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BY EMAIL AND COURIER

Ms Meg Kinnear
Secretary-General
International Centre for Settlement of
Investment Disputes
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Dear Secretary-General,

ICSID Case No. ARB/17/47: AS PNB Banka and Ors v. Republic of Latvia

A. Introduction and Summary

1. The Second to Sixth Claimants (the **Shareholder Claimants**) hereby respectfully submit this proposal to disqualify each of the members of the Tribunal in the above-referenced proceedings (**ICSID Proceedings**), which is comprised of the Hon. Mr James Spigelman QC (President), Mr John M. Townsend, and H.E. Judge Peter Tomka, pursuant to Articles 14 and 57 of the ICSID Convention and Rule 9 of the Arbitration Rules, on the basis that a reasonable observer would have reasonable doubts as to the impartiality of the Tribunal (the **Proposal**). This Proposal is accompanied by Shareholder Claimants' Challenge exhibits numbered **SCC-1** to **SCC-69**.

2. The Shareholder Claimants have also considered the proposal for disqualification filed on behalf of the First Claimant (the **Bank**) by Mr Aleksei Kutiavin, Mr Dmitrii Kalmykov, and Ms Anna Verbicka, former members of the Bank's Management Board (the **Former Management**), and their counsel, Mr Okko Behrends, dated 17 February 2020, which the Shareholder Claimants hereby endorse and adopt by reference as part of this Proposal.

3. This Proposal, as with the one filed on behalf of the Bank, arises out of the Tribunal's decision in Procedural Order No. 8 dated 30 January 2020 (**PO No. 8**), in which the Tribunal recognised, until further order, Mr Vigo Krastiņš, the insolvency administrator (**Insolvency Administrator**),

as the representative of the Bank in these ICSID Proceedings (**Representation Decision**).[1] In the result, the Bank is now represented by the Insolvency Administrator,[2] who has severe conflicts of interest and is incapable of impartially representing the Bank, and has been deprived of its right to continue to be represented by its Former Management, who the Bank authorised to file the Bank's Request for Arbitration (the **RFA**) registered by ICSID on 28 December 2017 and had full conduct of the ICSID Proceedings for the Bank until very recently.

4. First, for the reasons set out in the Proposal, the Shareholder Claimants submit that the Tribunal's Representation Decision is a severe violation of the Bank's fundamental right to due process in the ICSID Proceedings. In particular, the Tribunal has deprived the Bank of its right to be represented by its Former Management, and has undermined the Bank's right to be heard and to effective judicial protection by recognising the Insolvency Administrator, until further order, as the Bank's representative in the ICSID Proceedings. This has occurred in circumstances where the Insolvency Administrator is hopelessly and incurably conflicted, and cannot properly and faithfully represent the Bank's interests in the ICSID Proceedings, as a result of both his personal self-interest and his allegiance and overall accountability to the Respondent (the **Due Process Violations**). The Tribunal's willingness to entertain fundamental Due Process Violations against the Bank, and thereby deprive the Bank of its most sacrosanct procedural rights in the ICSID Proceedings, raises reasonable doubts as to the impartiality of the Tribunal, and engenders a clear appearance of bias against all of the Claimants.

5. Second, and allied with the first point, the Representation Decision, by which the Tribunal sought to justify its Due Process Violations, was conclusory, based on assertions and speculation rather than facts in the arbitral record, indicated prejudgment on the key issue of whether the Insolvency Administrator has conflicts of interest, and failed to address ICSID and other authority on the matter. These aspects of the Representation Decision serve to strengthen the reasonableness of the doubts as to the Tribunal's impartiality and amplify the appearance of bias, especially given that an experienced Tribunal would at a minimum be expected to avoid pretextual and conclusory reasoning in making a decision of such fundamental importance to the due process rights of a party to proceedings (the **Transparency Violations**).

6. Third, and separately, the Shareholder Claimants submit that the Tribunal prejudged an important issue arising in the bifurcated phase of the ICSID Proceedings, namely whether, notwithstanding that European Union (**EU**) law may deprive the Tribunal of jurisdiction in light of the decision of the Court of Justice of the European Union (**CJEU**) in *Slovak Republic v. Achmea*, the Claimants can in any event access the ICSID dispute resolution mechanism in the United Kingdom-Latvia BIT (the **BIT**) based on their legitimate expectations under EU law, which "trump" the EU rule in *Achmea*.

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1 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**.

2 Even if the Insolvency Administrator were the proper and lawful representative of the Bank, which he is not, the Claimant Shareholders also observe that the Bank – even in that case – would have been deprived of effective representation because the Tribunal has curtailed the Bank's representation by recognising the Insolvency Administrator *only* "for the purposes of completing submissions on the Bifurcated Issues", and has left open the prospect of his removal at the merits phase. At that point, the Tribunal may again seek to replace the Bank's representative with other – as yet unknown – representatives. In fact, the Tribunal has referred in the Representation Decision to putative representatives who have not even sought or applied to represent the Bank in the ICSID Proceedings, such as the "new shareholders": *see* Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, pp. 8–9.

7. The Representation Decision proceeds on the basis that the Tribunal can (and will) conclusively resolve the Respondent's objection in the bifurcated phase (the **Bifurcated Issue**) without determining whether the Claimants have legitimate expectations under EU law. By contrast, the Claimants have repeatedly argued and the Tribunal appears to have previously accepted that the issue of whether the Claimants have legitimate expectations under EU law has to be decided as part of the merits phase. By foreclosing the possibility of deferring the Bifurcated Issue to the merits phase, the Tribunal prejudged the Claimants' repeated submission that, if not rejected, the Bifurcated Issue has to be deferred to the merits phase, and thus cannot be resolved against the Claimants in the bifurcated phase (the **Prejudgment Violation**).

8. Article 58 of the ICSID Convention states that the decision on any proposal to disqualify the majority of arbitrators shall be taken by the Chairman of the ICSID Administrative Council. In the circumstances, and for the reasons outlined below, the Shareholder Claimants submit that, viewed singularly or collectively, the above grounds raise reasonable doubts as to the impartiality of the Tribunal in the ICSID Proceedings, with the consequence that, regrettably, the Chairman of the ICSID Administrative Council must disqualify each of the members of the Tribunal.

9. The Shareholder Claimants hereby reserve their right to submit additional and supplementary observations on this Proposal, including in response to any observations filed by the Respondent, the Insolvency Administrator, or the Tribunal, as the case may be.

10. For ease of reference, the balance of this Proposal is structured under the following headings:

- The Applicable Legal Standard
- Background to the Representation Decision
- First Ground: The Due Process Violations
- Second Ground: The Transparency Violations
- Third Ground: The Prejudgment Violation
- Conclusion and Request for Relief

B. The Applicable Legal Standard

11. In the context of this Proposal, the Shareholder Claimants submit that there are reasonable doubts as to the "independent judgment" of each of the members of the Tribunal due to an appearance of a lack of impartiality or bias, which engages Articles 57 and 14 of the ICSID Convention.

12. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

13. Article 14(1) of the ICSID Convention, in turn, reads as follows:

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

14. The English version of Article 14 of the ICSID Convention refers to "*independent judgment*", and the French version to "*toute garantie d'indépendance dans l'exercice de leurs fonctions*", whilst the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that all three versions are equally authentic, it is generally accepted that arbitrators must be both impartial and independent.[3] Impartiality refers to the absence of bias or predisposition towards a party, whereas independence is characterised by the absence of external control.[4] Independence and impartiality both "protect parties against arbitrators being influenced by factors other than those related to the merits of the case".[5]

15. ICSID practice endorses the view that the word "manifest" in Article 57 of the ICSID Convention means "evident" or "obvious",[6] and that it relates to the ease with which the alleged lack of the required qualities can be perceived.[7] For instance, in *EDF International S.A. v. Argentina*, the unchallenged arbitrators decided that the challenged arbitrator should have ceased to serve in the proceedings if "reasonable doubts exist[ed]" with regard to whether she could be relied upon to exercise independent judgment.[8] In *SGS v. Islamic Republic of Pakistan*, it was stated that, in order to disqualify an arbitrator, the inference resulting from the facts must be that "a readily apparent and reasonable doubt as to that person's reliability for independent judgment has arisen

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3 *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 Mar. 2010, **SCC-2**, paras. 35–36 (***Alpha***); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 Dec. 2013, **SCC-3**, para. 65 (***Burlington***); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 Nov. 2013, **SCC-4**, para. 58 (***Blue Bank***); *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Decision on the Proposal to Disqualify All Members of the Arbitral Tribunal (English), 28 Dec. 2016, **SCC-5**, para. 56 (***BSG***).

4 *Alpha*, **SCC-2**, paras. 35–36; *Burlington*, **SCC-3**, para. 66; *Blue Bank*, **SCC-4**, para. 59; *BSG*, **SCC-5**, para. 57.

5 *Urbaser S.A. and others v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 Aug. 2010, **SCC-6**, para. 43 (***Urbaser***); *Blue Bank*, **SCC-4**, para. 59; *Burlington*, **SCC-3**, para. 66.

6 *Blue Bank*, **SCC-4**, para. 61; *BSG*, **SCC-5**, para. 54; *Alpha*, **SCC-2**, para. 37; *Burlington*, **SCC-3**, para. 68.

7 *Blue Bank*, **SCC-4**, para. 61; *BSG*, **SCC-5**, para. 54; *Alpha*, **SCC-2**, para. 37; *Burlington*, **SCC-3**, para. 68.

8 *EDF International S.A. and others v. Argentine Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 Jun. 2008, **SCC-7**, para. 64.

from the facts established or not disputed".[9] Moreover, it was held by the *ad hoc* Committee in *Vivendi Universal S.A. v. Argentina* that:[10]

> If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld. Once the other arbitrators or Committee members had become convinced of this conclusion, there would no longer be room for the view that the deficiency was not "manifest".

16. Articles 57 and 14(1) of the ICSID Convention "do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias".[11] As it was held in *Urbaser v. Argentina*:[12]

> In order to be effective this protection does not require that actual bias demonstrate a lack of independence or impartiality. **An appearance of such bias from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality.**

17. The legal standard to be applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party",[13] which means that it should be based on the "point of view of a reasonable and informed third person".[14] For instance, in *Burlington Resources Inc. v. Republic of Ecuador*, the Chairman of the ICSID Administrative Council expressed the test as whether "a third party undertaking a reasonable evaluation" of the evidence would conclude that it "manifestly evidences an appearance of lack of impartiality".[15] Similarly, in *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, the Chairman of the ICSID Administrative Council stated that the test was whether a third party would "find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts".[16]

18. Drawing the above threads together, the legal standard that should be applied to the question of disqualification of arbitrators in ICSID proceedings is whether a reasonable observer would have reasonable doubts about an arbitrator's impartiality or independence due to an *appearance* of

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9 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator J. Christopher Thomas, 19 Dec. 2002, **SCC-8**, para. 21.

10 *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee (English), 3 Oct. 2001, **SCC-9**, para. 25.

11 *Blue Bank*, **SCC-4**, para. 59; *Urbaser*, **SCC-6**, para. 43; *Burlington*, **SCC-3**, para. 67; *BSG*, **SCC-5**, para. 58.

12 *Urbaser*, **SCC-6**, para. 43 (emphasis added).

13 *Blue Bank*, **SCC-4**, para. 59; *Urbaser*, **SCC-6**, para. 43; *Burlington*, **SCC-3**, para. 67; *BSG*, **SCC-5**, para. 58.

14 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Bruno Boesch, 20 Mar. 2014, **SCC-10**, para. 54.

15 *Burlington*, **SCC-3**, para. 80.

16 *Blue Bank*, **SCC-4**, para. 69.

dependence or bias. The appearance of dependence or bias must be assessed objectively, based on a reasonable evaluation of the evidence by a third party.

C. Background to the Representation Decision

19. The Representation Decision was issued against the following background.

20. First, the ICSID Proceedings against the Respondent directly implicate the conduct of the Financial and Capital Market Commission (the **FCMC**), the Central Bank of Latvia, and Mr Rimšēvičs. The claims against each of them are very serious, relating to (*inter alia*) the unreasonable regulatory treatment by the FCMC, attempted extortion and improper interference by Mr Rimšēvičs in the regulation of the Bank, and evidence of corruption by FCMC officials and Mr Rimšēvičs. As the Claimants pleaded in the RFA, "the Claimants' case is that, from late 2015, the Bank has faced unreasonable, unjustified, and sustained regulatory pressure from Latvian State organs and officials, including the [FCMC], which is Latvia's financial regulatory authority and the Bank's regulator".[17] The Claimants' position is that the regulation of the Bank was infected by systemic corruption on the part of the FCMC and the Central Bank of Latvia (Latvijas Bank):[18]

> [T]his dispute centres on corruption at the highest levels of the Latvian public financial sector. The Claimants' case in this regard is that these regulatory measures have been maintained and/or tightened at the direction of a very high-level, senior Latvian public official involved in the financial sector (the **Senior Latvian Official**), who has exerted influence and moral suasion over the FCMC. This Senior Latvian Official has taken advantage of the FCMC's regulatory measures as a goad to extort monetary bribes from the Claimants, and has both personally, and through intermediaries, sought repeatedly to extort money from Mr Guselnikov. In this context, the Claimants observe that Mr Guselnikov's continued opposition to paying bribes has precisely corresponded with increased regulatory pressure imposed by the FCMC on the Bank over the 2016 and 2017 period.

21. On 21 May 2019, the Claimants filed their Memorial on the Merits, along with four witness statements and two expert reports, which together outlined "concrete incidents of attempted extortion by the Governor of the Central Bank—Mr. Ilmārs Rimšēvičs—and repeated regulatory mistreatment and outright retaliation by Latvia's financial regulator, the [FCMC]".[19] The witness evidence[20] exhibits contemporaneous documents, records, and audio and video recordings that underpin the Claimants' allegations of regulatory mistreatment and corruption at the hands of the FCMC and Mr Rimšēvičs.[21]

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17 The Claimants' Request for Arbitration dated 12 Dec. 2017 (the **RFA**), **SCC-11**, para. 11.

18 RFA, **SCC-11**, para. 13.

19 The Claimants' Memorial on the Merits dated 21 May 2019, **SCC-12**, para. 2.

20 *See* Witness Statement of Mr Grigory Guselnikov dated 21 May 2019, **SCC-13**; Witness Statement of Mr Georgii Guselnikov (English) dated 21 May 2019, **SCC-14**; Witness Statement of Mr Oliver Bramwell dated 21 May 2019, **SCC-15**; Expert Report of Mr James Worsnip in relation to the regulation of AS PNB Banka dated 20 May 2019, **SCC-16**; Expert Report of Mr Charles Carr dated 17 May 2019, **SCC-17**.

21 In addition, and from the outset of these proceedings, the Claimants have repeatedly substantiated their concern that the so-called "Latvian insolvency administration mafia" were unscrupulously seeking to "loot" the Bank by way of insolvency processes, as has occurred to several other Latvian banks in the recent past. It is now clear that the Claimants' concerns that the Bank would be put into insolvency and stripped of its

22. Second, it is not in dispute that Former Management were the authorised representatives of the Bank at the time that ICSID registered the RFA on 28 December 2018. The Bank issued a power of attorney dated 25 August 2017 to former counsel of record to file the RFA (**Bank POA**) and confirmed that it had taken all necessary internal actions to authorise the submission of the RFA in accordance with Rule 2(1)(f) of the ICSID Institution Rules.[22] By way of a board resolution dated 24 August 2017, the Bank authorised Mr Oliver Bramwell, the then Chairperson of the Board, to undertake conduct of the ICSID Proceedings, and to grant the Bank POA.[23] Thus, the issue for the Tribunal in the Representation Decision was whether it should recognise the Insolvency Administrator as the Bank's representative instead of Former Management, not the converse.

23. Third, the Insolvency Administrator was selected and nominated directly by the FCMC, and was formally appointed by the local Latvian courts on an application by the FCMC. On 22 August 2019, the FCMC filed an insolvency petition to the City of Riga Vidzeme District Court (the **District Court**) in order to have the Bank declared insolvent.[24] The FCMC asserted that the Bank was insolvent since "the debt obligations of the credit institution exceed its assets" pursuant to section 145 of the Latvian Credit Institution Law. The FCMC requested that the District Court appoint Mr Krastiņš as Insolvency Administrator, stating in an accompanying online press release that:[25]

> The nomination and appointment of an insolvency administrator are regulated by the FCMC regulations. The FCMC shall select the insolvency administrator from the list provided by the Insolvency Control Service. The FCMC shall assess the vision for managing the bank's insolvency proceedings proposed by applicants, existing experience and available resources, in addition assessing their understanding of the issues related to the prevention of money laundering and terrorism financing, as well as the information received from the law enforcement authorities.

24. On 18 September 2019, the Respondent filed a letter enclosing a translated copy of a judgment of the District Court dated 12 September 2019 (the **Insolvency Judgment**).[26] The Respondent informed the Tribunal "that on 12 September 2019 the [District Court] declared AS PNB Banka insolvent and appointed an insolvency administrator". The Respondent quoted the following extract from the Insolvency Judgment:

> [P]ursuant to paragraph One of Article 161 of the Law on Credit Institutions, following declaration of insolvency of a credit institution, the Administrator has all the duties, rights and authority of management provided by the Articles of Association of the credit institution and the applicable legal provisions…

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assets were well founded. *See*, for example, the Claimants' Memorial on the Merits dated 21 May 2019, **SCC-12**, para. 20.

22 Power of Attorney on behalf of AS Norvik Banka, 25 Aug. 2017, **SCC-18**.

23 AS Norvik Banka, Meeting Minutes of the Council, 24 Aug. 2017, **SCC-19**, p. 2.

24 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, para. 1.

25 FCMC, "*FCMC files an application for insolvency to the court against JSC "PNB Banka"*", 22 Aug. 2019, **SCC-20**.

26 Letter from the Respondent to the Tribunal dated 18 Sep. 2019, **SCC-21**, attaching Riga City Vidzeme District Court's Judgment, 12 Sep. 2019, **SCC-22**.

25. Aside from the fact that the FCMC was responsible for initiating the insolvency proceedings, and selected and nominated the Insolvency Administrator, it is important to note that the Insolvency Administrator has continuing obligations towards, and remains accountable to, the FCMC and the Central Bank of Latvia under the Latvian Credit Institution Law. By way of non-exhaustive example:

(a) The Insolvency Administrator must "provide information regarding the insolvency proceedings to the Financial and Capital Market Commission and Latvijas Banka, and to submit all the requested information that is necessary for them to perform their functions, within the terms stipulated by them".[27]

(b) If the FCMC "expresses a lack of confidence in the administrator, it shall request a court to release such administrator and to appoint another, recommending a new candidacy for the administrator".[28]

26. Fourth, shortly after the Insolvency Judgment was handed down, Former Management instructed Mr Okko Behrends to represent the Bank in the ICSID Proceedings, in place of Quinn Emanuel. On 10 December 2019, Mr Okko Behrends advised the Tribunal that he was writing "as the lawyer representing PNB Banka […] based on the instructions by the Bank's management".[29] Mr Behrends attached a power of attorney dated 25 August 2019 signed by Former Management. Mr Behrends submitted that Mr Krastiņš "purports to act on behalf of the Bank in matters where he is excluded because of his conflict of interests", relying on the judgment of the CJEU in *ECB v. Trasta Komercbanka* dated 5 November 2019, in which the Grand Chamber recently held that an insolvency administrator nominated by the FCMC has an *inherent* conflict of interest in relation to the bringing or maintaining of legal proceedings that would challenge the acts of the FCMC or that may undermine the legal basis for the relevant insolvency proceedings.[30]

27. By email dated 17 December 2019, Mr Behrends submitted a further power of attorney granted by Former Management dated 17 December 2019, which "includes (without limitation) – the representation in front of any court, administration, arbitration tribunal or other decision-making body, the representation outside any such proceedings, and – the appointment and instruction of lawyers, consultants, advisors or representatives".[31]

28. Mr Behrends further submitted that, *inter alia*: (i) it is important to ensure that Mr Krastiņš "does not represent the Bank (or interfere with the representation of the Bank) in matters where he is not the appropriate representative of the Bank"; (ii) the Board did not have access to the ICSID Proceedings before the Tribunal and that "the effective representation of the Bank by the board

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27 Credit Institution Law, 1 Mar. 2018, **SCC-23**, section 161(9).

28 Credit Institution Law, 1 Mar. 2018, **SCC-23**, section 168(1).

29 Email from Mr Okko Behrends to the Tribunal dated 10 Dec. 2019, **SCC-24**, attaching Power of Attorney issued to Mr Okko Behrends by AS PNB Banka management, 29 Aug. 2019, **SCC-25**.

30 C-663/17 P, *ECB v. Trasta Komercbanka and Others*, Judgment, 5 Nov. 2019, **SCC-26**. The European Court of Human Rights has repeatedly affirmed the same legal position. *See*, for example, ECtHR, *Capital Bank AD v. Bulgaria*, Judgment, 24 Nov. 2005, **SCC-27**; ECtHR, *Credit and Industrial Bank v. Czech Republic*, Judgment, 21 Oct. 2003, **SCC-28**; and ECtHR, *Capital Bank AD v. Bulgaria*, Decision of the Court (First Section), 9 Sep. 2004, **SCC-29**.

31 Email from Mr Okko Behrends to the Tribunal dated 17 Dec. 2019, **SCC-30**, attaching Power of Attorney Issued by AS PNB Banka management to Mr Okko Behrends, 17 Dec. 2019, **SCC-31**.

needs to be restored before any further decisions may be taken by the board (including with respect to the representation of the Bank in the present proceedings)".

29. On 17 December 2019, Quinn Emanuel, writing for the Shareholder Claimants, observed that "[t]here appears to be a dispute in fact and law as to whether Mr Krastiņš or Former Management are legally entitled to represent the Bank in these ICSID proceedings and to appoint legal representation".[32] It advised that "in the circumstances in which both Former Management and Mr Krastiņš agree" that Quinn Emanuel should no longer represent the Bank, Quinn Emanuel would no longer represent the Bank in the ICSID Proceedings. It further noted that the Shareholder Claimants were of the view that the dispute as to the authority of the Bank should be resolved before the ICSID Proceedings continue.

30. Fifth, on 20 December 2019, the Tribunal invited Mr Krastiņš, Mr Behrends, the Respondent, and the Shareholder Claimants represented by Quinn Emanuel, "to file submissions on the issue of who can represent AS PNB Banka in this arbitration" (the **Representation Issue**).[33] On 10 January 2020, Mr Krastiņš, Mr Behrends on behalf of Former Management, the Respondent, and the Shareholder Claimants submitted their first submissions on the representation of the Bank.[34] The same parties all filed reply submissions on 24 January 2020.[35]

31. Sixth, on 8 January 2020, the Shareholder Claimants filed an "ancillary claim" under the BIT and the ICSID Convention, which directly challenged the basis of the Insolvency Judgment and the motivation and conduct of the FCMC in applying for the adoption of the Insolvency Judgment (the **Ancillary Claim**).[36] The Ancillary Claim stated relevantly that:[37]

> The Insolvency Judgment, whereby Latvia sought to deem AS PNB Banka "insolvent", and the conduct of the FCMC in facilitating or contributing to the circumstances bringing about the Insolvency Judgment violate Latvia's international law obligations. Those obligations include Latvia's obligations under the UK-Latvia bilateral investment treaty. The reasons for the wrongfulness of Latvia's conduct are numerous and will be further elaborated upon in formal submissions. For the present purposes, the second to sixth named Claimants submit that the Insolvency Judgment was adopted without any cogent evidence supporting the findings therein. The Insolvency Judgment was "based" on documents that in fact were not before the Riga City Vidzeme District Court as part of the record. In reaching its decision, the Court outright ignored, and the Insolvency Judgment overlooks, a series of contemporaneous findings by independent auditors, all of which confirmed up until year 2019 that the Bank was not, in fact, insolvent. In fact, even the FCMC's *own* asset inspection of the Bank confirmed that the Bank was solvent in 2017. Since that time, the Bank's core asset base remained effectively *unchanged*, since of course the Bank was subject at all relevant times (since mid-2015) to the

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32 Letter from the Shareholder Claimants to the Tribunal dated 17 Dec. 2019, **SCC-32**, p. 2.

33 Letter from the Tribunal to Parties dated 20 Dec. 2019, **SCC-33**, p. 1.

34 Letter from Mr Vigo Krastiņš to the Tribunal dated 10 Jan. 2020, **SCC-34**; Letter from Mr Okko Behrends to the Tribunal dated 10 Jan. 2020, **SCC-35**; Letter from the Respondent to the Tribunal dated 10 Jan. 2020, **SCC-36**; Letter from the Shareholder Claimants to the Tribunal dated 10 Jan. 2020, **SCC-37**.

35 Letter from Mr Vigo Krastiņš to the Tribunal dated 24 Jan. 2020, **SCC-38**; Letter from Mr Okko Behrends to the Tribunal dated 24 Jan. 2020, **SCC-39**; Letter from the Respondent to the Tribunal dated 24 Jan. 2020, **SCC-40**; Letter from the Shareholder Claimants to the Tribunal dated 24 Jan. 2020, **SCC-41**.

36 Shareholder Claimants' Notice of Ancillary Claims dated 8 Jan. 2020, **SCC-42**.

37 Shareholder Claimants' Notice of Ancillary Claims dated 8 Jan. 2020, **SCC-42**, pp. 1–2 (emphasis in original).

> FCMC's imposed operating restrictions and its direct participation in the Bank's management meetings. To put it simply, if the Bank is insolvent now, it must have been insolvent since mid-2015, despite the FCMC's own conduct to the contrary and its day-to-day supervision of the Bank's management. This fact, in itself, shows the absurdity of the Insolvency Judgment and Latvia's claim that the Bank suddenly somehow became "insolvent".
>
> Given the well-foreshadowed campaign of retaliation against the Bank and the second to sixth Claimants, it is not surprising to find that the Insolvency Judgment rests upon gross misrepresentations by the FCMC. It is our clients' submission that the FCMC's representations before the Riga City Vidzeme District Court were driven by ulterior motives, namely retribution for Mr Guselnikov's whistle-blowing, and to implement the well-laid plan to wrest control of AS PNB Banka and subject it and its substantial assets to an FCMC-controlled insolvency proceeding.

32. On 30 January 2020, the Tribunal issued its Representation Decision.[38] In parallel, the Tribunal also wrote to the parties in relation to the Ancillary Claim.[39] It stated that the Ancillary Claim "appears to be closely related to the merits of the case" and that the Tribunal had "suspended the proceeding on the merits on September 10, 2019". It then continued as follows:

> The Tribunal will therefore hold the Shareholder Claimants' application for leave until it has made its decision on the Bifurcated Issue. If it is necessary to consider the application at that point, it will set a timetable for submissions on that application then.

33. In response to this letter, the Shareholder Claimants wrote to the Tribunal on 17 February 2020 respectfully requesting them to "clarify that its statement in the letter dated 30 January 2020 was not intended to mean that the Shareholder Claimants' Insolvency Ancillary Claim is not properly brought before the Tribunal and that any permission to admit such a claim is required".[40] On the same day, the Tribunal failed to provide the clarification sought, stating instead that "it takes note of the content of the Shareholder Claimants' letter".[41]

34. Finally, on 28 January 2020, the Shareholder Claimants wrote to the Insolvency Administrator and the Respondent, copying the Tribunal, with respect to the revelation in the Respondent's submission dated 24 January 2020 that the Insolvency Administrator had held a secret meeting with counsel of record for the Respondent in the ICSID Proceedings from the State Chancellery of Latvia on 30 September 2019.[42] The Shareholder Claimants stated that "this development is relevant to the representation issue […], and specifically the contention that the Administrator has a conflict of interest in terms of his ability to represent the Bank in the ICSID proceedings".[43]

35. As a result, the Shareholder Claimants requested that each of the Respondent and Mr Krastiņš produce the following documents by 3 February 2020:

> (i) Transcripts, records, agendas or meeting minutes related to the Meeting;

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38 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**.

39 Letter from the Tribunal to Parties dated 30 Jan. 2020, **SCC-43**.

40 Letter from the Shareholder Claimants to the Tribunal dated 17 Feb. 2020, **SCC-44**, p. 3.

41 Email from the Tribunal to Parties dated 17 Feb. 2020, **SCC-45**.

42 Letter from the Shareholder Claimants to Latvia and Mr Vigo Krastiņš dated 28 Jan. 2020, **SCC-46**.

43 Letter from the Shareholder Claimants to Latvia and Mr Vigo Krastiņš dated 28 Jan. 2020, **SCC-46**, p. 2.

> (ii) Any list or record of the attendees at the Meeting;
>
> (iii) Documents or any materials discussed, reviewed or exchanged at the Meeting; and
>
> (iv) All communications of any kind (regardless of format) between the Administrator and/or any individual or entity reporting to the Administrator, on the one hand, and the State Chancellery of Latvia, Savoie Arbitration, Mme Marie P. Michon, Dr Angelos Dimopoulos, BDO Latvia, or any other individual providing legal advice to Latvia in relation to these ICSID proceedings, and any of their employees, consultants, agents, or representatives, of any kind, on the other hand, including all communications in relation to, or in connection with the Meeting, whether prior to, contemporaneous with or following the Meeting.

36. Moreover, the Shareholder Claimants requested that, by the same date, each of the Respondent and Mr Krastiņš:

> (i) Provide a detailed written description of the purpose and the contents of the Meeting, which should identify with precision the nature of the information or documents exchanged or discussed during the Meeting; and
>
> (ii) Confirm each occasion since 12 September 2019 (i.e., the date of the Insolvency Judgment) on which communications (regardless of format, and of whether orally or in writing) took place between the Administrator and/or any individual or entity reporting to the Administrator, on the one hand, and the State Chancellery of Latvia, Savoie Arbitration, Mme Marie P. Michon, Dr Angelos Dimopoulos, BDO Latvia, or any other individual providing legal advice to Latvia in relation to these ICSID proceedings, and any of their employees, consultants, agents, or representatives, of any kind, on the other hand, and provide a detailed written description of the same.

37. On 3 February 2020, the Insolvency Administrator addressed the Shareholder Claimants' requests, stating that he had received "no instructions, suggestions or advice from the Counsel for Latvia that may be regarded or treated as an invitation to coordinate [his] actions with the Counsel for Latvia in any way" and had not "received any documents or materials from the Counsel for Latvia during the meeting".[44] The letter failed to address the Shareholder Claimants' questions properly. On 5 February 2020, the Respondent wrote to the Shareholder Claimants to state that it would not address any of the questions raised in their letter as the questions had been "rendered moot" in light of the Representation Decision and the letter from Mr Krastiņš.[45]

D. First Ground: The Due Process Violations

38. The right to due process, and the related right to be heard, is fundamental to the integrity of all ICSID proceedings, and must not be violated, whether for reasons of expediency or otherwise. Indeed, ICSID practice is replete with admonitions of this nature:

    (a) In *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, the *ad hoc* Committee stated, in the context of annulment proceedings, that there is "no question that 'equal treatment of the parties' and 'the right to be heard' are both fundamental rules of procedure which are part and parcel of the right to a fair trial".[46] It added that "the

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44 Letter from Mr Vigo Krastiņš to the Shareholder Claimants dated 3 Feb. 2020, **SCC-47**.

45 Letter from the Respondent to the Shareholder Claimants dated 5 Feb. 2020, **SCC-48**, p. 2.

46 *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, 18 Mar. 2019, **SCC-49**, para. 177.

right to be heard guarantees participation in the administration of evidence, irrespective of the Applicant's chances of obtaining a different result".[47]

(b) In *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, the *ad hoc* Committee held that "each party must have the opportunity to address every formal motion before the tribunal and every legal issue raised by the case" and noted that "the principal human rights instruments also accept the right to present one's case as an essential element of a fair hearing".[48]

(c) In *Giovanni Alemanni v. Argentine Republic*, the Tribunal stated in the context of mass claims that "the principle of equality of arms and the right to be heard are fundamental to the judicial process" and must be distinguished from "issues of financial or economic policy".[49] Moreover, the Tribunal confirmed that "mere inefficiency" cannot be used to justify depriving a claimant of their right to be heard.[50]

39. The Shareholder Claimants should emphasise that this Proposal does not arise out of the mere existence of an adverse procedural decision, or from a sense of dissatisfaction by the Shareholder Claimants with the Tribunal's previous decisions. By stripping the Bank of its representation by Former Management and recognising the Insolvency Administrator instead, the Representation Decision violates the Bank's fundamental due process rights, such as its right to effective legal representation and the right to be heard. This Proposal therefore goes to the basic integrity and fairness of these entire ICSID Proceedings. To this end, the Shareholder Claimants have a clear interest in ensuring that the integrity and fairness of the ICSID Proceedings is preserved.

40. In the Representation Decision, the Tribunal recognised "Mr. Krastiņš as the representative of the Bank for the purposes of completing submissions on the Bifurcated Issue in answer to the Tribunal questions" and "[u]ntil further order, the Tribunal rejects Mr. Behrends' application to be accepted as the representative of the Bank".[51] The Shareholder Claimants submit that the Representation Decision is a severe violation of the Bank's fundamental right to due process in the ICSID Proceedings. In particular, the Tribunal both deprived the Bank of its right to be represented by Former Management, who have represented the Bank since the RFA was filed, and undermined the Bank's right to be heard and to effective judicial protection by recognising the Insolvency Administrator as the Bank's representative, until further order, in circumstances where he is incurably conflicted, and cannot properly represent the Bank's interests in the ICSID Proceedings, as a result of his personal self-interest and his allegiance and accountability to the Respondent. The Shareholder Claimants address these points below.

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47 *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, 18 Mar. 2019, **SCC-49**, para. 180.

48 *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 Dec. 2015, **SCC-50**, para. 80.

49 *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 Nov. 2014, **SCC-51**, para. 323.

50 *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, 17 Nov. 2014, **SCC-51**, para. 324.

51 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 9.

41. First, the Tribunal assumed that the Insolvency Administrator was the authorised representative of the Bank, and that Mr Behrends was the one making an "application" or "challenge" on behalf of Former Management to be "accepted" as the Bank's representative. The Tribunal started with the adverse assumption that it was Former Management who needed to apply to be "recognised" as representatives of the Bank by the Tribunal, despite the fact that Former Management were recognised in the ICSID Proceedings from the outset. Conversely, however, the Tribunal appears to have not considered whether the Insolvency Administrator is the one that should have been required to make an application to be recognised as the authorised representative of the Bank.

42. Second, the Tribunal must have implicitly held that the domestic law of the host state governs the Representation Issue since, prior to the Insolvency Judgment, which was the only relevant change in circumstances, Former Management were treated as the representatives of the Bank.[52] To this end, the Tribunal's approach is not only contrary to the established practice of ICSID tribunals, which have held that changes in domestic law do not change the representatives of the parties to ICSID proceedings,[53] but the fact that the Tribunal does not even consider the issue of the correct applicable law is highly anomalous in circumstances where the point was argued vigorously.[54] The correct position is clear: the procedure of an ICSID tribunal is governed by international law, and not the purported domestic law of the respondent State. Indeed, if the Tribunal's approach were embraced, the result would be that respondent States could deliberately change host State law or, as Latvia has done here, initiate sham insolvency proceedings to deprive parties of proper representation before ICSID tribunals and thereby stymie meritorious claims.

43. Further, and to compound the Tribunal's failure to identify any (let alone the correct) applicable law, even the Tribunal's putative application of Latvian domestic law was *incorrect* because it disregarded EU law (which forms part of Latvian domestic law), which has laid down a general rule that, *inter alia*, insolvency administrators cannot represent banks in legal proceedings where the acts or omissions of the authority that nominated or appointed them are being challenged.[55] This rule of EU law does not depend on the identification of an *actual* conflict of interest in any specific case. The *potential* for the existence of a conflict of interest is simply the rationale for the general rule. Of course, the identification of an *actual* conflict of interest – as is the case here for reasons set out below – is all the more problematic for the party represented by such a person (here, the Bank).

44. Accordingly, each decision made by the Tribunal in the Representation Decision, ranging from its failure to identify the applicable law to its failure to apply relevant authorities on which it had been briefed by the parties, not only favoured the Insolvency Administrator and the Respondent,

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52 As noted below, and for the avoidance of doubt, the Shareholder Claimants do not accept that the Tribunal, even if it were purporting to apply Latvian domestic law to the Representation Issue, applied those laws correctly in view of EU law, as articulated in the CJEU judgment in *ECB v. Trasta Komercbanka*, which prevails over inconsistent domestic laws of Latvia: *see* C-663/17 P, *ECB v. Trasta Komercbanka and Others*, Judgment, 5 Nov. 2019, **SCC-26**, paras. 60–61.

53 *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Representation (Annulment Proceeding), 7 Oct. 2016, **SCC-52**, paras. 43–44.

54 Letter from Mr Okko Behrends to the Tribunal dated 10 Jan. 2020, **SCC-35**; Letter from the Shareholder Claimants to the Tribunal dated 10 Jan. 2020, **SCC-37**; Letter from Mr Okko Behrends to the Tribunal dated 24 Jan. 2020, **SCC-39**; Letter from the Shareholder Claimants to the Tribunal dated 24 Jan. 2020, **SCC-41**.

55 C-663/17 P, *ECB v. Trasta Komercbanka and Others*, Judgment, 5 Nov. 2019, **SCC-26**, paras. 60–61.

but contained no reasoning or explanation at all for why that decision was being reached, and defied authority and logic. In short, the faults in the Tribunal's approach are so fundamental and basic, and its failure to identify or apply the proper applicable law is so obviously objectionable, that a reasonable observer would, even on this ground alone, have reasonable doubts as to the Tribunal's impartiality.

45. Third, the Tribunal states that in the "interests of fairness and efficiency it is desirable that the Tribunal determines as soon as practicable the issue raised by the Bifurcated Issue as to whether it has jurisdiction to decide the case brought by the Claimants".[56] Thus, a key motivation for the Tribunal in holding that the Insolvency Administrator is the representative of the Bank for the Bifurcated Issue, and refusing to determine whether he has a conflict of interest until the merits phase, seems to have been expediency as a result of the fact it is anxious to resolve the Bifurcated Issue. However, the Tribunal does not explain in the Representation Decision why it considered that resolution of the Bifurcated Issue should be prioritised over resolution of the Representation Issue in circumstances where the Tribunal was seized of the Representation Issue, had received full submissions from all parties, and had stated that it would proceed to decide the matter. Moreover, in any event, expediency with respect to the Bifurcated Issue does not afford a proper basis for the Tribunal to deprive the Bank of its due process rights, including its right to be heard.

46. Fourth, the Tribunal held that the Insolvency Administrator "has authority to represent the Bank, subject to allegations of a conflict of interest or other disentitling circumstances".[57] However, the Tribunal deferred the issue of conflicts of interest:[58]

> The Tribunal is of the view that that alleged conflict does not have any material effect for the resolution of the jurisdictional question presented by the Bifurcated Issue which it has to determine, particularly where another party has the same interest, and is represented by counsel who represented the Bank on the submissions now sought to be supplemented.

47. This part of the Representation Decision gives rise to reasonable doubts as to the impartiality of the Tribunal flowing from the following observations:

(a) The Tribunal wholly fails to explain *why* the Insolvency Administrator has any authority to represent the Bank, even in circumstances where there is no conflict of interest. It has instead proceeded solely on an assumption that he does, which (*arguendo*) is favourable to the Respondent.

(b) The Tribunal's assertion that the Insolvency Administrator's "alleged conflict does not have any material effect for the resolution of the jurisdictional question presented by the Bifurcated Issue" is based on no evidence and is simply speculative and implausible. For a start, the record contains no evidence as to the position the Insolvency Administrator is likely to adopt on the Bifurcated Issue. In fact, he recently applied for a very lengthy extension of time,[59] in order presumably to consider his position on the Bifurcated Issue. However, if the Insolvency Administrator were conflicted in favour of the FCMC and

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56 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 7.

57 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 8.

58 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 8.

59 Letter from Mr Vigo Krastiņš to the Tribunal dated 6 Feb. 2020, **SCC-53**.

Latvia, then it would be in his interest to have the ICSID Proceedings dismissed by virtue of the Bifurcated Issue, before reaching the merits phase, at which point the Claimants' various allegations against the FCMC and their challenge to the Insolvency Judgment would be ventilated. There was therefore no basis for the Tribunal to assume against the Claimants that his conflict of interest can have no bearing on the Bifurcated Issue.

(c) More fundamentally, it cannot be acceptable for a person with a conflict of interest to represent a party to ICSID proceedings merely because that conflict is assessed by the Tribunal not to have an immediate "material effect" on the proceedings. Fundamental due process rights, such as the right to proper representation and to be heard, cannot be violated even where the Tribunal does not believe that the consequences of doing so will be severe in terms of the effect on the Tribunal's resolution of an issue. In any event, if the Insolvency Administrator were found to have a conflict at the merits phase, *ipso facto*, he has a conflict at the jurisdiction phase, where he may elect not to pursue arguments in favour of proceeding to the merits phase, or to undermine arguments made by the Shareholder Claimants in support of doing so.

(d) The fact that the Tribunal considers that the Shareholder Claimants, who are represented by counsel, have the "same interest" in the outcome of the Bifurcated Issue as the Bank, is irrelevant. First, counsel for the Shareholder Claimants cannot and do not speak for the Bank, which is now separately represented. Second, the fact that other parties are aligned with what the Tribunal speculates is the Bank's interest, and are represented by counsel, does not "cure" a violation of the Bank's rights to due process. Nor is this an argument that supports the Insolvency Administrator anyway. Former Management were responsible for the previous submissions on the Bifurcated Issue on behalf of the Bank and should be permitted to "supplement" the submissions over which they had conduct for the Bank. There is no credible reason for why the Tribunal would recognise different representation in the context of post-hearing submissions on a discrete legal issue but then seek to "cure" the fact such representation may be deficient or conflicted by reliance on other submissions that will be made by another party, which the Tribunal merely speculates has the "same interest" as that of the Bank.

48. Fifth, the Tribunal held that the "challenge to Mr Krastiņš' right to represent the Bank does not need to be finally determined at this stage of the proceedings" even though it accepted that his authority was subject to allegations of a conflict of interest.[60] In the circumstances, the Tribunal's abdication of its duty to resolve the Representation Issue implicitly preferred the Insolvency Administrator. However, the Tribunal was not entitled to defer its "final" decision on whether the Insolvency Administrator has a conflict of interest until the merits given that the Bank will now be represented by a person whom it is alleged has a conflict of interest. The Tribunal needs to resolve the Representation Issue since, if such a person represents the Bank, it amounts to a violation of its fundamental due process rights caused by the Tribunal's failure to resolve that Issue. Moreover, the failure to render a "final" decision means that there is broader uncertainty for the conduct of the ICSID Proceedings. For example, it is not known who has authority to settle proceedings for the Bank. The Tribunal has left open the possibility that it will find that Former Management should be recognised as representing the Bank at the merits phase. If that is the case, it is unclear if the Former Management would be bound by anything said or done by the

60 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 8.

Insolvency Administrator purportedly on behalf of the Bank. Such uncertainty only serves to harm the Bank's interests.

49. Sixth, the Insolvency Administrator has obvious and incurable conflicts of interest, including as a consequence of the following factors:

(a) The FCMC placed the Bank in insolvency proceedings;

(b) The FCMC handpicked and nominated the Insolvency Administrator;

(c) The Insolvency Administrator owes reporting obligations to the FCMC;

(d) The FCMC can dismiss the Insolvency Administrator for lack of "confidence";

(e) The claims in the ICSID Proceedings concern serious allegations against the FCMC, including allegations of improper regulation and corruption; and

(f) The Ancillary Claim challenges the Insolvency Judgment and, therefore, the basis of the Insolvency Administrator's appointment.[61]

(g) In response to the Ancillary Claim, the Insolvency Administrator "forcefully reject[ed] the second to sixth Claimants allegations regarding the unlawfulness of the [Insolvency] judgment".[62]

50. In the circumstances, the Insolvency Administrator has (i) a personal conflict of interest, in that he has a profit motive in ensuring that the Ancillary Claim does not undermine the legal basis of his appointment as Insolvency Administrator, and (ii) has a conflict of interest between his loyalty to the FCMC and his loyalty to the Bank. In terms of the latter conflict, the Insolvency Administrator is highly unlikely to permit the Bank to challenge the FCMC's acts and omissions in the ICSID Proceedings, let alone allege that the FCMC engaged in bribery and corruption.

51. Indeed, as the judgment of the CJEU in *ECB v. Trasta Komercbanka* dated 5 November 2019 stated in relation to the conflict of interest that insolvency administrators have in determining whether to bring annulment proceedings on behalf of the bank against a decision of the FCMC:[63]

> The right of a legal person, such as Trasta Komercbanka, to an effective legal remedy before the Courts of the European Union would be infringed if, under the law of the Member State concerned, a liquidator empowered to take such decisions [to challenge the acts of the FCMC] were to be appointed on the basis of a proposal from a national authority which took part in the adoption of the act adversely affecting the legal person concerned and which resulted in its going into liquidation. Having regard to the relationship of trust between that authority and the appointed liquidator which is involved in such an appointment procedure and to the fact that a liquidator's task is to carry out the final liquidation of the legal person which has gone into liquidation, there is a risk that that liquidator may avoid challenging, in court proceedings, an act which that authority has itself adopted or which has been adopted with its assistance and which has led to the legal person concerned going into liquidation.

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61 Shareholder Claimants' Notice of Ancillary Claims dated 8 Jan. 2020, **SCC-42**.

62 Letter from Mr Vigo Krastiņš to the Tribunal dated 24 Jan. 2020, **SCC-38**, para. 11.

63 C-663/17 P, *ECB v. Trasta Komercbanka and Others*, Judgment, 5 Nov. 2019, **SCC-26**, paras. 60–61.

> That is a fortiori the case where the liquidator of the legal person concerned may be relieved of its duties by that authority or on a proposal from that authority in the event of annulment, following an action the bringing or maintaining of which depends on its own decision, of an act of the European Union adopted with the assistance of that authority and which led to that legal person going into liquidation.

52. This reasoning applies with equal force here. In fact, given the nature of the allegations against the FCMC in the ICSID Proceedings, as well as the challenge to the Insolvency Judgment, the Insolvency Administrator's conflicts of interest would be clear to any reasonable observer. The fact that the Tribunal ignored these blatant conflicts, despite receiving extensive submissions on the matter, raises reasonable doubts about its impartiality.

53. Finally, the Tribunal stated that, "should it find that it has jurisdiction to continue the proceedings, it would be desirable to receive submissions from both the Administrator of the Bank and from those representing the residual interests of the holders of equity in the Bank".[64] It also stated that it "reserves for consideration" whether the "residual interests of the holders of equity in the Bank" should be "represented by the pre-insolvency Directors, as distinct from the new shareholders of the Bank".[65] These statements mischaracterise the Representation Issue:

(a) The Representation Issue does not concern who has authority to represent the "residual interests of the holders of equity in the Bank". It concerns authority to represent the Bank. This pejorative characterisation minimises the extent of Former Management's interest in representing the Bank in the ICSID Proceedings. It also presumes that the Bank is insolvent, and not a fully competent legal person and Claimant in the ICSID Proceedings, whereas in fact the Insolvency Judgment is subject to challenge before the Tribunal.

(b) To the extent that the Tribunal is suggesting that it will permit Former Management *and* the Insolvency Administrator to represent the Bank, this is obviously unworkable. The Bank cannot be simultaneously represented by different parties who are likely to have divergent interests. Nor can the Tribunal be entitled to decide on an *ad hoc* basis which person it wishes to regard as the Bank's representative for any particular decision.

(c) The Tribunal has indicated that it may decide that the Former Management are, in any event, not the proper representatives of the "residual interests of the holders of equity in the Bank" and that this rests with the "new shareholders", who have at no time sought to be represented in the ICSID Proceedings.

54. In the circumstances, the Representation Decision deprived the Bank of its right to be represented by Former Management without justification, and undermined its right to be heard by recognising the Insolvency Administrator as the Bank's representative despite the fact that he has incurable conflicts of interest, and cannot properly represent the Bank in the ICSID Proceedings. For these reasons, the Shareholder Claimants submit that a reasonable observer, on an evaluation of the evidence, would have reasonable doubts as to the Tribunal's impartiality, there being an appearance of bias against not only the Bank but all of the Claimants in the Representation Decision.

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64 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, pp. 8–9.

65 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 9.

E. Second Ground: The Transparency Violations

55. Allied to the Due Process Violations, a number of aspects of the Representation Decision amplify the appearance of bias by the Tribunal. In particular, the Representation Decision was based on adverse assumptions, indicated prejudgment on whether the Insolvency Administrator has conflicts of interest, and failed to address ICSID and other authority on the matter. These aspects of the Decision imply that it was pretextual and designed to achieve a pre-determined outcome.

56. First, the Tribunal stated that "[c]ounsel for the Shareholder Claimants will answer the Tribunal's questions, having previously made submissions on behalf of all Claimants, including the Bank".[66] This is irrelevant. That the Tribunal will receive submissions from the Shareholder Claimants does not mean that each party does not have a right to representation and to make submissions on each legal issue raised by the case, even where the Tribunal does not believe that it will have any effect on the result. Further, the Tribunal states that "[n]othing in the submissions made by Mr. Behrends on behalf of the former Directors suggests that the former Directors have any interest which diverges from that of the Shareholder Claimants".[67] The Bank should not be deprived of its right to be heard because the Tribunal assumes that the Bank has the same "interest" to that of the Shareholder Claimants. Further, the Tribunal cannot assume that Former Management's submissions will be identical to those of the Shareholder Claimants and contain no additional or new points and arguments. There is no basis for such an assumption, which is adverse to the Former Management and the independent interests of the Bank.

57. Second, the Tribunal purported to justify its failure "finally" to decide the Representation Issue by referring to the fact that "the submissions on the Bank Representation issue overlap with merits issues, upon which the Tribunal should not adjudicate before it has determined whether it has jurisdiction".[68] It is not clear to what "merits issues" the Tribunal refers. However, even if it were correct that overlap exists, it is plainly not correct that the Tribunal should not adjudicate as a result. The Tribunal's reasoning seems to suggest that it cannot make a decision on the Representation Issue until it has formed a position on the merits, for otherwise it would not be necessary to wait until the merits phase. However, as a matter of simple logic, a tribunal can only form a view on the merits at the *conclusion* of the merits phase, and not at the *outset*, meaning that the Tribunal, on its approach, could not decide the Representation Issue until the conclusion of the ICSID Proceedings. Such reasoning is entirely spurious since the Representation Issue is a preliminary one. If the Tribunal were correct, a tribunal could never decide preliminary issues when jurisdictional objections were joined to the merits, as would usually be the case. That does not reflect ICSID practice.

58. Third, Mr Behrends on behalf of Former Management, and Quinn Emanuel on behalf of the Shareholder Claimants, made detailed submissions as to why Former Management are the rightful representatives of the Bank.[69] The Tribunal, however, provided no justification for why

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66 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 8.

67 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 8.

68 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 8.

69 Letter from Mr Okko Behrends to the Tribunal dated 10 Jan. 2020, **SCC-35**; Letter from the Shareholder Claimants to the Tribunal dated 10 Jan. 2020, **SCC-37**; Letter from Mr Okko Behrends to the Tribunal dated 24 Jan. 2020, **SCC-39**; Letter from the Shareholder Claimants to the Tribunal dated 24 Jan. 2020, **SCC-41**.

it recognised the Insolvency Administrator. The Tribunal does not appear to have considered key arguments that were put to it by the Shareholder Claimants, including that the applicable law to decide the Representation Issue is international law and the ICSID Convention, as was stated in *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*. The decision in *Carnegie* does not depend on whether there is a conflict of interest, and yet the Tribunal appears to have disregarded this decision. To this end, in *Carnegie*, it was held that:[70]

> The only question is whether the right to speak on behalf of Carnegie, which was recognized as resting with the Board of Directors in the case of the arbitration proceedings, has now changed as a result of the appointment of a liquidator under Gambian law. In other words, should the domestic law of Gambia apply to determine who is entitled to represent Carnegie in these annulment proceedings? […]
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> That the domestic law of the respondent state should not determine who is able to represent a claimant in cases where the claimant is deemed to be a national of a foreign state under Article 25(2)(b) follows as well from the logic of that provision. Under Article 25(2)(b) investors who are nationals of the Contracting State are to be included within the definition of a "national of another contracting state" where the parties have agreed to treat it "as a national of another Contracting State for the purposes of this Convention." A respondent state cannot assert a right to determine the representation of a claimant who is a national of another contracting state. Thus, a claimant who under Article 25(2)(b) is deemed "a national of another contracting state" would not be truly standing in the shoes of a national of another contracting state if the respondent state could determine its representation in ICSID proceedings. If the domestic law of Gambia were to be applied to determine who represents Carnegie in these proceedings, Carnegie would not be treated in the same way as a national of another contracting state for the purposes of the Convention.
>
> In light of the above, the Commission considers that there is no basis in the Convention for concluding that the question of representation of a claimant who is a deemed "national of another contracting state" under Article 25(2)(b) is to be decided by application of the domestic law of the respondent state. Accordingly, the Committee concludes that the issue of representation is not to be determined under Gambian law, and thus the appointment of a liquidator for Carnegie does not resolve the question of who represents Carnegie in this case.

59. Fourth, the Tribunal adopts a clearly pretextual position in respect to the Shareholder Claimants' Ancillary Claim, which challenges the Insolvency Judgment and appointment of the Insolvency Administrator. The Tribunal implies that the Ancillary Claim is not properly before the Tribunal and so cannot support an allegation that the Insolvency Administrator has a conflict of interest. In particular, in the Representation Decision, the Tribunal stated as follows:[71]

> The Tribunal notes that the Shareholder Claimants and the Board Members challenge as alleged breaches of the BIT the declaration of the insolvency of the Bank and the conduct of the insolvency procedure. This Procedural Order must not be seen as pre-judging either **any application to raise such issues by way of an ancillary claim** or the allegations on which the challenge to Mr. Krastiņš is based.

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70 *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Representation (Annulment Proceeding), 7 Oct. 2016, **SCC-52**, paras. 42–45.

71 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 9 (emphasis added).

60. The reference to "any application to raise such issues" implies that the Shareholder Claimants had not already filed the Ancillary Claim, or that such Claim was not duly before the Tribunal, which is not correct on either count.

61. Further, the Tribunal stated that it would "hold the Shareholder Claimants' application for leave until it has made its decision on the Bifurcated Issue".[72] Again, it seems that the Tribunal has treated the Ancillary Claim not as admitted, but rather as subject to an application for leave of the Tribunal to admit the Ancillary Claim, to support its position that no conflict of interest has arisen yet. This is not the case as the Ancillary Claim is properly before this Tribunal.

62. As this Tribunal must have been aware, there is no requirement under the ICSID Convention or the ICSID Arbitration Rules for the Shareholder Claimants to seek the Tribunal's permission or leave to pursue the Ancillary Claim. Article 46 of the ICSID Convention states as follows:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

63. In addition, Rule 40 of the ICSID Arbitration Rules, which deals with "Ancillary Claims", states:

> (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
>
> (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding. […]

64. It follows from these provisions that ancillary claims may be presented by parties as a matter of right, save in circumstances where they are sought to be introduced later than in the Parties' reply memorial, in which case the Tribunal's leave is required. The Ancillary Claim does not fall within that category of claims, given that the Claimants have not yet filed their reply memorial. On two previous occasions where the Tribunal was notified of ancillary claims – 18 June 2019[73] and 4 December 2019[74] – no leave was sought, nor was it considered necessary to seek such leave. There can therefore be no doubt that the Ancillary Claim is properly before the Tribunal, and is not the subject of an application for leave.

65. In the circumstances, as noted above, the Shareholder Claimants respectfully requested that the Tribunal "clarify that its statement in the letter dated 30 January 2020 was not intended to mean

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72 Letter from the Tribunal to Parties dated 30 Jan. 2020, **SCC-45**.

73 Ancillary claim regarding the 'Draft Decision' to remove Mr Grigory Guselnikov as the Chairman of the Supervisory Council of PNB Banka: *see* Claimants' Application for Provisional Measures dated 18 Jun. 2019, **SCC-54**, paras. 70–71.

74 Ancillary claim regarding the Respondent's conduct of certain ongoing criminal proceedings: *see* Letter from Quinn Emanuel to the Tribunal on behalf of the Second Claimant dated 4 Dec. 2019, **SCC-55**.

that the Shareholder Claimants' Insolvency Ancillary Claim is not properly brought before the Tribunal and that any permission to admit such a claim is required".[75] The Tribunal failed to provide any such clarification, stating merely that "it takes note of the content of the Shareholder Claimants' letter".[76] The Tribunal appears to be determined not to admit that the Ancillary Claim is before it since it would then have to concede that, even on its own assessment, the Insolvency Administrator is currently conflicted in his representation of the Bank given that the Ancillary Claim squarely challenges the Insolvency Judgment and his appointment. Indeed, the Insolvency Administrator has *already* informed the Tribunal in submissions purportedly on behalf of the Bank that he "forcefully rejects" the Ancillary Claim filed by the Shareholder Claimants. The Tribunal's pretextual approach to the Ancillary Claim has been engineered to avoid the precise conflict of interest that plainly *already exists* between the Insolvency Administrator's and the Bank's interests in the ICSID proceedings. The Tribunal's approach, together with its subsequent failure even to clarify its improper and flawed approach to the admission of the Ancillary Claim when given another opportunity to do so, only serves to compound the perception of a lack of impartiality arising from the Due Process Violations.

66. Finally, the Tribunal issued the Representation Decision without even waiting for the responses of the Insolvency Administrator and the Respondent to the Shareholder Claimants' letter dated 28 January 2020, in which the Insolvency Administrator and the Respondent were both requested to provide certain confirmations and documents in response to the revelation by the Respondent that the Insolvency Administrator and Counsel for the Respondent had met secretly for a meeting.

67. In light of the allegations made by Former Management and the Shareholder Claimants regarding the Insolvency Administrator's conflicts of interest, it shows prejudgment for the Tribunal to ignore the relevance of these inquiries and issue the Representation Decision anyway. Disclosure of the contents of that secret meeting could demonstrate that actual conflicts of interest exist. The Tribunal prejudged the importance of the contents of the meeting to the determination of the Representation Issue by issuing the Representation Decision without awaiting the parties' responses to the Shareholder Claimants' letter.

68. These aspects indicate that the Representation Decision was pretextual and designed to achieve a predetermined result. Together with the Due Process Violations, these Transparency Violations further strengthen the appearance of bias and give rise to reasonable doubts as to the impartiality of the members of the Tribunal.

F. Third Ground: The Prejudgment Violation

69. In the Shareholder Claimants' submission, a reasonable observer would find, separately from the Representation Issue, that the Tribunal has prejudged a critical aspect of the Bifurcated Issue. In particular, the Representation Decision proceeds on the basis that the Tribunal can conclusively resolve the Bifurcated Issue without deciding whether the Claimants have legitimate expectations under EU law. By contrast, the Claimants have repeatedly argued, and the Tribunal appears to

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75 Letter from the Shareholder Claimants to the Tribunal dated 17 Feb. 2020, **SCC-44**, p. 3.

76 Email from the Tribunal to Parties dated 17 Feb. 2020, **SCC-45**.

have previously accepted, that the issue of whether the Claimants have legitimate expectations under EU law has to be decided as part of the merits phase.[77]

70. By foreclosing the possibility of deferring the Bifurcated Issue to the merits phase, the Tribunal prejudged the Claimants' repeated submission that, if not rejected, the Bifurcated Issue has to be deferred to the merits phase, and thus cannot be resolved against the Claimants in the bifurcated phase. Moreover, the Claimants have contended that the nature of the Bifurcated Issue more generally warrants joinder to the merits phase.

Relevant Background

71. On 1 March 2019, the Tribunal issued its Decision on Bifurcation, in which it bifurcated "the proceedings [to] deal with the Respondent's objection to the Tribunal's jurisdiction based on the alleged unavailability of the investor-State arbitration mechanism under the UK-Latvia BIT as a preliminary matter".[78] In its reasons, the Tribunal rejected the Claimants' submissions that "the Tribunal will have to appreciate the Parties fully pleaded merits case to determine whether the facts before it engage EU law in the first place" and that "the need to interpret EU law cannot be conclusively resolved, *in abstracto* and as a preliminary matter divorced from the factual matrix".[79] The Tribunal held that it is "unnecessary to deal with any substantive provision of EU law to decide the objection".[80]

72. The Claimants contended from the outset that they have legitimate expectations under EU law to access the BIT dispute resolution mechanism (**Legitimate Expectations Issue**),[81] and that the Legitimate Expectations Issue would need to be resolved against the Claimants if the Tribunal were to decide the Bifurcated Issue against them, as the doctrine of legitimate expectations would otherwise "trump" any incompatibility between the BIT and EU law.[82]

73. In its Memorial on the Bifurcated Issue dated 19 May 2019, the Respondent argued that there was no basis for a finding that the Claimants have legitimate expectations under EU law and that, in

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77 Letter from the Claimants to the Tribunal dated 30 May 2019, **SCC-56**; Letter from the Claimants to the Tribunal dated 17 Jun. 2019, **SCC-57**; The Claimants' Counter-Memorial on the Bifurcated Objection dated 29 Jul. 2019, **SCC-58**, paras. 1–2, and 31; The Claimants' Rejoinder on the Bifurcated Objection dated 9 Sep. 2019, **SCC-59**, paras. 7–8, 118–123, and 131; Letter from the Claimants to the Tribunal dated 7 Oct. 2019, **SCC-60**, paras. 1–9, 19, and 36–38; Letter from the Claimants to the Tribunal dated 11 Nov. 2019, **SCC-61**, paras. 21–43.

78 The Decision of the Tribunal on Respondent's Request for Bifurcation dated 1 Mar. 2019, **SCC-62**, para. 200.

79 The Decision of the Tribunal on Respondent's Request for Bifurcation dated 1 Mar. 2019, **SCC-62**, para. 151; The Claimants' Post-Hearing Submissions on Bifurcation dated 31 Jan. 2019, **SCC-63**, para. 18.

80 The Decision of the Tribunal on Respondent's Request for Bifurcation dated 1 Mar. 2019, **SCC-62**, paras. 152-154.

81 RFA, **SCC-11**, paras. 32, and 71–72.

82 Letter from the Claimants to the Tribunal dated 30 May 2019, **SCC-56**, pp. 2, 5-9; Letter from the Claimants to the Tribunal dated 17 Jun. 2019, **SCC-57**; pp. 1–17; The Claimants' Counter-Memorial on the Bifurcated Objection dated 29 Jul. 2019, **SCC-58**, paras. 1–2, and 31; The Claimants' Rejoinder on the Bifurcated Objection dated 9 Sep. 2019, **SCC-59**, paras. 124–128; Letter from the Claimants to the Tribunal dated 7 Oct. 2019, **SCC-60**, Section B; Letter from the Claimants to the Tribunal dated 11 Nov. 2019, **SCC-61**, Section B.

any case, the Claimants had not acted in "good faith" based on the same facts as those relied on for its illegality objection, which meant they could not rely on legitimate expectations.[83]

74. On 30 May 2019, the Claimants filed an application seeking that the Tribunal reverse its Decision on Bifurcation dated 1 March 2019, and join the Respondent's EU Law Objection to the merits (the **Reversal Application**). The Claimants submitted that the Legitimate Expectations Issue, including whether the alleged lack of "good faith" rendered the Claimants unable to rely on the doctrine under EU law, were factual matters that were deeply intertwined with the merits.[84] The Respondent, however, sought to argue that the "good faith element" could be deferred, but that the Tribunal should decide the other elements of the Legitimate Expectations Issue. In other words, the Respondent wanted the Tribunal to decide that the Claimants did not have legitimate expectations as part of the Bifurcated Issue.

75. The Tribunal, in its Decision on the Application to Reconsider the Decision on Bifurcation dated 2 July 2019 (the **Reversal Decision**) held that the Legitimate Expectations Issue was not to be argued as part of the Bifurcated Issue:[85]

> For reasons analogous to those which caused the Tribunal to make the order for bifurcation, it is not appropriate to determine either the content of that EU law, or whether a case under it is made out on the facts, before determining the jurisdictional issue.
>
> It will be sufficient to note that there are circumstances in which EU law will prevent its own operation, including on the basis of the EU law of legitimate expectations, and that there is a right to effective protection under Article 19 of the TEU.
>
> The Tribunal accepts the submission of the Claimants that it is unfair to them to defer one issue, which is part of the same legal discourse as that which the Respondent asks the Tribunal to consider.
>
> The Tribunal also notes that it is inefficient to determine legitimate expectations under EU law, but to leave for the merits the Claimants' case of legitimate expectations under international law. The two doctrines may not be the same, but the evidence will clearly overlap.
>
> The Tribunal is also of the view that some of the elements of EU law, particularly on prejudice and public interest, appear to raise issues which overlap substantially with other issues that will be contested in the merits phase of the proceedings, if this proceeding reaches the merits phase.

76. In the circumstances, the Tribunal directed that:[86]

(a) The Claimants are not to adduce evidence to establish that they have legitimate expectations under EU law at the hearing on the Bifurcated Issue;

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83 The Respondent's Memorial on the Bifurcated Objection dated 17 May 2019, **SCC-64**, Section L.

84 Letter from the Claimants to the Tribunal dated 30 May 2019, **SCC-56**, pp. 8–9.

85 The Decision of the Tribunal on Claimants' Application to Reconsider the Decision on Bifurcation dated 2 Jul. 2019, **SCC-65**, paras. 14–18.

86 The Decision of the Tribunal on Claimants' Application to Reconsider the Decision on Bifurcation dated 2 Jul. 2019, **SCC-65**, para. 19(iii)–(v).

(b) The Claimants are not to adduce at that hearing expert evidence on the content of the EU law of legitimate expectations; and

(c) The Tribunal will not have regard at that hearing to any evidence by the Respondent directed to the content or existence of legitimate expectations.

77. The Tribunal held a hearing on the Bifurcated Objection as scheduled on 19 to 21 September 2019. At the hearing, neither party sought to present any submissions or adduce any evidence on the Legitimate Expectations Issue, in conformity with the Tribunal's Reversal Decision.

78. On 23 September 2019, the Tribunal indicated that it wished to receive post-hearing submissions from the parties with respect to three topics, including relevantly on whether it had deferred a decision on the Legitimate Expectations Issue until the merits phase (the **Deferment Question**):[87]

> **Directed to the Respondent:** the Tribunal refers to the submission at paragraph 31 of the Counter-Memorial on the Bifurcated Objection, including specifically the assertion that the Tribunal "has directed" that the issue of the application of the EU law of legitimate expectations has been "deferred to the merits", and to paragraph 13 of the Decision of July 2, 2019 on Reconsideration of the Decision on Bifurcation. The Tribunal invites the Respondent to reply.

79. Given the Reversal Decision, the parties had proceeded on the basis that the Tribunal had deferred the Legitimate Expectations Issue to the merits phase since the deferral of submissions on the "content of ... EU law" must include whether the EU law of legitimate expectations "trumps" the incompatibility objection under EU law. Thus, for example, the Claimants had stated in their Counter-Memorial on the Bifurcated Issue, in the paragraph referenced by the Tribunal in the Deferment Question, that:[88]

> As per the Tribunal's Decision on the Claimants' Application to Reconsider the Decision on Bifurcation dated 2 July 2019, the present Counter-Memorial does not exhaustively set out the Claimants' position on the Bifurcated Objection, as the issue of the Claimants' legitimate expectations under EU law (which, as the Claimants previously submitted, is in any event outcome-determinative of the Bifurcated Objection in the Claimants' favour) is not addressed hereunder and the Claimants' position is fully reserved. In the event the Respondent were to prevail on other aspects of the Bifurcated Objection, the Claimants will argue the issue jointly with the merits in accordance with the Tribunal's directions.

80. The Claimants objected to the Deferment Question to the extent that it sought to re-open the question of whether the Tribunal had deferred the Legitimate Expectations Issue to the merits phase. The Claimants requested that the Tribunal "withdraw question two, thus deferring all issues concerning the EU law and international law of legitimate expectations to the merits phase".[89] The Claimants made submissions in support on 7 October 2019 and in reply to the Respondent's submissions in opposition dated 29 October 2019 on 11 November 2019.[90]

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87 Letter from the Tribunal to Parties dated 23 Sep. 2019, **SCC-66**, p. 1.

88 The Claimants' Counter-Memorial on the Bifurcated Objection dated 29 Jul. 2019, **SCC-58**, para. 1.

89 Letter from the Claimants to the Tribunal dated 11 Nov. 2019, **SCC-61**, para. 51(b).

90 Letter from the Claimants to the Tribunal dated 7 Oct. 2019, **SCC-60**; Letter from the Respondent to the Tribunal dated 29 Oct. 2019, **SCC-67**; Letter from the Claimants to the Tribunal dated 11 Nov. 2019, **SCC-61**.

81. On 19 November 2019, the Tribunal stated that it "has reconsidered Question 2 [the Deferment Question] and has determined that it does not require a submission from the Respondent. The Question is withdrawn".[91]

The Basis of the Prejudgment Violation

82. In the Representation Decision, the Tribunal stated that in "the interests of fairness and efficiency it is desirable that the Tribunal determines as soon as practicable the issue raised by the Bifurcated Issue as to whether it has jurisdiction to decide the case brought by the Claimants".[92] The Tribunal also stated that:[93]

> It appears to the Tribunal that the submissions on the Bank Representation issue overlap with merits issues, upon which the Tribunal should not adjudicate before it has determined whether it has jurisdiction.

83. Further:[94]

> By whom, and in what capacity, such interests should be represented does not need to be determined until the Tribunal has decided the jurisdictional issue.

84. It is apparent from these statements that the Tribunal, in the Representation Decision, disclaims the prospect of *deferring* a decision on the Bifurcated Issue to the merits phase. The Tribunal instead indicates that it intends to *decide* whether it has jurisdiction "as soon as practicable". The fact that the Tribunal intends to decide the Bifurcated Issue is also supported by a recent letter from the Tribunal, in which the Tribunal stated that:[95]

> In view of the delays that have already occurred, the Tribunal is of the view that the timetable suggested by the Administrator is too long. The Respondent is entitled to a more expedited resolution of the issue.

85. The Tribunal's approach prejudges the Claimants' position throughout the ICSID Proceedings, which has been that, if the Bifurcated Issue is not rejected, the Tribunal must *defer* the Bifurcated Issue and join it to the merits, but that it cannot *decide* the Bifurcated Issue against the Claimants without resolving the Legitimate Expectations Issue during the merits phase. This emerges from the way in which this Issue has evolved throughout the ICSID Proceedings:

    (a) The Claimants have consistently argued that they have legitimate expectations under EU law to access the investor-State dispute resolution mechanism in the BIT, which "trumps" any alleged incompatibility with EU law per *Achmea*.[96] Accordingly, without deciding the Legitimate Expectations Issue, it is not possible to uphold the Bifurcated Objection (although it is possible to dismiss it).

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91 Letter from the Tribunal to Parties dated 19 Nov. 2019, **SCC-68**, p. 2.

92 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 7 (emphasis added).

93 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 8 (emphasis added).

94 Procedural Order No. 8 (corrected) dated 30 Jan. 2020, **SCC-1**, p. 9 (emphasis added).

95 Letter from the Tribunal to Parties dated 11 Feb. 2020, **SCC-69** (emphasis added).

96 RFA, **SCC-11**, paras. 32, and 71–72.

(b) In the Decision on Bifurcation, the Tribunal took the view that it was "unnecessary to deal with any substantive provision of EU law to decide the [Bifurcated Objection]".[97]

(c) In its Memorial on the Bifurcated Issue, the Respondent advanced arguments as to why the Claimants did not have legitimate expectations under EU law, including because they had allegedly not acted in "good faith".[98] The Respondent never denied, however, that the EU law of legitimate expectations could "trump" the rule in *Achmea*.

(d) In response to the Respondent's Memorial on the Bifurcated Objection, the Claimants filed the Reversal Application, in which they argued that the Legitimate Expectations Issue could not be separated from the merits.[99] In its Reversal Decision, the Tribunal directed that the Legitimate Expectations Issue was not to be argued in the context of the Bifurcated Issue and that no evidence was to be adduced in respect of that Issue.[100]

(e) The parties did not argue the Legitimate Expectations Issue in their written submissions on the Bifurcated Issue or at the hearing, and did not adduce any evidence in respect of it, as directed by the Tribunal. Both the Claimants and the Respondent proceeded on the basis that the Legitimate Expectations Issue had been deferred to the merits phase.[101]

(f) Following the hearing of the Bifurcated Issue, the Tribunal proposed the Deferment Question, which asked the Respondent to make submissions on whether the Tribunal had deferred the Legitimate Expectations Issue to the merits phase. This was an issue never previously raised by the Respondent or the Tribunal.

(g) In response, the Claimants requested that the Deferment Question be withdrawn and that the Tribunal confirm that the Legitimate Expectations Issue was, in fact, deferred to the merits phase. The Claimants filed detailed submissions in support of their position that the Legitimate Expectations Issue had been deferred to the merits phase. As a result of the Tribunal's direction, the Claimants had not been permitted to argue the Legitimate Expectations Issue, including the issue of whether the EU law of legitimate expectations "trumps" the rule in *Achmea*. Nor were the Claimants entitled to adduce expert and witness evidence on the Issues. The Claimants submitted that:[102]

> … if the Tribunal were to now hold that it did not actually defer the EU law of legitimate expectations issue to the merits phase, contrary to the parties' contemporaneous understanding, this would be a serious departure from fundamental rules of due process. As the Tribunal has raised the issue of whether the EU law of legitimate expectations trumps *Achmea*, the Claimants would wish to adduce detailed expert evidence on the issue, in addition to

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97 The Decision of the Tribunal on Respondent's Request for Bifurcation dated 1 Mar. 2019, **SCC-62**, para. 154.

98 The Respondent's Memorial on the Bifurcated Objection dated 17 May 2019, **SCC-64**, Section L.

99 Letter from the Claimants to the Tribunal dated 30 May 2019, **SCC-56**, pp. 8–9.

100 The Decision of the Tribunal on Claimants' Application to Reconsider the Decision on Bifurcation dated 2 Jul. 2019, **SCC-65**, para. 19(iii)–(v).

101 The Decision of the Tribunal on Respondent's Request for Bifurcation dated 1 Mar. 2019, **SCC-62**, para. 162; The Claimants' Counter-Memorial on the Bifurcated Objection dated 29 Jul. 2019, **SCC-58**, para. 1.

102 Letter from the Claimants to the Tribunal dated 11 Nov. 2019, **SCC-61**, para. 40.

> written submissions. An oral hearing would also be appropriate given that this could be an outcome-determinative issue if the Tribunal were to hold against the Claimants on all of the strands of its argument on the Bifurcated Objection. Depriving the Claimants of expert evidence, submissions and an oral hearing would be grossly unfair given the way the proceedings have evolved to date.

(h) In the face of these submissions, the Tribunal withdrew the Deferment Question.

86. In view of the foregoing, the Tribunal's statements in the Representation Decision to the effect that it will *decide* the Bifurcated Issue, and thereby confirm its jurisdiction one way or another, without allowing for the prospect that the Bifurcated Issue might be *deferred* to the merits phase, amounts to a prejudgment of the Shareholder Claimants' repeated submission that the Bifurcated Issue should be *rejected* or *deferred*. It means that the Tribunal has prejudged the Shareholder Claimants' submission in one of two respects:

(a) First, the Tribunal may have resolved that the Legitimate Expectations Issue does not need to be decided to decide the Bifurcated Issue against the Claimants because the EU law of legitimate expectations does not "trump" the EU law rule in *Achmea*. Given that the Tribunal prohibited the parties from arguing the Legitimate Expectations Issue, including whether the EU law of legitimate expectations "trumps" the rule in *Achmea*, such a decision would constitute prejudgment of the Legitimate Expectations Issue.

(b) Second, the Tribunal may have resolved that it did not defer the Legitimate Expectations Issue to the merits phase, as it intimated in its Deferral Question, which it later withdrew. If that were the basis for the Tribunal's statement that it will decide the Bifurcated Issue, this too would constitute prejudgment since it means that the Tribunal must have rejected the Claimants' position in the ICSID Proceedings that the Legitimate Expectations Issue had been deferred to the merits phase.

87. In the upshot, a reasonable observer would conclude that there is evidence of prejudgment arising out of the Representation Decision, which raises reasonable doubts as to the impartiality of the Tribunal.

G. Conclusion and Request for Relief

88. The Tribunal has committed three serious violations arising out of its Representation Decision. First, the Tribunal violated the Bank's fundamental right to due process by depriving the Bank of its authorised representatives in favour of an Insolvency Administrator, who in this case is incurably conflicted and accountable to the Respondent. This is a case where the Respondent's officials control a Claimant. Second, the Tribunal's justifications for the Representation Decision were demonstrably conclusory and pretextual, showed prejudgment, and disregarded a number of crucial authorities submitted by the parties before the Tribunal. Third, the Tribunal foreclosed the possibility of *deferring* the Bifurcated Issue to the merits phase, and thereby plainly prejudged the Claimants' repeated submission that the Tribunal *cannot* resolve the Bifurcated Issue against the Claimants without also deciding whether the Claimants have legitimate expectations under EU law to access the dispute resolution mechanism in the BIT, which is an issue that was itself deferred to the merits phase.

89. All roads, therefore, lead to one inescapable outcome: these serious violations, separately and collectively, would lead a reasonable observer to conclude that there exist reasonable doubts as to the impartiality of each of the members of the Tribunal. For these reasons, and in order to ensure

that the integrity and fairness of the ICSID Proceedings is preserved, the Tribunal must be disqualified forthwith.

90. In the circumstances, the Shareholder Claimants respectfully request the disqualification of the Tribunal in accordance with Articles 14 and 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.

Respectfully submitted,

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