

<p>1 Friday, 14 February 2020</p> <p>2 (9.30 am)</p> <p>3 SVEN JÖNSEN: Everybody is welcome back. Since we met the</p> <p>4 last time we have watched and listened to the</p> <p>5 examinations in the district court. We have received</p> <p>6 another couple of documents from the parties,</p> <p>7 I understand that you have also sent it to each other so</p> <p>8 the Court of Appeal will not send any of that out.</p> <p>9 We are going to spend today listening to closing</p> <p>10 arguments and in the order that we have sent out, the</p> <p>11 National Bank is going to begin. Is that the way you</p> <p>12 have planned things also?</p> <p>13 MR GUTERSTAM: Correct.</p> <p>14 SVEN JÖNSEN: I understand that you have until lunch, but we</p> <p>15 have a break whenever you think it is appropriate for</p> <p>16 about 15 minutes.</p> <p>17 We are recording this, please go ahead.</p> <p>18 Closing submissions by MR GUTERSTAM</p> <p>19 MR GUTERSTAM: I will start by handing out some slides and</p> <p>20 maybe we could hand the presentation equipment up.</p> <p>21 (Handed)</p> <p>22 The way we have planned our closing argument is that</p> <p>23 up until lunch we are going to consider the first two</p> <p>24 grounds.</p> <p>25 Firstly, that the property does not belong to</p> <p style="text-align: center;">Page 1</p>	<p>1 analysis of this must be made.</p> <p>2 During our opening statement we have gone through</p> <p>3 all the contracts that we have access to, all of them</p> <p>4 except for sub-custodian agreement. We have checked</p> <p>5 whether the assets have been mixed in the various</p> <p>6 accounts. From what we understand, all the</p> <p>7 circumstances are undisputed.</p> <p>8 So what remains to be done? What does the Court of</p> <p>9 Appeal have to do? What remains to do is only to assess</p> <p>10 the legal question and not the question of evidence.</p> <p>11 I would just like to clarify the National Bank's</p> <p>12 position here. Since we said in our submission to the</p> <p>13 district court and in other statements the National</p> <p>14 Bank's position is that every level in the debtor chain</p> <p>15 has a claim on its closest counterparty and nobody else.</p> <p>16 Therefore Kazakhstan cannot have the right of ownership</p> <p>17 in any specific property or assets in Sweden.</p> <p>18 If the court were nevertheless going to find that</p> <p>19 there is a right of claim on the securities, that does</p> <p>20 not belong to the account holder that's BNY Mellon. The</p> <p>21 national bank has in second place a claim that this</p> <p>22 right cannot belong to any other than the National Bank.</p> <p>23 This is since the National Bank is the investor in this</p> <p>24 acquisition structure and Kazakhstan was never</p> <p>25 registered in any register in any country as the holder</p> <p style="text-align: center;">Page 3</p>
<p>1 Kazakhstan.</p> <p>2 Then that the securities that were required within</p> <p>3 the structure that we have reported on is not located in</p> <p>4 Sweden.</p> <p>5 Then our colleagues are going to talk about the</p> <p>6 objections regarding state immunity after lunch. Of</p> <p>7 course the national bank concurs with everything that</p> <p>8 will be said on state immunity after lunch.</p> <p>9 Our plan is that we will start and in general about</p> <p>10 the central law, why Kazakhstan does not own the</p> <p>11 identified securities and why Kazakhstan does not have</p> <p>12 a claim on the securities in Sweden.</p> <p>13 Then a summary on Swedish law, my colleague Marcus</p> <p>14 is going to talk about that.</p> <p>15 Then I will talk a bit about foreign law.</p> <p>16 Before Magnus Nygren talks about conflict of laws</p> <p>17 and jurisdiction.</p> <p>18 This is the plan for this morning. Before I give</p> <p>19 the floor to Marcus I would just like to mention that</p> <p>20 the relevant circumstances for assessing who the</p> <p>21 property belongs to, the National Bank says that that is</p> <p>22 the contractual relationship between the parties, who</p> <p>23 acquired which right in relation to them and where the</p> <p>24 assets were held in accounts in the debtor chain,</p> <p>25 whether the assets were mixed or not and the legal</p> <p style="text-align: center;">Page 2</p>	<p>1 of the securities.</p> <p>2 The enforcement agency has enforced an enforcement</p> <p>3 against BNY Mellon and SEB. That means that the</p> <p>4 National Bank and BNY Mellon has had a freeze of the</p> <p>5 corresponding securities in London. Of course the</p> <p>6 National Bank has an interest in this case regardless of</p> <p>7 whether the National Bank is the owner of the securities</p> <p>8 or the claim on securities in Sweden.</p> <p>9 With that I will hand over to my colleague Marcus,</p> <p>10 who is going to go through the following ...</p> <p>11 Closing submissions by MR AXELRYD</p> <p>12 MR AXELRYD: I am going to go through items 1 to 5. That</p> <p>13 means that in my closing agreement I am going to explain</p> <p>14 why the National Bank believes that attached property</p> <p>15 does not belong to Kazakhstan according to Swedish law.</p> <p>16 If we start with an introduction. The law on</p> <p>17 dematerialised securities that are held in chains of</p> <p>18 custodians, it's complicated and still there is no</p> <p>19 guiding case law in Sweden. Within the court of law</p> <p>20 nonetheless is the legal situation the court has to take</p> <p>21 as the EU legislation on dematerialised securities as</p> <p>22 a point of departure. This regulates prior realities in</p> <p>23 a proper manner and of course Swedish law has to be</p> <p>24 interpreted in that the EU regulations have the intended</p> <p>25 effect.</p> <p style="text-align: center;">Page 4</p>

<p>1 The accounts with registered securities that this 2 case is about are the following. Securities of this 3 type of category and number are registered in accounts 4 with Euroclear, SEB and BNY Mellon. The first question 5 that you have to ask yourself then is: where are the 6 securities located? Are they with Euroclear, SEB or 7 BNY? They can hardly be in several accounts at the same 8 time.</p> <p>9 There are two accounts that stand out.</p> <p>10 The Euroclear accounts because it has a legal 11 effect, it is when you register this account that the 12 financial instrument is formed and exists as 13 an independent right in relation to a company.</p> <p>14 The BNY account stands out because that is the only 15 account where the holder, the National Bank, is 16 registered as the account holder and the owner of the 17 securities.</p> <p>18 The central bank holds that this structure means 19 that the securities are located with Euroclear and 20 within the framework of the EU regulation in this field 21 that Marcus Nygren is going to talk about later, the 22 structure means that the securities are to be considered 23 to be located with BNY. There is an important practical 24 reason why legal law says that the securities are deemed 25 to be located with BNY, as we've heard from the</p> <p style="text-align: center;">Page 5</p>	<p>1 those securities in pledge of loans they can --</p> <p>2 This question has to be solved in practical terms, 3 investors have to be able to borrow against their 4 securities in custodies. That means that the securities 5 must be with the original investor and that investor 6 should be able to pledge their entire right in relation 7 to the original custodian in the country where the 8 original custodian has the relevant register. The 9 solution presupposes that's not possible to attach the 10 securities in other jurisdictions that the original 11 custodian keeps on behalf of their customers. My 12 colleague Magnus is going to talk more about this 13 directive.</p> <p>14 What I want you to remember now is that Swedish law 15 has to interpret in such a way that the security 16 directive has its intended effect. This means that 17 there must be prohibition on upper tier. This is that 18 Swedish law has to interpret the law making it 19 practically possible to invest in securities in various 20 jurisdictions through one original custodian and also 21 pledge your own securities with the original custodian.</p> <p>22 We can just note here from this slide that this 23 begins here at the top with the investor. But when we 24 talked about upper tier attachment you have to turn the 25 slide around. Then this starts down with Euroclear</p> <p style="text-align: center;">Page 7</p>
<p>1 examination of Mats Gunnarsson and which is clear from 2 his witness statement. It is common for Swedish 3 securities to be acquired through custodian chains in 4 several levels. Originally there is a contract with the 5 custodian who then invests the securities in several or 6 in various jurisdictions, for example, an issue than an 7 investor in Denmark wants to invest in securities in 8 Spain and Switzerland, the investor goes to their bank, 9 they make the investments in their bank, the bank is the 10 original custodian and the investor usually then also 11 wants to borrow against their holdings in the bank and 12 that lien is between the bank and the investor. The 13 holdings in the bank is the pledge for a loan so that 14 further investments and securities can be made or they 15 can use the value of the securities in another way 16 without having to realise the securities.</p> <p>17 The same thing going to constitute a security or 18 pledge is a value that performs the investment and for 19 the investor it's important to borrow against 20 a security. This happens all the time and this is 21 regardless of whether it's Swedish or foreign 22 securities. If such loan is possible the bank has to 23 know that the lien on the pledge is a proper security 24 for the loan, the pledge cannot be effective security if 25 there is an upper tier ... if the original investor has</p> <p style="text-align: center;">Page 6</p>	<p>1 going the other direction.</p> <p>2 The acquisition structure that this case is about 3 and that Swedish law is applied to is financial matters 4 and securities and SEB custodian account with Euroclear. 5 The applicant in its opening statement has reported on 6 a number of documents where it says that the Swedish 7 securities that were acquired within the framework of 8 the structure were kept with SEB. This is correct that 9 it was kept in SEB's custody account with Euroclear.</p> <p>10 SEB was also the account keeping institute with 11 Euroclear and that means SEB can have access to the 12 custody account and can makes changes to it. However, 13 it does not mean as the applicant is claiming that the 14 securities are kept in the custody account that is in 15 SEB's account register. If a registry in SEB's account 16 register would mean the securities are kept in that 17 register it's hard for us to understand why the 18 securities are not then later transferred to BNY when 19 BNY registers the same category and the same number in 20 the national bank's custody accounts in the UK.</p> <p>21 If you compare the securities with the material 22 assets, the comparison can be made with grain. It can 23 be compared with a silo for grains where SEB is keeping 24 their customers' grains. If you look at this 25 illustration, you can see that the Swedish bank say it's</p> <p style="text-align: center;">Page 8</p>

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<p>1 SEB that the CSD account that is a silo full of grain.</p> <p>2 BNY then has an agreement with SEB and SEB keeps</p> <p>3 BNY's grains in Sweden, the bank has an agreement with</p> <p>4 a bank in Denmark and according to that agreement the</p> <p>5 Swedish bank keeps the securities belonging to the</p> <p>6 Danish bank but also the investor's securities in the</p> <p>7 CSD account. In SEB's register as well as in BNY's</p> <p>8 register there are also notes made how much grain SEB is</p> <p>9 holding on behalf of BNY and on behalf of BNY's</p> <p>10 customers. These notes in BNY's and SEB's registers in</p> <p>11 a purely Swedish context could be of significance for</p> <p>12 the protection of BNY's customers against their</p> <p>13 creditors. That is clear from the so-called grain case.</p> <p>14 I am not going to talk about that here. We are just</p> <p>15 going to refer to what we've said on that case on</p> <p>16 31 January of this year, articles 67 and 68. Regardless</p> <p>17 of what the case may be about, this mixing of the</p> <p>18 securities in Euroclear's account means that BNY's</p> <p>19 customers cannot be deemed to have any ownership right</p> <p>20 to the securities that can be attached.</p> <p>21 I will come back to this but the consequences of</p> <p>22 this is that the attachment of the customer's right to</p> <p>23 the securities must instead be made by attachment of the</p> <p>24 customer's claim on their bank. This is the claim on</p> <p>25 the bank in Denmark in this case.</p> <p style="text-align: center;">Page 9</p>	<p>1 these jurisdictions. A reasonable thing would be that</p> <p>2 an invested asset is deemed to be located and be</p> <p>3 available for attachment in one jurisdiction with the</p> <p>4 original custodian. It appears after all the original</p> <p>5 custodian that the investor has entered in to agreement</p> <p>6 with, it's that country which determines the rights that</p> <p>7 the investor can claim with respect to the securities.</p> <p>8 In this case it's Danish law that is considered to</p> <p>9 determine the right that the investor has to the</p> <p>10 securities. In this light too the only reasonable thing</p> <p>11 is that there's a prohibition against upper tier</p> <p>12 attachment according to Swedish law.</p> <p>13 This was my introduction and before we apply Swedish</p> <p>14 law to the circumstances we are briefly going to go</p> <p>15 through some fundamental basics on Swedish law.</p> <p>16 The question of who does an asset belong to</p> <p>17 according to Swedish law, according to the enforcement</p> <p>18 code, coincides with the question whether there is</p> <p>19 a right of separation in the case of bankruptcy. There</p> <p>20 is an important difference that I will come back to.</p> <p>21 The point of departure when it comes to enforcement law</p> <p>22 is described by Lindskog, he says that in the beginning</p> <p>23 as an owner he has right to separate an asset belonging</p> <p>24 to him that is kept with third party even if that party</p> <p>25 is made bankrupt or is the subject of attachment, as</p> <p style="text-align: center;">Page 11</p>
<p>1 In this case too it is the customer's bank, BNY, is</p> <p>2 located abroad. The legal identity of BNY is a Belgium</p> <p>3 bank which has a branch in England and BNY is doing the</p> <p>4 registration. The National Bank's claim is located in</p> <p>5 England, or possibly in Belgium. As a consequence there</p> <p>6 are legal proceedings in Belgium and in England about</p> <p>7 the applicant's attempts at attaching the central bank's</p> <p>8 claim on BNY under the global custody agreement on</p> <p>9 behalf of Kazakhstan. The national bank's claim under</p> <p>10 the global custody agreement of course covers the right</p> <p>11 to Swedish securities of the category and number that</p> <p>12 this case is assessing.</p> <p>13 So this leads us to a more overarching systematic</p> <p>14 argument that you have to take into consideration when</p> <p>15 interpreting Swedish law, why should there be legal</p> <p>16 proceedings in Sweden, England and Belgium about the</p> <p>17 National Bank's rights to Swedish securities that SEB is</p> <p>18 keeping its custody account with Euroclear. This point</p> <p>19 can be illustrated by my Danish example.</p> <p>20 The Danish customer has through the Danish bank</p> <p>21 invested in Spanish, Swedish, German and Swiss</p> <p>22 securities, are proceedings going to be held in each one</p> <p>23 of these jurisdictions? We are saying that this is</p> <p>24 an unreasonable burden on the legal and judicial system</p> <p>25 and an investor that has to defend themselves in all</p> <p style="text-align: center;">Page 10</p>	<p>1 long as the identity is kept on the assets and so the</p> <p>2 separation right to the kept assets doesn't just mean</p> <p>3 that the property is identifiable.</p> <p>4 He describes this as follows. Further you can note</p> <p>5 that an owner in some circumstances through segregation</p> <p>6 can separate property that is instead all the property</p> <p>7 in question. Right of segregation can be reinforcement</p> <p>8 of interest that carries the right of separation. That</p> <p>9 is the right is normally motivated by arguments of</p> <p>10 fairness. So the separation right that coincides with</p> <p>11 the concept of ownership in UB14479.</p> <p>12 But the separation goes further in some cases.</p> <p>13 According to the Accounting Act in some cases there are</p> <p>14 cases where the right of separation goes further than</p> <p>15 the right of ownership. This separation does not follow</p> <p>16 from the ownership right. It's a special type of</p> <p>17 activity that can be created according to the accounting</p> <p>18 Act and Lindskog is describing this as follows.</p> <p>19 It should be highlighted that separation according</p> <p>20 to this law does not mean that the identity has been</p> <p>21 kept from what follows from general substantive</p> <p>22 principles. What's special about this Act is that</p> <p>23 regardless of the identity having ceased within this</p> <p>24 legislation a special type of substantive identity can</p> <p>25 be created.</p> <p style="text-align: center;">Page 12</p>

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<p>1 Lindskog has expanded on this in his textbook. If 2 the substantive identity stops and even though the 3 debtor is creating a protection for the creditor 4 according to this Act, the question arises according to 5 which principles are the rights of the creditor to be 6 assessed. He says that there are two approaches to 7 this.</p> <p>8 The first approach is that by separating the 9 original substantive situation is deemed to have been 10 recreated. Again, there is a right of ownership the 11 creditors' right to separated assets are then to be 12 deemed a right of ownership.</p> <p>13 The second approach is that when you have lost the 14 substantive identity and there is now a relationship of 15 claim between the creditor and the debtor this is what 16 determines the judicial assessment. With this approach 17 the debt will remain without impediment of these funds 18 being separated and the creditors' rights to the 19 separate fund are to be seen as a right sui generis. 20 But you do, according to this law, have the right to 21 security.</p> <p>22 According to my opinion, the latter approach is to 23 be preferred but people have different views on this 24 matter but the Supreme Court has ruled on this issue in 25 2014, page 935, they are also referring to previous</p> <p style="text-align: center;">Page 13</p>	<p>1 the money in the accounts from a legal point of view is 2 a claim. When it comes to money in the accounts, 3 legally speaking this is a question of a claim. For 4 such a claim typically bank accounts where there is 5 a balance, more or less regular provisions regarding 6 claims apply.</p> <p>7 This what I wanted to say about the applicable legal 8 provisions.</p> <p>9 Now we are moving to the section where Kazakhstan 10 doesn't ... an identifiable securities. This is now 11 mostly cash in the account but it's the securities at 12 SEB's custodian account with Euroclear. In this section 13 our starting point is that the EA seized the securities, 14 not the claim to the securities.</p> <p>15 Based on our opening statements the securities 16 should reasonably be in Euroclear's CSD register, 17 through registration on this register they start to 18 exist, a right which is written on the company the 19 registration, this register creates rights of disposal 20 on the company according to LKF and through registration 21 on this register the financial rights with respect to 22 the company are awarded in the property work which 23 I mentioned to you in my opening statement. It follows 24 the rights of ownership follow from registration. 25 It follows from this investigation it's clear that</p> <p style="text-align: center;">Page 15</p>
<p>1 ruling number 71 on page 122 from 1971.</p> <p>2 I will come back to this, but in summary this means 3 that the law that we have now talked about that if 4 a debtor has property belonging to him with a third 5 party it can be attached for the debts of the debtor 6 according to UB14 for as long as the identity is kept. 7 If the right of ownership is ...</p> <p>8 THE INTERPRETER: Sorry, this is extremely difficult legal 9 text to translate simultaneously. I will give up.</p> <p>10 MR AXELRYD: The rights of separation also placed to cash 11 and funds of the amounts. This is example in NG2009 12 page 500, after a general discussion the following 13 follows from the Supreme Court's judgment. The above 14 mentioned applies also to money, someone who has the 15 notes to ... has the right to separate in the 16 perpetrator's bankruptcy statement if the notes can be 17 identified. If the note is exchanged, the right of 18 ownership through substitution transfers to the 19 exchanged money if the money can be identified ... the 20 question has been about physical management of money.</p> <p>21 Therefore the rights of separation applies to cash. 22 The money which illicitly has been received through 23 account transfers or transferred to an empty account, 24 the victim through substitution has the rights of 25 separation to the funds in the accounts. Lindskog said</p> <p style="text-align: center;">Page 14</p>	<p>1 SEB keeps securities for different customers on the same 2 accounts in Euroclear. It's the securities for BNY's 3 own investments and investments made by BNY's customers 4 into Swedish securities. It is not possible to identify 5 when, how or which securities are on this account, when 6 they were acquired within the structure discussed in 7 this case. Through this blending the identity has 8 ceased to exist. It's impossible to arrive at the 9 conclusion that Kazakhstan, or BNY for that matter, had 10 acquired rights of ownership to certain specific 11 securities.</p> <p>12 On the contrary, BNY has a claim for the securities 13 against SEB BNY's customer. In their turn they have 14 a claim to BNY for the securities. There is a chain of 15 debtors. Every party in the chain have a claim to their 16 respective counterparty. This corresponds to the 17 provisions of the English law, where the no-look-through 18 principle is applies which follows from the statement of 19 Professor Gullifer, which is (inaudible) in this case.</p> <p>20 This could be illustrated by the investments in the 21 shares in Handelsbanken. SEB acquires 630 million 22 shares on the account. BNY has an account with SEB. 23 BNY's is the account holder and they have a claim to SEB 24 with respect to 131 million shares. 25 Next level, NBK has an account with BNY, has a claim</p> <p style="text-align: center;">Page 16</p>

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<p>1 to 2.4 million shares.</p> <p>2 Since there is a chain in place and the line of</p> <p>3 claims on several levels every party has a claim to</p> <p>4 their immediate counterparty. Therefore there is a ban</p> <p>5 in place on upper tier attachment.</p> <p>6 When the European legislation on a ban against upper</p> <p>7 tier attachment was developed it was noted that the ban</p> <p>8 of upper tier attachment would merely be a clarification</p> <p>9 of existing law. This is something which was expressed</p> <p>10 in the following matter, in holding arrangements where</p> <p>11 a legal relationship exists only between the account</p> <p>12 holder and in turn the director cannot provide. The</p> <p>13 account holder has no rights against any higher tier</p> <p>14 account provider. Hence there is nothing to attach at</p> <p>15 the higher tier account provider level. The taking up</p> <p>16 of such rights in prohibition rule in such legal context</p> <p>17 is merely stating the obvious and serves as</p> <p>18 a clarification.</p> <p>19 When this legislation was developed experts from the</p> <p>20 different member countries expressed their opinions of</p> <p>21 whether a prohibition against upper tier provision</p> <p>22 existed in the respective countries. The clients from</p> <p>23 Sweden such prohibition was in place.</p> <p>24 Question: in which circumstances can (1) creditor</p> <p>25 and (2) a non-creditor third party, such a liquidator of</p> <p style="text-align: center;">Page 17</p>	<p>1 the NBK has the right to securities.</p> <p>2 Considering that it follows from the English law</p> <p>3 that Kazakhstan cannot even claim any rights to the</p> <p>4 securities in accordance with the GCA, so it's</p> <p>5 impossible for them to be considered to be account</p> <p>6 holders in Sweden or account creditors in Sweden.</p> <p>7 The claimants are saying that Kazakhstan could claim</p> <p>8 NBK's rights under the GCA, so you could equate</p> <p>9 Kazakhstan and NBK at this stage. Even in this</p> <p>10 situation Kazakhstan cannot be considered to be</p> <p>11 a creditor with respect to the CSD account, because</p> <p>12 according to the English law this legal provisions which</p> <p>13 decide the actual rights of the NBK to the securities,</p> <p>14 they apply the so-called no-look-through principle,</p> <p>15 which means that the NBK has no rights with respect to</p> <p>16 SEB.</p> <p>17 It's English law, this is the situation in place.</p> <p>18 This only applies to BNY and one else. This also</p> <p>19 follows from Professor Gullifer's statement, which Karl</p> <p>20 will return to. When it comes to the no-look principle</p> <p>21 there's established case law in England from which this</p> <p>22 principle follows, NBK has no claim to SEB, only to BNY.</p> <p>23 That will be in a completely Swedish context. It's</p> <p>24 completely hypothetical scenario which will be able to</p> <p>25 apply Swedish law, under which conditions could someone</p> <p style="text-align: center;">Page 19</p>
<p>1 the investor, claim securities from the upper tier</p> <p>2 intermediary?</p> <p>3 Answer: a creditor of an investor cannot claim</p> <p>4 securities from an upper tier intermediary.</p> <p>5 The Court of Appeal could stop here with their</p> <p>6 analysis but another question which the court possibly</p> <p>7 asks itself, could it possibly be the case that</p> <p>8 Kazakhstan still owns a claim in Sweden for the</p> <p>9 securities of a number of an issue which are found at</p> <p>10 the account with SEB? Is it the case that the EA have</p> <p>11 attached a claim to the account which is linked to the</p> <p>12 CSD? Can Kazakhstan be considered to be a creditor with</p> <p>13 respect to the CSD account? BNY holds the registered</p> <p>14 holdings on the CSD on behalf of the third party. Is</p> <p>15 that of any importance?</p> <p>16 The answer to this question is clearly no.</p> <p>17 Kazakhstan cannot be considered as a creditor. The</p> <p>18 question is not governed by Swedish law. Kazakhstan and</p> <p>19 the NBK can never receive a better right to the account</p> <p>20 compared to the public order which is applied to the</p> <p>21 relationship and the rights to the securities. What</p> <p>22 could be seen here is that BNY is the account holder</p> <p>23 with SEB and the NBK is an account holder at BNY. The</p> <p>24 relationship between the NBK and BNY is governed by</p> <p>25 English law. So the English law decides to which extent</p> <p style="text-align: center;">Page 18</p>	<p>1 else apart from BNY be consider as an account creditor</p> <p>2 with respect to CSD account.</p> <p>3 The first question which the court should decide on</p> <p>4 this is the account registration and SEB's account</p> <p>5 register. Does that mean that separate claims are</p> <p>6 created with respect to the securities? As you can see</p> <p>7 on the following slides, as BNY has a claim for</p> <p>8 131 million shares to SEB, when BNY and SEB make</p> <p>9 an account registration at SEB for the CSD account, is</p> <p>10 a separate right of claim created for 2.4 million of</p> <p>11 shares which could be the subject of a separate right of</p> <p>12 ownership? Or is it the case that there has been</p> <p>13 blending and you can never talk about the separate</p> <p>14 rights of ownership, BNY has 131 million shares and 2.4</p> <p>15 cannot be considered to be a separate claim.</p> <p>16 Let's assume that you arrive that conclusion that</p> <p>17 a separate claim is created for 2.4 million through</p> <p>18 account registration at the CSD account. Let's assume</p> <p>19 that this is the case. What happens then? Is it</p> <p>20 possible that anyone else apart from BNY can be</p> <p>21 considered to be the account creditor? We have made</p> <p>22 a large number of assumptions. We have ignored the</p> <p>23 following, we've always kept all these issues concerned</p> <p>24 with that. So the question is: who could be consider</p> <p>25 account creditor?</p> <p style="text-align: center;">Page 20</p>

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<p>1 Yes, but only under very special conditions. The 2 question about who should be considered the account 3 creditor, this was something which was in NJA2014, 4 page 935. This case was about a bankruptcy estate 5 administrator which opens an account for the bankruptcy 6 estate. The account was opened in the name of the law 7 firm, so the law firm was the account holder. BNY is 8 the account holder and SEB. On the account there were 9 funds and the question was whether the law firm had 10 a right to offset the amount on the account with respect 11 to their claim to bankruptcy estate.</p> <p>12 What was decided for this issue was who would be 13 considered the creditor account with respect to the 14 claimed account, if the law firm would be considered be 15 an account creditor then the estate only had a claim to 16 the law firm. If the law firm had a counterclaim then 17 this could be offset, but if the estate had the claim to 18 the account then this could not be offset.</p> <p>19 It follows from this legal case that the starting 20 point that the account holder is the account creditor. 21 In this case the law firm, in our case BNY.</p> <p>22 With the reference to NJA1971 275 and the Saras 23 Money case, the position of the Supreme Court was as 24 follows. In the case at hand, the bankruptcy estate was 25 the account creditor despite the fact that the law firm</p> <p style="text-align: center;">Page 21</p>	<p>1 an unbroken chain of ownership can be established with 2 respect to separation and substitution with respect to 3 the claim to the custodian accounts, only in that stage 4 someone else could be considered to be account holder -- 5 sorry, not the account holder but a creditor to the 6 account.</p> <p>7 The method, in this case 2013 they referred to the 8 Saras Money method and the method applied in Saras Money 9 and the requirement to investigate which is found in 10 Saras method, this is something presented in our 11 supplemented letter of appeal. We will not present this 12 case over again, but from a purely Swedish perspective 13 this is an essential case to assess but we will make the 14 conclusions which follow from this case.</p> <p>15 This case shows that the duty to investigate by the 16 enforcement agencies, they have to investigate in 17 immediate circumstances, which is important for the 18 right of ownership. That the applicant should suffer 19 from the flaws in the investigation, so you can't just 20 look at what is in the account now, the custodian 21 account. You have to see whether there is an unbroken 22 chain of owners, the rights of ownership is decided if 23 the identity has been kept, either the original one or 24 through substitution. The rights of ownership with the 25 exception for illicitly acquired money, which is not the</p> <p style="text-align: center;">Page 23</p>
<p>1 was the account holder. Therefore this was because you 2 could create an unbroken chain of ownership through the 3 request for substitution, this is the method which 4 follows from Saras Money case.</p> <p>5 The money of the bankruptcy estate was transferred 6 directly to the account and it was never blended with 7 the law firm's funds. Under these special conditions 8 and the conditions the fact that this was regarding 9 bankruptcy proceedings, under these special 10 circumstances you could say that someone else apart from 11 the account holder would be the counter creditor. But 12 it follows from the same case -- with the reference to 13 1971, page 122 -- that the bankruptcy estate would not 14 have been considered an account creditor if an unbroken 15 ownership chain could have been established according to 16 the methods in Saras Money case.</p> <p>17 So if these funds would have been blended with the 18 law firm's funds, step one, and then to be separated 19 under step two then the bankruptcy estate has no rights 20 of ownership to the claim to the accounts, namely 21 a later separation does not recreate the right of 22 ownership but due to the blending the right of ownership 23 has ceased to exist forever.</p> <p>24 The point of departure is that BNY is the account 25 holder, is the creditor to the account and only if</p> <p style="text-align: center;">Page 22</p>	<p>1 case here, ceases to exist after blending.</p> <p>2 Let's apply the method used by the Supreme Court in 3 this case. We have to see if the investigation 4 presented shows an unbroken chain of ownership for 5 an asset owned by Kazakhstan to the assets attached in 6 Sweden. So you follow the chain of events from the 7 point when the money leaves Kazakhstan and on.</p> <p>8 Step one in the chain, Kazakhstan transfers the 9 funds to the national fund account at the NBK. In this 10 case, I will just refer to what we said in our 11 submission. It is so weird to sit here and to apply the 12 Saras Money case to the relationship between Kazakhstan 13 and the NBK which is governed by the Kazakh law. When 14 it comes to the Kazakh law I would like to refer to my 15 colleague who will present it later, but I will not in 16 detail apply the Saras Money method to Kazakhstan.</p> <p>17 The next step, the money is transferred from the NBK 18 to BNY. With here this is a relationship which is 19 outside of Sweden and English law applies to this. 20 I will not be applying Swedish law to an English 21 circumstances. I would like to refer to what we've said 22 in our statement and to what will be presented later by 23 Karl.</p> <p>24 BNY transfers later the funds to Sweden and this is 25 where Swedish law applies. They transfer the amount</p> <p style="text-align: center;">Page 24</p>

6 (Pages 21 to 24)

<p>1 from their own account and for investors' account in 2 England to a common omnibus account with SEB in Sweden. 3 This is governed by Swedish law, which means that BNY 4 has a claim to an account at SEB. The money which is 5 transferred it's not only the money which the NBK has in 6 its account with BNY, but also BNY's own funds and funds 7 of BNY's other customers, which means that BNY's own 8 funds and BNY's customers' funds are blended at this 9 omnibus accounts. This omnibus account is linked to 10 6,000 custodian accounts, so every time a transaction is 11 made everything is done to the omnibus account. It's 12 impossible to demonstrate that there is unbroken link of 13 ownership to a claim which Kazakhstan have all the way 14 to the claim to SEB.</p> <p>15 Blending has taken place in the omnibus account and 16 therefore the link of ownership is broken forever.</p> <p>17 Kazakhstan or the central bank therefore cannot be 18 considered to have any rights of ownership to the funds 19 in the omnibus account, as the enforcement code 417 20 says. According to what was stated, this link cannot be 21 created later through separation.</p> <p>22 A potential right of ownership to any party 23 different from BNY is completely excluded, which means 24 that the central bank or Kazakhstan cannot acquire any 25 right of ownership to the claim of the account to the</p> <p style="text-align: center;">Page 25</p>	<p>1 Euroclear. You can identify which securities of this 2 account which were acquired by the existing acquisition 3 structure. If the EA attachment referred to the 4 securities not the claim to the securities, then the 5 attachment should be lifted because it has not been 6 presented that the specific security is sold off by the 7 EA to Kazakhstan.</p> <p>8 Kazakhstan is not the creditor with respect to the 9 CSD, so Kazakhstan does not have the claim to the 10 securities of SEB. Kazakhstan's right to SEB is not 11 governed by the Swedish law but the law of the country 12 where this right appeared. So according to the English 13 law Kazakhstan has no rights according to the GCA and 14 also a no-look-through principle applies. Therefore 15 BNY's counterparty can never claim any right with 16 respect to SEB.</p> <p>17 Additionally, Kazakhstan has no right to the 18 securities in accordance of the Kazakh law, which will 19 be presented by Karl. If the attachment made by EA had 20 to do with the claim to the account, this should be 21 lifted since Kazakhstan was not the creditor with 22 respect to the CSD account. But even if you could 23 divert completely from foreign law and if you could 24 pretend it's completely Swedish circumstances, 25 Kazakhstan still would not be an account creditor with</p> <p style="text-align: center;">Page 27</p>
<p>1 cash account just because BNY or SEB transfers some of 2 the funds from the omnibus account to the segregated 3 cash account. BNY is the account holder and no one else 4 can be considered to be the owner according to the 5 method in the Saras Money case.</p> <p>6 So neither Kazakhstan nor NBK acquire any rights of 7 ownership to the claim for the securities to the 8 custodian account just because BNY and SEB replace a 9 part of the claim to the account. Ie after registering 10 the securities at the CSD. This is what happens then 11 BNY conducted business from SEB, so the balance of the 12 omnibus account decreases and the securities are 13 registered with a different account which BNY has with 14 SEB. This is a separation of fund from the omnibus 15 account and that separation of funds creates a right of 16 ownership for Kazakhstan or for the NBK. The rights of 17 ownership is something which is held by the account 18 holder BNY, which means that even if one were to serve 19 that in a Swedish context this registration of accounts 20 of SEB would create separate claims to the separate 21 custodian accounts, it's BNY which is the creditor with 22 respect to the custodian account, no one else.</p> <p>23 Let us summarise what follows from the Swedish law. 24 Kazakhstan cannot be the owner to identified securities, 25 because they have not blended the account with</p> <p style="text-align: center;">Page 26</p>	<p>1 respect to CSD account. Even if it would be the case 2 that SEB's registration of the account means that 3 a separate claim is created linked to the CSD account 4 which could be the subject of a separate right of 5 ownership, it's the account holder which is the account 6 creditor. Unless it's possible to show an unbroken 7 chain of ownership for an asset owned by Kazakhstan to 8 the claim to the CSD account. Such unbroken chain of 9 ownership has not been proven and therefore there's no 10 other rights of ownership, apart from BNY's rights of 11 ownership.</p> <p>12 Therefore this would be lifted even if this will 13 take place in a completely Swedish context, because 14 Kazakhstan is not the account creditor to the CSD 15 account, which means the Swedish law is compatible with 16 the securities directive, upper tier ... prohibited and 17 it's possible for a Swedish investor to pledge its 18 accounts with securities at its local bank and the 19 securities cannot be seized from a sub-custodian in 20 Sweden.</p> <p>21 Maybe it's time to take a break. 22 SVEN JÖNSON: A 15-minute break now. 23 (10.20 am) 24 (A short break) 25 (10.37 am)</p> <p style="text-align: center;">Page 28</p>

7 (Pages 25 to 28)

<p>1 SVEN JÖNSON: Okay, so please go ahead. 2 Submissions by MR GUTERSTAM 3 MR GUTERSTAM: So I am going to say a couple of words on the 4 English and Kazakh levels. Before I do that I would 5 like to say something briefly about how the Swedish 6 court is to apply foreign law. This is really clear 7 from NJA2016, page 288. I am not going to go through 8 that here but I am just going to read what I have 9 underlined here from the quote. It says: 10 "When the Swedish court is to apply foreign legal 11 rules, the court is to interpret and apply the rules in 12 the same way as the court in the other country would 13 have done." 14 They say: 15 "The point of departure, however, is that it's up to 16 the Swedish court as far as possible as to try to apply 17 the foreign law in the same way as a court in the other 18 country would have done.pounds." 19 This is the premise for the assessment and this is 20 the principle of loyal application. Bogdan has written 21 about that and Robert Nordhs has also mentioned this in 22 his expert statement. 23 I am going to say something about the laws in 24 England and whether they are applicable, because if the 25 court does not find that it's efficient to assess it</p> <p style="text-align: center;">Page 29</p>	<p>1 Therefore the foreign owner basically has a foreign 2 right of ownership in the Swedish shares and other 3 registered financial instruments in the Swedish CSD." 4 The question then is does the National Bank or 5 Kazakhstan have this foreign right of ownership in this 6 case? We have reported on all the facts and all the 7 merits during our opening statement. We are not going 8 to do that again. I am just listing the main evidence 9 that the National Bank is invoking. We have the GCA 10 that confirms that it is only the national bank and 11 BNY Mellon that are parties to the agreement and have 12 the rights according to the agreement. BNY Mellon 13 confirmed in a letter that they have no relationship 14 with Kazakhstan and they do not take any instruction 15 from Kazakhstan. Bank of New York Mellon have also 16 confirmed in a letter that the National Bank is the 17 owner and they have attached excerpts from BNY Mellon's 18 register to prove this. 19 Then we have the legal opinion by 20 Professor Louise Gullifer that confirms that the 21 national bank is the only one with a claim, nobody else. 22 Then we have the English AIG judgment and two court 23 rulings from Holland. 24 According to the Supreme Court ruling, the Swedish 25 court can only arrive at the conclusion that it is the</p> <p style="text-align: center;">Page 31</p>
<p>1 according to Swedish law then you have to look at the 2 English law and the English level of the chain of 3 debtors. 4 If the court is to find that Kazakhstan owned the 5 securities and attached securities in Sweden, because 6 the court agreement principle it is English law that is 7 applicable to the substantive matters in England and ... 8 the analysis and the application that needs to be done 9 is to regard who has a claim on BNY Mellon according to 10 English law, is it Kazakhstan or BNY Mellon? What it is 11 that was acquired according to the GCA? 12 If it is the National Bank who does the acquisition 13 under the GCA and therefore the assets in England do not 14 belong to Kazakhstan, then no assets in Sweden can 15 belong to Kazakhstan either. In her account 16 Karin Wallin-Norman comments on this on acquisitions of 17 assets in chains of custodians. She says: 18 "In general the foreign investor gets a foreign 19 right of ownership." 20 We looked at this quote during our opening statement 21 and we'll take another look at it because this is 22 central: 23 "The underlying owners' right against the foreign 24 custodian should in most cases according to Swedish 25 international private law be governed by foreign law.</p> <p style="text-align: center;">Page 30</p>	<p>1 National Bank that has a claim according to the GCA. 2 The foreign right of ownership forms to the National 3 Bank and not Kazakhstan. The conclusion from that is 4 that this fact in itself is sufficient for it not being 5 possible to attach securities held in Sweden and 6 therefore the attachment order is to be lifted. 7 The securities can never belong to Kazakhstan if the 8 owner of the securities, which is the National Bank but 9 it should also be noted that the right of the National 10 Bank according to English law with regard to BNY Mellon 11 that securities in certain categories and number and 12 that right can only be exercised against Bank of New 13 York Mellon and no underlying levels. This follows 14 directly from English law that you can only have a claim 15 on the next level of the chain of debtors, your 16 contractual party. To support this the bank has 17 submitted an excerpt from -- this is clear from 18 Louise Gullifer's legal opinion, she has answered the 19 question on how they view chains of debtors when there 20 is a custodian such as BNY Mellon and a sub-custodian 21 such as SEB. 22 Her reply in her opinion is this: 23 "The rights that a customer has again the bank 24 acting as global custodians are the rights of 25 a beneficiary under a trust as qualified expanded by the</p> <p style="text-align: center;">Page 32</p>

<p>1 terms of the agreement between that customer and the 2 bank (as discussed in paragraph 18 above). However, one 3 result of the English law approach to the holding of 4 securities is that each tier is separate.</p> <p>5 "An account holder only has rights against its own 6 intermediary and it cannot assert any rights against 7 intermediaries further up the chain. This is known as 8 the no-look-through principle. Therefore, the customer 9 has no rights against any other intermediary in the 10 chain, such as the sub-custodian or against the issue."</p> <p>11 We have underlined this and put it in bold.</p> <p>12 The conclusion here is that this relationship in 13 itself means that the attachment of the securities has 14 to be revoked. If the National Bank cannot have any 15 claim on a lower tier of course then Kazakhstan cannot 16 have any such rights either.</p> <p>17 There are no assets belonging to Kazakhstan or the 18 National Bank located in Sweden that can be the subject 19 of attachment.</p> <p>20 During our opening statement and in our statements 21 submitted we have said that the applicant has never 22 specified when and how did Kazakhstan acquire the right 23 of ownership to the securities, to the securities that 24 were attached by the enforcement agency.</p> <p>25 On Tuesday we received an answer to this. They said</p> <p style="text-align: center;">Page 33</p>	<p>1 SVEN JÖNSON: So I understand that UAB61 that you are 2 referring to is also something that you would like us to 3 look at as part of the material, even though it's not 4 included in any of the evidentiary binders?</p> <p>5 MR GUTERSTAM: I will have to come back to you on that. 6 I will check this during lunch, but these are appendices 7 that were attached to the National Bank's statement on 8 22 May to the district court.</p> <p>9 SVEN JÖNSON: We have identified the document, I just wanted 10 to ensure that this is to be part of the procedural 11 material.</p> <p>12 MR GUTERSTAM: Anyway the only thing that they show from 13 this excerpt that they are referring to is that National 14 Bank has acquired the right to a certain category of 15 securities and the number in respect to BNY Mellon in 16 London. That is all that can be claimed by the National 17 Bank against BNY Mellon London. This does not explain 18 how Kazakhstan acquired the right of ownership to 19 certain securities in Sweden. That question is still 20 left unanswered.</p> <p>21 I would like to say something very brief about 22 Kazakh law. The question that is relevant, according to 23 Kazakh law, is whether the national fund is a trust and 24 what right does Kazakhstan to assets in the national 25 trust. As we have discussed several times now, it says</p> <p style="text-align: center;">Page 35</p>
<p>1 that through the transactions that were illustrated on 2 slide 61 in their presentation, this was an excerpt from 3 exhibit 47, through those transactions Kazakhstan has 4 taken over the ownership of the attached securities. 5 This is the slide that they referred to. This is the 6 document that has been submitted by the National Bank.</p> <p>7 This slide does not show any identified securities 8 that the National Bank or Kazakhstan has the right of 9 ownership to. Neither does it show that the National 10 Bank or Kazakhstan has a claim on SEB or Euroclear on 11 the securities, because what we see on this slide is the 12 account history of the National Bank of transactions 13 registered in the National Bank's account in London. 14 That is transactions according to the GCA that are 15 registered with BNY Mellon in England. What this slide 16 show is that National Bank has acquired a right to the 17 securities of a certain category and certain number from 18 Bank of New York Mellon from GCA.</p> <p>19 SVEN JÖNSON: Can I just interrupt here, because this slide 20 says the National Bank's exhibit 47. I don't quite know 21 what's meant by that, because it's not exhibit 47 in 22 this binder.</p> <p>23 MR GUTERSTAM: We are not referring to exhibits. It's 24 probably some pagination or when we submitted this as 25 appendix 1 to appendix 47.</p> <p style="text-align: center;">Page 34</p>	<p>1 explicitly in law and in agreements that that national 2 fund is not Kazakh assets. I have already reported on 3 that.</p> <p>4 The main matter in this dispute is what does it mean 5 for the rights of the National Bank and Kazakhstan that 6 the assets are held in trust? As we have reported from 7 the expert statements on Kazakh law that we have 8 submitted, the national bank has all the right to the 9 assets in the trust. Kazakhstan does not have the right 10 to any specific funds that are transferred to the 11 National Bank according to the national fund agreement. 12 Kazakh law is limited to a guaranteed and targeted 13 transfer of money under procedures stated in law after 14 decisions by Parliament.</p> <p>15 We've heard a lot about this during opening 16 statements, there are no claims on the securities and 17 there is certainly no right to specific securities.</p> <p>18 Kazakhstan's rights to the fund according to the 19 national agreement is in the local currency, tenge, and 20 only according to agreement. If there is a claim 21 between Kazakhstan and the national bank, Kazakhstan can 22 never own securities in any other jurisdiction and 23 certainly not in Sweden.</p> <p>24 The parties do not agree on the meaning of Kazakh 25 law. The applicant's experts talk about ownership, the</p> <p style="text-align: center;">Page 36</p>

<p>1 ownership to the "national fund". This is misleading 2 for two reasons.</p> <p>3 First of all, it is not clear what they mean when 4 they say ownership to the national fund, it's not 5 a clearly defined asset. It's not coincidence that they 6 have not wanted to define that. It's more about how 7 Kazakh law is structured.</p> <p>8 This leads us to a second argument, because there is 9 a difference in Kazakh law to the right of proprietary 10 rights and rights of claim. The applicants' experts 11 discuss whether Kazakhstan keeps ownership to assets 12 that have been transferred to a trust. Parties can 13 discuss this at length because we do not agree on this, 14 but it's irrelevant. Kazakhstan does not transfer cars 15 or some other physically identifiable object to the 16 National Bank to be managed as a trust. The only thing 17 that has been transferred is tenge currency monies and 18 this has then been changed into dollars and then it was 19 managed as part of this trust. This question of who has 20 the right of claim to the assets it's not explained by 21 the other side. Why would Kazakhstan have a right of 22 claim to these assets? Even less do they explain how 23 Kazakhstan could have a right of claim on claims that 24 the National Bank had acquired in their own name with 25 respect to a third party, in this case bank BNY Mellon.</p> <p style="text-align: center;">Page 37</p>	<p>1 During these proceedings, throughout the entire 2 proceedings and during their opening statement they have 3 consistently ignored the contractual relationship 4 between the parties and how these assets were acquired 5 via various accounts. These are in our view the 6 relevant circumstances.</p> <p>7 Instead they have referred to what various people 8 have said in email, what has been listed in forms and 9 account descriptions. With reference to these documents 10 and also the principle of free assessment of evidence, 11 they have said that the attached assets belonged to 12 Kazakhstan, but they have never explained their legal 13 basis for their action and why these actions are to be 14 relevant when assessing who the property belongs to. As 15 we've noted, the question still remains how and when did 16 Kazakhstan acquire the ownership right to the assets in 17 Sweden?</p> <p>18 If it were the case that the court can disregard the 19 structure and if you ignore what was said in the emails 20 and what the accounts were described as, has the 21 applicant then proven their action, then the applicant 22 has the burden of proof. The burden of proof, according 23 to the Saras Money case, is of relevance to the 24 ownership right. From the examinations of experts that 25 the court has listened to, experts and witnesses, you</p> <p style="text-align: center;">Page 39</p>
<p>1 As we said in our opening statement it's clear from 2 Kazakhstan if a trustee enters into an agreement in 3 their own name within the framework of the trust it's 4 only binding between the National Bank and the third 5 party and nobody else.</p> <p>6 I am not going to repeat what I said about Kazakh 7 law during our opening statement, the court has to make 8 up its own mind on that. If I would like to present 9 a wish, I would wish that the court reads the two expert 10 statements in the English proceedings, exhibits 26 and 11 20. This is Professor Maggs and Professor Suleimenov's 12 opinion in the legal proceeding in England. If you read 13 those statements one after the other and you decide 14 which one gives a credible reflection of Kazakh law, 15 I am absolutely convinced that the court will find that 16 what the National Bank is claiming is correct. This 17 gives a very clear illustration of Kazakh law and 18 a second opinion encourages the reader to ignore what it 19 says in the legislation because of corruption and 20 presidential powers, et cetera.</p> <p>21 If you assess this the way my Kazakh colleagues 22 would do, I think that you would come to this 23 conclusion.</p> <p>24 I would like to say something about the applicants' 25 procedural conduct and their action before the court.</p> <p style="text-align: center;">Page 38</p>	<p>1 cannot say anything about who the underlying investor is 2 from the documents that have been invoked by the 3 applicant. Even if you accept the applicants' view that 4 you can rely on the evidence that they have invoked, 5 they have still not proven that this belongs to 6 Kazakhstan, ie the assets or the property.</p> <p>7 Then I would like to move on to some allegations 8 made by the applicants in their opening statements. 9 There are some claims or statements there that are 10 incorrect. We have responded to some of that in our 11 statement of 31 January of this year. I am just going 12 to talk about a couple of things that we have talked 13 about in our opening statement. This slide was shown 14 during their opening statement. They allege that assets 15 managed by the national fund is owned by BNY Mellon.</p> <p>16 Instead, BNY Mellon's position in Belgium, and 17 BNY Mellon has given a statement to the court in 18 Belgium, and this illustration that they have taken from 19 that statement is under the heading "Semantic 20 overview"... the heading is about a conclusion about 21 a potential claim, a direct claim on BNY Mellon. So 22 from the very heading itself you can see that there is 23 a reservation here. If you read to the paragraph that 24 leads to this reservation you understand what this 25 reservation is about. This is what we have quoted here</p> <p style="text-align: center;">Page 40</p>

<p>1 from the statement. It says:</p> <p>2 "If Bank of New York Mellon would be informed that</p> <p>3 the management is terminated, it's not at all obvious</p> <p>4 that Bank of New York Mellon would only be obliged to</p> <p>5 return the assets to the National Bank of Kazakhstan,</p> <p>6 while the latter is neither the owner nor the manager of</p> <p>7 the assets. In such situations, BNYM could not and</p> <p>8 cannot exclude that the Republic of Kazakhstan is at</p> <p>9 least an additional creditor."</p> <p>10 What Bank of New York Mellon writes here is that in</p> <p>11 case the national fund agreement is revoked then it's</p> <p>12 not quite obvious that Bank of New York Mellon would</p> <p>13 just have to send back the assets to the national bank.</p> <p>14 In these circumstances BNY Mellon cannot exclude the</p> <p>15 possibility that there might also be the possibility of</p> <p>16 returning the assets to the state directly. This is</p> <p>17 something that BNYM has always claimed when they were at</p> <p>18 risk of \$0.5 million damages. This hypothesis that is</p> <p>19 illustrated here is illustrated in a scenario where the</p> <p>20 national fund agreement has been terminated. That the</p> <p>21 applicant is invoking this schematic illustration shows</p> <p>22 how weak their arguments are, because the ...</p> <p>23 This example is of no relevance at all to our case.</p> <p>24 Whether Kazakhstan could have a claim on BNY Mellon in</p> <p>25 case this agreement was terminated in the future, it's</p> <p style="text-align: center;">Page 41</p>	<p>1 the trust.</p> <p>2 Another piece of circumstances which has been</p> <p>3 mentioned is that the central bank and the RoK should</p> <p>4 advise when they appoint foreign counsel, but this is</p> <p>5 nothing to the issue of control.</p> <p>6 The last issue I would like to refer to is with</p> <p>7 respect to the statement made during the examination.</p> <p>8 This is the quote:</p> <p>9 "With respect to this quote the claim was made that</p> <p>10 Aliya Moldabekova had confirmed that Kazakhstan has been</p> <p>11 stated as an owner, but it follows from the answer that</p> <p>12 she talks about beneficial owner and nothing else."</p> <p>13 For some reason they have added a parenthesis at the</p> <p>14 end of the answer. It says --- and then in parenthesis:</p> <p>15 "Cut off by the NBK's counsel."</p> <p>16 This is to present a picture that we from NBK</p> <p>17 stopped Aliya Moldabekova from answering a question</p> <p>18 because she is about to say something which is not</p> <p>19 beneficial to our case. This was not obviously the</p> <p>20 case, you have listened to her statement. What happened</p> <p>21 was that -- well, first what Ms Moldabekova says is not</p> <p>22 controversial, the fact that Kazakhstan is stated as the</p> <p>23 owner it's not strange, it's completely relevant to our</p> <p>24 case.</p> <p>25 Secondly, Ms Moldabekova was never interrupted by</p> <p style="text-align: center;">Page 43</p>
<p>1 of course of no relevance to our case.</p> <p>2 The next question I would like to discuss is the</p> <p>3 claimed element which would follow from 886 in the civil</p> <p>4 code of Kazakhstan. The claim made by this letter was</p> <p>5 that there's a requirement from the Kazakh law that in</p> <p>6 order for the requirement for something to be a trust in</p> <p>7 accordance with the Kazakh law, but if you look the</p> <p>8 entire text, not only the section highlighted in yellow,</p> <p>9 it says that through the validity of the ... unless</p> <p>10 everything else is described in the legal acts of the</p> <p>11 Republic of Kazakhstan or expressed in agreement. So</p> <p>12 there is no element with respect to full separation of</p> <p>13 disposal.</p> <p>14 There is a description of how trusts should be</p> <p>15 structured and what kind of disposal there should be.</p> <p>16 This claim of separation of disposal is not supported by</p> <p>17 any of the extracts regarding Kazakh law submitted by</p> <p>18 any of the parties. Kazakhstan does not dispose of the</p> <p>19 assets in the trust and this follows ... or control.</p> <p>20 This is something which could follow from the other</p> <p>21 slides with respect to control.</p> <p>22 There is a claim that Kazakhstan has rights of</p> <p>23 guaranteed and targeted transfer from national fund, but</p> <p>24 this is not the control of the funds, of the assets in</p> <p>25 the trust. This is a condition to withdraw funds from</p> <p style="text-align: center;">Page 42</p>	<p>1 the counsel. They are just making this up. I would</p> <p>2 like the court to listen to this again, but what happens</p> <p>3 is that her answer was translated. There was a question</p> <p>4 about how the interpreter interpreted her words and this</p> <p>5 discussion was between myself, the presiding judge and</p> <p>6 the interpreter. Then Ms Moldabekova's examination</p> <p>7 continues. So what it says here is not correct.</p> <p>8 The last example I would like to mention is the</p> <p>9 claim made on page 49 in the applicants' submission that</p> <p>10 the claim that Aliya Moldabekova confirmed that</p> <p>11 Kazakhstan owns the share fund. This is something which</p> <p>12 we have responded to in writing from our submission from</p> <p>13 21 January. We not present this again, but briefly this</p> <p>14 is completely taken out of the context and if you read</p> <p>15 the quotes and if you listen to the 10 references given</p> <p>16 in our statement dated 21 January you will understand</p> <p>17 the context and it becomes self-evident that what Aliya</p> <p>18 means by national funds is Kazakhstan's right of claim</p> <p>19 to the NBK and nothing else.</p> <p>20 Having said that, I will pass the word to my</p> <p>21 colleague, Magnus.</p> <p>22 Submissions by MR AXELRYD</p> <p>23 MR AXELRYD: Just a couple of things. If the court looks at</p> <p>24 the investors' binder, which they used during their</p> <p>25 opening statement. I would like to present a couple of</p> <p style="text-align: center;">Page 44</p>

<p>1 points with respect to the document which was identified 2 by the presiding judge. If you look on page 18 in the 3 presentation you can see that you have this from the 4 public register of custodians and there is a number. It 5 says "personal number" or "organisational number" on the 6 left-hand side which was unique in the opinion of 7 investors, unique for every customer. We don't know 8 whether it's right, but let us assume it's the case so 9 this is the number on page 21, the same presentation.</p> <p>10 This is the statement of securities. You see the 11 account number. It's a different number. Then the next 12 document is the document referred to by the presiding 13 judge. This is the one on page 61. You can see that 14 there is a table on the left called "Swiss account". 15 Then it says "NBK" and then there is a number. This is 16 another account, an account name, NBK is the account 17 holder because this is on the upper tier of NBK in BNY's 18 register if you look at this.</p> <p>19 So this is one reflection. Our opinion is that this 20 has no relevance to the legal analysis of this document, 21 but there's one point we would like to emphasise. If we 22 look at the example with Handelsbanken there are 23 131 million shares at the account with SEB. These 24 shares belong to BNY and to 6,000 different customers of 25 BNY.</p> <p style="text-align: center;">Page 45</p>	<p>1 Secondly, in which jurisdiction the assets are 2 located and could be subjected to attachment.</p> <p>3 The answer to this question coincides because the 4 legal relation of this is based on where the asset is 5 located. I will make this presentation and it will 6 consist of two parts.</p> <p>7 First, I will explain why the securities are not 8 located in Sweden but in England according to the choice 9 of laws. Therefore English law governs the NBK's rights 10 to the shares, which are the shares at BNY London. The 11 English law should give us an answer to the following 12 questions.</p> <p>13 What's the material meaning of the investors' right? 14 Whether the material elements have been fulfilled in 15 order for investor to claim its rights against a third 16 party. If there's a different investor which has 17 a guilty right of pledge which should be respected.</p> <p>18 After presenting the choice of law I will explain 19 why neither Kazakhstan nor NBK's assets have been 20 located in Sweden and therefore the Swedish enforcement 21 agency didn't have jurisdiction to attach the assets in 22 Sweden. It flows from the same line of reasoning as 23 described above, but there are also important legal and 24 practical aspects. Therefore the question of attachment 25 jurisdiction should follow the decision or the</p> <p style="text-align: center;">Page 47</p>
<p>1 When transactions are made between the NBK and BNY 2 these transactions can happen between BNY and another of 3 BNY's customers and NBK. It could be the case that BNY 4 sells its own shares on the account at SEB to the NBK or 5 two customers of BNY could enter into a transaction with 6 respect to the Swedish shares.</p> <p>7 What happens then? The first thing which happens 8 that the registration of BNY changes, this is what 9 governs the transaction. Then there is a change to SEB 10 in their register, but on SEB's custodian account 11 nothing changes there because the shares are still 12 there. So the transactions at BNY's level don't have to 13 result in any changes in registration at the custodian 14 account -- sorry in Euroclear, because they could be 15 transactions between BNY and its customers and there 16 could be transactions between BNY's customers.</p> <p>17 Thank you.</p> <p>18 Closing submissions by MR NYGREN</p> <p>19 MR NYGREN: As I explained in my opening statement on 20 Monday, the third objection of the NBK is that the 21 securities are not located in Sweden. Those are two 22 different in issues.</p> <p>23 One is a question where it should be considered 24 where the investors' securities are located based on the 25 current say of law.</p> <p style="text-align: center;">Page 46</p>	<p>1 assessment on the governing laws.</p> <p>2 Moving on to the governing laws to assess that, just 3 like I said before. We have to know which accounts 4 contained investors' rights to the assets. Through my 5 presentation I will start at the level of the investor 6 and will talk about the investors' rights of claim to 7 the securities. The existing structure for acquisition 8 didn't create rights of ownership to certain specific 9 securities but rather a claim to securities of a certain 10 number and a certain kind. This is how the applicable 11 law is structured where you follow on the investors' 12 account at the original custodian to understand the 13 meaning of the investors' rights. The registers which 14 are held at a sub-custodian or a CSD is not relevant.</p> <p>15 These are the accounts which are found in the chain 16 of custodians. Like we said before, Kazakhstan is not 17 the account holder of any of these accounts and 18 therefore has no registered rights to any of the 19 securities anywhere in this chain. What Kazakhstan has 20 is a right with respect to the NBK. NBK has a legal 21 relationship with BNY and BNY still has a legal 22 relationship with SEB. In order for the court to arrive 23 at the conclusions of the rights of the investor in the 24 chain, whether it's NBK, what kind of rights have been 25 acquired. The court first has to decide which country's</p> <p style="text-align: center;">Page 48</p>

12 (Pages 45 to 48)

<p>1 laws should be applied to the issue of rights in 2 parties. This is something I will discuss this and 3 I will discuss the Swedish and the European legal choice 4 of law principle, claiming that the court should apply 5 the PRIMA principle and therefore the English law is 6 applicable to the material issues of the investors' 7 rights of claim, which in our position is the NBK's 8 rights to claim to the securities.</p> <p>9 This is a chapter 5, paragraph 3 a law which we call 10 LHF, the Trade and Financial Instruments Act. When 11 transferring, pledging or disposing of financial 12 instruments in any other ways for which share 13 certificates, promissory notes, et cetera, has not been 14 issued or a document has been issued but through 15 interpretation, the buyers' rights to the financial 16 instruments should be registered in the country where 17 the register is held for the legal effect with respect 18 to this other party.</p> <p>19 It's not quite easy to understand this provision, so 20 let's have a look at the preparatory which explains this 21 provision. We have described this in a lot of detail in 22 a supplementary letter of appeal, but we will present 23 some of the issues and we will summarise other issues 24 which are mentioned in the preparatory works. We would 25 like to ask the Court of Appeal to read the preparatory</p> <p style="text-align: center;">Page 49</p>	<p>1 general application or the disposal with dematerialised 2 account kept securities are covered by the Swedish 3 conflict of law provision, which follows from this 4 statement in the government bill, page 96.</p> <p>5 At the top of the page: 6 "The materiality of the reasons which indicate that 7 the conflicts of law should be regulated and that they 8 should also apply beyond the application area of the 9 finality directive. A regulation which would be limited 10 to the financial directive could lead to insecurity and 11 could lead to incorrect conclusions and therefore this 12 rule should be made general and not be limited to that 13 application area of the finality directive." 14 More or less the same thing follows from the box at 15 the bottom of the page. 16 This is repeated once again in the legislator's note 17 on the following page. It follows from this paragraph 18 that it applies generally when disposing of the 19 financial instruments in question, transfer and pledge 20 have been explicitly mentioned in the text before as 21 examples of the most important types of disposal. 22 However, this provision is also applicable to other 23 types of disposal. So-called repurchase agreements and 24 loans and security papers. 25 This is something which also follows from the</p> <p style="text-align: center;">Page 51</p>
<p>1 works, even the pages we are just referring to because 2 they give us a good understanding about how the choice 3 of law provision and the EU law should be understood.</p> <p>4 The choice of law provisions in LHF are based on 5 provisions in the finality directive, which entered into 6 legal force in the year 2000 in Swedish law. These are 7 securities without share certificates which account held 8 in Sweden, according to the corresponding Act or abroad.</p> <p>9 This provision is just clarification of a written law 10 which means that <i>lex rei sitae</i> is used with respect to 11 dematerialised securities, but legislator wanted to have 12 an explicit conflict of law rules. Therefore for the 13 securities which are not caught by the provision, the 14 same provisions in the choice of law Act ... sorry, 15 conflicts of laws.</p> <p>16 <i>Lex rei sitae</i> is the principle which is used by the 17 international private law to determine the applicable 18 law for real issues. Therefore, the issues of disposal 19 should be determined by the law where the securities 20 were located when the right was created. When the 21 principle is applied you have to take a position on 22 where the asset is located. This is what determines the 23 choice of laws, as opposed to the corresponding 24 provisions in the finality directive the Swedish 25 legislator decided that the provision in LHF should have</p> <p style="text-align: center;">Page 50</p>	<p>1 government bill 2004/05:30, after the security directive 2 became a part of Swedish law. I will not be reading 3 this but already at this stage the court can make 4 a conclusion on this that the Swedish conflict of law 5 provision has general applicability and is applied to 6 all the disposal of dematerialised account kept 7 securities.</p> <p>8 As we noted earlier, <i>lex rei sitae</i> was applied in 9 Sweden to determine choice of law before the finality 10 directive was made part of the Swedish law. The 11 question is what it meant and whether the Swedish legal 12 position corresponded to the finality directive. This 13 was something which was addressed by the legislator.</p> <p>14 On this page in the government bill, I will only 15 read the last section which has been underlined, which 16 describes the provisions of the Swedish law in place at 17 the time: 18 "With respect to dematerialised and ...(Reading to 19 the words)... If the right is registered in a register 20 held by a custodian overseas, the question should be 21 determined by law of the land where these operation are 22 conducted. Therefore Swedish law corresponds to 23 Article 9.2." 24 So according to an unwritten Swedish law, the 25 account keeping principle or the registration and</p> <p style="text-align: center;">Page 52</p>

<p>1 principle was applied earlier to decide where the 2 security was located. This was the determining question 3 in terms of choice of law and this was a result of the 4 application of lex rei sitae.</p> <p>5 In this quote it has been clarified that if the 6 securities registered in the CSD register, not 7 Euroclear, and the custodian operates overseas, then it 8 should be done at the place of registration of the 9 custodian at Euroclear. So where the register is held 10 does not refer to Euroclear's register.</p> <p>11 Finally, this corresponds to the use of the finality 12 directive. A bit further down in the same government 13 bill in the comments you can see that when the letter of 14 registration principles is applied, this is the register 15 from which follows the buyers rights of financial 16 instruments. So the register should show what kind of 17 right has been acquired, it could be rights of 18 ownership, rights of pledge or any other special rights 19 to financial instruments.</p> <p>20 The registration has happened lawfully. It's not 21 only registration supported by statutes but also 22 registrations which have been made on the basis of 23 generally accepted legal principles.</p> <p>24 Before we move on to the next slide, I would like 25 the court to note the statement that this is not just</p> <p style="text-align: center;">Page 53</p>	<p>1 as a general principle to determine on the conflict of 2 laws according to the Swedish conflicts of laws 3 provision.</p> <p>4 The conflict around the security directives is found 5 in Article 9.1, but it has to be read together with 6 definitions in Article 2.1 to understand this better.</p> <p>7 9.1 says: 8 "Every case which deals with any of the issues 9 mentioned under item 2 and which appear when it comes to 10 pledges as account keeping financial instruments should 11 be covered by the law of the land where the relevant 12 account is kept."</p> <p>13 What do they mean by the "relevant account"? It 14 follows from 2.1(h), relevant account: 15 "When it comes to such securities, or some pledges 16 as account kept financial instruments covered by an 17 agreement of financial pledge."</p> <p>18 This is the register of the account which is held by 19 the pledge taker, which includes information about the 20 pledges such as account kept financial instruments 21 pledged to the pledge taker.</p> <p>22 What does it tell us? If you read all these 23 provisions altogether as a summary directive you can see 24 that only one national law should be applied. This is 25 something which follows from Article 9.2 and this is the</p> <p style="text-align: center;">Page 55</p>
<p>1 thinking about which account or which register which 2 contains a registration of the buyers' right, from which 3 it follows which kind of right the buyer has. It would 4 be also interesting to think which account, which 5 accounts do not contain this type of information.</p> <p>6 This statement links to the question which was 7 resolved through the securities directive, which 8 introduced the so-called PRIMA principle.</p> <p>9 With the security directive the EU wanted to 10 establish where the securities are located which are 11 owned through a number of custodians with a number of 12 intermediaries. The purpose of this, just like Marcus 13 explained earlier, this is reason 8 for the directive, 14 to ensure that there is an agreement on security which 15 is applicable to the country where the account is 16 located. The validity/enforceability of the security 17 could be claimed against every competitive claim 18 exclusively on the basis of the law of the relevant 19 country. This is in order to avoid the situation where 20 legal uncertainty appear with respect to the pledges' 21 validity.</p> <p>22 The securities directive, this is the security of 23 the dematerialised securities but the PRIMA principle 24 which is introduced here, it's linked to the finality 25 directive to the winding-up directive and this also used</p> <p style="text-align: center;">Page 54</p>	<p>1 law of the land where the relevant account is located. 2 That's the applicable law, with the relevant account is 3 the register or the account which contains information 4 about the account kept financial instrument which has 5 been pledged.</p> <p>6 This is an expression of the PRIMA principle which 7 is place of relevant intermediary approach. Briefly the 8 principle means that a pledge to investors' assets 9 should be considered to be held at the account where the 10 investors' right has been registered. In our case at 11 the account of the original custodian.</p> <p>12 It follows from Article 9.2 the law of the original 13 custodian should determine which are the legal effects 14 and which legal rights should be considered primarily if 15 there are competitive claims. No changes of the 16 conflicts of law has been made in LHF on the basis of 17 this conflict of law provision, but both the conflict of 18 law provision and the LHF and the unwritten law, this 19 was something which was in compliance with the paragraph 20 my principle with respect to dematerialised securities 21 held through chains of custodians.</p> <p>22 Let's have a look at some statements made in the 23 preparatory works. When the legal review was made after 24 the security directive was introduced on page 82 we can 25 see that the choice of law in the security directive</p> <p style="text-align: center;">Page 56</p>

<p>1 identifies the relevant account. Here the reference 2 made to the PRIMA principle. At the top of the page. 3 The choice of conflict of law rules means that the 4 applicable law, and this the security directive, is the 5 law of the land where the relevant account is kept, 6 article 9.1. 7 Highlighted in yellow: 8 "The provision states therefore a variant of the 9 principle of lex rei sitae which means that the pledge 10 is located where the register is kept." 11 A question which comes up, how do you establish that 12 an account kept financial instrument is located for 13 example in Sweden? A financial instrument could be 14 registered in several tiers, at a number of 15 intermediaries, in a number of registers and in a number 16 of several countries. The conflict of law rules talk 17 about the relevant account. According to the so-called 18 PRIMA principle, the place of relevant intermediary 19 approach, the real aspect of a customer's disposition of 20 dematerialised financial instruments which are kept by 21 an intermediary should be assessed according to the law 22 at the custodian or the intermediary. 23 The following page, we can see that the Swedish 24 conflict of law in LHF corresponds to the security 25 directive and the Swedish provision considers the</p> <p style="text-align: center;">Page 57</p>	<p>1 It follows from the notes that the three directives 2 which Ms Wallin-Norman refers to which applied the PRIMA 3 principle are the finality directive, security directive 4 and the so-called winding-up directive. 5 The next page Karin Wallin-Norman notes that the 6 same PRIMA principle is applied according to the 7 conflict of law provision in the LHF. 8 We have described the PRIMA principle in the 9 supplementary letter of appeal, but I would like to 10 summarise the contents of the principle with reference 11 to the references which is on the page. The PRIMA 12 principle identifies the relevant account where the 13 dematerialised securities are held through a custodian 14 chain. It always starts with the investors' account at 15 an original custodian, the account could include 16 a number of underlying securities which have been 17 registered at a number of different custodians, 18 different places, which creates a chain of custodians. 19 The principle of the PRIMA principle is that the 20 underlying securities are considered to be holdings held 21 at the original custodian. Otherwise this could result 22 in a significant legal uncertainty which the creation of 23 PRIMA principle has tried to avoid. 24 As I mentioned before and the reasoning behind the 25 PRIMA principle means that the investors' holdings could</p> <p style="text-align: center;">Page 59</p>
<p>1 relevant account and not the underlying securities, 2 which corresponds to the PRIMA principle. 3 The fact that the PRIMA principle is applied in the 4 EU law, in the conflict of laws provision in the LHF and 5 according to unwritten Swedish law this is something 6 which follows from several pages in the preparatory 7 works and also confirmed by a number of sources which 8 have been submitted by the NBK and also by the legal 9 experts. Legal reports by Karin Wallin-Norman, 10 Louise Gullifer and Professor Bogdan. 11 Let me read two quotes from Karin Wallin-Norman's 12 book which summarises the issue very well and the rest 13 of the reference could be read by the court. On 14 page 300 Karin Wallin-Norman raised the following: 15 "The fact that the Hague Convention still has not 16 been accepted by the EU is partly connected with the 17 fact that the EU for a number of years have had common 18 conflict of laws provisions in the financial area, which 19 follow from a number of different EU directives which 20 have been implemented in the Member States. The choice 21 of law principle which follows from the directive means 22 that the law in the jurisdiction of account keeper 23 should apply and that the parties don't have any 24 prospect to choose, at least not formally. I would like 25 to describe this as a strict PRIMA rule."</p> <p style="text-align: center;">Page 58</p>	<p>1 be equated to a chain of debtors where you only have 2 a claim to your nearest counterparty. According to 3 PRIMA principles, every single tier of account should be 4 considered individually. The investors' rights to the 5 securities is considered to be as a claim vis-a-vis the 6 original custodian, so it's not relevant where the 7 specific securities are registered in different 8 custodians. There are different legal sources which 9 deal with the PRIMA principles. You see the list of 10 some of these on the screen but we will not present them 11 in any more detail. 12 Finally, about the meaning of the PRIMA principles. 13 I would like to say that there are requirements on the 14 relevant accounts must have an account registered and 15 have a consulting effect, that is the register in the 16 account or register has a legal effect. The applicant 17 claimed this in the district court and they are 18 apparently claiming the same here. 19 From the excerpt from the preparatory works on this 20 page and the following page that I am not going to read 21 to you it says that the Swedish legislator does not 22 believe that there is any such requirement according to 23 the security directive. The same thing applies to the 24 same conflict of rule provision and on non-codified law. 25 They have taken into consideration how the security</p> <p style="text-align: center;">Page 60</p>

<p>1 directive should be interpreted. This is an important 2 reason why the decision think that relevant accounts are 3 accounts with evidentiary effect, because otherwise it 4 would not be possible to uphold the PRIMA principle 5 because otherwise there would be one single account 6 where all the assets are registered. 7 It's also noted that no such requirement was made in 8 earlier non-codified law and that the phrasing that 9 ended up in the choice of law text did not make any 10 changes to previous law. 11 Now we've gone through the relevant legislation we 12 know what the PRIMA principle is, so what remains to be 13 done is to determine where the relevant account is 14 located. Again, we can establish that there is only one 15 account at the end of the chain of custodians and here 16 it is the register national bank account BNY Mellon, 17 which is the original custodian in this case. 18 This could apply even if it was Kazakhstan that had 19 been BNY Mellon's customer as the applicant claimed on 20 Tuesday, however this is not true this is confirmed by 21 BNY Mellon and it's also clear from account statements 22 and screenshots from Bank Mellon's database. 23 Kazakhstan does not have any account anywhere that 24 has a right to the registered securities, not in 25 England, not in Sweden. The only thing that Kazakhstan</p> <p style="text-align: center;">Page 61</p>	<p>1 with the original custodian. Therefore the applicable 2 law should be the one applying in the location of the 3 original custodian. That does not mean that the 4 investors' assets are located with one or more 5 sub-custodians or one CSD. 6 The application of the lex rei sitae and the PRIMA 7 principle are saying the assets belong with the original 8 custodian, this is the party that the investor has 9 a contractual relationship with and that's the only 10 party that the investor can make a claim against. The 11 attachable assets are located with the original 12 custodians and the attachment can only be made in the 13 name of original custodian. We know that the only right 14 that the National Bank has is a claim on Bank of 15 New York Mellon and a certain category and number of 16 shares. The National Bank does not have any right of 17 ownership to the underlying securities. 18 My colleague Karl has already explained this and 19 I am not going to say any more about that, but we can 20 establish that the central bank's asset which is a right 21 to securities is located in England and not in Sweden. 22 This has been confirmed by both Bogdan and Gullifer in 23 their legal opinions. 24 My colleague Marcus Axelryd has told us that upper 25 tier attachments are not allowed under Swedish law or</p> <p style="text-align: center;">Page 63</p>
<p>1 have are the rights that follow from the national fund 2 agreement that my colleague Karl has talked about. 3 These rights, as Michael Bogdan said in his legal 4 opinion, are located in Kazakhstan. The relevant 5 account in this chain of custodians is held by 6 BNY Mellon and that's located in London. 7 Therefore, the securities are considered located in 8 London according to the conflict of law provisions and 9 LHF and that means that no right in rem is to be applied 10 to ... 11 THE INTERPRETER: I am sorry, excuse me. 12 I just did not hear that, apologies. 13 MR NYGREN: When we establish which law is applicable, we 14 have to ask ourselves the question in which jurisdiction 15 are the securities held? But can be subject to 16 attachment. This is critical to the enforcement 17 agency's enforcement, because the enforcement agency's 18 powers are limited to Sweden. If the assets are held 19 abroad, the enforcement agency is not allowed to carry 20 out any enforcement measures. 21 The National Bank holds that possession of 22 dematerialised securities in a chain of custodians with 23 one or more intermediaries means that the investor has 24 an asset in their own original custodian. This could be 25 the right to underlying securities that are registered</p> <p style="text-align: center;">Page 62</p>	<p>1 English law. The reason for this is that the investor 2 does not have any answers further up the chain and 3 therefore attachment must be against the account that 4 the investor is the account holder of. For this reason 5 also it is only the exempt authority in the original 6 custodian's country that has the jurisdiction to do the 7 attachments. 8 The National Bank's view is that underlying 9 securities in Swedish (inaudible) which is invested in 10 the investors' account in their local bank, and that's 11 the original custodian. That does not mean that the 12 investor therefore is to be deemed to have an attachable 13 asset in Sweden. This position is supported by the 14 Supreme Court case where the Supreme Court assessed 15 whether a Swedish court had jurisdiction for a foreign 16 company that had dematerialised shares in a Swedish 17 company, this is NJA2004 ... the fact that the company 18 had a dematerialised share in a Swedish company was not 19 sufficient for it to have Swedish jurisdiction. 20 Even if that case was about jurisdiction and not the 21 authority to attach, the court found that it was too 22 much of an intervention for every investor around the 23 world who had holdings of dematerialised Swedish shares 24 that they would run the risk of standing before 25 a Swedish court of law without any other connections to</p> <p style="text-align: center;">Page 64</p>

<p>1 Sweden.</p> <p>2 Similar arguments can be applied in this case for</p> <p>3 Kazakhstan and the National Bank, whose only legal</p> <p>4 relationship is with their respective counterparty in</p> <p>5 Kazakhstan and in England, both Kazakhstan and the</p> <p>6 central bank have no connection with Sweden other than</p> <p>7 the underlying secure Swedish securities.</p> <p>8 This brings us to another aspect. These are the</p> <p>9 consequences if attachments are going to be made in</p> <p>10 several jurisdictions, not just in the original</p> <p>11 custodian but also the various intermediaries in the</p> <p>12 chain of custodians. If we look again at this slide we</p> <p>13 can see that there are three accounts that reflect</p> <p>14 shares in Handelsbanken, which are the same category</p> <p>15 that were acquired according to this structure, this SEB</p> <p>16 custodian account, Euroclear and it's BNY Mellon's</p> <p>17 custody account in SEB and it's the central bank's</p> <p>18 account with BNY Mellon.</p> <p>19 According to the National Bank, this cannot mean</p> <p>20 that the central bank or Kazakhstan's right in</p> <p>21 securities as alleged by the applicant are in all</p> <p>22 accounts and in all occasions at the same time and</p> <p>23 therefore can be subject of attachment in various</p> <p>24 locations.</p> <p>25 As my colleague mentioned earlier, there are legal</p> <p style="text-align: center;">Page 65</p>	<p>1 country from that country's legislation, if attachment</p> <p>2 of the assets in the relevant account with the original</p> <p>3 custodians cannot be made according to the relevant</p> <p>4 legislation the underlying securities should be</p> <p>5 protected from attachment in other countries.</p> <p>6 Allowing attachment of the underlying securities</p> <p>7 means that the pledge is worthless. In this case, the</p> <p>8 applicants' right to the underlying securities according</p> <p>9 to the GCA there is no reason to assume that that</p> <p>10 contract was not applicable according to English law if</p> <p>11 the Swedish court allows attachment of underlying</p> <p>12 securities, this is inconsistent with valid EU law.</p> <p>13 Even if it were the case as the applicant alleges</p> <p>14 that the directive cannot be applicable, it's still</p> <p>15 a case that this is a case of systematically erroneous</p> <p>16 thinking. The whole idea of this EU regulation if</p> <p>17 underlying securities can be attached for an investor,</p> <p>18 international trade and securities require there to be</p> <p>19 basic trust in the system, that each investor really</p> <p>20 gets the rights that the investor has acquired and is</p> <p>21 invested in the investors' account. The investor also</p> <p>22 has to know that this right can be claimed against the</p> <p>23 other parties, both the counterparty that the right was</p> <p>24 acquired from and from other parties that lay claim to</p> <p>25 it. This is the basic idea with the EU regulations</p> <p style="text-align: center;">Page 67</p>
<p>1 proceedings both in England and Belgium where the</p> <p>2 applicants have tried to attach the central bank's claim</p> <p>3 on BNY Mellon for Kazakhstan's debt and for the same</p> <p>4 reason we are here today. It sounds both unreasonable</p> <p>5 and not economic when it comes to procedural costs. The</p> <p>6 National Bank is saying that when assessing attachment</p> <p>7 jurisdiction the assets should be located in one place</p> <p>8 and when it comes to the choice of conflict of laws,</p> <p>9 that location should be at the original custodian.</p> <p>10 If attachments can be made against all the accounts</p> <p>11 in the chain of custodians, that means that an applicant</p> <p>12 as opposed to investor themselves can apply his right to</p> <p>13 every intermediary in the chain, whereas the investor</p> <p>14 can only claim on unsecured with their immediate</p> <p>15 contractual partner.</p> <p>16 Why should a Swedish creditor have a better right to</p> <p>17 the underlying securities than the investor themselves?</p> <p>18 The last aspect which according to the National Bank</p> <p>19 means that attachment of an investors' assets must be</p> <p>20 made with original custodian and nowhere else, means</p> <p>21 that this is the only alternative that is consistent</p> <p>22 with EU law.</p> <p>23 The whole idea of the EU securities directive is</p> <p>24 that investors should trust that a pledge in a country</p> <p>25 is also protected from all the other claims in that</p> <p style="text-align: center;">Page 66</p>	<p>1 which has been stressed by Karin Wallin-Norman and in</p> <p>2 the English Articles that the National Bank has</p> <p>3 submitted to the court. The investors should be able to</p> <p>4 trust that an acquisition in the original custodian's</p> <p>5 country cannot be subject to attachment in another</p> <p>6 country.</p> <p>7 Just to summarise the position of the National Bank</p> <p>8 when it comes to the jurisdiction of the Swedish</p> <p>9 enforcement agency. The applicant is saying that</p> <p>10 Kazakhstan is the investor because the National Bank in</p> <p>11 some way -- it's not clear how this happened -- acquired</p> <p>12 the rights to the securities on behalf of the state and</p> <p>13 therefore they cannot be attached for Kazakhstan.</p> <p>14 This is not true. As we have explained, Kazakhstan</p> <p>15 does not have any right to the securities, only</p> <p>16 conditional limited claim on targeted and guaranteed</p> <p>17 transfers according to the national fund agreement.</p> <p>18 This right is located in Kazakhstan and therefore</p> <p>19 should not even come into question that securities that</p> <p>20 have been acquired from this structure can be attached.</p> <p>21 Regardless of this, this does not change any of the</p> <p>22 facts of where a security has been registered. The</p> <p>23 registration that we've mentioned during opening</p> <p>24 statement and here today too, they are the same.</p> <p>25 There's no account of which Kazakhstan is the account</p> <p style="text-align: center;">Page 68</p>

<p>1 holder of.</p> <p>2 The last account in the chain is the National Bank's</p> <p>3 account with Bank of New York Mellon and the right to</p> <p>4 attach securities with BNY Mellon in England. There's</p> <p>5 a number of practical and legal reasons why this has to</p> <p>6 be the case. This means that in order to do</p> <p>7 an attachment at the enforcement agency ... should have</p> <p>8 focused on BNY Mellon's account, but the enforcement</p> <p>9 agency did not have jurisdiction to do that so such</p> <p>10 an attachment would have had to be made by the English</p> <p>11 enforcement agency, which would have jurisdiction to</p> <p>12 attach in England. Since the enforcement agency did not</p> <p>13 have jurisdiction to attach, the attachment is to be</p> <p>14 lifted.</p> <p>15 Thank you.</p> <p>16 SVEN JÖNSON: It is 1145. We will have lunch, we will come</p> <p>17 back here at 12.45. Thank you.</p> <p>18 (11.45 am)</p> <p>19 (The luncheon adjournment)</p> <p>20 (12.45 pm)</p> <p>21 SVEN JÖNSON: Now we pass the word to the Republic, you have</p> <p>22 an hour and a half according to the timetable, you will</p> <p>23 use the entire time?</p> <p>24 MR FOERSTER: We will use the time. Maybe a break is not</p> <p>25 required we hope, or maybe we'll take a break after.</p> <p style="text-align: center;">Page 69</p>	<p>1 statements with respect to the ambassador they stopped</p> <p>2 a planned state visit and that there are quite</p> <p>3 sufficient flaws in the investigation conducted by the</p> <p>4 SEA and by the district court. RoK hopes that the Court</p> <p>5 of Appeal at least corrects the latest mistakes</p> <p>6 committed by the SEA.</p> <p>7 Let me start with the interesting legal issues. The</p> <p>8 structure of the presentation will be as follows. There</p> <p>9 will be a short introduction.</p> <p>10 Then Mr Metz will talk about Article 19.</p> <p>11 Ms Fermbäck will discuss 21.1(c) of the Convention.</p> <p>12 Finally, I will respond to the applicants' claim</p> <p>13 that Kazakhstan has waived its right to claim immunity.</p> <p>14 The Supreme Court has described the issue of state</p> <p>15 immunity in their well-known case, the Sedelmayer case,</p> <p>16 a case which the appealing judges will be aware. This</p> <p>17 is the case 2011, page 765. This was about property on</p> <p>18 the (inaudible) which belonged to Russia's trade</p> <p>19 delegation. The question is whether this piece of</p> <p>20 property was covered by state immunity. I will come</p> <p>21 back to this legal case on several occasions.</p> <p>22 In paragraph 7 of the Supreme Court's motivation</p> <p>23 they say that state immunity is considered to be</p> <p>24 a natural consequence of the fact that states are</p> <p>25 sovereign and equal and therefore cannot exercise</p> <p style="text-align: center;">Page 71</p>
<p>1 SVEN JÖNSON: What I was thinking from your point of view,</p> <p>2 will you start with a brief introduction or will you</p> <p>3 deal with the entire issue.</p> <p>4 MR FOERSTER: More or less it will be divided into different</p> <p>5 sections.</p> <p>6 SVEN JÖNSON: Right. Because I am planning for a break at</p> <p>7 2.30. So that if you start then we'll break at 2.30</p> <p>8 will that be okay?</p> <p>9 MR FOERSTER: We could probably accommodate the court's</p> <p>10 wishes.</p> <p>11 SVEN JÖNSON: Let's see what happens.</p> <p>12 Please, thank you.</p> <p>13 Closing submissions by MR FOERSTER</p> <p>14 MR FOERSTER: Sometimes when I work as an arbitrator in</p> <p>15 arbitration proceedings I normally try to think about</p> <p>16 why are the parties here? What is it they really want?</p> <p>17 This is probably the question which is asked by the</p> <p>18 Court of Appeal. Why is the RoK so involved in this?</p> <p>19 The RoK does not claim the money which is in SA's</p> <p>20 accounts, why are we here? RoK is a sovereign state,</p> <p>21 a state with which Sweden has diplomatic relationships</p> <p>22 and RoK feels that its integrity has been violated by</p> <p>23 the actions of the SEA and the district court.</p> <p>24 The SEA attached the diplomatic accounts in</p> <p>25 violation of 1961 Convention, the SEA through different</p> <p style="text-align: center;">Page 70</p>	<p>1 jurisdiction over each other. The state immunity is</p> <p>2 based on one of the most fundamental principles of</p> <p>3 international law, that is the principle of sovereignty,</p> <p>4 the possibilities to limit sovereignty are quite small.</p> <p>5 The property which has been attached here from the</p> <p>6 point of view of international law belongs to the NBK</p> <p>7 and in any conditions this was used for state</p> <p>8 noncommercial purposes. Therefore, the property is</p> <p>9 immune against attachment and SEA's decision to attach</p> <p>10 should be lifted. The applicable approaches are</p> <p>11 expressed in Articles 19 and 21 of the UN Convention on</p> <p>12 state immunity and immunity of the property, this what</p> <p>13 we call "the Convention".</p> <p>14 Articles 19 and 21.1(c) in the Convention they</p> <p>15 describe the applicable customary law. This is</p> <p>16 something which should be applied here. This is also</p> <p>17 confirmed by the decision of the Court of Appeal in the</p> <p>18 Sedelmayer case, where the Supreme Court said this</p> <p>19 Convention codifies the existing customary law. This is</p> <p>20 section 12 in the decision. 19(c) expresses the</p> <p>21 principle that enforcement can be used for other</p> <p>22 property which are not used for noncommercial purposes</p> <p>23 of the state and absolute immunity should be granted to</p> <p>24 such property of special nature which is listed in</p> <p>25 Article 21.</p> <p style="text-align: center;">Page 72</p>

<p>1 This is something which is mentioned at the end of 2 paragraph 14 in the judgment of the Supreme Court. The 3 Convention is a part of Swedish law by incorporation. 4 This fact is a clear signal that what the Convention 5 says should be applied to Sweden. It should be 6 mentioned in this context that Article 18 in the 1969 7 Vienna Convention includes an international law 8 obligation for the states which have ratified the 9 Convention. That during the period between the 10 ratification and entering into force these parties will 11 refrain from activities which would negate the purposes 12 of the objectives of the Convention. Therefore, the 13 Swedish law cannot interpret the law in violation of the 14 said Convention.</p> <p>15 Kazakhstan's position on this issue is also 16 confirmed by the experts on this subject. Without 17 reading too much, I would like to refer to 18 Professor Mahmoudi's expert report. This is tab 25, 19 exhibit 50, paragraphs 32 and 33. Professor Wrangle's 20 expert report, this is the next tab, tab 26, pages 6 and 21 7, the first paragraph on page 7.</p> <p>22 A couple of words about the burden of evidence that 23 property can be attached the property is not covered by 24 immunity. It's the position of the RoK that the burden 25 of proof rests on the applicant even on issue of</p> <p style="text-align: center;">Page 73</p>	<p>1 paragraph 56. He is very clear on this issue. I would 2 also like to refer to Mr Wrangle's report on pages 12 and 3 13 at the end of the page.</p> <p>4 It is also confirmed by foreign doctrine, Hazel Fox 5 and Philippa Webb write in the book the Law of State 6 Immunity, this is found under tab 97, exhibit 138, 7 page 511:</p> <p>8 "The reason of the general immunity of property of 9 a foreign state for measures of constraint of the burden 10 of proof that the property is in use or intended for use 11 for commercial purpose rests with the claimant."</p> <p>12 Kazakhstan's position is also supported by Mr Tams' 13 comment to Article 5 in the Convention, where it's 14 confirmed that a presumption of immunity exists. This 15 has been filed in the second binder, exhibit 139, 16 page 103 in the book.</p> <p>17 The burden of proof rests on the applicants that the 18 property is used or is intended to be used for 19 commercial purposes. The applicants have not managed to 20 prove this and the Court of Appeal will understand this 21 once my colleagues have finished their closing 22 statements.</p> <p>23 Having said that I pass the word to Mr Metz. 24 25</p> <p style="text-align: center;">Page 75</p>
<p>1 immunity, so the applicants have to show that the 2 property is not covered by immunity.</p> <p>3 The main principle is absolute immunity. There is 4 a presumption in place, a presumption of immunity, which 5 is supported by the wording of 19(c) which describes 6 exceptions of immunity. It says it should be 7 established that the property is not of such nature that 8 it enjoys immunity and in English it has been 9 established that the signal is that the starting point 10 is immunity and the burden of proof rests on the party 11 which claims that immunity is not present. When it 12 comes to the claim the property is for commercial 13 purposes. The Court of Appeal in this Sedelmayer case 14 said the following:</p> <p>15 "According to the provision the burden of proof 16 rests on the party which claims that the property is 17 used for commercial purposes."</p> <p>18 This follows from NJA, page 488. The Supreme Court 19 did not make a statement on the burden of proof but 20 said:</p> <p>21 "The respective state immunity and respect for the 22 fact that foreign states cannot be forced to ..."</p> <p>23 Our position on the burden of evidence is also 24 confirmed by the experts and I would like to refer to 25 what Professor Mahmoudi said in exhibit 50, tab 25,</p> <p style="text-align: center;">Page 74</p>	<p>1 Closing submissions by MR METZ 2 MR METZ: Thank you.</p> <p>3 I will talk about Article 19. We have discussed 4 this Article earlier, so the importance of the principle 5 of immunity is how the intention or for the purpose and 6 how the property is intended to be used. This is the 7 purpose of the state's intended use.</p> <p>8 Kazakhstan and the NBK are covered by the concept of 9 state in the Convention, so here it's the purpose of 10 Kazakhstan's use or the intended use which is 11 interesting to the case. Trying the purpose of the 12 NBK's use does not come into question, since the 13 property which is used, possessed or controlled by NBK 14 is anyway protected by Article 21.</p> <p>15 I am about to tell the court how in Kazakhstan's 16 opinion the court should try this issue, but before 17 I get to that I would like to explain the way this 18 provision works in the ...</p> <p>19 The Supreme Court explained this in the Sedelmayer 20 case, NJA2011, page 475, the immunity that goes so fast. 21 This follows from the position that the states are equal 22 and this is what the immunity flows from. This is in 23 large violation of a country, of a state's immunity. To 24 allow constraints or coercive measures against a state's 25 property could have adverse effect on the other states</p> <p style="text-align: center;">Page 76</p>

<p>1 relationship with the state.</p> <p>2 This explains why the issue of constraint or</p> <p>3 enforcement has developed towards the more restrictive</p> <p>4 approach. This is also something -- it is also</p> <p>5 explained that the conditions to allow enforcement</p> <p>6 measures against the foreign state's property are not</p> <p>7 the same as the conditions to have jurisdiction against</p> <p>8 a foreign state.</p> <p>9 It is that the threshold should be higher to allow</p> <p>10 enforcement rather than to allow jurisdiction. The</p> <p>11 purpose of the use or intended use is the interesting</p> <p>12 issue. Therefore the next question how to establish</p> <p>13 this purpose. Kazakhstan's position is that the court</p> <p>14 can establish this purpose by considering Kazakhstan law</p> <p>15 and statute. It is explained in detailed and in</p> <p>16 exhaustive manner what the purposes of national fund</p> <p>17 are. The Kazakh statutes is a direct evidence which</p> <p>18 explains what are the purposes for which Kazakhstan</p> <p>19 could use the funds in the national fund. It's</p> <p>20 mentioned explicitly. This is a primary source and this</p> <p>21 is the best piece of evidence in this case.</p> <p>22 In the district court the applicants' argument was</p> <p>23 that you cannot look at the national fund's totality.</p> <p>24 From the opening statement which we hear on Tuesday we</p> <p>25 can believe that we will hear something along similar</p> <p style="text-align: center;">Page 77</p>	<p>1 arrives at the conclusion that some of the properties in</p> <p>2 the national fund they serve commercial purposes. This</p> <p>3 is paragraph 2 on page 588, in the middle of the page:</p> <p>4 "According to what has been established in the</p> <p>5 budget code of 2008, the national fund has two different</p> <p>6 functions. It should help to stabilise the Kazakh</p> <p>7 economy, it should generate yield and profit. Already</p> <p>8 on this basis we can note that some part of the national</p> <p>9 fund serve commercial purposes."</p> <p>10 He arrives at prefacing 28.3 in the budgetary code.</p> <p>11 What's interesting here is that Linderfalk arrives at</p> <p>12 this conclusion without taking a stand on the purposes</p> <p>13 of the fund as this were expressed in the law. This is</p> <p>14 an objective basis, so exactly the same Article 21, but</p> <p>15 the previous paragraph, paragraph 2. This is clear what</p> <p>16 the purposes are but it is something which was ignored</p> <p>17 by Professor Linderfalk. Instead he looks at the</p> <p>18 functions of the fund and on the basis of these</p> <p>19 functions he makes an assessment and the assumption of</p> <p>20 what the purposes should be, but he never analyses the</p> <p>21 explicit funds. There are no references in this report</p> <p>22 which discusses any provisions in the Kazakh statutes</p> <p>23 which references the purposes, which means that he</p> <p>24 creates that the purpose of the national funds are state</p> <p>25 ones and not commercial ones.</p> <p style="text-align: center;">Page 79</p>
<p>1 lines later today. The applicants are focusing on the</p> <p>2 savings portfolio, the commercial services as they</p> <p>3 allege by referring to the definitions of the savings</p> <p>4 portfolio in resolution number 65 of the board of NBK.</p> <p>5 The applicants would also lead away the intention from</p> <p>6 the explicit purposes of the national fund.</p> <p>7 One of the pages showed on Tuesday showed that the</p> <p>8 property's nature and use are objective circumstances,</p> <p>9 which say something about the purpose. So there was</p> <p>10 an extract from Professor Linderfalk's statement and</p> <p>11 this is on page 588 in the applicants' first binder.</p> <p>12 We'll have a look at that.</p> <p>13 [Uninterpreted exchange]</p> <p>14 In the following sense it should be noted that when</p> <p>15 applying Article 19 it's under the decisive ... for the</p> <p>16 purpose for which the purpose is used or intended to be</p> <p>17 used. Then he says: "However, it hasn't been said that</p> <p>18 the property's nature is of no interest ...(reading to</p> <p>19 the words)... this could help us to understand the</p> <p>20 purpose of this investment." Linderfalk equates with</p> <p>21 that experts, namely Mahmoudi and Wrangle, that the</p> <p>22 purpose says whether immunity is present and the purpose</p> <p>23 can only be established if you look at objective</p> <p>24 circumstances. He talks about nature of property as one</p> <p>25 of these objective pieces of circumstances. Linderfalk</p> <p style="text-align: center;">Page 78</p>	<p>1 Another report submitted by the applicants which</p> <p>2 also talk about the explicit purpose of the national</p> <p>3 fund is something written by Professor Ingrid Wuerth.</p> <p>4 The last sentence on 1211. You can probably start</p> <p>5 looking for the --</p> <p>6 MR NILSSON: This is which page?</p> <p>7 MR METZ: It's page 11 in the report by Ingrid Wuerth.</p> <p>8 SVEN JÖNSON: I believe the information in my binder is</p> <p>9 incomplete, but ...</p> <p>10 MR METZ: Let's have a look at the last sentence on</p> <p>11 page 1211. This is Ingrid Wuerth's conclusion about the</p> <p>12 purposes of the national fund. It says:</p> <p>13 "The national fund's structure and purpose as</p> <p>14 a sovereign wealth fund both tend to show that a savings</p> <p>15 portfolio is 'specifically in use or intended for use by</p> <p>16 the state for other than government and commercial</p> <p>17 purposes'."</p> <p>18 Tend to show she's quite careful. She comes to the</p> <p>19 conclusion that two factors indicate that the savings</p> <p>20 portfolio is not used for state noncommercial purposes.</p> <p>21 One is the structure of the national fund.</p> <p>22 The second issue is the purpose of the fund, but</p> <p>23 it's not the purpose as it's expressed in Kazakh law.</p> <p>24 On the contrary at the purpose which Wuerth assigns</p> <p>25 to the national fund, being a SWF, so purpose as</p> <p style="text-align: center;">Page 80</p>

<p>1 a sovereign wealth fund. What she does? She does the 2 same thing as Professor Linderfalk. She avoids 3 discussing the explicit purposes, not mentioned anywhere 4 in her report. This report was referred to on Tuesday, 5 while the applicants showed a header that the national 6 fund's status as an SWF, this was something should be 7 done when considering the immunity. I could have 8 misunderstood bit it was implied that the states which 9 constructed the Convention did not take into 10 consideration the SWF, which is quite a modern creation. 11 This should be taken with a pinch of salt. There are 12 more than 90 SWFs today, more than about half of them 13 existed before 2004, this is when the Convention was 14 adopted.</p> <p>15 My understanding of the applicants' counsel, the 16 claim was made that the sovereign wealth funds don't 17 have any political purposes but only commercial ones. 18 This is something the RoK does not agree with. This is 19 a way to claim to create conditions to assign to the 20 national fund a purpose as sovereign wealth funds 21 allegedly have in general, in order to avoid discussing 22 the purpose of the national fund as it's explicitly 23 expressed in the law, something which is done by 24 Ingrid Wuerth. Discussing the constructive purpose 25 rather than discussing actual purpose, this is something</p> <p style="text-align: center;">Page 81</p>	<p>1 at the factual use and based on that make conclusions on 2 the purpose. But it follows from the Supreme Court's 3 decision that the circumstances of that case were 4 specific, there was an in cost assessment, this is not 5 a general rule which was set up by the Supreme Court.</p> <p>6 The Supreme Court looked at the factual use of the 7 property, which was a piece of real estate. There was 8 no evidence what was the purpose of Russia's possession 9 of the piece of real estate. Kazakhstan claims that the 10 Supreme Court would have made a different assessment if 11 this piece of property would have been assigned as 12 an official premises of the Russian trade delegation ...</p> <p>13 So the factual use of the property should be used to 14 make the assessment.</p> <p>15 On Tuesday we saw extracts from three court 16 decisions referred to by the applicants. The decisions 17 in three different instances independently came to the 18 conclusion that Kazakhstan does not use its property for 19 state noncommercial purposes. This could seem to be 20 aggravating for Kazakhstan. You could have thought that 21 if there would be a line of reasoning which could serve 22 as a basis for this court's assessment, but this is not 23 the case. The Belgian court's decision has been 24 appealed, the same applies to Nacka district court's 25 decision this why we are here, so I will not be</p> <p style="text-align: center;">Page 83</p>
<p>1 the applicants want the court to do.</p> <p>2 I draw this conclusion from the references to other 3 pieces of evidence which we saw on Tuesday. We had look 4 at some of the introductions which the investment 5 advisers advised the fund to do. After that we saw that 6 the savings portfolio had certain return investments in 7 2017. Why 2017 was shown? Because this is when the 8 enforcement measures were taken, this is why this table 9 is relevant.</p> <p>10 Yesterday we received a brand new document, which 11 explains how the national fund was managed in 2019. How 12 this relates to everything else, it's not clear to me. 13 In the opening statement they referred to the current 14 deputy head of the NBK, Ms Moldabekova, but what was 15 shown there does not cover by the subject for the 16 examination of Ms Moldabekova.</p> <p>17 The fact that the applicants in this manner look at 18 the result of the use and how the property is used, this 19 might be explained by a statement made by the Supreme 20 Court in the Sedelmayer case.</p> <p>21 In that case the Supreme Court granted the 22 assessment of the purpose of Russia's use of the 23 evidence, they looked at the factual use and this is 24 something the court discussed in paragraph 20. We 25 believe the applicants want the court to do this, look</p> <p style="text-align: center;">Page 82</p>	<p>1 discussing this decision. But one of them have entered 2 into legal force, this is a decision by Stockholm 3 district court which is on page 109 in the first binder 4 of the applicants.</p> <p>5 In the middle of the page you see the headline "Does 6 Kazakhstan use or does Kazakhstan intend to use the 7 property in question for anything else than state 8 noncommercial purposes?"</p> <p>9 The district court of Stockholm starts by saying: 10 "The relevant property consists of commercial 11 companies' commercial shares."</p> <p>12 I believe that's quite contentious. In any case, 13 the starting point for the court's reasoning was the 14 type of property, which is wrong. Furthermore, the 15 court below said the purposes of the holdings, the PRIMA 16 purpose was to generate profit and this is because 17 Kazakhstan stated that the loss returned on the shares 18 would cause damage. Then they said it would be 19 improbable that the funds which were important for the 20 social and economic stability of Kazakhstan were 21 invested in a way that the value could disappear, but 22 I believe that the court does not really understand how 23 the securities market operates and how you diversify 24 your investments. The only way how the value of the 25 securities would have turned to nothing. It could have</p> <p style="text-align: center;">Page 84</p>

<p>1 only have resulted if a global crash would have taken 2 place. Even in that case it would not have happened, 3 this is about shares but 30 different companies, such 4 a crash would not have affected the shares in different 5 companies. In the same manner, the more different types 6 of securities you have, the lower is the risk that the 7 total value of the securities would turn to zero. 8 The purposes of the national fund could be reached 9 if NBK invested the funds in different types of 10 securities in different markets. Therefore, the risk of 11 the national fund's value turning to zero is much lower 12 and much lower if the profits or if the revenues were 13 not consisted of the revenues from the oil sector in 14 Kazakhstan. 15 The court says it's not probable that the funds 16 which were used to stabilise the country's social and 17 economic are invested in a way that the value could 18 quickly turn to zero. That's correct but the funds are 19 not invested in such a way that the value could quickly 20 turn to zero. This is something the court misunderstood 21 and this is why the court made the wrong conclusions. 22 There is a decision which this court used for 23 guidance. This is found under tab 3 in the first 24 binder. Kazakhstan's first binder. This is the English 25 High Court of Justice and this is the AIG case, tab 3,</p> <p style="text-align: center;">Page 85</p>	<p>1 future too. It also guarantees the future existence of 2 the national fund, even though the revenue from the oil 3 funds will ... be reduced. 4 We'd like to look at the Swedish Central Bank's 5 investment policy. This tab 21 in binder 1, the Swedish 6 Central Bank's investment policy. 7 There it has other purpose on the management of the 8 gold and currency reserve and how it's to be achieved. 9 On page 1 under the heading "Targets or objectives", 10 under Article 3 you'll find this. There it reads: 11 "The purpose of the goal and currency reserve of the 12 central bank is to ensure that the bank can meet its 13 obligations and be prepared to intervene on the currency 14 market and to give temporary liquidity support to 15 banks." 16 It says: 17 "The answers have to be composed in such a way that 18 the objectives can always be performed." 19 Because of this, the focus of the investment of gold 20 currency reserves have to give as higher yield as 21 possible in relation to the risk that has been 22 determined by the central bank. So the yield that's 23 generated from a mass of assets, for example, the 24 central bank's gold and currency reserves or the 25 national fund increases the possibility of achieving the</p> <p style="text-align: center;">Page 87</p>
<p>1 page 50. 2 This has been referred to as the AIG case, but 3 AIG Capital partners and others v Kazakhstan and the 4 National Bank on behalf of Kazakhstan. Starting on 5 paragraph 91 they talk about immunity according to the 6 English Sovereign Immunity Act, I am not going to talk 7 about this. You can read about this in your chambers, 8 please mark this paragraph and read it. 9 The purpose of the Kazakhs' use or intended use of 10 the property is clear from laws, statutes and the same 11 thing applies to the way the property can be used. As 12 the applicants and their experts have focused on this, 13 it's clear from Article 21.3 in Kazakhstan's budget code 14 that they have a savings and stabilisation function. 15 The savings function, according to the law, is about 16 gathering assets and providing long-term returns on the 17 means and a moderate risk. The saving function itself 18 is not a purpose, it's just one of the answers to the 19 question of how are the national fund's purposes going 20 to be achieved. We heard earlier Moldabekova talk about 21 this in her examination. 22 That there is a savings function does not change the 23 purpose of the national fund. 24 The national fund is to ensure that the 25 stabilisation function works and it will work in the</p> <p style="text-align: center;">Page 86</p>	<p>1 objectives. But the yield as such is not an objective 2 in itself. 3 The gold reserve of the central bank is mainly kept 4 abroad and from the applicants' point of view that might 5 be attached in the country where it's located, because 6 the management is for the purpose of achieving a high 7 yield in relation to risk. We talk about this. 8 Whatever I would just like to point out that gold 9 and currency reserves are used in the same way as 10 benchmarks are used when it comes to investments in 11 securities. It's not a spread risk. This is clear from 12 an excerpt from the website on the central bank on 13 tab 37 of the binder. 14 We can see the heading "The gold reserve". In the 15 second paragraph under that heading, the central bank 16 says: 17 "Nowadays the reason for the gold reserve is because 18 the price of gold reserves doesn't follow the same 19 process as the currency market, so therefore the 20 currency value is more stable than the gold reserve and 21 the price reserve were together in the old days." 22 The same thing with the national fund, investments 23 there are made in order for the fund's value to be 24 maintained over time and also to increase the value of 25 the fund. To come back to what I said initially, there</p> <p style="text-align: center;">Page 88</p>

22 (Pages 85 to 88)

<p>1 should be a higher threshold in order to take 2 enforcement measures against a foreign state's property 3 than it is to exercise jurisdiction in that state. 4 For that reason a rule has come that the purpose of 5 use or intended use is to determine whether there is 6 immunity. This something based on the character of the 7 asset or the use of the asset. You can ask yourself: is 8 anything left left of that rule then? Because basically 9 it's the same assessment when it comes to immunity 10 against restriction, that the requirement for 11 a nongovernmental noncommercial purposes is not there. 12 Kazakhstan are saying here when there is 13 an objective, the court must not consider what types of 14 property are included in the national fund or what 15 results the management gives or what the results that 16 (inaudible) management gives. When you assess this 17 based on the objective you can compare that for anything 18 state noncommercial purposes, the state has nothing that 19 that was done in the district court. This an objection 20 that's warranted when it comes to distant obscure 21 objectives. 22 That is not the case here. Here it's a matter of 23 an objective that's stated in law or statute. It is 24 clear. It is limited. It's clearly stated there are 25 regulations and that there is a public connection. Even</p> <p style="text-align: center;">Page 89</p>	<p>1 States wants to ensure that some state property is not 2 covered by the exception of Article 19(c)." 3 On page 82 in the government bill it says that 4 Article 21 is intended to prevent certain types of 5 property, when applying to Article 19(c) is deemed to be 6 used for other than state noncommercial purposes. 7 If the property is of the type that's stated in 8 Article 21, then you don't have to mention whether it is 9 used for a state noncommercial purposes. It's immune 10 regardless. As we heard from the applicants, they are 11 saying that Article 21.1(c) does not express the current 12 customary law and therefore it cannot be applied by the 13 Court of Appeal. They are saying that the Court of 14 Appeal should instead apply a number of requisites that 15 limits the application of the provision, also by 16 referring to US law. Since the court recognised the 17 Convention Sweden has twice tried cases against 18 enforcement measures, NJA209 and NJA2011, page 475. 19 In both those cases the Supreme Court said that the 20 Convention is deemed to be a codifying of customary law. 21 The Supreme Court in NJA2011 established that there 22 should be immunity against enforcement measurement if 23 the content of the property is of a qualified type. The 24 court also declared that property is of a qualified 25 nature if the property is of such a type that is stated</p> <p style="text-align: center;">Page 91</p>
<p>1 if it's of no significance to the Court of Appeal's 2 assessment, it is clearly described how Kazakhstan used 3 the fund. The assets are clearly visible to all 4 external people what the objectives of the national fund 5 is. 6 Kazakhstan holds that the property that was subject 7 to enforcement measures was used and is intended to be 8 used for state noncommercial purposes and therefore the 9 Court of Appeal should grant the appeal. 10 Closing submissions by MS FERMBÄCK 11 MS FERMBÄCK: As has been explained before Article 201 is 12 an exception to the exemption stated in Article 19(c): 13 "If the court were to find that the attached 14 property is not immune according to Article 9 then you 15 have to assess whether the property is immune because it 16 is of such a type as stated in Article 21." 17 Five types of assets are listed, a particular 18 property of the central bank is one of them. On page 82 19 in bill 208 and 209:204 the legislators and at the 20 background to Article 21 is the following: 21 "This special protection is deemed to be necessary 22 to include in the Convention because of the practice of 23 some states to grant permission to enforcement measures. 24 For example, on foreign state's bank account or national 25 bank's assets. By introducing Article 21 the Member</p> <p style="text-align: center;">Page 90</p>	<p>1 in Article 21 in the UN Convention of 2004. 2 The Supreme Court's statement means that there is an 3 impediment to enforcement in Sweden if the property is 4 of the type that is listed in Article 21. Kazakhstan 5 holds that Article 21(c) expresses valid customary law, 6 but that question is not to be considered by the Court 7 of Appeal because of the Supreme Court's statement that 8 the Article should be applied by Swedish courts. 9 To determine whether the property of this case is 10 covered by Article 21, that is that it constitutes 11 property of the central bank, the court then has to 12 interpret and apply the provision anyway that complies 13 with UN Convention in the view Kazakhstan, meaning that 14 the attached property is covered by state immunity. 15 I am going to discuss this in three points. 16 The first thing is that the central bank is covered 17 by the immunity applying to central bank. 18 Also that the attached property is the property of 19 the national central bank of Kazakhstan, in that the 20 central bank controls it. 21 The third one is that criteria that the applicant is 22 making claims that the court has to consider if they 23 find that the property is the property of the central 24 bank and is not covered by the UN Convention and 25 therefore should not be applied.</p> <p style="text-align: center;">Page 92</p>

<p>1 The first thing I am going to discuss is whether the 2 national bank is covered under the concept of state and 3 Article 2. Article 2, as we know, defines certain terms 4 that are used in the Convention. The concept of state 5 is defined under Article 2.1(b). 6 Article 2.1(b) what it does is they identify the 7 subjects that are covered by state. However, Article 2 8 does not say anything about the property that is covered 9 by immunity against enforcement measures. This is 10 stated in Articles 18, 19 and 21. 11 For an independent legal entity is to be covered by 12 the concept of state, according to Article 3 it's 13 required it's entitled to perform and is performing as 14 sovereign. The literature mentions national banks and 15 sovereign wealth funds are both subjects that are 16 covered by Article 21(b). I am referring to comment 50 17 of the Convention by O'Keefe and Tams, that was 18 submitted yesterday. 19 When it comes to the kind of properties being 20 discussed, in doctrine of whether Article 2 could have 21 an indirect meaning for the scope of the immunity. 22 Since central banks usually are separate legal entities 23 the definition of state under Article 2.1(b)(iii) could 24 mean that property of central banks is only protected to 25 the extent that the central bank is considered taking</p> <p style="text-align: center;">Page 93</p>	<p>1 However, the circumstances separates the management 2 of the national fund from a private asset management, 3 a position that a bank would typically perform. 4 First of all, the fund solely consists of public 5 funds that stem from the oil sector of Kazakhstan. 6 Secondly, the combination is not private individual 7 or corporation, it is the Kazakh government. 8 Thirdly, the National Bank is obliged by law to 9 manage the national fund. The National Bank would not 10 have been able to choose whether to take on the 11 commission or not. The terms and conditions for this 12 are not just regulated in agreements, which would have 13 been the case if it had been a matter of a private 14 management commission. 15 Thirdly, the national fund agreement does not have 16 any regular terms and conditions. For example it is 17 just the president who can terminate the agreement. 18 This is hardly a term and condition that a commercial 19 bank would have accepted. 20 The National Bank's management of the national fund 21 is not a private act, but it's an act in the exercise of 22 sovereign authority of the state. Therefore, the 23 National Bank is covered by the concept of state. 24 The second thing I am going to discuss is the 25 attached property is property of the central bank</p> <p style="text-align: center;">Page 95</p>
<p>1 acts in the exercise of sovereign authority of the 2 state. 3 If the court would like to read more about these 4 discussions I'm referred to page 343 and O'Keefe and 5 Tams's comments, which is in the applicants' 6 appendix 87. In Ingrid Wuerth's article on the 7 execution of central banks, exhibit 269 and the 8 submission yesterday. 9 This describes a possible interpretation of the 10 Convention as a loophole, which is likely not to have 11 been intentional. Regardless of the cases about this 12 possible interpretation of the Convention, the question 13 that's under discussion could only become relevant when 14 it's a question of a central bank that is acting which 15 is clearly distant from the acts and the exercises of 16 authority. This could, for example, be about the 17 central bank providing commercial banking services to 18 private individuals, beside their ... they work for the 19 state. The applicant seems to say that since the 20 central bank is getting money for their management of 21 the national fund, so therefore the bank should not be 22 covered by the concept of state. But the National Bank 23 is being paid for the asset management is actually 24 a condition that a commercial bank would have had to 25 manage the assets of private individuals or companies.</p> <p style="text-align: center;">Page 94</p>	<p>1 according to Article 21. If the court ends up here in 2 its assessment it's probably already found that the 3 property belong to Kazakhstan in the sense of the 4 enforcement code, which would mean that the National 5 Bank would own the property. However, the courts would 6 still have to assess whether the attached property is 7 held or controlled by the national bank. 8 The applicant is claiming here that the concept 9 property of does not cover property that the National 10 Bank holds or controls, only the type of property that 11 the bank owns. 12 In our view, that interpretation is not consistent 13 with the Convention. Since the concept property of is 14 not only used in Article 21(c) but in several other 15 Articles in the Convention, you have to look at the 16 meaning the concept is given there. In these articles 17 the expression is used a concept of property of the 18 state. The wording property of the state can give you 19 the impression that it's limited to property that the 20 state owns. The preparatory works of the Convention and 21 the literature in this area confirm that property of not 22 just own the right of property but also holding and 23 controlling. 24 I will have to ask the court to take out the second 25 evidentiary binder and get O'Keefe and Tams's comment to</p> <p style="text-align: center;">Page 96</p>

<p>1 the UN convention, which is under tab 98. If we go to 2 page 316, which is page 1257 of the binder. 3 THE INTERPRETER: We need the text of us in front of us, 4 even if you are reading the text in English. It's at 5 tab 98, page 1257. 6 MS FERMBÄCK: In the middle of the second paragraph, they 7 write: 8 "The words 'property of the state' having been 9 proposed as a shorthand for the formulation, its 10 property or property in its possession or control 11 adopted on first reading are to be construed as 12 referring to any property that the state owns or that it 13 possesses or controls." 14 So O'Keefe and Tams are referring to the preparatory 15 words of the Convention. In the comment on 16 international law from 1960 they discuss the need for 17 definition of the concept property of the state and such 18 a definition would in that case have covered property 19 that is used and held by a state. 20 On page 25 in the comment from 1991 on the 21 Convention ... the following is said on the scope: 22 "The criterion for the foundation of state immunity 23 is not limited to the claim of time or ownership, but it 24 clearly encompasses cases of property in actual 25 possession or control of the foreign state."</p> <p style="text-align: center;">Page 97</p>	<p>1 applicants have not been able to produce any support for 2 that, but they are saying that otherwise it would get 3 unreasonable consequence. It's hard to understand what 4 those unreasonable consequence would be. However, what 5 would appeal to strange consequence is if the concept of 6 property of would have meant one thing in Articles 18 7 and 19 and something else in Article 21. Since property 8 of covers both possession and control, according to the 9 main rule of Article 9.3 it means that no enforcement 10 measures can be taken against property owned, held or 11 controlled by the central bank. 12 According to Article 19(c) property used for 13 commercial purpose is exempted. That means that all 14 property that a central bank owns, holds or controls is 15 excepted from immunity according to Article 19 if it's 16 used for commercial purposes. 17 According to the interpretation of the applicants 18 the exception for property that's property of the 19 central bank under Article 19 should be limited to 20 property owned by the central bank. That means that 21 property owned by a central bank is covered by absolute 22 immunity, whereas property that the central bank holds 23 or controls can be attached if it's used for commercial 24 purposes. 25 There is no support in the interpretation of the</p> <p style="text-align: center;">Page 99</p>
<p>1 The state immunity is not limited to ownership but 2 clearly covers property that's held or controlled by 3 another state. In the law of state immunity (inaudible) 4 they also discuss the meaning of property of state. 5 They are referring to the so-called AIG case that my 6 colleague referred to earlier and the parties 7 AIG Capital partners and Kazakhstan inter alia. That's 8 under tab 3 in the binder 1. I am not going to go 9 through the judgment, but I am referring to 10 paragraph 45. The English judge there describes how the 11 concept of "property of" is to be interpreted. 12 The statement is about English law, but the doctrine 13 is deemed to be relevant as to how it's to be 14 interpreted according to the Convention. In 15 paragraphs 89 and 90 he gives his views on how the 16 assets in the national fund enjoy immunity as property 17 of the National Bank. 18 The concept of property of the state covers all the 19 property that the state owns, holds or controls. 20 As I said during my opening statement, this 21 interpretation is confirmed by the experts Pål Wrangé, 22 Said Mahmoudi and Ulf Linderfalk. 23 The applicants however seem to imply that the 24 concept of property of is to have a more limited meaning 25 than it does in the text property of the state. The</p> <p style="text-align: center;">Page 98</p>	<p>1 Convention that any such difference was intended and 2 I refer to the material for interpretation in page 103 3 of the bill. Apart from the Convention's provisions 4 that these are statements by the ad hoc committees' 5 chairman to the general assembly when the Convention's 6 report was submitted. This was a point adopted by the 7 ICC ... 8 This has the same meaning as the rest of the 9 Convention. That means that Article 21(c) protects all 10 property that's owned, held or controlled by central 11 bank. 12 It is undisputed in this case that the attached 13 property was acquired within the national fund and that 14 it's the National Bank that manages and holds the funds. 15 It is in itself sufficient for there to be immunity 16 according to Article 21.1(c). The evidence that we went 17 through during our opening statement also shows that the 18 National Bank also controls the specific securities and 19 claims that have been attached. The National Bank got 20 that control when the government instructed the bank to 21 manage the fund and the National Bank has kept that 22 control when they transferred funds to Bank of New York 23 Mellon for external management. 24 The attached property is therefore property of the 25 central bank according to Article 21.1(c). I should</p> <p style="text-align: center;">Page 100</p>

25 (Pages 97 to 100)

<p>1 also briefly comment on the Nacka district court, who 2 said that the fact that the funds of the national fund 3 were not entered into books, that that indicate that 4 it's not property of the central bank according to 5 Article 21.1(c). How they are entered into books is of 6 no significance to the court.</p> <p>7 If they arrive at this the court will already have 8 found that funds are not owned by the central bank, they 9 should assess whether it's held or controlled by the 10 National Bank. Of course this is regardless of how that 11 is reported on in the accounts.</p> <p>12 The second thing that the applicant is holding out 13 as important is the tax forms, implications for tax 14 forms, that does not change the fact that the National 15 Bank holds and controls the funds in the national fund.</p> <p>16 My last thing on the three requisites that the court 17 has to assess that the court finds that the attached 18 property is the property of the National Bank.</p> <p>19 The first requisite is for the property to be used 20 for monetary purposes.</p> <p>21 The second is that the property has to be held for 22 its own account. That can obviously mean that it's used 23 for traditional central bank tasks.</p> <p>24 The third is that the National Bank has to be 25 independent in relation to the state.</p> <p style="text-align: center;">Page 101</p>	<p>1 it follows from the preparatory work to the Convention 2 and Swedish law that the purpose or the intention of 21 3 is to categorically protect property of certain 4 character. I would like you to have a look at binder 1 5 of Kazakhstan, NBK and under 425 you have extract from 6 the year book of ILC, page 158. In the right-hand 7 column you have the comments to 19, which later on 8 became 21.</p> <p>9 The sentence to the comment it's stated: 10 "Article 21.6 to prevent any interpretation to the 11 effect the property classified as belonging to any of 12 the categories specified is in fact property 13 specifically in use or intended for use by the state for 14 other than government or commercial purposes."</p> <p>15 In the second sentence in 2, in the comments which 16 are on the next page, it is stated: 17 "Each of the specific categories of property by its 18 very nature must be taken to be in use or intended for 19 use for governmental purposes removed from any 20 commercial considerations."</p> <p>21 On page 82 in the government bill the Swedish 22 legislators said the following. Through its nature they 23 stated property should be considered to be used or 24 intended to be used only for state purposes, without any 25 commercial purposes whatsoever.</p> <p style="text-align: center;">Page 103</p>
<p>1 These requisites are not clear from Article 21.1(c) 2 and they are not to be applied by the Court of Appeal. 3 Even if the requisites were to be deemed to have been 4 met in this case, it is clear from Moldabekova's 5 testimony the use of national fund for monetary 6 purposes, it's also clear from Kazakh law that the 7 management of the national fund is work for the national 8 bank and that the bank is independent vis-a-vis the 9 state.</p> <p>10 These elements could be understood if you read the 11 context and the intention of these provisions, but there 12 is no support in place for such interpretation. When it 13 comes to the first element that the property will be 14 used for the purposes of monetary policy, when the 15 Convention was developed the proposal was to include 16 this element. This part was not adopted by general 17 assembly, it's not part of the final version.</p> <p>18 That the criteria proposed by the applicant, it was 19 rejected by the Member States and the UN indicates 20 strongly that such an element is not part of 21.1(c).</p> <p>21 The applicants claim that the Member States of the 22 UN through adoption of 21.1(c) adopted a minimum common 23 denominator and the question has been passed on to 24 application of law.</p> <p>25 There's no support for this claim. On the contrary,</p> <p style="text-align: center;">Page 102</p>	<p>1 The property of the central bank is immune due to 2 the fact that this belong to the central bank and not 3 with intents of the central bank with its holdings.</p> <p>4 It's difficult to understand what would be the 5 function of 21.1(c) if the intents of the property would 6 be considered. The purpose of Article 21 is to make 7 sure that certain property is covered with immunity, 8 even though it's covered by the exemption in 19(c), 9 because it's used for commercial purposes. It's 10 difficult to imagine how property which is used by the 11 central bank for the purposes of monetary policy could 12 at the same time be used for commercial purposes.</p> <p>13 If the requirement would be that the property is 14 used for the purposes of monetary purposes then 15 Article 21 would become superfluous.</p> <p>16 The second criteria of the applicant that the 17 property should be held for own account, this element 18 has been used in US case law and this is a qualifying 19 element which means that the assets of the central bank 20 should be used for traditional central bank tasks in 21 order to be covered by immunity according to the 22 American State Immunity Act.</p> <p>23 The starting point in this American element which -- 24 it's on the basis of this that the American professor, 25 Ms Wuerth, makes conclusions about the immunity in the</p> <p style="text-align: center;">Page 104</p>

26 (Pages 101 to 104)

<p>1 report she compiles on behalf of the respondent.</p> <p>2 A lot could be said about those reports and her</p> <p>3 conclusions but I will refer you to the report of just</p> <p>4 Professor Chester Brown, which was submitted yesterday,</p> <p>5 where he provides comments on Professor Wuerth's</p> <p>6 reports. When it comes to her conclusion it should be</p> <p>7 noted that the point of departure is US law where the</p> <p>8 position is much more restrictive to state immunity</p> <p>9 compared to the UN Convention. It should also be noted</p> <p>10 that the case law varies between different states when</p> <p>11 it comes to immunity of central bank assets.</p> <p>12 For example, the English and the Chinese legislation</p> <p>13 provide more or less the same protection for the assets</p> <p>14 of central bank as in 21, while the US legislation is</p> <p>15 much more restrictive.</p> <p>16 The contents in national case law is of no</p> <p>17 importance in this particular case. The Supreme Court</p> <p>18 has established that property which belongs to the</p> <p>19 specific categories listed in 21 in the Convention are</p> <p>20 covered by immunity and enforcement measures cannot be</p> <p>21 taken in Sweden against this type of property.</p> <p>22 The state case law is only relevant if in order to</p> <p>23 understand how Article 21 of the Convention should be</p> <p>24 applied but the American case law does not provide us</p> <p>25 with any such guidelines.</p> <p style="text-align: center;">Page 105</p>	<p>1 from the state. This independence is definitely not</p> <p>2 absolute being a state body which implements or</p> <p>3 exercises state authority. All the central banks are in</p> <p>4 one way or another more or less dependent on the state.</p> <p>5 The level of independence of the central bank is always</p> <p>6 relative.</p> <p>7 What is the level of independence which would be</p> <p>8 sufficient in this case is highly unclear. Although the</p> <p>9 development in a lot of places has indicated that</p> <p>10 central banks are becoming more independent, but there's</p> <p>11 no consensus in the global community about what degree</p> <p>12 of independence should be granted by the state to its</p> <p>13 central bank. The fact that national courts would have</p> <p>14 to make an assessment to which level the central bank</p> <p>15 influences the monetary policy is probably not the</p> <p>16 intent of the Member States of the UN and also violates</p> <p>17 one of the local principles of international law, the</p> <p>18 principle of sovereignty. Therefore Article 21 can be</p> <p>19 interpreted in the way proposed by the applicant.</p> <p>20 In conclusion and to summarise, the property managed</p> <p>21 by the NBK as part of national fund which was attached</p> <p>22 by the SEA is of the kind which is mentioned in 21.1(c).</p> <p>23 Therefore it's covered by state immunity and therefore</p> <p>24 the court should grant her motions.</p> <p>25 I pass the word to ...</p> <p style="text-align: center;">Page 107</p>
<p>1 The third element which should be applied in</p> <p>2 accordance with the claim of the applicants is that the</p> <p>3 central bank should be independent with respect to this</p> <p>4 state. This line of reasoning is based on the</p> <p>5 conclusions made by Professor Linderfalk is that the</p> <p>6 central banks have normally quite a large degree of</p> <p>7 independence vis-a-vis the state. The applicants refer</p> <p>8 to the doctrine that central bank has considerable</p> <p>9 autonomy from the parent state. These description of</p> <p>10 central banks are correct per se, it's also a place to</p> <p>11 hold National Bank of Kazakhstan, as organised NBK</p> <p>12 operates as a separate legal entity, it is not a state</p> <p>13 ministry.</p> <p>14 However, there is no support in authoritative legal</p> <p>15 sources that independence is a requirement for a central</p> <p>16 bank to be covered by 21.1(c). The wording seems to</p> <p>17 indicate on the contrary, or other monetary authorities</p> <p>18 of the state, that they have taken into account the fact</p> <p>19 that the states organise their public apparatuses</p> <p>20 differently and therefore the task of the central bank</p> <p>21 could also be executed by state authorities.</p> <p>22 The elements which is claimed by the applicant would</p> <p>23 lead to considerable enforcement difficulties, obviously</p> <p>24 when Sweden take for granted that the Swedish Central</p> <p>25 Bank operates with a high-level degree of independence</p> <p style="text-align: center;">Page 106</p>	<p>1 Submissions by MR FOERSTER</p> <p>2 MR FOERSTER: ... the applicants claim that Kazakhstan has</p> <p>3 laws that operate to ... due to abusive rights. But</p> <p>4 what the applicants really -- it's not very clear what</p> <p>5 they state. What is an abusive ... the applicants have</p> <p>6 been quite unclear in that respect. From what I could</p> <p>7 read and based on what was said on Tuesday is that</p> <p>8 Kazakhstan consistently refuses to pay, referring</p> <p>9 immunity. It's quite easy to respond. Look at</p> <p>10 statistics, look at mathematics. Out to the 11</p> <p>11 investment disputes which Kazakhstan has been involved</p> <p>12 in at the time for hearing the district court in April</p> <p>13 of last year, there has been another dispute. Eight of</p> <p>14 disputes were settled.</p> <p>15 In April, the additional case, this case has been</p> <p>16 appealed, yes, but this was done on the basis of the</p> <p>17 fact that the tribunal exceeded its authority.</p> <p>18 The other two cases where the payment was made, this</p> <p>19 has been settled by the -- so the payment has been made.</p> <p>20 So the only remaining case is this one.</p> <p>21 It's strange that this claim is still maintained,</p> <p>22 because you can read from all possible databases which</p> <p>23 the counsel probably also has access to and also it's</p> <p>24 not an abuse to right to pay on the basis of an arbitral</p> <p>25 award. There are different systems in the arbitral law</p> <p style="text-align: center;">Page 108</p>

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<p>1 to review the arbitral award based on different 2 procedural grounds but also as violation of order 3 public. 4 The fact they didn't pay after the award means they 5 violated their obligations, including 26.8 of the ECT, 6 the Energy Charter Treaty. I don't want to describe the 7 entire system. 8 This paragraph says that every state which has 9 acceded to the treaty should without delay follow 10 decisions by the appeal courts to make sure that the 11 statutes could be enforced efficiently. However. This 12 is not a promise with respect to the investors. This is 13 a treaty between the states. This means that the state 14 should take certain measures within its own 15 jurisdiction. For example, provide for an efficient 16 legal process to enforce arbitral award based on the 17 rules of enforceability, the ICSID rules on the UN 18 Convention. This is something which is described by 19 Pål Wrange in his second report, where he refers 20 specifically to page 12. This is under tab 40. The 21 provisional test would mean that Kazakhstan has 22 an application with respect to other states of the 23 treaty to pay to a third party after an award rendered 24 against the state. The provision, these obligations 25 between Kazakhstan and Sweden, and Sweden wasn't a party</p> <p style="text-align: center;">Page 109</p>	<p>1 The claim was that the Kazakhstan abuses 2 international principles of state immunity in order to 3 avoid paying on the basis of Linderfalk. The applicant 4 claims that there is such a fundamental principle the 5 international right of principle of good faith. The 6 only support for the applicants' claim is Linderfalk's 7 ... customary law, what's interesting is that 8 Professor Linderfalk where he claims that the abuse of 9 right doctrine is part of international legal order, and 10 he quotes himself. This is footnote 55 on page 14. He 11 does not provide any other sources. The right to invoke 12 immunity is completely separated from the international 13 obligations of the state. It has been confirmed by the 14 international court ... in the judgment from the 15 13 April 2012 in a case between Germany and Italy, where 16 Germany was allowed to invoke immunity with respect to 17 real property which located in Italy, although German 18 didn't pay damages for war crimes which Germany had to 19 pay. This is filed under tab 48 in binder 1, exhibit 20 210. The conclusions of the judgment: 21 "Where the state is entitled to immunity before the 22 court of another state is a question entirely separate 23 from whether the international responsibility of that 24 state is engaged when it has an obligation to make 25 reparation."</p> <p style="text-align: center;">Page 111</p>
<p>1 to that award. So therefore Sweden has no vested 2 interest in this matter. The applicant cannot claim 3 an abuse of rights which Kazakhstan has not against 4 Sweden. Kazakhstan did not violate any obligations in 5 accordance with the ECT by not paying in accordance with 6 the rendered award. 7 Next claim which was made is that Kazakhstan by 8 ratifying the ECT implicitly waived its right to raise 9 the immunity defence. With respect to that, the 10 starting point should be ... rights invoking community, 11 in accordance with international case law. It can be 12 done by explicitly and specifically by waiving this 13 right, but Kazakhstan did not do that. Such a waiver 14 and cannot be read from this Article 26.8 in the ECT, 15 because that provision refers to the fact that the state 16 with respect to the enforcement procedures, they refrain 17 to claim right to immunity to jurisdiction. So 18 obviously to assign to the ECT the waiver of their right 19 to claim immunity with respect to enforcement, but this 20 is not the case. This is confirmed by Professor Wrange 21 in his second report, tab 40, on pages 12 and 13 and 22 also the judgment by the Supreme Court of the 23 Netherlands delivered in October 2016, and also from the 24 French Cour D'Appel, the judgment which we sent in just 25 before this hearing opened.</p> <p style="text-align: center;">Page 110</p>	<p>1 A possible breach of the ECT is not relevant to the 2 issue whether this question can invoke state immunity or 3 not. 4 It is also said that Kazakhstan does not have 5 damages set in this case and they fight enforcement in 6 other countries where the applicants try to enforce the 7 arbitral award. The applicants seem to say the fact 8 that Kazakhstan invokes immunity that in itself is 9 an abuse of rights and therefore the right to invoke 10 immunity, which is not correct. Enforcement measures 11 are taken when voluntary payment didn't take place. If 12 the right has no right to invoke immunity to enforcement 13 measures every time the state does not pay a debt, the 14 state immunity against enforcement measures will become 15 a meaningless issue. 16 Kazakhstan's unwillingness to pay in accordance with 17 the award is based on the fact that the applicants 18 motions in the award are based on serious crimes and the 19 fact ... that this follows from the decision by the 20 English High Court, which under the prima facie 21 assessment came to the conclusion that the award 22 rendered fraud and therefore the award was not 23 enforceable in England. 24 This criminal act had become an issue in Sweden 25 through the new application by the (inaudible) to</p> <p style="text-align: center;">Page 112</p>

<p>1 invalidate this case to the Court of Appeal. As you 2 know, Kazakhstan has submitted a copy of the summons as 3 part of this case and, briefly, the fact that the 4 applicants have drained their operations in Kazakhstan 5 of funds to funnel the money to affiliated companies. 6 Therefore the applicants' Kazakh company was facing 7 serious financial difficulties, something which the 8 applicants blamed on Kazakhstan.</p> <p>9 The tribunal accepted the applicants' -- considered 10 the damages which de facto were caused by the applicants 11 themselves. So if Kazakhstan had paid in accordance 12 with the award Kazakhstan would pay for the damages 13 which have been caused by the applicant.</p> <p>14 It should be noted that this money was laundered by 15 the applicants to use improper payment to politicians, 16 among others the Kazakh vice minister which was 17 responsible for the industry in which the applicants 18 have been doing their business. If the court considers 19 that the enforcement of the award violates ... but if 20 the Court of Appeal in this case would really have to 21 try the actual abuse of rights. In that case, the 22 circumstances listed in our addendum K55 this is 23 relevant and this gives strong indications that 24 Kazakhstan had reasons to suspect the applicants of 25 committing crimes and should be tried by a competent</p> <p style="text-align: center;">Page 113</p>	<p>1 not enough, so why would Kazakhstan be criticised for 2 seeking justice on this matter? The minister for 3 Justice himself and the majority of his staff are 4 trained in American, English and other western 5 universities. These are qualified lawyers who have 6 studied foreign state government and know about rule of 7 law. Why would they not bring to justice people who 8 have benefited in criminal ways, especially from the 9 Kazakh natural resources?</p> <p>10 Sweden signed another convention, the 2003 UN 11 Convention on corruption. This is in 2007:44 and Sweden 12 is complying with this to fight the crime that preceded 13 the arbitral award. That is the basis of the 14 applicants' claim. This Convention has to be taken in 15 consideration. Therefore Swedish courts must respect 16 Kazakhstan's objections to enforcing the award in order 17 to prevent such criminal activities.</p> <p>18 Therefore the applicants' claim that Kazakhstan has 19 lost its right to invoke immunity be disregarded.</p> <p>20 Thank you very much for your attention.</p> <p>21 SVEN JÖNSON: The question now is would you like to begin 22 and then in 20 minutes ... or if that's not that good.</p> <p>23 MR NILSSON: Could we take a break, maybe a short break, 24 just so that we get our equipment installed. Then we 25 could have a longer break in the middle of our</p> <p style="text-align: center;">Page 115</p>
<p>1 court. If Kazakhstan had reasons to suspect that 2 a crime was committed this review can only be made on 3 the basis of the written evidence. The issue of burden 4 of proof is something else.</p> <p>5 The criminal acts by the applicant is something 6 which is part of the litigation in the Washington DC 7 litigation on the basis of RICO and this is something 8 which was quoted by the court. The court at first 9 instance rejected the claim and now on Monday, just 10 during our first day, there was a hearing in the US and 11 according to our information service in the US there are 12 now good chances that the judge on Monday signalled the 13 possibility of granting Kazakhstan's request to request 14 dismissal of the suit. So let's wait and see.</p> <p>15 Before this meeting the Ministry of Justice in 16 Kazakhstan has asked me specifically to raise the way 17 the applicants quoted from the message paper from 18 March 2019. It is here on page 913 in the binder of 19 evidence by the applicant. I would ask the court to 20 read the entire article later. In the article they 21 mention the criminal background of the applicant and the 22 new evidence that the minister for justice had just 23 receive then about the applicant's fraudulent conduct 24 and the need for precedence when it comes to the 25 question of immunity. The AIG judgment is apparently</p> <p style="text-align: center;">Page 114</p>	<p>1 presentation. That might be easier. If we take 2 a 10-minute break now.</p> <p>3 SVEN JÖNSON: That will be fine. 4 (2.07 pm)</p> <p>5 (A short break) 6 (2.23 pm)</p> <p>7 Closing submissions by MR NILSSON</p> <p>8 MR NILSSON: While we are waiting to get our technology in 9 order, I would just like to without the help of any 10 slides just give a very brief comment on the very last 11 thing that was said by the other side when it comes to 12 this lawsuit that has been submitted in 2002.</p> <p>13 The evidence was dismissed by this or abuse as 14 evidence in this case has been rejected. Therefore 15 there is no evidence for the allegations made. I would 16 just like for the sake of order that everything that is 17 said there is incorrectly stated by them. It is 18 contested, it's denied and the court should not take 19 this into any consideration when it assesses the case.</p> <p>20 If we can move on to what the Court of Appeal is to 21 take into account in its assessment, I am going to stick 22 to what I believe is a logical sequence of the questions 23 that have come up in this case.</p> <p>24 The first one is really only about the depository 25 and that is the question of the jurisdiction. Then the</p> <p style="text-align: center;">Page 116</p>

<p>1 next question is whether the attached property belongs 2 to Kazakhstan or not. If it does, then the question of 3 immunity comes up, firstly according to Article 19(c). 4 If that answer is answered in the negative, that is that 5 the court finds that the property is not solely used for 6 state noncommercial purposes, then the question of 7 immunity comes up according to Article 21. 8 Then finally if any of the principles of immunity 9 are to be applicable, then the court will have to answer 10 the question on whether that has been lost through abuse 11 by Kazakhstan. 12 I will start then with the question of jurisdiction. 13 All of the attempts that the opposite side is making to 14 locate the attached property, to locate it abroad is 15 only based on non-solid theoretical arguments, which 16 have nothing to do with reality. This situation is such 17 that the enforcement agency has attached shareholdings 18 belonging to Kazakhstan which are held in depository by 19 the Swedish SEB Bank, that they have sold these shares 20 and they are keeping the liquid funds in an account 21 belonging to the enforcement agency. 22 This was also held in separate cash account at SEB 23 at the time of the attachment. The shares, they were 24 formed in Sweden at the time they were issued in Sweden. 25 They were book entered in Sweden and they have never</p> <p style="text-align: center;">Page 117</p>	<p>1 examination that BNY Mellon sends written instructions 2 to the bank via SWIFT for immediate registration in the 3 bank's depository system. That BNY Mellon's 4 instructions state clearly the financial instrument and 5 the number that this transaction is about. That 6 registration in the SEB Bank in Sweden is made in 7 accordance with these abbreviations for the accounts 8 that the Court of Appeal recognises now and that you 9 have seen within this pink frame. I am sure you will 10 recognise it when you see these documents. 11 Now that assets that belong to a foreign debtor held 12 in a Swedish bank account, that that means that they are 13 in Sweden and it's not significant then that the shares 14 are dematerialised. 15 It is actually clear from the legal case from 2014 16 that the National Bank referred to that when property 17 originally is put into a specific account on behalf of 18 somebody else, it is of no significance who is named as 19 the account holder. What is decisive is the one who 20 owns the funds. In that case the law firm was the 21 account holder, but of course it was never claimed that 22 the funds belonged to the law firm. The important thing 23 is that it can be definitely identified who has access 24 to it. 25 This case of jurisdiction that the other side has</p> <p style="text-align: center;">Page 119</p>
<p>1 been taken out of Sweden. They are in Sweden to the 2 uncontested chain of custodians. They were originally 3 acquired for Kazakhstan with funds from the national 4 fund. 5 This of no significance to the question of 6 jurisdiction if the shares were acquired on behalf of 7 Kazakhstan. Bank of New York Mellon has had no 8 difficulties differentiating on the relevant 9 transactions. We will come back to this list of 10 transactions later. But I will just note that in this 11 context this list reflected directly to SEB as 12 Ms Buresten said during the examination of her, this 13 happened simultaneously or immediately by electronic 14 transfer in the SWIFT system. 15 SEB Bank has kept all the acquired shares in 16 segregated securities accounts from the time of the 17 acquisition. What happens first is the acquisition of 18 the shares and the registration of the shares. After 19 that there is a clearing made of payments, et cetera. 20 But it's not the case that Bank of New York Mellon first 21 sends SEB bank a lot of money which is then all mixed 22 together and there, after that, the money is used for 23 buying shares. It's the opposite. 24 The acquisition of the shares comes first and then 25 the clearing comes after. Ms Buresten confirmed in her</p> <p style="text-align: center;">Page 118</p>	<p>1 also gotten from other instances, this is about 2 jurisdiction. Different views are put forward when it 3 comes to whether a foreign party has to defend 4 themselves in the Swedish court of law and whether it's 5 possible to attach assets. 6 When it comes to jurisdiction, you can talk about 7 forum of convenience [as said] and parties are not 8 forced to appear when it would not be natural for them 9 to respond. When it comes to execution, of course then 10 it is legitimate that the assets of a non-cooperating 11 debtor can be taken anywhere they are found in the 12 world. 13 What the enforcement agencies said about their 14 executive authority and this refers to this and this is 15 a practical approach that the enforcement agency have. 16 They are saying what they have said in their statement, 17 which is on this slide of the enforcement agency 18 statement. Here they are establishing that the 19 territorial authority there is no guidance to that and 20 there is no precedent. But according to them the main 21 principle of the executive authority of the enforcement 22 agency is linked to the possibility of effectively 23 ensure attachment. This is a practical and 24 down-to-earth approach that the investors advocate. The 25 enforcement agency also says that attachment according</p> <p style="text-align: center;">Page 120</p>

<p>1 to 47 of the enforcement code is that an effective 2 attachment can be made. Of course that has to be the 3 case and there is no doubt that that was the situation 4 here in this case and that's the reason why we are 5 sitting here.</p> <p>6 What the opposite side is saying is really that 7 there is some form of prohibition against upper tier 8 attachment or pass through, whatever you call it in 9 proper English terminology. This is actually not 10 supported in Swedish law. If the debtor's property is 11 to be exempted from attachment, then that needs to be 12 supported by law and there is no such support here.</p> <p>13 The claim to get the shares is directed at SEB and 14 if you choose to look on this as a claim, then you have 15 to establish that the claim has to be where the debtor 16 is. In this case that is the SEB Bank. The enforcement 17 agency's authority to take measure against that cannot 18 be argued according to discussions on a doctrine that is 19 not part of Swedish legislation. It's not clear whether 20 this will be entered into Swedish legislation. It's 21 only been ratified by Bangladesh in the last 10 years 22 and as well as that the Convention allows exceptions 23 from the prohibition in international law, for example, 24 if the chain is transparent.</p> <p>25 The opposite wants to rely a lot on what</p> <p style="text-align: center;">Page 121</p>	<p>1 identified. If you are going to look at the 2 significance of keeping registers, the relevant register 3 in the view of the investors is kept where the register 4 shows who the owner is.</p> <p>5 The custodian registered with Euroclear, that is the 6 SEB Bank, knows who the owner is. That is clear from 7 the list of custodies by the bank and it's the SEB 8 register which is the relevant one there.</p> <p>9 The Court of Appeal can also look at how the London 10 High Court describes the legal situation in its ruling 11 on the Part 8 judgment. It is fairly long, it's 12 appendix SO5 or exhibit 125. The court can just note 13 that the sections that are registered are 74, 76, 81 and 14 101. There you can see that not according to English 15 law is the legal situation as clear as the National Bank 16 is claiming.</p> <p>17 If you raise your gaze a bit you see that the 18 National Bank's understanding of the law and the 19 possibility of getting at shares must be the dream of 20 any money launderer or drug dealer, if not even all the 21 elements of the chain knows who has is entitled to that. 22 It's possible to take the assets in possession if you 23 cannot intervene against the first custodian in the 24 chain. For some reason they always turn that upside 25 down so that the upper tier is at the very bottom. This</p> <p style="text-align: center;">Page 123</p>
<p>1 Wallin-Norman wrote, what was written in her statement 2 made on request of the other side and never experienced 3 a person making statements for both parties in 4 an ongoing dispute. I think this throws a shadow on the 5 general liability and credibility of her report.</p> <p>6 It is not really ... not very good to just agree 7 with the one who sent you the last invoice. So this is 8 the question of the chains of custodians or chains of 9 debtors. That objection is sort of beside the point.</p> <p>10 The mistake is that the National Bank mixes up ownership 11 right and legitimacy. The shares are held on deposit by 12 the bank, but of course the bank doesn't own the shares 13 because it's held on deposit. The same thing applies to 14 custodians further up the chain. That is 15 Bank of New York Mellon and the national bank.</p> <p>16 During the closing statement the National Bank 17 talked a bit about grains and silos, but that analogy is 18 not sustainable in the view of the investors. The CSD 19 account in Euroclear is not a silo. It is perfectly 20 possible if you just go to the relevant data in the one 21 who has the account, that is the SEB Bank, to 22 distinguish the individual shareholdings that are held. 23 It's not like just one big mix of grains that are just 24 sitting there unidentifiable, it is securities that have 25 been individualised and that's as they can be</p> <p style="text-align: center;">Page 122</p>	<p>1 is a mysterious thing that we can disregard for now, but 2 the practical significance is that if an investor, 3 whatever sort of shady nature is chooses an original 4 custodian in the jurisdiction where you can possibly be 5 found right, then that's the end of it. Normally 6 speaking that those who have inappropriately 7 appropriated funds, they are keen to conceal their 8 holdings and there are all kinds of complex company 9 constructions for that not to be revealed.</p> <p>10 If it is as the National Bank is saying, that would 11 be unnecessary work. All you have to do is ensure you 12 have a first custodian that you can't really get at. 13 Then everybody else in the chain can just then refer to 14 prohibition against upper tier attachment.</p> <p>15 There is a statement where it says that if the 16 shares cannot be attached in Sweden they have created 17 an effective way of withholding property. If we look at 18 this chain of custodians or nominees, according to the 19 investors it is Kazakhstan which is listed in red here 20 Kazakhstan which is the real owner, the National Bank is 21 original custodian, Bank of New York Mellon is the sub 22 nominee in Sweden and SEB is a sub nominee in Sweden.</p> <p>23 Then the first nominee in this chain, the National 24 Bank. The other side is not saying this, but this is 25 the logical consequence of their arguments. I take it</p> <p style="text-align: center;">Page 124</p>

<p>1 that they avoid saying this because anybody will 2 understand the possibilities the investors would have of 3 being found right by turning to enforcement agencies in 4 Kazakhstan requesting executive measures against the 5 National Bank.</p> <p>6 There are more and more requirements for 7 transparency in the financial systems now for various 8 reasons. For example, the 2018 directive on increased 9 shareholder engagement it's unreasonable to keep 10 an order which does not take into consideration who is 11 the beneficial owner. It's equally impossible as the 12 SEB representatives are saying that they don't really 13 know who Bank of New York Mellon's customers might be.</p> <p>14 Still, the SEB Bank has taken on responsibility 15 vis-a-vis the tax agency to ensure that the tax treaty 16 with Kazakhstan is applicable and it is also clear from 17 anybody who reads the list of custodians, including 18 Electrolux's advisers, that they can see the 19 shareholdings that belong to Kazakhstan. This is real 20 knowledge as opposed to imagined ignorance. The 21 shareholders have been identified with the help of 22 Swedish registers and the shares were available for 23 enforcement measures in Sweden. That is why we are 24 here.</p> <p>25 I think that's enough on the jurisdiction for the</p> <p style="text-align: center;">Page 125</p>	<p>1 submitted and the information in them and the decision 2 by the tax agency. I am only reminding you of this, 3 I am not going to look through these documents again. 4 I am only referring to what we looked at during our 5 opening statement.</p> <p>6 If we then take a look at what the National Bank has 7 said, Kazakhstan also owns the property. This filled-in 8 form identifies the ministry of finance of the 9 Republic of Kazakhstan as the owner and the National 10 Bank as the account holder and nothing else.</p> <p>11 This also corresponds with what Moldabekova said 12 during her examination and that the Court of Appeal has 13 listened to. What she described was actually that they 14 had considered the question before they drew up the 15 documents and sent them into the tax agency, at least at 16 an earlier stage. The other day the National Bank said 17 that it was actually Bank of New York Mellon who had 18 stated this or that. But that is wrong. It was the 19 National Bank's vice president and the ministry in 20 consultation had agreed that it was Kazakhstan who was 21 to be named as the owner of the shares.</p> <p>22 Then if we take a look at Bank of New York Mellon's 23 information, it's the same there. Earlier on we saw 24 a slide during the closing arguments by the National 25 Bank of this chart where the bank says that it is the</p> <p style="text-align: center;">Page 127</p>
<p>1 enforcement agency. If we then move on to the question 2 of ownership, to me that is fairly obvious. It has 3 never been explained how ownership right assets in the 4 national fund, which indisputably were created by and 5 belonged to Kazakhstan, how that right of ownership was 6 transferred to someone else. It is up to the opposite 7 party to refute this. We can hear from the 8 Supreme Court judgment of 1983, page 436 and what they 9 say on the burden of proof is slightly different to what 10 we've heard earlier today:</p> <p>11 "I a third man claims that the attached property 12 belongs to him, acknowledges that previously it belonged 13 to the debtor but claims that he has acquired the 14 property from him, then the third party should be 15 required to provide evidence for this claim for this to 16 be held credible."</p> <p>17 But neither the National Bank, 18 Bank of New York Mellon nor the SEB Bank say that they 19 have anything to do with the securities in the capacity 20 as an owner. However, Kazakhstan itself and all the 21 custodians have explained that it is Kazakhstan who is 22 the owner.</p> <p>23 When it comes to Kazakhstan's position, we have 24 looked at the power of attorney that was issued. We 25 have looked at these tax declarations that have been</p> <p style="text-align: center;">Page 126</p>	<p>1 Republic who has the ownership, whereas the national 2 bank only has the account holder. The submission that 3 we are referring to tells you a bit more than that, 4 a bit more than the National Bank said. We can take 5 a look at an excerpt from the submission.</p> <p>6 First they are saying that BNYM holds assets on 7 Republic of Kazakhstan pertaining to the national fund 8 ...</p> <p>9 Secondly:</p> <p>10 "For example, the assets of the national fund, which 11 BNYM holds under the GCA with the National Bank of 12 Kazakhstan, are owned by the Republic of Kazakhstan."</p> <p>13 Thirdly:</p> <p>14 "The national fund is owned by the 15 Republic of Kazakhstan."</p> <p>16 They are talking about the trust:</p> <p>17 "Such a trust is to be distinguished from the Anglo 18 Saxon trust as the ownership is not split. Pursuant to 19 the TMA, the Republic of Kazakhstan retains full control 20 over the management of the national fund and exercises 21 extensive control over the National Bank of Kazakhstan."</p> <p>22 This is a more extensive report on Mellon's 23 position. The National Bank is now trying to imply that 24 the world's largest asset manager was frightened by the 25 investors having made threats. What is really happening</p> <p style="text-align: center;">Page 128</p>

<p>1 is that there is a process where both Kazakhstan and the 2 National Bank is bringing an action against Bank of 3 New York Mellon and has claims of many millions of US 4 dollars. So who is trying to frighten Bank of New York 5 Mellon? One can discuss that but it would be a fairly 6 sterile debate.</p> <p>7 The central bank did not produce any explanation to 8 these account designations which have been presented by 9 BNY, which through and through identify Kazakhstan as 10 the owner. We haven't seen any evidence of the 11 instructions from the central bank either documents. 12 One could assert that there are reasons why these 13 instructions are not part of the written evidence of NBK 14 in this case.</p> <p>15 I may remind the court that BNY forwarded this 16 information that Kazakhstan is the owner, this is a part 17 of the tax case.</p> <p>18 The position of the custodians in this chain is that 19 they are intermediaries and nothing else. Kazakhstan is 20 the owner. The central bank is the original custodian, 21 Mellon is sub-custodian and SEB is the Swedish 22 sub-custodian to BNY.</p> <p>23 I will not tire the court with a new interpretation 24 of the documents, but on the right-hand side in red we 25 refer to the document which indicate the title of</p> <p style="text-align: center;">Page 129</p>	<p>1 operate in accordance with Kazakh law.</p> <p>2 The assumption here is that the trustor does not 3 have to take any measures? Could the control in 4 principle should be cut off from the trustor. This is 5 what the law says, but in our case Kazakhstan 6 administers quite a lot of influence over the national 7 fund. Not only through the national fund agreement but 8 also through also the management council of the national 9 fund. NBK earlier said, right, but Article 886 provides 10 for exceptions, this is something which follows from the 11 last sentence. But there should be limits of how 12 a legal provision could be supplemented with exceptions 13 but still maintain its identity.</p> <p>14 If you look at a Swedish rule, a foundation could 15 have different whole possible rules but you cannot 16 refrain from the basic rule. But the special -- there 17 should be special assets under management which are 18 managed in a particular way if. You eliminate that and 19 you say right the person which founded the foundation 20 could in any case come in and control the property, then 21 this is more than special exemption from the statutes. 22 It means that the foundation of the trust loses its 23 character.</p> <p>24 I won't spend a lot of time on Kazakh law even 25 though -- it's not particularly relevant to this case</p> <p style="text-align: center;">Page 131</p>
<p>1 Kazakhstan and the status of other custodians as 2 custodians.</p> <p>3 To say something about Kazakh law, this trust 4 argument which was launched by the Kazakh side and this 5 was presented quite late during the proceedings in the 6 lower court, from the point of view which we are 7 discussing now, the right of ownership, it's lacking 8 content because it should be quite clear according to 9 Kazakh law that if you call the party the trustor, the 10 trustor still remains the owner even if the custodian 11 agreement has ceased to exist.</p> <p>12 We have looked at 886 of the civil code on the trust 13 management of property. One of the party assigns the 14 trustor. The other party the trustee transfers 15 property for trust management. The other party 16 undertakes to manage this property in the interest of 17 the beneficiary.</p> <p>18 During the term of the trust management agreement 19 the trust does not have any right to conduct any 20 measures with respect to property in trust. Unless 21 anything else is mentioned the legislation of the RoK is 22 expressed in the agreement.</p> <p>23 The arrangements in this case don't really 24 correspond how this trust -- we can call it trust 25 although it's not a legal entity -- is supposed to</p> <p style="text-align: center;">Page 130</p>	<p>1 what the Kazakh law states, because if the property 2 should be protected from attachment, this is a question 3 of Swedish law. It's not that strange foreign 4 arrangements which create other rights different from 5 what's known to Sweden. This is not something that 6 should be applied here.</p> <p>7 It follows from ... NJA 78, page 5923, and ... this 8 clause could be claimed in Germany in accordance with 9 German law, but this is of no importance in Sweden.</p> <p>10 So therefore not in accordance with Swedish law or 11 to the Kazakh law, the NBK is only the custodian, the 12 manager of the asset. The owner is and remains to be 13 the RoK and therefore the immunity issues arrive and 14 this is the point which we discussed the part of the 15 case which are the most in interesting ones.</p> <p>16 The first question is about Article 19. We have 17 looked at the elements in Article 19 on several 18 occasions, which allows construing if the state uses or 19 intends to use the property for other purposes than 20 state noncommercial purposes. This is the critical text 21 in these two and this is what we are ...</p> <p>22 Please note it's the intent of use which is of 23 importance in accordance with 19(c), the intended use of 24 the property. The property which is challenged whether 25 it becomes a subject of attachment or execution if the</p> <p style="text-align: center;">Page 132</p>

<p>1 property is used by the state other than for government 2 noncommercial purposes then it could be attached. 3 When it comes to the burden of proof, it is the case 4 in the Sedelmayer case, everybody knows 2011, page 411 5 I will just say the Sedelmayer case. The Supreme Court 6 has made a statement on this issue. This does not 7 become less valid just due to the fact that Mahmoudi 8 writes something else in his legal report, something 9 which doesn't correspond to the active Swedish laws: 10 "The Supreme Court has obtained such a review, the 11 requirements with respect to state immunity with respect 12 to property which is ...(reading to the words)... means 13 that general rules on the burden of proof in an 14 execution order cannot be fully maintained." 15 The last part might be a bit difficult to 16 understand, but the Svea Court of Appeal explains it in 17 a more accessible manner, where they say: 18 "It is the Russian Federation who have to make it 19 probable that the property in question must be used for 20 official purposes in order to create impediments to 21 enforcement. During such a review particularly severe 22 requirements shouldn't put to the Russian Federation's 23 presentation of the operation and the use of certain 24 property." 25 The court says that this is not a question of</p> <p style="text-align: center;">Page 133</p>	<p>1 The Supreme Court says the immunity enforcement 2 could be invoked with respect to property which is used 3 for official functions of a state. However, this 4 shouldn't mean that immunity is in place with respect to 5 compulsory measures, only due to the fact that the 6 property is used by a state and it's used by the state 7 for noncommercial purposes. This is not enough. 8 Impediments due to state immunity should however be 9 present. If the purpose of the possession of the 10 property is of the qualified nature, for example, when 11 the property is used for the state exercising of its 12 actions as a state and similar tasks of official nature 13 or if the property is of such a special nature which is 14 listed in Article 21 in the UN Convention of 2004. This 15 is something which the Supreme Court says more or less 16 in passing, because these exceptions are not present in 17 Sedelmayer. 18 My reading of the last qualified nature is that this 19 is one exception. 20 Article 21 is another -- I believe the counterparty 21 had a different understanding of this term qualified 22 nature. 23 In any case, the assessment of the purpose of the 24 possession of the property is of such a qualified nature 25 that this would constitute an impediment to the</p> <p style="text-align: center;">Page 135</p>
<p>1 reversed burden of proof, but it's like the light burden 2 of proof due to the states due to the substantial nature 3 of these persons. 4 If we look at what Professor Mahmoudi wrote about 5 Sedelmayer, I would like to draw the court's attention 6 to the sections highlighted in yellow: 7 "What is generally accepted as the property of the 8 state which is not used for state purposes could under 9 certain conditions be a subject for an enforcement. The 10 Supreme Court of Italy established the law in 1926 in 11 a case which had to do with enforcements to gain 12 securities which belonged to Romania, that the 13 government is considered to be a legal subject of the 14 private law when it is involved in transactions of 15 private law. Similar case law is found in the majority 16 of European countries." 17 In the same report Mahmoudi is stating: 18 "To understand whether certain actions are actions 19 of a state or ie the jure imperii or the jure gestionis, 20 then the nature and the intent of the actions should be 21 reviewed. In his report in this case Mahmoudi 22 emphasised that it's the purpose which is the most 23 important factor, maybe the only important factor. 24 Have a look at the Swedish law as it follows from 25 the decision of the Supreme Court in Sedelmayer.</p> <p style="text-align: center;">Page 134</p>	<p>1 enforcement of the property, should be done on the basis 2 of the factual use of the property says the 3 Supreme Court, something which the investors have used 4 as an argument. 5 If we continue looking at the Supreme Court 6 decision, so this property was of mixed use. There were 7 apartments, premises and other property which would be 8 protected by the Vienna Convention on diplomat immunity, 9 but the Supreme Court made a comprehensive review. 10 It should be established that the property did not 11 to any -- was not used by the Russian Federation's 12 official activities. The purpose was not qualified 13 enough to protect the property against enforcement in 14 the case at hand. 15 This is obviously a decision which professors of 16 international law they have commented on this and 17 Pål Wrange, who submitted a report on this case, they 18 said that it was right to demand a significant part of 19 the property is used for official use otherwise the 20 state could invest in properties overseas and then 21 protect its assets by accommodating one or two diplomats 22 in each house. 23 Mahmoudi's comment is: 24 "The court, in my opinion, has made a correct 25 assessment of the status of the property considering the</p> <p style="text-align: center;">Page 136</p>

<p>1 actual use of the premises ...(reading to the words)... 2 related cases is on the increase. 3 What could we say about the nature of the property? 4 We have looked at this slide on several occasions which 5 show the transaction history, which is that this is 6 NBK's account at BNY, this is what has been submitted in 7 this case about 400 pages that were submitted by NBK. 8 We have heard from SEB's witnesses that this is 9 immediately mirrored in identical transaction vis-a-vis 10 SEB as a part of the SWIFT system. 11 This property and the use of it, which is constantly 12 turned over in order to maximise the profit, which of 13 its nature is something which belongs to the domain of 14 private actions and commercial law. These are listed 15 quotes which are "after instructions of asset managers 16 with the purpose to achieve high returns on the 17 investment and to get this portfolio of stock to grow in 18 value year after year after year". 19 We have heard during the opening statement from 20 Kazakhstan something about the instructions to the 21 Swedish central bank and the foreign currency reserves 22 and it was emphasised again they can buy calls and 23 shares. Yes, they can but the intentions are there not 24 to accumulate more and more assets for the central bank 25 of Sweden but this is in order for the central bank to</p> <p style="text-align: center;">Page 137</p>	<p>1 statement during her examination. We have looked at 2 that again during the closing statement of NBK, I will 3 not be repeating this. I just remind you of what she 4 said, and this is something the Court of Appeal were 5 able to hear for themselves. 6 When it comes to the purposes of the attached 7 property we don't believe Kazakhstan even had claim that 8 the shares were supposed to be used for something which 9 you can call any kind of official purposes. What we 10 know is that the shares are part of the savings 11 portfolio of the national fund and that the goal was 12 high profitability. It's quite obviously commercial 13 purpose and this type of property is not protected by 14 state immunity. 15 Kazakhstan says, "Right, but the purpose this is to 16 create good conditions in Kazakhstan". I think during 17 the opening statement it was mentioned that this was 18 something which would be used today, tomorrow, 19 in 10 years and 100 years, if my notes are correct. 20 Clearly to some extent one could claim that this is 21 the purpose of the fund in general. If we say that the 22 purpose of the use of the property follows from this 23 general florid description such as: 24 "Ensuring stable social development of the country 25 or accumulation of resources for future generations ..."</p> <p style="text-align: center;">Page 139</p>
<p>1 perform its tasks since the central bank is responsible 2 for the monetary policy of the country in general when 3 it comes to acquisition of shares. 4 Mahmoudi and Wrangle, together with Ove Bring, as 5 writers, they write the reference textbook "Sweden and 6 International Law". They quite laconically noted that 7 to buy shares is always a jure gestionis transaction, 8 considering the nature and purpose of the action. That 9 is what they say. 10 The specific piece of property which we are 11 discussing here we know that this is the part of the 12 so-called savings portfolio of Kazakhstan and the 13 purpose for this property is to reach high yield and 14 this is symbolised beautifully by this image on how the 15 NBK explains how they reach the growth of national fund 16 assets. Higher and higher piles of gold, which is -- 17 and with the glistening sun as the background. It says: 18 "The Deputy Governor of the national bank 19 ...(Reading to the words)... a long-term perspective." 20 Further: 21 "Firstly, it is intended within the next few years 22 to further increase the stocks share in the savings 23 portfolio from current 25 per cent to 30 per cent, at 24 the expense of bonds." 25 This context will likely refer to Ms Moldabekova's</p> <p style="text-align: center;">Page 138</p>	<p>1 Then as an extension of that all state property 2 becomes immune, nothing is left of the restrictive 3 opinion of your own immunity. If you account for such 4 abstract and futuristic general declarations, because by 5 the way as Wrangle says in his report -- I will come back 6 to this -- you can see that all the actions in the state 7 at some point as extension leads to some kind of 8 benefits to the citizens of the state. However, it does 9 not mean that the use of property on the way there is 10 a sovereign act of the state. 11 The argumentation of the counterparty in this 12 respect with respect to immunity under Article 19, if 13 the state gives \$1 billion to Chase, JP Morgan or 14 another large asset manager and tells them, "Please 15 exercise discretionary management and report the profits 16 to us", then this would be covered by immunity under 17 Article 19 because as extension the funds would be used 18 to create welfare in Kazakhstan. But the sovereign acts 19 are noncommercial purposes are not interpreted this wide 20 and they still leave room for execution in accordance 21 with the restrictive theory of immunity. 22 Maybe we should take another break before I move on 23 to Article 21. 24 SVEN JÖNSON: 15 minutes. 25 How much time is left?</p> <p style="text-align: center;">Page 140</p>

<p>1 MR NILSSON: We will conclude on time. I cannot give you 2 an exact time, but we will conclude in time or within 3 the given time frame. 4 (3.15 pm) 5 (A short break) 6 (3.35 pm) 7 SVEN JÖNSSON: Please proceed, thank you. 8 MR NILSSON: I am about to come to Article 21 as such but 9 before that I would like to remind you what we have said 10 about 2(b)(iii). In order for the NBK to invoke 11 immunity what is required is that they are covered by 12 the concept of state. This means that the central bank 13 makes submission as part of central sovereign exercise 14 of authority by the states, which is not the case when 15 it comes to 21.1(c) of the Convention. 16 The investors have claimed that it's not entirely 17 clear to which extent this corresponds to the customary 18 law, but larger flexibility exists in the view of the 19 investors. It could be noted that the state's case law 20 with respect to the property of central bank, it varied 21 at the time when the Convention was created and the 22 positions were different about where the specific 23 exemption from Article 9.1. I won't go back to the 24 discussions held within the International Law 25 Commission. But let's have a look at the first draft</p> <p style="text-align: center;">Page 141</p>	<p>1 convention, namely in accordance with the 2 Vienna Convention and treaties. The central provisions 3 there, Articles 31 and 32. 4 I would like to present them to the court. I have 5 to find them in my documents. The text on the screen is 6 too fine for me to read off the screen. 7 To save the Court of Appeal's time I will just read 8 the English text. There is a Swedish translation in the 9 right-hand column. The general rule is, 31.1: 10 "A treaty shall be interpreted in good faith in 11 accordance with the ordinary meaning to be given to the 12 terms of the treaty in their context and in the light of 13 its object and purpose." 14 Article 32, which discusses supplementary means of 15 interpretation, says: 16 "Recourse may be had to supplementary means of 17 interpretation, including the preparatory work of the 18 treaty and the circumstances of its conclusion, in order 19 to confirm the meaning resulting from the application of 20 Article 31, or to determine the meaning when the 21 interpretation according to Article 31: 22 "(a) leaves the meaning ambiguous or obscure or. 23 "(b) leads to a result which is manifestly absurd or 24 unreasonable." 25 The meaning of this as the Court of Appeal obviously</p> <p style="text-align: center;">Page 143</p>
<p>1 and the final text of the provision. You can see that 2 the differences are quite significant. A lot of states 3 initially considered that property of a central bank 4 held by it for central banking purposes should be exempt 5 and monetary authority held by it for monetary 6 noncommercial purposes, et cetera. 7 While in the final version of the Convention which 8 was adopted, they had different wording. It was also 9 the case that they were inspired in the wording. They 10 were inspired by the American Foreign Sovereign 11 Immunities Act, which as we have said in the case law in 12 the US is not that all the property of the central bank 13 is exempt or is from enforcement, but several other 14 requirements are put in place. 15 What the Swedish experts write about the American 16 position is not completely right. This follows from 17 Professor Wuerth's report, but she's actually 18 an American professor. The claimant wants to claim that 19 the text of the Convention, although it's finally 20 applicable in Sweden should be applied in exactly such 21 way as an applicable Convention. This is actually one 22 of the main points of the RoK. 23 If we accept that this is the case, then it would be 24 reasonable to interpret the text of the treaty in 25 exactly the same way as it should be done for a valid</p> <p style="text-align: center;">Page 142</p>	<p>1 know that the wording of a treaty have a much more 2 decisive importance compared to the wording of the 3 Swedish law, the Swedish courts. Normally they look at 4 preparatory works when interpreting the text of law but 5 according to Article 32 this is not something which 6 should be done, unless the interpretation according to 7 Article 31 leaves the meaning ambiguous or obscure or 8 leads to an unreasonable result. 9 To put it simply, the fundamental issue here is that 10 you read the text of the treaty in accordance with the 11 text. This something which Svea Court of Appeal 12 determined in a case which took place not too long ago. 13 This is a judgment from the 18 January 2016 in case 14 T9128-14, between the so-called Spanish funds and the 15 Russian Federation. 16 There, the Court of Appeal stated in a very concise 17 manner gave a statement on the meaning of Article 31 of 18 the Vienna Convention. 19 Once I have found the relevant text I will read it 20 out to you. It says: 21 "In Article 31 there is a general rule of 22 interpretation, according to that a treaty shall be 23 interpreted honestly and in the light of its object and 24 purpose. In considering the object and purpose, the 25 starting point for the interpretation is always the</p> <p style="text-align: center;">Page 144</p>

<p>1 wording of the treaty."</p> <p>2 Then there is reference to a source:</p> <p>3 "If the wording is clear, then in principle it also</p> <p>4 becomes the final destination of the interpretation.</p> <p>5 The object and purpose of the treaty is a part of the</p> <p>6 interpretation exercise which has to be done in the</p> <p>7 light of Article 31."</p> <p>8 Further down the court describe Article 32, but this</p> <p>9 description more or less describes the contents of</p> <p>10 Article 32.</p> <p>11 Moving from the abstract to the specific issues, it</p> <p>12 is the opinion of the RoK that even if the property is</p> <p>13 owned by the state it should be immune in accordance</p> <p>14 with Article 21, saying that the term "property of"</p> <p>15 should have a wider meaning than just "ownership".</p> <p>16 We can have a look at how this Article is worded in</p> <p>17 different languages.</p> <p>18 In English it's "Property of ...".</p> <p>19 In French it says "Les biens de la banque centrale</p> <p>20 ..."</p> <p>21 Spanish, "Los bienes del banco central ..." I would</p> <p>22 like to apologise to Spanish speakers.</p> <p>23 In Russian [Russian spoken].</p> <p>24 So in all the cases the translation is the property</p> <p>25 of the central bank.</p> <p style="text-align: center;">Page 145</p>	<p>1 central bank. It could be the case that some of these</p> <p>2 funds existed at the time, but they were not of the</p> <p>3 importance which they have acquired later.</p> <p>4 This is something which was commented on by</p> <p>5 Professor Wuert in her report. This is a shorter</p> <p>6 extract from her report. I would like to call the</p> <p>7 court's attention to this:</p> <p>8 "The growth and change in sovereign wealth funds</p> <p>9 since the adoption of the UN Convention should preclude</p> <p>10 any categorical conclusions about the immunity of</p> <p>11 sovereign well fund accepts when those assets are</p> <p>12 transferred to central banks."</p> <p>13 From the practical point of view, one could note</p> <p>14 that if you stretch the exemption in 21.1(c) so that it</p> <p>15 covers such sovereign wealth funds, if they are managed</p> <p>16 by the central bank, then you have recreated a state</p> <p>17 capitalistic system where the state has enormous</p> <p>18 financial assets which are exempt from enforcement and</p> <p>19 you come back to absolute immunity. This is against the</p> <p>20 grain of the existing direction of the international law</p> <p>21 of state immunity, becomes more and more restrictive.</p> <p>22 The investors are trying to say that object and purpose</p> <p>23 follow from this wording of other monetary policy, the</p> <p>24 purpose is to protect property which is linked to</p> <p>25 monetary policy or it links with traditional functions</p> <p style="text-align: center;">Page 147</p>
<p>1 This is the expression which apparently Kazakhstan</p> <p>2 feels the need to interpret, that it has it somehow</p> <p>3 would be unclear. It's quite difficult to understand</p> <p>4 what exactly is unclear about that term.</p> <p>5 If you want to widen the concept in this manner, the</p> <p>6 property of the central bank -- and it should also cover</p> <p>7 the property which belongs to someone else different</p> <p>8 from the central bank, apparently you attack the wording</p> <p>9 of the Article. This violates the interpretation which</p> <p>10 should be done in accordance with Article 31 of the</p> <p>11 Vienna Convention. This is not a good faith</p> <p>12 interpretation.</p> <p>13 You could possibly ask yourself a question. If you</p> <p>14 were to somehow find support in what is being said about</p> <p>15 object and purpose, the general opinion of experts in</p> <p>16 international law is that you cannot just go and start</p> <p>17 looking at object and purpose and escape the wording and</p> <p>18 this is not what the Article says. If you want to ask</p> <p>19 yourself: what is the object and purpose behind the</p> <p>20 wording of the property belonging to the central bank?</p> <p>21 Then you should note that when the text of the</p> <p>22 Convention was developed they didn't envision the</p> <p>23 violent extension of sovereign wealth funds, which has</p> <p>24 happened recently, or the fact that certain states have</p> <p>25 decided to put management of this wealth funds under the</p> <p style="text-align: center;">Page 146</p>	<p>1 of the central banks.</p> <p>2 Now we have two Swedish professors who claim</p> <p>3 something else. Their experts' reports, I don't</p> <p>4 understand how they can be reconciled with the accepted</p> <p>5 interpretation rules for the law on treaties. The</p> <p>6 experts on the other side that they refer to certain</p> <p>7 extent to the Vienna Convention on treaties, but this is</p> <p>8 just -- well, it's a general statement, they don't apply</p> <p>9 the interpretation rules provided for by this</p> <p>10 Convention.</p> <p>11 Additionally, one could possibly allow yourself to</p> <p>12 say that the statements are more or less all over the</p> <p>13 place when it comes to method and they are not entirely</p> <p>14 robust when it comes to the content. This applies to</p> <p>15 Professor Brown's report, especially with respect to</p> <p>16 Article 21. This report is quite a unique statement,</p> <p>17 not to say it's devoid of content. If we have a look at</p> <p>18 the statement in the report by Professor Mahmoudi dated</p> <p>19 20 April 2018.</p> <p>20 In paragraph 6 he claims that ...</p> <p>21 SVEN JÖNSON: Tab 25? Is that what you are referring to?</p> <p>22 MR NILSSON: He had just submitted one report in this case,</p> <p>23 yes, Professor Mahmoudi.</p> <p>24 Maybe he was in a hurry writing this but Article 6</p> <p>25 he makes a claim with respect to immunity to</p> <p style="text-align: center;">Page 148</p>

<p>1 enforcement, saying that the majority of the states 2 insist on absolute immunity. This was quite surprising. 3 Then, moving on, when you look at paragraph 12, he 4 says: 5 "The majority of the states accept that a foreign 6 state's property which is not used for sovereign 7 purposes under certain conditions could be subject to 8 enforcement or constraints. There is case law and there 9 is more or less uniform understanding in the 10 international law doctrine for this claim." 11 This contradicts what Professor Mahmoudi writes in 12 paragraph 6. 13 Then in paragraph 25 he says, and this is the last 14 sentence: 15 "National laws on absolute immunity against 16 attachment of property of the central bank." 17 He lists, among others, the US: 18 "... have affected the wording of Article 21(c)." 19 Just as Professor Wuertth writes in her report, this 20 is not the case. There is no absolute prohibition with 21 respect to the property of the central bank. These 22 might be details, although I feel that they undermine 23 slightly the quality of the entire report. What is even 24 more remarkable in the opinion of the investors is the 25 method which Professor Mahmoudi uses to arrive at the</p> <p style="text-align: center;">Page 149</p>	<p>1 possession, but he doesn't refer to what's mentioned in 2 Article 19, that is the intent of use. This is about 3 that. 4 When it comes to Wrangle, tab 26. in the counterparty 5 binder. 6 To start with he supports to a certain extent what 7 the investors have said earlier. He emphasises that 8 even property which is part of the state's commercial 9 activities, that the purpose of this is to create funds 10 for the state budget and other state purposes. This is 11 what we are saying. This is what the savings portfolio 12 is about. We mean that it doesn't mean that this 13 property is automatically immune, because that would 14 mean that all state property would be immune. But in 15 order for Wrangle to come to the conclusion that immunity 16 is still in force, he is saying -- this is the decisive 17 claim on page 103 -- that saving is a typical task of 18 a central bank. 19 It's difficult for me to see how he could find, he 20 didn't present any support for this claim, that saving 21 is a typical task of a central bank apart from the fact 22 that saving is probably not a reasonable description of 23 trading in securities. 24 The investors claim that in accordance with the 25 restrictive theory, the state immunity's function are</p> <p style="text-align: center;">Page 151</p>
<p>1 conclusion that property can actually belong to the 2 central bank without being bound by the central bank. 3 First, he references Article 13 in the Convention 4 which deals with ownership, possession and use of 5 property. He says that this shows that "property of" in 6 Article 21 must include possession and use: 7 "This is completely incomprehensible to me, the 8 natural outcome to me is to come a contrary decision 9 that since Article 21 doesn't speak about property, 10 ownership or use of central banks then the conclusion 11 must be made that 'property' in Article 21 means 12 specifically property and not ownership or use." 13 He refers to this appendix to the Convention. In 14 this annex you can see with respect to Article 19. Yes, 15 please note, a different Article. It says: 16 "The words property that has a connection with the 17 entity in subparagraph (c) of 19 are to be understood as 18 broader than ownership or possession." 19 Property that has a connection is superior(?) to 20 just property. That's completely self-evident. This 21 not an evidence of any broadened concept of property. 22 At least I don't understand how this could be that. You 23 could also note from Professor Mahmoudi's report earlier 24 he talks about the purpose or the intent of the 25 property, whatever it might be or the intent of the</p> <p style="text-align: center;">Page 150</p>	<p>1 not absolute and the results will become completely 2 unreasonable if all the property which the National Bank 3 handles becomes immune. In our case it follows from the 4 consolidated accounts of the bank that the bank offers 5 commercial services to other legal entities, not only to 6 the government. This is something we have conceded 7 earlier. This is an extract from the financial report 8 of the bank. So the property of all of the customers of 9 the central bank cannot be covered by immunity, which 10 would be the consequence of the fact that everything 11 which is managed by the national bank should be covered 12 by immunity. 13 It follows from Professor Mahmoudi's report that the 14 background is that central banks normally keep accounts 15 in foreign banks for different purposes as a part of 16 their foreign currency policy and that attachment of 17 such assets could create serious financial problems. 18 Yes, this is probably something every one agrees about 19 but when it comes to the savings portfolio and the part 20 which is managed by BNY the National Bank has no 21 function, apart from being an intermediary on behalf of 22 Kazakhstan. It would have been fully possible to 23 commission the real managers directly. The fact that 24 they used the bank to do so, this could probably have to 25 do with what has happened from Norway, that this could</p> <p style="text-align: center;">Page 152</p>

<p>1 improve the possibility of receiving immunity.</p> <p>2 Let's have a look at this MOU statement, which was</p> <p>3 presented by Kazakhstan. We can see one of the</p> <p>4 criteria, one of the bullet points here, which is not</p> <p>5 fulfilled in Kazakhstan. It's not that the assets are</p> <p>6 part of the central bank's funds. On the contrary, the</p> <p>7 assets are a part of the national budget but not of the</p> <p>8 funds of the central bank.</p> <p>9 The protected property should normally be property</p> <p>10 which is used to perform traditional national bank's</p> <p>11 functions. You should also require that the central</p> <p>12 bank operates as a regular national bank with</p> <p>13 a reasonable degree of independence. I will not develop</p> <p>14 this any further to what I said in my opening statement.</p> <p>15 Finally, when it comes to the burden of proof it's</p> <p>16 the position of the investors that it rests on the RoK</p> <p>17 when it comes to Article 19.</p> <p>18 Finally, something on the abuse of rights. We say</p> <p>19 that Kazakhstan has lost the right to claim immunity.</p> <p>20 There are two types of abuse. One has nothing to do</p> <p>21 with immunity, it has to do with the fact that the</p> <p>22 property is irrevocably removed from Kazakhstan's</p> <p>23 debtors if you accept that this is part of a protected</p> <p>24 trust. Although the legislation pre-supposes the</p> <p>25 possibility of the trustor's bankruptcy.</p> <p style="text-align: center;">Page 153</p>	<p>1 court in the countries where enforcement is requested,</p> <p>2 where these courts consider that it's possible to attach</p> <p>3 Kazakhstan's property.</p> <p>4 Therefore attachment should not be possible because</p> <p>5 the purpose of the intent of the use of the property is</p> <p>6 not of qualified nature as the Supreme Court said in the</p> <p>7 Sedelmayer case.</p> <p>8 That case showed that the Supreme Court was prepared</p> <p>9 to go quite far when it comes to restrictions with</p> <p>10 respect to assessing immunity and to allow an attachment</p> <p>11 over a portfolio of securities which is part of</p> <p>12 continuous trade, with a purpose of creating maximum</p> <p>13 profit must be much less far reaching than the</p> <p>14 attachment which was supported by the Supreme Court in</p> <p>15 the Sedelmayer case.</p> <p>16 SVEN JÖNSON: Thank you, then the parties have given their</p> <p>17 closing statements.</p> <p>18 Submissions in reply by MR FOERSTER</p> <p>19 MR FOERSTER: I would just like to reply briefly.</p> <p>20 This is about the last abuse of rights. I will</p> <p>21 correct myself, I did not say enough. What I meant was</p> <p>22 that 8 out of 11 cases they are stated paid, not</p> <p>23 settled. There are two that were opened in April, one</p> <p>24 of them has been settled, but that's not what is</p> <p>25 important. What's important to note and this was</p> <p style="text-align: center;">Page 155</p>
<p>1 As Mahmoudi writes in his report, in the Sedelmayer</p> <p>2 case it's not the meaning that immunity should give the</p> <p>3 standing estate a privilege and a possibility to abuse</p> <p>4 its position.</p> <p>5 The second instance of abuse when it comes to</p> <p>6 immunity, this is something which falls from the next</p> <p>7 slide, where we have Minister Beketayev, who talks about</p> <p>8 his position and makes it clear the minister of justice</p> <p>9 that he does not want to pay, because then he might have</p> <p>10 to pay all the investors.</p> <p>11 Kazakhstan says in their closing statements this is</p> <p>12 incorrect. Out of 11 awards, 8 have been settled, but</p> <p>13 it's not really payment in good faith when investors</p> <p>14 after years and years of fight have to accept to settle</p> <p>15 for a fraction of the awarded amount, because this is</p> <p>16 what it is normally a question about when we come to the</p> <p>17 settlements.</p> <p>18 This is about the abuse of power. Let me conclude</p> <p>19 where I started this hearing by noting that the</p> <p>20 investors have been a victim of an international</p> <p>21 (inaudible) which have relieved them of an asset of huge</p> <p>22 value. Additionally, they are bankrupt so this is not</p> <p>23 a situation which would be deserved but the position of</p> <p>24 the Minister of Justice, which is quite brash. They</p> <p>25 have no possibility to claim their right unless the</p> <p style="text-align: center;">Page 154</p>	<p>1 something that was quite new to us that we heard here at</p> <p>2 the beginning of when counsel Nilsson commented on</p> <p>3 a reference to the new lawsuit and the appendix 55.</p> <p>4 We know that that should not be taken into account</p> <p>5 when it comes to impediment to enforcement, but we are</p> <p>6 saying that it is of importance when the (inaudible)</p> <p>7 says it is important if you are invoking your right to</p> <p>8 invoke immunity. Here we heard for the first time that</p> <p>9 the applicants contest the circumstances that exist in</p> <p>10 the new lawsuit. So far they have done everything not</p> <p>11 to tell us their position. If they have now denied all</p> <p>12 the circumstances, then that's a very serious matter</p> <p>13 because Kazakhstan knows that around four years ago --</p> <p>14 I think that we were sitting in this very room -- the</p> <p>15 applicants also gave an account of their position of the</p> <p>16 old challenge case, which then turned out to be wrong.</p> <p>17 I am not saying that they such conceded know better,</p> <p>18 but their client, the investor, knew very well that they</p> <p>19 were misleading the Court of Appeal.</p> <p>20 We will find a forum for this question to be tried.</p> <p>21 It might not be this case. There will be other court</p> <p>22 proceedings or other ways to bring up this question. We</p> <p>23 know then that KPMG has restarted their audit of Kazakh</p> <p>24 companies and the correspondence in conjunction with</p> <p>25 that that the investors and maybe even the US lawyers</p> <p style="text-align: center;">Page 156</p>

<p>1 represented that they have misled both the arbitration 2 panel and the Swedish court. Therefore it's very 3 important for Kazakhstan to defend itself against such 4 criminal activities is and it's important to put that on 5 record. 6 Thank you. 7 SVEN JÖNNSON: The national bank, do you have a microphone? 8 Submissions in reply by MR GUTERSTAM 9 MR GUTERSTAM: Just a very short comments. 10 It was alleged here for the first time that national 11 fund is part of the state budget and that the assets 12 were to be included in the state budget. Of course that 13 is not correct. The only thing that is in the Kazakh 14 State budget are the guaranteed and targeted transfers 15 that were decided on from year to year. There is no 16 other asset reported in the state budget. 17 It might not be necessary to point this out to the 18 Court of Appeal, the principles that you have to use 19 when you interpret the contents of customary law but 20 there is no support for the claim referred here today, 21 that you are going to apply the Vienna Convention on 22 interpreting anything other than the law on treaties. 23 When you are going to apply customary law you have to 24 use the principles for interpreting the customary law, 25 not the foreign treaties. This is a case for all the</p> <p style="text-align: center;">Page 157</p>	<p>1 I understand that you want to do what you did in the 2 district court that you will submit that at a later 3 Point. Have you discussed this? Do you want to say 4 anything about this? 5 MR FOERSTER: We have talked about this, that we can give 6 that to you in two weeks. Before that we have looked at 7 each other's bills of costs and then we can present you 8 with a final bills of costs and any comments to the 9 other side's bills. 10 SVEN JÖNNSON: So in two weeks' time we will get -- 11 MR NILSSON: In two weeks we will exchange our bills on the 12 25th and then we will submit them to you on the 28th. 13 SVEN JÖNNSON: When it comes to costs in the district court, 14 there were bills of costs submitted and there were 15 objections. They had not been acknowledged by the 16 investors. The claims by the bank or Kazakhstan, do you 17 have the same position here? 18 MR NILSSON: Yes, we are just as difficult as them. 19 SVEN JÖNNSON: The Court of Appeal will not tell you today 20 when we will render our decision. We will inform you 21 that later, but our mission is to do this as quickly as 22 possible. 23 MR FOERSTER: This is very important to other countries' 24 proceedings that you will inform us that you will have 25 it in couple of days or a week's time.</p> <p style="text-align: center;">Page 159</p>
<p>1 cases which have invoked customary law. 2 That's all I have to say. 3 SVEN JÖNNSON: You wanted to say something again? 4 Submissions in reply by MR NILSSON 5 MR NILSSON: Just two brief comments. 6 Since counsel Foerster said it has nothing to do 7 with this case, which was mainly for the court reporter. 8 I am not going to comment on that. When it comes to 9 what counsel Guterstam said, I think that we can refrain 10 from exchanging comments and we can stop now. 11 Housekeeping 12 SVEN JÖNNSON: Okay, now that we are concluding the actual 13 hearing can we take it that you will not submit anything 14 more in writing to the case that you have actually now 15 concluded your action and what you have presented to us 16 now? 17 MR NILSSON: Well, on condition that nothing comes in from 18 the opposite side we will not -- 19 MR GUTERSTAM: We were going to send you the scripts of our 20 closing argument so that you have that, but we are not 21 going to send you anything new. 22 MS ISAKSSON: The Court of Appeal has recorded the closing 23 arguments, so we have nothing against you submitting 24 written version of your closing arguments. 25 SVEN JÖNNSON: What remains then is your claim for costs.</p> <p style="text-align: center;">Page 158</p>	<p>1 SVEN JÖNNSON: That's our plan. 2 Do you have any special requests or is a couple of 3 days enough or a -- 4 MR FOERSTER: A week would be fine because we have to get it 5 translated and all that. 6 SVEN JÖNNSON: We'll take that into consideration. 7 Thank you very much. 8 Unless there is anything further we will say thank 9 you very much for letting us listen to what you have 10 said. 11 Thank you very much. 12 (4.13 pm) 13 (The hearing concluded) 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: center;">Page 160</p>

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