Arbitration under the UNCITRAL Rules of 1976

BETWEEN

VALERI BELOKON

Claimant

and

THE KYRGYZ REPUBLIC

Respondent

AWARD

Tribunal:

Kaj Hobér
Niels Schiersing
Jan Paulsson

Representing Claimant:

Clifford Chance
Audley Sheppard
Christina Schuetz

Representing Respondent:

Lorenz Law
Niyaz Aldashev
Stephan Wagner

24 October 2014

103

23

TABLE OF CONTENTS

INTRODUCTION

1. On 22 May 2008, Latvia and the Kyrgyz Republic entered into an Agreement for the Promotion and Protection of Investments.[1] In doing so, both countries made public commitments to improving bilateral relations and ensuring that investors would be treated fairly and equitably and in accordance with international law.

2. This bilateral investment treaty (the "BIT") came in the wake of the signature by the Latvian and Kyrgyz Governments of an Agreement on Economic, Industrial, Scientific and Technical Cooperation in the fall of 2007.[2] At this time, Mr. Valeri Belokon, a Latvian banker who owned the Baltic International Bank, had been developing an interest in the Kyrgyz banking sector.[3]

3. Acting on this interest, Mr. Belokon in 2007 acquired a Kyrgyz bank, Insan, which he renamed Manas Bank. Drawing on the knowhow and human resources of the Baltic International Bank, Manas Bank enjoyed initial success.

4. That early success did not long endure. Although the previous national elections (held in 2005) had been internationally acknowledged as fair and free, by the spring of 2010 acute political tension had arisen in the Kyrgyz capital, Bishkek. Widespread protests erupted in the streets against the perceived financial misfeasance of the President, Kurmanbek Bakiev. Ultimately, he was made to abandon the Presidency.

5. During this period of turmoil, on 8 April 2010, the Kyrgyz National Bank issued Decree No 10/1 suspending the powers of the Boards and managing bodies of five Kyrgyz Banks, including Manas Bank.[4]

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[1] Agreement between the Government of the Republic of Latvia and the Government of the Kyrgyz Republic on the Promotion and Protection of Investments, 22 May 2008; CA-1; R-II.5, Bundle F.1 ["the BIT"].

[2] Agreement between the Government of the Republic of Latvia and the Government of the Kyrgyz Republic on Economic, Industrial, Scientific and Technical Cooperation, 13 September 2007; CA-3, Bundle F.2.

[3] Mr. Valeri Belokon, First Witness Statement, 28 August 2012, ¶¶11-13; Bundle B.1 ["Belokon One"].

[4] NBKR Decree no. 10/1 "on the introduction of a temporary administrator in commercial banks of the Kyrgyz Republic", 8 April 2010; CL-1, Bundle E.103 ["Decree No 10/1"].

6. Although the turbulence of regime change abated rather quickly, the National Bank has not revoked the emergency measures. More than four years later, Manas Bank remains under government control.

7. Asserting that this control was and remains justified, the Kyrgyz Republic has made grave allegations against Manas Bank, Mr. Belokon, and his employees, to the effect that they were guilty of money laundering and other serious criminal activities. The Claimant retorts that the accusations are baseless, and that his investment was despoiled in a manner that breached the BIT and entitles him to compensation from the Respondent.

THE PARTIES

8. The Claimant, Mr. Valeri Belokon, is a citizen of Latvia.[5] He is the sole shareholder of Manas Bank, which is the entity embodying his investment in the Kyrgyz Republic.[6] He is also the owner of Baltic International Bank in Latvia, in addition to various other business ventures and philanthropic projects.

9. The Respondent is the Kyrgyz Republic. The Claimant has alleged wrongdoing by the Kyrgyz National Bank and the state prosecutor. The Respondent has not disputed that responsibility of actions by these entities are attributable to the Kyrgyz Republic.[7]

THE PROCEDURE

10. The Claimant submitted a Request for Arbitration dated 2 August 2011, in which he nominated Mr. Kaj Hobér as co-arbitrator. On 5 September 2011, the Respondent nominated Mr. Niels Schiersing as co-arbitrator. On 30 September 2011, Mr. Jan Paulsson informed the Parties of his acceptance of the co-arbitrators' request that he preside over these proceedings.

11. The Tribunal was constituted on 30 September 2011.

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[5] Copy of Mr. Belokon's Latvian passport, 16 September 2008; C-03, Bundle E.53.

[6] Extract of Share Register for CJSC Bank Insan (later renamed ZAO Manas Bank), 14 December 2007, C-1, Bundle E.39.

[7] See e.g. Respondent's Rejoinder, 25 September 2012, at ¶ 63 ["Rejoinder"].

12. The Respondent manifested its assent to the selection of Mr. Paulsson in writing on 5 October 2011, as did the Claimant on 7 October 2011.

(i) Scheduling

13. The Tribunal established a procedural timetable for the arbitration on 15 March 2012.[8] A hearing was originally scheduled for 18-21 December 2012 in Paris.

14. On 10 December 2012, the Tribunal notified the Parties that on account of a medical emergency, the hearing would have to be postponed.[9] On 21 January 2012, the Claimant proposed eight possible weeks from September to December 2013 as new dates.[10] The Respondent indicated that it could only make itself available for the last possible dates, 9-13 December 2013.[11] The Tribunal rescheduled for those dates.[12]

(ii) Pleadings and Written Phase

15. The Claimant filed its Statement of Claim on 29 December 2011.

16. The Respondent submitted its Statement of Defense on 30 March 2012.

17. The Claimant's Memorial, including various witness statements and expert reports, was provided on 31 August 2012.

18. The Respondent's Rejoinder was produced on 26 September 2012 and noted that English translations of witness statements would follow.

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[8] Procedural Order, 15 March 2012; Bundle H.16.

[9] E-mail from Jan Paulsson re postponement of hearing due to medical emergency, 10 December 2012; Bundle H.50.

[10] Email from CC to Tribunal proposing hearing dates, 21 January 2013; Bundle H.53.

[11] Email from LL to Tribunal in relation to hearing dates, 29 January 2013; Bundle H.56.

[12] Email from Tribunal to Parties confirming new hearing Dates, 30 January 2013; Bundle H.57.

19. On 15 October 2012, the Claimant submitted rebuttal witness statements.[13]

20. On 20 November, the Respondent submitted a quantum report by its experts (East Star Capital).[14] This report, submitted four weeks before the originally planned hearing, commented on various operations of Manas Bank.

21. On 6 December 2012, the Respondent submitted attachments to its quantum report and to a witness statement, that is to say 12 days prior to the originally scheduled December 2012 hearing start which had not yet been vacated.

22. Additional submissions were made in the lead up to the December 2013 hearing and are discussed in more detail below.

(iii) Requests for Stays of Proceedings

23. When submitting its 30 March 2012 Statement of Defense, the Respondent requested a stay of proceedings, of unspecified duration, due to alleged ongoing criminal investigations in the Kyrgyz Republic relating to the Claimant and Manas Bank. After considering submissions from the Parties, the Tribunal decided on 15 May 2012 that no stay of proceedings was warranted, but acknowledged that the Respondent was at liberty to resubmit a similar request in the future if "there are concrete indications that the criminal proceedings are likely to provide imminent, specific, and relevant evidence."[15]

24. On 8 December 2012, the Tribunal dismissed an application for a stay of proceedings brought by Respondent on 30 November 2012 on account of information obtained regarding criminal investigations in New York against the former President's son, Maxim Bakiev.[16] The Tribunal found that there was not "a sufficient nexus established between the materials adduced in support of the application and the issues that arise in the arbitration." However, the Tribunal reserved the possibility of

[13] E-mail from CC to Tribunal, 15 October 2012; Bundle H.37.

[14] E-mail from LL to Tribunal attaching expert opinion of East Star Capital, 20 November 2012; Bundle H.43.

[15] Letter from the Tribunal to the Parties conveying decision not to suspend arbitral proceedings pending the outcome of criminal proceedings in the KR and covering email, 15 May 2012; Bundle H.23.

[16] E-mail from Tribunal to Parties denying Respondent's application to postpone hearing, 8 December 2012; Bundle H.48.

introduction of further evidence regarding criminal proceedings should they come to light.

25. On 9 December 2012, the Tribunal issued a Procedural Order affirming its decision not to stay the proceedings and laying out the procedure of the forthcoming scheduled hearing.[17] The schedule was thereafter modified as explained in Paragraph 14 above.

(iv) Supplemental Submissions

26. On 27 September 2013, the Claimant filed two supplemental witness statements and a reply expert report in response to the quantum evaluation of East Star Capital of 20 November 2012.[18] The hard copies and exhibits were received by the Respondent on 9 October 2013.[19]

27. On 1 November 2013, the Claimant filed a supplemental submission, including new witness statements and an updated quantum report.[20]

28. On 14 November 2013, the Respondent objected to the Claimant's new witness statements, expert reports, and supplemental submission.[21] The following day, the Claimant explained that:

(a) The Respondent had previously indicated that it intended to amend its existing East Star Capital quantum report and that the Claimant should wait before submitting an updated report. The Claimant had understood that the Parties were in agreement that the Claimant would file an updated quantum report. When no update was received from Respondent, the Claimant decided to submit its reply quantum report on September 27, two and a half months prior to the hearing.

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[17] Procedural Order denying Respondent's application to postpone hearing, 9 December 2012; Bundle H.49.

[18] Email from CC to Tribunal attaching supplemental witness statements and reply expert opinion of Claimant's quantum experts, 27 September 2013; Bundle H.63. This was acknowledged by the Respondent on 30 September 2013; Bundle H.64.

[19] Letter from LL to Tribunal in relation to the hearing Preparations, 18 November 2013; Bundle H.70 at 3.

[20] Claimant's Supplemental Submission, 1 November 2013 ["Supplemental Submission"].

[21] Emails from LL to CC in relation to hearing bundles, 14 November 2013; Bundle H.68.

(b) With regard to the factual witness statements, these merely updated the Tribunal on developing circumstances, and could have alternatively been included during oral submissions.

(c) The supplemental submissions withdrew a claim, provided an update on criminal proceedings that could have been included in the skeleton argument, and further explained claims of harassment discussed in the 27 September 2013 witness statement of Mr. Belokon.

29. The Claimant noted that the Respondent suffered no prejudice from its submissions as these submissions were provided two and a half months prior to the hearing.[22]

30. On 18 November 2013, the Respondent informed the Tribunal that by e-mail of 21 May 2013, they had indeed invited the Claimant to file an updated quantum report.[23] The Respondent indicated that it was "entitled to be granted a fair amount of time to submit its own submissions addressing the additional submissions of the Claimant."

31. On 21 November 2013, the Tribunal noted that "procedural dispensation can be made, as necessary, with respect to any of the issues of timeliness of communications that have been raised, so as to avoid prejudice to either side."

32. On 26 November 2013, the Respondent indicated that the procedural issues it had raised, regarding timing of submissions, had not been adequately resolved.[24] The Respondent however did not raise any particular issues with the substance of the additional materials submitted or its ability to consider and respond to these materials adequately in time for the hearing.

33. On 26 November 2013, the Tribunal decided to admit the Claimant's latest witness submissions and expert report. As for the Supplemental Submission of 1 November 2013, the Tribunal decided that it was admitted, subject to any specific difficulty Respondent may have had considering

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[22] Letter from CC to Tribunal in relation to the procedural timetable and hearing bundles, 18 November 2013; Bundle H.71 at ¶ 5.

[23] Letter from LL to Tribunal in relation to the hearing preparations, 18 November 2013; Bundle H.70 at 2-3.

[24] Email from LL to CC and the Tribunal re outstanding procedural matters, 26 November 2013; Bundle H.81.

particular exhibits.[25] No particularized issues were raised by the Respondent.

34. On 1 December 2013, the Claimant notified the Tribunal that it had received some 110 pages of additional materials from the Respondent on 27 November 2013. These included a second report by East Star Capital, a third witness statement by Ms. Mulkubatova, a second witness statement by Rakhat Aiylchieva, and expert opinions on banking regulations as well as criminal law procedures in the Kyrgyz Republic.

35. These materials were received some 8 days prior to the commencement of the hearing.

(v) The challenges to two members of the Tribunal

36. On 18 November 2013, the Respondent indicated that it would be raising a challenge to Mr. Paulsson on account of his published academic views and authorship of arbitral awards concerning the legal concept of denial of justice.

37. On 21 November 2013, the Tribunal decided that the challenge to Mr. Paulsson would not suspend the arbitration.[26]

38. The next day, the Respondent indicated that it would also be bringing a challenge against Mr. Hobér, the co-arbitrator appointed by the Claimant, for his alleged failure to provide a disclosure of his impartiality.[27]

39. On 22 November 2013, the Respondent purported to submit these two challenges to the "Secretary General" of UNCITRAL.[28] On 28 November 2013, UNCITRAL informed the Respondent that it was not an arbitral institution and did not deal with such matters. That same day, the Respondent sought to submit its challenges to the Secretary-General of the Permanent Court of Arbitration ["PCA"]. On 2 December 2013, the PCA

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[25] Email from the Chairman to CC and LL re the timeliness of materials produced by the Claimant, 26 November 2013; Bundle H.82.

[26] Email correspondence between the Tribunal, CC and LL in relation to arrangements for a teleconference ahead of the hearing, 21-22 November 2013; Bundle H.74.

[27] Email from LL to the Tribunal and CC in relation to the intention to challenge Mr. Hobér, 22 November 2013; Bundle H.75.

[28] Email from LL to the UNCITRAL Secretary General in relation to challenges to arbitrators, 25 November 2013, Bundle H.79.

informed the Respondent of the relevant procedure for the challenges to be considered.

40. On 9 July 2014, the PCA gave notice that each Party had confirmed its agreement that the Secretary-General of the PCA would act as appointing authority for the purpose of deciding the challenges, and gave the parties as well as the challenged arbitrators the opportunity to comment on the merits of the challenges.

41. On 6 October 2014, after having considered the materials put before him, the Secretary General of the PCA dismissed the challenges brought against Professor Hobér and Professor Paulsson. Having considered it prudent to keep it in abeyance pending the resolution of the challenges, the Tribunal now issues this Award.

(vi) Attendance of Witnesses

42. On 22 November 2013, the Claimant notified the Respondent as to which of the Respondent's witnesses it intended to examine.

43. On 25 November, the Respondent indicated that it was awaiting the resolution of the issues it had raised as to the timeliness of the Claimant's submissions and challenges to the Tribunal prior to indicating which witnesses it wished to examine.[29]

44. On 6 December 2013, the Respondent stated that only three of its witnesses could make themselves available at the hearing due to visa issues, and the others might be available by videoconference. The Tribunal requested an explanation of the efforts made to obtain such visas.

45. During the hearing, the Respondent provided a letter of November 2013 which counsel had sent to the Kyrgyz National Bank informing them that the testimony of certain individuals were requested and visas should be obtained.

46. During oral examination, by videoconference, one witness noted that she was unaware that her presence was requested in Paris and she had therefore never taken any steps to obtain a visa. The Respondent indicated this was an error by counsel.

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[29] Emails between CC and LL in relation to witnesses and experts to be called for cross-examination, 25 November 2013; Bundle H.78.

47. During the hearing, a number of witnesses were examined by Skype videoconference.

(vii) Hearing and Post-Hearing Briefs

48. The hearing was conducted in Paris from 9-13 December 2013. The procedural order for the hearing called for both Parties to have equal access to the time available to present their case. Both Parties made full and equal use of the allocated 27.5 hours of hearing time and were granted additional time on 13 December 2013 to complete their examination of expert witnesses.

49. Post-hearing briefs were received from both sides on 21 February 2014.

FACTUAL BACKGROUND

50. The Respondent has justified its actions against Manas Bank on the grounds that it was engaged in money laundering operations and other criminal activities. These were some of the grounds upon which a Temporary Administrator was appointed to replace the board and management of the Bank. These criminal allegations were also invoked as grounds for repeatedly renewed sequestration orders against Manas Bank.

51. In the same way as with other Kyrgyz banks, the activities of Manas Bank were subject to regular auditing and regulatory review. They had thus been under an obligation to comply with requirements for regular reporting and audits during its operations in 2008 and 2009. In no instance were serious irregularities identified by the Kyrgyz National Bank ["the NBKR"].

52. Following the imposition of various administration regimes upon Manas Bank, it has been subject to repeated investigations. It has been investigated by the NBKR, and its activity has been reviewed by administrators assigned by the NBKR. It has been investigated by the State Prosecutor's office and the Bishkek Prosecutor's office. It has been subject to administrative proceedings before the Kyrgyz Financial Intelligence Service. It is said to have been subject to investigations, alluded to by the Respondent as ongoing, by the State Service for Combating Economic Crimes. It has been the subject of investigation by the Respondent's experts, East Star Capital.

53. The activities of Manas Bank were also subject to regular verification prior to April 2010. In the course of the hearing, the arbitrators

were shows regular transaction reports provided by Manas Bank to the NBKR with respect to possibly suspicious transactions, in accordance with NBKR reporting requirements.

54. Be this as it may, the Respondent's case appears to have as its focal point that Manas Bank engaged in criminal activities, most notably money laundering.

55. In addition, the Respondent has alleged that the Claimant acquired Manas Bank through improper means. The Respondent suggests that the Claimant may have rigged the bid for the acquisition of the pre-cursor of Manas Bank, Insan Bank, stating that the only other bid was submitted by a Kyrgyz lawyer in the banking industry who had previously given advice in connection with the Claimant's interest in investing in the Kyrgyz Republic.

56. It seems useful at this stage first to review the facts surrounding the acquisition of Manas Bank, before proceeding to consider the evidence regarding its allegedly wrongful operations.

(i) The Acquisition of Manas Bank

57. The Claimant developed an interest in the Kyrgyz Republic during the mid-2000s.[30] In early 2007, this interest crystallised into a desire to open a commercial bank in the Kyrgyz Republic. In the summer of 2007 the Kyrgyz National Bank published a call to tender for the acquisition and rehabilitation of Insan Bank. A deadline of 27 August 2007 was set for bids.[31] Two bids for Insan Bank were reviewed by a committee for its rehabilitation on 28 August 2007. The Committee unanimously decided to accept the Claimant's bid on the strength of Mr. Belokon's business plan, which called for paying off the bank's existing debts, and his experience in the Latvian banking sector.[32]

58. The Insan Bank Rehabilitation Committee was required to have received at least two bids for consideration before one could be accepted.[33] The Respondent has alleged that the bid for Insan Bank was rigged, as the

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[30] Belokon One, *supra* n 3, ¶¶10-15.

[31] Announcement of tender for Insan JSCB in "Kyrgyz Tuusu" newspaper, 2007; C-15, Bundle E.11.

[32] Minutes of the Tender Commission for Rehabilitation of OJSC Insan Bank, 28 August 2007; C-205 R-I.7, RI 35, Bundle E.22.

[33] Ibid.

only other individual to bid for the bank, Mr. Eliseev, was a banking lawyer who had previously advised the Claimant.

59. The Respondent affirms that had there not been a second bid, the tender for Insan Bank would have been cancelled.[34] However, the Claimant has argued that a new call to tender would have been issued as Insan Bank's creditors would have continued to seek recovery by selling the Bank.[35]

60. The Tribunal finds it likely that had no second bidder shown interest in Insan Bank then further calls for tender would have ensued. However, even if the Tribunal is wrong in this conclusion, it accepts that the Claimant could have applied for a new banking license.

61. The Respondent's evidence of the alleged bid rigging consists of the fact that the second bidder for Insan Bank was a banking lawyer who had previously worked with the Claimant and his associates. The Claimant does not deny that a prior attorney-client relationship had existed, and that there were subsequent contacts between Mr. Eliseev and individuals associated with Manas Bank. The Claimant has stated that Mr. Eliseev also unsuccessfully tried to acquire a separate bank, Akilinvestbank, in 2008.[36] The Respondent has not challenged this assertion.

62. The Tribunal is in no position to make a positive determination as to the Respondent's allegations, since no corroborating evidence has been placed before it. The mere relationship between the Claimant and Mr. Eliseev is insufficient to prove fraud in connection with the investment. The Tribunal particularly notes that the Insan Bank committee appeared quite impressed with the bid by the Claimant for Insan Bank. Also, the Tribunal accepts that even in the absence of a bid by Mr. Eliseev, the Claimant may well have acquired a banking license in the Kyrgyz Republic.

63. In addition, the Respondent has suggested that there was something improper about the Claimant's investment in the Kyrgyz Republic as the Claimant was acquainted with the son of Kurmanbek Bakiev, the deposed Kyrgyz leader.

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[34] Respondent's Post-Hearing Brief, 21 February 2014, at 36.

[35] Minutes of the General Meeting of Creditors of Insan JSCB, 30 May 2007; C-18, R-I.6, Bundle E1.15.

[36] Mr. Valeri Belokon, Second Witness Statement, 15 October 2012, ¶20; Bundle B.2 ["Belokon Two"].

64. Again, the Tribunal is in no position to make a positive determination that there was anything improper in the Claimant's acquaintance with Mr. Bakiev's son, Maxim Bakiev, which was not shown to have been more than superficial.

65. The Tribunal concludes that insufficient evidence has been placed before it of any wrongdoing in the acquisition and establishment of Manas Bank.

(ii) Imposition of Temporary Administration of Manas Bank and Seizures by Kyrgyz Authorities

66. In April 2010, as noted, the Kyrgyz Republic underwent a regime change and removed President Bakiev. A key concern of the National Bank during the transition was to ensure stability in the banking sector.[37] As further explained below, protection of the Kyrgyz banking system took two prongs, the imposition of temporary administration regimes over banks and investigations into those banks by prosecutors and other agencies.

67. This section of the Award sets out (a) the events of April 2010, (b) the consequences of temporary administration on Manas Bank, (c) efforts by Manas Bank and the Claimant to challenge the temporary administration order and its effects, and (d) the extension of temporary administration beyond the six months permitted under Kyrgyz law.

a. *The Events of April 2010*

68. On 8 April 2010, the NBKR issued Decree No 10/1, establishing temporary administration of five major Kyrgyz Banks, including Manas Bank, for a term of no longer than 6 months.[38] The stated purpose of the temporary administration was to:

> *...control the flow of capital and retain assets in the interests of depositors and other bank creditors and in consideration of the system's significance and interrelation, as well as the circumstances of theft and threat of theft.*[39]

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[37] Decree no. 10/1, *supra* n 4.

[38] Ibid.

[39] Ibid.

69. The Claimant does not dispute that there was an urgent need for temporary stabilising actions during the disruptions that led to the regime change.[40]

70. The Tribunal notes that it is possible that Decree No 10/1 was not imposed in strict accordance with Kyrgyz law. This may have been because certain individual NBKR officials were not available to provide formal approvals. Regardless of any procedural defects that may have existed, those have no bearing on this arbitration as the Decree was enforced as if it had full force of law.

71. In accordance with Decree No 10/1 the NBKR appointed one of its employees, Ms. Alisherova, as Temporary Administrator. The Temporary Administrator was designated in order to "assume the authority of the Board of Directors and of the Executive Boards of the Bank."[41]

72. On 9 April 2010 the Kyrgyz Federal Prosecutor's office seized the assets of Manas Bank, based as it appears principally upon suspicions of illegality at an unrelated bank – Asia Universal Bank :

> *Various suspicious money transfer operations, whose origin raises doubts of their legality, were concluded on an especially large scale during the period from 2006 to 2010 through Asia Universal Bank, Issyk-Kul-Invest, Manas, KyrgyzCredit and Akylinvest banks.*
>
> *Thus, an inspection of only one client upon the incoming and outgoing transfers for several months of LLC Investment Company Tabylga in 2009 showed that its turnover on credit accounts are the following: 3 972 million dollars and 580 million euros, and this turnover exceeds the real gross domestic product of Kyrgyz Republic.*
>
> *Basically, the monetary funds come from the companies, which are registered in offshore zones, the received sums of money are converted into another currency and are transferred inside the bank to the accounts of other companies – the clients of Asia Universal Bank in divided amounts as for the Agency Agreement and etc., and then*

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[40] Claimant's Post-Hearing Brief, 24 February 2013, ¶ 131.

[41] Decree no. 10/1, *supra* n 4.

are transferred back to the accounts of the same companies – non-resident offshore companies. (Emphasis added.)[42]

73. Nothing in the record indicates that Manas Bank had the Tabylga entity as a client. Indeed East Star Capital's identification of Manas Bank's top 20 clients does not list Tabylga.[43] At any rate, as part of its general investigation of the above mentioned Asia Universal Bank the Prosecutor's Office ordered that the "the property of the bank Manas, whatever it is expressed, including realty, cars, funds and other property" be seized.[44]

74. On 17 April 2010, as part of the ongoing investigation, the State Prosecutor took the further measure of seizing the shares of a number of Banks, including Manas Bank:

> *In order to open a civil case and ensure the compensation of damages, as well as the execution of the sentence as related to the confiscation of property, it is necessary to seize all of the shares of the following banks: OAO Asia Universal Bank, OAO Investment Bank Yssyk-Kul, ZAO Manas Bank, OAO Kyrgyz Credit Bank, OAO Investment Joint-stock Commercial Bank Akyl, OAO Dos Credo Bank, and OAO Bank Bakai.* (Emphasis added.)[45]

75. While the criminal investigations of various banks began, the National Bank took steps to gain control over the administration of Manas Bank in accordance with Decree 10/1.

76. On 13 April 2010, the Temporary Administrator dismissed the management and board of Manas Bank.[46] The next day, the Claimant and the management of Manas Bank wrote to the National Bank objecting to the

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[42] Bishkek Prosecutor Decree of seizure of movables and immovable property of Manas Bank, 9 April 2010; CL-21. Bundle E2.104.

[43] East Star Capital (Mr. Andrew Howson), Second Report, 26 November 2013, at 8; Bundle D.5 ["Second ESC Report"].

[44] Bishkek Prosecutor Decree, *supra* n 42.

[45] Order of the Bishkek Prosecutor to seize shares in Manas Bank, 17 April 2010; CL-18 R-I.18, Bundle E2.107. This decision was reversed on 20 January 2011 [Decree of General Prosecutor of the KR "on partial annulment of imposed sequestration" on Mr. Belokon's shares in Manas Bank; CL-5, R-I.23, Bundle E.191].

[46] TA Decrees nos. 105-l.s. and 105(1)-l.s re dismissal of officers of Manas Bank, 13 April 2010; CL-11, Bundle E2.105.

imposition of the temporary administration regime and the dismissal of Manas Bank's managers.[47]

77. On 21 April 2010, the Kyrgyz State Financial Intelligence Service ordered the seizure of the building in which Manas Bank was operating.[48]

78. In response to objections from Manas Bank over the imposition of temporary administration, on 28 April 2010 the National Bank justified its decision as follows:

> *It is widely known that in Bishkek on the night from 7 April to 8 April ATM machines and payment and trading terminals of several bank, including Manas Bank CJSC, were damaged, destroyed and robbed, and one ATM was destroyed and looted. In addition, on 8 April the management of Manas Bank CJSC contacted the National Bank with a request to provide assistance and protection and to provide security against an armed penetration into bank buildings and against the threat of a forced, armed bank robbery. Thus, Manas Bank CJSC was facing a true threat against the safety of its assets.*
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> *Based on the above, we believe that in order to protect state assets and protect the interests of depositors, the introduction of temporary administration and Manas Bank CJSC was a necessary measure.* (Emphasis added.)[49]

> *The Tribunal notes the lack of evident connection between the physical threats and the decision to appoint a temporary administrator, as opposed to other possible actions, such as sending police officers or guards. At any rate, the Temporary Administrator set about managing the affairs of Manas Bank.*

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[47] Objection of CJSC Manas Bank to the Resolution of the Board of the National Bank of the Kyrgyz Republic No. 10/1 dated 8 April 2010; C-282, Bundle E2.106.

[48] Order of the Senior Investigator appointed by the Deputy General Prosecutor of the KR to seize real estate at 14 Logvinenko Street in Bishkek; CL-19, R-I.21, Bundle E.111.

[49] NBKR Decree no 24/2 re objections of Manas Bank to Decree no 10/1, 28 April 2010, CL-20, Bundle E.120.

b. *Temporary Administration of Manas Bank*

79. According to Kyrgyz regulations on the temporary administration of banks, the mandate of temporary administration is the provision of "proper operation of the bank's management in order to *safeguard the assets and the financial health of the bank* in the *interests of depositors* and other creditors of the bank."[50] Those regulations also state that "the purpose of the temporary administration – is to implement the measures for the conservation / restoration of bank management, *improvement of its financial position* and the *elimination of violations of legislation* and the NBRK' requirements."[51] From this, the Tribunal understands that it is the role of a temporary administrator to further the interests of the bank and bring it back into compliance by addressing the deficiencies which triggered the decision of the National Bank to impose temporary administration in the first place.[52]

80. While the objective of temporary administration of a bank is to "improve its financial position" and act in the interests of the bank and its clients, what happened during the administration of Ms. Alisherova does not appear compliant with these objectives.

81. Prior to the imposition of temporary administration, Manas Bank had set strategic expansion goals which included the establishment of further branches within the Kyrgyz Republic. Under the temporary administration, Manas Bank's expansion plans were not continued.

82. Under temporary administration, following the directive of Decree 10/1 of 8 April 2010, the financial activities of Manas Bank were severely curtailed. The NBKR forbade foreign currency conversions and restricted clients from transferring their funds to foreign banks. The Tribunal has no evidence of Ms. Alisherova lobbying the NBKR in the interests of the clients of Manas Bank to allow them to remove their foreign funds, or to the contrary explaining why she did not feel it appropriate to support their freedom to repatriate their funds.

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[50] NBKR Regulation no. 36/5 "on the temporary administration of banks", 30 September 2008; CL-7, R.II.13, art 1.2, Bundle F.35 (Emphasis added).

[51] *Ibid*, art 1.3 (emphasis added).

[52] This understanding appears consistent with the Respondent's Expert witness on Kyrgyz Banking law, Expert Report of Maksat Ishenbaev, 27 November 2013, ¶¶ 4-5. This is also the opinion of the Claimant's expert, Expert Report of Ulan Tilenbaev, 15 October 2013, section 3.4 ["This means that the main objective/duty of the temporary manager in relation to the bank is to implement measures to preserve/restore the system for managing the bank, to effect a recovery of the bank's financial position and to eliminate violations of the legislation and normative acts of the National Bank."].

83. One of the most consequential and significant decisions taken by Ms. Alisherova involved two of Manas Bank's largest depositors: The Kyrgyz Republic Social Fund and the Kyrgyz Development Fund. These were indirectly owned state funds of the Kyrgyz Republic. According to the Chairman of the Board of Manas Bank, Mr. Verbickis, as of 1 April 2010 the Social Fund had on deposit 320 million soms (7.1 million USD) and the Development Fund 362 million soms (8 million USD).[53] These represented a considerable portion of the nearly 1.5 billion soms on deposit in Manas Bank.[54]

84. On 19 April 2010, the Kyrgyz Social Fund met with Ms. Alisherova to negotiate an extension of its deposit agreement. According to the Deputy Chairman of the Fund, Ms. Alisherova refused to sign an extension of its deposit agreements. The Social Fund thereupon cancelled its agreements and transferred its accounts to another Kyrgyz Bank.[55]

85. The new Provisional Government of the Kyrgyz Republic decided to liquidate the Development Fund, by a decree of 30 April 2010.[56] Although a one year term deposit agreement had been signed between Manas Bank and the Development Fund on 26 March 2010, Ms. Alisherova proposed that the agreement be terminated.[57]

86. In effect, during the temporary administration Manas Bank's financial position was severely weakened. In her witness statement, Ms. Alisherova asserts that she made significant efforts to return the deposits of the Social Fund and the Development Fund "without violating the norms of liquidity."[58] The least one can say, based on the record, was that she was not successful in maintaining the solvency of Manas Bank. Nor is it clear why she apparently gave little thought to the advantages of retaining these deposits.

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[53] Mr. Jevgenijs Verbickis, First Witness statement, 28 August 2010, ¶¶ 46, 50; Bundle B.10.

[54] *Ibid*, at ¶41. Spreadsheet "MB PL, Balance 1 Apr 2010 fact budget.xls; C-177, Bundle E5.311.

[55] Letter from Kyrgyz Social Fund to Manas Bank re continued cooperation on bank deposit agreement, 25 May 2010; C-70, Bundle E.132. Letter from Kyrgyz Social Fund to Manas Bank re early termination of deposit agreement, 2 June 2010; C-67 Bundle E.136.

[56] Letter from KR Ministry on Economic Regulation to NBKR re deposit agreements, 2 June 2010; C-68, Bundle E.137.

[57] Ibid.

[58] Ms. Rakhat Alisherova, First Witness statement, 19 November 2012; Bundle C.4. ["Ms. Alisherova"]

i. *PENSIONAT VITYAZ*

87. The Parties devoted considerable attention to Manas Bank's involvement in a commercial construction project with a borrower called Pensionat Vityaz. The details of this involvement are set forth below.

88. In a letter of 15 June 2010, Ms. Alisherova informed the Claimant that Manas Bank was in violation of "Norm K 1.1" relating to the maximum risks allowed in relation to a borrower, Pensionat Vityaz, and two entities allegedly connected with it.[59] This was not the first time that Ms. Alisherova had the opportunity to consider the risks associated with this client. As acting Banking Supervision Department Chief in 2009, Ms. Alisherova had previously signed off on an inspection report of Manas Bank after the banking relationship with Pensionat Vityaz had been flagged as worthy of close attention.[60]

89. During cross-examination, Ms. Alisherova testified that at the time before she became involved in the inspection of Manas Bank she had signed off on the inspection report and had no concerns regarding its content.[61]

90. The 2009 inspection report highlighted, as one of the key conclusions, that these three entities were connected to a construction project in ways that exposed Manas Bank to certain risks should the project fail. Still, the report did not identify the Pensionat Vityaz loan as being in violation of norm "K 1.1" or otherwise. Instead, the report recommended the "diversification of [Manas Bank's] credit portfolio by sectors of economy and to regularly monitor the financial status of [its] borrowers."[62]

91. On 20 May 2010, the Provisional Government of the Kyrgyz Republic nationalised the construction project being undertaken by Pensionat Vityaz.[63] The Respondent has submitted that they are still attempting to "resolve the problems associated with this nationalised property."[64] Be that as it may, and despite assertions by Ms. Alisherova that

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[59] Letter from Ms. Alisherova to Mr. Belokon re status quo at Manas Bank, 15 June 2010; C-80, R-I.27, Bundle E.140.

[60] NBKR Report on the results of the inspection of Manas Bank in 2008 (excerpt), 3 March 2009; C-114, Bundle E.64.

[61] Hearing Transcript, 9-13 December 2013, Day 3, pp 89-91 ["Hearing Transcript"].

[62] *Supra* n 60.

[63] KR Provisional Government Decree no. 48 "on the nationalisation of plots of land and buildings of OsOO 'Pensionat Vityaz'", 20 may 2010; CL-25, Bundle E.130.

[64] Statement of Defence, 30 March 2012, ¶¶ 232-233 ["Statement of Defence"].

she took steps towards seeking compensation for Manas Bank,[65] the nationalisation had a significant effect; the asset underpinning very significant loans had been expropriated without compensation.

92. In a letter of 4 September 2012 from the Vice-Chairman of the National Bank, Mr. Chokoev, to the Vice Prime Minister of the Kyrgyz Republic, the former stated that one of two "main reasons for the unprofitability" of Manas Bank was the nationalisation of Pensionat Vityaz.[66] The letter goes on to note that this issue had been raised on at least four prior occasions.

93. Beyond writing letters, Manas Bank appears not to have sought recourse within the judicial system of the Kyrgyz Republic to seek just compensation for the loss of its collateral. To the contrary, following the nationalisation, Manas Bank reclassified the loans to Pensionat Vityaz and the other companies involved in the construction of the Vityaz project as "doubtful assets" unlikely to be recovered, resulting in Manas Bank also being in violation of Kyrgyz banking Norm K 4.1.[67]

94. As mentioned, in an action that would have great further significance, on 15 June 2010, Ms. Alisherova decided that loans to Pensionat Vityaz and other companies involved in the Vityaz construction project should never have been granted as they represented too high of a risk to Manas Bank that they would lead to violation of Kyrgyz banking norms. Ms. Alisherova concludes in her letter that having granted these loans, Manas Bank had engaged in "unsound and unsafe banking practices."

95. On account of these "unsafe and unsound" practices, the temporary administrator and the NBKR found that the management and board of Manas Bank included persons unsuitable to administer Manas Bank and should be replaced. In effect, the conclusions of June 2010 served as justification of the prior decision of May 2010 to dismiss Manas Bank's top officials.

96. As will be explained further, this resulted in the continuation of the Temporary Administration Regime imposed on Manas Bank.

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[65] Witness Statement of Ms. Alisherova, *supra* n58.

[66] Letter from NBKR to KR Vice Prime Minister re current state of Manas Bank, 4 September 2013; C-228. Tab E5.291.

[67] Statement of Defence, ¶ 235.

c. *Attempted Challenge to Temporary Administration Regime*

97. The Claimant does not dispute the right of the Respondent to take emergency temporary measures to secure its banking sector over a few days of unrest in April 2010 during which the Bakiev regime was deposed.

98. When that temporary administration was not terminated following the installation of the provisional government, the Board of Manas Bank sought to challenge the decision to impose temporary administration. On 14 April 2010, the Claimant, and the evicted Manas Bank management, wrote to the NBKR contesting the legal basis for the imposition of temporary management and affirming that Decree No 10/1 was harming the business of Manas Bank.[68]

99. Lawyers from the NBRK provided an opinion dated 27 April 2010 to the effect that NBKR Decree No 10/1 was valid.[69] They noted the physical violence perpetrated against the banking sector on April 7-8 2010. They also noted the importance of preserving the state assets on deposit at Manas Bank and the opinion of the State Prosecutor's office that from 2006-2010 there had been suspicious transactions in the Kyrgyz banking sector. The legal opinion was affirmed by the management of the NBKR in a decision of 28 April 2010.[70]

100. The unseated Manas Bank managers sought clarification and justifications from the temporary administrator through a series of letters beginning in April 2010. On 18 June 2010, the former Manas Bank managers turned to the Kyrgyz courts to challenge the temporary administration that had been imposed on it.[71]

101. Unfortunately for Manas Bank, it appears that Kyrgyz law restricted standing to challenge measures affecting Manas Bank in court:

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[68] Objection of CJSC Manas Bank to the Resolution of the Board of the National Bank of the Kyrgyz Republic No. 10/1 dated 8 April 2010, 14 April 2010; C-282 Bundle E.106.

[69] Opinion of the Legal and Banking Supervision Departments of the NBKR on Manas Bank's written objections pursuant to the pre-trial dispute resolution procedure, 27 April 2010; C-123 Bundle E.117.

[70] *Supra* n. 49.

[71] Application by CJSC Manas Bank to appeal against Resolutions of the Board of the National Bank of the Kyrgyz Republic No. 10/1 dated 8 April 2010 and No. 24/2 dated 28 April 2010, 18 June 2010; C-283, Bundle E.142.

> *3.1 At the appointment of the temporary administration, only temporary administration shall be entitled to act on behalf of the bank as a legal entity.*[72]

102. On 9 August 2010, the Inter-District Court of Bishkek found that the deposed Board and management of Manas Bank were unable to challenge the imposition of temporary administration as only the Temporary Administrator, or her delegate, could challenge the decision of the NBKR.[73]

103. On 9 September 2010, the Appellate Division of the Court affirmed this decision.[74]

104. Finally, on 21 February 2011, the Supreme Court of the Kyrgyz Republic affirmed both lower court decisions:

> *However, in accordance with Article 3.1 of the Resolution of the NBRK dated 30.09.208 No 36/5 only temporary administrators of the Bank are authorised to represent it as a legal entity in case temporary administration regime is imposed.*[75]

105. In sum, as interpreted by the highest court, Kyrgyz law does not permit the challenge of Decree No 10/1 imposing the temporary administration regime by the deposed board and managers of Manas Bank.

106. While the Respondent, in its post-hearing brief, has suggested that perhaps the Claimant himself could have had standing to pursue a remedy, they note this would require a demonstration that his rights as shareholder had been infringed. The fact is however that the State Prosecutor had ordered the seizure of the Claimant's shares on 17 April 2010. On 1 September 2010, the Temporary Administrator notified the Claimant that she had petitioned for the removal of the attachment that had been placed on the shares of Manas Bank.[76] On 20 January 2011, a decision from the Kyrgyz Attorney General's office was issued that partially removed the

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[72] Law "on sequestration, liquidation and bankruptcy of banks", 15 February 2004, Article 3.1; CL-27, R-II.24, Bundle F.20.

[73] Decision of the Bishkek City Court, case AD-777/10mbs9, 9 August 2010; C-73, Bundle E.149.

[74] Decision of the Appellate Instance of the Bishkek City Court, case AB-247/10-AD, 9 September 2010; C-74, E.158.

[75] Decision of the Supreme Court, case AD-777/10mbs8 n\p No. 6-542/10 AD, 21 February 2011; C-75, Bundle E.196.

[76] Letter from Ms. Alisherova to Ms. Matisone responding to letter dated 20 August 2010, 1 September 2010l; C-130, Bundle E.155.

sequestration of the shares of the Claimant to allow for "capitalization of Manas Bank" but continued to prohibit the "disposal of the mentioned shares (sale, pledge or any other type of alienation)."[77] The Tribunal notes that it is unknown how the Kyrgyz Courts would have reacted to a suit by the Claimant in these circumstances. In any event, the Claimant was not required to exhaust all possible remedies as a pre-condition to pursuing his claim in arbitration.

d. *Extension of Temporary Administration*

107. According to Kyrgyz banking law, temporary administration can "be introduced in the bank for a term of up to six months."[78] This is consistent with the stated purpose of temporary administration: the improvement of a bank's situation.[79] Under this six month time limitation, the temporary administration instituted on 8 April 2010 could last until 8 October 2010.

108. Nearing the end of this six month period of temporary administration, the NBKR did not cease their administration of Manas Bank but instead took measures to prolong it. The stated reasons for imposing temporary management this second time were that Mr. Belokon had failed to replace his management team as requested on 30 September 2010.

109. On Thursday, 30 September 2010, the NBKR issued decree No 76/2 which instructed Mr. Belokon to replace the members of the Board and senior management of Manas Bank within ten days.[80] It appears that this decree was faxed to Manas Bank, for forwarding to Mr. Belokon, on 4 October 2011.[81]

110. Even before this ten day deadline had elapsed, on Monday 4 October 2010 the National Bank prepared two resolutions to ensure that Manas Bank was kept under temporary administration. Resolution No 77/2 would put an end to the temporary administration as of eight a.m. on October 8 while Resolution No 77/6 imposed temporary administration anew as of that same

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[77] Decree of General Prosecutor of the KR "on partial annulment of imposed sequestration" on Mr. Belokon's shares in Manas Bank, 20 January 2011; CL-5, Bundle E.191.

[78] NBKR Regulation no. 36/5 "on the temporary administration of banks", 30 September 2008, Article 2.11; CL-7, R-II.13, Bundle E.55.

[79] *Ibid*, Article 1.3.

[80] NBKR Decree no. 76/2 re officers of Manas Bank, 30 September 2010; CL-12, R-I.14, Bundle E.164.

[81] Ibid.

date and time.[82] The Tribunal notes that it may well have been impossible for the Claimant to comply with the NBKR's instructions within the short time frame provided and that the NBKR clearly prepared for this failure in advance.

111. This second temporary administration regime would however not last long. It was replaced in January 2011 by a "sequestration" regime.

(iii) The Sequestration Regime

112. In "connection with the institution of criminal proceedings" against the management and board of Manas Bank, on 28 January 2011 the National Bank issued a decree for the temporary closure of Manas Bank.[83] That decree ended the temporary administration regime and appointed a Conservator, Ms. Nazgul Mulkubatova, to supervise a temporary shutdown of Manas Bank for 18 months, until 31 July 2012. The sequestration regime was imposed on account of the institution of criminal proceedings against the management and board of Manas Bank by reference to suspicious transactions at the bank, and the existence of "unhealthy and unsafe banking practices."

113. It is worth recalling that the management and Board of Manas Bank had been removed by the temporary administrator on 13 April 2010.[84] Further, the Supreme Court of the Kyrgyz Republic affirmed that these individuals had no standing to take actions on behalf of the Bank. In addition, the second temporary administration regime was, apparently, imposed because the Claimant had refused to appoint a new management team for Manas Bank. The Tribunal notes the lack of connection between the stated rationale of the NBKR and the facts on the ground.

114. On 9 February 2011, the Conservator of Manas Bank wrote to the Claimant and informed him that Kyrgyz law required the submission of a recommendation to the NBKR within 30 days of a plan for Manas Bank which would recommend one of three options:

- Revocation of the Bank's license

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[82] NBKR Decree no. 77/2 on the termination of the Temporary Administration at Manas Bank, 4 October 2010; CL-9, Bundle $.165. NBKR Decree No. 77/6 on the installation of a Temporary Administration at Manas Bank, 4 October 2010; CL-10, Bundle E.166.

[83] NBKR Decree no. 5/6 "on the introduction of a sequestration regime in ZAO Manas Bank", 28 January 2011; CL-3, R-I.10, Bundle E.192.

[84] *Supra* n 46.

- A detailed plan for the rehabilitation of Manas Bank
- A detailed plan for the sale of Manas Bank

115. No such plan, dated *ex hypothesi* prior to 27 February 2011, appears to have been exhibited in this arbitration. Ms. Mulkubatova has submitted three witness statements. None of them appears to address whether such a plan was made, as required by Kyrgyz law, let alone what it may have recommended.

116. Kyrgyz law allows for a nine month extension of a sequestration regime. On 25 July 2012, the National Bank issued a second decree extending the shutdown for a further 9 months, until 30 April 2013.[85] The stated grounds for the continued sequestration were that the criminal proceedings against Manas Bank directors and officers were still pending and that Manas Bank was in violation of the minimum bank capital requirements.

117. The sequestration has continued well beyond the nine month extension permitted under the laws of the Kyrgyz Republic. In July 2013, the National Bank again appointed a new sequestration administrator for Manas Bank.[86] The Tribunal understands that to this date, Manas Bank is still under sequestration administration.

118. The Tribunal has received no adequate explanation as to how the sequestration regime had been so extended a second time, let alone on a continuing basis, in apparent violation of the Kyrgyz law concerning sequestration.[87] Notably, the Respondent's Expert on Banking Law in the Kyrgyz Republic did not address this issue in his Report nor during examination at the hearing.[88]

119. The Tribunal directed the parties to elaborate in their post-hearing briefs on how the sequestration regime has continued to be in effect by answering the following questions:

> *What information now relied upon by the Respondent as justifying its post-April 2010 actions against the Manas*

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[85] NBKR Decree no. 30/11 "on extension of the sequestration regime in CJSC 'Manas Bank'", 25 July 2012; C-161 Bundle E.283.

[86] NBKR Decree No. 24/1, 23 July 2013; C-281, Bundle E.300.

[87] Supra n 72, Article 9.

[88] Hearing Transcript, Day 4, p 32 lines 14 – 34.

Bank were timely available to the Respondent prior to April 2010? What, if any, is the significance of the time limits (18 and 9 months respectively) mentioned in Article 9(2) of Law No 14 of 15 February 2004 On Sequestration, Liquidation and Bankruptcy of Banks (Bundle F2, tab 20)? In particular, did these statutory time limits preclude the National Bank from re-introducing or imposing a new sequestration regime on the same bank after the lapse of the aggregate number, i.e. 27, of months mentioned in the provision?[89]

120. The Respondent has answered that the continued regime was justified on account of the "existence of a friendship and close business interest between Maxim Bakiev and Mr. Belokon."[90] The Respondent also justifies the sequestration regime on account of "the involvement of Manas Banks officials in unsafe and unhealthy banking practice."[91] The Tribunal recalls that these officials were removed in April 2010.

121. The Claimant contends that "the extension of the sequestration over Manas Bank beyond 27 months has no lawful basis."[92]

(iv) The Administrative and Criminal Allegations against Manas Bank

122. The Respondent has justified the ongoing public administration of Manas Bank on what it alleges are "suspicious" transactions that took place at Manas Bank. These have been investigated by officials at the NBKR, by Kyrgyz prosecutors and agencies, and by the Respondent's experts for this arbitration.

a. *Administrative Proceedings*

123. Following a request of the NBKR, administrative proceedings were commenced against Manas Bank on 23 March 2011 on account of alleged violations of Kyrgyz banking laws relating to the issuance of credit cards.[93] On 25 March 2011, a Conservator of Manas Bank wrote to the State

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[89] Tribunal's Procedural Order Requesting Post-Hearing Briefs, 16 January 2014.

[90] Respondent's Post-Hearing Brief, at 36.

[91] Ibid.

[92] Claimant's Post-Hearing Brief, at ¶ 83.

[93] Order no. 9 of Chairman of KR Financial Intelligence Service ("KR FIS") concerning alleged breaches of administrative law by Manas Bank, 23 March 2011; C-4, Bundle E.201.

Financial Intelligence Service to explain that no credit cards were issued by Manas Bank, but rather by Baltic International Bank. Manas Bank simply assisted with applications.[94] It appears that the NBKR Conservator did not believe that Manas Bank had violated Kyrgyz banking law in this regard.

124. On 7 April 2011, the Chairman of the Kyrgyz Financial Investigations Service issued a decision dismissing the charges of wrongdoing against Manas Bank.[95]

125. The Tribunal understands that the Conservator's letter of 25 March 2011 was "withdrawn" on 29 December 2011[96] because the Respondent states the Conservator made a "mistake" in sending it.[97] No particulars as to the circumstances and reasons why nine months following the Conservator's letter it was deemed to be a mistake have been provided to this Tribunal. The Tribunal notes that the letter, clearly favourable to the Claimant in this case, was withdrawn on the same day as the filing of the Statement of Claim.

b. *Criminal Proceedings before the Kyrgyz Courts*

126. As previously noted, in April 2010 the Kyrgyz prosecutors started criminal investigations into the banking system. On 19 January 2011 Kyrgyz prosecutors issued charges against the Claimant and his associates at Manas Bank.

127. On 18 April 2011, a Kyrgyz Court reviewed charges brought against 32 persons, including the Claimant, of:

> *Organisation of a criminal group, corruption, legalisation of financial means obtained by criminal activities, fraud used for obtaining securities of the Russian issuers etc, and other charges according to various articles of the criminal code of the republic of Kyrgyzstan.*[98]

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[94] Letter from M.T. Taranchieva to KR FIS re Master Cards issued to Manas Bank customers, 25 March 2011; C-144, Bundle E.205.

[95] KR FIS Decision No. 9 dismissing administrative case, 7 April 2011; C-102, Bundle E3.209.

[96] *Supra* n 94.

[97] Statement of Defence, ¶ 244.

[98] Decision of the Pervomayski District Court of the City of Bishkek remanding criminal case for elimination of deficiencies, 18 April 2011; C-83, Bundle E.208.

128. The Kyrgyz Court ordered the case to be returned to the prosecutor's office on account of serious deficiencies in how it had been handled. The Court noted, for example, that there was no indication that 23 of the individuals charged were even aware of the case being brought against them. The Court also noted what appeared to it to be the complete lack of organisation in the evidence supporting the criminal accusations.

129. On 10 November 2011, a Kyrgyz Court invalidated decrees of the NBKR against the Chief Accountant of Manas Bank which had found her to be involved in "unfit and unsafe banking practices".[99] While that decision of the Kyrgyz Court only has affect as to that particular former Manas Bank employee, it is of relevance for the similar proceedings against the Claimant and others. In reviewing the decisions of the NBKR, the Court noted that:

> *Thus, the issue of violation of laws of the Kyrgyz Republic on counteraction against financing of terrorism and legalisation (Money Laundering) of the proceeds acquired in an illegal way by CJSC Manas Bank has been considered by the authorised state body – the Financial Intelligence Service of the Kyrgyz Republic and no reason has been found for application of any enforcement actions due to this.*[100]

130. That Court also considered the previous audits of Manas Bank (prior to the introduction of temporary administration) and found there to be no reason to doubt their findings or veracity:

> *Further on, the court demanded provision of Reports of independent auditors CJSC Top-Audit KG dated 23 March 2010 and 13 March 2009. According to the aforementioned reports, the financial statements of CJSC Manas Bank, as of 31 December 2008 and 31 December 2009, are credible in all significant aspects and are in conformity with the international financial reporting standards. Up to now, these reports have not been acknowledged as unlawful or invalid by anyone, i.e. the court has no reasons to doubt their credibility.*
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> *The court was also provided the NBKR Reports on the results of the complex inspection of operation of CJSC Manas Bank for the years 2008 (the inspection headed by*

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[99] Judgment of the Interdistrict Court of the City of Bishkek in case AD-463/11mbs2, 10 November 2011; C-224, Bundle E.242 [While this case is not a criminal proceeding, it is otherwise instructive of related allegations.].

[100] *ibid*, at 14.

E. Karabechelova (Карабечелова Э.)) and 2009 (the inspection headed by A. Dolubaev (Долубаев А.)), according to which the inspectors did not establish any violations in the operation of CJSC Manas Bank and E. K. Kyshtobaeva, which fall under the activities classified as unfit and unsafe banking practice. As a consequence, according to the results of the aforementioned inspections, neither E. K. Kyshtobaeva, nor other officials of CJSC Manas Bank were applied any measures or sanctions on the part of NBKR.

Therefore, the court cannot agree to the NBKR objections that the Report on checking the CJSC Manas Bank operation during the period of introduction of temporary administration in 2010 fully proves the fault of officials of the bank in committing actions which are determined as unfit and unsafe banking practice, as, according to the aforementioned, the defendant has not provided evidences of the fact that previous Reports on the results of the complex inspection by NBKR of operation of CJSC Manas Bank for the years 2008 and 2009 are invalid. Similarly, the defendant has not provided documents certifying on the lack of objectivity or lawlessness of the conclusions of the NBKR inspectors who performed the complex inspections in 2008-2008, as well as evidences of applying measures and sanctions established by the law with regard to them.

Moreover, in accordance with Clause 5.6 of the NBKR Instructions "On Performance of Inspections In-Situ", assessment of a banks operation performed in the course of an inspection is final. (Emphasis added.)[101]

131. While the overturning of an administrative action of the NBKR is of no direct effect on the parallel criminal prosecution, it could hardly fail to raise doubts with respect to the case against the Claimant and other individuals related to Manas Bank.

132. On 28 December 2011, a Kyrgyz Court once again considered the criminal allegations against the Claimant and his associates at Manas Bank. After a review of the case to date, in which the Court noted that for some charges there was "no evidence in the criminal case in support of these accusations", the Court stated:

Summing up the above mentioned facts, it should be noted that the criminal case has been investigated superficially,

[101] *ibid*, at 12.

with accusatory bias, while the criminal case should be investigated fully, objectively and comprehensively, it is desirable that the case should be investigated for each of the defined banks separately, since it would facilitate either criminal investigations or the proceedings.[102]

133. The Kyrgyz Court again returned the criminal case to the prosecutor's office for further investigation.

134. From the evidence presented in this arbitration, it does not appear that the Kyrgyz Courts have, in the intervening years since December 2011, rendered a verdict (or resumed a hearing) in the criminal case against the Claimant and other individuals associated with Manas Bank.

c. *Allegations by Respondent's Witnesses of criminal behaviour*

135. On 9 April 2010, one day following the institution of temporary administration, the Bishkek Public Prosecutor issued a decree freezing the assets of Manas Bank.[103] According to the Prosecutor, an investigation into "only one client" of Asia Universal Bank led to a conclusion that there was a "suspicious money transfer operations" on account of very significant currency conversion activity.[104] The Prosecutor believed that similar transactions were perhaps taking place at other Banks in the Kyrgyz Republic, and therefore seized the assets of Manas Bank.[105] No evidence or accusations relating to the activities of Manas Bank appear to have been mentioned in the decree of the Prosecutor.[106]

136. The Respondent's witnesses have provided repeated commentary on the allegedly illegal activities of Manas Bank. However, their assertions have not referred to evidence or coherent inferences concerning the alleged wrongful conduct, nor have particulars of such conduct been provided. Nor do the Respondent's subsequent submissions appear to have rectified or provided an adequate explanation for this evidentiary lacuna.

137. Thus, a Deputy Chairman of the National Bank, Mr. Suerkul Abdybaly Tegin, in his witness statement of 25 September 2012, stated that:

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[102] Ruling of Pervomayski District Court of the City of Bishkek returning criminal case to KR General Prosecutor, 28 December 2011; C-149, Bundle E.248.

[103] *Supra* n 42.

[104] Ibid.

[105] Ibid.

[106] Ibid.

> *29. The conservator held its examination with participation of Manas Bank's staff upon issues of compliance with requirements of the bank's activities regarding combating against the financing of terrorism and money laundering (Combating against financing of terrorism/money laundering). The inspection confirmed the presence of many violations of the law on (Combating against financing of terrorism/money laundering) indicated by the examination of banking supervision. The conservator sent the results of its examination to the National Bank and its shareholders.* (Emphasis added.)[107]

138. This witness statement of Deputy Chairman Abdybaly does not contain any references to exhibits or further elaboration on the nature of the impugned conduct. Notably, the "results of the examination" have not been accounted for in this arbitration.

139. As for the second witness statement of Deputy Chairman Zair Chokoev, it noted:

> *8. The reasons, that caused the financial difficulties of the bank and subsequent appropriate action by the supervisory authorities, are the actions of the bank's former management – Management Board and the Board of Directors which allowed the acceptance by the bank unreasonably high credit risk and other serious violations of the law.* (Emphasis added.)[108]

140. Similarly, however, this second witness statement of Deputy Chairman Chokoev does not contain any references to exhibits or further elaboration of the "other serious violations of the law".

141. Another Deputy Chairman of the National Bank, Ms. Baktygul Djeenbaeva, in her witness statement of 25 September 2012 stated that:

> *12. As the results of checks, numerous violations of economic standards observance, banking legislation and normative-legal acts of the National Bank were committed by the [Manas] Bank, a lot of questionable conduct and suspicious transactions took place in the bank, bank officials committed significant violations up to a conceal upon the record of guarantee bonds.*

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[107] Mr. Suerkul Abdybaly Tegin, First Witness Statement, 25 September 2012; Bundle C.1.

[108] Mr. Zair Chokoev, Second Witness Statement, 19 November 2012, Bundle C.6.

> *13. Accordingly, the question of the involvement of government officials in the conduct of unsafe and unhealthy banking practice was rendered to the Oversight Committee. The Committee approved the proposal for the oversight involvement. Because officials of Manas Bank appeal, the matter was considered by the Board of National Bank. NBKR's Board carefully enough studied the documents provided by the banking supervision Office. I, like other members of the Board, voted in favour of the proposal for the involvement since provided materials convincingly demonstrated numerous violations, and conduct of shady and suspicions transactions.* (Emphasis added.)[109]

142. The first witness statement of Ms. Djeenbaeva does not contain any references to exhibits or further elaboration on the nature of the impugned conduct. Notably, the "documents provided by the banking supervision Office" do not appear to have been exhibited.

143. In her second witness statement, Ms. Djeenbaeva adds:

> *6. The officers of banking supervision have provided me with the information on non-resident companies, serviced in Manas Bank, as well as on non-resident companies drawn through Baltic International Bank. Also I familiarised myself with the information on founders, owners, directors, managers and information on conducted transaction. The majority of the information seemed suspicious to me, and in my opinion, the employees in charge of Combating the terrorism financing/Money laundering, did not perform their job duties in dull and did not carry out the audit properly.* (Emphasis added.)[110]

144. Once again, this second witness statement of Ms. Djeenbaeva does not contain any references to exhibits or further elaboration on the nature of the impugned conduct.

145. The first Sequestration Administrator, Ms. Nazgul Mulkubatova, made the following observations in her first witness statement:

> *27. I paid attention to the fact that when issuing a bank guarantee, the decision of the Credit Committee was*

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[109] Ms. Baktygul Djeenbaeva, First Witness Statement, 25 September 2012; Bundle C.7.

[110] Ms. Baktygul Djeenbaeva, Second Witness Statement, 19 November 2012; Bundle C.8.

missing (violation of Article 35.2 of the Law "On bank and banking activity"), internal procedures on the issue and accounting of guarantee had not been complied with, unreliable financial statements had been provided since 2008, and, accordingly, from 2008 to 2010 Manas Bank showed no guarantee in reports to the national Bank, i.e. deliberately concealed it.

62. In pursuit of profit and attraction of new Manas Bank, in the absence of the development of appropriate maintenance procedures of VIP-customers, former management of Manas Bank, in violation of the Law on Banks and the Law "On Combating against Financing of Terrorism/Money laundering", held the service of so-called VIP-customers and their identification in Mr. Verbitsky's [the Chairperson's] office, contracts for their services were signed here.

63. ... Mr Verbitsky personally engaged in identification of [a VIP customer] and some non-resident customers. Although as a Chairman of Manas Bank, he did not have such authority to do so. Special authorized person, compliance-officer had to deal with the identification, verification of Mans Bank customers, and their compliance with requirements of the Kyrgyz Law "On Combating against Financing of Terrorism/Money Laundering".

65. In the first instance of the court, NBKR proved infringements with respect of suspicious transactions upon MasterCard Payment system by Mans Bank. The fact to attract customers who are citizens of Latvia to the service through the Kyrgyz Mans Bank looks very strange in terms of economic efficiency.

66. Violations revealed in Manas Bank and attributed to Mr. Sheytelman by the National Bank were confirmed by the Court's decision and were fully proved by the NBKR. These violations are reflected in the Report of the National Bank in 2010 upon the verifications by Manas Bank. (Emphasis added.)[111]

146. The witness statement of the Sequestration Administrator does not contain any references to exhibits or further elaboration on the nature of the impugned conduct. The Tribunal notes that where VIP clients were known to the Chairman of Manas Bank, services may have been provided without following the protocols for identification of such *personally known clients*

[111] Ms. Nazgul Mulkubatova, First Witness Statement, 25 September 2012; Bundle C.9.

in apparent technical violation of the rules in the Kyrgyz Republic on money laundering and financing of terrorism. Such technical breaches are similar to those identified in a January 2010 Inspection Report of Manas Bank where it was noted that some client identification data was not updated annually as required.[112] In that Report, the recommendation was further to assess the scope of the problem, and Manas Bank agreed to introduce better auditing of internal controls for combating the financing of terrorism and money laundering in 2010.

147. The first Sequestration Administrator, Ms. Nazgul Mulkubatova, made the following observations in her second witness statement:

> *25. The national Bank... have an irrefutable evidence of the activity of Manas Bank and its officers in violation of the Kyrgyz law and in violation of the principle of the implementation of healthy and unsafe banking practices by Manas Bank and its officers.*
>
> ...
>
> *37. In conclusion, I would like to note that the very nature of the relationships and conducting transactions of Mans Bank and [a VIP] (and others, as well holding Manas Bank operations with customers on the work with the international payment cards of Mastercard International through JSC "Baltic International Bank") are suspicious and do not make any economic sense.* (Emphasis added.)[113]

148. This statement does not exhibit the "irrefutable evidence" of activities in violation of Kyrgyz law. It is unclear how a foreign banking customer wanting to obtain a MasterCard, or otherwise deposit funds in a Kyrgyz Bank, is in violation of Kyrgyz law or how his or her application does "not make any economic sense." Further, the Tribunal recalls that the Kyrgyz authorities investigated the MasterCard issue. Indeed, as mentioned, prior to the determination that it had been in error, the conservator was of the opinion that there was nothing improper with the issuing of the credit cards. Mr. Verbickis notes in his second witness statement that foreign customers were attracted to the high interest rates offered by Manas Bank on foreign deposits.[114] At any rate, it has not been shown that registering non-Kyrgyz clients or processing credit card applications breaches criminal law.

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[112] Minutes of meeting to discuss results the NBKR's 2009 audit of Manas Bank, 20 January 2010; C-117, Bundle E.81.

[113] Ms. Nazgul Mulkubatova, Second Witness Statement; Bundle C.10.

[114] Mr. Jevgenijs Verbickis, Second Witness Statement, 15 October 2012, Bundle B.11.

149. Ms. Mulkubatova made the following observations in her third witness statement:

> *43. A letter to the General Prosecutor's Office of the Kyrgyz Republic No 9/07-10 of 20.01.2011, in which it was stated that according to the results of criminal investigation No 150-10-94 the officials and shareholder of "Manas Bank" CJSC were held criminally liable for committing crimes related to legalization (laundering) of unlawfully obtained funds, corruption and for participating in a criminal organization served as a prerequisite for imposition of the sequestration regime in "Manas Bank" CJSC.*
>
> ...
>
> *52. Furthermore, the violations set forth in the NBKR's Report have been confirmed by the sequestrator's Report on the results of the activity of "Mans Bank" OJSC in the field of the sequestrator on the results of audit of Manas Bank's activity in the field of combating the financing of terrorism / money laundering on 01.07.2011 (on the bank transactions conducted in 2008, 2009), which independently confirms the NBKR's findings on inefficient identification and verification of Manas Bank's clients. In particular, the Sequestrator's Report (page 5) states that "These facts suggest that identification of clients was carried out (on clients who opened accounts in Manas Bank in 2008, 2009, our clarification) improperly, as well as that on the side of the Compliance Control Department – Heads of Department on work with corporate non-resident clients – lax controls over identification of the bank's clients and end beneficiaries on their operations."* (Emphasis added.)[115]

150. This third witness statement exhibited 17 documents, but not the above referenced letter of 20 January 2011 authored by the prosecutor and explaining the purported criminal activities of the Claimant and Manas Bank. Nor does one find the sequestrator's report concluding that there was wrongdoing. The included exhibits do not elaborate on the facts pertaining to the alleged money laundering or financing of terrorism.[116]

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[115] Ms. Nazgul Mulkubatova, Third Witness Statement, 19 November 2013, Bundle C.11.

[116] For example, the first exhibit states that violations occurred but provides no particulars:

151. While it may well be that the Respondent's witnesses, as well as perhaps other citizens in the Kyrgyz Republic, believe that Manas Bank or the Claimant were involved in criminal activities, the Tribunal has not been presented with evidence that substantiates, supports, or corroborates such beliefs.

d. *Allegations of Criminal Behaviour Made by Respondent's Experts*

152. On 26 November 2013, i.e. a few days before the Witness Hearing in Paris, the Respondent submitted a second expert report to the Tribunal, prepared by Mr. Andrew Howson and Mr. Paul Devine of East Star Capital (this Award refers to the Respondent's experts collectively as ESC). This Report was prepared in the course of two and a half weeks. ESC's primary conclusion was that further investigation would be warranted with respect to the activities of Manas Bank:

> *During the course of the investigation East Star Capital has, in its opinion, found a number of trading and operational complexities that it believes warrant further investigation and or deliberation by international and Kyrgyz professional and judicial bodies. We clearly state that we are not qualified to offer an opinion on what those outcomes might be from any investigation, that that the facts point to a need to engage further qualified bodies going forward who can determine those matters. We do offer the opinion that evidence provided in this document does, from our understanding of the relevant international standards on money laundering and fraudulent behavior, raise a number of red flags that on the surface provide significant reason to believe that there were transactions*

> *Certain officers of ZAO Manas Bank were responsible for violations of articles 24, 25, 27, 35, 27, 39.1, 53, 58.3 and 60 of the Kyrgyz Republic Law "On Banks and Banking Activities"; articles 3.1 and 4.1 of the Kyrgyz Republic Law "On Combating the Financing of Terrorism and Money Laundering"; paragraphs 5.5, 5.6 and 5.7 of the Regulation on Minimum Requirements for Organizing Internal Controls at Commercial! Banks and other Financial/Credit Institutions Licensed by the NBKR. to Combat Financing of Terrorism and Money Laundering. [NBKR Decree no. 76/2 re officers of Manas Bank, 30 September 2010; CL-12, R-I.14, Bundle E.164.]*

and organizations that would be of interest to international judicial authorities. (Emphasis added.)[117]

153. As stated by the Financial Action Task Force (FAFT), which is an intergovernmental organization comprising, *inter alia*, the major economies in the world dedicated to combatting economic crimes, including corruption and money laundering:

> *"Money laundering is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardizing their source"*[118]

154. There are three acknowledged sequential phases to money laundering, namely (i) placement, (ii) layering, and (iii) integration.[119] The placement phase covers the time from the cash generated by crime is placed in the financial system. The layering phase is meant to obscure their origins by passing the money through - often complex – transactions. Finally, the integration part entails the obscured criminal funds to "resurface" as legitimate funds or assets.[120]

155. In practice, a plethora of ways is available to a culprit when considering how to launder the criminal proceeds. Financial institutions play, willingly or inadvertently, an integral part of most money laundering schemes.

156. This Tribunal is cognizant of the currency transaction patterns and significant amounts seemingly involved in these transactions mentioned in the second experts' reports by East Star Capital. In this context, the Tribunal is further mindful of the definitions and characteristics of a typical money laundering scheme.

157. Moreover, the Tribunal acknowledges that some of these transactions, could, on their face, warrant further investigations into whether activities adequately labelled as money laundering may have been carried out by or through Manas Bank.

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[117] Second ESC Report, at 2.

[118] Financial Action Taskforce, "What is Money Laundering" Online at www.fatf-gafi.org/pages/faq/moneylaundering/

[119] Second ESC Report, at 10.

[120] Ibid.

158. If probative and substantial evidence of Manas Bank having being actively involved in money laundering had been produced and presented to the Tribunal, the claim under the BIT may have been defeated. It scarcely needs to be said that investment protection is not intended to benefit criminals or investments based on or pursued by criminal activities.

159. Money laundering is a serious problem. Any adjudicator encountering allegations of money laundering must examine the evidence with punctiliousness. Still, the seriousness of the alleged offence does not entail that fundamental principles of due process or burden of proof can, or should, be relaxed when dealing with such claims.

160. In its post-hearing brief, the Respondent suggested that suspicions are enough:

> *This is an important distinction that must be made, in the cases of money laundering: the bank must act, not on proof of illegality, but on suspicion. This duty to act and report suspicion is usually legal obligation and failure to report can be a criminal offence in itself.*[121]

161. True enough, suspicion of money laundering alone may be enough to justify interlocutory measures by a host state in order to provide time for a thorough investigation of the allegedly suspicious activities. Nevertheless, it ultimately remains for the host state to prove that money laundering was actually carried out by the institution in question, *in casu* Manas Bank, and that the measures taken were in accordance with its international obligations.

162. It may of course be the case that state authorities are in a much better position that an international body to investigate allegedly criminal activities, including money laundering, by a subject of that state. But if state authorities, having thus been in a position to deploy their considerable powers into investigating criminal activities, come up empty handed to the extent that the local courts more than once have squashed the evidence and remanded the case for a further and more careful investigation, it is difficult to see how an international tribunal, in the absence of concrete evidence, could reach a different conclusion.

163. In the eyes of this Tribunal the position must necessarily be this: If the host state, notwithstanding its resources and powers, is unable to discharge the burden of proof before a municipal court, an international

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[121] Respondent's Post-Hearing Brief, at 38.

tribunal will find itself in a situation where it cannot, in the absence of concrete and decisive evidence, consider identical allegations as proven by the host state. Anything else would fly in the face of any notion of due process.

164. In this light, the ESC Report is of quite limited value to the Tribunal. The question that requires answering is whether in April 2010 the Kyrgyz authorities had reasonable and legitimate reasons to take control of Manas Bank and had justifiable reasons for later actions such as dismissing the Board of Directors and launching an international police search for Mr. Belokon and his colleagues at Manas Bank. That some nearly four years later ESC, in the person of two Western consultants having spent a few weeks to prepare a report, concludes that a closer look at certain transactions is warranted does little to justify the prior actions by Kyrgyz prosecutors and the Kyrgyz National Bank.

165. The Report itself does not purport to contain evidence but merely alludes to facts that are said to merit further investigation. The Tribunal reiterates that the Respondent's application to stay or suspend the proceedings was said to have been justified by reference, *inter alia*, to money laundering. The Tribunal declined to grant the application with the explicit proviso "that the Respondent is free to submit a similar request at a later stage if there is concrete indications that the criminal proceedings are likely to provide imminent, specific, and relevant evidence." No further application in this regard was submitted by the Respondent. Furthermore, with the consent of both Parties, the evidentiary records were closed after the witness hearings in December 2013. No application for a reopening of the evidence phase has been lodged by either party. This arbitration, consequently, has reached *finis litium* and the Tribunal must give its award based on the evidence before it.

166. The Tribunal moreover notes that a possible explanation for flagged and allegedly suspicious currency transactions, including the amounts seemingly involved, was provided by Mr. Verbickis. His explanation was in principle open for possible rebuttal by the Respondent but none was attempted.

167. It should be recalled that the Kyrgyz prosecutors have had access to the records at Manas Bank from April 2010, but have failed successfully to mount a criminal case in the Kyrgyz Republic. Nor was documentary evidence of wrongdoing presented at the December 2013 hearing.

168. Without relevant and material evidence, the Tribunal is in no better position than the Respondent's experts, or the prosecutors in the Kyrgyz

Republic, to determine if there were money laundering transactions or other criminal wrongdoings committed by the Claimant or Manas Bank. The lack of evidence presented, combined with the repeated negative findings by courts and tribunals in the Kyrgyz Republic, if anything suggests the contrary.

169. The question then arises whether the second report from East Star Capital, without further substantiation, is enough for Tribunal to support the Respondent's contention that violations of the legal order of the Kyrgyz Republic has been established to an extent where investment protection must, or should, be denied the Claimant.

170. The answer to this question is, and must be, negative. From the evidence presented to it, the Tribunal is unable to deduce or infer that the Respondent state has proved that Manas Bank was involved in money laundering activities. Consequently, the Tribunal finds that the Claimant is entitled to avail himself of the remedies of the BIT.

171. The ESC Report purported to serve a second function: to cast doubt on the value of Manas Bank by suggesting that its profits were derived from illegal deposits and activities committed by a variety of clients.

172. ESC pointed to various New Zealand companies who are alleged to be shipping "arms to North Korea and launder[ing] drug money"[122], to a South African company that engages in significant currency conversions through Manas Bank, to a Ukrainian company that "has been accused of being a shell company used in money laundering and fraud involving the sale of an oil rig to the Ukrainian government"[123], to a connection to a London branch of Wachovia and "Mexican drug cartels,"[124] to investigations by Moldova against a Latvian company.[125]

173. In addition, the ESC Report, using Google Street View, provided pictures of various buildings and houses which Manas Bank clients may have as listed offices with corporate registrars.[126] The ESC Report noted that some of these buildings are the corporate address for numerous corporations.

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[122] Second ESC Report, at 28.

[123] *Ibid*, at 26.

[124] *Ibid* at 34.

[125] *Ibid*, at 34.

[126] *Ibid*, at 24-5.

174. ESC also asserted that the auditors appointed for Manas Bank were allegedly "close to the Bakiev family" and that this "raises the question of involvement in money laundering by the auditors."[127]

175. The arbitrators infer from the second ESC Report that its authors suggest that the Tribunal should conclude on such anecdotal "evidence" that Manas Bank was at the center of a global conspiracy involving everything from arms sales to North Korea to oil extraction to Mexican drug cartels and involved hundreds of shell companies registered from New Zealand to South Africa and was assisted by corrupt auditors. At the same time, the authors of the ESC Report acknowledged that they are not "specialists in banking and/or anti-money laundering activities"[128] and "don't claim to be experts in certain parts of how transactions are conducted inside banks."[129]

176. During the cross-examination of the authors of the East Star Capital Report, a number of deficiencies in their work were identified. The authors acknowledged that a number of calculation mistakes were made.[130] The authors also noted that it is not the role of their report to say whether transactions of Manas Bank were or were not evidence of money laundering.[131] The authors also agreed that it was an "error" on their part to conclude that there had been money laundering in Mr. Belokon's banks in Kyrgyz or Latvia.[132] They conceded furthermore that there were errors in reversing debits and credits in their report on banking operations and errors in labeling transactions properly.[133]

177. In the period of less than two weeks between the submission of the Second ESC Report on 26 November 2013 and the December 2013 hearing, the Claimant endeavoured to respond to these accusations. With regard to a South African client of Manas Bank which the second Report suggested was engaged in money laundering, the cross-examination demonstrated that transactions were so labeled because "one of the red flags of the US Federal Financial Institutions Examining Council is funds transfer sent and received

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[127] *Ibid*, at 28-29.

[128] *Ibid*, at 2.

[129] Hearing Transcript, Day 5, p 21, lines 4-5.

[130] Hearing Transcript, Day 5, p 25.

[131] Hearing Transcript, Day 5, p 51, lines 8-9.

[132] Hearing Transcript, Day 5, p 51, line 25.

[133] Hearing Transcript, Day 5, pp 79-80.

from the same person in a different account" and therefore currency trading in significant volumes may be evidence of money laundering.[134]

178. During examination, ESC admitted that they did not look at the documents underlying these currency transactions effected in Manas Bank, nor had they sought to ask anyone at Manas Bank about these transactions or to secure any assistance from the Manas Bank government appointed administrators, nor indeed from the National Bank of the Kyrgyz Republic.[135] In effect, the ESC representatives identified transactions they thought were suspicious but apparently failed to follow up by asking for supporting documentation, such as contracts justifying client transactions – unless they did so ask, but were refused evidence presumably under the control of their own client. They seem content to elude doubts as to their methods by stating they would be "happy if other authorities who have greater expertise in [money laundering] than us would make that very investigation and a substantial investigation."[136] This, however, has the effect of confirming the fragility of their conclusions, which remain little more than suppositions.

THE CLAIMS

179. The Claimant's final formulation of its request for relief is for:

> *a. A declaration that the Respondent has breached the BIT.*
>
> *b. A monetary award to compensate the Claimant for harm to him by the aforesaid breaches including:*
>
> *i. the value of his shareholding in Manas Bank;*
>
> *ii. the amounts loaned to depositors and paid to Ms de Vaskevich-Mirska;*
>
> *iii. reputational harm.*
>
> *c. An order that the Respondent shall terminate all outstanding criminal and civil administrative investigations and proceedings against the Claimant and any persons affiliated with Manas Bank and shall not commence any such proceedings in the future in relation to events that occurred prior to the date of the award.*

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[134] Hearing Transcript, Day 5, p 65, lines 11-14.

[135] Hearing Transcript, Day 5, pp 61-4, 72.

[136] Hearing Transcript, Day 5, p 83, lines 1-3. See also p 88 line 24.

d. An order that the Respondent shall publish a statement in the leading newspapers of the KR, by which it rehabilitates the Claimant's name and indicates that all previous allegations raised against him and persons affiliated with Manas Bank have been withdrawn.

e. An order that the Respondent shall procure the withdrawal of all police search warrants and equivalent search notices issued by any international and/or Kyrgyz police authority against Mr Belokon, Mr Verbickis, Mr Kacnovs and Ms Matisone.

f. An order that the Respondent shall inform the relevant authorities of the European Union, the UK and any other jurisdiction to whom the General Prosecutor has sent defamatory statements about the Claimant / Manas Bank / Baltic International Bank, that these statements are withdrawn.

g. In the alternative to a monetary award of the amounts loaned to depositors and paid to Ms Mirska, an order that the KR procure that all the monies in the accounts at Manas Bank of the depositors listed at paragraph 89 of the Claimant's Statement of Claim be returned to those depositors or their authorised representatives with accrued interest and the monies in the account of Ms Mirska referred to at paragraph 92 of the Statement of Claim be paid to the Claimant with accrued interest.

i. An award of interest on money compensation up to the date of payment.

j. Such other relief as the Tribunal deems appropriate.

180. In its cost submission the Claimant has requested:

The Claimant respectfully requests that it should be awarded its costs of Euro 2,208,430.08 in full.

181. The Respondent requests the Tribunal to:

a. Dismiss the reliefs sought by the Claimant under points 3), 4) and 5) of the Statement of Claim as being inadmissible.[137]

b. Dismiss all reliefs sought by the Claimant in the Statement of Claim as being not founded.

c. Condemn the Claimant to the payment of the expenses associated with this claim and arbitration in the amount of 750 000 USD as well as all arbitration costs.

JURISDICTION AND ADMISSIBILITY

182. Pursuant to Article 9(2)d) of the BIT, the Claimant availed himself of the opportunity to submit the dispute to:

An ad hoc arbitral tribunal constituted under the Arbitration rules of [UNCITRAL], unless otherwise specified by the parties to the dispute.

183. The Claimant used this option to initiate these proceedings.

184. The Parties subsequently confirmed that the 1976 version of the UNCITRAL Arbitration rules apply to this case.

185. The BIT does not identify a seat of arbitration. Article 16(1) of the UNCITRAL Rules provides that unless the parties have agreed where the arbitration is to be held, "such place shall be determined by the Arbitral Tribunal". After consulting[138] with the Parties, the Tribunal selected Paris as the seat of arbitration.

186. The Respondent has not challenged the Tribunal's jurisdiction in general, but has argued that three elements of the relief sought by the

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[137] These are (3) an order that the Respondent terminate all outstanding criminal and civil administrative investigations and proceedings and not commence future investigations in relations to prior events, (4) an order that the Respondent shall inform Interpol that all Red Notices against persons affiliated with Manas Bank be withdrawn, (5) an order that the Respondent shall publish a statement in the leading newspapers of the Kyrgyz Republic to rehabilitate the Claimant by indicating that the charges and allegations against him had been withdrawn.

[138] Exchange of emails between Tribunal and Parties re seat of arbitration and procedural timetable, 14 December 2011, Bundle H.4 ["Both Parties would be agreeable to seating the arbitration in Paris, France."]. On 1 July 2013, the Respondent further indicated that this was acceptable, Bundle H.60 ["We are pleased to confirm the agreement of our client to hold the hearings in the offices of Clifford Chance."].

Claimant "are not within the competence of the arbitration Tribunal and are therefore inadmissible". The basis for this objection is that certain of the actions of which the Claimant complains are not attributable to the Respondent, or that the relief so requested is not available under the terms of the BIT. These objections essentially pertain to the merits of the dispute and will be examined as such.

SUBSTANTIVE CLAIMS

187. The Claimant's claims of breach of the BIT are examined under each of the substantive protections invoked.

(i) Expropriation

188. The Claimant alleges that the Respondent's administration of Manas Bank, and the restrictions placed on the operations of the investment, amount to an expropriation in violation of Article 5 of the BIT. The Respondent counters that no expropriation has taken place since the Claimant is still in possession of his shares in Manas Bank, and argues that the administration of Manas Bank is a temporary measure permitted as a regulatory exercise of the police powers of the Kyrgyz Republic.

a. *Legal standard*

189. Article 5 of the BIT sets forth the applicable expropriation standard:

> *"1. The Contracting Parties shall not directly or indirectly apply measures to expropriate or nationalise the investments of investors of the other Contracting Party or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except for expropriation:*
>
> *(a) for public purposes;*
>
> *(b) on a non-discriminatory basis; or*
>
> *(c) in accordance with national laws; and*
>
> *(d) with prompt, effective and adequate payment of compensation, in accordance with paragraph 2 of this Article.*
>
> *2. Compensation shall:*

(a) be made without delay. In the event of a delay, costs caused by fluctuations in the exchange rate that flow from the delay in payment shall be borne by the Contracting Party in whose territory the investment was made;

(b) amount to the current market value of the expropriated investment immediately before expropriation. The determination of current market value shall disregard any changes caused by the expropriation becoming public knowledge before it took place;

(c) be effectively realizable and freely transferable; and

(d) include interest at the commercial market rate for the currency for which the compensation will be paid, from the date of expropriation to date of actual payment."

190. The Parties appear to be in agreement that the question before the Tribunal is whether the actions of the Respondent amount to an indirect expropriation of Manas Bank. Elaborating on the standard, the Claimant has referred to the writings of Professor Schreuer:

An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. The deprivation would have to be permanent or for a substantial period of time.[139]

191. And further:

An indirect expropriation leaves the investor's title untouched but deprives him of the possibility to utilize the investment in a meaningful way[140]

192. The Respondent defends the treatment directed towards Manas Bank as constituting "general regulatory measures".[141] The Respondent submits that "a state is not responsible for loss of property or for other economic disadvantage resulting from the *bona fide* general" regulation

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[139] Christopher Schreuer, 'The Concept of Expropriation under the ECT and other Investment Protection Treaties', in C. Ribeiro (ed.), Investment Arbitration and the Energy Charter Treaty, 2006, p. 37.

[140] Rudolf Dolzer and Christopher Schreuer, Principles of International Investment Law, 2008, p 92.

[141] Statement of Defence, at ¶ 267.

under the "police power of the states, if not discriminatory".[142] Citing to *Feldman v Mexico*, Respondent notes that "government must be free to act in the broader public interest."[143] Invoking *Methanex v USA*, it insists that "as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable".[144] Lastly, the Respondent notes the observation in *Saluka v The Czech Republic* that "a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States.' "[145]

193. The Claimant appears in general agreement with the legal principles relied upon by the Respondent, but points out that as "the tribunals in *Tza Yap Shum v Peru* and *El Paso v Argentina* recently held, the deference paid to a State in exercising its police powers is limited where the exercise of that police power is arbitrary, discriminatory and/or disproportionate."[146]

b. *Determination of an Internationally Wrongful Act*

194. The Rejoinder appears to submit that for the Claimant to prove that an internationally wrongful act has occurred, he must prove that the Respondent breached its internal laws. In addition, the Respondent appears to suggest that so long as a continuing criminal or regulatory investigation is pending against the Claimant, a *de facto* expropriation cannot be found to have occurred.

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[142] Statement of Defence, at ¶ 268, citing to: Rudolf Dolzer and Christopher Schreuer, p. 109 with reference and quotation under footnote 116 to: American Law Institute, Restatement (third) of the Foreign Relations Law of the United States, Vol.1 (1987), Section 712, Comment (g).

[143] Statement of Defence, at ¶ 268, citing to: *Feldman vs. Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) 488, quoted in Rudolf Dolzer and Christopher Schreuer, p.109.

[144] Statement of Defence, ¶ 268, citing to: *Methanex vs USA*, Award, 3 August 2005, 44 ILM (2005) 1345, quoted in Rudolf Dolzer and Christopher Schreuer, Exhibit CA-, p.110.

[145] Statement of Defence, ¶ 271, citing to *Saluka vs Czech Republic*, Partial Award, 17 March 2006, quoted in Rudolf Dolzer and Christopher Schreuer, Exhibit CA-8/G3.31, p.110.

[146] Claimant's Reply, 31 August 2012, ¶ 170 ["Claimant's Reply"], citing to *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, ¶¶ 145-48 and *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 236-43.

195. The Claimant invokes the familiar principle set down in Article 3 of the ILC *Articles on State Responsibility* to the effect that determination of an internally wrongful act is not affected by the characterisation of the same act as lawful by internal law.[147] Whether an internal law has or has not been respected is a question of fact that the Tribunal can consider in determining whether there has been a breach of the BIT.

196. As for the ongoing investigations against Manas Bank, the Claimant, and related individuals, the Tribunal understands that if the Kyrgyz prosecutors abandon those investigations then the impetus for maintaining the sequestration regime on Manas Bank may terminate. However, should that occur, in which case control of Manas Bank *may* revert to the Claimant, the value of that Bank would be gravely affected, and perhaps irreversibly so, on account of its owner's being deprived of the property for more than four years, and of the ability to be present in an evolving market.

197. The Tribunal also understands that if prosecutors or other investigators finally, after years of no indications of progress or even systematic investigations, report that they have discovered evidence of wrongdoing by Manas Bank, then the Respondent may consider that its actions were justified. This Tribunal is charged with evaluating the facts invoked by the Respondent to justify the measures it took when they were taken, and what evidence was presented during the proceedings. There is always a risk in any adjudicative proceeding that, years after it has completed, new evidence may be said to arise that could affect the reasoning of the adjudicator. However, the possibility of new evidence being found does not mean that no determinations can ever be made. As always, a balance must be struck. In this case, the Kyrgyz courts twice denied the Kyrgyz prosecutor's efforts to move forward. The process before this Tribunal has given the Respondent four years to make its case.

c. *Kyrgyz Authorities Abused their General Regulatory Powers*

198. The Tribunal naturally accepts that the application of general regulatory powers, such as taxation or determination of bank capitalisation standards, does not in and of itself amount to indirect expropriation. States have considerable policy space to enact the laws and regulations they believe are appropriate. The NBKR is not just empowered, but *required* to regulate and inspect the activities of Manas Bank. Kyrgyz prosecutors are equally charged with responsibility for conducting investigations when they believe there may have been criminal wrongdoing.

[147] ILC Article 3: The characterisation of an act of State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law.

199. However, the measures challenged, while perhaps being based on Kyrgyz law, are challenged as having been abusive and arbitrary applications of that law given the factual reality as it was known. The Claimant alleges that five measures amount to an abuse of the Respondent's authority to the degree that they resulted in an indirect expropriation.

200. The first measure at issue is the initial imposition of temporary administration on 10 April 2010. While the Claimant does not dispute the authority of the Respondent to take necessary emergency measures, as were required immediately following 10 April 2010, the Claimant has convincingly argued that in so far as the threats to the banking system were physical threats, the imposition of temporary administration was a measure that went beyond what was required to provide physical security to Manas Bank.

201. The second measure at issue is the ongoing imposition of the temporary administration by the NBKR, given the inadequate justifications provided at their meeting of 28 April 2010, as described at Paragraph 78 above.[148] The NBKR continued the temporary administration because they are empowered to "defend the interests of depositors and creditors and/or maintain the stability of the republic's financial and banking system."[149] While the Bank is empowered to take such actions, which are general regulatory measures, they must not be arbitrary, discriminatory or disproportionate. As explained below, the actions of the NBKR failed to respect that dividing line.

202. The third measure is the re-imposition of a temporary administration regime from October 2010 to January 2011. The NBKR purportedly justified this action on account of the failure of the Claimant to put in place a new management team within a deadline of ten days. Yet the Bank had re-imposed temporary administration even prior to the expiry of this deadline. The Tribunal considers this re-imposition as non-compliant with Kyrgyz law.

203. The fourth measure at issue is the imposition of the sequestration regime. This was said to be justified by the criminal proceedings against Manas Bank. These proceedings have continued for years, achieving very little save two dismissals by the Kyrgyz courts – and the undeniable and effective destruction of the Claimant's investment. It is impossible to resist the impression, given the way the matter has been handled, that they are most unlikely to produce evidence of any wrongdoing by the Claimant or

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[148] *Supra* n. 49.

[149] Ibid.

Manas Bank, and in fact have been pursued in an abusive and discriminatory fashion.

204. The fifth measure is the unjustified extension of the sequestration regime. A state cannot be said to be acting in the public interest and exercising its police powers when it takes actions that are not authorised by its internal laws. As discussed, the Tribunal has received no satisfactory answer justifying the extension of the sequestration regime beyond its maximum permitted duration. The explanation offered, namely the fact that Maxim Bakiev and the Claimant are acquaintances, itself seems so thin as to give credence to the inference of arbitrary and discriminatory practices. The Tribunal considers the extension as a clear violation of Kyrgyz law.

205. The Claimant has also described the above measures as being a violation of the FET standard and in violation of other provisions of the BIT. The Tribunal consider a number of these measures further in the sections of this Award addressing those standards. However, the Tribunal presently considers whether the measures in question amounted to a taking of Manas Bank.

d. *Measures Equivalent to a Taking*

206. Whether there has been a measure equivalent to a taking depends on whether there has been a substantial deprivation of the benefits of property ownership, and that deprivation is permanent or imposed for a substantial period of time.

207. Manas Bank has been under the "temporary" administration of the NBKR since April 2010. Critically, Manas Bank has been under sequestration administration for longer than is permitted under Kyrgyz law. The Tribunal has been provided no assurances by the Respondent that this temporary administration will soon be at an end. To the contrary, the Tribunal understands that the temporary administration must be imposed while there is an ongoing investigation against the Claimant and the personnel of Manas bank.

208. While Kyrgyz law places limits on how long the NBKR can impose temporary administration or sequestration administration, the NBKR has extended both forms of administration in apparent contradiction with these limits. As previously noted, the Respondent has been unable to explain the legal basis for the continuing application of the sequestration regime to Manas Bank. In effect, there is no reason to expect that the sequestration administration of Manas Bank will terminate in a foreseeable future.

209. The Tribunal accepts that during the administration by the NBKR, Manas Bank's profitability and operations have been severely affected to the point that even if it were returned to the Claimant's control it has little or no residual value.

210. The Tribunal concludes that in so far as the Respondent, in violation of the maximum time limits prescribed by its own law, placed Manas Bank under its administrative control and deprived the Claimant of all input into its operations, the Respondent has indirectly expropriated the investment.

e. *Public Purpose*

211. Article 5(1)(a) of the BIT requires that expropriation be for public purpose. While the initial imposition of the temporary administration regime in mid-April 2010 may have been undertaken for a public purpose, the administration of the temporary regime does not appear to have been pursued with that goal. Rather, continued administration of Manas Bank appears to have been undertaken because of suspicions of wrongdoing on account of a connection between the Claimant and the Bakiev regime. Further, the administration of Manas Bank permitted the return of funds to state coffers despite contractual obligations to keep deposits with Manas Bank. In addition, the administration allowed the expropriation of assets secured by Manas Bank and prevented Manas Bank from taking legal actions to claim compensation for the expropriation of these secured assets.

212. On the whole the actions of the Kyrgyz Republic do not appear to have been taken in the interests of the public but to promote the narrower interests of the government in obtaining by seizure of Manas Bank what could not otherwise be achieved under the law.

f. *Discriminatory Application*

213. The Tribunal notes that actions were taken not just against Manas Bank but also additional banks in the Kyrgyz Republic. While it may be that the actions against the particular banks are related, perhaps because they all are suspected of having connections with the Bakiev regime, there is insufficient evidence before this Tribunal to make a determination that the actions were discriminatory in the sense of the BIT (by which the Tribunal means comprehensive discrimination susceptible to destroying an entire investment, as opposed to incidental discriminatory acts).

g. *In Accordance with Kyrgyz Law and for Adequate Compensation*

214. Neither aspect of Article 5(1) of the BIT is at issue as the Respondent engaged in an indirect expropriation.

h. *Conclusion*

215. The Tribunal concludes that the ongoing imposition of an administrative and sequestration regime on Manas Bank, with no end in sight, for a period of at least four years amounts to a disguised taking and expropriation of Manas Bank. The taking has not been for public purpose but rather serves the narrower interests of the Government. The Respondent has not compensated the Claimant for his lost property.

(ii) Fair and Equitable treatment

216. The Claimant has identified, *inter alia*, the imposition of temporary administration, the administration itself, the imposition of sequestration administration, and the criminal proceedings as being measures that breach the Fair and Equitable Treatment standard.

a. *The Respondent's Defence*

217. The Respondent has offered limited observations with regards to the alleged breaches of the FET standard of protection. In the Statement of Defence, the Respondent's entire submission on FET consists of an affirmation that the Claimant has been treated in accordance with Kyrgyz law:

> *287. It has been explained above that the measures taken were a part of the internal regulation norms of the Kyrgyz Republic and it has not been established by the Claimant that these internal regulation norms (the banking laws, the Criminal Procedural Code and the Criminal Code of the Kyrgyz Republic) would constitute a violation in one way or another of the interests of investment of the Claimant.*
>
> *288. It has to be reminded that these laws and Codes were already in place at the moment that the investment initially was made.*

289. The regulatory measures that were an execution of this legislation were totally in accordance with this legislation.

290. Therefore, the Claimant was given a fair and equal treatment and the said standard was not violated.

218. The Respondent's Rejoinder further states that "the Claimant argues that [actions taken by the NBKR] constitute breaches of the Fair and Equal Treatment" but that the Claimant has not proven that the actions "can be considered as internationally wrongful acts" as the Claimant has not proven that the actions of the "Public Prosecutor and the NBKR would have been unlawful."

219. Elaboration of the Respondent's defence to the alleged breaches of FET were only particularised in a Supplemental Rejoinder dated Wednesday 4 December 2013 – only a matter of days before the witness hearing started on 9 December. In that fuller discussion, the Respondent stated that the NBKR had no choice but to institute the administration and sequestration regimes as it was its statutory duty to protect the Kyrgyz banking system. The Respondent notes that a number of Manas Bank employees have withdrawn their domestic legal challenges, sometimes after winning at first instance, and suggest that these cases were withdrawn "when the NBKR was ready to provide the court with concrete evidence of the plaintiffs' – the officials of Manas Bank CJSC -- violations of the legislation of the KR, *inter alia* the Law On AML /CFT, and when the court began to consider the filed claims on the merits". The Respondent also notes that some of the civil challenges were stayed pending the (stalled) criminal case. The Tribunal understands that the Respondent may have been suggesting that an inference against liability under the BIT be drawn from the discontinuance of the challenges by Manas Bank employees.

220. The Respondent also noted that the length of the criminal proceedings does not constitute a denial of justice as the case against the Claimant and Manas Bank officials is complex and has been frustrated by the refusal of individuals to return to the Kyrgyz Republic to face questioning on the allegations against them. The Tribunal was also reminded that it is suspicious that Manas Bank had significant foreign currency exchange operations.

221. Finally, in its post-hearing brief, the Respondent submitted that the FET standard was not breached as the "Respondent did not deprive the Claimant of his investments because the Claimant was and still is the sole owner of the shares" of Manas Bank. The Respondent further submitted that the temporary administration regime was imposed in accordance with

Kyrgyz law such that all requirements of procedural propriety and due process were met.

222. The submissions of the Respondent are considered against the Claimant's contentions of breach of the FET standard.

b. *The Legal Standard*

223. The BIT provides, at Article 2, that:

> *Investments and returns of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.*

224. One notes the absence of qualifying language, such as "in accordance with customary international law". No point has been taken as to supposed consequences of the particular wording. Nevertheless, it is right to bear in mind that the words appear in a type of treaty which became commonplace in the second half of the 20th Century, and due consideration should be given to construing them in a way that is consonant with those treaties in general and thus to give effect to legitimate expectations. .

225. The Claimant, in reliance on Professors Dolzer and Schreuer, has submitted that "the FET standard encompasses several legal principles, including:

> *a. Transparency, stability and protection of the Investor's legitimate expectations;*
>
> *b. Compliance with contractual obligations;*
>
> *c. Procedural propriety and due process;*
>
> *d. Good faith; and*
>
> *e. Freedom from coercion and harassment.*[150]

226. The Claimant further notes that "the prohibition of arbitrary treatment has also been held to be encompassed by the FET standard" and that "breach of any of these principles entails a breach of the FET standard." In his Supplemental Submission, the Claimant also explained why he

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[150] *Supra n. 140* at Chapter VII.1.

considers that his treatment at the hands of the Respondent constituted a denial of justice.

227. The Claimant's Supplemental Submission also referred to a number of recent awards that discuss the FET standard in a manner relevant to the facts of this present dispute. Determination of whether the FET standard has been breached in a given case is inherently fact specific. Nevertheless, its tenets seem broadly well established and have not been disputed by the Respondent:

> *29. The Respondent agrees with the Claimant's opinion that according to the BIT "investment and returns of investor of either Contracting party shall at all times be accorded fair and equitable treatment " and that FET standard should include the following principles:*
>
> *a. Transparency, stability and protection of the investor's legitimate expectations;*
>
> *b. Procedural propriety and due process.*[151]

228. Although the Respondent in this passage did not also confirm other often-repeated features of FET – such as compliance with contractual obligations, good faith, freedom from coercion and harassment, prohibition of arbitrary treatment, and denial of justice – they are in fact subcategories or particularisations of the broader wording rather than different elements of the undertaking.

229. The Claimant's Reply particularised the breach of the FET standard into eleven distinct episodes (to which their Supplemental Reply added a violation of the denial of justice standard):

> *1. Imposition of Temporary Administrator without valid legal grounds*
>
> *2. Reinterpretation of legal standards*
>
> *3. Mismanagement of Manas Bank*
>
> *4. Unreasonable rejection of Mr. Belokon's good faith efforts to resolve the situation surrounding Manas Bank*
>
> *5. Imposition of Sequestration Administrator without valid legal grounds*

[151] Respondent's Post-Hearing Brief, ¶ 29.

6. Initiation of vexatious Criminal Trial

7. Resubmission of criminal case, notwithstanding continued grave procedural defects

8. Request for Red Notices

9. Harassment and coercion and illegality

a. Requests for bribes

b. Demands for injection of share capital without reciprocal return of shareholder control over Manas Bank

10. Procedural propriety and due process

a. Denial of standing to challenge Decree No. 10/1

b. Failure to seek explanations prior to initiation of criminal trial.

c. Failure duly to serve process in respect of criminal trial

11. Lack of proportionality.[152]

230. The Respondent did not present a particularised defence to the breaches in the manner they were cast by the Claimant.

c. *Imposition of Temporary Administration*

231. The imposition of temporary administration was defended as necessary in order to prevent capital flight and to address the chaos in the streets (which included attacks on ATMs).

232. States have considerable leeway in their policy actions, especially when faced with emergency situations such as the overthrow of a regime. As mentioned, the NBKR had an obligation to protect the Kyrgyz banking sector. Although States are often said to enjoy margins of discretion with respect to such matters, the Respondent's actions must still be rationally connected to their objectives. The lack of a rational connection is a strong indication of manifestly arbitrary treatment. This does not mean that a breach of the FET standard occurs where the State fails to pursue the most rational means, or the best means to accomplish their objectives. However, where there is no evident connection between the means and the objective, a breach of the FET standard has likely occurred.

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[152] Claimant's Reply, at ii.

233. As mentioned, the 28 April 2010 Decree of the NBKR identified the imposition of the temporary administration regime as a "necessary measure" on account of physical violence carried out against installations of the Kyrgyz banking sector. A rational response to physical violence would have been to employ the State's security apparatus – not sending in a temporary administration.

234. The Tribunal also notes that the NBKR was concerned to prevent "unsafe, ill-advised or unscrupulous banking activities". While the Tribunal acknowledges that the imposition of temporary administration, under Kyrgyz law, may be justified when such activities are identified, to avoid a breach of the FET standard the NBKR must be aware of those activities prior to the imposition of temporary administration. Decree No 10/1 of 8 April 2010 identified no such violations by Manas Bank. It is manifestly arbitrary to impose sequestration and then identify alleged evidence *a posteriori* to justify this decision.

235. The Tribunal further notes that had the NBKR imposed temporary administration on Manas Bank and then lifted that administration in a few days, once the chaos of the revolution had worn off, then the Respondent's actions may have been justified. However, no such defences have been pleaded by the Respondent, nor would they be relevant at this stage given that the temporary administration regime was continued.

d. *Treatment during the Temporary Administration Regime*

236. The Claimant has identified a number of measures during the temporary administration regime which he contends amounted to a breach of the FET standard.

237. The first of such alleged breaches is the reinterpretation of Kyrgyz banking norms regarding Pensionat Vityaz such that Manas Bank was in breach of Kyrgyz law despite a prior audit not having found these loans to be noncompliant. States are entitled to reverse prior determinations when they are presented with new information or identify that they had previously made an error. As mentioned, however, the Tribunal has been presented with no basis on which the temporary administrator reversed her prior determination with regard to the very same loans. While the Respondent has alleged that perhaps there was impropriety with respect to the previous NBKR audits, the temporary administrator, who testified before the Tribunal, has not identified any pressure put on her to improperly sign off on the 2009 audit of Manas Bank. The Tribunal thus finds the behaviour in question to be manifestly arbitrary and the decision making of the NBKR to be lacking in transparency.

238. The temporary administrator's actions led to the withdrawal from Manas Bank of deposits by the Kyrgyz Social Fund and the Development Fund. While the Tribunal finds that the Temporary Administrator failed to act in good faith in carrying out her duties and may have been in a situation of conflict of interest, these activities do not amount to a breach of the FET standard. The FET standard is not a remedy to every adverse action by a government agent. The Tribunal notes that these depositors may well have terminated their deposit agreements, albeit at a future date, even had Manas Bank not been under temporary administration.

239. The Claimant, and former Manas Bank officials, attempted to resolve the concerns of the NBKR through discussions with the temporary administrator. The NBKR and the temporary administrator did not accept these settlement offers, nor, it is alleged, did they act in good faith to resolve the situation. On the fact of this case, the Tribunal does not find that failure to reach a negotiated solution is sufficiently egregious to amount to a breach of the FET standard.

e. *Imposition of Sequestration Administration*

240. The NBKR imposed a sequestration administration on Manas Bank on account of the institution of criminal proceedings against officials of Manas Bank by virtue of Article 8(3)(5) of the Kyrgyz Law on Banks and Banking:

> *Article 8. Grounds for conservative appointment*
>
> *3. The National Bank is obliged to introduce the conservation and to appoint the conservative in the bank if any of the following reasons has occurred:*
>
> *5) the criminal case has been brought against bank's persons in charge (being accused for offence of economical and professional crimes) in accordance with implementation of his/her duties; in addition, the term "bank's persons in charge" shall mean the persons having the authority to participate or factually participating in basic operations of the bank, forming the policy of the bank, apart of the fact whether official title has been assigned to him/her or not or whether the remuneration has gained or not. The Chairman of the Board, Members of the Board, the top persons in charge for financial matters*

and credits are to be treated as executive persons in charge.[153]

241. However, it is to be recalled that the first temporary administrator had removed the management and board of Manas Bank on 13 April 2010. The criminally charged individuals were no longer persons in charge of Manas Bank. Indeed, by Decree No 10/1, the temporary administrator had "assume[d] the authority of the Board of Directors and of the Executive Board of the Bank." That these individuals had no power to act for Manas Bank was even affirmed by the Kyrgyz Supreme Court, who found they had no legal standing to take actions on behalf of Manas Bank.

242. It does not appear that the fact that proceedings were brought against the Claimant, as a shareholder, would justify sequestration under Article 8(3)(5). In its post-hearing brief, the Respondent made significant efforts to identify Mr. Belokon as the "supreme governing body" of Manas Bank.[154] The Respondent suggests that as the sole shareholder, the Claimant was to approve large scale transactions of Manas Bank, such as granting of loans or approving the large foreign currency trades undertaken by Manas Bank. In support of this, it identifies Articles 37 and 38 of the Kyrgyz law on Joint Stock Companies. While Article 37 of that law does identify the shareholder as the supreme governing body, the type of transactions that are approved by a shareholder do not include the day to day banking transactions (i.e. currency conversions or loans) put forward by the Respondent. Article 38(7) requires that shareholders "decide on major transaction in accordance with Article 73 of this Act". Article 73(2) of that law identifies that shareholder approval is required for transactions which involve 50% or more of the book value of the company. The Tribunal does not find that this type of shareholder decision making is one for which Article 8(3)(5) of the Kyrgyz law on banking and banks requires the imposition of sequestration administration. The Claimant has denied involvement or knowledge of the individual transactions that were undertaken by Manas Bank. He is not a person with "authority to participate" nor was he "factually participating in basic operations of the bank" as required by Article 8(3)(5).

243. The Tribunal therefore concludes that the imposition of sequestration administration with the justification that it was required on account of criminal proceedings brought against former officials or the Claimant was arbitrary. There is no rational basis in appointing a sequestration administrator on account of the alleged criminal activities of former bank officials.

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[153] *Supra* n 87.

[154] Respondent's Post-Hearing Brief at ¶¶22-25.

f. *Criminal Proceedings*

244. The Tribunal has noted the various criminal proceedings brought against the Claimant and former Manas Bank officials. The Tribunal also notes that these individuals plausibly contend that they were severely affected by restrictions placed upon them through Interpol "Red Flags" and notices within the Commonwealth of Independent States; those notices were improper and should never have been issued, the Claimant insists.

245. The BIT however only requires FET in accordance with "investments of investors of either contracting party". Investments is a defined term of the BIT and does not encompass the *former* directors and management of Manas Bank. The Tribunal therefore does not consider it has authority to consider the criminal proceedings, however abusive they may be, in its analysis under the FET standard of this particular BIT, except insofar as they form a pattern which may be relevant in assessing the context as a whole.

246. The Tribunal does note however that the Respondent's actions may be considered a violation of Article 2(3) of the BIT:

> *3. Neither Contracting party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.*

247. The Tribunal shall consider the factual aspects at issue later in this Award.

g. *Requests for Further Capital*

248. The Tribunal notes that the Claimant was requested by Manas Bank administrators to provide additional capital to Manas Bank to keep it afloat.

249. While the Tribunal notes the challenges that these requests have presented to the Claimant, they do not, on their face, appear to be a violation of the FET standard absent additional actions by the Respondent.

h. *Procedural Propriety and Due Process*

250. The Claimant has alleged three measures by the Respondent as constituting a denial of justice and a breach of the FET standard:

(a) The denial of standing to challenge Decree No 10/1;

(b) Failure to seek explanations from Manas Bank affiliated individuals prior to instituting criminal proceedings against them in alleged violation of Kyrgyz criminal law;

(c) Failure to serve Manas Bank individuals with notice of the criminal proceedings against them in alleged violation of Kyrgyz criminal law.

251. The latter of these two allegations, while understandably grave, cannot be considered under this BIT as a breach of the FET standard as they do not relate to the investment in Manas Bank. Again, they may be considered under Article 2(3) of the BIT. The Tribunal notes that in the *Loewen* decision, relied upon by the Claimant, the investment itself was the subject of judicial proceedings.

252. The Tribunal acknowledges that the distinction between providing FET to the directors and employees of an investment as opposed to the investment itself may in certain contexts be artificial. However, given the presence in this BIT of Article 2(3) the Tribunal considers it more appropriate for such considerations to be analysed under that treaty obligation.

253. As for the inability to challenge the imposition of temporary administration and the dismissal of the board of Manas Bank, the Tribunal also considers it more appropriate to undertake the analysis of whether the measures in question are a violation of Article 2(3) of the BIT.

254. *In addition,* the Claimant appears to have alleged that the Respondent's "lack of proportionality" in its actions is a breach of the BIT. The Tribunal does not consider that lack of proportionality can be considered in the abstract as a violation of the FET standard but, as it has done in this Award, as an element to be considered when determining whether measures amount to a breach of the FET standard.

(iii) Full Protection and Security

254. The Claimant has alleged that the above measures are equally (or alternatively) a breach of the Full Protection and Security standard defined by Article 2(2) of the BIT. Given the Tribunal's determinations under the FET standard, the Tribunal does not believe it is necessary to address this issue.

(iv) Unreasonable Interference with the Management, Maintenance, Use, Enjoyment and Disposal of the Investment

255. Article 2.3 of the BIT states that:

> *Neither Contracting party shall in any way impair by unreasonable, discriminatory or arbitrary measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.*

256. The Claimant has provided a definition of arbitrary treatment by Professor Schreuer:

> *a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
>
> *b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;*
>
> *c. a measure taken for reasons that are different from those put forward by the decision maker;*
>
> *d. a measure taken in wilful disregard of due process and proper procedure.*[155]

257. The Tribunal notes that there is a considerable overlap between the provision of protections under the FET standard and the prohibition against unreasonable or discriminatory measures enshrined in Article 2(3) of the BIT.

258. The Tribunal finds that where it has identified a breach of the FET standard on account of arbitrary measures those measures are likely to constitute overlapping violations of Article 2(3).

259. In its Statement of Defence, the Respondent has insisted that Article 2(3) of the BIT was not breached since the measures taken were in accordance with the legislation of the Kyrgyz Republic.

260. The Tribunal considers that unreasonable and arbitrary measures may well be taken pursuant to legislation and regulatory actions when there

[155] *EDF (Services) Ltd v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (Bernardini, Rovine, Derains) ¶. 303 [Citing to expert opinion of Professor Schreuer].

is a lack of a rational basis between the authority of the state to do something and the facts supporting the use of that authority. It is not enough for the Respondent to identify a source of local legal authority to justify an action, but it must also overcome the Claimant's contention that the authority was exercised in an unreasonable and arbitrary fashion.

261. The Tribunal will in due course consider whether the refusal to grant standing to challenge the imposition of temporary administration on Manas Bank, as well as the criminal proceedings against the Claimant and Manas Bank associated individuals, violated Article 2(3) of the BIT.

262. In the sections immediately below, the Tribunal considers (a) the issue of standing to challenge Decree No 1-/1, (b) the criminal proceedings against Manas Bank officials, and (c) the criminal proceedings against the Claimant.

a. *No Standing to Challenge Decree No 10/1*

263. The imposition of temporary administration restricted the Claimant's rights to manage Manas Bank and provide the strategic direction he would have preferred. The Kyrgyz courts, as said, found that only the temporary administrator herself had legal standing to challenge Decree No 10/1.

264. This is an unreasonable limitation on an investment. For a state to be able to seize control of a foreign investment and provide no remedy for access to the courts to challenge that seizure is a violation of Article 2(3) of the BIT.

265. The Respondent has suggested that the Claimant himself might have challenged Decree No 10/1. However, a corporate entity must be entitled to have its day in court; it is no answer to say that one of its shareholders (even a 100% shareholder) may raise the entity's grievance on his own behalf as an indirectly affected person. Certainly it is not the answer given by the Kyrgyz Supreme Court, which focussed solely on the formal issue of standing to act in the name of the entity:

> *However, in accordance with Article 3.1 of the Resolution of the NBRK dated 30.09.208 No 36/5 only temporary administrators of the Bank are authorised to represent it as*

a legal entity in case temporary administration regime is imposed.[156]

266. The Tribunal concludes that the failure to provide for a practicable means to challenge the imposition of temporary administration was an unreasonable impairment of the right to develop and manage Manas Bank, and to enjoy the fruits of its legitimate stakeholding, as the investor was encouraged to do by the BIT.

b. *The Criminal Proceedings against Manas Bank Officials*

267. The Tribunal considers the criminal proceedings to have had a profound effect on the Claimant and the individuals associated with Manas Bank. The Tribunal's powers under the BIT are however limited. The Tribunal cannot order the Respondent to cease investigating the Claimant or former Manas Bank officials. Nor can the Tribunal award damages to individuals who are not investors who have an investment in the Kyrgyz Republic.

268. The Tribunal does however note that the treatment by the NBKR of former Manas Bank officials likely rendered it nearly impossible for the Claimant to identify new board members, as he was directed to do in the days prior to the imposition of the second temporary administrator. These actions thus constituted an interference with the management of Manas Bank.

c. *The Criminal Proceedings against the Claimant*

269. The criminal proceedings against the Claimant were brought on charges that he, with the Bakiev family and former NBKR officials, was engaged in money laundering.[157]

270. Criminal allegations pursued against the Claimant in the absence of evidentiary support (or even cogent explanations) infringe on his rights to enjoy the benefits of his investment. A particular enjoyment of property is the right to be associated with that investment. Where that association is improperly characterised as criminal, the impairment is evident. The

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[156] *Supra* n 75.

[157] KR General Prosecutor's Office statement concerning criminal case no. 150-10-94, March 2012; R-I.1, Bundle E.261. KR General Prosecutor Decree on the prosecution of Marat Alapaev, 14 January 2011; R-1.11, Bundle E.190.

perfunctory but persistent allegations against the Claimant have curtailed his ability to manage his investment.

271. The Respondent is of course entitled to charge the Claimant with a violation of any crime they have the evidence to support. The BIT does not protect foreigners from criminal prosecution. However where that prosecution is used meretriciously to impose a sequestration administration and prohibit the management of property then the protections of the BIT must come to the fore.

272. Where such criminal proceedings have consequences of depriving the investor of the management, use, and enjoyment of property, then the BIT requires that the underlying charges not be "unreasonable, discriminatory or arbitrary". The Tribunal recalls that Kyrgyz courts have twice remanded the case against the Claimant back to the Kyrgyz prosecutor. Further, the Respondent has not provided evidence to this tribunal of money laundering committed by Mr. Belokon, nor has it provided the reasoning of the prosecutor's office that justified the criminal proceedings. Whether under Kyrgyz law or under international law, Mr. Belokon has a right to know the case against him. The conclusion in light of the record is inescapable, to the effect that his investment was arbitrarily destroyed and that compensation is accordingly due.

OTHER REQUESTED RELIEF

273. The Claimant has also put forward requests for:

> *an order that the Respondent shall terminate all outstanding criminal and civil administrative investigations and proceedings against the Claimant and any persons affiliated with Manas Bank and shall not commence any such proceedings in the future in relation to events that occurred prior to the date of the award;*
>
> *an order that the Respondent shall publish a statement in the leading newspapers of the KR, by which it rehabilitates the Claimant's name and indicates that all previous allegations raised against him and persons affiliated with Manas Bank have been withdrawn;*
>
> *an order that the Respondent shall procure the withdrawal of all police search warrants and equivalent search notices issued by any international and/or Kyrgyz police authority against Mr Belokon, Mr Verbickis, Mr Kacnovs and Ms Matisone;*

an order that the Respondent shall inform the relevant authorities of the European Union, the UK and any other jurisdiction to whom the General Prosecutor has sent defamatory statements about the Claimant / Manas Bank / Baltic International Bank, that these statements are withdrawn;

in the alternative to a monetary award of the amounts loaned to depositors and paid to Ms Mirska, an order that the KR procure that all the monies in the accounts at Manas Bank of the depositors listed at paragraph 89 of the Claimant's Statement of Claim be returned to those depositors or their authorised representatives with accrued interest and the monies in the account of Ms Mirska referred to at paragraph 92 of the Statement of Claim be paid to the Claimant with accrued interest.

274. Respondent asserts that "these claims are inadmissible" as under Kyrgyz domestic law, it would be unconstitutional for the Kyrgyz Republic's executive branch to direct that the judicial branch do or not do anything.[158]

275. The Tribunal has not been provided with sufficient pertinent legal authorities on the scope of its powers under the BIT or international law to grant the above requested relief. Notably, while the Tribunal has been directed to the ILC Articles on State Responsibility with regards to questions of attribution (Articles 4 and 8), no reference appears to have been made to this Tribunal's authority to grant Satisfaction (Article 11) or Assurances (Article 30) of the form requested. Nor is it clear that the Tribunal can order restitution of moneys held by foreign Manas Bank depositors who are not party to this arbitration.

276. The authority of this Tribunal to grant the above requested relief under international law or the BIT has not been sufficiently established in these proceedings. The Tribunal declines to grant the requested relief.

QUANTUM

277. The Claimant's damage experts, Chris Osborne and Stephen Kingsley of FTI Consulting, state that Mr. Belokon has invested some 10.358 million US dollars into Manas Bank.[159] In their second expert report,

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[158] Rejoinder, ¶64.

[159] FTI Consulting (Mr. Chris Osborne and Mr. Stephen Kingsley), First Report, 28 August 2012 at ¶3.6; Bundle D.2 ["First FTI Report"].

FTI valued Manas Bank at around 30 million US dollars, a decline from the 33 million US dollars calculated in their initial report.

278. During the hearing, FTI identified an alternate evaluation of 12 million US dollars based upon the assumption that the NBKR validly restricted the type of banking activities that could be engaged in.[160]

279. The Respondent's experts, Andrew Howson and Paul Devine, of East Star Capital, ["ESC"] valued Manas Bank as worth between USD 60,000 and 1.3 million.[161]

(i) Valuation Date

280. FTI has selected a valuation date of December 2012. They did not put forward a valuation as of the date of expropriation.[162]

281. ESC does not appear to have identified a specific valuation date in their reports. During the hearing, they were unable to identify a specific date in response to questioning from the Tribunal, but Mr. Howson said the evaluation date was what Manas Bank was "worth now".[163] Following this, Mr. Devine suggested that the report presented a valuation as "at the time of sequestration of the bank", but Mr. Howson then, in apparent contradiction, stated that valuation dated "from the time of the report."

(ii) Framework

282. FTI assessed the value of Manas Bank by reference to several indicators and market comparators. They determined that Manas Bank was a start-up retail bank with an aggressive but achievable growth plan.

283. ESC's ultimate endorsement of a nil value for Manas Bank focused on their assessment that Manas Bank was engaged in criminal operations. ESC opined that:

> *Manas Bank, as a Bank trading in Kyrgyzstan, had no real value because of a number of breaches advised to Manas*

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[160] Hearing Transcript, Day 5, p 12.

[161] Second ESC Report, at 70.

[162] Hearing Transcript, Day 5, p 13.

[163] Hearing Transcript, Day 5, pp 120-121.

Bank by NBKR the license would in all likelihood have been suspended or withdrawn at some stage.[164]

284. As noted, the Respondent has simply failed to substantiate the allegations of unlawfulness and money laundering made by its officials and experts. No Kyrgyz court has rendered a guilty verdict against Manas Bank, the Claimant, or related individuals.

285. During the course of his examination, Mr. Devine stated that he and Mr. Howson "are not experts in anything to do with anti-money laundering or anything else."[165] Despite their self-professed lack of expertise, and indeed unfamiliarity with the national language, they completed their second report very quickly indeed:

At the end, I would say that we had two and a half weeks, of which one and a half weeks was trying to gather data and information and talk to as many people as we possibly could. One week was trying to put the report together.[166]

286. FTI's second report identified mathematical errors in ESC's analysis. During the hearing, ESC first acknowledged a number of these errors, and when questioned admitted to a number of additional errors, some minor and others more significant.

287. ESC has done little to reassure the Tribunal as to the accuracy of their analysis. FTI had requested that they be provided with the underlying calculations used by ESC. During their examination, Mr. Howson and Mr. Devine noted that they had not provided the underlying Excel sheets they used in their calculations because, as they said rather blithely, they did not think the FTI still wanted these calculations.[167] They admitted knowing that FTI wanted this dataset for review and that they wanted to wait to give it until after their second report was circulated. When that moment came in the wake of the December 2013 hearing, ESC did not in fact circulate their worksheets.

(iii) Bank Valuation Methodology

288. In case of expropriation, Article 4(1) of the BIT provides that:

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[164] Second ESC Report, at 70.

[165] Hearing Transcript, Day 5, p 46.

[166] Hearing Transcript, Day 5, p 8.

[167] Hearing Transcript, Day 5, pp 43-44.

> *Compensation shall amount to the market value of the investment expropriated immediately before expropriation or before impending expropriation became public knowledge.*

289. As is generally the case, the BIT provides no detailed guidance in case of a violation of the FET standard. Still, the test of putting the injured party in the same position that it would have been in had the breach not occurred is one of general application in the context of State responsibility. In the case of the destruction of a going business, in the absence of the breach the investor would still be in possession of the going business and the quantum is thus simply the answer to the question: *what would it be worth under this hypothesis?*

290. In determining the market value of Manas Bank, FTI proposed using a "multiple applied to the bank's assets", which they opined is the generally used approach for bank valuation.[168] They also adopted a "price to book" method ["P/B"]. FTI further stated that a DCF value is inappropriate as Manas Bank had only 3 years of detailed forecasts, too few for a DCF model. In their second report, FTI added:

> *... in the case of banks, valuations are not typically carried out on a DCF basis, but rather on the basis of a P/B multiple. We can find no third party support for the proposition that discounted cash flow valuations are either popular or widely used for the purposes of valuing banks. In our own experience, the reverse is in fact true.*[169]

291. ESC were less definitive in the selection of an evaluation methodology. During examination, they noted that they used three methods of evaluation, including P/B and DCF.[170] ESC however appeared to prefer the DCF method.[171]

292. The reason why ESC selected the DCF method is ultimately unclear. During examination, they suggested that they used that method "largely because we wanted to stay roughly within the same parameters as FTI on the valuation."[172] Yet FTI adopted a price to book method. Further, it appears, regrettably, that ESC reproduced without attribution significant

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[168] First FTI Report, at ¶¶ 1.13-1.14.

[169] FTI Consulting (Mr. Chris Osborne and Mr. Stephen Kingsley), Second Report, 26 September 2013 at ¶4.3; Bundle D.3 ["Second FTI Report"].

[170] Hearing Transcript, Day 5, p 99.

[171] Hearing Transcript, Day 5, p 99.

[172] Hearing Transcript, Day 5, p 99.

portions of a text by a Professor Aswarth Damodaran, who has written about bank valuations. Having done so, ESC concluded:

> *the discounted cashflow valuation is a popular and the most widely used valuation approach not only to banks but to many companies and projects.*[173]

293. No sources are cited. During examination, Mr. Howson was unable to explain why his report so concluded.[174] A review of Professor Damodaran's cited article does not obviously suggest that he prefers a DCF methodology for bank valuation. It may well be that the error in the ESC report is not attributable directly to Mr. Howson and Mr. Devine, and that one of their staff members independently decided to plagiarise and modify the conclusions of Professor Damodaran,[175] but it certainly does not encourage the Tribunal to give much weight to their opinions. The value of expert reports depends upon the Tribunal's trust in the expertise and earnest analysis which is manifest in them. The Respondent's experts have not established the reliability of their conclusions.

294. The Tribunal accepts the Claimant's proposal for using a "Price to Book" method for determining the value of Manas Bank as one which is favoured in the context of bank valuation.

a. *Manas Bank's Business Model*

295. ESC opines that Manas Bank is not a bank engaged in retail operations, but rather a private wealth bank. The Tribunal understands that if Manas Bank were a private bank, providing personalised services to high net worth individuals, its market value would be considerably reduced given the risks of maintaining the goodwill of such a limited market segment in the environment of a small nation located far from the major international banking centres.

296. FTI disagrees that Manas Bank is a private wealth bank. While they accept that there was a high concentration of banking activities serving a limited number of clients, they identify that Manas Bank's goals and activities were consistent with retail banking. For example, they note that services were in place for customers to pay utility bills.

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[173] East Star Capital (Mr. Paul Devine), First Report, 19 November 2012, at 54; Bundle D.4 ["First ESC Report"].

[174] Hearing Transcript, Day 5, p 103.

[175] Hearing Transcript, Day 5, p 102.

297. ESC identified numerous aspects in support of their conclusion that Manas Bank is a private wealth bank:

> *1. Branches: with only 5 branches Manas was one of the smallest banks in the KR again its main business was conducted through the main branch in Bishkek.*
>
> *2. Customers: total of 4454 accounts were opened during the trading period of Manas. A number of these were closed during the period. There are also a great number of these accounts that have the same name and repeat. Also most were ELCARD users so not traditional opened accounts.*
>
> *3. It was difficult to estimate usage rates by clients and services given the limited time and data available.*
>
> *4. ATMs are an increasingly important part of banking.*
>
> *5. Systems: as at April 2010 the key platform of the system was not installed, until it was installed it was not possible to expand the bank to retail operation. The IT section was not developed sufficiently to operate a high transaction system such that is typical in a retail bank.*
>
> *6. Customer service structure: Manas bank had no retail bank structure such as customer services specialists, branches and structure,*
>
> *7. The depositors and the loan book of Manas Bank were highly concentrated into corporate accounts with large state owned organization. To reiterate 80.4% of deposits were with 12 clients, and 89.2% of loans with 10 clients in addition these 10 clients generated little of all transactions in the bank. In effect the bank depended on these clients. Behind this the control of the state industries was held by CADII which was controlled by Maksim Bakiev. Such a concentration suggests that Manas Bank was focused on servicing the needs of a small group of largely corporate clients. This suggests that the bank was more akin to a specialist corporate financing organization. As stated by Mr Verbickis he had made a point of visiting his main customers personally.*
>
> *8. The transactions and revenue contribution in 2009: Revenue was being generated primarily by fees and service rather than by net interest income. 43% from net interest*

income and 57% from fees and services. This was planned to continue in subsequent years.[176]

298. ESC further contended that

- *The depositors and the loan book of Manas Bank were highly concentrated into corporate accounts with large state owned organization. To reiterate 80.4% of deposits were with 12 clients and 89.2% of loans with 12 clients in addition these 12 clients generated a minimal number of all transactions in the bank. In effect the bank depended on this small number of clients.*

- *Such a concentration suggests that Manas Bank was focused on servicing the needs of a small group of largely corporate or foreign clients. This suggests that the bank was more akin to an specialist corporate financing organization*

- *Given the style and nature of many depositors and borrowers, a great number of whom were not Kyrgyz residence, but foreign nationals, it would appear that the bank was used primarily for the movement of monies across jurisdictions.*

- *The lack of service infrastructure and systems to support large scale financial transactions by multiple users.*

- *Manas bank was dependent on fees for service for revenue rather than interest earned.*[177]

299. In response, FTI's second report noted:

2.6 In our experience, a private wealth bank would have:

• senior relationship management professionals well-networked in the high net worth and ultra-high net worth community;

• an investment management and investment origination capability of its own or, alternatively, access to third party investment products;

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[176] First ESC Report, at 49.

[177] First ESC Report, at 51.

> • *an infrastructure of processes, systems and people which responds to the requirements of private banking and private wealth management needs; and*
>
> • *a business plan that supports a private wealth bank business.*
>
> *2.7 Manas Bank did not have any of these features, and we understand that it did not plan to have them. Contrary to the ESC statements, Manas Bank's high non-interest income relative to interest income is not an indication that Manas Bank was a private wealth bank.*
>
> *Furthermore, a central feature of a private wealth bank is that it should be incorporated and operating in a jurisdiction which is politically stable, with relatively certain legal and fiscal outcomes. We do not believe that the Kyrgyz Republic would likely meet these requirements in the eyes of potential private banking clients.*[178]

300. After considering the criteria put forward by the experts on both sides, the Tribunal concludes that the factors identified by ESC are consistent with Manas Bank being a new bank. The Tribunal notes that the second ESC report accepts that Manas Bank had plans for expanding its network into new branches and had, for example, taken steps to acquire further ATMs.[179]

301. The Tribunal finds that Manas Bank was a new retail bank and not a private wealth bank limited to the market of high net worth individuals. This does not, of course, imply acceptance that its future was secure and predictable as a matter of market risks wholly independent of whether the terms of the BIT were respected. As the Claimant was no doubt aware, doing business in the Kyrgyz Republic, given the then current state of its banking system and market, presented commercial risks.

(iv) Valuation According to the Price to Book Method

302. Evaluations using the price to book method are undertaken by dividing the market capitalisation by the book value of equity.[180] To determine a valuation ratio, FTI examined comparable transactions and initially determined that the market was paying 1.57-1.67 times the book

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[178] Second FTI Report.

[179] Second ESC Report, at 54. The Tribunal notes that ESC found the expansion plans of Manas Bank lacking.

[180] First FTI Report, at ¶ 6.9.

value of similarly situated banks. Their first report concluded that Manas Bank would have a value of 36 million US dollars. From this figure, 2.7 million US dollars were removed to account for the fact that the Claimant did not make a further investment in Manas Bank of that amount in May 2010, as had been expected prior to the events of April 2010. The first FTI report assessed the Claimant's loss at 33 million US dollars.

303. The second FTI report reduced the P/B ratio to 1.51. This reduction reflected more recent data for the valuation period up to December 2012. The second FTI report accordingly found a value of Manas Bank of 30 million US dollars. The second FTI Report alternatively provided a figure of 29.2 million, which is reached on assumption that the new Kyrgyz government could have removed funds belonging to the Kyrgyz Development Fund from Manas Bank even absent institution of temporary administration.

304. The first ESC report identified a P/B ratio for Manas Bank of 0.49 which would lead to a 4.5 million US dollar figure.[181]

305. FTI's identification of comparable banks was undertaken by searching for banks which had a majority shareholding acquired from January 2010 to June 2012 in Central and Eastern Europe and for which sufficient data was available to calculate historical P/B ratios. FTI identified banks in Belarus, Poland, the Russian Federation, Estonia and Ukraine.[182] However, they rejected outliers with P/B multiples of less than 0.6 and greater than 3.0.[183]

306. ESC looked to other banks in the Kyrgyz Republic. They excluded data for a Kyrgyz bank known as Demirbank, notwithstanding their own identification of Demirbank as one that "fits the model of a western style retail bank operating in the [Kyrgyz Republic]."[184]

307. The second FTI Report opines that the P/B values used by the ESC are doubtful as they are from banks that were not publicly traded.[185] Indeed, they further note that the ESC figures exactly match the nominal capital of the Kyrgyz banks studied. FTI considers Demirbank as having been comparably situated to Manas Bank in May 2010 and for 2012 projections.

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[181] First ESC Report, at 64.

[182] Second FTI Report, at 14.

[183] First FTI Report, at ¶ 6.11.

[184] First ESC Report, at 36.

[185] Second FTI Report, at 17.

308. The Tribunal accepts FTI's conclusion that comparably situated banks have a P/B value reasonably assessed at 1.51. The methodology adopted by ESC does not appear reliable for the reasons identified by FTI.

(v) Adjustments

309. As mentioned, the BIT envisages valuation as of the date of expropriation. While this is not necessarily applicable in the context of illicit expropriation, the Tribunal, when evaluating a business which in effect no longer exists, and having regard to the way this case has been pleaded, retains this date and declines to adopt the December 2012 valuation date proposed by FTI.

310. FTI estimates the equity book value of Manas Bank as of 31 Dec 2010 at 563,267,000 Kyrgyz soms.[186] As of 31 December 2009, this value was at 394,668,000 Kyrgyz soms. ESC has adopted the same figures.[187] Applying the P/B value of 1.51 and an exchange rate of 1 US dollar to 45 KGS, this provides a valuation between approximately 13.2 million US dollars and 18.9 million dollars.

311. The Tribunal determines that the value of Manas Bank as of roughly three months prior to the date of expropriation was $13,243,304.[188] The Tribunal does not consider it necessary to update the 31 December 2009 value to April 2010. There is insufficient evidence that the value of Manas Bank changed significantly in the intervening three months.

312. The Tribunal is conscious that its approach to the issue of compensation for damage suffered is in some respects mechanistic, and unlikely to be wholly consonant, one way or the other, with the uncertainties of business in the Kyrgyz Republic as they have revealed themselves in the record of this case. The final numbers reflect what the arbitrators believe to be prudent approximations derived from the best information available to them rather than transaction-by-transaction verifications which have not been possible in the circumstances. In sum, the circumstances are not free from difficulty or doubt. It remains that the deserving party, when it has satisfied the fact-finder of the reality of damages suffered, is not to be frustrated by the fact that the quantum of its loss cannot be assessed to scientific certainty.

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[186] Second FTI Report, at 39.

[187] First ESC Report, at 36.

[188] Calculated as 394,668,000 multiplied by 1.51 and then converted to USD at a rate of 45 KGS to 1 US dollar.

(vi) Cost of Loans to Depositors

313. The Claimant has identified an additional head of damage resulting from the Respondent's actions, namely his liability under indemnity undertakings, through Belokon Holdings, provided to certain customers of Manas Bank whose assets at Manas Bank have been frozen by the Respondent. These indemnities amount to USD 3,765,039 and EUR 1,527,142.77.

314. The Respondent's Statement of Defence contested the arbitrability of these claims, as the loans were made by Belokon Holdings.[189] In the Claimant's Reply, counsel explained that the Claimant is also the majority shareholder of Belokon Holdings and that he had issued a personal guarantee in respect of the loans themselves.

315. While Mr. Belokon, through Belokon Holdings, may be exposed to significant losses on account of these liabilities, he has not given sufficient particulars to satisfy the Tribunal that the BIT considers the transactions entered into as generating interests that meet the BIT's definition of "investment in the territory" of the Kyrgyz Republic. For the Claimant as a foreign banker to have provided guarantees of foreigners' deposits in the Manas Bank may have been useful in building up the Bank's capital base, but the implications raised have not been adequately developed in this case to permit at extension of the BIT to his claims in relation thereto.

316. The Tribunal notes that the funds in question are still held with Manas Bank and the account holders are presumably at liberty to take recourse against Manas Bank or the Kyrgyz Republic for return of their property, including (conceivably) under instruments of international law.

(vii) Reputational Harm

317. In the pre-hearing skeleton, the Claimant has in addition requested monetary compensation, as satisfaction, for the reputational harm he has suffered.[190] No particular quantum has been suggested.

318. The Tribunal considers that the conclusions reached in this Award should adequately restore the reputational harm suffered by the Claimant.

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[189] Statement of Defence, ¶ 179.

[190] Claimant's Skeleton Argument, 5 December 2013, at ¶155.

(viii) Interest

319. The Claimant has requested pre-Award interest "at the rate for deposits in US dollars in Latvia."[191] The requested rates are at 4.6% for 2010, 3% for 2011, 2.7% for 2012, and 2.2% for 2013.[192] The Claimant has requested that interest be compounded daily and has requested that post-Award interest be awarded at 5%, compounded monthly. The Claimant has, in the lead up to the December 2013 hearing, requested interest at a rate of 10% annually, compounded.[193]

320. The Respondent has noted the (initial) requested rates, without further comment.[194]

321. The BIT provides that, in case of expropriation, compensation shall "include interest at the commercial market rate for the currency for which the compensation will be paid, from the date of expropriation to date of actual payment." This criterion is of course applicable to *lawful* expropriation, whereas in this case the limitation does not apply to the extent that the Claimant has established that in the absence of *breach* of the BIT he would have had higher earnings. The Tribunal does not find that compensation in this case justifies more than interest at a commercial market rate for the US dollar.

322. The Tribunal determines that the date of expropriation is as of 8 April 2010.

323. Given that the Respondent has not contested the Claimant's proposed rates, and their commercial reasonableness, the Tribunal concludes that an appropriate commercial market rate is the rate for deposits in US dollars in Latvia, compounded annually:

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[191] Claimant's Reply, ¶ 279.

[192] The source used by the Claimant does not list a 2014 date. The Tribunal replicates the rate for 2013.

[193] Claimant's Skeleton Argument, at ¶158.

[194] Rejoinder, at ¶ 4.

Year	Latvian Interest on Deposits	Interest Accrued[195]	Total
2010	4.60%	$456,893.99	$13,700,197.99
2011	3.00%	$411,005.94	$14,111,203.93
2012	2.70%	$381,002.51	$14,492,206.43
2013	2.20%	$318,828.54	$14,811,034.98
2014	2.20%	$217,228.51	$15,028,263.49

Total Interest: $1,784,959.49

324. The Tribunal thus awards interest in the amount of $1,784,959.49, as of 30 August 2014. The total amount is rounded downward in favour of the debtor to US$ 15,020,000.00.

325. Post-Award interest should run as a matter of commercial realism at a rate that is unlikely to reward postponed payment. The Tribunal considers it fair to fix the post-Award rate at 4.5 % per annum, compounded annually, representing in the arbitrators view a rate which broadly conforms to current corporate debt instruments offered to the public. The Tribunal cannot predict the future, and therefore chooses this rate as its best estimate, prudently lower than the highest yields available.

SHARES

326. While the Respondent has made no specific request for a share transfer, the Tribunal considers an order to this effect a natural consequence of the determination that compensation is due on account of expropriation.

327. The Tribunal, having found that the Kyrgyz Republic has expropriated Manas Bank, as of April 2010, deems it necessary that Mr. Belokon transfer his shares in Manas Bank to the Kyrgyz Republic following full payment of all damages, costs, and interest ordered payable in this Award.

COSTS

328. In the Post-hearing Procedural Order, the Tribunal requested that the Parties provide submissions on costs. This request is made pursuant to Article 38 of the UNCITRAL Arbitration Rules 1976:

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[195] Rates are applied pro-rata to the number of months at issue: for 2010 nine months, and 2014 eight months.

"The arbitral tribunal shall fix the costs of arbitration in its award."

329. Article 40(1) of those Rules provides the "that costs of arbitration shall in principle be borne by the unsuccessful party".

330. Each Party has contributed EUR 250,000 to the fees and expenses of the Tribunal. The arbitrators' fees and expenses have, in total, somewhat exceeded the amount of the advances, but each of them has agreed to waive the overrun. The arbitrators consider that, as the prevailing party, the Claimant is entitled to recover its contribution from the Respondent.

331. The Respondent has requested that the Tribunal:

Condemn the Claimant to the payment of the expenses associated with his claim and arbitration in the amount of 750 000 USD as well as all arbitration costs.

332. The Respondent has not elaborated on what is meant by "all arbitration costs," but the Tribunal understands they refer to the costs that are generally associated with an arbitration as submitted by the Claimant. The Parties therefore appear in agreement that costs are to be allocated to the unsuccessful party.

333. The Claimant has asserted a particularised claim for reimbursement of its legal costs and disbursements in the amount of EUR 1,958,430.08, plus its portion of the advances on account of the Tribunal's costs. He is in a broad sense the prevailing party, and was undoubtedly put to additional expense by unwarranted applications by the Respondent. On the other hand, a number of his claims were denied or reduced, and moreover the Tribunal is conscious that the reasonability of fees includes a measure of proportionality. In the circumstances, the Tribunal determines it just and proper that the Respondent contribute to 50% of the Claimant's costs of presenting its case.

334. Costs are thus awarded in favour of the Claimant in the amount of EUR 979,215.04, rounded downward in favour of the debtor to EUR 970,000.00. Unpaid costs shall incur interest at the same rate as that of the Award, 4.5% compounded annually.

DECISION

335. The Tribunal hereby decides that:

(A) The Respondent has indirectly expropriated Manas Bank by imposing an arbitrary and unjustified series of administrative regimes on it in violation of Article 5 of the BIT;

(B) The Respondent has breached Articles 2(2) and 2(3) of the BIT by failing to provide Fair and Equitable Treatment to the Claimant and acting in a manifestly arbitrary and unreasonable manner;

(C) The Respondent is to pay the Claimant US$ 15,020,000 US dollars (fifteen million twenty thousand) within 60 days of this Award.

(D) The Respondent is to pay the Claimant EUR 250,000 (two hundred fifty thousand) within 60 days of this Award on account of the Claimant's advance of the fees and costs of the Tribunal.

(E) The Respondent is to pay the Claimant EUR 970,000 (nine hundred seventy thousand) within 60 days of this Award, as a contribution to the fees and disbursements incurred by the Claimant.

(F) Following 60 days of this Award, any unpaid amounts of those defined in paragraphs (C), (D), and (E) shall be augmented by interest at a rate of 4.5%, compounded annually.

(G) All other requests are dismissed.

(H) The Claimant shall transfer ownership of the shares of Manas Bank to the Respondent upon receipt of the damages and costs, including interest, ordered payable by this Award.

(H) In the event of judicial enforcement of the Award before national courts, the post-Award interest indicated above is without prejudice to applicable national rules of interest in such proceedings.

105

The Tribunal:

Niels Schiersing

Kaj Hobér

Jan Paulsson

Made in Paris
on 24 October 2014

Bound together and confirmed
45
(forty five pages)