

**ANNEX 3**

**to the**

**OPINION OF PROFESSOR GEORGE A. BERMANN**

**in the case of**

**Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd**

**versus**

**the Republic of Kazakhstan**

**January 17, 2021**

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## I. INTRODUCTION

1. This document, annexed to my Opinion, sets out the most relevant facts and refers to the respective supporting documents.
2. It is organized as follows: **Section II** summarizes the main positions of the parties in the underlying arbitration that was initiated on July 26, 2010, by Anatolie Stati, Gabriel Stati, Ascom Group S.A. (“**Ascom**”) and Terra Raf Trans Trading Ltd. (“**Terra Raf**”) (collectively, the “**Statis**”) against Kazakhstan under the Energy Charter Treaty (“**ECT**”) and pursuant to the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (“**Arbitration**”), and the arbitral tribunal’s (“**Tribunal**”) assessment thereof. **Section III** describes how, after the Arbitration began, Kazakhstan came to discover new facts that, though known to the Statis, were never disclosed in the Arbitration. The discovery of new facts started in 2015 and continued in different stages until 2020, thereby revealing the extent to which the Statis had engaged in serious misconduct impacting the integrity of the arbitral proceeding and the award rendered by the Tribunal in the Arbitration (“**Award**”). **Section IV** summarizes the various forms of the Statis’ misconduct established on the basis of the new evidence, as it was emerging. Finally, **Section V** describes the court proceedings that were initiated after the completion of the Arbitration in Sweden, England, the U.S., Italy, the Netherlands, Belgium and Luxembourg (“**post-Award Proceedings**”) taking place in parallel with the gradual discovery of new evidence of misconduct, the attempts of Kazakhstan to bring this to the attention of the courts, the Statis’ actions designed to prevent the courts taking cognizance of the new facts, and their systematic misconduct during these court proceedings.

## II. THE ARBITRATION (2010-2013)

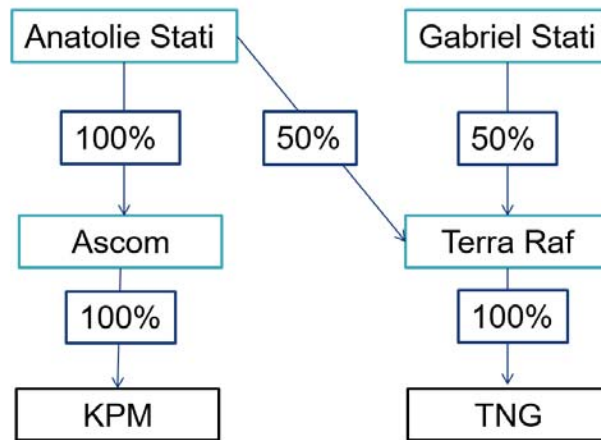
3. This section provides an overview of the Arbitration that was initiated by the Statis against Kazakhstan under the ECT.<sup>1</sup> **Ascom** is a company wholly owned by Anatolie Stati that is incorporated in Moldova.<sup>2</sup> **Terra Raf** is a company owned in equal shares by Anatolie Stati and his son, Gabriel Stati, and incorporated in Gibraltar.<sup>3</sup>
4. The dispute between the parties arose out of the Statis’ business operations in Kazakhstan. Between 1999 and 2004, the Statis purchased two pre-existing Kazakh companies, Tolkynneftegaz LLP (“**TNG**”) and Kazpolmunay LLP (“**KPM**”). TNG is wholly owned by Terra Raf, while KPM is wholly owned by Ascom. The ownership structure is reflected in this chart:

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<sup>1</sup> Request for Arbitration, *Stati et al. v. Republic of Kazakhstan*, Arbitration Institute of the Stockholm Chamber of Commerce, July 26, 2010; Award, *Stati et al. v. Republic of Kazakhstan*, Arbitration Institute of the Stockholm Chamber of Commerce, December 19, 2013 (the “**Award**”), ¶ 6.

<sup>2</sup> Award, ¶ 207.

<sup>3</sup> *Id.*, ¶¶ 718 and 746.



5. TNG and KPM were the corporate entities through which the Statis conducted their operations in Kazakhstan. These included oil and gas exploration, development, and production, on the basis of subsoil contracts with the Republic of Kazakhstan, and construction of a liquefied petroleum gas plant (the “LPG Plant”). The LPG Plant was planned to be operated jointly by TNG and the company Vitol FSU B.V. (“Vitol”).<sup>4</sup> However, the Statis abandoned the construction in early 2009, and the LPG Plant never became operative.
  
6. To finance their operations, the Statis raised money on the capital markets. In 2006, the Statis issued notes on the capital markets that were guaranteed by the shares of TNG and KPM (“Tristan Notes”).<sup>5</sup> By summer 2009, the Statis had issued the Tristan Notes with the total face value of \$531 million. The issuance of the Tristan Notes was governed by an Indenture entered into between Tristan Oil Ltd., a special-purpose BVI entity owned by Anatolie Stati, (“Tristan”) and Wells Fargo Bank, N.A. (“Wells Fargo”) dated December 20, 2006 (the “Indenture”).<sup>6</sup> The Indenture obligated the Statis to furnish the holders of the Notes (“Noteholders”) quarterly and annual financial information for TNG, KPM, and Tristan as is required in filings with the U.S. Securities and Exchange Commission on Forms 10-Q and 10-K.<sup>7</sup> The financial statements of TNG and KPM were reported on an individual and combined basis with those of another Stati company, Tristan, for the years

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<sup>4</sup> Vitol is a private Dutch energy and commodities company founded in the Netherlands in 1966. According to its website, it operates globally “from over 40 offices around the world” and is “the world’s largest independent trader of energy.” <https://www.vitol.com/about-us/>.

<sup>5</sup> See, e.g., Award, ¶¶ 209 and 254.

<sup>6</sup> Indenture between Tristan Oil Ltd, Kazpolmunay LLP, and Tolkyneftegaz LLP, December 20, 2006 (the “Indenture”).

<sup>7</sup> Indenture, § 4.03(a)(1).

2007-2009 (“**Financial Statements**”).<sup>8</sup> In the combined Financial Statements, transactions concerning the LPG Plant were reported by the Statis through TNG.<sup>9</sup>

7. The Indenture also required that the Statis include, with each annual report furnished to the Noteholders, an audit report from the “*certified independent accountants*” of Tristan, TNG, and KPM.<sup>10</sup> The Statis retained KPMG Audit LLC (“**KPMG**”) to audit and review the Financial Statements.
8. During the Arbitration, the Statis and their experts relied heavily on the Financial Statements to support their claims against Kazakhstan.<sup>11</sup> The Statis also relied heavily on the fact that KPMG had audited the Financial Statements to establish their reliability and trustworthiness:

*Kazakhstan argues that claimants’ investments were opaque, suggesting that they were structured to conceal profits and disguise who was the “real investor”. This position either is completely disingenuous, or the respondent understands nothing about finance. These companies created annual financial statements between 2003 and 2009 that were audited by “Big Four” accounting firms.*<sup>12</sup>

#### **A. Claims Raised by the Statis**

9. The Arbitration was commenced by the Statis in July 2010, and concluded in January 2014. Oral hearings were held in Paris, France on October 1-8, 2012, January 28-31, 2013, and May 2-3, 2013.<sup>13</sup>
10. The Statis’ claims were based on the assertion that Kazakhstan had violated the “fair-and-equitable-treatment (“**FET**”) standard” in Article 10(1) of the ECT by engaging in measures (referred to by the Statis as a “*harassment campaign*”) that allegedly caused TNG’s and KPM’s financial distress and, ultimately, led to termination by Kazakhstan of the contracts for the Statis’ Kazakh operations.<sup>14</sup> In determining whether a State has

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<sup>8</sup> Expert Opinion of PwC on the Reliability of the Financial Statements, August 19, 2019 (“**PwC I (financial statements)**”), ¶ 18.

<sup>9</sup> See, e.g., Interim Combined Financial Statement for Tristan, TNG and KPM for the Six Months ended June 30, 2008, 10.

<sup>10</sup> Indenture, § 4.03(a).

<sup>11</sup> FTI Consulting’s Expert Report, ECT Arbitration, May 17, 2011, ¶ 6.23; FTI Consulting’s Supplemental Expert Report, ECT Arbitration, May 28, 2012, ¶ 2.40 and note 37; FTI Consulting’s Post-Hearing Report, ECT Arbitration, April 8, 2013, ¶ 5.1; First Witness Statement of Artur Lungu, ECT Arbitration, May 17, 2011, ¶ 27; Witness Statement of Catalin Broscaru, ECT Arbitration, April 11, 2012, ¶ 14; Second Witness Statement of Anatolie Stati, ECT Arbitration, May 7, 2012, ¶ 40.

<sup>12</sup> Hearing on Jurisdiction and Liability, ECT Arbitration, October 1, 2012, Day 1, Opening Statement on Jurisdiction by Kevin Mohr, Transcript of the Hearing, 45.

<sup>13</sup> Award, ¶¶ 110, 155 and 187.

<sup>14</sup> See, e.g., *id.*, ¶ 683.

violated the FET standard, the Tribunal took into account the specific factual circumstances of the case, and evaluated them in the legal context of the ECT.<sup>15</sup>

11. Anatolie Stati testified that “*Kazakhstan’s actions contributed to a severe liquidity crisis in the companies in the first half of 2009*”<sup>16</sup> and that “*because of Kazakhstan’s harassment campaign [...] it was impossible to borrow money on reasonable commercial terms.*”<sup>17</sup> Similarly, Artur Lungu, the Chief Financial Officer (“CFO”) of Ascom and Vice President of Tristan, testified for the Statis that an alleged harassment campaign of Kazakhstan “*caused a liquidity crisis for TNG and KPM in the spring and summer of 2009.*”<sup>18</sup>

### **B. Kazakhstan’s Defense**

12. Kazakhstan maintained in defense that the Statis themselves were responsible for the liquidity shortage of their Kazakh companies.<sup>19</sup> It maintained that the asserted shortage was due to the Statis’ mismanagement in combination with a number of external factors, such as the international financial crisis of 2008.<sup>20</sup>
13. In this regard, Kazakhstan questioned the rationale behind the “*complex holding structure*” of the Statis’ ownership of their Kazakh companies, and the flow of cash among a number of affiliated companies outside of Kazakhstan.<sup>21</sup>
14. Further, Kazakhstan denied that it had engaged in any “*harassment campaign*” against the Statis.<sup>22</sup> Rather, Kazakhstan alleged that the Statis “*were not respecting the laws that Kazakhstan had enacted in order to safeguard its interests,*” and that, accordingly, its “*audits, inspections and investigations were the lawful reaction to [the Statis’] illegal conduct.*”<sup>23</sup>

### **C. Damages Claimed by the Statis**

15. The Statis sought to recover compensation for damages they allegedly suffered, in a total amount that they ultimately quantified as \$1.05 billion, plus a discretionary portion of an additional \$1.58 billion, with a compound interest at a rate of 10.5% from October 14, 2008 until the date of final satisfaction of the Award.<sup>24</sup> The Statis also demanded moral damages to be awarded at the discretion of the Tribunal.<sup>25</sup>

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<sup>15</sup> *Id.*, ¶ 944.

<sup>16</sup> Second Witness Statement of Anatolie Stati, ECT Arbitration, May 7, 2012, ¶ 41.

<sup>17</sup> *Id.*, ¶ 43.

<sup>18</sup> Second Witness Statement of Artur Lungu, ECT Arbitration, May 5, 2012, ¶ 7.

<sup>19</sup> *See, e.g.*, Award, ¶ 4.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, ¶¶ 657, 658.

<sup>23</sup> *Id.*, ¶ 4.

<sup>24</sup> Statis’ Second Post-Hearing Brief, ECT Arbitration, June 3, 2013, ¶ 396.

<sup>25</sup> *Id.*, ¶ 395.

## 1. The Statis' Claim of a \$245 Million Investment in the LPG Plant

16. For the LPG Plant, the Statis demanded compensation in the amount of their actual investment in the LPG Plant, which they alleged was at least \$245 million, as well as an additional \$84,077,000 in profit that the Statis claimed they would have realized from the LPG Plant had it been put into operation.<sup>26</sup> This level of investment was attested to in the Statis' revised Statement of Claim,<sup>27</sup> Artur Lungu's First Witness Statement,<sup>28</sup> FTI Consulting's Expert Report,<sup>29</sup> the Statis' Reply Memorial on Jurisdiction and Liability,<sup>30</sup> Anatolie Stati's Second Witness Statement,<sup>31</sup> the Statis' Reply Memorial on Quantum,<sup>32</sup> FTI Consulting's Supplemental Expert Report,<sup>33</sup> Anatolie Stati's Oral Testimony,<sup>34</sup> and both the Statis' First<sup>35</sup> and Second<sup>36</sup> Post-Hearing Briefs.
17. For example, the Statis asserted the following in the Arbitration:

*In 2006, Claimants commenced the development of a Liquefied Petroleum Gas ("LPG") processing facility, investing more than USD 245 million in its development and construction.<sup>37</sup>*

*Claimants invested more than USD 245 million in development and construction of the LPG Plant.<sup>38</sup>*

*Consequently, in May 2009, Claimants ceased their capital outlays for construction of the LPG Plant, having already invested more than US\$ 245 million in its construction.<sup>39</sup>*

*FTI [the Statis' financial experts] has made an adjustment to the total investment value that they believe Claimants' should, at a minimum, recover for the LPG Plant based on the approximately US \$37 million in additional expenditures through May, 2009, which would not have been incurred by Claimants had they been able to sell the Plant in October of 2008. With the addition of these expenditures, Claimants recoverable investment value for the LPG Plant is US \$245 million.<sup>40</sup>*

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<sup>26</sup> Statis' First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶¶ 580, 664.

<sup>27</sup> Statement of Claim, ECT Arbitration, May 18, 2011, ¶¶ 5, 64.

<sup>28</sup> First Witness Statement of Artur Lungu, ECT Arbitration, May 17, 2011, ¶ 27.

<sup>29</sup> FTI Consulting's Expert Report, ECT Arbitration, May 17, 2011, ¶ 6.23.

<sup>30</sup> Statis' Reply Memorial on Jurisdiction and Liability, ECT Arbitration, May 7, 2012, ¶ 604.

<sup>31</sup> Second Witness Statement of Anatolie Stati, ECT Arbitration, May 7, 2012, ¶ 40.

<sup>32</sup> Statis' Reply Memorial on Quantum, ECT Arbitration, May 28, 2012, notes 179, 199.

<sup>33</sup> FTI Consulting's Supplemental Expert Report, ECT Arbitration, May 28, 2012, ¶¶ 2.39–2.40.

<sup>34</sup> Anatolie Stati's Oral Testimony, ECT Arbitration, October 2, 2012, Transcript of the Hearing, 44.

<sup>35</sup> Statis' First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶¶ 127, 578.

<sup>36</sup> Statis' Second Post-Hearing Brief, ECT Arbitration, June 3, 2013, ¶¶ 354, 386.

<sup>37</sup> Statis' Statement of Claim, ECT Arbitration, May 18, 2011, ¶ 5.

<sup>38</sup> *Id.*, ¶ 64.

<sup>39</sup> Statis' Reply Memorial on Jurisdiction and Liability, ECT Arbitration, May 7, 2012, ¶ 604.

<sup>40</sup> Statis' Reply Memorial on Quantum, ECT Arbitration, May 28, 2012, note 179.



*Claimants request an award of the investment value of the LPG Plant, as adjusted by FTI to account for the approximately US \$37 million in additional expenditures by Claimants through May, 2009, in the sum of US \$245 million.*<sup>41</sup>

*Moreover, TNG's audited 2009 financial statements, which are backup to the annual report, list the net book value of the LPG Plant as US \$248 million at December 31, 2009, which corroborates FTI's assessment of US \$245 million. Data from the Claimants' historical financial records, particularly data from audited financial statements, is perfectly reliable evidence, and is not simply FTI parroting the Claimants.*<sup>42</sup>

18. Both Anatolie Stati and Artur Lungu, the Statis' former CFO, testified as to the amount invested into the LPG Plant:

*When the State seized KPM and TNG and all of their assets, including the LPG Plant, in July of 2010, more than USD 245 million had been invested in construction of the LPG Plant and the LPG Plant was over 90% complete [...].*<sup>43</sup>

*Faced with this climate of fear and uncertainty, I chose in May of 2009 to postpone the LPG Plant project, having already spent more than USD 245 million toward its construction.*<sup>44</sup>

19. The Statis' financial experts in the Arbitration, FTI Consulting ("FTI"), gave similar testimony:

*TNG constructed the LPG Plant at a site in Borankol field, next to the condensate and gas processing facilities. Per the audited financial statements for the period ended 31 December 2009, TNG has invested approximately \$245 million in the design and construction of the LPG Plant, but stopped construction in May 2009 due to cash constraints.*<sup>45</sup>

*We have updated the investment value of the LPG Plant to include additional investments made by Claimants after the 2008 Valuation Date. The Claimants' total investment into the LPG Plant includes the following:*

- *\$208.5 million as per the September 30, 2008 Financial Statements; and,*

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<sup>41</sup> *Id.*, note 199.

<sup>42</sup> Statis' Second Post-Hearing Brief, ECT Arbitration, June 3, 2013, ¶ 354.

<sup>43</sup> First Witness Statement of Artur Lungu, ECT Arbitration, May 17, 2011, ¶ 27.

<sup>44</sup> Second Witness Statement of Anatolie Stati, ECT Arbitration, May 7, 2012, ¶ 40.

<sup>45</sup> FTI Consulting's Expert Report, ECT Arbitration, May 17, 2011, ¶ 6.23.

- *Approximately \$37 million additional expenditure through May, 2009.*

*Total investment that the Claimants have invested in the LPG Plant is \$245 million.*<sup>46</sup>

20. Kazakhstan contended that the LPG Plant had never become operational because the Statis abandoned the construction long before initiating the Arbitration, and that it had a negative enterprise value based on its projected future sales revenue and expenses as well as an insufficient supply of gas to be commercially viable.<sup>47</sup> Because of this negative value, Kazakhstan contended, the Statis were at best entitled to the salvage value of the LPG Plant’s components.<sup>48</sup>

## **2. The Statis’ Claim that the Value of the LPG Plant was at Least the \$199 Million**

21. Although the Statis’ primary case was that they invested \$245 million in the construction of the LPG Plant, they explicitly requested that the Tribunal award damages in, at least, the amount of an indicative offer made by KazMunayGas Exploration and Production JSC, the State-owned oil and gas company (“KMG” and the “KMG Indicative Offer”).<sup>49</sup> The Statis obtained the KMG Indicative Offer in 2008, when they put their Kazakh operations up for sale. KMG preliminarily valued the LPG Plant at \$199 million. This valuation was directly based on the Statis’ financial information.<sup>50</sup> The Statis invoked the KMG Indicative Offer in the Arbitration both to validate their primary damages claim and, in the alternative, to claim a minimum of \$199 million in compensation for the LPG Plant, as shown in their Statement of Claim,<sup>51</sup> their Reply Memorial on Jurisdiction and Liability,<sup>52</sup> their Reply Memorial on Quantum,<sup>53</sup> in oral argument,<sup>54</sup> and in their First Post-Hearing Brief.<sup>55</sup> For example, the Statis asserted in the Arbitration:

*Indeed, the offer made for the LPG Plant by KazMunaiGas at that time was US \$199 million. While Claimants did not accept these offers because at the time they deemed them too low and did not feel that they would lead to a sale, the Tribunal should note that State-owned KazMunaiGas itself offered*

<sup>46</sup> FTI Consulting’s Supplemental Expert Report, ECT Arbitration, May 28, 2012, ¶¶ 2.39–2.40.

<sup>47</sup> Award, ¶¶ 1719–21; *see generally id.*, ¶¶ 1712–42 (summarizing Kazakhstan’s quantum arguments regarding the LPG Plant).

<sup>48</sup> Award, ¶ 1742.

<sup>49</sup> Hearing on Quantum, Day 1, ECT Arbitration, January 28, 2013, 21; ll. 5–9, 27; ll. 10–12, 28; ll. 2–6, 28; ll. 10–16, 31; ll. 17–20, 31–32; ll. 24–25, 32; ll. 20–24, 34; ll. 11–13, 49; ll. 9–15.

<sup>50</sup> As KMG stated in the Indicative Offer (p. 3): “*The value of the LPG [P]lant was calculated as an arithmetical average between the matrix of comparative method value and cost method value.*”

<sup>51</sup> Statis’ Statement of Claim, ECT Arbitration, May 18, 2011, ¶ 71.

<sup>52</sup> Statis’ Reply Memorial on Jurisdiction and Liability, ECT Arbitration, May 7, 2012, ¶ 378.

<sup>53</sup> Statis’ Reply Memorial on Quantum, ECT Arbitration, May 28, 2012, ¶ 66.

<sup>54</sup> Hearing on Jurisdiction and Liability, ECT Arbitration, October 1, 2012, Day 1, Transcript of the Hearing, at 91, 96.

<sup>55</sup> Statis’ First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶ 569.

*almost US \$200 million for the Plant, more than six times the highest value assigned to the LPG Plant by Deloitte of US \$32 million.*<sup>56</sup>

*In addition to the evidence from Mr. Broscaru and FTI that TNG could obtain gas from third parties to process in the LPG Plant, Deloitte and Kazakhstan utterly disregard the possibility that TNG could have sold the plant to a third party that had its own gas to run through the plant. One such third party was KMG E&P, which made an indicative offer of US \$199 million for the LPG Plant in September 2008. Importantly, KMG E&P arrived at that figure using a mixed comparative value and cost approach, not based on a discounted cash flow analysis:*

*The value of the LPG plant was calculated as an arithmetical average between the matrix of comparative method value and cost method value. EV/EBITDA multiple of 5.5x was used as a base for comparative method valuation. Historical costs of US \$193 million were used as a base for cost method valuation.*<sup>57</sup>

*The third indicator of value for the Tribunal, and a very important one in claimants' view, is the indicative offers [...].*<sup>58</sup>

22. The FTI expert reports submitted by the Statis to the Tribunal likewise relied on the KMG Indicative Offer.<sup>59</sup> FTI's Supplemental Report stated:

*The offer made by state-owned KazMunaiGaz at that time was \$199 million for the LPG Plant. Hence it is clear that the value of the LPG Plant at the 2008 Valuation Date was well in excess of its salvage value.*<sup>60</sup>

23. FTI further testified as follows for the Statis at the hearing on quantum:

*I further noted that in KMG's analysis of value for their indicative offer, they had also approached the LPG plant on a cost basis, and at the valuation date it was closer to \$200 million, because that was the information on the cost of the plant at that time.*<sup>61</sup>

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24. The above clearly demonstrates that the financial condition of the Statis – as reflected in their Financial Statements – bears directly on several key issues in the Arbitration, including the Statis' allegation that Kazakhstan breached the FET standard of the ECT by engaging in conduct that caused TNG's and KPM's financial distress, Kazakhstan's

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<sup>56</sup> Statis' Reply Memorial on Quantum, ECT Arbitration, May 28, 2012, ¶ 66.

<sup>57</sup> Statis' First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶ 569.

<sup>58</sup> Hearing on Quantum, Day 1, ECT Arbitration, Transcript of the Hearing, January 28, 2013, 27:10–12.

<sup>59</sup> FTI Consulting's Expert Reports, ECT Arbitration, May 17, 2011, May 28, 2012 amended on January 25, 2013, and April 8, 2013.

<sup>60</sup> FTI Consulting's Supplemental Expert Report, ECT Arbitration, May 28, 2012, ¶ 7.5.

<sup>61</sup> Hearing on Quantum, Day 4, ECT Arbitration, Transcript of the Hearing, January 31, 2013, 57:4–8.

demonstration that the reduction in value of TNG and KPM was the result of financial improprieties by the Statis, the Statis' alleged investment in the LPG Plant, as assessed both by the Statis' expert FTI and by KMG in the Indicative Offer, and generally the credibility of both parties in the Arbitration.

25. In support of their arguments, the Statis relied on witness statements and testimony of Anatolie Stati and Artur Lungu as fact witnesses on matters pertaining to the financial status of the Stati companies. The Statis further relied on the fact that their Financial Statements were audited by a "Big Four" accounting firm, KPMG, as well as on evidence presented by their financial expert FTI, which issued several expert reports and testified in the arbitral hearings. The Financial Statements were relied on by FTI and appended to their expert reports.
26. Among the numerous assertions that the Statis made in the Arbitration on the basis of the Financial Statements are the following:

*TNG's audited 2009 financial statements, which are backup to the annual report, list the net book value of the LPG Plant as US \$248 million at December 31, 2009, which corroborates FTI's assessment of US \$245 million. Data from the Claimants' historical financial records, particularly data from audited financial statements, is perfectly reliable evidence, and is not simply FTI parroting the Claimants.*<sup>62</sup>

*FTI used the net book value of the LPG plant as reflected in the Tristan Consolidated Financial Statements as at September 30, 2008, which was USD 208.5 million.*<sup>63</sup>

*Likewise, Claimants completed 90% of their LPG Plant and invested, on their behalf and on behalf of Vitol, in excess of US\$ 208.5 million in the LPG Plant.\**

[...]

*\*[...] Tristan Oil Consolidated Audited Financial Statements, September 30, 2008, at 10 [...].*<sup>64</sup>

*According to KPMG's Auditors' Report, the Management of Tolkyneftegaz LLP and Kazpolmunay LLP agreed to extend the payment terms for their largest customers, Stadoil Ltd. and General Affinity Ltd., which are related parties, after they were informed that these customers would not be able to comply with existing contractual payment terms.*<sup>596</sup>

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<sup>62</sup> Statis' Second Post-Hearing Brief, ECT Arbitration, June 3, 2013, ¶ 354.

<sup>63</sup> Statis' Statement of Claim, ECT Arbitration, May 18, 2011, ¶ 420.

<sup>64</sup> Statis' Reply Memorial on Jurisdiction and Liability, ECT Arbitration, May 7, 2012, ¶ 121.

[...]

<sup>596</sup> *Audited Financial Statements attached to 2009 Annual Report of Tristan Oil, at F-3 [...].*<sup>65</sup>

*At the end of September 2008, KPM and TNG combined had US \$221.5 million in net working capital (cash, cash equivalents, and receivables less current liabilities), and more than US \$367 million in retained earnings, on their balance sheets.*<sup>620</sup>

[...]

<sup>620</sup> *Reviewed Financial Statements for Nine Months Ended September 30, 2008, attached to Tristan Oil Interim Report for the Nine Months Ended September 30, 2008, at F-69, F-105 [...].*<sup>66</sup>

#### **D. The Award (December 2013)**

27. On December 19, 2013 (and as corrected on January 17, 2014), the Tribunal issued its Award. The Tribunal accepted the Statis' assertion that Kazakhstan had violated the FET standard in Article 10(1) of the ECT by engaging in a "harassment campaign" that allegedly caused the Statis' Kazakh companies' financial distress and ultimately led to the loss of their Kazakh business.<sup>67</sup>
28. On this basis, the Tribunal awarded the Statis the sum of \$497,685,101.<sup>68</sup> That sum comprised the following:
  - (i) \$277.8 million for two oil and gas fields;
  - (ii) \$31.3 million for the Statis' claimed out-of-pocket investment to explore and develop the Contract 302 Properties; and
  - (iii) \$199 million for the LPG Plant.<sup>69</sup>
29. In relation to the LPG Plant, the Tribunal based its assessment on the \$199 million KMG Indicative Offer proffered by the Statis, which the Tribunal considered to be "the relatively best source of information."<sup>70</sup> The Tribunal stated:

*[T]he Tribunal considers it to be of particular relevance that an offer was made for the LPG plant by state-owned KMG at that time for USD 199 million. The Tribunal considers that to be the relatively best source of*

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<sup>65</sup> Statis' First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶ 417.

<sup>66</sup> *Id.*, ¶ 435.

<sup>67</sup> Award, ¶¶ 1086–1095.

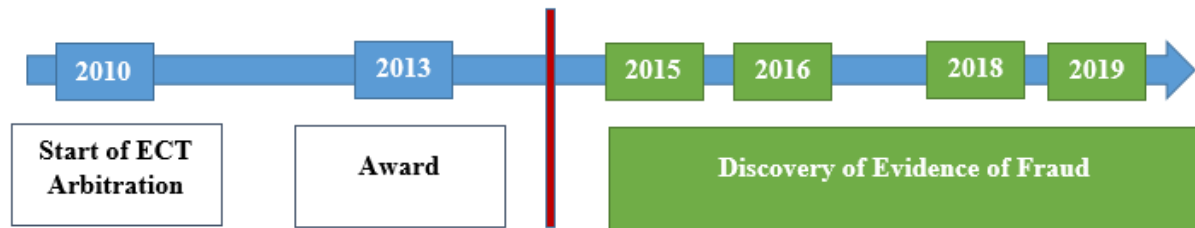
<sup>68</sup> *Id.*, ¶ 1859. The total sum awarded included a \$10,444,899 offset for debts owed.

<sup>69</sup> *Id.*, ¶ 1856.

<sup>70</sup> *Id.*, ¶ 1747.

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 during the relevant period of the valuation date.<sup>71</sup>

### III. KAZAKHSTAN’S DISCOVERY OF NEW EVIDENCE AFTER THE ARBITRATION (2015-2019)



30. Following the Arbitration, starting in mid-2015, new facts began to come to light which had at all times been known to the Statis but withheld by them both from Kazakhstan and the Tribunal. The new facts were discovered in different stages between 2015 and 2020 and they reveal the Statis’ pattern of misconduct both during the operation of their business in Kazakhstan and before the Tribunal. The new facts were discovered while the post-Award Proceedings were taking place in a number of jurisdictions. That the new evidence of fraud was concealed by the Statis is confirmed by the English High Court in one of the post-Award Proceedings:

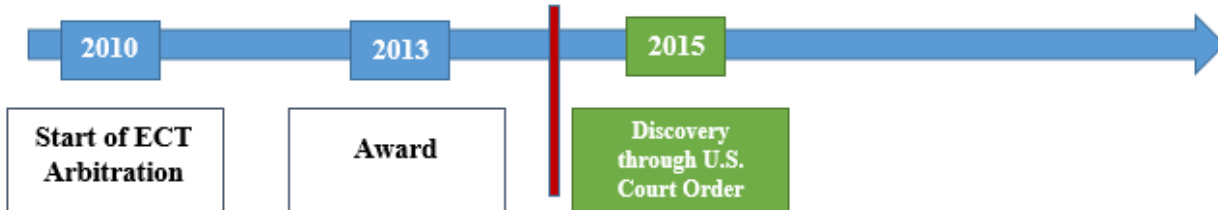
*I am satisfied that the State did not have access before the Award to the evidence of the alleged fraud on which it now seeks to rely, and that the evidence of the alleged fraud could not with reasonable diligence have been discovered before the Award had the State used reasonable diligence.<sup>72</sup>*

31. This section describes how Kazakhstan discovered evidence of the fraudulent conduct in stages. The following sets out in chronological order the circumstances allowing such discovery. The court proceedings described in **Section V** took place while the new evidence was gradually being discovered.

<sup>71</sup> *Id.*

<sup>72</sup> Approved Judgment of Justice Knowles, June 6, 2017, ¶ 79 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

## A. U.S. Discovery Order (June 2015)



32. In early 2015, Kazakhstan learned that the Statis, represented by the same team of lawyers of King & Spalding LLP acting on their behalf in the Arbitration, had been engaged in two parallel arbitration proceedings relating to the same LPG Plant project that was the subject of the Arbitration (“**Vitol Arbitrations**”). The counterparty in these arbitral proceedings was Vitol (*see supra*, ¶ 5),<sup>73</sup> the Statis’ partner in the LPG Plant project. These parallel arbitration proceedings were largely overlapping in time with the Arbitration at issue in this case.<sup>74</sup> It turned out that the Statis advanced different values and different positions regarding the LPG Plant in the Vitol Arbitrations than they were at the same time advancing in the Arbitration here, and a key witness even gave substantially different versions of testimony. This discovery marks the beginning of Kazakhstan’s acquisition of significant new evidence which was not known during the Arbitration.
33. The existence of the Vitol Arbitrations was not disclosed in the Arbitration under the ECT, even though the same team of King & Spalding representing the Statis in the Arbitration also represented the Stati-controlled companies in the parallel Vitol Arbitrations, and even though Artur Lungu, the Ascom CFO who testified in the Arbitration (*see supra*, ¶ 16), also testified in both proceedings.
34. In March 2015, Kazakhstan petitioned the U.S. District Court of the Southern District of New York under 28 U.S.C. § 1782 for discovery of documents from the parallel Vitol Arbitrations for use in the then-pending Swedish court proceedings seeking annulment of the Award in Sweden as the seat of the Arbitration (the “**Set-Aside Proceedings**”).<sup>75</sup> Kazakhstan filed the petition in the U.S. because it had come to understand that in the Vitol

<sup>73</sup> This term is used collectively for Vitol FSU B.V. and Vitol SA.

<sup>74</sup> Third Witness Statement of Dr Patricia Nacimiento, July 17, 2015, ¶ 46 *et seq.* [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070]. The first parallel arbitration proceeding was initiated by Vitol and another entity (Arkham S.A.) against another Stati company, Montvale Invest Ltd. (“**Montvale**”). Vitol maintained in this proceeding that it had a monetary claim against Montvale on the basis of a Crude Oil and Marketing Service Agreement, January 20, 2006 (“**COMSA**”) (“**COMSA Arbitration**”). The COMSA Arbitration was initiated on October 6, 2010, *i.e.*, two and a half months after initiation of the ECT Arbitration. The final award in the COMSA Arbitration was issued on April 16, 2012. The second parallel arbitration was initiated on November 6, 2012 by Ascom against Vitol on the basis of a Joint Operating Agreement dated June 27, 2006 (“**JOA**”) concluded among Terra Raf (referred to earlier), TNG, Ascom and Vitol with respect to the LPG Plant (“**Vitol Arbitrations**”). Ascom sought monetary compensation for alleged contractual damages. The tribunal issued a partial award on April 22, 2015.

<sup>75</sup> *Ex Parte* Petition for Discovery in Aid of a Foreign Proceeding Pursuant to 28 U.S.C. § 1782, March 27, 2015, *In re Application of Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. § 1782*, Case No. 15 Misc. 0081 (SHS) (S.D.N.Y. 2015).

Arbitrations, “the Stati Group had provided a lower estimate of the value of the [LPG] plant than it did in the [...] [ECT] arbitration and that this information is relevant to Kazakhstan’s appeal [of the Award] in Sweden.”<sup>76</sup> Kazakhstan sought discovery from Clyde & Co. LLP, the law firm that represented Vitol in the Vitol Arbitrations.

35. When the U.S. District Court granted Kazakhstan’s § 1782 petition, the Statis intervened, attempting to bar Kazakhstan from obtaining access to these documents.<sup>77</sup> The Statis made a number of assertions in support of their objections, including that the “*requested documents were irrelevant to the Swedish proceedings because the Swedish appellate review will be limited to procedural and jurisdictional review and will not evaluate the award’s substantive correctness.*”<sup>78</sup> After hearing oral argument, the district court by order dated June 22, 2015 rejected the Statis’ objections and granted Kazakhstan access to the documents. Specifically, the Court stated:

*Considering (1) the asymmetrical result prejudicial to a foreign government that would result were this Court to find that ROK is not an “interested person,” (2) the possibility that the requested documents could reveal that the arbitral award was contrary to Swedish public policy, and (3) the absence of authoritative proof that the Swedish tribunal would reject this evidence, this Court concludes that denying the Stati Group’s motion to vacate the March 30 section 1782 Order and quash the subpoena issued pursuant to that Order promotes section 1782’s aims.*<sup>79</sup>

36. The documents so obtained allowed Kazakhstan to begin a process of uncovering new evidence of the Statis’ systematic misconduct. These documents disclosed that the Statis in the Vitol Arbitrations had submitted reports from different financial experts than they had submitted in the Arbitration against Kazakhstan, even though both proceedings were largely contemporaneous, both related to valuation of the LPG Plant and its cost of construction, and both proceedings were conducted by the same King & Spalding lawyers. More importantly, the amounts allegedly invested in the construction of the LPG Plant presented by the Statis and their financial experts in the respective parallel arbitrations were significantly different. For instance, the Statis’ financial expert in the Arbitration, FTI, testified that the “[v]alue of Claimants’ total investment to the current date for the LPG Plant is \$245.0 million.”<sup>80</sup> This was also confirmed in that proceeding by the testimonies of Artur Lungu and Anatolie Stati.<sup>81</sup> In contrast, in the parallel Vitol Arbitrations, the Statis, using different experts,<sup>82</sup> submitted that the total construction costs were approximately \$54 million less. Specifically, Artur Lungu testified that a \$43,852,108

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<sup>76</sup> Opinion and Order, June 22, 2015, *In re Application of Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. § 1782*, Case No. 15 Misc. 0081 (SHS) (S.D.N.Y. 2015), 2.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, 6.

<sup>79</sup> *Id.*, 8–9.

<sup>80</sup> FTI Consulting’s Supplemental Expert Report, ECT Arbitration, May 28, 2012, ¶ 9.3 (ii).

<sup>81</sup> First Witness Statement of Artur Lungu, ECT Arbitration, May 17, 2011, ¶ 27; Second Witness Statement of Anatolie Stati, ECT Arbitration, May 7, 2012, ¶ 40.

<sup>82</sup> Charles River & Associates.



“*management fee*” and a \$11,921,778 interest charge had to be deducted from the stated \$245 million figure to arrive at the Statis’ true investment costs in the LPG Plant.<sup>83</sup> This was not known to Kazakhstan during its Arbitration against the Statis.

37. Additionally, Kazakhstan learned that a company named Perkwood Investment Ltd (“**Perkwood**”), that was presented as an independent company, was in fact an “*Ascom affiliate*.”<sup>84</sup> Ascom is a company wholly owned by Anatolie Stati. The fact that Perkwood was an Ascom affiliate was not known to Kazakhstan during the Arbitration and was not reflected in any of the financial documentation that was submitted by the Statis in the Arbitration, including the Financial Statements. Perkwood figures importantly in the deception perpetrated by the Statis, as explained below.

### B. Testimony of Tractebel (August 2015)



38. The documents from the Vitol Arbitrations also included a contract between Perkwood and TNG under which Perkwood sold the LPG Plant equipment to TNG at a price of \$191 million (the “**Perkwood Agreement**”). They further revealed that the German company Tractebel Gas Engineering GmbH (“**Tractebel**”) was among the suppliers for the LPG Plant construction.
39. Counsel for Kazakhstan contacted Tractebel and spoke to its employees who had been directly involved in the supply of equipment for construction of the LPG Plant. Tractebel confirmed that they had supplied the main equipment for the LPG Plant for a price of \$35 million. Tractebel also identified their own equipment in the Perkwood Agreement though at massively higher prices. Tractebel had never heard of Perkwood, had never had any dealings with Perkwood, and could not explain how Tractebel’s equipment had made its way into the Perkwood Agreement at triple the price.
40. In a witness statement filed in August 2015 in the Statis’ action to enforce the Award in England, the on-site electrical engineer for Tractebel, Franjo Zaja, testified that Tractebel had supplied the main equipment directly to TNG for an amount of approximately \$35 million and had had no dealings with Perkwood or ever heard of it. This testimony revealed an extraordinary and inexplicable discrepancy between the \$35 million charged by

<sup>83</sup> Witness Statement of Artur Lungu, Vitol Arbitration, October 11, 2013, ¶¶ 61, 65.

<sup>84</sup> *Id.*, ¶ 61.

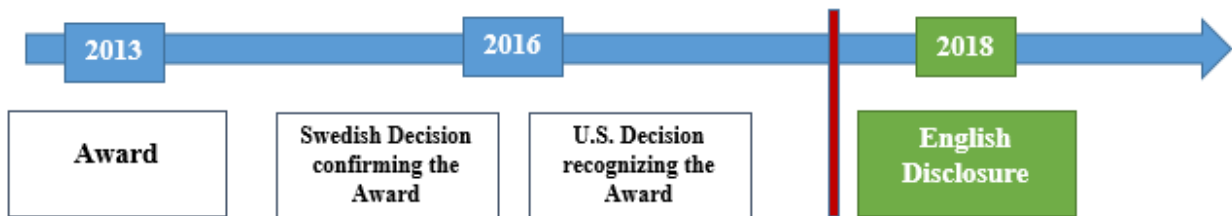
Tractebel to the Statis for the equipment, and the \$245 million the Statis claimed to have invested in the LPG Plant.<sup>85</sup>

### C. 2016 Disclosure of Latvian Documents



41. Around fall 2016, Kazakhstan, with the assistance of the Office for Prevention of Laundering of Proceeds Derived from Criminal Activity of the Prosecutors Office of the Republic of Latvia, obtained documents from the Latvian Rietumu Bank, where the Statis’ companies had bank accounts. These documents included general powers of attorney issued by Perkwood to Anatolie and Gabriel Stati.<sup>86</sup> The powers of attorney showed that the Statis secretly had full control over Perkwood and its bank accounts though this was not disclosed in their Financial Statements.<sup>87</sup> Although the Statis had in fact procured the LPG Plant equipment from Tractebel for \$35 million, they represented that the supplier was Perkwood, which “charged” them \$93 million for that equipment.

### D. Disclosures in the English Proceedings (February and June 2018)



42. Following issuance of the Award, the Statis initiated enforcement proceedings in England and the U.S. Within the context of the English enforcement proceedings, the parties were required to undertake disclosure of relevant documents.<sup>88</sup>

<sup>85</sup> See First Witness Statement of Franjo Zaja [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

<sup>86</sup> Powers of Attorney granted by Mr and Mrs Petre-Mears on behalf of Perkwood to Anatolie Stati and Gabriel Stati, April 14, 2003, April 21, 2004, March 20, 2005, March 21, 2006, June 14, 2007, May 15, 2008, April 22, 2009, June 30, 2010, April 26, 2011, April 17, 2012.

<sup>87</sup> Annual Combined and Individual Financial Statements of Tristan, KPM, and, TNG for the years ended December 31, 2007, 2008, and 2009; Interim Financial Statements of Tristan, KPM, and, TNG for the periods June 30 2007, September 30, 2007, March 31, 2008, June 30, 2008, September 30, 2008, March 31, 2009, June 30, 2009; and September 30, 2009.

<sup>88</sup> Expert Opinion of Alexander Layton QC, July 27, 2020, ¶ 15.

43. On February 23, 2018, the Statis disclosed a first set of documents to Kazakhstan (the “**February 2018 Disclosure**”).<sup>89</sup>
44. The February 2018 Disclosure included a contract between Azalia Limited (“**Azalia**”), a Russian company under the control of the Statis, and Perkwood, which, as noted, was also wholly controlled by the Statis (the “**Azalia Agreement**”). The contract provided for the sale and delivery by Azalia to Perkwood of equipment for the LPG Plant. Kazakhstan requested Russian law enforcement authorities for assistance in identifying Azalia’s directors and shareholders. The authorities interviewed the sole listed shareholder and director of Azalia, Alexey Nikolaevich Shorin, who denied any knowledge of TNG, Tractebel or Ascom, or any involvement whatsoever of Azalia with Perkwood, Ascom or Tractebel.<sup>90</sup> Alexey Shorin further stated that “*Azalia was incorporated for the purpose of retail trade, mainly food products, including beverages, and tobacco products.*”<sup>91</sup>
45. The February 2018 Disclosure also included contracts, invoices and payment orders between Azalia and Perkwood relating to transport, insurance and storage. They listed costs associated with delivery of equipment for the LPG Plant in the amount of approximately \$4.9 million. As will be explained later, during the post-Award Proceedings (*see infra*, Section V) the Statis initially explained the discrepancy between Tractebel’s proven costs of \$35 million, relating to the investment into the LPG Plant, as against the \$245 million they claimed in the Arbitration, by alleging – without supporting documentation – that the difference was attributable to the costs of transport, storage and insurance. When Kazakhstan was subsequently able to prove through the Statis’ own documentation that these costs amounted to no more than \$4.9 million and were therefore far from explaining the difference, the Statis dropped this assertion.
46. On June 11, 2018, the Statis made further disclosures in the English enforcement proceedings (the “**June 2018 Disclosure**”). These disclosures included:
- (i) *Representation letters of Anatolie Stati to the Statis’ auditors, KPMG, for the period of 2008-2009.*<sup>92</sup> The letters, which were required by KPMG as part of its audit process, did not mention Perkwood as a “related party,” even though, as noted *supra* at ¶ 37, the evidence obtained by Kazakhstan with the assistance of the Latvian authorities revealed that Perkwood had issued general powers of attorney to Anatolie and Gabriel Stati and, therefore, was under their control (*see supra*, ¶ 41).
  - (ii) *An exchange of documents and correspondence between Artur Lungu and the Statis’ auditors, KPMG, in August-September 2008* (the “**Lungu-KPMG**”).

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<sup>89</sup> List of Documents disclosed by the Statis, February 23, 2018. [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

<sup>90</sup> Affidavit of Ruslan Ashenov, an investigator of the Economic Investigation Service of the State Revenue Committee of the Ministry of Finance of Kazakhstan, February 4, 2019, certified translation, 2.

<sup>91</sup> *Id.*

<sup>92</sup> Representation Letters sent to KPMG Audit LLC by Anatolie Stati and Artur Lungu, November 11, 2008, June 10, 2009, August 25, 2009, December 14, 2009, and May 25, 2010.

**Communications**)<sup>93</sup> These documents and correspondence related to the preparation of a Vendor Due Diligence Report (“**VDD Report**”) that the Statis intended to distribute to prospective purchasers during the 2008 sale of 100% of TNG, KPM and Tristan.<sup>94</sup> These documents revealed that early drafts of the VDD Report identified Perkwood as a Stati company.<sup>95</sup> However, Artur Lungu requested that KPMG change all such references to say that Perkwood was an independent third party, which KPMG did.<sup>96</sup> The VDD Report was submitted by the Statis in the Arbitration and other post-Award Proceedings in connection with the LPG Plant’s valuation.

- (iii) *Two sets of internal Stati records of CAPEX (capital expenditure) costs for the LPG Plant.*<sup>97</sup> The two sets of records appear to be double bookkeeping ledgers that covered the same time periods, but contained numbers that differed by at least \$40-45 million. One set of such files carried in its name the word “Vitol” while the other did not. The “Vitol” files were shared with Vitol, the Statis’ partner in the LPG Plant project. The other files were shared internally among the Statis. This apparent double bookkeeping is further evidence of deliberate inflation of the costs of the LPG Plant.

#### E. Deposition of Artur Lungu (February 2019)



- 47. On April 3, 2019, Kazakhstan was able to depose Artur Lungu, who as CFO of Ascom had been one of the Statis’ key witnesses in the Arbitration, under 28 U.S.C. § 1782 (the “**Lungu Deposition**”). Despite Mr. Lungu’s functions and knowledge of the relevant issues, the Statis had not offered testimony from him in any of the post-Award Proceedings. At the deposition, Artur Lungu was represented by two King & Spalding partners: Kevin Mohr, who represented the Statis in the Arbitration, and Egishe Dzhazoyan, who is one of the Statis’ key attorneys in their post-Award Proceedings.<sup>98</sup>

<sup>93</sup> Correspondence between Artur Lungu and KPMG in August-September 2008.

<sup>94</sup> Vendor Due Diligence Report compiled by KPMG, August, 2008.

<sup>95</sup> Draft version of the Vendor Due Diligence Report compiled by KPMG, September 8, 2008.

<sup>96</sup> Correspondence between Artur Lungu and KPMG in August-September 2008.

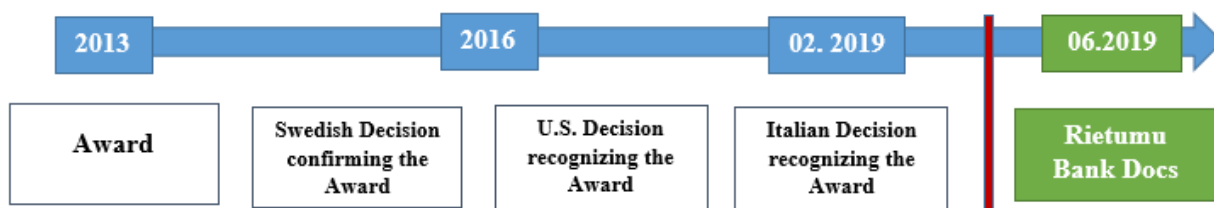
<sup>97</sup> Ascom internal records of the LPG Plant CAPEX.

<sup>98</sup> The Oral Videotaped Deposition of Artur Lungu, April 3, 2019, *In Re Application of Republic of Kazakhstan for Order Directing Discovery from Artur Lungu Pursuant to 28 U.S.C. § 1782*, Misc. Action No. 4:19-mc-00423 (S.D. Tex. 2019), 12:2–10 (the “**Lungu Deposition**”).

48. During the Lungu Deposition, Artur Lungu testified, *inter alia*:<sup>99</sup>

- (i) that the Stati “Group” of companies was facing a short-term and medium-term liquidity crisis in October 2008, that this was not caused by any action of Kazakhstan, and that Anatolie Stati knew this;<sup>100</sup>
- (ii) that Anatolie Stati at all times knew that Perkwood was a related party but misrepresented this material fact in the management representation letters issued to KPMG as part of its audit process;<sup>101</sup>
- (iii) that each of the Financial Statements was materially false because it failed to identify Perkwood as a related party and failed to identify TNG transactions with Perkwood in relation to the LPG Plant as related party transactions;<sup>102</sup> and
- (iv) that Artur Lungu expressly directed KPMG to change all the references to Perkwood in the VDD Report from that of a related party to that of an independent third party, which KPMG then did.<sup>103</sup>

#### F. Discovery of the Rietumu Bank Statements (Summer 2019)



49. Mention has already been made *supra* at ¶ 41, of the assistance given to Kazakhstan by the Prosecution Office of the Republic of Latvia in 2016. In 2019, through the same means, Kazakhstan obtained further data on numerous bank accounts held by the Statis in Rietumu Bank in Latvia (“**Rietumu Bank Statements**”).<sup>104</sup>

<sup>99</sup> Affidavit of Matthew Kirtland of Norton Rose Fulbright US LLP, May 9, 2019, *In Re Application of Republic of Kazakhstan for Order Directing Discovery from Artur Lungu Pursuant to 28 U.S.C. § 1782*, Misc. Action No. 4:19-mc-00423 (S.D. Tex. 2019).

<sup>100</sup> *Id.* ¶ 25.

<sup>101</sup> *Id.* ¶¶ 34–36.

<sup>102</sup> *Id.* ¶ 37.

<sup>103</sup> *Id.* ¶¶ 59–62.

<sup>104</sup> Rietumu Bank is one of several Latvian banks that have recently received negative press for facilitating money laundering. For example, a French court ordered Rietumu Bank to pay \$91 million in fines in July 2017, due to its involvement in money laundering in July 2017. According to the French court, between 2007 and 2012 the bank facilitated tax evasion by French citizens and small businesses in an amount totaling approximately \$964 million. *See*, The Baltic Times, *Rietumu Banka hit with heavy fine over laundering scheme in France*, published on July 6, 2017, <https://www.baltictimes.com/rietumu-banka-hit-with-heavy-fine-over-laundering-scheme-in-france/>.

50. The Rietumu Bank Statements revealed that the Statis were affiliated with approximately three dozen shell companies having bank accounts at Rietumu Bank.<sup>105</sup> An analysis of the Rietumu Bank Statements by an independent expert, PricewaterhouseCoopers LLP in London (“**PwC**”), revealed that the Statis systematically stripped their Kazakh companies, TNG and KPM, of hundreds of millions of dollars using a web of companies to conceal the flow and ultimate location of funds.<sup>106</sup> This new evidence directly contradicted the representations made by the Statis in the Arbitration – which were accepted by the Tribunal in assessing liability and damages against Kazakhstan – that their Kazakh companies were in financial distress because of a “*campaign of harassment*” undertaken by Kazakhstan.<sup>107</sup>
51. The PwC Report referenced in the preceding paragraph is one of a total of four expert opinions prepared by PwC in the present case, as follows:
- (i) Expert Opinion of PwC on the Reliability of the Financial Statements, August 19, 2019 (“**PwC I (financial statements)**”);
  - (ii) Expert Opinion of PwC on the further Correspondence of KPMG, January 21, 2020 (“**PwC II (KPMG correspondence)**”);
  - (iii) Expert Report of PwC: Review of the Application of TNG and KPM Funds by the Stati Parties, July 29, 2020 (“**PwC III (application of funds)**”); and
  - (iv) Expert Report of PwC: Review of Transactions by the Stati Parties for Characteristics of Money Laundering Risks, July 29, 2020 (“**PwC IV (money laundering risks)**”).
52. One company that stands out in the web of Stati companies is Hayden Interinvest Ltd (“**Hayden**”), a BVI shell company secretly controlled by Anatolie and Gabriel Stati. The analysis of the Rietumu Bank Statements revealed that Hayden was used for collecting funds channelled out of Kazakhstan before these funds were transferred further, disguising their final destination. Some of the funds were used for making certain payments, which included nine separate transfers between October 2007 and June 2008 to Yekaterina Lyazzatova, the daughter of Kazakhstan’s Deputy Minister of Energy at the time, Lyazzat Kiinov, in a total amount of \$1,254,000 and described in the bank statements as “*payment for scholarship*.”<sup>108</sup> Several millions of dollars were also used by the Statis for payments to politicians and state employees in Moldova, Congo, Romania, South Sudan and Kurdistan.<sup>109</sup> The funds accumulated in Hayden were also used for private purposes, such as construction of a castle in Moldova and purchase of premium class cars and diamond watches and rental of private jets, instead of being invested in the Statis’ Kazakh

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<sup>105</sup> Expert Report of PwC: *Review of the Application of TNG and KPM Funds by the Stati Parties, July 29, 2020* (“**PwC III (application of funds)**”), Appendix 4.1.

<sup>106</sup> *Id.*

<sup>107</sup> Award, ¶ 642.

<sup>108</sup> Expert Report of PwC: *Review of Transactions by the Stati Parties for Characteristics of Money Laundering Risks, July 29, 2020* (“**PwC IV (money laundering risks)**”), ¶ 3.71.

<sup>109</sup> *Id.*, ¶¶ 3.62–3.71.

operations.<sup>110</sup> This too directly contradicted the Statis’ contention in the Arbitration that their Kazakh companies were in financial distress, and that this distress was caused by the unlawful actions of Kazakhstan.

53. On the basis of the Rietumu Bank Statements, PwC, in PwC IV (money laundering risks), concluded that there exists credible indicators that the Statis have engaged in transnational money laundering operations.<sup>111</sup> Furthermore, Stefan D. Cassella, a former U.S. Department of Justice prosecutor and expert in money laundering, opined that “*it is apparent from our analysis that the Stati Parties engaged in extensive international money laundering activity involving the proceeds of crimes committed in the United States and Kazakhstan, and that the Tribunal in the ECT Arbitration was not informed of the scope of this criminal activity prior to the issuance of the ECT Award on 19 December 2013.*”<sup>112</sup>

### G. KPMG Invalidation of Audit Reports (August 2019)



54. As previously noted *supra* at ¶¶ 7-8, the Statis retained KPMG to perform audits and reviews of their Financial Statements for the years ending on December 31, 2007, 2008, and 2009, as well as quarterly interim Financial Statements for those years.<sup>113</sup>
55. By letter dated July 5, 2019, counsel for Kazakhstan provided KPMG with further documentation that it had obtained after the Award was issued, including in particular the new testimony obtained through the U.S. deposition of Artur Lungu (*supra*, ¶ 47 *et seq.*).<sup>114</sup>
56. Following requests for further information, KPMG notified counsel for Kazakhstan by letter dated August 21, 2019 (the “**KPMG-Kazakhstan Notice**”) that it had “*conducted a thorough and independent assessment*” of the relevant information and deemed this information to be material to the accuracy of both its audit reports and the underlying Financial Statements.<sup>115</sup> As a consequence, KPMG stated it had reached the conclusion

<sup>110</sup> *Id.*, ¶¶ 3.7–3.13.

<sup>111</sup> *Id.*, ¶ 3.73.

<sup>112</sup> Legal Opinion by Stefan Cassella of Streamhouse AG, July 30, 2020, 2.

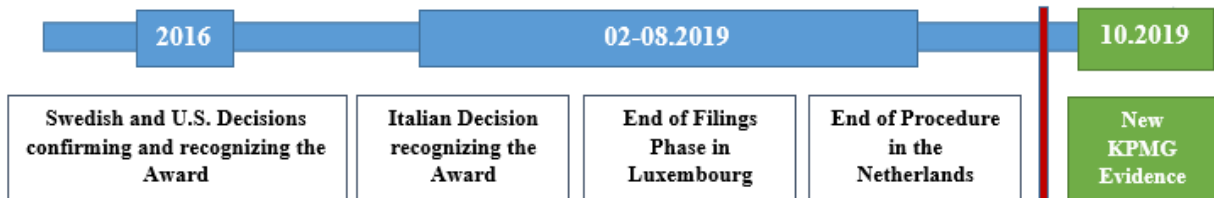
<sup>113</sup> Annual Combined and Individual Financial Statements of Tristan, KPM, and, TNG for the years ended December 31, 2007, 2008, and 2009; Interim Financial Statements of Tristan, KPM, and, TNG for the periods June 30 2007, September 30, 2007, March 31, 2008, June 30, 2008, September 30, 2008, March 31, 2009, June 30, 2009; and September 30, 2009. Prior to 2007, Deloitte audited the Stati Financial Statements.

<sup>114</sup> Letter from Dr Patricia Nacimiento, Herbert Smith Freehills LLP (at the time Herbert Smith Freehills Germany LLP) to KPMG Audit LLC, July 5, 2019.

<sup>115</sup> Letter from A. Clarke, KPMG Audit LLC, to Dr Patricia Nacimiento of Herbert Smith Freehills LLP (at the time Herbert Smith Freehills Germany LLP), August 21, 2019.

that “reliance should not be placed on the audit reports issued by” KPMG and that KPMG had “notified Anatolie Stati and Ascom S.A. of that conclusion and requested that they take all steps necessary to prevent any further or future reliance on” all of the audit reports that KPMG had issued for the Stati Financial Statements.<sup>116</sup>

#### H. New KPMG Evidence (October 2019)



57. On October 25, 2019, through its ongoing criminal investigations, Kazakhstan became aware of important and highly relevant correspondence between KPMG and the Statis that took place in two distinct time periods: 2016 (the “**2016 KPMG Evidence**”) and 2019 (the “**2019 KPMG Evidence**”) (collectively referred to as the “**New KPMG Evidence**”). Each of these two bodies of correspondence is described below:

##### 1. The 2016 KPMG Evidence

58. This correspondence revealed that, unbeknownst to Kazakhstan, KPMG had written to Anatolie Stati on February 15, 2016, questioning the legitimacy of the LPG Plant construction costs recorded in the Stati Financial Statements (the “**February 15, 2016 KPMG Letter**”).<sup>117</sup> In that correspondence, KPMG notified the Statis that it had become aware of certain highly disturbing facts of which it had been unaware at the time it conducted its audits, notably:

- (i) that there were serious doubts that the recorded LPG Plant construction costs were legitimate;
- (ii) that serious doubts also surrounded the \$44 million management fee that TNG allegedly paid to Perkwood which had elevated the apparent total construction cost of the LPG Plant to the circa \$245 million recorded in TNG’s financial statements for the year ending December 31, 2009;<sup>118</sup>
- (iii) that Perkwood was not the “*actual supplier of the equipment for the LPG Plant,*” but instead was a dormant company that was passing through costs that were

<sup>116</sup> *Id.*

<sup>117</sup> Letter from KPMG Audit LLC to A. Stati, February 15, 2016. KPMG stated that it wrote this letter after being provided “supporting evidence” by Kazakhstan’s outside legal counsel, the law firm of Norton Rose Fulbright LLP (“**Norton Rose**”). KPMG did not inform Norton Rose that it had contacted the Statis in 2016.

<sup>118</sup> *Id.*



“*significantly different from the corresponding cost*” charged by the actual supplier of the equipment, *i.e.*, Tractebel; and

(iv) that, while the Statis had presented Perkwood as an independent third party in their financial statements and to KPMG, Perkwood was in fact a Stati company.<sup>119</sup>

59. In light of the facts that had come to its attention and the suspicions that they aroused, KPMG demanded that the Statis provide “*explanations and supporting evidence*” in response to a series of six questions regarding these issues. KPMG also put the Statis on notice of the provisions of International Accounting Standard (“IAS”) 580 – “*Written Representations*” – and its statement that “*written representations by management and by those charged with governance are a necessary part of audit evidence required in connection with an audit.*”
60. Being aware of the fact that Kazakhstan had initiated proceedings to set aside the Award before the Svea Court of Appeal (the “**Set-Aside Proceedings**”), KPMG closed its February 15, 2016 Letter by warning the Statis that if it did not receive the requested “*explanations or additional representations,*” it reserved its rights to “*seek to prevent future reliance on [its] audit reports and in particular withdraw [its] audit reports and inform about such withdrawal all parties who are still, in [its] view, relying on these reports, including but not limited, to [the] Ministry of Justice of the Republic of Kazakhstan and the Svea Court of Appeals.*”<sup>120</sup>
61. However, the Statis did not provide KPMG the requested “*explanations or additional representations.*” Instead, by letter dated February 26, 2016, again unbeknownst to the Svea Court of Appeal or Kazakhstan, the Statis demanded that KPMG answer a series of ten “*threshold queries*” before they could be “*in a position to provide a substantive response.*”<sup>121</sup> These questions largely concerned the manner and means by which KPMG had obtained the evidence supporting its February 15, 2016 Letter. They did not address the substance of KPMG’s questions. The Statis closed their response with a threat:

*[W]e expressly reserve the right to hold your firm accountable should you choose not to co-operate with us and/or proceed to withdraw your audit reports.*<sup>122</sup>

62. KPMG responded on February 29, 2016, and explained that it was obligated by Kazakh law to provide the information requested in its prior letter to the General Prosecutor of the

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<sup>119</sup> PwC II (KPMG correspondence), makes a finding that identifying related parties and related-party transactions is important due to the heightened risk that transactions between related parties may not reflect normal market conditions. In view of the risk that transactions with related parties can seriously distort the profit or loss and financial position of an entity, it is essential that company management truthfully identify to its auditors all related parties and related-party transactions. *See also*, PwC I (financial statements), ¶¶ 29–30.

<sup>120</sup> Letter from KPMG Audit LLC to A. Stati, February 15, 2016. The Statis received KPMG’s February 15, 2016 Letter during the Swedish Set-Aside Proceedings but instead of disclosing it to the Svea Court the Statis continued invoking KPMG as a guarantor of the trustworthiness of their Financial Statements.

<sup>121</sup> Letter from A. Stati to KPMG Audit LLC, February 26, 2016.

<sup>122</sup> *Id.*, 2.

Republic of Kazakhstan.<sup>123</sup> KPMG suggested “*that it was in the best interest of both [KPMG and the Statis] to arrange a call to discuss the subject matter,*” and proposed times for a call in early March 2016.

63. The Statis responded by email dated March 2, 2016, still without answering KPMG’s substantive questions about Perkwood, the \$44 million management fee, or the true cost of the LPG Plant equipment.<sup>124</sup> Instead, the Statis (a) requested copies of all communications exchanged between KPMG and the Kazakh General Prosecutor’s Office, (b) requested a reply to the “threshold queries” from their prior letter, and (c) stated that once they received the “*requested documents and information,*” they would arrange a conference call with KPMG.
64. KPMG sent yet another letter to the Statis on March 10, 2016, reminding them that (a) it acts “*on the basis of Kazakhstan legislation, professional standards and the terms of the audit engagement contract,*” (b) its “*professional obligation is to protect the quality of [its] audit work to [its] client and to the parties using [its] audit report,*” and (c) it is also KPMG’s “*obligation to address those queries challenging [its] audit quality.*”<sup>125</sup> KPMG accordingly reiterated its request that the Statis provide responses to the “*audit-related queries*” set out in its February 15, 2016 letter.<sup>126</sup>
65. Kazakhstan has not seen any further correspondence following this March 10, 2016 communication, and KPMG appears not to have pursued the matter further until three years later, in 2019, as described below.

## 2. The 2019 KPMG Evidence

66. This correspondence revealed that on August 5, 2019, after being informed by Kazakhstan of the new evidence of the Statis’ fraud, as described *supra* at ¶ 49 *et seq.*, KPMG notified the Statis that, during its prior audits of the Financial Statements, it had “*received written representations signed by the management of the [Stati] Companies regarding the completeness of related party transactions disclosed in the financial statements of the Companies*” and “*were also provided with a list of entities which management represented to [KPMG] was a complete list of the Companies’ related parties.*”<sup>127</sup> KPMG attached those materials to its communication, and referenced Artur Lungu’s deposition testimony that these representation letters were “*false.*”
67. KPMG further confirmed that its audit files “*indicate that transactions with Perkwood were not disclosed in the financial statements of*” the Statis’ companies and that “*Perkwood*

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<sup>123</sup> Email from KPMG Audit LLC to Ascom, February 29, 2016.

<sup>124</sup> Email from Ascom to KPMG Audit LLC, March 2, 2016.

<sup>125</sup> Letter from KPMG Audit LLC, to A. Stati, March 10, 2016.

<sup>126</sup> *Id.*

<sup>127</sup> Letter from S. Zhumashev, KPMG Audit LLC, to A. Stati, August 5, 2019.

was not included in the list of related parties which management provided” during the audit. KPMG requested the Statis to provide “*explanations by August 16, 2019.*”<sup>128</sup>

68. The Statis did not provide the requested explanations and on August 21, 2019, KPMG informed the Statis by letter that it had invalidated its audit reports for the Financial Statements (“**KPMG Audit Invalidation**”). KPMG stated that it had “*not received a response from*” the Statis in respect of the letter dated August 5, 2019 or KPMG’s “*question regarding whether Perkwood was a related party.*”<sup>129</sup> KPMG noted that certain transactions “*should have been disclosed in its annual and interim financial statements*” and that this omission was “*material.*” On this basis, KPMG stated that “*the management of [the Stati companies] made misrepresentations*” to KPMG.<sup>130</sup> As noted, KPMG therefore notified the Statis “*that [they] should immediately take all necessary steps to prevent any further, or future, reliance*” on the audit reports for all of the Financial Statements, including “*ensuring that anyone in receipt of the relevant financial statements and Reports is informed of this development.*”<sup>131</sup>
69. The Statis did not comply with this express instruction from KPMG and failed to disclose this evidence in any of the ongoing post-Award Proceedings. The Statis instead wrote to KPMG on September 6, 2019, and demanded that it reverse its decision to invalidate the audit reports.<sup>132</sup> Between September 6 and October 3, 2019, KPMG and the Statis engaged in further correspondence.<sup>133</sup> Therein, as stated by KPMG, the Statis engaged in a “*continued refusal to provide a substantive response to the queries*” posed by KPMG with regard to the material misrepresentations made to it.
70. As noted *supra* at ¶ 57, Kazakhstan was not aware of this correspondence until October 25, 2019.

### I. Assessment of New Evidence by Independent Experts

71. The new evidence that Kazakhstan discovered in stages between 2015 and late 2019 has now been analyzed by a number of independent experts of high reputation and in a variety of disciplines. None of the new evidence was available to Kazakhstan during the Arbitration and therefore Kazakhstan was deprived of the opportunity to obtain such expert analysis and present it to the Tribunal. As summarized below, all experts reach the conclusion that the new evidence was highly pertinent to and significant for the matters decided by the Tribunal in the Arbitration. The number of experts, their reputation and their independent analysis confirm that the allegations of fraud made by Kazakhstan in the post-Award Proceedings are supported by convincing evidence:

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<sup>128</sup> *Id.*

<sup>129</sup> Letter from A. Clarke, KPMG Audit LLC, to A. Stati, August 21, 2019.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Letter from G. Pisica to KPMG Audit LLC, September 6, 2019.

<sup>133</sup> *Id.*; Letter from A. Clarke, KPMG Audit LLC, to G. Pisica, September 20, 2019; Letter from G. Pisica to KPMG Audit LLC, September 25, 2019; Letter from A. Clarke, KPMG Audit LLC, to G. Pisica, October 3, 2019.

- In 2015 and 2017 Deloitte & Touche GmbH (“**Deloitte**”), Kazakhstan’s quantum expert in the Arbitration, provided an assessment of the initial evidence of fraud that was obtained through the U.S. Discovery Order. Deloitte *inter alia* opined that the “*historical costs*” of the LPG Plant construction were inflated “[b]y an amount of up to approx. USD 130 million.”<sup>134</sup> The Statis’ quantum experts used in the Arbitration and in the parallel Vitol Arbitrations, FTI and Charles River, have remained silent even though this and other opinions directly affected their opinions submitted to the Tribunal.
- In November 2019, Kazakhstan obtained an expert opinion from BDO Mälardalen AB (“**BDO**”) that concluded that KPMG’s August 21, 2019 decision to withdraw its audit reports was made on the basis of proper investigation and application of IAS.<sup>135</sup>
- **Stefan Huibregtse**, the CEO and managing partner of Transfer Pricing Associates Global B.V. (“**TPA Global**”),<sup>136</sup> was asked to opine on the Statis’ assertion in the post-Award Proceedings that the use of Perkwood and Azalia to triple the price of the LPG Plant equipment was a legitimate transfer pricing and tax optimization arrangement. S. Huibregtse concluded that the Statis’ arrangement was “*clearly a sham*” and against the standards of reporting taxable income in the relevant countries.<sup>137</sup>
- **PwC** was engaged by Kazakhstan to assess certain accounting issues. PwC confirmed that “*the Financial Statements to which these audit reports refer have been relied upon by the Stati Parties in the ECT Arbitration, their witnesses, their experts, and their counsel, as well as the Arbitral Tribunal, and they continue to be part of the court records in the court proceedings following the Award.*”<sup>138</sup> It also determined that the KPMG Audit Invalidation had affected “*KPMG’s report on the TNG financial statements to 30 June 2008 that formed the basis of the costs and EBITDA figures that fed into the calculation of the Awarded Amount.*”<sup>139</sup> Furthermore, PwC found that the Statis had diverted hundreds of millions from their Kazakh operations to tax haven jurisdictions,<sup>140</sup> and that these transactions raised “*red flags*” for money laundering.<sup>141</sup>
- **Professor Christoph Schreuer**, a leading expert in the field of international investment law and arbitration, reached the view that the evidence of the Statis’ fraud “*would have been critical for the determination of [the Tribunal’s]*

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<sup>134</sup> Expert Report of Dipl. Ing. Ernst Kallweit of Tractebel, January 12, 2017, ¶ 28(e) [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

<sup>135</sup> Expert Opinion of BDO, November 25, 2019, ¶ 39.

<sup>136</sup> TPA Global is a global network of over 5,000 tax professionals. <https://www.tpa-global.com/>

<sup>137</sup> Expert Opinion of TPA Global, February 6, 2019, ¶¶ 107–109.

<sup>138</sup> PwC II (KPMG correspondence), ¶ 32.

<sup>139</sup> *Id.*, ¶ 31.

<sup>140</sup> PwC III (application of funds).

<sup>141</sup> PwC IV (money laundering risks), ¶ 3.74.

*jurisdiction, the admissibility of the Stati Parties’ claims and the liability of Kazakhstan.*”<sup>142</sup>

- Following the Statis’ attempt to enforce the Award in England, the English High Court rendered a judgment on June 6, 2017. **Alexander Layton QC** opined that the English High Court, in the judgment of Justice Knowles,<sup>143</sup> reached the view that there was sufficient evidence of fraud to warrant a trial of the fraud allegation for the purpose of setting aside an order for enforcement of a foreign arbitration award.<sup>144</sup> Further, he determined that the judgment of Mr. Justice Knowles is final and binding with *res judicata* effect of its own right with regard to the issues it necessarily decided, including that the evidence of fraud was so strong that, if it was examined at trial and remained unanswered, it would reasonably be expected to be decisive.<sup>145</sup>
- **Stefan D. Cassella**, an expert on asset forfeiture and money laundering and former Deputy Chief of the U.S. Justice Department’s Asset Forfeiture and Money Laundering Section, reached the view that there is evidence that the Statis “*could be prosecuted criminally in Latvia for money laundering offenses involving the proceeds of the Tristan Notes scheme, the Sales of Oil and Gas scheme, and the Perkwood scheme, and in the United States and in other jurisdictions for conducting any future financial transaction involving the Award from the Tribunal in the ECT Arbitration.*”<sup>146</sup>
- **Dr. Patrik Schöldström**, a current Judge of the Svea Court of Appeal, concluded that in the Set-Aside Proceedings the Svea Court “*did not consider*” the allegations of fraud “*in its assessment at all.*”<sup>147</sup> He also concluded that the Statis’ conduct in the Set-Aside Proceedings and in the Arbitration established “*credible evidence*” of an intentional misleading, which may qualify as criminal fraud under Swedish law,<sup>148</sup> and constituted a breach of the Statis’ duty under Swedish law to tell the truth at various points in the proceedings.<sup>149</sup>

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72. The above clearly demonstrates that the new evidence Kazakhstan obtained would have been fundamental for the outcome of the Arbitration, had it been known to the Tribunal and Kazakhstan at that time.

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<sup>142</sup> Legal Opinion of Professor C. Schreuer, January 21, 2020, ¶¶ 71, 72.

<sup>143</sup> Approved Judgment of Justice Knowles, June 6, 2017 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

<sup>144</sup> Expert Opinion of Alexander Layton QC, July 27, 2020, ¶ 55.

<sup>145</sup> *Id.*

<sup>146</sup> Legal Opinion by Stefan Cassella of Streamhouse AG, July 30, 2020, 20–21.

<sup>147</sup> Legal Opinion of Dr Patrik Schöldström, January 13, 2017, ¶ 13.

<sup>148</sup> Legal Opinion of Dr Patrik Schöldström, August 23, 2020, ¶¶ 38–39.

<sup>149</sup> *Id.*, ¶¶ 42–45.

#### IV. MISCONDUCT ESTABLISHED BY NEW EVIDENCE

73. The illicit acts that the Statis performed fall into four categories:
- (i) the use of the fraudulent transactions to inflate the LPG Plant investment costs (*see infra*, ¶ 75 *et seq.*);
  - (ii) the use of fraudulent oil sales transactions to strip assets from the Statis' Kazakh companies (*see infra*, ¶ 111 *et seq.*);
  - (iii) the use of Tristan to defraud investors (*see infra*, ¶ 117 *et seq.* and ¶ 123 *et seq.*); and
  - (iv) the use of Laren Holdings Ltd. to defraud investors (*see infra*, ¶ 131 *et seq.*).
74. All four categories are described in sub-sections below.

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##### A. Fraudulent Transactions

75. The new documents reveal that the Statis created a structure for the specific purpose of channelling the procurement and construction services for the LPG Plant through a series of undisclosed related-party contracts and related-party transactions that enabled the Statis to vastly inflate the real costs in the books and pocket the difference between actual and inflated costs. Perkwood, identified only after the conclusion of the Arbitration as an entity wholly owned by the Statis (*supra*, ¶ 41 *et seq.*), lay at the heart of the arrangement (the “**Fictitious Transactions Scheme**”):
76. First, the new facts discovered by Kazakhstan in 2015, more than a year after the Arbitration had concluded, revealed that the Statis had caused Ascom and Azalia to enter into a contract with Tractebel dated January 31, 2006 (the “**Tractebel Contract**”).<sup>150</sup> Thereunder, Tractebel was to supply the main equipment required for construction of the LPG Plant and supervise the plant's installation for a total sum of approximately \$35.05 million.<sup>151</sup>
77. Second, the February 2018 Disclosure in the English enforcement proceedings revealed that the Statis created a document dated January 11, 2006 that purported to be a contract

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<sup>150</sup> Contract between Ascom Group S.A., Azalia Limited and TGE Gas Engineering GmbH, January 31, 2005 (the “**Tractebel Contract**”).

<sup>151</sup> Second Witness Statement of Franjo Zaja, January 12, 2017, ¶ 4 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070]. All dollar figures cited in this report refer to U.S. dollars. The original contract price under the Tractebel Contract was approximately €28.38 million, which is equivalent to approximately \$34.29 million at the January 31, 2006 published exchange rate of 1.20825 Euro to the U.S. dollar. The Tractebel Contract price was subsequently amended to €29.01 million, which is equivalent to approximately \$35.05 million, at the same January 31, 2006 exchange rate.

between Azalia and Perkwood for the “re-sale” of the same Tractebel equipment from Azalia to Perkwood – the **Azalia Agreement** (*see supra*, ¶ 44).<sup>152</sup>

78. Third, the documents obtained with the assistance of the U.S. courts included a document that the Statis created dated February 17, 2006, the **Perkwood Agreement** (*supra*, ¶ 38 *et seq.*),<sup>153</sup> that purported to be a contract between Perkwood and TNG by which Perkwood further “re-sold” the LPG Plant equipment to TNG for the price of around \$93 million.
79. These three “contracts,” dated in rapid succession, enabled TNG to appear to have “purchased” the LPG Plant equipment from Perkwood, which in turn “purchased” it from Azalia, which in turn purchased it from the actual supplier, Tractebel.
80. As noted, TNG, Ascom, Azalia and Perkwood were all Stati-owned or controlled companies, but only Ascom and TNG were publicly disclosed as such in the Stati Financial Statements. Perkwood was not disclosed (nor was Azalia). As discussed *supra* at ¶ 37 *et seq.*, Kazakhstan did not learn that Perkwood was a Stati company until July 2015. This was one and a half years *after* the Award in the Arbitration was issued in December 2013 (for further details, *see supra*, ¶¶ 27-29).
81. The Statis deliberately concealed the true nature of Perkwood in their Financial Statements, thereby creating the appearance of a legitimate, fully operational company contributing to the construction of the LPG Plant. In reality, Perkwood (and by extension Azalia) were used to inflate the stated costs of the Tractebel equipment. For this purpose, the Statis created an ostensibly legitimate contract, the Perkwood Agreement, reflecting the inflated costs. When the new documents came to light, Tractebel was able to identify its own equipment in the Perkwood Agreement though at considerably higher prices and in a contract of which they had no knowledge. Franjo Zaja, the on-site electrical engineer for Tractebel, who was responsible for the LPG Plant construction site until the Statis abandoned it, testified in August 2015 in the English proceedings that he had “*never encountered a company named Perkwood.*”<sup>154</sup> When shown the Perkwood Agreement, Franjo Zaja testified that the equipment described therein was the Tractebel equipment, except that the prices were dramatically increased.<sup>155</sup>

### 1. Perkwood as a Sham Company

82. There are a number of salient facts about Perkwood:
  - The Statis incorporated Perkwood in England and Wales on September 14, 2005 and dissolved it on May 3, 2011. On its face, Perkwood was a separate company with an address in London, England. However, an analysis of its bank statements

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<sup>152</sup> The Azalia Agreement (Dkt. 37-3), January 11, 2006, *Stati v. Republic of Kazakhstan*, Civ. No. 14-1638 (ABJ) (D.D.C. 2016).

<sup>153</sup> Sale and Purchase Agreement No. 01/01\_TNG\_PRK, February 17, 2006, between Tolkyneftegaz LLP and Perkwood Investment Limited (the “**Perkwood Agreement**”).

<sup>154</sup> First Witness Statement of Franjo Zaja, August 27, 2015, ¶ 9 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

<sup>155</sup> *Id.*, ¶ 10.

reveals that it never had any employees, never incurred costs associated with the conduct of a business, and never paid taxes, salaries, or rent.<sup>156</sup>

- The sole director and shareholder of Perkwood was Sarah Petre-Mears. Her husband, Edward Petre-Mears, was the company secretary. The Petre-Mears are identified in public documents as sham directors, and purportedly are the “directors” of thousands of companies.<sup>157</sup> At all relevant times they were residents of Nevis, a small island in the Caribbean. A November 25, 2012 article published in the Guardian titled – “*Sham directors: the woman running 1,200 companies from a Caribbean rock*” – starts as follows: “*In name, Sarah Petre-Mears runs a global empire. In reality it is a sham, an offshore network of porn sites and luxury property vehicles linked by PO boxes and letter drops.*”<sup>158</sup>
- By deed dated November 2, 2005, the Petre-Mears granted a general power of attorney to Anatolie Stati and Gabriel Stati to act for Perkwood for one year. By deeds dated September 14, 2006, August 22, 2007, and August 26, 2008, the Petre-Mears granted further powers of attorney to Anatolie Stati and Gabriel Stati, each time for a year, and by a deed dated August 20, 2009, they granted a general power of attorney to Anatolie Stati for a further year.
- By a certificate dated November 28, 2005 executed by Gabriel Stati under his power of attorney, Perkwood declared that Anatolie Stati and Gabriel Stati were the beneficiaries of the funds held in its bank account at Rietumu Bank.
- Perkwood was thus under the ultimate ownership and/or control of Anatolie and Gabriel Stati at all times. The documents and information obtained by Kazakhstan revealed that the Statis took extraordinary measures to conceal that fact.
- From 2006 to 2009 – the same time period when the Statis were recording on their books hundreds of millions of dollars of purchases of LPG Plant equipment and services from Perkwood – the Statis filed dormant accounts for Perkwood with the British Companies House. Under English law, for a company to legally file dormant accounts, it must not have received any income for the relevant time period.

## **2. Falsely Inflated Amount of Investment in LPG Plant**

83. The materials obtained by Kazakhstan after the Arbitration had concluded reveal that the Statis used Perkwood at various stages to materially and baselessly inflate the construction costs for the LPG Plant. These steps are recounted below.

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<sup>156</sup> Bank Statements of Perkwood Investment Limited, Rietumu Banka, Latvia, January 1, 2006 – December 31, 2011.

<sup>157</sup> James Ball, *Sham directors: the woman running 1,200 companies from a Caribbean rock*, The Guardian, November 25, 2012.

<sup>158</sup> *Id.*



a. “Re-Sale” of Equipment at Inflated Prices

84. Under the Tractebel Contract, the Statis purchased three key pieces of equipment for the LPG Plant from Tractebel at the following actual prices:<sup>159</sup>

Equipment	Actual Cost – Tractebel Contract Price (in Euros)
Gas De-Carbonisation and De-Sulphurisation Unit	€5,676,000
LPG Recovery Unit	€11,352,000
Sales Gas Compression Unit	€11,352,000
<b>Total</b>	<b>€28,380,000<sup>160</sup></b>

85. In the Azalia Agreement, the Statis caused Azalia to “re-sell” these three items of equipment to Perkwood for approximately \$93 million, nearly triple their actual price.
86. In the Perkwood Agreement (Annex 2 to the Perkwood Agreement, dated March 27, 2006), the Statis caused Perkwood to again “re-sell” these same three items of equipment to TNG at the same inflated \$93 million price, as follows:<sup>161</sup>

Equipment	Perkwood Agreement Price (in Dollars)
Gas De-Carbonisation and De-Sulphurisation Unit	\$19,564,267
LPG Recovery Unit	\$38,648,885
Sales Gas Compression Unit	\$34,882,756
<b>Total</b>	<b>\$93,095,908</b>

87. The following chart directly compares the actual price of these three items of Tractebel equipment with the fictitious, inflated price at which the Statis “re-sold” the equipment to themselves via their own companies, showing in the last column the amount by which the cost of each item was falsely inflated.

<sup>159</sup> Tractebel Contract, ¶ 3(vii).

<sup>160</sup> The initial Tractebel price of €28,380,000 is roughly equivalent to \$34.2 million. During the course of the project, the contract price, in dollars, was slightly amended to \$35.17 million. *See* Second Witness Statement of Franjo Zaja, January 12, 2017, ¶ 4 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

<sup>161</sup> Annex 2 to the Perkwood Agreement, March 27, 2006.

Equipment	Tractebel Contract Price (in Euros)	Tractebel Contract Price (in Dollars)	Perkwood Agreement Price (in Dollars)	False Price Increase (in Dollars)
Gas De-Carbonisation and De-Sulphurisation Unit	€5,676,000	\$7,674,301	\$19,564,267	\$11,889,966
LPG Recovery Unit	€11,352,000	\$13,799,491	\$38,648,885	\$24,849,394
Sales Gas Compression Unit	€11,352,000	\$13,799,491	\$34,882,756	\$21,083,265
<b>Total</b>	<b>€28,380,000</b>	<b>\$35,273,283</b>	<b>\$93,095,908</b>	<b>\$57,822,625</b>

88. In summary, through the artifice of the Azalia and the Perkwood Agreements, the Statis nearly tripled the stated cost of these three key items of LPG Plant equipment, from the approximately \$35 million actually paid Tractebel, to the more than \$93 million paid by TNG to Perkwood, a false inflation of circa \$58 million.
89. The Statis capitalized this \$93 million as legitimate construction costs in TNG’s financial statements.<sup>162</sup>

**b. Double-Billing for Identical Equipment**

90. The Statis also included in the Perkwood Agreement the same Tractebel equipment not once, but twice. Specifically, on December 2, 2008, almost three years after the Tractebel Contract was executed, the Statis inserted in the Perkwood Agreement a new annex (“**Annex 14**”) pursuant to which they made it appear that Perkwood was “selling” to TNG three items of equipment at a total cost of \$21,884,989.<sup>163</sup>
91. In function, this equipment is an exact duplicate of the original LPG Plant equipment that the Statis purchased from Tractebel for circa \$35 million (equipment that, as seen, the Statis then inflated to \$93 million). In fact, only one set of this equipment was needed and actually purchased, not two sets. In order to disguise this double-billing, the Statis used

<sup>162</sup> See, Expert Report of Thomas Gruhn of Deloitte, Swedish Set-Aside Proceedings, October 1, 2015, ¶ 15 (the “**Gruhn Report**”) (The difference between the actual cost and the fictitious cost of the equipment “*can be deemed to have translated dollar for dollar into an overstatement of the LPG plant construction costs shown in the TNG financial statements and the KPM, TNG, and Tristan Oil combined Financial Statements.*”).

<sup>163</sup> Annex 14 to the Perkwood Agreement, December 2, 2008; Expert Report of Dipl. Expert Report of Dipl. Ing. Ernst Kallweit of Tractebel, January 12, 2017, ¶¶ 63–90. [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

differently worded descriptions in Annex 14 as well as different prices.<sup>164</sup> This further falsely inflated the stated costs of the LPG Plant equipment by \$21,884,989.

### c. Billing for Non-Existent Equipment

92. The Statis included in TNG's accounts charges for other equipment that did not exist.<sup>165</sup> Specifically, as of December 31, 2009, almost four years after the Tractebel Contract was executed, the Statis capitalized the amount of approximately \$72 million for the equipment that supposedly was yet to be assembled into the LPG Plant.<sup>166</sup>
93. However, as of October 2008, all the essential equipment for the building of the LPG Plant (ordered from Tractebel in 2006 for a price of \$35 million) had already been purchased, delivered and installed at the LPG Plant, the installation work was therefore by then materially complete,<sup>167</sup> and the project did not require any further substantial equipment. Confirming this, the Statis have admitted that, by the time that the “[c]onstruction of the Plant was forced to a halt in May 2009 [...] the LPG Plant was over 90% complete.”<sup>168</sup>
94. The inclusion in TNG's accounting of the charges for this non-existent equipment falsely inflated the stated LPG Plant constructions costs by an entirely improbable further sum of \$72,003,345.

### d. Fictitious Management Fee

95. The Statis also caused TNG to pay Perkwood a “management fee” in the amount of \$43,852,108.<sup>169</sup> This fee had no basis in the Perkwood Agreement, as was confirmed by Justice Cooke of the English High Court in the proceedings between the Statis and Vitol (*see supra*, ¶ 32):<sup>170</sup>

*Ascom has asserted that it paid a management fee of over \$[43] million to an English company called Perkwood. An agreement has been disclosed [the Perkwood Agreement] which makes no mention of any management fee nor of any formula for calculating it. It appears from other evidence that there was a mark up on prices for equipment supplied to the LPG Plant. It appears therefore that this “fee” was simply paid at will.*<sup>171</sup>

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<sup>164</sup> Expert Report of Dipl. Ing. Ernst Kallweit, January 12, 2017, ¶¶ 112–113 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

<sup>165</sup> *See*, Expert Report of Ernst Kallweit of Tractebel, Swedish Set-Aside Proceedings, June 2, 2016, ¶ 6.2.6.

<sup>166</sup> Gruhn Report, *supra*, note 162, ¶¶ 21, 48.

<sup>167</sup> First Witness Statement of Franjo Zaja, August 27, 2015, ¶ 7 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

<sup>168</sup> First Witness Statement of Artur Lungu, ECT Arbitration, May 17, 2011, ¶ 27.

<sup>169</sup> Witness Statement of Artur Lungu, Vitol Arbitration, October 11, 2013, ¶ 61.

<sup>170</sup> Reasons for Judgment, August 29, 2014, [*Vitol FSU BV v. Ascom Group SA*, In the High Court of Justice, Queen's Bench Division, Commercial Court, 2014 FOLIO 406].

<sup>171</sup> In this quoted paragraph of the decision, the English High Court references “\$33 million” but this is a typographical error, as confirmed by a subsequent paragraph that quotes the correct \$43 million figure. *Id.*, ¶ 39.

96. Since Perkwood was a dormant letterbox company with no employees, premises or operations, and paid no rent or taxes, it could not have provided any management services to TNG. Further details are presented *supra* at ¶ 82 *et seq.* This fictitious fee from TNG to Perkwood falsely inflated the stated LPG Plant construction costs by an additional \$43,852,108.

#### e. Fictitious Interest

97. Finally, the Statis included in TNG’s financial statements inter-company interest on the above-referenced inflated and fictitious costs. To the extent the costs of the construction either did not exist or were artificially inflated, such interest was necessarily also fictitious. The costs associated with this interest resulted in additional inflation of the stated LPG Plant construction costs of about \$60 million.<sup>172</sup>

### 3. False Financial Statements and Audit Reports

98. As noted *supra* at ¶¶ 7-8, the Statis retained KPMG to audit their Financial Statements for the years ending on December 31, 2007, 2008, and 2009, as well as their quarterly interim financial statements for those years.<sup>173</sup> KPMG’s audit reports recited that the Financial Statements were prepared in accordance with the then-applicable International Financial Reporting Standards (“IFRS”).
99. KPMG issued its audit reports for the Statis on the basis that (taking, by way of example, the 2008 interim Stati Financial Statements), “*nothing has come to our attention that causes us to believe that the combined interim financial statements do not present fairly, in all material respects, the combined interim financial position of the Companies as at June 30, 2008, and their combined interim financial performance for the three- and six-month periods ended June 30, 2008 and their combined interim cash flows for the six-month period then ended in accordance with International Financial Reporting Standard IAS 34 Interim Financial Reporting.*”<sup>174</sup>
100. In reality, as seen (*see supra*, ¶ 83 *et seq.*), the Statis concealed the illegitimacy of the LPG Plant construction costs and misrepresented facts that are “*material to the accuracy of the audit reports and financial statements.*”<sup>175</sup>
101. This is largely the basis on which KPMG in August 2019 withdrew all of its audit reports, and directed the Statis to take steps to prevent further or future reliance on these reports

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<sup>172</sup> Expert Report of Charles River Associates, Vitol Arbitration, October 11, 2013, ¶ 3.3.6.

<sup>173</sup> Annual Combined and Individual Financial Statements of Tristan, KPM, and, TNG for the years ended December 31, 2007, 2008, and 2009; Interim Financial Statements of Tristan, KPM, and, TNG for the periods June 30 2007, September 30, 2007, March 31, 2008, June 30, 2008, September 30, 2008, March 31, 2009, June 30, 2009; and September 30, 2009. Prior to 2007, Deloitte audited the Stati Financial Statements.

<sup>174</sup> PwC II (KPMG correspondence), ¶ 20.

<sup>175</sup> Letter from A. Clarke, KPMG Audit LLC, to Dr Patricia Nacimiento of Herbert Smith Freehills LLP (at the time Herbert Smith Freehills Germany LLP), August 21, 2019.

and to inform all recipients of the reports' withdrawal.<sup>176</sup> These actions by KPMG, as noted by PwC, are “*significant and extremely rare.*”<sup>177</sup>

#### 4. Inflated Bids for Purchase of the LPG Plant, Including from KMG

102. In June 2008, the Statis launched a process for the stated purpose of selling their Kazakh operations. Through a financial advisor, Renaissance Capital (“**Ren Cap**”), the Statis distributed a “teaser” offer to potential purchasers throughout the United States, Europe, the Middle East, and Asia. The teaser offer stated that \$160 million had been spent on the LPG Plant, and a total of approximately \$230 million in capital expenditures was expected through 2008. These figures incorporated the inflated costs identified above.
103. Shortly thereafter, Ren Cap, on behalf of the Statis, sent interested parties a Project Zenith Confidential Information Memorandum (the “**Information Memorandum**”), which contained key financial information concerning the Statis’ Kazakh operations. It too referred to, and relied upon, the false Financial Statements and audit reports, including the inflated LPG Plant construction costs. The Information Memorandum falsely stated that as of July 1, 2008, TNG had invested \$193 million in construction of the LPG Plant.<sup>178</sup>
104. One of the eight prospective purchasers of the Statis’ operations was the state-owned oil and gas company, KMG, identified *supra* at ¶¶ 21-23. The KMG Indicative Offer, dated September 25, 2008, specified that its bid was made “[o]n the basis of the information contained in the Information Memorandum and publicly available information, subject to the conditions and assumptions set out elsewhere in this Indicative Offer and contingent upon further due diligence,” which would specifically pertain to, among other things, “related parties’ contracts.”<sup>179</sup> KMG expressly stated that it assumed that the \$193 million in construction costs cited in the Information Memorandum was accurate.<sup>180</sup> The KMG Indicative Offer was, therefore, a direct product of the Statis’ false Financial Statements and audit reports,<sup>181</sup> of which the Statis were well aware.
105. As noted *supra* at ¶ 29, the Tribunal expressly relied on the KMG Indicative Offer in valuing the LPG Plant at \$199 million and awarding the Statis this amount. The Statis knew that this \$199 million offer was directly based on the false information that they had provided to the potential bidders.

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<sup>176</sup> PwC II (KPMG correspondence), ¶¶ 28–32; PwC III (application of funds), ¶ 6.10 *et seq.*

<sup>177</sup> PwC II (KPMG correspondence), ¶¶ 33–36.

<sup>178</sup> Project Zenith Confidential Information Memorandum, August 2008, 10.

<sup>179</sup> KMG Indicative Offer, September 25, 2008, ¶ j.

<sup>180</sup> *Id.*, ¶ f.

<sup>181</sup> Approved Judgment of Justice Knowles, June 6, 2017, ¶ 41 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

## 5. Falsified KPMG Vendor Due Diligence Report

106. In connection with the prospective sale of their Kazakh operations, the Statis also retained KPMG to prepare the VDD Report for use by potential purchasers of the Stati companies (*see supra*, ¶ 46(ii)).
107. KPMG based the VDD Report upon representations made to it by the Statis, including CFO Artur Lungu. As noted *supra*, ¶ 46, documents obtained by Kazakhstan in June 2018 revealed that, on August 31, 2008, KPMG provided the Statis a draft version of the report that reproduced the Statis' misrepresentations of the LPG Plant's total construction costs, estimated as of May 17, 2008 as \$233 million, of which \$193 million had already been invested as of June 30, 2008.<sup>182</sup>
108. The draft VDD Report specifically affirmed that it included mention of all related parties and related-party transactions.<sup>183</sup> In this respect, the draft report contained four references to Perkwood, each identifying it as a "*related party*."<sup>184</sup> However, the final version of the VDD Report for use by the potential purchasers identified Perkwood not as a *related party*, but as an *unrelated third party*. As previously explained, the Statis took great care to present Perkwood as an independent, operative English entity thereby concealing the fact that it was in reality a shell company secretly controlled by the Statis and used to falsely inflate construction costs.
109. The reason why the final version of the VDD Report falsely identified Perkwood as an unrelated third party is that Artur Lungu, according to his sworn testimony in the U.S., specifically informed KPMG, upon reading the draft VDD Report, that Perkwood was *not* owned or controlled by the Statis and asked KPMG to change all references in the draft to Perkwood from related party to unrelated third party.<sup>185</sup> KPMG complied with these instructions, modifying the final report to affirmatively (and falsely) state that Perkwood was one of the "*main third parties*" involved in construction of the LPG Plant.<sup>186</sup>
110. The final version of the VDD Report, which falsely identified Perkwood as an unrelated third party, stated that its content was reviewed in detail by the directors of the Stati Group, who confirmed it to be accurate and to contain no information that "*may cause the view [the Report] gives of [the Group] to be misleading*."<sup>187</sup> The Statis have repeatedly relied on the falsified VDD Report in the Arbitration and in subsequent post-Award Proceedings. Further details are provided *infra* at ¶ 136 *et seq.*

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<sup>182</sup> VDD Report August 29, 2008, 9, 20.

<sup>183</sup> Draft version of the Vendor Due Diligence Report compiled by KPMG, September 8, 2008.

<sup>184</sup> VDD Report, 7, 11, 12, 16, 72, 92.

<sup>185</sup> Lungu Deposition, *In Re Application of Republic of Kazakhstan for Order Directing Discovery from Artur Lungu Pursuant to 28 U.S.C. § 1782*, Misc. Action No. 4:19-mc-00423 (S.D. Tex. 2019), 271:8–12; *see also* Correspondence between Artur Lungu and KPMG in August–September 2008.

<sup>186</sup> VDD Report, 11.

<sup>187</sup> VDD Report, 125.

## B. Oil Sales – Diverting Monies from TNG and KPM

111. The analysis of newly discovered evidence revealed that the Statis also diverted money from their Kazakh companies, TNG and KPM, through transactions that the Statis presented to the Tribunal as legitimate business operations and as a basis for claiming damages.
112. TNG and KPM extracted petroleum products from oil and gas fields in Kazakhstan and sold them to Vitol. Both the Rietumu Bank Statements (see *supra*, ¶ 49-53) obtained by Kazakhstan and the investigations conducted by PwC on the basis of those statements reveal that these sales were conducted in such a way as to enable the Statis to divert a substantial portion of TNG’s and KPM’s oil and gas revenue to other related companies secretly controlled by the Statis.<sup>188</sup> As a result, TNG and KPM were deprived of the full value of the oil and gas that they sold to Vitol, leading to their financial collapse, while the Statis retained the diverted funds.<sup>189</sup>

### 1. Related Parties Used for Sales of Oil and Gas Condensate

113. As detailed in PwC III (application of funds), all of KPM’s and TNG’s sales of crude oil and gas condensate were made to related parties.<sup>190</sup> As part of the sales process, TNG and KPM sold their products, not to Vitol directly, but to General Affinity Ltd. (“**General Affinity**”) and Stadoil Ltd. (“**Stadoil**”), respectively, both of which were shell companies registered in the U.K. and owned or controlled by Anatolie and Gabriel Stati and their associates. Stadoil and General Affinity, in turn, sold TNG’s and KPM’s oil and gas to two other Stati companies: first to Terra Raf (co-owned by Anatolie and Gabriel Stati) (see *supra*, ¶¶ 2-3) and then, from July 2007 forward, to Montvale Ltd. (“**Montvale**”),<sup>191</sup> another shell company registered in the BVI and controlled by Anatolie Stati through a power of attorney. KPM, TNG, General Affinity, Stadoil, Montvale, as well as Terra Raf, were all related parties.

### 2. Sales Value Diverted from TNG and KPM

114. In PwC III (application of funds), PwC compiled the following table, which reflects the sales proceeds that the Statis managed to divert from KPM and TNG through the above-described network of related companies (see *supra*, ¶ 50).<sup>192</sup> All stated values are in U.S. dollars.

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<sup>188</sup> PwC III (application of funds), ¶ 5.22.

<sup>189</sup> *Id.*, ¶¶ 5.18–5.22.

<sup>190</sup> *Id.*, ¶ 5.10.

<sup>191</sup> *Id.*, ¶ 5.11 *et seq.*

<sup>192</sup> *Id.*, ¶ 5.19.

For the year ended 31 December							
ALL AMOUNTS IN USD	5M 2005	2006	2007	2008	2009	7M 2010	TOTAL
Sales proceeds retained by related parties from KPM	43,068,455	40,773,577	383,555	58,120,994	(4,853,784)	-	137,492,797
Sales proceeds retained by related parties from TNG	-	38,929,158	7,838,000	77,187,818	(11,086,162)	12,518,527	125,387,341
<b>Total</b>	<b>43,068,455</b>	<b>79,702,735</b>	<b>8,221,555</b>	<b>135,308,812</b>	<b>(15,939,946)</b>	<b>12,518,527</b>	<b>262,880,138</b>

115. As further detailed in PwC III (application of funds), instead of forwarding to Stadoil and General Affinity all the sale proceeds that they received from Vitol, both Terra Raf and Montvale diverted money to Hayden (another BVI shell company secretly controlled by Anatolie and Gabriel Stati) (*see supra*, ¶ 52). Specifically, Montvale paid a net amount of \$158 million to Hayden, and Terra Raf paid a net amount of \$128.1 million to Hayden.<sup>193</sup>
116. These uncovered circumstances were not known to Kazakhstan and the Tribunal during the Arbitration. They demonstrate that the Statis themselves caused the financial distress of TNG and KPM of which they complained in the Arbitration, and that this distress was not caused by Kazakhstan as was claimed by the Statis and accepted by the Tribunal.

### C. Tristan Notes

#### 1. The Tristan Indenture

117. The Statis financed their Kazakh operations in part by selling the Tristan Notes<sup>194</sup> to outside investors, the Noteholders,<sup>195</sup> through Tristan, their special-purpose BVI entity (*see supra*, ¶ 6).<sup>196</sup> This investment was governed by the Indenture entered into between Tristan

<sup>193</sup> *Id.*, ¶ 5.21.

<sup>194</sup> PwC III (application of funds), ¶ 4.5.

<sup>195</sup> *Id.*, ¶ 3.2 *et seq.*

<sup>196</sup> A number of investors purchased the Tristan Notes. These included Argo Capital Investors Fund SPC, Argo Distressed Credit Fund, Black River Emerging Markets Fund Ltd., Black River Emerging Markets Credit Fund Ltd., Black River EMCO Master Fund, Ltd., BlueBay Multi-Strategy (Master) Fund Limited, BlueBay Specialised Funds: Emerging Market Opportunity Fund (Master), CarVal CVI GVF (Lux) Master S.a.r.l., Deutsche Bank AG London,



and Wells Fargo on December 20, 2006.<sup>197</sup> The stated purpose of the Tristan Notes, which were guaranteed by the assets of KPM and TNG, was to finance the Kazakh operations of those companies.<sup>198</sup> Tristan issued Notes in an aggregate principal amount of \$300 million on or about December 2006 and an additional principal amount of \$120 million on or about June 7, 2007.<sup>199</sup> The Tristan Notes were guaranteed by KPM and TNG, and were signed by Anatolie Stati on behalf of KPM and TNG (*see infra*, ¶ 124).<sup>200</sup>

118. On a side note, after the Noteholders were not repaid for the Tristan Notes upon their maturity and/or an event of default, on December 17, 2012, the Noteholders entered into a Sharing and Assignment of Rights Agreement with the Statis (the “**Sharing Agreement**”) whereby they agreed to accept a portion of the Award in satisfaction of their rights as Noteholders.<sup>201</sup>
119. Significantly, the Indenture contained express restrictions on related-party transactions, as well as related-party reporting requirements intended to protect the Noteholders. Section 4.12 of the Indenture restricted the ability of Tristan, KPM, and TNG to enter into transactions with other Statis companies, termed “*Affiliates*.”<sup>202</sup>
120. Section 4.12 forbade the Statis from entering into any related-party transactions without first obtaining certain approvals, with the level of approval increasing with the amount of the related-party transaction. Specifically, Section 4.12 stated that Tristan, KPM, and TNG could not “*make any payment to, or sell, lease, transfer or otherwise dispose of any of its properties or assets to, or purchase any property or assets from, or enter into or make or amend any transaction, contract, agreement, understanding, loan, advance, or guarantee with, or for the benefit of, any Affiliate,*” except as follows:
  - If the aggregate consideration was in excess of \$1 million, the transaction was required to be on an arm’s-length basis (*i.e.*, the transaction was to be on “*terms that are no less favorable to [Tristan] or to [KPM or TNG] than those that would have been obtained in a comparable transaction by [Tristan] or [KPM or TNG] with an unrelated Person*”);
  - If the aggregate consideration was in excess of \$3 million, Tristan was required to deliver to the Trustee (Wells Fargo) a board resolution accompanied by an officer’s

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Goldman Sachs International, Gramercy Funds Management LLC, Latin America Recovery Fund LLC, Outrider Management LLC, Standard Americas, Inc., and Standard Bank Plc. *See Republic of Kazakhstan v. Stati et al.*, No. 17-cv-02067 (D.D.C. 2017), ECF 1, ¶ 45.

<sup>197</sup> Indenture between Tristan Oil Ltd, Kazpolmunay LLP, and Tokynneftgaz LLP, December 20, 2006.

<sup>198</sup> Tristan Notes Offering Circular, November 30, 2006, at 1 (“*The net proceeds from the sale of the Notes will be used to repay certain existing indebtedness of TNG, make a shareholder distribution and for working capital and general corporate purposes of KPM and TNG.*”).

<sup>199</sup> Statis’ First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶ 75.

<sup>200</sup> Indenture, § 11.01(a).

<sup>201</sup> Sharing Agreement and Assignment of Rights entered into by the Statis and the Noteholders, December 17, 2012.

<sup>202</sup> Indenture, § 4.12. An “*Affiliate*” was defined as “*any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such [...] Person.*” “*Control*” was defined as “*possession, directly or indirectly, of the power to direct or cause the direction of management or policies of such Person, whether through the ownership of voting securities, by agreement or otherwise, provided that beneficial ownership of 10% or more of the Voting Stock of a Person will be deemed to be control.*”

certification that a majority of the disinterested members of the board of directors and at least one independent director had determined that the transaction complied with Section 4.12; or

- If the aggregate consideration was in excess of \$10 million, Tristan was required to deliver to the Trustee (Wells Fargo) “*an opinion as to the fairness to [Tristan] or [KPM or TNG] of such Affiliate Transaction from a financial point of view issued by an accounting, appraisal or investment banking firm of national standing*” (an “**independent fairness opinion**”).

121. Both TNG and Perkwood met the definition of “*Affiliate*” because both were under the common control of the Statis. Each of the above-referenced TNG-Perkwood transactions used to inflate the stated construction costs of the LPG Plant exceeded \$10 million and therefore would have triggered the highest approval level set forth in Section 4.12, *i.e.*, an independent fairness opinion. But the Statis evaded this safeguard by concealing that Perkwood was a related party, both in the audited annual Financial Statements that they were required to issue to the Noteholders and in their representations to KPMG.<sup>203</sup> In so doing, the Statis violated the Indenture and defrauded the Noteholders.
122. As noted, the Indenture further required that the Statis, among other things, furnish the Noteholders with the combined Stati Financial Statements on a quarterly and annual basis, as well as audit reports by a certified independent accountant.<sup>204</sup> In these reports, the auditors were required to state that “*in making the examination necessary for certification of such financial statements, nothing has come to their attention that would lead them to believe that [Tristan] has violated any of the provisions of [the Indenture], or, if any such violation has occurred, specifying the nature and period of existence thereof.*”<sup>205</sup> These provisions included the Indenture’s restrictions on transactions with “*Affiliates.*” To comply with the terms of the Indenture, it thus was necessary for the Financial Statements to be audited and certified as true and accurate. However, as seen *supra* at ¶ 6 *et seq.*, the Financial Statements that were audited and approved by KPMG contained material misstatements and omissions.<sup>206</sup>

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<sup>203</sup> Lungu Deposition, *In Re Application of Republic of Kazakhstan for Order Directing Discovery from Artur Lungu Pursuant to 28 U.S.C. § 1782*, Misc. Action No. 4:19-mc-00423 (S.D. Tex. 2019), 241:8–242:9; TNG Management Representation Letter for KPMG, August 5, 2008.

<sup>204</sup> See Indenture, *supra* note 6, § 4.03.

<sup>205</sup> Indenture, § 4.04(b). Tristan, KPM, and TNG were also required to deliver to Wells Fargo, within 90 days after the end of each fiscal year, an Officers’ Certificate stating that a review had been made of Tristan’s activities “*with a view to determining whether [Tristan] has kept, observed and fulfilled its obligations*” under the Indenture, and stating that, for each Officer signing the certificate, “*to the best of his or her knowledge [Tristan] has kept, observed and fulfilled each and every covenant*” of the Indenture and “*is not in default in the performance or observation of any of the terms, provisions and conditions*” of the Indenture. *Id.*, § 4.04(a).

<sup>206</sup> The audited Financial Statements for the years 2007, 2008, and 2009 reported as costs of construction \$142,530,039, \$223,165,685, and \$248,084,113, respectively.

## 2. Misapplication of the Tristan Noteholders' Funds

123. As detailed in PwC IV (money laundering risks), the Statis used the funds they obtained from selling the Tristan Notes for purposes other than the operations of TNG and KPM.<sup>207</sup>
124. On December 29, 2006, pursuant to the Indenture and its amendments, dated May 21, 2007 and June 5, 2007, Tristan issued 10.5% “Senior Secured Notes” in the aggregate principal amount of \$300 million. Additional Tristan Notes in the aggregate principal amount of \$120 million were issued on June 7, 2007.<sup>208</sup> The Statis represented to the Tristan Noteholders that the proceeds from the Tristan Notes would be used “*to repay USD 160.3 million outstanding under TNG’s existing bank credit facility, including prepayment premium, and to fund the working capital and general corporate purposes of KPM and TNG.*”<sup>209</sup>
125. The Tristan Notes were secured by the capital stock of Tristan, KPM and TNG. The Tristan Notes were also secured jointly and severally by guarantees from TNG and KPM.<sup>210</sup>
126. On December 22, 2006, Tristan lent \$181 million to TNG and an additional \$30 million to KPM, both at an interest rate of 17.65% per annum to be repaid by December 22, 2011. On June 18 and 19, 2007, Tristan lent yet a further \$94 million to TNG and \$20 million to KPM respectively, at an interest rate of 16% per annum.<sup>211</sup>
127. Additionally, in 2006 and 2007, Tristan lent \$76 million of the funds from the Tristan Notes to Terra Raf.<sup>212</sup> In the Tristan Prospectus the Statis represented as follows with respect to this loan: “*Tristan Oil used USD 76.0 million from the net proceeds of the Note Offering to make a loan to Terra Raf, at an interest rate of 0%. Terra Raf used USD 70.0 million of the proceeds from this loan to repay USD 15.9 million and USD 54.1 million of accounts payable to each of TNG and KPM with respect to sales of oil and condensate.*”<sup>213</sup>
128. PwC further established that the loans of \$70 million and \$6 million to Terra Raf were followed by further loans by Tristan to Terra Raf during 2008, 2009 and 2010. By December 31, 2010, Terra Raf’s loan liability to Tristan totalled \$118.4 million.<sup>214</sup> However, PwC reported that it “[had] only been able to trace USD 24 million of this amount flowing directly to TNG and KPM. The other amounts appear to have been paid by Terra Raf to a series of other related party transactions.”<sup>215</sup>
129. Although Tristan actually paid an interest rate of 10.5% on the Tristan Notes, it charged KPM and TNG between 16% and 17.65% per annum on its loans to those companies. At the same time, the loans of \$76 million to Terra Raf were interest-free. In PwC III

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<sup>207</sup> PwC IV (money laundering risks).

<sup>208</sup> PwC III (application of funds), ¶ 3.2.

<sup>209</sup> *Id.*, ¶ 4.5.

<sup>210</sup> *Id.*, ¶ 4.6.

<sup>211</sup> *Id.*, ¶ 4.7.

<sup>212</sup> *Id.*, ¶ 4.8.

<sup>213</sup> *Id.*, ¶ 4.9.

<sup>214</sup> *Id.*, ¶ 4.22.

<sup>215</sup> *Id.*, ¶ 4.23.

(application of funds), PwC performed a calculation of what the interest expense would have been had TNG and KPM been granted their loans from Tristan at a rate of 10.5% (*i.e.*, the rate at which Tristan paid interest to its Noteholders), rather than 16% and 17.65%. According to these calculations, if KPM and TNG had been charged 10.5% interest on their loans from Tristan, they would have accrued a combined total interest of \$94.64 million during the period from December 22, 2006 to December 31, 2009. This amount is \$61.87 million *less* than the actual combined interest of \$156.52 million accrued by KPM and TNG on these loans during this period.

130. In short, PwC III (application of funds) demonstrates that the Stasis established a structure of intercompany loans and interest rates that caused a diversion of significant funds from KPM and TNG.<sup>216</sup> This too directly contradicted the assertions made by the Stasis during the Arbitration, and accepted by the Tribunal, that KPM and TNG were in financial distress due to the actions of Kazakhstan.

#### **D. Laren Transaction**

131. The Stasis also conducted illicit acts using Laren Holdings Ltd (“**Laren**”), a special purpose vehicle established by the Stasis in the British Virgin Islands. Specifically, on June 19, 2009, Tristan issued additional notes (“**New Notes**”) to Laren having an aggregate nominal value of \$111.11 million.<sup>217</sup> However, according to the evidence,<sup>218</sup> Laren paid only \$30 million for the New Notes, *i.e.*, it secured a discount of 73% on their face value.<sup>219</sup> The funds which were used to purchase the New Notes originated from a credit facility in the amount of \$60 million extended from six lenders to Laren at an interest rate of 35% per annum (“**Laren Loan**”).
132. Repayment of the Laren Loan was guaranteed by TNG and KPM.<sup>220</sup> In other words, the Stasis used the same Kazakh operating companies that were indebted both by virtue of the New Notes and the obligation to repay the funds that the Stasis received for the New Notes.
133. The Laren Loan transaction came under scrutiny in the Arbitration and the Tribunal made certain findings in this regard in the Award. The Stasis asserted that “*the ‘horrendous’ conditions of the Laren Loan*” – the 73% discount to face value and 35% interest rate – were caused by the fact that no other lenders had offered financing on commercial terms,<sup>221</sup> due to Kazakhstan’s conduct.<sup>222</sup> The Tribunal accepted these assertions, finding that the

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<sup>216</sup> *Id.*

<sup>217</sup> This was in addition to the two series of Tristan Notes issued by the Stasis in 2006 and 2007, described *supra*, ¶ 124.

<sup>218</sup> Facility Agreement for Laren Holdings LTD arranged by Renaissance Advisory Services Limited with Stichting Security Trustee, June 11, 2009, ¶ 3.1.

<sup>219</sup> Stasis’ First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶ 355.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*, ¶ 217.

<sup>222</sup> *Id.*, ¶ 360.

Laren Loan, “with its onerous terms,” was arranged and necessary because of “[Kazakhstan]’s actions.”<sup>223</sup>

134. As set out *supra*, ¶ 44, the June 2018 Disclosure documents provide direct evidence that the Statis deceived the Tribunal on the reasons behind the “horrendous” terms of the Laren Loan. The evidence may be summarized as follows:

- An internal note drafted by Ascom’s financial analyst prepared for Anatolie Stati stated that Ascom itself decided not to proceed with the credit facility that was offered by a recognized financial institution (*i.e.*, Credit Suisse).<sup>224</sup>
- Ascom correspondence with Renaissance Capital of 2009 revealed that the Statis had a financial interest in issuing the New Notes to Laren at a discount of at least 73%,<sup>225</sup> partly due to the fact that Laren was a Stati-controlled company<sup>226</sup> and not an independent entity, as the Statis falsely told the Tribunal in the Arbitration.<sup>227</sup>

135. The above was not known to Kazakhstan before the June 2018 Disclosure, let alone during the Arbitration.

## V. THE POST-AWARD PROCEEDINGS IN NATIONAL COURTS (2013-PRESENT)

136. Following issuance of the Award in the Arbitration in December 2013, both the Statis and Kazakhstan initiated a series of legal proceedings. These proceedings include annulment, recognition (or sometimes referred to as “*exequatur*”) and assets attachment actions.

137. Kazakhstan initiated proceedings in Sweden, the seat of arbitration, to set aside the Award on the ground, among others,<sup>228</sup> that the Statis had procured the Award by fraud.

138. The Statis initially brought actions to recognize and enforce the Award in the United Kingdom and the United States. When the High Court of England found that “*there is [...] sufficient prima facie evidence*” that the Award was obtained by fraud and ordered a full fraud trial (*see infra*, ¶ 181 *et seq.*),<sup>229</sup> the Statis did two things. First, they initiated enforcement proceedings in Luxembourg, Sweden, Italy, the Netherlands and Belgium.

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<sup>223</sup> Award, ¶ 1416.

<sup>224</sup> Internal note on the Credit Suisse Facility, December 11, 2008, Conclusion, 2.

<sup>225</sup> E-Mail Correspondence between Artur Lungu of Ascom and Adel Kamar of Renaissance Capital, June 6-8, 2009.

<sup>226</sup> Invoice from Harneys issued to Tristan Oil Ltd., June 24, 2009, 24 (Harneys, a BVI law firm, invoiced Tristan Oil Ltd. for the preparation of Laren’s articles of association.)

<sup>227</sup> Statis’ First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶ 354.

<sup>228</sup> As set forth below, Kazakhstan was not aware of the Statis’ fraud when it submitted its original set-aside petition, and therefore it included in its petition only its then-known grounds, *i.e.*, Kazakhstan being denied its opportunity to appoint its own arbitrator, the Statis initiating the arbitration in violation of the ECT’s three-month cooling-off period, one of the claimants being a Gibraltar-company and therefore outside the jurisdictional scope of the ECT, and certain procedural irregularities in the conduct of the arbitration. Kazakhstan filed a separate application to invalidate the Award after it discovered the fictitious transactions fraud.

<sup>229</sup> Approved Judgment of Justice Knowles, June 6, 2017, ¶¶ 37, 92 [Stati et al. v. The Republic of Kazakhstan, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

Second, they discontinued the English proceedings thereby avoiding a full fraud trial. The Statis also obtained pre-judgment attachments of property they claimed to be owned by Kazakhstan in Sweden and the Benelux countries.

139. Additionally, a criminal investigation into the Statis' suspected misconduct is underway in Luxembourg (discussed *infra*, ¶ 281 *et seq.*).
140. The sections that follow examine the post-Award Proceedings that have taken place in all of these jurisdictions. They deal, in turn, with the proceedings in Sweden, the U.K., the U.S., Italy, the Netherlands, Belgium and Luxembourg. The type of the proceedings, whether directed at the annulment, recognition (or exequatur) or execution of the Award, is identified directly within the text.

### A. Sweden – Seat of Arbitration

141. The following describes the Swedish court proceedings and reveals that no Swedish court has ever made a finding on the substance of Kazakhstan's claim of fraud by the Statis. This is confirmed by the legal opinion dated August 23, 2020 of Dr. Patrik Schöldström (“**Schöldström Opinion**”), now a judge at the Svea Court of Appeal, who also concluded that the Statis withheld highly significant evidence from the Swedish courts, and that the Svea Court of Appeal did not decide Kazakhstan's set-aside application on the basis of a full and truthful record.<sup>230</sup>

#### 1. The Set-Aside Proceedings (March 2014-December 2016) and Decision Dated December 9, 2016

142. On March 19, 2014, Kazakhstan submitted a statement of claim to the Svea Court of Appeal seeking to set aside the Award on the basis of certain procedural irregularities in relation to the Arbitration.<sup>231</sup> At that time, Kazakhstan was not aware of any of the above-described new evidence that Kazakhstan only discovered gradually during the period from 2015 to 2019 (*see supra*, ¶ 30 *et seq.*).
143. On October 5, 2015, after discovering new facts through the U.S. court proceedings (*see supra*, ¶ 32 *et seq.*), Kazakhstan filed a separate claim in the Svea Court of Appeal to invalidate the Award, on the ground that the Award contravened Swedish public policy due to the Statis' commission of fraud on the Tribunal.<sup>232</sup> That separate claim was later joined with Kazakhstan's original set-aside action.
144. Kazakhstan supported its allegations with those documents it had managed to discover to that date – which consisted only of documents showing fictitious transactions of the Statis.<sup>233</sup> These included witness statements, expert reports and submissions from the Vitol

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<sup>230</sup> Legal Opinion of Dr Patrik Schöldström, August 23, 2020, ¶¶ 86–87.

<sup>231</sup> Kazakhstan Statement of Claim, Swedish Set-Aside Proceedings, March 19, 2014.

<sup>232</sup> Kazakhstan's Amended Statement of Claim, Swedish Set-Aside Proceedings, October 5, 2015.

<sup>233</sup> The Joint Operating Agreement between Vitol, Ascom, TNG and Terra Raf, June 27, 2006; Expert Report of Charles River Associates, Vitol Arbitration, October 11, 2013; Witness Statement of Ian Roper Taylor, CEO of the

Arbitrations (*see supra*, ¶ 32 *et seq.*). In addition, Kazakhstan submitted a newly-prepared expert report from Deloitte that explained the financial impact the new facts would have had on the outcome of the Arbitration (*see supra*, ¶ 71).<sup>234</sup> Kazakhstan also submitted witness declarations from Tractebel confirming that there was an inexplicable gap between the actual \$35 million cost of the main equipment supplied by Tractebel and the \$245 million that the Statis alleged to have invested in the LPG Plant (*see supra*, ¶¶ 38-40). The witnesses from Tractebel testified that the LPG Plant construction costs, as reflected in the Stati Financial Statements, as well as in the Perkwood Agreement, were “*considerable and impossible to explain.*”<sup>235</sup>

145. The Statis, in their submission dated October 30, 2015 in the Set-Aside Proceedings, objected to Kazakhstan’s separate claim without addressing the substance of the allegations. The Statis argued that (a) Kazakhstan was already aware at the time of the Arbitration of the existence of the Vitol Arbitrations and most of the circumstances set out in the fraud claim, (b) the Tribunal decided that information about the Statis’ arbitration with Vitol was irrelevant to the Arbitration, (c) the Perkwood Agreement was not a sham contract, (d) the alleged construction costs of the LPG Plant were irrelevant to the outcome of the Arbitration, (e) there was no contradiction between the positions taken by the Statis’ in the Arbitration in the case against Kazakhstan and the Vitol Arbitrations, (f) the Award was not based on the Statis’ allegedly false evidence or untrue statements and (g) a violation of the *ordre public* rule is generally inapplicable in situations in which an award is based on incorrect documentation or untruthful statements.<sup>236</sup>
146. None of these arguments was supported by evidence. Neither Anatolie Stati, nor Gabriel Stati, nor Artur Lungu nor any of the other witnesses in the Arbitration appeared before the Svea Court of Appeal to offer testimony in support of the Statis. None of the quantum experts the Statis used in the Arbitration in the present case or the Vitol Arbitrations was offered to rebut the experts put forward by Kazakhstan.
147. However, the Statis relied on Ken Fleuriet (the Statis’ attorney from King & Spalding in the Arbitration) to testify as a witness on issues unrelated to the allegations of fraud. Ken Fleuriet was part of the team that had represented the Statis contemporaneously in the Arbitration under the ECT and the Vitol Arbitrations. The subject of these contemporaneous arbitrations was the LPG Plant for which a different value had been provided in each arbitration, using the same witness, Artur Lungu, and the same team of

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Vitol Group of companies at the time, January 22, 2014; Ascom LPG Plant – Business Plan; Witness Statement of Raymond Leslie Martin, January 21, 2014; Minutes of Meetings, November 29, 2006, October 2, 2007, February 5, 2008 and March 2009; Second Witness Statement of Artur Lungu, Vitol Arbitration, February 27, 2014; Second Witness Statement of Artur Lungu, Montvale Arbitration, July 22, 2011; Montvale’s Post-Hearing Brief, Montvale Arbitration, December 2, 2011; Written Declaration of Franjo Zaja, August 27, 2015; Minutes of a conference call between KPMG and the Stati Parties, March 31, 2010.

<sup>234</sup> Gruhn Report. Mr. Gruhn acted as Kazakhstan’s valuation expert during the ECT Arbitration.

<sup>235</sup> Expert Report of Ernst Kallweit of Tractebel, Swedish Set-Aside Proceedings, June 2, 2016, ¶ 6.1.4.

<sup>236</sup> Statis’ Rebuttal Submission, Swedish Set-Aside Proceedings, October 30, 2015, ¶ 5.

King & Spalding attorneys, but different quantum experts. These circumstances were decisive for the eventual uncovering of the true actions of the Statis.<sup>237</sup>

148. On November 23, 2015, Kazakhstan submitted a Brief and a Preliminary Statement of Evidence. Kazakhstan argued that the Statis (a) misled KMG in the submission of its Indicative Offer, (b) misrepresented financial information to KPMG as their statutory auditor, and (c) misled the Tribunal itself.<sup>238</sup>
149. During the exchange of submissions Kazakhstan underscored several times the fact that the Statis had not addressed many of the fraud allegations. On April 1, 2016, Kazakhstan raised various questions that needed to be addressed by the Statis relating to the legitimacy of the LPG Plant construction costs recorded in the Financial Statements.<sup>239</sup>
150. Unbeknownst to Kazakhstan and the Svea Court of Appeal, KPMG had posed essentially the same questions to the Statis some two months earlier in its February 15, 2016 Letter, as described above (*see supra*, ¶ 58 *et seq.*).<sup>240</sup>
151. During a case management conference, the Svea Court of Appeal directed the Statis to answer Kazakhstan's questions. In their May 18, 2016 response, the Statis instead asked the court to exclude the evidence introduced by Kazakhstan on the ground that it was irrelevant to the Set-Aside Proceedings.<sup>241</sup>
152. On June 29, 2016, the Svea Court of Appeal rejected the Statis' request to exclude the evidence that Kazakhstan had adduced.
153. Their submissions reveal that the Statis made false statements in connection with Kazakhstan's fraud allegations. For example, the Statis asserted that "*KPMG had full access to all accounting records*" during its review of the Stati Financial Statements,<sup>242</sup> and that "*KPMG was aware of Perkwood's function.*"<sup>243</sup> These denials cannot be squared

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<sup>237</sup> During cross examination, Ken Fleuriet was questioned about his and King & Spalding's role in the Vitol Arbitrations and he was asked for the reasons of instructing different experts. Ken. Fleuriet denied under oath any personal role of substance in the Vitol Arbitrations. His testimony is contradicted by the documents discovered through the 2015 U.S. Discovery Order, in particular the Notice of Arbitration dated November 6, 2012 in the Vitol Arbitration that carries Ken Fleuriet's name as one of the lead counsel, the Statement of Claim dated March 15, 2013 in the Vitol Arbitrations that lists him as one of the counsel for Ascom, as well as other documents, including the Partial Award and a transcript of the hearing in those proceedings. *See*, Hearing Transcript, Svea Court of Appeal, Swedish Set Aside Proceedings, Day 7, September 27, 2016, 21; Notice of Arbitration, Vitol Arbitration, November 6, 2012, 10; Statement of Claim, Vitol Arbitration, March 15, 2013, 60; Statement of Reply and Defence, Vitol Arbitration, May 10, 2013, 30; Claimant's Memorial, Vitol Arbitration, October 11, 2013, 76; Partial Award, Vitol Arbitration, April 22, 2015, 1; Hearing Transcript, Vitol Arbitration, Day 1, October 29, 2014, 1.

<sup>238</sup> Kazakhstan's Brief and Preliminary Statement of Evidence, Swedish Set-Aside Proceedings, November 23, 2015, ¶ 3.

<sup>239</sup> Kazakhstan's Submission, Swedish Set-Aside Proceedings, April 1, 2016.

<sup>240</sup> Letter from KPMG Audit LLC to A. Stati, February 15, 2016, 2.

<sup>241</sup> Statis' Request for the Dismissal of Evidence, Swedish Set-Aside Proceedings, May 18, 2016.

<sup>242</sup> Statis' Comments on the Court's recitals, Swedish Set-Aside Proceedings, May 18, 2016, 20.

<sup>243</sup> *Id.*



with the truth, given that the Statis already had in hand KPMG’s February 15, 2016 Letter stating the opposite.

154. As set forth in the Legal Opinion of Dr. Patrik Schöldström, the Statis, in not informing Kazakhstan and the Svea Court of Appeal of the 2016 KPMG Evidence in their May 18, 2016 response, breached their “*duty to tell the truth*” under Swedish law (*see supra*, ¶ 141).<sup>244</sup>
155. The Statis also made numerous unsupported assertions about Perkwood that are now known to be false, including that the Perkwood Agreement was not a sham agreement and that Perkwood performed services in purchasing and delivering the equipment during the construction of the LPG Plant.
156. As described *supra* at ¶ 39, the Statis concealed the true nature of Perkwood. As also described, Kazakhstan did not obtain access to the Statis’ Latvian Rietumu Bank account documents until 2016, and then only with the assistance of the Latvian Prosecutors Office. These documents included the Perkwood Powers of Attorney issued to Anatolie and Gabriel Stati. Before obtaining this evidence, Kazakhstan was not able to prove beyond doubt that the Statis secretly controlled Perkwood and had thus raised this question explicitly with the Statis through their Swedish counsel. Despite the fact that the question could be answered with a “yes” or “no,” the Statis were evasive and denied the truth. In their submission dated July 15, 2016, the Statis stated that they “*do not concede to the fact that Perkwood was an affiliate in some – yet unspecified by Kazakhstan – way.*”<sup>245</sup> In their subsequent submission dated August 30, 2016, the Statis again were evasive, stating that they “*have never been able to contest (but neither to admit) that Perkwood is in any particular way an affiliated company to the [Statis].*”<sup>246</sup>
157. Even when Kazakhstan submitted the Powers of Attorney to the Svea Court of Appeal on September 5, 2016, the Statis did not respond. It was not until the first day of the main hearing in the Set-Aside Proceedings on September 8, 2016, that they admitted that Perkwood was a Stati affiliate company:

*MR NILSSON [Counsel to the Statis]: The [powers of attorneys] that we have, those documents that you are presenting here, we are not contesting that it is an affiliate company. We don’t need to argue on this case, because it is an affiliate company. They have granted that from opposing counsel.*<sup>247</sup>

158. The Statis’ defense against the charge of double-billing for identical equipment, as described *supra* at ¶ 90 *et seq.*, was also unconvincing. In May 2016, they initially alleged that this equipment under Annex 14 of the Perkwood Agreement “*consisted of spare parts which were ordered by way of back-up, to ensure operation of the Plant.*”<sup>248</sup> However,

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<sup>244</sup> Legal Opinion of Dr Patrik Schöldström, August 23, 2020, ¶ 84.

<sup>245</sup> Statis’ Submission, Swedish Set-Aside Proceedings, July 15, 2016, 1.

<sup>246</sup> Statis’ Submission, Swedish Set-Aside Proceedings, August 30, 2016, ¶ 4.

<sup>247</sup> Hearing Transcript, Svea Court of Appeal, Swedish Set Aside Proceedings, Day 1, September 8, 2016, 31:12-16.

<sup>248</sup> Statis’ Comments to the Court’s Recitals, Swedish Set-Aside Proceedings, May 18, 2016, 20.

after Kazakhstan submitted evidence from Tractebel in June 2016, in which Tractebel confirmed that “*only exactly one set of*” such equipment was needed,<sup>249</sup> the Statis changed their position and in October 2016 began contending that this equipment was “*meant to be used if they increased the capacity of the LPG plant.*”<sup>250</sup>

159. Notably, as will be seen *infra* at ¶ 222 *et seq.* in the post-Award Proceedings a couple of years later, the Statis would yet again change their story in relation to the double-billing issue and would argue that the equipment under Annex 14 of the Perkwood Agreement was to be purchased “*as a backup.*”<sup>251</sup>
160. On December 9, 2016, the Svea Court of Appeal dismissed Kazakhstan’s petition to set aside the Award.<sup>252</sup> In its decision, the Svea Court did not rule on the merits of Kazakhstan’s assertion of fraud,<sup>253</sup> but rather determined that, even if the Statis had submitted “*false evidence*” in the form of witness testimony, witness affidavits and expert reports regarding the scale of the investment costs in the LPG Plant, as alleged by Kazakhstan, this did not have a direct or an obvious indirect effect on the Award and, therefore, did not come within the “*very narrow*” scope of Swedish public policy justifying set-aside of an arbitral award.<sup>254</sup> With respect to the KMG Indicative Offer, which the Svea Court confirmed *did* have a direct effect on the outcome of the Arbitration, the court found that, under Swedish law, it “*is not to be regarded as false evidence even if*” it was based on the allegedly false Financial Statements because the offer had in fact been submitted by KMG to the Statis “*prior to the initiation of the arbitration.*”<sup>255</sup> What this means in effect is that, under Swedish law, the KMG Indicative Offer had to be a forgery in order to constitute “*false evidence.*”
161. Lastly, the Svea Court of Appeal found that the Financial Statements – on which the KMG Indicative Offer was based – did not have a *direct* effect on the Award.<sup>256</sup> But it is a confirmed mathematical fact that the Financial Statements had an *indirect* effect on the

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<sup>249</sup> Expert Report of Ernst Kallweit of Tractebel, Swedish Set-Aside Proceedings, June 2, 2016, ¶ 6.2.1.

<sup>250</sup> Hearing Transcript, Svea Court of Appeal, Swedish Set Aside Proceedings, Day 13, October 6, 2016, 27.

<sup>251</sup> Statis’ Pleading Notes for the Hearing before the Amsterdam Court of Appeal on June 22, 2018, Dutch Exequatur Proceedings, ¶ 90.

<sup>252</sup> Judgment of the Svea Court of Appeal, Swedish Set-Aside Proceedings, December 9, 2016 (case no. T 2675).

<sup>253</sup> The Svea Court of Appeal did not decide on the merits of Kazakhstan’s fraud case, but rather limited its analysis to questions of causation. Legal Opinion of Dr Patrik Schöldström, January 13, 2017, ¶ 13: “*The [Svea] Court said nothing about the allegations of fraud, false evidence and misleading information when assessing whether the arbitral award as such violated public policy. My conclusion therefore, is that the Court did not consider those allegations in its assessment at all.*” *Id.*, ¶ 17: “*The Court’s test [...] has two elements: False evidence and causation. Unless the Court finds sufficient proof of both, the arbitral award will not be declared invalid under the relevant provision (Section 33, subsection 1, item 2 of the Act). That makes it possible for the Court, should it so wish, to assess only one of the elements, namely decisiveness (or causation). If that element fails, then it is unnecessary to assess the other element, namely the false evidence itself.*” *Id.*, ¶ 18: “*This is precisely what the Court did in the Judgment. It assessed only the causal link element and not whether the evidence was false as alleged.*” (emphasis added)

<sup>254</sup> Svea Court of Appeal’s Judgment, Swedish Set-Aside Proceedings, December 9, 2016 (case no. T 2675), 45.

<sup>255</sup> *Id.*, 46.

<sup>256</sup> Judgement of the Svea Court of Appeal, Swedish Set-Aside Proceedings, December 9, 2016 (case no. T 2675).

Indicative Offer<sup>257</sup> and thus, according to the Svea Court's own conclusion, had at least an indirect effect on the Award. However, as was noted by Justice Knowles in his judgment of June 6, 2017 (*infra*, ¶ 181 *et seq.*), the Svea Court did not determine whether the Financial Statements had that obvious indirect effect.<sup>258</sup>

162. At no point in its decision did the Svea Court of Appeal pass judgment on the reliability of the KMG Indicative Offer as evidence in the Arbitration. Neither did it make any finding on whether the false financial information provided by the Statis to the Tribunal constituted fraud.<sup>259</sup> Confirming this, the English High Court subsequently held: “*No Court has decided the question whether there has been the fraud alleged,*” including Sweden (and the United States).<sup>260</sup>

163. Indeed, the Svea Court of Appeal's non-decision on the merits of the fraud claim stands in stark contrast with what the English High Court decided on the basis of substantially the same evidence in the English enforcement proceedings, *i.e.*, that this evidence established *prima facie* that the Statis had obtained the Award by fraud and committed a fraud on the Tribunal:

*[T]here is the necessary strength of prima facie case [...] that, in asking the Tribunal to rely on the KMG Indicative Bid in circumstances (concealed from the Tribunal, as from the bidder) of the alleged fraud, there was a fraud on the Tribunal.*<sup>261</sup>

164. Thus, the Svea Court of Appeal did not rule on the merits of Kazakhstan's fraud allegations. Rather, it determined that those allegations, accepted *arguendo* as true, did not provide a basis for setting aside the Award under what the Court described as the “*very narrow*” scope of Swedish public policy.<sup>262</sup>

165. That the Svea Court of Appeal did not rule on the merits of Kazakhstan's fraud allegations was also confirmed by a ruling of the Brussels Court of First Instance in its decision of December 20, 2019, discussed below (*see infra*, ¶ 245 *et seq.*). The same finding was reached by the English High Court in its judgment of June 6, 2017 (*see infra*, ¶ 182 *et seq.*).

## 2. Swedish Supreme Court Decision Dated October 24, 2017

166. The Svea Court of Appeal did not grant leave for appeal to the Swedish Supreme Court. Subsequently, Kazakhstan exercised its right to ask the Swedish Supreme Court to rectify

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<sup>257</sup> Witness Statement of Nuran Kairakbayev, July 10, 2018, ¶ 21. [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

<sup>258</sup> Approved Judgment of Justice Knowles, June 6, 2017, ¶ 62 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

<sup>259</sup> Second Declaration of Alexander Foerster of Mannheimer Swartling, July 20, 2020, ¶¶ 61–62.

<sup>260</sup> Approved Judgment of Justice Knowles, June 6, 2017, ¶ 80 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

<sup>261</sup> *Id.*, ¶ 48.

<sup>262</sup> Judgement of the Svea Court of Appeal, Swedish Set-Aside Proceedings, December 9, 2016 (case no. T 2675), 45.

“grave procedural errors” by the Svea Court of Appeal – an extraordinary legal remedy – but the Supreme Court summarily denied that request.<sup>263</sup>

167. This naturally meant that the Swedish Supreme Court made no finding on the merits of Kazakhstan’s allegation of fraud.<sup>264</sup> The Swedish Supreme Court was not asked, nor could it have been asked, to review the ruling of the Svea Court of Appeal on the merits.<sup>265</sup>

### 3. Further Attempted Proceedings

#### a. Second Invalidation Proceedings (November 2019-March 2020)

168. Based on the then newly discovered evidence, notably the Rietumu Bank Statements (*supra*, ¶ 49 *et seq.*), Kazakhstan learned that the Tribunal had not only been misled on the quantum of the Statis’ investment in the LPG Plant, but also on the scope of Kazakhstan’s liability.
169. During the Arbitration, the Statis argued that Kazakhstan’s conduct caused a serious liquidity shortage and, as a consequence, the financial distress of KPM and TNG.<sup>266</sup> The Tribunal accepted the Statis’ contention that Kazakhstan was responsible for that financial distress, and held Kazakhstan liable for KPM’s and TNG’s loss.
170. Based on this previously unavailable information, Kazakhstan on November 25, 2019 filed a second claim in the Svea Court of Appeal to invalidate the Award (the “**New Invalidation Claim**”). In reply, the Statis did not address the truth or falsity of Kazakhstan’s evidence or the substance of its arguments. Rather, they petitioned the Svea Court for early dismissal on procedural grounds, namely on the basis of *res judicata* under Swedish law.
171. On March 9, 2020, the Svea Court of Appeal granted the Statis’ petition and dismissed the New Invalidation Claim on *res judicata* grounds. The Svea Court did not examine the record or call for written submissions or oral pleadings on the merits of Kazakhstan’s claim or the strength of its evidence.<sup>267</sup> The thrust of the Svea Court’s decision is that one cannot seek to annul an award more than once, regardless of whether the second claim is based on different legal grounds and new evidence.<sup>268</sup> In other words, it is clear that the decision of the Svea Court of Appeal dated March 9, 2020 was of a “*pure procedural character and the merits of the RoK’s application had not been assessed.*”<sup>269</sup> The Svea Court of Appeal again did not grant Kazakhstan leave to appeal the decision to the Swedish Supreme Court.

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<sup>263</sup> Kazakhstan’s Motion to Quash the Svea Court of Appeal’s Judgment, Swedish Set-Aside Proceedings, February 3, 2017 (Swedish Supreme Court’s case no. Ö 613-17).

<sup>264</sup> Legal Opinion of Dr. Patrik Schöldström, August 23, 2020, ¶¶ 73–75.

<sup>265</sup> *Id.*

<sup>266</sup> *See, e.g.*, Award, ¶ 642; Hearing on Quantum, Day 1, ECT Arbitration, Transcript of the Hearing, Direct Examination of Artur Lungu, January 28, 2013, 199–200.

<sup>267</sup> Second Declaration of Alexander Foerster of Mannheimer Swartling, July 20, 2020, ¶ 31.

<sup>268</sup> *Id.*

<sup>269</sup> Legal Opinion of Dr Patrik Schöldström, August 23, 2020, ¶ 79.

### b. Swedish Enforcement Proceedings – Public Policy Ground

172. On the same day that Kazakhstan filed its New Invalidation Claim, it proffered the evidence supporting this claim in the then pending Swedish enforcement proceedings in the Svea Court of Appeal relating to the attachment of assets of Kazakhstan’s central bank, the National Bank of Kazakhstan (“NBK”). Kazakhstan argued that enforcement of the Award was barred because the Award, primarily due to the manner in which it arose, was incompatible with Swedish public policy.<sup>270</sup> The Stasis did not respond to this argument on its merits.
173. On February 3, 2020, the Svea Court of Appeal dismissed Kazakhstan’s proffered evidence on the ground that it lacked relevance to the enforcement proceedings. Once again, no decision was reached on the substance of Kazakhstan’s claims of fraud.<sup>271</sup>
174. On June 17, 2020, the Svea Court of Appeal rendered its final decision in the enforcement proceedings, holding in favor of Kazakhstan and NBK and lifting the attachment of NBK’s assets on the basis of sovereign immunity.<sup>272</sup>

### c. Re-Opening of the Set-Aside Proceedings (April-May 2020)

175. On April 3, 2020, Kazakhstan filed a petition with the Swedish Supreme Court seeking to re-open the Set-Aside Proceedings on the basis of newly obtained evidence (the “**Petition to Re-Open**”). The Petition to Re-Open was premised on the argument that “*a new trial may be granted if a circumstance or evidence that was not presented previously is invoked and its presentation would probably have led to a different outcome.*”<sup>273</sup> Such a legal remedy further requires that the applicant was unable to present the newly obtained evidence before the court that rendered judgment and that it filed the petition within one year of acquiring knowledge of the evidence in question.<sup>274</sup>
176. The basis for Kazakhstan’s Petition to Re-Open was the evidence obtained from the Lungu Deposition and the New KPMG Evidence (see details particularly, *supra*, ¶ 47 *et seq.* and *supra*, ¶ 57 *et seq.*). Kazakhstan asserted that, had it been able to produce such evidence before the Svea Court of Appeal in the initial Set-Aside Proceedings, the Court would have likely found that the Award was in breach of Swedish public policy and should be set aside.<sup>275</sup>
177. On May 18, 2020, in a two-sentence decision, the Swedish Supreme Court dismissed the Petition to Re-Open without giving any reasons.<sup>276</sup> There had been no exchange of written submissions and no oral pleadings on the substance of Kazakhstan’s claims of fraud.<sup>277</sup> According to the Schöldström Opinion, the Swedish Supreme Court’s decision does not

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<sup>270</sup> Second Declaration of Alexander Foerster of Mannheimer Swartling, July 20, 2020, ¶ 34.

<sup>271</sup> Legal Opinion of Dr Patrik Schöldström, August 23, 2020, ¶ 76.

<sup>272</sup> Decision of the Svea Court of Appeal, Swedish Enforcement Proceedings, June 17, 2020 (case no. ÖÅ 7709-19).

<sup>273</sup> Second Declaration of Alexander Foerster of Mannheimer Swartling, July 20, 2020, ¶ 36.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*, ¶ 37.

<sup>276</sup> *Id.*, ¶ 38.

<sup>277</sup> *Id.*, ¶ 38.

represent a rejection of Kazakhstan’s claim on the merits or a judgment on the evidence of fraud proffered (*see supra*, ¶ 141).<sup>278</sup>

## **B. England**

178. This section details the post-Award Proceedings in England. It starts first with the proceedings directed at recognition of the Award in England (the “**English Recognition Proceedings**”) and thereafter describes the proceedings initiated by Kazakhstan and NBK against the custodian of NBK’s assets – the Bank of New York Mellon (“**BNYM**”) – and the Statis, related to the freeze of NBK’s assets under the custody of BNYM (the “**BNYM Proceedings**”).

### **1. English Recognition Proceedings (February 2014-August 2018)**

179. On February 28, 2014, the Statis obtained an *ex parte* order granting them permission to enforce the Award in the U.K. (the “**Provisional Enforcement Order**”), subject to an application by Kazakhstan to set aside the order. Kazakhstan filed its application to set aside the Provisional Enforcement Order (the “**English Application**”) on April 7, 2015. In August 2015, it applied to amend the English Application, contending, in light of the newly discovered evidence of the Statis’ fictitious transactions from the U.S. § 1782 proceedings (*see supra*, ¶ 32 *et seq.*), that enforcement of the Award would contravene English public policy and accordingly should be refused. Kazakhstan requested the English High Court to direct a trial of its claim inasmuch as (a) Kazakhstan had established a *prima facie* case that the Award was obtained by fraud and (b) Kazakhstan did not have, and could not with reasonable diligence have had, access to the evidence of the alleged fraud during the Arbitration.

180. On September 3, 2015, the English Recognition Proceedings were stayed pending the outcome of the Set-Aside Proceedings in Sweden.

#### **a. Judgment of Justice Knowles dated June 6, 2017**

181. Following the December 2016 decision of the Svea Court of Appeal in the Set-Aside Proceedings, the stay of the English Recognition Proceedings was lifted. Kazakhstan argued that the enforcement of the Award would contravene U.K. public policy by reason of fraud committed by the Statis on the Tribunal.<sup>279</sup> Kazakhstan submitted around 35 lever arch files of material that included (a) witness statements, expert reports, written submissions and supporting documents from the Arbitration, (b) written submissions and supporting documentation from the Swedish proceedings, and (c) documents and correspondence obtained after the Arbitration. In addition, Kazakhstan submitted new witness statements and expert reports from Dr. Patricia Nacimiento of Herbert Smith Freehills, Franjo Zaja of Tractebel, Ernst Kallweit of Tractebel, Thomas Gruhn of Deloitte and Dr. Patrik Schöldström.<sup>280</sup> In February 2017, a two-day hearing was held before Justice

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<sup>278</sup> Legal Opinion of Dr Patrik Schöldström, August 23, 2020, ¶ 81.

<sup>279</sup> Witness Declaration of Philip M. Carrington, April 1, 2019, ¶ 11.

<sup>280</sup> *Id.*

Knowles on Kazakhstan’s application to amend the English Application to add its fraud defense.

182. On June 6, 2017, Justice Knowles handed down his judgment. In that judgment, he held that Kazakhstan had established a *prima facie* case that the Award was obtained by fraud:

*In my judgment there is the necessary strength of prima facie case that the alleged fraud would have made a difference to the Tribunal. And that, in asking the Tribunal to rely on the KMG Indicative Bid in circumstances (concealed from the Tribunal, as from the bidder) of the alleged fraud, there was a fraud on the Tribunal.*<sup>281</sup>

*I am satisfied that the State did not have access before the Award to the evidence of the alleged fraud on which it now seeks to rely, and that the evidence of the alleged fraud could not with reasonable diligence have been discovered before the Award had the State used reasonable diligence.*<sup>282</sup>

183. In rejecting a collateral estoppel argument made by the Statis, Justice Knowles expressly confirmed that “*neither the Swedish Court, nor the US Court, nor English Court*” has decided “*the question whether there has been the fraud alleged.*”<sup>283</sup>

184. By order dated June 27, 2017, Justice Knowles then directed that Kazakhstan’s claim that the Award was obtained by fraud proceed to trial. On January 9, 2018, the Court of Appeal refused the Statis’ application for permission to appeal.

185. Kazakhstan served its Points of Claim on August 1, 2017, particularizing its allegations of fraud on the basis of its then-known evidence. The Statis served their Points of Defence on September 26, 2017,<sup>284</sup> following which Kazakhstan served its Points of Reply on November 7, 2017 (together, the “**English Pleadings**”). The Statis’ points of defence were not substantiated with any evidence on non-existence of fraud.

186. In their submissions, the Statis relied on the VDD Report, which subsequently was proven to have been deliberately falsified (as was discussed *supra*, ¶ 106 *et seq.*), to make the false arguments that they never intended to conceal Perkwood’s identity as a Stati company, and that Kazakhstan was aware of Perkwood’s identity as a Stati company during the Arbitration.<sup>285</sup> As stated above, *supra*, ¶ 37, Kazakhstan was in fact unaware of that fact.

187. On the double-billing for the LPG Plant equipment through Perkwood, the Statis alleged that a mark-up of around \$58 million was not extraordinary and was charged because Perkwood was responsible “*for safe delivery of goods to the named destination (i.e., Kazakhstan), paying all transportation expenses and assuming all risks during*

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<sup>281</sup> Approved Judgment of Justice Knowles, June 6, 2017, ¶ 48 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

<sup>282</sup> *Id.*, ¶ 79.

<sup>283</sup> *Id.*, ¶ 80.

<sup>284</sup> Statis’ Points of Defence, English Recognition Proceedings, September 26, 2017.

<sup>285</sup> *Id.*, ¶ 11.

*transportation except for the duty upon arrival.*”<sup>286</sup> In PwC II (KPMG correspondence), PwC clarifies that no supporting documents were provided by the Statis to support these claims and, furthermore, that it is not plausible that a LPG Plant, the principal equipment for which cost approximately \$35 million, would attract legitimate costs of transport, insurance and storage at a value of almost triple the price of such equipment.

188. At the same time, the Statis sought to argue that the difference in price was due to currency fluctuations, because Tractebel was charging for its equipment in Euros, whereas Perkwood and TNG transacted in U.S. Dollars.<sup>287</sup> However, in PwC II (KPMG correspondence), PwC again highlights that the Statis submitted no documents to support this allegation. PwC also noted that it does not seem plausible that the tripling of the LPG Plant’s cost could have arisen out of a difference in foreign exchange rates.
189. The next stage in the proceedings was disclosure. English law, and Justice Knowles’ order dated June 27, 2017, required the Statis and Kazakhstan to disclose not only all documents on which they proposed to rely, but all documents that either supported or adversely affected their or another party’s case. Thus, the Statis would have been required to disclose all documents evidencing (a) whether the Statis sought at any time to conceal Perkwood’s status as part of the group of companies owned and/or controlled by the Statis,<sup>288</sup> (b) whether there was any deliberate concealment of Perkwood’s status as a party related to TNG within the meaning of IFRS and IAS 24 or otherwise, and (c) whether the Statis fraudulently inflated the construction costs of the LPG Plant.<sup>289</sup> By consent, the deadline for the parties to make this disclosure was February 22, 2018. On that date, the Statis informed Kazakhstan that they needed an extension until March 1, 2018. Kazakhstan agreed to this request.

#### **b. Notice of Discontinuance (February 2018)**

190. On February 26, 2018, three days before the agreed upon revised deadline for disclosure, and without prior warning or explanation, the Statis served a notice of discontinuance of the English proceedings (the “**Notice of Discontinuance**”). Kazakhstan applied to have this notice set aside. In response, the Statis sought to justify the discontinuance on the grounds that (a) they lacked the resources to proceed to a trial of Kazakhstan’s fraud claim, in particular because their litigation funders had carved out the English proceedings from their funding arrangements, and (b) the attachment orders they had secured in other jurisdictions meant that they no longer had practical need to pursue their enforcement of the Award in England.
191. On May 11, 2018, Justice Knowles granted Kazakhstan’s application to set-aside the Notice of Discontinuance. In rejecting the Statis’ proffered justifications, Justice Knowles stated, “*the real reason for the [N]otice of [D]iscontinuaunce is that the [Statis] do not wish to take the risk that the trial may lead to findings against them and in favour of*

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<sup>286</sup> *Id.*, ¶ 16.2.3.

<sup>287</sup> *Id.*, ¶ 16.2.5.

<sup>288</sup> *Id.*, ¶ 11.

<sup>289</sup> *Id.*, ¶ 26.



[Kazakhstan].” In doing so, Justice Knowles acknowledged Kazakhstan’s legitimate interest in having the Provisional Enforcement Order reviewed on the merits. He concluded that “*it will not be without use to the Courts of at least some other countries to have a concluded answer on the question of fraud described in my judgment of 6 June 2017, and therefore on the question whether the English Court would enforce the Award.*”<sup>290</sup>

### **c. King & Spalding Come Off the Record (May 2018)**

192. On May 18, 2018, the Statis served notice that King & Spalding – which had until then been acting for the Statis in the English enforcement proceedings, had represented them in the Arbitration and parallel Vitol Arbitrations, and were also responsible for the Statis’ overall global enforcement strategy – would no longer be acting for them in the English enforcement proceedings.
193. King & Spalding nevertheless proceeded (a) later that day, to serve a skeleton argument purportedly on behalf of the Statis for the follow-up hearing listed on May 21, 2018, and (b) on May 20, 2018, to serve further written submissions purportedly on behalf of the Statis. In the hearing on May 21, 2018, King & Spalding sought to make oral submissions on behalf of the Statis, but in light of the notice that had been served by the Statis on May 18, 2018, Justice Knowles disallowed that.<sup>291</sup>
194. King & Spalding apparently has continued to advise the Statis in all other post-Award Proceedings, and continues to do so as of this date.

### **d. Disclosure and Witnesses for Trial (June 2018)**

195. On June 11, 2018, pursuant to the order of Justice Knowles directing the parties to undertake standard disclosure of documents, Kazakhstan served its disclosure statement and disclosure list on the Statis, who ostensibly were representing themselves. The Statis, in turn, served disclosure statements and a disclosure list on Kazakhstan. Kazakhstan argued that the disclosure statement served on behalf of Anatolie Stati, Ascom, and Terra Raf showed that the Statis had made no real attempt to conduct a proper privilege and relevance review. Kazakhstan observed that keyword searches (after de-duplication) yielded a total number of 172,906 responsive documents including families (130,879 excluding families). Yet, the Statis decided to withhold approximately 60,000 documents from disclosure, solely on the basis that they included the names of their past and present legal advisors and/or Ascom’s internal Head of Legal (Grigore Pisica).
196. On July 10, 2018, the parties were due to exchange fact witness statements, and thereby to confirm, firstly, the identities of the factual witnesses on whom they would rely at trial, and, secondly, the content of their evidence. Kazakhstan served two fact witness statements

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<sup>290</sup> Decision of Mr Justice Knowles, High Court of Justice of England and Wales, May 11, 2018, ¶ 63 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

<sup>291</sup> Transcript of the Hearing, May 21, 2018, 6. [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen’s Bench Division, Commercial Court, CL-2014-000070].

on the Statis. However, the Statis stated they would not be serving any fact witness statements.<sup>292</sup>

#### **e. The Statis' Appeal of Notice of Discontinuance (August 2018)**

197. By judgment dated August 10, 2018, the Court of Appeal allowed the Statis' appeal from Justice Knowles' 2018 Judgment, holding that, since the Statis were no longer seeking to enforce the Award in England, and were willing to give an undertaking not to seek to pursue enforcement there in the future, there was lacking the requisite "*legitimate interest*" for permitting Kazakhstan to proceed to trial on the fraud claim.<sup>293</sup> The fact that an English judgment might assist foreign courts seized with related proceedings was deemed insufficient.
198. Accordingly, upon the Statis' express undertaking never to re-initiate enforcement proceedings in the U.K., the Court of Appeal issued an order discontinuing the English enforcement proceedings, setting aside the Provisional Enforcement Order and addressing various issues of costs.

#### **f. Kazakhstan's Cost Application**

199. On November 22, 2018, following discontinuance of the English enforcement proceedings, Kazakhstan applied to the court for an order that the Statis pay Kazakhstan's costs in those proceedings.<sup>294</sup>
200. The hearing on Kazakhstan's Costs Application took place on July 1, 2019 before Justice Jacobs, but the Statis did not attend. On July 2, 2019, Justice Jacobs handed down his judgment, making various orders as to payment of costs,<sup>295</sup> including an order that the Statis make an immediate payment to Kazakhstan in the sum of GBP 1,300,000.00.<sup>296</sup>

## **2. BNYM Proceedings**

201. As will be seen *infra* at ¶ 249, on May 25, 2018, a Belgian court, before which the Statis had instituted attachment proceedings, held that an English court should decide whether BNYM, the custodian of NBK (Kazakhstan's central bank), owed a debt to Kazakhstan, such that the Statis could properly attach NBK accounts held by BNYM.<sup>297</sup> On May 28,

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<sup>292</sup> Email from the Statis to Herbert Smith Freehills LLP, July 10, 2018.

<sup>293</sup> Order of the English Court of Appeal, August 10, 2018, ¶ 67. [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

<sup>294</sup> Kazakhstan's Application for Indemnity Costs, November 22, 2018 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070]; Fourth Witness Statement of Philip Maitland Carrington, November 21, 2018. [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

<sup>295</sup> Judgment of the London High Court on Costs, July 2, 2019, ¶ 30. [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

<sup>296</sup> *Id.* ¶ 36.

<sup>297</sup> Judgment of the Dutch-speaking court of first instance in Brussels, Belgian Protective Garnishment Proceedings, May 25, 2018, section 3.1.4, 13.

2018, NBK and Kazakhstan filed a claim in the High Court of England against BNYM and the Statis seeking declaratory relief on this question.

202. Following trial on the merits, on April 22, 2020, Justice Teare rendered judgment in favor of Kazakhstan and NBK.<sup>298</sup>

203. During a hearing on the determination of follow-up issues after the trial on May 4, 2020, Justice Teare rejected the Statis' false assertion that it was uncertain which side had prevailed in the April 22, 2020 judgment, affirmed that Kazakhstan and NBK were the successful parties, and determined that the Statis would have to pay costs:

*Mr Sprange, on behalf of the Stati parties, says that it is difficult to say who has succeeded in this matter. In my judgment it is plain that the NBK and the RoK are the successful party. They said that the debt was owed by BNYM to the NBK. That was challenged by the Stati parties and on that challenge the Stati parties have failed and the Kazakhstan entities have succeeded. So in principle, and following the general rule, the claimants should get their costs.*<sup>299</sup>

204. Each party sought permission to appeal certain aspects of the April 22, 2020 judgment,<sup>300</sup> but on July 8, 2020 such permission was refused on the ground that none of the appeals had a “*real prospect of success.*”<sup>301</sup> In refusing the Statis' application for permission, the appeals court (Justice Carr) re-affirmed that:

*The Claimants [i.e. NBK and ROK] were the overall successful parties, and the Second to Fifth Defendants [i.e. the Stati Parties] the unsuccessful.*<sup>302</sup>

205. Despite the fact that they were told on three occasions that they lost in the BNYM Proceedings, and that Kazakhstan and NBK won, the Statis and their lawyers have actively

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<sup>298</sup> Approved Judgment of Mr Justice Teare, April 22, 2020, ¶ 131. [*National Bank of Kazakhstan et al. v. The Bank of New York Mellon et al.*, In the High Court of Justice, Queen's Bench Division, Commercial Court, FL-2018-000007].

<sup>299</sup> Ruling of Mr Justice Teare, May 4, 2020, ¶ 6 [*National Bank of Kazakhstan et al. v. The Bank of New York Mellon et al.*, In the High Court of Justice, Queen's Bench Division, Commercial Court, FL-2018-000007].

<sup>300</sup> Kazakhstan sought permission to appeal certain aspects of the April 22, 2020 judgment on the basis of the following Grounds for Appeal:

“2. Ground 1: a. Teare J erred in declining to adjudicate on the entire question whether the Cash was within the subject-matter of the Belgian Garnishment. b. The only course properly open had Teare J adjudicated on that question would have been to conclude that the Cash does not fall within the subject-matter of the Belgian Garnishment.

3. Ground 2: a. Teare J erred in declining to adjudicate on NBK's debt claim against BNYM in respect of the Cash and instead adjourning it by paragraph 6 of the Order. b. Teare J should have entered judgment against BNYM on NBK's debt claim.

4. Ground 3: a. Teare J erred in refusing to grant the declaratory relief in the form in Prayer 1(e) to the Re-Amended Particulars of Claim and instead granting it in the form in paragraph 5 of the Order. b. Had Teare J adjudicated on the entire question whether the Cash was within the subject-matter of the Belgian Garnishment, the only course properly open would have been to grant declaratory relief in the form sought by the Claimants.”

<sup>301</sup> Order of the English Court of Appeal on NBK and Kazakhstan's PTA application, July 8, 2020, 1.

<sup>302</sup> Order of the English Court of Appeal on the Statis' PTA application, July 8, 2020, 1.

portrayed the outcome of the BNYM Proceedings as a victory for the Statis on corporate websites and social media.<sup>303</sup> These websites are still active through the date of this Opinion.

### C. United States

206. On September 30, 2014, the Statis sought enforcement of the Award in the U.S. District Court for the District of Columbia (the “**D.C. Court**”).<sup>304</sup>
207. On April 5, 2016, after its then-known defenses had been briefed, Kazakhstan moved for leave to raise additional grounds in support of its opposition to enforcement, namely those relating to the newly discovered fraud on the Statis’ part. Kazakhstan invoked Articles V(1)(b) and V(2)(b) of the New York Convention, arguing, respectively, that the Statis’ fraud deprived Kazakhstan of the ability to effectively present its case to the Tribunal and that, due to the Award’s procurement through fraud, enforcement of the Award would violate U.S. public policy.<sup>305</sup>
208. The Statis opposed this motion, arguing that Kazakhstan’s additional grounds were “*futile*” because the Tribunal had not credited either party’s submissions on valuation of the LPG Plant, relying instead on the KMG Indicative Offer. They also argued that Kazakhstan’s allegations of fraud were being litigated in the Set-Aside Proceedings in Sweden and did not require litigation in the D.C. Court.<sup>306</sup>
209. On May 11, 2016, the D.C. Court denied Kazakhstan’s motion for leave on two grounds: (1) that the Tribunal’s valuation of the LPG Plant was not based on the alleged fraud; and (2) that, because the issue of the Statis’ fraud was already being litigated in Sweden, there was no warrant for it to be litigated in the D.C. Court. The following statement from the court is noteworthy:

*Under those circumstances, and given the fact that the issue has already been presented to the Swedish authorities, it will not be in the interest of justice to conduct a mini-trial on the issue of fraud here when the arbitrators themselves expressly disavowed any reliance on the allegedly fraudulent material.*<sup>307</sup>

210. Kazakhstan filed a motion for reconsideration, which was opposed by the Statis.<sup>308</sup> Thereafter, in June 2016, the D.C. Court *sua sponte* stayed the action in favor of the Set-

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<sup>303</sup> See, the website of King & Spalding at <https://www.kslaw.com/news-and-insights/tom-sprange-qc-egishe-dzhazoyan-and-kabir-bhalla-obtain-a-favorable-dismissal-in-the-court-of-appeal-for-moldovan-investors-in-their-protective-garnishment-dispute-with-kazakhstan>; see also <https://www.thelawyer.com/court-of-appeal-rules-on-kazakh-claim-in-long-running-award-row/?nocache=true&adfsuccess=1>

<sup>304</sup> Affidavit of Matthew Kirtland of Norton Rose Fulbright US LLP, January 17, 2021, ¶ 3.

<sup>305</sup> *Id.* ¶ 4.

<sup>306</sup> *Id.* ¶ 6.

<sup>307</sup> *Id.* ¶ 8 (quoting Order of the United States District Court, District of Columbia, May 11, 2016, at 4 in *Stati v. Republic of Kazakhstan*, Civ. No. 14-1638 (ABJ) (D.D.C. 2016)).

<sup>308</sup> *Id.* ¶¶ 9, 11.

Aside Proceeding, and maintained this stay until the Swedish Supreme Court refused Kazakhstan's request for extraordinary review in October 2017.<sup>309</sup>

211. During the pendency of this stay, Kazakhstan brought to the attention of the D.C. Court the June 2017 decision of Justice Knowles finding that Kazakhstan's evidence demonstrated a *prima facie* case that the Statis had obtained the Award by fraud, including fraud on the Tribunal. The Statis objected and again falsely asserted that the Svea Court of Appeal had decided the merits of the fraud in its December 2016 decision:

*In its decision denying the ROK leave to make its fraud allegations in this proceeding, the Court observed that it need not adjudicate the fraud issue because the Swedish Court was going to do so. The Swedish Court has now considered those allegations, having conducted a full three-week hearing in which it considered all of the evidence the ROK seeks to proffer here, only to reject those allegations for largely the same reason that this Court did. As discussed below, Petitioners respectfully submit that if this Court is going to take cognizance of another court's decision in connection with this dispute, it should be the ruling of the Swedish Court, which – unlike the English Court – is the only court with supervisory jurisdiction over the arbitration, and which – also unlike the English Court – has issued a final, binding ruling on the merits of the ROK's fraud case, holding after a full contested hearing that the Award was not tainted by fraud.<sup>310</sup>*

212. The Statis thereafter continued to repeat their argument that the Svea Court of Appel had, on the basis of a “*full and fair*” record, rejected Kazakhstan's fraud case on the merits. For example, they asserted:

*The Court has already decided that, because the tribunal did not rely on the parties' valuation estimates for the LPG Plant, it would **not** be in the interest of justice to conduct a mini-trial on the issue of fraud. Now that the ROK has had a full and fair adjudication of its fraud allegations in the primary jurisdiction (resulting in the Svea Court reaching, after considering all of the ROK's evidence, the same conclusion as this Court) – it is, Petitioners submit, impossible to see how the interests of justice would be served by allowing the ROK to take a do-over on a case it has already lost.<sup>311</sup>*

213. However, the Svea Court of Appeal in fact had made no finding on the merits of Kazakhstan's claims of fraud (*see supra*, ¶¶ 160-164). Nevertheless, the D.C. Court accepted the Statis' assertions. On March 23, 2018, it denied Kazakhstan's motion for reconsideration and granted the Statis' Petition to Confirm. In so doing, the D.C. Court relied heavily on the Svea Court of Appeal's decision, as the Statis had urged. However, it

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<sup>309</sup> *See id.* ¶¶ 10–12.

<sup>310</sup> *Id.* (quoting Statis' Response to Kazakhstan Notice of Supplemental Authority, June 28, 2017, at 5 in *Stati v. Republic of Kazakhstan*, Civ. No. 14-1638 (ABJ) (D.D.C. 2016)).

<sup>311</sup> *Id.* ¶ 11 (quoting Statis' Supplemental Submission in Opposition to Motion for Reconsideration, November 13, 2017, at 3 in *Stati v. Republic of Kazakhstan*, Civ. No. 14-1638 (ABJ) (D.D.C. 2016) (emphasis in original)).

made no judgment of its own on whether the alleged fraud had or had not occurred. It also ignored Mr. Justice Knowles' June 2017 ruling that Kazakhstan's evidence showed *prima facie* that the Statis' had obtained the Award by fraud and committed a fraud on the Tribunal. Thus, perversely, the D.C. Court cited the Swedish court for a finding on the fraud question that it *did not* make, while ignoring the English court's finding on that question that it *did* make. In any event, by denying Kazakhstan's motion for reconsideration, the D.C. Court did not permit Kazakhstan to submit evidence of the Statis' fraud,<sup>312</sup> and therefore this ruling by the D.C. Court cannot be a ruling on the merits of the fraud.

214. On appeal, the D.C. Circuit affirmed the D.C. Court's ruling in an unpublished *per curiam* decision, and the Supreme Court denied *certiorari*.<sup>313</sup>

#### D. Italy

215. On December 11, 2017, the Statis filed an *ex parte* application before the Rome Court of Appeal for recognition of the Award in Italy. On January 29, 2018, the Rome Court of Appeal granted the Statis' application and an exequatur decree was served on Kazakhstan on April 26, 2018.<sup>314</sup>
216. On May 14, 2018, Kazakhstan filed an opposition to the exequatur, arguing, among other things, that enforcement of the Award would contravene Italian public policy as the Award was obtained by fraud.<sup>315</sup> Notably, at that time Kazakhstan was only aware of the evidence from the 2015 U.S. Discovery Order and the February 2018 Disclosure in the United Kingdom (*see supra*, ¶ 32 *et seq.* and ¶ 43 *et seq.*). The Lungu Deposition, the Rietumu Bank Statements, and the New KPMG Evidence were not known or available at that time (*see supra*, ¶ 47 *et seq.*, ¶ 49 *et seq.* and ¶ 57 *et seq.*).
217. In their reply dated October 17, 2018, the Statis urged the Rome Court of Appeal to reject Kazakhstan's opposition on the grounds that (a) Kazakhstan's position had already been addressed and rejected by the Swedish courts and (b) the Italian court is not permitted, in an enforcement action, to assess the evidence presented in the Arbitration proceedings or otherwise review the merits of the Award.<sup>316</sup>
218. Significantly, at the time the Statis were urging the Italian court to follow the Swedish rulings, they already knew of KPMG's serious doubts about their Financial Statements and its launch of an investigation into the matter. The Statis concealed this evidence from the Rome Court of Appeal, as they did from all other courts, and of course, this evidence was not known to the Swedish courts when they made the rulings that the Statis were asking the Italian court to follow.

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<sup>312</sup> *Id.*, ¶ 12.

<sup>313</sup> *Id.*, ¶ 14.

<sup>314</sup> Affidavit of Daniele Geronzi and Cecilia Carrara of Legance, Italian Exequatur Proceedings, March 29, 2019, 1.

<sup>315</sup> *Id.*, 1.

<sup>316</sup> *Id.*, 2.

219. At the first hearing on November 7, 2018, the Rome Court of Appeal ordered Kazakhstan to file its defensive brief and supporting documents by November 21, 2018, and the Statis to file their reply brief by December 6, 2018.<sup>317</sup> In its brief, Kazakhstan presented to the Rome Court of Appeal all the then-available evidence of the Statis' fraud.<sup>318</sup> Only in its reply brief did the Statis for the first time attempt to raise a few points in defence to Kazakhstan's fraud allegations without presenting any evidence. At that point in the proceedings, Kazakhstan had no opportunity to reply.<sup>319</sup>
220. There followed on February 27, 2019, a mere twenty-minute hearing of which, under Italian civil procedure, there is no verbatim transcript. Also under Italian procedure, the courts rely pre-eminently not on oral argument by counsel but on the parties' written submissions. On the same day as the hearing, the Rome Court of Appeal rejected Kazakhstan's opposition and declared the Award enforceable.<sup>320</sup> Like the D.C. Court, the Rome Court of Appeal wrongly accepted the Statis' argument that the Svea Court of Appeal in the Set-Aside Proceedings had already made a determination of Kazakhstan's fraud allegations, which it had not done, and that that determination should be followed:

*[I]t appears from the documentation forming part of the proceedings that both the Stockholm Court of Appeal and the Swedish Supreme Court, in the application brought before them to set aside the award, considered arguments that substantially fall within the grounds relied on before this Court [...] that were decided against [Kazakhstan] in these proceedings, substantially showing the irrelevance for the purposes of the decision of the alleged fraudulent conduct of Anatoli Stati and Gabriel Stati.<sup>321</sup>*

221. I note once again that, in fact, at no point did the Swedish courts make a finding on the merits of the fraud, and the Statis' assertion that they had done so was false. With respect, I question both the D.C. and the Italian courts' reliance on purported findings of the Swedish courts that the Swedish courts did not make. Additionally, when the Swedish courts issued their rulings, they had before them none of the newly-discovered evidence of fraud. Meanwhile, the decision that the one court that actually made a finding, albeit a *prima facie* one – the English High Court – was given no consideration.

## **E. The Netherlands**

### **1. Dutch Exequatur Proceedings (September 2017-July 2020) and Decision Dated July 14, 2020**

222. On September 26, 2017, the Statis applied for a grant of exequatur of the Award in the Netherlands, which Kazakhstan opposed. After a June 22, 2018 hearing, the Amsterdam Court of Appeal on November 6, 2018 rendered an interim judgement allowing Kazakhstan

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<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*, 3.

<sup>321</sup> Judgment of the Rome Court of Appeal (No. 1490/2019), Italian Exequatur Proceedings, February 27, 2019, 4.

to make a submission to further substantiate its fraud allegations on the basis of documents discovered through disclosure in the English Recognition Proceedings.

223. On February 5, 2019, Kazakhstan made its submission, furnishing all of the key documents – including witness and expert evidence – that it had been able to discover up to that date.<sup>322</sup> In reply, the Statis advanced a number of familiar arguments:

- (i) First, the Statis denied the existence of the fraud, though they submitted no evidence in support of this denial and made no effort to refute Kazakhstan's evidence. They simply represented that their annual reports and KPMG's audit reports were all credible.<sup>323</sup>
- (ii) Second, the Statis argued that the procurement of the LPG Plant equipment was structured using a transfer pricing arrangement driven by tax-optimisation purposes.<sup>324</sup>
- (iii) The Statis also argued (falsely) that KPMG was aware of Perkwood's party-related status (*see supra*, ¶ 58):<sup>325</sup>

*During the examination of the annual financial accounts, TNG's auditors, KPMG, had full access to all the accounting records. KPMG was aware of Perkwood's function. During the arbitration the Investors submitted several documents in which Perkwood's role in the LPG Plant project was described.*<sup>326</sup>

*Kazakhstan's attempts to undermine the reliability of the annual reports in every way possible do not detract from this either.*<sup>327</sup>

- (iv) At the June 22, 2018 hearing, the Statis maintained that the difference in price charged by Tractebel and the one paid to Perkwood was mostly due to bona fide

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<sup>322</sup> The Azalia Agreement, January 11, 2006, between Perkwood and Azalia; Azalia and Perkwood Invoices; Customs Declaration Issued by Perkwood for the period March 2007 through December 2008; Correspondence between Artur Lungu and KPMG, August-September 2008; Representation Letters sent to KPMG Audit LLC by Anatolie Stati and Artur Lungu for the period 2008–2009; LPG Project CAPEX (Vitol) [Ascom's internal excel files detailing cost estimates of LPG Plant equipment], October 25, 2006; An analysis of contracts and invoices related to the Statis' costs on delivery of the LPG Plant equipment; Ascom's internal records of the LPG Plant CAPEX; Second Witness Statement of Franjo Zaja, January 12, 2017 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070]; Expert Report of Dipl. Ing. Ernst Kallweit of, January 12, 2017 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070]; Expert Report of Thomas Gruhn of Deloitte, January 19, 2018; Witness Statement by James Crawford of TGE, July 9, 2018; Expert Report of TPA Global, February 6, 2019; Expert Opinion of Professor T.F.E. Tjong Tjin Tai, August 15, 2019; Expert Opinion of PwC dated August 19, 2019; KPMG-Kazakhstan Notice, August 21, 2019.

<sup>323</sup> Statis' Pleading Notes for the Hearing, Dutch Exequatur Proceedings, August 27, 2019, ¶ 54.

<sup>324</sup> Statis' Pleading Notes for the Hearing, Dutch Exequatur Proceedings, June 22, 2018, ¶¶ 87–88.

<sup>325</sup> *See* for a full account of the Statis incorrect statements on KPMG, Letter of De Brauw Blackstone Westbroek N.V. to NautaDutilh N.V., November 13, 2019.

<sup>326</sup> Statis' Motion after Interim Judgment, Dutch Exequatur Proceedings, April 16, 2019, ¶ 221.

<sup>327</sup> Statis' Pleading Notes for the Hearing, Dutch Exequatur Proceedings, August 27, 2019, ¶ 54.



costs for transport of equipment.<sup>328</sup> Much later they added that difference in costs was because of Perkwood's ostensible management fee.<sup>329</sup>

- (v) In relation to the double-billing issue, the Statis argued that the equipment under Annex 14 of the Perkwood Agreement was to be purchased “*as a backup*.”<sup>330</sup> As was discussed *supra* at ¶¶ 158-159, the Statis ran a different story in Sweden and claimed that the equipment under Annex 14 was to be purchased to increase the capacity of the LPG Plant.<sup>331</sup>
- (vi) Finally, the Statis asserted that, even if there was fraud, Kazakhstan knew or should have known of this during the Arbitration.

224. In rebuttal, Kazakhstan presented a transfer pricing expert from TPA Global who opined that there was no transfer pricing (*see supra*, ¶ 71).<sup>332</sup> One of the reasons for the expert's conclusion was that honest disclosure of an affiliate status of the companies is a requirement for transfer pricing.<sup>333</sup> With regard to the credibility of the Financial Statements, it is now known that KPMG withdrew its Audit Reports for the Financial Statements as they were materially misstated and not a credible source of information (*see supra*, ¶ 54 *et seq.*). KPMG's withdrawal of its Audit Reports in August 2019 also dispelled any notion that, as the Statis contend, KPMG was aware of Perkwood's related-party status (*see supra*, ¶ 54 *et seq.*). On February 15, 2016, KPMG notified the Statis that they had presented Perkwood as an independent third party in their Financial Statements and to KPMG, while Perkwood was in fact a Stati company (*see supra*, ¶¶ 98-101). On the existence of any bona fide transport costs, the Statis' own documentation prove that their assertions were baseless (*see supra*, ¶¶ 42-46). Kazakhstan offered an estimate, based on the Statis' document disclosure in the English Recognition Proceedings, of what the actual costs associated with delivery of the LPG Plant equipment would be, and demonstrated that it could only amount, at most, to \$4.9 million.<sup>334</sup> Any assertion of a “management fee,” was also falsified. The English High Court of Justice found no evidence that Perkwood performed any management services at all (*see supra*, ¶¶ 95-96).

225. It took several years following issuance of the Award before the pervasiveness of the fraud committed by the Statis could be uncovered. Kazakhstan was not, and could not have been, aware of the magnitude of the Statis' fraud at the time of the Arbitration.

226. On August 22, 2019, Kazakhstan submitted to the Amsterdam Court of Appeal KPMG's letter to Kazakhstan of August 21, 2019 (“**KPMG-Kazakhstan Notice**”) (*see supra*, ¶ 56), in which KPMG had just informed Kazakhstan that it had invalidated its audit reports for

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<sup>328</sup> Statis' Pleading Notes for the Hearing, Dutch Exequatur Proceedings, June 22, 2018, ¶ 87.

<sup>329</sup> Letter of De Brauw Blackstone Westbroek N.V. to the Amsterdam Court of Appeal, August 2, 2019, ¶ 6.V.

<sup>330</sup> Statis' Pleading Notes for the Hearing, Dutch Exequatur Proceedings, June 22, 2018, ¶ 90.

<sup>331</sup> Hearing Transcript, Svea Court of Appeal, Swedish Set Aside Proceedings, Day 13, October 6, 2016, 27.

<sup>332</sup> *See*, Expert Opinion of TPA Global, February 6, 2019 (on transfer pricing aspects of intercompany transactions between Azalia, Perkwood and TNG).

<sup>333</sup> Letter of De Brauw Blackstone Westbroek N.V. to the Amsterdam Court of Appeal, Dutch Exequatur Proceedings, August 2, 2019, ¶ 6.I.

<sup>334</sup> *Id.*, ¶ 6. V.

the Statis' Financial Statements.<sup>335</sup> Notably, the New KPMG Evidence (*see supra*, ¶ 57 *et seq.*) was not yet available to Kazakhstan at that time, though it was available to the Statis.

227. At a hearing on August 27, 2019, Kazakhstan adduced the KPMG-Kazakhstan Notice in support of its allegations of fraud.<sup>336</sup> In response, the Statis argued that this late submission “deprived the Stati parties of the opportunity to respond properly [to this letter], for example by submitting earlier correspondence between KPMG and the Stati Parties from 2016, which correspondence would have put the aforementioned letter from KPMG in the right context.”<sup>337</sup> In fact, Kazakhstan did not know, and could not have known, of the existence of the 2016 correspondence between the Statis and KPMG before it discovered this correspondence in October 2019 (*see infra* ¶ 229).
228. After the hearing, on August 30, 2019, Kazakhstan requested the Statis to disclose the 2016 correspondence between them and KPMG that they had referenced.<sup>338</sup> The Statis responded on September 6, 2019, stating that “*the procedural debate has been concluded and the case is ready for judgment*” and that “[a]t this stage of the proceedings, we are unable to see what interest might still be served by the submission of the aforementioned correspondence.”<sup>339</sup> They added, incorrectly, that they “*did not rely at the hearing on (the contents of) this earlier correspondence with KPMG from 2016,*” but instead “*merely referred to the existence of the correspondence from 2016*” and that they had “*expressly offered to submit this correspondence from 2016 at the hearing should the Court or Kazakhstan so require*” but “*neither [Kazakhstan] nor the Court requested that this correspondence be produced at the hearing.*”<sup>340</sup> Kazakhstan sent a further request for disclosure of this correspondence on October 9, 2019, but on October 17, 2019 the Statis once again refused.<sup>341</sup>
229. It was only thereafter, on October 25, 2019, that Kazakhstan obtained the New KPMG Evidence through other legal proceedings in Kazakhstan involving KPMG.<sup>342</sup> Accordingly, on November 13, 2019, Kazakhstan again wrote to the Statis, stating that the New KPMG Evidence showed that they had deceived KPMG, the Svea Court of Appeal in Sweden, the English High Court and the Amsterdam Court of Appeal. Kazakhstan’s letter also advised the Statis that Dutch procedural law obligated them to submit the correspondence exchanged between KPMG and the Statis to the Amsterdam Court of Appeal, notwithstanding the fact that the procedural debate was closed and the judgment was pending.<sup>343</sup> Kazakhstan itself was prevented from submitting such evidence without

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<sup>335</sup> Kazakhstan’s Exhibits 123A and 123B, Dutch Exequatur Proceedings.

<sup>336</sup> Witness Statement of Albert Marsman, Dutch Counsel for Kazakhstan, October 14, 2020, ¶ 1.4.

<sup>337</sup> *Id.*, ¶ 1.5.

<sup>338</sup> *Id.*, ¶ 1.7.

<sup>339</sup> Letter from Nauta to DeBrauw, September 6, 2019, 2.

<sup>340</sup> *Id.*

<sup>341</sup> Witness Statement of Albert Marsman, Dutch Counsel for Kazakhstan, October 14, 2020, ¶¶ 1.9–1.10.

<sup>342</sup> *Id.*, ¶ 1.12.

<sup>343</sup> *Id.*, ¶ 1.14.

the Statis' consent because of applicable Dutch Rules of Procedure and Professional Conduct.<sup>344</sup>

230. In their written reply dated November 22, 2019, the Statis made no comment on the New KPMG Evidence, reiterating that the procedural debate was over and judgment was pending.<sup>345</sup>

231. On July 14, 2020, the Amsterdam Court of Appeal issued its judgment,<sup>346</sup> stating *inter alia* the following:

*From the statements made by Kazakhstan in the aforementioned procedure concerning the claimed deception, and from submitted documents in relation to wit [sic], it could be deduced that TNG, the shares of which were, at that time, owned by Stati et al., made payments to Perkwood and Azalia, other entities connected to Stati et al., while there was no clear factual or legal basis for those payments. This, however, does not mean that procedural deception was committed, as claimed by Kazakhstan. This claim is refuted simply by the fact that there is no proof that these payments were made with the intention of deceptively inflating the value of the LPG installation in the arbitral procedure.<sup>347</sup>*

232. It is on this basis that the Amsterdam Court of Appeal granted exequatur.

## 2. Dutch Attachment Proceedings

233. In parallel to the Dutch exequatur proceedings, the Statis initiated proceedings for interim enforcement of the Award against assets allegedly belonging to Kazakhstan, and thereby on September 8, 2017 obtained an *ex parte* attachment on moneys of the National Fund of Kazakhstan held by NBK. On January 23, 2018, the District Court of Amsterdam issued a judgment lifting the attachment on the ground *inter alia* that the Statis had breached their obligation of truthfulness to the court. Specifically, the Statis had failed to disclose in their *ex parte* application that three years earlier (in 2014) they had attempted to obtain *ex parte* attachment of the same assets, but this had been rejected by the Dutch court on the basis of sovereign immunity. The District Court of Amsterdam held:

*[T]he NBK is correct to argue that in the attachment application of 30 August 2017, Stati acted in breach of the obligation to be truthful in Article 21 DCCP. The attachment application submitted in 2014 also related, as acknowledged at the hearing, to this claim of the NBK on AAMGS BNYM. It is established that this attachment was unsuccessful (see 2.6 above). Stati*

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<sup>344</sup> *Id.* ¶ 1.6. Rules of Professional Conduct for Dutch lawyers, Rule 21, paragraph 3: “After the date for judgment has been set, the attorney at law is not allowed to address the court without the consent of the other party.” (informal translation from Dutch).

<sup>345</sup> *Id.*, ¶ 1.15.

<sup>346</sup> Judgment of the Amsterdam Court of Appeal, Dutch Exequatur Proceedings, July 14, 2020.

<sup>347</sup> *Id.*, ¶ 3.15 (Codex translation).

*should have made explicit reference hereof to th[is] in this attachment application. This is consistent with the fact that the Attachment Syllabus, which should be regarded as soft law/best practice also provides in the framework of Article 21 DCCP that attachment applications submitted previously must be reported.*<sup>348</sup>

234. The District Court of Amsterdam issued the following order to the Statis:

*Subject to penalty payment of €1 million for each violation, [the Statis] shall append a copy of this judgment to any future attachment applications submitted to a Dutch introductory court in which he applies for leave to levy attachment on the basis of the arbitral awards described in paragraph 2.1 of this judgment on (i) assets which are part of the National Fund, (ii) bank and securities accounts in the name of the NBK, (iii) claims based on the GCA and monies and securities held pursuant to the GCA, and (iv) other assets of the NBK.*<sup>349</sup>

## F. Belgium

### 1. The Belgian Exequatur Proceedings (November 2017-Present) and Decision Dated December 20, 2019

235. On November 13, 2017, the Statis filed an *ex parte* application for exequatur before the Brussels Court of First Instance which, on December 11, 2017, was granted (the “**Belgian Exequatur Order**”).
236. On February 2, 2018, Kazakhstan filed an opposition to the Belgian Exequatur Order. It was not at that time aware of the New KPMG Evidence, which only came to light more than a year later, in August-October 2019.
237. The Statis, in their written submissions, denied Kazakhstan’s fraud allegations, arguing falsely that KPMG had access to knowledge of Perkwood’s actual role and was duty bound to act on that knowledge. They denied concealment of that role, while elaborating on Perkwood’s alleged contribution to the construction of the LPG Plant. The Statis made these assertions despite having received KPMG’s letter dated February 15, 2016 casting serious doubt over them. At the time, Kazakhstan and the Belgian Court of Appeal were unaware of this 2016 correspondence between KPMG and the Statis.
238. In their submissions, the Statis also relied on the VDD Report to advance the false argument (*see supra*, ¶ 37) that Kazakhstan knew during the Arbitration that Perkwood was a Stati company.<sup>350</sup> The Statis repeated the narrative in their submission dated January

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<sup>348</sup> Judgment of the Amsterdam District Court, Dutch Attachment Proceedings, January 23, 2018, ¶ 5.4 (informal translation).

<sup>349</sup> *Id.*, ¶ 7.2 (informal translation).

<sup>350</sup> Statis’ First Submission, Belgium Exequatur Proceedings, September 28, 2018, ¶¶ 151, 167, 169.

31, 2019.<sup>351</sup> Notably, in this same submission, the Statis argued that Artur Lungu did not intend to hide the true status of Perkwood from KPMG. However, in their submission after the Lungu Deposition in the U.S. (*see supra*, ¶ 106 *et seq.*), the Statis deleted this assertion.

239. On August 9, 2019, before the KPMG-Kazakhstan Notice (*see supra*, ¶ 56) and without having the benefit of the New KPMG Evidence, Kazakhstan filed its final submission in the Belgian exequatur proceedings. However, after receipt of the KPMG-Kazakhstan Notice, though still unaware of the New KPMG Evidence, Kazakhstan on October 11, 2019 sent a letter to the Brussels Court of First Instance, seeking to introduce the KPMG-Kazakhstan Notice into evidence,<sup>352</sup> although the final date for its submissions, August 9, 2019, had passed.<sup>353</sup>
240. Then, after becoming aware of the existence of the New KPMG Evidence during the proceedings in the Amsterdam Court of Appeal (but still not having possession of it), Kazakhstan wrote to the Statis’ Belgian counsel, NautaDutilh, requesting production of all correspondence between the Statis and KPMG dating back to 2016.<sup>354</sup>
241. On October 25, 2019, the Statis sent a letter to the Brussels Court of First Instance, seeking to prevent the court’s taking into consideration KPMG’s decision to invalidate its audit reports (as recorded in the KPMG-Kazakhstan Notice).<sup>355</sup> In this letter, the Statis asserted *inter alia* that:
- (i) for the first time, ten years after their issuance, the Statis’ Financial Statements were “*suddenly*” being called into question by KPMG;
  - (ii) “*Kazakhstan had first put KPMG Audit LLC (Kazakhstan) under pressure in 2016 – the subject of the notorious correspondence of 2016 whose production is now requested by Kazakhstan – but the manoeuvre failed at the time;*”
  - (iii) KPMG’s August 21, 2019 letter invalidating its audits of the Statis’ Financial Statements “*is manifestly the result of new pressure exercised by Kazakhstan and is by no means the result of an independent and impartial investigation that we can expect from an auditor as renowned as KPMG;*”
  - (iv) “*the alleged findings of Kazakhstan are in any case not new because it has always claimed that the financial statements of the companies of the Statis were inaccurate and misleading;*” and

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<sup>351</sup> Statis’ Second Submission, Belgium Exequatur Proceedings, January 31, 2019, ¶¶ 251, 252. The same statements were reproduced in the Explicatory note annexed to the Statis’ Submission, Belgian Exequatur Proceedings, April 15, 2019, ¶¶ 80–82, 85 and in Statis’ Submissions, Belgian Exequatur Proceedings, April 15, 2019, ¶¶ 475–477.

<sup>352</sup> Kazakhstan’s letter to the Brussels Court of First Instance, Belgium Exequatur Proceedings, October 11, 2019.

<sup>353</sup> Witness Declaration of Arnaud Nuyts, Belgian Counsel for Kazakhstan, October 30, 2020, ¶ 16.

<sup>354</sup> Kazakhstan’s letter to NautaDutilh Avocats Luxembourg S.A.R.L, October 17, 2019.

<sup>355</sup> Statis’ letter to the Brussels Court of First Instance, Belgium Exequatur Proceedings, October 25, 2019.

- (v) Kazakhstan’s letter dated October 11, 2019 and its exhibits, “*constitute new dilatory manoeuvres and should be excluded from debate.*”

242. On October 25, 2019, the Statis made a final submission to the Brussels Court of First Instance in the Belgian exequatur proceedings in which they asserted that, despite the “*seriousness of the allegations made by Kazakhstan*” in regard to the audited Financial Statements, KPMG had in fact never “*piped a word.*”<sup>356</sup> This statement is clearly in contradiction with the February 15, 2016 KPMG Letter (*see supra*, ¶¶ 58-60), in which KPMG expressly raised its serious doubts concerning the accuracy of the Financial Statements.
243. On November 6, 2019, Kazakhstan sent a letter to the Brussels Court of First Instance stating that it had sought and obtained the correspondence from KPMG only upon issuance of the Kazakh court’s orders dated October 17, 2019 and further decision dated October 25, 2019.<sup>357</sup> Underscoring the Statis’ concealment of the correspondence from the Belgian court, Kazakhstan also categorically denied that it had “*put [KPMG] under pressure*” in 2016, that “*the manoeuvre failed at the time,*” or that the invalidation of the audit reports by KPMG’s letter dated August 21, 2019 came as a “*sudden*” surprise to the Statis. Kazakhstan emphasized that the actions taken by KPMG had direct relevance to the compatibility of the Award with public policy. Kazakhstan also informed the Brussels Court of First Instance that the Statis had been directed by KPMG, and were obligated, to “*ensure that anyone in receipt of the relevant financial statements and audit reports is informed of this development [i.e., KPMG’s invalidation of its independent audit reports].*”
244. At the hearing on Kazakhstan’s opposition to the Belgian Exequatur Order, held on November 13-15, 2019, the Statis initially objected to entry of the KPMG-Kazakhstan Notice and the New KPMG Evidence into the record.<sup>358</sup> But then, after Kazakhstan had completed its oral pleadings, the Statis withdrew their objection. This procedural tactic permitted the documents to be admitted on the last day of the hearing but prevented Kazakhstan from addressing the documents during its oral pleadings.<sup>359</sup>
245. On December 20, 2019, the Brussels Court of First Instance rendered its decision and authorized exequatur of the Award in Belgium (“**Belgian Exequatur Judgment**”). In its decision, the court did not address the substance of Kazakhstan’s fraud claim. Rather, drawing on the Svea Court of Appeal’s judgment in the Set-Aside Proceedings, it held that as a matter of Belgian law no causal link existed between the alleged fraud and the outcome of the Arbitration.<sup>360</sup> In so holding, the Brussels Court of First Instance ignored the fact that the LPG Plant’s valuation was based on the KMG Indicative Offer, which was itself the product of the Statis’ fraud.

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<sup>356</sup> Statis’ Second Submission, Belgium Exequatur Proceedings, January 31, 2019, ¶¶ 251–252.

<sup>357</sup> Kazakhstan’s Letter to the Brussels Court of First Instance, Belgium Exequatur Proceedings, November 6, 2019.

<sup>358</sup> Witness Declaration of Arnaud Nuyts, Belgian Counsel for Kazakhstan, October 30, 2020, ¶ 16.

<sup>359</sup> *Id.*, ¶ 17.

<sup>360</sup> Decision of the French-language court of First Instance of Brussels, Belgium Exequatur Proceedings, December 20, 2019, 26, 29.

246. However, the Brussels Court of First Instance found, correctly, that Kazakhstan’s allegations of fraud were not subject to *res judicata* since the Svea Court of Appeal had not in fact ruled on their merits in its December 9, 2016 judgment in the Set-Aside Proceedings. The Brussels Court of First Instance also properly held that in an enforcement action in Belgium, the conformity of an award with public policy is to be determined in accordance with Belgian public policy, and not Swedish public policy.
247. Still, having decided the case on causation grounds, the Brussels court gave no consideration to the KPMG-Kazakhstan Notice and the New KPMG Evidence or to the merits of Kazakhstan’s fraud allegations more generally (*see supra*, ¶¶ 239-244). All of those issues remained unaddressed and the Statis prevented Kazakhstan from properly addressing the New KPMG Evidence at the exequatur hearing (*supra*, ¶ 244). This did not prevent the Statis from mischaracterizing the November 2019 hearings before the Brussels Court of First Instance and pretending that the fraud arguments and the New KPMG Evidence were discussed in detail before the court and in the Belgian Exequatur Judgment.<sup>361</sup>
248. On February 17 and June 2, 2020, Kazakhstan filed two appeals against the Belgian Exequatur Judgment: one before the Brussels Court of Appeal and one before the Belgian Court of Cassation, respectively. On November 17, 2020, the Brussels Court of Appeal granted Kazakhstan’s request for a full appeal on the merits, including the fraud allegations, to be conducted on the basis of all available evidence, not just the evidence on the record in the Brussels Court of First Instance.<sup>362</sup> These proceedings are currently pending.

## 2. The Belgian Conservatory Garnishment Proceedings (September 2017-Present)

249. In parallel with the Belgian exequatur proceedings, the Statis initiated enforcement proceedings, filing on September 29, 2017 an *ex parte* application before the Belgian Attachment Judge for garnishment of assets of NBK (Kazakhstan’s central bank) held by BNYM. The application was granted *ex parte* on October 11, 2017 (the “**Belgian Garnishment Order**”). After being served, NBK and Kazakhstan filed an opposition to the garnishment and a hearing was held before the Belgian Attachment Judge. In a decision dated May 25, 2018, the garnishment was upheld in principle, although the court referred the issue of whether BNYM actually held any assets of Kazakhstan subject to garnishment<sup>363</sup> to the English court, being the competent court for the question of the BNYM-NBK relationship under the so-called Global Custody Agreement (on the respective proceedings before the High Court of Justice of England, *see supra*, ¶¶ 178-205).<sup>364</sup> Kazakhstan’s appeal against the May 25, 2018 Belgium decision is currently pending.

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<sup>361</sup> Witness Declaration of Arnaud Nuyts, Belgian Counsel for Kazakhstan, October 30, 2020, ¶ 37.

<sup>362</sup> Judgment of the Court of Appeal Brussels, Belgian Exequatur Proceedings, November 17, 2020.

<sup>363</sup> This is called the “subject-matter” of the garnishment in the English proceedings.

<sup>364</sup> Judgment of the Dutch-speaking court of first instance in Brussels, Belgian Protective Garnishment Proceedings, May 25, 2018, section 3.1.4, 13.

250. On November 8, 2019, Kazakhstan sought to have the KPMG-Kazakhstan Notice, the 2016 KPMG Evidence and the 2019 KPMG Evidence introduced in the Belgian conservatory garnishment proceedings, a request the Statis opposed on the basis of the allegation that these documents were irrelevant to the garnishment proceedings. The Statis falsely argued that “*the entire fraud discussion is foreign to the present proceedings, which only concern (the conditions and subject-matter of) a conservatory garnishment. The debate of the alleged fraud is conducted in the opposition against the exequatur before the French-speaking Court of First Instance in Brussels. The case has been pleaded last week [on November 13, 14 and 15, 2019] and the parties were heard on the KPMG-documents.*”<sup>365</sup>
251. The Statis once again repeated the false assertion that the evidence concerning Kazakhstan’s fraud arguments had already been dismissed by the Swedish courts. They also repeated the false assertion, without adducing any evidence, that KPMG’s actions were the result of pressure exerted by Kazakhstan on KPMG in 2016 and 2019. They argued that the new evidence did not in any event establish fraud.<sup>366</sup>
252. On December 3, 2019, the Brussels Court of Appeal rejected the Statis’ position, and granted Kazakhstan’s application to introduce the KPMG-Kazakhstan Notice, 2016 KPMG Evidence and 2019 KPMG Evidence into the garnishment proceedings. The Court of Appeal held that the new evidence was both “*new*” and “*relevant*” in the garnishment proceedings because it affected the “*quality of the title,*” *i.e.*, whether the “*title*” (the Award) had been obtained by fraud:

*In the present case, the documents that have been asserted to be new and relevant are: Exhibit 2 [KPMG’s letter of 21 August 2019 to Kazakhstan] and Exhibit 3 [KPMG’s letter of 21 August 2019 to the Statis], from which, according to [Kazakhstan], it must be inferred that the title on which the attachment is based, was obtained by fraud.*

*The Statis dispute this assertion.*

*The Court considers that these exhibits are relevant as they relate to the quality of the title.*

*The Court further considers that these exhibits (dated 21 August 2019) are new documents as they were issued after the last day of the period when allowed for the applicant to file its written submissions. In these circumstances, the request is granted.*<sup>367</sup>

253. The Brussels Court of Appeal then ordered adjournment of the hearing that had been scheduled for December 10 and 17, 2019. Kazakhstan was granted leave to file the KPMG-Kazakhstan Notice, the 2016 KPMG Evidence and the 2019 KPMG Evidence, together

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<sup>365</sup> Witness Declaration of Arnaud Nuyts, Belgian Counsel for Kazakhstan, October 30, 2020, ¶ 24.

<sup>366</sup> *Id.*, ¶ 25.

<sup>367</sup> *Id.*, ¶ 30.



with new submissions in support of the evidence. The hearings are scheduled to take place in April and May 2021.

### 3. The Belgian Renewal Garnishment Proceedings (September 2020-Present)

254. On September 9, 2020, the Statis filed an *ex parte* application before the Attachment Judge of the Dutch-speaking Court of First Instance of Brussels to request renewal of the original Garnishment Order obtained on 11 October 2017. The Statis' conservatory garnishment was set to automatically expire, by law, after three years unless renewed before its expiration.
255. In their application, the Statis concealed a series of important facts and developments from the Attachments Judge (who was a different attachment judge than the one that had granted the Garnishment Order), including key judgments before Belgian, English and Swedish Courts, which represented important rulings on the subject of the Kazakh assets and the Statis' attachments.<sup>368</sup> For example, the Statis failed to highlight the English High Court's April 22, 2020 decision that BNYM in fact owes no debt to Kazakhstan (*see supra*, ¶ 202 *et seq.*).<sup>369</sup> Further, the Statis also made no reference to the June 6, 2017 judgment of Justice Knowles holding that "*there is a sufficient prima facie case that the Award was obtained by fraud*" (*see supra*, ¶ 181).<sup>370</sup> And, the Statis failed to include any reference to the Svea Court of Appeal's judgment of June 17, 2020, holding that the very assets the Statis were seeking to attach were in fact protected by absolute immunity from execution (*see supra*, ¶ 174).<sup>371</sup>
256. On September 10, 2020, based solely on the Statis' *ex parte* application, the Dutch-speaking Court of First Instance in Belgium granted a renewal of the Garnishment Order ("**Renewal Order**")<sup>372</sup> for a period of three years.
257. On October 16, 2020, the Renewal Order was served on Kazakhstan, which on November 13, 2020 filed a third-party opposition against the Order. In that opposition Kazakhstan highlighted the many omissions and misrepresentations made by the Statis in their *ex parte* application for renewal, including the omission of material facts concerning the KPMG correspondence between Kazakhstan and the Stati Parties, as well as the fact that KPMG has invalidated all of its audit reports for the Statis' Financial Statements.<sup>373</sup>
258. On November 23, 2020, BNYM filed an application to voluntarily intervene in the proceedings.

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<sup>368</sup> Kazakhstan's Opposition to the Renewal Order, November 13, 2020, ¶ 35 *et seq.*

<sup>369</sup> *Id.*, ¶ 37.

<sup>370</sup> *Id.*, ¶ 39.

<sup>371</sup> *Id.*, ¶ 40.

<sup>372</sup> Order of Dutch-speaking Court of First Instance of Brussels, Belgian Renewal Garnishment Proceedings, September 10, 2020.

<sup>373</sup> Kazakhstan's Opposition to the Renewal Order, November 13, 2020, ¶ 43.

259. By order dated December 1, 2020, the Attachments Judge decided to schedule a hearing in the case on June 29, 2021 so that the decisions in the other ongoing proceedings could be taken into account before moving forward with the proceedings.

#### **4. The Belgian Executory Garnishment Proceedings (June 2018-Present)**

260. On June 12, 2018, the Statis served the Brussels Court of First Instance's decision of May 25, 2018 on BNYM by way of a bailiff's writ in order to convert the conservatory garnishment into an executory garnishment, following which, on June 27, 2018, Kazakhstan served its writ of opposition.

261. On October 25, 2018, the Statis applied for an interim measure in the form of a transfer of \$530 million from the London branch of BNYM to an escrow account of the Belgian treasury for deposit and consignment. The Brussels (French-speaking) Court of First Instance rejected the application on June 28, 2019, *inter alia* because the issue of whether BNYM actually had any assets of Kazakhstan subject to the garnishment was still in dispute between the parties in the English High Court.<sup>374</sup> The executory garnishment proceedings remain pending.

### **G. Luxembourg**

#### **1. The Luxembourg Exequatur Proceedings (August 2017-Present) and Decision Dated December 19, 2019**

262. On August 24, 2017, the Statis applied for exequatur of the Award in *ex parte* proceedings before the Luxembourg District Court, which on August 30, 2017, granted the request ("**Luxembourg Exequatur Order**").<sup>375</sup> Kazakhstan appealed to the Luxembourg Court of Appeal on November 2, 2017. Between November 2017 and July 2019 there followed several rounds of written submissions. In their submissions, the Statis denied Kazakhstan's fraud allegations, though without explanation or documentation. The Statis again maintained that the Perkwood Agreement was not a sham and that Perkwood performed a legitimate role in construction of the LPG Plant, while also repeating their contention that KPMG had access to all accounting records and was aware of Perkwood's functions.<sup>376</sup> These statements were made despite the enquiries raised in KPMG's February 15, 2016 Letter – then unknown to Kazakhstan – showing them to be false.

263. Though the phase for filing written submissions ended on July 15, 2019, Kazakhstan requested the Court of Appeal on September 18, 2019 to re-open that phase so that

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<sup>374</sup> Judgment of the French-speaking Court of First Instance of Brussels, Belgian Executory Garnishment Proceedings, June 28, 2019, section 2.1.

<sup>375</sup> Decision of the District Court of Luxembourg, Luxembourg Exequatur Proceedings, August 30, 2017.

<sup>376</sup> See, Statis' Reply on Kazakhstan's Opposition, Luxembourg Exequatur Proceedings, May 4, 2018, ¶¶ 31, 51; Statis' Reply on Kazakhstan's Rejoinder, Luxembourg Exequatur Proceedings, October 25, 2018, ¶¶ 57, 60, 62, 71; Statis' Reply to Kazakhstan's Second Rejoinder, Luxembourg Exequatur Proceedings, February 4, 2019, ¶¶ 119, 120, 124, 129, 165.

Kazakhstan could introduce the KPMG-Kazakhstan Notice (*see supra*, ¶ 56). In support of that request, Kazakhstan noted that the Statis had relied on its Financial Statements and KPMG’s audit reports in their briefs before the Luxembourg Court of Appeal.<sup>377</sup>

264. On September 24, 2019, the Statis objected to Kazakhstan’s request, arguing that:

(i) it did not meet the procedural requirement of containing “*serious grounds*;”

(ii) KPMG’s audit reports were not “*at the heart of the matter*” and not the “*cornerstone of the whole arbitration*;”

(iii) Kazakhstan’s new evidence “*comes late*;” and

(iv) debate over the impact of KPMG’s audit reports on quantum had already taken place.<sup>378</sup>

265. On September 26, 2019, Kazakhstan asked the Luxembourg Court of Appeal to hold a hearing at which the new evidence could be heard and, on October 9, 2019, Kazakhstan submitted a list of witnesses, comprised of ten KPMG employees who could testify about KPMG’s audits and the circumstances surrounding the KPMG-Kazakhstan Notice.<sup>379</sup>

266. At an October 10, 2019 hearing, the Statis repeated their objection to the admission of the KPMG-Kazakhstan Notice. The Statis submitted that the KPMG-Kazakhstan Notice had no influence on the Award or the Luxembourg exequatur proceedings, though the Statis conceded that the Financial Statements contained a “*mistake*,” viz., the status of Perkwood, while at the same time insisting that the mistake did not affect the accuracy of the Financial Statements’ numbers.<sup>380</sup>

267. Following the hearing, Kazakhstan sought on November 19, 2019 to introduce the 2016 correspondence between KPMG and the Statis that Kazakhstan only discovered on October 25, 2019. Kazakhstan argued that those documents had an important influence on the entire case. More particularly, they showed that the Statis falsified the Financial Statements and committed fraud not only in the Arbitration, but also in the various subsequent post-Award Proceedings, including but not only in the Luxembourg Court of Appeal.<sup>381</sup>

268. In their reply dated November 21, 2019, the Statis maintained that Kazakhstan was resorting to “*all available means*” to prevent the Award from being enforced. Kazakhstan’s request, they argued, was “*identical*” to the one it had made on September 18, 2019 and to which they had responded in their September 24, 2019 letter and their pleadings. The Statis

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<sup>377</sup> Witness Declaration of François Kremer, Luxembourg Counsel for Kazakhstan, December 3, 2020, ¶ 15.

<sup>378</sup> *Id.*, ¶ 16.

<sup>379</sup> *Id.*, ¶ 17.

<sup>380</sup> *Id.*, ¶ 18.

<sup>381</sup> *Id.*, ¶ 20.

repeated their assertion that the request did not in any event present the “serious grounds” required by Luxembourg rules of civil procedure.<sup>382</sup>

269. Between November 28 and December 16, 2019, the parties exchanged further correspondence on this issue with the court.<sup>383</sup>

270. On December 19, 2019, the Luxembourg Court of Appeal rendered its decision, confirming the exequatur order.<sup>384</sup> The Luxembourg Court of Appeal decided not to assess whether actual fraud took place, giving the following reasoning:

*In this case, the alleged fraud does not result from the decision of the Arbitral Tribunal, nor from the decision of the SVEA Court or the Supreme Court of Sweden, nor from a decision by a criminal court or of a court of another State.*

*Insofar as the fraud should be clear, it is not the responsibility of the Court, hearing the request for exequatur, to proceed with investigative measures to verify the existence of the alleged fraud.*

*It is therefore necessary to reject both the offer of evidence by witnesses as well as through decisory oath formulated by the appellant.*

*Even assuming it to be proven, the alleged fraud could not have impacted the arbitrators’ decision regarding Kazakhstan’s liability, but only concerned a portion of the damages and interest in question, in this case the damages and interest relating to the LPG Plant.<sup>385</sup>*

271. Additionally, the court found that “*there is no reason to revoke the closure order, given that the fact that KPMG withdrew all audit reports it prepared on behalf of the companies KPM and TNG is irrelevant and does not constitute a serious cause pursuant to Article 225 of the New Code of Civil Procedure.*”<sup>386</sup> The court also refused to summon and hear the ten KPMG employees as witnesses.<sup>387</sup>

272. On March 16, 2020, Kazakhstan filed an appeal in cassation to the Luxembourg Supreme Court. These appeal proceedings are currently pending.

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<sup>382</sup> *Id.*, ¶ 21 (citing Article 225 of the New Code of Civil Procedure).

<sup>383</sup> *See*, Kazakhstan’s Letter to Luxembourg Court of Appeal, Luxembourg Exequatur Proceedings, November 28, 2019; Kazakhstan’s Letter to Luxembourg Court of Appeal, Luxembourg Exequatur Proceedings, December 10, 2019; Stasis’ Letter to Luxembourg Court of Appeal, Luxembourg Exequatur Proceedings, December 16, 2019.

<sup>384</sup> Judgment of the Luxembourg Court of Appeal, Luxembourg Exequatur Proceedings, December 19, 2019.

<sup>385</sup> Judgment of the Luxembourg Court of Appeal, Luxembourg Exequatur Proceedings, December 19, 2019, 36–37 (informal translation).

<sup>386</sup> *Id.*, 38.

<sup>387</sup> *Id.*, 36.

## 2. The Luxembourg Attachment Proceedings (August 2017-Present)

273. In parallel with the exequatur proceedings, on August 22 and December 7, 2017 the Statis initiated garnishment proceedings in Luxembourg.
274. On January 23, 2020, the Statis’ requested validation of the attachments on the basis of the decision of the Luxembourg Court of Appeal dated December 19, 2019 (*see supra*, ¶ 270).
275. Kazakhstan objected to this request based on its allegation that the Award was obtained by fraud. Kazakhstan further argued that enforcement of the Award violates criminal laws on fraud and money laundering in Luxembourg and, given the fact that criminal proceedings are pending against the Statis in Luxembourg (*see infra*, ¶ 281 *et seq.*), requested a stay of the proceedings.
276. On October 20, 2020, Kazakhstan sent a letter to the Luxembourg court in the attachment proceedings noting that the Statis had not addressed many of the fraud allegations and supporting evidence, but instead had requested that the court close procedural debate and render judgment.<sup>388</sup> Kazakhstan underscored that “[u]nder normal circumstances, any honest party faced with such allegations of fraud should speak out. However, the Statis, faithful to their strategy, continue to flee forward by relying exclusively on an arbitral award obtained by fraud, as well as on its exequatur, and voluntarily avoid the debate that embarrasses them, to use a euphemism.”<sup>389</sup>
277. On December 2, 2020, Kazakhstan sent another letter to the Luxembourg court explaining that a court in Gibraltar, in proceedings initiated by the bankruptcy manager of TNG against Terra Raf, Anatolie and Gabriel Stati and Tristan, had decided to allow service of the proceedings on three Stati defendants located outside of Gibraltar. After examining the evidence on fraud by the Statis, including the New KPMG Evidence, the Gibraltar court had observed that there was a “*real prospect of success*” on each of the fraud claims.<sup>390</sup> In its letter of December 2, 2020, Kazakhstan requested leave from the Luxembourg court to address the decision of the Gibraltar court.<sup>391</sup>
278. On December 3, 2020, the Statis objected to Kazakhstan’s request, relying on their usual contentions,<sup>392</sup> and as a result the Gibraltar decision was not admitted into the Luxembourg proceeding.

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<sup>388</sup> Kazakhstan’s letter to the District Court of Luxembourg, Luxembourg Attachment Proceedings, December 2, 2020.

<sup>389</sup> Kazakhstan’s letter to the District Court of Luxembourg, Luxembourg Attachment Proceedings, October 20, 2020, 1.

<sup>390</sup> Judgment of the Supreme Court of Gibraltar, November 27, 2020, ¶¶ 43, 48, 57, 58, 63 and 68 [*Tolkynneftegaz LLP, Orynbasar Kybygul v. Terra Raf Trans Trading Ltd., Anatolie Stati, Gabriel Stati, Tristan Oil Limited*, in the Supreme Court of Gibraltar, 2020/ORD/072].

<sup>391</sup> Kazakhstan’s letter to the District Court of Luxembourg, Luxembourg Attachment Proceedings, December 2, 2020.

<sup>392</sup> Statis’ letter to the District Court of Luxembourg, Luxembourg Attachment Proceedings, December 3, 2020, pp. 1–2.

279. On December 11, 2020, a hearing was held before the Luxembourg court in the attachment proceedings.
280. On January 8, 2021, the Luxembourg Court of Appeal ruled in favor of Kazakhstan, denying the Statis' request for immediate validation of their claims under the Award.<sup>393</sup> After reviewing the evidence of the Statis' fraud, including various expert opinions submitted by Kazakhstan, the court found a substantial nexus between the allegations of fraud against the Statis and the Award rendered in their favor against Kazakhstan.<sup>394</sup> The court also observed that commission of the fraud as alleged would subject the Statis to the criminal law of Luxembourg, as they would have knowingly misled the Tribunal on the value of the LPG Plant.<sup>395</sup> As a result, the court decided to stay the proceedings pending the outcome of the criminal investigations that are currently ongoing against the Statis in Luxembourg (*see infra*, ¶ 281 *et seq.*).

### 3. The Luxembourg Criminal Complaint (May 2019-Present)

281. On May 27, 2019, Kazakhstan filed a criminal complaint for fraud and, concurrently, a civil claim for damages against the Statis before the Investigative Judge of the Luxembourg District Court (*juge d'instruction*). It argued that the Statis' attempts to enforce the Award amounted to fraud due to the Statis having:
- (i) engaged in forgery, attempted forgery and attempted use of forgery (in violation of Sections 196 and 197 of the Criminal Code);
  - (ii) obtained or attempted to obtain a judgment by fraud (in violation of Section 496 of the Criminal Code); and
  - (iii) engaged in money-laundering or attempted money-laundering (in violation of Section 506 of the Criminal Code).
282. On October 9, 2019, the investigating judge declined jurisdiction, but that ruling was reversed on January 28, 2020 by the Luxembourg Court of Criminal Appeal. Proceedings before the *juge d'instruction* remain pending.

## VI. CONCLUSION

283. This Annex is designed simply to record all the events pertinent to this case, from the underlying transactions, through the Arbitration, and up to the latest post-Award Proceedings in national courts. It is as long and detailed as it is because the case is exceptionally complex and because judicial proceedings in numerous jurisdictions relating to it have taken place and continue to do so. The details themselves are of the utmost

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<sup>393</sup> Judgment of the Luxembourg District Court, Luxembourg Attachment Proceedings, January 8, 2021.

<sup>394</sup> *Id.*, 19.

<sup>395</sup> *Id.*, 17.

importance because they are the basis of the patterns of conduct on the Statis' part that are the subject of my Opinion.

284. In this Annex, I have presented as factual and objective an account as possible based on the totality of the material available to me, ensuring to the best of my ability a fully accurate account of all pertinent events. This Annex strives to remain 100% factual and avoid any conclusions on my part. I reserve my conclusions for the Opinion to which this Annex is appended.