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SVEA HOVRÄTT

INKOM: 2017-12-27
MÅLNR: T 12033-17
AKTBIL: 5

FINAL AWARD

Made on 28 September 2017

The seat of arbitration is Stockholm, Sweden.

Arbitration No: V 2014/163

Claimant:

PL Holdings S.a.r.l. ("PL Holdings" or "Claimant"), incorporated under the laws of the Grand Duchy of Luxembourg and registered in the Commercial and Companies Register of Luxembourg under number B 151047,¹ 5, Rue Guillaume Kroll, L 1882 Luxembourg²

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Republic of Poland

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¹ Extract from the Trade and Companies Register of Luxembourg, 20 Nov. 2014 (Exh. C-244).

² Claimant a 100% subsidiary of Abris CEE Mid-Market Fund L.P. ("Abris CEE"), which is in turn a subsidiary of Abris Capital Partners Fund I ("Abris Fund I")

SE22 8UR, United Kingdom

Arbitral Tribunal:

Chairperson: Professor George A. Bermann, Columbia University School of Law, 435 West 116th St., New York, New York, 10027, USA

Co-arbitrator: Professor Julian D. M. Lew, 20 Essex Street, London WC2R 3A, United Kingdom

Co-arbitrator: Michael E. Schneider, Lalive Avocats, 35, Rue de la Mairie, 1211 Geneva 6, Switzerland

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I. RELATION TO PARTIAL AWARD

- 1. This instrument constitutes the Final Award in the above-captioned case.**

2. This dispute is the subject of a Partial Award rendered by this Tribunal on 28 June 2017. The dispute arises out of measures adopted by the Komisja Nadzoru Finansowego ("the KNF"), a Polish government entity created by the Polish Financial Market Supervision Act of 2006 to supervise the activity of all banks and credit institutions in Poland, and addressed to Claimant. The full history of the dispute is set forth in the Partial Award, paragraphs 90-235.
3. Taken together, the Partial Award and this Final Award determine the totality of claims and issues arising out of the dispute and submitted to the Arbitral Tribunal ("Tribunal") for decision.
4. Except to the extent otherwise expressly indicated, this Final Award incorporates by reference every fact recited and every determination, whether factual or legal, made in the Partial Award, thus largely obviating the need for repetition of such facts and determinations. These include the Partial Award's (a) summary of the claim and defense, (b) procedural history of the case, and (c) history of the investment and the dispute. In the sections that immediately follow, the Tribunal identifies, for purposes of the Final Award, the additions to be made to each of these three portions of the Partial Award. The sections that follow thereafter address and decide those issues and claims left unaddressed and undecided by the Partial Award.
5. The Partial Award contains the following dispositive section (*dispositif*), reflecting the findings and determinations made by the Tribunal based on the evidence and argument presented to the Tribunal over the course of the proceedings:

- A. Claimant is entitled to a declaration that Respondent committed a breach of its obligations under Article 4(1) of the Treaty on account of its expropriation of Claimant's shareholdings in FM Bank PBP through restrictions taking the form of a suspension of its voting rights and the compulsory sale of shares.
- B. Claimant is entitled to compensation of losses due to Respondent's expropriation of Claimant's shareholdings in FM Bank PBP through restrictions taking the form of a suspension of its voting rights and the compulsory sale of shares. The amount of compensation will be determined on the basis of the specific values assigned in this Partial Award to the factors upon which valuation of the FM Bank PBP and Claimant's losses depend under the methodology prescribed in this Partial Award. Computation of the value of FM Bank PBP and Claimant's losses shall be performed jointly by the Experts appointed by the Parties in this case and in accordance with the provisions of Procedural Order no. 17 dated 24 June 2017. These amounts shall be included in the Final Award issued in this case.
- C. Claimant is entitled to post-Award interest on the amount of liability to be determined in the Final Award from the date of that Award until its full satisfaction at the rate of 7.0 % computed on a simple basis.
- D. The allocation of responsibility for costs and fees (including attorneys' fees) will be determined in the Final Award issued in this case.
- E. Neither Party is entitled at this time to any additional relief.

II. ADDITIONAL CLAIMS AND DEFENSES

- 6. The Partial Award in this case reflects the Tribunal's then-understanding that Claimant had sought, in the event it should prevail on the merits and be entitled to damages, to recover only post-Award interest on damages, and not pre-Award interest on damages. In its Procedural Order no. 24, dated 29 August 2017, the Tribunal acknowledged that its understanding in this respect was at that time mistaken and that, more specifically, Claimant, subsequent to initiation of the Arbitration, had requested recovery of pre-Award damages and done so in a timely fashion. As further

stated in Procedural Order no. 24, the Tribunal ruled that it had authority, under the Arbitration agreement and the Rules of the Stockholm Chamber of Commerce ("SCC") to entertain Claimant's request for an Additional Award concerning its entitlement to pre-Award interest. In so doing, the Tribunal rejected Respondent's objection that it lacked authority to entertain that request under the SCC Rules and under the principle of *res judicata*. The Tribunal's disposition of Claimant's request for an Additional Award of pre-Award interest is set out in paragraphs 40-45, *infra*.

III. ADDITIONAL PROCEDURAL HISTORY OF THE CASE

7. The Tribunal issued a Partial Award in this case on 28 June 2017. In that Award, the Tribunal decided that it had jurisdiction over the dispute, found Respondent liable on the merits, and determined the figures to be used in the computation of asset value and damages. It made those decisions on the basis of the formula and valuation date that the Tribunal had decided upon in the course of the hearing and on which the Experts had based both the most recent of their individual expert reports and their joint submissions to the Tribunal.
8. Accompanying the Partial Award was Procedural Order no. 17, likewise dated 28 June 2017, in which the Tribunal asked Counsel to instruct their experts to jointly perform the computation of asset value and damages according to the formula that the Tribunal had decided upon and on the basis of the values that the Tribunal assigned in the Partial Award to each component factor of the formula, values that the Tribunal had determined on the basis of the Experts' submissions and testimony as well as Counsel's written and oral submissions. Procedural Order no. 17 specifically

contemplated that the Experts might require, and request, clarification or supplementation of the exercise and matters entrusted to them.

9. On 18 July 2017, Claimant reported that the Experts had agreed jointly on the need for a single clarification or supplementation (namely, a figure to be used as the tier-1 capital requirement percentage), while Claimant's Expert, Mr. Rathbone made a second request for clarification or supplementation (namely, Claimant's entitlement to pre-Award interest on damages) with which Respondent's Expert, Mr. Caldwell, did not agree. Respondent objected to submission to the Tribunal of the latter request.
10. On 19 July 2017, the Tribunal stated its willingness to entertain both requests. Both Parties thereafter transmitted the Experts' requests to the Tribunal.
11. On 21 July 2017, Respondent requested that the Tribunal amend Procedural Order no. 17 to eliminate what it regarded as an inconsistency between the terms of that Order and the Tribunal's 19 July 2017 communication (namely the Tribunal's willingness to entertain one Expert's request for clarification or supplementation even if the other Expert declined to join in that request). Respondent also asked the Tribunal to disregard the request for clarification or supplementation made by Mr. Rathbone alone. The Tribunal responded through Procedural Order no. 18, dated 25 July 2017, in which it rejected Claimant's assertion of a contradiction between Procedural Order no. 17 and the Tribunal's 19 July 2018 communication, but nevertheless offered clarification. The Tribunal also rejected Respondent's contention that a response to Mr. Rathbone's sole request concerning pre-Award interest on damages would amount to an impermissible amendment of the Partial Award, noting that the Partial

Award had not in fact addressed or decided the matter of pre-Award interest on damages. On the same date, 25 July 2017, the Tribunal also issued Procedural Order no. 19 in which it responded to the requests for clarification or supplementation that the Experts had formulated. On the request made jointly by the Experts, the Tribunal invited the Experts to provide both a brief summation of their respective views on the correct tier-1 capital requirement percentage figure and an indication of the reasons for disagreement with their counterpart. The Tribunal denied Mr. Rathbone's request concerning Claimant's entitlement to pre-Award interest on damages on the ground that Claimant had not requested a grant of pre-Award interest.

12. On 25 July 2017, Respondent set out its objections to the procedures provided for in Procedural Order no. 17, as clarified by Procedural Order no. 18, asking the Tribunal to repeal Procedural Order no. 17, to allow briefing by Counsel on quantum, and to reopen the hearings on quantum. (By letter of 11 August 2011, Respondent confirmed its objections to Procedural Order no. 17, as clarified by Procedural Order no. 18.)
13. On 28 July 2017, Claimant commented on Respondent's letter of 25 July 2015 and its objections and requests. Claimant also conveyed the response of its Expert, Mr. Rathbone, to the Tribunal's request of 25 July 2017 for additional information from the Experts on the tier-1 capital requirement percentage figure. Finally, Claimant made an application, under Article 42 of the SCC Rules, for an Additional Award on its claim for pre-Award interest that it indicated it had made during the proceedings but that the Partial Award did not address or decide.

14. Also by letter of 28 July 2017, Respondent provided to the Tribunal the response of its Expert, Mr. Caldwell, to the Tribunal's request of 25 July 2017 for additional information from the Experts on the tier-1 capital requirement percentage figure. Respondent also on that date requested issuance of the Partial Award in two redacted forms so as to reflect the Parties' agreed upon Confidentiality Agreement and, in so doing, advanced certain suggestions as to how the redaction should be performed. Claimant responded on 3 August 2017 to Respondent's request for redaction, likewise advancing certain suggestions as to how redaction should be performed.
15. On 4 August 2017, Respondent sent a letter to the Tribunal objecting to its consideration of Claimant's request for an Additional Award on pre-Award interest. On the same date, it sent a letter of reply to Claimant's 28 July 2017 letter which had commented on the objections and requests voiced by the Respondent on 25 July 2017.
16. On 8 August 2017, the Tribunal issued Procedural Order no. 20, providing Counsel with its determination of the applicable tier-1 capital requirement percentage figure, based largely on the explanations supplied by the Experts.
17. On 9 August 2017, the Tribunal issued Procedural Order no. 21 in which it responded to Respondent's various requests of 25 July 2017. In that Procedural Order, the Tribunal denied, with explanation, Respondent's requests that the Tribunal repeal Procedural Order no. 17, order briefing by Counsel on matters of quantum, and reopen the hearings on quantum. On the same day, the Tribunal issued Procedural Order no. 22, requesting certain steps by Counsel to facilitate issuance of the Partial Award in two redacted forms.

18. On 11 August 2017, both Parties communicated to the Tribunal the results of the joint calculation of asset value and damages, as requested by the Tribunal in Procedural Orders nos. 17 and 20.
19. On 25 August 2017, the Tribunal issued Procedural Order no. 23, reiterating its invitation to Counsel to comment on the Experts' joint calculation of asset value and damages reported to the Tribunal by Counsel on 11 August 2017. The Tribunal fixed 29 August 2017 as the date by which the Parties, should they wish to make any observations, must do so. The Claimant did not make any such observations. The Respondent did indeed submit comments on 29 August 2017. It criticized the Tribunal for allegedly having invited the Parties' Experts to do the work of the Parties' Counsel. The Respondent nevertheless confirmed that it had instructed its expert to cooperate with the Claimant's expert and the Tribunal, and added that "Mr. Caldwell's final computation was performed on the Tribunal's assumptions included in the Partial Award, not his own." It described this work as a "purely mechanical exercise." The Respondent also requested the Tribunal to reopen the hearings and give the Parties an opportunity to question the experts. The Respondent, however, did not point to any error in the calculation of the Experts; nor did it identify any issue on which the Experts should be interrogated or otherwise state that the result which the Experts reached did not represent the correct calculation that the Tribunal had invited them to make.
20. On 29 August 2017, the Tribunal issued Procedural Order no. 24 concerning the admissibility and merits of Claimant's request for an Additional Award. In that

Procedural Order, the Tribunal determined that Claimant had made a timely request for pre-Award interest, that the Partial Award had neither addressed nor decided that question, and that the Tribunal had authority under SCC Rule 42 to entertain Claimant's request for issuance of an Additional Award. It also found that the principle of *res judicata* was no bar to its doing so. As for the merits of the request, rather than decide the matter on that occasion, it requested Counsel to make any brief supplemental observations they might want to make on a particular aspect of Claimant's request, setting a deadline of 6 September 2017 for doing so.

21. On 31 August 2017, Respondent reiterated its request that the Tribunal order additional briefing and reopen hearings to allow questioning of the Experts on quantum. The Tribunal reiterated, with explanation, its rejection of those requests through Procedural Order no. 25, dated 31 August 2017.
22. Also, by letter of 31 August 2017, Respondent objected to Procedural Order no. 24 and, in particular, to the time set for Counsel to communicate any additional comments on Claimant's request for an Additional Award. On the same day, Respondent made a request that the date by which Counsel should respond to the invitation in Procedural Order no. 24 be extended to 21 September 2017. By Procedural Order no. 26, dated 1 September 2017, the Tribunal denied that request.
23. Counsel for Claimant, on behalf of itself and Counsel for Respondent, provided the Tribunal on 31 August 2017 with the indications for redaction of the Partial Award that the Tribunal had requested in Procedural Order no. 22 dated 9 August 2017.

24. Both Parties, as invited in Procedural Order no. 24, made submissions to the Tribunal on 6 September 2017 on the specific question that the Tribunal had posed in that Order. Claimant then requested, and was granted, an opportunity by 8 September 2017 to comment in reply to Respondent's 6 September 2017 submission. The Tribunal invited Respondent to communicate in turn by 12 September 2017 any observations it wished on Claimant's submissions. Both Parties made such supplementary observations.
25. On 13 September 2017, Claimant sought permission to update its final costs incurred in this arbitral proceeding. On the same day, the Tribunal granted that request, and at the same time invited Respondent to supply any such updating of its own if it wished to do so. The Tribunal requested that any updating be communicated to the Tribunal by the close of the following day so that the draft Final Award could be communicated in final form to the SCC by 15 September 2017, as required by the SCC. Both Parties provided their updates, as requested, on 14 September 2017.
26. On 13 September 2017, the Tribunal informed the Parties that it intended, in conformity with the deadline set by the SCC, to issue its Final Award in this proceeding by no later than 29 September 2017. It informed them further that accompanying that Award would be signed redacted versions of the Partial Award, dated 28 June 2017, in conformity with the Parties' requests.

IV. ADDITIONAL HISTORY OF THE DISPUTE

27. The Parties have not made the Tribunal aware of any further developments in the dispute as such since issuance of the Partial Award on 28 June 2017.

V. CLAIMANT'S ENTITLEMENT TO DAMAGES

28. In its Partial Award, the Tribunal, having established jurisdiction and liability, addressed the question of damages.
29. Based upon the Experts' several reports and the evidence produced with them, their examination at the hearing, as well as Counsel's submissions, the Tribunal made a determination as to the most accurate formula and valuation date for establishing asset value and damages, on the basis of which the Experts adopted an Agreed Financial Model.³ The Experts then submitted additional reports specifically on those bases. As indicated in the Partial Award and in the accompanying Procedural Order no. 17, the Tribunal undertook, again based primarily on the Experts' reports and examination, to assign a value to every relevant factor needed to perform a calculation of asset value and damages. (The Experts had furnished the Tribunal not only an Agreed Financial Model, but also an agreed list of relevant factors, accompanied by their respective analyses of each.) Those values are set out, expressly and in full, with reasons, in the Partial Award (paras. 547-642). However, the Tribunal considered it useful, in the interest of mathematical accuracy, to have the Experts themselves jointly perform the actual calculation based on the values decided upon

³ The Agreed Financial Model is described by Respondent's Expert, Mr. Caldwell, as follows:

[The Agreed Financial Model] takes projected net profits for 2014 to 2017 from the January 2014 business plan (either the basic or the investor version) and makes a series of adjustments to arrive at a projection of net profits, including those for 2018. The most significant of these adjustments relate to interest rates and the Warsaw Receivable. This projection is then used to calculate equity cash flows (consisting of capital injections and IPO proceeds) which are discounted at a cost of equity to arrive at a value of the Claimant's equity at 30 April 2015. The alleged damages are then calculated by deducting the value received by the Claimant in the sale to AnaCap and making certain other adjustments. ⁴ Caldwell Rpt., paras. 3.1.2-3.1.3

for each factor by the Tribunal. The Experts, having been invited to seek clarification or supplementation of information if needed, subsequently jointly requested the Tribunal to supply a figure for an additional factor – namely, a tier-1 capital requirement percentage – that they considered necessary to include in their calculation. Based on additional analyses by the Experts, the Tribunal issued Procedural Order no. 20, dated 8 August 2017, determining that percentage. With this supplementary datum in hand, the Experts were able to perform the calculation of damages and arrive at an agreed-upon damages figure which they supplied to Counsel on both sides and which Counsel then transmitted to the Tribunal in the form of a "Report on the Calculation of Damages Arising from the Partial Award of 28 June 2017," dated 11 August 2017.

30. The Experts' Joint Report calculated damages as PLN 653,639,384. As explained above (para. 19, *supra*), the Tribunal invited the Parties to make any observations they wished concerning this calculation. Neither Party criticized the result reached by the Experts. The Tribunal sees no fault in the Experts' calculation or its result. It adopts this result and decides that PLN 653,639,384 is the amount of damages to which Claimant is entitled.

VI. CLAIMANT'S ENTITLEMENT TO PRE-AWARD INTEREST

31. The Partial Award in this case granted Claimant as part of its relief post-Award interest at the rate designated by Polish law for interest on overdue debts, namely 7.0%, payable on a simple rather than compound basis.

(A) Claimant's Request for Pre-Award Interest

32. On the express understanding that Claimant had not sought pre-Award interest, the Tribunal did not address that matter or render any decision on it. It so stated in the Partial Award as well as in Procedural Order no. 24 dated 29 August 2017. In that Procedural Order, the Tribunal, upon hearing the Parties, determined that Claimant had in fact sought pre-Award interest, that the Tribunal had not considered or determined the matter in the Partial Award, that the Tribunal had authority under Article 42 of the SCC Rules⁴ to entertain Claimant's application for an Additional Award of pre-Award interest, and that entertainment of that request was not barred by the doctrine of *res judicata*. Claimant's request for pre-Award interest was thus held to be a proper subject of an Additional Award.
33. However, the Tribunal did not rule on the merits of Claimant's application for an Additional Award in Procedural Order no. 24. Rather, in the interest of properly determining the merits of that request, the Tribunal invited Counsel on both sides to supplement the argumentation they had had an opportunity to make, and had made, in their prior submissions to the Tribunal. More specifically, the Tribunal noted that the value of the Bank as an asset was to be determined by reference to what Claimant would have achieved in the Initial Public Offerings ("IPOs"), but also that, while 30 April 2015 was the date for valuation of the Bank, it was not necessarily also the date

⁴ Article 42 provides:

Within 30 days of receiving an award, a party may, upon notice to the other party, request the Arbitral Tribunal to make an additional award on claims presented in the arbitration but not determined in the award. If the Arbitral Tribunal considers the request justified, it shall make the additional award within 60 days of receipt of the request. When deemed necessary, the Board may extend this 60 day time limit.

when damage occurred. In Procedural Order no. 24, the Tribunal accordingly "invite[d] Counsel to comment specifically on Claimant's right to pre-Award interest for the specific period of time for which it is requested." The Tribunal essentially sought the Parties' views on the specific question of whether pre-Award interest (i.e., interest from 1 May 2015 to the date of this Award) could properly be granted in view of the fact that the actual loss to Claimant would appear to have been realized at the time of the IPOs. The Tribunal in effect asked whether, if Claimant's loss was actually realized at the time of the IPOs, it could recover interest from the date of its sale of the Bank to AnaCap.

34. The Parties responded to the Tribunal's question simultaneously on 6 September 2017. The Tribunal, upon request, gave Claimant an opportunity to address Respondent's submission, which Claimant did on 8 September 2017. The Tribunal also offered Respondent an opportunity in turn to address Claimant's submissions of 6 September and 8 September 2017, which Respondent did on 12 September 2017.
35. In its letter of 6 September 2017, Claimant first reiterated its statement of position of 28 July 2017 that it had, at various moments during the arbitral proceedings, made a request for pre-Award interest. It correctly noted that the Tribunal, upon hearing the Parties, had determined in Procedural Order no. 24 (a) that Claimant had indeed made such a request, (b) that the request was timely, and (c) that the Tribunal had neither addressed nor decided it.
36. By way of rationale for the grant of pre-Award interest, Claimant observed that the Tribunal, upon hearing the Parties, had specifically directed the Experts to make their

valuation of the Bank as of 30 April 2015, the date of the sale of the Bank to AnaCap, and that the Experts had done so. The valuation at which the Experts arrived in their joint report of 11 August 2017 was accordingly performed to ensure that Claimant would be made whole as of 30 April 2015, and only as of 30 April 2015. According to Claimant, a grant of interest from 30 April 2015 to the date of the Award was therefore necessary in order to make Claimant whole as of the latter date. Claimant cites in support of that proposition the expert testimony of Respondent's own Expert, Mr. Caldwell, both oral⁵ and written,⁶ confirming that, in the event of liability on Respondent's part, interest would start running from 1 May 2015.

37. In its own letter of 6 September 2017, Respondent dwelled principally on the question of the propriety of the Tribunal's entertaining Claimant's request for pre-Award interest at this time, a matter it had already raised in its letter of 4 August 2017, rather than on the merits of the request. In this regard, Respondent advanced four arguments:

- First, Respondent asserts that Claimant sought pre-Award interest for the first time in its post-hearing brief, and that Respondent did not therefore have an adequate opportunity to respond.
- Second, Respondent observes that, in its Procedural Order no. 19, dated 25 July 2017, the Tribunal stated its understanding that Claimant did not request pre-Award interest.

⁵ Tr. Day 8, p. 135, line3s 14-22

⁶ Fourth Caldwell Report, para. 6.6.1. In his Fourth Report, para. 57, Claimant's Expert, Mr. Rathbone concurred.

- Third, Respondent asserts that Claimant in any event failed to explain or substantiate its entitlement to pre-Award interest, either in its 28 July 2017 request for an Additional Award or in its communication of 6 September 2017, and that Respondent could not meaningfully reply.
- Finally, Respondent claims that by ordering simultaneous submissions on 6 September 2017, the Tribunal denied Respondent an opportunity to rebut Claimant's arguments.

38. Respondent turned to the merits of Claimant's request for pre-Award interest, albeit only on the last page of its submission.

39. Before addressing Claimant's request for pre-Award interest on the merits, the Tribunal responds to Respondent's assertion that even entertaining that request was improper. The Tribunal has already fully explained in Procedural Order no. 24 why Claimant's request was required to be entertained. However, since Respondent in its 6 September 2017 submission emphatically reiterates its objections, the Tribunal addresses them again here:

- First, Respondent is mistaken in suggesting that Claimant sought pre-Award interest for the first time in its post-hearing brief and that Respondent did not have an adequate opportunity to respond. As established in Claimant's request of 28 July 2017, even though it did not initially seek pre-Award interest in this Arbitration in express terms, Claimant made allowance for the pre-Award period by initially using the date of the Award as the valuation date. However, as Claimant points out, upon the Tribunal's subsequent decision to

treat 30 April 2015 rather than the date of the Award as the valuation date, consideration was properly to be given to a grant of pre-Award interest for the period between 1 May 2015 and the date of this Award. Claimant in fact requested pre-Award interest at several stages of the proceeding and the Experts accordingly expressly addressed the question of pre-Award interest, as if it were in principle recoverable. This is reflected in items 18 and 19 in the Agreed Financial Model on the basis of which the Experts conducted their analyses. It is therefore not true that a request for pre-Award interest was made for the first time in Claimant's post-hearing brief.

- Second, while Procedural Order no. 19 expressed the Tribunal's then-understanding that Claimant had not requested pre-Award interest, that understanding – as the Tribunal explained in Procedural Order no. 24 – was mistaken, and – again as explained in Procedural Order no. 24 – the Tribunal had the authority, indeed the obligation, to address it. It is the very purpose of Article 48 of the SCC Rules to allow an arbitral tribunal to rule on claims that, by mistake, oversight or for other reasons, it had not decided.
- Third, Respondent is mistaken in suggesting that Claimant failed to explain or substantiate its entitlement to pre-Award interest. Claimant more than adequately explained and sought to justify its request in both its July 28, 2017 request for an Additional Award and in its communication of 6 September 2017.

- e Finally, Respondent was not prejudiced by the Tribunal's inviting simultaneous submissions on 6 September 2017. On 29 July 2017, the day immediately following Claimant's request for pre-Award interest, the Tribunal expressly invited Respondent to comment, setting no deadline for its doing so. Respondent then specifically requested a deadline, which the Tribunal set at 4 August 2017 and to which Respondent expressed no objection. However, even in fixing that date, the Tribunal expressly stated that it would entertain a request by Respondent for an extension if needed – a request that Respondent did not make. Respondent thus had an opportunity from 29 July 2017 forward to comment specifically on Claimant's argumentation in favor of an Additional Award granting pre-Award interest and gave no indication whatsoever that it lacked a fair opportunity to do so. Moreover, though not asked by Respondent to do so, the Tribunal, as noted, thereafter gave Respondent through Procedural Order no. 24 an additional opportunity on 6 September 2017 to argue against the grant of pre-Award interest, and yet a further opportunity to do so on 12 September 2017. In sum, Respondent had ample opportunity both to make known its views on Claimant's entitlement to pre-Award interest and to rebut Claimant's views thereon.

(B) Claimant's Entitlement to Pre-Award Interest

40. Turning now to the merits of Claimant's request for pre-Award interest, which, as noted, Respondent addressed only on the final page of its 6 September 2017 submission (and then reiterated in its 12 September 2017 letter), Respondent

advances two lines of argument. First, Respondent maintains that discounting future cash flows to present value must necessarily mean discounting to the date of the Partial Award, 28 June 2017, a date it describes as roughly corresponding to the date of the first stage of the IPO. It rests this conclusion on the standard reference in the Partial Award to discounting "to present value." Second, Respondent argues that granting pre-Award interest "would literally eliminate the effect of the discount rate determined by the Tribunal."

41. The Tribunal disagrees. As for Respondent's first argument, the Tribunal fixed the valuation date at 30 April 2015; the Parties' Experts have understood this instruction and used this date for their valuation. In its 12 September 2017 submission, the Respondent firmly states: "it is unquestioned that the Experts adopted 30 April 2015 as the date of valuation." The term "discount to present value" is a generic locution, meant merely to suggest that income flows that will accrue in the future must, upon their being awarded in advance, be reduced to a lesser value which, when combined with future interest, will afford the Claimant the full value to which it is entitled. The Tribunal's mere use of that term did not amount to a designation of any precise date to which the future income flow was to be discounted.
42. Respondent's second argument also fails. According to the Partial Award, the damage done to Claimant occurred when it was required to dispose of its shares in the Bank, i.e., 30 April 2015. For all practical purposes, that is when the expropriation occurred. The damage consisted of Claimant's inability to obtain the amount of money it had a reasonable basis to expect at the time that the future IPOs would take place. Because

the actual loss was a future loss, both Parties agreed, the Tribunal found, and the Experts proceeded on the assumption, that the loss had to be discounted to an earlier time. The Experts were expressly instructed to perform that discount to the date of 30 April 2015, and they so did. That discounted amount represents the amount that Claimant would have to receive as of 30 April 2015 in order to be fully compensated for the loss that would be realized at the time of the future IPOs. The entire operation of discounting is designed to ensure that that amount, with interest, will yield a sum reflecting the future realization of loss, in this case realization of loss at the time of the IPOs.

43. Put differently, this is not a case in which the valuation of loss is discounted to the date of the Award. At no point did the Tribunal suggest, or the Parties or Experts understand, that valuation was to be performed as of the date of the Award, nor indeed at any date other than 30 April 2015. Rather, this is a case in which the value of the loss was clearly and expressly discounted to 30 April 2015 – a period of time considerably earlier than the date of the Award. Had Claimant received that amount on 30 April 2015, which is the supposition upon which discounting is based, it would have been able to use that amount and, if invested, that amount would have begun earning interest from 1 May 2015 forward.
44. To reach any other result would in fact be illogical. The Tribunal cannot discount Claimant's loss to 30 April 2015 – on the theory that that amount would start earning interest starting at that date – and then deprive Claimant of that very interest. Respondent is thus wrong in suggesting that a grant of pre-Award interest "would

literally eliminate the effect of the discount rate determined by the Tribunal." On the contrary, a grant of pre-Award interest is required in order for the discounting operation to serve its purpose of achieving full and accurate compensation.

45. The Tribunal thus concludes that, based on the premises on which the Experts' analyses and computations were actually conducted, Claimant is entitled to recovery of pre-Award interest.

(C) Applicable Rate of Interest

46. Having determined that Claimant is entitled to recovery of pre-Award interest, the Tribunal turns to the matter of interest rate.
47. In its submission of 6 September 2017, Claimant reiterated its position (first stated in its 28 July 2017 request for an Additional Award) that it is entitled to interest calculated at 9.75% for the period between 1 May 2015 and the date of the first IPO, and at 7.0% from the date of the first IPO to the date of this Award.
48. In its comments of 6 September 2017, Respondent objects to the proposed interest rate as "abnormally high. In its submission of 12 September 2017, the Respondent asserts that the Claimant "failed to explain why pre-Award interest should be awarded at all." Otherwise, Respondent does not address in any of its submissions – neither of 4 August, 6 September or 12 September 2017 – the question of the applicable rate of interest in the event the Tribunal should grant pre-Award interest.
49. The Tribunal turns to the positions expressed by the Experts in their Fourth Reports and the Valuation Model on the rate of pre-Award interest. Claimant's Expert, Mr. Rathbone, referring to Article 481 of the Polish Civil Code, proposed using the

reference rate of the National Bank of Poland (NBP) (i.e., 1.5%) plus 5.5 percentage points, resulting in a rate of 7.0%."

50. Respondent's Expert. Mr. Caldwell, referring to a note entitled "Changes in Law" (Exhibit BRG 56), reports that until 31 December 2015 the Polish statutory rate was 8.0%. For the period thereafter he confirms the NBP reference rate of 1.5%, but adds to it only 3.5 percentage points. The Wierzbowski Eversheds note explains that, as of 1 January 2016, Poland introduced a new uniform mechanism for determining the statutory interest rate which distinguishes between interest on capital, on the one hand, and interest on delay, on the other, with a higher rate for the latter. Interest on damage caused to Claimant by the forced sale on 30 April 2015 represents interest on capital. Under the new wording of Civil Code Article 359 §2, that interest rate is the NBP reference rate (now 1.5%) plus 3.5 percentage points, i.e. 5.0%. That rate is properly distinguishable from the rate of post-Award interest (7.0%) granted in paragraph 648 of the Partial Award, which is the rate of interest on overdue debt.
51. Accordingly, interest for the period from 1 May 2015 to 31 December 2015 must be paid at 8.0%, while interest for the period thereafter and up to the date of this Final Award (i.e. 28 September 2017). There is no provision in Polish law for compounding interest on capital.

VII. COSTS AND FEES

(A) *Costs of the Arbitration*

52. Article 43(1) of the SCC Rules states that the costs of the Arbitration consist of the administrative fees of the SCC and the fees and expenses of the Arbitral Tribunal. The costs of the Arbitration are finally determined by the Board of the SCC in accordance with the SCC Schedule of Costs (Article 43(2)), and must be specifically set out in the Final Award (Article 43(4)). Unless the Parties agree otherwise, the Tribunal is entitled to apportion liability for the costs of the Arbitration between the Parties "having regard to the outcome of the case and other relevant circumstances" (Article 43(5)).
53. On 13 September 2017, in accordance with Article 43 (2) of SCC Rules, the Tribunal requested that the SCC Board determine the costs of the Arbitration. By decision dated 14 September 2017, the SCC Board fixed the costs of this Arbitration as follows:

George A. Bermann
 fee EUR 135,500.00 plus any VAT
 expenses USD 13,032.78
 expenses EUR 632.60 plus any VAT
 expenses GBP 28.00
 per diem allowance EUR 6,000.00

Julian D.M. Lew
 fee EUR 81,000.00 plus any VAT
 expenses GDP 157.31

Michael E. Schneider
 fee EUR 81,000.00 plus any VAT
 expenses CHF 3,495.00
 per diem allowance EUR 6,000.00

Stockholm Chamber of Commerce
 administrative fee EUR 60 000.00 plus any VAT

The costs of the arbitration are to be paid from the Advance on Costs paid to the SCC by the Parties, in equal parts, at the outset of the Arbitration.

54. The Tribunal must now decide whether these costs are to be borne in equal parts by the Parties or reallocated in some fashion. The Tribunal has a wide discretion in making this determination.
55. The Tribunal observes that this dispute entailed serious and difficult issues of legitimate importance to both Parties. In addition, both Parties conducted the Arbitration in a basically responsible manner. It does not regard either Party as having presented especially unnecessary or irrelevant evidence or argument or as otherwise having imposed excessively undue costs on the proceedings. Thus, although Claimant largely prevailed on the merits – a consideration that the Tribunal takes seriously into account in the allocation of the Parties' costs and fees (see para. 63, *infra*) – the Tribunal considers it appropriate that the Parties bear in equal portions the costs of the Arbitration as such.

(B) The Parties' Costs and Fees

56. The Tribunal also must address the matter of the Parties' direct costs, including attorneys' fees (but exclusive of the costs of the Arbitration dealt with in the immediately preceding paragraphs).
57. More specifically, the Arbitral Tribunal is entitled to order one of the Parties to reimburse the other party for all or part of the reasonable legal costs and other expenses incurred in connection with the Arbitration. Article 44 of the SCC Rules provides:

Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable

costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

58. Both Parties presented a Statement of Costs on 9 December 2016.
59. In its Statement of that date, Claimant reiterated its request that all of its costs, including attorneys' fees, be borne by the Respondent, due to a variety of considerations, including but not limited to a variety of ways in which Respondent allegedly unjustifiably increased the costs and delay of the proceedings. Claimant reported its costs as follows:

| | <u>Euros</u> | <u>GB£</u> | <u>PLN</u> |
|----------------------------|---------------------|-------------------|-------------------|
| Lawyers' fees | 6,107,729.42 | 113,755.56 | |
| Lawyers' expenses | 278,290.66 | 182.46 | |
| Experts' fees and expenses | 1,427,745.43 | 35,942.50 | 7,842.78 |
| Witness expenses | 4,824.28 | | |
| Other costs | | | |
| Translation costs | 15,666.44 | | 268,262.99 |
| Hearing expenses | | 18,921.14 | |
| Court reporting | | 19,109.72 | |
| Travel/accommodation | 33,442.46 | 10,834.01 | 9,400.78 |
| Advance on Costs | 211,500 | | |
| [total other costs] | 260,608.90 | 48,864.87 | 277,663.77 |
| TOTAL | 8,079,198.69 | 198,745.39 | 285,506.55 |

60. In its Statement, Respondent reiterated its request that all of its costs, including attorneys' fees, be borne by the Claimant, due to the alleged lack of merit in

Claimant's underlying claim and certain elements of cost and delay that Respondent attributes to Claimant. As for Respondent's costs, it reports them as follows:

| | <u>PLN</u> |
|------------------------------------------------|----------------------------|
| Legal fees and expenses | 1,915,978.12 |
| Experts' fees and expenses | 4,990,884.98 |
| Witness expenses | 38,200.00 |
| Other costs | |
| Advance on costs | 897,454.20 |
| IDRC (hearing venue) fee | 96,980.02 |
| Respondent's representatives' hearing expenses | 54,806.86 |
| Document translations | 81,312.52 |
| Interpretation at hearing | 21,315.87 |
| Court reporting | 113,669.95 |
| Printing of joint bundle | 87,572.77 |
| [total other costs] | 1,353,112.19 |
| TOTAL | <u>8,298,175.29</u> |

61. On 20 December 2016, both Parties filed comments on the other Party's costs submission, claiming that the other's costs were, for various reasons, highly excessive and otherwise unjustified.
62. As noted (see para. 25, supra), both Parties, with permission of the Tribunal, updated their Statements of Costs on 14 September 2017. Claimant thus reported additional expenditures of GB£ 60.95 in external copying fees) and additional legal expenses of

Euros 148,390.50. That brought its total costs in Euros to 8,227,589.19 and its total costs in GB£ to 198,806.34, its expenditures in PLN remaining unchanged. For its part, Respondent reported additional expenses of PLN 288,000 in fees and expenses of Berkeley Research Group, Ltd. and PLN 98,670 in remuneration of employees of the Respondent's Office of General Counsel.

63. The Tribunal reaffirms its conclusion that the Parties conducted this Arbitration in a basically reasonable and responsible fashion. It is on that basis that the Tribunal chooses (see para. 55, *supra*) to have the Parties bear equally the costs of the Arbitration. On the other hand, however, the Tribunal cannot disregard the fact that Claimant presented a considerably more cogent and convincing case than Respondent on the great majority of issues in these proceedings and very substantially prevailed, albeit not to the level of compensation it had requested. This consideration cannot be ignored in determining whether and how the Parties' costs and fees should be reallocated. In light of all these circumstances, the Tribunal rules that Claimant is entitled to recover a significant portion of its costs. Respondent shall accordingly reimburse Claimant the sum of Euros 3,500,000, representing a portion of Claimant's costs and fees in this proceeding.

VIII. DISPOSITIVE SECTION

64. In addition to the relief granted in the Partial Award in this case (see Partial Award, paras. 649-650), the Tribunal thus grants the following additional relief.

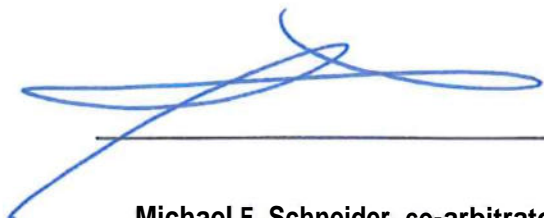
- A. The total amount of damages to which Claimant is entitled in this case, not finally quantified in the Partial Award, is hereby fixed at PLN 653,639,384.

- B. Claimant's request for pre-Award interest in this case is granted for the period from 1 May 2015 to 31 December 2015 at the rate of 8%, and for the period from 1 January 2016 to 28 September 2017 at the rate of 5.0%, in both cases computed on a single rather than compound basis.
 - C. Claimant and Respondent shall bear in equal portions the total cost of the Arbitration, as established in paragraph 53, supra. These costs are to be paid from the Advance on Costs that the Parties deposited with the SCC in equal parts at the outset of the Arbitration.
 - D. Respondent shall reimburse Claimant the sum of Euros 3,500,000 of the costs and fees (including attorneys' fees) incurred by Claimant in this Arbitration.
 - E. Neither Party is entitled to any additional relief.
65. According to Sections 34 and 43 of the Swedish Arbitration Act (Sw. lag (SFS 1999:116) om skiljeforfarande) ("Swedish Arbitration Act"), a Party seeking to challenge this Award in whole or in part must bring an action, within three months from the date upon which the party received the Award, in the Court of Appeal for the jurisdiction in which the arbitral proceedings were held.
66. According to Sections 41 and 43 of the Swedish Arbitration Act, a party may, within three months from the date upon which it received this Award, bring an action in the District Court against the Award regarding payment of compensation to the arbitrators.

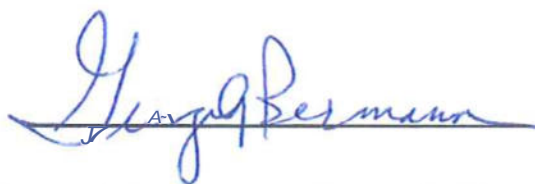
Signatures:

A handwritten signature in blue ink, appearing to read "Julian D.M. Lew", written over a horizontal line.

Julian D.M. Lew, co-arbitrator

A stylized handwritten signature in blue ink, written over a horizontal line.

Michael E. Schneider, co-arbitrator

A handwritten signature in blue ink, appearing to read "George A. Bermann", written over a horizontal line.

George A. Bermann, president of the Tribunal