Rechtsanwälte
Steuerberater
Notare

BERLIN
Mohrenstraße 42
10117 Berlin
T +49 30 203907 - 0
F +49 30 203907-44
berlin@gsk.de

FRANKFURT/MAIN
Taunusanlage 21
60325 Frankfurt am Main
T +49 69 710003-0
F +49 69 710003-144
frankfurt@gsk.de

HAMBURG
Neuer Wall 69
20354 Hamburg
T +49 40 369703-0
F +49 40 369703-44
hamburg@gsk.de

HEIDELBERG
Mittermaierstraße 31
69115 Heidelberg
T +49 6221 4566-0
F +49 6221 4566-44
heidelberg@gsk.de

MÜNCHEN
Karl-Scharnagl-Ring 8
80539 München
T +49 89 288174-0
F +49 89 288174-44
muenchen@gsk.de

LUXEMBURG
GSK Luxembourg SA
44, Avenue John F. Kennedy
L-1855 Luxemburg
T +352 271802-00
F +352 271802-11
luxembourg@gsk-lux.com

Verzeichnis der Partner unter gsk.de

GSK STOCKMANN
Rechtsanwälte
Steuerberater Partner-
schaftsgesellschaft mbB
Sitz München,
Amtsgericht München
Partnerschaftsregister 533

GSK.DE

GSK Stockmann | Taunusanlage 21 | 60325 Frankfurt am Main

Ms Meg Kinnear
Secretary-General
ICSID
1818 H Street, NW
Washington, DC 20433
United States of America
MKINNEAR@WORLDBANK.ORG
ICSIDSECRETARIAT@WORLDBANK.ORG

FRANKFURT AM MAIN, 17 FEBRUARY 2020

Okko Behrends | T +49 69 710003-154 | F +49 69 710003-144 | okko.behrends@gsk.de
Unser Zeichen: OHB

Re: AS PNB Banka and others v. Republic of Latvia
(ICSID Case No. ARB/17/47)

AS PNB Banka's Proposal for the disqualification of arbitrators James Spigelman, John M. Townsend and Peter Tomka

lodged by

Okko Hendrik Behrends
GSK Stockmann
Taunusanlage 21
60325 Frankfurt am Main
Germany

on behalf of AS PNB Banka.

A. Proposal for Disqualification

1. We hereby respectfully propose the disqualification of Peter Tomka, James Spigelman and John M. Townsend (the "**Challenged Arbitrators**") because of a manifest lack of impartiality[1].

2. The present proceedings were initiated on behalf of AS PNB Banka (the "**Bank**") by counsel appointed by the Bank's board (the "**Board**"). The Bank is a Latvian credit institution and benefits from BIT-protection pursuant to Art. 25(2)(b) ICSID-Convention. Further claimants are shareholders of the Bank at the time when the present proceedings were initiated (the "**Shareholder Claimants**" together with the Board the "**Claimants**").

3. The Claimants allege regulatory mistreatment culminating in a *de facto* expropriation by means of sham insolvency proceedings and the appointment of an administrator (the "**Administrator**"). The Respondent attempts to use its *de facto* control over the Bank (which is headquartered in Latvia) to take control of the representation of the Bank and thereby the present proceedings.

4. The Challenged Arbitrators adopted a procedural order[2] (the "**Procedural Order**") which purports to exclude all[3] or virtually all[4] procedural rights of

[1] Article 57 ICSID Convention allows a party to propose the disqualification of any member of a tribunal. A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by Article 14(1) ICSID Convention. The Spanish version of the Convention expressly requires "impartiality" and the English and French versions are interpreted in the same manner (cf. Commission, Jeffery; Moloo, Rahim. Procedural Issues in International Investment Arbitration, Paragraph 4.05).

[2] Procedural Order No. 8 dated 30 January 2020

[3] The Procedural Order eliminates all procedural rights of the Bank if the Tribunal subsequently decides that none of the two potential representatives which are active with respect to the proceedings are the appropriate representatives of the Bank. The Challenged Arbitrators expressly say that they may make such a determination in the future.

[4] Virtually all rights of the Bank are eliminated even if either the Board or the Administrator will subsequently be determined to be the appropriate representatives. In this case the procedural rights during the jurisdictional phase will be limited either to receiving communications of the parties with respect to the representation issue or to the ability to answer specific outstanding questions on the Respondent's jurisdictional challenge and to review the part of the file that pertains to the jurisdictional challenge.

the Bank (including the power to propose the disqualification of the Challenged Arbitrators) by provisionally limiting the powers of representation of potential representatives of the Bank and by suggesting that at a later stage of the proceedings another person may be determined to be the representative of the Bank in the present proceedings.

5. ICSID tribunals do not have this power so that the Procedural Order does not have its purported effect of limiting the powers of the Bank's representatives. ICSID proceedings presuppose the unlimited power of the parties to exercise their procedural rights freely without any restrictions. The existence of parties and their representatives is an indispensable condition of any proceedings, including default proceedings[5].

6. Procedural decisions may affect the manner in which procedural rights may be exercised (e.g. by determining the time and date of a hearing or by setting time limits) but may not limit the substantive scope of procedural rights by defining limited powers of representation. ICSID tribunals do not have the power to admit or reject representatives of the parties or to admit or reject them provisionally or subject to restrictions or conditions or by admitting them only for certain limited purposes or subject to the determination of other representatives at a later stage of the proceedings.

7. The existence of parties and their representatives who may exercise all procedural rights chronologically[6] and logically[7] precede the constitution

---

[5] Default proceedings presuppose the notification of the defaulting party or an intention of the defaulting party not to present its case and therefore presuppose representatives of the defaulting party (cf. Art. 45 ICSID Convention).

[6] The parties act through their representatives before the constitution of the tribunal (Art. 36 ICSID-Convention) and the constitution of the tribunal presupposes that both parties are represented. The Secretary-General has to be satisfied that the party initiating the proceedings is properly represented and that the other party's appropriate representatives are notified. Actions of representatives therefore do not presuppose any admission by the tribunal which does not exist yet at this stage.

[7] The determination by a tribunal of its own competence pursuant to Art. 41 ICSID Convention presupposes a dispute defined by the representatives of the parties. The tribunal then decides the dispute primarily in accordance with the rules agreed by the parties (Art. 42 ICSID Convention) and also determines the conduct of the proceedings primarily as agreed by the parties (Art. 44 first sentence ICSID Convention). A procedural question to be decided by the tribunal may by definition only arise in the absence of an agreement by the parties (Art. 44 second sentence ICSID Convention) so that any procedural decision necessarily presupposes the representation of the parties.

and continued existence of any ICSID tribunal. The tribunal's existence and powers are dependent upon and defined by the parties' procedural positions and it is not possible to reverse this order so that it is the tribunal's task to define the parties' powers of representation[8].

8. The procedural validity of all acts of a party but also of acts of other parties and the Tribunal depend on the representation of each party (irrespective of whether such party chooses to present its case) so that it is the tribunal's obligation to satisfy itself at any time that each party is appropriately represented or, alternatively, that the provisions on default procedures are complied with[9]. This task may never be postponed. It is also not possible to define less important phases of the proceedings where the representation of a party may be wholly or partially dispensed with or to rely on a tribunal's assessment of a party's interests or the interests of its representatives or the tribunal's expectations as to how procedural rights of the party will be exercised by such representatives. It is also not possible for a tribunal to limit the powers of representation on the grounds that comparable interests are sufficiently represented by the representatives of another party.

9. The Procedural Order thus does not have its purported effect and in particular does not affect the Bank's ability to propose the disqualification of the Challenged Arbitrators.

10. The Procedural Order nonetheless clearly demonstrates the Challenged Arbitrators' intention not to treat the Bank equally by limiting and potentially eliminating its procedural rights. The Procedural Order does not respect the Bank as a legal person and a party to the proceedings (although it is beyond doubt and undisputed that it continues to be both).

---

[8] Representation in this sense is synonymous with the exercise of procedural rights (as opposed to the right to interpose lawyers or other agents) so that an individual may represent itself and a legal person may act through its representatives without interposing lawyers or other external agents. The right to be represented by lawyers or other agents (cf. Rule 18 of the Arbitration Rules) is a far more limited (albeit important) right and would be specifically violated if a party was deprived of an ability to act through lawyers or other agents and was thus forced to "represent" itself. The Procedural Order clearly deals with the representation of the Bank in the broader sense since it relates to the question who the appropriate direct representative of the Bank is.

[9] Art. 45 ICSID Convention

The Procedural Order treats the Bank as an object rather than a subject of the present proceedings.

11. It is irrelevant whether this is because of a general view that claimants pursuant to Art. 25(2)(b) ICSID-Convention are claimants with an inferior status or because of the *de facto* control of the Bank by the Respondent. These are issues as to the underlying motivation of the Challenged Arbitrators. It is sufficient to demonstrate a concern that the Challenged Arbitrators will in fact not treat the challenging party equally (irrespective of why they will not do so).

12. Impartiality is the willingness to treat each party equally. A manifest lack of such impartiality is by far the most frequently used ground for a disqualification[10] and the present proposal is unusual in that the relevant fact (the Procedural Order) cannot be disputed and the inference of bias also is beyond doubt because the Challenged Arbitrators explicitly state that they will not treat the Bank equally and on the contrary intend to deprive it of virtually all of its procedural rights. There is therefore not only a legitimate concern that the Challenged Arbitrators might not treat the Bank equally and in particular listen to it equally. It is certain that the Challenged Arbitrators will not do this because they explicitly say so. There is therefore a certainty rather than a mere appearance of a lack of impartiality and there is no reasonable person who would not accept the Procedural Order as an authentic statement of the Challenged Arbitrators' intentions.

B. The attempts to justify the Procedural Order

13. The Challenged Arbitrators purport to exercise powers which an ICSID tribunal does not have under any circumstances. The ability of each party to exercise all of its procedural rights at any time is indispensable and may not be limited for any reason. We nonetheless note that the Procedural Order does not claim any compelling need for the limitations.

14. The Challenged Arbitrators merely state their preference to deal with the jurisdictional issue first. They do not claim that it is impossible to resolve the representation issue immediately. They propose to do this at a later

[10] Cf. Commission, Jeffery; Moloo, Rahim. Procedural Issues in International Investment Arbitration, Paragraph 4.05

stage of the procedure. The Challenged Arbitrators therefore confirm that the limitations on the Bank's representation are not necessary.

15. We also note that the parties to the proceedings as well as the potential representatives of the Bank agreed that the representation issue may be resolved and that it has to be resolved before any further procedural step is undertaken[11]. It is true that the Procedural Order suggests that other persons may be the appropriate representatives. However, this does not justify the decision because the other potential representatives were not contacted and the Challenged Arbitrators do not suggest that they assume an intention not to present the Bank's case within the meaning of Art. 45 ICSID Convention.

16. It has also not been suggested by any party or by any of the potential representatives of the Bank that a limitation of the powers of representation is possible or permissible. We also submit that it is not possible for a party to agree to a limitation of its rights of representation[12]. The powers of representation of a party cannot be limited even voluntarily in the sense that a party may go beyond the mere voluntary failure to exercise a procedural right and limit its representation in proceedings for the future in a binding manner. This is also because such limitations would prevent any valid procedural steps by the other parties and the tribunal.

---

[11] The Respondent stated in its letter dated 18 December 2019 (emphasis added): *"The Respondent is also of the view that it would be appropriate to resolve the issue of the representation of AS PNB Banka in the present proceedings prior to any further post-hearing submissions."*
Counsel of Shareholder Claimants (and former counsel of the Bank) stated in a letter dated 17 December 2019 (emphasis added): *"We and the remaining Claimants are of the view that the dispute as to authority to represent the Bank should be resolved before the proceedings continue. We note Mr Krastiņš' request for an extension of time for filing the post-hearing submissions due on 18 December 2019. The remaining Claimants are ready to file their submissions on time, however, we and our clients have no objection to that request. Indeed, we agree that a suitable extension, or suspension of the proceedings, is appropriate as we consider that the question of who is legally and factually authorised to represent the Bank in these proceedings respectfully must be resolved before the proceedings should continue*."
I said in my email dated 24 December 2019: "*I also emphasize again my point about the necessity of an effective representation of the bank by the board (which requires access to the bank, its information and resources). I note that any procedural steps in a situation where this effective representation is not in place (because of an illegal interference with the representation of the bank) is highly problematic*."

[12] Contractual obligations as regards procedural rights are a different matter.

17. It is not possible to determine less important parts of proceedings where the appropriate representation of a party is therefore less relevant. We merely note for the sake of completeness that the Respondent's jurisdictional challenge based on the Achmea-decision of the European Court of Justice is hardly unimportant. It may result in the Bank being denied any protection.

18. It is not permissible for a tribunal to speculate about the interests of a party and dispense with the representation of a party or limit it on the grounds that the relevant representatives are unlikely to make any contributions which the Tribunal regards as important. Any such speculation is in itself an indication of impermissible bias since the tribunal needs to leave it to the party how it exercises its procedural rights. Impartiality requires arbitrators to keep an open mind and it is manifestly lacking if arbitrators say that they know in advance what a party will say and are therefore not interested to hear it.

19. The unrestricted representation of a party with similar interests also does not justify limitations on the representation of a party. We merely note for the sake of completeness that the Bank has undoubtedly specific interests which are different from those of the shareholders at the time of the initiation of the present proceedings[13].

20. Even the Challenged Arbitrators admit this elsewhere in the Procedural Order when they see it as the Board's responsibility to represent the interests of new shareholders. This statement is nonetheless also extremely problematic. A bank's board would breach its fiduciary and regulatory duties and could even be exposed to criminal sanctions if it pursued the interests of the shareholders rather than those of the bank (especially but not only in a crisis situation).

21. Compliance by the Board with the Tribunal's expectation that the Board should pursue the interests of the new shareholders (rather than those of the Bank) would expose the Board to potential criminal sanctions. Any person asking the Board of a corporation (especially but not only a bank) to pursue the interests of the shareholders (rather than those of the

[13] It is also highly misleading for the Tribunal to state that nothing in my submissions on the representation issue suggests an interest which is different from that of the Shareholder Claimants since it was not the purpose of the submissions to describe such interests. It is even less appropriate to refer to the Board's interests (rather than to Bank's interests) in this context.

corporation) normally risks potential criminal liability for inciting or aiding and abetting a criminal offence (especially if the corporation is in a crisis situation and even more if it is a bank).

22. All jurisdictions punish criminally those who use potential claims of a corporation and especially a bank for the benefit of its shareholders. This is obviously especially problematic in the context of a potential insolvency scenario or other crisis situation and in the context of confidential arbitration proceedings where the underlying considerations of potential settlements are typically undisclosed. The relevant passages of the Procedural Order are therefore irresponsible in the extreme.

23. They are based on a logic which is comparable to the Respondent's objection to the Board's powers of representation on the grounds that the Board does not benefit personally from a successful outcome of the present proceedings[14]. The Respondent thereby replaces the principle that a representative pursues the interests of the principal by a rule that any representation must be justified by a personal benefit for the representative. The Respondent thus only regards as legitimate the type of representation that is normally regarded as abusive and as involving a breach of fiduciary duties.

24. The Tribunal's approach is similar since it openly refers to the interests of the Board (as opposed to the interests of the Bank) as well as to the interests of the New Shareholders (rather than to the interests of the Bank).

25. Legal issues in connection with the representation of a party also do not justify the limitation of the powers of representation of a party and restrictions on a potential representative cannot be justified on the basis that other potential representatives are also subject to restrictions. It is especially not possible to assess on a preliminary basis different degrees of probability that a representative is the appropriate representative and on this basis determine different scopes for powers of representation of each person.

[14] Cf. page 9 of the Respondent's letter dated 24 January 2020: "*While Respondent cannot speculate as to the exact motives of Mr. Behrends or the Bank's former management, it is unclear what is the interest of former management in the ICSID arbitration as they do not stand to gain financially from an award in the Bank's favor*."

26. An overlap of representation issues and merits issues also does not justify a limitation of the powers of representation of a party. It is on the contrary universally accepted and inevitable that the representation of a party needs to be determined on the basis of an assumption that the party will be successful on the merits.

27. The Procedural Order is not justified also because I act on the basis of a valid power of attorney predating the appointment of the Administrator which the Administrator expressly has not attempted to revoke[15].

28. The Challenged Arbitrators also confuse their ability to determine (within certain limits) the order in which issues may be addressed in the proceedings with an ability to compartmentalize different issues and thereby create sub-proceedings which run consecutively or simultaneously with different representations by the parties. It is also not possible for a tribunal to "direct" parties to treat a specific person as the passive representative for purposes of specific communications (e.g. on the representation issue).

29. The Tribunal may for example deal with a jurisdiction issue first and may suspend the proceedings on the merits but this is not to say that this results in different sub-proceedings so that representatives may only be admitted for one of several sub-proceedings. Jurisdictional and substantive issues can never be fully separated and any jurisdictional argument will always be made also with regard to the merits and the arguments of the counterparty will be scrutinized by each party in this regard as well. Each party therefore requires a full and unrestricted representation. The Administrator could not properly represent the Bank without full access to the file even if he was the legitimate representative of the Bank which he is not.

30. A tribunal may also not identify different representatives for the purpose of representing different interests in connection with a party. Any such approach eliminates the concept of representation. It can also not be justified because of the existence of different (potential) representatives

[15] He did not revoke it because a revocation would be contrary to the decision of the Judgment of the Court of Justice of the European Union (Grand Chamber) of 5 November 2019 in the joined appeal cases C-663/17 P / C-665/17 P and C-669/17 P (European Central Bank (ECB) and Others v Trasta Komercbanka and Others)

for different purposes or because of internal conflicts within the sphere of a party.

31. This becomes obvious if one considers the same approach as regards the Respondent. The idea that Latvia is a single legal person and party to the present proceedings is of course far more questionable than the same assumption in connection with the Bank. Latvia and other states have many different representatives for different purposes who legitimately pursue different interests. The idea that Latvia is one legal person and one party is a far more complex and potentially questionable legal construct then the same idea in the case of the Bank.

32. There are also many different interests within Latvia as regards the underlying key issues in the present case (especially as regards corruption). It would therefore in principle be entirely plausible for the Tribunal to identify interests in Latvia or in connection with Latvia and then assign specific tasks to the representatives of such interests in the present proceedings in order to the reach a conclusion that is objectively fair and just. It is nonetheless obvious that this approach would eliminate Latvia as a party to the proceedings and would fundamentally change the role of the Tribunal. The concepts of legal person, party and representation presuppose that a party may have several representative(s) but only one representation in the sense that it may only adopt one procedural position as opposed to several conflicting positions. It is therefore the duty and the practice of ICSID tribunals to treat even the most obviously dysfunctional states as one person and one party[16].

C. The background and underlying motivation of the Procedural Order

33. The underlying motivation of the Challenged Arbitrators is irrelevant. It is sufficient that they demonstrate an intention not to treat the Bank equally. Any such intention requires the disqualification of the Challenged Arbitrators even if it was assumed that the Challenged Arbitrators act out of a sense of duty and based on a good faith belief that their approach is in accordance with the law and in the best interest of a fair and equitable resolution of the present case.

[16] Goetz v. Burundi, Award, 10 February 1999, paras. 50-51 provides a useful illustration of this type of situation and the existence of a representative (albeit a passive one) even in the case of default proceedings.

34. The Procedural Order suggests that the Challenged Arbitrators have come to the realization that it has become an increasingly unrealistic and questionable legal fiction that the Bank is a legal person and a party to the present proceedings because the Bank is now actually solely an object of various interests. The Challenged Arbitrators therefore see it as their duty to identify interests in connection with the Bank which they regard as legitimate and therefore deserving of "representation" in the present proceedings. Even the interests of others in connection with the Bank are regarded as limited and questionable. The Challenged Arbitrators therefore refer to "residual" interests.

35. The Challenged Arbitrators regard as legitimate only the "residual interests of the holders of equity in the Bank". They explain that any acceptance of the Board as representative in the present proceeding would be to represent such interests, i.e. the interests of the "residual holders of equity in the Bank" (as opposed to the interests of the Bank which the Challenged Arbitrators appear to regard as an unrealistic legal fiction). They even say that they will decide in the future who will represent such interests "in what capacity". This suggests that the Bank's New Shareholders or others may be invited to act in their own name so that a party (namely the Bank) is essentially replaced by another party or other parties.

36. The Challenged Arbitrators also suggest that they pursue far more ambitious goals than the arbitration of a concrete dispute that is defined by the representatives of the parties. They suggest that they will identify legitimate interests and then identify representatives of such interests to whom they will assign the task of making specific contributions in order then to achieve a resolution of the present matter that is objectively fair and just.

37. We note that it would be irrelevant for present purposes if this was indeed the motivation behind the Procedural Order because the Procedural Order in any case demonstrates an intention by the Challenged Arbitrators not to treat the Bank equally and essentially not to respect it as a party to the proceedings (as opposed to an object of the dispute).

38. We also note, however, that any objective and reasonable observer would be concerned that the motivation behind the Procedural Order might be less admirable than the Procedural Order suggests and may be due to the fact that the Challenged Arbitrators are compromised by the fact that the Respondent has successfully installed the Administrator as the *de facto*

representative of the Bank and that the Procedural Order is primarily a response to the Board's open statements that the present proceedings may have been fundamentally undermined and that it will have to be examined, *inter alia* based on a review of the file, whether and how the defects of the present procedure may be rectified[17].

39. The Board also strongly criticized the Tribunal with respect to the circular logic on which the *de facto* admission of the Administrator as representative of the Bank was based[18]. The Respondent had submitted a decision of its own court and based on this created the impression that the Administrator had become the representative of the Bank[19]. The Tribunal's response had been to suggest that the representation of the Bank should be dealt with by way of agreement between the parties. In the present circumstances this resulted in the circular logic that it is sufficient if the Bank represented by the Administrator agrees to the Bank being represented by the Administrator. This was despite the fact that even the Latvian court order showed that the powers of representation of the Administrator were vigorously contested by the Board.

40. The Tribunal stated that any discussion of the representation of the Bank at a proposed hearing would have to be deducted from the time of the Respondent[20]. This further underlined the Tribunal's recognition that it was Latvia which was interested in the Board being replaced by the Administrator as representative of the Bank. It is obviously highly unusual and problematic if a party is allowed to adopt any active role (let alone the dominant role) as regards the representation of the opposing party.

41. A reasonable objective observer would also be concerned by the less than open reaction of the Tribunal when the Board complained about Latvia's

---

[17] Cf. paragraph 1 of my letter dated 9 January 2020 to the Tribunal:
"*I consider this letter as being part of preliminary correspondence as to the extent to which the integrity of the present proceedings has been undermined by Latvia's illegal interference with the representation of the Bank. It will then have to be discussed if it is possible to rectify this and what steps are necessary in this regard*."

[18] Cf. paragraph 10 of my letter to the Tribunal dated 9 January 2020.

[19] Cf. the Respondent's letter to the Tribunal dated 18 September 2019

[20] The Tribunal stated by email dated 19 September 2019: "*The issue of legal representation of the Bank should be discussed between the parties with a view to reaching an agreed position. If the matter needs to be considered by the Tribunal, it will be treated as an application by the Respondent and taken out if its allocated time*."

interference with the representation of the Bank. The Tribunal's reaction was primarily defensive and clearly such as to minimize any outside scrutiny[21]. It is particularly problematic that an extensive submission by the Administrator was not disclosed to the Board and that the Board was falsely informed that it had received all relevant documents[22].

42. An objective observer would be concerned about the discrepancy between the procedural assumptions on which the Procedural Order is based (i.e. the assumption that a representative must apply for admission and be formally admitted) and the fact that no such admission was considered necessary in order for the Administrator to be accepted as the *de facto* representative of the Bank.

43. An objective observer would also be concerned about the lack of due process and impartiality in the procedure as regards the representation issue (e.g. because of the fact that the Administrator was granted access to

[21] Cf. paragraphs 5 et seq. of my letter dated 9 January 2020.

[22] By email dated 24 December 2019 I was informed as follows:

> "*Please be assured that, although you have been inadvertently omitted from my email acknowledging receipt of Mr. Krastiņš's email, you have already received all relevant correspondence on this issue (including Mr. Krastiņš's email, which was included in my email transmitting the Tribunal's letter to the parties and yourself).*"

This was not true. I had in fact not received the main document namely a detailed submission dated 17 December 2019 with six attachments in which the Administrator commented in detail on the representation issue and especially on my power to represent the Bank. This was in response to my short email dated 10 December 2019.

I had in fact at that time received none of the documents which the Challenged Arbitrators subsequently relied upon and considered relevant to the representation issue in their Procedural Order dated 30 January 2020.

In my letter to the Tribunal dated 9 January 2020 I said:

> "*I have learned in the last few days through painstaking efforts on my part that there are important documents, including in particular a recent detailed submission by Mr Krastins specifically on the representation issue, which were not disclosed to me by the Tribunal although I was assured by the Tribunal that I had been provided with all relevant documents*."

This did not lead to any correction of the previous false assurance by the Tribunal and also not to any further disclosure of documents.

In an email to the Tribunal dated 15 January 2020 I informed the Tribunal that I had become aware of the existence of a number of specific relevant documents which had not been disclosed to me and described them and requested the disclosure of these documents and any other documents which are relevant in connection with the representation issue. On 21 January 2020 I was sent the documents of which I had become aware. The Tribunal nonetheless in its Procedural Order dated 30 January relied on a further relevant document (the letter of 10 October 2019 which is referred to in paragraph 6 of the Procedural Order) that had not been disclosed to me.

the file and the Board was not granted access[23]) and that the Administrator was initially allowed to have *ex parte* communications with the Tribunal on the representation issue. The Administrator's submission dated 17 December 2019 contained a detailed rejection of the Board as representative of the Bank also urged the Tribunal not to disclose any information, including the Administrator's submission to the Tribunal.

44. Any objective observer would be concerned because of the obvious inability of the Tribunal to deal with the representation issue and the Tribunal's view that the jurisdictional phase does not require any resolution of the representation issue. This will create a strong illegitimate incentive to uphold the Respondent's jurisdictional challenge in order to avoid the need to deal with the representation issue.

45. This also appears to be the Respondent's strategy. A favorable settlement or cost decision in the Respondent's favor cannot have any value *vis-à-vis* the Bank since Latvia (wrongly) claims that the Bank is insolvent. A precedent upholding the Respondent's jurisdictional challenge on the basis of the Achmea-decision of the European Court of Justice would, however, be very valuable.

46. An objective observer would also be extremely concerned about the Tribunal's reluctance to address the illegitimate collusion between the Respondent's counsel and the Administrator. The Respondent and the Administrator admitted that they even met physically (unbeknownst to the former counsel of the Bank and thus contrary to applicable professional rules of conduct[24]). An objective observer would finally be extremely concerned that the Tribunal accepts that collusion between the Administrator and the Respondent is not problematic during the jurisdictional phase.

[23] The Administrator was granted provisional access by letter of the Tribunal dated 20 December 2019 (without the subsequent limitation to the submissions on the jurisdictional issue that is set out in the Procedural Order dated 30 January 2020). I was informed by email dated 26 December 2019 that my "access will be determined by the process currently being undertaken".

[24] Code of Conduct for European Lawyers of the Council of Bars and Law Societies of Europe (CCBE) Art. 5.5 "*A lawyer shall not communicate about a particular case or matter directly with any person whom he or she knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications)*."

47. The Administrator and the Respondent allegedly agree that the Respondent's actions with respect to the Bank were legitimate, that the Bank is insolvent and that the Respondent is the appropriate representative of the Bank. If these were honestly held views then the Respondent and the Administrator would immediately settle or otherwise discontinue the present proceeding and their representatives would otherwise be exposed to a serious risk of personal liability for wasting resources on a purely academic examination of the jurisdictional issue.

48. The Challenged Arbitrators clearly understand this. This is evidenced by their expectation that counsel of the Shareholder Claimants rather than the Administrator will submit arguments rejecting the jurisdictional challenge of the Respondent on the basis of the Achmea-decision of the European Court of Justice. The Challenged Arbitrators therefore appear to accept a "staged" and fundamentally illegitimate procedure that is continued for the sole purpose of creating a specific precedent.

C. Due process as regards the determination of the representation issue

49. The Secretary-General has to determine the valid representation of the Bank by the Board independently of the Tribunal. Parties need to be given due process also as regards the determination of issues in connection with their representation. This is all the more obvious if the representative is the undisputed original representative of a party who initiated the proceedings on behalf of the party and who was treated as the appropriate representative until recently and if, as in the present case, no determination has been made that there was a change in the manner in which the party is represented.

50. It is also unclear what potential interests could legitimately result in the Board not being given full and unrestricted access to the file especially since they in any case owe strict fiduciary duties to the Bank.

51. We therefore respectfully request access to the file (the full arbitral record) in order to be able to supplement this proposal based on a review of the file.

D. Request for Relief

52. For the reasons set out above, the Bank therefore

(a) requests access to the file in order to be able to supplement the present proposal based on a review of the file and
(b) proposes the disqualification of the Challenged Arbitrators in accordance with Art. 14 and 57 ICSID Convetnion and Rule 9 of the Arbitration Rules.

Yours sincerely

Okko Hendrik Behrends
PARTNER
GSK Stockmann