SVEA COURT OF APPEAL	**JUDGMENT**	Case no.
Division 02	9 December 2016	T 2675-14
Bench 020106	Stockholm	

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Ministry of Justice
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THE MATTER
Invalidity of arbitral award, etc. regarding arbitral award issued in Stockholm on 19 December 2013, as rectified on 17 January 2014

HOLDING

1. The Court of Appeal dismisses the Republic of Kazakhstan's action.

2. The Republic of Kazakhstan shall compensate Ascom Group S.A. for litigation costs in the amounts of SEK 4,614,358 and USD 337,400.65, of which SEK 3,969,852 relates to counsel fees, as well as interest on the two first-mentioned amounts pursuant to section 6 of the Interest Act (SFS 1975:635), from the date of the Court of Appeal's judgment until such time as payment is made.

3. The Republic of Kazakhstan shall compensate Anatolie Stati for litigation costs in the amounts of SEK 4,114,357 and USD 377,400.65, of which SEK 3,969,582 relates to counsel fees, as well as interest on the two first-mentioned amounts pursuant to section 6 of the Interest Act, from the date of the Court of Appeal's judgment until such time as payment is made.

4. The Republic of Kazakhstan shall compensate Gabriel Stati for litigation costs in the amounts of SEK 4,114,357 and USD 377,400.65, of which SEK 3,969,582 relates to counsel fees, as well as interest on the two first-mentioned amounts pursuant to section 6 of the Interest Act, from the date of the Court of Appeal's judgment until such time as payment is made.

5. The Republic of Kazakhstan shall compensate Terra Raf Trans Traiding Ltd for litigation costs in the amounts of SEK 4,114,357 and USD 377,400.65, of which SEK 3,969,582 relates to counsel fees, as well as interest on the two first-mentioned amounts pursuant to section 6 of the Interest Act, from the date of the Court of Appeal's judgment until such time as payment is made.

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1. BACKGROUND

The Republic of Kazakhstan (“Kazakhstan”) possesses natural resources in the form of oil and natural gas and has desired to have foreign investors in order to assist in the exploitation of those resources. For this purpose, Kazakhstan has ratified the international agreement, Energy Charter Treaty (“ECT”). Between 1999 and 2003, Anatolie Stati and his son Gabriel, via the companies Ascom Group S.A. (“Ascom”) and Terra Raf Trans Traiding Ltd (“Terra Raf”) acquired all of the shares in tro Kazakh companies, Kazpolmunay LLP (“KPM”) and Tolkynneftegaz LLP (“TNG”). KPM owned exploitation rights to the Borankol oilfield, on which what is referred to as the LPG plant was to be constructed by TNG. TNG owned corresponding rights to the Tolkyn natural gas field. TNG also held exploration rights under an agreement designated as “Agreement 302”. Anatolie Stati, Gabriel Stati, Ascom and Terra Raf are hereinafter jointly referred to as the “Investors”.

Since, in 2010, Kazakhstan terminated agreements regarding exploitation rights, the Investors requested arbitration and claimed that Kazakhstan had breached its obligations in accordance with the ECT through violations of the investor protection rules. In the arbitration, the Investors claimed damages in excess of USD 3 billion. The arbitration took place at the Stockholm Chamber of Commerce (“SCC”) and an award was issued on 19 December 2013 in the SCC’s case no. V (116/2010), as rectified on 17 January 2014. The arbitral tribunal comprised Professor Karl-Heinz Böcksteigel (chairman), attorney David Haigh and Professor Sergei Lebedev. During the arbitration, each of the parties retained economic and geological experts for valuation of relevant assets.

The arbitral tribunal dismissed certain objections to jurisdiction raised by Kazakhstan and held that Kazakhstan had breached its obligations regarding ‘fair and equitable treatment’ pursuant to Art. 10 (1) ECT. That article provides that investments made are to be treated fairly and equitably. Furthermore, the arbitral tribunal held that the measures taken by Kazakhstan had caused loss and that Kazakhstan was liable to pay damages. The arbitral tribunal also held that the Investors were entitled to damages of USD 508,130,000, plus interest as from 30 April 2009 at a rate corresponding to the average rate of interest on six-month US treasury bills. A sum relating to debts of USD

10,444,899, in respect of which the arbitral tribunal considered that the Investors were no longer liable, was deducted from the amount of the damages. Thus, the amount that Kazakhstan was obliged to pay the Investors pursuant to the arbitral award was USD 497,685,101. The costs for the arbitration were apportioned between the parties such that Kazakhstan was required to pay three-quarters and the Investors one-quarter. Kazakhstan was ordered to compensate the Investors for their litigation costs in the amount of the USD 8,975,496.40, corresponding to one-half of the Investors' litigation costs.

Two of the arbitrators issued dissents. Sergei Lebedev dissented on the issue of the jurisdiction of the arbitral tribunal and David Haigh on the issue of the size of the damages.

2. MOTIONS

Kazakhstan has requested that the Court of Appeal primarily declare the arbitral award invalid in its entirety or, in any event, those parts of the award relating to the LPG plant, i.e. to an amount of USD 199 million plus interest pursuant to the arbitral award as well as a corresponding reduction in awarded litigation costs, in the amount of USD 1,757,546.

Kazakhstan has requested, in the alternative, that the Court of Appeal set aside the arbitral award, in its entirety or in part.

In the event the Court of Appeal finds that the arbitral award is to be declared invalid or partially set aside, Kazakhstan has requested that amounts awarded under the arbitral award be reduced by:

1. USD 199 million plus interest pursuant to the arbitral award as well as a corresponding reduction in awarded litigation costs in the amount of USD 1,757,546, in the event that the Court of Appeal finds that the Arbitral Tribunal has failed to take into account decisive witness evidence concerning the value of the LPG plant; and/or

2. USD 277.8 million plus interest pursuant to the arbitral award as well as a corresponding reduction in awarded litigation costs in the amount of USD 2,453,499, in the event that the Court of Appeal finds that the Arbitral Tribunal has relied on the Investors' geological experts without stating reasons therefor and has thereupon entirely failed to take into account Kazakhstan's geological experts; and/or
3. USD 215.3 million plus interest pursuant to the arbitral award as well as a corresponding reduction in awarded litigation costs in the amount of USD 1,901,506, in the event that the Court of Appeal finds that the Arbitral Tribunal has exceeded its mandate and committed a procedural irregularity by failing to take decisions on Kazakhstan's objections that all revenues that accrued to the Investors between the valuation date and the date of termination of the agreement were to be deducted from any damages; and/or
4. USD 99.5 million plus interest pursuant to the arbitral award as well as a corresponding reduction in awarded litigation costs in the amount of USD 878,773, in the event that the Court of Appeal finds that the Arbitral Tribunal has exceeded its mandate and committed a procedural irregularity by failing to take into account and to make a decision on Kazakhstan's objection that an arbitral award in respect of the LPG plant only may cover one-half of the assumed value; and/or
5. USD 277.8 million plus interest pursuant to the arbitral award as well as a corresponding reduction in awarded litigation costs in the amount of USD 2,453,499, in the event that the Court of Appeal finds that the Arbitral Tribunal has exceeded its mandate and committed procedural irregularities through, with respect to the valuation of Tolkyn and Borankol, erroneously assuming that Kazakhstan had stipulated to a certain valuation result, when in actual fact Kazakhstan clearly and unambiguously stated that the valuation result was incorrect and excessive.

The Investors have opposed the granting of Kazakhstan's action in any respect. In the event that the Court of Appeal were to find that the arbitral tribunal exceeded its mandate or committed any procedural irregularity, the Investors have requested that the

Court of Appeal stay the case and afford the arbitral tribunal an opportunity to effect rectification.

Kazakhstan has opposed the arbitral tribunal being afforded an opportunity to effect rectification.

The parties have claimed compensation for their litigation costs.

3. INVOKED LEGAL GROUNDS AND SUBSTANTIVE FACTS

3.1 *Kazakhstan*

3.1.1 Legal grounds for the action

1. The arbitral award and the manner in which the arbitral award has arisen are manifestly incompatible with fundamental principles of Swedish law, i.e. violate public policy and therefore it is wholly or partially invalid pursuant to section 33, first paragraph, subsection 2 of the Arbitration Act (SFS 1999:116) (*Sw. lagen om skiljeförfande*).

2. The arbitral award is to be set aside in its entirety since

   a) it is not covered by a valid arbitration agreement between the parties (section 34, first paragraph, subsection 1 of the Arbitration Act);
   b) the arbitral tribunal was appointed in violation of the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC rules") and the principle of equal treatment of the parties (section 34, first paragraph, subsection 4 of the Arbitration Act); and
   c) the appointment of the arbitral tribunal constitutes a procedural irregularity which has probably influenced the outcome (section 34, first paragraph, subsection 6 of the Arbitration Act).

3. The arbitral award is to be set aside wholly or partially since the arbitral tribunal has exceeded its mandate and/or committed procedural irregularities each of which, or in any event in combination, has influenced the outcome of the case (section 34, first paragraph, subsections 2 and 6 of the Arbitration Act).

In light of the fact that the arbitrator Sergei Lebedev passed away in April 2016, conditions are lacking for the arbitral tribunal to effect rectification.

3.1.2 Substantive facts

3.1.2.1 Invalidity based on the fraudulent scheme, false evidence, misleading information, etc.

The arbitral award and the manner in which the arbitral award has arisen are manifestly incompatible with fundamental principles of Swedish law, i.e. violate public policy. Furthermore, it is incompatible with fundamental legal principles to uphold arbitral awards that are based on extensive fraudulent schemes and corruption, or to allow procedural fraud in the form of false evidence.

To begin with, the construction of the LPG plant was surrounded by a large-scale, sophisticated fraudulent scheme, constituting corruption, on the part of the Investors. The scheme has been based on creating a significant fictitious value in the LPG plant, by means of sham agreements and sham transactions. Secondly, the Investors have engaged in procedural fraud by deliberately presenting false evidence in the form of witness affidavits, witness testimony and expert opinions regarding the fraudulent scheme and thereby the value of the LPG plant, which evidence has misled Kazakhstan, the SCC and the arbitral tribunal. Furthermore, the Investors have deliberately withheld information regarding the investment in, and valuation of, the LPG plant, in order to conceal the fraudulent scheme from Kazakhstan, the SCC and the arbitral tribunal. Thirdly, the Investors' fraudulent scheme and misleading actions have influenced the outcome of the case, since they constituted the basis for KazMunaiGas National Company's ("KMG") indicative bid and thereby the arbitral tribunal's calculation of the damages. Furthermore, the false evidence has influenced the arbitral tribunal's general assessment of testimony, witness affidavits, expert reports and the Investors' case in

general, which has influenced both the issue of liability and the assessment of the size of the damages.

The above circumstances, individually and taken together, mean that the arbitral award violates fundamental principles of Swedish law.

The fraudulent and misleading scheme

The Investors deliberately misled the arbitral tribunal, the SCC and Kazakhstan regarding their investment costs as regards the LPG plant. The alleged investment costs of USD 245 million largely comprised fictitious costs. The misleading scheme included the following.

The fictitious investment costs were based on an agreement (the Perkwood Agreement) between TNG and the company Perkwood Investment Limited ("Perkwood"). Despite the fact that, under the Perkwood Agreement, Perkwood was to act as the main supplier of building materials and equipment as well as project manager on the project for construction of the LPG plant, Perkwood has not delivered any goods or performed any services. Instead, the agreement between Perkwood and TNG was a sham arrangement. In the arbitration, the Investors failed to inform the arbitral tribunal and Kazakhstan regarding the Perkwood Agreement and Perkwood's role in the LPG plant construction project. The Investors also failed to inform the auditors who examined the annual reports prepared by the Investors regarding Perkwood's actual function, and in particular that Perkwood was a company closely related to TNG and the Investors.

Through the misleading scheme, the Investors created the impression that a large amount had been invested or was to be invested in the LPG plant, which made it possible for the Investors to claim higher damages than they would otherwise have been entitled to. The fictitious investment costs included the following aspects:

i. *Fictitious purchasing costs*
   According to Annex 2 to the Perkwood Agreement, TNG was to pay Perkwood approximately USD 93 million for equipment that was identical to what had

already been delivered by another company, Tractebel Gas Engineering GmbH ("TGE"). TGE was the real main supplier of the components and equipment for the LPG plant and had delivered for a price which, translated, amounted to USD 34.5 million. In addition, certain supplements to the Perkwood Agreement (Annexes 14 and 16) covered objects that were also included in Annex 2 and, in addition, had been delivered previously.

ii. Fictitious component costs

TNG entered in its books an amount of USD 72 million regarding components and equipment that had been allegedly delivered but not yet installed at the LPG plant. In reality, that equipment never existed.

iii. Fictitious interest expenses

The alleged interest expense of USD 60 million, with respect to loans taken in order to finance the construction of the LPG plant, is calculated on the fictitious investment costs and, accordingly, is fictitious to the same extent as the costs for components and equipment.

iv. Fictitious management fee

The alleged investment costs include a so-called management fee of approximately USD 44 million, which was paid to Perkwood without any contractual basis and without any consideration in the form of provided services.

Furthermore, TNG paid approximately USD 37 million in advance to Perkwood for building material and equipment that was not needed and that was never delivered, "Advance on non-delivered components". Despite the absence of delivery, the amount has not been repaid to TNG.

As result of the misleading scheme, it has been possible to make large outflows of money from Kazakhstan, which violates the fundamental purpose of the ECT, which is aimed at protecting good faith investments in the host country. Thereafter, the Investors brought a claim against the State of Kazakhstan, initiated arbitration and invoked investor protection under the ECT, despite the fact that such investor protection lacked any basis due to the aforementioned circumstances.

The Investors have presented false evidence, provided misleading information and withheld relevant information in the arbitration

The fraudulent scheme was intended to mislead the arbitral tribunal and Kazakhstan in order thereby to obtain significantly higher damages through the arbitral award than would otherwise have been possible. In order to achieve this, the Investors presented false evidence in the form of witness affidavits, witness testimony and expert reports, and provided misleading information in submissions and during the main hearing in the arbitration, as follows: "statement of claim" dated 18 May 2011; "claimant's reply memorial on jurisdiction and liability" dated 28 May 2012; "claimants reply memorial on quantum" dated 7 May 2012; "Stati's first post hearing brief" dated 8 April 2013; "Stati's second post hearing brief" dated 3 June 2013; "transcript from hearing on jurisdiction and the merits" dated 1 October 2012; "transcript from hearing on quantum" dated 28 January 2013; Arthur Lungus' first witness affidavit dated 17 May 2011; Anatolie Stati's second witness affidavit dated 7 May 2012; and Catalin Broscaru's witness affidavit dated 11 April 2011.

The Investors also misled the arbitral tribunal and Kazakhstan by withholding information which could have revealed the fraudulent scheme. Among other things, the Investors deliberately misled the arbitral tribunal and Kazakhstan as to which parties were participating in the investment in the LPG plant project, and consequently the size of the portion of the total investment cost accruing to the Investors. The misleading activity consisted of the Investors claiming in the arbitration that they alone had borne the entire investment cost, when in actual fact it had been shared with Vitol, as was asserted by the Investors in a parallel arbitration between Vitol and Montvale Invest Ltd ("Montvale"), the so-called Montvale case.

The Investors also misled the arbitral tribunal and Kazakhstan regarding entitled parties in connection with the LPG plant project. The misleading activity consisted of the Investors failing to notify Kazakhstan and the arbitral tribunal that Terra Raf had assigned all rights and obligations relating to the LPG plant to its affiliate company, Montvale, as the Investors asserted in the parallel Montvale case. This information would have been of importance for the arbitral tribunal's assessment of Terra Raf's

status as an investor under the ECT and also as regards Terra Raf's entitlement to damages in the arbitration.

The Investors withheld information regarding Perkwood, the Perkwood Agreement and Perkwood's role in the construction of the LPG plant. The Investors never presented any document during the arbitration which clarified Perkwood's role in the project. Neither Kazakhstan nor the arbitral tribunal were aware of the fraudulent scheme or the false evidence, before the arbitral award was issued.

It was against the background of this procedural fraud that the Investors presented their claims in the arbitration and the arbitral award was issued.

The valuation of the LPG plant

The arbitral tribunal reviewed the false evidence and misleading information referred to above, and it is likely that this influenced the arbitral tribunal's assessment of evidence in general and conclusions regarding both jurisdiction as well as the liability issue. However, with respect to the assessment of the size of the damages, the arbitral tribunal chose not to rely on the expert reports presented by the Investors in the case, which were based on fictitious investment costs. Instead, the arbitral tribunal took as its starting point KMG's indicative bid, which was also based on the Investors' misleading information regarding the value of the LPG plant.

In the arbitration, the Investors presented an indicative bid of USD 199 million for the LPG plant, which was presented by KMG as an alternative ground for its claim for damages in the ECT case; paragraph 1707 of the arbitral award. The indicative bid was based on incorrect and misleading information provided by the Investors to the company's auditors, KPMG Audit LLC ("KPMG"), the Russian investment bank Renaissance Capital, and KMG.

The indicative bid was based on the investment cost for the construction of the LPG plant. KMG took the investment cost from the "Information Memorandum", which was prepared by Renaissance Capital on behalf of the Investors. The Information

Memorandum was, in turn, based on financial information regarding the Investors' assets in Kazakhstan, as included in the consolidated annual reports for Tristan Oil Ltd ("Tristan Oil), KPM and TNG. These annual reports had been prepared by each company's management, which included Anatolie Stati, and had been audited by KPMG. The information regarding the amounts invested in the LPG plant, and which formed part of the annual reports, was incorrect and misleading due to the fictitious costs described above. The Investors also failed to inform KPMG that Perkwood was a closely related party, which the Investors had an obligation to disclose in accordance with International Financial Reporting Standards and the Information Memorandum.

Based on the valuation method stated in the indicative bid, KMG would have valued the LPG plant at a significantly lower amount if TNG's actual investment costs for the LPG plant had been reflected in the documents on which KMG's indicative bid was based. The arbitral tribunal's assessment of the LPG plant's value, and consequently the damages awarded to the Investors, was based on the indicative bid, and thus the Investors' fraudulent and deliberate scheme has directly influenced the outcome of the case; see paragraph 1747 of the arbitral award.

3.1.2.2 Setting aside on the ground that the arbitral award is not covered by a valid arbitration agreement

The arbitral award is not covered by a valid arbitration agreement between the parties since the Investors submitted their request for arbitration only five days after KPM's and TNG's agreements regarding exploitation rights were terminated, thereby breaching the mandatory provision in Art. 26 (2) ECT regarding three-month first-stage negotiations. Kazakhstan's offer to enter into an arbitration agreement under the ECT included a condition regarding three-month first-stage negotiations pursuant to Art. 26 (2). The request for arbitration is thus regarded as a qualified acceptance of Kazakhstan's offer. First-stage negotiations have not been conducted by the Investors.

It is denied that the requirement of first-stage negotiations has been cured by negotiations having been conducted after the arbitration was initiated. The requirement in Art. 26 ECT constitutes a mandatory formal provision and is a prerequisite for the formation of the arbitration agreement.

It is denied that Kazakhstan waived its objection of lack of jurisdiction in connection with the arbitral tribunal declaring the case stayed pending the attempt that the parties were to make to reach an amicable settlement in the case.

It is further denied that the letters that the Investors sent to Kazakhstan might be understood as constituting a request for first-stage negotiations under the ECT. The letters contained no demands related to the ECT or a desire for negotiations in order to reach an an amicable settlement. Furthermore, they did not include Anatolie Stati and Gabriel Stati, but rather referred solely to Terra Raf and Ascom. It is denied that any reference was made to the ECT in conjunction with the discussions held *inter alia* on 19 March 2009 at a meeting in which Kazakhstan participated.

It is denied that the assessment of whether or not first-stage negotiations are doomed in advance to fail is irrelevant as regards the obligation to participate in such negotiations. Furthermore, it is denied that, in this case, first-stage negotiations were doomed to failure.

The arbitral tribunal did not decide on the question of its jurisdiction in a correct manner at the latest in connection with the arbitral award. The arbitral tribunal should have considered whether the procedural prerequisites set forth in ECT were satisfied and whether a valid arbitration agreement was in place in relation to each of the Investors. (See paragraphs 828–830 of the arbitral award.)

3.1.2.3 Invalidity or setting aside based on the appointment of the arbitral tribunal

Kazakhstan was never afforded an opportunity to appoint any arbitrator. In Kazakhstan's stead, the SCC appointed Professor Sergei Lebedev as arbitrator. The procedure entailed a violation of Kazakhstan's fundamental procedural rights and the SCC rules. As a consequence of Kazakhstan being deprived of the right to appoint its own arbitrator, the manner in which the arbitral award has come about is manifestly incompatible with the fundamental principles of Swedish law. Alternatively, it constitutes a shortcoming in the appointment of the arbitral tribunal. In any event, an

irregularity has occurred in the SCC's handling that has influenced the outcome of the case.

It is denied that it is clearly evident from the SCC rules that Kazakhstan was to appoint an arbitrator in its statement of defence. According to the SCC rules, the respondent shall, *where appropriate*, provide information concerning the arbitrator who has been appointed. Kazakhstan has assumed that the SCC would first decide on the number of arbitrators, as is the case at other frequently retained arbitration institutes.

The orders from the SCC contained no information that Kazakhstan was to appoint an arbitrator in its response to the request for arbitration. Furthermore, the SCC's orders contained no information that the SCC would appoint an arbitrator in Kazakhstan's stead if Kazakhstan did not itself appoint an arbitrator. The SCC also afforded Kazakhstan no opportunity to comment on the Investor's request that an arbitrator be appointed on Kazakhstan's behalf. The SCC thereby violated the principle of equal treatment of the parties as enshrined in the Arbitration Act.

The SCC also violated the principle of fair proceedings and the principle of the equal treatment of the parties, by setting too short deadlines. According to the SCC rules, the deadline for Kazakhstan to submit a statement of defence must be calculated at the earliest as from 11 August 2010 when Kazakhstan received the order. This means that Kazakhstan was granted a 15-day deadline. Thus, the deadlines set were excessively short in light of the following factors: the complexity of the dispute; the fact that Kazakhstan was a sovereign state; that the arbitration was requested in violation of the prescribed period for negotiation; that the sending of documents took time; that the SCC's orders were unclear; that Kazakhstan could not easily understand English; that Kazakhstan must be afforded a reasonable time to retain counsel; and that the appointment of an arbitrator required careful consideration and communication.

The SCC granted Kazakhstan no right to be consulted in connection with the appointment of an arbitrator in its stead. Kazakhstan should, in any event, have been afforded an opportunity to comment on the Investors' request that an arbitrator be appointed on behalf of Kazakhstan.

It is denied that Kazakhstan has waived its right to appoint an arbitrator or to present an action thereon in the Court of Appeal. Kazakhstan has satisfied the requirements for "objection" pursuant to section 34, second paragraph of the Arbitration Act and Article 31 of the SCC rules. Kazakhstan has on no occasion confirmed that the arbitral tribunal was constituted in a correct manner and thereby waived its objection thereon. The statement during the hearing on 8 October 2012, which was held approximately two years after the arbitral tribunal had been constituted, referred solely to objections to the actions of the arbitral tribunal during the hearing, and not to bars to the arbitration in its entirety.

The SCC failed to cure its mistake by affording Kazakhstan a possibility to appoint a new arbitrator.

The SCC has failed to follow its previous practice regarding the appointment of arbitrators.

Sergei Lebedev adopted a very passive role during the arbitration and was unable to ensure that Kazakhstan's action was correctly understood by the arbitral tribunal.

3.1.2.4 Setting aside based on excess of mandate or procedural irregularity (incorrect assessment of evidence, etc.)

Taras Khalelov's witness statements and testimony

The arbitral tribunal based its decision to award the Investors damages in respect of the LPG plant solely on the allegation that Kazakhstan had worked to complete the LPG plant after the Investors had left the country. The allegation is based on two Internet links provided in a footnote in an expert report, the so-called FTI report, which was drawn up by the Investors' experts; see paragraph 1745 of the arbitral award. The Internet links were not submitted as evidence and not translated, which was in violation of item 7 in Procedural Order No. 1; see paragraph 20 of the arbitral award. The Investors also withdrew the allegation in subsequent submissions. The arbitral tribunal failed to take into account decisive oral evidence in the form of Taras Khalelov's witness statement and testimony, which rebutted this allegation.

The foregoing has influenced the outcome of the case as regards the value of the LPG plant in an amount of USD 199 million, which corresponds to the arbitral tribunal's estimation.

Kazakhstan's expert evidence and witness evidence

The arbitral tribunal failed to take into account:

i. submitted expert opinions from Professors Anatoly Didenko and Kadirbek Latifov as well as witness testimony of Salamat Baymaganbetov regarding the classification of pipelines;
ii. expert opinion from Professor Kulyash Ilyassova regarding the legality of the waiver of right of first refusal;
iii. expert opinion from Professor Tomas Balco and witness testimony of Nurlan Rahimgaliev regarding the legality of the tax arrears assessment;
iv. material parts of the opinion from Deloitte GmbH ("Deloitte") regarding causality; and
v. material parts of the report by Kazakhstan's geological experts, Gaffney Cline and Associates.

The arbitral tribunal, which based its award on a large number of circumstances which, taken together, were deemed to constitute a coordinated harassment campaign ("string of measurement of coordinated harassment"), would not have reached the assessments made if it had taken into consideration evidence invoked by Kazakhstan.

i. The arbitral tribunal failed to take into account the content of Kazakh law regarding the classification of pipelines (paragraph 1090 of the arbitral award), despite the fact that the parties were in agreement that Kazakh law must be applied in this context. In the arbitration, Kazakhstan presented legal opinions from Professors Anatoly Didenko and Kadirbek Latifov as well as a written witness statement from Salamat Baymaganbetov, all of which supported Kazakhstan's position with respect to classification of the pipelines. However,

the arbitral tribunal failed to even mention that these opinions had been submitted; cf. paragraphs 82, 174, 1088 and 1090 of the arbitral award.

ii. The arbitral tribunal decided a question of Kazakh civil law without taking into account the expert opinion by Kulyash Ilyassova invoked by Kazakhstan; see paragraphs 1093, 1095 and 1417 of the arbitral award. The issue in question related to Kazakhstan's right of first refusal to buy the shares in TNG in conjunction with Terra Raf's acquisition in 2005. Instead of applying Kazakh civil law, the arbitral tribunal held that Kazakhstan's revocation of the authorisation of this assignment constituted part of the coordinated campaign of harassment.

iii. The arbitral tribunal decided a question of Kazakh tax law without taking into account expert opinions from Tomas Balco and witness statement from Nurlan Rahimgaliev, which were invoked by Kazakhstan in support of Kazakhstan's position regarding the issue of tax arrears; see paragraphs 1541 and 1798–1800 of the arbitral award. Tomas Balco and Nurlan Rahimgaliev were not even mentioned in the reasons for the arbitral award. Instead of applying Kazakh tax law, the arbitral tribunal held that Kazakhstan's imposition of tax arrears in respect of KPM and TNG "were created by Respondent's conduct which this Tribunal found above to be a breach of the ECT", thus a part of the coordinated campaign of harassment; see paragraphs 1541 and 1798–1800 of the arbitral award.

iv. The arbitral tribunal has decided the question of a causal link between the alleged campaign of harassment and the loss alleged by the Investors without taking into account Kazakhstan's economic expert, Deloitte. In the arbitration, Kazakhstan presented expert opinions from Deloitte which demonstrated that the Investors' companies were in dire economic straits, wholly irrespective of measures taken by Kazakhstan, and thus that there was no causal link. The arbitral tribunal found that since Deloitte had not made any direct assessment of the ability of KPM and TNG to pay their debts pursuant to the bond loan from Tristan Oil (which is clearly wrong), the arbitral tribunal accepted the

conclusion from the Investors' expert, TFI Consulting ("TFI") that the companies were in a sound financial position prior to October 2008; see paragraph 1456 of the arbitral award.

v. In its assessment of damages, the arbitral tribunal took into account only the Investors' geological experts ("Ryder Scott") and disregarded Kazakhstan's geological experts ("Gaffney Cline & Associates"), without stating any reason for doing so. Despite the fact that the issue of the geological assessment of the reserves in the Tolkyn and Borankol fields was very extensive and complicated, and that the experts had each submitted four expert opinions, the arbitral tribunal determined in a single sentence that the Investors' expert Ryder Scott was convincing in its methodology and conclusions ("considers that the Ryder Scott reports on reserv [*sic*] estimates are convincing in their approach and results; see paragraph 1625 of the arbitral award.

Non-considered objections regarding deductions from the damages

The arbitral tribunal failed to take into consideration Kazakhstan's objections that certain deductions should be made from any awarded damages. The arbitral tribunal's reasons for the award in this regard are so minimal as to be tantamount to a lack of reasons; see paragraphs 1535–1542 of the arbitral award. In the arbitration, Kazakhstan objected that all revenues that accrued to the Investors after the valuation date should be deducted (see paragraphs 1486 and 1487 of the arbitral award) *and* that any damages in respect of the LPG plant could only amount to one-half of the value due to the fact that Vitol had financed one-half of the LPG plant and that Vitol was also entitled to one-half of the future income from the LPG plant, all of the aforesaid in accordance with an agreement between the Investors and Vitol (the JOA Agreement); see paragraphs 1738–1741 of the arbitral award. The Investors could not receive damages from Kazakhstan in respect of the part financed by Vitol. The objections may be equated with cross claims or set-off objections. Thus, the arbitral tribunal failed to perform its mandate to try the dispute in its entirety. The failure to take account of the objections influenced the outcome of the case. Due to this excess of mandate or procedural irregularity, the arbitral award must be set aside by, in any event, an amount of USD 314.8 million. The

amount corresponds to the revenues that have accrued to the Investors since the valuation date (USD 215.3 million) and to one-half of the assumed value of the LPG plant, USD 99.5 million.

3.1.2.5 Other excesses of mandate or procedural irregularities

The arbitral tribunal exceeded its mandate and committed procedural errors by, on a number of occasions, going beyond what had been invoked by the parties and by failing to take into account matters invoked by the parties and applicable law, as stated below.

KazAzot

i. On the issue of Kazakhstan's liability, the causal link between Kazakhstan's actions and the loss, the amount of the loss and the role played by the company KazAzot, the arbitral tribunal based its conclusions on the fact that KMG and Timur Kulibayev had influenced KazAzot, which however had not been invoked by any of the parties; see section 1418 of the arbitral award. The Investors had invoked KazAzot's role only in respect of the pricing of gas. The arbitral tribunal also failed to apply applicable legislation to the question of ascribing to the Kazakhstan state KazAzot's decision not to sign the tripartite agreement (customary international law on state liability including "Articles on Responsibility of States for Internationally Wrongful Acts" drafted by the International Law Commission [ILC Draft Articles][1]). (See paragraphs 1094 and 1418 of the arbitral award.)

Interfax

ii. The arbitral tribunal based its conclusions that a press release from Interfax, which according to the arbitral tribunal constituted a part of the coordinated campaign of harassment, had been caused by Kazakhstan's behaviour as early as in October and November 2008, despite the fact that this was not asserted

[1] ILC Draft Articles are a combination of codification and ongoing development of international law. On 12 December 2001, the United Nations General Assembly adopted resolution 56/83 through which ILC Draft Articles were entrusted to governments without obligations.

by any of the parties and emphasised incorrectly that this circumstance was undisputed; see paragraph 994 of the arbitral award.

The financial police

iii. With respect to the behaviour of the Kazakh financial police, the arbitral tribunal relied on the allegation that the financial police had reported to Kazakhstan's Deputy Prime Minister that it had discovered that KPM and TNG operated trunk pipelines, despite the fact that this had not been invoked by any of the parties. In addition, the arbitral tribunal incorrectly held that Kazakhstan had admitted that such was the case; see paragraph 990 of the arbitral award.

The Tristan bonds

iv. The arbitral tribunal failed to take into account the parties' legal arguments on the issue of whether deductions in respect of the so-called Tristan bonds should be made from value of the companies KPM and TNG; see paragraphs 1768–1771 of the arbitral award. The arbitral tribunal also based its decision on an alleged admission by Kazakhstan which was never given. If there has been any such admission, Kazakhstan has withdrawn it. In any event, on 30 April 2009 the value of the Tristan bonds amounted to USD 497,685,101. (See paragraphs 1536–1537 of the arbitral award.)

Valuation method

On the issue of the valuation of the Tolkyn and Borankol fields, the arbitral tribunal erroneously assumed that Kazakhstan had consented to a certain valuation method; see paragraph 1625 of the arbitral award. For this reason, the arbitral award must be set aside, in any event in an amount of USD 277.8 million.

Due to each and every one of the excesses of mandate or procedural irregularities, the arbitral award must be set aside. In any event, taken together the shortcomings constitute reason for setting aside the arbitral award.

3.2 *The Investors*

3.2.1 Legal grounds for the denial

The arbitral award and the manner in which the arbitral award has arisen are not manifestly incompatible with the fundamental principles of the Swedish legal system.

The arbitral award is covered by a valid arbitration agreement between the parties.

The arbitral tribunal has not been appointed contrary to the parties' agreement or the principle of equal treatment.

The SCC's appointment of the arbitral tribunal has not constituted a procedural irregularity that has influenced the outcome.

The tribunal has neither exceeded its mandate nor committed any procedural irregularity that has influenced the outcome.

The arbitral tribunal is quorate also with two arbitrators.

3.2.2 Substantive facts

3.2.2.1 Invalidity based on the alleged fraudulent scheme, false evidence, misleading information, etc.

The arbitral award or the manner in which the arbitral award arose is not manifestly incompatible with the fundamental principles of the Swedish legal system. Therefore, the arbitral award is not to be declared invalid.

It is denied that the arbitral award is based on a fraudulent scheme, corruption or false evidence.

Ever since the Investors acquired KPM and TNG, they have invested hundreds of millions of US dollars in development of the oil and gas fields and construction of the LPG plant. These costs are neither feigned nor fictitious.

The construction of the LPG plant has not taken place through a fraudulent scheme, corruption, sham agreements or sham transactions. The Investors have presented no false evidence (witness affidavits, witness testimony and expert opinions) and also have not misled Kazakhstan, the SCC or the arbitral tribunal, nor withheld information regarding the investment in, and the evaluation of, the LPG plant. KMG based its indicative bid also on its own assumptions and calculations. There is no proximate cause between the alleged misleading acts and the arbitral tribunal's award relating to the value of the LPG plant.

The arbitral award is not based on false evidence or untrue statements. The information in the Information Memorandum and annual reports which is alleged to have been false or misleading has not been created with the arbitration in mind, but rather for another purpose, and also long prior to the initiation of the ECT case. Even if Kazakhstan's accusations were to be justified in any respect (which is denied), these documents have not served as any direct basis for KMG's indicative bid or the arbitral tribunal's award insofar as relates to the value of the LPG plant.

Even if incorrect documentation or untrue information might in any way have constituted a basis for the arbitral award in this respect, this would not be sufficient to declare the arbitral award invalid, in whole or in part.

The fraudulent and misleading scheme is a fabrication

The Investors did not mislead the arbitral tribunal, the SCC or Kazakhstan in respect of their investment costs in the LPG plant. The investment cost in the LPG plant is not fictitious. It comprised not only costs for equipment but also costs for building materials and work on construction of the plant. At the time of the expropriation, the plant was almost completed.

The Perkwood Agreement involved no sham arrangement. Perkwood's role was to handle the procurement and delivery of equipment for construction of the LPG plant. Perkwood imported equipment valued at approximately USD 138 million to TNG in Kazakhstan and approximately USD 24.7 million has been paid to the Kazakh

authorities in the form of customs charges and taxes. In addition, in October 2008 the Kazakh customs authorities conducted an investigation of TNG, without finding that the company had violated any laws or regulations in its dealings with Perkwood or otherwise. Thus, there has been no misleading scheme or sham agreement between TNG and Perkwood. In conjunction with the audit of the prepared annual reports, TNG's auditors (KPMG) had full access to all accounting documents. KPMG was aware of Perkwood's function. During the arbitration, the Investors presented a number of documents in which Perkwood's role in the LPG construction project was described.

The Investors have invested significant sums in the LPG plant, which fact was known to Kazakhstan.

It is denied that the Investors have reported fictitious purchasing costs. The Perkwood Agreement was more extensive than the contract between TGE and Azalia Ltd. ("Azalia")/Ascom and included a large volume of equipment and material that was not included in the TGE agreement. The terms of delivery were also different. TGE sold certain parts of the equipment for the LPG plant to Azalia, but neither TGE nor Azalia was responsible for the delivery of equipment to Kazakhstan. It was Perkwood that sold equipment to TNG and delivered it to Kazakhstan. Thus, the equipment listed in Annexes 2, 14 and 16 to the Perkwood agreement could not have been delivered by TGE previously. Annex 14 did not include the same equipment as Annex 2, but rather related to spare parts that were ordered to ensure future operation. In any event, the paid advance of approximately USD 37 million for the equipment in accordance with Annex 14 was later settled between Perkwood and TNG.

It is denied that the Investors reported fictitious component costs. Perkwood has delivered equipment and material corresponding in value to the USD 72 million booked by TNG as delivered but not yet installed at the LPG plant. All amounts for this equipment have been reported in a report from an unscheduled inspection of TNG that was carried out between 25 January and 5 February 2010 by the Kazakhstan Ministry for Energy and Natural Resources; see paragraph 1072 of the arbitral award.

It is denied that the Investors reported fictitious interest expenses. Interest expenses of USD 60 million that were incurred in order to finance the construction of the LPG plant have been reported in TNG's accounts and correspond to the actual cost.

It is denied that the Investors reported a fictitious management fee. The contractual basis for the payment of the management fee is set forth in section 10.1 of the Perkwood Agreement.

It is denied that the Investors reported an advance on non-delivered components. Perkwood agreed to repay the advance to TNG. TNG subsequently assigned its claim against Perkwood regarding repayment of an advance of approximately USD 37 million to Tristan Oil on 9 February 2010. The parties executed an agreement whereby Tristan Oil notified Perkwood of the assignment and simultaneously wrote off a corresponding part of TNG's outstanding loans.

The allegation that there was no good faith investment in Kazakhstan is denied. This allegation was considered and rejected by the arbitral tribunal; see paragraphs 812–813 of the arbitral award.

The Investors presented no false evidence, provided no misleading information, nor withheld any relevant information in the arbitration

It is denied that the stated documents prove that the Investors provided false or misleading information in the arbitration.

It is denied that the Investors withheld "information that could have revealed the fraudulent scheme". The Investors did not mislead the arbitral tribunal or Kazakhstan as to which parties were participating in the investment in the project. Vitol never held any ownership stake in the LPG plant. The intention was that Vitol would advance half of the financing for its construction. The Investors did not claim that they alone had borne the entire investment cost (see paragraphs 1702–1703 and 1740 of the arbitral award).

The issue of Ascom's dispute with Vitol in the so-called JOA case was of significance when the Investors' claims for damages with respect to the LPG plant were considered by the arbitral tribunal. The arbitral tribunal held that it was of no significance for the question that the arbitral tribunal was required to assess, namely what constituted a reasonable market value for the LPG plant under international law, and whether Vitol had participated together with the Investors in the investments made in the LPG plant. (See items 1539 and 1542 of the arbitral award.)

The Investors did not mislead the arbitral tribunal or Kazakhstan as regards entitled parties in connection with the LPG plant project. It was never alleged in the Montvale case that Terra Raf had assigned all of its rights and obligations regarding the LPG plant to its affiliated company Montvale. What happened was that Terra Raf assigned all of its rights and obligations under the JOA agreement (regarding the joint financing of the LPG plant with Vitol) to Montvale through a Novation Agreement, to which Vitol also was a party. Terra Raf's status as TNG's sole shareholder never changed. Consequently, this information was of no significance whatsoever for the assessment of Terra Raf's status as an investor under the ECT or its entitlement to damages. Information about the Novation Agreement is reproduced in Squire Sanders' "Due diligence" report, which Kazakhstan presented in the arbitration and invoked on a number of occasions; see paragraphs 1177, 1197, 1489 and 1793 of the arbitral award. Under all circumstances, it was of no significance for the outcome.

It is denied that the Investors were guilty of procedural fraud by withholding information concerning Perkwood, the Perkwood Agreement and Perkwood's role in the construction of the LPG plant.

Valuation of the LPG plant

The Investors did not provide misleading information to their auditors or anyone else regarding investment costs. The information regarding investment costs for the LPG plant did not influence the assessment of the size of the damages.

KMG's indicative bid and internal data for decisions, which Kazakhstan presented in the arbitration, show that the company based its indicative bid on the Information Memorandum *and* on its own assumptions and calculations.

The Investors did not invoke the indicative bid as an alternative ground for its claim for damages in the arbitration. Information regarding KMG, as well as seven other bidders' indicative bids, were presented as support for the Investors' calculations regarding the value of the expropriated assets, since Kazakhstan called into question the Investors' valuation methods. In the arbitration, Kazakhstan adopted the position that the investment cost was irrelevant since a Discounted Cash Flow method was to be applied when assessing the Fair Market Value, and also that the investment costs in reality were much higher and that the Investors had attempted to conceal them; see paragraphs 1724 and 1718 of the arbitral award.

The arbitral tribunal essentially based its assessment of the value of the LPG plant on the indicative bid of USD 199 million that was submitted by KMG. The indicative bid was preliminary and was based on a number of uncertain assumptions. KMG took into account not only the Information Memorandum, but also other publicly available information and made its own assumptions and calculations. The bid was also not based solely on TNG's investment costs in the LPG plant, but had been calculated as an arithmetic average between "the matrix of the comparative methods value and cost method value". The average ended up at USD 199 million since the investment cost was USD 193 million and the amount according to the comparative valuation method was USD 205 million.

It is denied that information regarding the Investors' assets in Kazakhstan, as included in the consolidated annual reports for Tristan Oil, KPM and TNG, was incorrect or misleading.

KPMG was aware of Perkwood's function.

It is denied that Anatolie Stati was included in the management of KPM and TNG.

KMG's witness, Medet Suleimenov, stated in testimony that the indicative bid was based on limited information and that the size of the bid was determined by strategic considerations; see paragraph 1736 of the arbitral award. Therefore, it is impossible to say in what way, if any, changes in the investment cost would have affected the size of the bid.

3.2.2.2 The arbitral award is covered by a valid arbitration agreement

Kazakhstan and all of the Investors have entered into an arbitration agreement based on Kazakhstan's standing offer, included in the ECT, of arbitration in accordance with the SCC rules in respect of investment disputes, and the Investors' acceptance thereof through a request for arbitration, citing such offer.

Compliance with the provision regarding first-stage negotiations has not been a condition for the conclusion of an arbitration agreement. It follows from Art. 26 (3) (a) ECT that Kazakhstan has provided unconditional consent to arbitration. Through the Investors' request for arbitration, a binding arbitration agreement has arisen whereby the arbitral tribunal became endowed with jurisdiction.

The provisions of Art. 26 ECT do not constitute mandatory formal provisions. The failure to comply with first-stage negotiations does not constitute a bar to arbitration.

In any event, the arbitration was stayed for a period of three months at the request of Kazakhstan in order to facilitate negotiations pursuant to Art. 26 (2) ECT. Any shortcoming prior to the arbitration has therefore been cured and Kazakhstan has forfeited the right to object to jurisdiction.

The Investors accepted Kazakhstan's request for a stay on condition that Kazakhstan desist from presenting any objection on the ground that the time period had not been satisfied, which Kazakhstan accepted through its counsel at the time. Kazakhstan then continued to participate in the proceedings without informing the Investors that the objection was maintained. In any event, the Investors had reason to believe that Kazakhstan had waived its objection, a fact of which Kazakhstan must have been aware.

The parties' agreement was binding on Kazakhstan and, for this reason too, Kazakhstan was contractually bound vis-à-vis the Investors, in any event following the expiry of the three-month period.

The Investors satisfied the requirements of first-stage negotiations pursuant to Art. 26 (2) ECT before the arbitration was initiated. The only requirement imposed regarding the commencement of first-stage negotiations is a request from one of the investors affected to reach an amicable settlement, which need not be in writing. Thus, there was no requirement that all investors must sign all letters or participate in the first-stage negotiations. Furthermore, at the time in question Anatolie Stati was authorised to represent Gabriel Stati. It is sufficient that reference is made to one of the objects of the treaty so that the state against which a claim is directed is informed that there exists, or may come to exist, a dispute concerning such object. The Investors' letter to Kazakhstan clearly states that the investors object to Kazakhstan's treatment of KPM and TNG, i.e. the Investor's investments in the territory of Kazakhstan. During the years 2008–2010, the Investors had complained several times to Kazakhstan concerning the circumstances in dispute and had attempted to bring about a dialogue. The Investors also submitted both oral and written proposals for a settlement of the dispute and stated that, if a solution could not be reached, they intended to refer the dispute to international arbitration in accordance with the SCC rules. During this period of time, the basic cause of the dispute was the same. First-stage negotiations took place more than one year before the dispute was referred to arbitration, which is adequate. The fact that the word "amicable" or suchlike is not used is irrelevant.

There is no requirement to participate in first-stage negotiations during three months if such appear to be doomed to failure, which is evident from Art. 26 (1) ECT. Kazakhstan failed to respond to most of the Investors' requests and exhibited no interest in negotiating. Kazakhstan's behaviour prior to the initiation of the arbitration demonstrates that it was not possible to achieve a settlement of the dispute.

The arbitral tribunal determined the issue of its jurisdiction in a correct manner and in relation to each of the Investors.

3.2.2.3 The appointment of the arbitral tribunal

In conjunction with the appointment of the arbitral tribunal, the SCC did not violate the parties' arbitration agreement (of which the SCC rules constitute a part), or any fundamental principles and rights. Kazakhstan has not been deprived of the right to appoint its own arbitrator, but either due to its own failure deprived itself of the opportunity to do so or deliberately chose not to participate in the appointment of the arbitral tribunal. It is further denied that any shortcoming occurred in the appointment of the arbitral tribunal and that there was any procedural irregularity related to the SCC's appointment of the arbitral tribunal which influenced the outcome of the case.

It follows from the arbitration agreement that the respondent is to appoint an arbitrator in its answer to the request for arbitration. The SCC rules are clear on this point. Since the parties had not otherwise agreed, the arbitral tribunal was to comprise three arbitrators and each party had the possibility to appoint an arbitrator, unless otherwise decided by the SCC. The SCC has not decided otherwise. The fact that the arbitration was to be decided by three arbitrators is evident not only from the SCC rules but also from the SCC's letter and the request for arbitration.

The SCC's requests were clear. To the SCC's request to submit an answer, the request for arbitration and a copy of the SCC rules were appended, which provide that Kazakhstan needed to state in its answer which arbitrator Kazakhstan had appointed. Already in the request for arbitration, the Investors had requested that, in the event Kazakhstan failed to appoint an arbitrator, the SCC should appoint an arbitrator in Kazakhstan's stead. From receipt of the request for arbitration until the time when Sergei Lebedev was asked, Kazakhstan had 40 days at its disposal to submit an answer or to request a time extension. When the deadline for the answer had expired, Kazakhstan received a reminder and an additional 14 days to comply with the request, as well as information that Kazakhstan's failure to reply would not prevent the arbitration from moving forward. The SCC rules do not prescribe that the SCC's request must contain an express instruction to appoint an arbitrator. In addition, Kazakhstan was requested to comment on the Investors' proposal that the party-appointed arbitrators

appoint the chairman of the arbitral tribunal. The SCC has not violated the principle of equal treatment.

A response and appointment of an arbitrator must be submitted within the time decided upon by the SCC. The SCC's behaviour in this regard was in accordance with the arbitration agreement, the SCC's practice and fundamental principles and rights. Kazakhstan had competent and experienced employees possessing necessary language skills. A Russian translation of the SCC rules is also available on the SCC's website. Furthermore, Kazakhstan had been a party in a large number of arbitrations at the SCC prior to the currently relevant ECT case and was well acquainted with applicable rules and practice. There is no reason why Kazakhstan should have been treated more favourably in its capacity as a state or due to the fact that a complex investment dispute was involved. Neither the manner of delivering the documents, Kazakhstan's own bureaucracy, its alleged lack of English skills or its need for counsel, justified the designation of a longer time period. Kazakhstan did not request an extension and did not participate at all in the procedure until more than one month after the SCC had appointed an arbitrator on Kazakhstan's behalf.

Kazakhstan failed to appoint an arbitrator within the time decided upon by the SCC. The SCC therefore appointed an arbitrator on Kazakhstan's behalf, without consulting any party. In the situation that arose, the arbitration agreement does not grant Kazakhstan any right to be consulted.

Kazakhstan failed to present a timely objection to the appointment of the arbitral tribunal and has therefore forfeited its right to assert any irregularity. Following the appointment of Sergei Lebedev and Karl-Heinz Böckstiegel, Kazakhstan confirmed to the arbitral tribunal, during the hearing on the issue of jurisdiction held on 8 October 2012, that there were no objections to the procedure carried out thitherto. Kazakhstan has forfeited its right to assert the alleged irregularity.

It is denied that the SCC should have afforded Kazakhstan the possibility to appoint a new arbitrator when Kazakhstan finally participated in the arbitration.

The SCC did not commit any error but, rather, acted in accordance with the SCC rules and complied with its practice regarding the appointment of arbitrators.

It is denied that Sergei Lebedev adopted a passive role or that a party-appointed arbitrator is tasked with ensuring that the party's case is correctly understood by the arbitral tribunal.

3.2.2.4 Excesses of mandate or procedural irregularities (alleged incorrect evaluation of evidence, etc.)

Taras Khalelov's witness statement and witness testimony

The question was whether the LPG plant was to be valued as a going concern, as claimed by the Investors, or at scrap value, as claimed by Kazakhstan. The arbitral tribunal did not take into account circumstances or evidence that had not been invoked by the Investors.

The Investors never withdrew the allegation that Kazakhstan intended to complete the construction and commence operation of the LPG plant. This is not changed by the fact that the Investors did not later repeat the allegation. Furthermore, in their "Post-hearing Briefs" the Investor stated that they maintained everything that had previously been asserted in the case.

The evidence in the form of information from publicly available websites for the Mangystau region and the Kazakh embassy in Israel was correctly introduced in the case through the Investors' expert evidence from FTI and annexes to the Investors' submission dated 7 May 2012. The Investors also invoked other evidence in the form of Victor Romanosov's witness statement.

The arbitral tribunal took into account all written and oral evidence invoked by the parties, including Taras Khalelov's witness statement and witness testimony. Even if the arbitral tribunal were to have committed a procedural irregularity by failing to take this evidence into account, such irregularity has in any event not influenced the outcome of

the case. The evidence was insufficient to refute the circumstances on which the arbitral tribunal based its conclusions regarding the value of the LPG plant.

Consequently, the arbitral tribunal did not exceed its mandate or commit any other procedural irregularity which probably influenced the outcome of the case.

Kazakhstan's expert evidence and witness evidence

The arbitral tribunal took into account all evidence, including evidence regarding:

- the classification of pipelines;
- the right of first refusal;
- the assessment of tax arrears;
- causality;
- geological issues.

Kazakhstan's allegations in this regard are groundless and do not constitute, whether independently or together, any excess of mandate or procedural irregularity which has probably influenced the outcome of the case.

The arbitral tribunal took into account Kazakhstan's evidence on the content of Kazakh law regarding the classification of pipelines. The issue of fair and equitable treatment included questions concerning the classification of pipelines under Kazakh law. Kazakhstan's arbitrary handling of the classification issue in itself violated the obligation to observe fair and equitable treatment and Kazakh law was of limited importance for the assessment of the classification.

The arbitral tribunal described in chronological order the parties' main submissions without enumerating expert statements or witness statements. Kazakhstan's allegations with respect to Anatoly Didenko, Kadirbek Latifov and Salamat Baymaganbetov are incorrect. Anatoly Didenko's statement is mentioned in the arbitral award; see paragraph 193 of the arbitral award. Kadirbek Latifov's statement was submitted as a witness statement (not as an expert opinion) to Kazakhstan's second submission.

Kazakhstan also did not report any costs in respect of Kadirbek Latifov's statement; cf. paragraph 1872 of the arbitral award. The arbitral tribunal noted that Salamat Baymaganbetov testified on 8 October 2012; see paragraph 117 of the arbitral award.

Kazakhstan's allegation that the arbitral tribunal determined the question of Kazakh civil law without taking into account the expert opinion of Kulyash Ilyassova invoked by Kazakhstan is groundless. Kulyash Ilyassova's views with respect to Kazakhstan's right of first refusal to the TNG shares that were assigned from Gheso to Terra Raf have been reported in the arbitral award; see sections 787 and 993 of the arbitral award.

The arbitral tribunal has correctly decided the issue of Kazakh tax law relating to the matter of tax arrears, taking into account everything asserted by Kazakhstan, including expert evidence through Tomas Balco and the witness Nurlan Rahimgaliev. Both Tomas Balco and Nurlan Rahimgaliev are mentioned in several places in the arbitral award under both the Investors' position and Kazakhstan's position.

The arbitral tribunal correctly decided the question of causality – including the question of any intervening cause and the economic structure of KPM and TNG – taking into account everything that Kazakhstan had asserted, including the experts from Deloitte; see paragraphs 1456 and 1503 of the arbitral award.

The arbitral tribunal correctly took into account all geological expertise, including Gaffney Cline & Associates, and the arbitral award is not devoid of reasons for the award as regards the significance of the geological issues for the calculation of loss.

Objections regarding deductions from the damages

The arbitral tribunal took into account Kazakhstan's objections that certain deductions should be made from any damages, both with respect to revenues that have accrued to the Investors after the valuation date (USD 215.3 million) and the fact that, due to the Investors' agreement with Vitol, the damages in respect of the LPG plant could not exceed one half of the value (USD 99.5 million). Kazakhstan's objections related to the issue of the size of the damages and do not constitute a cross-claim or a set-off

objection. In the reasons for the award, the arbitral tribunal satisfactorily described its assessments and correctly found that no deductions should be made; see paragraphs 1530, 1531 and 1539 of the arbitral award.

Profits, to which Kazakhstan referred and which had been distributed as dividends, had been earned before both the valuation date adopted by the arbitral tribunal and the date invoked by the Investors. Such profits should not be deducted from the damages, which should correspond to the present value of profits which KPM and TNG are expected to generate in the future. (Cf. paragraphs 1473–1477 of the arbitral award.)

Vitol owned no part of the LPG plant and Vitol's agreement with the Investors regarding financing of the LPG plant (the JOA Agreement) did not justify any deduction from the damages. The arbitral tribunal did not exceed its mandate and committed no procedural irregularity which probably influenced the outcome of the case; see paragraph 1539 of the arbitral award.

3.2.2.5 Other excesses of mandate or procedural irregularities

The arbitral tribunal did not assess circumstances that had not been invoked and did not fail to take into account anything that should have been taken into account. The circumstances that Kazakhstan argues that the arbitral tribunal considered without necessary invocation thereof constitute evidentiary facts. The arbitral tribunal may, *sua sponte*, take into account evidentiary facts based on the existing material in the proceedings. The arbitral tribunal correctly took into account applicable law and international law principles.

KazAzot

The arbitral tribunal based its considerations regarding KazAzot on circumstances that were invoked by the parties. The Investors argued that Timur Kulibayev, the son-in-law of Kazakhstan's President, controlled KazAzot and that international legal principles regarding state liability are applicable to KazAzot's decision not to execute the so-called tripartite agreement. (See paragraphs 639, 674 and 1094 of the arbitral award.) Even if the parties handled KazAzot as a question concerning liability *per se* and the size of the

damages, the arbitral tribunal enjoys discretion to assess it as an issue of liability. The arbitral tribunal correctly applied international law and did not fail to take anything into account.

Interfax

The arbitral tribunal's assessment of the question of Kazakhstan's liability for the press release from Interfax constituted a legal assessment within the scope of the arbitral tribunal's jurisdiction. The arbitral tribunal did not assess a non-invoked circumstance. The Investors had argued that the press release from Interfax was the result of state involvement and was part of a major campaign directed against KPM and TNG. (See paragraphs 348, 1122, 1335 and 1339 of the arbitral award.)

The financial police's classification of pipelines

On the question of the decision by the Kazakhstan financial police regarding the classification of pipelines, the arbitral tribunal based its decision on circumstances invoked by the Investors. The Investors had argued that on 10 December 2008 the financial police notified the Deputy Prime Minister that it had decided that KPM's and TNG's pipelines comprised trunk pipelines and not field pipelines; see paragraph 343 of the arbitral award. In a submission, Kazakhstan admitted that a letter from the financial police to the Deputy Prime Minister stated that the financial police had decided that the pipelines in question were trunk pipelines. The arbitral tribunal was entitled to take into account the admission as an evidentiary fact; see paragraph 990 of the arbitral award.

The Tristan bonds

On the issue of the Tristan bonds and the value of the companies KPM and TNG, the arbitral tribunal based its decision on circumstances invoked by the parties. The Investors had argued that they continued to be liable for the Tristan bonds and that, from awarded damages, they would be forced to pay outstanding debts under the Tristan bonds; see paragraphs 1752–1758 of the arbitral award. Kazakhstan admitted that 'enterprise value' was a correct valuation method, in the event the Investors were obliged to make payment to the bondholders. Since the arbitral tribunal held that this was the case, it was correct that the parties were in agreement as to which valuation method should be applied; see paragraphs 1769–1771 of the arbitral award. Kazakhstan

was entitled to reconsider its admission, but the arbitral tribunal was nevertheless free to take into account the evidentiary weight to be accorded to the previous admission.

Valuation method

On the issue of the damages related to the Tolkyn and Borankol fields, the arbitral tribunal based its decision regarding the size of the damages on an alternative calculation which Kazakhstan introduced and described as appropriate; see paragraph 1625 of the arbitral award.

The arbitral tribunal did not base its assessment on a formal admission by Kazakhstan but, rather, conducted an assessment of the evidence, which is a substantive issue.

Consequently, the arbitral tribunal did not exceed its mandate or commit any procedural irregularity which probably influenced the outcome of the case.

4. THE EVIDENCE

The parties have invoked relatively extensive evidence, both oral and in writing. With respect to oral evidence, at the request of Kazakhstan the testimony was heard of certified engineer Ernst Kallweit, the project manager Franjo Zaja, authorised public accountant Thomas Gruhn, Professor Thomas Grant and attorney Dr Horacio A. Grigera Naón. At the request of the Investors, the testimony was heard of attorneys Kenneth R. Fleuriet, Johan Gernandt and Gary B. Born.

5. REASONS FOR THE JUDGMENT

5.1 *Outline of the Court of Appeal's reasons*

The case concerns invalidity and the challenge of an arbitral award by which the arbitral tribunal considered claims for compensation brought by the Investors against Kazakhstan as a consequence of investments made by the Investors within the territory of Kazakhstan. Kazakhstan's case is based on the argument that the arbitral award is invalid since the award *per se*, or the manner in which it arose, is manifestly incompatible with the fundamental principles of Swedish law (*public policy*).

Kazakhstan has also argued that the arbitral award should be set aside on the ground that it is not covered by any valid arbitration agreement between the parties and since one of the arbitrators was appointed in an incorrect manner. Also, Kazakhstan has argued that, in any event, the award is to be set aside on the grounds that the arbitrators have exceeded their mandate in many respects and that a number of procedural irregularities occurred that have influenced the outcome of the case.

To begin with, the Court of Appeal will present a description of the general, legal starting points for the Court of Appeal's assessment of the grounds invoked by Kazakhstan in respect of invalidity and the setting aside of the arbitral award. However, in section 5.3.2 the Court of Appeal will make a composite assessment of the prerequisites for a valid arbitration agreement in relation to Art. 26 ECT.

Following a description of the legal starting points for the assessment, the Court of Appeal will consider Kazakhstan's action based on the substantive circumstances invoked by Kazakhstan. The Court of Appeal will conduct the assessment according to the order in which Kazakhstan has chosen to present its grounds for its action, as are set forth in the description of Kazakhstan's case in section 3.1 above.

Finally, the Court of Appeal will also present its summarised conclusions from the decisions made and its summarised assessment of the grounds invoked by Kazakhstan in support of the arbitral award being declared invalid or set aside.

Lastly in the reasons for the judgment, the Court of Appeal will present its assessment on the matter of litigation costs.

5.2 *Legal starting points for the Court of Appeal's assessment*

5.2.1 Public policy as a ground for invalidity

Under section 33, first paragraph, subsection 2 of the Arbitration Act, an arbitral award is invalid if the award, or the manner in which the award arose, is manifestly incompatible with the fundamental principles of Swedish law.

Swedish law adopts a restrictive approach to the possibility of having an award declared invalid pursuant to the aforementioned provision. In the preparatory works to the provision, it is stated that it is intended to cover only highly objectionable cases and that, as a consequence of its narrow ambit, application of the provision is very rarely relevant and covers cases where fundamental principles of law of a substantive or procedural nature have been disregarded (see Govt. Bill 1998/99:35, pp. 142 and 234). In this context, it can also be mentioned that the Arbitration Institute of the SCC, in its handbook, expresses the view that the concept of public policy is to be interpreted extremely narrowly and applied when particularly objectionable cases are involved in which elementary principles have been ignored (see Öhrström, Arbitration Institute of the Stockholm Chamber of Commerce – a Handbook and commentary on the arbitration rules, 2009, p. 80). Furthermore, it follows from the decision of the Supreme Court in the case reported in NJA 2015, p. 433 that if the parties' evidence supports that an award clearly violates fundamental principles of law, the court should, *sua sponte*, draw the attention of the parties to such fact and afford them an opportunity to present in detail their views on the matter.

In the preparatory works to the Arbitration Act, the following examples are mentioned as to when an award may be deemed manifestly incompatible with fundamental principles of Swedish law (*supra*, Govt. Bill, p. 141 *et seq*). This is deemed to be the case when the arbitral tribunal has considered an issue that a court of general jurisdiction would decline to entertain as comprising a claim based on gambling or criminal activity (e.g. an obligation to pay an agreed bribe). Other cases stated are where a party, through an award, has been ordered to carry out performance which is prohibited by law or that the award has been of such a penal nature that it cannot be deemed acceptable. An example is also mentioned of the arbitral tribunal having determined a dispute without taking into consideration a mandatory rule of law for the benefit of a third party or a public interest (*supra*).

By its reference to the 'manner in which the award arose', the provision in section 33, first paragraph, subsection 2 of the Arbitration Act regarding public policy also contemplates fundamental legal principles of a procedural nature. An example provided in the preparatory works as to when such a situation might arise is that the award has

come about due to a crime, e.g. following a threat against, or the bribing of, an arbitrator (*supra*, Govt. Bill, p. 142).

Arbitral awards that are based on false evidence might possibly also be covered by the concept of public policy (see the Arbitration Committee's report, SOU 1994:81, p. 182). The Arbitration Committee considered the introduction of an express statutory provision whereby an award might be set aside upon the action of a party if a document invoked as evidence was forged or distorted or if any person other than a party or a representative of a party provided deliberately untrue testimony, and the document or the testimony could be assumed to have influenced the outcome of the case (see *supra*, section 6.5). However, the Committee considered that making the provisions on new trial (Sw. *resning*) fully applicable to arbitral awards would excessively conflict with the aim that arbitration should lead to a definitive decision without excessive delay. Accordingly, the Committee presented a proposal which only to a certain extent was in line with the provisions on new trial of the Code of Judicial Procedure (see *supra*, p. 182). However, the Government chose not to implement the proposal of the Arbitration Committee in this respect and primarily based its decision not to introduce the possibility to have an award set aside if false evidence or untrue testimony had influenced the outcome, on the interest in the regulations satisfying, to the greatest extent possible, the demands of the parties for a prompt and efficacious procedure, and to guarantee the finality of an arbitral award (see *supra*, Govt. Bill, p. 150 *et seq*). With this purpose in mind, it was considered to be particularly important to avoid rules which, through their structure, invite challenge actions and create uncertainty as to the validity of the arbitral award over an extended period of time (*supra*). However, the Government referred also to the Committee's conclusion that the situation where false evidence had been presented was probably covered by the public policy concept employed in the UNCITRAL Model Law on International Commercial Arbitration ("The Model Law") and the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*supra*). In legal literature, it has been assumed that in the situation described above, an arbitral award might be deemed invalid on the grounds of public policy in certain exceptional cases (see *supra*, Heuman, p. 600 *et seq*). A reason for this has been stated to be, *inter alia*, endeavours to harmonise Swedish law

with foreign practice . However, it has simultaneously been emphasised that the public policy provision may not be applied in such a manner as to open up a possibility, unlimited in time, to have the arbitral award declared invalid for this reason (see *supra*, Heuman, p. 600).

5.2.2 Excess of mandate and procedural irregularities as grounds for setting aside

Under section 34, first paragraph, subsections 2, 4 and 6 of the Arbitration Act, an arbitral award can also be set aside following a challenge if the arbitrators have exceeded their mandate, if an arbitrator has been appointed in conflict with the agreement between the parties or the Arbitration Act, or if, through no fault of the parties, an irregularity has otherwise occurred in the course of the proceedings which likely has influenced the outcome of the case. The arbitral tribunal's mandate is governed by the arbitration agreement, any agreements between the parties regarding the procedure, and the parties' cases as presented in the arbitration. It may sometimes be difficult to determine the purport of the concept of mandate and whether certain procedural irregularities are to be assessed in accordance with the provision in subsection 2 or whether they are to be assessed in accordance with the general clause in subsection 6, which contemplates other procedural irregularities (see Heuman, *supra*, p. 605 *et seq* and Lindskog, Arbitration. A Commentary, Zeteo, May 2016, commentary on section 34, in point 4.2.3).

In the case reported in NJA 2009, p. 128, the Supreme Court – citing legislative reasons and literature – summarised its view as to when a committed irregularity might be deemed to constitute an excess of mandate or a procedural irregularity. The Supreme Court also stated the demands which might be imposed as regards the reasons for the arbitral award. The Court stated:

> The provision in section 34, first paragraph, subsection 2 of the Arbitration Act, regarding excess of mandate contemplates the parameters for the arbitral tribunal's substantive assessment of the referred question. An example of excess of mandate is that the arbitral tribunal has exceeded the parties' claims; another is that it has based its decision on an operative fact (Sw. *rättsfaktum*) that has not been invoked (Govt. Bill 1998/99:35, p. 145; cf. *inter alia* Lindskog, Arbitration. A Commentary, 2005, p. 960 *et seq*).

> The parties may also limit the scope of the arbitral tribunal's assessment other than through claims and what is invoked. For example, they may restrict the arbitral tribunal's assessment to concern the application of a specific statutory provision, or they may exercise control over the procedure in another restrictive manner. Section 21 of the Arbitration Act provides that the arbitral tribunal must comply with what the parties have decided, unless there is any impediment to doing so. As a general rule, an excess of mandate occurs where such a restricting instruction from the parties has been ignored (Govt Bill, p. 146; cf. Heuman, Arbitration Law, 1999, p. 616).
>
> The situation is different as regards instructions aimed at the manner in which the procedure is to be carried out within the parameters established by the arbitration agreement, the claims, invoked circumstances and adduced evidence. In the event the arbitral tribunal fails to comply with such an instruction, the question is normally one of procedural irregularity under section 34, first paragraph, subsection 6 of the Arbitration Act (see e.g. Heuman, *supra*, p. 652 *et seq* and Lindskog, *supra*, p. 965 *et seq*). - - - There may be various reasons for a provision in the arbitration agreement setting forth that the arbitral award must contain reasons for the award. In the absence of more specific provisions as to the content of the reasons for the award, the parties may also have more or less far-reaching expectations as to the arbitral tribunal's reporting of its considerations. However, a distinction must be drawn between what the parties may, justifiably or not, expect regarding reasoning and what in this respect may be deemed to constitute standard practice among arbitrators, and the question of whether the arbitral tribunal's reasons for the award are so deficient as to constitute grounds for challenging the award.
>
> A presentation of sufficient reasons in an arbitral award constitutes a guarantee of due process since it forces the arbitral tribunal to analyse the legal issues and the evidence. However, where the issue of whether the arbitral award is challengeable is concerned, the interest in the finality of the award must be posited against the value which lies in the reasons for the outcome being deemed complete. A challenge procedure provides no scope for a substantive review of the decisions made by the arbitration tribunal. For this reason, and since a qualitative assessment of the reasons for the award would give rise to major demarcation difficulties, only a total absence of reasons for an award – or reasons which, in light of the circumstances, must be deemed so incomplete as to be equated with the absence of reasons for the award – will give rise to the existence of a procedural irregularity.

It is common for arbitral tribunals to decide on various procedural matters and on the detailed structure of the arbitration procedure by means of 'procedural orders'. In many cases, a procedural order does not reflect an agreement between the parties establishing parameters for the arbitral tribunal's mandate but, rather, constitutes a procedural decision made by the arbitral tribunal within the scope of the mandate (cf. Born, International Commercial Arbitration, vol. 2, 2014 p. 2230).

Under section 21 of the Arbitration Act, the arbitral tribunal must conduct the proceedings in an impartial, practical and speedy manner and, in so doing, act in accordance with the decisions of the parties in the absence of any impediment to doing so. Thus, in dealing with the case the arbitral tribunal must observe, *inter alia*, the principle of equal treatment which follows from the aforementioned section, i.e. that the parties must be treated equally from a procedural perspective.

Based on the these legal starting points, the Court of Appeal will now proceed to consider the grounds invoked by Kazakhstan in respect of the invalidity and setting aside of the arbitral award.

5.3 *The issue of the invalidity or setting aside of the arbitral award*

5.3.1 Invalidity based on the fraudulent scheme, false evidence, misleading information, etc.

Kazakhstan has argued that the arbitral award and the manner in which it arose violates public policy and invoked the detailed circumstances set forth in section 3.1.2.1.

The Court of Appeal makes the following assessment.

In the arbitration at hand, the Investors claimed that Kazakhstan had breached its obligations under the ECT by violating the investor protection provisions in the ECT and that Kazakhstan was thus liable to pay damages to the Investors, *inter alia* with respect to what was referred to as the LPG plant. It is undisputed in the case that the plant exists and, based on the evidence presented here, it is also clear that investments were made in it. The arbitral award states that Kazakhstan contested the Investors' claims, and consequently the arbitral tribunal made a substantive assessment of the claim. In light of the aforesaid, there is no reason to call into question the existence of an underlying real legal relationship between the parties (cf. the judgment of the Supreme Court in the case reported in NJA 2002, C 45) and, in the Court of Appeal's opinion, a claim such as that presented by the Investors can in no way be compared with a claim over which a court of general jurisdiction would refuse to exercise jurisdiction. Sweden's obligations under the United Nations Convention against Corruption do not lead to any other assessment. Nor does the arbitral award relate to such issues as, in the preparatory works, are otherwise emphasised as constituting typical examples of when an arbitral award may be deemed contrary to public policy. Already based on these conclusions, in the Court of Appeal's opinion, it is thus entirely clear that Kazakhstan's arguments in this respect cannot result in the assessment that the arbitral award *per se* manifestly violates fundamental principles of Swedish law and is thereby invalid.

In the arbitration, the Investors invoked evidence in the form of witness testimony, witness affidavits and expert reports to prove that the investment costs in the LPG plant had amounted to the alleged sum. However, the arbitral award states that the arbitral tribunal based its assessment of the damages with respect to the LPG plant on the so-called indicative bid which had been submitted by KMG; see paragraphs 1746–1748 in the award.

As the Court of Appeal has described above, the scope of application of the public policy provision is very narrow and the legislature has also clearly decided not to introduce into the Arbitration Act any provision corresponding to the concept of new trial. Accordingly, in the Court of Appeal's opinion there can be no question of declaring an arbitral award invalid solely on the ground that false evidence or untrue testimony has occurred, when it is not clear that such have been directly decisive for the outcome (cf. Heuman, *supra*, p. 600 *et seq*). However, situations are conceivable in which the invocation of false evidence may have an indirect impact on the arbitral tribunal in its assessment of the dispute. In light of the narrow scope of application and the restrictive approach that should pertain as regards opening up a new substantive assessment of the arbitrated dispute within the scope of challenge proceedings, in the Court of Appeal's opinion there should be no question of allowing such an indirect impact on the arbitral tribunal to result in the arbitral award being deemed invalid, except when it appears to be obvious that such indirect influence has been of decisive significance for the outcome in the case.

Since the arbitral tribunal based its assessment on the indicative bid, the evidence invoked by the Investors in the form of witness testimony, witness affidavits and expert reports regarding the size of the investment cost – which evidence Kazakhstan has claimed was false – has not been of immediate importance for the outcome. In the Court of Appeal's opinion, already in these circumstances, such evidence *per se* – even if it were proven to be false – does not constitute sufficient reason to consider the arbitral award invalid. In the Court of Appeal's opinion, it is also not obvious that this evidence, through indirect influence on the arbitration tribunal, was decisive for the outcome of the case.

Moving on to the question of whether the indicative bid *per se* constituted false evidence, it is undisputed that, prior to the initiation of the arbitration, KMG had submitted the relevant offer of USD 199 million for the LPG plant. Thus, the indicative bid *per se* is not to be regarded as false evidence, even if– through the annual reports for Tristan Oil, KPM and TNG – possibly incorrect information regarding the amount invested in the LPG plant was among the factors that KMG took into account when calculating the size of the offer. Accordingly, the allegedly false information in the annual reports did not directly constitute any basis for the arbitral tribunal's assessment of the value of the LPG plant. Against this background, the invocation of the indicative bid by the Investors did not constitute an invocation of false evidence.

Finally, with respect to Kazakhstan's allegation that, in the arbitration proceedings, the Investors withheld from the arbitral tribunal and Kazakhstan certain information which might have influenced the outcome in the case, the Court of Appeal notes that, in a procedure amenable to out-of-court settlement such as arbitration, it cannot be demanded that a party provide the opposing party with information which speaks against the party's own case. There is no room to regard the arbitral award as invalid on this ground, particularly not in light of the very narrow scope of application of the public policy rule.

To summarise, the Court of Appeal finds that none of the circumstances argued by Kazakhstan in this respect – neither separately nor together – are such that the arbitral award or the manner in which it arose are manifestly incompatible with fundamental principles of Swedish law.

5.3.2 Setting aside on the ground that the arbitral award is not covered by a valid arbitration agreement

In this respect, Kazakhstan has argued that the arbitral award is not covered by a valid arbitration agreement between the parties since the Investors submitted their request for arbitration only five days after KPM's and TNG's agreement on exploitation rights was terminated, and thus in violation of the mandatory provision in Art. 26 (2) ECT regarding three-month cooling-off negotiations. Kazakhstan has invoked the detailed circumstances set forth in section 3.1.2.2.

The Court of Appeal makes the following assessment.

In order for an arbitral tribunal to be competent to try a dispute, a valid arbitration agreement must be in place between the parties to the dispute. In the present case, the question of whether there was an arbitration agreement between the Investors and Kazakhstan is to be assessed on the basis of Art. 26 ECT, which the Investors invoked as basis for the arbitral tribunal's jurisdiction in their request for arbitration against Kazakhstan submitted to the SCC on 26 July 2010.

The ECT is a multilateral investment treaty between states. Art. 26 ECT contains provisions concerning the resolution of disputes between a contracting state and an investor from another contracting state. The relevant parts of the article are worded as follows:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
> (a) to the courts or administrative tribunals of the Contracting Party to the dispute;
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> (c) in accordance with the following paragraphs of this Article.
>
> (3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. […]
>
> (4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: […]
>
> (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

Art. 26 ECT includes an offer from each of the contracting states to investors from another contracting state to resolve certain disputes in accordance with the ECT, *inter alia* by way of arbitration. In an individual case, an arbitration agreement arises between a state and an investor which gives an arbitral tribunal jurisdiction to try a dispute between the parties, by virtue of the investor accepting the state's offer, which takes place in the form of a request for arbitration against the state.

The parties disagree on the interpretation of the ECT as to whether the question of a state's offer to arbitrate under Art. 26 includes a condition that the prerequisites set forth in item (2) – i.e. that the dispute between the parties cannot be settled within a period of three months from the date on which either party requested amicable settlement – must be satisfied at the time of an investor's request for arbitration against the state in order for an arbitration agreement to arise between the parties through the request for arbitration. The question is thus whether the provision imposes a condition that must be met in order for an arbitral tribunal to be competent to try the dispute.

Since the ECT is a treaty between states, the interpretation of Art. 26 ECT must be made in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Art. 31 contains a general rule of interpretation stating that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The wording of the treaty always constitutes the starting point for the interpretation. If the wording is clear, it in principle also constitutes the end point for the interpretation. A treaty's object and purpose are not an independent means of interpretation, but rather a part of the interpretation process that must take place under Art. 31 in order to understand the prevailing meaning of the treaty (cf. the Svea Court of Appeal's judgment dated 18 January 2016 in case no. T 9128-14, with references therein).

Art. 32 of the Vienna Convention provides that recourse may be had to supplementary means of interpretation, including the preparatory works of the treaty and the circumstances at its formation, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when an interpretation under Art. 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

In accordance with the aforesaid, the point of departure for the interpretation of Art. 26 ECT must be the wording of the provision.

In Art. 26 (1) ECT it is stated, by way of introduction, that disputes between a contracting state and an investor must, if possible, be settled amicably. Under item (2),

if a dispute cannot be settled in that manner within three months from the date on which any of the parties requested amicable settlement, an investor may choose to submit the dispute for various types of dispute resolution, for instance arbitration in accordance with the subsequent items in the article.

The wording of the relevant provisions fails to provide any answer as to what is possibly incumbent on the parties during the imposed three-month period, for example as regards the attempts that must be made to reach an amicable settlement. Nor is it stated what is to apply if, already before the end of that period, it is clear that the dispute cannot be amicably settled within three months. In the Court of Appeal's opinion, the aforesaid circumstances indicate that the provisions are not intended to impose conditions for an arbitral tribunal's jurisdiction. This interpretation gains further support when considering the structure of Art. 27, which concerns dispute resolution between two contracting states. Under that provision, a state may refer a dispute to *ad hoc* arbitration if the dispute cannot be resolved within a reasonable time through diplomatic channels. The difficulties associated with the assessment of what constitutes 'reasonable time' indicate that a condition for the arbitral tribunal's jurisdiction is not at issue. In the Court of Appeal's opinion, the fact that the provisions in Articles 26 and 27 ECT have a similar structure indicates that they should be interpreted in the same way.

Even if it is clear that the object behind the provisions in Art. 26 (1) and (2) is that the parties shall have a certain time at their disposal to reach an amicable settlement before arbitration is commenced, the Court of Appeal notes that the provisions do not expressly address the conditions for a state's consent to arbitration and the conditions in order for an arbitration agreement to arise between the parties. That question is however addressed in item (3) (a), which states that each contracting state gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of the article. Reservation is made only in respect of the exceptional cases set forth in items 3 (b) and (c), which are not relevant in the present case. The Court of Appeal notes that item (3) contains no reference to item (2) and the conditions stated therein. In the Court of Appeal's opinion, the reference to the state providing its consent to arbitration "in accordance with the provisions of this Article"

cannot be interpreted so as to mean that additional conditions are thereby imposed for the state's consent.

To summarise, the Court of Appeal makes the assessment that the wording and structure of Art. 26 ECT indicate that a state's consent to arbitration does not include a condition that the prerequisites set forth in item (2) must be satisfied at the time of an investor's request for arbitration against the state, in order for an arbitration agreement to arise between the parties through such request. However, the mere wording of the article cannot be deemed to provide an unequivocal answer to this question.

The Court of Appeal notes that in legal literature and among international arbitral tribunals that have been required to address the issue, it is a matter of debate whether or not provisions of the instant type – which stipulate that arbitration may be commenced only after a certain period of time has elapsed from a party having requested amicable settlement or from the occurrence of the events that gave rise to the dispute – impose conditions that must be met in order for an arbitral tribunal to be competent to try a dispute. In the literature, support is found for both positions (see the expert opinion of Gary B. Born dated 19 August 2015, pp. 5 *et seq* and 10, as well as the expert opinion of Dr. Thomas D. Grant dated 14 July 2015, pp. 19 and 39 *et seq*, with references therein).

Based on what is stated in the aforementioned expert opinions, the Court of Appeal further notes that among international arbitral tribunals there appears to be no uniform practice on the issue of the interpretation of Art. 26 and similar provisions in other investment protection treaties (see the expert opinion of Gary B. Born dated 19 August 2015, pp. 13–20 and the expert opinion of Dr. Thomas D. Grant dated 14 July 2015, pp. 23–38, with references therein). However, the Court of Appeal notes that, in the opinions, no example has been raised of an arbitral tribunal, when applying the ECT, having dismissed an investor's action on the ground that the investor had failed to comply with the provisions of Art. 26 (2) ECT. Furthermore, only a few decisions presented have concerned the application of other investment protection treaties where an investor's action has been dismissed on the present basis. Thus, even if it is not possible to find a uniform approach in the literature or in case law from international

arbitral tribunals on the question of how Art. 26 ECT is to be interpreted in the currently relevant respect, in the Court of Appeal's opinion there appears to be a certain preponderance in favour of the view that such provisions are not to be deemed to constitute conditions for the arbitral tribunal's jurisdiction.

Accordingly, since neither the wording and structure of Art. 26 ECT nor legal literature and international case law provide necessary support for the interpretation, the Court of Appeal must also consider the object and purpose of the provision.

The international dispute resolution provisions in the ECT have come about in light of the unease that existed regarding the neutrality, skill and efficiency of the national courts in some of the contracting states (Energy Charter Secretariat, The Energy Charter Treaty: A Reader's Guide, 2002, p. 51). The object with the ECT providing alternative methods for dispute resolution before international arbitral tribunals included contributing to increased confidence among investors and promoting the flow of investments between the contracting states (*supra*, p. 51). Thus, in the Court of Appeal's view, the object of the dispute resolution provision in Art 26 ECT may primarily be deemed to be to provide investors with the possibility to resolve disputes with a contracting state in accordance with the ECT by means of international arbitration.

Dispute resolution through arbitration is aimed at providing the parties with a prompt and final determination of their dispute. These interests have been raised in legal literature and by international arbitral tribunals as arguments against interpreting provisions whereby the parties are required, during a certain period of time, to attempt to settle a dispute amicably before arbitration may be requested, as a condition that must be satisfied in order for an arbitral tribunal to be competent to try the dispute (see the expert opinion of Gary B. Born dated 19 August 2015, p. 5 *et seq* with references therein). In this context, it has been emphasised *inter alia* that imposed time periods have often expired when the arbitral tribunal considers the issue of its jurisdiction. If, in such a situation, the arbitral tribunal were to dismiss the investor's action because the arbitration had been commenced before the time period had expired, the investor can

immediately bring a new action. In such a case, dismissal would only lead to the proceedings being unnecessarily delayed.

It can also be noted that it would entail an unjustified delay of an investor's possibility to have a claim against a state under the ECT tried by way of international arbitration to require that the investor wait bringing an action for three months from the date that a request for amicable settlement had been made, when already prior to the expiry of such period of time it is clear that conditions do not exist for reaching a settlement.

Furthermore, the arbitral tribunal's assessment of its jurisdiction could have such a scope as to result in an undesirable delay of the proceedings. As an example, it can be mentioned that the arbitral tribunal would have to consider which demands that are to be imposed as regards a party's request for an amicable settlement and whether the party requesting arbitration has first made a sincere attempt to reach an amicable settlement. As previously stated, Art. 26 (1) and (2) provide no answer to these questions. The issue of the arbitral tribunal's jurisdiction might also be referred to a court for adjudication (cf. section 2 of the Arbitration Act), which can further delay the procedure.

The parties' interest in an arbitral award resulting in a final determination of their dispute also militates against viewing a provision that arbitration must be preceded by settlement negotiations during a certain period of time, as constituting a condition for the arbitral tribunal's jurisdiction. Otherwise, an arbitral award might be challenged on this ground and later set aside if the court which considers the challenge action were to make a different assessment on the issue of jurisdiction than that made by the arbitral tribunal. Furthermore, for the same reasons enforcement of the arbitral award may be refused long after the arbitration has ended.

In this context, the Court of Appeal also notes that the objects underlying the provisions in Art 26 (1) and) (2) ECT can be satisfied at least in part also after an arbitration has commenced. These objects may be deemed primarily to encourage the parties to attempt to reach an amicable settlement with the aim of avoiding unnecessary disputes, but also to provide the parties with time for preparation pending a possible dispute. This may be achieved by way of the arbitral tribunal staying the proceedings for a certain period of

time in order to afford the parties the possibility to conduct settlement negotiations and to give them time to prepare. Such managing appears to be common among international arbitral tribunals and occurred also in the arbitration between the Investors and Kazakhstan.. Thus, the provisions are not rendered ineffective even if they cannot be deemed to impose conditions regarding the arbitral tribunal's jurisdiction, but rather can be addressed by the arbitral tribunal within the framework of the arbitration.

In light of the foregoing, the Court of Appeal makes the assessment that weighty reasons militate in favour of an interpretation of Art. 26 ECT whereby the conditions set forth in item (2) do not constitute conditions that must be satisfied at the time of an investor's request for arbitration, in order for an arbitration agreement – conferring upon the arbitral tribunal its jurisdiction to try the dispute – to arise by virtue of the request. Under item (3), the contracting states have given their unconditional consent to the settlement of certain disputes under the ECT by arbitration. In the Court of Appeal's opinion, in the absence of express support in the wording of the provision, additional conditions should not be imposed in order for an arbitration agreement to arise when an investor accepts the offer by requesting arbitration against the state. Such support is lacking in the instant case.

To summarise, the interpretation of Art. 26 ECT made by the Court of Appeal means that an arbitration agreement between the Investors and Kazakhstan, which gave the arbitral tribunal jurisdiction to try the dispute between the parties, arose by way of the Investors' request for arbitration against Kazakhstan which was submitted to the SCC on 26 July 2010, irrespective of whether or not the conditions stated in item (2) were satisfied at the time of the request. Accordingly, the arbitral award is not be set aside on the basis that it is not covered by a valid arbitration agreement between the parties.

5.3.3 Invalidity or setting aside due to the appointment of the arbitrators

In this respect, Kazakhstan has argued both that the arbitral award is invalid under section 33, first paragraph, subsection 2 of the Arbitration Act, and that there are grounds to set aside the award under section 34, first paragraph, subsections 4 or 6 of the Arbitration Act. To summarise, Kazakhstan has essentially invoked that Kazakhstan

was never afforded an opportunity to appoint an arbitrator, that the deadlines for the submission of a response were too short, and that Kazakhstan was never afforded an opportunity to comment on the appointment of Sergei Lebedev. According to Kazakhstan, the SCC thereby violated not only fundamental principles of Swedish law but also its own rules and the Arbitration Act. Kazakhstan has also argued that, in any event, procedural irregularities have occurred that have influenced the outcome of the case. In connection with this, Kazakhstan has emphasised that the arbitrator Sergei Lebedev was passive during the arbitration.

The Investors have objected that there is no reason for declaring the award invalid or setting it aside. They have added that Kazakhstan forfeited its right to assert any irregularity *and* that – as noted in the arbitral award – in October 2012, Kazakhstan stated that it had no objections to the proceedings.

The Court of Appeal will begin by describing what is shown by the evidence on the events at the SCC in conjunction with the appointment of the arbitral tribunal when Sergei Lebedev was appointed.

On 5 August 2010, the SCC sent the Investors' request for arbitration with annexes to Kazakhstan, together with an order written in English to submit a response no later than 26 August 2010. In the order, reference was made to Article 5 of the SCC's arbitration rules, which were also appended. It was also specifically pointed out that, *inter alia*, Kazakhstan was to comment on the Investors' proposal that the party-appointed arbitrators appoint the chair. In the request for arbitration, the Investors had requested that the arbitral tribunal was to consist of three arbitrators and that, pursuant to Article 13 (3) of the SCC's rules, SCC appoint an arbitrator in the event Kazakhstan failed to appoint an arbitrator. Information about the administrative personnel at the SCC's secretariat, with contact details, was also appended to the order. The document was sent by courier and arrived in Kazakhstan on 9 August and was received by the Ministry of Justice two days later. The response deadline expired 15 days thereafter, however without Kazakhstan having made contact. On 27 August, a reminder, also in English, was sent to Kazakhstan, to submit an answer to the request for arbitration under Article 5 of the SCC's rules. Reference was also made to the order dated 5 August.

Furthermore, Kazakhstan was informed that failure to respond would not prevent the arbitration from moving forward. A new deadline for submitting the answer to the request for arbitration was set to 10 September

The Ministry of Justice in Kazakhstan received the reminder on 1 September, but Kazakhstan failed to make contact by the stated deadline. On 13 September, the Investors requested that the SCC appoint an arbitrator on Kazakhstan's behalf. The request was sent to Kazakhstan on the same day. Ten days later, the SCC appointed Sergei Lebedev as arbitrator on Kazakhstan's behalf. Also, the SCC decided that Stockholm would be the seat of arbitration. Kazakhstan received the decision on 27 September. On the following day, the SCC appointed Karl-Heinz Böckstiegel as chair of the arbitral tribunal. That decision was received by Kazakhstan on 1 October. More than a month later, on 8 November, Kazakhstan gave notice of its counsel in the arbitration, whereupon it reserved the right to raise possible objections to jurisdiction and the arbitration. In a letter to the SCC dated 2 December, objections were raised to the arbitration and to the appointment of the arbitrator Sergei Lebedev. On 15 December, the SCC notified the parties and the arbitrators that the objection to Sergei Lebedev had been rejected. On 27 December, the SCC was notified by Kazakhstan that it maintained its objections to the arbitration and the appointment of Sergei Lebedev.

The Court of Appeal makes the following assessment.

The evidence thus shows that Kazakhstan was afforded an opportunity to submit a response to the Investors' request for arbitration and that Kazakhstan then had the possibility to appoint an arbitrator. However, neither in the order nor in the reminder was it expressly stated that an arbitrator was to be appointed by Kazakhstan. The question is whether Kazakhstan was thereby deprived of its right to appoint an arbitrator. Kazakhstan has referred to the fact that in previous cases under the SCC's arbitration rules, in which Kazakhstan was a party, express orders were given to appoint an arbitrator and information was provided on the consequences of failure to do so. In the Court of Appeal's opinion, it is of importance for the assessment that the currently relevant order made reference to Article 5 of the SCC rules, which were also attached. Under Article 5, where appropriate, the respondent must, in its submission, state the

name and address of the arbitrator appointed by the party. In the request for arbitration, the Investors had requested that the arbitral tribunal consist of three arbitrators, and Article 12 of the SCC rules sets forth that the tribunal shall consist of three members unless otherwise agreed by the parties and unless the SCC decides that the dispute is to be decided by a sole arbitrator. In the instant case, the SCC had not made any such decision. In the Court of Appeal's opinion, by the order and the additional documents attached to it, Kazakhstan received sufficiently clear information that the arbitral tribunal would consist of three arbitrators and that Kazakhstan had the opportunity to appoint one of them.

Kazakhstan has also objected that the deadline for responding to the SCC was too short and that it had difficulty in understanding the documents from the SCC since they were written in English. As regards the length of the deadlines, the Court of Appeal may note that they cannot be deemed to have been unacceptably short, not even when seen from an international perspective. Furthermore, it is of particular importance for the assessment of both the language and time issues that Kazakhstan failed to contact the SCC at all with a request for an extension of time. The first order included the email addresses of the designated administrative officials and international direct telephone numbers. The SCC rules also provide that it is possible for a party to obtain a deadline extension. In this context, it should also be borne in mind the Kazakhstan has previously been a party to arbitrations conducted in English by the SCC.

Moving on to the issue of Kazakhstan never having been afforded an opportunity to comment on the SCC's proposal that Sergei Lebedev be appointed as arbitrator on Kazakhstan's behalf, to begin with it can be noted that the SCC rules do not contain any provision on such a possibility to comment. In the Court of Appeal's opinion, the fact that the SCC did not afford Kazakhstan an opportunity to comment on the appointment of an arbitrator in a situation where Kazakhstan had failed to make contact at all, can in no way be deemed to violate fundamental principles of Swedish law.

To summarise, the Court of Appeal finds that the SCC's procedure in conjunction with the appointment of the arbitrator Sergei Lebedev was not manifestly incompatible with

fundamental principles of Swedish law. Neither on this ground is the arbitral award invalid.

Kazakhstan has also requested that the arbitral award be set aside on the ground that the appointment of the arbitrators took place in violation of the arbitration agreement, i.e. in violation of the SCC's rules, the Arbitration Act, or that some other procedural irregularity occurred in conjunction with the appointment of the arbitrators that influenced the outcome. In this regard, Kazakhstan has referred to the legal challenge grounds set forth in section 34, first paragraph, subsections 4 or 6 of the Arbitration Act. The provision in the second paragraph of the section – whereby a party may lose its right to rely on a circumstance by participating in the proceedings without objection or by otherwise being deemed to have waived the right to raise the objection – is also of importance in this context. The rule in this section is based on the general principle that a party cannot assert a procedural irregularity if it has previously declined to do so. Thus, a dissatisfied party must be active and protest in order to avoid forfeiting its right to raise the objection at a later stage (see *inter alia* Heuman, *supra*, p. 286). The Investors have claimed that Kazakhstan has lost its right of challenge in accordance with the provision in the second paragraph of the section. The Court of Appeal will commence its assessment in this respect by deciding on that issue.

To begin with, it can be noted that almost three months elapsed from the date when Kazakhstan received the SCC's first order until it commented for the first time. During the intervening period, Kazakhstan also received the SCC's decision regarding the appointment of Sergei Lebedev. Thus, a relatively long period of time elapsed before Kazakhstan commented for the first time, but it then did raise the objections to, *inter alia*, the proceedings. The Arbitration Act prescribes no fixed timeframe within which objections must be raised. In an earlier decision (see RH 2009:55, with further references to, *inter alia*, the preparatory works and legal literature), the Court of Appeal has stated that jurisdictional objections in arbitrations must be presented no later than in the statement of defence. In legal literature it has been set forth, by reference to the Model Law, that the objection must be presented without unreasonable delay (see Heuman, *supra*, p. 292 *et seq*). Since Kazakhstan registered a reservation in respect of possible objections when its counsel gave notice in the proceedings and since the

objection was raised when the first submission was made to the SCC and maintained after the SCC had rejected the request for another arbitrator in place of Sergei Lebedev, in the Court of Appeal's opinion Kazakhstan cannot be deemed to have waived its right to now criticise stated possible irregularities in the arbitration. In the Court of Appeal's opinion, in light of Kazakhstan's explanation that the statement related solely to the proceedings before the arbitral tribunal, the notation in paragraph 117 of the arbitral award does not show that Kazakhstan thereby waived or withdrew the objection to the appointment of the arbitrators.

Accordingly, the Court of Appeal will proceed to consider the question of whether such a procedural irregularity occurred in conjunction with the appointment of Sergei Lebedev as referred to in section 34, first paragraph, subsection 4 of the Arbitration Act. The provision primarily contemplates an arbitrator having been appointed contrary to agreed qualifications, but deviations from procedural rules in an arbitration agreement may also be covered. The principle of equal treatment of the parties, as expressed in section 21 of the Arbitration Act, is also of importance. The principle applies not only to the arbitrators but also to the procedure by which they are appointed.

In the instant case it can be noted that, by the arbitration agreement, it was determined that the SCC's rules would govern the arbitration, including the appointment of the arbitrators. Rules governing the commencement of the arbitration, including the structure of an answer to the request for arbitration, are set forth in Articles 2–11 of the SCC rules. Rules regarding, *inter alia*, the composition of the arbitral tribunal and its appointment are set forth in Articles 12–17 of the SCC rules. Here, Article 13 (3) is of particular interest since it governs cases where the arbitral tribunal is to consist of several members. The provision states that "[w]here a party fails to appoint arbitrator(s) within the stipulated time period, the Board shall make the appointment." However, no applicable time period is stated. Article 13 also contains provisions governing matters to be taken into account when the SCC appoints an arbitrator, for example language and nationality. However, as already mentioned, it is not stated that the party must also be afforded an opportunity to comment on who is to be appointed when the SCC appoints an arbitrator on behalf of that party. In the Court of Appeal's opinion, the evidence in the case regarding the SCC's case management does not show that, in relation to the

SCC's rules or the Arbitration Act, any procedural irregularity was committed when the arbitration was initiated and when Sergei Lebedev was appointed. Accordingly, the principle that the parties must be treated equally can also not be deemed violated, particularly taking into consideration that Kazakhstan received all relevant documents and was afforded due time to comment. Thus, based on section 34, first paragraph, subsection 4 of the Arbitration Act, no ground for setting aside the arbitral award exists in the instant respect.

Kazakhstan has also argued that, in conjunction with the appointment of the arbitrators, procedural irregularities occurred that influenced the outcome of the case and that the arbitral award must therefore be set aside pursuant to section 34, first paragraph, subsection 6 of the Arbitration Act. It is not entirely clear to the Court of Appeal which other circumstances in the managing of the case that pertain to the appointment of the arbitrators, other than those which have been invoked and which the Court of Appeal has been required to consider in relation to the provision in section 34, first paragraph, subsection 4 of the Arbitration Act. However, in conjunction with Kazakhstan having assailed the procedure in connection with the appointment of the arbitrators, Kazakhstan has argued that Sergei Lebedev adopted a very passive role during the arbitration and that he was thereby unable to ensure that Kazakhstan's case was correctly understood. However, in the Court of Appeal's opinion the evidence lends no support for Kazakhstan's allegation in this regard. Therefore, in conclusion the Court of Appeal is able to establish that, also in other respects, Kazakhstan has failed to prove that there occurred any procedural irregularity of the arbitral tribunal based on the appointment of Sergei Lebedev as arbitrator.

To summarise, the Court of Appeal has thus reached the conclusion that Kazakhstan has failed to prove that, in conjunction with the appointment of the arbitrators, such circumstances occurred as might constitute grounds for the invalidity of the arbitral award pursuant to section 33, first paragraph, subsection 2 of the Arbitration Act or for setting aside the award under, section 34, first paragraph, subsections 4 or 6 of the Arbitration ACt.

5.3.4 Setting aside on the ground of excess of mandate or procedural irregularity

5.3.4.1 Taras Khalelov's witness statement and testimony

Here, Kazakhstan has invoked the detailed circumstances set out in section 3.1.2.4 under the heading "Taras Khalelov's witness statement and testimony". Kazakhstan's allegations relate to the part of the arbitration and the arbitral award, in which the arbitral tribunal determined the size of the damages; see paragraphs 1743–1748 of the arbitral award.

As the Court of Appeal has noted above, the arbitral tribunal's determination of the size of the damages was based on the indicative bid from the state-owned Kazakh company KMG. However, there was also other evidence, including witness statements. At the request of Kazakhstan, testimony was given by the director Taras Khalelov on 29 January 2013. Taras Khalelov had also submitted a written witness statement to the arbitral tribunal. In this regard, Kazakhstan has argued that the arbitral tribunal failed to take into account the statements from Taras Khalelov, which according to Kazakhstan constitutes a procedural irregularity that has influenced the outcome of the case. According to Kazakhstan, the arbitral tribunal also took into account evidence in the form of Internet links that were not invoked in the case, which according to Kazakhstan constitutes an excess of mandate. The documents to which the Internet links referred were written in Russian.

The Court of Appeal makes the following assessment.

To begin with as regards Taras Khalelov's statements, the arbitral tribunal's minutes from the hearing on quantum held on 29 January 2013 show that Taras Khalelov testified on the day in question and that he also was given opportunity to comment on his written statement. According to the information provided by Taras Khalelov, Kazakhstan had no plans to complete the LPG plant and no such work had been carried out. In the Court of Appeal's opinion, the information provided by Taras Khalelov was addressed by the arbitral tribunal in paragraph 1745 of the arbitral award, in which reference is made to "Respondent's and their experts' conclusion", which as stated did not convince the arbitral tribunal. Admittedly, in paragraph 157 of the arbitral award,

the arbitral tribunal did not note that Taras Khalelov had testified on the day in question. However, this does not constitute any procedural irregularity within the meaning of section 34, first paragraph, subsection 6 of the Arbitration Act and the oversight also cannot lead to the conclusion that it is proven that, in its assessment, the arbitral tribunal failed to take into account Taras Khalelov's testimony. The evidence also fails to show that the Investors had withdrawn the claim that Kazakhstan had plans to complete the LPG plant.

With respect to the Internet links, it is also evident from paragraph 1745 of the arbitral award that the arbitral tribunal attached importance to documents that could be studied via the relevant links. However, the links were referred to and described in the FTI report, which was invoked by the Investors in the arbitration. According to the Investors, the documents were printed out and appended to the FTI report. In paragraph 1745, reference is also expressly made to the places in the FTI report where web addresses to the links were set forth. Thus, there is no justification for the allegation that the tribunal took into account evidence that had not been invoked.

However, in the FTI report the relevant web addresses were written in Russian and the documents to which the addresses referred were also written in Russian. Kazakhstan has argued that it constituted a procedural irregularity in the arbitration to invoke documents that were not translated into English, which was a requirement under "Procedural Order No. 1". In light of what the Court of Appeal has stated in the legal starting points for the assessment, there can normally be no question of an excess of mandate when the arbitral tribunal disregards what has been established in "Procedural orders". Thus, the question is whether a procedural irregularity has occurred. The Court of Appeal notes that it is evident from paragraph 1745 of the arbitral award that the arbitral tribunal also based its assessment on what was stated in section 7.7 of the FTI report, which was written in English. Therefore, in any event Kazakhstan has failed to show probable cause that the possible procedural irregularity which the arbitral tribunal's reference to the Russian Internet links may have constituted has influenced the outcome of the case.

To summarise, the Court of Appeal has thus found that, in this respect, Kazakhstan has failed to prove the occurrence of any excess of mandate or procedural irregularity which might constitute a basis for setting aside the arbitral award.

5.3.4.2 Kazakhstan's expert evidence and witness evidence

Here, Kazakhstan has relied on the detailed circumstances set out in section 3.1.2.4 under the heading "Kazakhstan's expert evidence and witness evidence". Kazakhstan has claimed that the arbitral tribunal failed to take into account large parts of the expert evidence and witness evidence invoked by Kazakhstan on several matters. Kazakhstan has also argued that, in certain parts, the award fails to state how the arbitral tribunal made its assessments, or that the arbitral tribunal's assessments are extremely brief.

The Court of Appeal makes the following assessment.

To begin with the issue of whether the arbitral tribunal took into account statements from Anatoly Didenko, Kadirbek Latifov and Salamat Baymaganbetov regarding the content of Kazakh law on the classification of pipelines, the parties are in agreement that the statements were invoked by Kazakhstan in the arbitration. The fact that the arbitral tribunal, in its reasons for the award, did not describe each and every one of the invoked pieces of evidence or failed to mention a particular piece of evidence does not prove *per se* that the arbitral tribunal failed to observe the invoked evidence and take it into account in its assessment. Even less is it possible to draw the conclusion – from the fact that the arbitral tribunal's assessment differed from that which a party believes is apparent from a piece of evidence – that the arbitral tribunal failed to take the evidence into account in its assessment. In the Court of Appeal's opinion, the evidence fails to support Kazakhstan's allegation that the arbitral tribunal omitted to take the aforementioned evidence into account in its assessment. It is also not proven that the arbitral tribunal applied any law other than Kazakh law in the matter.

With respect to the opinion of Kulyash Ilyassova on the content of Kazakh private law, the parties are in agreement that it was invoked by Kazakhstan. The statement has been taken into account in paragraphs 993 and 1368 of the arbitral award. The circumstances

referred to by Kazakhstan as a basis for its argument in this regard do not constitute sufficient support for it being deemed proven that an excess of mandate or a challengeable procedural irregularity has occurred.

With respect to the opinions of Tomas Balco and Nurlan Rahimgaliev on the content of Kazakh tax law, it is evident from both the arbitral award and invoked minutes from the arbitral tribunal's hearing on quantum that the arbitral tribunal has observed the opinions. As the Court of Appeal has stated above, the fact that the arbitral tribunal has not mentioned a particular piece of evidence in the reasons for the award does not mean that the arbitral tribunal has failed to read and take such evidence into account. The fact that the evidence is not expressly mentioned in the reasons for the award may, in fact, just as well reflect the arbitral tribunal's active decision on how the arbitral tribunal intended the reasons for the award to be set out on the issue in question. The mere fact that a particular piece of evidence is not mentioned in the reasons for the award thus does not show that the arbitral tribunal failed to take such evidence into account in its assessment. In this regard, too, Kazakhstan has thus failed to prove the occurrence any excess of mandate or procedural irregularity.

Kazakhstan has also argued that the arbitral tribunal failed to take into account an opinion from the accounting firm Deloitte. However, paragraph 1456 of the arbitral award shows that the arbitral tribunal took the opinion into account but, on the other hand, did not share the conclusion reached in the opinion regarding the financial position of the companies KPM and TNG. In this regard, too, it is thus not proven that any excess of mandate or challengeable procedural irregularity occurred.

Finally, Kazakhstan has alleged that the arbitral tribunal, without providing reasons, disregarded the geological experts from the consulting firm of Gaffney, Cline & Associates invoked by Kazakhstan. Kazakhstan has also argued that the arbitral tribunal addressed the invoked study in excessively scantily worded reasons for the award. The minutes from the arbitral tribunal's hearing on quantum show that the experts from Gaffney, Cline & Associates testified during the arbitration. Paragraph 1624 of the arbitral award sets out the arbitral tribunal's starting points for its assessment of the various expert opinions. In the subsequent paragraph, the arbitral tribunal considered the

various expert opinions, after which the arbitral tribunal reached a final decision. The arbitral tribunal's reasons for the award in the currently criticised aspects are far from being so deficient that the wording of the reasons might be deemed to constitute a procedural irregularity (see the case reported in NJA 2009, p. 128). Nor has the existence of any excess of mandate been proven (see the aforementioned precedent).

To summarise, in this regard, too, the Court of Appeal finds that Kazakhstan has failed to prove the occurrence of any excess of mandate or procedural irregularity which might constitute grounds for setting aside the arbitral award.

5.3.4.3 Consideration of objections regarding deduction from damages, etc.

In this regard, Kazakhstan has relied on the detailed circumstances set out in section 3.1.2.4 under the heading "Non-considered objections regarding deductions from damages". Here, Kazakhstan has argued that the arbitral tribunal failed to take into account certain objections raised by Kazakhstan regarding amounts which should be deducted from the damages and regarding the quantum of damages. Kazakhstan has also argued that the reasons for the award in this regard are so deficient as to be equated with the lack of any reasons for the award.

The Court of Appeal makes the following assessment.

First of all, as regards the question of deduction of revenues that the Investors purportedly received following the valuation date determined by the arbitral tribunal, it is evident that the arbitral tribunal addressed this question in paragraphs 1530 and 1531 of the arbitral award. It is also evident that the arbitral tribunal set out in paragraph 1542 which deductions the arbitral tribunal considered should be made from the damages *and*, in paragraph 1539, its positions regarding Vitol and the JOA agreement. In the Court of Appeal's opinion, the positions adopted cannot be understood other than as being relevant also as regards the objection by Kazakhstan set out in paragraphs 1738–1749 of the arbitral award. Thus, Kazakhstan has no justification for its allegations that the arbitral tribunal failed to take into account the objections in question.

Taking into account the starting points set forth by the Supreme Court in the case reported in NJA 2009, p. 128, in the Court of Appeal's assessment the reasons for the arbitral award in this context are also not so deficient that the wording of the reasons for the award might constitute a procedural irregularity.

Thus, in this respect, too, Kazakhstan has failed to prove the occurrence of any excess of mandate or procedural irregularity.

5.3.4.4 Other alleged excesses of mandate and procedural irregularities

Kazakhstan has also argued that the arbitral tribunal exceeded its mandate and committed procedural errors on an additional number of items by failing to take into account what was invoked by the parties and applicable law. In these respects, Kazakhstan has relied on the detailed circumstances set out in section 3.1.2.5. Kazakhstan's challenge action in this regard concerns the tribunal's dealing with questions concerning the role of the company KazAzot, the press release from Interfax, the conduct of the financial police regarding the classification of pipelines, the so-called Tristan bonds, and choice of valuation method regarding the Tolkyn and Borankol fields.

KazAzot

Kazakhstan has claimed that the arbitral tribunal's assessment in paragraphs 1094 and 1418 of the arbitral award was based on the non-invoked fact that KMG and President Nursultan Nazarbayev's son-in-law, Timur Kulibayev (who was also the chair of KMG) had influence over KazAzot. Kazakhstan has claimed that the fact had admittedly been invoked by the Investors, but only as regards the issue of the pricing of gas. Kazakhstan has also argued that, with respect to the assessment of the so-called tripartite agreement, the arbitral tribunal failed to apply certain international law in the area. In these respects, Kazakhstan has referred to paragraphs 1094 and 1418 of the arbitral award.

The Court of Appeal makes the following assessment.

The Court of Appeal notes that the evidence in the case, *inter alia* paragraph 674 of the arbitral award, shows that the relationship between KMG, Timur Kulibayev and KazAzot was introduced in the case by the Investors. In paragraph 674 it is stated, *inter alia*, that "Claimants' first allegation that KazAzot was controlled by Mr. Kulibayev was made at the Hearing on Jurisdiction and Liability". In the Court of Appeal's opinion, Kazakhstan has failed to prove that the Investors had restricted their reliance on the fact in the manner claimed by Kazakhstan, i.e. only with respect to the pricing of gas. The fact that the circumstance is not mentioned in the recitals under sections J and K of the arbitral award as specifically relied on by the Investors in those parts, does not affect the assessment in the instant case. Therefore, in the Court of Appeal's opinion there is no justification for the allegation that the arbitral tribunal took into account the circumstance without it having been invoked by a party. Thus, no excess of mandate or challengeable procedural irregularity has been proven in this respect.

Kazakhstan has failed to provide details of the allegation that the arbitral tribunal failed to apply certain international law regarding state liability, and how such failure allegedly influenced the outcome of the case. The relevant portions of the arbitral award in this regard are paragraphs 1094 and 1418, which address in all essential respects the arbitral tribunal's evaluation of evidence and the conclusions that the arbitral tribunal considered itself able to draw from what had been proven in the case. It has not been proven in the case that the arbitral tribunal's assessment included any incorrect application of law which might constitute an excess of mandate or a challengeable procedural irregularity.

<u>The press release from Interfax</u>

On this issue, too, Kazakhstan has asserted that the arbitral tribunal based its assessment on a circumstance that had not been invoked. According to Kazakhstan, the arbitral tribunal also proceeded on the assumption that the circumstance was undisputed. In this regard, Kazakhstan has referred to paragraph 994 of the arbitral award.

The Court of Appeal makes the following assessment.

According to what the arbitral tribunal has noted in the relevant passage in the award, the parties disagreed as to the way in which Interfax had obtained access to the information and whether Kazakhstan had anything to do with it. On this disputed question, the arbitral tribunal thereafter made an overall assessment of what caused the publication. In this regard, the arbitral tribunal stated its reasons that "Even if the Claimants have not shown that the Republic was in any way involved in the publication of the INTERFAX item, it is obvious and not disputed by the Respondent, that it was the Respondent's actions starting in October 2008 that caused the publication". The arbitral tribunal thus conducted a customary evaluation of evidence regarding the currently relevant circumstance within the scope of the Investors' overarching allegation that KPM and TNG were subject to a harassment campaign on the part of Kazakhstan. In the Court of Appeal's opinion, it is also not possible to draw any conclusion from the reasons for the award in this respect other than that the arbitral tribunal – in addition to noting that Kazakhstan had raised no objection – made an independent assessment of the circumstance. In this regard, too, Kazakhstan has thus failed to prove that the arbitral tribunal exceeded its mandate or that any challengeable procedural irregularity otherwise occurred.

The financial police's classification of pipelines

Also on this issue, Kazakhstan has asserted that the arbitral tribunal based its assessment on a circumstance that had not been invoked. According to Kazakhstan, in this case too the arbitral tribunal erroneously proceeded on the assumption that the circumstance was conceded by Kazakhstan. In this respect, Kazakhstan has referred to paragraph 990 of the arbitral award.

The Court of Appeal makes the following assessment.

The evidence in the case shows the following. It is evident from the Investors' submission to the arbitral tribunal dated 7 May 2012 that the Investors invoked the fact that the financial police had written to Kazakhstan's Deputy Prime Minister on the issue of how the pipelines were to be classified. Kazakhstan confirmed the letter and its content in a submission to the arbitral tribunal dated 13 August 2012, but argued as regards the interpretation of the letter. The arbitral tribunal described the relevant letter

in brief in paragraph 343 of the arbitral award and therein referred to the parties' submissions.

In the Court of Appeal's opinion, it is thus entirely clear that the Investors had invoked the questioned circumstance. The arbitral tribunal's assessment on the issue is set forth in paragraph 990 of the arbitral award. It is clear from the reasons for the award that, in the reasons for its substantive assessment, the arbitral tribunal did not include any concession by Kazakhstan. On the other hand, it appears that the arbitral tribunal concurred with the assessment that Kazakhstan had previously expressed on this issue during the arbitration. The arbitral tribunal's assessment of the evidence in this regard does not constitute any challengeable procedural irregularity. Thus, in this regard too, Kazakhstan has failed to prove the occurrence of any excess of mandate or procedural irregularity.

The Tristan bonds

In this regard, Kazakhstan's challenge ground concerns the arbitral tribunal's dealing with and assessment of the question of deductions in respect of a bond debt owed to Tristan Oil in conjunction with the valuation of the companies KPM and TNG. Kazakhstan has argued that the arbitral tribunal based its decision on an alleged concession by Kazakhstan, despite the absence of any such concession. Kazakhstan has also argued that the arbitral tribunal failed to take into account the parties' legal arguments. In this regard, Kazakhstan has referred to paragraphs 1536– 1537 and 1768–1771 of the arbitral award.

The Court of Appeal makes the following assessment.

In paragraphs 1536 and 1769 of the arbitral award, which are identically worded, the arbitral tribunal noted that Kazakhstan had possibly withdrawn an earlier position on the issue. However, in its assessment the arbitral tribunal concurred with the position that Kazakhstan had previously expressed during the arbitration. In the following paragraphs 1537 and 1770, which too are identically worded, the arbitral tribunal provided detailed reasons for its assessment. The arbitral tribunal thus did not include any concession in the basis for its decision on this matter, but rather made an assessment of the evidence

and took into account the different positions adopted by Kazakhstan on the matter. The arbitral tribunal's assessment on the issue of whether deductions were to be made due to the bonds constituted neither an excess of mandate nor a challengeable procedural irregularity. The aforesaid applies also to the allegation that the arbitral tribunal failed to take into account the parties' legal arguments on the issue. In this regard, too, Kazakhstan has thus failed to prove the occurrence of any excess of mandate or procedural error.

Valuation method

Kazakhstan's case in this regard concerns the arbitral tribunal's assessment of the question of the choice of method for calculating damages with respect to the Borankol and Tolkyn fields. Kazakhstan has argued that the arbitral tribunal erroneously proceeded on a certain concession by Kazakhstan. Here, Kazakhstan has referred to paragraph 1625 of the arbitral award.

The Court of Appeal makes the following assessment

It is evident from the relevant paragraph of the arbitral award that the arbitral tribunal initially made the assessment that the basis for calculation presented by the Investors was less convincing and that the Investors therefore had failed to meet their burden of proof. However, as stated in the aforementioned paragraph, the arbitral tribunal considered that, since the Investors had been caused loss, the calculation of the quantum of damages could be made based on the alternative loss calculation method presented by Kazakhstan in the case. The arbitral tribunal also referred to the submission in which Kazakhstan had stated the method based on various consultant reports. Thus, on the question of the quantum of damages, the arbitral tribunal made an assessment of the arguments and evidence presented by the parties and ultimately decided which calculation method should be used in order to determine the quantum of damages. Such an assessment constitutes neither an excess of mandate nor a challengeable procedural irregularity. Accordingly, in this respect, too, Kazakhstan has failed to prove the occurrence of any excess of mandate or procedural irregularity.

5.3.5 The Court of Appeal's summarised conclusions and summarised assessment of Kazakhstan's action

The Court of Appeal's assessment above of the grounds invoked by Kazakhstan in support of its action entails the following.

In no respect has the Court of Appeal found such circumstances have existed as might constitute grounds for invalidity of the arbitral award pursuant to the provision in section 33, first paragraph, subsection 2 of the Arbitration Act. This applies with respect to Kazakhstan's allegations regarding the so-called fraudulent scheme, false evidence and misleading information during the arbitration, as well as the allegations regarding shortcomings in SCC's actions in conjunction with the appointment of the arbitrators. (See sections 5.3.1 and 5.3.3 of the judgment.)

Furthermore, following an interpretation of the provisions regarding cooling-off negotiations in Art. 26 ECT, the Court of Appeal has found that a valid arbitration agreement arose between the parties by virtue of the Investors' request for arbitration, irrespective of whether or not the provisions regarding cooling-off negotiations in the aforementioned Article has been complied with. (See section 5.3.2 of the judgment.)

The Court of Appeal has also found that there were no shortcomings or procedural irregularities in conjunction with the appointment of the arbitrators (see section 5.3.3 of the judgment).

Finally, the Court of Appeal has found that Kazakhstan has failed to prove that alleged excesses of mandate and procedural irregularities have otherwise occurred (see section 5.3.4 of the judgment). Thus, an overall assessment of the arbitral tribunal's actions, in the manner alleged by Kazakhstan, also cannot lead to the conclusion that any excesses of mandate or procedural irregularities have occurred.

Kazakhstan's action must therefore be dismissed in its entirety.

5.4 *Litigation costs*

5.4.1 Party liable to compensate

The Court of Appeal's assessment of Kazakhstan's action means that Kazakhstan, as the losing party, must compensate the investors for their litigation costs (see Chapter 18, section 1 of the Code of Judicial Procedure).

5.4.2 The Investors' claim for costs

The Investors have claimed compensation in the amount of SEK 16,957,429 and USD 1,509,602.59. Of the claim for compensation in Swedish kronor, SEK 15,879,409 relates to counsel fees, SEK 578,020 to expenses, and SEK 500,000 to the party's own work. The claim in US dollars relates to expenses of USD 1,106,317.25 regarding compensation for assistance by attorneys at the law firm King & Spalding and USD 403,285.34 in expenses incurred by King & Spalding in assisting counsel in the case here.

Kazakhstan has left to the Court of Appeal to determine the reasonableness of claimed amounts and has presented objections regarding the compensation with respect to a party's own work, fees for assistance to attorneys from King & Spalding, and King & Spalding's expenses.

5.4.3 Compensation for party's own work

Firstly, as regards the requested compensation for a party's own work, the Investors have asserted that it relates to a total of 1,000 hours' work performed by employees at the legal department and treasury department at Ascom. According to the Investors, the work has comprised *inter alia* the production of evidentiary material. Kazakhstan has objected that in light of the content and structure of the Investors' submissions and their prosecution of their case in general, it is unlikely that so many hours have been worked, particularly since Kazakhstan's questions and wishes for clarification and information have not been answered or satisfied by the Investors. Kazakhstan has also pointed out

that no employees or representatives of Ascom have been present during the proceedings in the Court of Appeal.

The Court of Appeal makes the following assessment.

The Court of Appeal notes that the Investors are the respondents in the case and have therefore been required to act in response to Kazakhstan's formulation of its action and prosecution of its case and that the work that the Investors needed to expend on the case in order to protect their rights in their capacity as respondents is not necessarily reflected in their submissions and their prosecution of the case. On the other hand, Kazakhstan's formulation of the claimant's case is of importance for the assessment. Kazakhstan's action has included, *inter alia*, allegations regarding a large number of circumstances involving complex economic circumstances. In light of the aforesaid, the Court of Appeal finds no reason to call into question that the alleged work by Ascom employees has been performed and that it was also justified in order to protect the rights of Ascom and other respondents. The size of the claimed amount may be deemed reasonable.

5.4.4 Compensation for King & Spalding's assistance

The Investors have asserted that the attorneys at King & Spalding have assisted the Swedish counsel throughout the entire proceedings in the Court of Appeal and that this has been justified since the attorneys at King & Spalding were well acquainted with both the arbitration relevant here as well as the JOA and Montvale cases. Kazakhstan has objected that the claimed amount appears to be high, primarily in light of the fact that attorney Kenneth Fleuriet, in his testimony, stated that his own assistance to the Swedish counsel had been modest.

The Court of Appeal makes the following assessment.

The Court of Appeal notes that the arbitration in question was particularly extensive. Furthermore, Kazakhstan's invalidity action and challenge action in the Court of Appeal was of a significant scale and related to a large number of different aspects of the

arbitration. Since the Swedish counsel did not serve as counsel for the Investors in the arbitration, in the Court of Appeal's opinion there is no reason to call into question that the Swedish counsel have needed to obtain detailed information as to what occurred in the arbitration in order to be able to rebut Kazakhstan's action. In the Court of Appeal's view, the aforementioned circumstances amply justify the assistance from the attorneys at King & Spalding. In this context, the Court of Appeal notes that the compensation requested in this regard does not relate solely to assistance from Kenneth Fleuriet and there is no reason to call into question that assistance has been provided to the extent stated. The size of the claimed amount may be deemed reasonable.

5.4.5 Compensation for King & Spalding's expenses

According to the Investors' statement of costs, apart from *inter alia* food, lodgings and travel, King & Spalding's expenses substantially relate to remuneration to the expert Gary B. Born in the amount of USD 347,745.28. The Investors have stated that his opinions have also been invoked in foreign enforcement proceedings regarding the arbitral award, but that the claim is limited solely to costs directly attributable to the challenge action. Kazakhstan has objected that the requested compensation appears to be high in light of the fact that Gary B. Born's work can reasonably only relate to work on one of his two expert opinions, preparation pending and attendance at the main hearing, and certain additional contacts.

The Court of Appeal makes the following assessment.

The compensation requested in respect of Gary G. Born's participation is very high, but the Court of Appeal notes that Kazakhstan has also incurred expenses amounting to appreciable sums in respect of fees to experts. The Court of Appeal has no reason to call into question the information provided by the Investors that the requested compensation relates to costs for Gary G. Born's participation in the invalidity and challenge case, and also in this regard the Court of Appeal makes the assessment that the size of the requested compensation is reasonable.

5.4.6 The Investors' claim for compensation otherwise

The Investors' claim for compensation relates to other compensation to the Swedish counsel as well as expenses. Kazakhstan has raised no specified objections to these compensation items but has left to the Court of Appeal the assessment of the reasonableness of requested amounts.

The Court of Appeal makes the following assessment.

Also in these relevant respects, the Investors' compensation claims amount to a very large sum. In light of the scale of the case and upon a comparison with the claim for litigation costs presented by Kazakhstan in the Court of Appeal, which amounts to almost SEK 60 million, the Court of Appeal makes the assessment that the amount claimed by the Investors may be accepted as reasonable.

5.4.7 Summarised assessment

The Court of Appeal's assessment above means that Kazakhstan shall be ordered to pay compensation for the Investors' litigation costs in amounts claimed plus interest.

The Investors have not stated any detailed allocation of the claimed litigation costs as between the respondents. From the detailed claim for costs presented by the Investors, it is evident that the compensation for a party's own work relates in its entirety to Ascom. Thus, the compensation claim in this regard may be deemed presented on behalf of Ascom. With respect to the compensation claim in general, in the absence of any more detailed specification, the claimed amount may be deemed to inure to the Investors in the amount of one-fourth each.

5.5 *Appeal*

Pursuant to section 43, second paragraph of the Arbitration Act, the Court of Appeal's judgment may only be appealed if the court considers it to be of importance for guidance in the application of law that the appeal be tried by the Supreme Court. The Court of Appeal considers that there are no reasons to allow the decision to be appealed.

The Court of Appeal's decision may not be appealed.

Judges of Appeal Ulrika Beergrehn, Magnus Ulriksson (reporting judge and dissenting) and Kerstin Norman have participated in the decision.

Dissenting opinion, see next page.

Dissenting opinion

Magnus Ulriksson dissents on the issue of the reasoning as to why a valid arbitration agreement has arisen between the parties and states:

The jurisdiction of an arbitral tribunal to decide a dispute usually arises through the parties having agreed in advance that any disputes shall be resolved in that manner. In the instant case, there is no such agreement. The arbitration was initiated through the Investors writing to the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and invoking, with express consent, Art. 26, item 4 c, ECT as grounds for the arbitration. The question is whether an arbitration agreement has thereby arisen between the parties in the case.

The ECT is a multilateral treaty aimed at promoting long-term cooperation within the energy sector (Art. 2 ECT). The states offer various types of solutions for issues arising in respect of the various disputes stated in the treaty. With respect to disputes between the parties to the treaty, Art. 27 provides that such disputes shall preferably be resolved through diplomatic contacts and, if that does not succeed within a reasonable period of time, the dispute may be referred to an ad hoc tribunal. Art. 26 provides various solutions for disputes – including arbitration in accordance with the SCC's rules – in respect of disputes between a state and an investor from another state that is a party to the treaty. If the investor acts in accordance with the provisions of the article, the agreement thus arises which renders the appointed arbitral tribunal competent to decide the dispute.

The provisions in the article are arranged in such a manner that the first item states that disputes shall if possible be settled amicably. In the second item, it is stated that if disputes cannot be settled in such manner within three months from the date on which a party requested amicable settlement, the investor may choose among the various mechanisms which, apart from arbitration, offer a process before the national courts of the host country. With respect to the alternative of arbitration, the contracting parties provide their unconditional consent in accordance with the provisions of the article. The investor who chooses arbitration must, in its request, also provide its express consent.

This description of the procedure is evident not only from the wording of the treaty but also from "A reader's guide" issued by the secretariat for the administration of ECT (see also Kaj Hobér in *Journal of International Dispute Settlement*, vol. 1, 2010, pp. 153–190). The Investors also appear to have been of the view that settlement negotiations must have taken place when the arbitration is requested. In paragraph 108 of the request for arbitration it is stated that "[a]rticle 26(2) of the ECT provides for a three month notice before the commencement of arbitration. This requirement is satisfied." In my opinion, Art. 26 cannot be understood other than to mean that the procedure stated therein must be complied with in order for a valid arbitration agreement to arise when arbitration is requested as in the instant case.

Differences of opinion had arisen between the Investors and the Republic of Kazakhstan regarding, *inter alia*, the LPG plant mentioned in the case. In this context, the Investors were prepared to sell their assets in Kazakhstan (see the arbitral award, part F II). As a consequence of the differences of opinion, on various occasions during February and March 2009 the owners of the plant sent letters to the relevant representatives of Kazakhstan, including a specific settlement proposal. A meeting also took place between the parties in March 2009. On 7 May 2009, Anatolie Stati sent a letter addressed directly to Kazakhstan's President, Nursultan Nazarbayev, in which Anatolie Stati referred to the dispute regarding his operations in Kazakhstan. In the letter, Anatolie Stati requested that the President personally evaluate the operations and ensure that the dispute ceased. The letter concluded in stating that if that did not take place, no alternative would arise but to request arbitration. In so far as is evident, Anatolie Stati received no reply from the President. On the other hand, a letter dated 28 September 2009 from the Kazakhstan Ministry of Energy to the Ministry of Industry and Trade states that it should initiate negotiations with the owners of, *inter alia*, TNG, regarding acquisition of the company's assets. The letter also states that the Ministry was aware that any dispute would be resolved through international arbitration. The negotiations were clearly fruitless and, in July 2010, Kazakhstan terminated the agreement regarding exploitation rights. Several days after the termination, the investors requested arbitration at the SCC.

In my opinion, there can be no doubt that the Investors acted entirely in accordance with the procedure stated in Art. 26 and that, for this reason, it follows that a valid arbitration agreement must be deemed to have arisen between the Investors and Kazakhstan in order to decide the relevant dispute. The letter dated 7 May 2009 from Anatolie Stati was signed by him personally and sent by him as representative for both Ascom Group and Terra Raf. In addition, he also represented Gabriel Stati pursuant to a separate agreement between them. In light of the intensity of contacts between the parties at the time, it appears to be wholly superfluous to impose demands for an express reference to the ECT when settlement is requested. Kazakhstan was well aware of what the dispute concerned. The time period of approximately 15 months from the application for settlement negotiations to the request for arbitration exceeds by a wide margin the three months prescribed in ECT. The ECT states no maximum time limit for the settlement negotiations, which appears to be well founded. It is evident from Part F II of the arbitral award that relatively intensive contacts took place between the parties, *inter alia* during the autumn of 2009 and winter/spring of 2010. In light thereof, it may be deemed reasonable that the request for arbitration took some time, *inter alia* in light of the complexity of the issue. When the agreement was terminated in July 2010, there was thus no requirement that the Investors wait an additional period of time before arbitration was requested. The dispute was still the same.

Thus, I am in agreement with majority that a valid arbitration agreement arose between the Investors and Kazakhstan when arbitration was requested in July 2010 and that it was thus unnecessary to assess the exchange of correspondence that took place between the parties' counsel during the winter of 2011 and which resulted in a three-month deferment of the arbitration.