In the matter of an arbitration pursuant to the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, dated June 1981:

BETWEEN

HESHAM TALAAT M. AL-WARRAQ
(Claimant)

VS.

THE REPUBLIC OF INDONESIA
(Respondent)

Final Award

Members of the Tribunal:

Mr. Bernardo M. Cremades
Mr. Michael Hwang S.C.
Mr. Fali S. Nariman S.C.

Representing the Claimant

Mr. George Burn

Ms. Louise Woods
Mr. Alexander Slade
Vinson & Elkins LLP

Representing the Respondent

Ms. Karen Mills
Mr. Ilman F. Rakhmat
KarimSyah Law Firm

Mr. Yoseph Suardi Sabda
on behalf of the Attorney General
of the Republic of Indonesia

Mr. Arthur Marriott, Q.C.
Ms. Mahnaz Malik

I. PARTIES.-

1. The Claimant is **HESHAM TALAAT M. AL-WARRAQ**, Riyadh, Saudi Arabia (hereafter the ***"Claimant"***).

2. The Claimant has authorised the following to act on its behalf and to receive communications and notifications in this arbitration:

(i) Mr. George Burn
Ms. Louise Woods
Mr. Alexander Slade
Vinson & Elkins LLP
City Point, 33rd Floor
One Ropemaker Street
London EC2Y 9UE
United Kingdom
Tel.: +44 (0)20 7065 6055
Fax: +44 (0)20 7065 6001
Email: *gburn@velaw.com*; *lwoods@velaw.com*;
aslade@velaw.com

3. The Respondent is the **REPUBLIC OF INDONESIA** (hereafter the ***"Respondent"***).

4. The Respondent has authorised the following to act on its behalf and to receive communications and notification in this arbitration:

Ms. Karen Mills
Mr. Ilman F. Rakhmat
KarimSyah Law Firm
Level 7, Plaza Mutiara
Lingkar Mega Kuningan Kav. 1 & 2
Jakarta 12950

Republic of Indonesia
Tel.: +62 21 577 1177
Fax: +62 21 577 1947
Email: *kmills@cbn.net.id*; *ilman.rakhmat@karimsyah.com*;
with copies to: *iswahjudi.karim@karimsyah.com*,
yosephsuardi@yahoo.co.id, *masoemar@gmail.com*,
almqc@12graysinn.com; *mm@12graysinn.com*

5. The Claimant and the Respondent are jointly referred to as the ***"Parties"***.

II. APPOINTMENT OF THE TRIBUNAL.-

6. In the Notice of Arbitration the Claimant appointed Mr. Michael Hwang as an arbitrator in this arbitration. His contact details are as follows:

Michael Hwang
8 Marina Boulevard
#06-02 Marina Bay Financial Centre, Tower 1
Singapore 018981
Tel.: +65 6634 6250
Fax: +65 6834 3400
Email: *michael@mhwang.com*;

7. By letter dated 25 November 2011 the Respondent notified the Claimant of its appointment of Mr. Fali S. Nariman as an arbitrator in this arbitration. His contact details are as follows:

Bar Association of India
F-21/22 Hauz Khas Enclave
110016, New Delhi
India
Tel.: +91 (11) 2686 2980

Fax: +91 (11) 696 4718
Email: *falinariman@gmail.com*

8. The Parties by agreement, subject always to the Respondent's 25 November 2011 letter, have appointed Mr. Bernardo M. Cremades as presiding arbitrator. His contact details are as follows:

B. Cremades y Asociados
Calle Goya, 18
28001 Madrid
Spain
Tel.: +34 91 423 72 00
Fax: +34 91 576 97 94
Email: bcremades-mad@bcremades.com;

9. The Parties, in the Terms of Engagement dated 12 March 2012, confirmed that Messrs. Hwang, Nariman and Cremades (the "***Tribunal***") have been validly appointed for the purposes of the OIC Agreement and the UNCITRAL Arbitration Rules, subject always to the Respondent's 25 November, 2011 letter.

III. PROCEDURAL HISTORY.-

10. The arbitration commenced by means of a Notice of Arbitration filed on 1 August 2011, pursuant to Article 17(2) of the the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (the "**OIC Agreement**") and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010 (the ***"UNCITRAL Arbitration Rules"***). Article 17 (2) of the OIC Agreement reads as follows:

"2. Arbitration

a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute.

b) The arbitration procedure begins with a notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed. The other party must, within sixty days from the date on which such notification was given, inform the party requesting arbitration of the name of the arbitrator appointed by him. The two arbitrators are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes. If the second party does not appoint an arbitrator, or if the two arbitrators do not agree on the appointment of an Umpire within the prescribed time, either party may request the Secretary General to complete the composition of the Arbitral Tribunal.

(c) The Arbitration Tribunal shall hold its first meeting at the time and place specified by the Umpire. Thereafter the Tribunal will decide on the venue and time of its meetings as well as other matters pertaining to its functions.

(d) The decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts."

11. In the Notice of Arbitration the Claimant appointed Mr. Michael Hwang as arbitrator. By letter dated 25 November 2011 the Respondent appointed Mr. Fali S. Nariman as arbitrator in these proceedings, subject to the Respondent's objections to locus standi/jurisdiction and on conditions as set out in said letter.

12. Subject to the Respondent's 25 November 2011 letter, the Parties by agreement appointed Mr. Bernardo M. Cremades as presiding arbitrator.

13. On 10 January 2012, the Respondent filed its Summary of the Respondent's Application Containing Preliminary Objections to Jurisdiction and Admissibility of Claims.

14. On 10 January 2012 the Tribunal circulated a draft Terms of Engagement inviting the Parties' comments. The Respondent in its email dated 13 January 2012 requested insertion of a confidentiality provision and clarification as to the fact that the submission to arbitration is in the first place governed by the Parties' agreement on 25 November 2011, and that the first phase (determination as to whether or not there is any jurisdiction over the merits) must result in an award. In its email of 18 January 2012 the Claimant questioned the request for inclusion of confidentiality provision, asserting the appropriateness of transparency in investment treaty arbitrations. In its email of 19 January 2012, the Respondent stated that Singapore, as the seat of the arbitration, treats the duty of confidentiality as an overriding obligation. The Claimant in its email of the same date continued to manifest its objection to the inclusion of the provision and invited the Respondent to make an application "*including to set out the authority supporting the proposition that there is an applicable duty of confidence that is relevant to investment treaty arbitration seated in Singapore or an explanation to justify that there ought to be one for the purposes of this case*".

15. The Tribunal circulated its Provisional Timetable for Submission of Documents on 13 January 2012. In its email of 17 January 2012 the Claimant proposed to modify submission dates delaying submission date by one week and requesting confirmation of agreement from the Respondent. On 19 January 2012, the Respondent confirmed its agreement in general with slight modifications, these being accepted by the Claimant by return of email with the request that the Tribunal formally circulate the Production Order for submissions. The Tribunal circulated the Final Provisional Timetable on 19 January 2012.

16. On 25 January 2012 the Tribunal circulated the draft Terms of Engagement with the inclusion of the Parties' suggestions, with the exception of the confidentiality provision, and requesting signature of the final page by the Parties and return by fax or email. Addressing the issue of the confidentiality provision, it stated that such would require further briefing and ultimately a ruling by the Tribunal and was therefore not appropriate to incorporate in the Terms of Engagement. Leave thus was granted for the Respondent to submit a confidentiality application.

17. The Respondent sent an email on 29 January 2012 confirming the legal opinion in regard to the application of confidentiality and privacy in the present arbitration and voicing its surprise that the Claimant contests application of this duty when both the UNCITRAL Arbitration Rules of 2010 and the law of Singapore provide for the application of a duty of confidentiality to these arbitration proceedings, further stating that the only exceptions to this duty under the above-mentioned Arbitration Rules are set out in Article 34(5) in relation to the publication of the award. Furthermore, the Respondent rejected that these exceptions apply and should consequently not be considered further. The Respondent concluded that "*in the event that the Claimant breaches its obligations as to confidentiality and privacy the Respondent reserves its right to take action, either before this Tribunal or elsewhere, to protect its legal rights*".

18. In its email dated 31 January 2012 the Tribunal took note that the Respondent was simply stating its position rather than making an application for an immediate order, and it invited the Claimant to its comments.

19. Pursuant to the Claimant's email of 31 January 2012, the Tribunal recirculated the Terms of Engagement with the corrections of two typographical errors on 1 February 2012. The Terms of Engagement were returned by email duly signed by the Claimant on 1 February 2012 and by the Respondent on 8 February 2012. The Tribunal circulated a signed copy of the Terms of Engagement on 8 February 2012.

20. By email dated 9 February 2012 the Claimant refuted the Respondent's assertions as to the confidentiality provision in the UNCITRAL Arbitration

Rules of 2010 or that the law of Singapore provided for such. The Claimant consequently did not accept the existence of any such duty of confidentiality or that it should apply to the proceedings and stated that it "*will vigorously contest any application by the Respondent for a confidentiality order*".

21. The Tribunal by emails dated 10 and 17 February 2012, and with regard to the provision of funds, circulated a document entitled "SIAC Deposit Terms" with the request for the signature of the Parties and members of the Tribunal in confirmation of their agreement to the terms therein. A reminder to the Parties was sent on 24 February 2012 expressing its concern at the non-return of said signed document and urgently requested that they proceed to do so.

22. In accordance with the Timetable for the Provision of Documents dated 19 January 2012, the Respondent filed its Preliminary Objections to Jurisdiction and Admissibility of the Claim on 13 February 2012.

23. By email dated 1 March 2012 the Tribunal acknowledged receipt of signed original copies of the SIAC Deposit Terms document. It also referred to logistical matters with regard to the 28 April 2012 hearing and requested confirmation of the Parties that arrangements have been settled. The Claimant undertook the organization and confirmed all arrangements in its email of 4 April 2012.

24. On 7 March 2012, the Claimant filed its Response to the Respondent's Preliminary Objections to Jurisdiction and Admissibility of Claims.

25. On 29 March 2012, the Respondent filed its Rebuttal to the Claimant's Response to the Preliminary Objections to Jurisdiction and Admissibility of Claims.

26. In its email of 16 April 2012, the Tribunal requested of the Parties an agenda proposal and list of attendees to be submitted by 20 April 2012.

27. The Claimant filed its Rebuttal to the Respondent's Preliminary Objections to Jurisdiction and Admissibility of Claims on 20 April 2012.

28. The Hearing on the Jurisdiction and Admissibility of the Claim was held in Singapore, starting 28 April 2012.

29. On 21 June 2012, the Tribunal rendered its Award on the Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claim ("**Partial Award**").

30. On 31 July 2012, the Tribunal circulated a provisional schedule for document submission for the merits phase.

31. On 28 September 2012, the Claimant submitted his first request for production of documents. On 1 October 2012, the Respondent replied that the request for production of documents could be made following the first exchange of submissions. The Tribunal notified the Parties by email on 8 October 2012 that documents can be requested at any time as provided for in Paragraph 8(a) of the Provisional Timetable No. 2.

32. The Respondent in its letter of 16 October 2012 requested that the Claimant be more specific as to particular documents citing the Tribunal's email of 8 October 2008: "*...should be for specific documents or classes of documents that are adequately defined by date, origin, recipient, purpose and the like*".

33. By email dated 17 October 2012, the Tribunal reminded the Parties that the negotiations should be carried out in good faith and that "*it expects a co-operative attitude between the Parties in relation to document production*".

34. On 25 October 2012, Mr. Michael Hwang sent a Letter of disclosure regarding his appointment as party-appointed arbitrator by the Republic of Indonesia in ICSID Case ARB/12/14 between Churchill Mining PLS v The Republic of Indonesia.

35. On 7 November 2012, the Claimant requested an extension of deadlines for submissions due to *"family illness of one of the Counsel's family members"*,

confirming the Respondent's agreement to the same. By separate email dated 8 November 2012, the Respondent confirmed its agreement. On the same date, the Tribunal confirmed the Parties' agreement for an extension.

36. By letter dated 9 November 2012, the Claimant informed the Tribunal that the Respondent was actively seeking the extradition of Mr. Al-Warraq. The Claimant requested the Tribunal to issue an interim order and an order to restrain Respondent from taking further action.

37. In its email of 10 November 2012 the Tribunal desisted from making immediate *ex-parte* Order. The Tribunal suggested that the Claimant presents an application to the Tribunal under Article 26 of the UNCITRAL Arbitration Rules (and 16 and 17 of the OIC Agreement).

38. The Respondent in its email of 10 November 2012 stated that it was unaware of proceedings for an extradition order and requested that the Claimant provide documentary evidence in support of its allegations made (in the letter dated 9 November 2012).

39. On 13 November 2012, the Claimant submitted its request for interim measures.

40. The Tribunal in its email of 14 November 2012 invited the Respondent's comments on the Claimant's request to be filed by 21 November 2012. The Respondent replied by email dated 24 November 2012 that the Tribunal had no jurisdiction to issue such an order. The Claimant in its email of 26 November 2012 requested that the Tribunal ignore the Respondent's reply since it was submitted three days after the given deadline.

41. The Tribunal rendered its Decision on Interim Measures on 28 November 2012.

42. On 3 December 2012 the Claimant filed its Statement of Claim.

43. By email dated 21 December 2012, the Respondent informed the Tribunal that it had duly disclosed to the Claimant its official communications to Saudi Arabia

regarding the request for extradition of the Claimant and other documents relating thereto, in accordance with paragraph 30(2) of the Tribunal's Decision on Interim Measures dated 28 November 2012.

44. The Claimant in its email of 3 January 2013 requested the balance of documents in support of the extradition order, as per the Interim Measures Decision of 28 November 2012.

45. Furthermore, on 9 January 2013, the Claimant requested from the Tribunal an extension for the term of payment of funds (SGD 1,000,000.00) due to the difficulties Mr. al-Warraq was having to access his funds, which was granted by the Tribunal.

46. On 23 January 2013, the Claimant sent another letter reiterating the difficulty of accessing the funds and indicating availability of same within a 2 to 3 week period. The Tribunal in its email of 25 January 2013 reminded the Parties that the original request for funds was made on 18 September 2012 and the deadline had passed. The Tribunal granted another extension until 15 February 2013.

47. The Respondent indicated in its email of 26 January 2013 that it would not make any further payments in this matter and that it had been instructed not to perform any further work on this matter "*until and unless* [it] *has received full payment from the Claimant*".

48. The Claimant in its letter of 15 February 2013 informed the Tribunal that he was unable to meet the deadline. The Respondent requested the Tribunal to exercise its power under Article 43(4) of the UNCITRAL Arbitration Rules to order the suspension or termination of the arbitral proceedings.

49. On 18 February 2013, the Tribunal sent another letter requesting deposit of the outstanding payments within 30 days of receipt of letter, stating that failure would lead to suspension or termination of proceedings. The Tribunal also confirmed that Procedural Timetable No. 2 of 25 July 2012 was suspended with immediate effect until further notice.

50. On 19 March 2013, the Claimant informed the Tribunal that he had made the payment of SGD 1,000,000.00 and that he would supply proof of transfer.

51. By email of 22 March 2013 the Tribunal invited the Parties to discuss and provide their proposals for a revised procedural timetable.

52. On 4 April 2013, the Respondent notified the Tribunal of the new procedural schedule in agreement with the Claimant as to dates, and informing the Tribunal that the Parties had failed to agree on the hearing venue. The Respondent requested that the hearing (the ***"Final Hearing"***) be held in Singapore. The Claimant requested that London be fixed as the hearing venue. The Respondent requested the ruling of the Tribunal in this regard.

53. The Tribunal in its letter of 8 April 2013 confirmed the new procedural schedule and agreed to the "logic" of holding the hearing in Singapore. The Tribunal proposed that the hearing be in February 2014 and requested the Parties' indications of expected timings.

54. The Respondent in its letter of 9 April 2013 confirmed its availability for February 2014 provided that the venue was indeed to be Singapore. The Claimant on 12 April 2013 agreed to the hearing in February 2014 commencing on February 17, estimating a duration of two weeks.

55. Following an exchange of emails with the Parties to seek new dates, the Tribunal proposed in its email of 22 April 2013 to hold the hearing commencing Monday 10 March 2014 onwards.

56. The Respondent in its letter dated 23 April 2013 confirmed its availability for the new date and proposed a new procedural schedule for submissions given the time lapse before the actual hearing.

57. The Claimant in its letter dated 1 May 2013 provided his own schedule for equitable preparation time and proposed March 10 to 21 for hearing dates.

58. Pursuant to the Parties' agreement, the Respondent filed its Defence and Counterclaim on 15 July 2013.

59. The Claimant filed its Reply and Defence to Counterclaim, on 15 November 2013.

60. On 5 December 2013, the Claimant informed the Tribunal that on 4 December 2013, he was contacted by a local police officer and asked to attend a meeting, which he did, this time accompanied by his lawyer. The Claimant also informed the Tribunal that at the meeting, he was informed that the Saudi office of Interpol in Riyadh had, on 22 October 2013, received a written request from Indonesia relating to him, and the Claimant was again required to provide a formal statement. The Claimant requested the Tribunal to order that the Respondent desist from making any request of any Saudi agency with regard to the Claimant, and to produce the aforementioned letter of 22 October 2013.

61. On 6 December 2013 the Respondent replied by denying allegations and the existence of the 22 October 2013 letter. The Respondent also asserted that the Claimant's letter was "*another fictional attempt to prejudice this Tribunal against the Respondent*" and that "*the client assures us that there has been no further attempt to seek extradition of Claimant in more than a year*".

62. On 12 December 2013 the Tribunal informed the Parties that it cannot order the Respondent to desist from its pursuit of the Claimant, at the same time ordering the Respondent to disclose its official communications to Saudi Arabia dated 22 October 2013 referred to by the Claimant.

63. By letter dated 21 January 2014, the Claimant requested from the Tribunal the postponement of the Final Hearing scheduled on 10 March 2014, due to serious health issues and stress suffered by the Claimant. The Claimant informed the Tribunal that due to his psychological problems suffered because of the case, he is no fit state to attend the hearing either "*via video-conference or otherwise*". On 22 January 2014, the Respondent objected to the Claimant's request to

postpone the Final Hearing. On the same date the Tribunal requested that the Claimant provide a copy of his medical report. On 3 February 2014, the Claimant provided the Tribunal with a copy of his medical report dated 2 February 2014 and signed by Dr. Ayman Arnous asserting that the Claimant should take further medical advice to reassess whether he was fit to attend the Final Hearing in view of "his morbid physical health" (which included diabetes, hypertension, bronchial asthma, allergic rhinitis and hypercholesterolemia), his recent loss of appetite, insomnia, difficulty of concentration, and distress and anxiety which would be exacerbated by cross-examination at the Final Hearing.

64. On 5 February 2014, the Tribunal informed the Parties of its decision not to postpone the Final Hearing on the grounds of the Claimant's health, but that his *"medical condition is a matter that the Tribunal will be conscious of during the hearing"*.

65. The Respondent filed its Rejoinder and Rebuttal to Defence to Counterclaim on 11 February 2014.

66. The Claimant wrote to the Tribunal on 19 February 2014 expressing disappointment at the decision to hold the Final Hearing given "*Mr al-Warraq's fragility*", and contrary to doctor's orders. The Claimant insisted again on the point on being "*concerned by Mr al-Warraq's ability throughout the hearing to give us, his counsel, full instructions, and to withstand cross-examination without serious consequences for his physical and mental well-being*". The Claimant also stated the serious issues with respect to his inability to attend the hearing a) because the actions of Indonesia at INTERPOL had prevented Mr al-Warraq travelling to Singapore and b) on account of "*his health issues, resulting from the pressures of dealing with the situation over the last six years*".

67. On 27 February 2014, the Claimant provided the Tribunal with a letter from INTERPOL signed by the General Counsel Joël Sollier dated 27 February 2014 setting forth that the Red Notices were temporarily blocked for the duration of the travel period.

68. The Claimant filed his pre-hearing brief on 6 March 2014.

69. A ten-day hearing took place on 10 March 2014. On the first day of the Final Hearing, the Claimant reiterated his objections to the Tribunal's decision concerning the attendance of the Claimant at the Final Hearing, and made his submissions on the subject during the Hearing. The Parties had the opportunity to make extensive submissions on the subject.

70. The hearings were declared closed on 20 March 2014.

71. On 16 June 2014, the Parties filed their Post-Hearing briefs, as well as their submissions on costs.

72. By letter dated 4 September 2014 the Claimant made additional unsolicited submissions regarding a criminal trial in Indonesia, and advised of the progress of legal proceedings in Switzerland relating to funds held in an account at Dresdner Bank established for participating in the AMA (as explained below). The Respondent answered on 5 September 2014 objecting to the Claimant's letter. The Tribunal acknowledged receipt of this correspondence, and reminded the Parties that the hearings had been declared closed on 20 March 2014. By letter dated 5 November 2014 the Claimant sought permission to submit as a new exhibit in the arbitration pursuant to Articles 17 and 27 of the UNCITRAL Arbitration Rules the judgment of the Commercial Court of the Canton of Zurich dated 1 September 2014 relating to the funds held in the Dresdner Bank account. The Tribunal advised that Parties on 17 November 2014 that 'at this stage of the proceedings the additional evidence....will not be necessary'. The Tribunal was aware of the issues related to the Swiss proceedings from other evidence in the arbitration, and considers that the Swiss judgment is not of sufficient materiality (particularly considering the lack of probative value of any findings made by the Swiss court in this arbitration) to justify further evidence (with the necessary right of contradiction of the Respondent) significantly after closure of the hearing.

IV. FACTS.-

A. Bank Century

73. In 2000, Mr al-Warraq became a shareholder in Chinkara Capital Limited ("**Chinkara**"), a Bahamian company, which had been established in 1999 by Messieurs Rafat Ali Rizvi and Tommy Kim Tong Bhum. Chinkara was renamed First Gulf Asia Holdings Limited ("**FGAH**") in early 2005. FGAH's main areas of activity included the development and execution of turnaround strategies for distressed banks.

74. Starting from early 2000, through FGAH, the Claimant began to acquire shares in three banks, PT Bank CIC, Tbk ("**CIC**"), PT Bank Pikko, Tbk ("**Pikko**"), and, PT Danpac, Tbk ("**Danpac**") (jointly, the "**Pre-merger Banks**"). The Claimant also acquired and held directly 141,538,462 shares in Bank Century (**"Bank Century"**).

75. CIC had been established by the Tantular family in 1989. CIC had undergone an Initial Public Offering in June 1997 and had been advised on this by Mr Rizvi. Mr Rizvi had personally acquired some shares in CIC. At some point after the IPO, two of the Quantum Group of Funds (managed by Soros Fund Management), each of which held roughly 10% of the shares in CIC, were looking to dispose of their interests in CIC. The Claimant through FGAH acquired these shares from the Quantum funds. FGAH's total shareholding in CIC was approximately 19.8%. In addition to acquiring shares, FGAH also appointed Aziz Rajkotwala as CEO of CIC, and Mr Rajkotwala assembled a management team to run CIC.

76. FGAH acquired 65% of Pikko from the Texmaco group of companies when it defaulted on a loan, which had been secured by a pledge over the shares in Pikko. FGAH deposited USD 12,000,000, which was converted into shares in Bank Pikko in 2001. In or around the fourth quarter of 2001 FGAG acquired a 55% shareholding in Danpac.

77. Following the acquisition of Danpac, the Pre-merger Banks began preparing to merge. The merger process took about 18 months and was approved by both Bank Indonesia and the Jakarta Stock Exchange, and on 15 December 2004 the Pre-merger Banks merged to form Bank Century.

78. In 2006, the Claimant was appointed to the Board of Commissioners which oversaw the Board of Directors, and became a member of the Remuneration and Nomination Committee.

B. Bank Indonesia

79. Bank Indonesia was established as the central bank of Indonesia in 1953[1]. Its initial functions have been amended slightly since that time, through Law No. 13 of 1968 concerning Central Bank, and Law No. 23 of 1999 concerning Bank Indonesia as amended by Law No. 3 of 2004, Government Regulation as Replacement of Law No. 2 of 2008 and Law No. 6 of 2009 on the enactment of Law No. 2 of 2008.

80. Pursuant to Bank Indonesia Regulation No. 13/3/PBI/2011 on Status and Follow-Up of Bank Supervision, there are three different degrees of supervision available to the central bank. These are normal supervision, intensive supervision and special surveillance.

81. Bank Indonesia requires banks to have a specified capital adequacy ratio ("**CAR**") of 8% from time to time based on risk weighted assets. It most recently required this through Regulation No. 10/15/PBI/2008.

82. In carrying out its regulatory and supervisory functions, Bank Indonesia undertakes both direct and indirect supervision of banks. Direct supervision, also known as on-site supervision, involves auditing banks to assess their financial position and compliance with regulatory requirements, as well as making recommendations. Indirect supervision, or off-site supervision, consists of

[1] Expert Statement of Ibnu Fajar Ramadhan, para. 6.

analysing banks' reports and reviewing whether banks have complied with relevant regulations. Under Regulation No. 8/12/PBI/2006, all banks should prepare and submit Commercial Bank Monthly Reports (LBBU) to Bank Indonesia[2]. The reports cover conventional banking activities e.g. data regarding the bank's minimum capital requirements and detailed information about items listed on the bank's balance sheet. Submissions of the data are timed so that banks are required to provide information to Bank Indonesia on a weekly basis. This allows the central bank to be kept fully informed of each bank's position and operations. It therefore assists Bank Indonesia in carrying out its supervisory function.

83. Bank Indonesia would place a bank under special surveillance if, in its opinion, that bank is facing issues that threaten the continuation of its banking activities. Banks could be subjected to special surveillance for a maximum period of three months. Where a bank was under special surveillance, Bank Indonesia could require that the bank and/or the shareholders inject capital into the bank within a certain timeframe.

84. If a bank under special surveillance was suspected to have a systemic impact, then Bank Indonesia was required to report the same to the Indonesia Deposit Insurance Corporation (the "**IDIC**") or the Republic of Indonesia's Deposit Insurance Agency (the "**LPS**") and to the authorized institution that is the 'Coordination Committee', which in Bank Century's case was the Financial Sector Stability Committee (the "**KSSK**"), as established under Perpu No. 4 of 2004. A Perpu, is a regulation in lieu of law, issued by the President in an emergency situation when there is not sufficient time for it to go through the Parliamentary process normally required for the promulgation of a new law. A Perpu has the same force as a law, although possibly for a shorter duration. If not subsequently adopted by the Parliament into a Law (*Undang Undang*), the Perpu would cease to have the force of law, thereafter,[3] but would not nullify

[2] Christopher Laursen's Report, para. 102.

[3] The Claimant contends (but the Respondent disputes the contention) that the Perpu has no effect at all if it is rejected by Parliament. The Tribunal is of the view that a Perpu – and particularly Perpu 4 of 2004 – took effect and was not deprived of legal effect because it was not subsequently adopted into law by Parliament.

anything done under it up to the date of it not being adopted into law by Parliament. The institution then had to decide whether or not the bank has a systemic impact.

85. IDIC is an independent body and is a separate legal entity to Bank Indonesia. Pursuant to Law No. 24 of 2004, *"IDIC manages and administers the Deposit Guarantee Program"*[4].

86. If the authorised institution decides that a bank has a systemic impact, then Bank Indonesia would require it to set out the necessary action for the bank and its shareholders to take for recovery or rescue of the bank, if one of the following criteria was met:

1) Capital adequacy ration ("CAR") of the bank was less than 2%;
2) statutory reserve ratio in Rupiah was less than 0%; or
3) the special surveillance period of three months had been exceeded[5].

87. If the authorised institution determined that the bank did not have a systemic impact but nonetheless satisfied one of the above three criteria, Bank Indonesia was then required to notify IDIC. Bank Indonesia would then request IDIC to decide whether or not it would take action to rescue the relevant bank.

C. Bank Century's Bailout

88. On 21 November 2008, Bank Century was placed under the administration of the LPS. The decision was made pursuant to Perpu No. 4 of 2008 and Law No. 24 of 2004. As at 21 November 2008, FGAH held approximately 2707 million shares in Bank Century and the Claimant personally held 141,538,462 shares in Bank Century[6].

[4] Expert Statement of Ibnu Fajar Ramadhan, para. 14.
[5] Expert Statement of Ibnu Fajar Ramadhan, para. 59.
[6] C-41

89. The Claimant and his partners provided at least five separate letters of commitment between October of 2005 and November of 2008[7] in the circumstances following.

90. According to the Claimant, and as explained by Mr Rizvi in his witness statement[8], in September 2008[9] Bank Indonesia started pressing the Claimant and Mr Rizvi to sign a letter of commitment drafted by Bank Indonesia. The two men were unwilling to sign the letter proposed by Bank Indonesia. The draft letter contained a provision that the Claimant and Mr Rizvi would *"Settle by cash all the bank's securities as mentioned in Assets Management Agreement ("AMA"), as attached, particularly which will due* [sic] *in 2008..."*.On 4 September 2008[10] Mr Rizvi and the Claimant proposed to amend the letter, to the effect that they would take steps to:

> *(i) "work out a resolution of the ... Foreign Currency Securities and other assets of the Bank" by 31 March 2009 with a view to removing the assets from the balance sheet and replacing them with cash or assets acceptable to Bank Indonesia; and*
>
> *(ii) "seek to bring in new investors ... [to] control not less than 51% of Century", again by no later than 31 March 2009.*

91. Bank Indonesia refused to accept the alteration proposed and insisted that the Claimant and Mr Rizvi sign a letter incorporating the terms as proposed by Bank Indonesia.

92. On 15 October 2008 a letter of commitment (the **"October LOC"**)[11], was duly signed by Mr Rizvi, the Claimant and Mr Tantular on behalf of FGAH, Outlook Investment Ltd and PT Century Mega Investindo. The October LOC provided as follows:

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[7] R 31, Letters of Commitment.
[8] Paragraph 67 of the witness statement.
[9] C-54 Draft letter of commitment, September 2008.
[10] C-55 Letter of Commitment, 4 September 2008.
[11] C1 Letter of Commitment 15 October 2008.

"..., Mr. Hesham Al Warraq, as the controlling shareholder of PT Bank Century Tbk (hereinafter as the "bank"), Mr. Rafat Ali Rizvi and Mr. Robert Tantular, as majority shareholders of the bank, committed to Bank Indonesia to solve the foreign currency securities and other bad assets of the bank, approximately IDR2. 637.441 million or equivalent to USD271. 68 million as follow:

1. Settle by cash all the bank's securities as mentioned in Assets Management Agreement ("AMA") earlier which will due on October 30, 2008 amounting USD11 million, on November 3, 2008 amounting USD45 million, on December 9, 2008 amounting USD40.4 million. In addition, we will settle by cash earlier for the Structured Notes (SN) of JP Morgan Luxembourg Banking SA amounting USD25 million and SN Nomura Bank Int'l Plc, London amounting USD40 million.

2. Return and settle by cash the securities which are maintained and held by First Gulf Asia Holding Ltd amounting USD15.88 million.

3. Settle the securities which will due on October 30, 2008 USD15 million and on November 3, 2008 amounting USD7 million which are pledged to PT Canting Mas Persada and PT Wibhowo Wadah Rezeki.

4. Inject the capital or invite a strategic investor to solve bank's problem no later than March 31, 2009 or earlier in case of there is any significant change of bank's condition."

93. This was the first letter of commitment which Mr Tantular had signed. According to the Claimant, he and Mr. Tantular believed that the October LOC provided that the signatories had until March 2009 to inject capital or find a strategic investor to invest in Bank Century[12].

[12] Final Hearing Transcript, Day 1, p.99 (L.25).

94. By November of 2008, the world was facing an economic crisis, and major banks and other large corporate entities faced problems in the United States, the UK and elsewhere. Depositors were beginning to withdraw funds from some banks, including Bank Century, because its liquidity problem had become known when it requested short-term liquidity support from Bank Indonesia on 14, 17 and 18 of November, 2008[13].

95. Moreover, on 13 October, 2008, the Government issued Perpu No. 2 of 2008[14], authorizing Bank Indonesia to approve short term loans to ailing banks under less rigid circumstances than previously. As an implementation of the Perpu, Bank Indonesia on 30 October 2008, issued Bank Indonesia Regulation (PBI) No. 10/26/PBI/2008[15] which introduced the mechanism for granting short-term loans. On 14 November 2008, further amendments were applied to this instrument through PBI No. 10/30/PBI/2008[16], providing a further reduction in the requirements for obtaining the short-term loans.

96. On 20-21 November 2008, Bank Century was given a short-term loan by Bank Indonesia and placed under Bank Indonesia's "special surveillance" regime. A second letter of commitment was signed by Mr. Rizvi and Mr. Tantular on 16 November 2008 (the "**November LOC**")[17]. The November LOC provided as follows:

> *"LETTER OF COMMITMENTS*
>
> *16 November 2008*
>
> *We, First Gulf Asia Holdings Limited (FGAH) and Outlook Investment Plc. (directly or indirectly owned, controlled, and managed by Mr. Rafat Ali Rizvi), and PT Century Mega Investindo (CMI) (directly or indirectly owned, controlled, and managed by Mr. Robert Tantular), as majority*

[13] C19, Second Audit Report of BPK, December 2011, page 7. A Perpu, short for Peraturan Pengganti Undang-Undang, is a Regulation in Lieu of Law, commonly used when a need arises that cannot await the legislative process needed for full promulgation of a law.
[14] R 32, Perpu No. 2 of 2008 on the Second Amendment to Law No. 23 of 1999 on Bank Indonesia.
[15] R 33, PBI No. 10/26/PBI/2008 on Short Term Financing Facility for General Banks.
[16] R 34, PBI No. 10/30/PBI/2008 on Amendment to PBI No. 10/26/PBI/2008 on Short Term Financing Facility for General
Banks.
[17] C56.

shareholders of PT Bank Century Tbk ("The Bank"), acknowledge that The Bank:

a. *has received Bank Indonesia short-term loan (FPJP);*
b. *has been placed in "special surveillance" status by Bank Indonesia which requires all of The Bank's assets should be kept and under control by The Bank;*
c. *needs liquidity supports.*

We, First Gulf Asia Holdings Limited (FGAH) and Outlook Investment Plc. (directly or indirectly owned, controlled, and managed by Mr. Rafat Ali Rizvi), and PT Century Mega Investindo (CMI) (directly or indirectly owned, controlled, and managed by Mr. Robert Tantular), will:

1. *transfer all The Bank's assets to bank custodian in Indonesia and under the name of The Bank including US Treasury Notes USD 41 million that been placed in Dresdner Bank;*
2. *return the proceeds from settlement on the matured marketable securities and Negotiable Certificate of Deposits (NCDs) from West L.B. amounting to USD 16 million and National Australia Bank amounting to USD 45 million.*
3. *still committed to all commitments that First Gulf Asia Holdings Limited (FGAH) and Outlook Investment Plc. (directly or indirectly owned, controlled, and managed by Mr. Rafat Ali Rizvi), and PT Century Mega Investindo (CMI) (directly or indirectly owned, controlled, and managed by Mr. Robert Tantular), have already committed in the Letter of Commitment dated 15 October 2008;*
4. *Arrange and ensure (on a best-effort basis) to transfer all The Bank's shares under FGAH (and its affiliates/associates) amounting to 32% and CMI (and its affiliates/associates) amounting to 38% to be placed with a custodian in Indonesia; and*
5. *not pledge The Bank's marketable securities and Negotiable Certificate of Deposits (NCDs) to other parties for our own personal benefits. If any of those assets are pledged, we will unwind those transaction with our own cost.*

We, First Gulf Asia Holdings Limited (FGAH) and Outlook Investment Plc. (directly or indirectly owned, controlled, and managed by Mr. Rafat Ali Rizvi), and PT Century Mega Investindo (CMI) (directly or indirectly owned, controlled, and managed by Mr. Robert Tantular), acknowledge that Bank Indonesia reserves it rights to take whatever steps it deems necessary to protect its interests in this matter, including report to or getting assistance from respective banks counterparty banks, respective central bank and other authority bodies.

Jakarta, 16 November 2008

97. On 20-21 November 2008, a meeting of the KSSK was held, which comprised representatives from the Republic of Indonesia's Finance Ministry, Bank Indonesia and LPS. The KSSK meeting was chaired by the then Finance Minister, Sri Mulyani Indrawati ("**Sri Mulyani**"). The Claimant submits that Mr. Tantular, but not Mr. Rizvi and himself, who had been informed about that meeting and had been asked to attend at Bank Indonesia's offices. Since 2005 Bank Century had been enrolled in the Deposit Insurance scheme. The Undertakings provided by shareholder and management of Bank Century to LPS and signed by the Claimant himself on 5 December 2005 read as follows:

"LETTER OF STATEMENT OF SHAREHOLDER LEGAL ENTITY

(For Bank which is Indonesian Legal Entity)

In relation to the obligation of the participant banks in the Blanket Guarantee as mentioned in Article 9 point a number 4 of the Constitution Number 24 year 2004 Regarding the Indonesia Deposit Insurance Corporation (hereinafter referred to as Blanket Guarantee Scheme), the undersigned below:

Name: *Hesham Al-Warraq.*

Position: *Director*

Nationality: *Saudi Arabia*

ID. No: *E717981*

Address: *Kingdom Tower 20th Floor, Riyadh 1162, Kingdom of Saudi Arabia*

Acting for and on behalf of First Gulf Asia Holdings Limited as the Shareholder of PT Bank Century, Tbk., hereby declares that:

1. *I will fulfill all regulations stated by the Constitution regarding the Blanket Guarantee Scheme conducted by the Indonesia deposit Insurance Corporation (LPS);*

2. *I will be willing to discharge and submit to the LPS, any right, management, and/ or any other interest if the bank becomes Failed Bank; and*

3. *I will be willing to undertake responsibility for any negligent and/ or unlawful acts that the shareholder make, either direct or indirect, which couse* [sic] *losses or risk on the bank's activities, including the willingness to submit the asssets* [sic] *of the legal entity (First Gulf Asia Holdings Limited) to the LPS, if the bank becomes Failed Bank.*

This Letter of Statement is made in good faith and the undersigned is fully authorized to sign this letter according to law, and cannot be revoked or cancelled, in which can be executed by the LPS without prior approval from this legal entity (First Gulf Asia Holdings Limited).

This Letter of Statement is made on the date of 5 December, 2005."

98. As at July 2009, the total funds injected by Bank Indonesia stood at IDR 6.76 trillion (about USD 676-700 million).

99. The Claimant submits that there were riots in the streets and bitter infighting between several of the parties in the ruling coalition. The Indonesian press reported allegations that the bailout funds, some of which had reputedly disappeared from Bank Century after being injected, had been used to fund the 2009 presidential election campaign. The Indonesian House of Representatives established a special inquiry committee tasked with looking into all aspects of the Bank Century bailout from the provision of the original short-term loan

facility and the actual decision to bail out Bank Century through to the use to which the bailout funds were put. The Claimant also submits that the Respondent has confirmed as much.[18]

100. In this regard, it had been reported in mid-February 2010 (in the local newspapers) that seven of the nine political factions represented on the special inquiry committee had declared the bailout "illegal and mired in corruption", with only the two remaining parties represented deeming the bailout to have been legitimate19. It was also reported that in March 2010, the House of Representatives' special committee ruled that there were violations in the Bank Century bailout which should be investigated by the law enforcement agencies, and a special House of Representatives' team was subsequently formed to monitor the investigations into the Bank Century bailout.

101. It was further reported that the Chairman of the Corruption Eradication Commission (**"KPK"**) had expressed his view that Vice-President Boediono was *"involved in the Bank Century bailout scandal"*20. The inquiry by the House of Representatives' committee was not the only enquiry spawned by the bailout. There were two others – one by the Supreme Audit Agency (**"BPK"**), an ongoing enquiry by the KPK and another by the police.

102. Indonesia's KPK began its investigation in the immediate aftermath of the bailout, amidst rumors of the bailout monies having been diverted into President Yudhoyono's 2009 election campaign.

D. Mr. Tantular's Connection with Bank Century

103. Mr. Tantular is an Indonesian national, a member of the founding family of CIC, Bank Century's anchor bank, resident in Indonesia. Mr. Tantular did not

[18] In an email to the Claimant's counsel dated 14 January 2012, the Respondent's counsel admits that there has been a conflict within the Indonesian cabinet concerning the Bank Century bailout stating that *"there are a number of politicians in this country who are trying to use this case for their own political advantage"* (C59, Email from KarimSyah, 14 January 2012.

[19] C60, Jakarta Globe, 'Political Tension Likely to be Only Fallout from Century Investigation', 17 February 2010.

[20] C61, Jakarta Globe, 'KPK: Boediono Involved in Bank Century Scandal', 21 November 2010.

formally occupy an executive position at Bank Century. However, Mr. Tantular controlled the Bank Century Board of Directors, of which there were five members, all of whom had been appointed by him and all of whom were deemed to be "Fit and Proper" by Bank Indonesia, having passed Bank Indonesia's Fit and Proper Test.

104. Mr. Tantular also appointed all members of the Board of Commissioners other than Mr. Al-Warraq. Mr. Tantular's sister, Theresia Dewi Tantular, was the head of the Bank Notes Division and another Tantular appointee, Sunartono, headed the International Division.

105. On 14 December 2009, Bank of Indonesia issued a press release naming Mr. Tantular as Bank Century's majority shareholder: *"in anticipation of several items that required the signatures of the owners of majority shareholders of Century Bank in the event of a bank closure or a takeover by the Deposit Insurance Corporation (DIC)"*.[21]

106. Following the bailout of Bank Century on 21 November 2008, Bank Indonesia reported Mr. Tantular, the Claimant and Mr. Rizvi to the National Police for banking irregularities, and on 25 November 2008, Mr. Tantular was arrested. The charges were as follows:

1) Charges against Mr. Tantular related to the channeling of customer funds from Bank Century by (i) inducing customers to purchase financial products from Antaboga, a company owned by Mr. Tantular and various of his relatives; and (ii) issuing letters of credit to companies connected with Mr. Tantular and his relatives without declaring his interest.

2) Charges centering on non-performance of financing commitments and other alleged breaches of prudent banking practices.

[21] C43, Bank Indonesia press release, *'Background Behind Robert Tantular's Appearance at the Ministry of Finance on 20th November'*, 14 December 2009.

107. The criminal verdict rendered by the Jakarta District Court against Mr. Tantular and various press releases list a number of violations of applicable banking regulations which Mr. Tantular and his related companies were found to have carried out[22]. These include:-

1) Transferring funds from an account without the owner's written consent;

2) Extending loans to third parties without performing appropriate risk assessments and following the appropriate procedures:

3) Opening fraudulent bank accounts by bypassing the appropriate customer identification and verification procedures; and

4) Releasing collateral deposits made by debtors in connection with letters of Credit issued by Bank Century before any liabilities associated with those Letters had been extinguished.

E. The Investigation and Prosecution of the Claimant

108. Following the bailout on 21 November 2008, Bank Indonesia lodged a complaining with the National Police about the banking irregularities of Mr. Tantular and the Claimant, and on 25 November 2008, Mr. Tantular was arrested. The charges against Mr. Tantular were as follows:

1) Charges against Mr. Tantular related to the channeling of customer funds from Bank Century by (i) inducing customers to purchase financial products from Antaboga, a company owned by Mr. Tantular and various of his relatives; and (ii) issuing letters of credit to companies connected with Mr. Tantular and his relatives without declaring his interest (the "**Embezzlement Charges**"); and

[22] C94.

2) Charges centering on non-performance of financing commitments and other alleged breaches of prudent banking practices (the "**Mismanagement Charges**"); (the Embezzlement Charges and the Mismanagement Charges being jointly the "**Bank Century Charges**").

109. The Claimant states that the investigation of Bank Century Charges was led at the outset by two people, Lt General Susno Duadji, the Head of the Criminal Division of the Republic of Indonesia Police Headquarters, and Lt General Edmon Ilyas, the Director II/Special Economic Criminal Division of the Republic of Indonesia Police Headquarters. Warrants were issued for the arrest of the Claimant and Mr. Rizvi on or about 4 December 2008. The Claimant also states that in or around May 2009, the Claimant and Mr. Rizvi instructed an Indonesian law professor, Professor Indriyanto, to make contact with one of the police officers leading the investigation and, as a consequence Professor Indriyanto met Lt. Gen. Ilyas in late May 2009.

110. The Claimant states that, at that meeting, Lt. Gen. Ilyas solicited a bribe of USD 300,000 in order to discontinue the proceedings against Mr. Tantular and Mr. Rizvi. In early June 2009, Mr. Rizvi wrote to Lt General Duadji[23] to offer his and Mr. al-Warraq's co-operation in the investigation into the Embezzlement Charges but received no reply. On 9 June 2009, the Claimant and Mr. Rizvi were made the subject of Interpol Red Notices[24]. The Red Notice against the Claimant contained the following:

"1. IDENTITY PARTICLUARS

1.1 PRESENT FAMILY NAME: AL-WARRAQ

1.2 FAMILY NAME AT BIRTH: N/A

1.3 FORENAMES: Hesham Talaat Mohammed Besheer

1.4 SEX: M

1.5 DATE AND PLACE OF BIRTH: 2 April 1958 – Cairo, Egypt

1.6 ALSO KNOW AS / OTHER DATES OF BIRTH USED: AL WARRAQ Hesham

[23] C16, Letter from Hesham al-Warraq to Lt. Gen. Duadji, 3 June 2009.
[24] C62, Interpol Red Notices, 9 June 2009.

1.7 FATHER'S FAMILY NAME AND FORENAMES: N/A

1.8 MOTHER'S MAIDEN NAME AND FORENAMES: N/A

1.9 IDENTITY CONFIRMED

1.10 NATIONALITY: SAUDI ARABIAN (CONFIRMED)

1.11 IDENTIY DOCUMENTS: Passport No. GO99420 ***(?)***

1.12 OCCUPATION: N/A

1.13 LANGUAGES SPOKEN: Arabic, English

1.14 DESCRIPTION: N/A

1.15 DISTINGUISHING MARKS AND CHARACTERISTICS: N/A

1.16 DNA CODE: N/A

1.17 REGIONS/COUNTRIES LIKELY TO BE VISITED: United Kingdom, China (Hong Kong), Saudi Arabia, Singapore

1.18 ADDITIONAL INFORMATION: N/A

JUDICIAL INFORMATION

SUMMARY OF FACTS OF THE CASE: INDONESIA, Jakarta: on 14 November 2008 Hesham Al-Warraq and Rafat Ali Rizvi as the shareholder received the bond from the management board of Bank Century. The said bond actually had to be sold and the selling handed over Bank Century. However, they just stored at First Gulf Asian Holding which is not also a custodian agency. As consequently Bank Century had financial problems and on 24 November 2008 Bank Century was taken over by the Government as it has bank clearing problem, Robert Tantular as the main director of Bank Century has been sent to the court and Theresia Devi Tantular as the head of bank note of Bank Century is still at large.

CONFIDENTIAL. INTENDED ONLY FOR POLICE AND JUDICIAL AUTHORITIES

2.2 ACCOMPLICES: AL WARRAQ Hesham Talaat Mohammed Besheer, born on 12 April 1958, subject of red notice, File No. 2009, Control No. A-1667/6-2009; TANTULAR Theresia Dowi, born on 24 February 1960, subject of red notice, File No. 2009/7460-7460, Control No. A-1668/6-2009

2.3 CHARGE: Banking crime

2.3 LAW COVERING THE OFFENCE: Articles 49 and 50 of Banking Law

3.4 MAXIMUM PENALTY POSSIBLE: 15 years imprisonment

2.5 TIME LIMIT FOR PROSECUTION OR EXPIRTY DATE OF ARREST WARRANT: 12 years

2.6 ARREST WARRANT OR JUDICIAL DECISION HAVING THE SAME EFFECT: No. SPKAPi5013/XH/2008: DiT 11 EKSUS, issued on 1 December 2008 by the judicial authorities in Jakarta (DiT li Eksus Bareskrim Polri), Indonesia

Name of signatory: Edmon Ilyes

COPY OF ARREST WARRANT AVAILABLE AT THE GENERAL SECRETARIAT IN THE LANGUAGE USED BY THE REQUESTING COUNTRY No

3 ACTION TO BE TAKEN IF TRACED

3.1 IMMEDIATELY INFORM INTERPOL, JAKARTA (NCB reference: NCB/RED/71/vi2009 OF 09 June 2009) AND THE ICPO-INTERPOL GENERAL SECRETARIAL THAT THE FUGITIVE HAS BEEN FOUND

3.2 FOR COUNTRIES WHICH CONSIDER RED NOTICES TO BE VALID REQUESTS FOR PROVISIONAL ARREST, PLEASE PROVISIONALLY ARREST THE FUGITIVE

EXTRADITION WILL BE REQUESTED FROM ANY COUNTRY WITH WHICH THE REQUESTING COUNTRY IS LINKED BY A BILATERAL EXTRADITION TREATY AN EXTRADITION CONVENTION OR BY ANY OTHER CONVENTION OR TREATY CONTAINING PROVISIONS ON EXTRADITION."

111. According to Article 82 of INTERPOL's Rules on the Processing of Data *"Red Notices are published at the request of a National Central Bureau (NCB) in order to seek the location of a wanted person and his/her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action"*.

112. The Claimant submits that Kingsley Napley LLP, a law firm in the UK, was instructed by the Claimant and Mr. Rizvi to deal with and remove the criminal allegations against them (the Claimant and Mr. Tantular), and the law firm was successful in getting the information relating to them removed from the Interpol website, once the political nature of the charges had been made clear to Interpol.

113. The Claimant further submits that he and Mr. Rizvi instructed Kingsley Napley to write to the Attorney General's Office ("**AGO**"), requesting a meeting at which the defence of the Claimant and Mr. Rizvi to the criminal allegations could be explained[25]. When no response was received, the Claimant and Mr. Rizvi instructed RISC Management Ltd and its Operations Manager, Mr. Ernest Pallett, to make contact with the AGO to see whether there was any possibility of opening up a line of communication. Mr. Pallett states in his first witness statement given in Mr. Rizvi's ICSID arbitration[26], that he travelled to Jakarta in order to set up a meeting with the AGO. Local contacts put him in touch with a British banking consultant, who in turn put him in contact with an Indonesian Law Firm, SH & Associates, who had connections with the AGO. A meeting was arranged with the AGO on 7 June 2010.

114. Mr. Pallett explains at paragraphs 12 and 13 of his first witness statement (given in Mr. Rizvi's arbitration), that he was put into contact with SH & Associates, with whom he had a meeting. According to Mr. Pallett, he was informed by Mr. Sahnun of SH & Associates at that meeting that he *"had met with the Attorney General himself the day before and also with Mr Amari, the Deputy of the*

[25] Witness Statement of Rafat Ali Rizvi, para. 112, Exhibit C86, Witness Statement of Angus Keith McBride, para. 5
[26] Exhibit EEP1.

Attorney General and the man ultimately responsible for the prosecution." Mr. Pallett was then informed that the Attorney General would be prepared to reach a settlement, privately and confidentially, with no details to be leaked to the press, following which the Red Notices would be lifted. Mr. Sahnun also confirmed that the Attorney General and SH & Associates would ensure the matter was cleared through parliament and had "*lined up some ministers who were aware of the potential issues and agreed that the matter must be sorted out*".

115. The Claimant submits that details of the 7 June 2010 meeting with the Deputy Attorney General are set out in the first as well as the second witness statements given by Mr. Pallett in Mr. Rizvi's ICSID arbitration[27]. Present at that meeting were the Deputy Attorney General, Mr. Amari, and MS Desi Meutia, the investigating officer in charge of the case, amongst others. Mr. Pallett states that, at that meeting he was informed that the settlement figure the Respondent was seeking was approximately IDR 3.1 trillion, although this was subject to change. When Mr. Pallett asked Mr. Amari and MS Meutia to explain how the figures (MS Meutia had quoted from a report in her possession) had been arrived at and why they had not yet been finalised, they replied that the figures quoted for the alleged offences of money laundering had not as yet been submitted. Mr. Pallett was also repeatedly told that only Mr. Sahnun of SH & Associates could resolve the matter and the Claimant and Mr. Rizvi would have to instruct SH & Associates to represent them in their dealings with the AGO.

116. The Claimant then submits that following his meeting with Mr. Amari, Mr. Pallett returned to the offices of SH & Associates who were confident that "*the matter could all be settled quickly with the involvement of the Attorney General and his Deputy, Mr Amari.*" Mr. Pallett was then told that, in order to secure the deal, SH & Associates required an immediate payment of USD 2 million, USD 1 million of which would be for "*networking*", a USD 500,000 engagement fee and USD 500,000 for professional fees, together with a USD 2 million success fee payable once the case was settled and closed. When Mr. Pallett enquired

[27] Exhibit EEP1, paras. 14 - 16 and Exhibit EEP2, paras. 9 - 20.

about the USD 1 million "*networking fee*", he was told that this sum would be "*distributed amongst the various agencies and departments that needed to 'close off' on any settlement deal.*" Mr. Pallet then sought clarification that such sum was payable to various governmental officials involved and was not part of the formal settlement figure. He was told that this was indeed the case and that the monies should be paid directly to SH & Associates, who would then themselves arrange for the various payments to be made. Mr. Pallett states, at paragraph 18 of his first witness statement given in Mr. Rizvi's ICSID arbitration that, "*it was clear to [him] that this networking fee as described constituted at least a 'facilitation payment' (that is a payment made to an official in the course of their normal duties) to the officials involved in resolving this matter which is of course a bribe*"[28].

117. The Claimant submits that the Respondent's actions in this regard confirmed the Claimant's belief that he would not be afforded a fair trial in Indonesia and that he could not therefore participate in the proceedings. Kingsley Napley were therefore instructed by the Claimant and Mr. Rizvi to bring this matter to the attention of the Respondent's law enforcement agencies, which they did, but to no avail. Letters were sent to the Attorney General, the Central Jakarta District Court and the panel of Judges hearing the criminal case against the Claimant and Mr. Rizvi. A formal complaint was made to the Special Task Force on Judicial Corruption[29]. No response to any of these letters was ever received.

118. In response to Mr. Rizvi's account of these bribery attempts at soliciting bribes in his ICSID arbitration, the Respondent submits that it was Mr. Pallett who sought to bribe the AGO on the Claimant's and Mr. Rizvi's behalf. The Respondent asserts that Mr. Rizvi and the Claimant "*sent unqualified representatives first to seek to bribe the prosecutor at the Attorney General's office after [Mr Rizvi] had failed to enlist the support of known corrupt police officials to try to have [his] conviction dismissed informally*"[30]. In support of its

[28] Exhibit EEP1.
[29] C86, Witness Statement of Angus Keith McBride, Annexes 2 to 7.
[30] C69, Respondent's Rule 41(5) Application in Mr. Rizvi's ICSID arbitration, para. 106.

allegation of bribery by Mr. Pallett on the Claimant's behalf, the Respondent relies on the Affidavit of Ms Firdaus dated 17 October 2011.

119. On 1 September 2009 Mr. Rizvi wrote again to Lt General Duadji, on behalf of himself and the Claimant[31]. However, according to the Claimant no response was received. In late November 2009, Lt General Duadji was removed from his position and suspended from active duty on allegations of corruption in relation to both his investigation of Bank Century Charges and to another unrelated investigation. The allegations included permitting the unwarranted release of USD 18 million from Bank Century's frozen account to one of Bank Century's largest depositors[32]. According to press reports Lt General Duadji was, on or around 24 March 2011, convicted of corruption, given a three and a half year jail sentence and ordered to repay IDR 4 billion in assets[33].

120. The Claimant further submits (relying on press report) that, Lt General Duadji came openly into conflict with the KPK when it transpired that he had led a conspiracy aimed at discrediting the KPK which involved the arrest of two deputy KPK chairmen on trumped-up charges on the basis of fabricated evidence in order to deflect their attention from him[34].

121. The Claimant submits that in March 2010, Lt General Duadji alleged that Lt General Ilyas himself, along with another police general, had acted as a case broker in a money laundering and tax evasion case[35]. The Respondent had described Lt. Gen. Duadji and Lt. Gen. Ilyas as "known corrupt police officials" in its Rule 41(5) application[36]. On 30 December 2009 the Claimant and Mr. Rizvi also wrote to Vice-President Boediono[37] and the then Attorney General, Bpk, Hendarman Supandji[38] to explain their innocence and offer their assistance in

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[31] C17, *Letter from Rafat Ali Rizvi to Lt. Gen. Duadji*, 1 September 2009.
[32] C66 Jakarta Post article, '*Susno faces Century bailout inquiry*', 20 January 2010.
[33] C67, Jakarta Globe article '*Susno Duadji jailed for corruption*', 24 March 2011.
[34] C68, *Letter from Kingsley Napley to Wayne Walsh, Deputy Law Officer at Hong Kong Secretary for Justice*, 8 March 2010.
[35] C5.
[36] C69, Respondent's Rule 41(5) Application dated 17 October 2011, p. 42.
[37] C18, *Letter from Rafat Ali Rizvi to Vice-President Boediono*, 30 December 2009.
[38] C19, Letter from Rafat Ali Rizvi Attorney General Hendarman Supandji (erroneously dated 8 January 2009), 8 January 2010.

recovering Bank Century funds embezzled by Mr. Tantular and his family. But no reply was received from either of them.

122. Another of the investigations spawned by the Bank Century bailout is that of the KPK. Indonesia's KPK – established by President Yudhoyono as part of his anti-corruption platform – began its investigation in the immediate aftermath of the bailout, amidst rumors of the bailout monies having been diverted into President Yudhoyono's 2009 election campaign. Over the years the investigation has attracted a lot of press attention, and has resulted in a number of Bank Indonesia and other government officials being named as possible suspects in the Bank Century case.

123. Moreover, in December 2009, the AGO commenced a criminal investigation against Mr. Rizvi and Mr. al-Warraq in connection with the collapse of Bank Century and in particular in relation to the Mismanagement Charges.

124. The primary indictment dated 2 March 2010[39], is a charge under Art. 2(1) of the Corruption Act that the Claimant and Mr. Rizvi committed acts aimed at enriching themselves which could create loss to the state finances. The total loss the two men were alleged to have caused was IRP 3,115,889 billion (USD 286,650,550). This offence was based on the transactions for the procurement, placement and/or exchange of CIC's foreign currency securities by Chinkara/FGAH.

125. Further as a subsidiary indictment[40], there was a second Corruption Act charge, pursuant to which it was alleged that the Claimant and Mr. Rizvi had misused their positions in Bank Century to cause Bank Century to conduct improper banking practices which had caused loss to Bank Century. There was also a further charge under Law Number 15 of 2002 concerning the Criminal Offence of Money Laundering (the "**Money Laundering Act**") in relation to alleged illegal placements or transfers of money. The Money Laundering Act charge

[39] C6

[40] This second indictment was referred to in the Jakarta District Court Ruling of December 2010 (specifically p.5 of the Judgement).

concerned the USD 52 million National Australian Bank Limited notes, which had allegedly been illegally transferred from Bank Century to FGAH. As part of this offence, it was alleged that the USD 52 million National Australian Limited notes had originally been exchanged for criminal proceeds.

F. The Claimant's Trial in Absentia

126. The Prosecutor issued three documents, which the Respondent alleges were Court Summonses requiring the Claimant and Mr. Rizvi to attend the District Court for their trial on three different dates as follows:

127. The first document issued is dated 12 March 2010 and allegedly required the Claimant and Mr. Rizvi to attend the District Court on 18 March 2010. The first document reads as follows:

DISTRICT ATTORNEY'S OFFICE CENTRAL JAKARTA
Jl. Merpati Blok XII N° 5 Kemayoran
SUMMONS OF DEFENDANT
Number: B-226/0.1.10/Ft. 1/03/2010
For purpose of hearing in relation to the case in favor of HESHAM TALAAT MOHAMED BESHEER ALWARRAQ alias HESHAM ALWARRAQ et al., you, as defendant:

Full Name:	*HESHAM TALAAT MOHAMED BESHEER ALWARRAQ alias HESHAM ALWARRAQ*
Place of Birth:	*Cairo, Egypt*
Age / Date of Birth:	*51 years old / April 12, 1958*
Sex:	*Male*
Nationality:	*Saudi Arabia*
Address:	- *Kingdom Tower 20th Floor, Riyadh 11622 Kingdom of Saudi Arabia PO Box 88014, Riyadh 11622, Saudi Arabia*

	- *First Gulf Asia Holdings Ltd, Offshore group chambers PO Box CB 12751, Nassau, New Providence Bahamas*
	- *50 Raffles Place #34-04-05, Singapore Lane Tower, Singapore 048623, Phone: +06565334869*
Religion:	*Islam*
Occupation:	- *Shareholder of First Gulf Asia Holding*
	- *Deputy President Commissioner of PT Bank Century Tbk from 2006 through 2008*
Education:	*Western Illinois, USA*
	TO APPEAR BEFORE:
Name, Rank, title:	*1.-FEBRI ADRIANSYAH, S.H., M.H./ Public Prosecutor* *2.-ZAINUL ARIFIN, S.H, M.H./ Public Prosecutor* *3.-VICTOR ANTONIUS, S.H., M.H. / Public Prosecutor*
Address:	*DISTRICT COURT OF CENTRAL JAKARTA Jl. Gajah Mada No. 17 Central Jakarta*
On:	*THURSDAY*
Date/Time:	*March 18, 2010/10.00 WiB*
For Purpose:	*Hearing as Defendant*
Duly issued for proper perusal.	
Defendant,	*Jakarta, March 12, 2010*
	Daily Executive Staff of HEAD OF DISTRICT
	ATTORNEY'S OFFICE OF CENTRAL JAKARTA
HESHAM TALAAT MOHAMED	*Signed and sealed*

BESHEER ALWARRAQ alias	*CHUCK SURYOSUMPENO, S.H., M.H*
HESHAM ALWARRAQ	*Jaksa Utama Pratama Nip 19600908 198201 1 001*

RECEIPT OF SUMMONS

On this day, ... Date ..... time ..... 1 ..... title ..... have given the abovementioned summons to the Defendant ..... and in fact the defendant as mentioned above:

a. Sign this summons

b. Not existing in the said address and the summons has been given to -.....

With receipt duly made under the power of Hippocratic Oath

Received by *Given by*

(.....) *(.....)*

128. The document mentioned above was allegedly served on the Claimant and Mr. Rizvi as follows:

1) Sending the summonses to the NCB/Interpol Indonesia on 12 March 2010 requesting that the NCB serve the summonses on the Defendants.

(i) On 17 March 2010 NCB Indonesia sent an email dated 15 March 2010 to NCB local offices in Riyadh, Nassau and Singapore requesting NBC's assistance to bring the Defendants to the Court for hearing.

(ii) NCB Singapore responded on 17 March 2010 stating that the request had been forwarded to the relevant authority for follow-up.

(iii) NCB Nassau responded by email dated 18 March 2010 stating that Mr. Rizvi was not registered at the Bahamas immigration and that Mr. Rizvi was a director of Chinkara Capital Ltd which was an international business company in the Bahamas, but there were no business activities in the Bahamas.

(iv) No response was received from NCB Riyadh.

2) Sending the summonses to the Secretary General of the Ministry of Foreign Affairs in Jakarta on 12 March 2010, and requesting that the Ministry of Foreign Affairs forward them to the Defendants.

(i) On 15 March 2010, the Ministry of Foreign Affairs sent a fax to the Indonesian Ambassadors in Saudi Arabia, Singapore and Cuba requesting their assistance in serving the summonses on the Defendants.

(ii) The Indonesian Embassy in Saudi Arabia forwarded the summons for Mr. Al-Warraq to the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia through an Embassy Note dated 16 March 2010. Subsequently, the Ministry of Foreign Affairs of the Saudi Arabia responded by letter dated 17 March 2010 stating that, because the period determined for the hearing on 18 March 2010 had lapsed, the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia hoped that another period could be determined for a maximum of one month to settle matters.

(iii) The Indonesian Embassy in Cuba translated the summons into English and served the summons on the Defendants on 18 March 2010 at the address of First Gulf Asia Holdings Ltd in the Bahamas through DHL.

(iv) No response was received from the Indonesian Embassy in Singapore.

3) Advertising in (i) Media Indonesia, a nationwide newspaper, in Bahasa Indonesia; and (ii) Jakarta Post, an English newspaper, in English on 15 March 2010.

129. The summonses were not put on the notice board of the District Court in accordance with Article 145(5) KUHAP as the Claimant and Mr. Rizvi were not resident in Indonesia, and according to MS Meutia, the Prosecutor formed the view that service through the media would be more effective in bringing the summonses to the Claimant and Mr. Rizvi's attention.

130. Ms. Meutia explained in her witness statement that on 18 March 2010 and to the Minutes of the Hearing and Hearing Report, the Prosecutor informed the Court that the Defendants had been summoned through the NCB, the Ministry of Foreign Affairs and newspapers. The Panel of Judges ordered that:

1) The Prosecutor look for the Defendants' most recent place of residence in Indonesia;

2) The Prosecutor summon the Defendants again according to Article 36(1) of the Money Laundering Law; and

3) The hearing be adjourned to 19 April 2010.

131. The second document issued is dated 24 March 2010 and allegedly required the Claimant and Mr. Rizvi to attend the District Court on 19 April 2010. The second document reads as follows:

DISTRICT ATTORNEY'S OFFICE CENTRAL JAKARTA
Jl. Merpati Blok XII N° 5 Kemayoran

SUMMONS OF DEFENDANT

Number: B-248/0.1.10/Ft. 1/03/2010

For purpose of hearing in relation to the case in favor of HESHAM TALAAT MOHAMED BESHEER ALWARRAQ alias HESHAM ALWARRAQ alias ALWARRAQ et al., you, as defendant:

Full Name:	*HESHAM TALAAT MOHAMED BESHEER ALWARRAQ alias HESHAM ALWARRAQ*
Place of Birth:	*Cairo, Egypt*
Age / Date of Birth:	*51 years old / April 12, 1958*
Sex:	*Male*
Nationality:	*Saudi Arabia*
Address:	- *First Gulf Asia Holdings Ltd, Offshore group chambers PO Box CB 12751, Nassau, New Providence Bahamas*
Religion:	*Islam*
Occupation:	- *Shareholder of First Gulf Asia Holding*
	- *Deputy President Commissioner of PT Bank Century Tbk from 2006 through 2008*
Education:	*Western Illinois, USA*
	TO APPEAR BEFORE:
Name, Rank, title:	*1.-FEBRI ADRIANSYAH, S.H., M.H./ Public Prosecutor* *2.-ZAINUL ARIFIN, S.H, M.H./ Public Prosecutor* *3.-VICTOR ANTONIUS, S.H., M.H. / Public Prosecutor*
Address:	*DISTRICT COURT OF CENTRAL JAKARTA Jl. Gajah Mada No. 17 Central Jakarta*
On:	*MONDAY*
Date/Time:	*April 19, 2010/10.00 WiB*
For Purpose:	*Hearing as Defendant*

Duly issued for proper perusal.

Defendant,	*Jakarta, March 24, 2010*
	Daily Executive Staff of HEAD OF DISTRICT
	ATTORNEY'S OFFICE OF CENTRAL JAKARTA

HESHAM TALAAT MOHAMED	*Signed and sealed*
BESHEER ALWARRAQ alias	*CHUCK SURYOSUMPENO, S.H., M.H*
HESHAM ALWARRAQ	*Jaksa Utama Pratama Nip 19600908 198201 1 001*

RECEIPT OF SUMMONS

On this day, ... Date ..... time ..... I ..... title ..... have given the abovementioned summons to the Defendant ..... and in fact the defendant as mentioned above:

a. Sign this summons

b. Not existing in the said address and the summons has been given to -.....

With receipt duly made under the power of Hippocratic Oath

Received by *Given by*

(.....) *(.....)*

132. The above-mentioned document was allegedly served on the Claimant and Mr. Rizvi as follows:

1) Sending the summonses and indictment to NCB/Interpol Indonesia and requesting that NCB serve them on the Defendants (see letter dated 24 March 2010 from District Attorney's Office to NCB).

(i) On 1 April 2010, NCB Indonesia sent an email dated 31 March 2010 to NCB's local offices in Riyadh, Nassau and Singapore requesting that NCB inform the Defendants of their trial date (see emails dated 1 April 2010 from NCB Jakarta to NCB Riyadh, Nassau and Singapore).

(ii) No response was received from NCB Riyadh, NCB Nassau or NCB Singapore.

2) Sending the summonses and indictment to the Secretary General of the Ministry of Foreign Affairs in Jakarta and requesting that the Ministry of Foreign Affairs deliver the request to summon the Defendants to the Indonesian Embassy in Saudi Arabia, Singapore and Cuba, together with the summonses and indictments (see letter dated 24 March 2010 from the District Attorney's Office to the Ministry of Foreign Affairs). There was no response from the Ministry of Foreign Affairs.

3) Sending the summonses to the Indonesian Embassy in Cuba and requesting that it serve them on the Defendants (see letter dated 24 March 2010 from the District Attorney's Office to the Indonesian Embassy in Cuba, Tab 22). The Indonesian Embassy in Cuba translated the summonses and the indictment into English and served the English translation of the summonses and the indictment on Mr. Al Warraq at the address of First Gulf Asia Holdings Ltd in the Bahamas.

4) In relation to the Claimant, sending the summons to the Indonesian Embassy in Saudi Arabia and requesting that the Indonesian Embassy deliver the summons to Mr. Al Warraq at his address in Saudi Arabia (see letter dated 24 March 2010 from the District Attorney's Office to the Indonesian Embassy in Saudi Arabia).

(i) The Indonesian Embassy in Saudi Arabia forwarded the summons, which had been translated into Arabic, to the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia.

5) Sending the summonses to the Indonesian Embassy in Singapore and requesting that the Indonesian Embassy deliver them to the Defendants (see letter dated 24 March 2010 from the District Attorney's Office to the Indonesian Embassy in Singapore.

6) Sending the summonses to the President Director of Bank Mutiara (see two letters dated 24 March 2010 from the District Attorney's Office to Bank Mutiara).

7) Advertising in (i) Media Indonesia in Bahasa Indonesia; and (ii) Jakarta Post in English on 14 April 2010.

133. On 26 March 2010 in accordance with the Court's order on 18 March 2010 to search for the Claimant's and Mr. Rizvi's most recent place of residence, the Prosecutor sent requests for information to three hotels where it was understood that the Defendants had previously stayed in Indonesia. Hotel Shangri-La, Hotel Mulia and Ritz Carlton Hotel, and to Bank Mutiara.

134. Based on the request for information, Hotel Shangri-La responded with a letter dated 8 April 2010 providing information on the identity of the Defendants and their last visit to the hotel.

135. Ban Mutiara also responded through a letter dated 12 April 2010 stating, among others, that the Defendants did not have a work permit in Indonesia and did not have a permanent domicile in Indonesia.

136. According to the Minutes of the Hearing and Hearing Report, the Defendants did not attend the hearing on 19 April 2010. The Panel of Judges ordered, amongst other things, that:

1) the Prosecutor summon the Defendants again legally and properly according to the law by attaching the notes of indictment; and

2) the hearing be adjourned to 19 May 2010.

137. The third document issued is dated 26 April 2010 and allegedly required the Claimant and Mr. Rizvi to attend the District Court on 19 May 2010. The third document reads as follows:

DISTRICT ATTORNEY'S OFFICE CENTRAL JAKARTA

Jl. Merpati Blok XII N° 5 Kemayoran

SUMMONS OF DEFENDANT

Number: B-353/0.1.10/Ft. 1/03/2010

For purpose of hearing in relation to the case in favor of HESHAM TALAAT MOHAMED BESHEER ALWARRAQ alias HESHAM ALWARRAQ alias ALWARRAQ et al., you, as defendant:

Full Name:	*HESHAM TALAAT MOHAMED BESHEER ALWARRAQ alias HESHAM ALWARRAQ*
Place of Birth:	*Cairo, Egypt*
Age / Date of Birth:	*51 years old / April 12, 1958*
Sex:	*Male*
Nationality:	*Saudi Arabia*
Address:	- *50 Raffles Place # 34-04-05, Singapore Lane Tower, Singapore 048623, Phone: +6565334869*
Religion:	*Islam*
Occupation:	- *Shareholder of First Gulf Asia Holding*
	- *Deputy President Commissioner of PT Bank Century Tbk from 2006 through 2008*
Education:	*Western Illinois, USA*
	TO APPEAR BEFORE:
Name, Rank, title:	*1.-FEBRI ADRIANSYAH, S.H., M.H./ Public Prosecutor* *2.-ZAINUL ARIFIN, S.H, M.H./ Public Prosecutor*

	3.-VICTOR ANTONIUS, S.H., M.H. / Public Prosecutor
Address:	*DISTRICT COURT OF CENTRAL JAKARTA Jl. Gajah Mada No. 17 Central Jakarta*
On:	*WEDNESDAY*
Date/Time:	*May 19, 2010/10.00 WiB*
For Purpose:	*Hearing as Defendant*
Duly issued for proper perusal.	
Defendant,	*Jakarta, April 26, 2010*
	Daily Executive Staff of HEAD OF DISTRICT
	ATTORNEY'S OFFICE OF CENTRAL JAKARTA
HESHAM TALAAT MOHAMED	*Signed and sealed*
BESHEER ALWARRAQ alias	*CHUCK SURYOSUMPENO, S.H., M.H*
HESHAM ALWARRAQ	*Jaksa Utama Pratama Nip 19600908 198201 1 001*

RECEIPT OF SUMMONS

On this day, ... Date ..... time ..... I ..... title ..... have given the abovementioned summons to the Defendant ..... and in fact the defendant as mentioned above:

a. Sign this summons

b. Not existing in the said address and the summons has been given to -.....

With receipt duly made under the power of Hippocratic Oath.

Received by *Given by*

(……..) *(……..)*

138. The above-mentioned document was allegedly served on the Claimant and Mr. Rizvi as follows:

1) Sending the summonses and indictment to NCB/Interpol Indonesia and requesting that they be served on the Defendants (see letter dated 26 April 2010 from the District Attorney's Office to NCB/Interpol Indonesia, Tab 45). On 5 May 2010 NCB/Interpol Indonesia sent an email dated 4 May 2010 to NCB in Riyadh, Nassau, and Singapore seeking assistance to inform the Defendants of their trial date. No response was received from NCB Riyadh, Nassau and Singapore.

2) Sending the summonses and indictment to the Secretary General of the Ministry of Foreign Affairs in Jakarta and requesting that they be served on the Defendants.

3) Sending the summonses to the Indonesian Embassy in Singapore and requesting that the Indonesian Embassy deliver them to the Defendants. The Indonesian Embassy in Singapore responded through letter dated 11 May 2010.

4) Sending the summonses to the Indonesian Embassy in Cuba and requesting that the Indonesian Embassy deliver them to the Defendants. There was no response from the Indonesian Embassy in Cuba.

5) Sending the summons to the Indonesian Embassy in Saudi Arabia and requesting that the Indonesian Embassy deliver them to Mr. Al Warraq. There was no response from the Indonesian Embassy in Saudi Arabia.

6) Sending the summons to the President Director of Bank Mutiara and requesting that the Bank deliver them to the Defendants. There was no response from Bank Mutiara.

7) Advertising in (i) Media Indonesia in Bahasa Indonesia; and (ii) Jakarta Post in English on 10 May 2010

139. Based on the Minutes of the Hearing and Hearing Report, neither Defendant appeared in Court at the hearing on 19 May 2010. The Panel of Judges adjourned the hearing to 2 June 2010 for the reading of the in absentia judgment.

140. On 2 June 2010, the Panel of Judges read an Interlocutory Judgment which, amongst other things:

1) Declared that the Defendants had been summoned legally and properly, but neither of them had appeared (in absentia);

2) Ordered that the "investigation" of corruption crime and money laundering crime of the Defendants proceed in absentia (the reference to "investigation" is a reference to the trial of the Defendants – see also the Hearing Report of 2 June 2010); and

3) Ordered the Prosecutor to announce the Interlocutory Judgment (page 57 of the Interlocutory Judgment).

141. On 16 December 2010, the Claimant was convicted by the Central Jakarta District Court and his assets up to the value of more than IDR 3 billion were confiscated by virtue of the verdict.

V. THE PARTIES' POSITION.-

1. THE CLAIMANT'S STATUS AS AN INVESTOR

A. The Respondent

142. The Respondent refers to paragraph 113 of the Tribunal's Partial Award, dated 21 June 2012. The Tribunal reserved for consideration: "*the determination of its jurisdiction to the merits phase of the arbitration, where the questions to be determined include whether the Claimant can establish its status as an 'investor' within the meaning of the OIC Agreement*".

143. At paragraph 90 of the Award, the Tribunal made the following finding: *"The nationality requirements of an 'investor' are set out in Article 1 of the OIC Agreement. The Claimant alleges its investment was made through FGAH as well as by the Claimant personally. FGAH is a company registered in the Bahamas.* ***The Bahamas are not a Contracting Party to the OIC Agreement, and so FGAH is not an 'investor' for the purposes of the OIC Agreement."*** (emphasis added)

144. The Tribunal went on to observe (at paragraph 91) that the Respondent "*. . . has called into question whether the Claimant personally held shares in Bank Century at the time it was placed in administration ... The Tribunal requires further evidence and submissions on the Claimant's condition as an 'investor' for the purposes of the OIC Agreement, and this question is accordingly reserved until the merits phase of this arbitration."*

(i) The Claimant did not hold any shares in Bank Century in his own right

145. According to the Respondent, the Claimant acknowledges that the Award requires him to "*establish his status as an "investor" within the meaning of the OIC Agreement.*"[41]

146. However, the Claimant has failed to produce any proof that he did own this shareholding, despite the Respondent's request for him to do so in its Request for Discovery. In lieu of any such proof, the Claimant has submitted a single

[41] Paragraph 5 of the Claimant's Statement of Claim.

sheet of heavily redacted paper purporting to be a letter from ABN AMRO Private Banking. That letter (Exhibit C41) supposedly indicates his portfolio of shares in Bank Century. In fact it does nothing of the sort. Aside from the highly questionable nature of this exhibit– which bears no address and does not even indicate from which country it was issued, nor in what currency the "price" per share is expressed – the one bit of information not redacted there is false. The Claimant cannot have held any shares in Bank Century in his own name. He was never listed in the share register, or with the stock exchange.

147. The Respondent submits that while FGAH held 2,706,800,937 shares, amounting to 9.55% of the bank's equity capital, the Claimant did not hold a single share on his own behalf. According to the Respondent there is a very small holding by ABN AMRO (502 shares), but on behalf of someone else entirely, not the Claimant[42].

148. The Respondent also submits that at the time of the alleged "expropriation," therefore, the Claimant did not own a single share in Bank Century. That alone should suffice to dismiss the Claimant's entire case as falling outside the scope of the OIC Agreement.

149. The Respondent also argues that even if the Claimant did own the shares he claims to have held, that interest would be a miniscule percentage (0.2 percent) of the capital of Bank Century before the bailout. If the Claimant could somehow establish that he was an investor in Bank Century in his own right, which clearly is not the case, the Tribunal would still need to consider whether the holding of 1/500th of the equity of a publicly listed bank is sufficient to give an "investor" the right to bring arbitration under the OIC Agreement, and whether his alleged loss would warrant consideration by an arbitral tribunal at all. This is particularly so where the value of Bank Century at the time of the bailout was a negative figure, due primarily to the embezzlement of its assets by the Claimant himself together with his partners.

[42] Page 15, R25.

(ii) The Tribunal has already ruled that the Claimant cannot seek damages for shares owned by FGAH

150. The Respondent submits that the Claimant fails to recognise that for the OIC Agreement to apply, he must first meet the definition of "*Investor*" and then show that the dispute concerning the "*investment*" is covered by the OIC Agreement. The Claimant argues that he is an "*investor*" because "*indirect*" investments ought to be covered by the OIC Agreement, despite the Tribunal's ruling in its Award. The Respondent argues that the Claimant misses the point. The first question is whether the Claimant qualifies as an investor under the OIC Agreement. The OIC Agreement makes it plain in Article 1(6) that the national of the Contracting Party must own the capital and invest it in the territory of the host state.

151. According to the Respondent, in the present case the Claimant fails to do so because FGAH has a distinct legal personality from that of the Claimant. The Claimant argues that he has standing to bring the claim because he is a shareholder in FGAH. However, the definition of investor under the OIC Agreement provides otherwise. Article 1(6) defines "investor" as:

> *"The Government of any contracting party or natural corporate person, who is a national of a contracting party and* ***who owns the capital and invests it in the territory of another contracting party.*** *" (emphasis added)*

152. FGAH is a Bahamas Company. The Bahamas are not a party to the OIC Agreement, nor a member of the OIC. The Tribunal has already found that FGAH is not an Investor for the purposes of the OIC Agreement. It is simply not open to the Claimant to claim personal ownership of the shares in Bank Century held by FGAH.

153. The Respondent submits that he Claimant's assertion that he personally owns Bank Century shares through his minority ownership in FGAH goes against the fundamental and now universal principle that the legal personality of a company is separate and distinct from that of its shareholders.

154. The Respondent also submits that FGAH does not have *locus standi* under the treaty. The Claimant can only qualify as an investor for any shareholding he himself owns in Bank Century.

(iii) The OIC Agreement only protects investors that comply with Article 9 of the OIC Agreement

155. The Respondent argues that even if the Claimant were somehow to be deemed to meet the definition of an investor in Article 1(6), it is clear that the OIC Agreement protects only those investors that comply with the obligations set out in Article 9 of the OIC Agreement, which the Claimant clearly does not. Article 9 of the OIC Agreement stipulates:

> *"The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means."*

156. The Respondent submits that the OIC Agreement imposes an on-going duty on the investor to observe the host state laws and to refrain from acts that may disturb public order or morals or that may be prejudicial to the public interest. Further, the investor must also refrain *from trying to achieve gains through unlawful means.*

157. The Respondent also submits that Article 9 goes beyond the typical stipulation found in BITs, *i.e.,* to observe the host state law when making the investment. First, the obligation to comply with the host state law is on the investor, and not on the investment. Second, the duty to comply with the host state law is not restricted to the time of making the investment, but is on-going throughout the time the investor operates in the host state. Third, the obligation is not limited solely to compliance with domestic law, it requires that the investor refrain from even attempting acts that *may disturb public order or morals* or conduct that *may*

be prejudicial to public interest. Additionally, he should also refrain from even *trying to achieve gains through unlawful means*. It is plain that Article 9 requires the investor to observe an enhanced code of conduct throughout the life of his investment in the host state.

158. Moreover, it is well-established that investments that violate host state law are not afforded treaty protection and the Tribunal is said to lack jurisdiction over the subject matter (*ratione materiae*) of such a claim. If the Claimant does not comply with Article 9, the Tribunal lacks jurisdiction to adjudicate his claims (*ratione personae*).

159. The Respondent submits that the Claimant's breach of Article 9 is indisputable in this case. He perpetrated criminal offences in relation to his role in Bank Century, for which he was duly convicted by a competent court. The final and binding judgment of the Indonesian Court confirms that he acted in violation of Indonesian criminal laws. It goes without saying that this constituted highly immoral, as well as illegal, conduct and that the Claimant achieved gains through unlawful means.

160. The Respondent submits that the Court's finding of illegality, and indeed immorality, is binding on this Tribunal. The position under Indonesian law is a question of fact. The Court interprets and enforces the Indonesian criminal law applicable to the Claimant's conduct. According to the Respondent, in the present case the Tribunal is faced with a *finding* – not merely an allegation – of criminality, by the competent court. It must accept the Court's judgment as dispositive of the Claimant's criminality and immorality in this case.

(iv) The "clean hands" doctrine renders the Claimant's claims inadmissible

161. According to the Respondent, even if the Tribunal should otherwise find it has jurisdiction over the Claimant's claims the fact that he comes to this Tribunal with "unclean hands" renders his claims inadmissible. The Indonesian Court

convicted the Claimant of theft, corruption and money laundering. All these offences were perpetrated in relation to the alleged investment.

162. The Respondent argues that in the context of investment arbitration the doctrine of "clean hands" has also been affirmed as a general principle regarding claims tainted by corruption[43] and operates as a ground of inadmissibility[44].

163. Moreover, investment treaty tribunals, as upholders of public international law, should be viewed as having inherent or incidental jurisdiction to find that claims are inadmissible for abuses of process or other serious forms of misconduct.

164. The Respondent submits that in the present case, the integrity of the Tribunal requires that a convicted criminal and a fugitive from justice cannot be allowed to abuse the OIC Agreement by submitting a claim that is tainted by his own fraud and corruption. The "clean hands" doctrine operates as a procedural bar to his claims. This Tribunal should render them inadmissible.

B. The Claimant

(i) The Claimant clearly has an investment within the meaning of the OIC Agreement

165. The Claimant submits that the OIC Agreement Article[45] 1(4) defines capital as *"[a]ll assets ... owned by a contracting party to this Agreement or by its nationals, whether a natural person or a corporate body and present in the territories of another contracting party whether these were transferred to or earned in it ..."*. In turn, Article 1(5) of the OIC Agreement defines investment as the *"employment of capital in one of the permissible fields in the territories of a contracting party with a view to achieving a profitable return, or the transfer*

[43] RLA 27, Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, page 317.
[44] RLA 28, Yearbook of the International Law Commission, 1999, documents of the fifty-first session, paragraph 333.
[45] CLA01.

of capital to a contracting party for the same purpose, in accordance with this Agreement".

166. By the ordinary meaning of the text of Article 1(4), the OIC Agreement requires that the "*assets*" be "*owned by a contracting party to this Agreement or by its nationals, whether a natural person or a corporate body...*" The Claimant submits that nothing in the OIC Agreement - in Article 1(4), Article 1(5), or elsewhere - requires the natural person *directly* to own the capital or to hold title in his own name. According to the Claimant, this reading is consistent with every investment tribunal's answer to the question of whether indirect investments are protected[46], as well as with the vast majority of legal commentaries on the subject[47].

167. According to the Claimant the decided practice of arbitral tribunals is to construe the definitions of "*capital*" and "*investments*" broadly to include indirect investments - e.g. where the owner of an investment invests through an interposed company[48]. The Claimant submits that by the ordinary meaning of the text of the OIC Agreement, as well as the practice of arbitral tribunals, the Claimant has a qualifying investment under the OIC Agreement.

(ii) The Claimant Qualifies as an Investor within the Meaning of the OIC Agreement.

168. According to the Claimant, he made an "*investment*" within the meaning of the OIC Agreement when he invested indirectly through FGAH. The Claimant submits that the Respondent's circular rebuttal that the Claimant must first *"meet the definition of investor"* before showing that the "*investment is covered by the OIC Agreement"* is illogical because the definition of "*investor*" in Article 1(6) relies upon the definitions of "*capital*" and "*investment*" in Articles 1(4) and 1(5), respectively.

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[46] CLA259 ("*The assertion that a claimant lacks standing because an investment is only an indirect investment has been made numerous times, but never with any success.*" *See also* CLA131 ¶¶ 136-37; CLA132 ¶¶ 123-24.

[47] *See, e.g.* CLA183 at 65; CLA184 p. 475; CLA185 at 66-101.

[48] *See* Reply and Defence to Counterclaim, ¶ 25.

169. The Claimant submits that the definition of investor in the OIC Agreement, Article 1(6) is "*the Government of any contracting party or natural corporate person, who is a national of a contracting party and who owns the capital and invests it in the territory of another contracting party.*" According to the Claimant he meets the criteria for an "*investor*" within the meaning of the OIC Agreement.

(a) The Claimant is a National of a Contracting Party.

170. The Claimant was born in Cairo, Egypt and became a Saudi citizen on 15 December 1985. Saudi Arabia signed the OIC Agreement on 23 September 1983 and ratified it on 17 September 1984[49]. The Respondent does not, and cannot, dispute that the Claimant is a National of a Contracting Party.

(b) The Claimant "*Owns the Capital*" and "*Invests it in the Territory*" of Indonesia, a Contracting Party.

171. Article 1(4)'s definition of "*capital*" is broad and includes "*all assets ... owned by a contracting party to this Agreement or its nationals . . . and shall include the net profits accruing from such assets and the undivided shares and intangible rights.*" The Claimant submits that "*distinct legal personality*" is not the applicable test for whether indirect ownership of assets is covered by the OIC Agreement. Rather, the well-settled principle that "indirect investment" is protected by contemporary investment treaties instructs the analysis, as well as the longstanding practice of arbitral tribunals. The Claimant is an "*investor*" within the meaning of the OIC Agreement. The Claimant claims that he has demonstrated that he "*owns the capital*" in Bank Century through his 100 per cent legal ownership of FGAH First Gulf Asia Holdings, as well as his ownership of shares through his personal shareholding through ABN Amro.

[49] The Claimant's Statement of Claim, ¶ 265.

(iii) The Claimant's Investment is not entitled to the protections afforded by the OIC Agreement

172. The Respondent argues that the Claimant should be denied the protections afforded to investors by the OIC Agreement, as a result of his alleged failure to comply with Article 9 which requires him to "*refrain 'from trying to achieve gains through unlawful means'*"[50] and as a result of his "*unclean hands*"[51]. The Claimant has reiterated in his Second Witness Statement[52], that he has not committed any illegal acts, either in relation to his investment, or at all, and the findings of the Jakarta Criminal Court in this regard cannot be regarded as just or reliable by this Tribunal.

173. The Claimant also refers to the First and Second Witness Statements of Mr. Pallett in which he confirms that the Attorney General's investigation was tainted by an attempt by the Attorney General's office to extract a bribe, via the medium of Indra, Sahnun & Lubis, S.H. & Associates ("**Indra Sahnun & Lubis**"), from the Claimant and Mr. Rizvi, in exchange for which the criminal charges would be dropped.

174. According to the Claimant, it was this unsuccessful bribery attempt, together with the media witch-hunt to which the Claimant was subjected by the Respondent and the threat of the death penalty that prevented the Claimant and Mr. Rizvi from appearing at their trial. As the Claimant explains, "*[h]ad there been a system of justice in Indonesia that was not tainted by corruption and political influence, I would have had the chance to rebut the outrageous allegations made against me. But in reality, neither I nor Mr Rizvi stood a chance of having a fair hearing in Indonesia*"[53]. He and Mr. Rizvi were ultimately convicted *in absentia* without ever having had the opportunity properly to defend themselves.

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[50] The Respondent's Defence and Counterclaim, ¶ 54.
[51] *Ibid.*, ¶¶ 64-70.
[52] Second Witness Statement of Hesham Talaat M. al-Warraq, 11 November 2013, ¶¶ 11, 12.
[53] Second Witness Statement of Hesham Talaat M. al-Warraq, ¶ 12.

175. It is the Claimant's submission, based on Mr. Rizvi's First Witness Statement, that none of the charges against the Claimant and Mr. Rizvi withstand the slightest scrutiny[54]. The Claimant submits that the Jakarta Central District Criminal Court's verdict was manifestly unjust on the basis of the evidence before it and indicative of a predetermination on the part of the judges. The reality, which must have been apparent to all the Respondent's agencies concerned, is that the Claimant and Mr. Rizvi were victims, not perpetrators. The real loss to Bank Century was caused by the Respondent's central bank's negligent failures, in respect of its own supervisory obligations and Mr. Tantular's fraudulent activities.

176. The Claimant submits that, in the circumstances, neither Article 9 of the OIC Agreement, nor the clean hands doctrine is relevant and, contrary to the Respondent's contention, the Claimant's claims are therefore admissible.

2. THE CLAIMANT'S RIGHTS UNDER ARTICLE 10 OF THE OIC AGREEMENT

A. The Claimant's contentions

(i) The Respondent violated Article 14(2) of the ICCPR when it prejudged the Claimant's guilt

177. The Claimant argues that by virtue of Article 31.3(c) of the Vienna Convention on the Law of Treaties ("**VCLT**"), the basic rights and guarantees accorded to the Claimant by virtue of Article 10.1 of the OIC Agreement must be interpreted to include basic international law norms and rights. By virtue of its obligation under Article 10.1 of the OIC Agreement to abstain from undertaking any measures that directly or indirectly deprive the Claimant of his "basic rights", the Respondent was duty bound to respect the Claimant's right to be presumed innocent[55], when it decided to:

1) attribute the alleged "State loss" to the Claimant and his business partner;

[54] Witness Statement of Rafat Ali Rizvi, 3 December 2012, ¶¶ 51, 103 and 108-109.
[55] Final Hearing, Transcript, Day 1, Monday 10 March 2014, p 202 lines 8-203

2) subject the Claimant and his business partner to criminal proceedings with the objective of depriving them of their property through asset forfeiture and/or criminal fines; and,

3) pursue the Claimant's assets and those of his business partner through the application of the mechanisms for mutual legal assistance in criminal matters.

178. The Claimant submits that it is inherent in the "basic rights" envisaged by Article 10.1 of the OIC Agreement, that any of these measures must be taken with due respect for the Claimant's right to be treated in accordance with the fair trial principles, including the right to be presumed innocent. The right to be presumed innocent until proved guilty is a principle that conditions the treatment to which an accused person is subjected throughout the period of criminal investigations and trial proceedings, up to and including the end of the final appeal. Article 14(2) of the ICCPR provides that *"everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*[56]

179. The UN Human Rights Committee, the body that supervises compliance with the ICCPR, made that clear in its General Comment 13 of 1984[57]:

> *"No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial".*

180. The Claimant submits that according to the jurisprudence of the various international human rights bodies, the presumption of innocence is violated whenever public authorities or representatives of government make public

[56] CLA254.
[57] CLA226.

statements, which prejudge the outcome of particular criminal proceedings. As the Inter-American Court of Human Rights ("**IACHR**") stated[58]:

> *"The right to presumption of innocence ... requires that the State should not convict an individual informally or emit an opinion in public that contributes to forming public opinion, while the criminal responsibility of that individual has not been proved."*[59]

181. The IACHR has also held that the police's public exhibition of a suspect as the perpetrator of a crime constituted a violation of that right[60]. The European Court of Human Rights ("**ECHR**"), applying Article 6(2) of the European Convention on Human Rights[61], held that statements made by a minister of interior holding up a suspect as an instigator of a murder constituted a violation of the right to the presumption of innocence[62]. The ECHR has also held it to be a violation for a speaker of parliament to make statements amounting to declarations of a suspect's guilt[63] and for a minister of the interior, in a magazine interview, to make statements leaving the public with the impression that the suspect was part of a criminal organization[64]. Likewise, the African Commission on Human and People's Rights, applying Article 7(1)(b) of the African Charter on Human and People's Rights[65], has found it to be a violation of the right for government representatives, including a state military administrator and a special adviser to the president, publicly to pronounce suspects guilty before and during trial[66], and for government representatives to organise media campaigns declaring suspects guilty.[67]

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[58] CLA264 American Convention on Human Rights, art 8(2) ("Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proved according to law.")
[59] CLA218
[60] CLA218
[61] *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".*
[62] CLA220
[63] CLA220
[64] CLA221
[65] RLA70, *"Every individual shall have .... The right to be presumed innocent until proved guilty by a competent court of tribunal."*
[66] CLA223
[67] CLA224 and CLA225

182. This jurisprudence stems from the fact that the presumption of innocence is one of the most established fundamental rights of individuals recognised by customary international law. The Universal Declaration of Human Rights of 1948, states in its Article 11 that:

> *"[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law".*[68]

183. As stated by the Human Rights Committee, this duty to refrain from prejudging a trial applies to all public officials, including and especially public prosecutors and other law enforcement authorities[69]. The need for strong, independent and impartial prosecutorial authorities for the effective maintenance of the rule of law and human rights standards cannot be sufficiently emphasized. So much so, that according to Paragraph 12 of the United Nations' Guidelines on the Role of Prosecutors (1990)[70],

> *"[p]rosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."*

184. In this light, the Claimant submits that by making adverse public comments about him, the Respondent failed to respect his right to be presumed innocent and has therefore acted in violation of the basic rights under Article 10.1 of the OIC Agreement. Specifically, the Claimant submits that his right to be presumed innocent was compromised by the conduct and publicly expressed views of Indonesian public officials as for instance in:

> Jakarta Globe 8 January 2010: Deputy Attorney General Marwan Effendy: *"We have learned that Hesham alone took Rp 3 trillion. We're ready [to*

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[68] See the Universal Declaration of Human Rights (UN 1948), available at: http://daccessddsny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement (last accessed 7 June 2014)
[69] Final Hearing, Transcript, Day 1, 10 March 2014, p. 203 lines 9-20
[70] CLA265

go to court] but we still need official loss estimates from state auditors and the money laundering charge provided by the police," ... "Once they finish their job, the case is ready for trial. We hope it will happen this month."[71]

185. According to the Claimant there is nothing wrong with the Deputy Attorney General stating that he suspects the Claimant of having stolen the said amount. Nor is there anything wrong in saying that Claimant has been charged with such a crime. However, it was wrong of Deputy Attorney General Marwan Effendy publicly to declare that the Claimant actually stole Rp 3 trillion. That is prejudicial to the Claimant and a clear violation of the Claimant's Article 10.1 basic right to be presumed innocent.

186. A few weeks later, Deputy Attorney General Marwan Effendy trampled again on the Claimant's right to be presumed innocent when as reported in the press:

> Jakarta Globe 21 January 2010: Deputy Attorney General Marwan Effendy: *"Their case will be handed to the Central Jakarta Prosecutor's Office because we have concluded the investigation," ... "Hesham and Rafat have inflicted state losses of Rp 3.115 trillion [$336 million]."*[72]

187. Again, the affirmative way in which Deputy Attorney General Marwan Effendy chose to convey his view in this matter is reflective of the lack of respect afforded to Mr. al- Warraq's fundamental right to be presumed innocent until proven guilty.

188. It is clear therefore that the Respondent's behaviour in this case violated the Claimant's right to be presumed innocent. That behavior is incompatible with the obligations that the Respondent was required to observe in relation to the Claimant under the OIC Agreement and under general international law.

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[71] C171
[72] C172

(ii) The Claimant's right to a fair trial under Article 14 of the ICCPR is further violated in light of the Respondent's nefarious motive for his prosecution and conviction

(a) Improper objective of the AGO

189. The Claimant claims that the criminal proceedings against him were unfair and contrary to the most fundamental elementary procedural guarantees. It has always been the Claimant's contention that the criminal proceedings against him were not based on genuine law enforcement motives, but were designed to pursue his assets and those of his business partner in an attempt to mitigate the public outcry about the unlawful bailout of Bank Century. The Claimant submits that all the evidence shows that from the outset the only motive behind his prosecution, including the selection of the charges and the use of the mechanisms for mutual legal assistance in criminal matters, was the Respondent's desire to pursue assets. The Respondent's pursuit of the Claimant in satisfaction of this nefarious motive contravenes the OIC Agreement.

190. The Respondent's true motive for its pursuit of the Claimant and Mr. Rizvi is explained in details in an article that appeared in the Jakarta Globe on 8 January 2010:

> ***"Indonesian AGO Eager to Try Century Suspects as It Pursues Stolen Wealth***
>
> *Eager to reclaim hundreds of millions of dollars of cash collateral allegedly stolen and stashed in Swiss bank accounts, the Attorney General's Office is pushing for the speedy trial of Hesham al Warraq and Ravat Ali Rizvi, the majority shareholders of the failed PT Bank Century, who are currently graft suspects, a spokesman said on Friday. "Our Priority now is to have this case tried in court, as soon as possible. Swiss authorities require us to provide a court decision on this case," AGO spokesman Didiek Darmanto said. Hesham and Ravat, who have fled abroad, are charged with embezzling assets worth trillions of rupiah from Bank Century, which received a Rp 6.7 trillion ($710 million) government bailout after it was taken over by the Deposit Insurance Agency (LPS) in*

November 2008. Prosecutors have pledged to seek a trial in absentia for both men later this month, but Didiek would not provide the date. "We are waiting for the estimated state losses from officials at the Supreme Audit Agency and the case files from police. Those documents will be combined with a request for a trial in absentia," Didiek said. Marwan Effendy, the AGO's deputy for special crimes, said earlier this week that prosecutors were determined to bring the case to court before the end of the month. "We have learned that Hesham alone took Rp 3 trillion. We're ready [to go to court] but we still need official loss estimates from state auditors and the money laundering charge provided by the police," Marwan said. "Once they finish their job, the case is ready for trial. We hope it will happen this month."

The AGO said earlier it had contacted authorities in Switzerland and Hong Kong to seek assistance in retrieving stolen assets worth more than $1 billion allegedly embezzled by the two suspects. A joint team of officials from various state agencies has asked the Swiss authorities to help return cash collateral worth $220 million held at Dresdner Bank of Switzerland, and has sought help from authorities in Hong Kong to trace and seize assets belonging to Hesham and Ravat.

The two are alleged to have stashed $650 million in stolen Bank Century assets in Standard Chartered Bank and another $388.8 million in ING Bank in Hong Kong.

The joint team, led by Finance Minister Sri Mulyani Indrawati, includes officials from the AGO, the National Police, the Financial Transaction Report and Analysis Center (PPATK), the central bank, the Capital Market and Financial Institutions Supervisory Agency (Bapepam), the Ministry of Justice, the Ministry of Finance and the new management of Bank Century, which has been renamed PT Bank Mutiara. Heru Andriyanto"[73].

[73] C171.

191. The Claimant submits that the bluntness and candour displayed by the AGO in this article reveals the Respondent's true motive behind the criminal proceedings against the Claimant, explains why certain charges were selected and why the Respondent was equally selective in its use of international conventions.

(b) THE ENDORSEMENT OF THE IMPROPER MOTIVE BY THE JAKARTA DISTRICT COURT FURTHER VIOLATED THE CLAIMANT'S MINIMUM GUARANTEE TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY.

192. According to the Claimant this is consistent with the approach adopted by the Jakarta District Criminal Court in its Interlocutory Judgment of 10 June 2010, when it took the decision to proceed with the trial *in absentia*[74]. It is clear from the following considerations listed in the Interlocutory Judgment that the Court was also of the view that the objective of the criminal proceedings was the confiscation of the Claimant's and Mr. Rizvi's assets:

> *"Taking into account, whereas under Chapter IV (Articles 43 through Article) Such referred UN convention contains international cooperation, extradition, transfer of people who have been pronounced, legal assistance cooperation, the delivery of for punishment, law enforcement cooperation, the delivery for punishment, law enforcement cooperation, joint investigations, special investigation techniques, and Chapter V (Article 51-Article 59) is a partnership with comprehensive approach in dealing with corruption involving two or more countries, including involving foreign nationals on the procedure to track down and confiscate and return the corruption assets of a state while the he/she take benefit at the state's victim...Taking into account, whereas Indonesia is one state that joined the UN Convention of 2003 on UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC) is the consequence that national laws and rights owed by Indonesia as a state party to the UN-protected so that wherever and wherever corruptor run away and hide its assets it can be tracked and their property confiscated"*[75].

[74] Exhibit DMF1, Tab 57a (Indonesian); Exhibit DMF1, Tab 57b (English)
[75] *Id*; p. 99, second paragraph

193. This confirms that the objective of the criminal proceedings against the Claimant was to obtain a judgment that would enable Indonesia to trace and seize the Claimant's assets. Pursuing his assets – as opposed to the ends of justice – has always been seen by the Indonesian authorities as the means to recover the state's alleged losses that resulted from the unlawful decision to bail out Bank Century. Alleging that the Claimant committed a crime and going after his assets was thus a convenient way to manage the political scandal that erupted over the misuse of the Respondent's taxpayers' money when Bank Century was bailed out[76].

(c) Corroboration by the Respondent's counsel

194. The Claimant submits that it is in evidence in the proceedings that the Respondent made an extradition request to Saudi Arabia on 29 October 2009[77] based on the United Nations Convention on Transitional Crime ("**UNTOC**")[78][79]. It is also in evidence that the Respondent is not committed to the pursuit of its extradition request and has not seriously pursued the Claimant's extradition.

195. The Claimant claims that the Respondent has consistently used the available international mechanisms in a very selective way, motivated as it is with only the seizure of the Claimant's assets. The dismissiveness of fundamental rights displayed in the above exchanges reflects the fact that the Respondent requested the Claimant's extradition while knowing all the time that its intention was to try the Claimant *in absentia*. As a matter of fact, according to the Jakarta Globe article of 8 January 2010, within a very short period after the extradition request, the AGO was already quoted as saying that "*[p]rosecutors have pledged to seek a trial in absentia for both men later this month, but Didiek would not provide the date.*"[80]

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[76] C188
[77] C177
[78] CLA252
[79] *Id*; Article 16, Section 4 UNTOC prescribes that if a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the convention the legal basis for extradition in respect of any offence to which this article applies.
[80] C171

196. The Claimant submits that the Respondent has never considered the Claimant's extradition necessary or relevant because the Respondent's objective throughout was to obtain his conviction *in absentia* in order to pursue his assets through the mechanisms for mutual assistance in criminal matters.

(d) "Intelligent" charges

197. The Claimant claims that despite charging him with corruption and money laundering, it has never been contended nor suggested by the AGO that there had been any payments to state officials[81] or payments made to procure advantages to the Claimant or Mr. Rizvi or any third party[82]. Similarly, it has nowhere been suggested that the Claimant acquired securities with criminal proceeds[83]. To understand why these charges were selected, one must refer back

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[81] CLA253, *UNCAC, Article 15. Bribery of national public officials:*
"Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official
himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official
himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties"

[82] *Id.*, UNCAC, Article 21. Bribery in the private sector:
"Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as
criminal offences, when committed intentionally in the course of economic, financial or commercial activities:
(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting; (b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting."

[83] *Id.*, UNCAC Article 23. Laundering of proceeds of crime:
"1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and
other measures as may be necessary to establish as criminal offences, when committed intentionally:
(a)(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of
concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
(b) Subject to the basic concepts of its legal system:

to the fact that the charges and the use of the mechanisms for mutual legal assistance in criminal matters were motivated by the Respondent's sole objective of retrieving assets. According to the Claimant, this was the most effective way for the Respondent to:

1) try the Claimant *in absentia* under a special Indonesian anti-corruption law;

2) prevent the Claimant from being represented by counsel during his trial *in absentia* pursuant to Indonesian Supreme Court Circular No. 6 of 1988 ("**SEMA 6/1988**");

3) exclude the Claimant from the right to appeal under the same SEMA 6/1988, once convicted *in absentia* for corruption, unless he appears in person;

4) likewise, exclude the Claimant from the right to file a petition for judicial review unless he appears in person under the same SEMA 6/1988, including under the modification introduced by Supreme Court Circular No. 1 of 2012 ("**SEMA 1/2012**"); and therefore,

5) use the corruption conviction so obtained as the basis to trace and seize the Claimant's assets worldwide pursuant to the United Nations Convention Against Corruption (the "**UNCAC**") and the UNTOC[84].

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. For purposes of implementing or applying ¶ 1 of this article:
(a) Each State Party shall seek to apply ¶ 1 of this article to the widest range of predicate offences;
(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences
established in accordance with this Convention; (...)".

[84] *Id.* UNCAC Article 23.2(c):

"*For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a*

198. The Claimant states that, as soon as the conviction was obtained, the Attorney General was quoted as confirming the sole objective of the criminal proceedings against the Claimant. Jakarta Globe on 17 December 2010 stated that:

> *"The guilty verdict against two foreign co-owners of Bank Century has provided the Attorney General's Office with the means to recover their stolen assets from overseas banks, the attorney general said on Friday. .... "We will inform authorities in Hong Kong about the verdict so that they can continue with the process of asset recovery," Attorney General Basrief Arief told reporters in Jakarta."*[85] 142

199. Unless one overlooks the fact that the Respondent's objective throughout has been to dispossess the Claimant of his assets, the Respondent's reliance on the UNTOC seems remarkable, if not erroneous.

200. To start with, the facts of the case do not meet the threshold test for the application of the UNTOC. According to UNTOC Article 2(a), "'*organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.*" Despite invoking the UNTOC, the Respondent never alleged, nor provided evidence, that the Claimant was part of "*a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences.*" However, it was convenient for the Respondent to invoke this convention on account of its provisions concerning confiscation and seizure of assets.

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criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there; (.....)".

[85] C189

201. Furthermore, the Claimant submits that the charges of corruption and money laundering were chosen by the AGO and endorsed by the Jakarta District Criminal Court because these charges meant that a conviction *in absentia* could be obtained, which was *de facto* non-appealable, and which could be relied upon to seize the Claimant's assets worldwide. The Respondent's measures, seen cumulatively and in light of their effect on the Claimant, do not pass the test of being *bona fide*.

(iii) The Respondent deprived the Claimant of his basic rights in the manner in which it conducted its criminal investigation of the Claimant

(a) Failure to inform the Claimant

202. The Claimant submits that it is a basic right of any individual to be informed properly and in a timely fashion of the nature and cause of the charges against him. The Respondent has failed to respect this basic right. In these circumstances it is impossible to conclude that criminal proceedings against the Claimant were compliant with the Respondent's obligations under Article 10.1 of the OIC Agreement, as interpreted in accordance with principle of systemic integration articulated in Article 31.3(c) of the VCLT.

203. The principle of systemic integration requires the Tribunal to take Article 14(3)(a) ICCPR and other governing norms of international law into account when interpreting and applying Article 10.1 of the OIC Agreement. Article 14(3)(a) of the ICCPR provides in this respect that, in the determination of any criminal charge against him, everyone shall be entitled "*to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.*" According to the Human Rights Committee, the right to be informed in Article 14(3)(a) "*applies to all cases of criminal charges, including those of persons not in detention,*" and the term "*'promptly' requires that information is given in the manner described as soon as the charge is first made by a competent authority*"[86]. The Committee made it clear that "*this right must*

[86] CLA 226, p. 124, ¶ 8; emphasis added

arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based"[87].

204. In the view of the Committee, the duty to inform also means that "*detailed information about the charges against the accused must not be provided immediately upon arrest, but with the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused*"[88].

205. Although according to evidence tendered by the Respondent, examination of a suspect is mandatory under Indonesian law[89], it is in evidence that the Claimant was never examined by either the Indonesian police or the AGO. Having regard to the nature and purpose of the OIC Agreement (i.e. to promote foreign investment), it was all the more important to respect the Claimant's basic rights, as required by its Article 10.1. The Respondent was obliged to take reasonable steps to ensure that the Claimant was properly and in a timely manner informed that he was the subject of a criminal investigation and why. Foreign investors are unlikely to reside in the host state. As a consequence, the good faith principle inherent in the *pacta sunt servanda* principle[90] that must be complied with in the application of Article 10.1 of the OIC Agreement demands that in such situations the host state employs the existing mechanisms for international mutual legal assistance. In fact, Article 14(3)(a) ICCPR –which must be taken into account in the interpretation of the OIC Agreement – recognizes that trials *in absentia* pose special problems in regard to the duty to inform, which must be addressed by the prosecuting state. According to the Human Rights Committee, special

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[87] *Id.*
[88] CLA267 Communication No. R.14/63, *R. S. Antonaccio v. Uruguay* (Views adopted on 28 October 1981), UN doc. *GAOR*, A/37/40, p. 120, ¶ 20 as compared with p. 119, ¶ 16.2
[89] R40, ¶ 13
[90] RLA2, Article 26: "*Pacta sunt servanda* - Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

precautions are required in this respect: "*the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him*" under article 14(3)(a). There are "*certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused*"[91] but it is clear that Indonesia did not come close to reaching those limits in the way it treated the Claimant.

206. The Claimant submits that the Respondent failed to take the required special precautions needed to inform the Claimant of the fact that he was being investigated[92]. The Respondent cannot justify this failure on the basis that it would have been required to undertake excessive measures, since the Respondent relied upon that convention to seek the freezing of the Claimant's assets in Hong Kong153 and that convention also applies in its relations with Saudi Arabia. The UNTOC contains a prescribed mechanism for the delivery of judicial documents and was thus available to ensure that the Claimant was duly informed of the fact that he was being investigated. Under Article 18 UNTOC (and 46(3)(b) UNCAC), Saudi Arabia undertook to afford other convention parties - including the Respondent - the widest possible mutual assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention[93]. However, despite the availability of a mechanism that would have enabled the Respondent properly and in a timely manner to inform the Claimant of the investigation, the Respondent opted not to undertake the effort to honour the Claimant's basic right in this regard.

(b) Failure to hear the Claimant

207. The Claimant claims that in addition to failing to inform him about the investigation, the Respondent conducted and concluded the whole investigation without ever hearing or taking a statement from him[94].

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[91] CLA268 Communication No. 16/1977, *D. Monguya Mbenge v. Zaire* (Views adopted on 25 March 1983), UN doc. *GAOR*, A/38/40, p. 138, ¶¶ 14.1-14.2
[92] Transcript, Day 7, 18 March 2014, p. 70 (line 22) – p. 73 (line 10)
[93] CLA252, UNTOC, Article 18.1
[94] Transcript, Day 7, 18 March 2014, p. 70 (line 19) – p. 73 (line 10).

208. The Claimant further submits that according to UNTOC Article 18(3)(a) and UNCAC Article 46(3)(a), mutual assistance to be afforded under the convention may be requested for the purpose of "*[t]aking of evidence or statements from persons.*" In other words, under the UNTOC it was possible for the Respondent to request that the authorities of Saudi Arabia interrogate the Claimant or even allow investigators of the Respondent to go to Riyadh to hear him and take a statement from him. Nevertheless, despite this possibility the Respondent opted not to invoke the relevant provisions in the UNTOC or the UNCAC. Clearly, there was no excuse for the authorities of the Respondent to prejudice the rights of the Claimant in such an unfair way.

(e) Failure to dispel doubts about the integrity of the investigations

209. The Claimant submits that the Respondent's failure to dispel doubts about the integrity of the investigations lends further support to the view that the Claimant's basic rights were of less concern to the Respondent than the pursuit of its stated aim to recover state losses. The Claimant also submits that the fact that the Respondent's inaction with regard to the complaints of corruption made by the Claimant against those involved in two separate ostensive corruption attempts renders the Respondent's conduct a violation of the Claimant's basic rights. The criminal prosecution of the Claimant cannot be considered compliant with the Claimant's basic rights so long as the improprieties in the investigation and his subsequent prosecution remain unaddressed. The Claimant claims that letters outlining the bribery attempts were sent to;

1) the Attorney General,
2) the Central Jakarta District Court
3) the panel of judges hearing the case; and
4) the Special Task Force on Judicial Corruption

210. With the exception of a short letter of acknowledgement from the Task Force, these letters remain without any response to date. The Claimant argues that

without these unanswered letters and complaints, this Tribunal would have been right to dismiss the argument of corruption.

211. The Claimant submits that in the present case, the Claimant sought redress in the way just described, but to no avail. He had to wait until the Final Hearing in March 2014 to hear any explanation that could have alleviated his concerns regarding the integrity of the investigations against him.

212. The Claimant also argues that the nature of the Respondent's breach in this regard is all the more egregious, because the UNCAC restricts the signatories' discretion in matters of investigation and prosecution of corruption allegations:

"Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences"[95].

(iv) The Respondent deprived the Claimant of his basic rights, when it failed properly to summon him to attend the criminal trial

(a) Selective use of the available mechanisms for mutual legal assistance

213. The Claimant submits that he never received any of the summonses at the material time. He denies having done so and the Respondent has never produced a copy of any receipt or acknowledgement from him. Given that, as stated in the Interlocutory Judgment of the Central Jakarta District Court, the Respondent's objective was to confiscate the Claimant's and Mr. Rizvi's assets and it was less concerned with their imprisonment, the Respondent avoided using the prescribed procedures under the governing international treaties that would have ensured delivery of the summonses to the Claimant.

[95] CLA253 Article 30(3)

214. According to the Jakarta District Criminal Court, international criminal law is one of the governing sources of law in the criminal proceedings against the Claimant: Taking into account, whereas as both the Defendant are under foreign citizen status and both the Defendants are also currently believed to be abroad, and their assets located in foreign countries as well, then the offenses charged by the Public Prosecutor has been passed jurisdiction boundaries of Indonesia, then in this case the panel of judges instead of considering provisions of national criminal law will also consider the provision of international criminal law on Corruption Crime and Money Laundering which has been ratified by the Government of Indonesia[96].

215. The Jakarta District Criminal Court identified the relevant treaty as being the UNCAC: *"Taking into account, whereas Indonesia is one state that joined the UN Convention of 2003 on UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC) is the consequence that national laws and rights owed by Indonesia as a state party to the UN-protected so that wherever and wherever corruptor run away and hide its assets it can be tracked and their property confiscated*[97]*."*

216. Moreover, in its request for mutual assistance to Hong Kong, Indonesia relied on the UNTOC. In the second paragraph of the cover letter dated 29 October 2010 accompanying its Second Mutual Legal Assistance Request[98], the Respondent states that the request is, *inter alia*, "based on United Nations Convention against Transnational Organized Crimes."

217. Thus, according to the Indonesian judiciary and the executive branch, the UNCAC and the UNTOC are engaged in respect of the criminal proceedings against the Claimant. The UNCAC and the UNTOC apply to Hong Kong by reason of P.R. China's ratification[99]. It appears, however, that the Indonesian

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[96] DMF1 Tab 57b

[97] *Id.* ¶ 99, second paragraph.

[98] C52

[99] The United Kingdom signed the UNCAC on 9 December 2003 and ratified the same on 9 February 2006. For Saudi Arabia these dates are 9 January 2004 and 29 April 2013 respectively. Saudi Arabia signed the UNTOC on 12 December 2000 and ratified it on 18 January 2005. The UNTOC was signed by the UK on 14 December 2000 and ratified on 9 February 2006. On the status of these convention in Hong Kong, see:

authorities chose to observe these conventions only when that was convenient to pursue the assets of the Claimant, but not when that would have ensured the respect of the Claimant's fundamental rights.

(b) The Respondent failed to follow the UNCAC and UNTOC procedures that it invoked to prosecute the Claimant

218. The Claimant submits that The Jakarta District Criminal Court would not have approved of the summonses had it properly considered Articles 18.1 UNTOC and 46(3)(b) UNCAC. Under these provisions, the countries relevant to the proceedings against the Claimant (Hong Kong, Indonesia, Saudi Arabia, Switzerland, Mauritius and the UK) undertook to afford each other the widest possible mutual assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the convention. Article 18, Section 3 (b) UNTOC and its equivalent in the UNCAC specify that one of the purposes for which mutual assistance may be requested is "effecting service of judicial documents."

219. Article 18.7 UNTOC also states that unless another treaty prevails, the procedures and conditions for mutual assistance set forth in that article are mandatory. Therefore, the treaties cited by the Jakarta District Criminal Court establish a mandatory default regime that applies to the service of judicial documents, which the Court should have considered before approving a trial *in absentia*.

220. The Claimant also submits that by acceding to the UNTOC and the UNCAC, and by invoking them in its request for extradition or prosecution of the Claimant, the Respondent accepted that, in order for a summons to trial to be legally valid, that summons would have to be processed according to the procedures prescribed in them.

Margaret K. Lewis, China's Implementation of the United Nations Convention against Transnational Organized Crime, 2 Asian Journal of Criminology (2007), 179; Daniel Chow, The Interplay between China's anti-Bribery Laws and the Foreign Corrupt Practices Act, 73 Ohio St. LJ 73 (2012), 1015.

221. Furthermore, the UNTOC and the UNCAC establish a special mechanism for channeling requests for the service of judicial documents in order to ensure authenticity, accuracy, and efficiency of service. These mechanisms require each treaty party to designate a central authority that shall have the responsibility and power to receive requests for mutual assistance; either to execute them or to transmit them to the competent authorities for execution. They specifically stipulate that *"[c]entral authorities shall ensure the speedy and proper execution of or transmission of the requests received"*.

222. The Respondent invoked the UNTOC and the UNCAC (i) to seek extradition of the Claimant from Saudi Arabia, or alternatively to allow for Saudi Arabia to prosecute the Claimant; (ii) to request mutual assistance from Hong Kong; and (iii) to prosecute the Claimant. However, those same conventions provide a mandatory mechanism to ensure that proper notice of proceedings is given, which mechanism has not been observed by the Respondent. Despite the availability of a mandatory procedure that would have ensured proper service of process, this avenue was completely ignored by the Respondent.

223. The Respondent's invocation of these conventions against the Claimant, and its subsequent failure to abide by the obligations contained therein, amount to a violation of the Claimant's basic rights under domestic law (Law No. 12 of 2005), under ICCPR Article 14(3)(a) and under Article 10(1) of the OIC Agreement.

224. Furthermore, the Respondent's invocation of the UNTOC and the UNCAC - in order to seek the Claimant's extradition, to seize the Claimant's assets, and to prosecute him – combined with its subsequent failure to adhere to mandatory procedures in those same treaties in respect of service of the Court summonses - violates general principles of international law. The Respondent should not be permitted to resile from its obligations under the UNTOC and the UNCAC, having invoked them to its own benefit. The Respondent's conduct violates general principles of law recognized by civilized nations[100], or the general

[100] See ICJ Statute 38(1)(c), available at http://www.icj cij.org/documents/index.php?p1=4&p2=2&p3=0& (last accessed 24 April 2014) (authorizing the ICJ to apply, in addition to treaties and custom, the "general

principle of law on estoppel, namely that "a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another."[101]

(c) The Respondent's failure to use customary practices also violates international law

225. The Claimant submits that customary international practice dictates that service of the court summonses on the Claimant should have been processed in compliance with the provisions and practices of international law relating to letters rogatory.

226. A letter rogatory, or letter of request, is a formal request from a court to a foreign court for some type of judicial assistance. The most common remedies sought by letters rogatory are service of process and the taking of evidence. In many instances, letters rogatory cannot be transmitted directly between the applicable courts and must be transmitted via consular or diplomatic channels. International doctrine on letters rogatory has been codified in international conventions.

227. The Claimant submits that in the present case, there is no evidence that the investigation summonses or the summonses for the Claimant to attend trial were processed in compliance with customary international law. The facts show that the summonses were sent to several addresses (including the Claimant's office address and various embassies or consulates) and advertised in the mass media – all of which are insufficient under customary international law.

(d) The Respondent failed to verify the delivery of the summonses

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principles of law recognised by civilised nations."); CLA284 Nuclear Tests Case, (Australia v France) (Judgment) (1974) ICJ Rep. 253 at 268.

[101] CLA283 Bin Cheng, General Principles of Law As Applied by International Courts and Tribunals (Cambridge 1953, 2006) 141-49 (and cases cited therein).

228. The Claimant submits that the manner in which the Respondent dealt with service of the summonses cannot be reconciled in any way with ICCPR 14(3)(a) and therefore violates the Claimant's "basic rights" under OIC Article 10.1.

229. The Claimant submits that he AGO was not concerned with the question of whether the Claimant had, in fact, received any of the summonses. When this is considered in conjunction with the fact that a Red Notice, as opposed to a Blue Notice, was requested by the Respondent and obtained from INTERPOL, it becomes abundantly clear that the Respondent failed to use the available mechanisms to ensure that it would have the Claimant's residential address for the purpose of service of the summonses.

230. According to Article 88 (1) of INTERPOL's Rules for the Processing of Data *"Blue notices are published in order to: (a) obtain information on a person of interest in a criminal investigation, and/or (b) locate a person of interest in a criminal investigation, and/or (c) identify a person of interest in a criminal investigation."* Thus if the Respondent really wanted to ascertain the Claimant's residential address, rather than engaging in pro forma operations, it should have asked INTERPOL to issue a Blue Notice in order to locate the Claimant and establish with accuracy his residential address, in order that he be properly and effectively served.

(v) The Respondent's trial in absentia of the Claimant violated its own domestic law, and deprived the Claimant of his basic rights, inter alia, his right "to be tried in his presence and to defend himself in person or his counsel of his own choosing" and to his "conviction and sentence to be reviewed by a higher tribunal according to law"

(a) Lack of jurisdiction to try the Claimant in absentia

231. The Claimant submits that an *aut dedere aut judicare* clause excludes the competence of a treaty party to try an alleged offender in absentia for the offence covered by the relevant treaty. Indeed, it is only where the accused is present in a state that the obligation to exercise universal jurisdiction is invoked, because only then does the state have the requisite "capacity" to take preventative action.

The requirement for the presence of the accused is sensible for practical, as well as legal, reasons. Without such a condition there would be no point in having an obligation either to extradite or to prosecute in a multilateral convention; a simple extradition provision would suffice to enforce those convicted in absentia. But if the requested state is required either to extradite or to prosecute, then the requesting state's jurisdiction will depend on a positive response to an extradition request. Absent that, the only thing it can demand is that the requested state abides by the obligation to prosecute. Stated differently, trials in absentia and the obligation either to extradite or to prosecute are mutually exclusive. Accordingly, the Respondent lacked the jurisdiction to try the Claimant in absentia.

232. This conclusion is reinforced by the Respondent's own conduct in this matter, which may be even be considered as having estopped any recourse to a trial in absentia[102]. According to the Claimant the Respondent's extradition request to Saudi Arabia dated 29 October 2009[103] makes interesting reading on this subject. Paragraph 3 of the extradition request states:

> *"Should the Government of Saudi Arabia is unable to grant the request for extradition, the Government of the Republic of Indonesia seeks the assistance of the Government of Saudi Arabia to carry out investigations and prosecute Hesham Talaat Besheer Al Warraq under Article 16(10) UNTOC".*

233. The Claimant also submits that UNTOC Article 16, Section 10, on which the Respondent relied in order to seek the Claimant's extradition, stipulates as follows:

> *"A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the*

[102] CLA283
[103] C177

case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The State Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution".

234. Given the obligation of the requested party to prosecute whenever it declines to extradite, it would seem obvious that as a consequence, the UNTOC and UNCAC do not give the contracting parties the option to try a person in absentia. Thus any prosecution and trial in absentia in respect of offences covered by the UNCAC and/or the UNTOC would be at odds with these treaties. The UNCAC contains a similar provision. According to the Jakarta District Criminal Court's own words, the provisions of international criminal law – including the UNCAC – must be taken into account as a matter of Indonesian law. It is clear therefore that the Jakarta Criminal Court ignored Articles 16(10) UNCAC and 44(11) UNCAC, contrary to its international law obligations.

235. Moreover, the Claimant submits that the *maxim aut dedere aut judicare* represents the principle that a state must either surrender a suspected criminal within its jurisdiction to a state that wishes to prosecute the criminal or prosecute the alleged offender in its own courts.

236. Other than the exchange between counsel for the Respondent and the Tribunal reflected above, it is not clear what happened with the Indonesian request to Saudi Arabia in respect of the Claimant. But the fact is that the Claimant has never been prosecuted in Saudi Arabia. It can thus be inferred from the fact that the Claimant was neither extradited nor prosecuted, that Saudi Arabia was not convinced that a crime had been committed or that the motives for the prosecution were proper. This is because the obligation to prosecute does not necessarily imply that proceedings will be undertaken, and still less that the alleged offender will be punished. Thus, if there is insufficient evidence, the state where the alleged offender is found, in this case Saudi Arabia, is not obliged to

prosecute the alleged offender; nor, of course, does the obligation to prosecute entail an obligation to punish in the absence of a conviction. The UNCAC and the UNTOC provide no specific time-frame for the performance of the obligation to prosecute.

237. However, the fact that apparently Saudi Arabia decided not to prosecute, or has ignored its obligation either to prosecute or to extradite the Claimant, does not mean that the Respondent had therefore the right to try him in absentia by way of self-help. Thus if the Respondent was of the view that Saudi Arabia failed in this respect, it was right to take action. However, resorting to trying the Claimant in absentia was not the indicated course under the UNTOC and the UNCAC. By providing a dispute settlement mechanism, the UNTOC and the UNCAC exclude such self-help. Thus, rather than trying the Claimant in absentia the Respondent should have followed the example of Belgium and sought enforcement of the UNTOC.

238. Another course was available to the Respondent. If it disagreed with a Saudi decision not to cooperate as regards extradition or prosecution (if any), it should have invoked the dispute settlement clause in the UNTOC to challenge the decision. That would have been the lawful, just and honorable, way to proceed, rather than resorting immediately to the extreme measure of trial in absentia. Both the Respondent and Saudi Arabia have ratified the UNTOC without making any reservation in respect of Article 16 of UNTOC. Thus this procedure was available to the Respondent. Only through this procedure could it have been established whether or not Saudi Arabia was justified in failing to extradite or prosecute the Claimant. By resorting to the extreme measure of a trial in absentia instead of invoking Article 16 UNTOC, the Claimant violated the principle of *electa una via, non datur recursus ad alteram.*

(b) Disregard of the Minimum Standards

239. The Claimant submits that the Respondent's disregard of the Claimant's basic right to a fair trial did not stop there. It continued in the form of a trial and conviction without the Claimant being present or represented.

(i) Minimum conditions for trials in absentia

240. On 23 February 2006, Indonesia acceded to the 1966 ICCPR. Article 14, Section 3(b) of this treaty provides that: □

> *"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality .....(b) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing".*[104]

241. This provision consecrates a general principle of law and natural justice that pertains to the "basic rights" that Article 10.1 of the OIC Agreement seeks to guarantee. Various international courts, tribunals and other competent bodies have interpreted this norm.

242. From this jurisprudence it can be concluded that for the extreme measure of trial in absentia to be permissible under international law, the Respondent must provide evidence that the Claimant:

1) was notified of the trial, i.e. proper service of process;

2) had unequivocally and explicitly waived his right to be present at trial;

3) had the legal right to be represented at trial and that he was actually represented;

4) is able subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge.

[104] CLA254

243. From the point of view of international law, in particular the basic rights protected by Article 10.1 of the OIC Agreement, the Claimant claims since the Respondent cannot provide evidence to meet these cumulative criteria, the Claimant's basic rights have been violated. The trend in international law is to recognise the importance of a defendant's right to be physically present and to participate in his or her trial. More and more, trials in absentia are provided for only in exceptional circumstances or where there has been an explicit, unequivocal waiver of one's right to be present.

244. ICCPR Article 14(3)(d) states that every person shall be entitled *"[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing."*[105]

245. The United Nation's Human Rights Committee, which is the body charged with supervising compliance with this treaty, further explained this provision in General Comment No. 13, which states *"[t]he accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defense is all the more necessary."*[106]

246. However, the Committee does not define "justified reasons" for holding trials in absentia. For an elaboration one must look at the jurisprudence of the human rights courts. Article 6(3) of the European Convention on Human Rights and Fundamental Freedoms specifies that everyone charged with a criminal offence has the right *"to defend himself in person or through legal assistance of his own choosing..."*

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[105] CLA254

[106] CLA226 Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Hnman Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 (1994), ¶11 (1994) (on equality before the courts and the right to a fair and public hearing by an independent court established by law).

(ii) Indonesian law barred the Claimant from being represented by counsel

247. The Claimant claims that Indonesian law allows for the extreme measure of trial in absentia in corruption cases but by virtue of SEMA 6/1988 persons accused of corruption that are tried in absentia are not allowed to be represented by counsel. Indonesian law thus barred the Claimant from appointing counsel to represent him during his trial in absentia. This is a clear contravention of the principle of fair trial in the Universal Declaration and its articulation in Article 14.3(b) ICCPR.

(iii) Indonesian law barred the Claimant from the right of appeal

248. The Claimant submits under Indonesian law the Claimant was not allowed to appeal his conviction unless he appeared in person. This condition is an impermissible restriction of his basic rights. Article 14, Section 5 of the ICCPR, prescribes that *"[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"*. Thus SEMA 6/1988 also makes the right to appeal subject to the convicted person being present in Indonesia.

249. In other words, according to the evidence tendered by the Respondent, the right to appeal one's conviction in absentia is conditioned on the appellant appearing in person before the court in order to appeal. Appeal through counsel by convicts in absentia is thus not permitted. Such condition is in contravention of Article 14, Section 5 of the ICCPR and therefore amounts to a breach of the Claimant's basic rights under Article 10.1 of the OIC Agreement.

(iv) The Respondent made it impossible for the Claimant to appeal

250. The Claimant also submits that it is also in evidence that, even if the Claimant had felt able to appear in person in order he could not have because the Respondent made it practically impossible for him to appeal.

251. The Claimant submits that, according to Indonesian law, the period within which the Claimant would have had the right to appeal (but for SEMA 6, 1988) was allowed to expire without ensuring that he was aware of the existence of the judgment containing his conviction. For the right of appeal to be effectively available, a convicted person is entitled to have, within a reasonable time, access to duly reasoned written judgments; failing the availability of such judgments, Article 14(5) of the ICCPR has been violated.

252. The Claimant claims that the Respondent's authorities allowed the appeals period to expire without ascertaining whether the Claimant had actually received the judgment. This failure is attributable to the Respondent because customary international law contains a long established procedure that would have enabled the Respondent to establish without any doubt whether and when the Claimant had received the judgment in order to start the period within which appeals were allowed. That procedure is codified in Article 5(f) of the Vienna Convention on Consular Relations (1963) (the "**VCCR**"), which states that one of the functions of consular missions is to cooperate with the local authorities when the delivery judicial documents is necessary. Both Indonesia and Saudi Arabia are parties to the VCCR. If this procedure had been followed, the authorities of Saudi Arabia would have informed Indonesia if and when the judgment had actually been served. For reasons that have yet to be disclosed by the Respondent, it does not appear that the Respondent followed this procedure and it thus allowed the appeals period to expire without ascertaining whether the Claimant was actually aware of the judgment containing his conviction.

(v) The Claimant is excluded from the right to file for judicial review

253. The Claimant submits that Indonesian law bars the Claimant from even this very limited remedy. This is because the amended SEMA 1/2012 excludes absent convicts from the right to file a petition for judicial review. To file for judicial review, an absent convict must go to Indonesia.

254. The Claimant also submits that, even if the Claimant were not excluded from this right, that would still not erase the violation of his right to appeal. Article

14(5) ICCPR provides that *"everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law"*. The United Nations' Human Rights Committee has ruled that the existence of a right to appeal is a right guaranteed by the ICCPR itself and its existence is thus not in theory dependent on domestic law.

(c) Invalidity of the proceedings

255. The Claimant submitted that the evidence obtained through the testimony of the Respondent's witnesses throughout the proceedings reveals that the Claimant was never served with the Court summonses and that the Respondent not only failed to observe the procedures prescribed by the governing multilateral treaties, but simply abstained from ascertaining whether the Claimant ever received the summonses.

(d) The Claimant is also entitled to compensation under Article 13.1(d) of the OIC Agreement because the summonses were not in compliance with Article 227(3) of the Indonesian Code of Criminal Procedure ("KUHAP")

256. The Claimant claims that he is entitled to damages in respect of the Respondent's violation of its own domestic laws. The Claimant submits that as a matter of Indonesian law, service of the summonses to attend trial was not valid. The KUHAP specifies the mandatory requirements for summonses and includes a mandatory provision applicable where the defendant is overseas.

257. Article 145(1) of the KUHAP requires that a Court summons to attend trial must be *"conveyed by written summons at a defendant's residence or most recent place of residence"*. Furthermore, Article 227(1) of the KUHAP requires that the summons be conveyed no later than three days before the hearing. Article 227(2) of the KUHAP requires that the *"official that executes the summons must personally meet and directly speak with the person summoned"*.

258. The Claimant submits that these provisions only apply to domestic summonses. If the person is not at his or her residential address and is overseas, Article 227(3)

of the KUHAP applies. Under Article 227(3) of the KUHAP, the summons must be conveyed *"through a legation of the Republic of Indonesia"*. The Claimant claims that he was never summoned at his place of residence through a representative of the Republic of Indonesia. Furthermore, the Claimant's learning about the Hearing through media reports or other channels is not sufficient under the KUHAP to eliminate the need for good service.

259. In this regard, the Claimant submits that service purportedly made through PT Bank Mutiara Tbk is ineffective. Service of process through newspapers does not meet the express provisions for a proper summons under the KUHAP.

B. The Respondent

260. The Respondent submits that the Claimant was duly served with summonses; knew full well about the investigation and, later, his trial; knew all the facts of the case much better than the prosecutors; and nevertheless freely chose not to attend, even for the investigation stage.

(i) The Claimant was properly made a subject of the Interpol Red Notice

261. The Respondent submits that the Claimant was summoned to assist in the investigation, but refused to come, and that he knew very well what had been going on but would not disclose, thereby withholding information and evidence. Thus an arrest warrant was issued for the Claimant in December 2008. The Respondent claims that the Indonesian authorities sent three summonses, each delivered to his last known addresses and in every other required manner to ensure these would reach him. They therefore did what any reasonable government does under the circumstances: they asked Interpol to help find him.

262. The Respondent submits that Interpol issued "Red Notices" for Mr. Al Warraq and Mr. Rizvi on June 9, 2009. A Red Notice represents a request for cooperation from one country's law enforcement authorities to those of other countries. According to Interpol's own web site:

"In the case of Red Notices, the persons concerned are wanted by national jurisdictions for prosecution or to serve a sentence based on an arrest warrant or court decision. INTERPOL's role is to assist the national police forces in identifying and locating these persons with a view to their arrest and unac or similar lawful action".

263. The Claimant alleges that he and Mr. Rizvi retained an Indonesian law Professor, Professor Indriyanto Seno Adji, to contact a high ranking police officer they somehow thought were leading the investigation against them. According to the Claimant, Professor Indriyanto met this officer in May 2009. The police officer allegedly asked Professor Indriyanto for US$ 300,000 to discontinue proceedings against the Claimant and Mr. Rizvi. According to the Respondent, the Claimant did not provide a witness statement, either in these proceedings or Mr. Rizvi's ICSID arbitration brought by Mr. Rizvi, from Professor Indriyanto, and refused to present him as a witness. The assertion that Indonesian police sought a bribe to discontinue proceedings against him remains an unsubstantiated second-hand hearsay allegation. If the Professor's visit was to request discontinuance of the case against them, they had to realize that no such thing was possible.

264. However, the fact is that the police were not even handling the investigation, let alone the prosecution of the case against the Claimant. This case was handled by the Attorney General's office. Any approach to the police could only be explained as a misplaced attempt by the Claimant and/or his colleagues to buy their way out. But the offer was made in the wrong venue, and thus could not have had any connection with the case. The alleged solicitation of a bribe by the investigator in charge of the case is yet another lie repeated so many times in hopes the Tribunal will believe it despite not a shred of evidence.

265. The Respondent submits that assuming for the sake of argument, however, that there had been *credible* evidence of a bribe solicitation, then this would not affect the Red Notice. A Red Notice request is standard international procedure whenever a person whose arrest has been sought cannot be found within the

jurisdiction. There is no real debate that Indonesian authorities had probable cause to issue an arrest warrant for Mr. Al Warraq and Mr. Rizvi.

266. There is likewise no debate that the Claimant was in Saudi Arabia, not Indonesia, when the authorities sought to question, and later to arrest him. The authorities had two options: forget about him and Mr. Rizvi, or request a Red Notice from Interpol. The Respondent argues that those steps towards requesting the Red Notices are conceptually distinct from any supposed bribe solicitation to have investigation proceedings discontinued, or even to have the Red Notices withdrawn. Even assuming that the latter allegations are true, they do nothing to invalidate the former.

(ii) The Claimant was properly served with investigation summonses, and was fully aware of the proceedings at all relevant times.

267. The Respondent submits that following the issuance of the Red Notice, the Claimant was sent three investigation summonses, in December 2009 and January 2010[107]. The Summonses were sent to the Claimant's known address in Saudi Arabia, the hotel in which he always stayed in Jakarta and to his office at Bank Century (by then Bank Mutiara); were posted on the court notice board, and published in major Indonesian and English language newspapers.

268. The Respondent claims that the Claimant acknowledged receiving three summonses[108], and that even Mr. Rizvi received at least one because he refers to it in a letter to the Indonesian Attorney General dated 7 January 2010[109].

269. The Respondent argues that the Red Notices would not have prevented the Claimant or Mr. Rizvi from complying with the investigation summonses, to attend the very proceedings for which failure to come to Indonesia, the Red Notices were issued in the first place.

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[107] R40 Affidavit of Desy Meutia Firdaus, paragraph 14.
[108] Transcript 12 March, page 100: line 19 and page 101: line 23.
[109] DMF1-Tab 4 attached to the Affidavit of Desy Meutia Firdaus (also included in the Hearing Bundle under Tab 318, Bundle C, Volume 17)

(iii) The Claimant was properly served with the court summons

270. The Respondent submits that when the Claimant and Mr. Rizvi declined to attend the investigation hearing to which they had been summoned three times, the Indonesian Attorney General had no option but to proceed to build his case against them without their input as to any mitigating facts or circumstances. The Attorney General had no idea what position they would take, what they would deny, what needed to be proven, so the Prosecutor had to prove everything. According to the Respondent, that is a perfectly normal and understandable development: a government's prosecutors cannot simply wait for absent suspects to show up and cooperate. If prosecutors believe they have a case to make on the strength of the witness and documentary evidence before them, and the suspect has had the opportunity to be tried in his presence and defend himself, but has refused, then they are entitled to do so.

271. The Respondent submits that the Indonesian authorities served three successive trial summonses on the Claimant and Mr. Rizvi. The first summons was dated 12 March 2010. Because, aside from being served in every prescribed manner in Indonesia the summons was served overseas, Indonesian authorities sought the assistance of the Indonesian Ministry of Foreign Affairs. The Ministry forwarded the summons information to the Indonesian Embassy in Riyadh; the Embassy sent the information to the Saudi Ministry of Foreign Affairs. They also sought help from Interpol. The Indonesian Prosecutor's Office forwarded the court summons to the National Central Bureau ("**NCB**") in Indonesia. The NCB in turn sent the summons to its counterpart office in Riyadh. The Prosecutors also placed the summons on the notice board in Jakarta District Court, as was the usual practice pursuant to Section 145(5) of the KUHAP.

272. The Respondent also submits that finally, as an added measure, the Prosecutor advertised the existence of the summons in both Media Indonesia (a widely-read Indonesian language daily newspaper) and the Jakarta Post, Indonesia's leading English language newspaper, which is also widely read by Indonesian-interested

persons outside of Indonesia through that newspaper's website, on which the entire publication is posted on a daily basis[110]. The District Court held a hearing on 18 March 2010. The Prosecutors explained that they served the summonses several ways, but that the Claimant and Mr. Rizvi had not responded. The Court adjourned the hearing until 19 April 2010.

273. On 24 March 2010, the Prosecutors issued a second set of summonses to the Claimant and Mr. Rizvi. Once again, the summonses were sent both to the NCB, to the Ministry of Foreign Affairs, posted on the court's notice board and advertised in newspapers. The Prosecutors also sent copies of the summonses to the President of Bank Mutiara (Bank Century's successor), and to the Hotel Shangri-La, the place where both the Claimant and Mr. Rizvi were known to have stayed on their previous visits to Indonesia.

274. Moreover, Bank Mutiara forwarded the Claimant's summons to his known address in Saudi Arabia. Likewise, the Indonesian Embassy in Riyadh confirmed that counterparts in the Saudi Foreign Ministry had delivered the summons to the Claimant's address. That address was the same as the one that the Claimant lists as his residence in his Statements for the present Arbitration. The Claimant does not deny that he received this summons and, in fact, as referred to above, confirmed, when testifying, that he had.

275. The Respondent submits that neither the Claimant nor Mr. Rizvi appeared at the adjourned hearing on 19 April 2010. The judges accordingly ordered that the Prosecutors serve the summonses a third time, and adjourned the hearing until 19 May 2010. The Prosecutors served a third set of summonses on the Claimant and Mr. Rizvi, using the same channels as refereed above.

276. The court resumed session on 19 May 2010, but again the Claimant and Mr. Rizvi failed to appear. The Court adjourned yet again to determine whether it was now appropriate to proceed in absentia. On 2 June 2010, the Court

[110] www.thejakartapost.com

concluded that the manner and methods of service had been sufficient and reasonably calculated to apprise the Claimant and Mr. Rizvi of the hearing.

277. The Court adjourned the hearing until 10 June 2010. On that date, the trial of the Claimant and Mr. Rizvi was to begin, with or without them. They had been duly served and there is no doubt that the Claimant and Mr. Rizvi knew very well both that they had been summoned and that their trial was about to proceed *in absentia*. The Court's decision reflected its conclusion that the Indonesian authorities had tried repeatedly and in good faith to serve the Claimant and Mr. Rizvi with notice of the impending hearing. That of course is the purpose of a summons.

278. The Respondent submits that the Claimant nor Mr. Rizvi claims to have been ignorant of the proceedings against them in Indonesia. They merely chose not to attend. Meanwhile they had been trying to create evidence of corruption in the investigation process, to use as an excuse. The Respondent submits as a matter of Indonesian law, the summonses were validly and properly served.

279. The Respondent as a matter of both fact and law, therefore, the summonses were valid and proper. As a matter of fact, there is no doubt that the Claimant had received at least three summonses and knew of the proceedings against him. As a matter of law, the summonses were valid when sent through the Ministry of Foreign Affairs, as well as being validly served through other means. As a matter of fact, notice was effectively received. The summonses served their essential purpose.

(iv) By refusing to comply with the court summons, the Claimant was properly tried *in absentia*

280. The Respondent submits that the ICCPR requires that he be entitled to be present and to defend himself in person or through counsel. As long as he is present, he may choose whether to defend himself in person or by counsel, but may not do both. That is what is meant by "or". But he cannot choose not to be present and still have the right to be defended by counsel. That is what is meant by "and". He must be present to be entitled to the benefit that follows.

281. According to the Respondent, the Claimant was not compelled to be absent. He was not told that he could not attend under any circumstances. He was not convicted in secret, without any opportunity to present a defense. He was given more than adequate notice and had more than ample opportunity to attend and defend himself. He intentionally chose not to do so.

282. The Respondent argues that there is thus nothing in international law that provides a blanket prohibition against *in absentia* trials. The purpose of the ICCPR's fair trial provisions in Article 14 is to ensure that a defendant has baseline guarantees against procedurally or substantively unfair judicial proceedings. They do not -- nor are they intended to -- provide a defendant with complete immunity from prosecution if he chooses not to answer for the crimes alleged against him. According to the Respondent, if that were the case, every defendant would do what the Claimant and Mr. Rizvi did.

283. Moreover, the Respondent submits that even the court of Hong Kong, has found that the Indonesian summonses were served properly on the Claimant and that it would not be contrary to the interests of justice to recognise and enforce the Indonesian judgment. In fact at paragraph 97 of that Judgment the court of Hong Kong found that "Mr. Rizvi *and* [Mr. Al Warraq] *had suffered no unfairness, prejudice or injustice in the proceedings in Indonesia*"[111]. As is evident from that judgment, the court of Hong Kong analysed the facts and considered expert opinions. The Respondent also submits that the requests for mutual legal assistance to Hong Kong and Saudi Arabia were made in compliance with Indonesian law[112]. In any case the burden of proof is on the Claimant to prove that acts attributable to the Respondent were: "*...shocking, egregious behaviour that every reasonable person would recognise that it fell short of international standards*"[113]. According to the Respondent, the Claimant failed to do so.

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[111] R61
[112] See evidence of Desy Meutia Firdaus, Transcript, 18 March, page 89: lines 19-22.
[113] RLA 68. JFH Neer and Pauline Neer v. United Mexican States.

284. Furthermore, concerning the denial of justice claim, the Respondent argues that the Claimant's attempt to bring a denial of justice claim under Article 10(1) of the OIC Agreement contorts its language and defies the rules of treaty interpretation, as set out in Article 31 of the VCLT

285. Article 10(1) speaks of "*basic rights*" in the context of the "*ownership, possession or utilisation of his capital*", as is obvious from the construction, context and objective of the provision. It does not concern the "human rights" of an OIC national in relation to a criminal proceeding.

286. The preamble to the OIC Agreement on Investment makes clear that the treaty must be read in conjunction with the OIC Charter of 1972: "*In keeping with the objectives of the Organization of the Islamic Conference as stipulated in its Charter. . .* "

287. The preamble to the OIC Charter says that members should respect:

> *"the present Charter, the Charter of the United Nations and international law...while strictly adhering to the principle of noninterference in matters which are essentially within the domestic jurisdiction of any State" (Preamble to OIC Charter penultimate paragraph.)*
>
> "*to strive to achieve good governance...non-interference in matters which are within their domestic jurisdiction*" (Preamble of OIC Charter last paragraph)

288. Article 2(6) of the OIC Charter further states:

> "*As mentioned in the UN Charter, nothing contained in the present Charter shall authorise the Organization and its Organs to intervene in matters which are essentially within the domestic jurisdiction of any State or related to it;*"

289. The Respondent submits that the Contracting Parties to the OIC Agreement did not intend for criminal matters within the domestic jurisdiction of the states to be submitted to an arbitral tribunal. The Respondent also submits that even

accepting, for argument's sake, that Article 10 somehow refers to basic human rights, it is absolutely clear that the Contracting Parties intended that a "*decision given by a competent judicial authority*" would be a permissible measure (Article 10(2)(b)).

290. The Jakarta Court's decision to convict Mr. Al Warraq in absentia is such a permissible measure under Article 10 and thus cannot constitute a violation of the OIC Agreement.

3. THE CLAIMANTS' EXPROPRIATION CLAIM

A. The Claimant

291. The Claimant submits that the Respondent's pre-bailout actions amount to an expropriation of the Claimant's investment in breach of Article 10.1 of the OIC Agreement, which provides as follows:

> *"The host state shall undertake not to adopt or permit the adoption of any measure – itself or through one of its organs, institutions or local authorities – if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or all or part of his basic rights or the exercise of his authority on the ownership, possession or utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realization".*

(i) Bank Indonesia's negligent supervision

(a) Bank Indonesia owed a duty to stakeholders such as the Claimant

(1) The Claimant's reasonable expectation

292. The Claimant submits that Indonesia owed such a duty to the Claimant, as a shareholder in an Indonesian bank. Those investing in banks will always have the fact of close regulation of banks at the heart of their calculating on whether

to invest. Regulation provides a degree of trust, on which investors, whose investments are sought, are entitled to rely.

293. According to the Claimant, he and Mr. Rizvi confirmed that they had such expectations of Bank Indonesia. At paragraph 79 of his First Witness Statement, Mr. Rizvi states that he "*also had [his] own expectations of Bank Indonesia and assumed it would be fulfilling its own obligations as regulator of Bank Century.*" The Claimant confirmed that he "*knew from [his] prior experience that banking was a regulated activity in Indonesia, and that Bank Indonesia played an active and central role in the functioning of the banking sector. This was an important component in our decision to invest: without a reasonable degree of supervision and regulation, investing in Indonesia would have been much less attractive.*"[114]

294. The Claimant claims that it was therefore reasonable for him, as shareholder, to expect Bank Indonesia to carry out its supervisory duties effectively.

(2) Bank Indonesia's assurances

295. The Claimant claims that his expectations of Bank Indonesia were, in part, based on representations Bank Indonesia had itself made as to its regulatory regime. In 1999, Bank Indonesia announced publicly that it intended to enhance its banking supervision and, in 2006, the Respondent presented a roadmap for the implementation of the Basel Core Principles on Banking Supervision. These acts contributed to an impression of the Respondent's regulatory environment.

296. The Claimant further submits that in those circumstances and bearing in mind the extent of Bank Indonesia's involvement in supervising and overseeing the Pre-Merger Banks' preparation for the merger over the course of nearly three years and its approval of the merger on 15 December 2004, the Claimant was entitled to, and did, rely on Bank Indonesia's representations as to its supervisory capabilities.

[114] Witness Statement of Hesham al-Warraq, ¶ 21

(b) Bank Indonesia's negligent supervision

297. The Claimant submits that Bank Indonesia has a wide range of powers at its disposal in order to achieve its aim as regulator and supervisor of banks. It utilises a risk-based system that requires banks to undergo regular self-assessment and allows Bank Indonesia to monitor the banking sector before problems arise. It also has a range of actions available for it to deal with banks that fail to comply with the relevant regulations and requirements, including varying levels of supervision, the ability to revoke a bank's licence and to prohibit those who are not deemed Fit and Proper from involvement in the banking sector. However, Bank Indonesia negligently or wilfully failed to avail itself of those powers.

(c) Bank Indonesia's failure to properly supervise had an expropriatory effect

298. The Claimant claims that the Respondent's negligent failure to properly supervise Bank Century and Mr. Tantular's consequent fraud on the bank amounts to an unlawful expropriation, which had the effect of destroying the Claimant's investment.

299. Article 10.1 of the OIC Agreement presents expropriation as an exceptional measure, subject to several conditions. By virtue of the first paragraph of Article 10, the Respondent commits itself "*not to adopt or permit the adoption of any measure – itself or through one of its organs, institutions or local authorities – if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or of all or part of his basic rights or the exercise of his authority on the ownership, possession or utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realization of its benefits or guaranteeing its development and growth.*"

300. According to the Claimant, his general undertaking applies to all forms of "*capital*" or "*investment*" as defined in Article 1 of the OIC Agreement.

Consequently, it covers the ownership of shares. It is the following paragraph that contains the exception to this general undertaking. Article 10(2)(a) essentially provides that it is permissible to "*[e]xpropriate the investment in the public interest in accordance with the law, without discrimination and on prompt payment of adequate and effective compensation to the investor in accordance with the laws of the host state regulating such compensation, provided that the investor shall have the right to contest the measure of expropriation in the competent court of the host state*".

301. Hence, any restriction of property rights is subject to limitations – expropriation of an investment being permitted only if it complies with certain specific conditions and, first and foremost, with the law of the host state. Furthermore, the measure must not be discriminatory and compensation must be offered to the investor for depriving him or her of his or her property rights.

302. The Claimant submits that the general obligation set out in Article 10.1 concerns both direct and indirect takings of property rights. Article 10 of the OIC Agreement also contemplates those measures short of physical takings that amount to expropriation in that they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way.

303. The Claimant submits that the issue has been raised here whether Article 10 of the OIC Agreement has any application in respect of *bona fide* regulatory measures such as the rescue of a bank from insolvency. It is a general rule of customary international law that a *bona fide* regulatory act that genuinely pursues a legitimate public policy objective and complies with the requirements of non-discrimination, due process and proportionality may not be designated as expropriatory, despite an adverse economic impact[115]. The Claimant claims that, this is not the case here. The Claimant's main claim is related to the absence of regulation or, more precisely, the improper and insufficient exercise of regulatory power by the Respondent. Bank Century's worsening liquidity

[115] CLA139

position and subsequent placement under state administration are the result of Bank Indonesia's failure to take in due course the necessary regulatory measures which should have been taken pursuant to domestic law and good international banking practices and regulations in order to save the bank from collapse.

304. It is well-established in international law that the violation by a State of one or more of its international obligations may arise just as easily from passivity as from positive action. Therefore, States may be held responsible for both their actions and their omissions insofar as they constitute international wrongful acts.

305. The Claimant states that it is because the regulatory function was exercised in a deficient manner that Bank Century was in a critical situation. The fundamental cause of the Claimant's problems and of the damage suffered by him is Bank Indonesia's weak and negligent supervision of Bank Century. The fate of Bank Century is not, as the Respondent has repeatedly alleged, the result of the Claimant's – and Mr. Rizvi's – actions, but the logical consequence of Bank Indonesia's failure adequately to perform its duties and properly to supervise the Bank's operations. The Claimant submits that were it not for Bank Indonesia's negligence in failing properly to regulate Bank Century, Mr. Tantular would not have been able to carry out the extensive fraud to which he has admitted and both the Claimant and Mr. Rizvi would still enjoy the benefit of their investment. The injection of capital into Bank Century and its subsequent placement under state administration represents a face saving measure and an attempt by those in charge of the bank's supervision to avoid responsibility.

(ii) The LPS takeover of Bank Century

306. The Claimant's second proposition which supports a finding of unlawful expropriation, is that the unlawful bailout of Bank Century was an expropriation in itself, for which the Claimant has received no compensation.

(a) Questionable legality of the bailout

307. It is the Claimant's case that the bailout was unlawful because, *inter alia*, it was authorized pursuant to a government regulation in lieu of law – a Perpu – that was subsequently rejected by the Indonesian Parliament.

308. The Claimant submits that Perpu No. 4 of 2008 was introduced by the Indonesian Government on 15 October 2008[116]. Its stated purpose was "*in the effort to face financial crises threats having the potentials to endanger the stability of national financial and economy system [...] to stipulate a strong legal basis in the context of the prevention and handling of crises.*" In order to achieve this stated objective, Perpu No. 4 of 2008 provided for the establishment of the KSSK, a financial system stability committee, whose membership would consist of the Minister of Finance and the Governor of Bank Indonesia. The KSSK was empowered "*to stipulate policies in the context of the prevention and handling of crises.*" The KSSK's powers included the ability, where a bank has been declared by Bank Indonesia as a "*default bank*" having a "*systemic impact*" to determine whether said bank has a systemic impact or not. If the KSSK so decided, the handling of the failed bank would then be passed over to the LPS, which body is responsible for managing the failed bank, including by injecting bailout funds.

309. The Claimant further submits that the day on which Perpu no. 4 of 2008 was introduced – 15 October 2008 – is the day on which the Claimant, Mr. Rizvi and Mr. Tantular were required to attend Bank Indonesia's office in Jakarta to sign the last Letter of Commitment. The decision to bail out Bank Century was ultimately taken by the KSSK at a meeting during the night of 20 to 21 November 2008. The Claimant submits that there was first a meeting of Bank Indonesia officials at which the recommendation was made by Bank Indonesia to the KSSK that Bank Century was a "*failed bank*" with a "*systemic impact.*"

310. Following the Bank Indonesia meeting, on the same night, the KSSK met and approved Bank Indonesia's determination that Bank Century was a failed bank having a systemic impact and this decision paved the way for the bailout which

[116] C4

was ultimately carried out by means of an injection of funds by the LPS. After the bailout occurred, in its sitting on 18 December 2008, the Indonesian Parliament did not approve Perpu No. 4 of 2008. The Parliament subsequently sent a letter to the President on 24 December 2008, asking the government to submit a Financial System Security Net Bill on 19 January 2009. The government did this on 14 January 2009. In its closing provisions, that bill sought to annul the Perpu.

311. In late September 2009, the Parliament, together with the Finance Minister, decided the bill could not be deliberated further during the term of the 2004-2009 Parliament. This bill, along with several others, was returned to the President. On 11 December 2009, the government introduced a bill to revoke Perpu No.4 of 2008. According to press reports, this bill was sent back to the President by Parliament because it contained an error.

312. Moreover, the recommendation made by Bank Indonesia to the KSSK that Bank century was a failed bank with a systemic effect was not unanimous.

313. Taken together, these events cast serious doubt over the true motive for the bailout and call into question the legal basis for it.

314. Furthermore, there is evidence that the bailout was not lawful as Bank Century did not fit the criteria stipulated in government regulation in lieu of Perpu No. 4 of 2008, which mandated that any bank that was to be bailed out had to be shown to pose a systemic risk to the Indonesian banking sector. The Claimant also claims that a few weeks before the bailout, Bank Century applied for short term liquidity; the Directorate of Banking Supervision's assessment of Bank Century's ineligibility for short term funding was overruled by the then Deputy Governor of Bank Indonesia and current Vice President, Mr. Boediono. The Claimant submits that the Parliament has neither approved nor rejected Perpu No. 4 of 2008, in spite of the constitutional requirement that any Perpu must obtain the approval of the Parliament at its next sitting. Consequently, there remains serious doubt as to the current status of Perpu No. 4 of 2008 and the effect this has on the legality of the bailout. In addition, the Claimant claims that

the decision to bail out Bank Century, which decision remains the focus of significant and serious scrutiny and criticism in Indonesia today, was not sound and was taken in order to protect a limited number of very high profile politically-linked depositors who stood to lose significant amounts of money if Bank Century was allowed to fail.

315. The Claimant submits that whatever the true reason for the bailout, it is clear that it amounts to an unlawful expropriation, for which the Claimant has received no compensation.

(b) Failure to follow the proper procedures

316. The Claimant refers to Articles 21 and 22 of the Indonesian Deposit Insurance Committee Regulation No. 5/PLPS/2006, as amended by IDIC Regulation No. 3/PLPS/2008 which provide as follows:

Article 21

All expenses for rescuing a systemic failing bank spent by IDIC constitute a temporary capital participation in such bank.

Article 22

(1) In the event of temporary capital participation as mentioned in Article 21, the bank issues convertible preferred stock which is convertible into ordinary shares.

(2) Convertible preferred stock which is convertible into ordinary shares as refer to in (1) is shares which grant preferred rights in: obtaining non-cumulative dividend; and obtaining first payment in the event bank is liquidated.

317. The Claimant submits that as such, the LPS's capital injection into Bank Century is reflected in the issue of ordinary shares in the bank to the LPS. These shares

provide the LPS with preferential rights over other shareholders, such as the Claimant, in obtaining dividend payments and payment in the event Bank Mutiara is liquidated.

318. In this regard, the Claimant submits that there are no evidence to support the Respondent's assertion that the Claimant consented to the bailout and that he was given an opportunity to inject funds into Bank Century at the time of the bailout in order to preserve his percentage ownership in the bank. There is nothing in any of the Letters of Commitment signed by the Claimant which could constitute prospective consent to the bailout process.

319. Pursuant to Article 22(1)(b) of the IDIC Law:[117]

> *(1) The resolution or handling of a Failing Bank [...] is performed by IDIC with the following procedures:*
>
> *a. The resolution of a Failing Bank that does not have a systemic effect is done by rescuing or not rescuing the aforementioned Failing Bank;*
>
> *b. The handling of a Failing Bank that has a systemic effect is done by rescuing the Failing Bank with or without existing shareholders' participation.*

320. Chapter V (Resolution and Handling of Failing Banks) of the IDIC Law is divided into five sections, as follows: Section One (Decision making); Section Two (Rescuing a Failing Bank That does Not Have a Systemic Effect); Section Three (Not Rescuing Failing Banks That Do Not have a Systemic Effect); Section Four (Handling of A Systemic Failing Bank With Capital Injection by the Shareholders); and Section Five (Handling of a Systemic Failing Bank Without Capital Injection by the Shareholders).

[117] CLA277

321. Section Four (Handling of a Systemic Failing With Capital Injection by the Shareholders), Article 32 provides that "*[t]he handling of a systemic failing bank shall be performed by the IDIC by involving the shareholders*" (emphasis added). Articles 33 to 38 go on to set out the procedures for the handling of a failing bank in those circumstances.

322. Section Five (Handling of a Systemic Failing Bank Without Capital Injection by the Shareholders), Article 39 provides that *"[i]n the instance of the handling of the Failing Bank as stipulated in Article 32 cannot be carried out, the IDIC shall undertake the handling of the Failing Bank without shareholders' participation"* (emphasis added). Articles 40 to 42 inclusive detail the procedures for the handling of a failed bank in those circumstances.

323. The Claimant submits that taken together, the mandatory nature of Article 32 (*"shall be performed by the IDIC by involving the shareholders"*) and the qualification in Article 39 (*"in the instance of the handling of the Failing Bank as stipulated in Article 32 cannot be carried out"*) make it clear that there is an obligation on the LPS to involve the shareholders of the failing bank in the bailout unless there is a reason why that cannot be done.

324. Accordingly, it was mandatory on the LPS to involve, *inter alia*, the Claimant and Mr. Rizvi in the capital injection process, as stipulated in Articles 33 to 38 of the IDIC Law, which affords them the opportunity to participate in the process by injecting a minimum of 20% capital from the estimated total handling cost. Only in circumstances where the bailout could not be carried out with their involvement, as stipulated in Articles 33 to 38, would it have been permissible for LPS to proceed with the capital injection without the Claimant's and FGAH's involvement.

325. The Claimant submits that even if the LPS were not required to involve the shareholders in the bailout process having chosen to do so, it was incumbent on the Respondent's LPS to follow the specific procedures set down in Articles 33 to 39 of the IDIC Law. These include obtaining various statements and releases from the shareholders at a general meeting of shareholders of the bank. No

evidence has been provided by the Respondent and the Claimant denies that he was ever consulted about the bailout process – let alone that he attended a general meeting of shareholders in order to provide such statements and releases.

326. In light of the above, the Claimant submits that the bailout was clearly unlawful as the LPS failed to comply with the relevant procedures mandated by the IDIC Law.

(c) The LPS bailout is an act of state attributable to the Respondent

327. Article 10.1 of the OIC Agreement prohibits the "*host state*" from adopting or permitting the adoption of any measure "*itself or through one of its organs, institutions or local authorities.*"

328. The Claimant submits that as "*organs*" or "*institutions*" of the Respondent, the KSSK's decision to bail out Bank Century and the LPS's injection of funds and issue of new shares are measures capable of being caught by the prohibition contained in Article 10.1.

329. Alternatively, the decision to bailout Bank Century by the KSSK and the injection of funds and equity participation by the LPS are acts of the state for which the Respondent is liable as a matter of customary international law and in accordance with the principles stipulated in the Draft Articles on State Responsibility (the "**ILC Draft Articles**").

330. Article 4 of the ILC Draft Articles provides that the conduct of any person or entity acting as an organ of the state, including the exercise of legislative, executive, judicial or any other governmental function, is attributable to the state. A state "*organ*" is "*to be understood in the most general sense. It extends to organs from any branch of the State, exercising legislative, executive, judicial or any other functions.*"[358]

331. The Claimant submits that the LPS is an organ of the Respondent, empowered under the IDIC Law to handle failing banks having a systemic impact, *inter alia*, by way of capital injection and equity participation.

332. The KSSK, the body ultimately responsible for the decision to declare Bank Century a "*failed bank*" having a "*systemic effect*," is also an organ of the Respondent, empowered to do so by virtue of the Perpu.

333. As such, the conduct of the KSSK and the LPS in deciding (i) to bailout Bank Century on the basis of its status as a "*failed bank*" having a "*systemic impact*"; and (ii) in effecting the bailout, is attributable the Respondent.

(d) The bailout amounts to an expropriation

334. The Claimant further submits that the effect of the Respondent's unlawful injection of funds has been to reduce the Claimant's shareholding to such a tiny percentage of Class B shares that he cannot use his investment in any meaningful way. In this way, the Respondent's actions have both "*directly and indirectly affect[ed] the [Claimant's] exercise of his authority on ownership, possession or utilization of his capital.*"

335. Article 10 of the OIC Agreement covers "*any measure*" adopted by the host State which "*may directly or indirectly affect the ownership of the investor's capital or investment...*" It follows that if one accepts, for the sake of argument, the Respondent's proposition that "*no shares were expropriated at all*" in the formal sense, the acts and omissions of the Respondent, through Bank Indonesia, eventually had an effect "*tantamount to expropriation*", according to the consecrated formula in international investment treaties.

336. In the circumstances, the Respondent's bailout of Bank Century amounts to an expropriation of the Claimant's investment in breach of Article 10.1 of the OIC Agreement, entitling the Claimant to compensation under Article 13.1(a) of the OIC Agreement. The bailout caused the Claimant's shareholding in Bank

Century to be reduced from around 9.55% to less than 0.004%, thereby causing substantial damage to the Claimant.

337. Furthermore, the Claimant submits that the bailout was not in compliance with Indonesian law as (i) it was undertaken pursuant to a government regulation that was later rejected by Parliament; and (ii) the LPS failed to follow the proper procedures for the involvement of shareholders in accordance with Law No. 24 of 2004. In the circumstances, the bailout was carried out in breach of Indonesian law and the Claimant is entitled to compensation for the damage caused pursuant to Article 13.1(d) of the OIC Agreement.

(iii) The competing fraud analyses and their impact on the Claimant's expropriation damages claim

338. Dr. Okongwu's damages calculation stems from a basic set of assumptions that differ from those contained in the Brattle Group's Report. There are two competing explanations for the liquidity crisis experienced by Bank Century in 2008. The Brattle Group's explanation is that the liquidity crisis was down to a fraud by the Claimant and Mr. Rizvi which resulted in Bank Century being insolvent at the time of the bailout. The second explanation, which the Claimant advances, is that Bank Century's liquidity problems were the result of Bank Indonesia's poor supervision, as demonstrated by Mr. Tantular's crimes which resulted in a very substantial sum of money being taken from the bank. This substantial hole in Bank Century's books exceeded the bank's market capitalisation and only became apparent after Bank Century's nationalisation. That is the Claimant's case, and the assumption upon which Dr. Okongwu's damages calculation is based.

339. At the Final Hearing, Dr. Okongwu explained the two important factors bearing on his damages calculation: the date on which to calculate the value of the Claimant's shareholding and the method to employ. He went on to explain that he chose 10 November 2008 and not 21 November 2008 as the appropriate valuation date because rumours surrounding Bank Century's liquidity became public on 13 November 2008. As the Claimant's case is that those liquidity problems resulted from the Respondent's poor supervision, if the Claimant

succeeds in establishing liability, it is appropriate to use as the valuation date the last trading date before the rumours circulated and any effect on the share price was felt.

340. Dr. Okongwu then explained the market model calculation based on the historical relationship between Bank Century's shares and certain factors that ought to explain it, such as how similar banks perform and how the stock market as a whole performs. Dr. Okongwu then explained the adjustment he made to that figure to account for the USD 40 million MCB that had not yet been reflected in Bank Century's books, even though the cash had been received. The difference between the valuation of the Claimant's shareholding as at 10 November 2008 and the value of his shares in Bank Century post-nationalisation (zero) gives Dr. Okongwu his expropriation damages figure of USD 4.48 million.

341. Although the Brattle Group took issue with a number of details pertaining to the methodology employed by Dr. Okongwu in his valuation of the Claimant's pre-nationalisation shares in Bank Century, these criticisms were easily defeated by Dr. Okongwu in his oral testimony. The only element of Dr. Okongwu's analysis which the Brattle Group challenged with any conviction was his assumption that Bank Century would have been worth something but for Bank Indonesia's poor supervision and the resulting Tantular fraud.

B. The Respondent

(a) The bailout was not an expropriation, but even if it were, it would be a permissible one.

342. The Respondent submits that:

(i) The Claimant has the same number of shares as he did before the bailout, if in fact he had any. Nothing was taken; funds were injected. And there has been no diminution in the value of those shares.

343. The Respondent submits that expropriation is a governmental taking or modification of an individual's property rights, and what happened to the Claimant's shares, if he had any, was not an expropriation, by that or any other reasonable definition. Indonesian regulators did not take his shares; they did not seize the bank. The Claimant's holdings (to be more precise, FGAH's) remain exactly as they were before the bailout: some 2.7 billion shares, valued at least at 50 Rupiah per share, and they may now be worth more than that.

344. The Respondent submits that the Claimant was not in any way deprived of his alleged shareholding. No shares were taken. All shareholders retained, and as far as we are aware still retain, the same number of shares. Funds were injected into the bank and a new class of shares was issued to evidence this interest. The original, now class B, shares were valued at that time at Rp. 78 per share, whereas the new, class A, shares were issued at the value of Rp. 0.01 per share.

345. The Respondent argues that even if this could be interpreted as an expropriation, Article 10(I)(a) of the OIC Agreement makes it plain that an expropriation is permissible if it is non-discriminatory, lawful under the host state's law and compensation is provided in accordance with the host state's law. The Claimant cannot prove that Indonesian law was violated nor that he was not given due compensation under Indonesian law. Nor was there any discrimination, as all shareholders, be they Indonesian or foreign, nationals or legal entities, were treated in the same manner. Furthermore, the bailout itself was in accordance with Indonesian law. Hence, there is no violation. Claimant avers that the shares in Bank Century were "*in fact worthless by the time of the bailout on 20 November 2008*"[118]. Hence, on his own case, there could have been no compensation for worthless shares.

(ii) The Bailout was a permissible preventive measure under Article 10(2)(a) of the OIC Agreement

[118] Paragraph 90 of the Reply.

346. Article 10(2)(a) expressly makes it permissible for a state to "*adopt preventive measures issued in accordance with an order from a competent legal authority*". According to the Respondent, the onus is on the Claimant to prove that the bailout was *not* a preventive measure issued in accordance with the order of a competent legal authority. This he has utterly failed to do. Even in relation to expropriation clauses without explicit carve outs, tribunals have found that *bona fide* regulatory measures, such as the administration of a failed bank, are outside the scope of expropriation.

(iii) The Claimant waived his right to object to any bailout, or even any taking of shares for that matter, by signing the consent for LPS to take measures necessary in case of failure, in applying to join the LPS program.

347. The Respondent submits that the fact that the bailout was a preventive measure expressly mandated by the OIC Agreement as a permissible measure under Article 10(1)(a) is not the only hurdle in the way of the Claimant's case. In this case, he had expressly consented to such a bailout and hence has waived all rights to object.

348. The Respondent submits that the Claimant consented by signing a statement, on behalf of FGAH, agreeing ". . . *to discharge and submit to LPS any right, management, and/or any other interest if the bank [Bank Century] becomes a failed Bank*"[119]. As such, the Claimant cannot now object to the bailout or otherwise claim that it constituted any kind of taking against his will, including any expropriation.

(b) The bank had negative value at the time of its bailout: Thus no compensation can be due.

349. The Respondent submits that one of the more curious aspects of the Claimant's claim is that he seeks damages for shares in a bank that, by his own admission,

[119] R 35. Undertakings provided by Shareholders and Management of Century to LPS.

had negative value at the time of the act of which he complains. It is difficult to understand how any damages could be due to him under those circumstances,

350. According to the Respondent, this is not a contested question, the Claimant concedes that Bank Century had more liabilities than assets in November 2008[120]. Common sense suggests that he cannot ask for money that, by his own admission, he knows did not accrue in his "investment." He acknowledged this when he had requested this Tribunal to drop his claim for damages.

351. The Respondent also submits that, of all the shareholders in Bank Century, only two have claimed damages as a result of the alleged expropriation in consequence of the bailout: the Claimant and Mr. Rizvi, exactly the ones who caused the meltdown. Even Mr. Tantular has registered no objection to the bailout.

(c) The bailout measure was legal under Indonesian Law

352. The Respondent submits that whether or not the Indonesian Parliament subsequently chose to ratify the Perpu in December 2008 has no bearing on the legal validity of the Perpu when it was issued and when it was acted upon.

353. The Respondent submits that the bailout was a legal and binding measure duly authorized under Indonesian law. If the Parliament did not subsequently ratify the Perpu that would not invalidate it nor the actions taken under it. The bailout was legal and permissible as a matter of Indonesian law.

354. According to the Respondent, the Claimant has not presented, and cannot present, any Indonesian law evidence that provides otherwise. The Perpu, being the legal instrument that facilitated the bailout, was a valid and legal act under Indonesian law. It was therefore a permissible measure falling squarely within Article 10(1)(b) of the OIC Agreement. The onus is on the Claimant to prove that it is not so, which burden he has clearly failed to discharge.

[120] Paragraph 90 of the Reply.

(d) Bank Indonesia's supervision of Bank Century was not negligent

355. According to the Respondent, Bank Indonesia identified weaknesses in Bank Century as early as 2005, immediately after its creation. Those weaknesses led Bank Indonesia to place Bank Century under enhanced scrutiny. The Respondent submits that Bank Indonesia spent the next three years exerting its supervision: extracting promises out of the Claimant and Mr. Rizvi to address Bank Century's liquidity problems. They committed to do this on several occasions, but in fact never did meet these obligations.

356. The Respondent submits that in 2008 the world was facing an economic crisis and, to address instability in the banking system, Bank Indonesia had requested approval to issue a blanket guarantee of all deposits, as many other countries were doing at the time. However, Mr. Jusuf Kalla, the Vice President at the time, vetoed that idea. Instead, the guarantee ceiling was raised to Rp. 2 billion (roughly US$ 200,000)[121]. Thus, when Bank Century's situation became desperate -- and when it became clear that the Claimant and Mr. Rizvi would not honor their commitments the only options were to shut the bank down or bail it out.

(i) The Commitment Letters and the AMA are evidence of Bank Indonesia's diligence.

357. The Respondent submits that the main issue that Bank Indonesia found with Bank Century was a lack of liquidity. Obviously that is an undesirable situation in a bank. Bank Indonesia sought to address -- and redress -- that deficiency by asking Bank Century's major shareholders to inject liquidity into the bank. Thus, the Claimant and Mr. Rizvi signed the first of several commitment letters on 4 October 2005. Four more commitment letters followed: on 5 April 2006; 28 November 2006; 15 October 2008; and 16 November 2008. The Respondent submits that i) Bank Indonesia had placed Bank Century under special

[121] R73, chart reproduced from Tempo, Indonesia's leading news weekly.

supervision following an audit immediately after Bank Century's creation; ii) Bank Indonesia sought to address the problems it had identified (liquidity issues) by demanding that the Claimant and Mr. Rizvi find **liquid** assets for Bank Century; iii) Bank Indonesia persisted over several years in seeking a solution from the Claimant and Mr. Rizvi, and; iv) the Claimant and Mr. Rizvi persisted over several years in stating that they would provide a solution, but defaulted every time. During this period Bank Century was still maintaining its Capital Adequacy Ratio at acceptable levels.

358. The Respondent also submits that the Asset Management Agreement ("**AMA**"), signed by Telltop Holdings Ltd and Bank Century, which was at the Claimant's and Rizvi's urgings, likewise constituted part of this supervision regime. The Claimant and Mr. Rizvi were in possession of a number of Bank Century instruments. Some of those instruments had been pledged as collateral for loans that FGAH or other Al Warraq/Rizvi entities were supposed to arrange; others were held custodially.

359. According to the Respondent, the purpose of the AMA was to sell these instruments and to provide Bank Century with cash from those sales. If the sales reaped a profit (i.e., more than the face value of the asset(s) sold), then Telltop would take part of that profit; if the assets were sold at a loss, Bank Century was entitled to take the difference between the face value and the sale value from an account that Telltop had set up at Dresdner Bank in Zurich. In either case, however, Telltop was paid a management fee, which it took at the outset, *in toto*.

360. The AMA was put forward by the Claimant and Mr. Rizvi as a substantial step in the strategy to ensure Bank Century's liquidity. Bank Indonesia had reservations about using a Swiss bank for the deposit of Telltop's collateral. The Respondent submits that, when Bank Century sought to call on the funds in the Dresdner account, it discovered that the funds in the account had been pledged to another entity to secure a loan to FGAH, while the pledge in favor of Bank Century had never even been filed with Dresdner Bank. The Respondent submits that this scheme alone shows unquestionable *mens rea*.

361. The Respondent submits that Bank Indonesia wanted the funds in Indonesia, and preferably in the currency of Bank Century's equity, Indonesian Rupiah. It was for that reason that Bank Indonesia encouraged Bank Century to enter into a revised AMA in 2008.

362. According to the Respondent, all these initiatives -- the five commitment letters, the original and revised AMA -- represent indisputable evidence that Bank Indonesia was paying very close attention indeed to Bank Century's predicament. These were hardly the actions of a negligent regulator. Had no action been taken in November of 2008, neither a bailout nor a shutdown of Bank Century, then it might well have been said that Bank of Indonesia was negligent. But appropriate action, in the form of the bailout, was in fact taken before any depositors could suffer any loss.

363. The Respondent further submits that the Commitment Letters and the AMA were in fact binding documents. They constituted obligations which the Claimant and Mr. Rizvi undertook, and which they failed to complete. Bank Indonesia is entitled to call them to account for the failure.

(ii) The proximate cause of the bailout was the Claimant's and Mr. Rizvi's own misdeeds, not Mr. Tantular's.

364. The Respondent submits that the Claimant and Mr. Rizvi promised Bank Century, and Bank Indonesia, that they would help address Bank Century's liquidity issues. That was the purpose of the commitment letters and of the AMA. It was also the purported purpose of the various swaps and collateral arrangements entered into supposedly to secure loans for Bank Century.

365. The Respondent submits that the asset swaps left Bank Century with less valuable assets than those it had traded, and did nothing for its liquidity. Likewise, the collateral that Bank Century pledged to various Rizvi/Al Warraq entities was of far greater value than the loans it received, if any, in consideration of the pledged assets.

366. Indeed, in one instance, Bank Century pledged US$ 65 million worth of assets in order to secure a US$ 40 million loan facility with ABN AMRO Dubai. That loan facility was never issued to Bank Century, although ABN AMRO did provide a loan to the Claimant, or one of his companies, secured by some of those same assets belonging to Bank Century. In any case, those assets were never returned to Bank Century.

367. Furthermore, throughout the period of intensive supervision, Bank Indonesia attempted repeatedly to recoup those assets for Bank Century, and to ensure that the Claimant and Mr. Rizvi did their part to improve Bank Century's liquidity position through, for example, the commitment letters and the AMA.

368. The Respondent submits that the worst that might be said of Bank Indonesia is that it was naïve to believe that the Claimant and Mr. Rizvi would do what they promised numerous times, yet failed repeatedly, to do. Reasonable central bankers could differ on their approach. According to the Respondent, the Claimant and Mr. Rizvi had no intention of ever returning the assets they had taken from Bank Century.

369. The Respondent alleges that the root cause of Bank Century's ills was the Claimant's and Mr. Rizvi's own actions. According to the Respondent, it is an uncontested fact that the Claimant and Mr. Rizvi held custody of some US$ 300 million of Bank Century's assets, in the form of securities, which they have not returned to this day. In either event, Bank Century was left with a huge hole in its finances.

370. The Respondent argues that even if Mr. Tantular had been stopped before he caused any damage, the impact of the Claimant's and Mr. Rizvi's activities were large enough in themselves to render Bank Century insolvent. In fact, it was the condition of Bank Century resulting from the tremendous drainage of its assets by the Claimant and Mr. Rizvi that put that bank on the brink of failure.

371. The bailout therefore had to occur, irrespective of anything Mr. Tantular did. And even if the Claimant and Mr. Rizvi were handling Bank Century's assets

with the best of intentions, the fact that Bank Century was deprived of those assets, and of cash to substitute for them, particularly in the midst of a world economic crisis, was in itself sufficient to cause the liquidity crisis that resulted in the bailout.

372. The Respondent also submits that the nature of Mr. Tantular's crimes was different from the activities of the Claimant and Mr. Rizvi. The former's misdeeds, for the most part, consisted of circumventing various banking and depository regulations and procedures, allowing certain depositors, including his own entities, to recoup funds that ought to have remained within the bank during the period of special surveillance.

373. As such, Mr. Tantular's offense, though damaging to Bank Century's liquidity, was less so than the various schemes that the Claimant and Mr. Rizvi undertook with Bank Century's proprietary trading assets. After all, the funds released to the depositors by Mr. Tantular did in fact belong to those depositors.

374. Bank Indonesia's inability to prevent Mr. Tantular's crimes was not the proximate cause of the bailout. It may well be that Bank Indonesia's indulgence of the Claimant's and Mr. Rizvi's repeated, broken promises to help recapitalize the bank contributed to the need for the bailout.

375. The Respondent submits that it is not in any case clear what more Bank Indonesia could have done to prevent further improper conduct of Mr. Tantular, or further embezzlements by the Claimant and Rizvi, over and above insisting upon them rectifying those acts already committed, short of shutting down the bank entirely or taking over its management, which latter it eventually did through the bailout.

(iii) There is no basis from which to conclude that there was a breach of the OIC Agreement's "adequate protection and security" clause

376. The Respondent argues that international standards of protection in treaties are limits jointly self-imposed by contracting states. The onus is on the investor to

prove that the alleged state conduct rises to the high threshold of an international wrong[122].

377. The Contracting Parties to the OIC Agreement, as evidenced by the text, intended that customary international law standards for minimum standard of treatment of aliens would apply to its provisions. Paragraph 7 of the preamble makes plain that standards set out in the treaty were intended to provide only the "*minimum in dealing with the capitals and investments coming in from the Member States.*"

378. The Respondent submits that the Claimant's case is that allegedly negligent supervision by Bank Indonesia failed to detect fraud by Mr. Tantular, which, he claims, caused the collapse of Bank Century and left the shares worthless. The first element of that claim is that the duty of care must be owed to the Claimant. Bank Indonesia owes its regulatory duties to the depositors, not to portfolio investors. The Claimant held the office of Deputy President of the Board of Commissioners and Mr. Tantular was his business partner. In fact, it was the Claimant's duty as the Deputy President of the Board of Commissioners to supervise the Bank and to detect any misconduct. This he failed to do.

379. The Respondent further submits that Article 2 is a promise to provide physical protection and security that is adequate in the circumstances. It does not apply to regulatory conduct. According to the Respondent, even if the applicable standard were the "full protection and security" standard common to a "regular" BIT, it would not exceed the duty of care found in customary international law. The high point of the duty is to provide no more than a reasonable measure of prevention, which a well administered government could be expected to exercise in similar circumstances.

[122] *MTD v Chile* (RLA 50), paragraph 81 of the Rejoinder; paragraph 184, *De Levi v Peru*, (RLA 63 and RLA 64).

4. THE CLAIMANT'S FAIR AND EQUITABLE TREATMENT CLAIM

A. The Claimant

380. The Claimant submits the following:

(i) The Claimant is entitled to fair and equitable treatment through the most favoured nation clause at Artiele 8 of the OIC Agreement.

381. Article 8 of the OIC Agreement contains a most favoured nations clause that provides as follows:

> *"*[t]*he Investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors".*

382. The Claimant claims that Article 8 entitles him to import provisions from, *inter alia*, the BIT between the United Kingdom and Indonesia which provides more favourable treatment to foreign investors than the OIC agreement, so long as certain conditions are met. Specifically, Article 8 provides that the "*treatment*" must be in the "*context of economic activity in which [the investors] have employed their investments in the territories of another contracting party*" and *"in the context of that activity and in respect of rights and privileges accorded to those investors."*

383. The OIC Agreement does not include a provision requiring the Respondent to provide fair and equitable treatment ("**FET**") to the Claimant. It is also undisputed that Article 3 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments ("UK-Indonesia BIT") does require that investors "*at all times be accorded fair and equitable treatment.*" As a result, the MFN clause of the OIC Agreement

entitles the Claimant to the more favourable fair and equitable treatment afforded to investors by the UK-Indonesia BIT.

384. In response to the Claimant's submissions on this point in his Statement of Claim and his Reply, the Respondent has advanced several meritless arguments. The Respondent claims that the OIC Agreement "*restricts MFN treatment strictly to the context of the same economic activity*" as that protected by other treaties. Both the UK-Indonesia BIT and the OIC Agreement were entered into for the purpose of encouraging and protecting foreign investment. The Claimant submits that the Respondent fails to explain how the Claimant's economic activity is in any way different from the economic activity covered by the UK-Indonesia BIT or any other bilateral investment treaty which the Claimant has chosen to invoke.

385. The Respondent also accuses the Claimant of "*cherry pick[ing] provisions from other investment treaties into the OIC Agreement*," and importing obligations from other treaties *carte blanche*. According to the Claimant, this argument also fails, as the Claimant only seeks to import those protections afforded to similarly-situated nationals of third-party states. The Respondent's reference to Article 8(2)(b) of the OIC Agreement is even less persuasive. Article 8(2)(b) is irrelevant to the present set of facts, as it only applies when the investor seeks to enforce the Respondent's obligations from treaties under which an economic union, customs union, or mutual tax exemption is in place. The Claimant submits that this is clearly not the case for him.

386. Moreover, the Respondent asserts that the Claimant may not import provisions from the UK-Indonesia BIT because his investment was not "*granted admission*" in accordance with the BKPM-administered admissions process. This argument ignores the fundamental purpose of the MFN clause. The purpose is to create a level playing field among foreign investors and to import obligations from third-party treaties to give effect to that purpose[123]. The Respondent's argument suggests that the MFN clause acts to import all

[123] CLA179

obligations imposed upon the Claimant from the UK-Indonesia BIT. The Claimant claims that this is simply not true, as the MFN acts to import only those provisions that are "*more favourable*" to the foreign investor.

387. Nonetheless, even if the Claimant's investment was required to be admitted under by BKPM, the Respondent's argument still fails. The tribunal in *Rafat Ali Rizvi v. Republic of Indonesia* found that the BKPM-administered process is not a requirement for the admission of foreign investments in the banking sector and that investments under the UK-Indonesia BIT are not required to have gone through a BKPM administered admission process in order to gain the protection of the treaty[124].

388. The Respondent's argument that the Claimant's investment was not granted admission under Indonesian law fails for the additional reason that the UK-Indonesia BIT is not the only BIT in which the Respondent has agreed to accord fair and equitable treatment to foreign investments. As a result, even if the Claimant has not met obligations that it is somehow required to meet under the UK-Indonesia BIT, as the Respondent suggests, the Claimant is still entitled to import the fair and equitable treatment protection from several other BITs to which Indonesia is a party.

389. The Claimant refers to different BITs with Indonesia, for example, the Netherlands-Indonesia BIT which provides that the Respondent shall "*ensure fair and equitable treatment of the investments of nationals of [the Netherlands] and shall not impair, by unreasonably or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.*"[125] This BIT does not specifically limit the scope of the treaty to those investments "*granted admission in accordance with the Foreign Investment Law.*" Additionally, the Singapore-Indonesia BIT provides that "*investors shall at all times be accorded fair and equitable treatment,*"[126] while

[124] RLA67, ¶ 140
[125] CLA14
[126] CLA281 Article 3 of the Singapore-Indonesia BIT signed and entered into force on 28 August 1990.

mentioning nothing about a mandatory admissions process. Moreover, the India-Indonesia BIT provides that "*investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.*"[127]

390. The Claimant submits that the Respondent has chosen to focus solely on provisions of the UK-Indonesia BIT, ignoring the numerous other treaties in which Indonesia has agreed to accord fair and equitable treatment to foreign investments. As a result, the Claimant is entitled to FET protection through the OIC Agreement's MFN clause, and the Respondent's argument fails.

(ii) The Respondent's breach of its prosecutorial and investigative powers amounted to a denial of fair and equitable treatment

391. The Claimant claims that he was the victim of a series of actions taken by the Indonesian authorities that destroyed all possibility of a fair trial. The measures taken in the criminal investigation and the subsequent prosecution amounted to a denial of fair and equitable treatment as recognized by several arbitral awards.

392. The Claimant claims that he has suffered from a series of procedural irregularities, corrupt practices, and arbitrary and discriminatory measures that were detrimental to his investment and resulted in a denial of fair and equitable treatment.

393. The Claimant further submits that the AGO issued several inflammatory statements in which it accused the Claimant of being a fugitive from justice, even though he was never a resident of Indonesia[128]. The Jakarta Court summons was also inadequate, and as a result the Claimant was denied the opportunity to defend himself. The Claimant also claims that the Indonesian authorities also engaged in a variety of corrupt acts, including two separate solicitations of bribes in order to drop the criminal investigation and prosecution and a politically

[127] CLA13 Article 2 of the India-Indonesia BIT signed on 10 February 1999 and entered into force on 22 January 2004.
[128] Statement of Claim, ¶ 75

motivated abuse of the INTERPOL Red Notice system in issuing Red Notices relating to the Claimant and Mr. Rizvi[129].

394. The Claimant further claims that, in addition to the discriminatory and corrupt measures leading up to the criminal trial, the trial and the judgment themselves contained several deficiencies resulting in an outright denial of due process. First, the Respondent failed to provide and effectively serve proper summonses in accordance with international and Indonesian law, yet the trial was nevertheless conducted *in absentia*[130]. Second, both the corruption and money laundering charges were wholly unsubstantiated. The Claimant was charged with the "*purchase of commercial papers which have no rating and are not registered in any stock exchange by unlawfully using the money of P.T. Bank Century.*" But the Criminal Court failed to provide any description of the commercial papers, their price, how and when they were purchased, and how the Claimant unlawfully used Bank Century's money[131].

395. Furthermore, the Claimant claims that the Jakarta District Criminal Court Verdict was also contradictory, at times using the worthlessness of the securities as the basis for the Claimant's liability, and at other times asserting that the Claimant had enriched himself, and that he somehow used the allegedly worthless securities as collateral for loans[132]. Moreover, the Jakarta Court Verdict failed to provide the basis for two crucial elements of a corruption offence: (1) a finding that the defendant had enriched himself; and (2) a finding that the defendant's actions caused loss to the state. The Claimant, the money laundering charge was equally problematic. The Jakarta Court Verdict did not specify the commercial papers that it accused the Claimant of hiding, nor did it present evidence of how the Claimant hid such papers[133].

396. The Claimant submits that the Indonesian authorities in the Claimant's case repeatedly solicited bribes, the Jakarta Court wrongfully conducted a trial *in*

[129] Statement of Claim, ¶ 80
[130] Statement of Claim, ¶¶ 88–90
[131] Statement of Claim, ¶ 92
[132] Statement of Claim, ¶ 93
[133] Statement of Claim, ¶¶ 100–02

absentia and the Court's judgment had no evidentiary basis. The extent of the procedural irregularities indicates that Indonesian authorities were aware of the harm their measures could cause to the Claimant as a foreign investor, yet they took no steps to "*assess or to avoid, minimize, or mitigate that possibility of harm*". As a result the Respondent's unreasonable and discriminatory measures amount to a denial of due process and a breach of the fair and equitable treatment standard.

B. The Respondent

(i) The OIC Agreement does not provide for "fair and equitable treatment," and the Claimant in any event was not treated unfairly

397. The Respondent submits that Article 8 of the OIC Agreement restricts MFN treatment strictly to the context of the same economic activity. It envisions that the host state must not favor investments from third states over those from a Contracting State, in the context of a particular economic activity. It does not grant an investor *carte blanche* to selectively import obligations from the universe of treaties signed by Indonesia.

398. According to the Respondent, the limitation in Article 8 that the MFN treatment only applies within the context of the same economic activity illustrates the limited scope of this article. It is different from a typical MFN clause found in BITs that do not contain such a limitation. Even so, there is considerable debate in allowing investors to use MFN provisions to cherry-pick guarantees from other treaties without taking into account the restrictions that come with them.

399. In fact, had Claimant's (or FGAH's) investment, been made by a national or legal entity of the UK, it would not be entitled to protection of the UK-Indonesia BIT at all. Article 2(1) of the UK-Indonesia BIT limits the scope of application of that treaty only to: "*... investments by nationals or companies of the UK.... in the territory of Indonesia that have been granted admission in accordance with*

the Foreign Investment Law, No. 1 of 1967, or any law amending or replacing it."

400. The Respondent further submits that investments made in accordance with the Foreign Investment Laws are granted admission through application to and approval by the Indonesia Investment Coordinating Board (the **"BKPM"**). They must be made by establishing an Indonesian foreign investment company (*Penanaman Modal Asing*, "**PMA**") to operate the intended project. This does not apply to publicly-listed companies, such as Bank Century, nor to investments in the banking sector at all (as banks may not be established as PMA companies). Since investors in the banking and capital markets sector do not benefit from BIT protections, there is no comparison here to be made at all.

401. Nor did the Claimant or any of his colleagues make any application to BKPM for admission of their investment, or claim to have done so. Thus, under the MFN clause in the OIC Agreement, neither the Claimant's nor FGAH's "investment" would be entitled to any protection under the UK-Indonesia BIT. This limitation is found in virtually every BIT entered into by Indonesia.

402. Furthermore, the Respondent submits that even if the Claimant were somehow able to invoke the protections under the UK-Indonesia BIT, or any other similar treaty, the FET provisions invariably afford fair and equitable treatment to the qualified investments of qualified investors, not to the person of the investors themselves. FET clauses provide the guarantee to the investments only and not to investors who, in their own right, became subject to criminal prosecution. Thus, even if the Claimant could rely upon an FET provision it would not assist his case that challenges the criminal prosecution and conviction of his person. This is not an issue relating to his investment, if any, but to the criminality of his conduct.

403. The Respondent also submits that even if the Claimant could somehow invoke the FET clause, particularly that in the UK-Indonesia BIT, his claim would fail on the facts because his colleague, Mr. Rafat Ali Rizvi, a UK subject, was afforded exactly the same treatment for exactly the same activities and crimes as

was the Claimant. Therefore, even if the Claimant could import an FET standard, the Respondent's conduct does not come even close to a breach of this treatment guarantee.

404. According to the Respondent, the fair and equitable treatment standard does not go beyond what is required by the customary international law minimum standard of treatment of aliens. International law sets a high standard for a state's conduct to breach fair and equitable treatment. It must be egregious and shocking, and this must be blatantly apparent to any reasonable person. It is a serious charge to accuse a state of committing an international wrong or delinquency.

405. The Claimant accuses the Indonesian Court's decision of being unfair and unjust. This is a grave charge against the independent judiciary of one of the world's largest democracies. The principle of comity alone requires this Tribunal to assume that the Indonesian Court has acted properly unless the Claimant proves that there has been a glaring disregard of due process by the Court. And even if the Indonesian Court had denied the Claimant due process, which it certainly had not, the Claimant did not exhaust his remedies in local law. Where he has failed to do so, there can be no claim for denial of justice.

406. The Respondent submits that the Claimant not only refused to appear at his own trial, but also has made no attempt to appeal the verdict of the Indonesian Court, where a robust and effective appeals procedure was, and still is, available to him. Nor has the Claimant provided a legal opinion of an Indonesian law expert that supports his view. The Claimant's refusal to participate in the trial, and indeed to appeal the conviction, cannot be excused.

(ii) The Claimant's treatment was fully just and fair, in accordance with proper procedures

407. The Respondent submits that the shareholders and management who were discovered to be at fault in draining off the liquidity of Bank Century were all tried equally and properly in fair and open judicial proceedings fully in

accordance with Indonesian law and practice, following proper applicable procedures.

408. According to the Respondent, the Claimant was notified through every conceivable means of the investigation and was invited to attend and explain what he understood of the situation to assist in the investigation. He ignored a series of summonses and as a result became a suspect and was indicted. He was then served even more times through even more channels, including in each instance diplomatic channels, business address, last known residence address, press publication, but failed to appear or even send counsel to appear on his behalf, throughout.

409. Meanwhile the full judicial process continued, first with a series of hearings only to determine whether he was properly notified and given an opportunity to present his case and, as was finally decided, the matter should go on *in absentia.* Several statements of expert and factual witnesses are presented with this submission to substantiate the properness of the judicial process employed[134].

410. The Respondent submits that the Claimant cannot truthfully say that he was not served, nor aware of the proceedings. He was fully aware of them, as he appointed legal counsel for the sole purpose of attending the court hearings and taking notes to report back to him. It is telling that the Claimant has neglected to advise the Tribunal of this fact. He disclosed it in the Hong Kong proceedings, but not in these.101 He has also refused, when requested in the Discovery Process, to disclose the identity of such counsel or provide the text of the notes provided.

411. Furthermore, the Respondent alleges that on the eve of the commencement of his criminal trial, the Claimant sent a representative to Jakarta to try to persuade the Attorney General to drop the case.

412. An offer was made by Mr. Pallett, on behalf of the Claimant and Mr. Rizvi, in the amount of US $ 220 million, approximately one third of the bailout funds, or

[134] Exhibit R 42, Affidavit of Yahya Harahap and Exhibit R 42, Affidavit of Desy Meutia Firdaus. And Exhibit R 43, Affirmation of Timothy Charles Lindsey. Also Exhibit R 42, Affidavit of Muhammad.

approximately two thirds of the amount the prosecutors had been able to provide sufficient evidence to seek in the trial[135].

413. The Deputy Attorney General and the prosecutor with whom this representative (Ernest Pallett) met explained that if the Claimant and Mr. Rizvi were to return the state's losses in their entirety, or at least in the amount for which proof was being presented in the criminal case as having been purloined, the Attorney General would be able to ask for clemency, although the case was too far along to even discuss dismissal[136].

414. The Respondent submits that not only the Prosecutor but also the counsel who brought the Claimant's representative to the Prosecutor urged that the Claimant appear, or at least engage counsel to appear, on his behalf, at the trial and put forward his defense (the defense was understood to be that at least 1/3 of the liability should fall upon Mr. Tantular and thus that the liability of the Claimant and Mr. Rizvi should be proportionately reduced).

415. The Respondent further submits that neither the Claimant's representative nor anyone else at this stage was contending that the Claimant was innocent of the charges against him. In fact, it appears that his guilt was taken as a given by all, including his own representatives and counsel.

416. Despite being urged by all to do the right thing, the Claimant chose to absent himself from the entire proceeding. But he did want to know what was going on, thus he sent a lawyer to attend the hearings and "take notes". It is telling that with all the misinformation from various ignorant media reports the Claimant has inundated us with, and the interminable witness statements describing what his foreign witnesses, who have no first-hand knowledge of the situation, see as the Indonesian judicial and political environment (none of which disputes the fairness of the process as applied) the Claimant has neglected even to mention that he had a legal representative sitting in the court day after day and reporting

[135] Affidavit of Aldha Hera Sarirafita, R 41, at paragraph 12.
[136] R 44, Affidavit of Amari and R 40, Affidavit of Desy Meutia Firdaus.

to him, presumably night after night, let alone share with us what was reported to him.

417. The trial went on for six months, during which all evidence that could be found, all that had not already been removed and hidden or destroyed by the Claimant and his partners, was presented and analysed. It is all summarized in the court judgment[137], outlined in Detective Senior Inspector R.J.C. Harding's First Affirmation dated 15 December 2010 to the High Court of Hong Kong in *In the Matter of the Mutual Legal Assistance in Criminal Matters Ordinance Cap. 525* and *In the Matter of Rafat Ali Rizvi, Hesham Talaat Mohamed Al-Warraq et al HCMP No. 2557/2010.*[138]

418. The Respondent submits that the Claimant intentionally chose not to put any evidence before the Court in his own defense. He was notified of the whole of the judgment, not only informally by his note taking counsel but also officially by the Court.

419. Furthermore, the Claimant's home state, Saudi Arabia, has respected the Indonesian Court's judgment against its own citizen. According to the Claimant himself, it has imposed among other things, travel restrictions. It is obvious that the Saudi government credits the Indonesian Court's conclusion that the Claimant is a criminal.

420. The Respondent submits that if the Claimant sincerely believed that the judgment was incorrect or unfair, he had every opportunity to file an appeal. Appeal to the High Court is the proper remedy for anyone not satisfied with a court judgment. Such appeal is open to all parties, in any civil or criminal case, provided notice of intention to file appeal is given within 7 days of the day the judgment is notified to such party. Clearly, there is no evidence of "futility" regarding the administration of justice in Indonesia.

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[137] English translation of the Indonesian verdict No. 339/PID.B/2010/PN.JKT.PST dated 16 December, 2010, is attached as Exhibit R 45

[138] See Exhibit C53, Affirmation of RJC Harding in particular paragraphs 13-17.

421. According to the Respondent, the Claimant had ample opportunity to appeal. He chose not to do so. Even after the time had passed to seek appeal to the High Court, the Claimant still had the time and opportunity to apply to the Supreme Court for the recourse of last resort: Judicial Review (*Peninjauan Kembali*, "**PK**"). In fact he may still do so. But this he has also chosen not to do.

5. THE CLAIMANT'S PROTECTION AND SECURITY CLAIM UNDER ARTICLE 2 OF THE OIC

A. The Claimant

422. The Claimant claims the following:

(i) There is no substantive difference between the standards of "adequate protection and security" and "full protection and security".

423. Article 2 of the OIC Agreement provides that the "*invested capital shall enjoy adequate protection and security.*" The Claimant submits that tribunals have been called upon to interpret treaties referring to "*full protection and security,*" "*most constant protection and security,*" and simply "*protection and security.*" here is no indication that such variations impose different degrees of protection, as argued by the Respondent. Tribunals and scholars have repeatedly affirmed that "*arbitration practice does not seem to attach a significant importance to the wording of the applicable treaty in the interpretation of the obligation of granting full protection and security.*" Accordingly, the Tribunal should find that "*adequate protection and security*" is the same standard as "*full protection and security.*"

424. According to the Claimant, even if "*adequate protection and security*" is in fact a lower standard, then pursuant to the most-favoured-nation clause ("**MFN**") clause at Article 8 of the OIC Agreement, the Claimant is entitled to import the higher standard of "*full protection and security*" from Article 3(2) of the UK-Indonesia BIT or any other treaty to which Indonesia is a party.

(ii) "Adequate protection and security" extends to protection against the instabilities of the legal and business environment

425. The Respondent claims that adequate protection and security is restricted to the promise of physical protection and security only. The language of the OIC Agreement provides for no such limitation. The Claimant relies on six recent ICSID decisions[139] that according to the Claimant, rejected the Respondent's position, finding that full protection and security extends to providing a stable and secure investment environment.

426. The Claimant submits that given the plain language of the OIC Agreement and the support from other awards, the Tribunal should find that "*adequate protection and security*" applies to regulatory and supervisory protection and security as well as protection of physical assets.

(iii) The obligation to provide adequate protection and security applies not only to the Claimant's investment but also to the Respondent's treatment of the Claimant.

427. The Respondent claims that the "protection and security" provision of Article 2 of the OIC Agreement applies only to the investment, and not to the investor. According to the Claimant, such a limitation has been rejected in the awards of several tribunals.

428. The Claimant submits that, in the present case the Claimant has showed the Respondent's illegal conduct by both its investigative and prosecutorial authorities, as well as its application of criminal legislation in a discriminatory manner. Both of the claims demonstrate that the host State has failed to "*properly examine*" his case in a way that would "*vindicate his rights.*" A "*functioning*

[139] Exhibit CLA201 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08, Award (6 February 2007) ¶303 (finding that termination of a migration control contract deprived Siemens of its "legal security and protection"). Exhibit CLA202 *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award (3 November 2008) ¶ 189 (finding that a "dismantling" of the regulatory framework through pessifaction and termination of tariff adjustment rights violated the "protection and constant security" standard). Exhibit CLA203 *Frontier Petroleum Service Ltd. v. The Czech Republic*, UNCITRAL, Award (12 November 2010); Exhibit CLA204 *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Award (29 December 2004); Exhibit CLA205 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (13 September 2001).

court system" was not made available to the investor. The Respondent offers no support for the premise that a "*functioning court system*" applies only to claims brought by the investor. The Claimant claims that the Respondent has levied an arbitrary, discriminatory, and illegal criminal judgment against the Claimant. In doing so it has deprived the Claimant of his right to a functioning court system.

429. The Claimant also submits that he has demonstrated that the Respondent's investigative and prosecutorial authorities engaged in illegal conduct by failing to properly serve him with notice of the criminal proceedings and by soliciting corrupt payments. Additionally, the Claimant has shown that the Respondent applied its criminal legislation to the Claimant in a discriminatory manner. Moreover, the Claimant was denied the right to a functioning court system, as the verdict of the Central Jakarta District Court was tainted by corruption and the denial of due process.

430. Moreover, the Claimant submits that he has demonstrated through his written and oral submissions that the Respondent was negligent in its supervisory role over Bank Century, thereby causing harm to the Claimant's investment. The Respondent's negligent regulatory supervision allowed Mr. Tantular to embezzle over USD 300 million of Bank Century's funds, placing the bank on the brink of collapse and depriving the Claimant of any meaningful use of his investment.

B. The Respondent

431. The Respondent submits that the Claimant's assumption that "full" protection and security is the same as "adequate" protection and security cannot hold up under any interpretation of those terms, in any language. Article 2 provides for "*adequate*" protection and security. It is obvious that this was intended to impose a lower standard than the adjective "*full*".

432. The Respondent further submits that the Claimant also takes it for granted that the protection and security standard extends to regulatory measures. According

to the Respondent several tribunals, have confirmed that this provision is restricted to the promise of physical protection and security only.

433. The Respondent argues that the Claimant has not shown in this case that the adequate protection and security standard applies to regulatory acts. He does not explain the standard this obligation places upon a host state in regulating its banking sector. Nor does he specify in what way he deems the Respondent to have breached this obligation.

434. Moreover, the Claimant has not pointed to a single law or regulation that the Respondent has violated, nor provided any evidence of the same. The fact that the Claimant claims that he expected Bank Indonesia to detect the cleverly concealed corrupt practices of his coconspirators, to say nothing of his own misdeeds, is in itself telling of the ridiculous nature of his allegation.

435. The Claimant also faces the additional hurdle of arguing that the Government failed to protect him not only from himself, but also from the acts of a third party, in the person of Mr. Tantular. It should be noted, however, that in this case, Mr. Tantular was no ordinary third party, he was the Claimant's chosen business partner and supposed co-conspirator. The Claimant asserts that he knew, or believed, Mr. Tantular to be "blacklisted" by Bank Indonesia, yet he opted to do business with him, and indeed co-signed a letter of commitment with him. It was a risk he assumed.

436. The Respondent submits that the Claimant has anyone besides himself and Mr. Rizvi to blame, it is his chosen business partner. There is no evidence to support the allegation that Indonesia encouraged, fostered or contributed in any way to the acts allegedly committed by Mr. Tantular. He is the Claimant's accomplice, not a random third party.

437. The Claimant also alleges, that the Respondent failed to ensure adequate protection and security to "*... the Claimant himself in the criminal proceedings arising out of the nationalization of Bank Century; in breach of Article 2 of the OIC Agreement.*" It is obvious that Article 2 is very clear in saying that "*the*

invested capital shall enjoy adequate protection and security." It does not provide for the protection of the investor himself, in particular in relation to protecting his person from criminal prosecution when he commits acts contrary to domestic law.

6. THE RESPONDENT'S COUNTERCLAIM

A. The Respondent

1. The Tribunal has jurisdiction to decide on the Respondent's Counterclaim

(i) Article 9 of the OIC Agreement provides a basis for the counterclaim.

438. The Respondent submits that Article 9 of the OIC Agreement does more than merely limit the right of an investor to claim redress only to when he is in compliance with certain standards of behavior and good order; it also commits him to assume liability for any breaches thereof in arbitration.

439. According to the Respondent, the language of Article 9 demonstrates that the provision is intended to serve as more than a bar to certain claims; it is an affirmative commitment by an investor who seeks protection of the treaty to abide by certain obligations in respect of his conduct. Failure to do carries consequences. Article 9 reads: *"The investor shall be bound by the laws and regulations in force in the host* ***state*** *and* ***shall refrain from all acts*** *that* ***may*** *disturb public order or morals or that* ***may*** *be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from* ***trying*** *to achieve gains through unlawful means." (emphasis added)*

440. The Respondent submits that the Claimant has not met those obligations. If he chooses, as he has done, to bring a claim against Indonesia, he must be prepared for the eventuality that Indonesia would reciprocate, and in fact so acknowledged in writing in the 25 November 2011 letter agreement.

(ii) Article 17 of the OIC Agreement likewise contemplates counterclaims

441. The Respondent submits that Article 17 of the OIC Agreement likewise clearly indicates that counterclaims are to be treated similarly to, and along with, main claims. In contrast to the language of several Bilateral Investment Treaties, which limit the class of claimants to investors only, the OIC Agreement is decidedly neutral in its language concerning who may bring an arbitration:

> *"If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then* ***each party*** *has the right to resort to the Arbitration Tribunal for a final decision on the dispute. (emphasis added) (Article 17(2)(a))".*

442. Furthermore, Article 17 (2) (d) anticipates that awards will be rendered against Investors. It says: *"The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not* ***and whether the investor against whom the decision was passed is*** *one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts." (emphasis added)*

443. It would have been a simple matter for the drafters to limit the scope of arbitration to claims by investors. Indeed, in Article 16, the drafters specifically refer to the rights of the investor with respect to recourse in the courts of the host state.

444. The Respondent argues that had they intended that arbitration under the OIC Agreement be similarly one sided, one imagines they would likewise have referred only to the ability of investors to bring it. Instead, they chose the words: "***each party*** *has the right to resort to the Arbitration Tribunal for a final decision on the dispute*", as well as making reference to enforcement against an investor.

(iii) The UNCITRAL Rules, *which are* applicable to this arbitration, permit counterclaims

445. This arbitration is conducted under the 2010 UNCITRAL Arbitration Rules, by agreement of the Parties, and accepted by this Tribunal.

446. The Respondent submits that Article 21.3 of the UNCITRAL Rules explicitly and unambiguously permits the filing of counterclaims:

> *"In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it".*

(iv) The Claimant's own legal representatives consented to counterclaims in the arbitration agreement

447. The Respondent also submits that the Claimant explicitly consented to counterclaims through his counsel. The Parties' letter of agreement of 25 November 2011 provides that:

> *"If the Tribunal rules in favour of your client in relation to the preliminary objections' application, any further jurisdictional or admissibility objections, the merits and any counterclaim will be submitted to the same Tribunal"*[140]

448. The Respondent argues that there is no room for ambiguity in that formulation, despite the Claimant's counsel's assertion at the Final Hearing that although they had agreed that the Respondent could bring its counterclaim before this Tribunal in the present arbitration, that did not imply that the Tribunal had jurisdiction to hear it[141].

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[140] R1

[141] Transcript, 10 March, page 535: line 5.

449. The Respondent submits that the Parties agreed on the scope and manner of arbitration and one clear agreement was Indonesia's ability to bring a counterclaim if the Claimant's claim survived the jurisdictional phase. Thus, by determining that it has jurisdiction to hear the Claimant's claim, this Tribunal also determined that it has jurisdiction to hear Respondent's counterclaim.

(v) Indonesia is not claiming the same damages as in the criminal judgment

450. The Respondent submits that the principal substantive argument that the Claimant raised against Indonesia's counterclaim was that it constituted an attempt to recoup the same damages as the Jakarta court found that Mr. Al Warraq owed to Bank Century. As such, claims the Claimant, the counterclaim violates the international law principle of *ne bis in idem.*

451. It is certainly true that the monies that the Claimant and Mr. Rizvi were convicted of having taken from Bank Century amount to approximately the same sum as the assets for which Indonesia seeks redress in its counterclaim. The jurisdictional basis for the prosecution and the counterclaim, however, are entirely different.

452. The Jakarta Court convicted the Claimant and Mr. Rizvi of money laundering and corruption – criminal offenses.

453. The Respondent also submits that the jurisdictional basis for the counterclaim, by contrast, is Article 9 of the OIC Agreement. For the reasons set forth above, Article 9 obligates an investor to abide by certain standards of morality and good order, and not to attempt to enrich himself by unlawful means as follow:

> *"Indonesia's claims in this arbitration are for Al Warraq's unjustly enriching himself (OIC Article 9), at the cost of the state, and her taxpayers".*

454. The Claimant and Mr. Rizvi took well in excess of US$ 300 million of Bank Century assets and converted them to their own use and possession. The Respondent submits that unjust enrichment is hardly a model of morality and good order, nor could this have been done in good faith.

(vi) The Counterclaim does not violate the rule of ne bis in idem

455. The Respondent submits that, under the principle of *ne bis in idem*, a person shall not be prosecuted more than once for the same criminal conduct. The principle is found in various legal jurisdictions and is incorporated in Article 14(7) of the ICCPR which provides that "*[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*" *Ne bis in idem* prevents the Claimant to be tried again for the same criminal offense.

456. The Respondent submits that in its counterclaim, Indonesia does not seek to re-prosecute the Claimant for his criminal offense. Nor does this Tribunal have any criminal jurisdiction. The counterclaim is based on a civil matter that is, the Claimant's breach of Article 9 of the OIC Agreement. Such breach is not a criminal offense, and thus the counterclaim does not violate the rule of *ne bis in idem*.

457. The basis of the unjust enrichment claim is the failure to honor the Commitment Letters and the AMA, not specifically the criminal theft of assets. It should be patently clear that the Claimant and Mr. Rizvi defrauded and embezzled their way to wealth, by tricking Bank Century, as well as Bank Indonesia, into believing that they would redeem or repay Bank Century assets which they ultimately retained.

458. The Respondent submits that, whoever was responsible for the shortfall in Bank Century assets, it was the Claimant, in concert with Mr. Rizvi, who promised, and committed to Bank Indonesia, to recapitalize the bank. They failed to do so. And more: they manipulated to their own advantage the securities that they were entrusted to sell. As such, they enriched themselves directly at Bank Century's

expense. It fell to the Indonesian government, through the LPS, to make up the shortfall. This was a direct breach of Article 9 of the OIC Agreement.

2. Indonesia is entitled to more than US$ 300 million in damages from the Claimant

(i) The actions of the Claimant, together with Mr. Rizvi, were the proximate cause of Bank Century's insolvency and the need for the bailout

459. The Respondent submits that, even without Mr. Tantular's misdeeds, Bank Century was insolvent in November 2008. It needed a bailout.

460. The Respondent submits that, because both the Commitment Letters and the AMA were binding, the Claimant and Mr. Rizvi were legally responsible for enforcing their terms. By failing to do so, by holding on to Bank Century's assets rather than either selling them (as required under the AMA) or returning them (as required under the Commitment Letters), the Claimant and Mr. Rizvi ended up more than US$ 300 million better off than they ought to have been, all to the loss of Bank Century and ultimately the people of the Republic of Indonesia.

1. Loss of value through AMA

461. The AMA structure is straightforward. Bank Century entrusted just over US$ 200 million (US$ 203.4 million) in assets to Telltop Holdings, a British Virgin Islands vehicle of the Claimant and Mr. Rizvi. Telltop Holdings, the Manager in the Agreement, warranted to Bank Century (the "Bank" in the AMA) as follows:

> *5.1 The Manager hereby warrants that the Bank shall realize from the disposal of each of the assets an amount which is at least the Face Value of each of the Assets by the respective maturity dates listed in Schedule 1 herein.*
>
> *5.2 As security for the warranty in clause 5.1 herein, the Manager shall within seven (7) days of the Commencement Date (or such other date as the parties may agree), place a sum of US$220,000,000 at its bank account*

at Dresdner Bank (Switzerland), Zurich (the "Security Deposit") and shall execute all documents effecting a pledge to Dresdner Bank of the Security Deposit in favour of the Bank, in accordance to the form set out in Schedule 4 herein. 5.3 In the event that the amount realized from the disposal of any of the Assets is less than the Face of that Asset, the Bank shall be entitled to deduct from the Security Deposit the Shortfall. For this purpose, "Shortfall" means the difference between (i) the amount received by the Bank from the disposal of, and dividends and interest arising from, that Asset and

(ii) the total of the Face Value of that Asset and the expenses of the Bank in respect of such realization and tax charges which would be payable by the Bank, if any. In the event that [an] Asset listed has a maturity date longer than the pledge, the Bank shall be entitled to deduct the Security Deposit for the same amount as the Face Value of the Asset on or before the maturity date of the pledge.

462. According to the Respondent, Telltop was entitled to take a commission on every transaction, and in fact took the entire amount at the outset, before any transaction was made. And as an inducement to selling the assets for the highest possible price, Telltop was also entitled to a "profit share" of 20% of any sums it recouped over and above the Face Value of an asset[142].

463. The Respondent submits that, by the expiration date of the AMA, in February 2009, not one of Bank Century's assets had been sold. It was then that Bank Century sought to recoup the Security Deposit in Dresdner Bank, in accordance with the AMA, only to find that the whole of such deposit had been pledged to another entity having no relation to Bank Century or Indonesia, and that no pledge in favor of Bank Century had been registered with or delivered to Dresdner Bank. In fact, it would appear that no pledge in favor of Bank Century was even executed.

[142] Section 6.2. of AMA. C 47.

464. The Claimant thus deprived Bank Century -- and by extension the LPS -- of the US$ 203.4 million entrusted to him, or his entity, in order to improve the Bank's finances and liquidity position. In other words, the Claimant retained these assets for his own unjust enrichment.

2. Loss of value in fraudulent asset pledges and unreturned assets

465. The Respondent submits that, in addition to the AMA losses, Bank Century suffered significant losses when the Claimant organised asset pledges in order to secure collateral, but kept the assets for himself.

466. There were two such asset pledges that could be identified: the first occurred in 2004. Bank Century pledged US$ 70 million of US Treasury Strips (maturing in 2011) and US$ 42.48 million in Republic of Indonesia bonds, to FGAH[143]. The pledge documents provided that the pledged securities would guarantee up to US$ 100 million in loans. Ultimately FGAH secured only US$ 35 million in loans with these pledged securities.

467. In 2005, Bank Century arranged to sell the entirety of the Republic of Indonesia bonds portfolio to FGAH. The sale price was US$ 42.48 million, the face value of the bonds.

468. Upon sale, Bank Century instructed FGAH to take US$ 35 million of the sale proceeds and pay off the loan for which the bonds had stood as pledged security. Bank Century told FGAH to invest the remaining US$ 7.48 million in new US Treasury Strips. FGAH paid off the US$ 35 million loan, but Bank Century never saw the remaining US$ 7.48 million again. Now that the US$ 35 million loan had been paid off, the US$ 70 million in US Treasury Strips were likewise free from a security pledge. Bank Century arranged to swap some US$ 12 million of the Strips for Indonesian Rupiah in a deal with Kuo Capital. US$ 45 million of the Strips were deposited in an account in Dresdner Bank in Zurich, reportedly

[143] RB 49-51.

on behalf of Bank Century (the same bank that would later hold the security for the AMA).

469. The Respondent claims that the remaining US$ 13 million of the US Treasury Strips suffered the same fate as the US$ 7.48 million from the sale of the Republic of Indonesia bonds: Bank Century never saw them again. As for the US$ 45 million in Dresdner Bank: when Bank Century sought to recoup these funds, Dresdner Bank informed it that US$ 30 million had been pledged as security for a private loan to FGAH, which is the Claimant's own Bahamas Company.

470. The Claimant and his witness, Mr. Rizvi, have insisted that Bank Century was aware of this private loan, but the Claimant has provided no documentation to support his assertion. Nor has he ever offered to repay the loan.

471. The Respondent alleges that, as a result of this asset pledge scheme, the Claimant, presumably with Mr. Rizvi, enriched himself in the amount of US$ 55.48 million (US$ 7.48 million + US$ 13 million + US$ 30 million), at Bank Century's expense.

472. The Respondent further alleges that, the second asset pledge scheme is more straightforward. In 2005, the Claimant and Mr. Rizvi offered the possibility of a US$ 40 million loan from ABN AMRO Dubai. As intended security for that loan, Bank Century initially provided to the Claimant a National Australia Bank CD valued at US$ 30 million, Nomura Bank International CD valued at US$ 10 million, and a West LB CD valued at US$ 10 million. A few months later Bank Century provided an additional National Australia Bank CD valued at US$ 15 million, intended as further security for the loan facility. The total value of the pledged assets was thus US$ 65 million[144].

473. The Respondent submits that no loan facility was ever arranged for Bank Century, and the Claimant never returned for Bank Century, and the Claimant

[144] Exhibit RB 64.

never returned Bank Century's assets. (It appears that instead, the Claimant arranged a loan to himself, or to one of his companies, using at least some of Bank Century's assets as collateral.

474. The Respondent submits, therefore, the Claimant and Mr. Rizvi unjustly enriched themselves in the amount of at least US$ 323.88 million (US$ 203.4 million + US$ 55.48 million + US$ 65 million). As the ultimate party responsible for rescuing Bank Century, Indonesia would now like that money back.

B. The Claimant

475. The Claimant submits that the Respondent's counterclaim must fail, for the following reason:

(i) The OIC Agreement grants no right of recourse to the state; the right only belongs to the investor

476. The Claimant submits that the Tribunal in the present case does not have jurisdiction to decide on the Respondent's counterclaim because the state does not accrue any rights under the OIC Agreement. Any right to recourse arising from the agreement belongs to the investor. Because the OIC Agreement does not provide for a state's right to a cause of action against an investor, the Respondent's counterclaim must fail.

477. Under UNCITRAL Rule 21.3, "*the respondent may make a counterclaim or rely on a claim for the purpose of set-off provided that the tribunal has jurisdiction over it.*"[145]

478. The Claimant further submits that Article 16 of the OIC Agreement provides that the "*host state undertakes to allow **the investor** the right . . . to complain against a measure adopted by its authorities against him.*" Article 16 also provides that "*if **the investor** chooses to raise the complaint before the national courts or*

[145] CLA207 UNCITRAL Arbitration Rules 2010, art. 21.3.

before a tribunal then having done so . . . he loses the right of recourse to the other." The only rights of recourse that can be found in the language of the OIC Agreement belong to "*the investor*," as the investor is the beneficiary of the obligations imposed on the state.

479. The Respondent's suggestion that Article 17(2)(d) of the OIC Agreement grants it the right to assert a counterclaim has no merit. Article 17(2)(d) has nothing to do with counterclaims. Instead, it is an enforcement mechanism providing that decisions of an arbitral tribunal concerning a dispute under the OIC Agreement "*have the force of judicial decisions.*"

480. Article 17(2)(d) further provides that "*contracting parties must implement [the decisions] in their territory*," regardless of whether the "*investor against whom the decision was passed*" is a national of the implementing state. According to the Respondent, the fact that a decision may be "*against the investor*" entitles the state to assert a counterclaim. A decision is "*against the investor*" if the investor does not prevail in its own claim – it does not give the state the right to assert a counterclaim.

(ii) The Respondent's counterclaim is outside the scope of the Claimant's consent to arbitration

481. The Respondent's assertion that the Claimant consented to the Tribunal's jurisdiction over the counterclaim lacks merit. The scope of the Claimant's consent to arbitration was limited to the scope of jurisdiction provided by the OIC Agreement, which does not include state counterclaims.

482. The OIC Agreement is a binding offer of jurisdiction by the host state, which must be accepted by the investor in writing.[376] The Claimant accepted the Respondent's offer of jurisdiction by requesting arbitration and filing a Statement of Claim. The terms of his acceptance are governed by the language of the OIC Agreement. As already discussed, the OIC Agreement grants rights to "*the investor*," not the state. As a result, the Claimant's acceptance of the Respondent's offer enabled the Claimant to enforce his rights as an investor, as provided by the scope of jurisdiction in the OIC Agreement. As the Respondent

does not accrue the right to a counterclaim under the OIC Agreement, any argument that the Claimant consented to jurisdiction over a counterclaim must fail.

483. The Respondent also claims that the Claimant consented to jurisdiction over the counterclaim by way of a "Letter of Agreement" dated 25 November 2011146. The Claimant submits that this argument has no merit. The letter of agreement states that if the Tribunal rules in favour of the Claimant locus standi to bring the claim, then the "merits and any counterclaim" will be heard by the same Tribunal. As the claiming party in respect of the counterclaim, it falls to the Respondent to prove every element of that counterclaim, including the legal basis for it. The Claimant's consent to such a counterclaim being brought before the Tribunal does nothing to alleviate the responsibility of the Respondent. The letter of agreement does not create additional substantive rights that are absent in the OIC Agreement[147]. If the Respondent cannot show a right to bring a counterclaim by reference to the text of the OIC Agreement, it has failed at the first hurdle.

(iii) The Respondent has already raised the complaint before the national courts and is therefore precluded from seeking relief through arbitration

484. The Claimant submits that the OIC Agreement does not impose any obligations on the investor, nor does it create an avenue for the Respondent to seek relief for alleged breaches of Indonesian law by the investor. Therefore, the Tribunal does not have jurisdiction to decide on the merits of the Respondent's counterclaim. Alternatively, if the Tribunal does find that the language of the OIC Agreement gives rise to jurisdiction over the counterclaim, it should still decline to exercise jurisdiction, because the Respondent has already sought relief in the national courts.

[146] The Respondent's Defence and Counterclaim ¶ 295

[147] The Respondent refers to Exhibit CLA212 (pending claim asserted by Peru for breach of two concession contracts entered into with investor Caravelí Cotaruse); Exhibit CLA210 (finding jurisdiction for the state's counterclaim where the BIT's dispute resolution clause contained broad language that referred to resolving disputes under both municipal and international law).

485. Article 16 of the OIC Agreement states that, "*Provided that if the investor chooses to raise the complaint before the national courts or before an arbitral tribunal then having done so before one of the two quarters he loses the right to the other.*" As mentioned in the section above, this language applies to rights of the investors to bring claims, and those rights do not accrue to the Respondent under the agreement.

486. Even if the Tribunal finds that such rights do in fact accrue to the host state, the Respondent is still precluded from bringing its counterclaim by Article 16 and the doctrine of *ne bis in idem*. Article 16 applies the doctrine of *ne bis in idem*, which means "*not twice for the same.*"[148] It prevents prosecution twice for the same cause of action. The Respondent has already raised the cause of action against the Claimant in the national courts. Therefore, it is precluded from raising it a second time in arbitration.

(iv) The findings of the Indonesian court have no effect on the findings of the Tribunal

487. The Claimant submits that there are no rights in the OIC Agreement that accrue to the state against the investor. As a result, the Tribunal does not have jurisdiction over the Respondent's counterclaim. Nevertheless, the Respondent now wishes to take the judgment of an Indonesian court and apply it to the present proceedings such that it would have a *res judicata* effect of establishing a violation of a bilateral investment treaty. International law prohibits this.

488. "*There is no effect of res judicata from the decision of a municipal court so far as international jurisdiction is concerned.*"[149] The characterization of an act as internationally wrongful is governed by international law. The fact that such an act was characterized as wrongful under domestic law has no effect on its characterization under international law[150]. As a result, the Respondent may not

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[148] CLA211 *Occidental Petroleum Corporation v. Ecuador*, ICSID Case No. ARB/06/11, Award, ¶¶ 573–74 (5 October 2012).

[149] CLA214 Ian Brownlie, *Principles of Public International Law*, 51 (7th ed. 2008)

[150] CLA194; CLA195 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 38 (2001).

apply the result of a decision rendered under domestic law to an international arbitration proceeding applying the terms of a BIT.

489. The Claimant submits that the Tribunal does not have jurisdiction over the Respondent's counterclaim because the OIC Agreement does not grant the state the right to a cause of action against the investor. Even if the Tribunal does find that the OIC Agreement grants the Respondent the right to assert a counterclaim, it should still decline jurisdiction under Article 16 and the doctrine of *ne bis in idem* because the Respondent has already raised its claim in the national courts. Alternatively, if the Tribunal does not decline jurisdiction over the counterclaim, then it should find that the judgment of the Indonesian court has no effect on the Tribunal's decision as to whether there has been a violation of international law.

(v) No evidence that losses claimed were incurred as a result of the Claimant's actions

490. The Claimant submits that the Respondent's understanding of the financial transactions is woeful and, it would appear, the Respondent fails to grasp the fundamental contradictions in its case against the Claimant and Mr Rizvi. On the one hand, it accuses the Claimant and Mr Rizvi of "*replacing valuable assets for trash*" – specifically "*marketable securities*" for "*illiquid, 'zero coupon' CDs*". On the other hand, it claims that the Claimant and Mr Rizvi used these so-called "*worthless junk securities*" as collateral for substantial loans from major financial institutions. It is on the basis of these misconceptions that the Respondent bases its ill-fated counterclaim.

491. The Claimant claims that the Respondent does not appear to have carried out even the most basic of due diligence. Had it done so, for example, it would have discovered that Delta Advisory Pty is not related to the Claimant or Mr Rizvi and any claims in respect of that entity must immediately fall away. The Respondent claims that "*[t]he Brattle Group Report confirms that the frauds of Messrs. Al Warraq and Rizvi alone were the cause of the liquidity crisis that forced Bank Century's bailout*",[151] yet there is nothing in the Brattle Report to

[151] The Respondent's Defence and Counterclaim.

demonstrate how this conclusion was arrived at. Indeed, nowhere is it suggested that Mr Tantular's misdeeds have been the subject of any meaningful analysis. Instead, the Respondent has sought out the very perpetrator of these frauds and invited him to tell his "story" which the Respondent has then advanced as the truth, the whole truth and nothing but the truth. The Claimant submits that, in reality, each and every one of the allegations that form the basis of the Brattle Group's Report and the Respondent's counterclaim is flawed. Mr. Rizvi deals with the true nature and effect of the securities transactions and the source of Bank Century's liquidity problems in his Second Witness Statement.

VI. THE DECISION.-

492. On 21 June 2012, the Tribunal rendered its Partial Award, and decided as follows:

> *"1. Article 17 of the OIC Agreement establishes investor-State dispute resolution provisions between the Contracting Parties and investors of other Contracting Parties;*
>
> *2. In accordance with the above paragraph, the Respondent has consented to arbitrate the dispute with the Claimant arising from the Claimant's avowed investment in Bank Century and as described in the Notice for Arbitration;*
>
> *3. The Tribunal reserves the determination of its jurisdiction to the merits phase of the arbitration, where the questions to be determined include whether the Claimant can establish its status as an 'investor' within the meaning of the OIC Agreement;*
>
> *4. The applications for security for costs by the Respondent is dismissed;*

5. *The costs of the jurisdictional phase of the arbitration are reserved for the merits phase of the arbitration."*

493. In the following sections, the Tribunal will discuss the issues that are decisive to the outcome of the arbitration:

1) Does the Claimant qualify as an investor within the meaning of Article 1 of the OIC Agreement?

2) Did the Respondent breach Article 10 of the OIC Agreement?;

3) Is there an obligation on the Respondent to provide fair and equitable treatment, and if so, has that obligation been breached by the Respondent?;

4) Did the Respondent fail to provide adequate protection and security to the Claimant's investment, and therefore breached Article 2 of the OIC Agreement?;

5) What is the effect, if any, of Article 9 of the OIC Agreement, on the rights of the Parties in the arbitration; and

6) Does the OIC Agreement authorize the Respondent to submit a counterclaim and, if so, how should the Respondent's counterclaim be determined?

1. PRELIMINARY ISSUES

494. At the Final Hearing, the Claimant presented its objections to the Tribunal's decision to have the Claimant testify via video-conference. The Parties had the opportunity to make extensive submissions on the subject.

495. The Tribunal notes that there is no requirement that the claimant or the respondent appear in person under the UNICTRAL Arbitration Rules or in international arbitration in general. The Claimant was represented by counsel and had the opportunity to provide his testimony by video-conference, and has

put in statements, his witnesses have put in statements. The Claimant also had the opportunity to present its case through its testimony as well as written submissions.

496. The Tribunal therefore upholds its decision to hear the Claimant's testimony via video-conference during the Final Hearing, and confirms that the Parties have had the opportunity to present their case in accordance with the UNCITRAL Arbitration Rules.

2. THE CLAIMANT'S STATUS AS INVESTOR WITHIN THE MEANING OF ARTICLE 1 OF THE OIC AGREEMENT

497. In its Partial Award of 21 June 2012, the Tribunal reserved the determination of whether the Claimant can establish its status as an 'investor' within the meaning of the OIC Agreement to the merits phase. The Tribunal will discuss and decide in this section whether the Claimant has standing as investor pursuant to Article 1 of the OIC Agreement.

498. Article 31 of the VCLT provides that a *"treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"*.

499. The OIC Agreement Article 1(4) defines capital as *"[a]ll assets . . . owned by a contracting party to this Agreement or by its nationals, whether a natural person or corporate body and present in the territories of another contracting party whether these were transferred to or earned in it, and whether these be moveable, immoveable, in cash, in kind, tangible as well as anything pertaining to these capitals or investments by way of rights or claims and shall include net profits accruing from such assets and the undivided shares and intangible rights"*.

500. Also, Article 1(5) defines investment as the *"employment of capital in one of the permissible fields in the territories of a contracting party with a view to*

achieving a profitable return, or the transfer of capital to a contracting party for the same purpose, in accordance with this Agreement".

501. Regarding the Claimant's status as an investor in the present arbitration, the Tribunal refers to the nationality requirements for an 'investor' as set out in Article 1(6) of the OIC Agreement which defines the investor as:

> *"*[T]*he Government of any contracting party or natural corporate person [sic], who is a national of a contracting party and who owns the capital and invests it in the territory of another contracting party.*
> *Nationality shall be determined as follows.*
>
> *(a) Natural Persons:*
>
> *Any individual enjoying the nationality of a contracting party according to the provisions of the nationality law in force therein.*
>
> *(b) Legal Personality:*
> *Any entity established in accordance with the laws in force in any contracting party and recognized by the law under which its legal personality is established."*

502. The Claimant argues that the definition of investor in Article 1(6) of the OIC Agreement applies to him since he is a Saudi citizen, and Saudi Arabia signed the OIC Agreement on 23 September 1983 and ratified it on 17 September 1984.

503. The Tribunal notes that there is no explicit reference to direct or indirect investments in the OIC Agreement, and in particular in Article 1(4) and 1(5). Article 1(5) requires the 'employment' of capital in the territory of a contracting party (here Indonesia) without designating that the employment must be in the investor's own name. Similarly, Article 1(4), which defines capital, requires the assets (here the shares in Bank Century) to be 'owned' by a national of a contracting state (here, allegedly the Claimant, a national of Saudi Arabia) but does not require the shares to be owned personally or directly, leaving open the possibility of ownership through an investment vehicle such as FGAH.

504. The Respondent has called into question whether the Claimant personally held shares in Bank Century at the time it was placed in administration. The Claimant has referred to evidence that the Respondent treated the Claimant as a shareholder at the time.

505. In fact, the Claimant alleges that its investment was made through FGAH as well as by the Claimant personally. FGAH is a company registered in the Bahamas. The Bahamas are not a Contracting Party to the OIC Agreement, and so FGAH is not an investor for the purposes of the OIC Agreement. However, the Claimant also claims that he has demonstrated that he "*owns the capital*" in Bank Century through his 100 per cent legal ownership of FGAH, as well as his ownership of shares through his personal shareholding through ABN Amro. Also the Claimant acquired and held directly 141,538,462 shares in Bank Century[152].

506. Concerning the Claimant's direct ownership of "capital" in Bank Century, according to a letter dated 13 June 2013 from the Financial Services Authority Otoritas Jasa Keuangan, which administers the Indonesia Stock Exchange, on which Bank Century's (now Bank Mutiara's) shares are listed, as at 21 November 2008, the date of the bailout, not a single share was registered in the name of the Claimant.

507. Furthermore, the List of Shareholders of Bank Century as of November 2008 (Exhibit R 25) listed "Clearstream Banking SA Luxembourg" to hold shares in the care of Citibank, NA., Jakarta. ABN Amro's name was not mentioned. The Claimant claims that his shares were held on his behalf by ABN AMRO. But ABN AMRO does not appear on the Bank Century share register, except as the custodian of a far smaller number of shares on behalf of someone else entirely whose name is recorded on the register (401 Budhi Somjtino). The Claimant also claimed that his shares were held by a Luxembourg company, Clearstream. However, there is no evidence of the Claimant's interest in any shares held by Clearstream.

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[152] C41, ABN AMRO statement dated 4 January 2009, and the Witness Statement of Hesham al-Warraq, para. 22.

508. Even if for the sake of argument the Tribunal would accept the Claimant's claim that his shares were held by Clearstream, Indonesia does not recognize "bearer shares". Even "nominee" or "trustee" arrangements are not permissible under Indonesian law. Shares in any Indonesian company must be issued (and registered) in the name of their owner. Only the registered holder is recognized as the owner. Even "nominee" or "trustee" arrangements are not permissible under Indonesian law.

509. Article 48 of the Indonesian Company Law, Law No. 40 of 2007 (replacing Law No. 1 of 1995)153 states as follows:

"Article 48

(1) Companies' shares shall be issued under the name of their owner.

(2) The requirements for ownership of shares may be determined in the articles of association with due attention to the requirements determined by the authorised agency in accordance with the provisions of legislative regulations.

(3) In the event that requirements for ownership of shares as contemplated in paragraph (2) have been determined and are not fulfilled, then the party who obtained ownership of the shares may not exercise rights as shareholder and the shares shall not be counted in any quorum which must be achieved in accordance with the provisions of this Act and/or the articles of association."

510. Accordingly, the Tribunal finds that the Claimant did not have a direct investment in Bank Century.

511. However, the Tribunal considers that the Claimant's ownership of shares in Bank Century does not have to be direct in order for the Claimant to own the capital within the meaning of investor in Article 1(6). The Claimant's indirect

[153] Exhibit RHA 23.

ownership of shares in Bank Century through FGAH satisfies the 'investor' requirement in the OIC Agreement.

512. Article 1(5) defines investment as the "*employment of capital*". In the present case, the employment of capital took the form of the acquisition of shares. As it has been demonstrated during the proceedings, starting from early 2000, FGAH, began to acquire shares in the Pre-merger banks (which merged to form Bank Century), specifically three banks, CIC, Pikko, Danpac. FGAH's total shareholding in CIC was approximately 19.8%. FGAH also acquired 65% of Pikko, and FGAH deposited USD 12,000,000 which was converted into shares in Pikko in 2001. FGAH also acquired a 55% shareholding in Danpac in or around the fourth quarter of 2001.

513. The Claimant acquired shares in FGAH in March 2001, being 11,970,000 shares or 40% of the company. In 2004, the Claimant became the sole legal owner and registered shareholder of FGAH, having full control of the management of FGAH. Furthermore, FGAH acquired shares in the three Pre-Merger Banks that came to constitute Bank Century, ultimately holding 2.707 billion shares in Bank Century.

514. The Respondent has argued throughout the proceedings that investment treaties must explicitly include indirect investments in their definitions, or else the protection of investments is confined to direct investments. However, contemporary arbitral jurisprudence adopts a broader definition of 'investment'[154]. For instance, in the case *Siemens v. Argentina*, the ICSID Tribunal observed that *"there is no explicit reference to direct or indirect investment as such in the [German/Argentine BIT]. The definition of 'investment' is very broad. An investment is any kind of asset considered to be under the law of the Contracting Party where the investment has been made. The*

[154] Fedax N.V. v. Republic of Venezuela (ICSID Case No. ARB/96/3).

Decision on Objections to Jurisdiction of July 11, 1997; 37 ILM 1378 (1998); 5 ICSID Rep. 186 (2002); 24a Y.B. Com Arb. 24 (1999) (excerpts); French translation of English original in 126 *Journal du droit international* 276 (1999) (excerpts).

specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words 'not exclusively' before listing the categories of 'particularly' included investments. One of the categories consists of 'shares, rights of participation in companies and other type of participation in companies'. The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments"[155].

515. Similar decisions were adopted on the same ground by several ICSID tribunals. This was the case in *Ioannis Kardassopoulos v. Georgia*[156], which interpreted the BIT between Greece and Georgia. This was also the case in *Tza Yap Shum v. Peru*, which interpreted the BIT between Peru and China[157]. This was finally the case in *Mobil v. Venezuela*, interpreting the BIT between the Netherlands and Venezuela[158].

516. Moreover several contemporary commentators have confirmed that the definitions given to "capital" and "investment" in modern international investment treaties refer broadly – as is the case with Article 1 of the OIC Agreement – to "all assets". As explained by Andrew Newcombe and Luis Paradell in their Commentary "Chapter 1 - Historical Development of Investment Treaty Law", "[w]*ith small variations, similar definitions bringing into the scope of treaties almost all possible forms of investment are found in most IIAs. These definitions cover direct, as well as indirect, investments and modern contractual and other transactions having economic value".*

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[155] Siemens A.G. v. Argentina (Decision on Jurisdiction), ICSID Case No. ARB/02/8 (3 Aug. 2004), ¶137.
[156] *Ioannis Kardassopoulos v. Georgia* (Decision on Jurisdiction), ICSID Case No. ARB/05/18 (6 July, 2007), ¶¶ 123–24.
[157] *Tza Yap Shun v. Republic of Peru* (Decision on Jurisdiction), ICSID Case No. ARB/07/6 (19 June, 2009), ¶¶ 106–11 (where the Tribunal based its decision on the text of Article 1 of the BIT, the intention of the Parties to promote and protect investments and the absence of an express limitation in the Treaty).
[158] *Mobil Corporation and Others v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction), ICSID Case No. ARB/07/27 (10 June, 2010), ¶¶ 162–66.

517. For these reasons, the Tribunal finds that the Claimant is an investor in Bank Century within the meaning of the OIC Agreement by reason of his indirect shareholding in Bank Century through FGAH.

3. THE MEANING OF "BASIC RIGHTS" UNDER ARTICLE 10 OF THE OIC AGREEMENT / INVESTMENT GUARANTEES

518. Article 10 of the OIC Agreement provides:

> *"1. The host state shall undertake not to adopt or permit the adoption of any measure – itself or through one of its organs, institutions or local authorities – if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or of all or part of his basic rights or the exercise of his authority on the ownership, possession or utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realization of its benefits or guaranteeing its development and growth.*
>
> *2. It will, however, be permissible to:-*
>
> *(a) Expropriate the investment in in the public interest in accordance with the law, without discrimination and on prompt payment of adequate and effective compensation to the investor in accordance with the laws of the host state regulating such compensation, provided that the investor shall have the right to contest the measure of expropriation in the competent court of the host state.*
>
> *(b) Adopt preventive measures issued in accordance with an order from a competent legal authority and the execution measures of the decision given by a competent judicial authority."*

519. The Claimant argues that the phrase 'basic rights' in Article 10(1) means 'fundamental rights' and "includes the Claimant's human and civil and political

rights codified in international law. These include the basic right to a fair trial, as enumerated in Article 14 of the ICCPR" (Claimant's Post-Hearing Brief, paragraph 119). The Claimant argues that this interpretation is supported by the principle of systematic integration of international law norms articulated in Article 31.3(c) of the VCLT as well as the ordinary meaning of the terms in Article 10(1).

520. The Tribunal approaches the interpretation of 'basic rights' in accordance with the general rule of interpretation in Article 31.1 VCLT. The object and purposes of the OIC Agreement, as determined in paragraph 73 of the Partial Award, is investment promotion and protection by conferring a broad range of rights on investors.

521. Nevertheless, when Article 10(1) is considered as a whole it refers to measures affecting the ownership or the exercise of ownership rights over an investment. The Claimant's interpretation considers the term 'basic rights' on a stand-alone basis, whereas in Article 10(1) 'basic rights' appears as part of an extended phrase relating to the ownership, possession, use, control, management and realization of benefits of capital. The 'basic rights' referred to in Article 10(1) are *"basic rights...on the ownership, possession or utilization of [the investor's] capital"*. In short, properly interpreted in its context 'basic rights' refers to 'basic property rights' and is not a general reference to civil and political rights such as the right to a fair trial pursuant to Article 14 of the ICCPR relied upon by the Claimant.

522. For these reasons, the Claimant's submission that his right to a fair trial is guaranteed by Article 10(1) of the OIC Agreement is rejected. However, for the reasons set out later in this Final Award, the Tribunal will deal with the contention that the Claimant's rights guaranteed by the ICCPR form an element of the guarantee of fair and equitable treatment by the Respondent under Article 14(2) of the ICCPR to which Convention Indonesia is an acceding party.

4. CLAIMANT'S EXPROPRIATION CLAIM

523. It is undisputed that Bank Century, like other banks in Indonesia, had suffered the consequences of the 2008 global credit crisis[159]. Indonesian banks were holding on to their liquid assets, which threatened to paralyze particularly small and medium sized enterprises that needed credit. Depositors were beginning to withdraw funds from some banks, including Bank Century, after its liquidity problem had become known when it requested short-term liquidity support from Bank Indonesia[160]. As explained in the Second Audit Report of BPK of December 2011, to overcome its liquidity issue, Bank Century received on 14, 17 and 18 November 2008 Short-Term Credit Facility loans from Bank Indonesia in a total sum of Rp 683.39 billion[161].

524. The Tribunal refers back to the circumstances of the bailout and does not consider the bailout as expropriation, as the Claimant has not been deprived *"totally or partially or his ownership"* of the shares in Bank Century nor of *"his basic rights in the exercise of his ownership"* of the shares, nor of his 'actual control' over the shares within the meaning of Article 10(1). As it has been demonstrated during the proceedings, Indonesian regulators did not take his shares; they did not seize the bank. The Claimant's holdings remain exactly as they were before the bailout: some 2.7 billion shares, valued at least at 50 Rupiah per share162. The Claimant was not deprived of his shareholding. Funds were injected into the bank and a new class of shares was issued. The original, now class B, shares were valued at that time at Rp. 78 per share, whereas the new, class A, shares were issued at the value of Rp. 0.01 per share.

525. Further, Bank Century had, since 2005, been enrolled in the Deposit Insurance scheme and had agreed, as was required of all banks joining the programme that if they needed to be bailed out, the amount injected would be recognized as equity in favour of the LPS. The Claimant consented by signing a statement (Undertakings provided by Shareholders and Management of Century to LPS)

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[159] This has been admitted by both Parties in their submissions (for example the Claimant's Statement of Claim para. 51, p.23).
[160] See the affidavit of the Respondent's expert, Dr Halim Alamsyah ps: 1-3.
[161] C21 Second Audit Report of BPK, December 2011, page 7.
[162] Hearing Transcript 19 March 2014, p. 275. Testimony of CHUDOZIE OKONGWU.

on behalf of FGAH, agreeing ". . . to discharge and submit to LPS any right, management, and/or any other interest if the bank [Bank Century] becomes a failed Bank".[163] As such, the Claimant cannot now object to the bailout or otherwise claim that it constituted any kind of taking against his will, including any expropriation.

526. The value of Bank Century at the time of the bailout was negative, and thus the shares likewise were of no value. It is the view of the Tribunal that the bailout was within the discretion and authority of the government and was completely justified, particularly since Bank Century at a ratio below 10% at the time of the bailout, could have caused a systemic risk to the entire Indonesian financial system. Bank Century represented the 0.73% of the banking deposits and 0.68% of the commercial banks actives.

527. Notwithstanding, under the investment guarantee in Article 10(1) and as is provided by Article 10(2)(b), Indonesia is authorized to take 'preventive measures' by order of a 'competent legal authority'. Bank of Indonesia had a responsibility to protect its depositors and took preventive measures in respect of the banking crisis. On 13 October 2008, the Government, as a preventive measure to rescue the ailing banks, issued Perpu No. 2 of 2008, authorising Bank Indonesia to approve short term loans to ailing banks under less rigid circumstances. As an implementation of the Perpu, Bank Indonesia on 30 October 2008, issued Bank Indonesia Regulation (PBI) No. 10/26/PBI/2008 which introduced the mechanism for granting short-term loans. On 14 November 2008, further amendments were applied to this instrument through PBI No. 10/30/PBI/2008, providing a further reduction in the requirements for obtaining the short-term loans.

528. The Claimant claims that the bailout was unlawful because, *inter alia*, it was unauthorized pursuant to a government regulation in lieu of law that was subsequently rejected by the Indonesian Parliament. The Tribunal is of the view that the bailout has factual and legal foundations. The decision was made pursuant to Perpu No. 4 of 2008 and Law No. 24 of 2004, by the persons who

[163] R35

had the legal authority to make such decisions and take such action, and is valid under Indonesian law. In this regard, the Tribunal refers to the expert opinion of Dr. Ishrat Husain:

> *"To summarize, I have examined the events between 2005 and 2008 and the letter from Governor Boediono to the Minister of Finance as the Chairman of the Committee of Financial System Stability dated November 20, 2008 along with 'Analysis of Failed Bank' that resulted in the action by Government of Indonesia against BC. I am of the view that the action taken was justifiable, appropriate and bonafide and should have been taken to avert the likely possibility of a systemic breakdown of the Indonesian Banking system. It would be worth recalling that the Indonesian Banking system had a systemic collapse in 1998 when the closure of 16 banks by President Soeharto had immediately led to the failure of 52 other banks because of runs by their depositors. Given this background, the market nervousness and the spillover effects of the Global Financial crisis the action taken by the Government of Indonesia can in no sense, be construed as regulatory failings or lack of enforcement or lack of monitoring of the BC. In my opinion, BI's actions as a regulator and supervisor of Bank Century were appropriate and satisfactory under the given circumstances."*[164]

529. The nature of a Perpu was explained by the Respondent's legal expert Mr. Fred Tumbuan. In very special circumstances, the Government of Indonesia, which is always represented by the President, has the power to enact a government regulation in lieu of legislation which has full powers and will act as a law until the next session of Parliament. Parliament would then have to decide whether to ratify or to reject the government regulations. If the Parliament ratifies it, like in the case with the bankruptcy law, for example of 1998, then it becomes a law. A Perpu will be effective unless subsequently revoked or repealed.

530. The bailout in the present case was legal because it was based on an existing operative legislative product which had the form of a Perpu. The fact that it was

[164]Exhibit R 28, Expert Report of Dr. Ishrat Husain, at paragraph 53.

a measure issued in accordance with an order from the competent legal authority, which in this case was the Financial Sector Stability Committee (the KSSK), and which represents the Indonesian State in its administrative and regulatory activities, to prevent the possibility of a systemic meltdown of the banking system, makes it a permissible measure under Article 10(2)(b) of the OIC Agreement. If the Parliament did not subsequently ratify the Perpu, it would not invalidate it or the actions taken under it. The bailout was legal and permissible as a matter of Indonesian law.

531. In the present case and, as confirmed by the Respondent's witness Mr Halim Alamsyah, based on the mandate given by Perpu No. 4 of 2008, the Committee of the KSSK assessed the matter and decided on 21 November 2008 that Bank Century should be rescued by the LPS.

532. Furthermore, the Claimant alleges that the Respondent did not follow the proper procedure since there is no evidence that the Claimant consented to the bailout and that he was given an opportunity to inject funds into Bank Century at the time of the bailout to preserve his percentage ownership in Bank Century. However, the Tribunal is of the view that the measures taken by Bank Indonesia were in accordance with Law No. 24 of 2004 on Deposit Insurance Agency. Under this law, the LPS, has the power and mandate to rescue a failed bank which is deemed to have systematic effect for the purpose of safeguarding the depositor's fund and to maintain the stability of the Indonesian banking system. In accordance with Article 9(4) of the law:

> *"As a member of the Deposit Insurance as stipulated in Article 8, each bank is obliged to:*
>
> *a. Submit the following documents:*
>
> *[...]*
>
> *4) statement from the commissioners, the directors and the bank's shareholders, that contains:*
>
> *i. commitment and willingness from the commissioners, the directors and the bank's shareholders to comply with all conditions as stipulated in the IDIC Regulations;*

ii. *willingness to take personal responsibility for any negligence and/or unlawful act that results in a loss or endangering the continuity of the bank's operations; and*

iii. *willingness to release and surrender to the IDIC all entitlements, proprietorship, management, and/or interests should the bank become a Failing Bank and is decided to be rescued or liquidated;"*

533. In the case of Bank Century, five letters of commitment were signed. At least three of them were signed by the Claimant himself, which is evidence that the Claimant was aware of his obligations regarding Bank Century. As explained by Mr. Tumuban, these Letters of Commitment are legally binding, in accordance with Law No. 24 mentioned above.

534. In addition to the above, the Claimant had signed the Undertakings provided by Shareholders and Management of Century to LPS. Specifically, Bank Century had, since 2005, been enrolled in the Deposit Insurance scheme and had agreed, as was required of all banks joining the programme that, if they needed to be bailed out, the amount injected would be recognized as equity in favor of the LPS.

535. Moreover, as explained by Dr Husain in his testimony, the atmosphere of fear and uncertainty in late 2008 meant that no bank (even one holding 0.73% of the total deposits in Indonesia) was too small to fail. There was an urgency for the LPS to act swiftly to assuage the fears of the general public and prevent bank runs. Depositors were already uneasy about the prospects of the financial economy and had withdrawn significant sums of deposits from Bank Century after the short term funding facility was granted to Bank Century on 14 and 15 November 2008.[165]

[165] Transcript of 13 March 2014, p. 34 line 10 to p. 35 line 6.

536. Accordingly, the Tribunal is of the view that the LPS was entitled to proceed to bail out Bank Century without the involvement of the shareholders and had complied with the procedures in the IDIC Law in the conduct of the bailout.

537. With respect to the Claimant's negligence claims[166], the Claimant claims that it was reasonable for him to expect Bank Indonesia to carry out its supervisory duties effectively. The Claimant claims that these expectations were in part based on representations that Bank Indonesia itself made as to its regulatory regime. The Claimant also claims that Bank Indonesia has a wide range of powers at its disposal in order to achieve its aim as regulator and supervisor of banks, but that Bank Indonesia negligently or wilfully failed to avail itself of those powers. The Claimant alleges that the Respondent's negligent failure to properly supervise Bank Century and Mr Tantular's consequent fraud on the bank amounts to an unlawful expropriation, which had the effect of destroying the Claimant's investment.

538. However, the Tribunal considers that Bank Indonesia exercised sufficient diligence in its supervisory functions and rejects the allegations of negligence by the Claimant. The Tribunal refers to the testimony of the Respondent's expert Dr Husain who stated that: "*[t]he threshold for negligence is much higher than the greater laxity or what I call as a weakness of the supervision. In this case, I would admit that the central bank was weak in its supervision in the sense that it should not have allowed this intensive supervision to extend for three and a half years. But from all the material which I have reviewed and seen, I do not think that the threshold of negligence has been crossed or has been reached. The reason is that the internal controls, the operational controls of risk management, of compliance, of audit, of legal supervision, have not been followed by either the management or the board of directors or board of commissioners. In many cases, the approvals have been given by the board of commissioners who represent the shareholders. So this cannot be attributed to the negligence of the central bank. It is impossible for the central bank to micromanage every single bank. It doesn't have the resources to do so. So I would say, yes, very humbly I would submit that there was a weakness as far as supervision was concerned.*

[166] Transcript of 13 March, page 53, line 19 – page 54, line 8.

But there was no negligence as far as my own threshold level of negligence is concerned."[167]

539. The Claimant seeks in relation to the expropriation claim damages to compensate him for the alleged loss of his investment in the sum of USD 9,671,060. However, the Tribunal concludes that the bailout in the present case was a permissible preventive measure under Article 10(2)(b) of the OIC Agreement. Article 10(2)(b) expressly makes it permissible for a state to "*adopt preventive measures issued in accordance with an order from a competent legal authority*". Consequently, the Claimant's claim for damages in the sum of USD 9,671,060 is dismissed.

5. THE CLAIMANT'S FAIR AND EQUITABLE TREATMENT CLAIM

(i) Article 8 and the Most Favoured Nation Standard

540. There is no fair and equitable treatment guarantee in the OIC Agreement. However, the Claimant alleges that the Respondent is subject to a fair and equitable treatment obligation by virtue of the most-favoured-nation clause in Article 8 of the OIC Agreement.

541. The Tribunal notes that the most-favoured-nation clause has been applied to matters of dispute-settlement as well as substantive treaty guarantees. This issue has been dealt with by a number of contemporary arbitral decisions, which also recognized the application of most-favoured-nation clauses to import fair and equitable treatment.

542. In *Pope & Talbot Inc. v. Canada (2001, 2002)*[168], the tribunal relied on the most-favoured-nation clause contained in NAFTA Article 1103 in order to underpin its argument that the fair and equitable treatment standard of NAFTA Article 1105 could not be considered as providing for less protection than other free-standing fair and equitable treatment clauses.

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[167] Transcript, 13 March, page 52: line 19 - page 54: line 8.
[168] *Pope & Talbot Inc. v. Government of Canada* (Tribunal Decision – 10 April 2001).

543. Also in *MTD v. Chile*[169], the most-favoured-nation clause was combined with the obligation to accord fair and equitable treatment in the same provision of the applicable BIT between Chile and Malaysia. It was the tribunal's view that this clause allowed for the invocation of substantive obligations contained in other BITs concluded by Chile and Denmark and Croatia, namely the obligation to award permits subsequent to approval of an investment and to fulfilment of contractual obligations.

544. There are two views regarding the application of MFN clauses. The first view is that the MFN clause would only operate to the extent that a provision in another treaty is compatible in principle with the scheme negotiated by the parties in the basic treaty and departs from it only in a detail consistent with the broader scheme. The other view adopts a literal interpretation that would extend the operation of the MFN clause to all areas of other treaties, regardless of any comparison or judgment or compatibility. However, even under this view, the *ejusdem generis* rule would still apply. The two treaties would still have to deal with the same subject matter, as is the case with the protection of investments treaties.

545. The OIC Agreement does not include a FET provision. However, Article 8 of the OIC Agreement contains a most favoured nation clause that provides as follows:

> *"[t]he Investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors".*

546. Specifically, Article 8 provides that the "treatment" must be in the "context of economic activity in which [the investors] have employed their investments in

[169] *MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004).

the territories of another contracting party" and "in the context of that activity and in respect of rights and privileges accorded to those investors."

547. The Claimant seeks to rely on Article 8 of the OIC Agreement to incorporate the obligation in Article 3 of the UK-Indonesia BIT which came into force on 24 March 1977, and which provides:

> *"Promotion and protection of investment*
>
> *Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory and, subject to its right to exercise powers conferred by its laws, shall admit such capital.*
> ***Investments of nationals or companies 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. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."* (emphasis added)

548. The preamble of the OIC Agreement reads as follows:

> *"PREAMBLE*
>
> *The Government of the Member States of the Organisation of the Islamic Conference signatory to this Agreement,*
>
> *In keeping with the objectives of the Organisation of the Islamic Conference as stipulated in its Charter,*

In implementation of the provisions of the Agreement for Economic, Technical and Commercial Cooperation among the Member States of the Organisation of the Islamic Conference and particularly the provisions of Article 1 of the said Agreement,

Endeavouring to avail of the economic resources and potentialities available therein and to mobilize and utilize them in the best possible manner, within the framework of close cooperation among Member States,

Convinced that relations among the Islamic States in the field of investment are one of the major areas of economic cooperation among these states through which economic and social development therein can be fostered on the basis of common interest and mutual benefit,

Anxious to provide and develop a favourable climate for investments, in which the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of their peoples,

Have approved this Agreement,

And have agreed to consider the provisions contained therein as the minimum in dealing with the capitals and investments coming in from the Member States,

And have declared their complete readiness to put the Agreement into effect, in letter and in spirit, and of their sincere wish to extend every effort towards realizing its aims and objectives."

549. The preamble of the OIC Agreement refers to the anxiety of the signatories to develop 'a favourable climate for investment'. The OIC Agreement contains typical investment protection provisions, including guarantees of adequate protection and security, incentives, freedom of movement of personnel, most-

favoured-nation protection, protection against expropriation, free transfer and disposition of capital, compensation for the violation of rights, and national treatment. The object and purpose of the OIC Agreement is investment, promotion and protection by conferring a broad range of rights on investors.

550. The preamble of the UK-Indonesia BIT refers to the signatories' desire to create favourable conditions for greater economic cooperation between them, and in particular for investment of nationals and companies of one State in the territory of the other State. It also recognizes that the encouragement and reciprocal protection under international agreement of such investments will be conducted to the stimulation of individual business initiative and will increase property in both states.

551. The Tribunal is of the view that the MFN clause applies to import other clauses as long as the *ejusdem generis* rule applies. In the present arbitration, the Tribunal notes from the above preamble that the subject matter of the OIC Agreement as well as the UK-Indonesia BIT relied upon by the Claimant to import fair and equitable treatment, is the same, which is the protection of the foreign investment.

552. The Respondent has argued that there is a limitation in Article 8, and that the MFN treatment only applies within the context of the same economic activity, and that in this respect Article 8 is different from a typical MFN clause found in BITs that do not contain such a limitation. The Tribunal does not view the reference to *"same economic activity"* as imposing a limitation on the scope of application of the MFN clause relevant in this case. The investment of the Claimant was employed in the banking sector, and this is the area of economic activity for the purposes of Article 8. There is nothing in the UK-Indonesia BIT that excludes or restricts the banking sector from the scope of protection granted to investments of the other State.

553. The Respondent has also argued during the proceedings that the Claimant may not import provisions from the UK-Indonesia BIT because his investment was not "*granted admission*" in accordance with BKPMP-administered admissions

process. However, The Tribunal agrees with the conclusion reached by the tribunal in *Rafat Ali Rizvi v. Republic of Indonesia*[170] that the BKPM-administered process is not a requirement for the admission of foreign investments in the banking sector and that investments under the UK-Indonesia BIT are not required to have gone through a BKPM administered admission process in order to gain the protection of the treaty[171]. The tribunal in that case found that: *"the BKPM regime and the regulatory regime governing the banking sector are separate and distinct. However, neither the BIT nor the FCIL indicate that all foreign investment in Indonesia is subject to the BKPM regime. On the contrary, foreign investment in certain sectors is not subject to BKPM procedures. The Tribunal notes in particular that FCIL Article 5, was part of the FCIL when the BIT was concluded. That provision makes it clear that Indonesia had the flexibility to decide what sectors would foreign investment be allowed and under what conditions. Article 5 does not specify that those conditions of admission could only be found within the FCIL itself. The reference to the banking sector in the negative list of the amended FCIL confirms the conclusion that the FCIL itself is broad enough to address the banking sector without also requiring investments in that sector to obtain admission through the BKPM. Were this not so, banking would not be included in parts of the negative list".*

554. Moreover, the UK-Indonesia BIT is not the only BIT in which the Respondent has agreed to accord fair and equitable treatment to foreign investments. The Claimant has referred to similar fair and equitable treatment standards in several other BITs to which Indonesia is a party. Such examples include, the Netherlands-Indonesia BIT, which provides that the Respondent shall "*ensure fair and equitable treatment of the investments of nationals of [the Netherlands] and shall not impair, by unreasonably or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals.*"[172] This BIT does not specifically limit the scope of the treaty to those investments "*granted admission in accordance with the Foreign Investment Law.*" Additionally, the Singapore-Indonesia BIT provides that

[170] *Rafat Ali Rizvi v. Republic of Indonesia* (ICSID Case No. ARB/11/13)
[171] RLA67, ¶ 140
[172] CLA14

"investors shall at all times be accorded fair and equitable treatment,"[173] while mentioning nothing about a mandatory admissions process. The India-Indonesia BIT also provides that *"investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party."*[174]

555. Based on the above, the Tribunal concludes that the Claimant is entitled to fair and equitable treatment protection through the OIC Agreement's MFN clause.

(ii) The Fair and Equitable Treatment Standard and the ICCPR

556. The Claimant alleges that the Respondent has exceeded its prosecutorial and investigative powers and therefore denied the Claimant of fair and equitable treatment. In particular, the Claimant alleges that his treatment by the Respondent breached the ICCPR. In this section the Tribunal will discuss the ICCPR and its relevance to the Claimant's FET claim.

557. The ICCPR is an integral part of the UN's "International Bill of Rights", which includes the Universal Declaration of Human Rights 1948, the ICCPR 1966 and its two Optional Protocols, as well as the International Covenant on Economic, Social and Cultural Rights: ICESCR 1966.

558. The ICCPR is now regarded as "a part of general international law"[175] It constitutes an extension of the rule first established by the Permanent Court of International Justice in 1925 that "rights under international law could be conferred on individuals."[176]

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[173]Exhibit CLA281 Article 3 of the Singapore-Indonesia BIT signed and entered into force on 28 August 1990.

[174]Exhibit CLA13 Article 2 of the India-Indonesia BIT signed on 10 February 1999 and entered into force on 22 January 2004

[175] So held in the November 3, 1999 decision of the International Criminal Tribunal for Rwanda in the case Jean Bosco vs. Prosecutor (paragraph 40).

[176] Polish Service in Danziq – 1925 PCIJ Series B.No.11 page 32-41.

559. The most signally important feature of the ICCPR is that it is a universal instrument which contains binding legal obligations for the States parties to it. The rights enshrined within it represent the basic minimum set of civil and political rights recognized by the world community. Moreover, whatever the disagreement over the nature of the human rights obligations in the United Nations Charter and in the Universal Declaration of Human Rights, there is no doubt that the obligations in Article 2 of the ICCPR to respect and ensure the rights in the ICCPR are legally binding.[177]

560. When a State becomes a party to the ICCPR by ratification of the Covenant it enters into a set of relationships with the individuals within its jurisdiction, and with other State parties. Every State party binds itself to a series of obligations arising from the provisions of the ICCPR (Article II). Underlying all these obligations is the overriding principle of good faith, a principle first recognised in the Charter of the UN 1945 Article 2(2): "All members in order to ensure to all of them the rights and benefits resulting from membership shall fulfil *in good faith* the obligations assumed by them in accordance with the present Charter",[178] and reiterated in the Declaration on Friendly Relations and Co-operation Among States in accordance with the Charter of the UN of 1970: [UN Gen. Ass. Resolution No. 2625 (XXV) – "The state shall fulfil in good faith the obligations assumed by them in accordance with the Charter"]. Good faith is now a principle of customary international law. Under Article II a State-party assumes the obligation to respect and to ensure the protection of human rights without any discrimination within its jurisdiction. As a consequence, the State Party undertakes to refrain from doing anything injurious to *human rights* and do everything to ensure respect for *human rights of the individual person concerned. It is the failure to honour this obligation that amounts to a violation of the principle of good faith.* And the role of Civil Society – a role reflected and replicated in decisions of international arbitral tribunals – is to keep

[177] So stated in "The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights" by Dominic McGoldrick – Clarendon Paperbacks (1994).

[178] The principle of good faith is now a principle of customary International Law and that the drafters thought it desirable to state the principle more explicitly. See para 31 page 243, of Vol. X (2012 – Oxford University Press) of The Max Planck Encyclopedia of Public International Law. Editor Rediger Wolfrun.

reminding the State party to adhere to the *principle of good faith, and if and when the State has failed to do so,* to so declare in its arbitral award.

561. When ratifying a treaty the State undertakes to honour its obligations[179] under that treaty. This means in the present context its obligations to comply *inter alia* with the provisions of Article 14(3)(d) in all aspects. When it does not do so, it is the duty of the competent Court or Tribunal to so declare: even though there is no recourse to be had to the implementing agency - the Human Rights Commission - with respect to remedies.

562. The Tribunal notes that, on 23 February 2006, Indonesia acceded to the 1966 ICCPR.

563. Article 14(3) of the ICCPR provides that:

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> *(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
>
> *(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*
>
> *(c) To be tried without undue delay;*
>
> *(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*

[179] Page 1226 to 1229: page 1234 para 609 Vol.2 Oppenheim's International Law 9th Edition, Longman (1992). (Annexed as Annexure-II).

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt".

564. From the foregoing paragraphs it is clear that under Article 14(3)(d) of the ICCPR all persons charged with a criminal offence have a primary, unrestricted right to be present at the trial and to defend themselves. However, this right (and other requirements of due process enshrined in Article 14) cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence, there must be some exceptional reason for holding the trial *in absentia* even where the address of the assumed is known.

565. Proceedings *in absentia* are not prohibited under Article 14(3)(d) only when the accused person, although informed of the proceedings sufficiently in advance, voluntarily declines to exercise his right to be present. In such circumstances proceedings *in absentia* are permissible in the interest of the proper administration of justice.

566. Where a person has been duly summoned, has received summons well in time to attend the trial but has chosen not to appear (there being no impediment to his not appearing - such as for instance a Red Corner Notice dated 9 June 2009 as in the case of the Claimant) then it would be permissible, even in the light of Article 14(3)(d) to try the accused *in absentia*, and it would not be a breach of that Article where the accused chooses not to appear.

567. A judgment *in absentia* in order to be valid requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance – otherwise the accused will not have been given adequate time and facilities for preparation of his

defence (Article 14(3)(b)), will not have been able to defend himself through legal assistance of his own choosing (Article 14(3)(d)) nor, would he have the opportunity to examine or to have had examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf (Article 14(3)(e)).

568. Where a person has been tried and convicted *in absentia,* it must be shown that the accused was summoned in a timely manner and was informed of the proceedings against him – and this cannot be presumed or assumed. It is incumbent on the Court that tried the case to verify that the accused had been informed of the pending case and the proceeding to hold the trial in absentia because failing such evidence the right of the accused to be tried in his presence is violated.

569. Where a summons has been stated to be served but no indication is given of any steps actually taken by the State-party in order to transmit the summons to the accused person, and whose address is known to the judicial authority, it will be taken that there is violation of the provisions of Article 14(3)(d): this is because *"when exceptionally, for justified reasons, trials in absentia are held strict observance of the rights of defence is all the more necessary"*.

(a) Presumption of innocence

570. Regarding the Claimant's right to be presumed innocent, the Claimant claims that, by making adverse public comments about the Claimant, the Respondent failed to respect his right to be presumed innocent, and has therefore acted in violation of the fair and equitable treatment standard.

571. The presumption of innocence is one of the most established fundamental rights of individuals recognized by customary international law. Article 14(2) of the ICCPR provides that *"everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*

572. The UN Human Rights Committee, the body that supervises compliance with the ICCPR, made that clear in its General Comment 13 of 1984[180]:

> *"No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial".*

573. The right to be presumed innocent until proved guilty is a principle that conditions the treatment to which an accused person is subjected throughout the period of criminal investigations and trial proceedings, up to and including the end of the final appeal.

574. Various international human rights bodies consider that the presumption of innocence is violated whenever public authorities or representatives of government make public statements, which prejudge the outcome of particular criminal proceedings. As the Inter-American Court of Human Rights ("IACHR") stated[181]:

> *"The right to presumption of innocence ... requires that the State should not convict an individual informally or emit an opinion in public that contributes to forming public opinion, while the criminal responsibility of that individual has not been proved."*[182]

575. The European Court of Human Rights ("ECHR"), applying Article 6(2) of the European Convention on Human Rights[183], also held that statements made by a minister of interior holding up a suspect as an instigator of a murder constituted a violation of the right to the presumption of innocence[184]. The ECHR has also held it to be a violation for a speaker of parliament to make statements amounting

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[180] CLA226.
[181] CLA264 American Convention on Human Rights, art 8(2) ("Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proved according to law.")
[182] CLA218
[183] *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".*
[184] CLA220

to declarations of a suspect's guilt[185]and for a minister of the interior, in a magazine interview, to make statements leaving the public with the impression that the suspect was part of a criminal organization[186]. Likewise, the African Commission on Human and People's Rights, applying Article 7(1)(b) of the African Charter on Human and People's Rights[187], has found it to be a violation of the right for government representatives, including a state military administrator and a special adviser to the president, publicly to pronounce suspects guilty before and during trial[188], and for government representatives to organize media campaigns declaring suspects guilty[189].

576. The Universal Declaration of Human Rights of 1948, states in its Article 11 that:

> "[e]*veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law".*[190]

577. As stated by the Human Rights Committee, this duty to refrain from prejudging a trial applies to all public officials, including and especially public prosecutors and other law enforcement authorities[191]. The need for strong, independent and impartial prosecutorial authorities for the effective maintenance of the rule of law and human rights standards cannot be sufficiently emphasized. According to Paragraph 12 of the United Nations' Guidelines on the Role of Prosecutors (1990)[192],

> "[p]*rosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system."*

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[185] CLA220
[186] CLA221
[187] RLA70, *"Every individual shall have .... The right to be presumed innocent until proved guilty by a competent court of tribunal."*
[188] CLA223
[189] CLA224 and CLA225
[190] See the Universal Declaration of Human Rights (UN 1948), available at:http://daccessddsny.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement (last accessed 7 June 2014)
[191] Final Hearing, Transcript, Day 1, 10 March 2014, p. 203 lines 9-20
[192] CLA265

578. The Claimant claims that, in the present case, the Claimant's right to be presumed innocent was compromised by the conduct and publicly expressed views of Indonesian public officials, specifically the declaration of Deputy Attorney General Marwan Effendy at the Jakarta Globe on 8 January 2010: *"*[w]*e have learned that Hesham alone took Rp 3 trillion. We're ready [to go to court] but we still need official loss estimates from state auditors and the money laundering charge provided by the police," ... "Once they finish their job, the case is ready for trial. We hope it will happen this month."*[193]

579. The Claimant refers to another public declaration was done through the Jakarta Globe on 21 January 2010, whereby the Deputy Attorney General Marwan Effendy, in reference to the Claimant and Mr Rizvi, stated that: *"*[t]*heir case will be handed to the Central Jakarta Prosecutor's Office because we have concluded the investigation," ... "Hesham and Rafat have inflicted state losses of Rp 3.115 trillion [$336 million]."*[194]

580. In this regard, the Tribunal is of the view that, although the above-mentioned statements were unwise, they state that the Claimant has inflicted losses, but do not state that he is guilty of a crime. To the contrary, they presume his right to a trial.

(b) The Respondent's conduct of the criminal investigation of the Claimant

581. Regarding the investigation of the Claimant, it appears from the evidence that the Claimant was never examined by the Police or AGO in Indonesia. The Respondent did not take reasonable steps to ensure that the Claimant was informed in a timely manner of the criminal investigation that was being conducted against him. The Respondent was well aware of the presence of the Claimant in Saudi Arabia, and yet it failed to seek the assistance of the authorities in Saudi Arabia to interrogate the Claimant or even allow investigators of the Respondent to go to Riyadh to hear him and take a statement from him.

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[193] C171
[194] C172.

582. In this regard, the Tribunal notes that Article 18(3) of UNTOC and Article 46(3) of UNCAC provide:

> *"Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*
> *(a) Taking evidence or statements from persons;*
> *(b) Effecting service of judicial documents;*
> *(c) Executing searches and seizures, and freezing;*
> *(d) Examining objects and sites;*
> *(e) Providing information, evidentiary items and expert evaluations;*
> *(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
> *(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
> *(h) Facilitating the voluntary appearance of persons in the requesting State Party;*
> *(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party".* (emphasis added).

583. Both the UNTOC Article 18(3)(a) and UNCAC Article 46(3)(a) establish that mutual assistance be afforded under the convention and may be requested for the purpose of *"[t]aking of evidence or statements from persons"*. Despite the fact that, under both UNTOC and UNCAC the Respondent could have requested the assistance of the Saudi authorities, it failed to do so.

584. The Claimant has also the right to be properly examined in accordance with Articles 50(1) and 52 of KUHAP. As explained by Ms. Desy Meutia herself in her affidavit "[f]*or the purposes of its investigations of criminal offfences, the AGO may issue summonses to suspects and witnesses requiring them to attend the AGO to be questioned in relation to particular offences. The examination is a mandatory part of the criminal procedure process. Upon completion of the investigation, the case is transferred to the Public Proescutor at the Distrivt Attorney's Office (the "Prosecutor"), who may issue an indictment and summons*

for a defendant to attend trial". Thus, the Respondent breached the Claimant's rights under Articles 50(1) and 52 KUHAP to be examined as a suspect and to freely give information during the examination, by failing to hear him or take any statements from him during the investigation phase.

(c) The service of court summonses

585. Moreover, under Articles 145, 146 and 227 KUHAP, the procedure for service of court summonses on overseas defendants is as follows;

(1) An attempt to personally serve the person summoned at his place of residence, or most recent place of residence in Indonesia, at least 3 days before the date of the hearing. (Art 227(3) read with Art 227(1)-(2) KUHAP)

(2) If the person is not present at his place of residence in Indonesia but is overseas, the summons must be conveyed through a representative of Indonesia (typically the Indonesian embassy) at his place of residence or most recent place of residence. (Art 227(3) read with Art 145 KUHAP). This service need not be personal. (see Transcript of 12 March 2014 p. 24 lines 14-16 and Transcript of 18 March 2014, p. 137 lines 24-25). There is no presumption that service is valid, whether or not the embassy forwards the summons onto the defendant, unless proven otherwise.

(3) If the person summonsed is not at his overseas place of residence, the summons must be put on the office noticeboard of the official who issued the summons, *i.e.*, the public prosecutor. (Art 227(3) read with Art 146 KUHAP)

(4) There is no prohibition against service by newspaper advertisement, but this must be in addition to the methods mentioned in KUHAP[195].

[195] (See Justice Harahap's repeated comments that service on the notice board is perfected by service via newspaper at Transcript of 18 March 2014, p. 110 line 19 to p. 112 line 1 and p. 128 line 24 to p. 130 line 8).

(5) The summons must (i) include the date, day and time of the hearing; (ii) specify the case about which the defendant is summoned, including the nature and cause of the charge against him, (iii) be in "a language which he understands", and (iv) be received no less than 3 days before the hearing begins. (Arts 51(b) and 146(1) KUHAP; Arts 14(3) and (3)(a) ICCPR)

586. The Claimant was not properly served under these provisions of the KUHAP:-

(1) None of the court summonses was personally served on the Claimant at his most recent place of residence in Indonesia, which is the first step in the procedure for valid service[196].

(2) Even if the aforesaid first step was satisfied, only one of the court summonses (*i.e.*, the summons dated 24 March 2010)[197] was served at the Claimant's most recent overseas place of residence (i.e. Kingdom Tower) through the Indonesian embassy, and that summons did not properly specify the case against the Claimant.

587. Specifically, the summons did not state the provisions of the Anti-Corruption Law for which the Claimant was being indicted, or give any details about the allegedly improperly placed forex notes (e.g. the relevant dates, parties, notes). Nor did it mention the money laundering charge.

588. Although in its Orders of 23 May 2010 and 4 June 2010, the Central Court of Jakarta has by interlocutory judgment declared the summons to have been duly served on the Claimant, the Tribunal is of the view that the evidence of Ms. Desy Meutia Firdaus (including her cross-examination) clearly establish that there is no proof of actual service of the Court's summons to attend trial on the Claimant himself. The Respondent failed to prove that the Claimant received the summons well in time to attend the trial and chose not to appear. On the contrary, the Claimant had said during his examination at the Final Hearing in answer to a

[196] (See Desy Firdaus' testimony at Transcript of 18 March 2014, p. 82 lines 15-25).

[197] Tab 355.

question as to why he did not attend trial in Indonesia: "because I was put on the Red Notice and the Saudi Government said I could not leave or go anywhere"[198]. Moreover, Article 88 (1) of INTERPOL's Rules for the Processing of Data provides that "Blue notices are published in order to: (a) obtain information on a person of interest in a criminal investigation, and/or (b) locate a person of interest in a criminal investigation, and/or (c) identify a person of interest in a criminal investigation". It is the Tribunal's view that the Respondent also failed to establish that it made any efforts to verify that the Claimant received any of the summonses allegedly sent to the Claimant. The Tribunal agrees with the Claimant that the Respondent should have asked INTERPOL to issue a Blue Notice in order to locate the Claimant and establish with accuracy his residential address, so the Claimant be properly and effectively served. The Respondent did not attempt to serve the court summonses on the Claimant via letters rogatory. The Respondent also failed to use the mechanisms reasonably available to it (*i.e.*, its embassies in Singapore and Saudi Arabia, and a request to Interpol to issue a Blue Notice) to verify which of the Claimant's addresses was his place of residence. The Tribunal finds that these failures amount to a breach of the Claimant's basic rights under Article 51(b) of the KUHAP and Article 14(3)(a) of the ICCPR to be properly informed of the charge against him.

(d) The Claimant's trial in absentia/right of review

589. Furthermore, Article 14, Section 3(b) of the ICCPR provides that:

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality .....(b) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing".*

590. Article 16 (10) of the UNTOC provides:

[198] Transcript of 12 March 2014 page 73.

"A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The State Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution."

591. Also Article 44(1) of the UNCAC provides:

"This Article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which the extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party".

592. According to the above, if the party requested declines to extradite then it has the obligation to prosecute. The UNTOC and UNCAC does not give the option for a trial in absentia. This interpretation was reinforced by the ICJ in Belgium v Senegal:

"[...] if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an

international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State"[199].

593. Moreover on 29 October 2009, the Respondent made the following request to the government of Saudi Arabia"[s]hould the Government of Saudi Arabia is unable to grant the request for extradition, the Government of the Republic of Indonesia seeks the assistance of the Government of Saudi Arabia to carry out investigations and prosecute Hesham Talaat Besheer Al Warraq under Article 16(10) UNTOC."

594. The above request by the Respondent confirms that trial *in absentia* is not an option under the UNCAC and UNTOC.

595. The Tribunal agrees with the Claimant that, for the extreme measure of *trial in absentia* to be permissible under international law, the Respondent must provide evidence that the Claimant:

1) was notified of the trial, i.e. proper service of process;

2) had unequivocally and explicitly waived his right to be present at trial;

3) had the legal right to be represented at trial and that he was actually represented;

4) is able subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge.

596. The ICCPR Article 14(3)(d) states that every person shall be entitled "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing". In the same vein, Article 54 of the KUHAP provides that, for the purpose of his defence, an accused has the right to obtain legal assistance from one of more legal counsel during the period of and at every stage of examination, according to the procedures stipulated in the KUHAP.

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[199] Exhibit CLA270 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, ¶ 95.

597. Furthermore, under Indonesian law the Claimant was not allowed to be represented by counsel in his absence. In this regard, the Tribunal refers to the testimony tendered at the Final Hearing by the Respondent (in particular the quoted extract of Dr Harahap[200], by which it confirmed that under SEMA 6/1988, once a defendant *in absentia* has been summoned, he will not be allowed to be represented by counsel appointed after the date of the summons.

> *Q. Okay. The next question, if a defendant is absent, can he appoint a lawyer to represent him in the case while he is absent?*
>
> *A. Initially, it is open to that. However, because of bitter experience of the court, experience by the community and Indonesian people, when the law on anti-corruption was promulgated in the year 1970, many people who committed to corruption fled to outside of Indonesia and did not want to appear before the court. But then he appointed a lawyer to represent him. And such conduct constituted contempt of law. If the – he is freed, then they would come to Indonesia and get applause. But if he is punished, then he run away. It is very bitter.*
>
> *At that time, I was a justice of the Supreme Court, it came to my mind about how to overcome with this contempt of court. Then since then, a so-called Supreme Court circulation number 6 of the year 1988, so from since the year 1973 through to the year 1988, the society, Indonesian people suffered from bitter harassment conducted by the corrupt people.*
>
> *Q. Because basically so the – so are you saying that under Supreme Court circular 6, 1988, an absent defendant cannot appoint a lawyer, are you saying?*
>
> *A. (In English) Yes.*

[200] Transcript, Day 7, 18 March 2014, p. 117 line 13 to p. 118 line 13.

598. The Respondent's expert witness on Indonesian criminal law, Dr Harahap, who testified on this point before the Tribunal explained the ratio legis of SEMA No. 6/1988 in a recent interview:

> *"I was a judge from 1982 to 2000. At the time, corruptors tended to flee. Then their lawyers started to submit all kinds of appeals. The state courts opened the possibility for attorneys to submit any legal appeal, whether cassation or case reviews, but the accused was in absentia, had run away. This is clearly making fun of the courts"*[201].

599. Dr. Harahap confirmed this in his Affidavit[202] as well as during cross-examination at the Hearing.

600. The Tribunal concludes from the above that Indonesian law allows for the extreme measure of trial *in absentia* in corruption cases but by virtue of SEMA 6/1988 persons accused of corruption that are tried *in absentia* are not allowed to be represented by counsel. Indonesian law thus barred the Claimant from appointing counsel to represent him during his trial *in absentia*.

601. Furthermore, according to the evidence tendered by the Respondent through the oral testimony of Dr. Harahap[203], the right to appeal one's conviction *in absentia* is conditioned on the appellant appearing in person before the court in order to appeal. Appeal through counsel *in absentia* is thus not permitted. It must also be noted that the amended SEMA 1/2012 excludes absent convicts from the right to file a petition for judicial review. To file for judicial review, an absent convict must go to Indonesia, which in the case of the Claimant was not possible, since the Respondent issued a Red Notice against the Claimant, and therefore the latter could not leave Saudi Arabia, not even to attend his own trial. The Tribunal is of the view that such a condition is in contravention of Article 14, Section 5 of the ICCPR.

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[201] C182
[202] R42
[203] Transcript, Day 7, 18 March 2014, pp. 118-121. pp. 116-117 and 160 - 161

602. Further, the Tribunal agrees with the Claimant that the Respondent's authorities allowed the appeals period to expire without ascertaining whether the Claimant had actually received the judgment. This is in breach of Indonesian Law (Articles 67 and 233(1)-(2)), which provide for the Claimant's right to file an appeal within 7 days from the date he is made aware for the judgement.

603. Articles 67 and 233(1)-(2) KUHAP require any appeal to be filed by the Claimant within 7 days from the time he is '*made aware*' of the Jakarta Verdict. The threshold for being made aware of a judgment is set out in Art 36(3) Anti-Money Laundering Law. (Art 38(3) of the Law on Corruption sets a lower threshold than the Anti-Money Laundering Law and therefore is not discussed here.) Under Art 36(3), an *in absentia* decision must be (i) announced by the public prosecutor on the notice board of the court that decided the case and (ii) included in at least 2 newspapers with national circulation for at least 3 days or in 3 consecutive publications. What the Respondent did was to advertise the Jakarta Verdict in Media Indonesia twice (on 11-12 April 2011) and once in the Jakarta Post (on 11 April 2011). However, the Claimant did not dispute that the Jakarta Verdict was announced by the public prosecutor on the notice board of the deciding court. Hence, under the Anti-Money Laundering Law, the Claimant was 'made aware' of the Jakarta Verdict by 12 April 2011.

604. The Respondent also breached the Claimant's right under Article 14(5) ICCPR to have his conviction reviewed by a higher tribunal. Art 14(5) ICCPR requires the Claimant to be given access to the Jakarta Verdict in a manner that enables him to effectively exercise his right of review in Art 14(5). Due to the Claimant's inability to travel to Indonesia, he could not attend the reading of the verdict or consult the court noticeboard for notification of the verdict. Moreover, he could not read Bahasa, which is the language of the newspaper Media Indonesia. In these circumstances, the Respondent should have, but failed to, give the Claimant access to a soft/hard copy of the Jakarta Verdict prior to the expiration of the 7 days appeal period on 19 April 2011.

605. Also, this failure is attributable to the Respondent because customary international law contains a long established procedure that would have enabled the Respondent to establish without any doubt whether and when the Claimant

had received the judgment in order to start the period within which appeals were allowed. That procedure is codified in Article 5(f) of the Vienna Convention on Consular Relations (1963) (the "**VCCR**"), which states that one of the functions of consular missions is to cooperate with the local authorities when the delivery of judicial documents is necessary. Both Indonesia and Saudi Arabia are parties to the VCCR. If this procedure had been followed, the authorities of Saudi Arabia would have informed Indonesia if and when the judgment had actually been served. The Respondent failed to demonstrate that it followed this procedure, and it thus allowed the appeals period to expire without ascertaining whether the Claimant was actually aware of the judgment containing his conviction.

(e) The Claimant's other claims in relation to the fair and equitable treatment standard

606. The Claimant has also argued that the offences of corruption and money laundering under Indonesian law cannot be categorised as such under recognised principles of international law. Moreover, the Claimant asserts that the Jakarta court's decision was not supported by the evidence before it, and that the Jakarta court did not explain the basis on which the Claimant was held personally liable for the acts allegedly carried out by FGAH and Mr. Rizvi, and moreover, at times conflated the Claimant and FGAH. The Claimant also alleges that the Jakarta Court discriminated against him in terms of his sentencing. However, the Tribunal finds that the Claimant has not provided sufficient evidence to confirm these allegations, which are therefore dismissed.

607. The Claimant failed to demonstrate how the offences of corruption and money laundering under Indonesian law do not accord with internationally recognised principles of criminal law. The Claimant's reliance on Articles 15 and 21 of the UNCAC is misplaced because these provisions do not set out the elements of corruption and/or money laundering, but instead impose a general obligation on State Parties to adopt legislation which criminalises the bribery of public officials and bribery in the private sector. The Claimant's argument that the money laundering charge merely requires transfer or restructuring of assets is

also misconceived. The elements of Art 3(1)(g) Anti Money Laundering Law, as set out in the Jakarta court's decision, clearly require *mens rea.*

608. The Tribunal observes that the Jakarta Verdict does appear to conflate the Claimant and FGAH in some instances. For example, some of the securities transactions in issue for the corruption conviction were conducted between Bank Century and FGAH. Moreover, the money laundering conviction relies on, among other things, the Claimant and Mr. Rizvi having conducted transactions involving commercial paper of Bank Century to a value of USD$116.08m eventually placed with or controlled by FGAH .

609. However, the Jakarta Verdict's conflation of the Claimant and FGAH is justified on the basis of Article 20 of the Law on Corruption Eradication and Article 4 of the Anti-Money Laundering Law:

a. Article 20(1) of the Law on Corruption Eradication states that "*In the event that the criminal act of corruption is committed by or on behalf of a corporation,* ***the lawsuit and the sentence can be instituted against and imposed on the corporation or its board of directors***" (emphasis added).

b. Article 4(1) of the Anti-Money Laundering Law provides that "*In the event that the crime is committed by the managers ... on behalf of a corporation,* ***both the managers and/or the managers' agents as well as the corporation shall be subject to prosecution and imposition of criminal sanctions***" (emphasis added). Article 4(2) limits the managers' criminal liability "***to the extent that the managers concerned hold functional positions in the corporation's organisational structure***" (emphasis added).

610. The Claimant is the sole shareholder and director of FGAH.[204] Pursuant to Article 20 of the Law on Corruption Eradication and Article 4(1)-(2) of the Anti-Money Laundering Law, he can be prosecuted and punished for acts which he

[204] Transcript of 12 March 2014, p. 81 lines 1-5.

committed on behalf of FGAH in his capacity as a member of the board of directors of FGAH.

611. Regarding the corruption claims, the Claimant submits that the Respondent failed to investigate or even engage with the Claimant's and Mr Rizvi's complaints of bribe solicitations during the criminal investigation. The Claimant and Mr Rizvi through their counsel Kingsley Napley wrote to Central Jakarta District Court, dated 7 July 2010, 22 July 2010 and 22 October 2010, to inform them about the irregular conduct and bribe solicitations made by the Attorney General's Office[205]. Regardless of whether the bribe solicitation allegations are true, there is no evidence that the Respondent took or attempted to take the necessary steps to investigate these allegations. However, the Tribunal is not persuaded that such behaviour by the Respondent amounts to a violation of the fair and equitable treatment standard, since there is no connection between the corruption allegations and the Claimant's alleged deprivation of its investment.

612. Moreover, the Claimant did not demonstrate that he had a right to have his allegations of corruption investigated by State authorities. The Claimant, *inter alia,* relied on Article 30(3) of the UNCAC. This article requires that States "**endeavour** to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences" (emphasis added). The UN's Legislative Guide for the implementation of this Convention classifies Article 30(3) under the heading of "non-mandatory requirements", and further states in relation to Article 30(3) that "these States must **make an effort** to encourage the application of the law to the maximum extent possible in order to deter the commission of offences established in accordance with the Convention" (emphasis added). Indonesia therefore has no obligation under Art 30(3) to investigate corruption allegations.

[205] C9.

613. The Tribunal further notes that, when the Special Task Force on Judicial Corruption responded to the Claimant's allegations of corruption and requested him to provide further information, the Claimant did not respond with further information.

614. The Tribunal is also not satisfied that the Respondent has (i) attempted to solicit bribes from the Claimant on multiple occasions, (ii) initiated criminal proceedings against the Claimant, not out of a genuine belief in his guilt, but in order to access his funds abroad, (iii) breached the Claimant's right to the status quo ante and non-aggravation of the dispute by virtue of the initiation of asset seizure proceedings against the Claimant's funds abroad, the Red Notice, and its involvement in getting the Saudi police to interrogate the Claimant. The Claimant has failed to provide sufficient evidence of these allegations.

615. The Tribunal recognises that there is a general right to status quo ante and non-aggravation of disputes in investment arbitration law. Based on past decisions of tribunals, the threshold to be satisfied for the imposition of sanctions for a breach of this right is extremely high: the conduct of the State must undermine the integrity of the arbitral process: see *Lao Holdings N.V. v. Lao People's Democratic Republic,* ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, paragraphs 14-42; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* ICSID Case No. ARB/06/2 Decision on Provisional Measures, paragraphs 116-124 and 134-148.

616. On the facts, the Tribunal finds that Indonesia's actions did not undermine the integrity of this arbitration. Indonesia's initiation of asset seizure proceedings against the Claimant, while resulting in the Clamant having to spend GBP 411,896,60 to date to defend himself, were not so disruptive in diverting the Claimant's resources away from this arbitration. The Claimant was still able to raise sufficient funds to make the deposits required for this arbitration. Moreover, the Red Notice against the Claimant also did not have the effect of undermining the integrity of this arbitration. While the Claimant was prevented from travelling overseas by reason of the Red Notice, he had many convenient

means by which to give instructions to his counsel (e.g. by email, by telephone call, by contacting the Saudi Arabia office of Vinson & Elkins). The Claimant was also able, during the merits hearing, to testify via videoconference, hear the proceedings through skype, and give instructions to his counsel through skype and other means of communication. Furthermore, being called to the local police station for questioning on three occasions since the commencement of this arbitration (i.e. over a span of three years or so) does not qualify as harassment, and there is no indication on the evidence that the information gathered by the Saudi authorities during the interrogations was supplied to Indonesia for use in this arbitration.

617. Additionally, the Tribunal considers that, if the Claimant was of the view that Indonesia's actions breached the principle of status quo ante and non-aggravation of the dispute, he should have raised his concerns at an earlier stage of this arbitration in the form of an application for interim measures, rather than waiting until after the conclusion of the evidentiary hearing to bring up his concerns.

618. The Claimant has also argued that Bank Century's placement under LPS administration and the subsequent criminal conviction *in absentia* of the Claimant and his business associate, Mr Rizvi, to imprisonment and the payment of a huge amount of money, seriously impaired the management, maintenance, use, enjoyment or disposal of the Claimant's investment in the territory of Indonesia. As discussed above in paragraphs 525-534, the bailout was a preventive measure necessary and permitted under Article 10(2) of the OIC Agreement. Although the Tribunal finds that the Claimant's trial and criminal conviction in absentia constitutes a denial of justice and therefore a breach of the fair and equitable treatment standard, however, the Tribunal is not persuaded that the Claimant's criminal conviction in absentia deprived him of his investment, since (as it was discussed above) Bank Century was at negative value and in need of a bailout.

619. Furthermore, the Claimant claims that the Respondent's alleged expropriation of his investment, as well as the conduct of its police officers and judicial

authorities in investigating any wrongdoing in relation to Bank Century's collapse and bailout, are by their nature attributable to the Respondent. Inaction by the banking regulator, Bank Indonesia, is also an act attributable to the Respondent that can be at the origin of a breach of international law. Hence, the frustration of the Claimant's legitimate expectations results from both regulation by the Respondent (in the form of Perpu No. 4 of 2008 etc. etc.) and from the Respondent's negligent supervision of Bank Century in breach of its duties as banking regulator. The Tribunal is of the view that a central bank's primary duty of care is to the depositors of a bank, not to portfolio investors who buy shares of the bank, or of other financial institutions through intermediate corporate entities on the stock market. Thus, the Claimant could not have legitimately expected that the central bank owes him a duty in the circumstances.

620. The Tribunal points out that its role is not to correct procedural or substantive errors that might have been committed by the local courts in Indonesia. As explained by Jan Paulsson in his book Denial of Justice in International Law[206], the international obligation on states is not to create a perfect system of justice but a system of justice where serious errors are avoided or corrected. The Tribunal also stresses that the threshold to establish a claim of denial of justice is high.

621. Having said that, the Tribunal is of the view that denial of justice constitutes a clear violation of the FET standard. Failure to comply with the most basic elements of justice when conducting a criminal proceeding against an investor amounts to a breach of the investment treaty. The Tribunal concludes that in the present case, the Claimant was not properly notified of the criminal charges against him, he was tried and convicted *in absentia* and the sentence was not properly notified to the Claimant. The Claimant was not able to appoint legal counsel and was not able to appeal his sentence. The Tribunal concludes, therefore, that the Claimant did not receive fair and equitable treatment as enshrined in the ICCPR for the above reasons – and not for any other pleaded by

[206] Denial of Justice in International Law. Cambridge: Cambridge University Press, 2005, By Jan Paulsson.

the Claimant. Accordingly, the Claimant's fair and equitable treatment claim is upheld.

6. THE CLAIMANT'S PROTECTION AND SECURITY CLAIM UNDER ARTICLE 2 OF THE OIC

622. The Claimant argues that the obligation provided by Article 2 of the OIC Agreement was also breached by failing to provide adequate protection and security to his investment, and by the conduct of the prosecutorial authorities and of the courts of law who applied the criminal legislation in an arbitrary and discriminatory manner.

623. Article 2 of the OIC Agreement provides:

> *"The Contracting parties shall permit the transfer of capitals among them and its utilization therein in the fields permitted for investment in accordance with their laws. The invested capital shall enjoy adequate protection and security and the host state shall give the necessary facilities and incentives to the investors engaged in activities therein".*

624. The language of Article 2 is straightforward. It creates an obligation on the host state to provide adequate protection and security to the invested capital of the investor, *i.e*, the investment.

625. Moreover, the Respondent has an obligation to provide protection and security that is adequate in the circumstances. The Tribunal is of the view that the host state has an obligation to provide no more than a reasonable measure of prevention, which a well administered government could be expected to exercise in similar circumstances[207].

626. In the present arbitration, Bank Century, along with other banks in Indonesia was facing serious liquidity issues which prompted the Respondent to intervene. The Claimant cannot argue that the investment was not provided the adequate protection since as indicated above in paragraphs 525-534, the bailout in the

[207] CLA 150 and RLA 33.

present case was a permissible preventive measure under Article 10(2)(b) of the OIC Agreement. Article 10(2)(b) expressly makes it permissible for a state to "*adopt preventive measures issued in accordance with an order from a competent legal authority*".

627. The Claimant also argues that the Respondent failed to provide the investment with adequate protection and security within the meaning of Article 2 of the OIC, as a consequence of the Respondent's negligence in supervising Bank Century. The Tribunal refers to the paragraphs set out above including paragraphs 535 and 536 and holds that the Claimant has failed to provide evidence of the Respondent's negligence in its supervisory role. The Claimant also argues that adequate protection and security is not only limited to protection against physical violence, but also extends to legal protection. However, as explained above, since the protection under Article 2 of the OIC Agreement only applies to the "investment" and not the "investor", it is generally not infringed by physical threats (if proved) to the investor.

628. The Tribunal is of the view that the Respondent's bailout of Bank Century falls within the reasonable measures expected from a well administered government in similar circumstances. The Tribunal concludes therefore that the Respondent did not breach Article 2 of the OIC Agreement.

629. The Claimant alleges that the Respondent denied him adequate protection and security by violating his due process rights. However, since adequate protection and security is offered only to the investment, measures that affect an investor personally with no concomitant effect on the investment do not amount to a breach of that standard of protection. Indonesia's violation of the Claimant's due process rights did not have any adverse impact on the Claimant's investment as the bailout had already been concluded by the time the Indonesian authorities conducted their investigation and prosecuted the Claimant. Accordingly, the violations of due process did not deny the Claimant's investment adequate protection and security.

630. As a final point, the Tribunal notes that the standard of protection and security required by Article 3 of the UK-Indonesia BIT (applicable by virtue of the MFN clause in Article 8 of the OIC Agreement) is '*full* protection and security'. The Tribunal considers that full protection and security is not a higher standard than adequate protection and security. As the Tribunal has found there has been no violation of the adequate protection and security standard, its follows that nor has there been any violation of the full protection and security standard.

7. APPLICATION OF ARTICLE 9 OF THE OIC AGREEMENT

631. Unlike most BITs, the OIC Agreement contains an explicit provision that binds an investor to observe certain norms of conduct. That restriction is found in Article 9 which reads:

> *"The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means."*

632. Article 9 prevents the investor from taking any actions that would disrupt the public interest. It appears from the evidence provided by the Parties during the present proceedings, that the systematic threat of the Claimant's actions in the Indonesian financial system have been prejudicial to the public interest. Article 9 also prevents the investor from *"trying to achieve gains through unlawful means"*.

633. The Tribunal has heard the testimonies of highly qualified experts and heard them critically analyze the actions of the Claimant and Mr. Rizvi in the investment banking sector.

634. The Tribunal refers to the Brattle Report[208], which identified six types of fraud in which the Claimant was engaged. These are as follows:

[208] R26.

635. Uneconomical *Swap – with his own entity:* According to the Report, in December 2004, Bank Century handed over substantial cash and valuable assets to Chinkara (now FGAH), an investment company owned by the Claimant. In exchange it received securities worth substantially less. The assets obtained by Bank Century were worth roughly US$70 million less than the assets delivered. Bank Indonesia identified these losses during its 2005 audit of Bank Century.

636. Use *of Bank Century Assets to Obtain Private Loan*: During 2004, Bank Century pledged to Chinkara/FGAH existing securities with face value of US$157.48 million. The pledged securities would have commanded a market value of around US$100 million at the time. The understanding was that Chinkara/FGAH would then use the pledged assets as collateral to obtain credit facilities on behalf of Bank Century. Rather than obtaining the full US$100 million facility, however, the Claimant caused Chinkara/FGAH to obtain a loan of only US$35 million. The Claimant and Mr. Rizvi used at least part of the remainder of the securities, as collateral for a loan for themselves.

637. Failure *to Obtain Loans and Return Collateral: Bank* Century pledged further securities with US$65 million face value to FGAH during 2005 and 2006, on the understanding that FGAH would use the assets as collateral to obtain credit facilities on its behalf. FGAH, controlled by the Claimant, never obtained new loan facilities. The Claimant did not return to Bank Century many of the securities pledged to FGAH.

638. Failure *to Honour the AMA*: Following Bank Indonesia's guidance at the end of 2005, Bank Century sought to sell over US $200 million of its "marketable" securities. Bank Century signed the AMA with Telltop, one of their investment vehicles. Under the AMA, Bank Century appointed Telltop to manage and sell various securities and then to deliver back to Bank Century the cash proceeds from any sale. Although FGAH/Telltop held various securities on behalf of Bank Century under the AMA, and although Telltop warranted to Bank Century that it would receive cash of at least face value by 2009 for these securities, it appears that Bank Century received little or none of such proceeds.

639. Replacing *Valuable Assets For Trash*: The Report also states that, the Claimant and Mr. Rizvi replaced on several occasions from 2005 onwards several of Bank Century's securities that would pay out cash in US dollars upon maturity, for others that would pay out in shares of various funds managed by a company called First Capital Management, also controlled by them. The Claimant and Mr. Rizvi made the "Assets for Trash" switches on their own initiative and without Bank Century's approval. Bank Century has derived no value whatsoever from shares in the funds managed by First Capital Management.

640. Failure *to Pay Interest on Securities Held for Bank Century*: Throughout the period 2005 to 2008, and resulting from asset pledges and other transactions, FGAH held various securities on behalf of Bank Century. Many of the securities were interest-bearing. But according to the Report, the Claimant never passed through the associated interest payments to Bank Century.

641. In addition to the above, the Claimant was the Vice President of the Board of Commissioners in Bank Century. As a member of the Board of Commissioners the Claimant had the obligation, among others, to supervise management policies, the running of management in general, with regard to both the company and the company's business, and give advice to the Board of Directors.

642. Article 108(2) of the Indonesian Company Law provides:

> *"Boards of Commissioners shall supervise management policies, the running of management in general, with regard to both the Company and the Company's business, and give advice to the Board of Directors."*

643. The Claimant admitted at the Final Hearing during his cross-examination[209] that he was not aware of his obligations as provided by Indonesian Company Law.

644. The Claimant's admission that he undertook the duties on the Board of Commissioners in a major bank without understanding their significance is clearly prejudicial to the public interest prohibited by Article 9 which refer to

[209]Transcript, 12 March, page 87: line 5 to page 89: line 25.

the investor's being *"bound by the laws and regulations in force in the host state"*.

645. The Tribunal concludes from the above that the Claimant failed to uphold the Indonesian laws and regulations. The Tribunal further considers that the Claimant's action, whether criminal or not, caused a liquidity issue to Bank Century, and his actions have been prejudicial to the public interest, in this case the Indonesian financial sector. The Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the OIC Agreement.

646. In this regard, the Tribunal is of the view that the doctrine of *"clean hands"* renders the Claimant's claim inadmissible. As Professor James Crawford observes, the "*clean hands*" principle has been invoked in the context of the admissibility of claims before international courts and tribunals. Also the Tribunal refers to the decision of Lord Mansfield in Holman v Johnson (1775) which states:

> *"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted"*.

647. As mentioned above, it is established the Claimant has breached Article 9 of the OIC Agreement by failing to uphold the Indonesian laws and regulations and in acting in a manner prejudicial to the public interest. The Claimant's actions were also prejudicial to the public interest. The Tribunal finds that the Claimant's conduct falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement.

648. The Tribunal concludes that, although it has been established that the Claimant did not receive fair and equitable treatment, as set out in paragraphs 555 to 603 above however, by virtue of Article 9 of the OIC Agreement the Claimant is prevented from pursuing his claim for fair and equitable treatment.

8. THE CLAIMANT'S CLAIM FOR DAMAGES

649. Regarding the Claimant's claim for damages, the Claimant argues that, pursuant to Article 13 of the OIC Agreement, he is entitled to damages for the Respondent's violation of the Claimant's rights under the ICCPR. The Claimant claims for compensation in the sum of USD 5 million under Articles 13.1(a) and 13.1(d) for damages caused to the Claimant by the Respondent's violation of the Claimant's "*basic rights*" under Article 10.1 and its violation of the laws in force in Indonesia, including the Claimant's costs and expenses incurred in connection with his defence of the asset seizure and other ancillary proceedings relating to the Respondent's pursuit of his assets which are assessed at GBP 702,874.00.

650. The Claimant also claims for moral damages in the sum of USD 5 million to compensate the Claimant for the physical and psychological harm he has suffered as a result of the Respondent's egregious conduct towards him in breach of Articles 10.1 and 13, including injury to business reputation.

651. Article 13 of the OIC Agreement reads as follows:

> "
>
> *1. The investor shall be entitled to compensation for any damage resulting from any action of a contracting party or one of its public or local authorities or its institutions in the following cases:-*
>
> *a. Violation of any or the rights or guarantees accorded to the investor under this Agreement:*
>
> *b. Breach of any of the international obligations or undertakings imposed on the contracting party and arising under the Agreement for the benefit of the investor or the non-performance of whatever is necessary for its execution whether the same is intentional or due to negligence:*
>
> *c. Non-execution of a judicial decision requiring enforcement directly connected with the investment;*
>
> *d. Causing, by other means or by an act or omission, damage to the investor in violation of laws in force in the state where the investment exists.*

2. The compensation shall be equivalent to the damage suffered by the investor depending on the type of damage and its quantum.

3. The compensation shall be monetary if it is not possible to restore the investment to its state before the damage was sustained.

4. The assessment of monetary compensation shall be concluded within 6 (six) months from the date when the damage was sustained and shall be paid within a year from the date of agreement upon the amount of compensation or from the date when the assessment of the compensation has become final."

652. The application of Article 13 is subject to Article 9. As explained above, although the Tribunal has established that the Claimant did not receive fair and equitable treatment, (as set out in paragraphs 555 to 603 above) the Tribunal also finds that pursuant to Article 9 of the OIC Agreement the Claimant is prevented from pursuing his claim for fair and equitable treatment. Thus, the Claimant cannot request for compensation under Article 13 of the OIC Agreement.

653. Furthermore, the Tribunal finds that moral damages are generally awarded only if illegal action was motivated or maliciously induced (see for instance *Inmaris v. Ukraine* ICSID Case No: ARB/08/8 - Award of 1.3.2012 para 428; see also in a later award the *Rompetrol Group v. Romania* ICSID Case No: ARB/06/3 – Award dated 6.5.2013:

"The Claimant asserts in its Post-Hearing submissions that "moral damages cover non-pecuniary injury for which monetary value cannot be mathematically assessed and ...must be determined by the tribunal with a certain amount of discretion." This would conform to the approach taken by the only two ICSID tribunals that have hitherto awarded moral damages. A leading commentary draws as its conclusion from the cases that tribunals seem to enjoy "an almost absolute discretion in the matter of determining the amount of moral damages." The very fact, however, that this alternative claim for damages is both notional and widely discretionary prompts a considerable degree of caution on the part of the present Tribunal in facing the proposition that compensable 'moral' damage can be suffered by a corporate investor.

The case law in the investment field, as indicated, is very thin: two tribunals have accepted claims for moral damage and two have declined to award it. In general international law, while the award of moral damages is certainly accepted, both practice and the published literature show that this represents either damage to the honour and dignity of a State – in which case the remedies are non - economic – or else indirect compensation under the rubric of diplomatic protection for injuries of a personal kind suffered by the citizens of the claimant State. In the opinion of the Tribunal, neither of these categories fits the present case. The Tribunal has already indicated that reputational damage to a protected foreign investor is a perfectly conceivable consequence of unlawful conduct by the State of the investment, and if so is likely to show itself, for example, in increased financing costs, and possibly other transactional costs as well. But the Tribunal regards that as just another example of actual economic loss or damage, which is subject to the usual rules of proof. To resort instead to a purely discretionary award of moral solace would be to subvert the burden of proof and the rules of evidence, and that the Tribunal is not prepared to do."[210]

654. The Tribunal is of the view that, in any event, the doctrine of "clean hands" is invoked in the present case and it precludes the awarding of such damages.

9. THE RESPONDENT'S COUNTERCLAIM

655. The Respondent counterclaims for an order from the Tribunal in the following terms[211]:

"f. To award to Respondent, and order the Claimant to pay to the Respondent, forthwith, the full amount of the bailout, being Rp. 6.7 trillion; or, alternatively the amount that he has been shown to have stolen, being ***US $ 360,735,638****; or such other sum as the Tribunal may determine appropriate in light of the evidence put forward in this case, plus interest*

[210] *Rompetrol Group v. Romania* ICSID Case No: ARB/06/3, para 289 page 157.
[211] The Respondent's Submission on the Claimant's Lack of Status as an Investor, Defence and Counterclaim dated July 15, 2013, paragraph 337.f.

on such amount from the date of Claimant's conviction until the date paid, calculated at the Indonesian statutory interest rate of 6% per annum, or such other rate as the Tribunal may order;"

656. The Respondent submits that, for the Respondent to succeed on the counterclaim "...this Tribunal need make only three findings: first, that it has jurisdiction to adjudicate the Respondent's counterclaim; second, that the Claimant took actions to threaten Bank Century's liquidity (whether such actions were also criminal is beside the point for this analysis – although they plainly were); third, that those actions inflicted losses on the Respondent"[212].

657. The Respondent bases its counterclaim on the 'various manipulations' that enriched 'the Claimant and Mr. Rizvi...at the expense of Bank Century'. It relies on six specific types of fraud identified in the Brattle Report. The Respondent argues that *"inescapable reality is that, if Messrs. Al Warraq and Rizvi had not siphoned off Bank Century's funds for their own benefit – or even if they had replaced them as required by the commitment letters – the Indonesian Government would not have needed to step in to guarantee Bank Century's safety"*[213].

658. In its Post-Hearing brief filed on 16 June 2014, the Respondent submits that

"In order to find for Indonesia on the counterclaim, therefore, this Tribunal need not follow the tangled web of Mr. Al Warraq's and Mr. Rizvi's trades and transactions (though it helps to have been through them). All it need do is to conclude that Mr. Al Warraq had obligations as a Commissioner of Bank Century, as a signatory to the Commitment Letters, and as the partner in interest with the signatory of the AMA, to give back what he and Mr. Rizvi had taken from Bank Century -- in cash or in kind."

659. Counterclaims are problematic in investment arbitration because of the 'inherently asymmetrical character' of an investment treaty. However, as a

[212](ibid, paragraph 264)
[213](paragraph 314)

matter of principle *"tribunals should be able to hear closely connected investment counterclaims arising under the investment contract. Otherwise the maxim pacta sunt servanda operates in only one direction"*(James Crawford Treaty and Contract in investment Arbitration, the 22nd Freshfields Lecture on International Arbitration, London 29, November 2007, page 17). *"The jurisdiction of an Arbitral Tribunal over a State party counterclaim under an investment treaty depends upon the terms of the dispute resolution provisions of the treaty, the nature of the counterclaim, and the relationship of the counterclaims with the claims in the arbitration"* (*Limited Liability Company Amto v Ukraine*, SCC Case 080/2005, Award, paragraph 118, March 26, 2008). *"It is a cardinal principle relating to the bringing of counterclaims, however, that the necessary parties to the counterclaim must be the same as the parties to the primary claim"* (*Saluka Investments B.V. v The Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, paragraph 49).

660. The Tribunal is satisfied that the OIC Agreement, on a proper interpretation, authorizes counterclaims by the state party. Firstly, Article 17, which establishes the investor-State arbitration mechanism, envisages claims by the State party (and arguably goes even further to contemplate that a State Party initiates arbitration as a Claimant against an investor). Article 17, as far as is relevant reads (emphasis added):

> *"Until an organ for the settlement of disputes arising under the agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules of procedure:*
>
> *1. Conciliation: ……*
> *2. Arbitration*
>
> *a) If the two* ***parties*** *to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then* ***each party*** *has the right to resort to the Arbitration Tribunal for a final decision on the dispute.*

b) .....

(d) The decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not and irrespective of whether ***the investor against whom the decision was passed*** *is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts."*

661. As the Tribunal noted in its Partial Award dated 21 June 2012, paragraph 75, *"The opening phrase of Article 17 is ambiguously drafted. The reference to "disputes" lacks a subject..."* but the Tribunal found that it included disputes between States and investors. Article 17(2)(a) then makes clear that if the dispute is not resolved amicably then "each party"- that is, both the State and an investor in an investor-State arbitration- may resort to arbitration. A party may exercise 'a right to resort to arbitration' either by commencing the arbitration itself, or making a counterclaim if the other party commences the arbitration first. Finally, Article 17(2)(d) imposes an obligation on other contracting States to implement decisions against investors that are nationals of that state. In its ordinary meaning, a 'decision' against an investor presupposes that the state party has a right to bring a claim or counterclaim against the investor, which is consistent with the remainder of Article 17, and preferable to restricting the meaning of decision to procedural and costs matters in a procedure where only the investor has a right of action.

662. There is further support for an interpretation of the OIC Agreement so as to authorize counterclaims by state parties in Article 9, which provides:

"The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to

refrain from exercising restrictive practices and from trying to achieve gains through unlawful means."

663. Article 9 imposes a positive obligation on investors to respect the law of the Host State, as well as public order and morals. An investor of course has a general obligation to obey the law of the host state, but Article 9 raises this obligation from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor state arbitration. An analogy can be drawn with so called 'umbrella clauses' that elevate contractual obligations to the treaty plane. The fact that the Contracting Parties imposed treaty obligations on investors (which the Claimant assented to by accepting the open offer of investment arbitration made by the Respondent in the OIC Agreement) confirms the interpretation of Article 17 that permits counterclaims by the respondent state.

664. For these reasons, the Tribunal finds that the OIC Agreement authorizes counterclaims, and so the Tribunal has jurisdiction to decide on the Respondent's counterclaim. There is additional support for the right to a counterclaim in the procedural rules selected by the Parties and the terms of their Letter Agreement regarding the arbitration of 25 November 2011[214]. The Parties selected the UNCITRAL Arbitration Rules, Article 21.3 of which reads as follows:

"In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it".

665. The Letter of Agreement dated 25 November 2011, includes the following:

"If the Tribunal rules in favour of your client [*i.e*, the Claimant] *in relation to the preliminary objections' application, any further jurisdictional or*

[214]See paragraph 13 of the Partial Award dated 21 June 2012.

admissibility objections, the merits and any counterclaim will be submitted to the same Tribunal".[215]

666. The Tribunal concludes therefore, that the Respondent has the right to file counterclaims.

667. The right to bring counterclaims under the OIC Agreement is very broad. Article 17 refers to 'disputes' between the investor and the State and does not specifically limit the type of disputes. The fact that Article 9 establishes a treaty obligation to respect the law of the host states confirms the absence of restrictions on the nature of the counterclaim, and specifically the absence of an express restriction on counterclaims arising from the investment. However, in this case the counterclaim is closely related both to the investment and to the Claimant's claims. The counterclaim, like the claims, centers on the bailout of Bank Century in November 2008, with the Respondent alleging that the bailout was a result of various frauds of the Claimant and Mr. Rizvi that caused substantial losses to the Indonesian state.

668. The counterclaims are also based on similar facts as the criminal proceedings against the Claimant in Indonesia. The Claimant invokes the principle of *ne bis in idem*, which is an aspect of the *res judicata* doctrine. Pursuant to the principle of *res judicata "an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties"*[216]. The extent to which the criminal prosecution of the Claimant in this case might preclude the Respondent's efforts to obtain compensation for losses from the same factual circumstances that were the basis of the Claimant's conviction is a difficult question, and one that the Tribunal does not need to decide. The counterclaims here fail on broader grounds.

669. The counterclaim does not distinguish the actions of the Claimant from the actions of Mr. Rizvi, who is not a party to this arbitration. Further, they involve

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[215] R1

[216] ILA Recommendations on *res judicata, supra* n. 3 at p.2.

various other entities, including FGAH, Tell Tale Holdings Limited and First Capital Management Limited, not parties to this arbitration. As made clear in the *Saluka Investments B.V. v The Czech Republic* decision referred to above, it is a *'cardinal principle'* that the necessary parties to the counterclaim must be the same as the parties to the primary claim", and while this might be formally so in the present case there are many other entities that are either primarily or jointly responsible for the alleged frauds. The Respondent has failed to define the Claimant's personal liability, and the counterclaim must fail.

670. Further, the counterclaim is based on frauds committed against Bank Century, and the losses were initially incurred by bank Century and only passed on to the State when a bailout of Bank Century was required. While the subrogation of the State to claims of Bank Century might be juridically possible, the legal basis of the Respondent's rights to recover these losses has not been demonstrated to the Tribunal in this case.

671. Finally, some of the transactions that the Respondent alleges were fraudulent are subject to their own dispute resolution clauses. For example, one of the frauds relied upon by the Respondent involves losses arising from the failure to honour the AMA Agreement. Not only is the AMA Agreement between two separate entities (Bank Century and Telltop Holdings Limited), but it is subject both to the non-exclusive jurisdiction of the courts of England and the Arbitration Rules of the Singapore International Arbitration Centre.

672. For these reasons, the Tribunal finds that the Respondent has failed to demonstrate an adequate legal basis for its counterclaim, which is accordingly dismissed in its entirety.

10. COSTS

673. Both Parties have claimed costs in the present arbitration and filed short submissions quantifying their fees and costs.

674. Paragraph 24 of the Terms of Engagement provides as follows:

"The Parties shall be jointly and severally liable for the fees and expenses of the Arbitral Tribunal (and as between themselves equally). The Arbitral Tribunal shall require the Parties to pay deposits on account of its fees and expenses from time to time. Such deposits will be placed with the Singapore International Arbitration Centre as an independent stakeholder upon its usual terms of stakeholding with its fees to be paid from the deposits. If one party defaults in paying its share or any part thereof of a deposit request, the other shall pay the full amount, with credit to be given for such advance in the final award."

675. In relation to the allocation of costs, Article 42 of the UNICTRAL Rules provides:

"1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs".

676. At the Partial Award rendered on 21 June 2012, the Tribunal decided that the costs of the jurisdictional phase would be considered as part of the overall costs of the procedure at the conclusion of the merits phase, and reserved all questions relating to costs including costs involved in the proceedings relating to the preliminary objection to jurisdiction to the conclusion (merits- phase) of the arbitration.

677. The Claimant seeks reimbursement of GBP 1,318,377.59 in costs of legal fees and GBP 93,317.74 in other costs, GBP 380,265.03 in costs of experts, and GBP 471,000 for the costs of arbitration

678. The Respondent seeks reimbursement of SGD 1,258,848.65 in costs of Arbitrator's fees, USD 5,500,000.00 in costs of counsel's fees, USD 150,000.00 in costs of counsel's hearing expenses, USD 625,000.00 in costs of experts' fees, USD 50,000.00 in costs of experts' and witnesses' expenses, USD 10,589.00 in costs of translator's fees and expenses and USD 68,023.00 in costs of fees and expenses for delegations of the Government.

679. The Tribunal also notes that the Claimant has paid the amount of SGD 1,251,343.84, and the Respondent has paid SGD 1,251,729.13 towards the deposit account of the Singapore International Arbitration Centre.

680. In the current case the Claimant was partially successful in the preliminary jurisdictional phase. The Claimant has also successfully demonstrated that the most favoured nation clause in the OIC Agreement incorporates a fair and equitable treatment standard, and that the Respondent has breached this standard in relation to the trial and conviction of the Claimant. However, the Claimant has not successfully recovered any damages. The Respondent has failed on the jurisdictional issues, substantially succeeded on the merits, and has failed in its counterclaim.

681. The Tribunal also notes that the Parties have argued their positions and filed their submissions diligently and in good faith throughout the proceedings.

682. Based on the above and applying the principles in Article 42.1 of the UNCITRAL Rules the Tribunal considers reasonable that each party shall bear its own legal expenses and costs, as well as the expenses and costs of the arbitration, including the Arbitrator's fees and expenses and those of the Singapore International Arbitration Centre.

11. AWARD

683. For all the above reasons this Tribunal finds as follows[217]:

1) The Claimant is an investor in Indonesia within the meaning of Article 1(6) of the OIC Agreement;

2) The Respondent did not expropriate the Claimant's investment, and therefore did not breach Article 10 of the OIC Agreement in its treatment of the Claimant's investment in Bank Century;

3) By reason of the operation of the most-favoured nation clause in Article 8 of the OIC Agreement, the Claimant as an investor was entitled to fair and equitable treatment in the terms of the standard in Article 3 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments;

4) The Respondent's conduct in the prosecution and conviction of the Claimant breached the fair and equitable treatment standard;

5) The Claimant's invested capital in Bank Century has enjoyed adequate protection and security within the meaning of Article 2 of the OIC Agreement;

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[217] The minority of the Tribunal believes that, by virtue of the violation of Articles 50(1), 51(b), 52, 54, 66-67, 233-4 and 263 of the KUHAP, Article 38(1) of the Anti-Corruption Law and Article 79(1) of the Money Laundering Law, there has been a breach of the Claimant's treaty rights under Article 13(1)(d) of the OIC Agreement, thus entitling him to damages for the legal expenses he has incurred in relation to his wrongful conviction by the Central Jakarta District Court, as well as the legal costs of defending himself against asset seizure proceedings initiated by Indonesia in various jurisdictions to the extent that the wrongful conviction was the basis for these enforcement actions.

The minority does not agree that the doctrine of 'clean hands' applies to render the Claimant's claims inadmissible by virtue of his illegality unless that illegality relates to the acquisition of his investment, which is not the present case.

6) (By a majority) the Claimant has breached Article 9 of the OIC Agreement in that he committed acts prejudicial to the public interest, and for this reason is not entitled to any damages in respect of the Respondent's breaches of the fair and equitable treatment standard;

7) The Tribunal has jurisdiction over the Respondent's counterclaim under the OIC Agreement, but the counterclaim is dismissed on the merits;

8) The Parties shall each bear one half of the fees and expenses of the Arbitral Tribunal and the Singapore International Arbitration Centre. The Parties shall each bear their own legal and other costs, including the fees and expenses of witnesses and experts;

9) All other claims and counterclaims are dismissed.

Place of Arbitration: Singapore

Date: Dec. 15th 2014

THE ARBITRAL TRIBUNAL

Michael Hwang S.C.	Bernardo M. Cremades	Fali S. Nariman
Arbitrator	President	Arbitrator