INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

AS PNB BANKA AND OTHERS

Claimants

and

REPUBLIC OF LATVIA

Respondent

ICSID Case No. ARB/17/47

DECISION ON THE PROPOSALS TO DISQUALIFY MESSRS. JAMES SPIGELMAN, PETER TOMKA AND JOHN M. TOWNSEND

Chair of the Administrative Council
Mr. David Malpass

Secretary of the Tribunal
Mr. Francisco Abriani

Date of dispatch: June 16, 2020

TABLE OF CONTENTS

I. THE PARTIES

1. The Claimants are AS PNB Banka (formerly AS Norvik Banka) (the "**Bank**"), Mr. Grigory Guselnikov, Mrs. Yulia Guselnikova, Mr. Alexander Guselnikov, Miss Aglaya Guselnikova and Master Pyotr Guselnikov (collectively referred to as the "**Claimants**"). The Bank is a joint stock company incorporated under the laws of Latvia, whereas Mr. Grigory Guselnikov, Mrs. Yulia Guselnikova, Mr. Alexander Guselnikov, Miss Aglaya Guselnikova and Master Pyotr Guselnikov are nationals of the United Kingdom.

2. The Respondent is the Republic of Latvia.

3. The Claimants and the Respondent shall be referred to together as the "**parties**".

II. PROCEDURAL HISTORY

4. On December 14, 2017, the Claimants submitted their Request for Arbitration to the International Centre for Settlement of Investment Disputes in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated March 18, 1965 ("**ICSID Convention**").

5. On December 28, 2017, the Secretary-General of ICSID registered the RFA in accordance with Article 36(3) of the ICSID Convention and notified the parties of the registration.

6. On July 5, 2018, a Tribunal composed of James Spigelman, President, appointed by agreement of the parties; Stanimir Alexandrov, Arbitrator, appointed by the Claimants; and Peter Tomka, Arbitrator, appointed by the Respondent, was constituted. Francisco Abriani, Legal Counsel, ICSID, was designated to serve as Secretary of the Tribunal. Professor Alexandrov subsequently resigned on September 26, 2018 and was replaced by John M. Townsend on September 29, 2018, appointed by the Claimants in accordance with ICSID Arbitration Rule 11(1).

7. On August 14, 2018, the Respondent filed a Request for Bifurcation.

8. On August 24, 2018, the Tribunal issued Procedural Order No. 1. The schedule for submissions was later modified by the reconstituted Tribunal on October 2, 2018.

9. On September 29, 2018, the Tribunal was reconstituted. The Tribunal is composed of The Honorable James Spigelman QC, a national of Australia, President, appointed by agreement of the parties; Mr. John M. Townsend, a US national, appointed by the Claimants; and H.E. Judge Peter Tomka, a national of Slovakia, appointed by the Respondent.

10. On October 10, 2018, the Claimants filed their Response to the Request for Bifurcation.

11. On November 16, 2018, the Respondent submitted its Reply on Bifurcation.

12. On December 3, 2018, the Claimants submitted their Rejoinder on Bifurcation.

13. From December 12 to 14, 2018, the Tribunal held a hearing on the application for provisional measures, bifurcation and the disqualification of the Respondent's counsel in The Hague.

14. On January 31, 2019, the parties filed their respective post-hearing briefs on Bifurcation.

15. On March 1, 2019, the Tribunal rendered its Decision on the Request for Bifurcation, deciding as follows:

> Now, therefore, the Tribunal:
>
> (i) decides to bifurcate the proceedings and 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;
>
> (ii) asks that the Parties confer and attempt to reach agreement on the dates on which the above submissions will be made;
>
> (iii) directs the Parties to submit agreed dates to the Tribunal within two weeks of the date of this Decision and if the Parties are unable to reach agreement on such dates, each side should submit proposed dates by the same time.

16. On March 15, 2019, the Respondent provided its proposed dates to brief the bifurcated issue to the Tribunal and requested the suspension of the proceeding on the merits pursuant to the ICSID Arbitration Rules, including Rule 41(3).

17. On March 16, 2019, the Claimants confirmed the parties' agreement on a schedule for submissions on the bifurcated issue and their intention to submit their Memorial on the Merits on May 17, 2019. The Claimants also requested that the Tribunal reject the Respondent's request for suspension of the proceeding under ICSID Arbitration Rule 41(3).

18. On March 21, 2019, the Tribunal issued Procedural Order No. 5, ordering as follows:

> (i) The schedule for submissions on the bifurcated issue, as agreed by the parties, is confirmed. […]
>
> (iv) The Claimants shall file their Memorial on the Merits by Friday 17 May 2019.
>
> (v) The Tribunal defers any decision on the application to suspend the proceeding on the merits for the period following the filing of the Memorial on the Merits by the Claimants.

19. On May 19, 2019, the Respondent submitted its Memorial on the Bifurcated Objection.

20. On May 22, 2019, the Claimants submitted their Memorial on the Merits.

21. On May 30, 2019, the Claimants filed an application requesting that the Tribunal reverse its Decision on Bifurcation and join the Respondent's EU Law Objection to the merits ("**Application to Reconsider Bifurcation**").

22. After the parties' respective submissions on the Application to Reconsider Bifurcation, the Tribunal issued its Decision on the Claimants' Application on July 2, 2019, deciding to maintain its "decision to address as a preliminary matter 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." The Tribunal also confirmed that it would hold a hearing on the bifurcated issue on September 19-21, 2019.

23. On July 29, 2019, the Claimants filed their Counter-Memorial on the Bifurcated Objection.

24. On August 19, 2019, the Respondent submitted its Reply on the Bifurcated Objection.

25. On September 4, 2019, the Respondent requested that the Tribunal suspend the proceeding on the merits while the decision on the bifurcated issue was pending. By letter of the same date, the Claimants requested that the Tribunal reject the Respondent's request.

26. On September 9, 2019, the Claimants submitted their Rejoinder on the Bifurcated Objection.

27. On September 10, 2019, the Tribunal issued Procedural Order No. 6 on the Respondent's second request to suspend the proceeding on the merits, ordering the suspension.

28. On September 18, 2019, the Respondent submitted a translated copy of the judgement of the Riga City Vidzeme District Court of September 12, 2019 (the "**Insolvency Judgement**"). In its letter accompanying the judgment, the Respondent informed the Tribunal "that on 12 September 2019, the [District Court] declared AS PNB Banka insolvent and appointed an insolvency administrator." In the Insolvency Judgment, Mr. Vigo Krastiņš was identified as the appointed Administrator of the insolvency proceedings of the Bank (the "**Administrator**").

29. The Hearing on the Bifurcated Objection was held in Paris on September 19 and 20, 2019.

30. On September 23, 2019, the Tribunal gave directions to the parties for their Post-Hearing briefs and invited them to agree on a schedule for submissions.

31. On October 22, 2019, Quinn Emanuel Urquhart & Sullivan, the then representative of all the Claimants, requested that Mr. Krastiņš be added to the distribution list as "a courtesy".

32. By email of December 9, 2019, Mr. Krastiņš requested access to the case materials and informed that the power of attorney of Maris Vainovskis, a former counsel for the Claimants in this arbitration, had been withdrawn.

33. On December 10, 2019, Mr. Okko Hendrik Behrends informed the Tribunal that he was writing "as the lawyer representing PNB Banka […] based on the instructions by the Bank's management." Mr. Behrends attached a power of attorney dated August 29, 2019 signed by two members of the Bank's Board. According to this power of attorney, Mr. Behrends was authorized "[t]o represent the interests of the Grantor in the courts and judicial institutions of the Republic of Latvia and of the European Union".

34. By letter of December 11, 2019, the Tribunal invited Mr. Behrends to explain how his appearance in this arbitration falls within the scope of the power of attorney dated August 29, 2019.

35. By separate letter of the same date, the Tribunal invited Mr. Krastiņš to comment on Mr. Behrends' application to be added to the distribution list and to provide an explanation regarding Mr. Krastiņš' December 9, 2019 request that Mr. Vainovskis be excluded from further correspondence on the matter.

36. By separate letter of the same date, the Tribunal invited Quinn Emanuel Urquhart & Sullivan to comment on Mr. Krastiņš' email of December 9, 2019 and Mr. Behrends' email of December 10, 2019.

37. By letter of December 17, 2019, Mr. Krastiņš submitted a letter to the Tribunal, providing an explanation regarding the revocation of Mr. Vainovskis' power of attorney, and informing the Tribunal (i) that he had become the sole representative of the Bank on the date of the Insolvency Judgement, September 12, 2019, and (ii) that "the Bank's former management board lost its authority to act on behalf of the Bank at the moment [he] was approved as administrator by the Vidzeme Suburb Court of the City of Riga on 12 September 2019." He also informed the Tribunal that on December 16, 2019, the Bank had notified its counsel Quinn Emanuel Urquhart & Sullivan of the termination of its power of attorney. In addition, he rejected Mr. Behrends' alleged authority to represent the Bank claiming that he had "no valid authorization to act on behalf of the Bank in the ICSID Arbitration proceedings ARB/17/47 and that any actions or decision professed to be taken on behalf of the Bank by him are of no force or effect."

38. On December 17, 2019, Quinn Emanuel Urquhart & Sullivan informed the Tribunal that it was no longer representing the Bank, but that it continued representing the other Claimants ("**Second to Sixth Claimants**" or the "**Shareholder Claimants**"). It further noted that the dispute as to who is authorized to represent the Bank should be resolved before the proceeding could continue.

39. Also on December 17, 2019, Mr. Behrends submitted a new power of attorney signed by three members of the board of PNB Banka (the "**Former Managers**" or the "**Board**") on the same date, authorizing him to represent PNB Banka "in any and all matters for which the board of the Bank is the appropriate representative of the Bank," including the representation before international tribunals. In the same email, Mr. Behrends argued that it was important that the Administrator does not represent the Bank and noted that the Board did not have access to the proceeding or to the documents, systems and other resources of the Bank.

40. On December 20, 2019, the Tribunal invited the Administrator, the Shareholder Claimants, the Respondent and Mr. Behrends to file submissions on the issue of the representation of the Bank. In the same letter, the Tribunal indicated that Mr. Behrends "will be included in the distribution list for correspondence on this issue." The Tribunal also granted Mr. Krastiņš provisional access to the file, subject to reconsideration after receiving the submissions of the parties and on the condition that Mr. Krastiņš provide an undertaking that he would return or destroy anything he downloads if his access was withdrawn. Mr. Krastiņš provided an undertaking on the same date, which the Tribunal asked him to clarify. Mr. Krastiņš provided the requested clarification on January 2, 2020. The submissions on the representation issue were filed on January 10, 2020, and reply submissions were filed on January 24, 2020.

41. On January 8, 2020, the Shareholder Claimants notified the Tribunal that they "wish and intend" to file an ancillary claim arising from the "conduct of Latvia's Financial and Capital Market Commission (FCMC)" and the declaration of insolvency of the Bank.

42. On January 24, 2020, in their reply submission on the representation issue, the Shareholder Claimants further elaborated on the ancillary claim. They argued, *inter alia*, that "it is now

apparent from the Administrator's submission that the administrator *opposes* the Shareholder Claimants' ancillary claims submitted to the Tribunal on 8 January 2020, thereby effectively seeking to undermine the Shareholder Claimants' claims before this Tribunal."

43. On January 30, 2020, following submissions on the issue of representation by Mr. Krastiņš, Mr. Behrends, the Shareholder Claimants and the Respondent, the Tribunal issued Procedural Order No. 8, deciding on the representation of the Bank ("**Representation Decision**" or "**PO 8**") as follows:

> Having considered the submissions made by Mr. Krastiņš, the Shareholder Claimants, the Respondent, and Mr. Behrends, and having regard to the following considerations:
>
> - The Tribunal stayed proceedings on the merits of these proceedings on 10 September 2019, pending determination of the Bifurcated Issue.
>
> - 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.
>
> - The Tribunal received full submissions on the Bifurcated Issue, including on behalf of the Bank.
>
> - The Tribunal subsequently asked some questions on the Bifurcated Issue and proposes to add to those questions.
>
> - The answers to these questions are the only matters outstanding before the Tribunal.
>
> - 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.
>
> - Counsel for the Shareholder Claimants will answer the Tribunal's questions, having previously made submissions on behalf of all Claimants, including the Bank.
>
> - Nothing 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.

- Mr. Krastiņš has authority to represent the Bank, subject to allegations of a conflict of interest or other disentitling circumstances.

- 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.

- The authorities on conflicts to which our attention has been drawn have no such comparable facts. The challenge to Mr Krastiņš' right to represent the Bank does not need to be finally determined at this stage of the proceedings.

- The Tribunal accepts 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.

- The Tribunal reserves for consideration at that time whether those interests should be represented by the pre-insolvency Directors, as distinct from the new shareholders of the Bank.

- 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.

- 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.

Accordingly, the Tribunal orders as follows:

a. The Tribunal recognises Mr. Krastiņš as the representative of the Bank for the purposes of completing submissions on the Bifurcated Issue in answer to the Tribunal questions.

b. Mr. Krastiņš will be given access to the submissions on the Bifurcated Issue.

c. Until further order, the Tribunal rejects Mr. Behrends' application to be accepted as the representative of the Bank. The parties are directed to continue to copy Mr. Behrends on any communication relating to the representation of the Bank.

d. The Tribunal accepts that both Mr. Krastiņš, in the exercise of his statutory powers, and the former Directors or the current shareholders, reflecting the separate legal personality of the Bank, are entitled to be heard if the Tribunal rejects the Respondent's jurisdictional challenge on the Bifurcated Issue.

e. If that occurs, further submissions will be sought at that time.

44. Also on January 30, 2020, by separate letter the Tribunal informed the parties that it was taking note of the Shareholder Claimants' request for leave to make an ancillary claim, and that it would hold the Shareholder Claimants' application for leave until it had made its decision on the Bifurcated Issue.

45. On February 17, 2020, Mr. Behrends' filed a proposal for the disqualification of James Spiegelman, Peter Tomka and John Townsend, "initiated on behalf of AS PNB Banka (the **"Bank**") by counsel appointed by the Bank's board" (the "**Former Managers' disqualification proposal**"). The proposal was signed by Mr. Behrends and was accompanied by a letter signed by three members of the former board of the Bank "acting on behalf of AS PNB Banka". In the letter, the former managers stated that they were submitting the attached proposal for disqualification, that they fully endorsed it and that they requested the disqualification of the arbitrators and access to the full arbitral record.

46. Also on February 17, 2020, the Shareholder Claimants sent a letter to the Tribunal requesting that it "clarify that its statement in the letter dated January 30, 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." On the same date, the Tribunal sent a letter to the parties stating that "it takes note of the content of the Shareholder Claimants' letter."

47. On February 18, 2020, the Shareholder Claimants filed a proposal to disqualify each Member of the Tribunal, "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" ("**Shareholder Claimants' disqualification proposal**").

48. On February 20, 2020, the Secretary-General informed the parties that the proceeding was suspended in accordance with ICSID Arbitration Rule 9(6). The Administrator, the Respondent and the three members of the Tribunal were invited to file submissions on the Shareholder Claimants' disqualification proposal.

49. By separate letter of the same date, the Secretary-General noted that "the Tribunal has decided that Mr. Behrends does not represent AS PNB Banka in this proceeding", and informed the parties that "the [disqualification proposal] filed by Mr. Behrends cannot be considered a submission by 'a party' to the proceeding and, as such, does not meet the requirement for submission to the Chair of the Administrative Council under Article 57 of the ICSID Convention and ICSID Arbitration Rule 9."

50. By letter of February 27, 2020, the Shareholder Claimants' requested "that the Secretary-General: (a) transmit the PNB Banka Proposal to the Chairman; and (b) inform the Chairman of this request by the Shareholder Claimants that he determine, as a preliminary matter, based on submissions by all the affected parties, whether: (i) the PNB Banka Proposal was filed in accordance with the requirements of Article 57 of the ICSID Convention and ICSID Arbitration Rule 9; and (ii) the Former Board is entitled to submit observations on the Shareholder Claimants' Proposal."

51. On February 28, 2020, Mr. Behrends' submitted a letter to the Secretary-General requesting that: (a) "the Board's proposal for disqualification be transmitted to the Chairman"; and (b) "the Board … be included in the procedure with respect to the Shareholder-Claimants' proposal for disqualification."

52. On March 5, 2020, the Secretary-General informed the parties that she would transmit "the proposal for disqualification filed on February 17, 2020 by Mr. Behrends on behalf of AS PNB Banka to the Chairman, together with the proposal for disqualification filed on February 18, 2020 by counsel for the Second to Sixth Claimants." The Administrator, Mr. Behrends, the Second to Sixth Claimants, the Respondent and the members of the Tribunal were invited to file observations on the disqualification proposals according to a revised schedule.

53. On March 12, 2020, the Administrator and the Respondent filed observations on both proposals for disqualification. On the same date, Mr. Behrends on behalf of AS PNB Banka filed observations on the Shareholder Claimants' disqualification proposal.

54. On March 17, 2020, the Members of the Tribunal furnished explanations on both proposals for disqualification.

55. By letter of the same date, Mr. Behrends requested: (a) that the Administrator be instructed to notify the Secretary-General of the name of his counsel pursuant to Article 18(1) of the Arbitration Rules; (b) that the Bank's board and its counsel be provided with access to the file (the arbitral record); and (c) that the timetable for submissions be extended so as to permit counsel appointed by the Bank's board to review the file (the arbitral record).

56. On March 24, 2020, ICSID reminded the parties of Arbitration Rule 18, informed them that the letter submitted by Mr. Behrends would be transmitted to the Chair of the Administrative Council and invited them to submit any comment "that they may have on the issues raised in Mr. Behrends' letter (other than Arbitration Rule 18) together with their final observations on the proposals for disqualification".

57. On March 26, 2020, the Administrator, Mr. Behrends, the Shareholder Claimants and the Respondent filed final observations on the disqualification proposals.

58. On March 29, 2020, Mr. Behrends submitted a further disqualification proposal, along with additional arguments on his request for access to the file and the disclosure of counsel's name by the Administrator.

59. On March 30, 2020, the Secretary-General invited the Members of the Tribunal to furnish any explanations they wish to provide on Mr. Behrends' further disqualification proposal by April 2, 2020. In the same letter, the Secretary-General invited the Shareholder Claimants, the Administrator and the Respondent to submit any final comments on Mr. Behrends' letter of March 29, 2020 by April 6, 2020.

60. On April 2, 2020, the Members of the Tribunal informed the Secretary-General that the Tribunal had no further comments to make on the disqualification proposals.

61. On April 6, 2020, the Shareholder Claimants, the Administrator and the Respondent filed their observations on Mr. Behrends' letter of March 29, 2020. On the same date, Mr. Behrends commented on the Tribunal's communication of April 2, 2020.

III. BACKGROUND

62. The Former Managers, the Shareholder Claimants, the Respondent and the Administrator have made submissions on the Former Managers' and the Shareholder Claimants' disqualification proposals. These arguments are summarized below.

A. FORMER MANAGERS' ALLEGED RIGHT TO PROPOSE THE DISQUALIFICATION OF THE MEMBERS OF THE TRIBUNAL

(1) Former Managers' Arguments

63. In his letter of February 28, 2020, Mr. Behrends contends that he has represented the Bank before European institutions such as the European Central Bank, the Single Resolution Board and the General Court of the European Union based on an authorization by the Board. He notes that the Respondent could have contested the Board's ability to represent the Bank before those institutions but has not done so.[1]

64. He mentions that the issue of the representation of Latvian banks in liquidation has been examined by the European Courts in the case of another Latvian bank (the *Trasta Komercbanka* case). Mr. Behrends asserts that the view of the European Court of Justice is that "an administrator cannot represent the bank *vis-à-vis* the state and the European institutions". He adds that this view "is not based on any such concrete facts but expressly on the systematic dependence of an administrator […] pursuant to applicable Latvian law", which provides that the administrator is selected by the Latvian authorities and may at any time be removed by the Latvian authorities.[2]

[1] Letter from the Former Managers dated February 28, 2020, para. 2.

[2] Letter from the Former Managers dated February 28, 2020, paras. 4-7. Also, Letter from the Former Managers dated March 26, 2020, paras. 21-22.

65. In his view, the position of the European Court of Justice confirms case law by the European Court of Human Rights, which "did not merely hold that the alleged sole representation of the bank was not in accordance with applicable law." In his view, "[t]hey decided that it violates the most fundamental due process guarantees under the European Convention on Human Rights, under the Charter of Fundamental Rights of the European Union and the common constitutional traditions of the member states of the European Union."[3] He asserts that the same position is confirmed by the courts of the Member States of the European Union and by the decision rendered in *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia* (ICSID Case No. ARB/09/19).[4]

66. Mr. Behrends argues that "[a]ny decision in ICSID proceedings necessarily involves a determination as to the proper representation of the parties", and that the Chair has to determine who represents the Bank for the purposes of his decision.[5]

67. Mr. Behrends contends that PO8 "does not decide who the proper representative of the Bank is in the present proceedings."[6] He adds that:

> The Tribunal does not deny that this issue is capable of being determined based on a determination of the applicable law, any factual issues which may be relevant and then the application of the law to the facts. The Procedural Order accepts that a genuine issue as to the proper representative of the Bank has arisen which will have to be decided and on which the Tribunal proposes to obtain further submissions by the parties and the potential representatives of the Bank.[7]

68. Mr. Behrends also argues that PO8 does not claim that the above-cited case law is incorrect or irrelevant. In his view, the Tribunal believes that there are specific circumstances that allow it to postpone the determination of the proper representative of the Bank, namely the fact that it currently focuses on the jurisdictional challenge, that it merely requires answers to certain limited questions to resolve this issue, that the proceedings on the merits have been suspended, and that the Bank's former counsel continues to represent the Shareholder

[3] Letter from the Former Managers dated February 28, 2020, paras. 8-9.

[4] *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia ("Carnegie Minerals v. Gambia")*, ICSID Case No. ARB/09/19, Decision on Representation (Annulment Proceeding), October 8, 2016.

[5] Letter from the Former Managers dated March 12, 2020, paras. 7 and 11.

[6] Letter from the Former Managers dated February 28, 2020, para. 14 (emphasis in the original). See also para. 31.

[7] Letter from the Former Managers dated February 28, 2020, para. 14.

Claimants and is expected to submit any arguments as to why the Respondent's jurisdictional objection should be rejected.[8] According to Mr. Behrends, the Tribunal "suggests that the adverse effect of postponing the determination of the proper representative of the Bank may be mitigated by strictly limiting the acts for which the Administrator is provisionally recognized as the Bank's representative […] and by ensuring that the Board's counsel will remain included in the further discussion of the issue as to the proper representation of the Bank."[9]

69. Mr. Behrends further contends that "the Tribunal […] formally decides as part of the operative part of the Procedural Order that the Bank is entitled to a right to be heard either through its Board or the New Shareholders."[10]

70. Mr. Behrends also criticizes PO8 on the basis that the Tribunal did not determine the applicable law or make any relevant factual determinations, despite having received detailed submissions from the parties.[11]

71. In relation to the Former Managers' right to file a proposal for disqualification of the Members of the Tribunal, Mr. Behrend's position can be summarized as follows:

    a. Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 do not provide requirements that must be met for a proposal to be submitted to the Chair.[12]

    b. The "Challenged Arbitrators have no decision-making power with respect to the proposals for disqualification, including with respect to the question of whether a valid proposal for disqualification was submitted by an appropriately authorized representative."[13]

[8] Letter from the Former Managers dated February 28, 2020, para. 15.

[9] Letter from the Former Managers dated February 28, 2020, para. 16.

[10] Letter from the Former Managers dated February 28, 2020, para. 17.

[11] Letter from the Former Managers dated February 28, 2020, para. 19.

[12] Letter from the Former Managers dated February 28, 2020, para. 21.

[13] Letter from the Former Managers dated February 28, 2020, para. 29. Also, Letter from the Former Managers dated March 12, 2020, para. 6.

c. PO8 recognizes "the Bank's right to be heard through representatives other than the Administrator (namely the Board or the New Shareholders)." The Tribunal considered the provisional recognition of the Administrator as the Bank's representative to be justifiable only because it is limited to answering outstanding questions on the jurisdictional objection. The question as to whether the Administrator may appropriately represent the Bank in connection with a proposal for disqualification is not answered by PO8.[14]

d. If one were to assume that a representative may be admitted (potentially provisionally) for certain limited purposes, that such a decision was binding as regards the treatment of proposals for disqualification of arbitrators, and that no representation of the Bank other than the one already recognized by the Tribunal can be admitted, then the Bank is not represented at all with respect to proposals for disqualification. A tacit expansion of the Administrator's admission as a representative of the Bank by the Tribunal would thus be inappropriate.[15]

e. The Challenged Arbitrators' approach is based on a recognition that the Bank is entitled to due process as regards the determination of its proper representatives. The ability of a party to propose the disqualification of arbitrators is a fundamental due process right.[16]

f. The provisional nature of PO8 means that a rejection of the Board's proposal for disqualification will also remain provisional. As a result, a subsequent recognition of the Board as the proper representative of the Bank will lead to the Board's proposal for disqualification having to be treated as a valid proposal.[17]

[14] Letter from the Former Managers dated February 28, 2020, para. 33.
[15] Letter from the Former Managers dated February 28, 2020, para. 34.
[16] Letter from the Former Managers dated February 28, 2020, para. 35.
[17] Letter from the Former Managers dated February 28, 2020, para. 38.

g. If the jurisdictional objection is upheld, "the representation issue will not be addressed at all", and such an award "could not be recognized as having been made in proceedings involving the Bank as a party."[18]

72. Mr. Behrends adds that the Challenged Arbitrators' view that issues regarding the representation of a party may not have to be addressed immediately is unprecedented. The same is true for the idea that the powers of representation may be provisionally or temporarily limited. He insists that PO8 "does not conclude that the Administrator is the Bank's proper representative for present purposes", and that it involves limitations being imposed on the Administrators' potential actions with respect to these proceedings.[19]

73. According to Mr. Behrends, if the Bank is deprived of its ability to act through its Board the practical effect would be comparable to the views which the European Court of Justice and the European Court of Human Rights have rejected. Such an interpretation of the ICSID Rules would fail to ensure the minimum due process required under European human rights law.[20]

74. In his letter of March 26, 2020, Mr. Behrends explains that his email of December 10, 2019 to the Tribunal was a reaction to the news that the Administrator had requested access to the file and appeared to be keen on taking over the representation of the Bank.[21] In the same letter, Mr. Behrends also rejects the Administrators' arguments regarding his power of attorney.[22]

(2) Shareholder Claimants' Arguments

75. The Shareholder Claimants consider the Former Board, and not the Administrator, to be the proper representative of the Bank, including for the purposes of filing the proposal for disqualification on behalf of the Bank.[23] On this basis, they request the Chair to "determine,

[18] Letter from the Former Managers dated February 28, 2020, paras. 39-40.

[19] Letter from the Former Managers dated February 28, 2020, paras. 43-44. Similarly, Letter from the Former Managers dated March 12, 2020, paras. 8-9.

[20] Letter from the Former Managers dated February 28, 2020, paras. 45-46.

[21] Letter from the Former Management dated March 26, 2020, para. 23.

[22] Letter from the Former Management dated March 26, 2020, paras. 29-31.

[23] Letter from the Shareholder Claimants dated February 27, 2020, para. 6.

as a preliminary matter, based on submissions by all of the affected parties, whether: (i) the PNB Banka Proposal was filed in accordance with the requirements of Article 57 of the ICSID Convention and ICSID Arbitration Rule 9; and (ii) the Former Board is entitled to submit observations on the Shareholder Claimants' Proposal."[24]

76. According to the Shareholder Claimants, as part of his power to decide whether to uphold a proposal for disqualification under Article 58 of the Convention, the Chair has competence to determine whether a putative representative is entitled to file a proposal for disqualification.[25] They also argue that:

> the Chairman effectively stands in the shoes of a tribunal for the purposes of deciding a disqualification proposal where it relates to a majority of a tribunal instead of a sole arbitrator, and there can be no question that a tribunal has competence to decide the representation of a party under Article 41 of the ICSID Convention. Thus, if arbitrators have competence to decide the representation question in circumstances where a sole arbitrator is challenged, which they do, it follows that the Chairman has such competence where a majority is challenged.[26]

77. The Shareholder Claimants reject any reliance on PO8 as a justification for refusing to hear the Board's disqualification proposal. They advance, *inter alia*, the following reasons:[27]

a. The grounds for the Board's and the Shareholder Claimants' disqualification proposals arise directly out of PO8.

b. It defies common sense to use PO8, which is impugned by the Board's disqualification proposal, as the basis to reject the Board's disqualification proposal.

[24] Letter from the Shareholder Claimants dated February 27, 2020, para. 6.

[25] Letter from the Shareholder Claimants dated February 27, 2020, para. 9, citing *ConocoPhillips Petrozuata B.V. & Ors v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, para. 43: "Under the ICSID Convention and the ICSID Arbitration Rules, the Chairman has discretion to determine the procedure that will be followed in deciding a disqualification proposal. The sole procedural guidance in the Rules is that the Chairman shall use his best efforts to make the decision within thirty days after he has received the proposal."

[26] Letter from the Shareholder Claimants dated February 27, 2020, para. 10.

[27] Letter from the Shareholder Claimants dated February 27, 2020, paras. 11-12.

c. To allow the Tribunal to immunize itself against the Board's disqualification proposal by its own decision undermines the integrity of the ICSID proceedings.

d. The Tribunal in PO8 did not hold that the Administrator was the representative of the Bank for all purposes in these proceedings, let alone for the specific purpose of filing a proposal for disqualification under Articles 14 and 57 of the ICSID Convention and ICSID Arbitration Rule 9. The Tribunal recognized the Administrator as the representative of the Bank "*for the purposes of completing submissions on the Bifurcated Issue* in answer to the Tribunal questions".

e. The Tribunal did not hold that the Board (through Mr. Behrends) does not represent the Bank in these proceedings. Nor did it decide who the representative is for purposes other than addressing certain questions on the Bifurcated Issue. The Tribunal did not decide who the representative of the Bank is for the purposes of filing a disqualification proposal.

f. All of the affected parties must be entitled to an independent, reasoned decision and *de novo* decision on the matter from the relevant decision-maker (which is the Chairman), following proper briefing from the parties and in light of prevailing ICSID practice.[28]

(3) Respondent's Arguments

78. The Respondent argues that Mr. Behrends' challenge is outside the Chair's jurisdiction and/or inadmissible as:[29]

a. It requires a determination of whether Mr. Behrends is a "party" or represents a "party" in this arbitration, which: (a) has already been determined by the Tribunal in PO8; and (b) is a pre-requisite for challenging an ICSID tribunal under the ICSID Convention and Arbitration Rules;

[28] Citing the decision rendered by the Annulment Committee in *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on Representation (Annulment Proceeding), October 7, 2016, paras. 39 and 42-45.

[29] Letter from the Respondent dated March 12, 2020, pp. 26-28.

b. A determination by the Chair as to whether Mr. Behrends is a party would consist of an inappropriate infringement on the powers of an ICSID Tribunal in the context of the balance of powers created by the Convention;

c. The Chair's power is restricted by the powers given to him by the Member States through the ICSID Convention as well as the architecture of the ICSID Convention. While Article 46 of the ICSID Convention expressly provides that "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", no similar provision exists for the Chair in the context of disqualification proposals creating jurisdiction regarding ancillary issues.

d. "Mr. Behrends' challenge is not really a challenge of the Tribunal but really an appeal of the Tribunal's decision not to consider him a party or party representative at this time."

e. Should the Chair find that Mr. Behrends represents a party but that the challenge is unfounded, the Chair would be acting as a second Tribunal or some kind of appellate body. This is not how the Convention and the Arbitration Rules were meant to function with respect to challenges or more generally.

f. According to Art. 57 of the ICSID Convention and Arbitration Rule 9, the Chair was only given jurisdiction to decide upon requests for the disqualification of a majority of the members of arbitral tribunals.

79. The Respondent also rejects the arguments advanced by the Shareholder Claimants, which assimilate the Chair's role to the Tribunal's. The Respondent says: (i) this is "incorrect in light of the much more extensive powers of the Tribunal"; (ii) it fails to see the Chairman's role as one set up in the context of an international organization which must be interpreted strictly; and (iii) is incompatible with how ICSID arbitration is conceived and functions, as it "would allow for appeals of Tribunal decisions through the backdoor".[30]

[30] Letter from the Respondent dated March 12, 2020, p. 28.

80. The Respondent asserts that, in any event, the Tribunal has decided that Mr. Behrends is not the representative of the Bank until it has decided on the bifurcation objection, which should make his challenge at least inadmissible.[31]

(4) Administrator's Arguments

81. The Administrator first refers to a letter from Oleksei Kutiavin, Dmitrii Kalmykov and Anna Verbicka, accompanied by Mr. Behrends, where they "[…] refer to themselves as 'the former board of AS PNB Banka'", and notes that Mr. Kalmykov's signature "looks different from the signature of Mr. Kalmykov that the Bank has in its files." On this basis, the Administrator sees a need to investigate further and reserves his rights in this respect.[32]

82. The Administrator asserts that Mr. Behrends' statements suggesting that he was accepted as the Bank's sole representative by the ECB is false. He explains that the ECB, in a decision of February 17, 2020, indicated that the Administrator represents the Bank judicially and extra-judicially, and that Mr. Behrends does not represent the Bank for regulatory purposes but for the purposes of bringing a legal challenge against a withdrawal decision.[33]

B. FORMER MANAGERS' ALLEGED RIGHT TO ACCESS THE FILE

(1) Former Managers' Arguments

83. Mr. Behrends requests full access to the record of this arbitration,[34] stating that without access, his clients' procedural rights cannot be exercised properly.[35]

84. Mr. Behrends further contends that his disqualification proposal "is not limited to the representation issue" and that "[t]here are two further grounds for the Proposal on which the Bank's counsel cannot comment without access to the file."[36] In his March 29, 2020 letter, Mr. Behrends argues that access to the file is important to address the Challenged

[31] Letter from the Respondent dated March 12, 2020, p. 28.
[32] Letter from the Administrator dated March 12, 2020, para. 48.
[33] Letter from the Administrator dated March 12, 2020, paras. 49-50.
[34] Letter from the Former Managers dated February 17, 2020, para. 51.
[35] Letter from the Former Managers dated March 29, 2020, paras. 18-19.
[36] Letter from the Former Managers dated March 12, 2020, para. 3.

Arbitrators' references to undisclosed parts of the file, and in particular the Challenged Arbitrators' comments on the ancillary claims.[37]

(2) Respondent's Arguments

85. The Respondent argues that Mr. Behrends cannot have access to the file because he is not a party or does not represent a party to the case.[38] While noting that the ICSID Convention and Arbitration Rules are silent on access to the file by third parties, the Respondent draws an analogy with similar requests for access to the file in the context of non-disputing party applications. It notes that tribunals have only granted access to the record to third parties if: (i) it was required for them to discharge their task, *i.e.* to provide useful information to the tribunal; and (ii) it would not disrupt the proceeding or unduly burden or unfairly prejudice either party.[39]

86. In this case, Mr. Behrends does not need access to the record to supplement his challenge, as it stems from PO 8.

87. Additionally, granting access to Mr. Behrends would significantly disrupt the proceeding, as he would likely need several months to review the file.[40]

(3) Administrator's Arguments

88. The Administrator contends that the question of Mr. Behrends' access to the file has already been decided and rejected.[41]

C. FORMER MANAGERS' AND SHAREHOLDER CLAIMANTS' DISQUALIFICATION PROPOSALS

(1) Former Managers' Arguments

89. Mr. Behrends argues that PO8 shows a lack of impartiality by the Challenged Arbitrators. He says that: (i) the Tribunal "purports to exclude all or virtually all procedural rights of

[37] Letter from the Former Managers dated March 29, 2020, paras. 18 and 20-22;
[38] Letter from the Respondent dated March 12, 2020, p. 32.
[39] Letter from the Respondent dated March 12, 2020, p. 33.
[40] Letter from the Respondent dated March 12, 2020, p. 33.
[41] Letter from the Administrator dated March 26, 2020, para. 9.

the Bank […] by provisionally limiting the powers of representation of potential representatives of the Bank";[42] and (ii) "tribunals do not have the power to admit or reject representatives of the parties […] provisionally or subject to restrictions or conditions or by admitting them only for certain limited purposes", and the task of satisfying themselves that each party is appropriately represented may never be postponed.[43]

90. Mr. Behrends criticizes the Challenged Arbitrators, *inter alia*, for the following reasons:

a. The Challenged Arbitrators do not claim that it is impossible to resolve the representation issue immediately, but they propose to do this at a later stage of the procedure. They thus "confirm that the limitations on the Bank's representation are not necessary".[44]

b. The parties and the potential representatives of the Bank agreed that the representation issue may be resolved before any further procedural step is undertaken. While PO8 suggests that "other persons may be the appropriate representatives […], this does not justify the decision because the other potential representatives were not contacted and the Challenged Arbitrators do not suggest that they assume an intention not to represent the Bank's case" within the meaning of Article 45 of the ICSID Convention.[45]

c. No party or potential representative of a party has suggested that a limitation of the powers of representation is possible or permissible. A party cannot agree to a limitation of its rights of representation.[46]

d. It is not possible to determine that the appropriate representation of a party is less relevant in certain parts of the proceeding.[47]

[42] Letter from the Former Managers dated February 17, 2020, para. 4; see also para. 10.

[43] Letter from the Former Managers dated February 17, 2020, paras. 6-8. See also, Letter from the Former Managers dated March 12, 2020, paras. 15-16.

[44] Letter from the Former Managers dated February 17, 2020, para. 14.

[45] Letter from the Former Managers dated February 17, 2020, para. 15.

[46] Letter from the Former Managers dated February 17, 2020, para. 16.

[47] Letter from the Former Managers dated February 17, 2020, para. 17.

e. A tribunal cannot speculate about the interests of a party and dispense with its representation, or limit it, on the grounds that the relevant representatives are unlikely to make any contributions which the Tribunal regards as important. Any such speculation is in itself an indication of impermissible bias.[48]

f. The unrestricted representation of a party with similar interests does not justify limitations on the representation of a party. The Bank has undoubtedly specific interests which are different from those of the shareholders. A Bank would breach its fiduciary and regulatory duties, and could be exposed to criminal sanctions, if it pursued interests of the shareholders rather than those of the bank.[49]

g. The Tribunal's approach is similar to the Respondent's since it refers to the interests of the Board or the interests of the New Shareholders, as opposed to the interests of the Bank.[50]

h. Legal issues regarding the representation of a party, or an overlap of representation issues and merits issues, do not justify a limitation of the powers of representation of a party.[51]

i. PO8 is not justified because Mr. Behrends acts on the basis of a valid power of attorney predating the appointment of the Administrator which the Administrator has not attempted to revoke.[52]

j. A tribunal cannot compartmentalize different issues and thereby create sub-proceedings that run consecutively or simultaneously with different representations by the parties. Nor is it possible for a tribunal to treat a specific person as a "passive"

[48] Letter from the Former Managers dated February 17, 2020, para.18.
[49] Letter from the Former Managers dated February 17, 2020, paras. 19-22.
[50] Letter from the Former Managers dated February 17, 2020, paras. 23-24.
[51] Letter from the Former Managers dated February 17, 2020, paras. 25-26.
[52] Letter from the Former Managers dated February 17, 2020, para. 27.

representative for purposes of specific circumstances such as the representation issue.[53]

k. A tribunal cannot identify different representatives of a party for purposes of representing different interests in connection with a party.[54]

91. Mr. Behrends notes that "[t]he underlying motivation of the Challenged Arbitrators is irrelevant" and that "[i]t is sufficient that they demonstrate an intention not to treat the Bank equally."[55] In his view, any such intention requires their disqualification.

92. In his view, PO8 "suggests that the Challenged Arbitrators have come to the realization that it has become increasingly unrealistic and questionable legal fiction that the Bank is a legal person and a party to the present proceedings because the Bank is now actually solely an object of various interests." Therefore, Mr. Behrends says, the Challenged Arbitrators "see it as their duty to identify interests in connection with the Bank which they regard as legitimate and therefore deserving 'representation' in the present proceedings."[56]

93. In his view, "the Challenged Arbitrators regard as legitimate only the 'residual interests of the holders of equity in the Bank'." Indeed, Mr. Behrends argues that the Challenged Arbitrators "suggest that they will identify legitimate interests and then identify representatives of such interests".[57]

94. Mr. Behrends further argues that any objective and reasonable observer would be concerned about the following:

a. That the motivation behind PO8 may be that the Challenged Arbitrators "are compromised by the fact that the Respondent has successfully installed the Administrator as the *de facto* representative of the Bank and that [PO8] is primarily a response to the Board's open statements that the present proceedings may have

[53] Letter from the Former Managers dated February 17, 2020, paras. 28-29.

[54] Letter from the Former Managers dated February 17, 2020, paras. 30-32.

[55] Letter from the Former Managers dated February 17, 2020, para. 33; also, para. 37. See also Letter from the Former Managers dated March 12, 2020, para. 22.

[56] Letter from the Former Managers dated February 17, 2020, para. 34.

[57] Letter from the Former Managers dated February 17, 2020, paras. 35-36.

been fundamentally undermined". Mr. Behrends also notes that the Board has also strongly criticized the Tribunal for the circular logic on which the *de facto* admission of the Administrator as representative of the Bank was based.[58]

b. The Tribunal's "primarily defensive" reaction to the Board's complaint about Latvia's interference with the representation of the Bank and, in particular, the alleged failure to provide him with a submission filed by the Administrator on December 17, 2019 in spite of him allegedly having been informed otherwise.[59]

c. The "discrepancy between the procedural assumptions on which [PO8] is based", *i.e.* that a representative must apply for admission and that no such admission was considered necessary in order to consider the Administrator as the *de facto* representative of the Bank.[60]

d. The alleged lack of due process and impartiality regarding the representation issue, given that the Administrator was granted access to the record and the Board was not, and the Administrator was allegedly initially allowed to have *ex parte* communications with the Tribunal on the representation issue.[61]

e. The Tribunal's inability "to deal with the representation issue and [its] view that the jurisdictional phase does not require any resolution of the representation issue", which "will create a strong illegitimate incentive to uphold the Respondent's jurisdictional challenge in order to avoid the need to deal with the representation issue."[62]

f. The Tribunal's "reluctance to address the illegitimate collusion between the Respondent's counsel and the Administrator," who admit that they met physically,

[58] Letter from the Former Managers dated February 17, 2020, paras. 38-39 (emphasis in the original).
[59] Letter from the Former Managers dated February 17, 2020, para. 41.
[60] Letter from the Former Managers dated February 17, 2020, para. 42.
[61] Letter from the Former Managers dated February 17, 2020, para. 43.
[62] Letter from the Former Managers dated February 17, 2020, para. 44.

and its acceptance of this alleged collusion as not being problematic for the jurisdictional phase.[63]

95. Mr. Behrends also refers to a decision by the Tribunal, in the context of the organization of the hearing on jurisdiction, to the effect that any discussion of the representation of the Bank would have to be deducted from the time of the Respondent. In Mr. Behrends' view, this "underlined the Tribunal's recognition that it was Latvia which was interested in the Board being replaced by the Administrator", and highlights that "it is highly unusual and problematic if a party is allowed to adopt an active role (let alone a dominant role) as regards the representation of the opposing party."[64]

96. On March 29, 2020, Mr. Behrends filed a "further proposal for disqualification." He argued that, as noted by the Shareholder Claimants, the Challenged Arbitrators omitted the main statement of an authority they cite in their observations on the disqualification proposals and mischaracterized other statements from the same authority, thereby suggesting that their conduct and PO8 do not need to be examined.[65] Mr. Behrends says that this conduct is reprehensible, and that the arbitrators must therefore resign or be removed from their positions.[66]

(2) Shareholder Claimants' Arguments

a. Merits of the Shareholder Claimants' application

97. The Shareholder Claimants advance the following three grounds for disqualification: (i) due process violations; (ii) transparency violations; and (iii) prejudgment violation. The Shareholder Claimants state that an additional ground arises from the Tribunal's observations on the disqualification proposals.

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[63] Letter from the Former Managers dated February 17, 2020, para. 46.

[64] Letter from the Former Managers dated February 17, 2020, para. 40.

[65] Letter from the Former Managers dated March 29, 2020, paras. 6 and 13.

[66] Letter from the Former Managers dated March 29, 2020, para. 14. Mr. Behrends also criticized the Tribunal's explanations in his letter of March 26, 2020 (paras. 5-12), arguing, *inter alia*, that: (i) it was inappropriate for the challenged arbitrators to submit a collective statement; and that (ii) it was inappropriate to avoid any substantive comment on the criticism which has been made and instead launch a formal counterattack against the parties proposing the disqualification.

(i) Due process violations

98. According to the Shareholder Claimants, "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."[67] They hold that their disqualification proposal, therefore, goes to the basic integrity and fairness of these proceedings.

99. In support of this ground, the Shareholder Claimants advance the following reasons:

a. The Tribunal assumed that it was the Former Management who had to apply to be recognised as representative of the Bank by the Tribunal, despite the fact that they were recognised in this proceeding from the outset. The Tribunal did not consider that the one who needed to make such an application was the Administrator.[68]

b. The Tribunal appears to have implicitly applied domestic law to the representation issue, contrary to established practice. In any event, the fact that the Tribunal does not identify "the correct applicable law is highly anomalous in circumstances where the point was argued vigorously."[69]

c. The Tribunal's putative application of Latvian law was incorrect because it disregarded EU law, which is part of Latvian law and provides that insolvency administrators cannot represent banks in legal proceedings where the acts of the authority that nominated or appointed them are being challenged. This rule of EU law does not depend on the identification of an actual conflict of interest.[70] In the Shareholder Claimants' view, the faults in the Tribunal's approach to the law applicable to the representation issue are such that "a reasonable observer would,

[67] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 39.

[68] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 41. Also, Shareholder Claimants' letter of March 26, 2020, para. 21.

[69] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 42. Also, Shareholder Claimants' letter of March 26, 2020, para. 23.

[70] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 43.

even on this ground alone, have reasonable doubts as to the Tribunal's impartiality."[71]

d. The Tribunal does not explain in PO8 why the resolution of the bifurcated issue should be prioritised over the resolution of the representation issue. In any event, expediency "does not afford a proper basis for the Tribunal to deprive the Bank of its due process rights, including its right to be heard."[72]

e. The Tribunal held that the Administrator "has authority to represent the Bank, subject to allegations of conflict of interest or other disentitling circumstances"; however, the Tribunal deferred the issue of conflicts of interest.[73] The Shareholder Claimants state that: (i) the Tribunal fails to explain why the Administrator has authority to represent the Bank, even in the absence of conflict of interest; (ii) the Tribunal's assertion that the "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", as there is no evidence in the record as to the Administrator's position on the bifurcated issue; (iii) it cannot be acceptable for a person with a conflict of interest to represent a party in ICSID proceedings merely because that conflict is assessed to have no immediate "material effect" on the proceeding; (iv) the fact that the Tribunal considers the Shareholder Claimants and the Bank to have the same interest is irrelevant because they do not speak for the Bank, and because this would not "cure" a violation of the Bank's right to due process. Moreover, the Former Management was responsible for making previous submissions on the bifurcated issue and should be permitted to supplement the submissions over which they had conduct for the Bank.[74]

f. 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

[71] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 44.
[72] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 45.
[73] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 46.
[74] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 47.

it accepted that his authority was subject to allegations of a conflict of interest. The Tribunal was not allowed to defer its "final" decision. If a person who is alleged to have a conflict of interest represents the Bank, this amounts to a violation of the Bank's fundamental due process rights caused by the Tribunal's failure to resolve the issue. Moreover, the Tribunal left the door open to find that the Former Management should represent the Bank in the merits phase; it is unclear whether the Former Management would be bound by what has been said or done by the Administrator purportedly on behalf of the Bank.[75]

g. The Administrator has "obvious and incurable conflicts of interest." He 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."[76] The fact that the Tribunal ignored these conflicts after receiving substantive submissions on the matter raises reasonable doubts about its impartiality.

h. The Tribunal mischaracterised the representation issue by referring to the representation of the "residual interests of the holders of equity in the Bank."[77] The Shareholder Claimants note that: (i) the representation issue concerns the authority to represent the Bank, not who has the authority to represent the "residual interests of the holders of equity in the Bank." This pejorative characterization minimizes the extent of the Former Management's interest in representing the Bank in this proceeding and presumes the Bank is insolvent rather than a fully competent legal person; (ii) the Bank cannot be represented simultaneously by different parties who are likely to have divergent interests, and the Tribunal cannot decide on an *ad hoc* basis which person it wishes to regard as the Bank's representative for any particular decision; (iii) the Tribunal has indicated that it may decide that the

[75] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 48.

[76] Shareholder Claimants' disqualification proposal dated February 18, 2020, paras. 49-50, referring to circumstances already cited above. Also, Shareholder Claimants' letter of March 26, 2020, paras. 3-5, 16, 20 and 29-35.

[77] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 53. Also, Shareholder Claimants' letter of March 26, 2020, para. 36.

Former Management are 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 these proceedings.[78]

(ii) Transparency violations

100. The Shareholder Claimants further hold that PO8 was based on adverse assumptions, indicated prejudgment and failed to address ICSID authorities. This implies that PO8 was "pretextual and designed to achieve a pre-determined outcome". They argue that the "transparency violations" further strengthen the appearance of bias and give rise to reasonable doubts as to the impartiality of the members of the Tribunal.[79] In support of this ground, the Shareholder Claimants allege, *inter alia*, the following:

a. The Tribunal stated that "the Shareholder Claimants will answer the Tribunal's questions, having made submissions on behalf of all Claimants, including the Bank" and that "[n]othing in the submissions made by Mr. Behrends on behalf of the former Directors suggests that the former Directors have any interest that diverges from that of the Shareholder Claimants." The Shareholder Claimants say that: (i) this is irrelevant; (ii) the Bank cannot be deprived of it right to be heard based on the Tribunal's assumption that its "interest" is the same as that of the Shareholder Claimants; and (iii) there is no basis to assume that the Former Management's submissions will be identical as those made by the Shareholder Claimants.[80]

b. The Tribunal purported to justify its failure to "finally" decide the representation issue on the basis that it overlapped with merits issues which the Tribunal could not adjudicate before it has jurisdiction. This reasoning, which suggests that the Tribunal cannot decide the representation issue until it has formed a position on the merits, is incorrect and does not reflect ICSID practice. The Tribunal can only

[78] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 53.

[79] Shareholder Claimants' disqualification proposal dated February 18, 2020, paras. 55 and 68.

[80] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 56. Also, Shareholder Claimants' letter of March 26, 2020, para. 39.

decide the merits at the conclusion of the merits phase, while the representation issue is a preliminary one.[81]

c. The Tribunal provided no justification as to why it recognized the Administrator as the Bank's representative and appears to have disregarded the *Carnegie Minerals* decision and other arguments advanced by the Shareholder Claimants.[82]

d. The Tribunal appears to have treated the ancillary claim not as admitted but as an application for leave to admit the ancillary claim, while there is no requirement under the ICSID Convention or the Arbitration Rules to seek the Tribunal's leave to pursue ancillary claims. The Shareholder Claimants sought a clarification from the Tribunal on this matter and the Tribunal did not provide it, simply taking note of their letter. In the Shareholder Claimants' view, "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." This, in their view, serves to compound the perception of lack of impartiality arising from due process violations.[83]

e. The Tribunal issued PO8 without awaiting responses from the Administrator and the Respondent to the Shareholder Claimants' letter of January 28, 2020, requesting certain documents and information in relation to their meeting.[84]

(iii) Prejudgment violation

101. The Shareholder Claimants advance this ground against the background of the Claimants' allegation 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

[81] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 57. Also, Shareholder Claimants' letter of March 26, 2020, paras. 40-41.

[82] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 58. Also, Shareholder Claimants' letter of March 26, 2020, paras. 24-27 and 42-43.

[83] Shareholder Claimants' disqualification proposal dated February 18, 2020, paras. 59-65. Also, Shareholder Claimants' letter of March 26, 2020, paras. 44-45, rejecting the Tribunal's explanation on this matter.

[84] Shareholder Claimants' disqualification proposal dated February 18, 2020, paras. 66-67. Also, Shareholder Claimants' letter of March 26, 2020, para. 46.

EU law per *Achmea*." In their view, it is not possible to decide on the bifurcated issue without deciding on the legitimate expectations issue.[85]

102. The Shareholder Claimants' argument is based, *inter alia*, on the Tribunal's statement in the Decision on Bifurcation that it is "unnecessary to deal with any substantive provisions of EU law to decide the [Bifurcated Objection]".[86]

103. The Shareholder Claimants argue that PO8 "proceeds on the basis that the Tribunal can conclusively resolve the Bifurcated Issue without deciding whether the Claimants have legitimate expectations under EU law."[87] In their March 26 submission, the Shareholder Claimants clarified that "the prejudged issue is *not* the issue of legitimate expectations, nor its relationship to the remainder of the sub-issues of the Bifurcated Issue […] the prejudged issue is whether the Bifurcated Issue *will* or *will not be* conclusively resolved at the bifurcated phase of the proceedings".[88] In their view, "[b]y 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."[89] In their view, the Tribunal has prejudged their submission in one of two respects: (i) it may have resolved that the legitimate expectations issue does not need to be decided to decide the bifurcated issue against the Claimants because it does not trump the EU law rule in *Achmea* (which would constitute prejudgment given that the Tribunal prohibited the parties from arguing the legitimate expectations issue); or (ii) it may have resolved that it did not defer the legitimate expectations issue to the merits phase (which would constitute prejudgment because it means the Tribunal must have rejected "the Claimants' position in

[85] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 85.

[86] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 85, citing Decision on Bifurcation, para. 154.

[87] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 69.

[88] Shareholder Claimants' letter of March 26, 2020, paras. 51-52 (emphasis in the original).

[89] Shareholder Claimants' disqualification proposal dated February 18, 2020, paras. 69-70.

the ICSID Proceedings that the Legitimate Expectations Issue had been deferred to the merits phase").[90]

(iv) Tribunal's reaction to the disqualification proposals

104. The Shareholder Claimants argue that the Tribunal Members, in their observations on the disqualification proposals, "decided to quote selectively (and, indeed, misleadingly) from Professor Born's treatise."[91]

105. The Shareholder Claimants contend that this adds to their "misgivings about the propriety and impartiality of this Tribunal."[92]

b. Mr. Behrends' Further Proposal for Disqualification

106. The Shareholder Claimants adopt Mr. Behrends' argument describing the circumstances in his letter as "sufficient, without further elaboration, for the Chairman to disqualify the entire Tribunal."[93]

(3) Respondent's Arguments

a. Admissibility

107. The Respondent argues that both disqualification proposals are inadmissible because they constitute an abuse of process. It contends that, in examining the rules applicable to ICSID proceedings, international law must be taken into account. This includes the principles that cases must be litigated in good faith and efficiently.[94]

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[90] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 86. Indeed, the Shareholder Claimants note that the Tribunal had: directed the parties not to argue the legitimate expectations issue in the context of the bifurcated issue; then asked the Respondent to reply, in its post-hearing submissions, to the Claimants' assertion (in their Counter-Memorial on the Bifurcated Objection) that the issue of the application of EU law of legitimate expectations has been "deferred to the merits" and to paragraph 13 of the Tribunal's decision of July 2, 2019; and then withdrew that question after receiving a letter from the Claimants stating that, if the Tribunal had decided not to defer the EU law of legitimate expectations question to the merits phase, this would be a serious departure from a fundamental rule of procedure and the Claimants would wish to adduce expert evidence. Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 85.

[91] Shareholder Claimants' letter dated March 26, 2020, para. 9.

[92] Shareholder Claimants' letter dated March 26, 2020, para. 17.

[93] Shareholder Claimants' letter dated April 6, 2020.

[94] Letter from the Respondent dated March 12, 2020, pp. 3-5 and 9.

108. The Respondent advances the following reasons:

a. The disqualification proposals constitute the Claimants' third attempt to delay post-hearing submissions on the bifurcated issue. According to the Respondent, Mr. Behrends made himself known to the Tribunal "strategically" on December 11, 2019, i.e. less than a week before the filing of the first round of post-hearing submissions, about three months after Mr. Krastiņš's appointment as Administrator on September 12, almost four months after the issuance of the power of attorney (which Mr. Behrends alleges would grant him the relevant mandate) of August 25, and almost three months after the hearing on the bifurcated issue (which was held on September 19-20).[95]

b. They appear to be aimed at trying to "beat Brexit," extending the arbitration until after the transition period under which EU law continues to apply to the UK (December 31, 2020). By doing this, the Claimants would be trying to establish jurisdiction over a claim after the fact where a tribunal actually had no jurisdiction at the time the dispute arose and was submitted to it.[96]

c. The Tribunal suspended the proceeding on the merits while inviting the Shareholder Claimants to make an application to update their Memorial on the Merits (submitted in May 2019) taking into account the Shareholder Claimants' sale of a significant part of the interest in the Bank in June 2019. However, rather than making such an application, the Shareholder Claimants appear to aim at delaying or derailing the proceedings.[97]

d. The effect of the disqualification proposals is that the Chairman is being asked to review the Tribunal's determination that Mr. Behrends does not represent a party

[95] Letter from the Respondent dated March 12, 2020, p. 6.

[96] Letter from the Respondent dated March 12, 2020, pp. 7-8.

[97] Letter from the Respondent dated March 12, 2020, p. 8.

at this time, which is a pre-requisite for filing a disqualification proposal under Articles 57 and 58 of the ICSID Convention and Arbitration Rule 9.[98]

b. The Legal Standard

109. As to the standard applicable to disqualification proposals, the Respondent notes that: (i) pursuant to Arbitration Rule 9 they must be submitted "promptly"; and (ii) the threshold to challenge an arbitrator or Tribunal is manifest lack of independence or impartiality, including an appearance of bias.[99] The Respondent argues, however, that "in the context of complaints about the result of a decision […], there must be something more than the considerations of the tribunal or the manner in which the Tribunal reached the decision. There must be, for example, bad faith."[100] It also says that when disqualification proposals have been based on the content of a decision, as well as more generally, the legal standard is very high and only six out of 76 decisions between 1982 and 2019 compiled on ICSID's website have upheld such a challenge.[101]

110. The Respondent notes that under Article 57 of the ICSID Convention, the challenging party has the burden of establishing the existence of "a fact indicating a manifest lack of the qualities required by the paragraph (1) of Article 14." The Respondent also says that it agrees with the Shareholder Claimants that:

- according to Article 14(1) of the ICSID Convention, arbitrators must be "both impartial and independent";
- the lack of those qualities must be "evident" and "obvious";
- actual dependence or bias is not required but the appearance of dependence or bias is sufficient; and

[98] Letter from the Respondent dated March 12, 2020, p. 8.
[99] Letter from the Respondent dated March 12, 2020, pp. 9-11.
[100] Letter from the Respondent dated March 12, 2020, p. 11.
[101] Letter from the Respondent dated March 12, 2020, p. 11.

- the standard to be applied is an objective one based on a reasonable evaluation of the evidence by a third party.[102]

111. However, citing the Decision on the Proposal to Disqualify a Majority of the Tribunal rendered in *ConocoPhillips Petrozuata B.V. and others v. Venezuela*, the Respondent says that the Claimants "must prove not only that the purported lack of independence and impartiality is 'evident' or 'obvious' but also that it is 'highly probable, not just possible' as pointed out by the Shareholder Claimants themselves."[103]

112. Relying on *Abaclat and others v. Argentina*, the Respondent also argues that the burden of proof is on the Claimants to establish (i) the existence of the facts from which it is said that a manifest lack of the relevant qualities can be inferred, and (ii) that such an inference can reasonably be made in the circumstances.[104]

113. Finally, the Respondent argues that "disagreements over the merits of the case are not considered proper arguments to request the disqualification of an arbitrator (or of an entire Tribunal) as it does not constitute in itself evidence of lack of independence or impartiality."[105]

c. Shareholder Claimants' Disqualification Proposal

114. The Respondent asserts that the "prejudgement violation" ground indirectly attacks the July 2, 2019 decision and should thus be deemed waived for not having been made

[102] Letter from the Respondent dated March 12, 2020, p. 12.

[103] Letter from the Respondent dated March 12, 2020, p. 12, citing *ConocoPhillips Petrozuata B.V. & others v. Bolivarian Republic of Venezuela* ("*ConocoPhillips Petrozuata B.V. and others v. Venezuela"*), ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, para. 56.

[104] Letter from the Respondent dated March 12, 2020, pp. 12-13, citing *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic* ("*Abaclat and others v. Argentina*"), ICSID Case No. ARB/07/05, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier and Prof. Albert Jan van den Berg, December 19, 2011, para. 63.

[105] Letter from the Respondent dated March 12, 2020, pp. 13-15, referring to *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/05, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier and Prof. Albert Jan van den Berg, December 19, 2011; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, August 12, 2010 ("*Urbaser S.A. and others v. Argentina*"); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* ("*Suez and others v. Argentina*"), ICSID Case No. ARB/03/19, Decision on the Proposal for Disqualification of a Member of the Arbitral Tribunal, October 22, 2007.

promptly.[106] To the extent that the Shareholder Claimants' complaint relates to the Tribunal's decision to withdraw its post-hearing question on November 19, 2019, the Respondent notes that the ground for disqualification is equally waived.[107]

115. The Respondent argues that all of the allegations of due process, transparency and prejudgment violations concern the merits of the Tribunal's decision and are thus not proper grounds for a disqualification proposal.[108]

116. Regarding the alleged "due process violations", the Respondent rejects each one of them also individually, for the following reasons:[109]

a. Regarding the issue of whether Mr. Krastiņš should have applied to be recognized as the Bank's representative, there is no rule on who must apply to be considered a party representative in ICSID proceedings where there are competing claims on party representation. In any event, Quinn Emmanuel Urquhart and Sullivan UK LLP represented the Bank until the first half of December 2019, after stating at the hearing in September 2019 that they represented the Bank. The Respondent also notes that Mr. Behrends invokes a mandate from August 25, 2019, and that he would have had ample opportunity to contact the Tribunal earlier and avoid the issues he complains about.

b. It is incorrect to say that the Tribunal did not consider the EU law arguments on representation advanced by the Claimants. The Tribunal considered the CJEU's *Trasta Komercbanka* judgement and considered that the facts were not comparable to those in the present case.

[106] Letter from the Respondent dated March 12, 2020, pp. 16-17, citing the following decision of the Tribunal from July 2, 2019: "With regard to the Claimants' contention that they have legitimate expectations under EU law and that EU law will not prevent access to the dispute resolution provisions of the BIT, the Tribunal notes that whether it has jurisdiction to determine the EU law of legitimate expectations at all is encompassed by the bifurcated issue." (emphasis omitted).

[107] Letter from the Respondent dated March 12, 2020, p. 17.

[108] Letter from the Respondent dated March 12, 2020, p. 17.

[109] Letter from the Respondent dated March 12, 2020, p. 19-20.

c. Efficiency is indeed a principle that applies to ICSID proceedings, while "the so-called due process 'right' of the Bank to be represented by former management is based on non-existent principles that do not obviously apply to investment treaty arbitration."

d. To the extent that Mr. Krastiņš would have a conflict of interest in representing the Bank (which the Respondent denies), the material effect of the alleged situation is relevant (as it is, *e.g.*, regarding grounds invoked for annulment of ICSID awards), and therefore such a consideration is proper.

e. The criticism that it is an abdication of duty by the Tribunal to open the door to reconsider the matter of Mr. Krastiņš's conflict of interest is unfounded. According to the Respondent, PO8 adopts a careful approach considering the Respondent's intra-EU objection, which goes both to jurisdiction and admissibility, and the Respondent's position on the role of EU law in the present dispute.[110]

f. The alleged incurable conflict of Mr. Krastiņš to represent the Bank is unfounded. The Shareholder Claimants fail to mention Mr. Krastiņš's legal obligation to act in the best interest of the Bank, and the civil and criminal law consequences that he would be subject to if he failed to do so. The allegation that Mr. Krastiņš rejected the ancillary claim filed on January 8, 2020 does not change the fact that the interest of the Shareholder Claimants and/or Mr. Behrends remain significantly aligned with Mr. Krastiņš's at this stage of the arbitration.

g. It is incorrect to affirm that the question of residual interest of the Bank mischaracterizes the representation issue. The new shareholders of the Bank never showed any interest in continuing the ICSID claim, nor have they presented themselves to the Tribunal. On this basis, the Respondent raises a number of questions as to the relationship between the former management board, Mr. Guselnikov and the shareholders that purchased Mr. Guselnikov family's shares in the Bank, including why only three out of four members of the management board

[110] Letter from the Respondent dated March 12, 2020, p. 21.

have been signing Mr. Behrends' alleged power of attorney, and why former management believes it is appropriate to continue signing new powers of attorney in spite of their not having power to do so since the appointment of Mr. Krastiņš.

117. Regarding the "transparency violations", the Respondent argues as follows:[111]

a. The criticism that the interests of the Bank and those of the Shareholder Claimants may not fully converge has been addressed above. Moreover, the question of who will present arguments against the intra-EU objection is inapposite, as these have been extensively made by the Shareholder Claimants' lawyers.

b. The allegedly inappropriate deferral by the Tribunal of its final consideration of the alleged conflict of interest of Mr. Krastiņš has also been addressed above. The Tribunal's approach was prudent.

c. The alleged failure by the Tribunal to address the *Carnegie Minerals* decision is unfounded and cannot go to establish any bias in favour of either party, as the Tribunal also does not address the Respondent's arguments on that point. Moreover, the Shareholder Claimants' and Mr. Behrends' primary argument is based on the *Trasta Komercbanka* judgement and EU law, which the Tribunal should be careful about interpreting or applying.

d. There is no prejudgment or any pre-textual position on the ancillary claim of January 8, 2020: (i) it is absurd to refer to the September 12, 2019 Insolvency Judgment as a sham proceeding "since it is based on a finding of 'failing or likely to fail' of the European Central Bank itself"; (ii) in any event, the Tribunal suspended the proceeding on the merits since September 10, 2019, which means the ancillary claim has no other purpose that manufacturing a conflict and the Tribunal needs not to react; (iii) the Tribunal's order of September 10, 2019 opens the door to an application by the Claimants to update their Memorial on the Merits,

[111] Letter from the Respondent dated March 12, 2020, pp. 22-24.

which they have shown no interest to do; and (iv) no ancillary claim can be "accepted" until the bifurcated issue has been decided.

e. There can be hardly anything unfair in the Tribunal's not granting the production of documents requested by the Shareholder Claimants on January 28, 2020, and the Tribunal considered it and referred to it specifically in PO8.

118. Regarding the alleged "prejudgment violations", the Respondent says that:[112]

a. This ground does not arise from PO8 but rather from the Tribunal's decision on July 2, 2019, where the Tribunal held as follows:

> With regard to the Claimants' contention that they have legitimate expectations under EU law and that EU law will not prevent access to the dispute resolution provisions of the BIT, the Tribunal notes that whether it has jurisdiction to determine the EU law of legitimate expectations at all is encompassed by the bifurcated issue.[113]

b. The allegation is premature. The Tribunal has not decided the bifurcated issue and therefore there is nothing to infer from the status of the matter, either on the link of the intra-EU objection and legitimate expectations or on whether it may be appropriate to re-join the matter to the merits of the case.

c. It was the Shareholder Claimants who opposed the consideration of the question of their legitimate expectations under EU law to use the Latvia-UK BIT. After opposing its consideration, the Shareholder Claimants complain the issue is intertwined with the bifurcated issue.

119. Regarding the argument as to the Tribunal's reaction to the disqualification proposals, the Respondent argues that this is "yet another instance of an abusive argument." They note that "[i]n no way did the Tribunal misrepresent any legal standard on the independence or impartiality of tribunals."[114] It notes that the quote cited by the Tribunal Members "simply

[112] Letter from the Respondent dated March 12, 2020, p. 25.

[113] Letter from the Respondent dated March 12, 2020, p. 25 (emphasis omitted).

[114] Letter from the Respondent dated April 6, 2020, p. 3.

states that complaints as to arbitrators' conduct have been 'generally' rejected"[115] and that "the exceptions mentioned in Mr. Born's treatise are not even remotely relevant to the present disqualification proposal."[116]

d. Mr. Behrends' Disqualification Proposal

120. The Respondent argues that Mr. Behrends' disqualification proposal must be dismissed first and foremost because it constitutes a complaint about PO8, which is not a ground for disqualification of an ICSID tribunal.[117]

121. The Respondent says that Mr. Behrends does not understand the legal standard when he states that "the underlying motivation of the Challenged Arbitrators" for issuing PO8 is "irrelevant" and that "[i]t is sufficient to demonstrate an intention not to treat the Bank equally." The Respondent relies on *Abaclat* to the effect that "an arbitrator's lack of independence or impartiality requires evidence other than the making of a decision which is considered to be adverse to one party", and that a ruling could be such evidence only if it reveals objective evidence of bad faith.[118] In the Respondent's view, the Tribunal has not shown any bad faith justifying the disqualification of its members.

122. The Respondent addresses, in particular, Mr. Behrends' criticism of the Tribunal's disclosure of submissions to the Administrator and not to him. The Respondent says that this "does not illustrate any lack of independence or impartiality". In its view, "an 'objective observer' would only see that the Tribunal accepted the appointment of the legal representative, i.e. the representative designated by the law, of the Bank."[119] The Respondent also notes that there were no *ex parte* communications, as all of the parties were copied except for Mr. Behrends, who is not a party.

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[115] Letter from the Respondent dated April 6, 2020, p. 3.

[116] Letter from the Respondent dated April 6, 2020, p. 3.

[117] Letter from the Respondent dated March 12, 2020, pp. 29-30, citing *Suez and others v. Argentina*, ICSID Case No. ARB/03/19, Decision on the Proposal for Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, para. 35.

[118] Letter from the Respondent dated March 12, 2020, p. 31, citing *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/05, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier and Prof. Albert Jan van den Berg, December 19, 2011, paras. 60, 83.

[119] Letter from the Respondent dated March 12, 2020, p. 31.

123. The Respondent finally rejects Mr. Behrends' allegation that the Tribunal has no power to rule on whether he represented the Bank, also noting that this is the first time Mr. Behrends advanced this argument, and that it contradicts the position of the Shareholder Claimants.[120]

(4) Administrator's Arguments

124. According to the Administrator, the words "manifest lack" in Art. 57 impose a heavy burden of proof on the party making the proposal, the facts must be obvious and highly probable rather than just possible, and a supposed or inferred lack of impartiality does not suffice. He also states that Art. 57 sets an objective standard.[121] Further, the Administrator argues that "proposals for disqualifications may not be used as an instrument to remove arbitrators who have rendered a decision that is dissatisfying to one party."[122]

125. The Administrator states that the Shareholder Claimants have failed to demonstrate that the Tribunal lacked impartiality or independence, and that their application is an attempt to re-litigate issues previously argued.[123] He notes that the *Trasta Komercbanka* case relied upon by Mr. Behrends is immaterial to this proceeding, and noted that the first power of attorney filed by Mr. Behrends was limited in scope to "judicial institutions of the Republic of Latvia and the European Union", while the second one, dated December 17, 2019, was issued after the Insolvency Declaration and therefore the former management was not in a

[120] Letter from the Respondent dated March 12, 2020, p. 31.

[121] Letter from the Administrator dated March 12, 2020, paras. 6-16, citing *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Recommendation pursuant to the Request by ICSID dated 24 January 2019 of the Respondent's Proposal to Disqualify all Members of the Tribunal dated 12 November 2018, March 4, 2019, para. 50; *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, November 12, 2013 ("*Blue Bank v. Venezuela*"), para. 60; *Suez and others v. Argentina*, ICSID Cases No. ARB/03/17 and ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, May 12, 2018, paras. 29, 39; *Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/19/3, Decision on the challenge to the President of the Committee, October 3, 2001, para. 24; *ConocoPhillips Petrozuata B.V. and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, March 15, 2016, para. 33; *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/05, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier and Prof. Albert Jan van den Berg, December 19, 2011, para. 60; and *Electrabel S.A. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, February 25, 2008, para. 39.

[122] Letter from the Administrator dated March 12, 2020, para. 14, citing *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/05, Recommendation on Proposal for Disqualification of Prof. Pierre Tercier and Prof. Albert Jan van den Berg, December 19, 2011.

[123] Letter from the Administrator dated March 12, 2020, para. 17.

position to act on behalf of the Bank.[124] He also distinguishes the *Carnegie Minerals* decision relied upon by the Shareholder Claimants on the facts and said that it is inapplicable to this case.[125]

126. The Administrator further notes that the Shareholder Claimants' disqualification proposal "is not targeted at any particular arbitrator, but against the Honorable Tribunal as a whole." He also notes that, as a matter of fact, "all that the Shareholder Claimants do is identify what they perceive as mistakes of the Honorable Tribunal."[126]

127. The Administrator also rejects the grounds advanced by the Shareholder Claimants, for the following reasons:

a. The Shareholder Claimants failed to identify any "due process violations" of their own due process rights. This, in his view, would prove that the interest of the former management Board coincides with that of the Shareholder Claimants.[127]

b. Neither the Shareholder Claimants' nor the Bank's right to be heard has been breached. The Tribunal directed that Mr. Behrends be included in copy on any communications regarding the representation of the Bank. Moreover, the Tribunal accepted that both the Administrator, in the exercise of his statutory powers, and the former Directors of the current shareholders, reflecting the separate legal personality of the Bank, are entitled to be heard if the Tribunal rejects the jurisdictional challenge on the bifurcated issue.[128]

c. The alleged transparency violations constitute a distortion of the facts. The Tribunal decided not to follow the case law adduced by the Shareholder Claimants and Mr. Behrends.[129]

[124] Letter from the Administrator dated March 12, 2020, paras. 20-21.
[125] Letter from the Administrator dated March 12, 2020, para. 22.
[126] Letter from the Administrator dated March 12, 2020, paras. 24-25. See also paras. 37-40.
[127] Letter from the Administrator dated March 12, 2020, paras. 26-27.
[128] Letter from the Administrator dated March 12, 2020, para. 28.
[129] Letter from the Administrator dated March 12, 2020, paras. 29-30.

d. There is no evidence of a conflict of interest.[130]

e. The Tribunal made it clear in PO8 that this decision "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."[131]

(5) Tribunal's Observations

128. In their explanations of March 17, 2020, the Tribunal Members denied any bias or partiality.

129. The Tribunal Members also stated that they think "it is unwise for us to engage in any defense or explanation of our own conduct of this arbitration or the rulings we have made […] except to state that we have done our best to address and decide fairly the numerous and often difficult issues that have been presented to us."

130. Finally, the Tribunal Members explained that, at the time of the issuance of PO8, they understood that the ancillary claims had not yet been made.[132]

IV. ANALYSIS

(1) Former Managers' Disqualification Proposal

a. The Requirements to Propose the Disqualification of Tribunal Members

131. Article 57 of the ICSID Convention provides 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.

132. Pursuant to Article 57 of the ICSID Convention, only a party to the proceeding is entitled to propose the disqualification of a Tribunal member. Thus, as a preliminary matter it is

[130] Letter from the Administrator dated March 12, 2020, paras. 32-34 and 46.

[131] Letter from the Administrator dated March 12, 2020, para. 36.

[132] Letter from the Tribunal Members dated March 17, 2020.

necessary to determine whether Mr. Behrends, who filed a disqualification proposal "on behalf of AS PNB Banka", can be considered an authorized representative of the Bank. Only if that were the case can the Chair consider his application as being made by "a party".

b. The Power to Decide on the Representation of the Bank

133. The first question is thus whether (i) the Chair has the power to determine *de novo* who represents the Bank for purposes of deciding the disqualification proposal filed by Mr. Behrends, or (ii) the Chair should defer to the Tribunal on the issue of representation of the Bank.

134. According to the Shareholder Claimants, the Chair "stands in the shoes of a tribunal," and "as part of its power to decide whether to uphold a proposal for disqualification of a tribunal under Article 58 of the ICSID Convention and ICSID Arbitration Rule 9 […] has competence to determine whether a putative representative is entitled to file a proposal for disqualification on behalf of that party."[133] The Respondent, on the other hand, says that the Chair's role must be interpreted strictly and that it cannot be assimilated to the role of the Tribunal under the ICSID Convention.[134]

135. Art. 44 of the ICSID Convention provides that:

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

136. ICSID Arbitration Rule 19 provides that "[t]he tribunal shall make the orders required for the conduct of the proceeding."

137. Who represents the parties is a fundamental decision regarding the conduct of the proceeding, which, pursuant to Art. 44 of the ICSID Convention and ICSID Arbitration

[133] Letter from the Shareholder Claimants dated February 27, 2020, para. 9.

[134] Letter from the Respondent dated March 12, 2020, pp. 27-28.

Rule 19, is vested in the Tribunal. In this case, this means that the Chair shall defer to the Tribunal's decision on the representation of the Bank.

138. Art. 58 of the Convention provides that the Chair shall decide a disqualification proposal if it concerns a majority of the arbitrators or in the event that the unchallenged arbitrators are *equally divided*, but does not suggest that the Chair has the power to make decisions on party representation, or that the Chair should ignore a decision made by the Tribunal on that matter.

139. The Shareholder Claimants appear to suggest that the Chair's power to decide on the representation of a party is inherent in the Chair's role in deciding the disqualification proposal.[135] This is incorrect; adopting the approach suggested by the Shareholder Claimants would amount to ignoring a decision made by the Tribunal in the conduct of the arbitral proceeding.

140. None of the authorities cited by the Shareholder Claimants and Mr. Behrends support their position. They invoke the decision rendered in *Carnegie Minerals (Gambia) Limited v. Gambia*,[136] for the proposition that the Tribunal failed to consider the issue and that, in the circumstances, "it is incumbent on the Chairman to consider and address the prevailing ICSID practice as part of an independent and reasoned decision on the issue" of the representation of the Bank.[137] This decision, however, was made by an *ad hoc* annulment committee and not by the Chair. Pursuant to Art. 52 of the ICSID Convention, Art. 44 applies *mutatis mutandis* to proceedings before annulment committees. Thus, an annulment committee is in the same position as an arbitral tribunal regarding procedural issues. No similar powers are granted to the Chair in the context of a disqualification proposal.

[135] Letter from the Shareholder Claimants dated February 27, 2020, para. 10.

[136] *Carnegie Minerals v. Gambia*, ICSID Case No. ARB/09/19, Decision on Representation (Annulment Proceeding), October 8, 2016.

[137] Letter from the Shareholder Claimants dated February 27, 2020, para. 15.

141. The passage from the Chair's decision in *Conoco Phillips Petrozuata B.V and others v. Venezuela* is also inapposite.[138] As acknowledged by the Shareholder Claimants, that passage concerned a decision as to whether to hold a hearing. The Chair can decide the manner in which it will hear the parties' submissions on a disqualification proposal. However, that does not extend powers to the Chair that belong to the Tribunal (such as the issue of party representation) or allow the Chair to ignore the Tribunal's decision on party representation.

c. The Scope of the Tribunal's Decision on the Representation of the Bank

142. In this case, the Tribunal has made a decision on the representation of the Bank in PO8. In the dispositive part the Tribunal stated the following:

> a. The Tribunal recognises Mr. Krastiņš as the representative of the Bank for the purposes of completing submissions on the Bifurcated Issue in answer to the Tribunal questions.
>
> b. Mr. Krastins will be given access to the submissions on the Bifurcated Issue.
>
> c. Until further order, the Tribunal rejects Mr. Behrends' application to be accepted as the representative of the Bank. The parties are directed to continue to copy Mr. Behrends on any communication relating to the representation of the Bank.
>
> d. The Tribunal accepts that both Mr. Krastiņš, in the exercise of his statutory powers, and the former Directors or the current shareholders, reflecting the separate legal personality of the Bank, are entitled to be heard if the Tribunal rejects the Respondent's jurisdictional challenge on the Bifurcated Issue.
>
> e. If that occurs, further submissions will be sought at that time.

143. Mr. Behrends and the Shareholder Claimants advance a number of arguments regarding the scope of this decision. Mr. Behrends argues that PO8 "does not decide who the proper representative of the Bank is in the present proceedings."[139] He also says that PO8 "does not answer the question as to the proper representative of the bank with respect to proposals

[138] Letter from the Shareholder Claimants dated February 27, 2020, para. 9, citing *ConocoPhillips Petrozuata B.V. and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, para. 43.

[139] Letter from the Former Managers dated February 28, 2020, para. 14 (emphasis in the original).

for disqualification",[140] and suggests that the Tribunal believes "there are specific circumstances in the present case that allow [it] to postpone the determination of the proper representative of the Bank."[141] Similarly, the Shareholder Claimants state that "[t]he Tribunal did not hold that the Insolvency Administrator was the representative of PNB Banka *for all purposes* in these ICSID proceedings, let alone for the specific purpose of filing a proposal for disqualification under Articles 14 and 57 of the ICSID Convention and ICSID Arbitration Rule 9."[142] Further, the Shareholder Claimants argue that "[t]he Tribunal did *not* hold that the Former Board (including via its counsel, Mr Behrends) does not represent PNB Banka 'in this proceeding' (*c.f.*, the Bifurcated Issue)."[143]

144. The reading of PO8 by Mr. Behrends' and the Shareholder Claimants' is also not correct. The Tribunal recognized Mr. Krastiņš "as the representative of the Bank for the purposes of completing submissions on the Bifurcated Issue in answer to the Tribunal's questions," and expressly "reject[ed] Mr. Behrends' application to be accepted as the representative of the Bank." This constitutes a decision as to who represents the Bank in this arbitration, and who does not. The fact that the Tribunal said that its decision regarding the Administrator is "for the purposes of completing submissions on the Bifurcated Issue" does not change the fact that the Tribunal has made a decision on the representation of the Bank which remains valid today.

145. Deference to the Tribunal's decision on the Bank's representation does not amount to a "tacit expansion" of the Administrator's admission as a representative of the Bank, as suggested by Mr. Behrends. PO8 is clear as to who is recognized as the proper representative of the Bank today. Moreover, a party cannot be deemed to have a representative for the purposes of making submissions before the Tribunal and a different representative in relation to applications before the Chair in the context of the same arbitral proceeding. From the moment the Administrator is recognized as the Bank's representative by the Tribunal, he is the Bank's representative in the arbitral proceeding until the Tribunal

[140] Letter from the Former Managers dated February 28, 2020, para. 47. See also Letter from the Former Managers dated February 17, 2020, para. 9.

[141] Letter from the Former Managers dated February 28, 2020, para. 15.

[142] Letter from the Shareholder Claimants dated February 27, 2020, para. 11(c) (emphasis in the original).

[143] Letter from the Shareholder Claimants dated February 27, 2020, para. 11(d) (emphasis in the original).

decides otherwise. The Tribunal's decision on party representation applies to applications before the Chair. The disqualification proposal cannot be dissociated from the arbitral proceeding in the manner proposed by the Shareholder Claimants and Mr. Behrends.

146. The Chair does not see how the alleged "provisional" nature of the Tribunal's decision in PO8 may be relevant to its decision as to whether Mr. Behrends' disqualification proposal was validly made on behalf of the Bank.[144] Even if that were the case, it does not change the Tribunal's determination that, at the time Mr. Behrends filed the disqualification proposal, purportedly on behalf of AS PNB Banka, the only recognized representative of the Bank in this arbitration was the Administrator.

147. The Chairman's decision does not mean any recognition of some sort of decision-making power to the challenged arbitrators with respect to the disqualification proposal.[145] Nor does it mean that it would allow the Tribunal to "immunise itself against the PNB Banka Proposal."[146] The decision is consistent with the allocation of power under the ICSID Convention.

148. The Chair notes the Shareholder Claimants' and Mr. Behrends' arguments that Mr. Behrends' disqualification proposal arises directly out of PO8, the criticism against PO8, and the fact that Mr. Behrends represents the Bank before institutions of the European Union. However, Art. 58 of the ICSID Convention is not the appropriate mechanism to challenge a decision rendered by the Tribunal and, as noted above, does not allow the Chair to ignore the Tribunal's decision on party representation.

d. Conclusion

149. For the reasons stated above, Mr. Behrends' proposal for disqualification of February 17, 2020 is rejected as he did not represent the Bank at the time of its submission. Mr. Behrends' further disqualification proposal of March 29, 2020 is also rejected.

[144] See, *e.g.*, Letter from the Former Managers dated February 28, 2020, para. 33.

[145] Letter from the Former Managers dated February 28, 2020, para. 29.

[146] Letter from the Shareholder Claimants dated February 27, 2020, para. 11(b).

150. The Chair takes note of the Administrator's observations to the authenticity of the signatures of the members of the Board in the power of attorney accompanied by Mr. Behrends. Given the Chair's decision above, it is unnecessary to address this issue.

(2) Former Managers' Request to Access the File

151. Mr. Behrends' request for access to the file must also be rejected as he is not a party and does not represent the Bank in this proceeding.

(3) Shareholder Claimants' Disqualification Proposal

a. The Applicable Legal Standard

152. Art. 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal.

153. As acknowledged by the Shareholder Claimants, a number of decisions have concluded that the word "manifest" in this provision means "evident" or "obvious,"[147] and that it relates to the ease with which the alleged lack of the required qualities can be perceived.[148]

154. The required qualities are stated in Article 14(1) of the ICSID Convention 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.

155. In this case, the Shareholder Claimants' disqualification proposal alleges that "there are reasonable doubts as to the 'independent judgement' of each of the members of the Tribunal due to an appearance of lack of impartiality or bias."[149]

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[147] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, December 13, 2013 ("*Burlington v. Ecuador*"), para. 68 and footnote 83; *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014, para. 71 and footnote 25; *Blue Bank v. Venezuela*, para. 61 and footnote 43; *ConocoPhillips Petrozuata B.V., and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, para. 39 .

[148] C. Schreuer, *The ICSID Convention: A Commentary*, Second Edition (2009), p. 1202, paras. 134-154.

[149] Shareholder Claimants' disqualification proposal dated February 18, para. 11.

156. While 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*" (guaranteed independence in exercising their functions), the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that all three versions are equally authentic, it is understood that pursuant to Article 14(1) arbitrators must be both impartial and independent.[150]

157. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both "protect parties against arbitrators being influenced by factors other than those related to the merits of the case." [151]

158. The parties agree that 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.[152]

159. The parties also agree that the legal standard applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party."[153] As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention. [154]

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[150] *Burlington v. Ecuador*, para. 65; *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014, para. 74; *Blue Bank v. Venezuela*, para. 58; *ConocoPhillips Petrozuata B.V., and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, para. 50.

[151] *Blue Bank v. Venezuela*, para. 59; *ConocoPhillips Petrozuata B.V., and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, para. 51; *Urbaser S.A. v. Argentina*, para. 43.

[152] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 17; Letter from the Respondent dated March 12, 2020, p. 12; *Burlington v. Ecuador*, para. 66; *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014, para. 76; *Blue Bank v. Venezuela*, para. 59; *ConocoPhillips Petrozuata B.V., and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, para. 52.

[153] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 17; Letter from the Respondent dated March 12, 2020, p. 12; *Blue Bank v. Venezuela*, para. 60; *Suez and others v. Argentina*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, para. 28.

[154] *Id*.

160. Therefore, for the Shareholder Claimants' disqualification proposal to be accepted, they must show that there is an evident or obvious appearance of a lack of impartiality or independence, based on a reasonable evaluation of the relevant facts.

161. With respect to the timeliness of disqualification proposals, ICSID Arbitration Rule 9(1) reads as follows:

> A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

162. The ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined on a case by case basis.[155]

b. The Disqualification Proposal

163. As noted above, the Shareholder Claimants' disqualification proposal is grounded on the allegation that "there are reasonable doubts as to the 'independent judgment' of each of the members of the Tribunal due to an appearance of lack of impartiality or bias." These doubts would arise from a series of alleged violations by the Members of the Tribunal, namely: (i) the due process violations; (ii) the transparency violations; and (iii) the prejudgment violation.

(i) Due process allegations

164. The purpose of Art. 57 of the ICSID Convention is to ensure that arbitrators possess the qualities required by Art. 14(1) of the ICSID Convention. Other provisions of the ICSID Convention offer remedies against due process violations but do not allocate that task to the Chair. In assessing the arguments advanced by the Shareholder Claimants the Chair has focused solely on whether the circumstances are indicative of a manifest lack of the qualities required by Art. 14(1).

[155] *Burlington v. Ecuador*, para. 73; *ConocoPhillips Petrozuata B.V., and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, May 5, 2014, para. 39; *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, February 4, 2014, para. 68.

165. The Shareholder Claimants say 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."[156] The Chair does not find anything in PO8 indicating an "adverse assumption" with respect to the submissions made by the Administrator and Mr. Behrends on the issue of representation. The chronology of events shows that the Insolvency Declaration gave rise to a dispute between three members of the former Board and the Administrator as to who represents the Bank in this arbitration. The Tribunal had to resolve the controversy arising from the Insolvency Declaration and gave everyone involved ample opportunity to make submissions on the matter before issuing its decision.

166. The Shareholder Claimants also criticize the Tribunal for failing to identify the law applicable to the issue of representation and for failing to apply EU law. The Shareholder Claimants do not explain how this alleged deficiency would establish an appearance of lack of independence or bias on each one of the Members of the Tribunal. They simply point out that "the faults in the Tribunal's approach are so fundamental and basic" and the Tribunal's approach to applicable law "so obviously objectionable" that a reasonable observer would have reasonable doubts as to the Tribunal's impartiality.[157] Yet an alleged failure by the Tribunal in the application of the law is not *per se* sufficient to disqualify its Members on the basis of alleged lack of independence or bias. As indicated above, Art. 57 of the ICSID Convention is not the appropriate mechanism to address alleged failures in the Tribunal's reasoning.

167. The same conclusion applies to the Shareholder Claimants' arguments that the Tribunal: (i) prioritized expediency in deciding the bifurcated issue over the decision on the representation of the Bank; (ii) deferred the issue of conflict of interest even though it acknowledged that the Administrator was recognized as the Bank's representative subject to allegations of conflict of interest or other disentitling circumstances; or (iii) deferred the "final" decision on the representation of the Bank, leaving the door open for a finding that the former Board represents the Bank. All of these allegations challenge the Tribunal's

[156] Shareholder Claimants' disqualification proposal dated February 18, 2020, paras. 22 and 41.

[157] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 44.

reasoning in PO8. Additionally, the Shareholder Claimants have not substantiated how these circumstances show an appearance of a lack of independence or bias by the Tribunal Members.

168. The Chair does not find that the Tribunal "ignored" the conflicts of interest alleged by the Shareholder Claimants. The Tribunal considered them but found that the "alleged conflict does not have any material effect for the resolution of the jurisdictional question presented by the Bifurcated Issue."[158] That decision falls within the scope of the Tribunal's functions under the ICSID Convention.

169. The Shareholder Claimants also argue that the Tribunal mischaracterized the issue of representation by referring to the representation of the "residual interests of the holders of equity in the Bank." They say that the Tribunal: (i) minimized the former Board's interest in representing the Bank and presumed that the Bank is insolvent, whereas the Insolvency Declaration is being challenged before the Tribunal; (ii) suggested that it will permit the Bank to be represented simultaneously by the former management and by the Administrator, or that it may decide on an *ad hoc* basis who represents the Bank for any particular decision; and (iii) "indicated that it may decide that the Former Management are […] not the proper representative of the 'residual interest 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."[159]

170. The second and third arguments above are speculative and thus must be rejected. So far, the Tribunal has determined that only the Administrator represents the Bank in this arbitration. As to the alleged minimization of the former Board's interest in representing the Bank, the Tribunal "accept[ed] that both Mr. Krastiņš, in the exercise of his statutory powers, and the former Directors or the current shareholders, reflecting the separate legal personality of the Bank, are entitled to be heard if the Tribunal rejects the Respondent's jurisdictional challenge on the Bifurcated Issue."[160] This does not suggest that the Tribunal

[158] Procedural Order No. 8, p. 8.

[159] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 53.

[160] Procedural Order No. 8, p. 9.

"minimized the extent of the Former Management's interest in representing the Bank." Finally, the concern as to the alleged "presumption" that the Bank was insolvent does not appear to be justified. The Tribunal actually acknowledged that "the Shareholder Claimants and the Board Members challenge as alleged breaches of the BIT the declaration of insolvency of the Bank and the insolvency procedure," and said that "[t]his Procedural Order must not be seen as pre-judging either any application to raise any such issues by way of an ancillary claim or the allegations on which the challenge to Mr. Krastiņš is based." It also held that 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."

171. Finally, the allegation that PO8 "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"[161] is not persuasive. In the absence of specific circumstances indicating an appearance of lack of independence or bias, the outcome of the representation decision cannot justify the disqualification of the Tribunal Members.

(ii) Transparency allegations

172. The Shareholder Claimants' also argue that PO8 "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."[162] These aspects of the decision, in their view, "imply that it was pretextual and designed to achieve a pre-determined purpose" and "amplify the appearance of bias."

173. They complain, in particular, about the Tribunal's statement 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," and the Tribunal's statement that "[n]othing in the submissions made by Mr. Behrends […] suggests that the former Directors have any interest which diverges from that of the Shareholder Claimants." In the

[161] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 54.
[162] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 55.

Shareholder Claimants' view, not only does this affect the Bank's right to be heard but also the Tribunal cannot assume that the former Board's arguments will be identical to those of the Shareholder Claimants. This, in their view, constitutes an assumption that is adverse to the interests of the Bank.[163]

174. These statements must be read in the broader context of PO8. The Tribunal noted that: (i) it had "received full submissions on the Bifurcated Issue, including on behalf of the Bank"; (ii) the answers to some questions on the bifurcated issue are the only matters pending before the Tribunal; and (iii) "[i]n the interest 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."[164] These statements suggest that the Tribunal, confirming that full submissions had been filed on behalf of the Bank on the bifurcated issue, was concerned about efficiency in the conduct of the proceeding. Indeed, as noted by the Respondent, Mr. Behrends' presentation on behalf of the former Board was first made on December 10, 2019 (that is, almost three months after the Insolvency Declaration and the appointment of the Administrator), and after almost three months from the hearing on the bifurcated issue. Also, the Bank was represented by the same counsel as the Shareholder Claimants up to December 17, 2019. In the circumstances, the Tribunal's decision is not indicative of an appearance of lack of independence or bias.

175. The Tribunal Members also acknowledged that "the submissions on the Bank Representation issue overlap with merits issues, upon which the Tribunal should not adjudicate before determining whether it has jurisdiction." The Shareholder Claimants suggest that this was an attempt by the Tribunal "to justify its failure 'finally' to decide the Representation Issue."[165] They also argue that this does not reflect ICSID practice. The relevant standard, however, is whether the concern expressed by the Tribunal Members is indicative of an appearance of lack of independence or bias. In the circumstances mentioned above, the Chair's conclusion is that it is not. *First*, it is speculative to suggest at this stage that the Tribunal's decision to recognise the Administrator as the representative

[163] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 56.

[164] Procedural Order No. 8, pp. 7-8.

[165] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 57.

of the Bank is not final. *Second*, as explained above, the Tribunal appears to have weighed a number of different factors in its decision. The circumstances do not indicate an appearance of lack of independence or bias on the part of the Tribunal Members.

176. The Shareholder Claimants further argue that the Tribunal "provided no justification for why it recognized the Insolvency Administrator," and that it appears to have disregarded the *Carnegie Minerals* decision and other arguments advanced by the Shareholder Claimants.[166] This objection goes to the reasoning of the Tribunal's decision. Alleged deficiencies in the reasoning of the Tribunal are not in and of themselves enough to establish a lack of independence or bias.

177. Finally, the Shareholder Claimants argue that the Tribunal's position regarding the ancillary claim is "pretextual and designed to achieve a predetermined result." They note the Tribunal's statement in PO8 that: "[t]his Procedural Order must not be seen as pre-judging either any application to raise any such issues by way of an ancillary claim or the allegations on which the challenge to Mr. Krastiņš is based."[167] In the Shareholder Claimants' view, "it seems that the Tribunal has treated the Ancillary Claims 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." They contend, however, that the Ancillary Claim is properly before the Tribunal.

178. In their observations on the disqualification proposals, the Tribunal Members clarified that "the Tribunal did not understand, when it issued Procedural Order No. 8, that the Claimants had yet made an ancillary claim." The Tribunal Members explained that "[t]he Claimants had stated that they *would* make such a claim, but they had not yet made it."[168] The Tribunal Members referred to the relevant correspondence with the parties on the issue of the ancillary claim. The relevant passages of the letters notifying the ancillary claims (as highlighted in the Tribunal Member's observations) are as follows:

[166] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 58.

[167] Shareholder Claimants' disqualification proposal dated February 18, 2020, paras. 59 *et seq.*

[168] Letter from the Tribunal Members dated March 17, 2020.

Letter from Mr. Guselnikov to the Tribunal of December 4, 2019:

We write on behalf of Mr Grigory Guselnikov, the second named Claimant (Mr Guselnikov). The purpose of the present letter is to **notify the Tribunal of ancillary claims** brought by Mr Guselnikov, pursuant to Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules.

[…]

We hereby notify the Tribunal and the Respondent of Mr Guselnikov's ancillary claims arising out of the Respondent's wrongful conduct described above (the Ancillary Claims). For the avoidance of any doubt, **the Ancillary Claims, which will be further particularised in due course** (either in the Claimants' updated Memorial or in subsequent submissions), concern, in addition to the Criminal Proceeding, the other supposedly ongoing "criminal proceedings" that relate to the harassment and attempted extortion of Mr Guselnikov by Mr Rimšēvičs and his affiliates, insofar as Latvia has failed properly to investigate and pursue those proceedings in accordance with its international obligations.

Separately, the Tribunal may note that the present letter **does not reflect the full scope of ancillary claims that the Claimants (together or individually) might intend to bring** (in accordance with Article 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules) arising out of the subject-matter of the dispute (including, amongst other things, the decision of Latvian authorities to deem AS PNB Banka insolvent). At this juncture, all rights are fully reserved.

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Letter from the Second to sixth Claimants to the Tribunal of January 8, 2020:

We write on behalf of the second to sixth named Claimants. We hereby notify the Tribunal that the second to sixth named Claimants challenge the Decision of the Riga City Vidzeme District Court dated 12 September 2019 (the Insolvency Judgment) and the conduct of Latvia's Financial and Capital Market Commission (FCMC) triggering the adoption of the Insolvency Judgment, and respectfully **wish and intend to file ancillary claims** in respect of such measures in the present proceeding.

[…]

Our clients reserve their rights to make further submissions on the matters described in brief above. **With the Tribunal's leave, we shall file further submissions on the above-notified ancillary claims, in the form of a brief "Request for Arbitration", or otherwise,** and on a date that the Tribunal may direct. Our clients respectfully would require at least three weeks in order to prepare and file such submissions.

179. Before going any further in the assessment of the relevant correspondence on this matter, the Chair notes that the formulations used by the Claimants in their December 4 and January 8 letters are ambiguous. In the circumstances, the Chair has no reason to doubt the Tribunal Members' assertion that they believed the ancillary claim had not yet been made.

180. The Shareholder Claimants also complain that on February 17, 2020, they requested a clarification from the Tribunal on their ancillary claim and the Tribunal failed to provide it. Specifically, they requested the Tribunal "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."[169] The Tribunal's letter to the Parties of January 30, 2020, read as follows:

> The Tribunal takes note of the Shareholder Claimants' **request for leave to make an ancillary claim**, dated January 8, 2020. The Tribunal also notes the Shareholder Claimants' further elaboration on this claim in their letter dated January 24, 2020.
>
> The subject of the ancillary claim notified by the Claimants on January 8, 2020 appears to be closely related to the merits of the case. **The Tribunal suspended the proceeding on the merits on September 10, 2019**.
>
> **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.

181. In response to the Shareholder Claimants letter of February 17, 2020, the Tribunal stated that "it takes note of the content of the Shareholder Claimants' letter of today."

182. The issue before the Chair is now whether the Tribunal's alleged failure to provide the requested clarification is indicative of an appearance of lack of independence or bias. The Chair finds that it is not. Both the letter of February 17, and the Tribunal's reaction to it, occurred more than two weeks after the issuance of PO8. The Chair fails to see any connection between the handling of the ancillary claim and the decision on the representation of the Bank. It also fails to see how this reaction would be indicative of a

[169] Shareholder Claimants' disqualification proposal dated February 18, 2020, para. 65, citing SCC-44, p. 3.

lack of independence or bias independent of PO8, given that the proceeding on the merits had been suspended.

183. Finally, the Shareholder Claimants complain that the Tribunal "issued [PO8] without even waiting for the responses of the Insolvency Administrator and the Respondent to the Shareholder Claimants' letter dated 28 January 2020." The Shareholder Claimants refer to a letter addressed by them to the Administrator and the Respondent – not to the Tribunal – requesting the disclosure of information about a meeting between the Administrator and counsel for the Respondent. While the Tribunal was in copy of that letter, neither party requested the Tribunal to wait until the Administrator and the Respondent have responded to the Shareholder Claimants before issuing the decision on the Bank's representation. In the absence of a specific request to that effect, the Chair does not see why the Tribunal would have had to wait for the Administrator and the Respondent to address the Shareholder Claimants' letter.

184. On the basis of the above, the Chair does not agree that the Tribunal's handling of the ancillary claim demonstrates an appearance of lack of independence or bias.

(iii) Prejudgment allegation

185. In the view of the Shareholder Claimants, PO8 "reveals that the bifurcated issue *will* be conclusively decided, one way or another, in the bifurcated phase, without allowing for the joinder of the Bifurcated Issue to the merits."[170]

186. The Respondent stated that "the Tribunal *has not* decided the Bifurcated Issue and as such there is nothing to infer from the status of the matter, whether on the link between intra-EU objection and legitimate expectations at EU law or on whether it may be appropriate to rejoin the matter to the merits of the case."[171]

187. The argument advanced by the Shareholder Claimants is speculative. The Tribunal has not yet rendered its decision on the bifurcated issue. PO8 is only a decision on the

[170] Shareholder Claimants' letter of March 26, 2020, para. 63. See also Shareholder Claimants' letter of March 26, 2020, paras. 63-65(emphasis in the original).

[171] Respondent's letter of March 12, 2020, p. 25 (emphasis in the original).

representation of the Bank. The Chair cannot regard PO8 as conclusive evidence on what the Tribunal may decide in the future regarding the bifurcated issue and cannot infer an appearance of lack of independence or bias on that basis.

188. Having found that the Shareholder Claimants' argument fails on the merits, it is unnecessary to address the issue of whether this ground was advanced promptly pursuant to ICSID Arbitration Rule 9.

(iv) Tribunal's observations on the disqualification proposals

189. The Chair does not see the Tribunal's observations on the disqualification proposals as indicating an appearance of lack of independence or bias. As noted by the Respondent, the Tribunal Members refer to a general statement. In quoting that passage, the Tribunal Members expressly noted that footnotes had been omitted. Even if one were to assume that the omissions noted by the Shareholder Claimants were relevant, it is difficult to infer that the Tribunal had any intention to mislead.

190. The arguments advanced by Mr. Behrends (i) that it was inappropriate for the Tribunal to provide a collective statement, and (ii) that it was inappropriate for a challenged arbitrator to avoid any substantive comment but instead launch a formal counterattack against the parties proposing the disqualification,[172] are also rejected. The Arbitration Rules do not include any specific requirements for the submission of observations by the challenged arbitrators. Besides, as noted above, nothing in the observations submitted by the challenged arbitrators indicate an appearance of lack of independence or bias.

(v) Other arguments

191. In this section, the Chair will address the arguments advanced by Mr. Behrends, as they have been adopted by reference by the Shareholder Claimants. Mr. Behrends' arguments have been summarized above and are not reproduced here. To the extent that these arguments overlap with the Shareholder Claimants' arguments, reference will be made to the analysis regarding the Shareholder Claimants' disqualification proposal.

[172] Letter from the Former Management dated March 26, 2020, paras. 5-12.

192. For the reasons explained below, the Chair does not find that any of the arguments advanced by Mr. Behrends justifies the disqualification of the Tribunal Members.

193. A number of the arguments advanced by Mr. Behrends fail for the same reason as those advanced by the Shareholder Claimants. This is the case, for example, of Mr. Behrends' arguments that: (i) the Tribunal "purports to exclude all or virtually all procedural rights of the Bank […] by provisionally limiting the powers of representation of potential representatives of the Bank";[173] (ii) "tribunals do not have the power to admit or reject representatives of the parties […] provisionally or subject to restrictions or conditions or by admitting them only for certain limited purposes" and the task of satisfying themselves that each party is appropriately represented may never be postponed;[174] (iii) the Tribunal proposes to resolve the representation issue at a later stage without finding that it is impossible to resolve the issue immediately;[175] (iv) while PO8 recognizes that other persons may be the appropriate representative of the Bank, the decision is not justified because those people have not been contacted;[176] (v) an overlap of representation issues and merits issues does not justify a limitation of the powers of representation of a party;[177] (vi) the Tribunal cannot compartmentalize different issues and thereby create sub-proceedings that run consecutively or simultaneously with different representations by the parties.[178] (vii) the Tribunal cannot identify different representatives of a party for purposes of representing different interests in connection with a party;[179] (viii) the challenged arbitrators "see it as their duty to identify interests in connection with the Bank which they regard as legitimate and therefore deserving 'representation' in the present proceedings";[180] (ix) any speculation by the Tribunal that the appropriate representation of a party is less relevant in certain parts of the proceeding is in itself an indication of

[173] Letter from the Former Managers dated February 17, 2020, para. 4.
[174] Letter from the Former Managers dated February 17, 2020, paras. 6-8.
[175] Letter from the Former Managers dated February 17, 2020, para. 14.
[176] Letter from the Former Managers dated February 17, 2020, para. 15.
[177] Letter from the Former Managers dated February 17, 2020, paras. 25-26.
[178] Letter from the Former Managers dated February 17, 2020, paras. 28-29.
[179] Letter from the Former Managers dated February 17, 2020, paras. 30-32.
[180] Letter from the Former Managers dated February 17, 2020, para. 34. See also paras. 35-36.

impermissible bias;[181] and (x) a tribunal cannot speculate with the representation of a party and dispense with its representation, or limit it, on the ground that they are unlikely to make any contributions which the Tribunal regards as important.[182]

194. The first three arguments suggest that the Tribunal has "postponed" or not "finally" ruled on the representation of the Bank. As stated above, it is speculative to suggest at this stage of the proceeding that the Tribunal's decision to recognise the Administrator as the representative of the Bank is not final.[183] In any event, all of these arguments concern the reasoning of the Tribunal. The Chair can neither review the merits of the Tribunal's decision, nor decide the disqualification proposal on the basis of alleged errors in the Tribunal's reasoning. It can only decide to disqualify the challenged arbitrators if their decisions or statements indicate an appearance of a lack of independence or bias. The Chair has already explained it did not find such evidence in PO8. When read in the broader context of PO8, the Tribunal Member's statements on the overlap of representation and merits issues and the identification of the different interests arising from the Insolvency Declaration do not show an appearance of lack of independence or bias on the part of the Tribunal Members.[184]

195. Mr. Behrends also stated that "the Challenged Arbitrators explicitly state that they will not treat the Bank equally".[185] However, the text of PO8 contains no statement by the Tribunal to that effect.

196. Mr. Behrends also says that the motivation behind PO8 may be that the Tribunal Members "are compromised" by statements made by the Board to the effect that the proceeding may have been fundamentally undermined. Nothing in PO8 appears to confirm Mr. Behrends' views. This cannot not serve as the basis for a finding of an appearance of lack of independence or bias.

[181] Letter from the Former Managers dated February 17, 2020, paras. 17-18.
[182] Letter from the Former Managers dated February 17, 2020, para. 18.
[183] See para. 175 above.
[184] See paras. 167 and 174-175 above.
[185] Letter from the Former Managers dated February 17, 2020, para. 12.

197. Mr. Behrends further argues that PO8 is not justified because he "acts on the basis of a valid power of attorney predating the appointment of the Administrator which the Administrator expressly has not attempted to revoke."[186] The Chair has concluded that the decision on the representation of the Bank belongs to the Tribunal.

198. Mr. Behrends states that the Tribunal failed to provide him with a submission filed by the Administrator on December 17, 2019, in spite of his allegedly having been informed otherwise. The Tribunal ordered that Mr. Behrends be included in copy of correspondence on the issue of the representation of the Bank on December 20, 2019, for the purposes of making submissions on the representation. Thus, from this date onwards, Mr. Behrends should have received the correspondence on the representation issue. He was inadvertently omitted from an email of the Secretary of the Tribunal of December 23, 2019, acknowledging receipt of an email from the Administrator, and the email was forwarded to him on December 24, 2019. The reassurance given to Mr. Behrends on December 24 was intended to confirm that he had received all the correspondence on the representation issue since December 20, 2019. It could never refer to earlier correspondence because the Tribunal had not yet granted him access to earlier correspondence. This misunderstanding does not appear to indicate a lack of independence or bias on the part of the Tribunal Members.

199. Mr. Behrends' argument about the alleged procedural assumption that he had to apply for admission while the Administrator was accepted as the *de facto* representative[187] has been addressed above and does not need to be addressed again here.[188]

200. As to Mr. Behrends' comment about the time allocation during the hearing on jurisdiction, the Chair finds that it is speculative and that the Tribunal's decision does not indicate any appearance of lack of independence or bias. Should that decision be in any way unfair to the Bank, counsel for the Bank at the time of the hearing wold have no doubt complained about it at that time. No evidence to that effect has been submitted by Mr. Behrends.

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[186] Letter from the Former Managers dated February 17, 2020, para. 27.

[187] Letter from the Former Managers dated February 17, 2020, para. 42.

[188] See para. 165 above.

201. Regarding Mr. Behrends' argument that the Administrator was initially allowed to have *ex parte* communications with the Tribunal on the representation issue,[189] the Chair notes that Mr. Behrends' argument refers to the Administrator's submission of December 17, 2019. This submission by the Administrator did not constitute an *ex parte* communication because counsel for the Respondent and counsel for the Shareholder Claimants were in copy. As to Mr. Behrends' being denied access to the file, the Chair does not see this decision of the Tribunal as indicative of an appearance of lack of independence or bias, particularly in circumstances where: (i) Mr. Behrends first invoked a power of attorney which appears to have been unsuitable for this arbitration, having had to file a new one on December 17, 2019; and (ii) on October 22, 2019, the then representative of the Bank requested that the Administrator be added to the distribution list.

202. Mr. Behrends also suggests that an objective third party would be concerned about the Tribunal's inability to deal with the representation issue and with the Tribunal's view that the jurisdictional phase does not require any resolution of the representation issue. The Chair has already addressed the issue of whether the Tribunal's decision is indicative of an appearance of lack of independence or bias, finding that it is not.[190]

V. DECISION

203. For the reasons stated above, the Chair decides as follows:

a. Mr. Behrends has no standing to file a proposal for disqualification on behalf of the Bank.

b. Accordingly, his proposals for disqualification and request for access to the file of February 17 and March 29, 2020, are dismissed.

c. The Shareholder Claimants' proposal for disqualification is rejected.

[189] Letter from the Former Managers dated February 17, 2020, para. 43.

[190] See paras. 174-175 above.

[Signed]

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Mr. David Malpass
Chairman of the ICSID Administrative Council