NOTICE OF APPEAL

To Mr/Madam Chairman, Ladies and Gentlemen Members of the Brussels Court of Appeal

HAS THE HONOR OF PRESENTING,

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;

Hereafter referred to as the "Republic of Kazakhstan"

Claimant in appeal

Represented by its counsels Arnaud NUYTS and Bruno HARDY,lawyers, with offices at 1000 Brussels, Boulevard de l'Empereur 3, (a.nuyts@liedekerke.com and b.hardy@liedekerke.com ; Tel : +32 2 551 14 72 ; Fax : +32 2 551 14 54).

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1. Notification to opposing parties

That this application must be notified to :

(1) Mr. **Anatolie Stati**, entrepreneur, domiciled at MD-2008\Moldavia, 20 Dragomirna Street, Chisinau;

(2) Mr. **Gabriel Stati**, entrepreneur, domiciled at MD-2008\Moldavia, 1A Ghioceilor Street, Chisinau ;

(3) The company under foreign law **Ascom Group SA** with registered office at MD-2009\Moldavia, 75A Mateevici Street, Chisinau (hereafter, « Ascom ») ;

(4) The company under foreign law **Terra Raf Trans Traiding Ltd**, with registered office at Gibraltar, GI-13/1 Line Wall Road (hereafter, « Terra Raf ») ;

Hereinafter referred to as « Stati »,

Defendants in incidental appeal

Represented by their counsels Stan BRIJS, Karen PARIDAEN and Arie VAN HOE having office at Terhulpsesteenweg 120, 1000 Brussels.

having made, by their official letter of 21 January 2020, for the needs of the present procedure, election of domicile at the office of their Bailiff, Mr. Marc Sacré, located at 1081 Koekelberg, avenue de Jette 32,;

2. Time and Place of appearance before Court

The respondent parties are invited to appear at the ……..……. at ……. hours, before the ……. chamber of the Court of Appeal of Brussels, seated at the ordinary venue for its hearings,, Courtroom…… Justice Palace, place Poelaert, 1 à 1000 Brussels, where they can have their statement of appearance recorded in accordance with article 1061 of the Judicial Code.

3. Appealed judgment

The judgment delivered by the Fourth Chamber of the Court of First Instance of the French-speaking part of Brussels, Civil Section, on 20 December 2019, in the case entered in the General List under number 18/1312/A.

4. Facts and history of the procedure

4.1. Presentation of the parties and origin of the dispute

1. Anatolie Stati and Gabriel Stati, the first two respondents, are two "entrepreneurs" of Moldovan and Romanian nationality. Together, they hold shares in a series of companies (the '**Stati Group**'), whose ownership and control can be summarised as follows :

- Anatolie Stati holds all the shares of Ascom (third party respondent), a joint-stock company under Moldovan law;
- Anatolie Stati and Gabriel Stati together own Terra Raf (Fourth Respondent), a company incorporated under the laws of Gibraltar;
- Anatolie Stati and Gabriel Stati acquired all the shares of two companies incorporated under Kazakh law, Kazpolmunay LLP (hereinafter "**KPM**") and Tolkynneftegaz (hereinafter "**TNG**") between 1999 and 2005. These two companies have been authorised by the Republic of Kazakhstan to explore and develop various oil and gas fields in the country under various land use agreements;
- Anatolie Stati also owns 100% of the shares of a company called Tristan Oil Ltd ("**Tristan**"), a financial securitisation vehicle created in the British Virgin Islands for the sole purpose of financing the activities of KPM and TNG.

2. At the beginning of 2006, TNG began construction work on a liquefied petroleum gas power plant in the city of Opornaya in Kazakhstan (hereinafter referred to as the "**LPG Power Plant**"), in cooperation with the oil company Vitol FSU B.V. (hereinafter "**Vitol**"), a company registered in the Netherlands.

3. At the end of 2008, the Kazakh authorities identified several tax violations committed in the context of KPM and TNG operations. Further inspections, carried out in June and July 2010, also revealed that the two companies were guilty of a significant number of violations of various environmental regulations.

4. As a result of these shortcomings, the Ministry of Oil and Gas of the Republic of Kazakhstan terminated, on 21 July 2010, the land use contracts that had been granted to KPM and TNG.

4.2. Arbitral proceedings

5. On July 26, 2010, the Respondent Parties commenced arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter, "**SCC**"), based on Article 26 of the Energy Charter Treaty (hereinafter, "**ECT**"). This provision provides a detailed system for the settlement of disputes between an "investor" of a State Party (in this case, the respondent parties) and another State Party to the ECT (in this case, the appellant) concerning an "investment" made in the territory of the State Party

The respondents claimed compensation for their "damage" consisting, inter alia, of a substantial amount allegedly invested in the development of oil fields and gas deposits in Kazakhstan.

6. By an arbitral award (hereinafter the "**Award**") dated December 19, 2013, the Arbitral Tribunal ordered the appellant to pay the respondent parties the sum of USD 497,685,101 plus costs and interest, as damages for losses incurred in connection with their "investments" in Kazakhstan.

4.3. Swedish annulment procedure

7. On March 19, 2014, the appellant brought an action for annulment against the Award before the SVEA Court, relying in particular on (i) the improper constitution of the Arbitral Tribunal and (ii) the failure to comply with the three-month waiting period ("cooling off period") imposed as a condition for the validity of the consent to arbitration by Article 26 ECT.

8. In the summer of 2015, the appellant discovered initial elements relating to the frauds orchestrated by the respondent parties following the production of various documents in the context of an arbitration proceeding relating to the LPG Central and which opposed the respondent parties to Vitol (hereinafter; the "**Vitol v. Stati Arbitration**"). At the appellant's request, a New York court[1] ordered the respondent parties to produce documents relating to this parallel arbitration. These documents revealed that the construction costs of the LPG Facility had been artificially inflated by the respondents, through the intermediary of a company called Perkwood, which the Stati Group controlled despite its allegations to the contrary

9. In view of these findings, the appellant, on 5 October 2015, filed a second summons to set aside the Award and invoked, as an additional ground, the fact that the Award had been obtained by fraud.

10. By a decision of 9 December 2016, the SVEA Court dismissed the appellant's action for annulment, adopting a very restrictive interpretation of the grounds for annulment, specific to Swedish law and without examining the substance of the fraud.

11. On 3 February 2017, the appellant lodged an "exceptional and extraordinary appeal"[2] with the Supreme Court of Sweden, claiming that the SVEA Court had committed a serious procedural error because it had failed to rule on several grounds raised by it.

On 24 October 2017, the Supreme Court of Sweden rejected this extraordinary appeal without giving any reasons.

At the time the Swedish courts ruled, the respondent parties were still withholding from them the KPMG Correspondence and other elements of the fraud obtained during the year 2019 and described in the present application.

4.4. Exequatur procedures

12. On the basis of the Award, the Respondents have brought a number of exequatur proceedings, including those briefly described below.

[1] *United States District Court for the Southern District of New York*
[2] The SVEA Court refused to grant an ordinary appeal.

4.4.1. Proceedings in the United Kingdom

13. On 24 February 2014, the Respondents applied for enforcement of the Award before the High Court in London, United Kingdom. On 7 April 2015, the appellant brought an application for the annulment of the decision authorizing the enforcement of the Award. Following the discovery of the first elements of fraud in the course of 2015, she supplemented her grounds for annulment to include the refusal of exequatur based on the violation of public policy, in particular with regard to the fraud committed by the respondent parties.

14. By judgment of 6 June 2017, the High Court of London decided that there was "*sufficient* prima facie *evidence that the Award was obtained by fraud*" and ordered a full trial on the merits of the fraud to be held in November 2018.

15. In the course of this trial, the parties were compelled to submit to a mandatory document disclosure procedure ("Disclosure Procedure"). These documents brought to light a whole series of other elements relating to fraud and lies by the Stati (see below).

16. On 26 February 2018, in the middle of this "disclosure procedure", the respondents filed a "notice of discontinuance" of the English exequatur proceedings. By an order of 21 May 2018, the High Court found that the grounds put forward to justify this application for discontinuance were not sufficiently credible, and decided that the fraud trial should proceed as scheduled in November 2018.

17. The respondents have appealed this order to avoid a trial on their fraud.

By a decision of 10 August 2018, the English Court of Appeal allowed the respondents to terminate the exequatur proceedings, provided that they definitively waived further enforcement of the Award in the United Kingdom. In addition, the Court stated that the appellant was entitled to make use of the documents that had been produced in the "disclosure procedure" in exequatur proceedings in the stranger.

4.4.2. Proceedings in Belgium

18. By unilateral application of 13 November 2017, the Respondents requested the Tribunal de première instance francophone de Bruxelles (the French-speaking Court of First Instance of Brussels) to append the enforcement formula to the Award. By an order of 11 December 2017 (hereinafter **'the Enforcement Order'**), the Court declared the application brought by the Respondents admissible and well-founded, stressing that its decision was based on the situation as known to it at the time.

19. The appellant lodged a third party opposition to that order, putting forward three pleas in support of its application for annulment of the Order : (i) the lack of

jurisdiction of the Court of First Instance in view of the necessary application of the former provisions of Part Six of the Judicial Code; (ii) the obtaining of the Award by means of fraud and (iii) the existence of serious procedural irregularities vitiating the arbitration proceedings.

20. In the course of the proceedings before the Court of First Instance, the appellant discovered, by analysing the documents obtained in the English proceedings and by carrying out further investigations, certain new elements relating to fraud committed by the respondents.

For example, at the appellant's request, a U.S. court ordered the sworn deposition of the former CFO of the Stati Group, Mr. Lungu. Mr. Lungu confirmed in his testimony that false financial information had been produced in the arbitration proceedings by the respondent parties by misleading their own external auditors, the auditing firm KPMG.

21. The appellant brought this information to the attention of KPMG, which stated that it would conduct a review of the file.

In a letter dated 21 August 2019, addressed to the appellant, KPMG stated that after "*having conducted a thorough and independent review*", it had taken the decision to invalidate all financial reports performed for the companies of the Stati Group. KPMG also stressed that "*no reliance should be placed on the reports published by KPMG*".

22. In addition, in late summer 2019, it became apparent that the respondents had concealed a series of other correspondence with KPMG. After the respondents refused to produce this correspondence, the appellant obtained judicial production of this correspondence at the end of October 2019, which contains correspondence between the respondents and KPMG in 2016 and 2019 (hereinafter, the "**KPMG correspondence**").

This correspondence reveals a whole series of elements relating to the fraud committed by the respondents, including (i) the deception of KPMG, expressly confirmed by the latter in a letter addressed to the respondents on 21 August 2019, which justifies in particular on this basis the invalidation of all the audit reports, (ii) the misappropriation of funds from the "investments" made by the respondent parties, for which they claimed and obtained substantial compensation, and (iii) the fraudulent manoeuvres of the respondent parties to conceal crucial information from the courts and tribunals (see below).

23. Although this KPMG Correspondence, which includes KPMG's August 21, 2019 invalidation decision, is a major development in the case, the trial judge did not rule on this crucial aspect of the litigation. This, due to the procedural manoeuvres deployed by the respondent parties.

The KPMG Correspondence was discovered and obtained after the appellant's final submissions to the first judge were filed on August 9, 2019 (KPMG's invalidation decision was dated August 21, 2019, and the appellant did not obtain judicial production of the KPMG Correspondence until October 25, 2019).

By several letters addressed to the French-speaking Court of First Instance in Brussels, the respondents firmly objected to the production in the proceedings of the Correspondance KPMG, requested by the appellant.

The respondents maintained this refusal to produce on the first day of the hearing before the first judge. On the second day of hearing, after the closing of the appellant's allotted time for argument, the respondents "suddenly" changed their minds and agreed to the filing of the KPMG correspondence. As a result, the exhibits were not filed until the third day, after the close of oral argument.

24. By judgment under appeal, delivered on 20 December 2019, the French-speaking Court of First Instance in Brussels declared the third-party application admissible but unfounded. The Court of First Instance did not rule on the KPMG Correspondence, which is not even mentioned in the judgment.

The grievances for which this judgment is developed below.

25. Following the hearing before the first judge, the Brussels Court of Appeal ruled on the admissibility of the KPMG Correspondence in the seizure of assets proceedings pursued by the respondent parties. By an order dated December 3, 2019 issued pursuant to Article 748 §2 of the Judicial Code, the Brussels Court of Appeal ruled that the letters by which KPMG invalidates the audit reports, insofar as they relate to an allegation of fraud committed by the respondent parties, are both "new" and "relevant" in that they relate to the "quality of the title", i.e. the validity of the arbitral award.

4.4.3. Proceedings in Luxembourg

26. By an order of 30 August 2017, the Tribunal d'Arrondissement du Luxembourg made the Arbitral Award enforceable on Luxembourg territory.

27. On November 2, 2017, the appellant appealed against this exequatur order. This appeal was declared admissible but unfounded by a decision of the Court of Appeal of Luxembourg of 19 December 2019.

As in Belgium, the respondents have, by their manoeuvres, avoided the Luxembourg Court of Appeal ruling on the KPMG Correspondence.

28. Subsequent to this decision of 19 December 2019, in a judgment of 28 January 2020, the Court of Appeal of the GD de Luxembourg decided in substance, in the criminal aspect of the proceedings at the GD de Luxembourg, that false documents were used at the GD de Luxembourg, namely the financial statements invalidated by KPMG, and that this justifies the international jurisdiction of the Luxembourg

courts to conduct a criminal investigation into the facts committed by the respondents.

5. Statement of Grievances

5.1. 1st plea: the first judge infringed the rules of jurisdiction imposed by the sixth part of the Judicial Code as in force before its amendment by the Law of 24 June 2013

29. The judgment under appeal decides that "*it is (...) with good reason that the order of 11 December 2017 was adopted by the French-speaking Court of First Instance of Brussels exercising pursuant to Articles 1680, §6, 1719 to 1721 new of the Judicial C*ode" and, consequently, that the first ground of annulment formulated by the appellant in terms of conclusions is "unfounded".

In so doing, by refusing to apply the rules of Part Six of the Judicial Code as they were in force before they were amended by the Law of 24 June 2013, the first judge infringed the transitional regime devised by the legislature and, consequently, disregarded the rule of jurisdiction imposed by Article 1719(1) and (2) of the Judicial Code in its earlier wording.

5.1.1. The exequatur order was issued by a court which had no jurisdiction in respect of the legal provisions applicable to the proceedings in question

5.1.1.1. The procedure in question is subject to the former provisions of Part Six of the Judicial Code

30. In view of the date on which the disputed arbitration proceedings were initiated by the respondent parties, the entire exequatur procedure is governed exclusively by the provisions of Part Six of the Judicial Code in their previous wording, i.e. prior to their amendment by the Law of 24 June 2013.

This follows both from the clear scope of the transitional regime introduced by the legislator (**A**) and from the majority of the doctrinal opinions on this subject as well as from the opinion of the First Advocate General at the Court of Cassation A. Henkes (**B**).

A. The clear scope of the transitional regime

31. Article 59 of the Law of 24 June 2013[3] derogates from the rule of principle laid down in Article 3 of the Judicial Code by imposing a transitional regime which can be

[3] Pursuant this provision :

summarised as follows: Part Six of the Judicial Code, in its previous wording, remains fully applicable to arbitration proceedings (and resulting legal actions) which commenced before 1 September 2013, whereas the new regime of the Judicial Code applies to arbitration proceedings (and resulting legal actions) which were commenced after that date.

32. The question as to when arbitration proceedings are deemed to have commenced is clearly answered by Article 34 of the Law of 24 June 2013, to which the above-mentioned Article 59 refers: "unless the parties agree otherwise, the arbitral proceedings shall commence on the date on which the request for arbitration is received by the respondent in accordance with Article 1678 § 1(a)".

33. These two provisions make no distinction according to whether the seat of the arbitral proceedings is located in Belgium or abroad. The thesis developed in this respect by the respondent parties[4], on the basis of cascading references of provisions and artificial distinctions, cannot call into question a fundamental observation: the legislator, inspired in particular by various foreign legislations and by the UNCITRAL Model Law on International Commercial Arbitration, has in no way expressed the will to limit the scope of application of the transitional regime of the Law of 24 June 2013 to "Belgian awards". If that had been its intention, in derogation from the rule of principle aimed at avoiding such distinctions according to the place of arbitration, it would not have failed to specify it expressly, in particular in view of the difficulties that might result from the application of separate regimes and the risk that that might pose to legal certainty - of which the legislator was well aware.[5]

34. For the rest, it should be noted that the provisions of the remedial law of 25 December 2016 do not make any changes in this regard and, above all, do not call into question the lack of distinction, as regards the applicable law, according to the place of arbitration. The authoritative doctrine clearly recalls this[6].

"*This Act applies to arbitrations that commence in accordance with section 34 after the date of coming into force of this Act. Part 6 of the Judicial Code, as it was drafted before the entry into force of this Act, shall continue to apply to arbitrations that commenced before the date of entry into force of this Act.*
This Law shall apply to proceedings that are brought before the judge, insofar as they concern an arbitration referred to in paragraph 1.
Part 6 of the Judicial Code, as it was drafted before the coming into force of this Act, shall continue to apply to actions pending or brought before the judge in respect of an arbitration referred to in paragraph 2".

[4] Which are essentially based on the erroneous assertion that Article 59 of the Law of 24 June 2013 concerns only judicial proceedings relating to Belgian judgments, so that the exequatur procedure is only applicable to Belgian judgment of a foreign award would not be covered by the transitional provision and should therefore be subject to the new provisions of Part VI of the Judicial Code.

[5] For example, the travaux préparatoires state that "For reasons of legal certainty, it is not desirable that the same arbitral proceedings be subject to two distinct categories of rules with regard to the procedural law of arbitration. It is also necessary to avoid distortions with the arbitration rules of arbitral institutions established on the basis of current arbitration procedural law because these procedural rules of arbitration rules frequently apply to ongoing arbitrations. It is for this reason that the transitional law as proposed departs from the rule enshrined in Article 3 of the Judicial Code". See Act amending Part VI of the Judicial Code relating to arbitration, Doc. No. 2743/001, p. 45.

[6] Indeed, the commentaries to the remedial law of 25 December 2016 reconfirm that the legislature has never intended to distinguish the temporal application of the 2013 law on the basis of the nationality of the sentences.. See. for instance O. Caprasse, « Le droit de l'arbitrage après la loi 'Pot-pourri IV' », in *Modes alternatifs de règlement des conflits. Réformes et actualités*, CUP, Anthemis, 2017, p. 120 ; M. Dal, « Quelques précisions apportées au droit

35. In the present case, there is little dispute that the disputed proceedings commenced well before September 1, 2013: the respondents filed their Request for Arbitration with the SCC Arbitration Institute on July 26, 2010. It must therefore be governed by the provisions of Part Six of the Judicial Code in their previous wording.

B. Confirmation by the majority doctrine and by First Advocate General A. Henkes

36. This interpretation - the only legally relevant one - is confirmed by the majority doctrine.

37. In addition to the fact that it is defended by several authors who have carried out a meticulous analysis of the amendments made by the Law of 24 June 2013[7], it should be noted that the appellant's argument is endorsed by the First Advocate General at the Court of Cassation A. Henkes, in conclusions filed on 7 September 2017[8].

38. The terms used are clear and the appellant considers it useful to reproduce some of them :

> "22. [...] Arbitrations that commenced before the date of entry into force of the Law [of 24 June 2013] shall remain subject to Part VI of the Judicial Code as it was drafted before the entry into force of the Law. The same shall apply to actions pending or brought before the court in connection with such arbitration.
> 23. Arbitrations that commenced before the date of entry into force of the Law (...) are not subject to a definition of the material scope of the new Law that only concerns arbitrations that commenced after the said entry into force (...). To maintain the contrary, i.e. to define all arbitrations referred to in article 59 by reference to the first paragraph of the latter, is to exclude from the application of Part VI of the Judicial Code arbitrations commenced before the entry into force of the law which, by definition, are never identified with respect to the first paragraph of article 59 !
> (...)
> 28. (...) Article 1676, §8, of the Judicial Code provides that "(...), the provisions of Articles 1682, 1683, 1696 to 1698, 1708 and 1719 to 1722 shall apply regardless of the place of arbitration and notwithstanding any contractual clause to the contrary".

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de l'arbitrage », *J.T.*, 2017, p. 642 ; H. Verbist, « *Aanpassing van de Belgische arbitragewet door de wet van 25 decembre 2016* », *b-Arbitra*, 2016, p. 264.

[7] O. CAPRASSE, « Introduction au nouveau droit belge de l'arbitrage », in *Actualités en droit judiciaire*, Bruxelles, Larcier, 2013, p. 426 ; M. DAL, « La nouvelle loi sur l'arbitrage », *J.T.*, 2013, p. 794 ; D. MATRAY et G. MATRAY, « L'exécution sur le territoire belge des sentences arbitrales étrangères annulées dans leur pays d'origine », in *Liber amicorum François Glansdorff et Pierre Legros*, Bruxelles, Bruylant, 2013, pp. 651-653 ; D. PHILIPPE, « Modernisation of the Belgian law on arbitration », *D.A.O.R.*, 2014, p. 20, n° 33.

[8] The appellant reiterates, in so far as necessary, that those submissions were made in the context of a dispute very similar to the present case, since the question of the admissibility of an action brought against a judgment of the Tribunal de première instance francophone de Bruxelles ruling on the third-party opposition brought against an exequatur order of an arbitral award, itself made in 2004, was at issue. Relying wrongly on the new provisions of Part 6 of the Judicial Code, as the respondent parties now do, even though the arbitral proceedings at issue had commenced before 1 September 2013, the applicant in the case in question had lodged an appeal in cassation against the aforementioned judgment. The applicant finally withdrew its appeal prior to the delivery of the judgment, which did not, however, prevent the communication of the submissions to which the appellant refers here.

Articles 1719 to 1722 concern the recognition and enforcement of Belgian and foreign arbitral awards.
Admittedly, neither Article 1678, §1 (communication of the request for arbitration) nor Article 1702 (date of commencement of the proceedings) are included in the list contained in Article 1676, §8, cited above. However, it does not necessarily follow that these articles therefore ipso facto concern only arbitrations having their seat in Belgium.
(...)
29. (...) it does not follow from the text of Article 59 of the Law of 24 June 2013 that the application of the transitional law that it establishes would be limited to arbitrations whose place of business is in Belgium, to the exclusion of those whose place of business is abroad.
30. Moreover, the thesis [based on the assertion that Article 59 of the Law of 24 June 2013 concerns exclusively arbitrations having their seat in Belgium] also runs up against the explicit will of the legislator to subject Belgian and foreign awards to the same exequatur regime.
(...)
31. (...) a priori it does not follow from the preparatory work for the adoption of Article 59 of the Law of 24 June 2013 that, following the adoption of that article, the application of the transitional regime it establishes would be limited to arbitrations whose seat is in Belgium, to the exclusion of those whose place of arbitration is abroad".

On the basis of these principles, the First Advocate General at the Court of Cassation A. Henkes came to the conclusion that since, according to the documents in the case before the Supreme Court, the disputed arbitration proceedings, whose seat was abroad, had begun before 1 September 2013, the subsequent legal action "remains, irrespective of when it was brought before the judge, governed by Part 6 of the Judicial Code as previously drafted".

39. A similar conclusion must be reached in the present case.

5.1.1.2. The French-speaking Court of First Instance of Brussels did not have jurisdiction to issue the Order for enforcement

40. Under the terms of Article 1719, §1er, of the Judicial Code, as in force prior to its amendment by the Law of 24 June 2013 and therefore as it is to apply to the present case, "the president of the court of first instance, seised by way of application, shall rule on the application for enforcement of arbitral awards made abroad pursuant to an arbitration agreement".

41. This is an exclusive competence of attribution, which is a matter of public policy.

42. In the present case, however, the respondents erroneously based their unilateral application on the new Article 1720(2) of the Code judiciaire and erroneously brought it before the Tribunal de première instance francophone de Bruxelles (French-speaking Court of First Instance, Brussels).

43. This error was not corrected in the course of the proceedings, despite the appellant's diligence. Consequently, the Exequatur Order was issued by the

French-speaking Court of First Instance of Brussels, on the basis of "Articles 1680, §6, 1719 to 1721 of the Judicial Code"[9].

44. From the foregoing it is inferred that the Exequatur Order was issued by an incompetent court.

45. In accordance with the reversal of the litigation entailed in contesting an exequatur order issued on a unilateral application, such a lack of jurisdiction, resulting from the violation of a rule of public policy, may be invoked in the context of third-party proceeding[10]s[11], without justifying a referral to the district court. It implies the annulment of the Order.

5.1.2. The first judge's decision is ill-founded

46. After recalling the derogatory scope of Article 59 of the Law of 24 June 2013 in relation to Article 3 of the Judicial Code and stressing that in the present case "*the SCC communicated the request for arbitration [to the appellant] by letter of 5 August 2010, received on 11 August 2010*", the judgment under appeal bases its analysis of the issue on the scope of Article 1676 §§ 7 and 8 of the Judicial Code.

It considers that :

> "*Article 1676, §§ 7 and 8 (...) provides (...) that (...) with the exception of Articles 1682, 1683, 1696 to 1698, 1708 and 1719 to 1722, Belgian judicial law on arbitration applies only to Belgian awards, to the exclusion of foreign awards.*
> *By including a derogatory list of specific articles, without any reservation or possibility of supplementing the said list, Article 1676, §8, cannot be interpreted as implying the possibility of applying other provisions of Part VI of the Judicial Code to foreign arbitral proceedings. (...)*
> *Neither Article 1678, which lays down the means of communication between the parties in arbitration proceedings, nor Article 1702, which lays down the commencement of arbitral proceedings, are among the provisions referred to in Article 1676, §8 applicable to foreign arbitral proceedings.*

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[9] It is important to note that these provisions are contained in the Judicial Code as amended by the Law of 24 June 2013 and have no equivalent in the former provisions.

[10] See in this respect.H. BOULARBAH, *Requête unilatérale et inversion du contentieux*, Bruxelles, Larcier, 2010, pp. 760 et 761, § 1094, who points out that : «Required, by virtue of Article 1125(1) of the Code of Judicial Procedure, to bring his appeal before the court which made the order under appeal, may the third party nevertheless challenge in support of his third-party opposition the latter's jurisdiction to hear the original application? As in the case of opposition, an affirmative answer must be given to this question.».

[11] See. H. BOULARBAH, *Requête unilatérale et inversion du contentieux*, Bruxelles, Larcier, 2010, pp. 76 et 762, which provides in this respect: "A possible referral to the district court does not coincide well with the necessary celerity which must preside over the examination of the third party opposition directed against the order on unilateral application. That solution in fact prevents the judge hearing the appeal from immediately declaring that it has no jurisdiction and from directly withdrawing the order on that ground (...) In the meantime, the decision taken, which is immediately enforceable, will continue to take effect to the detriment of the third party (...) the judge hearing the appeal could in any event rule directly on the decline of jurisdiction and, if he considers that he has no jurisdiction, withdraw the order on that ground".

(...) In general, it is not for the Belgian legislator to define the arbitral procedure applicable to foreign arbitration. (...)
It would be equally inappropriate to take into account the date of commencement of foreign arbitral proceedings which are not governed by Belgian law in order to determine which version of Belgian law is applicable in case of enforcement of the award".

Similarly, the judgment under appeal considers, referring to the ratio legis of Article 59 of the Law of 24 June 2013, that "*insofar as foreign arbitral proceedings are never subject to Belgian law, except in the context of the enforcement of the award, there is no risk that the same arbitral proceedings are subject to two distinct categories of rules of Belgian law*".

On that basis, he concludes that *'both the clarity of the texts and the ratio legis of the transitional regime of exception make it possible to designate the Judicial Code as amended by the Law of 24 June 2013 as the version applicable in the present case', so that the ground for annulment relied on by the appellant is 'unfounded'*.

47. By these considerations, the first judge disregarded the scope of both Article 1676 §§ 7 and 8 of the Judicial Code by giving it an overly restrictive interpretation.

By endorsing a distinction, as to the applicable law, between arbitrations having their seat in Belgium and arbitrations having their seat abroad, he also and above all disregarded Articles 59 and 34 of the Law of 24 June 2013, as they must be interpreted in particular in the light of the clearly expressed intention of the legislator, perfectly summarized recently by Mr. Le Premier Avocat Général près la Cour de cassation A. Henkes.

In so far as it finds that the arbitral proceedings in the present case began before 1 September 2013, and taking into account the lack of distinction created by the legislator as to the law applicable according to the place of arbitration, the first judge was required to find that the rules of Part VI of the Judicial Code in their former wording should be applied.

Its decision on this point needs to be reformed.

5.1.3. The present request for appeal is admissible

48. Insofar as the proceedings in question are subject to the provisions of Part VI of the Judicial Code in their former wording, there is no need to apply the new article 1720 of the Judicial Code.

49. Consequently, the Tribunal de première instance francophone de Bruxelles did not, in the judgment under appeal, give a ruling at first and last instance on the following questions.

50. In accordance with the general rules laid down in articles 1050 et seq. of the Judicial Code, the judgment of 20 December 2019 may therefore be appealed against.

51. The present application is therefore admissible.

5.2. Second plea in law: the first judge wrongly recognised a certain res judicata authority to Swedish decisions

5.2.1. The Swedish decisions have no effect in Belgium

52. It is for each State sovereignly to determine the conditions under which it agrees to grant exequatur to an arbitral award.

In particular, in accordance with the system prevailing under international law (New York Convention of 1958), the national courts of each State in which recognition and enforcement of a foreign arbitral award is sought must, themselves and independently of the position taken by the national courts of another State, examine the grounds for refusal of exequatur which may exist and/or which are raised before them.

53. To the extent that an application for the enforcement of a foreign arbitral award involves determining the effect of the award on Belgian territory, the Belgian court should fully exercise its own control over the arbitral award in accordance with the rules applicable in Belgium.

54. In this context, the Belgian court is hardly bound by decisions taken by foreign courts: it is accepted that foreign judgments which rule on the legality of an international arbitral award in their respective legal systems, whether in the context of an exequatur or an annulment procedure, are necessarily territorially limited in scope.

55. It necessarily follows from the foregoing that the Belgian courts are in no way bound by the Swedish decisions, in particular by the judgment of the SVEA Court of 9 December 2016 dismissing the application to set aside the arbitral award.

5.2.2. The first judge's decision is ill-founded

56. Ruling on the res judicata authority of the SVEA Court's judgment of 9 December 2016, the first judge decides first of all that "*the supplementary rules provided by the CODIP apply*" in this case.

After a brief review of the scope of articles 22, 25 and 26 of the CODIP, the first judge decides :

> "*It will be for the tribunal to consider the extent to which the Svea Court has already decided any of the grounds raised by [the appellant] before the court in this case.*

In the affirmative, the exequatur judge will have to examine whether the res judicata authority of the foreign decision does not produce an effect incompatible with Belgian international public policy, prohibited by Articles 25, §1, 1° and 26, §1, paragraph 2, of the CODIP, or an infringement of the rights of defence prohibited by Article 25, §1, 2° of the CODIP.
If not, the enforcement judge may directly exercise his power of control over the effects of the arbitral award, as defined by Article 1721, §1 of the Judicial Code".

57. In that it intends to apply the CODIP and suggests that the Belgian judge would be required, before ruling on the question of the effect, in the Belgian legal order, of a foreign arbitral award, to have regard to decisions previously taken by foreign courts, the judgment appealed against disregarded the fundamental principle of the autonomous nature of the exequatur procedure.

5.2.3. In any event: lack of authority for decisions relating to fraud

58. In any event, it must be noted that the First Judge acknowledges that the SVEA Court of Appeal did not actually rule on the fraud relied on by the appellant, so that that decision would have no de facto authority over the Belgian courts, irrespective of the scope which it is intended to give to foreign decisions in the context of an exequatur procedure.

The first judge points out that :

"*(...) As the London High Court rightly noted in its judgment of 6 June 2017 (...) the Svea Court did not rule on the existence of fraud in the financial statements. (...)*
It is thus established that at no point in time does the Swedish decision rule on the question of the existence of fraud committed by the [respondents].
The fact that [the appellant] presented the same factual elements before the court in this case as those presented before the Svea Court (...) and the same characterisation of those elements as fraudulent manoeuvres is not sufficient to conclude that res judicata, in the absence of a position of the court on the truthfulness of those factual elements and their correct legal characterisation.
In other words, although the question of fraud was indeed referred to the Swedish courts, they did not decide it.''

64. Similarly, the new elements discovered since the delivery of the judgment of the SVEA Court, in particular through KPMG correspondence, have in essence never been submitted to the Swedish judges. The decisions taken by the Swedish courts cannot therefore have any authority in that regard.

It is for each court to decide on the grounds for refusal of exequatur which are presented before it, on the basis of the documents and information actually submitted for consideration.

6. Third plea: the first judge disregarded the impact of the fraud committed by the respondent parties on the arbitral proceedings as a whole

6.1.1. The first judge did not rule on the existence of fraud

6.1.1.1. The need for the Belgian judge to rule on the existence of fraud

59. It is important to recall that despite the large number of proceedings brought between the parties, no court - with the exception of the High Court of London (see supra) - has ruled as such on the existence of fraud attributable to the respondent parties.

The same applies to the Court of Auditors of the SVEA. As the first judge rightly recognised in the judgment under appeal, "*although the question of fraud was indeed submitted to the Swedish courts, they did not decide it*".

60. Having made this observation, one might logically expect the first judge to deal with this issue with due diligence, the importance of which has continued to grow with the new information obtained by the appellant. It must be noted that this is not the case.

61. The judgment under appeal begins by recalling (see p. 23), quite rightly, that "*the restrictive interpretation of the grounds for refusal of exequatur does not prevent an effective review of the effect of a foreign award on Belgian international public policy", it being understood that "the effectiveness of such a review implies an understanding of the elements of fact and law in order to verify the adequacy of the solution adopted by the arbitrator with Belgian international public policy*".

The judge then considers (see p. 24) that "*fraud is precisely one of those elements of fact whose existence can be verified by the exequatur judge without there being any question of a review of the merits of the sentence*"*.*

In this respect, it rightly decides that "*full and complete control of the existence of fraud is justified, all the more so as there is no recourse in arbitration comparable to the civil claim allowing the retraction of judicial decisions which have become res judicata (...)*".

62. However, after a very brief and incomplete analysis of certain circumstances of the case, not dealing with the very existence of the alleged fraud, the judgment under appeal finds that the appellant "*fails to adduce evidence that the frauds relied upon had a clear and definite impact on the result of the sentence or, in other words, that they were 'the determining cause'*" and *"by way of consequence (...) does not establish how the alleged fraudulent manoeuvres would have the effect of rendering the recognition or enforcement of the arbitral award contrary to Belgian international public policy*".

63. This analysis is questionable.

64. In so far as it finds that a "full and complete control" is required, as to the existence of fraud, the first judge must necessarily carry out such control before deciding, in a second stage, on the possible causality of the alleged fraud in relation to the arbitral proceedings.

It is in fact materially impossible, or at least contradictory, to claim to rule validly on the causal link between fraudulent practices and an arbitral procedure before having sought and established, through an analysis of all the circumstances of the case, what those fraudulent practices consist of and their seriousness.

65. The decision of the first judge is, therefore, not legally justified.

6.1.1.2. The indisputable existence of fraud in the present case

66. The decision of the trial judge on this point is all the more questionable in that the trial judge was seized of a clearly formulated request by the appellant which, in terms of conclusions, established the existence of numerous and particularly serious fraudulent schemes attributable to the respondent parties.

The main elements of the fraud are summarized below.

A. <u>Financial and audit fraud</u>

67. The disputed arbitration proceedings were initiated by the respondent parties with a view to obtaining compensation from the appellant for alleged "investments" made on the territory of Kazakhstan between 1999 and 2009 through several companies of the Stati.

(1) Introduction

68. The Respondents alleged that they had invested large sums of money in the development of oil and gas fields in Kazakhstan, including the sum of USD 245 million for the construction of the LPG Power Plant.

In support of their claim, the respondents relied on the financial statements of a number of companies in the Stati Group and on various documents derived directly from those financial statements.

69. However, it has now been shown that the financial statements produced by the Respondents were "materially misstated" and that KPMG, the auditor of the Respondents, was misled in the preparation of those financial statements.

Thus, the Respondents have, inter alia, artificially inflated the alleged "investment costs" incurred for the construction of the LPG Power Plant.

(2) Confirmation des fraudes par l'ancien directeur financier du Groupe Stati

70. The substance of the fraud carried out by the respondents was confirmed by Mr. Lungu, former CFO of the Stati Group, in his sworn testimony before a court in the United States.

It appears from this statement that, in substance, (i) the respondents deliberately communicated false information to KPMG in order to conceal the fact that Perkwood, the main supplier for the construction of the LPG Plant, was in fact a company of the Stati Group; (ii) the consolidated financial statements of Tristan, KPM and TNG contain material misstatements; and (iii) these financial statements, as audited and verified by KPMG, are false.

(3) KPMG's confirmation of the fraud

71. As noted, by letters dated 21 August 2019, KPMG indicated (i) that it had conducted a "thorough and independent review" of the file and documents ; (iii) that the transactions between TNG and Perkwood in 2007, 2008 and 2009 should have been disclosed and included in the annual and interim financial statements of the Stati Group in accordance with IAS 24, Auditing Standard 24, and that their omission constitutes a material misstatement (iv) its decision to consider that the financial reports published for the companies of the Stati Group should be invalidated; (v) the fact that "no reliance should be placed on the reports published" by itself; and (vi) the fact that it invites the respondent parties to "take all necessary measures to avoid that no reliance is placed on the audit reports in the future".

72. Following the communication of this decision to the respondents, the respondents aggressively criticized the process that led to KPMG's withdrawal of the audit reports, and attempted to put pressure on KPMG to reverse its decision.

This led KPMG to point out, in a letter of October 3, 2019, that "*more than 8 weeks after we asked you for an explanation, we have not received any substantive response regarding the elements mentioned in our letter of August 5, 2019 (in fact, you have not even sought to challenge these elements). It is inappropriate for you to criticise the actions of KPMG, when those actions were induced in part by your failure to provide any response, as outlined in our letter of 21 August 2019, while at the same time continuing to refuse to answer our questions (...). Your changing explanations for your refusal to answer are unfounded. As we have already explained to you, our action in this matter is in full compliance with our obligations under international auditing standards, the IESBA Code, and the contractual agreements that bind us*".

(4) Clarifications provided by the PwC report

73. In order to better understand the meaning and scope of the decision taken by KPMG, the appellant sought the expertise of PricewaterhouseCoopers (hereinafter "**PwC**"). In an expert report dated 21 January 2020, PwC provided several clarifications:

- Firstly, PwC notes that the invalidation of audit reports is in practice an extremely rare measure, reserved for situations where a company's management is unable to provide an explanation for false information given to the auditor :

"The effective withdrawal of an audit report is the auditor's last resort, and only occurs in rare circumstances, including, for example, when management fails to provide explanations for repeated material misstatements to the auditor and/or when management provides no explanation [justifying the existence] of material misstatements in the accounts and resulting financial statements.

To contextualize the action taken by KPMG, we consulted our audit team at PricewaterhouseCoopers LLP. They informed us that in the United Kingdom there has been only one occasion that they can recall in the last fifteen years, during which time PricewaterhouseCoopers LLP has issued tens of thousands of audit reports, where Pricewaterhousecoopers LLP has taken a similar action to 'withdraw' previously issued audit reports''.

- Second, PwC describes KPMG's decision as "unusual and serious", considering that it invalidates not only the audit reports but also all the financial information contained in the reports :

"The measures taken by KPMG [...] represent in practice a complete 'withdrawal' by KPMG from audit reports on all financial information in the financial statements. This includes, but is not limited to, KPMG's report on the financial statements of TNG as of June 30, 2008 which served as the basis for the costs and EBITDA figures used in the calculation of the Amount Granted".

- Thirdly, PwC is of the opinion that KPMG's request that steps be taken to ensure that no reliance is placed on the disputed reports in the future means that the audit reports contain material misstatements and that KPMG's decision removes the credibility of the financial information contained in the report and any documents based thereon :

"KPMG's actions, as well as the KPMG Correspondence, show that KPMG has concluded that the Financial Statements and the supporting documents and files of TNG contain material misstatements. In addition, the KPMG Correspondence reports misleading statements provided by the management of the Stati to KPMG. These misleading statements demonstrate management's lack of credibility and reinforce the skepticism with which the information provided by them would/should be viewed. In short, the actions taken by KPMG and their subsequent actions would completely remove confidence in the reliability of all financial information of Tristan, TNG and KPM and everything derived from or based on it (including, but not limited to, any written and oral testimony in the TCE arbitration proceedings, expert reports and statements of advisors based on such financial information)".

74. It is therefore rare - even exceptional - for an independent and reputable auditor such as KPMG to invalidate its own audit reports. Such a measure confirms the extremely serious nature of the fraud committed by the respondents.

B. <u>Embezzlement</u>

75. In order to finance their "investments" in Kazakhstan, the Respondent Parties raised funds on the financial markets and from banks. These funds were normally intended for the acquisition of equipment and services for the construction of the LPG Power Plant.

76. It is now established that TNG did not acquire the equipment concerned directly from the main supplier, the German company Tractebel (hereinafter '**TGE**'). Rather, the respondents interposed two companies of the Stati Group, Azalia and Perkwood, in the contractual chain in order to inflate the initial price of the equipment sold by TGE.

77. The implementation of such a chain of contracts for the purchase of the same equipment allowed (i) artificially inflating the construction costs of the LPG Plant, which were recorded in TNG's financial statements and (ii) channelling funds from the "investment" outside Kazakhstan to the benefit of the respondent parties, while concealing this fraudulent mechanism from all stakeholders, KPMG, the Stati Group's bondholders, the banks, the appellant and the Arbitral Tribunal.

78. More specifically, and schematically, the fraud mechanism was carried out as follows :

- A contract was concluded on January 31, 2006 between TGE, Azalia and Ascom for the sale of equipment by TGE to Azalia for a price of approximately USD 34,500,000 ;

- The same equipment was subsequently sold by Azalia to Perkwood, on the basis of a contract dated 11 January 2006, for a value of USD 62,400,000 (according to a first version of the contract) or USD 92,600,000 (according to a second version of the contract, which was therefore drawn up in two contradictory versions) ;

- A new sales contract for the same disputed equipment was concluded on 27 March 2006 between Perkwood and TNG for a value of USD 93,000,000.

79. Only the latter amount was recorded as construction costs and included in the financial statements of TNG, certified at the time by KPMG.

80. The fraudulent system, as summarised above, is based on a central element which was carefully concealed by the respondents: far from being independent companies as KPMG had been informed at the time of the preparation of the financial statements, Perkwood and Azalia are, in fact, wholly controlled by the Stati.

The fraud is all the more egregious in that the defendants have repeatedly falsely claimed, including in the annulment proceedings in Sweden and in the proceedings in Belgium, that KPMG was aware of the true status of Perkwood; even though it now emerges from the KPMG Correspondence that KPMG was completely unaware that Perkwood was a company of the Stati Group.

81. The sums corresponding to the fictitious inflation of their alleged investment in Kazakhstan were misappropriated by the respondent parties for the personal benefit of Mr. Anatolie Stati and his son. This misappropriation has now been established by updating the financial flows between the companies of the Stati Group, through Rietumu Bank (see below).

C. Fraud in connection with the Laren Transaction

82. It is also worth noting the fraudulent manoeuvres that led to the conclusion of the Laren Transaction, a loan to make up for an alleged lack of liquidity on the part of the Respondents, concluded by the Respondents on allegedly "horrible" terms in June 2009.

83. Without going into the complex details of the structure of this financing, it is worth noting the many lies transmitted on this subject by the respondent parties to the Arbitral Tribunal :

- Laren, which was established as an "independent vehicle" within the structure of the agreement, was a company closely related to the Stati Group, contrary to what the respondent parties told the Arbitral Tribunal ;
- The lack of liquidity of the respondents that led to the Laren Transaction was in no way due to the appellant's "actions", since the said lack of liquidity existed well before the facts that the respondents intended to accuse the appellant of, and found its main source in the misappropriation of investments for the personal benefit of the respondents ;
- The refusal by a bank (Credit Suisse) to grant a loan to the respondents, which led to the Laren Transaction, was in no way due to any "actions" on the part of the appellant, but rather stemmed from the finding that the rate offered by that institution was disproportionate.

The real reason for the alleged financial difficulties that led to the Laren Transaction have now been established: it lies in the misappropriation of funds by the respondents for the personal benefit of Mr Anatolie Stati and his son.

D. New Evidence of Corruption of Respondent Parties

84. Significant new information has come to light since the proceedings before the first judge, namely, corrupt practices by the respondent parties, including the following.

85. As a result of the investigations carried out by the Latvian State Prosecutor at a Latvian bank, namely Rietumu Bank, particularly serious acts of corruption were established. Rietumu Bank is known to be involved in a series of scandals and to have been convicted of money laundering, was used by the respondent parties to channel funds from their alleged "investment" in Kazakhstan.

86. In addition to providing evidence of the misappropriation of funds for the private benefit of Mr. Anatolie Stati and his son (see above), these new documents revealed, inter alia, that :

- The first respondent owned no less than 80 companies, most of which were offshore companies "managed" by straw men, for which the aforementioned had received a general power of attorney allowing him, inter alia, to have access to the bank accounts opened by these companies, more than 35 of which operated through Rietumu Bank ;

- Part of the funds (obtained following the issue of bonds to international creditors) was not used for the benefit of their alleged "investment" in Kazakhstan, but was diverted to other companies of the Stati ;

- The first two respondents paid exorbitant amounts to several government officials and their families. For example: (i) between March 2003 and December 2011 an amount of USD 1,153,670 was paid to the daughter of the Deputy Minister of Energy and Mineral Resources of Kazakhstan, Yekaterina Lyazzatova, as a "scholarship"; (ii) between 2009 and 2014, several hundred dollars were paid to the wife and children of the Moldovan Prime Minister; (iii) USD 1.5 million was paid to a high-ranking official in Kurdistan responsible for the management of oil refineries. These payments were made through Rietumu Bank ;

- The first two respondents secretly diverted profits to another company they controlled, namely the Hayden company, which contributed to the alleged financial and economic problems for the respondents' operating companies in Kazakhstan.

87. The evidence now available betrays the real intention pursued by the Respondent parties in their alleged investment in Kazakhstan, namely to raise funds from banks and financial markets in order to divert them for their personal benefit.

88. This is confirmed by PwC, which notes that the actions of the first two respondents have all the characteristics of money laundering :

> "*The fact that Perkwood was a dormant company, but ultimately, as we understand it, claimed to charge TNG in excess of USD 130 million, would certainly raise alarm bells both in terms of the size of these transactions and the illogical structure of the deals. Similarly, the fact that the Stati apparently made misleading statements to KPMG about the status of Perkwood as a related party and did not respond to the questions raised by KPMG, raises red flags regarding both "identity" and "behaviour" [two of the red flags identified by PwC]. Ultimately, the questions raised by KPMG regarding the transactions between TNG and Perkwood cast doubt on the rationale for the transaction and also trigger a number of serious money laundering red flags*".

89. Evidence of such embezzlement, corruption and money laundering could not be considered by the first judge.

6.1.2. The alleged fraud impairs the validity of the arbitral proceedings and should lead to the annulment of the Enforceability Order

6.1.2.1. The first judge's use of the concept of "decisive cause" is erroneous

90. After an incomplete analysis of the facts of the case, the trial judge concluded (see the judgment appealed from, p. 28) that the appellant "*does not adduce evidence that the frauds relied on had a clear and definite impact on the outcome of the sentence or, in other words, that they were 'the determining factor*'".

91. In so doing, the trial judge is holding that there is an erroneous conception of causation, influenced by the unsubstantiated allegations of the respondents in this regard.

92. The test for refusing to enforce an arbitral award for fraud is not whether the alleged fraud is the "determining cause" of the Award as made. Rather, the test is whether or not the arbitral tribunal could actually have become aware of the facts constituting fraud that may have an impact on the resolution of the dispute.

93. It should be recalled, in this context, that, in accordance with Articles 1704, §3, a) and 1723, 3° old, of the Judicial Code, the arbitral award may be set aside and/or its exequatur refused when the said award was "obtained by fraud". It is not disputed that this formulation refers to both fraud in arbitration and fraud in arbitration, by the use of dishonest manoeuvres that hinder the proper conduct of the proceedings.

94. In order to ascertain whether the arbitral award was not so "obtained by fraud", the judge hearing an action to set aside the award or an opposition to an exequatur decision need only consider whether, as a result of the manoeuvres complained of, which the judge should examine, the judicial truth could have been different from that expressed in the award at issue, on the ground that the fraud prevented the contradiction - the essential character of which in order to establish the judicial truth is no longer to be demonstrated - from being contradicted.

The question is, in other words, whether the facts as presented were likely to have an impact on the sentence and not whether they were in fact determinative - which is inherently a perilous exercise.

95. It should be noted that the thesis thus summarised is endorsed by the Court of Cassation[12], which sanctions "dishonest procedural manoeuvres" which have had the effect that "the judge whose decision has become res judicata has not been able to take cognizance of facts likely to be decisive for the resolution of the dispute", which may be the case in particular when the purpose of the manoeuvres was "to prevent the opposing party from asserting its contradiction"[13].

96. To require, as the respondents do, that it be shown that the alleged fraud constitutes the "decisive cause" of the award or, in other words, that "without the

[12] In the context, which is more rigorous than that of exequatur, of personal fraud that may justify a civil claim to withdraw a final decision handed down by a civil court, in accordance with articles 1132 et seq. of the Judicial Code.
[13] Cass., 11 mai 2001, *Pas.*, 2001, p. 830.

fraud, the arbitral award would not have been made", amounts to a drastic restriction of the scope of application of Articles 1704, §3, a) and 1723, 3° old, of the Judicial Code, to an extent which is not at all apparent from the statutory provisions.

97. The first judge, limiting himself to having regard to the notion of "decisive causality", disregarded the scope of the causality check that must be carried out in a hypothesis such as that of the cause and therefore disregarded Articles 1704, §3, a) and 1723, 3° old, of the Judicial Code.

98. It is for the Court of Appeal, doing what the first judge neglected to do, to find, in accordance with the above-mentioned provisions, that the manoeuvres denounced by the appellant were likely to have an impact on the Award, in that they obstructed the actual contradiction and, consequently, to declare it void.

99. For all intents and purposes, the appellant summarises the impact of the fraud in the present case as follows.

6.1.2.2. The impact of fraud on the arbitration procedure

100. In the first place, the fraud as denounced has had a clear impact on the arbitral proceedings.

101. Duly informed, the Arbitral Tribunal would have been bound to dismiss the action brought by the respondent parties on at least one of the following three grounds: (i) the lack of jurisdiction of the Tribunal or the inarbitrariness of the dispute; (ii) the inadmissibility of the claims; and/or (iii) the lack of merit of the action. These grounds are briefly explained below.

102. First of all, the financial and other frauds described above, if they had been known to the Arbitral Tribunal, would have led to the dismissal of the claims for lack of jurisdiction of the Tribunal or for the inarbitability of the dispute.

103. It is indeed well accepted that arbitral proceedings cannot be brought by an investor against a State when the alleged investment is tainted by fraud, financial irregularities or when a party is guilty of acts of corruption.

104. In this regard, reference may be made to the case *Inceysa v Republic of San Salvador*, in which the investor (claimant in the arbitration proceedings) had produced, in the context of a tender, financial statements that were fraudulent and did not represent the real financial situation of its company. The Tribunal decided :

> "*The financial statements submitted by the [applicant] do not reflect actual conditions, as the information they contain is not correct.... The [applicant] has submitted false and incorrect information during the bidding process. This behaviour is extremely appalling given that the financial situation is one of the main elements that is taken into account*

when deciding on a bid and in particular the one that gave rise to the arbitration. Falsehoods and inaccuracies constitute a flagrant violation of one of the pillars of the Offer itself".

Accordingly, in this case, the Tribunal decided that the existence of financial and audit fraud in the implementation of the investment excludes an investor from the protection of the Investment Protection Treaty, and declared itself incompetent to hear the case.

105. Second, even if jurisdiction or arbitrability were to be established (quod non), the fraud and financial irregularities as highlighted were to lead to the rejection of the claim on the merits. Reference is made here to the case of *Sanum v Laos*, where the arbitral tribunal dismissed the claim on the merits on the grounds (i) that the investor had carried out a transaction in bad faith and (ii) that the financial statements produced contained material irregularities. The Tribunal noted as follows :

"*The evidence is clear that the Plaintiffs acted in bad faith with the government, from the initial signing of the Paksong Hotel and PDA Casino, which requested a hotel and casino worth $25 million, to the financial irregularities in the operation of the Savan Vegas Hotel and Casino. The Plaintiffs never intended to build a US$25 million facility in Paksong. ... Bad faith continued throughout the litigation regarding the Savan Vegas Hotel and Casino, which were built but operated in violation of the reporting obligations of the Samum Government (and when the accounts were finally opened, revealed significant financial irregularities)) ... In Phoenix v. Czech Republic, the tribunal characterized "Phoenix's recourse and pursuit of this arbitration" as "an abuse of the ICSID system of international arbitration". ... it is well established that the investor's bad faith conduct is relevant to the award of relief under an investment treaty.''*

106. In substance, the bad faith of the investor leads to the rejection of the claim on the merits where the fraud denounced affects the implementation or execution of the investment.

107. The above is confirmed by the report written by Prof. Christoph Schreuer, one of the most recognized experts in investment arbitration law and the author of the authoritative Treaty on Investment Arbitration. He was consulted by the appellant following the discovery of the KPMG Correspondence and the other elements of fraud and corruption described above.

In his report, Prof. Christoph Schreuer explains that :

- Good faith is an imperative condition for a request for arbitration. Consequently, "*the finding of bad faith on the part of investors invariably leads to the rejection of their claims*". This condition is in line with the so-called "*clean hands*" doctrine, according to which courts and tribunals refuse "*to offer recourse in situations caused by illegal or immoral methods*" ;

- The doctrine of "*clean hands*" excludes a claimant who seeks to rely on his or her own fault. Investment arbitration tribunals have unequivocally subscribed to this principle and systematically reject claims and actions based on acts of corruption or investments made in an illicit manner, in particular through false or fraudulent evidence ;

- It is well established that investment protection will be denied to an investor who has committed acts of corruption or bribery of public officials. Such acts will result in the rejection of the investment application either in the jurisdictional phase or in the substantive proceedings.

108. In the present case, the arbitration proceedings initiated by the respondent parties were based on false and fraudulent financial statements obtained as a result of false statements communicated to KPMG and relied upon by them to certify the existence, legality and significance of their investment in Kazakhstan. In practice, the defendants would never have been able to support this argument if the Arbitral Tribunal had been aware of the false statements made by the management of the Stati Group and considered as material misstatements by KPMG.

109. In addition, if the Arbitral Tribunal had been informed of the invalidation of the reports by KPMG and of the fact that no reliance can be placed on the financial statements (produced by the respondent parties in the arbitration proceedings) due to the deceit and misrepresentation of the respondent parties to their auditor, the Arbitral Tribunal would have been obliged to dismiss the action, in accordance with arbitration practice. The Arbitral Award would therefore never have been rendered.

In this sense, Prof. Christopher Schreuer observes :

> *"The evidence now available, in particular KPMG's correspondence and false financial statements, clearly demonstrates the unlawful conduct and bad faith of the [respondents]. The availability of this evidence to the Arbitral Tribunal would have been central to the determination of its jurisdiction, the admissibility of the [respondents'] claim and the liability of [the appellant]."*[14].

110. In addition, the Arbitral Tribunal would also have been obliged to reject the Respondents' claims under the principles identified above, had it known (i) that the first two Respondents had devised a mechanism to divert money from their alleged investment in Kazakhstan to their own benefit, while hiding this mechanism from all stakeholders, including their external auditors, banks, financial market investors and (ii) that the first two Respondents had paid substantial sums of money to the daughter of the Deputy Minister of Energy of Kazakhstan.

111. Finally, the fraud confirmed by the KPMG Correspondence, as well as the manoeuvres of the respondent parties, directly infringe the appellant's rights to a fair trial and in particular its right to be contradictory in the arbitration proceedings.

[14] Rapport d'expert du 21 janvier 2020 §§ 71-72.

112. Indeed, the manoeuvres of the respondent parties prevented the discovery of the judicial/arbitral truth and deprived the appellant of her ability to successfully plead her case on the basis of the information that is available today. The debate in the arbitration would necessarily have taken a completely different turn had this information been known. First of all, as indicated, the judge would have been required to rule on his jurisdiction, arbitrability and the merits of the claim. Secondly, an international arbitration procedure such as the one conducted in the present case depends, to a very large extent, on the credibility of the witnesses. If the members of the Arbitral Tribunal had known that they were faced with witnesses (and parties) who had falsified the financial statements to such an extent that KPMG had to withdraw its audit reports, they would never have given credibility to the testimony of the respondent parties.

6.1.2.3. The impact of fraud on the quantum of damage

113. Secondly, the fraud as denounced had a consequent impact on the quantum of the sum awarded by the Arbitral Tribunal to the respondents.

114. The Arbitral Tribunal awarded the Respondents the sum of USD 199 million corresponding to their alleged "investment" in the LPG Facility. This amount was fixed by reference to the Indicative Offer that had been made by a third party (KMG) for the acquisition of the LPG Facility. The Arbitral Tribunal found that this offer was "*the best relative source*" for assessing the amount of damages. However, KMG's Indicative Offer was based, for 50%, on the historical costs of the construction of the LPG Plant, as presented in the Information Memorandum, which was prepared on the basis of the (inflated) figures contained in the financial statements.

115. In so doing, the Arbitral Tribunal based its decision on false data which were the result of fraud by the respondents. It is clear that the Arbitral Tribunal could never have considered KMG's Indicative Offer to be "*the best relative source*" if it had known that the information underlying the Indicative Offer was false and fraudulent.

116. In addition, the KPMG Correspondence highlights the misappropriation of funds from the alleged investment in Kazakhstan. The misappropriated amount, which is to be regarded as a hidden profit or dividend for the benefit of the Respondent Parties, should have been deducted from the compensation awarded for the alleged loss relating to the Respondent Parties' "investment" in Kazakhstan.

Had the Arbitral Tribunal been informed of this fact, the misappropriated amounts would necessarily have been taken into account in determining the quantum of the alleged loss relating to the respondent parties' "investment" in Kazakhstan. Otherwise, the award of damages would result in "double counting", as PwC explains in its expert report[15]:

[15] Voy. le rapport de PwC du 21 janvier 2020, p. 12 (§ 37) et p. 15 (§45).

"*The [transactions] simply appear to be a means of transferring funds from TNG (which we understand were originally provided by various third party investors) to Perkwood and, therefore, to an entity controlled by the [respondent parties]. To the extent that the amount awarded [by the Arbitral Tribunal] was intended to compensate the [Respondent Parties] for losses allegedly suffered in connection with their investment in Kazakhstan, including in respect of the LPG Facility, and to the extent that the [Respondent Parties] had already potentially received a hidden dividend by transferring funds from TNG through inflated transactions with Perkwood, such inflated cost would reflect double counting of the alleged investment to the benefit of the [Respondent Parties]*".

117. This also applies to the Laren transaction (i.e., as explained above, the debt incurred by the respondents to finance their investment in Kazakhstan and concluded on allegedly "appalling" terms due to the appellant's alleged "actions"), which the respondents invoked as part of their injury. The internal documents of the respondents proved that the facts put forward, relating to the conclusion of this transaction, were untrue.

7. Fourth plea: the first judge wrongly considered that the arbitral proceedings were due process of law

118. The first judge rejected the appellant's plea concerning the irregularity of the appointment of an arbitrator by default on behalf of the appellant and the failure to comply with the three-month waiting period prescribed by Article 26(2) of the EC Treaty.

The first judge erroneously considered that the plea relating to the violation of the three-month waiting period referred to above was "inadmissible" because of the res judicata authority of the decision of the Court of Svéa on this point. As noted above, the decision of the Court of Svéa does not have the force of res judicata in Belgium, and in any event could not prevent the Belgian judge from exercising control over the award in the light of the appellant's plea on this point.

It was also erroneous for the first judge to consider, with respect to the plea relating to the irregularity of the appointment of a default arbitrator on behalf of the appellant, that the court is "bound by the position of the Court of Svéa" concluding that the arbitral tribunal complied with the SCC rules, for the same reasons as those cited above. The first judge also wrongly decided, moreover, that the procedure as prescribed by the SCC Rules is not contrary to the fundamental principles of the Belgian legal order. On the contrary, not only were the rules of the SCC not complied with, but the appellant was deprived, in violation of her fundamental rights, of effectively exercising her right to appoint an arbitrator to the three-member arbitral tribunal, even though that right had been recognized and exercised by the respondent parties.

FOR THESE REASONS,

Subject to any other pleas of law or fact to be raised in the course of the proceedings,

PLEASES THE COURT OF APPEAL OF BRUSSELS,

Declare the present appeal admissible and well-founded.

Revise the judgment under appeal, except in so far as it declared the third party opposition against the exequatur order of 11 December 2017 admissible and, ruling by way of new provisions,

- Granting the original third party opposition against the exequatur order ;

- To rule that the exequatur procedure is subject to the provisions of Part Six of the Judicial Code in their wording prior to the Law of 24 June 2013 ;

- Primarily, declare that the exequatur order of 11 December 2017 was issued by an incompetent court, pursuant to provisions which are inapplicable or even non-existent, and, consequently, order its annulment and withdrawal ;

- In the alternative, declare the third party's opposition against the exequatur order to be well-founded, and declare that the Award could not, and cannot, be recognised or enforced in Belgium, pursuant to Articles 1723, 2° ; and 1723, 3° juncto 1704, §3, a), b) and c), and 1704, §2, b), c), d), f) and g), former, of the Judicial Code (before its modification by the Law of 24 June 2013 and by virtue of Articles V, 2(a), V, §2(a), V, §2(b), V, §1(b), V, §1(c) and/or V, §1(d) of the New York Convention and, consequently, order the annulment and revocation of the exequatur order ;

- Order the defendants to pay the costs and expenses of the appeal, including the liquidated damages for non-monetary disputes, up to a maximum amount of EUR 36.000.

JUSTICE WILL BE SERVED.

Brussels, 17February 2020

For the appellant,

One of her counsels,