

# OPUS 2

## INTERNATIONAL

National Bank of Kazakhstan v Bank of New York

Day 3

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Phone: 020 3008 5900

Email: [transcripts@opus2.com](mailto:transcripts@opus2.com)

Website: <https://www.opus2.com>

1 Monday, 30 March 2020  
 2 (10.30 am)  
 3 MR JUSTICE TEARE: Good morning, everybody. I can see one  
 4 or two people, but I can't see Mr Sprange.  
 5 Mr Sprange, are you there?  
 6 MR SPRANGE: I am indeed.  
 7 MR JUSTICE TEARE: Jolly good.  
 8 Unless there are any housekeeping matters, it is  
 9 presumably for Mr Malek to call his witness on Kazakh  
 10 law.  
 11 MR QUEST: My Lord, it is actually me who will be calling  
 12 the Kazakh expert. Professor Suleimenov will be giving  
 13 his evidence in Russian, so we need first I think to  
 14 swear the translator, if he has not already been sworn.  
 15 MR JUSTICE TEARE: If it is the same translator that we had  
 16 the other day ...  
 17 MR QUEST: He was sworn last week.  
 18 MR JUSTICE TEARE: He was sworn.  
 19 MR QUEST: In that case, do we have Professor Suleimenov  
 20 online?  
 21 THE WITNESS: Yes, I can hear you.  
 22 PROFESSOR MAIDAN SULEIMENOV (called)  
 23 (All questions and answered interpreted)  
 24 MR QUEST: Do you have in front of you a paper with a form  
 25 of affirmation or oath on it?

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1 A. Yes, I have.  
 2 MR QUEST: Please could you read it out loud.  
 3 PROFESSOR MAIDAN SULEIMENOV (affirmed)  
 4 Examination in-chief by MR QUEST  
 5 MR QUEST: Could you tell us who is in the room with you,  
 6 Professor Suleimenov?  
 7 A. Together with me in the room I have Adil from the  
 8 National Bank, who will be assisting us on all matters  
 9 technical, and also Lauriza, who will be helping me with  
 10 the paperwork and the bundles.  
 11 Q. Do you have some case files with you?  
 12 A. Yes.  
 13 Q. Do you have one marked "D1"?  
 14 A. Yes.  
 15 Q. Could you open it, please, to the first tab and the  
 16 first page.  
 17 A. Yes.  
 18 Q. Do you recognise that as your first report in these  
 19 proceedings?  
 20 A. Yes.  
 21 Q. If you go to page 49, is that your signature on page 49?  
 22 A. Yes, it is indeed.  
 23 Q. Can I ask you next to turn to tab 4 in the file .  
 24 A. Yes.  
 25 Q. Do you recognise that as the joint memorandum that you

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1 prepared with Professor Maggs?  
 2 A. Yes.  
 3 Q. At page 194, that is your signature, is it?  
 4 A. Yes, indeed.  
 5 Q. Finally, if you turn to tab 5 in the file .  
 6 A. Yes.  
 7 Q. Is that your second report?  
 8 A. Yes.  
 9 Q. Which you signed on page 214 at the bottom?  
 10 A. Yes, it is my signature.  
 11 Q. Do those reports contain your true opinions on the  
 12 matters on which you have been instructed?  
 13 A. Yes.  
 14 MR QUEST: Thank you, Professor Suleimenov. There will be  
 15 some questions from Mr Sprange now.  
 16 (10.35 am)  
 17 Cross-examination by MR SPRANGE  
 18 MR SPRANGE: My Lord, I didn't catch the names of the two  
 19 people who were present in the room with the Professor,  
 20 but perhaps either your Lordship or Mr Quest could  
 21 confirm with the Professor that he is not to take any  
 22 assistance from them other than with respect to the  
 23 bundles.  
 24 A. I am happy to confirm that.  
 25 Q. Professor, do you understand your role in these

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1 proceedings as an expert?  
 2 A. Yes.  
 3 Q. You are to be independent, and your duty to the court  
 4 overrides any obligation to those who instruct you. Do  
 5 understand that?  
 6 A. I understand that.  
 7 Q. Could you please be given the D bundle and go to the  
 8 report of Professor Maggs, which is at tab D/3.  
 9 A. Yes. I have it in front of me. This is in English. Do  
 10 we have the Russian text? We don't have this in  
 11 Russian, do we?  
 12 I have this in front of me in English. I think I do  
 13 have the Russian translation, so with your permission  
 14 I will ask for that to be provided.  
 15 Q. Yes, if you have a Russian version of that by all means  
 16 be referred to it.  
 17 A. Just a second, please. (Pause) Yes. I have it in  
 18 Russian.  
 19 Q. Okay. Page 21, this is the expert declaration.  
 20 A. Which paragraph are you referring to, sir?  
 21 Q. The declaration has a number of bullets; I am referring  
 22 to the seventh, which starts:  
 23 "I have exercised reasonable skill and care in  
 24 preparing this report."  
 25 Perhaps you can read that paragraph to yourself.

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1 A. Yes.  
 2 Q. Have you complied with that duty in preparing your  
 3 report?  
 4 A. Yes, I have done my best.  
 5 Q. I don't want to know whether you have done your best,  
 6 I want to know whether you have complied with that duty  
 7 in preparing your first and second reports.  
 8 A. Yes.  
 9 Q. Could you please read to yourself the next bullet that  
 10 starts :  
 11 "I have drawn to the attention of the court all  
 12 matters of which I have knowledge or which I have been  
 13 made aware ..." et cetera.  
 14 (Pause)  
 15 A. Yes.  
 16 Unfortunately, I did not have that portion of this  
 17 statement translated no Russian; I only have the English  
 18 version of this portion of the opinion. Would it be  
 19 appropriate to ask the interpreter to perhaps translate  
 20 this for me or maybe you can do it, sir?  
 21 MR SPRANGE: Mr Interpreter, do you have the document in  
 22 question at your disposal?  
 23 THE INTERPRETER: Yes, I do, Mr Sprange.  
 24 MR SPRANGE: Could you translate that paragraph commencing:  
 25 "I have drawn to the attention of the court ..."

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1 And ending:  
 2 "... have clearly stated any qualifications to my  
 3 opinion."  
 4 Could you translate that, please, to the witness.  
 5 THE INTERPRETER: Yes, I will.  
 6 (Passage interpreted for the witness)  
 7 A. Yes.  
 8 Q. Have you complied with that duty in preparing your first  
 9 and second reports?  
 10 A. Yes.  
 11 Q. Okay. I want to turn to your qualifications and  
 12 experience. If you could please take up your first  
 13 report, and you can use the Russian version.  
 14 I am on page D/100 of tab 2 of the first D bundle.  
 15 I understand that is page D/50 of the Russian.  
 16 A. Yes.  
 17 Q. Professor, is it right that you have spent the majority  
 18 of your professional life employed by State universities  
 19 and organs of the Government of Kazakhstan?  
 20 A. Not quite. I spent quite some time working in the  
 21 Academy of Sciences, which I really would struggle to  
 22 define as a State institution. I next spent some time  
 23 working in the State Institute of Kazakhstan, which used  
 24 to be first owned by the State and then it became  
 25 a privately run educational enterprise. And for the

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1 remainder of my professional career, including now,  
 2 I have been working with the Caspian University, which  
 3 is a private university.  
 4 Q. In paragraph 2 of your appendix 1 you describe the  
 5 Academy of Sciences as a powerful State authority at  
 6 this time, what do you mean by "powerful State  
 7 authority"?  
 8 A. The Academy of Sciences was not a State authority or  
 9 a government authority, it was rather a State-owned  
 10 institution with a very special status.  
 11 Q. What was that special status?  
 12 A. The special status was that even though it did report to  
 13 the Ministry of Science it was, by and large, an  
 14 independent entity.  
 15 Q. Who was it funded by?  
 16 A. Can you repeat the question, please?  
 17 Q. Who was is it funded by?  
 18 A. It was funded by the State, by the government.  
 19 Q. You were involved in working groups to draft over  
 20 60 laws on behalf of the Republic of Kazakhstan. Were  
 21 you remunerated for this work?  
 22 A. Yes. Yes, I was remunerated for that. But that  
 23 remuneration was paid out of the World Bank grant that  
 24 had been provided to the Republic of Kazakhstan by the  
 25 World Bank.

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1 Q. You were involved, you tell us in paragraph 7, as the  
 2 leader of the delegation on behalf of Kazakhstan in the  
 3 negotiation of the Energy Charter Treaty, the treaty at  
 4 the heart of the underlying arbitration. Were you  
 5 remunerated for that work?  
 6 A. No.  
 7 Q. So you undertook work for over a decade on behalf of the  
 8 Republic of Kazakhstan for free?  
 9 A. I was paid subsistence allowance and our travel expenses  
 10 were provided to us by the Energy Charter. There was no  
 11 remuneration paid per se; what was reimbursed to us was  
 12 travel expenses and the daily subsistence allowance, a  
 13 per diem. I was interested in conducting that work.  
 14 Q. Understood. You describe in paragraph 8 various roles  
 15 that you have had on councils --  
 16 THE STENOGRAPHER: Mr Sprange, I'm sorry to interrupt.  
 17 Could I ask, through you, the interpreter to please keep  
 18 his voice up and not talk before the witness finishes,  
 19 because I am missing some words, I just can't hear them.  
 20 Did you hear that, Victor?  
 21 THE INTERPRETER: Yes. Thank you.  
 22 MR SPRANGE: Thank you. Do you need me to repeat the  
 23 question?  
 24 THE INTERPRETER: I don't think you finished it, Mr Sprange.  
 25 MR SPRANGE: Understood. I think I can shrink it second

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1 time around.  
 2 In paragraph 8 you refer to various memberships of  
 3 councils appointed by either the president or the  
 4 Senate. Please explain how you were appointed to those  
 5 positions.  
 6 A. So far as the council on the policy in the field of law  
 7 was concerned, it was put together by the president, it  
 8 was attached to the president.  
 9 Now, the academic experts board was put in place by  
 10 the Senate, whereas the board attached to the  
 11 Supreme Court was formed by the Supreme Court of the  
 12 Republic. Members of those boards included academics as  
 13 well as government officials.  
 14 Q. Professor, you tell us in paragraph 6 that you were  
 15 awarded the Order of Honour with respect to your work in  
 16 developing the Constitution. Did anyone else receive  
 17 that award for that work, other than you?  
 18 A. Are you referring to the work with respect to the  
 19 drafting of the Constitution only or legal work in  
 20 general?  
 21 Q. Drafting the Constitution.  
 22 A. Yes, all the members of that working panel have been  
 23 awarded those orders, Orders of Honour.  
 24 Q. Did you personally meet the President of Kazakhstan to  
 25 receive that award?

1 A. Yes, the award was handed to me physically by the  
 2 president.  
 3 Q. How many times have you given evidence on behalf of  
 4 Kazakhstan in disputes?  
 5 A. Can you clarify your question; when you say "disputes"  
 6 can you define "disputes"?  
 7 Q. I will put the question another way. How many times  
 8 have you been hired by the Republic of Kazakhstan to  
 9 assist them with legal work?  
 10 A. I do not recall exactly. I do know that I appeared both  
 11 on behalf of the Republic of Kazakhstan and also against  
 12 the Republic of Kazakhstan, and I also did some work  
 13 within the framework of private disputes, disputes  
 14 involving private parties.  
 15 Q. I am focusing on the work that you have done for  
 16 Kazakhstan. Can you put a number on the number of times  
 17 that you have been hired by the Republic of Kazakhstan  
 18 to do legal work?  
 19 A. Maybe five, six or seven times.  
 20 Q. So in all your years of practice you have only done  
 21 legal work for the Republic of Kazakhstan five or six  
 22 times?  
 23 A. Yes. Maybe more than that. To be honest, I do not  
 24 recall exactly.  
 25 Q. Why do you think it may be more than that?

1 A. Could be eight or nine.  
 2 Q. Have you ever been engaged by NBK, National Bank of  
 3 Kazakhstan, with respect to its day-to-day business?  
 4 A. No, not in its day-to-day business.  
 5 Q. Have you done any legal work for the National Bank of  
 6 Kazakhstan?  
 7 A. Maybe in these proceedings, yes, but not before that.  
 8 Q. Do you have any direct knowledge of the practical  
 9 day-to-day business of the National Bank of Kazakhstan?  
 10 A. Could you clarify your question, please?  
 11 Q. Do you have any personal knowledge of the business on  
 12 a day-to-day basis of the National Bank of Kazakhstan?  
 13 A. No, I was never interested in their day-to-day  
 14 operations. Having said that, when drafting Civil Code  
 15 of the Republic of Kazakhstan we did take part in some  
 16 heated debate and dispute with the National Bank of  
 17 Kazakhstan with respect to the status and position of  
 18 the National Bank of Kazakhstan within the legal system  
 19 of the Republic.  
 20 Q. Thank you. Before I ask you some specific questions  
 21 about the legal issues you have addressed, I want to  
 22 check with you as to whether I have properly understood  
 23 the hierarchy of the laws in Kazakhstan.  
 24 A. Yes.  
 25 Q. Do you agree that the following laws, in order, help us

1 understand the position in relation to NBK and its role  
 2 as manager of the National Fund? I will list them out.  
 3 Victor, I don't know if you want to translate that  
 4 first.  
 5 THE INTERPRETER: Yes. Thank you. (Interpreted)  
 6 Q. Number 1, the law on the National Bank. Number 2, the  
 7 Budget Code. Number 3, the Civil Code. Number 4, any  
 8 case law relating to those statutes. Number 5, the TMA.  
 9 Number 6, the GCA.  
 10 Do you agree?  
 11 A. Can you just clarify, when you speak about the hierarchy  
 12 of those laws, are you referring to the legal force that  
 13 each of those documents has?  
 14 Q. No, I am referring to the order in which we look to the  
 15 rights and obligations of the National Bank of  
 16 Kazakhstan with regards to the National Fund that it  
 17 manages.  
 18 A. In terms of hierarchy, I would list first the Civil  
 19 Code; next, the Budget Code; followed by the law on the  
 20 National Bank. Then I think you mentioned the contracts  
 21 and the treaties.  
 22 Now, so far as case law is concerned, obviously they  
 23 do not have the force of a legal precedent. Obviously  
 24 one does need to look into case law, one needs to refer  
 25 it, but it does not have any preemptory legal role or

1 force.  
 2 Q. Thank you.  
 3 One last general question. In your CV you refer to  
 4 a considerable amount of experience with international  
 5 commercial arbitration; I note particularly paragraph 5,  
 6 paragraph 9, paragraph 12 and paragraph 14.  
 7 A. Yes.  
 8 I think I've lost you.  
 9 Q. You were also engaged for ten years in the drafting of  
 10 the Energy Charter Treaty. Correct?  
 11 A. Yes.  
 12 Q. Are you aware that the underlying arbitration with  
 13 respect to this dispute was a Stockholm Chamber of  
 14 Commerce arbitration?  
 15 A. Yes, I took part in that.  
 16 Q. Are you aware that challenges to that award at the seat  
 17 of the arbitration in Stockholm have completely failed?  
 18 A. Yes.  
 19 Q. Do you recall that Article 26(8) of the Energy Charter  
 20 Treaty provides, among other things, that "each  
 21 contracting party shall carry out without delay any such  
 22 award, and shall make provision for the effective  
 23 enforcement in its area of such awards"?  
 24 A. Yes, I recall that.  
 25 Q. Do you agree that that is a binding obligation on

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1 signatories to the ECT?  
 2 A. Yes.  
 3 Q. And Kazakhstan is a signatory to the ECT.  
 4 A. Yes.  
 5 Q. In your view, does Kazakhstan comply with its  
 6 obligations under the ECT treaty, including  
 7 Article 26(8) in good faith?  
 8 A. While I cannot speak on behalf of Kazakhstan, I do  
 9 recall that they were referring to instances of fraud,  
 10 but I do agree that awards must be enforced.  
 11 Q. Awards being enforced mean that if they involve the  
 12 payment of money that money should be paid. Correct?  
 13 A. Yes.  
 14 Q. Are you aware that Article 46 of the Stockholm Chamber  
 15 of Commerce rule says:  
 16 "An award shall be final and binding on the parties  
 17 when rendered. By agreeing to arbitration under these  
 18 rules the parties undertake to carry out an award  
 19 without delay."  
 20 A. Yes, that's the general rule for all arbitral fora.  
 21 Q. And similar provisions appear in the ICC Rules, the  
 22 LCIA Rules and the UNCITRAL Rules, for example.  
 23 A. Correct.  
 24 Q. Do you agree that for a party, in the face of the  
 25 obligation in the ECT treaty and in the applicable

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1 rules, to not pay a valid award is acting in bad faith?  
 2 A. By and large, yes.  
 3 Q. I would like to take up, please, your first opinion.  
 4 Please follow the Russian. I will be using the English  
 5 for the benefit of the court and my colleagues.  
 6 Could you please take up page D/68 at paragraph 41.  
 7 In this section you are dealing with trust management  
 8 under Kazakh law and you are --  
 9 A. Yes.  
 10 Q. And you are discussing the works of Professor, and I am  
 11 just going to spell it for everybody's benefit,  
 12 Z-H-A-N-A-Y-D-A-R-O-V.  
 13 A. Yes.  
 14 Q. He was of the view, wasn't he, that the Anglo-American  
 15 principles of trust could not apply in Kazakhstan  
 16 because of the way the Anglo-American trust system had  
 17 developed and evolved through case law; correct?  
 18 A. Yes.  
 19 Q. You say that that view was rejected, and Kazakhstan in  
 20 fact adopted an Anglo-American-style trust concept.  
 21 A. No, Kazakhstan did not accept the Anglo-American trust  
 22 system.  
 23 Q. Thank you. If you could look at the quote, please, in  
 24 paragraph 43.  
 25 A. Yes.

15

1 Q. The jurist there, and I will spell his name,  
 2 S-U-K-H-A-N-O-V, concluded that, amongst other things:  
 3 "The trust is completely alien to the continental  
 4 legal system for which one of the generally recognised  
 5 and fundamental postulates is the impossibility of  
 6 establishing two identical ownership rights in the same  
 7 property (asset). The ownership right in this sense is  
 8 impossible to split."  
 9 A. Yes.  
 10 Q. That is the fundamental reason why the Anglo-American  
 11 trust model was not adopted. Correct?  
 12 A. Yes. So far as ownership is concerned, yes.  
 13 Q. And that is because under Kazakh law there is no concept  
 14 of actual owner and beneficial owner, there is only one  
 15 owner recognised.  
 16 THE INTERPRETER: I think the picture has frozen. This is  
 17 the interpreter speaking.  
 18 MR SPRANGE: Yes, it looks like it.  
 19 A. Can you hear me now?  
 20 Q. Yes.  
 21 Mr Translator, you might want to repeat the  
 22 question. It is at [draft] line 6 on page 18?  
 23 THE INTERPRETER: Yes. Thank you, Mr Sprange.  
 24 (Interpreted).  
 25 A. Yes, so far as the right of ownership is concerned you

16

1 are right .

2 Q. I want to turn, please, to D/70, paragraphs 45 and 46 of  
3 your report.

4 Do you agree that chapter 44 of the Civil Code,  
5 which deals with entrusted management, and in particular  
6 Articles 883 to 886, are the most important and most  
7 fundamental provisions under Kazakh law in terms of  
8 understanding what entrusted management is?

9 A. Yes.

10 Q. In paragraph 47 you discuss is the position in relation  
11 to bankruptcy of assets and you say in the last sentence  
12 of the quote -- sorry, you quote here a commentary,  
13 which says:

14 "In case of bankruptcy and insolvency of such  
15 founders the trust management is terminated and the  
16 property shall be included to the bankruptcy assets."

17 Am I correct in -- sorry, Victor. (Pause)

18 Now, am I correct in saying that it is the  
19 termination of the trust management arrangement which is  
20 the important legal step here in ensuring that the  
21 property subject to the entrusted management is  
22 available as part of the bankruptcy assets?

23 A. Yes, definitely .

24 Q. So the cause, in other words, what has triggered the  
25 termination, is less important than the actual

1 termination itself .

2 A. I am not sure I understood the question.

3 Q. It's okay, Professor, I will deal with it another way  
4 later .

5 Do you agree and accept that the level of control  
6 exercised by the Government of Kazakhstan over the  
7 National Bank of Kazakhstan is an important factor in  
8 determining the nature of their relationship and how the  
9 National Fund is managed?

10 A. You see, the National Bank can appear in a variety of  
11 capacities . When the National Bank appears in its  
12 capacity as a State body, then the  
13 Republic of Kazakhstan definitely does exercise control  
14 over NBK. However, when the bank appears in its  
15 capacity as a participant to legal civil law legal  
16 relations , then whatever control the government may have  
17 is exercised on the basis of the Civil Code.

18 Q. Professor, I need you to listen to my question and  
19 answer my question. The answer you just gave had  
20 nothing to do with my question.

21 There are nine questions under Kazakh law that this  
22 court has asked you and Professor Maggs to answer and my  
23 question, which I repeat, is: do you accept that the  
24 level of control exercisable by the Government of  
25 Kazakhstan over the NBK is an important factor in

1 addressing those questions? Yes or no.

2 A. So what's "those questions"? When you say "Address  
3 those questions", what are those?

4 THE INTERPRETER: Mr Sprange, your microphone.

5 MR SPRANGE: Are you telling us you can't remember the  
6 questions that you were asked to answer in this case?

7 A. I do remember those. Are we now speaking in terms of  
8 trust management only? Or are you --

9 Q. No, all issues.

10 A. -- referring to the question referring to the role  
11 played by the National Bank as a State body?

12 Q. It is very simple, Professor. You were asked nine  
13 questions relating to the NBK, the government, and the  
14 National Fund. I want to know whether you agree or  
15 disagree with the proposition that the elements of  
16 control exercised by the government over the National  
17 Bank are relevant to those questions. It's simple. Yes  
18 or no?

19 A. May I repeat myself? My question was: are you referring  
20 to control where NBK appears in its capacity as a State  
21 body or control where the bank appears in its capacity  
22 as a participant in civil law relations? Are you  
23 referring to trust management?

24 Q. No, I'm referring to both capacities .

25 A. Well, in answer to that question, so far as the first

1 capacity is concerned whereby the bank appears as  
2 a State body, then the government does exercise control.  
3 So far as its capacity as a participant in civil law  
4 relations is concerned, in that case, whatever control  
5 the government may have is exercised on the basis of  
6 a contract.

7 Any founder of trust management does exercise  
8 control over the entrusted manager, the trust manager.

9 Q. Right.

10 A. On the basis of the contract.

11 Q. In your --

12 THE INTERPRETER: Sorry, I did not finish that.

13 A. That control is exercised on the basis of a contract.

14 MR SPRANGE: Thank you.

15 In your first report, D/73, paragraph 56 onwards,  
16 you refer to various provisions of the law on the  
17 National Bank.

18 A. Yes.

19 Q. Do you agree that the accountability of the National  
20 Bank of Kazakhstan to the Government of Kazakhstan or  
21 the President of Kazakhstan is important in helping the  
22 judge understand how it works in both those capacities ,  
23 entrusted management and civil law?

24 A. Yes.

25 Q. Please take up page 4, which is in tab 3 of the D

1 bundle, page D/110, which is Professor Maggs' first  
 2 report. It is paragraph 11, D/110, tab 3 of the  
 3 D bundle.  
 4 A. Yes.  
 5 Q. Do you accept that each of these factors can impact upon  
 6 the level of control that the government can exercise  
 7 over the National Bank, either in the context of  
 8 entrusted management or in its civil law capacity?  
 9 A. This here refers to the National Bank as a State body.  
 10 Now, when we are referring to trust management all the  
 11 control functions are spelt out in a contract. They  
 12 only become binding on the National Bank once they have  
 13 been clearly set out in the contract.  
 14 Q. Is it your evidence to this court that the President of  
 15 Kazakhstan cannot influence the National Bank when it is  
 16 acting as an entrusted manager through these provisions?  
 17 A. Well, obviously it is open to the president and the  
 18 government to exercise influence just as any founder of  
 19 trust management would be able to exercise; they can  
 20 dictate the terms and conditions or the inclusion in the  
 21 contract. However, as long as there is no contract  
 22 there is no ability for either of those to exercise any  
 23 influence, because there are no ex-contractual  
 24 obligations thus far. Civil law relations operates in  
 25 a manner which is fundamentally different from public

1 law relationships.  
 2 Q. Professor, it is right, isn't it, that the president and  
 3 the government, exercising their powers, ordered NBK to  
 4 enter into the trust management agreement?  
 5 A. Those instructions were not issued to NBK by the  
 6 president or the government; they were issued on the  
 7 basis of a law. The very first presidential decree, the  
 8 one enacted in the year 2000 with respect to the  
 9 creation of the fund, there was a provision to the  
 10 effect that that contract, that agreement had to be  
 11 entered into, and that decree major adds to the force of  
 12 law. And then a similar provision was entered in the  
 13 law on the National Bank and in the Budget Code.  
 14 MR JUSTICE TEARE: Mr Sprange, whenever you have  
 15 a convenient moment, the shorthand writer might require  
 16 a break.  
 17 MR SPRANGE: That moment can be now, my Lord.  
 18 MR JUSTICE TEARE: Right. Thank you. We will break for  
 19 five minutes.  
 20 (11.45 am)  
 21 (Short break)  
 22 (11.50 am)  
 23 MR JUSTICE TEARE: Are we ready?  
 24 MR SPRANGE: Yes, thank you.  
 25 Professor, in relation to the last topic, is it not

1 right that the law that you speak of with respect to the  
 2 formation of the TMA was a law that was passed by the  
 3 government?  
 4 A. Which law are you referring to, sir?  
 5 Q. The law that you just described, pursuant to which the  
 6 TMA was entered into.  
 7 A. What happened was first that there was a Presidential  
 8 Decree with respect to the formation of the National  
 9 Fund and there was a provision in that Presidential  
 10 Decree instructing the government to draft a contract.  
 11 On the basis of that, the government then issued  
 12 a resolution which said that the draft contract must be  
 13 put in place and it has to be signed off on by the  
 14 National Bank; in other words, the draft first has to be  
 15 agreed with the National Bank. Then, acting together,  
 16 they drafted that contract.  
 17 Q. You accept then that the president and the government  
 18 had a role in the formation of the TMA, surely?  
 19 A. Yes, that goes without saying, that is factual. Any  
 20 trust management founder has to play a fundamental role  
 21 in the drafting of the trust management agreement.  
 22 Q. And in this case it was the President and Government of  
 23 Kazakhstan. Correct?  
 24 A. Yes.  
 25 Q. It is right, isn't it, Professor, that the combination

1 of chapter 44 of the Civil Code, that National Bank law  
 2 and the TMA give NBK the authority to carry out its  
 3 activities when it is managing the National Fund?  
 4 A. Yes, it is incumbent on any person, on any body to  
 5 comply with the laws.  
 6 Q. And it's right as well, isn't it, that the National Bank  
 7 has no other source of authority with respect to the  
 8 management of the National Fund other than those three  
 9 instruments: chapter 44 Civil Code, National Bank law  
 10 and the TMA; correct?  
 11 A. Yes.  
 12 Q. All right, the last question for you with respect to  
 13 these Article 3 powers. I suggest to you, Professor,  
 14 that these are broad and all-encompassing, and give the  
 15 President of Kazakhstan almost unfettered power over  
 16 NBK. Do you agree with that or not?  
 17 A. Obviously in his capacity as the chief executive the  
 18 President of Kazakhstan does exercise authority over all  
 19 bodies. Only when we are referring to public law  
 20 relationships.  
 21 Q. On that, Professor, there is nothing in Article 3 that  
 22 says it only applies to the National Bank in its State  
 23 capacity?  
 24 A. Article 3, you said?  
 25 Q. Yes, and it is produced on page D/110 of

1 Professor Maggs' first report.  
 2 A. Is it paragraph 11, sir?  
 3 Q. Paragraph 11, exactly.  
 4 A. Correct. It refers to the accountability of the  
 5 National Bank to the president so far as public law  
 6 relationships are concerned.  
 7 Q. Where does it say "so far as public law relationships  
 8 are concerned"?  
 9 A. Because it says that the National Bank appears in its  
 10 capacity as a State body.  
 11 Q. What are you referring to, Professor?  
 12 A. I am not referring to any specific provision here; what  
 13 I am saying is that in general this article only deals  
 14 with the National Bank of Kazakhstan in its capacity as  
 15 a State body, and it does not make reference to any  
 16 contracts or treaties.  
 17 In other words, whenever we make reference to civil  
 18 law relationships only, this has to be explicitly spelt  
 19 out.  
 20 Q. So where do you say in this law is the civil contract  
 21 accountability of the National Bank set forth?  
 22 A. The bank is not accountable to anyone in terms of any  
 23 ex-contractual relationships. Whenever the bank enters  
 24 into a contractual relationship its accountability, as  
 25 it were, is governed by that contract.

1 THE INTERPRETER: I'm sorry, Mr Sprange, your microphone is  
 2 off.  
 3 MR SPRANGE: Surely the bank would be accountable to  
 4 a founder in respect of an entrusted management  
 5 contract?  
 6 A. Yes, as any trust manager would, within the framework of  
 7 a trust management agreement.  
 8 Q. I missed that.  
 9 Yes, okay. So it's not quite right to say that the  
 10 bank is not accountable to anyone in terms of any extra  
 11 contractual relationships.  
 12 A. The bank is accountable to that contract itself.  
 13 Q. Okay. Now I want to suggest this to you, Professor,  
 14 that you are making up this distinction between NBK  
 15 acting as a State and acting as its civil law capacity  
 16 in Article 3, and that no such distinction exists.  
 17 A. Article 3 only deals with the accountability of the  
 18 National Bank within the framework of public law  
 19 relationships.  
 20 Q. Why then, in paragraph 60 of your first -- sorry.  
 21 A. These paragraphs deal with the accountability of the  
 22 State body, the structure of the State body. This is a  
 23 pure public law matter.  
 24 Q. Well, in paragraph 60 of your first statement you said:  
 25 "NBK is not part of the government, and is

1 accountable to the President of Kazakhstan, as Article 3  
 2 of the law on the National Bank provides."  
 3 A. Yes.  
 4 Q. You did not make that distinction there, did you?  
 5 A. Why not? I am referring only to the National Bank in  
 6 this paragraph in its capacity as a discipline in public  
 7 law relations. There is nothing about contract here.  
 8 Q. Let's assume this, and the judge will get to decide who  
 9 is right or wrong on this, but do you accept this: that  
 10 the President of Kazakhstan can appoint and dismiss the  
 11 chairman of NBK?  
 12 A. Definitely, yes.  
 13 Q. And he can decide the number of staff of the National  
 14 Bank?  
 15 A. Yes.  
 16 Q. He can dictate how much they are paid?  
 17 A. Yes.  
 18 Q. He has final approval over the regulations of the  
 19 National Bank?  
 20 A. Yes.  
 21 Q. And, working with the chairman of the National Bank that  
 22 he can hire or fire, he can also dismiss from office the  
 23 deputies, the deputy chairmen of the National Bank;  
 24 correct?  
 25 A. Correct.

1 He can also enter into a contract with the  
 2 National Bank.  
 3 Q. Yes, I will come on to that in a moment.  
 4 My Lord, I have realised I forgot to give you the  
 5 reference. It is D1/2/74.  
 6 Now, do you accept, Professor, that with all of  
 7 those powers -- let me withdraw that, I will ask you  
 8 another question.  
 9 Professor Maggs describes the president and the  
 10 system in Kazakhstan as "autocratic". Do you agree with  
 11 that description?  
 12 A. Yes.  
 13 Q. So given that there is an autocratic president with  
 14 those abundance of broad-ranging powers, do you accept  
 15 that the president has an influence over NBK and the  
 16 nature of the contractual relationships that the  
 17 government enters into with NBK?  
 18 A. Obviously, amongst other things, because the Republic  
 19 appears in its capacity as the founder of the trust  
 20 management, and based on that it is open to the  
 21 president to exercise influence over the nature of the  
 22 contractual relationships that they enter into.  
 23 Q. Professor, there's two examples of things that the  
 24 president might be able to do. The first is the  
 25 president could, under his powers under the Budget Code,



1 pass a decree with respect to a targeted budget.  
 2 Correct?  
 3 A. Yes.  
 4 Q. So if the President of Kazakhstan wanted to comply with  
 5 Kazakhstan's duty under Article 26(8) of the Energy  
 6 Charter Treaty, he could pass a targeted budget decree  
 7 with respect to the payment of an outstanding award  
 8 under the Energy Charter Treaty, couldn't he?  
 9 A. It would not have required a Presidential Decree,  
 10 actually; it would have been sufficient to amend the law  
 11 on budget.  
 12 Q. Leaving aside the technicalities, it is certainly  
 13 something that he has the power to do.  
 14 A. Yes.  
 15 Q. Okay. The second thing the president could do is  
 16 terminate the trust management arrangement in accordance  
 17 with Article 7.4. Do you agree?  
 18 A. Yes, definitely. As any founder would be able to.  
 19 Q. As you confirmed earlier in your evidence in the example  
 20 of bankruptcy, that would mean that all of the property  
 21 within the entrusted management would be available to  
 22 the creditors of the founder. Correct?  
 23 A. Well, if the trust management agreement is terminated,  
 24 then all the property, all the assets, will revert to  
 25 the treasury, to the State coffers. And of course it

1 can then be enforced against.  
 2 THE INTERPRETER: Sorry, your microphone is off, Mr Sprange.  
 3 I'm sorry your microphone is off.  
 4 MR SPRANGE: Sorry, we're all getting used to these types of  
 5 trial. I will repeat the question.  
 6 When you say "all the assets" in [draft] line 12 on  
 7 page 28, you mean all classes of assets?  
 8 A. Yes, yes, all the assets that are part of the National  
 9 Fund.  
 10 Q. Thank you. Now I want to move on to this question of  
 11 whether the National Bank owns any assets of the  
 12 National Fund, and for that purpose could you please  
 13 take up in your first report paragraph 99. For the  
 14 court, the reference is tab 2 of D1 bundle, D/83.  
 15 The conclusion you reach in paragraph 101 -- do you  
 16 want to just read that to yourself, Professor? (Pause)  
 17 A. Yes.  
 18 Q. That is based entirely on the premise that the assets in  
 19 question are rights of claim.  
 20 A. Correct.  
 21 Q. If you are wrong about that, then all of the assets  
 22 remain owned by the Government of Kazakhstan. Correct?  
 23 A. You mean if I am wrong?  
 24 Q. Yes.  
 25 A. If I am wrong then that would be the case, yes.

1 Q. Okay. Now you accept, as I understood your evidence  
 2 earlier, that there can only be one owner of an asset  
 3 under Kazakh law. Correct?  
 4 A. Yes. If we are referring to the rights of ownership.  
 5 Q. When you prepared your first report you expressed the  
 6 view that rights of claim were not property that  
 7 remained with the founder, but instead were transferred  
 8 to the ownership of the trust manager. Correct?  
 9 A. Yes, but it's not the ownership that passes. Ownership  
 10 is not transferred. It is the actionable rights, the  
 11 rights of claim that are transferred.  
 12 Q. Do you accept that as a matter of Kazakh law somebody  
 13 can own a right of claim -- and I don't know whether  
 14 this will work in the translation -- or a chose in  
 15 action?  
 16 THE INTERPRETER: It will work.  
 17 A. I'm not sure I understood the question.  
 18 THE INTERPRETER: Mr Sprange, you are off mic, sorry.  
 19 MR SPRANGE: Let's assume Mr Quest and I enter into  
 20 a contractual arrangement, and I breach that arrangement  
 21 and Mr Quest wishes to sue me. He has a chose in action  
 22 against me which he owns. Do you accept that that is  
 23 a correct analysis under Kazakh law of ownership of  
 24 Mr Quest's right of claim against me?  
 25 A. I'm not sure I have entirely understood the question.

1 Not quite.  
 2 Q. All right, Professor. Well, I'm surprised by that but  
 3 I will approach it in a different way.  
 4 You said in the beginning of your evidence that you  
 5 complied with all of your duties as an expert in  
 6 preparing your reports, which includes your first  
 7 report. I would like you to please take up  
 8 Professor Maggs' opinion. I'm looking at the English on  
 9 page D/114, which for the court's reference is tab 3 of  
 10 the first of the D bundles.  
 11 So if you look at paragraph 31 Professor Maggs  
 12 quotes Professor, and I will spell it for everyone's  
 13 benefit, D-I-D-E-N-K-O.  
 14 A. Yes.  
 15 Q. Are you familiar with Professor Didenko?  
 16 A. Yes.  
 17 Q. He was your opposing expert, was he not, in the AIG v  
 18 Kazakhstan matter?  
 19 A. Correct.  
 20 Q. His work is very well-known in Kazakhstan, isn't it?  
 21 A. Yes.  
 22 Q. You have access to his work, don't you?  
 23 A. Yes.  
 24 Q. He is regarded as one of Kazakhstan's leading civil law  
 25 scholars?

1 A. Yes.  
 2 Q. He says in very clear terms that:  
 3 "... it is undisputable, that the State, after  
 4 concluding a contract of entrusted management with the  
 5 National Bank of the Republic of Kazakhstan remains the  
 6 owner of the property of the National Fund transferred  
 7 into entrusted management."  
 8 Correct?  
 9 A. That's what he writes, yes.  
 10 Q. He makes no distinction between rights of claim and  
 11 other assets, does he?  
 12 A. Rights. However, unfortunately this is not consistent  
 13 with what the law says.  
 14 Q. We will come to what the law says, but you agree that  
 15 one of Kazakhstan's leading civil law scholars does not  
 16 make a distinction when referring to non-transfer of  
 17 property into entrusted management by the government to  
 18 the National Bank?  
 19 A. Yes.  
 20 Q. And you, in a similar commentary on the Civil Code as  
 21 referred to in paragraph 30 of Professor Maggs' report,  
 22 also made no such distinction.  
 23 A. Correct. We are talking about ownership.  
 24 Q. All right. Well, tell me this: if you were complying  
 25 with your duties to this court to put information that

1 was relevant to the opinions or that might adversely  
 2 affect your opinions or give a range of reasonable  
 3 opinions, why would you not refer to these two leading  
 4 commentaries?  
 5 THE INTERPRETER: I'm afraid the Professor is off mic.  
 6 A. I do not believe that it is incumbent on me to make  
 7 reference to all these scholarly writings that are  
 8 listed here.  
 9 Q. That's not what I asked you. I asked you whether you  
 10 agreed that you are giving all matters that are relevant  
 11 to your opinions, that might adversely affect your  
 12 opinion and the range of reasonable opinions. Do you  
 13 agree that in compliance with your duty you ought to  
 14 have brought these to the court's attention in your  
 15 first report?  
 16 A. I did not believe that I was under a duty to list all  
 17 the views and opinions that exist. I believe that I set  
 18 out my position, and wherever legal discussion or legal  
 19 debates have taken place with respect to various  
 20 controversial legal positions I set those out. So far  
 21 as this article is concerned, however, to be honest I do  
 22 not even recall exactly whether I saw that article at  
 23 that time.  
 24 Q. Let's take up, please, your supplemental report. It is  
 25 at tab 6 of the first D bundle.

1 Now, before I ask you some questions about the  
 2 contents of this, you said to me earlier that you didn't  
 3 agree with your own commentary and that of  
 4 Professor Didenko because you said unfortunately it's  
 5 not what the law says.  
 6 Now, can I clarify with you, please, what you mean  
 7 by the law; do you mean chapter 44 of the Civil Code?  
 8 A. I am referring to Article 115 of the Civil Code.  
 9 Q. Anything else?  
 10 A. And also the law on State property, more specifically  
 11 Article 1, paragraph 23.  
 12 Q. Anything else?  
 13 A. These two are the fundamental ones.  
 14 Q. All right. If you could take up, please, paragraph 41  
 15 of your supplemental opinion, which is at D/227, tab 6  
 16 of the first D bundle.  
 17 A. Yes.  
 18 Q. In there you say:  
 19 "The Civil Code defines more than Things as being  
 20 property."  
 21 Then you say:  
 22 "But that does not mean that one can own (in the  
 23 proper sense) property which is not a Thing ...  
 24 ownership is a Proprietary Right and can only subsist in  
 25 relation to a Thing."

1 A. Yes.  
 2 Q. Does that mean it is your evidence that under the laws  
 3 of Kazakhstan unless something is a "Thing", as defined  
 4 by you in your second report, it can't be owned?  
 5 A. If it's not a "Thing", if it is not a "res", it is  
 6 a right of claim.  
 7 Q. I'm sorry, I didn't understand that answer. You said  
 8 "If it's not a 'Thing', if it is not" -- and then  
 9 there's a word I didn't follow.  
 10 THE INTERPRETER: Mr Sprange, it is "res", Latin  
 11 for "thing".  
 12 MR SPRANGE: Okay, right. Got it.  
 13 Professor, if you go on to paragraph 44 of that same  
 14 report, you set forth Article 115.2 of the Civil Code.  
 15 Now, there you refer to a commentary of yours with  
 16 respect to the Civil Code and you describe things as  
 17 having "ownership rights", and then you say, with  
 18 respect to what I guess you would say are "non-things":  
 19 "... or property rights [then you say] (non-cash  
 20 money, uncertificated securities) ..."  
 21 Do you accept, therefore, that things like non-cash  
 22 money and uncertificated securities can be equated to  
 23 a property right?  
 24 THE INTERPRETER: Professor Suleimenov is asking me to  
 25 repeat the translation of the question. With

1 your Lordship's permission I will do so.  
 2 (Question reinterpreted).  
 3 A. Yes, it is a property right.  
 4 THE INTERPRETER: Mr Sprange, I'm sorry, we can't hear you.  
 5 MR SPRANGE: My apologies. I am trying to keep my shuffling  
 6 of papers quiet and I keep forgetting .  
 7 If you could take up tab 3 of that same D bundle and  
 8 go to page D/138 or the Russian equivalent, where we  
 9 find chapter 44 of the Civil Code on "Entrusted  
 10 management of property".  
 11 Now, Professor, it is very, very clear in these  
 12 provisions relating to the subject, Article 884, and  
 13 relating to the object, Article 885, that what may be  
 14 the subject and object of an entrusted management is  
 15 both something that is owned but also a property right .  
 16 I refer you to subparagraph 1 of 884, and subparagraph 1  
 17 of 885.  
 18 A. Correct. There is a difference between 884 and 885.  
 19 884 refers to entrusted management, which is an in rem  
 20 proprietary right, whereas 885 refers to assets such as  
 21 cash and so on and so forth .  
 22 Q. Professor, the word "property right" is used in both of  
 23 those articles as it is used in your commentary in  
 24 paragraph 44 of your second report, referenced at  
 25 footnote 42. That is right, isn't it?

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1 A. Yes.  
 2 Q. There is no language in chapter 44 or in Article 115  
 3 that supports your theory that there is a distinction  
 4 between the treatment of property rights and things that  
 5 are owned upon the setting up of an entrusted  
 6 management. Correct?  
 7 A. Actually 2.1 in Article 115 does draw a distinction  
 8 between things and the right of claim, for instance so  
 9 far as money is concerned.  
 10 Q. Yes, Professor, I understand that. But it says nothing  
 11 about that distinction having any impact or effect upon  
 12 the placement into entrusted management of either  
 13 a thing or a property right (right of claim).  
 14 A. No, actually there is a major distinction that is drawn  
 15 between rights in rem, proprietary rights, and rights in  
 16 personam, ie the rights of claim, in the Civil Code.  
 17 There is a major fundamental difference between those  
 18 two.  
 19 Q. All right, I will put my question a different way.  
 20 Where in the language of Article 115.2, and take a look  
 21 at it on page 44 of your second opinion, does it say,  
 22 "When setting up an entrusted management the in rem  
 23 rights stay with the founder but the in personam rights  
 24 go to the entrusted manager"? Where does it say that in  
 25 Article 115.2?

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1 A. Well, actually paragraph 2 of Article 885 clearly says  
 2 that all assets shall be accounted for separately when  
 3 they are transferred into the trust management, and no  
 4 distinction is drawn between in rem rights or in  
 5 personam rights; ie rights of ownership, proprietary  
 6 rights, and rights of claim.  
 7 Q. Sorry, I missed the article you referred to.  
 8 Paragraph 2 of ...?  
 9 A. 885.2.  
 10 Q. Yes. Thank you for that, Professor. Does that mean the  
 11 answer to my actual question that no such language  
 12 appears in Article 115.2 is correct?  
 13 A. What do you mean?  
 14 Q. I asked you whether there was some specific language  
 15 relating to the divergent approach to in personam and  
 16 in rem assets upon setting up of an entrusted management  
 17 in Article 115.2.  
 18 MR JUSTICE TEARE: Mr Sprange, where do I find the text of  
 19 Article 115.2?  
 20 MR SPRANGE: My Lord, at the moment I have taken the witness  
 21 to it on page D/228, paragraph --  
 22 MR JUSTICE TEARE: But that is not ...  
 23 MR SPRANGE: My Lord, the one I have been working on, if you  
 24 look at Professor Maggs' first report, you will see it  
 25 there on page D/117.

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1 THE INTERPRETER: Mr Sprange, would you like me to restate  
 2 your question to Professor Suleimenov? Mr Sprange?  
 3 MR SPRANGE: Sorry, I'm having trouble.  
 4 THE INTERPRETER: This is the interpreter speaking. Would  
 5 you like me to retranslate your question for  
 6 Professor Suleimenov? Because I did not have an  
 7 opportunity to do so.  
 8 MR SPRANGE: Subject to his Lordship.  
 9 MR JUSTICE TEARE: Yes, of course. I would like it repeated  
 10 as well.  
 11 (Question reinterpreted)  
 12 A. You see, 115 contains language of a general nature which  
 13 applies across the board to all relationships, not just  
 14 trust management, therefore it does not make reference  
 15 to trust management. It simply draws a fundamental  
 16 distinction in 2.1 between in rem proprietary rights and  
 17 choses in action or actionable rights or rights in  
 18 personam. This is the fundamental distinction in 2.1.  
 19 MR SPRANGE: Okay. Do you accept that other than ...  
 20 A. But we do not have 2.1 in the English excerpt from this  
 21 article that I have been provided with, unfortunately.  
 22 Q. Professor, I am somewhat disturbed that you have been  
 23 provided with an article that I don't quite know what  
 24 it is right now, so can you refrain from looking at any  
 25 other documents that anybody has given you during the

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1 course of your evidence?  
 2 MR QUEST: I'm sorry to interrupt, but the Article 115 does  
 3 appear in the bundle with the section that I think  
 4 Professor Suleimenov is referring to. There is  
 5 a translation of it at page ... (break in audio  
 6 transmission) ... in the Russian, and the English at  
 7 D2/449.  
 8 MR SPRANGE: I understood he was referring to Article 2.1,  
 9 which wasn't to do with Article 115.  
 10 Perhaps we could clarify that with the witness.  
 11 What Article were you referring to that you said  
 12 wasn't in English?  
 13 A. It is paragraph 2.1 in Article 15, sir -- sorry,  
 14 Article 115. 115.  
 15 Q. Fine, okay. Let me check what you said about it .  
 16 (Pause)  
 17 What point did you want to make about Article 2.1?  
 18 A. There is a distinction that is drawn in 2.1 between  
 19 money as res, as a thing, and money as a right of claim,  
 20 as an actionable right .  
 21 Q. Understood. Just so it is clear , and perhaps we can  
 22 tidy that up as between Mr Quest and I, my Lord, the  
 23 quote from Professor Maggs does contain that language it  
 24 is just missing the (1) in parenthetical in the  
 25 paragraph that is indented after (2)?

1 MR JUSTICE TEARE: Well, I have looked at page 449 of D2,  
 2 which is the page to which I think Mr Quest referred,  
 3 and the translation there is not same as the translation  
 4 in Professor Maggs' report. So at some stage we will  
 5 have to resolve which is the correct translation .  
 6 MR SPRANGE: Yes. I certainly don't intend to do that now.  
 7 MR JUSTICE TEARE: It is 2 minutes to 1.00 pm, so presumably  
 8 you're not going to finish .  
 9 MR SPRANGE: My Lord, I have a question. In these times the  
 10 unorthodox, I presume, is invited. If we stopped now  
 11 but started again at a quarter to 2 that should give me  
 12 some time to tidy up, and probably cut things down  
 13 a little , but also we can use that extra time, since  
 14 none of us have to commute anywhere.  
 15 MR JUSTICE TEARE: Is the intention that Professor Maggs  
 16 starts at 2.00 pm?  
 17 MR SPRANGE: I don't think it will be 2.00 pm, but it won't  
 18 be long after .  
 19 MR JUSTICE TEARE: Mr Quest?  
 20 MR QUEST: If it is not long after 2.00 pm then that won't  
 21 be a problem.  
 22 MR JUSTICE TEARE: Thank you.  
 23 Do you have any preference as to whether we go on  
 24 now until a quarter past 1 or whether we adjourn now and  
 25 start again at a quarter to 2?

1 MR SPRANGE: No preference either way, my Lord.  
 2 MR JUSTICE TEARE: Mr Quest?  
 3 MR QUEST: None from me.  
 4 MR JUSTICE TEARE: I would prefer to go on now until 1.15  
 5 and then ...  
 6 MR SPRANGE: Fine, let's go for another 15 minutes.  
 7 Professor, on your evidence then, Article 115.2 is  
 8 general, in terms of drawing the distinction between in  
 9 personam and in rem. Would we find the specific  
 10 treatment of in personam and in rem rights with respect  
 11 to entrusted management in chapter 44 of the Civil Code?  
 12 A. You see, those general provisions are applicable across  
 13 the board including contracts, irrespective of whether  
 14 that is made reference to in any specific chapter of the  
 15 Civil Code or not.  
 16 Q. Do you agree that there is nothing chapter 44, in the  
 17 articles that we have looked at, that tells us there is  
 18 a distinction between in rem and in personam property  
 19 rights that are placed into entrusted management?  
 20 A. There is no need to draw the distinction in every single  
 21 article or chapter dealing with different types of  
 22 contracts, so long as a general distinction across the  
 23 board has already been drawn. It simply mentions that  
 24 this applies to cash and securities which are examples  
 25 of property rights .

1 Q. Do you accept then that there is nothing in chapter 44  
 2 that says, either expressly or implicitly , that when we  
 3 speak of "in personam property rights" ownership is  
 4 transferred to the manager and leaves ownership of the  
 5 founder?  
 6 A. Yes, but the general provision is applicable no matter  
 7 what, irrespective of whether a specific mention is made  
 8 to that effect in the articles dealing with specific  
 9 types of contracts, nominated or innominate contracts.  
 10 There are two parts in our Civil Code, the general  
 11 part and the part dealing with specific types of  
 12 obligations . So all provisions contained in the general  
 13 part of the Civil Code are by definition applicable to  
 14 each and every specific provision of the second part of  
 15 the Civil Code, which deals with specific types of  
 16 obligation .  
 17 Q. This concept of yours, Professor, that when an entrusted  
 18 management is set up, that in personam property rights  
 19 are treated differently , is not something you have  
 20 expressed in the AIG v Kazakhstan opinion. To remind  
 21 you of that, I would like you to look, please, in the  
 22 D bundle and it is volume D1, tab 9.  
 23 Professor, do you recall that the dispute in that  
 24 case was whether funds held under the GCA could be  
 25 subject to an English third party debt order?

1 A. I think it was in 2005 and, to be honest, I have a very  
 2 vague recollection of what was being said. It was all  
 3 in English at that time, so I do not really recall very  
 4 well.  
 5 Q. Have you re-read your opinions in that case since they  
 6 have been produced in these proceedings?  
 7 A. Yes.  
 8 Q. Do you stand by those opinions that you wrote in 2005?  
 9 A. No, I would not have put it in the same way now.  
 10 Q. Is that because you need to give a different opinion to  
 11 help the person or the party that has instructed you in  
 12 this case?  
 13 A. No, not because of this. The reason was because you may  
 14 have noticed that those were very brief, very short  
 15 opinions indeed, not more than two to three pages. Mind  
 16 you, in 2004/2005 the National Fund had just been  
 17 created, had just been put in place, and we had a very  
 18 vague idea of how it was actually going to function.  
 19 For these proceedings, however, I have done  
 20 additional research, I think we are looking at 115 pages  
 21 and 50 pages, and I have had a much closer look at the  
 22 position.  
 23 At that time, unfortunately both Professor Didenko  
 24 and myself were mainly focusing on property rights, on  
 25 the rights of ownership, and we did not pay considerable

1 attention, the attention that those matters would  
 2 require, to such matters as cash and securities.  
 3 Therefore, after having done considerable additional  
 4 research, in the year 2007 we amended the Civil Code by  
 5 adding subparagraph 2.1, where we draw a distinction  
 6 between "things" on the one hand and "rights of claim"  
 7 on the other.  
 8 In 2011 we drafted the law on State property, where  
 9 we also drew a distinction between various types of  
 10 State-owned property rights. In Article 1.23 that  
 11 I make reference to in my opinions, I deal with and  
 12 I discuss State-owned property rights and I say that  
 13 a very clear distinction is now drawn between the two  
 14 types of State-owned property rights, ie in rem rights,  
 15 including the right of ownership, and in personam  
 16 rights, ie what we call rights of claim.  
 17 Also we included -- at the same time, we included  
 18 paragraph 7 into Article 192, where we said that all the  
 19 provisions dealing with State-owned property apply to --  
 20 also apply to other types of property rights owned by  
 21 the State.  
 22 Therefore, I would say that in 1994 I made a bona  
 23 fide mistake.  
 24 Q. Why do you say in 1994?  
 25 A. My apologies, I meant 2004. It was in 2004.

1 Q. Just before we take the lunch break, two questions.  
 2 Do you accept that where we are looking at a TMA and  
 3 a GCA that were signed and put into place before the  
 4 amendments in 2007 and 2011 those amendments are  
 5 irrelevant?  
 6 A. Yes, but this is a very theoretical point. What matters  
 7 is that according to 115.2 all property rights are  
 8 broken down into "things" and other property rights.  
 9 It is simply that it occurred to us later on, in the  
 10 course of a much more detailed review of the legal  
 11 position, that this breakdown needs to be better spelt  
 12 out in law.  
 13 Q. The last question before we take the lunch break: do you  
 14 accept that in *AIG versus Kazakhstan*, what was in  
 15 dispute there was cash and securities, so in personam  
 16 rights to those cash and securities?  
 17 A. Yes, I agree with that.  
 18 MR SPRANGE: My Lord, there we are until 2 o'clock.  
 19 MR JUSTICE TEARE: Thank you. So how much longer at  
 20 2 o'clock?  
 21 MR SPRANGE: I would say 30 minutes, but I will have a good  
 22 look at my notes and confer with my colleagues during  
 23 that time.  
 24 MR JUSTICE TEARE: 30 minutes takes us to 2.30. Mr Quest,  
 25 is that acceptable to you?

1 MR QUEST: I think that will be just about all right.  
 2 MR JUSTICE TEARE: I assumed in my innocence that the two of  
 3 you had agreed the morning for one witness and the  
 4 afternoon for the other.  
 5 MR QUEST: We had, and that is what the timetable provides.  
 6 Perhaps, in fairness, obviously Professor Suleimenov is  
 7 giving evidence through an interpreter and  
 8 Professor Maggs will not be.  
 9 MR JUSTICE TEARE: If you're happy with 2.30 for the start  
 10 of Professor Maggs, then fine.  
 11 MR QUEST: Well ... I will do my best, my Lord, that is all  
 12 I can say.  
 13 MR JUSTICE TEARE: Mr Sprange, can I restrict you to 2.20?  
 14 MR SPRANGE: I will do my absolute best, my Lord.  
 15 MR JUSTICE TEARE: Because I assume we are hoping to  
 16 complete Professor Maggs by 4.30.  
 17 MR QUEST: Absolutely.  
 18 MR JUSTICE TEARE: Very well, we will adjourn until  
 19 2 o'clock and Mr Sprange must, if at all possible,  
 20 finish by 2.20.  
 21 MR SPRANGE: Thank you.  
 22 A. Good, thank you.  
 23 (1.20 pm)  
 24 (The short adjournment)  
 25 (2.00 pm)

1 MR JUSTICE TEARE: It's 2 o'clock, so we are ready.  
 2 MR SPRANGE: Take out tab 9 of the first D bundle. I am  
 3 interested in paragraphs 15 and 16.  
 4 In paragraph 15 you say:  
 5 "NBK holds and manages the assets of the RoK  
 6 National Fund by virtue of this agreement."  
 7 A. Yes.  
 8 Q. That being the TMA; correct?  
 9 A. Yes.  
 10 Q. The TMA was entered into because of the authority  
 11 granted to NBK by the government under the statutes we  
 12 referred to earlier; correct?  
 13 A. Yes.  
 14 Q. In exercising that authority NBK entered into the GCA  
 15 that was the subject matter of this litigation; correct?  
 16 A. Yes.  
 17 Q. Okay. In addition to the views you express there in  
 18 paragraphs 15 and 16, if you could move on to tab 11 of  
 19 the same bundle or the Russian equivalent, and please  
 20 look at paragraph 4 on D/267. Just read that to  
 21 yourself.  
 22 A. Yes.  
 23 MR SPRANGE: My Lord, I have been told that we have not got  
 24 a transcript at the moment. (Pause)  
 25 MR JUSTICE TEARE: Does that mean that it is not being

1 transcribed or it is simply not coming up on your  
 2 screen? I don't think your microphone is on.  
 3 MR SPRANGE: I think it means that there is no transcript  
 4 being transcribed. I expect that there is a recording  
 5 so we will not have lost those minutes and we don't need  
 6 to redo them.  
 7 MR JUSTICE TEARE: If there is a recording can we not  
 8 continue?  
 9 MR SPRANGE: I am happy to provided that everybody else is.  
 10 MR JUSTICE TEARE: Why don't you continue?  
 11 MR SPRANGE: I will continue then.  
 12 You have read paragraph 4 of your statement from the  
 13 AIG v Kazakhstan case.  
 14 A. Which paragraph are you referring to?  
 15 Q. Paragraph 4, and the Russian is at tab 10.  
 16 A. Yes.  
 17 Q. That statement that you make there with respect to the  
 18 capacity in which the National Bank acted on behalf of  
 19 the government, arises not only from Article 26, which  
 20 you have referred to, but also Article 23 of the  
 21 National Bank law. Correct?  
 22 A. You are referring to the NBK law. Because the bank has  
 23 a variety of functions, it appears both as -- it acts as  
 24 a bank, as an adviser, as an agent, and therefore we are  
 25 looking both actually at 26 and 23.

1 Q. We similarly would look at Article 889 of the Civil Code  
 2 and chapter 44 as well.  
 3 That is in D/144 at tab 3 in the first volume if you  
 4 want it.  
 5 For your benefit, my Lord, it is D/140 of tab 3 of  
 6 the first D bundle.  
 7 A. Is this Article 889, sir? Re "Delegation", right?  
 8 Q. Yes.  
 9 A. Yes.  
 10 Q. Okay. Could you please then go to tab 12 of the D  
 11 bundle. This is the protocol that you and  
 12 Professor Didenko entered into in the AIG v RoK case.  
 13 Please look at the last paragraph on page 269.  
 14 There you are drawing the distinction between the  
 15 treatment of in rem and in personam rights.  
 16 Now, that statement was as correct then as it is  
 17 now; do you agree?  
 18 A. No, not quite. As I already mentioned, at that time we  
 19 had not reviewed in depth the legal status of the  
 20 National Fund and therefore we used the provisions  
 21 dealing with property rights to the National Fund.  
 22 Q. Are you telling me you gave sworn expert testimony to  
 23 this court in 2005 and didn't properly check the status  
 24 of the National Fund in doing so, when the dispute  
 25 focused entirely on the assets of the National Fund?

1 A. No, at that time I simply set out my views within the  
 2 framework of my interpretation and understanding of the  
 3 legal position at that time.  
 4 You may recall that before we broke for the brief  
 5 adjournment I mentioned that these are very brief  
 6 opinions indeed, two to three pages maximum, therefore  
 7 I did not have an opportunity to look at the true legal  
 8 position in great detail.  
 9 Q. That dispute related to whether a creditor could enforce  
 10 an arbitral award against assets of the National Fund  
 11 held by NBK under the GCA. Correct?  
 12 A. I'm not sure I quite understood you.  
 13 Q. Tell the court what you recall the AIG v RoK dispute was  
 14 about.  
 15 A. I have a very vague recollection of what happened  
 16 15 years ago. I have only read my opinions and also the  
 17 protocol that we drew up together with  
 18 Professor Didenko, and we do not address the subject  
 19 matter and the gist of the dispute. It had something to  
 20 do with tax returns.  
 21 Q. Professor, are you in the habit of providing expert  
 22 testimony where you have only taken a perfunctory view  
 23 of the background material?  
 24 A. No, I did look into the matter and I did review the  
 25 materials at that time, I simply do not recall all the

1 details sitting here today.  
 2 Q. Okay.  
 3 Auditors in Kazakhstan who audit the records of NBK,  
 4 what kind of duties are they under, Professor, to be  
 5 accurate?  
 6 THE INTERPRETER: Mr Sprange, could you repeat the question  
 7 please?  
 8 MR SPRANGE: I will rephrase it .  
 9 Are you aware that the accounts and financial  
 10 records of NBK are audited by KPMG?  
 11 A. You mean now?  
 12 Q. Yes.  
 13 A. No, I am not aware of that .  
 14 Q. All right. Let me ask you this: one of the deputy  
 15 governors of the NBK gave evidence in these proceedings;  
 16 she was of the view that creditors could enforce against  
 17 assets held by NBK by way of entrusted management of the  
 18 National Fund.  
 19 Do you regard that evidence to reflect your  
 20 understanding of the legal position?  
 21 A. I'm aware of what she said.  
 22 Q. Do you agree with it , the legal conclusion?  
 23 A. You were referring to enforcement against the assets ;  
 24 did I understand you correctly?  
 25 Q. Yes.

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1 MR QUEST: I'm sorry to interrupt, but I think in fairness  
 2 to the witness Mr Sprange should make it clear which  
 3 creditors he is talking about, whether it is creditors  
 4 of the State or creditors of the National Bank.  
 5 MR SPRANGE: Yes, that is a fair point.  
 6 Creditors of the National Bank.  
 7 A. It is not open to the creditors of the National Bank of  
 8 Kazakhstan to enforce against the assets of the  
 9 National Bank. The assets of the National Bank are  
 10 accounted for separately from the assets of the  
 11 National Bank and therefore the National Bank cannot be  
 12 held liable with respect to whatever debts or liability  
 13 the others may have.  
 14 MR SPRANGE: My Lord, those are the second to fifth  
 15 defendants' questions for the Professor.  
 16 MR JUSTICE TEARE: Thank you.  
 17 Mr Quest.  
 18 Re-examination by MR QUEST  
 19 (2.20 pm)  
 20 MR QUEST: Professor Suleimenov, I have just one question  
 21 for you.  
 22 You recall you were asked about the times on which  
 23 you have given evidence on behalf of the  
 24 Republic of Kazakhstan in earlier cases.  
 25 Can I ask you whether you have ever give evidence on

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1 behalf of the Stati parties in a dispute?  
 2 A. Yes, I did appear on behalf of the Stati parties against  
 3 the Republic of Kazakhstan.  
 4 Q. Can you recall or confirm who instructed you on that  
 5 occasion?  
 6 A. I have no recollection of that sitting here today.  
 7 MR QUEST: Thank you. Those are my questions  
 8 Professor Suleimenov.  
 9 MR JUSTICE TEARE: Thank you very much,  
 10 Professor Suleimenov. It has been most interesting  
 11 listening to your evidence. Thank you for making  
 12 yourself available .  
 13 A. Thank you.  
 14 MR JUSTICE TEARE: Yes, Mr Quest.  
 15 No, it will be Mr Sprange.  
 16 MR SPRANGE: That's right.  
 17 I think we are just waiting for Professor Maggs to  
 18 join us.  
 19 PROFESSOR PETER MAGGS (called)  
 20 MR SPRANGE: It is Tom Sprange from King & Spalding.  
 21 I don't know if you can see and hear me.  
 22 A. I can see and hear you perfectly .  
 23 Q. Thank you, Professor. Can you also see the court,  
 24 Mr Justice Teare and Mr Quest?  
 25 A. Yes, I can see all of them.

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1 Q. Great, thank you.  
 2 Professor, I think you are by now familiar with the  
 3 approach. I just need to formally confirm your written  
 4 evidence in these proceedings. If I could start by  
 5 asking you please, do you have the affirmation in front  
 6 of you?  
 7 A. Yes, I do.  
 8 Q. At a nod from his Lordship could you please read out  
 9 that affirmation?  
 10 MR JUSTICE TEARE: Thank you.  
 11 PROFESSOR PETER MAGGS (affirmed)  
 12 Examination in-chief by MR SPRANGE  
 13 (2.24 pm)  
 14 MR SPRANGE: Thank you, Professor Maggs. Do you have the  
 15 D bundle, the first volume with you?  
 16 A. Yes. And I have my statements on paper.  
 17 Q. Okay. I am going to need to just do it through the  
 18 bundles. As you have probably gathered, we are in  
 19 multiple locations .  
 20 A. I have the bundle on a separate computer for easy  
 21 reference .  
 22 Q. Okay, thank you.  
 23 A. Go ahead.  
 24 Q. At tab 3 of the D bundle, can you identify that  
 25 document, please?

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1 A. Yes, that's my first report in this case.  
 2 Q. Okay. Would you please identify the signature for me on  
 3 page D/128, or 22 of the internal pagination?  
 4 A. Yes, that's my signature.  
 5 Q. Okay. Could you please identify the document at tab  
 6 D/4?  
 7 A. Yes, that is my supplemental report.  
 8 Q. Just --  
 9 A. Just give me one second, let me just check I have the  
 10 right report.  
 11 Q. Thank you. The signature on the right-hand side on page  
 12 D/194?  
 13 A. Yes, that's my signature.  
 14 Q. Thank you. Then, lastly, tab 7 of the first volume of  
 15 the D bundle, page D/233. Could you identify that  
 16 document please, along with the signature at page D/248?  
 17 A. Yes, that's my supplementary report, and that is my  
 18 signature on page D/248.  
 19 MR SPRANGE: Thank you very much, Professor Maggs. Mr Quest  
 20 on behalf of the claimants will have some questions for  
 21 you.  
 22 A. Thank you.  
 23 (4.27 pm)  
 24 Cross-examination by MR QUEST  
 25 MR QUEST: Good morning, Professor Maggs. Could I ask you

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1 to take up file D1, please, and your report, your first  
 2 report, which you will find in tab 3, and paragraph 15  
 3 of that report at page D/112.  
 4 A. Yes.  
 5 Q. Do you see there that you have set out Article 8 of the  
 6 law on the National Bank?  
 7 A. Yes.  
 8 Q. Which provides that one of the functions of the NBK is  
 9 to conduct entrusted management on the basis of  
 10 a contract of entrusted management, which shall be  
 11 concluded between the National Bank and the government.  
 12 A. Yes.  
 13 Q. Then if I can ask you, please, do you have a core bundle  
 14 there, a bundle marked "Core"?  
 15 A. Yes.  
 16 Q. If you turn to the first tab and the first page of the  
 17 bundle you should find an index.  
 18 A. Yes.  
 19 Q. On that you will see agreement number 299 on trust  
 20 management, and this is the contract, is it not, that  
 21 was concluded pursuant to Article 8?  
 22 A. Yes.  
 23 Q. It was concluded, you will see the date is 11 June 2001.  
 24 A. Yes.  
 25 Q. Then if you turn to page 13 at the bottom, page 3 of the

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1 document, do you see at the bottom of the page  
 2 a signature block?  
 3 A. Yes.  
 4 Q. And this agreement, this is obviously in the  
 5 translation, but in the original this agreement was  
 6 signed on behalf of the National Bank by Mr Marchenko,  
 7 the chairman, wasn't it?  
 8 A. Yes.  
 9 Q. And it was signed on behalf of the government by  
 10 Mr Esenbayev, the Minister of Finance at the time?  
 11 A. Yes.  
 12 Q. This agreement would not have taken effect, would it,  
 13 until it was signed by both of those parties?  
 14 A. No, it would have to be signed by authorised persons.  
 15 Q. And it is a contract, isn't it, with the National Bank  
 16 on one side and the government on the other side?  
 17 A. Yes.  
 18 Q. So we can see from this document, can't we, that in  
 19 principle the National Bank is able to contract in its  
 20 own right as a legal entity, separate from the  
 21 government?  
 22 A. It can. It is a legal -- it is civil law contracts. It  
 23 is a legal entity separate from the government.  
 24 Q. But in this case it has contracted with the government,  
 25 hasn't it?

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1 A. Yes.  
 2 Q. Can we go back to your first report, please, at  
 3 paragraph 36, which is on page D/116.  
 4 A. Yes.  
 5 Q. You see what you say there. You say:  
 6 "This contract [and you are referring there to the  
 7 trust management agreement that we have just looked at]  
 8 was not freely negotiated. Rather various governmental  
 9 decrees provided the specific language that the contract  
 10 was to contain."  
 11 Then at the end of that paragraph you say:  
 12 "The decrees setting out the content of this  
 13 contract are below in appendix 3."  
 14 Yes?  
 15 A. Yes.  
 16 Q. I wanted to ask you some questions about your statement  
 17 that the contract was not freely negotiated. Can we  
 18 please look at those government decrees that you  
 19 referred to. You have attached them as an appendix to  
 20 your report at D/147. Can you turn them up? Do you  
 21 have that?  
 22 A. What was the page number again?  
 23 Q. D/147, or internally it is page 41 of your report. Do  
 24 you have that?  
 25 A. Just a moment. Yes.

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1 Q. So these are the decrees that you rely on in support of  
 2 your opinion that the contract was not freely  
 3 negotiated?  
 4 A. Yes.  
 5 Q. I want to look at these that you will see on D/147 and  
 6 we can look at it in translation. This is the first  
 7 decree that you rely upon and it is a decree dated  
 8 18 May 2001, isn't it?  
 9 A. Yes.  
 10 Q. What it provides, you will see in the numbered  
 11 paragraphs, is first of all that the Government of the  
 12 Republic decrees:  
 13 "To approve the attached draft contract on entrusted  
 14 management of the National Fund ..."  
 15 And 2, it entrusts:  
 16 "... the signing of the contract on behalf of the  
 17 Government ... to the Minister of Finance ..."  
 18 Then you will see a little bit down the page the  
 19 draft contract has been exhibited.  
 20 A. Yes.  
 21 Q. Now, nothing in this decree requires the National Bank  
 22 to sign a contract in this form, does it?  
 23 A. Not explicitly.  
 24 Q. Not at all.  
 25 A. The head of the National Bank may be dismissed by the

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1 president at any time. I think it is a very strong  
 2 suggestion that it sign a contract along these lines.  
 3 Q. We will come to that in a moment. You have exhibited  
 4 this decree in support of your opinion that the contract  
 5 was not ... (break in audio transmission) ...  
 6 negotiated, but it is right that this decree does not  
 7 require the National Bank to enter into a contract in  
 8 this form.  
 9 A. Not specifically.  
 10 Q. The decree is not addressed to the National Bank at all,  
 11 is it?  
 12 A. No.  
 13 Q. And the purpose of the decree is to approve the contract  
 14 on behalf of the government.  
 15 A. Yes.  
 16 Q. And to authorise the minister to sign it on behalf of  
 17 the government.  
 18 A. Yes.  
 19 Q. It has nothing to do with the National Bank, has it?  
 20 A. Well, again, I think it envisions that a contract will  
 21 be signed on these general lines.  
 22 Q. The draft contract that is exhibited, which you see at  
 23 D/147, if you turn forward to the end of the draft,  
 24 which is at D/150 --  
 25 A. Yes.

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1 Q. -- you will see that the draft envisages that it would  
 2 have to be signed by Mr Marchenko on behalf of the  
 3 National Bank.  
 4 A. Yes.  
 5 Q. Yes. So it would not come into force unless  
 6 Mr Marchenko was happy to sign it on behalf of the  
 7 National Bank.  
 8 A. Yes.  
 9 Q. That is the first decree. Also, if you are on page 150  
 10 you will see that you also exhibit another decree, and  
 11 you see that midway down 150, decree of 18 May 2001,  
 12 number 655. Do you see that?  
 13 A. What page is that on?  
 14 Q. Page 150. D/150.  
 15 A. Okay.  
 16 Q. I'm sorry, I have given you the wrong reference. I gave  
 17 you the previous one. D/154 is the second decree in  
 18 English.  
 19 A. Yes.  
 20 Q. If you glance through the numbered paragraphs, 1, 2 and  
 21 3, this decree approves on behalf of the government  
 22 a supplemental agreement which amends the trust  
 23 management agreement, doesn't it?  
 24 A. Yes.  
 25 Q. Again, this decree is not addressed to the National

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1 Bank, is it?  
 2 A. No, it was a power to the government, to the official to  
 3 sign it.  
 4 Q. Nothing in this decree as a matter of law, a matter of  
 5 Kazakh law, requires the National Bank to enter into  
 6 this agreement?  
 7 A. Not as a matter of law.  
 8 Q. Then the third document that you refer to in your  
 9 appendix you will find at D/158.  
 10 A. Yes.  
 11 Q. This is a draft supplementary agreement.  
 12 A. Yes.  
 13 Q. And this document again does not, as a matter of law,  
 14 impose any obligation on the National Bank.  
 15 A. Not until it is signed; not until they sign the  
 16 contract.  
 17 Q. Not until they sign, exactly.  
 18 Go back in your report to paragraph 36 where we  
 19 started on page D/116.  
 20 Do you have that?  
 21 A. Just a moment. (Pause)  
 22 Yes.  
 23 Q. Where you say at the beginning of paragraph 36:  
 24 "This contract was not freely negotiated."  
 25 None of the materials we looked at show that the

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1 contract was not freely negotiated, do they?  
 2 A. Well, once that decree was issued there wasn't room for  
 3 negotiation.  
 4 Q. I think you have agreed that the contract didn't come  
 5 into effect until Mr Marchenko signed it.  
 6 A. Yes, but once the government had approved that language  
 7 the ministry could not sign any other language.  
 8 Q. No, but the National Bank also had to approve the  
 9 language, didn't it?  
 10 A. It had to provide formal agreement, yes.  
 11 Q. As a matter of Kazakh law, it had to agree the terms of  
 12 the agreement before it came into force.  
 13 A. It would only come into force when it was signed both by  
 14 the Minister of Finance and the officer of the  
 15 National Bank.  
 16 Q. So do I understand your point about the contract not  
 17 being freely negotiated is that it's really a political  
 18 point rather than a legal one, in that it's your opinion  
 19 that Mr Marchenko would have signed anything that the  
 20 government put in front of him?  
 21 A. He was serving at the pleasure of the president, so  
 22 I think that creates some question at least about  
 23 freedom of negotiation.  
 24 Q. Right, but that is a political point, in the sense that  
 25 your opinion is that if he had not signed it he would

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1 have been sacked.  
 2 A. Yes.  
 3 Q. He had no legal obligation in Kazakh law to sign it.  
 4 A. No.  
 5 Q. Can we look in the joint statement, please, at page  
 6 D/183. This is the joint statement that you discuss  
 7 with Professor Suleimenov.  
 8 Can I ask you, please, to turn to, sorry, page 184.  
 9 D/184, paragraph 10.3. Do you see that? It says:  
 10 "Whilst as a State institution the NBK may  
 11 independently conclude contracts, the NBK entered into  
 12 the GCA with BNYM in this capacity, not independently  
 13 but in performance of the TMA, which it was forced to  
 14 sign by the Republic of Kazakhstan."  
 15 A. Yes.  
 16 Q. Now, you are here, of course, to give evidence on the  
 17 law of Kazakhstan, aren't you?  
 18 A. Yes.  
 19 Q. And it is right, isn't it, that as a matter of Kazakh  
 20 law Mr Marchenko was not forced to sign the Trust  
 21 Management Agreement in any particular form?  
 22 A. There is no Kazakh law that required him to sign it.  
 23 There was a Kazakh law which said the president could  
 24 dismiss him at will.  
 25 Q. Right, but as a matter of Kazakh law the contract had to

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1 be executed both by the National Bank and the government  
 2 before it entered into it?  
 3 A. Yes.  
 4 Q. You are not, presumably, giving evidence about why  
 5 Mr Marchenko did or didn't choose to sign a contract in  
 6 this form?  
 7 A. No, you would have to ask Mr Marchenko.  
 8 Q. You don't know Mr Marchenko?  
 9 A. I don't know him. I have no idea of his thoughts.  
 10 Q. He was known as a very ... (break in audio transmission)  
 11 ... banker, wasn't he, Mr Marchenko?  
 12 A. I am only speaking about the law concerning the control  
 13 exercised over who was chair of the National Bank.  
 14 Q. You make the point on a number of occasions in your  
 15 reports that the government "forced", to use your word,  
 16 forced the National Bank to sign the TMA and that the  
 17 government dictated the terms of the TMA; but just to be  
 18 clear, when you say that, you are not making a point  
 19 about Kazakh law, you are making -- the opinion that you  
 20 are expressing is that if that hadn't happened then  
 21 Mr Marchenko would have been sacked and someone else  
 22 would have been appointed to do it.  
 23 A. Yes.  
 24 Q. That's the point you're making.  
 25 A. Yes.

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1 Q. So it is not a legal point, it's in a sense a political  
 2 point.  
 3 A. I would say a point that depends on the legal power of  
 4 the president to fire the chairman of the National Bank.  
 5 Q. Just before we look a bit more closely at the terms of  
 6 the TMA, can I next deal, Professor Maggs, with some of  
 7 points that you make about the validity of the TMA.  
 8 A. Yes.  
 9 Q. For that purpose we need to go back to your first report  
 10 at page 125 and to paragraph 72.  
 11 A. Yes.  
 12 Q. Now, what you say there is this, you say:  
 13 "... if, given the extensive powers reserved to the  
 14 government and the president, and given the fact that  
 15 Kazakhstan through its government was on one side of the  
 16 TMA and through the National Bank that it controlled was  
 17 on the other side of the contract."  
 18 Then it is right, isn't it, that there is a word  
 19 missing from this sentence?  
 20 A. Yes, I corrected that.  
 21 Q. You did, and I think the words that should be added at  
 22 the end of that sentence are "Article 160 should be  
 23 considered".  
 24 A. Yes.  
 25 Q. Then you set out Article 160 of the Code, which you will

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1 see in paragraph 72, and there are two parts to it ,  
 2 aren't there, which we will look at quickly?  
 3 A. Yes.  
 4 Q. But I just wanted to start with the second part of  
 5 Article 160, which you see provides:  
 6 "If a transaction was made with the purpose of  
 7 concealing another transaction, then the rules shall be  
 8 applied relating to the transactions that the parties  
 9 actually had in mind shall be applied."  
 10 Now, in terms of the application of this article in  
 11 this case, what, as you understand it, is the  
 12 transaction that is said to be concealed by the TMA?  
 13 A. I said that should be investigated .  
 14 Q. Right.  
 15 A. It could be a transaction which would be a contract of  
 16 a type not regulated by the Civil Code, because the  
 17 Civil Code also allows freedom of contract in addition  
 18 to the main contracts. That, essentially, kept a great  
 19 deal of government control and did not really have the  
 20 same effects such as freedom from attachment by  
 21 creditors as a contract of entrusted management. But  
 22 again, that is a factual issue. And here I am agreeing  
 23 with you, I am saying that should be investigated, but  
 24 there is freedom of contract in Kazakhstan and they  
 25 could make any type of different contract.

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1 Q. I understand you are not here to give evidence of the  
 2 facts, of course, Professor Maggs, but so that this  
 3 point is not a purely hypothetical one, what, as you  
 4 understand it, is a factual basis in this case for  
 5 saying that it was the purpose of Kazakhstan for the  
 6 National Bank to conceal some other transaction?  
 7 A. Well, in this contract they -- I would say in the TMA  
 8 there is a clause saying it was freeing the -- that the  
 9 assets were free from attachment from liability, they  
 10 were free of liability. I discussed what that meant.  
 11 I'm not sure what it means, and that would be a question  
 12 of interpretation of the contract, which I think is not  
 13 for me. But if it had no effect other than freeing in  
 14 liability, then a contract between two closely related  
 15 parties freeing both of them from liabilities of their  
 16 creditors would have to be evaluated as to whether that  
 17 was valid under the law of Kazakhstan.  
 18 Q. We will come a little bit later to some of the  
 19 particular provisions of the contract, Professor Maggs.  
 20 Leaving aside the contractual provisions, it is right,  
 21 isn't it, that no one has shown you any factual material  
 22 which suggests from the Kazakh perspective that it was  
 23 the intention of anyone to conceal anything by entering  
 24 into the TMA?  
 25 A. I have not seen any correspondence or minutes of

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1 meetings between National Bank representatives and the  
 2 government.  
 3 Q. No one has shown you any factual material at all, have  
 4 they, to suggest that the TMA was intended to conceal a  
 5 different transaction?  
 6 A. Nothing not in the bundle.  
 7 Q. Or outside the bundle.  
 8 A. Nothing outside the bundle. I haven't seen anything  
 9 outside the bundles.  
 10 Q. Can we look, please, at paragraph 76 of your report, on  
 11 D/126.  
 12 A. Yes.  
 13 Q. Do you see, what you say there is :  
 14 "To the extent that the Government of Kazakhstan  
 15 could require NBK to sign the TMA dictated by the  
 16 Government, which agreement left extremely strong de  
 17 jure powers of control with the Government, and with  
 18 respect to which the NBK tolerated exercise by the  
 19 Government of even stronger de facto powers of control,  
 20 the NBK could be considered to be an 'entrusted manager'  
 21 that the parties did not really expect to engage in  
 22 management. In such a situation Paragraph 2 of Article  
 23 160 ... would apply."  
 24 Now, first just picking up the point that you make  
 25 there about the parties' not really expecting to engage

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1 in management. When you were preparing your evidence  
 2 were you shown the evidence of Ms Moldabekova of the  
 3 National Bank?  
 4 A. I didn't look at the factual evidence because I am not  
 5 a fact witness. This is hypothetical on what the facts  
 6 might show, and at that early stage I didn't know what  
 7 the facts might show. I might not -- I really couldn't  
 8 tell what facts would be presented or would be found  
 9 between the date -- that date and the date of the trial .  
 10 Q. Can I just, on a hypothetical basis, show you what she  
 11 said in her witness statement. Do you have file C  
 12 there?  
 13 A. Yes.  
 14 Q. Could I ask you, in the first tab you will find the  
 15 witness statement of Aliya Moldabekova.  
 16 A. Yes.  
 17 Q. She was a director at the relevant time in the National  
 18 Bank. Can I ask you to turn to paragraph 15 of her  
 19 statement, which you will find on C/5.  
 20 A. Yes.  
 21 Q. Perhaps you could just read paragraph 15 to yourself.  
 22 (Pause)  
 23 A. Yes, I have read it .  
 24 Q. Also, can I ask you to read on page C/11 paragraph 39 to  
 25 yourself. (Pause)

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1 A. Yes.  
 2 Q. Professor Maggs, I am not going to ask you to comment on  
 3 whether that is right or wrong but, hypothetically, if  
 4 that evidence were accepted by the court, there would be  
 5 no basis, would there, for saying that the parties  
 6 didn't really expect NBK to engage in management?  
 7 A. I think if that were accepted. But again, at that early  
 8 stage I didn't know what contrary evidence would be  
 9 presented.  
 10 Q. I understand, Professor Maggs. I am just trying to  
 11 understand how far your evidence goes. If that evidence  
 12 were accepted, then there would be no basis --  
 13 A. No basis for that, yes.  
 14 Q. Apologies, the way that it works, there is a bit of  
 15 a danger of overspeaking, so if you wouldn't mind  
 16 waiting until I have finished my question before you  
 17 answer, otherwise it gets lost.  
 18 The question I was going to ask is: if that evidence  
 19 were accepted, there would be no basis would there, for  
 20 the application of Article 160.2?  
 21 A. There would be no evidence for the application of 160.2.  
 22 Q. Let's turn to the other part of Article 160 then, that  
 23 is sub 1. For that we need to turn to your second  
 24 report, which you will find at D/246, paragraph 42.  
 25 A. Just a moment. (Pause)

1 Could you give me the page number again?  
 2 Q. D/246.  
 3 A. I'm sorry, I pulled up the wrong report. Just a moment.  
 4 Okay.  
 5 Q. Okay. Do you see what you say in paragraph 42 is that  
 6 you had originally taken the position that only  
 7 paragraph 2 of Article 160 was relevant. Then you say  
 8 in the third line:  
 9 "After I submitted my first report, lawyers for the  
 10 RoK provided further documents showing unilateral  
 11 changes made by the Government of the RoK in the TMA.  
 12 In the light of these documents, I have concluded that  
 13 paragraph 1 of Article 160 should also be considered."  
 14 Then you set out paragraph 1, which provides that:  
 15 "A sham transaction, made only for appearances,  
 16 without the intention to create legal consequences is  
 17 void."  
 18 Then if you just turn over the page, on paragraph 43  
 19 you say:  
 20 "If the effect of the transaction, given the powers  
 21 of the government under the TMA including the right to  
 22 order any change in the contract at any time, meant that  
 23 there really was no contract in the sense of an  
 24 agreement binding on the parties, then paragraph 1 of  
 25 Article 160 would apply, in that a 'contract' where one

1 party can change any terms at will may not show an  
 2 'intention to create legal consequences'"  
 3 Just to be clear, and following the point we were  
 4 discussing earlier, when you say that the government had  
 5 the power to order any change in the contract at any  
 6 time, am I right that you don't mean that as a legal  
 7 conclusion?  
 8 A. Absolutely. It is a conclusion that follows from the  
 9 right of the president to dismiss the head of the bank  
 10 at any time.  
 11 Q. Because as a matter of Kazakh contract law, in order for  
 12 the TMA to be changed, that would need, would it not,  
 13 the consent of both the government and the National  
 14 Bank?  
 15 A. It would need their formal consent, yes.  
 16 Q. And the point you are making, as I understand it, is  
 17 that you consider that the National Bank would  
 18 inevitably, as a matter of practice, do whatever the  
 19 government told it to do?  
 20 A. Or that such proof could be shown or maybe if there was  
 21 an attempt, as you know, by lawyers for the Stati  
 22 parties to show some government interference, and I had  
 23 no idea what evidence they might try to produce and how  
 24 successful they might be.  
 25 Q. Again, just to be clear, and I should make it absolutely

1 clear that I am not agreeing with you that the bank  
 2 would follow what the government said, but I am not  
 3 going to ask you about that because you are here to give  
 4 evidence about the legal position, of course. Yes?  
 5 A. Yes.  
 6 Q. And as a matter of Kazakh law, the contract can only be  
 7 changed, can't it, with the consent of the  
 8 National Bank?  
 9 A. Yes, both parties have to sign an amendment.  
 10 Q. So it is right, isn't it, that unless the court were to  
 11 find some evidence of government interference or  
 12 something like that, outside the legal perspective,  
 13 there would be no basis for applying paragraph 1 of  
 14 Article 160, would there?  
 15 A. Yes, you would have to find in some way that there was  
 16 evidence that outside the legal perspective the bank in  
 17 fact was not free to refuse to sign it.  
 18 Q. Yes. Without that evidence, there would be no basis for  
 19 this court to decide that Article 160.1 would apply?  
 20 A. Yes, because the court can only decide on evidence that  
 21 is presented.  
 22 Q. You, of course, are not yourself giving any evidence  
 23 about whether the government does or does not interfere  
 24 with the actions of the National Bank?  
 25 A. No, that's a factual question.

1 Q. Can we turn, please, to the Trust Management Agreement  
 2 itself . For that we need to go back to the core bundle,  
 3 tab 1.  
 4 A. Yes, I have it .  
 5 Q. If you turn it to the first page, you see there is  
 6 a heading "Rights and obligations of the bank".  
 7 A. Yes.  
 8 Q. The first clause under that heading says that the bank  
 9 has the right to "possess, use and dispose of the fund  
 10 under the condition specified herein".  
 11 A. Yes.  
 12 Q. I am going to come back to that clause, if I may. Then  
 13 I wanted to ask you about clause 2.1.2, which says this :  
 14 "Within the rules of conducting investment  
 15 operations, independently carry out investments of the  
 16 Fund, including the transfer of the part of the fund  
 17 under management by external managers, and herewith  
 18 control over activities of the external rests with the  
 19 bank."  
 20 A. Yes.  
 21 Q. Where that clause says in the first line that the bank  
 22 has the right independently to carry out investments of  
 23 the Fund, that presumably means independently from the  
 24 government?  
 25 A. Yes.

1 Q. The rules of conducting investments ... which are  
 2 referred to in clause 2.1.2, are you familiar with those  
 3 rules?  
 4 A. Not completely, no.  
 5 Q. Can I ask you, because this again was dealt with by  
 6 Ms Moldabekova, to go back into file C at page 5,  
 7 paragraph 17.  
 8 A. Just a moment. (Pause)  
 9 Q. Do you have that?  
 10 A. Yes.  
 11 Q. Do you see at paragraph 17 she explains that the  
 12 National Fund investment operator rules were approved  
 13 and adopted by NBK's board in 2006?  
 14 A. Yes.  
 15 Q. I suggest those are the rules that are referred to in  
 16 the TMA, aren't they?  
 17 A. Yes.  
 18 Q. Yes. She goes on to say that the rules set parameters  
 19 for investments, permitted markets and so on, and she  
 20 says that the board amends the rules from time to time  
 21 and that the board takes into account the  
 22 recommendations of the consultative advisory body known  
 23 as the Council on Management of the National Fund when  
 24 the rules are amended. She says the council consists of  
 25 the president, the governor, the chair of the Senate,

1 the chairperson of the lower house of the parliament and  
 2 various other dignitaries .  
 3 A. Yes.  
 4 Q. So the position on the rules, as she explains it, is  
 5 that the rules are set, aren't they, by the National  
 6 Bank itself?  
 7 A. Well, they weren't set in 2001. I guess it refers to  
 8 rules to be created in 2006.  
 9 Q. Yes.  
 10 A. And we have a factual question, which I am not going to  
 11 comment on, what takes into account the recommendations,  
 12 how strong she would be testifying and be cross-examined  
 13 on what "taking into account" meant.  
 14 Q. She has already been cross-examined and the court has  
 15 heard her evidence. I am not asking you to comment on  
 16 it .  
 17 If what she says is right and if what she says is  
 18 accepted, then the position is that the rules, the  
 19 investment rules, are adopted by the National Bank  
 20 itself , with the president having a consultative role .  
 21 A. That is what she said. Again, I don't know what the  
 22 de facto situation , and I shouldn't comment on it, to  
 23 what extent she takes into account what the president  
 24 says.  
 25 Q. Can we go back to the TMA in the core bundle.

1 Still on 2.1.2, on the first page of that. Now,  
 2 that provides, at the end of 2.1.2, that control over  
 3 the activities of external managers rests with the bank.  
 4 So it is right, isn't it, that in this case, when  
 5 the National Bank engaged BNYM under the GCA, control  
 6 over the activities of BNYM rested with the National  
 7 Bank and not with the government?  
 8 A. It was required to control the activities . It was  
 9 required by the relevant provisions of the Civil Code on  
 10 delegation of management activities and by the contract  
 11 to exercise control .  
 12 Q. This contract says, doesn't it, that control over the  
 13 activities of BNYM would have rested with the National  
 14 Bank?  
 15 A. There is a question of interpreting "rest with", whether  
 16 this means they must control. Can I look at the Russian  
 17 of this provision?  
 18 Q. You can. You will find it, I think, in F1 at page 14.  
 19 A. Just a second. I will look at the Russian. It says  
 20 (Russian spoken), something like it's assigned to the  
 21 National Bank or it's imposed on the National Bank.  
 22 Q. Okay.  
 23 A. Yes, I think it is a bit ambiguous whether it means they  
 24 have the sole right to control or whether the Russian  
 25 means that they have the obligation to control but not

1 necessarily to the exclusion of other people.  
 2 I think the English which you seem to interpret as  
 3 meaning exclusive, that the Russian doesn't necessarily  
 4 mean "exclusive", and that is a question of  
 5 interpretation .  
 6 Q. Can we at least agree on this, Professor Maggs: there is  
 7 nothing else in the TMA which indicates that the  
 8 government has any right to exercise control over the  
 9 activities of external managers?  
 10 A. Yes, that is true.  
 11 Q. If you look -- and we can see that, because if you look  
 12 at 2.2.2; do you see that?  
 13 A. Yes.  
 14 Q. The bank has the obligation to inform the government of  
 15 choosing each external manager and the custodian.  
 16 A. Yes.  
 17 Q. So the government has a right to be told who it is .  
 18 A. Yes.  
 19 Q. But there is nothing in the agreement that says the  
 20 government has any right to either approve the choice or  
 21 to control the activity of the manager.  
 22 A. No.  
 23 Q. Right. So can we now go back to 2.1.1 on this same  
 24 page.  
 25 A. Yes.

1 Q. That provides that the bank has the right to possess,  
 2 use, and dispose of the fund under the conditions  
 3 specified herein, and that expression "possess, use and  
 4 dispose", that reflects , doesn't it, the right that  
 5 a trust manager has, under the general law, in relation  
 6 to assets under trust management?  
 7 A. Yes.  
 8 Q. That expression "possess, use and dispose" appears in  
 9 the general law as well.  
 10 A. Yes. And the general law, it also allows basic  
 11 conditions on those, right .  
 12 Q. Now, can I ask you about one of your comments on  
 13 Professor Suleimenov's report. If in the D file you go  
 14 to page 72 --  
 15 A. Okay, just a moment.  
 16 Q. Page 72 at D1. Do you see paragraph 52(1) of  
 17 Professor Suleimenov's report?  
 18 A. Okay. Which tab am I in in D1?  
 19 Q. I am sorry, I am looking at the English, but tab 2 is  
 20 the English.  
 21 A. Tab 2 of Professor Suleimenov's report.  
 22 Q. Tab 2 of file D.  
 23 A. Yes.  
 24 Q. Paragraph 52.  
 25 A. Page D/72, yes.

1 Q. Yes. He says this :  
 2 "As I explain above, trust management confers upon  
 3 the trust manager the right to possess, use and dispose  
 4 of the relevant property. The trust manager's rights  
 5 operate to the exclusion of the founder who while the  
 6 trust management lasts has no right to possess, use or  
 7 dispose of the entrusted assets (except in the way, if  
 8 any, provided for in the agreement ...)."  
 9 Then your comment on that we find in the joint  
 10 statement at page 182 of the same file .  
 11 A. Yes.  
 12 Q. At paragraph 7.2.  
 13 There you say in response to that paragraph that you  
 14 disagree with the provisions of paragraph 52(1):  
 15 "Paragraph 52(1) fails to state that the founder of  
 16 entrusted management at all times has ownership of the  
 17 property subject to entrusted management, including all  
 18 types of property as described in Article 115."  
 19 Then you say this :  
 20 "Paragraph 52(1) ignores the provisions of the TMA,  
 21 whereby the Republic of Kazakhstan retains important  
 22 rights of disposition of property under entrusted  
 23 management and the rights to terminate entrusted  
 24 management at any time."  
 25 What I wanted to do, Professor Maggs, just focusing

1 on that statement that the Republic of Kazakhstan  
 2 retains important rights of disposition of the property,  
 3 if we can go back to the TMA in the core bundle, could  
 4 you identify which provisions of the agreement you were  
 5 referring to when you say that the Republic of  
 6 Kazakhstan retains important rights of disposition of  
 7 the property?  
 8 A. Okay. 2.2.5.  
 9 Q. Right.  
 10 A. Requires conducting money transfers.  
 11 Q. Right.  
 12 A. Which means that it has to take property that is under  
 13 entrusted management and either transfer money or sell  
 14 stock or bonds to raise money and transfer it . In  
 15 addition, the president can always cancel the agreement  
 16 at any time.  
 17 So the value of the property, or in the case of the  
 18 cancellation of the agreement the property itself , is  
 19 going to go to the government, as the government  
 20 directs .  
 21 Q. We will come to cancellation and termination in  
 22 a moment. I am just focusing for a moment on your  
 23 statements that the contract terms give the Republic of  
 24 Kazakhstan important rights of disposition over the  
 25 property. As I understand it, the provision you say

1 that does that is 2.2.5.  
 2 A. Yes.  
 3 Q. Now 2.2.5 simply says that the National Bank has, in  
 4 certain circumstances, an obligation to conduct or make  
 5 a transfer of money back into the Republic budget. And  
 6 Ms Moldabekova told us when she gave evidence that that  
 7 would be done by selling assets and making a local  
 8 currency payment.  
 9 A. Yes.  
 10 Q. Does that sound right?  
 11 A. That sounds right.  
 12 Q. So I suggest to you 2.2.5 is not giving the government  
 13 any rights of disposition over the property in the Fund.  
 14 All it is doing is saying that in certain circumstances  
 15 the government can withdraw money out of the Fund and  
 16 back into the budget.  
 17 A. As much as it needs under those criteria .  
 18 Q. It doesn't have, under this contract, any  
 19 specific rights of disposition had over the  
 20 National Fund assets --  
 21 A. That is going to force disposition of assets. It may  
 22 not force disposition of these particular assets, but  
 23 some assets will have to be liquidated in order to do  
 24 this.  
 25 Q. Just to be clear, when you say the government has

1 important rights of disposition, what you mean is that  
 2 if a payment out of the Fund has to be made, that may  
 3 result in assets being sold.  
 4 A. Yes.  
 5 Q. That is what you meant in the joint statement?  
 6 A. Yes.  
 7 Q. Now, the other point you made in the joint statement and  
 8 the point, Professor Maggs, you just made to me now, is  
 9 that you say that the president could end the trust  
 10 arrangement.  
 11 A. Yes.  
 12 Q. And if it were ended, then obviously all the assets  
 13 would have to be sold. I just wanted to ask you --  
 14 A. No, they would not have to be sold. All the assets  
 15 remained at all times the property of the Republic. If  
 16 it were ended, they would still be the property of the  
 17 Republic.  
 18 Q. As I understand it, you are saying the reason that the  
 19 government retains a right of disposition over the  
 20 assets is because the president could terminate this  
 21 arrangement.  
 22 A. As soon as it terminated it, it could keep the assets or  
 23 sell them in any combination it wished.  
 24 Q. I just want to ask you about the termination.  
 25 A. It didn't have to be sold with connection with the

1 determination. What the government decided to sell upon  
 2 termination would be completely up to the government,  
 3 because it would hold all the rights .  
 4 Q. I just want to ask you, Professor Maggs, about your  
 5 opinion that the President of Kazakhstan could terminate  
 6 this agreement at any time. If I could just ask you to  
 7 look on the third page of the agreement, there are two  
 8 clauses dealing with termination, 7.3, and 7.4; do you  
 9 see that?  
 10 A. Yes.  
 11 Q. Clause 7.3 provides that the agreement runs for  
 12 20 years. Then if in the event of one month before  
 13 expiration neither of the parties notifies the other of  
 14 its intention to terminate the agreement, it is extended  
 15 for another term. Do you see that?  
 16 A. Yes.  
 17 Q. Then you see in paragraph 7.4, if the ... (break in  
 18 audio transmission) ... may be terminated only on the  
 19 basis of a decision of the president of the  
 20 Republic of Kazakhstan.  
 21 A. Yes.  
 22 Q. I think you understand, Professor, that the  
 23 interpretation of this agreement is ultimately a matter  
 24 for this court and not for the experts.  
 25 A. Yes.

1 Q. But just to be clear, do I understand that you read that  
 2 clause as giving the president the right to terminate  
 3 the agreement at any time?  
 4 A. That was the way I read it. As I recall,  
 5 Professor Didenko at some point read it the same way and  
 6 said he thought that was an unlawful clause. But  
 7 leaving that aside, that is the way I read it but it is  
 8 ultimately for his Lordship to decide.  
 9 Q. It is. Because it is fair to say, isn't it, that it  
 10 doesn't say in terms, does it, that the president can  
 11 terminate it at any time? It says that it can only be  
 12 terminated on the decision of the president.  
 13 A. Well, under the rules of interpretation we have to  
 14 interpret that in the context of the whole agreement.  
 15 And again, that's not my job.  
 16 Q. Can I just then ask you this. I think you mentioned  
 17 Professor Didenko.  
 18 A. Yes.  
 19 Q. That he had suggested that if this clause means that the  
 20 president could terminate at any time, then the clause  
 21 might well be unlawful.  
 22 A. Yes.  
 23 Q. And it would perhaps be surprising if the government and  
 24 the National Bank had anything to do with a contract  
 25 which contained an unlawful term, wouldn't it?

1 A. That would be surprising.  
 2 Q. Yes. So if your interpretation of this clause is right,  
 3 then it has a somewhat surprising result, doesn't it?  
 4 A. That is surprising and it also, I believe, would be an  
 5 abuse of right for the government to defend itself  
 6 against a creditor by saying: we signed an invalid  
 7 clause.  
 8 Q. Right. If the clause means, if the clause means that  
 9 either party can terminate up to 20 years but only if  
 10 the president also agrees, then there wouldn't be any  
 11 problem about lawfulness, would there?  
 12 A. In that case the president would not have a right to  
 13 terminate at any time; it would just be a discussion of  
 14 the termination procedures.  
 15 Q. Right. Now can we go back again to clause 2.1.1 on the  
 16 first page of the TMA where, again, that clause that  
 17 says that the bank has a right to possess, use and  
 18 dispose of the Fund. Now, I think you know,  
 19 Professor Maggs, that the present case that we are  
 20 concerned with at the moment is concerned principally  
 21 with certain bank accounts that were held at BNYM.  
 22 A. Yes.  
 23 Q. The right to possess, use and dispose of a bank account  
 24 would include, wouldn't it, a right to give payment  
 25 instructions to the bank?

1 A. Yes.  
 2 Q. And it would include the right to draw funds out of the  
 3 account?  
 4 A. Yes.  
 5 Q. And it would include the right to open and close the  
 6 account.  
 7 A. Yes.  
 8 Q. So while this trust management agreement is in force, it  
 9 is the National Bank that has the right to give  
 10 instructions on the bank accounts held at BNYM.  
 11 A. That is a question of interpreting the GCA, and I am not  
 12 an expert in English law.  
 13 Q. I'm only asking you to look at matters from the  
 14 perspective of this agreement. I think you just agreed  
 15 with me that the right to possess, use and dispose of  
 16 a bank account would include a right to give payment  
 17 instructions on it, and the point I am making is that --  
 18 A. Under Kazakh law, if this was an account in a private  
 19 bank in Kazakhstan the owner of the account could give  
 20 instructions or a payment order for money transferred.  
 21 The effect of the GCA is something I can't comment on.  
 22 Q. Leave the GCA aside. You agreed with me that the right  
 23 to possess, use and dispose of the bank account would  
 24 include the right to give instructions on the bank  
 25 account, and those rights, under this agreement, belong

1 to the National Bank, don't they?  
 2 A. They didn't belong to the National Bank; they were  
 3 administered by the National. They were exercised by  
 4 the National Bank in its capacity to exercise the rights  
 5 of the Republic of Kazakhstan. When -- if it opened  
 6 a bank account in a private bank in Kazakhstan for the  
 7 National Fund, for some money from the National Fund, it  
 8 would be exercising these rights, which are rights of  
 9 the Republic that are exercised by the entrusted  
 10 manager.  
 11 Q. Professor Maggs, this agreement says that the bank has  
 12 the right to possess, use and dispose of the Fund?  
 13 A. That is true, because those powers are given to it by  
 14 the contract of entrusted management; but it is not  
 15 disposing of its own funds, it is disposing of the funds  
 16 of the entrusted manager -- of the founder of the  
 17 entrusted manager.  
 18 Q. Professor Maggs, I am not asking you about whose funds  
 19 they are, I am just asking a simpler question, which is:  
 20 that under this agreement the National Bank is given the  
 21 right to possess, use and dispose of the Fund.  
 22 A. Under this agreement, in accordance with the agreement,  
 23 for the purposes of this agreement, under this agreement  
 24 the National Bank, under the law of Kazakhstan, can open  
 25 an account in a private bank in Kazakhstan and put some

1 of the money it was administering in it, and exercise  
 2 the normal powers of the holder of the bank account.  
 3 Q. And for as long as the trust management agreement is in  
 4 force, the government does not have the right to  
 5 possess, use and dispose of the bank account.  
 6 A. Under the law of Kazakhstan, only the party legally  
 7 authorised to -- only a party legally authorised to do  
 8 so; and to the extent the exercise of these powers was  
 9 given to the bank, only it could exercise those rights  
 10 with respect to an account at a private bank in  
 11 Kazakhstan.  
 12 Q. So in relation to a private bank account, for as long as  
 13 this agreement is in force the National Bank has the  
 14 right to possess, use and dispose of the bank account,  
 15 and the government does not have the right to possess  
 16 use and dispose of the bank account.  
 17 A. In a private bank in Kazakhstan.  
 18 Q. In relation to any bank account.  
 19 A. Well, I can't comment on bank accounts in other  
 20 countries, because every country has a different  
 21 contract law, banking law, agency law.  
 22 Q. But you would agree that if you were dealing with  
 23 a Kazakh bank account, the right to possess, use and  
 24 dispose of the bank account would be the right of the  
 25 bank and not the right of the government for as long as



1 its agreement was in force.  
 2 A. As long as it's in force, yes.  
 3 MR JUSTICE TEARE: Could I just ask, is there an applicable  
 4 law clause in the TMA, Mr Quest?  
 5 MR QUEST: There is, my Lord. You will find it at --  
 6 I thought there was. I don't think there is any dispute  
 7 it is governed by the law of Kazakhstan.  
 8 MR JUSTICE TEARE: I had also thought there was an  
 9 applicable law clause, no doubt I have been told, but  
 10 I haven't been able to find it.  
 11 MR QUEST: No.  
 12 MR JUSTICE TEARE: But it is common ground, is it, that the  
 13 applicable law is Kazakh law.  
 14 MR QUEST: It is 6.1, my Lord. In case of disagreement the  
 15 parties are obliged to take all necessary steps to  
 16 resolve them in accordance with the legislation of the  
 17 Republic of Kazakhstan.  
 18 MR JUSTICE TEARE: Right. So the true construction of this  
 19 agreement is, what, a matter of Kazakh law?  
 20 MR QUEST: To the extent that there are any special rules of  
 21 interpretation then one looks to Kazakh law for them.  
 22 If the only question --  
 23 MR JUSTICE TEARE: I haven't been given any special rules,  
 24 have I?  
 25 MR QUEST: No, you haven't been given any, and therefore

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1 what the words mean is simply a question for  
 2 your Lordship.  
 3 MR JUSTICE TEARE: Right, I see. Thank you.  
 4 MR QUEST: The conclusion that while the agreement continues  
 5 the government does not have the right to possess, use  
 6 and dispose of bank accounts, is also consistent,  
 7 Professor Maggs, with the general law on trust  
 8 management, isn't it?  
 9 A. That's it. Trust management, the founder can delegate  
 10 these rights or delegate them with express limitations  
 11 --  
 12 Q. Right ...  
 13 A. -- on the terms of the contract and their  
 14 interpretation.  
 15 Q. I had in mind, Professor Maggs, if you go to D/139 in  
 16 your report, do you see you have set out Article 886 of  
 17 the chapter on Entrusted Management of Property?  
 18 A. Yes. Just a moment. (Pause) Yes.  
 19 Q. I am sorry, I have a wrong reference. Would you just  
 20 give me one moment. (Pause)  
 21 I will find the reference in a moment. But perhaps  
 22 you can agree this it is right, isn't it, that whilst  
 23 a TMA is in effect the founder of the trust has no right  
 24 to take any action in respect of the property?  
 25 A. Except those he has reserved in the agreement.

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1 Q. Exactly so. So unless he has reserved some right of  
 2 disposition in the agreement, the founder has no rights  
 3 or can't exercise any rights or take any action in  
 4 relation to the property?  
 5 A. Yes.  
 6 Q. So in relation to bank accounts it is right to say,  
 7 isn't it, that whilst this agreement is continuing the  
 8 Republic of Kazakhstan does not have any relevant rights  
 9 in the bank accounts at all?  
 10 A. It is the owner of all the rights in the bank account,  
 11 but it has given up management rights to the National  
 12 Bank of Kazakhstan.  
 13 Q. It is not the owner --  
 14 A. The owner of bank accounts remain the property of the  
 15 Republic of Kazakhstan at all times. It has authorised  
 16 the National Bank to deal with these accounts and  
 17 exercise these rights.  
 18 Q. If it is an owner it is an owner who can't exercise any  
 19 right of possession, any right of use, or any right of  
 20 disposal over the asset?  
 21 A. Well, that is quite common when an owner gives over  
 22 management of his property to an exclusive agent, to  
 23 give up all the rights to the agent, because often the  
 24 agent knows how to do it better than the owner.  
 25 I don't see the relationship of hiring someone to

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1 manage your property to the question of ownership;  
 2 a good manager may want a lot of management powers,  
 3 particularly if they are rewarded on the results of the  
 4 management.  
 5 Q. But it is not just management. In this arrangement, in  
 6 relation to bank accounts, the RoK have given up all  
 7 rights, including the rights of disposition in relation  
 8 to those assets; it has not retained any rights at all,  
 9 has it?  
 10 A. Well, it has given the National Bank the right to  
 11 exercise these rights with respect to bank accounts that  
 12 are its property. It has not given up the rights; it  
 13 has said that the National Bank may exercise these  
 14 rights.  
 15 Q. But the RoK, as matters stand, cannot exercise any right  
 16 or take any action in relation to bank accounts in the  
 17 name of the National Bank of Kazakhstan that are part of  
 18 the National Fund?  
 19 A. That is because it might be in violation of the contract  
 20 if it did it. It's not that it is not the -- the rights  
 21 to its property, it has contracted to give certain  
 22 rights under Kazakh law to the National Bank.  
 23 Q. But to be clear, under Kazakh law the RoK would have no  
 24 right to go to Bank of New York Mellon and take money  
 25 out of the accounts?

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1 A. Well, if the Bank of New York Mellon founded  
 2 a subsidiary as a Kazakh licensed bank, in that case it  
 3 would have no right to take the money out of the Kazakh  
 4 licensed bank, BNYM Almaty, or whatever it would be  
 5 called, or any other private bank. Under Kazakh law on  
 6 banking it would have no right because those rights had  
 7 been assigned to the entrusted manager.  
 8 The day the agreement terminates those rights which  
 9 were always the property of the Republic could be  
 10 exercised by the Republic. It has temporarily given up  
 11 those rights; temporarily given up how it exercised  
 12 those rights.  
 13 Q. Let's try and make this a little bit simpler. Would you  
 14 agree with this: you are not suggesting, are you, that  
 15 for as long as the trust management agreement continues  
 16 the Republic of Kazakhstan has any right in Kazakh law  
 17 against Bank of New York Mellon in relation to these  
 18 bank accounts?  
 19 A. Again, that contract is an English law contract.  
 20 I can't comment on it.  
 21 Q. I am not asking you to comment on --  
 22 A. If the bank had opened a Kazakh subsidiary that was say  
 23 a joint stock company in Kazakhstan, and they had signed  
 24 a contract of bank account with the entrusted manager as  
 25 entrusted manager, then the only person who could

1 exercise those rights -- the rights would still be the  
 2 property of the Republic -- but the only person who  
 3 could exercise it would be the NBK during the duration  
 4 of the entrusted management agreement.  
 5 Q. So it is no part of your opinion, is it,  
 6 Professor Maggs, that in this case the  
 7 Republic of Kazakhstan has some right in Kazakh law  
 8 against Bank of New York Mellon?  
 9 A. Kazakh law includes a set of conflicts rules, one of  
 10 which says if you have a choice of law clause for  
 11 foreign law then that shall be applied. But I don't  
 12 know how this court is going to deal with that rule.  
 13 But I am not going to comment on English law, because  
 14 I can't.  
 15 Q. No, I am not asking you to comment on English law. But  
 16 just to be clear, it is no part of your opinion that the  
 17 Republic of Kazakhstan has some right in Kazakh law  
 18 against the Bank of New York Mellon?  
 19 A. I didn't discuss that issue.  
 20 Q. No. Just before we leave --  
 21 MR JUSTICE TEARE: Mr Quest, on the question of time if we  
 22 are going to have a break would this be a convenient  
 23 moment?  
 24 MR QUEST: Could you just give me two more minutes, my Lord,  
 25 and then it would be a natural break?

1 MR JUSTICE TEARE: Of course.  
 2 MR QUEST: Thanks.  
 3 Just to finish this point, Professor Maggs, do you  
 4 have D2?  
 5 A. What was the volume?  
 6 Q. D2 at page 455.  
 7 A. What tab is that?  
 8 Q. Tab 27. Do you have that?  
 9 A. Yes, just a minute. What page?  
 10 Q. Page 455. You should have Article 188 of the Civil  
 11 Code.  
 12 A. Yes.  
 13 Q. Yes. You see the title is "The definition and content  
 14 of the right to own".  
 15 A. Yes.  
 16 Q. You will see in paragraph 2 the code provides in  
 17 translation:  
 18 "The owner shall have the rights to possess, use and  
 19 dispose of his assets."  
 20 Do you see that?  
 21 A. Yes.  
 22 Q. Those were the rights that were transferred to the  
 23 National Bank of Kazakhstan under the Trust Management  
 24 Agreement?  
 25 A. Those rights of the owner were not transferred. The

1 National Bank of Kazakhstan was empowered to exercise  
 2 those rights, which remained the rights of the owner,  
 3 but they are exercised by the entrusted manager.  
 4 Q. They could be exercised by the entrusted manager and  
 5 could not be exercised by the government?  
 6 A. Except to the extent otherwise provided in the contract.  
 7 MR QUEST: Thank you, my Lord, that would be a convenient  
 8 moment for a short break.  
 9 MR JUSTICE TEARE: Thank you. Then we will break for five  
 10 minutes.  
 11 A. Thank you.  
 12 (3.39 pm)  
 13 (Short break)  
 14 (3.44 pm)  
 15 MR JUSTICE TEARE: If we are all back we can start.  
 16 MR QUEST: Very good.  
 17 Can we turn next to the question of abuse of rights  
 18 and can I ask you, please, to turn to page 120 in D1,  
 19 paragraph 54 of your report.  
 20 Here at paragraph 54 you have set out Article 885 in  
 21 the Civil Code, which provides that:  
 22 "The levy of execution from the debts of a founder  
 23 on property transferred by him into trust administration  
 24 is not allowed, with the exception of the cases provided  
 25 by Article 1081 or in case of bankruptcy."

1 So there are two exceptions when you can levy  
 2 execution under Kazakh law on property in trust  
 3 management; one is bankruptcy and one is 1081, which is  
 4 the death of the founder.

5 I think you have got your microphone muted,  
 6 Professor.

7 A. Sorry.

8 Q. I think you agree with me on that point?

9 A. Yes, yes.

10 Q. Of course neither of those exceptions can apply to  
 11 Kazakhstan because it can't either die or become  
 12 bankrupt?

13 A. Right.

14 Q. What you take from that we see first of all if we can go  
 15 to D/124, paragraph 66. You say:

16 "Given the large amount of assets put into entrusted  
 17 administration the RoK must have known that it would  
 18 create the opportunity to argue that the provisions of  
 19 paragraph 4 of Article 885 would protect the National  
 20 Fund property from claims of creditors, by ordering the  
 21 National Bank to sign a contract of entrusted management  
 22 with the Republic that made no provision for payment of  
 23 creditors out of the property."

24 Then at paragraph 68 you say:

25 "By putting a substantial portion of the assets of

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1 its State treasury into entrusted management the  
 2 Republic has attempted to immunise a substantial portion  
 3 of the State treasury from attachment for payment of its  
 4 debts."

5 Now this may just have been the way it was drafted,  
 6 Professor, but I read those paragraphs as you saying  
 7 that it was in fact the purpose or intention of the  
 8 Republic in putting the assets into trust management to  
 9 shield State assets from the claims of creditors. Is  
 10 that your evidence?

11 A. Well, it is a dual evidence.

12 One, the Constitution does not create any  
 13 exceptions. So in that part you didn't read in 68,  
 14 contrary to paragraph 1 of 113, whether or not there was  
 15 an intention, the Constitution says the assets of the  
 16 President shall be available.

17 But it must have consulted good lawyers who would  
 18 have told them this, and I think Professor Suleimenov  
 19 quoted Professor Didenko, or Professor Didenko said that  
 20 the effect of this would be that the assets could not be  
 21 attached under Kazakh law.

22 Q. Let's leave aside the effect of it for a moment. I am  
 23 just asking you about the purpose of it.

24 A. Well --

25 Q. Let me ask you the question first.

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1 A. Well, it have to be an intent and a purpose. If you  
 2 know it would have this effect you have an intent. If  
 3 that is your sole purpose that is one thing. If it is  
 4 a purpose it is another. If it is not the purpose at  
 5 all then you still have an intent but it is not your  
 6 purpose to do that.

7 Q. Were you provided with any factual material relating to  
 8 the purpose or intent of the RoK when it created the  
 9 National Fund in 2001?

10 A. I wasn't provided with any separate material other than  
 11 the fact that the plain language of the statute would  
 12 seem to exclude creditors, quite.

13 Q. But I am just trying to understand what the factual  
 14 basis is for your opinion that the purpose or intent of  
 15 this arrangement was to shield --

16 A. There is also an issue of interpretation which is  
 17 ultimately for the English court. What clause 7.2 of  
 18 the TMA means.

19 Q. I am not asking you about the interpretation, I am  
 20 asking: what is the factual basis for your opinion --

21 A. It is clear the parties as a matter of fact signed  
 22 clause 7.2.

23 Q. Please let me finish the question first, otherwise it  
 24 get tangled on the transcript.

25 A. Yes.

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1 Q. The question was: what is the factual basis for your  
 2 opinion that the purpose of this arrangement was to  
 3 shield assets from creditors?

4 A. My opinion was based on two things. (1) the  
 5 Constitution, which implies that all the assets of the  
 6 treasury should be available, and (2) the rather obvious  
 7 legal effect of the combination of the clause preventing  
 8 attachment of assets by creditors with the fact that the  
 9 State cannot either go bankrupt or die.

10 Q. Right, and --

11 A. Separate things of which somebody said in an email to  
 12 somebody saying, "Hey, here is a great way to conceal  
 13 assets from creditors", nothing like that.

14 Q. So this inference you're asking the court to draw is an  
 15 inference simply from the fact that the effect of this  
 16 arrangement would be to prevent execution under Kazakh  
 17 law, that that must have been its purpose?

18 A. And must have been -- there's a difference between  
 19 purpose and intent. It must have been their intent,  
 20 because they have must have had -- when you are dealing  
 21 with \$20 billion you must have had good legal advice and  
 22 they must have known about the provision of entrusted  
 23 management.

24 Q. I mean, Ms Moldabekova's evidence, and we can look at it  
 25 if you like, was that the National Fund was structured

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1 in this way following the way in which the Norwegian oil  
 2 fund was structured. Did you know that?  
 3 A. Well, I actually heard her say that, but I know nothing  
 4 about the Norwegian oil fund or whether it is insulated  
 5 from creditors of the country of Norway.  
 6 Q. If she's right, and that was why the fund was structured  
 7 in that way, then there would be no basis, would there,  
 8 for the court to infer that it was done to shield assets  
 9 from creditors?  
 10 A. Well, that raises questions of Norwegian law which  
 11 I certainly can't answer, of whether an agreement that  
 12 shields assets from creditors is in fact valid under  
 13 Norwegian law.  
 14 Q. You are not suggesting you have seen any factual  
 15 material that the purpose of this arrangement was to  
 16 shelled assets from creditors?  
 17 A. No, I am talking about they must have known what the  
 18 effect would be.  
 19 Q. Right. Can we look down to paragraph 70 in your report,  
 20 D/124.  
 21 A. Yes.  
 22 Q. I think you explain that one of the reasons for your  
 23 conclusion was based on clause 7.2 of the TMA. What you  
 24 say there, you see in paragraph 69 you set out  
 25 clause 7.2, which says that:

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1 "The Fund transferred to entrusted management is  
 2 free from the claims of third parties."  
 3 A. Yes.  
 4 Q. Yes? And it is right, isn't it, that it is  
 5 a requirement of Kazakh law that the TMA must specify  
 6 the rights of third parties to the property being  
 7 transferred?  
 8 A. Yes. Yes.  
 9 Q. So that is undoubtedly why this clause appeared in the  
 10 TMA.  
 11 A. Yes.  
 12 Q. Now, at paragraph 70 you say:  
 13 "If clause 7.2 means that assets ... were free from  
 14 claims of third parties while the assets were in the  
 15 State treasury before they were transferred into  
 16 entrusted management, it is untrue, to the extent that  
 17 there were outstanding unpaid claims against the  
 18 Republic, such as unpaid investments international  
 19 arbitration awards, since such outstanding claims were  
 20 against the State treasury as a whole."  
 21 Just to be clear, you are not suggesting, are you,  
 22 that money or assets paid to the National Fund by the  
 23 Republic of Kazakhstan were already subject to  
 24 attachment in favour of a third party?  
 25 A. Well, the money in the National Fund or other assets in

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1 the National Fund, before it was put into entrusted  
 2 administration, were part of the treasury of the  
 3 Republic of Kazakhstan, and under the Constitution the  
 4 entire treasury is subject to claims of third parties.  
 5 I am suggesting that this is the actual statement by  
 6 the Republic, but I'm questioning whether it is a true  
 7 statement.  
 8 Q. All right. So it's your opinion that this statement  
 9 would be false if there were unpaid debts of the  
 10 government.  
 11 A. If there were unpaid debts of the government, the whole  
 12 treasury is subject to those claims.  
 13 Q. Can we go to paragraph 71, please. Perhaps you could  
 14 just read paragraph 71 to yourself, just to remind  
 15 yourself of what it says. (Pause)  
 16 A. Yes, I have read it.  
 17 Q. You say:  
 18 "Relying on this clause [that is 7.2] and  
 19 Article 885(4) of the Civil Code in the current  
 20 litigation in an attempt to shield its property from  
 21 creditors is a clear abuse of right ..."  
 22 Now --  
 23 A. This is all hypothetical on what -- it's the result of  
 24 a hypothetical interpretation of clause 7.2. Again,  
 25 clause 7.2 is not for me to interpret; I am discussing

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1 various hypothetical interpretations.  
 2 Q. I was just going to ask you: as far as I am aware, no  
 3 one is relying on clause 7.2 in this litigation, in fact  
 4 so far as I am aware you are the only person who has  
 5 ever mentioned clause 7.2; does that sound right to you?  
 6 A. I have not seen clause 7.2 mentioned anywhere else.  
 7 Q. No, so no one is in fact relying on clause 7.2 as  
 8 a defence in this action.  
 9 A. I have not seen anyone relying on it, but my assignment  
 10 was to discuss all possible areas of the law that might  
 11 apply and I discussed them.  
 12 Q. So this is a hypothetical conclusion.  
 13 A. Hypothetical -- it is a conclusion of law based on  
 14 various hypothetical interpretations of 7.2.  
 15 Q. As far as Article 885(4) of the Civil Code is concerned,  
 16 that concerns enforcement under Kazakh law in  
 17 Kazakhstan, does it not?  
 18 A. Well, it also concerns questions, which I can't answer,  
 19 of whether other countries would apply that by way of  
 20 conflict of laws.  
 21 Q. Right. Are you aware of anyone having relied on Article  
 22 885(4) in the Belgian proceedings?  
 23 A. I am not aware of anyone having relied one way or the  
 24 other upon it.  
 25 Q. So again, this is a hypothetical conclusion, is it?

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1 A. A hypothetical situation , yes.  
 2 Q. Just in paragraph 71 you say that such reliance would be  
 3 completely analogous to the attempts of heirs to  
 4 simultaneously enjoy their inheritance and at the same  
 5 time protect it from creditors by abuse of legal  
 6 formalities .  
 7 In support of that analogy you relied , I think , on  
 8 two cases, and I just want to briefly ask you about  
 9 them.  
 10 The first of them you will see set out in D/174,  
 11 which is the case of a Mr Miskevich. Yes?  
 12 A. Just a moment, let me open that up.  
 13 Q. D/173 it starts .  
 14 A. Okay.  
 15 Q. Just to summarise, the background to this case, is this  
 16 right, is that in Kazakh law when someone dies and  
 17 leaves an inheritance the heir has the choice either to  
 18 accept the inheritance or not to accept it, but if they  
 19 accept the inheritance they are liable for the  
 20 testator's debts up to the value of the inheritance; is  
 21 that right?  
 22 A. Yes.  
 23 Q. What had happened in this case that we see in front of  
 24 us is that Mr Miskevich had accepted the inheritance of  
 25 a flat from his father which was mortgaged. Then if you

1 turn over the page to D/174, do you see at the bottom of  
 2 that page the court explains in the penultimate  
 3 paragraph that Mr Miskevich was unwilling to legally  
 4 confirm the inheritance he had accepted, explained,  
 5 according to his own admissions, by his desire to avoid  
 6 the enforced collection of the pledged assets .  
 7 A. Yes.  
 8 Q. What had happened is that he had taken the inheritance  
 9 but then refused to legally confirm the inheritance, and  
 10 the creditors were complaining about that.  
 11 A. Yes. The creditors, they found it difficult to enforce  
 12 their claims since he was not owner of record on the  
 13 Land Registry of the particular property.  
 14 Q. The court in this case said that was an abuse because  
 15 you can't, as an heir, both take the property but then  
 16 refuse to register it .  
 17 A. Yes.  
 18 Q. Now, just so we understand what analogy there is with  
 19 our facts , who in the present case do you say is  
 20 analogous to Mr Miskevich?  
 21 A. The Republic of Kazakhstan.  
 22 Q. Right. And what is it the Republic of Kazakhstan has  
 23 done that is analogous to Mr Miskevich taking his  
 24 inheritance but refusing to confirm it?  
 25 A. Well, Mr Miskevich took the property, refused to confirm

1 it , and didn't go through the necessary legal  
 2 formalities to confirm it . The Republic of Kazakhstan  
 3 put the property into entrusted administration and there  
 4 appears now to be an argument that that prevents the  
 5 creditors from getting to it . So in a way it did more  
 6 than Miskevich. Miskevich merely didn't file the proper  
 7 papers at the Land Registry. The Republic actively put  
 8 the property in a position where it would be hard to  
 9 attach, or at least where there could be arguments that  
 10 it couldn't be attached.  
 11 Q. So again, this analogy, or the premise of all of this ,  
 12 is that the Republic has deliberately put money into the  
 13 National Fund in order to shield it from creditors .  
 14 A. Well, it must have known, according to your theory of  
 15 law of Kazakhstan, that this would be the effect --  
 16 Q. Let's --  
 17 A. -- due to the actual language of the section on  
 18 shielding from creditors in the Civil Code.  
 19 Q. It is not my theory, it is your theory. What I am  
 20 suggesting to you is that the premise for this analogy  
 21 is that Kazakhstan has taken some active steps, by way  
 22 of putting money in the National Fund, in order to  
 23 shield claims from creditors .  
 24 A. Well, in both cases a party took active steps to enjoy  
 25 the benefits of the property but engaged in legal

1 formalities that, at least arguably, would protect it or  
 2 make it more difficult for creditors to claim.  
 3 Q. Mr Miskevich had an obligation to register the property,  
 4 didn't he, once he had inherited it?  
 5 A. He didn't have -- if there are no creditors it would  
 6 have been stupid not to register it, but he wouldn't  
 7 have any obligation to register it .  
 8 Q. With creditors, if he was going to take the property  
 9 then he had to register it .  
 10 A. He could not fail to register it . He could not, by  
 11 failure to register it, frustrate the claims of the  
 12 creditors .  
 13 Q. That is the analogy you say we should draw from this  
 14 case.  
 15 A. Yes.  
 16 Q. The other case, of Mr Ibrayev, that is essentially a  
 17 very similar case isn't it?  
 18 A. Very similar .  
 19 Q. It also involved an heir who took mortgage property and  
 20 then refused to register it .  
 21 A. Yes.  
 22 Q. Finally, can I just ask you about paragraph 51 on  
 23 page D/119.  
 24 A. Yes.  
 25 Q. You say:

1 "If Kazakhstan frustrated the collection of  
 2 a creditor's claim, when it could have satisfied the  
 3 claim by, for example, simply sending a notice of  
 4 termination ... the failure of Kazakhstan to send such  
 5 a notice would be an abuse of right under the law of  
 6 Kazakhstan. The remedy would be to give the creditor  
 7 access to the right."  
 8 Do I understand you to be saying that in some way  
 9 Kazakhstan or the President of Kazakhstan had some kind  
 10 of obligation to terminate the National Fund in order to  
 11 meet --  
 12 A. Under civil law the parties have the -- where the status  
 13 of a party is treated exactly like other parties, and  
 14 therefore would have the same sorts of obligations not  
 15 to engage in abuse of right, it has a further public law  
 16 obligation under the Constitution to make the treasury  
 17 available to creditors. And depending on the  
 18 interpretation of the presidential termination clause,  
 19 if the president could terminate it by just signing  
 20 a piece of paper, that is very similar to the heir just  
 21 registering the property by signing a registration  
 22 request and by filing the proper papers.  
 23 Q. I think we were told by Ms Moldabekova that the  
 24 National Fund has a value of some \$60 billion. Is it  
 25 your evidence that the President of Kazakhstan has

1 a constitutional obligation to collapse and terminate  
 2 the National Fund in this case? Is that your evidence?  
 3 A. I don't think the abuse of right depends on how much  
 4 money you have shielded from creditors, unless you  
 5 shield more money from creditors, the situation is less  
 6 different than if you shield less money from creditors.  
 7 Q. I am trying to understand what you are saying is the  
 8 obligation on the president.  
 9 A. The obligation is to sign a piece of paper that would  
 10 let the creditors access the property.  
 11 Q. Right, and you are saying, your evidence is that the  
 12 president has a legal obligation under Kazakh law to do  
 13 that.  
 14 A. I am saying that if we apply the Supreme Court decisions  
 15 by analogy, the fact that a lot more valuable property  
 16 was involved here is not relevant.  
 17 Q. Just to be clear, your evidence is that the president  
 18 has a legal obligation to terminate the National Fund in  
 19 this case?  
 20 A. In this case the president can the next day have the  
 21 government re-establish the National Fund, or it could  
 22 just use other money to pay the debt.  
 23 Q. But that is what you are saying. And what is the source  
 24 of that obligation, for the president to terminate the  
 25 National Fund?

1 A. The stripped back obligation is that it is abuse of  
 2 right to shield the money, and the more of your assets  
 3 you shield, the greater the abuse of right to shield  
 4 money from creditors.  
 5 Q. What provision of the code or the law requires  
 6 a president to do that?  
 7 A. The section on abuse of right as interpreted by the  
 8 Supreme Court.  
 9 Q. Again, if this court were to find, hypothetically, that  
 10 there is no evidence that the National Fund was set up  
 11 to shield the State from claims of creditors, then none  
 12 of these points would arise, would they?  
 13 A. Not necessarily. First, the constitutional point that  
 14 the whole treasury should be available. Second, even if  
 15 that was not the primary purpose, the fact that they --  
 16 if the court finds they must have known it would shield  
 17 it from creditors.  
 18 Q. That would be a finding that the court would have to  
 19 make.  
 20 A. Those would be the findings that would -- and in the  
 21 Supreme Court cases they didn't actually make it  
 22 registered, they said: we will treat it as if he had  
 23 registered, and we will give the creditor access to  
 24 satisfy his claims out of the property.  
 25 MR QUEST: Thank you, Professor Maggs, I don't have any more

1 questions.  
 2 A. Thank you.  
 3 Re-examination by MR SPRANGE  
 4 (4.11 pm)  
 5 MR SPRANGE: Professor Maggs, could you please take up your  
 6 supplemental report at paragraph 30. That is in tab 7  
 7 of the first of the D bundles.  
 8 A. Yes.  
 9 Q. Mr Quest asked you a number of questions about the TMA  
 10 and its significance with regard to the rights of the  
 11 government in terms of imposing decision on NBK.  
 12 You have listed in footnote 12 of paragraph 30  
 13 a number of addendums. Could you please explain what  
 14 they are and what you regard to be their significance?  
 15 A. Well, there are two kinds of addenda. One, where change  
 16 in the TMA, approved by the government and, as I said,  
 17 the chairman of the National Bank serves at the pleasure  
 18 of the president, and thus I would assume they will be  
 19 rubber stamped with his signature. Second, this concept  
 20 of the formation and use of funds, which is a concept  
 21 that is controlled and can be changed by the Government  
 22 of Kazakhstan.  
 23 Q. Okay. What is the legal genesis of the power exercised  
 24 in respect of the addendums that we see referred to in  
 25 paragraph 12 that you have exhibited to your

1 supplemental opinion?  
 2 A. There was a Presidential Decree and amendment to the law  
 3 of the National Bank saying that the National Bank was  
 4 required to conclude such an agreement.  
 5 Q. Is there any restriction on those powers with regards to  
 6 amendments to the TMA?  
 7 A. No.  
 8 Q. All right. Mr Quest asked you some questions about  
 9 abuse and I want to ask you this: for an abuse of right  
 10 to arise, do you need an act of commission, an act of  
 11 omission, or both?  
 12 A. Either.  
 13 Q. Are you aware, Professor Maggs, under Kazakh law, as to  
 14 whether there is a general right to terminate an  
 15 agreement?  
 16 A. There is not a general right to terminate an agreement.  
 17 There are rights to terminate an agreement in certain  
 18 situations, but there is no general right to terminate  
 19 an agreement unilaterally by one party. Both parties to  
 20 an agreement can terminate it at any time.  
 21 Q. So there is no fetter on a party's right to terminate an  
 22 agreement.  
 23 A. No, they may terminate it at any time, for any reason or  
 24 no reason.  
 25 Q. Are there, as far as you are aware, specific provisions

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1 relating to the termination of an entrusted management  
 2 agreement?  
 3 A. I would have to look at those provisions, but any  
 4 provision -- any contract can be terminated by the  
 5 parties under the law of Kazakhstan simply by agreeing  
 6 to terminate it.  
 7 Q. All right.  
 8 A. And an agreement may be terminated by operation of law,  
 9 as in the case of bankruptcy of the founder of entrusted  
 10 management.  
 11 Q. On that latter point, Professor Maggs, if you could take  
 12 up, please, D/141, which is one of the extracts from  
 13 your first report.  
 14 A. Okay. I have this page.  
 15 Q. Now a moment ago you provided us with some evidence  
 16 regarding the general right to terminate. In your  
 17 opinion, is there any real fetter on that general right  
 18 to terminate imposed by the specific provisions relating  
 19 to entrusted management of property under Article 891?  
 20 A. Okay, the general right is in paragraph 1, and then it  
 21 lists a number of other ones, grounds to terminate the  
 22 agreement.  
 23 Q. Just to be clear, do those provision fetter the general  
 24 right to terminate?  
 25 A. They incorporate the general right to terminate -- they

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1 incorporate the general grounds for termination, and on  
 2 those general grounds is the right of the parties to  
 3 amend or rescind their contract at any time.  
 4 MR SPRANGE: I see.  
 5 Thank you, my Lord, those are the questions in  
 6 re-examination.  
 7 MR JUSTICE TEARE: Thank you very much.  
 8 Thank you, Professor Maggs, for your evidence.  
 9 I think I have had the pleasure of reading your reports  
 10 in a great many cases over the years, so it has been  
 11 a pleasure to meet you, at any rate online.  
 12 A. I am happy the online trial worked amazingly well.  
 13 MR JUSTICE TEARE: I agree. Thank you very much.  
 14 A. Thank you, my Lord, for organising it.  
 15 Do you have more questions or am I released?  
 16 MR JUSTICE TEARE: Yes, you are released. Thank you very  
 17 much, Professor Maggs.  
 18 A. Thank you.  
 19 (4.18 pm)  
 20 Housekeeping  
 21 MR JUSTICE TEARE: So we adjourn until Wednesday at 10.30,  
 22 is that right?  
 23 MR MALEK: That is correct.  
 24 MR JUSTICE TEARE: Thank you. You will each send me your  
 25 written closing submissions both electronically and, if

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1 you can, physically, tomorrow.  
 2 MR MALEK: Yes, we, certainly in our team, were aiming to  
 3 get them done by 3.00 pm, so that will give you some  
 4 time to read them. So you will get them electronically  
 5 at 3.00 pm and then we will take steps to get it down to  
 6 your house as soon as possible after 3.00 pm.  
 7 MR JUSTICE TEARE: Right.  
 8 Does the same go for you, Mr Sprange?  
 9 MR SPRANGE: It sounds like a gauntlet, my Lord, so yes, we  
 10 will seek to do the same.  
 11 MR JUSTICE TEARE: Right. Have you agreed on length?  
 12 MR SPRANGE: We have not.  
 13 MR JUSTICE TEARE: The only reason I ask is that if  
 14 I receive the submissions at 3 o'clock and they are all  
 15 very, very long, I'm not sure that I will have had an  
 16 opportunity to read them all. But if they are of modest  
 17 length, perhaps I can.  
 18 MR SPRANGE: How would your Lordship define "modest" in  
 19 numbers?  
 20 MR JUSTICE TEARE: Well, how long were your opening  
 21 submissions?  
 22 MR SPRANGE: I believe most of them were just on 50 pages or  
 23 thereabouts.  
 24 MR JUSTICE TEARE: Are you contemplating more or less than  
 25 that?

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1 MR SPRANGE: Less, my Lord.  
 2 MR MALEK: Less, less, less, less, less, less.  
 3 MR JUSTICE TEARE: Very good then.  
 4 I look forward to that, and we will meet again at  
 5 10.30 on Wednesday.  
 6 Thank you all very much indeed. Thank you.  
 7 (4.20 pm)  
 8 (The hearing was adjourned until 10.30 am on Wednesday,  
 9 1 April 2020)  
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