ARBITRATION INSTUTUTE

of the

STOCKHOLM CHAMBER OF COMMERCE

Box 16050, 103 21 Stockholm, Sweden Phone: +46 8 555 100 00, E-mail:

arbitration@chamber.se www.sccinstitute.com

PARTIAL AWARD

Made on 28 June 2017

The Seat of Arbitration is Stockholm, Sweden

Arbitration No.: V 2014/163

PL Holdings S.à.r.l./. Republic of Poland

TABLE OF CONTENTS

I. THE PARTIES

1. Claimant PL Holdings S.a.r.l. ("PL Holdings" or "Claimant") is a company incorporated under the laws of the Grand Duchy of Luxembourg ("Luxembourg").[1] It is 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"), among the largest private equity funds in Central and Eastern Europe. Abris Fund I was is managed by Abris

[1] PL Holdings was incorporated on 15 January 2010 and duly registered on 3 February 2010. Extract from the Trade and Companies Register of Luxembourg, 20 Nov. 2014 (Exh. C-244).

Capital Partners ("Abris"). Claimant is registered in the Commercial and Companies Register of Luxembourg under number B 151047.

2. Claimant is represented in these proceedings principally by Stephen Fietta, Fietta, 1 Fitzroy Square, London, W1T 5HE, United Kingdom, and by Matthew Weiniger, QC, Linklaters, One Silk Street, London, EC2Y 8HQ, United Kingdom.

3. Respondent is the Republic of Poland ("Poland"). Although its representation has changed over the course of these proceedings. It has been represented principally by Joanna Jackowska-Majeranowska, Deputy Director of the International and European Law Department, Office of General Counsel to the Republic of Poland, Hoża 76/78, 00-682 Warsaw, Poland, and by Stewart Shackleton, SR Shackleton LLP, 150 Woodwarde Rd, Dulwich Village, London, SE22 8UR, United Kingdom.

4. The measures of which Claimant complains in this proceeding were adopted by the Komisja Nadzoru Finanswego ("the KNF"), a Polish government entity created by the Financial Market Supervision Act of 2006 to supervise the activity of all banks and credit institutions in Poland.

II. THE TRIBUNAL

5. The Arbitral Tribunal is composed as follows:

- Professor George A. Bermann, Columbia University School of Law, 435 West 116th St., New York, New York, 10027, USA
- Professor Julian D. M. Lew, 20 Essex Street, London WC2R 3A, United Kingdom
- Michael E. Schneider, Lalive Avocats, 35, Rue de la Mairie, 1211 Geneva 6, Switzerland

III. GLOSSARY

6. **For ease of understanding of the Award, the Tribunal provides here a glossary of certain terms used with some frequency in the Award:**

Glossary of Defined Terms and Abbreviations

Abris	Abris Capital Partners
Abris CEE	Abris CEE Mid-Market Fund L.P.
Abris Fund I	Abris Capital Partners Fund I
Alior Bank	Alior Bank S.A.
AnaCap	AnaCap Financial Partners III LP
APC	Polish Administrative Procedures Code
AQR	Asset Quality Review
Banking Act	Polish Banking Act of 29 August 1997
BESI	Banco Espirito de Investimento S.A. Spólka Akcyjna
BGK	Bank Gospodarstwa Krajowego
BIT	Bilateral Investment Treaty
BOŚ	Bank Ochrony Środowiska S.A.
DSS	Dolnośąlaskie Surowce Skalne Spóślka Akeyjina
DSS Bonds	Bonds issued by DSS and purchased by PBP Bank on 12 April 2011
EU	European Union
Euro Bank	Euro Bank S.A.
FDD	Financial Due Diligence
Financial Trading Act	Act on Trading ion Financial Instruments
FM Bank	FM Bank Spólka Akcyjna
FM Bank PBP	FM Bank PBP Spólka Akcyjna
IDM	Dom Maklerski IDM Spólka Akcyjna
IFC	International Finance Corporation

Innova	Innova Capital Sp. z. o.o.
IPO	Initial public offering
June Plan 2013	Remedial Plan of June 2013
KNF	Komisja Nadzoru Finanswego
Lone Star Funds	Lone Star Fund IX (US) LP, Lone Star Fund IX (Bermuda) LP, Lone Star Fund IX Parallel (Bermuda) LP
Meritum Bank	Meritum Bank ICB Spólka Akcyjna
OTP	OTP Bank
PBP Bank	Polski Bank Przedsiębiorczości Spólka Akcyjna
PL Holdings	PL Holdings S.a.r.l.
PLN	Polish Zlotys
Poland	Republic of Poland
Porto Group	Porto Group Holdings Limited
Project Berlin	Plan to market FM Bank PBP mobile banking business
SCC	Stockholm Chambers of Commerce
SPA	Sale and Purchase Agreement dated 12 March 2010 between WestLB Bank AG, PL Holdings and Abris CEE
TFEU	Treaty on the Functioning of the European Union
Treaty	Reciprocal Protection of Investments between Poland and the Government of the Kingdom of Belgium and the Government of the Grand-Duchy of Luxemburg 19 May 1987
VCLT	Vienna Convention on the Law of Treaties
VDD Report	Vendor Due Diligence Report
Warsaw Receivables	Amount owed to FM Bank PMP by the City of Warsaw as compensation for a forced sale of property
WestLB Bank Polska	WestLB Bank Polska Spólka Akcyjna

IV. SUMMARY OF THE CLAIM AND DEFENSE

7. It is Claimant's contention in this proceeding that Poland has expropriated Claimant's qualifying investment in Poland and done so without compensation,[2] in violation of the Bilateral Investment Treaty ("BIT") between Poland and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg ("the Treaty"),[3] whose stated purpose is "the [e]ncouragement and the [r]eciprocal [p]rotection of [i]nvestments."

8. The relevant chronology, as presented by Claimant in these proceedings is as follows.

9. On 1 December 2010, Claimant became the owner of 55% of the shares in a Polish bank known at the time as WestLB Bank Polska Spólka Akcyjna ("WestLB Bank Polska") and subsequently renamed as Polski Bank Przedsiębiorzcości Spólka Akcyjna ("PBP Bank"). On 18 July 2012, PL Holdings purchased the other 45% share in PBP Bank from a Polish corporation, Dom Maklerski IDM Spólka Akcyjna ("IDM"), so that Claimant became the sole shareholder of PBP Bank.

10. In June 2013, Claimant also acquired an interest in a second Polish bank, FM Bank Spólka Akcyjna ("FM Bank").

11. On 1 July 2013, FM Bank and PBP Bank were merged into a new entity known as FM Bank PBP Spólka Akcyjna ("FM Bank PBP"), with Claimant becoming the 99.59% shareholder of FM Bank PBP. (The remaining 0.41% interest in FM Bank PBP is owned by a third party individual, Piotr Stępniak). Claimant contends that this merger took place at the insistence of the KNF. Claimant further asserts that Poland knew that

[2] Statement of Claim, para. 1.

[3] Statement of Claim, paras. 4-5.

Claimant had the intention of exiting its investments by way of an initial public offering ("IPO").[4]

12. Shortly following the merger, the KNF took a series of measures that are the subject of this proceeding. These measures consisted of an order to PL Holdings prohibiting its exercise of voting rights in connection with its shareholding in FM Bank PBP and an order to PL Holdings compelling it to sell its shares in the FM Bank PBP.[5]

13. Claimant maintains that it had no choice but to comply with the measures, as they were compulsory and immediately enforceable under Polish law. According to Claimant, these measures amount to an expropriation, defined in Article 4 of the Treaty as "measures of direct or indirect dispossession."[6]

14. On 30 April 2015, Claimant and Mr. Stępniak sold all of their respective shareholdings in FM Bank PBP to Porto Group Holdings Limited, an affiliate of AnaCap Financial Partners III LP ("AnaCap").

15. More specifically, Claimant alleges in this proceeding that:[7]

- **the measures taken against it lacked any factual or legal basis under Polish law**
- **the measures did not genuinely pursue any legitimate aim or public purpose**
- **the measures were manifestly disproportionate**
- **Claimant had violated no provision of Polish law**
- **Respondent never raised any concerns about Claimant's alleged failure to meet certain financial commitments made in June 2010 before imposing the measures**
- **Respondent denied Claimant an effective administrative or judicial remedy for purposes of challenging these measures prior to the forced sale deadline of 30 April 2015.**

[4] Statement of Claim, paras. 4-
[5] Statement of Claim, para. 5,
[6] Statement of Claim, para. 5.
[7] Statement of Claim, para. 6.

16. **Claimant contends that the Treaty requires full reparation for Respondent's violation, entailing payment of full monetary compensation and reestablishment of the situation that would most likely have prevailed if Respondent's breach of the Treaty had not occurred.[8]**

17. **Claimant's Expert, Paul Rathbone of CEG, calculated the value that Claimant would have received from its investment, had the compulsory sale not been ordered and had Claimant been allowed to pursue its growth strategy and then mount an IPO in the Warsaw Stock Exchange, thus arriving at a loss initially valued at 1,888,413,217 Polish Zlotys ("PLN").**

18. **In support of its claim, Claimant adduced witness statements by the following persons:**

- **Mr. Pawel Boksa ("Boksa ws")**
- **Mr. Pawel Gieryński ("Gieryński ws")**
- **Mr. Slawomir Lachowski ("Lachowski ws")**
- **Mr. Piotr Stępniak (("Stępniak ws")**

19. **In addition, Claimant adduced expert opinions by the following persons:**

- **Dr. Stanislaw Kluza ("Kluza op.")[9]**
- **Prof. Dr. Kern Alexander ("Alexander op.")**
- **Dr. Paul Rathbone of CEG ("Rathbone op. or "CEG op.")**

20. **Respondent denies having expropriated Claimant's property or having otherwise violated its obligations under the Treaty. It maintains that the actions challenged here**

---

[8] Statement of Claim, para. 7.

[9] Respondent urges the Tribunal to ignore Mr. Kluza's testimony in this proceeding due to the fact that he was unavailable for cross-examination. Respondent's Post-Hearing Brief, paras. 239-246.

were all legitimate exercises of its right to regulate in the public interest fully consistent with the principle of proportionality and not otherwise arbitrary, unreasonable or discriminatory.

21. Respondent further denies having violated any of Claimant's fundamental procedural rights in connection with the actions taken.

22. In support of its defense, Respondent adduced witness statements by the following persons:

- **Mr. Krzysztof Góral ((Góral ws")**
- **Ms. Iwona Kozłowska ("Kozlowska ws")**
- **Ms. Iwona Kozlowska ("Kozlowska 2d ws")**
- **Mr. Marek Kulczycki ("Kulczycki ws")**
- **Mr. Krzysztof Kulig ("Kulig ws")**
- **Mr. Wojciech Kwaśniak ("Kwaśniak ws")**
- **Mr. Wojciech Kwaśniak ("Kwaśniak 2d ws")**
- **Mr. Maciej Stańczuk ("Stańczuk ws")**
- **Mr. Maciej Stańczuk ("Stańczuk 2d ws")**

23. In addition, Respondent adduced expert opinions by the following persons:

- **Dr. Andrew Caldwell of Berkley Research Group ("Caldwell op.")**
- **Dr. Andrew Caldwell of Berkley Research ("Caldwell 2d op.")**
- **Prof. Grzegorz Laszczyca ("Laszczyca op.")**
- **Prof. Marek Szewczyk and Dr. Ewa Szewczyk ("Szewczyk op.")**
- **Mr. Józef Wancer) ("Wancer op.")**
- **Prof. Piotr Zapadka ("Zapadka op.")**
- **Prof. Fryderyk Zoll and Dr. Marcin Spyra ("Zoll & Spyra 2d op.")**

24. By way of relief, Claimant requests the following:

- **a declaration that Respondent has breached Article 4(1) of the Treaty**
- **an order requiring Respondent to pay damages to the Claimant of no less than PLN 1,888,413,217**
- **an order requiring Respondent to pay compound post-award interest on the amount that the Tribunal awards to the Claimant in damages**

- **an order requiring Respondent to pay all the costs of the arbitration, including all the fees and expenses of the Arbitration Institute of the Stockholm Chamber of Commerce and of the Tribunal and all the legal costs and expenses incurred by the Claimant, with compound post-award interest on the amount that the Tribunal awards to the Claimant as costs**
- **an order of such other relief as the Tribunal deems appropriate**

25. Respondent requests the following by way of relief:

- **a declaration to the effect that the Tribunal is without jurisdiction to adjudicate the present dispute**
- **a declaration that Respondent bears no liability to Claimant on the basis of an alleged breach of Article 4(1) of the Treaty**
- **an order requiring Claimant to pay all the costs of the arbitration, including all the fees and expenses of the Arbitration Institute of the Stockholm Chamber of Commerce and of the Tribunal and all the legal costs and expenses incurred by the Respondent, with post-award interest on the amount that the Tribunal awards to the Claimant as costs**
- **an order of such other relief as the Tribunal deems appropriate**

V. PROCEDURAL HISTORY OF THE CASE

26. On 26 November 2014, Claimant filed a request for arbitration with the Arbitration Institute of the SCC, as supplemented on 27 November 2014. In that request, it nominated Professor Julian D. M. Lew as arbitrator.

27. On 2 December 2014, the SCC notified the Republic of Poland of the filing and invited it to submit an answer by 30 December 2014. On 30 December 2014, Respondent denied any and all allegations, claims and relief sought by Claimant and requested an extension of time to answer the request for arbitration. Upon being invited by the SCC on 2 January 2005 to comment on the request, Claimant urged on 3 January 2015 that the request be denied. However, on 5 January 2015, the SCC granted Respondent an extension of time until 19 January 2015 to file an answer and appoint an arbitrator.

28. **On 16 January 2015, Respondent wrote to the SCC, nominating as arbitrator Michael E. Schneider, stating its preference for Stockholm, Sweden or Prague, Czech Republic as arbitral seats, and taking the position that the arbitral proceedings should be governed by the 2010 SCC Arbitration Rules. On 26 January 2015, Claimant insisted that the proceedings were properly governed by the SCC Rules adopted and in force as of 1 January 1988.**

29. **On 12 February 2015, the SCC stated its intention to appoint as chair of the tribunal in this case Professor George A. Bermann of Columbia Law School in New York, New York USA, and inquired as to his ability to serve in that capacity. Professor Bermann replied, indicating his ability and willingness to serve.**

30. **On 13 February 2015, the SCC informed the Parties of the following determinations: that the SCC did not manifestly lack jurisdiction over the dispute, that the seat of arbitration was Stockholm, Sweden, and that the advance on costs was fixed at €426,000, to be paid by the Parties in equal shares.**

31. **On 16 February 2015, the SCC confirmed that Professor Bermann had been appointed as chair in the case. On the same day, Professor Bermann confirmed his acceptance and affirmed his impartiality and independence. On the following day, the SCC reported Professor Bermann's appointment to the Parties.**

32. **On 6 March 2015, the advance on costs having been paid, the SCC referred the case to the Tribunal. On 12 March 2015, Professor Bermann wrote to the SCC for clarification of various matters. The SCC responded to Professor Bermann's inquiry the same day. Still on the same day, Professor Bermann wrote to the Parties' counsel to (a) urge as**

much cooperation and collaboration in general between them as possible, (b) request that Counsel endeavor to agree on a procedural timetable for the case, and (c) request Counsel to communicate in no more than two pages their position on the applicable SCC Rules. On 24 March 2015, Counsel reported to the Tribunal that they had agreed that the 2010 SCC Rules would be applicable.

33. On 2 April 2015, Counsel reported agreement on all procedural matters but one, viz. the timing of production of documents. On 13 April 2015, Counsel related to the Tribunal further procedural matters as to which they had reached agreement and posed certain questions, to which the Chair of the Tribunal replied the following day. The Tribunal eventually issued Procedural Order no. 1 on 6 May 2015, setting out a basic but detailed procedural framework and calendar of stages in the arbitration, consistent with the agreement between the Parties.

34. On 3 August 2015, Claimant reported to the Tribunal that it could not meet the initial deadline for submitting its Statement of Claim due to the fact that doing so depended on the availability of the testimony of a key witness who at the last moment declined to testify due to fear of repercussions at the hands of the Respondent. On 4 August 2015, the Tribunal, without making any finding on that charge, granted Claimant an extension for filing its Statement of Claim until 7 August 2015. On that day, Respondent rejected any suggestion of witness intimidation on its part and requested an extension of the deadline for its Answer to the Claim equal in length to the extension granted to Claimant. The Tribunal granted that request. On that same day

as well, Claimant submitted its Statement of Claim, accompanied by four witness statements and three expert opinions.

35. **On 11 August 2015, the SCC extended until 23 January 2017 the time for rendering the final award in this case.**

36. **On 13 August 2015, Claimant requested that Respondent provide assurance that Respondent, including the KNF, had done and would do nothing, directly or indirectly, to interfere with the ability of Claimant's fact and expert witnesses to testify freely in the proceedings without fear of adverse consequences or otherwise to interfere with Claimant's ability freely to present its case. On 7 September 2015, Claimant reported that it had still not received from Respondent the assurance requested. On 9 September 2015, Respondent declined to give the requested assurance in the absence of any evidence by Claimant of actual witness intimidation. On the same day, the Tribunal stated that Respondent could not be expected to make an affirmation of the sort requested by Claimant in the absence of any substantiation of the charge of intimidation. The Tribunal stated:**

> **Rather, the Tribunal considers that, under the present circumstances, the shared interest of all in the complete integrity of this proceeding can be satisfied by reminding counsel that the Tribunal operates on the firm assumption that the parties and their counsel would not and will not engage, directly or indirectly, in witness intimidation. The Tribunal further considers the parties and counsel to have made an implied commitment to that very effect. Should any such intimidation nevertheless be shown to have occurred, the Tribunal will draw appropriate inferences.**

37. **On 14 September 2015, Claimant's Expert, Mr. Paul Rathbone, provided certain Polish-language originals and English-language translations that had been missing from his**

Report on the Valuation of PL Holdings' Investment in FM Bank PBP, dated 31 July 2015.

38. On 17 September 2015, the procedural schedule was amended to reflect one-week extensions to both Parties for their filing of, respectively, their Statement of Claim and Answer thereto.

39. On 13 November 2015, Respondent submitted its Statement of Defence, accompanied by three witness statements and three expert opinions.

40. On 27 November 2015, each Party submitted to the other its request for document production. On 18 December 2015, each Party filed objections to certain of the other's production requests. On 28 December 2015, the Parties replied to the respective stated objections.

41. On 13 January 2016, Respondent provided certain corrections to appendixes to the Respondent's Statement of Defence.

42. On 22 January 2016, the Tribunal, which was in receipt of both Parties' Redfern Schedules, issued Procedural Order no. 2, ruling on both Parties' requests for and objections to production. On 29 January 2016, Claimant complained of Respondent's failure to produce certain documents as ordered by the Tribunal, while also reformulating, at the Tribunal's suggestion, one of its own production requests. On 1 February 2016, Respondent requested additional time to respond to Procedural Order no. 2. On the same date, the Tribunal issued Procedural Order no. 3, dealing with Claimant's complaints over delays in document production by Respondent.

43. **For a period starting 5 February 2016, Counsel discussed Respondent's assertion of confidentiality with regard to the production of certain documents and exchanged drafts of a Confidentiality Order. By Procedural Order no. 4, dated 16 February 2016, the Tribunal gave instructions to Counsel with regard to claims of confidentiality and the functioning of an eventual confidentiality regime. There followed Procedural Order no. 5, dated 20 February 2016, in which the Tribunal laid down further particulars about the confidentiality regime. Counsel ultimately agreed upon a Confidentiality Order that the Tribunal was able to issue on 22 February 2016.**

44. **On 15 February 2016, Respondent reformulated two of its discovery requests that the Tribunal had rejected as originally formulated. The Parties discussed the reformulated requests between 15 and 18 February 2016, and through Procedural Order no. 6 of 22 February 2016, the Tribunal again rejected the requests as reformulated.**

45. **On 23 February, 2015, Respondent made further production of documents pursuant to the Tribunal's orders. There ensued discussions between 23 and 24 February 2016 over the completeness of Respondent's production.**

46. **On 26 February 2016, Claimant submitted its Statement of Reply, accompanied by second witness statements of Mr. Boksa. Mr. Gieryński, Mr. Lachowski, Mr. Pawlowski, and Mr. Stępniak; second expert opinions of Dr. Rathbone and Dr. Alexander; and a first joint witness statement of Experts Professors Zoll and Oplustil and Dr. Spyra. In submitting its Statement of Reply, Claimant also requested permission to supplement that Statement by way of an annex, basing that request on the asserted lateness of document production by Respondent. Over Respondent's**

objection, the Tribunal granted the request. Claimant filed its supplement on 4 March 2016.

47. On 22 March 2016, Respondent requested an extension of time until 13 July 2016 for filing its Rejoinder, a request to which Claimant objected on 24 March 2016. On 28 March 2016, the Tribunal issued Procedural Order no. 7, indicating the Tribunal's proposed approach to adjustment of the hearing schedule and requesting Counsel to meet and confer on a mutually agreeable solution. Following further discussion, the Parties reached agreement on an extended deadline of 27 May 2016 for Respondent's filing of its Rejoinder, which the Tribunal accepted and confirmed by Procedural Order no. 8 dated 4 April 2016.

48. On 15 April 2016, Counsel informed the Tribunal that they had agreed to hold hearings in London, England, even though the seat of arbitration remained Stockholm, Sweden, and conveyed other logistical information upon which the Parties had agreed. The Tribunal indicated on 17 April 2016 that it had no objection to the hearings being held in London, England rather than Stockholm, Sweden.

49. On 4 May 2016, the Tribunal requested an update from Counsel on the hearing schedule, receiving an update the following day. In correspondence exchanged between 10 and 17 May 2016, Counsel discussed certain hearing arrangements.

50. On 21 May 2016, the Tribunal issued Procedural Order no. 9, confirming hearing days, hearing costs, and other hearing arrangements. On 29 May 2016, the Tribunal rendered a Reissued Procedural Order no. 7, to reconfirm certain previously settled procedural determinations.

51. On 27 May 2016, Respondent submitted its Rejoinder, accompanied by second fact witness statements of Mr. Kwaśniak, Mr. Stańczuk, and Ms. Kozlowska; first witness statements of Mr. Marek Kulczycki, Mr. Krzysztof Kulig, and Mr. Krzysztof Góral; a second expert opinion of Mr. Caldwell, Prof. Szewczyk, and Prof, Zapadka, as well as of Profs. Fryderyk Zoll and Marcin Spyra; and first expert opinions of Prof. Cezary Kozikowski, Prof. Grzegorz Laszczyca and Mr. Józef Wancer.

52. On 29 May 2016, the Tribunal reissued Procedural Order no. 9, replacing the original Procedural Order no. 9, reflecting two minor changes proposed by Counsel. On the same day, the Chair of the Tribunal requested Counsel's consent for the Chair of the Tribunal alone to participate in the pre-hearing conference with Counsel. Both parties agreed.

53. On 6 June 2016, Claimant wrote to the Tribunal complaining about a new jurisdictional objection advanced in Respondent's Rejoinder of 27 May 2016. By that jurisdictional objection, Respondent argued that the Treaty itself was no longer in effect since it was superseded by Poland's accession to the European Union ("EU") or was otherwise inapplicable on account of EU law, invoking Articles 30 and 59 of the Vienna Convention on the Law of Treaties ("VCLT") and Article 344 of the Treaty on the Functioning of the European Union ("TFEU"). Respondent further argued that EU law offers investors from other EU Member States, such as Luxembourg, adequate investor protection and that interpretation of EU law is entrusted exclusively to the courts of the EU. Claimant asked the Tribunal to rule the objection inadmissible as interposed too late in the proceedings. Respondent replied on 9 June 2016, arguing

that the objection was not entirely new, but even if new, was one for which it should be entitled, in light of the importance of the question, to amend its pleadings. There followed further communications on the matter from Claimant and Respondent on 13 June and 16 June 2016, respectively.

54. The Chair of the Tribunal wrote to Counsel on 12 June 2016, establishing an agenda for the pre-hearing conference call scheduled for 21 June 2016 at which all procedural aspects of the hearing would be confirmed or addressed, as the case may be, including Claimant's objection to Respondent's new jurisdictional objection. On 17 June 2016, Counsel gave the Tribunal a progress report on agreement over procedural matters surrounding the hearing. On the same day, the Tribunal issued Procedural Order no. 10, establishing rules governing court reporting services, interpretation services and printing costs. On 19 June 2016, Respondent reported to the Tribunal further procedural matters on which Counsel had managed to reach agreement, as well as procedural matters on which differences of view remained. On 21 June 2016, Counsel on both sides indicated the names of the individuals who would be attending the pre-hearing conference.

55. There took place on 21 June 2016 a telephone pre-hearing conference among Counsel and the Chair of the Tribunal on behalf of the full Tribunal. Following the conference call and a discussion among the members of the Tribunal, the Chair reported the Tribunal's grant of Respondent's request that fact witnesses not remain present in the hearing room following their testimony and expressed the Tribunal's desire to receive

post-hearing briefs, for which deadlines, page limits and other particular would be communicated at a later time.

56. On 22 and 23 June 2016, Counsel itemized the procedural matters on which Counsel had not yet reached agreement. On 23 June 2016, the Tribunal issued Procedural Order no. 11, confirming matters of procedure subsequently agreed upon by the Parties and indicating that it would postpone until after the hearings a ruling upon Claimant's objection to Respondent's having filed new jurisdictional defenses on 2 May 2016.

57. On 24 June 2016, Respondent furnished to opposing Counsel and the Tribunal copies of documents that corrected mis-translations and replaced illegible versions. Between 24 and 30 June 2016, further disagreements arose between Counsel over the number of copies of certain documents to be produced to the other Party, over the adequacy of the copies of certain exhibits, and over a request for Counsel to identify in advance matters on which witnesses would be examined on direct. On 26 June 2016, the Tribunal issued Procedural Order no. 12, both confirming additional procedural matters on which the Parties had reached agreement and ruling on pending procedural matters on which the Parties had failed to reach agreement. Remaining items were resolved by the Tribunal informally by email to Counsel on 30 June and 1 July 2016. On 1 July 2016, Counsel supplied the Tribunal with a revised schedule of witnesses for the hearing. On the same day, Claimant, with Respondent's agreement subject to a reservation of rights, offered into evidence nineteen new Exhibits and an additional excerpt.

58. **On 30 June 2016, at the Tribunal's request, Claimant indicated the matters upon which it intended to examine Profs. Zoll and Oplustil and Dr. Spyra.**

59. **On 1 July 2016, the Chair of the Tribunal made certain requests to Counsel regarding the presence and availability of documents in the hearing room. On the same date, Counsel provided the Tribunal with exact time allocations for each of the witnesses at the hearing.**

60. **On 4 July 2016, Claimant advised the Tribunal of ongoing discussions between Counsel regarding arrangements whereby witness Dr. Kluza, who feared a conflict of interest, given his new position at another bank also dealing with the KNF, could nevertheless testify. A number of communications on the matter were exchanged over the following few days.**

61. **On 5 July 2016, Respondent objected to Claimant's introduction into the record of certain new exhibits, at which point Respondent sought to withdraw the consent it had previously given to the admission into evidence of other exhibits.**

62. **On 6 July 2016, the Tribunal issued Procedural Order no. 13, determining the modalities of examination and cross-examination of Dr. Kluza and the admissibility of new documents into the record. There followed, on 7 July 2016, Procedural Order no. 14, specifying the proper matters for examination at the hearing of legal experts Professors Zoll and Oplustil and Dr. Spyra. Following that Order, Claimant provided additional information on matters to be covered in the direct examination of those Experts. On 9 July 2016. Claimant reported that witness Dr. Kluza would attend the**

hearing. On 10 July 2016, Respondent communicated the Confidentiality Undertakings signed by all court reporters present at the hearing as well as by both interpreters.

63. Hearings in the case were held on 11 to 15 and 17 to 20 July 2016 at the International Dispute Resolution Centre in London. On 17 July 2016, Claimant introduced into the record two new exhibits. On the same day, Respondent reported that it was in the process of seeking to locate the minutes of the KNF meeting of 8 April 2014, as requested by the Tribunal. On the same day, the Tribunal requested minutes of the July 2015 KNEF meeting at which the Second KNEF Decision was taken. On the next day, Respondent indicated that it was in the process of looking for them. On the same day, Claimant offered into evidence a further new exhibit. On 19 July 2016, Respondent delivered Respondent's Experts' Confidentiality Undertakings, as well as certain additional legal exhibits. It too delivered a new exhibit. On 20 July 2016, Respondent identified certain documents as the quarterly reports reflecting execution of the recovery plan from 2014 until the last quarter of 2015, as well as an exhibit, dated 15 October 2014, consisting of a communication from KNF relating to the sale process in the autumn of 2014. On the same day, Claimant and Respondent produced as new exhibits, respectively, charts referred to by the Polish law Experts during their expert witness conference.

64. Prior to the close of hearings on 20 July 2016, the Tribunal delivered to Counsel a description of the further quantum reports it was asking the Experts to produce.

65. **On 25 July, 2016, Claimant submitted additional legal authorities. Claimant also wrote on 25 July 2016, requesting indications from the Tribunal as to the matters, if any, the Tribunal specifically wished the Parties to address in their post-hearing briefs.**

66. **On that same day, the Tribunal issued Procedural Order no. 15, as amended by a message from the Chair of the Tribunal the following day, asking Counsel to furnish a joint list of documents that the Tribunal had requested during the hearings and the status of those requests. In Procedural Order no. 15, the Tribunal also provided guidelines (in the form of Annex A to the Order) for the Experts' preparation of quantum reports that the Tribunal had requested on 20 July 2016, for post-hearing briefs on the merits, and for post-hearing briefs on the admissibility and merits of Respondent's new jurisdictional objection. The Tribunal invited the Experts to meet and confer prior to producing their quantum reports. In Annex B to the Order, the Tribunal posed questions the Tribunal wished Counsel to address in post-hearing briefs.**

67. **On 27 July 2016, Respondent's Expert, Mr. Caldwell requested clarification concerning the quantum report that the Tribunal had requested in Procedural Order no. 15. In a communication of the same day, Claimant objected to Respondent's unilateral request for clarification. On 28 July 2016, Claimant set out the answers that had been provided by Mr. Rathbone to questions and requests of Mr. Caldwell.**

68. **On 2 August 2016, Mr. Caldwell submitted a response to Mr. Rathbone's Supplementary Expert Report. On 12 September, the Experts provided the Tribunal a**

joint response to the first item in the directions given to the Experts in preparing the quantum reports.

69. **On 15 September 2016, Respondent submitted its post-hearing submission on its additional jurisdictional objection, as requested by the Tribunal in Procedural Order no. 15.**

70. **On 21 September 2016, Claimant registered with the Tribunal numerous complaints over Respondent's alleged failure of compliance with the Tribunal's various requests for post-hearing production of documents, and Respondent replied on 25 September 2016, rejecting Claimant's complaints as unfounded. Respondent also asked the Tribunal to issue an order requiring the Parties to produce, within the shortest time possible, any documents not in the file, but relevant to the case. Claimant objected to the request as an improper attempt to bring in belatedly new documents and arguments.**

71. **By Procedural Order no. 16, dated 27 September 2016, the Tribunal dealt with requests for and objections to the production of certain documents at the post-hearing stage. Respondent followed up with explanations the following day. Claimant in turn made production in accordance with the requirements set out in Procedural Order no. 16.**

72. **On 7 October 2016, Mr. Caldwell submitted the quantum report previously requested by the Tribunal. Mr. Rathbone submitted his quantum report on 8 October 2016, accompanied by an Excel spreadsheet jointly agreed to by the Experts.**

73. **The Parties filed simultaneous post-hearing briefs on 14 October 2016.**

74. **On 15 October 2016, Claimant submitted its post-hearing submission on Respondent's additional jurisdictional objection, as requested by the Tribunal in Procedural Order no. 15.**

75. **On 22 October 2016, Claimant wrote to the Tribunal seeking instructions on costs submissions and requesting closure of the proceeding.**

76. **On 25 October 2016, in connection with Claimant's request for closure of the proceeding, Respondent, among other things, informed the Tribunal and opposing counsel that on 21 October 2016 (one week after the post-hearing briefs were submitted), the Regional Administrative Court in Warsaw had issued a ruling dismissing the Claimant's and Abris' challenge to the Second KNF Decision. Respondent asked that the ruling be admitted in evidence in the case. On 31 October 2016, Claimant opposed admission into evidence of the Regional Administrative Court judgment and renewed its request that the proceedings be closed.**

77. **On 9 November 2016, the Chair of the Tribunal wrote to Counsel, allowing Respondent to file the Regional Administrative Court judgment, with an English translation, doing so by no later than 18 November 2016, with any comments it wished to make, but in any event identifying the specific relevance and materiality of the judgment respecting issues in this arbitration. Claimant was given until 28 November 2016 to make any comments it wished to make with respect to the judgment and in response to the comments made by Respondent. The Tribunal indicated that it would determine the admissibility of the judgment in the course of its continuing deliberations. In the letter, the Tribunal ordered the proceedings closed,**

subject to acceptance of the communications of 18 and 28 November 2016, referred to above. Third, the Tribunal set 10 December 2016 as the deadline for submission of the Parties' statement of costs, with comments, if any, on the other Party's submission due by 20 December 2016. Lastly, the Tribunal stated that the deadline for issuance of the Award would be 15 April 2017.

78. On 16 November 2016, the Parties jointly submitted to the Tribunal, at the Tribunal's request, a chart setting out the provisions of Polish law relevant to the case. On the same day, the Tribunal advised Counsel that it would defer decision on the admissibility and merits of Respondent's new jurisdictional defense until rendition of the Award.

79. On 29 November 2016, Respondent provided the Tribunal and opposing counsel with an English-language translation of the Warsaw Regional Administrative Court's judgment of 21 October 2016. On 23 December 2016, Claimant objected to reopening of the record to introduce the translation of the Regional Administrative Court's judgment, adding that, should the Tribunal decide to admit the judgment into evidence, it should also admit the Claimant's 20 December 2016 appeal of the judgment.

80. At the request of the Tribunal dated 9 November 2016, Claimant and Respondent both filed a Statement of Costs on 9 December 2016 and replies to the other side's Statement of Costs on 20 December 2016.

VI. THE REGULATORY LANDSCAPE

A. The KNF and its Regulatory Context

(i) The Powers of the KNF

81. THE KNF, established pursuant to the Act on Trading in Financial Instruments ("Financial Trading Act"),[10] consists of seven persons, three of whom (a chair and two vice-chairs) are appointed by the Polish Prime Minister, one of whom is appointed by the Polish President, one of whom is an officer of the National Bank of Poland, and two of whom are cabinet ministers. The KNF in turn is supervised by the Polish Prime Minister who receives annual reports of the KNF and may dismiss the KNF chair and, at the request of the KNF chair, the KNF vice-chairs.

82. Prior to 2008, when the Financial Trading Act came into effect, banking supervision in Poland was exercised by the General Inspectorate of Banking situated within the National Bank of Poland. In 2000 and 2007, the Inspectorate was managed by Mr. Wojciech Kwaśniak, the General Inspector of Banking Supervision.

83. The Polish Banking Act of 29 August 1997 ("the Banking Act")[11] confers on the KNF responsibility for ensuring the safety of funds held in Polish bank accounts. To that end, the KNF monitors compliance by Polish banks with the Banking Act, as well as with Article 70, paragraph 2, of the Financial Trading Act.[12] The KNF thus assesses, among other things, banks' financial standing (including the adequacy of their capitalization) and management systems.

---

[10] Act of 21 July 2006 on Financial Market Supervision, J. of Laws 2015, item 614 (Exh. CLA-4).
[11] Polish Banking Act of 29 August 1997, consolidated text, Journal of Laws of 2015, no. 128 (Exh. CLA-5).
[12] Polish Banking Act, art. 133, paras. 1, 2 (CLA-5).

84. The Banking Law identifies the KNF's functions as follows:[13]

- **assessing the financial situation of banks, including analysis of their solvency, asset quality, payment liquidity and financial results**
- **examining the quality of bank management systems, in particular risk management and internal control systems**
- **examining the compliance of credit, cash loans, letters of credit, bank guarantees and sureties and bank securities with the applicable regulations**
- **testing security and timely repayment of credit and cash loans**
- **examining whether the limits referred to in Article 71 of the Banking Law are respected, and evaluating processes for identifying, monitoring and controlling exposure concentration, including large exposures**
- **examining compliance of the operations of the banks with the KNF's standards regarding acceptable risk in banking operations, risk management, including the adaptation of the bank's processes of identifying, monitoring and reporting risks to the type and scale of the bank's operations**
- **assessing the estimation, maintenance and review of the internal capital of banks.**

85. The KNF has authority to adopt resolutions and to issue administrative decisions and orders. The KNF's administrative decisions and orders take the form of:

- **permits for the establishment and entry into operations of banks**
- **decisions approving the appointment of the members of a bank's management board**
- **recommendations reflecting best practices**
- **orders to banks to take certain remedial measures in response to violations of banking regulations**
- **sanctions, ranging from cash penalties, to suspension of management board members, restrictions on a bank's business, and revocation of a banking license, to appointment of a receiver in bankruptcy.[14]**

86. The role of the KNF as described above is influenced by developments in the banking regulation and supervision system within the European Union. EU law – in the form of

[13] Polish Banking Act, art. 133, para. 2 (CLA-5).

[14] Polish Banking Act, arts. 11, para. 2, 25n, 138, 141, 143-146 (CLA-5). According to witness Stanislaw Kluza, the KNF typically imposes penalties on a bank's management board, but may, in exceptional circumstances, impose them on a bank's shareholders. Kluza op., paras. 11, 42.

directives and regulations[15] – requires Member States to establish a "competent authority" to supervise the functioning of credit institutions, including banks. In Poland, that authority is the KNF. As such, the KNF is instructed to follow the guidelines and recommendations issued by the European Banking Authority, established at the EU level. Pursuant to that authority, the KNF is responsible for ensuring the stability of the financial system, by which is meant a condition in which the financial system – intermediaries, markets and market infrastructures – can withstand shocks without major disruption in financial intermediation or in the effective allocation of savings to productive investment.[16]

87. As stated in the expert opinion of Mr. Zapadka:

> **For European countries, including Poland, these concepts are of particular importance in the context of turmoil in the global and European financial markets caused by the subprime crisis in 2008. Since then, both in Polish law and EU law special attention to issues regarding ensuring the systemic safety for the functioning of all financial market participants, attention to strengthening the role of prudential supervision over the financial market, attention to safety of collected clients' funds, attention to reducing information asymmetry in relation between the financial institution and customers, and finally attention to the transparency of activities of financial institutions, risk management, high standards of internal audit and the compliance function.[17]**

B. <u>The Polish Banking Sector</u>

[15] Directive 2006/48/EC (art. 4(4)), OJ L 177, 30.6.2006, p. 1 (Exh. CLA-43); Directive 2013/36/EU (art. 3(36)), OJ L 176, 27.6.2013, p. 338 (Exh. CLA-44); Regulation (EU) 575/2013 (art. 4(1)(40)), OJ L 176, 27.6.2013, p. 1 (Exh. CLA-45).
[16] Printout from the website of European Central Bank: https://www.ecb.europa.eu/pub/fsr/html/index.en.html (Exh. R-29).
[17] Zapadka op., paras. 45-46, 49.

88. Article 12, paragraph 1, of the Banking Act provides that a bank may be established in Poland as (a) a State-owned bank, (b) a cooperative bank, or (c) a joint-stock company. There was, as of 31 March 2015, only one State-owned bank, Bank Gospodarstwa Krajowego ("BGK"), but there were 563 cooperative banks, 38 commercial banks, and 28 branches of foreign credit institutions.[18]

89. According to Claimant, the Polish banking sector has grown steadily over the last decade. In 2014, the net income of the Polish banking sector was the largest in history, standing at PLN 16.2 billion, and it has grown further since.[19]

VII. HISTORY OF THE INVESTMENT AND THE DISPUTE

90. In this Section, The Tribunal relates the basic history of the present dispute.

A. Establishment of FM Bank and PBP Bank

91. On 26 March 2008, Abris Fund I established an entity called Abris Holdings 1 S.a.r.l., later renamed FM Holdings,[20] for the purpose of establishing a new bank in the form of a joint-stock company.[21] Under the Banking Act, in order to establish a new bank, there must be three founders.[22] In this case, those three were (a) FM Holdings, (b) the International Finance Corporation ("IFC") (a member of the World Bank Group

[18] Statement of Claim, para. 25.
[19] Statement of Claim, para. 26.
[20] FM Holdings is a company incorporated under the laws of Luxembourg.
[21] Gieryński ws, para. 6.
[22] Banking Act, art. 13, para. 1 (Exh. CLA-5).

promoting the private sector in developing countries), and (c) Mr. Piotr Stępniak, an experienced businessman in the Polish banking sector.

92. The founders accordingly applied to the KNF on 12 August 2008 for a banking license.[23] Almost one year later, on 31 July 2009, the KNF approved the application to establish the new bank, FM Bank,[24] which occurred on 6 August 2009. The shareholdings in FM Bank stood at that time as FM Holdings, 89%; the IFC, 10%; and Mr. Stępniak 1%. On 19 October 2009, FM Bank was registered in the Register of Businesses of the National Court Register.[25]

93. On 22 October 2009, FM Bank applied to the KNF for a permit to begin operations.[26] The permit was granted and FM Bank began operations on 23 February 2010. [27]

94. In the same general period, Mr. Pawel Gieryński, representing PL Holdings, became interested in acquisition of WestLB Bank Polska ("WestLB"), a relatively small bank specializing in wholesale commercial and investment banking.[28] He was introduced to that possibility by WestLB's CEO and Management Board President, Mr. Maciej Stańczuk. While negotiating with WestLB, Mr. Gieryński, on 28 December 2009, met with KNF officials to discuss Abris' interest in acquiring WestLB, either through 100% ownership or through ownership shared with IDM, a Polish brokerage house and asset manager experienced in IPOs, on the understanding that Abris would retain majority ownership. According to Respondent, the KNF reminded Mr. Gieryński of the process

[23] Application to the KNF for permission to establish a bank, 12 Aug. 2008 (Exh. C-11).
[24] KNF Decision permitting the establishment of FM Bank, 31 July 2009 (Exh. C-13).
[25] Printout from the National Court Register re. FM Holdings (Exh. R-1).
[26] Application by FM Bank to the KNF for a permit to begin operations, 22 Oct. 2009 (Exh. C-15).
[27] KNF Decision on application for permit for FM Bank to commence activity, 23 Feb. 2010 (Exh. C-17).
[28] Gieryński ws, para. 13; Boksa ws, para. 8.

for obtaining the KNF's permission to exercise voting rights attached to the shares in a Polish bank.[29]

95. Mr. Gieryński eventually joined with IDM to make that purchase. On 12 March 2010, WestLB Bank Polska's German parent corporation entered into a sale and purchase agreement with IDM and PL Holdings.[30] According to the KNF, it learned about this transaction only through the press and expressed to Claimant its concern that the transaction had not been brought to it attention beforehand.[31]

96. In connection with their application to exercise voting rights in WestLB Bank Polska,[32] Claimant and Abris CEE (as parent company) were required to present their investment strategy, as well make certain commitments. On June 15, 2010, in response to requests from the KNF expressed at meetings[33] and in writing,[34] Claimant submitted a "List of the Shareholders' Commitments," addressing five matters[35]:

- **shape of the Bank's corporate bodies**
- **financial support available from Claimant to the Bank in the event of a threat to the Bank's liquidity**
- **adequacy of equity**
- **policy on "outsourcing"**
- **reinvestment of dividend and profit**

---

[29] KNF internal note, 4 Jan. 2010 (Exh. R-4).

[30] Press release of Abris upon acquisition of WestLB Bank Polska, 12 Mar. 2010 (Exh. C-18); Preliminary Share Purchase Agreement WestLB AG, PL Holdings and IDM, 12 Mar. 2010 (Exh. C-19).

[31] Letter from PL Holdings to the KNF (Exh. R-3).

[32] Application for consent to exercise voting rights at the Shareholder Meeting of WestLB Bank Polska, 12 Apr. 2010 (Exh. C-20).

[33] Gieryński ws, paras. 20-21; Boksa ws, para. 13.

[34] Letter from the KNF to PL Holdings and Abris CEE, 17 May 2010 (Exh. C-21).

[35] Letter from PL Holdings and Abris-EMP to the KNF, 15 June 2010 (Exh. C-22).

97. **This list was the subject of discussion at a meeting at the KNF on 15 June 2010 and in other exchanges, as a result of which the KNF requested revision of some wording of the commitments.[36]**

98. **The Parties disagree over which of them insisted on the idea of keeping the two banks separate. According to Claimant, the KNF requested a commitment by Claimant not to integrate PBP Bank and FM Bank,[37] while the KNF insists that having the banks operate independently was Mr. Gieryński's own preference.[38]**

99. **In response to KNF's request for a reworded List of Commitments,[39] Claimant presented a revised list to the KNF on 21 June 2010.[40] The revised list sought to satisfy KNF's demands, while adding a commitment to float PBP Bank's shares on the Warsaw Stock Exchange within two to three years of their acquisition and a commitment by PBP to take no action that would cause it to compete with FM Bank.**

100. **On 27 October 2010,[41] the KNF issued a decision permitting Claimant to exercise its voting rights in WestLB Bank Polska on the basis of the commitments specified in Claimant's 21 June 2010 letter. Witnesses Gieryński and Boksa testified that that they**

---

[36] Email from the KNF to Abris, 18 June 2010 (Exh. C-24).

[37] Email from the KNF to Abris, 18 June 2010 (Exh. C-24).

[38] Application for consent to exercise voting rights at the WestLB Bank Polska General Meeting (attaching description of the WestLB Bank Polska S.A. development strategy following the acquisition of the controlling stake by PL Holdings S.a r.l., item 9, p. 6, 12 Apr. 2010 (Exh. C-20). Respondent points out that its letter of May 17, 2010, setting out bank commitments contained no commitment that the banks would not merge. Letter from the KNF to PL Holdings and Abris CEE dated 17 May 2010 (Exh. C-21). Further, in their reply to the KNF, Claimant submitted a list of shareholder commitments that did not include a commitment to keep the banks separate. Finally, in its reply to the KNF listing commitments made to the KNF, Claimant did not include a commitment to this effect. Letter from PL Holdings and Abris-EMP) to the KNF, 15 June 2010 (Exh. C-22).

[39] Gieryński ws, para. 20.

[40] Letter from PL Holdings and Abris-EMP to the KNF, 21 June 2010 (Exh. C-25).

[41] KNF Decision permitting the exercise of voting rights at the Shareholder Meeting of WestLB Bank Polska, 27 Oct. 2010, para. 23 (Exh. C-27). See also Letter from the KNF to Abris-EMP, PL Holdings and IDM, 20 Oct. 2010 (Exh. C-26).

reassured the KNF that they had no intention to merge the two banks, and no interest n doing so.[42] The testimony of Mr. Stępniak is to the same effect.[43]

101. On 27 October 2010, the KNF approved the application of PL Holdings and Abris-EMP to exercise voting rights in WestLB Bank Polska.[44] The decision stated that "analysis of the business strategy presented by the Applicants for WestLB Bank Polska S.A. suggests that there is no risk of the Applicants exerting an adverse impact on the bank's stable and prudent management."[45]

102. On 2 November 2010, the KNF approved a change of name of WestLB Bank Polska to PBP Bank. The following month, PL Holdings purchased the 55% shareholding in PBP Bank still held by the Bank's German parent.

B. Lead-up to a PBP Remedial Plan

103. On 2 September 2011, the KNF sent a letter to PBP Bank stating that, as a result of its financial situation and results up to that point, it was required to prepare a "remedial plan."[46] On 12 September 2011, PBP Bank replied to the KNF objecting to the KNF's requirement.[47] It maintained that the request was premature and that the KNF should wait for the year-end accounts, by which time PBP Bank expected to be able to show

[42] Boksa ws, para. 14; Gieryński ws, para. 17.
[43] Stępniak ws, para. 13.
[44] KNF Decision permitting the exercise of voting rights at the Shareholder Meeting of WestLB Bank Polska, 27 Oct. 2010 (Exh. C-27).
[45] KNF Decision permitting the exercise of voting rights at the Shareholder Meeting of WestLB Bank Polska, 27 Oct. 2010 (Exh. C-27).
[46] Letter from the KNF to PBP Bank, 2 Sept. 2011 (Exh. C-31). Article 142, para. 1, of the Banking Law contemplates that, under certain circumstances, the KNF may impose on a bank's management board an obligation to prepare a remedial plan.
[47] Letter from PBP to the KNF, 12 Sept. 2011 (Exh. C-32).

profitability. It added that it thought preparation of a remedial plan would have an adverse effect on the Bank's financial situation.

104. Discussions between the KNF and PBP Bank took place throughout September and October 2011. According to Claimant,[48] at a meeting in late October between Mr. Stańczuk (President of PBP's Management Board) and Mr. Wojciech Kwaśniak (Vice-president of KNF), Mr. Kwaśniak agreed that imposing a remedial plan at that time would be premature.[49]

105. On 10 February 2012, PBP Bank's Management Board updated the KNF with financial information through the end of 2011, urging the KNF to formally withdraw its request for a remedial plan.[50] It expressed concern that news of the initiation of a remedial plan would adversely affect the Bank's development of its credit portfolio and deposit base. The KNF responded on 15 March 2012 to the effect that any reversal of the request for a remedial plan depended on the Bank's financial performance.[51]

106. On 1 July 2013, pursuant to the KNF's instruction, FM Bank and PBP Bank were merged into FM Bank PBP. In consideration for the assets of FM Bank, PBP Bank issued shares to FM Holdings and to Mr. Stępniak.[52] PL Holdings subsequently acquired FM Holdings' shares in FM Bank PBP by issuing PL Holdings shares to FM Holdings. Then, on 18 July 2013, PL Holdings acquired IFC's shares in FM Bank.[53] As a

---

[48] Statement of Claim, para. 54.
[49] Boksa ws, paras. 16-17.
[50] Letter from PBP Bank to the KNF, 10 Feb. 2012 (Exh. C-36).
[51] Letter from the KNF to PBP Bank, 15 March 2012 (Exh. C-38); Gieryński ws, para.25.
[52] Supplement to the motion for permit to marge a bank, 9 Apr. 2013, schedule 2, para. 4, subpara. 1 (Exh. C-95).
[53] Registered Share Pledge Agreement between PL Holdings and IFC, 18 July 2013 (Exh. C-122).

result, PL Holdings came to hold a direct 99.59% interest in FM Bank PBP, with Mr. Stępniak holding a 0.41% interest.

107. In March 2012, a listed Polish company that was one of PBP's primary creditors and a new entrant into the Polish construction industry – Dolnośąlaskie Surowce Skalne Spóślka Akeyjina ("DSS") – underwent a financial collapse. On 12 April 2011, PBP Bank had bought Series F bearer bonds issued by DSS worth PLN 60 million, representing about 1/5 of the Bank's net book value.[54] As a result of DSS' collapse, PBP Bank experienced a net loss for 2011.[55] According to Respondent, the investment was made at the fierce insistence of IDM, which as underwriter earned a substantial commission for the transaction. Further, according to Respondent, Mr. Stańczuk objected to the investment as unsafe and imprudent, but was overridden.[56] According to Mr. Stańczuk's testimony, the DSS bonds, which were supposed to be fully secured, were in fact unsecured, and the Bank had full knowledge of that, as well as of DSS' difficulties, since September or October 2011, but did not have a plan of action.[57]

108. According to Respondent, discord between Abris and IDM clearly surfaced at the 19 April 2012 meeting at the KNF to discuss the problem,[58] and, although Abris informed the KNF on 24 April 2012 that IDM and Abris had reached agreement on a buy-out of

---

[54] PBP Bank letter to the KNF, 2 Apr. 2012 (Exh. R-5). See also Boksa ws, para. 18.
[55] PBP Bank Income Statement for 2010 and 2011, 19 June 2012 (Exh. C-54).
[56] Stańczuk ws, paras. 11, 12.
[57] Stańczuk ws, para. 18.
[58] Email from M. Stańczuk to P. Gieryński and P. Boksa, 31 Oct. 2011 (Exh. C-33), describing Mr. Kwaśniak's assessment of IDM's attitude in the shareholding structure as "destructive."

IDM's shares in the Bank,[59] they had not in fact agreed. Their discord resurfaced in a subsequent meeting of 22 May 2012 with the KNF.[60]

109. A consensus emerged at the 22 May 2012 meeting in favor of injection into the Bank by Claimant of a cash amount approximately equal to the loss suffered from the DSS Bonds, either through buying out the DSS Bonds or issuing new shares.[61]

110. The Parties disagree as to their understandings of the form that a buy-out of the DSS loans would take. Claimant argues that the Bank was meant merely to transfer title to the bonds to Claimant by way of a loan (entailing deferred payment), whereas Respondent argues that nothing short of an immediate injection of cash was contemplated.[62] Respondent alleges that Abris deliberately misled the KNF into thinking that it had paid cash for the bonds.[63] Ultimately, the KNF insisted that Abris and the Bank agree on an actual purchase of the bonds by Abris,[64] and prevailed.[65]

111. According to Respondent, PBP Bank already showed a loss in the fourth quarter of 2010 and continued to show a loss each month up to August 2011, so that it was threatened with a balance sheet loss for the financial year ending 31 December 2011. Under Article 142(1) of the Banking Act,[66] once a bank is threatened with a balance-

---

[59] Letter from Abris to the KNF, 24 Apr. 2012 (Exh. C-43).
[60] Minutes of the KNF meeting, 22 May 2012, p. 10 (Exh. R-11). See Statement of defence, para. 66.
[61] Minutes of the KNF meeting, 22 May 2012, p. 6 (Exh. R-11).
[62] Note from meeting at the KNF, 12 July 2012 (Exh. R-16).
[63] Statement of Defence, para. 71. According to Respondent, Mr. Boksa's testimony in favor of the position taken by Claimant is "nothing other than a lie." Statement of Defence, para. 70.
[64] Letter from the KNF to PBP Bank, 30 Nov. 2012 (Exh. C-75).
[65] Statement of Defence, para. 72.
[66] Respondent maintains that the Claimant has filed an incorrect translation of Article 142(1), mistakenly translating the Polish term *strata bilansowa* as "net loss" rather than the correct term "balance-sheet loss." Thus the provision would read:

> In the event of a bank suffering a balance-sheet loss, being threatened with such a loss or finding itself in danger of insolvency or a loss of liquidity, the bank's management board shall immediately advise the

sheet loss, it must immediately inform the KNF and submit a recovery plan, which Claimant apparently did not do.[67] On 2 September 2011, the KNF exercised its right under Article 142(1) to require the Bank to submit a remedial plan within a 30-day period. KNF's letter stated:

> **The analysis of the Bank's financial data indicates a considerable deterioration in its economic and financial position, shown mainly by the considerable worsening of financial results observed since Q4, 2010. In 2010, net profit was at a level of PLN 4 million, compared to PLN 23 million in 2009. The adverse trends regarding the financial result were more pronounced this year. The Bank has suffered losses since the beginning of 2011. At the end of Q1 2011, the accumulated net loss was PLN 1.7 million, which, according to the information provided by the Bank, arose from lower revenues in the early months of 2011 in connection with the process of ownership transformations, the implementation of a new strategy and the reconstruction of the Bank's loan portfolio and client database. At the end of June 2011, the net loss declined to a level of PLN 205 thousand, but, according to data as at the end of this July, the loss increased again to a level of over PLN 2 million, mainly because of increasing operating expenses. …**
>
> **In the presented financial forecasts, in 2011, the Bank assumed that net profit would be achieved at a level of PLN 13.6 million, which is influenced by a considerable increase in the loan portfolio up to a level of PLN 1.3 billion (actual at the end of June of this year being 23%), an increase in the interest result to the amount of PLN 28.3 million (actual at the level of 7%) and operating expenses at a level of PLN 43.3 million. As at 30 June 2011, most of the amounts forecast in the financial plan were not achieved in a manner that ensures the achievement of the target profit at the end of 2011.[68]**

112. At a meeting with the KNF on 19 April 2012, Mr. Gieryński and Mr. Boksa, together with a representative of IDM, broached two solutions to the DSS bonds problem. One solution was that PL Holdings and IDM purchase the DSS bonds at nominal value with a deferred payment. The other was for PL Holdings to buy out IDM's stake in PBP

Polish Financial Supervision Authority of this and shall submit a recovery plan, ensuring its implementation.

[67] Statement of Defence, para. 49.

[68] Letter from the KNF to PBP Bank, 2 Sept. 2011 (Exh. C-31).

Bank and then buy the DSS bonds from PBP Bank, with payment for the bonds deferred until PL Holdings' exit from the PBP Bank.[69] According to Claimant, while KNF approved both proposals, IDM rejected the former, largely because it itself needed a cash injection to enable it to avoid bankruptcy.[70] Accordingly, on 24 April 2012, Abris informed the KNF that IDM was ready to sell its 45% stake in PBP Bank and that PL Holdings stood ready to execute that transaction. This arrangement did not satisfy the KNF which, on 27 April 2012, reiterated its requirement that PBP prepare a remedial plan.[71] Despite this fact, Claimant hoped that the requirement of a plan would still be withdrawn if Claimant managed to remove the DSS bonds from the PBP Bank's books.[72]

113. On 2 May 2012, Mr. Gieryński and Mr. Boksa again met with Mr. Kwaśniak, reiterating PL Holdings' willingness to buy IDM's stake in PBP Bank and then buy the DSS bonds.[73] According to Claimant, Mr. Kwaśniak accepted that course of action, including the fact that PL Holdings would defer payment of the bonds until its exit from its investment in PBP Bank, and stated that it did not require KNF approval.[74] Evidently, however, IDM was not following through, and Mr. Boksa so reported to KNF.[75]

114. On 22 May 2012, at the KNF's invitation,[76] Mr. Gieryński attended a meeting of the KNF Board of Directors at which PBP's financial situation was to be discussed. In

[69] Letter from Abris to the KNF, 24 Apr. 2012 (Exh. C-43); Boksa ws, para. 19.
[70] Boksa ws, para. 19; Gieryński ws, para. 29.
[71] Letter from the KNF to PBP Bank, 27 Apr. 2012 (Exh. C-47); Boksa ws, para. 20.
[72] Boksa ws, para. 20.
[73] Gieryński ws, para. 31.
[74] Boksa ws, para. 21.
[75] Letter from Abris to the KNF, 21 May 2012 (Exh. C-50).
[76] Letter from the KNF to Abris, 16 May 2012 (Exh. C-49).

attendance for the KNF, alongside Mr. Kwaśniak, were Andrzej Jakubiak (Chairman of the KNF), Leslaw Gajek (Vice-Chairman of the KNF), as well as Witold Koziński and Ludwik Kotecki. According to Claimant, Mr. Gieryński informed the KNF officials that PL Holdings still preferred to buy out IDM's stake in PBP Bank, and those officials were agreeable to that approach, again stating that no formal KNF approval would be needed for that transaction.

115. On 12 July 2012, a further meeting was held at which Mr. Boksa presented to the KNF the terms of the offer PL Holdings had received to purchase IDM's 45% stake in PBP Bank.[77] However, Mr. Kwaśniak pointed out that, having failed to solve the DSS problem by 30 June 2012, PBP Bank could not help but show a loss in its year-end accounts.[78] According to Mr. Gieryński, Mr. Kwaśniak nevertheless expressed approval of the proposed deal with IDM.[79]

116. The next day, Mr. Boksa informed the KNF that agreement had been reached with IDM for PL Holdings' purchase of the bonds.[80] That transaction closed on 18 July 2012, with PL Holdings acquiring IDM's 45% share in PBP Bank for PLN 95 million and becoming 100% owner of the Bank, while at the same time acquiring the DSS bearer bonds from PBP Bank.[81] On 24 July 2012, PBP's Management Board wrote to the KNF

---

[77] Boksa ws, para. 24. According to the terms of the offer, PBP Bank would transfer title to the DSS bonds to PL Holdings by way of a loan, in return for interest payments from PL Holdings and payback by PL Holdings of the value of the bonds at the end of 2015.
[78] Gieryński ws, para. 35.
[79] Gieryński ws, para. 36.
[80] Letter from Abris to the KNF, 13 July 2012 (Exh. C-58).
[81] IDM current report on purchase agreement with PL Holdings, 13 July 2012 (Exh. C-59); Boksa ws, para. 26; Gieryński ws, para. 37.

confirming PL Holdings' acquisition of the IDM shares and its removal of the bad debts from PBP's portfolio.

117. On 23 November 2012, Mr. Kwaśniak informed Mr. Stańczuk that the KNF disapproved of the transactions "in terms of business risk and quality of the Bank's equity."[82] Despite Mr. Boksa's effort to dissuade Mr. Kwaśniak by reminding him of the history of the transactions,[83] Mr. Kwaśniak stood firm, claiming that the DSS bond arrangement "[was] not what [Claimant] declared earlier before the KNF and during the meetings with the KNF Chairman and Deputy Chairman."[84] Nevertheless, Mr. Kwaśniak told PL Holdings in the same letter that it expected PL Holdings to make the payment to PBP Bank for purchase of the DSS bonds by the end of 2012.[85] In early 2013, PL Holdings complied with the KNF's directive, paying PBP Bank an additional PLN 60 million for the DSS bonds.[86]

118. The fact remained that Claimant had been unable to close the IDM and DSS bonds transactions before the end of June 2012, i.e. before the date for approval of PBP's 2011 financial year-end accounts. Consequently, the loss of PLN 73.763 million due to the DSS bonds remained on PBP's 2011 accounts.[87] Claimant maintains that, without that item, PBP Bank would have shown a profit of PLN 6.414 million.[88]

[82] Letter from the KNF to PBP Bank, 23 Nov. 2012 (Exh. C-73). See also Letter from the KNF to PBP Bank, 30 Nov. 2012 (Exh. C-75).
[83] Letter from Abris to the KNF, 7 Dec. 2012 (Exh. C-76).
[84] Letter from the KNF to Abris, 18 Dec. 2012 (Exh. C-78).
[85] Letter from the KNF to Abris, 18 Dec. 2012 (Exh. C-78).
[86] Boksa ws, para. 26.
[87] PBP Bank Income Statement for 2010 and 2011, 19 June 2012 (Exh. C-54).
[88] Minutes of the meeting of the Supervisory Board of PBP Bank, 5 June 2012 (Exh. C-51).

C. The PBP Bank Remedial Plan

119. On 12 September 2011, the Bank informed the KFN that, in its opinion, the request to prepare a recovery plan was premature.[89] After several exchanges and meetings, on 25 October 2011, the KNF asked the Bank to provide detailed financial forecasts for the remainder of 2011 and a budget for 2012.[90] On 31 October 2011, Mr. Kwaśniak stated that the KNF was not prepared to formally withdraw its request for a remedial plan, but would reassess the Bank's financial situation at the end of 2011.[91]

120. On 4 November 2011, PBP Bank submitted to the KNF its financial forecasts for the remainder of 2011,[92] and on 11 February 2012 submitted its preliminary, unaudited financial results for 2011.[93] These data revealed that the Bank had realised a net profit of PLN 8.72 million, which was PLN 4.78 million less than planned in the approved budget for 2011, but PLN 7.69 million higher than the projections presented in September. According to Respondent, "[t]he Bank's financial results, therefore, finally seemed to be on the plus side, although this was not yet conclusive evidence that the Bank's financial position had been permanently rectified."[94]

121. On 15 March 2012, the KNF reiterated that it could only withdraw its request for a remedial plan if an examination of the Bank's existing and projected financial situation justified that step, and to that end, requested further information from the Bank. "The measures taken by the Management Board must guarantee the Bank's safe

---

[89] Letter from PBP Bank to the KNF, 12 Sept. 2011 (Exh. C-32).
[90] Official KNF Note from the meeting of 25 October 2011, 25 Oct. 2011 (Exh. R-6).
[91] Kwaśniak ws, p. 2.
[92] Letter from the PBP Bank to the KNF, 4 Nov. 2011 (Exh. R-7).
[93] Letter from the PBP Bank to the KNF, 10 Feb. 2012 (Exh. C-36).
[94] Statement of Defence, para. 52.

development over a long-term perspective and cannot lead to any potential destabilization of the banking system."[95]

122. On 27 April 2012, following a great many exchanges over the IDM and DSS bonds transactions, the KNF decided to require PBP to prepare a remedial plan.[96] In its letter of that date, the KNF attributed its request to the Bank's adverse financial situation. Respondent cites as evidence of that situation a decline in the Bank's equity and in its capital adequacy, the latter to a point below that recommended by the KNF.[97]

123. On 2 May 2012, the Bank informed the KNF that it had not managed to meet the KNF's liquidity requirements, due largely to a decline in deposits.[98] According to Respondent, the Bank attributed that decline not merely to the DSS losses, but also to the difficulties that IDM was experiencing, having sustained a significant loss in 2011 reflected in its financial statements for the fourth quarter of 2011.[99] Further, the Bank advised the KNF that it had formally requested Abris and IDM for liquidity assistance,[100] pursuant to the commitment to provide such assistance they had made when applying to the KNF for consent to exercise voting rights in the Bank.[101] According to Mr. Stańczuk, the assistance that the Bank received from Abris and IDM was entirely insufficient.[102] Consequently, the Bank's senior management met with the National Bank of Poland (i.e., the central bank), as well as with the Ministry of

---

[95] Letter from the KNF to PBP, 15 Mar. 2012 (Exh. C-38).
[96] Letter from the KNF to PBP Bank, 27 Apr. 2012 (Exh. C-47); Gieryński ws, para. 30.
[97] Letter from the KNF to PBP Bank, 29 Aug. 2012 (Exh. C-60).
[98] Letter from the PBP Bank, 2 May 2012 (Exh. R-9); Stańczuk ws, para. 19.
[99] Statement of Defence, para. 60.
[100] Letter from the PBP Bank, 2 May 2012 (Exh. R-9).
[101] KNF Decision permitting the exercise of voting rights at the shareholder meeting of WestLB Bank Polska, 27 Oct. 2010 (Exh. C-27).
[102] Stańczuk ws, para. 19. According to Mr. Stańczuk, "we [i.e., the Bank] were left actually all alone." Id., para. 21.

Finance and the Bank Guarantee Fund, to discuss the possibility of an emergency loan.[103] Respondent cites as a further source of concern the high degree of concentration in both the Bank's depositor base and its loan portfolio.[104] The KNF accordingly conducted an analysis of the bank's exposure related to the construction industry, in which companies other than DSS had also failed.[105] It concluded that, as of 30 April 2012, the Bank's exposure included two unsecured loans that amounted to approximately PLN 38 million.[106] At the KNF's urging, the Bank reclassified the loans and made appropriate provision for their loss.[107]

124. The record suggests that the Bank's inability to meet required liquidity levels continued until the second half of August 2012.[108]

125. However, Claimant observes that the KNF required preparation of a remedial plan even before it could know for a fact that the IDM and DSS bonds transactions would not close before 30 June 2012, and that the KNF maintained its demand even after it knew that the books of PBP Bank for 2012 would show a large accounting profit.[109] Respondent, on the other hand, denies that the KNF ever led the Bank to believe that it would not need to prepare a remedial plan if it successfully dealt with the DSS Bond issue.[110]

---

[103] Stańczuk ws, para. 21. See also minutes of KNF Meeting, 22 May 2012 (Exh. R-11).
[104] Statement of Defense, para. 63, citing minutes of KNF Meeting, 22 May 2012 (Exh. R-11).
[105] Letter from the KNF to the PBP Bank, 11 June 2012 (Exh. R-12).
[106] Letter from the PBP Bank to the KNF, undated (Exh. R-13).
[107] Letter from the KNF to the PBP Bank, 2 July 2012 (Exh. R-14); Letter from the PBP Bank to the KNF, undated (Exh. R-15); Kozłowska ws, p. 3.
[108] Letter from the PBP Bank to the KNF, 20 Aug. 2012 (Exh. R-10).
[109] Boksa ws, para. 30.
[110] Kwaśniak ws, p.10.

126. In accordance with the KNF's demand, on 6 June 2012, PBP Bank and Claimant submitted a draft PBP Bank remedial plan for the period between 1 July 2012 and 30 June 2013.

127. The draft remedial plan was discussed at a 13 June 2012 meeting at which the KNF expressed some reservations.[111] The KNF wanted, among other things, a provision for loss of certain loans, further reduction in concentration of deposits and loans, additional action on the liquidity front, submission of a model of bank functioning, consideration of merger and additional shareholders, and greater capitalization. The Parties addressed specifically and in positive terms the prospect of an eventual merger with FM Bank.[112]

128. On 13 June 2012, PBP Bank wrote to the KNF asking permission to make certain adjustments to the remedial plan as submitted on 6 June 2012 and to furnish the revision by no later than 29 June 2012.[113] PBP Bank worked through the month of June on revising the 6 June remedial plan.[114] At a meeting of the Supervisory Board of PBP Bank on 28 June 2012, Mr. Stańczuk, who was President of the PBP Bank Management Board, presented five possible scenarios for the future of PBP Bank to be used in the revised remedial plan, as follows:

- **continuation of the present model**
- **maintenance the corporate profile, but modification of the business model**
- **merger with a retail bank**
- **introduction of a new investor**
- **dissolution of the Bank**

111 Note from meeting of 13 June 2012, 13 June 2012 (Exh. R-18).
112 Note from meeting of 13 June 2012, 13 June 2012 (Exh. R-18).
113 Letter from PBP Bank to the KNF, 13 June 2012 (Exh. C-53).
114 Statement of Claim, para. 78.

While the second option had the advantage of being achievable more quickly, discussion at the Supervisory Board meeting revolved mainly around the third and fourth.[115]

129. On 29 June 2012, the Supervisory Board adopted a resolution to submit the revised remedial plan to the KNF,[116] which PBP Bank did on the same day,[117] laying out all the options while indicating its preferences.

130. A favored option was to bring in additional shareholders. To this end, the KNF examined the possibility of a particular cooperative bank, Społdzielczy Bank Rzemiosła i Rolnictwa ("SK Bank") becoming a shareholder of the PBP Bank.[118] In the meantime, at a 12 July 2012 meeting, Mr. Kwaśniak raised the possibility with Abris of a merger with FM Bank,[119] a possibility that met with Abris' initial favor.[120] When it became clear that SK Bank was not in fact in a position to contribute the capital needed, the KNF came to the view that merger with FM Bank was the best solution.[121]

131. On 29 August 2012, the KNF informed PBP Bank that the 29 June 2012 version of the remedial plan could not be accepted, and invited the Bank to submit an adjusted version of the plan within 30 days.[122] It specifically asked that, in addition to addressing financial concerns that the KNF did not think the Bank had adequately addressed, consideration be given to the alternative of a merger with another banking

---

[115] Minutes of the meeting of the Supervisory Board of PBP Bank, 28 June 2012 (Exh. C-55); Boksa ws, para. 28.
[116] Minutes of the meeting of the Supervisory Board of PBP Bank, 28 June 2012 (Exh. C-55).
[117] Letter from PBP Bank to the KNF, 29 June 2012 (Exh. C-56), transmitting "[T]he adjusted Remedial Program of [PBP Bank] for the period from 1 July 2012 to 30 June 2015."
[118] KNF internal memo, 4 July 2012 (Exh. R-19).
[119] KNF official note from the meeting of 12 July 2012, 12 July 2012 (Exh. R-16).
[120] KNF official note from the meeting of 12 July 2012, 12 July 2012 (Exh. R-16).
[121] Minutes of internal KNF meeting, 28 Aug. 2012(Exh. R-49).
[122] Letter from the KNF to PBP Bank, 29 Aug. 2012 (Exh. C-60).

entity through a common shareholder.[123] Claimant describes this request for a merger on the KNF's part as a "volte-face."[124]

132. Claimant's witnesses testified that, at a meeting at the KNF on 3 September 2012, Mr. Kwaśniak indicated that the KNF was maintaining its request for an amended remedial plan and that the bank with which he urged PBP Bank to merge was FM Bank. According to Claimant, Mr. Kwaśniak stated to Mr. Gieryński and Mr. Boksa in very strong terms at a 7 November 2012 meeting that any remedial plan proposed by PBP Bank had to entail a merger with FM Bank.[125] Evidently Mr. Kwaśniak also floated the alternative of PL Holdings selling its 100% shareholding in the PBP bank, a course of action Claimant strongly opposed.[126] According to Respondent, Mr. Gieryński appeared entirely amenable to the idea of a merger with FM Bank.[127] Due to what appeared to it to be a reversal of position by the KNF on the merger, Claimant asked KNF to confirm that it was released from the commitment it had made in 2010 not to merge.

---

[123] Letter from the KNF to PBP Bank, 29 Aug. 2012 (Exh. C-60).

[124] Statement of Claim, para. 85.

[125] Boksa ws, para. 32. According to Mr. Boksa:

> [Mr. Kwaśniak banged on the table and shouted something to this effect (I cannot recall the precise words): "Don't you understand what we want from you? We want you to merge the banks. We won't approve any remedial plan that does not include a merger. We will reject any remedial plan you submit and appoint a receiver."

[126] Mr. Gieryński testified to this effect:

> Selling PBP Bank was not a realistic option. PL Holdings had invested with a particular time horizon in mid, wishing to grow the bank to the limit of its capital injection and then exit the investment through a staged IPO at the appropriate time. To sell at this point did not make financial sense; PL Holdings would not have been able to grow the business to the limit of the capital injection it had provided thereby realising as much as possible the value of its investment in PBP Bank.
>
> A sale of the bank at that point would have been a fire sale, which would have been reflected in the level of the offers received. Also, after only a year or so of operations, PBP Bank's business was only just beginning to develop in the way anticipated.

Gieryński ws, paras. 41, 44.

[127] Minutes of meeting at the KNF on 3 September 2012, 3 Sept. 2012 (Exh. R-21).

133. **At the deadline of 15 November 2012 that the KNF had established for PBP Bank's submission of an amended remedial plan, PBP Bank submitted a document titled "[A]djusted Remedial Plan for [PBP Bank] for the years 2013-2015."[128] The plan was premised on a merger with FM Bank.[129]**

134. **On the next day, Mr. Boksa wrote to the KNF reiterating his question whether the KNF was reversing the commitment it had required in 2010 and seeking confirmation merger was the KNF's "preferred option."[130]**

135. **The KNF responded to these questions in two separate letters, each dated 19 November 2012. The first letter stated that the KNF had never requested or received an undertaking by Claimant not to pursue a merger.[131] The second letter confirmed that a merger between the PBP Bank and the FM Bank to form a single entity was "the preferred route."[132]**

136. **Shortly thereafter, on 23 November 2012, the KNF rejected the amended remedial plan that PBP Bank had submitted on 15 November 2012. According to the KNF, the plan did not adequately effect the merger intended:**

> **The idea of merger, as presented by the Bank, in fact, means preserving the split into two banks, and not into two divisions, and deprives the Bank of the synergy effect in terms of both business and costs. The operation of the merger of the two banks should lead to a full integration of the processes of future operations, including risk management, so that the merged Bank operate[s] as an integrated whole. Moreover, the Bank has presented an approximate schedule for the merger of the banks, failing to specify the expected operation's time framework, which needs to be supplemented. At the same**

---

[128] Letter from PBP Bank to the KNF, 15 Nov. 2012 (Exh. C-67).

[129] Gieryński ws, para. 42. PBP Bank indicated that the merger would occur within six to nine months from the time an agreement was reached on a merger plan by both banks' management boards and approved by both banks' shareholders.

[130] Letter from Abris to the KNF, 16 Nov. 2012 (Exh. C-69).

[131] Letter from the KNF to Abris regarding merger, 19 Nov. 2012 (Exh. C-70).

[132] Letter from the KNF to Abris regarding investor commitments, 19 Nov. 2012 (Exh. C-71).

time, the presented development diagram of the separated parts, including the retail area, within the indicated corporate structures, indicates the intent of the non-merger of both institutions.[133]

137. In its letter, the KNF gave PBP Bank a period of 21 days to produce another version of the remedial plan.

138. Claimant represents that, starting then, PL Holdings and Abris, in conjunction with the two banks, worked on a new remedial plan premised on a full merger between FM Bank and PBP Bank, though both PL Holdings and Abris had misgivings about the merger.[134] **On 17 December 2012, PBP Bank submitted its further amended plan,**[135] **which the Bank described as "based on the assumption of a full-scale merger, taking into account the integration of all corporate processes and functions, including the ones related to risk management."**[136] **It contemplated the merger taking place on 30 June 2013.**

139. By letter of 9 January 2013, the KNF responded positively to this latest remedial plan, subject to some comments and requests for supplemental information.[137] **PBP Bank accordingly submitted an adjustment to the remedial plan on 31 January 2013.**[138]

---

[133] Letter from the KNF to PBP Bank, 23 Nov. 2012 (Exh.C-73).

[134] Boksa ws, paras. 34-35. Among the sources of misgivings was the fact that, once merged, FM Bank would be subject to the remedial plan prompted solely by concerns relating to the PBP Bank. According to Mr. Boksa, FM Bank had been very successful, making a net profit in 2012 of PLN 10 million. Financial Statement of FM Bank for 2012, 12 Mar. 2013 (Exh. C-89).

[135] Letter from PBP Bank to the KNF, 17 Dec. 2012 (Exh. C-77).

[136] The letter further reported as follows:

> The Management Boards of PBP Bank S.A. and FM Bank S.A. have jointly determined target client segments, product offer, pricing policy, services distribution channels, and equity policy. The organizational structure has been also defined to specify the scope of responsibility of individual Management Board members in the merged bank … A detailed legal and operational schedule, taking into account the time framework of the merger, is presented in … the [remedial plan.

[137] Letter from the KNF to PBP Bank, 9 Jan. 2013 (Exh.C-83).

[138] Letter from PBP Bank to the KNF, 31 Jan. 2013 (Exh. C-85).

140. **On 18 March 2013, FM Bank and PBP Bank jointly presented the KNF with an application for permission to merge which indicated that PBP Bank would be the surviving entity. The application was also to serve as a business plan of the merged bank.**

D. <u>The Merger with Meritum Bank</u>

141. **According to Claimant, it came to the view that, despite the prospective merger, a gap in banking services remained. The merged bank would manage to cater to the microloans market (FM Bank's advantage) and the corporate banking market (PBP Bank's advantage), but would leave untouched "the middle."[139] Claimant identified Meritum Bank ICB Spólka Akcyjna ("Meritum Bank") as the best candidate to fill that gap.[140] Thus, a three-way merger was contemplated.**

142. **The chair of Meritum Bank's Supervisory Board was at that time Mr. Slawomir Lachowski, an experienced Polish banking executive. According to his own witness testimony, Mr. Lachowski (a) had developed the first internet bank in Poland, (b) had contributed to the restructuring of the very large Polish bank, PBG Bank, and (c) as CEO of another Polish bank, BRE Bank, had successfully implemented a remedial plan.[141] In conversation with Mr. Krzysztof Kulig, a partner at Meritum Bank's largest (but not majority) shareholder, Innova Capital Sp. z. o.o. ("Innova"), Mr. Gieryński,**

---

[139] Boksa ws, paras. 34-36; Gieryński ws, para. 45. According to Mr. Gieryński:

> [Meritum Bank] had some strengths that FM Bank and PDP Bank did not have and some weaknesses where FM Bank and PBP Bank did not have any, so there were a number of potential synergies. It was also 47%-owned by Innova Capital Sp. z. o.o ("Innova"), another private equity fund, which meant it would likely have a similar time horizon in mind for the investment…

[140] Boksa ws, para. 36; Gieryński ws, para. 46.

[141] Lachowski ws, para. 7.

came to the view that Mr. Lachowski would serve well as CEO and President of the Management Board of a prospective three-way merged bank.[142]

143. On 22 January 2013, Mr. Gieryński and Mr. Kulig requested a meeting with the KNF to discuss a possible three-way merger.[143] That meeting – attended by seven KNF officials – took place two days later. According to Claimant, the KNF reacted positively to the idea because it was compatible with the policy of consolidating smaller banks and creating more universal ones.[144] However, Mr. Kwaśniak stated that the merger between PBP Bank and FM Bank should be consummated first (by the end of June 2013) followed by a merger of that merged bank with Meritum Bank (by the end of 2013), i.e. via two two-way mergers.[145] There is some dispute between the Parties over how the suggestion of appointing Mr. Lachowski as President of the Management Board of the merged bank, which arose at the meeting, was received. While Mr. Gieryński reported touting Mr. Lachowski's knowledge and experience,[146] Respondent suggests that even Mr. Gieryński did not display perfect confidence in those respects.[147] Apparently, Mr. Kwaśniak took no definitive position at the time on Mr. Lachowski's candidacy.[148]

[142] Gieryński ws, para. 47. They also identified Mr. Tomasz Maciejewski, then Deputy President of FM Bank, as a prospective deputy president of the prospective three-way merged bank.
[143] Letter from Meritum Bank and PBP Bank to the KNF. 22 Jan. 2013 (Exh. C-84).
[144] Gieryński ws, para. 49.
[145] Minutes of meeting at KNF, 25 Jan. 2013 (Exh. R-22): Boksa ws, para. 37; Gieryński ws, para. 49, 52.
[146] Gieryński ws, para. 50.
[147] Minutes of meeting at KNF, 25 Jan. 2013 (Exh. R-22).
[148] Minutes of meeting at KNF, 25 Jan. 2013 (Exh. R-22).

144. Negotiations among the three banks ensued, with Mr. Lachowski, who was highly optimistic about the prospect, taking the lead.[149] On 11 February 2013, Mr. Kulig, Mr. Boksa and Mr. Lachowski signed a letter of intent to produce a three-way merger, whose essentials were recorded in a document titled "Project Boat: Term Sheet."[150] During this period, Mr. Lachowski familiarized himself with PBP Bank (and its remedial plan) and FM Bank.[151]

145. On 6 June 2013, Mr. Lachowski presented to the KNF the proposed strategy for the eventual three-way merger and a business plan.[152] As stated in the "Project Boat: Term Sheet," the eventually merged bank would be "perceived as less risky (due to larger scale) and capable of more dynamic growth thanks to larger capital base … and customer reach."

146. According to Claimant's witnesses, the Meritum Bank shareholders other than Innova (i.e., the EBRD and Wolfensohn) did not support the idea of a three-way merger and it could not therefore go through. According to Respondent, however, Meritum Bank itself acquired "cold feet" over the merged bank's likely susceptibility to market volatility:

> **Works on the transaction were stopped, because during the commercial due diligence investigation, the shareholders of Meritum Bank decided, that due to a significant concentration of both deposits and credits, the PBP Bank business model is less stable and more prone to fluctuations, and thus bears a higher risk than the other entities. This risk associated with the PBP Bank business**

---

[149] Lachowski ws, para. 20, Boksa ws, para. 38; Gieryński ws, para. 51. Mr. Lachowski testified (Lachowski ws, para. 19) that: "Considering the different profiles of the businesses of each of the three banks, a skilful execution of the merger would create an opportunity to develop a competitive business and operational model."
[150] Project Boat: Term Sheet, signed by Innova, Abris and S. Lachowski, 11 Feb. 2013 (Exh. C-86).
[151] Lachowski ws, para. 22.
[152] Presentation of S. Lachowski on a potential merger of Meritum, FM Bank and PBP Bank, 6 June 2013 (Exh. C-104).

model outweighed the potential positive contribution which could result from the merger of Meritum Bank and FM Bank, and led to the decision of the shareholders of Meritum Bank on the withdrawal from the project.[153]

In any event, at a meeting on 25 July 2013, the merger talks collapsed.[154] On the same day, Mr. Boksa so informed the KNF.[155]

E. The FM/PBP Merger

147. The Polish Banking Act required PBP Bank and FM Bank to seek approval of the KNF for the proposed merger.[156] On 15 March 2013, the FM Bank and PBP Bank Management Boards approved the merger plan and three days later submitted to the KNF the merger application, together with a business plan for the merged bank for 2014-2016.[157] On 26 April 2013, the KNF, while requiring a number of adjustments, expressed a favorable view of the business plan. It stated that "[a]nalysis of the Business Plan has shown that if all of its assumptions are realized, this would create an opportunity to achieve permanent improvement of the situation of the merged Bank, while reducing the risk generated by the Bank."[158] Then on 20 May 2013, the two banks submitted a revised business plan as requested.[159] Among the information provided at the KNF's request was an indication of the responsibilities of individual Management Board members for different elements of the business plan. Further

[153] Letter from Meritum to the KNF, 17 June 2014 (Exh. R-24).
[154] Gieryński ws, paras. 58-59; Boksa ws, para. 45.
[155] Letter from Abris to the KNF, 25 June 2013 (Exh. C-113).
[156] Banking Act, art. 124 (Exh. LA-5)
[157] Application from PBP and FM Bank for permission to merge, 18 Mar. 2013 (Exh. C-91);
[158] Letter from the KNF to FM Bank and PBP Bank, 26 Apr. 2013 (Exh. C-99).
[159] Letter from FM Bank and PBP Bank to the KNF, 20 May 2013 (Exh. C-102).

comments by the KNF led to some further revisions submitted to the KNF on 29 May 2013.[160] PBP Bank evidently understood that this revised business plan would also serve as PBP's remedial plan.[161] A further revised draft, approved by the banks, titled Remedial Plan of June 2013 ("June 2013 Remedial Plan"), was submitted to the KNF on 10 June 2013.[162]

148. The banks informed the KNF that Mr. Tomasz Maciejewski (then First Deputy President of FM Bank) would become CEO and President of the Management Board of the merged bank, while Ms. Elzbieta Bhagat (then Vice-President of the Management Board of PBP Bank) would join the Management Board of the merged bank.[163] In early March 2013, Mr. Gieryński offered the position of Deputy President of the Management Board of the merged bank to Mr. Stańczuk, who had expected to have a position on the merged bank's Supervisory Board. Mr. Stańczuk had immediate reservations about that assignment, but appeared to accept it.[164] According to Respondent, the only reason Mr. Stańczuk agreed to this arrangement was because he had been promised that, as soon as the three-way merger took place, he would become deputy president of that bank, which he considered to be a great deal bigger and stronger entity than the two-way merged bank on its own.[165] The implication is that if Mr. Stańczuk had known the three-way merger would not take place and that

[160] Letter from FM Bank and PBP Bank to the KNF, 29 May 2013 (Exh. C-103).
[161] Statement of Claim, para. 120.
[162] Letter from FM Bank and PBP Bank to the KNF, attaching FM Bank PBP Business Plan for 2013-2017 ("June 2013 Remedial Plan"), 10 June 2013 (Exh. C-105).
[163] Minutes of the meeting of the Supervisory Board of PBP Bank, 16 Feb. 2012 (Exh. C-37); Letter from PBP Bank to KNF (14 Mar. 2013) (Exh. C-90).
[164] Gieryński ws, para. 55; Boksa ws, para. 44.
[165] Statement of Defence, para. 105.

he would only be deputy president of the two-way merged bank, he would never have agreed.

149. **The final business plan submitted to the KNF on 10 June 2013, showed the following lineup of officers of the merged bank:**[166]

- **Mr. Maciejewski: President of the Management Board**
- **Mr. Stańczuk: Deputy President of the Management Board**
- **Michal Zielke: Deputy President of the Management Board**
- **Stefan Świątkowski: Deputy President of the Management Board**
- **Krzysztof Jaczewski: Deputy President of the Management Board**
- **Jarosław Lejko: Deputy President of the Management Board**

150. **On 18 June 2013, the KNF approved the June 2013 Remedial Plan,**[167] **enabling the merger to take place and the merged bank, known as "FM Bank PBP" to be established, effective 1 July 2013. The shareholding in FM Bank PBP was PL Holdings, 99.59% and Mr. Stępniak, 0.41%. According to Respondent, since the composition of the Management Board was an element of the remedial plan, any changes to its composition required an amendment to the remedial plan.**[168]

F. Changes in Management Board Composition

151. **Toward the end of June 2013, the Supervisory Board of PBP Bank (as the surviving entity of the imminent merger) set about appointing the merged bank's Management Board, as outlined above. Among other things, in order to appoint Mr. Stańczuk as Deputy President of the Management Board, he had to be removed from his position as President of the PBP Bank's Management Board. On 20 June 20 2013, PBP Bank's**

---

[166] June 2013 Remedial Plan.
[167] KNF Decision consenting to the merger of FM Bank and PBP Bank, 18 June 2013 (Exh. C-109).
[168] Statement of Defence, para. 97.

General Counsel sent draft minutes of a meeting of PBP Bank's Supervisory Board to Mr. Stańczuk which reflected that he would be resigning from his previous position as President of the Management Board of PBP Bank. According to Claimant, it was unexpected that Mr. Stańczuk would refuse to resign,[169] but in fact he did so refuse.[170] Mr. Gieryński then met on an emergency basis with Mr. Stańczuk to remind him that he had agreed to become Deputy President of the Management Board.[171]

152. PBP Bank's Supervisory Board met on 24 June 2013 to make the appointments to the Management Board. The Supervisory Board made all the appointments provided for in the June 2013 Remedial Plan, with the exception of Mr. Stańczuk as Deputy President.[172] The next day, Mr. Stańczuk sent a letter to the KNF, copied to Mr. Gieryński, urging that it take action against Mr. Maciejewski's appointment as President of the Management Board, since Mr. Stańczuk had not resigned from that position.[173] On 26 June 2013, the Supervisory Board of PBP Bank adopted a resolution accepting Mr. Stańczuk's resignation as President of the PBP Bank's Management Board,[174] basing that resignation on his approval of the remedial plan submitted to the KNF on 17 December 2012, which had identified Mr. Maciejewski as Management Board President. Respondent argues forcefully that Mr. Stańczuk's failure to reject the

---

[169] Statement of Claim, para. 132; Gieryński ws, para. 61. It was unexpected because Mr. Stańczuk had previously appeared to accept that he would become a Deputy President of the merged bank's Management Board and because he had signed the June 2013 Remedial Plan which showed him in that position. Gieryński ws, para. 61; KNF witness interview record for P. Boksa, para. 19 (Exh. C-152) ("[Mr. Stańczuk voted for approving [the business plan], so I guess his objections, if he raised any, were dispelled."

[170] "I would like to declare that I am not giving consideration to tendering my resignation from the position of President of the Management Board of PBP." Email from Mr. Stańczuk to Ms. A Werner, 20 June 201`3 (Exh. C-111).

[171] Gieryński ws, para. 62.

[172] Minutes of the meeting of the Supervisory Board of PBP Bank, 24 June 2013 (Exh. C-112); Boksa ws, para. 48.

[173] Letter from Mr. Stańczuk to the KNF, 25 June 2013 (Exh. C-114).

[174] Minutes of the meeting of the Supervisory Board of PBP Bank, 26 June 2013 (Exh. C-115).

remedial plan cannot be properly considered a resignation as bank official because it was insufficiently clear and decisive.[175] According to Respondent, the Supervisory Board, rather than dismiss Mr. Stańczuk (and pay whatever consequences attend such action) improperly named Mr. Maciejewski as Management Board President while Mr. Stańczuk technically still occupied that post.[176] The result was the irregular situation of having two occupants of a single position.

153. That same day, after the meeting, Mr. Stańczuk sent an email to the Supervisory Board members in effect refusing any position on the Board other than President but also refusing to resign from the Board.[177]

154. On 1 July 2013, in accordance with the agreed upon schedule, the two-way merger creating FM Bank PBP became effective. When Mr. Stańczuk refused to accept the departure package offered him, the Supervisory Board finally on 10 July 2013 dismissed him from the Management Board altogether.[178]

155. On 12 July 2013, FM Bank PBP notified the KNF of the Management Board changes and reported what had transpired between the Supervisory Board and Mr. Stańczuk.[179] On 22 July 2013, the KNF sent a letter to FM Bank PBP affirming the KNF's approval of the merger and reiterating that the merger plan also constituted a remedial plan within the meaning of Article 142 of the Banking Law.[180]

---

[175] Statement of Defence, para. 110

[176] Minutes of the meeting of the Supervisory Board of PBP Bank, 24 June 2013 (Exh. C-112).

[177] Email from PBP Bank (Mr. Stańczuk) to FM Bank PBP (P. Gieryński and P. Boksa), 26 June 2013 (Exh. C-116). Mr. Stańczuk thus repeatedly – on 20 June, 24 June and 25 June – refused to resign. Statement of Defence, para. 114.

[178] Minutes of the meeting of the Supervisory Board of PBP Bank, 10 July 2013 (Exh. C-117).

[179] Letter from FM Bank PBP to the KNF, 12 July 2013 (Exh. C-120).

[180] Letter from the KNF to FM Bank PBP, 22 July 2013 (Exh. C-123).

156. Respondent is critical in these proceedings of the way in which Mr. Stańczuk's placement on the Management Board was handled. In Respondent's view, the Supervisory Board of PBP Bank did not properly inform Mr. Stańczuk of his anticipated position in the merged bank. More generally, the Board failed to ensure the "diligent selection of people for managerial positions" and instead acted in a manner that "can be best described as careless and unprofessional."[181] According to Respondent, Abris' handling of the matter was unlawful and in breach of both its investor commitments and the remedial plan.[182]

157. Mr. Stańczuk's dismissal had left an obvious vacancy on the Management Board. Following conversations between Mr. Gieryński and Mr. Lachowski, the latter indicated that he would welcome involvement with FM Bank PBP and the opportunity to consolidate the two-way merger.[183] He reiterated that sentiment in conversations with Mr. Boksa.[184] At a 29 July 2013 meeting among Mr. Boksa, Mr. Gieryński and Mr. Lachowski, the latter revealed a keen interest to work with FM Bank PBP.[185] At the beginning of August, Mr. Lachowski met with Mr. Maciejewski. According to Claimant, Mr. Lachowski acknowledged in the discussion the need to act in accordance with the remedial plan.[186] According to Mr. Lachowski, Mr. Maciejewski stated that if the Supervisory Board should want to appoint Mr. Lachowski as President of the

[181] Statement of Defence, para. 106.
[182] Statement of Defence, para. 108.
[183] Gieryński ws, para. 65.
[184] Boksa ws, paras. 53-54.
[185] Boksa ws, para. 54.
[186] Lachowski ws, para. 29.

Management Board, he would be willing to step down and become a Deputy President.[187]

158. On 5 August 2013, Mr. Lachowski met with Mr. Gieryński and Mr. Boksa to explain how he proposed to implement the remedial plan as well as improve the functioning of the Management Board.[188] The next day, Mr. Lachowski presented his views to the entire Board.[189] Finally, on 8 August 2013, the Supervisory Board appointed Mr. Lachowski to the Management Board.[190] At the same meeting, Mr. Maciejewski tendered his resignation as CEO and President of the Management Board, and was appointed First Vice-President of the Management Board (CFFO).[191] Mr. Lejko and Mr. Zielke resigned from the Management Board and became directors of FM Bank PBP.[192] On the same day, FM Bank PBP issued a press release reporting that Mr. Lachowski would serve as acting President of the Board until consent of the KNF was obtained,[193] and the news was reported in the press.[194] In his testimony, Mr. Kwaśniak described the KNF's learning about a bank president's appointment only through the press as unprecedented.[195] According to Respondent, "[this] series of unconsulted changes to the Bank's Management Board, following other events described in [the] Statement of Defence, left the KNF's trust in Abris shattered."

[187] Lachowski ws, para. 29
[188] Boksa ws, para. 59.
[189] Boksa ws, para. 59.
[190] Minutes of the meeting of the Supervisory Board of FM Bank PBP, 8 Aug. 2013 (Exh. C-127); Letter from FM Bank PBP to the KNF, 12 Aug. 2013 (Exh. C-128).
[191] Minutes of the meeting of the Supervisory Board of FM Bank PBP, 8 Aug. 2013 (Exh. C-127).
[192] Minutes of the meeting of the Supervisory Board of FM Bank PBP, 8 Aug. 2013 (Exh. C-127).
[193] FM Bank PBP press release on the appointment of S. Lachowski to the Supervisory Board of FM Bank PBP, 8 Aug. 2013 (Exh. C-126).
[194] "Sławomir Lachowski – President of FM Bank PBP," Forbes Magazine, 8 Aug. 2013 (Exh. C-125).
[195] Kwaśniak ws, p. 8.

159. On Monday, 12 August 2013, Mr. Boksa sent a letter to the KNF informing it of all the changes in composition of the Management Board and explaining their rationale.[196] These included the 10 July 2013 dismissal of Mr. Stańczuk from the Management Board, Mr. Maciejewski's 8 August 2013 resignation from the position of Management Board President and appointment as the first Vice-President of the Board, Mr. Lachowski's 8 August 2013 appointment as President of the Management Board, and the 8 August 2013 resignations of Mr. Lejko and Zielke as Management Board members. It is uncontested that all of these changes were made without prior consultation with the KNF, and in the case of Mr. Lachowski also without the KNF's prior approval. However, the new appointments were evidently identified as "acting" only.

160. The 12 August 2013 letter from Mr. Boksa stated that "the decision [of Mr. Stańczuk to resign] compelled the Bank's Supervisory Board to search urgently for a candidate who would strengthen the composition of the Bank's Management Board and who would give a guarantee of implementing the plan approved for the Bank." It added that the person chosen, Mr. Lachowski, was an individual whose "education and professional experience … gives a guarantee of [FM Bank PBP's] prudent and stable management."

161. The KNF regarded the changes in composition of the Management Board notified to it by Mr. Boksa as improper.

162. According to Article 22b(1) of the Banking Act, as it then stood:

[196] Letter from FM Bank PBP to the KNF, 12 Aug. 2013 (Exh. C-128)

> **The appointment of two management board members, including the president, shall require the approval of the Polish Financial Supervision Authority. The application for such approval shall be submitted by the supervisory board.[197]**

In addition, in its commitments as investor, Abris undertook to consult with the KNF when filling positions in the Management Board.[198]

163. Respondent claims that the KNF assigned great importance to the declared composition of the Management Board remaining unchanged, in particular Mr. Maciejewski's appointment as President of the Board, inasmuch as he had personally coordinated preparation of the remedial plan that the KNF ultimately approved.

164. Given FM Bank's and PBP Bank's financial challenges, KNF reportedly considered staffing of the Management Board to be a key element in ensuring effective implementation of the merged bank's remedial plan.[199] According to Respondents' expert witness, Mr. Zapadka, while a change of management board members would not ordinarily be a matter of major concern, it is a matter of major concern when a bank is subject to a remedial plan whose correct implementation is essential.[200]

165. That same morning, 12 August 2013, Ms. Iwona Kozlowska, Deputy Director of the KNF's Department of Commercial and Specialised Banking and Payment Institutions, called Mr. Gieryński on behalf of Mr. Kwaśniak. According to Mr. Gieryński, Ms. Kozlowska demanded that the Supervisory Board of FM Bank PBO "invalidate" all decisions it had taken at its meeting of 8 August 2013, notably all changes to the

[197] Banking Act of 29 Aug. 1996 (Exh. RLA-2).
[198] KNF Decision permitting the exercise of voting rights at the Shareholders Meeting of WestLB Bank Polska, 27 Oct. 2010 (Exh. C-27).
[199] Statement of Defence, para. 116.
[200] Zapadka op., pp. 45-46.

Management Board.[201] Mr. Gieryński reiterated the reasons for those decisions and, when Ms. Kozlowska was unmoved, he stated that he refused to take the requested action. According to Mr. Gieryński, Ms. Kozlowska essentially told him, "you need to realize that we are prepared to take serious steps if you don't do this." Further, according to Mr. Gieryński, when he reiterated his unwillingness, Ms. Kozlowska said "so now you will see."[202] In her testimony, however, Ms. Kozlowska denies ever having demanded that the Supervisory Board annul Mr. Lachowski's appointment. According to her, she did no more than state that the KNF "would conduct further supervisory activities in this case."[203] The Respondent asserts that she did nothing more than "loyally inform[ ] Mr. Gieryński that the KFN may take suitable actions in connection with this situation."[204]

166. In his witness statement, Mr. Gieryński affirms that Polish law does not allow the Supervisory Board chairman to unilaterally invalidate decisions by the Supervisory Board merely because instructed to do so.[205]

G. <u>The KNF's Proceedings against FM Bank PBP</u>

167. Because, in Respondent's words, "the situation with the Bank was out of control,"[206] the KNF took action. On 14 August 2013, the KNF instituted two proceedings: one against FM Bank PBP and the other against PL Holdings and Abris-EMP. These

[201] Gieryński ws, para. 75.
[202] Gieryński ws, para. 75.
[203] Kozlowska ws, p. 6.
[204] Statement of Defence, para. 123.
[205] Gieryński ws, para. 75.
[206] Statement of Defence, para. 126.

proceedings contemplated, respectively, an order establishing a receivership (to be managed by a KNF-appointed trustee)[207] and an order prohibiting PL Holdings from exercising its voting rights as FM Bank PBP shareholder.[208] The first set of proceedings was explained in the following terms:

> **an impact on the efficacy of executing the remedial plan by making a change to the position of Management Board President, which forms a deviation from the remedial plan accepted by KNF, [a change that] may not just adversely affect the introduced conditions for stable management but may also pose a threat to the proper execution of the remedial plan in the financial and economic area.**

168. The second proceeding was similarly described as prompted by fear of "an adverse impact on the prudent and stable management of FM Bank PBP S.A." According to Mr. Kwaśniak, there was "nothing extraordinary or non-standard" about the proceedings.[209] Moreover, according to Respondent, Claimant was afforded all reasonable procedural protections.[210]

169. In a letter of the same date to the Supervisory Board, the KNF clarified that the proceedings were being launched due to changes to the composition of the

---

[207] Notification from the KNF to FM Bank BPB of the commencement of an administrative proceeding to appoint a receiver, 14 Aug. 2013 (Exh. C-131). Appointment of a receiver is authorized by Article 145(1) of the Banking Act if the KNF finds that a bank's performance of a remedial plan is ineffective.

[208] Notification from the KNF to Abris-EMP and PL Holdings of the commencement of an administrative proceeding to issue a ban against exercising voting rights attached to shares. 14 Aug. 2013appoint a receiver, 14 Aug. 2013 (Exh. C-130).

[209] Kwaśniak ws, p. 10.

[210] Kwaśniak ws, p. 10:

> In the course of the administrative proceedings Abris was allowed full, active participation in the proceedings; they were represented by the attorneys throughout the whole proceedings. The party was informed of the termination of the explanatory and evidence proceedings, it had the opportunity to get acquainted with the files and submit its comments.

Management Board, and in particular to the appointment of Mr. Lachowski as acting President of that Board.[211]

170. On 19 August 2013, Mr. Boksa requested a meeting with the KNF to discuss initiation of the proceedings and the board changes that evidently had prompted the KNF to bring them.[212] There followed a 21 August 2013 meeting between Mr. Boksa and Mr. Gieryński, on the one hand, and several KNF representatives, including Mr. Jakubiak, on the other. Mr. Boksa explained the reasons for the Board changes,[213] while Mr. Gieryński apologized for the press report on Mr. Lachowski's appointment and offered to step down as Chairman of the FM Bank PBP Supervisory Board.[214] The Supervisory Board followed up, at Mr. Jakubiak's request, with detailed written explanations of the changes.[215] In a letter to the KNF, Mr. Boksa asserted, among other things, that the changes were "aimed at ensuring the bank's prudent and stable management," and reported that Mr. Gieryński would step down as Chairman of the Supervisory Board, effective 31 October 2013.[216] He was eventually replaced on 31 October 2013 by Mr. Tomasz Bieske.[217]

[211] Letter from the KNF to FM Bank PBP, 14 Aug. 2013 (Exh. C-129).
[212] Letter from FM Bank PBP to the KNF, 19 Aug. 2013 (Exh. C-132).
[213] Boksa ws, para. 69.
[214] Gieryński ws, para. 79.
[215] Letter from FM Bank PBP to the KNF, 27 Aug. 2013 (Exh. C-133).
[216] Letter from FM Bank PBP to the KNF, 27 Aug. 2013 (Exh. C-133). See also Letter from the Management Board of FM Bank PBP to the KNF, 18 Oct. 2013 (Exh. C-139).
[217] Letter from the Management Board of FM Bank PBP to the KNF, 7 Nov. 2013 (Exh. C-148).

171. On 4 September 2013, FM Bank PBP applied to the KNF for formal approval of Mr. Lachowski's appointment as President of the Bank's Management Board.[218] The KNF eventually approved Mr. Lachowski's appointment on 22 July 2014.[219]

172. Upon application by Mr. Boksa on 13 September 2013, the KNF approved the appointment of Mr. Wojciech Papierak to the Management Board of FM Bank PBP.[220] At a 30 September 2013 meeting, the Supervisory Board adopted a resolution changing the scope of Mr. Lachowski's responsibilities, entrusting him with temporary supervision over the Corporate Banking Division and defining Mr. Papierak's responsibility for supervising the Micro-Enterprise Banking Division.[221] These changes were reported to the KNF on 1 October 2013.[222]

173. On 9 October 2013, the KNF asked the Supervisory Board of the FM Bank PBP to further explain what had occurred in July and August 2013,[223] and Mr. Boksa furnished those explanations on 21 October 2013.[224]

174. As part of the administrative proceedings contemplating receivership of the FM Bank PBP, between 5 and 20 November 2013, the KNF conducted interviews with several

---

[218] Motion for approval of S. Lachowski as President of the management Board of FM Bank PBP, 4 Sept. 2013 (Exh. C-134). Mr. Boksa explains in his witness statement that the passage of time before the application was due to the necessity of collecting a great many documents pertaining to Mr. Lachowski's background and professional experience. Boksa ws, para. 66.
[219] KNF Decision consenting to the appointment of S. Lachowski as President of the management Board of FM Bank PBP, 22 July 2014 (Exh. C-215).
[220] Statement of Claim, para. 170.
[221] Minutes of the meeting of the Supervisory Board of FM Bank PBP, 30 Sept. 2013 (Exh. C-135).
[222] Supplementary letter to the application regarding S. Lachowski from FM Bank PBP to the KNF, 1 Oct. 2013 (Exh. C-136); Letter from FM Bank PBP to the KNF, 1 Oct. 2013 (Exh. C-137).
[223] Letter from KNF to FM Bank PBP, 9 Oct. 2013 (Exh. C-138).
[224] Letter from FM Bank PBP to the KNF, 21 Oct. 2013 (Exh. C-140). Mr. Boksa referred in his reply to the collapse of the three-way merger with Meritum Bank and Mr. Stańczuk's departure from the FM Bank PBP Management Board. He again referred to the change in management Board composition as "aimed at ensuring the Bank's prudent and stable management and uninterrupted execution of the remedial plan.

persons (Mr. Gieryński, Mr. Boksa, Mr. Lachowski, Mr. Maciejewski and Mr. Stańczuk) concerning the changes to the Management Board.[225]

175. There followed, in connection with the receivership proceeding, a comprehensive inspection by the KNF of the FM Bank PBP pursuant to Article 133 of the Banking Act. This inspection was conducted over a four-week period between 25 November and 20 December 2013. According to Mr. Boksa, the inspection entailed visits by 30 KNF inspectors to FM Bank PBP's headquarters.[226]

176. There resulted a detailed 61-page inspection record, with exhibits, dated 31 January 2014 ("Inspection Record").[227] The Parties offer dramatically different descriptions of the Record.

177. As described by Claimant, the Record reported essentially three management "irregularities":

- **issuance of "opinions" by the Supervisory Board that amounted to binding instructions and reflected arrogation to the Supervisory Board of management decisions belonging to the Management Board**
- **conclusion by the FM Bank PBP of two contracts for services rendered by acting President Mr. Lachowski that were part of his business activities**
- **conclusion by the FM Bank PBP of a contract for legal services contracts with Mr. Lachowski and with a law firm, one of the partners of which (Wojciech Fabrycki) was a member of the Supervisory Board**

---

[225] KNF witness interview record for P. Gieryński, 5 Nov. 2013 (Exh. C-145); KNF witness interview record for M. Stańczuk, 5 Nov. 2013 (Exh. C-144); KNF witness interview record for T. Maciejewski, 6 Nov. 2013 (Exh. C-146); KNF witness interview record for J. Lejko, 7 Nov. 2013 (Exh. C-149); KNF witness interview record for M. Zielke, 7 Nov. 2013 (Exh. C-147); KNF witness interview record for S. Lachowski, 13 Nov. 2013 (Exh. C-150); KNF witness interview record for W. Papierak, 15 Nov. 2013 (Exh. C-151); KNF witness interview record for P. Boksa, 20 Nov. 2013 (Exh. C-152).
[226] Boksa ws, para. 74.
[227] Report of the comprehensive inspection of FM Bank PBP, 31 Jan. 2014 ("Inspection Record") (Exh. C-162).

178. **That aside, the Inspection Record concluded that, as of 30 September 2013, "the economic and financial situation of FM Bank PBP S.A. was stable and did not endanger the security of the funds deposited in the bank accounts."[228]**

179. **In Respondent's view, however, the inspection did not merely show management irregularities on the part of the Bank, but also established that those irregularities represented violations of law. Thus, the Supervisory Board's issuance of binding opinions to the Management Board might constitute a violation of Article 375 of the Commercial Companies Code. Moreover, the KNF described the service contracts entered into with Mr. Lachowski and with Mr. Fabrycki's law firm as evidencing potential violations of various corporate governance conflict of interest rules. To this extent, the Record was "rather disastrous for the Bank."[229]**

180. **On 18 February 2014, the Bank wrote to the KNF attempting to explain the few concerns that the KNF had expressed. Regarding the "opinions," the letter stated that the Supervisory Board had issued only one such opinion, which approved the extension of financing to an FM Bank PBP client. (Ultimately, the financing was refused.) Regarding the contract for services with Mr. Lachowski, the letter explained that Mr. Lachowski's appointment as acting President of the Management Board was itself based on a management contract under which Mr. Lachowski performed his services in that capacity. The additional services were rendered pursuant to a separate consultancy contract pertaining to certain project-specific services. The letter reported that the Bank's entry into that other contract was ratified by a reputable law firm,**

[228] Inspection Record, p. 2 (Exh. C-162).
[229] Statement of Defence, para. 129.

whose opinion was attached to the letter. However, the Bank indicated its willingness to terminate that other contract if the KNF so wished. Finally, the letter stated that the Bank had specifically asked the law firm, with which it already had a contract for services, whether appointing one of its partners to the Supervisory Board was lawful and had been informed that it was. The Bank hastened to add in the same letter that Mr. Fabrycki had, out of an excess of caution, resigned from the Supervisory Board, effective 1 March 2014.[230]

181. On 2 April 2014, the KNF sent FM Bank PBP a set of post-inspection recommendations ("Post-Inspection Recommendations") instructing the Bank to correct their regularities cited in the Inspection Record.[231] According to Claimant, the Supervisory Board of the Bank was ordered to discontinue the issuance of binding instructions to the Management Board on the granting of loans. It was also ordered to discontinue entering into service contracts with persons or entities linked to members of either the Supervisory or Management Board. It added:

> **Failure to implement the foregoing recommendations may lead to KNF applying the supervisory measures provided for in Article 138 Section 3 and Article 141 Section 1 of the entitled Banking Law.[232]**

182. Respondent portrays the Post-Inspection Recommendations differently. Rather than merely address the three irregularities referred to above, they gave notice of the Bank's multiple violations of law. The Recommendations read, in part, as follows:[233]

---

[230] Letter from FM Bank PBP to the KNF, 18 Feb. 2014 (Exh. C-164), attaching legal opinion regarding S. Lachowski's management contract, prepared by GWW Woźny I Wspólnicy sp.k., 5 June 2014 (Exh. C-198) and legal opinion prepared by GWW Woźny I Wspólnicy sp.k.,17 Feb. 2014

[231] Letter from the KNF to FM Bank PBP, 2 Apr. 2014 ("Post-Inspection Recommendations"), page 24 (Exh. C-171).

[232] Post-Inspection Recommendations, p. 28 (Exh. C-171).

This admonition is issued for the following reasons:

1. Performance of banking activity in breach of the regulations, resulting in irregularities in the management system, including the risk management system and the internal control system, including in particular the following:

1.1. Article 70 sec. of the Act entitled Banking Law of 29 August 1997 – failure to perform an assessment of the debtor's creditworthiness, and granting a loan to a client that is not credit worthy without implementing detailed measures of securing loan repayment or presenting a business recovery plan whose performance would – in the bank's opinion – ensure achievement of creditworthiness within the specified time period.

1.2. KNF's Resolution No. 258/2011 of 4 October 2011 in terms of lack of the following:

1.2.1. analysis of the impact of interest rate changes on the capital's economic value for the bank's portfolio – which amounts to breach of § 13 sec. 7 of the resolution,

1.2.2. adjustment of the system of internal limits to the scale and complexity of conducted operations – which amounts to breach of § 17 sec. 1 of the resolution,

1.2.3. assessment of operational efficiency of the internal audit unit – which amounts to breach of § 41 sec. 2 of the resolution,

1.2.4. review of the internal capital estimation process in 2012 – which amounts to breach of § 51 sec. 1 of the resolution.

1.3. KNF's Resolution No. 386/2008 of 17 December 2008 in terms of taking into account in:

1.3.1. the basic and supplementary provision – the liquidity of commercial papers, despite lack of market analyses confirming the accepted estimates of their value – which amounts to breach of § 6 sec. 4 of the resolution,

1.3.2. the basic liquidity provision – the State Treasury bonds designated to be traded according to nominal price – not in the amount attainable in 7 days – which amounts to breach of § 1 item 4 of Attachment no. 1 to the resolution.

1.4. Attachment no. 1 item 5 of the Finance Minister's Regulation of 27 January 2011 in the matter of requirements for the calculation systems kept in the entities subject to the mandatory guarantees system – the Bank Guarantee Fund's calculation system was not included in critical applications.

1.5. Act of 16 November 2000 on Combating Money Laundering and Financing Terrorism in the scope of the following:

---

[233] Letter from the KNF) to FM Bank PBP, 2 Apr. 2014, pp. 17-18 (Exh. C-171).

1.5.1. lack of periodic verification of assessment of the measures related to prevention of money laundering and financing terrorism – which amounts to breach of Article 8b sec. 3 of the act,
1.5.2. failure to send information on a timely basis to the General Inspector of Financial Information – which amounts to breach of Article 12 sec. 2 item 1 of the act.

1.6. Finance Minister's Regulation of 21 September 2001 in the matter of defining a model transaction register, the manner of keeping it and the procedure for delivering data from the register to the General Inspector of Financial Information – in terms of erroneous and untimely recording of data in the transaction register – which amounts to breach of § 2 sec. 2 of the regulation.

2. Failure to implement the recommendations related to asset quality, market risk and capital adequacy issued by KNF on 25 March 2013 after a comprehensive inspection conducted in FM Bank SA (letter DIB/SPK/7110/125/16/2012/2013/MG) concerning, among other things, the following:

2.1. analysis of revenues and costs incurred by clients applying for loans as part of the express offer, including in particular analysis of revenues and costs incurred by clients,
2.2. periodic verification of the applicants' representations on the amount of income, on the basis of an adequate sample,
2.3. review of the client economic and financial standing at least once a year,
2.4. development of stress tests designated for estimation of change of the Bank's economic value, assuming a sudden and unexpected interest rate change by 200 business points,
2.5. acceptance of assumptions for stress tests that take into consideration the Bank's activities related to deposits and credits and which ensure adequate risk assessment,
2.6. formalizing the rules for conducting stress tests implemented in the capital planning process.

183. The Inspection Record contained 168 specific recommendations covering 11 pages and pertaining to all seven areas of the Bank operations.[234]

[234] Letter from the KNF) to FM Bank PBP, 2 Apr. 2014, pp. 18-28 (Exh. C-171).

184. Further, a bank is required to respond in accordance with a strict time-frame.[235] First, a bank must, within one month of receiving the recommendations, provide the KNF a detailed schedule of the tasks required in order to implement them, specifying dates and manner of execution of the tasks as well as the persons directly responsible for their execution and the relevant Management Board members. A bank's management board must furnish the KNF quarterly progress reports by the end of the month following the end of the relevant quarter.[236]

185. In fact, the KNF took no further action against the Bank.

H. <u>KNF Measures against Claimant</u>

(i) The First KNF Decision

186. Six days after making its recommendation to the FM Bank PBP, the KNF, on 8 April 2014, issued a decision ("First KNF Decision") addressed to PL Holdings and Abris-EMP suspending their voting rights as shareholders of FM Bank PBP and requiring PL Holdings to sell all of its shares in the Bank by 31 December 2014.[237]

187. The KNF based its ban on the exercise of voting rights on Article 25n, paragraph 1, of the Banking Act, authorizing imposition of such a ban:

> **Where this is justified by the requirement of prudent and stable management of a domestic bank, in view of assessment of the financial standing of an entity, including the founder of a domestic bank, which has obtained, directly or**

[235] Banking Act, art. 139, sec. 1, item 3.

[236] Letter from the KNF) to FM Bank PBP, 2 Apr. 2014, p. 28 (Exh. C-171). The Recommendations state that failure to implement them may lead the KNF to impose certain supervisory measures provided for in Article 138, Section 3, and Article 141, Section 1 of the Banking Act. Id.

[237] KNF Decision regarding the ban on exercising voting rights, 8 Apr. 2014 ("First KNF Decision") (Exh. C-173).

indirectly, the right to exercise votes at a general meeting at levels specified in Art. 25, para. 1, or has become, directly or indirectly a domestic bank's parent company, due to possible impact of this entity on the bank, in particular, when it is proved that the entity fails to respect the commitments referred to in Art. 25h, para. 3, or the commitments referred to in Art. 30, para. 1b.[238]

188. Article 25n, paragraph 4, goes on to provide that "in the case of the decision referred to in para. 1, the Polish Financial Supervision Authority may, by way of decision, order disposal of shares within the time fixed."

189. The KNF based its conclusion that PL Holdings and Abris-EMP "acting through their representatives on the Supervisory Board of FM Bank PBP, have exerted an adverse impact on the Bank's sound and prudent management" on the following findings: [239]

- **the Supervisory Board made changes to the Management Board's composition that created serious legal and operational risks**
- **the Supervisory Board issued binding instructions on matters within the competence of the Management Board**
- **the Supervisory Board had the Bank enter into service agreements with the acting President of the Management Board and a law firm co-owned by a member of the Supervisory Board**
- **the Supervisory Board failed to comply with the obligations in relation to the composition of the Management Board**

190. The changes to which the KNF objected included (a) dismissal of Mr. Stańczuk from the Bank's Management Board, (b) resignation of Mr. Lejko and Mr. Zielke from the Bank's Management Board, (c) resignation of Mr. Maciejewski as President of the Bank's Management Board and his appointment as First Vice-President, and (d) appointment of Mr. Lachowski as member of the Bank's Management Board and entrusting him with the duties of the President of the Board.

[238] Banking Act, art. 25n (Exh. CLA-5).
[239] First KNF Decision, pp. 2, 9-10 (Exh. C-173).

191. PL Holdings claims that, by the time of the First KNF Decision, certain of the KNF's concerns had already been addressed. Thus, Mr. Fabrycki had resigned from the Supervisory Board, as of 1 March 2014,[240] and by 25 March 2014, the Bank had changed its loan decision process to confine the Supervisory Board's role in that process. These changes were made prior to the KNF's issuance of its Post-Inspection Recommendations on 2 April 2014.

192. On 9 April 2014, the day following issuance of the First KNF Decision, the KNF invited members of the Supervisory Board of FM Bank PBP to a meeting on 11 April 2014.[241] At that meeting (attended by Mr. Bieske, Mr. Boksa, Mr. Gieryński and Mr. Stępniak for the Bank and by Mr. Kwaśniak, Mr. Parys and several other officials for the KNF), the KNF delivered to the Supervisory Board members a letter detailing the failures by the Board of its obligations.[242]

193. According to Mr. Stępniak, he was prohibited by Mr. Kwaśniak from recording the meeting,[243] even though, in Mr. Stępniak's opinion, he had the right to do so.[244] Also according to Mr. Stępniak, Mr. Kwaśniak insisted that there was no requirement that a minority shareholder be involved in the proceedings.[245]

194. On the same day, however, the KNF formally discontinued the receivership proceedings, as placing the Bank in receivership was unwarranted:

[240] See para. 180, supra.
[241] Letter from the KNF to the Supervisory Board of FM Bank PBP, 9 April 2014 (Exh. C-176); Kwaśniak ws, p. 8.
[242] Letter from the KNF to the Supervisory Board of FM Bank PBP, 11 April 2014 (Exh. C-180); Boksa ws, para. 80; Gieryński ws, para. 82; Stępniak ws, para. 32. See Note of KNF meeting, 11 Apr. 2014 (Exh. R-25).
[243] Stępniak ws, para. 30.
[244] Email from P. Stępniak to T. Bieske, P. Gieryński and P. Boksa, 11 Apr. 2014 (Exh. C-178). See also Draft memorandum addressed to the members of the KNF prepared by P. Stępniak, Apr. 2014 (Exh. C-169).
[245] Stępniak ws, para. 30. See also Boksa ws, paras. 79-80; Gieryński ws, para. 82.

> **Analysis of the evidentiary material gathered during the pending administrative proceeding, the progress in the execution of the Remedial Plan giving consideration to the Bank's economic standing and the findings of the comprehensive inspection conducted in the Bank according to its status as at 30 June 2013 do not point to material deviations from executing the objectives and assumptions adopted by the Bank and laid down in the Remedial Plan. Accordingly, a receiver in the FM Bank PBP SA would be groundless and pointless.[246]**

195. Respondent maintains that there is no contradiction between the KNF's adoption of the First KNF Decision, on the one hand, and its termination of the receivership proceedings against the Bank, on the other. It explains that, while the Bank's Supervisory Board was adversely affecting the management of the Bank (thus requiring issuance of the First KNF Decision), the Bank was not deviating from execution of the remedial plan (thus obviating the need for a receivership).[247]

196. PL Holdings and Abris-EMP pursued two remedies against the First KNF Decision.

197. First, on 18 April 2014, PL Holdings and Abris-EMP requested repeal of the Decision, citing Article 25n, paragraph 6, of the Banking Act[248] and asserting that "the circumstances justifying the issuance of the decisions have ceased to exist."[249] That letter reported that the post-inspection recommendation in connection with Mr. Lachowski's service contracts had been implemented.[250] By way of confirmation, the

---

[246] KNF Decision discontinuing proceeding to appoint an administrator, 11 Apr. 2014 (Exh. C-179).
[247] Statement of Defence, para. 141.
[248] Article 25n, paragraph 6, provides as follows:

> At the request of the shareholder or the parent company, the KNF shall revoke the decision issued under paragraph 1, if the circumstances which justified issuing that decision have passed.

[249] Application by PL Holdings and Abris-EMP to the KNF requesting repeal of the First KNF Decision, 18 Apr. 2014 (Exh. C-184).
[250] Letter from FM Bank to the KNF, 18 Apr. 2014 (Exh. C-183). The letter stated as follows:

> The business consulting service agreement of 8 August 2013 and the management contract of 8 August 2013 with Mr. Slawomir Lachowski were terminated on 11 April 2014 (with effect on 30 April 2014). On the same date, i.e., on 11 April 2014, an employment agreement was signed with Mr. Slawomir Lachowski, which comes into effect on 1 May 2014.

Bank reported on 29 April 2014 that no loans would thereafter be granted without the Management Board's approval and that the Management Board would no longer be required to obtain the Supervisory Board's consent to deviate from financing rules.[251] That letter also reiterated the Bank's undertaking that it would no longer enter into service contracts with entities related to Management or Supervisory Board members.[252] The Bank thus certified to the KNF that the latter's Post-Inspection Recommendations had been fully implemented.

198. On 11 July 2014, the KNF stated that the request for repeal of the First KNF Decision was premature and should be withdrawn because, while the decision was a final administrative decision, it was still subject to appeal and therefore not "a final decision within the meaning of the Code of Administrative Procedure."[253] The KNF confirmed this position by a decision of 18 July 2014.[254]

(ii) The Second KNF Decision

199. On 24 April 2014, PL Holdings and Abris-EMP applied to the KNF for reconsideration of the First KNF Decision on the basis of the Decision's alleged invalidity.[255] In a decision of 24 July 2014 ("Second KNF Decision"), the KNF partially affirmed and partially overturned the First KNF Decision. It affirmed the First KNF Decision's ban on PL

[251] Letter from FM Bank PBP to the KNF, attaching a time schedule for implementation of KNF recommendations, 29 Apr. 2014 (Exh. C-187).
[252] The letter reiterated more specifically that Mr. Lachowski would be employed by FM Bank PBP solely on the basis of an employment contract and that Mr. Fabrycki had resigned from the Bank's Supervisory Board.
[253] Letter from the KNF to Abris-EMP and PL Holdings, 11 July 2014 (Exh. C-293).
[254] KNF Decision discontinuing repeal petition proceedings, 18 July 2014, p. 1 (Exh. C-212).
[255] Application by PL Holdings and Abris-EMP to the KNF for reconsideration of the case closed by the First KNF Decision, 24 Apr. 2014 (Exh. C-185).

Holdings' exercise of voting rights, but overturned the order to PL Holdings to sell all of its shares in FM Bank PBP by 31 December 2014.

200. In support of its affirmance of the voting rights ban in the Second KNF Decision, the KNF did not mention the specific irregularities that it had identified in the course of its inspection of the Bank in November 2013 and on which it had based the First KNF Decision. Rather, the KNF found that PL Holdings and Abris-EMP had failed in their obligations to "carefully select persons for managerial positions, with a special focus on experience in the banking sector and skills in banking risk management, and [to] consult with KNF [on] the filling of positions of management board members and the Bank's chief accountant."[256] The Decision explained that, since the KNF's approval of the Bank's remedial plan in June 2013 was based on the listing of the Management Board members at that time, the subsequent changes that the Supervisory Board made to the composition of the Management Board constituted a breach of the conditions of the KNF's approval of the remedial plan.[257]

201. In support of overturning the order to PL Holdings to sell its shares in the Bank by 31 December 2014, the Second KNF Decision cited a procedural rule according to which the KNF could adopt such a drastic order only after first having imposed a less severe one. Thus, the voting rights ban and the order to sell the shares could not be ordered at the same time.[258] The KNF explained:

---

[256] KNF Decision on the application for reconsideration of the First KNF Decision, 24 July 2014 ("Second KNF Decision"), p. 23 (Exh. C-218).
[257] Second KNF Decision, p. 21 (Exh. C-218).
[258] Second KNF Decision, p. 28 (Exh. C-218):

> **Repealing the decision in the part relating to the order to dispose of the bank's shares is connected exclusively with formal and legal issues and does not change the fact that PL Holdings s.a.r.l. and Abris-EMP Capital Partners Limited did not meet their investor commitments towards the KNF, which, in the KNF's opinion, had a negative influence on the prudent and stable operations of the bank.**

When taking the decision, the KNF was guided by the need to limits its legal risk. Issuing both decisions together evidently entailed an additional risk of litigation.[259]

202. Thus, by its own account, the KNF repealed its order to PL Holdings to sell its shares in the Bank for purely procedural reasons and without prejudice to reopening those proceedings. In fact, within one day the KNF recommenced proceedings which eventually led, on 18 November 2014 to a forced sale order.[260]

203. On 22 September 2014, PL Holdings applied to the KNF for suspension of the prohibition on the exercise of voting rights in the FM Bank PBP.[261] The KNF denied the request on 22 September 2014.[262]

204. During the time that PL Holdings was pursuing these remedies, there remained the matter of Mr. Lachowski's appointment as CEO of FM Bank PBP and President of the Bank's Management Board. As noted,[263] on 8 August 2013, the Supervisory Board had appointed Mr. Lachowski, subject to KNF approval, as acting President of the Bank's Management Board. The Bank then collected and on 4 September 2013 submitted to

---

> The administrative decision ordering the sale of all the FM Bank PBP shares was issued simultaneously with the decision prohibiting the exercise of the voting rights. In so doing, the authority failed to realize that, in the prevailing circumstances, it did not have the competence to order the sale of the shares.

See Article 25n, para. 4 of the Banking Act.

[259] Communication regarding 223d meeting of the KNF held on 24 July 2014, 24 July 2014 (Exh. C-216).

[260] Statement of Defence, para. 146.

[261] Application by PL Holdings and Abris-EMP to the KNF to suspend the performance of the Second KNF Decision, 10 Sept. 2014 (Exh. C-206).

[262] Decision of the KNF refusing to suspend the execution of the KNF's challenged decision of 24 July 2014, 22 Sept. 2014 (Exh. C-231).

[263] See para. 158, supra.

the KNF the application materials as required by Article 22b, paragraph 1, of the Banking Act.[264] According to the relevant provisions of the Banking Act, approval of a candidate for appointment as president of the management board of a bank could be denied on only certain specified grounds. The individual must:

- **have been convicted of a fiscal offence, or**
- **have been found responsible for documented losses at his or her place of employment, or**
- **have been prohibited from performing business activities, or**
- **have failed to guarantee the sound and prudent management of a bank or to have not been adequately educated.[265]**

205. On 9 October 2013, the KNF inquired further as to why Mr. Maciejewski had resigned as President of the Management Board of the Bank and why Mr. Lachowski had been appointed as President of the Management Board prior to receiving the KNF's consent to that appointment.[266] Then, on 21 October 2013, Mr. Boksa reiterated the explanations he had given in a 27 August 2013 letter to the KNF.[267]

206. There then followed a series of notices by the KNF to the Bank reporting extensions of the deadline for deciding on the Bank's application for Mr. Lachowski's approval. Thus, on 31 October 2013, the KNF extended the deadline to 20 December 2013, citing a need to further examine Mr. Lachowski's banking sector experience.[268] On 10 December 2013, the deadline was further extended to 28 February 2014, the stated reason being that the KNF was awaiting the results of the KNF's inspection of the FM

---

[264] Motion for approval of S. Lachowski as President of the Management Board of FM Bank PBP, 4 Sept. 2013 (Exh. C-134).
[265] Banking Act, arts. 22b, 30, para. 1, subpara. 2 (Exh. CLA-5).
[266] Letter from the KNF to FM Bank PBP, 9 Oct. 2013 (Exh. C-138).
[267] Letter from FM Bank PBP to the KNF, 21 Oct. 2013 (Exh. C-140), referring to Letter from FM Bank PBP to the KNF, 27 Aug. 2013 (Exh. C-133).
[268] Letter from the KNF to FM Bank PBP, 31 Oct. 2013 (Exh. C-142).

Bank PBP.[269] The deadline was again extended on 21 February 2014 for the same stated reason until 1 April 2014,[270] and yet again on 28 March 2014 until 30 May 2014.[271]

207. Respondent maintains that the KNF's process for reviewing Mr. Lachowski's appointment was not a dilatory one. It claims that the length of time required was due to various concerns raised by Mr. Lachowski's activity in the banking sector over the years. For example, some of the consumer loan contract clauses used by a bank (the BRE Bank) of which Mr. Lachowski was CEO and President of the Management Board were subsequently found to be abusive, and that bank was sued by clients in a well-publicised class action lawsuit.[272] According to Mr. Kwaśniak, the KNF found it necessary to examine Mr. Lachowski's entire career working in financial institutions, and given the length of his service in that sector, the process was necessarily time-consuming.[273]

---

[269] Letter from the KNF to FM Bank PBP, 10 Dec. 2013 (Exh. C-154).

[270] Letter from the KNF to FM Bank PBP, 21 Feb. 2013 (Exh. C-165).

[271] Letter from the KNF to FM Bank PBP, 28 Mar. 2013 (Exh. C-168).

[272] Statement of Defence, para. 148.

[273] Kwaśniak ws, pp. 8-9:

> The KNF had to examine a series of issues associated with the candidate, inter alia, his experience, years in service, career in financial institutions so far and professional record in PBP Bank and after the merger. We were also aware that since 2008 Mr. Lachowski has not fulfilled any functions in the management boards of companies in the banking sector. The KNF examined his activity associated with foreign currency loans granted by the bank managed by him previously, the number of suits filed by clients of the bank he was leading; how the post-inspection recommendations in the area of money laundering were implemented in the bank he was leading; his behaviour as a member of the Supervisory Board of Meritum Bank covered by the recovery plan, including the reasons of termination of his cooperation with Meritum Bank. All those activities took time.

Respondent also suggests that the abruptness with which Mr. Lachowski left the Presidency of Meritum Bank's Supervisory Board was a cause of concern. Letter from Meritum to the KNF, 17 June 2014 (Exh. R-24), in which Mr. Lachowski's successor as President of the Meritum Bank's Supervisory Board seriously criticized the manner of Mr. Lachowski's departure from Meritum Bank. See Statement of Defence, para. 149.

208. **On 14 May 2014, the KNF finally interviewed Mr. Lachowski as witness in the proceedings over his appointment. Present at the interview, in addition to Mr. Lachowski, were Mr. Stępniak and Mr. Gieryński, as well as FM Bank PBP's General Counsel. According to the minutes of the meeting, the questioning revolved around the legal form of Mr. Lachowski's relationship with the Bank.[274] On the following day, the KNF probed further into the form of cooperation between Mr. Lachowski and the Bank, focusing on the identity of the persons who negotiated the terms and conditions of Mr. Lachowski's employment and on the legal opinions received by the Supervisory Board in determining the lawfulness of the pair of agreements between Mr. Lachowski and the Bank.[275] Although the Supervisory Board believed that it had already much earlier supplied this information to the KNF, it provided the documents and other information requested.[276] Following this exchange, on 30 May 2014, the KNF extended once again the deadline for acting upon Mr. Lachowski's application to 8 July 2014, citing its need for information from third-party institutions.[277]**

209. **Aggrieved by the KNF's actions, the Supervisory Board of the FM Bank PBP on 17 June 2014 petitioned the KNF to remedy the harm done in delaying action on Mr. Lachowski's appointment.[278] Filing a petition of this sort is admittedly a prerequisite under Polish administrative law for bringing a complaint before a regional**

[274] KNF minutes of S. Lachowski interview, 14 May 2014 (Exh. C-188).
[275] Letter from the KNF to FM Bank PBP, 15 May 2014 (Exh. C-189).
[276] Letter from FM Bank PBP to the KNF, 21 May 2014 (Exh. C-194); Letter from FM Bank PBP to the KNF, attaching Legal Opinion regarding S. Lachowski's management contract, prepared by GWW Woźny I Wspólnicy sp.k., 5 June 2014 (Exh. C-198). See Statement of Claim, para. 222.
[277] Letter from the KNF to FM Bank PBP, 30 May 2014 (Exh. C- 195).
[278] Summons from FM Bank PBP to the KNF to rectify the breach of law, 17 June 2014 (Exh. C-202).

administrative court.[279] Then, on 22 July 2014, approximately eleven months following the application's filing, the KNF finally approved Mr. Lachowski's appointment as President of the Management Board of the FM Bank PBP.[280] The decision was taken by a vote of 3-2, with Mr. Jakubiak and Mr. Kwaśniak, KNF Chairman and Vice-Chairman, respectively, in the minority.[281]

210. As noted,[282] in its Second Decision, the KNF overturned the order to PL Holdings to sell its shares on the ground that that very severe order could not be imposed at the same time as the less severe sanction of a loss of voting rights. However, the KNF evidently considered it unnecessary to wait any length of time between issuing successively an order banning the exercise of voting rights and an order commencing proceedings with a view to compelling the sale of shares:

> **Although it may occur – which the lawmaker himself does not exclude – that both administrative resolutions under analysis are issued by the regulatory authority on the same date, these administrative decisions may in no way be treated as the same from the legal point of view, and should be treated as autonomous and separate acts.[283]**

(iii) The Third KNF Decision

211. On 25 July 2014, only one day after issuing the Second KNF Decision, the KNF instituted further proceedings against PL Holdings in contemplation of an eventual

[279] Exh. CLA-57 (Code of Administrative Proceeding), art. 35; Szewczyk op. 1, para. 73; Transcript, Day 1, p. 188, lines 11-14, p. 190, line 2 - p. 191, lines 5-7.
[280] KNF Decision consenting to the appointment of S. Lachowski as President of the management Board of FM Bank PBP, 22 July 2014 (Exh. C-215).
[281] Communication regarding 222d meeting of the KNF held on 22 July 2014, 22 July 2014 (Exh. C-214).
[282] See para. 201, supra.
[283] Second KNF Decision, p. 28 (Exh. C-218).

order to PL Holdings requiring its sale of shares.[284] According to PL Holdings, KNF already made it clear to PL Holdings' representatives at a 31 July 2014 meeting that the KNF intended to issue an order compelling PL Holdings to sell its shareholding in FM Bank PBP.[285] To PL Holdings, the outcome of the proceeding initiated on 25 July 2014 was thus predetermined.[286]

212. Finally, on 18 November 2014, the KNF issued a decision ("Third KNF Decision") ordering PL Holdings to sell all of its shares in FM Bank PBP by 30 April 2015.[287] This Decision was adopted on the basis of a 3-2 vote among KNF representatives, with one representative abstaining.[288] In the Third KNF Decision, the KNF reiterated that the August 2013 Management Board changes made by the Supervisory Board constituted a violation of PL Holdings' commitment "to consult the KNF on the filling of positions on the management board and the chief accountant of the Bank."[289] Somewhat peculiarly, the KNF cited in further justification of the Third KNF Decision the fact that PL Holdings could not exercise its voting rights, a sanction that the KNF itself had imposed.[290]

213. On this occasion, unlike on the occasion of the Second KNF Decision, the KNF relied upon the same irregularities that it had identified in the course of its inspection of the

---

[284] KNF notification to PL Holdings of the commencement of an administrative proceeding to issue an order to sell the shares in FM Bank PBP, 25 July 2014 (Exh. C-220).
[285] Statement of Claim, para. 238, citing Email from J. Zawadzki to Abris, 31 July 2014 (Exh. C-222).
[286] Statement of Claim, para. 238.
[287] Decision on the administrative proceeding to issue an order to sell shares, 18 Nov. 2014 ("Third KNF Decision") (Exh. C-242).
[288] Communication regarding 241st meeting of the KNF held on 18 November 2014, 18 Nov. 2014 (Exh. C-243).
[289] Third KNF Decision (Exh. C-242).
[290] Third KNF Decision, p. 4 (Exh. C-242).

Bank in November 2013.[291] PL Holdings points out that, in this regard, the Third KNF Decision appears to ignore the fact that by the end of August 2014, all the KNF's Post-Inspection Recommendations relating to those irregularities had been rectified.

I. Claimant's Resort to Judicial Remedies

214. There is apparent agreement between the Parties that it is only after the KNF had issued the Second KNF Decision that PL Holdings was entitled to appeal to a court of law. On 25 August 2014 – before the KNF rendered its Third KNF Decision on 18 November 2014 – PL Holdings and Abris-EMP filed a complaint in the Regional Administrative Court in Warsaw challenging the First KNF Decision's prohibition on PL Holdings' exercise of voting rights and the part of the Second KNF Decision upholding that ruling,[292] On 4 February 2015, the Regional Administrative Court refused to suspend performance of the Second KNF Decision.[293]

215. On 13 March 2015, PL Holdings and Abris-EMP (by then renamed Abris Fund I) appealed to the Supreme Administrative Court against the lower court's refusal to suspend enforcement of the Second KNF Decision.[294] On 29 May 2015, the Supreme Administrative Court dismissed the appeal.[295]

[291] Third KNF Decision, p. 10 (Exh. C-242).
[292] Compliant by PL Holdings and Abris-EMP filed with the Regional Administrative Court against the Second KNF Decision, 25 Aug. 2014 (Exh. C-228).
[293] Ruling of the Regional Administrative Court, 4 Feb. 2015 (Exh. C-261).
[294] Appeal against Regional Administrative Court Ruling of 4 February 2015, 13 Mar. 2015 (Exh. C-268).
[295] Statement of Claim, para. 247. By the time PL Holdings filed its Statement of Claim in this proceeding on 7 August 2015, the Supreme Administrative Court had not yet formally issued this 29 May 2015 ruling with a statement of reasons.

216. By this time, PL Holdings had already on 3 December 2014 filed a motion with the KNF for reconsideration of the Third KNF Decision, which required PL Holdings to sell its shares in FM Bank PBP by 30 April 2015, alleging that Decision's invalidity.[296] Under Polish administrative law, the filing of such a motion for reconsideration to the KNF and its denial by the KNF is a prerequisite to filing a challenge in the Regional Administrative Court.[297]

217. PL Holdings' access to the Regional Administrative Court in relation to the Third KNF Decision thus had to await a ruling by the KNF on PL Holdings' request for reconsideration of the Third KNF Decision. The KNF's ruling on the motion was long in coming. On 28 December 2014, the KNF, citing the complexity of the case, postponed its deadline for issuance of the ruling until 4 March 2015.[298] Then, on 2 March 2015, the KNF, citing the need for further study of the Bank's financial situation, further postponed its deadline for issuance of the ruling until 30 April 2015.[299] Thus, the KNF extended its deadline for issuing its ruling on reconsideration to the very date by which PL Holdings had been ordered to sell its shares. Even then, however, in 27 April 2015, the KNF, citing a need for more thorough analysis, extended the deadline once more, until 23 June 2015.[300] The 23 June deadline was extended still again on 22 June 2015 until 2 September 2015. By this time, PL Holdings (along with Mr. Stępniak) had already -- on 30 April 2015 – sold its shareholdings in FM Bank PBP to Porto Group

---

[296] Application by PL holdings to the KNF for reconsideration of the case closed by the Third KNF Decision, 3 Dec. 2014 (Exh. C-248).
[297] Exh. CLA-57 (Code of Administrative Proceeding), art. 35; Szewczyk op. 1, para. 73; Transcript, Day 1, p. 188, lines 11-14, p. 190, line 2 - p. 191, lines 5-7.
[298] Letter from the KNF to PL Holdings, 28 Dec. 2014 (Exh. C-252).
[299] Letter from the KNF to PL Holdings, 2 Mar. 2015 (Exh. C-267).
[300] Letter from the KNF to PL Holdings, 27 Apr. 2015 (Exh. C-278).

Holdings Limited ("Porto Group"), an affiliate of AnaCap Financial Partners III LP ("AnaCap").[301] The KNF gave as its reason for the latest extension the need to analyze PL Holdings' sale agreement with Porto Group.

J. Claimant's Sale of its FM Bank PBP Shares

218. Throughout this period, PL Holdings took the position that – because the Third KNF Decision was still in effect and was immediately enforceable – it was bound by that Decision to sell its shareholdings by 30 April 2015.[302] According to PL Holdings, it understood that, under Article 25n, paragraph 5, of the Banking Act, failure by PL Holdings to execute the order by the date prescribed would expose it to administrative sanctions in the form of a fine of as much as PLN 10 million (approximately € 2.5 million at the current exchange rate), as well as to placement of the Bank in receivership, revocation of its banking license, and liquidation.[303] PL Holdings maintains that, in light of what it regarded as the KNF's drastic actions up to that point, it had real reason to fear that those measures might in fact be imposed.[304]

219. Respondent, however, takes the position that Claimant was not in fact under an immediate obligation to dispose of its shares in the Bank pursuant to the Third KNF Decision because, under Polish law, that Decision is not enforceable as long as a

[301] Letter from PL Holdings and Abris Capital Partners Fund I to the KNF, 30 Apr. 2015 (Exh. C-280). See also Exh. C-27).
[302] Statement of Claim, para. 253.
[303] Banking Act, art. 25n, para. 5 (Exh. CLA-5).
[304] Statement of Claim, para. 253.

motion for reconsideration is pending.[305] In its view, Claimant's sale of its shares was accordingly voluntary.

220. On 28 April 2014, by which time the KNF had issued the First KNF decision, compelling sale of the shares, Abris-EMP informed the KNF of PL Holdings' intention to sell its shares in FM Bank PBP.[306] To that end, Abris invited proposals from financial advisers for preparation of a vendor due diligence report ("VDD Report"), ultimately selecting Banco Espirito de Investimento S.A. Spólka Akcyjna ("BESI") as its adviser. BESI assisted PL Holdings in assembling a list of potential investors to whom requests for expressions of interest would be sent. So-called "teasers" on FM Bank PBP were eventually sent to some 100 potential buyers,[307] stating that the sale was required by the KNF to be executed by no later than 31 December 2014.[308] The date set for initial offers was the end of July 2014.[309]

221. On 21 July 2014, PL Holdings and Abris-EMP informed the KNF that they had initiated discussions with interested investors and provided a provisional timeline.[310] The next day, PL Holdings requested a meeting with the KNF to furnish additional details and answer any questions the KNF might have, and a meeting was contemplated for 31

[305] Statement of Defence, para. 147.
[306] Notification by Abris-EMP to the KNF of the intention to sell shares in FM Bank PBP, 28 Apr. 2014 (Exh. C-186).
[307] Project status of Project Porto, 29 Aug. 2014, slide 2, p. 1 (Exh. C-170).
[308] PowerPoint presentation on the sale of shares in FM Bank PBP by PL Holdings prepared by BESI, June 2014, slide 1 (Exh. C-196).
[309] PowerPoint presentation on the sale of shares in FM Bank PBP by PL Holdings prepared by BESI, June 2014, slides 1, 9 (Exh. C-196).
[310] Letter from Abris-EMP and PL Holdings to the KNF, 21 July 2014 (Exh. C-213).

July 2014.[311] However, on 24 July 2014, the KNF issued the Second KNF Decision that overturned the order to PL Holdings to sell its shares in FM Bank PBP.

222. By the time of the scheduled 31 July 2014 meeting, the KNF had, as noted,[312] re-instituted proceedings 25 July 2014 with a view to issuance of an order compelling sale by PL Holdings of its FM Bank PBP shares. According to PL Holdings, at the meeting, the KNF indicated that it still intended to require PL Holdings' sale of its shares.[313] At the meeting, PL Holdings reaffirmed its game plan and schedule for selling the shares, identifying to the KNF the identity of interested investors.[314] At that point, the KNF expressed disfavor of a sale of the shares to private equity funds,[315] as well as concern over certain potential investors that KNF regarded as insufficiently experienced.[316]

223. PL Holdings thus continued to pursue sale of the shares by the stated deadline of 31 December 2014 laid down in the First KNF Decision.[317] The deadline for the sale was postponed to 30 April 2015 only on 18 November 2014, when the Third KNF Decision was issued. On 13 August 2014, PL Holdings and Abris-EMP gave the KNF a shortened list of potential investors, namely, those that had signed confidentiality agreements in

---

[311] Statement of claim, para. 259.
[312] See para. 210, supra.
[313] Email from J, Zawadzki to Abris, 31 July 2014 (Exh. C-222). PL Holdings' counsel, Jacek Zawadzki's report of the meeting summarized it as follows:
KNF has confirmed that it intends to issue a decision ordering to sell the bank's shares again – such a decision will possibly be taken even within approx. two weeks. They did not specify when the order to sell the shares would be issued, but the starting point is to be 31 December 2014.
[314] Email from J, Zawadzki to Abris, 31 July 2014 (Exh. C-222); Status of the investors in the Porto Project, 30 July 2014 (Exh. C-191).
[315] Email from J, Zawadzki to Abris, 31 July 2014 (Exh. C-222). The KNF cited private equity funds' shorter investment horizons, their strategies, and the negative experiences the KNF had had with them.
[316] Statement of Claim, para. 264,
[317] Boksa ws, para. 114.

relation to the sale.[318] The list of fourteen included three banks, five private equity funds, and six other investors. Ultimately, six of them delivered non-binding offers. These included: (a) Alior Bank S.A. ("Alior Bank"), (b) AnaCap, (c) Bank Ochrony Środowiska S.A. ("BOŚ"), (d) JRJ Group, (e) Lone Star Fund IX (US) LP, Lone Star Fund IX (Bermuda) LP, Lone Star Fund IX Parallel (Bermuda) LP ("Lone Star Funds"), and (f) Mr. Michael Solowow, though the last one eventually withdrew. On 4 September 2014, PL Holdings and Abris-EMP informed the KNF of the five remaining non-binding offers, indicated that the due diligence processes of all five would begin on 8 September 2014, and asked the KNF whether it had objections to any of the five.[319] Thereafter two additional investors – OTP Bank ("OTP Bank") and Euro Bank S.A. ("Euro Bank") – entered the competition, and PL Holdings so informed the KNF.[320] By then, the deadline for completion of due diligence had been reset at 29 October 2014 and the deadline for submission of binding offers had been reset at 3 November 2014.[321]

224. Ultimately, binding offers were submitted by four among the group – Alior Bank, BOŚ, OTP Bank, and AnaCap – and PL Holdings and Abris-EMP so informed the KNF.[322] By 26 November 2014, PL Holdings had in hand binding offers from Alior Bank, BOŚ, and AnaCap.[323] PL Holdings eliminated BOŚ from the competition,[324] leaving only Alior Bank and AnaCap; PL Holdings again so informed the KNF.[325]

[318] Letter from PL Holdings and Abris-EMP to the KNF, 13 Aug. 2014, attaching a Remedial Plan Update of August 2014 (Exh. C-224).
[319] Letter from PL Holdings and Abris-EMP to the KNF, 4 Sept. 2014 (Exh. C-229).
[320] Letter from PL Holdings and Abris-EMP to the KNF, 10 Sept. 2014 (Exh. C-230).
[321] Letter from PL Holdings and Abris-EMP to the KNF, 6 Oct. 2014 (Exh. C-233).
[322] Letter from PL Holdings and Abris-EMP to the KNF, 14 Nov. 2014 (Exh. C-240).
[323] PL Holdings notified the KNF that OTP Bank had withdrawn from the process. Letter from PL Holdings and Abris-EMP to the KNF, 16 Jan. 2014 (Exh. C-256).

225. In early 2015, while Alior Bank and AnaCap pursued their due diligence and prepared new offers, the KNF launched an "Asset Quality Review ("AQR") of FM Bank PBP.[326] The AQR is a method for assessing the value of a bank's assets introduced by the European Central Bank in response to the financial crisis, to be performed by national banking authorities.[327] No Polish bank figured on the initial list of 124 European banks on which the ECB was to conduct an AQR. And when, on 6 March 2014, the KNF identified the selected banks operating in Poland for which an AQR would be performed starting in April 2014, the FM Bank PBP was not among them.[328] The 15 banks chosen were ones that were considered to be "systematically-significant," that were listed, or that quoted WIBOR/WIBID rates, and they accounted for 79% of the total commercial bank assets in Poland. The results were published on 26 October 2014.[329]

226. On 27 January 2015, the KNF informed FM Bank PBP that it was to the subject of a new AQR, and demanded that certain data be produced for that purpose by mid-February.[330] On the next day, the Management Board of the Bank requested an

---

[324] Letter from PL Holdings and Abris-EMP to the KNF, 28 Nov. 2014 (Exh. C-246); Letter from PL Holdings and Abris-EMP to the KNF, 10 Dec. 2014 (Exh. C-250).
[325] Letter from PL Holdings and Abris-EMP to the KNF, 16 Jan. 2015 (Exh. C-256).
[326] Letter from the KNF to FM Bank PBP, 27 Jan. 2015 (Exh. C-258); Letter from the KNF to PL Holdings and Abris-EMP, 27 Feb. 2015 (Exh. C-265).
[327] "Asset Quality Review – European Central Bank unveils ambitious plan," Deloitte Blogs, available at http://blogs.deloitte.co.uk/financialservices/2013/10/asset-quality-review-23october-2013.html, 23 Oct. 2013 (Exhibit C-5).
[328] Communiqué on banks subject to asset quality review, 6 Mar. 2014 (Exh. C-166).
[329] Results of the comprehensive assessment of banks in Poland carried out by the KNF, 26 Oct. 2014 (Exh. C-237).
[330] Letter from the KNF to FM Bank PBP, 27 Jan. 2015 (Exh. C-258). See also Letter from the KNF to FM Bank PBP, 10 Dec. 2014 (Exh. C-249).

extension of the deadline for the production of documents, due to the effort that their collection entailed, and the request was granted.[331]

227. At this time, sale negotiations with AnaCap and Alior Bank were ongoing. In February 2015, AnaCap offered a higher purchase price than any other company,[332] and on that basis, on 24 February 2015, PL Holdings granted it exclusivity, until 25 March 2015,[333] following which, on 11 March 2015, Alior Bank withdrew. On 25 February 2015, the day after granting AnaCap exclusivity, PL holdings and Abris-EMP so informed the KNF.[334] When on 18 March 2015, PL Holding extended AnaCap's exclusivity to 3 April 2015, PL Holdings likewise so informed the KNF.[335]

228. By 2 April 2015, the structure of the sale and purchase agreement with AnaCap had been determined and was communicated to the KNF.[336] Claimant pointed out that AnaCap, like the other potential investors, had insisted that certain Receivable Claims ("the Warsaw Receivables") were carved out of the Bank's assets as part of the deal. In its 17 April 2015 reply, the KNF did not yet take a position on the purchase and sale transaction.[337]

229. The AQR procedure concerning FM Bank PBP concluded on 6 March 2015 and on 10 April 2015, KNF representatives informed the Bank's Management Board of the KNF's preliminary findings. According to those findings, FM Bank PBP needed to undergo

[331] Letter from FM Bank PBP to the KNF, 28 Jan. 2015 (Exh. C-259).
[332] Second Stage Offer from AnaCap signed by G. Koulouris and F. Cesario, 24 Feb. 2015 (Exh. C-262).
[333] Letter from PL Holdings to AnaCap, 24 Feb. 2015 (Exh. C-263).
[334] Letter from PL Holdings and Abris-EMP to the KNF, 25 Feb. 2015 (Exh. C-264).
[335] Letter from PL Holdings and Abris-EMP to the KNF, 18 Mar. 2015 (Exh. C-269).
[336] Letter from PL Holdings and Abris Capital Partners Fund I to the KNF, 2 Apr. 2015 (Exh. C-271).
[337] Letter from the KNF to PL Holdings and Abris Capital Partners Fund I Limited, 17 Apr. 2015 (Exh. C-274).

asset impairment adjustments of approximately PLN 69 million.[338] According to PL Holdings, the coincidence in time between the final AQR report and the deadline for the sale of the Bank shares meant that the preliminary AQR findings had to be provided to AnaCap.[339]

230. On 17 April 2015, the same day on which the KNF replied to PL Holdings' 2 April 2015 letter communicating the draft purchase and sale agreement with AnaCap, without taking a position on the transaction, PL Holdings received a revised and drastically reduced offer from AnaCap. AnaCap had lowered its purchase offer from PLN 100 million (net) to PLN 30 million, thus by PLN 70 million, an amount largely corresponding to the asset impairment adjustment that had been announced by the KNF.[340]

231. According to PL Holdings, at that late date – less than two weeks prior to the 30 April 2015 sale deadline – PL Holdings had no choice but to go through with the deal.[341] Thus, on 30 April 2015, even without having received any approval or disapproval of the transaction by the KNF, PL Holdings executed a sale and purchase agreement ("SPA") with Porto Group Holdings Limited, an AnaCap affiliate, on AnaCap's new and dramatically less favorable terms.[342] Moreover, AnaCap had refused to agree to PL Holdings' proposal that it be entitled to terminate the SPA in the event that the KNF,

---

[338] Email from BESI to GT Law, attaching note of telephone call concerning preliminary AQR results, 13 Apr. 2015, Exh. C-272.
[339] Boksa ws, para. 123.
[340] Proposed Terms of Transaction between Abris and AnaCap for FM Bank PBP, 17 Apr. 2015 (Exh. C-273); Boksa ws. para. 123.
[341] Boksa ws, para. 125. According to Mr. Boksa, at that date, PL Holdings had no possibility of restarting negotiations with other potentially interested buyers.
[342] Letter from PL Holdings and Abris Capital Partners Fund I to the KNF, 30 Apr. 2015 (Exh. C-280).

upon PL Holdings' request for reconsideration, were subsequently to reverse the Third KNF Decision.[343]

232. On 24 April 2015, PL Holdings wrote to the KNF complaining about the timing of the AQR and the harm caused to PL Holding in its negotiations for the sale of FM Bank PBP shares.[344]

233. The sale transaction closed on 8 October 2015 and the KNF was notified on the following day.[345]

234. However, the final AQR report contained no requirement that the Bank provide for any particular exposure.[346] **Basically, it ordered the Bank to review a specific loan agreement, which the Bank then did, resulting in a decision to make provision in an amount of only PLN 5 million.**[347] **According to PL Holdings, "the damage caused by the KNF's deliberate timing of the AQR process and the KNF's preliminary report of an additional PLN 69 million provision (which ultimately was not required) had been done and it was irreversible."**[348]

235. As noted, on 21 October 2016, the Regional Administrative Court in Warsaw issued a ruling dismissing the Claimant's and Abris' challenge to the Second KNF Decision.

---

[343] Email from Greenberg Traurig LLP to Weil, Gotshal & Manges LLP, 25Apr. 2015 (Exh. C-277).

[344] Letter from PL Holdings and Abris-EMP to the KNF, 24 Apr. 2015 (Exh. C-276). The letter explained:

> Only after the Bank received the preliminary results of the asset review, which were also disclosed as part of the due diligence process (with the observance of all legal requirements and KNF's recommendations), PL Holdings received, on a preliminary basis in oral form and subsequently, on 17 April, in writing, AnaCap's revised offer, whose conditions differed significantly from the offer submitted on 24 February 2015.

[345] Exh. C-352.

[346] Letter from the KNF to FM Bank PBP, 24 Apr. 2015 (Exh. C-275).

[347] Boksa ws, para. 124; FM Bank PBP Financial Statement of 2014, p. 119, point 50, Events after the balance sheet date, AQR (Exh. C-289).

[348] Statement of Claim, para. 285; Boksa ws, para. 123.

VIII THE CLAIM

236. The Tribunal sets out here the basic assertions of Claimant on jurisdiction, applicable law, claims on the merits, and the relief requested.

A. Jurisdiction

237. The Claimant bases the jurisdiction of this Tribunal on the Treaty between the Polish People's Republic, on the one hand, and the Kingdom of Belgium and the Government of the Grand-Duchy of Luxembourg, on the other, regarding the Encouragement and the Reciprocal Protection of Investments ("the Treaty"), which was concluded in Warsaw on 19 May 1987 in three equally authentic languages: French, Dutch and Polish.[349] The Polish Council of State ratified the Treaty on 18 February 1988.[350] The Parties to the Treaty exchanged instruments of ratification in Brussels on 2 July 1991,[351] and the Treaty entered into force on 2 August 1991. The record in the case contains a translation into English of each language version.[352]

238. In concluding the Treaty, Poland has agreed that covered disputes between Poland and an investor of Luxembourg nationality may be submitted to arbitration under the Treaty.

239. The Claimant has met the following conditions laid down in Article 9 of the Treaty, according to which:

[349] Exhs. CLA-1, CLA-2, CLA-3.
[350] Statement from the Republic of Poland confirming ratification of the Treaty, 7 Nov. 2000 (Exh. CLA-9).
[351] Record of the Exchange of instruments of Ratification of the Treaty, 2 July 1991 (Exh. CLA-8).
[352] Exhs. CLA-1, CLA-2, CLA-3.

a) **The disputes between one of the Contracting Parties and an investor of the other Contracting Party shall be subject to a written notification accompanied by a detailed memorandum sent by said investor to the relevant Contracting Party.**
b) **Within the meaning of this Article, the term "dispute" refers to the disputes with regard to the expropriation, nationalization, or any other similar measures that affect the investments, and in particular, the transfer of an investment to public ownership, putting it under public supervision, as well as any other deprivation or restriction of rights *in rem* by sovereign measures that might entail consequences that are similar to those of expropriation.**
c) **Said disputes shall, as much as possible, be settled amicably between the two parties involved.**

240. With respect to notification, on 19 May 2014, Claimant sent Respondent a written notification of the dispute, with specific reference to talks aimed at its amicable resolution.[353] Claimant asserts that Respondent rejected Claimant's offer to pursue amicable settlement in a letter of 18 November 2014.[354] Claimant accordingly, on 26 November 2014, submitted a request for arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce.

241. Claimant asserts that it is an "investor" having made an "investment," within the meaning of the Treaty. The Treaty, in Article 1.1 defines an "investment" as "any kind of asset," specifically including "shares of stock and other forms of investment interests in companies." From 1 December 2010, Claimant owned shares in FM Bank PBP and its predecessor PBP Bank. It is undisputed that this shareholding constitutes an investment.

[353] Letter from PL Holdings to the Minister of the State Treasury and Minister of Foreign Affairs of Poland, 19 May 2014 (Exh. C-193).
[354] Letter of the Minister of Finance of Poland top PL Holdings, 18 Nov. 2014 (Exh. C-241).

242. The Treaty makes the presence of an "investor" dependent on its nationality. Claimant was incorporated on 15 January 2010 under the laws of Luxembourg and registered under Luxembourg law on 3 February 2010.[355] It has its head office and makes its essential business decisions at 5 Rue Guillaume Kroll, 1882 Luxembourg.

B. Applicable Law

243. According to Article 9(5) of the Treaty:

> **The arbitral organization shall make its award on the basis:**
>
> **-- of the national law of the Contracting Party that is a party to the dispute, in the territory of which the investment is located, including the rules regarding conflict of laws;**
>
> **-- the provisions stipulated in this Treaty;**
>
> **-- the terms of any special commitment that might have been made regarding the investment;**
>
> **-- the generally accepted rules and principles of international law.**

(i) The Treaty and International Law

244. Claimant urges in particular that, despite the fact that national law is first mentioned, it is the Treaty provisions and international law that should predominate in the analysis.[356]

245. Insofar as expropriation is concerned, the Treaty provides in Article 4(1):

> **The investments made by investors of one of the Contracting Parties in the territory of the other Contracting party may be expropriated or subject to**

[355] Extract from the Trade and Companies Register of Luxembourg on registration of PL Holdings, 20 Nov. 2014 (Exh. C-244).
[356] Statement of Claim, paras. 328-331.

other measures of direct or indirect dispossession that have a similar effect only if the following conditions are met:

> **(a) the measures are adopted in the public interest and in accordance with due process;**
> **(b) they are neither discriminatory nor contrary to a special commitment as stipulated in Article 7, paragraph 2.; and**
> **(c) they are accompanied by provisions that stipulate the payment of compensation.**

246. The Treaty defines neither "expropriation" nor "dispossession," nor does it indicate what would constitute a "similar" direct or indirect effect. For this and other reasons, reference may be made to Article 31 of the Vienna Convention on the Law of Treaties, according to which "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Claimant maintains that the concept of "dispossession" is wider than that of "expropriation."[357]

247. Claimant further asserts that, to establish expropriation, an investor need not show an improper motive or intent on the host State's part, and that the fact that a measure serves a public purpose does not immunize it from being considered an expropriation.[358] Further, an expropriation need not take the form of a direct physical taking, but may consist of a forced transfer of the investor's assets or an interference in management or enjoyment of assets so extreme as to deprive the investor of their use or enjoyment.[359]

---

[357] Statement of Claim, para. 334.
[358] Statement of Claim, paras. 335-336.
[359] Statement of Claim, paras. 340-345.

(ii) European Union Law

248. Claimant suggests that, as part of international law, the law of the European Union is applicable in the present case.[360] In addition to serving as the framework in which supervision of financial institutions by competent Member State authorities is conducted, European law embraces a principle of proportionality. In that regard, Claimant cites Article 65 of Directive 2013/36/EU, which requires that sanctions imposed by national banking authorities be "effective, proportionate and dissuasive." Further Article 70 states as follows:

> **Art. 70. Effective application of penalties and exercise of powers to impose penalties by competent authorities.**
>
> **Member States shall ensure that when determining the type of administrative penalties or other administrative measures and the level of administrative pecuniary penalties, the competent authorities shall take into account all relevant circumstances, including, where appropriate:**
>
> **(i) the gravity and duration of the breach;**
> **(ii) the degree of responsibility of the natural or legal person responsible for the breach;**
> **(iii) the financial strength of the natural or legal person responsible for the breach, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person;**
> **(iv) the importance of profits gained or losses avoided by the natural or legal person responsible for the breach, insofar as they can be determined;**
> **(v) the losses for third parties caused by the breach, insofar as they can be determined;**
> **(vi) the level of cooperation of the natural or legal person responsible for the breach with the competent authority;**
> **(vii) previous breaches the natural or legal person responsible for the breach;**
> **(viii) any potential systemic consequences of the breach.**

[360] Statement of Claim, paras. 346-351.

Claimant observes that Directive 2013/36/EU also requires that the addressee of supervisory measures taken by competent authorities be informed that it has a right of appeal (art. 72) and a right of judicial recourse (art. 55). Claimant also cites various procedural and substantive protections guaranteed by the European Convention of Human Rights.[361]

(iii) Polish Law

249. Among the sources of Polish law that Claimant finds relevant to the present case are the Polish Constitution,[362] the Act on Financial Market Supervision,[363] the Polish Banking Act,[364] the Act on Proceedings before Administrative Courts,[365] Act of 5 December 2014 amending the Act on Trading in Financial Instruments and Certain Other Acts,[366] the Code of Administrative Proceedings,[367] and KNF Resolution no. 312/2012 of 27 November 2012 (on bank inspections).[368]

250. Claimant also invokes the principle of proportionality in Polish administrative and constitutional law.[369] It cites, in addition, numerous decisions of the Polish courts.

C. <u>The Merits</u>

[361] Statement of Claim, paras.365-370.
[362] Constitution of the Republic of Poland, 2 Apr. 1997 (Exh. CLA-53).
[363] Exh. CLA-4.
[364] Exh. CLA-5.
[365] Exh. CLA-58.
[366] Exh, CLA-64.
[367] Exh. CLA-57.
[368] KNF Resolution no. 312/2012 of 27 Nov. 2012 on the procedure for supervising banking activity (Exh. CLA-59).
[369] Statement of Claim, paras. 404-409, citing among other things, the Code of Administrative Proceedings (Exh. CLA-57).

251. **Claimant maintains that Poland is responsible, as a matter of international law, for the conduct of the KNF.**[370]

252. **Claimant further claims that Poland's conduct constitutes an illegal expropriation within the meaning of the Treaty and applicable principles of international law. According to it, neither the order depriving PL Holdings of its voting rights in FM Bank PBP, nor the order to PL Holdings to sell its shares in FM Bank PBP, satisfies the conditions for lawful expropriation within the meaning of Article 4(1) of the Treaty.**[371]

253. **In support of this contention, Claimant seeks to show that the orders referred to in the preceding paragraph effectively deprive Claimant of its investment by depriving it of the economic use and enjoyment of the investment.**[372] **Because it was barred from voting at the Bank's general shareholders' meeting, Claimant has been prevented from, among other things, approving FM Bank PBP's financial statements in violation of Polish accountancy law, making changes in the composition of the Bank's Supervisory Board, approving the Bank's issuance of bonds, injecting new capital into the Bank, and retaining employees. It also could not effectively execute the Banks' remedial plan.**

254. **Claimant asserts that the orders in question also precipitated a significant withdrawal of deposits**[373] **and prevented it from pursuing valuable business opportunities.**[374]

[370] Statement of Claim, paras. 431-434.
[371] Statement of Claim, para. 435.
[372] Statement of Claim, pars. 438.
[373] Statement of Claim, paras. 441.
[374] Statement of Claim, para. 443.

255. **Ultimately, in Claimant's view, the KNF's actions compelled Claimant to make a forced sale of its shares in FM Bank PBP, thus sustaining a loss of reasonably anticipated profits that would have been made in a sale at a more opportune time.[375]**

256. **The measures taken by the KNF cannot, according to Claimant, be justified as legitimate *bona fide* regulations because they were arbitrary, inappropriate, out of proportion with the public purpose allegedly served, and not taken in good faith.[376] With regard to proportionality, Claimant underscores the extreme severity of the effect of the KNF's measures on the Claimant and its investment in FM Bank PBP, coupled with the availability to the KNF of less draconian measures.[377] To meet the proportionality test, an adverse measure must be suitable for achieving a legitimate aim, must be the least restrictive of available sanctions, and must present benefits that outweigh its costs. Claimant maintains that, for a variety of reasons, none of the three measures taken by the KNF meets any of these requirements, even assuming they are in their nature rationally related to the KNF's mission of ensuring the prudent and stable management of the Bank.**

257. **As regards the orders' suitability, Claimant calls attention to the fact, among others, that the alleged irregularities did not in themselves breach any Polish banking law, that Claimant ultimately satisfied all the obligations called to its attention by the KNF, that none of the irregularities Claimant was accused of engaging in threatened the Bank's sound and prudent management, that the KNF exaggerated the number and**

---

[375] Statement of Claim, paras. 447-448.
[376] Statement of Claim, paras. 450-456
[377] Statement of Claim, paras. 472, 474

seriousness of the alleged irregularities, and that the KNF approved the remedial plan notwithstanding its objections to certain alleged irregularities. Claimant maintains in particular that it properly and effectively rose to the challenge, following Mr. Stańczuk's unexpected departure from the Management Board, of bringing onboard a person of the requisite skills, knowledge and experience who was able and willing to take charge of the Bank's operations.[378]

258. Claimant's witness, Dr. Kluza, former KNF chair, testified that:

> **I do not consider that any of those purported justifications demonstrate a failure by PL holdings and Abris as majority shareholders, let alone one that justified the adoption of severe measures against them under the Banking Act. In particular, none of the reasons directly engaged the legal responsibility of the majority shareholder …[379]**

259. Turning to the necessity of the measures imposed, Claimant observes that the KNF has a broad range of administrative measures and penalties at its disposal under Polish and EU law when it considers the prudent and stable management of a bank to be at risk. An initial question is whether the KNF reasonably took the position that its concerns could only be met by reinstating the Management Board as identified in the remedial plan.[380] Claimant points out that the KNF chose to address no supervisory measures to the Management Board, but only the Supervisory Board, even though many of the KNF's grievances pertained to management of the bank.[381]

260. In his testimony, Dr. Kluza maintains that the Banking Act furnishes adequate remedies far less drastic than those imposed, including imposing additional capital

[378] Claimant's Post-Hearing Brief, para. 11.
[379] Kluza op., para. 40.
[380] Claimant's Post-Hearing Brief, para. 20.
[381] Claimant's Post-Hearing Brief, para. 44.

requirements, suspending or discharging a member of the Management Board, limiting the permissible scope of banking activity, enjoining bank officials to take or refrain from taking certain actions, issuing public statements, or imposing a financial penalty.[382] Professor Alexander opines that "[i]n the circumstances it faced, it must be the case that the KNF could have chosen less restrictive penalties than compelling the shareholder to sell its shares."[383] Dr. Kluza testified that he could not recall "any situation in which [he] decided to adopt such supervisory measures to a commercial banking sector entity during [his] term of office as the Chairman of the KNF."[384] According to Claimant, the KNF ordered Innova to sell its shares in Meritum Bank after that bank's remedial plan had been in place for more than a decade, while it initiated proceedings against Claimant when the Bank's remedial plan had been in effect for less than a month.[385] Turning finally to the relative costs and benefits of the measures imposed by the KNF, Claimant argues that all of the factors set out in Article 70 of Directive 2013/36/EU militate in favor of a milder rather than a harsher sanction.[386]

261. Claimant argues more particularly that Claimant's deprivation of voting rights was even perverse in that it actually disabled the Claimant from taking the various actions that might have addressed the bank's financial difficulties.[387] As Respondent itself stated in these proceedings:

---

[382] Statement of Claim, paras. 498-500. See Banking Act, arts. 138, 138a, 141.
[383] Alexander op., para. 99.
[384] Kluza op., para. 44.
[385] Claimant's Post-Hearing Brief, para. 49.
[386] Statement of Claim, paras. 503-504.
[387] According to Claimant, these actions include: increasing share capital, approving the issuance of bonds or subordinate debt, executing the Bank's Investor Plan; approving the Bank's financial statement, appointing or dismissing Supervisory Board Members. Claimant's Post-Hearing Brief, para. 67.

> **[T]he KNF was aware that the situation, where the key investor could not exercise its voting rights on shares, in the long term, would have a negative influence on the situation and thus on the value of the Bank.**

To that extent, the voting rights ban contributed to whatever operational difficulties the bank was experiencing.[388]

262. Claimant also considers the KNF to have violated its procedural rights by, for example, improperly under Polish law imposing simultaneously a freeze on voting rights and an order compelling the sale of shares,[389] by refusing to lift sanctions even when irregularities had been cured,[390] by failing to act on a motion for reconsideration within one month,[391] by having the motion for reconsideration decided by the same officials who adopted the challenged measure initially,[392] by altering over the course of the three decisions taken the grounds on which those measures were based and invoking *ex post* rationales for its decision,[393] by failing to give notice that the First KNF Decision might order not only loss of voting rights but also the compulsory sale of shares,[394] by prejudging outcomes[395] and, above all, by repeatedly postponing the deadline for reconsideration of its Third Decision until such time as Claimant's shares were required to be sold, thereby effectively depriving Claimant of its right of appeal and the judicial protection thereby afforded.[396] According to Claimant, the shares had

[388] Exh. C-242 (Third KNF Decision); [redacted] p. 32, line 21 – p. 33, line 10; Day 7, p. 105, lines 19-21.
[389] Statement of Claim, para. 534(a).
[390] Statement of Claim, para. 534(b).
[391] Statement of Claim, para. 534(c).
[392] Statement of Claim, para. 534(d).
[393] Statement of Claim, para. 538.
[394] Claimant's Post-Hearing Brief, para. 18.
[395] Statement of Claim, paras. 540, 546.
[396] Statement of Claim, para. 446.

to be sold by 30 April 2015 because the order to sell them was immediately enforceable under Polish law,[397] and Mr. Kwaśniak, in breach of the principle of transparency, did nothing to inform Claimant that the 30 April deadline had been suspended on account of the pendency of the KNF's reconsideration.[398]

263. Claimant rejects Respondent's charge that it neglected to avail itself of a number of legal remedies available to it. According to Claimant, none of them gave it a reasonable chance within a reasonable time of vindicating its rights, but were either inapt or futile.[399] Claimant maintains that it pursued every appeal route identified in the KNF decisions as required by Polish law.[400]

264. Finally, Claimant asserts that the KNF's measures manifest a lack of good faith. In support of this contention, Claimant argues that, by the time it issued the Second and Third Decisions, the KNF should no longer have had any concerns over the sound and prudent management of the Bank.[401] More pointedly, Claimant takes the position that the KNF acted more out of "personal agendas and apparent animosities" than out of "any genuine or rational concerns."[402]

[397] For this assertion, Claimant cites Article 11, paragraph 2, item 5 of the Banking Act: "Decisions of the Polish Financial Supervision Authority with respect to ordering the sale of shares by a specified date shall have the force of a final administrative decision and shall be subject to immediate enforcement."
[398] Claimant's Post-Hearing Brief, para. 24.
[399] Claimant's Post-Hearing Brief, para. 82, 88-89.
[400] Claimant's Post-Hearing Brief, para. 87.
[401] Statement of Claim, para. 559.
[402] Statement of Claim, para. 560. Dr. Alexander opines that "[f]rom the materials I have reviewed, I cannot conclude that the KNF's order forcing the controlling shareholders of FM Bank PBP to sell their shareholding was justifiably done in the public interest." Alexander op., para. 101.

265. **It is not seriously maintained that the measures taken by the KNF were accompanied by the payment of compensation corresponding to the real value of Claimant's investment. Respondent has in fact paid Claimant no compensation.[403]**

266. **Finally, while Claimant advances only a claim of expropriation and no other, it invokes Respondent's violation of the principle of "fair and equitable treatment" as probative of expropriation.[404]**

D. Relief Requested

267. **Claimant seeks full compensation in damages for the alleged expropriation, in an amount restoring Claimant to the position it would have been in had Respondent not breached the Treaty.**

268. **More specifically, to quote the Claimant, damages are sought in an amount reflecting "the difference between (i) the value of its investment under the counterfactual assumption that the KNF had not ordered the Claimant to sell its investment and that the Claimant remained free to benefit from the implementation of the strategy developed by the Bank; and (ii) the amount for which the Claimant has agreed to sell its investment to AnaCap, under duress and in 'fire sale' conditions."[405] Claimant had planned to sell its shares in a two-stage IPO on the Warsaw Stock Exchange, with the first stage taking place in 2017 and the second in 2018.**

---

[403] Statement of Claim, paras. 568-570.
[404] Statement of Claim, paras. 571-602.
[405] Statement of Claim, para. 604.

269. **In support of its claim, Claimant submits an expert report prepared by Mr. Paul Rathbone of the consulting firm CEG Europe, based in London. Mr. Rathbone essentially calculated the value that the Claimant would have received from its investment if it had been allowed to retain ownership through the period of anticipated growth and execution of the IPO. He initially employed a combination of a "comparative multiples-based valuation" and a "cash to equity" model, taking 30 April 2017 and 30 April 2018 as the date of the first and second IPO stages, and the date of the award as the valuation date. (Claimant accordingly does not claim pre-award interest.) On that basis, Mr. Rathbone initially quantified damages at PLN 1,888,412,217.**[406]

270. **Claimant also claims entitlement to compounded post-award interest.**[407]

IX THE DEFENSE

271. **Respondent advances a jurisdictional defense, a defense on the merits and a challenge to Claimant's calculation of damages.**

A. Alleged Lack of Jurisdiction

272. **Respondent asserts that Claimant does not qualify as an investor under the Treaty and that the Tribunal accordingly lacks jurisdiction to hear and decide the present dispute.**

273. **Basically, Respondent contends that the Treaty, as drafted, protects investments** ***made*** **and not investments merely** ***held*****.**[408] **The relevant Treaty provisions follow:**

---

[406] Statement of Claim, para. 606.
[407] Statement of Claim, paras. 714-726.

> **Art. 3(1). Each of the Contracting Parties agrees to ensure, within its territory, that the investments *made* by investors of the other Contracting Party receive fair and equitable treatment that precludes any unjustified or discriminatory measures that could hinder the management, the maintenance, the use, the possession, or the liquidation of said investments.**
>
> **Art. 4(1). The investments *made* by investors of one of the Contracting Parties in the territory of the other Contracting Party may be expropriated or subject to other measures of direct or indirect dispossession that have a similar effect only if the following conditions are met…**

(emphasis added).

274. Respondent further maintains that, in any event, the investor in the present case is Abris, not PL Holdings. Respondent cites Article 25 of the Polish Banking Act, according to which:

> **A party is deemed to become indirectly a parent undertaking of a domestic bank or to take up or acquire shares or voting rights on shares of a domestic bank indirectly when it becomes a parent undertaking of a party that directly becomes a parent undertaking of a domestic bank or directly takes up or acquires shares or voting rights on shares, and also a party that takes actions as a result of which it will become a parent undertaking of a party that is a parent undertaking of a domestic bank or that holds shares or rights on shares in a domestic bank.[409]**

275. According to Respondent, the record shows that PL Holdings was established purely as a special purpose vehicle for the sole purpose of the sale and purchase of the shares in WestLB Bank Polska.[410] Indeed, permission to exercise voting rights at the WestLB Bank Polska General was granted by the KNF to Abris, not PL Holdings.[411] Moreover, Abris is registered in Jersey and operates out of Poland, and has no relationship with

---

[408] Statement of Defence, para. 270.
[409] Banking Act, art. 25(2) (Exh. RLA-2).
[410] Statement of Defence, para.277.
[411] Decision permitting the exercise of voting rights at the Shareholder Meeting of WestLB Bank Polska, 27 Oct. 2010 (Exh. C-27).

Luxembourg.[412] Respondent concludes that "it was Abris which made the investment, for which the Claimant is seeking protection in these proceedings, while the Claimant was only a tool in Abris' hands merely formally holding (possessing) FM Bank PBP's shares."[413]

276. In its Rejoinder of 27 May 2016, Respondent interposed an additional jurisdictional objection based upon the impact on the Treaty of Poland's accession to the EU. Respondent argues that Poland's accession to the EU superseded, or otherwise rendered the Treaty inapplicable, as a matter of international law under Articles 30 and 59 of the Vienna Convention on the Law of Treaties. Moreover, EU law offers investors from other EU Member States, like Luxembourg, adequate investor protection, and interpretation of EU law is entrusted exclusively to the courts of the EU. Accordingly, the Tribunal is without jurisdiction to entertain and decide the present dispute.[414]

B. The Merits

277. At the outset, Respondent describes as undisputable "the principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever."[415] Respondent thus invokes the State's "right to regulate," which it defines as the "right to independently and fully regulate in

---

412 Statement of Defence, para.277.
413 Statement of Defence, para.278.
414 Respondent's Rejoinder, paras. 215-318.
415 Tecmed v. Mexico, ICSID Case No. ARB (AF)/00/2, para. 119, p. 45, http://www.italaw.com/documents/Tecnicas_001.pdf (Exh. RLA-18).

certain areas without such regulation being considered as being in breach of a given treaty. Unlike an expropriation measure, an exercise of the right to regulate does not give rise to an obligation on a State to pay compensation.[416]

278. According to Respondent, a claim of expropriation should be viewed through the prism of the fair and equitable treatment standard.[417] Fair and equitable treatment is denied when a State fails to apply measures in a proportional manner, acts arbitrarily or violates due process. To satisfy the proportionality principle, a measure must be suitable for achieving a legitimate government purpose, necessary for doing so, and justifiable in terms of costs and benefits.[418]

279. Respondent gives national law a major role in the conduct of a proportionality analysis:

> **Within the prerequisites of the breach formed by the relevant provisions of the BIT, it should be national law that should have the deciding role.[419]**

280. The relevant Polish legal provisions, according to Respondent, are the Constitution of the Republic of Poland, the Financial Market Supervision Act, the Banking Act, and the Polish Administrative Procedures Code ("APC"). According to Respondent, the APC embraces a series of fundamental procedural rights, notably:

- **the principle of the rule of law**
- **the principle of explaining**
- **the principle of active participation of the parties in proceedings**
- **the principle of disclosure of the proceedings to the parties**
- **the principle of inspiring trust in public authorities**

---

416 Statement of Defence, paras. 304-305.
417 Statement of Defence, para. 310.
418 Statement of Defence, para. 320.
419 Statement of Defence, para. 333.

- **the principle of two instances**
- **the principle of weighing public interest and the equitable interest of the parties**
- **the principle of impartiality**
- **the principle of material truth[420]**

281. On the merits, Respondent insists that the KNF acted at all times properly under the Polish Banking Act to ensure the prudent and sound management of the FM Bank PBP. As formulated in its Post-Hearing Brief:

> **[T]the administrative proceedings and KNF's decisions were a result of a few years' poor management of the Bank, disregard or ignorance of the Investor's commitments and improper or negligent implementation of supervisory decisions. This process began long before the instigation of the administrative proceedings, which were the last act of the drama.[421]**

282. In Respondent's view, Claimant, as investor in the Bank, repeatedly violated its regulatory obligations towards the KNF, even while its financial situation remained highly precarious, largely due to liquidity deficiencies and credit risk.[422] In particular, the Bank's lack of liquidity and inadequacy of share capital presented, in the KNF's view, a very serious and real threat to the stability of the Bank and to the Polish banking market generally.[423] Among Claimant's faults were its failure to the keep the Management Board composed of the persons specified in the Bank's remedial plan.[424] According to Respondent, "[t]he risk to the prudent and stable management of the Bank was confirmed in practice by the fact that the change to the [Management

---

[420] Statement of Defence, para. 351.
[421] Respondent's Post-Hearing Brief, para. 2.
[422] Statement of Defence, paras. 368-369.
[423] Statement of Defence, para. 370.
[424] Statement of Defence, para. 371.

Board] and the new strategy pushed through by the Board threatened the implementation of the [remedial plan]."[425] No less important, though, was Claimant's allegedly dilatory conduct in addressing the Bank's difficulties, including most notably its failure to support the Bank financially for a prolonged period of time, nearly a year,[426] as well as its pursuit of the BankSmart Project, at the end of April and beginning of May 2014, after closure of the receivership proceedings.[427] Respondent rejects what it views as Claimant's attempt to shift responsibility from the Supervisory Board to the Management Board, since it is the former that adopts the remedial plan and supervises the Management Board's compliance with it.[428]

283. Respondent maintains that the measures taken were not only within its authority, but were also the only adequate measures available to it in responding the situation it faced.[429] The KNF insists that all non-restrictive measures – such as engaging the Bank and its investors in problem-solving efforts and requiring compliance with the Bank's remedial plan – were unsuccessful. It asserts, supported by the testimony of Mr. Zapadka, that, in the face of the Bank's failure to implement the remedial plan,[430] the only restrictive instruments at KNF's disposal under the circumstances were those specified in Article 25n of the Banking Act.[431] (According to Respondent, measures

[425] Respondent's Post-Hearing Brief, para. 32.
[426] Respondent's Post-Hearing Brief, paras. 10-12, 44.
[427] Respondent's Post-Hearing Brief, paras. 44, 105.
[428] Respondent's Post-Hearing Brief, para. 41.
[429] Statement of Defence, paras. 377-378.
[430] Statement of Defence, paras. 391, 395.
[431] Zapadka ws, paras. 143-144. Article 25n provides:

(1) If this is required for the prudent and stable management of a domestic bank, because of the assessment of the financial situation of the entity … which, directly or indirectly, received the right to exercise voting rights at a general meeting … or because of the possible influence of that entity on the bank, in particular, if it is found that the entity fails to meet the obligations referred to in Article 25h,

prescribed by Article 138 of the Banking Act could not be applied to Claimant because they apply directly only to Banks themselves.[432]) Respondent also denies that the loss of voting rights prevented Claimant from participating at general shareholders meetings, formulating resolutions, or implementing the Bank's business strategy. According to Respondent, Claimant could have increased the Bank's share capital without going through the general shareholders meeting, simply by granting the Bank a subordinated loan or having the Bank issue subordinated bonds.[433]

284. If the KNF's treatment of FM Bank PBP was unprecedented, as Claimant maintains, it is only, according to Respondent, because Claimant's actions and inactions were themselves unprecedented.[434] Thus the measures taken by the KNF were reasonable and in conformity with the principle of proportionality.[435]

285. From a due process point of view, Respondent maintains that Claimant was fully apprised of the charges against it and had a wholly adequate opportunity to participate in the proceedings and to be heard.[436] It also had every reason to expect

---

para. 3, or the obligations referred to in Article 30, para. 1b, the KNF may, by way of a decision, prohibit exercising voting rights from the shares of a domestic bank held by that entity or exercising the rights of a parent company.

…

(4) If the decision referred to in para. 1 is issued, the KNF may, by way of a decision, order the sale of the Shares within a set deadline.

(5) If the shares are not sold within the deadline referred to in para. 4, the KNF may impose a fine of up to PLN 10,000,000 on the shareholder of the domestic bank, establish a receivership at the domestic bank or revoke the authorisation to establish the bank and issue a decision to wind up the bank….

(6) At the request of the shareholder or the parent company, the KNF shall revoke the decision issued under para. 1, if the circumstances which justified issuing that decision have passed.

….

[432] Statement of Defence, pars. 397.

[433] Respondent's Post-Hearing Brief, paras. 194-206.

[434] Respondent's Post-Hearing Brief, para. 46.

[435] Respondent's Post-Hearing Brief, paras. 78-80.

[436] Statement of Defence, para. 410.

that information gathered in the proceeding that contemplated receivership would be used in the proceeding contemplating a prohibition on the exercise of voting rights.[437]

286. As for the KNF's delay in issuing a decision on reconsideration, Respondent rejects Claimant's contention that Polish law in all circumstances required its issuance within a period of one month. Rather, each case is decided on its own facts, and the proceedings against Claimant involved especially complex determinations and were conducted by a new team having to deal with the case *ab novo*.[438] **In any event, whatever the delay, the outcome of the reconsideration exercise would have been the same.**[439]

287. Respondent disputes Claimant's contention that the Third KNF Decision was immediately enforceable and compelled Claimant to sell its shares. According to Respondent, the Third KNF Decision could be deemed immediately enforceable only under one of three circumstances, none of which was present. To be immediately enforceable as against the addressee, either (a) a measure of some sort must have been requested by it, or (b) the KNF must have declared the measure to be immediately enforceable under Article 108 of the Administrative Procedures Code, or (c) a specific provision of law must have so declared.[440] **Respondent denies that the provision relied on by Claimant – Article 11, paragraph. 2, item 5 of the Banking Law**[441] **– constitutes such a provision because the Third KNF decision required Claimant to**

[437] Respondent's Post-Hearing Brief, paras. 91-99.
[438] Respondent's Post-Hearing Brief, para. 116.
[439] Respondent's Post-Hearing Brief, para. 117.
[440] Statement of Defence, paras. 419-425.
[441] According to the referenced provision, "[d]ecisions of the Polish Financial Supervision Authority with respect to ordering the sale of shares by a specified date shall have the force of a final administrative decision and shall be subject to immediate enforcement."

dispose of its shares, not to sell them. Accordingly, Claimant was entitled to appeal the decision before the Regional and Supreme Administrative Courts before disposing of the shares. The sale of shares did not become mandatory until a decision on reconsideration was issued and the case was finally heard and decided by the administrative courts.

288. Respondent insists that while Claimant availed itself of some remedies at its disposal – applications for reconsideration of the First and Third KNF Decisions and challenge to the Second KNF Decision in the administrative court – it neglected to avail itself of others. Thus, Claimant could have applied for a stay of enforcement of the First and Third KNF Decisions under Article 135 of the Polish Code of Administrative Procedure.[442] (Respondent notes that Claimant did seek a stay of enforcement of the Second KNF Decision.[443]) Similarly, Claimant did not seek explanation of the Third KNF Decision, as provided for by Article 113, section 2 of the Polish Code of Administrative Procedure.[444] Article 37 of the same Code also entitled Claimant to specifically seek a remedy for the KNF's delay in ruling upon Claimant's reconsideration request.

289. All in all, Respondent maintains that Claimant's sale of shares was voluntary and accordingly could not be regarded as the result of an expropriation.[445]

[442] Respondent's Post-Hearing Brief, paras. 165-173.
[443] Respondent's Post-Hearing Brief, para. 174.
[444] Respondent's Post-Hearing Brief, paras. 175-176.
[445] Statement of Defence, para. 425. Respondent denies that the KNF's communications with Claimant over the sale of shares was "threatening." It was, according to Respondent, nothing more than a warning, about which Claimant sought no explanation. Respondent's Post-Hearing Brief, para. 146.

290. **In any event, according to Respondent, whatever procedural irregularities or shortcomings that may have occurred did not rise to the level of a violation of international law.[446]**

291. **As far as good faith is concerned, Claimant was unable to establish any motives of the KNF in its treatment of Claimant other than those dictated by the need to protect the Bank and its customers.[447]**

C. Challenge to Claimant's Damages Calculation

292. **Respondent disputes the validity of the comparable multiples-based and discounted cash flow methods of calculating damages employed by Dr. Rathbone.[448] Respondent challenges not only the accuracy of the data relied upon by Dr. Rathbone, but also several of Dr. Rathbone's assumptions regarding the feasibility of Claimant implementing the December 2014 Business Plan[449] and the likelihood and value of the business opportunities that Claimant allegedly lost.[450]**

293. **Using three alternative methodologies – a transactional values method, a market approach, and income approach – Respondent's Expert, Dr. Caldwell, initially arrived at a valuation of between PLN 250 million to PLN 350 million, from which it is necessary to deduct the PLN 249.9 million received from the actual sale.[451] He**

[446] Respondent's Post-Hearing Brief, para. 86.
[447] Respondent's Post-Hearing Brief, paras. 47, 81, 113.
[448] Statement of Defence, paras. 474-486.
[449] Statement of Defence, paras. 493-515.
[450] Statement of Defence, paras. 516-538.
[451] Statement of Defence, paras. 547-550.

concluded that the damages, if any, to which Claimant would be entitled were no more than PLN 100 million.[452]

294. Respondent denies that Claimant, even if it establishes liability and damages, is entitled to compounded interest.

X. THE ISSUES TO BE DETERMINED

295. The issues to be determined in this case are the following:

A. <u>Does this Tribunal have Jurisdiction to Decide the Present Case?</u>

(i) Is Claimant an Investor within the Meaning of the Treaty?

(ii) Does Poland's Accession to the EU deprive this Tribunal of Jurisdiction?

B. <u>Did Respondent Violate its Obligations to Claimant under the Treaty?</u>

(i) Did Respondent Expropriate Claimant's Investment?

(ii) Did Respondent Satisfy its Obligations of Compensation under the Treaty in Connection with the Expropriation?

(iii) Did the Measures Taken by the KNF Comport with the Principle of Proportionality?

(iv) Was the KNF's Treatment of Claimant Seriously Procedurally Unfair?

(v) Is Claimant Barred from Relief due to Failure to Exhaust Available Legal Remedies?

C. <u>To What Relief, if any, is Claimant Entitled?</u>

(i) Is Claimant Entitled to Recover Damages from Respondent and, if so, in what Amount?

(ii) Is Claimant Entitled to Recover Interest from Respondent and, if so, in what Amount?

D. <u>How Shall the Costs and Fees Associated with this Proceeding be Allocated as</u>

[452] Statement of Defence, paras. 552-556.

between the Parties?

XI. DETERMINATIONS ON JURISDICTION

A. Is Claimant an Investor within the Meaning of the Treaty?

(a) Respondent's Position

296. As detailed earlier, Respondent argues that, while Claimant is a Luxembourg entity and thus has the requisite nationality under the BIT, it is not actually the investor in this case. The actual investor is Abris, which is neither Claimant in these proceedings nor a Luxembourg entity, being registered in Jersey. Claimant is merely a "tool" through which Abris made and controlled its own investment in Poland.

(b) Claimant's Position

297. Claimant, having its head office and place of incorporation in Luxembourg, is a national of "the other Contracting State," as required by the Treaty, and there is no basis upon which it might be described as a "shell company."[453] Claimant itself made the investment in FM Bank PBP, conducted all its business and held all its meetings in Luxembourg, and oversaw the functioning of the Bank from there. There is no basis on which to conclude that the investor in FM Bank PBP is Abris, not PL Holdings.

(c) Findings of the Tribunal

---

[453] Exh. C-244.

298. **The Tribunal notes that, although Respondent challenged Claimant's investor status at the outset of these proceedings, it has not seriously pursued this jurisdictional defense. For that reason, the Tribunal may be justified in considering it as abandoned. However, the status of Claimant as investor, for purposes of the BIT, is a matter that goes to the very authority of the Tribunal to adjudicate the present dispute. For that reason, the Tribunal nevertheless addresses it.**

299. **Respondent has adduced no evidence in these proceedings to contradict Claimant's representations that it itself made the investment in FM Bank PBP, that it conducted all its business and held all its meetings in Luxembourg, and that it oversaw the functioning of the Bank from there. Certainly the fact that Claimant raised additional capital for the Bank from Abris when needed to maintain the required capital ratio does not deprive Claimant of investor status. In any event, the KNF plainly treated Claimant as the investor and addressed all of its decisions to it. Respondent undoubtedly bears the burden of proving that Abris, not PL Holdings, made the investment in this case, and it has made no apparent effort to do so.**

300. **Respondent's jurisdictional defense based on Claimant's failure to satisfy the requirements of an investor within the meaning of the BIT is accordingly rejected**

B. <u>Does Poland's Accession to the EU deprive this Tribunal of Jurisdiction?</u>

(a) Respondent's Position

301. **As noted, Respondent, while participating in these proceedings, challenges the Tribunal's authority to adjudicate the present dispute on the ground that the Accession Treaty whereby Poland acceded to the European Union superseded the**

earlier BIT. Claimant bases this argument on both Articles 30 and 59 of the Vienna Convention on the Law of Treaties (VCLT).

302. Article 30(3) provides that "when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended …, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty." According to Respondent, the dispute resolution provisions of the BIT are incompatible with the Treaty of Accession because once Poland has acceded to the EU, its treatment of an investor from another Member State (here, Luxembourg) is governed exclusively by EU law and may be challenged exclusively in the courts of the EU or its Member States.

303. Somewhat similarly, VCLT Article 59 provides in pertinent part that:

> [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) [i]t appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) [t]he 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.

Because EU law and the BIT relate to the same subject-matter and because both the BIT's substantive protections and its dispute resolution provisions are incompatible with the intra-EU investor protection under EU law, the BIT is terminated, and the authority of the Tribunal to adjudicate the present dispute is lacking.

304. Finally, under Article 344 of the Treaty on the Functioning of the European Union (TFEU), "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than

those provided for therein." This provision vests exclusive authority to adjudicate the present dispute in the European judiciary.

(b) Claimant's Position

305. Claimant contends that neither Article 30 nor Article 59 of the VCLT operates to deprive this Tribunal of authority to adjudicate the present dispute. Article 30 has no application because there is in fact no incompatibility between the BIT and the rights and obligations that Poland incurred upon acceding to the EU. As for VCLT Article 59, not only is there no incompatibility, but the BIT and the European treaties do not relate to the same subject-matter to begin with, as required in order for Article 59 to apply. For its part, TFEU Article 344 has no application because the present case is not one in which a Member State has submitted a dispute "concerning the interpretation or application of the [European] Treaties."

(c) Findings of the Tribunal

306. Respondent interposed this jurisdictional objection to these proceedings in its Rejoinder, well after the period for stating its defenses had passed. Moreover, this particular jurisdictional objection is one that Respondent could readily have interposed on a timely basis, i.e., with its Answer to the Request for Arbitration or with its Statement of Defence. All the circumstances that Respondent points to were in existence and known at that time. The Tribunal would accordingly be justified in granting Claimant's request that the defense be rejected as out of time.

307. The Tribunal does not, however, follow that course. The objection that Respondent belatedly raises is a fundamental one, implicating the subsistence of the BIT pursuant to which this Tribunal sits and thus this Tribunal's very jurisdiction to adjudicate. It also of course implicates important sovereign assertions not only by Poland but also by the European Union. For these reasons, the Tribunal sees fit to address the objection, notwithstanding its untimeliness. The Tribunal notes for the record that it has given Respondent ample opportunity to explain the objection and has given Claimant ample opportunity to refute it. Both parties availed themselves of these opportunities.

308. The Tribunal notes that this is by no means the first occasion on which a Respondent State has challenged the jurisdiction of an investor-State arbitral tribunal on the ground that the BIT by virtue of which the tribunal sits has been superseded and terminated by the Respondent State's accession to the EU. A jurisdictional defense along these lines has been advanced in several investor-State disputes,[454] in many of which the European Commission has intervened as *amicus curiae*. So far as this Tribunal can tell, in none of those prior cases has this jurisdictional defense succeeded.

309. The Tribunal does not view the situation any differently than it has been viewed by earlier tribunals faced with what might be called this "intra-EU BIT" defense. An easy answer to the challenge would be that this Tribunal determines its jurisdiction solely

---

[454] See, for example, Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC case no. 088/2004 (Mar. 27, 2007); Micula v. Romania, ICSID case no. ARB/05/20 (Sept. 24, 2008). For similar ruling on challenges to the enforceability of the Energy Charter Treaty in intra-EU cases, see AES Summit Generation Ltd and **AES**-Tisza Erömü Kft **v** Republic of Hungary, **I**CSID Case no. ARB/07/22 (Sept. 23, 2010); Electrabel S.A. v. Hungary, ICSID Case no. ARB/07/19 (Nov. 25, 2015).

on the basis of the instrument that purports to found its jurisdiction and not on the norms of an entirely different legal order. Other tribunals faced with a challenge of this sort have maintained, rightly, that the treaty from which the tribunal emanates is for all practical purposes the tribunal's "constitution," and it is on that instrument and that instrument alone that the tribunal's authority depends.[455]

310. However, the Tribunal finds it unnecessary to make a pronouncement of this sort in order to reject Respondent's jurisdictional objection because it finds that Respondent's defense fails on the merits. This is because neither Article 30 nor Article 59 supports Respondent's contention that the BIT in this case is no longer of legal force and effect.

311. The Tribunal fails to see the incompatibility, within the meaning of VCLT Article 30 between the BIT and the treaty by which Poland acceded to the EU. The BIT authorizes an investor of one of the signatory States to institute a claim against the other signatory State for breach of the investor protection norms enshrined in the BIT. The Tribunal discerns no incompatibility between an investor's recourse to a remedy under the BIT and the possibility that it could obtain redress through invocation of EU law's free movement principles or recognition of property rights.

312. So far as Article VCLT Article 59 is concerned, the Tribunal need not even reach the question whether "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." This is because that inquiry is to be made only once it is found that the

[455] RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30, para. 74 (6 June 2016).

two treaties relate to the same subject-matter. The Tribunal does not doubt that EU law affords an investor from one Member State in another Member State certain protections. To a considerable extent, the foreign investor derives directly effective rights from the European Treaties' provisions on free movement of capital and freedom of establishment as well as from their prohibition against nationality discrimination. They also ensure in this context treatment of investors in accordance with the principle of proportionality and with respect for the right of property. However, the subject-matter of the BIT and the subject-matter of EU law, insofar as it protects investors from one Member State in the territory of another, are by no means congruent. The BIT in this case, like most BITs, affords foreign investors rights that are wider than those afforded by EU law. The principle of proportionality in EU law notwithstanding, the principle of "fair and equitable treatment" which undergirds a great number of the awards rendered pursuant to BITs has no analog in EU law, particularly compared to the extensive arbitral jurisprudence that has developed on the basis of that provision. The Tribunal also sees merit in the observation by other investor-State tribunals that the right of an investor under a BIT to submit its claims to arbitral dispute resolution is a highly valuable right that is indissociable from the substantive rights with which it deals, and one that the EU system does not afford.[456]

313. The Tribunal concludes that neither Article 30 nor Article 59 of the VCLT operate to nullify the BIT in this case and thereby negate the authority of this Tribunal to resolve the present dispute.

---

[456] See Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004, para. 164 (27 Mar. 2007).

314. It remains to consider TFEU Article 344. Like virtually every other tribunal that has faced this question, the Tribunal finds that the argument based on Article 344 TFEU misses its mark. Article 344 provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein." From all indications what Article 344 bars is an action by one Member State against another on a claim implicating the interpretation or application of EU law. The leading case was indeed one in which the United Kingdom succeeded in barring Ireland from submitting a dispute between the two States to the court established by the United Nations Convention on the Law of the Sea.[457] But the dispute before this Tribunal is decidedly not between two Member States even if it ultimately arises out of a treaty between them. Rather, it is a dispute by an investor from one Member State against another Member State. To a dispute of this character, TFEU Article 344 has no application.

315. The Tribunal observes that Member States and the European Commission alike have advanced a more sweeping proposition, namely that the European courts enjoy a monopoly over the interpretation and application of EU law and that no other courts or tribunals may engage in that exercise. The argument assumes of course that this Tribunal will have occasion to interpret or apply EU law and that is by no means a foregone conclusion. But even if it were, the Tribunal rejects any such assertion. So far as the Tribunal knows, no other jurisdiction in the world has asserted a monopoly – much less succeeded in asserting a monopoly – over the interpretation and

[457] Ireland v. United Kingdom (the MOX Plant case), Case C-459/03.

application of its law, even though it may of course claim to have "the last word" on the meaning of its law.

316. The Tribunal is aware that there is currently pending a case before the European Court of Justice in which that Court is being asked to rule precisely on the question whether intra-EU BITs entered into prior to one of the Member State's accession to the EU survive.[458] The pendency of that case does not spare this Tribunal the obligation to address this matter. Nor does the Tribunal have occasion to consider how the decision this Tribunal takes today would be affected were the European Court of Justice to rule that the intra-EU BITs entered into prior to a member State's accession to the EU no longer have legal force or effect. Accordingly, the Tribunal rejects Respondent's argument that the Tribunal lacks jurisdiction to determine the claim in this Arbitration.

317. The Tribunal accordingly rejects Respondent's defense based on the incompatibility between the BIT under which this case is proceeding and EU law.

XII. DETERMINATIONS ON THE MERITS

A. Did Respondent Expropriate Claimant's Investment?

(a) Claimant's Position

318. Claimant's position has been laid out in some detail earlier. Suffice it here to recall that Claimant invokes the Treaty's guarantee of compensation to investors for investments "expropriated or subject to other measures of direct or indirect

---

[458] Slovak Republic v. Achmea, Case C-284/16.

dispossession that have a similar effect."[459] According to Claimant, there can be no question that the KNF Decisions carried out an expropriation in the sense of depriving Claimant of the use and enjoyment of its property in the host State. Claimant was deprived of its voting rights for a period of nearly 18 months, from April 2015 until the sale of shares. Even if the loss of voting rights did not completely destroy the value of Claimant's shares in FM Bank PBP, the requirement that it sell its shares surely did.

(b) Respondent's Position

319. As noted earlier, Respondent emphasizes that, even if a forced sale of shares constitutes a deprivation of the use and enjoyment of those shares, Claimant was not required to sell the shares at the time it did, namely 30 April 2015. Thus no expropriation took place.

(c) Findings of the Tribunal

320. At least technically, Claimant was not deprived of its investment, but rather of certain rights forming part of it, viz, the right to vote its shares in the Bank and the right to dispose of the investment as it saw fit (here, more specifically, the right to offer the shares in an IPO rather than selling them three years earlier through a different procedure and under different less favourable circumstances). However, the KNF measures severely restricted these rights, rights that constitute essential elements of the right of ownership. These restrictions thus deprived the Claimant of the full benefit of its rights of ownership to such an extent as to constitute an expropriation. A State may be deemed to expropriate private property even if it does not itself take

[459] Exh. CLA-1.

ownership of it. Expropriations in investor-State arbitration are commonly found to have occurred without any actual physical deprivation of the property in question. In indirect expropriation cases, the investor almost invariably retains ownership; expropriation will have occurred because, notwithstanding that fact, the investment has been deprived of virtually all value.

321. To the extent that Respondent advances a distinction between having to "sell" one's shares and having to "dispose" of them, it advances a distinction without a difference. For all practical purposes, a "sale" of shares is nothing less than a form of "disposal" of them. Certainly both represent serious interferences with a party's rights of ownership.

322. In fact, the terms of the BIT do not literally require proof of expropriation in any narrow definition of the term. It also addresses "other measures of direct or indirect dispossession that have similar effect." Whether or not forfeiture of voting right constitutes a "dispossession," and it arguably does, the forced sale of property most certainly does.

323. The Tribunal accordingly finds that the action taken by the KNF represents an expropriation, within the meaning of the Treaty.

B. Did Respondent Satisfy its Obligations of Compensation under the Treaty?

(a) Claimant's Position

324. While it expropriated Claimant's property, Respondent admittedly has paid Claimant no compensation. Respondent is accordingly obligated to make full compensation for

the damage Claimant suffered as a result of the expropriation, placing Claimant as fully as possible in the position it would have been in had the expropriation not occurred.

(b) Respondent's Position

325. Because Respondent did not expropriate Claimant's assets, Respondent is under no duty of compensation. Having voluntarily sold its shares at the time it did, Claimant suffered no compensable loss.

(c) Findings of the Tribunal

326. It is undisputed in this case that Respondent, having denied any liability to Claimant, has not deemed it necessary to offer Claimant any compensation, and it has not done so. This does not mean that Claimant remained entirely uncompensated for what it regards as the forced sale of its shares, since Claimant did of course secure some value in the sale. That amount would have to be deducted from any recovery to which Claimant may be entitled on the basis that it was required by the KNF to sell its assets in April 2015 rather than being able to offer the shares, as planned, in a later IPO.

C. <u>Did the Measures Taken by the KNF Comport with the Principle of Proportionality?</u>

(a) Claimant's Position

327. Claimant's position has been laid out in detail earlier. Claimant fully concedes a State's "right to regulate," in the sense of adopting measures legitimately needed for

safeguard of the public good.[460] However, the right to regulate does not entitle States, under an international investment treaty, to take measures that are disproportionate, arbitrary or discriminatory. More specifically, it is for this Tribunal to determine whether the measures in question "were taken in good faith, (ii) were proportionate to the public welfare objective, (iii) were non-discriminatory, and (iv) accorded with basic due process rights."[461]

328. An inquiry into proportionality in particular entails an inquiry into whether the measure in question:

- **was taken in furtherance of a legitimate and substantial public interest and was a suitable one for serving the legitimate and substantial public interest invoked**
- **was necessary, in the sense that no less drastic measure would have sufficed**
- **was disproportionately severe for the Investor, compared to the purposes meant to be achieved (i.e., proportionality *stricto sensu*)**

329. Although Claimant intimates that the KNF acted out of hostility and bias, it does not squarely question whether the actions taken by the KNF are one whose objective is furtherance of a legitimate and substantial public interest. But, even if a legitimate and substantial public interest is meant to be served, other requirements of the proportionality principle must be satisfied.

330. Claimant thus first contests the suitability of the KNF's measures, and on numerous grounds. Prime among them is the claim that all three KNF decisions were predicated chiefly on failures by Claimant that in all cases Claimant had by then already promptly rectified. Claimant also underscores how soon after the order to Claimant to sell its

[460] Claimant's Post-Hearing Brief, para. 35.
[461] Claimant's Post-Hearing Brief, para. 36.

shares was vacated in the Second KNF Decision the KNF opened proceedings envisaging that very same sanction.

331. Turning to the Bank's financial situation and to the DSS investment in particular, it was not Claimant, but the Bank's Management Board itself, that was responsible for that ill-advised investment.[462] In any event, and most importantly, Claimant was once again highly proactive in addressing the situation once it surfaced and discussions with the KNF were underway.[463]

332. Although the KNF referred increasingly over time to the Bank's level of liquidity and exposure to credit risk, the fact remains that neither the First, Second nor Third KNF Decisions was based on those considerations.[464] In any event, the liquidity concerns of the KNF in regard to PBP Bank related to the period between the end of April and August 2012, during which time the Bank was heavily influenced by conduct of Claimant's co-shareholder, IDM.[465] Claimant addressed that situation promptly and effectively.[466]

333. The KNF had asked PBP Bank to prepare a remedial plan on a merger with FM Bank largely to improve liquidity in PBP Bank, and in fact none of the Bank's quarterly reports between the July 2013 merger and the end of 2014 (i.e., after the Third KNF Decision) showed any breach by the Bank of liquidity standards.[467]

---

[462] Transcript, Day 4, p. 75, lines 5-16, p. 79, lines 14-17, p.89, lines 6-9, p. 93, lines 2-8.
[463] Claimant's Post-Hearing Brief, para. 16.
[464] Claimant's Post-Hearing Brief, para. 142.
[465] Mr. Stańczuk testified that from August 2012, the situation of the Bank in regard to liquidity constantly improved. Transcript, Day 4, p. 230, lines 9-11.
[466] Testimony of Mr. Gieryński, Transcript, Day 2, p. 39, line 8 – p. 41, line 8.
[467] Claimant's Post-Hearing Brief, para. 144, citing Exhs. C-161 (p. 11, sec. 5, para. 2), C-190, C-238, C-232, C-253.

334. As for the financial situation of PBP Bank more generally, it had improved substantially by the time of the merger with FM Bank.[468] According to Claimant, the KNF failed utterly to appreciate how much the Bank's fortunes had been affected by a single bad investment, i.e., namely the DSS bonds, and how promptly and cooperatively Claimant participated in addressing the problem. More generally, the KNF failed to give the Bank a reasonable opportunity to put its forward-looking development plans into practice.

335. Turning to the necessity prong of the proportionality principle, Claimant disputes that the KNF's decisions were necessary as a matter of Polish law for the prudent and stable management of the Bank.

336. The KNF unquestionably enjoys a broad range of powers. These include measures that may be directed to banks' management bodies pursuant to Articles 138 and 143 of the Banking Act, rather than to the shareholders.[469] Employing them would have been appropriate to the extent the KNF was genuinely concerned about bank operations (as its comprehensive inspection of the Bank had indicated), since it was the Bank's, not the shareholders', primary responsibility to implement the KNF's recommendations on banking operations.

337. The final prong of the proportionality analysis ("proportionality *strictu senso*") entails a determination of whether the costs of a measure manifestly outweigh its benefits. Any such analysis requires consideration of the magnitude of the risks that a given measure purports to address. The KNF predicated the measures it took on the

[468] Exhs. C-161, p. 4, C-162, C-179, p. 2; Transcript, Day 4, p. 230, lines 8-10.
[469] Exh. R-85.

propositions that FM Bank PBP was not managed in a sound and prudent manner, that this state of affairs was attributable to Claimant acting through the Bank's Supervisory Board, and that the Bank's operations threatened the stability of the Polish banking sector at large. However, the KNF has failed to establish any of these propositions. Under those circumstances, the measures taken by the KNF cannot meet this final element of the proportionality principle.

338. The KNF's Decisions were also discriminatory. When the KNF was concerned over the financial situation of Meritum Bank, it gave its parent, Innova, twelve months to dispose of its shares in the Bank, which had itself been subject to a remedial plan for over ten years (compared to FM Bank PBP's having been subject to a remedial plan for less than a month when KNF initiated proceedings).[470] Also, contrary to the usual practice,[471] the KNF subjected FM Bank PBP to an AQR less than six months after the two-way merger had taken place, and just at the time that Claimant was engaged in the sale process. Indeed, it released the results of the AQR on the same day as the deadline for the Claimant's forced sale of shares.[472]

339. European Union law, which is applicable to this case, if only as an element of international law, fully subscribes to the principle of proportionality. The EU's Capital Requirements Directive ("CRD")[473] specifically requires that administrative measures,

---

470 Transcript, Day 5, p. 44, lines 7-11, 25.

471 See the testimony of Mr. Góral, Transcript, Day 3, p. 221, lines 6-11.

472 Exhs. C-259, C-276, R-60, R-84.

473 Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, OJ L 176 (27 June 2013), pp. 338-436.

including penalties, be "effective, proportionate and dissuasive,"[474] give due consideration to "all relevant circumstances,"[475] and guarantee a right of appeal.[476]

(b) Respondent's Position

340. A critical commitment in the remedial plan adopted in June 2013 was the composition of the Bank's Management Board and the competences of its members.[477] Changes made in these arrangements on 8 August 2013 without consultation of the KNF were violations of that commitment. Although Claimant disclaims responsibility for the changes, and attributes them to members of the Management Board itself, Claimant as shareholder both inspired and agreed to them.[478] Claimant cannot shift responsibility to the Management Board for decisions for which it was, for all practical purposes, responsible. Nor can it sharply distinguish between itself and the Supervisory Board, inasmuch as it dominated the latter.[479]

341. Ms. Kozlowska did not, as alleged, invalidate the Board changes, but merely required that they be reversed and that the original composition and assignments be restored. Though it apologized, Claimant did not, however, do as directed. That is what prompted the KNF to bring proceedings contemplating a receivership and deprivation of voting rights.[480]

[474] CRD, art. 65.
[475] CRD, art. 70.
[476] CRD, art. 72.
[477] Exh. C-105, pp. 34-36.
[478] Exh. C-150, pp. 2-3; testimony of Mr. Lachowski, Transcript, Day 3, p. 125, lines 5-9.
[479] Respondent's Post-Hearing Brief, paras. 24.
[480] Respondent's Post-Hearing Brief, paras. 28.

342. Although the three KNF Decisions made primary reference to particular actions of the Bank's Supervisory Board – notably its changes in composition of the Bank's Management Board – in fact those measures were taken against the background of a pattern of poor bank management, disregard of investor commitments – on such matters as liquidity and adequate capitalization – and improper or negligent implementation of the KNF's supervisory decisions.[481]

343. Upon receiving the KNF's consent to exercise voting rights in the PBP, Claimant made the following commitment:

> **Financial support provided by the Applicants in an event posing a threat to the Bank's liquidity: The Applicants, acting as a shareholder in the Bank will ensure that the Bank's liquidity, capital position and solvency ratio remain at a satisfactory and stable level for the Bank to be able to discharge its financial obligations. The Applicants as Bank shareholders will take the above actions in particular in a situation posing a threat to the Bank's liquidity or a need to strengthen its capital position or a need to provide the Bank with sufficient own funds.[482]**

The Claimant violated this commitment by failing to increase the Bank's share capital when the Bank did not meet the KNF's liquidity standards,[483] and, as admitted by Mr. Gieryński, the liquidity standards were violated as early as 30 April 2012. [484] This situation lasted for a year. Despite calls from the Management Board,[485] Claimant, invoking a number of excuses – including difficulties with its co-shareholder IDM – refrained from taking the needed action. Claimant did not, as it asserts, react promptly to problems that the KNF brought to its attention. For example, once the

[481] Respondent's Post-Hearing Brief, paras. 2, 5.
[482] Exh. C-27.
[483] Respondent's Post-Hearing Brief, para. 9.
[484] Transcript, Day 2, p. 40, lines 9-11.
[485] Exh. R-9.

DSS bonds problem surfaced, Claimant was dilatory, for nearly a year, in taking remedial steps, such as purchasing the bonds.

344. In terms of proportionality, the measures taken by the KNF were unquestionably suitable in light of the legitimate interest they served.

345. After deciding to abandon receivership proceedings as "useless," because the remedial plan was being implemented, the KNF was informed in May 2014 that the Management Board intended to pursue a new business strategy – the so-called BankSmart Project[486] – that the KNF believed to be at odds with the assumptions underlying the Banks' remedial plan.[487] Claimant knew about Mr. Lachowski's plans and accepted them,[488] although when the KNF requested that the remedial plan be modified, Mr. Lachowski submitted the requested update.[489] Ultimately, on 10 October 2014, the KNF rejected the update.[490]

346. It is true that FM Bank PBP, under its new ownership, is today implementing the BankSmart Project, to which the KNF had objected in Claimant's case. However, the Bank is today in a different situation, its owners having increased the Bank's share capital and having developed an extensive branch network.[491]

347. By the time the KNF took its Second and Third Decisions, it was presented with new grounds for ordering the disposal of shares. The Bank's new and problematic strategy had unexpectedly came to light. Although the KNF requested an updating of the

[486] Exh. C-218, pp. 7-8.
[487] Exh. C-192.
[488] Exh C-151(correspondence between Mr. Boksa and Abris); Exh. CEG-67 (minutes of the 24 January 2014 Supervisory Board meeting.
[489] Exh. C-255, Transcript, Day3, p. 132, lines 24-25, p. 133. Lines 6-25.
[490] Exh. C-234.
[491] Kulczycki ws, p. 2.

remedial plan, and although Claimant provided an update, the new strategy could not be reconciled with the requirements of the remedial plan:

> **The fact that as of the date of this decision KNF has not accepted the updated remedial plan submitted by the Bank on 14 August 2014 continues to be of significance. The Bank was advised that the findings of the analysis on the updated remedial plan indicate that it cannot be accepted in the form presented to KNF as a remedial plan within the meaning of Art. 142 section 2 of the Act entitled Banking Law. In particular, the forecasts pertaining to the rate of growth in the level of profit earned and the credit portfolio evoke doubts and reservations. . . . Considering the foregoing KNF could not recognize that the assumptions made in this respect by the Bank guarantee the achievement of one of the overriding objectives of the remedial plan, i.e. to cover the Bank's losses from previous years. The updated remedial plan does not afford the opportunity to assess the accepted assumptions as forming a basis for the safe and stable development of the banking activity conducted, and thereby as providing for permanent improvement in the Bank's economic and financial standing.[492]**

348. The proportionality principle requires that a State take only those measures that are reasonably necessary to achieve its stated public interest goals, and must avoid any that are needlessly onerous.

349. Claimant is mistaken in asserting that the KNF had available to it adequate remedies that were significantly less drastic. Among those mentioned by Claimants are sanctions that could have been addressed to the Management Board rather than the Supervisory Board, and Claimant in particular. But since it was Claimant that bore responsibility for the bank's precarious situation, it would not have been rational to apply corrective measures against members of the Bank's other governing bodies.[493]

[492] Third KNF Decision (Exh. C-242).
[493] Respondent's Post-Hearing Brief, para. 235.

350. Respondent takes the position that finding a lack of proportionality requires finding that there is no rational connection between the measures adopted and the public interest.[494]

351. Claimant exaggerates the impact of its loss of voting rights on its ability to supervise Bank operations soundly and effectively. A shareholder retains the right to participate in the division of profits (dividends), the pre-emptive right to acquire newly issued shares, the right to participate in the distribution of the company's assets in the case of its liquidation, the right to participate in the general meeting, the right to submit draft resolutions for the general meeting, right to obtain information, the right to sell shares, and other rights determined in the Statute.[495] Moreover, there were no legal obstacles to the Claimant's participation in the GSM or submission of draft resolutions, following the prohibition of the exercise of voting rights.[496] The competences of the Management Board were in no way restricted.[497] More generally, the prohibition was no obstacle to implementing the Bank's strategy for 2014–2017. That strategy provided for the issuance of subordinated debt.[498] Under Polish law, investors are allowed to grant subordinated loans to a bank, and commonly do so.[499] However, the Claimant never took the initiative, even though that was a means of increasing the Bank's share capital without exercising voting rights.

[494] Respondent's Post-Hearing Brief, paras 79-80.
[495] Exh. CLA-55, pp. 6-7.
[496] Exh. CLA-55.
[497] Exhs.C-179, C-180, R-25.
[498] Exh. C-160.
[499] Exh. CLA-5.

352. **In sum, the KNF had good reason to find that Claimant's actions presented a serious risk to the prudent and stable management of the Bank, one that can be described as "alarming."[500] By contrast, the new owner of the Bank has managed the Bank in a prudent and stable manner.[501]**

353. **In regard to good faith, the KNF in fact exercised a good deal of restraint and tolerance inasmuch as the circumstances would have justified it in excluding Claimant from the banking sector as unreliable, but the KNF chose instead to work with Claimant and the Bank to improve matters.[502] The KNF would have no reason to act, and did not act, in the interest of anything other than the interest of the Bank and its customers.[503] Any suggestion that the KNF discriminated against Claimant by treating it more harshly than it treated Innova in the case of Meritum Bank can be explained by the greater degree of cooperation that Innova displayed in working with the KNF.**

(c) Findings of the Tribunal

354. **Through its three decisions, the KNF imposed sanctions on Claimant as the holder of shares in FM Bank PBP. The question which the Tribunal must examine is whether Claimant engaged in serious misconduct and whether the measures ordered by the KNF addressed these wrongdoings in a proportional manner. Whether the measures taken by the KNF vis-à-vis Claimant were taken in violation of the principle of proportionality is indeed one of the most highly contested issues in this case.**

[500] Respondent's Post-Hearing brief, para. 219.
[501] Respondent's Post-Hearing brief, para. 208.
[502] Respondent's Post-Hearing Brief, para. 4.
[503] Respondent's Post-Hearing Brief, para. 47.

355. Application of the principle of proportionality inevitably entails an exercise in judgment on the part of a court or tribunal, and this case is no exception. Regardless of the law specifically applicable to the principle of proportionality in this case, the principle is understood in largely similar terms across jurisdictions. To satisfy the principle, a measure must (a) be one that is suitable by nature for achieving a legitimate public purpose, (b) be necessary for achieving that purpose in that no less burdensome measure would suffice, and (c) not be excessive in that its advantages are outweighed by its disadvantages.

Suitability

356. There can be no serious doubt that the KNF's measures were ones whose objective is to further a legitimate and substantial public interest and ones that, if the circumstances justified it, would be appropriate. Although Claimant intimates that the KNF acted out of hostility and bias, that assertion has simply not been established.

357. However, the Tribunal nevertheless seriously questions the suitability of the measures taken under the circumstances of this case.

358. The most serious reproaches made against Claimant by the KNF in this case, and those that would most persuasively justify strong action by the KNF for the protection of the banking system, concern the capitalisation of the bank and its liquidity. To be sure, forcing a shareholder to sell its shares may under some circumstances be justified, as when a controlling shareholder fundamentally fails to meet its basic obligations with

respect of the capitalisation of the bank and its liquidity. But it is highly questionable whether that state of affairs prevailed at the time of the three KNF decisions.

359. **While the Bank was indeed undergoing financial difficulties and while the Claimant may not have been as forthcoming or diligent as the KNF could rightfully expect, the KNF expressed no immediate need for additional financial support at the time of the First Decision. By that time, the financial situation of the Bank had substantially improved and KNF recognised that "the progress in the execution of the Remedial Plan giving consideration to the Bank's economic standing and findings of the comprehensive inspection conducted in the Bank according to its status as at 30 June 2013 do not point to material deviations from executing the objectives and assumptions adopted by the Bank and laid down in the Remedial Plan."[504] On the contrary, Claimant was addressing the Bank's financial problems. As early as three days after the First Decision was issued, the KNF declared that placement of the Bank in receivership would have been "groundless and pointless."[505] No adverse change in the Bank's financial situation thereafter occurred in the period leading up to the Third KNF Decision. When that decision was issued, the Bank's financial problems were substantially less serious.**

360. **This will in turn explain why the KNF did not justify its decisions on the basis of such considerations as illiquidity or insufficient capitalisation. In light of the evidence before it, the Tribunal must conclude that the reliance on "the Bank's lack of liquidity**

[504] See para. 194, supra.

[505] KNF Decision discontinuing proceeding to appoint an administrator, 11 Apr. 2014 (Exh. C-179).

and inadequacy of share capital" on which the Respondent chiefly predicates its case[506] was not the motivation for the KNF decisions.

361. The contemporaneous justifications that KNF advanced in support of its decisions are of an entirely different nature. They concern essentially (i) changes in the Bank's Management Board that had been made during the period of July and August 2013, as described above, and (ii) certain irregularities in management of the Bank that had been identified in the Inspection Record and that the KNF attributed to the Supervisory Board, and hence to Claimant.[507] More specifically, the KNF complained that the Supervisory Board had failed to inform the KNF of important personnel changes in the Management Board and that it had committed such irregularities as Mr. Lachowski's consultancy agreement, potential conflicts of interest of another Board member, and a direction given in one instance by the Supervisory Board to the Management Board on a matter within the latter's competence. In short, even the KNF's Third Decision was largely predicated, not on financial conditions at the Bank, but on Claimant's failure "to consult the KNF on the filling of positions on the management board and the chief accountant of the Bank"[508] and the "irregularities" referred to earlier.[509]

362. As rationales for the KNF decisions, these are unconvincing. To begin with, the circumstances surrounding the personnel changes, and in particular the need for Mr. Lachowski's designation as Management Board President, were to some extent

---

[506] See para. 282, supra.
[507] See paras. 189-190, supra.
[508] Third KNF Decision (Exh. C-242).
[509] Third KNF Decision, p. 10 (Exh. C-242).

beyond Claimant's control. Mr. Stańczuk had led Claimant to believe that he was willing to serve as Vice President of FM Bank PBP, even if he actually harbored no intention of doing so.[510] Despite having heard rumors that the three-way talks with Meritum Bank might collapse, he signed the Bank's remedial plan which clearly stated that he would serve as Vice-President of the two-way merged Bank. By the time the KNF approved the Bank's remedial plan, it had already been informed by Claimant of Mr. Stańczuk's departure from the Management Board.[511]

363. Claimant acted swiftly in response to Mr. Stańczuk's unexpected departure by seeking to identify a person who had the requisite knowledge, skill and experience and who was willing and immediately available to serve.[512] As for Mr. Lachowski's eventually replacing Mr. Maciejewski as President of the merged Bank, it is undisputed that Mr. Lachowski was better suited to that role.[513] The KNF had always known that Mr. Lachowski was to become President of the Bank after the three-way merger, that is, within a period of six months, voicing no objections.[514] Moreover, Mr. Lachowski had in any event been appointed on an "acting" basis, which is not an unusual practice in the banking sector.[515]

364. That change, as well as the change in positions of Mr. Lejko and Mr. Zielke, were a result, not of dictates by Claimant, but of discussions within the Management Board,

---

[510] Tr., Day 4, p. 127, lines 11-15, p. 196, lines 17 – 19.
[511] Exh. C-120 (letter from FM Bank PBP to the KNF), 12 July 2013. Mr. Stańczuk had also already met with the KNF on 10 July 2013. Tr., Day 4, p. 161, lines 14-24. See also Exh. C-144.
[512] Exh. C-133, pp. 1-2.
[513] Even Mr. Stańczuk so agreed. Tr., Day 4, p. 210, lines 18-20, p. 125, lines 15-19.
[514] T., Day 3, p. 148, line 18 – p. 149, line 11; Day 4, p. 143, line 19 – p. 144, line 12.
[515] Claimant's Post-Hearing Brief, para. 43.

and more particularly discussions between Mr. Lachowski and Mr. Maciejewski.[516] Respondent has never demonstrated how the changes made to the Management Board were detrimental to the Bank or to implementation of the remedial plan.[517]

365. Notably, notwithstanding its stated reservations, the KNF ultimately unreservedly approved Mr. Lachowski's appointment as President of the Bank. The absence of any ultimate objections to his appointment calls into question whether the KNF had serious doubts in the first place.[518]

366. Moreover, Claimant did not fail to keep the KNF informed of developments during the period of time in question and it responded to the KNF's inquiries in a consistently diligent manner.[519] Claimant was entirely forthcoming in its explanations for the Management Board changes – explanations offered at Claimant's meeting with the KNF on 21 August 2003 and in writing on 27 August 2013.[520] Even after the Management Board changes of which the KNF complained, the KNF approved the Bank's remedial plan.

367. As far as the other cited "irregularities" are concerned, it is undisputed that Claimant and the Bank took promptly all corrective action needed to address the KNF's concerns. By the time of all three KNF Decisions, either these irregularities had already

---

[516] Testimony of Mr. Lachowski, at Transcript, Day 3, p. 120, line 2 - p. 126, line 9.

[517] Tr., Day 1, p. 154, line 20 – p. 156, line 13; Day 6, p. 112, line 18 – p. 114, line 17; Day 7, p. 54, line 12 to p. 57, line 3.

[518] Claimant's Post-Hearing Brief, para. 42.

[519] Exhs. C-113 (informing the KNF of the collapse of the three-way merger talks with Meritum Bank); C-120 (informing the KNF of changes to the Management Board of FM Bank PBP, including the resignation and subsequent dismissal of Mr. Stańczuk from the Management Board); C-128 (informing the KNF of further changes to the Management Board of FM Bank PBP, including the appointment of Mr. Lachowski).

[520] Exh. C-133.

been corrected or Claimant had assured the KNF that they would not recur.[521] **Nor is there any indication that any of these irregularities had in fact recurred by the time of the Third KNF Decision.**

368. Nor has Respondent established a meaningful link between the stated irregularities and the Bank's financial performance. It has never been demonstrated, nor frankly even suggested, that the failure of consultation on personnel changes or the other irregularities, as such, threatened the Bank's sound and prudent management.

369. Moreover, whatever its failings, Claimant and the Supervisory Board were hardly defiant. Besides correcting errors made, Mr. Gieryński formally apologized and offered to step down as Chairman of the Supervisory Board, effective 31 October 2013.[522] **He was in fact eventually replaced in that position on 31 October 2013 by Mr. Tomasz Bieske.**[523]

370. The Tribunal also has doubts, in terms of suitability, about the timing of the KNF's decisions. Only six days after issuing extensive formal recommendation to the FM Bank PBP following its conduct of an in-depth inspection of the Bank and its supervision, the KNF issued its First Decision to PL Holdings and Abris-EMP suspending their voting rights as shareholders of FM Bank PBP and requiring PL Holdings to sell all of its shares in the Bank by 31 December 2014.[524] **The Tribunal cannot reconcile the issuance of detailed recommendations for future conduct with the adoption of such severe sanctions a mere six days later. It is all the more puzzling in view of the**

[521] See para. 197, supra.

[522] Letter from FM Bank PBP to the KNF, 27 Aug. 2013 (Exh. C-133). See also Letter from the Management Board of FM Bank PBP to the KNF, 18 Oct. 2013 (Exh. C-139).

[523] Letter from the Management Board of FM Bank PBP to the KNF, 7 Nov. 2013 (Exh. C-148).

[524] KNF Decision regarding the ban on exercising voting rights, 8 Apr. 2014 ("First KNF Decision") (Exh. C-173).

Inspection Report's conclusion that "the economic and financial situation of FM Bank PBP S.A. was stable and did not endanger the security of the funds deposited in the bank accounts."[525]

371. Also troubling is the fact that on 25 July 2014, a mere one day after issuing its Second Decision (which, as noted, was prompted by a legal requirement that the KNF assess the effectiveness of the order depriving Claimant of its voting right before imposing an additional more serious sanction), the KNF instituted proceedings contemplating the very much more serious sanction of an order requiring PL Holdings to sell its shares.[526] Respondent has not refuted Claimant's allegation that at a meeting held less than one week later, the KNF indicated to Claimant's representatives that it indeed intended to issue an order compelling PL Holdings to sell its shareholdings in the Bank.[527] These factors support Claimant's suspicion that the outcome of the proceedings initiated on 25 July 2014 was predetermined.[528]

372. Finally, even if the Bank's financial difficulties, rather than these various irregularities, had motivated the KNF to take action, the measures ordered were not appropriate. This is certainly the case of Claimant's loss of voting rights. A sanction of that sort cannot be regarded as suitable for resolving the Bank's financial problems; quite to the contrary. Suspension of those rights voting rights may not altogether prevent the shareholder from taking action to improve the Bank's financial situation, but it quite obviously does not facilitate any such action. Certainly, the KNF cannot plausibly cite

[525] Inspection Record, p. 2 (Exh. C-162).
[526] KNF notification to PL Holdings of the commencement of an administrative proceeding to issue an order to sell the shares in FM Bank PBP, 25 July 2014 (Exh. C-220).
[527] Statement of Claim, para. 238, citing Email from J. Zawadzki to Abris, 31 July 2014 (Exh. C-222).
[528] Statement of Claim, para. 238.

in further justification of this Decision the fact that PL Holdings could not exercise its voting rights, when that is a sanction that the KNF itself had imposed.[529]

373. The Tribunal concludes that, in the circumstances, the KNF measures cannot be justified by concerns relating to the capitalisation of the bank and its liquidity.

Necessity

374. Also problematic is the second prong of the proportionality analysis, namely whether the KNF had at its disposal less draconian means for achieving the legitimate and substantial public interest it considered to be at stake.

375. To the extent that the KNF measures were motivated by the various irregularities cited above, the question whether less drastic means were available to the KNF does not even arise. Given Claimant's prompt and adequate remedying of those irregularities, no serious sanction at all was warranted, much less an unnecessarily drastic one. However, even if sanctions were warranted on these grounds, any number of lesser measures than deprivation of voting rights or a forced sale could readily be imagined.

376. Necessity for the KNF measures plausibly arises only in connection with the Bank's financial problems, and here the KNF unquestionably had numerous less drastic measures at its disposal. Claimant properly points out that the KNF chose to address no supervisory measures to the Management Board, but only the Supervisory Board,

---

[529] See Mr. Kwaśniak's testimony at Transcript, Day 7, p. 105, lines 19-21. See also Claimant's Post-Hearing Brief, paras. 65-67.

even though many of the KNF's grievances pertained to management of the bank.[530] As noted by Claimant, the Banking Act equips the KNF to issue a wide range of orders to bank management that, if issued and complied with, could have gone some distance in meeting the KNF's objectives.[531]

377. Leaving that aside, Respondent has not attempted to survey all the milder available remedies and sanctions it could have addressed to Claimant and the Supervisory Board and show that they would have been inadequate for accomplishing KNF's purposes. Dr. Kluza convincingly recited a good number of measures readily at the KNF's disposal that would have substantially enabled it to address the problems that the FM Bank PBP presented. These included suspending or discharging a member of the Management Board, limiting the permissible scope of banking activity, enjoining bank officials to take or refrain from taking certain actions, issuing public statements, or imposing a financial penalty, among others.[532] Professor Alexander similarly opines that "[i]n the circumstances it faced, it must be the case that the KNF could have chosen less restrictive penalties than compelling the shareholder to sell its shares."[533]

378. The Tribunal finds that Respondent has not successfully refuted these arguments. The Tribunal also notes Dr. Kluza's uncontradicted testimony that neither the KNF nor its predecessor body had ever taken as drastic a measure as dispossessing an investor of its shares in a bank.[534] Nor has Respondent attempted to show that the situation

---

[530] Claimant's Post-Hearing Brief, para. 44.
[531] See paras. 259-261, supra.
[532] Id.
[533] Alexander op., para. 99.
[534] See para. 260, supra.

presented by FM Bank PBP was unprecedentedly dangerous, as one would have expected under these circumstances.

379. The non-necessity of the measures ostensibly taken by the KNF on the basis of the Bank's financial performance is confirmed by the timing of the KNF measures, as described above. Reference has already been made to the fact that only six days after issuing its formal Inspection Report, based on a detailed investigation and accompanied by extensive recommendations, the KNF issued its First Decision to PL Holdings and Abris-EMP suspending their voting rights as shareholders of FM Bank PBP and requiring PL Holdings to sell all of its shares in the Bank by 31 December 2014.[535] It is difficult, under these circumstances, to consider issuance of the First KNF Decision the "least drastic means" available to the KNF.

380. The Tribunal also cannot fail to take into consideration in this regard the potential impact of the KNF's First and Second Decisions – namely depriving Claimant of the right to exercise the voting rights associated with its shares – on Claimant's ability to respond to the KNF's concerns over the health of FM Bank PBP. It is difficult to regard as the "least drastic means" available for addressing a legitimate concern of a State a measure that lessens the addressee's capacity to respond to that concern.

381. Turning in particular to the KNF's Third Decision, it will be recalled that the KNF had predicated its Second Decision in large part on the necessity of giving a first remedial measure an opportunity to achieve its objectives before adopting a second more drastic one. It is precisely for that reason that the KNF was not allowed by law to

---

[535] KNF Decision regarding the ban on exercising voting rights, 8 Apr. 2014 ("First KNF Decision") (Exh. C-173).

combine both the loss of voting rights and forced sale of shares in a single decision. The very fact that, notwithstanding that principle, the KNF initiated the procedure leading to the Third Decision, requiring sale of the shares, so closely on the heels of – i.e., one day after – its Second Decision, depriving Claimant of its voting rights, again makes it difficult to conclude that the KNF had no less draconian measures at its disposal than those it took.

382. Similarly, the KNF launched proceedings against the Claimant and the Bank almost immediately upon announcement of Mr. Lachowski's appointment and without taking the opportunity to ensure that its suspicions surrounding Mr. Lachowski and his likely performance as Bank President had any basis.[536] This timing too strikes the Tribunal as precipitous and not in keeping with the requirement of resort to the "least drastic means."

383. As an aside, the Tribunal notes, without relying on it for its conclusion, that the KNF adopted its Third Decision by a vote of 3-2 (with Mr. Kwaśniak in the minority), and one representative abstaining.[537]

Excessiveness

384. As its final prong, the principle of proportionality requires that a measure taken not be excessive in relation to the purposes meant to be served. There is no question that the measures taken – the forced sale of shares in particular – were exceptionally harsh. The question, in connection with this third prong, is whether the situation facing the KNF was so dire as to justify them.

---

[536] Claimant's Post-Hearing Brief, para. 20.

[537] Communication regarding 241st meeting of the KNF held on 18 November 2014, 18 Nov. 2014 (Exh. C-243).

385. Admittedly, Claimant, acting through the Supervisory Board, failed to act in prompt compliance with all of its commitments. But in determining whether the sanctions imposed were excessive, within the meaning of the proportionality principle, it is important to keep Claimant's shortcomings in perspective. For example, Claimant clearly should have notified the KNF in advance of personnel changes in the Management Board, and failed to do so. However, it is uncontested that at the time of making the changes, the Supervisory Board identified the new personnel as holding office in an "acting" capacity only. This does not excuse the failure to notify, but it does mitigate that failure. More important, and as noted, Claimant and the Bank took promptly all corrective action needed to address the concerns said to underlay the KNF's First Decision. By the time of the Second and Third KNF Decisions, those concerns had been dissipated. And they had certainly been dissipated by the time the KNF mounted its inspection into the Bank.

386. Also troubling, in connection with the claimed excessiveness of the sanctions imposed on Claimant is the KNF's launch of an "Asset Quality Review ("AQR") of FM Bank PBP. The KNF launched that inquiry in early 2015, just while Alior Bank and AnaCap were pursuing their due diligence in connection with possible acquisition of Claimant's shares in the FM Bank PBP Bank.[538] In these proceedings, the absolute necessity for the inquiry was never established, and its timing was, at best, unfortunate. It is not contested that, upon apprising AnaCap of the AQR results, which Claimant was

[538] Letter from the KNF to FM Bank PBP, 27 Jan. 2015 (Exh. C-258); Letter from the KNF to PL Holdings and Abris-EMP, 27 Feb. 2015 (Exh. C-265).

obligated to do, AnaCap had lowered its purchase offer from PLN 100 million (net) to PLN 30 million, thus by PLN 70 million.[539]

387. To justify imposing as severe a sanction as a forced sale of shares – or dispossession, within the meaning of the Treaty – the KNF should have been persuaded not only that the situation was dire, but also that the shareholders had shown themselves to be so utterly unwilling or unable to take corrective action if specifically ordered to do so that dispossession was the KNF's only option. Claimant's witness, Dr. Kluza, former Chairman of the KNF, testified that:

> **I do not consider that any of those purported justifications demonstrate a failure by PL Holdings and Abris as majority shareholders, let alone one that justified the adoption of severe measures against them under the Banking Act. In particular, none of the reasons directly engaged the legal responsibility of the majority shareholder …**[540]

388. Dr. Kluza further testified that he could not recall "any situation in which [he] decided to adopt such supervisory measures to a commercial banking sector entity during [his] term of office as the Chairman of the KNF."[541]

389. In short, the documents and testimony in the case fall well short of refuting the Claimant's contention that the KNF's measures were excessive, within the meaning of the proportionality principle.

Conclusion on Proportionality

390. The Tribunal does not doubt that the KNF acted in what it considered to be the public good. Nor does it question that protecting the stability of a country's banking system

[539] Proposed Terms of Transaction between Abris and AnaCap for FM Bank PBP, 17 Apr. 2015 (Exh. C-273); Boksa ws. Para. 123.
[540] Kluza op., para. 40.
[541] Kluza op., para. 44.

is a matter of great public importance. There are certainly circumstances in which the measures taken to that end would be entirely justifiable and in keeping with the principle of proportionality.

391. However, in order to reach the conclusion that such was the case here, the Tribunal would have to find that, under the circumstances, (a) the measures taken by the KNF were suitable and appropriate in achieving its stated public interest concerns, (b) the KNF had no less draconian means available to it or tried those less draconian means and found them to fail, and (c) the measures taken were not excessive in light of the magnitude of the public interest said to be at stake. The Tribunal cannot so conclude.

D. <u>Did the KNF Seriously Violate Claimant's Procedural Rights?</u>

(a) Claimant's Position

392. The KNF violated Claimant's procedural rights both in taking the challenged measures and in conducting its reconsideration.

393. As a general matter, Respondent advances justifications for the measures taken against Claimant other than those that were advanced at the time and that figure in the KNF Decisions themselves as the basis of those decisions.[542] Such *ex post facto* rationales cannot serve as a defence in these proceedings. They show, in any event,

542 [redacted] See Claimant's Post-Hearing Brief, para. 13, n.22, citing Exhs. C-173, [redacted] Even at the hearing, Mr. Kwaśniak cited as the real reason for issuing the First KNF Decision were the changes in composition of the Bank's Management Board. Transcript, Day 6, p. 114, line 19 – p. 115, line 7, p. 127, lines 10-11. Claimant's Post-Hearing Brief, para. 15.

that Claimant was not, as due process requires, properly informed of the charges against it so as to enjoy a right to be heard before adverse decisions were taken.

394. More particularly, as to the First KNF Decision, Respondent gave Claimant no notice that it would seek to impose the sanction of a forced sale of shares. A bar on voting rights was the only sanction of which Claimant was given notice.[543] It was also admittedly contrary to Polish law for the KNF to impose both sanctions simultaneously.[544] Moreover, Claimant was not given a reasonable opportunity to be heard on its compliance with its investor commitments in advance of issuance of the First KNF Decision.[545] The KNF conducted no interviews in connection with its proceeding against Claimant, relying exclusively on interviews conducted in connection with its proceeding against the Bank.[546]

395. In addition, the KNF launched proceedings almost immediately upon announcement of Mr. Lachowski's appointment and without any effort to ensure that its suspicions surrounding Mr. Lachowski and his likely performance as Bank President had any basis.[547]

396. The Second KNF Decision was also marred by procedural irregularity. Under established practice, decision-makers in an initial KNF decision should be excluded

[543] Exh. C-130.

[544] See testimony of Professor Szewczyk (Transcript, Day 7 (evening), p. 20, line 19 – p. 21, line 4; testimony of Professor Łaszczyca (Łaszczyca op., para. 3.2.

[545] Claimant's Post-Hearing Brief, para. 19. According to Mr. Kwaśniak, it was for Claimant to produce evidence and request interviews. Transcript, Day 6, p. 122, lines 19-23.

[546] According to Mr. Kwaśniak, no interviews were conducted in connection with the proceedings against Claimant because "people heading the proceeding came to the conclusion that there [was] no point." Transcript, Day 6, p. 122, lines 19-21.

[547] Claimant's Post-Hearing Brief, para. 20.

from a proceeding for reconsideration.[548] The evidence suggests that, in fact, no fresh consideration was given to the initial decision to deprive Claimant of its voting rights.[549]

397. The KNF initiated proceedings leading to the Third KNF Decision, re-imposing the order to Claimant to sell its shares, immediately upon issuance of the Second KNF Decision overturning the previous order to the same effect.[550] That the KNF's mind was again made up is supported by Mr. Kwaśniak's invocation at the hearing of his "wife's approach who told [him] that: when you misuse my trust, you would never regain it."[551]

398. Worse yet, reconsideration of the Third KNF Decision was postponed five times,[552] to the point that action on the request for reconsideration was extended even beyond the deadline for the compulsory sale of shares. It is undisputed that these delays were in violation of Polish law, which requires administrative authorities to review their decisions within one month of a request for reconsideration.[553] Nor is there any presumption in Polish law that the silence of the administration for any particular length of time is to be considered as either tacit approval or disapproval of a request.[554]

---

548 [redacted] Exhs. C-172, C-216, [redacted]

[redacted]

550 Exhs. C-217, C-222.

551 Transcript, Day 6, p. 114, lines 16-17.

552 Exhs. C-252. C-26 C-278 C-286 C-350.

553 Transcript, Day 6, p. 185, line 2 – p. 186, line 2.114, lines 16-17 (Respondent's Opening Statement).

554 Transcript, Day 6, p. 189, lines 12-17 (Respondent's Opening Statement).

399. Importantly, under Polish law, reconsideration is a prerequisite for judicial review.[555] However, the KNF's repeated postponements deprived the Claimant of the possibility for review of the Third KNF Decision by an independent and impartial adjudicator. Moreover, there is no evidence suggesting that the KNF conducted any substantive evidentiary proceedings throughout this extended period.[556]

400. Claimant had no reason to believe that the order to sell its shares was impliedly suspended as a result of the successive postponements. The KNF never informed the Claimant directly or indirectly that the 30 April 2015 deadline had been suspended by virtue of the Claimant's reconsideration application.[557]

(b) Respondent's Position

401. Respondent takes the position that in order for an investor to invoke procedural irregularities in support of its claim, it must establish a denial of justice, or a willful disregard of due process of law.[558] The KNF did not "cross the line."[559]

402. The fact that the witnesses were notified that they would be interviewed as part of a receivership proceeding, but have their interviews used in a proceeding for a prohibition on the exercise of voting rights cannot be regarded as a gross due process

---

[555] Exh. CLA-57 (Code of Administrative Proceeding), art. 35; Szewczyk op. 1, para. 73; Transcript, Day 1, p. 188, lines 11-14, p. 190, line 2 - p. 191, lines 5-7.
[556] Claimant's Post-Hearing Brief, para. 27
[557] [redacted] Transcript, Day 1, p. 188, line 4 – p. 189, line 23.
[558] Respondent's Post-Hearing Brief, paras. 84-85.
[559] Respondent's Post-Hearing Brief, para. 87.

violation.[560] In any event, Claimant had access to all the evidence collected in the receivership proceeding and suffered no detriment.

403. Contrary to Claimant's assertions, the timing and manner in which the KNF dealt with Claimant's application for reconsideration of the Third KNF Decision conformed to the relevant CAP provisions. It could not reasonably be expected that the reconsideration procedure could be completed in one month, even if the law so required. Postponements are, in any event, permitted, as here, where the matter was referred to an entirely new team. The KNF's handling of the request for reconsideration was tainted neither by animosity nor by a "hidden agenda," as alleged.[561]

404. Finally, even if there were shortcomings in the KNF's mode of proceeding, they have no bearing inasmuch as "[t]he only issue of material relevance is that all decisions at question were justified and legitimate."[562] Otherwise put, the KNF's alleged procedural shortcomings are irrelevant to [proportionality], as, contrary to the Claimant's opinion, … proportionality should be assessed as regards the merits.[563]

(c) Findings of the Tribunal

405. Although the Tribunal's finding that the measures taken by the KNF failed the principle of proportionality is sufficient to justify the conclusion that Respondent violated its obligations of investor protection under the Treaty, the Tribunal is also

560 Respondent's Post-Hearing Brief, paras. 91-92, 97-99.
561 Respondent's Post-Hearing Brief, para. 113.
562 Respondent's Post-Hearing Brief, para. 157.
563 Respondent's Post-Hearing Brief, para. 236.

troubled by several aspects of the way in which the KNF proceeded in this case, unreasonably ignoring Claimant's right to a timely hearing on this issue.

406. As a procedural matter, the KNF never should have issued in its First Decision the combination of an order depriving Claimant of its right to vote its shares and an order requiring it to sell its shares. As noted, the KNF did not allow its prohibition on Claimant's exercise of voting rights to demonstrate its effectiveness as a sanction before embarking on the process of imposing the even more draconian requirement that Claimant dispose of its shares. That represented a serious breach of the KNF's own procedural obligations, albeit one the KNF sought – purely formalistically – to remedy through its Second Decision.

407. The proceedings over Mr. Lachowski's candidacy as President of the Management Board were protracted in the extreme and bordered on the abusive. It was in August 2013 that Claimant requested approval of Mr. Lachowski's candidacy as President of the Management Board and on 4 September 2013, at the KNF's request, it supplied the materials required by Article 22b, paragraph 1, of the Banking Act[564] for obtaining the KNF's approval. The KNF extended the deadline for making that decision multiple times over a long period. On 31 October 2013, the KNF extended the deadline to 20 December 2013;[565] on 10 December 2013, it extended the deadline to 28 February 2014;[566] on 21 February 2014, it extended the deadline to 1 April 2014;[567] and on 28

[564] Motion for approval of S. Lachowski as President of the Management Board of FM Bank PBP, 4 Sept. 2013 (Exh. C-134).
[565] Letter from the KNF to FM Bank PBP, 31 Oct. 2013 (Exh. C-142).
[566] Letter from the KNF to FM Bank PBP, 10 Dec. 2013 (Exh. C-154).
[567] Letter from the KNF to FM Bank PBP, 21 Feb. 2013 (Exh. C-165).

March 2014 it extended the deadline to 30 May 2014.[568] While Mr. Kwaśniak sought to justify each extension on the ground that further investigation was needed,[569] only on 14 May 2014, did the KNF finally interview Mr. Lachowski. But then, on 30 May 2014, the KNF extended the deadline once again, this time to 8 July 2014.[570] On 17 June 2014, the Supervisory Board of the Bank took remedial action, petitioning the KNF to put an end to the delay in acting on Mr. Lachowski's appointment,[571] this step being a prerequisite under Polish law for bringing a complaint before a regional administrative court. Finally, on 22 July 2014, approximately eleven months following the application's filing, the KNF finally approved Mr. Lachowski's appointment as President of the Management Board of the FM Bank PBP.[572]

408. There are additional procedural irregularities cited by Claimant and unrefuted by Respondent. But the most egregious procedural irregularity is KNF's repeated and lengthy postponements of its reconsideration, upon request, of the Third KNF Decision. As noted, reconsideration was postponed five times, to the point that action on the request for reconsideration was extended even beyond the deadline for the

---

[568] Letter from the KNF to FM Bank PBP, 28 Mar. 2013 (Exh. C-168).

[569] Statement of Defence, para. 148. See Kwaśniak ws, pp. 8-9:

> The KNF had to examine a series of issues associated with the candidate, inter alia, his experience, years in service, career in financial institutions so far and professional record in PBP Bank and after the merger. We were also aware that since 2008 Mr. Lachowski has not fulfilled any functions in the management boards of companies in the banking sector. The KNF examined his activity associated with foreign currency loans granted by the bank managed by him previously, the number of suits filed by clients of the bank he was leading; how the post-inspection recommendations in the area of money laundering were implemented in the bank he was leading; his behaviour as a member of the Supervisory Board of Meritum Bank covered by the recovery plan, including the reasons of termination of his cooperation with Meritum Bank. All those activities took time.

[570] Letter from the KNF to FM Bank PBP, 30 May 2014 (Exh. C- 195).

[571] Summons from FM Bank PBP to the KNF to rectify the breach of law, 17 June 2014 (Exh. C-202).

[572] KNF Decision consenting to the appointment of S. Lachowski as President of the management Board of FM Bank PBP, 22 July 2014 (Exh. C-215).

compulsory sale of shares. These delays are in manifest violation of Polish law, which requires administrative authorities to review their decisions within one month of a request for reconsideration, even if extensions are possible.[573] This exceptionally prolonged and repeated failure to act on Claimant's petition for reconsideration effectively barred Claimant's fundamental right of access to court for redress since, under Polish administrative law, a judicial challenge cannot be mounted until a party's reconsideration request has been addressed.

409. This episode reproduced the same pattern of prolonged and inadequately explained delay that Claimant experienced in connection with the proceedings for approval of Mr. Lachowski as Management Board President.

410. The Tribunal concludes that, at the very least, the procedural abuses recounted here compounded the lack of proportionality of the measures imposed on Claimant by the KNF.

E. Did Claimant Sell its Shares Voluntarily?

(a) Claimant's Position

411. Respondent's assertion that Claimant voluntarily sold its shares because the Third KNF Decision was not immediately enforceable is incorrect.[574] Under Article 11.2.5 of the

[573] Transcript, Day 6, p. 185, line 2 – p. 186, line 2.114, lines 16-17 (Respondent's Opening Statement).
[574] Zoll op., paras. 52-72.

Banking Act, failure to execute the required sale on time would have had serious consequences.[575]

412. The Parties are in agreement that the First KNF Decision was immediately enforceable, insofar as it barred Claimant from exercising its voting rights in the Bank.[576] But the Third KNF Decision was immediately enforceable also, since any failure to execute the sale on time would have triggered serious consequences under Article 25n.5 of the Banking Act.[577]

(b) Respondent's Position

413. Because the Third KNF Decision was not immediately enforceable, and because reconsideration proceedings were ongoing, Claimant was under no compulsion to sell its shares by 30 April 2015. It could have waited, not only until a reconsideration ruling was rendered, but also until the administrative courts had ruled on Claimant's challenge. Claimant freely chose to dispose of its shares before the KNF issued its reconsideration decision.

414. In fact, Claimant did not ultimately dispose of its shares until 8 October 2015, over five months beyond the 30 April 2015 deadline later.[578] All that was concluded on 30 April 2015 was a preliminary share purchase agreement.[579]

415. Claimant cannot complain that the KNF failed to inform it that the Third KNF Decision was not immediately enforceable or that the pendency of the reconsideration

[575] [redacted]
[576] Transcript, Day 1, p. 189, lines 12-17 (Respondent's Opening Statement); Exhs. C-167, C-212.
[577] Exh, CLA-5A.
[578] Exh. C-351.
[579] Exh. C-282.

proceeding in any event suspended enforcement of the Decision. The administration is under no legal obligation to inform Parties that are well represented legally of their legal rights and remedies and the timing in which they may or must be asserted, and nothing prevented Claimant from making its own inquiries or seeking confirmation of its understandings. The fact that the KNF made repeated reference to the sale deadline in its communications with Claimant[580] does not mean that the deadline was in fact fixed and immovable. The Claimant may have been convinced that the Decision was immediately enforceable despite the pendency of the reconsideration process,[581] but Claimant's belief is not decisive of what its rights and remedies actually are. Interestingly, on 26 November 2014, Claimant filed its notice of arbitration, even before filing its application for reconsideration of the Third KNF Decision on 3 December 2014.

416. As for actions called for in the Third KNF Decision, Claimant was free to hold off on them, not only until the KNF ruled on the request for reconsideration, but also until the matter was finally decided by the administrative courts. Claimant's interests were fully secured by the fact that the Third KNF Decision was not immediately enforceable.[582]

417. Even if the Decision were immediately enforceable, this would not amount to deprivation of the right of appeal. Appeal is still available even after an immediately

[580] Exh. C-265.
[581] Exh. C-242.
[582] Respondent's Post-Hearing Brief, para. 121.

enforceable order is in fact enforced.[583] "Moreover, under Polish law it was absolutely not possible for the KNF to 'close the door' to the review of its decisions by administrative courts or to hamper the Claimant in requesting compensation before Polish civil courts."[584]

(c) Findings of the Tribunal

418. The Tribunal is unable to conclude that Claimant's sale of shares in April 2015 was voluntary.

419. There is conflicting expert legal testimony as to whether as a matter of law the order to sell the shares was immediately enforceable, in the sense that failure to sell by the deadline would have led to their seizure or otherwise been punishable; the legal experts are in full contradiction. However, Respondent itself advanced the understanding that the Third KNF Decision could be deemed immediately enforceable under three particular circumstances, none of which it maintained were present. The Tribunal disagrees. Two of the circumstances are admittedly not present in this case and cannot justify immediate enforceability. According to the first, a measure is immediately enforceable if it is one that the addressee itself requested. The second circumstance is one in which the KNF would have expressly declared the measure to be immediately enforceable under Article 108 of the Administrative Procedures Code, which of course it did not do. Neither is available to the Claimant here.

[583] Respondent's Post-Hearing Brief, para. 122.
[584] Respondent's Post-Hearing Brief, para. 124.

420. **What matters, however, is the third circumstance that Respondent admits renders a decision of the KNF immediately enforceable, namely that a specific provision of law so prescribes.[585] According to Article 11, paragraph. 2, item 5 of the Banking Law,**

> **[d]ecisions of the Polish Financial Supervision Authority with respect to ordering the sale of shares by a specified date shall have the force of a final administrative decision and shall be subject to immediate enforcement.**

Respondent claims that this provision is inapplicable because it comes into play, by its terms, only if the KNF "order[s] the sale of shares by a specified date," whereas in the present case, the KNF did not order Claimant to "sell" its shares, but merely to "dispose of" them. Accordingly, a conclusion that the Third KNF Decision was immediately enforceable cannot be predicated on this basis either.

421. **The Tribunal finds Respondent's reasoning on this score to be untenable. It was obvious to all that the means by which Claimant would almost certainly "dispose of" its shares would be to "sell" them.**

422. **The Tribunal also rejects Respondent's contention that Claimant, being well represented legally, should have known that it did not need to sell its shares by the end of April 2015. Even if Respondent correctly asserts that the order to Claimant to sell its shares was suspended until the request for reconsideration was acted upon, the KNF gave Claimant no assurance that if the Third KNF Decision was upheld, Claimant would enjoy a reasonable period of time in which to arrange for disposal of its shares.**

---

585 Statement of Defence, paras. 419-425.

423. For the following reasons, however, the Tribunal does not find it necessary to reach an ultimate legal conclusion on the immediate enforceability *vel non* of the Third KNF Decision.

424. Claimant properly took the KNF's orders to sell its shares seriously, acting on the Third KNF Decision in accordance with the terms in which it was framed. It initiated the process promptly even after the First KNF Decision, which had required sale by 31 December 2014, on the assurance by its legal advisers that both the prohibition on voting rights and the sale order were immediately enforceable.[586] As noted earlier, even after the Second KNF Decision overturned the sale order, the KNF made it clear to the Claimant that "it intends to issue a decision ordering to sell the bank's shares again."[587] PL Holdings had to expect that, under Article 25n, paragraph 5, of the Banking Act, failure by PL Holdings to execute the order by the date prescribed would expose it to administrative sanctions in the form of a fine of as much as PLN 10 million (approximately € 2.5 million at the current exchange rate), as well as to placement of the Bank in receivership, revocation of its banking license, and liquidation.[588] There is no evidence to refute the notion that Claimant genuinely and reasonably considered itself bound to make the sale by the 30 April 2015 deadline.

425. But the Tribunal finds that, even if Claimant were mistaken in its belief that the Third Decision was immediately enforceable, the KNF owed it to Claimant, at some point over the long period of postponements of decision on its part, to so inform Claimant.

[586] Exhs. C-430, C-431.
[587] Exh. C-222. See also Exh. C-235, p. 2.
[588] See para. 218, supra.

Upon examination by the Tribunal, Mr. Kwaśniak repeatedly insisted that the KNF had absolutely no obligation to do so.

426. **The Tribunal disagrees. It finds that, despite Respondent's suggestion to the contrary, the KNF was not only obligated to act much more quickly than it did on the request for reconsideration, but ought properly to have advised Claimant that enforcement of its order to sell the bank shares had the effect under Polish law of suspending enforcement of the requirement to sell the Bank shares. The Tribunal finds that good governance requires nothing less. Respondent had ample opportunity over that long period to apprise Claimant of that fact, but chose not to do so.**

427. **The KNF could not have been unaware that Claimant considered the Third Decision to be immediately enforceable. Already on 21 July 2014, PL Holdings and Abris-EMP informed the KNF that they had initiated discussions with interested investors and provided a provisional timeline.[589] At a 31 July 2014 meeting between Claimant and the KNF, the KNF affirmatively stated that it still intended to require PL Holdings' sale of its shares,[590] and so Claimant proceeded to explain to the KNF how it planned to go about selling its shares and who it contemplated as interested investors.[591] The KNF even injected its own views, disfavoring sale of the shares to private equity funds[592]**

[589] Letter from Abris-EMP and PL Holdings to the KNF, 21 July 2014 (Exh. C-213).
[590] Email from J, Zawadzki to Abris, 31 July 2014 (Exh. C-222). PL Holdings' counsel, Jacek Zawadzki's report of the meeting summarized it as follows:
KNF has confirmed that it intends to issue a decision ordering to sell the bank's shares again – such a decision will possibly be taken even within approx. two weeks. They did not specify when the order to sell the shares would be issued, but the starting point is to be 31 December 2014.
[591] Email from J, Zawadzki to Abris, 31 July 2014 (Exh. C-222); Status of the investors in the Porto Project, 30 July 2014 (Exh. C-191).
[592] Email from J, Zawadzki to Abris, 31 July 2014 (Exh. C-222). The KNF cited private equity funds' shorter investment horizons, their strategies, and the negative experiences the KNF had had with them.

and cautioning Claimant about the risk of selling to insufficiently experienced investors.[593] On 13 August 2014, the KNF was presented by Claimant with a "short list" of potential investors.[594] Having ordered the sale of shares well in advance of Claimant's contemplated future IPO, the KNF could not reasonably expect that Claimant suddenly sought to sell its shares voluntarily. The KNF could only suppose that Claimant understood that it had no choice.

428. But, worse yet, the KNF actually led Claimant to believe that it had no choice but to sell upon the stated deadline. As late as January 2015, the KNF, in asking Claimant for an update on the sale, referred expressly to "the deadline for selling the shares specified in KNF's decision of 18 November 2014"[595] which was the Third KNF Decision and which indeed required sale by 30 April 2015. At the hearing, Mr. Kwaśniak was unable to square that reference with the notion that the sale order had somehow been suspended as a matter of law. Thus, even if, as a purely legal matter, the sale order was not immediately enforceable, the KNF did not make the slightest effort to inform Claimant of that fact; instead it made statements that confirmed the existence of a binding deadline by which the Claimant had to sell.

429. Under these circumstances, it would be unjust to Claimant to treat its sale of shares as if it were purely voluntary.

F. <u>Is Claimant Barred from Relief due to Failure to Exhaust Available Remedies?</u>

[593] Statement of Claim, para. 264,

[594] Letter from PL Holdings and Abris-EMP to the KNF, 13 Aug. 2014, attaching a Remedial Plan Update of August 2014 (Exh. C-224).

[595] Exh. C-353.

(a) Claimant's Position

430. To begin with, unlike other Polish BITs,[596] the Treaty at issue in the present case does not impose an exhaustion of remedies requirement. In such circumstances investor-State tribunals have generally not imposed an exhaustion of remedies requirement either, except where the Claimant specifically bases its claim on a denial of justice.[597]

431. In fact, however, Claimant in this case pursued all of the appeal routes, by way of reconsideration or judicial review, that it can reasonably be expected to have pursed, and certainly all of the ones of which it was notified by the KNF.[598]

432. On 3 December 2014, the Claimant filed its motion with the KNF for reconsideration of the Third KNF Decision, alleging that Decision's invalidity.[599] Under Polish administrative law, the filing of such a motion for reconsideration to the KNF and its denial by the KNF is a prerequisite to filing a challenge in the Regional Administrative Court.[600] However, Claimant was unable to pursue an appeal against the Third KNF Decision due to the KNF's repeated postponements in its reconsideration of that decision.

433. Respondent is mistaken in asserting that there remain other remedies that Claimant was required to exhaust before initiating this arbitration. Respondent first invokes the

[596] Claimant's Post-Hearing Brief, para. 92, n. 185

[597] See Inmaris Perestroika v. Ukraine (CLA-25, para. 302); Abengoa v. Mexico (CLA-210, para. 626); Crystallex v. Venezuela (CLA-212).

[598] Polish law requires the KNF to notify aggrieved parties of the remedies for appealing an adverse decision. Claimant availed itself of all the remedies notified to it. See Exhs. C-173, C-218, C-242, C-427.

[599] Application by PL holdings to the KNF for reconsideration of the case closed by the Third KNF Decision, 3 Dec. 2014 (Exh. C-248).

[600] Exh. CLA-57 (Code of Administrative Proceeding), art. 35; Szewczyk op. 1, para. 73; Transcript, Day 1, p. 188, lines 11-14, p. 190, line 2 - p. 191, lines 5-7.

right under Polish law to challenge an administrative body's delay in rendering a decision. However, such a challenge must first be lodged with the body that is accused of delay, and the administrative court that hears the challenge ordinarily takes six months or so to rule.[601] In any case, the court's ruling is not a ruling on the merits, but merely on the matter of delay.[602] Respondent next invokes the possibility of filing a complaint directly to the administrative court on account of delay, but that too only produces a ruling on the delay issue and not on the merits. In order to turn to the administrative court for a remedy on the merits, a party must first seek and await reconsideration by the KNF, and even then cannot expect a ruling from the court in less than six months. Claimant, it is said, could also have moved before the KNF for a stay of enforcement of the Third KNF Decision.[603] Claimant did seek such a stay of enforcement of the Second KNF Decision on 10 September 2014,[604] but the KNF rejected the request twelve days later,[605] as did the administrative courts.[606] Claimant also could have sought from the KNF an explanation of the Third KNF Decision, but that yields nothing more than a clarification of what the KNF has ordered;[607] there is no suggestion in the record that clarification was needed. According to the Experts, there is no remedy in Polish law for requesting an extension of the deadline for

[601] Exh. CLA-57 (Code of Administrative Proceedings, art. 37.1); Transcript, Day 7 (evening), p. 7, line 18 t p. 8, line 247/18-8/24 and 9/6 – p. 11, line 3.
[602] Exh. CLA-58 (Act on Proceedings before Administrative Courts, art. 149.1)
[603] Exh. CLA-57 (Code of Administrative Proceedings), art. 135, according to which "[i]n justified cases the [KNF] may stay the immediate enforcement of the decision."
[604] Exh. C-206.
[605] Exh. C-231.
[606] Exh. C-261 (decisions of 4 Feb. 2015, 29 May 2015).
[607] Exhs. CLA-207, CLA- 208, CLA-209; Claimant's Post-Hearing Brief, para. 85.

disposal of the shares.[608] Claimant could only have sought reconsideration, which it of course did.[609]

434. Thus, apart from the fact that the KNF brought none of these other remedies to Claimant's attention, none of them would have given Claimant a reasonable chance within a reasonable time of having its claims heard.[610] Given the administrative court's exceptionally long delay in ruling on Claimant's appeal from the Second KNF Decision, and given the repeated postponements of action on Claimant's request for reconsideration of the Third KNF Decision, these avenues, even if available, would have been of purely hypothetical value only.[611]

(b) Respondent's Position

435. Claimant did not make systematic use of the remedies available to it. According to Article 135 CAP, "[i]n justified cases the appellate authority may stay the immediate enforcement of [a] decision."[612] Claimant filed a motion to stay enforcement of the Second KNF Decision, but inexplicably refrained from filing a similar motion in connection with the First and, above all, the Third KNF Decision.[613] The most likely explanation is that, contrary to its assertion in this case, Claimant did not in fact view the Third KNF Decision as immediately enforceable.[614]

608 Testimony of Prof. Szewczyk, Transcript, Day 7, p. 184, lines 10-15; testimony of Professor Łaszczyca, Transcript, Day 7, p. 186, lines 5-12.
609 Exhs. C-185, C-248.
610 Exh. CLA-22, para. 435.
611 Claimant's Post-Hearing Brief, para. 88.
612 Exh. RLA-28.
613 Exhs. C-206, RLA-82.
614 Claimant's Post-Hearing Brief, para. 168.

436. **Similarly, Claimant had at its disposal a remedy under Article 113 APC in the form of a request for explanation of an administrative decision in the event of any uncertainty concerning its scope or effect. It could thus have asked the KNF directly whether the Third KNF Decision was immediately enforceable.**

437. **Also available to Claimant, but not exercised, was the remedy afforded by Article 37 CAP. Under that provision, a Party may challenge directly the failure of an administrative authority to issue a decision within the prescribed time limit.**

438. **In sum, Claimant cannot properly prosecute a claim of expropriation under the Treaty without having taken sufficient and due care to make use of the existing local remedies.**

(c) Findings of the Tribunal

439. **The extent to which investors are required to exhaust remedies prior to initiating investor-State arbitration under BITs is not a settled matter. The reference here is not of course to specific preconditions to arbitration (such as mediation or litigation in national court for a stated length of time), but rather to a general exhaustion of remedies requirement.**

440. **Some BITs expressly impose an obligation to exhaust administrative and/or judicial remedies before resorting to arbitration. Many of the early BITs did precisely that. Thus, for example, the 1976 Germany-Israel BIT provided that "[l]ocal judicial remedies shall be exhausted before any dispute is submitted to an arbitral**

tribunal."[615] The 1981 Romania-Sri Lanka BIT states that "each Contracting Party hereby requires the exhaustion of local administrative or judicial remedies as a condition of its consent to conciliation or arbitration."[616] The examples can be multiplied.

441. The prevailing view, however, is that in the absence of treaty language of this sort, no generalized exhaustion of remedies requirement is applicable.[617] The ICSID Convention, not applicable to this case of course, so states in Article 26:

> **Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[618]**

But non-ICSID investor-State tribunals have largely taken the same position.[619]

442. The Treaty in the present case contains no requirement of exhaustion of remedies. The Tribunal concludes that Claimant was not therefore obligated under the Treaty to exhaust either administrative or judicial remedies prior to instituting arbitration.

443. The Tribunal notes, however, that Claimant was in any event anything but idle with respect to availing itself of local remedies. As noted, on 25 August 2014, Claimant challenged both the First and relevant portion of the Second KNF Decisions in the

---

615 Treaty between the Federal Republic of Germany and the State of Israel concerning the Encouragement and Reciprocal Protection of Investments (24 June 1976), art. 10, para. 5.

616 Agreement on the Mutual Promotion and Guarantee of investments (9 Feb. 1981), art. 7, para. 2.

617 Ursula Kriebaum, Local Remedies and the Standards for the protection of Foreign Investments, in International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer (C. Binder et al., eds.) (Oxford Univ. Press., 2009), p. 426.

618 See Christoph Schreuer, The ICSID Convention: A Commentary (Cambridge Univ. Press, 2d ed. 2001), art. 26, paras. 96-98.

619 See, e.g., Nykomb Synergetics Technology Holding AB v. Republic of Latvia, S.C.C. award, at 10 (16 Dec. 2003); CME Czech Republic B.V. v. Czech Republic, UNCITRAL, paras. 245-247 (22 May 2002); Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia, UNCITRAL, partial award on jurisdiction, paras. 189, 204-208, 220-222 (8 Sept. 2006)

Warsaw Regional Administrative Court.[620] It was unsuccessful both in that court[621] and on appeal in the Supreme Administrative Court.[622] We know that on 21 October 2016, Claimant's challenge to the Second KNF Decision was finally rejected on the merits by the Warsaw Regional Administrative Court.

444. As for the Third KNF Decision, Claimant duly filed for reconsideration, which is a prerequisite to any subsequent judicial challenge,[623] and it is that request that the KNF repeatedly postponed deciding. To that extent, the KNF obstructed Claimant's access to the principal remedy available to it under local law. The parties disagree over whether certain other remedies cited by Respondent would have been effective in addressing Claimant's objections to the KNF Decisions. However, no determination of that matter is required. The Tribunal finds that, though not required under the Treaty to do so, Claimant invoked or sought to invoke the most important and direct remedies offered under Polish law.

445. Failure to exhaust remedies is accordingly no basis for denying Claimant compensation under the Treaty to which it is otherwise entitled.

XIII. TO WHAT RELIEF, IF ANY, IS CLAIMANT ENTITLED?

A. Is Claimant Entitled to Recover Damages and, if so, in what Amount?

(a) Claimant's Position

[620] Compliant by PL Holdings and Abris-EMP filed with the Regional Administrative Court against the Second KNF Decision, 25 Aug. 2014 (Exh. C-228).
[621] Ruling of the Regional Administrative Court, 4 Feb. 2015 (Exh. C-261).
[622] Appeal against Regional Administrative Court Ruling of 4 February 2015, 13 Mar. 2015 (Exh. C-268). See Statement of Claim, para. 247.
[623] Exh. CLA-57 (Code of Administrative Proceeding), art. 35; Szewczyk op. 1, para. 73; Transcript, Day 1, p. 188, lines 11-14, p. 190, line 2 - p. 191, lines 5-7.

446. As set out above, the Tribunal has determined that Respondent expropriated Claimant's shares of stock in FM Bank PBP by compelling Claimant to sell those shares at a highly disadvantageous moment and before Claimant was even in a position to mount its intended IPOs. Claimant is therefore entitled to damages in an amount equal to the difference between the profit it can reasonably be expected to have made if the IPOs had occurred as planned and the price paid by AnaCap in purchasing those shares at the time it did.

Paul Rathbone's First Expert Report

447. Claimant's Expert, Paul Rathbone, submitted an independent expert report on valuation dated 31 July 2015. In that report, Mr. Rathbone made a valuation of Claimant's investment in FM Bank PBP under the counterfactual assumption that the KNF had not issued its rulings barring Claimant from exercising its voting rights and requiring it to dispose of its entire stake in the Bank by 30 April 2015. Absent the KNF's rulings, Claimant would have remained free to implement the business plan that the Bank had developed in 2013, in anticipation of a sale by Claimant of its shares through a staged IPO at a later time of its choosing.[624] Though the actual date of sale of the Bank to the buyer, AnaCap, was 30 April 2015, Mr. Rathbone set as his date of valuation 31 December 2016, a date chosen on the basis of an estimate that that might be the date of issuance of the award in this case.[625]

---

[624] Rathbone Rpt., para. 2.
[625] Rathbone Rpt., para. 53.

448. **The IPO offerings were never contemplated to have taken place in December 2016, but rather at later dates. It is accordingly necessary to update any 31 December 2016 valuation of Claimant's shareholdings in the Bank to reflect their actual value at the time the contemplated IPO would have occurred. The investment memorandum prepared in anticipation of the merger of FM Bank and PBP Bank identified as a leading exit strategy a pair of IPOs, the first contemplating disposal of a tranche of 40% of Bank shares on 30 April 2017, and the second contemplating disposal of a tranche of 60% of Bank shares on 30 April 2018.[626]**

449. **Mr. Rathbone prefers a forward-looking basis for calculation rather than one based on the Bank's profile as of the time of the alleged expropriation itself. At the time of the Third KNF Decision, the Bank, in Mr. Rathbone's words "had just gone through its merger,… was just started on its restructuring plan and its results were pretty poor."[627] He considers it unreasonable to assess the Bank's financial value before the strategic plan "had a chance to really get up and running."[628] He regards his methodology as appropriate for a "growth company."[629]**

450. **Mr. Rathbone disfavors using the bids actually received during the auction process as evidence of value because he doubts that they at all adequately reflected the Bank's real financial promise in the years immediately ahead.[630] For example, AnaCap had a very different business strategy which included closing the corporate unit and**

---

[626] Rathbone Rpt., para. 49.
[627] Tr., 19 July 2016, p. 35, lines 21-24.
[628] Tr., 19 July 2016, p. 34, line 25 – p. 35, line 1.
[629] Tr., 20 July 2016, p. 58, lines 3-5.
[630] Tr., 19 July 19 2016, p. 41, lines 4-6. "[Bidders put very little value in [future profits] because essentially they were getting it on the cheap."

promoting instead the consumer finance unit.[631] Above all, he characterizes the sale to AnaCap as "a forced or fire sale."[632] He also doubts the accuracy of so-called comparable transactions, since they were entered into prior to the merger, prior to the new strategic plan (especially the retail banking launch) and prior to the new management team.[633]

451. Mr. Rathbone's basic methodology consisted of what he identifies as a "comparative multiplier approach," which essentially entails the following steps. First, he establishes a net profit projection figure by using the projections shown by the Bank for the two calendar years in question, 2017 and 2018. Mr. Rathbone had at his disposal, as the basis for such projections, eight different sets of financial projections drawn up for various purposes, beginning with the remedial plan of June 2013 and ending with an updated March 2015 set of numbers.[634] For several reasons,[635] Mr. Rathbone considered the Bank's five-year (2014-2019) December 2014 business plan to be the most valid source.[636] According to Mr. Rathbone, the January 2014 plan failed to consider the retail banking launch and more specifically, the BankSmart project championed by Mr. Lachowski,[637] as well as his introduction of a credit risk management system.[638] While the July 2014 plan had begun to reflect the retail

[631] Tr., 19 July 2016, p. 66, lines 8-21.
[632] Tr., 20 July 2016, p. 55, lines 10-12.
[633] Tr., 19 July 2016, p. 46, lines 12-17.
[634] Rathbone Rpt., para. 115.
[635] Rathbone Rpt., para. 16.
[636] Rathbone Rpt., para. 116.
[637] Tr., 20 July 2016, p. 82, lines 15-17.
[638] Tr., 20 July 2016, p. 82, lines 25 – p. 83, line 15.

banking launch,[639] and was the one given to prospective bidders, it failed to take into account the fall in interest rates that occurred in autumn 2014.[640] The December 2014 business plan was an apt one to use because it was conservative in that it specifically reflected the detrimental effects of KNFs decisions insofar as Claimant's loss of voting rights impeded the infusion of new capital to fund growth and generated staffing problems, in the form of staff departures and difficulties in recruitment.[641] While admitting that the Bank was in a rather weak, even poor, financial situation in 2014 and into 2015,[642] Mr. Rathbone viewed the Bank as in a turnaround mode.[643] He testified that he had a high degree of confidence that the December 2014 Business Plan projections could be achieved.[644] By contrast, Mr. Rathbone believed that the March 2015 Business Plan reflected detriment from the KNF measures and, in particular, the pressure to sell.[645] According to him, if one were to use the March 2015 figures, one would have to imagine that the IPOs would be postponed.[646]

452. The December 2014 business plan (encompassing the Banks' micro-lending, corporate, retail and treasury units) reported actual net income in 2014 of PLN 203.936 million and projected net income for years 2015, 2016, 2017, 2018 and 2019, respectively, of PLN 235.277 million, PLN 352.306 million, PLN 493.060 million, PLN 569.829 million,

---

639 Tr., 19 July 2016, p. 64, lines 14-19.
640 Tr., 19 July 2016, p. 65, lines 19-22.
641 Rathbone Rpt., para. 119.
642 Tr., 20 July 2016, p. 27, lines 13-18.
643 Mr. Rathbone testified, on cross-examination, that while the Bank's financial situation had been difficult, it "had moved on." Tr., 20 July 2016, p. 27, lines 3-12.
644 Tr., 19 July 2016, p. 72, lines 10-20, p. 76, line 23 – p. 77, line 1, Tr., 20 July 2016, p. 47, lines 1-4.
645 Tr., 19 July 2016, p. 75, lines 8-13, p. 79, lines 9-12.
646 Tr., 19 July 2016, p. 158, lines 15-23.

and PLN 635.917 million, representing a cumulative average of 26%.[647] (The income growth here projected is based on an average projected growth rate in banking assets for that period of 26 %.[648])

453. **By way of check, Mr. Rathbone compared the December 2014 growth projections with the historical growth (in the period of 2009 to 2014) of a group of comparable publicly traded banks on the Warsaw Stock Exchange (WSE), namely Bank Pocztowy, Alior Bank, and Meritum Bank, all of which resemble FM Bank PBP in terms of business focus and size.[649] For the performance of a fourth comparable bank (mBank), Mr. Rathbone exceptionally used the 2003 to 2008 period, because it was a time in which that bank, under the leadership of Mr. Lachowski himself, pursued a particular focus on the retail sector.[650]**

454. **Mr. Rathbone finds in the growth data of these banks confirmation of the reasonableness of FM Bank PBP's projected growth rate for the 2014-2019 period and evidence that those projections were not overly optimistic.[651]**

455. **In accordance with the "comparative multiplier approach," Mr. Rathbone then selected a Price-to-Earnings (P/E) multiple, a formula he regards as the most common to be used in an IPO valuation, particularly of a growth company.[652] A P/E multiple is a standard means of establishing the value of a stock and is arrived at by dividing the**

---

[647] Rathbone Rpt., para. 91.
[648] Rathbone Rpt., paras. 93-94.
[649] Tr., 19 July 2016, p. 91, line 9 – p. 94, line 1.
[650] Rathbone Rpt., para. 99-105.
[651] Rathbone Rpt., para. 109. As a further check, Mr. Rathbone tried to calculate what Claimant's return on investment would have been if it had been able to hold its asset to maturity. Based on past investment data, he arrives at a return on investment of 28 % which he considers to fall within normal expectations. Id., para. 112.
[652] Tr., 20 July 2016, p. 100 line 23 – p. 101, line 21.

actual stock price by earnings per share (EPS), thus indicating how many years at that earning level would be required to equal the stock price. Mr. Rathbone selected a P/E multiple by consulting the P/E multiples of listed Polish banks at 20 July 20 2015, the closest practicable date close to finalization of his report. Examination of the financial data yielded a median P/E of all WSE-listed banks of 15.6.[653] To arrive at a more exact figure, Mr. Rathbone then confined himself to data for the three WSE-listed banks (Alior, Millennium and Getin Noble) having business most comparable to FM Bank PBP's. That resulted in a median P/E of 15.3,[654] the figure he chose to use.

456. For greater precision, the comparative multiplier approach calls for applying the chosen multiple to a company's "maintainable" rather than merely "base" profits figure,[655] the former being meant to more accurately reflect the company's future prospects and risks. To arrive at the Bank's maintainable profit figure, Mr. Rathbone made two adjustments to its expected net profit figures for 2017 and 2018 based on the Bank's December 2014 Business Plan. These adjustments related to the Bank's so-called "Warsaw Receivables" and to contemplated Bank projects that were not consummated on account of the KNF measures, but were probable.

457. The Warsaw Receivables refers to the amount the Bank was owed by the City of Warsaw as compensation for a forced sale of property. The Bank had acquired this asset in 2011 and 2012. Though the exact amount of the debt remains in dispute, it was valued in the Bank's 31 December 2013 balance sheet at PLN 210.9 million. As

[653] Rathbone Rpt., para. 174.
[654] Rathbone Rpt., paras. 176, 181.
[655] Rathbone Rpt., para. 182.

Claimant's sale of the Bank to AnaCap in April 2015 approached, Claimant learned that AnaCap was unwilling to include this asset in its acquisition of the Bank, with the result that Claimant itself was required to purchase it from the Bank at book value. For this reason, Mr. Rathbone removed the effects of the Warsaw Receivables from the Bank's financial projections. Mr. Rathbone in effect asserted, and Mr. Caldwell on cross-examination conceded, that "the Claimant didn't receive the Warsaw Receivable as a form of consideration for the shares of the Bank."[656]

458. Second, at the time the KNF took its measures, the Bank was conducting several sets of negotiations with certain large retail organizations to whose customers the Bank sought to provide mobile banking services.[657] Mr. Rathbone attached a reasonable probability of success to achieving at least one of the contemplated opportunities, namely the so-called White Label project.[658] Because the project had not yet reached the stage of Board approval at the time of the KNF measures, its success could not be assured and it was not reflected in the December 2014 Business Plan. Rathbone nevertheless considered its success to be "real and measurable" and its inclusion in the valuation to be warranted.[659] Inclusion of the White Label Project in the valuation necessitated an increase in the amount of Claimant's required capital contribution to maintain the applicable capital adequacy ratio. Mr. Rathbone considered that the Abris II Fund would have provided this capital and he therefore included this increase

[656] Tr., 20 July 2016, p. 18b, lines 6-25.
[657] Tr., 19 July 2016, p. 101, lines 12-17.
[658] Rathbone Rpt., para. 139. The White Label project refers to the Bank's prospective arrangement with PLAY, a Polish mobile telephone company.
[659] Rathbone Rpt., para. 138.

in his estimate of Claimant's cash outflow.[660] According to Mr. Rathbone, the KNF's actions necessarily aborted this project.[661] Otherwise, in his view, the KNF would have had no reason not to approve it.[662]

459. When these two adjustments are made, the maintainable profit figures for 2017 and 2018 were PLN 145.39 million and PLN 173.38 million, respectively. Applying the 15.3 P/E multiplier to these maintainable profit levels yielded the following analysis of IPO proceeds:

> **(a) A first tranche of the IPO, to be performed on April 30. 2017, would cover 40% of the Bank's shares and be based on the year's maintainable profit figure of PLN 145.39 million. That figure, when multiplied by the 15.3 P/E multiple, yields IPO proceeds of PLN 889.79 million. From that amount is deducted 6%, or PLN 53.39 million, to account for expenses associated with the IPO itself (such as underwriting, legal and accounting fees), thus yielding net proceeds on the first tranche of PLN 836.4 million.**
>
> **(b) A second tranche of the IPO, performed on April 30. 2018, would cover 60% of the Bank's shares and be based on that year's maintainable profit figure of PLN 173.38 million. That figure, when multiplied by the 15.3 P/E multiple, yields IPO proceeds of PLN 1.591,660 billion. From that amount is likewise deducted 6%, or PLN 95.5 million, to account underwriting, legal, accounting and like fees, thus yielding net proceeds on the second tranche of PLN 1.496,160 billion.**

460. The total proceeds of the two IPOs would amount to PLN 2.332.560 billion. This amount, however, would need to be discounted to 31 December 2016 through a Discounted Cash Flow ("DCF") calculation to reflect the time value of money and the risk of delay in receiving funds.[663] Using a standard capital asset pricing model tailored

---

[660] Rathbone Rpt., para. 169.
[661] Tr., 19 July 2016, p. 102, line 19 – p. 103, line 4.
[662] Tr., 19 July 2016, p. 107, lines 10-14.
[663] Rathbone Rpt., para. 59.

to the Polish banking sector, he arrives at a cost of capital rate of 8.40%.[664] This operation resulted in a discounted value of the IPO proceeds, as of 31 December 2016, of PLN 2.157 billion, from which is deducted PLN 228 million in additional equity required of Claimant between 2014 and 2017 to enable the Bank to meet its capital adequacy requirements. The resulting sum is PLN 1.929,390 billion.

461. PL Holdings was not, however, the Bank's sole shareholder. Mr. Stepniak would still have held a 0.41% interest in the Bank, valued at PLN 7.9 million, leaving Claimant's net IPO proceeds at the level of PLN 1.921,481,566.

462. For Mr. Rathbone, there still remain two adjustments to be made. First, Claimant must account for the proceeds of its actual April 30, 2015 sale of the Bank to AnaCap for PLN 29,878,410 million, thus reducing the potential recoverable damages to PLN 1.891,603,156 billion. Second, Mr. Rathbone takes into account the fact, while Claimant will not have received the proceeds from the IPOs until 2017 and 2018, it will already have received in 2015 the proceeds from the sale of the Bank to AnaCap. To capture the time value of that sum of money, Mr. Rathbone "uplifts" the purchase price paid by AnaCap, using the same cost of capital as used earlier (i.e., 8.4%) by the amount of PLN 3,189,939.

463. With that final deduction made, Claimant's loss as of 31 December 2016 is quantified by Mr. Rathbone at PLN 1.888,413,217 billion.

Paul Rathbone's Second Expert Report

---

[664] Rathbone Rpt., paras. 187-194.

464. **On 26 February 2016, Mr. Rathbone issued a Second Report, taking account of and responding to Mr. Caldwell's First Report. This Report echoes most of the themes set forth in Mr. Rathbone's First Report.**

465. **Mr. Rathbone reaffirms the correctness of basing the Bank's valuation on a forward-looking methodology, predicated on the Bank's December 2014 Business Plan.**

> **It is clear to me that the Business Plan of December 2014 was closely based on the Bank's Strategy for 2014-2017 developed by its management prior to the dispute between PL Holdings and the KNF, and only adjusted to reflect real events that had occurred in the intervening period between the preparation of the two plans. That strategy in turn was developed from and consistent with the Remedial Plan of June 2013 that was formally accepted by the KNF. I remain of the opinion that the plans were professionally prepared and provide the most suitable basis for the valuation of the Bank in a "but for" scenario.**[665]

According to Mr. Rathbone, by contrast,

> **Mr. Caldwell does not use any of FM Bank PBP's projections in his "income approach" valuations. Instead he uses a projected asset growth model, which takes industry average growth rates for banking assets, applies these to the Bank's actual figures at the end of 2014 and derives a set of financial projections by using industry ratios. I believe that his approach wholly fails to take account of the particular circumstances of FM Bank PBP.**[666]

466. **Mr. Rathbone accordingly criticizes all but Mr. Caldwell's "income calculation" as based on projections that are unduly negative. He finds particularly objectionable Mr. Rathbone's use of the AnaCap sale price as a transaction-based proxy for the worth of the Bank, due to the combined facts that (a) Claimant was not a "willing seller," (b) the Bank was not at that time in a decent state to be sold (it was "unready"), (c) competition among bidders was minimal due to the circumstances and timing of the sale, and (d) the market believed that PL Holdings was being forced to sell and it**

---

[665] 2d Rathbone Rpt., para. 16.
[666] 2d Rathbone Rpt., para. 17.

behaved accordingly.[667] All in all, the sale to AnaCap cannot be regarded as a "fair market value" sale.[668] The two other transactions employed by Mr. Caldwell as comparators under the "transaction" approach are in Mr. Rathbone's view, for a variety of reasons, simply not comparable.[669] As for Mr. Caldwell's "market approach," it allegedly ignores the Bank's growth potential by focusing unduly on the Bank's earnings and assets in and around the date of expropriation.[670]

467. According to Mr. Rathbone, both his methodology and his reliance on the December 2014 Business Plan are "totally consistent with PL Holdings' status as part of a private equity fund, where a 'restructure, grow and exit' strategy is very commonplace."[671] According to Mr. Rathbone, Mr. Caldwell clearly ignores the fact that PL Holdings is a P/E investor and disregards the reality of how such investors manage with their investments.

468. Although Mr. Caldwell's income calculation has the merit of being forward-looking, the figures used in making that calculation are, in Mr. Rathbone's estimation, flawed. Mr. Caldwell's income calculation thus fails to recognize that "PL Holdings was forced to sell its investment early, at a price that did not reflect its growth prospects, and was thus denied the opportunity to implement its investment strategy to grow its investment and divest according to that investment strategy."[672] For much the same

[667] 2d Rathbone Rpt., paras. 52-64.
[668] 2d Rathbone Rpt., paras. 5-6.
[669] 2d Rathbone Rpt., paras. 105-113.
[670] 2d Rathbone Rpt., para. 127.
[671] 2d Rathbone Rpt., para. 8.
[672] 2d Rathbone Rpt., para. 74.

reason, he finds fault, among other things,[673] with Mr. Caldwell's use of a P/BV multiplier, in preference to a P/E multiplier, on the ground that the former is appropriate only for a mature business with steady growth, but not for a growing business that had only just been restructured and was embarking on a new business strategy under new management, pursuant to a remedial plan that had been agreed to by the KNF. [674]

469. That said, Mr. Rathbone does introduce several changes in his calculations. On the one hand, he defers to Mr. Caldwell's observation that there is often an IPO discount in the case of a new entrant, reflecting: (i) a lack of history of provision of good quality non-financial information, and (ii) an incentive for investors to buy the shares, to ensure that the IPO is a success and to encourage an aftermarket. He concedes that most practitioners would include an IPO discount, and so proceeds to apply a 12% discount to the initial IPO, that figure being the average of the discount rates quoted by Mr. Caldwell.[675] On the other hand, Mr. Rathbone believes he had erred in including underwriting fees among the prospective costs of the IPO, since it is in fact

---

[673] According to Mr. Rathbone, Mr. Caldwell unjustifiably includes two additional risk premia within his discount rate calculation and imputes asset growth and a return on assets figures by looking at the Polish banking sector as a whole, rather than at comparable subsectors. 2d Rathbone Rpt., para. 129.

[674] 2d Rathbone Rpt., paras. 11-12. Thus, Mr. Caldwell mistakenly build his projections "on the Bank's assets and depressed earnings in 2014 [which fails to] represent the true underlying value of the shares." 2d Rathbone Rpt., para. 157:

> Whilst I agree that the recent history of one of the predecessor banks (PBP Bank) had raised some serious challenges, I believe that Mr. Caldwell's description of the merged Bank is unduly negative. His review ignores the history of the second predecessor bank (FM Bank), the effect of the new management brought in after the merger and the restructuring plan that management had developed, based on the Remedial Plan agreed with the KNF, and that the Bank had started to implement.

2d Rathbone Rpt., para. 162.

[675] 2d Rathbone Rpt., paras. 83-85.

unusual to pay underwriting fees in Poland. He thus reduces the IPO expense percentage from 6% to 1 %.[676]

470. In addition, Mr. Rathbone agreed not to disregard the Warsaw Receivable fully, but rather to charge it to Claimant to the extent of the portion of the compensation already paid in the amount of PLN 2,636,264.[677] However, he maintains that Claimant's lost earnings must include a portion of expected proceeds from the White Label project.[678]

471. Mr. Rathbone's computation, as adjusted, is reflected in his Table 9 as follows. This table shows a bank valuation on 31 December 2016 of PLN 1.940 billion, as compared to Mr. Rathbone's original PLN 1.929 billion.[679]

---

[676] 2d Rathbone Rpt., paras. 89-90.
[677] Tr., 20 July 2016, p. 60, lines 21-23.
[678] 2d Rathbone Rpt., para. 16.
[679] 2d Rathbone Rpt., para. 21.

Table 9: Revised Calculation of Value to Equity

PLN million	Year ending 31 December				
	2014	2015	2016	2017	2018
Net profit after tax					
Business plan Dec. 2014	(9.02)	0.34	47.63	130.67	137.61
Adjustment to exclude Receivable	2.35	4.70	4.70	(11.74)	0.00
Adjustments for White Label business	(0.98)	2.45	12.01	26.46	35.77
Projected Maintainable Net Profit after Tax	(7.65)	7.49	64.34	145.39	173.38
Planned Equity Increase	0.00	(100.00)	(45.00)	0.00	
Additional equity required to meet Tier 1 target	0.00	0.00	(17.98)	(57.82)	
Terminal value - IPO Proceeds			0.00	889.79	1,591.63
Less: IPO Discount (12% on tranche 1)					(106.77)
Less: IPO Expenses (1%)			0.00	(8.90)	(15.92)
Net cash flow to equity	0.00	(100.00)	(62.98)	716.30	1,575.71
Discount Factor (8.40%)	1.1751	1.0840	1.0000	0.9731	0.8977

Net present values	0.00	(108.40)	(62.98)	697.03	1,414.51
Valuation of business at 31 December 2016					**1,940.16**
Less: value of minority interest (1,252/308,907)					(7.86)
Valuation of PL Holdings shares at 31 December 2016					**1,932.30**

472. On this basis, Mr. Rathbone arrives at a recalculated damages figure in Table 11, as follows:

Table 11: Loss incurred by PL Holdings

	Amount	Date	Days	Interest at 8.40%	Valuation at 31 31 Dec. 2016
Value of PL Holdings' investment at 31 December 2016		31/12/2016			1,932,296,532
Less: Initial Equity Price Received from AnaCap	(22,448,698)	16/10/2015	442	(2,283,494)	
Tranche 1 and Tranche 2 Escrow	(7,429,712)	16/04/2017	(106)	181,244	(29,878,410)
Less: Cash received from Warsaw Receivable claims[680]	(2,636,264)	16/10/2015	442	(268,162)	(2,636,264)
Add: Deferred consideration Actually paid to IFC[681]	5,068,641	16/10/2015	442	515,585	
Less: counterfactual deferred consideration paid upon IPO[682]	(23,144,985)	30/06/2017	(181)	964,100	(18,076,344)

[680] Rathbone explains: "As discussed in section 1, I have only accounted for the Warsaw Receivable to the extent that it has generated cash."
[681] Mr. Rathbone explains: "The IFC Deferred Consideration is equal to the higher of PLN 4,155,278 and 50% of the exit value of 12,526 shares in the Bank at the first transaction where PL Holdings sells more than 12,526 shares. As discussed in section 6.2.1, on 16 October 2015 PL Holdings paid the IFC PLN 5,068,641 to settle this liability. However, under my counterfactual scenario, the sale to AnaCap does not take place, and the first time that the IFC Deferred Consideration will be triggered is the IPO in June 2017. Thus I need to account for the additional deferred consideration that PL Holdings would have to pay the IFC under my counterfactual scenario."
[682] Mr. Rathbone explains: "This calculation is complicated by the fact that, under my counterfactual, the Bank will have to issue new capital, thus diluting the IFC stake. On 31 December 2014 FM Bank PBP had 308,907 shares of PLN 1,000 in issue. According to my valuation model (Table 9), new equity of PLN 220.8 million will be required for the years 2016- 2018 to meet capital requirements155. Assuming that new equity was issued at par, this would need 220,800 new shares at PLN 1,000 each to be issued. Thus the share capital at IPO would be 529,707 shares.

Less: uplift on purchase price at cost of capital 8.40%[683]	(890,727)
PL Holdings' loss at 31 December 2016	**PLN 1,880,814,787**

(b) Respondent's Position

473. Claimant has no entitlement to damages both because no expropriation occurred and because, even if it suffered a loss of property, it did so as a result of Respondent's legitimate use of its authority and responsibilities in regulating the Polish banking sector.

Andrew Caldwell's First Expert Report

474. Against the possibility that the Tribunal might find Respondent liable to Claimant in this case, Respondent's Expert, Andrew Caldwell, submitted an expert report dated 6 November 2015, reviewing and critiquing the report submitted by Mr. Rathbone.

475. Comparison of the Experts' reports is rendered difficult due to Mr. Caldwell's having been instructed by counsel to value FM Bank PBP as of 18 November 2014 rather than December 2016, as Mr. Rathbone had been instructed to do. Mr. Caldwell was told

---

My valuation of the 2017 IPO is PLN 889.79 million less the IPO discount of 12%, so 783.02 million. This is for 40% of the company, so the valuation of the whole company at IPO would be PLN 1,957.55 million. Thus the IFC Deferred Consideration payable upon the first IPO would be 50% of 12,526/529,709 of this amount, or PLN 23.145 million. I have thus added back the PLN 5.069 million actually paid and deducted the PLN 23.145 million payable under my counterfactual in my damages calculation."

[683] Mr. Rathbone explains: "The uplift on the purchase price reflects the fact that, under my counterfactual case, various payments and receipts occur at various times, so I need to adjust these amount for the time value of money. I have thus calculated interest on each of the various amounts from the assumed date of each transaction to the date of the valuation, using the same cost of capital as I have used for discounting the IPO proceeds."

that 18 November 2014, the date of the Third KNF Decision, should be treated as the date of the alleged breach and that valuation as of that date had the advantage of logically not reflecting any adverse effects on valuation due to Respondent's alleged breach.

476. As a general matter, Mr. Caldwell considers it safer, in the presence of considerable uncertainty, to avoid forward-looking valuations of the Bank's short-term prospects and the longer-term prospects at the time of a future IPO event, and rely instead on more or less contemporaneous transactions in the shares.[684] He evidently would feel differently if he regarded the Bank as a fully mature business.[685] In fact, Mr. Caldwell doubts that Mr. Rathbone's projections could in fact be achieved.[686] For these reasons, Mr. Caldwell prefers not to base his valuation on any of the Bank's business plans.[687]

477. As alternative methodologies, Mr. Caldwell successively a "transactional value" approach, a "market" approach, and an "income" approach.

478. Under a transactional value approach, one considers recent comparable arm's length transactions in, or offers for, the asset in question. In this case, these transactions arguably include (a) Claimant's acquisition in July 2012 of a 45% share in PBP Bank from IDM, (b) Claimant's acquisition of a 10% share in FM Bank from IFC as part of the FM Bank and PBP Bank merger, and of course (c) the transaction resulting in AnaCap's offer for the Bank, already discussed. As for the first, it reveals a PBP Bank value at

[684] Tr., 19 July 2016, p. 174, lines 14-20.
[685] Tr., 19 July 2016, p. 207, lines 11-17.
[686] Tr., 19 July 2016, p. 201, line 25 – p. 202, line 3.
[687] Tr., 19 July 2016, p. 204, lines 20-22.

the time of PLN 211 million which, considering the relative values of FM Bank and PBP Bank, suggests an adjusted valuation of the merged bank of between PLN 375 million and PLN 394 million.[688] As for the second, it reveals a merged bank value of PLN 243.2 million.[689]

479. **However, Mr. Caldwell focuses, by way of transaction on the AnaCap transaction, i.e., on the assumption that the value of the investment, had Claimant been allowed to keep it, would be reflected in the amount that AnaCap was prepared to pay for it following the July 2014 to April 2015 period during which Claimant was marketing its shares in the Bank to potential purchasers.[690] The bases for this assumption are several. First, AnaCap and the other potential investors had presumably been supplied all the necessary information and had had the time needed to conduct due diligence.[691] Second, the data they relied on were drawn from the Bank's July 2014 Business Plan,[692] which Mr. Rathbone admits "is the latest plan available that is not materially affected by the damage to the business caused by some of the KNF's action."[693] Third, AnaCap actually raised its October 2014 bid by PLN 20 million when it revised its offer in February 2015.[694] Finally, the July 2014 Business Plan data were actually more optimistic than the December 2014 Business Plan data were.**

---

688 Caldwell Rpt., para. 8.4.4.

689 Caldwell Rpt., para. 8.3.7.

690 Caldwell Rpt., para. 6.1.15.

691 In fact, Mr. Caldwell concludes that the auction process was such as to allow "potential buyers to be properly identified, canvassed and informed, and to conduct their own diligence and decision-making processes." "Therefore, it appears reasonable to consider the result of the process as a strong indicator of value." Caldwell Rpt., para. 6.1.14

692 Exh. CEG 46.

693 Caldwell Rpt., para. 6.1.23, quoting Rathbone Rpt., para. 116.

694 Caldwell Rpt., para. 3.1.6.

480. The offer made by AnaCap on 25 February 2015 was in the amount of PLN 100 million, plus the value of the Warsaw Receivables, estimated as PLN 220 million, yielding a total valuation of PLN 320 million. Mr. Caldwell sees no reason why AnaCap would not, on that basis, have offered a figure that adequately reflected the Bank's real prospects for growth and profit over the years immediately ahead. Mr. Caldwell writes:

> **I would expect AnaCap and other bidders to have considered all potential exit routes in preparing their offers, and therefore these offers would reflect value accruing from such an exit, using the bidders' own views on exit values and adjusted for the risk and timing.[695]**

Put differently, the offer that Claimant received from AnaCap – being the highest offer – should be regarded as reflecting the most positive market assessment of the Bank's true value.

481. However, Mr. Caldwell recognizes that, while AnaCap offered to buy the Bank for PLN 320 million on 24 February 2015, it actually reduced that offer by PLN 70 million in April 2015, in the wake of the KNF's critical AQR evaluation of the Bank. Although Mr. Caldwell considers that reduction in valuation to be justified by the AQR results themselves,[696] he allows that the range of damages plausibly recoverable by Claimant could possibly be extended under this valuation approach to between PLN 0 and PLN 71 million.

[695] Caldwell Rpt., para. 6.2.1.
[696] Caldwell Rpt., para. 6.1.42. He adds: "It may also partly reflect the strong position that a buyer enjoys in an exclusivity period in many Merger & Acquisition ("M&A") processes."

482. Alternatively, under a market approach, one relies on comparable market data, based either on transactions in listed shares in other banks or on bank mergers and acquisitions. Here the valuation figures that result depend upon whether the calculation is made using P/E multiples or P/BV multiples. Using P/BV multiples as applied to transactions in listed shares in other banks, Mr. Caldwell arrives at a Bank valuation range of between PLN 163.4 million and PLN 253.8 million.[697] Using P/E multiples as applied to such transactions, he arrives at a Bank valuation range of between PLN 167.4 and PLN 221.3 million.[698] Looking at mergers and acquisitions among other banks, Mr. Caldwell arrives at a valuation for the merged Bank in the range of PLN 233 million to PLN 320.9 million.[699]

483. Under a third method entertained by Mr. Caldwell, one adopts an essentially forward-looking approach, assessing the present value of future income flows, which of course ultimately requires a discounting of expected future flows. This approach, unlike the transaction or market approaches, and somewhat like Mr. Rathbone's approach, assumes the existence of a reasonable basis for estimating future cash flows.[700] Mr. Caldwell prepared his projection of future income on the basis of less optimistic assumptions than Mr. Rathbone did. For example, he posited (a) a five-year growth rate of 7.35% , (b) an opening return on assets of -0.46%, (c) a growth of return on assets of 1.3% by year five, (d) a required increase in equity capital of 9%, and (e) a

[697] Caldwell Rpt., para. 9.3.11.
[698] Caldwell Rpt., para. 9.4.5.
[699] Caldwell Rpt., para. 9.6.5.
[700] Caldwell Rpt., paras.7.2.1-7.2.7.

discount rate to present based on a cost of equity of 13%.[701] Using this income valuation approach, Mr. Caldwell arrives at a valuation for the merged Bank in the range of PLN 256.1 million to 264 million.[702] Cross-examining counsel asked Mr. Caldwell why he assumed a 7.35% growth rate when the Bank's actual growth rate up to December 2014 as 31 %.[703] Mr. Caldwell replied that he was merely "trying to take a conservative view as to what the bank could do in its present condition as [of] 18 November [2014]."[704]

484. Assembling the results of Mr. Caldwell's valuation alternatives reveals a valuation range of between PLN 250 million and PLN 350 million.[705]

485. Mr. Rathbone's assessment took as its financial point of departure the Bank's December 2014 Business Plan, and proceeded from there. Mr. Caldwell believes that the projections contained in that business plan were unrealistic and in fact unachievable,[706] and he criticizes Mr. Rathbone for accepting them unqualifiedly.[707]

> **Mr. Rathbone's approach to calculation of losses is dependent on an assumption that, but for the alleged breach related to certain KNF actions, FM Bank BPB would have achieved the results as projected in the December 2014 Business Plan.**
>
> **He accepts these figures without making any form of qualification or adjustment as to the likelihood of them being achieved. In my experience, it is very rare for a trading company, especially one that has been recently created or merged, and that is introducing new lines of business, to achieve the precise results as set out in a medium term plan. Ignoring this fact can have a significant impact on valuation. Mr. Rathbone's methodology omits any**

---

[701] Caldwell Rpt., para. 10.3.1.
[702] Caldwell Rpt., para. 9.6.5.
[703] Tr., 20 July 2016, p. 181, lines 10-16.
[704] Tr., 20 July 2016, p. 181, lines 6-9.
[705] Caldwell Rpt., para. 11.1.2.
[706] Caldwell Rpt., para. 3.1.3
[707] Caldwell Rpt., para. 3.1.7

element of failing to achieve its forecast result for its then-existing business, and falls outside what might be seen as normal valuation practice.[708]

486. Mr. Caldwell identifies a certain number of general weaknesses observable in the Bank's operations and its circumstances toward the end of 2014 of which he believes Mr. Rathbone fails to take due account.[709] These include: (a) a highly concentrated depositor base (risking a liquidity crisis if any one of the top depositors were to withdraw); (b) a high cost-to-income ratio; (c) falling interest rates; (d) a rise in non-performing loans; (e) a highly concentrated corporate loan portfolio, and (f) certain regulatory and operational risks. According to Mr. Caldwell, the 25 July 2014 Vendor Due Diligence Report, prepared by Ernst & Young upon initiation of the auction process,[710] echoes these same weaknesses. On cross-examination, however, Mr. Caldwell conceded that interest income in both FM Bank and PBP Bank grew consistently between 2010 and 2012.[711] Nor did he disagree with cross-examining counsel's representation that in 2012 FM Bank was the highest growth bank in Poland and also had the highest return on equity.[712] Mr. Caldwell nevertheless stood by his testimony that the financial performance of the banks was consistently weak.[713]

487. While falling short of terming them squarely unachievable, Mr. Caldwell characterizes achievement of the December 2014 Business Plan projections as "challenging."[714] The challenges are that (a) any growth policy based on an increase in new lending

708 Caldwell Rpt., paras. 6.2.45-6.2.46.
709 Tr., 19 July 2016, p. 171, line 7 – p. 172, line 23.
710 Exh. CEG 1, referred to at Caldwell Rpt., paras. 4.4.1, 5.14.1.
711 Tr., 20 July 2016, p. 142, line 19 – p. 143, line 19.
712 Tr., 20 July 2016, p.145, lines 9-14.
713 Tr., 20 July 2016, p. 146, lines 7-10.
714 Caldwell Rpt., para. 5.15.1.

increases the risk of credit losses; (b) the Bank would face stiff competition from other banks for the secure but small "professional" loan segment the Bank was targeting; (c) the bank needed to make a major investment in information technology; and (d) the Bank's projected rate of growth, both in income from banking operations and return on equity, was unrealistic and beyond what competitor banks were achieving.[715]

488. In sum, Mr. Caldwell views the December 2014 Business Plan "as a marketing tool to present FM Bank PBP in the best possible light, to encourage bidder interest and higher offers."[716] He characterizes the forecasts as "aggressive."[717]

489. Mr. Caldwell's reasons for considering the Rathbone Report to be unduly optimistic are numerous. For example, Mr. Rathbone's counterfactual assumed that all profits of the Bank profits would be plowed back into it and no dividends paid. Mr. Caldwell questions how attractive that scenario would be to potential IPO investors.[718] Mr. Caldwell further notes that, according to the December 2014 Business Plan projections, maintainable net profits after tax would grow at a rate of 126% between 2016 (PLN 64.3 million) and 2017 (PLN 145.4 million), more than doubling.[719] Replacing a forward multiple with a historical multiple would greatly reduce the Bank's valuation and expected IPO proceeds.[720] Third, the Bank's retail banking activity contemplated by the Business Plan had only been launched in July 2014, and growth would require heavy marketing and an offer of high enough interest rates to attract

[715] Caldwell Rpt., para. 5.15.1.
[716] Caldwell Rpt., para. 5.15.3.
[717] Caldwell Rpt., para. 5.15.5.
[718] Caldwell Rpt., para. 6.2.1.
[719] Caldwell Rpt., para. 6.2.38.
[720] Caldwell Rpt., paras. 6.2.36-6.2.42.

new depositors.[721] Then too, Mr. Caldwell challenges Mr. Rathbone's assumption that the needed subordinated debt could in fact be raised from independent sources, could be priced as per the December 2014 Business Plan, or would qualify as Tier 1 capital for capital adequacy purposes (requiring still additional capital infusion if it did not),[722] and questions whether Abris would be willing and able to fund the December 2014 Business Plan.[723]

490. In addition, Mr. Caldwell calls into question the comparability of the peer banks chosen by Mr. Rathbone,[724] as well as Mr. Rathbone's choice of time periods for measuring bank growth rates.[725] With respect to the latter, Mr. Caldwell notes that the original strategy set out in in the Bank's Investment Committee paper contemplated a single IPO in 2016 based on 2015 results.[726] Mr. Caldwell considers that if Mr. Rathbone's methodology were to be used, but (a) the IPOs were not postponed until 2017 and 2018 but made in 2016 as once contemplated, and (b) the July 2014 Business Plan numbers rather than the December 2014 Business Plan numbers were used, Mr. Rathbone's suggested gross IPO proceeds of PLN 2.332.6 billion would fall to PLN 1.813.1 billion.[727] (The decline would be even sharper if historical rather than forward multiples were used.[728]).

[721] Caldwell Rpt., paras. 6.2.48-6.2.50.
[722] Caldwell Rpt., paras. 6.2.59-6.2.64.
[723] Caldwell Rpt., paras. 6.2.65-6.2.70.
[724] Caldwell Rpt., paras. 6.2.52-6.2.53.
[725] Caldwell Rpt., paras. 6.2.54-6.2.58.
[726] Exh. CEG 25, p. 1.
[727] Caldwell Rpt., para. 6.2.8, and Figure 10 (p. 42) ("IPO Proceeds using July 2014 Business Plan"). Indeed, if the exit had occurred entirely in 2016, the total IPO proceeds number would decline still further from PLN 1,813.1 million to PLN 1,148.7 million. Id., para. 6.2.10.
[728] Caldwell Rpt., paras. 6.2.12- 6.2.13.

491. An additional objection to Mr. Rathbone's calculation is his addition of the White Label project to the Bank's December 2014 Business plan.[729] Mr. Caldwell still considered that project to be insufficiently developed to be considered a significant element of the Bank's value.[730]

492. On the other hand, Mr. Caldwell's challenge to Mr. Rathbone's treatment of the Warsaw Receivables in Mr. Rathbone's methodology is not particularly clear.[731] Mr. Caldwell does not apparently accept that Mr. Rathbone fully removed the effects of the Warsaw Receivables from the Bank's financial projections due to the fact that the Receivables had contributed a major component of the book value of the Bank's entity and that, but for it, the Bank would have been inadequately capitalized and would have required an additional equity injection of the same amount.[732]

493. From a purely methodological point of view, Mr. Caldwell again rejects Mr. Rathbone's wholesale reliance in his model on P/E multiples. He thinks that unless some consideration is given to the principal alternative method, viz., a "Price-to-Book Value Multiples," or P/BV multiples, approach,[733] a valuation is necessarily flawed.

494. Mr. Caldwell concludes his Report by performing a calculation according to Mr. Rathbone's methodology, rather than his own, but utilizing component figures he

---

[729] Caldwell Rpt., paras. 6.2.22-6.2.32. Mr. Rathbone valued the White Label Project opportunity at PLN 363 million at a valuation date of 31 December 2016. Rathbone Rpt., table 1, p. 3.
[730] Caldwell Rpt., paras. 7.5.1-7.5.8.
[731] Caldwell Rpt., paras. 6.2.19-6.2.21.
[732] Caldwell Rpt., para. 13.1.5.
[733] Caldwell Rpt., paras. 6.2.43-6.2.44., 7.3.1-7.3.12. Mr. Caldwell notes that Abris itself used the P/BV multiple method in its original Investment Memorandum regarding its acquisition of FM Bank in 2010 and also in connection with the FM Bank and PBP Bank merger. Caldwell Rpt., paras. 7.3.3-7.3.5.

considers more accurate and realistic than those that Mr. Rathbone employs. This entails the following:

- **First, Mr. Caldwell uses figures from the March 2015 Business Plan rather than either the July 2014 or December 2014 Business Plan. While the March 2015 Plan shows lower net profit than the December 2014 Plan, Mr. Caldwell states that this may be attributed not to an adverse impact of the KNF's actions (which would have affected the December 2014 Business Plan figures as well) but to widely acknowledged reduced interest rates.[734] Mr. Caldwell insists that, while less optimistic than the December 2014 figures, the March 2015 figures remain unrealistic.[735]**
- **Second, Mr. Caldwell removes the White Label project opportunity for the reasons given.[736]**
- **Third, Mr. Caldwell applies a 13% cost of equity.[737]**
- **Fourth, Mr. Caldwell applies a 15% IPO discount to the first IPO tranche.[738]**

495. On the basis of all these adjustments, the discounted cash flow valuation at 31 December 2016 – using Mr. Rathbone's methodology subject to Mr. Caldwell's adjustments – would be PLN 1.034,400 billion. When minority shareholder Mr. Stepniak's interest is deducted, the resulting valuation of Claimant's shares becomes 1.030,100 million. [739]

Andrew Caldwell's Second Expert Report

496. Like Mr. Rathbone, Mr. Caldwell subsequently submitted a second expert report. In this report, dated 26 May 2016, Mr. Caldwell, while maintaining 18 November 2014 as the valuation date, echoes most of the criticisms he had initially leveled at Mr.

---

[734] Caldwell Rpt., paras. 12.5.1-12.6.1.
[735] Caldwell Rpt., para. 12.6.5.
[736] Caldwell Rpt., para. 12.6.2.
[737] Caldwell Rpt., para. 12.6.2.
[738] Caldwell Rpt., para. 12.6.2.
[739] Caldwell Rpt., para. 12.6.3.

Rathbone's analysis, challenging notably the achievability of the December 2014 Business Plan.

497. By way of methodology, Mr. Caldwell stands by his position that the AnaCap sale and earlier transactions in shares of FM Bank PBP and its predecessors are apt comparators, rejecting Mr. Rathbone's criticisms of that position. He denies that the disposal process was too abbreviated and compressed or was for related reasons conducted as a "fire sale."

> **While Abris may have had a plan to enhance the value of the bank in the future, this would only be reflected in the current value to the extent that potential buyers found the value creation plan credible and were prepared to pay an increased acquisition price as a result.[740]**

498. Mr. Caldwell claims to have made all the necessary adjustments to the two previous transactions in FM Bank and PBP Bank shares – viz., the IFC transaction and the IDM transaction – so that they too are apt comparators.[741] He notes that the Claimant itself valued FM Bank PBP at PLN 397.9 million in October 2013,[742] thus only just beyond Mr. Caldwell's projected range of value of between PLN 250 million and PLN 350 million. Mr. Caldwell also stands by his market approach valuation, justifying his decisions to accept or reject valuations of other banks claimed by Mr. Rathbone to be comparable.[743]

499. Mr. Caldwell maintains that his income-based projections properly assume moderate, rather than unduly optimistic, profitability in line with prevailing industry patterns.[744]

---

740 2d Caldwell Rpt., para. 4.3.48.
741 2d Caldwell Rpt., paras. 4.3.54-4.3.62.
742 2d Caldwell Rpt., paras. 4.3.35-4.3.41.
743 2d Caldwell Rpt., paras. 4.4.29-4.4.40.
744 2d Caldwell Rpt., paras. 3.1.1-3.1.7.

As before, he does not assume an IPO exit, but merely a stable ongoing business to which he attaches a "terminal value," based on expected cash flow, growth rate and risk quantified in light of industry patterns.[745] According to Mr. Caldwell, Mr. Rathbone understates the challenges of growing a retail deposit base[746] and the Bank's vulnerability from a liquidity standpoint.[747]

500. An important feature of Mr. Caldwell's Second Report are data from 2015 showing, in his view, that the December 2014 Business Plan projections were indeed over-ambitious. He notes, first, that the Bank itself reported a loss of PLN 100.8 million in 2015,[748] thus explaining AnaCap's determination that it would have to provide a capital injection of PLN 432.9 million.[749] Mr. Caldwell cites further data to the effect that the Bank's liabilities grew from Q1 2014 to Q2 2015, while net interest income and net profit decreased, and also that, while the Bank was profit-making in the first two quarters of 2014, it was loss-making from Q3 2014 to Q2 2015.[750] These results may reflect the persistence of low interest rates and newly introduced Polish usury regulations.[751]

501. Mr. Caldwell remains of the view that, even if the value of the Warsaw Receivables cannot be assessed with exactitude, it cannot be ignored because it remained an asset of Claimant even after the sale to AnaCap. In his view, to value it only to the extent

---

[745] 2d Caldwell Rpt., paras. 4.5.3-4.5.9.
[746] 2d Caldwell Rpt., paras. 4.6.3-4.6.163.1.1-3.1.7.
[747] 2d Caldwell Rpt., para. 4.6.13. According to Mr. Caldwell, the loan impairment situation had worsened of late, and the Banks' impairment was PLN 49 million higher than expected due to three corporate loans being reclassified as impaired in 2014. 2d Caldwell Rpt., para. 4.6.22, citing Exh. C-284A, p. 4.
[748] 2d Caldwell Rpt., paras. 4.4.12, 5.3.11, citing Kulczycki ws, para. 18.
[749] 2d Caldwell Rpt., para. 5.3.11, citing Kulczycki ws, para. 16.
[750] 2d Caldwell Rpt., paras. 5.3.14.
[751] 2d Caldwell Rpt., paras. 5.3.21-5.3.30.

of moneys received, as does Mr. Rathbone on Claimant's instruction, entails double recovery,[752] and thus some effort should be made to assess its value. Noting that the Bank rejected the City of Warsaw's settlement offer of PLN 160 million, Mr. Caldwell ultimately attaches a value of PLN 201.1 million, reflecting the extent to which the receivable can be expected to be collected.[753]

502. As for the White Label project, Mr. Caldwell finds the project to have made very limited if any progress since his First Report, notwithstanding efforts on Abris' and FM Bank PBP's parts.[754] He thus remains of the view that that it should be excluded from any calculation of the Bank's worth.

503. Mr. Caldwell continues to believe that the discount-to-present-value rate should be subject to increase on account of a premium to which the Bank would be subject in borrowing due to its size and history. He thus rejects Mr. Rathbone's use of an 8.4% rate in favor of a 13% rate.[755] "It is clear … that Mr. Rathbone's choice of a COE [cost of equity] of 8.4% is significantly lower than any of the much larger quoted Polish banks, all of [which] appear to be well established and mature. A COE of 8.4% is clearly out of line with any common sense consideration of an appropriate cost of capital."[756]

504. Mr. Caldwell notes Mr. Rathbone's decision, on the basis of a 2012 report, to reduce IPO costs from 6% to 1%. However, using a later 2014 version of the same report, Mr.

[752] 2d Caldwell Rpt., para. 4.8.4.
[753] 2d Caldwell Rpt., paras. 3.1.13--3.1.16.
[754] 2d Caldwell Rpt., para. 4.9.6.
[755] 2d Caldwell Rpt., paras. 4.5.16-4.5.30.
[756] 2d Caldwell Rpt., para. 4.5.38.

Caldwell raises that 1% figure for IPO costs to 2.05% for the first tranche and 1.09% for the second.[757]

505. As in his First Report, Mr. Caldwell finally performs a calculation based on Mr. Rathbone's counterfactual approach, but using what Mr. Caldwell considers to be more reliable figures. As before, he (a) relies on the March 2015 rather than December 2014 Business Plan, (b) excludes earnings from the White Label opportunity, (c) applies a 13% cost of equity, and (d) applies a 15% IPO discount in relation to the first IPO tranche. As noted, he now estimates IPO costs as 2.05% on the first tranche and 1.09% on the second. On this basis, Mr. Caldwell arrives at an adjusted counterfactual Bank valuation of PLN 1.088.9 million.[758]

506. However, Mr. Caldwell finds that Mr. Rathbone's calculation is still flawed. First, he finds that Mr. Rathbone failed to update his P/E multiples, as his First Report indicated he would. Employing Mr. Rathbone' multiples calculation, but updating on the basis of new data available in February 2016, Mr. Caldwell arrives at a mean P/E multiple of 12.6x, and uses that figure.[759] He also faults Mr. Rathbone for failing to include Poland's bank tax in the maintainable net profit calculation. According to Mr. Caldwell, if these additional adjustments are made, the resulting valuation is PLN 740.2 million, a decrease of PLN 1.1921 billion compared to Mr. Rathbone's revised valuation of PLN 1.9323 billion. Mr. Caldwell graphs this as follows:

[757] 2d Caldwell Rpt., para. 5.3.6. Mr. Caldwell also recognizes that, in his Second Report, Mr. Rathbone included an IPO discount of 12% to the first IPO tranche.
[758] 2d Caldwell Rpt., para. 5.6.8.
[759] 2d Caldwell Rpt., para. 5.5.10.

Figure 23 Updated restated counterfactual approach

PLN million	2014	2015	2016	2017	2018
Projected Maintainable Net Profit after Tax (Mar. 2015 Plan)	**(18.3)**	**(29.4)**	**1.6**	**68.4**	**119.0**
Bank Tax	-	-	(1.8)	(9.4)	(14.5)
Adjusted Maintainable Net Profit After Tax	**(18.3)**	**(29.4)**	**(0.3)**	**59.1**	**104.6**
Planned Equity Increase	-	(100.0)	(45.0)	-	-
Terminal Value – IPO Proceeds	-	-	-	297.7	790.4
Less IPO Discount	-	-	-	(44.7)	-
Less IPO Expenses	-	-	-	(5.2)	(8.6)
Net Cash Flow to Equity	**-**	**(100.0)**	**(45.0)**	**247.9**	**781.7**
Discount factor	**1.277**	**1.130**	**1.000**	**0.959**	**0.849**
Discounted Cash Flow	**-**	**(113.0)**	**(45.0)**	**237.7**	**663.5**
Valuation of FM Bank PBP at 31 December 2016					**743.2**
Minority interest					(3.0)
Valuation of Claimant's Shares at 31 December 2016					**740.2**

507. When it comes finally to valuing Claimant's loss, Mr. Caldwell introduces a reduction on account of the Warsaw Receivables. He also calculates the uplift on the purchase price at a cost of equity of 13% rather than Mr. Rathbone's 8.4%. This results in a table of damages as follows:

Figure 24 Updated counterfactual damages incurred by the Claimant

PLN million	Amount	Date	Days	13% Interest	Valuation at 31 Dec. 2016
Value of Claimant's Investment at 31 December 2016		**31 Dec. 2016**			**740,407**
Less Initial Equity Price received From AnaCap Tranche 1 and 2	(22,449)	16 Oct. 2015	442	(3,534)	
Escrow	(7,430)	16 April 2017	(106)	280	(29,878)
Add Deferred consideration Actually paid to IFC	5,069	16 Oct. 2015	442	798	
Less counterfactual deferred Consideration paid upon IPO	(23,145)	30 June 2017	(181)	1,492	(18,076)
Less minimum value of Warsaw Receivable	(201,000)	31 Dec. 2017	(365)	26,058	(201,000)
Less uplift on purchase price at 13%					25,095
Claimant's Loss at 31 December 2016					**516,304**

The result, using the restated counterfactual scenario, based on Mr. Caldwell's figures, is PLN 516.3 million.[760]

[760] 2d Caldwell Rpt., para. 5.6.15.

508. Though, like Mr. Rathbone, Mr. Caldwell updated some of his calculations in light of information received subsequent to his First Report, his conclusion that Claimant's damages fall in the range between PLN 0 million and OLN 100 million remains unchanged.[761]

(c) The Experts' Post-Hearing Submissions

509. At the hearing, Mr. Rathbone submitted an updated report ("Third Rathbone Rpt.") dated 11 July 2016, in which he undertook to modify his Report in light of recent market changes as of 4 July 2016. The Tribunal thereupon invited Mr. Caldwell to submit a supplemental report of his which he did on 2 August 2016 ("Third Caldwell Rpt.").

510. While continuing to rely on the Bank's December 2014 projections as a source of net profit information, Mr. Rathbone provided the following: (a) an update of the P/E multiple for use in his valuation of the Bank (b) an update of the cost of equity, and (c) an update to his calculation of value to equity based on the revised multiple. He also opined on the effect of the new bank tax introduced in Poland in 2016.

511. In Mr. Rathbone's post-hearing report, he updates P/E multiples as of 4 July 2016, showing a drop from 16.0x to 14.4x, although, if he continued to use the forward P/E multiples for Alior Bank, Millennium Bank and Getin Noble Bank, which had become, 15.8x, 10.9x and 13.0x, respectively, the average would have been 13.2x. However, based on the fact that Bank Millennium and Getin Noble Bank have exposure to Swiss

[761] 2d Caldwell Rpt., para. 3.4.1.

franc mortgages, he excludes them from consideration, giving him, on the basis of Alior Bank alone, a P/E multiple of 15.8x, in lieu of the 15.3x figure in his First Report. Mr. Rathbone continues to employ the 12% discount rate he posited in his Second Report.

512. Following more recent reports of Warsaw IPO costs, Mr. Rathbone raises the figure for IPO expenses to 2% of net IPO proceeds. He also recalculates the cost of equity at 8.65% as compared to 8.32% in his First Report.

513. Mr. Rathbone argues that the new Polish bank tax does not affect banks operating under an official remedial plan, and therefore FM Bank PBP would not pay the tax until 2018 when the five-year remedial plan agreed in 2013 expires, and that in any event effects of the tax would be significantly mitigated by the banks being able to pass on the cost to customers.

514. As a result of the updated information, Mr. Rathbone values FM Bank PBP at PLN 1,989.570 million, as reflected in the following tables.

Revised Calculation of Value to Equity

PLN million	2014	2015	2016	2017	2018
Net profit after tax					
Business plan Dec. 2014	(9.02)	0.34	47.63	130.67	137.61
Adjustment to exclude Receivable	2.35	4.69	4.69	(11.74)	0.00
Adjustments for White Label business	(0.98)	2.45	12.01	26.46	35.77
Projected Maintainable Net Profit after Tax	(7.65)	7.49	64.33	145.39	173.38

	2014	2015	2016	2017	2018
Planned Equity Increase		(100.00)	(45.00)		
Additional equity required to meet Tier 1 target			(23.06)	(63.47)	
Of which funded by retained profits			8.51	16.70	
Terminal value - IPO Proceeds 889.79 1,591.63				918.62	1643.19
Less: IPO Discount				(110.23)	
Less: IPO Expenses				(16.17)	(32.86)
Net cash flow to equity		(100.00)	(59.54)	745.45	1441.12
Discount Factor	1.1815	1.0865	1.0000	0.9723	0.8949
Net present values		(108.65)	(59.54)	724.84	1441.12
Valuation of business at 31 December 2016					**1997.76**

Less: value of minority interest	8.19
Valuation of PL Holdings shares at 31 December 2016	**1989.57**

As a result, Mr. Rathbone calculates Claimant's losses at PLN 1,898.84 million.

515. In his supplemental report, dated 2 August 2016, Mr. Caldwell contests certain of Mr. Rathbone's assertions. He rejects Mr. Rathbone's revised P/E multiple as based on a single comparator (Alior Bank) and faults it for failing to consider a historical earnings multiple. According to Mr. Caldwell, there was no substantial change in the two banks' exposure and, by reducing the sample size in this way, Mr. Rathbone increased his valuation result, despite a decline in market prices and a reduction in P/E multiples across the sector. By correcting what he considers an error, Mr. Caldwell reduces the P/E multiple from 15.8x to 11.3x.[762]

516. As for the bank tax, Mr. Caldwell reiterates his contention that it is inconceivable that the Bank could launch an IPO in 2017 if it were still subject to a remedial plan, so one can only assume that the remedial measures would be lifted in advance of the 2017 IPO, in which case the Bank tax would be applicable. He also discredits the notion that the Bank would be able to pass along the tax to its customers.[763]

517. On the basis of adjustments made in his Second Report and the new adjustments made here, Mr. Caldwell arrives at the following counterfactual-based results for valuation and losses:

[762] 3d Caldwell Rpt., paras. 2.2.2-2.2.3.
[763] 3d Caldwell Rpt., paras. 4.2.1 – 4.2.12.

Figure 2. Updated restated counterfactual approach

PLN million	2014	2015	2016	2017	2018
Projected Maintainable Net Profit after tax	(18.3)	(29.4)	1.6	68.4	119.0
March 2015 Business Plan Bank Tax	-	-	(1.8)	(9.4)	(14.5)
Projected Maintainable Net Profit After Tax	**(18.3)**	**(29.4)**	**(0.3)**	**59.1**	**104.5**
Planned Equity Increase	-	(100.0)	(45.0)	-	-
Additional equity increase: Warsaw Receivable provision	-	(148.6)	-	-	-
Terminal Value - IPO Proceeds	-	-	-	267.4	710.0
Less IPO Discount	-	-	-	(40.0)	-
Less: IPO Expenses	-	-	-	(4.7)	(7.7)
Net Cash Flow to Equity	**-**	**(248.6)**	**(45.0)**	**222.7**	**702.2**
Discount factor	1.277	1.130	1.000	0.959	0.849
Discounted Cash Flow	**-**	**(280.9)**	**(45.0)**	**213.5**	**596.0**
Valuation of FM Bank PBP at 31 December 2016	**-**	**-**	**-**	**-**	**483.6**

Less: value of minority interest					
(1,252/308,907)	-	-	-	-	(2.0)
Valuation of Claimant's Shareholding					
at 31 December 2016	**-**	**-**	**-**	**-**	**481.6**

Figure 3. Updated counterfactual damages incurred by the Claimant.

PLN million	Amount	Date	Days	Interest at 13%	Valuation at 31 31 Dec. 2016
Loss incurred by Claimant					
Value of Claimant's' investment at 31 December 2016		31 Dec. 2016			481,627
Tranche 1 and 3	(22,449)	16 Oct. 2015		442	(3,534)
Escrow	(7,430)	16 Apr. 2017	(106)	280	(29,878)
Less: Cash received from Warsaw Receivable claims	(2,636)	16 Oct. 2015	442	(415)	(2,636)
Add: Deferred consideration actually paid to IFC	5,069	16 Oct. 2015	442	798	
Less: counterfactual deferred consideration paid upon IPO	(6,719)	30 June 2017	(181)	433	(1,651)
Less: Warsaw Receivable	(33,000)	16 Oct. 2015	442	(5,195)	(33,000)
Less: uplift on purchase price at cost of capital 13%					(7,632)
Claimant's' Loss at 31 Dec. 2016					406,829

518. Toward the close of the hearings, the Tribunal invited the Experts both to file brief updated reports and, following that, to address certain questions, doing so, to the

extent possible, jointly. Mr. Rathbone filed a supplementary report ("Supp. Rathbone Rpt.") on 26 August 2016 and Mr. Caldwell filed his ("Third Caldwell Rpt.") on 2 August 2016.

519. In response to the Tribunal's request that they identify the factors having the greatest impact on valuation, the Experts submitted a joint memorandum dated 12 September 2016. They identified the key factors as:

Table 1: Factors affecting the Valuation

Potential Adjustments to the Plan

1. Basis by which to extend the projections to 2018, to the extent that an IPO in 2018 is assumed.

2. Actual performance for Q1 2014

3. Actual performance for Q2 2014

4. Effect of "Project Berlin": expansion of BankSmart to Germany, approved by Management Board in August 2014

5. Effect of White Label

6. Impact of interest rate cuts post 14 April 2014

7. Impact of PBP loans that became non-performing.

8. Effect of developments in the Warsaw Compensation Receivable claims

9. Imposition of bank tax in February 2016

10. Any additional capital requirements required as a result of the above adjustments

11. Any additional capital requirements required as a result of increased regulatory capital requirements applied across the Polish Banking sector.

Valuation Assumptions

12. Appropriate date for market data (30 April 2015 or latest date available)

13. Basis of IPO pricing/multiplier

14. Basis of IPO discount/costs

15. Discount rate/cost of equity

16. Treatment of Warsaw Receivable

17. Other adjustments to valuation in order to arrive at damages

18. Interest rate from 30 April 2015 to date of hypothetical IPO

19. Interest rate from date of hypothetical IPO to date of settlement

520. The Tribunal had also asked at the close of the hearings, on 20 July 2016, that the Experts (a) quantify the financial impact of each of the stated factors and (b) identify the applicable interest rate and source for calculating interest on damages for any

losses. On these matters, the Experts submitted separate reports, Mr. Caldwell's dated 7 October 2016 ("Fourth Caldwell Rpt.") and Mr. Rathbone's dated 8 October 2016 ("Fourth Rathbone Rpt.").

521. Importantly, the Experts settled jointly on a single Agreed Financial Model ("Agreed Model") for calculating damages, if any. The Agreed Model is described by Mr. Caldwell as follows:

> **[The Agreed 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.[764]**

522. The Experts also managed, in a most welcome exercise in good faith, to narrow their differences on certain disputed points and arrive at agreed figures for a number of the factors enumerated above.

523. For example, the Experts agreed on increasing the Bank's 2014 net profit in the January 2014 Basic Plan by PLN 2.844 million to reflect FM Bank PBP's improved actual performance against budget for the period 1 January 2014 to 8 April 2014.[765] They also agreed that the Bank's actual performance in Q2 2014 was PLN 8.931 million against a budget of PLN 4.593 million, a favourable variance of PLN 4.338 million.

---

[764] 4th Caldwell Rpt., paras. 3.1.2-3.1.3.
[765] 4th Caldwell Rpt., para. 4.3.25; 4th Rathbone Rpt., para. 16.

Since the Q1 and Q2 figures are cumulative, the net favourable variance for Q2 alone is agreed to be PLN 1.494 million.[766]

524. With respect to the Warsaw Receivables, Mr. Rathbone had most recently suggested a value of PLN 33.0 million, or 15% of its book value. Mr. Caldwell stated that he was prepared to accept such a write-down of 85%, provided it was accompanied by recognition of the need for a commensurate capital injection to address the resulting capital shortfall of PLN 148.4 million.[767] However, in his Fourth Report, Mr. Rathbone now believes, based on recent decisions of Polish authorities and the attitudes of all of the potential buyers, that the Receivables have little or no market value and are to be fully omitted in the calculation of damages.[768]

525. As for the IPO discount, the Experts compromised and agreed upon an IPO discount rate of 13.5% and IPO costs of 2.0% in their counterfactual scenarios.[769]

526. In addition, the Experts came to agreement on the methodology for calculating additional capital requirements, though they disagree on the content and application of the Tier 1 capital requirements.[770]

527. The Experts further agreed to use the most recent available market data, i.e. data available on 15 September 2016, even though the Tribunal had designated 30 April 2015 as the valuation date.[771] This is agreeable to the Tribunal.

528. But other differences remain.

---

[766] 4th Rathbone Rpt., para. 17.
[767] 4th Caldwell Rpt., para. 4.3.55.
[768] 4th Rathbone Rpt., paras. 54-55.
[769] 4th Caldwell Rpt., paras. 5.2.9 - 5.2.10, 4th Rathbone Rpt., para. 51.
[770] 4th Rathbone Rpt., paras. 43-45.
[771] 4th Rathbone Rpt., paras. 46-47.

529. In his Fourth Report, Mr. Rathbone made certain assumptions as the basis for his adjusted counterfactual calculation. He made assumptions in particular about net profits in 2018,[772] arriving at a projected profit for 2018 of PLN 173.02 million.

530. Mr. Rathbone decided to take into consideration the Bank's planned expansion of BankSmart to Polish customers working in Germany, pursuant to the so-called Project Berlin, a plan approved by the Management Board in August 2014. Project Berlin had been included in the December 2014 Business Plan and thus in Mr. Rathbone's previous valuations. Although the decision to embark upon the project was made subsequent to the 14 April 2014 KNF decision, Mr. Rathbone considers that it would

---

[772] Mr. Rathbone made the following assumptions in arriving at net profits, He assumed that for 2018 the following ratios would remain constant as compared to the 2017 projections in the January 2014 Investor Plan: Tier 1 Ratio (Tier 1 Capital/ Risk Weighted Assets ("RWA")) and Net Profit as a percentage of Risk Weighted Assets ("Return on RWA").

He also assumed that these other ratios would remain constant for 2018 projections for loans and advances and for total assets: (a) RWA as a percentage of Loans and Advances; (b) Net Interest Margin (Net Interest Income/Loans and Advances); and (c) Total Assets as a percentage of RWA.

He continues (4th Rathbone Rpt., paras. 11-14):

My calculation of the projected 2018 net profit of PLN 173.02 million follows the following logical argument:

(a) The Tier 1 Capital at the end of 2017 was projected to be PLN 485.6 million. This would increase in 2018 by the 2017 retained profits, once they were approved by the Board at the annual general meeting. The 2017 net profits were projected in the January 2014 Investor Case to be PLN 135.6 million, so the 2018 Tier 1 Capital, excluding any additional capital raise, would be PLN 621.2 million.
(b) The Tier 1 Ratio in 2017 was projected in the January 2014 Investor Case to be 9.2%. Thus I calculate Risk Weighted Assets at the end of 2018 to be PLN 6,743.6 million, against the balance projected by the January 2014 Investor Case at the end of 2017 of PLN 5,271.8 million.
(c) Net Profit as a percentage of Risk Weighted Assets ("Return on RWA") in 2017 was 2.88% according to the January 2014 Investor Case. Again, assuming that this remained constant during 2018, and using the average RWA for 2018 (i.e. the average of RWA at the start and end of the year), the net profit for 2018 is PLN 173.02 million.

I believe that these are conservative assumptions, since the January 2015 Investor Case showed continually rising Return on RWA. In Table 3 below, I have set out the key statistics as well as the growth rate in profits implied by the above approach. One can see clearly that, as a result of this approach, the high profit growth projected in the January 2014 Investor Case slows after 2016, and my projected 2018 net profit figure implies an annual growth of just 28%, compared with 85% in the preceding year as per the January 2014 Investor Plan.

clearly have been approved, since simply taking advantage of new EU passport rules, and he thus includes both the profits and related capital requirements as adjustments to the January 2014 Investor Plan.[773]

531. Although Mr. Rathbone had excluded the P/E multiples of two of his three comparator banks (Bank Millennium and Getin Noble Bank), subsequent pronouncements by the Polish Government in August 2016 had lifted the uncertainty over the Swiss Franc mortgages. As a result, he reverted to his original use of an average P/E across three comparator banks (Alior Bank, Bank Millennium, and Getin Noble Bank) resulting in a 17.4x forward profit.[774]

532. Mr. Rathbone also adjusted his interest rate figures on the basis that, while they were in recent decline, the Management Board expected them to rise again in the near to medium term, and also introduced an important series of cost saving measures.[775] The Management Board having noted in its Report of Performance of the Remedial Plan in Q2 2015 that three corporate loans had been reclassified as impaired, a downward adjustment needed to be made.[776]

533. Mr. Rathbone continues to believe that the new Polish bank tax introduced in February 2016 does not apply to banks under remedial plans and would have no effect until after 2018, when the Remedial Plan expires, and that if there were any effect it would be passed on to customers.[777]

---

[773] 4th Rathbone Rpt., paras. 18-20.
[774] 4th Rathbone Rpt., para. 49.
[775] 4th Rathbone Rpt., paras. 25-27.
[776] 4th Rathbone Rpt., paras. 32-33.
[777] 4th Rathbone Rpt., para. 39.

534. Based on more recent market data, Mr. Rathbone posits a discount rate of 8.55% as compared to the discount rate of 8.40% in his earlier reports.

535. On the basis of these data, Mr. Rathbone calculates valuation and damages in his Fourth Report as follows:

Table 1: Cash Flows to Equity

Cash Flows to Equity

Year ending 31 Dec.	**2014**	**2015**	**2016**	**2017**	**2018**
	PLN m	**PLN m**	**PLN m**	**PLN m**	**PLN m**
Net profit after tax					
January 2014 Investor Case	12.77	26.19	73.09	135.58	
Adjustments to the January 2014 Investor Case					
1. Basis by which to extend the projections to 2018	0.00	0.00	0.00	0.00	173.02 2
2. Actual performance for Q1 2014	2.84	0.00	0.00	0.00	0.00
3 Actual performance for Q2 2014	0.00	0.00	0.00	0.00	0.00
4 Effect of "Project Berlin"	0.00	(2.38)	(0.76)	2.83	7.02
5 Effect of White Label	(0.98)	2.45	12.00	26.46	35.77
6 Impact of interest rate cuts post 14 April 2014	0.00	(29.00)	(23.30)	(24.00)	(27.70)
7 Impact of PBP loans that became nonperforming	(22.70)	0.00	0.00	0.00	0.00
8 Effect of developments in the Warsaw Receivable claim	0.00	0.00	0.00	0.00	0.00
9 Imposition of bank tax in Feb. 2016	0.00	0.00	0.00	0.00	0.00
Projected Profit after tax	**(8.07)**	**(2.74)**	**61.03**	**140.86**	**188.11**
- one-off loan provisions less tax	22.70	0.00	0.00	0.00	0.00
- one-off Warsaw Receivable adjustments less tax	0.00	0.00	0.00	0.00	0.00

Projected Maintainable Profit after tax	**14.63**	**(2.74)**	**61.03**	**140.86**	**188.11**
10 & 11 Additional Capital Requirements to get to required Tier 1 Ratio	0.00	(92.98)	(116.43)	(52.81)	0.00
Terminal value - IPO Proceeds				980.41	1,963.83
IPO discount				(132.36)	
Less costs of IPO			0.00	(16.96)	(39.28)
Net cash flow to equity	0.00	(92.98)	(116.43)	778.28	1,924.55
	0%	0%	0%	40%	60%
Discount Factor	1.028	0.946	0.871	0.836	0.770
NPV	**0.00**	**(87.93)**	**(101.44)**	**650.49**	**1,481.84**
Indicative valuation at 30 Apr. 2015					1,942.95
Less: value of minority interest (0.41%)					(7.97)
Valuation of PL Holdings shares at 30 April 2015					**1,934.99**

Table 2: Loss incurred by PL Holdings.

	Amount	Date	Days	Interest	Valuation at 30 Apr. 2015
Value of PL Holdings' investment at 30 April 2015		**30/04/2015**			**1,934,987,983**
Less: Initial Cash Payment received from AnaCap	(22,448,698)	16/10/2015	(169)	888,692	
Less: Escrow	(7,429,712)	16/04/2017	(717)	1,247,856	(29,878,410)
Less: Cash received from Warsaw Receivable claim	(2,636,264)	16/10/2015	(169)	104,364	(2,636,264)
Add: Deferred consideration actually paid to IFC	5,068,641	16/10/2015	(169)	(200,656)	5,068,641
Less: counterfactual deferred consideration paid upon IPO	(23,249,399)	30/06.2017	(792)	4,313,305	(23,249,399)
Less: uplift on purchase price at cost of capital 8.55%					6,353,560
PL Holdings' loss at 30 Apr. 2015					**PLN 1,890,646,112**

536. Accepting the Tribunal's direction to adopt a counterfactual approach and assuming a two-stage IPO in 2017 and 2018, but utilizing his own figures, Mr. Caldwell arrives at the following:

Figure 1 Calculation of damages

PLN million	January 2014 Basic Plan	January 2014 Investor Plan
One stage IPO in 2017	(67,562)	298,461
Two stage IPO in 2017/2018	(62,259)	353,925

537. It should be added, however, that Mr. Caldwell continues to favor other approaches. He would also consider assuming a full exit in 2017, which he considered more likely, and notes that Mr. Rathbone had stated that, were the January 2014 business plans to be adopted with adjustments for lower interest rates, he would model a two-stage IPO in 2016 and 2017.[778] But even if a two-stage IPO is assumed, Mr. Caldwell continues to believe that the Plan would have been constrained by the continuing low interest rate environment and that large capital injections would have been required, particularly after a substantial write-off of the Warsaw Receivables. On that basis, he finds that Claimant would have suffered no loss.[779]

538. Mr. Caldwell prefers using the January 2014 Basic Plan as opposed to the January 2014 Investor Plan, since only the former was approved by the Bank's Supervisory Board and since he finds the latter unduly optimistic. But, for completeness, he utilizes both.

539. Employing the January 2014 Basic and Investor Plans, Mr. Caldwell makes a series of assumptions consistent with what he considers to be the most likely developments,[780] and arrives at the following figures to be employed in his counterfactual calculation.

---

[778] 4th Caldwell Rpt., paras. 3.4.1-3.4.2

[779] 4th Caldwell Rpt., para. 3.5.3.

[780] The assumptions Mr. Caldwell makes are these:

(I) the loan portfolio will grow by 7% between 31 December 2017 and 31 December 2018, based on the forecast lending growth for Polish banks in 2018 in an analyst report prepared by JP Morgan dated 26 February 2016;

(II) the net interest margin (expressed as net interest income a percentage of the average of total loans at the year end and total loans at the previous year end) will be equal to that achieved in 2017, based on the fact that the predicted WIBOR rate in 2017 from Bloomberg is materially the same as the rate in 2018.10 I applied this margin to the average 2017 and 2018 loan portfolio balances to calculate 2018 net interest income;

(III) the net fee and commission income margin will be equal to that achieved in 2017.11 I applied this margin to the average 2017 and 2018 loan portfolio balances to calculate 2018 net fee and commission income;

(IV) the net FX result will be equal to the amount earned in 2017;

Figure 2 Forecast of 2018 net profit – January 2014 Basic Plan

PLN million	2017	2018
Net interest income	353,359	390,580
Net fee & commission income	82,555	91,251
Net FX result	8,590	8,590
Net banking revenues	444,504	490,421
Other operating income	240	240
Cost of risk	(149,348)	(165,079)
Operating income	295,396	325,581
Total operating expenses	(204,216)	(225,084)
Pre-tax profit	91,180	100,497
Tax	(17,780)	(19,597)
Net profit	73,400	80,900
Loan portfolio	4,311,928	4,613,763
Growth	15%	7%
Net interest margin	8.8%	8.8%
Cost of risk ratio	3.7%	3.7%
Cost/income ratio	69.1%	69.1%
Net fee & commission income ratio	2.0%	2.0%

Figure 3 Forecast of 2018 net profit – January 2014 Investor Plan

PLN million	2017	2018
Net interest income	433,505	504,472
Net fee & commission income	98,766	114,935
Net FX result	14,560	14,560
Net banking revenues	546,831	633,966
Other operating income	240	240
Cost of risk	(167,437)	(194,847)
Operating income	379,634 4	39,359
Total operating expenses	(211,216)	(244,445)
Pre-tax profit	168,418	194,914
Tax	(32,842)	(38,008)
Net profit	135,576	156,906

(V) the cost of risk as a percentage of loan portfolio will be equal to 2017. I applied this cost of risk ratio to the average 2017 and 2018 loan portfolio balances to calculate 2018 cost of risk;

(VI) other operating income and costs would be equal to 2017. These relate only to the Micro Lending business line, and are at a consistent level of PLN 240,000 from 2014 to 2017 in the January 2014 Basic Plan, therefore I forecast the same cost in 2018;

(VII) the cost to income ratio would be equal to 2017. I applied this ratio to the net operating income, after cost of risk, to calculate 2018 operating expenses; and

(VIII) I applied a tax rate of 19.5% to the resulting net profit before tax to calculate net profit after tax. This rate is agreed between Mr. Rathbone and me as the applicable tax rate for FM Bank PBP.

4th Caldwell Rpt., paras. 4.3.2.

Loan portfolio	6,428,345	6,878,329
Growth	28%	7%
Net interest margin	7.6%	7.6%
Cost of risk ratio	2.9%	2.9%
Cost/income ratio	55.6%	55.6%
Net fee & commission income ratio	1.7%	1.7%.

540. However, Mr. Caldwell continues to posit declining interest rates in the period following the January 2014 Plans and to adjust net profits accordingly.[781]

541. Although the Experts agreed to use the date of 15 September 2016 to measure earnings and share price, they continue to differ on choice of a P/E multiple.[782] They also continue to differ on choice of comparable banks. Also, based on recent data, Mr. Caldwell rounds up his estimated cost of equity, taking into account a small company and a company-specific premium, to 13.5%.[783]

542. Mr. Caldwell also excludes from consideration the so-called Project Berlin, a plan to market FM Bank PBP's mobile banking services to the Polish community living elsewhere in the EU that was approved by the Management Board in August 2014. He does so because the Tribunal directed the Experts to consider the Bank's plans at the time of the KNF's First Decision (8 April 2014) in projecting its results and valuation.[784] He takes the same position with the White Label project.[785]

543. Mr. Caldwell also adjusts the Bank's assets in the amount of PLN 43.3 million based on a Deloitte Report on impairment of the Bank's non-performing loans. He also assumes that the Bank would have been required to maintain a Tier 1 capital requirement of

---

[781] 4th Caldwell Rpt., para. 4.3.4-4.3.23.
[782] 4th Caldwell Rpt., paras. 5.3.2 – 5.3.5.
[783] 4th Caldwell Rpt., para. 5.4.6.
[784] 4th Caldwell Rpt., para. 4.3.25
[785] 4th Caldwell Rpt., para. 4.3.31.

11.25% from 1 January 2016.[786] As for the Polish bank tax, Mr. Caldwell continues to consider it appropriate for inclusion in the counterfactual scenario.[787]

544. On these bases, Mr. Caldwell calculates a counterfactual value of FM Bank PBP as of 30 April 2015 and adds interest to 31 December 2016, while deducting (a) the amounts actually received by the Claimants (including in relation to the Warsaw Receivable) and (b) the counterfactual deferred consideration that would have been paid to IFC.

545. Turning to damages, Mr. Caldwell makes a calculation based not only on the two-tranche 2017/2018 IPO to which the Tribunal pointed (relying both on the January 2014 Basic and Investor Plans), but also (a) the January 2014 Basic Plan with a one-stage IPO in 2017 and (b) the January 2014 Investor Plan with a one-stage IPO in 2017; and (c) using the January 2014 Investor Plan with a two-stage IPO in 2017 and 2018. The damages results are as follows:

Figure 13 Summary of damages[788]

PLN million	January 2014 Basic Plan	January 2014 Investor Plan
One stage IPO in 2017	(67,562)	298,461
Two stage IPO in 2017/2018	(62,259)	353,925

Clearly, whether a one-stage 2017 IPO or a two-stage 2017/2018 IPO is envisaged, if the January 2014 Basic Plan is used in the counterfactual, Claimant is actually better

[786] 4th Caldwell Rpt., para. 4.3.57.
[787] 4th Caldwell Rpt., para. 4.3.63.
[788] 4th Caldwell Rpt., para. 6.7.2.

off than it would have been had the alleged expropriation not occurred, and so no damages would be payable. It would be entitled to damages if the January Investor Plan were to be used.

546. In conclusion, Mr. Caldwell suggests that, if additional capital contributions would be required between April 2015 and the IPO and if Claimant, through its owners Abris Fund I and Abris Fund II, lacked sufficient funds to make such contributions, there would be need of third party contribution, resulting in a dilution of Claimant's ownership interest in the Bank. Mr. Caldwell predicts that an additional PLN 435 million in additional outside equity would be required, with Claimant's investment in the Bank diluted by at least 50% with a commensurate reduction in the Claimant's share of the eventual IPO proceeds. [789]

(d) Findings of the Tribunal

547. The Tribunal has found that Respondent deprived the Claimant of essential ownership rights by suspending the voting rights of the shares and ordering it to sell the shares and, to that extent, breached its obligations under the BIT.[790] It must accordingly compensate the Claimant for the resulting loss.

548. As indicated in its prior instructions to Counsel and the Experts, the Tribunal finds that the valuation of the FM Bank PBP and the assessment of damages are to be conducted on the basis of the Agreed Financial Model described more fully below.[791] This

---

[789] 4th Caldwell Rpt., para. 7.4.3.
[790] See paras. 320-323, 390-391, supra.
[791] See para. 554, infra.

approach basically corresponds to the forward-looking formula which was initially elaborated by Mr. Rathbone and which figured among the methodologies that Mr. Caldwell employed.

549. As concerns the specific values to be assigned to the factors comprising these formulas, the Tribunal has studied the successive opinions of both Experts in detail, focusing on their disagreement as to the correct values to be assigned to each. The Tribunal specifically took into consideration for these purposes the various factors that the Experts included in their joint list of factors relevant to the valuation of the Bank and the assessment of Claimant's loss. Except to the extent that Experts ultimately reached agreement on a particular variable-specific value, the Tribunal proceeded on the basis of the reports to determine for itself the value most appropriately assigned to each of the factors. Each of these decisions is set out and explained in the subsections of the Award that follow.

550. However, in consideration of the number of variables involved in these calculations, the extreme complexity of the formulas, and the necessity of avoiding computational error, the Tribunal has decided to give the Experts the opportunity to conduct jointly the relevant calculations, on the condition that they utilize the formulas prescribed by the Tribunal[792] and, for each factor, the value specifically assigned to it by the Tribunal in this Award. The Tribunal believes that, having made these determinations, the Tribunal has placed the Experts in a position to perform fully both the valuation of the FM Bank PBP and the calculation of compensable damages, and to do so jointly. The

[792] See para. 548, supra.

Tribunal's instructions to the Experts in conducting the calculations are elaborated in greater detail in Procedural Order no. 17 bearing the same date as this Award.

551. The present Award is accordingly issued in the form of a Partial Award, reflecting not only the Tribunal's determination on jurisdiction and liability, but also its determination of the values for each of the variables on the basis of which the valuation of Claimant's equity interest in the Bank and the calculation of damages are to be performed. To that very limited extent, the Tribunal reopens the proceedings, pursuant to Article 34 of the SCC Rules, which permits reopening of the proceedings "in exceptional circumstances."[793] For the reasons indicated above – the number of variables involved in these calculations, the extreme complexity of the formulas, and the necessity of avoiding computational error in determining quantum – the Tribunal considers the circumstances sufficiently exceptional to warrant following this course of action.

552. Discussion of each of the relevant parameters follows, with the Tribunal's specific determination set out in italics in the final paragraph of each subsection.

Valuation Methodology

553. The Tribunal acknowledges Mr. Caldwell's emphatic preference for a valuation methodology based on largely historical considerations (including but by no means limited to the AnaCap offer) rather than a valuation based on projections. It is true that the former tend to be less speculative in nature than the latter, but they also tend

[793] According to Article 34, "[i]n exceptional circumstances, prior to the making of the final award, the Arbitral Tribunal may reopen the proceedings on its own motion, or upon the application of a party."

to deny effect to the particular circumstances of a party's loss, and it is such particular circumstances that are the most proper touchstones of analysis. Certainly, to take AnaCap's offer as a guide to valuation would be inconsistent with the very rationale upon which liability is imposed in this case, namely the prejudice caused to Claimant by KNF's wrongful actions. While the case for relying upon other transactions of a similar kind or on the performance of presumably comparable actors is stronger than the case for relying on the AnaCap offer, they too fail to take into consideration the particular circumstances of Claimant's loss of expectation in this case.

554. Rather than abandon a forward-looking methodology based on projections particular to Claimant and its business plans, the Tribunal prefers to focus on ensuring that, in conducting such an analysis, adjustments are made where necessary to render assumptions reasonable. Accordingly, as instructed by the Tribunal, and in accordance with the Experts' Agreed Financial Model, the Experts are to employ a counterfactual-based forward-looking scenario. On the basis of that methodology, the Experts take as their point of departure the Bank's January 2014 business plan, using that plan as an initial basis for valuing net profits for the years 2014 through 2017, coupled with a projection for 2018, adjusting those figures in various ways to better ensure their reliability.[794] These projections, as adjusted, are subjected to a P/E multiple, ultimately resulting in a value that is then discounted by reference to the cost of equity in order to arrive at a valuation at 30 April 2015. This projection is then discounted at a cost of equity to arrive at a value of the Claimant's equity interest at

[794] See para. 521, supra.

30 April 2015. It is from this valuation, subject to further adjustments, that is deducted the price paid to Claimant by AnaCap in connection with the sale of the Bank, to arrive at damages, making allowance of course for the fact of a minority shareholder in the Bank.[795]

555. ***Thus, the bank valuation and damages calculations are to be performed by the Experts on the basis of the above-described methodology.***

Business Plan as Point of Departure

556. On 20 July 2016, the Tribunal directed the Experts to conduct their valuations of the Bank on the basis, as starting point, of the Investor Case Plan of January 2014. The Tribunal selected this date as the latest business plan prior to any possible impact of the KNF's decisions addressed to Claimant, the first of which was dated 8 April 2014, the purpose being to reflect the Bank's strategies over the next several years (in particular, but not limited to, development of its retail sector) while at the same time avoiding distortions to the fullest extent possible. In his fourth and final expert opinion, Mr. Caldwell urged that, rather than employ the January 2014 Investor Case Plan, the Tribunal should apply the January 2014 Basic Plan, which he considers more conservative and which was formally approved by the Supervisory Board. The Tribunal disagrees. In the Tribunal's view, the Investor Case Plan corresponds better than the Basic Plan to the counterfactual-based methodology that the Tribunal also

[795] 4th Caldwell Rpt., paras. 3.1.2-3.1.3.

directed the Experts to employ.[796] **The Basic Plan, though somewhat forward looking, represents essentially the formal bank budget for the year 2014 rather than a projection of what were taken to be reasonable business development prospects under new management. Moreover, the investor Case Plan is the one that the Experts principally used in their prior opinions based on the counterfactual-based methodology.**

557. **The Tribunal acknowledges Mr. Caldwell's concern that the January 2014 Investor Case Plan may have been unduly optimistic and accordingly has undertaken in the analysis that follows to take fully into account, as to each factor, the extent to which Claimant's projections may be overly optimistic or otherwise unreasonable. That will be apparent as the analysis proceeds.**

558. ***Accordingly, the business plan on the basis of which the valuation commences shall be the January 2014 Investor Case Plan.***

Updating of Business Plan with 2018 Projections

559. **The January 2014 Investor Case Plan included projections through 2017, but not through 2018. The Tribunal finds that the Experts are in agreement that, basically, constancy between 2017 calculations and 2018 calculations should be posited. For convenience and clarity, the Tribunal adopts and prescribes the assumptions detailed in Mr. Caldwell's Fourth Expert Opinion, as follows:**

796 4th Caldwell Rpt, para. 3.1.3.

(i) the loan portfolio will grow by 7% between 31 December 2017 and 31 December 2018, based on the forecast lending growth for Polish banks in 2018 in an analyst report prepared by JP Morgan dated 26 February 2016;

(ii) the net interest margin (expressed as net interest income a percentage of the average of total loans at the year end and total loans at the previous year end) will be equal to that achieved in 2017, based on the fact that the predicted WIBOR rate in 2017 from Bloomberg is materially the same as the rate in 2018. I applied this margin to the average 2017 and 2018 loan portfolio balances to calculate 2018 net interest income;

(iii) the net fee and commission income margin will be equal to that achieved in 2017. I applied this margin to the average 2017 and 2018 loan portfolio balances to calculate 2018 net fee and commission income;

(iv) the net FX result will be equal to the amount earned in 2017;

(v) the cost of risk as a percentage of loan portfolio will be equal to 2017. I applied this cost of risk ratio to the average 2017 and 2018 loan portfolio balances to calculate 2018 cost of risk;

(vi) other operating income and costs would be equal to 2017. These relate only to the Micro Lending business line, and are at a consistent level of PLN 240,000 from 2014 to 2017 in the January 2014 Basic Plan, therefore I forecast the same cost in 2018;

(vii) the cost to income ratio would be equal to 2017. I applied this ratio to the net operating income, after cost of risk, to calculate 2018 operating expenses; and

(viii) I applied a tax rate of 19.5% to the resulting net profit before tax to calculate net profit after tax. This rate is agreed between Mr. Rathbone and me as the applicable tax rate for FM Bank PBP.[797]

.

560. ***The Experts are accordingly instructed to extrapolate projections for 2018 in accordance with the guidelines set forth in the immediately preceding paragraph.***

Adjustment to Actual Performance to 8 April 2014

---

[797] According to Mr. Rathbone:

> It is … reasonable to assume some continued growth, but perhaps not at the same rate. I have decided that the appropriate way to do this is simply to assume that profits for 2017 will be reinvested in capital for 2018, and that the returns on that capital will be the same as those returns for 2017. I believe that this is conservative, since under the January 2014 Investor Case, the Bank's key return statistics increase each year rather than remain stable

4th Rathbone Rpt, para. 10.

561. **The Tribunal specifically instructed that the January 2015 Business Plan "be adjusted to make allowance [for] the actual performance of the Bank during the time up to the First Decision,"[798] i.e., for the period from 1 January 2014 to 8 April 2014. As a result, the Experts agreed to adjust the January 2015 Business Plan to take account of a "variance to budget" of PLN 2.844 million.[799]**

562. ***The Experts shall accordingly make an adjustment to actual performance to 8 April 2014 as provided for in the immediately preceding paragraph.***

Adjustment for Lower Interest Rates

563. **The Experts are in agreement that interest rates fell significantly in the period following the January 2014 Business Plan and that that would negatively affect FM Bank PBP's profitability. They therefore further agree that the January 2014 Business Plan's projection of net profits must be lowered.[800]**

564. **Mr. Caldwell provides a detailed analysis of the impact of falling interest rates on the Bank's profitability and concludes that the adjustment should be determined in accordance with the following table:[801]**

---

798 Directions for the Quantum Experts.
799 4th Caldwell Rpt, para. 4.3.26; 4th Rathbone Rpt, para. 16. The Experts also agreed to disregard any adjustments for the additional eight days between 1 April 2014 and 8 April 2014. 4th Caldwell Rpt, para. 4.3.26. In fact, they agreed more generally to make no adjustments for performance in the second quarter of 2014. 4th Rathbone Rpt, para. 17.
800 4th Caldwell Rpt, para. 3.2.2; 4th Rathbone Rpt, paras. 22-29.
801 4th Caldwell Rpt, p. 18 (figure 7).

	2014	2015	2016	2017
Original net interest income	150,149	186,051	220,565	255,604
Original net interest margin	*13.0%*	*12.7%*	*12.8%*	*13.0%*
Adjusted net interest income	123,460	144,312	172,825	196,538
Adjusted net interest margin	*10.7%*	*9.9%*	*10.0%*	*10.0%*
Difference	26,689	41,739	47,740	59,066

565. Mr. Rathbone conducts a still more detailed analysis, concluding that the lower margins would have a negative impact of between PLN 37 million and PLN 47 million on profit before tax each year. He then observes that, in consideration of this reduction in profit, the Bank's management introduced a series of offsetting cost savings in personnel and administrative expenses, which he factors in to lessen the impact. In all fairness, Mr. Rathbone concedes that some of these savings resulted from measures taken by the KNF which, in a forced sale environment, actually impeded retention and recruitment and saved money, but for which Claimant should take no credit. Thus, he takes into account only 50% of the personnel cost savings and 75% of the administrative cost savings as mitigating measures. The justification for considering these savings is that they stem from actions taken in direct response to interest rate developments.[802]

566. Mr. Rathbone's calculation is thus as follows:[803]

[802] 4th Rathbone Rpt, paras. 22-29.
[803] 4th Rathbone Rpt, p. 12 (table 8).

Calculation of Impact of Interest Rate Cuts

Year ending 31 December	2014	2015	2016	2017	2018
Average Loans and Advances	2,147.8	3,233.7	4,380.5	5,717.4	7,325.7
Change in Interest Margin	0.16%	-1.31%	-0.85%	-0.73%	-0.63%
Reduction in net interest income	3.4	(42.2)	(37.3)	(41.8)	(46.4)
50% of personnel cost savings	2.5	1.8	1.5	2.7	2.7
75% of administrative cost savings	0.6	4.4	6.9	9.2	9.2
Impact of interest rate cuts before tax	6.5	(36.0)	(28.9)	(29.8)	(34.5)
Tax relief at 19.5%	(1.3)	7.0	5.6	5.8	6.7
Impact of interest rate cuts after tax	5.2	(29.0)	(23.3)	(24.0)	(27.7)

567. The Tribunal is not convinced that the personnel and administrative cost savings invoked can legitimately be used to offset the effect of the interest rate decline, largely because it views them as insufficiently linked to that decline, because the evidence supporting these claims of saving is not apparent, and because they were in fact not reflected in the January 2014 Investor Case Plan..

568. The Tribunal finds both Experts' calculations of the profitability effects of the interest rate decline (with the costs savings offset in Mr. Rathbone's calculation removed from consideration) to be equally convincing. Absent a compelling reason to prefer one Expert's account over the other's, the Tribunal orders that the impact of the interest rate decline be measured as the average for each year of the two Expert's assessments of that impact.

569. ***The Experts shall accordingly adjust the figures in the January 2014 Business Plan to reflect the impact of the lower interest rates that followed, using as that figure the***

average of Mr. Caldwell's and Mr. Rathbone's measurements of impact, it being understood that there is to be no offset in impact to reflect the Bank's putative personnel and administrative cost savings as reported by Mr. Rathbone.

Inclusion of Project Berlin

570. Project Berlin, it will be recalled, refers to the Bank's plan to market its mobile banking services to the Polish community living elsewhere in the EU[804] and was approved by the Management Board in August 2014. Mr. Caldwell excludes this initiative on the ground that, because subsequent to the January 2014 Business Plan, Project Berlin cannot be taken into consideration in terms of projected profits.[805]

571. Mr. Rathbone disagrees. He argues that not only was Project Berlin included in the December 2014 Business Plan and therefore figured into the Experts' previous valuations, but more importantly that the initiative was "a perfectly routine business decision made by management to take advantage of new rules on EU passporting."[806]

572. The Tribunal rejects Mr. Caldwell's objection, noting that Project Berlin was adopted by the Management Board before the sale of shares and was sufficiently concrete to justify its inclusion in the Bank's valuation. The Tribunal notes that Mr. Caldwell offered no objection, as he did with respect to the White Label Project, to the effect that launch of the project was altogether too uncertain. In sum, the Tribunal has no basis for excluding Project Berlin in calculation of net profits.

---

[804] 1st Rathbone Rpt, para. 314.
[805] 4th Caldwell Rpt, para. 4.3.29.
[806] 4th Rathbone Rpt, paras 18-20.

573. ***The Experts shall accordingly take Project Berlin into account in their valuation of the Bank.***

Inclusion of the White Label Project

574. **The question whether the White Label Project should be counted in the valuation of the Bank has been a live one throughout the proceedings. Mr. Rathbone has maintained from the start that the Project was sufficiently promising that the profits associated it should be added to the baseline profit figures drawn from the bank's business plan. Thus, for example, Mr. Rathbone stated in his First Opinion that the Bank's baseline net profit for 2018, projected to be PLN 137.61m, should be enhanced by PLN 35.77m, resulting in a maintainable net profit figure of PLN 173.38m.**

575. **Mr. Caldwell, by contrast, has been consistently of the view that doubts as to whether the White Label Project would come to fruition are such that it should be disregarded in its entirety in assessing the Bank's maintainable net profit.**

576. **In his Second Opinion, Mr. Rathbone insisted that, though project success was not assured, the value of the White Label Project could not be altogether ignored. According to him, "simply to say 'too remote' is wrong – any true arms' length buyer would attribute some value to the option for the White Label Project."[807] Mr. Rathbone cites testimony suggesting that Bank officers genuinely and reasonably believed the project had a high probability of success[808] and that the circle of**

[807] 2d Rathbone Rpt, para. 101.
[808] 2d Rathbone Rpt, para. 96, citing 2d Lachowski ws, para. 28.

interested partners had actually widened.[809] Mr. Rathbone's views thus have not faltered over time.[810]

577. **For his part, Mr. Caldwell has remained skeptical, noting the scarce evidence over time that the Project had seriously advanced.[811] Significant for him is the fact that the Project lacks Board approval or incorporation in any business plan, and that a similar project, contemplating a joint venture with a different mobile telephone company, likewise has faltered.[812]**

578. **The Tribunal finds the anticipated profit attributed to the White label Project to be highly speculative, especially in light of its apparently slow progress over time. While the possibility of success might, in theory, justify attaching some value to this prospective asset, the Tribunal has simply no basis for doing so. It accordingly disregards the Project in calculating the Bank's maintainable net profit figure.**

579. ***The Experts are instructed to leave the White Label project out of consideration in their valuation of the Bank.***

Inclusion of Warsaw Receivables as Bank Asset

580. **The difficulties associated with the Warsaw Receivables have been canvassed repeatedly in connection with the Parties' argumentation and the Experts' opinions. Treatment of the Receivables is complicated by the fact that they arise *both* in the**

---

[809] 2d Rathbone Rpt, para. 96, citing 2d Gieryński ws, para. 60; 2d Lachowski ws, paras. 32-37.
[810] 4th Rathbone Rpt, para. 21.
[811] 2d Caldwell Rpt, paras. 4.9.6.
[812] 1st Caldwell Rpt, para. 7.52.

valuation of the Bank *and* in assessment of Claimant's losses. In this section, the Award deals only with the former.

581. The financial statements of FM Bank PBP for the year ending 31 December 2014 were signed off by the Management Board on 27 May 2015 with the Warsaw Receivables shown as included at full book value, with no impairment. This was done on the basis of an independent valuation from a major accounting firm and signed off on by both Bank management and the auditors. Moreover, on 16 October 2015, Claimant was obliged to purchase the Warsaw Receivables at full book value as part of the forced sale of the Bank to AnaCap, which did not want the asset.[813] For these reasons, according to Mr. Rathbone, it was proper for the January 2014 Business Plan to include the Warsaw Receivables at full book value. This is because, in the counterfactual scenario, the asset would either have been recovered or would have been considered recoverable at the time of the IPO.[814]

582. However, this is where treatment of the Receivables at the damages calculation phase enters the picture. As will be seen,[815] the Experts have reached agreement, for purposes of computing Claimant's loss, on a valuation of the Receivables at 15% of book value or PLN 33.0 million, and the Tribunal accepts that determination. That being the case, the Tribunal does not see any reason why the same value should not be attributed to the Receivables in the valuation of the Bank.

---

813 4th Rathbone Rpt, para. 34.
814 4th Rathbone Rpt, para. 36.
815 See para. 618, infra.

583. **Account must still be taken of the fact, consistently emphasized by Mr. Caldwell, that the Bank's financials recorded the Warsaw Receivables PLN 220.0 million book value as an asset. But if the asset were written off to the tune of 85%, that would require an immediate offsetting capital injection in order for FM Bank PBP to remain within its required capital limits. According to Mr. Caldwell, Tier 1 equity of PLN 148.4 million would need to be injected to compensate for the Warsaw Receivables impairment.[816] Though the Tribunal finds considerable merit in Mr. Caldwell's contention, it is not comfortable simply assuming that the additional capitalization required would necessarily be of the same amount as the reduced value of the Receivables. The Tribunal thus favors a somewhat more conservative assumption that additional Tier 1 equity of PLN 100 million would need to be injected.**

584. ***Accordingly, the Experts shall include the Warsaw Receivables as assets of the Bank, however assigning them a value, for Bank valuation purposes, of PLN 33.0 million. However, the Experts must also assume that Claimant would be required to inject PLN 100 million in additional Tier 1 equity. That factor must either be taken into account either here or in connection with computation of Claimant's loss (see paragraphs 619-620, infra).***

Adjustment for Impairment of Loans

585. **Mr. Caldwell insists that the January 2014 Business Plan be further adjusted to recognize the impairment of loans that were identifiable as non-performing between**

[816] 4th Caldwell Rpt, para. 4.3.55.

January 2014 and April 2015. [redacted]

586. **Mr. Rathbone, using the Bank's own reports, identifies three corporate loans as impaired. He then compares the cost of risk actually charged in the 2015 financial statements (PLN 127.54 million) with the cost of risk projected in the January 2014 Business Plan for 2015 (PLN 99.49 million), concluding that the difference of PLN 28.05 million is the maximum additional loss that could be attributable to reclassified loans. Deducting 19.5% tax relief from the maximum loss yields a net downward adjustment of PLN 22.70 million.**[819]

587. **The Tribunal sees no reason to adopt the most "pessimistic" of the figures supplied by Deloitte, as Mr. Caldwell proposes. It finds more persuasive Mr. Rathbone's separate and detailed calculation resulting in a number within the Deloitte range. The Tribunal accordingly assesses the loan impairment value at PLN 28.05 million. However, the tax**

817 [redacted]
818 [redacted]
819 4th Rathbone Rpt, paras. 32-33.

savings realized as a result of the non-performance of the loans must also be taken into account in mitigation of the loss.

588. ***The Experts are accordingly instructed to value the Bank's loan impairment at PLN 28.05, subject specifically to a deduction from that loss of tax relief at the rate of 19.5%.***

Bank Tax

589. **A question newly raised in Mr. Caldwell's Second Report concerns the then recently enacted Polish bank tax. Mr. Rathbone initially ignored the new tax because it had not been approved and because there was to be an exemption for banks subject to remedial plans. However, Mr. Caldwell was able to point out in his second report that the tax bill was in fact signed into law in January 2016. According to Mr. Caldwell, the bank tax formula is the following:**

> **0.44% x (total assets – PLN billion size threshold – Treasury Bonds and Bills – Equity).[820]**

590. **Mr. Rathbone affirms that "it is unlikely that FM Bank PBP's results would be significantly affected by the tax, and … thus excluded it from [his] calculations."[821] He thus considers the tax as irrelevant to the Bank's valuation. First, he maintains that recognition of the claimed exemption was obvious from reading the statutory language itself. He also argues that, even if the tax were levied on the Bank, it would be able simply to "pass along" the tax to the Bank's customers. (Mr. Caldwell**

[820] 2d Caldwell Rpt, paras. 5.5.5.
[821] 2d Rathbone Rpt, para. 25.

disagreed that the Bank could pass the tax along to customers due to Poland's anti-usury restrictions, which limit allowable interest rates to twice the statutory rate of interest (currently 5%)).[822]

591. As it turns out, Mr. Rathbone is correct in his assertion that the new bank tax will have no application to FM Bank PBP because it does not apply to banks under a remedial plan.[823] On its face, the Bank is not subject to the tax.

592. Mr. Caldwell also called into question the notion of an exemption for banks subject to remedial plans[824]:

> **I do not see it as a credible scenario where FM Bank PBP would launch an IPO while still operating under a remedial plan. Were the Claimant to go ahead with an IPO in such a scenario, this would inevitably raise serious concerns among investors as to why the remedial plan was in place, what restrictions it placed on the bank's ability to operate freely, and what was the risk that such restrictions would not be lifted in the future. If the remedial plan restrictions were still in effect in 2017 and the Claimant had decided to press on with an IPO, regardless of the effect on investors' appetite for the Bank's shares, then there would need to be a significant pricing discount, in addition to the 12% IPO discount applied by Mr. Rathbone. This additional discount has not been allowed for in his calculations. I therefore consider an IPO in 2017 would not be plausible unless the restrictions had already been lifted, in which case the bank tax would apply and Mr. Rathbone's point would be negated.[825]**

Mr. Caldwell's contention cannot, however, be maintained. First, it cannot be assumed that a remedial plan would cease to be in effect. Second, the impact of a remedial plan on prospective buyers' readiness to buy cannot be known. Any such effect would depend not only on the content and terms of the plan, but also on an assessment of the constraints on bank operations that such a plan imposes.

[822] 3d Caldwell Rpt, para. 4.2.6.
[823] 4th Rathbone Rpt, para. 39.
[824] 2d Caldwell Rpt, paras. 5.5.3-5.5.4.
[825] 3d Caldwell Rpt, paras. 4.2.2 – 4.2.4.

593. ***The Tribunal concludes that the bank tax is to be excluded from consideration in the Experts' conduct of the valuation.***

Maintainable Profit Adjustment

594. **Now that the principal items of inclusion and exclusion from the net profit calculation have been determined, it is appropriate to ask whether some general allowance should be made for the fact that the January 2014 Investor Plan is predominantly based on projections of increased profits that are, by their nature, speculative. From the beginning, the Experts have debated whether the projections in that Plan were realistic.**

595. **In his Second Report, Mr. Rathbone mounted a spirited defense of his reliance on the projections, arguing that Mr. Caldwell focused too heavily on the Bank's depressed earnings in early 2014 and more generally on the period during and immediately after the merger. In his opinion, Mr. Caldwell had given too little attention either to the Bank's new and vigorous management operating under a new remedial plan that had the KNF's approval or to various indications of the Bank's serious turnaround.[826] He similarly found that Mr. Caldwell focused excessively on the difficulties associated with one of FM Bank PBP's predecessors (PBP Bank) and too little on the superior record of the other (FM Bank).[827]**

596. **More generally, Mr. Rathbone considered Mr. Caldwell to have greatly overstated the challenges facing the Bank and sought, with some effectiveness, to rebut each of the**

[826] 2d Rathbone Rpt, para. 165.
[827] 2d Rathbone Rpt, para. 162.

bases of Mr. Caldwell's more negative assessment. Thus, to Mr. Caldwell's assertion that the Bank lacked a market presence in retail, Mr. Rathbone cited testimony by Mr. Boksa offering evidence of visible success in that sector.[828] Mr. Rathbone found that, in his stated concern over the Bank's historical credit loss performance, Mr. Caldwell unfairly overlooked the new risk management structures and processes that had been put in place,[829] largely pursuant to KNF recommendations.[830] In Mr. Rathbone's opinion, Mr. Caldwell similarly overlooked the Bank's well-documented response to its informational technology challenge.[831] As for overall growth in income from banking operations, Mr. Rathbone cited evidence that the Bank was demonstrably emerging from a period of poor results immediately following the merger.

597. While Mr. Rathbone considered Mr. Caldwell to have underestimated the Bank's progress, Mr. Caldwell considers Mr. Rathbone to have overestimated them. In his Second Report, Mr. Caldwell maintained his skepticism, citing various indicators of the Bank's relatively poor health.[832] On this occasion, he underscored what he regarded as the Bank's particular vulnerability from a liquidity standpoint, due to its heavy dependence on internet deposits and the high degree of concentration among depositors, with over 30% of deposit sourced from the Bank's top ten depositors.[833] He also reported a higher incidence of loan impairment than expected.[834] All in all, Mr.

[828] 2d Rathbone Rpt, para. 176, citing, for example, 2d Boksa ws, para. 48(a).
[829] 2d Rathbone Rpt, para. 179.
[830] 2d Rathbone Rpt, para. 185.
[831] 2d Rathbone Rpt, para. 195.
[832] 2d Caldwell Rpt, para. 4.6.20.
[833] 2d Caldwell Rpt, paras. 4.6.2, 4.6.13, 4.6.15.
[834] 2d Caldwell Rpt, paras. 4.6.21

Caldwell considers the Bank's anticipated growth "highly ambitious when viewed in comparison with the other Polish banks that Mr. Rathbone considers comparable."[835]

598. There would necessarily be a considerable challenge for the Bank in launching a new stand-alone retail business division upon which so much of the Bank's earnings were predicated.[836] The Tribunal agrees with Mr. Caldwell's suggestion that Investors would necessarily be cautious in light of the Bank's need to expand rapidly into new customer segments under new technological circumstances.[837]

599. Mr. Caldwell also questions the ease with which the Bank could achieve the required infusions of Tier 1 capital, as planned, through the issuance of subordinated debt in the large amounts anticipated. Mr. Rathbone contends that either there is enough capital available or, if not, it would be provided by the shareholders as needed to maintain the appropriate ratio.[838] However, there remains some uncertainty whether the required amounts could be raised in the quantity and at the pricing projected, and apparently even some uncertainty as to whether all such subordinated debt would qualify as Tier 1 capital. [839]

600. In his First Report, Mr. Rathbone suggested that business plan figures might have been more favorable but for the adverse actions taken by the KNF.[840] However, it was to avoid that very distortion that the Tribunal has directed the experts to a business plan that precedes the KNF's interventions.

---

[835] 2d Caldwell Rpt, paras. 4.7.6.
[836] 1st Caldwell Rpt, para. 6.2.48.
[837] 1st Caldwell Rpt, para. 6.2.50.
[838] 4th Rathbone Rpt, para. 40.
[839] 1st Caldwell Rpt, para. 6.2.59. Mr. Caldwell also sheds some doubt on Abris Fund's financial and legal ability to provide the 55m euros anticipated. Id.
[840] 1st Rathbone Rpt, paras. 211-213.

601. To be clear, Mr. Caldwell does not take the view that the Business Plan goals are impossible, or unachievable or unprecedented among banks. He simply considers them overly optimistic.[841]

602. Although the Tribunal adheres to the counterfactual forward-looking methodology advanced by Mr. Rathbone, on the ground that it is best suited to reflect the Bank's' actual promise under new circumstances, it nevertheless takes note of the fact that Mr. Caldwell's alternative methodologies yielded markedly lower valuations.[842] As Mr. Caldwell calculates it, a transaction-value-based approach yields between PLN 83.1m and PLN 357.8m, while market approach yields a valuation range of between PLN 233.0m and PLN 320.9m[843] and an income approach yields values in the range between PLN 256.1m and PLN 264.0m.[844] These estimations present the distinct advantage of being based on actual transactions, and that is their strength. They promise a kind of "reality check." On the other hand, however, they also assume comparabilities across a sector and over time, while de-emphasizing any given economic actor's distinctive features, circumstances, and strategies.

603. In this section of the Award, which dwells on the factors that the Experts jointly consider most important in valuating the FM Bank PBP, the Tribunal has proceeded systematically on a factor-by-factor basis, taking into consideration Mr. Caldwell's legitimate concerns and making adjustments with a view to achieving more sober and

[841] 2d Caldwell Rpt, paras. 4.7.3.
[842] 1st Caldwell Rpt, paras. 8.2.1, 8.3.2, 8.4.2.
[843] 1st Caldwell Rpt, para. 9.2.2.
[844] 1st Caldwell Rpt, para. 10.1.3.

realistic projections. It has done so in connection with both the factors treated in previous subsections and the factors treated in the sections that immediately follow.

604. Notwithstanding this effort on the Tribunal's part to strike an appropriate balance in its consideration of each valuation factor, the Tribunal cannot be sure of fully capturing the element of uncertainty in the projections upon which the valuation in this case is based. The Tribunal notes that Mr. Rathbone himself made certain concessions that would support a modest lowering of the Bank's projections. Thus, he acknowledged not only the general uncertainty associated with of projections, but also the fact that quite different results would emerge if different IPO dates and/or different business plans were used as points of departure.[845]

605. These considerations lead the Tribunal to the conclusion that, in light of the uncertainties, it is only fair and appropriate to adjust FM Bank PBP's net profit figure somewhat downward, albeit conservatively. It believes that, combined with the factor-specific adjustments detailed in this section, such a reduction will yield a more realistic result. It accordingly concludes that, in addition to those factor-specific adjustments, the net profit figure ultimately arrived at should be reduced by a 10% margin. Any such percentage is necessarily somewhat arbitrary, but a reduction of this magnitude will, in the Tribunal's overall assessment, yield a sounder and fairer outcome.

[845] 1st Rathbone Rpt, paras. 200-210.

606. ***The experts are asked, after having made all categorical adjustments to business plan projections, and before applying the P/E multiple, to reduce the net profit figure by 10%.***

The P/E Multiple

607. **Although the Experts have changed over time the P/E multiple they are willing to employ in the valuation, at no point in time have they agreed on a figure.**

608. **In his First Report. Mr. Rathbone considered the forward-looking P/E multiples of the three best comparator banks (Alior Bank, Getin Noble Bank and Millenium Bank) listed on the Warsaw Stock Exchange as of 20 July 2015. Their average P/E multiple was 15.3x,[846] a figure falling below the median, 15.6x, of all Polish banks. Mr. Rathbone promised to update the multiples at a later point to reflect the latest available data.[847]**

609. **Mr. Caldwell initially objected, preferring that historical P/E multiple be introduced as a reality check.[848] However, in his Second Report, Mr. Caldwell chose to follow Mr. Rathbone's method of analysis, based on data as of 17 February 2016 from the same three comparator banks. On that basis, Mr. Caldwell arrived at an average forward P/E multiple of 12.6x.[849]**

610. **There followed considerable changes of opinion. In his Third Report, Mr. Rathbone eliminated from consideration both Getin Noble Bank and Bank Millenium, due to the**

[846] 1st Rathbone Rpt, para. 181.
[847] 1st Rathbone, para. 54.
[848] 1st Caldwell Rpt, para 6.2.38-.42.
[849] 2d Caldwell Rpt, para. 5.5.11.

fact that they, unlike FM Bank PBP, held Swiss franc mortgages which appeared to operate as a liability under Polish law. That left Mr. Rathbone with a single comparator bank – Alior Bank – resulting in an assumed P/E multiple of 15.8x, a multiple that Mr. Rathbone described as conservative.[850] Mr. Caldwell strongly objected, reminding Mr. Rathbone that he himself had previously impugned the notion that reliable assessments can be made on the basis of a single comparator.[851] Mr. Caldwell found the 15.8x figure particularly inapt, given Mr. Rathbone's own admission that, between 2014 and 2016, the median P/E multiple for his original list of nine "selected banks" had fallen from 15.6x to 14.0x, and the median of all listed banks had fallen from 16.0x to 14.4x..[852] The two banks he eliminated from consideration, Getin Noble Bank and Millennium Bank, had P/E multiples in 2016 of 13.0x and 10.9x, respectively, which, if combined with the Alior Bank figure, would produce an average of 13.2x. Mr. Caldwell convincingly points out that Mr. Rathbone was already taking the Swiss Franc mortgage issue into account in his First Report when he had included all three banks as "those [banks] whose business seems closest to that of FM Bank PBP,"[853] and that the intervening period between his First and Third Reports had not brought any major changes in that regard.[854]

611. As it turns out, the Polish Government ultimately decided not to require banks to pay for foreign exchange losses on Swiss franc mortgages, with the result that Mr. Rathbone reincorporated the two excluded banks into his analysis and arrived, using

[850] 3d Rathbone Rpt, para. 12.

[851] 3d Caldwell, paras. 3.2.4 - 3.2.5, citing 1st Rathbone, para. 272

[852] 3d Caldwell, para. 3.3.1.

[853] 1st Rathbone Rpt, para. 272.

[854] 3d Caldwell Rpt, para. 3.4.2.

updated data, at a median P/E multiple of 17.4x.[855] However, Mr. Rathbone expressly conceded that this figure was very much a matter of judgment and was necessarily heavily contingent on market movements. He also expressly allowed that the Tribunal might want to take a more "long distance" approach and rely on the banking sector average P/E over the last ten years of around 15.0x.[856]

612. All things considered, and in light of the wide fluctuations in figures over time, the Tribunal does in fact find itself more comfortable with a longer-term figure such as 15.0x, which also happens to fall between the two Experts' extreme numbers.

613. *The Tribunal accordingly directs the Experts to employ in the valuation they perform a P/E multiple of 15.0x.*

Warsaw Receivables as Claimant Asset

614. With the final bank valuation figure in hand, one can turn to valuation of Claimant's loss. That figure must of course be reduced to reflect the proceeds of sale to AnaCap in the amount of PLN 29,878,410. But, in addition, Claimant must account for the value of the Warsaw Receivables of which it became the owner upon AnaCap's refusal to purchase it.

615. The Warsaw Receivables having been excluded from net profits, and thus from the basic Bank valuation, the question arises as to how they should be treated in the context of the AnaCap transaction. Mr. Rathbone initially excluded consideration of the Receivables at that stage as well, precisely because AnaCap refused to purchase

---

[855] 4th Rathbone Rpt, para. 49.
[856] 4th Rathbone Rpt, para. 50.

them and paid no value corresponding to them. The asset, he concluded, had little or no value.

616. Mr. Caldwell initially disagreed, insisting that, even if AnaCap refused to buy the asset, the fact remained that Claimant thereby retained it, and must account for its book value.

617. In his Second Report, Mr. Rathbone made a modest concession, acknowledging that it would be appropriate to lessen Claimant's loss by a factor reflecting the Receivables' actual fair market value.[857] Finding it impossible to identify with any confidence the fair market value of the Receivables, Mr. Rathbone was prepared simply to include in the calculation, as a diminution of loss, any proceeds actually that Claimant might receive in relation to the Receivables.

618. In his Second Report, Mr. Caldwell adduced evidence suggesting that the Warsaw Receivables have actual value. He cited a legal opinion from the law firm of Hogan Lovells, dated 13 June 2014, in which the firm assessed the probability of success in litigation as "significantly exceeding 50%."[858] He also noted that Claimant rejected a settlement offer of PLN 160m made by the City of Warsaw.[859] Indeed, Mr. Rathbone himself admitted that Alior Bank had expressed a willingness during the bidding process to buy the Receivables at 15% of book value.[860] Finally, Mr. Caldwell observes that the Bank's December 2014 Business Plan had counted the Receivables as an element of its capitalization position, without which it would have exhibited a

---

[857] 2d Rathbone Rpt, para. 239.
[858] 2d Caldwell Rpt, paras. 4.8.9.
[859] 2d Caldwell Rpt, paras. 4.8.15.
[860] 2d Rathbone Rpt, para. 237.

capitalization shortfall.[861] Notwithstanding evidence that the Warsaw Receivables had significantly diminished in value, as compared to its book value of PLN 220m, in his Second Report Mr. Caldwell maintained his position that the full book value should be deducted from PL Holdings' claimed losses.[862]

619. Eventually, however, Mr. Rathbone's agreed to value the Warsaw Receivables at 15% of their book value, or PLN 33.0 million, a proposition in which Mr. Caldwell eventually concurred.[863] The Tribunal accepts that valuation.

620. Mr. Caldwell, however, is still unwilling to overlook the fact that the Bank's financials recorded the Warsaw Receivables PLN 220.0 million book value as an asset. If the asset were written off to the tune of 85%, that would require an immediate offsetting capital injection in order for FM Bank PBP to remain within its required capital limits. According to Mr. Caldwell, Tier 1 equity of PLN 148.4 million would need to be injected to compensate for the Warsaw Receivables impairment.[864]

621. The Tribunal has already dealt with the probable capitalization shortfall, finding that an injection of additional capital in the amount of PLN 100 million would be required.[865] The need for that injection should not however be taken into account twice. The Tribunal leaves it to the Experts to decide whether that adjustment is more appropriately made in the context of the Bank's valuation (as suggested at paragraphs 580-584, supra) or in connection with the calculation of Claimant's loss (in which case it would be taken into account here).

---

861 2d Caldwell Rpt, paras. 4.8.18.

862 2d Caldwell Rpt, paras. 4.8.29.

863 4th Caldwell Rpt, para. 3.3.2.

864 4th Caldwell Rpt, para. 4.3.55.

865 See paras. 580-584, supra.

622. There is one caveat. In his Fourth Report, Mr. Rathbone states:

> **I am instructed that the Claimant has made an offer to surrender the rights under the usufruct claims if the Respondent agrees that no deduction will be made to damages for the Warsaw Receivable in the arbitration. In this way, the Claimant will be made whole but any risk of double recovery will be avoided. If this offer is accepted, then the asset should be valued at nil in the damages calculation, because it will be transferred to the Respondent. On the basis that this offer is still open, and on the basis that the Claimant has repeatedly assured the Tribunal that it will not seek double recovery in respect of the Warsaw Receivable, I have consequently attributed no value to the Warsaw Receivable in calculating my damages.[866]**

623. However, the Tribunal is unaware of the status of the offer by Claimant described by Mr. Rathbone and cannot therefore assume that it stands and will be accepted. Should the Experts agree that the offer stands and would be accepted, then in principle they should attribute no value to the Warsaw Receivables *either* for purposes of valuating the Bank *or* for reducing Claimant's net losses.

624. *Accordingly, in assessing Claimant's losses, the Experts must deduct the amount of PLN 30.0 million, as the agreed upon value of the Receivables of which Claimant retains ownership. The only circumstance in which this deduction is not to be made is if Claimant's offer to transfer the Receivables to Respondent, reported in paragraph 621, supra, still stands and Respondent accepts it.*

IPO Discount

625. Mr. Caldwell has suggested that the anticipated IPO proceeds, at least in the first tranche, should be subject to an IPO discount *even before* discount to present values is

[866] 4th Rathbone Rpt, paras. 54-55.

performed.[867] He explains that the counterfactual analysis followed by Mr. Rathbone assumes that all retained profit in any given year would be contributed to capital in the following year, with the result that shareholders would receive no dividends. Mr. Caldwell insists that the prospect of an absence of dividends over a prolonged period would cause a prospective buyer of the Bank to lower its valuation. Citing literature on IPO discounts, Mr. Caldwell, proposes a discount figure of 15%.[868]

626. Mr. Rathbone came around to Mr. Caldwell's view that an IPO discount should be applied, due to the lack of a history of good information about the Bank and the likelihood that Claimant would feel it needed to give a special incentive to buy. However, he agreed to an IPO discount of 12% only.[869]

627. Ultimately, however, the Experts themselves compromised and agreed on an IPO discount of 13.5%.[870]

628. *Thus, in calculating Claimant's loss, the Experts shall subject the valuation of the bank to an IPO discount of 13.5%.*

IPO Costs

629. To avoid any unjust enrichment, and to act in keeping with the counterfactual scenario, the Tribunal must deduct from Claimant's losses all transaction costs associated with the two IPOs, including notably underwriting costs, on the one hand,

867 1st Caldwell Rpt, para. 6.2.1
868 2d Caldwell Rpt, para. 5.6.5.
869 2d Rathbone Rpt, para 85.
870 4th Caldwell, para. 5.2.9; 4th Rathbone Rpt, para. 51.

and legal and accounting fees, on the other. Mr. Rathbone initially estimates those as 5% for the former and 1% for the latter, for a total of 6%,[871] In his Second Report, Mr. Rathbone reduced the IPO cost factor from 6% to 1% due to his learning that it is highly unusual to pay underwriting fees on IPOs in Poland.[872] Mr. Caldwell, citing a more recent study, proposed IPO costs of 2.05% in connection with the first IPO tranche and 1.09% in connection with the second.[873]

630. As in the case of the IPO discount, however, the Experts ultimately agreed on a common IPO cost figure, settling on a cost of 2.0% for each tranche.[874]

631. *Accordingly, Claimant's damages are to be reduced to reflect projected IPO costs at the rate of 2% per IPO tranche.*

Discount Rate

632. The Experts agree that, in order to arrive at a quantum in this case, the future cash flows stemming from the counterfactual IPOs must be reduced to present value. Both Experts base this rate in principle on the cost of equity.

633. Mr. Rathbone initially selected as the cost of equity 8.40%, arrived at by totaling three components: risk-free rate (3.19%), equity risk premium (5.20%) and adjusted beta (1.01 %).[875] Based on later market data, he raised the cost of equity to 8.65%.[876]

634. Mr. Caldwell posited a somewhat higher discount rate. Much of the difference appears to stem from his including in the cost of equity two additional components,

---

[871] 1st Rathbone Rpt, para. 184.
[872] 2d Rathbone Rpt, para. 91.
[873] 2d Caldwell Rpt, paras. 5.3.6.
[874] 4th Caldwell, para. 5.2.10, 4th Rathbone Rpt, para. 51.
[875] 1st Rathbone Rpt, paras. 188-193
[876] 3d Rathbone Rpt, paras. 16-19.

namely a "small company premium," reflecting smaller companies' relatively greater difficulty accessing funds, and a "company-specific premium," reflecting additional difficulties that any particular small company might, on account of its peculiar circumstances, encounter. With those additional components included, Mr. Caldwell arrives at a cost of equity of between 11.7% and 14%, settling on a figure of 13%.[877]

635. **Mr. Rathbone regards use of both the small company premium and the company-specific premium as discredited in the literature, citing in particular Professor Damodaran (relied upon for other purposes by Mr. Caldwell), who described those premiums as no longer relevant.**[878]

636. **The Tribunal is comfortable with Mr. Caldwell's inclusion of a modest small company supplement, but not the further inclusion, on top of that, of a company-specific supplement. The Tribunal prefers remaining in the suggested range of 9.75 to 11%, and sees no reason to elevate that figure beyond 9.75%**

637. ***In discounting future cash flows to present value, the Experts are to use a discount rate of 9.75%.***

Dilution Factor

[877] 1st Caldwell Rpt, para. 10.2

[878] Aswath Damodaran, The Small Cap Premium: Where is the Beef,"? 11 April 2015 (CEG 156). See also Company-Specific Risk Premiums: Update on the Scholarly Evidence, B Calvert & D Smith, 20 March 2011 (CEG 157):

> The preponderance of the scientific evidence suggests that the use of a company-specific risk premium cannot be admissible as expert testimony because the use is not reliable. In particular, current practitioner techniques that incorporate a company-specific risk premium into cost-of-capital applications fail all four judicial checks for reliability of testimony. Thus our paper serves as a warning to valuation experts about the dangers associated with including a CSRP in their cost-of-capital models.

638. **In his Fourth Report, Mr. Caldwell for the first time states that it is necessary to determine to what extent, if any, Claimant's ownership (expressed as a percentage of total equity) would have changed between January 2014 and the IPO. Mr. Caldwell asks in effect (a) whether additional capital contributions would be required, (b) whether the Claimant, through Abris Fund I and Abris Fund II, would have had had sufficient funds to provide such capital contributions, and (c) what the impact would be in terms of share ownership if there were a shortfall and Claimant were required to resort to third party contributions, thus diluting its share ownership.**

> **Given the obvious and significant requirement for further equity capital, in my opinion it would be incorrect to assume that the Claimant would provide 100% of this requirement without strong evidence of its ability to do so, including details of its concentration limits, commitments to other investments, and confirmation of no other formal or informal restrictions. The impact of third party investment being required would be significant, as it would be based on much lower valuations than the IPO, being much earlier in FM Bank PBP's development stage than the IPO, and the investment would be in response to a capital shortfall, and therefore be an urgent requirement which would leave the existing owners in a weak negotiating position.[879]**

639. **Because it views this consideration as largely an afterthought and in any event so inherently speculative, the Tribunal declines to assume any further dilution of Claimant's shareholdings in FM Bank PBP.**

640. ***Accordingly, apart from the dilution traceable to Mr. Stepniak's minority interest in the Bank (see paragraph 640, infra), no dilution of share ownership is to be assumed.***

The Minority Shareholder's Interest

[879] 4th Caldwell Rpt, paras. 7.5.1 – 7.5.3.

641. **Due to its not being the sole shareholder of FM Bank PBP, Claimant would not in any event be entitled to the entirety of the proceeds of the sale to AnaCap. The minority shareholder, Mr. Stepniak, holds a 0.41% interest in the Bank. Claimant is therefore entitled only to an amount equal to 99.59% of the proceeds.**

642. ***Accordingly, the loss valuation must be reduced by the value corresponding to Mr. Stepniak's 0.41% shareholding interest in the Bank.***

B. <u>Is Claimant Entitled to Recover Interest and, if so, in what Amount?</u>

(a) Claimant's Position

643. **Claimant does not seek pre-award interest of any kind. However, it seeks post-award interest, i.e., interest accruing from the date of rendition of this Award until payment of the Award.**

644. **Mr. Rathbone is of the view that interest should be charged on any award at the discount rate (cost of equity) up to the date of the hypothetical IPO, i.e., 30 April 2017, thereby making Claimant whole in terms of what it would have received had the IPOs gone ahead. In his First Report, he posited 8.40% as the cost of capital and thus as the appropriate rate of interest for this period, while allowing that a somewhat lower rate might appropriately be applied to the periods following 30 April 2017 and 30 April 2018, in the event the award is not paid by then, since, under the counterfactual scenario, Claimant would have converted its investment into cash, which would earn a lower rate of return.[880] In his Fourth Report, Mr. Rathbone states more specifically**

[880] Rathbone Rpt., paras. 217-218.

that interest for the periods following 30 April 2017 and 30 April 2018 should be charged at the Polish statutory rate of interest. Under Article 481 of the Polish Civil Code, interest for default in payment is computed as the sum of the reference rate of the National Bank of Poland plus 5.5 percentage points. As the reference rate is currently 1.5%, the current interest rate on defaults would be 7.0%.

645. According to Claimant, the prevailing practice of investor-State tribunals is to award compound rather than simple interest,[881] and there is no reason to deviate from that practice in this case. Thus, interest should be calculated on a compound basis.

(b) Respondent's Position

646. According to Respondent, even if it is held liable in damages to Claimant and obligated to pay any post-award interest that accrues, such interest must be calculated on a simple, rather than compound, basis. Respondent does not, however, propose that any specified rate of interest be used.

647. Respondent's Expert, Mr. Caldwell finds that, in the event damages are awarded, interest should be applied from 30 April 2015 to the date of award. As for applicable

---

[881] Claimant cites the award in the case of *Gemplus v. Mexico, Exh.* CLA-121, paras. 16-26, as follows:

> [I[t is clear … that the current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal's opinion, there is now a form of 'jurisprudence *constante*' where the presumption has shifted from the position a decade or so ago with the result that it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.

Claimant also cites Ripinsky and Williams, *Damages in International Investment Law* (BIICL, 2008), Exh. CLA-220, p. 387, as follows:

> As far as international investment law is concerned, there has been a reversal of the presumption of simple interest: a significant number of recent tribunal decisions provide a strong indication that compound interest has come to be treated as the default solution. This may be due to the nature of economic activity of the claimants in investor-State disputes and strong theoretical support for granting compound interest in such cases.

interest rate and its source, he considers that the most appropriate rate to apply in this case is a risk-free rate based on the yields on Polish government bonds. On that basis, he posits a rate of 1.64%. He concedes that if the Polish statutory interest rate were to be used, that rate for the period between 30 April 2015 and 31 December 2015 was 8%, a figure that dropped to 5% on 1 January 2016.[882]

(c) Findings of the Tribunal

648. The Tribunal considers that the most appropriate interest rate for post-award interest in this case is the rate designated by Polish law for interest on overdue debts. Article 481 of the Polish Civil Code prescribes an interest rate for those purposes consisting of the reference rate of the National Bank of Poland plus 5.5 percentage points. The current reference rate being 1.5%, post-award interest on this Award shall be paid at a rate of 7.0%. The Tribunal has been shown no reason why interest should be payable on other than a simple basis.

XIV. COSTS AND FEES

649. The matter of the allocation between the Parties of costs and fees in connection with this proceeding shall be determined in the Final Award in this case.

XV. RELIEF GRANTED

[882] 4th Caldwell Rpt., paras. 36.6.1 – 6.6.3.

650. In view of the foregoing, the Tribunal rules as follows:

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% 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.

Signatures

George A. Bermann, chair of the Tribunal

Julian D.M. Lew, co-arbitrator

Michael E. Schneider, co-arbitrator

Dated: