SVEA COURT OF APPEAL	**DECISION**	Matter No.
Department 05	17 June 2020	ÖÄ 7709-19
Division 0502	Stockholm	

APPEALED DECISION
Nacka District Court's final decision of 5 July 2019 in case no. Ä 6686-17, Ä 6620-18, Ä 6339-18, Ä 4354-18, Ä 4353-18, Ä 2544-18, Ä 1977-18, Ä 1976-18, Ä 1859-18, Ä 1857-18, Ä 1223-18, Ä 1222-18, Ä 1221-18 and Ä 2543-18, see appendix A

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MATTER
Attachment

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DECISION OF THE COURT OF APPEAL

1. By reversal of the District Court's decision, the Court of Appeal annuls the Enforcement Agency's following decisions on attachment

- of 1 November 2017, decision number 12174654207,
- of 1 November 2017, decision number 12174652920,
- of 14 November 2017, decision number 12174759568,
- of 19 February 2018, decision number 1218367322,
- of 12 April 2018, decision number 12181151692,
- of 12 April 2018, decision number 12181151544,
- of 12 April 2018, decision number 12181150496,
- of 12 June 2018, decision number 12183170427,
- of 18 June 2018, decision number 12183207427, and
- of 20 September 2018, decision number 12184059371.

2. The Republic of Kazakhstan and The National Bank of Kazakhstan are discharged from the obligation to compensate the litigation costs of Ascom Group S.A, Anatoile Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd before the District Court.

3. Ascom Group S.A, Anatoile Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd are ordered to jointly and severally compensate

a) The Republic of Kazakhstan for its litigation costs before the District Court with USD 1,446,116 and SEK 30,807, of which USD 1,108,490 comprises costs for legal counsel. The amounts shall accrue interest pursuant to Section 6 of the Interest Act as from 5 July 2019 until the day of payment.
b) The National Bank of Kazakhstan for its litigation costs before the District Court with USD 1,428,897.50, GBP 8,039.92, KZT 8,473,175 and SEK 321,921, of which USD 1,118,897.50 comprises costs for legal counsel. The amounts shall accrue interest pursuant to Section 6 of the Interest Act as from 5 July 2019 until the day of payment.

4. Ascom Group S.A, Anatoile Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd are further ordered to jointly and severally compensate

a) The Republic of Kazakhstan for its litigation costs before the Court of Appeal in with USD 480,537 GBP 3,248 and SEK 19,061, of which USD 436,760 comprises costs for legal counsel. The amounts shall accrue interest pursuant to Section 6 of the Interest Act as from the day of the Court of Appeal's decision until the day of payment.
b) The National Bank of Kazakhstan for its litigation costs before the Court of Appeal with USD 874,849.16, GBP 3,248, and SEK 166,400, of which USD 629,152 comprises costs for legal counsel. The amounts shall accrue interest pursuant to Section 6 of the Interest Act as from the day of the Court of Appeal's decision until the day of payment.

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MOTIONS AND POSITIONS

The Republic of Kazakhstan (the Republic) and the National Bank of Kazakhstan (the National Bank) have requested that the Court of Appeal annul the attachment decisions falling within the scope of the appealed decision, discharge them from the liability to compensate Ascom Group S.A, Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd (the Investors) for their litigation costs before the District Court and instead order that the Investors compensate their litigation costs before that Court.

The Investors have disputed the requests.

The parties have requested compensation for litigation costs before the Court of Appeal.

GROUNDS

The Republic and the National Bank

The Republic and the National Bank (hereinafter, where applicable, jointly referred to as "Kazakhstan") have objected that there are bars at hand to the attachment of the property covered by the appealed decision. As grounds for the objection, they have in the main argued that the property does not belong to the Republic in the sense set forth in Chapter 4, section 17 of the Enforcement Code; as a first alternative and only with respect to the securities – that they are not located in Sweden; and as a second alternative that the property is covered by state immunity. In addition to the aforementioned, the Republic has as a third and final alternative argued that enforcement would violate *ordre public*.

The Investors

The Investors have disputed that any impediment to enforcement is at hand on any of the grounds invoked by the Republic or the National Bank. In the event that the Court of Appeal would find that the property is covered by state immunity, the Investors have

argued that the Republic and the National Bank have lost their right to claim immunity due to so-called abuse of rights.

THE EVIDENCE PRESENTED

Through a decision dated 3 February 2020, the Court of Appeal dismissed new evidence invoked by the Republic in support of its third alternative ground. The parties have submitted new legal opinions before the Court of Appeal. Aside from this, the evidence is largely the same as that before the District Court.

On the issue of state immunity, the Republic and the National Bank have invoked legal opinions issued by Professors Pål Wrange, Said Mahmoudi and Chester Brown, and the Investors have submitted legal opinions issued by Professors Ulf Linderfalk and Ingrid Wuerth.

REASONS FOR THE COURT OF APPEAL'S DECISION

The starting points for the Court of Appeal's review

By way of the decisions appealed to the District Court, the Enforcement Agency decided on attachments of property in the form of securities in securities accounts in Skandinaviska Enskilda Banken (SEB), claims for dividends on those securities as well as funds deposited to a cash account in the same bank. Nothing has been established to contradict that the claims for dividends and the funds deposited to the bank account are located in Sweden under enforcement law. The basis for the measures of constraint was an enforceable title in the form of a final and binding arbitral award rendered on 19 December 2013 by an arbitral tribunal at the Stockholm Chamber of Commerce in a case between the Investors and the Republic, through which the Republic was ordered to pay to the Investors a principal amount of just under USD 500 million plus interest (the arbitral award). The Republic challenged the arbitral award and also requested that the arbitral award be declared invalid. As legal ground for the request for invalidity, the Republic argued, amongst other things, that the arbitral award and the manner in which

it had arisen violated *ordre public*. Through its judgment of 9 December 2016 in case no. T 2675-14, the Court of Appeal rejected the Republic's requests. After the judgment had become final and binding, the Republic challenged the judgment arguing that a grave procedural error (Sw. *domvilla*) had occurred and applied for a new trial (Sw. *resning*), which applications were rejected by the Supreme Court. The Republic also filed a new request that the judgment be declared invalid and as a ground invoked, amongst other things, that the manner in which the arbitral award had arisen violated *ordre public*. In its decision of 9 March 2020 in case no. T 12462-19, the Court of Appeal concluded that it was barred from hearing the case on its merits because the subject matter of the dispute was the same as that in the earlier litigation, and so dismissed the Republic's case. That judgment may not be appealed. The attachment decisions named the Republic as debtor. Also the National Bank has appealed the attachment decisions and in its decision of 23 February 2018 in matter no. ÖÄ 11256-17, the Court of Appeal held that the National Bank was able to appear as a party in a court trial pursuant to Chapter 11, section 2, first paragraph, first sentence of the Code of Judicial Procedure.

In order for the Republic and the National Bank to be successful in their appeals, it is required that one of the invoked grounds create a bar to the attachment. Thus, if the evidence in the matter establishes that the property does not belong to Kazakhstan or that it is covered by state immunity, the attachments shall be lifted. The same applies if the measures of constraint violate *ordre public* as argued by the Republic. Moreover, as concerns the securities, the attachments shall be lifted if the evidence establishes that they are not located in Sweden.

The Court of Appeal starts its review of the matter by determining whether the property is covered by state immunity or not. In this review, the Court of Appeal makes the assumptions that also the securities are located in Sweden and that all of the property at issue belongs to Kazakhstan in the meaning set forth in Chapter 4, section 17 of the Enforcement Code. It should be stressed, however, that these assumptions apply only to the review of the issue of state immunity and do not imply any conclusions on the questions of the location of the securities or to whom the property belongs.

General observations on state immunity

State immunity is a principle of international law, which entails that a state is not under an obligation to subject itself to the jurisdiction of other states' courts or other judicial or executive agencies. It is recognized as customary international law and emanates from the most fundamental principle of international law – the principle of sovereignty – under which states are sovereign, mutually equal and prohibited from exercising power over each other (SOU 2008:2, p. 11 f.).

A state may dispose of its right to immunity and may thus refrain from invoking it. In cases where the state does not refrain from invoking it, the right to immunity is, under now applicable international law, nevertheless not unconditional. From having comprised a virtually absolute right for states to immunity against the jurisdiction of foreign courts until the 1930s, the principle of state immunity has in fact, in step with increased engagement in commercial activity by states, developed in a more restrictive direction (Government Bill 2008/09:204, p. 34 ff.). Within the scope of this development, customary international law has distinguished between sovereign acts by states, which usually enjoy immunity, and their private law acts, which most often do not. This distinction can be expressed through the so-called restrictive theory of immunity, according to which a state's commercial or private law acts are typically exempt from the right to immunity (Government Bill 2008/09:204, p. 45 and 56, cf. e.g. Hazel Fox & Philippa Webb, The Law of State Immunity, 3rd ed., 2013, p. 133 f., and August Reinisch, European Court Practice Concerning State Immunity from Enforcement Measures, in The European Journal of International Law, Vol 17 (2006), p. 803 ff.). Thus, the application of the theory implies determining whether a certain act is sovereign or falls under private law. A development in a more restrictive direction, corresponding to that which has taken place in state practice as concerns immunity from jurisdiction, appears, as concerns immunity from measures of constraint, to have been limited to the countries in the Western hemisphere (Government Bill 2008/09:204, p. 45). Joint state practice has previously been careful in not granting immunity to a foreign state from measures of constraint, and traditionally, it has been deemed a

greater encroachment on state sovereignty to take measures of constraint against the property of another state than to assume jurisdiction over that state (Government Bill 2008/09:204, p. 56).

Applicable international law on state immunity

There is no general and enacted international treaty in the field of state immunity. On the international law level, state immunity is thus governed by customary international law. It is often the national court, before which a claim against a state is made, who is tasked with applying the rules of international law on state immunity. Despite the restrictive theory of state immunity having been generally accepted, there is consequently substantial variations in how it is applied in its details (Government Bill 2008/09:204, p. 35). Moreover, there is no uniform state practice on limitations on state immunity from measures of constraint. Under the restrictive theory of state immunity, as concerns jurisdiction, it is generally accepted that national courts are free not to grant a foreign state immunity when the dispute concerns an act of private law, but, as concerns measures of constraint, such are allowed only in property that is used or intended for use for commercial purposes (Government Bill 2008/09:204, p. 45).

At a global level – within the framework of the United Nations (UN) International Law Commission (ILC) – the customary international law on state immunity has been the subject of a comprehensive attempt at codification. During the work, which was ongoing during the years 1978–1991, observations were gathered from the member states of the UN, after which special rapporteurs prepared draft articles which were reviewed by inter alia working groups as well as the UN General Assembly Sixth Committee. Following several years of negotiations, in 2004, the UN Convention on Jurisdictional Immunities of States and Their Property was adopted (the convention).

The convention applies, if the court and the foreign state at issue fall under the definitions of article 2, to all exercises of judicial, administrative or executive power that has a connection to a legal proceeding – but not to criminal proceedings (cf. article 1, see also Government Bill 2008/09:204, p. 61). The convention covers state

immunity from the jurisdiction of another state's courts as well as immunity from measures of constraint against the property of the state (Government Bill 2008/09:204, p. 61). It takes as its starting point that state immunity applies, and that the immunity may be pierced only when it follows from the provisions of the convention (article 5, see also Tom Grant, Article 5, p. 103 f. in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al.* (ed.), 2013). A state may also explicitly or implicitly waive immunity (articles 7–9). As concerns jurisdictional immunity, the convention is pervaded by the restrictive theory of state immunity. In this section, the convention's provisions list a number of cases in which immunity may not be invoked and entail an explicit regulation of immunity and non-immunity for several areas of law (articles 10–17, see also Government Bill 2008/09:204, p. 59 and Roseanne van Alebeek, Part III: Proceedings in which state immunity cannot be invoked, p. 154 ff. in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.), 2013). The provisions on state immunity from measures of constraint against a state's property are, as opposed to the rules on state immunity from jurisdiction, devised such that measures of constraint may in principle only be taken following consent from the relevant state (articles 18–21, see also Government Bill 2008/09:204, p. 59). This restraint from the piercing of state immunity as regards measures of constraint must be viewed in light of the fact that the restrictive theory of state immunity for such measures has not had the same impact on customary international law (cf. Government Bill 2008/09:204, p. 45).

Because a sufficient number of states has not yet ratified or otherwise adequately approved the convention it has not entered into force (cf. article 29). Despite the fact that the convention has not yet entered into force, it may be considered to constitute the at this point clearest expression of the states' prevailing understanding as concerns state immunity (Hazel Fox & Philippa Webb, The Law of State Immunity, 3rd ed., 2013, p. 294 f., see also Pål Wrange's legal opinion of 10 October 2018, p. 2). Its provisions have been drafted taking into account state practice on state immunity and to a large extent it can even be considered to constitute a codification of applicable customary international law on state immunity (Government Bill 2008/09:204, p. 87, 113). In this

context it should be noted that the convention was adopted by the General Assembly without a vote, i.e. without any state objecting to its adoption (see Michael Wood "Immunity from Jurisdiction and Immunity from measures of constraint", p. 13 in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.), 2013). As concerns Sweden, the legislator has assessed that the convention largely reflects applicable customary law. In 2009, parliament approved the government's proposal as set out in the Government Bill (2008/09:204) Jurisdictional Immunities of States and Their Property (Sw. *Immunitet för stater och deras egendom*) that Sweden shall ratify the convention and that it shall be incorporated into Swedish law by way of an act (the Act [2009:1514] on Jurisdictional Immunities of States and Their Property [Sw. *lag om immunitet för stater och deras egendom*]). This act will enter into force when the convention does. Since the ratification, the Supreme Court has, in two cases concerning state immunity, NJA 2009 p. 905 and NJA 2011 p. 475, referenced the convention's provisions. However, since the convention supplements customary international law where no clear customary international law has been established and in several respects constitutes a compromise between the views of different states, each separate provision cannot without further consideration be accepted as applicable customary law (Government Bill 2008/09:204, p. 102, cf. NJA 2011 p. 475 paragraph 14). As noted in the preamble of the convention, the rules of customary international law will continue to govern matters not regulated by the provisions of the convention (Government Bill 2008/09:204, p. 85).

In view of the above background, the Court of Appeal finds that the convention shall form the starting point for a Swedish court's determination of a matter of state immunity. In so doing, the court shall start at the wording of the convention texts. The English original text is appended to the act which incorporates the convention. There is no Swedish original text, and the not yet entered into force act sets out that the wording of the original texts shall apply as Swedish law. As a reason for an incorporation, the Government Bill states that the Swedish application of the convention shall be consistent with that of other convention states and that an application based directly on the original text ought to promote future uniform state practice (Government Bill 2008/09:204, p. 115). As a reason for Sweden's ratification, the fact has also been noted

that Swedish courts gain access to a written set of rules on matters of state immunity (Government Bill 2008/09:204, p. 97).

As concerns the interpretation of the provisions of the convention, the court must, as is the case when interpreting international treaties in general, in accordance with the principles set out in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, start from the ordinary meaning of the terms of the convention in their context and in the light of the purpose and objective of the convention (see Gerhard Hafer "Historical Background of the Convention", p. 12 in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.), 2013, cf. Ulf Linderfalk's legal opinion of 25 June 2018, p. 6 and Chester Brown's legal opinion of 13 February 2020, p. 4 and 5). In addition to the wording of the convention, in this context also state practice and what article 32 of the Vienna Convention refers to as supplementary means of interpretation, i.e. the preparatory works to the convention, as well as legal literature on international law and other legal sources, may be of relevance. As regards the preparatory works, inter alia the ILC commentaries on the 1991 draft articles are of interest.

In sum, the Court of Appeal shall, when reviewing the issue of state immunity, apply the applicable customary international law that is expressed in the provisions of the convention.

The convention's provisions on state immunity from post-judgment measures of constraint

The review of whether certain property enjoys immunity from post-judgment measures of constraint raises the issue of an application of the provisions in articles 19 and 21. The articles are worded as follows in English.

> **Article 19**
> **State immunity from post-judgment measures of constraint**
> No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a

proceeding before a court of another State unless and except to the extent that:
(a) the State has expressly consented to the taking of such measures as indicated:
(i) by international agreement;
(ii) by an arbitration agreement or in a written contract; or
(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 21
Specific categories of property
1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
(b) property of a military character or used or intended for use in the performance of military functions;
(c) property of the central bank or other monetary authority of the State;
(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

Article 19 sets out as the main rule that no measures of constraint may be taken other than to the extent set forth in the provision. In certain instances, post-judgment measures of constraint may be taken even if the state has not consented in accordance with (a) or allocated or earmarked property for satisfaction in accordance with (b). The property which in such cases may become subject to post-judgment measures of

constraint is described in the provision in subparagraph (c). For post-judgment measures of constraint to be allowed under this part of the provision, it is required that "it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

Article 21.1 sets forth various kinds of state property that shall not be considered as property specifically in use or intended for use by the state for other than government non-commercial purposes under article 19 (c). The property enumerated in article 21 thus cannot become subject to measures of constraint on the basis of the provision in article 19 (c). The structure of the convention means that the assessment of whether property could become subject to post-judgment measures of constraint should be made on the basis first of the special rules in article 21 and thereafter, only subsidiarily, on the basis of the general rule expressed in article 19 (Chester Brown & Roger O'Keefe, "Article 21", p. 338 f. in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.) 2013, cf. Ulf Linderfalk's legal opinion of 25 June 2018, p. 5). Only if the relevant property is not covered by immunity on the basis of article 21 or 19 can the property become subject to post-judgment measures of constraint.

The International Court of Justice in the Hague (ICJ) has in the case Jurisdictional Immunities of the State referred to the provision in article 19 (Germany v. Italy: Greece intervening, Judgment, I.C.J. Reports 2012, p. 99) and legal literature on international law is in agreement that the provision in chief reflects applicable customary international law (see e.g. Chester Brown & Roger O'Keefe, "Article 21", p. 327 f. in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.) 2013 and Ulf Linderfalk's legal opinion of 25 June 2018, p. 13). In the case NJA 2011 p. 475, the Supreme Court has stated with respect to article 19 (c) that the convention may be viewed to express the principle now recognized by many states that measures of constraint may be taken at

least with respect to certain property of a state (paragraph 14). As concerns the provision in article 21, there is ample support in inter alia state practice that at least subparagraphs (1) (a) and (b) reflect applicable customary international law (see e.g. Chester Brown & Roger O'Keefe, "Article 21", p. 346 f. in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.) 2013). As regards subparagraph (c) of the provision, state practice diverges between the views, on the one hand, that all property of a central bank enjoys immunity because of its nature and, on the other hand, that the property of a central bank shall, as regards state immunity, be viewed as any other type of state property (see Chester Brown & Roger O'Keefe, "Article 21", p. 327 in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.) 2013, p. 346 and Said Mahmoudi's legal opinion of 20 April 2018, p. 8). In the application of the provision in article 21.1 (c), a more detailed review of customary international law is thus required.

Review of the issue of state immunity on the basis of the rules of the convention

Starting points for the review

To start, the Court of Appeal notes that the Republic and the National Bank represent the sovereign state Kazakhstan in the sense that the parties may invoke state immunity in the present legal proceeding. It is undisputed – beyond what is set out in the section on abuse of rights – that the parties have neither explicitly nor implicitly waived immunity from the measures of constraint relevant in the matter at issue. Therefore, there is no bar to reviewing the objection concerning state immunity on its merits.

In line with what has been described above, the Court of Appeal will first determine whether the relevant property enjoys immunity on the basis of the provision in article 21. If immunity is not at hand on the basis of this article, the Court of Appeal will have reason to review whether immunity is at hand by virtue of the provision in article 19. If this is not the case, the property does not enjoy state immunity.

The part of article 21 relevant in the present review is subparagraph (c), which concerns immunity for property of a central bank and similar property. For immunity to be granted, the wording of the provision stipulates that two conditions must be met. The relevant institution must be a central bank or other monetary authority of the state and the property shall belong to this entity. In legal literature on international law, it has been discussed whether the provision shall be applied categorically or functionally. A categorical application of the provision would mean that property belonging to a central bank or other monetary authority of the state enjoys immunity already on the basis of the nature of the property. Those who instead favor a functional interpretation of the provision argue that it should be read in light of the definition of the term "State" in article 2.1 (b) (iii). For the property of a central bank, this would mean that the property would enjoy state immunity only to the extent that the relevant central bank is "entitled to perform and [is] actually performing acts in the exercise of sovereign authority of the State" (see e.g. Chester Brown & Roger O'Keefe, "Article 21", p. 343 in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.) 2013).

Therefore, in its review based on article 21.1 (c), the Court of Appeal must first decide the questions of whether the National Bank is such a central bank as covered by the provision and whether the property belongs to the National Bank in the sense intended by the provision. If the answers to those questions are in the affirmative, the Court of Appeal must also determine whether the provision shall be applied categorically or functionally. If the provision shall be applied categorically, the relevant property enjoys state immunity. If the provision shall be applied functionally, the Court of Appeal must determine whether the National Bank is has a right to perform, and with respect to the property actually performs, acts in the exercise of the sovereign authority of the state Kazakhstan, and the outcome of this determination will be decisive as to whether state immunity is at hand on the basis of this provision.

Is the National Bank a central bank as envisioned by article 21.1 (c)?

The convention contains no definition of the term "central bank" and customary international law has not produced a uniform meaning of the term. In legal literature on international law, a central bank has been generally described as an institution set up by the state that issues money and is in charge of the monetary policy. It has further been noted that such a bank may also be tasked with supervising the national banking and currency systems, providing banking services to the state, administering the state's gold and currency reserves and the like (see e.g. Hazel Fox & Philippa Webb, The Law of State Immunity, 3rd ed., 2013, p. 373 f. and Ingrid Wuerth, Immunity from Execution of Central Bank Assets, p. 267 f. in The Cambridge Handbook of Immunities and International Law, Tom Ruys *et al*. (ed.), 2019). In the book The Law of State Immunity (2013), Hazel Fox and Philippa Webb argue that a particular characteristic of central banks is that they also enjoy substantial autonomy from the states that incorporated them (Hazel Fox & Philippa Webb, The Law of State Immunity, 3rd ed., 2013, p. 374). The authors have, however, pointed to difficulties in generalizing on the management of central banks and stressed that in some countries they are authorities under the authority of the government, whereas in others they are separate legal entities (Hazel Fox & Philippa Webb, The Law of State Immunity, 3rd ed., 2013, p. 373 f.). In this context, it should also be emphasized that state practice implies that there is a limit on the extent of the autonomy of a central bank from the state before the right to immunity for its property is called into question (see e.g. the case Trendtex Trading Corpn v Central Bank of Nigeria [1977] 1 All ER 881;64 ILR111; [1977] QB 529).

The Court of Appeal finds that the determining factor for whether a certain institution is a central bank in the sense of article 21.1 (c) ought, in view of the foregoing, be how the institution is constituted and its functions. As concerns the issue of a central bank's autonomy from the state, also aspects of the governance and purpose of the central bank should be taken into account (cf. e.g. Amsterdam District Court's judgment of 5 January 2018 in case no. C/13/638381/KG ZA 17-1217 FB/MB).

It is undisputed that the state of Kazakhstan has appointed the National Bank as its central bank and that the operations of the National Bank are governed by Kazakhstani law. The Kazakhstani Law on the National Bank stipulates that Kazakhstan has tasked the National Bank with carrying out the state's monetary policy, ensure the function of the payment system, regulate the currency and supervise the financial system (articles 1 and 2). It is further clear from this Law that the National Bank is tasked with ensuring price stability in the country, determining the official interest rate, carrying out currency exchange transactions in the Kazakhstani currency tenge and managing, amongst other things, the National Fund and the currency reserves (articles 7, 8, 29 and 39). That the practical reality is such as stipulated in the legislation is strongly supported by the testimony provided by Aliya Moldabekova and the other evidence invoked by the Republic and the National Bank. The Court of Appeal finds that the National Bank has been incorporated by the Kazakhstani state, fills such functions described in legal literature on international law as typical for a central bank and that its mission is statutory and clearly defined. This means that the Court of Appeal finds that the National Bank, as regards its constitution and function, is such a central bank as envisioned by the provision.

The question then is, as argued by the Investors, whether the autonomy of the National Bank from the Kazakhstani state is so insufficient that the National Bank cannot be viewed as a central bank. In this respect, the Court of Appeal must evaluate the Kazakhstani regulations which govern the legal status and operations of the bank, as well as the other evidence invoked by the Investors in support of their claim of insufficient autonomy. The parties have submitted relevant regulations in English translations.

As regards the legal status of the National Bank, the Law on the National Bank stipulates that the National Bank is a state organ which shall represent the interests of the state in relation to central banks of other states, international banks and other financial and credit institutions (articles 1 and 2), that the National Bank shall be a "legal entity in organizational legal form of a republican state institution" and that it, on the state's behalf, shall incorporate certain legal entities (article 6). Under article 6 of

the Law on the National Bank, the National Bank shall be considered as a legal entity. The Kazakhstani Civil Code stipulates that a legal entity must have its own balance sheet or budget. The regulations on the central bank stipulate that the National Bank has its own balance sheet. It is further clear from the regulations that the central bank may enter into civil law relations in its own name (see articles 1.4 and 1.5). The fourth paragraph of article 22 of the Law on the National Bank stipulates that the Kazakhstani government shall not be liable for the obligations of the National Bank and that the National Bank shall not be liable of the obligations of the government, unless it has explicitly undertaken such liability. Thus, the National Bank is – according to Kazakhstani law – a legal entity.

As regards the governance of the National Bank, Kazakhstani law stipulates, amongst other things, the following. The Law on the National Bank stipulates that the National Bank shall be subordinated to the President of Kazakhstan (article 3) and that its capital is owned by the state (article 9). The same Law further stipulates that, following the President's approval of the National Bank's annual report, the remainder of the National Bank's undistributed annual net profits shall be transferred to the state budget within a certain period (article 11). The Law further stipulates that the President has influence in the appointment and removal of the National Bank's representatives and that the President is represented on the National Bank's Board of Directors (articles 13, 14, 16 and 18). As concerns the President's statutory powers in these respects, the Law authorizes the President to appoint and remove the chair as well as four of the nine directors of the National Bank and that the President has authority to determine the National Bank's organization, the number of employees and their compensation. In this context it should be mentioned that a report invoked by the Republic and the National Bank – Issues in the Governance of Central Banks – issued by the biggest cooperation entity for central banks, the Bank of International Settlements, clarifies that in the majority out of the 47 countries described in the report, it is the head of state or government that appoints the chair of the central bank and that in one third of the countries, it is the government or the minister of finance who appoints the chair.

According to the Investors, the governance of the National Fund is an expression of the National Bank's insufficient autonomy from the Kazakhstani state. Here, the Investors have pointed out that article 8 of the Law on the National Bank stipulates a requirement that the National Bank and the Republic be parties to the National Fund Agreement and that Kazakhstan's President may unilaterally terminate the Agreement (article 7.4 of the National Fund Agreement). The Investors have further argued that Kazakhstan's President has a right to decide on the operations of the National Fund as long as the decisions comply with Kazakhstani law (article 3.1.2 of the National Fund Agreement) and may decide on the fund as regards "size and directions" (Presidential Decree no. 402). The Court of Appeal notes, however, that Presidential Decree no. 385 stipulates that transfers of funds from the National Fund to Kazakhstan may be carried out only for certain specific purposes and in accordance with a statutory procedure and that the funds withdrawn must be used in accordance with the purposes of the National Fund. From Aliya Moldabekova's testimony it has further been clarified that the funds must be paid in the currency tenge and that the transfer must be approved by Kazakhstan's parliament and be incorporated into the state budget. In addition, Kazakhstan's Budget Code stipulates that the funds of the National Fund may not be used for payments to individuals or legal entities or as security for the performance of obligations (article 23.4).

The Investors have further stressed, amongst other things, that Kazakhstan's President during an expanded government meeting expressed discontent concerning the National Bank's performance of its mission, that the President in a statement in 2018 to the Kazakhstani citizens encouraged the National Bank to act on the issue of loans in foreign currency and that the President had removed several chairs of the National Bank. The Investors have also pointed out that the National Bank in a report published in an Asian financial magazine in 2015 had been ascribed "a low level of transparency and independency [sic]" (Daniyar Nurbayev, Independence and Transparency of the Central Bank of Kazakhstan, 26 August 2015, in the Journal of Asian Finance, Economics and Business, Vol. 2, p. 31–38) and that an article published by the think-tank Carnegie Endowment for International Peace clarifies that several officials of the National Bank were dismissed in response to protests against a devaluation of the

currency in August of 2015 (Paul Stronski, Kazakhstan at Twenty-Five: Stable but Tense, Carnegie Endowment for Peace, 2016, p. 2). In addition, the Investors have invoked a report by the Swedish Ministry for Foreign Affairs, which refers to a so-called rule-of-law index devised by the World Justice Project and which covers 113 countries. Kazakhstan has been placed in the middle of this index.

In view of the considerable variation that, according to legal literature on international law, exists on the issue of the legal status of central banks, the Court of Appeal finds that what has otherwise been presented on the National Bank and its governance cannot entail that it would not be a central bank in the sense of article 21.1 (c).

In sum, the evidence demonstrates that the National Bank has characteristics of a central bank. The evidence does not support the assertion that the National Bank lacks autonomy *vis-à-vis* the Kazakhstani state to such extent that it cannot be considered a central bank. Therefore, the National Bank is a central bank as envisioned by the provision.

Does the property belong to the National Bank in the sense intended by article 21.1 (c)?

The term “property” is also not defined in the convention. Guidance for the interpretation of the term is most closely found in the convention’s appendix, named “Understanding with respect to certain provisions of the Convention”, which according to article 25 is an integrated part of the convention. The appendix states with respect to article 19 inter alia that “The words ‘property that has a connection with the entity’ in subparagraph (c) are to be understood as broader than ownership or possession.” According to its wording, article 21 is directly linked to article 19 (c). It can therefore be assumed that the statements on “property” in the appendix also apply when the term is used in article 21. All legal opinions on state immunity invoked in the matter at issue point to the same direction. The aforementioned leads to the conclusion that all assets owned, managed, possessed or controlled by a central bank may be considered to fall under the scope of the term “property of” in article 21.1 (c).

Article 2 of Presidential Decree no. 402 and article 21 of the Kazakhstani Budget Code stipulate that the National Bank manages the assets of the National Fund and, according to articles 1 and 2 of the National Fund Agreement, the National Bank is entitled to possess, use and dispose of the funds in the Fund. This is evident also from the National Bank's annual report for the year 2017. It is undisputed that the National Bank has transferred part of the assets in the National Fund to the third party Bank of New York Mellon (BNYM) as global custodian, that this bank has retained SEB as sub-custodian and that SEB has opened securities accounts and bank accounts in Sweden on BNYM's behalf. Under the Global Custody Agreement between the National Bank and BNYM, the ownership to specific assets held by BNYM shall be registered in the National Bank's name in BNYM's register. That BNYM manages the assets at SEB on the National Bank's behalf and acts solely upon the instructions of the National Bank follows from a letter from BNYM of 13 October 2017 addressed to Frank Advokatbyrå AB and from the examination of Aliya Moldabekova.

In sum, against the background of the presented evidence there can be no doubt that the property subject to attachment belongs to the National Bank in the manner intended by article 21.1 (c).

Shall article 21.1 (c) be applied categorically or functionally?

The parties have presented different views on the correct interpretation of article 21.1 (c). The Republic and the National Bank have argued that the provision shall be applied categorically, whereas the Investors have argued that it shall be applied functionally. To the extent the article shall not be read in conjunction with article 2, the Investors have argued that the phrase "other monetary authority of the state" in article 21.1 (c) at least implies a requirement that the property of the central bank at issue shall be used for monetary purposes in order to enjoy state immunity.

First, the Court of Appeal notes that the provision in article 21.1 (c) does not state that the immunity is limited to property intended for use in any specific manner. Thus, the wording of the provision supports a categorical application (see Hazel Fox & Philippa

Webb, op. cit., p. 522 f. and Pål Wrange's legal opinion of 10 October 2018, p. 7). The wording of the other parts of article 21 also support a categorical application of its subparagraph (c). In all subparagraphs of the article, except subparagraph (c), there are requirements on certain use of the property in order for it to enjoy state immunity. The fact that the corresponding limitation is missing in subparagraph (c) must reasonably mean that there is no requirement that the property of a central bank shall be used in a certain manner or for certain purposes in order to enjoy immunity (cf. Pål Wrange's legal opinion of 10 October 2018, p. 6).

Also other, supplementary, means of interpretation than the wording of the convention, such as the structure of the convention concerning immunity from post-judgment measures of constraint, support a categorical application of the provision in article 21.1 (c). The convention contains two provisions on state immunity from post-judgment measures of constraint, of which one – article 19 (c) – makes state immunity conditional upon certain use of the relevant property, whereas the other – article 21 – exempts property of specific nature from the application of article 19 (c). If the intention would have been that state immunity always should be conditional upon certain use of the relevant property, then the provision in article 21 would have served no purpose. The structure of the convention on these issues is also apparently in line with the underlying purpose of article 21, which is to protect property of particularly sensitive nature from measures of constraint (Chester Brown & Roger O'Keefe, Article 21, p. 334 in The United Nations Convention on Jurisdictional Immunities of States and Their Property: a commentary, Roger O'Keefe *et al*. (ed.), 2013, see also e.g. Ulf Linderfalk's legal opinion of 25 June 2018, p. 9 and Said Mahmoudi's legal opinion of 20 April 2018, p. 7).

In view of the convention's objective and purpose, the wording of the provision, seen in its context, clearly supports a categorical application. This means, on the basis for interpretation of treaties provided in the Vienna Convention, that a review of so-called supplementary means of interpretation is of limited interest. It can however be noted that the question of whether a central bank's property enjoys immunity due to its nature or is conditional upon its use was dealt with on several occasions in the preparatory

works to the provision that became article 21.1 (c). At one stage of the negotiations, several states objected to the then proposed wording, which corresponds to the now applicable wording, arguing that it would mean that all property of a central bank or other monetary authority of the state would unconditionally be considered as non-commercial. In response thereto, ILC's rapporteur on the issue proposed an addition with the following wording "and used for monetary purpose" to be added *in fine* (see Said Mahmoudi's legal opinion of 20 April 2018, p. 7 f.). However, the proposal did not receive sufficient support amongst the ILC delegates, and the addition was removed. In his legal opinion, Prof. Mahmoudi has taken the aforementioned to mean that the intention is that the property of central banks shall enjoy categorical immunity. Professors Linderfalk and Wuerth have both in their legal opinions pointed out that the explanation to the rejection of the addition could be that the majority of the ILC delegates deemed it redundant, since it merely expressed what already followed from the definition of state in article 2.1 (b) (iii). In the commentary to ILC's final draft provision, i.e. after the addition had been rejected, it was stated, however, that the purpose of the provision was to grant certain categories of property a special protection and that this was deemed necessary specifically against the background that court practice in certain states contained granted motions for measures of constraint against bank accounts or property of central banks of foreign states (Government Bill 2008/09:204, p. 82, see also Said Mahmoudi's legal opinion of 20 April 2018, p. 7). The Court of Appeal finds that the commentary to ILC's final draft of the provision strongly supports that the provision shall be applied categorically. Also the circumstance that the question of whether central bank property should be granted immunity based on its nature or not was discussed on several occasions during the preparatory stages, without it leading to any adjustments of the proposed wording of the convention supports this interpretation.

As concerns Swedish sources , the Government Bill underlying the act incorporating the convention states that the provision in article 21 means that the property "By its very nature ought to […] be considered in use or intended for use by the state solely for non-commercial purposes." (Government Bill 2008/09:204, p. 82). In the case NJA 2011 p. 475, the Supreme Court referenced article 21 when it reviewed the issue of

what should be deemed as property in use by the state for non-commercial purposes under article 19 (c). The Supreme Court stated that "Impediment due to state immunity […] should, however, be deemed to be at hand if the purpose of the use of the property is of a qualified nature […] or when the property is of such specific nature as set forth in article 21 of the 2004 UN convention." Thus, the Swedish legislator and the Supreme Court apparently adhere to the interpretation that article 21.1 (c) shall be applied categorically.

State practice does, nevertheless, provide some support for a functional application of the provision in article 21.1 (c) (see e.g. Ingrid Wuerth's legal opinion of 15 January 2020, p. 4 and 5). There is also discussion in certain legal literature on international law concerning such an application. Inter alia, Chester Brown and Roger O'Keefe argue in chapter "Article 21" in The United Nations Convention on Jurisdictional Immunities for States and Their Property: a commentary that article 21.1 (c), despite its appearance, does not necessarily render immune all central bank property or the like, but only to the extent a parallel application of article 2 allows it. According to the authors, this means that the property of a central bank does not enjoy immunity for example when the central bank engages in commercial activity, because then it does in fact not perform acts in the exercise of the sovereign authority of the state as per the provision of article 2.1 (b) (iii). The authors do, however, stress that it is not clear whether, but unlikely that, this potential consequence of the interaction between articles 21.1 (c) and 2.1 (b) (iii) was intended. Prof. Wuerth, who even more clearly advocates a functional interpretation, has in her legal opinion stated that the provisions of articles 2.1 (b) (iii), 19 (c) and 21.1 (c) are all based on the field of use of the property and the purpose of the possession of the property. According to Prof. Wuerth, the functional requirement in article 2.1 (b) (iii) is incorporated in the provision in article 19 (c) through the phrase "property of a state" since the provision in article 21.1 (c) refers to "… or other monetary authority". However, Prof. Wuerth acknowledges that the interaction between article 2 and articles 19 and 21 may have been unintentional. The Court of Appeal concludes that it appears questionable, on the basis of the principles of the Vienna Convention, to apply the provision in article 21.1 (c) functionally if an interaction between the provisions was not intended in the preparatory works to the convention.

In sum, the wording of the provision, seen in its context and in light of the objective and purpose of the convention, strongly implies that it shall be applied categorically. A categorical application is also supported by the preparatory works to the convention as well as by what the Swedish legislator has stated in the Government Bill which incorporates the convention, and also by the statements of the Supreme Court in NJA 2011 p. 475. The opposite view, which has been set forth in certain legal literature on international law and which has support in certain state practice, does not deprive the aforementioned reasons of their strength. Against this background, the Court of Appeal finds that the provision shall be applied categorically. This means that property that belongs to a central bank or other monetary authority of the state enjoys immunity already on the basis of the nature of the property.

Irrespective of the assessment made by the Court of Appeal above, the Court wishes to point out that it cannot be excluded that there may be instances when property, despite belonging to a central bank, cannot enjoy immunity under the provision in article 21.1 (c). If, for example, a central bank in competition with other market actors would offer banking services to consumers, it would be difficult to argue that property of the commercial segment of the banking operations would enjoy immunity. It cannot be excluded that there may be other situations where a categorical application of article 21.1 (c) would lead to unreasonable outcomes. There should consequently exist a limited scope to apply article 21.1 (c) in conjunction with article 2.1 (b) (iii) with respect to central bank property. This could mean that the relevant property would not enjoy immunity if the sovereignty criterion is not met. Such an application should, however, be limited to cases where it is obvious that the relevant property is held in such manner as is fundamentally different from the regular operations of a central bank and a categorical application would lead to an unreasonable outcome. However, the Court of Appeal wishes to stress that this cannot be the case for property of a central bank held within the framework of a national fund such as the one in the matter at issue. Management of the state's economy must be deemed as such an exercise of sovereign authority as intended by article 2.1 (b) (iii) (cf. the case AIG Capital Partners, Inc & Anr v. Kazakhstan (National Bank of Kazakhstan intervening), 2005, EWHC 2239

(Comm); [2006] 1 WLR 1420, [2006] 1 All ER (comm) 1 129 ILR 589, see also Ingrid Wuerth, Immunity from Execution of Central Bank Assets, p. 280 in The Cambridge Handbook of Immunities and International Law, Tom Ruys *et al*. (ed.), 2019).

The Court of Appeal's conclusion means that the relevant property enjoys state immunity. Accordingly, the Investors' objection concerning abuse of rights remains to be reviewed.

Has Kazakhstan by way of abuse of rights lost the right to invoke state immunity?

As grounds for their objection that Kazakhstan has lost the right to invoke immunity by way of abuse of rights, the Investors have stated mainly the following. The arbitral award in the case between the Investors and the Republic was rendered on the basis of the intergovernmental treaty the Energy Charter Treaty, to which both Sweden and Kazakhstan are parties. Article 26 of the treaty provides that an arbitral award is final and binding on the parties and that all parties shall consent to the enforcement thereof. In spite of this, payment has not been made. In the matter at issue, Kazakhstan invokes immunity for the sole purpose of circumventing the obligation it has under the said treaty.

As detailed above, the starting point of the convention is that state immunity applies and that it may be pierced only to the extent that follows from the provisions of the convention. The Court of Appeal notes that the convention does not contain a provision entailing that a state is denied the right to invoke immunity by reference to abuse of rights. It is true that the ICJ has held on several occasions that immunity may be pierced when state representatives or diplomatic staff have violated international law (see e.g. Ulf Linderfalk's legal opinion of 25 June 2018 p. 14 ff.). As regards states, however, the question has been answered in the negative, irrespective of the severity of the violation of international law (Germany v. Italy: Greece intervening, Judgment, I.C.J. Reports 2012, see also Pål Wrange's legal opinion of 10 October 2018, p. 10). There is no state practice that indicates that anything else would be the case. Thus, there is

nothing to support the Investors' objection that a state could lose its right to invoke immunity against measures of constraint on the grounds that it has abused its rights.

The Court of Appeal also wishes to stress that the purpose of state immunity is to prevent that a foreign state is subjected to proceedings before another state's courts without consent (Government Bill 2008/09:204, p. 38). It is only logical that immunity from post-judgment measures of constraint is invoked specifically on the ground that the state does not consent to them, i.e. irrespective of the state's position on the proceeding that lead to the measure of constraint. The fact that state immunity from measures of constraint is unrelated to the question of whether the state is required under international law to fulfill an obligation has been held by the ICJ (Germany v. Italy: Greece intervening, Judgment, I.C.J. Reports 2012, p. 100). The convention, with separate rules on state immunity from jurisdiction and from measures of constraint, is an expression of this distinction. The Court of Appeal notes that the doctrine on abuse of rights advocated by the Investors is irreconcilable with the rules on state immunity.

In sum, the Court of Appeal finds that international law does not support the proposition that a state would lose its right to invoke immunity from measures of constraint on the grounds that it has abused its rights.

Summary of conclusions on the issue of state immunity

In reviewing a question of state immunity, Swedish courts shall apply the customary international law expressed in the provisions of the convention. The assessment of whether immunity from post-judgment measures of constraint is at hand shall be made first on the basis of the provision in article 21 of the convention. The evidence in the matter at issue demonstrates that the National Bank is a central bank and that the relevant property is property of the National Bank in the sense set out in article 21.1 (c). Because the provision shall be applied categorically, the present property enjoys state immunity. A functional application of the provision, taking into account article 2 of the convention, would not lead to any other conclusion. There is no support in international law for deviating from the rules on state immunity due to abuse of rights. Because the

property enjoys state immunity, it may not be subject to attachment. Therefore, the attachments at issue in this matter shall be lifted.

With this outcome, the Court of Appeal lacks reason to review whether there is any bar to the attachments on either of the other grounds argued by the Republic and the National Bank.

Litigation costs

In view of the outcome in the matter at issue, the Republic and the National Bank shall be discharged from the obligation to compensate the Investors for their litigation costs before the District Court and the Investors shall be ordered to jointly and severally compensate the Republic and the National Bank for their respective reasonable litigation costs before the District Court as well as the Court of Appeal. The Court of Appeal finds no reason to question that the work reported by counsel for the Republic and the National Bank has been carried out nor that the parties have incurred the reported expenses and costs.

The Investors have argued that they, irrespective of the outcome of the action at issue, shall not be liable to compensate the USD 136,793 which relate to the ground argued before the Court of Appeal that the enforcement would violate *ordre public*. As a reason for this position, the Investors have mainly argued that the litigation costs incurred to argue the Republic's case on this issue, in view of the Court of Appeal's dismissal decision of 3 February 2020, cannot be reasonably justified to protect the interests of the party. The Court of Appeal agrees with what the Investors have stated concerning the allocation of the litigation costs for this portion of the case.

Otherwise, the Investors have not presented precise objections to any cost items, but have left it to the Court of Appeal to determine the reasonableness of the claimed amounts.

On this issue, the Court of Appeal finds as follows. The Republic and the National Bank have claimed compensation for costs for legal counsel, expenses for legal opinions and assistance by foreign counsel as well as costs for own time spent. The matter has comprised several complex factual and legal issues. In addition to Swedish and international law, also the application of English and Kazakhstani law has been relevant. The scope of the documents of the case has been very extensive and all parties have invoked substantial evidence. This is true in particular for the Republic and the National Bank. As regards the costs for legal counsel, the Court of Appeal further notes that the Republic and the National Bank have been appellants before the District Court as well as the Court of Appeal and have made several objections to the attachments. Since the matter has involved foreign legal systems and it has been necessary to coordinate with other legal proceedings in which Kazakhstan is a party and which are connected to the underlying attachments, the Court of Appeal finds no reason to question the reasonableness of the expenses for foreign legal counsel. It is only logical that a matter concerning measures of constraint concerning state property is of particular importance to the foreign state. In addition, the Court of Appeal notes that the amounts of the relevant attachments are substantial. The outcome could also impact the other legal proceedings mentioned above. Against this background, the Court of Appeal finds the Republic's and the National Bank's claims for compensation before the District Court as well as the Court of Appeal reasonable.

In view of the nature and scope of the case at issue, there is no reason to question the reasonableness of the other claims, which cover expenses for transcription, interpretation and translation as well as travel costs for witnesses and party representatives.

The above conclusions of the Court of Appeal mean that the Investors shall be ordered to jointly and severally compensate the Republic and the National Bank for their respective litigation costs before the District Court and the Court of Appeal in the amounts set out in the Court of Appeal's decision.

HOW TO APPEAL, see appendix B

Appeals to be submitted by 8 July 2020

The decision has been made by Judges of Appeal Sven Jönson, Anne Mellqvist and Katja Isberg Amnäs as well as Deputy Associate Judge Henrik Starfelt, reporting judge.