special knowledge.

ARBITRATOR PRICE: And the other nine did not participate in the decision?

THE WITNESS: They didn't have special knowledge so as to fix them with liability. [...] The other two persons who had – could be fixed with knowledge were Mr. Mylonas and Mr. Stylianides. These two people could have been added as accused persons on the charge sheets. Mr. Mylonas was accepted for the reasons I gave – old age. And Mr. Stylianides was preferred to be used as a prosecution witness."¹¹⁹⁹

1293. The Tribunal accepts the explanation offered by the Cyprus Attorney General.
1294. Claimants add that a statement attributed to the President of the Institutions Committee in November 2013,¹²⁰⁰ as well as a statement attributed to the President of CySEC in January 2014¹²⁰¹ also demonstrate the "vindictiveness"¹²⁰² of the criminal prosecutions initiated against them.
1295. The Tribunal has already examined the statement attributed to the President of CySEC. Therein, the Tribunal has concluded that Claimants have not demonstrated by a preponderance of evidence that this statement can effectively be attributed to the President

¹¹⁹⁸ C-PHS, at 129.

¹¹⁹⁹ Interim Measures Hearing Transcript, Day 2, 347: 18-22; 348: 1-4, 9-20; 354: 7-14.

¹²⁰⁰ "The unimaginable pillage", *Simerini*, 14 November 2013 (Exhibit C-0498).

¹²⁰¹ T. Agathokleus, "New investigations commenced for Laiki", *Alitheia*, 26 January 2014 (Exhibit C-0506).

¹²⁰² C-PHS, at 130 (emphasis omitted).

of CySEC. For this reason, this statement cannot support Claimants' argument of a targeted criminal prosecution.

1296. The Tribunal further notes that the statement attributed to the President of the Institutions Committee was included in an opinion piece published in *Simerini*. The paragraph in which the contested statement appears reads as follows:

“Further than this, however, there are grave liabilities by many and various persons on many levels. We are talking about a five billion euro loss. The Assistant-Attorney General, R. Erotokritou, correctly said that: ‘To rob a bank, you must first buy it’. The [sic] bought it, they governed it the way they wanted to and they pillaged it! The Secretary-General of DISY stated, the day before yesterday, yet again, that all those responsible for this pillage have names and addresses. The night before last, the Attorney-General asked everyone to be very careful when dealing with cases under investigation, such as the pillage of the banking system and, particularly, of Laiki. This was, obviously, a direct reference to the Committee of Institutions. Yesterday, this caused a reaction from the Chairman of the latter, who indicated intensely that for at least the last 15 months, nothing has happened. The Committee is looking for evidence but it is the Attorney-General who must promote the cases and look for the guilty parties, whom we all know. ‘If justice is not soon delivered and the guilty persons not punished’, D. Syllouris said, ‘then we will be the pseudo state. A serious state cannot delay the punishment of those found guilty’.”¹²⁰³ [emphasis added]

1297. A simple reading of the text above shows that the author of the opinion piece was not seeking to attribute the statement “whom we all know” to the President of the Institutions Committee, since the remark is not a direct quote. Moreover and in any event, the observation itself does not mention any individual by name. In other words, this opinion piece has a very low probative value and certainly cannot substantiate an allegation of a selective prosecution.
1298. For the reasons mentioned above, the Tribunal is not persuaded that the evidence in the record demonstrates that the criminal proceedings unfairly and arbitrarily targeted Claimants or their affiliates.
1299. For these reasons, the Tribunal concludes that Respondent did not breach Article 2(2) of the Treaty through its conduct of the criminal prosecutions.
1300. Statements made in the media against Claimants and their affiliates. Claimants also challenge a number of statements that were published in the Cypriot media, which they contend created a climate of hostility towards them and their investment and impeded the Cypriot authorities from impartially deciding their cases.

¹²⁰³ “The unimaginable pillage”, *Simerini*, 14 November 2013 (Exhibit C-0498).

1301. The Tribunal has reviewed this evidence and has reached the conclusion that it does not support Claimants' allegations.
1302. First, the Tribunal has already examined the statements attributed to the President of CySEC and to the President of the Institutions Committee and has concluded that they cannot support a conclusion of hostility towards Claimants or of a prejudgment of their cases.
1303. Second, the evidence referred to by Claimants includes a number of instances where the Attorney General of Cyprus emphasized that the presumption of innocence and the rule of law must be upheld in all proceedings involving the causes of the Cypriot financial crisis.¹²⁰⁴ Such statements cannot have caused any harm to Claimants and, if anything, showed that the prosecutorial authorities in Cyprus were intent on ensuring that the principles of the presumption of innocence and due process were complied with.
1304. Third, a number of statements challenged by Claimants do not specifically refer to them. An example is the following statement by the President of the Institutions Committee:

“The president of the committee on institutions noted that ‘there are particular issues which do not require comprehensive treatment in order for us to conclude to punishment.’”¹²⁰⁵

1305. Similarly, a statement by the President of Cyprus, Nikos Anastasiades, does not refer to Claimants:

“Receiving the report, the President of the Republic warmly thank [sic] the Institutions Committee because, with the complete and admirable co-operation between its members, ‘in order to clarify a certainly criminal behaviour on the part of those who were responsible for the banking system of the country, has closed in a very brief time, I must say, taking into consideration the complexity of the issue, an investigation with specific findings, which will undoubtedly, I am sure, help those who bear the responsibility for the prosecution and punishment of those who are involved in the crime against the economy of the land, [ie] the Attorney-General.’”¹²⁰⁶

1306. The Tribunal also notes that, while Claimants challenge these statements made in connection with the report of the Institutions Committee, Claimants do not reiterate such concerns with regard to the actual findings included in the final report of the Institutions Committee. Consequently, the Tribunal finds that the statements above do not substantiate Claimants' submission that Cypriot authorities had an *animus* against them.

¹²⁰⁴ M. Adamou, “They make populist and taunting statements...”, *Simerini*, 6 April 2014 (Exhibit C-0511); “Cypriot Economy: Time for Justice for the economy”, *Stockwatch*, 22 December 2013 (Exhibit C-0502).

¹²⁰⁵ “Cypriot Economy: Time for Justice for the economy”, *Stockwatch*, 22 December 2013 (Exhibit C-0502).

¹²⁰⁶ “The Report of the Institutions Committee is with the President”, *Stockwatch*, 13 May 2014 (Exhibit C-0521).

1307. Finally, the Tribunal considers that, of the public statements challenged by Claimants, two could potentially raise concerns. In the first, a member of the Cypriot Parliament's Green Party described Mr. Vgenopoulos as "a curse and a plague for Cyprus".¹²⁰⁷ In the second, the Cypriot Minister of Finance, H. Georgiades, declared in a radio interview that he "had the impression that Laiki was destroyed by that very well known individual who was welcomed as an investor from Greece".¹²⁰⁸

1308. The Tribunal does not consider however that these statements are sufficient to warrant a conclusion that Claimants were unfairly targeted by Cyprus or were denied due process in the various civil, administrative or criminal proceedings in the country as a result of animosity towards them. As mentioned above, in the Nicosia, Paphos, Limassol and CySEC proceedings, as well as in the criminal prosecutions initiated against Claimants, the Tribunal identified no breach of due process. Two statements that are adverse to Claimants' interests in these proceedings, made by individuals who are not involved in local proceedings, are not sufficient to outweigh the evidence showing that Claimants' due process rights were complied with.

1309. For all the reasons identified above, the Tribunal finds that Cyprus did not breach the FET standard in Article 2(2) of the Treaty through a failure to provide due process to Claimants' investment.

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1310. On the basis of the considerations above, the Tribunal concludes that Respondent did not breach Article 2(2) of the Treaty by failing to accord fair and equitable treatment to Claimants' investment.

XI. WHETHER RESPONDENT FAILED TO GRANT CLAIMANTS FULL PROTECTION AND SECURITY

[REDACTED]

[REDACTED]

¹²⁰⁷ N. Palala, "Barrage fire against Vgenopoulos", *Simerini*, 14 November 2013 (Exhibit C-0497).

¹²⁰⁸ Astra Radio 92.8 FM, Extract of the Interview with the Minister of Finance of Cyprus, H. Georgiades, on the "Morning edition" show, 5 April 2017 (Exhibit C-0859).

[REDACTED]

C. The Tribunal's analysis

1319. The Tribunal finds that Claimants' claim has no merit.
1320. Claimants' case concerning the breach by Respondent of the FPS standard in Article 2(2) of the Treaty is based – with a few exceptions – on roughly the same arguments as those raised in the context of its expropriation and FET claims analyzed in Sections IX.C and X.C above. The Tribunal need not determine with precision the content of the obligation to accord full protection and security to Claimants' investment under Article 2(2) of the Treaty in order to find that Claimants' claims pertaining to PSI+, the removal of management, the recapitalization of Laiki or the discrimination of Laiki in comparison with the BoC have no merit. Even assuming that Claimants' understanding regarding the content of the FPS standard was correct and that a breach of the FET standard would automatically entail a breach of the FPS standard, their claims would fail for the same reasons as those that have been set out in detail in Sections IX.C and X.C above.
1321. There are two elements that differentiate Claimants' claims under the FET Standard and those under the FPS Standard. Claimants argue that the CBC's decision to impose conditions on Laiki's commercial operations in November 2011 and Respondent's amendment of the Management of Financial Crises Law in January 2013 breached the FPS Standard.
1322. The Tribunal notes that the CBC's decision of 7 November 2011 to place restrictions on Laiki's commercial operations was taken pursuant to Section 30(1)(b) of the Banking Law, pursuant to which:

“30. (1) The Central Bank may take all or any of the following measures where a bank fails to comply with any of the provisions of this Law, or of any Regulation issued under this Law or with the conditions of its licence, or in the opinion of the Central Bank the liquidity and character of its assets have been impaired or there is a risk that the ability of the bank to meet promptly its obligations may be impaired, or where this is considered necessary for the safeguarding of the interests of depositors or creditors –

[...]

- (b) Without prejudice to the generality of paragraph (a) above, impose conditions under this section and in particular:
- (i) require the bank to take certain steps or to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way;
 - (ii) impose limitations on the bank on the acceptance of deposits, the granting of credit or the making of investments;

- (iii) prohibit the bank from soliciting deposits, either generally or from specified persons or class of persons;
- (iv) prohibit the bank from entering into any other transaction or class of transactions;
- (v) require the removal of any director, chief executive or manager of a bank;
- (vi) oblige the bank to hold own funds in excess of the minimum level laid down pursuant to the provisions of section 21;
- (vii) require the reinforcement of the arrangements, processes, mechanisms and strategies of the bank implemented to comply with subsections (2) and (3) of section 19 and section 19A;
- (viii) to require the bank to apply a specific provisioning policy or treatment of assets in terms of capital requirements;
- (ix) restrict or limit the business, operations or network of banks; and
- (x) require the reduction of the risk inherent in the activities, products and systems of banks.”¹²²²

1323. The Tribunal also recalls that, prior to imposing these conditions on the Bank, the CBC and Laiki engaged in a lengthy correspondence during which the regulator made clear to management that it was extremely concerned about the precarious financial situation of the Bank and dissatisfied with the measures taken by management to address it. One week before the imposition of restrictions on the Bank’s commercial operations, on 31 October 2011, the CBC notified Laiki that it was “examin[ing] the possibility of taking measures pursuant to the powers granted to it in accordance with section 30 of the Banking Business Law of 1997 to (No 2) of 2011”.¹²²³ The CBC’s letter attached a report of the Bank Supervision and Regulation Department, which laid out the very grave concerns of the regulator with respect to the Bank’s liquidity. Laiki submitted its comments on the above on 3 November 2011, and expressed its disagreement with the CBC’s understanding of the causes of the Bank’s liquidity problem.¹²²⁴ During this time, Laiki was reliant on emergency liquidity financing from the CBC in order to be able to continue offering its services. On 7 November 2011, following a meeting between Mr. Orphanides and Messrs. Bouloutas and Vgenopoulos, the CBC reiterated its dissatisfaction with management’s solutions to the Bank’s liquidity problems and concluded that “there [was] danger that the ability of the Bank for addressing its obligations on time could be reduced”.¹²²⁵ The CBC

¹²²² Republic of Cyprus, Banking Laws of 1997-2013 (Exhibit CL-0138).

¹²²³ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 31 October 2011 (Exhibit C-0275).

¹²²⁴ Letter from MPB (E. Bouloutas) to the CBC (A. Orphanides), 3 November 2011 (Exhibit C-0277).

¹²²⁵ Letter from the CBC (A. Orphanides) to MPB (E. Bouloutas), 7 November 2011 (Exhibit C-0280).

therefore imposed nine conditions on the Bank's operations "in order to safeguard the interests of the depositors".¹²²⁶

1324. For the same reasons that have prompted the Tribunal to conclude that the removal of Mr. Bouloutas was carried out in the legitimate exercise of Cyprus' police powers, the Tribunal also finds that the CBC's decision to impose nine operating conditions on the Bank was likewise a legitimate exercise of Respondent's police powers. There was thus no excess of power against which Claimants deserved protection. Consequently, even if the Tribunal were to interpret the FPS standard as advocated by Claimants, i.e., as imposing an obligation to take all reasonable preventative, precautionary and remedial measures in order to ensure a secure investment environment, there would be no breach of Article 2(2) of the Treaty on this account.
1325. The Tribunal further notes that the amendment to the Management of Financial Crises Law challenged by Claimants reads as follows:

"(3) Persons appointed in any way as member [sic] to the board of directors or the Committee of the beneficiary financial institution, and officers of the said institution acting on the instructions of the board of directors or the Committee, in case of initiation of a lawsuit, application or any other legal procedure for the claim of compensation or other remedy or for the imposition of sanction [sic] against them in relation to an act or omission during the exercise of their duties and responsibilities, which act or omission has occurred during the period in which the Republic holds the majority shares of the beneficiary institution with voting rights or appoint [sic] the majority of members or members with a right to veto the decisions of the board of directors or the Committee, shall not be liable for any responsibility unless it is proved that the act or omission was not in good faith or was a result of gross negligence."

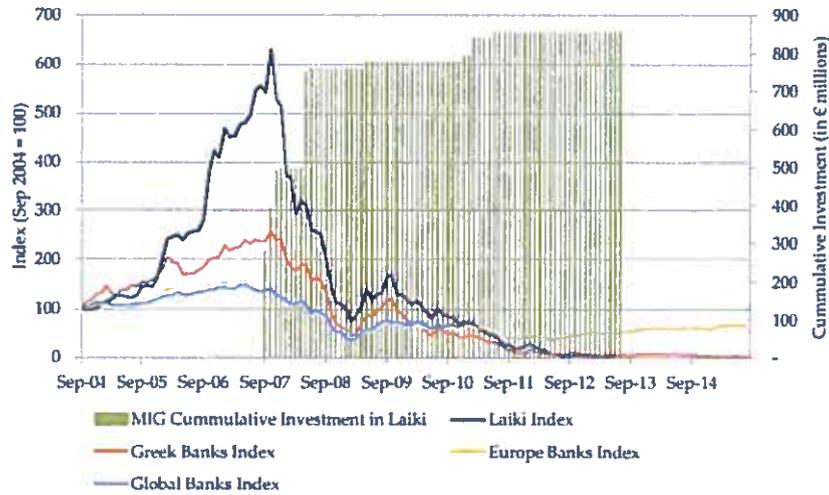
1326. Claimants complain that the limitation imposed on their right as shareholders to sue members of Laiki's Board of Directors for breach of duties rendered their investment substantially less secure, in contravention to Article 2(2) of the Treaty. Respondent counters that the introduction of this limitation was necessary in order to attract competent professionals to the boards of Cyprus' deeply troubled financial institutions at a time of considerable economic uncertainty.
1327. The Tribunal, after considering all the circumstances surrounding the enactment of this amendment to the Management of Financial Crises Law, as well as its impact on Claimants' investment, finds that it does not fall foul of the FPS Standard in Article 2(2) of the Treaty, even if one were to endorse Claimants' interpretation thereof.

¹²²⁶ *Id.*

1328. First, the Tribunal notes that, pursuant to this amendment of Section 13 of the Management of Financial Crises Law, Claimants' right as shareholders to pursue in court the members of Laiki's Board of Directors was not curtailed in its entirety. Claimants retained the right to sue on the basis of bad faith or gross negligence.
1329. Second, the Tribunal observes that the amendment applied after the entry into force of the Underwriting Decree ("during the period in which the Republic holds the majority shares of the beneficiary institution with voting rights or appoint [sic] the majority of members or members with a right to veto the decisions of the board of directors of the Committee"). The Underwriting Decree entered into force on 18 May 2012. The results of Laiki's recapitalization pursuant to the terms of the Underwriting Decree were announced on 2 July 2012, when Cyprus thus became the owner of 84% of the shareholding in Laiki. The Tribunal therefore finds that the limitation on the shareholders' right to sue the Bank's directors for breach of duties primarily and substantially affected the rights of the Cyprus Government itself. Claimants, though affected, were far less impacted due to the size of their shareholding.
1330. Third, the Tribunal is persuaded that there is some truth to Respondent's submission according to which, in the absence of this type of legal protection for members of the boards of Cyprus' troubled financial institutions, it would have been difficult to attract professionals with the required competence to manage a bank in financial difficulty.
1331. Fourth and in any event, the Tribunal recalls that, at the time the Underwriting Decree entered into force and following Laiki's recapitalization, the Bank was in an extremely difficult financial position. Its share price in June 2012 reflected this dire condition:¹²²⁷

¹²²⁷ Kaczmarek First Expert Report, Figure 35.

Figure 35 – Laiki’s Indexed Share Price and MIG’s Investment³⁹⁰



1332. Consequently, any loss in value that Claimants would have suffered as a result of the limitation of their rights was insubstantial for two reasons. First, due to their minority shareholding. Second, due to the Bank’s precarious financial condition, reflected in its insubstantial market capitalization.

1333. The Tribunal is thus not persuaded that the limitation to Claimants’ rights to pursue members of Laiki’s Board was substantial enough to warrant a conclusion that their investment was not accorded full protection and security, even when this standard is understood as Claimants plead in this arbitration.

1334. For all these reasons, the Tribunal finds that Respondent did not breach the FPS Standard in Article 2(2) of the Treaty.

XII. WHETHER RESPONDENT DISCRIMINATED AGAINST CLAIMANTS’ INVESTMENT

[REDACTED]

[REDACTED]

C. The Tribunal's analysis

1339. Article 3 of the Treaty ("Most Favoured Nation and National Treatment Provisions") stipulates:

"1. Neither Contracting Party shall subject investments in its territory owned in whole or in part by investors of the other Contracting Party to treatment less favourable than that which it accords to investments of its own investors or to investments of investors of any third State.

2. Neither Contracting Party shall subject investors of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

3. Such treatment shall not relate to privileges or advantages which either Contracting Party accords to investors of any third State:

a) on account of its membership of, or association with, a customs or economic union, a common market, a free trade area or similar institutions.

b) on the basis of any double taxation agreement or other agreements regarding matters of taxation.

4. Each Contracting Party has the right to maintain, in accordance with its laws, regulations and its policy regarding foreign investments, exceptions from the national treatment of paragraphs 1 and 2 of this Article."

1340. In Section X.C.7 above, the Tribunal has examined Claimants' claim that Cyprus discriminated against their investment by preferring the BoC to Laiki. That analysis was made under Article 2(2)'s FET standard. In the paragraphs below, the Tribunal will focus on Claimants' discrimination claim based on Article 3 of the Treaty, in other words, on their claim that they suffered from discrimination on the basis of their Greek nationality.

1341. For the reasons that are set out below, the Tribunal finds that Claimants' claim of discrimination on the basis of nationality has no merit.

1342. First, the Tribunal recalls its conclusion at Section X.C.7 above that Respondent did not treat Laiki and the BoC differently with respect to the removal of management, the granting of ELA and the sale of their Greek branches. Consequently, Claimants' contention that the BoC was preferred by Cyprus on account of it being controlled by Cypriots has no factual or legal basis insofar as it concerns these three issues.

1343. Second, the Tribunal concluded at Section X.C.7 above that there was a difference in treatment between Laiki and the BoC consisting of Cyprus' decision in March 2013 to resolve Laiki and rescue the BoC. Nevertheless, the Tribunal found that this difference in

treatment was justified by the different financial conditions of the two banks and that, in any event, the original shareholders of the BoC and the original shareholders of Laiki were both completely wiped out in the process.

1344. The Tribunal further finds that there is no support in the record for Claimants' contention that, when Cyprus decided to rescue the BoC and resolve Laiki, it preferred the BoC on account of the controlling shareholders' nationality. Claimants' reference to the Secret Report in an attempt to prove otherwise does not assist its case. In relevant part, the Secret Report reads as follows:

"The afore mentioned information on investment interest was not credible. The Bank's CEO, Chr. Stylianides had sent an urgent letter (23/2/2012) to the Finance Minister Kikis Kazamias as regards the bank's plan for raising capital and requested a meeting to 'discuss the parameters of a potential financial guarantee by the state to cover the issue (underwriting)'.

This was proof that there was no investment interest in an insolvent bank. Kikis Kazamias accepted the proposal put forward by Marfin Popular Bank and on 2 March 2012, sent a letter to Orphanides in which he said that following the announcement of Marfin Popular Bank's preliminary results, **the government of the Republic of Cyprus reiterated its commitment to support the banks**, in case they did not receive the required funds from private investors.

[...]

The fact that this decision was political, was confessed later on by the General Secretary of AKEL, Andros Kyprianou:

'As regards to Marfin Popular Bank, the amount of €1,8 billion, we had an internal party difference of approach. A few of us said that the bank should be left to collapse or go into a resolution process so that the Bank of Cyprus would be protected. Others said that we should keep the bank at any cost and in the end we decided that Marfin Popular Bank should be saved. From what the experts were saying [sic]. We trusted the experts and we decided that Marfin Popular Bank had to be saved whilst perhaps it shouldn't.'¹²³⁴
[emphasis in original]

1345. The Tribunal notes that the quoted section in the Secret Report refers to Laiki's recapitalization in June 2012 and not to its resolution in March 2013. Thus, for this reason alone, the Secret Report is inapposite. However, the Tribunal is also persuaded that this section in the Secret Report does not support Claimants' contention that the Government of Cyprus intended to protect the BoC to the detriment of Laiki. According to this document, at that time, there was a dispute within the AKEL party as to whether Laiki should be recapitalized by the State or be resolved in order to protect the BoC. As this document and a substantial body of documentary and testimonial evidence in the record make clear, Laiki was not left to collapse. Instead, Respondent continued offering ELA,

¹²³⁴ Secret Report, pp. 16, 17.

increased its sovereign debt by EUR 1.8 in order to assist with the Bank's recapitalization, and sought funds from the Troika to save both Laiki and the BoC. The fact that a defeated faction within the governing party in Cyprus would have preferred to adopt a different strategy and protect the BoC to Laiki's detriment does not demonstrate that the Cyprus Government itself was animated by such intent.

1346. As support for their contention that Laiki was discriminated against in March 2013, Claimants also refer to a statement made by Mr. Pavlou to the press:

“[D]uring the weekend after the 21st March, something occurred [sic] and instead of the plan for the creation of Good and Bad Laiki moving forward, the dissolution of the bank and the absorption of its assets by Bank of Cyprus was finally decided. Although I do not have any evidence, I am almost certain that known, rich and powerful families of Nicosia intervened so that they would not lose Bank of Cyprus’, he characteristically mentioned.”¹²³⁵ [emphasis added]

1347. The Tribunal notes that, on the face of the declaration made by Mr. Pavlou, a member of Laiki's Board of Directors in 2012-2013 and then Special Administrator of the Bank, Mr. Pavlou was speculating as to the reasons why Laiki was resolved while the BoC was allowed to continue operating. The Tribunal cannot attribute any evidentiary weight to such a statement.

1348. As regard Claimants' claim that Respondent discriminated against their investment by enacting the amendment to the Management of Financial Crises Law in January 2013, the Tribunal finds it to be equally meritless. As mentioned in Section XI.C above, this amendment curtailed Cyprus' right to pursue in court members of Laiki's Board of Directors for breach of their duties to a far greater degree than it curtailed Claimants' right. Indeed, at the relevant time, Cyprus was the owner of 84% of Laiki's shares, while Claimants' shareholding had been diluted to about 1%. It is difficult to see how, under these circumstances, Respondent protected its own investment to the detriment of Claimants'.

1349. For all the reasons mentioned above, the Tribunal concludes that Respondent did not breach Article 3 of the Treaty.

¹²³⁵ A. Antoniou, “Chris Pavlou: Powerful families destroyed Laiki”, *Signalive*, 14 May 2013 (Exhibit C-0463).

XIII. WHETHER RESPONDENT BREACHED ITS UNILATERAL DECLARATIONS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. The Tribunal's analysis

1356. The Tribunal need not engage in an analysis of the legal basis of Claimants' claim hereunder in order to conclude that it lacks merit. As the Tribunal's analyses under Sections IX-XII above make clear, Respondent offered liquidity and recapitalization support to Laiki and this permitted the Bank to continue operating until March 2013. The Tribunal does not consider it necessary to reiterate these considerations here. This claim is therefore dismissed.

XIV. DAMAGES

[REDACTED]

[REDACTED]

[REDACTED]

w [REDACTED]

[REDACTED]

[REDACTED]

w [REDACTED]

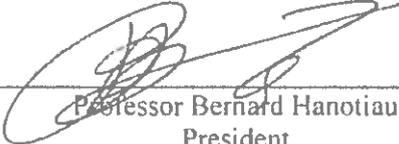
¹²⁴⁶ *Case Concerning the Factory at Chorzów, Germany v. Poland (Claims for Indemnity) (Merits)* (1928) PCIJ Series A No 17 (Exhibit CL-0065) ("Chorzów Factory").

¹²⁴⁷ Memorial, at 563-567; Reply, at 360, 361.

XVI. DECISION

For the foregoing reasons, the Tribunal decides as follows:

- (a) Dismisses the claims by Messrs. Andreas Vgenopoulos and Alexandros Bakatselos;
- (b) Finds that it has jurisdiction to hear the remaining Claimants' claims in this arbitration;
- (c) Finds that Respondent, the Republic of Cyprus, has not acted in breach of the Treaty;
- (d) Dismisses Claimants' claim for damages;
- (e) Orders Claimants to pay Respondent on a joint and several basis the amount of EUR 5,000,000 as compensation for Respondent's reasonable costs in this arbitration;
- (f) Dismisses all other claims.



Professor Bernard Hanotiau
President
17 July 2018



Mr. Daniel M. Price
Arbitrator
24 July 2018



Sir David A. O. Edward QC
Arbitrator
18th July 2018