

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF  
INVESTMENT DISPUTES**

ICSID CASE No. ARB/11/13

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**Rafat Ali Rizvi  
(Claimant)**

v.

**Republic of Indonesia  
(Respondent)**

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**APPLICATION FOR ANNULMENT AND STAY OF ENFORCEMENT  
OF AWARD ON JURISDICTION**

*11 November 2013*

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## GLOSSARY OF TERMS

In this Application:

“**Application**” means this application for the annulment of the Award;

“**Award**” means the Award on Jurisdiction dated 16 July 2013;

“**Bank Indonesia**” is the Central Bank of the Republic of Indonesia;

“**BIT**” means the 1997 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments;

“**BKPM**” means *Badan Koordinasi Penanaman Modal* – Indonesia Investment Coordinating Board;

“**Centre**” means the International Centre for Settlement of Investment Disputes between States and Nationals of Other States;

“**Central Bank**” means the Central Bank of the Republic of Indonesia;

“**Claimant**” means Rafat Ali Rizvi;

“**Chinkara/FGAH**” means First Gulf Asia Holding, formerly Chinkara Capital Ltd;

“**Decision on Bifurcation**” means the Decision on Bifurcation issued by the Tribunal under Rule 41(3) of the ICSID Arbitration Rules on 22 June 2012;

“**ICSID**” means the International Centre for Settlement of Investment Disputes between States and Nationals of Other States;

“**ICSID Convention**” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States;

“**Party**” or “**Parties**” means Rafat Ali Rizvi and/or the Republic of Indonesia;

“**Preliminary Objections**” means Preliminary Objections filed by the Respondent on 18 October 2011 pursuant to Rule 41(5) of the ICSID Arbitration Rules;

“**Respondent**” means the Republic of Indonesia.

**APPLICATION BY RAFAT ALI RIZVI FOR THE ANNULMENT  
OF THE AWARD ON JURISDICTION DATED 16 JULY 2013**

**I. Introduction**

1. Rafat Ali Rizvi (the “**Claimant**”) respectfully files with the Secretary-General of the International Centre for Settlement of Investment Disputes between States and Nationals of Other States (hereinafter “**ICSID**” or the “**Centre**”) this application for annulment and stay of enforcement of the Award on Jurisdiction dated 16 July 2013 (the “**Application**”) in the case of *Rafat Ali Rizvi v. Republic of Indonesia* (Case No. ARB/11/13).
2. Enclosed with this original are five copies of the Application, together with its accompanying Exhibits and Legal Authorities.

**II. Purpose of the Application**

3. Pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”) and Rule 50 of the ICSID Arbitration Rules, the Claimant applies for the annulment of the Award on Jurisdiction dated 16 July 2013 (the “**Award**”).
4. This Application is filed on 11 November 2013. In accordance with Administrative and Financial Regulation 16 and the Schedule of Fees effective 1 January 2013, the non-refundable application fee of US\$25,000 has been transferred to the Centre by the Claimant.<sup>1</sup>
5. This Application is based on the ground that
  - (a) the Tribunal manifestly exceeded its powers, pursuant to Article 52(1)(b) of the ICSID Convention;
  - (b) there has been a serious departure from a fundamental rule of procedure, pursuant to Article 52(1)(d) of the ICSID Convention; and
  - (c) the Award has failed to state the reasons on which it is based, pursuant to Article 52(1)(e) of the ICSID Convention.

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<sup>1</sup> A copy of the CHAPS transfer receipt is attached as Exhibit CA-1.

6. In addition, pursuant to Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules, the Claimant requests that the enforcement of the Award be stayed provisionally until the *ad hoc* Committee that is formed to hear this Application shall have the opportunity to rule on the Application.

### **III. Factual and Procedural Background**

7. On 5 April 2011, the Claimant, a British national, filed a Request for Arbitration (the “**Request**”) with the Centre against the Republic of Indonesia (the “**Respondent**”). The Claimant’s claims were brought under the 1997 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments (the “**BIT**”).
8. The Request was registered on 19 May 2011 as ICSID Case No. ARB/11/13 by the Secretary-General of ICSID, who notified the Parties pursuant to Article 36(3) of the ICSID Convention.
9. On 18 October 2011, the Respondent filed Preliminary Objections pursuant to Rule 41(5) of the ICSID Arbitration Rules on the basis that the Claimant’s claims manifestly failed for lack of jurisdiction and merit because the Claimant’s alleged investments did not fall within the scope of Article 2(1) of the BIT.
10. The Respondent made a separate application for security for costs. The Tribunal established a schedule for the Parties’ submissions on the Respondent’s Preliminary Objections under Rule 41(5) on 27 October 2011, and informed the Parties on the same day that the Respondent’s application for security for costs would not be addressed until after the disposition of the Respondent’s Rule 41(5) application.
11. The Claimant filed his Response to the Respondent’s Preliminary Objections on 30 November 2011. The Respondent filed its Rebuttal to the Claimant’s Response on 9 January 2012, and the Claimant filed his Rejoinder on 30 January 2012.
12. The hearing on the Respondent’s Preliminary Objections pursuant to Rule 41(5) was held on 20 and 21 February 2012. During the hearing the Respondent stated

- that it intended to file objections to the jurisdiction of the Tribunal under Rule 41(1) of the ICSID Arbitration Rules, if the Tribunal found against it in its Rule 41(5) application.
13. The Tribunal's 4 April 2012 Decision on the Respondent's Preliminary Objections under Rule 41(5) rejected the Respondent's Preliminary Objections. According to the Tribunal, it was not "*manifest*" that the Claimant's alleged investment did not fall within the scope of the BIT. The Tribunal reserved all other issues.<sup>2</sup>
  14. On 18 April 2012, the Respondent reiterated its intention to file objections in relation to the Tribunal's jurisdiction under Rule 41(1) of the ICSID Arbitration Rules, and requested the bifurcation of the proceedings pursuant to Rule 41(3) of the ICSID Arbitration Rules.
  15. The Tribunal issued its Decision on the Respondent's Application for Security for Costs on 8 May 2012, dismissing that application.
  16. The Claimant filed observations on the Respondent's request to address its objections as to the Tribunal's jurisdiction as a preliminary question on 18 May 2012. The Respondent filed a Reply to the Claimant's observations on 28 May 2012, to which the Claimant filed a Rejoinder on 8 June 2012.
  17. The Tribunal issued a Decision on Bifurcation under Rule 41(3) of the ICSID Arbitration Rules on 22 June 2012 ("**Decision on Bifurcation**"). The Tribunal decided to hear objections to the Tribunal's jurisdiction as a preliminary question. It consequently suspended the proceeding on the merits. In its Decision on Bifurcation, the Tribunal ordered that the Respondent's Rule 41(1) application would be "*strictly limited to the objection described in paragraph 9.*" Paragraph 9 stated that the "*Claimant's investment is excluded from coverage by the BIT due to its failure to meet the requirements of its Article 2(1).*" The Tribunal

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<sup>2</sup> Exhibit CA-2: *Rafat Ali Rizvi v. Republic of Indonesia* (Case No. ARB/11/13), Decision on the Respondent's Objection Under Rule 41(5), 4 April 2012, para. 93.

- emphasized that it would “*not entertain any legal argument, nor consider any evidence, that relates to any other matter*”.<sup>3</sup>
18. The Respondent filed Objections to Jurisdiction Pursuant to Rule 41(1) of the ICSID Arbitration Rules on 30 August 2012, on the basis that the Claimant’s investment in the banking sector does not fall within the scope of the BIT, as it was not “*granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it*” pursuant to Article 2(1) of the BIT.<sup>4</sup>
  19. The Claimant filed his Response to the Respondent’s Rule 41(1) Objections to Jurisdiction on 1 November 2012, and on 22 November 2012 the Respondent filed its Reply to the Claimant’s Response. The Claimant filed his Rejoinder on 13 December 2012, to which he filed a further Addendum on 18 December 2012.
  20. On 19 December 2012, the Respondent requested the Tribunal to call upon the Claimant to disclose the full corporate records of Chinkara/FGAH. The Tribunal rejected the Respondent’s request in a letter dated 28 December 2012, and asked the Claimant to update his description of his investment to take into account facts that had emerged in the proceedings before the Tribunal.
  21. After the Claimant updated the description of his investment, the Respondent stressed that it was imperative to investigate the precise nature of the Claimant’s investment during the jurisdictional phase of the proceedings. The Respondent noted that the question whether the investment was made in the territory of Indonesia was incorporated into the jurisdictional phase.
  22. The Tribunal on 17 January 2013 informed the parties that the issues for determination at the jurisdictional stage were limited to “*whether the investment as stated by the Claimant was ‘granted admission in accordance with the Foreign*

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<sup>3</sup> Exhibit CA-3: *Rafat Ali Rizvi v. Republic of Indonesia* (Case No. ARB/11/13), Decision on Bifurcation under Rule 41(3), 22 June 2012, paras. 9, 28.

<sup>4</sup> Exhibit CA-4: *Rafat Ali Rizvi v. Republic of Indonesia* (Case No. ARB/11/13), Objections to Jurisdiction Pursuant to Rule 41(1), 30 Aug 2012, para. 1.

*Capital Investment Law No. 1 of 1967 or any law amending or replacing it.”*<sup>5</sup>  
The Tribunal explained that “*if the Respondent’s objection to jurisdiction does not succeed at this stage, the question of proof of an investment and the implications of investment through a company incorporated in a third State*” would be carried with the merits.<sup>6</sup>

23. The hearing on the Respondent’s Objections to Jurisdiction pursuant to Article 41(1) of the ICSID Arbitration Rules was held on 22 through 24 January 2013.
24. In its Award, the Tribunal accepted the Respondent’s Objections to Jurisdiction pursuant to Rule 41(1) and determined that neither it nor the Centre has jurisdiction over the Claimant’s claims. The Tribunal ordered the costs of the Centre to be allocated equally between the Parties and for each Party to bear its own costs and legal representation.

#### **IV. The Tribunal’s Reasoning in its Award**

25. In its Award, the Tribunal accepted the Respondent’s jurisdictional objection that the Claimant’s investment was not “*granted admission in accordance with the Foreign Capital Investment Law No 1. of 1967*”, as required by Article 2(1) of the BIT and that it therefore does not fall within the scope of the BIT.<sup>7</sup> This result was reached in breach of Article 52.
26. The Tribunals’ narrow scope of inquiry at the jurisdictional stage is important to understanding the Claimant’s detailed grounds for annulment. Its focus was on whether the investment was granted admission in accordance with the Foreign Capital Investment Law stemmed from BIT Article 2(1), which provides

*“(1) This Agreement shall only apply to investments by nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it.”*

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<sup>5</sup> Exhibit CA-5: *Rafat Ali Rizvi v. Republic of Indonesia* (Case No. ARB/11/13), Award on Jurisdiction, 16 July 2013, para. 31.

<sup>6</sup> *Ibid.*

<sup>7</sup> Exhibit CA-5: *Rafat Ali Rizvi v. Republic of Indonesia* (Case No. ARB/11/13), Award on Jurisdiction, 16 July 2013.

27. The Tribunal viewed that its inquiry was limited “*to a question of law, that is, the meaning of BIT Article 2(1),*” which was distinct from evidence bearing on the merits of the claim. The evidence to be considered in the jurisdictional phase was limited to “*evidence regarding the question whether the Claimant complied with provisions of Indonesian law in respect to admission of his investment.*”<sup>8</sup> No mention was made to the subjective awareness of the Government of Indonesia as having any bearing on compliance with Indonesian law.
28. Moreover, the Tribunal stated that its narrow inquiry prohibited entertaining any legal argument or “*consider[ing] any evidence that relates to any other matter.*”<sup>9</sup>
29. The Tribunal structured its inquiry in two steps. First, the Tribunal was to interpret the phrase, “*granted admission in accordance with the Foreign Investment Law No. 1 of 1967 or any law amending or replacing it.*” Second, the Tribunal would consider whether, “*in fact*” “*Claimant’s investment was ... ‘granted admission.’*” Again, the Tribunal did not make any mention of any requirement that the Government of Indonesia was subjectively aware that the Claimant was making an investment, or the role that the Claimant played in the investment.
30. The first step of the inquiry required deciding between the Parties’ competing interpretations of the phrase “*granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it.*”<sup>10</sup>
31. In deciding on the matter, the Tribunal rejected a Claimant-proffered interpretation that any investment that was not contrary to the Foreign Capital Investment Law would suffice.<sup>11</sup>
32. The Tribunal also rejected the Respondent’s contention that only a specific process—one administered by *Badan Koordinasi Penanaman Modal* (Indonesia

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<sup>8</sup> Award, para. 33.

<sup>9</sup> *Ibid.*, para. 34.

<sup>10</sup> *Ibid.*, para. 52.

<sup>11</sup> *Ibid.*, paras. 54-74.

Investment Coordinating Board or “**BKPM**”)—constitutes the sole and exclusive process to be “granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967.” The Tribunal preferred instead the Claimant’s contention that the admission process to which his investment was subjected by the central bank of the Republic of Indonesia (“**Bank Indonesia**” or “**Central Bank**”) was capable of satisfying the requirement of Article 2(1) of the BIT.<sup>12</sup>

33. The Tribunal then went on to the second step. Namely, it considered whether, on the evidence before it in the proceedings, the Claimant’s investment could be said to have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967, as required by Article 2(1) of the BIT.<sup>13</sup> The inquiry was “*whether the Claimant’s stated investment was ‘granted admission’ through the regulatory steps taken by Bank Indonesia.*”

34. The Tribunal set out what steps it considered were required by its interpretation:

*“Claimant does not rely on Bank Indonesia procedures that are particular to foreign investors or that are formally denominated as admission procedures. Thus, the question before the Tribunal is whether, taken as a whole, the regulatory steps taken by Bank Indonesia comprised a de facto grant of admission of Claimant’s stated investment. Unlike Claimant’s primary interpretation, Claimant’s secondary interpretation means that the Tribunal must closely examine the facts on which Claimant relies. The steps in the de facto admission procedure on which Claimant relies (see para. 147) are: the approval of Chinkara’s share purchases in Pikko and Danpac; the approval of the Bank Century merger and the ‘fit and proper’ test to which Claimant was subjected.”*<sup>14</sup>

35. In finding that the Claimant’s investment did not satisfy this test, the Tribunal held that “*the evidence before the Tribunal establishes that Bank Indonesia took the three regulatory steps on which the Claimant relies*” but that the “*Claimant has not established that Bank Indonesia took these three steps in awareness of Claimant’s shareholding in the investment*”. On that basis, the Tribunal concluded that “*it [had] insufficient evidence before it that the Claimant’s*

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<sup>12</sup> See *ibid.*, paras. 73-107, 136-139.

<sup>13</sup> *Ibid.*, paras. 143-198.

<sup>14</sup> *Ibid.*, para. 182.

*investment was ‘granted admission in accordance with’ the [Foreign Capital Investment Law]’.*<sup>15</sup> The “awareness” requirement has no basis in the Tribunal’s own stated scheme.

36. Therefore, although the Tribunal agreed with the Claimant that Bank Indonesia (i) was capable of granting admission to his investment in accordance with the Foreign Capital Investment Law No. 1 of 1967; and (ii) took the three regulatory steps on which the Claimant relies as evidence that his investment was granted admission by Bank Indonesia, it nonetheless declined jurisdiction to the Claimant’s claims on the basis that the Claimant had not provided sufficient evidence to establish Bank Indonesia’s state of mind at the time these regulatory steps were taken.
37. For the reasons set out in detail in the paragraphs that follow, the Claimant considers that, in so determining, the Tribunal manifestly exceeded its powers; failed to state the reasons on which the Award was based; and disregarded a fundamental rule of procedure. The Claimant seeks the annulment of the Award on those bases.

## **V. Grounds for the Annulment of the Award**

38. In this section, in accordance with Rule 50(1)(c)(ii) of the ICSID Arbitration Rules, the Claimant sets out the detailed grounds upon which his Application for annulment of the Award is based.

### ***A. That the Tribunal manifestly exceeded its powers in determining that it does not have jurisdiction over the Claimant’s claims under the BIT***

39. An arbitral tribunal derives its powers from the arbitration agreement entered into by the parties - in this case the UK-Indonesia BIT. Where, as here, the arbitration agreement provides for ICSID arbitration, the ICSID Convention is incorporated by reference into the parties’ agreement. As a result, the scope and limit of the Tribunal’s powers are to be found in the ICSID Convention and any relevant provisions in the BIT.

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<sup>15</sup> *Ibid.*, para. 196.

40. According to Article 52(1)(b) of the ICSID Convention, any excess of powers by a tribunal must be “*manifest*”. The ordinary meaning of manifest is “*clear*” or “*evident*”. It follows therefore that the requirement that a tribunal’s excess of powers be “*manifest*” does not necessarily constitute a requirement that such excess be of a serious or grave nature.
41. In *The ICSID Convention: A Commentary*, Professor Schreuer explains that “*the word [manifest] relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis*”.<sup>16</sup>
42. This approach to the requirement that a tribunal’s excess of power be manifest was approved in annulment decisions in *Wena Hotels v. Egypt*<sup>17</sup>, *CDC v. Seychelles*<sup>18</sup> and *Repsol v. Petroecuador*.<sup>19</sup>
43. One often-cited example of a manifest excess of powers occurs when a tribunal exceeds its jurisdiction in respect of the dispute, or any aspect of the dispute, before it.
44. Jurisdiction is defined at Article 25(1) of the Convention as extending “*to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally*”.
45. Article 26 of the Convention provides that “[*c*]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.” Accordingly, it is not within

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<sup>16</sup> Exhibit CLAA-1: Schreuer, *The ICSID Convention: A Commentary*, Second Edition, Article 52, para. 135.

<sup>17</sup> Exhibit CLAA-2: *Wena Hotels Limited v. Arab Republic of Egypt* (Case No. ARB/98/4), Decision on Annulment, 5 February 2002, para. 25.

<sup>18</sup> Exhibit CLAA-3: *CDC Group plc v. Republic of the Seychelles* (Case No. ARB/02/14), Decision on Annulment, 29 June 2005, para. 41.

<sup>19</sup> Exhibit CLAA-4: *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador* (“Petroecuador”) (Case No. ARB/01/10), Decision on Annulment, 8 January 2007, para. 36.

the powers of the tribunal either (i) to refuse to decide a dispute or any part of a dispute which is the subject of the arbitration agreement between the parties; or (ii) to exceed its jurisdiction in deciding a matter which is not the subject of the issue to be determined by the tribunal.

46. This principle was confirmed by the *ad hoc* Committee in *Vivendi I*:

*“It is settled [...] that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power. Subject to that qualification, however, the failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee’s view to a manifest excess of powers within the meaning of Article 52(1)(b).”*<sup>20</sup>

47. This principle was underlined by the tribunal in *Soufraki v. UAE*. In that case, the tribunal held that “[t]he manifest and consequential non-exercise of one’s full powers conferred or recognized in a tribunal’s constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as the overstepping of the limits of that power”.<sup>21</sup>

48. In determining that it does not have jurisdiction to hear the Claimant’s claims against the Respondent arising out of his investment in Bank Century, in its Award the Tribunal stated that the scope of its enquiry was limited to “a question of law, that is, the meaning of BIT Article 2(1), with particular attention to the meaning of the phrase ‘granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending it or replacing it’”. The Tribunal further noted that “any evidence regarding the question whether the Claimant complied with provisions of Indonesian law in respect to admission of

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<sup>20</sup> Exhibit CLAA-5: *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (Case No. ARB/97/3), Decision on Annulment, 3 July 2002, para. 86.

<sup>21</sup> Exhibit CLAA-6: *Houssein Nuaman Soufraki v. United Arab Emirates* (Case No. ARB/02/07), Decision on Annulment, 5 June 2007, para. 43 (emphasis in original).

*his investment is distinct from the evidence relating to the merits of the Claimant's claims.*"<sup>22</sup>

49. The limited scope of the Tribunal's enquiry at this stage, upon which the Claimant relied in the presentation of his case in response to the Respondent's Rule 41(1) Application, was set out in the Tribunal's Decision on Bifurcation dated 22 June 2012 and reiterated at paragraphs 33 to 35 of its Award. In that Decision, the Tribunal held that the Respondent's Rule 41(1) Application would be "*strictly limited to the objection described in paragraph 9*" which states that the "*Claimant's investment is excluded from coverage by the BIT due to its failure to meet the requirements of its Article 2(1)*" and that it would "*not entertain any legal argument, nor consider any evidence, that relates to any other matter*".<sup>23</sup>
50. In its Award, having considered the interpretation of the meaning of "*granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it*" and determined that the Claimant's investment was capable of meeting that requirement, the Tribunal held that it did not have sufficient evidence before it as to the admission of the Claimant's investment by the Respondent's Central Bank to find that the Claimant's investment was "*granted admission in accordance with [the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it]*".<sup>24</sup>
51. In reaching this conclusion, the Tribunal made a determination as to the extent of the admission procedure carried out by the Respondent. But the Tribunal made a dispositive issue out of the importance of the Respondent Central Bank's awareness of the Claimant's position as shareholder in Bank Century at the time the admission procedure was undertaken. This directly contradicts the Tribunal's own stated, limited scope of its enquiry, which required assessing only "*any*

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<sup>22</sup> Award, para. 33.

<sup>23</sup> Exhibit CA-3: *Rafat Ali Rizvi v. Republic of Indonesia* (Case No. ARB/11/13), Decision on Bifurcation under Rule 41(3), 22 June 2012, paras. 9, 28.

<sup>24</sup> Award, para. 198.

evidence regarding the question *whether the Claimant complied with provisions of Indonesian law in respect to admission of his investment*".<sup>25</sup> (Emphasis added).

52. In so doing, the Tribunal exceeded its remit to determine the question of whether the Claimant's investment was granted admission in accordance with Article 2(1) of the BIT.
53. Having set such a limited scope of enquiry in its Decision on Bifurcation, it was a manifest excess of powers for the Tribunal to make a dispositive question out of the extent to which the Respondent was aware of the Claimant's shareholding in Bank Century when considering admitting his investment into the Republic of Indonesia. In short, the Tribunal exceeded its jurisdiction by setting up an inquiry, and then making the dispositive issue one that was not part of its inquiry. Such an excess of jurisdiction constitutes a manifest excess of the Tribunal's powers for the purposes of Article 52(1)(b).

***B. That the Tribunal manifestly exceeded its powers in misdirecting itself as to the law and the relevant question to be determined as a matter of fact***

54. As part of its limited enquiry into the meaning of Article 2(1) of the BIT, the Tribunal was required to, and did, determine the meaning of the phrase "*admitted in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it*".
55. Favouring the Claimant's arguments on the matter, the Tribunal concluded that:

*"by referring to investments 'granted admission in accordance with' the FCIL, BIT Article 2(1) potentially can embrace not only investments granted admission by the BKPM or pursuant to authority delegated by BKPM, but also investments granted admission pursuant to conditions imposed by Indonesia with respect to sectors that are open to investment but not governed by the BKPM procedures. For the banking sector, such conditions of admission would be administered by Bank Indonesia"*.<sup>26</sup>

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<sup>25</sup> *Ibid.*, para. 33.

<sup>26</sup> *Ibid.*, para. 139.

56. Having found that the meaning of Article 2(1) of the BIT is such that the Claimant's investment in the banking sector was capable of admission in accordance with the relevant law and was therefore, at least in theory, entitled to BIT protection, the Tribunal turned to the question of whether the Claimant's investment was, in fact, so admitted.
57. At this point, following on from its finding as to the Respondent's ability to impose admission requirements on investments such as the Claimant's in the banking sector, the Tribunal observed that the "*Claimant does not rely on Bank Indonesia procedures that are particular to foreign investors or that are formally denominated as admission procedures*" and concluded, on that basis, that the "*question before the Tribunal is whether, taken as a whole, the regulatory steps taken by Bank Indonesia comprised a de facto grant of admission of Claimant's stated investment.*"<sup>27</sup>
58. However, in answering this question, the Tribunal wrongly considered as relevant Bank Indonesia's knowledge of the Claimant's shareholding in the investment at the time of its admission. Although the Tribunal held that "*the evidence before [it] establishes that Bank Indonesia took the three regulatory steps on which Claimant relies [...] Claimant has not established that Bank Indonesia took these three steps in awareness of Claimant's shareholding in the investment. That is an important deficiency in his contention that Bank Indonesia's approvals, which apply equally to foreign and local investors, amount to a grant of admission of his stated investment*".<sup>28</sup>
59. With respect, there is absolutely no basis in law or fact for this conclusion. Having found, as a matter of Indonesian law, that Bank Indonesia is empowered to admit investments such as the Claimant's in accordance with the Foreign Capital Investment Law, in circumstances where Bank Indonesia's approvals process draws no distinction between local and foreign investments in the banking sector, such that there is effectively no admissions procedure specific to foreign

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<sup>27</sup> *Ibid.*, para. 182.

<sup>28</sup> *Ibid.*, para. 196.

- (as opposed to local) investments in the banking sector, that is a matter for the policymakers in the Indonesian banking sector. It is not open to the Tribunal to deny the Claimant's investment the protection of the BIT on the basis of a hypothetical admissions process (i.e., one that would take into account whether the individual vetted was foreign or domestic), applicable to foreign investments.
60. The effect of the Tribunal's approach to this question is to elevate whatever admission requirements the Respondent's banking sector imposes upon foreign investments and to deny the Claimant's investment BIT protection on the basis that the Claimant's investment has not complied with such a hypothetical elevated admissions process. The net effect of this process is to deny BIT protection to foreign investments such as the Claimant's on the basis of admissions processes which the Respondent itself was not concerned to impose. This is not right as a matter of Indonesian or international law and does not give effect to the intention and purpose of the BIT which is to create and encourage a favourable environment for foreign investment as between the Respondent and the United Kingdom and their respective investors.
61. This is particularly true in circumstances where the Tribunal has found as a matter of fact that Bank Indonesia approved the acquisition of shares in the pre-merger banks by Chinkara, a foreign legal entity, without imposing any specific admission process on Chinkara's investment despite being afforded the opportunity to do so, had it so wished.
62. It is clear that a manifest excess of powers can occur on a question of merits.<sup>29</sup> In the circumstances, it is self-evident that the Tribunal has erred in its Award, as a matter of both law and fact. This constitutes a manifest excess of the Tribunal's powers and the Claimant contends that the Tribunal's finding on this point in its Award must therefore be annulled.

*C. That the Tribunal failed to state the reasons on which the Award was based*

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<sup>29</sup> Exhibit CLAA-7: *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (Case No. ARB/01/7), Decision on Annulment, 21 March 2007, para. 44.

63. Article 48(3) of the ICSID Convention provides that an ICSID award must state the reasons on which it is based. The rationale for this requirement was noted by the *ad hoc* Committee in *Wena Hotels v. Egypt*:

*“This requirement is based on the Tribunal’s duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision.”*<sup>30</sup>

64. In *Lucchetti v. Peru*, the *ad hoc* Committee held that the requirement of reasons *“aims at ensuring the parties’ right to ascertain whether or to what extent the tribunal’s findings are sufficiently based on the law and on a proper evaluation of relevant facts.”*<sup>31</sup>

65. In its leading decision on annulment for failure to state reasons under Article 52(1)(e), the *ad hoc* Committee in *Vivendi I* said that *“annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision”*.<sup>32</sup>

66. In concluding that it did not have sufficient evidence before it to determine that the Claimant’s investment had been admitted in accordance with the Foreign Capital Investment Law No. 1 of 1967, as required by Article 2(1) of the BIT, as explained in section B above, the Tribunal made no reference to the specific admission criteria by which it considered the Claimant to be bound.

67. In reaching its decision, the Tribunal first held that *“the question before [it] is whether, taken as a whole, the regulatory steps taken by Bank Indonesia comprised a de facto grant of admission of Claimant’s investment”*. The Tribunal went on to recognize that the steps upon which the Claimant relied as constituting the *de facto* admission process were *“the approval of Chinkara’s share purchases*

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<sup>30</sup> Exhibit CLAA-2: *Wena Hotels Limited v. Arab Republic of Egypt* (Case No. ARB/98/4), Decision on Annulment, 5 February 2002, para. 79.

<sup>31</sup> Exhibit CLAA-8, *Lucchetti v. Peru* (Case No. ARB/03/4), Decision on Annulment, 5 September 2007, para. 98.

<sup>32</sup> Exhibit CLAA-5: *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (Case No. ARB/97/3), Decision on Annulment, 3 July 2002, para. 65.

*in Pikko and Danpac; the approval of the Bank Century merger and the ‘fit and proper’ test to which Claimant was subjected. Claimant emphasizes that Bank Indonesia was aware of his ultimate ownership of the Pre-Merger Banks and Bank Century at the time of the steps in what he regards as a de facto admission process”.*<sup>33</sup>

68. Having laid out the parameters for its analysis of the question before it, the Tribunal went on to determine that “*the question is whether Bank Indonesia was aware of his shareholding when it took the regulatory steps on which Claimant relies*”. On that basis alone, the Tribunal concluded that “*Claimant has not established that Bank Indonesia took these three steps in awareness of Claimant’s shareholding in the investment*”<sup>34</sup> and therefore that it had insufficient evidence before it that the Claimant’s investment was granted admission in accordance with the Foreign Capital Investment Law.
69. In reaching its conclusion in this regard, the Tribunal failed to state any reasons (i) why it considered the Respondent Central Bank’s state of awareness to be relevant to the question of whether the Claimant’s investment had complied with the applicable admission process; (ii) why, absent any specific identifiable admission process relevant to his investment, the regulatory steps with which it found the Claimant had complied to the Respondent’s satisfaction were not sufficient to constitute admission in accordance with the Foreign Capital Investment Law for the purposes of the BIT; and (iii) why it considered the evidence before it to be insufficient.
70. In the circumstances, in relation to the key question of whether the Claimant’s investment was granted admission in accordance with the Foreign Capital Investment Law, the Tribunal has failed to explain the rationale for its decision and it is impossible to reconstruct the Tribunal’s reasoning in reaching its conclusion.

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<sup>33</sup> Award, para. 182.

<sup>34</sup> *Ibid.*, paras. 194 & 196.

71. Indeed, the Tribunal’s putative review of the documentary and witness evidence makes matters less clear.<sup>35</sup> For example, on the one hand, the Tribunal states that the evidence is not in dispute that the Claimant passed a vetting process.<sup>36</sup> But then the Tribunal seeks to impose on the evidence a construct: that passing the vetting process as a “President Commissioner” of a bank somehow would differ from the vetting process imposed on a shareholder in the claimed investment.<sup>37</sup>
72. The Tribunal, upon reviewing this evidence, concludes that there is an “attenuated link” between the vetting process (which all parties agree the Claimant passed) and the asserted “*de facto admission of [the Claimant’s investment vehicle’s] investment in the pre-merger banks.*”<sup>38</sup> The Tribunal does not explain why this “attenuated link” matters, or why any different test would have made any difference either.
73. In accordance with the test laid down in *Vivendi I* therefore, the Claimant considers that the Tribunal’s rationale in reaching its decision on jurisdiction is incomplete as expressed. On that basis, the Claimant contends that the Award fails to state the reasons upon which it is based and respectfully requests that the Award be annulled in accordance with Article 52(1)(e) of the ICSID Convention.

*D. That the Tribunal disregarded a fundamental rule of procedure in reversing the burden of proof on jurisdiction*

74. The object and purpose of the power to annul an award under ICSID Convention Article 52(1)(d) is control of the integrity of the arbitral procedure.<sup>39</sup> To merit annulment the departure from the rule is serious; and the rule concerned must be fundamental.<sup>40</sup> This can occur when the burden of proof on an issue is reversed.<sup>41</sup>

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<sup>35</sup> *Ibid.*, paras. 183-188.

<sup>36</sup> *Ibid.*, para. 185.

<sup>37</sup> *Id.*

<sup>38</sup> *Ibid.*, para. 188.

<sup>39</sup> Exhibit CLAA-9: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (Case No. ARB/03/25), Decision on Annulment, 23 December 2010, para. 180; Exhibit CLAA-6: *Soufraki v. UAE* (Case No. ARB/02/7), Decision on Annulment, 5 June 2007, para. 23.

<sup>40</sup> Exhibit CLAA-10: *Maritime International Nominees Establishment v. Guinea* (Case No. ARB/84/4), Decision on Annulment, 14 December 1989, para. 4.06 (“[T]he text of Article 52(1)(d) makes clear that not every departure from a rule of procedure justifies annulment; it requires that the departure be a *serious* one and that the rule of procedure be *fundamental* in order to constitute a ground for annulment”); Exhibit

75. Although the burden of proof on jurisdiction lies on the Claimant, that burden is to make a *prima facie* showing, i.e. some evidence that suggests the jurisdictional requirements are met.<sup>42</sup> After such a showing has been made, the burden of proof falls on the Respondent, as proponent of the Objections to Jurisdiction.
76. As described in Section V.A. above, having delimited its inquiry to assessing only “any evidence regarding the question whether the Claimant complied with provisions of Indonesian law in respect to admission of his investment,” the Tribunal then disposed of the inquiry based on Respondent Central Bank’s awareness (or lack thereof) of the Claimant’s position as shareholder in Bank Century at the time the admission procedure was undertaken. By refusing to adhere to the inquiry that the Tribunal itself set out, the Tribunal required the Claimant to prove an additional element: that the Respondent was aware that the Claimant was being vetted in his role as a shareholder, instead of vetted as a President Commissioner of a bank.<sup>43</sup> This reversed the burden, requiring claimant to make more than a *prima facie* showing of jurisdiction.
77. Indeed, the Tribunal intimated that being vetted as a shareholder versus as a President Commissioner might matter. But the Tribunal never explained why such a difference might matter. In this way, by requiring Claimant to prove an element that Claimant was unaware it had to prove, Claimant was also denied the ability to make the case it had to meet.

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CLAA-9: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (Case No. ARB/03/25), Decision on Annulment, 23 December 2010, para. 180; Exhibit CLAA-2: *Wena Hotels Limited v. Arab Republic of Egypt* (Case No. ARB/98/4), Decision on Annulment, 5 February 2002, para. 58.

<sup>41</sup> Exhibit CLAA-11: *Klöckner v. Cameroon*, Resubmitted Case (Case No. ARB/81/2), Decision on Annulment, 17 May 1990, 14 ICSID Rep. 102, para. 6.80.

<sup>42</sup> E.g., Exhibit CLAA-12: *Wena Hotels Limited v. Arab Republic of Egypt* (Case No. ARB/98/4), Decision on Jurisdiction, 28 June 1999, paras. V, VI (tribunal refused to convert a preliminary jurisdictional dispute, requiring claimant to make only a *prima facie* showing), 41 Int’l Legal Materials 890 (2002).

<sup>43</sup> Award, paras. 185-186.

## **VI. Stay of Enforcement of the Award**

78. Pursuant to Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules, the Claimant requests that the enforcement of the Award be stayed until such time as the Tribunal has determined the outcome of this Application.
79. This request for a stay of enforcement of the Award pending the outcome of the *ad hoc* Committee's decision on this Application is made so as to avoid further irreparable harm to the Claimant, which would occur should the Respondent be permitted to continue with its enforcement action in several jurisdictions.
80. Although the Award does not place any positive obligations on the Parties, with the exception of a requirement that each Party bears its own costs of the proceedings, as a result of correspondence sent by the Respondent to the Centre following issue of the Award, the Claimant has reason to believe that the Respondent intends to enforce the Award, to the extent possible, in Indonesia, commencing with its registration.
81. Thereafter, the Claimant is concerned that the Respondent will use the registered and enforceable Award to generate further negative publicity surrounding the Claimant's role in the bailout of Bank Century and to advance its position in various jurisdictions in relation to the seizure of assets belonging to the Claimant.
82. The Claimant has already suffered, and continues to suffer, significant on-going moral, reputational and financial harm as a result of the Respondent's actions in expropriating his investment and publicly pursuing him through the Indonesian Courts as a scapegoat for its own government's corrupt and unlawful actions in nationalizing Bank Century. The Claimant has reason to believe that the Respondent intends to use the Award to harm further the Claimant in this regard.

**VII. Prayer for Relief**

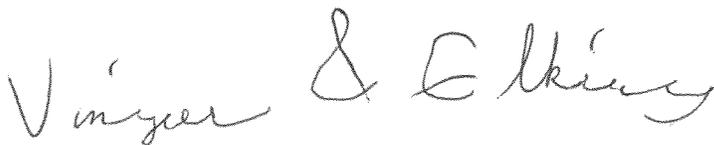
83. The Claimant requests:

- (a) that pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Arbitration Rules, the Award issued in this case be annulled; and
- (b) that pursuant to Article 52 of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules, the enforcement of the Award be stayed until the *ad hoc* Committee rules on the annulment thereof; and
- (c) that pursuant to Rule 54 of the ICSID Arbitration Rules, the Secretary-General notify the parties of the provisional stay of the Award; and
- (d) pursuant to Articles 61(2) and 52(4), an order that the Respondent pay the Claimant's costs of this annulment proceeding, together with the Centre's costs.

Respectfully submitted this 11<sup>th</sup> day of November 2013

GEORGE BURN, TIMOTHY TYLER and LOUISE WOODS

VINSON & ELKINS R.L.L.P.

A handwritten signature in cursive script that reads "Vinson & Elkins". The signature is written in dark ink and is positioned below the typed name of the law firm.