Friday, 14 February 2020
(9.30 am)
SVEN JÖNSON: Everybody is welcome back. Since we met the last time we have watched and listened to the examinations in the district court. We have received another couple of documents from the parties, I understand that you have also sent it to each other so the Court of Appeal will not send any of that out.
We are going to spend today listening to closing arguments and in the order that we have sent out, the National Bank is going to begin. Is that the way you have planned things also?
MR GUTERSTAM: Correct.
SVEN JÖNSON: I understand that you have until lunch, but we have a break whenever you think it is appropriate for about 15 minutes.
We are recording this, please go ahead.
Closing submissions by MR GUTERSTAM
MR GUTERSTAM: I will start by handing out some slides and maybe we could hand the presentation equipment up.
(Handed)
The way we have planned our closing argument is that up until lunch we are going to consider the first two grounds.
Firstly, that the property does not belong to

Kazakhstan.
Then that the securities that were required within the structure that we have reported on is not located in Sweden.
Then our colleagues are going to talk about the objections regarding state immunity after lunch. Of course the national bank concurs with everything that will be said on state immunity after lunch.
Our plan is that we will start and in general about the central law, why Kazakhstan does not own the identified securities and why Kazakhstan does not have a claim on the securities in Sweden.
Then a summary on Swedish law, my colleague Marcus is going to talk about that.
Then I will talk a bit about foreign law.
Before Magnus Nygren talks about conflict of laws and jurisdiction.
This is the plan for this morning. Before I give the floor to Marcus I would just like to mention that the relevant circumstances for assessing who the property belongs to, the National Bank says that that is the contractual relationship between the parties, who acquired which right in relation to them and where the assets were held in accounts in the debtor chain, whether the assets were mixed or not and the legal

analysis of this must be made.
During our opening statement we have gone through all the contracts that we have access to, all of them except for sub-custodian agreement. We have checked whether the assets have been mixed in the various accounts. From what we understand, all the circumstances are undisputed.
So what remains to be done? What does the Court of Appeal have to do? What remains to do is only to assess the legal question and not the question of evidence.
I would just like to clarify the National Bank's position here. Since we said in our submission to the district court and in other statements the National Bank's position is that every level in the debtor chain has a claim on its closest counterparty and nobody else. Therefore Kazakhstan cannot have the right of ownership in any specific property or assets in Sweden.
If the court were nevertheless going to find that there is a right of claim on the securities, that does not belong to the account holder that's BNY Mellon. The national bank has in second place a claim that this right cannot belong to any other than the National Bank. This is since the National Bank is the investor in this acquisition structure and Kazakhstan was never registered in any register in any country as the holder

of the securities.
The enforcement agency has enforced an enforcement against BNY Mellon and SEB. That means that the National Bank and BNY Mellon has had a freeze of the corresponding securities in London. Of course the National Bank has an interest in this case regardless of whether the National Bank is the owner of the securities or the claim on securities in Sweden.
With that I will hand over to my colleague Marcus, who is going to go through the following ...
Closing submissions by MR AXELRYD
MR AXELRYD: I am going to go through items 1 to 5. That means that in my closing agreement I am going to explain why the National Bank believes that attached property does not belong to Kazakhstan according to Swedish law.
If we start with an introduction. The law on dematerialised securities that are held in chains of custodians, it's complicated and still there is no guiding case law in Sweden. Within the court of law nonetheless is the legal situation the court has to take as the EU legislation on dematerialised securities as a point of departure. This regulates prior realities in a proper manner and of course Swedish law has to be interpreted in that the EU regulations have the intended effect.

The accounts with registered securities that this case is about are the following. Securities of this type of category and number are registered in accounts with Euroclear, SEB and BNY Mellon. The first question that you have to ask yourself then is: where are the securities located? Are they with Euroclear, SEB or BNY? They can hardly be in several accounts at the same time.

There are two accounts that stand out.

The Euroclear accounts because it has a legal effect, it is when you register this account that the financial instrument is formed and exists as an independent right in relation to a company.

The BNY account stands out because that is the only account where the holder, the National Bank, is registered as the account holder and the owner of the securities.

The central bank holds that this structure means that the securities are located with Euroclear and within the framework of the EU regulation in this field that Marcus Nygren is going to talk about later, the structure means that the securities are to be considered to be located with BNY. There is an important practical reason why legal law says that the securities are deemed to be located with BNY, as we've heard from the

examination of Mats Gunnarsson and which is clear from his witness statement. It is common for Swedish securities to be acquired through custodian chains in several levels. Originally there is a contract with the custodian who then invests the securities in several or in various jurisdictions, for example, an issue than an investor in Denmark wants to invest in securities in Spain and Switzerland, the investor goes to their bank, they make the investments in their bank, the bank is the original custodian and the investor usually then also wants to borrow against their holdings in the bank and that lien is between the bank and the investor. The holdings in the bank is the pledge for a loan so that further investments and securities can be made or they can use the value of the securities in another way without having to realise the securities.

The same thing going to constitute a security or pledge is a value that performs the investment and for the investor it's important to borrow against a security. This happens all the time and this is regardless of whether it's Swedish or foreign securities. If such loan is possible the bank has to know that the lien on the pledge is a proper security for the loan, the pledge cannot be effective security if there is an upper tier ... if the original investor has

those securities in pledge of loans they can --

This question has to be solved in practical terms, investors have to be able to borrow against their securities in custodies. That means that the securities must be with the original investor and that investor should be able to pledge their entire right in relation to the original custodian in the country where the original custodian has the relevant register. The solution presupposes that's not possible to attach the securities in other jurisdictions that the original custodian keeps on behalf of their customers. My colleague Magnus is going to talk more about this directive.

What I want you to remember now is that Swedish law has to interpret in such a way that the security directive has its intended effect. This means that there must be prohibition on upper tier. This is that Swedish law has to interpret the law making it practically possible to invest in securities in various jurisdictions through one original custodian and also pledge your own securities with the original custodian.

We can just note here from this slide that this begins here at the top with the investor. But when we talked about upper tier attachment you have to turn the slide around. Then this starts down with Euroclear

going the other direction.

The acquisition structure that this case is about and that Swedish law is applied to is financial matters and securities and SEB custodian account with Euroclear. The applicant in its opening statement has reported on a number of documents where it says that the Swedish securities that were acquired within the framework of the structure were kept with SEB. This is correct that it was kept in SEB's custody account with Euroclear.

SEB was also the account keeping institute with Euroclear and that means SEB can have access to the custody account and can makes changes to it. However, it does not mean as the applicant is claiming that the securities are kept in the custody account that is in SEB's account register. If a registry in SEB's account register would mean the securities are kept in that register it's hard for us to understand why the securities are not then later transferred to BNY when BNY registers the same category and the same number in the national bank's custody accounts in the UK.

If you compare the securities with the material assets, the comparison can be made with grain. It can be compared with a silo for grains where SEB is keeping their customers' grains. If you look at this illustration, you can see that the Swedish bank say it's

SEB that the CSD account that is a silo full of grain.

BNY then has an agreement with SEB and SEB keeps BNY's grains in Sweden, the bank has an agreement with a bank in Denmark and according to that agreement the Swedish bank keeps the securities belonging to the Danish bank but also the investor's securities in the CSD account. In SEB's register as well as in BNY's register there are also notes made how much grain SEB is holding on behalf of BNY and on behalf of BNY's customers. These notes in BNY's and SEB's registers in a purely Swedish context could be of significance for the protection of BNY's customers against their creditors. That is clear from the so-called grain case.

I am not going to talk about that here. We are just going to refer to what we've said on that case on 31 January of this year, articles 67 and 68. Regardless of what the case may be about, this mixing of the securities in Euroclear's account means that BNY's customers cannot be deemed to have any ownership right to the securities that can be attached.

I will come back to this but the consequences of this is that the attachment of the customer's right to the securities must instead be made by attachment of the customer's claim on their bank. This is the claim on the bank in Denmark in this case.

In this case too it is the customer's bank, BNY, is located abroad. The legal identity of BNY is a Belgium bank which has a branch in England and BNY is doing the registration. The National Bank's claim is located in England, or possibly in Belgium. As a consequence there are legal proceedings in Belgium and in England about the applicant's attempts at attaching the central bank's claim on BNY under the global custody agreement on behalf of Kazakhstan. The national bank's claim under the global custody agreement of course covers the right to Swedish securities of the category and number that this case is assessing.

So this leads us to a more overarching systematic argument that you have to take into consideration when interpreting Swedish law, why should there be legal proceedings in Sweden, England and Belgium about the National Bank's rights to Swedish securities that SEB is keeping its custody account with Euroclear. This point can be illustrated by my Danish example.

The Danish customer has through the Danish bank invested in Spanish, Swedish, German and Swiss securities, are proceedings going to be held in each one of these jurisdictions? We are saying that this is an unreasonable burden on the legal and judicial system and an investor that has to defend themselves in all

these jurisdictions. A reasonable thing would be that an invested asset is deemed to be located and be available for attachment in one jurisdiction with the original custodian. It appears after all the original custodian that the investor has entered in to agreement with, it's that country which determines the rights that the investor can claim with respect to the securities. In this case it's Danish law that is considered to determine the right that the investor has to the securities. In this light too the only reasonable thing is that there's a prohibition against upper tier attachment according to Swedish law.

This was my introduction and before we apply Swedish law to the circumstances we are briefly going to go through some fundamental basics on Swedish law.

The question of who does an asset belong to according to Swedish law, according to the enforcement code, coincides with the question whether there is a right of separation in the case of bankruptcy. There is an important difference that I will come back to. The point of departure when it comes to enforcement law is described by Lindskog, he says that in the beginning as an owner he has right to separate an asset belonging to him that is kept with third party even if that party is made bankrupt or is the subject of attachment, as

long as the identity is kept on the assets and so the separation right to the kept assets doesn't just mean that the property is identifiable.

He describes this as follows. Further you can note that an owner in some circumstances through segregation can separate property that is instead all the property in question. Right of segregation can be reinforcement of interest that carries the right of separation. That is the right is normally motivated by arguments of fairness. So the separation right that coincides with the concept of ownership in UB14479.

But the separation goes further in some cases. According to the Accounting Act in some cases there are cases where the right of separation goes further than the right of ownership. This separation does not follow from the ownership right. It's a special type of activity that can be created according to the accounting Act and Lindskog is describing this as follows.

It should be highlighted that separation according to this law does not mean that the identity has been kept from what follows from general substantive principles. What's special about this Act is that regardless of the identity having ceased within this legislation a special type of substantive identity can be created.

Lindskog has expanded on this in his textbook. If the substantive identity stops and even though the debtor is creating a protection for the creditor according to this Act, the question arises according to which principles are the rights of the creditor to be assessed. He says that there are two approaches to this.

The first approach is that by separating the original substantive situation is deemed to have been recreated. Again, there is a right of ownership the creditors' right to separated assets are then to be deemed a right of ownership.

The second approach is that when you have lost the substantive identity and there is now a relationship of claim between the creditor and the debtor this is what determines the judicial assessment. With this approach the debt will remain without impediment of these funds being separated and the creditors' rights to the separate fund are to be seen as a right sui generis. But you do, according to this law, have the right to security.

According to my opinion, the latter approach is to be preferred but people have different views on this matter but the Supreme Court has ruled on this issue in 2014, page 935, they are also referring to previous

ruling number 71 on page 122 from 1971.

I will come back to this, but in summary this means that the law that we have now talked about that if a debtor has property belonging to him with a third party it can be attached for the debts of the debtor according to UB14 for as long as the identity is kept. If the right of ownership is ...

THE INTERPRETER: Sorry, this is extremely difficult legal text to translate simultaneously. I will give up.

MR AXELRYD: The rights of separation also placed to cash and funds of the amounts. This is example in NG2009 page 500, after a general discussion the following follows from the Supreme Court's judgment. The above mentioned applies also to money, someone who has the notes to ... has the right to separate in the perpetrator's bankruptcy statement if the notes can be identified. If the note is exchanged, the right of ownership through substitution transfers to the exchanged money if the money can be identified ... the question has been about physical management of money.

Therefore the rights of separation applies to cash. The money which illicitly has been received through account transfers or transferred to an empty account, the victim through substitution has the rights of separation to the funds in the accounts. Lindskog said

the money in the accounts from a legal point of view is a claim. When it comes to money in the accounts, legally speaking this is a question of a claim. For such a claim typically bank accounts where there is a balance, more or less regular provisions regarding claims apply.

This what I wanted to say about the applicable legal provisions.

Now we are moving to the section where Kazakhstan doesn't ... an identifiable securities. This is now mostly cash in the account but it's the securities at SEB's custodian account with Euroclear. In this section our starting point is that the EA seized the securities, not the claim to the securities.

Based on our opening statements the securities should reasonably be in Euroclear's CSD register, through registration on this register they start to exist, a right which is written on the company the registration, this register creates rights of disposal on the company according to LKF and through registration on this register the financial rights with respect to the company are awarded in the property work which I mentioned to you in my opening statement. It follows the rights of ownership follow from registration.

It follows from this investigation it's clear that

SEB keeps securities for different customers on the same accounts in Euroclear. It's the securities for BNY's own investments and investments made by BNY's customers into Swedish securities. It is not possible to identify when, how or which securities are on this account, when they were acquired within the structure discussed in this case. Through this blending the identity has ceased to exist. It's impossible to arrive at the conclusion that Kazakhstan, or BNY for that matter, had acquired rights of ownership to certain specific securities.

On the contrary, BNY has a claim for the securities against SEB BNY's customer. In their turn they have a claim to BNY for the securities. There is a chain of debtors. Every party in the chain have a claim to their respective counterparty. This corresponds to the provisions of the English law, where the no-look-through principle is applies which follows from the statement of Professor Gullifer, which is (inaudible) in this case.

This could be illustrated by the investments in the shares in Handelsbanken. SEB acquires 630 million shares on the account. BNY has an account with SEB. BNY's is the account holder and they have a claim to SEB with respect to 131 million shares.

Next level, NBK has an account with BNY, has a claim

to 2.4 million shares.

Since there is a chain in place and the line of claims on several levels every party has a claim to their immediate counterparty. Therefore there is a ban in place on upper tier attachment.

When the European legislation on a ban against upper tier attachment was developed it was noted that the ban of upper tier attachment would merely be a clarification of existing law. This is something which was expressed in the following matter, in holding arrangements where a legal relationship exists only between the account holder and in turn the director cannot provide. The account holder has no rights against any higher tier account provider. Hence there is nothing to attach at the higher tier account provider level. The taking up of such rights in prohibition rule in such legal context is merely stating the obvious and serves as a clarification.

When this legislation was developed experts from the different member countries expressed their opinions of whether a prohibition against upper tier provision existed in the respective countries. The clients from Sweden such prohibition was in place.

Question: in which circumstances can (1) creditor and (2) a non-creditor third party, such a liquidator of

the investor, claim securities from the upper tier intermediary?

Answer: a creditor of an investor cannot claim securities from an upper tier intermediary.

The Court of Appeal could stop here with their analysis but another question which the court possibly asks itself, could it possibly be the case that Kazakhstan still owns a claim in Sweden for the securities of a number of an issue which are found at the account with SEB? Is it the case that the EA have attached a claim to the account which is linked to the CSD? Can Kazakhstan be considered to be a creditor with respect to the CSD account? BNY holds the registered holdings on the CSD on behalf of the third party. Is that of any importance?

The answer to this question is clearly no. Kazakhstan cannot be considered as a creditor. The question is not governed by Swedish law. Kazakhstan and the NBK can never receive a better right to the account compared to the public order which is applied to the relationship and the rights to the securities. What could be seen here is that BNY is the account holder with SEB and the NBK is an account holder at BNY. The relationship between the NBK and BNY is governed by English law. So the English law decides to which extent

the NBK has the right to securities.

Considering that it follows from the English law that Kazakhstan cannot even claim any rights to the securities in accordance with the GCA, so it's impossible for them to be considered to be account holders in Sweden or account creditors in Sweden.

The claimants are saying that Kazakhstan could claim NBK's rights under the GCA, so you could equate Kazakhstan and NBK at this stage. Even in this situation Kazakhstan cannot be considered to be a creditor with respect to the CSD account, because according to the English law this legal provisions which decide the actual rights of the NBK to the securities, they apply the so-called no-look-through principle, which means that the NBK has no rights with respect to SEB.

It's English law, this is the situation in place. This only applies to BNY and one else. This also follows from Professor Gullifer's statement, which Karl will return to. When it comes to the no-look principle there's established case law in England from which this principle follows, NBK has no claim to SEB, only to BNY.

That will be in a completely Swedish context. It's completely hypothetical scenario which will be able to apply Swedish law, under which conditions could someone

else apart from BNY be consider as an account creditor with respect to CSD account.

The first question which the court should decide on this is the account registration and SEB's account register. Does that mean that separate claims are created with respect to the securities? As you can see on the following slides, as BNY has a claim for 131 million shares to SEB, when BNY and SEB make an account registration at SEB for the CSD account, is a separate right of claim created for 2.4 million of shares which could be the subject of a separate right of ownership? Or is it the case that there has been blending and you can never talk about the separate rights of ownership, BNY has 131 million shares and 2.4 cannot be considered to be a separate claim.

Let's assume that you arrive that conclusion that a separate claim is created for 2.4 million through account registration at the CSD account. Let's assume that this is the case. What happens then? Is it possible that anyone else apart from BNY can be considered to be the account creditor? We have made a large number of assumptions. We have ignored the following, we've always kept all these issues concerned with that. So the question is: who could be consider account creditor?

Yes, but only under very special conditions. The question about who should be considered the account creditor, this was something which was in NJA2014, page 935. This case was about a bankruptcy estate administrator which opens an account for the bankruptcy estate. The account was opened in the name of the law firm, so the law firm was the account holder. BNY is the account holder and SEB. On the account there were funds and the question was whether the law firm had a right to offset the amount on the account with respect to their claim to bankruptcy estate.

What was decided for this issue was who would be considered the creditor account with respect to the claimed account, if the law firm would be considered be an account creditor then the estate only had a claim to the law firm. If the law firm had a counterclaim then this could be offset, but if the estate had the claim to the account then this could not be offset.

It follows from this legal case that the starting point that the account holder is the account creditor. In this case the law firm, in our case BNY.

With the reference to NJA1971 275 and the Saras Money case, the position of the Supreme Court was as follows. In the case at hand, the bankruptcy estate was the account creditor despite the fact that the law firm

was the account holder. Therefore this was because you could create an unbroken chain of ownership through the request for substitution, this is the method which follows from Saras Money case.

The money of the bankruptcy estate was transferred directly to the account and it was never blended with the law firm's funds. Under these special conditions and the conditions the fact that this was regarding bankruptcy proceedings, under these special circumstances you could say that someone else apart from the account holder would be the counter creditor. But it follows from the same case -- with the reference to 1971, page 122 -- that the bankruptcy estate would not have been considered an account creditor if an unbroken ownership chain could have been established according to the methods in Saras Money case.

So if these funds would have been blended with the law firm's funds, step one, and then to be separated under step two then the bankruptcy estate has no rights of ownership to the claim to the accounts, namely a later separation does not recreate the right of ownership but due to the blending the right of ownership has ceased to exist forever.

The point of departure is that BNY is the account holder, is the creditor to the account and only if

an unbroken chain of ownership can be established with respect to separation and substitution with respect to the claim to the custodian accounts, only in that stage someone else could be considered to be account holder -- sorry, not the account holder but a creditor to the account.

The method, in this case 2013 they referred to the Saras Money method and the method applied in Saras Money and the requirement to investigate which is found in Saras method, this is something presented in our supplemented letter of appeal. We will not present this case over again, but from a purely Swedish perspective this is an essential case to assess but we will make the conclusions which follow from this case.

This case shows that the duty to investigate by the enforcement agencies, they have to investigate in immediate circumstances, which is important for the right of ownership. That the applicant should suffer from the flaws in the investigation, so you can't just look at what is in the account now, the custodian account. You have to see whether there is an unbroken chain of owners, the rights of ownership is decided if the identity has been kept, either the original one or through substitution. The rights of ownership with the exception for illicitly acquired money, which is not the

case here, ceases to exist after blending.

Let's apply the method used by the Supreme Court in this case. We have to see if the investigation presented shows an unbroken chain of ownership for an asset owned by Kazakhstan to the assets attached in Sweden. So you follow the chain of events from the point when the money leaves Kazakhstan and on.

Step one in the chain, Kazakhstan transfers the funds to the national fund account at the NBK. In this case, I will just refer to what we said in our submission. It is so weird to sit here and to apply the Saras Money case to the relationship between Kazakhstan and the NBK which is governed by the Kazakh law. When it comes to the Kazakh law I would like to refer to my colleague who will present it later, but I will not in detail apply the Saras Money method to Kazakhstan.

The next step, the money is transferred from the NBK to BNY. With here this is a relationship which is outside of Sweden and English law applies to this. I will not be applying Swedish law to an English circumstances. I would like to refer to what we've said in our statement and to what will be presented later by Karl.

BNY transfers later the funds to Sweden and this is where Swedish law applies. They transfer the amount

from their own account and for investors' account in England to a common omnibus account with SEB in Sweden. This is governed by Swedish law, which means that BNY has a claim to an account at SEB. The money which is transferred it's not only the money which the NBK has in its account with BNY, but also BNY's own funds and funds of BNY's other customers, which means that BNY's own funds and BNY's customers' funds are blended at this omnibus accounts. This omnibus account is linked to 6,000 custodian accounts, so every time a transaction is made everything is done to the omnibus account. It's impossible to demonstrate that there is unbroken link of ownership to a claim which Kazakhstan have all the way to the claim to SEB.

Blending has taken place in the omnibus account and therefore the link of ownership is broken forever.

Kazakhstan or the central bank therefore cannot be considered to have any rights of ownership to the funds in the omnibus account, as the enforcement code 417 says. According to what was stated, this link cannot be created later through separation.

A potential right of ownership to any party different from BNY is completely excluded, which means that the central bank or Kazakhstan cannot acquire any right of ownership to the claim of the account to the

cash account just because BNY or SEB transfers some of the funds from the omnibus account to the segregated cash account. BNY is the account holder and no one else can be considered to be the owner according to the method in the Saras Money case.

So neither Kazakhstan nor NBK acquire any rights of ownership to the claim for the securities to the custodian account just because BNY and SEB replace a part of the claim to the account. Ie after registering the securities at the CSD. This is what happens then BNY conducted business from SEB, so the balance of the omnibus account decreases and the securities are registered with a different account which BNY has with SEB. This is a separation of fund from the omnibus account and that separation of funds creates a right of ownership for Kazakhstan or for the NBK. The rights of ownership is something which is held by the account holder BNY, which means that even if one were to serve that in a Swedish context this registration of accounts of SEB would create separate claims to the separate custodian accounts, it's BNY which is the creditor with respect to the custodian account, no one else.

Let us summarise what follows from the Swedish law. Kazakhstan cannot be the owner to identified securities, because they have not blended the account with

Euroclear. You can identify which securities of this account which were acquired by the existing acquisition structure. If the EA attachment referred to the securities not the claim to the securities, then the attachment should be lifted because it has not been presented that the specific security is sold off by the EA to Kazakhstan.

Kazakhstan is not the creditor with respect to the CSD, so Kazakhstan does not have the claim to the securities of SEB. Kazakhstan's right to SEB is not governed by the Swedish law but the law of the country where this right appeared. So according to the English law Kazakhstan has no rights according to the GCA and also a no-look-through principle applies. Therefore BNY's counterparty can never claim any right with respect to SEB.

Additionally, Kazakhstan has no right to the securities in accordance of the Kazakh law, which will be presented by Karl. If the attachment made by EA had to do with the claim to the account, this should be lifted since Kazakhstan was not the creditor with respect to the CSD account. But even if you could divert completely from foreign law and if you could pretend it's completely Swedish circumstances, Kazakhstan still would not be an account creditor with

respect to CSD account. Even if it would be the case that SEB's registration of the account means that a separate claim is created linked to the CSD account which could be the subject of a separate right of ownership, it's the account holder which is the account creditor. Unless it's possible to show an unbroken chain of ownership for an asset owned by Kazakhstan to the claim to the CSD account. Such unbroken chain of ownership has not been proven and therefore there's no other rights of ownership, apart from BNY's rights of ownership.

Therefore this would be lifted even if this will take place in a completely Swedish context, because Kazakhstan is not the account creditor to the CSD account, which means the Swedish law is compatible with the securities directive, upper tier ... prohibited and it's possible for a Swedish investor to pledge its accounts with securities at its local bank and the securities cannot be seized from a sub-custodian in Sweden.

Maybe it's time to take a break.

SVEN JÖNSON: A 15-minute break now.

(10.20 am)

(A short break)

(10.37 am)

SVEN JÖNSON: Okay, so please go ahead.

Submissions by MR GUTERSTAM

MR GUTERSTAM: So I am going to say a couple of words on the English and Kazakh levels. Before I do that I would like to say something briefly about how the Swedish court is to apply foreign law. This is really clear from NJA2016, page 288. I am not going to go through that here but I am just going to read what I have underlined here from the quote. It says:

"When the Swedish court is to apply foreign legal rules, the court is to interpret and apply the rules in the same way as the court in the other country would have done."

They say:

"The point of departure, however, is that it's up to the Swedish court as far as possible as to try to apply the foreign law in the same way as a court in the other country would have done.pounds."

This is the premise for the assessment and this is the principle of loyal application. Bogdan has written about that and Robert Nordhs has also mentioned this in his expert statement.

I am going to say something about the laws in England and whether they are applicable, because if the court does not find that it's efficient to assess it

according to Swedish law then you have to look at the English law and the English level of the chain of debtors.

If the court is to find that Kazakhstan owned the securities and attached securities in Sweden, because the court agreement principle it is English law that is applicable to the substantive matters in England and ... the analysis and the application that needs to be done is to regard who has a claim on BNY Mellon according to English law, is it Kazakhstan or BNY Mellon? What it is that was acquired according to the GCA?

If it is the National Bank who does the acquisition under the GCA and therefore the assets in England do not belong to Kazakhstan, then no assets in Sweden can belong to Kazakhstan either. In her account Karin Wallin-Norman comments on this on acquisitions of assets in chains of custodians. She says:

"In general the foreign investor gets a foreign right of ownership."

We looked at this quote during our opening statement and we'll take another look at if the because this is central:

"The underlying owners' right against the foreign custodian should in most cases according to Swedish international private law be governed by foreign law.

Therefore the foreign owner basically has a foreign right of ownership in the Swedish shares and other registered financial instruments in the Swedish CSD."

The question then is does the National Bank or Kazakhstan have this foreign right of ownership in this case? We have reported on all the facts and all the merits during our opening statement. We are not going to do that again. I am just listing the main evidence that the National Bank is invoking. We have the GCA that confirms that it is only the national bank and BNY Mellon that are parties to the agreement and have the rights according to the agreement. BNY Mellon confirmed in a letter that they have no relationship with Kazakhstan and they do not take any instruction from Kazakhstan. Bank of New York Mellon have also confirmed in a letter that the National Bank is the owner and they have attached excerpts from BNY Mellon's register to prove this.

Then we have the legal opinion by Professor Louise Gullifer that confirms that the national bank is the only one with a claim, nobody else.

Then we have the English AIG judgment and two court rulings from Holland.

According to the Supreme Court ruling, the Swedish court can only arrive at the conclusion that it is the

National Bank that has a claim according to the GCA. The foreign right of ownership forms to the National Bank and not Kazakhstan. The conclusion from that is that this fact in itself is sufficient for it not being possible to attach securities held in Sweden and therefore the attachment order is to be lifted.

The securities can never belong to Kazakhstan if the owner of the securities, which is the National Bank but it should also be noted that the right of the National Bank according to English law with regard to BNY Mellon that securities in certain categories and number and that right can only be exercised against Bank of New York Mellon and no underlying levels. This follows directly from English law that you can only have a claim on the next level of the chain of debtors, your contractual party. To support this the bank has submitted an excerpt from -- this is clear from Louise Gullifer's legal opinion, she has answered the question on how they view chains of debtors when there is a custodian such as BNY Mellon and a sub-custodian such as SEB.

Her reply in her opinion is this:

"The rights that a customer has again the bank acting as global custodians are the rights of a beneficiary under a trust as qualified expanded by the

terms of the agreement between that customer and the bank (as discussed in paragraph 18 above). However, one result of the English law approach to the holding of securities is that each tier is separate.

"An account holder only has rights against its own intermediary and it cannot assert any rights against intermediaries further up the chain. This is known as the no-look-through principle. Therefore, the customer has no rights against any other intermediary in the chain, such as the sub-custodian or against the issue."

We have underlined this and put it in bold.

The conclusion here is that this relationship in itself means that the attachment of the securities has to be revoked. If the National Bank cannot have any claim on a lower tier of course then Kazakhstan cannot have any such rights either.

There are no assets belonging to Kazakhstan or the National Bank located in Sweden that can be the subject of attachment.

During our opening statement and in our statements submitted we have said that the applicant has never specified when and how did Kazakhstan acquire the right of ownership to the securities, to the securities that were attached by the enforcement agency.

On Tuesday we received an answer to this. They said

that through the transactions that were illustrated on slide 61 in their presentation, this was an excerpt from exhibit 47, through those transactions Kazakhstan has taken over the ownership of the attached securities. This is the slide that they referred to. This is the document that has been submitted by the National Bank.

This slide does not show any identified securities that the National Bank or Kazakhstan has the right of ownership to. Neither does it show that the National Bank or Kazakhstan has a claim on SEB or Euroclear on the securities, because what we see on this slide is the account history of the National Bank of transactions registered in the National Bank's account in London. That is transactions according to the GCA that are registered with BNY Mellon in England. What this slide show is that National Bank has acquired a right to the securities of a certain category and certain number from Bank of New York Mellon from GCA.

SVEN JÖNSON: Can I just interrupt here, because this slide says the National Bank's exhibit 47. I don't quite know what's meant by that, because it's not exhibit 47 in this binder.

MR GUTERSTAM: We are not referring to exhibits. It's probably some pagination or when we submitted this as appendix 1 to appendix 47.

SVEN JÖNSON: So I understand that UAB61 that you are referring to is also something that you would like us to look at as part of the material, even though it's not included in any of the evidentiary binders?

MR GUTERSTAM: I will have to come back to you on that. I will check this during lunch, but these are appendices that were attached to the National Bank's statement on 22 May to the district court.

SVEN JÖNSON: We have identified the document, I just wanted to ensure that this is to be part of the procedural material.

MR GUTERSTAM: Anyway the only thing that they show from this excerpt that they are referring to is that National Bank has acquired the right to a certain category of securities and the number in respect to BNY Mellon in London. That is all that can be claimed by the National Bank against BNY Mellon London. This does not explain how Kazakhstan acquired the right of ownership to certain securities in Sweden. That question is still left unanswered.

I would like to say something very brief about Kazakh law. The question that is relevant, according to Kazakh law, is whether the national fund is a trust and what right does Kazakhstan to assets in the national trust. As we have discussed several times now, it says

explicitly in law and in agreements that that national fund is not Kazakh assets. I have already reported on that.

The main matter in this dispute is what does it mean for the rights of the National Bank and Kazakhstan that the assets are held in trust? As we have reported from the expert statements on Kazakh law that we have submitted, the national bank has all the right to the assets in the trust. Kazakhstan does not have the right to any specific funds that are transferred to the National Bank according to the national fund agreement. Kazakh law is limited to a guaranteed and targeted transfer of money under procedures stated in law after decisions by Parliament.

We've heard a lot about this during opening statements, there are no claims on the securities and there is certainly no right to specific securities.

Kazakhstan's rights to the fund according to the national agreement is in the local currency, tenge, and only according to agreement. If there is a claim between Kazakhstan and the national bank, Kazakhstan can never own securities in any other jurisdiction and certainly not in Sweden.

The parties do not agree on the meaning of Kazakh law. The applicant's experts talk about ownership, the

ownership to the "national fund". This is misleading for two reasons.

First of all, it is not clear what they mean when they say ownership to the national fund, it's not a clearly defined asset. It's not coincidence that they have not wanted to define that. It's more about how Kazakh law is structured.

This leads us to a second argument, because there is a difference in Kazakh law to the right of proprietary rights and rights of claim. The applicants' experts discuss whether Kazakhstan keeps ownership to assets that have been transferred to a trust. Parties can discuss this at length because we do not agree on this, but it's irrelevant. Kazakhstan does not transfer cars or some other physically identifiable object to the National Bank to be managed as a trust. The only thing that has been transferred is tenge currency monies and this has then been changed into dollars and then it was managed as part of this trust. This question of who has the right of claim to the assets it's not explained by the other side. Why would Kazakhstan have a right of claim to these assets? Even less do they explain how Kazakhstan could have a right of claim on claims that the National Bank had acquired in their own name with respect to a third party, in this case bank BNY Mellon.

As we said in our opening statement it's clear from Kazakhstan if a trustee enters into an agreement in their own name within the framework of the trust it's only binding between the National Bank and the third party and nobody else.

I am not going to repeat what I said about Kazakh law during our opening statement, the court has to make up its own mind on that. If I would like to present a wish, I would wish that the court reads the two expert statements in the English proceedings, exhibits 26 and 20. This is Professor Maggs and Professor Suleimenov's opinion in the legal proceeding in England. If you read those statements one after the other and you decide which one gives a credible reflection of Kazakh law, I am absolutely convinced that the court will find that what the National Bank is claiming is correct. This gives a very clear illustration of Kazakh law and a second opinion encourages the reader to ignore what it says in the legislation because of corruption and presidential powers, et cetera.

If you assess this the way my Kazakh colleagues would do, I think that you would come to this conclusion.

I would like to say something about the applicants' procedural conduct and their action before the court.

During these proceedings, throughout the entire proceedings and during their opening statement they have consistently ignored the contractual relationship between the parties and how these assets were acquired via various accounts. These are in our view the relevant circumstances.

Instead they have referred to what various people have said in email, what has been listed in forms and account descriptions. With reference to these documents and also the principle of free assessment of evidence, they have said that the attached assets belonged to Kazakhstan, but they have never explained their legal basis for their action and why these actions are to be relevant when assessing who the property belongs to. As we've noted, the question still remains how and when did Kazakhstan acquire the ownership right to the assets in Sweden?

If it were the case that the court can disregard the structure and if you ignore what was said in the emails and what the accounts were described as, has the applicant then proven their action, then the applicant has the burden of proof. The burden of proof, according to the Saras Money case, is of relevance to the ownership right. From the examinations of experts that the court has listened to, experts and witnesses, you

cannot say anything about who the underlying investor is from the documents that have been invoked by the applicant. Even if you accept the applicants' view that you can rely on the evidence that they have invoked, they have still not proven that this belongs to Kazakhstan, ie the assets or the property.

Then I would like to move on to some allegations made by the applicants in their opening statements. There are some claims or statements there that are incorrect. We have responded to some of that in our statement of 31 January of this year. I am just going to talk about a couple of things that we have talked about in our opening statement. This slide was shown during their opening statement. They allege that assets managed by the national fund is owned by BNY Mellon.

Instead, BNY Mellon's position in Belgium, and BNY Mellon has given a statement to the court in Belgium, and this illustration that they have taken from that statement is under the heading "Semantic overview"... the heading is about a conclusion about a potential claim, a direct claim on BNY Mellon. So from the very heading itself you can see that there is a reservation here. If you read to the paragraph that leads to this reservation you understand what this reservation is about. This is what we have quoted here

from the statement. It says:

"If Bank of New York Mellon would be informed that the management is terminated, it's not at all obvious that Bank of New York Mellon would only be obliged to return the assets to the National Bank of Kazakhstan, while the latter is neither the owner nor the manager of the assets. In such situations, BNYM could not and cannot exclude that the Republic of Kazakhstan is at least an additional creditor."

What Bank of New York Mellon writes here is that in case the national fund agreement is revoked then it's not quite obvious that Bank of New York Mellon would just have to send back the assets to the national bank. In these circumstances BNY Mellon cannot exclude the possibility that there might also be the possibility of returning the assets to the state directly. This is something that BNYM has always claimed when they were at risk of $0.5 million damages. This hypothesis that is illustrated here is illustrated in a scenario where the national fund agreement has been terminated. That the applicant is invoking this schematic illustration shows how weak their arguments are, because the ...

This example is of no relevance at all to our case. Whether Kazakhstan could have a claim on BNY Mellon in case this agreement was terminated in the future, it's

of course of no relevance to our case.

The next question I would like to discuss is the claimed element which would follow from 886 in the civil code of Kazakhstan. The claim made by this letter was that there's a requirement from the Kazakh law that in order for the requirement for something to be a trust in accordance with the Kazakh law, but if you look the entire text, not only the section highlighted in yellow, it says that through the validity of the ... unless everything else is described in the legal acts of the Republic of Kazakhstan or expressed in agreement. So there is no element with respect to full separation of disposal.

There is a description of how trusts should be structured and what kind of disposal there should be. This claim of separation of disposal is not supported by any of the extracts regarding Kazakh law submitted by any of the parties. Kazakhstan does not dispose of the assets in the trust and this follows ... or control. This is something which could follow from the other slides with respect to control.

There is a claim that Kazakhstan has rights of guaranteed and targeted transfer from national fund, but this is not the control of the funds, of the assets in the trust. This is a condition to withdraw funds from

the trust.

Another piece of circumstances which has been mentioned is that the central bank and the RoK should advise when they appoint foreign counsel, but this is nothing to the issue of control.

The last issue I would like to refer to is with respect to the statement made during the examination. This is the quote:

"With respect to this quote the claim was made that Aliya Moldabekova had confirmed that Kazakhstan has been stated as an owner, but it follows from the answer that she talks about beneficial owner and nothing else."

For some reason they have added a parenthesis at the end of the answer. It says --- and then in parenthesis:

"Cut off by the NBK's counsel."

This is to present a picture that we from NBK stopped Aliya Moldabekova from answering a question because she is about to say something which is not beneficial to our case. This was not obviously the case, you have listened to her statement. What happened was that -- well, first what Ms Moldabekova says is not controversial, the fact that Kazakhstan is stated as the owner it's not strange, it's completely relevant to our case.

Secondly, Ms Moldabekova was never interrupted by

the counsel. They are just making this up. I would like the court to listen to this again, but what happens is that her answer was translated. There was a question about how the interpreter interpreted her words and this discussion was between myself, the presiding judge and the interpreter. Then Ms Moldabekova's examination continues. So what it says here is not correct.

The last example I would like to mention is the claim made on page 49 in the applicants' submission that the claim that Aliya Moldabekova confirmed that Kazakhstan owns the share fund. This is something which we have responded to in writing from our submission from 21 January. We not present this again, but briefly this is completely taken out of the context and if you read the quotes and if you listen to the 10 references given in our statement dated 21 January you will understand the context and it becomes self-evident that what Aliya means by national funds is Kazakhstan's right of claim to the NBK and nothing else.

Having said that, I will pass the word to my colleague, Magnus.

Submissions by MR AXELRYD

MR AXELRYD: Just a couple of things. If the court looks at the investors' binder, which they used during their opening statement. I would like to present a couple of

points with respect to the document which was identified by the presiding judge. If you look on page 18 in the presentation you can see that you have this from the public register of custodians and there is a number. It says "personal number" or "organisational number" on the left-hand side which was unique in the opinion of investors, unique for every customer. We don't know whether it's right, but let us assume it's the case so this is the number on page 21, the same presentation.

This is the statement of securities. You see the account number. It's a different number. Then the next document is the document referred to by the presiding judge. This is the one on page 61. You can see that there is a table on the left called "Swiss account". Then it says "NBK" and then there is a number. This is another account, an account name, NBK is the account holder because this is on the upper tier of NBK in BNY's register if you look at this.

So this is one reflection. Our opinion is that this has no relevance to the legal analysis of this document, but there's one point we would like to emphasise. If we look at the example with Handelsbanken there are 131 million shares at the account with SEB. These shares belong to BNY and to 6,000 different customers of BNY.

When transactions are made between the NBK and BNY these transactions can happen between BNY and another of BNY's customers and NBK. It could be the case that BNY sells its own shares on the account at SEB to the NBK or two customers of BNY could enter into a transaction with respect to the Swedish shares.

What happens then? The first thing which happens that the registration of BNY changes, this is what governs the transaction. Then there is a change to SEB in their register, but on SEB's custodian account nothing changes there because the shares are still there. So the transactions at BNY's level don't have to result in any changes in registration at the custodian account -- sorry in Euroclear, because they could be transactions between BNY and its customers and there could be transactions between BNY's customers.

Thank you.

Closing submissions by MR NYGREN

MR NYGREN: As I explained in my opening statement on Monday, the third objection of the NBK is that the securities are not located in Sweden. Those are two different in issues.

One is a question where it should be considered where the investors' securities are located based on the current say of law.

Secondly, in which jurisdiction the assets are located and could be subjected to attachment.

The answer to this question coincides because the legal relation of this is based on where the asset is located. I will make this presentation and it will consist of two parts.

First, I will explain why the securities are not located in Sweden but in England according to the choice of laws. Therefore English law governs the NBK's rights to the shares, which are the shares at BNY London. The English law should give us an answer to the following questions.

What's the material meaning of the investors' right? Whether the material elements have been fulfilled in order for investor to claim its rights against a third party. If there's a different investor which has a guilty right of pledge which should be respected.

After presenting the choice of law I will explain why neither Kazakhstan nor NBK's assets have been located in Sweden and therefore the Swedish enforcement agency didn't have jurisdiction to attach the assets in Sweden. It flows from the same line of reasoning as described above, but there are also important legal and practical aspects. Therefore the question of attachment jurisdiction should follow the decision or the

assessment on the governing laws.

Moving on to the governing laws to assess that, just like I said before. We have to know which accounts contained investors' rights to the assets. Through my presentation I will start at the level of the investor and will talk about the investors' rights of claim to the securities. The existing structure for acquisition didn't create rights of ownership to certain specific securities but rather a claim to securities of a certain number and a certain kind. This is how the applicable law is structured where you follow on the investors' account at the original custodian to understand the meaning of the investors' rights. The registers which are held at a sub-custodian or a CSD is not relevant.

These are the accounts which are found in the chain of custodians. Like we said before, Kazakhstan is not the account holder of any of these accounts and therefore has no registered rights to any of the securities anywhere in this chain. What Kazakhstan has is a right with respect to the NBK. NBK has a legal relationship with BNY and BNY still has a legal relationship with SEB. In order for the court to arrive at the conclusions of the rights of the investor in the chain, whether it's NBK, what kind of rights have been acquired. The court first has to decide which country's

laws should be applied to the issue of rights in parties. This is something I will discuss this and I will discuss the Swedish and the European legal choice of law principle, claiming that the court should apply the PRIMA principle and therefore the English law is applicable to the material issues of the investors' rights of claim, which in our position is the NBK's rights to claim to the securities.

This is a chapter 5, paragraph 3 a law which we call LHF, the Trade and Financial Instruments Act. When transferring, pledging or disposing of financial instruments in any other ways for which share certificates, promissory notes, et cetera, has not been issued or a document has been issued but through interpretation, the buyers' rights to the financial instruments should be registered in the country where the register is held for the legal effect with respect to this other party.

It's not quite easy to understand this provision, so let's have a look at the preparatory which explains this provision. We have described this in a lot of detail in a supplementary letter of appeal, but we will present some of the issues and we will summarise other issues which are mentioned in the preparatory works. We would like to ask the Court of Appeal to read the preparatory

works, even the pages we are just referring to because they give us a good understanding about how the choice of law provision and the EU law should be understood.

The choice of law provisions in LHF are based on provisions in the finality directive, which entered into legal force in the year 2000 in Swedish law. These are securities without share certificates which account held in Sweden, according to the corresponding Act or abroad. This provision is just clarification of a written law which means that lex rei sitae is used with respect to dematerialised securities, but legislator wanted to have an explicit conflict of law rules. Therefore for the securities which are not caught by the provision, the same provisions in the choice of law Act ... sorry, conflicts of laws.

Lex rei sitae is the principle which is used by the international private law to determine the applicable law for real issues. Therefore, the issues of disposal should be determined by the law where the securities were located when the right was created. When the principle is applied you have to take a position on where the asset is located. This is what determines the choice of laws, as opposed to the corresponding provisions in the finality directive the Swedish legislator decided that the provision in LHF should have

general application or the disposal with dematerialised account kept securities are covered by the Swedish conflict of law provision, which follows from this statement in the government bill, page 96.

At the top of the page:

"The materiality of the reasons which indicate that the conflicts of law should be regulated and that they should also apply beyond the application area of the finality directive. A regulation which would be limited to the financial directive could lead to insecurity and could lead to incorrect conclusions and therefore this rule should be made general and not be limited to that application area of the finality directive."

More or less the same thing follows from the box at the bottom of the page.

This is repeated once again in the legislator's note on the following page. It follows from this paragraph that it applies generally when disposing of the financial instruments in question, transfer and pledge have been explicitly mentioned in the text before as examples of the most important types of disposal. However, this provision is also applicable to other types of disposal. So-called repurchase agreements and loans and security papers.

This is something which also follows from the

government bill 2004/05:30, after the security directive became a part of Swedish law. I will not be reading this but already at this stage the court can make a conclusion on this that the Swedish conflict of law provision has general applicability and is applied to all the disposal of dematerialised account kept securities.

As we noted earlier, lex rei sitae was applied in Sweden to determine choice of law before the finality directive was made part of the Swedish law. The question is what it meant and whether the Swedish legal position corresponded to the finality directive. This was something which was addressed by the legislator.

On this page in the government bill, I will only read the last section which has been underlined, which describes the provisions of the Swedish law in place at the time:

"With respect to dematerialised and ...(Reading to the words)... If the right is registered in a register held by a custodian overseas, the question should be determined by law of the land where these operation are conducted. Therefore Swedish law corresponds to Article 9.2."

So according to an unwritten Swedish law, the account keeping principle or the registration and

principle was applied earlier to decide where the security was located. This was the determining question in terms of choice of law and this was a result of the application of lex rei sitae.

In this quote it has been clarified that if the securities registered in the CSD register, not Euroclear, and the custodian operates overseas, then it should be done at the place of registration of the custodian at Euroclear. So where the register is held does not refer to Euroclear's register.

Finally, this corresponds to the use of the finality directive. A bit further down in the same government bill in the comments you can see that when the letter of registration principles is applied, this is the register from which follows the buyers rights of financial instruments. So the register should show what kind of right has been acquired, it could be rights of ownership, rights of pledge or any other special rights to financial instruments.

The registration has happened lawfully. It's not only registration supported by statutes but also registrations which have been made on the basis of generally accepted legal principles.

Before we move on to the next slide, I would like the court to note the statement that this is not just

thinking about which account or which register which contains a registration of the buyers' right, from which it follows which kind of right the buyer has. It would be also interesting to think which account, which accounts do not contain this type of information.

This statement links to the question which was resolved through the securities directive, which introduced the so-called PRIMA principle.

With the security directive the EU wanted to establish where the securities are located which are owned through a number of custodians with a number of intermediaries. The purpose of this, just like Marcus explained earlier, this is reason 8 for the directive, to ensure that there is an agreement on security which is applicable to the country where the account is located. The validity/enforceability of the security could be claimed against every competitive claim exclusively on the basis of the law of the relevant country. This is in order to avoid the situation where legal uncertainty appear with respect to the pledges' validity.

The securities directive, this is the security of the dematerialised securities but the PRIMA principle which is introduced here, it's linked to the finality directive to the winding-up directive and this also used

as a general principle to determine on the conflict of laws according to the Swedish conflicts of laws provision.

The conflict around the security directives is found in Article 9.1, but it has to be read together with definitions in Article 2.1 to understand this better.

9.1 says:

"Every case which deals with any of the issues mentioned under item 2 and which appear when it comes to pledges as account keeping financial instruments should be covered by the law of the land where the relevant account is kept."

What do they mean by the "relevant account"? It follows from 2.1(h), relevant account:

"When it comes to such securities, or some pledges as account kept financial instruments covered by an agreement of financial pledge."

This is the register of the account which is held by the pledge taker, which includes information about the pledges such as account kept financial instruments pledged to the pledge taker.

What does it tell us? If you read all these provisions altogether as a summary directive you can see that only one national law should be applied. This is something which follows from Article 9.2 and this is the

law of the land where the relevant account is located. That's the applicable law, with the relevant account is the register or the account which contains information about the account kept financial instrument which has been pledged.

This is an expression of the PRIMA principle which is place of relevant intermediary approach. Briefly the principle means that a pledge to investors' assets should be considered to be held at the account where the investors' right has been registered. In our case at the account of the original custodian.

It follows from Article 9.2 the law of the original custodian should determine which are the legal effects and which legal rights should be considered primarily if there are competitive claims. No changes of the conflicts of law has been made in LHF on the basis of this conflict of law provision, but both the conflict of law provision and the LHF and the unwritten law, this was something which was in compliance with the paragraph my principle with respect to dematerialised securities held through chains of custodians.

Let's have a look at some statements made in the preparatory works. When the legal review was made after the security directive was introduced on page 82 we can see that the choice of law in the security directive

identifies the relevant account. Here the reference made to the PRIMA principle. At the top of the page.

The choice of conflict of law rules means that the applicable law, and this the security directive, is the law of the land where the relevant account is kept, article 9.1.

Highlighted in yellow:

"The provision states therefore a variant of the principle of lex rei sitae which means that the pledge is located where the register is kept."

A question which comes up, how do you establish that an account kept financial instrument is located for example in Sweden? A financial instrument could be registered in several tiers, at a number of intermediaries, in a number of registers and in a number of several countries. The conflict of law rules talk about the relevant account. According to the so-called PRIMA principle, the place of relevant intermediary approach, the real aspect of a customer's disposition of dematerialised financial instruments which are kept by an intermediary should be assessed according to the law at the custodian or the intermediary.

The following page, we can see that the Swedish conflict of law in LHF corresponds to the security directive and the Swedish provision considers the

relevant account and not the underlying securities, which corresponds to the PRIMA principle.

The fact that the PRIMA principle is applied in the EU law, in the conflict of laws provision in the LHF and according to unwritten Swedish law this is something which follows from several pages in the preparatory works and also confirmed by a number of sources which have been submitted by the NBK and also by the legal experts. Legal reports by Karin Wallin-Norman, Louise Gullifer and Professor Bogdan.

Let me read two quotes from Karin Wallin-Norman's book which summarises the issue very well and the rest of the reference could be read by the court. On page 300 Karin Wallin-Norman raised the following:

"The fact that the Hague Convention still has not been accepted by the EU is partly connected with the fact that the EU for a number of years have had common conflict of laws provisions in the financial area, which follow from a number of different EU directives which have been implemented in the Member States. The choice of law principle which follows from the directive means that the law in the jurisdiction of account keeper should apply and that the parties don't have any prospect to choose, at least not formally. I would like to describe this as a strict PRIMA rule."

It follows from the notes that the three directives which Ms Wallin-Norman refers to which applied the PRIMA principle are the finality directive, security directive and the so-called winding-up directive.

The next page Karin Wallin-Norman notes that the same PRIMA principle is applied according to the conflict of law provision in the LHF.

We have described the PRIMA principle in the supplementary letter of appeal, but I would like to summarise the contents of the principle with reference to the references which is on the page. The PRIMA principle identifies the relevant account where the dematerialised securities are held through a custodian chain. It always starts with the investors' account at an original custodian, the account could include a number of underlying securities which have been registered at a number of different custodians, different places, which creates a chain of custodians.

The principle of the PRIMA principle is that the underlying securities are considered to be holdings held at the original custodian. Otherwise this could result in a significant legal uncertainty which the creation of PRIMA principle has tried to avoid.

As I mentioned before and the reasoning behind the PRIMA principle means that the investors' holdings could

be equated to a chain of debtors where you only have a claim to your nearest counterparty. According to PRIMA principles, every single tier of account should be considered individually. The investors' rights to the securities is considered to be as a claim vis-a-vis the original custodian, so it's not relevant where the specific securities are registered in different custodians. There are different legal sources which deal with the PRIMA principles. You see the list of some of these on the screen but we will not present them in any more detail.

Finally, about the meaning of the PRIMA principles. I would like to say that there are requirements on the relevant accounts must have an account registered and have a consulting effect, that is the register in the account or register has a legal effect. The applicant claimed this in the district court and they are apparently claiming the same here.

From the excerpt from the preparatory works on this page and the following page that I am not going to read to you it says that the Swedish legislator does not believe that there is any such requirement according to the security directive. The same thing applies to the same conflict of rule provision and on non-codified law.

They have taken into consideration how the security

directive should be interpreted. This is an important reason why the decision think that relevant accounts are accounts with evidentiary effect, because otherwise it would not be possible to uphold the PRIMA principle because otherwise there would be one single account where all the assets are registered.

It's also noted that no such requirement was made in earlier non-codified law and that the phrasing that ended up in the choice of law text did not make any changes to previous law.

Now we've gone through the relevant legislation we know what the PRIMA principle is, so what remains to be done is to determine where the relevant account is located. Again, we can establish that there is only one account at the end of the chain of custodians and here it is the register national bank account BNY Mellon, which is the original custodian in this case.

This could apply even if it was Kazakhstan that had been BNY Mellon's customer as the applicant claimed on Tuesday, however this is not true this is confirmed by BNY Mellon and it's also clear from account statements and screenshots from Bank Mellon's database.

Kazakhstan does not have any account anywhere that has a right to the registered securities, not in England, not in Sweden. The only thing that Kazakhstan

have are the rights that follow from the national fund agreement that my colleague Karl has talked about. These rights, as Michael Bogdan said in his legal opinion, are located in Kazakhstan. The relevant account in this chain of custodians is held by BNY Mellon and that's located in London.

Therefore, the securities are considered located in London according to the conflict of law provisions and LHF and that means that no right in rem is to be applied to ...

THE INTERPRETER: I am sorry, excuse me.

I just did not hear that, apologies.

MR NYGREN: When we establish which law is applicable, we have to ask ourselves the question in which jurisdiction are the securities held? But can be subject to attachment. This is critical to the enforcement agency's enforcement, because the enforcement agency's powers are limited to Sweden. If the assets are held abroad, the enforcement agency is not allowed to carry out any enforcement measures.

The National Bank holds that possession of dematerialised securities in a chain of custodians with one or more intermediaries means that the investor has an asset in their own original custodian. This could be the right to underlying securities that are registered

with the original custodian. Therefore the applicable law should be the one applying in the location of the original custodian. That does not mean that the investors' assets are located with one or more sub-custodians or one CSD.

The application of the lex rei sitae and the PRIMA principle are saying the assets belong with the original custodian, this is the party that the investor has a contractual relationship with and that's the only party that the investor can make a claim against. The attachable assets are located with the original custodians and the attachment can only be made in the name of original custodian. We know that the only right that the National Bank has is a claim on Bank of New York Mellon and a certain category and number of shares. The National Bank does not have any right of ownership to the underlying securities.

My colleague Karl has already explained this and I am not going to say any more about that, but we can establish that the central bank's asset which is a right to securities is located in England and not in Sweden. This has been confirmed by both Bogdan and Gullifer in their legal opinions.

My colleague Marcus Axelryd has told us that upper tier attachments are not allowed under Swedish law or

English law. The reason for this is that the investor does not have any answers further up the chain and therefore attachment must be against the account that the investor is the account holder of. For this reason also it is only the exempt authority in the original custodian's country that has the jurisdiction to do the attachments.

The National Bank's view is that underlying securities in Swedish (inaudible) which is invested in the investors' account in their local bank, and that's the original custodian. That does not mean that the investor therefore is to be deemed to have an attachable asset in Sweden. This position is supported by the Supreme Court case where the Supreme Court assessed whether a Swedish court had jurisdiction for a foreign company that had dematerialised shares in a Swedish company, this is NJA2004 ... the fact that the company had a dematerialised share in a Swedish company was not sufficient for it to have Swedish jurisdiction.

Even if that case was about jurisdiction and not the authority to attach, the court found that it was too much of an intervention for every investor around the world who had holdings of dematerialised Swedish shares that they would run the risk of standing before a Swedish court of law without any other connections to

Sweden.

Similar arguments can be applied in this case for Kazakhstan and the National Bank, whose only legal relationship is with their respective counterparty in Kazakhstan and in England, both Kazakhstan and the central bank have no connection with Sweden other than the underlying secure Swedish securities.

This brings us to another aspect. These are the consequences if attachments are going to be made in several jurisdictions, not just in the original custodian but also the various intermediaries in the chain of custodians. If we look again at this slide we can see that there are three accounts that reflect shares in Handelsbanken, which are the same category that were acquired according to this structure, this SEB custodian account, Euroclear and it's BNY Mellon's custody account in SEB and it's the central bank's account with BNY Mellon.

According to the National Bank, this cannot mean that the central bank or Kazakhstan's right in securities as alleged by the applicant are in all accounts and in all occasions at the same time and therefore can be subject of attachment in various locations.

As my colleague mentioned earlier, there are legal

proceedings both in England and Belgium where the applicants have tried to attach the central bank's claim on BNY Mellon for Kazakhstan's debt and for the same reason we are here today. It sounds both unreasonable and not economic when it comes to procedural costs. The National Bank is saying that when assessing attachment jurisdiction the assets should be located in one place and when it comes to the choice of conflict of laws, that location should be at the original custodian.

If attachments can be made against all the accounts in the chain of custodians, that means that an applicant as opposed to investor themselves can apply his right to every intermediary in the chain, whereas the investor can only claim on unsecured with their immediate contractual partner.

Why should a Swedish creditor have a better right to the underlying securities than the investor themselves?

The last aspect which according to the National Bank means that attachment of an investors' assets must be made with original custodian and nowhere else, means that this is the only alternative that is consistent with EU law.

The whole idea of the EU securities directive is that investors should trust that a pledge in a country is also protected from all the other claims in that

country from that country's legislation, if attachment of the assets in the relevant account with the original custodians cannot be made according to the relevant legislation the underlying securities should be protected from attachment in other countries.

Allowing attachment of the underlying securities means that the pledge is worthless. In this case, the applicants' right to the underlying securities according to the GCA there is no reason to assume that that contract was not applicable according to English law if the Swedish court allows attachment of underlying securities, this is inconsistent with valid EU law.

Even if it were the case as the applicant alleges that the directive cannot be applicable, it's still a case that this is a case of systematically erroneous thinking. The whole idea of this EU regulation if underlying securities can be attached for an investor, international trade and securities require there to be basic trust in the system, that each investor really gets the rights that the investor has acquired and is invested in the investors' account. The investor also has to know that this right can be claimed against the other parties, both the counterparty that the right was acquired from and from other parties that lay claim to it. This is the basic idea with the EU regulations

which has been stressed by Karin Wallin-Norman and in the English Articles that the National Bank has submitted to the court. The investors should be able to trust that an acquisition in the original custodian's country cannot be subject to attachment in another country.

Just to summarise the position of the National Bank when it comes to the jurisdiction of the Swedish enforcement agency. The applicant is saying that Kazakhstan is the investor because the National Bank in some way -- it's not clear how this happened -- acquired the rights to the securities on behalf of the state and therefore they cannot be attached for Kazakhstan.

This is not true. As we have explained, Kazakhstan does not have any right to the securities, only conditional limited claim on targeted and guaranteed transfers according to the national fund agreement.

This right is located in Kazakhstan and therefore should not even come into question that securities that have been acquired from this structure can be attached. Regardless of this, this does not change any of the facts of where a security has been registered. The registration that we've mentioned during opening statement and here today too, they are the same. There's no account of which Kazakhstan is the account

holder of.
The last account in the chain is the National Bank's account with Bank of New York Mellon and the right to attach securities with BNY Mellon in England. There's a number of practical and legal reasons why this has to be the case. This means that in order to do an attachment at the enforcement agency ... should have focused on BNY Mellon's account, but the enforcement agency did not have jurisdiction to do that so such an attachment would have had to be made by the English enforcement agency, which would have jurisdiction to attach in England. Since the enforcement agency did not have jurisdiction to attach, the attachment is to be lifted.
Thank you.
SVEN JÖNSON: It is 1145. We will have lunch, we will come back here at 12.45. Thank you.
(11.45 am)
(The luncheon adjournment)
(12.45 pm)
SVEN JÖNSON: Now we pass the word to the Republic, you have an hour and a half according to the timetable, you will use the entire time?
MR FOERSTER: We will use the time. Maybe a break is not required we hope, or maybe we'll take a break after.

SVEN JÖNSON: What I was thinking from your point of view, will you start with a brief introduction or will you deal with the entire issue.
MR FOERSTER: More or less it will be divided into different sections.
SVEN JÖNSON: Right. Because I am planning for a break at 2.30. So that if you start then we'll break at 2.30 will that be okay?
MR FOERSTER: We could probably accommodate the court's wishes.
SVEN JÖNSON: Let's see what happens.
Please, thank you.
Closing submissions by MR FOERSTER
MR FOERSTER: Sometimes when I work as an arbitrator in arbitration proceedings I normally try to think about why are the parties here? What is it they really want? This is probably the question which is asked by the Court of Appeal. Why is the RoK so involved in this? The RoK does not claim the money which is in SA's accounts, why are we here? RoK is a sovereign state, a state with which Sweden has diplomatic relationships and RoK feels that its integrity has been violated by the actions of the SEA and the district court.
The SEA attached the diplomatic accounts in violation of 1961 Convention, the SEA through different

statements with respect to the ambassador they stopped a planned state visit and that there are quite sufficient flaws in the investigation conducted by the SEA and by the district court. RoK hopes that the Court of Appeal at least corrects the latest mistakes committed by the SEA.
Let me start with the interesting legal issues. The structure of the presentation will be as follows. There will be a short introduction.
Then Mr Metz will talk about Article 19.
Ms Fermbäck will discuss 21.1(c) of the Convention.
Finally, I will respond to the applicants' claim that Kazakhstan has waived its right to claim immunity.
The Supreme Court has described the issue of state immunity in their well-known case, the Sedelmayer case, a case which the appealing judges will be aware. This is the case 2011, page 765. This was about property on the (inaudible) which belonged to Russia's trade delegation. The question is whether this piece of property was covered by state immunity. I will come back to this legal case on several occasions.
In paragraph 7 of the Supreme Court's motivation they say that state immunity is considered to be a natural consequence of the fact that states are sovereign and equal and therefore cannot exercise

jurisdiction over each other. The state immunity is based on one of the most fundamental principles of international law, that is the principle of sovereignty, the possibilities to limit sovereignty are quite small.
The property which has been attached here from the point of view of international law belongs to the NBK and in any conditions this was used for state noncommercial purposes. Therefore, the property is immune against attachment and SEA's decision to attach should be lifted. The applicable approaches are expressed in Articles 19 and 21 of the UN Convention on state immunity and immunity of the property, this what we call "the Convention".
Articles 19 and 21.1(c) in the Convention they describe the applicable customary law. This is something which should be applied here. This is also confirmed by the decision of the Court of Appeal in the Sedelmayer case, where the Supreme Court said this Convention codifies the existing customary law. This is section 12 in the decision. 19(c) expresses the principle that enforcement can be used for other property which are not used for noncommercial purposes of the state and absolute immunity should be granted to such property of special nature which is listed in Article 21.

This is something which is mentioned at the end of paragraph 14 in the judgment of the Supreme Court. The Convention is a part of Swedish law by incorporation. This fact is a clear signal that what the Convention says should be applied to Sweden. It should be mentioned in this context that Article 18 in the 1969 Vienna Convention includes an international law obligation for the states which have ratified the Convention. That during the period between the ratification and entering into force these parties will refrain from activities which would negate the purposes of the objectives of the Convention. Therefore, the Swedish law cannot interpret the law in violation of the said Convention.

Kazakhstan's position on this issue is also confirmed by the experts on this subject. Without reading too much, I would like to refer to Professor Mahmoudi's expert report. This is tab 25, exhibit 50, paragraphs 32 and 33. Professor Wrange's expert report, this is the next tab, tab 26, pages 6 and 7, the first paragraph on page 7.

A couple of words about the burden of evidence that property can be attached the property is not covered by immunity. It's the position of the RoK that the burden of proof rests on the applicant even on issue of

immunity, so the applicants have to show that the property is not covered by immunity.

The main principle is absolute immunity. There is a presumption in place, a presumption of immunity, which is supported by the wording of 19(c) which describes exceptions of immunity. It says it should be established that the property is not of such nature that it enjoys immunity and in English it has been established that the signal is that the starting point is immunity and the burden of proof rests on the party which claims that immunity is not present. When it comes to the claim the property is for commercial purposes. The Court of Appeal in this Sedelmayer case said the following:

"According to the provision the burden of proof rests on the party which claims that the property is used for commercial purposes."

This follows from NJA, page 488. The Supreme Court did not make a statement on the burden of proof but said:

"The respective state immunity and respect for the fact that foreign states cannot be forced to ..."

Our position on the burden of evidence is also confirmed by the experts and I would like to refer to what Professor Mahmoudi said in exhibit 50, tab 25,

paragraph 56. He is very clear on this issue. I would also like to refer to Mr Wrange's report on pages 12 and 13 at the end of the page.

It is also confirmed by foreign doctrine, Hazel Fox and Philippa Webb write in the book the Law of State Immunity, this is found under tab 97, exhibit 138, page 511:

"The reason of the general immunity of property of a foreign state for measures of constraint of the burden of proof that the property is in use or intended for use for commercial purpose rests with the claimant."

Kazakhstan's position is also supported by Mr Tams' comment to Article 5 in the Convention, where it's confirmed that a presumption of immunity exists. This has been filed in the second binder, exhibit 139, page 103 in the book.

The burden of proof rests on the applicants that the property is used or is intended to be used for commercial purposes. The applicants have not managed to prove this and the Court of Appeal will understand this once my colleagues have finished their closing statements.

Having said that I pass the word to Mr Metz.

Closing submissions by MR METZ

MR METZ: Thank you.

I will talk about Article 19. We have discussed this Article earlier, so the importance of the principle of immunity is how the intention or for the purpose and how the property is intended to be used. This is the purpose of the state's intended use.

Kazakhstan and the NBK are covered by the concept of state in the Convention, so here it's the purpose of Kazakhstan's use or the intended use which is interesting to the case. Trying the purpose of the NBK's use does not come into question, since the property which is used, possessed or controlled by NBK is anyway protected by Article 21.

I am about to tell the court how in Kazakhstan's opinion the court should try this issue, but before I get to that I would like to explain the way this provision works in the ...

The Supreme Court explained this in the Sedelmayer case, NJA2011, page 475, the immunity that goes so fast. This follows from the position that the states are equal and this is what the immunity flows from. This is in large violation of a country, of a state's immunity. To allow constraints or coercive measures against a state's property could have adverse effect on the other states

relationship with the state.

This explains why the issue of constraint or enforcement has developed towards the more restrictive approach. This is also something -- it is also explained that the conditions to allow enforcement measures against the foreign state's property are not the same as the conditions to have jurisdiction against a foreign state.

It is that the threshold should be higher to allow enforcement rather than to allow jurisdiction. The purpose of the use or intended use is the interesting issue. Therefore the next question how to establish this purpose. Kazakhstan's position is that the court can establish this purpose by considering Kazakhstan law and statute. It is explained in detailed and in exhaustive manner what the purposes of national fund are. The Kazakh statutes is a direct evidence which explains what are the purposes for which Kazakhstan could use the funds in the national fund. It's mentioned explicitly. This is a primary source and this is the best piece of evidence in this case.

In the district court the applicants' argument was that you cannot look at the national fund's totality. From the opening statement which we hear on Tuesday we can believe that we will hear something along similar

lines later today. The applicants are focusing on the savings portfolio, the commercial services as they allege by referring to the definitions of the savings portfolio in resolution number 65 of the board of NBK. The applicants would also lead away the intention from the explicit purposes of the national fund.

One of the pages showed on Tuesday showed that the property's nature and use are objective circumstances, which say something about the purpose. So there was an extract from Professor Linderfalk's statement and this is on page 588 in the applicants' first binder. We'll have a look at that.

[Uninterpreted exchange]

In the following sense it should be noted that when applying Article 19 it's under the decisive ... for the purpose for which the purpose is used or intended to be used. Then he says: "However, it hasn't been said that the property's nature is of no interest ...(reading to the words)... this could help us to understand the purpose of this investment." Linderfalk equates with that experts, namely Mahmoudi and Wrange, that the purpose says whether immunity is present and the purpose can only be established if you look at objective circumstances. He talks about nature of property as one of these objective pieces of circumstances. Linderfalk

arrives at the conclusion that some of the properties in the national fund they serve commercial purposes. This is paragraph 2 on page 588, in the middle of the page:

"According to what has been established in the budget code of 2008, the national fund has two different functions. It should help to stabilise the Kazakh economy, it should generate yield and profit. Already on this basis we can note that some part of the national fund serve commercial purposes."

He arrives at prefacing 28.3 in the budgetary code. What's interesting here is that Linderfalk arrives at this conclusion without taking a stand on the purposes of the fund as this were expressed in the law. This is an objective basis, so exactly the same Article 21, but the previous paragraph, paragraph 2. This is clear what the purposes are but it is something which was ignored by Professor Linderfalk. Instead he looks at the functions of the fund and on the basis of these functions he makes an assessment and the assumption of what the purposes should be, but he never analyses the explicit funds. There are no references in this report which discusses any provisions in the Kazakh statutes which references the purposes, which means that he creates that the purpose of the national funds are state ones and not commercial ones.

Another report submitted by the applicants which also talk about the explicit purpose of the national fund is something written by Professor Ingrid Wuerth.

The last sentence on 1211. You can probably start looking for the --

MR NILSSON: This is which page?

MR METZ: It's page 11 in the report by Ingrid Wuerth.

SVEN JÖNSON: I believe the information in my binder is incomplete, but ...

MR METZ: Let's have a look at the last sentence on page 1211. This is Ingrid Wuerth's conclusion about the purposes of the national fund. It says:

"The national fund's structure and purpose as a sovereign wealth fund both tend to show that a savings portfolio is 'specifically in use or intended for use by the state for other than government and commercial purposes'."

Tend to show she's quite careful. She comes to the conclusion that two factors indicate that the savings portfolio is not used for state noncommercial purposes.

One is the structure of the national fund.

The second issue is the purpose of the fund, but it's not the purpose as it's expressed in Kazakh law.

On the contrary at the purpose which Wuerth assigns to the national fund, being a SWF, so purpose as

a sovereign wealth fund. What she does? She does the same thing as Professor Linderfalk. She avoids discussing the explicit purposes, not mentioned anywhere in her report. This report was referred to on Tuesday, while the applicants showed a header that the national fund's status as an SWF, this was something should be done when considering the immunity. I could have misunderstood bit it was implied that the states which constructed the Convention did not take into consideration the SWF, which is quite a modern creation. This should be taken with a pinch of salt. There are more than 90 SWFs today, more than about half of them existed before 2004, this is when the Convention was adopted.

My understanding of the applicants' counsel, the claim was made that the sovereign wealth funds don't have any political purposes but only commercial ones. This is something the RoK does not agree with. This is a way to claim to create conditions to assign to the national fund a purpose as sovereign wealth funds allegedly have in general, in order to avoid discussing the purpose of the national fund as it's explicitly expressed in the law, something which is done by Ingrid Wuerth. Discussing the constructive purpose rather than discussing actual purpose, this is something

the applicants want the court to do.

I draw this conclusion from the references to other pieces of evidence which we saw on Tuesday. We had look at some of the introductions which the investment advisers advised the fund to do. After that we saw that the savings portfolio had certain return investments in 2017. Why 2017 was shown? Because this is when the enforcement measures were taken, this is why this table is relevant.

Yesterday we received a brand new document, which explains how the national fund was managed in 2019. How this relates to everything else, it's not clear to me. In the opening statement they referred to the current deputy head of the NBK, Ms Moldabekova, but what was shown there does not cover by the subject for the examination of Ms Moldabekova.

The fact that the applicants in this manner look at the result of the use and how the property is used, this might be explained by a statement made by the Supreme Court in the Sedelmayer case.

In that case the Supreme Court granted the assessment of the purpose of Russia's use of the evidence, they looked at the factual use and this is something the court discussed in paragraph 20. We believe the applicants want the court to do this, look

at the factual use and based on that make conclusions on the purpose. But it follows from the Supreme Court's decision that the circumstances of that case were specific, there was an in cost assessment, this is not a general rule which was set up by the Supreme Court.

The Supreme Court looked at the factual use of the property, which was a piece of real estate. There was no evidence what was the purpose of Russia's possession of the piece of real estate. Kazakhstan claims that the Supreme Court would have made a different assessment if this piece of property would have been assigned as an official premises of the Russian trade delegation ...

So the factual use of the property should be used to make the assessment.

On Tuesday we saw extracts from three court decisions referred to by the applicants. The decisions in three different instances independently came to the conclusion that Kazakhstan does not use its property for state noncommercial purposes. This could seem to be aggravating for Kazakhstan. You could have thought that if there would be a line of reasoning which could serve as a basis for this court's assessment, but this is not the case. The Belgian court's decision has been appealed, the same applies to Nacka district court's decision this why we are here, so I will not be

discussing this decision. But one of them have entered into legal force, this is a decision by Stockholm district court which is on page 109 in the first binder of the applicants.

In the middle of the page you see the headline "Does Kazakhstan use or does Kazakhstan intend to use the property in question for anything else than state noncommercial purposes?"

The district court of Stockholm starts by saying:

"The relevant property consists of commercial companies' commercial shares."

I believe that's quite contentious. In any case, the starting point for the court's reasoning was the type of property, which is wrong. Furthermore, the court below said the purposes of the holdings, the PRIMA purpose was to generate profit and this is because Kazakhstan stated that the loss returned on the shares would cause damage. Then they said it would be improbable that the funds which were important for the social and economic stability of Kazakhstan were invested in a way that the value could disappear, but I believe that the court does not really understand how the securities market operates and how you diversify your investments. The only way how the value of the securities would have turned to nothing. It could have

only have resulted if a global crash would have taken place. Even in that case it would not have happened, this is about shares but 30 different companies, such a crash would not have affected the shares in different companies. In the same manner, the more different types of securities you have, the lower is the risk that the total value of the securities would turn to zero.

The purposes of the national fund could be reached if NBK invested the funds in different types of securities in different markets. Therefore, the risk of the national fund's value turning to zero is much lower and much lower if the profits or if the revenues were not consisted of the revenues from the oil sector in Kazakhstan.

The court says it's not probable that the funds which were used to stabilise the country's social and economic are invested in a way that the value could quickly turn to zero. That's correct but the funds are not invested in such a way that the value could quickly turn to zero. This is something the court misunderstood and this is why the court made the wrong conclusions.

There is a decision which this court used for guidance. This is found under tab 3 in the first binder. Kazakhstan's first binder. This is the English High Court of Justice and this is the AIG case, tab 3,

page 50.

This has been referred to as the AIG case, but AIG Capital partners and others v Kazakhstan and the National Bank on behalf of Kazakhstan. Starting on paragraph 91 they talk about immunity according to the English Sovereign Immunity Act, I am not going to talk about this. You can read about this in your chambers, please mark this paragraph and read it.

The purpose of the Kazakhs' use or intended use of the property is clear from laws, statutes and the same thing applies to the way the property can be used. As the applicants and their experts have focused on this, it's clear from Article 21.3 in Kazakhstan's budget code that they have a savings and stabilisation function.

The savings function, according to the law, is about gathering assets and providing long-term returns on the means and a moderate risk. The saving function itself is not a purpose, it's just one of the answers to the question of how are the national fund's purposes going to be achieved. We heard earlier Moldabekova talk about this in her examination.

That there is a savings function does not change the purpose of the national fund.

The national fund is to ensure that the stabilisation function works and it will work in the

future too. It also guarantees the future existence of the national fund, even though the revenue from the oil funds will ... be reduced.

We'd like to look at the Swedish Central Bank's investment policy. This tab 21 in binder 1, the Swedish Central Bank's investment policy.

There it has other purpose on the management of the gold and currency reserve and how it's to be achieved. On page 1 under the heading "Targets or objectives", under Article 3 you'll find this. There it reads:

"The purpose of the goal and currency reserve of the central bank is to ensure that the bank can meet its obligations and be prepared to intervene on the currency market and to give temporary liquidity support to banks."

It says:

"The answers have to be composed in such a way that the objectives can always be performed."

Because of this, the focus of the investment of gold currency reserves have to give as higher yield as possible in relation to the risk that has been determined by the central bank. So the yield that's generated from a mass of assets, for example, the central bank's gold and currency reserves or the national fund increases the possibility of achieving the

objectives. But the yield as such is not an objective in itself.

The gold reserve of the central bank is mainly kept abroad and from the applicants' point of view that might be attached in the country where it's located, because the management is for the purpose of achieving a high yield in relation to risk. We talk about this.

Whatever I would just like to point out that gold and currency reserves are used in the same way as benchmarks are used when it comes to investments in securities. It's not a spread risk. This is clear from an excerpt from the website on the central bank on tab 37 of the binder.

We can see the heading "The gold reserve". In the second paragraph under that heading, the central bank says:

"Nowadays the reason for the gold reserve is because the price of gold reserves doesn't follow the same process as the currency market, so therefore the currency value is more stable than the gold reserve and the price reserve were together in the old days."

The same thing with the national fund, investments there are made in order for the fund's value to be maintained over time and also to increase the value of the fund. To come back to what I said initially, there

should be a higher threshold in order to take enforcement measures against a foreign state's property than it is to exercise jurisdiction in that state.

For that reason a rule has come that the purpose of use or intended use is to determine whether there is immunity. This something based on the character of the asset or the use of the asset. You can ask yourself: is anything left lift of that rule then? Because basically it's the same assessment when it comes to immunity against restriction, that the requirement for a nongovernmental noncommercial purposes is not there.

Kazakhstan are saying here when there is an objective, the court must not consider what types of property are included in the national fund or what results the management gives or what the results that (inaudible) management gives. When you assess this based on the objective you can compare that for anything state noncommercial purposes, the state has nothing that that was done in the district court. This an objection that's warranted when it comes to distant obscure objectives.

That is not the case here. Here it's a matter of an objective that's stated in law or statute. It is clear. It is limited. It's clearly stated there are regulations and that there is a public connection. Even

if it's of no significance to the Court of Appeal's assessment, it is clearly described how Kazakhstan used the fund. The assets are clearly visible to all external people what the objectives of the national fund is.

Kazakhstan holds that the property that was subject to enforcement measures was used and is intended to be used for state noncommercial purposes and therefore the Court of Appeal should grant the appeal.

Closing submissions by MS FERMBÄCK

MS FERMBÄCK: As has been explained before Article 201 is an exception to the exemption stated in Article 19(c):

"If the court were to find that the attached property is not immune according to Article 9 then you have to assess whether the property is immune because it is of such a type as stated in Article 21."

Five types of assets are listed, a particular property of the central bank is one of them. On page 82 in bill 208 and 209:204 the legislators and at the background to Article 21 is the following:

"This special protection is deemed to be necessary to include in the Convention because of the practice of some states to grant permission to enforcement measures. For example, on foreign state's bank account or national bank's assets. By introducing Article 21 the Member

States wants to ensure that some state property is not covered by the exception of Article 19(c)."

On page 82 in the government bill it says that Article 21 is intended to prevent certain types of property, when applying to Article 19(c) is deemed to be used for other than state noncommercial purposes.

If the property is of the type that's stated in Article 21, then you don't have to mention whether it is used for a state noncommercial purposes. It's immune regardless. As we heard from the applicants, they are saying that Article 21.1(c) does not express the current customary law and therefore it cannot be applied by the Court of Appeal. They are saying that the Court of Appeal should instead apply a number of requisites that limits the application of the provision, also by referring to US law. Since the court recognised the Convention Sweden has twice tried cases against enforcement measures, NJA209 and NJA2011, page 475.

In both those cases the Supreme Court said that the Convention is deemed to be a codifying of customary law.

The Supreme Court in NJA2011 established that there should be immunity against enforcement measurement if the content of the property is of a qualified type. The court also declared that property is of a qualified nature if the property is of such a type that is stated

in Article 21 in the UN Convention of 2004.

The Supreme Court's statement means that there is an impediment to enforcement in Sweden if the property is of the type that is listed in Article 21. Kazakhstan holds that Article 21(c) expresses valid customary law, but that question is not to be considered by the Court of Appeal because of the Supreme Court's statement that the Article should be applied by Swedish courts.

To determine whether the property of this case is covered by Article 21, that is that it constitutes property of the central bank, the court then has to interpret and apply the provision anyway that complies with UN Convention in the view Kazakhstan, meaning that the attached property is covered by state immunity.

I am going to discuss this in three points.

The first thing is that the central bank is covered by the immunity applying to central bank.

Also that the attached property is the property of the national central bank of Kazakhstan, in that the central bank controls it.

The third one is that criteria that the applicant is making claims that the court has to consider if they find that the property is the property of the central bank and is not covered by the UN Convention and therefore should not be applied.

The first thing I am going to discuss is whether the national bank is covered under the concept of state and Article 2. Article 2, as we know, defines certain terms that are used in the Convention. The concept of state is defined under Article 2.1(b).

Article 2.1(b) what it does is they identify the subjects that are covered by state. However, Article 2 does not say anything about the property that is covered by immunity against enforcement measures. This is stated in Articles 18, 19 and 21.

For an independent legal entity is to be covered by the concept of state, according to Article 3 it's required it's entitled to perform and is performing as sovereign. The literature mentions national banks and sovereign wealth funds are both subjects that are covered by Article 21(b). I am referring to comment 50 of the Convention by O'Keefe and Tams, that was submitted yesterday.

When it comes to the kind of properties being discussed, in doctrine of whether Article 2 could have an indirect meaning for the scope of the immunity. Since central banks usually are separate legal entities the definition of state under Article 2.1(b)(iii) could mean that property of central banks is only protected to the extent that the central bank is considered taking

acts in the exercise of sovereign authority of the state.

If the court would like to read more about these discussions I'm referred to page 343 and O'Keefe and Tams's comments, which is in the applicants' appendix 87. In Ingrid Wuerth's article on the execution of central banks, exhibit 269 and the submission yesterday.

This describes a possible interpretation of the Convention as a loophole, which is likely not to have been intentional. Regardless of the cases about this possible interpretation of the Convention, the question that's under discussion could only become relevant when it's a question of a central bank that is acting which is clearly distant from the acts and the exercises of authority. This could, for example, be about the central bank providing commercial banking services to private individuals, beside their ... they work for the state. The applicant seems to say that since the central bank is getting money for their management of the national fund, so therefore the bank should not be covered by the concept of state. But the National Bank is being paid for the asset management is actually a condition that a commercial bank would have had to manage the assets of private individuals or companies.

However, the circumstances separates the management of the national fund from a private asset management, a position that a bank would typically perform.

First of all, the fund solely consists of public funds that stem from the oil sector of Kazakhstan.

Secondly, the combination is not private individual or corporation, it is the Kazakh government.

Thirdly, the National Bank is obliged by law to manage the national fund. The National Bank would not have been able to choose whether to take on the commission or not. The terms and conditions for this are not just regulated in agreements, which would have been the case if it had been a matter of a private management commission.

Thirdly, the national fund agreement does not have any regular terms and conditions. For example it is just the president who can terminate the agreement. This is hardly a term and condition that a commercial bank would have accepted.

The National Bank's management of the national fund is not a private act, but it's an act in the exercise of sovereign authority of the state. Therefore, the National Bank is covered by the concept of state.

The second thing I am going to discuss is the attached property is property of the central bank

according to Article 21. If the court ends up here in its assessment it's probably already found that the property belong to Kazakhstan in the sense of the enforcement code, which would mean that the National Bank would own the property. However, the courts would still have to assess whether the attached property is held or controlled by the national bank.

The applicant is claiming here that the concept property of does not cover property that the National Bank holds or controls, only the type of property that the bank owns.

In our view, that interpretation is not consistent with the Convention. Since the concept property of is not only used in Article 21(c) but in several other Articles in the Convention, you have to look at the meaning the concept is given there. In these articles the expression is used a concept of property of the state. The wording property of the state can give you the impression that it's limited to property that the state owns. The preparatory works of the Convention and the literature in this area confirm that property of not just own the right of property but also holding and controlling.

I will have to ask the court to take out the second evidentiary binder and get O'Keefe and Tams's comment to

the UN convention, which is under tab 98. If we go to page 316, which is page 1257 of the binder.
THE INTERPRETER: We need the text of us in front of us, even if you are reading the text in English. It's at tab 98, page 1257.
MS FERMBÄCK: In the middle of the second paragraph, they write:
"The words 'property of the state' having been proposed as a shorthand for the formulation, its property or property in its possession or control adopted on first reading are to be construed as referring to any property that the state owns or that it possesses or controls."
So O'Keefe and Tams are referring to the preparatory words of the Convention. In the comment on international law from 1960 they discuss the need for definition of the concept property of the state and such a definition would in that case have covered property that is used and held by a state.
On page 25 in the comment from 1991 on the Convention ... the following is said on the scope:
"The criterion for the foundation of state immunity is not limited to the claim of time or ownership, but it clearly encompasses cases of property in actual possession or control of the foreign state."

The state immunity is not limited to ownership but clearly covers property that's held or controlled by another state. In the law of state immunity (inaudible) they also discuss the meaning of property of state. They are referring to the so-called AIG case that my colleague referred to earlier and the parties AIG Capital partners and Kazakhstan inter alia. That's under tab 3 in the binder 1. I am not going to go through the judgment, but I am referring to paragraph 45. The English judge there describes how the concept of "property of" is to be interpreted.
The statement is about English law, but the doctrine is deemed to be relevant as to how it's to be interpreted according to the Convention. In paragraphs 89 and 90 he gives his views on how the assets in the national fund enjoy immunity as property of the National Bank.
The concept of property of the state covers all the property that the state owns, holds or controls.
As I said during my opening statement, this interpretation is confirmed by the experts Pål Wrange, Said Mahmoudi and Ulf Linderfalk.
The applicants however seem to imply that the concept of property of is to have a more limited meaning than it does in the text property of the state. The

applicants have not been able to produce any support for that, but they are saying that otherwise it would get unreasonable consequence. It's hard to understand what those unreasonable consequence would be. However, what would appeal to strange consequence is if the concept of property of would have meant one thing in Articles 18 and 19 and something else in Article 21. Since property of covers both possession and control, according to the main rule of Article 9.3 it means that no enforcement measures can be taken against property owned, held or controlled by the central bank.
According to Article 19(c) property used for commercial purpose is exempted. That means that all property that a central bank owns, holds or controls is excepted from immunity according to Article 19 if it's used for commercial purposes.
According to the interpretation of the applicants the exception for property that's property of the central bank under Article 19 should be limited to property owned by the central bank. That means that property owned by a central bank is covered by absolute immunity, whereas property that the central bank holds or controls can be attached if it's used for commercial purposes.
There is no support in the interpretation of the

Convention that any such difference was intended and I refer to the material for interpretation in page 103 of the bill. Apart from the Convention's provisions that these are statements by the ad hoc committees' chairman to the general assembly when the Convention's report was submitted. This was a point adopted by the ICC ...
This has the same meaning as the rest of the Convention. That means that Article 21(c) protects all property that's owned, held or controlled by central bank.
It is undisputed in this case that the attached property was acquired within the national fund and that it's the National Bank that manages and holds the funds. It is in itself sufficient for there to be immunity according to Article 21.1(c). The evidence that we went through during our opening statement also shows that the National Bank also controls the specific securities and claims that have been attached. The National Bank got that control when the government instructed the bank to manage the fund and the National Bank has kept that control when they transferred funds to Bank of New York Mellon for external management.
The attached property is therefore property of the central bank according to Article 21.1(c). I should

also briefly comment on the Nacka district court, who said that the fact that the funds of the national fund were not entered into books, that that indicate that it's not property of the central bank according to Article 21.1(c). How they are entered into books is of no significance to the court.

If they arrive at this the court will already have found that funds are not owned by the central bank, they should assess whether it's held or controlled by the National Bank. Of course this is regardless of how that is reported on in the accounts.

The second thing that the applicant is holding out as important is the tax forms, implications for tax forms, that does not change the fact that the National Bank holds and controls the funds in the national fund.

My last thing on the three requisites that the court has to assess that the court finds that the attached property is the property of the National Bank.

The first requisite is for the property to be used for monetary purposes.

The second is that the property has to be held for its own account. That can obviously mean that it's used for traditional central bank tasks.

The third is that the National Bank has to be independent in relation to the state.

These requisites are not clear from Article 21.1(c) and they are not to be applied by the Court of Appeal. Even if the requisites were to be deemed to have been met in this case, it is clear from Moldabekova's testimony the use of national fund for monetary purposes, it's also clear from Kazakh law that the management of the national fund is work for the national bank and that the bank is independent vis-a-vis the state.

These elements could be understood if you read the context and the intention of these provisions, but there is no support in place for such interpretation. When it comes to the first element that the property will be used for the purposes of monetary policy, when the Convention was developed the proposal was to include this element. This part was not adopted by general assembly, it's not part of the final version.

That the criteria proposed by the applicant, it was rejected by the Member States and the UN indicates strongly that such an element is not part of 21.1(c).

The applicants claim that the Member States of the UN through adoption of 21.1(c) adopted a minimum common denominator and the question has been passed on to application of law.

There's no support for this claim. On the contrary,

it follows from the preparatory work to the Convention and Swedish law that the purpose or the intention of 21 is to categorically protect property of certain character. I would like you to have a look at binder 1 of Kazakhstan, NBK and under 425 you have extract from the year book of ILC, page 158. In the right-hand column you have the comments to 19, which later on became 21.

The sentence to the comment it's stated:

"Article 21.6 to prevent any interpretation to the effect the property classified as belonging to any of the categories specified is in fact property specifically in use or intended for use by the state for other than government or commercial purposes."

In the second sentence in 2, in the comments which are on the next page, it is stated:

"Each of the specific categories of property by its very nature must be taken to be in use or intended for use for governmental purposes removed from any commercial considerations."

On page 82 in the government bill the Swedish legislators said the following. Through its nature they stated property should be considered to be used or intended to be used only for state purposes, without any commercial purposes whatsoever.

The property of the central bank is immune due to the fact that this belong to the central bank and not with intents of the central bank with its holdings.

It's difficult to understand what would be the function of 21.1(c) if the intents of the property would be considered. The purpose of Article 21 is to make sure that certain property is covered with immunity, even though it's covered by the exemption in 19(c), because it's used for commercial purposes. It's difficult to imagine how property which is used by the central bank for the purposes of monetary policy could at the same time be used for commercial purposes.

If the requirement would be that the property is used for the purposes of monetary purposes then Article 21 would become superfluous.

The second criteria of the applicant that the property should be held for own account, this element has been used in US case law and this is a qualifying element which means that the assets of the central bank should be used for traditional central bank tasks in order to be covered by immunity according to the American State Immunity Act.

The starting point in this American element which -- it's on the basis of this that the American professor, Ms Wuerth, makes conclusions about the immunity in the

report she compiles on behalf of the respondent.

A lot could be said about those reports and her conclusions but I will refer you to the report of just Professor Chester Brown, which was submitted yesterday, where he provides comments on Professor Wuerth's reports. When it comes to her conclusion it should be noted that the point of departure is US law where the position is much more restrictive to state immunity compared to the UN Convention. It should also be noted that the case law varies between different states when it comes to immunity of central bank assets.

For example, the English and the Chinese legislation provide more or less the same protection for the assets of central bank as in 21, while the US legislation is much more restrictive.

The contents in national case law is of no importance in this particular case. The Supreme Court has established that property which belongs to the specific categories listed in 21 in the Convention are covered by immunity and enforcement measures cannot be taken in Sweden against this type of property.

The state case law is only relevant if in order to understand how Article 21 of the Convention should be applied but the American case law does not provide us with any such guidelines.

The third element which should be applied in accordance with the claim of the applicants is that the central bank should be independent with respect to this state. This line of reasoning is based on the conclusions made by Professor Linderfalk is that the central banks have normally quite a large degree of independence vis-a-vis the state. The applicants refer to the doctrine that central bank has considerable autonomy from the parent state. These description of central banks are correct per se, it's also a place to hold National Bank of Kazakhstan, as organised NBK operates as a separate legal entity, it is not a state ministry.

However, there is no support in authoritative legal sources that independence is a requirement for a central bank to be covered by 21.1(c). The wording seems to indicate on the contrary, or other monetary authorities of the state, that they have taken into account the fact that the states organise their public apparatuses differently and therefore the task of the central bank could also be executed by state authorities.

The elements which is claimed by the applicant would lead to considerable enforcement difficulties, obviously when Sweden take for granted that the Swedish Central Bank operates with a high-level degree of independence

from the state. This independence is definitely not absolute being a state body which implements or exercises state authority. All the central banks are in one way or another more or less dependent on the state. The level of independence of the central bank is always relative.

What is the level of independence which would be sufficient in this case is highly unclear. Although the development in a lot of places has indicated that central banks are becoming more independent, but there's no consensus in the global community about what degree of independence should be granted by the state to its central bank. The fact that national courts would have to make an assessment to which level the central bank influences the monetary policy is probably not the intent of the Member States of the UN and also violates one of the local principles of international law, the principle of sovereignty. Therefore Article 21 can be interpreted in the way proposed by the applicant.

In conclusion and to summarise, the property managed by the NBK as part of national fund which was attached by the SEA is of the kind which is mentioned in 21.1(c). Therefore it's covered by state immunity and therefore the court should grant her motions.

I pass the word to ...

Submissions by MR FOERSTER

MR FOERSTER: ... the applicants claim that Kazakhstan has laws that operate to ... due to abusive rights. But what the applicants really -- it's not very clear what they state. What is an abusive ... the applicants have been quite unclear in that respect. From what I could read and based on what was said on Tuesday is that Kazakhstan consistently refuses to pay, referring immunity. It's quite easy to respond. Look at statistics, look at mathematics. Out to the 11 investment disputes which Kazakhstan has been involved in at the time for hearing the district court in April of last year, there has been another dispute. Eight of disputes were settled.

In April, the additional case, this case has been appealed, yes, but this was done on the basis of the fact that the tribunal exceeded its authority.

The other two cases where the payment was made, this has been settled by the -- so the payment has been made. So the only remaining case is this one.

It's strange that this claim is still maintained, because you can read from all possible databases which the counsel probably also has access to and also it's not an abuse to right to pay on the basis of an arbitral award. There are different systems in the arbitral law

to review the arbitral award based on different procedural grounds but also as violation of order public.

The fact they didn't pay after the award means they violated their obligations, including 26.8 of the ECT, the Energy Charter Treaty. I don't want to describe the entire system.

This paragraph says that every state which has acceded to the treaty should without delay follow decisions by the appeal courts to make sure that the statutes could be enforced efficiently. However. This is not a promise with respect to the investors. This is a treaty between the states. This means that the state should take certain measures within its own jurisdiction. For example, provide for an efficient legal process to enforce arbitral award based on the rules of enforceability, the ICSID rules on the UN Convention. This is something which is described by Pål Wrange in his second report, where he refers specifically to page 12. This is under tab 40. The provisional test would mean that Kazakhstan has an application with respect to other states of the treaty to pay to a third party after an award rendered against the state. The provision, these obligations between Kazakhstan and Sweden, and Sweden wasn't a party

to that award. So therefore Sweden has no vested interest in this matter. The applicant cannot claim an abuse of rights which Kazakhstan has not against Sweden. Kazakhstan did not violate any obligations in accordance with the ECT by not paying in accordance with the rendered award.

Next claim which was made is that Kazakhstan by ratifying the ECT implicitly waived its right to raise the immunity defence. With respect to that, the starting point should be ... rights invoking community, in accordance with international case law. It can be done by explicitly and specifically by waiving this right, but Kazakhstan did not do that. Such a waiver and cannot be read from this Article 26.8 in the ECT, because that provision refers to the fact that the state with respect to the enforcement procedures, they refrain to claim right to immunity to jurisdiction. So obviously to assign to the ECT the waiver of their right to claim immunity with respect to enforcement, but this is not the case. This is confirmed by Professor Wrange in his second report, tab 40, on pages 12 and 13 and also the judgment by the Supreme Court of the Netherlands delivered in October 2016, and also from the French Cour D'Appel, the judgment which we sent in just before this hearing opened.

The claim was that the Kazakhstan abuses international principles of state immunity in order to avoid paying on the basis of Linderfalk. The applicant claims that there is such a fundamental principle the international right of principle of good faith. The only support for the applicants' claim is Linderfalk's ... customary law, what's interesting is that Professor Linderfalk where he claims that the abuse of right doctrine is part of international legal order, and he quotes himself. This is footnote 55 on page 14. He does not provide any other sources. The right to invoke immunity is completely separated from the international obligations of the state. It has been confirmed by the international court ... in the judgment from the 13 April 2012 in a case between Germany and Italy, where Germany was allowed to invoke immunity with respect to real property which located in Italy, although German didn't pay damages for war crimes which Germany had to pay. This is filed under tab 48 in binder 1, exhibit 210. The conclusions of the judgment:

"Where the state is entitled to immunity before the court of another state is a question entirely separate from whether the international responsibility of that state is engaged when it has an obligation to make reparation."

A possible breach of the ECT is not relevant to the issue whether this question can invoke state immunity or not.

It is also said that Kazakhstan does not have damages set in this case and they fight enforcement in other countries where the applicants try to enforce the arbitral award. The applicants seem to say the fact that Kazakhstan invokes immunity that in itself is an abuse of rights and therefore the right to invoke immunity, which is not correct. Enforcement measures are taken when voluntary payment didn't take place. If the right has no right to invoke immunity to enforcement measures every time the state does not pay a debt, the state immunity against enforcement measures will become a meaningless issue.

Kazakhstan's unwillingness to pay in accordance with the award is based on the fact that the applicants motions in the award are based on serious crimes and the fact ... that this follows from the decision by the English High Court, which under the prima facie assessment came to the conclusion that the award rendered fraud and therefore the award was not enforceable in England.

This criminal act had become an issue in Sweden through the new application by the (inaudible) to

invalidate this case to the Court of Appeal. As you know, Kazakhstan has submitted a copy of the summons as part of this case and, briefly, the fact that the applicants have drained their operations in Kazakhstan of funds to funnel the money to affiliated companies. Therefore the applicants' Kazakh company was facing serious financial difficulties, something which the applicants blamed on Kazakhstan.

The tribunal accepted the applicants' -- considered the damages which de facto were caused by the applicants themselves. So if Kazakhstan had paid in accordance with the award Kazakhstan would pay for the damages which have been caused by the applicant.

It should be noted that this money was laundered by the applicants to use improper payment to politicians, among others the Kazakh vice minister which was responsible for the industry in which the applicants have been doing their business. If the court considers that the enforcement of the award violates ... but if the Court of Appeal in this case would really have to try the actual abuse of rights. In that case, the circumstances listed in our addendum K55 this is relevant and this gives strong indications that Kazakhstan had reasons to suspect the applicants of committing crimes and should be tried by a competent

court. If Kazakhstan had reasons to suspect that a crime was committed this review can only be made on the basis of the written evidence. The issue of burden of proof is something else.

The criminal acts by the applicant is something which is part of the litigation in the Washington DC litigation on the basis of RICO and this is something which was quoted by the court. The court at first instance rejected the claim and now on Monday, just during our first day, there was a hearing in the US and according to our information service in the US there are now good chances that the judge on Monday signalled the possibility of granting Kazakhstan's request to request dismissal of the suit. So let's wait and see.

Before this meeting the Ministry of Justice in Kazakhstan has asked me specifically to raise the way the applicants quoted from the message paper from March 2019. It is here on page 913 in the binder of evidence by the applicant. I would ask the court to read the entire article later. In the article they mention the criminal background of the applicant and the new evidence that the minister for justice had just receive then about the applicant's fraudulent conduct and the need for precedence when it comes to the question of immunity. The AIG judgment is apparently

not enough, so why would Kazakhstan be criticised for seeking justice on this matter? The minister for Justice himself and the majority of his staff are trained in American, English and other western universities. These are qualified lawyers who have studied foreign state government and know about rule of law. Why would they not bring to justice people who have benefited in criminal ways, especially from the Kazakh natural resources?

Sweden signed another convention, the 2003 UN Convention on corruption. This is in 2007:44 and Sweden is complying with this to fight the crime that preceded the arbitral award. That is the basis of the applicants' claim. This Convention has to be taken in consideration. Therefore Swedish courts must respect Kazakhstan's objections to enforcing the award in order to prevent such criminal activities.

Therefore the applicants' claim that Kazakhstan has lost it's right to invoke immunity be disregarded.

Thank you very much for your attention.

SVEN JÖNSON: The question now is would you like to begin and then in 20 minutes ... or if that's not that good.

MR NILSSON: Could we take a break, maybe a short break, just so that we get our equipment installed. Then we could have a longer break in the middle of our

presentation. That might be easier. If we take a 10-minute break now.

SVEN JÖNSON: That will be fine.

(2.07 pm)

(A short break)

(2.23 pm)

Closing submissions by MR NILSSON

MR NILSSON: While we are waiting to get our technology in order, I would just like to without the help of any slides just give a very brief comment on the very last thing that was said by the other side when it comes to this lawsuit that has been submitted in 2002.

The evidence was dismissed by this or abuse as evidence in this case has been rejected. Therefore there is no evidence for the allegations made. I would just like for the sake of order that everything that is said there is incorrectly stated by them. It is contested, it's denied and the court should not take this into any consideration when it assesses the case.

If we can move on to what the Court of Appeal is to take into account in its assessment, I am going to stick to what I believe is a logical sequence of the questions that have come up in this case.

The first one is really only about the depository and that is the question of the jurisdiction. Then the

next question is whether the attached property belongs to Kazakhstan or not. If it does, then the question of immunity comes up, firstly according to Article 19(c). If that answer is answered in the negative, that is that the court finds that the property is not solely used for state noncommercial purposes, then the question of immunity comes up according to Article 21.

Then finally if any of the principles of immunity are to be applicable, then the court will have to answer the question on whether that has been lost through abuse by Kazakhstan.

I will start then with the question of jurisdiction. All of the attempts that the opposite side is making to locate the attached property, to locate it abroad is only based on non-solid theoretical arguments, which have nothing to do with reality. This situation is such that the enforcement agency has attached shareholdings belonging to Kazakhstan which are held in depository by the Swedish SEB Bank, that they have sold these shares and they are keeping the liquid funds in an account belonging to the enforcement agency.

This was also held in separate cash account at SEB at the time of the attachment. The shares, they were formed in Sweden at the time they were issued in Sweden. They were book entered in Sweden and they have never

been taken out of Sweden. They are in Sweden to the uncontested chain of custodians. They were originally acquired for Kazakhstan with funds from the national fund.

This of no significance to the question of jurisdiction if the shares were acquired on behalf of Kazakhstan. Bank of New York Mellon has had no difficulties differentiating on the relevant transactions. We will come back to this list of transactions later. But I will just note that in this context this list reflected directly to SEB as Ms Buresten said during the examination of her, this happened simultaneously or immediately by electronic transfer in the SWIFT system.

SEB Bank has kept all the acquired shares in segregated securities accounts from the time of the acquisition. What happens first is the acquisition of the shares and the registration of the shares. After that there is a clearing made of payments, et cetera. But it's not the case that Bank of New York Mellon first sends SEB bank a lot of money which is then all mixed together and there, after that, the money is used for buying shares. It's the opposite.

The acquisition of the shares comes first and then the clearing comes after. Ms Buresten confirmed in her

examination that BNY Mellon sends written instructions to the bank via SWIFT for immediate registration in the bank's depository system. That BNY Mellon's instructions state clearly the financial instrument and the number that this transaction is about. That registration in the SEB Bank in Sweden is made in accordance with these abbreviations for the accounts that the Court of Appeal recognises now and that you have seen within this pink frame. I am sure you will recognise it when you see these documents.

Now that assets that belong to a foreign debtor held in a Swedish bank account, that that means that they are in Sweden and it's not significant then that the shares are dematerialised.

It is actually clear from the legal case from 2014 that the National Bank referred to that when property originally is put into a specific account on behalf of somebody else, it is of no significance who is named as the account holder. What is decisive is the one who owns the funds. In that case the law firm was the account holder, but of course it was never claimed that the funds belonged to the law firm. The important thing is that it can be definitely identified who has access to it.

This case of jurisdiction that the other side has

also gotten from other instances, this is about jurisdiction. Different views are put forward when it comes to whether a foreign party has to defend themselves in the Swedish court of law and whether it's possible to attach assets.

When it comes to jurisdiction, you can talk about forum of convenience [as said] and parties are not forced to appear when it would not be natural for them to respond. When it comes to execution, of course then it is legitimate that the assets of a non-cooperating debtor can be taken anywhere they are found in the world.

What the enforcement agencies said about their executive authority and this refers to this and this is a practical approach that the enforcement agency have. They are saying what they have said in their statement, which is on this slide of the enforcement agency statement. Here they are establishing that the territorial authority there is no guidance to that and there is no precedent. But according to them the main principle of the executive authority of the enforcement agency is linked to the possibility of effectively ensure attachment. This is a practical and down-to-earth approach that the investors advocate. The enforcement agency also says that attachment according

to 47 of the enforcement code is that an effective attachment can be made. Of course that has to be the case and there is no doubt that that was the situation here in this case and that's the reason why we are sitting here.

What the opposite side is saying is really that there is some form of prohibition against upper tier attachment or pass through, whatever you call it in proper English terminology. This is actually not supported in Swedish law. If the debtor's property is to be exempted from attachment, then that needs to be supported by law and there is no such support here.

The claim to get the shares is directed at SEB and if you choose to look on this as a claim, then you have to establish that the claim has to be where the debtor is. In this case that is the SEB Bank. The enforcement agency's authority to take measure against that cannot be argued according to discussions on a doctrine that is not part of Swedish legislation. It's not clear whether this will be entered into Swedish legislation. It's only been ratified by Bangladesh in the last 10 years and as well as that the Convention allows exceptions from the prohibition in international law, for example, if the chain is transparent.

The opposite wants to rely a lot on what

Wallin-Norman wrote, what was written in her statement made on request of the other side and never experienced a person making statements for both parties in an ongoing dispute. I think this throws a shadow on the general liability and credibility of her report.

It is not really ... not very good to just agree with the one who sent you the last invoice. So this is the question of the chains of custodians or chains of debtors. That objection is sort of beside the point. The mistake is that the National Bank mixes up ownership right and legitimacy. The shares are held on deposit by the bank, but of course the bank doesn't own the shares because it's held on deposit. The same thing applies to custodians further up the chain. That is Bank of New York Mellon and the national bank.

During the closing statement the National Bank talked a bit about grains and silos, but that analogy is not sustainable in the view of the investors. The CSD account in Euroclear is not a silo. It is perfectly possible if you just go to the relevant data in the one who has the account, that is the SEB Bank, to distinguish the individual shareholdings that are held. It's not like just one big mix of grains that are just sitting there unidentifiable, it is securities that have been individualised and that's as they can be

identified. If you are going to look at the significance of keeping registers, the relevant register in the view of the investors is kept where the register shows who the owner is.

The custodian registered with Euroclear, that is the SEB Bank, knows who the owner is. That is clear from the list of custodies by the bank and it's the SEB register which is the relevant one there.

The Court of Appeal can also look at how the London High Court describes the legal situation in its ruling on the Part 8 judgment. It is fairly long, it's appendix SO5 or exhibit 125. The court can just note that the sections that are registered are 74, 76, 81 and 101. There you can see that not according to English law is the legal situation as clear as the National Bank is claiming.

If you raise your gaze a bit you see that the National Bank's understanding of the law and the possibility of getting at shares must be the dream of any money launderer or drug dealer, if not even all the elements of the chain knows who has is entitled to that. It's possible to take the assets in possession if you cannot intervene against the first custodian in the chain. For some reason they always turn that upside down so that the upper tier is at the very bottom. This

is a mysterious thing that we can disregard for now, but the practical significance is that if an investor, whatever sort of shady nature is chooses an original custodian in the jurisdiction where you can possibly be found right, then that's the end of it. Normally speaking that those who have inappropriately appropriated funds, they are keen to conceal their holdings and there are all kinds of complex company constructions for that not to be revealed.

If it is as the National Bank is saying, that would be unnecessary work. All you have to do is ensure you have a first custodian that you can't really get at. Then everybody else in the chain can just then refer to prohibition against upper tier attachment.

There is a statement where it says that if the shares cannot be attached in Sweden they have created an effective way of withholding property. If we look at this chain of custodians or nominees, according to the investors it is Kazakhstan which is listed in red here Kazakhstan which is the real owner, the National Bank is original custodian, Bank of New York Mellon is the sub nominee in Sweden and SEB is a sub nominee in Sweden.

Then the first nominee in this chain, the National Bank. The other side is not saying this, but this is the logical consequence of their arguments. I take it

that they avoid saying this because anybody will understand the possibilities the investors would have of being found right by turning to enforcement agencies in Kazakhstan requesting executive measures against the National Bank.

There are more and more requirements for transparency in the financial systems now for various reasons. For example, the 2018 directive on increased shareholder engagement it's unreasonable to keep an order which does not take into consideration who is the beneficial owner. It's equally impossible as the SEB representatives are saying that they don't really know who Bank of New York Mellon's customers might be.

Still, the SEB Bank has taken on responsibility vis-a-vis the tax agency to ensure that the tax treaty with Kazakhstan is applicable and it is also clear from anybody who reads the list of custodians, including Electrolux's advisers, that they can see the shareholdings that belong to Kazakhstan. This is real knowledge as opposed to imagined ignorance. The shareholders have been identified with the help of Swedish registers and the shares were available for enforcement measures in Sweden. That is why we are here.

I think that's enough on the jurisdiction for the

enforcement agency. If we then move on to the question of ownership, to me that is fairly obvious. It has never been explained how ownership right assets in the national fund, which indisputably were created by and belonged to Kazakhstan, how that right of ownership was transferred to someone else. It is up to the opposite party to refute this. We can hear from the Supreme Court judgment of 1983, page 436 and what they say on the burden of proof is slightly different to what we've heard earlier today:

"I a third man claims that the attached property belongs to him, acknowledges that previously it belonged to the debtor but claims that he has acquired the property from him, then the third party should be required to provide evidence for this claim for this to be held credible."

But neither the National Bank, Bank of New York Mellon nor the SEB Bank say that they have anything to do with the securities in the capacity as an owner. However, Kazakhstan itself and all the custodians have explained that it is Kazakhstan who is the owner.

When it comes to Kazakhstan's position, we have looked at the power of attorney that was issued. We have looked at these tax declarations that have been

submitted and the information in them and the decision by the tax agency. I am only reminding you of this, I am not going to look through these documents again. I am only referring to what we looked at during our opening statement.

If we then take a look at what the National Bank has said, Kazakhstan also owns the property. This filled-in form identifies the ministry of finance of the Republic of Kazakhstan as the owner and the National Bank as the account holder and nothing else.

This also corresponds with what Moldabekova said during her examination and that the Court of Appeal has listened to. What she described was actually that they had considered the question before they drew up the documents and sent them into the tax agency, at least at an earlier stage. The other day the National Bank said that it was actually Bank of New York Mellon who had stated this or that. But that is wrong. It was the National Bank's vice president and the ministry in consultation had agreed that it was Kazakhstan who was to be named as the owner of the shares.

Then if we take a look at Bank of New York Mellon's information, it's the same there. Earlier on we saw a slide during the closing arguments by the National Bank of this chart where the bank says that it is the

Republic who has the ownership, whereas the national bank only has the account holder. The submission that we are referring to tells you a bit more than that, a bit more than the National Bank said. We can take a look at an excerpt from the submission.

First they are saying that BNYM holds assets on Republic of Kazakhstan pertaining to the national fund ...

Secondly:

"For example, the assets of the national fund, which BNYM holds under the GCA with the National Bank of Kazakhstan, are owned by the Republic of Kazakhstan."

Thirdly:

"The national fund is owned by the Republic of Kazakhstan."

They are talking about the trust:

"Such a trust is to be distinguished from the Anglo Saxon trust as the ownership is not split. Pursuant to the TMA, the Republic of Kazakhstan retains full control over the management of the national fund and exercises extensive control over the National Bank of Kazakhstan."

This is a more extensive report on Mellon's position. The National Bank is now trying to imply that the world's largest asset manager was frightened by the investors having made threats. What is really happening

is that there is a process where both Kazakhstan and the National Bank is bringing an action against Bank of New York Mellon and has claims of many millions of US dollars. So who is trying to frighten Bank of New York Mellon? One can discuss that but it would be a fairly sterile debate.

The central bank did not produce any explanation to these account designations which have been presented by BNY, which through and through identify Kazakhstan as the owner. We haven't seen any evidence of the instructions from the central bank either documents. One could assert that there are reasons why these instructions are not part of the written evidence of NBK in this case.

I may remind the court that BNY forwarded this information that Kazakhstan is the owner, this is a part of the tax case.

The position of the custodians in this chain is that they are intermediaries and nothing else. Kazakhstan is the owner. The central bank is the original custodian, Mellon is sub-custodian and SEB is the Swedish sub-custodian to BNY.

I will not tire the court with a new interpretation of the documents, but on the right-hand side in red we refer to the document which indicate the title of

Kazakhstan and the status of other custodians as custodians.

To say something about Kazakh law, this trust argument which was launched by the Kazakh side and this was presented quite late during the proceedings in the lower court, from the point of view which we are discussing now, the right of ownership, it's lacking content because it should be quite clear according to Kazakh law that if you call the party the trustor, the trustor still remains the owner even if the custodian agreement has ceased to exist.

We have looked at 886 of the civil code on the trust management of property. One of the party assigns the trustor. The other party the.trustee. transfers property for trust management. The other party undertakes to manage this property in the interest of the beneficiary.

During the term of the trust management agreement the trust does not have any right to conduct any measures with respect to property in trust. Unless anything else is mentioned the legislation of the RoK is expressed in the agreement.

The arrangements in this case don't really correspond how this trust -- we can call it trust although it's not a legal entity -- is supposed to

operate in accordance with Kazakh law.

The assumption here is that the trustor does not have to take any measures? Could the control in principle should be cut off from the trustor. This is what the law says, but in our case Kazakhstan administers quite a lot of influence over the national fund. Not only through the national fund agreement but also through also the management council of the national fund. NBK earlier said, right, but Article 886 provides for exceptions, this is something which follows from the last sentence. But there should be limits of how a legal provision could be supplemented with exceptions but still maintain its identity.

If you look at a Swedish rule, a foundation could have different whole possible rules but you cannot refrain from the basic rule. But the special -- there should be special assets under management which are managed in a particular way if. You eliminate that and you say right the person which founded the foundation could in any case come in and control the property, then this is more than special exemption from the statutes. It means that the foundation of the trust loses its character.

I won't spend a lot of time on Kazakh law even though -- it's not particularly relevant to this case

what the Kazakh law states, because if the property should be protected from attachment, this is a question of Swedish law. It's not that strange foreign arrangements which create other rights different from what's known to Sweden. This is not something that should be applied here.

It follows from ... NJA 78, page 5923, and ... this clause could be claimed in Germany in accordance with German law, but this is of no importance in Sweden.

So therefore not in accordance with Swedish law or to the Kazakh law, the NBK is only the custodian, the manager of the asset. The owner is and remains to be the RoK and therefore the immunity issues arrive and this is the point which we discussed the part of the case which are the most in interesting ones.

The first question is about Article 19. We have looked at the elements in Article 19 on several occasions, which allows construing if the state uses or intends to use the property for other purposes than state noncommercial purposes. This is the critical text in these two and this is what we are ...

Please note it's the intent of use which is of importance in accordance with 19(c), the intended use of the property. The property which is challenged whether it becomes a subject of attachment or execution if the

property is used by the state other than for government noncommercial purposes then it could be attached.

When it comes to the burden of proof, it is the case in the Sedelmayer case, everybody knows 2011, page 411 I will just say the Sedelmayer case. The Supreme Court has made a statement on this issue. This does not become less valid just due to the fact that Mahmoudi writes something else in his legal report, something which doesn't correspond to the active Swedish laws:

"The Supreme Court has obtained such a review, the requirements with respect to state immunity with respect to property which is ...(reading to the words)... means that general rules on the burden of proof in an execution order cannot be fully maintained."

The last part might be a bit difficult to understand, but the Svea Court of Appeal explains it in a more accessible manner, where they say:

"It is the Russian Federation who have to make it probable that the property in question must be used for official purposes in order to create impediments to enforcement. During such a review particularly severe requirements shouldn't put to the Russian Federation's presentation of the operation and the use of certain property."

The court says that this is not a question of

reversed burden of proof, but it's like the light burden of proof due to the states due to the substantial nature of these persons.

If we look at what Professor Mahmoudi wrote about Sedelmayer, I would like to draw the court's attention to the sections highlighted in yellow:

"What is generally accepted as the property of the state which is not used for state purposes could under certain conditions be a subject for an enforcement. The Supreme Court of Italy established the law in 1926 in a case which had to do with enforcements to gain securities which belonged to Romania, that the government is considered to be a legal subject of the private law when it is involved in transactions of private law. Similar case law is found in the majority of European countries."

In the same report Mahmoudi is stating:

"To understand whether certain actions are actions of a state or ie the jure imperii or the jure gestionis, then the nature and the intent of the actions should be reviewed. In his report in this case Mahmoudi emphasised that it's the purpose which is the most important factor, maybe the only important factor.

Have a look at the Swedish law as it follows from the decision of the Supreme Court in Sedelmayer.

The Supreme Court says the immunity enforcement could be invoked with respect to property which is used for official functions of a state. However, this shouldn't mean that immunity is in place with respect to compulsory measures, only due to the fact that the property is used by a state and it's used by the state for noncommercials purposes. This is not enough. Impediments due to state immunity should however be present. If the purpose of the possession of the property is of the qualified nature, for example, when the property is used for the state exercising of its actions as a state and similar tasks of official nature or if the property is of such a special nature which is listed in Article 21 in the UN Convention of 2004. This is something which the Supreme Court says more or less in passing, because these exceptions are not present in Sedelmayer.

My reading of the last qualified nature is that this is one exception.

Article 21 is another -- I believe the counterparty had a different understanding of this term qualified nature.

In any case, the assessment of the purpose of the possession of the property is of such a qualified nature that this would constitute an impediment to the

enforcement of the property, should be done on the basis of the factual use of the property says the Supreme Court, something which the investors have used as an argument.

If we continue looking at the Supreme Court decision, so this property was of mixed use. There were apartments, premises and other property which would be protected by the Vienna Convention on diplomat immunity, but the Supreme Court made a comprehensive review.

It should be established that the property did not to any -- was not used by the Russian Federation's official activities. The purpose was not qualified enough to protect the property against enforcement in the case at hand.

This is obviously a decision which professors of international law they have commented on this and Pål Wrange, who submitted a report on this case, they said that it was right to demand a significant part of the property is used for official use otherwise the state could invest in properties overseas and then protect its assets by accommodating one or two diplomats in each house.

Mahmoudi's comment is:

"The court, in my opinion, has made a correct assessment of the status of the property considering the

actual use of the premises ...(reading to the words)... related cases is on the increase.

What could we say about the nature of the property? We have looked at this slide on several occasions which show the transaction history, which is that this is NBK's account at BNY, this is what has been submitted in this case about 400 pages that were submitted by NBK. We have heard from SEB's witnesses that this is immediately mirrored in identical transaction vis-a-vis SEB as a part of the SWIFT system.

This property and the use of it, which is constantly turned over in order to maximise the profit, which of its nature is something which belongs to the domain of private actions and commercial law. These are listed quotes which are "after instructions of asset managers with the purpose to achieve high returns on the investment and to get this portfolio of stock to grow in value year after year after year".

We have heard during the opening statement from Kazakhstan something about the instructions to the Swedish central bank and the foreign currency reserves and it was emphasised again they can buy calls and shares. Yes, they can but the intentions are there not to accumulate more and more assets for the central bank of Sweden but this is in order for the central bank to

perform its tasks since the central bank is responsible for the monetary policy of the country in general when it comes to acquisition of shares.

Mahmoudi and Wrange, together with Ove Bring, as writers, they write the reference textbook "Sweden and International Law". They quite laconically noted that to buy shares is always a jure gestionis transaction, considering the nature and purpose of the action. That is what they say.

The specific piece of property which we are discussing here we know that this is the part of the so-called savings portfolio of Kazakhstan and the purpose for this property is to reach high yield and this is symbolised beautifully by this image on how the NBK explains how they reach the growth of national fund assets. Higher and higher piles of gold, which is -- and with the glistening sun as the background. It says:

"The Deputy Governor of the national bank ...(Reading to the words)... a long-term perspective."

Further:

"Firstly, it is intended within the next few years to further increase the stocks share in the savings portfolio from current 25 per cent to 30 per cent, at the expense of bonds."

This context will likely refer to Ms Moldabekova's

statement during her examination. We have looked at that again during the closing statement of NBK, I will not be repeating this. I just remind you of what she said, and this is something the Court of Appeal were able to hear for themselves.

When it comes to the purposes of the attached property we don't believe Kazakhstan even had claim that the shares were supposed to be used for something which you can call any kind of official purposes. What we know is that the shares are part of the savings portfolio of the national fund and that the goal was high profitability. It's quite obviously commercial purpose and this type of property is not protected by state immunity.

Kazakhstan says, "Right, but the purpose this is to create good conditions in Kazakhstan". I think during the opening statement it was mentioned that this was something which would be used today, tomorrow, in 10 years and 100 years, if my notes are correct.

Clearly to some extent one could claim that this is the purpose of the fund in general. If we say that the purpose of the use of the property follows from this general florid description such as:

"Ensuring stable social development of the country or accumulation of resources for future generations ..."

Then as an extension of that all state property becomes immune, nothing is left of the restrictive opinion of your own immunity. If you account for such abstract and futuristic general declarations, because by the way as Wrange says in his report -- I will come back to this -- you can see that all the actions in the state at some point as extension leads to some kind of benefits to the citizens of the state. However, it does not mean that the use of property on the way there is a sovereign act of the state.

The argumentation of the counterparty in this respect with respect to immunity under Article 19, if the state gives $1 billion to Chase, JP Morgan or another large asset manager and tells them, "Please exercise discretionary management and report the profits to us", then this would be covered by immunity under Article 19 because as extension the funds would be used to create welfare in Kazakhstan. But the sovereign acts are noncommercial purposes are not interpreted this wide and they still leave room for execution in accordance with the restrictive theory of immunity.

Maybe we should take another break before I move on to Article 21.

SVEN JÖNSON: 15 minutes.

How much time is left?

MR NILSSON: We will conclude on time. I cannot give you an exact time, but we will conclude in time or within the given time frame.
(3.15 pm)
(A short break)
(3.35 pm)
SVEN JÖNSON: Please proceed, thank you.
MR NILSSON: I am about to come to Article 21 as such but before that I would like to remind you what we have said about 2(b)(iii). In order for the NBK to invoke immunity what is required is that they are covered by the concept of state. This means that the central bank makes submission as part of central sovereign exercise of authority by the states, which is not the case when it comes to 21.1(c) of the Convention.
The investors have claimed that it's not entirely clear to which extent this corresponds to the customary law, but larger flexibility exists in the view of the investors. It could be noted that the state's case law with respect to the property of central bank, it varied at the time when the Convention was created and the positions were different about where the specific exemption from Article 9.1. I won't go back to the discussions held within the International Law Commission. But let's have a look at the first draft

and the final text of the provision. You can see that the differences are quite significant. A lot of states initially considered that property of a central bank held by it for central banking purposes should be exempt and monetary authority held by it for monetary noncommercial purposes, et cetera.
While in the final version of the Convention which was adopted, they had different wording. It was also the case that they were inspired in the wording. They were inspired by the American Foreign Sovereign Immunities Act, which as we have said in the case law in the US is not that all the property of the central bank is exempt or is from enforcement, but several other requirements are put in place.
What the Swedish experts write about the American position is not completely right. This follows from Professor Wuerth's report, but she's actually an American professor. The claimant wants to claim that the text of the Convention, although it's finally applicable in Sweden should be applied in exactly such way as an applicable Convention. This is actually one of the main points of the RoK.
If we accept that this is the case, then it would be reasonable to interpret the text of the treaty in exactly the same way as it should be done for a valid

convention, namely in accordance with the Vienna Convention and treaties. The central provisions there, Articles 31 and 32.
I would like to present them to the court. I have to find them in my documents. The text on the screen is too fine for me to read off the screen.
To save the Court of Appeal's time I will just read the English text. There is a Swedish translation in the right-hand column. The general rule is, 31.1:
"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
Article 32, which discusses supplementary means of interpretation, says:
"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
"(a) leaves the meaning ambiguous or obscure or.
"(b) leads to a result which is manifestly absurd or unreasonable."
The meaning of this as the Court of Appeal obviously

know that the wording of a treaty have a much more decisive importance compared to the wording of the Swedish law, the Swedish courts. Normally they look at preparatory works when interpreting the text of law but according to Article 32 this is not something which should be done, unless the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to an unreasonable result.
To put it simply, the fundamental issue here is that you read the text of the treaty in accordance with the text. This something which Svea Court of Appeal determined in a case which took place not too long ago. This is a judgment from the 18 January 2016 in case T9128-14, between the so-called Spanish funds and the Russian Federation.
There, the Court of Appeal stated in a very concise manner gave a statement on the meaning of Article 31 of the Vienna Convention.
Once I have found the relevant text I will read it out to you. It says:
"In Article 31 there is a general rule of interpretation, according to that a treaty shall be interpreted honesty and in the light of its object and purpose. In considering the object and purpose, the starting point for the interpretation is always the

wording of the treaty."

Then there is reference to a source:

"If the wording is clear, then in principle it also becomes the final destination of the interpretation. The object and purpose of the treaty is a part of the interpretation exercise which has to be done in the light of Article 31."

Further down the court describe Article 32, but this description more or less describes the contents of Article 32.

Moving from the abstract to the specific issues, it is the opinion of the RoK that even if the property is owned by the state it should be immune in accordance with Article 21, saying that the term "property of" should have a wider meaning than just "ownership".

We can have a look at how this Article is worded in different languages.

In English it's "Property of ...".

In French it says "Les biens de la banque centrale ..."

Spanish, "Los bienes del banco central ..." I would like to apologise to Spanish speakers.

In Russian [Russian spoken].

So in all the cases the translation is the property of the central bank.

This is the expression which apparently Kazakhstan feels the need to interpret, that it has it somehow would be unclear. It's quite difficult to understand what exactly is unclear about that term.

If you want to widen the concept in this manner, the property of the central bank -- and it should also cover the property which belongs to someone else different from the central bank, apparently you attack the wording of the Article. This violates the interpretation which should be done in accordance with Article 31 of the Vienna Convention. This is not a good faith interpretation.

You could possibly ask yourself a question. If you were to somehow find support in what is being said about object and purpose, the general opinion of experts in international law is that you cannot just go and start looking at object and purpose and escape the wording and this is not what the Article says. If you want to ask yourself: what is the object and purpose behind the wording of the property belonging to the central bank? Then you should note that when the text of the Convention was developed they didn't envision the violent extension of sovereign wealth funds, which has happened recently, or the fact that certain states have decided to put management of this wealth funds under the

central bank. It could be the case that some of these funds existed at the time, but they were not of the importance which they have acquired later.

This is something which was commented on by Professor Wuerth in her report. This is a shorter extract from her report. I would like to call the court's attention to this:

"The growth and change in sovereign wealth funds since the adoption of the UN Convention should preclude any categorical conclusions about the immunity of sovereign well fund accepts when those assets are transferred to central banks."

From the practical point of view, one could note that if you stretch the exemption in 21.1(c) so that it covers such sovereign wealth funds, if they are managed by the central bank, then you have recreated a state capitalistic system where the state has enormous financial assets which are exempt from enforcement and you come back to absolute immunity. This is against the grain of the existing direction of the international law of state immunity, becomes more and more restrictive. The investors are trying to say that object and purpose follow from this wording of other monetary policy, the purpose is to protect property which is linked to monetary policy or it links with traditional functions

of the central banks.

Now we have two Swedish professors who claim something else. Their experts' reports, I don't understand how they can be reconciled with the accepted interpretation rules for the law on treaties. The experts on the other side that they refer to certain extent to the Vienna Convention on treaties, but this is just -- well, it's a general statement, they don't apply the interpretation rules provided for by this Convention.

Additionally, one could possibly allow yourself to say that the statements are more or less all over the place when it comes to method and they are not entirely robust when it comes to the content. This applies to Professor Brown's report, especially with respect to Article 21. This report is quite a unique statement, not to say it's devoid of content. If we have a look at the statement in the report by Professor Mahmoudi dated 20 April 2018.

In paragraph 6 he claims that ...

SVEN JÖNSON: Tab 25? Is that what you are referring to?

MR NILSSON: He had just submitted one report in this case, yes, Professor Mahmoudi.

Maybe he was in a hurry writing this but Article 6 he makes a claim with respect to immunity to

enforcement, saying that the majority of the states insist on absolute immunity. This was quite surprising.

Then, moving on, when you look at paragraph 12, he says:

"The majority of the states accept that a foreign state's property which is not used for sovereign purposes under certain conditions could be subject to enforcement or constraints. There is case law and there is more or less uniform understanding in the international law doctrine for this claim."

This contradicts what Professor Mahmoudi writes in paragraph 6.

Then in paragraph 25 he says, and this is the last sentence:

"National laws on absolute immunity against attachment of property of the central bank."

He lists, among others, the US:

"... have affected the wording of Article 21(c)."

Just as Professor Wuerth writes in her report, this is not the case. There is no absolute prohibition with respect to the property of the central bank. These might be details, although I feel that they undermine slightly the quality of the entire report. What is even more remarkable in the opinion of the investors is the method which Professor Mahmoudi uses to arrive at the

conclusion that property can actually belong to the central bank without being bound by the central bank.

First, he references Article 13 in the Convention which deals with ownership, possession and use of property. He says that this shows that "property of" in Article 21 must include possession and use:

"This is completely incomprehensible to me, the natural outcome to me is to come a contrary decision that since Article 21 doesn't speak about property, ownership or use of central banks then the conclusion must be made that 'property' in Article 21 means specifically property and not ownership or use."

He refers to this appendix to the Convention. In this annex you can see with respect to Article 19. Yes, please note, a different Article. It says:

"The words property that has a connection with the entity in subparagraph (c) of 19 are to be understood as broader than ownership or possession."

Property that has a connection is superior(?) to just property. That's completely self-evident. This not an evidence of any broadened concept of property. At least I don't understand how this could be that. You could also note from Professor Mahmoudi's report earlier he talks about the purpose or the intent of the property, whatever it might be or the intent of the

possession, but he doesn't refer to what's mentioned in Article 19, that is the intent of use. This is about that.

When it comes to Wrange, tab 26. in the counterparty binder.

To start with he supports to a certain extent what the investors have said earlier. He emphasises that even property which is part of the state's commercial activities, that the purpose of this is to create funds for the state budget and other state purposes. This is what we are saying. This is what the savings portfolio is about. We mean that it doesn't mean that this property is automatically immune, because that would mean that all state property would be immune. But in order for Wrange to come to the conclusion that immunity is still in force, he is saying -- this is the decisive claim on page 103 -- that saving is a typical task of a central bank.

It's difficult for me to see how he could find, he didn't present any support for this claim, that saving is a typical task of a central bank apart from the fact that saving is probably not a reasonable description of trading in securities.

The investors claim that in accordance with the restrictive theory, the state immunity's function are

not absolute and the results will become completely unreasonable if all the property which the National Bank handles becomes immune. In our case it follows from the consolidated accounts of the bank that the bank offers commercial services to other legal entities, not only to the government. This is something we have conceded earlier. This is an extract from the financial report of the bank. So the property of all of the customers of the central bank cannot be covered by immunity, which would be the consequence of the fact that everything which is managed by the national bank should be covered by immunity.

It follows from Professor Mahmoudi's report that the background is that central banks normally keep accounts in foreign banks for different purposes as a part of their foreign currency policy and that attachment of such assets could create serious financial problems. Yes, this is probably something every one agrees about but when it comes to the savings portfolio and the part which is managed by BNY the National Bank has no function, apart from being an intermediary on behalf of Kazakhstan. It would have been fully possible to commission the real managers directly. The fact that they used the bank to do so, this could probably have to do with what has happened from Norway, that this could

improve the possibility of receiving immunity.
Let's have a look at this MOU statement, which was presented by Kazakhstan. We can see one of the criteria, one of the bullet points here, which is not fulfilled in Kazakhstan. It's not that the assets are part of the central bank's funds. On the contrary, the assets are a part of the national budget but not of the funds of the central bank.
The protected property should normally be property which is used to perform traditional national bank's functions. You should also require that the central bank operates as a regular national bank with a reasonable degree of independence. I will not develop this any further to what I said in my opening statement.
Finally, when it comes to the burden of proof it's the position of the investors that it rests on the RoK when it comes to Article 19.
Finally, something on the abuse of rights. We say that Kazakhstan has lost the right to claim immunity. There are two types of abuse. One has nothing to do with immunity, it has to do with the fact that the property is irrevocably removed from Kazakhstan's debtors if you accept that this is part of a protected trust. Although the legislation pre-supposes the possibility of the trustor's bankruptcy.

As Mahmoudi writes in his report, in the Sedelmayer case it's not the meaning that immunity should give the standing estate a privilege and a possibility to abuse its position.
The second instance of abuse when it comes to immunity, this is something which falls from the next slide, where we have Minister Beketayev, who talks about his position and makes it clear the minister of justice that he does not want to pay, because then he might have to pay all the investors.
Kazakhstan says in their closing statements this is incorrect. Out of 11 awards, 8 have been settled, but it's not really payment in good faith when investors after years and years of fight have to accept to settle for a fraction of the awarded amount, because this is what it is normally a question about when we come to the settlements.
This is about the abuse of power. Let me conclude where I started this hearing by noting that the investors have been a victim of an international (inaudible) which have relieved them of an asset of huge value. Additionally, they are bankrupt so this is not a situation which would be deserved but the position of the Minister of Justice, which is quite brash. They have no possibility to claim their right unless the

court in the countries where enforcement is requested, where these courts consider that it's possible to attach Kazakhstan's property.
Therefore attachment should not be possible because the purpose of the intent of the use of the property is not of qualified nature as the Supreme Court said in the Sedelmayer case.
That case showed that the Supreme Court was prepared to go quite far when it comes to restrictions with respect to assessing immunity and to allow an attachment over a portfolio of securities which is part of continuous trade, with a purpose of creating maximum profit must be much less far reaching than the attachment which was supported by the Supreme Court in the Sedelmayer case.
SVEN JÖNSON: Thank you, then the parties have given their closing statements.
Submissions in reply by MR FOERSTER
MR FOERSTER: I would just like to reply briefly.
This is about the last abuse of rights. I will correct myself, I did not say enough. What I meant was that 8 out of 11 cases they are stated paid, not settled. There are two that were opened in April, one of them has been settled, but that's not what is important. What's important to note and this was

something that was quite new to us that we heard here at the beginning of when counsel Nilsson commented on a reference to the new lawsuit and the appendix 55.
We know that that should not be taken into account when it comes to impediment to enforcement, but we are saying that it is of importance when the (inaudible) says it is important if you are invoking your right to invoke immunity. Here we heard for the first time that the applicants contest the circumstances that exist in the new lawsuit. So far they have done everything not to tell us their position. If they have now denied all the circumstances, then that's a very serious matter because Kazakhstan knows that around four years ago -- I think that we were sitting in this very room -- the applicants also gave an account of their position of the old challenge case, which then turned out to be wrong.
I am not saying that they such conceded know better, but their client, the investor, knew very well that they were misleading the Court of Appeal.
We will find a forum for this question to be tried. It might not be this case. There will be other court proceedings or other ways to bring up this question. We know then that KPMG has restarted their audit of Kazakh companies and the correspondence in conjunction with that that the investors and maybe even the US lawyers

represented that they have misled both the arbitration panel and the Swedish court. Therefore it's very important for Kazakhstan to defend itself against such criminal activities is and it's important to put that on record.

Thank you.

SVEN JÖNSON: The national bank, do you have a microphone?

Submissions in reply by MR GUTERSTAM

MR GUTERSTAM: Just a very short comments.

It was alleged here for the first time that national fund is part of the state budget and that the assets were to be included in the state budget. Of course that is not correct. The only thing that is in the Kazakh State budget are the guaranteed and targeted transfers that were decided on from year to year. There is no other asset reported in the state budget.

It might not be necessary to point this out to the Court of Appeal, the principles that you have to use when you interpret the contents of customary law but there is no support for the claim referred here today, that you are going to apply the Vienna Convention on interpreting anything other than the law on treaties. When you are going to apply customary law you have to use the principles for interpreting the customary law, not the foreign treaties. This is a case for all the

cases which have invoked customary law.

That's all I have to say.

SVEN JÖNSON: You wanted to say something again?

Submissions in reply by MR NILSSON

MR NILSSON: Just two brief comments.

Since counsel Foerster said it has nothing to do with this case, which was mainly for the court reporter. I am not going to comment on that. When it comes to what counsel Guterstam said, I think that we can refrain from exchanging comments and we can stop now.

Housekeeping

SVEN JÖNSON: Okay, now that we are concluding the actual hearing can we take it that you will not submit anything more in writing to the case that you have actually now concluded your action and what you have presented to us now?

MR NILSSON: Well, on condition that nothing comes in from the opposite side we will not --

MR GUTERSTAM: We were going to send you the scripts of our closing argument so that you have that, but we are not going to send you anything new.

MS ISAKSSON: The Court of Appeal has recorded the closing arguments, so we have nothing against you submitting written version of your closing arguments.

SVEN JÖNSON: What remains then is your claim for costs.

I understand that you want to do what you did in the district court that you will submit that at a later Point. Have you discussed this? Do you want to say anything about this?

MR FOERSTER: We have talked about this, that we can give that to you in two weeks. Before that we have looked at each other's bills of costs and then we can present you with a final bills of costs and any comments to the other side's bills.

SVEN JÖNSON: So in two weeks' time we will get --

MR NILSSON: In two weeks we will exchange our bills on the 25th and then we will submit them to you on the 28th.

SVEN JÖNSON: When it comes to costs in the district court, there were bills of costs submitted and there were objections. They had not been acknowledged by the investors. The claims by the bank or Kazakhstan, do you have the same position here?

MR NILSSON: Yes, we are just as difficult as them.

SVEN JÖNSON: The Court of Appeal will not tell you today when we will render our decision. We will inform you that later, but our mission is to do this as quickly as possible.

MR FOERSTER: This is very important to other countries' proceedings that you will inform us that you will have it in couple of days or a week's time.

SVEN JÖNSON: That's our plan.

Do you have any special requests or is a couple of days enough or a --

MR FOERSTER: A week would be fine because we have to get it translated and all that.

SVEN JÖNSON: We'll take that into consideration.

Thank you very much.

Unless there is anything further we will say thank you very much for letting us listen to what you have said.

Thank you very much.

(4.13 pm)

(The hearing concluded)

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