

**PCA CASE NO. 2017-25**

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT ON  
RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS BETWEEN  
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN AND THE  
GOVERNMENT OF THE KINGDOM OF BAHRAIN DATED OCTOBER 19, 2002**

**-and-**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW, 1976 (the “UNCITRAL Rules”)**

**-between-**

**1. BANK MELLI IRAN (IRAN)**

**2. BANK SADERAT IRAN (IRAN)**

**(the “Claimants”)**

**-and-**

**THE KINGDOM OF BAHRAIN  
(the “Respondent,” and together with the Claimants, the “Parties”)**

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**AWARD**

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**Tribunal**

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)  
Professor Bernard Hanotiau  
The Rt. Hon. Lord Collins of Mapesbury

**Secretary to the Tribunal**

Dr. Levent Sabanogullari

**Registry**

Permanent Court of Arbitration

**9 November 2021**

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**GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS**

<b>2006 Report</b>	The Anti-Money Laundering examination report submitted by the BMA (Compliance Directorate) dated August 6, 2006
<b>2008 CBB Report</b>	The CBB's Inspection Directorate's report dated April 12, 2009
<b>2009 CBB Report</b>	The CBB's Compliance Directorate Examination Report, dated April 22, 2009
<b>2012 CBB Report</b>	The CBB's Investigation Report dated October 31, 2012
<b>2015 CBB Report</b>	The CBB's Investigation Report dated May 24, 2015
<b>2018 CBB Report</b>	The CBB's Investigation Report dated February 16, 2018
<b>2015 KPMG Report</b>	The report prepared by KPMG dated April 28, 2015
<b>AML/CFT</b>	Anti-Money Laundering/Countering the Financing of Terrorism
<b>AMS</b>	Alternative Messaging System
<b>Answer on Interim Measures</b>	The Respondent's Answer to the Claimants' Application for Interim Measures submitted on October 12, 2017
<b>Application for an Interim Award of Costs</b>	The Respondent's Application for an Interim Award of Costs submitted on October 12, 2018
<b>Application for Interim Measures</b>	The Claimants' Application for Interim Measures submitted on September 26, 2017
<b>Bank</b>	Future Bank B.S.C
<b>Bank Melli</b>	Bank Melli Iran
<b>Bank Saderat</b>	Bank Saderat Iran
<b>BIT</b>	Bilateral Investment Treaty
<b>BMA</b>	Bahrain Monetary Authority, predecessor to the CBB
<b>BMI</b>	Bank Melli Iran
<b>BSI</b>	Bank Saderat Iran
<b>CBB</b>	Central Bank of Bahrain
<b>CBB Decision</b>	CBB's decision to place Future Bank under forced administration dated April 30, 2015

<b>CBB Directive</b>	CBB's Directive issued on September 8, 2010
<b>CBB Law</b>	Central Bank of Bahrain and Financial Institutions Law (Decree No. 64 of 2006)
<b>CBB Rulebook</b>	CBB's Rulebook containing regulations governing the banking sector
<b>Claimants' Comments on Security for Costs</b>	The Claimants' Comments on the Respondent's Application for Security for Costs submitted on August 28, 2017
<b>Claimants' Costs Claims Update</b>	The Claimants' update on their cost claims submitted on September 15, 2020
<b>Claimants' Further Requests Regarding Document Production</b>	The Claimants' additional requests regarding the Respondent's document production submitted on October 22, 2018
<b>Claimants' Rejoinder on the Application for an Interim Award of Costs</b>	The Claimants' Rejoinder on the Application for an Interim Award of Costs submitted on October 30, 2018
<b>Claimants' Reply Comments on the Application for Interim Measures</b>	The Claimants' Reply Comments on the Application for Interim Measures submitted on October 23, 2017
<b>Claimants' Reply Comments on Submission on Costs</b>	The Claimants' Reply Comments on the Respondent's Submission on Costs submitted on July 24, 2019
<b>Claimants' Request No. 13</b>	The Claimants' document production request no. 13 submitted on March 16, 2018
<b>Claimants' Response to the Application for an Interim Award of Costs</b>	The Claimants' Response to the Respondent's Application for an Interim Award of Costs submitted on October 22, 2018
<b>Claimants' Submission on Costs</b>	The Claimants' Submission on Costs dated July 10, 2019
<b>Confidentiality Agreement</b>	The Confidentiality Agreement agreed by the Parties
<b>Decision on the Designation of Certain Documents as Confidential and on Redactions</b>	The Tribunal's Decision on the Designation of Certain Documents as Confidential and on Redactions dated December 13, 2018
<b>EDD</b>	Enhanced due diligence
<b>FATF</b>	Financial Action Task Force
<b>First ER Davies</b>	The First Expert Report of Mr. Gary Davies dated February 16, 2018
<b>First ER Fair Links</b>	The First Expert Report of Fair Links dated October 2017
<b>First ER Sharma</b>	The First Expert Report of Mr. Paul Sharma dated February 16, 2018



<b>FB</b>	Future Bank
<b>FC Module</b>	The Financial Crime Module of the CBB Rulebook, as amended from time to time
<b>FET</b>	Fair and equitable treatment
<b>FID</b>	Financial Intelligence Directorate within the Bahrain Ministry of the Interior
<b>FPS</b>	Full protection and security
<b>Hearing</b>	The five-day hearing held on May 6-10, 2019 in Paris, France
<b>IAEA</b>	International Atomic Energy Agency
<b>IFSR</b>	Iran Financial Sanctions Regulations
<b>Interim Award on Interim Measures</b>	The Tribunal's Interim Award on the Claimants' Application for Interim Measures
<b>Interim Award on Security for Costs</b>	The Tribunal's Interim Award on the Respondent's Application for Security for Costs dated November 16, 2017
<b>Interim Award on the Respondent's Application for an Interim Award of Costs and the Claimants' Further Requests Regarding Document Production</b>	The Tribunal's Interim Award on the Respondent's Application for an Interim Award of Costs and the Claimants' Further Requests Regarding Document Production dated December 6, 2018
<b>JCPOA</b>	The Joint Comprehensive Plan of Action signed between Iran, China, France, Germany, Russia, the United Kingdom and the United States on July 14, 2015
<b>KYC</b>	Know-Your-Customer
<b>MFN</b>	Most-favoured nation
<b>MIS</b>	Management Information Systems
<b>MLRO</b>	Money Laundering Reporting Officer
<b>Notice of Arbitration</b>	Notice of arbitration submitted by the Claimants on February 8, 2017
<b>OFAC</b>	The United States Department of Treasury office of Foreign Assets Control
<b>P/B</b>	Price-to-Book ratio
<b>P/E</b>	Price-to-Earnings ratio
<b>PCA</b>	Permanent Court of Arbitration

<b>PEP</b>	Politically Exposed Persons
<b>POGC</b>	Pars Oil and Gas Company
<b>Published CBB Decision</b>	The publication of the placement of Future Bank under administration in the Official Gazette, dated May 7, 2015
<b>Rejoinder</b>	The Respondent's Rejoinder dated February 27, 2019
<b>Rejoinder on Security for Costs</b>	The Claimants' Rejoinder Comments on the Respondent's Application for Security for Costs submitted on September 28, 2017
<b>Rejoinder on Interim Measures</b>	The Respondent's Rejoinder to the Claimants' Application for Interim Measures submitted on November 3, 2017
<b>Reply</b>	The Claimants' Reply submission dated December 19, 2018
<b>Reply on Interim Measures</b>	The Claimants' Reply to the Respondent's Answer on Interim Measures submitted on October 23, 2017
<b>Respondent's Application for Security for Costs</b>	The Respondent's Application for Security for Costs submitted on August 10, 2017
<b>Respondent's Costs Claims Update</b>	The Respondent's update on its cost claims submitted on September 15, 2020
<b>Respondent's Reply on Security for Costs</b>	The Respondent's Reply Comments on the Application for Security for Costs submitted on September 14, 2017
<b>Respondent's Reply on the Application for an Interim Award of Costs</b>	The Respondent's Reply on the Application for an Interim Award of Costs submitted on October 25, 2018
<b>Respondent's Reply Comments on Submission on Costs</b>	The Respondent's Reply Comments on the Claimants' Submission of Costs submitted on July 24, 2019
<b>Respondent's Request No. 1</b>	The Respondent's document production request no. 1 submitted on March 16, 2018
<b>Respondent's Submission on Costs</b>	The Respondent's Submission on Costs dated July 10, 2019
<b>SDN</b>	Specially Designated Nationals under the U.S. Iran Financial Sanctions Regulations
<b>Second ER Davies</b>	The Second Expert Report of Mr. Gary Davies dated February 27, 2018
<b>Second ER Fair Links</b>	The Second Expert Report of Fair Links dated November 30, 2018

<b>Second ER Sharma</b>	The Second Expert Report of Mr. Paul Sharma dated February 27, 2019
<b>SoC</b>	The Claimants' Statement of Claim submitted on October 16, 2017
<b>SoD</b>	The Respondent's Statement of Defense submitted on February 16, 2018
<b>STR</b>	Suspicious transaction Reporting
<b>SWIFT</b>	Society for Worldwide Interbank Financial Telecommunication
<b>UNCITRAL Rules</b>	The Arbitration Rules of the United Nations Commission International Trade Law of 1976
<b>UNSC</b>	United Nations Security Council
<b>VCLT</b>	Vienna Convention of the Law of Treaties

## I. INTRODUCTION

### A. THE PARTIES

1. The Claimants in this Arbitration are Bank Melli Iran (“**BMI**” or “**Bank Melli**”), with headquarters on Ferdowsi Street in Tehran, Iran,<sup>1</sup> and Bank Saderat Iran (“**BSI**” or “**Bank Saderat**”), with headquarters at Bank Saderat Tower, 43 Somayeh Avenue, Tehran, Iran<sup>2</sup> (collectively, the “**Claimants**”). The Claimants are represented in these proceedings by Dr. Hamid Gharavi, Mr. Emmanuel Foy, and Ms. Déborah Schneider of Derains & Gharavi International, 25 rue Balzac, 75008 Paris, France.
2. The Respondent in this Arbitration is the Kingdom of Bahrain, a sovereign State (“**Bahrain**” or the “**Respondent**”, and together with the Claimants, the “**Parties**”). The Respondent is represented in these proceedings by counsel Professor Jan Paulsson of Three Crowns LLP, 9th Floor, West Tower, Bahrain World Trade Centre, P.O. Box 17396, Manama, Kingdom of Bahrain, Mr. Luke Sobota, Ms. Kimberly Larkin, Ms. Kelly Renehan of Three Crowns LLP, Washington Harbour, 3000 K Street, N.W., Suite 101, Washington D.C. 2000-5109, United States of America, Dr. Ryan Manton and Ms. Zara Desai of Three Crowns LLP, 104 avenue des Champs-Élysées, 75008 Paris, France, Mr. Josh Simmons, Ms. Jessica Ji and Mr. Mushegh Manukyan, formerly of Three Crowns LLP, and party representatives Sheikh Khalid bin Ali bin Abdullah Al Khalifa (Agent for Bahrain, Minister of Justice), Sheikh Salman bin Khalifa Al Khalifa (Minister of Finance), Governor Rasheed Mohammed Al Maraj (Governor of Central Bank of Bahrain), Ms. Manar Mustafa Al Sayed (General Counsel of Central Bank of Bahrain), Mr. Khalid Hamad (Central Bank of Bahrain), Mr. Khalil Ebrahim Swailim (Central Bank of Bahrain), Mr. Mohamed Rashed Al-Najem (Central Bank of Bahrain), Mr. Nayef Yousef (Public Prosecutor), and Mr. Devashish Krishan (Consultant).

### B. OVERVIEW OF THE DISPUTE

3. A dispute has arisen between the Claimants and the Respondent, in respect of which the Claimants filed a notice of arbitration (the “**Notice of Arbitration**”) pursuant to Article

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<sup>1</sup> Articles of Association of Bank Melli Iran, November 17, 1981 (C-1).

<sup>2</sup> Official Gazette of Iran No. 2206, Notice No. 2551, September 11, 1952 (C-2); Official Gazette of Iran No. 5800, Notice No. 6/13573, January 13, 1965 (C-3).

11 of the Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Islamic Republic of Iran and the Kingdom of Bahrain, dated October 19, 2002 (the “**BIT**”) and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the “**UNCITRAL Rules**”).

4. The dispute concerns the alleged breach by the Kingdom of Bahrain of its obligations under the BIT arising out of the forced administration of Future Bank (“**Future Bank**” or the “**Bank**”), a bank established by the Claimants together with Ahli United Bank (“**AUB**”) in 2004 on the territory of Bahrain.<sup>3</sup>
5. According to the Claimants, “[t]he Kingdom of Bahrain expropriated Claimants’ investments without any justification or any form of due process or fairness, nor any sense of proportionality, but rather abruptly and arbitrarily in violation of all procedural and substantive protections under the BIT.”<sup>4</sup> According to the Claimants, the expropriation was not accompanied by compensation.
6. The Respondent denies the claims in their entirety and submits that the claim is inadmissible because of the Claimants’ illegal activities.<sup>5</sup>

### **C. THE ARBITRATION AGREEMENT**

7. Article 11 of the BIT contains the arbitration agreement and provides:

#### **ARTICLE 11**

##### **SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND INVESTOR(S) OF THE OTHER CONTRACTING PARTY**

1. If any dispute arises between the host Contracting Party and investor(s) of the other Contracting Party with respect to an investment, the host Contracting Party and the investor(s) shall primarily endeavour to settle the dispute in an amicable manner through negotiation and consultation.
2. In the event that the host Contracting Party and the investor(s) can not agree within 4 months from the date of notification of the claim by one party to the other, either of them may refer the dispute to:
  - (a) the competent courts of the Contracting Party in the territory of which the investment has been made; or

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<sup>3</sup> Shareholders Agreement, March 3, 2004 (hereinafter “**Shareholders Agreement**”) (C-97).

<sup>4</sup> Statement of Claim, October 16, 2017 (hereinafter “**SoC**”), ¶ 3.

<sup>5</sup> Statement of Defense, February 16, 2018 (hereinafter “**SoD**”), ¶ 1.

- (b) the International Center for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, on March 18, 1965; as soon as both Contracting Parties become members to that convention.
  - (c) an ad-hoc arbitral tribunal which, unless otherwise agreed upon by the parties to the dispute, shall be established under the arbitration rules of the United Nations Commission on international Trade Law (UNCITRAL).
3. A dispute primarily referred to the competent courts of the host Contracting Party, as long as it is pending, cannot be referred to arbitration save with the parties agreement; and in the event that a final judgment is rendered, it cannot be referred to arbitration.
  4. National courts shall not have jurisdiction over any dispute referred to arbitration. However, the provisions of this paragraph do not bar the winning party to seek for the enforcement of the arbitral award before national courts.<sup>6</sup>

#### **D. THE APPLICABLE LAW**

8. The Netherlands arbitration law, which applies to these proceedings as *lex arbitri*, contains the following provision concerning the law applicable to the substance of the dispute:

If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law which it considers appropriate.<sup>7</sup>

9. Article 33 of the UNCITRAL Arbitration Rules contains essentially the same choice of law rules, except that in the absence of a choice of law by the parties, it points to the application of the “law determined by the conflict of law rules which [the tribunal] considers applicable”. In the present context of an investment treaty dispute, this difference is without effect on the law that this Tribunal will apply.
10. The BIT contains no choice-of-law clause, nor have the Parties otherwise made such a choice. Therefore, the Tribunal must decide the issues in dispute pursuant to the law which it considers appropriate. Since it is seised of this dispute on the basis of the BIT, the Tribunal will first and foremost apply the provisions of the BIT. For the interpretation

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<sup>6</sup> Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Islamic Republic of Iran and the Government of the Kingdom of Bahrain, October 19, 2002 (hereinafter “**BIT**”) (**CL-1**), Article 6.

<sup>7</sup> Code of Civil Procedure (Book 4: Arbitration) of the Netherlands, Article 1054(2).

of the BIT, it will resort to the rules of customary international law contained in the Vienna Convention on the Law of Treaties (the “**VCLT**”). If the BIT is silent on an issue or if it uses notions pertaining to other sets of rules, the Tribunal will determine in each case whether a given issue is subject to rules of international law (other than the BIT) or to municipal law.

## **II. PROCEDURAL HISTORY**

### **A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL**

11. The Claimants served their Notice of Arbitration on February 8, 2017, together with factual exhibits CE-1 to CE-68 and legal authorities CLA-1 to CLA-29. In their Notice of Arbitration, the Claimants proposed that the UNCITRAL Arbitration Rules of 2010, as revised in 2013, or, alternatively, the UNCITRAL Rules of 2010, or of 1976, apply to the dispute. They also proposed that the proceedings be administered by the Permanent Court of Arbitration in The Hague (the “**PCA**”), that the PCA act as “appointing authority” in accordance with the UNCITRAL Rules, that the place of arbitration be Paris, France, and that the language of arbitration be English.
12. Additionally, in their Notice of Arbitration, the Claimants appointed Professor Emmanuel Gaillard, a French national as arbitrator. Professor Gaillard’s contact details where then as follows:

**Professor Emmanuel Gaillard**  
Shearman & Sterling LLP  
7 rue Jacques Bingen  
75017 Paris  
France  
Tel.: +33 (0)1 53 89 70 00  
Fax.: +33 (0)1 53 89 70 70  
E-mail: [egaillard@shearman.com](mailto:egaillard@shearman.com)

13. By letter dated March 13, 2017, the Respondent raised certain questions pertaining to the status of the Claimants as Specially Designated Nationals (“**SDN**”) under U.S. Iranian Financial Sanctions Regulations (“**IFSR**”) and the need for an arbitrator in a case involving SDNs to obtain prior clearance from the U.S. Department of Treasury Office of Foreign Assets Control (the “**OFAC**”) with respect to funds emanating from such entities. In particular, the Respondent asked the PCA to “inquire whether Shearman & Sterling (or Professor Gaillard, or anyone else) has obtained OFAC clearance that would

cover receipt of remittances originating from both of the Claimants with respect to fees earned in this case”.

14. By letter dated March 15, 2017, the Claimants stated, *inter alia*, that the Respondent “cannot rely on [the OFAC license] issue to delay its appointment of an arbitrator” and that it had “failed to nominate an arbitrator within the 30-day deadline under Article 7 of the 1976 [UNCITRAL Rules]”. The Claimant thus informed the PCA and the Respondent that it would proceed to request the Secretary-General of the PCA to appoint an arbitrator on behalf of the Respondent.
15. By letter dated March 16, 2017, the Claimants submitted a request for the Secretary-General of the PCA to designate an appointing authority to appoint a second arbitrator on behalf of the Respondent in accordance with Article 7(2)(b) of the UNCITRAL Rules.
16. Between March 17 and March 27, 2017, at the invitation of the PCA, the Parties exchanged comments on the Claimants’ request for the Secretary-General of the PCA to designate an appointing authority.
17. By e-mail of March 27, 2017, the Respondent agreed that the PCA should serve as appointing authority.
18. By letter dated March 29, 2017, the Claimants reiterated their request that the PCA Secretary-General designate an appointing authority.
19. Following further correspondence between the Parties and the PCA, by e-mail dated May 8, 2017, the Respondent notified the Claimants and the PCA of its nomination as arbitrator of The Rt. Hon. Lord (Lawrence) Collins of Mapesbury, a U.K. national.
20. On May 9, 2017, the PCA invited the Claimants to provide any comments on Lord Collins’ nomination as arbitrator.
21. By letter dated May 15, 2017, the Claimants objected to the “purported nomination” of Lord Collins.
22. By letter dated May 16, 2017, the Respondent commented on the Claimants’ objection and asked the PCA to confirm Lord Collins’ appointment.



23. On May 17, 2017, the Claimants responded to the Respondent's comments.
24. Also on May 17, 2017, the PCA informed the Parties that the Secretary-General of the PCA had appointed Lord Collins as the second arbitrator in these proceedings pursuant to Article 7(2)(a) of the UNCITRAL Rules. Lord Collins' contact details are as follows:

**The Rt. Hon. Lord Collins of Mapesbury**

Essex Court Chambers  
24 Lincoln's Inn Fields  
London WC2A 3EG  
United Kingdom  
Tel.: +44 (0)20 7813 8000  
E-mail: lcollins@essexcourt.net

25. By letter dated July 20, 2017, the Claimants informed the PCA that, together with the Respondent, they proposed that the Secretary-General of the PCA appoint the Presiding Arbitrator. By letter of the same date, the PCA informed the Parties that the Secretary-General of the PCA had agreed to make such appointment.
26. By letter dated July 26, 2017, the Secretary-General of the PCA appointed Professor Dolzer as the Presiding Arbitrator. Professor Dolzer's contact details were as follows:

**Professor Dr. Rudolf Dolzer**

Am Pferchelhang 4/1  
69118 Heidelberg  
Germany  
E-mail: rdolzer@me.com

27. On July 27 and 29, 2017, respectively, the Claimants and the Respondent confirmed that they had no objection to the constitution of the Tribunal. In the same correspondence, the Claimants confirmed their consent to proceed under the 2010 UNCITRAL Rules, while the Respondent argued in favour of the application of the 1976 UNCITRAL Rules. Upon the invitation of the Tribunal, further comments on the applicable version of the UNCITRAL Rules were received on August 4, 2018.
28. By letter dated August 14, 2017, the Tribunal, *inter alia*, informed the Parties that, having considered the Parties' submissions on the applicable version of the UNCITRAL Rules, it had determined that the UNCITRAL Arbitration Rules, as promulgated in 1976, were applicable to the present proceedings. By the same letter, the Tribunal proposed a first

procedural meeting and requested that the Parties make simultaneous written submissions on various procedural matters.

29. By letter dated August 18, 2017, the Tribunal advised the Parties that communications to and from the Tribunal in this matter should be made *via* the PCA and proposed the appointment of Dr. Levent Sabanogullari as Secretary to the Tribunal, appending Dr. Sabanogullari's *curriculum vitae* to the letter. The Parties agreed to such appointment by separate correspondence of the same date.

#### **B. FIRST PROCEDURAL CONFERENCE AND PROCEDURAL TIMETABLE**

30. By letters dated August 30, 2017 and September 7, 2018, the Claimants and the Respondent responded to the matters set forth in the Tribunal's letter of August 14, 2017. In particular, they agreed on The Hague as the place of arbitration, and on the dates for the submission of the Statement of Claim and Statement of Defense.
31. By letter dated September 14, 2017, after considering the Parties' comments, the Tribunal decided that the first procedural meeting would be held via conference call on September 27, 2017.
32. Such meeting proceeded as scheduled. Both Parties were represented by counsel. All the members of the Tribunal, as well as the Secretary to the Tribunal were present.
33. On November 6, 2017, the Tribunal issued the final Terms of Appointment, which were signed by the Parties and each Member of the Tribunal. On the same date, and after having sought the Parties' comments, the Tribunal issued Procedural Order No. 1, which, *inter alia*, fixed The Hague as the seat and English as the language of the Arbitration. Further, Annex 1 of Procedural Order No. 1 set forth the Procedural Calendar.

#### **C. APPLICATION FOR SECURITY FOR COSTS, APPLICATION FOR INTERIM MEASURES, AND INTERIM AWARDS**

34. By e-mail of August 10, 2017, the Respondent submitted an Application for Security for Costs and Request for Disclosure of any Funding Arrangement (the "**Respondent's Application for Security for Costs**"), accompanied by factual exhibits R-1 to R-55 and legal authorities RL-1 to RL-43.

35. On August 14, 2017, the Tribunal invited the Claimants to provide any comments on the Application for Security for Costs, which the latter did on August 28, 2017 (the “**Claimants’ Comments on Security for Costs**”) also filing exhibits C-69 to C-80 and legal authorities CL-30 to CL-72.
36. By letter dated August 31, 2017, the Tribunal invited the Respondent to file reply comments and the Claimants to file rejoinder comments.
37. On September 14, 2017, the Respondent submitted its reply comments on the Application for Security for Costs (the “**Respondent’s Reply on Security for Costs**”), together with factual exhibits R-56 to R-61 and legal authorities RL-44 to RL-52.
38. On September 26, 2017, the Claimants submitted an Application for Interim Measures (the “**Application for Interim Measures**”), together with exhibits C-81 to C-82 and legal authorities CL-73 to CL-77. The Claimants requested that the Tribunal (a) order the Respondent to stay the ongoing winding up proceedings initiated against Future Bank; (b) order the Respondent to refrain from any further winding up or equivalent proceedings against Future Bank; (c) order the Respondent to secure, store, and maintain any documentation and data held by Future Bank, and (d) order the Respondent to bear all costs incurred by the Claimants in this Application for Interim Measures.
39. On September 28, 2017, in accordance with the Tribunal’s instructions, the Claimants submitted their **Rejoinder on Security for Costs**, along with exhibits C-38 to C-90 and legal authorities CL-78 to CL-81.
40. On October 12, 2017, the Respondent submitted its **Answer on Interim Measures**, accompanied by legal authorities RL-53 to RL-58.
41. On October 23, 2017, the Claimants submitted their **Reply on Interim Measures**, along with legal authorities CL-122 to CL-123.
42. On November 3, 2017, the Respondent submitted its **Rejoinder on Interim Measures**, dated November 2, 2017, together with factual exhibits R-62 to R-67 and legal authorities RL-69 to RL-74.

43. On November 14, 2017, the Claimants asked the Tribunal for leave to submit comments on paragraphs 8, 9, and 32 (bullet points nos. 6 and 7) of the Rejoinder on Interim Measures, arguing that the Respondent had “raised new allegations” in these paragraphs and introduced “new exhibits” in support thereof. On the same date, the Tribunal invited the Respondent to comment on the Claimants’ request.
44. On November 15, 2017, in accordance with the Tribunal’s instructions, the Respondent filed its comments on the Claimants’ request of November 14, 2017.
45. On November 16, 2017, the Tribunal granted the Claimants’ request to comment on paragraphs 8, 9, and 32 (bullet point nos. 6 and 7) of the Rejoinder on Interim Measures, including on the supporting exhibits.
46. On the same day, the Tribunal issued its **Interim Award on Security for Costs**, denying the Respondent’s Application and reserving its decision as to costs.
47. On November 20, 2017, the Claimants submitted their comments on the Rejoinder on Interim Measures, together with exhibit C-130.
48. On November 23, 2017, the Tribunal advised the Parties that no further submissions on the Claimants’ Application for Interim Measures were necessary.
49. On February 1, 2018, the Tribunal issued its **Interim Award on Interim Measures**. In that award, the Tribunal (i) denied the request to stay the administration proceedings, (ii) ordered the Respondent to “secure, store and maintain documentation concerning the full history of the administration of Future Bank as well as the manner of its implementation, any transfer to third parties and the accounting of Future Bank’s assets relevant for the computation of potential damages to the Claimants”, and (iii) reserved its decision on costs.

**D. STATEMENT OF CLAIM AND STATEMENT OF DEFENSE; DOCUMENT PRODUCTION PHASE**

50. On October 16, 2017, the Claimants submitted their Statement of Claim (the “**SoC**”) as well as exhibits C-91 to C-129, legal authorities CL-82 to CL-121, and Witness Statements CWS-1 and CWS-1, as well as Expert Report CER-1.

51. On February 16, 2018, pursuant to the Procedural Calendar, the Respondent submitted its Statement of Defense (the “**SoD**”), together with a covering letter, exhibits R-68 to R-174, legal authorities RL-75 to RL-119, and Witness Statements RWS-1 to RWS-2, Expert Reports RER-1 to RER-2, and the CBB Assessment of Future Bank B.S.C. dated February 16, 2018 (the “**2018 CBB Report**”).
52. By e-mail of February 22, 2018, the Claimants requested “leave to submit brief comments on Respondent’s [...] cover letter of February 16, 2018”.
53. By e-mail of the same date, the Tribunal granted the Claimants’ request and invited the Claimants to submit their comments by February 28, 2018.
54. By e-mail dated February 28, 2018, the Claimants notified the Tribunal of the Parties’ agreement to an extension for the submission of the Claimants’ comments to the Respondent’s covering letter accompanying the SoD.
55. On March 2, 2018, the Claimants submitted their comments on the Respondent’s covering letter of February 16, 2018.
56. On March 16, 2018, the Parties exchanged requests for the production of documents in the form of Redfern Schedules pursuant to Procedural Order No. 1.
57. On March 29, 2018, further to the Parties’ agreement, the Tribunal issued Procedural Order No. 2, providing a revised Procedural Calendar.
58. By letter dated April 5, 2018, the Claimants submitted to the Tribunal a Washington Post article of April 3, 2018 titled “Billion-dollar sanctions-busting scheme aided Iran, documents show”, which, according to the Claimants, “essentially relay[ed] Bahrain’s most recent allegations in this arbitration”. The Claimants requested *inter alia* that the Tribunal direct Bahrain “to refrain from further leaking to the press or any third parties any materials on the record that is not in the public domain”.
59. On April 6, 2018, the Tribunal invited the Respondent to comment on the Claimants’ letter of April 5, 2018, which the former did on April 7, 2018.

60. On April 9, 2018, the Claimants requested leave to submit a reply to the Respondent's comments. The Tribunal allowed the Claimants to provide reply comments by April 11, 2018, and the Respondent to submit rejoinder comments by April 16, 2018.
61. By e-mail dated April 11, 2018, the Claimants submitted such reply comments to the Respondent's letter of April 7, 2018 and requested that the Tribunal Order the Respondent to issue a statement admitting to the leak.
62. Also on April 11, 2018, the Parties produced the documents to which no objections were made and submitted their objections to each other's requests for production.
63. On April 16, 2018, the Respondent submitted a response to the Claimants' reply comments of April 11, 2018, attaching Annexes 1-3 and asking the Tribunal to "summarily dismiss" the Claimants' requests.
64. On April 19, 2018, the Tribunal responded to communications by the Parties regarding the alleged leak by the Respondent. It found that the letters by the Claimants of April 5, 2018 and April 11, 2018, regarding, respectively, a "general" complaint about the leak and a request that the Tribunal order the Respondent to issue a statement admitting to the leak did "not warrant an order against the Respondent", noting that "[they] are not in the nature of categories of recognized types of applications by parties before an investment tribunal".
65. On April 25, 2018, the Parties exchanged their replies to each other's objections pursuant to the revised Procedural Calendar, and submitted their requests for the production of documents to the Tribunal for its decision.
66. On April 26, 2018, the Claimants submitted their Document Production Requests (including Respondent's Objections, and Claimants' Replies thereto), together with Annexes A to C. On the same date, the Respondent submitted its Application for an Order for Document Production, including the legal authorities it relies on for the application.
67. On April 27, 2018, the Claimants filed a copy of the notice of arbitration dated April 6, 2018, which Iran Insurance Company had served on Bahrain.

68. On May 2, 2018, the Tribunal confirmed receipt of the Parties' requests for document production of April 26, 2018. In view of the volume and the complexity of the requests submitted, the Tribunal informed the Parties that it would render its decisions by May 30, 2018, as opposed to May 16, as foreseen under the revised Procedural Calendar. The Tribunal did not consider that further adjustments to the revised Procedural Calendar were required.
69. On May 29, 2018, the Tribunal issued Procedural Order No. 3 on the production of documents and advised the Parties that it had deferred its decision on the Claimants' document production request no. 13 (the "**Claimants' Request No. 13**") and the Respondent's document production request no. 1 (the "**Respondent's Request No. 1**"), and decided to afford the Parties an opportunity to provide further comments on these requests.
70. On June 6, 2018, the Respondent wrote to the Tribunal regarding Procedural Order No. 3, seeking an extension to the production of documents so ordered. The Respondent also stated that its document disclosure was predicated on a confidentiality agreement, which had not yet been agreed with the Claimants.
71. On June 13, 2018, following an extension agreed between the Parties and on the Tribunal's request, each side submitted its additional comments regarding the Parties' outstanding document production requests.
72. On June 19, 2018, each side commented on the other's additional comments.
73. On June 27, 2018, the Tribunal denied the Claimants' Request No. 13 and the Respondent's Request No. 1 and asked the Parties to provide updates on their efforts to comply with Procedural Order No. 3.
74. On June 29, 2018, the Claimants updated the Tribunal on its progress to comply with Procedural Order No.3 and commented on a certain statement therein.
75. On July 6, 2018, the Respondent wrote to the Tribunal requesting that, in the light of the Claimants' letter of June 29, 2018, the Tribunal reconsider its decision to deny the Respondent's Request No. 1.

76. On July 17, 2018, upon the Tribunal's invitation and following an agreed extension, the Claimants provided their comments on the Respondent's request just mentioned.
77. On July 26, 2018, the Tribunal denied the Respondent's request for reconsideration of the Tribunal's order with respect to the Respondent's Request No. 1.
78. On July 31, 2018, the Claimants provided the Tribunal with the Parties' agreed, newly revised procedural calendar.
79. By letter dated July 31, 2018, the Tribunal issued Procedural Order No. 4, revising the Procedural Calendar, set out in Annex 1 to Procedural Order No. 1 and revised by Procedural Order No. 2.
80. On September 27, 2018, the Claimants advised the Tribunal that the Parties had agreed to a further extension of the time to produce documents, which the Respondent confirmed on the same day.
81. By e-mail dated September 27, 2018, the Tribunal granted such further extension.
82. On October 4, 2018, the Respondent circulated the Confidentiality Agreement agreed by the Parties (the "**Confidentiality Agreement**") for the Tribunal's reference.

**E. INTERIM AWARD ON COSTS AND FURTHER APPLICATIONS CONCERNING DOCUMENT PRODUCTION**

83. On October 12, 2018, the Respondent filed an application for an Interim Award of costs (the "**Application for an Interim Award of Costs**") dated October 11, 2018, with exhibits R-175 to R-210 and legal authorities RL-120 to RL-134.
84. On October 12, 2018, the Tribunal invited the Claimants to respond to this Application.
85. On October 22, 2018, the Claimants responded to the Application for an Interim Award of Costs (the "**Claimants' Response to the Application for an Interim Award of Costs**"), seeking that the Tribunal dismiss the application without further briefing. They also filed additional requests regarding the Respondent's document production (the "**Claimants' Further Requests Regarding Document Production**").



86. On October 25, 2018, the Respondent replied to the Response to the Application for an Interim Award of Costs (the “**Respondent’s Reply on the Application for an Interim Award of Costs**”), attaching exhibits R-211 to R-213 and legal authorities RL-135 to RL-136.
87. On October 30, 2018, the Claimants’ submitted their rejoinder to such reply (the “**Claimants’ Rejoinder on the Application for an Interim Award of Costs**”).
88. On November 1, 2018, the Claimants sought an order pursuant to paragraph 6 of the Confidentiality Agreement regarding documents which the Respondent had designated as confidential. They also requested that the Tribunal “enjoin [...] the Respondents to remove all redactions made” to certain documents.
89. On the same day, the Respondent wrote to the Tribunal objecting to the Claimants’ challenge to its confidentiality designations and redactions. It proposed that the Tribunal review the disputed documents *in camera* and decide on their proper designation, and by separate e-mail, submitted all such documents in accordance with Article 6(3) of the Confidentiality Agreement for the Tribunal’s review, with an index.
90. On December 6, 2018, the Tribunal issued its Interim Award denying the Respondent’s Application for an Interim Award of Costs. In the same Award, it also rejected the Claimants’ further requests regarding document production.
91. On December 13, 2018, the Tribunal issued Procedural Order No. 5 containing its **Decision on the Designation of Certain Documents as Confidential and on Redactions**.
92. By e-mail dated December 13, 2018, the Claimants informed the Tribunal that the Parties had agreed to extend the time limit for the Reply, with a corresponding extension for the Rejoinder. On the same day, the Tribunal confirmed these extensions.

#### **F. REPLY AND REJOINDER**

93. On December 19, 2018, the Claimants submitted its **Reply**, together with exhibits C-1 to C-301, legal authorities CL-1 to CL-168, Witness Statement CWS-3, and Expert Report CER-3.

94. On February 22, 2019, the Claimants submitted further documents that they had been ordered to produce in Procedural Order No. 3, with a letter explaining the delay. The Claimants further requested that the Tribunal grant leave to introduce into the record a letter from the Iranian Ministry of Foreign Affairs, dated July 9, 2011 (copied to Bank Melli and Bank Saderat) produced in response to Document Request No. 6, in order to request corresponding disclosures.
95. Following an exchange of comments on this request, on March 2, 2019, the Tribunal granted the Claimants' request to admit the letter of July 9, 2011.
96. On February 27, 2019, the Respondent submitted its **Rejoinder** with exhibits R-214 to R-302, legal authorities RL-137 to RL-167, Witness Statements RWS-3 and RWS-4, as well as Expert Reports RER-3 and RER-4.

#### **G. HEARING**

97. By letter dated March 15, 2018, having invited and considered the Parties' comments, the Tribunal fixed Paris, France as the venue for the hearing ("**Hearing**").
98. On June 29, 2018, in the light of certain delays, the Respondent asked the Tribunal to allow the Parties to confer and agree on a revised Procedural Calendar, including a rescheduling of the Hearing.
99. In July 2018, upon the Parties' agreement, the Tribunal rescheduled the five-day hearing from December 2018 to the week commencing May 6, 2019.
100. On March 7, 2019, the Claimants requested that the Tribunal issue an order calling on the Respondent to produce the five following persons as witnesses at the Hearing, none of whom had produced a witness statement to date. These five persons were: (1) Mr Khalid Hama, Executive Director for Banking Supervision at the CBB; (2) Mr. Khalil Ebrahim Swailim, Head of Compliance Directorate at the CBB; (3) Mr. Nawaf Ahmed Bubshair, Superintendent Compliance Examination at the CBB; (4) Mr. Isa Ahmed Falamarzi, Ministry of Interior; and (5) Mr. Ebrahim Khalil Swailim, Ministry of Interior.
101. By letter dated March 11, 2019, the Tribunal scheduled the pre-hearing telephone conference to be held on April 15, 2019, and invited the Respondent to provide its comments to the Claimants' aforementioned request, which the Respondent did on

March 15, 2019, followed by further comments from the Claimants on March 20, 2019, and from the Respondent on March 21, 2019.

102. On March 27, 2019, the Tribunal issued Procedural Order No. 6, in which it ordered the Respondent to procure Mr. Khalid Hamad and Mr. Khalil Ebrahim Swailim to testify at the Hearing with regard to matters specified by the Tribunal, and denied all other requests.
103. By joint letter dated April 15, 2019, the Parties submitted to the Tribunal areas of agreement and disagreement regarding the organization of the Hearing, ahead of the pre-hearing telephone conference.
104. On April 15, 2019, the Tribunal and the Parties held a pre-hearing telephone conference to discuss the outstanding issues pertaining to the organization of the Hearing.
105. On April 16, 2019, the Tribunal issued Procedural Order No. 7 dealing with logistical and procedural issues for the Hearing.
106. By letter dated April 26, 2019, the Respondent requested leave from the Tribunal to submit additional factual documents upon which it intended to rely on during the Hearing, with Annexes 1-25. Following an exchange of comments by the Parties, on May 1, 2019, the Tribunal granted the Respondent's request, in part allowing the introduction of some documents and denying others.
107. On May 3, 2019, the Claimants submitted demonstrative exhibits A and B, in accordance with Procedural Order No. 7. On the same day, the Respondent submitted additional legal authorities RL-168 to RL-174, to which it claimed it may refer to during the Hearing.
108. On May 4, 2019, the Respondent submitted new exhibits R-303 to R-208, and a complete version of Exhibit R-74, in accordance with the Tribunal's directions of May 1, 2019.
109. The Hearing took place over five days, commencing on May 6, 2019, at the offices of Shearman & Sterling LLP (7 rue Jacques Bingen, 75017 Paris, France). The following persons attended the Hearing:

**Tribunal**

Professor Dr. Rudolf Dolzer  
The Rt Hon Lord Collins of Mapesbury  
Professor Emmanuel Gaillard

**Claimants**

*Counsel*

Dr. Hamid Gharavi  
Mr. Emmanuel Foy  
Mr. Dimtry Bayandin  
Mr. Ali Al-Khasawneh  
Ms. Alveen Shitinyans  
Ms. Shirin Gurdova  
Ms. Sara Eftekhari Jahromi  
(Derains & Gharavi LLP)

*Party Representatives*

Mr. Gholam Sourì  
Ms. Asrar Pazhouhi  
Mr. Mahmoud Baheri  
Ms. Hamideh Barmakhshad  
(Bank Saderat Iran)

Mr. Eshagh Yousef Nejad  
Mr. Arash Arasteh  
Mr. Saeed Vakili  
Mr. Abbas Fatemi Torshizi  
(Bank Melli Iran)

Dr. Mohammad Jafar Ghanbari Jahromi  
(Centre of International Legal Affairs in Tehran)

**Claimants' Witnesses**

*Fact Witnesses*

Mr. Gholam Sourì  
(Bank Saderat Iran)  
Dr. Abdolnaser Hemmati  
(Central Bank of Iran)

*Expert Witnesses*

Mr. David Brain  
(Bovill)

Mr. Anton de Feuarden  
Mr. Benjamin Roux  
Ms. Jeanne Vellard  
(Fair Links)

**Respondent**

*Counsel*

Prof. Jan Paulsson  
Mr. Luke Sobota  
Mr. Ryan Manton

Ms. Kimberly Larkin  
Ms. Jessica Ji  
Ms. Zara Desai  
Ms. Kelly Renehan  
(Three Crowns LLP)

H.E. Sheikh Khalid bin Ali bin Abdullah Al Khalifa  
Agent for Bahrain  
(Minister of Justice)

*Party Representatives*

Mr. Nayef Yousef  
Bahrain Representative  
(Public Prosecutor)

Ms. Manar Mustafa Al Sayed  
Bahrain Representative  
(General Counsel of Central Bank of Bahrain)

Mr. Devashish Krishan  
Bahrain Representative

**Respondent's Witnesses**

*Fact Witnesses*

Mr. Khalid Ebrahim Swailim  
Mr. Khalid Hamad  
Governor Mohammed Al Maraj  
Mr. Mohamed Rashed Al-Najem

*Expert Witnesses*

Mr. Paul Sharma  
Mr. Gary Davies  
Mr. Adrian Martin  
(Alvarez & Marsal)

**Permanent Court of Arbitration**

Dr. Levent Sabanogullari

**Interpreters**

Ms. Michèle Antaki  
Ms. Aline Bazouni  
Ms. Mina Faress  
Mr. Reza Amini

**Court Reporter**

Ms. Susan McIntyre

110. Dr. Gharavi and Mr. Foy presented oral arguments on behalf of the Claimants. H.E. Sheikh Khaled bin Ali bin Abdullah Al Khalifeh, Minister of Justice, made a statement as agent of the Respondent, and Prof. Paulsson and Mr. Sobota presented arguments on behalf of the Respondent.

111. During the Hearing, by e-mail of May 9, 2019, the Claimants submitted new legal authorities CL-169 to CL-174, as well as exhibit C-303, as instructed by the Tribunal at the Hearing.

#### **H. POST-HEARING PROCEEDINGS AND COSTS SUBMISSIONS**

112. On May 13, 2019, the Tribunal invited the Parties to make simultaneous costs submissions by no later than July 10, 2019. By the same letter, the Tribunal invited the Parties to file reply comments on the other side's costs submissions by July 24, 2019.

113. On July 10, 2019, the Respondent submitted its letter to the Tribunal regarding costs (the "**Respondent's Submission on Costs**") and a declaration of costs in an Annex. On the same date, the Claimants filed their submission on costs (the "**Claimants' Submission on Costs**").

114. On July 24, 2019, the Respondent replied to the Claimants' Submission on Costs (the "**Claimants' Reply Comments on Submission on Costs**"), and submitted a declaration of amended costs in an Annex. On the same date, the Claimants replied to the Respondent's Submission on Costs (the "**Respondent's Reply Comments on Submission on Costs**").

115. On September 21, 2019, the Claimants sought confirmation that no further submissions were required from the Claimants with respect to their amended request for relief, which the Tribunal confirmed on September 26, 2019.

116. On February 13, 2020, the Respondent wrote to the Tribunal to "update the Tribunal in relation to the criminal investigations in Bahrain" in respect of Future Bank "in the interest of transparency", enclosing a press release from the Office of the Public Prosecutor in Bahrain.

117. By e-mail of February 27, 2020, the Claimants commented on such letter regarding the criminal proceedings initiated in Bahrain against Future Bank, the Claimants, and Future Bank executives. In this communication, the Claimants referred to the Respondent's letter and the underlying criminal proceedings as aggravating the dispute and the reputational damage inflicted on them. They also reserved their rights and requested an indication on the date of issue of the Award.

118. On February 27, 2020, the Respondent answered the Claimants' letter regarding the criminal proceedings underway in Bahrain.

**I. REPLACEMENT OF THE PRESIDING ARBITRATOR, RE-HEARING, AND SUPPLEMENTAL COSTS SUBMISSIONS**

119. On April 6, 2020, the PCA informed the Parties of the recent passing of Professor Rudolf Dolzer.

120. On April 30, 2020, the co-arbitrators appointed Professor Gabrielle Kaufmann-Kohler as presiding arbitrator pursuant to Articles 13(1) and 7(1) of the UNCITRAL Rules. Professor Kaufmann-Kohler's contact details are as follows:

**Professor Gabrielle Kaufmann-Kohler**  
3-5, rue du Conseil-Général  
P.O. Box 552  
1211 Geneva 4  
Switzerland  
Tel.: +41 22 809 62 00  
E-mail: gabrielle.kaufmann-kohler@lk-k.com

121. On May 11, 2020, with reference to Article 14(1) of the UNCITRAL Rules, the Tribunal invited the Parties to provide their views on the appropriate next procedural steps, informing the Parties that the Tribunal would be inclined to hold a hearing at which counsel would be afforded an opportunity to present oral arguments and address any questions from the Tribunal.

122. By letters dated May 18, 2020, each side confirmed its availability for a hearing.

123. On May 25, 2020, the Tribunal proposed dates for a hearing by videoconference to the Parties, who confirmed their availability on May 25 and June 6, 2020 respectively.

124. On June 15, 2020, the Tribunal confirmed that the hearing would take place on August 10 and 11, 2020, proposed to conduct the hearing via the *Zoom* platform, and invited the Parties' comments on draft Procedural Order No. 8 in respect of arrangements for a videoconference hearing.

125. On June 29, 2020, the Parties provided their joint comments on draft Procedural Order No. 8.

126. On July 1, 2020, having considered the Parties' comments, the Tribunal issued Procedural Order No. 8, *inter alia* setting out the hearing schedule and the videoconference etiquette.
127. On July 28, 2020, the Tribunal informed the Parties of areas of particular interest and invited them to address these in their oral arguments at the forthcoming hearing.
128. By letter of the same date, the Claimants updated the Tribunal on recent development in the criminal proceedings in Bahrain and requested that "any monetary relief awarded by the Tribunal be accompanied by language expressly setting out that such monetary relief shall not be capable of set off against any other amounts allegedly owed by Future Bank, Claimants, or their respective representatives, in the context of other actions initiated by Bahrain", citing *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo* in support.
129. On July 29, 2020, the Tribunal invited the Respondent to comment on the Claimants' correspondence of July 28, 2020, noting that the Parties may further address the issues raised in the Claimants' correspondence in their oral arguments at the hearing if they deemed it appropriate.
130. On July 30, 2020, the Claimants requested certain changes to the hearing schedule.
131. On the same date, the Tribunal invited the Respondent's views on such changes, to which the Respondent objected on July 30, 2020.
132. On July 31, 2020, having considered the Parties' positions and taking into account that what was expected was as summary of elements already in the record, the Tribunal decided to keep the original schedule fixed in Procedural Order No. 8.
133. On August 4, 2020, the Respondent commented on the Claimants' letter of July 28, 2020, arguing *inter alia* that the Claimants' new request for relief was inadmissible.
134. Also on August 4, 2020, the Respondent sought leave to file two updated exhibits and two legal authorities into the record for purposes of the upcoming hearing.
135. On August 5, 2020, the Tribunal informed the Parties that it was inclined to admit the documents for which the Respondent sought leave, subject to any compelling reason to



the contrary raised by the Claimants, in which case the Tribunal would reconsider its position.

136. On August 5, 2020, the Claimants informed the Tribunal that they did not object to the introduction of the documents “without prejudice to the relevance and materiality of the same”. By the same letter, the Claimants introduced legal authorities CLA-175 to CLA-179.
137. Also on August 5, 2020, a pre-hearing conference took place via the *Zoom* platform in which counsel and representatives for the Parties, the members of the Tribunal, and the PCA participated and tested the features of the videoconference platform.
138. By letter dated August 6, 2020, the Tribunal admitted the exhibits and legal authorities that the Respondent sought to introduce on August 4, 2020, and the Claimants’ legal authorities CLA-175 to CLA-179 into the record. By the same letter, the Tribunal noted the Respondent’s letter of August 4, 2020, addressing the criminal proceedings in Bahrain.
139. The Re-Hearing took place on August 10 and 11, 2020 by videoconference. The following persons were in attendance:

**Tribunal**

Professor Gabrielle Kaufmann-Kohler  
Professor Emmanuel Gaillard  
The Rt Hon Lord Collins of Mapesbury

**Claimants**

*Counsel*

Dr. Hamid Gharavi  
Mr. Emmanuel Foy  
Mr. Ali Al-Khasawneh  
Ms. Deborah Schneider  
(Derains & Gharavi LLP)

**Respondent**

*Counsel*

Prof. Jan Paulsson  
Mr. Luke Sobota  
Mr. Scott Vesel  
Mr. Ryan Manton  
Ms. Kimberly Larkin  
Ms. Zara Desai  
Ms. Supriya Suresh  
Ms. Kelly Renehan

Ms. Tracey Stokes  
(Three Crowns LLP)

*Party Representatives*

H.E. Sheikh Khalid bin Ali bin Abdullah Al Khalifa  
Bahrain Representative  
(Minister of Justice)

H.E. Sheikh Salman bin Khalifa Al Khalifa  
Bahrain Representative  
(Minister of Finance)

H.E. Governor Rasheed Mohammed Al Maraj  
Bahrain Representative  
(Governor of the Central Bank of Bahrain)

Mr. Khalid Hamad  
Bahrain Representative  
(Executive Director of Banking Supervision, Central Bank of Bahrain)

Mr. Mohamed Rashed Al-Najem  
Bahrain Representative  
(Head of Compliance Examination – Banks, Central Bank of Bahrain)

Ms. Manar Mustafa Al Sayed  
Bahrain Representative  
(General Counsel of Central Bank of Bahrain)

Mr. Devashish Krishan  
Bahrain Representative

**Permanent Court of Arbitration**

Dr. Levent Sabanogullari  
Ms. Ruba Ghandour  
Ms. Hosna Sheikhattar

**Court Reporters**

Ms. Diana Burden  
Ms. Ann LLoyd

140. On behalf of the Claimants, oral arguments were presented by Dr. Gharavi, while the Respondent presented arguments through Prof. Paulsson and Mr. Sobota.
141. On August 11, 2020, the Tribunal invited the Parties to update their costs claims.
142. On September 15, 2020, the Parties filed the respective updates of their costs claims (the “**Claimants’ Costs Claims Update**” and the “**Respondent’s Costs Claims Update**”, respectively).

143. On November 24, 2020, the Tribunal informed the parties of its intention to have the Award issued by the end of March 2021.
144. By letter dated December 30, 2020, the Claimants insisted that the Tribunal make efforts to issue the Award promptly. In this communication, they referred to developments in the criminal proceedings in Bahrain and claimed that the Respondent was “continuing to use each day that elapses to aggravate the dispute” through these proceedings. They further repeated their request that “any monetary relief awarded by the Tribunal be accompanied by language expressly setting out that such monetary relief shall not be capable of set off against any other amounts allegedly owed by Future Bank, Claimants, or their respective individual representatives, in the context of other actions initiated by Bahrain”.
145. On January 4, 2021, the Tribunal gave the Respondent the opportunity to submit comments on the Claimants’ letter of December 30, 2020, by January 8, 2021.
146. By letter dated January 6, 2021, the Respondent replied to the Claimants’ letter of December 30, 2020.
147. On January 7, 2021, the Tribunal took note of the content of the Claimants’ letter of December 30, 2020.
148. On March 3, 2021, the Tribunal notified the Parties that it would “not be in a position” to issue the Award by the end of March, as previously anticipated, and proposed to give notice three days in advance of its issue.
149. By e-mail dated March 4, 2021, the Claimants urged for the Award “to be issued promptly” and “within the first half of April”.
150. On March 18, 2021, the Tribunal informed the Parties that it would be continuing its deliberation process and would provide a status update in two months.
151. By e-mail dated March 19, 2021, the Claimants repeated calls for the prompt issue of the Award, reiterating concerns regarding the ongoing criminal proceedings in Bahrain.
152. By e-mail dated March 23, 2021, the Respondent replied to the Claimants’ letter of March 19, 2021, commenting on the criminal proceedings in Bahrain.

153. On March 24, 2021, the Tribunal invited the Claimants to comment on the Respondent's letter of March 23, 2021, by March 26, 2021, and the Respondent to make further observations by March 31, 2021.
154. By e-mail dated March 26, 2021, the Claimants commented on the Respondent's e-mail communication of March 23, 2021, reiterating *inter alia* their concerns over the criminal proceedings in Bahrain and their calls for a prompt issue of the Award.
155. By e-mail communication dated March 31, 2021, the Respondent made observations on the remarks made by the Claimants in their e-mail of March 26, 2021.

**J. APPOINTMENT OF A SUBSTITUTE ARBITRATOR**

156. On April 6, 2021, the PCA informed the Parties of the passing of Professor Emmanuel Gaillard and invited the Claimants to appoint a substitute arbitrator by May 3, 2021, pursuant to Article 13(1) of the UNCITRAL Rules.
157. By letter dated April 12, 2021, the Claimants notified the Tribunal of their appointment of Professor Hanotiau as substitute arbitrator. Professor Hanotiau's contact details are as follows:

**Professor Bernard Hanotiau**  
Hanotiau & van den Berg  
IT Tower  
480, avenue Louise – box 9  
B - 1050 Brussels  
Tel.: (32.2) 290.39.00  
Fax: (32.2) 290.39.39  
E-mail: [bernard.hanotiau@hvdb.com](mailto:bernard.hanotiau@hvdb.com)

158. In the same communication, the Claimants noted that they did not request a repetition of hearings and called for an expeditious conclusion of the arbitration.
159. By e-mail dated April 22, 2021, the Respondent welcomed the Claimants' appointment of Professor Hanotiau and made comments on the Claimants' letter of April 12, 2021.
160. Following exchanges between the Parties, the Tribunal informed the Parties on June 29, 2021, that Professor Hanotiau considered a repetition of the Hearing unnecessary and that the Tribunal would resume its deliberation process.

161. On September 9, 2021, the Claimants requested an update as to the date of issue of the award.
162. On September 10, 2021, the Tribunal informed the Parties that it had made substantial progress and expected to be in a position to issue the award in late October or early November 2021.
163. On October 21, 2021, the Respondent informed the Tribunal of “the internationally-broadcast news of the ten year jail sentence for corruption that an Iranian court has pronounced against the former Governor of the Central Bank of Iran, Dr. Valiollah Seif.” On the same day, the Claimants notified the Tribunal that they did not intend to respond to the Respondent’s communication, “other than to say that the issue bears no relevance to the specific points in dispute.”

### **III. FACTUAL BACKGROUND**

164. This section restates the main facts of this dispute. Where a fact or its significance is disputed, reference is made to the Parties and, where appropriate, the Parties’ respective positions on such facts. In particular, it addresses the establishment of Future Bank in Bahrain, the various compliance reports issued by the Central Bank of Bahrain (the “**CBB**”) and Future Bank’s responses thereto, the circumstances and events surrounding the CBB’s decision to place Future Bank under administration and, subsequently, liquidation. In the analysis set out in Chapters V to VIII the Tribunal will refer to additional facts where this appears necessary.

#### **A. THE LEGISLATIVE AND REGULATORY FRAMEWORK**

165. Before setting out the chronology of the main facts, the Tribunal briefly summarizes the relevant Bahraini legal framework.

##### **1. Central Bank of Bahrain and Financial Institutions Law**

166. Article 136 of the Central Bank of Bahrain and Financial Institutions Law (Decree No. 64 of 2006) (the “**CBB Law**”) sets out the grounds upon which the Central Bank may place a bank holding a licence under administration as follows:

- (a) The Central Bank may, pursuant to a justified resolution, assume the administration of a Licensee or may appoint another person (the

“External Administrator”) to conduct the administration of a Licensee on behalf of the Central Bank under any of the following circumstance:

- 1) If the Licensee becomes insolvent or appears most likely to be insolvent.
- 2) If the license is amended or cancelled pursuant to the provisions of items (1) and (3) of paragraph (c) of Article (48) of this law.
- 3) If the Licensee continued to provide regulated services which resulted in inflicting damages to financial services industry in the Kingdom.

- (b) In this part the term administrator denotes the Central Bank if it assumes the administration of the Licensee or any external administrator to be appointed for this purpose.<sup>8</sup>

167. Pursuant to Article 138(a), the Administrator “shall, promptly after assuming the administration of a Licensee, publish a notice to this effect in the Official Gazette and in one Arabic and one English language newspaper published in the Kingdom, and to show such notice in every place of business of the Licensee in the Kingdom all through the period in which he assumes the administration.”<sup>9</sup> Article 138(b) adds that “the appointment of the Administrator shall only have effect on the day following the publication of such notice [...]”<sup>10</sup>

168. The CBB Law further provides in Article 139(a), that a financial institution placed under administration may file an appeal before the CBB within ten days following the publication of the administration. Article 139(b) then stipulates that the decision on the appeal must be notified to the appellant within 15 days and that reasons must be given in the event that the appeal is dismissed. Under Article 139(c), the financial institution may then challenge the decision of administration or the dismissal of the appeal before the competent court within 30 days.<sup>11</sup>

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<sup>8</sup> The Central Bank of Bahrain and Financial Institutions Law, 2006 (hereinafter “**CBB Law**”) (**CL-5**).

<sup>9</sup> **CBB Law (CL-5)**.

<sup>10</sup> **CBB Law (CL-5)**.

<sup>11</sup> **CBB Law (CL-5)**.

169. Within a period of two years from the commencement of the administration, a petition for the compulsory liquidation of the bank under administration or to terminate the administration and reinstate the bank's management shall be made (Art. 143).<sup>12</sup>
170. Article 145 specifies that compulsory liquidation will ensue in case of insolvency and where it is shown to be just and equitable.<sup>13</sup>

## 2. The CBB Rulebook

171. In the exercise of its powers as the regulator of all financial institutions in Bahrain, the CBB has issued a Rulebook (the "**CBB Rulebook**"), which contains regulations governing the banking sector.<sup>14</sup>
172. In an introductory statement, the CBB explains that the Rulebook contains "regulatory and supervisory authority for all financial institutions in Bahrain, issues regulatory instruments that licensees and other specified persons are legally obliged to comply with."<sup>15</sup>
173. The Rulebook contains the following provisions on administration:

### EN 8.1.1

Article 136 of the CBB Law empowers (but does not oblige) the CBB to assume the administration of a licensee in certain circumstances. These circumstances are outlined in the above Article and may include the following:

- (a) The licensee has become insolvent;
- (b) Its solvency is in jeopardy;
- (c) Its continued activity is detrimental to the financial services industry in the Kingdom; or
- (d) Its license has been cancelled.

### EN 8.2.1

The CBB views the administration of a licensee as a very powerful sanction, and will generally only pursue this option if less severe measures are unlikely to achieve its supervisory objectives.

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<sup>12</sup> CBB Law (**CL-5**), Article 143.

<sup>13</sup> CBB Law (**CL-5**).

<sup>14</sup> Central Bank of Bahrain Rulebook Volume 1—Conventional Banks, October 2007 (hereinafter "**CBB Rulebook**") (**PS-30**).

<sup>15</sup> CBB Rulebook (**PS-30**), UG A.1.1.

## EN 8.2.2

Although Article 136 of the CBB Law specifies the circumstances in which the CBB may pursue an administration, it does not oblige the CBB to administer a licensee. The CBB may pursue other courses of action such as suspension of a license (under Article 131 of the CBB Law), if it considers that these are more likely to achieve the supervisory outcomes sought. Because an administration is likely to send a negative signal to the markets about the status of a licensee, other supervisory actions may in fact be preferable in terms of protecting the interests of those with a claim on the licensee.

## EN 8.2.3

The criteria used by the CBB in deciding whether to seek an administration of a licensee include the following:

- (a) the extent to which the interests of the market, its users and those who have a claim on the licensee would be best served by the administration of the license, for instance because of the potential impact on asset values arising from an administration;
- (b) the extent to which other regulatory actions could reasonably be expected to achieve the CBB's desired supervisory objectives (such as restrictions on the licensee's operations, including limitations on new business and asset disposals);
- (c) the extent to which the liquidity or solvency of the licensee is in jeopardy; and
- (d) the extent to which the licensee has contravened the conditions of the CBB Law, including the extent to which the contraventions reflect more widespread or systemic weaknesses in controls and/or management.

## EN 8.3 Procedure for Implementing an Administration

## EN 8.3.1

All proposals for assuming the administration of a licensee are subject to a thorough review by the CBB of all relevant facts, assessed against the criteria outlined in Section EN 8.1.

## EN 8.3.2

A formal notice of administration is issued to the licensee concerned and copies posted in every place of business of the licensee. As soon as practicable thereafter, the notice is also published in the Official Gazette and in one Arabic and one English newspapers in the Kingdom. The term "in administration" should be clearly marked in all Future Bank's correspondence and on its website, next to Future Bank's name.

## EN 8.3.3

Article 136 of the CBB Law allows a licensee 10 days following the administration taking effect in which to appeal to the CBB. If the CBB refuses the appeal, the licensee has a further 30 calendar days from the date of the refusal in which to lodge an appeal at the courts. So as to reduce the potential damage of an administration order being applied and then withdrawn on appeal, where feasible the CBB will give advance notice to a licensee's Board



of its intention to seek an administration, and allow the Board the right of appeal prior to an administration notice being formally served.<sup>16</sup>

174. Volume 1 of the CBB Rulebook, which applies to all licensed conventional banks, provides a “comprehensive framework of Rules and Guidance aimed at combating money laundering and terrorist financing”. Within Volume 1, the so-called Financial Crime Module (the “**FC Module**”) places certain obligations on conventional banks which are summarized as follows:

The Module requires conventional bank licensees to have effective anti-money laundering (‘AML’) policies and procedures, in addition to measures for combating the financing of terrorism (‘CFT’). The Module contains detailed requirements relating to customer due diligence, reporting and the role and duties of the Money Laundering Reporting Officer (MLRO).<sup>17</sup>

175. The CBB Rulebook is amended from time to time.

#### **B. THE ESTABLISHMENT OF FUTURE BANK (2004)**

176. BMI and BSI had been operating in Bahrain since 1971.<sup>18</sup> According to the Claimants, Future Bank was established on the active encouragement of Bahrain<sup>19</sup> following the conclusion in 2002 of the Memorandum of Understanding between the Central Bank of Iran and its Bahraini counterpart, the Bahrain Monetary Agency (the “**BMA**”), which was the predecessor of the CBB. In that Memorandum, the two signatories expressed their willingness to “allow the establishment of banks and financial institutions” in their respective jurisdictions.<sup>20</sup>

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<sup>16</sup> CBB Rulebook (**PS-30**).

<sup>17</sup> Central Bank of Bahrain Rulebook Volume 1—Conventional Banks, Financial Crime Module, accessed January 2018 (hereinafter “**CBB Rulebook Financial Crime**”) (**RL-119**), FC A.1.2.

<sup>18</sup> Letter from Dr. Hemmati (FB) to Governor Al Maraj (CBB), Sub: Administration of Future Bank by the Central Bank of Bahrain, May 7, 2015 (hereinafter “**Letter Hemmati to Al Maraj, May 7, 2015**”) (**C-10**).

<sup>19</sup> SoC, ¶¶ 37, 41.

<sup>20</sup> SoC, ¶ 49, citing Memorandum of Understanding between Bank Markazi Jomhouri Islami Iran and the Bahrain Monetary Agency, October 19, 2002 (**C-20**).

177. For the Respondent, that Memorandum “was a far cry from inducement of the Claimants’ specific investment in Future Bank”.<sup>21</sup> The Respondent avers that the Claimants established Future Bank as “it was in their commercial and strategic interests”.<sup>22</sup>
178. Officials of the BMA met with the general managers of the Bahrain branches of BMI and BSI to discuss a possible joint venture with a local bank for the mutual benefit of Iran and Bahrain.<sup>23</sup>
179. On March 3, 2004, BMI, BSI, and a bank incorporated in Bahrain, AUB, signed a Shareholders’ Agreement forming Future Bank, a commercial bank to be incorporated in Bahrain.<sup>24</sup> The three banks hold an equal interest in Future Bank and the Shareholders’ Agreement provides that each shareholder will nominate three members to the nine-member Board of Directors of Future Bank. It also addresses Future Bank’s plan to establish a branch in the Kish Free Zone in Iran.<sup>25</sup>
180. On June 23, 2004, the CBB issued a licence to Future Bank for the provision of regulated retail banking pursuant to Decree No. 64 of 2006,<sup>26</sup> and on July 7, 2004 BMI, BSI, and AUB signed a Memorandum of Association to incorporate Future Bank.<sup>27</sup>
181. According to the Respondent, a licensed “retail” bank may provide financial services “generally” to individuals or small institutions, by contrast to a licensed ‘wholesale’ bank, which provides financial services primarily to foreign banks, multinationals, and pension funds.<sup>28</sup>

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<sup>21</sup> SoD, ¶ 80.

<sup>22</sup> SoD, ¶¶ 80-81.

<sup>23</sup> First Witness Statement of Mr. Gholam Souri, October 15, 2017 (hereinafter “**First WS Souri**”) (CWS-1), ¶ 13.

<sup>24</sup> Shareholders Agreement (C-97), Articles 1.0-2.0.

<sup>25</sup> Shareholders Agreement (C-97), Article 4.0.

<sup>26</sup> License to Provide Regulated Services, No. RB/026, March 15, 2007 (C-28).

<sup>27</sup> Future Bank B.S.C. (c) Memorandum of Association, July 7, 2004 (C-26).

<sup>28</sup> SoD, ¶ 46, referring to the CBB Rulebook Volume 1: Conventional Banks, Licensing Requirements Module, July 2017 (RL-118).

## C. FUTURE BANK OPERATIONS (2005-2009)

### 1. Future Bank's Operations and Strategy 2005-2009

182. According to the Claimants, Future Bank operated as a largely successful bank from its inception. Between 2004 and 2006, it had significantly increased its assets and saw an almost three-fold increase in net profits.<sup>29</sup> The Claimants attribute this growth to the co-operation between Bahraini and Iranian authorities.<sup>30</sup>
183. By contrast, for the Respondent, Future Bank's growth was largely due to its dealings with Iran. The Respondent points to Future Bank's refinancing agreement of October 2, 2006 with the Central Bank of Iran, as an indication of Future Bank's dependence on Iranian business. Under this agreement, Future Bank was to "make available a facility for an amount of USD 400 million for refinancing [letters of credit] opened by [the Central Bank of Iran and other Iranian banks]".<sup>31</sup> The Respondent alleges that, on the basis of this agreement, the Central Bank of Iran and other Iranian banks "would open letters of credit for buyers of goods or services in Iran and instruct Future Bank to pay beneficiaries of the letter of credit in Bahrain". The Respondent claims this was the reason Future Bank was able to grow and perform as well as it did by 2006.<sup>32</sup>
184. The Claimants stress that Future Bank obtained the CBB's approval for the refinancing agreement with the Central Bank of Iran for this opening of a branch in the Kish Island Free Zone in Iran as contemplated in the Shareholders' Agreement among BMI, BSI, and AUB.<sup>33</sup> In the following year, on August 6, 2007, the CBB informed Future Bank that it was in the process of reviewing Future Bank's proposal regarding the Kish Free Zone branch, and instructed it not to start activities until further notice.<sup>34</sup>

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<sup>29</sup> Future Bank Annual Report for 2006 (C-100).

<sup>30</sup> SoC, ¶¶ 59-60.

<sup>31</sup> Refinancing Agreement between Future Bank and the Central Bank of the Islamic Republic of Iran, October 2, 2006 (R-75), Article 1.

<sup>32</sup> SoD, ¶ 83.

<sup>33</sup> Shareholders Agreement (C-97), Article 4.0; Letter from Mr. Abghari to Dr. Seif, Kish Branch Premises, October 12, 2006 (C-104); Future Bank, The Memorandum of the Board, Status of Kish Island Branch Premises, October 12, 2006 (C-105).

<sup>34</sup> Letter from Mr. Hamad to Dr. Seif, Future Bank Proposed Branch in Kish Island, August 6, 2007 (C-32).

185. The Claimants allege that the CBB demanded in 2007 that Future Bank submit to increased supervision and enhanced inspections, which the latter accepted.<sup>35</sup> In spite of this “encumbering scrutiny”<sup>36</sup>, the Claimants argue, Future Bank maintained profitability, increasing net profits to USD 23.5 million by the end of 2007.<sup>37</sup>

## 2. Future Bank’s Board of Directors

186. In November 2007, the members of the Board of Directors that had been appointed by the AUB, Mr. Hamad Al Marzouq and Mr. Adel A. El-Labban, resigned and requested that the Board authorize the transfer of AUB’s shareholding in Future Bank to a trust, in order to shield the AUB from “the very serious contagion effects of Iranian sanctions”.<sup>38</sup>

187. In their stead, Mr. A. Aziz Ahmed A. Malek and Mr. Abel Al Mannai were appointed by the entity which had taken over Dana Trust participation.<sup>39</sup> The former was also appointed to the Board Audit Committee, with responsibilities including Future Bank’s accounting policy, internal controls, compliance procedures, risk management function, and relations with external auditors and regulators.

188. The Claimants allege that these two individuals were in fact appointed by the CBB in order to gain access to Future Bank’s internal operations.<sup>40</sup> The Respondent denies that these “independent board members [...] somehow acted as the CBB ‘pawns’”.<sup>41</sup>

## 3. Sanctions Regime against Iran (2005-2008)

189. On July 31, 2006, the United Nations Security Council (“UNSC”) issued Resolution 1969, which noted the concern in respect of Iran’s nuclear programme and called upon “all States, in accordance with their national legal authorities and legislation and consistent with international law, to exercise vigilance and prevent the transfer of any

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<sup>35</sup> SoC, ¶ 75.

<sup>36</sup> SoC, ¶77.

<sup>37</sup> Future Bank Annual Report for 2007 (C-84), p. 19.

<sup>38</sup> Letter from Mr. Hamad Abdulrahman to Governor Al Maraj, November 1, 2007 (R-78).

<sup>39</sup> Future Bank Annual Report for 2010 (C-85), p. 7; Future Bank Annual Report for 2009 (C-86), p. 9.

<sup>40</sup> SoC, ¶ 74.

<sup>41</sup> Rejoinder, February 27, 2019 (hereinafter “Rejoinder”), ¶ 5(e)(i).

items, materials, goods and technology that could contribute to Iran's enrichment-related and reprocessing activities and ballistic missile programmes".<sup>42</sup>

190. On December 23, 2006, the UNSC issued Resolution 1737, also regarding Iran's nuclear program, deciding that all States shall "freeze the funds, other financial assets and economic resources which are on their territories at the date of adoption of the resolution or at any time thereafter, that are owned or controlled by the persons or entities designated in the Annex, as well as those additional persons or entities designated by the Security Council [...] and *decides further* that all States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any person or entities within their territories, to or for the benefit of these [designated] persons and entities".<sup>43</sup>
191. Following the adoption of the UNSC Resolution 1737, on February 27, 2007, the Council of the European Union (the "EU") issued a common position on the enactment of sanctions on listed persons, which included freezing "all funds and economic resources which belong to, are owned, held or controlled, directly or indirectly" to persons and entities designated in the annex to UNSC Resolution 1737.<sup>44</sup>
192. On October 25, 2007, OFAC designated Bank Saderat under Executive Order 13224 and Bank Melli under Executive Order 13382 as sanctioned entities.<sup>45</sup> On April 19, 2007, there followed Regulation No. 423/2007,<sup>46</sup> which provided for freezing the property of

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<sup>42</sup> UNSC, United Nations Security Council Resolution 1696, S/RES/1696 (2006), July 31, 2006 (C-102), ¶ 5.

<sup>43</sup> UNSC, United Nations Security Council Resolution 1737, S/RES/1737 (2006), December 23, 2006 (hereinafter "UNSC Res 1737") (C-34), ¶ 12.

<sup>44</sup> Council of the European Union, Council Common Position 2007/140/CFSP concerning restrictive measures against Iran, 2007/140/CFSP, February 27, 2007 (hereinafter "EU CP 2007/140/CFSP") (C-35), Article 5.

<sup>45</sup> "Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism", October 25, 2007 (C-33).

<sup>46</sup> Council of the European Union, Council Regulation (EC) No 423/2007 concerning restrictive measures against Iran, No 423/2007, April 19, 2007 (hereinafter "EU Reg 423/2007") (C-37).

listed persons, among them Bank Melli as of June 23, 2008,<sup>47</sup> and Bank Saderat and Future Bank, as of July 26, 2010.<sup>48</sup>

193. On March 3, 2008, the UNSC issued Resolution 1803 calling on all States to “exercise vigilance” over “the activities of financial institutions in their territories with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad”.<sup>49</sup>

194. Consequently, on March 12, 2008, the CBB issued a directive with respect to UN Resolutions 1737 and 1803 requiring in relevant part that:

licensees [...] exercise vigilance and enhanced due diligence over the following:

- When entering into new commitments for public provided financial support for trade with Iran, including the granting of export credits, guarantees or insurance, to their nationals or entities involved in such trade.
- Over activities with all bank domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad.<sup>50</sup>

195. The Claimant alleges that, between 2007 and 2008, the U.S. exerted pressure on Bahrain in an effort to end Future Bank’s activities and close the bank.<sup>51</sup> This allegedly led Bahrain’s Undersecretary of Foreign Affairs to state his intention to obtain a “political decision to shut down Future Bank before March 11, [2008]”.<sup>52</sup> In a letter to the Bahraini

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<sup>47</sup> Council of the European Union, Council Decision, implementing Article 7(2) of Regulation (EC) No 423/2007 concerning restrictive measures against Iran, 2008/475/EC, O.J. (L 163) 29, June 23, 2008 (**RL-8**), p. 32.

<sup>48</sup> Council of the European Union, Council Decision, concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP, O.J. (L 195) 39, July 26, 2010 (**RL-12**), p. 64.

<sup>49</sup> UNSC, United Nations Security Council Resolution 1803, S/RES/1803(2008), March 3, 2008 (**RL-7**), ¶ 10.

<sup>50</sup> Central Bank of Bahrain Directive re: UN Security Council Resolution 1803 (2008), March 12, 2008 (**RL-150**).

<sup>51</sup> SoC, ¶ 64, referring to Central Bank Governor [sic] Underscores Commitment to Dollar and Cooperation on Future Bank, Cable 07MANAMA1089\_a from US Embassy in Bahrain to US Embassy in Bahrain, December 9, 2007 (**C-103**), Bahrain’s Central Bank takes action against Future Bank, Cable 07MNAMA1029\_a from US Embassy in Bahrain to US Department of Treasury, November 27, 2007 (**C-39**); Correspondence from US Embassy in Bahrain to US Department of Treasury, Future Bank’s Future, March 4, 2008 (hereinafter “**Correspondence US Embassy to US Treasury**”) (**C-40**); Finance minister reviews options for sanctioning Future Bank, Cable 07MANAMA1011\_a from US Embassy in Bahrain to Department of Treasury, November 6, 2007 (**C-41**).

<sup>52</sup> Correspondence US Embassy to US Treasury (**C-40**).

Minister of Foreign Affairs, Sheikh Al Khalifeh, the Ambassador of Bahrain in the U.S. Al Baloushi noted that the U.S. Undersecretary for Terrorism and Financial Intelligence had informed him of the U.S.' intention to designate Future Bank as a sanctioned entity, emphasizing the interest of Bahrain in "clos[ing Future Bank] a few days before the Department of Treasury does so".<sup>53</sup>

196. The Claimants aver that throughout this period the CBB, among other Bahraini authorities, expressed their support for Future Bank and assured it of forthcoming improvements in the relationship with the U.S..<sup>54</sup>

#### **4. Future Bank's Compliance with the CBB Framework (2006-2008)**

##### **(a) The BMA 2006 Compliance Report**

197. On August 6, 2006, the BMA communicated to Future Bank a copy of the anti-money laundering report (the "**2006 Compliance Report**"),<sup>55</sup> of the same date relating to an examination carried out between May 29 and June 4, 2006. The 2006 Compliance Report contained the following findings and conclusions:

- a. certain procedures needed to be put in place, including with respect to enhanced due diligence ("**EDD**") with regard to charities, clubs and other societies, as well as persons identified as politically exposed persons ("**PEPs**") at the time of opening an account;
- b. weaknesses in customer due diligence ("**CDD**") were found in the identification documentation and background information on clients referring to the nature of the account and the anticipated activity. In particular, some documentation in CDD reports had been outdated as they must have been updated every three years;

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<sup>53</sup> Letter from Bahrain's Ambassador to the US to Bahrain's Minister of Foreign Affairs, Visit of the Under Secretary for Terrorism and Financial Intelligence to the Kingdom, February 22, 2008 (**C-173**).

<sup>54</sup> First WS Sourì (**CWS-1**), ¶ 37.

<sup>55</sup> Letter from Mr. Bumtaia (BMA) to Dr. Seif (FB), attaching BMA's Compliance Directorate Examination, August 6, 2006 (hereinafter "**2006 Compliance Report**") (**R-74**).

- c. the bank's money laundering reporting officer (the "MLRO") had failed to report unusual transactions, acknowledging that the anti-money laundering ("AML")/ ("CFT") procedures had been implemented in April 2006, with the result that their effectiveness could not yet be assessed; and
- d. additional training of employees was required for purposes of suspicious transaction reporting ("STR").<sup>56</sup>

198. The 2006 Compliance Report also noted that examiners had reviewed a random sampling of inward wire transfers and found that there were cases where originator information was missing,<sup>57</sup> a failure related to the wire stripping issue that would resurface later.<sup>58</sup>

199. Future Bank reacted on September 4, 2006, conveying the management's responses to the issues raised by the BM. The response acknowledged a number of shortcomings identified in the 2006 Compliance Report and set out the measures that Future Bank took or contemplated taking in order to address such shortcomings. In particular, the bank represented that the trade finance department would ensure that all inward transfers would include originator information and that it was in the process of updating all customer account profiles in order to address the issue of incomplete customer identification documentation.

#### (b) The 2006 CBB Inspection Report

200. During the month of August 2006, the Inspection Directorate of the CBB performed an examination of Future Bank and issued a report dated March 5, 2007 (the "**2006 CBB Inspection Report**").<sup>59</sup>

201. The executive summary of the 2006 CBB Inspection Report's executive summary provides as follows:

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<sup>56</sup> 2006 Compliance Report (R-74).

<sup>57</sup> 2006 Compliance Report (R-74), p. 10.

<sup>58</sup> Future Bank's response to the CBB 2006 Compliance Report on Future Bank, September 4, 2006 (PS-56).

<sup>59</sup> Letter from Mr. Hamad (CBB) to Mr. Al Sadeeqi (FB) attaching the CBB Inspection Directorate Examination, March 5, 2007 (hereinafter "**2006 CBB Inspection Report**") (R-76).



To embrace best practice corporate governance the Board is required to implement control framework which is robust focused towards risk and is sufficiently documented to provide direction to staff in the execution of their duties.

The Board is alerted to the significant number of non-compliance issues raised in this report. Immediate Board attention is warranted to ensure there is proper and effective compliance environment within Future Bank. The Board must therefore submit to the CBB by the end of April 2007 an action plan on establishing both compliance culture and compliance function.

Moreover all outstanding issues in the external auditors Management Letter and Internal Audit reports need to be resolved within the first half of 2007 to enhance Future Banks' internal control environment.

Management is required to improve the credit culture of Future Bank by ensuring that measures such as credit assessment and review are undertaken to facilitate effective credit portfolio management.

Serious misrepresentations made by previous Management regarding the provision of consumer finance were uncovered during the examination and the Board is required to submit immediate proposals to the CBB detailing the actions they propose to take in respect of such finance.

Management is also required to establish connection with the Credit Reference Bureau regarding the existing consumer loans.<sup>60</sup>

202. Future Bank responded on March 29, 2007, with a detailed action plan, indicating that more than half of the points had been addressed and that the remaining issues would be addressed by September 2007.<sup>61</sup>

### (c) Political Tensions and August 2007 Meeting

203. As sanctions against Iran gradually gained ground, Bahrain came under increased pressure due to its political and economic ties with Iran. This created an internal political tension in Bahrain. The Respondent also stresses that the Financial Action Task Force (the "FATF"), an intergovernmental organization founded to develop policies to combat money laundering, declared in 2007 that it was "concerned that the Islamic Republic of Iran's lack of a comprehensive [AML/CFT] regime represents a significant vulnerability within the international financial system".<sup>62</sup>

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<sup>60</sup> 2006 CBB Inspection Report (R-76), pp. 4-5.

<sup>61</sup> Future Bank's response to the CBB 2006 Inspection Report on Future Bank, March 20, 2007 (PS-57).

<sup>62</sup> Rejoinder, ¶ 21(d), referring to FATF Statement on Iran, October 11, 2007 (PS-44).

204. In this context, on August 9, 2007 Dr. Seif, the CEO and Managing Director of Future Bank, met with Mr. Hamad, the Executive Director of Banking Supervision at the CBB, to discuss the adverse effects of these developments on Future Bank's business.
205. After that meeting, Dr. Seif wrote to record the CBB's recommendations that Future Bank maintain sufficient liquidity to respond to mass withdrawal of deposits and not to assume new risks on Iran. He also stated the bank reduce its share of business involving Iranian trade, and shift to Bahrain based activities. He in particular concluded that trade related activities would be under enhanced supervision and control.<sup>63</sup> The CBB also required Future Bank to submit weekly audits by independent auditors, together with usual compliance and risk reports, and regular updates on its Iran exposure.

**(d) The 2008 CBB Report**

206. The CBB's Inspection Directorate conducted an on-site examination of Future Bank between November 9, 2008 and December 14, 2008, producing a report (the "**2008 CBB Report**")<sup>64</sup> in which it found that Future Bank had "failed to implement substantial improvements in the control environment since the previous examination in 2006",<sup>65</sup> especially in connection with credit controls. Among other matters, the report noted, that the CBB has "temporarily allowed" Future Bank's exposure to BMI and BSI, provided that it would not exceed 60% of the bank's capital base. At that time, the direct exposure to BMI and BSI reportedly amounted to 58.8%.<sup>66</sup> Through credit facilities extended to BMIIC International General Trading and Ghadir Investment Company, that percentage increased to 83.06%.<sup>67</sup> The 2008 CBB Report also noted that Future Bank's "Core Banking System did not have the capability to automatically generate timely and tailor-

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<sup>63</sup> Letter from Mr. Seif (FB) to Mr. Hamad (CBB), August 12, 2007 (hereinafter "**Letter Seif to Hamad, August 12, 2007**") (R-77), p. 3.

<sup>64</sup> Letter from Governor Al Maraj to Mr. Hamid Borhani, attaching the Central Bank of Bahrain Inspection Directorate Examination Report of Future Bank B.S.C. (c), April 2009 (hereinafter "**2008 CBB Report**") (R-83).

<sup>65</sup> 2008 CBB Report (R-83), p. 3.

<sup>66</sup> 2008 CBB Report (R-83), p. 12.

<sup>67</sup> 2008 CBB Report (R-83), p. 13.

made [Management Information System] reports”, which meant that “reports were not accurate [or] reliable”.<sup>68</sup>

207. The executive summary of the Report highlighted these matters in the following terms:

It was evident that the Bank failed to implement substantial improvements in the control environment since the previous examination in 2006. One of the implications of this failure is that the Bank’s credit culture remains unsound. The Bank was heavily reliant on collateral when granting credit. This control weakness was exacerbated where the financial health of the borrower was in question.

The Bank also lacked effective monitoring over shares and properties used to secure the credit facilities. Moreover, compliance with consumer finance regulations was not demonstrated in a number of instances. Such practices violate the rules and the guidelines outlined in “Credit Risk Management” Module of the CBB Rulebook.

In addition, the credit rating system was not consistently applied across facilities, and there was a lack of periodical credit reviews for a number of facilities despite this being recommended by the CBB in the last examination report. The credit files did not include important documents such as those related to the borrower’s financial conditions; know your customer regulation, and property valuations.

The Board must immediately adopt corrective measures to address the unsound credit culture of the Bank, comply with the requirements of the CBB Rulebook,

including a plan for enhancing compliance, and advise the CBB of the action taken accordingly.

The Bank lacked a corporate strategy and a detailed business plan. This does not demonstrate good business practice, and it also constitutes a violation to the “High Level Controls” Module of the CBB Rulebook.

In respect of liabilities, the Bank did not have a diversified base of depositors. The top ten non-bank depositors constituted approximately 59% of total non-bank deposits.

The effectiveness of the critical support functions, namely Internal Audit and Risk Management, was considered to be significantly compromised. The Board must immediately rectify this, including but not limited to, the implementation of practices which demonstrates the independence of each of the support functions noted.<sup>69</sup>

208. Although not reflected in the executive summary, the Report also noted that, in five instances, Future Bank overstepped the precautionary cap on Iranian exposure, which the CBB had set at USD 1,019m in its country exposure report of September 30, 2008. The

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<sup>68</sup> 2008 CBB Report (**R-83**), p. 15.

<sup>69</sup> 2008 CBB Report (**R-83**), pp. 3-4.

Board was thus required to establish robust controls over the exposures to Iran to ensure full compliance with the CBB requirements.<sup>70</sup>

209. On May 6, 2009, Dr. Seif, the CEO and Managing Director of Future Bank responded to the Inspection Report.<sup>71</sup> He observed that, since receiving the 2006 CBB Inspection Report in 2007, Future Bank had taken the opportunity to pro-actively strengthen corporate governance, internal controls, risk management and controls and credit culture, including through the appointment of KPMG and Ernst & Young to advise on policies and procedures. To his letter, Dr. Seif attached an action plan addressing the issues raised by the Inspection Report, and in particular, stating that, in the five instances identified by the CBB where the Iranian exposure limit was exceeded, there was no actual excess. In reality, Future Bank's report contained errors, and they were rectified because it was clear that the exposure was within the prescribed limits.

**(e) Subsequent CBB Reports and Examinations**

210. On April 12, 2009, Future Bank wrote to the CBB requesting an extension of its exemption from limitations to the exposure to its Iranian shareholders, which were set to expire on June 30, 2009 until June 30, 2011. Future Bank requested the approval of the extension in return for a commitment of limiting its exposure to its shareholders, BMI and BSI, to 60% of its capital base. Following a meeting with the CBB, Future Bank explained that such extension was required to maintain its profitability, including due to the fact that its "Iranian shareholder banks together have more than 50% of the Iran import market share".<sup>72</sup>
211. The CBB answered on July 21, 2009 demanding that Future Bank diversify its exposures "over a wider range of counterparties" and to limit its exposure to BMI and BSI to 40% of its capital base by September 2009.<sup>73</sup>

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<sup>70</sup> 2008 CBB Report (**R-83**), p. 13.

<sup>71</sup> Letter from Dr. Seif (FB) to Governor Al Maraj (CBB), Future Bank's response to CBB 2008 Inspection Report on Future Bank, May 6, 2009 (**PS-58**).

<sup>72</sup> Letter from Dr. Seif (FB) to Mr. Hamad (CBB), Related Party Exposure Limit, April 12, 2009 (**R-86**).

<sup>73</sup> Letter from Mr. Hamad to Dr. Seif, Connect Counterparties' Exposure Limit, July 21, 2009 (hereinafter "**Letter Hamad to Seif, July 21, 2009**") (**R-87**).

212. In the meantime, on April 23, 2009, the CBB had directed Future Bank to (a) “immediately cease all non-trade related cross border transactions similar to those provided on behalf of Post Bank of Iran and Export Development Bank of Iran”; (b) amend its existing account criteria classification and implement criteria in compliance with the CBB requirements, in relation to wholesale and retail accounts held at Future Bank; (c) seek and obtain the prior written approval of the CBB’s Compliance Directorate on the appointment of an external auditor for the 2010 AML/CFT audit; and (d) “provide detailed analysis on the account of Intra National Industrial Company”, in particular, in connection with wire transfers and the veracity of the line of credit documents.<sup>74</sup>
213. In the same letter, the CBB requested that Future Bank review the attached Anti-Money Laundering and Terrorism Financing Report (the “**2009 CBB Report**”), and requested comments within one month.<sup>75</sup>

**(f) The 2009 CBB Report**

214. In the 2009 CBB Report, the CBB examined Future Bank’s compliance with its money laundering regulations. Among other matters, the report noted the following:
- a. The majority of client files reviewed contained the required legal and identification documents, but raised concerns about know-your-customer (“**KYC**”) due diligence. Accordingly, the CBB required Future Bank to establish and maintain thorough Original Identification Documents (“**OID**”) procedures, especially in respect of Intra National Industrial Chemicals Company;
  - b. Future Bank did not have an automated system to monitor high-risk accounts. Hence, the CBB directed Future Bank to establish such a system to allow the identification of a significant or abnormal activity on accounts held in particular by PEPs and charities;

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<sup>74</sup> Letter from Mr. Al Baker to Dr. Seif, attaching Central Bank of Bahrain Compliance Directorate Examination, Anti-Money Laundering & Combating Financial Terrorism Examination Report, April 22-23, 2009 (hereinafter “**2009 CBB Report**”) (**R-85**).

<sup>75</sup> 2009 CBB Report (**R-85**), p. 2.

- c. The CBB was concerned that Future Bank may have caused a European counterpart to contravene Iran sanctions, by accepting instructions from Iranian banks to forward funds without including all originator information when making the transfers. It concluded that Future Bank needed full originator information for cross-border transactions;
- d. The CBB was also apprehensive of the due diligence taken in collecting customer information, especially since the majority of wholesale customers were not account holders and thus high risk;
- e. Future Bank was accepting business introduced by Post Bank of Iran and Export Development Bank of Iran, the latter being an OFAC designated sanctioned entity. These banks were routing funds through Future Bank due to the UN sanctions. In several instances, Future Bank had not included all originator information in the swift transfers, thus not disclosing the true origin of the funds. As a result, Future Bank may have unintentionally caused its European counterpart to unknowingly contravene UN and other sanctions.<sup>76</sup>

215. In the covering letter enclosing the 2009 CBB Report, the CBB directed that Future Bank take the following actions:

- a. To immediately cease all non-trade related cross border transactions similar to those on behalf of Post Bank of Iran and Export Development Bank of Iran;
- b. To rectify the account criteria classification pertaining to wholesale and retail accounts to ensure full compliance with the CBB requirements;
- c. To seek the necessary prior written approval from the CBB's Compliance Directorate on the appointment of an external auditor for next year's AML/CFT audit;

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<sup>76</sup> 2009 CBB Report (**R-85**).

- d. To provide a detailed analysis of the account of Intra National Industrial Chemicals Company, specifically justifications for the wire transfers and genuineness of the letter of credit documentation.<sup>77</sup>

216. In answer, on May 20, 2009, Future Bank affirmed that it had resolved all shortcomings identified in the Report, except for the following:

- a. It was finalizing an automated AML system, which would also monitor high-risk accounts, including those held by PEPs and charities. The bank represented that it expected to implement the system by the end of 2009. This system would also assist Future Bank in monitoring compliance with the CBB's directions in respect of the UNSC resolutions on terrorist financing, which were at that time manually verified;
- b. It would submit a "detailed report" on Intra National Industrial Chemicals company by the end of May 2009; and
- c. It would review its account classification criteria and bring them in line with the CBB guidelines.<sup>78</sup>

**(g) Ernst & Young Report for 2009**

217. On April 28, 2010, Future Bank supplied a report prepared by Ernst & Young to the CBB Retail Banking Supervision Directorate (the "**Ernst & Young Report for 2009**").<sup>79</sup> It is common ground that this report (and subsequent reports prepared by Ernst & Young and, later, KPMG) is not an audit.

218. While largely positive in its assessment of the activities of Future Bank, the Ernst & Young Report for 2009 identified a few of areas for Future Bank's improvement. In particular, the findings of the Report can be summarized as follows:

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<sup>77</sup> 2009 CBB Report (**R-85**), pp. 1-2.

<sup>78</sup> Letter from Dr. Seif (FB) to Mr. Al Baker (CBB), Re: Central Bank of Bahrain (CBB) AML Inspection Report dated 22 April, 2009: Examination conducted during March and April 2009, May 20, 2009 (**PS-59**), pp. 1-2.

<sup>79</sup> Letter from Dr. Seif (FB) to Mr. Yousif (CBB), Re: Anti-Money laundering Review for the year end 31/12/2009, attaching Ernst & Young, Agreed-upon procedures relating to compliance with Anti-Money Laundering Regulations issued by the Central Bank of Bahrain for the year ended 31 December 2009, April 28, 2010 (hereinafter "**Ernst & Young Report for 2009**") (**R-249**).

- a. The policy and procedural framework complied with the CBB Rulebook;
- b. An effectiveness testing of ten payments (five outward and five inward wire transfers) showed that all originator information was on file, which was an improvement compared to the deficiency recorded in the 2009 CBB Report;
- c. A due diligence sample on five correspondent banks showed compliance with relevant requirements of the FC Module;
- d. The procedures to identify PEPs at the time of establishing business relationships and thereafter were adequate;
- e. CDD and EDD requirements were largely complied with, while some samples revealed occasional shortcomings, they were exceptional; and
- f. A weakness was identified in relation to verifying the source of funds for transactions over BHD 6,000.<sup>80</sup>

**(h) The 2010 CBB Report**

219. On May 23, 2010, the CBB issued a follow-up report based on an inspection conducted by the competent Directorate from January 21, 2010 to February 25, 2010 (the “**2010 CBB Report**”).<sup>81</sup>
220. The 2010 CBB Report found “weaknesses [constituting] violations of the CBB regulations in respect of High Level Controls, Financial Crime and Credit Risk Management”. It noted that, while Future Bank had made “substantial efforts” to remedy deficiencies raised in previous reports, several matters required attention:

The Board must ensure that systems are in place to identify, measure and control the risks to which Future Bank is exposed in its business activities. In fulfilling such responsibilities towards risk recognition and assessment the Board and Management should give due consideration to the views raised by Risk Management. This would facilitate the implementation of proper risk mitigants. The Board is also required to establish robust monitoring controls over the exposures to Iran to ensure full compliance with the CBB requirements.

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<sup>80</sup> Ernst & Young Report for 2009 (**R-249**).

<sup>81</sup> Central Bank of Bahrain, Inspection Directorate Examination Follow-up Report: Future Bank B.S.C. (c), May 23, 2010 (hereinafter “**2010 CBB Report**”) (**R-92**).



Finally the Board is encouraged to enhance the overall credit culture in Future Bank. The Board also needs to consider the consistent implementation of Ernst and Young's proposed rating system and enhance the diversification of the credit portfolio across various security types and economic sectors.<sup>82</sup>

221. In connection to Future Bank's Iranian exposure, a review of the position on December 1, 2009 had revealed that such exposure stood at BHD 367.043 million against the precautionary cap of BHD 84.329 million. The 2009 country exposure reports prepared by Future Bank mentioned 14 cases of violations of the cap, which had not been reported to the competent Directorate,<sup>83</sup> and which called for controls to avoid recurring breaches in the future.<sup>84</sup>
222. According to the Respondent, Future Bank was then contemplating an automated system called SafeWatch, but postponed its installation while simultaneously representing to the CBB that it was working on installing an automated solution.<sup>85</sup> The Respondent alleges that SafeWatch was not installed until 2012.<sup>86</sup> In any event, according to the Respondent, Future Bank used a system to override SafeWatch's filters (through the so-called "Good Guys List") allowing transactions with sanctioned entities.<sup>87</sup>
223. The Claimants do not deny the existence of the so-called "Good Guys List". They point out, however, that these allegations relate to events in 2009 when Future Bank was not bound by the U.S. sanctions, and the Respondent has not demonstrated that any entities in the "Good Guys List" fell under sanctions that applied in Bahrain.<sup>88</sup>
224. The Respondent points to an incident uncovered when Future Bank was under administration, involving the Islamic Revolutionary Guard Corps ("IRGC"), a sanctioned entity as an example of Future Bank's intentionally misleading the CBB.<sup>89</sup>

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<sup>82</sup> 2010 CBB Report (**R-92**), p. 4.

<sup>83</sup> 2010 CBB Report (**R-92**), ¶ 5.6.

<sup>84</sup> 2010 CBB Report (**R-92**), ¶ 5.6.

<sup>85</sup> Rejoinder, ¶ 83, referring to e-mail from Mr. Shehabi to Ms. Ali Makki, December 23, 2008 (**R-228**); Calendar invite from Mr. Rezaee to Mr. Meledath, February 1, 2009 (**R-237**).

<sup>86</sup> Rejoinder, ¶ 80-84.

<sup>87</sup> Rejoinder, ¶ 84(a).

<sup>88</sup> Hearing Transcript, Day 1, pp. 82:13-89:18 (Mr. Foy).

<sup>89</sup> Rejoinder, ¶ 103.

The incident turned on a high-performance powerboat, Bladerunner 51, manufactured in the UK. According to the Respondent, export of the powerboat was restricted by the U.S.; however, in 2009, Future Bank funded the unlawful shipment of this powerboat to an Iranian entity, in breach of the U.S. sanctions.<sup>90</sup>

225. On June 10, 2010, the Future Bank CEO Dr. Seif wrote to the CBB that Future Bank had put in place procedures to monitor country exposure. He accepted that breaches had occurred on the days identified by the 2010 CBB Report, but not to the extent alleged there. The breaches were due to currency fluctuations. Asked to clarify its position on currency fluctuations, the CBB had advised Future Bank that such breaches did not need reporting. Hence, said Dr. Seif, all breaches could be accounted for, save for a purely technical one.<sup>91</sup>
226. Subsequently, Future Bank's Audit Committee<sup>92</sup> as well as the Board minutes<sup>93</sup> recorded that all outstanding issues had been resolved by December 12, 2010.

#### **D. THE CBB DIRECTIVE OF 8 SEPTEMBER 2010 AND THE EVENTS OF 2011**

##### **1. UNSC Resolution 1929 and the 2010 CBB Directive**

227. On June 9, 2010, the UNSC adopted Resolution 1929, recalling its previous resolutions concerning Iran's nuclear programme and calling upon all States to:

prevent the provision of financial services, including insurance or re-insurance, or the transfer to, through, or from their territory, or to or by their nationals or entities organized under their laws (including branches abroad), or persons or financial institutions in their territory, of any financial or other assets or resources if they have information that provides reasonable grounds to believe that such services, assets or resources could contribute to Iran's proliferation-sensitive nuclear activities, or the development of nuclear weapon delivery systems, including by freezing any financial or other assets or resources on their territories or that hereafter come within their territories, or that are subject to their jurisdiction or that hereafter become subject to their jurisdiction, that are related to such programmes or activities and applying

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<sup>90</sup> US Department of Commerce, Bureau of Industry and Security, Action Affecting Export Privileges, Order Temporarily Denying Export Privileges, February 6, 2009 (**R-238**).

<sup>91</sup> Reply, December 18, 2018 (hereinafter "**Reply**"), ¶ 113, citing Future Bank, Compliance Department Update, October 23, 2010 (hereinafter "**Future Bank Minutes, October 23, 2010**") (**C-179**).

<sup>92</sup> Future Bank, Audit Meeting, January 29, 2011, (**C-175**).

<sup>93</sup> Future Bank, Board Meeting, January 29, 2011, (**C-180**), p. 4.

enhanced monitoring to prevent all such transactions in accordance with their national authorities and legislation;

[...] require their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction to exercise vigilance when doing business with entities incorporated in Iran or subject to Iran's jurisdiction, including those of the IRGC and IRISL, and any individuals or entities acting on their behalf or at their direction, and entities owned or controlled by them, including through illicit means, if they have information that provides reasonable grounds to believe that such business could contribute to Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems or to violations of resolutions 1737 (2006), 1747 (2007), 1803 (2008) or this resolution;

[...] take appropriate measures that prohibit in their territories the opening of new branches, subsidiaries, or representative offices of Iranian banks, and also that prohibit Iranian banks from establishing new joint ventures, taking an ownership interest in or establishing or maintaining correspondent relationships with banks in their jurisdiction to prevent the provision of financial services if they have information that provides reasonable grounds to believe that these activities could contribute to Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems

[...] take appropriate measures that prohibit financial institutions within their territories or under their jurisdiction from opening representative offices or subsidiaries or banking accounts in Iran if they have information that provides reasonable grounds to believe that such financial services could contribute to Iran's proliferation-sensitive nuclear activities or the development of nuclear weapon delivery systems.

[supply] any information at their disposal on the implementation of the measures decided in resolutions 1737 (2006), 1747 (2007), 1803 (2008) and this resolution, in particular incidents of non-compliance.<sup>94</sup>

228. Following up on this Resolution, on September 8, 2010, the CBB issued a directive to all banks requiring that "all licenses [*sic*] in the Kingdom of Bahrain must ensure that they are fully compliant with the requirements of all United Nations Security Council Resolutions imposing sanctions on the Islamic Republic of Iran, most recently UNSC Resolution No. 1929 of 2010" (the "**CBB Directive**").<sup>95</sup> The CBB Directive also required licensed institutions to familiarize themselves with the sanctions imposed by the U.S. pursuant to the Comprehensive Iran Sanctions, Accountability, and Divesture Act of 2010, and "ensure that they do not fall foul of its provisions".<sup>96</sup>

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<sup>94</sup> UNSC, United Nations Security Council Resolution 1929, S/RES/1929 (2010), June 9, 2010 (**PS-78**).

<sup>95</sup> Directive of the Central Bank of Bahrain, September 8, 2010 (hereinafter "**CBB Directive**") (**C-109**).

<sup>96</sup> CBB Directive (**C-109**).

## 2. The Events of 2011

229. On June 5, 2011, Future Bank's then CEO, Mr. Gholam Sourì, and representatives of the AUB attended a meeting with the Executive Director of the Banking Supervision Division of the CBB, Mr. Khalid Hamad. According to the Claimants, Mr. Hamad told the representatives of Future Bank that the CBB had decided to revoke Future Bank's license.<sup>97</sup> Mr. Hamad also invited the Bank's representatives to convey to their shareholders that the CBB recommended that they consider voluntary liquidation.
230. The Respondent disagrees with this narrative of the 2011 meeting. Governor Al Maraj recalls that the meeting was an invitation to "consider voluntarily winding up Future Bank" to "underscore just how urgently Future Bank needed to reform and live up to its commitments".<sup>98</sup>
231. In a letter addressed to Governor Al Maraj a few days later on June 10, 2011, the shareholders of Future Bank referred to the CBB's decision to "revoke the license of FB and its request for the FB shareholders to consider a voluntary liquidation process",<sup>99</sup> and stated their intention to take this recommendation under consideration. They also requested a meeting to seek advice on an action plan.
232. On June 15, 2011, Iran's Minister of Economic Affairs and Finance, H.E. Mr. Seyed Shamseddin Hosseini wrote to his Bahraini counterpart, H.E. Mr. Sheikh Ahmad Bin Mohammed Al Khalifeh, about the CBB "orally stating that [Future Bank] has to be closed down instantly" and requested that H.E. Mr. Al Khalifeh "investigate the matter and cancel the order".<sup>100</sup>
233. It is the Claimants' case that Bahrain's action was politically motivated in the light of the events in Bahrain linked to the Arab Spring and allegations of Iran's involvement in these events. The Claimants consider that Bahrain's Report to the UNSC on October 31, 2011,

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<sup>97</sup> First WS Sourì (CWS-1), ¶ 45.

<sup>98</sup> Witness Statement of Governor Al Maraj, February 14, 2018 (hereinafter "First WS Al Maraj") (RWS-1), ¶ 23.

<sup>99</sup> Letter from BMI, BSI, and AUB to Governor Al Maraj, June 10, 2011 (C-111).

<sup>100</sup> Letter from Minister of Economic Affairs and Finance of Iran to Bahrain's Minister of Economic Affairs and Finance, June 15, 2011 (C-182).

given pursuant to its reporting obligations under UNSC 1929, was one of the reasons that this “revocation” never materialized. In this report, Bahrain stated that “Future Bank and financial institutions licensed by the [CBB] have confirmed that no financial assets are held by the individuals and organizations referred to in the resolution”.<sup>101</sup>

234. On the other hand, the Respondent speaks of a “warning”<sup>102</sup> for Future Bank’s repeated violations of the CBB regulations, alleging, for example, that in April 2011, a prominent PEP, Mr. Isa Qassim, had been found to hold approximately USD 10.6 million at Future Bank.<sup>103</sup> The Respondent argues that the Financial Intelligence Directorate (“**FID**”) of Bahrain’s Ministry of the Interior had notified the CBB of Mr. Qassim’s holding and that the CBB was under “intense public pressure” to take action against Future Bank.<sup>104</sup> While the Respondent acknowledges that Future Bank submitted an STR concerning Mr. Qassim, it contends that this does not show a proactive compliance by the bank, since the filing of the STR had instead been prompted by the CBB’s express request that Future Bank investigate Mr. Qassim.<sup>105</sup>

## **E. FUTURE BANK’S OPERATIONS AND COMPLIANCE WITH BAHRAINI LAW (2011-2015)**

### **1. Future Bank’s Activities (2011-2014)**

235. In January 2011, following the CBB’s directions, Future Bank developed a “Revised Strategies and Business Plan” for 2011-2013, under which Future Bank would (i) focus on Bahraini business for future growth; (ii) venture into new business lines to diversify

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<sup>101</sup> SoC, ¶ 100, referring to Report of the Kingdom of Bahrain to the Security Council Committee established pursuant to resolution 1737 (2006) on implementation of Security Council resolution 1929 (2010), October 31, 2011 (**C-42**).

<sup>102</sup> SoD, ¶ 95.

<sup>103</sup> Central Bank of Bahrain, Assessment of Future Bank B.S.C. (2004-2015), February 16, 2018 (hereinafter “**2018 CBB Report**”) (**R-172**), ¶ 127-128.

<sup>104</sup> SoD, ¶ 50, citing First WS Al Maraj (**RWS-1**), ¶ 21.

<sup>105</sup> SoD, ¶¶ 50-52; Letter from Governor Al Maraj to Mr. Souri, attaching Central Bank of Bahrain Compliance Directorate Examination, Anti-Money Laundering & Combating the Financing of Terrorism Examination Report for Future Bank B.S.C. (c), October 31, 2012 (hereinafter “**2012 CBB Report**”) (**R-62**).

income streams; (iii) expand into new countries; and (iv) reduce Iranian exposures “in a phased and prudent manner”.<sup>106</sup>

236. In its annual report for 2011, Future Bank reported healthy profits (with an increase of 7.1% over the previous year). According to the Claimants, it had decided to put on hold its intention to expand its business into new countries and “reassessed its expansion plans within the Kingdom of Bahrain”.<sup>107</sup> In the same year, Future Bank had developed several business models, including a so-called “Core Bank System” named TEMENOS to ensure “compliance with a higher regulatory environment”.<sup>108</sup>
237. The Respondent contends that TEMENOS could not ensure compliance, as it was not a compliance software system and was distinctively not the automated, risk-based AML/CFT system which Future Bank was required to implement. Instead, according to the Respondent, it was a system assisting operational efficiency, which even in this respect, produced inaccurate management information systems (“MIS”) reports.<sup>109</sup>
238. In 2013, Future Bank moved to the “Future Bank Tower”, a large building whose construction had cost it approximately USD 18.5 million, located in the Seef district in Bahrain’s capital, Manama.<sup>110</sup> In the same year, Future Bank also upgraded the operating systems of its ATMs. According to the Claimants, both developments required advance approval from the CBB and were therefore an indication of the CBB’s satisfaction with Future Bank’s operations. The Respondent disputes this characterization; Governor Mr. Al Maraj describes the approvals as a way for the CBB to protect Future Bank’s Bahraini customers.<sup>111</sup>
239. Reporting on its yearly earnings, Future Bank noted a “record net profit of BD 11.0 million [in 2013], as compared to BD 7.9 million in the previous year”.<sup>112</sup> In 2014, Future

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<sup>106</sup> Future Bank, Memorandum on Revised Strategies and Business Plan, January 29, 2011 (C-110), p. 32.

<sup>107</sup> Future Bank, Annual Report for 2011 (C-87), p. 15.

<sup>108</sup> Future Bank's Annual Report for 2011 (C-87), p. 16.

<sup>109</sup> Rejoinder, ¶¶ 35-37.

<sup>110</sup> Future Bank, Annual Report for 2012 (C-107), p. 43.

<sup>111</sup> First WS Al Maraj (RWS-1), ¶ 27.

<sup>112</sup> Future Bank, Annual Report for 2013 (C-30), p. 6.

Bank reported net profits of BD 17.9 million,<sup>113</sup> and ranked best performing Bahraini bank and 7th best performing bank in the GCC.<sup>114</sup>

## 2. The 2011 CBB Report

240. Following an inspection of Future Bank between September 29, 2011 and October 25, 2011, the CBB issued a report on March 20, 2012 (the “**2011 CBB Report**”). The Executive Summary to this report provides in pertinent parts as follows:

The inspection process focused on the credit practices of Future Bank and demonstrated that Future Bank has continued to follow lenient approach in sanctioning credit facilities, resulting in substantial deterioration in the quality of credit portfolio during 2011. [...]

For several restructured/new loans sanctioned by Future Bank the credit committee of Future Bank has ignored the concerns raised by risk management function regarding the ability of the borrower to service the facilities.

Furthermore the credit monitoring process of Future Bank was found to be weak as Future Bank had not obtained cash flow assessments to ascertain utilization of funds for the purpose for which the loans were granted.

Moreover deviating from its policy of sanctioning overdrafts for short-term working capital mismatches, Future Bank has routinely renewed overdraft facilities without detailed assessment of fund utilization or cash flow position of the licensee. Additionally, it was noted that loan tranches and overdrafts were disbursed without corresponding endorsement from approving authority. This raised grave concerns of operational risks arising from deficient control framework within Future Bank. Therefore, Future Bank needs to explore the control weaknesses behind such disbursements and avoid the recurrence of the same in future.

The Board is required to consider the findings of the examination report with a view to enhance controls over credit review and administrative processes and to ensure that sound credit culture is established within Future Bank. As such, the Board must commission an external skilled consulting firm to review the credit culture of Future Bank and report back to the CBB the results accordingly.<sup>115</sup>

241. Future Bank submitted a lengthy response on April 15, 2012, in which it noted that it had instructed external auditors to conduct a second review of all the accounts perused by the

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<sup>113</sup> Future Bank, Annual Report for 2014 (C-31), p. 20.

<sup>114</sup> GCC Commercial Bank Performance Rankings, the Darien Analytics Survey, 2015 (C-43), p. 3.

<sup>115</sup> Letter from Governor Al Maraj to Mr. Borhani, attaching Central Bank Bahrain Inspection Directorate Examination Report, Future Bank B.S.C. (c), March 20, 2012 (R-103), pp. 3-4.

CBB.<sup>116</sup> These auditors had reportedly completed their review issuing a report on February 4, 2012, in which they concluded that there were no serious concerns.

### 3. The Ernst & Young Report for 2011

242. On May 23, 2012, Ernst & Young submitted its report for 2011 to Future Bank.<sup>117</sup> This report provided as follows:

- a. In a sample of 10 high risk customer files relating to charities, clubs and other societies, Future Bank was found to have met all identification requirements, including confirming the identities of those purporting to act on behalf of the entities;
- b. For a sample of five correspondent banks, Future Bank had fully complied with EDD requirements;
- c. Effectiveness testing of 10 payments (five outward wire transfers and five inward wire transfers) noted that all originator information was on file;
- d. In a sample of five customer files, all records were retained in line with the CBB requirements;
- e. CDD weaknesses were identified across both individual and entity accounts in the samples tested by Ernst & Young; and
- f. There had been no AML training delivered in 2011.

### 4. The 2012 SWIFT Ban

243. On March 21, 2012, Future Bank was disconnected from the Society for Worldwide Interbank Financial Telecommunication (“**SWIFT**”) code registry. Future Bank reported

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<sup>116</sup> Letter from Mr. Gholam Sourì (FB) to Governor Al Maraj (CBB), attaching Responses/Action Plan – Future Bank B.S.C. (c), April 15, 2012, (**R-105**), p. 6.

<sup>117</sup> Letter to Mr. Sourì (FB), attaching the Appendix to Ernst & Young’s Agreed Upon Procedures Report, May 23, 2012 (hereinafter “**Ernst & Young Report for 2011**”) (**C-196**).



that as a result, it had made “payment arrangements through test key mechanism separately entered into with correspondent banks” to effect payments.<sup>118</sup>

244. On March 26, 2012, the CBB, following this disconnection, sent a letter to Mr. Sourì of Future Bank, notifying him of the CBB’s decision to suspend Future Bank’s membership of two other financial settlement systems (Real Time Gross Settlement System and Scripless Securities Settlement System) “to eliminate any prospective risks to the financial sector”.<sup>119</sup>
245. On the same day, the CBB sent a circular to all banks operating in Bahrain stating that, following Future Bank’s disconnection from SWIFT, their dealings with Future Bank were to be “at their own risk”.<sup>120</sup> On April 1, 2012, after a meeting between the CBB and Future Bank, the CBB issued a second circular in relation to the matter, advising banks to disregard the earlier March 26 circular.<sup>121</sup>
246. The SWIFT cut-off led the CBB to suspend from April 2, 2012 Future Bank’s membership from two other financial settlement systems (the Real Time Gross Settlement System (RTGS) and the Scripless Securities Settlement System (SSS)) “to eliminate any prospective risks to the financial sector”, while noting that this “suspension does not extinguish Future Bank’s responsibilities and potential liabilities at law”.<sup>122</sup> As a result, the cut-off from SWIFT made Future Bank lose access to international banking, and other banks in Bahrain were no longer willing to transact with Future Bank or accept its cheques.<sup>123</sup>
247. According to the Claimants, the CBB assisted Future Bank with its transactions following the disconnection by handling and clearing, on a daily basis, Future Bank’s

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<sup>118</sup> Letter from Mr. Gholam Sourì to the Central Bank of Bahrain, Re: CBB Report on Anti Money Laundering and Combating the Financing of Terrorism (AML/CFT) Examination 2012, November 29, 2012 (hereinafter “**FB Response to 2012 CBB Report**”) (C-156), p. 20.

<sup>119</sup> Letter from Mr. Al-Khalifa to Mr. Sourì, Re: Suspension of membership in RTGS and SSS systems, March 26, 2012 (hereinafter “**Letter Al-Khalifa to Sourì, March 16, 2012**”) (R-104).

<sup>120</sup> Future Bank, Board Committee, Assumptions Towards Three Year Strategy – 2012-14, July 14, 2012 (hereinafter “**FB Board Committee, July 14, 2012**”) (CBB.R-40), p. 9.

<sup>121</sup> FB Board Committee, July 14, 2012 (CBB.R-40), p. 9.

<sup>122</sup> Letter Al-Khalifa to Sourì, March 16, 2012 (R-104).

<sup>123</sup> First WS Al Maraj (RWS-1), ¶ 26.

transactions.<sup>124</sup> The Respondent rejects the implication that this amounted to implicit support from the CBB, noting that this mechanism for clearing local transactions was borne of an intention to minimize disruptions to Bahrain customers, and “protect [...] local depositors and transactions of Bahraini-based customers”.<sup>125</sup>

248. The system adopted by Future Bank as an alternative to SWIFT was the Test Key mechanism.<sup>126</sup>
249. The Respondent further contends that Future Bank had implemented an alternative messaging system (“AMS”) many years prior to the disconnection from SWIFT, and had concealed this use from the Bahraini authorities.<sup>127</sup> The Respondent accepts that AMS, with “ordinary due diligence, record-keeping and reporting requirements would be consistent with the CBB laws and regulations”, and it finds the concealment and the “misrepresentation about Future Bank’s extensive use of AMS prior to 17 March 2012, as prohibited under Article 163 of the CBB Law”.<sup>128</sup>
250. The Claimants reject these statements, asserting that “it is simply not plausible that any alleged use by Future Bank of the Test Key mechanism prior to 2012 would have gone unnoticed by the CBB...given the extent of internal checks and balances, external audits, inspections undertaken by the CBB”.<sup>129</sup> The Claimants refer to an internal Compliance Department Update that was prepared for the Audit Committee, in which Future Bank had contemplated keeping “the Fully [*sic*] automated AML System on hold for the time being until reinstatement of SWIFT”.<sup>130</sup> The Claimants recall that Mr. Malek sat as Chairman of this Audit Committee. The Claimants explain that as a result of the cut-off, the number of transactions and new customers giving rise to suspicion was significantly

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<sup>124</sup> First WS Sourì (CWS-1), ¶ 52.

<sup>125</sup> First WS Al Maraj (RWS-1), ¶ 28.

<sup>126</sup> Reply, ¶¶ 298-300; Second Expert Report of David Brain, Bovill, December 18, 2018 (hereinafter “**Second ER Bovill**”) (CER-3), p. 38.

<sup>127</sup> 2018 CBB Report (R-172), pp. 157-159.

<sup>128</sup> Rejoinder, ¶ 113.

<sup>129</sup> Reply, ¶ 313.

<sup>130</sup> Reply, ¶ 581.2.

reduced, and therefore it was no longer warranted for the implementation of such an automated system.<sup>131</sup>

251. According to the Respondent, such a failure to detect the illicit use of AMS is unsurprising as the first internal audit on its use came in 2012,<sup>132</sup> and that AMS was not listed in Future Bank's policies and procedures before that date.<sup>133</sup> The Respondent alleges that this practice took place before the SWIFT cut off.

## 5. The 2012 CBB Report

252. The CBB's Compliance Department conducted an assessment of Future Bank in April 2012 in order to examine Future Bank's compliance with the FC Module. This assessment resulted in the production of a report dated October 31, 2012 (the "**2012 CBB Report**").<sup>134</sup>

253. The covering letter to the 2012 CBB Report provided as follows:

Future Bank was found to be in breach of several requirements stipulated under FC Module of Volume 1. Furthermore, Future Bank failed to address most of the deficiencies raised previously in the licensee's AML/CFT report in 2006.

Below is a summary of the issues that were pointed out in the report, which will have to be addressed in Future Bank's response to the CBB:

- Future Bank fell short in implementing the rules and regulations stipulated under the CBB's FC Module and, therefore, found to be in breach of key regulatory requirements.
- Major deficiencies were noted regarding the licensee's compliance with customer identification requirements.
- The customer due diligence performed by Future Bank with respect to Politically Exposed Persons fell short of the FC Module EDD requirements.
- No evidence of Enhanced Due Diligence was found in the KYC files of non-profit organizations' accounts and a significant number of the selected accounts included expired and/or missing KYC documents.
- Future Bank lacks an automated transaction monitoring system that can efficiently and reliably detect significant or abnormal transactions.

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<sup>131</sup> Reply, ¶ 581.2.

<sup>132</sup> Rejoinder, ¶ 114, referring to e-mail from U.P. Raviprakash, Head of Internal Audit (FB) to Mr. Sundram, Re: Test key tables – IAD review, July 18, 2012 (**CBB.R-167**).

<sup>133</sup> Rejoinder, ¶ 114.

<sup>134</sup> 2012 CBB Report (**R-62**).

- The fact that Future Bank has submitted only one STR in 2011 raises the examination team’s concern regarding the effectiveness of the manual monitoring process implemented by Future Bank.
- Future Bank refrained from producing KYC records in relation to two Iranian financial institutions and failed to state a justification for the unavailability of such documents. The examination team has also observed inconsistent formats of account statements among the various financial institutions requested as part of the selected sample.
- Future Bank was found to be in breach of the CBB Directive EDFIS/C/021/2010 issued on 8 September 2010 regarding sanctions against the Islamic Republic of Iran.

Considering the seriousness, duration and potential consequences of the breaches found in Future Bank’s AML/CFT frame-work, your bank is required to submit to the CBB, within a period of **one month** from the date of this letter- an action plan with definitive target dates to resolve all the issues raised in the attached AML/CFT examination report.<sup>135</sup>

254. The 2012 CBB Report also noted the following:

- a. whilst Future Bank checked against the CBB-issued list of sanctioned persons and entities before opening an account, Future Bank was found to be “in breach” of the CBB Directive for conducting U.S. dollar-denominated “dealings with Iranian Financial institutions”, and for continuing to maintain business with “sanctioned entities”;<sup>136</sup>
- b. that Future Bank failed to incorporate an “automated transaction monitoring system that can effectively and reliably detect significant or abnormal transactions”, instead leaving it to the MLRO to manually conduct a daily review of transactions exceeding BD 6,000;<sup>137</sup>
- c. there was no indication that Future Bank was to decrease its current exposure in relation to sanctioned entities, and further notes that “the fact that [Future Bank] continued its dealing with the Central Bank of Iran and other Iranian institutions after the CBB Directive was issued raises serious concerns regarding Future Bank’s commitment to directives and regulations enforced by [the CBB]”.<sup>138</sup>

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<sup>135</sup> 2012 CBB Report (R-62), pp. 1-2.

<sup>136</sup> 2012 CBB Report (R-62), p. 18.

<sup>137</sup> 2012 CBB Report (R-62), p. 11.

<sup>138</sup> 2012 CBB Report (R-62), p. 18.

255. Future Bank submitted its comments on November 29, 2012, noting:

- a. Acceptance that there could have been a few lapses relating to updating KYC records;
- b. No corresponding banking relationship had been established without the approval of the appropriate authority;
- c. Future Bank's MLRO reviewed reports generated and inquired about any unusual transactions, and fewer STRs by itself did not indicate that there was a lack of monitoring or staff members lacked training but that Future Bank's transaction volume (and thus the number of potentially suspicious transactions) had come down drastically due to sanctions;
- d. Future Bank was not in breach of the 2010 CBB sanctions directive. It continued the relationship with Iranian banks/financial institutions/Central Bank of Iran only to the extent that it facilitated funding of existing assets/liquidity management. Future Bank's exposure to Iran had decreased from BD 371.746 million (as of October 31, 2010) to BD 347.741 million (as of November 22, 2012), which it claimed testified that Future Bank was making sincere efforts to comply with the CBB's sanctions directive;
- e. Future Bank continued its relationship with Iranian banks/Central Bank of Iran for reasons explained to the CBB, namely that Future Bank relied on deposits from the Central Bank of Iran for funding and liquidity needs, and the need to keep Iranian banks as correspondent banks to manage Future Bank's assets portfolio in Iran.<sup>139</sup>

256. The Claimants submit that through this letter, Future Bank "expressly communicated to the CBB" the "fact that Future Bank would rely on [...] an alternative system", referring to the 'Test Key system' alleged to be a violation of applicable laws and regulations by the Respondent.<sup>140</sup>

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<sup>139</sup> FB Response to 2012 CBB Report (C-156), p. 3.

<sup>140</sup> Reply, ¶ 306-309.

257. On December 3, 2012 Mr. Al-Najem sent a memorandum to Mr. Swailim, Head of Investigations, to say that notwithstanding Future Bank's letter, it was in breach of the CBB 2010 Directive on sanctions.<sup>141</sup> The memorandum outlined the examination team's concerns about Future Bank's response to the examination conducted in April 2012. It highlighted the following matters:

- a. Future Bank failed to explain the absence of a sound methodology to assess the client's AML/CFT risk;
- b. There was no appropriate action plan for KYC-related issues in relation to PEP accounts;
- c. Future Bank was in breach of the CBB Directive of September 8, 2010, since it had failed to cease its business relationships with Iranian financial institutions and the Central Bank of Iran;
- d. It was in breach of UN Security Council Resolution UNSC 1929 in its relations with the Central Bank of Iran, the maintenance of which Future Bank said was vital as it was its main depositor;
- e. Notwithstanding Future Bank's disconnection from the SWIFT network, it was conducting dollar-denominated transactions with Iranian financial institutions, and had given no written explanation;
- f. Future Bank claimed that its Iranian exposure had been decreasing during 2010-2012, but its quarterly reports showed that it was increasing. The net decline of approximately BD 24 million was measured based on Future Bank's initial total exposure and not its ongoing progress.<sup>142</sup>

258. A handwritten note on the memorandum suggested that there should be a meeting with Future Bank.<sup>143</sup>

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<sup>141</sup> Internal CBB Memo from Mr. Mohamed Al-Najem to Mr. Khalil Swailim, Re: Future Bank B.S.C. (c) Examination – Response, December 3, 2012 (hereinafter “**Internal CBB Memo Al-Najem to Swailim**”) (R-107); First Witness Statement of Mohamed Rashed Al Najem, February 14, 2018 (hereinafter “**First WS Al Najem**”) (RWS-2), ¶ 14.

<sup>142</sup> Internal CBB Memo Al-Najem to Swailim (R-107).

<sup>143</sup> Internal CBB Memo Al-Najem to Swailim (R-107).

259. This meeting took place on December 11, 2012. The CBB and Future Bank met on this date to discuss a number of matters, including Future Bank's difficulties following the SWIFT disconnection as well as its exposure to Iranian sanctioned entities. At this meeting, Future Bank expressed its thanks to the CBB for supporting it and enabling it to maintain and increase banking operations in Bahrain following the SWIFT disconnection. Among other matters, the attendees discussed Future Bank's plans, which included mobile banking, relocation of ATMs, and Future Bank's Iran exposure. Noting an increase in such exposure, the CBB inquired as to Future Bank's exposure to connected counterparties (BSI and BMI) and "reiterated to Future Bank that it must further reduce its exposure to Iran".<sup>144</sup> Future Bank explained that the short-term exposure (less than 3 months) consisted of the amounts in current accounts and placements only, whereas the longer-term exposure had "reduced significantly".<sup>145</sup>
260. On February 14, 2013, Future Bank wrote to the CBB following up on the meeting of December 11, outlining an action plan to:
- a. reduce Future Bank's Iran exposure, highlighting that Future Bank's "Iran Loans & Advances portfolio has continuously dropped in the last three years", and explaining that the loan repayments from Iran and UAE-based customers has been credited to Future Bank's Nostro accounts with BMI and BSI, as Future Bank has been unable to build relationships with non-Iranian correspondent banks due to international sanctions in relation to such transactions;
  - b. resolve the final issue highlighted in the 2012 CBB Report, as all other matters have been "closed & resolved"; and
  - c. establish a Special Asset Management unit in order to monitor Future Bank's nonperforming loans portfolio.<sup>146</sup>

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<sup>144</sup> Internal CBB Memo from Mr. Khaled Al Alawi to Mr. Yousif Hassan Yousif, Re: Minutes of Prudential Meeting with Future Bank, January 7, 2013 (hereinafter "**Internal CBB Memo Al Alawi to Yousif**") (**R-109**), p. 9.

<sup>145</sup> Internal CBB Memo Al Alawi to Yousif (**R-109**), p. 8.

<sup>146</sup> Letter from Mr. Fatemi (FB) to Mr. Yousif (CBB), Re: Follow-up on Prudential meeting, February 14, 2013 (**C-200**).

## 6. The Ernst & Young Report for 2012

261. On April 30, 2013, Future Bank submitted a report to the CBB confirming that it had addressed all issues identified in the Ernst & Young external audit of May 23, 2012,<sup>147</sup> concerning Future Bank's AML/CFT procedures, systems and protocols.<sup>148</sup>

262. The Ernst & Young Report for 2012 stated as follows:

- The Bank's policy and procedural framework complied with the CBB Rulebook.
- Effectiveness testing of 10 payments (five outward wire transfers and five inward wire transfers) noted that all originator information was on file.
- EDD was applied to a sample of high risk relationships.
- For a sample of 10 high risk customer files relating to charities, clubs and other societies Future Bank was found to have met all identification requirements, including confirming the identities of those purporting to act on behalf of the entities.
- For a sample of five respondent banks, Future Bank had fully complied with EDD requirements.
- Some of the customer files sampled displayed CDD weaknesses, particularly legal entities; in addition for some PEP files source of funds, source of wealth and expected activity could all be improved.
- There were instances in transactions over BD 6,000 where the source of funds was not verified.<sup>149</sup>

263. An internal Future Bank report was produced by Future Bank's Compliance Department in April 2013, in which it was noted that Future Bank was working on acquiring a risk-based monitoring system for AML that would identify "significant or abnormal transactions or patterns of activity".<sup>150</sup> The Claimants argue that Future Bank had worked to identify such a system in the period between April and June 2013,<sup>151</sup> but ultimately found that this type of system was not necessary in the light of the "low volume of

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<sup>147</sup> Ernst & Young Report for 2011 (C-196); Future Bank, Audit Meeting, Compliance Department Update Report, July 14, 2013 (C-195).

<sup>148</sup> Future Bank, Audit Meeting, Compliance Department Update Report, April 27, 2013 (hereinafter "**FB Compliance Department Update Report, April 27, 2013**") (C-199), p. 6.

<sup>149</sup> Second ER Bovill (CER-3), ¶ 5.8.1.

<sup>150</sup> FB Compliance Department Update Report, April 27, 2013 (C-199), ¶ 7.

<sup>151</sup> Future Bank, Audit Meeting, Compliance Department Update Report, April - June 2013 (hereinafter "**FB Compliance Department Update Report, April - June 2013**") (C-299), ¶ 5.



business” and that it would instead implement a “compliance monitoring system to concentrate and focus closely on the daily transactions”.<sup>152</sup>

## 7. The 2013 KPMG Report

264. On November 11, 2012 the CBB notified Future Bank that it had decided to appoint KPMG as an appointed expert for Future Bank to examine Future Bank’s internal audit function, compliance function, and internal controls.<sup>153</sup> On July 4, 2013, KPMG produced a report on Future Bank’s operational risk activities, internal system controls, and compliance with the 2012 CBB Report.
265. On July 4, 2013, Mr. Hamad (CBB) wrote to Mr. Souri (Future Bank) enclosing the KPMG Report and stating the following:

[...] The Report reflects significant shortcomings in relation to the sound credit assessment and credit review as well as compliance with the CBB's Consumer Finance Regulations. It shows weaknesses in the implementation of strong internal controls for credit portfolio. The internal audit review, operational risk assessment including KYC documentation and compliance monitoring of Future Bank are not in line with the best practices and the CBB's rules and regulations. These shortcomings have resulted in serious deterioration of the loans portfolio and poor oversight of internal controls over the credit assessment and extension.

The CBB is concerned about this situation and expects Future Bank to fully comply with the relevant rules and regulations.

Future Bank is directed to undertake a thorough review of the enclosed report and submit an action plan to the CBB detailing steps to be taken to address and rectify the gaps identified in the aforesaid report, by no later than 4111 August 2013. Subsequently, Future Bank must provide the CBB with a quarterly progress report starting from the end of October, 2013, until all the outstanding issues in the attached report have been addressed to the CBB's satisfaction.<sup>154</sup>

266. In response, Mr. Souri (Future Bank) wrote to Mr. Hamad (CBB) on July 24, 2013 noting that the report identified gaps in corporate and retail credit, as well as operational risk activities, and informed the CBB that it had developed a plan to address all such gaps.

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<sup>152</sup> Future Bank, Audit Meeting, Compliance Department Update Report, October 31, 2013 (C-206), ¶ 5.

<sup>153</sup> Letter from Mr. Yousif (CBB) to Mr. Souri (FB), November 11, 2012 (C-201), p. 1.

<sup>154</sup> Letter from Mr. Hamad to Mr. Souri, Re: Appointed Expert’s Report on Future Bank, July 4, 2013 (R-273).

The letter enclosed a gap analysis report and an action plan for the gaps identified. The CBB was assured that Future Bank would provide a quarterly progress report.<sup>155</sup>

267. Future Bank reported that it had addressed almost all the issues identified by the 2013 KPMG Report by December 31, 2013, specifically that 54 out of 56 recommendations had been implemented. Per the CBB's advice in this regard, Future Bank submitted a quarterly progress report starting from the end of October 2013 until all the outstanding issues in the report were addressed. The first progress report was sent to the CBB on January 29, 2014.<sup>156</sup>

### 8. Special Inspection Reports November-December 2013

268. A special inspection of Future Bank had been made during the period between October 3, 2013 and October 12, 2013 with the purpose of examining cash inflows and outflows in the Nostro and Vostro accounts in order to verify Nostro and Vostro Account reconciliations conducted by Future Bank, and of reviewing letters of credit issued by Future Bank during the period between June 2013 and September 30, 2013.<sup>157</sup>
269. Two memoranda were circulated internally within the CBB following this examination, but were not shared with Future Bank. The first was sent on November 24, 2013 from Mr. Hamad to Mr. Abdulla (Director, Inspection Directorate) noting that Future Bank had increased its exposure to Pars Oil and Gas Company ("**POGC**"), an Iranian energy sector company currently under OFAC SDN List and also under U.S. sanctions, and that therefore Future Bank had not adhered to the CBB circulars on U.S. sanctions. Moreover, the memorandum reported that a fresh AED 50 million loan had been sanctioned to MAPNA International, FZE, a company engaged in "developing the FARS GAS Power Plant Project in Iran". The CBB found that MAPNA International's parent company,

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<sup>155</sup> Letter from Mr. Souri to Mr. Hamad, Re: Appointed Expert's Report on Future Bank, attaching Future Bank - Status Report on KPMG's Review, July 24, 2013 (**R-274**).

<sup>156</sup> Future Bank, Internal Audit – Progress Tracking Report, January 29, 2014 (**C-202**).

<sup>157</sup> Internal CBB Memo from Ms. Maha Mohammed Abdulla to Mr. Ahmed Bumtaia, Re: Future Bank– Special Scope Examination, December 30, 2013 (hereinafter "**Internal CBB Memo Abdulla to Bumtaia**") (**R-79**).

“MPNA”, a Tehran-based company, was the project manager in one oilfield of Pars Oil & Gas Company and so there was indirect involvement with an OFAC related entity.<sup>158</sup>

270. The second internal memorandum was produced on December 30, 2013. This memorandum, which was sent from Mr. Abdulla to Mr. Mumtaia, Director, Compliance Directorate (with a copy to Mr. Hamad), notes that the inspection team had observed two cases where Future Bank appeared to be in “contravention of the CBB circulars on U.S. sanctions and OFAC restrictions”.<sup>159</sup> These incidents related again to POGC and MAPNA. The CBB observed that Future Bank, when alerted to POGC’s designation under OFAC, explained that no new investments had been made following the CBB Directive. The CBB finds that Future Bank had reinvested the proceeds from its original investment in the Eurobonds in March and May 2010, into additional Eurobonds issued by that company when they became available. As such, the CBB recommended that “a penalty of BD 20,000” be issued and to “refer the matter to the Compliance Directorate for assessment and action”.<sup>160</sup>

271. The CBB reiterated Future Bank’s interactions with MAPNA, concluding that “this [is] another instance where Future Bank evaded the restrictions placed on entities connected to the Iranian energy sector”.<sup>161</sup>

272. According to the Respondent, Future Bank’s investments with POGC in the period between 2010 and 2015 amounted to a violation of “the CBB’s Directive of 8 September 2010”, as 23 Eurobonds were purchased on or after January 1, 2011, *i.e.*, following the issue of the CBB Directive.<sup>162</sup> Accepting repayments for the bonds in 2013 and “purchasing new POGC bonds in the same year”, amounted to a violation of U.S. sanctions, and by extension, the CBB Directive.<sup>163</sup> The Respondent argues that Future

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<sup>158</sup> Internal CBB Memo from Ms. Maha Mohammed Abdulla to Mr. Khalid Hamad, Re: Future Bank–Special Examinations, November 24, 2013 (hereinafter “**Memo Abdulla to Hamad, November 24, 2014**”) (R-117).

<sup>159</sup> Internal CBB Memo Abdulla to Bumtaia (R-79).

<sup>160</sup> Internal CBB Memo Abdulla to Bumtaia (R-79).

<sup>161</sup> Internal CBB Memo Abdulla to Bumtaia (R-79).

<sup>162</sup> 2018 CBB Report (R-172), ¶ 462.

<sup>163</sup> Rejoinder, ¶ 76.

Bank had misrepresented the 2013 POGC investments as “rollovers and not new investments”,<sup>164</sup> following an external examination by the CBB. Future Bank then amended this explanation upon being confronted with new evidence to concede that the proceeds of the 2010 investment had been put in interbank placements before Future Bank reinvested them in Eurobonds, when such bonds became available.<sup>165</sup>

273. The Claimants, on the other hand, reaffirm Future Bank’s explanation that at the time the investment in the POGC bonds was made, the company was not under any sanctions and the repayments from POGC occurred between March and May 2013. Future Bank denies all allegations of any subsequent, additional investments in POGC bonds. The Claimants dispute the accuracy of the documents on which these allegations rest, which in their submission, are erroneous entries in fact referring to the original investment of 2010.<sup>166</sup>
274. The Claimants also assert that Future Bank had been entirely transparent on these purchases on the secondary market, having informed the CBB that when the POGC bonds matured in the first half of 2013, Future Bank used the proceeds, parked them in interbank placements with BSI,<sup>167</sup> and from there decided to “reinvest this available euro liquidity in POGC Eurobonds, as and when available on the secondary market, given the comparatively high rate of return of the same, and limited risk involved”.<sup>168</sup>

## 9. The Ernst & Young Report for 2013

275. On March 27, 2014, Future Bank provided to the CBB an audit report for the year 2013, produced by its external auditor, Ernst & Young (the “**Ernst & Young Report for**

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<sup>164</sup> Rejoinder, ¶ 78, referring to e-mail exchange between Dr. Ravi Prakash Urapayilputhenveetil (FB) and Mr. Sunando Roy (CBB), December 10, 2013 (hereinafter “**E-mail Exchange Prakash and Roy**”) (CBB.R-213).

<sup>165</sup> E-mail exchange Prakash and Roy (CBB.R-213).

<sup>166</sup> Reply, ¶¶ 417-421.

<sup>167</sup> E-mail exchange Prakash and Roy (CBB.R-213), p. 2.

<sup>168</sup> Reply, ¶ 429, referring to e-mail exchange Prakash and Roy (CBB.R-213); Future Bank, Investment in EURO Bonds, Ref. ALCO/04/2013, March 12, 2013 (CBB.R-241); Future Bank, Investment in EURO Bonds, Ref. FUBBOBU/330/13, June 10, 2013 (CBB.R-243).

2013”).<sup>169</sup> The report examined the bank’s system of internal control and identified several weaknesses, which it rated with three different degrees of importance:

Rating	Explanation
<b>High</b>	Issues which need to be addressed on an urgent basis.
<b>Medium risk</b>	Issues which need to be addressed at the first available opportunity.
<b>Low risk</b>	Issues which have little impact on the operations but considered industry best practice if implemented.

276. So far as relevant, the Ernst & Young Report for 2013 identified the lack of appropriate KYC procedure as low risk, and recommended that the bank “put dedicated resources to remedy the situation and improve the KYC documentation”.<sup>170</sup> With respect to this item, the Claimants submit that Future Bank accounted for this risk by installing and integrating a “compliance monitoring” software provided by “Bench Matrix” in January 2014, which assisted in creating a comprehensive risk assessment framework within Future Bank.<sup>171</sup>
277. Among the matters classified as medium risk, Ernst & Young identified that the nostro reconciliations prepared for one of the bank’s shareholders, BMI, were inaccurate and the reconciled balance did not match the amount in the account and recommended that senior staff accurately review each nostro reconciliation before signing off.<sup>172</sup> The report also noted, as a matter of medium risk, that Future Bank had granted credit facilities to 25 companies, amongst them National Iranian Tanker Co. and Adel International Equipment Co FZE, without obtaining their latest financial statements, and recommended that the bank grant credit facilities after receiving the required financial information.<sup>173</sup> The report did not identify any items as high risk.

<sup>169</sup> Letter from Mr. Abbas Fatemi and Mr. Vistasopariwalla to Mr. Yousif Hassan Yousif, External Audit – Management Letter 2013, attaching Ernst & Young, Matters Arising During the Audit Management Letter of 6 March 2014, March 27, 2014 (hereinafter “**Ernst & Young Report for 2013**”) (R-279).

<sup>170</sup> Ernst & Young Report for 2013 (R-279), p. 11.

<sup>171</sup> Reply, ¶ 581.4, referring to Future Bank Audit Committee, Compliance Department Update, January 29, 2014 (hereinafter “**FB Compliance Update, January 29, 2014**”) (C-207).

<sup>172</sup> Ernst & Young Report for 2013 (R-279), p. 5.

<sup>173</sup> Ernst & Young Report for 2013 (R-279), p. 12.

## 10. The KPMG Report for 2014

278. In 2014 Future Bank decided to appoint KPMG as external auditor,<sup>174</sup> and this decision was approved by the CBB.
279. On April 29, 2015, Future Bank submitted an external report by KPMG on Future Bank's compliance with the provisions of "the Financial Crime Module of Vol. 1 of the CBB Rule Book", as required under the CBB Rulebook<sup>175</sup> dated April 28, 2015 (the "**KPMG Report for 2014**"). The purpose of the report was to examine Future Bank's compliance with the FC Module.<sup>176</sup>
280. The covering letter to the 2015 KPMG Report notes that the report "does not constitute either an audit or review made in accordance with the International Standards on Auditing".<sup>177</sup> The 2015 KPMG Report notes general compliance with the FC Module, and makes certain specific findings, including:
- a. For domestic and cross border wire transfers, KPMG selected a representative sample of payments and verified whether Originator Information and required beneficiary information had been included with all electronic transfers of funds they made on behalf of, including name, address and account number of the payer (FC 3.1.1), and the report stated "no exceptions noted."<sup>178</sup>
  - b. In relation to CDD, KPMG selected a representative sample of customers covering existing and new (individuals, corporates, trusts, GCC nationals, non-residents) and tested the CDD on file against the requirements of 1.2 of the FC Module, and reported that for 9 of 25 corporates Future Bank did not hold the most up to date audited financial statements.<sup>179</sup>

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<sup>174</sup> Future Bank Audit Committee, Compliance Department Update, May 3, 2014 (C-208), p. 7.

<sup>175</sup> CBB Rulebook Financial Crime (RL-119), FC 4.3.1(d).

<sup>176</sup> Letter from Mr. Sourì to Mr. Bumtaia, Sub: Anti-Money laundering report for the year ended 31<sup>st</sup> December 2014, April 29, 2015 (hereinafter "**KPMG Report for 2014**") (C-64).

<sup>177</sup> KPMG Report for 2014 (C-64).

<sup>178</sup> KPMG Report for 2014 (C-64), p. 16.

<sup>179</sup> KPMG Report for 2014 (C-64), p. 3.

- c. In relation to Enhanced Due Diligence for Charities, Clubs and other Societies, KPMG selected a representative sample of customers who were charitable funds and religious, sporting, social, cooperative, and professional societies and tested whether Future Bank had obtained identities of such customers from the relevant Ministry confirming the identities of those purporting to act on their behalf, and for any incoming or outgoing wire transfer from or to any foreign country on behalf of charity and non-profit organizations licensed by the Ministry of Social Development were obtained. The report stated “no exceptions noted.”<sup>180</sup>
- d. A representative sample of correspondent banks were selected and the level of Enhanced Due Diligence for Correspondent Banking Relationships was tested, which included a review of correspondent banks’ ownership structures, location of the correspondent and its customers, the respondent’s AML/CFT controls, purpose of the account and senior management approval. The report stated “no exceptions noted.”<sup>181</sup>
- e. KPMG tested Future Bank’s record keeping controls by selecting a sample of business relationship records, transaction documents, compliance records and training records to determine whether these policies were being complied with, and stated “no exceptions noted.”<sup>182</sup>
- f. KPMG also reviewed Future Bank’s risk management systems for determining whether a customer was a PEP at the time of opening the account relationship and thereafter on a periodic basis, and the report stated “no exceptions noted”.<sup>183</sup>

## **F. FUTURE BANK’S IRANIAN EXPOSURE**

281. The Parties dispute whether Future Bank violated the CBB’s instructions with respect of the bank’s exposure to Iranian entities. The CBB’s instructions on Future Bank’s Iranian exposure can be divided in two parts: (a) those related to the bank’s exposure to Iranian

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<sup>180</sup> KPMG Report for 2014 (C-64), p. 8.

<sup>181</sup> KPMG Report for 2014 (C-64), p. 10.

<sup>182</sup> KPMG Report for 2014 (C-64), p. 24.

<sup>183</sup> KPMG Report for 2014 (C-64), p. 7.

entities in general, and (b) those in respect of the bank’s exposure to its Iranian shareholders. While the Parties dispute the legal nature of the CBB’s instructions, the following communications are relevant in this respect:

- Future Bank’s letter to the CBB summarizing the meeting of August 9, 2007 between the CBB and Future Bank shows that the CBB had “recommended” that Future Bank not “assume new risks on Iran.”<sup>184</sup> In the same letter, Future Bank represented that it would “attempt to source its assets and liabilities to the extent possible from Bahrain and other GCC countries”; “reduce the share of activities involving Iranian trade”; and “avoid enlarging our current exposure to Iran”<sup>185</sup>, which amounted to USD 1,019 million (equivalent to BHD 384 million).

282. This letter of Future Bank is not clear on whether the CBB had issued a mandatory instruction capping the bank’s Iranian exposure. However, in the 2008 CBB Report, the CBB referred to the USD 1,019 million limit as a “precautionary cap placed by the CBB” on Future Bank’s Iranian exposure and required the Bank to establish robust controls over the exposures to Iran to ensure compliance with the cap.<sup>186</sup>

283. The record shows that, in the period leading up to the impugned measures, Future Bank’s Iranian exposure fluctuated as follows:

Date	Iran Exposure	Evidence
August 11, 2007	BHD 365.848 million  (USD 973 million)	Balance sheet attached to Letter from Mr. Seif (Future Bank) to Mr. Hamad (CBB), August 12, 2007 (R-77), p. 2
Various dates in 2008	The CBB found that Future Bank exceeded the cap on five individual dates in 2008.	Letter from Governor Al Maraj to Mr. Hamid Borhani, attaching the Central Bank of Bahrain Inspection Directorate Examination Report of Future Bank B.S.C. (c), April 2009 (R-83), ¶ 4.17

<sup>184</sup> Letter Seif to Hamad, August 12, 2007 (R-77), p. 1.

<sup>185</sup> Letter Seif to Hamad, August 12, 2007 (R-77).

<sup>186</sup> 2008 CBB Report (R-83), ¶ 4.17.



December 31, 2009	BHD 367,329 million  But the CBB also found that Future Bank exceeded the cap on 14 individual dates in 2009. <sup>187</sup>	Central Bank of Bahrain, Inspection Directorate Examination Follow-up Report: Future Bank B.S.C. (c), May 23, 2010 ( <b>R-92</b> ), ¶ 5.6
December 31, 2012	BHD 370,213 million	Balance sheet attached to letter from Future Bank to the CBB regarding Iran exposure in December 2012, January and February 2013, March 17, 2013 ( <b>C-220</b> )
January 31, 2013	BHD 375,697 million	Balance sheet attached to letter from Future Bank to the CBB regarding Iran exposure in December 2012, January and February 2013, March 17, 2013 ( <b>C-220</b> )
February 28, 2013	BHD 367,797 million	Balance sheet attached to letter from Future Bank to the CBB regarding Iran exposure in December 2012, January and February 2013, March 17, 2013 ( <b>C-220</b> )
March 31, 2013	BHD 371,851 million	Balance sheet attached to letter from Future Bank to CBB attaching report on Iran exposure in March 2013, April 14, 2013 ( <b>C-217</b> )
March 31, 2014	BHD 350,762 million	Balance sheet attached to letter from Future Bank to the CBB regarding Exposure to Iran as of March 31, 2014, April 22, 2014 ( <b>C-221</b> )
July 31, 2014	BHD 345,421 million	Balance sheet attached to letter from Future Bank to CBB attaching report on Iran exposure in July 2014, August 11, 2014 ( <b>C-223</b> )
August 31, 2014	BHD 349,971 million	Balance sheet attached to letter from Future Bank to CBB attaching report on Iran exposure in August 2014, September 10, 2014 ( <b>C-218</b> )
September 30, 2014	BHD 342,839 million	Balance sheet attached to letter from Future Bank to CBB regarding Iran

<sup>187</sup> Letter from Dr. Seif (FB) to Governor Al Maraj (CBB), June 20, 2010 (**PS-60**), p. 5; Future Bank's defences included that the breaches were "not to the extent shown", "technical in nature" or due to "foreign exchange rate fluctuations".

		Exposure as on September 30, 2014, October 8, 2014 ( <b>C-159</b> )
December 31, 2014	BHD 342,085 million	Balance sheet attached to letter from Future Bank to the CBB regarding Exposure to Iran as of December 31, 2014, January 13, 2015 ( <b>C-222</b> )
March 31, 2015	BHD 329,847 million	Balance sheet attached to letter from Future Bank to the CBB regarding Iran Exposure as on March 31, 2015, April 16, 2015 ( <b>C-160</b> )

284. As for Future Bank’s exposure to its own shareholders, the record shows that, on July 21, 2009, the CBB instructed Future Bank to reduce its exposure to 40% of the capital base (total assets) by September 2009.<sup>188</sup>
285. Furthermore, on April 1, 2014, the CBB instructed Future Bank to “immediately reduce its exposure limits to its shareholders, BSI and BMI and bring such limits down to the outstanding balances as of end of December 2013 [amounting to BHD 174,033 million], while not undertaking any new exposure to these shareholders”.<sup>189</sup> It further requested Future Bank to “initiate measures to bring down such exposures to nil, in line with the CBB’s requirement under the CBB Rule CM-5.5.12 which stipulates that banks must not undertake any exposures to shareholders with significant ownership (*i.e.*, 10% or more) of the bank’s capital base”.<sup>190</sup>
286. Against the background of these instructions, Future Bank’s exposure to its shareholders fluctuated as follows:

Date	Shareholder Exposure	Evidence
December 31, 2009	BHD 233,406 million	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ), Appendix GD2-2.4

<sup>188</sup> Letter from Mr. Hamad (CBB) to Dr. Seif (FB), Re: Connected Counterparties’ Exposure Limit, July 21, 2009 (**PS-28**).

<sup>189</sup> Letter from Mr. Yousif (CBB) to Mr. Souri (FB), April 1, 2014 (hereinafter “**Letter Yousif to Souri, April 1, 2014**”) (**R-125**) ¶ 2.

<sup>190</sup> Letter Yousif to Souri, April 1, 2014 (**R-125**), p. 2.

Date	Shareholder Exposure	Evidence
	(= 42.63% of total assets)	
December 31, 2010	BHD 183,701 million (= 35% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ), Appendix GD2-2.4
December 31, 2011	BHD 110,854 million (= 36% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ), Appendix GD2-2.4
December 31, 2012	BHD 164,726 million (=30.15% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ), Appendix GD2-2.4
December 31, 2013	BHD 174,033 million (= 30.06% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ), Appendix GD2-2.4  Letter from Future Bank to the CBB, October 22, 2014 ( <b>PS-53</b> )
March 31, 2014	BHD 167,53 million	Letter from Future Bank to the CBB, June 19, 2014 ( <b>PS-51</b> )
June 30, 2014	BHD 183,53 million	Letter from Future Bank to the CBB, October 22, 2014 ( <b>PS-53</b> )
September 30, 2014	BHD 176,26 million	Letter from Future Bank to the CBB, October 22, 2014 ( <b>PS-53</b> )
December 31, 2014	BHD 173,903 million (= 29.12% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ), Appendix GD2-2.4

## G. THE JCPOA

287. On July 14, 2015, Iran, China, France, Germany, Russia, the United Kingdom and the U.S. signed the Joint Comprehensive Plan of Action (“**JCPOA**”).<sup>191</sup> The JCPOA provided for a lifting of sanctions against Iran upon the confirmation by the International

<sup>191</sup> Joint Comprehensive Plan of Action, July 14, 2015 (hereinafter “**JCPOA**”) (**RL-27**).

Atomic Energy Agency (“**IAEA**”) of certain commitments undertaken by Iran, in respect of peaceful nature of its nuclear programme.<sup>192</sup>

288. The IAEA established that Iran had implemented these commitments on January 16, 2016.<sup>193</sup> Soon thereafter, the U.S.,<sup>194</sup> the UN<sup>195</sup> and the EU<sup>196</sup> began easing sanctions against Iran.
289. The Claimants argue that in anticipation of the JCPOA, it had informed the CBB on December 4, 2014, of its intention to expand its international operations into countries including Iran, Oman, and Malaysia.<sup>197</sup> The Claimants further assert that in the light of “improvement of the international situation”, Future Bank’s Board of Directors projected an equity return of 20%, an improvement over the 14% in 2014.<sup>198</sup>
290. The Claimants assert that while the international community welcomed the JCPOA, it “hit on [Saudi Arabia’s] fears that the United States wants to abandon them in order to ally with Iran”<sup>199</sup> and “jeopardize the Saudi hegemony in the Gulf and the Middle East region”.<sup>200</sup> According to the Claimants, this led to Saudi political pressure on Gulf States to cut their ties with Iran, which gave rise to the CBB’s politically motivated measures against Future Bank.

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<sup>192</sup> JCPOA (**RL-27**).

<sup>193</sup> Confirmation of Verification of Iranian Actions Pursuant to the Joint Comprehensive Plan of Action, Press Statement from John Kerry, Secretary of State, January 16, 2016 (hereinafter “**Press Statement Kerry**”) (**C-45**).

<sup>194</sup> Press Statement Kerry (**C-45**).

<sup>195</sup> UNSC, United Nations Security Council Resolution 2231, S/RES/2231, July 20, 2015 (**C-47**).

<sup>196</sup> EU CP 2007/140/CFSP (**C-35**).

<sup>197</sup> Reply, ¶ 185, citing Memorandum regarding Minutes of Prudential Meeting with Future Bank, December 9, 2014 (**C-189**), p. 4.

<sup>198</sup> Reply, ¶ 185, referring to Future Bank, Minutes of the Meeting of the Board of Directors of Future Bank, February 5, 2015 (**C-229**), p. 5.

<sup>199</sup> Reply, ¶ 219, citing New York Times, How the Iranian-Saudi Proxy Struggle Tore Apart the Middle East, November 19, 2016 (**C-124**), p. 6.

<sup>200</sup> Reply, ¶ 219, referring to Brookings, What the Iran deal has meant for Saudi Arabia and Regional Tensions, July 13, 2016 (**C-230**), p. 1.

291. The Respondent argues that Future Bank could in no way predict whether sanctions would be lifted at the time it made these projections.<sup>201</sup> It denies that the CBB's measures were informed by the political considerations arising out of the conclusion of the JCPOA.

## **H. THE ADMINISTRATION AND SUBSEQUENT LIQUIDATION OF FUTURE BANK**

### **1. Placement of Future Bank under Administration**

292. The Respondent asserts that, on April 30, 2015, the Crisis Management Committee of the CBB met and decided to place Future Bank under administration pursuant to Article 136 of the CBB Law. It produced a set of minutes of that meeting, which appears to record that the Committee recommended this action on the grounds that allowing the two companies to continue to offer their "services under supervision will cause harm to the production of financial services and the general interest in the Kingdom".<sup>202</sup> The minutes are reproduced in full as follows:

#### **Minutes of the Meeting of the Crisis Management Committee**

Date: Thursday April 30, 2015

Time: 3pm

Place: Fifth floor

Presence:

1. Sheikh Salman Ben Issa Al Khalifa, executive director of banking operations – head of the committee
2. Mr. Khaled Hamad Abdel Rahman, executive director of Future Banking supervision body
3. Mr. Abdel Rahman Mohamad Baker, executive director of the financial institution supervision body
4. Mr. Manar Mostafa Al Sayed, Assistant to the general advisor

The following topic was discussed:

1. Putting Future Bank under administration
2. Putting the Iranian Insurance Company under administration

Based on article 136 of the Law regarding the Bahrain Central Bank, and given the fact that Future Bank and the Iranian Insurance Company are still offering services under supervision will cause harm to the production of

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<sup>201</sup> SoD, ¶ 107.

<sup>202</sup> Minutes of the Meeting of the Crisis Management Committee, April 30, 2015 (hereinafter "**CBB Meeting Minutes, April 30, 2015**") (C-152).

financial services and the general interest in the Kingdom, the committee recommends the following:

“Putting Future Bank and the Iranian Insurance Company under the administration of the Bahrain Central Bank”.

[Signatures]<sup>203</sup>

293. The Claimants dispute that such meeting took place at all. They point to the fact that the meeting was allegedly held after office hours and that an administrator was available on the same day.<sup>204</sup>

294. On the same day, the Director of the CBB Banking Services Directorate, Mr. Ahmed Buhiji, delivered a letter from Governor Al Maraj addressed to Mr. Sourì, the CEO of Future Bank, containing the CBB’s decision to place Future Bank into administration (the “**CBB Decision**”).<sup>205</sup> The relevant part of the letter reads as follows:

By virtue of the power vested in the Central Bank of Bahrain (“CBB”) by Article 136 of the Central Bank of Bahrain and Financial Institutions Law (Decree No. 64 of 2006, the “CBB Law”), the CBB has today resolved to place Future Bank into administration.

Your company is required to cease trading immediately. You must give the CBB’s representative, Mr. Ahmed Buhiji, Director of Banking Services Directorate who is delivering this letter to you, full access to your premises and business, its records and its systems. Your staff must comply with our instructions going forward. The legal rights of all directors, management and shareholders in relation to the company, are now suspended. The CBB has assumed full managerial control over your business.<sup>206</sup>

295. Thus, the CBB ordered Future Bank to “cease trading immediately” and provide Mr. Buhiji, the CBB representative, full access to the premises as well as Future Bank’s records and systems, asserting that the CBB had assumed “full managerial control”.<sup>207</sup>

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<sup>203</sup> CBB Meeting Minutes, April 30, 2015 (C-152).

<sup>204</sup> Hearing Transcript, Day 5, pp. 1040:24-1041:18 (Dr. Gharavi).

<sup>205</sup> Letter from Governor Al Maraj (CBB) to Mr. Sourì (FB), April 30, 2015 (hereinafter “**CBB Decision**”) (C-56).

<sup>206</sup> CBB Decision (C-56).

<sup>207</sup> CBB Decision (C-56).

296. Accordingly, in the evening of April 30, 2015 the CBB took control of Future Bank by securing the premises with the assistance of the security personnel of the Ministry of Interior, and excluding the bank's senior management from the premises.<sup>208</sup>
297. On May 3, 2015, the CBB's Executive Director, Mr. Khalid Hamad, met with Future Bank's CEO and Deputy CEO, Mr. Gholam Souri and Mr. Abbas Fatemi, to discuss the reasons for Future Bank's placement under administration. The only documentary evidence of the meeting are the Claimants' contemporaneous minutes, which record Mr. Hamad of the CBB informing the representatives of Future Bank that it was a "Sovereign Decision to put the Bank into Administration".<sup>209</sup> Future Bank was further informed that the CBB "officials will [...] act as the CEO of Future Bank and will run Future Bank with the help of the Heads of Departments [...] of Future Bank and a team of officials of the CBB", and that Mr. Ahmed Buhji was appointed as the administrator of Future Bank.<sup>210</sup> According to the minutes, the CBB informed Future Bank at this meeting that it had "decided to liquidate Future Bank", inviting the Claimants to agree to "voluntary liquidation" and that of Future Bank's four branches, two will be "closed immediately".<sup>211</sup>
298. Following the appointment as the administrator, Mr. Buhji began issuing first instructions to Future Bank's management on May 4, 2015.<sup>212</sup>
299. On May 7, 2015, the CBB published its decision on the placement of Future Bank into administration in the Official Gazette (the "**Published CBB Decision**").<sup>213</sup> Pursuant to

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<sup>208</sup> First WS Souri (CWS-1), ¶ 66; First Witness Statement of Dr. Abdolnaser Hemmati (hereinafter "**First WS Hemmati**") (CWS-2), ¶ 15.

<sup>209</sup> Meeting Report (CBB and FB), May 3, 2015 (hereinafter "**Meeting Report, May 3, 2015**") (C-60), p. 1.

<sup>210</sup> Meeting Report, May 3, 2015 (C-60), p. 1.

<sup>211</sup> Meeting Report, May 3, 2015 (C-60), p. 1. *See* also Reply, ¶ 556.

<sup>212</sup> Internal Memo from Mr. Ahmed Buhji to All Heads of Department/Branch Managers (FB), May 4, 2015 (C-62); Internal Memo-Amendment Memo from Mr. Ahmed Buhji to All Heads of Department/Branch Managers (FB), May 5, 2015 (C-63).

<sup>213</sup> Central Bank of Bahrain, Decision No. (21) of the year 2015 Re: putting Future Bank under Administration, Official Gazette 26/3208, May 7, 2015 (hereinafter "**Published CBB Decision**") (C-61).

Article 138 of the CBB Law, “the appointment of the Administrator shall only have effect on the day following the publication of such notice [in the Official Gazette]”.<sup>214</sup>

300. The Published CBB Decision stated that the grounds on which Future Bank had been placed under administration included the fact that Future Bank offered services that could “cause harm to the industry of financial services in the Kingdom of Bahrain”.<sup>215</sup>

301. On the date of the publication of the decision, Future Bank sent a letter to the CBB, which they referred to as a formal appeal against the CBB’s decision to place the bank into administration.<sup>216</sup> In the letter, the Claimants emphasized, inter alia, that (i) they had been present in Bahrain since 1971, and were two of the oldest banks continuously operating there; (ii) they had invested in Future Bank at the invitation, and with the blessing of the Governments of both Bahrain and Iran; (iii) ever since its incorporation in 2004, Future Bank had conducted its activity in a transparent manner, providing all the information and clarifications required by the CBB, and it had a track record of minimal fines or penalties from the CBB; and (iv) since 2007, the CBB had appointed and maintained on Future Bank’s Board of Directors two independent Bahraini directors, whose sole mandate was to oversee and monitor, on behalf of the Government of Bahrain, the overall functioning of Future Bank, without ever finding any material shortcomings, infringements, or breaches.

302. The CBB dismissed the appeal on May 18, 2015 with the following explanations:

Due to the existence of violations of what was decreed by Law number 4 for the year 2001 regarding the Prohibition of Money Laundering and its amendments, as well as violations of the Law on the Central Bank of Bahrain and Financial Institutions, issued by the law number 64 for the year 2006, in addition to violations of the local and international regulations in relation to bank transactions with institutions that are subject to international sanctions;

The Central Bank of Bahrain deems that the fact for Future Bank to continue to offer services subject to scrutiny by the CBB will cause harm to the industry of financial services in the Kingdom of Bahrain as well as

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<sup>214</sup> CBB Law (CL-5), Article 138(b).

<sup>215</sup> Published CBB Decision (C-61), Article 2.

<sup>216</sup> Letter Hemmati to Al Maraj, May 7, 2015 (C-10), p. 3.



consequences of said violations in terms of damage to the reputation of the financial and banks sector in the Kingdom of Bahrain.<sup>217</sup>

303. By this time, Mr. Al-Najem was conducting an enquiry into Future Bank's affairs, and had provided progress reports on May 5, 2015<sup>218</sup> and May 9, 2015.<sup>219</sup> The Respondent says that the CBB's denial of Future Bank's appeal was the product of the CBB's careful consideration of Future Bank's violations of the applicable regulations. The Respondent contends that it took into account the results of Mr. Al-Najem's ongoing investigation, which was revealing a fuller picture of Future Bank's wrongdoings.<sup>220</sup>
304. On May 26, 2015, Dr. Hemmati, the dismissed Chairman of Future Bank, sent a letter to the CBB, requesting that the CBB reconsider its decision to place Future Bank under administration.<sup>221</sup> Dr. Hemmati referred to Future Bank's adherence to the CBB regulations and emphasized that the bank had submitted itself to the CBB's supervision and examination, as well as to multiple external audits. He further emphasized the fact that Future Bank's Management Committee, including the two members elected and appointed by the CBB, had reviewed and approved the various examination reports of the bank. The letter enclosed a copy of the latest report, the KPMG Report for 2014. According to Dr. Hemmati, Future Bank had not caused any harm to the financial and banking system of Bahrain. The letter referred to the BIT and requested negotiation and exchange of opinions between the Bahraini Government and the Claimants.<sup>222</sup> This letter received no response.

## 2. The 2015 CBB Report

305. The Respondent asserts that, two days after the placement of Future Bank into administration, on May 5, 2015, the CBB initiated an investigation into Future Bank's

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<sup>217</sup> Letter from Governor Al Maraj (CBB) to Dr. Hemmati (FB), Re: Objection to the decision of putting Future Bank under administration, May 18, 2015 (C-58).

<sup>218</sup> Future Bank – Status Report, May 5, 2015 (C-158).

<sup>219</sup> Future Bank – Progress Report, May 9, 2015 (C-157).

<sup>220</sup> Rejoinder, ¶¶ 226, 254, referring also to Second Witness Statement of Governor Al Maraj, February 25, 2019 (hereinafter “**Second WS Al Maraj**”) (RWS-3), ¶ 34.

<sup>221</sup> Letter from Dr. Hemmati (FB) to Governor Al Maraj (CBB), Re: Objection to putting Future Bank under supervision and administration 7/5/2015, May 26, 2015 (hereinafter “**Letter Hemmati to Al Maraj, May 26, 2015**”) (C-59).

<sup>222</sup> Letter Hemmati to Al Maraj, May 26, 2015 (C-59).

activities.<sup>223</sup> The record contains no contemporaneous documentary evidence demonstrating the initiation of the investigation. It does show, however, that, on May 24, 2015, the CBB issued an Investigation Report (the “**2015 CBB Report**”).<sup>224</sup>

306. The Claimants contest the authenticity of the 2015 CBB Report, citing the lack of corroborating evidence that the Report was indeed produced on the indicated date.<sup>225</sup> They note that the Report was never shared with Future Bank or its shareholders, nor were they requested to comment at the time.<sup>226</sup> The Claimants further contend that the Respondent mischaracterizes the contents of the report as “recent discoveries”. According to the Claimants, the information on the transactions discussed in the 2015 CBB Report had been consistently disclosed to the CBB in the course of multiple inspection and audit reports.<sup>227</sup>
307. The Respondent asserts that the 2015 CBB Report was a product of an investigation, which the CBB commenced immediately after it put Future Bank into administration. It refers to the witness statements of Mr. Al-Najem and Governor Al Maraj who attest to the drafting of the 2015 CBB Report on the date specified in the report.<sup>228</sup> Mr. Swailim, an employee of the Central Bank of Bahrain corroborated this in his oral testimony, asserting that once Future Bank was placed under administration, on May 4, 2015, Mr. Bumtaia, the director of the CBB at the time, requested him to perform the investigation into Future Bank.<sup>229</sup>
308. The content of the 2015 CBB Report relates to Future Bank’s multiple alleged violations of applicable regulations. In particular, the report found that Future Bank violated the United Nations Security Council (UNSC) Resolution 1747 (2007), UNSC Resolution 1803 (2008) and UNSC Resolution 1929 (2010) as it provided loans and continued to

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<sup>223</sup> Hearing Transcript, Day 3, p. 434:13-15 (Mr. Al-Najem).

<sup>224</sup> Central Bank of Bahrain, Future Bank B.S.C. Investigation Report, May 24, 2015 (hereinafter “**2015 CBB Report**”) (R-142).

<sup>225</sup> Hearing Transcript, Day 5, p. 1065:7-12 (Dr. Gharavi).

<sup>226</sup> Reply, ¶¶ 240-254.

<sup>227</sup> Reply, ¶ 252.

<sup>228</sup> Rejoinder, ¶ 130, referencing First WS Al Najem (RWS-2), ¶¶ 17-20; First WS Al Maraj (RWS-1) ¶ 37.

<sup>229</sup> Hearing Transcript, Day 2, pp. 362:4-363:2 (Mr. Swailim).

provide financial assistance to legal entities that were directly and indirectly owned by the Government of Iran.<sup>230</sup> According to the report, Future Bank was “in direct breach of the [CBB Directive]...as the Bank failed to adhere to its provisions by providing financial support and maintaining business relationships, including correspondent banking relationships, with OFAC sanctioned entities”.<sup>231</sup> The Report also maintained that Future Bank was in breach of regulations in relation to credit facilities, misuse of accounts, and filing of timely STRs.<sup>232</sup>

309. The 2015 CBB Report went on to describe Future Bank’s transactions with specific clients, which according to the report constituted violations of various applicable regulations. These included granting credit facilities with no apparent commercial purposes, failing to report timely STRs, processing large volumes of cash transactions without obtaining the customer due diligence documentation, approving loans that supported the financing of terrorist organizations, providing credit facilities to at least 8 Iranian sanctioned entities, and allowing its exposure to BMI and BSI to exceed the limits set by the CBB.<sup>233</sup>
310. With respect to a number of alleged violations, the 2015 CBB Report was inconclusive and indicated that further investigation was required.

### 3. The Liquidation of Future Bank

311. On December 22, 2016, the CBB resolved to liquidate Future Bank and published its decision in the Official Gazette.<sup>234</sup>
312. According to the Respondent, it was on the basis of the 2015 CBB Report that the CBB determined that the extent of Future Bank’s wrongdoings made it necessary to proceed to liquidation.<sup>235</sup> Conversely, the Claimants contend that the Respondent had resolved

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<sup>230</sup> 2015 CBB Report (R-142), p. 29.

<sup>231</sup> 2015 CBB Report (R-142), p. 30.

<sup>232</sup> 2015 CBB Report (R-142), p. 31.

<sup>233</sup> 2015 CBB Report (R-142), pp. 1, 30-31.

<sup>234</sup> Central Bank of Bahrain, Notice of Petition for Compulsory Liquidation, Official Gazette of Bahrain No. 3293, December 22, 2016 (hereinafter “**Notice for Liquidation**”) (R-66).

<sup>235</sup> Rejoinder, ¶¶ 208, 213, 215.

to liquidate Future Bank from the outset of the administration, and point to their minutes of the meeting of May 3, 2015 at which the CBB's representatives are recorded saying that the bank had to be liquidated.<sup>236</sup>

313. Following the CBB's decision of December 22, 2016, the liquidation process has progressed without the participation of the Claimants. The Respondent asserts that the Claimants are entitled to the proceeds of the liquidation once the process is complete.<sup>237</sup> As the record stands at the time of the issue of this Award, the liquidation is still ongoing and the Claimants still maintain their nominal shareholding in Future Bank.

#### 4. The 2018 CBB Report

314. In August 2017, following the commencement of this Arbitration, the CBB ordered a comprehensive investigation into Future Bank's activities in the period from July 1, 2004 to April 30, 2015. What ensued from the investigation was a report, dated February 16, 2018 (the "**2018 CBB Report**"), which concluded that Future Bank had misrepresented its use of an alternative messaging system to the CBB, wire stripped transactions with a total value of over USD 4.5 billion, engaged in systematic violations of the AML/CFT Law, the CBB Law, the Financial Crimes Module of the CBB Rulebook, as well as the CBB Directives implementing the UNSC and OFAC sanctions.<sup>238</sup>
315. While the Respondent has filed the report as a factual exhibit, the Claimants dispute its probative value. They refer to the 2018 CBB Report "as some sort of *sui generis* evidence" and point to the fact that it is a document produced in the course of this Arbitration in support of the Respondent's allegations.<sup>239</sup>
316. Given that the findings of the 2018 CBB Report are not established facts, but are instead at the centre of the Parties' dispute, the Tribunal will provide a more detailed summary of the report's findings as part of the Parties' positions and the analysis in the relevant subsequent parts of the Award.

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<sup>236</sup> Meeting Report, May 3, 2015 (C-60), p. 1.

<sup>237</sup> SoD, ¶ 132.

<sup>238</sup> 2018 CBB Report (R-172).

<sup>239</sup> Reply, ¶ 592.

#### IV. REQUESTS FOR RELIEF

##### A. THE CLAIMANTS' REQUEST FOR RELIEF

317. In their Statement of Claim, the Claimants request the Tribunal to:

- a. Declare that the Tribunal has jurisdiction over this dispute; and
- b. Declare that Respondent has breached its obligations under the BIT and/or international law, and in particular its obligations under Article 4, 5, and 6 of the BIT; and

Order Respondent to:

- a. Reinstate Bank Melli Iran and Bank Saderat Iran in all of their rights as shareholders of Future Bank, and Future Bank in all of its rights and licenses prior to the taking; and
- b. Pay Bank Melli Iran and Bank Saderat Iran compensation for the material damages incurred in the meantime, namely the difference between the fair market value of Claimants' investment at the Expropriation Date, expressed at its value at the date of restitution, and the fair market value of Claimants' investment at the hypothetical date of restitution, to be quantified in due course [...], as well as those additional damages that Claimants will inevitably incur for some time once they are restored in their rights because of Respondent's acts and omissions.

Alternatively, order Respondent to pay Bank Melli Iran and Bank Saderat Iran full compensation for the damages they suffered as a result of Respondent's breaches, including:

- a. EUR 280.3 million as compensation for the fair market value of Claimants' investment, as quantified by Fair Links [...], or alternatively any other amount which the Tribunal deems appropriate; and
- b. EUR 92.2 million as compensation for the loss of business opportunities incurred by Claimants, as quantified by Fair Links, or alternatively any other amount which the Tribunal deems appropriate; and

In any event:

- a. Order Respondent to compensate Bank Melli Iran and Bank Saderat Iran for the moral and/or reputational damages they have incurred in the amount of EUR 10 million; and
- b. Order Respondent to pay the costs of this arbitration, including all expenses incurred by Bank Melli Iran and Bank Saderat Iran, including all of the fees and expenses of the arbitrators, legal counsel, experts and consultants, as well as Bank Melli Iran and Bank Saderat Iran's internal costs associated with the management of these arbitral proceedings; and
- c. Order Respondent to pay post-award interest on any amounts awarded to Claimants at a Libor + 2% rate, compounded semi-annually, as of

the date these amounts are determined to have been due to Bank Melli Iran and Bank Saderat Iran, until the date of payment; and

- d. Order any other relief that the Tribunal deems appropriate.<sup>240</sup>

318. In their Reply, the Claimants request that the Tribunal:

- a. Declare that the Tribunal has jurisdiction over this dispute; and
- b. Declare that Respondent has breached its obligations under the BIT and/or international law, and in particular its obligations under Article 4, 5, and 6 of the BIT; and

Order Respondent to:

- a. Reinstate Bank Melli Iran and Bank Saderat Iran in all of their rights as shareholders of Future Bank, and Future Bank in all of its rights and licenses prior to the taking; and
- b. Pay Bank Melli Iran and Bank Saderat Iran compensation for the material damages incurred in the meantime, namely the difference between the fair market value of Claimants' investment at the Expropriation Date, expressed at its value at the date of restitution, and the fair market value of Claimants' investment at the hypothetical date of restitution, as well as those additional damages that Claimants will inevitably incur for some time once they are restored in their rights because of Respondent's acts and omissions; or

Alternatively, order Respondent to pay Bank Melli Iran and Bank Saderat Iran full compensation for the damages they suffered as a result of Respondent's breaches, including:

- a. EUR 300.9 million as compensation for the fair market value of Claimants' investment, as quantified by Fair Links [...], or alternatively any other amount which the Tribunal deems appropriate; and
- b. EUR 133.4 million as compensation for the loss of business opportunities incurred by Claimants, as quantified by Fair Links, or alternatively any other amount which the Tribunal deems appropriate; and

In any event:

- a. Order Respondent to compensate Bank Melli Iran and Bank Saderat Iran for the moral and/or reputational damages they have incurred in the amount of EUR 10 million; and
- b. Order Respondent to pay the costs of this arbitration, including all expenses incurred by Bank Melli Iran and Bank Saderat Iran, including all of the fees and expenses of the arbitrators, legal counsel, experts and consultants, as well as Bank Melli Iran and Bank Saderat Iran's internal costs associated with the management of these arbitral proceedings; and
- c. Order Respondent to pay post-award interest on any amounts awarded to Claimants at a Libor + 2% rate, compounded semi-annually, as of

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<sup>240</sup> SoC, ¶ 297.

the date these amounts are determined to have been due to Bank Melli Iran and Bank Saderat Iran, until the date of payment; and

d. Order any other relief that the Tribunal deems appropriate.<sup>241</sup>

319. At the Hearing, the Claimants amended their request for relief, withdrawing their request for restitution and claiming monetary damages only. The Claimants also requested, as a minimum, pre-Award interest at Libor + 2%.<sup>242</sup>

320. In a letter of July 28, 2020, the Claimants requested that “any monetary relief awarded by the Tribunal be accompanied by language expressly setting out that such monetary relief shall not be capable of set off against any other amounts allegedly owed by Future Bank, Claimants, or their respective representatives, in the context of other actions initiated by Bahrain”.

321. At the Re-hearing, in response to a question from the Tribunal, the Claimants clarified their request for relief as follows: “Bank Melli and Bank Saderat each are entitled to equal share of any monetary award, because they have the same shareholding in Future Bank.”<sup>243</sup>

322. These requests remained unchanged.

#### **B. THE RESPONDENT’S REQUEST FOR RELIEF**

323. The Respondent has not indicated its request for relief in a specific manner in its written submissions. However, throughout its submissions it has requested the Tribunal do dismiss the claims for lack of jurisdiction, as inadmissible or, in any event, as unsubstantiated on the merits. At the Re-Hearing, the Tribunal asked the Respondent to confirm that its request for relief is as follows:

PRESIDING ARBITRATOR: Then I have a question about Request for Relief for the Respondent. I have not found in the record, and if I have not looked well you will point me to it, an actual Request for Relief, and I understand from your submissions that you ask for a decision that there is no jurisdiction, and you will confirm this? As a result of the illegality in making the investment. You also ask for dismissal on the merits. I think that is it. And

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<sup>241</sup> Reply, ¶ 284.

<sup>242</sup> Hearing Transcript, Day 1, p. 100:23-24 (Dr. Gharavi).

<sup>243</sup> Re-Hearing Transcript, Day 2, p. 236:9-12 (Dr. Gharavi).

of course both parties also have claims in respect of costs which are specified in your submission on costs.

...

Can you confirm that the way I phrased your Request for Relief is correct? It goes to jurisdiction first and then a dismissal on the merits.<sup>244</sup>

324. In response, the Respondent clarified the content of its request for relief as follows:

PROFESSOR PAULSSON: Yes. We have observed that tribunals sometimes have different ways of approaching the distinction between admissibility and jurisdiction, and so in that respect the factual predicates of either relief as a matter of jurisdiction or admissibility might be the same, but it is a matter of indifference to us whether the dismissal is on either one of those, but we are not dropping one for the other.<sup>245</sup>

## V. PRELIMINARY OBJECTIONS

325. The Parties disagree on whether the claims are admissible. In particular, they dispute whether Future Bank's alleged illegal activities render the claims inadmissible under the doctrines of clean hands and international public policy ((A) below), and whether the Claimants had to exhaust local remedies before submitting their claims to international arbitration ((B) below).

326. The Tribunal will address each of these positions in turn. Before doing so, it notes that the Respondent has not raised any other objections to the Tribunal's jurisdiction or to the admissibility of the claims.

### A. ALLEGED ILLEGAL ACTIVITIES OF FUTURE BANK

327. The Parties dispute whether Future Bank engaged in systematic illegal activities, such as sanctions violations and money laundering, and whether such activities constitute a bar to the Tribunal's jurisdiction and/or render the claims inadmissible. Before setting out its analysis on this objection, the Tribunal will summarize the Parties' positions.

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<sup>244</sup> Re-Hearing Transcript, Day 2, pp. 235:8-237:22 (Prof. Gabrielle Kaufmann-Kohler).

<sup>245</sup> Re-Hearing Transcript, Day 2, pp. 237:23:-238:6 (Prof. Paulsson).



## 1. The Respondent's Position

328. The Respondent argues that the claims are “inadmissible by reason of the Claimants’ unclean hands or, alternatively, their violation of international public order.”<sup>246</sup>
329. According to the Respondent, the clean hands doctrine is a “fundamental principle of international law and a prerequisite for legal claims”, and is widely recognized in both the common and the civil law tradition.<sup>247</sup> Among the awards having applied the unclean hands doctrine,<sup>248</sup> Bahrain considers *Al Warraq v. Indonesia* as a particularly instructive example. That decision, the Respondent explains, held that an investor relinquishes the protection of an investment treaty where its conduct is “prejudicial to the public interest”, irrespective of any hypothetical treaty breach by the host State.<sup>249</sup>
330. The Respondent rejects the Claimants’ attempt to distinguish *Al Warraq v. Indonesia* on the basis of a specific provision found in the applicable treaty, arguing that the “reasoning makes clear that the tribunal’s reliance on the general principle of unclean hands [...] was a distinct basis on which it dismissed the investor’s claim as inadmissible”.<sup>250</sup> Thus, the principle governs irrespective of whether it is “expressly embodied in the text of the applicable treaty”.<sup>251</sup> Nothing suggests here that the Contracting Parties intended to exclude the application of general principles of law, such as the clean hands doctrine.<sup>252</sup>
331. Moreover, in connection with situations such as the present one and the one found in *Al Warraq v. Indonesia*, where the investor’s wrongdoings post-date the making of the investment, the Respondent refers to the Paris Court of Appeal annulment of the award in *Belokon v. Kyrgyz Republic* on grounds of international public policy. In that case, the

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<sup>246</sup> SoD, ¶ 117.

<sup>247</sup> SoD, ¶ 118, referring to Report of the International Law Commission, 57<sup>th</sup> Session (2 May-3 June and 11 July-5 August 2005), UN Doc. A/60/10, 2005 (RL-92).

<sup>248</sup> SoD, ¶ 119, referring to *World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, October 4, 2006 (hereinafter “*World Duty Free v. Kenya*”) (RL-70).

<sup>249</sup> SoD, ¶ 122, referring to *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, December 15, 2014 (hereinafter “*Al Warraq v. Indonesia*”) (CL-17), ¶ 645.

<sup>250</sup> Rejoinder, ¶ 146.

<sup>251</sup> Rejoinder, ¶¶ 143-144.

<sup>252</sup> Rejoinder, ¶ 143.

investor had engaged in money laundering operations throughout the life of the investment.<sup>253</sup>

332. The Respondent further submits that the present case is distinguishable from all the authorities on which the Claimants rely on the basis of the nature and scale of the investors' wrongdoing.<sup>254</sup> For the Respondent, the clean hands doctrine "should be triggered [...] in cases where: (a) an investor engages in serious and/or repeated wrongdoing by, inter alia, making false statements to a State authority; (b) that wrongdoing is closely connected with the claim [...]; and (c) dismissing the claims in all the circumstances [is] appropriate, considering such key factors as the gravity and extent of the wrongdoing, and the absence of the State's appropriation of the investor's property for its own benefit".<sup>255</sup>
333. According to the Respondent, the facts set forth in the 2018 CBB Report satisfy these conditions in the light of the repeated "false statements to the CBB" and the facilitation of "serious criminal conduct".<sup>256</sup> To establish the wrongdoing, the Respondent urges the Tribunal to "consider whether the Claimants' hands were clean *throughout the duration of the investment*, not merely when the investment is made".<sup>257</sup> More specifically, the inadmissibility need not be premised on illegality at the time of making the investment.<sup>258</sup> In the Respondent's submission, the principle of unclean hands is not "subject to any arbitrary division between hands that are unclean at the time an investment is made and hands that are unclean by virtue of conduct after the investment is made".<sup>259</sup> Otherwise,

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<sup>253</sup> Rejoinder, ¶ 158, referring to *Kyrgyz Republic v. Belokon*, Paris Court of Appeal Decision 15/01650, February 21, 2017 (hereinafter "*Kyrgyz Republic v. Belokon*") (RL-162).

<sup>254</sup> Rejoinder, ¶¶ 160-163.

<sup>255</sup> Rejoinder, ¶¶ 164-165, referring to *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004 (RL-144), ¶¶ 83-86.

<sup>256</sup> Rejoinder, ¶ 166.

<sup>257</sup> SoD, ¶ 123, referring to *Al Warraq v. Indonesia* (CL-17), ¶¶ 646-647.

<sup>258</sup> Report of the International Law Commission, 57th Session (2 May-3 June and 11 July-5 August 2005), U.N. Doc. A/60/10, ¶ 236 (concluding remarks of the Special Rapporteur on Diplomatic Protection) (RL-92), ¶ 236.

<sup>259</sup> Rejoinder, ¶ 171.

foreign investors would be free to commit all kinds of wrongs as long as they complied with the host State's laws at the time of the investment.<sup>260</sup>

334. In any event, the Respondent alleges that the Claimants' conduct at the time of making the investment also falls under the unclean hands doctrine. It points to alleged misrepresentations at the time of the investment according to which they would operate Future Bank in accordance with Bahraini law, while directing Future Bank's staff to continue Bank Saderat Bahrain's illegal practice of wire stripping.<sup>261</sup> The Respondent relies on *Inceysa Vallisoletana, v. El Salvador* and *Plama v. Bulgaria* to support the argument that misrepresentations at the time of making an investment preclude a tribunal's jurisdiction.<sup>262</sup>
335. The Respondent thus contends that to entertain a claim in circumstances where the Claimants' conduct breaches the clean hands doctrine, at the time of the investment or thereafter, would be in violation of the integrity of the arbitral process.<sup>263</sup>
336. In addition, the Respondent argues that the "Claimant's violations and outright contempt of the international order [...] require dismissal of this case."<sup>264</sup> Relying on *World Duty Free v. Kenya*, it submits that the claims are precluded in the light of the Claimants' "illicit activities [which] implicate public international law and the clearest form of international public policy – UN Security Council Resolutions", including international sanctions intended to "combat [...] terrorism, money laundering, and proliferation of weapons of mass destruction", forming an "international consensus against [the Claimants'] unlawful behavior."<sup>265</sup>

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<sup>260</sup> SoD, ¶¶ 123-124, referring to *Al Warraq v. Indonesia* (CL-17), ¶ 645.

<sup>261</sup> Rejoinder, ¶¶ 150-151.

<sup>262</sup> Rejoinder, ¶ 149, referring to *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006 (hereinafter "*Inceysa Vallisoletana v. El Salvador*") (RL-69), ¶ 44 and *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No ARB/03/24, Award, August 27, 2008 (hereinafter "*Plama v. Bulgaria*") (RL-9), ¶ 143.

<sup>263</sup> Rejoinder, ¶ 155.

<sup>264</sup> SoD, ¶ 126.

<sup>265</sup> SoD, ¶¶ 127-129, referring to *World Duty Free v. Kenya* (RL-70).

337. The Respondent also emphasizes that, pursuant to the UN Charter, a State's obligations under UNSC resolutions prevail over its other international obligations.<sup>266</sup> Hence, non-compliance cannot be disregarded based on the expectation that the sanctions would be lifted in April 2015.<sup>267</sup>
338. Similarly, the Paris Court of Appeal, in setting aside the award in *Belokon v. Kyrgyz Republic*, held that "declining to set aside the award would mean that the investor would benefit from its unlawful acts, which would be contrary to international public policy".<sup>268</sup>
339. Apart from acts contrary to UNSC resolutions, for the Respondent, the Claimants' behaviour also threatened "the health of the international financial system", which qualifies also as a violation of international public policy.<sup>269</sup> Indeed, investment tribunals have found fraudulent misrepresentation to constitute an affront to international public policy,<sup>270</sup> and the same is true of money laundering.<sup>271</sup>
340. For the Respondent, such breaches of international public policy must be considered as a matter of admissibility in circumstances where "so much of the conduct was concealed from the regulator at the time that the regulatory acts in question took place and where the dismissal of the case would be a proportionate response in the light of the seriousness of the Claimants' wrongdoing".<sup>272</sup>
341. On this basis, the Respondent requests the Tribunal to rule the claims inadmissible "not least because entertaining such claims would encourage the Claimants to pursue similar

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<sup>266</sup> SoD, ¶ 128.

<sup>267</sup> SoD, ¶ 130.

<sup>268</sup> Rejoinder, ¶ 174, referring to *Kyrgyz Republic v. Belokon* (RL-162).

<sup>269</sup> Rejoinder, ¶ 164.

<sup>270</sup> Rejoinder, ¶ 164, referring to *Inceysa Vallisoletana v. El Salvador* (RL-69) and *Plama v. Bulgaria* (RL-9).

<sup>271</sup> Rejoinder, ¶ 164, referring to *Kyrgyz Republic v. Belokon* (RL-162).

<sup>272</sup> Rejoinder, ¶ 179.

enterprise elsewhere”,<sup>273</sup> but also because the Tribunal has a duty to preserve the values of the international legal system.<sup>274</sup>

## 2. The Claimants’ Position

342. The Claimants argue that no precedent exists in investor-State arbitration for the Respondent’s submissions in respect of alleged illegalities. They also claim that the Respondent misrepresents *Al Warraq v. Indonesia* and erroneously invokes that decision.<sup>275</sup> The tribunal in *Al Warraq v. Indonesia* was asked to interpret a *sui generis* treaty provision pursuant to which

[t]he 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.<sup>276</sup>

343. For the Claimants, it was on the basis of that provision that the *Al Warraq v. Indonesia* tribunal held that the investor forfeited treaty protection. While the tribunal found that the claimant’s conduct in breach of this provision also fell within the wider principle of “unclean hands”, the claims were not deemed inadmissible on the “basis of a self-standing ‘clean hands’ doctrine”.<sup>277</sup> The tribunal’s determination was only “rendered possible, or rather necessary” through the specific treaty provision.<sup>278</sup> Since the BIT in the present case contains no similar provision, reliance on *Al Warraq v. Indonesia* is inapposite.<sup>279</sup>

344. Further, it is to the Claimants’ submission that the other cases which the Respondent invokes refer to “unclean hands” when making the investment. They do not address unclean hands “during the life of the investment”.<sup>280</sup> Moreover, those tribunals’

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<sup>273</sup> SoD, ¶ 129.

<sup>274</sup> SoD, ¶ 129.

<sup>275</sup> Reply, ¶¶ 706-709.

<sup>276</sup> Reply, ¶ 710, referring to *Al Warraq v. Indonesia* (CL-17), ¶ 631.

<sup>277</sup> Reply, ¶ 712.

<sup>278</sup> Reply, ¶ 713.

<sup>279</sup> Reply, ¶¶ 714-715.

<sup>280</sup> Reply, ¶ 716.

reasoning centres on express or implied treaty requirements that investments be made in compliance with applicable laws.<sup>281</sup> These cases, so the Claimants, are in contrast to the present one where the investment was made in compliance with Bahraini law.<sup>282</sup>

345. More generally, the Claimants argue that “investment treaties [...] provide for specific, self-contained, and negotiated frameworks of treatment, which were expressly consented to by the contracting States, and relied upon by investors” and are *lex specialis* to general international law. Therefore, an investment made in accordance with the terms of a BIT should be governed by that BIT and “any allegations of illegality with respect to an investment, absent any express term to the contrary, ought to be decided only in the context of the substantive, procedural and other safeguards provided therein”.<sup>283</sup>
346. For the Claimants, this position has been adopted by a number of investment tribunals. For example, *Oxus Gold v. Uzbekistan* dismissed the admissibility objection grounded on the investor’s illegal activity during the life of the investment, considering it as a “question which relates to the merits of the case and not to the issues of jurisdiction or admissibility.”<sup>284</sup> The Claimants also draw the Tribunal’s attention to *Khan Resources v. Mongolia*, which held that “there is no compelling reason to altogether deny the right to invoke the [Energy Charter Treaty] to any investor who has breached the law of the host state in the course of its investment”, and that “[i]t would undermine the purpose and object of the Treaty to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits”.<sup>285</sup>

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<sup>281</sup> Reply, ¶ 717.

<sup>282</sup> Reply, ¶ 722.

<sup>283</sup> Reply, ¶¶ 718-9.

<sup>284</sup> *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, December 17, 2015 (hereinafter “*Oxus Gold v. Uzbekistan*”) (CL-165), ¶ 712.

<sup>285</sup> *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Decision on Jurisdiction, July 25, 2012 (hereinafter “*Khan Resources v. Mongolia Decision on Jurisdiction*”) (CL-166), ¶ 384.

347. According to the Claimants, even if an unclean hands doctrine existed under international law and were to be applied to the present case, the Respondent would still have failed to prove any illegality during the life of the Claimants' investment.<sup>286</sup>
348. The Claimants further submit that the Respondent's objection to admissibility on grounds of international public policy should be dismissed because it finds no support in investment jurisprudence. No arbitral decision has held a claim inadmissible due to violations of international public policy during the life of the investment. The only case relied upon by the Respondent in this regard is *World Duty Free v. Kenya*, which concerned an investment that had "originally been procured by corruption".<sup>287</sup>
349. Moreover, as confirmed by several investment treaty decisions, any alleged violations of international public policy are a matter of substance and therefore, while potentially relevant for the merits, not a "procedural test for admissibility".<sup>288</sup>
350. Finally, the Claimants contend these allegations of illegality were advanced many years after the CBB Decision and must thus be viewed with caution. The Claimants refer to *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* in which the tribunal found that "while the lapse in time provides, by itself, no complete answer to the Respondent's allegations under international law, it raises doubts as to why such allegations were not raised and investigated by the Respondent's criminal authorities long before".<sup>289</sup>

### 3. Analysis

351. The Parties disagree on whether the Tribunal has jurisdiction and whether the claims are admissible. The Respondent argues that the Claimants' violations of Bahraini law and international sanctions against Iran result in the lack of jurisdiction of the Tribunal and/or render the claims inadmissible on grounds of the clean hands doctrine and of international public policy. Specifically, the Respondent submits that Future Bank engaged in

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<sup>286</sup> Reply, ¶ 731.

<sup>287</sup> Reply, ¶¶ 735-737, referring to *World Duty Free v. Kenya* (RL-70).

<sup>288</sup> Reply, ¶¶ 740-742 referring to *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [I]*, ICSID Case No. ARB/03/25, Award and Dissenting Opinion of Mr. Bernardo M. Cremades, August 16, 2007 (hereinafter "*Fraport v. Philippines, Award and Dissenting Opinion of Mr. Bernardo M. Cremades*") (RL-72), ¶¶ 37-38.

<sup>289</sup> Hearing Transcript, Day 1, p. 1077:15-20 (Dr. Gharavi).

systematic illegal activities, including sanctions violations, non-compliance with rules against money laundering and financing of terrorism, and other breaches of Bahraini laws.

352. The Tribunal will thus first examine whether the alleged illegal activities of Future Bank constitute a bar to its jurisdiction or to the admissibility of the claims.

**(a) Can the Alleged Illegalities Constitute a Jurisdictional Bar?**

353. The Parties put forward conflicting views on whether the Respondent's objection concerning the illegal activities of Future Bank relates to the Tribunal's jurisdiction. While the Respondent primarily argues that the defence is one of admissibility, it has signaled that it may also be characterized as jurisdictional.<sup>290</sup> For the Claimants, by contrast, Future Bank's alleged illegal activities can only relate to the merits of the claims.<sup>291</sup>

354. The Claimants invoke the arbitration clause contained in Article 11 of the BIT as the basis of the Tribunal's jurisdiction. The clause provides for broad jurisdiction to resolve "any dispute aris[ing] between the host Contracting Party and investor(s) of the other Contracting Party with respect to an investment".<sup>292</sup> In turn, Article 1(1) of the BIT defines the term "investment" as "every kind of asset, *invested* by the investors of one Contracting Party in the territory of the other Contracting Party *in accordance with the laws and regulations* of the other Contracting Party [...]".<sup>293</sup>

355. Therefore, for the present dispute to come within the Tribunal's jurisdiction, it must have arisen out of assets "invested [...] in accordance with the laws and regulations" of Bahrain. The ordinary meaning of this formulation leaves no doubt that it requires that investments be "*invested*", or in other words *made* in accordance with local law. It does not address the consequences of any illegal activities in which the investor may engage after making the investment.

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<sup>290</sup> Re-Hearing Transcript, Day 2, pp. 237:19-238:8 (Prof. Paulsson).

<sup>291</sup> Reply, ¶¶ 731-37.

<sup>292</sup> BIT, Article 11 (CL-1).

<sup>293</sup> BIT, Article 1(1) (emphasis added).



356. This is not to suggest that the BIT constitutes an insurance policy for an investor who engages in unlawful activities. However, unlike the illegality that affects the making of the investment, which places the investment – and thus any related disputes – outside the scope of the treaty and the treaty tribunal’s jurisdiction, subsequent illegal activities and their consequences are for the treaty tribunal to rule upon. In other words, once the investment is lawfully made (and subject to other jurisdictional requirements not at issue here), the Contracting States have consented to give the treaty tribunal the competence to adjudicate the disputes arising out of such investment, including disputes about alleged subsequent illegal activities and their consequences.
357. This explains why investment tribunals have consistently interpreted provisions similar to Article 1(1) of the BIT to be temporally limited to the making of the investment.<sup>294</sup> To quote one of many examples, the tribunal in *Kim v. Uzbekistan* reasoned that the clause requiring investments to be “made” lawfully was limited in time:

The Tribunal finds that the legality requirement has a temporal dimension. The word ‘made’, both in terms of its ordinary meaning and its use in the past tense, indicates that the test applies at the time the investment is established. It is not a requirement subsequent to the making of the investment. Indeed, if this were not so, the second use of the word ‘made’ in Article 12 of the BIT would make no sense [...].<sup>295</sup>

358. The temporal limitation of the legality clause is not an arbitrary requirement, but one based on the text of the treaty. Nor is it a declaration that subsequent illegal activities are acceptable. Rather, the limitation circumscribes the scope of the tribunal’s jurisdiction, by defining which illegal conduct is within the tribunal’s competence and which is not.
359. In the present case, the Respondent’s allegations of illegal conduct do not pertain to the Claimants’ making of their investment in Bahrain. As further detailed in the following subsection, while there is evidence of certain wrongdoings by Future Bank, the record

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<sup>294</sup> *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018 (hereinafter “*Gavrilovic and Gavrilovic v. Croatia*”), ¶ 303; *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, March 8, 2017 (hereinafter “*Vladislav Kim v. Uzbekistan*”), ¶¶ 374-377; *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 Jurisdiction, September 27, 2012, hereinafter “*Quiborax v. Bolivia*”), ¶ 266; *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, January 16, 2013, ¶ 167; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, December 19, 2012 (hereinafter “*Urbaser v. Argentina*”), ¶ 260.

<sup>295</sup> *Vladislav Kim v. Uzbekistan*, ¶ 374.

contains insufficient evidence to demonstrate that the Claimants have initially made their investment unlawfully or for the overarching purpose of engaging in illegal activities, such as money laundering or evasion of sanctions. This distinguishes the present dispute from *Belokon v. Kyrgyz Republic* on which the Respondent relies. In that case, the Paris Court of Appeal annulled the arbitral award because the investment was *made* through an illegal collusion with representatives of local authorities and with the goal of engaging in recurrent money laundering. More precisely, the court found:

serious, precise, and concurring evidence that Insan Bank was taken over by Mr. Belokon in order to develop, in a State [the Kyrgyz Republic] in which his privileged relations with the holder of economic power would guarantee him a lack of any actual oversight over his activities, money laundering schemes that had not been able to flourish in Latvia's less favorable environment.<sup>296</sup>

360. In the present case, the evidence of the alleged unlawful conduct proffered by the Respondent pertains to activities post-dating the establishment of Future Bank by the Claimants. The record does not show that the Claimants set up the bank as part of an illicit scheme or with the primary purpose of engaging in unlawful activities.
361. Therefore, Future Bank's alleged illegal activities do not call into question the legality of the Claimants' actions when establishing the investment pursuant to Article 1(1) of the BIT. As a result, this objection does not pertain to the Tribunal's jurisdiction. Put differently, it is within the Tribunal's competence to resolve the present dispute, including the issues of Future Bank's alleged illegal activities and their consequences.

**(b) Can the Alleged Illegalities Constitute an Admissibility Bar?**

362. The Parties dispute whether the alleged unlawful conduct of Future Bank may constitute a bar to the admissibility of the claims raised in this arbitration under doctrines or principles, such as international public policy and unclean hands.
363. The Claimants argue that an investor's claims are not inadmissible "by reason of the fact that the investor's conduct *during the life of the investment* had breached any so-called international public policy."<sup>297</sup> According to them, if the unlawful conduct does not relate

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<sup>296</sup> *Kyrgyz Republic v. Belokon (RL-162)*, p. 15.

<sup>297</sup> Reply, ¶ 735 (emphasis in original).

to the acquisition or procurement of the investment, it does not constitute an admissibility obstacle to the investor's claims. In contrast, the Respondent calls this temporal limitation artificial and arbitrary and argues that the general principles of good faith and unclean hands as well as the doctrine of international public policy compel an international tribunal not to entertain claims tainted by serious wrongdoing of the investor, irrespective of the timing of such wrongdoing.<sup>298</sup>

364. As explained in the previous subsection, unlike the illegality that taints the establishment or acquisition of the investment, which places the investment and any resulting disputes outside the scope of the treaty and the treaty tribunal's jurisdiction, subsequent illegal activities do not affect the Parties' consent to arbitration.

365. That being so, the rationale for the temporal restriction of the jurisdictional legality defence, which is not to grant treaty protection to an investment made illegally, does not apply to an admissibility defence under the doctrines of international public policy and unclean hands. The reason why serious violations such as a breach of international public policy may bar the admissibility of claims is that international adjudicatory bodies have a duty not to entertain claims tainted by violations of certain universally accepted norms pursuant to general principles of good faith and *nemo auditur propiam turpitudinem allegans*.<sup>299</sup>

366. For instance, faced with evidence of bribery, the tribunal in *World Duty Free v. Kenya* declared the claims inadmissible on the ground that the claimant was "not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa*

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<sup>298</sup> Rejoinder, ¶¶ 172 et seq.

<sup>299</sup> *Fraport v. Philippines, Award and Dissenting Opinion of Mr. Bernardo M. Cremades (RL-72)*, ¶ 40(2) ("In cases of gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for example, the principles of good faith and public policy may bar a claim".); *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Award, December 6, 2016 (hereinafter "*Churchill Mining v. Indonesia*"), ¶¶ 507-508 ("[...]. The question is thus whether, on the ground of the legal principles just set forth, the claims can still deserve protection or whether they must be dismissed. The Tribunal views this question as a matter of admissibility. Indeed, if it dismisses the claims, it will do so on the ground of a threshold bar, without entering into an analysis of the alleged treaty violations. The Tribunal agrees with the Respondent that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy").

*non oritur action.*”<sup>300</sup> It is true that this case related to an investment that had been acquired using corrupt practices. However, its reasoning as to why violations of fundamental norms render the investor’s claims inadmissible is relevant to post-acquisition violations as well.

367. While in investment arbitration, international public policy has primarily been invoked in the context of illegalities affecting the making of the investment,<sup>301</sup> the underlying rationale also applies to subsequent illegalities, if they are severe and taint the claims in arbitration. According to Douglas, an investor whose claims are tainted by a breach of international public policy must not be “assisted in any way by the arbitral process”:

The justification for treating a violation of international public policy as a ground of inadmissibility is as follows. The concept of international public policy vests a tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute and regardless of whether it is specifically raised by one of the parties. That condemnation must entail that a party that has engaged in a violation of international public policy is not assisted in any way by the arbitral process in the vindication of any rights that are asserted by that party under any law.<sup>302</sup>

368. While this quotation is excerpted from a section discussing illegalities at the inception of an investment, the rationale that Douglas sets out applies with equal force to illegalities in the course of the life of the investment. Indeed, if the rationale for the inadmissibility of claims tainted by serious illegalities is the international tribunal’s “responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute”, and the idea that the party having engaged in such illegalities must “not be assisted in any way by the arbitral process”, there is no reason why the inadmissibility should be limited to illegalities at the time of the making of the investment.
369. In one form or another, scholars and adjudicators have recognized that adjudicatory bodies must not aid a party that engages in unlawful conduct, if the claims are affected

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<sup>300</sup> *World Duty Free v. Kenya* (RL-70), ¶¶ 178-179.

<sup>301</sup> *Plama v. Bulgaria* (RL-9), ¶¶ 139-143; *World Duty Free v. Kenya* (RL-70), ¶¶ 178-179; *Inceysa Vallisoletana v. El Salvador* (RL-69), ¶ 240.

<sup>302</sup> Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, ICSID Review, 29(1) (2014) p. 180.

by severe wrongdoings.<sup>303</sup> Based on the analysis of the decisions of international courts and tribunals, Kreindler concludes that the rules that “[n]o one should be allowed to reap advantages from his own wrong” and that “an unlawful act cannot serve as the basis of an action in law” are manifestations of the general principle of good faith.<sup>304</sup>

370. There is no justification for the proposition that the unlawful conduct must necessarily relate to the acquisition of the investment for purposes of the admissibility of claims as opposed to the jurisdictional requirement of legality of the investment. It is true that, for the purposes of the jurisdictional legality requirement, the violation must taint the making of the *investment* and that, when it comes to admissibility, what matters is whether the unlawful conduct taints the *claims*. While the two instances often overlap in practice, they are conceptually distinct.
371. Pursuant to the rule of systemic integration embodied in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), the Tribunal must interpret the BIT taking into account “[a]ny relevant rules of international law applicable in the relations between the parties”,<sup>305</sup> which includes general principles of law,<sup>306</sup> such as the principle of good faith and those principles underlying international public policy.

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<sup>303</sup> Holman et al. v. Johnson (1775) (**RL-75**) 1 Cowp. 342, 343 (“No Court will lend its aid to a man who founds his cause of action upon an immoral or an 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”); Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, in: Between East and West: Essays in Honour of Ulf Franke (Kaj Hober, Annette Magnusson & Marie Öhrström eds., JurisNet 2010) (**RL-153**), p. 317; Bin Cheng, *General Principles Of Law As Applied By International Courts And Tribunals* (Stevens & Sons 1953) (**RL-82**), p. 157; Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 *Recueil Des Cours* 1, 119 (1957) (citations omitted) (noting as applicable in international law the principle that “[h]e who comes to equity for relief must come with clean hands”); Stephen M. Schwebel, *Clean Hands, Principle*, *Max Planck Encyclopedia of Public International Law* (March 2013) (**RL-106**); Karl-Heinz Böckstiegel, *Applicable Law in Disputes Concerning Economic Sanctions: A Procedural Framework for Arbitral Tribunals*, 30(4) *Arbitration International* (2014) (**RL-108**), p. 609.

<sup>304</sup> Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, in: Between East and West: Essays in Honour of Ulf Franke (Kaj Hober, Annette Magnusson & Marie Öhrström eds., JurisNet 2010) (**RL-153**), p. 317.

<sup>305</sup> Vienna Convention on the Law of Treaties (with annex), 1155 UNTS 331, May 23, 1969 (**CL-143**).

<sup>306</sup> Article 38(1) of the Statute of the International Court of Justice lists general principles as one of the primary sources of international law.

372. In this respect, the Tribunal cannot accept the Claimants' argument that investment treaties provide for a "self-contained" regime and that "any allegations of illegality with respect to an investment ought to be decided only in the context of the substantive, procedural, and other safeguards provided therein."<sup>307</sup> The authorities that the Claimants cite in this respect confirm the uncontroversial proposition that investment tribunals have resolved jurisdictional legality objections based on the legality provisions of the applicable treaties.<sup>308</sup> They do not state or imply that general principles of law are irrelevant to the admissibility of claims in investment treaty arbitrations.
373. Thus, the Tribunal's mandate under the Bahrain-Iran BIT does not exist in isolation, but in the framework of general international law. The rule of systemic interpretation dictates that the Tribunal take into account general principles that govern the exercise of its jurisdiction under that treaty, one of such principles being that claims tainted by serious wrongdoings are not admissible.
374. It was on the basis of such principle that the tribunal in *Al Warraq v. Indonesia* held that the claimant's unlawful conduct rendered the claims inadmissible.<sup>309</sup> Although the applicable treaty contained a specific provision requiring investors to "refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest", the reasoning of the tribunal indicates that, in addition to this provision, it distinctly relied on the clean hands doctrine as a general principle of law. In particular, the tribunal cited the expert opinion of Professor Crawford who observed that "the 'clean hands' principle has been invoked in the context of the admissibility of claims before international courts and tribunals."<sup>310</sup> The tribunal added 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."<sup>311</sup>

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<sup>307</sup> Reply, ¶ 719.

<sup>308</sup> *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010 (CL-68), ¶ 127; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Ad Hoc Arbitration, Decision on Jurisdiction, April 30, 2010 (CL-162), ¶ 176; *Urbaser v. Argentina* (CL-163), ¶ 260.

<sup>309</sup> *Al Warraq v. Indonesia* (CL-31), ¶ 631.

<sup>310</sup> *Al Warraq v. Indonesia* (CL-31), ¶ 646.

<sup>311</sup> *Al Warraq v. Indonesia* (CL-31), ¶ 647.

375. The Tribunal does not consider it necessary to determine whether the clean hands doctrine is an established general principle of law. As described above, international tribunals have commonly recognized that claims tainted by serious wrongful conduct are inadmissible, be it under the doctrine of clean hands, international public policy, or other general principles such as good faith, *ex turpi causa non oritur action*, or *nemo auditur propriam turpitudinem allegans*. For present purposes, it is sufficient to observe that the common rationale behind these principles applies not only to violations that concern the making of the investment, but also to post-establishment breaches that may taint the claims put forward before an international tribunal.

376. That being so, not every unlawful activity will render an investor's claims inadmissible in international adjudications. To have this effect, the illegal conduct must be (i) serious and widespread and (ii) bear a close relationship to the claims.<sup>312</sup> On the one hand, sporadic and trivial violations of the law will not trigger the inadmissibility of the claims. On the other hand, the fact that an investor has committed serious violations of the law does not mean that such investor must be denied access to international treaty arbitration as a blanket measure even in a situation where the particular claims do not arise out of these illegal activities. To warrant a sanction as stringent as the inadmissibility of the claims, the two requirements of seriousness and connexity must be cumulatively satisfied. The Tribunal now proceeds to assessing whether these requirements are met on the basis of the record.

### (c) Did Future Bank Engage in Serious Illegal Activities?

377. To result in the inadmissibility of the claims, the investor's unlawful conduct must be severe.<sup>313</sup> The Respondent appears to acknowledge this condition when it insists that it

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<sup>312</sup> Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, in: *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hober, Annette Magnusson & Marie Öhrström eds., JurisNet 2010) (RL-153), p. 317; *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Award on the Merits, March 2, 2015 (RL-160), ¶ 340; *Khan Resources v. Mongolia Decision on Jurisdiction* (CL-166), ¶ 384; *Case Concerning the Diversion of Water from the River Meuse (Netherlands v. Belgium)*, Judgment (Individual Opinion of Judge Hudson), 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (28 June 1937) (RL-78).

<sup>313</sup> See *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No ARB/10/13, Award, March 2, 2015 (RL-159), ¶ 212; *Oxus Gold v. Uzbekistan* (CL-165), ¶ 712; *Khan Resources v. Mongolia Decision on Jurisdiction* (CL-166), ¶ 384; *Case Concerning the Diversion of Water*

was the Claimants’ “serious and repeated wrongdoing” that constituted a violation of international public policy.<sup>314</sup>

378. In a business as complex and heavily regulated as banking, certain violations are bound to occur. Even serious violations, such as the facilitation of money laundering or sanction violations, would not necessarily result in the inadmissibility of the investor’s international claims as a blanket measure, if they were infrequent and the bank remedied their consequences and took action to avoid repetitions.<sup>315</sup> By contrast, the position would be different in circumstances involving pervasive violations forming part of a business strategy, furthered through non-disclosure or concealment and misrepresentation of relevant information to the regulator instead of implementing proper checks and balances.<sup>316</sup>

379. In reliance on the reports of the CBB, the Respondent submits that, between Future Bank’s inception in July 2004 and the start of its administration in April 2015, the bank committed innumerable illegal acts. In particular, the Respondent alleges that Future Bank systematically violated international sanctions against Iranian entities (i); failed to monitor and disclose suspicious transactions (ii); engaged in recurrent wire stripping (iii); used the unauthorized Alternative Messaging System (AMS) (iv); and misrepresented its exposure to Iranian entities. The Tribunal will address each of these allegations in turn.

*i. Violations of the Iran Sanctions*

380. The Parties diverge on whether Future Bank engaged in activities contrary to the sanctions that the UN, U.S. and EU imposed against Iran and multiple Iranian entities

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*from the River Meuse (Netherlands v. Belgium)*, Judgment (Individual Opinion of Judge Hudson), 1937 P.C.I.J. (ser. A/B) No. 70, at 77 (28 June 1937) (**RL-78**).

<sup>314</sup> Rejoinder, ¶ 172.

<sup>315</sup> *Kyrgyz Republic v. Belokon (RL-162)*, p. 15.

<sup>316</sup> *Fraport v. Philippines, Award and Dissenting Opinion of Mr. Bernardo M. Cremades (RL-72)*, ¶ 40(2) (“In cases of gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for example, the principles of good faith and public policy may bar a claim.”); *Kyrgyz Republic v. Belokon (RL-162)*, p. 15; *Churchill Mining v. Indonesia*, ¶¶ 507-508 (“[...] The question is thus whether, on the ground of the legal principles just set forth, the claims can still deserve protection or whether they must be dismissed. The Tribunal views this question as a matter of admissibility. Indeed, if it dismisses the claims, it will do so on the ground of a threshold bar, without entering into an analysis of the alleged treaty violations. The Tribunal agrees with the Respondent that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy”).



from 2006 until the bank was put in administration in 2015. Several threshold questions arise in this respect, which the Tribunal must answer before it enters the analysis of the specific allegations.

381. First, as explained above, to justify the inadmissibility of claims, the investor's wrongful conduct must relate to a fundamental rule of law. Not all international sanctions constitute fundamental rules of international law, as some may seek to advance non-universal political or economic interests of specific States. The Tribunal must therefore determine whether the sanctions at issue were based on fundamental norms of international law, the violation of which could render the claims inadmissible. The international legal norms that underlie the sanctions regime that the UN Security Council has introduced against Iran starting from its Resolution 1696 (2006) concern the prevention of the proliferation of nuclear weapons pursuant to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons and the preservation of international peace and security under Chapter VII of the UN Charter.<sup>317</sup> These are some of the most fundamental norms of international law and as such form part of international public policy.
382. The sensitivity and universality of the international concern over Iran's nuclear programme is confirmed by the very fact that the UN Security Council managed to reach a hardly attainable consensus and adopted several Chapter VII resolutions to address this issue. Importantly, pursuant to Article 103 of the UN Charter, Chapter VII resolutions take precedence over all other international agreements.<sup>318</sup> In the context of international dispute resolution, Böckstiegel for instance writes that UN sanctions are "part of mandatory public international law" and they "will have to be applied by the arbitral tribunal".<sup>319</sup> Thus, the sanctions introduced by the UN Security Council qualify as norms of what is generally called transnational or truly international public policy.<sup>320</sup>

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<sup>317</sup> UNSC Res 1696 (**PS-74**).

<sup>318</sup> Charter of the United Nations, 1 UNTS XVI, June 26, 1945 (**RL-81**) Article 103; UNSC Res 1696 (**PS-74**); UNSC Res 1737 (**PS-75**); UNSC, United Nations Security Council Resolution 1747, S/RES/1747(2007), March 24, 2007 (hereinafter "**UNSC Res 1747**") (**PS-76**); UNSC Res 1803 (**PS-77**).

<sup>319</sup> Karl-Heinz Böckstiegel, *Applicable Law in Disputes Concerning Economic Sanctions: A Procedural Framework for Arbitral Tribunals*, 30(4) *Arbitration International* (2014) (**RL-108**), p. 609.

<sup>320</sup> Pierre Lalive, *Transnational (or truly international) public policy and international arbitration*, ICCA Congress Series (1987) 257-318.

383. National (US/OFAC) and regional (EU) sanctions are different in the sense that they lack the degree of universality that characterizes UN sanctions. While the U.S. and EU sanctions shared in the global effort against Iran's nuclear program,<sup>321</sup> they did not themselves constitute fundamental rules of law forming part of international public policy, insofar as they diverged from the scope of the UN sanctions. More specifically, not all the persons that the U.S. and EU included in their respective lists of sanctioned entities featured in the UN sanctions. The record is scarce on the reasons leading the U.S. or the EU to sanction specific entities that the UN had not designated. Therefore, the Tribunal will take the UN sanctions as the basis of its analysis of the alleged violation of international public policy.
384. Second, the Parties diverge on whether the sanctions imposed on Iran and Iranian entities by the UN, U.S. and EU were opposable to Future Bank. To state the obvious, the UN Security Council Resolutions apply to States, which are required to implement the resolutions pursuant to the UN Charter,<sup>322</sup> and Bahrain is a member of the UN. The U.S. and EU sanctions in turn apply to persons that are within the prescriptive or enforcement jurisdiction of the U.S. or the EU.<sup>323</sup> Therefore, none of these sanctions apply *directly* to Bahraini entities, such as Future Bank.
385. That being said, Bahrain gave effect to the international sanctions against Iran in various forms starting in 2007.<sup>324</sup> In February 2007, the CBB issued a circular, implementing

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<sup>321</sup> When imposing their sanctions, the US and the EU purported to implement, and made multiple references, to the UN Security Council resolutions, Council of the European Union Regulation (EC) No 423/2007 concerning restrictive measures against Iran, April 19, 2007, Preamble (The European Council relied on its "implementing powers itself in view of the objectives of UNSCR 1737 (2006), notably to constrain Iran's development of sensitive technologies in support of its nuclear and missile programmes, and the proliferation-sensitive nature of the activities undertaken by the persons and entities supporting these programmes".) (C-37); US Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (PS-79), p. 22.

<sup>322</sup> This is obvious from the text of the resolutions: UNSC Res 1696 (PS-74); UNSC Res 1737 (PS-75); UNSC Res 1747 (PS-76); UNSC Res 1803 (PS-77).

<sup>323</sup> EU Reg 423/2007 (C-37), Article 18.

<sup>324</sup> CBB Circular regarding UN Security Council Resolution 1737 (2006), February 22, 2007 (RL-147); Central Bank of Bahrain Circular regarding UN Security Council Resolution 1747 (2007), April 8, 2007 (CBB.RL-30); Central Bank of Bahrain Directive regarding UN Security Council Resolution 1803 (2008), March 12, 2008 (RL-150); the CBB Directive (RL-48).

UNSC Resolution 1737 (2006), directing its licensees not to deal with UN sanctioned entities:

Licensees are directed to prohibit dealing with the designated individuals and entities, and immediately report to the CBB details of: A. Funds or other financial assets or economic resources or insurance policies held with them. B. All claims whether actual or contingent, which they have with any of these individuals or entities.<sup>325</sup>

386. In March 2008, the CBB further implemented UNSC Resolution 1803 (2008), directing its licensees “to exercise vigilance and enhanced due diligence over [...] activities with all banks domiciled in Iran, in particular with Bank Melli and Bank Saderat, and their branches and subsidiaries abroad.”<sup>326</sup>

387. A more comprehensive implementation of the international sanctions came with the CBB Directive of 8 September 2010, which required the licensed financial institutions to comply with the UN and U.S. sanctions as follows:

With immediate effect, all licensees in the Kingdom of Bahrain must ensure that they are fully compliant with all United Nations Security Council Resolutions imposing sanctions on the Islamic Republic of Iran, most recently UNSC Resolution 1929 of 2010.

Additionally, with immediate effect, all licensees in the Kingdom of Bahrain must familiarize themselves with the US Comprehensive Iran Sanctions Accountability and Divestiture Act of 2010 and ensure that they do not fall foul of its provisions.<sup>327</sup>

388. The difference in the language between the two paragraphs just quoted suggests that Bahrain implemented the UN and U.S. sanctions with different levels of binding force. The first paragraph requires the licensees to comply with the UN sanctions in unequivocal terms. By contrast, it is not clear whether the second paragraph formally transposes the U.S. sanctions or merely warns the licensees not to violate such sanctions whenever they may apply pursuant to their own terms.

389. The Claimants presented a record of their contemporaneous understanding of the 2010 Directive being “a notice of caution to all other banks which deal with U.S.A. in one

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<sup>325</sup> CBB Circular regarding UN Security Council Resolution 1737 (2006), February 22, 2007 (**RL-147**).

<sup>326</sup> CBB Directive regarding UN Security Council Resolution 1803 (2008), March 12, 2008 (**RL-150**).

<sup>327</sup> CBB Directive (**C-109**), p. 1.

form of another, so that these banks don't engage themselves with certain entities (listed in the Act) resulting in attracting penalty from the USA".<sup>328</sup> This understanding was communicated to the CBB, which raised no objection at that juncture.<sup>329</sup> As for the Respondent, it has offered no evidence of its contemporaneous interpretation of the 2010 Directive. Nor has it pointed to any examples where the directive would have been read to expand the scope of application of the U.S. sanctions to the territory of Bahrain. Indeed, had the 2010 Directive been interpreted as an expansion of the territorial scope of the U.S. sanctions, that understanding would have prevented Future Bank from continuing its activities, as Future Bank was itself a U.S. sanctioned entity.

390. Thus, the Tribunal is not persuaded that the 2010 Directive expanded the scope of application of the U.S. sanctions. Instead, it must rather be regarded as merely warning Bahraini financial institutions to comply with such sanctions whenever they applied under their own terms, *e.g.*, if a particular institution operated on the U.S. territory. It follows that Iran-related sanctions other than those of the UN Security Council, were not opposable to Future Bank either under Bahraini law or as a matter of international public policy.
391. Third, a recurring question in respect of alleged sanctions violation is whether it was illegal to receive repayments on a loan or to restructure a loan granted to a borrower which was initially not a sanctioned entity but was so designated before the reimbursement or restructuring.
392. The Claimants' expert Mr. Brain opines that receiving a loan reimbursement from a sanctioned entity was lawful or else the borrower would receive "free money".<sup>330</sup> According to him, while the applicable sanctions prohibit affording economic benefit to the sanctioned entities, obtaining the repayment of previously granted financing does not qualify as such. The Respondent objects that Future Bank ought to have sought "the

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<sup>328</sup> CBB Directive, Sanctions Against the Islamic Republic of Iran, 2010 (C-214), item 2.

<sup>329</sup> Future Bank response to the CBB 2012 Compliance Report on Future Bank, November 29, 2012 (hereinafter "**FB Response to 2012 CBB Report**") (PS-61), pp. 11-12.

<sup>330</sup> Second ER Bovill (CER-3), p. 33.

requisite approval from Bahraini and UN authorities” before accepting repayments from the sanctioned entities,<sup>331</sup> which it failed to do.

393. Paragraph 12 of the UN Security Council Resolution 1737 (2006), which the CBB implemented in February 2007,<sup>332</sup> provides that all funds of the sanctioned entities shall be frozen. It makes an exception for payments under existing contracts, provided that the relevant State has determined that the contract is not related to prohibited items:

The measures in paragraph 12 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that:

(a) the contract is not related to any of the prohibited items, materials, equipment, goods, technologies, assistance, training, financial assistance, investment, brokering or services referred to in paragraphs 3, 4 and 6 above;

(b) the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 12 above;

and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, ten working days prior to such authorization;<sup>333</sup>

394. Accordingly, the collection of payments from a sanctioned entity under a pre-sanction loan should have been authorized by the relevant State, which would then notify the Committee of the Security Council. However, for these requirements to apply to private persons, such as Future Bank, Bahrain should have implemented them at least by designating an organ that would entertain repayment requests and providing a form and time limits for such requests. The Respondent has not pointed to any such implementation. Instead, the CBB’s internal memorandum of November 2013 concerning Future Bank simply took note of “loans sanctioned to Iranian companies prior to international sanctions being repaid upon maturity”,<sup>334</sup> without qualifying such repayment as a violation or raising any issue with Future Bank.

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<sup>331</sup> Rejoinder, ¶ 72.

<sup>332</sup> Central Bank of Bahrain Circular regarding UN Security Council Resolution 1737 (2006), February 22, 2007 (**RL-147**).

<sup>333</sup> UNSC Res 1737 (**C-34**), ¶ 15.

<sup>334</sup> Memo Abdulla to Hamad, November 24, 2014 (**R-117**), p. 6, item F.

395. Be that as it may, even if Future Bank's acceptance of the repayment of pre-sanction loans were considered unlawful, by its nature this illegality would constitute a less severe violation than providing fresh financing to sanctioned entities. Hence, the Tribunal is not convinced that, without more, such failures, would suffice to declare the claims inadmissible.
396. The position is different when it comes to the restructuring of pre-sanction loans. By such restructuring, the lender affords an economic benefit to the borrower by improving the latter's creditworthiness. If the borrower were a sanctioned entity, such restructuring would breach the sanctions, which require that "funds, financial assets or economic resources are prevented from being made available to" sanctioned entities.<sup>335</sup>
397. With these threshold observations in mind, the Tribunal will now review the Respondent's specific allegations of sanctions violations.
398. The CBB Reports allege that Future Bank committed multiple violations of Bahraini and international sanctions.<sup>336</sup> In particular, according to the CBB, Future Bank gave 26 loans totaling BHD 116 million (USD 300 million) to entities,<sup>337</sup> many of which were allegedly owned, controlled, or associated with the IRGC or other entities under UN, U.S. and EU sanctions.<sup>338</sup> The Respondents' allegations, which the Tribunal will review in the following subsections, are summarized as follows:

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<sup>335</sup> UNSC Res 1737 (C-34), Article 12; EU Reg 423/2007 (C-37), Article 5(2).

<sup>336</sup> 2018 CBB Report (R-172), ¶¶ 4, 35, 396.

<sup>337</sup> 2018 CBB Report (R-172), ¶¶ 6, 149, 374, referring to Central Bank of Bahrain, Future Bank: Table of Suspicious Loans (International Business Loans) (2005 to 2014) (CBB.R-178). See also 2015 CBB Report (R-142), pp. 8-20.

<sup>338</sup> 2018 CBB Report (R-172), ¶¶ 149, 376, 489 *et seq.*; 2015 CBB Report (R-142), p. 29.

Sanctioned Entity	Date <sup>339</sup>	Amount <sup>340</sup>	Violations Alleged
National Iranian Tanker Co. (NITC) <sup>341</sup>	February 24, 2014	EUR 12.5 million (USD 15.3 million)	OFAC sanctions
Islamic Republic of Iran Shipping Lines (IRISL) <sup>342</sup>	November 17, 2010	EUR 17 million (USD 20.9 million)	UNSC Resolution 1747 (2007), paragraph 5; <sup>343</sup> UNSC Resolution 1929 (2010); OFAC sanctions.
Bahman Group Company Tehran (BGCT) <sup>344</sup>	August 9, 2007	USD 6.25 million	UNSC Resolution 1929 (2010); OFAC sanctions <sup>345</sup>
Adel International Equipment Company FZCO (AIECO) <sup>346</sup>	December 12, 2013	AED 50 million (USD 13.6 million)	No reference to specific sanctions
Pars Oil & Gas Co (POGC)	September 10, 2013 January 29, 2014	EUR 19.8 million <sup>347</sup>	OFAC sanctions <sup>348</sup>

<sup>339</sup> 2015 CBB Report (**R-142**), pp. 8-20; Central Bank of Bahrain, Table: Future Bank's Loans to Suspicious Iranian Companies, February 2018 (**CBB.R-64**).

<sup>340</sup> 2015 CBB Report (**R-142**), pp. 8-20; Central Bank of Bahrain, Table: Future Bank's Loans to Suspicious Iranian Companies, February 2018 (**CBB.R-64**).

<sup>341</sup> 2018 CBB Report (**R-172**), ¶¶ 424-432; 2015 CBB Report (**R-142**), pp. 8-10.

<sup>342</sup> 2018 CBB Report (**R-172**), ¶¶ 400-423; 2015 CBB Report (**R-142**), pp. 10-13, According to the 2015 CBB Report, IRISL is "managed by the Iranian Ministry of Commerce [...] and caters to all trade imports/exports of Iran made through sea".

<sup>343</sup> 2015 CBB Report (**R-142**), pp. 12-13.

<sup>344</sup> 2015 CBB Report (**R-142**), pp. 13-15.

<sup>345</sup> 2015 CBB Report (**R-142**), p. 15.

<sup>346</sup> 2015 CBB Report (**R-142**), p. 16.

<sup>347</sup> 2018 CBB Report (**R-172**), ¶ 459.

<sup>348</sup> 2018 CBB Report (**R-172**), ¶ 458.

Sanctioned Entity	Date <sup>339</sup>	Amount <sup>340</sup>	Violations Alleged
Sepahan Oil Company (SOC), <sup>349</sup> one of the largest suppliers of refined petroleum to Iran	September 16, 2008	AED 64 million (USD 17.4 million)	OFAC sanctions <sup>350</sup>
International Solar Oil Company FZE (ISOC), <sup>351</sup> owner of vessels used for transportation of base oil	August 2013; October 22, 2014	AED 64 million (USD 17.4 million); AED 64 million (USD 17.4 million).	OFAC sanctions <sup>352</sup>
PIIC <sup>353</sup>	November 14, 2005; August 30, 2006	EUR 30 million (USD 37 million); EUR 10 million (USD 12.3 million)	OFAC and EU sanctions <sup>354</sup>

*a. National Iranian Tanker Co. (NITC)*

399. On November 24, 2009, Future Bank approved a loan of EUR 12.5 million to NITC. The loan was secured by mortgages over two of NITC's vessels, issued in February and March 2010.<sup>355</sup> Shortly after January 22, 2010, the loan was disbursed.<sup>356</sup> The disbursement was disclosed to Future Bank's Executive Committee and the CBB.<sup>357</sup>

<sup>349</sup> 2018 CBB Report (R-172), ¶¶ 441-451.

<sup>350</sup> 2018 CBB Report (R-172), ¶ 442.

<sup>351</sup> 2018 CBB Report (R-172), ¶¶ 452-56; 2015 CBB Report (R-142), pp. 19-20. Note that ISOC is fully-owned by SOC.

<sup>352</sup> 2018 CBB Report (R-172), ¶ 452.

<sup>353</sup> 2018 CBB Report (R-172), ¶¶ 433-40.

<sup>354</sup> 2018 CBB Report (R-172), ¶ 435.

<sup>355</sup> Future Bank, NITC Credit Application, September 28, 2014 (C-234).

<sup>356</sup> Future Bank, Executive Meeting Agenda, January 30, 2010 (C-237); Letter to Dr. V. Seif (FB) and Mr. S. Iranzad (Bank Saderat) by eihbank regarding NITC €72.5 million Syndicated Term Loan Facility, January 27, 2010 (C-253); Future Bank, NITC Credit Application, September 28, 2014 (C-234).

<sup>357</sup> Future Bank, Prudential Information Return, April 20, 2010 (C-183); Future Bank, NITC Credit Application, September 28, 2014 (C-234), p. 4; Future Bank, Executive Meeting Agenda, January 30, 2010 (C-237).



400. On July 12, 2012, OFAC designated NITC as a sanctioned entity. On October 15, 2012, the EU froze NITC's funds.
401. In September 2014, Future Bank approved a restructuring of the loan, the repayment of the principal being postponed until February 22, 2016 and the full repayment due by February 22, 2018.<sup>358</sup>
402. Pursuant to the CBB 2018 Report, Future Bank's dealings with NITC constituted a violation of U.S. and EU sanctions, and thus Bahraini laws and regulations, including the CBB's Directive of September 8, 2010 for the following reasons:
- (1) Future Bank disbursed a EUR 12.5 million loan to NITC in May 2013, whereas OFAC had added NITC to the list of sanctioned entities on 12 July 2012, and the EU had begun applying restrictive measures against NITC on 15 October 2012;
  - (2) The stated purpose of the loan to NITC, namely to finance "*the first pre-delivery instalments*" of twelve vessels, was fictitious as these vessels had been delivered to NITC by January 2011, almost two years before the loan disbursement;
  - (3) In February 2014, NITC repaid Future Bank EUR 2.5 million towards the principal, which Future Bank then re-lent to NITC in August 2014, thereby providing new financing to a sanctioned entity; and
  - (4) Future Bank restructured the loan to NITC in March 2014, and then again in September 2014, again providing new financing to a sanctioned entity, it did so despite an unacceptable credit rating of the loan by its internal rating system and despite problems with securing insurance for the vessels pledged as security.<sup>359</sup>
403. None of these allegations relates to a possible violation of the UN sanctions. As the Tribunal determined above, Bahrain had not expanded their scope of application of the U.S. and EU sanctions to Bahraini territory, with the result that the U.S. and EU sanctions as such were not opposable to Future Bank. In addition, to the extent that they deviate from the UN sanctions, the U.S. and EU sanctions do not constitute fundamental norms forming part of international public policy. Therefore, the Tribunal concludes that the Respondent's allegations related to the NITC transactions lack merit.

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<sup>358</sup> Future Bank, NITC Credit Application, September 28, 2014 (C-234).

<sup>359</sup> 2018 CBB Report (R-172), ¶¶ 427-432.

*b. Islamic Republic of Iran Shipping Lines (IRISL)*

404. On May 2, 2009, Future Bank approved a loan to IRISL in the amount of EUR 17 million.<sup>360</sup> On February 17, 2010, the loan was disbursed.<sup>361</sup>
405. In November 2012, the repayment period was extended by one year. Full repayment was due by August 17, 2016.<sup>362</sup>
406. The CBB 2018 Report states that Future Bank's dealings with IRISL constituted a violation of UN and U.S. sanctions, and thus Bahraini laws and regulations, including the CBB's Directive of September 8, 2010, for the following reasons:
- (1) Future Bank booked interest income under a loan granted to IRISL on 17 May 2011, 17 August 2011, and 17 November 2011, without approval of the CBB or the UN, despite the fact that IRISL and 123 of its vessels had been designated as sanctioned by the US on 10 September 2008, by the UN on 9 June 2010, and by the EU on 26 July 2010;
  - (2) The stated purpose of the loan in the corresponding credit application, which was "to meet final delivery payment on newly built vessels, which were delivered six months before," was inconsistent with other sections of the Credit Application, where the loan was described as intended "to meet working capital requirements;" and
  - (3) Between May 2011 and October 2012, after four of the seven vessels pledged by IRISL as security came under threat of seizure in the Isle of Man due to UN designation on 9 June 2010, Future Bank conspired with IRISL to transfer the ownership of those four vessels from Hong Kong companies to Malta based companies, and to "de-flag" all seven vessels initially offered as security in Malta and "re-flag" them in Iran in breach of UN sanctions.<sup>363</sup>

407. In respect of the facts underlying allegation (1), the contemporaneous record of Future Bank's relationship with IRISL confirms that the loan was disbursed on February 17, 2010.<sup>364</sup> This predates IRISL's designation as a sanctioned entity by the UN (UNSCR 1929 (2010), on June 9, 2010 and by the EU on July 26, 2010. It is true that, by the time of the disbursement of the loan, the U.S. had designated IRISL as a sanctioned entity on September 10, 2008. However, as was established earlier, Bahrain had not made the U.S.

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<sup>360</sup> Future Bank, "History of Relationship with Customer" (C-258), p. 13.

<sup>361</sup> Future Bank, "History of Relationship with Customer" (C-258), p. 13.

<sup>362</sup> Future Bank, "History of Relationship with Customer" (C-258), p. 13.

<sup>363</sup> 2018 CBB Report (R-172), ¶¶ 403-423.

<sup>364</sup> Future Bank, "History of Relationship with Customer" (C-258).

sanctions applicable on its territory. In any event, a possible implementation of the U.S. sanctions would have been effected with the CBB Directive of September 8, 2010, *i.e.*, after the decision to grant the loan in May 2009 and the disbursement in February 2010.

408. As for the repayment of a loan and the payment of interest, which is the subject matter of allegation (1), the UN sanctions required the States to verify the origins of the funds and notify the relevant UN entities. However, as discussed above, Bahrain has not pointed to any implementing legislation specifying verification and notification procedures for private financial institutions. In any event, here again, a failure of this type would not constitute a severe violation.
409. Regarding allegation (2), the Tribunal understands that there was a discrepancy about the purpose of the loan between two sections in the credit application.<sup>365</sup> For the Tribunal, this discrepancy is insufficient to prove an intent to conceal the true purpose of the transaction. First, it may be due to various causes, including a clerical error. Second, had Future Bank meant to hide the actual purpose of the loan, it seems unlikely that it would have indicated contradictory purposes several pages apart in the same document.
410. In relation to allegation (3), while the record does not contain sufficient evidence to prove that Future Bank conspired with IRISL, it does show that it cooperated with IRISL towards reflagging the vessels, over which Future Bank held security interests. The contemporaneous exchange between Future Bank's Tehran representative officer, Kambakhsh Katami, and its head of Corporate Banking, Suresh Kumar (with the bank CEO in copy) demonstrates that Future Bank facilitated IRISL's efforts to evade the effects of the applicable UN sanctions.<sup>366</sup> An internal memorandum shows that the bank understood the reasons for the relocation and re-flagging of the vessels and turned a blind eye to the evasion of the sanctions.<sup>367</sup>

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<sup>365</sup> Future Bank, "History of Relationship with Customer" (C-258), pp. 5 and 13.

<sup>366</sup> E-mail exchange between Mr. Katami and Mr. Kumar (CBB.R-194), cited in 2018 CBB Report (R-172), ¶¶ 410-412.

<sup>367</sup> Future Bank, CA: IRISL, February 7, 2013, Central Bank of Bahrain, Compliance Department, Investigation Report of Future Bank, May 24, 2015 (CBB.R-192), Appendix G, p. 2.

*c. Petrochemical Industries Investments Co, Iran (PIIC)*

411. On August 30, 2007, Future Bank's Board approved joining a syndicate led by Bank Saderat to lend EUR 10 million to PIIC.<sup>368</sup> The loan was paid out and the account was closed on September 5, 2011.<sup>369</sup>
412. On February 10, 2009, Bank Saderat (London) paid Future Bank its share of the loan interest into a bank account with Bank Markazi, at a time when all three banks had come under U.S. sanctions.<sup>370</sup>
413. On July 26, 2010, Future Bank came under EU sanctions, resulting in the freezing of its EUR account with Bank Saderat (London). Hence, Bank Saderat, which had to credit this account with Future Bank's share of payments received from PIIC under the syndicated loan, was not able to do so without an authorization of the UK authorities. Thus, on November 18, 2010, Future Bank's CEO requested PIIC to pay the bank's share of interest and principal reimbursement to an account that was not frozen, specifically to Future Bank's EUR account with Parsian Bank in Tehran.<sup>371</sup>
414. Under the heading "Violations of US and EU sanctions", the 2018 CBB Report states that Future Bank should have applied to the British authorities to allow Bank Saderat to credit the payments to Future Bank's frozen account because they related to a pre-sanction transaction. Further applications should then have been made to withdraw those funds on the same basis.<sup>372</sup>
415. The CBB further alleges that PIIC acted as a "front" for sanctioned entities. Yet, it does so without further substantiation.<sup>373</sup>
416. The Tribunal notes that the alleged violations do not relate to the provision of financing to sanctioned entities. Instead, the Respondent alleges that Future Bank received its share of repayment on a pre-sanction loan without requesting an authorization from the UK

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<sup>368</sup> Future Bank, Syndicated Medium Term Loan, (CBB.R-209).

<sup>369</sup> Future Bank, Board Meeting, July 30, 2011 (C-265), p. 5.

<sup>370</sup> Fax from Bank Saderat to Futurebank, February 10, 2009 (CBB.R-207).

<sup>371</sup> 2018 CBB Report (R-172), ¶¶ 435-440.

<sup>372</sup> 2018 CBB Report (R-172), ¶¶ 435-436.

<sup>373</sup> 2018 CBB Report (R-172), ¶ 149, fn. 148.

authorities. The Respondent has not pointed to any provision in the EU sanctions that would require a financial institution to continue receiving payments on a pre-sanction transaction on a frozen account or to refrain from redirecting such payments to its other accounts. In any event, as the Tribunal explained above, Bahrain has not transposed the EU sanctions in its legislation, and thus, they were not opposable to Future Bank.

417. As for the U.S. sanctions, the Respondent bases its allegation on the fact that Future Bank received its share of payment on a pre-sanction loan from Bank Saderat (London) at its bank account with Bank Markazi, at a time when all three banks had come under the U.S. sanctions. However, the Respondent does not explain how the U.S. sanctions applied on transaction taking place outside the territory of the U.S. In addition, as the Tribunal explained above, Bahrain has not implemented the U.S. sanctions in a manner that would extend their territorial scope of application.

418. For these reasons, the Tribunal concludes that the Respondent's allegations with respect to PIIC lack merit.

*d. Bahman Group Company Tehran (BGCT)*

419. On August 9, 2006, Future Bank joined a syndicate led by Bank Melli to grant BGCT a loan of USD 50 million. Future Bank's share amounted to USD 6,250 million. The term was four years, with a one year grace period, ending on August 9, 2011.<sup>374</sup>

420. BGCT's shareholder Bonyad Taavon Sepah was added to the OFAC list on December 21, 2010,<sup>375</sup> and came under EU sanctions on May 23, 2011.<sup>376</sup>

421. The CBB 2015 Report contains the following allegations:

- (1) Future Bank's participation in the loan to BGCT constituted a violation of UN sanctions due to ties between one of BGCT's main shareholders, Bonyad Taavon Sepah, and the IRGC; and
- (2) On 25 September 2014, Future Bank informed Bank Melli that it would only accept repayment under the loan if it was made in USD or any

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<sup>374</sup> 2015 Report, Credit Application, Appendix H, September 11, 2011 (C-269), pp. 4-6.

<sup>375</sup> US Treasury, OFAC SDN List Update, January 1, 2010 (C-270).

<sup>376</sup> European Council, Council Decision 2011/299/CFSP of 23 May 2011 amending Decision 2010/413/CFSP concerning restrictive measures against Iran, May 23, 2011 (C-271).

other currency convertible to USD in Iran, which constituted a U-turn transaction in breach of OFAC requirements.<sup>377</sup>

422. In connection with allegation (1), neither Bonyad Taavon Sepah nor BGCT were sanctioned entities at the time when the loan was granted. Therefore, “participation” in the sense of granting the loan could not have violated the sanctions. Repayment is addressed in the context of allegation (2) below.

423. As regards allegation (2), at the time of the repayment of the loan by BGCT, Future Bank was under the U.S. sanctions.<sup>378</sup> Among other things, Future Bank was thus prohibited from using the U.S. financial system for so-called U-turn transactions (including using U.S. banks for USD transactions). This is stated in a press release of the U.S. Treasury as follows:

Prior to today's action, U.S. financial institutions were authorized to process certain funds transfers for the direct or indirect benefit of Iranian banks, other persons in Iran or the Government of Iran, provided such payments were initiated offshore by a non-Iranian, non-U.S. financial institution and only passed through the U.S. financial system en route to another off shore, non-Iranian, non-U.S. financial institution. As a result of today's action, U.S. financial institutions are no longer allowed to process these U-turn transfers.<sup>379</sup>

424. Compliance with Future Bank’s request for Bank Melli to re-payment in USD or USD convertible currency in Iran would probably result in a violation of this restriction. Mr. Sharma indeed explained that “US dollar payments are typically (but not necessarily always) routed via a US bank even if neither the sending bank nor end-recipient bank is in the US.”<sup>380</sup> That being so, the record contains insufficient evidence to establish Bank Melli’s compliance with Future Bank’s request and the existence of a U-turn transaction through a US bank.

425. As for the Respondent’s allegation that Bonyad Tavoon Sepah was controlled by IRGC which was a UN sanctioned entity, and that Future Bank breached its duty of vigilance

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<sup>377</sup> 2015 CBB Report (**R-142**), p. 16.

<sup>378</sup> US Treasury press release, “Treasury Designates Iran Controlled Bank for Proliferation: Future Bank Controlled by Iran’s Bank Melli”, March 12, 2008 (**R-3**).

<sup>379</sup> US Treasury Press Release, “Treasury Revokes Iran’s U-turn License”, November 6, 2008 (**R-5**).

<sup>380</sup> First Expert Report of Mr. Paul Sharma, February 16, 2018 (hereinafter “**First ER Sharma**”), ¶ 3.11.1.

in dealing with BGCT, it is not substantiated. In particular, the CBB 2015 Report does not cite any documentary or other evidence for this allegation.<sup>381</sup> Tellingly, the allegation is not repeated in the CBB 2018 Report.

426. For these reasons, the Tribunal concludes that the record does not sufficiently demonstrate that Future Bank's demand to Bank Melli that it would only accept repayment in USD or any other currency convertible to USD in Iran constituted a U-turn transaction in breach of the US sanctions.

*e. Adel International Equipment Company FZCE (AIECO)*

427. In January 2012, Future Bank approved an AED 50 million loan to AIECO,<sup>382</sup> which, according to the CBB 2018 Report, was one of the eight Iranian entities that received services from Future Bank while being "sanctioned by the UN/US/EU".<sup>383</sup>

428. There is no evidence in the record to support that the UN, the U.S. or the EU sanctioned AIECO. In addition, the Respondent did not assert specific sanctions violations. The CBB 2015 Report merely noted in general terms that AIECO's ownership structure was in possible contravention of international economic sanctions. Accordingly, the Tribunal has no evidentiary basis to find a sanction violation.

*f. Sepahan Oil Company (SOC) and International Solar Oil CO FZE (ISOC)*

429. On September 15, 2008, Future Bank granted Sepahan Oil Company (SOC) a loan of AED 64 million with a 5-year tenor.<sup>384</sup> On May 24, 2011, OFAC sanctioned SOC.<sup>385</sup>

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<sup>381</sup> 2015 CBB Report (**R-142**), p. 14.

<sup>382</sup> Report 2015, Credit Application, April 15, 2015 (**C-236**) Appendix I, pp. 3-4.

<sup>383</sup> 2018 CBB Report (**R-172**), ¶ 148.

<sup>384</sup> 2018 CBB Report (**R-172**), ¶ 443.

<sup>385</sup> US State Department, Fact Sheet: Seven Companies sanctioned Under the Amended Iran Sanctions Act, May 24, 2011 (**R-212**).

430. SOC's owner, OIPF, is a state-owned entity, which came under the EU sanctions on December 22, 2012,<sup>386</sup> its investment arm, SOC, being designated by OFAC on June 4, 2013.<sup>387</sup>
431. Additionally, in 2007 UNSC Resolution 1747 designated OIPF's managing director, Mr. Naser Maleki as "Head of Shahid Hemmat Industrial Group (SHIG), which is designated under Resolution 1737 (2006) for its role in Iran's ballistic missile programme" and as the Iranian Ministry of Defence's logistics "official overseeing work on the Shahab-3 ballistic missile, Iran's long range ballistic missile currently in service."<sup>388</sup>
432. On August 12, 2013, Future Bank opened an account for ISOC, a UAE-registered free zone company, owned by SOC. On August 14, 2013, it approved a 5-year loan of AED 64 million to ISOC.
433. The CBB observes that Future Bank "ought not to have done business with entities controlled by individuals sanctioned by the UNSC."<sup>389</sup> It further notes that "it seems rather possible that ISOC is ultimately positioned as a front-line company to support SOC's line of business" and thereby evade the sanctions.<sup>390</sup>
434. With respect to SOC, evidence shows that Future Bank issued a loan before SOC came under the U.S. sanctions. The granting of the loan itself could thus not constitute a breach of such sanctions. The CBB reports do not mention whether and when SOC repaid the loan, but the Claimants acknowledge that "the SOC loan was reimbursed by September 2013".<sup>391</sup> Accordingly, Future Bank accepted reimbursement of the loan from an OFAC sanctioned entity. However, as the Tribunal reviewed above, the U.S. sanctions were not directly opposable to Future Bank.

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<sup>386</sup> UNSC EU sanctions on NITC on December 22, 2012 (**RL-39**).

<sup>387</sup> US Treasury, OFAC SDN List Update, June 4, 2013 (**RL-35**).

<sup>388</sup> CBB, Inspection Department, Internal Memo: Sanctions (**CBB.R-191**).

<sup>389</sup> 2018 CBB Report (**R-172**), ¶ 448.

<sup>390</sup> 2018 CBB Report (**R-172**), ¶¶ 456; 2015 CBB Report (**R-142**), pp. 19-20.

<sup>391</sup> Reply, ¶ 399.



435. In respect of ISOC, the record shows that Future Bank opened an account and granted a loan to that company and that it did so at a time when the managing director of the sole shareholder (OIPF) of its sole shareholder (SOC) was designated by the UNSC for his participation in Iran's ballistic missile programme.<sup>392</sup> The Respondent has not pointed to any specific provision of the applicable UN sanctions that prohibits opening an account and providing a loan in a situation involving this type of indirect connection. That said, when dealing with entities indirectly controlled by a UNSC-designated PEP, namely Mr. Maleki, and ultimately owned by the Iranian government, Future Bank ought to have exercised enhanced diligence.<sup>393</sup> This is particularly so as the Respondent's allegation that Future Bank produced no due diligence report identifying the customer's controllers and beneficial owners stands unrebutted. The lack of diligence is all the more striking as the credit application which Future Bank approved indicated SOC as the guarantor of the loan and the purpose of the loan was vaguely identified as "ISOC's Long Term Working capital needs".<sup>394</sup>

436. As a result, the Tribunal finds that Future Bank failed to comply with its due diligence and reporting obligations with respect of the ISOC loan.

*g. Pars Oil & Gas Company (POGC)*

437. On March 10, and May 3, 2010, Future Bank purchased Eurobonds issued by Pars Oil & Gas Company (POGC) for EUR 17.5 million and EUR 2.5 million respectively.<sup>395</sup> OFAC sanctioned POGC on December 21, 2010. The bonds matured in March and May 2013, at which time the bank accepted the proceeds, put them in an interbank placement with

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<sup>392</sup> CBB, Inspection Department, Internal Memo: Sanctions (CBB.R-191).

<sup>393</sup> Financial Action Task Force, Statement on Iran, October 11, 2007 (CBB.RL-10). See also Central Bank of Bahrain, Rulebook Volume 1 (Conventional Banks), Module: Financial Crime (hereinafter "CBB Rulebook Financial Crime") (CBB.RL-7), FC 8.1.1, 8.1.3.

<sup>394</sup> 2015 CBB Report, ISOC Credit Application, Appendix M, August 14, 2013 (R-142), p. 2.

<sup>395</sup> 2018 CBB Report (R-172), ¶ 469 referring to Future Bank, ALCO Decision Subject: Investment in EURO Bonds, March 4, 2010 (CBB.R-219).

BSI and reinvested the available Euro liquidity in POGC Eurobonds on the secondary market.<sup>396</sup> At that time, POGC was under U.S. sanctions.

438. The Respondent argues that Future Bank's receipt of repayment and interest from POGC and purchase of bonds violated the CBB Directive on U.S. sanctions.<sup>397</sup>
439. With respect to Future Bank's acceptance of the repayment and interest from POGC on the bonds purchased prior to the latter's sanctioning, as the Tribunal determined earlier, OFAC sanctions were not directly opposable to Future Bank. That said, the Tribunal notes an email exchange between the CBB and Future Bank, which ensued after the CBB's 2013 review of the bank, which shows that Future Bank initially misrepresented its reinvestment of the proceeds in POGC Eurobonds as "rollovers and not new investments."<sup>398</sup> The CBB challenged this assertion stating that the evidence did "not indicate rollover for the specific investments by the Bank", after which Future Bank conceded that "[t]he maturity proceeds of such bonds were first parked as interbank placements before the bank again reinvested in Euro bonds when the bonds became available."<sup>399</sup> While these acts did not breach the sanctions, the Tribunal takes note of the misrepresentation with a view to its overall assessment of Future Bank's allegedly unlawful activities.

*h. Behnam Trading Co LLC (BTC), MAPNA International FZE (MAPNA), and Fars Gas Power Plant FZE (FGPP)*

440. The CBB takes issue with the fact that Future Bank accepted POGC bonds as collateral for loans to Behnam Trading Co LLC (BTC), MAPNA International FZE (MAPNA), and Fars Gas Power Plant FZE (FGPP). As set out above, OFAC included POGC in the list of sanctioned entities on December 21, 2010.

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<sup>396</sup> Reply, ¶ 429; Future Bank, ALCO Decision regarding Investment in Euro Bonds, Ref. ALCO/04/2013, March 12, 2013 (**CBB.R-241**); Future Bank, ALCO Decision regarding Investment in Euro Bonds, FUBBOBU/330/13, June 10, 2013 (**CBB.R-243**).

<sup>397</sup> Rejoinder, ¶ 78.

<sup>398</sup> Central Bank of Bahrain, E-mail from Ravi Prakash Urpayilputhenveetil (Future Bank) to Sunando Roy (CBB), December 10, 2013 (**CBB.R-213**).

<sup>399</sup> Central Bank of Bahrain, E-mail from Ravi Prakash Urpayilputhenveetil (Future Bank) to Sunando Roy (CBB), December 10, 2013 (**CBB.R-213**), pp. 2, 3.

441. In September 2012 and between January and March 2014, respectively, Future Bank granted loans to BTC (EUR 15 million), MAPNA (AED 50 million) and FGPP (EUR 25 million). These loans were partially secured by POGC Eurobonds.
442. The CBB reports that Future Bank granted the loans as a mean to earn income from POGC bonds without owning them, thereby violating OFAC sanctions.
443. The record evidences that Future Bank accepted Eurobonds issued by POGC as collateral for loans granted to the three entities at issue at a time when POGC was under U.S. sanctions. The record also shows that in relation to BTC Future Bank expected that the “source of repayment for the disbursed credit facility will be through the interest payout from the proposed pledging of [POGC] bonds covering 100% of the facility amount.”<sup>400</sup> The bank identified the interest payments as primary source or repayment, while adding that “there is also additional comfort that the financials of the borrower is good.”<sup>401</sup>
444. As the Tribunal explained above, Bahrain did not take over the U.S. sanctions in its legislation in a manner that would expand the scope of application of such sanctions. Therefore, the OFAC sanctions were not directly opposable to Future Bank, with the result that the Respondent’s allegations with respect to the POGC bonds lack merit.

*i. Other transactions*

445. The CBB 2018 Report lists a number of other loans granted by Future Bank to various entities between August 2007 and January 2012 under the heading “Violations of sanctions on the IRGC and the government of Iran”.<sup>402</sup>
446. The CBB labels these transactions as (i) “suspicious loans to Iranian corporate customers that appear to be fronts for sanctioned entities” and (ii) “loans to Iranian companies apparently linked to sanctioned entities”, indicating that certain of these loans constitute

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<sup>400</sup> 2015 CBB Report, Credit Application, January 14, 2014 (R-142), Appendix J, p. 10.

<sup>401</sup> 2015 CBB Report, Credit Application, January 14, 2014 (R-142), Appendix J, p. 10.

<sup>402</sup> 2018 CBB Report (R-172), ¶¶ 489-490.

“finance to the IRGC” or are “suspected to constitute finance to the IRGC and/or the government of Iran”,<sup>403</sup> without further support for these allegations.

447. The CBB itself recognizes that “[t]hese files need to be investigated further”.<sup>404</sup> Consequently, these sanction violations cannot be regarded as established.

448. Overall, the record contains only sporadic evidence of violations of the applicable sanctions by Future Bank. To assess whether sanction violations may have been more widespread than documented in the record, the Tribunal will now review circumstantial evidence, in particular evidence of Future Bank’s alleged practices adopted to conceal transaction information.

*ii. Monitoring and Disclosure of Suspicious Transactions*

449. In Bahrain, like in other jurisdictions, banks are under a duty to file suspicious transaction reports (STRs) and to comply with the regulator’s instructions on developing and applying internal anti-money laundering (AML) and counter financing of terrorism (CFT) policies.<sup>405</sup> Banks in Bahrain also have a duty to undertake due diligence and to maintain ongoing monitoring regarding their customers and transactions.<sup>406</sup> In addition, as of October 2007, for transactions relating to Iran, Bahraini banks were under an obligation to apply “enhanced due diligence” measures when opening an account and for the duration of the banking relationship.<sup>407</sup>

450. The CBB claims that Future Bank breached these duties as it “failed to adequately report [STRs] for irregular transactions [...] [and] exercised willful blindness on many of the

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<sup>403</sup> 2018 CBB Report (R-172), ¶¶ 149, 489-490.

<sup>404</sup> 2018 CBB Report (R-172), ¶ 491.

<sup>405</sup> 2018 CBB Report (R-172), ¶ 243, referring to Kingdom of Bahrain’s AML Law, Arts. 2(6), 5. Article 2(6) obligates banks to provide “information and suspicious transactions related to the customer’s irregular activity [...] in relation to the offence of money laundering” (CBB.RL-9).

<sup>406</sup> 2015 CBB Report (R-142), pp. 30-31; 2018 CBB Report (R-172), ¶ 116, referring to CBB Rulebook Financial Crime (CBB.RL-7), FC 2.1. See also 2018 CBB Report (R-172), ¶ 208.

<sup>407</sup> 2018 CBB Report (R-172), ¶141, referring to Financial Action Task Force, Statement on Iran, October 11, 2007 (CBB.RL-10); CBB Rulebook Financial Crime (CBB.RL-7), FC 8.1.1, 8.1.3 (Banks “must give special attention to any dealings they may have with entities or persons domiciled in countries or territories which are identified by the FATF as being ‘non-cooperative’ and “must apply enhanced due diligence measures to business relationships and transactions with natural and legal persons, and financial institutions, from countries where such measures are called for by the FATF.”) The detailed rules for enhanced due diligence are in FC 1.

suspicious transactions conducted and on transactions that are considered in clear breach to the CBB's regulations and directives."<sup>408</sup> Future Bank also "accept[ed] and facilitate[d] transactions without the proper implementation of the relevant customer due diligence measures [...]. For certain corporate and individual accounts, Future Bank failed to provide valid documentary evidence to identify the customer's source of funds."<sup>409</sup>

451. Having reviewed the record, the Tribunal finds that Future Bank failed to monitor and disclose suspicious transactions on several cash transactions. In particular, Future Bank's processed large Euro-denominated cash transactions for the Iranian embassy without obtaining the customer due diligence documentation in violation of the disclosure provisions of AML Decree Law 54 of 2006, Ministerial Order No. 6 of 2008, and FC Module 1.10.<sup>410</sup> In addition, as set out in the table below, Future Bank's held cash deposits for entities without engaging in due a diligence procedure.<sup>411</sup>

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<sup>408</sup> 2015 CBB Report (**R-142**), pp. 30-31.

<sup>409</sup> 2015 CBB Report (**R-142**), pp. 30-31.

<sup>410</sup> 2015 CBB Report (**R-142**), p. 30.

<sup>411</sup> 2015 CBB Report (**R-142**), pp. 23-24.

No.	Customer's Name	2013	2014	2015	Total
1.	Ebrahim Ali Akbar Ebrahimi	1,542,581	1,509,346	540,375	3,592,302
2.	Akber Qambar & Mahmood Shanbeh Co	1,492,688	1,453,272	422,645	3,368,604
3.	Abbasali Abdulhussain Khawari	1,189,905	1,072,386	336,765	2,599,056
4.	Taylos Gifts CTR Company W.L.L	898,980	1,076,978	408,095	2,384,053
5.	Hasan Mahmood Cold Store	954,841	965,210	342,797	2,262,848
6.	Marmaryes Group S.P.C	851,158	715,160	379,562	1,945,881
7.	Abbas Foodstuff Co. WLL	666,244	742,062	228,775	1,637,081
8.	KH & M Trading Co. W.L.L.	763,830	463,940	208,245	1,436,015
9.	Sari For Packing Grains and Other FS FS	273,500	709,500	250,000	1,233,000
10.	Lebanon Restaurant Catering W.L.L	163,436	480,693	298,087	942,216
11.	Isfahani Restaurant Hooraa	486,319	340,761	61,821	888,901

452. The Tribunal notes that the Claimants have not specifically addressed the allegations of the lack of due diligence in respect of the deposits of these entities. Thus, the Tribunal is satisfied that the record bears out Future Bank's failure to adhere to the applicable due diligence regulations.
453. The record does not, however, contain sufficient evidence to demonstrate other monitoring and reporting failures by Future Bank. The Tribunal is not persuaded that the specific instances of failure of oversight by the bank raise to the level required to demonstrate a systematic and severe breach of the applicable laws. In addition, while a part of the bank's failure related to sanctioned entities for which the bank opened accounts without applying the required due diligence or filing STRs, this does not suffice to show that Future Bank's failure to monitor and report transactions was primarily related to evasion of the sanctions.
454. Therefore, the evidence of Future Bank's transaction monitoring and reporting failures does not suffice to substantiate the Respondent's preliminary objections.

*iii. Wire Stripping*

455. Wire stripping is the deliberate act of changing or removing material information from wire payments or instructions, making it difficult or impossible to identify payor or payee and thus payments to and from sanctioned individuals or entities. This practice includes the use of SWIFT.
456. It is common ground that Future Bank engaged in wire stripping, but the Parties disagree until when it did so and whether wire stripping was illegal at the relevant time.
457. According to the CBB, the wire stripping practice “ran from at least January 2004 (possibly before) until at least October 2009.”<sup>412</sup> At other places in the 2018 CBB Report, the wire stripping is alleged to have lasted “from 2004 to 2012, and maybe longer.”<sup>413</sup> The wire stripping inventory by Deloitte included 9,352 messages covering the period from August 2004 to December 2010.<sup>414</sup> The inventory shows two transactions in 2010, one on 31 January 2010 for GBP 57,253 and one on October 18, 2010 for GBP 18,739, which was the last one.<sup>415</sup> In addition, it shows 11 wire stripped transactions after April 2009. The 2018 CBB Report notes that “much of the evidence discovered *so far* regards transactions that took place *before* March 2008.”<sup>416</sup>
458. For the Claimants, this last statement in the 2018 CBB Report is largely in line with their own position that there is no evidence of wire stripping after April 2009. The Claimants argue that, as soon as the CBB raised concerns regarding Future Bank’s handling of certain SWIFT messages in April 2009,<sup>417</sup> Future Bank implemented measures to address

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<sup>412</sup> 2018 CBB Report (**R-172**), ¶ 27, referring to the total value of wire stripping transactions (**CBB.R-307**) and the underlying messages related to these transactions (**CBB.R-308**). Neither seems to support the conclusion that wire stripping took place until October 2009. The documents containing the messages are over 1,000 pages long and not pdf-searchable.

<sup>413</sup> 2018 CBB Report (**R-172**), ¶ 246, referring to CBB, Table: Wire Stripping v.1, February 14, 2018 (**CBB.R-115**). This 122-page table contains only two transactions carried out on August 22, 2008 and October 25, 2009 respectively.

<sup>414</sup> Wire stripping Inventory – Summary Review (2019) (**PS-84**).

<sup>415</sup> Wire stripping Inventory – Summary Review (2019) (**PS-84**).

<sup>416</sup> 2018 CBB Report (**R-172**), ¶ 331 (emphasis in original).

<sup>417</sup> 2009 CBB Report (**R-85**).

such concerns, which is confirmed by the AML compliance reports for 2010 and 2011.<sup>418</sup> In any event, according to the Claimant, no wire stripping could have taken place after March 17, 2012 because Future Bank was then cut off from the SWIFT banking transactions system.

459. In other words, it emerges from the evidence that the Claimants gradually phased out the wire stripping practice after the CBB's notice of April 2009, with only 11 instances of wire stripping between April and December 2009 and two in 2010.<sup>419</sup>
460. In addition, the Respondent has identified no rule of Bahraini law prohibiting wire stripping in the relevant period. While Bahrain's AML Law of 2001 required the banks to "keep a transaction record" in general terms,<sup>420</sup> the implementing modules did not particularize the required information until 2014.
461. As a consequence, the Respondent has not established that Future Bank's wire stripping practices violated applicable rules and regulations. Nor has the Respondent shown that the wire stripping practices were linked to the alleged sanction violations.

*iv. Alternative Messaging System*

462. On March 17, 2012, Future Bank was disconnected from the SWIFT network<sup>421</sup> and used an alternative messaging system (AMS) or test key system to process inter-bank payments.<sup>422</sup> It is common ground that using AMS is not in itself illegal as long as the bank keeps records that allow the retrieval and verification of transaction information.<sup>423</sup> At the same time, it is also undisputed that AMS is by its nature not subject to the same transaction monitoring, filtering, and screening as the SWIFT system.

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<sup>418</sup> Future Bank, Appendix to Ernst & Young's Agreed upon procedures report dated 28 April 2011 (**DB-5**); Future Bank, Appendix to Ernst & Young's Agreed upon procedures report dated 23 May 2012 (**DB-6**).

<sup>419</sup> Wire stripping Inventory – Summary Review (2019) (**PS-84**).

<sup>420</sup> AML Law, Article 5 (**PS-10**).

<sup>421</sup> 2018 CBB Report (**R-172**), ¶ 339.

<sup>422</sup> Reply, ¶¶ 298-307.

<sup>423</sup> 2018 CBB Report (**R-172**), ¶ 341.



463. It is also common ground that Iranian banks used AMS because of the threat posed by the international sanctions.<sup>424</sup> It is also established that Future Bank used AMS since 2008.<sup>425</sup> In addition, at the hearing, the Claimants' witness Mr. Sourì conceded that Future Bank had not filed STRs for transactions conducted through AMS,<sup>426</sup> which appears unusual and indicative of an improper due diligence.
464. The Parties dispute whether Future Bank misrepresented to the CBB that it had only started using AMS after it was cut off from the SWIFT network in 2012 (a).<sup>427</sup> They also disagree on whether the use of AMS allowed Future Bank to avoid keeping mandatory records of transactions, monitoring them for suspicious activity, and reporting to the CBB (b).<sup>428</sup> It is also disputed whether the use of AMS was related to the alleged violations of the applicable sanctions (c). These facts must be considered in turn.

*a. Did Future Bank Fail to Disclose to the CBB its Use of AMS Prior to 2012?*

465. The CBB contends that Future Bank had started using AMS even before it was disconnected from the SWIFT network in March 2012.<sup>429</sup> The Claimants do not expressly state that Future Bank used AMS prior to March 2012. However, they impliedly do so, admitting that Iranian banks used AMS "for decades" because of the "looming threat" of sanctions,<sup>430</sup> and that the CBB was, or must have been, aware of Future Bank's use of AMS.<sup>431</sup>
466. The record shows that, on November 29, 2012, Future Bank represented to the CBB that "until 17<sup>th</sup> March 2012, the payments were effected through SWIFT. Later on, when we were disconnected from the Swift network, Future Bank has made payment arrangements

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<sup>424</sup> Reply, ¶ 304.

<sup>425</sup> Deloitte Summary of the Inventory of AMS, (PS-85).

<sup>426</sup> Hearing Transcript, Day 2, p. 335:2-13 (Mr. Sourì).

<sup>427</sup> 2018 CBB Report (R-172), ¶ 347; Reply, ¶¶ 310-314.

<sup>428</sup> 2018 CBB Report (R-172), ¶¶ 348-357.

<sup>429</sup> 2018 CBB Report (R-172), ¶¶ 344-345, 351.

<sup>430</sup> Reply, ¶¶ 304, 307.

<sup>431</sup> Reply, ¶¶ 295-314.

through test key mechanism separately entered into with correspondent banks.”<sup>432</sup> This representation omits to mention that Future Bank had already used AMS prior to its disconnection from SWIFT. At the hearing, the Claimants’ witness Mr. Sourì, who served as Future Bank’s CEO at the time, admitted that Future Bank did not disclose its use of AMS to the CBB prior to the cut off from SWIFT.<sup>433</sup>

467. The Deloitte inventory of AMS messages of Future Bank, shows that the bank sent and received a total of 9,193 messages using AMS, out of which 1211 were sent between February 5, 2008 and March 17, 2012, while Future Bank still had full access to the SWIFT network.<sup>434</sup> The underlying documentation, including the AMS message Future Bank’s messages prior to being disconnected from SWIFT, is on the record.<sup>435</sup> The Claimants did not rebut this evidence.
468. On this basis, the Tribunal is convinced that, in its letter of November 29, 2012, Future Bank misrepresented its use of AMS prior to 2012 to the CBB.
469. The Respondent argues that the failure by Future Bank to disclose this information to the CBB was a violation of Article 163 of the CBB Law, which provides that “any officer or employee of a Licensee or a listed company shall be punished [...] if he (1) concealed any records, information or documents relevant to the activities of the Licensee” requested by the CBB or an external auditor.<sup>436</sup>
470. Article 163 of the CBB Law addresses the individual criminal liability of a bank’s officer or employee. The provision does not purport to regulate the conduct of banks. That said, the failure of the officers of Future Bank to disclose the bank’s use of AMS appears to have been contrary to the requirements of the CBB Law. Although not dispositive, this is a fact that the Tribunal must take into account when assessing the propriety of the Claimants’ conduct.

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<sup>432</sup> FB Response to 2012 CBB Report (C-156), p. 3.

<sup>433</sup> Hearing Transcript, Day 2, pp. 333:9-334:2 (Mr. Sourì).

<sup>434</sup> Appendix PS 2.1.3, ¶ 1.1.1.

<sup>435</sup> AMS Review, Appendix PS 2.1.3; Second Expert Report of Mr. Paul Sharma, February 27, 2019 (hereinafter “**Second ER Sharma**”) (RER-3).

<sup>436</sup> Rejoinder, ¶ 121 referring to The CBB Law (CL-5), Article 163.

*b. Was the Failure by Future Bank to Keep Proper Transaction Records while Using the AMS System Illegal?*

471. According to the CBB, Future Bank was required “to maintain a reliable and complete record of pay orders” and “to maintain adequate books and records capable of clearly demonstrating that the pay orders (and Future Bank’s operating of business) complied with the legal requirements for transparency in cross-border payments.”<sup>437</sup>

472. The CBB Rulebook requires that banks keep “adequate records [...] enabling a reconstitution of the transaction concerned”:

Conventional bank licensees must comply with the record keeping requirements contained in the AML Law. Conventional bank licensees must therefore retain adequate records (including accounting and identification records), for the following minimum periods:

(a) For customers, in relation to evidence of identity and business relationship records (such as application forms, account files and business correspondence [...]), for at least five years after the customer relationship has ceased; and

(b) For transactions, in relation to documents [...] enabling a reconstitution of the transaction concerned, for at least five years after the transaction was completed.<sup>438</sup>

473. The CBB points out that “while Future Bank maintained fax confirmations, there is no electronic ledger for recording [AMS] transactions” nor a “manual entry ledger”. Moreover, the AMS “was never part of the Treasury Department’s Manual or the Operations Department’s SOPs.”<sup>439</sup> For the CBB, this state of affairs conflicted with Future Bank’s obligation to “keep [...] a record of any money transfers through the [AMS].”<sup>440</sup> The CBB also infers from the “absence of proper records” that the AMS “was deliberately designed to be less transparent and less well documented than the SWIFT system, ultimately to conceal from scrutiny the true nature of the transactions to which the pay orders relate.”<sup>441</sup>

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<sup>437</sup> 2018 CBB Report (**R-172**), ¶¶ 354-355.

<sup>438</sup> CBB Rulebook Financial Crime (**RL-119**), FC 7.1.1.

<sup>439</sup> 2018 CBB Report (**R-172**), ¶ 32.

<sup>440</sup> 2018 CBB Report (**R-172**), ¶¶ 29, 340-341.

<sup>441</sup> 2018 CBB Report (**R-172**), ¶ 353.

474. The Respondent argues that the failure to record a transaction is a criminal offence under the AML Law pursuant to Article 5 of Ministerial Order 7/2001.<sup>442</sup> Future Bank failed to make records of at least 955 messages sent by way of AMS. Unlike SWIFT messages, AMS transactions can only be reviewed and monitored if they are manually recorded. Because of Future Bank's failure to record these 955 messages, the CBB had no effective way of verifying these transactions. The Respondent also argues that there is no evidence that Future Bank applied any transaction monitoring or reporting systems to AMS, which implicates a violation of Rules FC 2.2.1 and 2.2.3 of the Financial Crime Module of the CBB Rulebook. Further, according to the Respondent, the failure to report a single AMS transaction as suspicious was in breach of Rule FC 3.1.4(b) of the same module.<sup>443</sup>
475. The Claimants do not comment on these allegations in any detail. They contend that "even assuming for the sake of argument that Future Bank's use of the Test Key mechanism would have been prohibited under Bahraini laws and regulations at the time [...] this had not been complained of nor notified by the CBB to Future Bank prior to the Respondent's Statement of Defense".<sup>444</sup>
476. The record sufficiently shows that the absence of records in respect of 955 messages for which AMS was used violated the requirements of Article 5 of the AML Law and Ministerial Order 7/2001, which requires the banks to "maintain a register containing all details of transactions", and in particular:
- a) to enable the Anti Money Laundering Unit to follow up every transaction and the institution's compliance with the duties provided for in this Order,
  - c) the possibility of restructuring the transaction;
  - d) the possibility of answering, within a reasonable period of time, any inquiries requested by the Anti Money Laundering Unit with the implementation of any orders issued with respect to disclosure of transactions including the identity of the owner of funds or beneficiary thereof and the monetary transactions conducted by the institutions requiring proof of identity;<sup>445</sup>

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<sup>442</sup> Rejoinder, ¶ 121, referring to Ministerial Order No. 7 of 2001 with respect to the obligations governing institutions concerning the prohibition and combating of money laundering, November 26, 2001 (hereinafter "**Ministerial Order No. 7 of 2001**") (**RL-142**).

<sup>443</sup> Rejoinder, ¶ 121, referring to CBB Rulebook Financial Crime (**RL-119**), FC 3.1.4(b).

<sup>444</sup> Reply, ¶ 297.

<sup>445</sup> Ministerial Order No. 7 of 2001 (**RL-142**).

477. Similarly, Future Bank has also breached the provisions of the CBB Rulebook, which require that banks keep “adequate records [...] enabling a reconstitution of the transaction concerned.”<sup>446</sup>

478. However, a violation of Bahrain’s regulations does not necessarily entail that Future Bank breached applicable sanctions. The Tribunal must therefore review whether Future Bank’s use of AMS and the lack of adequate record keeping were related to the sanctions.

*c. Did Future Bank Use AMS to Conceal Sanction Violations?*

479. Deloitte’s AMS inventory make the following findings:

- (a) Future Bank sent and received 9,193 messages using AMS, relating to at least USD 2.1 billion in outbound fund transfers;
- (b) 89% of these messages were sent to or from, or related to, entities while they were the subject of sanctions, including 182 messages from 2011 relating to IRISL (subject to UN sanctions since 9 June 2010), and 61 messages from 2012 relating to POGC (subject to US sanctions since 21 December 2010);
- (c) 1,211 AMS messages were sent between 5 February 2008 and 17 March 2012, while Future Bank still had full access to SWIFT;
- (d) 7,982 messages were sent using AMS after 17 March 2012; and
- (e) Future Bank failed to make any record of 955 of these messages.

480. Regarding the 89% of AMS messages sent to or received from sanctioned entities referred to in (b) above, the Deloitte inventory shows that the large majority of these messages were exchanged with various Iranian banks subsequent to those banks’ designation as sanctioned entities by OFAC and, in part, by the EU.<sup>447</sup> Similarly, Future Bank used AMS messages in relation to dealings with POGC after it had been sanctioned by OFAC. That said, as the Tribunal concluded above, the U.S. and EU sanctions were not opposable to Future Bank. Thus, the use of AMS in respect of entities coming under those sanctions do not support the Respondent’s preliminary objections.

481. In contrast, Future Bank exchanged 182 messages with IRISL subsequent to the latter’s designation as sanctioned entity by the UN on June 9, 2010.<sup>448</sup> This further substantiates

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<sup>446</sup> CBB Rulebook Financial Crime (**RL-119**), FC 7.1.1.

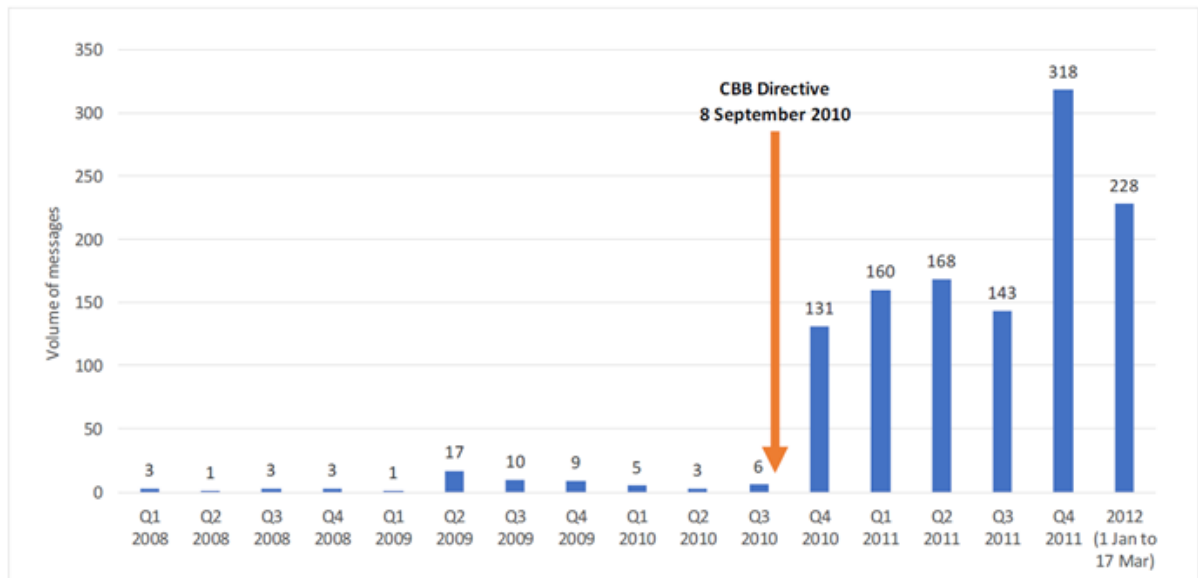
<sup>447</sup> Deloitte Summary of the Inventory of AMS (**PS-85**).

<sup>448</sup> Deloitte Summary of the Inventory of AMS (**PS-85**), p. 33.

the conclusion that the Tribunal reached above according to which Future Bank's dealings with IRISL breached UN sanctions.

482. The Deloitte inventory further demonstrates that Future Bank's use of AMS sharply increased after Bahrain implemented the UN sanctions in September 2010 and remained high in 2011 and early 2012 although at that time Future Bank still had access to SWIFT, which only ended on March 17, 2012.<sup>449</sup>

**Figure 5.1 AMS volume of messages (Q1 2008 to 17 March 2012)**



483. As this figure depicts, there is an evident correlation between the endorsement of the UN sanctions by Bahrain and the use of AMS. As AMS keeps a lower level of transaction information as opposed to SWIFT, it is not far-fetched to infer that the former was preferred over the latter to conceal transactions contrary to the sanctions. The same reason also explains why the bank chose not to disclose to the CBB that it had been using AMS before being cut off from SWIFT in 2012.
484. On this basis, the Tribunal concludes that it is possible that Future Bank's violations of the UN sanctions may have been more numerous than what emerged from the individual violations established in sub-section i) above.

<sup>449</sup> Second ER Sharma (RER-3), ¶ 5.1.25, figure 5.1.

*v. Iranian Exposure*

485. The Parties diverge on whether Future Bank exceeded the limits allegedly imposed by the CBB on Iranian exposure. The Respondent argues that the failure by Future Bank to reduce its country and shareholder exposure contradicted the CBB's repeated direct instructions. The Claimants' position is that the requirements imposed on Future Bank in terms of the limitation of the Iranian exposure were unclear, but that, in any event, Future Bank made good faith efforts to reduce its Iranian exposure to the extent possible and in part succeeded.<sup>450</sup>

486. The debate about the alleged excess exposure pertains to two different aspects, first to country exposure, *i.e.*, exposure to Iranian interests in general ((a) below) and, second, to exposure to the bank's Iranian shareholders, *i.e.*, to the Claimants ((b) below).

*d. Country Exposure*

487. An initial question with respect to Future Bank's alleged violation of the country exposure limit is whether the CBB had indeed imposed such a limit on the bank. Future Bank's letter to the CBB summarizing the meeting of August 9, 2007 between the CBB and Future Bank shows that the CBB had "recommended" that Future Bank not "assume new risks on Iran."<sup>451</sup> In the same letter, Future Bank represented that it would "attempt to source its assets and liabilities to the extent possible from Bahrain and other GCC countries"; "reduce the share of activities involving Iranian trade"; and "avoid enlarging our current exposure to Iran", which amounted to USD 1,019 million at that time (equivalent to BHD 384 million).

488. The letter is not clear on whether the CBB had issued a mandatory instruction capping the bank's Iranian exposure. However, in the 2008 CBB Report, the CBB referred to the USD 1,019 million limit as a "precautionary cap placed by the CBB" on Future Bank's Iranian exposure and required the Bank to establish robust controls to ensure compliance with the cap.<sup>452</sup> In response, Future Bank represented to the CBB that it would comply with such instructions and would "reduce its Iran exposure gradually in a phased manner"

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<sup>450</sup> Reply, ¶¶ 135-160.

<sup>451</sup> Letter Seif to Hamad, August 12, 2007 (R-77).

<sup>452</sup> 2008 CBB Report (R-83), ¶ 4.17.

and “recalibrate its business model towards non-Iranian entities”.<sup>453</sup> It emerges from this correspondence that, in August 2007, the CBB had instructed Future Bank to reduce its Iranian exposure and imposed a cap on such exposure at **USD 1,019 million** or BHD 384 million.

489. Following the imposition of the cap, Future Bank exceeded the cap on five days in 2008, as shown in the following chart:<sup>454</sup>

<b>Exposure Date</b>	<b>Size of Exposure (Funded and Unfunded) in USD Millions</b>
29 <sup>th</sup> of September 2008	1,031
25 <sup>th</sup> May 2008	1,129
26 <sup>th</sup> May 2008	1,120
22 <sup>nd</sup> May 2008	1,115
5 <sup>th</sup> October 2008	1,102

490. To avoid such incidents in the future, the CBB required Future Bank “to establish a robust monitoring controls over the exposures to Iran”.<sup>455</sup> In spite of this requirement, Future Bank exceeded the cap on country exposure in 2009 on 13 occasions listed in the chart below:<sup>456</sup>

<sup>453</sup> Letter Seif to Hamad, August 12, 2007 (**R-77**).

<sup>454</sup> 2008 CBB Report (**R-83**), ¶ 4.17.

<sup>455</sup> 2008 CBB Report (**R-83**), ¶ 4.17.

<sup>456</sup> 2010 CBB Report (**R-92**), ¶ 5.6.



Date	BHD	USD	Excess in BD
22-Mar-09	393,473,684	1,043,696,775	9,144,684
23-Mar-09	397,986,936	1,055,668,264	13,657,936
24-Mar-09	401,426,883	1,064,792,793	17,097,883
25-Mar-09	399,604,890	1,059,959,921	15,275,890
26-Mar-09	400,140,520	1,061,380,691	15,811,520
2-Apr-09	385,560,989	1,022,708,193	1,231,989
5-Apr-09	386,236,632	1,024,500,351	1,907,632
6-Apr-09	388,265,414	1,029,881,734	3,936,414
6-May-09	388,435,856	1,030,333,836	4,106,856
21-May-09	385,013,421	1,021,255,758	684,421
27-May-09	387,861,300	1,028,809,814	3,532,300
28-May-09	387,922,937	1,028,973,307	3,593,937
1-Jun-09	391,116,705	1,037,444,841	6,787,705

491. The CBB reiterated its direction to the Board of Future Bank to put in place controls “to avoid the recurrence of similar breaches in future.”<sup>457</sup>
492. The CBB Inspection Reports for 2010 and 2011 do not report any violation of the country exposure limits. However, in a letter of December 29, 2011, the CBB requested Future Bank to further “continue reducing exposures to Iran.”<sup>458</sup> It reiterated this instruction in a letter of September 9, 2012.<sup>459</sup>
493. The record shows that, in 2011-2012, Future Bank complied with these instructions, reducing its Iranian exposure to BHD 347.741 million in November 2012.<sup>460</sup> However, that figure then rose again the following month to BHD 370 million.<sup>461</sup> While this level was below the cap of BHD 384 million, it contradicted the CBB’s instructions of December 29, 2011 and September 9, 2012 to continue reducing the exposure.

<sup>457</sup> 2010 CBB Report (**R-92**), ¶ 5.6.

<sup>458</sup> Letter from the CBB to Future Bank, December 29, 2011 (**R-259**).

<sup>459</sup> Minutes of December 11, 2012 Meeting between FB and the CBB, January 7, 2013 (**R-267**), p. 9.

<sup>460</sup> FB Response to 2012 CBB Report (**PS-61**).

<sup>461</sup> Balance sheet attached to letter from Future Bank to the CBB regarding Iran exposure in December 2012, January and February 2013, March 17, 2013 (**C-220**).

494. On January 31, 2013, the CBB again instructed Future Bank to reduce its exposure to Iranian entities/customers and not to undertake any new exposure.<sup>462</sup> At that time, Future Bank's Iranian exposure amounted to BHD 375 million.<sup>463</sup> Thus, by this letter the CBB effectively imposed a new cap at BHD 375 million while at the same time repeating its instruction to reduce the exposure. As can be seen from the table below, Future Bank largely complied with these instructions, with the exception of the level shown at the end of March 31, 2013 (BHD 371,851), which remained below the cap of BHD 375 million, but was higher than the one at the end of February 2013 (BHD 367,797), in violation of the instruction to continue reducing the country exposure.

Date	Iran Exposure	Evidence
February 28, 2013	BHD 367,797	Balance sheet attached to letter from Future Bank to the CBB regarding Iran exposure in December 2012, January and February 2013, March 17, 2013 (C-220)
March 31, 2013	BHD 371,851	Balance sheet attached to letter from Future Bank to CBB attaching report on Iran exposure in March 2013, April 14, 2013 (C-217)
March 31, 2014	BHD 350,762	Balance sheet attached to letter from Future Bank to the CBB regarding Exposure to Iran as of March 31, 2014, April 22, 2014 (C-221)
July 31, 2014	BHD 345,421	Balance sheet attached to letter from Future Bank to CBB attaching report on Iran exposure in July 2014, August 11, 2014 (C-223)
August 31, 2014	BHD 349,971	Balance sheet attached to letter from Future Bank to CBB attaching report on Iran exposure in August 2014, September 10, 2014 (C-218)
September 30, 2014	BHD 342,839	Balance sheet attached to letter from Future Bank to CBB regarding Iran

<sup>462</sup> Letter from the CBB to FB, January 31, 2013 (R-271); Letter Yousif to Souri, April 1, 2014 (R-125).

<sup>463</sup> Balance sheet attached to letter from Future Bank to the CBB regarding Iran exposure in December 2012, January and February 2013, March 17, 2013 (C-220).

		Exposure as on September 30, 2014, October 8, 2014 (C-159)
December 31, 2014	BHD 342,085	Balance sheet attached to letter from Future Bank to the CBB regarding Exposure to Iran as of December 31, 2014, January 13, 2015 (C-222)
March 31, 2015	BHD 329,847	Balance sheet attached to letter from Future Bank to the CBB regarding Iran Exposure as on March 31, 2015, April 16, 2015 (C-160)

495. Overall, it is true that the record shows that, in the years 2007-2015, Future Bank failed to comply with the CBB's instructions with respect to country exposure on several occasions. However, the violations were sporadic and the bank managed to gradually reduce the exposure over time. The Tribunal in particular notes that, in the years leading to Future Bank's administration, the bank's country exposure decreased steadily. As was seen above, between April 2013 and March 2015, the country exposure progressively decreased and was never above the cap imposed by the CBB.

496. Furthermore, the record contains no instruction about the pace of the required reduction. Therefore, the Tribunal is unconvinced by the Respondent's argument that an annual average reduction of 1.53% from 2007 to 2015 was in breach of any applicable rule.<sup>464</sup>

*e. Shareholder Exposure*

497. In respect of Future Bank's exposure to its shareholders, on July 21, 2009, the CBB directed Future Bank to reduce its exposure to Bank Melli Iran and Bank Saderat Iran to 40% of its capital base by September 2009.<sup>465</sup> The previously approved limit was set at 60% of the capital base.<sup>466</sup>

498. In the following year, during a meeting with Future Bank on September 20, 2010, the CBB orally advised Future Bank to (i) stop transacting with Bank Melli and Bank Saderat, (ii) stop transacting with all OFAC listed entities/individuals, (iii) put a hold on

<sup>464</sup> Rejoinder, ¶ 60.

<sup>465</sup> Letter Hamad to Seif, July 21, 2009 (R-87).

<sup>466</sup> 2008 CBB Report (R-83).

all other non-OFAC related transactions in respect of Iranian entities/individuals. Referring to the CBB's statements at the meeting, the minutes first use the word "advise" and later mention "oral instructions, which we need to follow".<sup>467</sup> The record contains no indication of a follow up in the form of written instructions or otherwise.

499. On April 1, 2014, the CBB directed Future Bank to "immediately reduce its exposure limits to its shareholders, BSI and BMI and bring such limits down to the outstanding balances as of end of December 2013, while not undertaking any new exposure to these shareholders." It added that the bank "should initiate measures to bring down such exposures to nil".<sup>468</sup> As the Claimants observe, the CBB gave Future Bank no time limit for such reduction.

500. The following table depicts the chronology of the CBB's instructions and the evolution of Future Bank's shareholder exposure:

Date	Shareholder Exposure/ CBB Instruction	Evidence
July 21, 2009	CBB instruction to reduce shareholder exposure from 60% to 40% of capital base	2008 CBB Report, April 12, 2009 ( <b>R-83</b> )
December 31, 2009	BHD 233,406,000 (= 42.63% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ) Appendix GD2-2.4
December 31, 2010	BHD 183,701,000 (= 35% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ) Appendix GD2-2.4
December 31, 2011	BHD 110,854,000 (= 36% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ) Appendix GD2-2.4
December 31, 2012	BHD 164,726,000 (=30.15% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ) Appendix GD2-2.4

<sup>467</sup> Future Bank Minutes, October 23, 2010 (**C-179**), p. 51.

<sup>468</sup> Letter Yousif to Sourì, April 1, 2014 (**R-125**).

Date	Shareholder Exposure/ CBB Instruction	Evidence
December 31, 2013	BHD 174,033,000  (= 30.06% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ) Appendix GD2-2.4  Letter from Future Bank to the CBB, October 22, 2014 ( <b>PS-53</b> )
March 31, 2014	BHD 167,530,000  (no indication of the percentage)	Letter from Future Bank to the CBB, June 19, 2014 ( <b>PS-51</b> )
April 1, 2014	CBB instruction to reduce exposures to the outstanding balance at the end of December 2013 (BHD 174,033,000) and initiate measures to further reduce to nil.	Letter from the CBB to Future Bank, April 1, 2014 ( <b>R-125</b> ).
June 30, 2014	BHD 183,530,000  (no indication of the percentage)	Letter from Future Bank to the CBB, October 22, 2014 ( <b>PS-53</b> )
September 30, 2014	BHD 176,260,000  (no indication of the percentage)	Letter from Future Bank to the CBB, 22 October 22, 2014 ( <b>PS-53</b> )
December 31, 2014	BHD 173,903 million  (= 29,12% of total assets)	Second Davies Report, February 27, 2018 ( <b>RER-4</b> ) Appendix GD2-2.4

501. The record thus reveals that Future Bank complied with the CBB instruction of July 21, 2009 to reduce its shareholder exposure to 40% of its capital base. The Respondent does not suggest otherwise. Yet Future Bank failed to comply with the CBB's later instructions, given on April 1, 2014, to maintain its shareholder exposure at the level existing at the end of December 2013 and to start to reduce it to zero. It exceeded the December 2013 limit at the end of the second and third quarters of 2014 and complied with it at the end of the fourth quarter.

*vi. Preliminary Conclusions*

502. It emerges from the foregoing review that only an insignificant number of sanction violations are established. This being so, it is true that the evidence of specific instances of violations must be viewed in the context of the circumstantial evidence discussed above and on the backdrop of Future Bank's deficient AML and CFT reporting system, its practice of wire stripping and use of AMS. The increase in the use of AMS following Bahrain's implementation of the UN sanctions and Future Bank's misrepresentations and failure to keep records on many AMS transactions suggest a potential larger scale of violations than the available evidence actually proves.
503. Yet, even considering these factors, the record contains insufficient indications to establish systematic and/or severe violations of fundamental rules of law that would call for a declaration of inadmissibility as a blanket measure. While the Tribunal must take into account Future Bank's violations of the applicable laws and regulations when assessing the merits and the quantum, these breaches do not rise to the level that has led international tribunals to reject claims as inadmissible.

**(d) Do Future Bank's Illegal Activities Taint the Claims in This Arbitration?**

504. As discussed above, an additional requirement of inadmissibility is that the unlawful conduct be related to the claims that the investor submits to arbitration.<sup>469</sup> The Respondent acknowledges this requirement, when it argues that "[s]erious or repeated wrongdoing *connected to the subject-matter of an investor's claim* disqualifies that claim from being heard".<sup>470</sup> Indeed, the rationale underlying the rules on admissibility would not justify denying the investor access to international arbitration as a blanket measure if the illegalities in question do not taint the claims.<sup>471</sup>

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<sup>469</sup> Richard Kreindler, *Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine*, in: *Between East and West: Essays in Honour of Ulf Franke* (Kaj Hober, Annette Magnusson & Marie Öhrström eds., JurisNet 2010) (RL-153), p. 317; *Khan Resources v. Mongolia Decision on Jurisdiction* (CL-166), ¶ 384.

<sup>470</sup> Rejoinder, ¶ 6(a)(ii) (emphasis added).

<sup>471</sup> This does not of course prevent the host State from responding to such trivial violations by appropriate measures, provided that it does so in accordance with its obligations under the applicable treaty (*e.g.*, FET and prohibition of uncompensated expropriation).

505. The claims in this arbitration relate to the measures taken by the Bahraini regulatory authorities against Future Bank. They do not arise out of a transaction tainted by Future Bank's unlawful conduct. This distinguishes the present dispute from the cases outlined above, where the investor's claims arose out of transactions tainted by illegal activities, such as corruption,<sup>472</sup> fraud<sup>473</sup> or forgery.<sup>474</sup> In such instances, the declaration of inadmissibility seeks to avoid that, by entertaining such claims, the international tribunal allows the claimant to benefit from its own wrong. In the present case, however, the Claimants would not benefit from their own wrongful conduct if the Tribunal were to entertain their claims, which claims put into questions the lawfulness of the Respondent's regulatory conduct.
506. This does not mean that the Tribunal must ignore the evidence of Future Bank's unlawful activities. Rather, it must assess the consequences of these illegalities as an issue of the merits. In particular, the Tribunal must determine whether Bahrain's regulatory measures were a *bona fide* and proportionate response to Future Bank's unlawful conduct, and/or whether the evidence of Future Bank's unlawful activities affects the quantification of any compensation due to the Claimants.
507. For the foregoing reasons, the Tribunal concludes that Future Bank's unlawful conduct is not sufficient to constitute a bar to its jurisdiction or to the admissibility of the claims. The Tribunal will assess consequences of such conduct as part of its analysis on the merits.

## **B. EXHAUSTION OF LOCAL REMEDIES**

508. As a further preliminary objection, the Respondent submits that the Claimants failed to exhaust local remedies. The Respondent raises this objection as part of its submissions on the merits and has not formulated it as an issue of jurisdiction or admissibility. However, given the threshold nature of the objection, the Tribunal will dispose of it as part of its analysis of the preliminary objections.

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<sup>472</sup> *World Duty Free v. Kenya (RL-70)*; *Metal-Tech v. Uzbekistan*.

<sup>473</sup> *Fraport v. Philippines, Award and Dissenting Opinion of Mr. Bernardo M. Cremades (RL-72)*.

<sup>474</sup> *Churchill Mining v. Indonesia*.

## 1. The Respondent's Position

509. The Respondent argues that the Claimants cannot successfully advance due process violations in the issue of the CBB's decision to place Future Bank under administration when they failed to seek redress through available remedies before Bahraini courts. According to the Respondent, when an investor fails to make reasonable efforts to obtain correction of alleged violations of due process in the issue of administrative decisions before local courts, it cannot prevail in establishing an international delict.<sup>475</sup>
510. In support of this objection, the Respondent relies on *Thunderbird v. Mexico*, *Helnan v. Egypt*, *Apotex v. United States of America*, as well as on *Generation Ukraine v. Ukraine*. In the Respondent's submission, these awards confirm that a violation of due process treaty standards can only occur once some redress has been sought and denied in domestic courts.<sup>476</sup>
511. The Respondent further asserts that the standards of due process applicable in administrative proceedings are lower than in judicial proceedings.<sup>477</sup> According to the Respondent, had the Claimants appealed the CBB's decision, they would have been afforded many of the due process protections they now claim to have been denied.<sup>478</sup> Finally, the Respondent notes that the Claimants' futility argument is not supported by any reliable evidence.<sup>479</sup>

## 2. The Claimants' Position

512. According to the Claimants, "there is no general requirement to exhaust local remedies for a treaty claim to exist, unless a treaty requires the exhaustion of local remedies as a

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<sup>475</sup> SoD, ¶¶ 153-154; Rejoinder, ¶¶ 246-257.

<sup>476</sup> See for instance Rejoinder, ¶¶ 246-249; Hearing Transcript, Day 1, pp. 187:5-196:5 (Prof. Paulsson).

<sup>477</sup> See for instance Hearing Transcript, Day 1, p. 187:5-15 (Prof. Paulsson).

<sup>478</sup> Rejoinder, ¶ 251.

<sup>479</sup> Rejoinder, ¶¶ 255-257.



condition for the commencement of an [...] arbitration”.<sup>480</sup> They further point to the absence of any requirement of exhaustion of local remedies in the BIT.<sup>481</sup>

513. For the Claimants, the “BIT just provides for state responsibility for the acts and omissions of its organs, and it does not distinguish between judiciary, executive, and the legislative”. In this context, accepting the Respondent’s argument would, so the Claimants say, defeat the substantive protection and the arbitration clause.<sup>482</sup> For the Claimants, the awards upon which the Respondent relies are fact-specific and do not apply in the present circumstances.<sup>483</sup>

514. At the Hearing, the Claimants drew the Tribunal’s attention to the fork-in-the road provision contained in Article 11(3) of the BIT, arguing that this provision would be inoperable if the investors were required to exhaust local remedies.<sup>484</sup>

515. The Claimants further argue that an appeal of the CBB’s decision would, in any event, have been futile since Future Bank had already been informed that the taking was a “sovereign decision” and Bahrain’s judiciary is highly dependent on the executive.<sup>485</sup>

### 3. Analysis

516. Article 44 of the ILC Articles on State Responsibility provides that:

The responsibility of a State may not be invoked if:

[...]

(b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

517. As is generally recognized and undisputed in the case at hand, no requirement of exhaustion of local remedies applies in investment treaty arbitration, unless the

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<sup>480</sup> Hearing Transcript, Day 5, p. 1054: 6-12 (Dr. Gharavi), relying on the decision in *Gavrilovic and Gavrilovic v. Croatia*.

<sup>481</sup> See for instance Hearing Transcript, Day 1, pp. 42:24-43:3 (Dr. Gharavi); Day 5, p. 1050:14-15 (Dr. Gharavi).

<sup>482</sup> Hearing Transcript, Day 5, p. 1050:11-21 (Dr. Gharavi).

<sup>483</sup> See for instance Reply, ¶¶ 656-659; Hearing Transcript, Day 5, pp. 1051:16-1052:4 (Dr. Gharavi).

<sup>484</sup> Hearing Transcript, Day 5, pp. 1052:22-1053:11 (Dr. Gharavi).

<sup>485</sup> See for instance Reply, ¶¶ 662-663.

Contracting Parties have agreed otherwise.<sup>486</sup> As noted by the *RosInvest* tribunal, “the consent to investor-state arbitration [...] amounts to a waiver of the principle of exhaustion of local remedies. By choosing international arbitration to settle third party investment arbitration disputes the principle of exhaustion of national legal remedies is excluded”.<sup>487</sup>

518. In the present case, neither the dispute settlement clause in Article 11 nor any other provision of the BIT require the exhaustion of local remedies. The exhaustion of local remedies is not therefore a condition to arbitrate a dispute under the BIT.<sup>488</sup>
519. That said, the Respondent maintains that its defence is not based on the need for exhaustion of local remedies but rather on the requirement to make reasonable efforts to obtain the correction of alleged due process violations in local courts. The issue is thus whether, and to what extent, an investor may be required to pursue local remedies in order to sustain a valid claim for breach of treaty.
520. The Tribunal finds that the Respondent’s attempt to nuance its position does not assist its position. Indeed, for a number of reasons, it considers that there is no substantive or procedural requirement to pursue local remedies before initiating a treaty claim unless such a claim is for denial of justice.
521. First, contrary to the Respondent’s submission, the Tribunal is of the view that the rationale behind the requirement of exhaustion of local remedies for a denial of justice claim cannot be transposed to the present situation. As emphasized in *Oostergetel*, “[a] denial of justice implies the failure of a national system as a whole to satisfy minimum

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<sup>486</sup> See for instance ILC ‘Preliminary Report on Diplomatic Protection’ UN Doc A/CN.4/484, ¶ 40; *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and the Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, September 8, 2006 (hereinafter “*Mytilineos v. The State Union of Serbia & Montenegro and the Republic of Serbia*”), ¶ 225.

<sup>487</sup> *RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 1, 2007, ¶ 153.

<sup>488</sup> As explained in the ILC’s Commentary, Article 44 is “not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the condition for the admissibility of cases brought before such courts or tribunals. Rather, [it] define[s] the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States”: See Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Article 44, Commentary, Point (1).

standards”.<sup>489</sup> Thus, as long as the system as a whole is not given a reasonable opportunity to correct aberrant judicial conduct, a denial of justice cannot arise.<sup>490</sup>

522. Invoking due process violations in the administrative decision-making, in order to establish a breach of BIT standards does not rest upon the predicate of a “systemic failure of the State’s justice system” or on the failure of the national system “as a whole”. It rather seeks to rely on the breach of a specific international obligation undertaken by the State, be the protection against expropriation or fair and equitable treatment.
523. Second, as the *Helnan v. Egypt ad hoc* Committee held, a State is undoubtedly responsible at an international level for a decision taken by its administrative authorities, when that decision conflicts with one of its international obligations.<sup>491</sup>
524. Third, the lawfulness of the CBB’s decision to place Future Bank under administration as it may be determined by a Bahraini court under Bahraini law is not dispositive of the characterization of such decision under international law, which is determinative for purposes of the BIT. Hence, the Tribunal is not persuaded that it has to await the outcome of the local proceedings.
525. Fourth, arbitral practice shows that “(i)n numerous ICSID cases, tribunals have rendered awards in favour of the claimants as a result of administrative decisions, in which no such application to the local courts had been made”.<sup>492</sup> In that sense, the *Quiborax v. Bolivia* tribunal found that “the availability of domestic actions to challenge the Revocation Decree does not change the Tribunal’s conclusion that the revocation did not comply

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<sup>489</sup> *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, April 23, 2012 (CL-162), ¶ 273.

<sup>490</sup> See, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10(20)(5) of the DR CAFTA, May 31, 2016, ¶ 254 (“*The international delict of denial of justice rests upon a specific predicate, namely, the systemic failure of the State’s justice system. When a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent’s legal system as a whole has failed to accord justice to the claimant.*”)

<sup>491</sup> *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, June 14, 2010 (hereinafter “*Helnan v. Egypt*”) (CL-172), ¶ 51.

<sup>492</sup> *Helnan v. Egypt*, ¶ 48.

with due process [...]”.<sup>493</sup> The same is true in non-ICSID investment arbitrations<sup>494</sup> and the Tribunal sees no reason to depart from this approach.

526. Consequently, the Tribunal finds no basis in the BIT or in international law to impose a general requirement to pursue local remedies for an investor to bring a treaty claim (with the exception of a denial of justice claims, which is not at issue here).
527. This conclusion is reinforced by the presence of a fork-in-the-road clause in Article 11(3) of the BIT, which reads as follows:

A dispute primarily referred to the competent courts of the host Contracting Party, as long as it is pending, cannot be referred to arbitration save with the parties’ agreement; and in the event that a final judgment is rendered, it cannot be referred to arbitration.

528. Thus, by virtue of Article 11(3), the Contracting Parties have chosen to bar recourse to arbitration when the investor has “primarily referred” the dispute to the courts of the host State and local proceedings are pending or a final judgment has been rendered. Thus, had the Claimants sought redress of the violations impugned here before Bahraini courts, the Tribunal would have been barred from ruling on such claims.
529. It follows that accepting the Respondent’s position and requiring an investor to seek redress before local courts would amount to precluding that investor from accessing an international forum available under the BIT. This would render Article 11(2) of the BIT, which allows investors to submit investment disputes to international arbitration, inoperative and devoid of any utility. Therefore, considering the context of Article 11(3) of the BIT, the imposition of a prior requirement to act in local courts would be contrary to the well-established rule of effective interpretation of treaties, according to which treaty provisions must be interpreted in a manner that gives them a purposeful meaning rather than making them meaningless or redundant.<sup>495</sup>

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<sup>493</sup> *Quiborax v. Bolivia (CL-127)*, ¶ 226.

<sup>494</sup> *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, ¶¶ 857, 873; *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Final Award, April 26, 2019.

<sup>495</sup> See, *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, September 3, 2013, ¶ 309; *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, November 26, 2009, ¶ 195.

530. The same view was expressed by the tribunal in the *Mytilineos v. The State Union of Serbia & Montenegro and the Republic of Serbia* case in a similar context:

To assume that the BIT had not tacitly dispensed with the requirement to exhaust local remedies would imply that an investor, before making his or her choice between domestic courts and international arbitration, would have to exhaust domestic remedies. This would in effect render the ‘domestic courts’ alternative of the fork-in-the-road clause meaningless and thus such an assumption cannot be made. On the contrary, a fork-in-the-road clause obliges an investor to choose whether to pursue remedies before domestic or international fora. Once the choice is made in favor of domestic remedies, international arbitration is no longer available. Thus, one cannot require the exhaustion of local remedies as a precondition for access to international arbitration. Instead, the initiation of local proceedings forfeits access to international arbitration.<sup>496</sup>

531. For the foregoing reasons, the Tribunal concludes that the Claimants were not required to first proceed before Bahraini courts, with the result that this objection must also be dismissed.

## **VI. LIABILITY**

532. Since the Respondent did not prevail with its preliminary objections, the Tribunal now proceeds to examine the merits of the dispute. The Claimants allege that the Respondent’s actions amount to violations of the expropriation, fair and equitable treatment (“**FET**”), and full protection and security (“**FPS**”) standards. The Respondent opposes the claims in their entirety.

### **A. EXPROPRIATION**

533. The Parties dispute whether the Respondent’s measures against Future Bank constituted an expropriation contrary to the requirements of Article 6(1) of the BIT.

#### **1. The Claimants’ Position**

534. The Claimants argue that the Respondent expropriated their investment, either directly or indirectly, in breach of Article 6 of the BIT.

535. According to the Claimants, direct expropriation is characterized by the deprivation of the investor’s property and a corresponding appropriation by the state, or state-mandated

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<sup>496</sup> *Mytilineos v. The State Union of Serbia & Montenegro and the Republic of Serbia*, ¶ 221.

beneficiary, of specific property rights.<sup>497</sup> In contrast, indirect expropriation is defined as “a form of [...] expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property”.<sup>498</sup>

536. In the Claimants’ submission, the CBB’s pronouncement on April 30, 2015 that Future Bank “cease trading immediately” and provide the CBB with “full access to [its] premises” satisfies the definition of direct expropriation.<sup>499</sup> In any event, the Claimants argue that the Respondent’s actions amount at a minimum to an indirect expropriation as they deprived the Claimants of the use or enjoyment of their investment. In addition to *Generation Ukraine v. Ukraine* quoted above, the Claimants rely on *PSEG v. Turkey*, according to which indirect expropriation entails “some form of deprivation of the investor in the control of the investment, the management of day-to-day operations of the company”.<sup>500</sup> The Claimants submit that, contrary to the Respondent’s argument, economic depreciation is not a necessary component of indirect expropriation. They point to *Deutsche Bank v. Sri Lanka*, which found that “a substantial interference with rights may well occur without actually causing any economic damage [...] the effect of conduct must be considered in deciding whether an indirect expropriation has occurred, does not necessarily import an economic test”.<sup>501</sup>

537. In any event, the Claimants dispute the assertion that no economic depreciation occurred or that, as the Respondent suggests, Future Bank’s share value had increased under administration, as the “CBB’s priority was to maximize Future Bank’s assets rather than

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<sup>497</sup> SoC, ¶ 175, citing Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) (CL-84), p. 340.

<sup>498</sup> SoC, ¶ 176, citing *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003 (hereinafter “*Generation Ukraine v. Ukraine*”) (CL-86), ¶ 20.22.

<sup>499</sup> SoC, ¶ 178.

<sup>500</sup> SoC, ¶ 176, citing *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007 (CL-89), ¶ 278.

<sup>501</sup> Reply, ¶ 523, citing *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, October 31, 2012 (CL-94), ¶ 504.

run a commercial venture”.<sup>502</sup> The Claimants distinguish the apparent increase in share value from the fair market value of the shares, which in fact decreased.<sup>503</sup>

538. Finally, the Claimants challenge the Respondent’s position that the administration decision could not amount to an expropriation because a banking licence is a privilege. They also dispute that placing Future Bank in administration was a “mere legitimate exercise of regulatory authority”,<sup>504</sup> referring to a writing of Prof. Paulsson according to whom “it is not normal to regulate in contradiction of justifiably perceived commitments. Nor it is normal to regulate while ignoring due process. Nor obviously is it normal to use regulatory enactments or conduct as a pretence of form serving as a cloak for the pursuit of hidden objectives”.<sup>505</sup> The Claimants do not deny that the Tribunal must afford the Respondent a measure of deference when it comes to the exercise of regulatory authority. However, quoting *Marfin v. Cyprus*, they specify that “such deference must not impede its [the Tribunal’s] task to verify whether international law was complied with”.<sup>506</sup>

539. In addition, the Claimants observe that an expropriation is only lawful if it meets the conditions under international law. They emphasize that a single violation of one of these conditions must result in a finding of liability.<sup>507</sup> In the present case, the Respondent breached every one of the conditions set in Article 6 for a lawful expropriation, *i.e.*, (a) a public purpose, (b) non-discrimination, (c) due process, (d) proportionality, and (e) prompt, adequate and effective compensation.

#### (a) Public Purpose

540. According to the Claimants, for an expropriation to be lawful, it must be effected for a legitimate public purpose. The decision to place Future Bank under administration was not made in pursuit of such a purpose; it was politically motivated and thus, in contravention of Article 6 of the BIT.

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<sup>502</sup> Reply, ¶ 526.

<sup>503</sup> Reply, ¶ 526.

<sup>504</sup> Reply, ¶ 533.

<sup>505</sup> Reply, ¶ 534, citing Jan Paulsson, *Indirect Expropriation: Is the Right to Regulate at risk?*, 3(2) Transnational Dispute Management (2006) (CL-151), p. 12.

<sup>506</sup> Hearing Transcript, Day 5, p. 1059:8-9 (Dr. Gharavi).

<sup>507</sup> Reply, ¶ 540.

541. The Claimants base this argumentation first, on the timing of the action, which was too short for a reasoned decision-making process on the basis of a legitimate public purpose; second, on the fact that the alleged public purpose was divorced from reality; and third, on the context at the time of the action, which suggests a political motivation.
542. In the Claimants' submission, the fact that the Respondent gave no justification at the time of the administration decision demonstrates that it was not taken in pursuit of a public purpose. The Claimants point to *Vestey Group v. Venezuela* in which the tribunal held that a failure to "advance a declared public purpose at the time of the expropriation *inter alia* demonstrated" that the measures complained of were not taken in the public interest.<sup>508</sup> The Claimants add that where tribunals found that a stated public purpose was "pretextual", they considered the respondent State in violation of the applicable treaty.<sup>509</sup>
543. In this context, the Claimants argue that because the Respondent provided a justification only after the decision was taken and the Respondent had assumed control over Future Bank, the "taking was not undertaken pursuant to a genuine public purpose".<sup>510</sup> The Claimant adds that the first justification for the CBB Decision came on May 7, 2015 when it was stated that should Future Bank "continue to offer services [it] will cause harm to the industry of financial services in the Kingdom of Bahrain".<sup>511</sup> In the Claimants' submission, this was a mere restatement of Article 136(a)(3) of the CBB Law and substantiation was not offered at the time.<sup>512</sup> In the same vein, the Claimants contend that the minutes of the Crisis Management Committee at the CBB on the day of the taking do not assist the Respondent either as they do not make mention of any breaches by Future Bank.<sup>513</sup>

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<sup>508</sup> Reply, ¶ 551, referring to *Vestey Group v. Venezuela* (CL-152), ¶ 296.

<sup>509</sup> Reply, ¶ 551, referring to *Mohammad Reza Dayyani, et al. v. Republic of Korea*, PCA Case No. 2015-38, Award, June 5, 2018 (hereinafter "*Dayyani v. Korea*") (CL-126), ¶ 453.

<sup>510</sup> Reply, ¶ 553, referring to *Vestey Group v. Venezuela* (CL-152), ¶ 296.

<sup>511</sup> Reply, ¶ 558, citing Published CBB Decision (C-61), Article 2.

<sup>512</sup> Reply, ¶ 559.

<sup>513</sup> Reply, ¶ 558, referring to CBB Meeting Minutes, April 30, 2015 (C-152).



544. According to the Claimants, these purported justifications do not even satisfy the requirements under the CBB Law, which provides that the decision to place a bank under administration can only be made “pursuant to a justified resolution”.<sup>514</sup>
545. The Claimants add that the Respondent’s failure to produce evidence of the decision-making process that culminated in the CBB Decision is demonstrative of a lack of a coherent public purpose.<sup>515</sup> In this regard, the Claimants point to the *Dayyani v. Korea* cases, where the tribunal reasoned that had the respondent State’s justifications for its measure “been the significant issue that the Seller had made it out to be, it would have been discussed and analyzed at length by the various supervisory authorities”.<sup>516</sup> In the absence of documents, adverse inferences must be made. They further submit that the Respondent’s failure to prove that the Respondent itself or the CBB addressed the “detailed”<sup>517</sup> appeals set out in Future Bank’s letters of May 7 and 26, are illustrative of the lack of public purpose.<sup>518</sup>
546. For the Claimants, there could have been no legitimate concerns about Future Bank’s activities, since it was under intense scrutiny since 2007. It is thus “implausible that if Future Bank had breached applicable laws and regulations in any material manner [...] the same would not have been immediately notified to Future Bank”.<sup>519</sup>
547. The reasons proffered after the event are equally unavailing, say the Claimants. The reason given on May 18, 2015 that the administration decision was based on the “violations of [Law no. 4 of 2001 on the Prohibition of Money Laundering] and the CBB Law” and on local and international sanctions were not substantiated either and therefore cannot be regarded as “factual or legal justification”<sup>520</sup> for the CBB Decision.<sup>521</sup>

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<sup>514</sup> Reply, ¶ 563, referring to CBB Law (CL-5), Article 136(a).

<sup>515</sup> Reply, ¶ 565.

<sup>516</sup> Reply, ¶ 570, citing *Dayyani v. Korea* (CL-126), ¶ 453.

<sup>517</sup> Reply, ¶ 572.

<sup>518</sup> SoC, ¶ 151.

<sup>519</sup> Reply, ¶ 575.

<sup>520</sup> Reply, ¶ 561.

<sup>521</sup> CBB Decision (C-56).

548. The Claimants conclude that the Respondent’s decision to place Future Bank under administration was “pretextual” and not “undertaken pursuant to any genuine public purpose established at the time”.<sup>522</sup>
549. Contrary to the Respondent’s assertion, the Claimants deny that the State is to be accorded unfettered deference in characterizing a public purpose or the parameters of its regulatory powers.<sup>523</sup> Relying on *Vestey Group v. Venezuela*, they identify the relevant test as whether the stated “public policy objectives” were “genuine [and] proven”, or whether they were “divorced from reality”.<sup>524</sup> In support of this text, the Claimants further cite *UP and CD Holding v. Hungary*, in which it was held that “[i]nternational law does not recognize a blanket exception related to ‘general regulatory powers’”.<sup>525</sup> Even *Kardassopoulos v. Georgia*, which the Respondent invokes, in reality serves the Claimants’ case, as it held that the State is only entitled to a measure of deference.<sup>526</sup>
550. The Claimants also categorically dispute the Respondent’s purported justifications put forward “for the first time”<sup>527</sup> in its SoD. These justifications do not comply with the CBB regulations and instructions as regards (i) an alleged lack of automated systems, (ii) an alleged lack of risk-based methodology for enhanced customer due diligence, (iii) an alleged lack of proper record keeping and KYC records, and (iv) alleged violations of domestic and international sanctions. According to the Claimants, the Respondent’s last reports of non-compliance prior to the CBB Decision were issued in 2012, and all such reports from 2008-2012 had been addressed and resolved promptly by Future Bank.<sup>528</sup>
551. In response to the allegation that Future Bank lacked automated systems, the Claimants contend that Future Bank had contemplated installing an automated AML monitoring

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<sup>522</sup> Reply, ¶ 571.

<sup>523</sup> Reply, ¶ 548, referring to SoD, ¶ 136.

<sup>524</sup> Reply, ¶ 551, referring to *Vestey Group v. Venezuela (CL-152)*, ¶ 235 and ¶ 211.

<sup>525</sup> Reply, ¶ 551, referring to *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, October 9, 2018 (**CL-153**), ¶ 359.

<sup>526</sup> Reply, ¶ 548, referring to *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010 (hereinafter “**Kardassopoulos v. Georgia**”) (**RL-99**), ¶ 391.

<sup>527</sup> Reply, ¶ 672.

<sup>528</sup> Reply, ¶ 579.

system before 2012,<sup>529</sup> and again in 2013, but that it ultimately came to the conclusion that such a system was “not required for the time being due to low volume of business”.<sup>530</sup> Instead, Future Bank installed a “compliance monitoring tool” called Bench Matrix at the end of January 2014.<sup>531</sup> There being no further indication of the CBB’s dissatisfaction with Future Bank’s monitoring systems or of any further requests that Future Bank install an automated monitoring system, the Claimants submit that the CBB approved Future Bank’s response.<sup>532</sup>

552. The alleged lack of risk-based methodology for enhanced customer due diligence is similarly unavailing say the Claimants. Future Bank had in fact “promptly addressed” the CBB’s recommendation in 2012<sup>533</sup> to adopt a “risk based approach for categorizing the customers and to send STRs where required”<sup>534</sup> and confirmed its intention to comply with the CBB’s recommendations to install an automated AML system to further enhance due diligence. It had done so by installing Bench Matrix in 2014. The Claimants stress that the CBB never objected to this solution, “[a]ccordingly, Future Bank had strictly no reason to believe that such a response had been deemed in any way unsatisfactory”.<sup>535</sup> The Claimants highlight several other systems which Future Bank implemented in order to comply with the CBB directions, including awareness training for Bank staff.<sup>536</sup> In further support, the Claimants note the report of their external auditors, Ernst & Young, who confirmed Future Bank’s compliance with the CBB rules.<sup>537</sup>
553. In response to the alleged lack of proper record keeping and KYC records, the Claimants submit that Future Bank had promptly addressed any deficiencies identified by the 2012

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<sup>529</sup> First ER Sharma (**RER-1**), ¶ 4.5.11.

<sup>530</sup> Reply, ¶ 581.3, referring FB Compliance Department Update Report, April - June 2013 (**C-299**), ¶ 5.

<sup>531</sup> Reply, ¶ 581.4, referring to FB Compliance Update, January 29, 2014 (**C-207**), ¶ 6.

<sup>532</sup> Reply, ¶ 581.5.

<sup>533</sup> Reply, ¶ 582.1.

<sup>534</sup> 2012 CBB Report (**R-62**).

<sup>535</sup> Reply, ¶ 582.2.

<sup>536</sup> Reply, ¶ 582.2, referring to FB Compliance Update, January 29, 2014 (**C-207**) and Memorandum regarding Review and Amendments to Compliance & AML Manual, Future Bank, April 2014 (**C-300**).

<sup>537</sup> Reply, ¶ 582.3.

CBB Report.<sup>538</sup> They underline the CBB’s failure to voice any objections to these responses, which could only be taken as an indication that the CBB was satisfied. Despite the absence of objections, the Claimants had taken a “proactive approach and undertook additional substantial efforts to improve KYC record keeping compliance”.<sup>539</sup>

554. It is the Claimants’ future submission that Future Bank had also addressed and resolved the CBB’s concerns regarding its Iranian exposure, and that the CBB had even expressed its satisfaction with Future Bank’s reduced exposure two months before the administration.<sup>540</sup>

555. In the same vein, the Claimants dispute all findings of violations in the 2018 CBB Report and argue that (i) Iranian exposure had been “put to rest following Future Bank’s letter of December 1, 2014”, (ii) the test key mechanism had “at all material times been disclosed to the CBB”, and (iii) Future Bank’s dealings with sanctioned entities were disclosed and not objected to.<sup>541</sup>

556. The Claimants also take issue with the 2015 CBB Report, not least because its findings “actually relate to information Future Bank had at all times transparently disclosed”<sup>542</sup> and do not “reveal any violations by Future Bank [that were not] already known to the CBB at the time”.<sup>543</sup> The 2015 CBB Report was not issued on May 24, 2015, but later to “rubberstamp” the administration decision after the fact,<sup>544</sup> which the testimonies of the Respondent’s fact witnesses confirm.<sup>545</sup>

557. For the Claimants, the actual reason for the CBB Decision is to be found in the political context prevailing at the time. In the light of the leaked diplomatic cables, it is clear that Saudi Arabia exerted significant influence over Bahrain, which given the strained

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<sup>538</sup> FB Response to 2012 CBB Report (PS-61).

<sup>539</sup> Reply, ¶ 583.3.

<sup>540</sup> Reply, ¶ 577.

<sup>541</sup> Reply, ¶ 594.

<sup>542</sup> Reply, ¶ 587.

<sup>543</sup> Reply, ¶ 588.

<sup>544</sup> Reply, ¶ 586.

<sup>545</sup> Hearing Transcript, Day 5, pp. 1037:13 – 1040:8 (Dr. Gharavi).

relations between that country and Iran, led to the CBB Decision.<sup>546</sup> The Claimants also point to Bahrain's dependence on Saudi Arabia<sup>547</sup> to submit that it was not a coincidence that Bahrain placed Future Bank under administration so soon after the JCPOA was announced.<sup>548</sup> In this context, the Claimants invite the Tribunal to draw adverse inferences from the Respondent's failure to produce all "correspondence and minutes of meeting, between Saudi authorities and Bahraini authorities, for the period 2010 to 2015, in relation to Iranian interests in Bahrain and Future Bank in particular", contrary to the Tribunal's order.<sup>549</sup>

558. To support this interpretation of the events, the Claimants refer to the meeting held by the Crisis Management Committee of the CBB in April 2015, in which the Committee recommended that Future Bank and the Bahraini branch of the Iran Insurance Company be placed under administration. The Claimants treat this recommendation as "generic and political", considering the "very distinct activities and business models" of the two companies.<sup>550</sup>

559. To reinforce their argument on the political nature of the CBB Decision, the Claimants argue that the alleged public purpose of protecting the financial services industry was untenable, considering the JCPOA and the imminent end of sanctions.<sup>551</sup> The Claimants also observe that the letter informing Future Bank of the Decision had been signed by Governor Al Maraj, an individual of "ministerial rank".<sup>552</sup> The Claimants also refer to the fact that the CBB Decision was termed a "sovereign decision"<sup>553</sup> and that, at the

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<sup>546</sup> SoC, ¶ 205.

<sup>547</sup> Reply, ¶ 602, referring to BTI Bahrain Country Report, 2018 (C-141), p. 26.

<sup>548</sup> Reply, ¶ 603.

<sup>549</sup> Reply, ¶ 606, citing Procedural Order No. 3, May 29, 2018, Claimants' Document Request No. 7, pp. 63-67.

<sup>550</sup> Reply, ¶ 604.

<sup>551</sup> Reply, ¶ 597.

<sup>552</sup> First WS Al Maraj, (RWS-1), ¶ 1.

<sup>553</sup> Reply, ¶ 605, referring to Meeting Report, May 3, 2015 (C-60), p. 1.

meeting held between the CBB and Future Bank on May 3, 2015, the CBB “confirmed” that the taking was “political and the result of a ‘sovereign decision’”.<sup>554</sup>

**(b) Non-Discrimination**

560. The Claimants submit that the alleged taking was discriminatory, as Bahrain was targeting all Iranian investments. Under customary international law as reflected in the leading commentary, “the presence of discrimination should be determined by evaluating the individual factual circumstances of each particular case”, highlighting that “[t]akings that invidiously single out property of persons of a particular nationality would be unreasonable”.<sup>555</sup>
561. The Claimants submit that the meeting allegedly held by the Crisis Management Committee within the CBB on April 30, 2015 shows the discriminatory nature of the Respondent’s actions. To the Claimants, “it is undeniable that Bahrain’s abrupt taking of distinct and unrelated Iranian investments, on the very same day, by way of the same unsubstantiated letter [...] *prima facie* show discrimination based on nationality”.<sup>556</sup>
562. According to the Claimants, their burden of proof is limited to a *prima facie* case of discrimination and they have discharged it.<sup>557</sup> They refer to *Feldman v. Mexico* in which the tribunal was satisfied with *prima facie* proof, as “requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government”.<sup>558</sup>
563. The Claimants further emphasize the different treatment accorded to other Bahraini banks similarly placed under administration, namely, Awal Bank and the International Banking Corporation. These two banks had only been placed under administration on

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<sup>554</sup> SoC, ¶ 190.

<sup>555</sup> Reply, ¶ 610, citing *Chapter 9: Violation of Investor Rights under Investment Treaties*, in: *Foreign Investment Disputes: Cases, Materials and Commentary* (W. Michael Reisman, James Crawford, et al. (eds.), 2<sup>nd</sup> edition, Kluwer Law International 2014) (CL-154), pp. 36-37.

<sup>556</sup> Reply, ¶ 612.

<sup>557</sup> Reply, ¶ 612.

<sup>558</sup> Reply, ¶ 612, citing *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002 (CL-155), ¶ 183.

their own “declaration that they were unable to meet their financial obligations”<sup>559</sup> and after the CBB commissioned an “investigators’ report” confirming that the bank had “a substantial short-fall of assets compared to [...] liabilities”.<sup>560</sup>

564. The Claimants challenge the Respondent’s submission that the proper test for discrimination is a comparison between the treatment accorded to the *Iranian* and the Bahraini shareholders of Future Bank, which finds no support in prior case law or customary international law. The Claimants add that, as the Tribunal found in *ADC v. Hungary*, the relevant comparator is “investors as a whole”.<sup>561</sup>

565. The Claimants further assert that, in this case, the treatment of Bahraini shareholder AUB is irrelevant as it had relinquished all its shareholding in 2007.<sup>562</sup> Similarly like the Claimants, AUB was found to engage in analogous “wire stripping” practices as those which are purportedly the basis of the administration of Future Bank, without facing identical or comparable consequences.<sup>563</sup>

### (c) Due Process

566. The Claimants argue that the taking contravened the obligation to afford them due process, since the Respondent failed to provide Future Bank with (i) an opportunity to cure violations prior to the CBB Decision, (b) notice of the CBB Decision, (c) reasons for such decision, and (d) a meaningful opportunity to challenge the CBB Decision. In addition, the CBB had not complied with domestic procedures.

567. In respect of the first failure, the Claimants rely on *Bear Creek v. Peru* which stated that an investor is “entitled to be heard before such a fundamental decision [is] to be

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<sup>559</sup> Reply, ¶ 616, referring to the CBB Press Release, the Administration of Awal Bank, July 30, 2009 (hereinafter “**CBB Press Release, July 30, 2009**”) (**R-88**).

<sup>560</sup> Reply, ¶ 616, citing the CBB Press Release, July 30, 2009 (**R-88**).

<sup>561</sup> Reply, ¶ 611, referring to *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006 (hereinafter “*ADC v. Hungary*”) (**CL-26**), ¶ 442.

<sup>562</sup> Reply, ¶ 613.

<sup>563</sup> Reply, ¶ 614.

considered and taken”,<sup>564</sup> and on *Quiborax v. Bolivia* which found a violation of due process, as the basis for the disputed measure was not shared with the investor so as to have “allowed the Claimants to participate in the audit prior to the revocation of the concessions”, regardless of “the availability of domestic actions to challenge the [disputed measure]”.<sup>565</sup> The Claimants also cite *Rumeli v. Kazakhstan*, which found that “the process that led to the decision of the Working Group lacked transparency and due process, and was unfair, in contradiction with the requirements of the fair and equitable treatment principle”.<sup>566</sup>

568. With respect to notice, the Claimants assert that “if a state fails to provide an investor notice of an expropriation, the state’s conduct would breach due process”.<sup>567</sup> They invoke several decisions in support of this proposition.<sup>568</sup> In addition to the notice requirement under international law, the Claimants note that the CBB Rulebook imposes an “obligation” on the CBB to provide advance notice of a decision for administration, whenever “feasible”, which was not done here.<sup>569</sup>
569. For the Claimants, the 2012 CBB Report cannot be characterized as a notice of impending administration, not only because such notice relates to breaches *in 2012*, but also because Future Bank had remedied all of these alleged violations well before the taking in 2015.<sup>570</sup>

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<sup>564</sup> Reply, ¶ 645, citing *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, November 30, 2017 (hereinafter “*Bear Creek v. Peru*”) (CL-158), ¶ 446.

<sup>565</sup> Reply, ¶ 645, referring to *Quiborax v. Bolivia* (CL-127), ¶¶ 223-227.

<sup>566</sup> Reply, ¶ 646, citing *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008 (CL-2), ¶¶ 617-618.

<sup>567</sup> Reply, ¶ 629, citing *Chapter 7 - Expropriation*, in: *Law and Practice of Investment Treaties: Standards of Treatment* (Andrew Newcombe and Lluís Paradell, Kluwer Law International 2009) (CL-156), p. 375.

<sup>568</sup> Reply, ¶ 629, relying on *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002 (CL-157), ¶ 143; *ADC v. Hungary* (CL-26), ¶ 435; and *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, July 1, 2009 (CL-27), ¶ 442.

<sup>569</sup> Reply, ¶ 629, referring to the CBB Rulebook (PS-30), EN 8.3.3.

<sup>570</sup> Reply, ¶¶ 632-633.



570. The Claimants reject the Respondent's attempt at justifying its failure to give notice on grounds that "States may decline to provide investors with prior notice [...] when doing so could lead to greater non-compliance":<sup>571</sup>

- a. The Respondent would need to demonstrate that it placed Future Bank under administration without notice, on the "basis of legitimate concerns that prior notice would lead to 'greater non-compliance'" which it failed to do;
- b. The Respondent has equally failed to prove that providing notice would not have been "feasible" pursuant to the CBB Rulebook;<sup>572</sup> and
- c. The Respondent has also failed to substantiate that the CBB harbored serious concerns that "there was a real risk of document destruction and concealment of information had [Future] Bank been given advance notice".<sup>573</sup>

571. The Claimants distinguish the decisions which the Respondent invokes and in particular *Apotex v. United States of America*. That case did not concern direct or indirect "deprivation of ownership rights" and is thus not relevant, and the investor had received several warnings, including one two months before the "contested measure was imposed". According to the Claimants, this "contrasts greatly with the circumstances of the present case, where the most recent inspections date back to 2012, namely over two years prior to the April 30, 2015 taking".<sup>574</sup> In any case, *Apotex v. United States of America* sets an "extremely high threshold" for a State to justify a failure to provide prior notice.<sup>575</sup>

572. The Claimants similarly distinguish *Genin v. Estonia*, arguing that, while no express prior notice was provided, the investor had been subjected to several consistent warnings, including an audit and a series of meetings immediately preceding the disputed

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<sup>571</sup> Reply, ¶ 634, citing SoD, ¶ 146.

<sup>572</sup> Reply, ¶ 635.

<sup>573</sup> Reply, ¶ 636, referring to SoD, ¶ 148.

<sup>574</sup> Reply, ¶ 639, relying on *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 (hereinafter "*Apotex v. United States of America*") (RL-109).

<sup>575</sup> Reply, ¶ 640.

measure.<sup>576</sup> Furthermore, the tribunal stated that the lack of prior notice was “contrary to generally accepted banking and regulatory practice”.<sup>577</sup>

573. By contrast, in the present situation, no exceptional circumstances warranted the lack of notice. The Claimants recall that the most recent concerns set out in the 2012 CBB Report were promptly addressed by Future Bank, that the Iranian exposure matter was definitively dealt with by the end of 2014 with the CBB reporting that “no action was required” in this regard in March 2015, and Future Bank was not in financial difficulty.<sup>578</sup>
574. In addition to a failure to provide an opportunity to cure and advance notice, the Respondent provided no reasons until its SoD. Consequently, the Claimants argue, they were denied a meaningful opportunity to challenge the CBB Decision at the time and after it was taken, which breaches due process. They invoke *ADC v. Hungary*<sup>579</sup> and *Kardassopoulos v. Georgia*,<sup>580</sup> where the tribunals held that the State must allow an investor a “reasonable chance within a reasonable time” to make its claim and have it heard, as dictated by due process. For the Claimants, the failure to provide reasons constitutes an independent breach of the BIT and warrants a finding of liability.<sup>581</sup>
575. The Claimants reiterate that there was a paucity of information justifying the CBB Decision at the time of the taking; the vague and unsubstantiated justifications denied the Claimants “any meaningful opportunity to defend themselves against such allegations”.<sup>582</sup> In particular, the mere mirroring of Article 136 of the CBB Law and the blanket assertion in the May 18 letter “cannot possibly suffice to meet the justification requirement under the BIT’s procedural safeguard, as otherwise the mere reference to the

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<sup>576</sup> Reply, ¶ 641.

<sup>577</sup> *Alex Genin, Eastern Credit Limit, Inc. and A.S. Baltoil v. the Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001 (hereinafter “*Genin v. Estonia*”) (CL-57), ¶ 364.

<sup>578</sup> Reply, ¶ 642.

<sup>579</sup> *ADC v. Hungary* (CL-26), ¶ 435.

<sup>580</sup> *Kardassopoulos v. Georgia* (RL-99), ¶ 404.

<sup>581</sup> Reply, ¶¶ 626-627, referring to *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 (hereinafter “*Saluka v. Czech Republic*”) (CL-100).

<sup>582</sup> Reply, ¶ 623.

grounds pursuant to which an expropriatory measure can be adopted under municipal law would be sufficient to meet the BIT's justification requirement".<sup>583</sup>

576. Moreover, the Claimants assert that Bahrain did not engage with them once the Decision was taken, thus denying them a meaningful opportunity to challenge the CBB Decision and defend themselves against any allegations upon which the Decision was purportedly based. Additionally, the Claimants contend, an opportunity to challenge must include adequate time to do so. In the light of the Respondent's late submission of the 2018 CBB Report, the Claimants were denied such an opportunity.<sup>584</sup>
577. The Claimants reject the Respondent's proposition that they should have resorted to the local courts to submit their grievances and that, had they done so, they would have benefitted from safeguards that satisfy due process under customary international law.<sup>585</sup> They did not resort to the local courts to challenge the CBB Decision as they were actively discouraged from doing so, having been "informed that the [CBB Decision] was a final sovereign decision".<sup>586</sup> Any attempt to appeal the CBB Decision would have been futile,<sup>587</sup> also because the Bahraini judiciary is "widely recognized" as lacking independence.<sup>588</sup>
578. The Claimants distinguish the cases on which the Respondent relies in this respect. In particular, they argue that, in contrast to *Generation Ukraine v. Ukraine*, where the tribunal found that "in the absence of a reasonable – not necessarily exhaustive – effort by the investor to obtain correction", it was insufficient for that investor to "seize upon an act of maladministration" to justify a finding of expropriation,<sup>589</sup> the taking here is not a "mere act of maladministration" as the CBB Decision was taken at the "ministerial level".<sup>590</sup> They had indeed expended reasonable effort to obtain correction, "only to see

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<sup>583</sup> Reply, ¶ 621 -622.

<sup>584</sup> Reply, ¶ 512.

<sup>585</sup> Reply, ¶ 655.

<sup>586</sup> SoC, ¶ 186.

<sup>587</sup> First WS Hemmati (CWS-2), ¶ 17.

<sup>588</sup> Reply, ¶ 663.

<sup>589</sup> Reply, ¶ 659, citing *Generation Ukraine v. Ukraine* (CL-86), ¶ 20.30.

<sup>590</sup> Reply, ¶ 661.

the same summarily dismissed”<sup>591</sup> in the CBB’s letter of May 18, 2015. By assuming control over Future Bank and restricting the Claimants’ access to relevant documentation, the Respondent further undermined the Claimants’ ability to properly respond to the alleged breaches of Bahraini law and international sanctions.<sup>592</sup>

579. Finally, the Claimants contend that its due process rights under Article 6 of the BIT were breached as the Respondent failed to abide by its own domestic law. They repeat that Bahrain gave no “justified resolution” in accordance with the CBB Law Article 136, and failed to observe the statutorily mandated time limits in relation to administration, by assuming control and appointing an administrator before a notice of administration was published in the Official Gazette.<sup>593</sup>

580. In addition, the Respondent did not adhere to the procedures under the CBB Rulebook for placing a bank under administration, thereby breaching the obligation to accord the Claimants due process. Under Rule 8.3.1, the CBB must first introduce a proposal for administration, then “subject” that proposal to “a thorough review by the CBB of all relevant facts, assessed against the criteria outlined in Section EN 8.1”.<sup>594</sup> In the absence of evidence demonstrating such review, the Claimants argue that the Respondent has breached the CBB Rulebook. Further, as stated above, the CBB Rulebook contains an obligation to provide advance notice of an administration decision where “feasible” in order “reduce the potential damage of an administration order being applied and then withdrawn on appeal”.<sup>595</sup> The Respondent did not show that such notice was not feasible in the circumstances and thus breached its obligations under the procedural safeguards of Article 6.<sup>596</sup>

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<sup>591</sup> SoC, ¶ 186; Reply, ¶ 661.

<sup>592</sup> Reply, ¶ 512.

<sup>593</sup> SoC, ¶¶ 140-145; Reply, ¶¶ 563 and 624.

<sup>594</sup> Reply, ¶ 670, citing CBB Rulebook (PS-30), EN 8.3.1.

<sup>595</sup> Reply, ¶ 670, citing CBB Rulebook (PS-30), EN 8.3.3.

<sup>596</sup> Reply, ¶¶ 670-671.

**(d) Proportionality**

581. The Claimants consider proportionality a necessary component of a lawful expropriation under the BIT and international law<sup>597</sup> and submit that the taking was disproportionate to the stated justification.
582. For the Claimants, the taking of Future Bank was “not proportional to any purported wrongdoing on the part of Claimants”.<sup>598</sup> It was Future Bank’s purported violation of sanctions that formed the primary basis of the CBB Decision. Given the political context at the time of the CBB Decision, with the JCPOA in sight, the decision to place Future Bank under administration “on the ground [...] that Future Bank was in breach of sanctions can only be viewed – at best – as premature, and in any event as entirely disproportionate”.<sup>599</sup>
583. Further, so argue the Claimants, there were other “more moderate regulatory tools”<sup>600</sup> available to address the purported public aim of protecting the Bahraini financial services sector but the CBB did not attempt to use these tools, which shows the disproportionality of the measure.
584. The Claimants say that even where foreign investors have been guilty of violations and contributed to the injury they sustained at the hands of the State, the taking could amount to an expropriation if it was disproportionate to the violations to which it responded.<sup>601</sup> Therefore, even if *arguendo* Future Bank had committed the violations on which the Respondent relies in justifying the taking, by enacting measures that are disproportionate to the public aim pursued, the Respondent committed an unlawful expropriation, as was found in *Tecmed v. United Mexican States*.<sup>602</sup>

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<sup>597</sup> Reply, ¶ 673.

<sup>598</sup> SoC, ¶ 204.

<sup>599</sup> Reply, ¶ 679.

<sup>600</sup> Reply, ¶ 674; SoC, ¶ 204.

<sup>601</sup> SoC, ¶ 201, referring to (among other awards) *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006 (CL-85), ¶ 195.

<sup>602</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 (hereinafter “*Tecmed v. United Mexican States*”) (CL-87), ¶ 122.

(e) **Compensation**

585. Finally, the Claimants submit that the expropriation was illegal because it was not accompanied by a prompt, adequate and effective compensation, a requirement under Article 6 of the BIT, and customary international law.<sup>603</sup>
586. The Claimants refer to various investment tribunals that upheld claims for unlawful expropriation where the State failed to provide compensation for an otherwise lawful expropriation,<sup>604</sup> such as the tribunal in *Guaracachi v. Bolivia*.<sup>605</sup>
587. The Claimants assert that they are entitled to rely on the most-favoured nation (MFN) clause (Article 4 of the BIT) to access more specific, or additional, obligations in matters of compensation.<sup>606</sup> They refer to *CME v. Czech Republic* in this regard, where the tribunal held that, while the applicable treaty referred only to “just compensation” in the event of an expropriation, the investor was able to invoke the MFN clause to access the more favourable treatment afforded to investors of a third state, including that compensation should be “equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken”.<sup>607</sup>
588. Accordingly, the Claimants are due “the fair market value of the investment immediately before the expropriation occurred”<sup>608</sup> as specified under Article 6(2)(a) of the BIT between Bahrain and the United Mexican States. They are owed such value within six months of the taking, as provided, for instance, in Article 5(4) of the BIT between Italy and Bahrain.

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<sup>603</sup> SoC, ¶ 207, referring to *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Damages and Costs (1994) 95 ILR 211, June 30, 1990 (CL-97).

<sup>604</sup> Reply, ¶ 682, referring to *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Final Award, February 17, 2000 (CL-99), ¶ 71.

<sup>605</sup> *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, January 31, 2014 (CL-128), ¶ 441.

<sup>606</sup> Reply, ¶ 491, referring to BIT (CL-1), Article 4.

<sup>607</sup> Reply, ¶ 492, citing *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, March 14, 2003 (CL-142), ¶ 500.

<sup>608</sup> Reply, ¶ 683, citing Agreement between the Government of the Kingdom of Bahrain and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, November 29, 2012 (CL-83), Article 6(2)(a).

589. The Claimants observe that no payment has yet been paid. They also observe that the Respondent's argument that the fair market value of the investment would be paid at the conclusion of the liquidation proceedings does not satisfy the treaty compensation requirement.<sup>609</sup>
590. Finally, the Respondent's argument that the Claimants "cannot benefit from their own obduracy" because they failed to participate in the liquidation proceedings or to challenge the CBB Decision, is not in good faith, in the Claimants' submission.<sup>610</sup> The Claimants recall the futility of any formal process of challenge or appeal before the Bahraini courts and reaffirm that the liquidation proceedings stem from the Respondent's breaches of international law.<sup>611</sup>

## 2. The Respondent's Position

591. The Respondent submits that the Claimants have failed to establish that it expropriated the investment. Even if the Claimants were able to establish expropriation, which the Respondent contends they cannot, the latter maintains that its actions were taken in pursuit of a *bona fide* public purpose, were proportional to the purpose, were non-discriminatory and in accordance with due process.
592. First, the Respondent submits that where a State acts within its legitimate police powers, no compensable taking takes place. The Respondent's position is that the CBB Decision is a valid exercise of regulatory authority that does not carry a compensation obligation. Not only is Future Bank's licence a privilege that may be revoked by the CBB, but under customary international law, in the words of *Marfin v. Cyprus*, "a distinction exists between the reasonable *bona fide* exercise of police powers, which does not amount to a compensable taking, and indirect expropriation".<sup>612</sup> To the Respondent, the burden falls on the Claimants to prove that the CBB's "exercise of [its] supervision authority" was

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<sup>609</sup> Reply, ¶¶ 540-541.

<sup>610</sup> SoC, ¶ 209, referring to Respondent's Answer on Claimants' Application for Interim Measures, October 12, 2017, ¶ 11.

<sup>611</sup> SoC, ¶¶ 209-210.

<sup>612</sup> Rejoinder, ¶ 218, citing *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, dated July 26, 2018 (hereinafter "*Marfin v. Cyprus*") (RL-167), ¶ 828.

arbitrary.<sup>613</sup> The Respondent cites *Marfin v. Cyprus*, which considered that allegations of a political taking were “insufficient to second-guess the acts of the Cypriot banking regulator”.<sup>614</sup> The same is true here, the Claimants’ case being based on unproven “conspiracy theories” that depend on adverse inferences. The Respondent emphasizes that a “party cannot possibly win its case on the basis of adverse inference alone”.<sup>615</sup>

593. According to the Respondent, the Claimants mischaracterize the CBB Decision as a “permanent taking”, thereby conflating two distinct regulatory actions taken by the CBB; the CBB Decision on the one hand, and the decision to liquidate Future Bank, based on the CBB’s investigations following administration, on the other.<sup>616</sup>
594. The Respondent similarly rejects the argument that there has been a creeping or indirect expropriation as Future Bank’s value has increased since administration and the Claimants have retained ownership of their shares. It calls attention to *Spyridon Roussalis v. Romania*, in which expropriatory claim was dismissed, as the companies “still function[ed] and Claimant continu[ed] to profit from their operations” and “the value of the investment’s asset base [...] ha[d] exponentially increased” since the disputed measures.
595. In addition, the Respondent observes that the CBB merely exercised its authority to police Future Bank, not “to take it over”.<sup>617</sup> The Claimants retain full ownership of their shares in Future Bank and will receive their share of liquidation proceeds. These shares have also increased in value, and as no economic depreciation has taken place, it follows that no expropriation is established.
596. The Respondent submits that, contrary to the Claimants’ contentions, the administration and subsequent liquidation were undertaken (a) for a public purpose, (b) in a non-discriminatory way, (c) in accordance with due process, and (d) that they were

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<sup>613</sup> SoD, ¶ 134.

<sup>614</sup> Rejoinder, ¶ 217, referring to *Marfin v. Cyprus* (RL-167).

<sup>615</sup> Rejoinder, ¶ 198, citing Vera van Houtte, *Adverse Inferences in International Arbitration*, in: *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (Teresa Giovannini and Alexis Mourre eds., 2009) (RL-151).

<sup>616</sup> Rejoinder, ¶ 207.

<sup>617</sup> SoD, ¶ 132.



proportionate, thus making them a non-compensable exercise of regulatory authority. Nonetheless, the Respondent confirms that effective and appropriate compensation is envisaged in line with Article 6 of the BIT.<sup>618</sup>

**(a) Public Purpose**

597. The Respondent contests the Claimants' assertion that it bears the burden of proving the existence of a public purpose. In any case, as a *bona fide* regulatory act within the State's police powers taken to protect the Bahraini financial sector, the CBB Decision was taken for a public purpose. It is a State's sovereign right to regulate sectors that have a significant impact on public interest, including the banking sector.<sup>619</sup> The burden of proving otherwise falls on the Claimants,<sup>620</sup> and they have failed to "articulate a coherent theory of pretext" or "ulterior motive".<sup>621</sup>
598. For the Respondent, a certain degree of deference must be accorded to the State to undertake the requisite measures to promote social or general welfare purposes, the State being free "to judge for itself what it considers useful or necessary for the public good".<sup>622</sup>
599. Future Bank's persistent failures to establish adequate AML/CFT systems, to comply with Bahraini law and regulations, to deal transparently with the CBB posed significant risks to the financial sector in Bahrain,<sup>623</sup> which was explicitly stated in the CBB's notice of administration.
600. On the Respondent's case, the administration ended the Claimants' control over Future Bank and thus achieved the public purpose of putting an end to the Claimants' use of Future Bank as a vehicle to commit financial crimes and other wrongdoings.<sup>624</sup> The CBB

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<sup>618</sup> SoD, ¶ 135.

<sup>619</sup> Rejoinder, ¶ 216.

<sup>620</sup> Rejoinder, ¶ 222.

<sup>621</sup> Rejoinder, ¶ 203.

<sup>622</sup> SoD, ¶ 136, citing *Libya American Oil Company (LIAMCO) v. Libyan Arab Republic*, 20 I.L.M. 1, Award, April 12, 1977 (RL-55), p. 114.

<sup>623</sup> Rejoinder, ¶ 226.

<sup>624</sup> Rejoinder, ¶ 228.

Decision also served a public purpose as it allowed the CBB to access Future Bank's accounts and records and to uncover Future Bank's illicit activities and "prevent future noncompliance".<sup>625</sup> The Respondent claims it would not have been able to do so prior to administration as the Claimants concealed its violations from the CBB, which could only be "uncovered through the unfettered investigation that the administration would allow".<sup>626</sup>

601. The Respondent blames the Claimants' conflation of the decision to place Future Bank in administration and the decision to liquidate it, as the cause of the Claimants' flawed argument that Bahrain could produce no contemporaneous evidence of a legal or factual basis for the alleged taking. It was on the basis of the 2015 CBB Inspection Report that the Respondent took the decision to place Future Bank under liquidation, a report that, the Respondent claims, documents Future Bank's persistent violations.<sup>627</sup> This was distinct from the rationale for placing Future Bank under administration, which placement was based on the CBB's "grave doubts [...] about the *bona fides* of the Future Bank's [*sic*] activities after years of documented regulatory violations".<sup>628</sup>
602. Therefore, the Respondent says that the CBB Decision was the "culmination of...suspensions and concerns" that, unlike *Quiborax v. Bolivia*, related to violations that were not "minor infractions", but were actions that posed a significant threat to the financial sector of Bahrain.<sup>629</sup> The Respondent emphasizes that no permanent action was taken until the CBB "investigated and verified these suspicions".<sup>630</sup> Additionally, in contrast to *Dayyani v. Korea*, these suspicions were communicated to the Claimants on multiple occasions prior to the Decision.<sup>631</sup>

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<sup>625</sup> SoD, ¶ 138, referring to FATF Public Statement, February 19, 2016 (**R-14**); Samuel Rubinfeld, Iran again Holds Top Spot on Money-Laundering Risk Index, Wall Street Journal, July 28, 2016 (**R-20**).

<sup>626</sup> Rejoinder, ¶ 211.

<sup>627</sup> Rejoinder, ¶¶ 212-215.

<sup>628</sup> Rejoinder, ¶ 215.

<sup>629</sup> Rejoinder, ¶ 230, referring to *Quiborax v. Bolivia* (**CL-127**).

<sup>630</sup> Rejoinder, ¶ 229.

<sup>631</sup> Rejoinder, ¶ 231, referring to *Dayyani v. Korea* (**CL-126**).

603. The Respondent claims that these violations were as follows, all of which were “well-documented”:<sup>632</sup>

- a. The lack of a functioning AML/CFT system,<sup>633</sup> which the Respondent describes as requiring three distinct procedures; first, customer due diligence (KYC) in order to anticipate behaviour to create a baseline against which deviations can be measured; second, transaction monitoring, in order to identify and block suspicious transactions; and finally reporting suspicious transactions to the relevant authorities. According to the Respondent, Future Bank failed on all three counts, citing the incident with the “bladerunner” ship as an example;
- b. Wire stripping, which is also a violation of Bahraini domestic law, as it “involves omitting or in some cases even falsifying information that all banks are required to keep and share with one another”;<sup>634</sup>
- c. The use of AMS before the SWIFT cut-off; and
- d. Violations of sanctions and a failure to reduce its exposure to Iran despite the CBB’s directives to do so.

604. The Respondent rejects the Claimants’ contentions that the CBB Decision was politically motivated.<sup>635</sup> Contemporaneous political and diplomatic developments were unrelated and coincidental only in timing.<sup>636</sup> In the Respondent’s submission, the Claimants have failed to articulate a coherent theory of pretext, instead relying on uncorroborated “conspiracy theories”.<sup>637</sup> The allegation that the disputed measures were targeting Iranian

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<sup>632</sup> Rejoinder, ¶ 181.

<sup>633</sup> Rejoinder, ¶ 211; Hearing Transcript, Day 1, pp. 134:7-135:23 (Mr. Sobota).

<sup>634</sup> Hearing Transcript, Day 1, pp. 118:13-119:1-4, 120:10-15 (Mr. Sobota), referring to the Decree-Law No. (23) of 1973 promulgating the law establishing the Monetary Agency of Bahrain, December 5, 1973 (as amended July 11, 1981) (**RL-138**) and Ministerial Order No. 7 of 2001 (**RL-142**).

<sup>635</sup> Rejoinder, ¶ 228.

<sup>636</sup> SoD, ¶ 139.

<sup>637</sup> Rejoinder, ¶¶ 203-204.

entities in Bahrain due to the timing of the administration of Iranian Insurance Company is “unsubstantiated” and “equally unavailing” to establish a political motivation.<sup>638</sup>

605. In the Respondent’s submission, the characterization of the CBB Decision as a “sovereign” decision is both unsupported and inconsequential. Indeed, every act of State could be attributed to a “sovereign decision”, which characterization cannot be dispositive of the nature and purpose of that decision.<sup>639</sup> In any event, the CBB enjoys “regulatory independence from the Bahraini government”.<sup>640</sup>
606. The Respondent similarly denies any “targeting” of Iranian interests or companies by Bahrain, the decision to place Future Bank and Iran Insurance Company in administration being solely made on the basis of their documented and persistent violations of Bahraini law and regulations.<sup>641</sup>

**(b) Non-discrimination**

607. The relevant test, says the Respondent, for a finding of discrimination, is that an “investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification”<sup>642</sup> and, crucially, whether the State acted in good faith.<sup>643</sup> The appropriate comparison in this case is between the CBB’s treatment of the Bahraini investors in Future Bank and its treatment of the Claimants. All the shareholders in Future Bank, including the Claimants and AUB, the Bahraini investor, received “equal treatment”,<sup>644</sup> meaning that all of them face the same consequences from the CBB Decision and the subsequent liquidation.
608. The Respondent contends that, even if one accepts the standard for discrimination put forward by the Claimants, the claim would still fail as the CBB acted on the reasonable basis that Future Bank’s activities constituted a threat to the stability and reputation of

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<sup>638</sup> Rejoinder, ¶ 205.

<sup>639</sup> Rejoinder, ¶ 204.

<sup>640</sup> Rejoinder, ¶ 204.

<sup>641</sup> Rejoinder, ¶ 205.

<sup>642</sup> SoD, ¶ 157.

<sup>643</sup> Rejoinder, ¶ 229.

<sup>644</sup> SoD, ¶ 157.

the Bahraini financial sector”.<sup>645</sup> The Claimants offer no substantiation for the claim that other banks conducting business with sanctioned entities did not meet the same regulatory response as Future Bank. In this context, the Respondent stresses the low number of STRs submitted by Future Bank and emphasizes that, unlike Future Bank, those banks that dealt with Iranian sanctioned entities had much lower Iranian exposure and yet still filed more STRs than Future Bank, thus demonstrating that the motivation was not discriminatory but based Future Bank’s repeated violations of the CBB’s instructions.<sup>646</sup>

609. Further, the Respondent points to two Bahraini banks that violated the CBB Law and faced regulatory action by the CBB,<sup>647</sup> being placed in administration for “fraudulent operations”.<sup>648</sup> Thus, the Respondent submits, while it does not subscribe to the view that Future Bank is an “Iranian bank” as it is incorporated in Bahrain, it is clear that the Respondent takes regulatory action in response to violations, not based on nationality.<sup>649</sup>

**(c) Due Process**

610. The Respondent challenges the Claimants’ contention that this requirement was not met.
611. First, the Respondent submits that the Claimants were provided with ample opportunity to rectify the breaches that the CBB had identified and which constituted the basis for the CBB Decision. According to the Respondent, “the CBB repeatedly notified Future Bank about its ‘major’ and ‘significant’ violations”, through examination reports such as the 2012 CBB Report.<sup>650</sup>
612. Second, the Respondent argues that it is within a State’s right not to provide prior notice of non-compliance, where such notice would lead to further non-compliance.<sup>651</sup> This applies here, with reference to Mr. Sharma’s report, the Respondent submits that there

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<sup>645</sup> SoD, ¶158.

<sup>646</sup> Rejoinder, ¶ 235.

<sup>647</sup> Rejoinder, ¶ 227, referring to the CBB Press Release, July 30, 2009 (**R-88**).

<sup>648</sup> SoD, ¶ 158.

<sup>649</sup> SoD, ¶ 160; Rejoinder, ¶ 235.

<sup>650</sup> SoD, ¶ 144.

<sup>651</sup> SoD, ¶ 146.

was a “real risk of document destruction and concealment of information had the [Future] Bank been given advance notice” of the administration.<sup>652</sup>

613. The Respondent invokes *Apotex v. United States* to support that a failure to provide advance notice of a measure adversely affecting an investment does not breach due process if the notice may lead to greater noncompliance.<sup>653</sup> In *Apotex v. United States of America*, it was considered that several communications concerning the suspected wrongdoing over two years preceding the disputed measure were adequate prior warning.<sup>654</sup>
614. Third, the Respondent asserts that the Claimants had been “afforded several ‘meaningful opportunities’ to challenge the administration as it unfolded”,<sup>655</sup> and offer no valid reason for their failure to raise “any legitimate process objections to the CBB’s reasoned rejection before a Bahraini court”.<sup>656</sup> Further, and in contrast to all the authorities cited by the Claimants,<sup>657</sup> the placing in administration should not have come as a surprise given the CBB’s repeated notices of non-compliance during almost nine years.<sup>658</sup> In further contrast to those other authorities, Future Bank had years to remedy its non-compliance.<sup>659</sup>
615. The Respondent disputes the Claimants’ reasons for failing to challenge the CBB Decision in court and denies any pressure on Future Bank to this effect.<sup>660</sup> Future Bank had the right to challenge the CBB Decision or the CBB’s rejection of its appeal in its letter of May 18, 2015, through administrative review before the appropriate Bahraini

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<sup>652</sup> First ER Sharma (**RER-1**), ¶¶ 5.9.14 and 5.9.21.

<sup>653</sup> Rejoinder, ¶ 261, referring to *Apotex v. United States of America* (**RL-109**), ¶¶ 3.59, 3.60.

<sup>654</sup> SoD, ¶ 147.

<sup>655</sup> Rejoinder, ¶ 257.

<sup>656</sup> Rejoinder, ¶ 257.

<sup>657</sup> *Genin v. Estonia* (**CL-57**); *Kardassopoulos v. Georgia* (**RL-99**); *Bear Creek v. Peru* (**CL-158**); and *Quiborax v. Bolivia* (**CL-127**).

<sup>658</sup> Rejoinder, ¶¶ 258-259.

<sup>659</sup> Rejoinder, ¶ 262.

<sup>660</sup> SoD, ¶ 152.

court<sup>661</sup> pursuant to Article 139(c) of the CBB Law.<sup>662</sup> That it did not make use of this right cannot be attributed to the Respondent.

616. Fourth, the Respondent avers that the CBB did in fact provide reasons at the time of administration, challenging the Claimants' assertion that no reasons were provided in contravention of due process. In accordance with Article 136 of the CBB Law, the CBB stated that Future Bank's continued operation "will cause harm to the industry of financial services in the Kingdom of Bahrain".<sup>663</sup> The CBB then gave further reasons on May 18, 2015, noting Future Bank's violations of the AML and the CBB Laws.<sup>664</sup>
617. Finally, the Respondent dismisses as "trivial" and "incorrect"<sup>665</sup> the Claimants' contention that the procedure for appointing the administrator was contrary to Article 138 of the CBB Law and further violated the Claimants' right to due process. On the Respondent's reading, the CBB Law contemplates the administration of a licensee before the publication of a notice in the Official Gazette, Article 138(a) providing "the Administrator shall, promptly after assuming the administration [...] publish a notice to this effect in the Official Gazette".<sup>666</sup>
618. Moreover, even assuming that these procedural irregularities did in fact occur, they would not amount to a violation of the treaty. In *Genin v. Estonia*, where a bank licence was revoked without an opportunity to challenge the underlying findings, the tribunal held, that although such practice may "invite criticism", it did "not rise to the level of a violation of any provision of the BIT".<sup>667</sup>

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<sup>661</sup> SoD, ¶ 152.

<sup>662</sup> Rejoinder, ¶ 254.

<sup>663</sup> SoD, ¶ 142, referring to CBB Law (CL-5); Published CBB Decision (C-61).

<sup>664</sup> SoD, ¶ 143.

<sup>665</sup> SoD, ¶ 149.

<sup>666</sup> SoD, ¶ 150, referring to CBB Law (CL-5).

<sup>667</sup> *Genin v. Estonia* (CL-57), ¶ 365.

(d) **Proportionality**

619. The Respondent contends that the CBB's actions were proportionate, *i.e.*, that there was a "reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized".<sup>668</sup>
620. For the Respondent, the Claimants conflate the administration and the liquidation decisions. In the Respondent's submission, the Claimants fail to see that the administration itself was a temporary measure, a "moderate step", allowing the CBB to investigate Future Bank and decide whether to start liquidation proceedings.<sup>669</sup>
621. The Respondent asserts that the CBB Decision and the subsequent liquidation were necessary because, as Mr. Sharma reports, Future Bank's violations were systemic and "so pervaded its business model that there was no way to salvage it".<sup>670</sup> It relies on Mr. Sharma's opinion that out of the eight measures open to the CBB in the face of Future Bank's persistent non-compliance, the placement in administration was "the only viable justified action that could have achieved [ending the non-compliance without destroying Future Bank's value] with an appropriate level of severity".<sup>671</sup> As such, the Respondent argues that the severity of the Future Bank's violations and wrongdoings necessitated a "proportionately serious measure".<sup>672</sup>
622. As to the claim that the CBB Decision was not proportionate because it was primarily based on the sanctions violations, which sanctions were to be lifted following the JCPOA, the Respondent contends that the CBB based its decision on a range of regulatory breaches, including but not limited to sanctions,<sup>673</sup> and that the *possibility* of an international agreement overturning sanctions could not render violations retroactively

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<sup>668</sup> Rejoinder, ¶ 236, citing *Tecmed v. United Mexican States (CL-22)*, ¶ 122.

<sup>669</sup> Rejoinder, ¶ 237.

<sup>670</sup> SoD, ¶ 138.

<sup>671</sup> First ER Sharma (**RER-1**), ¶ 5.4.3. and ¶ 5.4.9.

<sup>672</sup> Rejoinder, ¶ 239; First ER Sharma (**RER-1**), ¶ 5.5.6.

<sup>673</sup> Rejoinder, ¶ 241.



lawful and measures taken in response to these violations retroactively disproportionate.<sup>674</sup>

**(e) Compensation**

623. The Respondent rejects the contention that it owes any compensation to the Claimants as the CBB Decision to place Future Bank in administration was a valid regulatory act and appropriate compensation will in any event be paid, at the conclusion of the liquidation proceedings.
624. For the Respondent, there is a “clear line of case law [that] has recognized that regulatory decisions by financial authorities are not compensable absent ‘clear and compelling evidence’ of an abuse of that regulatory power”.<sup>675</sup> The Claimants are unable to satisfy this “appropriately rigorous standard”, given that they proffer unsubstantiated “conspiracy theories” to seek to establish breaches by the Respondent.<sup>676</sup> By contrast, the latter submits that it has shown that the CBB had more than adequate justification to place Future Bank in administration.<sup>677</sup>
625. Second, the Respondent argues that the payment of adequate compensation is being envisaged. Following administration, the CBB maintained Future Bank’s liquidity in order to pay its depositors. In fact, under the CBB’s control, Future Bank’s value increased and the bank was even able to settle transactions with Bank Melli following removal from the OFAC list in January 2016.<sup>678</sup>
626. In any event, says the Respondent, the Claimants will receive a payment roughly equivalent to the “fair market value of the expropriated investment immediately before the expropriation occurred”, in accordance with Article 6 of the BIT, through the liquidation proceedings currently underway.<sup>679</sup>

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<sup>674</sup> Rejoinder, ¶ 241.

<sup>675</sup> Rejoinder, ¶ 180, referring to *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, July 26, 2018 (**RL-167**), ¶ 898; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶¶ 273, 174 (**C-100**).

<sup>676</sup> Rejoinder, ¶ 181.

<sup>677</sup> Rejoinder, ¶ 182.

<sup>678</sup> SoD, ¶ 161.

<sup>679</sup> SoD, ¶ 162.

### 3. Analysis

627. Article 6(1) of the BIT prohibits unlawful expropriation of investments in the following terms:

Investments of investors of either Contracting Party shall not be nationalized, confiscated, expropriated, or subjected to similar measures by the other Contracting Party except such measures are taken for public purposes, in accordance with due process of law, in a non-discriminatory manner and effective and appropriate compensation is envisaged. The amount of compensation shall be paid without delay.<sup>680</sup>

628. The primary question that the Tribunal must answer in relation to the expropriation claim is whether the Respondent's measures constituted an expropriation. It is undisputed that the CBB Decision suspended the exercise of the Claimants' shareholding rights in Future Bank in the following terms:

You must give the CBB's representative, Mr. Ahmed Buhiji, Director of Banking Services Directorate who is delivering this letter to you, full access to your premises and business, its records and its systems. Your staff must comply with our instructions going forward. The legal rights of all directors, management and shareholders in relation to the company, are now suspended. The CBB has assumed full managerial control over your business.<sup>681</sup>

629. While this decision was by its nature temporary, the CBB eventually determined that Future Bank was operating in violation of applicable Bahraini laws and consequently issued the notice of liquidation on December 22, 2016.<sup>682</sup> Since then, the Claimants have neither been re-established in their rights as shareholders of Future Bank, nor have they received the bank's liquidation proceeds. The Respondent has provided no detailed information about the liquidation process and its timeline. In these circumstances, the Tribunal finds that the deprivation of the Claimants' shareholding interest in Future Bank has become permanent. The Respondent does not appear to dispute the premises of this conclusion, as it maintains that the CBB's "decision to *make the administration permanent* was informed by the findings of the intensive examination undertaken during the May 2015 Investigation".<sup>683</sup>

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<sup>680</sup> BIT (CL-1), Article 6(1).

<sup>681</sup> CBB Decision (C-56).

<sup>682</sup> Notice for Liquidation (R-66).

<sup>683</sup> Rejoinder, ¶ 263 (emphasis added).

630. The Tribunal notes that the CBB's decisions concerning the administration and liquidation of Future Bank directly affected the Claimants' rights as shareholders in Future Bank. Therefore, the Tribunal is not persuaded by the Respondent's argument that its measures did not constitute an expropriation, given that Future Bank's banking licence was a mere privilege rather than a property interest. Even assuming the correctness of the premise of the Respondent's argument, according to which the expropriation provision only protects property interests, the Tribunal notes that the disputed measures interfered with the exercise of the Claimants' shareholding rights in Future Bank, which are undoubtedly property interests. As the Tribunal explained above, such intervention became permanent as the Claimants have no realistic prospect of being re-established in their rights as shareholders; nor is it clear, more than six years from the Future Bank's placement in administration, whether and to what extent the Claimants will receive proceeds from the bank's liquidation.
631. In addition, to determine whether the Respondent's measures were expropriatory, the Tribunal must assess whether Bahrain took the measures within the recognized limits of the State's regulatory and police powers. Indeed, if the administration and liquidation of Future Bank were a *bona fide*, non-discriminatory and proportionate answer to Future Bank's unlawful activities, such measures would not qualify as an expropriation and would therefore not give rise to the State's duty to provide compensation. To hold otherwise would entail that States could be held liable to pay compensation for enforcing their existing laws and regulations against the investor's wrongdoings.
632. The jurisprudence of investment treaty tribunals is consistent in that a State's *bona fide* enforcement of its regulations against the investor's illicit activities does not constitute an expropriation and is thus not compensable.<sup>684</sup> Regulatory and police powers are of particular relevance when an investment treaty tribunal scrutinizes the State's conduct in fields such as banking, where the investors are required to comply with a myriad of regulations designed to protect the stability of the financial sector and, more generally, the public welfare.

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<sup>684</sup> *Saluka v. Czech Republic* (CL-100), ¶¶ 254-255; *Genin v. Estonia* (CL-57), ¶ 385; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, February 26, 2014 (hereinafter "*Levi v. Peru*") (RL-63), ¶¶ 476, 519.

633. A number of investment tribunals have highlighted the role of the police and regulatory powers in the field of banking and finance. For instance, in *Saluka v. Czech Republic*, the tribunal reasoned that the treaty's expropriation provision left a regulatory space for the State's *bona fide* non-compensable regulations:

Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order [...] States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.<sup>685</sup>

634. Similarly, in *Levi v. Peru*, the tribunal found that the central bank's intervention in the claimant's bank was justified since the latter's violations of banking regulations led to the bank's loss of liquidity.<sup>686</sup> The tribunal accepted that "in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation".<sup>687</sup>

635. In *Genin v. Estonia*, the tribunal held that the central bank's revocation of the claimants' banking licence due to the latter's recurring self-dealing activities and repeated failure to comply with the regulator's demands for information on the ultimate owners of the bank, constituted a non-compensable measure. In reaching this conclusion, the tribunal analyzed whether the respondent's conduct was motivated by genuine regulatory concerns:

[T]he reluctance of Mr. Genin to divulge the beneficial ownership of Eurocapital, which would have enabled the Bank of Estonia's Banking Supervision department to understand the relationship of the various entities associated with him, was the cause of legitimate concern and cannot be considered to have been a mere excuse, or pretext, to revoke EIB's license.<sup>688</sup>

636. As the Tribunal determined above, the record contains evidence of certain unlawful activities by Future Bank. The Tribunal must determine whether such evidence provided

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<sup>685</sup> *Saluka v. Czech Republic* (CL-100), ¶¶ 254-255.

<sup>686</sup> *Levi v. Peru* (RL-63), ¶ 474.

<sup>687</sup> *Levi v. Peru* (RL-63), ¶ 475.

<sup>688</sup> *Genin v. Estonia* (CL-57), ¶ 362.

a genuine cause for Bahrain's measures against Future Bank. In this respect, the Tribunal agrees with the Respondent that it owes a certain degree of deference to the State's specialized regulatory organ, the CBB.<sup>689</sup> Indeed, the Tribunal cannot sit in judgment of every procedural or substantive error of the regulator, or else it would encroach on the function of an administrative review body or an appellate court. Genuine errors or inefficiencies of a regulator would not transform the State's *bona fide* enforcement of its regulations into a compensable expropriation.

637. That said, the gravity and multiplicity of the regulator's errors may well call into question the true intent behind the impugned measures. When scrutinizing the purported regulatory conduct, the Tribunal must focus its analysis on the evidence (or the lack thereof) of the connection between the impugned measures and the investor's unlawful activities. It should also analyze whether the measures were arbitrary, discriminatory, disproportionate and contrary to the requirements of due process. This inquiry overlaps with but is not identical to the question of lawfulness of expropriation.

638. With these initial observations in mind, the Tribunal proceeds with analyzing the record. It will first set out a summary of the applicable legal framework (a), and will then embark on the analysis of whether the Respondent's measures constituted a *bona fide* regulatory response to the Claimants' unlawful activities (b).

#### **(a) Regulatory Framework**

639. To determine whether the Respondent's measures constituted a *bona fide* exercise of regulatory powers, the Tribunal should first analyze the legal framework under which the Respondent took such measures. Thus, the Tribunal sets out the regulatory framework that applied to the placement of Future Bank in administration and its eventual liquidation.

##### ***i. The CBB Law***

640. Article 136 of the CBB Law<sup>690</sup> provides as follows:

(a) The Central Bank may, pursuant to a justified resolution, assume the administration of a Licensee or may appoint another person (the "External

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<sup>689</sup> *Genin v. Estonia* (CL-57), ¶ 385.

<sup>690</sup> CBB Law (CL-5).

Administrator”) to conduct the administration of a Licensee on behalf of the Central Bank under any of the following circumstances:

- 1) If the Licensee becomes insolvent or appears most likely to be insolvent.
- 2) If the License is amended or cancelled pursuant to the provisions of items (1) and (3) of paragraph (c) of Article (48) of this law
- 3) If the Licensee continued to provide regulated services which resulted in inflicting damages to financial services industry in the Kingdom.

(b) In this part the term administrator denotes the Central Bank if it assumes the administration of the Licensee or any external administrator to be appointed for this purpose.

641. Pursuant to Article 138(a), the Administrator “shall, promptly after assuming the administration of a Licensee, publish a notice to this effect in the Official Gazette and in one Arabic and one English language newspaper published in the Kingdom, and show such notice in every place of business of the Licensee in the Kingdom all through the period in which he assumes the administration”. By virtue of Article 138(b), “[t]he appointment of the Administrator shall only have effect on the day following the publication of such notice [...]”.
642. In accordance with Article 139(a), a licensee may, within the ten days following the date of publication of the decision on placing it in administration, appeal to the Central Bank against such decision. The appeal must be submitted in the form prepared by the Central Bank for this purpose and accompanied by such supporting documents and information as the Central Bank may specify. Article 139(b) provides that a decision must be reached with regard to the appeal, and the appellant must be notified with the decision in writing within 15 days of the date of submitting the appeal, and reasons must be given in case of rejecting the appeal. Article 139(c) adds that the licensee may challenge the decision of administration or rejection of the appeal, before the competent court, within 30 days from the date of receipt of such decisions.
643. Pursuant to Article 143, the Administrator must submit, with the prior approval of the Central Bank in case of an External Administrator, within a period of two years from the commencement of the administration, a petition for compulsory liquidation of the licensee or otherwise terminate the administration and restore the management to the licensee.

644. Article 145 provides for the grounds for compulsory liquidation which are (i) the insolvency of the licensee, or (ii) a situation where compulsory liquidation is decisively proved to be a just and equitable action.

ii. ***The CBB Rulebook***

645. The CBB Rulebook<sup>691</sup> is introduced by a statement (User Guide UG-A.1.1) that the CBB:

in its capacity as the regulatory and supervisory authority for all financial institutions in Bahrain, issues regulatory instruments that licensees and other specified persons are legally obliged to comply with. These regulatory instruments are contained in the CBB Rulebook.

646. The CBB Rulebook contains the following guidance on administration:

**EN 8.1.1**

Article 136 of the CBB Law empowers (but does not oblige) the CBB to assume the administration of a licensee in certain circumstances. These circumstances are outlined in the above Article and may include the following:

- (a) The licensee has become insolvent;
- (b) Its solvency is in jeopardy;
- (c) Its continued activity is detrimental to the financial services industry in the Kingdom; or
- (d) Its license has been cancelled.

**EN 8.2.1**

The CBB views the administration of a licensee as a very powerful sanction, and will generally only pursue this option if less severe measures are unlikely to achieve its supervisory objectives.

**EN 8.2.2**

Although Article 136 of the CBB Law specifies the circumstances in which the CBB may pursue an administration, it does not oblige the CBB to administer a licensee. Faced with the circumstances described, the CBB may pursue other courses of action such as suspension of a license (under Article 131 of the CBB Law), if it considers that these are more likely to achieve the supervisory outcomes sought. Because an administration is likely to send a negative signal to the markets about the status of a licensee, other supervisory actions may in fact be preferable in terms of protecting the interests of those with a claim on the licensee.

**EN 8.2.3**

The criteria used by the CBB in deciding whether to seek an administration of a licensee include the following:

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<sup>691</sup> CBB Rulebook (PS-30).

(a) the extent to which the interests of the market, its users and those who have a claim on the licensee would be best served by the administration of the license, for instance because of the potential impact on asset values arising from an administration;

(b) the extent to which other regulatory actions could reasonably be expected to achieve the CBB's desired supervisory objectives (such as restrictions on the licensee's operations, including limitations on new business and asset disposals);

(c) the extent to which the liquidity or solvency of the licensee is in jeopardy; and

(d) the extent to which the licensee has contravened the conditions of the CBB Law, including the extent to which the contraventions reflect more widespread or systemic weaknesses in controls and/or management.

### **EN 8.3 Procedure for Implementing an Administration**

#### **EN 8.3.1**

All proposals for assuming the administration of a licensee are subject to a thorough review by the CBB of all relevant facts, assessed against the criteria outlined in Section EN 8.1.

#### **EN 8.3.2**

A formal notice of administration is issued to the licensee concerned and copies posted in every place of business of the licensee. As soon as practicable thereafter, the notice is also published in the Official Gazette and in one Arabic and one English newspapers in the Kingdom. The term "in administration" should be clearly marked in all the bank's correspondence and on its website, next to the bank's name.

#### **EN 8.3.3**

Article 136 of the CBB Law allows a licensee 10 days following the administration taking effect in which to appeal to the CBB. If the CBB refuses the appeal, the licensee has a further 30 calendar days from the date of the refusal in which to lodge an appeal at the courts. So as to reduce the potential damage of an administration order being applied and then withdrawn on appeal, where feasible the CBB will give advance notice to a licensee's Board of its intention to seek an administration, and allow the Board the right of appeal prior to an administration notice being formally served.

647. In so far as relevant for present purposes, the overall effect of these provisions of the CBB Law and the CBB Rulebook can be summarized as follows:

- (1) The CBB may, pursuant to a justified resolution, appoint a person to be the administrator of a licensed bank if the bank "continued to provide regulated services which resulted in inflicting damages to financial services industry" in Bahrain (CBB Law, Article 136(a)(3) or "its continued activity is detrimental to the financial services industry" in Bahrain (CBB Rulebook, EN 8.1.1(c)).



- (2) The CBB Rulebook, EN 8.2, emphasises that
  - (a) the CBB is not obliged to pursue administration which is a very powerful sanction only to be pursued if less severe measures are unlikely to achieve the CBB's supervisory objectives;
  - (b) the CBB may pursue other courses of action such as suspension of a license if it considers that these are more likely to achieve the supervisory outcomes sought; and
  - (c) other supervisory actions may be preferable to protect the interests of those with a claim on the bank.
- (3) The CBB Rulebook, EN 8.2.3, sets out the criteria which will be applied by the CBB in deciding whether to seek an administration, including
  - (a) the extent to which other regulatory actions can reasonably be expected to achieve the CBB's desired supervisory objectives (such as restrictions on the bank's operations); and
  - (b) the extent to which the bank has contravened the conditions of the CBB Law, including the extent to which the contraventions reflect more widespread or systemic weaknesses in controls and/or management.
- (4) All proposals for assuming the administration of a bank are subject to a thorough review by the CBB of all relevant facts, assessed against the criteria outlined in EN 8.1, which include that the bank's continued activity is detrimental to the financial services industry in Bahrain.
- (5) To reduce the potential damage of an administration order being applied and then withdrawn on appeal, where feasible the CBB will give advance notice to a bank's board of its intention to seek an administration, and allow the board the right of appeal prior to an administration notice being formally served.
- (6) Pursuant to the FC Module of the CBB Rulebook, a bank must review the effectiveness of its AML/CFT procedures, systems and controls at least once each calendar year, and the review must include (*inter alia*) a report as to the quality of the bank's anti-money laundering procedures, systems and controls, and compliance with the AML Law and the CBB Rulebook Module, which the bank must instruct external auditors to produce by April 30 of the following year (FC 4.3.1(d), FC 4.3.5).

648. Consequently, administration is a last resort if less severe sanctions will not achieve the regulatory objective. Any proposal for administration is subject to a thorough review of all relevant facts, including the detrimental effect on the financial services industry. Where feasible, an advance notice will be given to the bank's board.
649. In the following section, the Tribunal will examine whether Bahrain's measures constituted a *bona fide* enforcement of this regulatory framework against Future Bank's unlawful activities.

**(b) Did the CBB's Measures Constitute a *Bona Fide* Enforcement of the Applicable Regulations?**

650. In this section, the Tribunal analyzes whether the CBB's measures were a genuine response to Future Bank's unlawful activities. To make this assessment, the Tribunal must review, *inter alia*, the evidence of illegalities available to the CBB at the time of its decisions of administration and liquidation and the evidence of the reasons considered by the CBB when taking its decisions.
651. Having carefully considered the record and the Parties' arguments, the Tribunal is persuaded that Bahrain's measures against Future Bank were not genuine regulatory measures aiming at addressing Future Bank's unlawful conduct. The reasons are as follows.

***i. No Contemporaneous Trace of Consideration of Reasons***

652. The record lacks contemporaneous trace of the CBB's consideration of reasons for the measures it took against Future Bank. As described above, the Respondent alleges that the CBB resolved to put Future Bank into administration at the Crisis Committee Management meeting of April 30, 2015. In the course of the document production process, the Respondent produced a set of minutes of that meeting, which reads as follows:

**Minutes of the Meeting of the Crisis Management Committee**

Date: Thursday April 30, 2015

Time: 3pm

Place: Fifth floor

Presence:

1. Sheikh Salman Ben Issa Al Khalifa, executive director of banking operations – head of the committee
2. Mr. Khaled Hamad Abdel Rahman, executive director of the banking supervision body
3. Mr. Abdel Rahman Mohamad Baker, executive director of the financial institution supervision body
4. Mr. Manar Mostafa Al Sayed, assistant to the general advisor

The following topic was discussed:

1. Putting Future Bank under administration
2. Putting the Iranian Insurance Company under administration

Based on article 136 of the Law regarding the Bahrain Central Bank, and given the fact that Future Bank and the Iranian Insurance Company are still offering services under supervision will cause harm to the production of financial services and the general interest in the Kingdom, the committee recommends the following:

“Putting Future Bank and the Iranian Insurance Company under the administration of the Bahrain Central Bank”.<sup>692</sup>

653. The minutes record that the meeting was attended by the Executive Directors of the CBB, none of whom made a witness statements. Only Mr. Hamad, the CBB Executive Director, attended to give evidence at the hearing following a direction by the Tribunal.
654. Be that as it may, the minutes contain no record of a discussion of the reasons for the decisions, but simply reflect the recommendation to put Future Bank and Iran Insurance Company under the CBB’s administration because they “are still offering services under supervision [and] will cause harm to the production of financial services and the general interest in the Kingdom”.
655. The CBB Governor Al Maraj, who actually took the decision on administration, could not recall any discussion of the reasons for the decision, but assumed that discussion must have taken place in previous meetings over many months.<sup>693</sup> In his first witness statement, he said that in 2015 the Executive Directors of the CBB’s Retail Banking Supervision, Banking Operations, and Financial Institutions Directorates raised the issue of the future of Future Bank with him, because Future Bank’s aberrant behaviour had

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<sup>692</sup> CBB Meeting Minutes, April 30, 2015 (C-152).

<sup>693</sup> Hearing Transcript, Day 3, p. 662:2-6 (Governor Al Maraj).

reached a stage where its continuation was affecting the wider financial sector in Bahrain.<sup>694</sup> However, there is no paper trail of such internal discussion.

656. The minutes are the only contemporaneous evidence documenting the process of the CBB's decision-making with respect to Future Bank's administration, and even this single document is a result of a production order. Indeed, the Tribunal ordered the Respondent to produce:

All correspondence exchanged, or minutes of meetings held internally or collectively, by organs of Respondent, including the office of the H.E. The King, Ministers, Ministries, the CBB or other governmental entities and their employees or officers, as well as all internal Documents to the CBB, the Ministry of Finance, or the Ministry of Foreign Affairs, that relate to who and which organ originally triggered the process that led to the decision to place Future Bank under administration as communicated on April 30, 2015 [...] at what exact time this process was triggered, for what reasons, the nature and extent of the due diligence undertaken prior to the April 30, 2015 taking, and in relation thereto, and at what time the process culminated in, and the decision taken and by which organ with respect to, the decision to place Future Bank under administration as communicated on April 30, 2015.<sup>695</sup>

657. The only document relevant to this order that the Respondent produced was precisely the minutes of the Crisis Management Committee. The Tribunal can thus conclude that there is no contemporaneous evidence of any discussion of the reasons for putting Future Bank under the CBB's administration.
658. The Governor of the CBB wrote in his witness statement that the purpose of his consulting the Crisis Management Committee prior to making the decision on administration was to ensure that his decision would be informed by the most up-to-date information, as considered by the three individuals directly responsible for monitoring and supervising the Bank.<sup>696</sup> Yet, neither the meeting minutes, nor any other documentary evidence, demonstrate consideration of any up-to-date information concerning Future Bank's compliance with the applicable regulations.
659. As the record stands, not only did the CBB not discuss evidence of Future Bank's alleged illegal activities when placing it under administration, but no such contemporaneous

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<sup>694</sup> First WS Al Maraj (**RWS-1**), ¶ 39.

<sup>695</sup> Procedural Order No. 3, pp. 21-22.

<sup>696</sup> Second WS Al Maraj (**RWS-3**), ¶ 31.

evidence existed. As set out in the section on preliminary objections above, the record contains limited evidence of Future Bank's unlawful activities. Even that limited evidence is, however, a result of the CBB's examination of Future Bank's records *after* the Respondent's decisions of administration and liquidation.

660. By way of example, with respect to the alleged violations of the applicable sanctions, the Tribunal found that the existing evidence only partly substantiates the allegations with respect of Future Bank's dealings with IRISL, SOC and ISOC. The evidence of such illegalities were contained in the 2018 CBB Report. There is no indication that the CBB was aware of these violations at the time of its decision to place the bank into administration in April 2015.
661. Governor Al Maraj conceded at the hearing that, when taking the decision to place Future Bank under administration, he did not have benefit of any compliance reports for the year 2014 or January-April 2015.<sup>697</sup> While on April 29, 2015, KPMG had issued an assessment report for the year 2014, Governor Al Maraj confirmed that he did not see that report.<sup>698</sup> The Respondent has provided no evidence that the CBB gave any consideration to the KPMG report when making its decision. In any event, the Respondent's banking compliance expert Mr. Sharma opined that the KPMG report may not on its own have been a reason to put Future Bank into administration and conceded that it was not proved that it was taken into account at all.<sup>699</sup> The Respondent's fact witness Mr. Hamad also confirmed that there was no documentary assessment of the situation, and that there were no compliance or inspection reports for 2014 (adverse or otherwise), prior to the April 30, 2015 decision.<sup>700</sup>
662. This stands in sharp contrast with the requirements of the regulatory framework summarized above.<sup>701</sup> In particular, pursuant to the CBB Rulebook, the procedure for placing a bank under administration should have been initiated by way of a proposal to

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<sup>697</sup> Hearing Transcript, Day 3, pp. 648:22-649:20 (Governor Al Maraj).

<sup>698</sup> Hearing Transcript, Day 3, pp. 648:22-649:20 (Governor Al Maraj).

<sup>699</sup> First ER Sharma (**RER-1**), ¶ 2.1.8; Opening Presentation of Mr. Paul Sharma, May 9, 2019, slide 11.

<sup>700</sup> Hearing Transcript, Day 3, pp. 597:18-25, 605:3-20 (Mr. Hamad).

<sup>701</sup> CBB Rulebook (**PS-30**), EN 8.3.3 requiring that a proposal for administration undergo a thorough review.

this effect, which would then be subject to a “thorough review” by the CBB of all relevant facts, assessed against specific criteria.<sup>702</sup> The Respondent’s witness Mr. Hamad confirmed this at the hearing, stating that there was a need for a thorough review before putting a bank in administration under the CBB Rulebook, EN 8.3.1.<sup>703</sup> Had the CBB followed this rule, there would have been an extensive documentary record readily available at the CBB, which the Respondent would have been able to produce.

663. As the Claimants’ banking compliance expert Mr. Brain confirms, a decision such as the placement of a bank under administration would normally be preceded by substantial recent investigations and exchanges with the Bank’s representatives, documenting the grounds for such action, and the insufficient or unsatisfactory nature of the responses provided or remedial measures implemented by the Bank.<sup>704</sup>
664. In turn, the Respondent’s banking compliance expert Mr. Sharma was asked in cross-examination whether he knew “what the CBB relied on to justify, to take the decision to place the bank in administration”. His answer was “[...] no, I can’t say [...] that they used all the information in their possession, readily available to them, easily accessible to them. I cannot say [...] They used all of that”.<sup>705</sup> Furthermore, on the question: “Do you know what they used?”, his answer was in the negative. He also stated that, when he sought the information from the Respondent, what he received was Governor Al Maraj’s witness statement, which he thought “actually does go some way to answer as to what information they used”. He eventually accepted that four years after the administration “we still do not know what information the regulators relied on when taking the decision”.<sup>706</sup> Mr. Sharma further conceded that there had been no prior case in which a Bahraini bank had been put into administration without an investigation report.<sup>707</sup>
665. The Tribunal is persuaded that, if there had been a genuine decision to place Future Bank into administration on one of the grounds in section 136(a) of the CBB Law there would

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<sup>702</sup> CBB Rulebook (**PS-30**), EN 8.3.1, 8.3.3.

<sup>703</sup> Hearing Transcript, Day 3, pp. 603:20-604: 20 (Mr. Hamad).

<sup>704</sup> Second ER Bovill (**CER-3**), ¶ 10.1.

<sup>705</sup> Hearing Transcript, Day 4, p. 826:4-8 (Mr. Sharma).

<sup>706</sup> Hearing Transcript, Day 4, p. 827:7-12 (Mr. Sharma).

<sup>707</sup> Hearing Transcript, Day 4, p. 827:21-25 (Mr. Sharma).

have been a full documentary record of internal correspondence, reports, and minutes of meetings discussing the reasons justifying such an extreme measure. What is striking is that there is not a single document other than the Crisis Management Committee minutes, which were only produced at the document production stage, that sheds any light on the reasons for the Respondent's decision to put Future Bank into administration.

666. For these reasons, the Tribunal concludes that the CBB placed Future Bank under administration without any substantial deliberation or consideration of reasons for its decision. The manifest lack of reasoning for a decision of such severity does not comply with the applicable regulatory framework and suggests that the Respondent's impugned conduct was not a legitimate law enforcement measure.

*ii. Evidence of Political Targeting*

667. The Tribunal cannot ignore the wider political context that prevailed at the time when Bahrain took the impugned measures. In particular, on April 2, 2015, a few weeks before Bahrain placed Future Bank under administration, it was announced that Iran had agreed with the United States, France, Germany, the United Kingdom, Russia, and China to accept constraints on its nuclear programme in exchange for partial relief from sanctions. The JCPOA was then signed on July 14, 2015. Press reports indicated that Saudi Arabia was strongly opposed to the JCPOA and had been pressuring neighboring (and other) States to sever ties with Iran. As for Bahrain, it is reported to have strong ties with Saudi Arabia and to be economically dependent on Saudi Arabia.<sup>708</sup>

668. In this respect, the Tribunal considers it significant that Iran Insurance Company was put into administration on the same day as Future Bank. In his first witness statement Governor Al Maraj's testified that Future Bank was the only item on the agenda of the meeting of the Crisis Management Committee. That witness statement was filed before the production of the minutes of the Crisis Management Committee meeting, which revealed that the committee also recommended that Iran Insurance Company be put into administration.<sup>709</sup> In the absence of any contemporaneous documents about the reasons

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<sup>708</sup> Kenneth Katzman, Bahrain: Reform, Security and U.S. Policy, US Congressional Research Service, October 28, 2016 (hereinafter "**Bahrain: Reform, Security and U.S. Policy, US Congressional Research Service**") (C-19); SSANSE Self-Preservation and Strategic Hedging in the Gulf Cooperation Council, June 26, 2018 (C-143).

<sup>709</sup> CBB Meeting Minutes, April 30, 2015 (C-152).

for recommending administration, it remains unclear what led the CBB to target these two Iranian entities on the same day.

669. In the SoC, the Claimants alleged that the administration of Future Bank was part of a wider campaign against Iranian interests, which included the measure against Iran Insurance Company, and the freezing of assets of the Central Bank of Iran in a large number of banks in Bahrain.<sup>710</sup> The Respondent did not rebut these allegations in the SoD.
670. The Reply reiterated the allegations, adding that the fact that the decision covered both Future Bank and Iran Insurance Company, although each of them had distinct activities and business models, confirmed that these were not case-specific, but rather generic and political measures.<sup>711</sup> The Rejoinder did not engage with this argument but merely stated that Iran Insurance Company's claims are not before this Tribunal, and that such entity is not actively pursuing its claims.
671. In oral evidence before the Tribunal, Governor Al Maraj testified that he had not asked the Crisis Management Committee to discuss Iran Insurance Company at the same time as Future Bank, but that the committee elected to consider both because they were in the same situation.<sup>712</sup> The record contains no information as to any assessment of the similarity of the situations of these two entities. The only similarity that is apparent is that both of them were Iranian-owned businesses.
672. While the Tribunal does not consider the evidence before it sufficient to demonstrate a nationality-based discrimination, the political context and the absence of any thorough review of the reasons for putting these Iranian entities into administration on the same date constitute a strong circumstantial evidence of a motivation of political retribution behind the CBB's impugned measures.
673. What is more, the statement made by the CBB official Mr. Hamad after the CBB placed Future Bank under administration further reveals the political dimension of the decision.

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<sup>710</sup> SoC, ¶ 199.

<sup>711</sup> Reply, ¶¶ 21, 61 and 222.

<sup>712</sup> Hearing Transcript, Day 3, p. 655:6-10 (Governor Al Maraj).



The Claimants' record of the meeting of May 3, 2015 between the CBB and Future Bank records Mr. Hamad saying:

1. It is a Sovereign Decision to put the Bank into Administration.
2. It is decided to liquidate the Bank.
3. M Ahmed Buhejil [*sic*] will be the Administrator of the Bank.
- ...
5. If you want you can go for voluntary liquidation, else we will initiate the process for liquidation.<sup>713</sup>

674. The meaning of Mr. Hamad's statement that "[i]t is a Sovereign Decision to put the Bank into Administration" is controversial. The Claimants rely on the phrase as evidence that the decision was not taken as a matter of banking regulation but was a purely political decision taken at the ministerial level.<sup>714</sup> The Respondent contends that the term "sovereign decision" does not assist the Claimants' position, since the decision was said to be "sovereign" simply because it came from the CBB.<sup>715</sup> In his closing submissions, counsel for the Respondent dismissed the reference to "sovereign decision" on the basis that "every exercise of regulatory power necessarily involves a sovereign decision by the delegated agency of a sovereign government which makes a decision".<sup>716</sup>

675. In the light of the other evidence discussed above, the Tribunal is persuaded that the reference to a "Sovereign Decision" in the record of the May 3, 2015 meeting provides an additional indication that the CBB's conduct against Future Bank was dictated by a political agenda as opposed to regulatory considerations. Indeed, not only does the natural meaning of the expression, and the context in which it was used, support this conclusion, but it would also have been pointless for Mr. Hamad to mention that the decision was sovereign if all that he had meant to convey was that the decision had been taken by the CBB, as a State organ, a fact that was clear to everyone.

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<sup>713</sup> Meeting Report, May 3, 2015 (C-60).

<sup>714</sup> SoC, ¶¶ 142, 190; Reply, ¶¶ 29, 225, 605, 661.

<sup>715</sup> SoD, ¶¶ 108-109.

<sup>716</sup> Hearing Transcript, Day 1, p. 204:9-11 (Prof. Paulsson).

*iii. No Recent Warnings or Expressions of Concerns*

676. The record contains limited evidence of the CBB raising the alleged violations of applicable regulations either internally or with Future Bank in the time leading to the impugned decisions.
677. Mr. Hamad testified that he raised the issue of Future Bank's irresponsible conduct with Governor Al Maraj in 2015, but he could not remember in which month he did so or how many times.<sup>717</sup> He said that sometime between January and April 2015, he told Governor Al Maraj about his concern with Future Bank's sanction breaking<sup>718</sup> but that he did not show Governor Al Maraj any documents, because the Governor had access to inspection reports.<sup>719</sup> Later, Mr. Hamad admitted however that, at the time of the decision on the placement of Future Bank under administration, there were no compliance or inspection reports for the year 2014, and no fine or official warning toward Future Bank as from 2012.<sup>720</sup> Governor Al Maraj corroborated this account conceding that, since 2012, the CBB had not warned or fined Future Bank for any unlawful activities.<sup>721</sup>
678. Furthermore, Governor Al Maraj was not able to say when between January 2015 and April 2015 Mr. Hamad raised the issue of Future Bank with him.<sup>722</sup> Nor could he recall when the other executive directors could have raised the issue.<sup>723</sup>
679. In answer to a question from the President as to why the CBB waited until 2015 to take action after a period with no fines or specific warnings to Future Bank, the Governor responded that he was "a very patient man", but he eventually decided that administration was the right way to deal with the situation.<sup>724</sup>

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<sup>717</sup> Hearing Transcripts, Day 3, pp. 587:22-590:22 (Mr. Hamad)..

<sup>718</sup> Hearing Transcripts, Day 3, p. 591:18-25 (Mr. Hamad).

<sup>719</sup> Hearing Transcripts, Day 3, p. 597:13-24 (Mr. Hamad).

<sup>720</sup> Hearing Transcripts, Day 3, pp. 598:3-12, 606:17-23 (Mr. Hamad).

<sup>721</sup> Hearing Transcripts, Day 3, p. 649:17-24 (Governor Al Maraj).

<sup>722</sup> Hearing Transcripts, Day 3, pp. 644:11-645:16 (Governor Al Maraj).

<sup>723</sup> Hearing Transcripts, Day 3, p. 647:3-18 (Governor Al Maraj).

<sup>724</sup> Hearing Transcript, Day 3, p. 699:2-22 (Governor Al Maraj).

680. There is no evidence why it was precisely in April 2015 that the Governor decided that it was no longer appropriate to exercise his patience, especially given that at that time he did not have access to any recent compliance reports for the years 2014 or 2015. Under cross-examination, Mr. Hamad said that he did not know why Governor Al Maraj convened the Crisis Management Committee meeting of April 30, 2015.<sup>725</sup>
681. This evidence corroborates that the CBB's measures against Future Bank were not motivated by *bona fide* regulatory objective of protecting the stability of Bahrain's financial sector from Future Bank's unlawful activities.

*iv. No Consideration of Less Restrictive Alternatives*

682. As summarized above, the CBB Rulebook provides that the CBB "views the administration of a licensee as a very powerful sanction, and will generally only pursue this option if less severe measures are unlikely to achieve its supervisory objectives".<sup>726</sup> It further specifies that "the CBB may pursue other courses of action such as suspension of a license [...] because an administration is likely to send a negative signal to the markets".<sup>727</sup> Mr. Hamad accepted at the hearing that administration is a measure reserved for extreme cases.<sup>728</sup>
683. The record contains no evidence of the CBB considering less restrictive measures. Governor Al Maraj's testified at the hearing that no remedy other than administration and liquidation was considered.<sup>729</sup> This was confirmed by Mr. Hamad, who noted that all three executive directors came to the Crisis Management Committee meeting of April 30, 2015 convinced that they should put an end to Future Bank.<sup>730</sup> According to him, he had no need to prepare for the April 30, 2015 meeting because he was pressing Governor Al Maraj to put an end to Future Bank.<sup>731</sup>

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<sup>725</sup> Hearing Transcript, Day 3, p. 582:19 (Mr. Hamad).

<sup>726</sup> CBB Rulebook (**PS-30**), EN 8.2.1.

<sup>727</sup> CBB Rulebook (**PS-30**), EN 8.2.2.

<sup>728</sup> Hearing Transcript, Day 3, pp. 604:24-25-605:1 (Mr. Hamad).

<sup>729</sup> Hearing Transcript, Day 3, p. 687:1-12 (Governor Al Maraj).

<sup>730</sup> Hearing Transcripts, Day 3, pp. 602:16-603:19 (Mr. Hamad).

<sup>731</sup> Hearing Transcripts, Day 3, p. 600:12-18 (Mr. Hamad).

684. No credible reason has been suggested why suspension of Future Bank's license, which is expressly envisaged by the CBB Rulebook, would not have been sufficient to prevent damage to Bahrain's financial system. Mr. Sharma sought to justify the absence of other remedies by an assumption that the CBB had already taken measures such as capping Iranian exposure.<sup>732</sup> In the view of the Tribunal, that is not an adequate answer. As the Tribunal found, at the time of placing the bank under administration, the CBB did not have any compliance reports from the years 2014-2015. Thus, the CBB had no information on whether Future Bank had ignored its past warnings on issues such as Iranian exposure. Therefore, such past warnings could not have justified the election of the most drastic measure, without a consideration of alternatives.
685. That the CBB had resolved to put Future Bank into administration and eventual liquidation without considering less restrictive measures is further confirmed by the record of the May 3, 2015 meeting. As reproduced above, the record shows Mr. Hamad saying to Future Bank: "If you want you can go for voluntary liquidation, else we will initiate the process for liquidation".<sup>733</sup> The written evidence of the Claimants' witness Mr. Soury bears out that Mr. Hamad announced that a decision had been made to liquidate Future Bank already at that time, and that the only decision for the shareholders was whether it would be a voluntary or a compulsory liquidation.<sup>734</sup> The Respondent did not cross-examine Mr. Soury on his account of the meeting.
686. In turn, Mr. Hamad gave evidence that he had no minutes of the meeting, but said that he did not recall telling Mr. Soury that there was a decision to liquidate at that point.<sup>735</sup> He had reported on the meeting to Governor Al Maraj,<sup>736</sup> which the latter confirmed without recalling the details.<sup>737</sup>
687. The Tribunal notes that the Respondent has not produced any written trace of its record of the May 3, 2015 meeting or the internal report by Mr. Hamad to Governor Al Maraj.

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<sup>732</sup> Hearing Transcripts, Day 4, pp. 838:8-839:24 (Mr. Sharma).

<sup>733</sup> Meeting Report, May 3, 2015 (C-60).

<sup>734</sup> First WS Soury (CWS-1), ¶ 70.

<sup>735</sup> Hearing Transcripts, Day 3, pp. 619: 20-24, 621:22-622:15 (Mr. Hamad).

<sup>736</sup> Hearing Transcripts, Day 3, p. 623: 13-14 (Mr. Hamad).

<sup>737</sup> Hearing Transcripts, Day 3, pp. 675:18-677:1 (Governor Al Maraj).

The only documentary evidence is the Claimants' note. Considering this together with the content of the witness testimony, the Tribunal is satisfied that, as of May 3, 2015, the CBB had already decided to liquidate Future Bank, be it by voluntary or compulsory liquidation.

688. It follows from these conclusions that the Respondent's *ex post facto* justifications for the administration have limited relevance for determining the actual reasons for the CBB's measures. The decision to put Future Bank into administration and then liquidation was a political one and not a result of the bank's alleged shortcomings.
689. Overall, the staggering absence of evidence of consideration of reasons for the administration, the CBB's choice not to await and review new compliance information, as well as its failure to consider less restrictive alternative measures, when put in the political context prevailing at the time of the impugned measures, lead to the conclusion that the Respondent's purported justification for its measures was merely pretextual. Instead, the evidence in the record demonstrates that the Respondent acted with a contrived agenda of political retribution against the Claimants' investment.
690. For the foregoing reasons, the Tribunal concludes that Future Bank's administration and liquidation were not *bona fide* regulatory measures. It follows that the deprivation of the Claimants' shareholding interests in Future Bank was not a non-compensable measure. As the Tribunal explained above, while the Claimants remain nominal owners of their shares in Future Bank, they have not been able to exercise their shareholding rights for over six years, with the result that the deprivation has become permanent. Therefore, the administration and liquidation of Future Bank, not being a justified exercise of police and regulatory power, constituted an indirect expropriation of the Claimants' shareholding interests in Future Bank.

### (c) Lawfulness of Expropriation

691. The Tribunal must determine next whether the expropriation was lawful. The first requirement that Article 6(1) of the BIT sets for the lawfulness of expropriation is that expropriatory measures must be "taken for public purposes".<sup>738</sup> As explained above, the question whether the measures were for a public purpose overlaps to a significant extent

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<sup>738</sup> BIT (CL-1), Article 6(1).

with the question whether the disputed measures constituted a legitimate non-compensable regulation, which the Tribunal answered in the negative in the preceding section. In particular, as the Tribunal determined above, the CBB's administration and liquidation decisions were politically motivated, disproportionate measures that manifestly lacked contemporaneous rational justification.

692. The Tribunal recognizes that it owes a certain degree of deference to the State's determination of the existence of a public purpose. As the Respondent rightly cites, according to the *Marfin v. Cyprus* tribunal, “[a] decision to revoke a bank’s license, which takes place within a detailed national legal framework that includes administrative and judicial remedies, is not reviewed at the international law level for its correctness, but rather for whether it offends the more basic requirements of international law”.<sup>739</sup>
693. Similarly, according to the tribunal in *Vestey Group v. Venezuela*, “[i]nternational tribunals should thus accept the policies determined by the state for the common good, except in situations of blatant misuse of the power to set public policies”.<sup>740</sup> The tribunal went on to say, however, that the deference owed to a sovereign’s policies does not exempt the measures from scrutiny as to “whether the impugned expropriatory measure was for the public purpose as Article 5(1) of the BIT requires [expropriation provision]”.<sup>741</sup>
694. As noted earlier, the lack of reasons for the disputed measures and the pretextual nature of the *post hoc* justification advanced by the Respondent are manifest. The Tribunal has not scrutinized the Respondent’s measures for mere mistakes of fact or law. Rather, it has found that the measures were unreasonable, disproportionate and politically motivated. For these same reasons, the Tribunal considers that the expropriatory measures did not meet the requirement of a public purpose under Article 6(1) of the BIT.
695. In addition, the Tribunal notes that, to this day, the Claimants have received no compensation for the expropriation of their shareholding interests in Future Bank. While the Respondent contends that the Claimants are entitled to the proceeds of liquidation of

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<sup>739</sup> *Marfin v. Cyprus* (RL-167), ¶ 897.

<sup>740</sup> *Vestey Group v. Venezuela* (CL-152), ¶ 294.

<sup>741</sup> *Vestey Group v. Venezuela* (CL-152), ¶ 296.

the bank, Article 6(1) of the BIT requires that “effective and appropriate compensation [...] be paid without delay”.

696. The Tribunal held above that the Respondent’s decision to place Future Bank in administration was not a legitimate exercise of regulatory powers, but constituted an indirect expropriation. It also considered that the Respondent had resolved to liquidate Future Bank from the outset of the administration. It follows that the Respondent’s obligation to pay effective and appropriate compensation arose at the time when the CBB placed the bank under administration, *i.e.*, on April 30, 2015. The continued lack of compensation more than six years after the expropriation does not comply with the requirement of compensation “paid without delay” under Article 6(1) of the BIT.
697. Having reached these conclusions, the Tribunal can dispense with analyzing whether the expropriation may also be unlawful on additional grounds, including discrimination and lack of due process.

#### **B. OTHER ALLEGED TREATY VIOLATIONS**

698. The Claimants allege violations of standards of treatment contained in Articles 4(1) of the BIT, which require that investments be accorded “full legal protection and fair treatment not less favourable than that accorded to its own investors or to the investors of any third state who are in a comparable situation”.<sup>742</sup> They also invoke Article 5 of the BIT, which provides for the application of more favourable provisions available to the investors in the following terms:

If the laws of either Contracting Party, or obligations under international agreements existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall, to the extent that they are more favourable, prevail over the present Agreement.<sup>743</sup>

699. The factual premises on which the Claimants rely in respect of these other standards of protection are the same as those underlying their unlawful expropriation claim. A finding

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<sup>742</sup> BIT (CL-1), Article 4(1).

<sup>743</sup> BIT (CL-1), Article 5.

of a violation of Article 4 or 5 of the BIT would not therefore alter the Tribunal's analysis on reparation, or the quantification of the compensation.

700. The Claimants do request a declaration of breach of Articles 4, 5 and 6 of the BIT. However, in the interest of procedural economy, the Tribunal can dispense with entering into the analysis of alleged violations that would not alter or add to the remedies already available to the Claimants.

701. The Tribunal recognizes that, as some investment tribunals have held, declaration of a breach can itself constitute a form of reparation, specifically the form of satisfaction.<sup>744</sup> That being said, as Article 37(1) of the ILC Articles on State Responsibility indicates, satisfaction can be elected as a remedy "insofar as [the injury] cannot be made good by restitution or compensation."<sup>745</sup> In the present case, and as further elaborated in the section on reparation below, the Claimants' loss can be remedied by compensation. Therefore, even if the Claimants' request for a declaration of breach of Articles 4 and 5 of the BIT could be deemed as a request for satisfaction, the Tribunal could dispense with ruling on that request as the harm can be made good by way of compensation.

## VII. REPARATION

702. The Tribunal will first summarize the Parties' positions (A and B), and then proceed to the analysis (C).

### A. THE CLAIMANTS' POSITION

703. At the Hearing, the Claimants amended their relief requests for and withdrew their claim for restitution of their investment.<sup>746</sup> Thus, they claim monetary compensation and moral damages.

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<sup>744</sup> *Quiborax v. Bolivia (CL-127)*, ¶¶ 560-562. See also, *European Media Ventures SA v. Czech Republic*, UNCITRAL, Judgment of the English High Court of Justice on the Application to Set Aside Award on Jurisdiction, December 5, 2007, ¶ 51.

<sup>745</sup> International Law Commission Articles on State Responsibility, December 12, 2001 (hereinafter "**ILC Articles on State Responsibility**") (CL-106).

<sup>746</sup> Hearing Transcript, Day 1, p. 95:19-22 (Dr. Gharavi).



## 1. Monetary Compensation

704. The Claimants request monetary compensation encompassing (i) payment of fair market value of the Claimants' investment, including lost profits, and (ii) pre-award interest, to compensate for the loss of business opportunities suffered following April 30, 2015, as a result of the Respondent's breaches.<sup>747</sup>

### (a) Payment of the Fair Market Value of the Investment

705. According to the Claimants, the BIT standard of fair market value of the expropriated investment applies to lawful expropriation. As the expropriation was unlawful, according to the Claimants, compensation must be determined in accordance with general principles of international law, which provide for "full reparation based on the investment's fair market value".<sup>748</sup> Citing several awards and the ILC Articles, the Claimants submit that this standard includes future lost profits.<sup>749</sup>

706. The Claimants identify three valuation methods generally accepted in the literature and arbitral jurisprudence for valuing the fair market value of a banking venture: (i) the income-based approach; (ii) the market-based approach; and (iii) the asset-based approach. For present purposes, they favour the 'income-based approach'. The Claimants submit that this method is the most suitable in the light of Future Bank's proven track record of profitability, and the "certainty" that it would continue to generate the same or greater levels of profit, particularly in the light of the JCPOA.<sup>750</sup>

707. In support of this approach, the Claimants refer to the *Quiborax v. Bolivia* tribunal, which found that in circumstances where the expropriated investment has a "proven record of profitability" it is "widely accepted [that] the appropriate method to assess the [Fair Market Value]" is through the Discounted Cash Flow method.<sup>751</sup>

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<sup>747</sup> Reply, ¶ 760.

<sup>748</sup> SoC, ¶¶ 249-252.

<sup>749</sup> SoC, ¶¶ 253-254.

<sup>750</sup> Reply, ¶¶ 762-764.

<sup>751</sup> Reply, ¶ 764, citing *Quiborax v. Bolivia (CL-127)*, ¶ 344.

708. Under this methodology, the Claimants consider that they are entitled at least to an amount between EUR 271.7 million and EUR 300.9 million.<sup>752</sup> Their expert from Fair Links arrives at these figures based on two scenarios involving “the book value of Future Bank’s equity and the present value of its future economic profits (measured as Future Bank’s earnings less a charge reflecting Future Bank’s cost of equity)”.<sup>753</sup> The first scenario, which is conservative, values Future Bank on the basis of the return on equity for the year 2014, reaching EUR 280.3 million, revised in the second Fair Links report to EUR 300.9 million. For the Claimants, these figures do not account for the growth Future Bank would have achieved in the wake of the JCPOA.<sup>754</sup> The second scenario, which is allegedly even more conservative, relies on the average return on equity for the years 2005-2014, reaching EUR 253.1 million, revised in the second Fair Links report at EUR 271.7 million.<sup>755</sup>
709. In the alternative, the Claimants request an award of the fair market value of their investment established based on the “value of comparable assets sold in the open market [...], which accordingly factored in future profits of Future Bank, but failed to take into account the particularly favorable circumstances and outlook existing at the time of the taking”.<sup>756</sup> In valuing Future Bank through this method, Fair Links used the price-to-earnings ratio (“P/E”), based on the assets’ earnings, and the price-to-book ratio (“P/B”), which the Claimants submit is “particularly well suited for the valuation of banking ventures”.<sup>757</sup> Using the P/E ratio, the First Fair Links Report values Future Bank at 234.5 EUR and, under the P/B ratio, at EUR 250 million.<sup>758</sup> The second Fair Links Report revised these values to EUR 259.7 million and EUR 243.5 million, respectively.<sup>759</sup>

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<sup>752</sup> Reply, ¶ 762.

<sup>753</sup> SoC, ¶ 262.

<sup>754</sup> SoC, ¶¶ 263-265; Second Expert Report of Fair Links, November 30, 2018 (hereinafter “**Second ER Fair Links**”) (CER-2), table 1.

<sup>755</sup> SoC, ¶ 266; Second ER Fair Links (CER-2), table 1.

<sup>756</sup> SoC, ¶ 267.

<sup>757</sup> SoC, ¶ 269, referring to First Expert Report of Fair Links, October 2017 (hereinafter “**First ER Fair Links**”) (CER-1), ¶ 90.

<sup>758</sup> First ER Fair Links (CER-1), figure 1.

<sup>759</sup> Second ER Fair Links (CER-2), table 1.

710. As to the Respondent's critique of the market-based and income-based evaluations conducted by Fair Links, the Claimants submit that the Respondent has failed to establish that Future Bank's profits arose from violations of Bahraini law and international sanctions. Even if that were so, as expressed by Fair Links, "it is unlikely that the decision of a willing buyer to purchase Claimants' shares in Future Bank would have been influenced by potential concerns regarding the legitimacy of Future Bank's profits".<sup>760</sup> Indeed, Future Bank's audited financial statements would form the basis of the buyer's assessment, and those do not record any violations. For the Claimants, there is thus no reason why a willing buyer would have paid no more than an asset-based valuation of Future Bank. In addition, the Claimants point out that the comparables used in the Fair Links reports are commensurable to Future Bank and were thus a valid basis to establish the fair market value of the investment.<sup>761</sup>
711. The Claimants do not find the argument that they hold assets in Future Bank to be relevant in this regard, and assert that "there may be no set-off between the two amounts [monies owed by the Claimants to Future Bank and the fair market value of Future Bank], nor reduction of Bahrain's obligations under international law".<sup>762</sup>
712. The Claimants further contend that using the income-based approach as implemented by Fair Links is the minimum amount to which they are entitled, as both valuations of EUR 300.9 million and EUR 271.7 million, are conservative estimates, as is shown by the proximity with the figures under the market-based approach at EUR 259.7 million and EUR 243.5 million.<sup>763</sup>
713. As a final alternative, the Claimants submit that they are entitled to an award of EUR 214 million under the asset-based approach.<sup>764</sup>

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<sup>760</sup> Second ER Fair Links (CER-2), ¶ 146.

<sup>761</sup> Reply, ¶ 767.

<sup>762</sup> Reply, ¶ 768.

<sup>763</sup> Reply, ¶ 769.

<sup>764</sup> Second ER Fair Links (CER-2), table 1.

**(b) Pre-Award Interest**

714. The Claimants request pre-award interest to remedy the harm caused by the loss of business opportunities, “incurred as a result of Respondent’s failure to compensate Claimants for the taking ‘without delay’ as provided for under the BIT”.<sup>765</sup>
715. The Claimants’ expert uses Future Bank’s average 2015-2016 WACC as a pre-award interest rate. They dismiss Mr. Davies’ objections in this respect on the grounds that Mr. Davies misunderstands the purpose of the pre-award interests.<sup>766</sup>
716. On the assumption that an Award will be rendered in December 2019 and that the Tribunal will adopt Fair Links’ income-based approach using Future Bank’s 2014 performance levels, the Claimants assert that they are entitled to pre-award interest in the amount of EUR 133.4 million.<sup>767</sup>
717. As an alternative, the Claimants submit that they are at least entitled to compensation for the loss of business opportunities computed at a risk-free rate, which would result in an interest award of EUR 34.1 million.<sup>768</sup>

**(c) Post-Award Interest**

718. The Claimant contends that, under international law, the principle of full reparation implies that interest be paid on any amount awarded until settlement.<sup>769</sup> Hence, they claim post-award interest at a rate of Libor +2%, compounded semi-annually, from the date when an amount is due until payment.<sup>770</sup> The Claimants seek post-award interest on all amounts awarded, including arbitration costs.

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<sup>765</sup> SoC, ¶ 276.

<sup>766</sup> Reply, ¶ 772-773, referring to Second ER Fair Links (CER-2), ¶¶ 281-282.

<sup>767</sup> Second ER Fair Links (CER-2), table 1.

<sup>768</sup> Second ER Fair Links (CER-2), table 1.

<sup>769</sup> SoC, ¶ 294.

<sup>770</sup> Reply, ¶ 782.

## 2. Moral Damages

719. In addition to the fair market value of the investment, the Claimants request the payment of moral and/or reputational damages.
720. According to the Claimants, it is generally accepted under international law and most legal systems that legal persons may be granted moral damages in addition to economic compensation if they have suffered harm to their “reputation, credit, or prestige”.<sup>771</sup> In support, the Claimants refer to several investment awards that have granted moral damages.<sup>772</sup>
721. In the Claimants’ understanding, the Respondent has not disputed that their professional reputation has indeed been seriously affected.<sup>773</sup> The Claimants argue that such harm has been exacerbated by the publication of information on the arbitration in the Washington Post, especially “in the context of the [then] current administration in the US”.<sup>774</sup> The Claimants also aver that as a result of the “opportunities opened by the signature of the JCPOA in July 2015”, the “devastating consequences for the Claimants’ reputation” were made even worse.<sup>775</sup> In this regard, the Claimants highlight that Mr. Sharma, the expert instructed by the Respondent, acknowledged that the JCPOA is a “material development”.<sup>776</sup>
722. The Claimants request compensation for moral damages in the amount of EUR 10 million.<sup>777</sup>

### B. THE RESPONDENT’S POSITION

723. The Respondent argues that the Claimants are not entitled to any reparation because the value of Future Bank has increased under administration and the Claimants already hold

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<sup>771</sup> Reply, ¶ 777; SoC, ¶¶ 282-285.

<sup>772</sup> SoC, ¶¶ 282-288.

<sup>773</sup> Reply, ¶ 778, referring to SoD, ¶ 220.

<sup>774</sup> Reply, ¶ 779, referring to Souad Mekhennet and Joby Warrick, Billion-dollar sanctions-busting scheme aided Iran, *The Washington Post* (April 3, 2018) (C-164).

<sup>775</sup> SoC, ¶ 292.

<sup>776</sup> Hearing Transcript, Day 5, p. 1063:5-6 (Dr. Gharavi).

<sup>777</sup> SoC, ¶ 297.5.

the assets of Future Bank, thus the “hypothetical damage is zero” (1).<sup>778</sup> It also rejects the Claimants’ request for moral damages (2).

### 1. Monetary Compensation

724. The Respondent relies on the expert report of Mr. Davies of Alvarez & Marsal which explains that the Claimants have incurred no damages. It stresses that the current value of the Claimants’ shares in Future Bank is significantly higher than on the date of administration. Therefore, the Claimants cannot succeed with the argument that they have suffered harm as a result of the administration,<sup>779</sup> and hence no compensation is owing.
725. The Respondent argues that the Fair Links Report inflates the value of Future Bank, but that such inflation should be rejected because “no willing buyer would have paid more than the asset-based valuation of Future Bank given that its profits arose from violations of Bahraini law and international sanctions” and the comparable banks used by Fair Links are not accurate comparisons for Future Bank.<sup>780</sup>
726. For the Respondent, any damages awarded to the Claimants must account for the proceeds the Claimants would receive upon liquidation, which would deduct the Claimants debt to Future Bank. If the debt is not taken into account, the Claimants would end up being “unjustly enrich[ed]”.<sup>781</sup>
727. The Respondent further contends that the Claimants’ debt “currently exceeds any reasonable valuation of their shares”, meaning that the Respondent is asked “to compensate [the Claimants] for money they already have”.<sup>782</sup> According to the Respondent, the Claimants owe Future Bank BHD 136.3 million,<sup>783</sup> which exceeds even

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<sup>778</sup> SoD, ¶ 212.

<sup>779</sup> SoD, ¶ 219.

<sup>780</sup> SoD, ¶ 219.

<sup>781</sup> Rejoinder, ¶ 288.

<sup>782</sup> Rejoinder, ¶ 281.

<sup>783</sup> Rejoinder, ¶ 288.

the highest income-based valuation quantified by Fair Links at BHD 128.5 million, without interest.<sup>784</sup>

728. The Respondent emphasizes that its expert favours an asset-based valuation, being “more appropriate given the circumstances of this case”.<sup>785</sup> It also notes and that the asset-based value is higher now than on the date of the CBB Decision, with the consequence that the Claimants have incurred no loss.<sup>786</sup>
729. The Respondent disputes that Future Bank was a profitable entity that must be valued by a method other than the asset-based approach. Referring to the Davies Report, the Respondent argues that Future Bank’s “core business segment leveraged and profited from the existence of sanctions”.<sup>787</sup> As such, no buyer would purchase a bank that relies on its business with sanctioned entities. The Respondent further denies that a buyer would look no further than Future Bank’s financial statements.<sup>788</sup>
730. Furthermore, the contention that Future Bank would have expanded its business following the JCPOA, thus warranting an alternative method of valuation, is “premised upon two layers of speculation, first that a hypothetical buyer would have assumed at the date of the administration that the JCPOA would come into existence, and that Future Bank’s profits would increase thereafter”.<sup>789</sup>
731. The Respondent draws attention to the protection of a decrease in Future Bank’s profits in late 2014. As Mr. Davies notes, that projection shows that Future Bank perceived “the lifting of sanctions as a threat not an opportunity”.<sup>790</sup> Therefore, the Claimants’ assertion that a buyer would have been willing to pay more than the asset value is unsustainable.<sup>791</sup>

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<sup>784</sup> Second ER Fair Links (**CER-2**), table 1. Fair Links uses the exchange rate of 0.376 BHD/USD, *see* Second ER Fair Links, (**CER-2**), fn. 89.

<sup>785</sup> Rejoinder, ¶ 282, referring to Second Davies Report, February 27, 2018 (hereinafter “**Second ER Davies**”) (**RER-4**).

<sup>786</sup> Rejoinder, ¶ 282, referring to Second ER Davies (**RER-4**).

<sup>787</sup> Rejoinder, ¶ 283, referring to Second ER Davies (**RER-4**).

<sup>788</sup> Rejoinder, ¶ 284, referring to Second ER Davies (**RER-4**).

<sup>789</sup> Rejoinder, ¶ 285.

<sup>790</sup> Second ER Davies (**RER-4**), ¶ 3.4.5.

<sup>791</sup> Rejoinder, ¶ 285.

732. The Davies Report sets the fair market value of the Claimants' shares at BD 96.2 million on the date of administration in the but-for scenario and at BD 109.7 million as at December 31, 2019, in the actual scenario.<sup>792</sup> The latter exceeding the former, the Respondent submits that the Claimants have suffered no loss, with the consequence that no compensation is due.

## 2. Moral Damages

733. The Respondent asserts that "any damage to the Claimants' reputation flows only from their own conduct" and that it "was impossible to blacken the reputation of two banks that have been specifically identified by the UN Security Council for their role in financing terrorism and nuclear proliferation".<sup>793</sup> Hence, whatever damage was inflicted to the Claimants' reputation cannot be attributed to the Respondent.

734. The Respondent also notes that Fair Links does not opine on the Claimants' request for moral damages.<sup>794</sup>

## C. ANALYSIS

735. As a preliminary matter, the Tribunal notes that the Claimants withdrew their request for restitution at the Hearing in the following terms:

We are in an advanced stage of the liquidation. We have your provisional measures. There is obviously no intention of Bahrain to see any Iranian investors, let alone us. So we have to ask now, amend our relief sought, to only ask for compensation whereas we were asking for restitution and damages up to restitution. So we're only asking now for material damages.<sup>795</sup>

736. Hence, the Tribunal will now move on to consider the request for monetary compensation.

### 1. Standard of Compensation

737. The Claimants submit that the BIT sets a standard of compensation for lawful expropriation, namely the fair market value, but does not specify or limit, the standard of

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<sup>792</sup> Rejoinder, ¶ 286, referring to Second ER Davies (**RER-4**).

<sup>793</sup> SoD, ¶ 220.

<sup>794</sup> Rejoinder, ¶ 290.

<sup>795</sup> Hearing Transcript, Day 1, p. 95:15-22 (Dr. Gharavi).



compensation applicable in case of an unlawful expropriation or of other breaches under the BIT.<sup>796</sup> They thus argue that compensation must be determined in accordance with the general principles of international law, namely full reparation based on the investment's fair market value.<sup>797</sup> The Respondent does not dispute this standard of compensation.

738. The Tribunal recalls that it is a basic principle of international law that States incur responsibility for their internationally wrongful acts.<sup>798</sup> The corollary to this principle is that the responsible State must repair the damage caused by its internationally wrongful act. As stated in Article 31 of the ILC Articles on State Responsibility, “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act”.<sup>799</sup>

739. The principle of full reparation was first set forth by the PCIJ in the often-quoted *Chorzów Factory* case, which held that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed”.<sup>800</sup> “Full” reparation must therefore eliminate all consequences of the internationally illicit act and restore the injured party to the situation that would have existed if the act had not been committed.

740. In this respect, ILC Article 36(1) provides that “[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution”.<sup>801</sup> Article 31(2) specifies that a compensable injury includes “any damage, whether material or moral, caused by the internationally wrongful act”<sup>802</sup> and, again under Article 36(2),

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<sup>796</sup> SoC, ¶ 249.

<sup>797</sup> SoC, ¶ 250.

<sup>798</sup> See for instance ILC Articles on State Responsibility (CL-106), Article 1, which provides that “[e]very internationally wrongful act of a State entails the international responsibility of that State”.

<sup>799</sup> ILC Articles on State Responsibility (CL-106), Article 31(1).

<sup>800</sup> *Chorzow Factory Case (Germany v. Poland)*, PCIJ (Ser. A) No. 17, September 13, 1928 (CL-105), ¶ 125.

<sup>801</sup> ILC Articles on State Responsibility (CL-106), Article 36(1).

<sup>802</sup> ILC Articles on State Responsibility (CL-106), Article 31(2).

“compensation shall cover any financially assessable damage, including loss of profits insofar as it is established”.<sup>803</sup>

741. While they were drawn up for interstate disputes, these general principles of international law are routinely applied by analogy in investor-state arbitration such as the present one. The BIT is silent on the standard of compensation for internationally wrongful acts. Article 6(2) of the BIT only sets out the standard of compensation for lawful expropriations (“the value of the investment immediately before the action of nationalization, confiscation or expropriation was taken”). The standard governing compensation for unlawful expropriations is thus subject to customary international law, specifically to the principle of full reparation as articulated by the PCIJ in the *Chorzów Factory* case and later expressed in the ILC Articles.

742. The Tribunal notes that both Parties’ valuations rely on Future Bank’s fair market value at the time of the expropriation. In the Tribunal’s view, this approach is consistent with the full reparation principle, insofar as it eliminates all consequences of the Respondent’s breaches of the BIT and restores the Claimants to the situation in which they would have been had the Respondent not breached the BIT.

## 2. The Existence of a Loss and the Claimant’s Actual Scenario

743. The Respondent disputes that the Claimants have incurred a loss, noting that the value of their shares in Future Bank is higher than on the date when the bank was put in administration.<sup>804</sup> It further submits that the damage computation must factor in the Claimants’ liquidation proceeds and their outstanding debts to Future Bank, the result being that the Claimants have suffered no harm and that an award granting compensation would result in unjust enrichment.<sup>805</sup>

744. The Claimants oppose these arguments.<sup>806</sup> For them, the current value of their equity is irrelevant. In the same vein, the Claimants’ expert expresses the view that “no value may

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<sup>803</sup> ILC Articles on State Responsibility (CL-106), Article 36(2).

<sup>804</sup> SoD, ¶ 219.

<sup>805</sup> Rejoinder, ¶ 288.

<sup>806</sup> Reply, ¶ 765, referring to SoD, ¶ 219.

be ascribed to the Actual Scenario and suggesting otherwise is wrong from an economic standpoint”. He recognizes, however, that “[s]hould a compensation be received in the foreseeable future by BMI and BSI, it would of course have to come in deduction of the amount determined in the But-For Scenario”.<sup>807</sup>

745. The Tribunal has held above that the Claimants’ investment in Future Bank had been expropriated and the expropriation was unlawful. Specifically, the Respondent’s measures deprived the Claimants of the use and control of their shares and neutralized any economic benefit flowing from their property interest in Future Bank.
746. As was already stated earlier, compensation is intended to wipe out the material consequences of the unlawful act by restoring the investor to the position in which it would have been had the expropriation not occurred. The damage inflicted by the unlawful conduct is thus equal to the difference between (i) the Claimants’ economic position but-for the wrongful measures (but-for scenario) and (ii) their actual economic position (actual scenario).
747. In assessing whether the Claimants have suffered a loss, the Tribunal cannot merely compare the value of the Claimants’ shares at the time of the expropriation and on the date of the present award. Such a comparison would ignore the *de facto* economic position of the Claimants, who were permanently deprived of the possibility to exercise essential attributes of their interest in Future Bank. They have been deprived of the control and benefits deriving from their shares in Future Bank and such deprivation has become permanent, even though they retain formal ownership of their shares. In other words, the Respondent’s measures amounted to an indirect expropriation of the shares, which was unlawful.
748. Indirect expropriation typically occurs when the expropriated party is deprived of the control and benefits of its investment but retains a formal title over the assets in question. Investment tribunals have consistently awarded the fair market value of expropriated investments in cases of indirect expropriations, without accounting for the actual value of a nominal title that a claimant investor retains over the expropriated asset.

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<sup>807</sup> Second ER Fair Links (CER-2), ¶ 332.

749. This being so, the Tribunal takes note of the Respondent's representation that the Claimants are entitled to the liquidation proceeds of Future Bank. The question is thus whether the possibility of the Claimants recovering liquidation proceeds should lead the Tribunal to alter or condition the amount awarded through this award in reparation of the unlawful expropriation.
750. In circumstances where the Claimants have not received liquidation proceeds for over six years, the prospect of recovery remains highly uncertain. This uncertainty is exacerbated by the fact that the Respondent has not provided any detailed information on the progress of the liquidation proceedings. Nor has it explained whether the liquidation proceeds would amount to the fair market value of the Claimants' shares or whether there would be reductions, *e.g.*, on account of alleged illegalities committed by the Claimants.
751. Even if there is substantial uncertainty, one cannot rule out that the Respondent may pay liquidation proceeds to the Claimants. Such a payment may carry with it a risk of (partial) double recovery if the Claimants collect the liquidation proceeds and recover the amount awarded in this arbitration. The position in terms of double recovery will vary depending on the chronology of these collections.
752. If the Claimants collect under this Award before liquidation proceeds are paid out, the Tribunal considers that it would be up to the competent Bahraini authorities to consider the amounts at issue and avoid the materialization of the risk of double recovery.
753. If, by contrast, the Claimants receive liquidation proceeds before they collect on the Award, then the Tribunal sees no reason why the liquidation payment could not come in deduction of the amount of damages owed hereunder. In this context, it recalls the statement of the Claimants' damages expert, which it understands to be made on behalf of the Claimants, that "[a]ssuming Claimants were to receive a compensation from the winding down of Future Bank, we agree that it should be deducted from the Fair Market Value of the Expropriated Asset in the assessment of the damage value".<sup>808</sup>

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<sup>808</sup> Second ER Fair Links (CER-2), ¶ 82.

754. Accordingly, the Tribunal takes due notice of the Claimants' undertaking not to seek double recovery and to deduct any amount of liquidation proceeds received from damages owing under this Award.
755. The consistent practice of international tribunals is that they do their best to avoid double recovery. In doing so, they often rely on undertakings of claimants not to seek double recovery, and where proceedings are pending in national courts, those courts can be relied upon to avoid double recovery.<sup>809</sup>
756. Hence, the Tribunal will calculate the damages due to the Claimants without discounting the alleged current value of their shares in Future Bank or the uncertain amount that the Claimants may receive at the end of the liquidation proceedings of Future Bank. This being so, the Tribunal takes note of the statement made by the Claimants' expert that the Claimants will not seek double recovery and will thus deduct proceeds collected from the liquidation of Future Bank from damages owing to them under this Award.

### 3. Valuation Methods and Calculation of the Fair Market Value

757. The Tribunal notes that both Parties agree that an asset-based approach is an acceptable method to compute the FMV of the Claimants' shares in Future Bank and arrive at similar valuations under that approach. The Claimants' expert estimates the book/asset value of the Claimants' shares in Future Bank at USD 243 million as of April 30, 2015,<sup>810</sup> which is equivalent to BHD 91,368,000.<sup>811</sup> In turn, the Respondent's expert assesses the asset-based value of the Claimants' shares in the bank as of the same date at BHD 96,195,000.<sup>812</sup>
758. The Claimants' expert opines, however, that the asset-based approach fails to "capture the value of the future profits that would have been generated by Future Bank but for its

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<sup>809</sup> *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v. Republic of Ecuador I*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, March 30, 2010, ¶ 557; *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, May 22, 2014, ¶ 175; *British Caribbean Bank Ltd. v. Government of Belize*, UNCITRAL, PCA Case No. 2010-18/BCB-BZ, Award, December 19, 2014, ¶ 190; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Award, April 9, 2015, ¶¶ 38-40.

<sup>810</sup> Second ER Fair Links (**CER-2**), table 1.

<sup>811</sup> Fair Links uses the exchange rate of 0.376 BHD/USD, *see* Second ER Fair Links (**CER-2**), fn. 89.

<sup>812</sup> Second ER Davies (**RER-4**), table 5.2.

expropriation”.<sup>813</sup> Instead, the Claimants propose to use the income-based approach. They submit that this method is the most suitable in the light of Future Bank’s proven track record of profitability, and the certainty that it would continue to generate the same or greater levels of profit, particularly in the light of the JCPOA. Pursuant to this methodology, the Claimants consider that the minimum value to which they are entitled is “comprised between EUR 300.9 million and EUR 271.7 million”.

759. In the alternative, the Claimants seek the fair market value of their investment based on a market approach, *i.e.*, based on the “value of comparable assets sold in the open market [...], which accordingly factored in future profits of Future Bank, but failed to take into account the particularly favorable circumstances and outlook existing at the time of the taking”.
760. The Respondent’s damages expert accepts that the income-based and the market-based methods are generally appropriate methods to value banks.<sup>814</sup> His opinion, however, is that these approaches are not appropriate in the present circumstances, notably because “a hypothetical purchaser would not have paid any more than the Asset-Based valuation for the Claimants’ shares at the Administration Date”. He further opines that “[t]o justify a premium to this amount, a hypothetical purchaser would have to assume that Future Bank could continue to generate the same or greater profits under its future stewardship than it had done previously”.<sup>815</sup> Yet, according to the Respondent’s expert, a hypothetical purchaser would not make such an assumption due to the dependence of Future Bank’s business model on its relationship with the Claimants and due to doubts about the legitimacy of Future Bank’s historical profits.<sup>816</sup> The Respondent’s expert therefore concludes that the only available valuation method in the case at hand is an asset-based one.<sup>817</sup>

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<sup>813</sup> Second ER Fair Links (**CER-2**), ¶ 162.

<sup>814</sup> First Davies Report, February 16, 2018 (hereinafter “**First ER Davies**”) (**RER-2**), ¶ 5.2.3.

<sup>815</sup> Second ER Davies (**RER-4**), ¶ 2.3.18.

<sup>816</sup> First ER Davies (**RER-2**), ¶¶ 2.3.8-2.3.14.

<sup>817</sup> Second ER Davies (**RER-4**), ¶ 2.3.27.

761. The Tribunal notes that, generally, the income-based approach is considered to best reflect the fair market value of a going concern with a proven record of profitability.<sup>818</sup> In the words of the tribunal in *Quiborax v. Bolivia*, “the DCF method [*i.e.*, an income base approach] is widely accepted as the appropriate method to assess the FMV of going concerns with a proven record of profitability”.<sup>819</sup>
762. It is undisputed that, at the time of its administration, Future Bank was a going concern with a proven record of profitability.<sup>820</sup> That said, the income-based valuation presupposes that Future Bank would have continued to be equally or, according to the Claimants’ expert, more profitable, had Bahrain not put the bank under administration and liquidation. On the facts of this dispute, this assumption is speculative for the following main reasons:
763. *First*, as reviewed in the section on the preliminary objections above, Future Bank engaged in some violations of applicable laws and regulations, including by dealing with sanctioned entities and by failing to adopt required due diligence practices. While the evidence of such violations is insufficient to warrant the inadmissibility of the claims, they must be taken into account when assessing the fair market value of the Claimants’ investment. A hypothetical buyer of the Claimants’ shares in Future Bank would have discovered the irregularities and would have factored into the price a discount for the risk of increased regulatory intervention, impacting the prospects of the future profitability of the bank.
764. While the income-based valuation of the Claimants’ investment may account for ordinary equity risk that Future Bank’s business entailed, it does not consider increased regulatory risk. Selecting the correct level of such increased risk would involve a random or speculative choice, as it would entail assessing the likelihood of the Respondent’s fair

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<sup>818</sup> See for instance *Merrill & Ring Forestry L. P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, March 31, 2010, ¶ 264; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, June 8 2010, ¶¶ 70-71; *Walter Bau v. Thailand*, UNCITRAL, Award, July 1, 2009, ¶ 14.22; *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, September 9, 2009, ¶ 164; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶¶ 416-417; *Biwater Gauff (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 793.

<sup>819</sup> *Quiborax v. Bolivia (CL-127)*, ¶ 344.

<sup>820</sup> See for instance First ER Fair Links (**CER-1**), Exhibit 4.4.

regulatory conduct and its economic impact on the bank's business. The *Amco II* tribunal, stressed the inherently speculative nature of such an exercise:

The Tribunal cannot pronounce upon what a 'fair [Respondent]' would have done. This is both speculative and not the issue before it. Rather, it is required to characterize the acts that [the Respondent] did engage in and to see if those acts, if unlawful, caused damage to [the Claimant].<sup>821</sup>

765. By contrast, not to account for such risks would result in the Claimants receiving compensation on the assumption that they would be allowed to freely continue unlawful activities and generate profits without regulatory intervention. That assumption is too uncertain or not sufficiently plausible to provide a reliable basis for an assessment of damages.

766. It is true that, as of Future Bank's placement into administration, the sanctions against Iran were expected to be gradually lifted following the conclusion of the JCPOA.<sup>822</sup> However, on the date of valuation, this evolution was only an expectation. More importantly, even if the expectation was sufficiently plausible, the lifting of the sanctions would not have entirely removed the regulatory risk, as the illegalities were not exclusively related to the sanctions. In any event, the bank's business plan drawn up in the lifting of the Iran sanctions would in fact "substantially reduce" the return on average assets ("ROAA"):

ROAA: Relatively higher mainly because of higher level of interest margins in respect of Placements with Banks. *Once sanctions against Iranian Banks are lifted, these high margins will substantially be reduced.*<sup>823</sup>

767. The Claimants' witness Mr. Hemmati corroborated this projection at the hearing, explaining his contemporaneous position that the lifting of the sanctions would affect the viability of the bank's three-year business plan for 2015-2017 in 2014.<sup>824</sup> Thus, the conclusion of the JCPOA did not dispel the uncertainty associated with the bank's future profitability due to its unlawful conduct. Instead, as the bank itself perceived, the lifting

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<sup>821</sup> See *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Award, May 31, 1990, ¶ 174.

<sup>822</sup> Bahrain: Reform, Security and U.S. Policy, US Congressional Research Service (C-19).

<sup>823</sup> Future Bank Business Strategy (2015-2017), October 24, 2016 (CBB.R-46), Appendices 1-3, p. 72 (emphasis in original).

<sup>824</sup> Hearing Transcript, Day 2, pp. 274:3-275:25 (Dr. Hemmati).



of the sanctions added to such uncertainty, which is an additional factor militating against an income-based valuation.

768. *Second*, it is uncontroversial that Future Bank’s business model was primarily based on its dealings with Iranian entities. As mentioned above, while the bank’s Iranian exposure fluctuated over the years, it remained consistently high, and at the time of the impugned measures amounted to approximately BHD 329 million.<sup>825</sup> A large part of the exposure arose out of the bank’s dealings with the Claimants, which amounted to approximately 30% of the bank’s total assets.<sup>826</sup> The following table extracted from Mr. Davies’s Second Expert Report summarizes the role played by Iranian banks, and particularly the Claimants, in Future Bank’s income in the years prior to the expropriation.<sup>827</sup> Indeed, Future Bank’s business with Iranian banks generated 50% or more of the bank’s income:

**Table 3.3 Income from the Claimants and other banks as proportion of total income (2012 to 2014)<sup>90</sup>**

	<b>2012</b>	<b>2013</b>	<b>2014</b>
Income from Claimants as proportion of total income	16%	19%	18%
Income from other banks as proportion of total income	40%	34%	32%
<b><i>Total Income due from Iranian banks as proportion of total income</i></b>	<b>56%</b>	<b>53%</b>	<b>50%</b>

769. Calculating the value of Future Bank’s shares with the income-based methodology assumes that the bank would have continued its activities based on the existing business model, which heavily relied on the bank’s exposure to Iran, and more specifically to its existing shareholders. Yet, as described above, Future Bank was facing increased pressure from the CBB to reduce its exposure to its shareholders and more generally to Iran. On April 1, 2014, the CBB directed Future Bank to “immediately reduce its exposure limits to its shareholders, BSI and BMI and bring such limits down to the outstanding balances as of end of December 2013, while not undertaking any new

<sup>825</sup> Balance sheet attached to letter from Future Bank to the CBB regarding Iran Exposure as on March 31, 2015, April 16, 2015 (**C-160**).

<sup>826</sup> Second ER Davies, Amounts due to Future Bank from banks (2006-2014) February 27, 2019 (**RER-4**), Appendix GD2-2.4.

<sup>827</sup> Second ER Davies (**RER-4**), table 3.3.

exposure to these shareholders. Further, it should initiate measures to bring down such exposures to nil”.<sup>828</sup>

770. It is unlikely that a hypothetical buyer of the shares of Future Bank in April 2015 would have ignored this context and its potential impact on Future Bank, and thus valued the bank assuming that it would continue earning profits based on its historical business model, irrespective of the fact that it conflicted in some cases with the regulator’s explicit instructions. A buyer would likely consider that the existing record of profitability, which chiefly derived from Iranian exposure was too speculative to project into the future, and would instead rely on the book value of the bank’s existing assets.

771. These considerations also affect the market-based valuation. As the Claimants’ expert admits, “[a] limitation of the Market-Based Approach is that it does not allow the incorporation of specific assumptions in the analysis”.<sup>829</sup> Indeed, none of the suggested market comparators considers the unique situation in which Future Bank found itself before the expropriation. In particular, the bank’s violations of the applicable regulations, its heavy exposure to Iranian entities and its shareholders, and the uncertainties created by the announcement of the JCPOA are not captured by the Claimants’ market based valuation. This is, in particular, clear from paragraph 92 of the First Report of the Claimants’ expert, which lists the factors that the expert took into account in selecting the market comparators.<sup>830</sup> None of these factors consider the circumstances just referred to which were unique to Future Bank.

772. For its part, the asset-based valuation rules leave out or at least minimizes the risk of compensating the Claimants for their violations of applicable regulations. In this respect, the Tribunal notes that the Respondent has not established that any of the specific assets of Future Bank had been acquired as a result of unlawful activities. Thus, by awarding compensation based on an asset-based valuation, the Tribunal does not allow the Claimants to benefit from any wrongful conduct. Nor does the asset-based valuation assume that Future Bank would continue its operations according to the Iran-exposed

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<sup>828</sup> Letter Yousif to Souri, April 1, 2014 (**R-125**).

<sup>829</sup> First ER Fair Links (**CER-1**), ¶ 85.

<sup>830</sup> First ER Fair Links (**CER-1**), ¶ 92.

business model with which the regulator had taken issue. For these reasons, the Tribunal will compute damages based on an asset-based valuation methodology.

773. The Claimants' expert calculates the asset-based value of the Claimants' shares in Future Bank as of April 30, 2015 at USD 243 million,<sup>831</sup> which converts to BHD 91,368,000.<sup>832</sup> In turn, the Respondent's expert assesses the asset-based value of the Claimants' shares in the bank as of the same date at BHD 96,195,000.<sup>833</sup> Given that the valuation of the Respondent's expert is higher than that of the Claimants', the Tribunal will adopt the amount put forward by the Claimant's expert, and therefore sets the fair market value of the Claimants' shares in Future Bank as of the date of the expropriation at **BHD 91,368,000**.

#### **4. The Respondent's Request for a Set-Off and the Impact of the Amount Due by the Claimants to Future Bank**

774. The Respondent submits that the Claimants' current debt to Future Bank amounts to BHD 136.3 million and therefore exceeds any reasonable valuation of the Claimants' shares in Future Bank.<sup>834</sup> In the same vein, the Respondent's expert on damages expresses the opinion that "[t]he current value of Future Bank is inextricably linked to the recovery of the BHD 136.3 million currently owing from the Claimants. Similarly, the value of Future Bank on the Administration Date was inextricably linked to the large amounts the Claimants owed at that time".<sup>835</sup>

775. The Respondent thus requests the Tribunal to "deduct the Claimants' debt" from the amount awarded to the Claimants.<sup>836</sup> The Respondent relies on the risks of

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<sup>831</sup> Second ER Fair Links (**CER-2**), table 1.

<sup>832</sup> Fair Links uses the exchange rate of 0.376 BHD/USD, *see* Second ER Fair Links (**CER-2**), fn. 89.

<sup>833</sup> Second ER Davies (**RER-4**), table 5.2.

<sup>834</sup> Rejoinder, ¶ 287.

<sup>835</sup> Second ER Davies (**RER-4**), ¶ 2.1.7.

<sup>836</sup> Hearing Transcript, Day 5, p. 1131:14-16 (Prof. Paulsson).

overcompensation or unjust enrichment<sup>837</sup> and on the principle that “any award by the Tribunal must reflect the economic realities between the parties as they exist today”.<sup>838</sup>

776. The Claimants oppose the Respondent’s request, arguing that “there is no counterclaim possible under the BIT for there to be a set-off nor is there a set-off possible under this procedure because they are different operations and different contracts and different parties. [...] Here we have an investment case against the government of Bahrain based on the BIT. So at most there is an enforcement issue, but this is not for your Tribunal to consider because different parties in different relationships, that is irrelevant for the purposes of BIT”.<sup>839</sup>
777. The Respondent’s request can be understood in two ways. It may be regarded as a request that the Tribunal take into account the Claimants’ debt to Future Bank in assessing the fair market value of their shares in the bank as of the date of the expropriation. Alternatively, the Respondent may be requesting a set-off of the Claimants’ debt towards Future Bank against the amount due by the Respondent to the Claimants as a result of its breach of the BIT.
778. If the Respondent’s argument is that the Claimants’ debt reduces the value of Future Bank as of the date of the expropriation, the Tribunal considers that the argument lacks merit. Future Bank was the creditor of the Claimants’ debt, and thus the debt constituted an asset for the bank. Indeed, banks’ assets usually consist of loans. While the Tribunal took into account Future Bank’s shareholder exposure when selecting the valuation method, it is not obvious why the bank’s book value should be reduced due to the fact that it had granted a loan to its shareholders.
779. The Respondent has neither argued nor presented any evidence that would suggest that Future Bank would not be able to recover the loan from the Claimants, *e.g.*, because of a risk of insolvency. Instead, as described above, the Respondent’s expert calculated the book value of the bank at a figure higher than the valuation of the Claimants’ expert.<sup>840</sup>

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<sup>837</sup> Hearing Transcript, Day 5, p. 1131:7-8 (Prof. Paulsson).

<sup>838</sup> Hearing Transcript, Day 5, p. 1131:9-11 (Prof. Paulsson).

<sup>839</sup> Hearing Transcript, Day 1, pp. 101:18-102:7 (Dr. Gharavi).

<sup>840</sup> Second ER Davies (**RER-4**), table 5.2.

Therefore, the Tribunal considers that the book value of Future Bank need not be reduced due to the fact that the loan Future Bank had granted to its shareholders constituted one of the key assets of the bank.

780. Alternatively, the Respondent's request may be to the effect that the amount owed by the Claimants to Future Bank be set off against the compensation that the Respondent owes to the Claimants for the breach of the BIT. In this scenario, the Tribunal reaches the conclusion that it cannot order such set-off for the following main reasons.
781. *First*, pursuant to Article 19 of the UNCITRAL Rules of 1976 applicable in the present case, "the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off".
782. As is clear from this article, an arbitral tribunal established under these rules has no jurisdiction over a set-off claim (or defence) if it does not arise out of the contract containing the arbitration agreement, or transposed into an investment treaty context, out of the BIT. In the case at hand, the Claimants' current debt towards Future Bank arises from contractual relationships between the Claimants and Future Bank, nor between the Claimants and the Respondent. It follows that the Respondent's claim for a set-off (or set-off defence) cannot be brought before this Tribunal pursuant to the applicable arbitration rules.
783. *Second*, pursuant to Article 11 of the BIT, the Tribunal has jurisdiction over "dispute[s] aris[ing] between the host Contracting Party and investor(s) of the other Contracting Party with respect to an investment". The recovery of debt contracted by the Claimants vis-à-vis Future Bank is a matter of contract not involving the Respondent. Hence, it cannot be seen as a "dispute aris[ing] between the host Contracting Party and an investor of the other Contracting Party". Again, the Tribunal lacks jurisdiction over a claim for recovery of amounts, which the Claimants owe to Future Bank.
784. *Third*, even assuming the Tribunal had jurisdiction over the set-off (*quod non*) critical questions remain: What law governs? What are the requirements for set-off? Are these met here? Yet, neither Party has addressed these questions. The Respondent has made no submissions on these issues.

785. Similar considerations led the tribunal in *Micula v. Romania* to conclude that it was “not in a position to declare that [the Respondent] ha[d] a right to set-off”:

[W]hether the Respondent has a right to set off the Award against the EFDG’s tax debts would be (primarily at least) a matter of Romanian law and of enforcement of this Award. Romanian law establishes the conditions under which a set-off may be carried out and nothing the Tribunal says will affect that. In certain jurisdictions, set-off may even operate as a matter of law (*ipso iure*) when strict conditions are met. Thus, as a matter of principle, the Tribunal is not in a position to declare that Romania has a right to set-off the amounts awarded in this arbitration against the EFDG’s tax debts. Whether Romania has a right to set-off the amounts awarded against the Claimants or other companies of the EFDG will depend on whether the conditions set out in Romania law are fulfilled.

Even if the Tribunal were to state that, in principle, Romania has a right to set-off, it would not be able to decide whether in this particular case such set-off is warranted. The Respondent has not explained why the (Romanian law) conditions for set-off are fulfilled in this case, what are the amounts to be set off, or which are the specific parties involved.<sup>841</sup>

786. In these circumstances, the Tribunal dismisses the Respondent’s set-off request.

787. The Tribunal notes that the Respondent further argues in this context that there is a risk of “overcompensation” or “unjust enrichment”. That argument rests on the assumption that the amounts due by the Claimants to Future Bank would not be recovered. Yet, as mentioned already, the Respondent has offered no evidence or other indications substantiating this assumption. On the contrary, the Claimants’ experts have alleged that they understand from the Claimants’ counsel that “the recovery of those debts by Future Bank has not occurred yet and [...] Claimants are not responsible for any delay in the recovery”.<sup>842</sup> This statement was not contradicted by the Respondent.

788. In these circumstances, the Tribunal finds no basis to assume that the amounts due by the Claimants to Future Bank would not be recovered. In the hypothetical case where they would not be, the proper recourse would be for Future Bank to exercise its contract remedies and bring an action in the competent court. If it prevails, it could then enforce the judgment against the judgment debtors.

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<sup>841</sup> *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, December 11, 2013 (CL-115), ¶¶ 1291-1292.

<sup>842</sup> Second ER Fair Links (CER-2), ¶ 345.

789. For all the foregoing reasons, the Tribunal dismisses the Respondent's request for a set-off.
790. Conversely, the Tribunal notes that, in a letter of July 28, 2020, the Claimants requested that "any monetary relief awarded by the Tribunal be accompanied by language expressly setting out that such monetary relief shall not be capable of set off against any other amounts allegedly owed by Future Bank, Claimants, or their respective representatives, in the context of other actions initiated by Bahrain". The Tribunal considers that this request lacks substantiation. Without any indication on the "amounts allegedly owed" referred to and any legal submission, the Tribunal cannot but deny the request to give a blanket declaration against a possible set off of alleged liabilities.

### 5. Moral Damages

791. In addition to material damages, the Claimants request moral or reputational damages.<sup>843</sup> They submit that their professional reputation has been significantly damaged, notably since the Respondent has "leak[ed] its sensational claims raised for the first time in this arbitration to medias as widely published as the Washington Post, moreover in the context of the current administration in the US".<sup>844</sup> Hence, the Claimants seek relief for moral damages suffered as a result of the Respondent's breaches in an amount of EUR 10 million.<sup>845</sup>
792. The Respondent argues that the Claimants' request is "wholly unfounded, as any damage to the Claimants' reputation flows only from their own conduct as longstanding and notorious participants in sanctions evasion and financial crime".<sup>846</sup> The Respondent further stresses that the claim "is unsupported by any evidence whatsoever".<sup>847</sup>

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<sup>843</sup> Reply, ¶¶ 776-780.

<sup>844</sup> Reply, ¶ 779.

<sup>845</sup> Reply, ¶ 784.5.1.

<sup>846</sup> Rejoinder, ¶ 289.

<sup>847</sup> Rejoinder, ¶ 290.

793. As correctly held by the *Pey Casado* tribunal, “a claim to damages of a moral character does not escape the burden of proof resting on a claimant”.<sup>848</sup> The claimant must thus prove the existence of a reputational damage and the causal link between the Respondent’s breaches of the BIT and such damage.
794. The Respondent disputes the existence of a damage to reputation.<sup>849</sup> Having reviewed the record, the Tribunal finds that the Claimants have failed to offer evidence, let alone establish, the existence of such a damage.
795. In these circumstances, without having reviewed whether and under which circumstances moral damages might be justified, the Tribunal dismisses the Claimants’ claim for moral damages.

## 6. Pre-Award Interest

796. It is undisputed that the Claimants are entitled to pre-award interest from the valuation date, *i.e.*, April 30, 2015, to the issue of the present Award.
797. Pursuant to Article 38 of the ILC Articles, interest for late payment is part of the “full reparation” standard.<sup>850</sup> As correctly summarized by the tribunal in *Vivendi v. Argentina*, “[t]he object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive”.<sup>851</sup>
798. The Parties disagree, however, on the appropriate interest rate. The Claimants’ expert submits that Future Bank’s WACC should be used since it “would reflect the loss of business opportunities suffered by Claimants when they were not in a position to develop Future Bank’s activity, following the expropriation”.<sup>852</sup> The Respondent objects that the

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<sup>848</sup> *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, September 13, 2016 (RL-35), ¶ 243. See also *Tecmed v. United Mexican States* (CL-22), ¶ 198; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶ 293.

<sup>849</sup> Rejoinder, ¶ 290.

<sup>850</sup> ILC Articles on State Responsibility (CL-106), Article 38.

<sup>851</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 9.2.3. See also *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, ¶ 55.

<sup>852</sup> First ER Fair Links (CER-1), ¶ 162.



application of the WACC “would reflect the loss of business opportunities suffered by the Claimants when they were not in a position to develop Future Bank’s activity, following the expropriation”.<sup>853</sup>

799. The Tribunal considers that the Claimants are entitled to interest from the valuation date, *i.e.*, April 30, 2015, until payment in full. The award of interest must compensate for the time value of money. By contrast, it would be economically unjustified if the interest would also compensate for business risks associated with the investment for a period during which the Claimants did not bear these risks anymore because they had lost control of the investment.
800. In this respect, the Tribunal agrees with the *Burlington* tribunal, which noted that the WACC “contains an element of cost of capital that allows cash flows to reflect the time value of money, but it also includes a reward for all the risks involved in doing business”.<sup>854</sup> In fact, the Claimants’ expert concedes that the WACC includes an element of “business risk that is incurred”.<sup>855</sup> Thus, the Tribunal finds that it would be inappropriate to apply Future Bank’s WACC as interest rate and that instead a risk-free interest rate should be applied. The Tribunal thus dismisses the claim for the loss of business opportunities. Instead, it will award interest on a risk-free basis.
801. Both Parties’ damages experts have proposed a risk-free rate based on the average return on U.S. Treasury bonds.<sup>856</sup> They disagree, however, on the relevant duration of the U.S. Treasury bonds. The Claimants’ damages expert would select the average return on 10-year bonds (amounting to 2.1% per year),<sup>857</sup> whereas the Respondent expert favours the average return on 5-years bonds (amounting to 1.9% per year),<sup>858</sup> since “it is logical to

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<sup>853</sup> First ER Davies (**RER-2**), ¶¶ 6.2.1-6.2.2, referring to First ER Fair Links (**CER-1**), ¶ 162.

<sup>854</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, February 7, 2017, ¶ 532.

<sup>855</sup> Hearing Transcript, Day 5, p. 964:2-5 (Mr. de Feuarent).

<sup>856</sup> First ER Fair Links (**CER-1**), ¶ 165; First ER Davies (**RER-2**), ¶¶ 6.2.4-6.2.7.

<sup>857</sup> First ER Fair Links (**CER-1**), ¶ 165.

<sup>858</sup> Second ER Davies (**RER-4**), ¶ 5.3.8.

match (within the constraints of available information) the duration of the bond being used as a proxy with the duration of the interest period”.<sup>859</sup>

802. The Tribunal agrees with the latter view. Since the time between the valuation date and the issue of the present Award is closer to 5 than to 10 years, the Tribunal finds it appropriate to apply a pre-award interest rate calculated on the basis of the average return on a 5-year risk-free investment. The Tribunal will thus apply, as a pre-award interest rate, the return on 5-year U.S. Treasury bonds.
803. The Parties and their experts have not addressed whether interest at the U.S. Treasury bond rate should be compounded. While the Claimants have asked that interest be compounded when computed at Libor +2%, they have not done so with respect to the U.S. Treasury bond rate. Nor have they indicated at what frequency it would be appropriate to compound interest at such rate, if at all. Therefore, the Tribunal will award simple interest.
804. Finally, the Tribunal notes that both experts have discussed the possibility of computing interest at U.S. Treasury bond rates although the claims were denominated in Euros. Hence, the Tribunal is satisfied that it is inappropriate in the circumstances to apply a U.S. Treasury bond rate to an award in a currency other than U.S. dollars.

## **7. Post-Award Interest**

805. The Claimants also request post-award interest. The Respondent does not specifically oppose such request. It is thus undisputed that the Claimants have a right to post-award interest.
806. The Claimants propose a rate of Libor + 2%, compounded semi-annually, on any amount awarded to them, including arbitration costs, as of the date “these amounts are determined to have been due to Claimants”, until the date of payment.<sup>860</sup> They further request that post-award interest be compounded semi-annually.
807. The Claimants do not explain the applicability of Libor, which is an interbank borrowing rate in the post-award context. The Tribunal sees no reason to award post-award interest

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<sup>859</sup> First ER Davies (**RER-2**), ¶ 6.2.6.

<sup>860</sup> Reply, ¶ 782.

at a rate different from the pre-award interest. As described above, by putting Future Bank into administration in April, 2015, the Respondent unlawfully expropriated the Claimants' shareholding interest. The Respondent's obligation to provide reparation arose at that time of the commission of this wrongful act. Thus, insofar as the Respondent has not paid the compensation for its wrongful conduct, the Claimants' economic position remains unchanged. The Tribunal will therefore award post-award interest at the same rate as pre-award interest.

## VIII. COSTS

### A. THE CLAIMANTS' POSITION

808. The Claimants submit that they "are confident that they will prevail" and that the Respondent should bear all costs in the arbitration,<sup>861</sup> including the costs of the Claimants' legal representation and assistance,<sup>862</sup> namely in the amount of EUR 4,976,060.79 and GBP 95,000.<sup>863</sup> According to the Claimants, the Respondent's Submission on Costs "confirm[s] the reasonableness of Claimants' Cost Submission".<sup>864</sup>

809. The Claimants have provided the breakdown of their total costs, which reads as follows:<sup>865</sup>

Advance on costs	EUR 700,000 (subsequently increased to EUR 960,000)
Legal fees of Claimants' counsel	EUR 3,726,000
Expenses and disbursements of Claimants' counsel	EUR 45,277.79

<sup>861</sup> The Claimants' Submission on Costs, July 10, 2019 (hereinafter "**Claimants' Submission on Costs**"), ¶ 2; The Claimants' Reply Comments on Submission on Costs, July 24, 2019 (hereinafter "**Claimants' Reply Comments on Submission on Costs**"), ¶ 1.

<sup>862</sup> Claimants' Submission on Costs, ¶ 7.

<sup>863</sup> Claimants' Submission on Costs, ¶ 2; Claimants' Reply Comments on Submission on Costs, ¶ 1; The Claimants' Costs Claims Update, September 15, 2020 (hereinafter "**Claimants' Costs Claims Update**"), ¶ 4.

<sup>864</sup> Claimants' Reply Comments on Submission on Costs, ¶ 2.

<sup>865</sup> Claimants' Costs Claims Update, ¶ 4.

Expenses directly incurred by Claimants for Experts and Witnesses travel, accommodation and related expenses for the preparation of the case and the hearing	EUR 54,783
Expert fees (excluding travel, lodging and other expenses, which are covered under the previous heading) of Mr. Brain, of Bovill	GBP 95,000
Expert fees (excluding travel, lodging and other expenses, which are covered under the previous heading) of Mr. de Feuardent, of Fair Links	EUR 190,000

810. As regards counsel fees, the Claimants explain that they agreed to pay counsel a lump sum of EUR 1,000,000 plus 1.75% of all amounts awarded. In this context, they refer to *Lahoud v DRC* in which the costs award covered all legal fees, including an agreed percentage on amounts awarded.<sup>866</sup> This being so, the Claimants say that they do not seek payment of the lump sum and success fee, but instead request compensation for the number of hours spent by their legal team, comprising one partner, six associates, and one paralegal. The fees for these hours amount to EUR 3,726,000.
811. In the alternative, the Claimants request that the Respondent pay legal fees in the amount of EUR 1,200,000, which would reflect the sum effectively paid or to be paid on the date of the Claimants' Costs Claims Update.<sup>867</sup> The Claimants add that they take this alternative position "out of abundance of caution, and in fact reluctantly, as it would enable Respondent to avoid making Claimants whole for the fees they would ultimately have to pay Counsel, and reward Respondent by way of a cost award that would not even accurately reflect the Counsel time actually spent on the case".<sup>868</sup>
812. In support of their costs application, the Claimants submit that, pursuant to Article 42 of the UNCITRAL Rules, the Tribunal has discretion to make a costs order against the Respondent for the entirety of the arbitration costs.<sup>869</sup> They also refer to conduct of the Respondent that prolonged the duration of the proceedings and increased costs:

<sup>866</sup> Claimants' Submission on Costs, ¶ 4, referring to *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Award, February 7, 2014, ¶¶ 655, 658.

<sup>867</sup> Claimants' Submission on Costs, ¶ 8; Claimants' Costs Claims Update, ¶ 5.

<sup>868</sup> Claimants' Costs Claims Update, ¶ 5.

<sup>869</sup> Claimants' Submission on Costs, ¶ 6.

- a. The time taken up for the appointment of the Tribunal, triggering the Claimants' request that the PCA act as appointing authority;
- b. The fact that the Respondent did not provide any reasons for the CBB Decision and the measures taken against Future Bank prior to the SoD, that is, three years after the measures;
- c. The leaking of the proceedings to the Washington Post;
- d. The Respondent's unsuccessful application for security for costs;
- e. The conclusion of the confidentiality agreement; and
- f. The late production of voluminous documents.<sup>870</sup>

813. For the Claimants, by contrast to their own costs, the Respondent's costs claim of USD 12,915,511.69 is "abnormally high" for an arbitration such as this one.<sup>871</sup> In particular, the Claimants point out that the Respondent's "costs of investigating and documenting the Claimants' [alleged] unlawful conduct throughout their investment in Future Bank" and "professional legal fees" are not arbitration-related defense costs, but represent costs for last-minute investigations to build a *post hoc* case to justify the taking and for the co-ordination with local or other parallel actions.<sup>872</sup>

814. Similarly, so say the Claimants, the fees of the Alvarez & Marsal regulatory and quantum experts are unreasonable and unrelated to this arbitration as they remunerated services for the preparation of the 2018 CBB Report and *post factum* defences, and do not represent *bona fide* defence costs.<sup>873</sup>

815. The Claimants further assert that the fees for the Deloitte forensic accountants and the DLA Piper/Alix Partners data analysts cannot be claimed because these firms did not

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<sup>870</sup> Claimants' Submission on Costs, ¶ 7.

<sup>871</sup> Claimants' Reply Comments on Submission on Costs, ¶ 1.

<sup>872</sup> Claimants' Reply Comments on Submission on Costs, ¶ 1.

<sup>873</sup> Claimants' Reply Comments on Submission on Costs, ¶ 1.

produce independent expert reports filed in this arbitration and because the precise scope and purpose of their work are not known.<sup>874</sup>

816. Finally, the Claimants reject the Respondent's extraordinary costs claim related to the document production exercise. They recall that the Respondent's production was "wholly defective", failing to produce any document in 15 out of 18 document categories.<sup>875</sup> As to the costs of maintaining and producing Future Bank's documents, the Claimants underline that these documents were effectively their own and should not have been removed from their control in the first place.<sup>876</sup>

#### **B. THE RESPONDENT'S POSITION**

817. The Respondent requests that the Tribunal award it the entirety of the costs it incurred in this arbitration.<sup>877</sup> These costs reflect its efforts defending against the Claimants' meritless claims and are "reasonable and commensurate with the nature of this case".<sup>878</sup> With respect to the costs incurred in connection with the Re-hearing, the Respondent notes that "it required the difficult effort of recapitulating a very extensive record 15 months after the final substantive hearing, which was rendered all the more arduous given the requirements of (i) extreme compression due to the limited time for oral presentations by counsel, and (ii) the need for counsel to prepare comprehensively in order to answer any questions that might come from the Tribunal".<sup>879</sup>

818. The Respondent claims the following costs:<sup>880</sup>

Professional legal fees	USD 9,211,837
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<sup>874</sup> Claimants' Reply Comments on Submission on Costs, ¶ 1.

<sup>875</sup> Claimants' Reply Comments on Submission on Costs, ¶ 1.

<sup>876</sup> Claimants' Reply Comments on Submission on Costs, ¶ 1.

<sup>877</sup> Respondent's Submission on Costs, ¶ 7; The Respondent's Reply Comments on Submission on Costs, July 24, 2019 (hereinafter "**Respondent's Reply Comments on Submission on Costs**"), ¶ 2; The Respondent's Costs Claims Update, September 15, 2020 (hereinafter "**Respondent's Costs Claims Update**"), ¶ 3.

<sup>878</sup> Respondent's Submission on Costs, ¶ 2; Respondent's Reply Comments on Submission on Costs, ¶ 5.

<sup>879</sup> Respondent's Costs Claims Update, ¶ 2(i).

<sup>880</sup> Respondent's Costs Claims Update, Annex.

Expenses, including travel-related costs, courier delivery charges, printing charges, translation costs, and other ordinary and necessary expenditures	USD 741,019.13
Expert fees, including fees of regulatory and quantum experts, and forensic accountants	USD 3,159,925.20
Document preservation costs	USD 341,402.34
Costs advances for the Tribunal's and the PCA's fees and expenses	EUR 450,000 (subsequently increased to EUR 960,000)

819. The Respondent refers to Article 40(1) of the UNCITRAL Rules according to which the “costs of arbitration shall in principle be borne by the unsuccessful party” and highlights the Tribunal’s “broad discretion” in awarding costs.<sup>881</sup>
820. Although it expects to recover its costs as the prevailing Party, the Respondent submits that the Tribunal may exercise its discretion in allocating costs by taking into consideration the differences in the Parties’ costs attributable to (i) the work associated with exposing the Claimants’ wrongdoing; (ii) the number of witnesses; and (iii) “the (gross) disparity” in the Parties’ production of evidence.<sup>882</sup>
821. Specifically, the Respondent notes that it has incurred the additional costs of “investigating and documenting the Claimants’ unlawful conduct through their investment in Future Bank”,<sup>883</sup> which required “monumental effort for Bahrain to organize, preserve, and analyze Future Bank’s files”.<sup>884</sup> The Respondent also highlights “the evident disparity in the scope, rigors, and seriousness” its expert evidence and the additional expert fees incurred for hiring forensic accountants and data analysts from Deloitte, DLA Piper, and Alix Partners to reveal the Claimants’ unlawful conduct.<sup>885</sup>

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<sup>881</sup> Respondent’s Submission on Costs, ¶ 3.

<sup>882</sup> Respondent’s Reply Comments on Submission on Costs, ¶ 4.

<sup>883</sup> Respondent’s Submission on Costs, ¶ 5(i).

<sup>884</sup> Respondent’s Submission on Costs, ¶ 5(i).

<sup>885</sup> Respondent’s Reply Comments on Submission on Costs, ¶¶ 4(ii), (iv).

822. The Respondent further challenges the Claimants' assertion that it delayed the proceedings and increased costs on six occasions.<sup>886</sup> For the Respondent, these alleged "aggravations" are largely attributable to the Claimants and thus provide further reasons that it be awarded costs:

- a. The Claimants increased costs by objecting to the Respondent's choice of arbitrator. In particular, the Claimants challenged Lord Collins, arguing that he was a "hired-gun" because, *inter alia*, he had recused himself from unrelated cases involving the Government of Iran. Yet, Lord Collins was appointed by the PCA Secretary-General two days later after having confirmed his impartiality in the usual way.
- b. The CBB provided reasons for the measures when it took them. The Claimants failed to challenge these measures in local courts. Thus, the SoD was the Respondent's first opportunity to defend its regulatory measures.
- c. The Tribunal already rejected the Claimants' complaint about the Washington Post article;
- d. The Respondent's applications for security for costs and for an interim award of costs were justified, whereas the Claimants' application for interim measures was a "pure waste";
- e. The conclusion of the confidentiality agreement was not insisted upon by the Respondent but ordered by the Tribunal; and
- f. The Respondent answered the Claimants' "sweeping document requests",<sup>887</sup> and produced all documents but one in accordance with the procedural timetable.<sup>888</sup>

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<sup>886</sup> Respondent's Reply Comments on Submission on Costs, ¶ 3.

<sup>887</sup> Respondent's Submission on Costs, ¶ 5(ii).

<sup>888</sup> Respondent's Reply Comments on Submission on Costs, ¶ 3.



### C. ANALYSIS

823. The relevant provisions of the 1976 UNCITRAL Arbitration Rules on costs read as follows:

#### **Article 38**

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

#### **Article 40**

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. 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. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

824. It is common ground between the Parties that the Tribunal has broad discretion in awarding and apportioning costs. The Parties also agree that the outcome is a relevant factor for determining the allocation. That said, as the difference in language between paragraphs 1 and 2 of Article 40 of the UNCITRAL Rules makes clear, the Tribunal enjoys a wider discretion with respect to the apportionment of the legal fees of the successful party than it does for other cost categories.

825. The Tribunal notes that the Claimants largely prevailed on the preliminary objections, as well as on liability and quantum. By contrast, they did not succeed with respect to their

argumentation on valuation methodology, interest rate and moral damages. The Tribunal also held that the Claimants engaged in some irregularities during the life of their investment in Bahrain.

826. In addition, the Tribunal notes that the costs of this arbitration have increased as a result of the need to reconstitute the Tribunal on two occasions following the passing of two of its members. These sad and unforeseen events required the re-hearing of the Parties' oral submissions and additional time commitment on the part of counsel and of the Tribunal. While it is speculative to try to assess the extra costs due to the reconstitutions, the Tribunal considers that no Party should bear these extra costs alone.
827. In connection with the Parties' procedural conduct, the Tribunal observes that the Parties and counsel conducted the proceedings in an efficient and professional manner. While each Party made several unsuccessful applications, such as the Claimants' request for interim measures and the Respondent's request for security for costs, none of these requests appeared abusive or aimed at obstructing the proceedings. Therefore, the Tribunal does not consider that the Parties' procedural conduct should influence the allocation of costs.
828. On the basis of the foregoing reasons, the Tribunal considers it fair and appropriate that the Respondent reimburse the Claimants for 80% of their share of the fees and expenses of the Arbitral Tribunal and the PCA in the amount of EUR 1,804,462.66, broken down as follows:
829. The Tribunal incurred fees and expenses in the amount of EUR 1,525,018.56 as follows: (i) Professor Gaillard incurred fees in the amount of EUR 411,075.00 and expenses in the amount of EUR 575.00; (ii) Professor Hanotiau incurred fees in the amount of EUR 100,485.00. He did not incur any expenses; (iii) Lord Collins of Mapesbury incurred fees in the amount of EUR 408,661.16 and expenses in the amount of EUR 2,253.89; (iv) Professor Dolzer incurred fees in the amount of EUR 193,210.00 and expenses in the amount of EUR 3,106.00; (v.) Professor Kaufmann-Kohler incurred fees in the amount of EUR 405,405.00 and expenses in the amount of EUR 247.51.
830. The PCA's fees and expenses for the administration of the arbitration amount to EUR 189,760.50 in fees and EUR 10,402.57 in expenses. Other costs, including costs of

court reporting, IT/AV support, catering, courier services, hearing venue services, office supplies and printing, telecommunications, and banking services, amount to EUR 79,281.03. The PCA will provide the Parties with a statement of account in due course.

831. The Parties have made the following advances in respect of arbitration costs: EUR 960,000 from the Claimants and EUR 960,000 from the Respondent, for a total of EUR 1,920,000.
832. As a result, the Respondent shall pay EUR 721,785,06 to the Claimants to account for the Tribunal's and PCA costs. The PCA will reimburse the balance of the deposit in the amount of EUR 115,537.34 to the Parties in equal shares of EUR 57,768.67.
833. Turning to the Claimants' own costs, the Tribunal finds the claimed amount reasonable. This finding applies to expenses and expert fees as well as legal fees. In this latter respect, the Tribunal deems it appropriate to take into account the actual fees incurred amounting to EUR 3,726,000 as opposed to the alternative claim of EUR 1,200,000. It can see no reason to adopt this alternative amount, especially considering that the lump sum and success fee agreed between the Claimants and their counsel will exceed the fees for time effectively spent. In this context, it notes that the Claimants have not sought reimbursement of the agreed lump sum and success fee.
834. It remains to be determined which percentage of the Claimants' costs must be borne by the Respondent. For the reasons set out in paragraphs 825 to 827 above, the Tribunal finds it fair and appropriate in consideration of all relevant circumstances that the Respondent bear 60% of the Claimants' costs, *i.e.*, EUR 2,409,636.47 and GBP 57,000. This percentage differs from the one adopted for the Tribunal and PCA costs because, in accordance with Article 40(1) of the UNCITRAL Rules, the Tribunal attributed more weight to the outcome of the case than to other factors when apportioning the Tribunal and PCA costs.
835. The Tribunal also notes that the Claimants have requested post-award interest on all amounts awarded, including costs. The Respondent has not specifically opposed this claim. As the Tribunal reasoned above, it considers that the rate of the 5-year U.S. Treasury bonds appropriately reflects the time value of the money that the Respondent

ought to pay to the Claimants under the present award. Therefore, the Tribunal will award post-award interest on costs at that rate from the date of the Award until payment in full.

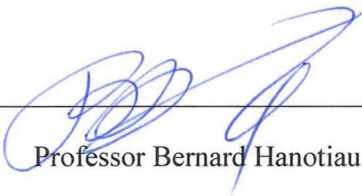
## IX. OPERATIVE PART

836. For the reasons set out above, the Tribunal:

- a. Declares that the Tribunal has jurisdiction over the dispute and that the claims are admissible;
- b. Declares that the Respondent has breached its obligations under Article 6 of the BIT;
- c. Orders the Respondent to pay to the Claimants compensation in the amount of EUR 243 million, plus simple interest at the rate of 5-year U.S. Treasury bonds from April 30, 2015, until payment in full;
- d. Dismisses the claim for moral and/or reputational damages;
- e. Orders the Respondent to pay EUR 721,785,06 to the Claimants in reimbursement of their share of the fees and expenses of the Tribunal and the PCA, plus simple interest at the rate of 5-year U.S. Treasury bonds from the date of this Award until payment in full;
- f. Orders the Respondent to pay EUR 2,409,636.47 and GBP 57,000 to the Claimants, for the fees and expenses incurred in connection with this arbitration, plus simple interest at the rate of 5-year U.S. Treasury bonds from the date of this Award until payment in full;
- g. Dismisses all other claims, counterclaims and requests for relief.

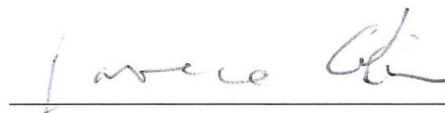
Place of arbitration: The Hague, the Netherlands

Date: 9 November 2021



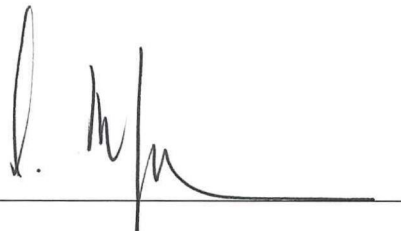
Professor Bernard Hanotiau

Arbitrator



The Rt. Hon. Lord Collins of Mapesbury

Arbitrator



Professor Gabrielle Kaufmann-Kohler

Presiding Arbitrator