INFORMAL TRANSLATION IN ENGLISH OF THE FRENCH ORIGINAL VERSION (ONLY THE FRENCH VERSION HAS BEEN SUBMITTED TO THE BRUSSELS COURT)

WRIT OF THIRD-PARTY OPPOSITION AGAINST THE ORDER OF EXEQUATUR

I. Introduction and Structure of the Present Application

1. By an ex-parte application dated 13 November 2017, wrongly based on Article 1720 of the new version of the Belgian Judicial Code (the "BJC"), the Stati Parties have sought from the French-Speaking Court of First Instance an order granting the exequatur to an arbitral award issued on 19 December 2013 (and corrected on 17 January 2014) by an Arbitral Tribunal seated in Stockholm, Sweden, and operating under the auspices of the Stockholm Chamber of Commerce (the "SCC") in case V1116/2010 (the "Award"). The Award wrongly ordered the Republic of Kazakhstan (the "RoK") to pay the Stati Parties a total of USD 497,685,101, to be increased by interest charges and costs.

2. Having been made aware that the Stati Parties would apply on an *ex parte* basis for an exequatur, the RoK's counsels wrote on 15 November 2017 to the President of the Brussels French-Speaking Court of First Instance, in charge of *ex-parte* applications (as they had previously done to the attention of the President of the Brussels Dutch-speaking Court) requesting that any application for exequatur brought on an ex-parte basis by the Stati Parties be dismissed or, at least, that the RoK be heard by the President before any such application for exequatur be ruled upon .

3. The possibility for a party against whom the exequatur of the Award is sought, to be heard by the President of the Court of First Instance, called upon to rule on an application for exequatur, is expressly provided in Article 1719, §5, of the former BJC, which is applicable in the present case. In their letter, the RoK's counsel informed the President of the Court of First Instance that the Award could not validly be granted the exequatur in Belgium, including because it has been obtained by fraud.

4. By an ex-parte order dated 11 December 2017 (the "Order"), wrongly based on the new version of the BJC (Articles 1680, §6, and 1719 to 1721), the Court of First Instance admitted the Stati Parties' request and granted the exequatur to the Award, without hearing the RoK.

5. As it appears from the Order, the Court of First Instance addressed a series of questions orally to the Stati Parties. Those questions are not reproduced in the Order, and their precise content is therefore unknown to the RoK. On 23 November 2017, the Stati Parties have also sent a letter to the Court, which is not attached to the Order. Finally, on 7 December 2017, the Stati Parties have submitted written submissions to supplement their ex-parte application. Those submissions are attached to the Order.

6. In the Order, the Court of First Instance stressed that exequatur was granted in view of the information available at this stage, and that it was open to the RoK to bring this third-party opposition to set aside the Order.

7. As will be demonstrated, following the present third-party opposition, Your Court must indeed set aside the Order for the following reasons:

- Firstly, the Court of First Instance had no jurisdiction to issue the Order. Since the arbitration started in 2010, thus before the entry into force on 1 September 2013 of the new law of 24 June 2013 amending part VI of the BJC on arbitration[1], the Belgian law provisions of part VI of the BJC that are applicable to the exequatur of the Award are the former provisions of the BJC (hereinafter, the "former BJC"). Pursuant to Article 1719, §1, of the former BJC, it was not the Court of First Instance which had jurisdiction, but the President of the Court of First Instance. The Stati Parties have thus wrongly seized the Court, which issued the Order on the basis of Articles 1680, §6, and 1719 to 1721 of the (new) BJC, whereas these provisions are not applicable in the present case. Since this constitutes a breach of an imperative jurisdiction rule, Your Court must necessarily set aside the Order;

- Secondly, the Order must be set aside because the Award was obtained by and through a fraud committed by the claimants before and during the arbitration. The Award cannot receive exequatur in Belgium, since it breaches Article V(2)(b) (public policy), Article V(2)(a) (arbitrability), and Article V(1)(c) (jurisdiction) of the New York Convention on the recognition and enforcement of foreign arbitral awards of 1985[2] (hereinafter, the "New York Convention"), as well as Article 1723, 2°, Article 1723, 3° *juncto* 1704, 3, a, b) and c) and Articles 1723, 3° *juncto* 1704, 2, c) and d) of the former BJC;

- Thirdly, the Order must be set aside because the Award was issued in an arbitration in which several fundamental procedural rules were breached, affecting the RoK's rights of defense and due process rights. Indeed, as will be demonstrated hereafter (i) the Stati Parties have not respected a mandatory cooling-off period imposed by the Energy Charter Treaty of 17 December 1994 (the "ECT") under which they purported to bring the arbitration and which is a condition for the jurisdiction of the Arbitral Tribunal; and (ii) the RoK was not afforded the right to appoint its own arbitrator in the Arbitral Tribunal, while this is one of the most fundamental rights of a party to an arbitration procedure. The Award cannot therefore receive the exequatur in Belgium, on the basis of Article V(2)(b) (public policy), Article V(1)(b) (due

[1] *M.B.*, 28 June 2013, p. 41263.
[2] The New York Convention was approved in Belgium by the Law of 5 June 1975 (*M.B.,* 15 November 1975, p. 14411).

process), Article V(1)(c) (jurisdiction), and V(1)(d) (composition and procedure not in accordance with the parties' agreement) of the New York Convention, as well as Articles 1723, 2° and Articles 1723, 3° *juncto* 1704, 2, b), c), d), f) and g) of the former BJC.

8. The RoK reserves its right to complete and/or amend the various grounds for refusal raised in these summons, and to add any new ground which would come to light in the course of the present proceedings.

II. Relevant Facts and Procedural Background

A. Background of the Case

9. The first two defendants, Anatolie Stati and Gabriel Stati, are entrepreneurs, holding passports of Moldova and Romania. Anatolie Stati claims to own 100% of the third defendant, Ascom, a joint stock company incorporated under the laws of Moldova, with headquarters in Moldova. Anatolie Stati and Gabriel Stati each claim to own 50% of Terra Raf, a limited liability company incorporated under the laws of Gibraltar.

10. During the period between 1999 and 2004, the Stati Parties acquired 100% of the shares in two Kazakh companies, Kazpolmunay LLP ("KPM") and Tolkynneftegaz ("TNG").

11. KPM is wholly-owned by Ascom, which in turn is wholly-owned by Anatolie Stati. TNG is wholly-owned by Terra Raf, which in turn is owned in equal shares by Anatolie Stati and Gabriel Stati.

12. Anatolie Stati also wholly owns Tristan Oil Ltd. ("Tristan"), a special purpose vehicle organized in the British Virgin Islands that was formed for the sole purpose of financing the operations of KPM and TNG. Anatolie Stati served as President and CEO of Tristan and Chairman of its board of directors.

13. Prior to their acquisition by the Stati Parties, KPM and TNG had obtained approval from Kazakhstan to explore and develop various oil and gas fields in Kazakhstan pursuant to different subsoil use contracts.

14. More precisely, in 2006, TNG, together with another oil trading company called Vitol, initiated activities to construct a Liquefied Petroleum Gas Plant in Kazakhstan (the "LPG Plant").

15. Prompted by an inter-governmental communication, from late 2008, the RoK's authorities began to investigate the Stati Parties' activities more closely. The investigations demonstrated various serious irregularities in the operations of KPM and TNG, including regulatory and tax breaches.

16. In June and July 2010, other inspections of KPM and TNG revealed a large number of infringements of a range of environmental regulations and contractual requirements under various licenses.

17. Ultimately, on 21 July 2010, based on these multiple violations, the Kazakh Ministry of Oil and Gas terminated KPM's and TNG's subsoil use contracts. The fields as well as the facilities on the fields (but not the LPG Plant) were taken into trust management by KazMunaiGas National Company ("KMG NC"), the Kazakh state oil company, and by its subsidiary KazMunaiTeniz ("KMT"). Their operation of the fields is not for profit, but in order to maintain and preserve the fields.

18. On 26 July 2010, **only five days after the termination of the subsoil use contracts**, the Stati Parties instituted arbitration proceedings before the Stockholm Chamber of Commerce ("SCC") purportedly under the terms of the Energy Charter Treaty (the "ECT"), an international treaty signed in December 1994 (and which came into force in April 1998), which aims to protect foreign investments in the energy sector.

19. The arbitration clause on which the Stati Parties purported to bring the arbitration is contained in Article 26 of the ECT. This provision provides for a detailed dispute resolution mechanism for disputes between a State that is a contracting party to the Treaty (in this case, the RoK) and an Investor from another State contracting party (in this case, the Stati Parties) in relation to an investment made by the latter in the area of the former. and concerning a breach of one or more of the provisions contained in Part III of the ECT, which provisions impose upon each contracting State (in this case, the RoK) a series of duties in relation to foreign investments made on their territory (in this case, the purported investments made by the Stati Parties).

20. Article 26(1) ECT further imposes upon each party a duty to try settling the dispute through amicable settlement before to submit it to arbitration. Article 26(2) ECT expressly provides that a three months period must lapse from the date on which either party requested amicable settlement before a dispute may be brought to arbitration. As will be further developed below, those provisions have been breached by the Stati Parties in this case.

21. The Stati Parties asserted in the arbitration that the RoK's alleged conduct had breached several provisions of Part III of the ECT, namely Articles 10, 11, 13 and 14. More precisely, the Stati Parties requested to be compensated for the alleged substantial amounts of money they had purportedly invested in generation of a new life in the oil and gas fields in Kazakhstan, including and most importantly in the construction of the LPG Plant.

22. Yet, the RoK learned after the arbitration proceedings (and after that the Award was issued), that the substantial amounts allegedly invested by the Stati Parties in the construction of the LPG Plant, and which were at the basis of their claims before the Arbitral Tribunal, had simply never been invested by them in the LPG Plant.

23. Therefore, the Stati Parties could not have validly and legitimately relied on the ECT, and especially on the arbitration clause in Article 26 of the ECT, on which they purported to bring the arbitration proceedings against the RoK.

B. Arbitration Proceedings

24. On 5 August 2010, the SCC forwarded the Stati Parties' Request for Arbitration to the RoK. The same letter requested the RoK to submit an Answer by 26 September 2010, as well as its observations regarding the questions of the seat of the arbitration and the Stati Parties' proposal for appointment of the chairperson.

25. This was received by the competent department within the RoK (the Department of the Protection of the State's Property Rights, or the "DPSPR") on 11 August 2010.

26. On 27 August 2010, the SCC sent a further letter by courier to the RoK reminding it to submit an Answer to the Request for Arbitration and setting a new deadline of 10 September 2010. This was received by the DPSPR on 1 September 2010.

27. On 13 September 2010, the Stati Parties submitted by electronic correspondence an ex-parte request to the SCC that the SCC Board appoint an arbitrator on the RoK's behalf.

28. The Stati Parties did not send a copy of this communication to the RoK. The SCC received and forwarded this request to the RoK on the same day, but sent it by registered mail rather than by courier. As a result, this request did not reach the RoK until 23 September 2010.

29. Meanwhile, on 15 September 2010 (two days after receiving the Stati Parties' request to appoint a default arbitrator on behalf of the RoK), the SCC Board nominated Professor Lebedev to be appointed as arbitrator on behalf of the RoK.

30. The SCC informed Professor Lebedev of his appointment on 20 September 2010. Professor Lebedev accepted his appointment immediately.

31. The SCC notified the parties of Professor Lebedev's appointment by a letter dated 23 September 2010, the very day on which the RoK received the copy of the Stati Parties' request for the SCC to appoint an arbitrator on the RoK's behalf.

32. Also on 23 September 2010, the SCC Board determined that the seat of the Arbitration would be Stockholm, Sweden.

33. On 2 December 2010, once the RoK had complied with its internal procedures and retained counsel to represent it, it formally objected to the SCC's appointment of Professor Lebedev as its arbitrator, arguing that it was done without the RoK's consent and prior consultation, without providing prior notice of the Stati Parties' request, and

without giving the RoK adequate opportunity to select its own arbitrator. The RoK therefore requested an opportunity to appoint its own arbitrator.

34. On 15 December 2010, a meeting of the SCC Board took place, chaired by Mr Gernandt. The minutes of this meeting record the SCC Board's decision that the challenge to Professor Lebedev, introduced by the RoK, was dismissed. It also appears from the minutes of this meeting that Margrete Stevens, a lawyer and partner within the law firm King&Spalding, participated to this meeting. Yet, King&Spalding was representing the Stati Parties in the arbitration.

35. The RoK at all times maintained its objection to the appointment of Professor Lebedev and reserved all of its rights in that regard.

36. The arbitration continued until the submission of the final post-hearing briefs on 3 June 2013, and included three hearings which took place in Paris.

37. On 19 December 2013 the Tribunal rendered its Award.

38. On the signature page of the Award (page 414), Professor Lebedev is recorded as having dissented on jurisdiction and Mr Haigh is recorded as having dissented on parts of the quantum analysis. Neither provided a separate dissenting opinion or otherwise explained the basis of his dissent.

39. On 17 January 2014, the Tribunal issued a correction to the Award under Article 41 of the SCC Rules and Section 32 of the Swedish Arbitration Act ("the SAA") in respect of the arbitration costs.

40. The Award ordered the RoK to pay the Stati Parties a total of USD 497,685,101, to be increased by interest charges and costs.

41. On 19 March 2014, the RoK commenced proceedings in Sweden to annul the Award pursuant to Swedish arbitration law.

42. Thereafter the Stati Parties instituted proceedings to enforce the Award in the US, in England, in Luxembourg, in the Netherlands and now in Belgium.

43. In all the jurisdictions where enforcement is sought by the Stati Parties, the RoK is contesting recognition and enforcement (exequatur) of the Award, under the New York Convention on the recognition and enforcement of foreign arbitral awards of 1985 (the "NY Convention") and/or under the relevant national arbitration laws.

C. Discovery of the Fraud

44. It was only after the Award had been rendered, and after the US and English exequatur actions had been commenced, that the RoK came to learn that the Award had been obtained by fraud.

45. Particularly, the RoK discovered that the Stati Parties had been involved in other arbitral proceedings relating to the same LPG Plant. Those other arbitration proceedings partially overlapped in time with the arbitration proceedings against the RoK. The Stati Parties were represented by the same counsel in both proceedings, namely the law firm [King & Spalding].

46. When the RoK discovered this, it lodged an application before the U.S. District Court for the Southern District of New York for discovery at the law firm Clyde & Co. Against the strong objection of the Stati Parties, the US Court granted discovery by an order of 22 June 2015.

47. Based on the order, Clyde & Co. was forced to disclose a large number of documents. It is on the basis of these documents, and further investigations, that the fraud was unravelled by the RoK in the summer of 2015.

48. The fraud is related to the LPG Plant that the Stati Parties were to develop in Kazakhstan, and which they invoked at the basis of their “investment” to ground the Arbitral Tribunal’s jurisdiction under the arbitration clause contained in Article 26 of the ECT.

49. The main equipment for the LPG Plant was delivered and its instalment supervised by the German company TGE Gas Engineering GmbH ("TGE") for a contract price of approximately EUR 32,000,000.

50. The Stati Parties abandoned the construction in early 2009. By then it was 80% to 90% complete.

51. Only eighteen days after the agreement with TGE had been concluded, the companies linked to the Stati Parties concluded an agreement with Perkwood Investment Limited ("Perkwood") (the "Perkwood Contract"). Perkwood was purported to be an independent third party company established in the UK and with which the Stati Parties had entered into arms-length contracts. The stated purpose of the Perkwood Contract was the purchase of equipment for the LPG Plant.

52. As discovered later based on the documents disclosed by Clyde & Co., **Perkwood was simply another Stati company**, which the Stati Parties – after denying this initially, including in submissions before the Swedish court – were forced to concede when confronted with Powers of Attorney issued by Perkwood to Mr. A. Stati and his son, M. G. Stati.

53. It has now surfaced that the Stati Parties used an important number of schemes to fraudulently inflate the construction costs of the LPG Plant through Perkwood and the Perkwood Contract. For instance:

- The Stati Parties purportedly purchased equipment for the LPG Plant from Perkwood at artificially inflated prices when the identical equipment had already been supplied, at a much lower cost, by TGE under the legitimate TGE Contract. This has been evidenced by an engineer from TGE, M. Franjo Zaya, who testified in the English proceedings that he had never encountered Perkwood while working on the LPG Plant, and that multiple equipment described in the Perkwood Contract referred to the exact same equipment that had already been delivered by TGE;

- The Stati Parties moreover purportedly purchased equipment in an amount of USD 72 million from Perkwood for the LPG Plant that was not required for the construction of the LPG Plant, and was never in fact delivered to the construction site of the LPG Plant, in order to fictitiously inflate the construction costs of the LPG Plant;

- The Stati Parties created a fictitious USD 43,852,108.00 “management fee” included in the total amount of the Perkwood Contract. Besides the fact this fee had no contractual basis, it was not paid in consideration for any services actually provided by or on behalf of Perkwood. The true purpose of any purported “management fee” paid by TNG to Perkwood was, again, to inflate the construction costs of the LPG Plant on a purely fictitious basis;

- From the time of its establishment in 2005 until its liquidation in 2011, Perkwood lodged “dormant accounts” with the UK Companies House. Under English law, a company may only lodge "dormant accounts" if during the relevant financial year it has not performed a single transaction. Hence, while Perkwood was, according to the Perkwood Contract, involved in every kind of activity for the benefit of the development of the LPG plant, Perkwood was taking the position in England that it was "dormant”. If it was a dormant company, it could simply not have rendered the “management services” for which it received purported “management fees” under the Perkwood Contract.

54. The fraudulently inflated costs of constructions are in excess of USD 150 million.

55. Throughout the arbitration proceedings, the Stati Parties argued, relying on false evidence, that they had invested over USD 245 million in the LPG Plant, while **the sums they alleged have in fact never been invested in the plant.**

56. Amongst other, the fraudulently inflated costs were communicated by the Stati Parties to KPMG, their auditor, and became part of the financial statements of their companies which they submitted in the arbitration.

57. The Stati Parties did not tell their auditor that Perkwood was linked to them. Yet this was an obligation under International Accounting Standard ("IAS") 24.1. IAS 24.1 obliges party-related transactions to be reported to the auditor. As a consequence the auditor came to the mistaken conclusion that the Perkwood Contract was a bona fide commercial agreement with a third party. For this reason, the auditor, without any further investigation, permitted the purported costs said to have been incurred in the context of the Perkwood Contract to be included in the annual accounts.

58. The evidence submitted by the Stati Parties in the arbitration included also testimonies of Mr. A. Stati himself, his chief accountant and others, as well as documents, for example the financial statements above mentioned. Those testimonies and financial statements all contained or referred to the fraudulently inflated construction costs of the LPG Plant. Therefore, those testimonies and evidence were false.

59. The Stati Parties further submitted in the arbitration an indicative bid that had been made by the Kazakh state-owned company KazMunaiGas ("KMG") to purchase the LPG Plant from the Stati Parties' companies (Ascom and Terra Raf) (the "Indicative Bid"). In the Indicative Bid, KMG had valued the LPG Plant for an amount of USD 199 million.

60. The Stati Parties continuously argued before the Arbitral Tribunal that this Indicative Bid represented a relevant "*guide to the value*" of the LPG Plant, for the purpose of valuation the amount of their investment, and the alleged damages they purportedly suffered. **Yet, this Indicative Bid was based on an "Information Memorandum" that had been communicated by the Stati Parties, and which was based on the fictitious costs described above**.

61. In the Award, the Arbitral Tribunal considered the Indicative Bid "*to be the relatively best source of information for the valuation of the LPG Plant among the various sources of information submitted by the Parties regarding the valuation for the LPG Plant*" (§ 1747 of the Award).

62. For this reason, the Arbitral Tribunal set the value of the LPG plant at USD 199,000,000, in line with KMG's Indicative Bid.

63. When the Award is based on KMG's Indicative Bid for the value of the LPG plant, a bid that is itself based on the fictitious costs linked to the Perkwood Contract, the Award became vitiated by the fraud committed by the Stati Parties.

64. In addition, and more fundamentally, if the fraud committed by the Stati Parties to falsely inflate the alleged costs of the LPG Plant had been known to the Arbitral Tribunal, the arbitration would have unfolded entirely differently.

65. The fraud would obviously have been raised by the RoK as a defence against the jurisdiction of the Arbitral Tribunal. The purported investment made on the territory (the "area") of Kazakhstan, on which they based the Tribunal's jurisdiction under Article 26 ECT, had simply never been made in the manner (and in the proportion) alleged.

66. The fraud would also have been raised by the RoK as a defence against the admissibility and merits of the claims.

67. It follows from the above that the Stati Parties' fraudulent scheme and false evidence have therefore directly affected the Arbitral Tribunal's assessment of the questions of: (i) the Tribunal's jurisdiction and the admissibility of the Stati Parties' claims; (ii) the RoK's potential liability for damages; and, (iii) (in any event) the quantum of damages wrongly awarded by the Arbitral Tribunal.

68. Had the Arbitral Tribunal known about the massive fraudulent scheme masterminded and performed for over three years by the Stati Parties before the beginning of the arbitration, as well as the false witness statements, expert opinions procured by the Stati Parties and other submissions made by the Stati Parties, it would simply not have ordered the RoK to pay any compensation to the Stati Parties under the ECT.

D. Setting-Aside Proceedings before the Swedish Courts

69. On 19 March 2014, the RoK instituted proceedings before the Svea Court of Appeal in Stockholm to set-aside the Award under the Swedish Arbitration Act. In its initial application, the RoK challenged the Award on the ground of several procedural flaws, amongst which:

- the invalid constitution of the Arbitral tribunal due to SCC's improper default appointment of Professor Lebedev on behalf of the RoK; and ;

- the Stati Parties' failure to comply with the cooling-off requirement of article 26 of the ECT, which is a condition precedent to the right to have the dispute settled in arbitration and to the jurisdiction of the Arbitral Tribunal.

As mentioned above, at that time, the fraud had not yet been discovered.

70. On 5 October 2015, after the RoK began to unravel the Stati Parties' fraudulent scheme, the RoK filed another motion to set aside the Award because it was procured by fraud.

71. In November 2015, the Svea Court decided to consolidate the RoK's challenges of the Award.

72. With respect to the jurisdiction of the Arbitral Tribunal more particularly, the RoK asserted in front of the Svea Court that an action under the ECT requires a good-faith

investment and that in the present case Stati Parties' purported investment was the result of a fraud. With respect to liability, RoK stressed that the erroneous reliance on the Stati Parties' assertions (which proved to be false and fictitious) led the Arbitral tribunal to give a ruling in their favour. The RoK also highlighted that during the arbitration proceedings the Stati Parties misled the Arbitral Tribunal in claiming that they had incurred USD 245 million in constructing and developing the LPG Plant, whereas this investment, as claimed, was fictitious.

73. The Stati Parties did not offer any evidence to contradict the key factual elements brought by the RoK concerning the fraudulent scheme. In particular, they did not offer evidence as to the actual and true construction costs of the LPG Plant.

74. On 9 December 2016, the Svea Court of Appeal wrongly dismissed the RoK's action despite the RoK's detailed and specific allegations regarding the fraudulent scheme.

75. Importantly, **the Court did not rule on the question whether the Stati Parties engaged in a fraudulent scheme or offered false evidence and testimony in the SCC Arbitration**.

76. The Court merely considered that *"the indicative bid per se is not to be regarded as false evidence"*, without addressing the argument that the false evidence was itself based (directly) on the Stati Parties' fictitious and fraudulent evidence.

77. The Court also did not address RoK's arguments that the Stati Parties' fraud in effect deprived the Arbitral Tribunal of jurisdiction under the ECT.

78. Moreover, the Court did not give permission to RoK to appeal the decision (this being a condition to make an appeal to the Swedish Supreme Court).

79. On 3 February 2017, the RoK filed a motion with the Swedish Supreme Court for grave procedural errors, because the Svea Court had not ruled on all of the RoK's set-aside grounds. This is an extraordinary recourse, and not the regular appeal that the Swedish Court of appeal had refused permission to pursue as noted above. On 24 October 2017, the Swedish Supreme Court wrongly dismissed this extraordinary recourse, **without providing any reasoning**.

E. The English judgment recognizing a fraud "*prima facie*"

80. On 24 February 2014, the Stati Parties filed an ex-parte application to enforce the Award in the High Court of Justice, Queen's Bench Division, Commercial Court, in London, England ("the High Court").

81. On 28 February 2014, the High Court issued an order granting the Stati Parties permission to enforce the Award.

82. This order was served by the Stati Parties on the RoK only nearly a year later, on 14 January 2015.

83. On 7 April 2015, the RoK filed an application to annul the permission to enforce the Award, setting out the grounds to challenge the enforcement that were known to the RoK at the time.

84. The effects of the enforcement order have been stayed in England since that time.

85. After the fraud was unravelled in the summer of 2015, on 27 August 2015, the RoK applied to amend its pleadings to add the ground that the enforcement of the ECT Award **contravenes public policy by reason that it had been procured by fraud**.

86. The RoK submitted extensive witness evidence and documents in support of its application. This included witness statements and supporting documents from international accountants, construction engineers, and Kazakhstan's counsel, Mrs Patricia Nacimiento.

87. On 6 June 2017, on the basis of the evidence submitted and after having heard the Stati Parties, the High Court (Justice Knowles) issued a judgment in which it held that RoK **had presented a "*sufficient prima facie case that the Award was obtained by fraud*"** (the "English judgment").

88. At para. 65 of the English judgment, the High Court found that, should the RoK's position be confirmed in the trial on the merits:

> "*the present case is one where [the Stati Parties] encouraged the Tribunal to rely on an indicative offer [from KMG] that [the Stati Parties] knew was misleading, because it was based on false information that they had provided*".

89. Importantly, the High Court decided that the reasoning of the Swedish Court could not be followed. The High Court found, amongst other, the following:

> "*the Swedish Court (...) reasoned that the KMG Indicative Bid was not (itself) false evidence. That assessment holds at the time the KMG Indicative Bid was made, but I respectfully question whether it still holds when the KMG Indicative Bid is later deployed by a party who knows (but continues to conceal) that it is the product of that party's fraud*".

90. Accordingly, the High Court ordered a full trial on the merits regarding the fraud. Both Parties are currently engaged in the proceedings and working towards a 8-day trial to begin in October 2018, where witnesses and experts will be heard and subject to cross-examination. As the Stati Parties are fully aware, this process can only further expose the extent of the fraudulent scheme instigated by the Stati Parties to obtain the Award.

91. In their ex-parte application dated 13 November 2017 to seek the exequatur of the Award submitted before this Court, the Stati Parties **entirely failed to disclose the existence of the English proceedings and the English judgment**, in breach of their duty to act loyally in ex-parte proceedings[3]. The English judgment is clearly relevant and material because, as will be further developed below, an Award obtained by fraud may not be recognized and enforced under both the New York Convention and Belgian law.

92. It was only thanks to the initiative of the RoK that the Stati Parties were finally forced to inform the Court about the English proceedings and the English judgment.

93. Indeed, as explained above (§ 2), on the 15 November 2017, the RoK's counsel sent a letter to the President of the French-speaking Court of First Instance before the ex-parte application for exequatur. That letter seemingly prompted the Court to ask questions to the Stati Parties, that the Stati Parties were subsequently forced to mention the existence of the English judgment in their additional submissions dated 7 December 2017.

94. As the RoK was not summoned to appear before to issue the Order, the Court could only rely on the unilateral and biased presentations about the English proceedings made by the Stati Parties in their additional submissions, including on their allegation that an appeal against the English judgment was pending. In fact, their appeal has been lodged too late and has since then been declared inadmissible by an Order of the Court of Appeal of England dated 9 January 2018. There is thus no appeal pending against the English judgment, having confirmed the existence of a fraud *prima facie*.

95. Moreover, in their additional submissions dated 7 December 2017, the Stati Parties wrongly relied on the alleged "*res judicata*" effect of the Swedish judgments, while these judgments have no legal consequences in the Belgian legal order (as further explained below in §147 and following).

F. Attachment Proceedings

96. Before the Stati Parties applied on an ex-parte basis to this Court to seek the exequatur of the Award, they had sought also on an ex-parte basis, from the Dutch-speaking Court of First Instance, on 29 September 2017, the authorization pursuant to Article 1412*quinquies*, §2, 3°, of the BJC, to proceed to a pre-judgment (conservatory) garnishment in the hands of the Belgian bank BNY Mellon SA/NV ("BNYM") on assets "*relating to*" the "*Savings Fund*" of the National Fund of the Republic of Kazakhstan.

97. This authorization was granted to the Stati Parties in an order dated 11 October 2017.

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[3] Civ. Gent (Prés.), 29 November 1991, *TGR*, 1992, n°7, p. 13; Brussels, 14 March 2000, *JT*, 2001, p. 337, obs. L. Van Bunnen.

98. This garnishment purportedly intended to protect the Stati Parties' claim against the RoK based on the Award (which had not yet been recognized in Belgium at that time).

99. Towards the end of October 2017, BNYM issued an (undated) declaration stating that it had frozen all the assets held on cash and securities accounts held by a third party, the National Bank of Kazakhstan ("NBK"), at BNYM's London branch for a total amount of approximately **USD 22 billion.**

100. The garnishment of this amount, without proportion with the amount of the Award, causes a very substantial prejudice to the NBK.

101. Upon review of the Stati Parties' ex-parte application before the Dutch-speaking Attachment Court, the garnishment order and the declaration of BNYM, it appears that:

- the conditions to obtain the authorization for the attachment of funds held by foreign central banks (Article 1412*quater* of the BJC) and foreign sovereign funds (Article 1412*quinquies* of the BCJ) are not satisfied;

- the assets that were frozen are held with BNYM by the NBK, and not by the RoK;

- those assets are held with the London branch of BNYM, and not on the Belgian territory.

102. On 20 November 2017, the RoK filed a "third-party opposition" against the garnishment order before the Dutch-speaking Attachment Court. Through that application, the RoK asked the Dutch-speaking Attachment Court to set aside the garnishment order and to release the garnished assets.

103. This case is currently pending before the Dutch-speaking Attachment Court, and no decision has been issued yet in these proceedings.

104. Like they did before this Court concerning the application for exequatur, the Stati Parties have failed to disclose a series of relevant information in their ex-parte application filed before the Dutch-speaking Attachment Court. Again, they failed to disclose the English judgment.

105. The Stati Parties have also sought and obtained ex-parte protective garnishment orders in other jurisdictions, including in the Netherlands and Luxembourg. In the latter two jurisdictions, the Stati Parties have purported to attach the very same assets held by the NBK with the London branch of BNYM. The Stati Parties therefore attempt to circumvent both the territorial nature of the seizures and the effect of the English judgment.

106. This attempt has already failed in the Netherlands, where the Amsterdam Court of first instance recently lifted the Dutch attachment in a judgment dated 23 January 2018.

Amongst other, **the Amsterdam Court of first instance confirmed that the Stati Parties had breached their duty to act loyally in ex-parte proceedings** because they had failed to mention a previous unsuccessful attempt to attach RoK's assets in the Netherlands. The Amsterdam Court of first instance also confirmed that the Stati Parties wrongly sought to attach assets that are held by a third party, the NBK.

107. It is therefore clear that the Stati Parties are engaged in extreme and unwarranted forum-shopping and abuse of ex-parte procedures, within and outside Belgium.

108. The circumstance that they have brought their ex-parte application for exequatur before the Brussels French-speaking Court of first instance at the beginning of November 2017, while they had previously sought the garnishment order from the Brussels Dutch-speaking Court of first instance at the beginning of October 2017, can only be seen as a further attempt to conceal the fraud which vitiates the Award. The Stati Parties perfectly knew that the RoK was going to raise the fraud in front of the Attachment Judge of the Dutch-speaking Court in their "third-party opposition" to the attachment authorization, which was precisely to be introduced during the month of November 2017. It is most probably for this reason that the Stati Parties applied, on an ex-parte basis and without mentioning the English judgment, for the exequatur of the award in front of the French-speaking court.

III. Legal Discussion

A. Introduction and Structure of the Arguments

109. The RoK respectfully requests that Your Court set aside the Order, for the following reasons (and for any other reason that may come to light in the course of the present proceedings):

- The Order has been issued by a Court which had no jurisdiction (see point (b) below);

- The Award has been obtained by fraud and, therefore, it breaches public policy and it was rendered by an Arbitral Tribunal with no jurisdiction on the basis of an inapplicable arbitration clause.(see point (c) below).

- The Award has been issued in an arbitration procedure that is affected by various serious procedural errors (see point (d) below).

B. The Order must be set aside because it has been issued by a Court which had no jurisdiction

1. The Belgian Arbitration Law Regime *Ratione Temporis*

110. Arbitration-related court proceedings in Belgium are governed by Part VI of the BJC. Part VI of the BJC has been amended by the Law of 24 June 2013[4], and subsequently (on minor issues) by the Law of 25 December 2016[5].

111. The Law of 24 June 2013 contains a transitional provision[6], which provides that:

> "*This Law applies to arbitration commencing in accordance with Article 34 after the date of entry into force of this Law.*
>
> *The sixth part of the Judicial Code, as written prior to the entry into force of this Law, remains applicable to arbitration that commenced prior to the entry into force of this Law.*
>
> *This Law applies to actions that were brought before the court to the extent that they concern an arbitration referred to in Paragraph 1.*
>
> *The sixth part of the Judicial Code, as written prior to the entry into force of this Law, remains applicable to actions pending or introduced before the court relating to an arbitration referred to in Paragraph 2*" (emphasis added).

112. The Law of 24 June 2013 entered into force on 1 September 2013[7]. Therefore, it only applies to arbitration proceedings commenced after that date, and to judicial proceedings to set aside or enforce arbitration awards rendered in arbitration proceedings that commenced after that date.

113. By way of consequence, the former provisions of Part VI of the BJC remain applicable to all arbitral proceedings initiated prior to 1 September, as well as to all Belgian judicial proceedings in relation to arbitral awards which relate to arbitrations initiated prior to 1 September 2013 (whether or not "pending" on 1 September 2013).

114. In the case at hand, as mentioned above (§ 18), the arbitration proceedings were initiated by the Stati Parties against the RoK in July 2010, long before the entry into force of the Law of 24 June 2013.

115. It follows that the provisions in force before the amendments of the Law of 24 June 2013 apply to the application for exequatur of the Award (those provisions will be referred to hereinafter as being part of the "former BJC").

2. The Order was issued by a Court with no jurisdiction

[4] *M.B.*, 28 June 2013, p. 41263.
[5] *M.B.*, 30 December 2016, p. 91990.
[6] Conversely, the Law of 25 December 2016 does not contain any transitional provision.
[7] *M.B.*, 28 June 2013, p. 41263.

116. Pursuant to Article 1719, §1 and §2, of the former BJC, an application for exequatur of a foreign arbitral award has to be brought before the President of the Court of First Instance, located at the place where enforcement is sought[8]. This jurisdiction is exclusive, meaning that no other Court could be seized of this application.

117. This rule has been changed in the Law of 24 June 2013. Under the new regime, Articles 1680, §5 and §6, as well as Article 1720, §1 and §2, of the (new) BJC provide that the application must be brought before the Court of First Instance (at the place where the enforcement is sought)[9], and no more before the President of the Court.

118. In the case at hand, the Stati Parties have wrongly based their application on "*Article 1720, §2*" of the (new) BJC (see para. 8 *in fine* of their ex-parte application). In line with this wrong provision, their application has been brought to "*Mr the President and Messrs. and Mrs. the judges of the Court of First Instance of Brussels*" (emphasis added).

119. This mistake has not been corrected in front of the Court below. The Order has been issued by the Court of first instance on the basis of Articles 1680, §6, 1719 to 1721 of the BJC. Those provisions are taken from new BJC as amended by the Law of 24 June 2013. They actually have no equivalence under the former BJC (for instance, Article 1680 §6, does not exist under the former BJC). Moreover, the Order is expressly issued by M. Minot, "*designated by the President of the Court under Articles 1680, §6, 1719 to 1721 of the BJC*", thus in its capacity of judge of the Court and not in his capacity as "*acting President*" of the Court.

120. It follows that the Order was issued by a Court that had no jurisdiction. The infringement of this imperative rule of exclusive jurisdiction must lead to the setting aside of the Order[10].

121. Even if no grievance must be demonstrated, it should be noted that the fact that the wrong jurisdiction was seized on the basis of a legal regime that is not applicable has had material consequences for the RoK.

122. Firstly, under the new provisions of the BJC, the possibility to summon the party against whom the exequatur is asked on an ex-parte basis has been removed. This right was expressly provided in Article 1719, §5, of the former BJC, applicable in the present case. Hence, RoK had the right to be summoned, before that the Court granted the exequatur, as the RoK asked in its letter dated 15 November 2017.

123. In this case, the Court, being wrongly seized on the basis of the new BCJ (inapplicable), was not authorized to summon the Applicant to appear before to grant the exequatur.

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[8] Except if the debtor under the award has its domicile in Belgium.
[9] Except if the debtor under the award has its domicile in Belgium.
[10] H. Boularbah, *Requête unilatérale et inversion du contentieux*, Larcier, Bruxelles, 2010, pp. 761-762.

124. Secondly, the Law of 24 June 2013 has also removed the possibility for either Party to appeal the judgment that this Court will issue on the present "third-party opposition" (Article 1680, §5, of the new BJC), while an appeal is allowed under the former BJC, which must be applied in the present case.

125. It is therefore essential that this Court enacts that the former provisions apply and that the new provision upon which the Court below wrongly relied upon are not applicable.

126. By way of consequence, this Court must (necessarily) rule that the Order has been issued by a Court that had no jurisdiction and draw the applicable legal consequence from such ruling, namely the setting aside of the Order.

C. The Order must be set aside because the Award has been obtained by fraud

1. The Applicable Legal Principles

127. Belgium is party to the New York Convention on the recognition and enforcement of foreign arbitral awards of 1985 (the "New York Convention")[11], which can be invoked directly before Belgian courts.

128. Article V of the New York Convention provides a list of grounds which must lead the national courts to refuse the recognition and enforcement of foreign arbitral awards. Article V(1) provides the list of grounds which must be raised by the party against whom enforcement is sought, while Article V(2) provides the list of grounds that can be raised *ex officio* by the courts.

129. Pursuant to Article V(1) of the New York Convention, a foreign arbitral award cannot be recognized and enforced if the party against whom enforcement is sought furnishes proof that:

- "*The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made*" (Article V(1)(a));

- "*The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case*" (Article V(1)(b));

[11] The New York Convention was approved by the Law of 5 June 1975 (*M.B.,* 15 November 1975, p. 14411).

- "*The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced*" (Article V(1)(c));

- "*The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*" (Article V(1)(d));

- "*The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*" (Article V(1)(e)).

130. Pursuant to Article V(2) of the New York Convention, a foreign arbitral award cannot be recognized and enforced if the courts find that:

- "*The subject matter of the difference is not capable of settlement by arbitration under the law of that country*" (Article V(2)(a));

- "*The recognition or enforcement of the award would be contrary to the public policy of [the country where recognition and enforcement is sought]*" (Article V(2)(b)).

131. Similarly, under Belgian law, a (foreign) arbitral award cannot be recognized and enforced in Belgium if:

- The award breaches Belgian international public policy or was not capable of settlement by arbitration (Article 1723, 2°, of the former BJC);

- The award was obtained by fraud (Article 1723, 3° *juncto* 1704, 3, a, of the former BJC);

- The award was issued by an arbitral tribunal without jurisdiction, on the basis of an invalid arbitration clause, or having exceeded its powers (Article 1723, 3° *juncto* 1704, 2, c) and d) of the former BJC);

- The award was issued by an arbitral tribunal that was not regularly appointed (Article 1723, 3° *juncto* 1704, 2, f), of the former BJC);

- The award was issued by an arbitral tribunal without giving the parties the possibility to defend their rights and/or without respecting a mandatory provision of the arbitration procedure (Article 1723, 3° *juncto* 1704, 2, g), of the former BJC).

132. Almost each of those distinct grounds for refusal of recognition and enforcement is met in the present case.

2. The Award was obtained by fraud

133. As has been demonstrated above, as a result of various documents obtained through the US discovery in 2015 and further investigations, it became perfectly clear that the Stati Parties committed fraud before and during the arbitration proceedings.

134. The Stati Parties have used a number of schemes to artificially inflate the construction costs of the LPG Plant through Perkwood and the Perkwood Contract. As a consequence, they have introduced the arbitration proceedings on the basis of an alleged investment which, if taken as it was argued throughout the arbitration, was false.

135. During the arbitration, the Stati Parties deliberately misled the Arbitral Tribunal regarding the amount of the investment in the LPG Plant.

136. They have been repeatedly representing – and relying on evidence to the effect – that they had invested over USD 245,000,000 in the development and construction of the LPG Plant. This was a totally fictitious amount, based on the Perkwood contract, which was purportedly concluded with a third company, while Perkwood is a company entirely controlled by the Stati Parties. This has had the consequence of deceiving the potential acquirers of the Plant, the RoK and the Arbitral Tribunal.

137. The false evidence submitted included, amongst other, testimony of Mr. A. Stati himself, his chief accountant and others, as well as experts' opinions and documents, for example financial statements containing the fraudulently inflated construction costs.

138. The Stati Parties have then deliberately misled the Arbitral Tribunal by relying on the Indicative Bid for the purchase of the LPG Plant, which was based, and which they knew to be based, on false evidence. Yet, the amount that the RoK has been ordered to pay to the Stati Parties under the Award has been largely based on that Indicative Bid. The Award is therefore the direct product of the Stati Parties' fraud.

139. An arbitral award obtained by fraud is the archetypal example of an award that breaches (international) public policy. Such an award cannot be recognized and enforced according to Article V(2)(b) of the New York Convention.

140. Under the latter provision, this ground for refusal of recognition and enforcement must be reviewed, and raised, *ex officio* by the courts[12]. This is what the judge should

[12] B. Hanotiau, B. Duquesne, "L'exécution en Belgique des sentences arbitrales étrangères", *JT*, 1997, p. 313.

have done in the case at hand, since he has been informed of the existence of the English judgment, which recognized the fraud on a *prima facie* basis.

141. Under Belgian law, a (foreign) award obtained by fraud also breaches Belgian (international) public policy. It cannot be recognized and enforced on the Belgian territory pursuant to both Article 1723, 2°, of the former BJC (public policy ground) and Article 1723, 3° *juncto* 1704, 3, a, b and c of the former BJC (fraud). Article 1723, 3, c expressly provides that a foreign arbitral award cannot be recognized and enforced if:

> "*since the award was rendered, a document or any other element of proof has been discovered, which would have had a significant impact on the award and which has been retained by the opposing party*".

142. Moreover, and importantly, since the claims brought by the Stati Parties in arbitration, pursuant to the arbitration clause in Article 26 of the ECT, were based on a fraudulent scheme and a false investment, the Arbitral Tribunal had no jurisdiction and (in any event) the claims brought in arbitration were inadmissible.

143. Indeed, as mentioned above, Article 26 of the ECT, which contains the arbitration clause, applies to disputes in relation to a – legitimate and true – investment made by a foreign investor in the country of a contracting State (in this case, purportedly, Kazakhstan). Yet, the "investment" that the Stati Parties have continuously invoked in the arbitration proceedings, namely a purported investment in the LPG Plant for an amount of approximately USD 245 million, was never made as alleged by the Stati Parties, let alone in Kazakhstan.

144. Therefore, the Stati Parties were not entitled to bring an arbitration claim under the ECT, and the Arbitral Tribunal had no jurisdiction to hear the Stati Parties' claim against the RoK.

145. It is also evident that the RoK has never consented to arbitrate disputes which are based on a fraudulent and/or a fictitious investment. Claims based on a fraud are not covered by Article 26 ECT and, in any event, inadmissible.

146. For all those reasons, and others to be developed in the course of the proceedings, the Award also breaches Articles V(2)(a) and V(1)(c) of the New York Convention, as well as Article 1723, 2°, and Articles 1723, 3° *juncto* 1704, 2, c) and d) of the former BJC.

3. Your Court is not (and cannot be) bound by the Swedish judgment

147. As was recognized by the High Court, the Swedish courts, which have been seized by the RoK's setting aside application against the Award, have not addressed the RoK's arguments in relation to the fraud. The Swedish courts have simply abstained to rule on the existence of the fraud and on the consequences of such a fraud on the award. There

is therefore no finding in the Swedish court judgments that can be relied upon by the Stati Parties in relation to the existence of the fraud.

148. In addition, and in any event, contrary to what has been alleged by the Stati Parties in their ex-parte application (para. 5, p. 2, of their supplemental submissions dated 7 December 2017 attached to the Order), the Belgian courts are by no means bound to any findings made by the Swedish courts.

149. Under the New York Convention (as well as under Belgian law which implements the New York Convention), the national courts in every country in which recognition and enforcement of a foreign international arbitral award is sought, must perform, for themselves and independently from the findings made by any other foreign national court, a review of the grounds for refusal of recognition and enforcement of the arbitral award that are raised before them.

150. Indeed, the purpose of recognition and enforcement proceedings of a foreign award in Belgium is to determine if that foreign award may or may not be recognized and enforced on the Belgian territory, *i.e.* have effects or not, in the Belgian legal order[13].

151. This is true not only in relation to any foreign judgment having ruled on recognition and enforcement of an arbitral award, but also (and all the more so) in relation to any judgment setting aside the award at the country of the seat of the arbitration. In both cases, the scope of the foreign judge's decision is territorially limited.

152. In the present case, the Swedish judgment of the Svea Court of appeal invoked by the Stati Parties only ruled on whether the Award was valid in Sweden, nothing else and nothing more.

153. This is all the more so since the Svea Court of Appeal ruled under Swedish national law and not on the basis of an international convention. This judgment is therefore irrelevant in the Belgian exequatur proceedings.

154. As clearly explained by Belgian legal scholars:

> "*If courts and tribunals of the country where the arbitral award was rendered have rejected the application for annulment of the award, this does not mean that it will simply obtain exequatur in Belgium. The judicial decision of foreign courts and tribunals declaring the application for annulment ill-founded do not preclude the Belgian court from verifying, in the exercise of its jurisdiction, that there is no ground for refusal with regard to the recognition and/or enforcement of the foreign arbitral award for which the applicant seeks to obtain the exequatur in Belgium.*

[13] B. Hanotiau, B. Duquesne, « L'exécution en Belgique des sentences arbitrales belges et étrangères », *JT*, 1997, p. 305 ; Cass. fr. civ. 1st Ch., 29 June 2007 (2 decisions), *Rev. arb.*, 2007, p. 507, Report of J.-P. Ancel and comment from E. Gaillard.

The Belgian court may refuse the exequatur of a foreign arbitral award even though the courts of the country of the seat have refused to set it aside."[14].

155. The Paris Court of Appeal confirms this principle:

"*Similarly to exequatur decisions, decisions rendered following setting aside proceedings produce no international effects as they only concern a sovereignty limited to the territory where they were issued; no consideration may be given to these decisions issued by foreign courts in an indirect proceeding [for recognition and enforcement of an international arbitral award]*"[15]..

156. Holding the opposite would mean that, as soon as an international arbitral award has been refused setting aside by the courts located at the seat of the arbitration, the recognition and enforcement proceedings of that same award in any other country would become devoid of purpose. This is of course wrong, and cannot be reasonably argued.

157. It also deserves to be mentioned that the above principles have been endorsed by the EU legislator in the Regulation (EU) n° 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I*bis* Regulation"). Recital n°12 indeed confirms that the rules on recognition and enforcement of EU judgments shall not apply to judgments issued by Member State courts ruling on the validity, or invalidity, the amendment, the recognition or the execution of arbitral awards[16]. It is upon each Member State court to apply the New York Convention (and/or its own national law) to determine what can (or cannot) be the effects of a (foreign) arbitral award in its own legal order.

158. It follows that, contrary to what the Stati Parties have argued in their additional submissions filed after their ex-parte application, this Court is by no means bound by the

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[14] P. Colle, H. Boularbah, « De invloed ... », *Liber amicorum Jozef van den Heuvel*, 1999, p. 178. Traduction libre de "*wanneer de hoven en rechtbanken van het land, waar het scheidsrechterlijk uitspraak geveld werd, de vordering tot nietigverklaring van de sententie afgewezen hebben, betekent dit niet dat deze uitspraak zomaar het exequatur in België zal bekomen. De gerechtelijke beslissing van buitenlandse Hoven en rechtbanken, die de vordering tot nietigverklaring ongegrond verklaren, vormt geen beletsel voor de Belgische rechter om in het kader van de uitoefening van zijn rechtsmacht na te gaan of er geen weigeringsgrond bestaat t.a.v. de erkenning en/of tuinuitvoerlegging van de buitenlandse arbitrale beslissing die de verzoekende partij door middel van een exequatur aanvraag zou willen uitnemen. De Belgische rechter mag de exequatur weigeren van een buitenslandse scheidsrechterlijke uitspraak die de rechter van het land, waar zij gewezen werd, heeft weigeren te vernietigen*".

[15] Court of appeal of Paris, 20 September 2005, No. 2004/07635, The Directorate-General of Civil Aviation of the Emirate of Dubai v. International Bechtel Co. Limited Liability Company.Free translation of "*Les décisions rendues à la suite d'une procédure d'annulation, à l'instar des décisions d'exequatur, ne produisent pas d'effets internationaux car elles ne concernent qu'une souveraineté déterminée sur le territoire où elle s'exerce, aucune appréciation ne pouvant être portée sur ces décisions émises par un juge étranger, à l'occasion d'un procès indirect* ».

[16] EU Regulation 1215/2012, recital 12.

findings made by the Swedish courts in relation to the Arbitral Award, whatever their final and binding nature in Sweden and under Swedish law.

159. Finally and in any event, since the Swedish courts have refused to consider and review the RoK's arguments, including the cogent evidence that had been adduced in respect of the fraud and its consequences on the Award, the Swedish judgment has no value or relevance whatsoever in the present proceedings, as it has been decided by the High Court in London (above § 89).

D. The Order must be set aside because of procedural errors and violations of the Applicant's due process rights in the arbitration

160. There are other grounds that mandate that the Award cannot be recognized and enforced in Belgium, and which therefore warrant that your Court set aside the Order.

161. **Firstly**, as explained above, the procedure of appointment of the Arbitral Tribunal was invalid.

162. The right to appoint an arbitrator is of the most fundamental importance in international arbitration, all the more so in investor-State arbitration where sovereign interests are at issue.

163. Therefore, it is vital that arbitral institutions comply with their own rules and respect the Parties' rights of defense, and particularly the right to be heard. The Stockholm Chamber of Commerce ("SCC") manifestly disregarded this rule in the present case:

- The SCC Board appointed Professor Lebedev pursuant to an ex-parte request of the Stati Parties on which the RoK was denied the opportunity to comment because the SCC Secretariat inexplicably sent the ex-parte request to the RoK by regular post (and not by courier) such that the RoK did not receive it until **after** the SCC Board had made the default appointment of Professor Lebedev ;

- The default appointment was made by SCC Board in purported exercise of its power under Article 13(3) of the SCC Rules, on the basis that the RoK had failed to appoint an arbitrator within the stipulated time period. However, the RoK had not been under any duty to appoint, since the SCC Board had not yet determined the number of arbitrators or the method of appointment of the chairperson.

- Having failed to comply with its own rules about default appointments, and having failed to wait for the RoK to receive the ex-parte application before making the default appointment, the SCC Board then compounded its error by refusing to grant the RoK the opportunity to remedy the situation and

appoint its own arbitrator, in contrast with its prior practice. Yet, the application from the RoK to exercise its right to appoint an arbitrator of its own choosing was made before even the first procedural hearing had taken place in an arbitration which was certain to last several years.

164. For those reasons, the Award breaches Articles V(2)(b) (public policy), V(1)(b) (due process) and V(1)(d) (procedure not in accordance with the agreement of the parties) of the New York Convention. Under Belgian law, it breaches Article 1723, 3° *juncto* 1704, 2, f) and g) of the former BJC.

165. **Secondly**, Articles 26(2) and (2) of the ECT requires compliance with a mandatory three-month cooling-off period before a claim can validly be brought in arbitration. This provision requires any claimant to attempt an amicable settlement following notification of an ECT claim, and precludes the bringing of an arbitration until the end of the period of three months prescribed for those amicable settlement negotiations. This period also allows a party which allegedly infringed the ECT to know that a dispute might eventually be arbitrated, and therefore allows this party to organize its defense accordingly.

166. The cooling-off period is a precondition, under Article 26 of the ECT, to the RoK's consent to arbitrate. It is therefore as such a decisive condition for the validity of the arbitration clause, the jurisdiction of the Arbitral Tribunal, and the admissibility of the claims.

167. In the case at hand, the Stati Parties have initiated the arbitration proceedings only five days after the termination of the subsoil use contracts. The Stati Parties did not notify the RoK of a potential ECT claim prior to their Request for Arbitration, nor did they make any attempt to seek amicable settlement of such a claim.

168. The Stati Parties therefore manifestly failed to comply with the cooling-off period imposed on them by the ECT and the Arbitral Tribunal effectively did not find that this period had been respected.

169. In addition to its jurisdiction consequences, the Stati Parties' failure to comply with the cooling-off period had the practical consequence that the RoK was deprived of three additional months in which it could have, for instance, completed the formalities required to appoint external counsel and considered its appointee as arbitrator. The Stati Parties' breach of Articles 26 (1) and (2) of ECT, therefore, also impacted materially on the situation which led to the SCC's invalid appointment of Professor Lebedev as default arbitrator, and depriving the RoK of its fundamental right to appoint an arbitrator of its own choosing.

170. The Stati Parties asserted that the RoK waived this failure by agreeing to a subsequent stay for settlement, but that is wrong in fact and impossible in law. A subsequent stay for settlement has obviously not the same effects than a cooling-off obligation, being a condition precedent to the right to submit a dispute to arbitration. As has just been explained, the harm resulting from the Stati Parties' failure had already

materialized, certainly in part, at the time the proceedings were suspended. Furthermore, the RoK never waived this argument.

171. For those reasons, the Award breaches Articles V(1)(b), (c) and (d) of the New York Convention, as well as Articles 1723, 2° and 1723, 3° *juncto* 1704, 2, b), c), d), f) and g) of the former BJC.

E. Conclusion

172. It follows from the foregoing that the Order has been issued by an incompetent Court. Moreover, the Award could not be validly recognized and enforced in Belgium. Indeed, the Award has been obtained by fraud, breaches (international) Belgian public policy and was issued by an Arbitral Tribunal without jurisdiction and following multiple procedural irregularities.

173. For each and all of these reasons, the RoK respectfully requests this Court to set aside the Order and condemn the Stati Parties to support the RoK's legal costs.

174. The RoK reserves its right to complete and/or amend the various grounds for refusal raised in these summons, and to add any new ground which would come to light in the course of the present proceedings.

Such being the facts,

The year two thousand eighteen, on 2 February,

At the request of **THE REPUBLIC OF KAZAKHSTAN**, represented by its Minister of Justice, with the Ministry of Justice, with offices at 010000 Astana (Kazakhstan), Left Bank, Mangilik El Street 8, House of Ministries, 13

Having as counsels **Arnaud NUYTS, Hakim BOULARBAH, Roel FRANSIS and Olivier VAN DER HAEGEN**, lawyers, with offices at 1000 Brussels, Bld. De l'Empereur 3 (a.nuyts@liedekerke.com; h.boularbah@liedekerke.com)

I, the undersigned *Nathalie* ***DRAULANS***, deputy bailiff of *Philippe* ***Schepkens***, bailiff with office located at 1050 Ixelles, Avenue de la Couronne, 145 Bloc F 4ème étage,

Have notified and declared to:

1. Mr. **STATI ANATOLIE**, entrepreneur, domiciled at MD-2008\Moldavia, 20 Dragomirna Street, Chisinau;

2. Mr. **STATI GABRIEL**, entrepreneur, domiciled at MD-2008\Moldavia, 1A Ghioceilor Street, Chisinau;

3. **ASCOM GROUP SA** ("**Ascom**"), with registered office at MD-2009\Moldavia, 75A Mateevici Street, Chisinau;

4. **TERRA RAF TRANS TRAIDING LTD** ("**Terra Raf**"), with registered office at GI-13/1 Line Wall Road\GIBRALTAR;

*Hereinafter referred to as the "**Stati**" or the "**Defendants**"*;

Having elected domicile in their writ of service of the order of exequatur dated 2 January 2018 :

a) at the office of their bailiff, Me Marc Sacré, avenue de Jette, 32, 1081 Koekelberg, where being and speaking to, *Karel Taffijn, attendant*

b) at the office of their counsel Stan BRIJS and Charlotte De Muynck, lawyers, with offices at 1000 Brussels, Chaussée de la Hulpe 120

where being and speaking to, *Dominique Bodart, attendant*

That the applicant brings **third-party proceedings** against the order issued by M. J-P Minot from the French-speaking Court of First Instance of Brussels on 12/11//2017 (R.G.17/3560/B)

I, the undersigned and abovementioned bailiff, have **SUMMONED** the party who has been served to appear **on Tuesday 13 March two thousand eighteen at nine a.m., before the FIRST CHAMBER of the FRENCH-SPEAKING COURT OF FIRST INSTANCE** of **BRUSSELS, sitting in the room where it usually holds its hearings, room 7, Courthouse – Annexe, 1000 Brussels, Rue des Quatre Bras 13.**

IN ORDER TO**:**

For the reasons mentioned hereafter and for all other reasons to be raised in the course of the proceedings that are hereby expressly reserved,

Ask the French-speaking Court of First Instance of Brussels to:

- Find that this third-party opposition is admissible and well-founded and, as a consequence,

In principal:

- Find that the Order dated 11 December 2017 was issued by an incompetent Court and, as a consequence,

- Set aside the Order;

In the alternative:

- Find that the Arbitral Award could not and cannot be recognized and enforced in Belgium, by virtue of articles V, para. 2, a), V, para. 2, b), V, para. 1, b), V, para. 1, c), and/or, V, para. 1, d) of the New York Convention on the recognition and enforcement of foreign arbitral awards, and by virtue of former articles 1723,2°, and 1723,3° *juncto* 1704, para. 3, a), b) and c), and 1704, para. 2, b), c), d), f) and g) of the judicial code (before being amended by the law of 24 June 2013) ; and, as a consequence,

- Set aside the Order;

In any event:

- Condemn the Defendants to the payment of all costs of these proceedings, including the expenses linked to the summon and the procedural costs indemnity, computed on the basis of the basic amount for disputes non assessable in monetary terms, namely 1.440 EUR;

And in order for the summoned party not to ignore this, I have left a copy of the current writ and of the underlying title corresponding to the prescriptions of the law, if necessary under closed letter.

OF WHICH RECORD.

Costs: 586,54 EUR

potentially increased with postal costs, 0,74 EUR

The Bailiff.

Pursuant to the Royal decree of 26 April 2017, 20,00 EUR in cost are levied to finance the second line legal aid budget fund.

Registration Tax – Application of Article 8bis of the Registration Tax Code.
Registration Tax: 50,00 EUR