Neutral Citation Number: [2005] EWHC 2239 (Comm)

Case No: 2004/536

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2005

Before :

MR JUSTICE AIKENS

- -

Between :

(1) AIG Capital Partners, Inc	**Claimants**
(2) CJSC Tema Real Estate Company Limited	
- and -	
The Republic of Kazakhstan	**Defendant**
(1) ABN AMRO Mellon Global Securities Services B.V.	**Third Parties**
(2) ABN AMRO Bank N.V.	
The National Bank of Kazakhstan	**Intervener**

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Mr R Salter QC, Mr D Lloyd Jones QC and Mr Paul Key (instructed by **Holman Fenwick Willan, Solicitors, London**) for the **Claimants**
Mr A Malek QC and Mr D Quest (instructed by **Richards Butler, Solicitors, London**) for the **Defendants**

Hearing dates: 26th and 27th July 2005

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Judgment)

Mr Justice Aikens :

A. The Main Issue

1. This case concerns a claim for state immunity by the Republic of Kazakhstan (“***the RoK”***) and its central bank, the National Bank of Kazakhstan (“the NBK”). The Claimants have obtained an arbitration award from the International Centre for the Settlement of Investment Disputes (“***ICSID”)*** *in* Washington, DC, against the RoK.[1] The Award required the RoK to pay to the Claimants a total of US$ 9,951,709 plus continuing interest. The Claimants have obtained leave to register this award in the High Court under ***section 1*** of the ***Arbitration (International Investment Disputes) Act 1966.***[2] They wish to enforce this award as a judgment by obtaining final Third Party Debt and Charging Orders against cash and securities that are held in London by

[1] The Award was dated and published to the parties on 7 October 2003.
[2] Order of Langley J dated 2 July 2004.

the Third Parties ("***AAMGS"),*** pursuant to a Global Custody Agreement dated 24 December 2001 with the National Bank of Kazakhstan.[3] The Claimants have already obtained Interim Orders[4] and they say that the cash and the securities are assets of the RoK that can and should be the subject of Final Orders. The National Bank of Kazakhstan intervened in the proceedings and applied to discharge both orders on the ground that the cash and securities held by AAMGS constitute "*property*" of the NBK and are the subject of immunity from enforcement under ***sections 13(2)(b) and 14(4)*** of the ***State Immunity Act 1978.***[5] The Claimants say that those sections, properly construed and applied to the facts of this case, do not grant immunity, so that the Interim Orders should indeed be made Final.

2. Following an Order of Master Miller made on 25 November 2004 giving directions on the trial of the issue[6], (which was varied by a further order of Langley J on 23 February 2005), I heard argument on 26 and 27 July 2005 on whether Final Third Party Debt and Charging Orders should be made against the cash and securities held by AAMGS in the name of the NBK. No witnesses were called. It was agreed between the parties that the statements,[7] experts' reports[8] and documents before the court should all be received as evidence of the facts stated in them, subject to any comments as to weight. I was also supplied with 5 bundles of authorities. After the succinct and very helpful oral submissions from Mr Salter QC for the Claimants and Mr Malek QC for the RoK and NBK, for which I am most grateful, I reserved judgment.

B. The Facts giving rise to the Main Issue

3. The Project and the dispute giving rise to the ICSID Arbitration.

In 1999 and 2000 the First Claimant (***"AIG")*** became involved in a project to develop a residential housing complex called "*Crystal Village"* in Almaty, in the RoK. This project was a joint venture between AIG and a Kazakhstan company called LLP Tema, which was owned and controlled by Kazakhstani principals. Those two companies together formed a joint venture company, CJSC Tema Real Estate Company, the Second Claimant. Property was purchased for the project; contracts for the construction were signed and the work begun. Then the government of the

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[3] Originally the Global Custody Agreement was between the National Bank of Kazakhstan and Boston Safe Deposit and Trust Company and Mellon Bank NA, London Branch. In December 2002 a "*dedicated new bank"*, ABN AMRO Mellon Global Security Services BV ("***AAMGS"),*** was set up to continue to provide the global custody services and there was a novation of the Agreement so as to be between the National Bank of Kazakhstan and AAMGS: **see letter from AAMGS to the National Bank of Kazakhstan dated 27 December 2002: C/Tab 12/page 210.**

[4] Orders of Master Fontayne dated 13 September 2004.

[5] Application dated 23 November 2004: the NBK had also asked to be joined as a party to the proceedings. On 25th November 2005, Master Miller ordered that NBK be joined.

[6] He also ordered that: (i) AAMGS need not take any further part in the proceedings on agreeing to be bound by the result; (ii) a Commercial Judge should determine the issue of whether Final Orders should be made.

[7] The principal statements were two by Mr Yuri Gerasimenko, a Deputy Director of the Monetary Operations Department of the NBK.

[8] Each side put in an expert's report on the law of Kazakhstan relating to the NBK and the National Fund of the RoK: Professor AG Didenko for the Claimants; Professor MK Suleimenov for the RoK and NBK. The two experts prepared a Joint Protocol: **A/Tab 23.** The Protocol stated that the Experts' opinions on the interpretation of the provisions of the legislation of Kazakhstan "*are generally consistent with each other":* **A/Tab 23/page 141**.

RoK announced that the project was to be cancelled because the land concerned was required for a national arboretum. In March 2000 the Almaty Oblast issued a resolution ordering the transfer of the project property to the City of Almaty, without compensation to the joint venture.[9] On 15 May 2000 the joint venture attempted to resume construction work on the site, but the City Authorities, accompanied by the police, expelled the joint venture's contractors from the property. In February 2001 the City of Almaty physically seized the project property. The ICSID Arbitration Award recorded that these actions amounted to expropriation, were arbitrary, in wilful disregard of the due process of law and *"were shocking to "all sense of juridical propriety"…".*[10]

4. The project had been started pursuant to a Bilateral Investment Treaty between the USA and the RoK dated 19 May 1992 ("the BIT"). Article VI(4) of the BIT stated that investment disputes between an investor and the host company could be submitted to arbitration by ICSID.[11] On 3 May 2001 the two Claimants filed a request for arbitration with ICSID, claiming that the RoK had expropriated the Claimants' investment in the project. The ICSID Arbitration Tribunal was constituted on 5 October 2001. It held hearings in 2002, at which the RoK was represented by McGuireWoods, Kazakhstan LLP. The tribunal's Award was published to the parties on 7 October 2003. No part of the sums awarded to the Claimants have been paid by the RoK.

5. Under the terms of the ICSID Convention, to which the UK is also a party, each Contracting State shall recognise an arbitration award made pursuant to the ICSID Convention. Contracting States will *"enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that State".*[12] The Convention provides that "*Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought".*[13] However, ***Article 55*** of the ***ICSID Convention*** states expressly that:

> *"Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or any foreign State from execution".*

6. The ***Arbitration (International Investment Disputes) Act 1966*** was passed to implement the Washington Convention on the settlement of investment disputes between States and nationals of other States. ***Section 1(2)*** provides that a person seeking recognition or enforcement of an Award made pursuant to the Washington Convention (ie. an ICSID Award) "*shall be entitled to have the award registered in*

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9 See: ICSID Award para 3.2. **E/Tab 1/pages 12 – 13.**

10 See: ICSID Award para 10.5.2: **E/Tab 1/page 199.** The phrase in quotes "*all sense of juridical propriety"* refers to a decision of the International Court of Justice: ***Electronica Sicula (USA v Italy) (1989) ICJ Rep 15 at 76 para 128: "****Arbitrariness…is a wilful disregard of due process of law, an act which shocks or at least surprises a sense of juridical propriety".*

11 Both the USA and the RoK are parties to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which set up ICSID.

12 ***ICSID Convention Art 54(1).***

13 ***Ibid: Art 54(3).***

the High Court.." subject to various matters set out in the 1966 Act. ***Section 2*** of the 1966 Act provides that, subject to the provisions of the Act, an award registered under the Act:

> "*…shall, as respect the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date or registration under this Act, and, so far as relates to such pecuniary obligations –*
>
> *(a) proceedings may be taken on the award,*
>
> (b) *the sum for which the award is registered shall carry interest,*
>
> (c) *the High Court shall have the same control over the execution of the award,*
>
> *as if the award had been such a judgment of the High Court."*

7. As I have said, on 2 July 2004, Langley J made an order permitting the Claimants to register the ICSID Award as a judgment.

8. **The Assets against which the Claimants wish to enforce the judgment**

As referred to above, AAMGS' predecessors had agreed with the RoK to hold cash and securities of the National Fund of the RoK, "*as custodian and banker"* [14] pursuant to a Global Custody Agreement (***"GCA")*** dated 24 December 2001. AAMGS is now the Global custodian of cash and securities of the National Fund of the RoK. The Claimants wish to enforce the judgment against these assets insofar as they are held by AAMGS in the jurisdiction.

9. In a letter dated 22 September 2004 from AAMGS to Holman, Fenwick & Willan, solicitors for the Claimants, AAMGS stated that it held cash and securities "*to the order of the NBK"* in a number of jurisdictions, including England and Wales. The letter stated that the value of the cash held on behalf of the NBK within England and Wales was £3.1 million. The value of the securities held on behalf of the NBK was stated as £91 million.[15] It is agreed that this cash and these securities form part of the assets of the National Fund of Kazakhstan ("***the National Fund").*** These assets were referred to (together) as "***the London Assets"*** of the National Fund. It is also agreed that AAMGS holds the cash and securities in two separate types of account, respectively the Cash Accounts and the Securities Accounts. Under the terms of the GCA, the cash and the securities are held by AAMGS in the name of the NBK.

10. **The National Bank of Kazakhstan**

The Deputy Director of the Monetary Operations Department of the NBK, Mr Gerasimenko, describes the National Bank in his statement as "*the central bank of Kazakhstan*".[16] The NBK carries out its activities under the Law on Banks and

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14 ***GCA Recital C: C/Tab 2/page 12***
15 **C/Tab 14/pages 231 – 2.**
16 **Gerasimenko (1): paras 1 and 5: A/Tab 15/page 68; 69.**

Banking Activity of 31 August 1995 and the law on the National Bank of the Republic of Kazakhstan dated 30 March 1995. Article 1 of the latter law provides that the NBK shall be the central bank of the RoK. Article 6 states that NBK will be a distinct legal entity, with a single structure that has branch offices, representative offices and organisations. Article 7 of the same law sets out the responsibilities of the NBK. These include: the development and pursuit of the credit and monetary policy of the RoK; ensuring that payment systems function properly; currency regulation and control; and assisting towards the stability of the financial system of the RoK.[17]

11. **The National Fund of Kazakhstan ("National Fund") and its management.**

Kazakhstan has large oil resources. In common with other states which are rich in natural resources like oil and natural gas, (such as Norway, Venezuela and Canada), Kazakhstan has set up a "national resources fund". The object of such funds is to "*help stabilise fiscal policy and save a portion of oil and gas revenues*".[18] As described by Miss Tsalik in *Caspian Oil Windfalls,* natural resources funds are established to deal with the principal challenge that faces a country whose state revenues are mainly dependent on the export of natural resources such as oil and gas. This challenge arises from the volatility of commodity prices. When prices are high, there is a temptation to spend all the revenues obtained from the production and export of the commodities, without retaining some for times when prices, and so state revenues, are low. Natural resources funds can be used as "stabilisation funds" or "saving funds" or a combination of both. Stabilisation funds smooth out government spending by transferring excess revenues to the stabilisation fund when commodity prices are high and then transferring funds for government spending when prices are low. Saving funds "*act as a kind of "rainy day" fund, storing up wealth for future generations"*.[19]

12. The National Fund was constituted on 23 August 2000 by Presidential Decree Number 402. That stated the purpose of the National Fund as to be:

> "[To ensure] stable social and economic development of the country, accumulation of financial resources for future generations, [and] reduction of the vulnerability of the economy to the influence of unfavourable external factors".[20]

The management of the National Fund is governed by "*Rules for the Formation and Use of the National Fund*", which were promulgated by Presidential Decree No 543 of 29 January 2001 and also by the *Budget Code of the Republic of Kazakhstan.*[21] The latter is now the governing code. Paragraph 2 of Article 11 of the Code describes the object of the National Fund in similar terms to those set out in the

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17 **Gerasimenko (1): paras 5 and 6: A/Tab 15/pages 69 – 70.**

18 As stated in "*Caspian Oil Windfalls: Who will benefit?", (***C/Tab 15/page 261*)**.** This is a paper written by Svetlana Tsalik, the director of *Caspian Revenue Watch,* a project run by the *Open Society Institute,* which is a private and grant-making foundation based in New York, USA, whose aim is to promote "open society". The paper was published in 2003. Chapter 6 of the Paper deals with the National Fund of the Republic of Kazakhstan and makes some criticisms of the management of the fund. Those are not relevant to the present matters. The paper was disclosed by the Claimants, but referred to by both sides at the hearing.

19 **C/Tab 15/page 276.**

20 Preamble to the Decree: **B/Tab 9/page 325.**

21 **Law No 548 of 24 April 2004.**

Presidential Decree. Paragraph 3 of Article 11 describes its two functions as being to run savings and stabilisation functions with aims as follows:

> *"….Savings function provides for the accumulation of financial assets and other property….Stabilisation function is purposed for the reduction of the Republican budget from the influence of world prices for raw materials".*

13. Paragraph 1 of Article 24 of the Budget Code specifies the matters on which the National Fund can be spent. These include: any deficit between planned and actual state revenues from raw materials; specific projects as determined by the President and set out in the state budget; and the cost of managing the National Fund and auditing it.

14. The National Fund is described in a presentation document that was prepared by the NBK in 2003. That states[22] that the funds that make up the National Fund come from tax revenues derived from oil extraction and other mining activities; budget transfers of other earnings derived from the oil sector and other mining activities; investment income from the management of the National Fund itself; and some other revenues. The assets of the National Fund were US$ 2.2 billion as at 1 May 2003.

15. The rules for the investment of sums that are transferred to the National Fund are set out in paragraph 2 of Article 24 of the Budget Code. That states:

> *"2. The [National Fund] shall be placed in authorised financial assets and other property….in order to secure:*
>
> *(1) Maintenance of the [National Fund];*
>
> *(2) Support of the sufficient level of liquidity of the [National Fund];*
>
> *(3) High Profitability level of the [National Fund] in the long term outlook at the reasonable risk level;*
>
> *(4) Gaining of investment income."*

16. The National Fund is managed by the National Bank of Kazakhstan under the terms of Agreement No 299 on Trust Management of the National Fund of the Republic of Kazakhstan, as amended by Addendum Agreement On Changes and Amendments No 305 of 16 August 2004: *"**The Trust Management Agreement".*** By Clause 1.1 of the Trust Management Agreement the government of Kazakhstan transferred the National Fund of Kazakhstan "*under trust management by [the NBK]"* and the NBK agreed to carry out trust management of the National Fund "*for the benefit of the Government by way of investing financial assets of the [National Fund]".*[23] By clause 2 of the Trust Management Agreement the bank is given the rights to "*possess, use and dispose of the Fund assets in accordance with the terms and conditions set forth herein";*[24] and, subject to investment rules, "to *invest the [National Fund] assets".*[25] For this service there is a fee arrangement between the government of

22 **D1/Tab 13/pages 201 – 225.**
23 **C/Tab 1/page 1.**
24 **Clause 2.1.1:**
25 **Clause 2.1.2.**

Kazakhstan and the NBK. NBK will receive commission if the National Fund profits, but it must pay the government of Kazakhstan compensation if there is a loss.[26] Clause 7.1 of the Trust Management Agreement states that "*The Government shall be the beneficiary under this Agreement*".

17. According to the opinion of Professor Didenko, the Claimants' expert on Kazakhstan law, under a trust management structure established under Kazakhstan law, the trust manager does not become the owner of the property that is subject to the trust management. He states that Kazakhstan law does not differentiate between legal and beneficial ownership as does English law. "*Therefore, the property held by the trust manager remains under the full ownership of the trust founder*",[27] and "*the trust manager does not acquire any title to the property under his management*".[28] However, Professor Didenko also quotes ***Article 888.1*** of the ***Civil Code, Specific Part*** which provides that "*the trust manager has a right to take any actions with respect to the property in trust that could have been taken by the owner with the purpose of its proper management*".[29] He also states that the powers of dealing with the property under trust are primarily to be exercised by the trust manager, rather than the "beneficiary" or trust founder or "owner" of the funds under trust, but "*the trust manger does not acquire any title to the property under his management*".[30] As I understood the argument of Mr Malek QC, on behalf of RoK and NBK, he did not challenge this analysis of Kazakhstan law. However, he said that this did not preclude the NBK having "property" in both the cash and securities that are in the custody of AAMGS for the purposes of English law and, in particular, for the purposes of the provisions of the State Immunity Act 1978; indeed, he submitted that was so in this case.

18. **The Terms of the Global Custody Agreement ("GCA")[31] between the NBK and AAMGS and its operation**.

The GCA (as novated) appointed AAMGS to act as custodian and to provide custodian services to the NBK, as "the Client", on the terms set out in the GCA.[32] The GCA is governed by English law. It expressly provides that the Agreement is not enforceable by third parties under the Contracts (Rights of Third Parties) Act 1999.[33] Recital A of the GCA states that the NBK is carrying out "*certain trust management services with respect to the (sic) certain securities of the Republic of Kazakhstan (the "National Fund") in accordance with the Trust Management Agreement by and between the Government of [the RoK] and [the NBK]…*". Under the terms of the GCA, AAMGS was appointed as banker to the NBK.[34] AAMGS agreed to open Cash Accounts to hold cash of the NBK received by AAMGS.[35] Clause 16(j) confirms the general position in English law that cash of the NBK in the Cash Account constitutes "*a debt owed by [AAMGS] to [the NBK]*". In respect of

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26 **Clauses 2.1.3 and 2.1.4.**
27 **Didenko report: paras 59; 60: A/Tab 19/page 102.**
28 **Para 62: A/Tab 19/page 103.**
29 **Para 62.**
30 **Para 62.**
31 **C/Tab 2/page 11**
32 **Clause 2(a): C/Tab 2/page 13**
33 **Clauses 26 and 27 respectively.**
34 **Clause 2(b).**
35 **Clause 3(b).**

securities, AAMGS agreed to open securities accounts for them.[36] The securities were (unless special arrangements were agreed) to be registered in the name of a nominee of AAMGS.[37] However AAMGS agreed that it would hold the securities in safekeeping for the account of the NBK.[38] The ownership of securities held in the securities account would be "*clearly recorded on [AAMGS's] books as belonging to [the NBK]*".[39]

19. AAMGS holds assets (ie. cash and securities) under the GCA in 16 custody accounts.[40] The securities held include UK government bonds and shares in UK listed companies.[41] NBK has disclosed statements for these 16 accounts for the period from 1 July 2003 to 31 December 2004. It is clear, and is accepted by the RoK and NBK, that the securities in these accounts have been actively traded. I was informed by the Claimants (without challenge)[42] that during the period from July 2003 to December 2004 there were some 120,500 trades, or just under 6,700 trades per month. Income and profits from the securities held by AAMGS have almost invariably been re-invested in other securities and there have been very few cash withdrawals from AAMGS' custody.[43]

C. The English legislation

20. Third Party Debt Orders

The court's jurisdiction to make a Third Party Debt Order ("***TPDO")*** is found in the ***CPR Part 72.2.*** That provides:

> *"(1) Upon the application of a judgment creditor, the court may make an order (a "final third party debt order") requiring a third party to pay to the judgment creditor –*
>
> *(a) the amount of any debt due or accruing due to the judgment debtor from the third party; or*
>
> *(b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application".*

21. Charging Orders

The court's jurisdiction and powers in respect of Charging Orders are set out in ***sections 1 and 2*** of the ***Charging Orders Act 1979.*** These provide:

> "**1 Charging Orders**
>
> (1) Where, under a judgment or order of the High Court or a county court, a person (the "debtor") is required to pay a

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36 **Clause 3(a).**
37 **Clause 6(b).**
38 **Clause 5(a).**
39 **Clause 5(b).**
40 Letter from AAMGS to NBK dated 15 November 2004: **C/Tab 12/page 213.**
41 See: **E/Tab 4/pages 202 – 3 and Tab 5/page 215.**
42 All the trades were recorded electronically and the material was disclosed on a CD – Rom; it would have translated into 19,000 A4 pages so was not before the court in hard copy.
43 **Letter of AAMGS to NBK dated 18 January 2005: C/Tab 12/page 215.**

sum of money to another person (the "creditor") then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.

……

(3) An order under subsection (1) above is referred to in this Act as a "charging order".

(4) Where a person applies to the High Court for a charging order to enforce more than one judgment or order, that court shall be the appropriate court in relation to the application if it would be the appropriate court, apart from this subsection, on an application relating to one or more of the judgments or orders concerned.

(5) In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to –

(a) the personal circumstances of the debtor, and

(b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.

2 Property which may be charged

(1) Subject to subsection (3) below, a charge may be imposed by a charging order only on -

(a) any interest held by the debtor beneficially-

(i) in any asset of a kind mentioned in subsection (2) below, or

(ii) under any trust; or

(b) any interest held by a person as trustee of a trust ("the trust"), if the interest is in such an asset or is an interest under another trust and-

(i) the judgment or order in respect of which a charge is to be imposed was

made against that person as a trustee of the trust, or

(ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit, or

(iii) in a case where there are two or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.

(2) The assets referred to in subsection (1) above are-

(a) land,

(b) securities of any of the following kinds –

(i) government stock,

(ii) stock of any body (other than a building society) incorporated within England and Wales,

(iii) stock of any body incorporated outside England and Wales or of any state or territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales,

(iv) units of any unit trust in respect of which a register of the unit holders is kept at any place within England and Wales, or

(c) funds in court.

(3) In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in paragraph (b) or (c) of subsection (2) above, the court making the order may provide for the charge to extend to any interest or dividend payable in respect of the asset.

……."

22. **State Immunity Act 1978**

The law relating to the immunity of sovereign States and their property in respect of proceedings in the courts of the United Kingdom is set out in the ***State Immunity Act 1978 ("SIA").*** The Act replaced and codified the English common law on the topic. The common law had developed swiftly over the previous decade, from a rule that sovereign States had absolute immunity from suit, (in the absence of consent by a foreign sovereign State) to a rule that States had more restricted immunity. This development gave effect to what had become widely recognised, viz. that the English common law rules as to state immunity, as had been stated in the courts, were out of step with the law in most countries outside the Commonwealth, where a more restricted theory of state immunity was applied. The SIA also gave effect in English law to the European Convention on State Immunity 1972, to which the UK had become a party in May 1972. That Convention provides that a State should be immune from the jurisdiction of a Contracting State's courts subject to various exceptions.

23. ***Section 1(1)*** of the SIA provides that a State is immune from the jurisdiction of the UK Courts, except as provided for in Part 1 of the Act. The succeeding sections set out the circumstances in which a State is not immune from suit. ***Section 2(1)*** provides that a State is not immune with respect to proceedings where it has submitted to the jurisdiction of the courts of the UK. ***Section 3*** deals with the important exception from immunity when a State engages in commercial transactions. That section provides:

> **"**(1) A State is not immune as respects proceedings relating to –
>
> (a) a commercial transaction, entered into by the State;….
>
> ……
>
> (3) In this section "commercial transaction" means –
>
> (a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; …."

24. ***Section 13*** is headed "*Other procedural privileges"*. Subsections (2), (3) and (4) deal with injunctions and enforcement of a judgment or arbitration award against a State. They provide:

> " …….

> (2) Subject to subsections (3) and (4) below –
>
> (a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and
>
> (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award, or in an action in rem, for its arrest, detention or sale.
>
> (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
>
> (4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in the case not falling within section (1) above, this subsection applies to property of a State party to the European Convention on State Immunity only if:-
>
> ……..”

25. ***Section 13(5)*** is also important in the present case. It provides that the head of a State’s diplomatic mission in the UK shall be deemed to have authority to give on behalf of that State, for the purposes of ***section 13(4),*** *“his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes…”* and such a certificate “*…shall be accepted as sufficient evidence of that fact unless the contrary is proved”*. In this case the Ambassador of the RoK to the Court of St James has certified, in a letter dated 18 November 2004 addressed to the High Court,[44] that the assets held by AAMGS for the NBK form part of the NATIONAL FUND and beneficially belong to the RoK. The letter continues:

> **“**The National Fund is designed to ensure economic stability of Kazakhstan and to accumulate funds for future generations by way of investment in securities. In this connection, the assets held in custody in NBK’s accounts with AAMGS have never been used for commercial purposes since they were opened in 2001, and they are not intended to be used for such purposes”.

26. ***Section 14*** of the SIA deals with the entities that are entitled to the immunities and privileges set out in Part 1 of the Act. ***Sub – sections (1) to (4)*** provide as follows:

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[44] **A/Tab 18/page 89**

"14 States entitled to immunities and privileges

……

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if-

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank, or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity."

(4) Property of a State's central bank or monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority

…….".

D. The arguments of the parties in outline

27. The arguments on behalf of the Claimants

Mr Salter QC, on behalf of the Claimants, submitted as follows:

(1) The RoK is the beneficial owner of all the London assets held by AAMGS, because those assets are part of the National Fund. As the RoK has an equitable proprietary right in the Cash Accounts held by AAMGS, the cash constitutes "*debts due or accruing due*" to the RoK, within the meaning of CPR Pt 72.2. Therefore, subject to the issues of immunity, which are the same in relation to both the TPD Order and the Charging Order, the Claimants are entitled to a final TPD Order to the extent of the cash held by AAMGS in the UK on behalf of the RoK.

(2) Subject to the question of immunity, the Claimants would be entitled to a Charging Order against the Security Accounts held by AAMGS in London so as to discharge the judgment debt of the RoK.[45]

(3) The Claimants accept that the NBK is the central bank of Kazakhstan and that it is to be treated as a separate entity from the Republic of Kazakhstan for the purposes of ***section 14(4)*** of the SIA. However, the London assets held by AAMGS, which are held ultimately for the beneficial ownership of the RoK, do not constitute "*property of a State's central bank or other monetary authority*" within ***section 14(4).*** If that section is properly construed, then on the facts: (a) the London Assets are not "*property*" of the NBK, but the RoK; and/or (b) the words only apply to property that is held by a central bank (or other monetary authority) in its capacity as such, ie. when it is acting as in the exercise of sovereign authority and not for commercial purposes.

(4) This constitutes the proper construction of ***section 14(4)*** as a matter of common law canons of construction. But if the "common law construction" is otherwise, then ***section 14(4)*** must be read in accordance with ***section 3(1)*** of the ***Human Rights Act 1998.*** ***Section 14(4)*** of the SIA must be construed in a way that makes it compatible with the Claimants' rights of access to the adjudicative and enforcement jurisdiction of the court under ***Article 6*** of the ***ECHR,*** or with the Claimants' rights (under ***Article 1*** of the ***Protocol 1*** of the ***ECHR),*** to the peaceful enjoyment of their possessions, ie. the ICSID Arbitration Award that they have obtained. The only way to make ***section 14(4)*** **"**Convention compliant" is to read it so as to grant a narrower immunity in respect of property

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[45] This was not in dispute. The steps are: (a) the RoK has an interest in the Securities as the sole and unencumbered beneficiary under a trust of which the NBK is the bare trustee; therefore (b) either the RoK, as the judgment debtor, holds an interest beneficially in the securities (***section 2(1)(a) of the Charging Act 1979***), or (c) the RoK holds the whole beneficial interest, unencumbered and for its own benefit, in the securities under a trust of which the NBK is the trustee, so that the charging order can be made on the interest held by the person as trustee of the trust, ie. NBK; (d) AAMGS holds the securities on behalf of NBK: ***section 2(1)(b)(ii) of the Charging Act.***

held by central banks; the immunity can only apply to property that is held by a central bank (or other monetary authority) in its capacity as such.

(5) Those parts of the London Assets not in cash, which are held by AAMGS on behalf of the National Fund, are invested in securities that are actively traded so as to produce a high level of investment income, as is required by paragraph 24 of the Budget Code of the RoK.

(6) This has two consequences. First, those assets do not fall within the term *"property of a State's central bank or other monetary authority"* within ***section 14(4)*** of the SIA.

(7) Secondly, those assets are, in fact, the property of RoK, which are *"for the time being,*[46] *in use or intended for use for commercial purposes",* within ***section 13(4)*** of the SIA. Therefore those assets can be the subject of a Charging Order, which is a "*process for the enforcement of a judgment"* within ***section 13(2)(b)*** of the SIA.

(8) The same arguments apply in relation to the Cash Accounts held by AAMGS in London.

(9) Therefore neither the NBK nor the RoK can claim that the London assets are immune from the enforcement process of the English Court. So, the TPD Order and the Charging Order should be made Final.

28. **The arguments on behalf of the RoK and NBK**

Mr Malek QC, on behalf of the RoK and NBK, submitted as follows:

(1) The Cash Accounts held by AAMGS within the jurisdiction represent a debt due by AAMGS to the NBK, because the relationship created by the GCA is between AAMGS and the NBK. They do not constitute a "*debt due or accruing due to"*[47] the judgment debtor, ie. the RoK. There is no relationship of creditor and debtor between AAMGS and the RoK. Therefore the court has no jurisdiction under ***CPR Pt 72.2*** to make a TPD Order in respect of the Cash Accounts held within the jurisdiction. So the Interim TPD Order must be discharged.

(2) It is accepted that the RoK has a beneficial interest in the London Assets held by AAMGS. It is therefore accepted that, subject to the issue of State immunity, a charging order could be made on those securities held by AAMGS which compromise UK government stock or UK listed companies, ("the UK Securities"), although not other securities.[48]

(3) However, the UK Securities ***do*** constitute "*property*" of the NBK, within the meaning of ***section 14(4)*** of the SIA. As the NBK is the central bank of the RoK, then, in accordance with ***section 14(4),*** the UK Securities held by

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[46] That is at the time that the enforcing process was begun: ***Alcom Ltd v Republic of Columbia [1984] AC 580 at 604D-E per Lord Diplock.***

[47] The wording of CPR Pt 72.2(1)(b).

[48] As the value of the UK Securities far exceeds the amount of the judgment debt, the status of non – UK Securities is irrelevant.

AAMGS, being property of a State's central bank, "*…shall not be regarded fur the purposes of sub – section (4) of section 13 [of the SIA] as in use or intended for use for commercial purposes"*. That provision is clear and conclusive.

(4) The fact that NBK is a separate legal entity from the Republic of Kazakhstan makes no difference. By virtue of the wording of the last sentence of ***section 14(4)*** of the SIA,[49] the provisions of ***section 13(4)*** of the SIA will still apply to the property of the NBK as a separate legal entity.

(5) Therefore the London Assets held by AAMGS as custodian for the NBK cannot be regarded as being in use or intended for use "*for commercial purposes"* within ***section 13(4)*** of the SIA. Thus they are immune from any process for the enforcement of a judgment, by virtue of ***section 13(2)*** of the SIA, because the London Assets are in the same position as "*the property of a State"*, within the meaning of that subsection.

(6) As to the Claimants' argument that ***section 14(4)*** of the SIA must be construed to be consistent with the Claimants' rights under Article 6 of the ECHR, that Article has no application to the present case, because the Claimants never had any right to a hearing or determination in the UK or before a UK court of their rights against the RoK. Article 1 of the Protocol is also irrelevant to the present case, because the SIA, in particular ***section 14(4),*** does not infringe the Claimants' peaceful enjoyment of their ICSID Award or the judgment obtained. Even if Article 6 or Protocol rights are involved, the grant of immunity to assets of foreign central banks is proportionate and in pursuit of a legitimate aim of the State, i.e. the UK. Therefore the construction of the section should not be altered, pursuant to section 3(1) of the HRA 1998.

(7) Even if, as the Claimants argue, the London Assets are not "*property of a State's central bank or other monetary authority"* within the meaning of ***section 14(4)***, nonetheless the London Assets are the "property" of the RoK. As the certificate of the Ambassador of the RoK has certified, those assets in the hands of AAMGS are not and never have been used or intended for use for commercial purposes.

(8) On the contrary, it is clear on the facts that those assets, being part of the National Fund, are being used and always have been used in the exercise of sovereign authority. Therefore the London Assets are immune from being subject to any process for the enforcement of the judgment obtained by the Claimants, pursuant to ***section 13(2)*** of the SIA. Therefore the Interim Charging Order must be discharged.

(9) The same arguments as to immunity apply to the Cash Accounts relating to money held by AAMGS for the account of the NBK, if the argument at (1) above is not accepted. Therefore the TPD Order must be discharged on the ground of immunity in any event.

E. The Issues to be determined

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[49] *"…where any such bank or authority [ie. central bank or other monetary authority]is a separate entity subsections (1) to (3) of [section 13 of the SIA] shall apply to it as if references to a State were references to the bank or authority".*

29. In my view, given the arguments set out above, the following issues have to be determined:

(1) **The Third Party Debt Order.** The question is whether, in relation to the Cash Accounts held by AAMGS (within the jurisdiction), they constitute a "*debt due or accruing due to the judgment debtor [ie. the RoK] from the third party [ie. AAMGS]"*, within the terms of CPR Pt 72.2(1)(a). If they do not constitute such a debt, then the Interim TPD Order must be discharged. If they do, then the same issues as to immunity arise as with the Securities Accounts.

(2) **The construction of *section 14(4)* of the *State Immunity Act*: using common law principles of construction.** There are two question to be decided. First, what is the scope of the word "*property"* in that section? In particular, what is the position if one entity has legal ownership or some other interest in assets and another entity has a beneficial interest or some other interest?. Secondly, do the words "*property of a State's central bank or other monetary authority"* mean ***any property*** that is allocated to or held in the name of a central bank, irrespective of the capacity in which or the purpose for which that property is held (as RoK and NBK contend); or is the scope of the words restricted to property held by a central bank (or other monetary authority) as such, as the Claimants contend?

(3) Does ***section 14(4)****:* (a) potentially have an impact on the Claimants' right of access to the adjudicative and enforcement jurisdiction of the UK courts; alternatively (b) does it potentially affect their rights to peaceful enjoyment of their possessions – ie. the ICSID Award and the judgment derived from it?

(4) If the answer to either question in (3) above is "yes", is it possible to alter the construction to be given to *section 14(4)* of the SIA and, if so, should that be done in the manner proposed by the Claimants?

(5) What are the characteristics of the Cash Accounts and the Security Accounts held in London by AAMGS for the NBK? In particular are they: (a) "*property of a State's central bank"* within *section 14(4) o*f the SIA; (b) if not, are they "*property [of a State] which is for the time being in use or intended for use for commercial purposes"* within *section 13(4)* of the SIA? The second of these questions will only arise if the Claimants are correct in respect of either the first or second question that arises on the construction of ***section 14(4)*** of the SIA and I conclude, on the facts, that the London Assets do not constitute property held by the NBK (as the central bank of the RoK) in its capacity as a central bank.

F. First Issue: Is there a debt due or accruing due from AAMGS to the RoK, for the purposes of making a Third Party Debt Order?

30. A TPD Order cannot be made unless there is a "*debt due or accruing due"* from a third party to the judgment debtor.[50] In this case the judgment debtor is the RoK, not the NBK. The relevant third party is AAMGS. The Cash Accounts held by AAMGS in London are in the name of the NBK, not the RoK. The Cash Accounts were opened pursuant to the GCA and Clause 16(j) of the GCA (which is governed by

[50] **CPR Pt 72.2(1)(a)**

English law) recognises the common law rule that cash in the Cash Accounts reflects a debt owed by AAMGS to the NBK, which is the account holder.

31. The fact that the RoK holds the ultimate beneficial interest in the National Fund and thereby has a beneficial interest in the Cash Accounts held by AAMGS on behalf of the NBK does not, in my view, mean that there is a debt due or accruing due to the RoK in respect of those accounts. The RoK has no contractual rights against AAMGS either under the GCA or otherwise. There is no relationship of debtor and creditor between them. The fact that the RoK may, ultimately, have a beneficial interest in the money represented in the Cash Accounts cannot, in my view, create such a relationship.

32. Therefore there is no basis on which to make a TPD Order against AAMGS. On this ground alone, the Interim TPD Order must be discharged.

G. Second Issue: What is the proper construction of section 14(4) of the State Immunity Act 1978 using common law principles of construction?

33. The clause of the State Immunity Bill which became ***section 14(4)*** of the SIA was introduced by amendment in the House of Commons. The somewhat laconic explanation of the provision and its scope, given by the Parliamentary Secretary to the Law Officers on behalf of the government, was:

> "…that the amendment ensures that a central bank or other monetary authority shall have the same immunity with regard to execution or in respect of relief by way of injunction or order for specific performance…as a State shall have, irrespective of whether the central bank is a separate entity or is acting in the exercise of sovereign authority".[51]

34. The argument of the Claimants is, basically, that if the wording of ***section 14(4)*** is read literally, or even "naturally", then that provision appears to grant a greater immunity to the assets of a central bank than is granted to those of a State; which do not have immunity if they are used for commercial purposes. Such a wider immunity cannot have been the intention of Parliament, they say, so that a narrower reading has to be given to the words, as proposed by the Claimants.

35. Mr Salter emphasised the fact that ***section 14(4)*** is phrased so as to apply to two situations. First, where the central bank is ***not*** a separate entity from the State concerned and, secondly, where it ***is*** a separate entity. He submits that in the first of those circumstances, if the central bank is not a separate legal entity, then (at least so far as English law is concerned) it could not be capable of owning property independently from the State of which it is the central bank. Any "property" of the central bank would, in fact, be the property of the State of which the bank is a department or agent. Therefore, in that situation the wording "*Property of a State's central bank or other monetary authority…*" in ***section 14(4)*** cannot be applied literally; it does not make sense.

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[51] **HC Hansard 13 June 1978,** Standing Committee D, vol 951 col 844, quoted in **Fox,** ***The Law of State Immunity at p 363 – 4.***

36. Furthermore, Mr Salter submits, the second situation also creates difficulties. If the central bank is a separate entity, then its property will belong to the central bank; but may not necessarily belong to the relevant State. Yet if the State is the judgment debtor, then execution of the judgment debt can only be made on the property of the State itself, not another's property. But ***section 14(4)*** appears to contemplate execution against the property of a central bank when the judgment debtor is the relevant State, because of its reference back to ***section 13(4)*** and ***section 13(2)(b),*** which are dealing with enforcement against a State.

37. Mr Salter submits that if the words cannot be applied literally because of these problems then, in order to give them proper effect, they must be given a "purposive" construction. He submits that this purposive construction must apply to all cases, that is whether the central bank is, or is not, a separate entity from the State concerned. To arrive at this proper, purposive, construction, he submits it is necessary to deal with three issues. The first is: what is meant by "*property"* in ***section 14(4).*** Mr Salter says that "*property"* is confined to property owned beneficially by a State's central bank or other monetary authority against which only a judgment against the central bank or other monetary authority could be executed. The second issue is: what is a central bank or other monetary authority; and the third is: what is it about such an institution that requires that its property should have a special immunity from execution by virtue of ***section 14(4)?***

38. Mr Salter notes that the SIA does not define a "*central bank or other monetary authority"*. There is no handy definition of a central bank in either English law or public international law. The status of a central bank varies from State to State. However, the key characteristics and functions of a central bank are well – known and clear. Fundamentally, a central bank is set up by a State with the duty of being the guardian and regulator of the monetary system and currency of that State both internally and internationally.[52] The same applies, I would say, to a "*monetary authority"*.

39. Mr Salter accepts that there is good reason to confer special immunity on the assets held by a central bank or monetary authority, where the assets are being used to perform the functions set out above. But, he says, there is no sound reason to grant immunity to assets held in the name of a central bank for other purposes. Hence the Claimants' submission that, on the proper construction of ***section 14(4)*** of the SIA, the words "*property of a State's central bank or other monetary authority.."* must be construed so as to apply only to property held by a State's central bank or monetary authority when acting in respect of its duties as such. Mr Salter suggested, as an alternative construction of ***section 14(4),*** that it should cover those assets held by a State's central bank or other monetary authority, but held only "*for the purpose of acting as a central bank or other monetary authority"*. To my mind there is no significant difference between the breadth of the two proposed constructions.

40. Mr Salter submitted that if any broader construction were to be given to the words of ***section 14(4),*** then it could facilitate abuse by central banks who could use funds held in their name for commercial purposes and then not honour contracts. He also

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[52] See: **Fox:** ***State Immunity at page 360;*** **Blair:** ***The Legal Status of Central Bank Investments Under English Law (1998) 57(2) CLJ 374 at 375; Statutes of the Bank of International Settlements: Art 56; Mann on the Legal Aspects of Money (6th Ed. 2004, by Charles Proctor LLD) Ch 21, pages 540 – 1.***

noted that it has been suggested that an unspoken reason for the width of the immunity granted by ***section 14(4)*** is the commercial interest of the banking community in the City of London, which could thereby attract funds of States' central banks with the assurance that they are immune from execution at the hands of judgment creditors of the relevant States. If there were such a motive, then it has been criticised in characteristically trenchant terms by the late Dr FA Mann.[53]

41. Mr Salter also draws attention to the fact that in other jurisdictions the scope of the immunity granted to the property of central banks appears to be narrower than that which the words of ***section 14(4)*** would confer if construed literally.[54] He submits that the UK should not be out of step.

42. **Discussion on the "common law construction" point.**

In order to determine the scope of ***section 14(4),*** I must look at it in its context in the SIA as a whole. ***Section 1(1)*** sets out the general rule that a State is immune from the jurisdiction of the UK courts, unless the circumstances in which it is sued falls into one of the categories specified in Part 1 of the Act. In ***Alcom Ltd v Republic of Columbia***[55] Lord Diplock described the method of draftsmanship of the succeeding sections as "*a somewhat convoluted style*". I respectfully agree. The Act draws a distinction between what Lord Diplock called the "*adjudicative*" jurisdiction of the UK courts and the "*enforcement*" jurisdiction.[56] In the former category, as I have already noted, one of the most important exceptions from immunity of suit against a State is in respect of proceedings relating to "*a commercial transaction entered into by the State*": ***section 3(1)(a).*** "*Commercial transactions*" are defined in ***section 3(3).*** "*Commercial purposes*" are defined in ***section 17(1)*** as being purposes of such transactions and activities as are mentioned in ***section 3(3).***

43. The jurisdiction of the UK courts as to enforcement of a judgment against a State is dealt with by ***section 13,*** which is in Part 1 of the Act but comes under the general heading "*Procedure*" and the particular heading of "*Other Procedural Privileges*". Subject to exceptions, the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award: ***section 13(2)(b)***. But this rule is subject to the all – important exception in ***section 13(4),*** which says that ***section***

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53 The suggested policy is referred to by Prof James Crawford (then an Australian Law Commissioner, now Whewell Professor of International Law at Cambridge University) in: ***International Law and Foreign Sovereigns: Distinguishing Immune Transactions (1983) The British Year Book of International Law (BYIL) page 75 at 117.*** The comment by **Dr FA Mann** is at**:** ***The State Immunity Act 1978; BYIL (1979) page 43 at 62:*** *"Is it in the true interest of Britain and the City of London to assist Foreign States or their central banks in avoiding the discharge of their commercial debt?…..Does principle and financial and commercial probity no longer count?"*

54 Compare **US Foreign Sovereign Immunities Act 1976: s.1611 (b): "….***the property of a foreign state shall be immune from attachment and from execution, if – (1) the property is that of a foreign central bank or monetary authority* ***held for its own account…";*** **The Canadian State Immunity Act 1982,** which exempts only property of a central bank "*that is held for its own account and is not used or intended for a commercial activity": **s.11(4).*** **The Australian Foreign State Immunities Act 1985 s.32** provides that "*commercial property of a State*" is not immune from any process of enforcement. "*Commercial property*" is defined as "*property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes…*".

55 ***[1984] AC 580 at 600;*** hereafter "***Alcom".***

56 ***Alcom at page 600.***

13(2)(b) "…*does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes…".*

44. The word "*property*" in section 13(4) clearly refers to "*the property of a State*", which is the phrase used in ***section 13(2)(b).*** So ***section 13(2)(b) and (4)*** set out the rules on immunity from enforcement with respect only to the property of a State. It is noteworthy that even if a State can be sued because one of the exceptions set out in the earlier sections of the SIA applies, still it may not be possible to enforce a judgment obtained against it on that State's ***property*** in the jurisdiction, unless the State's property falls within the scope of ***section 13(4).***

45. There is no definition of "property" in the SIA. However, in **Alcom,**[57] Lord Diplock stated that the expression "property" in **section 13(2)(b) and (3)** "…*is broad enough to include, as being the property of a banker's customer, the debt owed to him by the banker which is represented by the total amount of any balance standing to the customer's credit on current account*". In **AIC Ltd v Federal Government of Nigeria,**[58] Stanley Burnton J stated (albeit obiter) that the word "property" in **section 14(4)** included a chose in action constituted by the debts owed by the Bank of England to the Central Bank of Nigeria that had accounts with the Bank. In my view the word "property" must have the same meaning and scope in both ***sections 13*** and ***14*** of the Act. Moreover, I think it clear from Lord Diplock's statement in ***Alcom,*** which I have quoted above, that the word should be given a broad scope. So, in my view, "property" will include all real and personal property and will embrace any right or interest, legal, equitable, or contractual in assets that might be held by a State or any "emanation of the State"[59] or central bank or other monetary authority that comes within ***sections 13*** and ***14*** of the Act.

46. ***Section 14*** of the SIA comes under the general heading (still in Part 1 of the Act) of "*Supplementary Provisions*". The section is headed: "*States entitled to immunities and privileges*". However, the section deals with more than that. ***Section 14(1)*** sets out not only which States can take advantage of the privileges and immunities set out in the Act, but it also defines which "*entities*" are embraced by the word "*State*". A "*central bank or other monetary authority*" is not included amongst those definitions. "*Separate entities*" which are "*distinct from the executive organs of the government of the State and capable of suing and being sued*" are expressly excluded from the scope of ***section 14(1).***

47. ***Section 14(2)*** deals with the circumstances in which such "*separate entities*" can have immunity from the jurisdiction of the UK courts. As I read it, this sub-section refers to both the adjudicative and the enforcement jurisdictions of the court. Two pre - conditions must be fulfilled before a separate entity can have immunity. First, the proceedings must relate to anything done by the separate entity "*in the exercise of sovereign authority*". Secondly, the circumstances must be such that a State would have been "*so immune*". So, only limited right of immunity from suit is given to "*separate entities*". In my view of ***section 14(2),*** the definition of a "*separate*

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57 ***[1984] AC 580 at 602.*** The issue in that case was whether a commercial trader could obtain a "garnishee order" against the current account of the Embassy of the Republic of Columbia in respect of goods supplied to the Embassy. The HL, reversing the CA and restoring the judgment of Hobhouse J, held it could not.

58 ***[2003] EWHC 1357 (QB) at para 47.***

59 The phrase used by Lord Diplock in ***Alcom at page 600.***

entity" would cover a central bank or other monetary authority which is distinct from the executive organs of the government of a State and is capable of suing and being sued. If so then such a central bank (or other monetary authority) is covered by ***section 14(2).*** Therefore, on the face of it, a central bank or other monetary authority that falls within the statutory definition of a "*separate entity"* is not immune from the jurisdiction of the UK courts (both as to adjudication and enforcement) unless if fulfils the two pre – conditions for immunity set out in ***section 14(2).***

48. ***Section 14(3)*** deals with enforcement when a "*separate entity"* has submitted to the adjudicative jurisdiction of the UK courts. It specifically states that it does not apply to a State's central bank or other monetary authority. The position of those entities, in relation to the enforcement jurisdiction of the UK courts, is dealt with in ***section 14(4).***

49. ***Section 14(4)*** is concerned solely with enforcement processes. That is clear from the reference back to ***section 13(4),*** which itself refers to ***section 13(2)(b),*** which prohibits the property of a State from being subject to "*any process for the enforcement of a judgment or arbitration award"*. Once this limitation on the scope of ***section 14(4)*** is grasped, I think that it becomes much easier to follow the scheme of the Act in relation to the immunity of a central bank or other monetary authority from suit and the immunity of State property and central bank property from the enforcement processes of the UK courts.

50. In my view the scheme of the Act in relation to the immunity of a central bank (or other monetary authority) from suit and the immunity of its property from the enforcement processes of UK courts has the following pattern. First, if the central bank (etc) is a department of the government of the State, but is not a "*separate entity"* as defined by ***section 14(1),*** then the central bank is immune from the adjudicative process unless it falls within one of the exceptions in the Act, including the "commercial transaction" exception set out in ***section 3.*** That is the effect of ***section 14(1).***

51. Secondly, any process for the enforcement of a judgment or arbitration award may only be issued as against a State's property if, *"for the time being [it] is in use or intended for use for commercial purposes"*. That is the effect of ***sections 13(2)(b) and 13(4).*** As I have already stated, in my view what constitutes "*property"* must be given a broad interpretation and "*property"* must mean the same in ***sections 13(2)(b), 13(4) and 14(4).*** Of course, whether a particular enforcement provision can be used against a State's property by the UK court will depend on three matters: (a) proof that the State concerned does have an interest in the particular asset; (b) proof that the State's property comes within the exception expressed in ***section 13(4);*** and (c) the nature of the property to be the subject of enforcement and the scope of the particular enforcement process under English law.[60]

52. Thirdly, because ***section 14(1)*** defines what is covered by the words "*a State"**,*** it must mean that the property of any department of the government of the State will constitute "*State property"*, for the purposes of ***sections 13(2)(b) and (4),*** unless the department or other emanation of the State is a "*separate entity"* as defined in

[60] For example, compare the scope of a TPD Order in CPR Pt 72.2 and the property against which a Charging Order can be made under ***section 2*** of the ***Charging Order Act 1979.***

section 14(1). This must follow from the wording of the opening sentence of ***section 14(1).***

53. Therefore, if ***section 14(4)*** did not exist, then because central banks and other monetary authorities are not excluded from the scope of ***section 14(1),*** a central bank (etc) that is a department of the government of a State and is not a "*separate entity*", (as defined), and its property could be the subject of an enforcement process in respect of a judgment obtained against the relevant State. But to be so the property of the central bank (etc) would have to fall within the scope of ***section 13(4).***

54. Fourthly, as to the immunity of "*separate entities*", which is dealt with in ***section 14(2),*** the same rules as to immunity of a State apply, (for both the adjudicative and enforcement jurisdictions), if the two pre-conditions set out are fulfilled. If ***section 14(4)*** did not exist, then it seems to me that ***section 14(2)*** would be applicable to a central bank (etc) that fell within the definition of a "*separate entity*" as set out in ***section 14(1).*** This means that, but for the existence of ***section 14(4),*** the property of a central bank that is a "*separate entity*" could be the subject of the enforcement jurisdiction of UK courts in respect of a judgment against the central bank (etc), provided the property came within the scope of ***section 13(4) –*** ie. that the relevant property is in use or intended for use for commercial purposes at the relevant time.

55. Fifthly, if a "*separate entity*" (which is not a central bank etc), is entitled to immunity, but it submits to the jurisdiction of the UK courts, then its property can be the subject of process to enforce a judgment against it. If the exclusion of central banks (etc) from the scope of ***section 14(3)*** was not present, then that sub – section would have dealt with the situation when a central bank (etc) was indeed a "*separate entity*" as defined in ***section 14(1)*** and the central bank (etc) had submitted to the jurisdiction in circumstances when it could have asserted immunity**.** In that case, there could be enforcement of a judgment obtained against a central bank (etc) as against "the property" of the central bank (etc) that is a "*separate entity*", but only if that property of the central bank (etc) as a "*separate entity*" was in use or intended for use for commercial purposes: ***section 13(4).***

56. But, sixthly, ***section 14(4)*** does exist and effect must be given to its wording. It is specifically directed to the question of enforcement processes against "*Property of a State's central bank or other monetary authority*". In my view it is clear that Parliament intended that the position of a central bank or other monetary authority should be dealt with distinctly from either any other department of the government of a State, or any "*separate entity*" as defined in ***section 14(1).*** As I have attempted to show, it would have been possible to deal with the position of central banks (etc) using ***sections 14(1), (2) and (3)*** without the need for a separate sub – section. But ***section 14(4)*** was specifically introduced as an amendment. To my mind that makes it clear that Parliament intended this separate sub - section to have a different effect from the preceding sub – sections of ***section 14*** so far as they concern the ability to use enforcement processes against States and "*emanations of the State*".

57. In my view the wording of ***section 14(4)*** is clear and imperative; hence the wording *"…The property of a State's central bank…shall not be regarded…"*. The words are, in their natural meaning, not capable of qualification. When they are set in their context, as I have tried to do, it is clear that they should not be qualified. This has the following consequences:

(1) All "*property"* of a State's central bank or other monetary authority is covered by ***section 14(4).*** The only question is whether the central bank (etc) has one of the types of interests in the property concerned, as I have described the interests above, so that the assets concerned can be described as the "*property"* of the central bank concerned.

(2) It does not matter whether the central bank is a department of the State or a separate entity. In all cases the central bank's property *"shall not be"* regarded as in use or intended for use for commercial purposes "*for the purposes of [section 13(4)]"*.

(3) Given the wording of ***section 14(4)***, then the property of a State's central bank (or other monetary authority) must enjoy complete immunity from the enforcement process in the UK courts.

(4) If the central bank (etc) has an interest in the property concerned, but the State of the central bank has another interest in the same property, then in my view the effect of ***section 14(4)*** is that the relevant property is immune from enforcement in respect of a judgment against that State, whether the property concerned is in use or intended for use for commercial purposes or not.

58. One can only speculate on why a separate sub – section was introduced by amendment to deal with the position of property of central banks and other monetary authorities with regard to the enforcement process in UK courts. But one can note, first, that generally speaking, when a central bank or a State's monetary authority is performing its key functions of acting as guardian and regulator of the State's monetary system, it will be exercising governmental or sovereign authority; it will not be acting for commercial purposes. Secondly, it is likely that the most obvious "property" of a central bank, a State's reserves, will be held and used for governmental, or sovereign purposes and not for commercial purposes. It may be that it was recognised by the draftsmen of the Act that it would be difficult, if not impossible, to determine whether a particular asset of a central bank or monetary authority was, at a relevant time, being used or intended for use for sovereign purposes or for commercial purposes. The assets of a State's central bank (or monetary authority) would be an obvious target for the enforcement process in relation to judgments against the State or its central bank (etc). This might lead to unwelcome and perhaps embarrassing litigation in UK courts. Therefore this possibility was pre-empted by the all – embracing and imperative immunity granted by ***section 14(4).***

59. Contrary to the submissions of Mr Salter, the wording of ***section 14(4)*** will work in relation to "property" of the central bank whether the central bank is a department of a State or a separate entity. Take first the case where the central bank is a department of the State. If the central bank handles "property", then it will do so as a part of the State. But, as a department of State, it might have the capacity to sue and be sued and it could have the right to enter contracts. That capacity will all depend on the law of the particular State concerned. If the central bank has no interest in the relevant property, then ***section 14(4)*** does not apply. But if it is established that the central bank has "property" in the asset in the sense I have described above, then this asset is immune from any enforcement process, whether the judgment is against the State as such, or it is the central bank that has been sued.

60. In the case of a central bank that is a separate entity from a department of the State, there can be no problem (in English law at least) about it having "property" in assets. Thus in the present case it is clear that the NBK has "property" of some form in the London Assets; ***viz***. a contractual right to the payment of debts in the case of the cash accounts held by AAMGS, and a beneficial interest in the securities held by AAMGS.[61] At the same time the State could also have an interest in the same property; it may be some kind of beneficial interest, as it is agreed to be in this case. But in all cases, whatever the nature of the "property" right of the central bank, the assets concerned are immune from the enforcement process.

61. Therefore I conclude that the words "*Property of a State's central bank or other monetary authority"* in ***section 14(4),*** when construed using common law principles of construction, mean any asset in which the central bank has some kind of "property" interest as I have described, which asset is allocated to or held in the name of a central bank, irrespective of the capacity in which the central bank holds it, or the purpose for which the property is held.[62]

H. Issues Three and Four: (a) Does section 14(4) potentially have an impact on the Claimants' right of access to the adjudicative and enforcement jurisdiction of the UK courts (Article 6(1) ECHR); and/or (b): does that section potentially affect their rights to the "peaceful enjoyment" of their possession: viz. the ICSID Award? If the answer to either (a) or (b) is "yes", then would it alter the construction to be given to section 14(4) of the SIA?

62. **The Article 6(1) point**.

The Claimants submit that, whatever the position may be using common law principles of construction, a construction that gives a narrower immunity must be given to ***section 14(4),*** by virtue of the ***Human Rights Act, section 3. Section 3*** of the ***HRA*** requires that: "*So far as it is possible to do so, primary legislation….must be read and given effect in a way which is compatible with Convention rights"*. The section applies to all legislation, whenever enacted.[63] The Convention Rights granted by ***Article 6(1)*** include the right that:

> "*…In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…*"

63. Mr Malek did not dispute that the case law of the European Court of Human Rights has derived from ***Article 6(1)*** the principle that a person has a right of access to the court in order to secure the determination of his civil rights and obligations.[64] Nor did Mr Malek dispute that the European Court of Human Rights has also held that this right of access extends beyond the right to the adjudication of civil claims. It has held that such a right of access would be illusory if a Contracting State's legal system allowed a final, binding judicial decision to be inoperative to the detriment of one

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61 See, respectively, clause 16(j) and clause 5(b) of the GCA.

62 It follows that I also agree with the conclusion of Stanley Burnton J at ***para 47*** of the ***AIC case,*** although I fear I have expressed my reasons at greater length.

63 ***Section 3(2)(b).***

64 ***Golder v United Kingdom [1975] EHRR 528 at para 57.***

party. Thus "….*Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6".*[65]

64. Mr Salter argued that a statute which grants immunity to a central bank from the enforcement process of UK courts constitutes a procedural bar on those courts' power to determine and enforce the Claimants' civil rights, in this case the right to enforce an arbitration award that has legitimately been turned into a judgment of the English court. He accepts that the "right of access", as developed in the jurisprudence of the European Court of Human Rights, is not an absolute right. But he submits that any restriction on the right of access to the court must be justified under ***Article 6*** as being a proportionate measure in pursuit of a legitimate objective. He submits that it is impossible to justify the restriction that results if ***section 14(4)*** is given its "common law" construction. In this regard, he referred me to the analysis and statement of principle by the European Court of Human Rights in ***Al – Adsani v the United Kingdom.***[66]

65. That case concerned an attempt by Mr Al – Adsani to pursue a claim in the English courts against the State of Kuwait, whose officials he alleged had tortured him when he was imprisoned in a state jail in Kuwait. The Court of Appeal had held that proceedings could not be brought against Kuwait, because it was entitled to claim sovereign immunity pursuant to ***section 1(1)*** of the SIA in respect of acts allegedly committed outside the jurisdiction of the English courts.[67] The Court of Appeal held that there could be no implied exception in relation to a claim for damages for being tortured by a State. Mr Al – Adsani took his case to the E.C.H.R.

66. The European Court of Human Rights held: (i) that it was not concerned with the substantive law of Contracting States to the Convention, but with procedure, in particular in this case, with the question of access to the court; (ii) that the grant of immunity by a State in favour of other states did not qualify a substantive right of a litigant, but acted as a procedural bar on a national court's power to determine the litigant's substantive right;[68] (iii) the issue was whether the grant of immunity was a legitimate aim that was proportionate; (iv) the grant of sovereign immunity to a State in civil proceedings pursued a legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty;[69] (v) measures taken by a High Contracting Party (to the Human Rights Convention) which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in ***Article 6(1);***[70] (vi) it was not yet established, as a matter of international law, that States were not entitled to claim sovereign immunity in respect of civil claims for damages

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65 ***Hornsby v Greece [1997] 24 EHRR 250 at para 40.***

66 ***[2002] 34 ECHR 11, in particular paras 53 – 56.*** The principles were applied in ***Jones v Ministry of the Interior (The Kingdom of Saudi Arabia) [2005] 2 WLR 808 at para 82 per Mance LJ*** (as he then was).

67 Under ***section 5*** of the ***SIA, "****A State is not immune as regards proceedings in respect of – (a) death or personal injury….. caused by an act or omission in the United Kingdom…".* Therefore, as the claimant alleged that the torture took place in Kuwait at the hands of State employees, the general Rule in ***section 1*** of the SIA applied to give the State of Kuwait sovereign immunity from suit in the UK courts.

68 **Paras 47 and 48.**

69 **Para 54.**

70 **Para 56.**

for alleged torture committed outside the State where the claim is made;[71] (vii) therefore, the SIA, which grants sovereign immunity in respect of claims for personal injury unless the damage was caused within the UK, is consistent with the limitations generally accepted by the community of nations as part of the doctrine of State immunity. So the English court's application of the SIA to uphold Kuwait's claim for immunity was a justified restriction on the applicant's access to the court; therefore (viii) there was no violation of ***Article 6(1).***

67. Mr Salter submitted that the analysis of the European Court of Human Rights in ***Al – Adsani case*** leads to the conclusion that an absolute rule granting immunity to the property of central banks was both an illegitimate objective and disproportionate. He submitted that there is no requirement in international law that the courts of States should have an absolute rule making the property of central banks of States immune from the enforcement jurisdiction of the courts where it is sought to enforce a judgment. He pointed to the legislation in other countries, in particular Switzerland, Australia, Canada, the United States, and also a Resolution of the ***Institut de Droit International.*** All of these placed limitations on the right of a central bank to claim immunity from enforcement for its property. Generally the test adopted in these circumstances was whether the property was being held by the central bank for its own account as a central bank. He also submitted that immediately before the SIA was passed, under English common law the property of central banks was available for attachment and enforcement.[72]

68. Mr Salter fairly pointed to the fact that many countries have adopted similar wording to that in the SIA in their statutes dealing with sovereign immunity. But, he submitted, this simply demonstrated that there was no consensus of international law that the immunity to be granted to the property of central banks should be absolute.

69. Mr Salter therefore submitted that, in the absence of such a consensus, then can be no valid justification for the imposition of a restriction in the enforcement procedures against assets of central banks of States, which would otherwise be available in the UK courts. So, ***section 14(4)*** should be "read down", to give it the narrower construction for which the Claimants contend. He submitted that it is clear, on House of Lords authority, that even if the wording of the statute is apparently unambiguous, a different construction can be given to a statute in order to make it consistent with ECHR rights. The only limit on what is "*possible"* under ***section 3(1)*** of the ***Human Rights Act*** is that the court cannot adopt an interpretation of the legislation under consideration which is inconsistent with a fundamental feature of the legislation itself.[73]

70. Mr Malek has two responses. First, he submits that ***Article 6(1)*** of the ECHR is not brought into play at all in this case. The Claimants had access to the adjudicative process by virtue of the ICSID arbitration. The enforcement process is separate and immunity in relation to that does not involve a denial of access to the courts.

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71 **Para 66.**

72 He relied on the reasoning in ***Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529,*** although that did not directly concern enforcement of a judgment debt of a State against the property of the Central Bank of Nigeria. However, the spirit of this landmark judgment is certainly consistent with Mr Salter's submission**.**

73 ***Ghaidan v Godin – Mendoza [2004] 2 AC 557 in particular at paras 30 to 33 per Lord Nicholls; paras 44 and 49 per Lord Steyn.***

71. I do not accept that submission. It is not legitimate to say that because one tribunal decides the merits and another decides on enforcement, therefore ***Article 6(1)*** cannot apply to the latter stage. Such a submission is, in my view, quite contrary to the reasoning and spirit of the European Court of Human Rights' decision in ***Hornsby v Greece.***[74] A party to an ICSID arbitration has the right, by virtue of the ***1966 Act,*** to enforce an ICSID Award as a judgment of the English court. Execution of that judgment is an integral part of the "trial" because it is part of the overall process of the ICSID arbitration procedure that was set up by the Washington Convention to which the UK is a party. The ***1966 Act*** was passed to give effect to the Washington Convention in the UK and so as to assist in effective enforcement of ICSID arbitration awards in the UK.

72. Mr Malek's second response is that ***section 14(4)*** does not impose a restriction on a party's access to the UK courts, but simply imposes a restriction on the enforcement jurisdiction available in the courts in this case. Mr Malek further submits that a holder of a "domestic" or "foreign" arbitration award does not have the general right to enforce it against state assets. He says that the general rule in international law, as shown by the legislation of many countries, is to the opposite effect.

73. In this regard Mr Malek has drawn my attention to the United Nations Resolution 59/38, adopted by the General Assembly at the UN's 59th session on 16 December 2004. By that Resolution, the General Assembly adopted a ***United Nations Convention on Jurisdictional Immunities of States and Their Property,*** which had been produced as a result of work by the International Law Commission and an Ad Hoc Committee (of the UN) on Jurisdictional Immunities of States and Their Property. The Convention is annexed to the Resolution. It has been deposited with the Secretary – General of the UN and is open for signature but, I am told, no States have yet signed or ratified it.

74. Within Part IV of the Convention, Article 19 deals with "*State immunity from post – judgment measures of constraint*". That Article provides:

> *"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 to the extent that:*
>
> …….
>
> *(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…"*

75. That may be called the general rule. However, Article 21 is headed "*Specific categories of property*". That provides:

> *"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*

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74 ***[1997] ECHHR Rep 250***

> *State for other than government non – commercial purposes under Article 19, subparagraph (c):*
>
> …….
>
> (c) *property of the central bank or other monetary authority of the State;"*

76. Mr Malek submits that this Convention shows a consensus of international opinion on what categories of State property should be immune from enforcement processes in the courts of another State. He points out that the language of Article 21 of the Convention is very similar to that of ***section 14(4).*** He submits that Article 21 of the UN Convention shows that ***section 14(4)*** is a legitimate and proportionate restriction on the ability of parties to enforce judgments against State property.

77. Mr Malek therefore submits that even if ***section 14(4)*** does constitute a restriction on a party's access to the UK courts, it is both legitimate and proportionate. The UN Convention is in keeping with the views of the international community on what property should be immune from enforcement procedures.

78. **Conclusions on the Article 6(1) ECHR point**.

I accept Mr Salter's submission that ***section 14(4)*** does impinge on the rights of access of parties to the enforcement jurisdiction of the UK courts and so Article 6(1) is involved. A restriction on the remedies available in particular types of case, if severe, can amount to a limitation of access to the court for a party. Therefore I accept that it is the court's duty, under ***section 3(1)*** of the HRA, to ensure, so far as is possible, that ***section 14(4)*** is read and given effect in a way that is compatible with those Convention rights.

79. But, in my view, the restriction on the right of a party to enforce a judgment on the property of a central bank or other monetary authority that is imposed by ***section 14(4)*** is both legitimate and proportionate. This is for four principal reasons.

80. First, I regard the UN Convention on ***Jurisdictional Immunities of States and their Property***, adopted by the General Assembly, as a most important guide on the state of international opinion on what is, and what is not, a legitimate restriction on the right of parties to enforce against State property generally. I accept that the Convention does not constitute a *jus cogens* in international law. I recognise that the Convention has not yet been adopted by any States. But its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, [75] powerfully demonstrates international thinking on the point. It suggests that the grant of immunity to all the property of a State's central bank is, in the eyes of the international community of States, legitimate. It must be their view that it will promote comity and good relations between States through respect of one another's sovereignty as regards a State's central bank and its property.

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[75] The UN General Assembly resolved to refer the question of jurisdictional immunities of States and their property to the International Law Commission in December 1977. After it had reported the matter was taken up by a Working Group of the Sixth Committee of the General Assembly. Subsequently the Ad Hoc Committee reported. **See the preamble to Resolution of 16 December 2004.**

81. Secondly, in the existing legislation of States there is no consensus which grants only limited immunity as to enforcement procedures against the property of a State's central bank. Some States' legislation permits enforcement against a central bank's property if used for commercial purposes; other States' legislation does not.

82. Thirdly, the wording of ***section 14(4)*** provides a sensible rule which is easy to apply and thereby assists the promotion of comity and good relations between States. As I have already pointed out, the overwhelming presumption must be that a central bank's work is for sovereign purposes and that its property is used for sovereign purposes. But if there had to be a more restrictive provision than ***section 14(4)*** then there could be much scope for litigation. A party could obtain a legitimate judgment against a State. It might wish to enforce it in the UK and that State's central bank may maintain funds in the UK. Those funds would be the obvious target for enforcement. Such an attempt could lead to a dispute over whether the funds are for use or intended for use for commercial purposes, with the need for disclosure, statements and a hearing. That is not conducive to comity and good relations between States. The interpretation of ***section 14(4)*** I have adopted avoids all that.

83. Fourthly, the fact that the Claimants would not be able to enforce the ICSID award against the London Assets does not mean that the award is ineffective and a nullity. I do not know what other assets might be available for enforcement purposes. But there is no evidence before me to indicate that the Claimants would be left without a remedy worldwide.

84. Therefore I conclude that although ***section 14(4)*** does affect the Claimants' rights of access to the courts, the interpretation that I have given it is consistent with their Article 6(1) rights; it is legitimate and proportionate in the circumstances.

85. **The Article One, First Protocol point.**

Article 1 of the First Protocol to the ECHR provides:

> ***"****Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary in order to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".*

86. Mr Salter submits that the ICSID arbitration award is a "possession" within Article 1 of the Protocol.[76] Mr Malek accepts that is so. Mr Salter submits that ***section 14(4)*** deprives the Claimants of the peaceful enjoyment of that possession because the effect of ***section 14(4)*** is to make the award less valuable and more difficult to enforce.

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[76] He relies on ***Stran Greek Refineries v Greece [1994] 19 ECHRR 368, in particular paras 61 and 62,*** where the court held that an arbitration award against the State of Greece and in favour of Stran Greek Refineries was a "*possession"* within Article 1 of the Protocol.

87. I do not accept that submission. The ICSID arbitration procedure, the award that resulted from it and the judgment obtained using the ***1966 Act*** were all subject to the existing law, which included ***section 14(4).*** In other words, the "possession" always had limitations on its utility and value from the moment it was created. The "possession" was always going to be subject to the existing rules concerning immunity of States and the property of central banks. The case is entirely unlike the ***Stran Greek Refineries case*** where the Greek government passed legislation ***after*** the award to render it invalid and unenforceable. So I hold that Article 1 of the Protocol is not involved. But even if it is, to the extent that the Claimants have been deprived of the peaceful enjoyment of their possession by virtue of ***section 14(4),*** that is legitimate and proportionate. My reasons are the same as those set out in relation to the Article 6(1) point.

88. **Conclusions on the ECHR points.**

For the reasons I have given, I have concluded that the proper construction of ***section 14(4)*** on common law principles is consistent with the Claimants' ECHR rights under Article 6(1) and Article 1 of the Protocol. Therefore there is no need to "read down" ***section 14(4).***

I. Issue Five: What are the characteristics of the Cash Accounts and the Securities Accounts held in London by AAMGS for the NBK; in particular are they (a) *"property of a State's central bank"* within section 14(4) of the SIA; (b) if not, are they *"property [of a State] which is for the time being in use or intended for use for commercial purposes"* within section 13(4) of the SIA?

89. Given the conclusions I have reached on Issues One to Four, I can deal with this issue briefly. AAMGS holds the cash and securities that constitute the London Assets to the order of NBK. NBK has the contractual right to payment of the debt that is constituted by the Cash Accounts: clause 16(j) of the GCA. AAMGS records the NBK as being the owner of the securities it

holds in the Securities Accounts: clause 5(b) of the GCA. On my construction of ***section 14(4)*** of the SIA, in particular the word "*property*", that makes the London Assets the "*property*" of the NBK, which, everyone agrees, is the central bank of the RoK. Therefore all the London Assets are within ***section 14(4)*** and so cannot be the subject of enforcement processes by the UK courts at all.

90. In my view that conclusion is not affected by the fact that, as the experts on Kazakhstan law agree, the NBK holds those assets as part of the National Fund of Kazakhstan under the Trust Management Agreement with the RoK, by which the government of the RoK is the beneficiary: clause 7.1. Professor Didenko appears to contemplate (at para 60 of his report) that there can be "*property held by the trust manager*", ie. the NBK, which "*remains under the full ownership of the trust founder*", ie. the RoK. Professor Suleimenov does not dissent from this view. Therefore, as a matter of Kazakhstan law, the RoK remains the owner, but gives the trust manager the power to deal with the relevant property. That is enough, in my view, to bring the London Assets within ***section 14(4).***

91. The conclusion that the London Assets are within ***section 14(4)*** means that they are immune from enforcement proceedings in the UK courts. So I think I do not need to

decide whether, for the purposes of ***section 13(4)*** of the SIA, the London Assets were, at the time the enforcement processes were started, (a) also the property of the RoK and, if so, (b) "*in use or intended for use for commercial purposes*". However, on the first of these points it is agreed that the RoK is the beneficial owner of the London Assets. Therefore they must, on my reading of the word "*property*"**,** constitute "*the property of a State*" within ***section 13(2)(b) and section 13(4).***

92. On the second point, my firm view is that the London Assets were not in use or intended for use for commercial purposes at any stage. My reasons, briefly, are as follows:

(1) The London Assets formed part of the National Fund. That Fund was, in my opinion, created to assist in the management of the economy and government revenues of the RoK, both in the short and long term. Management of a State's economy and revenue must constitute a sovereign activity.

(2) The National Fund had to be managed by the NBK in accordance with the law set out in the Budget Code, in particular Article 24. That demanded that the National Fund be invested: Article 24 para 2. I accept that this required that investment had to be placed in authorised financial assets in order to secure, amongst other things, *"high profitability levels of the [National Fund] in the long term outlook at reasonable risk levels"*. I also accept the uncontroverted evidence that the Securities Accounts held by AAMGS on behalf of the NBK were actively traded at all times and that the NBK obtained from the RoK a commission on good results and paid a penalty for poor ones. But I cannot accept that this activity is inconsistent with the Stability and Savings Funds of the National Fund being used or intended for use for sovereign purposes. The aim of the exercise, at all times, was and is to enhance the National Fund. To do that the assets have to be put to use to obtain returns which are reinvested in the National Fund, ie. to assist the sovereign actions.

(3) Mr Salter relies on the definition of "*commercial purposes*" set out in ***section 17(1)*** of the SIA and points to the fact that "*commercial purposes*" means transactions and activities mentioned in ***section 3(3)*** of the Act. Those include "*any transaction or activity (whether of a commercial…financial…or similar character) into which a State enters or in which it engages otherwise in the exercise of sovereign authority*". He says that the trading activities of the Securities Accounts by AAMGS are clearly financial transactions and their aim is to make profits. Therefore they could not be transactions "*in the exercise of sovereign authority*" within ***section 3(3).*** So, for the purposes of ***13(4),*** at least the Securities Accounts of the London Assets constitute "*property in use or intended for use for commercial purposes*". Again, I must disagree. The dealings of the Securities Accounts must, in my view, be set against the background of the purpose of the GCA. That was established to assist in running the National Fund. The Securities Accounts contain assets which are part of the National Fund. In my view the dealings are all part of the overall exercise of sovereign authority by the Republic of Kazakhstan.

(4) Last, but not least, there is the certificate of the Ambassador. That is clear and unambiguous. I have seen no evidence to contradict it other than the fact that the Securities Accounts are traded. For the reasons I have given, the

trading of those accounts does not mean they were being used or were intended for use for commercial purposes.

93. **Conclusion on Issue Five**

My conclusion is that all the London Assets were, at all times, in use for sovereign purposes and pursuant to the exercise of sovereign authority of the RoK, acting through the National Bank and AAMGS as the Global Custodian of the National Fund. Therefore even if I had concluded that ***section 14(4)*** should be construed more narrowly and in the Claimants' favour, I could not have avoided a conclusion that the London Assets constituted property held by the NBK in its capacity as such and it does not matter that it held them simply as trust manager for the RoK and had only a limited interest in those assets.

94. Further, even if I were wrong about the construction of the word "*property"* in ***section 14(4),*** and I should conclude (on the facts of this case) that the London Assets cannot be regarded as property of the NBK at all, my conclusion would be that the London Assets were at all times the "property" of the Republic of Kazakhstan (within S.13(2)(b)) and were the subject of transactions that were (through the NBK and AAMGS) the exercise of sovereign authority. Accordingly, the London Assets do not fall within ***section 13(4),*** so are immune from the enforcement process of the UK courts.

J. Overall Conclusions

95. In summary, my conclusions are:

(1) As to the Third Party Debt Order, the cash accounts held by AAMGS in London are in the name of the NBK. The cash accounts constitute a debt owed by AAMGS to the NBK, which is the account holder. The RoK has no contractual rights to that debt against AAMGS. Therefore there is no "*debt due or accruing due"* from AAMGS (the third party) to the judgment debtor. So the court has no power under CPR Pt 72.2(1)(a) to make a Third Party Debt Order in respect of the cash accounts. The Third Party Debt Order must be discharged on this ground.

(2) The meaning of ***section 14(4)*** of the ***SIA,*** using "common law" rules of construction, is clear. In particular:

(a) the word "*property"* must have the same meaning in ***section 14(4)*** as it does in ***section 13(2)(b) and 13(4).***

(b) "*Property"* has a wide meaning. It will include all real and personal property and will embrace any right or interest, legal or equitable, or contractual, in assets that are held by or on behalf of a State or any "emanation of the State" or a central bank or other monetary authority that comes within ***sections 13*** and ***14*** of the ***SIA.***

(c) The words "*property of a State's central bank or other monetary authority"* mean any asset in which the central bank has some kind of property interest as described above, which asset is allocated to or

held in the name of the central bank, irrespective of the capacity in which the central bank holds the asset or the purpose for which the asset is held.

(3) The immunity created by ***section 14(4)*** does concern the rights of access to the court of a claimant who wishes to enforce against the assets of a central bank. In this case ***section 14(4)*** does affect the right of the Claimants to enforce an ICSID arbitration award that has been legitimately registered as a judgment under ***section 1*** of the ***Arbitration (International Investment Disputes) Act 1966.*** Therefore ***section 14(4)*** does concern the right of a claimant to a civil right to have access to the courts, in accordance with Article 6(1) of the European Convention on Human Rights.

(4) However, that right is not absolute. The immunity granted to assets of central banks, as set out in ***section 14(4),*** is both legitimate and proportionate and is in accordance with the expectations of States. Therefore there is no violation of the Claimants' rights under Article 6(1).

(5) ***Section 14(4)*** does not deprive the Claimants of their possession, ie. the ICSID Award or the judgment that has been registered. The Award was always subject to the restrictions on enforcement that existed at the time it was made. Those restrictions are clear from Article 55 of the Washington Convention which set up the ICSID arbitration procedure. Therefore there is no infringement of ***Article 1*** to the ***Protocol*** to the European Convention on Human Rights.

(6) Accordingly, there is no requirement to modify the "common law" construction of ***section 14(4)*** of the ***SIA*** in order to give it effect in a way which is compatible with Convention Rights, because it is compatible anyway.

(7) On the facts of this case, the London Assets, held by AAMGS on behalf of the NBK are "*property of a central bank"*, **ie.** the property of NBK, within the meaning of ***section 14(4).*** This is because NBK has an interest in that property within the definition of "*property"* that I have set out above. Therefore all the London Assets are immune from the enforcement jurisdiction of the UK courts.

(8) If, contrary to my view, the London Assets are not the property of NBK within the meaning of ***section 14(4),*** then, on the facts of this case, they constitute "*the property of a State"* within the meaning of ***section 13(2)(b) and 13(4)*** of the ***SIA.*** The London Assets were not at any time either in use or intended for use for "*commercial purposes"* within the meaning of ***section 13(4)*** of the ***SIA.*** Therefore they are immune from the enforcement jurisdiction of the UK court by virtue of ***section 13(2)(b)*** of the ***SIA.***

(9) Accordingly, the court must discharge the Interim Charging Order. As the same reasoning applies to both the cash and securities accounts within the London Assets, even if the court had otherwise had jurisdiction to make the Third Party Debt Order, it would have to discharge it because the cash

accounts are immune from enforcement proceedings for the reasons set out above.

96. Therefore I must discharge both Interim Orders.