Date: 18 November 2021

Re: In-house translation of the Supreme Court's judgment in Stati et al v. The Republic of Kazakhstan and the National Bank of Kazakhstan dated 18 November 2021

Westerberg & Partners Advokatbyrå AB | P O Box 3101 | 103 62 Stockholm | Sweden
info@westerberg com | www westerberg com | Phone +46 8 5784 0300 | Org nr 559162-3268

SUPREME COURT

DECISION

given in Stockholm on 18 November 2021

Case No.
Ö 3828-20

PARTIES

Complainant

1. Ascom Group S.A.

75 A. Mateevici Street

Chisinau MD-2008

Moldova

2. Anatolian States

20 Dragomirna Street

Chisinau MD-2008

Moldova

3. Gabriel Stati

1A Ghioceilor Street

Chisinau MD-2008

Moldova

SUPREME COURT	Postal Address	Phone +46 8 561 666 00	Expedition hours
Riddarhustorget 8	Box 2066	Fax -	08:45–12:00
	103 12 Stockholm	E-mail: 13:15–15:00	
		hogsta.domstolen@dom.se	
		www.hogstadomstolen.se	

4. Terra Raf Trans Traiding Ltd
No 41 Unit 1.2.02 Block 1 Eurotowers Gibraltar
GX11 1AA
Gibraltar

Counsel for 1-4: Attorneys Bo G.H. Nilsson, Ginta Ahrel, Therése Isaksson and Maria Fogdestam Agius and associate Astrid Baldomero Warstrand
Westerberg & Partners Advokatbyrå AB
Box 3101
103 62 Stockholm

Respondents

1. Republic of Kazakhstan
Ministry of Finance
11 Zhenis Avenye
010000 Nur-Sultan
Kazakhstan

Counsel: Attorneys Alexander Foerster and Ludwig Metz and associate Agnes Jäderberg
Mannheimer Swartling Advokatbyrå AB
Box 1711
111 87 Stockholm

2. National Bank of Kazakhstan
21 "Koktem-3"
Almaty, 050040
Kazakhstan

Counsel: Attorneys Karl Guterstam, Linda Landén and Magnus Nygren
Sandart & Partners Advokatbyrå KB
Box 7131
103 87 Stockholm

THE ISSUE

Seizure and enforcement

APPEALED DECISION

Svea Court of Appeal's decision 2020-06-17 in case ÖÄ 7709-19

Decision of the Court of Appeal see Annex

SUPREME COURT RULING

The Supreme Court declares that there is no immunity from enforcement in the property covered by the Enforcement Agency's seizure order (paragraph 1 of the Court of Appeal's decision).

The Supreme Court grants leave to appeal against the case in general.

Supreme Court quashes the decision of the Court of Appeal and remands the case to the Court of Appeal for further consideration.

In the context of the determination of the case, the Court of Appeal shall examine the question of liability for legal costs in the Supreme Court.

MOTIONS BEFORE THE SUPREME COURT

Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd (the investors) have requested the Supreme Court to uphold the decision of the District Court, relieve them of the obligation to reimburse the respondents' legal costs in the District Court and the Court of Appeal, and order the respondents to jointly and severally reimburse them for their costs in the District Court and the Court of Appeal.

The Republic of Kazakhstan and the National Bank of Kazakhstan have opposed the change in the decision of the Court of Appeal.

The parties have sought compensation for their costs before the Supreme Court.

The Supreme Court has granted leave to appeal as set out in paragraph 9.

REASONING

Background

1. After a dispute arose between the investors and Kazakhstan, the investors requested arbitration before the Stockholm Chamber of Commerce pursuant to Article 26 of the Energy Charter Treaty[1]. In December 2013, an award was rendered under which Kazakhstan was ordered to pay approximately USD 500 million plus interest and compensation for the investors' legal costs.

2. Kazakhstan brought a claim to set aside the award. The Court of Appeal left the claim without approval. Kazakhstan then brought a complaint for grave procedural error and petitioned for a review of the Court of Appeal's judgment. The Supreme Court rejected both the complaint and the petition.

[1] Energy Charter Treaty and Energy Charter Protocol on Energy Efficiency and related Environmental Aspects, together with the final act of the European Energy Charter Conference (SÖ 1997:57).

3. After the investors requested enforcement of the award, the Enforcement Agency decided to seize securities in a securities depository with SEB bank, funds in a cash account in SEB and receivables linked to the securities (the property). The securities consisted of shares in some thirty listed Swedish limited liability companies. The seizure orders were taken on the grounds that the property was considered as belonging to Kazakhstan.

4. Kazakhstan and the National Bank appealed against the seizure orders. They argued that there were impediments to the enforcement of the award, partly because the property does not belong to Kazakhstan within the meaning of enforcement law, partly because the securities are not located in Sweden, and partly because the property is subject to state immunity. Kazakhstan and the National Bank argued that the property belonged instead to the National Bank. The district court rejected the appeals. The decision was appealed to the Court of Appeal.

5. Without considering the objections of Kazakhstan and the National Bank that the seized property does not belong to Kazakhstan within the meaning of enforcement law and that the securities are not located in Sweden, the Court of Appeal has concluded that the property is subject to state immunity. The court has therefore reversed the District Court's decision and overturned the seizure orders.

6. The investors have appealed against the Court of Appeal's decision, contending that the property can be seized.

7. Kazakhstan and the National Bank have maintained, on the same grounds as in the District Court (cf. para. 4), that the property cannot be seized.

8. Investors dispute that the property is subject to immunity. They have claimed that the property belongs to Kazakhstan and not the National Bank and that it is used for other than governmental, non-commercial purposes. They further submit that Kazakhstan has in any event lost the right to invoke state immunity on grounds of abuse of rights.

Leave to appeal

9. The Supreme Court has granted leave to appeal regarding the question of immunity from enforcement against the property covered by the Enforcement Agency's seizure order. The question of the leave to appeal in the remaining aspects of the case have been stayed.

10. The leave to appeal means that the Supreme Court does not decide in this decision whether the seized property is located in Sweden, nor whether it belongs to Kazakhstan within the meaning of enforcement law.

Legal considerations

Immunity from enforcement

11. States' claims for immunity are based on the principle that states are sovereign and equal; they may therefore in principle not exercise jurisdiction over one another. However, this principle has developed in state practice in a restrictive direction in such a way that exceptions can be made for disputes arising from the commercial or private law conduct of a state. This limitation has, as far as immunity from jurisdiction is concerned, been applied in the case law of the Supreme Court (cf. "The Nordic Education Agreement" NJA 1999 p. 821 and "The Embassy Renovation Cost" NJA 2009 p. 905).

12. The fact that a State has not been granted immunity from jurisdiction does not mean that it lacks immunity also from the enforcement of a judgment or award. The question of immunity from enforcement shall be assessed separately, whereby enforcement measures are considered to be more intrusive in relation to the sovereignty of a foreign State than the exercise of jurisdiction. As a result, a foreign State enjoys a more far-reaching immunity from enforcement than from jurisdiction. (See, for example, Hazel Fox and Philippa Webb, The Law of State Immunity, 3 ed., 2015, p. 23 f.)

13. However, immunity from enforcement is not absolute either. A creditor's interest to be paid in accordance with an award even if the debtor is a State justifies restricting immunity (cf. James Crawford, Brownlie's Principles of Public International Law, 9 ed., 2019, p. 489). Such considerations, however, require that there are no impediments under customary international law.

Significance of the 2004 UN Convention

14. There are no provisions in Swedish legislation on the immunity of a foreign state against enforcement here. However, Swedish courts are deemed obligated to observe the immunity arising from customary international law.

15. On 2 December 2004, the UN General Assembly adopted a convention on jurisdictional immunities of states and their property (the United Nations Convention on Jurisdictional Immunities of States and Their Property). Sweden has ratified the convention (see SÖ 2009:32) and incorporated it into Swedish law through the act (2009:1514) on the immunity of states and their property.

16. Neither the convention nor the law has entered into force. Nevertheless, the convention may have an impact to the extent that its provisions highlight the content of customary international law (cf. Jurisdictional Immunities of the State, I.C.J. Reports 2012, p. 99 paragraph 66).

17. The convention deals with issues of immunity from measures of constraint in the context of court proceedings in Articles 18 to 21. As a general rule, no measures of constraint may be taken against the property of a state other than to the extent provided for in these provisions. Article 19 regulates state immunity from post-judgment measures of constraint ("*post judgment measures of constraint*"). According to Article 19 (c), exceptions from immunity from enforcement may be made if:

> … *it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.*[2]

18. In the preparatory works for the act of 2009, it was stated that there was no common state practice with regard to restrictions on the principle of immunity to enforcement, but that Western countries had developed an approach whereby enforcement would be permitted in property used or intended for commercial purposes (cf. prop. 2008/09:204 p. 45 and 56). This approach can also be seen to have come to expression in Article 19 (c).

19. In the case of "The Lidingö House" NJA 2011 p. 475 (para. 14), the Supreme Court has ruled that the convention in this part expresses the principle recognised by many states that enforcement can take place at least in property used for purposes other than governmental, non-commercial purposes. In doing so, the Supreme Court has specified the principle by delimiting cases where enforcement cannot take place. According to the Court, there are impediments due to state immunity from enforcement in property owned by a foreign state where the purpose of the state's possession of the property is of a qualified nature, such as when the property is used for the state's exercise of its sovereign activity and similar activity of an official character. That case also mentions, in this context, property of a special nature as provided for in Article 21 of the UN Convention.

20. Article 21.1 provides that certain types of state property "*shall not be considered as property specifically in use or intended for use by the State for*

[2] There is no authentic Swedish text of the Convention. A translation is available in SÖ 2009:32.

other than government non-commercial purposes under article 19". According to article 21.1 (c) this concerns "*property of the central bank or other monetary authority of the State*".

21. Article 21.1 (c) intends to provide central banks and other monetary policy authorities with special protection against enforcement measures. However, the extent of this protection appears to be unclear in customary international law. This is particularly true in view of the fact that during the negotiations preceding the convention there were different views on the matter and no clear state practice has subsequently developed.

22. In view of the protected interest reflected in Article 21.1 (c), the special protection of a central bank should apply not only to property of which the central bank is the civil owner, but also property that the bank controls in some other way.

23. However, it is not self-evident that the special protection should apply to all property owned or controlled by a central bank. The reason why central bank property should be accorded special protection must be considered to be that a central bank conducts activities in the area of monetary policy in a broad sense. The great importance of monetary policy for the central functions of the state justifies close to absolute immunity for property used within that activity.

24. There is no clear support in customary international law that immunity also applies to property which the bank controls without there being a connection with the bank's mission in terms of monetary policy. Such wide scope of immunity also does not appear to be justified. The special protection that central banks should enjoy may therefore be seen as limited to property that has a clear connection with the central bank's activities in the area of monetary policy. The extent to which other property that the bank owns or controls is protected against enforcement measures should instead

be determined in accordance with the principles set out in Article 19 of the Convention.

The purpose of a State's holding of financial assets

25. For the purposes of applying the principles expressed in Article 19, as already discussed (cf. paras 17-19), the purpose for which the property is held is of great importance. The purpose of holding immovable property and movable goods is normally apparent from the actual use of the property. In "The Lidingö House", the Supreme Court could therefore examine the exception to the principle of immunity from enforcement based on how the foreign state used a property at the time when the application for enforcement against the property was made. When it comes to holdings of financial assets traded on the capital market, there is often no actual use that may serve as a basis for assessing the purpose of the holding. The assessment must then be made in a different way.

26. There may be several purposes behind a state's investment of funds on the international capital market. It is then, as a rule, a question of funds that are not immediately needed to meet the purposes of the state. The purpose of the investment may be that the state generally wishes to secure and increase the state's assets to meet the needs of society in the long term and to create increased prosperity in the country. The motivation may also be overall macroeconomic in that the state, for example, considers that immediate consumption of assets leads to undesirable effects for the country's economy. In addition, the holding of financial assets may be intended to counteract the adverse effects of events in the outside world or other unforeseen circumstances. A government's decision to save in financial assets abroad may also be underpinned by monetary policy considerations.

27. The purpose of a State's investment of funds on the international capital market can be reflected in the chosen investment strategy. In the case of investments that will generate long-term returns for an as yet undetermined use, the tolerance for risk can often be higher and the liquidity requirements

be lower than in the case of funds that the state wants to be able to access in the near future for a specific purpose. In the latter case, investments in government bonds and balances on bank accounts are more prevalent than investments in corporate shares. Thus, the level of risk and the return requirement chosen can say something about the purpose of the holding.

28. Those who invest in listed shares and similar securities indirectly expose themselves to the same commercial risks as the undertakings in which the investments are made. A state's primary motivation for exposing itself to such risks can typically be assumed to be the same as those of other equity investors; namely, to achieve better development of the asset's value and higher returns than an investment aimed solely at real value safe assets. If the state's motivation for the investment is not more pronounced than that, it cannot, as a general rule be seen as an outflow of the state's sovereign activity. In order for such property to be immune, it must therefore be required that, beyond such commercial motives, qualified purposes of a sovereign nature must come to concrete and clear expression in the state's regulation of how the property is to be used. The mere fact that the state will have the opportunity to use the value of the property for government activities or that the value of the property shall benefit future generations cannot be considered sufficient.

29. A government's savings in financial assets on the international capital market may in itself, like other government savings, have a general macroeconomic function. However, this does not without further ado mean that such savings fall within the framework of the state's sovereign activity. In order for this to be the case, a more concrete link is required between, on the one hand, the form of saving and, on the other hand, the monetary policy of the state or other sovereign activity.

Financial assets of a sovereign wealth fund

30. The seized assets are part of the National Fund. The fund may be designated as a so-called sovereign wealth fund (*Sovereign Wealth Fund*).

31. Such funds have been created by many states. However, there is no generally accepted definition of what a sovereign wealth fund is. In the broad sense, it relates to a type of investment fund – i.e. a collection of different securities – owned by the state or controlled by the state through another party who manages the fund. Often the fund is financed by revenues from the exploitation of natural resources, surpluses from the government's foreign currency reserves or revenues from the privatisation of state property.

32. The fund assets may be divided into different portfolios, based on differences in investment strategies and purposes. A commonly used distinction is that between stabilisation portfolios and savings portfolios. Typical of a stabilisation portfolio is that the assets can be rapidly allocated to the state budget in order to stabilise the domestic economy. By contrast, a savings portfolio normally has as its primary function to yield high long-term returns for a not yet specified use, whereby liquidity requirements are usually set at a lower level. The two types of portfolios thus normally differ, inter alia, when it comes to the tolerance for risk (cf. para. 27). However, the two types of portfolios may be functionally connected in that funds from the savings portfolio may be intended for transfer to the stabilisation portfolio for use in accordance with political decisions.

33. The fact that certain securities are part of a sovereign wealth fund does not in itself have a decisive impact on the assessment of whether the securities shall be subject to enforcement immunity. The assessment must be made in the manner discussed above (see paras 26-29).

Kazakh National Fund

34. The National Fund was established by Kazakhstan in 2000 in accordance with a presidential decree. The purpose of the fund was stated to be to ensure a stable economic development of the country, to accumulate of assets for future generations and to reduce the dependence of the domestic economy on for the country unfavourable

external factors. The decree states that the assets of the fund are accumulated for the benefit of Kazakhstan and that the President decides on the size and direction of the fund and decides on the use of the assets on the basis of proposals from the government.

35. The assets are accumulated in the National Bank, which also has a management instruction under an agreement with the state (the so-called Trust Management Agreement). The agreement provides the framework for the management instruction and states that parts of the assignment may be delegated to external managers. The National Bank's management task is also laid down in the Kazakh National Bank Act. The act also specifies other tasks usually assigned to monetary authorities.

36. The Kazakh Budget Act states that the National Fund is financed inter alia by state revenues derived from the extraction of oil and natural gas, in particular tax revenues and royalties. It is also clear that the National Fund shall fulfil, on the one hand, a stabilisation function (through a stabilisation portfolio) and, on the other hand, a savings function (through a savings portfolio). The two portfolios apply different investment strategies.

37. The state may withdraw funds from the National Fund through transfer to the state budget in the form of planned withdrawals or, where necessary, for certain purposes. This is governed, inter alia, by Articles 21.3 and 21.4 of the Budget Act, which have the following wording according to the translation into English which the National Bank has provided in this case:

> *21.3 National Fund of the Republic of Kazakhstan provides saving and stabilization functions. Saving function provides the accumulation of financial assets and other assets, excluding intangible assets, and the return on assets of the National Fund of the Republic of Kazakhstan in the long term with a moderate level of risk. Stabilization function is designed to maintain a sufficient level of liquidity of assets of the National Fund of the Republic of Kazakhstan. Part of the National*

Fund of the Republic of Kazakhstan, used for stabilization function is determined in the amount, necessary to provide the guaranteed transfer.

21.4 The formation and use of the National Fund of the Republic of Kazakhstan are determined by the situation in the global and domestic commodity and financial markets, the economic situation in the country and abroad, and the priorities of social and economic development while safeguarding macroeconomic and fiscal stability, and the compliance with the basic goals and objectives of the National Fund of the Republic of Kazakhstan.

The assessment in this case

The objection regarding the National Fund's affiliation with the National Bank

38. A first question is whether, as Kazakhstan and the National Bank have argued, the seized property is protected against enforcement measures already under the principle expressed in Article 21.1 (c) of the UN Convention.

39. The National Bank may be considered to be a central bank of the kind that according to customary international law may enjoy special protection against enforcement measures. What has emerged about the relationship between Kazakhstan's government and the National Bank does not give rise to any other assessment.

40. The special treatment of central bank property in terms of immunity is connected with the fact that central banks operate in the area of monetary policy. A question then becomes whether the seized property has a clear connection with the bank's central monetary policy function. (Cf. paras 20-24.)

41. The property was included in the National Fund's savings portfolio at the time of seizure. The portfolio is actively managed with an investment strategy focused on

shares and with a relatively high risk tolerance – significantly higher than that which applies to the stabilisation portfolio – in order to yield high returns.

41. The management of the savings portfolio cannot be considered fundamentally different from other active and long-term asset management on the international capital market. From this perspective, the management of the savings portfolio thus appears rather as normal asset management than as an instrument for the exercise of the National Bank's monetary policy functions. It is furthermore not established that the portfolio is in some other way clearly related to such a function; management of the portfolio could equally have been entrusted to a state entity without such a function. (Cf. para. 24.)

42. In light of this assessment, the question of whether the National Bank can be considered to be in control the National Fund is irrelevant (cf. para. 22).

43. Against this background, the question of immunity must be determined through the application of what generally applies to immunity from enforcement (cf. Article 19 of the UN Convention).

The objection concerning the purpose of the holding

44. The seized shares and the related receivables were thus part of the savings portfolio at the time of the seizure. As noted above, the management of that portfolio is not different from other active and long-term management of shares and similar securities on the international capital markets. There was thus a commercial element to the holding of the property. The question then is whether the property still had such a concrete and clear connection to a qualified purpose of a sovereign nature so that, despite the commercial element, it should be subject to immunity from enforcement.

45. What Kazakhstan and the National Bank have stated about future state purposes is very general and the proffered regulation of the National Fund does not express concretely what these purposes are. Nor has it

otherwise been established that, prior to the time of the seizure, it had been decided that the seized property would be used for any specified state purpose. There is thus no clear connection between the assets subject to enforcement and qualified purposes of a sovereign character. In this context, it may be noted that long-term state saving for future needs – not yet defined – in itself cannot be regarded a sovereign activity. (Cf. para. 28.)

46. In itself, the National Fund, which includes the savings portfolio, is also intended to "ensure macroeconomic stability". The underlying idea appears to be that the long-term savings that take place in the savings portfolio should create conditions for taking measures of budgetary stabilisation and similar measures also in the more long-term future perspective. The link between the seized property and this stabilisation objective may, however, be described as weak. A completion of that objective requires not only the realisation of the shares, but also – as the Kazakh regulation has been described in this case – that the value of what has been realised is then transferred from the savings portfolio to the stabilisation portfolio, to be further transferred in the next step to the state budget. This connection cannot be regarded as sufficiently concrete to justify assets of this kind being covered by immunity (cf. para. 29).

47. The main purpose with the holding of the property at the time of execution must against this background be viewed as being to contribute long-term in a more general way to maintaining and increasing the wealth of the Kazakh state for future use (cf. para. 28). This purpose is not sufficiently qualified to be viewed as an expression of Kazakhstan's sovereign activity or similar actions of an official character.

48. The purpose was thus such that the property is not immune from enforcement.

Conclusion

49. The court of appeal's decision shall therefore be quashed and leave to appeal is declared in the remaining aspects of the case.

50. Since the outstanding questions have not been examined by the Court of Appeal, the case must be remanded there for further consideration. The question of liability for costs in the Supreme Court must be examined there (Chapter 18, Section 15, paragraph 3 of the Code of Procedure).

_____

The case was decided by Justices Kerstin Calissendorff, Sten Andersson, Eric M. Runesson (Rapporteur), Cecilia Renfors and Johan Danelius

The reporting clerk was Judge Referee Josefine Wendel