INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

AS PNB Banka and others

v.

Republic of Latvia

(ICSID Case No. ARB/17/47)

PROCEDURAL ORDER NO. 9*

Decision on Representation of AS PNB Banka

Members of the Tribunal
Mr James Spigelman QC, President of the Tribunal
HE Judge Peter Tomka, Arbitrator
Mr John M. Townsend, Arbitrator

Secretary of the Tribunal
Mr Francisco Abriani

Assistant to the President of the Tribunal
Adam Butt

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9 August 2021

* The redactions were made at the request of the former directors and supported by the Shareholder Claimants.

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A. INTRODUCTION

1. In Procedural Order No. 8, issued on 30 January 2020 (also referred to below as "**PO 8**"), the Tribunal provisionally determined a challenge to the representation of AS PNB Banka (the "**Bank**") in these proceedings by Mr Krastiņš, the insolvency Administrator appointed by the Riga Vidzeme District Court (also referred to below as the "**Administrator**"). The issue was whether the Administrator or the nominee of the former Directors of the Bank, Mr Behrends, was the appropriate representative of the Bank in these proceedings after the withdrawal of Quinn Emanuel Urquhart and Sullivan LLP ("**Quinn Emanuel**"), which initially acted as counsel for the Bank.

2. The Tribunal determined that Mr Krastiņš should continue to represent the Bank in the jurisdictional challenge then under consideration. The Tribunal left open the issue of Bank representation for the merits phase. Following the rejection of the Respondent's intra-EU objection, the proceedings on the merits have resumed and the issue of Bank representation has now to be determined.

3. In Procedural Order No. 8, the Tribunal made the following findings and orders:

> [38] Having considered the submissions made by Mr. Krastiņš, the Shareholder Claimants, the Respondent, and Mr. Behrends, and having regard to the following considerations:
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> - 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 intertest, 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. 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.

4. The Shareholder Claimants, as parties to the proceedings, continue to challenge Mr Krastiņš as the representative of the Bank. However, as will appear below, divisions have arisen amongst those who claim to replace him for the merits phase.

B. PROCEDURAL HISTORY

5. On 14 December 2017, the Claimants submitted their Request for Arbitration ("**RFA**") to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated 18 March 1965 ("**ICSID Convention**") and Article 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of

Latvia for the Promotion and Protection of Investments ("**UK/Latvia BIT**" or "**Treaty**"), which was signed on 24 January 1994 and entered into force on 15 February 1995. The Request was submitted on behalf of the Claimants by Quinn Emanuel Urquhart and Sullivan LLP ("**Quinn Emanuel**"), based on a Power of Attorney signed by Oliver Bramwell in his capacity as "*Chairman of the Board*".[1]

6. On 28 December 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.

7. On 9 November 2018, the Claimants submitted a letter to the Tribunal indicating that Mr Māris Vainovskis had been retained as co-counsel for the Claimants in these proceedings with Quinn Emanuel.

8. On 22 October 2019, Quinn Emanuel informed the Tribunal that Mr Vigo Krastiņš had been appointed as the Administrator of Insolvency Proceedings of Insolvent AS PNB Banka, and requested that Mr Krastiņš (also referred to below as the "**Administrator**") be added to the distribution list.

9. On 9 December 2019, Mr Krastiņš informed the Tribunal that the power of attorney of Māris Vainovskis had been withdrawn.

10. On 10 December 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 29 August 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*".

11. On 11 December 2019, the Tribunal requested Mr Krastiņš to provide the original power of attorney granted to Mr Vainovskis and its withdrawal. It also asked Mr Krastiņš to comment on Mr Behrends' application to be added to the distribution list.

[1] Exhibit C-47.

12. On the same date, the Tribunal requested Mr Behrends to explain how his appearance in this arbitration falls within the scope of the power of attorney of 29 August 2019, which he attached to his email of 10 December 2019.

13. On the same date, the Tribunal invited Quinn Emanuel to comment on Mr Krastiņš and Mr Behrends' emails of 9 and 10 December 2019, respectively.

14. On 17 December 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, on 12 September 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 16 December 2019, the Bank had notified its counsel Quinn Emanuel 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.*"

15. On the same date, Quinn Emanuel informed the Tribunal that it no longer represented the Bank in these proceedings, but that it continued representing the other Claimants (the "**Shareholder Claimants**").

16. Also on 17 December 2019, Mr Behrends submitted a new power of attorney signed on the same date by three members of the Bank's board (Mr Kutiavin, Mr Kalmykov and Ms Verbicka), authorizing him to represent the Bank "*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.

17. On 20 December 2019, the Tribunal invited the Administrator, the Shareholder Claimants, the Respondent and Mr. Behrends to file submissions on the Bank representation issue. 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 2 January 2020.

18. On 8 January 2020, the Shareholder Claimants notified the Tribunal that they "*wish and intend*" to file ancillary claims in respect of "*the conduct of Latvia's Financial and Capital Market Commission (FCMC) and the adoption of the Insolvency Judgment*" (the "**Ancillary Claim**").

19. On 10 January 2020, Mr Krastiņš, the Shareholder Claimants, Latvia and Mr Behrends filed submissions on the representation of the Bank.

20. On 24 January 2020, Mr Krastiņš, the Shareholder Claimants, Latvia and Mr Behrends filed further submissions on the representation of the Bank. Mr Behrends' submission was accompanied, *inter alia*, by a letter from Ms Verbicka, Mr Kutiavin and Mr Kalmykov "*endors*[ing]" Mr Behrends' 10 and 24 January 2020 submissions.

21. On 28 January 2020, the Shareholder Claimants sent a letter to Latvia and Mr Krastiņš in relation to Latvia's disclosure, in its letter of 24 January 2020, that "*on 30 September 2019, State Chancellery counsel Ms. Ilze Dubava, Mr. Dainis Pudelis and Ms. Nērika Lezinska met with Mr. Krastiņš.*"

22. On 30 January 2020, the Tribunal issued Procedural Order No. 8, which has been reproduced in relevant part above.

23. On the same date, the Tribunal informed the Parties by separate letter 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.

24. On 3 February 2020, Mr Krastiņš replied to the Shareholder Claimants' letter of 28 January 2020.

25. On 17 February 2020, the Shareholder Claimants confirmed that "*there is in fact no such pending request or application for leave before the Tribunal*" regarding the ancillary claim, and requested the Tribunal to clarify that the statement in the Tribunal's letter of 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.

26. On the same date, the Tribunal informed the Parties that it took note of the content of the Shareholder Claimants' letter of 17 February 2020.

27. On 17 and 18 February 2020, Mr Behrends and the Shareholder Claimants, respectively, filed a proposal to disqualify each of the Members of the Tribunal pursuant to Articles 14 and 57 of the ICSID Convention and Rule 9 of the Arbitration Rules.

28. On 16 June 2020, the Chair of the Administrative Council rejected the applications filed by Mr Behrends and the Shareholder Claimants.

29. On 22 July 2020, Mr Behrends submitted a statement signed on the same date by the new shareholders Roger Edward Tamraz, Said Mehraik, Antoine Baaklini, Dolly Khoury, Michel Fayad, George Mgaloblichvili, Nikolay Paskalev Paskalev and Marc, Jean-Louis, d'Hombres, "strongly support[ing] the Bank's representation by Mr. Okko Hendrik Behrends in the same way as in front of the European Courts."

30. On 17 March 2021, Quinn Emanuel sent a letter to the Secretary-General informing her that they no longer represent the Shareholder Claimants in this arbitration.

31. On 17 March 2021, Kristof Vizy informed the Secretary General that VP Arbitration will represent the Shareholder Claimants in this arbitration. Powers of attorney from the Second to Sixth Claimants were provided on 22 March 2021.

32. On 14 May 2021, the Tribunal issued the Decision on the Intra-EU Objection.

33. On 4 June 2021, Dr Friedrich Rosenfeld informed the Tribunal that Hanefeld Rechtsanwälte and Mr Verners Skrastiņš had been retained to represent the Bank in these proceedings, and submitted two powers of attorney signed by Mr Krastiņš on the same date.

34. On 9 June 2021, Ms Verbicka, Mr Kutiavin and Mr Kalmykov (who are referred to below, together with Ms Ignatjeva, as the "**Directors**"), as well as the former Chairman of the Board, Mr Bramwell, informed the Tribunal that Mr Behrends' power of attorney had been withdrawn and that he no longer represents the Bank in these proceedings. A note signed by Ms Verbicka and Mr Kutiavin on 11 June 2021 was subsequently filed, confirming the withdrawal of previous powers of attorney to act on behalf of the Bank.

35. On 11 June 2021, Mr Behrends sent a letter to the Tribunal indicating that the Tribunal should address the Bank representation issue.

36. On 14 June 2021, Dr Rosenfeld sent a letter confirming that the Tribunal should decide on the Bank representation issue and announcing its intention to brief the Tribunal on this matter in the submission by then scheduled for 30 June 2021.

37. On 14 June 2021, Ms Verbicka sent an email to the Secretary of the Tribunal requesting that any future correspondence from Mr Behrends be excluded from the record.

38. On 14 June 2021, Mr. Behrends sent a letter to the Tribunal explaining that he represents the Bank before the General Court of the European Union and the Court of Justice of the European Union in a number of cases pursuant to principles which were upheld by the Grand Chamber of the Court of Justice in the *ECB and Others v Trasta Komercbanka and Others* ("***Trasta***") judgment.[2] He also explained, *inter alia*, that the "*normal governance mechanism of the Bank no longer exists*", that he "*represent[s] the Bank as an institution*

[2] *ECB and Others v Trasta Komercbanka and Others*, CJEU Judgment of 5 November 2019 – Joined Cases C-663/17 P, C-665/17 P and C-669/17 P ("***Trasta***"), Exhibit CL-268 (also submitted as Annex 5 to Dr Hanning's Letter of 2 July 2021).

(rather than any individual in connection with the Bank)" and that "*the interests of individuals are not identical with those of the Bank as an institution.*"

39. [redacted]

40. [redacted]

41. On 28 June 2021, Ms Verbicka sent an email to the Tribunal indicating that Mr Behrends' position does not reflect the position of the board members. She also indicated that none of the Bank's former board members has approved any of the submissions made by Mr Behrends. She further explained that Dr Hanning "*was not a member of the Bank's board, never had any right to represent the Bank, and his role on the Council of the Bank ended well before the appointment of the insolvency administrator.*"

42. On 30 June 2021, Dr Henning sent a letter to the Tribunal, which was signed by him as well as by Peter Odintsov and Anders Fogh Rasmussen, as the "*former members of the council of PNB Bank*". In this letter, they stated that they "*do not approve any change in the representation of the Bank*" and that "*Mr Behrends should continue this representation.*"

43. On 2 July 2021, submissions on the Bank representation issue were filed by Dr Henning. Mr Kutiavin (with Ms Verbicka, Mr Bramwell and Mr Kalmykov), Dr Rosenfeld, the Shareholder Claimants and Latvia. In his submission on behalf of the Shareholder Claimants, Mr Vizy also requested that VP Arbitration be removed from the distribution list as it would no longer represent the Shareholder Claimants in these proceedings.

44. On 3 July 2021, Mr David Pusztai sent a letter to the Secretary-General and the Tribunal informing them that the Shareholder Claimants had retained Ivanyan & Partners LLP and Ivanyan & Partners Law Office to represent them in these proceedings. Powers of attorney signed by the Shareholder Claimants were filed on 4 July 2021.

45. On 5 July 2021, further submissions were filed by Dr Rosenfeld, Mr Behrends, Mr Kutiavin, Ms Verbicka, Dr Hanning, Latvia and the Shareholder Claimants.

46. On 6 July 2021, the Tribunal held a Case Management Conference with the Parties by videoconference. During this session, the Tribunal heard the Parties arguments on the Bank representation issue.

47. On 8 July 2021, Dr Hanning informed the Tribunal that "*the Bank's Council has dismissed Mrs Verbicka and Mr Kutiavin from their positions as board members and has reconfirmed Mr Behrends' authority to represent the Bank.*" He added that the Latvian court stated that him, Mr Odintsov and Mr Rasmussen were council members until the opening of insolvency proceedings on 12 September 2019. The Council's decision, which was dated 7 July 2021, was filed by Dr Hanning separately on 8 July 2021.

48. On 10 July 2021, Mr Kutiavin sent an email in reply to Dr Hanning's letter of 10 July 2021.

49. On 12 July 2021, Dr Hanning filed a further submission.

50. On the same date, the Tribunal informed the Parties that no further correspondence will be forwarded to the Tribunal on the Bank representation issue after 20 July 2021.

51. On 20 July 2021, Dr Rosenfeld, Mr Kutiavin and Ms Verbicka, Dr Hanning, the Shareholder Claimants and Latvia made final submissions on the Bank representation issue.

C. LEGAL CONTEXT

52. Article 44 of the ICSID Convention provides, in part:

> … 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.

53. Rule 18 of the Arbitration Rules provides:

> (1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.
>
> (2) For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

54. Further, Rule 19 provides:

> The Tribunal shall make orders required for the conduct of the proceedings.

55. The issue before the Tribunal is whether Mr Krastiņš' assertion of his own right to represent the Bank and his purported authorisation, pursuant to Rule 18(1), of counsel to represent the Bank should be accepted by the Tribunal. Alternatively, whether some other, and if so which, person should be recognised as representing the Bank, including for purposes of appointing counsel in these proceedings.

56. The precedent drawn to the Tribunal's attention which most closely reflects the facts before this Tribunal is the Decision on Representation by the Annulment Committee in *Carnegie Minerals (Gambia) Limited v Republic of Gambia* (ICSID Case No. ARB/09/19) ("***Carnegie***").[3] This involved a contractual dispute where a Tribunal found in favour of the corporation that was a party to the contract. In *Carnegie* the question was whether a law firm could continue to represent the company in annulment proceedings brought by Gambia on the basis of an authorization granted by the Board of Directors when Carnegie instituted the arbitral proceedings in 2009.

57. The award was rendered in July 2015. Subsequently, on 6 August 2015, the company was put into liquidation in Gambia. On 11 November 2015 Gambia applied for the annulment of the award. Gambia asked that the law firm provide a copy of power of attorney to act for Carnegie in the annulment proceedings, considering that Carnegie was placed in liquidation.

58. The questions the Committee had to consider were whether the company's original authorization of the law firm was broad enough to cover also the annulment proceeding, and if so, whether the appointment of a liquidator in Gambia had any effect on the authority of a law firm to represent the company and whether the right to speak had changed as a result of the appointment of a liquidator under Gambian law.

59. The key issue in that case, as in this, was whether the power to authorise legal representation of the company was to be determined by Gambian law which, as is usual in the case of insolvency, conferred the power, after insolvency, to appoint legal representatives on the administrator or liquidator.

60. In that case, as in this, the company was incorporated in the Respondent State. Pursuant to ICSID Convention Article 25(2)(b) the definition of "*National of a Contracting State*" is extended to include:

[3] *Carnegie Minerals (Gambia) Limited v Republic of Gambia* (ICSID Case No. ARB/09/19), Decision on Representation, 7 October 2016 ("***Carnegie***"), Exhibit CL-269 (also submitted as Annex 7 to Dr Hanning's Letter of 2 July 2021).

> … any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

61. In this case, as in *Carnegie*, the Claimants had submitted at the time that these proceedings were instituted that the Bank, although incorporated under the domestic law of the Respondent, should be considered to have the nationality of the other contracting Party under ICSID Article 25(2)(b) by reason of foreign control by the nationals of that other contracting Party. An issue concerning the nationality status of the second named Claimant remains to be determined, but it was not suggested by any party that this was pertinent to the issue under consideration.

62. The Tribunal generally agrees with and adopts the reasoning in the following paragraphs of the *Carnegie* decision:

> 43. … But, just as the question of who is a party to proceedings before an ICSID tribunal is a matter governed by the ICSID Convention, not by the domestic law of a party, so too the question of who represents a party before ICSID must be a matter for the ICSID Convention as well and not for the domestic law of a party to the proceedings. As pointed out, Article 18 of the Arbitration Rules provides for representation of the parties under the Convention, but it makes no renvoi to the domestic law of a party to the proceedings before an ICSID tribunal for the purpose of deciding who represents a party.
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> 44. That the domestic law of the respondent state should not determine who is able to represent a claimant in cases where the claimant is deemed to be a national of a foreign state under Article 25(2)(b) follows as well from the logic of that provision. Under Article 25(2)(b) investors who are nationals of the Contracting State are to be included within the definition of a "national of another contracting state" where the parties have agreed to treat it "as a national of another Contracting State for the purposes of this Convention." A respondent state cannot assert a right to determine the representation of a claimant who is a national of another

> contracting state. Thus, a claimant who under Article 25(2)(b) is deemed "a national of another contracting state" would not be truly standing in the shoes of a national of another contracting state if the respondent state could determine its representation in ICSID proceedings. If the domestic law of Gambia were to be applied to determine who represents Carnegie in these proceedings, Carnegie would not be treated in the same way as a national of another contracting state for the purposes of the Convention.
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> 45. In light of the above, the Commission considers that there is no basis in the Convention for concluding that the question of representation of a claimant who is a deemed "national of another contracting state" under Article 25(2)(b) is to be decided by application of the domestic law of the respondent state. Accordingly, the Committee concludes that the issue of representation is not to be determined under Gambian law, and thus the appointment of a liquidator for Carnegie does not resolve the question of who represents Carnegie in this case.[4]

63. The *Carnegie* Committee, having rejected the direct application of Gambian law, being the only submission before it, accepted the affirmation by the law firm that its original authorisation by the Board continued in the annulment phase of the proceedings. It also took into account that it was the normal practice of ICSID to act on that basis.

64. In the present case there is no continuity of representation, from the period before insolvency, of the kind that existed in *Carnegie*, because the Bank's original counsel has withdrawn. In *Carnegie*, it was the Respondent State, which applied for the annulment of the award, that challenged the authority of the previously appointed legal representatives. In this case, it is the pre-insolvency stakeholders who are making a challenge to the post-insolvency Administrator.

65. The Tribunal will discuss this matter further below. It is sufficient at this stage to note that the Administrator's subsequent revocation of the authority to represent the Bank of Quinn Emanuel and co-counsel Māris Vainovskis, who were still retained at the date of the insolvency, has not been raised before the Tribunal on this part of the case.

[4] *Carnegie*, paragraphs 43-45.

66. This factual distinction does not determine the issue before the Tribunal. However, it is of significance. Absent continuity of a prior appointment of legal counsel, the issue becomes: who, after insolvency, has the authority to represent the Bank and, accordingly, to appoint a legal representative?

67. The critical part of the *Carnegie* Committee's reasoning is that representation, including appointment of counsel, is a matter to be determined as a matter of international law, not domestic law. That does not mean that the operation of domestic law is irrelevant to the determination of the representation issue under international law. We do not understand that the *Carnegie* Committee made any such finding.

68. A significant factual distinction is that the Shareholder Claimants, who controlled the Bank and whose UK nationality was the basis of treating the Bank as a UK national and thus enabling it to be a Claimant in the first place, were, and remain, claimants in their own right. This was a distinction to which the Tribunal referred in Procedural Order No. 8.

69. The most persuasive step in the reasoning of the Committee in *Carnegie* is the Committee's conclusion that, if the Respondent state could determine the legal representation of a corporate Claimant, that corporation could not be said to be in the same position as the nationals whose citizenship gave the corporation its right to be a Claimant. The Tribunal accepts the force of this reasoning. However, it must be understood in the context of the factual matrix in that case. The most relevant differences are the continuity of representation in that case and the fact that the shareholders remain as separate parties to this one.

70. The Tribunal notes that it has received submissions of a kind that do not appear to have been put to the Committee in *Carnegie.* Of some significance is the emphasis that has been placed by the Administrator, in submissions to this Tribunal, on the interests in the outcome of these proceedings of creditors of the Bank, whose interests he says he represents. If the Administrator were excluded from these proceedings, those stakeholders would not be represented.

71. The Tribunal does not accept that *Carnegie* is authority for a general proposition that, whenever a state agency has instituted proceedings for insolvency in an ICSID arbitration, the administrator or liquidator is *per se* disentitled to represent the corporation in extant proceedings. Insolvency law and practice throughout the world frequently involve an administrator/liquidator pursuing proceedings against a state, including against an agency that may have instituted the insolvency proceedings. The most frequent example of that situation is insolvency proceedings brought by taxation authorities. No precedent from any jurisdiction suggesting that the appointee is unable to act at all has been drawn to the Tribunal's attention. The Tribunal sees no basis for any such result in international law. The *Carnegie* Committee's conclusion of law was that a Respondent state could not "*determine*" who is entitled to represent a claimant. It proceeded to apply international law to the facts of that case. It found:

> 46. In accordance with the normal practice of ICSID, the authority of Clyde & Co. to represent Carnegie provided to ICSID for the arbitration proceedings continues for the annulment proceedings. Although ICSID practice is not determinative on the interpretation or application of the Convention, the Committee sees no reason to depart from it in this case. Clyde & Co. was duly authorized to represent Carnegie in the arbitration proceedings and Clyde & Co. has confirmed that its representation continues. The only ground that has been raised to challenge that representation is the appointment of a liquidator under Gambian law. But the Committee has rejected the application of Gambian law to determine the question of representation. Thus, the Committee sees no ground for looking beyond the affirmation of Clyde & Co. in its letter of 10 December 2015 that its representation of Carnegie continues for the purposes of these annulment proceedings.[5]

72. Like the Committee in *Carnegie,* the Tribunal will apply international law to the facts of this case.

73. The Tribunal asked the participants to address specific questions with respect to *Carnegie* and received submissions in response:

[5] *Carnegie*, paragraph 46.

- Whether it is a distinguishing factor that in this case the Shareholder Claimants, whose nationality enabled the company to be a claimant, are Claimants in their own right and the nationality of the Bank was fixed at the time of the Notice of Arbitration.

- Whether it is a distinguishing factor that the original authority to counsel continued in force both at the time of insolvency and at the time the issue was raised by Gambia.

74. The Parties responded consistently with their earlier submissions. The Shareholder Claimants, the former Directors, the former Members of the Council answered these questions in the negative. Mr Behrends did not specifically reply to this request but had earlier made submissions consistent with a negative answer. Mr Krastiņš and Latvia answered them in the positive. The Tribunal has concluded that they are distinguishing factors and that they constitute a relevantly different factual matrix. It leads the Tribunal to the conclusion that the relevant issue for it is not about authority, but about conflict of interest.

75. As the Tribunal will repeat below, with reference to *Trasta*, the issue for this Tribunal is to use its powers over procedure to protect the fairness and integrity of the arbitral process. In the present case that turns on how best to manage consideration of the allegations of a conflict of interests.

76. In *Carnegie,* the company was the sole Claimant, as the party to the contract. The issue before the Committee was, in effect, whether the entire proceedings could go ahead. The assessment of the conflict of interests on the part of a supervening administrator/ liquidator differs in a context where the shareholders are co-claimants with similar, even if not identical, interests. Their presence operates as a contrast, indeed a check, on the administrator's conduct of the proceedings where potential conflicts of interest exist.

77. In PO 8 the Tribunal regarded this factor as significant. In that context, all the Claimants had been represented by the same counsel for almost the whole of the process of dealing with the bifurcated issue. There was not a glimmer of any difference of interests or

approach with respect to jurisdictional issues. The Tribunal's discretion to determine the procedure on the merits differs in this regard.

78. As the concluding paragraph 46 of the decision in *Carnegie* made clear, Gambian law was not applicable as such and, accordingly, Gambia's challenge failed on the basis that the authority of the legal representative remained in effect. The change of control did not have the effect of revoking that extant authority as a matter of international law. The case is not authority for the proposition that the appointment of an administrator or liquidator has no effect on who represents the Bank in ICSID proceedings.

79. The submissions opposing the relevance of the separate representation of the Shareholder Claimants emphasised that the interests of the Bank and the shareholders may not coincide. That may well be true, as is sometimes the case with co-claimants. At this stage no such divergence has emerged. The Administrator has adopted the Memorial on the Merits. If such a divergence emerges, for example in the context of apportioning damages, it will have to be resolved. Such a divergence does not create a conflict of interest. It merely represents a difference of interests.

80. The Tribunal discusses below the various allegations of conflict of interests, including with respect to the Ancillary Claim. In that context it will address the allegations that the Administrator is "*dependent*" (the Directors) or, more dramatically, "*controlled*" (the Council) by the Respondent.

81. The participants in this procedural process who objected to Mr Krastiņš representing the Bank also placed reliance on the decision of the CJEU in *Trasta*. The issue concerned the powers of the former management of a financial institution to lodge an appeal to the European court against the decision of the Latvian court to put it into liquidation. The Riga court had upheld the withdrawal by the liquidator of the appointment by the previous Board of the legal representatives of the Trasta bank.

82. As in the present case, the ECB had made adverse findings concerning the bank's right to maintain its financial institutions license. The proceedings in the Riga court were instituted

by the FCMC, an agency of the Respondent. The appeal was brought to the European courts by the bank and shareholders of the Bank. One of the issues to be determined was the efficacy of the liquidator's revocation of the power of attorney by the Bank which appointed a legal representative, Mr Behrends, who is also involved in the present proceedings, for the European court process.

83. The General Court had held that the revocation was effective from the date of service upon the lawyer. Accordingly, it found that it did not have to decide the appeal of the Trasta bank against the decision of the Riga court. The General Court held that the shareholders did have sufficient interest to maintain the appeal.

84. The ECB and the FCMC appealed the decision to allow the shareholders to proceed. The bank and shareholders cross-appealed the decision to disentitle the directors to proceed in the name of the bank and to appoint the legal representative of the bank. They sought orders that Mr Behrends was entitled to represent the bank in the General Court and on appeal in the CJEU.

85. The principal focus of the appeal by the bank was on the "*right to effective judicial protection*" under Article 47 of the Charter of Fundamental Rights of the European Union and Latvian law. The bank and shareholders emphasised the conflict of interest that the liquidator had faced in challenging the decision to place the bank into liquidation.

86. The ECB and FCMC upheld the right of the liquidator to act for the bank and to revoke the power of attorney appointing Mr Behrends, previously issued by the bank. They submitted that the liquidator had an interest and an obligation to maintain the proceedings challenging the decisions of the ECB and the FCMC and, accordingly, there was no breach of the right to effective judicial protection.

87. The CJEU held[6] that the effective judicial protection principle was a general principle of European law, referred to in Article 19(1) of the TEU, Articles 6 and 13 of the European

[6] *Trasta*, paragraphs 54-56.

Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47 of the Charter.

88. The CJEU said:

> 60. The right of a legal person, such as Trasta Komercbanka, to an effective legal remedy before the Courts of the European Union would be infringed if, under the law of the Member State concerned, a liquidator empowered to take such decisions were to be appointed on the basis of a proposal from a national authority which took part in the adoption of the act adversely affecting the legal person concerned and which resulted in its going into liquidation. Having regard to the relationship of trust between that authority and the appointed liquidator which is involved in such an appointment procedure and to the fact that a liquidator's task is to carry out the final liquidation of the legal person which has gone into liquidation, there is a risk that that liquidator may avoid challenging, in court proceedings, an act which that authority has itself adopted or which has been adopted with its assistance and which has led to the legal person concerned going into liquidation.
>
> 61. That is a fortiori the case where the liquidator of the legal person concerned may be relieved of its duties by that authority or on a proposal from that authority in the event of annulment, following an action the bringing or maintaining of which depends on its own decision, of an act of the European Union adopted with the assistance of that authority and which led to that legal person going into liquidation.[7]

89. The CJEU went to hold that this situation involves a conflict of interests which "*may adversely affect the right of the legal person … to an effective remedy*".[8] It went on to note that the power of attorney to the lawyer to appeal to the General Court was issued by a person who had the authority to do so at the date it was issued. The purported revocation of that power was a subsequent act by the liquidator.

90. With regard to the issue of conflict of interests, the CJEU held:

> 73. Moreover, the General Court failed to take account of the fact, relied on before it by Trasta Komercbanka, that the liquidator, in

[7] *Trasta*, paragraphs 60-61.
[8] *Trasta*, paragraph 62.

> accordance with Article 377(2) of the Law on Civil Procedure, had been appointed at the suggestion of the FCMC and that, by virtue of Article 387(2) of that law, the FCMC could request that the liquidator be discharged if it no longer had confidence in that liquidator.
>
> 74. Although the FCMC is neither the author of the decision at issue nor the defendant before the General Court, that person being the ECB in both instances, the fact remains that the FCMC participated in the adoption of the decision at issue, which was adopted at its suggestion. Having regard to the task conferred on it pursuant to Latvian law, **the liquidator has a conflict of interests** because the challenge, before the Courts of the European Union, to the withdrawal of the authorisation of the legal person which it represents could lead it, contrary to that task, to deprive the liquidation proceedings concerning that person of any legal basis. (Emphasis added)
>
> 75. In accordance with what has been stated in paragraphs 60 to 62 above, it follows from the existence of such links between the FCMC and the liquidator and from the role played by the FCMC in the adoption of the decision at issue that the responsibility for any revocation of the power of attorney issued to Trasta Komercbanka's lawyer for the purpose of bringing an action before the Courts of the European Union against that decision cannot be given to that liquidator without infringing Trasta Komercbanka's right to effective judicial protection within the meaning of Article 47 of the Charter.[9]

91. The Court added:

> 77. … While it is true that the transfer to a liquidator, under Latvian law, of the responsibility for deciding to bring or maintain an action against a decision to withdraw authorisation such as the decision at issue does not, in principle, entail an infringement of the right to effective judicial protection, the situation is otherwise if the person to whom such responsibility is transferred has a conflict of interests as regards the decision to bring or maintain such an action.
>
> 78. Having regard to the foregoing, it must be found that the General Court erred in law in ruling, in paragraphs 35 and 36 of the order under appeal, that the application of Latvian law did not, contrary to the arguments put forward by Trasta Komercbanka to justify

[9] *Trasta*, paragraphs 73-75.

> maintaining the power of representation of its former decision-making bodies, lead to an infringement of that company's right to effective judicial protection and in inferring, in paragraphs 47 and 48 of that order, that the lawyer who had brought the action before it on behalf of Trasta Komercbanka no longer had a properly conferred authority to act, on behalf of that company, from a person qualified to confer it, given that the power of attorney initially issued to him had been revoked by that company's liquidator. Indeed, in the light of the considerations set out in paragraphs 70 to 77 above, the General Court could not take that revocation into account, given that it infringed Trasta Komercbanka's right to effective judicial protection as enshrined in Article 47 of the Charter.
>
> 79. Accordingly, it must be held that the appeal lodged by Trasta Komercbanka in Case C-669/17 P is both admissible and well founded, and **the order under appeal must be set aside** in so far as the General Court ruled that there was no need to adjudicate on the action brought by Trasta Komercbanka.[10] (Emphasis added)

92. It is pertinent to note that the CJEU went on to uphold the appeal by the ECB and the FCMC against the decision of the General Court to accept the standing of the shareholders to challenge the decisions leading to the liquidation of the Bank. The CJEU did so on the basis that, in accordance with European law, they did not have a sufficiently direct interest in those decisions. Only the company had a direct interest.

93. In this respect, the CJEU reflected the corporations law of many jurisdictions, which restrict the ability of shareholders to institute proceedings for wrongs done to the company. The position in investment treaty law is quite different.

94. As we have noted, the ICSID Convention contains an express deeming provision which transmogrifies a corporation established in a host nation into a national of the shareholders' nation. That is reinforced by the customarily wide definition of investment in BITs. In the case of the UK/Latvia BIT, Article 1 defines "*investment*" to extend to "*every kind of asset*" and refers specifically to shares in a company. In these proceedings, the standing of the Shareholder Claimants derives directly from the Treaty. So does that of the Bank.

[10] *Trasta*, paragraphs 77-79.

95. No point about the indirect interest of shareholders has been, or could be, taken against the Shareholder Claimants in this case. In *Trasta*, the shareholders had no standing. An appeal by the corporation itself was the only way that the relevant decisions could be reviewed by the European courts. In the context of enforcing a 'right to effective protection', that factor was significant and probably, although not expressed as such, decisive.

96. Some of the submissions before the Tribunal proceeded on the assumption that it should follow the General Court decision in *Trasta.* As the Tribunal found in its Decision on the Intra-EU Objection, this Tribunal is not bound by EU law. It must apply international law. Quinn Emanuel, when acting for the Shareholder Claimants, did not submit that the Tribunal should follow EU law. It put that the Tribunal should adopt an analogous principle for purposes of exercising its distinct jurisdiction with respect to the issue before it.[11]

97. The Tribunal accepts that it may exercise its powers over procedure under Article 44 of the ICSID Convention to regulate the kind of conflict of interest alleged in these proceedings. Where the loyalty of an agent to the corporate Claimant is potentially compromised by his or her relationship with the Respondent State, this could undermine the fairness, indeed the integrity, of the arbitral process for which the ICSID Convention provides.

98. In exercising this power, the Tribunal must rely on the principles reflected in the ICSID Convention, the UK/Latvia BIT and general international law.

99. The Tribunal asked the participants to address specific questions with respect to *Trasta* and received submissions in response:

- Whether it is a distinguishing factor that the CJEU was applying a right to effective judicial protection under European law.

- Whether it is a distinguishing factor that the CJEU determined that the shareholders had no right to bring proceedings.

[11] Shareholder Claimants' Letter of 10 January 2020, pp 2-3.

100. The Shareholder Claimants, the former Directors and the former Council Members answered these questions in the negative. Mr Behrends did not reply to that request, but his earlier submissions were consistent with a negative answer. The Administrator and Latvia answered in the positive. The Tribunal has decided that these questions require a more nuanced answer in the light of the submissions. As it said in the context of discussing *Carnegie*, the Tribunal does not regard the issue as one of authority, but one of conflict of interests. As noted above, that is a theme of the reasoning in *Trasta.*

101. The European law principle of a right to effective judicial protection is not a principle of general international law. However, Latvia and the UK are both parties to the European Convention on Human Rights ("ECHR") which provides for such protection. The Tribunal has discussed Article 42 of the ICSID Convention above as a source of guidance for its procedural decisions, but not as applicable law. The Tribunal treats the ECHR in that way. The issues that arise with respect to Mr Krastiņš require the Tribunal to exercise its procedural powers to ensure the fairness and integrity of the arbitral process. The terminology of a conflict of interest is a convenient shorthand for these principles. The Tribunal will assess those submissions below.

102. Unlike *Trasta*, the shareholders in the Bank at the time of the institution of these proceedings were, and remain, parties. Their enforcement of their indirect interest as shareholders replicates in relevant respects the direct interests of the Bank. Subject to the ancillary claim, they still share the same Memorial on the Merits.

103. The Tribunal notes Dr Hanning's submission[12] that shareholders could have an action for damages under EU law but did not have standing to challenge the revocation of a license. Under the ICSID Convention, they can do both.

104. For analogous reasons to those discussed above with respect to *Carnegie*, this element does distinguish *Trasta* insofar as the reasoning addresses authority, rather than conflict of

[12] Hanning's Submission of 20 July 2021, pp 5-6.

interests. However, as indicated above, this difference does not have the weight it had at the time of Procedural Order No. 8.

105. As the Tribunal discusses below, the assessment of whether there is a disentitling conflict of interest is an issue of fact. In making that assessment, the Tribunal is not bound by the reasoning of the CJEU. The Tribunal treats it with respect.

D. THE ADMINISTRATOR

106. Mr Krastiņš, supported by Latvia, relies on Latvian statutory law for his authority to represent the Bank and to appoint counsel. In particular he invokes the following sections of the Credit Institutions Law[13]:

- Section 149(2), which states that upon declaration of a credit institution as insolvent "*the activities of the administrative bodies of the credit institutions shall be suspended, and the credit institution shall be managed by the administrator*".

- Section 161(1), which states that "[a]*fter a credit institution has been declared insolvent, the administrator shall have all the duties, rights and powers of the administrative bodies and the heads of such bodies provided for in the laws and in the articles of the credit institution*".

107. Mr Krastiņš contends that he is the only representative of the Bank under Latvian law. In the absence of any rule of international law on representation of corporations, Latvian law is the applicable law for this issue. An insolvent company is no longer represented by its organs, but by the administrator. The Respondent adopts the same approach.

108. Counsel for Mr Krastiņš noted that the Administrator remains a party to the case against Latvia. He submitted that the Tribunal should not exclude the Administrator, thereby creating a situation where the interests of creditors are not represented. The attempt to

[13] Krastiņš' Letter of 2 July 2021.

remove the Administrator undermines the rights of the creditors. If the Administrator is removed, no other party represents their interests.

E. THE DIRECTORS

109. Pursuant to Article 301(1) of the Latvian Commercial Code: "*A board of directors is the executive institution of the company, which manages and represents the company*". The Tribunal notes that at insolvency, Section 149(2) of the Credit Institutions Law "suspends" the Board's "*activities*" and vests its power in the Administrator. It does not dismiss the directors, contrary to the language used in Latvia's submissions.[14]

110. The Articles of Association relevantly provide:

> 5.5. The Chairman of the Board represents the Bank individually; whereas, other members of the Board represent the Bank together with another member of the Board.[15]

111. The Articles of Association state that the Board consists of ten members. At no relevant time was that the case.

112. Latvia draws attention to Section 310(1) of the Commercial Law:

> A board of directors has the right to take decisions if more than one half of the members of the board of directors take part in the meeting of the board of directors. If a specific number of the members of the board of directors is provided for in the articles of association and if the board of directors has fewer members than provided for in the articles of association, the quorum shall be determined according to the number of members of the board of directors laid down in the articles of association.[16]

113. Latvia submits that Section 310(1) requires 5 members for a valid decision. However, the quorum provision in the Articles states:

[14] Latvia's Submission of 2 July 2021, paragraphs 7 and 18.
[15] AS PNB Banka Articles of Association, R-413.
[16] The Commercial Law dated 15 June 2017, Exhibit C-209.

> 5.8. The Board is entitled to take decisions if more than one half of the Board members participate at the meeting.[17]

114. It is by no means clear that this section of the Articles refers to the requirement for ten Board members, rather than to the actual number of Board members in office at the time. It seems most likely to be the latter as otherwise the company would have been paralysed for some time. The Tribunal has not had the benefit of any expert evidence on Latvian law. It is clear that the Bank Board proceeded on the latter interpretation prior to the liquidation.

115. In any event, the legal conclusion that Latvia draws is that a decision taken by less than five members is not binding on the Bank. For present purposes the Tribunal is not concerned with the binding effect on the Bank. The Tribunal is concerned with recognition of authority to make decisions, as a matter of international law, for purposes of the proceedings before it.

116. Irrespective of the binding force on the Bank itself, the Board as constituted from time to time is, subject to the suspension under the Credit Institution Law, the relevant body for that purpose in the constitutional structure of the Bank. If, for any reason, the Administrator is disqualified, the Tribunal cannot accept that no-one can represent a Claimant in ICSID proceedings.

117. Attached to the Request for Arbitration of 17 December 2017 was a Power of Attorney, dated 25 August 2017, appointing Quinn Emanuel as the legal representative of the Bank for these proceedings. It was signed only by Mr Bramwell as the then Chair of the Board.

118. At the time of the appointment of the Administrator, there were four directors of the Bank: Ms Verbicka, Mr Kalmykov, Mr Kutiavin and Ms Ignatjeva.

119. Ms Ignatjeva has only signed one document in evidence before the Tribunal. This was a power of attorney signed by herself and Ms Verbicka authorising the law firm Eversheds to write on behalf of the Bank, at the instigation of the new shareholders, offering to commence settlement negotiations with the Respondent. That letter is dated 12 August

[17] AS PNB Banka Articles of Association, R-413.

2019. She has signed no other relevant document in the course of this dispute, including the purported powers of attorney or revocations. Nor is any communication expressed to be sent in her name or even copied to her. Certain assertions have been made about which side the directors supported, presumably including her. Her absence has never been explained. The Tribunal makes no finding about her absence.

120. It is sufficient to note that it was the practice of the former Board that formal documents could be signed by only the chair alone or by two or three directors, as will appear. That coincides with Article 5.5 of the Articles of Association set out above. In the absence of expert evidence that explains the relationship between this express provision and the quorum requirements under Article 310(1) of the Commercial Law and the Articles, the Tribunal accepts the clear terms of Article 5.5 for the purposes of its decision.

121. On the material before the Tribunal, the first assertion by three of the four directors of their right, post insolvency, to act on behalf of the Bank is contained in a letter from Quinn Emanuel of 17 December 2019. The letter informed the Tribunal that the firm had received a letter on 5 December 2019 from Ms Verbicka, Mr Kalmykov and Mr Kutiavin revoking that firm's authority to act in these proceedings and appointing Mr Behrends. After inquiry of the Administrator, Quinn Emanuel also received a letter of revocation from Mr Krastiņš on 16 December. Quinn Emanuel in their letter of the 17th noted that there was a dispute between the Directors and the Administrator as to who was entitled to act on behalf of the Bank. They advised the Tribunal that the firm no longer represented the Bank.

122. The Directors reject the suggestion, which they identify in Procedural Order No. 8, that the Shareholder Claimants could make sufficient submissions on the merits. The Directors submit that this approach assumes that the Shareholder Claimants' interests will always be aligned with the interests of the Bank. Further, it is a matter for the Bank to decide whether that is the case.

123. The Directors submit that the Tribunal's reference to a right to be heard in Procedural Order No. 8, is not a substitute for the right to represent the Bank. In particular, the latter entitles the party to discovery and unconstrained access to the case record. Further, a party can

engage in settlement negotiations. It cannot be accepted that such negotiations should occur between Latvia and "*an individual appointed by and visibly loyal to Latvia*". They seek to replace Mr Krastiņš as the representative of the Bank in these proceedings.

124. The Shareholder Claimants oppose Mr Krastiņš as the representative of the Bank. They submit that the Directors are the appropriate persons to act in that capacity. They note that in the absence of the insolvency judgment, that would be the case.

F. THE COUNCIL

125. Article 292 of the Latvian Commercial Law provides that the Council is the supervisory institution of the company, which represents the interests of stockholders during the time periods between the meetings of stockholders and supervises the activities of the board of directors within the functions specified in this Law and the Articles of Association.

126. The Tribunal received the following submission on the power of the Council from counsel representing the Administrator[18]:

> According to Section 294 of the Commercial Law, an entity's articles of association may specify which acts require consent by the Council. The Bank's Articles of Association in their version of February 2019 state that the following acts require such consent of the Council:
>
> 4.6.1. acquiring participation in other companies and increasing, decreasing or alienation of such participation;
>
> 4.6.2. acquisition or alienation of undertakings;
>
> 4.6.3. acquisition of immovable property, alienation or encumbering rights pertaining to property;
>
> 4.6.4. opening or closing of branches and representative offices;
>
> 4.6.5. approval of the Bank's annual statements;

[18] Krastiņš' Letter of 2 July 2021, paragraph 46.

> 4.6.6. approval of the Bank's development strategy, including business objectives, risk strategy and capital adequacy maintenance strategy and its assessment process;
>
> 4.6.7. approval of the Bank's risk identification and management policies;
>
> 4.6.8. approval of the Bank's corporate values and standards of professional conduct and ethics;
>
> 4.6.9. approval of the Bank's policy for managing conflict of interest;
>
> 4.6.10. approval of the Bank's policy for introducing new financial services;
>
> 4.6.11. approval of job descriptions of the members of the Board and the Council and allocation of responsibilities among them;
>
> 4.6.12. establishment of underlying principles of remuneration policy.

127. Counsel for the Administrator observes that the grant or withdrawal of a power of attorney for arbitration proceedings is not mentioned in this list. Furthermore, they note that Section 303 of the Commercial Law states: "*The representation rights of the board of directors in respect of a third party may not be restricted*".

128. The Directors, whose submissions are adopted by the Shareholder Claimants, submit that the Council has no legal basis for involvement on the issue of Bank representation. It was never involved at any stage before the insolvency.

129. On 30 June 2021, former Members of the Council, Dr Hanning, Mr Odintsov and Mr Rasmussen wrote to the Tribunal stating that Mr Behrends should continue his representation of the Bank. They stated that Ms Verbicka and Mr Kutiavin did not represent the Bank. Nor, invoking *Trasta*, could Mr Krastiņš represent the Bank, because of a disentitling conflict of interest.

130. [redacted]

[redacted]

131. The Council emphasised the damage which Latvia's alleged conduct has inflicted on the Bank itself, on its creditors, on the new shareholders and, by reason of proceedings brought against them by Mr Krastiņš, on members of the Board and Council. This is said to create an incentive for the Shareholder Claimants, the Bank and Latvia to eliminate the Bank as a Claimant.

132. The Council asserts that any change in the legal representation of the Bank requires the consent of the Council under Section 294 of the Latvian Commercial Law, "*because of the obvious importance of the matter*". It is also a "*related persons matter*" under Section 184(2), because of Mr Guselnikov's involvement. Further the Council has general powers of supervision and specifically has the power under Section 292(1) to remove a Board member "*at any time*".

133. On 7 July 2021 the former Members of the Council purported to remove Ms Verbicka and Mr Kutiavin as Board members. The same document "*confirm*[ed]" the authority of Mr Behrends to represent the Bank.

134. It is clear, on the provisions set out above, that it is the Board that has the right to appoint legal representatives. Section 293(5) of the Commercial Law, repeated in Article 4.6. of the Articles of Association, states:

> The Council does not have the right to decide issues, which are within the competence of the Board.[19]

135. With respect to the purported termination of the membership of the Board by the Council on 7 July 2021, the Tribunal has received a legal opinion from the Directors that the act

[19] The Commercial Law dated 15 June 2017, Exhibit C-209; AS PNB Banka Articles of Association, R-413.

was invalid under Latvian law. This was in the final round of submissions and the other participants have not had an opportunity to respond. The Tribunal does not rely on it.

136. On the face of the legislative provisions, the Tribunal is not satisfied that the Council has any role in the appointment of legal representatives of the Bank. Nor is it entitled to itself represent the Bank in legal proceedings. It is not necessary to decide the matter on that basis.

137. The critical issue for the purposes of the present case is whether the members of the Council were at the time of the insolvency, or at any later time, still members. If they had already resigned, then the insolvency did not "*suspend*" their powers and they had no right to purport to demand involvement in these proceedings or to adopt the resolution of 7 July 2021.

138. Dr Hanning relied on the corporate register which showed that the three members of the Council continued in office until the insolvency. The accuracy of that document is in issue.

139. The registry certificate, purporting to show the state of affairs as at the date of the insolvency, has effect with respect to third parties under Section 12 of the Commercial Law. With respect to the company itself, a resignation is effective, at the latest, as at the date it is submitted or specified in a notice of resignation.

140. Section 296(8) of the Commercial Law, adopted in terms by Article 4.4 of the Articles of Association, provides:

> (8) A member of the council may relinquish his or her office at any time, submitting a notice to the company.[20]

141. Dr Hanning submitted that Latvia recognised that the three members of the Council continued in office at the time of the Riga court decision, because they were referred to as such in the court's order.[21] In fact they were in a list of person who were to be interrogated by the Administrator, which included a number of former, departed members of the

[20] The Commercial Law dated 15 June 2017, Exhibit C-209; AS PNB Banka Articles of Association, R-413.
[21] Hanning's Letter of 8 July 2021.

Council,--- including Mr Guselnikov, who had resigned in July 2019 when he sold his shares. The order spoke as at 12 September, but it said nothing about anyone's actual status at that date.

142. Dr Hanning also relied on the Administrator's Statement of Claim of 10 September 2020 by which all the previous Council and Board members were sued by the Administrator.[22] It does give the dates for the three relevant Council members being in office until 12 September 2019. Those statements are likely to have been based on the search of the register which, we find, did not reflect the time of the resignations. In any event this statement does not operate as some kind of concession.

143. The directors stated that they recollect that Dr Hanning and Mr Rasmussen had resigned from the Council prior to the appointment of the Administrator.[23] Subsequently they tendered an actual resignation by Mr Rasmussen dated 28 August 2019 stating that the resignation takes effect from that date.

144. The Tribunal has received nothing further from Mr Rasmussen. However, Dr Hanning asserts that his resignation could not have been signed on the date which it bears, because it was sent to him on 6 September. The Tribunal prefers the document to such an assertion. In any event, that date is still before the insolvency.

145. It is perfectly understandable why members of the Council would wish to resign in order to limit any personal liability, presumably of the kind that Mr Krastiņš is pursuing against former members of the Council and of the Board. Shortly before the date of efficacy of Mr Rasmussen's resignation, the ECB had found that the Bank was "*failing or likely to fail*".

146. Dr Hanning said during the hearing on 6 July 2021, in response to a question from the Tribunal about the Rasmussen document, that the resignation was because of the ECB decisions. He added: "***We*"** *made the decision, under these circumstances, that it doesn't make sense to continue our work in the present circumstances as council of the Bank*".

[22] Hanning's Submission of 20 July 2021, p 2.
[23] Directors' Submission of 5 July 2021, paragraph 16.

(Emphasis added.) He expressly accepted that he resigned as well as Mr Rasmussen.[24] The Tribunal finds that Dr Hanning and Mr Rasmussen were no longer members of the Council as at the date of the insolvency.

147. The position of Mr Odinstov is not as clear. The Tribunal finds that Dr Hanning's reference to "*we*", on the balance of probabilities, includes him. It is highly unlikely that he would have continued as the sole member of the Council and thus accepted responsibility in the context of probable insolvency.

148. The Tribunal is reinforced in this conclusion by the absence of any reference to the position of Mr Odintsov in Dr Hanning's final submission of 20 July 2021. The significance of the issue of resignation was clear by that time, as shown in that submission by his detailed explanation of the position, including additional information about Mr Rasmussen.

149. The Tribunal concludes that the Council document of 7 July 2021 is of no effect. That would be so even if Mr Odintsov had not resigned as the Tribunal has inferred he did. Nor can the former members of the Council be accepted as representing the Bank in any capacity. They had resigned voluntarily and were never "*suspended*" under the Credit Institutions Law.

G. MR BEHRENDS

150. In a letter to the Tribunal of 10 December 2019, Mr Behrends relied on a power of attorney to represent the Bank dated 19 August 2019. However, the terms of that power were clearly restricted to judicial proceedings and did not extend to an arbitration.

151. Relevantly, for present purposes, that power of attorney was signed by only two of the four directors, Ms Verbicka and Mr Kutiavin.

152. At the time of the insolvency, Mr Behrends held no valid authority to represent the Bank in these proceedings.

[24] Transcript pp 44:12 – 46:7.

153. Mr Behrends invokes the fact that he continues to represent the Bank in proceedings in the European courts, some of which overlap with issues that arise in these proceedings. The outcome of those cases may have implication for this case. However, the fact that he is recognised as the representative of the Bank in a different jurisdiction does not determine the issue before the Tribunal. It appears likely that his authority to act, supported by the CJEU decision in *Trasta*, was based on the 19 August 2019 power of attorney referred to above or a parallel appointment which the Tribunal has not seen.

154. On 17 December 2019, after the declaration of insolvency, three former Directors---Ms. Verbicka, Mr Kalmykov and Mr Kutiavin---executed a power of attorney in favour of Mr Behrends. This power was broad enough to be viewed as conferring authority to represent the Bank in these proceedings.

155. By letter of 24 January 2020, the same three former Directors indicated their continued support of Mr Behrends.

156. On 9 June 2021, the Tribunal received an email from Ms Verbicka, copied to Messrs Kalmykov and Kutiavin and to Mr Bramwell, a former chair of the Board. By this email the former directors advised that they had revoked Mr Behrends' power of attorney. She requested that all of those persons be copied in future communications from the Tribunal.

157. On 11 June 2021, the Tribunal received a further email from Ms Verbicka, copied to the same three persons as the email of 9 June, annexing a notice to Mr Behrends withdrawing all previous powers of attorney to represent the Bank. This document was signed by Ms Verbicka and Mr Kutiavin.

158. It is not clear why the two emails of 9 and 11 June 2021 were copied to Mr Bramwell, who was no longer a director at the time of the declaration of insolvency on 12 September 2019. It is, however, significant that they were copied to Mr Kalmykov. Similarly, a subsequent email to the Tribunal sent by Mr Kutiavin on 10 July 2021, responding to communications by Dr Hanning for the Council, was also copied to Mr Kalmykov as well as Ms Verbicka and Mr Bramwell.

159. Mr Behrends challenges the revocation of his authority on the basis that it was signed by only two directors. He asserts, as does Dr Hanning, that the other directors did not agree with that decision.

160. Although the Tribunal has not received a document signed by Mr Kalmykov, since the power of attorney of 19 December 2019, the fact that he was copied into the emails from Ms Verbicka may be evidence that he concurred. Ms Verbicka and Mr Kutiavin state that they have received no indication from Mr Kalmykov that he disagrees with their position.[25]

161. Dr Hanning included in his final submission of 20 July 2021 a statement attributed to Mr Kalmykov that he maintains his trust in Mr Behrends and expresses the opinion that "*the power of attorney should be kept*". This was said to be contained in an email, which was not provided to the Tribunal. The Tribunal will assume, without finding, that this statement refers to the second of the powers of attorney extending the scope to encompass these proceedings.

162. In any event, on the material before the Tribunal, a document signed by two directors is, on the basis of past practice, the Articles of Association and in the absence of evidence to the contrary, sufficient to establish authority to appoint and to revoke. Indeed, Mr Behrends himself originally relied on the power of attorney of 19 August 2019, signed by the same two directors who signed the revocation.

163. The Tribunal's conclusion is reinforced by the fact that the formal revocation was signed by two of the three directors who signed the only power of attorney on which Mr Behrends could rely. That majority would be sufficient, even if the Tribunal accepted the statement attributed to Mr Kalmykov in Dr Hanning's final submission.

164. For the reasons set out above, the belated attempt by the former members of the Council to appoint Mr Behrends is ineffective.

[25] Directors' Submission 5 July 2021, paragraph 19.

165. The Tribunal notes the statement of 22 July 2020, signed by the new shareholders "*strongly support(ing) the Bank's representation by Mr… Behrends in the same way as in front of the European courts*". This terminology of "*support*" was repeated in the statement from four of the new shareholders annexed to Dr Hanning's submission of 20 July 2021. It is sufficient to say that there is no basis to conclude that such "*support*" constitutes an authority to act, even if they could, or purported to, speak for the Bank (which they cannot and do not).

166. The Tribunal concludes that there is no basis on which the Tribunal could recognise Mr Behrends as the representative of the Bank in the present proceedings.

H. THE NEW SHAREHOLDERS

167. In Procedural Order No 8 the Tribunal referred to either the former directors or the new shareholders participating in the merits phase of the proceedings. Determining the issue of Bank representation is preliminary to that process.

168. As set out above, the Directors were the appointing party prior to the insolvency and have pressed their right to continue to represent the Bank and appoint counsel consistently since that time, albeit changing the way they would exercise that authority.

169. The new shareholders have never indicated any such interest. Their comments conveyed to the Tribunal have simply been statements of support for Mr Behrends as the legal representative of the Bank.

170. Nothing in the material before the Tribunal indicates that the new shareholders were in a position to, or even interested in, giving instructions to that legal representative.

171. By contrast, the detailed submissions made by the Council and the Directors manifested their involvement in the affairs of the Bank.

172. Mr Krastiņš informed the Tribunal that there was an agreement between the new shareholders and the Shareholder Claimants to the effect that the latter would maintain

their claims in these proceedings and that the new shareholders undertook to withdraw the Bank from these proceedings.[26]

173. Such an agreement is affirmed by a letter sent on 12 August 2019, on behalf of the Bank, proposing settlement discussions in view of the new shareholding structure. This proposal did not eventuate.

174. Mr Krastiņš also refers to a dispute about the validity of the agreements between the old and new shareholders. He submits that these agreements are irrelevant to the issue of Bank representation. Subsequently, Counsel for Mr Krastiņš informed the Tribunal that under this agreement the Shareholder Claimants were authorised to continue to conduct these proceedings. He also informed the Tribunal that the new shareholders apparently contest the validity and the content of this agreement.[27] The Tribunal has no further information about this dispute

175. [redacted]

176. The Tribunal notes that the Shareholder Claimants intend to assert that the sale to the new shareholders was forced upon them and therefore part of the alleged breach by the Respondent.[28] In earlier correspondence they described the sale as "*...a measure of mitigation, in the face of years of the Respondent's harassment and wrongful conduct*".[29]

177. The Tribunal has referred above to the statement by the new shareholders of 22 July 2020 supporting the representation of the Bank by Mr Behrends. This is the only document

[26] Krastiņš' Submission of 5 July 2021, paragraph 3.
[27] Transcript pp 10:17 – 11:4.
[28] Transcript, p 17:18-24.
[29] Shareholder Claimants' Letter of 28 June 2019.

signed by all the new shareholders before the Tribunal. The Council's final submission of 20 July 2021 attached a letter signed by four of them, not including Mr Tamraz. As before, it expresses support for Mr Behrends, adds an expression of lack of confidence in Ms Verbicka and Mr Kutiavin and criticises the conduct of Mr Krastiņš.

178. In his submissions of 5 July 2021 Mr Behrends asserted that "*based on a conversation with the new shareholders on 4 July*", they oppose any representation of the Bank by Ms Verbicka and Mr Kutiavin or by Mr Krastiņš.

179. On the material before the Tribunal, there is no basis on which the new shareholders can be accepted as the representatives of the Bank. They supported Mr Behrends as the legal representative. However, Mr Behrends did not suggest that he was acting on their instructions. Neither Mr Behrends, nor the Council who asserted they were in communication with the new shareholders, suggested that the new shareholders wished to assume the responsibility of representing the Bank. In any event, the corporate documents of the Bank confer the ability to name representatives for the Bank on the Board of Directors, not the shareholders.

I. THE SUBMISSIONS CONCERNING THE ADMINISTRATOR

180. The Shareholder Claimants, as parties to the proceedings, oppose the recognition of Mr Krastiņš as the representative of the Bank. In written submissions, subject to one additional point, they adopted the submissions of the directors on Bank representation.

181. The Shareholder Claimants added what they described as a relevant circumstance. This was the fact that the Latvian authorities had closed the complaint of criminal misconduct in the form of an attempt at extortion affecting the Bank made by Grigory Guselnikov. That was done on the basis, described as formalistic and cynical, that he was not the victim. The alleged victim was the Bank. They submit that it can be inferred that Mr Krastiņš did not pursue the complaint on behalf of the Bank.[30]

[30] Shareholder Claimants' Submission of 5 July 2021.

182. In final submissions, the Shareholder Claimants appeared to step back from this inference as an indication of conflict. They referred to the fact that Mr Guselnikov had made a separate ancillary claim arising out of the failure of Latvian authorities to pursue his complaint concerning extortion. This was said to be an example of when the "*Shareholder Claimants had suffered grievances that the Bank have not*" suffered. Somewhat confusingly, the submission suggested that the Bank had decided "*in its own best interests*" not to pursue such matters.[31]

183. In oral submissions, the Shareholder Claimants argued that it cannot be the case that one party to ICSID proceedings can determine who is the representative of another party, citing *Carnegie*. That, they say, is the implication of accepting Mr Krastiņš as the representative of the Bank. He was appointed by a Latvian court on the application of a Latvian government agency. The Bank is not relevantly a Latvian corporation. For purposes of these proceedings it must be considered as a UK national.

184. In their written submissions, the Directors postulate that the issue before the Tribunal is determining whether the appointment of the Administrator had the effect of depriving the Board of its right to represent the Bank in these proceedings. They identify this as a due process issue. Is one party to a dispute, they ask, entitled to designate the representatives of another party to a dispute? That is particularly an issue in a case where the appointment of the designee is itself an issue in the proceedings.

185. They refer to the Ancillary Claim which contests the decision of the Riga court appointing the Administrator. They affirm the Claim is extant, as do the Shareholder Claimants. They submit this claim can stand alone, as well as being a manifestation of what they describe as Latvia's scheme to destroy the Bank and deprive it of its assets, as set out in the Memorial on the Merits.

186. The Directors, supported by the Shareholder Claimants, emphasise that the Administrator is "*dependent*" on Latvia in a number of respects. This contention is derived from the

[31] Shareholder Claimants' Submission of 20 July 2021, p 1 and fn 1.

decision of the European Court of Human Rights in *Capital Bank AD v Bulgaria* (24 November 2005). The Court applied a test of dependency when reaching the conclusion that there would be a deprivation of the fundamental right to a fair hearing if a State appointed liquidator was the applicant party's representative in proceedings against the State.

187. They submit that Mr Krastiņš depends on Latvia, particularly on the FCMC and Latvian courts, the state organs at the centre of this case. Accordingly, the Bank would not be able to properly state its case before this Tribunal.

188. In this regard the Directors, like other participants, place particular weight on Section 168(1) of the Credit Institutions Law which provides that if the FCMC "*…expresses a lack of confidence in the administrator, it shall request a court to release such administrator and to appoint another, recommending a new candidacy for the administrator*".

189. They note that, although a court will decide on the FCMC's application, the process is instigated by the mere expression of a lack of confidence by the FCMC. The Directors submit that this indicates that the Administrator is dependent on the State. Furthermore, the courts that can replace him are also an arm of the State. They ask, in such a context, how can the Administrator make out the best case that the decisions of the FCMC and the courts have been tainted by corrupt influences.

190. In this regard they rely on the reasoning in *Carnegie* and *Trasta* as authority for the proposition that a party's representation in a pending proceeding cannot be compromised by an adverse party.

191. The Directors also submit that Mr Krastiņš' conduct has already manifested that he is "*incurably conflicted*". This includes allegations that he:

- Failed to make proper and well-argued submissions on behalf of the Bank. Specifically, he failed to make any serious argument on the Bifurcated Issue.

- Met counsel for the Bank in what they described as a "*secret meeting*".

- Actively resisted the Ancillary Claim in a letter to the Tribunal of 10 January 2020.

192. The submissions the Tribunal has received from Mr Behrends and Dr Hanning are to similar effect. Mr Behrends also refers to Mr Krastiņš' opposition to various steps he has taken in the proceedings in the European courts. He refers to the possibility of proceedings against Mr Krastiņš if, as a result of the present proceedings, it is determined that the Bank was not in fact insolvent.

193. With respect to the alleged conflict of interest, Mr Krastiņš denies that he is dependent on Latvia or the FCMC. He submits that he must act to maximise recovery for the creditors and is personally liable for his actions under Section 163 of the Credit Institution Law. That section imposes liability "*for losses that have been caused to the creditors by his or her fault*".

194. Mr Krastiņš submits that no conflict of intertest arises from the institutional framework of the insolvency. He must act in the interests of the stakeholders, including the creditors. He must act independently and is personally liable for compliance with his duties.

195. It is the case, he notes, that he can be removed from office, but so can directors. The mere risk that Latvia could misuse its powers does not create a conflict of interests. He refers to the possibility of his dismissal by Latvia as "*unlawful*".[32]

196. Mr Krastiņš notes that an administrator in insolvency will sometimes take action against the State on administrative or taxation matters.[33] He adds that it is standard practice for an insolvency administrator to pursue claims for acts that may have contributed to the insolvency, referring to such matters raised in the Memorial on the Merits.[34] He maintains that he has no conflict in pursuing the claims raised in the Memorial against Latvia.

[32] Krastiņš' Submission of 5 July 2021, paragraph 12.
[33] Krastiņš' Letter of 2 July 2021, paragraph 17.
[34] Krastiņš' Letter of 2 July 2021, paragraphs 21-22.

197. In its submissions, Latvia contends that the Administrator is independent of the State and refers to the following provisions:

> Credit Institution Law, at […] (s161) (providing that insolvency administrators act on behalf of the debtor), […] s. 163(1)) (providing that insolvency administrators are personally liable for their actions), […] (s. 166) (providing that insolvency administrators are not remunerated in the form of a State salary); Code of Professional Ethics for Insolvency Administrators and Administrators of Legal Protection Proceedings […] dated 14 July 2017, […] (s. 2.13) ("The administrator shall perform his duties objectively and independently. The administrator does not allow conflicts of interest or other influences that are not compatible with the professional and proper performance of his duties.") and […] (s. 2.14) ("The administrator shall be free from any influence in the course of his professional activities, especially those which may arise from his personal interests, as a result of pressure or fear of criticism.").[35]

198. Latvia submits that if the Administrator considers that he has a case against the State then he has both an interest in, and an obligation to, pursue the Bank's claims in the arbitration.

199. Latvia foreshadowed a defence to the Ancillary Claim, insofar as it is pleaded as a stand-alone breach. It contends that the Bank must be owned by UK nationals at the time of the alleged breach of the BIT. It was not so controlled, Latvia says, on 12 September 2019. Accordingly, Latvia argues, the Tribunal does not have jurisdiction to hear the claim in respect of the Bank.[36] At this stage of the proceedings the Tribunal does not deal with this submission.

J. CONCLUSION

200. On the materials before the Tribunal, it appears that Mr Behrends was correct in his letter of 14 January 2021 when he said that the "*normal governance mechanism of the Bank no longer exists*". This reflects not only the assumption of all management powers by the Administrator, but also the emergence of factions and the break-down of relations between

[35] Latvia's Submission of 2 July 2021, fn 13.
[36] Latvia's Submission of 5 July 2021, paragraph 11.

members of the Board and members of the Council. It also reflects the emergence of disputes between the Shareholder Claimants and the new shareholders.

201. [redacted]

202. Dr Hanning and Mr Behrends also make unsubstantiated allegations that there is some form of arrangement between the Shareholder Claimants and Mr Krastiņš to remove the Bank from the proceedings. The Shareholder Claimants deny this.[37] So do the Directors.[38] The Tribunal is in no position to make a finding about this issue. Nor is there any basis for finding that any such arrangement, if it exists, would be inappropriate.

203. The Tribunal has been advised that the following legal proceedings have arisen involving the participants in the Bank representation issue:

[redacted]

- The Administrator is pursuing the new shareholders in a London arbitration for the enforcement of amounts due under an assignment agreement.

[37] Shareholder Claimants' Email of 2 July 2021.
[38] Transcript p 68:4-11.

- Mr Behrends, in the name of the Bank, is pursuing a series of actions in the CJEU and the General Court of the EU for the annulment of each step in the decision-making process of the ECB which underpinned the application to declare the Bank insolvent, including the revocation of the banking license.

- Mr Behrends is also pursuing an appeal in the CJEU to establish that the ECB is able to take enforcement action against the Administrator.

[redacted]

204. For the above reasons, neither Mr Behrends, nor the former Members of the Council have any authority to represent the Bank. The only participants before the Tribunal who have any legitimate claim are the Directors. Their role is "*suspended*" as a matter of Latvian law. In the exercise of the Tribunal's power to make procedural orders required to ensure the integrity of the proceedings, the Tribunal is not bound by that suspension as a matter of international law.

205. As a result of the Sections 149((2) and 161(1) of the Credit Institutions Law set out above, the Administrator is in control of the assets and documents of the Bank. He is the only person with the ability and authority to enforce its legal rights.

206. The position under Latvian law is clear, subject to the application of EU law, which is part of Latvian law, notably the decision of the CJEU in *Trasta.*

207. On the other hand, there is no rule of international law concerning appointment of agents of corporations. Nothing in the ICSID Convention or the UK/Latvia BIT fills this gap. Nor have any of the participants identified any relevant international law principle of this character.

208. As discussed by the Tribunal in the Decision on the Intra-EU Objection, Article 42 of the ICSID Convention applies to the determination of the merits of the dispute. Although not directly applicable to the procedural issue under consideration, it is a relevant provision. It provides that, in the absence of agreement of the parties on applicable law and of any rule of international law, the Tribunal should apply the domestic law of the State that is a party to the dispute, i.e. Latvia. The Tribunal is not required to apply that law to a procedural issue. Article 42 indicates that consideration of domestic law is pertinent. In the absence of any other source, domestic law provides guidance.

209. The Tribunal is now concerned with a procedural, rather than a substantive, issue. The Tribunal has express power to decide such issues by Article 44 of the Convention and Rule 19 of the Arbitration Rules.

210. The Tribunal affirms its ruling in the 9th bullet point of paragraph 38 of Procedural Order No 8 that: "*Mr Krastiņš has authority to represent the Bank, subject to allegations of conflict or other disentitling conduct*". The Tribunal discusses below whether the exception has been established.

211. With respect to the Ancillary Claim, upon which considerable reliance was placed on the issue of conflict of interest, it is pertinent to note the steps leading up to the appointment of the Administrator by the Riga court:

- On 21 December 2018, the FCMC requested the ECB to take over direct supervision of the Bank.
- On 4 April 2019 the ECB took over direct supervision of the Bank.

- On 11 July 2019 the ECB issued an intervention decision requiring the Bank to address its capital shortfall and other matters.

- On 12 August 2019 the ECB conducted an on-site inspection and identified certain deficiencies.

- On 15 August 2019 the ECB found that the Bank was "*failing or likely to fail*".

- On the same day the European Single Resolution Board agreed with the ECB's assessment.

- On 15 August 2019 the FCMC suspended the Bank's provision of financial services.

- On 22 August 2019 the FCMC applied to the Riga Court requesting that the Bank be declared insolvent.

- On 12 September 2019, the Riga Court declared the Bank insolvent and appointed the Administrator.

212. With respect to the submissions of the participants, to the effect that the Ancillary Claim created a conflict of interests, the Tribunal finds that the Bank is not and never was a party pursuing the Ancillary Claim. The chronology is as follows:

- Quinn Emanuel wrote on 17 December 2019 notifying that they no longer represented the Bank.

- On 8 January 2020 Quinn Emanuel wrote making a "*challenge*" to the Riga Court decision. That letter **expressly** stated it was made on behalf of the 2nd to 6th Claimants.

- The Tribunal wrote on 8 January 2020 referring to the reference in their letter to requesting leave.

- Quinn Emanuel replied on 17 February 2020 writing that they did not request leave. Nor was that required. They asserted that their earlier letter notified the Tribunal of the

Ancillary Claim and requested confirmation that that claim was properly before the Tribunal.

- The Tribunal replied noting their letter.

213. Counsel for the Bank at the oral hearing stated that the Administrator would "*stay silent*"[39] and "*neutral*"[40] with respect to the Ancillary Claim. He reserved the right to participate in the future. The Tribunal finds that this approach is appropriate. Under ICSID Arbitration Rule 40 an ancillary claim can be made at any time until the Reply, or even later with the approval of the Tribunal. If the Administrator does seek to become involved in the Ancillary Claim, the Tribunal can review his position.

214. The position of Mr Krastiņš is not as straightforward as he and Latvia submit. The Tribunal affirmed in Procedural Order No. 8 that he has the right to appear, subject to conflicts of interest or other disentitling circumstances. The Tribunal has come to the conclusion that, on the material before it, no such excluding factors have been established save with respect to the Ancillary Claim.

215. The Tribunal does not accept the few examples in the submissions that allege the Administrator has displayed bias. It notes that during the Bifurcated Issue he adopted the Shareholder Claimants' submissions against the interests of Latvia

216. The Tribunal dismisses the submission that he had not made a sufficiently assertive contribution to the Tribunal deliberations. His submissions on the jurisdictional objection were short. There was every reason for him to accept the submissions of the Shareholder Claimants and no more. Quinn Emanuel were highly experienced in this field and their submissions, most of which were accepted, required no duplication. It was perfectly acceptable for the Administrator not to expend resources in that way. Indeed, Quinn Emanuel had represented the Bank for most of the time in which those submissions were

[39] Transcript p 12:16-20.
[40] Transcript p 62:8,12.

developed. The oral hearing on the bifurcated issue occurred a few days after the decision of the Riga Court.

217. The allegation of potential conflict of interests is of more significance. The Tribunal does not give weight to what the opponents of his representation refer to as the "*secret meeting*". There are many reasons why the Administrator would need to meet with the FCMC. Counsel for Mr Krastiņš informed the Tribunal that the merits of the case were not discussed. That is understandable as, at that stage, counsel for Latvia was focussed on the bifurcated issue. The Tribunal is not prepared to infer that the meeting was inappropriate.

218. A second specific allegation was that the Administrator "*actively resisted the Ancillary Claim*". The letter on which this allegation is based was a submission made during the course of the first dispute about Bank representation. The allegation does not accurately reflect the content of Mr Krastiņš' submission of 10 January 2020.

219. First, he expressly stated that he would not comment on the substance of the Quinn Emanuel Notice of Ancillary Claim of 8 January 2020. Secondly, he referred to the fact that former management had made complaints to relevant prosecutors, which had been dismissed. Finally, he said; "*I forcefully reject the 2nd-6th Claimant' allegation regarding the unlawfulness of the Judgement, which otherwise remains binding*". It is this last comment which is said to constitute '*active resistance*'. That comment is a response to an allegation of "*unlawfulness*" and was, expressly, not directed to the substance of the Claim.

220. As the Tribunal has indicated above, the existence of the Ancillary Claim is not entitled to the weight his opponents placed on it with respect to his right to represent the Bank. The Administrator is not involved in that Claim and has indicated that he will remain silent and neutral on that part of the case. At this stage, that Claim is entirely a matter between the Shareholder Claimants and the Respondent.

221. The formal statutory framework contains many provisions which ensure the Administrator's independence, as set out in his and Latvia's submissions, referred to above. It is common for an insolvency process to be instituted by a government agency, often a

tax authority. It is also usual for statutory provisions to envisage applications for removal of an administrator or liquidator. Such provisions could well be instituted by a government agency. The fact that an administrator could be removed in that way is not, of itself, dis-entitling.

222. However, in this case, the fact that the FCMC, whose conduct is at the heart of the case against Latvia, can institute proceedings for removal on the basis of a mere expression of concern, without specific objective criteria in the statute, could affect the Administrator's sense of security in this and, possibly, future appointments. The fact that a court may ultimately decide the application on the basis of objective criteria does little to assuage the risk to his professional reputation from the institution of such proceedings.

223. Furthermore, the Tribunal is conscious of the fact that informal arrangements and personal relationships can affect the strict application of the statutory framework. Allegations of that character are a significant part of the case in the Memorial on the Merits, of all the Claimants, including by the Bank. Ultimately the Tribunal will have to make findings of fact. It is not able to do so now. Nor is it appropriate to act on the assumption that the Claimants will make out those allegations.

224. If there is any suggestion that the FCMC was contemplating a step such as instituting proceedings to terminate his appointment, this Tribunal expects to be informed. Further, if the Shareholder Claimants form the view that the Administrator is compromised in some other manner or acting in a way that indicates dependence on, or subservience to, the Respondent, they may make an application to re-open the issue of Bank representation. The Tribunal reserves the power to re-open the issue.

225. It is not realistic, however, to overlook the obvious conflict of interest that the Administrator would have if he were required to take a position on behalf of the Bank concerning the Shareholder Claimants' claim that placing the Bank into liquidation was or was not itself a breach of Latvia's obligations under the UK/Latvia BIT (the "Ancillary Claim"). As the Tribunal has noted above, the Administrator has decided to remain neutral on the Ancillary Claim.

226. The Bank nevertheless has an interest in the articulation and conduct of the Ancillary Claim by the Shareholder Claimants, which could represent a step in the causation of alleged loss to the Bank under the existing Memorial on the Merits which has been submitted also on behalf of the Bank.

227. The Tribunal rejects the submissions of the Directors (supported by the Shareholder Claimants) that they should supersede Mr Krastiņš altogether as the representatives of the Bank. On the material before it, the Tribunal is not satisfied that the Administrator is dependent on, let alone controlled by, the Respondent so as to establish a dis-entitling conflict of interest on all issues. The Tribunal affirms Mr. Krastiņš' status as the appropriate person to represent the Bank as to all issues except for the Ancillary Claim.

228. However, the Tribunal accepts the Shareholder Claimants' and Directors' submissions to the extent of the Ancillary Claim. In the peculiar circumstances of this case, the Tribunal has formed the view that it should divide the representation of the Bank so as to recognize Mr. Krastiņš (or his counsel) as the Bank's representative for purposes of all claims other than the Ancillary Claim, and to recognize the Directors (or their counsel) as the Bank's representatives for any position the Bank may take with regard to the Ancillary Claim.

229. The Tribunal envisages that the Directors would be entitled to file a reply with respect to the Ancillary Claim at the same time as the Shareholder Claimants' reply on all issues involved and Mr Krastins' reply, on behalf of the Bank, on all issues except those with respect to the Ancillary Claim. For this purpose, the Directors would be given full access to the records of this case.

230. The Parties have agreed on a timetable.[41] A number of issues for the future conduct of the proceedings need to be considered by the Parties. That includes the pleading by the Shareholder Claimants with particularisation of the Ancillary Claim.

[41] Joint letter of 11 June 2021.

K. ORDERS

231. The Tribunal orders as follows:

a. The Tribunal affirms Mr Krastiņš as the representative of the Bank in these proceedings for all issues other than the Ancillary Claim.

b. The Tribunal affirms that the Directors are entitled to represent the Bank with respect to the Ancillary Claim.

c. Mr Krastiņš and the Directors are entitled to access the case file.

d. Mr Krastiņš, the Shareholder Claimants, the Directors and the Respondent are directed to consult with respect to the timetable and update the Tribunal on or before 23 August 2021.

On behalf of the Tribunal,

[Signed]

James Spigelman QC
President of the Tribunal