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SUMMARY
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TEAM

Court fees charge current account NautaDutilh N.V. quoting case number 50107248

APPLICATION FOR LEAVE TO LEVY PRE-JUDGMENT GARNISHMENT PURSUANT TO ARTICLE 700 ET SEQ DCCP

To the Court in summary proceedings of the Court of Amsterdam, location Amsterdam,

We respectfully submit:

Mr **Anatolie Stati**, residing in Chisinau, Moldavia

Mr **Gabriel Stati**, residing in Chisinau, Moldavia

the company under foreign law **Ascom Group SA.** ("**Ascom Group**"), with its registered office in Chisinau, Moldavia

the company under foreign law **Terra Raf Trans Traiding Ltd.** ("**Terra Raf**"), with its registered office in Gibraltar

Hereinafter jointly "**Stati et al.**"

electing domicile in this case in Amsterdam at Beethovenstraat 400 (1082 PR), being the office address of NautaDutilh N.V., lawyers, civil-law notaries and tax consultants, where lawyers responsible for the case are Mr G.J. Meijer and Mr J.M. Hummelen, the former of whom has signed and submits this application:

This application is directed at:

1. the **REPUBLIC OF KAZAKHSTAN**, with its seat in Astana, Kazakhstan, hereinafter "**Kazakhstan**", which is understood to include:

   the **REPUBLIC OF KAZAKHSTAN (NATIONAL FUND OF THE REPUBLIC OF KAZAKHSTAN)**, with its seat in Astana, Kazakhstan, hereinafter "**NFRK**"

2. the company under foreign law **SAMRUK-KAZYNA JSC**, with its registered office in BC "Emerald Towers", Block B, 8 Kunayev Street, Astana, Kazakhstan, hereinafter "**Samruk**"

Introduction

Stati et al. claims

1. Kazakhstan has natural mineral fuel reserves in the form of oil and gas and has in the past expressed a wish to attract investors for the exploitation of these minerals. For that reason, Kazakhstan ratified the Energy Charter Treaty ("**Energy Charter**").

2. Between 1999 and 2003, Anatolie Stati and his son Gabriel Stati – through the Ascom Group and Terra Raf companies – acquired shares in two Kazakhstan companies: Kazpolmunay LLP ("**KPM**"). and Tolkynneftegaz LLP ("**TNG**")- KPM owned the exploitation rights for the Borankoil oilfield. TNG had similar exploitation rights for the Tolkyn oilfield and the Tabyl Block.

3. After Stati et al. had invested substantial sums in making the oilfield profitable, Kazakhstan started a campaign of slander and intimidation against Stati et al. so that it could acquire Stati et al.'s investments at rock bottom prices. When the plan misfired, Kazakhstan simply appropriated the Stati et al. investments.

4. These actions by Kazakhstan prompted Stati et al. to start arbitration proceedings. The basis for the claim was violation of obligations upon Kazakhstan under the Energy Charter Treaty. In the arbitration proceedings, Stati et al. claimed compensation in the amount of USD 2.5 billion.

5. On 19 December 2013, the tribunal gave an arbitral award (the "**Arbitral Award**") (**Exhibit 1**), as supplemented on 17 January 2014 (the "**Supplementary Arbitral Award**") (**Exhibit 2**). In the Arbitral Award, the tribunal dismissed certain jurisdiction defences raised by Kazakhstan and held that Kazakhstan had violated its obligation, as laid down in Article 10 (1) of the Energy Charter Treaty, to treat investors "fairly and equitably":[1]

> *"Taking into account the above considerations, the Tribunal concludes that [Kazachstan] 's measures, teen cumulatively in context to each other and compared with the treatment of [Stati et al.'s] investments before the Order of the President of the Republic on 14/16 October 2008, constituted a String of measures of coordinated harassment by various institutions of [Kazakhstan]. These measures must be considered as a breach of the obligation to treat investors fairly and equitably, as required by Art. 10(1) ECT."* [underlining added].

6. The tribunal also ruled that the unlawful conduct of Kazakhstan had caused damage to Stati et al. and that Kazakhstan was liable for this damage. In the Arbitral Award, the tribunal ordered Kazakhstan to pay the following amounts:[2]

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[1] Arbitral Award, paragraph 1095.
[2] Arbitral Award, page 414.

"1. The Respondent has violated its obligations under the Energy Charter Treaty with respect to Claimants' investments.

2. Subtracting the subtotal of debts (USD 10,444,899.00) from the subtotal of compensation due (USD 508,130,000.00), the Tribunal decides that Respondent shall pay to claimant a net amount of USD 497.685.101.

3. This net amount is to be paid from Respondent to Claimants with interest, defined as the rate of 6 months US Treasury Bills from 30 April 2009 to the date of payment, compounded semi-annually,

4. Regarding the costs of arbitration, the Tribunal decides:

4.1 Of the costs of arbitration as determined by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Respondent shall bear 3/4 and Claimants 1/4. These arbitration costs will be drawn from the advances paid by the Parties to the SCC.

4.2 Further, Respondent shall pay to Claimants 50% of Claimants costs of legal representation, i.e. an amount of USD 8.975,496.40.

5. All other claims are dismissed." [Emphasis added].

7. In the Supplementary Arbitral Award, the tribunal then, in conformity with the Swedish Arbitration Act, specified the costs of arbitration, which it fixed at EUR 1,069,470.98. On the basis of part 4.1 of the operative part of the Arbitral Award shown above, Kazakhstan was ordered to pay three quarters of that amount to Stati et al., i.e. EUR 802,103.24.

8. The Arbitral Award and the Supplementary Arbitral Award are not open to appeal.

9. Following the Arbitral Award, Kazakhstan instituted proceedings to have the Arbitral Award and the Supplementary Arbitral Award set aside before the competent court in Stockholm, Sweden, the Svea Court of Appeal, in which proceedings Kazakhstan claimed that the Arbitral Award and the Supplementary Arbitral Award should be set aside in full or in part.

10. Stati et al. disputed the Kazakhstan claims extensively in the proceedings before the Svea Court of Appeal. In a judgment on 9 December 2016 (the "**Swedish Court Judgment**"; Exhibit 3), the Svea Court of Appeal dismissed the claim to set aside the Arbitral Award and the Supplementary Arbitral Award in full. The judge also ruled that Kazakhstan must compensate Stati et al. for legal costs and ruled that Kazakhstan must pay the following amounts:[3]

    i) SEK 4,614,358 and USD 377.400.65 to Ascom Group;

    ii) SEK 4,114,357 and USD 377,400.65 to A. Stati;

[3] See page 2 of the Swedish Court Judgment.

iii) SEK 4,114,357 and USD 377,400.65 to G. Stati;

iv) SEK 4,114,357 and USD 377,400.65 to Terra Raf;

v) interest on the above amounts at the rate of interest according to Article 6 of the Swedish Interest Act 1975:635 with effect from 9 December 2016 until the date of payment in full.

11. Finally, and in accordance with Article 43 (2) of the Swedish Arbitration Act, the Svea Court of Appeal ruled that the Swedish Court Judgment was not open to appeal.[4] Nevertheless, Kazakhstan pursued an extraordinary legal remedy before the Swedish Supreme Court seeking to set aside the Swedish Court Judgment on the basis of a 'grave procedural error' allegedly made by the Svea Court of Appeal. A ruling is not expected in those proceedings within the foreseeable future. In this regard, Stati et al. refer to paragraphs 86-89.

12. In spite of repeated demands, Kazakhstan has refused to satisfy the payment obligations arising from the Arbitral Award and the Supplementary Arbitral Award.

13. Stati et al. will submit a request for the recognition and enforcement of the Arbitral Award and the Supplementary Arbitral Award with the competent Dutch court in order to proceed with enforcement of the Arbitral Award and the Supplementary Arbitral Award in the Netherlands. To secure its rights during the aforesaid proceedings, Stati et al. is applying in these proceedings for leave to levy pre-judgment attachment.

Attachment of assets of a foreign state

14. Stati et al. are aware of the fact that they are requesting leave to levy attachment against a foreign state (Kazakhstan), which enjoys immunity from enforcement in relation to assets which are designated for public purposes. However, this immunity from enforcement does not preclude the award of this application for leave to levy pre-judgment attachment. Stati et al. refer to the following in that connection.

Previous application for leave to levy attachment (1 April 2014)

15. Consequent upon the Arbitral Award, Stati et al. did apply to the court in summary proceedings at the Court of Amsterdam previously – namely on 1 April 2014 – for leave to levy pre-judgment garnishments or attachments.

16. Thereafter, on 3 April 2014, the aforesaid court in summary proceedings granted provisional leave in response to that application to levy pre-judgment attachment for an amount of USD 520 million (**Exhibit 4**).

17. In his decision, the court in summary proceedings considered, inter alia, the following:

[4] Swedish Court Judgment, page 66.

"It is for the bailiff to determine whether enforcement of the instruction received could be contrary to the obligations of the State under international law."

18. Leave was then (nevertheless) granted, on the condition that the attachment may not be levied before seven days had elapsed after bailiff had notified the Minister of Security and Justice, on the basis of Article 3a of the Bailiffs Act ("**Bailiffs Act**") of the intention to levy attachment, unless the Minister had already announced within the seven days that in his view, the attachment was not contrary to the obligations of international law.

19. Article 3a (1) and (2) Bailiffs Act read:

"1. A bailiff who receives instruction to perform an official act shall, if he must reasonably take into account the possibility that the performance of that act is contrary to the obligations of the State under international law, notify Minister immediately of the instruction received, in the manner established by ministerial regulation.

2. Our Minister can give notice to a bailiff that an official act which he has or will be instructed to perform, or which he has already performed, is contrary to the obligations of the State under international law.

20. On 14 April 2014, the Minister of Security and Justice gave notice within the definition of Article 3a Bailiffs Act (the "**Notice**"; **Exhibit 5**). The Notice states, inter alia:

"I consider this official act (...) to be contrary to the obligations of the Dutch State under international law. (...) Immunity can denied only where it can be established that the assets are not designated for public purposes. However, Ascom et al. has failed to demonstrate that none of these assets are designated for public purposes."

21. In summary proceedings against the Dutch State, Stati et al. objected to the Notice. In those proceedings, Stati et al. relied primarily on the argument that it is not incumbent upon Stati et al. is to assert facts which indicate that the envisaged attachment objects are designated for – essentially – non-public purposes and that Kazakhstan has waived immunity from enforcement under the Energy Charter Treaty.

22. The court in summary proceedings at the Court of The Hague and the Hague Court of Appeal dismissed Stati et al.'s claims. On 14 October 2016, the Supreme Court then rendered judgment in these summary proceedings. In its appellate judgment (published anonymized as VJ2017, 192) the Supreme Court considers, inter alia:

In accordance with Article 13a of the Dutch General Provisions (Kingdom Legislation) Act, enforceability in the Netherlands of both pre-judgment and executory measures is limited by public international law in the sense that such measures are excluded unless and insofar as the circumstances are as provided for in Article 19 parts a-c of the UN Treaty (Supreme Court, 30

September 2016, ECLI:NL:HR:2016:2236, paragraph 3.4.8).

It is in line with the foregoing that the obligation to furnish facts and burden of proof in relation to fulfilment of the conditions for attachment and enforcement are upon the creditor who levies or wishes to levy attachment on the property of the foreign state and that, even if the foreign state fails to appear, it must still be established that the property in question meets the conditions for attachment. The creditor must therefore submit information on the basis of which it is possible to establish that the property is used or designated by the foreign state for, essentially, non-public purposes.

23. However, as will be explained below, the foregoing does not preclude the award of this application for leave to levy pre-judgment attachment.

Current application for leave to levy attachment (30 August 2017)

24. Stati et al. point out that the validity of the Arbitral Award and the Supplementary Arbitral Award has been affirmed in full in the Swedish setting aside proceedings since the earlier application for leave to levy attachment (of 1 April 2014) was submitted (paragraphs 9-11).

25. Furthermore, this application for leave to levy attachment relates largely to different attachment objects from those described in the earlier application for leave to levy attachment (of 1 April 2014) (paragraph 40 et seq).

26. Finally, Stati et al. have carried out specific research into establishment of the non-public use or the non-public designation of the envisaged attachment objects (see again paragraph 40 et seq, which focuses specifically on the non-public designation). Stati et al. are furthermore of the view that this establishment in the context of the granting of leave to levy pre-judgment attachment should not be under discussion, as Stati et al. will now explain (paragraphs 27-36).

The court in summary proceedings should not assess whether immunity from enforcement exists

27. In this part, Stati et al. will address (i) the question of whether in the assessment of the application, the court in summary proceedings should at this point assess whether Kazakhstan is entitled to invoke community from enforcement and (ii), if this question is answered in the affirmative, the question of which criterion the court in summary proceedings should apply.

28. Insofar as necessary, Stati et al. will demonstrate in a separate part of this application that the attachment objects described in the application (or at least a part of them) are used or designated for non-public purposes (see paragraphs 40 et seq).

29. In regard to the ***first question*** (from paragraph 27), in the assessment of the application to levy pre-judgment attachment against a foreign state, the court in summary proceedings should not at that point assess whether the attachment objects envisaged in the application are used or designated for non-public

purposes.

30. It follows from the system of the (Bailiffs) Act that this assessment is reserved for the bailiff, the Minister and – possibly – the court in summary proceedings.

31. In accordance with the principles of international law underlying Article 13a of the General Provisions Act, foreign states can invoke immunity from enforcement in relation to goods which are used or designated for public purposes. Therefore, Article 3a (1) of the Bailiffs Act imposes an obligation on the bailiff to report an instruction to perform official acts (including the levying of attachment) which may conflict with the obligations of the State under international law to the Minister of (currently) Security and Justice. The Minister can then give notice to the bailiff, pursuant to Article 3a (2) of the Bailiffs Act that the official act which he has or will be instructed to perform, or has already performed, is contrary to the obligations of the State under international law. Under Article 3a (3) Bailiffs Act, this notice can only be ex officio. The Parliamentary history to Article 3a (3) of the Bailiffs Act shows clearly that only the Minister of (currently) Security and Justice can take the initiative to give the aforesaid notice:

> *"By ruling that notice can only be given ex officio, it is clarified that the initiative for a notice can come* only *from the Minister of Justice." [Underlining added].*[5]

32. If the official act has not yet been performed at the time the bailiff receives the notice as provided for in Article 3a (2) Bailiffs Act, it follows from Article 3a (5) Bailiffs Act that as a consequence of the notice from the Minister, the bailiff is not competent to perform the official act and the performance of an official act that is contrary to the foregoing is null and void. If the official act has already been performed at the time the bailiff receives the notice and it included an attachment notification, the bailiff immediately serves this notice on the party on whom the notification was served, lifts the attachment and reverses its consequences (Article 3a (6) Bailiffs Act). It follows from Article 3a (7) Bailiffs Act that this notice from the Minister can be challenged in summary proceedings before the court in summary proceedings, who can lift the aforesaid effects of the notice, without prejudice to the competence of the ordinary court. The bailiff can, furthermore, pursuant to Article 3a (7) Bailiffs Act in conjunction with article 438 (4) DCCP, independently obtain the opinion of the court in summary proceedings by instituting summary proceedings between the parties involved.

33. It therefore follows from the Bailiffs Act that it is for the Minister in the first instance to assess – following a report from the bailiff – whether the foreign state can invoke immunity from enforcement. This Minister's opinion can then

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[5] *Parliamentary Papers* II 1999-2000,23 081,9, p. 2.

– at the request of the attaching party or the bailiff – be put before the court in summary proceedings. The court in summary proceedings who assesses the application for leave to levy pre-judgment attachment must also therefore confine himself in principle to the "summary investigation" provided for in Article 700 (2) DCCP, whereby the application for leave to attach is assessed against the requirements of subsidiarity and proportionality (see also paragraph 17).

34. It follows from two recent appellate judgments from the Supreme Court in 2016 relating to immunity from enforcement[6] that the route of Article 3a Bailiffs Act described above was followed. In the Morning Star v Gabon case, the court in summary proceedings granted an application to levy pre-judgment garnishments against Gabon, following which the bailiff levied a number of garnishments against Gabon. At the same time, the bailiff had notified the Minister pursuant to Article 3a Bailiffs Act, whereupon the Minister issued the notice as provided for in Article 3a (2) and (6) Bailiffs Act. The bailiff then instituted summary proceedings between the parties concerned, pursuant to Article 3a (7) Bailiffs Act in conjunction with Article 438 (4) DCCP. In State v Servaas, the bailiff levied executory attachment against Iraq, following which the bailiff reported those attachments, in accordance with the Bailiffs Act, to the Minister. The Minister then gave notice to the bailiff that the attachments are contrary to the obligations of the Dutch State under international law and must be lifted. In that case too, the bailiff instituted summary proceedings pursuant to Article 3a (7) Bailiffs Act in conjunction with Article 438 (4) DCCP, between Servaas and the State.

35. Therefore the question of the designation of the attachment objects was always considered first in these proceedings after the appointment of the bailiff to levy (pre-judgment or executory) attachment, and the question of immunity from enforcement was ultimately determined by the court in summary proceedings in summary proceedings (in a defended action). Any other interpretation, moreover, would also lead to an in desirable inequality between the levying of pre-judgment and executory attachment against a foreign state. After all, where executory attachment is levied there is no preceding application to the court in summary proceedings and consequently in the case of executory attachment the statutory route of the Bailiffs Act must always be followed.

36. Furthermore, the fact that the question of immunity from enforcement should not be considered in the proceedings to obtain leave to levy pre-judgment attachment follows from the Supreme Court's considerations in the aforesaid appellate judgments on the obligation to furnish facts and the burden of proof in relation to fulfilment of the conditions for attachment.7 As submitted

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[6] Supreme Court, 30 September 2016, ECLI:NL:HR2016:2236. NJ2017, 190 (*Morning Star v Gabon*) and Supreme Court, 14 October 2016, ECLI:NL:HR:2016:2354, NJ2017,191 (*Staat v Servaas*) (see also Supreme Court appellate judgment of 14 October 2016, ECLI:NL:HR:2016:2371,NJ2017, 192 (*NN v Staat*) cited in paragraph 22 of the application to levy attachment).

[7] See footnote 1.

previously in paragraph 22 of the application for leave to levy attachment, the Supreme Court considered, inter alia, in NN v State that the obligation to furnish facts and the burden of proof in relation to the fulfilment of conditions for attachment and enforcement are upon the creditor who levies or wishes to levy attachment on the property of the foreign state and that, even if the foreign state fails to appear, it must still be established that the property in question meets the conditions for attachment.8 A possible nonappearance presumes an ability to call the foreign state to appear in the proceedings, which does not exist in the (ex parte) proceedings to obtain leave to levy pre-judgment attachment. Moreover, in Morning Star v Gabon, the Supreme Court ruled (in paragraph 3.5.2) that foreign states are not obliged to submit information to demonstrate that their property has a designation which prevents attachment and enforcement. It also follows from this that the Supreme Court assumes that there is a possibility for the foreign state to provide such information (in proceedings), which in principle does not exist in the proceedings to obtain leave to levy pre-judgment attachment.

37. If the court in summary proceedings should find that it must be determined during the assessment of the application for leave to attach whether the attachment objects are used or designated for non-public purposes, then on the grounds of the foregoing and in light of the nature of these application proceedings, the court in summary proceedings must confine itself to a reasonableness evaluation of whether there is a possible infringement of the foreign state's immunity from enforcement and only where there are very clear circumstances of violation of the principle of immunity may leave be refused. As will be explained below, there are no such clear circumstances in this case.

38. In regard to the ***second question*** (from paragraph 27), if the court in summary proceedings finds that there should nevertheless be a full evaluation, the court in summary proceedings must apply the "plausible case" standard developed by the Supreme Court. In accordance with this standard, the creditor must *make a plausible case* that the relevant property (or which parts of it)[9] are (or is) used or designated for non-public purposes. In that context it is also important that this designation criterion must be interpreted such that the creditor need only demonstrate that the immediate designation of the property or use of the proceeds from it is non-public (and therefore not that the ultimate or further designation is non-public), which criterion must also be applied in foreign case law.[10] Any other view (where the ultimate designation of the property must be non-public) would mean that a foreign state would always enjoy immunity from enforcement, given

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[8] See also *State v Senate*, paragraph 3.4.2 and *Morning Star v Gabon*, paragraph 3.S.3.
[9] See Morning Star v Gabon, paragraph 3,5.4; and to what extent those funds and credit balances meet the conditions for attachment. See also Supreme Court, 11 July 2008, ECLI:NL:HR:2008:BD1387, NJ2010, 525 (Azeta v JCR and State), paragraph 3.5: "(…) assigned in full or in part to non-public purposes,".
[10] See Prof C.M.J. Ryngaert, 'Staatsimmuniteit van executie; beslagmogelijkheden, voor crediteuren na the herfstarresten van the Hoge Raad (2016)', TCR 2017, 3, p. 111 (Exhibit 6), p. 111, 116 and 118.

that government property can ultimately always be used for public government purposes and moreover it is almost impossible for the creditor to gain an insight into (for example) cash flows between government entities which generate proceeds for the state through commercial contracts.[11] In this specific case, there would be a conflict with Article 6 ECHR and Article 1 First Protocol to the ECHR[12] and the purpose of the exception of Article 19 (c) UN Treaty would also be at risk, since it follows from Article 19 (c) UN Treaty that immunity from enforcement is by no means absolute.

39. If the court in summary proceedings should find that it must be determined in the assessment of the application for leave to attach whether Stati et al. have made a plausible case that the attachment objects described in the application (or a part of them) are used or designated for non-public purposes, Stati et al. have included a description in the following part of the attachment objects envisaged in the application for leave to attach, which also shows the non-public designation of those attachment objects.

Attached assets

40. Stati et al. are applying for leave to levy attachment in relation to the following assets. Stati et al. wish to emphasise that the non-public purpose or envisaged purpose (and the ability to prove this) of these assets was specifically taken into account in selecting these assets, as will also be discussed below.

Badhuisweg 91, The Hague

41. By means of a notarial deed dated 3 July 2017, Kazakhstan acquired from Procon Europe B.V. a right of leasehold and a right to transfer ownership in relation to the immovable property located at Badhuisweg 91 (2587 CE), The Hague.13 The property is not in use as an embassy or consulate. The embassy and consulate are both located at Nieuwe Parklaan 69 (2597 LB) in The Hague (see **Exhibit 8**). The property is furthermore not in use for any other public purpose. The latter is demonstrated by the fact that the entire building at the aforesaid address is to let as office space and at the moment the whole property is available for rent (see **Exhibit 9**):

> *"911 m2 of office space located at Badhuisweg in The Hague. This is an office villa consisting of four generous floors; basement 140 m2, ground floor 285 m2, first floor 281 m2 and second floor 205 m2. <u>The entire office villa is currently available to let</u>."* [Emphasis added]14

42. The fact that the entire property is to let for an indefinite period also shows that

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[11] See Prof C.M.J. Ryngaert, 'Staatsimmuniteit van executie; beslagmogelijkheden, voor crediteuren na the herfstarresten van the Hoge Raad (2016)', TCR 2017, 3, p. 111 (Exhibit 6), p. 111, 116.
[12] See Prof C.M.J. Ryngaert, 'Staatsimmuniteit van executie; beslagmogelijkheden, voor crediteuren na the herfstarresten van the Hoge Raad (2016)', TCR 2017, 3, p. 111 (Exhibit 6), p. 114 and 115.
[13] Deed creating a ground lease dated 3 July 2017 (Exhibit 7*)*.
[14] Advertisement for letting of Badhuisweg 91 (Exhibit 9), p. 1.

there is no intention to use the property for (immediate) use as an embassy or consulate or for public, non-commercial purposes.

43. Although it is stated in Article 6 of the aforesaid deed creating a ground lease dated 3 July 2017 that the property was originally intended for use as the embassy of Kazakhstan, the fact that Kazakhstan has the entire property to let for an indefinite period demonstrates that the (immediate) designated use is no longer public.

44. There is further evidence of the foregoing in a permit application relating to the property that was submitted to the Municipality of The Hague. According to The Hague Municipal Gazette of 2 August 2017 (**Exhibit 10**), application had been made for a permit to place advertising signage on the facade of the property in question :

> *"The alteration of the facade of the single family dwelling at Badhuisweg 91 by the affixing of* advertising signage." [Emphasis added].[15]

45. On the basis of the foregoing, Stati et al. are applying for leave to levy attachment on:

    i. PROCON EUROPE B.V., with its registered office in Leidschendam and business address at Braillelaan 9 (2289 CL), Rijswijk ("**Procon Europe**")

46. and specifically on:

    i. all claims which Kazakhstan has on Procon Europe (in particular the aforesaid right to transfer the immovable property located at Badhuisweg 91 (2587 CE), The Hague); and

    ii. all claims which Kazakhstan will acquire directly from an existing legal relationship on Procon Europe (in particular the aforesaid right to transfer the immovable property located at Badhuisweg 91 (2587 CE), The Hague).

Assets in the National Fund of the Republic of Kazakhstan (NFRK) as part of Kazakhstan

47. Assuming that the NFRK is not a separate legal entity, but a fund that in its entirety is part of the state (Kazakhstan). More specifically, the activities of the NFRK are performed by the Ministry of Finance of Kazakhstan and it does not enjoy legal personality.

48. Stati et al. refer in support of this to (an English translation of) Presidential Decree no. 402 of 23 August 2000, which is appended to this application, by means of which decree the NFRK was formed (**Exhibit 11**). The decree states:

> *"(...) I promulgate as follows:*

[15] The Hague Municipal Gazette, 2 August 2017, no. 134370 (**Exhibit 10**).

(...)

2. Determine that:

1) the assets of the Fund are accumulated on the account of the Government of the Republic of Kazakhstan with the National Bank of the Republic of Kazakhstan;(...)."

49. This also shows that the NFRK is part of the State (Kazakhstan) and is not a separate legal entity.

50. The Bank of New York Mellon SA/NV ("**BNY Mellon**") acts as global custodian for the NFRK, on the basis of which Kazakhstan must have .... on BNY Mellon in relation to the assets in the NFRK kept in custody by BNY Mellon for the NFRK as a full part of Kazakhstan.

51. BNY Mellon is a Belgian entity, but is registered with the Chamber of Commerce in Amsterdam (**Exhibit 12**). As such, BNY Mellon is domiciled in the Netherlands (Amsterdam) on the basis of Article 1:10 in conjunction with 1:14 DCC and attachments can be levied on this party.

52. The funds in the NFRK were transferred in two separate portfolios, the 'Stabilisation Fund' and the Savings Fund'.[16] Of the aforesaid funds, 24.8% is allocated to the Stabilisation Fund and the remaining 75.2% to the Savings Fund part of the NFRK.[17] The (immediate) purpose of the Savings Fund is (purely commercial) "*to increase the return on assets in the long term*".[18]

53. External managers – i.e. not the Ministry of Finance of Kazakhstan – manage (the securities portfolio of) the Savings Fund of the NFRK:

"The assets of NFRK are placed under external management with the view to:

(...)

2) increase the profitability of the Fund's assets through using the experience, analytical materials research and technical capabilities of the external manager;

(...)." [Underlining added].[19]

54. The use of the assets in the Savings Fund – to achieve a commercial return on the aforesaid assets – is a non-public, commercial use. Furthermore there is no intention to make (immediate) use of the funds in the Savings Fund for any purpose other than a non-public, commercial purpose. This follows from the fact that the "*savings portfolio's assets are invested with a view to maximizing long-*

[16] See National Bank of the Republic of Kazakhstan financial statements 2016 (**Exhibit 13**), p. 63.
[17] See National Bank of the Republic of Kazakhstan financial statements 2016 (**Exhibit 13**), p. 63; See also Morning Star v Gabon, paragraph 3; *"(...) and to what extent those funds and credit balances meet the conditions for attachment (...)"*. See also Supreme Court, 4 July 11, ECLI:NL:HR:2008:BD2008, NJ1387, 2010.525 (Azeta v JCR and State), paragraph 3.5: "*(...) assigned in full or in part to non-public purposes.".*
[18] Resolution of the Board of the National Bank of the Republic of Kazakhstan no. 65 of 25 July 2006 (**Exhibit 14**), paragraph 17.
[19] Resolution of the Board of the National Bank of Kazakhstan no. 126 of 30 May 2016 (**Exhibit 15**), p. 2.

<u>term</u> returns"[20] [underlining added].

55. In the light of the foregoing, Stati et al. applies for leave to levy attachment on:

i. THE BANK OF NEW YORK MELLON SA/NV, with its registered office in Brussels, Belgium, and place of business at Strawinskylaan 337 (1077 XX), Amsterdam

And in addition to the Dutch branches, more particularly on the following branches[21]:

a. The Bank of New York Mellon SA/NV
46 Rue Montoyerstraat
1000 BRUSSELS
Belgium

b. The Bank of New York Mellon SA/NV
BNYMSANV RE SANVLON RE MINISTRY
BNVYM
11 Podeba Avenue
Astana 10000
Kazakhstan

c. THE BANK OF NEW YORK MELLON SA/NV
160 Queen Victoria Street
London, EC4V 4LA
United Kingdom

56.*on, insofar as this relates to (parts of) the* Savings Fund:

i. all claims Kazakhstan (including the NFRK) has on BNY Mellon; and

ii. all claims Kazakhstan (including the NFRK) will acquire directly on the basis of an existing legal relationship on BNY Mellon; and

iii. all property belonging to Kazakhstan (including the NFRK) – not being registered property – held in custody by BNY Mellon (in any capacity);

iv. all monies and/or monetary equivalents which BNY Mellon holds and all will acquire (in any capacity) for Kazakhstan (including the NFRK; and

v. all securities, security deposits, participation rights in security deposits or collective deposits held and/or administered by BNY Mellon on behalf of and/or for the account of Kazakhstan (including the NFRK).

[20] 'National Fund of the Republic of Kazakhstan'. Columbia Center 2013 (**Exhibit 16**), p. 8.
[21] This report is made with a view to the requirements of the attachment syllabus, p. 50.

Claims on third parties

57. Numerous Dutch legal entities pay Kazakhstan in connection with commercial oil extraction activities in Kazakhstan.22

58. The payments made by these Dutch legal entities are deposited with the aforesaid NFRK. Presidential Decree no. 385 of Kazakhstan, issued on 8 December 2016, contain specific rules on deposits with the NFRK:

> ***"Formation of the National Fund***
>
> *The National Fund shall be accumulated using;*
>
> *1) direct taxes from oil companies (except taxes credited to local budgets), which include the corporate income tax, extraction tax, bonuses, the export rental tax, excess profits tax, production share and additional payment of subsurface users acting under a production sharing contract;*
>
> *2) other receipts from operations carried out by oil companies (except receipts credited to local budgets), including receipts for violations of oil contract terms (except receipts credited to local budgets);*
>
> *(...)."23*

59. In the above quotation, a distinction is drawn between tax monies in paragraph 1 and other payments in paragraph 2. It follows from this that even Kazakhstan itself assumes that Kazakhstan receives payment in connection with oil extraction activities of both tax payments and non-tax payments (i.e. commercial payments).

60. It is also noted that a substantial part of these (commercial) non-tax payments are designated effectively and immediately for non-public, commercial purposes. These payments are deposited with the NFRK. As explained above, at least that part of the assets in the NFRK that is allocated to the Savings Fund (i.e. 75.2%) clearly has no (immediate) public, non-commercial purpose. Hence a corresponding part of the commercial payments which the Dutch legal entities must pay to Kazakhstan also has a non-public, commercial purpose.[24] This part of these claims on third parties therefore meets the conditions for attachment.

61. Furthermore, Stati et al. is aware that Kazakhstan has instituted arbitration proceedings against Karachaganak Petroleum Operating B.V. ("**KPO**") in relation to an agreement concluded between Kazakhstan and KPO:

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[22] See for example Shell Kazakhstan Development B.V. financial statements 201S (**Exhibit** 17), **KMG Kashagan B.V. financial statements 2015 (**Exhibit 18) and North Caspian Operating Company NV financial statements 2016 (**Exhibit 19**).

[23] Presidential Decree no. 385 of 8 December 2016 (Exhibit 20), chapter 5.1, 'Formation of the National Fund'.

[24] See Morning Star v Gabon, paragraph 3.5.4: *"(...) and to what extent those funds and credit balances meet the conditions for attachment (...)."* See also Supreme Court, 11 July 2008, ECU:NL:HR;2008:BDI387, NJ2010,525 *"(...)* (Azeta v JCR and State), paragraph 3.5: *"(...) designated in full or in part for non-public purposes."*

"Within nine months, the shareholders of Karachaganak Petroleum Operating (KPO) will have to come up with a proposal to Kazakhstan's government on how to resolve the dispute about allocation of oil sales proceeds at the Karachaganak gas-condensate field, energy minister Kanat Bozumbayev has said

The government thinks the present system is unfair. The energy ministry will also pursue a parallel claim through international arbitration."[25]

62. The arbitration concerns a dispute relating to the interpretation of a production sharing agreement, which is commercial contract that was concluded between the (commercial) shareholders of KPO and Kazakhstan.[26] Payment of the claim which may be made under the arbitral award will also be deposited with the NFRK. The above observations in relation to Kazakhstan's claims on the Dutch legal entities also apply here.

63. In light of the foregoing, Stati et al. applied for leave to levy attachment on the following companies (hereinafter jointly the "**Dutch Companies**"):

i. KARACHAGANAK PETROLEUM OPERATING B.V, with its registered office in Amsterdam and place of business at Strawinskylaan 1345 (1077 XX), Amsterdam;

ii. AGIP KARACHAGANAK B.V., with its registered office in Amsterdam and place of business at Strawinskylaan 1725 (1077 XX), Amsterdam;

iii. LUKOIL OVERSEAS KARACHAGANAK B.V., with its registered office in Amsterdam and place of business at Strawinskylaan 963 Tw D 9e (1077 XX), Amsterdam

iv. NORTH CASPIAN ÖPERATING COMPANY N.V., with its registered office in Amsterdam and place of business at Strawinskylaan 1725 (1077 XX), Amsterdam;

v. KMG KASHAGAN B.V., with its registered office in Amsterdam and place of business at Strawinskylaan 807 Tower A-8 (1077 XX), Amsterdam;

vi. AGIP CASPIAN SEA B.V., with its registered office in Amsterdam in place of business at Strawinskylaan 1725 (1077 XX), Amsterdam;

vii. SHELL KAZAKHSTAN DEVELOPMENT B.V., with its registered office in The Hague and place of business at Carel van Bylandtlaan 30 (2596 HR), The Hague;

viii. CNPC KAZAKHSTAN B.V., with its registered office in Amsterdam and

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[25] See 'Karachaganak Petroleum Operating 'Has Nine Months' To Satisfy Government', KasWorld 27 January 2017 (**Exhibit 21**).
[26] See 'Karachaganak Petroleum Operating 'Has Nine Months' To Satisfy Government', KasWorld 27 January 2017 (**Exhibit 21**).

place of business at Strawinskylaan 627 (1077 XX), Amsterdam;

ix. CASPIMERUERTY ÖPERATING COMPANY B.V., CASPIMERUERTY OPERATING COMPANY B.V., with its registered office in The Hague and place of business at Prins Bernhardplein 200 (1097 JB), Amsterdam;

64. and on, insofar as it concerns the assets described below which would be allocated to the Savings Fund of the NFRK (i.e. 75.2% thereof):

i. all claims that Kazakhstan has on the Dutch Companies; and

ii. all claims Kazakhstan will acquire directly on the basis of an existing legal relationship on the Dutch Companies; and

iii. all property belonging to Kazakhstan – not being registered property – held in custody by BNY Mellon (in any capacity);

KMG Kashagan B.V. shares held by Samruk as part of Kazakhstan

65. Samruk is a national holding company for Kazakhstan's investments, in the form of a 'Joint Stock Company'.

66. Kazakhstan has adopted legislation in relation to the governance of Samruk. This legislation provides, inter alia, that: i) Kazakhstan is the sole shareholder of Samruk; ii) the chairman of the Management Board must be the Prime Minister of Kazakhstan; and iii) that Samruk must carry out its activities in the interest van Kazakhstan as its sole shareholder.27 In the light of these circumstances, Samruk must be deemed to be part of the State (Kazakhstan), even if it is a separate legal entity.

67. This assertion is strongly supported by the fact that Samruk also considers itself to be fully part of the State (Kazakhstan).

68. In this context, Stati et al. refers specifically to the frequent submissions by Samruk in proceedings conducted in the United States of America, in which Samruk invoked state immunity under the US Foreign Sovereign Immunities Act (or the "FISA") when it was confronted with the claim from a number of investors in relation to deception by Samruk.

69. Thus Samruk stated the following in its Motion to Dismiss in relation to its status (**Exhibit 22**, p. 13):

> *"On a motion to dismiss under the FS1A, the defendant must first make a prima facie showing that it is a "foreign state" or an "agency or instrumentality of the foreign state." See Kensington Int'l Ltd. v. Itoua, 505 F.3d 147,153 (2d Cir. 2007). Once the defendant makes that showing, the plaintiff has the burden of going forward with evidence showing that an exception to immunity under the FS1A applies. See id. The ultimate burden of persuasion rests with the foreign*

[27] Law of the Republic of the Kazakhstan on the National Welfare Fund (no. 550-IV).

state claiming immunity. See id. Here, there is no issue that S-K Fund is a foreign state - Plaintiffs have alleged it in their Amended Complaint. (Am. Compl. ¶14; see Sarsenbayev Decl. ¶5.) Thus, S-K Fund is presumptively immune from jurisdiction in this case unless an exception to immunity applies. " [Underlining added)

70. The (federal) Court of the Southern District of New York also went on to rule in its Opinion (**Exhibit 23**, p. 9):

> *"It is well established that '[t]he FSIA is the sole source for subject matter jurisdiction over any action against a foreign state.' Kensington lnt'1 Ltd. v. Itoua, 505 F.3d 147, 153 (2d Cir. 2007) (internal quotation marks omitted). Specifically, the FSIA provides that a foreign state'— defined to include 'a political subdivision of a foreign state or an agency or instrumentality of a foreign state,' 28 U.S.C. § 1603(a) — 'shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.' Id § 1604; see Kensington Int'l, 505 F.3d at 153. As there is no dispute that S-K Fund is a 'foreign state' for purposes of the FSIA (see Am. Compl. ¶14: Def. 's Mem. 13). the threshold question in this case is thus whether any of the FSIA's statutory exemptions apply."* [Emphasis added].

71. Also on appeal, Samruk categorically took the position that it regards itself as part of the State (Kazakhstan). In its *Brief and Special Appendix for Appellant* (**Exhibit 24**, p. 1/2 and 18), Samruk states the following in that connection:

> *"SK Fund is a corporation formed trader the laws of Kazakhstan and is 100%owned by the Government of Kazakhstan. Accordingly. SK Fund is an agency or instrumentality of a foreign state as defined in the FSIA, and is presumptively immune from the jurisdiction of United States courts.*
>
> *(...)*
>
> *Here, there is no dispute - and the District Court correctly concluded - that SK Fund is a 'foreign state' under the FSIA. A-1089."* [underlining added].

72. Samruk holds a 100% share (50% direct and 50% indirect, the latter through the Kazakhstan national oil company ("**KMG** ")) in KMG Kashagan B.V.[28] KMG Kashagan B.V. is a legal entity which was set up with the sole purpose of managing Kazakhstan's commercial interests in the "North Caspian Project Consortium" under the commercial agreements known as the "North Caspian Production Sharing Agreement" and the "Joint Operating Agreement". The North Caspian Project Consortium is made up of a group of international oil companies: Agip Caspian Sea B.V., ExxonMobil Kazakhstan Inc., Total E&P Kazakhstan, Inpex North Caspian Sea Ltd., ConocoPhillips North Caspian Ltd. and Shell Kazakhstan Development B.V.[29]

[28] See KMG Kashagan B.V. financial statements 2015 (**Exhibit 18**), p. 1
[29] See KMG Kashagan B.V. financial statements 2015 (Exhibit 18), p.2.

73. KMG Kashagan B.V. is therefore a commercial company devoted to the development, management and exploitation – together with the consortium of international oil companies – of oilfields located in Kazakhstan's territorial waters in the Caspian Sea. See for example the KMG Kashagan B.V. financial statements 2015, page's 4-5:

> *"Additionaly, during the 2015 year, the Company carried out the following work under the North Caspian project:*
>
> *1) Review and decision making jointly with other Contracting companies and the NCP Operator by way of the Contractor committee, other committees and subcommittees in regard of the following issues:*
>
> - *Projectmanagement;*
> - *(...)*
> - *Risk insurance issues;*
> - *tinman resources management;*
> - *Technical issues;*
> - *(…);*
>
> *2) (...);*
>
> *(...)*
>
> *7) Evaluation of the Operator's proposal about the progress of the project implementation and preparation of the analytical statements in regard of the project management issues;*
>
> *(…)."*

74. KMG Kashagan B.V. is also active *"in arranging of oil and byproducts transportation and sales"*[30]

75. KMG Kashagan B.V. is consequently a commercial entity which was not set up for public, non-commercial purposes. Therefore those shares held by Samruk in KMG Kashagan B.V. are assets which are used (or held) directly (or indirectly) for a non-public, commercial purpose. They therefore fulfil the conditions for attachment.

76. In light of the foregoing, Stati et al. must be able to levy attachment on assets which are held directly by Samruk in the Netherlands. Stati et al. are therefore applying for leave to levy attachment on all shares held by Samruk in:

i. KMG KASHAGAN B.V., with its registered office in Amsterdam and place of business at Strawinskylaan 807 Tower A-8 (1077 XX), Amsterdam;

Application

77. In order to secure recovery of its claim on Kazakhstan, Stati et al. has a right to

[30] See KMG Kashagan B.V. financial statements 2015 (Exhibit 18), p. 6.

and an interest in levying pre-judgment attachment, before instituting recognition and enforcement proceedings before the Dutch court in respect of Arbitral Award and the Supplementary Arbitral Award.

78. In the context of the attachment, the amount of the Stati et al. claim must be increased to include a margin for interest and costs calculated in accordance with the sliding scale of the attachment syllabus.

79. The Stati et al. claims on the basis of the Arbitral Award and the Supplementary Arbitral Award are USD 506,660,597.40 and EUR 802,103.24 respectively. On the basis of the attachment syllabus applicable in August 2017, this leads to claims fixed at USD 557,656,657.14 and EUR 992,523.89 respectively.

80. The claim which Stati et al. has on the basis of the Arbitral Award is in a foreign currency. In principle, it is possible to convert the relevant amount into your own the context of the leave to levy attachment. However, such a conversion has no added value and will only lead to complications given the fluctuation of currency rates. For example a 1% change in the exchange rate on a claim of USD 500 million would make a difference of USD 5 million. For that reason, Stati et al. asked that the claim be fixed in the various original currencies.

Fear of embezzlement

81. Kazakhstan has no known domicile in the Netherlands. Article 765 DCCP does not require that fear of embezzlement be demonstrated.

Claim in the principal action

82. The claim in the principal action seeking an enforcement order in the Netherlands, namely – the application for recognition and enforcement of the Arbitral Award and the Supplementary Arbitral Award, will be instituted before the competent court in accordance with Articles 1075-1076 DCCP.

Period for claim in the principal action

83. In light of the interests at stake, the complexity of the case and the various cross-border aspects (such as the foreign nationality of applicants and the associated need to translate documents), Stati et al. asked that the period for instituting the claim in the principal action as provided for in Article 700 (3) DCCP be fixed at twelve weeks. This period is also justified on the basis of the fact that legal proceedings may have to be conducted if the Ministry of Security and Justice issues a notice within the meaning of Article 3a Bailiffs Act.

Obligation to substantiate the claim and the position of Kazakhstan

84. Kazakhstan refuses to satisfy the obligations arising from the Arbitral Award and the Supplementary Arbitral Award.

85. In regard to the Arbitral Award and the Supplementary Arbitral Award, Kazakhstan has adduced in setting aside proceedings – which resulted in the Swedish Court Judgment – that:[31] i) the Arbitral Award was arrived at in conflict with public policy; ii) that the Arbitral Award is not based on invalid arbitration agreement between parties; iii) the composition of the tribunal is a regular; iv) the composition of the tribunal was subject to a procedural error which influenced the outcome of the arbitration proceedings; and v) the tribunal committed serious errors which affected the outcome of the case.

86. Stati et al. point out that the grounds adduced by Kazakhstan for setting aside the Arbitral Award and the Supplementary Arbitral Award have all been assessed thoroughly by the Svea Court of Appeal and were dismissed in its Swedish Court Judgment. As part of this, the Svea Court of Appeal also excluded the possibility of an appeal to the Swedish Supreme Court against the Swedish Court Judgment.[32]

87. Kazakhstan takes the view, however, that the Svea Court of Appeal committed serious procedural errors and on that ground has pursued an extraordinary legal remedy against the Swedish Court Judgment with the Swedish Supreme Court (which, as explained above, is currently pending).

88. Naturally, this is just yet another attempt by Kazakhstan to frustrate the rights of Stati et al. However, the pursuit of the aforesaid extraordinary legal remedy may not under Swedish and Dutch law lead to the deferral or refusal of the application for recognition and enforcement of an arbitral award. Nor does it affect or suspend the effect and/or validity of the Arbitral Award and the Supplementary Arbitral Award. Stati et al. also referred in this respect to the recent decision of the Court of The Hague, paragraph 4.1, in the matter of *Carpatsky Petroleum Corporation v PJSC Ukrnafta* (**Exhibit 25**), which involved precisely the same type of extraordinary legal remedy:

> *"The cassation appeal instituted by Ukrnqfta does not change the foregoing. The decision of the Swedish Supreme Court does not relate to the question of whether the judgment of the Court of Appeal of 26 March 2015, in which the Ukrnafta claim seeking to have the arbitral award set aside was dismissed, can be upheld and therefore does not deny the effect of the arbitral award. By contrast to what Ukrnafta has argued, the question of whether the cassation appeal has any prospect of success is therefore not relevant for the moment in this case."*

89. Finally, it is noted that the pursuit of the aforesaid extraordinary legal remedy does not in any way detract from the right to an interest in the pre-judgment attachment for which Stati et al. has now requested leave.

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[31] See also: Swedish Court Judgment, page 8.
[32] Swedish Court Judgment, page 66.

Foreign recognition and enforcement proceedings

90. Proceedings for the recognition and enforcement of the Arbitral Award are currently pending before the High Court of Justice in London, England and the (federal) US District Court for the District of Columbia, United States. Kazakhstan is opposing recognition and enforcement in both proceedings.

91. Proceedings also pending before the US District Court for the Southern District of New York, for the recognition of the Swedish Court Judgment as a 'foreign money judgment'.

Declaration of provisional enforceability

92. Stati et al. are applying to the court in summary proceedings for a declaration that the ruling is provisionally enforceable. Although the granting of leave cannot be appealed, this does not prevent Kazakhstan from nevertheless filing an appeal based on case law on overturning appeal and cassation prohibitions, with the aim of having enforcement of the decision suspended. Therefore Stati et al. have an interest in the ability to enforce the ruling, even if an appeal is instituted.

Enforceability on any day and at any time

93. In light of the international nature of this case, it cannot be ruled out that levying of the attachment cannot start and/or will not be completed within the hours in which the bailiff is competent to perform his duties and Stati et al. therefore have an interest in levying attachment on any day and at any time

Competence of the court in summary proceedings

94. The court in summary proceedings at the District Court of Amsterdam is competent in relation to this matter, because a number of the third parties on whom attachment is envisaged, are domiciled in the District of Amsterdam and as such the Court of Amsterdam has jurisdiction.

On this ground, Stati et al. requests the Court:

- to grant leave to levy the pre-judgment attachments described above in this application;
- to fix the amount for which leave is granted, including interest and costs which the defendant can be ordered to pay, at USD 557,656,657.14 and EUR 992,523.89.
- to fix the period as provided for in Article 700 (3) DCCP at twelve weeks;
- to declare that the requested ruling is provisionally enforceable and to grant leave to levy pre-judgment attachment on any day and at any time.

Amsterdam, 30 August 2017

Counsel