



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

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Award Name and Date: PL Holdings S.à.r.l. v. Republic of Poland (SCC Case No. V 2014/163) – Partial Award – 28 June 2017

Case Report by: Ibrahim Amir**, Editor Diego Luis Alonso Massa***

Summary: The Claimant's contention in this proceeding that Poland has expropriated Claimant's qualifying investment in Poland and done so without compensation, in violation of the Bilateral Investment Treaty between Poland and the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg. The Tribunal has determined that Respondent expropriated Claimant's shares of stock by compelling Claimant to sell those shares at a highly disadvantageous moment, and therefore, ordered Respondent to compensate the Claimant for the resulting loss.

Main Issues: Expropriation – Violation of BIT's Provisions – The Principle of Proportionality - Fair and Equitable Treatment

Tribunal: Professor George A. Bermann (President), Professor Julian D. M. Lew (appointed by the Claimant) and Michael E. Schneider (appointed by the Respondent)

Claimant's Counsel: Mr. Stephen Fietta (Fietta, London) and Mr. Matthew Weiniger QC (Linklaters, London)

Respondent's Counsel: Ms. Joanna Jackowska-Majeranowska (Office of General Counsel to the Republic of Poland, Warsaw) and Stewart Shackleton (SR Shackleton, London)

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Digest:

1. Relevant Fact

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”). 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. (¶1) The measures of which Claimant complains in this proceeding were adopted by the Komisja Nadzoru Finansowego (“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. (¶¶4, 81)

Between 18 July 2012 and June 2013, Claimant became the sole shareholder of Polski Bank Przedsiębiorczości Spółka Akcyjna (“PBP Bank”) and acquired an interest in a second Polish bank, FM Bank Spółka Akcyjna (“FM Bank”). FM Bank and PBP Bank were then merged into a new entity known as FM Bank PBP Spółka Akcyjna (“FM Bank PBP”), with Claimant becoming the 99.59% shareholder of FM Bank PBP on 1 July 2013. (¶¶ 9-11)

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. On 30 April 2015, Claimant sold all of its respective shareholdings in FM Bank PBP to Porto Group Holdings Limited, an affiliate of AnaCap Financial Partners III LP (“AnaCap”). (¶12)

On 8 April 2014, KNF 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. 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 grounds: (i) the Supervisory Board made changes to the Management Board’s composition that created serious legal and operational risks; (ii) the Supervisory Board issued binding instructions on matters within the competence of the Management Board; (iii) 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; (iv) the Supervisory Board failed to comply with the obligations in relation to the composition of the Management Board. (¶¶186-189)

However, on 24 July 2014, the KNF issued a second decision (“Second KNF Decision”), partially affirming and partially overturning the First KNF Decision. It affirmed the First KNF Decision’s ban on PL 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. (¶193) Only one day after issuing the Second KNF Decision, the KNF instituted further proceedings against PL Holdings in contemplation of an eventual order to PL Holdings requiring its sale of shares. (¶211)

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. In its 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." 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. (¶212)

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

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. On 4 February 2015, the Regional Administrative Court refused to suspend performance of the Second KNF Decision. 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. On 29 May 2015, the Supreme Administrative Court dismissed the appeal. (¶¶214-215)

2. Procedural History

On 19 May 2014, Claimant sent Respondent a written notification of the dispute, with specific reference to talks aimed at its amicable resolution. (¶240) On 26 November 2014, Claimant filed a request for arbitration with the Arbitration Institute of the SCC. 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. (¶¶ 26-27)

On 13 February 2015, the SCC informed the Parties 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 to be paid by the Parties in equal shares. On 17 February 2015, the SCC reported Professor Bermann's appointment as chair of the tribunal to the Parties. On 6 May 2015, the Tribunal issued Procedural Order no. 1, setting out a detailed procedural framework and calendar of stages in the arbitration, consistent with the agreement between the Parties. (¶¶ 30-33)

On 7 August 2015, Claimant submitted its Statement of Claim, accompanied by four witness statements and three expert opinions. (¶34) On 13 November 2015, Respondent submitted its Statement of Defence, accompanied by three witness statements and three expert opinions. (¶39) 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. (¶40)

On 22 January 2016, the Tribunal issued Procedural Order no. 2, ruling on both Parties' requests for and objections to production. 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. (¶42)

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. (¶43)

On 26 February 2016, Claimant submitted its Statement of Reply, accompanied by second witness statements. (¶46) On 27 May 2016, Respondent submitted its Rejoinder, accompanied by second fact witness statements. (¶51) On 21 June 2016, a telephone pre-hearing conference took place among Counsel and the Chair of the Tribunal on behalf of the full Tribunal. (¶55)

Hearings in the case were held on 11 to 15 and 17 to 20 July 2016 at the International Dispute Resolution Centre in London. (¶63) On 15 September 2016, Respondent submitted its post-hearing submission on its additional jurisdictional objection. (¶69) And on 27 September 2016 Respondent submitted its post-hearing submission. (¶71) On 15 October 2016, Claimant submitted its post-hearing submission on Respondent's additional jurisdictional objection. (¶74) The Parties filed simultaneous post-hearing briefs on 14 October 2016. (¶73)

On 9 November 2016, the Tribunal wrote a letter to Counsel ordering the proceedings to be closed. In the same letter, 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. (¶74)

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. (¶80)

3. Determination on Jurisdiction

3.1 Is Claimant an Investor within the Meaning of the Treaty?

3.1.1 Respondent's Position

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. (¶¶ 273-275, 296)

3.1.2 Claimant's Position

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. It has its head office and makes its essential business decisions at 5 Rue Guillaume Kroll, 1882 Luxembourg. Claimant, therefore, 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." 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. (¶¶ 242, 297)

3.1.3 Findings of the Tribunal

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. Respondent's jurisdictional defence is accordingly rejected. (¶¶ 298-299)

3.2 Does Poland's Accession to the EU deprive this Tribunal of Jurisdiction?

3.2.1 Respondent's Position

Respondent challenges the Tribunal's authority on the ground that the Accession Treaty to the European Union superseded the earlier BIT. Respondent bases this argument on both Articles 30 and 59 of the Vienna Convention on the Law of Treaties (VCLT). 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. 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. Furthermore, Article 344 of the Treaty on the Functioning of the European Union (TFEU) vests exclusive authority to adjudicate the present dispute in the European judiciary. (¶¶ 301-304)

3.2.2 Claimant's Position

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." (¶305)

3.2.3 Findings of the Tribunal

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. (¶311)

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 two treaties relate to the same subject-matter. 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 analogue 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. (¶312)

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. (¶313)

It remains to consider TFEU Article 344. The Tribunal finds that the argument based on Article 344 TFEU misses its mark and has no application. 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. 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.

Accordingly, the Tribunal rejects Respondent’s argument that the Tribunal lacks jurisdiction to determine the claim in this Arbitration. (¶314)

4. Determination on the merits

4.1 Did Respondent Expropriate Claimant’s Investment?

4.1.1 Claimant’s Position

Claimant invokes the Treaty’s guarantee of compensation to investors for investments “expropriated or subject to other measures of direct or indirect dispossession that have a similar effect.” 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. 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. (¶¶ 252, 318)

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. 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. (¶¶ 255-256)

4.1.2 Respondent's Position

Respondent invokes the State's "right to regulate," which it defines as the "right to independently and fully regulate in 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. (¶278)

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. (¶319)

4.1.3 Findings of the Tribunal

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. The Tribunal accordingly finds that the action taken by the KNF represents an expropriation, within the meaning of the Treaty. (¶¶ 320-323)

4.2 Did Respondent Satisfy its Obligations of Compensation under the Treaty?

4.2.1 Claimant's Position

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. (¶324)

4.2.2 Respondent's Position

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. (¶325)

4.2.3 Findings of the Tribunal

Respondent denied any liability to Claimant and deemed it necessary to offer Claimant any compensation. 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. (¶326)

4.3 Did the Measures of the KNF Comport with the Principle of Proportionality?

4.3.1 Claimant's Position

Claimant fully concedes a State's "right to regulate", in the sense of adopting measures legitimately needed for safeguard of the public good. However, the right to regulate does not entitle States, under an international investment treaty, to take measures that are disproportionate, arbitrary or discriminatory. 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, (ii) was necessary, in the sense that no less drastic measure would have sufficed, and (iii) was disproportionately severe for the Investor, compared to the purposes meant to be achieved (i.e., proportionality *stricto sensu*) (¶¶ 327-328)

Claimant maintains that, for a variety of reasons, none of the three measures taken by the KNF meets any of the proportionality's 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. (¶256)

4.3.2 Respondent's Position

In terms of proportionality, the measures taken by the KNF were unquestionably suitable in light of the legitimate interest they served. Claimant is mistaken in asserting that the KNF had available to the measures adequate remedies that were significantly less drastic. (¶¶ 344, 349)

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. 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. 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. (¶¶ 350, 353)

4.3.3 Findings of the Tribunal

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. 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. (¶¶ 354-355)

(i) Suitability

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. However, the Tribunal nevertheless seriously questions the suitability of the measures taken under the circumstances of this case. In light of the evidence before it, the Tribunal must conclude that the reliance on "the Bank's lack of liquidity and inadequacy of share capital" on which the Respondent chiefly predicates its case was not the motivation for the KNF decisions. 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. (¶¶ 356-373)

(ii) Necessity

To the extent that the KNF measures were motivated by the various irregularities, the question whether less drastic means was 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. 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. (¶¶ 375-376)

(iii) Excessiveness

The question, in connection with this third prong, is whether the situation facing the KNF was so dire as to justify them. 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. (¶¶ 384-387)

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 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. (¶390)

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. (¶391)

4.4 Did the KNF Seriously Violate Claimant's Procedural Rights?

4.4.1 Claimant's Position

Claimant 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, by refusing to lift sanctions even when irregularities had been cured, by failing to act on a motion for reconsideration within one month, by having the motion for reconsideration decided by the same officials who adopted the challenged measure initially, 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, 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, by prejudging outcomes 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. (¶362)

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. Claimant maintains that it pursued every appeal route identified in the KNF decisions as required by Polish law. (¶363)

4.4.2 Respondent's Position

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 wilful disregard of due process of law. The KNF did not "cross the line." (¶401) 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." 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. (¶404)

4.4.3 Findings of the Tribunal

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. 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. (¶406)

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 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. 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. (¶408)

The Tribunal concludes that the procedural abuses recounted here compounded the lack of proportionality of the measures imposed on Claimant by the KNF. (¶410)

4.5 Did Claimant Sell its Shares Voluntarily?

4.5.1 Claimant's Position

Respondent's assertion that Claimant voluntarily sold its shares because the Third KNF Decision was not immediately enforceable is incorrect. Under Article 11.2.5 of the Banking Act, failure to execute the required sale on time would have had serious consequences. (¶411)

The Parties agree that the First KNF Decision was immediately enforceable, insofar as it barred Claimant from exercising its voting rights in the Bank. 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. (¶412)

4.5.2 Respondent's Position

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. (¶413)

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. 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 enforceable order is in fact enforced. (¶¶ 416-417)

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. (¶289)

4.5.3 Findings of the Tribunal

The Tribunal is unable to conclude that Claimant's sale of shares in was voluntary. (¶418) 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. (¶426) Under these circumstances, it would be unjust to Claimant to treat its sale of shares as if it were purely voluntary. (¶429)

4.6 Is Claimant Barred from Relief due to Failure to Exhaust Available Remedies?

4.6.1 Claimant's Position

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. (¶430) 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 pursued, and certainly all of the ones of which it was notified by the KNF. (¶431)

4.6.2 Respondent's Position

Claimant did not make systematic use of the remedies available to it, and it 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. (¶¶435, 438)

4.6.3 Findings of the Tribunal

The reference here is not of course to specific preconditions to arbitration, but rather to a general exhaustion of remedies requirement. (¶439) 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. (¶442) 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. (¶444) Failure to exhaust remedies is accordingly no basis for denying Claimant compensation under the Treaty to which it is otherwise entitled. (¶445)

5. To What Relief, if any, is Claimant Entitled?

5.1 Is Claimant Entitled to Recover Damages and, if so, in what Amount?

5.1.1 Claimant's Position

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. More specifically, 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.” 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. On the basis of its expert’s report, Claimant seeks quantified damages at PLN 1,888,412,217. (¶¶ 267-269)

5.1.2 Respondent's Position

Respondent disputes the validity of the comparable multiples-based and discounted cash flow methods of calculating damages employed by the Claimant’s expert. Respondent challenges not only the accuracy of the data relied upon by the Claimant’s expert, but also several of

expert's assumptions regarding the feasibility of Claimant implementing the December 2014 Business Plan and the likelihood and value of the business opportunities that Claimant allegedly lost.

Using three alternative methodologies – a transactional values method, a market approach, and income approach – Respondent's Expert 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. Respondent's expert concluded that the damages, if any, to which Claimant would be entitled were no more than PLN 100 million. (¶¶ 292-293)

5.1.3 Findings of the Tribunal

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. It must accordingly compensate the Claimant for the resulting loss. 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. (¶¶446, 547) The Tribunal also 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, an approach basically corresponds to the forward-looking formula. (¶548)

5.2 Is Claimant Entitled to Recover Interest and, if so, in what Amount?

5.2.1 Claimant's Position

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. (¶643) According to Claimant, the prevailing practice of Investor-State tribunals is to award compound rather than simple interest, and there is no reason to deviate from that practice in this case. Thus, interest should be calculated on a compound basis. (¶645)

5.2.2 Respondent's Position

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. (¶646)

5.2.3 Findings of the Tribunal

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. (¶648)

6. Costs and Fees

The Tribunal decided that 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. (¶649)

7. Relief Granted

In view of the foregoing, the Tribunal rules as follows:

(1) 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.

(2) 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.

(3) 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.

(4) The allocation of responsibility for costs and fees (including attorneys' fees) will be determined in the Final Award issued in this case.

(5) Neither Party is entitled at this time to any additional relief. (¶650)