Lawyers at the Court

Case 82

Luxembourg Court of Appeal
Third Chamber
Docket No. CAL-2018-00013
Notified on 30 April 2021

029636-70001.33963898v.2

CONCLUSIONS I AFTER CASSATION

For :

the **Republic of Kazakhstan**, represented by the President of the Republic, currently in office, and insofar as necessary by the Prime Minister, currently in office, or by any other body empowered to do so, or by the Ministry of Justice, represented by the Minister of Justice, currently in office, established at 8, Mangilik Elr Street, House of Ministries, 13 Entrance 010000, Nur-Sultan Left Bank, Kazakhstan

Appellant by virtue of a writ of the bailiff Véronique Reyter, residing in Esch-sur-Alzette, 50 bd J.F. Kennedy, registered with the District Court of and in Luxembourg; writ served on 2 November 2017;

appearing on behalf of the limited liability company **Arendt & Medernach,** registered with the Luxembourg Bar, established and having its registered office at L-2082 Luxembourg, 41A, avenue J.F. Kennedy, registered in the Trade and Companies Register under number B 186.371, represented for the purposes of the present document by **Mr François Kremer**, lawyer at the Court, residing in Luxembourg, assisted by the firm **BONN STEICHEN & PARTNERS**, a limited partnership, established and having its registered office at L-2370 Howald, 2, rue Peternelchen, Immeuble C2, registered in the Luxembourg Trade and Companies Register under number B211933, registered in list V of the Luxembourg Bar Association, represented by its manager currently in office, namely the limited liability company BSP S.à r.l., established and having its registered office at L-2370 Howald, 2, rue Peternelchen, Immeuble C2, registered in the Luxembourg Trade and Companies Register under number B211880, itself represented for the purposes of the present proceedings by **Mr Fabio TREVISAN**, Avocat à la Cour;

Against :

1) **ASCOM GROUP SA, a** company under Moldovan law, established and having its registered office at 75 Mateevici Street, Chisinau, MD 2009 MOLDOVA, registered under the number 1002600006034, represented by its president currently in office, or by any other body authorised for this purpose;

2) Mr. **Anatolia STATI**, businessman, residing at 20 Dragomirna Street, Chisinau, MD-2008 Moldova;

3) Mr **Gabriel STATI**, businessman, living at 1A Ghioceilor Street, Chisinau, MD-2008 Moldova;

4) **TERRA RAF Trans Traiding Ltd, a** company incorporated under the laws of Gibraltar, having its registered office at 13/1 Line Wall Road, Gibraltar, British Overseas Territory, registration number 68609, represented by its present director, or by any other body empowered for that purpose;

hereinafter referred to together as the "**Stati**";

Respondents for the purposes of the aforementioned writ of bailiff Véronique Reyter;

appearing on behalf of the limited liability company **Nauta Dutilh Avocats Luxembourg S.à r.l.**, registered at the Luxembourg Bar, established and having its registered office at L-1233 Luxembourg, 2 rue Bertholet, registered in the Luxembourg Trade and Companies Register under number B189905 and represented for the purposes of the present proceedings by **Maître Antoine Laniez**, lawyer at the Court, residing in Luxembourg;

In the presence of :

Madame le Procureur Général d'Etat, Parquet Général du Luxembourg, Cité Judiciaire, Plateau du St Esprit, Luxembourg.

Reviewed the act of appeal of 2 November 2017;

Reviewed the judgment of the Court of Appeal of Luxembourg of 19 December 2019;

Reviewed the decision of the Court of Cassation of 11 February 2021.

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I. PROCEDURAL FEEDBACK

The Stati seek to enforce in Luxembourg an arbitral award of 19 December 2013, as amended on 17 January 2014 (hereinafter, the "**Award**"), rendered by an arbitral tribunal (hereinafter, the "**Arbitral Tribunal"**) on the basis of the Energy Charter Treaty (hereinafter, the "**ECT"**) in the arbitration case of *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan* (SCC Case No. V 116/2010) (hereinafter, the "**ECT Arbitration**").

The Award was declared enforceable in the Grand Duchy of Luxembourg by an order made on request on 30 August 2017 (No. 40/2017).

By bailiff's writ of 2 November 2017, the Republic of Kazakhstan filed an appeal against this exequatur order. This appeal was rejected by the Court of Appeal in a judgment n°CAL-2018-00013 of 19 December 2019,

This judgment was appealed to the Supreme Court. On 11 February 2021, the Court of Cassation quashed and annulled the judgment of 19 December 2019 and declared *the said judicial decision and the subsequent acts* '*null and void*'.

MACHINE TRANSLATION

The case was thus referred back to your Court to rule on the appeal against the exequatur order.

The issue in this case is to show that the enforcement of the Award in Luxembourg would be contrary to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "**New York Convention"**).

The pleadings of the Republic of Kazakhstan will unequivocally demonstrate the fraudulent actions of the Stati before and during the ECT Arbitration, which therefore prevent the exequatur of the Arbitral Award in Luxembourg.

II. THE CONTEXT OF THE DISPUTE BETWEEN THE PARTIES

Anatolie Stati and his son Gabriel Stati are two "entrepreneurs" of Moldovan and Romanian nationality, who acquired 100% of the shares of two Kazakh companies; Kazpolmunay LLP (hereinafter, "**KPM**") and Tolkynneftegaz LLP (hereinafter, "**TNG**").

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

In 2006, Stati (via its company TNG) initiated the project to build a liquefied petroleum gas plant in Kazakhstan (hereinafter, "**LPG Plant**"), in collaboration with the oil company Vitol FSU B.V. (hereinafter, "Vitol"), which would also fall victim to Stati's fraudulent manoeuvres. (hereinafter, "**Vitol"**), a company that will also fall victim to the fraudulent manoeuvres of the Stati. The LPG Plant was never operational because Stati abandoned the construction of the LPG Plant long before the TCE Arbitration was initiated.

In October 2008, after receiving information that Anatolia Stati was using KPM and TNG for illegal activities to invest in areas under UN sanctions (in particular South Sudan), the Kazakh authorities conducted an investigation into the activities of TNG and KPM. The investigation, which lasted more than a year and a half, revealed a number of serious shortcomings such as tax evasion and breaches of obligations under subsoil use contracts. As a result, the Ministry of Oil and Gas of the Republic of Kazakhstan terminated the subsoil use contracts awarded to KPM and TNG in July 2010.

Alleging a breach of the ECT[1], the Stati initiated investor-state arbitration proceedings against Kazakhstan. They claimed, inter alia, that (i) they were victims of an alleged "campaign of harassment" launched by the Republic of Kazakhstan against them, giving rise

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[1]The ECT is an international treaty that aims to promote and protect bona fide investments in foreign states. To this end, the ECT grants certain rights to investors acting in good faith

to state responsibility under the ECT, (ii) that they had invested more than USD 245 million in the construction of the LPG Plant and that the value of the LPG Plant was at least USD 199 million, as set out in an indicative bid obtained by the Stati for the LPG Plant from the state-owned entity KazMunayGas Exploration and Production JSC (hereinafter, "**KMG**" and "**KMG indicative bid"**).

The Arbitral Tribunal accepted, almost verbatim, the Stati's allegations on Kazakhstan's liability. On this basis, the Arbitral Tribunal also accepted Stati's argument that the value of the LPG Plant was at least equal to the USD 199 million indicated in the KMG indicative bid.

III. THE DEFENCE LINE OF THE REPUBLIC OF KAZAKHSTAN REMAINS CONSTANT IN THE POST-CASSATION PROCEEDINGS

Since the award was made, it has become clear that the Stati's alleged 'investment' in Kazakhstan was illegal and in reality a mere front for the diversion of funds.

In the ECT Arbitration, the Stati knowingly made false statements and provided misleading information and documents to the Arbitral Tribunal to continue to benefit from their illegal activities in Kazakhstan. In order to win their case, they made false statements and relied on false information in all forms of submissions they made to the Arbitral Tribunal, including briefs, witness statements, expert reports, pleadings and post-hearing briefs.

The dishonest behaviour and fraudulent acts of the Stati before and during the ECT Arbitration were particularly well orchestrated and thus exceedingly difficult to bring to light. Their discovery was thus gradual.

These facts and their discovery are described in detail in paragraphs 73-125 of Professor George A. Bermann's expert opinion of 17 January 2021 (Arendt Exhibit 151) and in paragraphs 73-135 of Annex 3 (Arendt Exhibit 154). Bermann of 17 January 2021 (**Arendt Exhibit 151**) and in paragraphs 73-135 of Annex 3 (**Arendt Exhibit 154**).

The new evidence uncovered in stages - after the TCE Arbitration - from mid-2015 until 2020 has been analysed by various leading independent experts, all of whom have confirmed the veracity of the allegations of fraud made by the Republic of Kazakhstan:

(i) In 2015 and 2017, Deloitte & Touche GmbH (hereinafter, "Deloitte**")** provided an assessment of the early evidence of fraud obtained by the Republic of Kazakhstan. In particular, Deloitte estimated that the "*historical costs*" of the construction of the LPG Plant had been inflated *"[b]y an amount of up to approx. USD 130 million*" (**Exhibits No. 157 and 158 Arendt**).

(ii) In February 2019, Stefan Huibregtse, Managing Director and Managing Partner of Transfer Pricing Associates Global B.V. (hereinafter, "**TPA Global"**) (a global network of over 5,000 tax professionals) concluded that the Stati supply agreement for the construction of the LPG Plant was "*clearly a sham*" (**Arendt Exhibit No. 159**).

(iii) In August 2019, PricewaterhouseCoopers LLP in London (hereinafter, "**PwC**") issued a report, in which it concluded that "*TNG's auditors were provided with false representations*", and that these "*material misstatements and the serious attack on the integrity of TNG's management would render [the financial statements] unreliable*" (**Arendt Exhibit No. 160**).

(iv) In January 2020, Professor Christoph Schreuer[2] opined that evidence of the Stati's fraud on the Tribunal "*would have been essential to the determination of [the Tribunal's] jurisdiction, the admissibility of the Stati Parties' claims and Kazakhstan's liability*" (**Arendt Exhibit 161**).

(v) In July 2020, Alexander Layton QC[3] confirmed that the English High Court, in the June 2017 judgment of Justice Knowles, came to the conclusion that there was sufficient evidence of fraud to justify a trial for the purpose of setting aside an order to enforce a foreign arbitral award. Furthermore, it confirmed that Justice Knowles' judgment is final and binding (**Arendt Exhibit No. 162**).

(vi) In January 2020, PwC issued a further report confirming that the decision of Stati's auditors (i.e. KPMG) to invalidate the audit reports issued for the financial statements 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*. (**Arendt Exhibit No. 163**).

(vii) In July 2020, PwC published two more reports. The first revealed that the Stati had diverted hundreds of millions of dollars from their Kazakh operations/companies to tax havens. The second revealed that these transactions raised "*red flags"* indicating money laundering (**Arendt Exhibits 164 and 165**).

(viii) In July 2020, Stefan D. Cassella[4] opined that there is evidence that the Stati "*could be criminally prosecuted in Latvia for money laundering offences involving the proceeds of the Tristan Notes scheme, the Sales of*

[2] Leading expert in the field of international investment law and arbitration.

[3] English *Barrister with* Twenty Essex, specialising in private international law, cross-border litigation and commercial law.

[4] Money laundering expert and former *Deputy Chief of the U.S. Justice Department's Asset Forfeiture and Money Laundering Section Justice*.

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" (**Arendt Exhibit 166**).

(ix) In August 2020, Dr Patrik Schöldström[5] concluded that in the Swedish proceedings, the court did not take into account the allegations of fraud "*in its assessment at all*". He also concluded that there is "*credible evidence that the Stati Parties procured the [ECT] Award by actions and omissions that under Swedish law amount to criminal fraud*" and that in the course of the proceedings the Stati violated their duty to tell the truth. As a result, he concluded that "*the Svea Court did not have a correct and truthful basis for its 2016 Decision*" and that the award should not be enforced (**Arendt Exhibit 167**).

(x) In January 2021, Professor George A. Bermann of Columbia University in New York, one of the world's leading experts on arbitration and the New York Convention, concluded that :

"189. *The Statis' conduct in this case reveals a pervasive lack of integrity and thus falls decisively short of the standards of truthfulness applicable to parties in arbitration and litigation. Reported here are not isolated acts, but rather a full-scale and systematic pattern of deception that began at the start of their Kazakh operations and continued through both the Arbitration and the post-Award Proceedings. "[T]he Award in this case is a product of gross deceit and is unworthy of recognition or enforcement under the New York Convention*." (**Arendt Exhibit No. 151**).

(xi) In January 2021, Professor Catherine Rogers, another leading expert on international arbitration, concluded that false statements and fraudulent evidence had been presented and withheld by the Arbitral Tribunal on several key issues concerning both the merits of the case and damages in the ECT Arbitration (**Arendt Exhibit 168**).

(xii) In April 2021, Professor Bernard Hanotiau, one of Belgium's and the world's most renowned arbitration specialists, who has acted as arbitrator in a very large number of arbitrations and investment arbitrations, concluded in an opinion that the Award cannot be enforced in Belgium due to a clear and fundamental violation of international public policy (**Arendt Exhibit No. 169**).

[5] Judge at the Court of Appeal in Svea

MACHINE TRANSLATION

IV. DESCRIPTION OF THE FRAUDULENT ACTIONS OF THE STATI

A. As for the fraud committed by the Stati against the Arbitral Tribunal

The Stati's fraud on the Arbitral Tribunal has many aspects. Two main aspects will be analysed below: the Arbitral Tribunal was deliberately misled as to the liability of Kazakhstan on the basis of the ECT, *i.e.* as to the true causes of the financial difficulties of the Stati companies in Kazakhstan (1); and the Arbitral Tribunal was fraudulently led to determine the alleged damages of the Stati on the basis of the production of false declarations and documents containing inflated and fraudulent financial data (2).

In each case, the following is provided (a) the position of Stati in the ECT Arbitration, (b) how the Arbitral Tribunal ruled on this basis, (c) the demonstration that Stati's behaviour amounts to fraud and (d) the conclusion.

1. As for the deception about the real causes of the financial difficulties of the Stati companies in Kazakhstan

1.1 The position of the Stati

During the ECT Arbitration, the Stati claimed that the Republic of Kazakhstan had violated the provisions of the ECT by engaging in an alleged "campaign of harassment" against TNG and KPM, which would have contributed to a severe liquidity crisis[6] for these companies.

For example, during the pleadings before the Arbitral Tribunal, the Stati argued that "*the state actions that took place had a direct effect that exacerbated the temporary liquidity problems, such as the denial of the Credit Suisse loan facility which, in Claimants' view, was directly attributable to the actions of the state*"[7].

In his witness statement, Mr Anatolie Stati said that "*Kazakhstan's actions contributed to a severe liquidity crisis in the companies in the first half of 2009*"[8] and that due to Kazakhstan's harassment campaign, "*it was impossible to borrow money on reasonable commercial terms*"[9]. Similarly, Artur Lungu, CFO of Ascom and vice president of Tristan, testified for the Stati that an alleged harassment campaign in Kazakhstan *"caused a liquidity crisis for TNG and KPM in the spring and summer of 2009.*" [10]

According to the Stati, the rating agencies therefore placed the Stati companies '*on negative watch*' [11]and they were forced to obtain a bridging loan[12]. The Stati were then forced to enter

[6] Second witness statement of Anatolia Stati, ECT Arbitration, 7 May 2012, para 41; Second witness statement of Artur Lungu, ECT Arbitration, 5 May 2012, para 7.
[7] Transcript of Final Hearings, Day 2, May 2013, p. 86.
[8] Second Witness Statement of Anatolie Stati, ECT Arbitration, 7 May 2012, paragraph 41.
[9] Idem paragraph 43
[10] Second witness statement of Artur Lungu, ECT arbitration, 5 May 2012, paragraph 7.
[11] Claimants' First Post Hearing Brief, ECT Arbitration, paragraph 23.
[12] Award, paragraph 642.

into the Laren transaction[13], which made the financial situation of TNG and KPM very problematic (hereinafter, the '**Laren loan**'). [14]

In this regard, Mr Anatolie Stati testified as follows: "*although the terms were terrible (35% interest on a $60 million note, plus the issuance of $111 million of new Tristan notes), I had no choice but to proceed with that loan in order to keep the companies afloat while I tried to sell them*"[15].

Mr. Artur Lungu, the former CFO of Ascom Group S.A. and Vice President of Tristan Oil Ltd. confirmed in his testimony:

"The terms of the Laren Facility were not good. But it was all we could acquire at the time because of the substantial risks posed by Kazakhstan's harassment campaign [...]"[16] .

In their pleadings, the Stati did not hesitate to dramatise the events surrounding the Laren loan and alleged that the Laren lenders had "taken advantage" of the situation:

"So the bottom line here is that the Claimants drove the best bargain they could to keep these companies afloat, from loan sharks who took advantage of the fact that no one would lend to the Claimants on commercial terms after the rating agencies had downgraded Tristan, based on the criminal investigations and the pre-emptive rights issues in January, February and March of 2009.

The Stati maintained throughout the ECT Arbitration that the Laren loan, with its "*disastrous*"[17], "*horrendous*" [18]and "*extremely onerous"* conditions imposed by the *Laren loan sharks,* would not have taken place without the actions of the Republic of Kazakhstan[19].

On the basis of the above, the Stati claimed that the Republic of Kazakhstan had violated the '*fair and equitable* treatment*'* (hereinafter, the "**FET")** standard under the ECT[20].

1.2 The Arbitral Tribunal's decision on the liability of the Republic of Kazakhstan

[13] Award, paragraph 1338.
[14] Award, paragraph 1334.
[15] Second Witness Statement of Anatolie Stati, ECT Arbitration, 7 May 2012, paragraph 43.
[16] Second witness statement of Artur Lungu, ECT arbitration, 5 May 2012, para 9.
[17] Claimants' *First Post Hearing Brief*, ECT Arbitration, paragraph 24.
[18] *Idem* paragraph 217.
[19] Transcript of the final hearings, Day 2, May 2013, pp. 86-87.
[20] Award, paragraph 683.

The Arbitral Tribunal found that the Republic of Kazakhstan had violated the FET standard under the ECT[21] and awarded the Stati the sum of USD 497,685,101[22]. This sum included the following items:

- USD 277.8 million for two oil and gas fields;
- USD 31.3 million for Stati's alleged investment to explore and develop a new contract sector;
- USD 199 million for the LPG plant.

The Arbitral Tribunal recognised that it had to take into account the specific factual circumstances of the case as set out by the Stati and assess them in the context of the ECT[23].

In its analysis of the factual circumstances and liability under the ECT, the Arbitral Tribunal accepted the Stati's allegations which were mainly put forward by the testimonies of Mr Anatolie Stati, Mr Artur Lungu, as well as by the written and oral submissions of the Stati's counsels, and concluded that the Republic of Kazakhstan's measures constituted a series of harassment measures coordinated by various institutions, which amplified the financial difficulties of KPM and TNG.

In particular, the Arbitral Tribunal reproduced almost verbatim the arguments of the Stati in its findings on the liability of Kazakhstan. Thus, the Arbitral Tribunal determined that the "*actions caused the Credit Suisse loan to fall through*"[24]. The Arbitral Tribunal was also satisfied that the Laren loan *"with its onerous terms, was arranged in June 2009 because it was necessary for KPM and TNG to secure these funds and because Respondent's actions prevented them from doing so sooner*"[25]. In particular, the Arbitral Tribunal stated:

"Although Claimants drove the best bargain they could, the cumulative effect of the barrage of inspections and the very public revelation in December 2009 of the alleged forgery and fraud said to have been committed in relation to the transfer to Terra Raf, as indicated above, led to the severe downgrades by Moody's and Fitch rating agencies. While the worldwide economic crisis was affecting these companies in late 2008 and early 2009, the State's aggressive and concerted actions, including the inspections, the criminal charges, and the asset seizures - even before Mr. Cornegruta's trial in Agusut and September 2009 - forced Claimants to accept the "horrendous" Laren Facility. " [26]

[21] Award, paragraphs 1086-1095.
[22] *Idem* paragraph 1859. The total amount awarded included an offset of $10,444,899 for debts owed.
[23] Award, paragraph 944.
[24] Award, paragraph 1398.
[25] Award, paragraph 1416.
[26] *Same as*

The cumulative effect of the Republic of Kazakhstan's conduct on the liquidity crisis, the Credit Suisse facility and the Laren loan was considered by the Arbitral Tribunal as a violation of the FET standard under the ECT[27].

The Arbitral Tribunal did not make findings on other alleged violations of the ECT, including the illegal expropriation of the Stati investment in Kazakhstan.

1.3 Demonstration of fraud

After the ECT Arbitration, the Republic of Kazakhstan gradually began to discover evidence that it (and the Arbitral Tribunal) did not have at the time of the ECT[28] Arbitration.

This evidence was obtained in stages, through *discovery*, disclosure and deposition procedures, to which the Republic of Kazakhstan and the Stati were subjected in various post-arbitration court proceedings.

Paragraphs 30-135 of Annex 3 to Professor George Bermann's legal opinion of 17 January 2021 (**Arendt Exhibit 154**) give the full chronology of the discovery of the evidence. The conclusions drawn on the basis of this evidence can be found in paragraphs 73 to 205 of Professor Bermann's expert opinion **(Arendt Exhibit 154**), in Professor Rogers' expert opinion (**Arendt Exhibit 168**) and in Professor Hanotiau's expert opinion (**Arendt Exhibit 169**).

This establishes that the Stati misled the Arbitral Tribunal about, among other things, the causes of the Kazakh companies' liquidity crisis and the real reasons why they did not obtain the Credit Suisse loan and the 'appalling' terms of the Laren loan.

1.3.1 The liquidity crisis

In 2016 and 2019 (i.e. 3 and 6 years after the ECT Arbitration), the Republic of Kazakhstan obtained bank statements of dozens of Stati companies registered worldwide and mainly in *offshore*[29] jurisdictions.

These bank statements were provided to the Republic of Kazakhstan through intergovernmental legal support by the [30]Latvian law enforcement authorities. Some of these bank statements were disclosed by the Stati during the English exequatur proceedings in June 2018 (i.e. 5 years after the ECT Arbitration).

Analysis of these bank statements (by PWC) shows that during the period 2006-2010 (which largely coincides with or immediately precedes the alleged harassment campaign) the Stati diverted hundreds of millions of dollars from Kazakh companies to their foreign subsidiaries,

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[27] Award, paragraph 1540.

[28] Approved judgment of Knowles J, 6 June 2017, paragraph 79 [Stati et al. v. Republic of Kazakhstan, in the High Court of Justice, Commercial Court, CL-2014-000070].

[29] Opinion of Prof. George Bermann of 17 January 2021, paragraphs 41, 49 - 53.

[30] Same as

through[31]complex related party transactions. The schemes by which the Stati illegally extracted cash from their Kazakh companies can be summarised as follows:

- **Tristan's *notes* (1st fraudulent scheme)**

The Stati incorporated a company called Tristan Oil (hereinafter, "**Tristan"**) in the British Virgin Islands to issue bonds, the funds of which were intended to be used to finance TNG and KPM's operations in Kazakhstan. In reality, Stati used the funds received from investors for purposes other than the operation of TNG and KPM, and entered into transactions with related parties that falsely inflated the costs of the oil and gas operations (PwC Report - **Arendt Exhibit 164**). Of course, the link between these parties was concealed.

For example, between December 2006 and June 2007, Tristan raised $420 million by issuing bonds subscribed by investors in the US. Investors were promised 10.5% interest. They were told that the money would be used for oil and gas operations in Kazakhstan by TNG and KPM and that the money would not be used in major transactions with related parties without informing the bondholders.

In 2006 and 2007, Tristan used the money from these bonds to lend USD 325 million to TNG and KPM at an interest rate of 16% or more, and a further USD 76 million to another Stati company, Terra Raf Trans Trading Ltd (hereinafter '**Terra Raf**') at zero interest.

The difference in interest rates between what Tristan charged TNG and KPM and what it promised to pay bondholders allowed Tristan to divert approximately US$62 million from Kazakh companies, while giving the related entity, Terra Raf, an interest-free loan.

In addition, Terra Raf used the money from these bonds, at least in part, to finance activities that had nothing to do with oil and gas exploration in Kazakhstan, and to channel the money through other related entities, in violation of representations made to bondholders.

For example, between 2006 and 2009, Jepson Corporation Ltd, another Stati company, received at least USD 19.2 million directly from Terra Raf or another Stati company called Hayden Intervest Ltd. (hereinafter, "**Hayden"**), to pay for an estate in Moldova known as "Castle Stati". Hayden, in turn, diverted money from Terra Raf to Jepson, as well as the fraudulent related party transactions referred to below, involving the sale of oil and gas to Vitol and fictitious purchases of equipment from Perkwood Investment Ltd. (hereinafter, "**Perkwood**", another company whose direct holding links to the Stati were knowingly concealed and have recently been revealed).

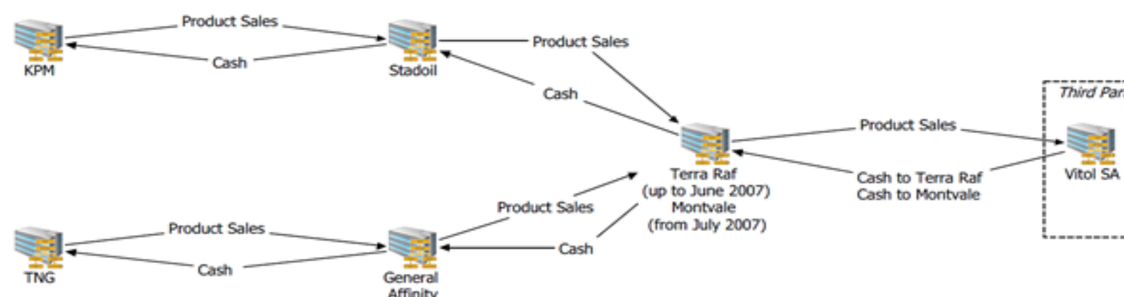
- **The sale of oil and gas (2nd fraudulent scheme)**

TNG and KPM extracted petroleum products from oil and gas fields in Kazakhstan and sold them to Vitol, a Swiss-Dutch company that trades in oil, natural gas and other products.

[31] PwC expert report dated 29 July 2020 (Analysis of the use of TNG and KPM funds by the Stati), p. 13.

These sales allowed the Stati to divert a significant portion of oil and gas revenues to a related, secretly owned company, rather than to TNG and KPM.

As described in the PwC report (**Arendt Exhibit 164)**, the system worked as follows:



TNG and KPM sold crude oil and gas condensate to General Affinity and Stadoil, two UK-registered shell companies owned or controlled by Anatolia Stati and Gabriel Stati.

Stadoil and General Affinity then sold the oil and gas first to Terra Raf and then, from July 2007, to Montvale, a shell company registered in the British Virgin Islands and controlled by Anatolia Stati through an agent.

Then Terra Raf and later Montvale sold the oil and gas to Vitol, but instead of passing on the proceeds to Stadoil and General Affinity, Montvale diverted about US$158 million to Hayden, another BVI shell company secretly controlled by Anatolia Stati and Gabriel Stati.

TNG and KPM were thus deprived of the full value of the oil and gas sold to Vitol, leading to their financial collapse, while the Stati secretly kept the embezzled funds in Hayden's account at the Rietumu Bank in Latvia.

- **The fictitious supply of equipment by Perkwood to TNG (3rd fraudulent scheme)**

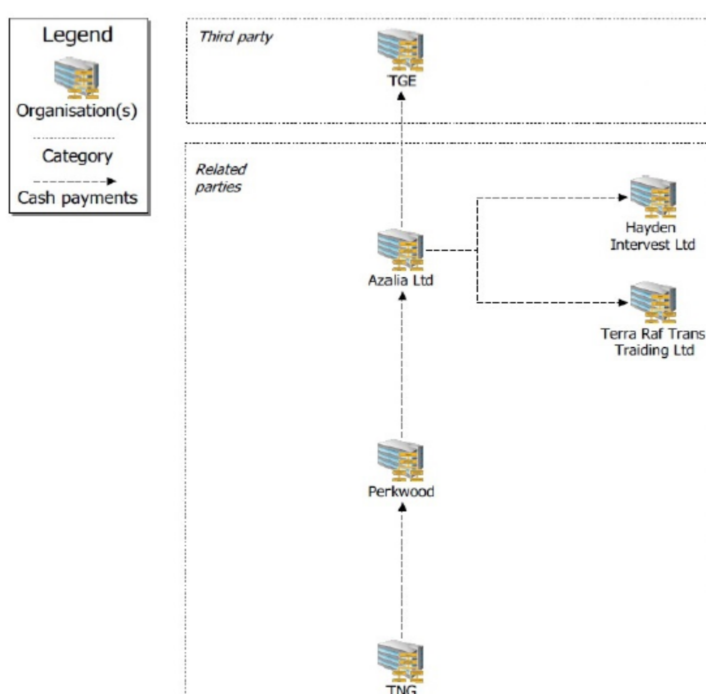
Azalia Ltd (hereinafter, "**Azalia**") is a company incorporated in Russia, controlled by the Stati, which purchased from the German company TGE Gas Engineering GmbH (hereinafter, "**TGE**"), for approximately USD 35 million, the components for the installation of the LPG Plant operated by TNG in Kazakhstan.

However, the Stati fraudulently "sold" this equipment to Perkwood shortly thereafter at a much higher price. The Stati then arranged for TNG to ostensibly "buy" the same equipment from Perkwood.

Perkwood issued fictitious invoices that allowed the Stati to transfer millions of dollars from TNG to Perkwood's account at Rietumu Bank in Latvia.

Perkwood transferred the illegally obtained funds to Azalia's account at the same bank, from where the funds were transferred to Hayden's bank account. In total, according to the PwC report, Perkwood overcharged TNG at least USD 58.8 million.

These fraudulent manoeuvres resulted in a fictitious increase in the actual construction costs incurred for the LPG Plant.



- **The evidence that the liquidity crisis was created by the Stati**

Through emails obtained in the US *discovery* proceedings in 2019 (i.e. 6 years after the ECT Arbitration), it was discovered that in August 2008, the Stati attempted to obtain financing from an investment bank to fund their operations in Kazakhstan.

In internal discussions on the potential financing of Tristan, the investment bankers raised some concerns:

"*There are a couple of wrinkles with this. One is that the reason they need this facility is because they have previously used cash from the BVI company to acquire other assets (a service company in Kurdistan, oil equipment for their refinery in Kurdistan, land in Moldova)*

and hence cannot pay the monies owed to their local Kazakh companies that hold the fileds to carry out OpEx and CapEx requirements. " [32]

This email shows that in the summer of 2008, the Stati's diverted a substantial amount of money from their Kazakh companies to their projects in Kurdistan and for the acquisition of land in Moldova (which explains why they could no longer meet their financial obligations in Kazakhstan). Notably, the diversion of funds for land acquisition in Moldova coincides with the construction of Mr Anatolia Stati's personal castle outside the capital of Moldova[33].

In addition, in the English proceedings, in June 2018, the Stati were forced to disclose certain internal documents. One of these documents was the minutes of an Ascom Group S.A. meeting dated 14 October 2008 which acknowledged "*a short- and medium-term deficit of approximately $250 - $300 million of which approximately $50 million is in relation to the activities foreseen in the 2008 budget and the remainder is from investment activities in Kurdistan/Iraq*"[34].

The Stati companies were therefore in serious financial trouble long before the alleged harassment campaign. Although they were in possession of this document during the ECT Arbitration, the Stati chose not to disclose it to the Republic of Kazakhstan and the Arbitral Tribunal.

It is clear that much of the half a billion USD embezzled was pocketed and used by the Stati to live the lavish life of a millionaire (including buying diamonds, watches, company cars, renting private jets and staying in luxury hotels[35]).

In addition, in its analysis, PwC presents evidence of possible bribery of politically exposed persons in Kazakhstan and other jurisdictions by the Stati[36] .

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[32] E-mail between John Hanson, Jonathan Wood and Roderick Fraser of Jefferies Investment Bank dated 25 November 2008.

[33] https://www.youtube.com/watch?v=Rz9wuAndO0c

[34] *Minutes of the* Ascom Group S.A. meeting of 14 October 2008.

[35] PwC expert report dated 29 July 2020 (Analysis of transactions carried out by Stati in relation to money laundering risk characteristics), paras. 3.7 - 3.13.

One example is a number of payments totalling USD 1.254 million, all made on behalf of Ms Yekaterina Lyazzatova, the daughter of Lyazzat Kiinov, former Deputy Minister of Energy and Mineral Resources of Kazakhstan and Deputy Minister of Oil and Gas, and therefore a politically exposed[37] person.

In its report, PwC also highlights a number of other such payments, including to Sarbaz H Hawrami, then a senior official in Iraqi Kurdistan, Iurie Leanca, then a member of the government and former Prime Minister of Moldova, Matombe Masanga Adelard and Olowa Lungudi, who are considered civil servants and politicians in the Democratic Republic of Congo, and Costella Garang Ring Lual, who is considered a politician in South Sudan[38] .

1.3.2 The Stati voluntarily decided to withdraw from negotiations for a loan from Credit Suisse

New evidence was uncovered during the English proceedings in June 2018 regarding a financing with Credit Suisse.

The internal memorandum prepared by the financial department of Ascom Group S.A. for Mr. Anatolie Stati in December 2008 shows that the Stati decided to reject a financing proposed by Credit Suisse, contrary to what was presented in the ECT Arbitration.

Ascom Group S.A.'s financial analyst, Adrian Golomoz, said:

"Following the analysis of the financing offer launched by Credit Suisse and the incorporation of all costs related to this transaction (cash, PIK, underwriting and other costs), it is concluded that the default interest rate (the actual cost of transaction) perceived by the lender amounts to approximately 44.7% per year. We believe that this funding offer is very expensive and restrictive as a structure. In light of the current constraints and the uncertainty surrounding the subsequent evolution of oil prices on international stock exchanges, and implicitly our income and loan repayability, we recommend rejecting it. " [39]

Although relevant to the Arbitral Tribunal's analysis, the Stati never mentioned that they planned to reject Credit Suisse's financing. Instead, they knowingly led the Arbitral Tribunal to believe that Credit Suisse's offer was unsuccessful because of the Republic of Kazakhstan's actions.

1.3.3 The Laren loan was designed to secretly reap profits

In June 2009, the Stati obtained USD 60 million in emergency funding from various lenders in a complex and opaque financial transaction. They claimed that they were forced to enter

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[36] PwC expert report dated 29 July 2020 (Analysis of transactions carried out by Stati in relation to money laundering risk characteristics), p. 35.
[37] *Idem* p. 38.
[38] *Idem* pp. 34-38.
[39] Internal memorandum prepared for Mr Anatolie Stati by the *Corporate Finance Division* of Ascom Group S.A., sent on 11 December 2008 by Mr Adrian Golomoz to Mr Artur Lungu.

into this loan on extremely unfavourable terms due to harassment by the Republic of Kazakhstan.

However, on the basis of evidence that was disclosed in June 2018 during the English proceedings, it emerged that the Laren loan was not "*caused by the conduct of Respondent*", as the Arbitral Tribunal recognised on the assertion of the Stati, but rather for the purpose of circumventing the regulations governing the issue of bonds[40].

In addition, it was discovered that Laren Holdings Ltd. (hereinafter "**Laren**") was in fact a company set up on the instructions of Tristan's financial director, Mr Artur Lungu[41], and controlled by the Stati family, whose director was Mr Eldar Kasumov, Mr Anatolie Stati's personal[42] driver.

1.3.4 Obtaining financing on reasonable terms

Although the Stati claimed in the ECT Arbitration that they were unable to obtain external financing on reasonable commercial terms and therefore had to resort to "*Laren loan sharks*", the newly discovered evidence proves this to be false.

In January 2010, i.e. six months after the Stati had concluded the Laren loan, they actually took out two more loans: USD 8.7 million from Reachcom Public Ltd and USD 10 million from Limozen Investments Ltd, both at an interest rate of approximately 11.12%[43] . As was later revealed by the Republic of Kazakhstan, Reachcom Public Ltd and Limozen Investments Ltd were associated with Rennaissance Capital, which was in fact the arranger and main contributor to the Laren loan. Needless to say, this rate is much cheaper than the 35% interest rate promised to Laren a few months earlier.

It is interesting to note that although the Stati sought compensation from the Arbitral Tribunal for the Reachcom and Limozen loan facilities, they chose not to pay the loan agreement in the proceedings. The Arbitral Tribunal criticised the Stati for not paying out the Reachcom and Limozen loan agreements and rejected the Stati[44]'s claim. It is clear that the Stati withheld these loan agreements in order to prevent the Arbitral Tribunal from drawing the conclusion that the onerous terms of the Laren loan had in fact been engineered by the Stati themselves and were not attributable to the actions of the Republic of Kazakhstan.

1.4 Conclusion

The above evidence shows that the Stati themselves stripped their Kazakh companies TNG and KPM of their assets through related party transactions.

[40] Opinion of Prof. George Bermann of 17 January 2021, paragraph 23.
[41] Invoice from Harney Westwood & Riegels to the CFO of Tristan Oil Ltd, fee note of 13 June 2009.
[42] Videotaped oral testimony of Mr Artur Lungu, transcript, 3 April 2019, p. 256.
[43] Reachcom credit facility agreement dated January 2010.
[44] Award, paragraph 1538, 1542.

These embezzlements amounted to hundreds of millions of US dollars and were directed to their investment operations in Southern Sudan and Northern Iraq (Kurdistan), using these funds to make dubious payments to politically exposed persons in Kazakhstan, Southern Sudan, Moldova, Northern Iraq (Kurdistan) and the Democratic Republic of Congo.

The evidence further shows that Stati's business operations were on the verge of bankruptcy as early as 14 October 2008, i.e. even before the alleged "harassment campaign" by the Republic of Kazakhstan began. Nevertheless, Stati told the Tribunal that its financial difficulties were caused by the Republic of Kazakhstan.

The Arbitral Tribunal accepted Stati's request on the basis of the information and documents they produced.

This clearly constitutes a fraud on the Arbitral Tribunal. If the Arbitral Tribunal had been aware of the true facts, it would not have found that Stati's investment in Kazakhstan had been harmed and that the Republic of Kazakhstan had violated the ECT standard of fair and equitable treatment.

2. <u>As for the amount of the Stati investment and the fraudulent quantum</u>

2.1 The position of the Stati

2.1.1 Stati's allegation of an alleged USD 245 million investment in the LPG Plant

In the TCE Arbitration, the Stati claimed compensation for the LPG Plant in the amount of their "real" investment, which they claimed amounted to at least USD 245 million, as well as an additional profit of USD 84,077,000 which the Stati claimed would have been made by the LPG Plant if it had been commissioned[45].

This investment amount was evidenced in Stati's revised statement, Artur Lungu's first witness statement, FTI Consulting's expert report, Stati's reply brief on jurisdiction and liability, Anatolie Stati's second witness statement, Stati's reply brief on quantum, FTI Consulting's additional expert report, Anatolie Stati's oral testimony, and Stati's first and second post-hearing briefs (**Exhibits 6, 7, 8, 9, 10, 47, 174, 175 Arendt**).

For example, the Stati stated the following in the ECT Arbitration:

[45] Stati's First Post-Hearing Brief, ECT Arbitration, 8 April 2013, paras 580, 664.

"*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.*" [46]

Anatolia Stati and Artur Lungu (former CFO of Stati), as well as Stati's financial experts, FTI Consulting (hereinafter, "**FTI"**), all testified as to the alleged USD 245 million invested in the LPG[47] Plant.

This alleged investment amount was supported by the financial statements of TNG, KPM and Tristan for the period 2007-2009, audited by KPMG Audit LLC (hereinafter, the "**Financial Statements"**).

2.1.2 **The Stati's allegation that the value of the LPG Plant was at least USD 199 million**

Although the Stati mainly argued that they had invested US$245 million in the construction of the LPG Plant, in the alternative they explicitly requested the Tribunal to award them damages in an amount at least equal to that of an indicative offer made by KMG.

The Stati obtained KMG's indicative offer in 2008, when they put their Kazakh companies up for sale. KMG preliminarily valued the LPG Plant at USD 199 million.

The figure of USD 199 million was based on the historical costs provided by the Stati on the one hand and on the results of the so-called "comparative method" on the other. The historical costs were taken directly from the financial statements of the Stati.

The Stati relied on KMG's indicative offer in the TCE Arbitration both to validate their claim for damages and, in the alternative, to claim a minimum of USD 199 million in compensation for the LPG Plant, as set out in their statement of claim[48], their reply brief on jurisdiction and liability[49], their reply brief on quantum[50], at oral argument [51]and in their first post-hearing brief[52].

FTI also relied on KMG's indicative offer in its expert reports and in its testimony before the Tribunal[53].

For example, the Stati stated in the ECT Arbitration:

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[46] *Statis' Statement of Claim*, ECT Arbitration, 18 May 2011, paragraph 5.
[47] First witness statement of Artur Lungu, ECT Arbitration, 17 May 2011 (Exhibit No. 6 Arendt), paragraph 27; second witness statement of Anatolie Stati, ECT Arbitration, 7 May 2012, paragraph 40 (Exhibit No. 8 Arendt); expert report of FTI Consulting, ECT Arbitration, 17 May 2011, paragraph 6.23 (Arendt Exhibit No. 7); Additional Expert Report of FTI Consulting, ECT Arbitration, 28 May 2012, paragraphs 2.39-2.40 (Arendt Exhibit No. 9).
[48] Declaration of the Stati, ECT Arbitration, 18 May 2011, paragraph 71.
[49] Stati's Reply Brief on Jurisdiction and Liability, ECT Arbitration, 7 May 2012, paragraph 378.
[50] Statis's Reply Brief on Quantum, ECT Arbitration, 28 May 2012, paragraph 66.
[51] Hearing on Jurisdiction and Liability, ECT Arbitration, 1 October 2012, Day 1, Hearing Transcript, pp. 91, 96.
[52] Stati's First Post-Hearing Brief, ECT Arbitration, 8 April 2013, paragraph 569.
[53] Supplementary Expert Report of FTI Consulting, ECT Arbitration, 28 May 2012, paragraph 7.5; Quantum Hearing, Day 4, ECT Arbitration , transcript of hearing, 31 January 2013, 57:4-8.

"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 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. [54]

"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. [55]

"The third indicator of value for the Tribunal, and a very important one in claimants' view, is the indicative offers [...]." [56]

The FTI expert reports submitted by the Stati to the Arbitral Tribunal also relied on KMG's indicative offer. [57]FTI's supplementary 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"[58].

FTI further testified for the Stati at the quantum hearing as follows:

"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[59] *."*

Finally, during the hearing on quantum, the Stati explicitly argued that the Arbitral Tribunal should deduct, at a minimum, the value of the Kazakh assets from KMG's indicative offer, which included the USD 199 million figure for the LPG Plant[60].

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[54] *Statis' Reply Memorial on Quantum*, ECT Arbitration, 28 May 2012, para 66.
[55] *Statis' First Post-Hearing Brief*, ECT Arbitration, 8 April 2013, paragraph 569.
[56] Quantum Hearing, Day 1, ECT Arbitration, transcript of hearing, 28 January 2013, 27:10-12.
[57] Expert reports by FTI Consulting, TCE Arbitration, 17 May 2011, 28 May 2012 modified on 25 January 2013, and 8 April 2013.
[58] *FTI Consulting's Supplemental Expert Report*, ECT Arbitration, 28 May 2012, paragraph 7.5.
[59] Quantum Hearing, Day 4, ECT Arbitration, transcript of hearing, 31 January 2013, 57:4-8.
[60] Quantum Hearing, Day 1, ECT Arbitration, transcript of hearing, 28 January 2013, 49:9-15.

2.2 The Arbitral Tribunal's decision on quantum

The Arbitral Tribunal found that the Republic of Kazakhstan had violated the FET standard under the ECT and awarded the Stati the sum of USD 497,685,101[61] .

This amount included USD 199 million for the LPG Plant.[62] The Arbitral Tribunal based its assessment on KMG's indicative offer of USD 199 million submitted and relied upon by the Stati in the TCE Arbitration, which the Tribunal considered "*the relatively best source of information*"[63].

2.3 Demonstration of fraud

Through documents obtained in 2015 (i.e. 2 years after the Arbitral Tribunal rendered the Award), it was discovered that, although the Stati claimed to have invested USD 245 million in the LPG Plant and that its value was at least USD 199 million, a large part of this amount was "*paid at will*" to an English company named Perkwood Investment Ltd (hereinafter, "**Perkwood**")[64].

Thanks to the documents obtained in the US *discovery* proceedings, it has come to light that in another arbitration proceeding against Vitol, the Stati claimed to have invested (only) about USD 200 million for the construction of the LPG[65] Plant.

The same documents also showed that Perkwood was controlled by the Stati[66]. Perkwood's 'subsidiary' status was not disclosed in any of the Financial Statements[67].

These facts, as well as the existence of parallel arbitration proceedings, were not known and were not disclosed to the Republic of Kazakhstan or the Arbitral Tribunal during the ECT[68] Arbitration.

In this case, during the annulment proceedings at the seat of arbitration in Sweden, the Stati initially did not want to acknowledge that Perkwood was an affiliate until they were confronted with compelling evidence in the form of powers of attorney issued by Perkwood to Anatolia and Gabriel Stati[69].

Further analysis of the evidence uncovered after the TCE Arbitration revealed that the actual manufacturer and supplier of the main equipment of the LPG Plant was a German company called Tractebel Gas Engineering GmbH (hereinafter, "**Tractebel**").

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[61] *Idem* paragraph 1859. The total amount awarded included an offset of $10,444,899 for debts owed.
[62] *Idem* paragraph 1856.
[63] *Idem* paragraph 1747.
[64] Reasons for judgment, 29 August 2014, [Vitol FSU BV v Ascom Group SA, before the High Court of Justice, Commercial Court, 2014 FOLIO 406].
[65] Annex 3 to the opinion of Prof. George Bermann of 17 January 2021, paragraph 36.
[66] Idem paragraph 37.
[67] PwC report of 21 January 2020.
[68] Annex 3 to the opinion of Prof. George Bermann of 17 January 2021, paragraph 33.
[69] Idem paragraph 157.

While Stati falsely claimed to have invested USD 245 million in equipment and services for the construction of the LPG Plant, the amount that Stati actually paid to Tractebel for the main equipment of the LPG Plant was only USD 35 million. The details of such a gross cost increase can be summarised as follows:

(i) Stati purchased three key pieces of equipment for the LPG Plant under a contract with Tractebel (hereinafter, the "**Tractebel Contract"**) for approximately USD 35 million, but by routing the purchase first through a sham contract between Azalia Ltd. and Perkwood (hereinafter, the "**Azalia Contract**") and then through another sham contract between Perkwood and TNG (hereinafter, the "**Perkwood Contract**"), the Stati tripled the price to approximately USD 93 million[70].

(ii) The following table directly compares the actual price of these three pieces of equipment with the fictitious and inflated price at which the Stati allegedly "resold" these pieces of equipment through the bogus Azalia and Perkwood agreements, indicating in the last column the amount by which the cost of each item was falsely inflated: [71]

Equipment	Tractebel contract price (in euros)	Tractebel contract price (in dollars)	Price of the Perkwood agreement (in dollars)	False price increase (in dollars)
Gas de-carbonisation and desulphurisation 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
Total	€28,380,000	$35,273,283	$93,095,908	$57,822,625

[70] Annex 3 to the opinion of Prof. George Bermann of 17 January 2021, paragraphs 76-78.
[71] *Idem* paragraph 87.

(iii) In addition, the Stati charged twice for the same equipment, adding approximately USD 22 million to the reported construction costs of the LPG Plant. In order to do so, Stati inserted a new annex into the Perkwood contract (hereinafter, "**Annex 14**") under which they made it appear that Perkwood was "selling" to TNG three pieces of equipment for a total cost of USD 21,884,989, the purchase of which was already recorded in another annex (Annex 2 of the Perkwood contract). In order to conceal this double billing, Stati used different descriptions in Schedule 14 and different prices[72].

(iv) Stati also included charges for equipment that did not exist[73]. Specifically, as at 31 December 2009, almost four years after the execution of the Tractebel contract, Stati capitalised an amount of approximately USD 72,003,345 for equipment for the LPG Plant that in fact did not exist[74]. This falsely inflated the reported construction costs of the LPG Plant by USD 72 003 345.

(v) The Stati concealed this cost increase by misrepresenting Perkwood as an independent English company, trading at arm's length from the Stati company, TNG.

(vi) No less problematic is[75] the so-called "*management fee*" of over USD 43 million that, according to the Stati, TNG paid to Perkwood under the Perkwood Agreement. The Stati have provided no evidence in this regard, and the English High Court of Justice has found no evidence that Perkwood provided management services:

"An agreement has been disclosed 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." [76]

(vii) The Republic of Kazakhstan did not begin to discover this scheme until well after the conclusion of the TCE Arbitration, when in August 2015, Mr Franjo Zaja, the Tractebel engineer personally involved in the construction of the LPG Plant, acknowledged Tractebel's own equipment in the sham Perkwood agreement[77] . In a witness statement filed in August 2015 in the Stati's action to enforce the Award in England, Mr Zaja, stated that

[72] *Idem* paragraph 91; Expert report by Ernst Kallweit of Tractebel, 12 January 2017, paragraphs 63-90 [*Stati et al. v The Republic of Kazakhstan*, Before the High Court of Justice, Commercial Court, CL-2014-000070].
[73] Expert report by Ernst Kallweit of Tractebel, Swedish mothballing procedures, 2 June 2016, paragraphs 6.2.6.
[74] Expert report by Thomas Gruhn of Deloitte, Swedish mothballing procedures, 1 October 2015, paragraphs 21, 48.
[75] Annex 3 to the opinion of Prof. George Bermann of 17 January 2021, paragraphs 95 *et seq.*
[76] Reasons for Judgment, 29 August 2014, paragraph 39 [*Vitol FSU BV v Ascom Group SA*, In the High Court of Justice, Queen's Bench Division, Commercial Court, 2014 FOLIO 406].
[77] Annex 3 to the opinion of Prof. George Bermann of 17 January 2021, paragraph 81.

> Tractebel had supplied the main equipment directly to TNG for approximately USD 35 million and that there had been no transaction with Perkwood or ever heard of it. When shown the Perkwood contract, Mr Zaja testified that the equipment described in it was Tractebel equipment, but that the prices had been increased considerably[78].

The analysis of the evidence uncovered by Deloitte indicates that the historical construction costs of the LPG Plant were inflated by up to several million dollars by transactions with Perkwood[79].

When in July 2019 the Republic of Kazakhstan shared the evidence discovered on the alleged investment costs in the LPG Plant with the Stati's auditors at KPMG, the latter conducted a thorough and independent assessment of this evidence and concluded on 21 August 2019 that the concealment of this information was material to the accuracy of both their audit reports and the audited financial statements[80] . On this basis, KPMG decided that the audit reports issued by KPMG were not to be relied upon 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 audit reports that were issued for the Audited Financial Statements[81] . Further details of KPMG's unprecedented decision are provided below.

In other words, the financial information on which KMG based its indicative bid and, by extension, on which the Tribunal based its determination of quantum for the LPG Plant, was shown to be false and/or unreliable. The director of KMG, who was directly involved in the production of the indicative offer, testified that had he known that the financial information was unreliable, he "*would have taken all steps necessary to ensure that the company was not misled by unreliable financial information*" and "*would have recommended the management of KMG EP not to submit the Indicative Offer at all*." [82]

2.4 **Conclusion**

With regard to the assessment of damages, the Stati presented to the Arbitral Tribunal crucial information which they themselves falsified, by invoking before the Arbitral Tribunal a set of fictitious transactions by which they dramatically inflated their investment in the LPG Plant. The Stati presented an inflated figure to the Arbitral Tribunal as the true amount invested in the GPL Plant, purporting to base it on KPMG audit reports which, without the Tribunal's knowledge, were obtained through false declarations to KPMG and on the basis of Financial Statements which the Stati knew to be false.

[78] *First Witness Statement* of Franjo Zaja, 27 August 2015, paragraph 10 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].
[79] Expert report by Dipl. Ing. Ernst Kallweit of Tractebel, 12 January 2017*,* paragraph 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].
[80] Letter from A. Clarke, KPMG Audit LLC, to Dr Patricia Nacimiento of Herbert Smith Freehills LLP (then Herbert Smith Freehills Germany LLP), 21 August 2019.
[81] *Same as*
[82] *Witness Statement* by Nuran Kairakbayev of 2 April 2020.

The Stati claimed that an indicative offer of USD 199 million obtained for the KMG LPG Plant was a neutral and fair basis on which to value the LPG Plant.

KMG expressly relied on the falsified construction costs to calculate its indicative offer of USD 199 million. Knowing this, Stati falsely, but successfully, convinced the Arbitral Tribunal that the KMG indicative offer should be used to award them USD 199 million in compensation for the LPG Plant. This clearly constitutes a fraud on the Arbitral Tribunal.

B. Fraud is established by accounting elements

The evidence uncovered by the Republic of Kazakhstan in recent years, and particularly in 2019, has been submitted to independent experts, who have confirmed that the Stati obtained the Award by defrauding the Arbitral Tribunal. Furthermore, the fraudulent behaviour of the Stati has been confirmed by the Stati's own witness and their former auditors.

1. Mr Artur Lungu

Mr. Lungu is the former CFO of the Stati Group and was sworn in court in the United States in April 2019 (**Arendt Exhibit #106**).

In this statement, Mr Lungu admitted that the Stati had provided false information to KPMG about Perkwood (*i.e*. that Perkwood was a third party company to the Stati group, when in fact it was an empty shell, directly linked to the Stati group, and through which the Stati fraudulently inflated their alleged investment costs in the LPG Plant).

KMG's indicative offer was based directly on the Financial Statements of the Stati. These statements had to be provided in accordance with International Financial Reporting Standards (hereinafter, "**IFRS**"). These standards require the disclosure of all related parties and transactions related to the parties.

The Stati's concealment of Perkwood therefore runs counter to IFRS, whose purpose is to ensure, among other things, through the truthful disclosure of related parties and related party transactions, that all expenses recorded on a company's balance sheet reflect fair and honest expenses. The Stati concealed the fact that Perkwood was a related company and that their transactions with Perkwood were related party transactions, precisely in order to keep KPMG in the dark about the fact that the Azalia and Perkwood agreements were shams and allowed the construction costs of the LPG Plant to be grossly inflated.

The audit reports prepared by KPMG for the Stati are therefore false, as is the *vendors due diligence* report prepared by KPMG Tax & Advisory LLC in August-September 2008. This was confirmed by KPMG, which withdrew these reports in 2019 and stated that they could no longer be used by the Stati.

These documents, as well as the KMG indicative offer obtained on the basis of false information, were used by the Stati in the ECT arbitration proceedings, but also before the Luxembourg courts.

2. **KPMG**

KPMG confirmed that the financial information relied upon by the Stati and presented to the Tribunal throughout the ECT Arbitration was false.

In a letter dated 21 August 2019 (**Exhibit No. 136 Arendt**) to the lawyers of the Republic of Kazakhstan (Herbert Smith Freehills), KPMG indicated that it was withdrawing all audit reports issued on behalf of KPM and TNG[83] .

By a further letter of the same day (**Exhibit No. 142 Arendt**), of which the Republic of Kazakhstan only became aware on 25 October 2019, KPMG also passed on this information to Stati, further stating that it was Stati's materially false statements to KPMG that led to the withdrawal of the audit reports.

Immediately after the exequatur case giving rise to the annulled judgment of 19 December 2019 was taken under advisement, the Republic of Kazakhstan discovered that KPMG was already requesting explanations from the Stati in a letter of 15 February 2016 (**Arendt Exhibit No. 139**), regarding their financial statements, in particular regarding the management fee of approximately USD 43 million charged by Perkwood and other construction costs of the LPG Plant charged by Perkwood, as well as Perkwood's status with respect to international accounting standards.

In this letter, KPMG made it clear that if Stati did not respond, KPMG would indicate to third parties, including the Svea court (while the annulment proceedings were pending), that they could no longer guarantee the veracity of their reports, thereby calling into question the financial statements provided by Stati on which KMG's indicative offer - on the basis of which the Arbitral Tribunal determined the amount of damages awarded to Stati - was based.

By letter dated 26 February 2016 (**Arendt Exhibit No. 140**), the Stati refused to cooperate and provide any answers to KPMG's questions, and refused to confirm that Perkwood was a related party. While refusing to provide any information, the Stati threatened KPMG with legal action if it withdrew its audit reports.

By letter of 10 March 2016 **(Arendt Exhibit 141**), KPMG was therefore forced to reiterate the issues raised in their previous letter of 15 February 2016. However, no action appears to have been taken on this letter.

[83] Herbert Smith Freehills had drawn KPMG's attention to inaccurate statements in various audit reports. After a thorough analysis, KPMG considered this information to be relevant. Despite a specific request for a statement, the Stati did not respond, KPMG withdrew its reports and asked the Stati to take all measures to prevent anyone from relying on the reports.

For example, as early as 2016, the Stati knew full well that KPMG's reports would have been withdrawn if the auditors had had access to certain key information about Perkwood.

The Stati never mentioned this crucial information during the procedure and continued to use the annual accounts with the KPMG reports as if nothing had happened.

On 5 August 2019, KPMG sent a new request for explanations to Stati, again Stati did not find it useful to respond on the substance of KPMG's requests (**Exhibit No. 144 Arendt**).

By letter of 21 August 2019 to the Stati (**Exhibit No 142 Arendt**), KPMG noted that, contrary to what had been indicated by the Stati, various transactions were entered into with Perkwood by the Stati companies during the years 2007, 2008 and 2009, and that "*these transactions should have been disclosed in the annual and interim financial statements for these periods in accordance with IAS 24"* on related party transactions. According to KPMG, this omission is a *"material omission"* which has forced it to withdraw all its reports on these financial statements and to ask Stati to stop referring to them.

By letter of 6 September 2019 (**Arendt Exhibit No. 143**), the Stati again threatened KPMG with legal action if it refused to reverse its decision to withdraw its reports, without providing any response to justify their position.

On 20 September 2019 (**Arendt Exhibit No. 180**), KPMG responded to the false allegations made against it by Stati and reaffirmed its decision to withdraw its reports, in particular because of the inertia it was faced with by Stati, which was repeatedly offered the opportunity to provide explanations but never took up these opportunities.

On 25 September 2019 (**Exhibit No. 145 Arendt**), the Stati sent a letter to KPMG, which again does not take a position on the substantive issues raised by KPMG, arguing that it did not have sufficient time to provide them.

On 3 October 2019 (**Exhibit No. 146 Arendt**), KPMG points out the inconsistency of Stati in the justifications given for not having taken a position on the issues raised by KPMG and confirms that it has not received any information from Stati following their letter sent 8 weeks earlier on 5 August 2019 (**Exhibit No. 144 Arendt**).

In the exequatur procedure leading to the annulled judgment of 19 December 2019, Stati therefore submitted false reports, which were based on false information provided to their auditors.

3. **PWC**

To illustrate this, the Republic of Kazakhstan submits as Exhibit 163 an expert report prepared by PwC on KPMG's decision to withdraw its reports.

As the PwC report explains in detail:

"*the decision by KPMG in 2019 to take steps to prevent any further, or future, reliance on the audit opinions that had previously been issued by KPMG in respect of TNG et al. is a highly unusual and serious issue. The actions taken by KPMG do not only go to specific transactions, for example in relation to those between Perkwood and TNG, but represent in effect a complete 'withdrawal' by KPMG of its audit opinions over all of the financial information of the Financial Statements. This includes but is not limited to 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. As set out in the KPMG Correspondence, it further extends as well to a wider range of 26 sets of financial statements prepared by the Stati Parties for which KPMG had previously issued audit reports. "*(**Arendt Exhibit 163**, PwC report of 21 January 2020, paragraph 31).

PwC still confirms that:

"*Further, the KPMG Correspondence records that misleading representations had been provided by management of the Stati Parties to KPMG. Such misleading representations demonstrate the lack of credibility of management and further increase the skepticism with which any information provided by them would be / should be viewed. In short, the actions taken by KPMG and their subsequent actions would entirely remove confidence in the reliability of Tristan's, TNG's and KPM's overall financial information and anything derived therefrom or based thereon (including, but not limited to, any written and oral testimony in the ECT Arbitration, expert opinions and statements from counsel based on such financial information)*. **(Arendt Exhibit 163,** PwC report of 21 January 2020, paragraphs 39-40).

More importantly, in its 29 July 2020 report on the Stati's use of TNG and KPM funds, PwC confirms that the Stati have diverted hundreds of millions of dollars from their Kazakh operations to tax havens and that, therefore, the "financial crisis" of TNG and KPM is the fault of the Stati themselves **(Arendt Exhibit 164)**

C. The assessment of fraud by the English courts

KPMG's withdrawal of its reports shows that KMG's indicative offer could not legitimately be presented to the Arbitral Tribunal as a basis for valuing the LPG Plant.

The Stati knew full well that KMG had based its calculations on falsified financial statements. This was confirmed by Knowles J in the English proceedings, which the Stati abandoned after the English court made the following determination

"If construction costs were not US$245 million because that figure was fraudulently inflated by the Claimants to the extent alleged by the State, then, because the KMG Indicative Bid

valued the LPG Plant using a calculation that brought costs of US$193 million into an arithmetical average there is the clearest argument that the KMG Indicative Bid would have been lower. [84]

"If the KMG Indicative Bid was in fact the result of the Claimants' dishonest misrepresentation then it seems to me, at this stage of scrutiny on the English Application, there is the necessary strength of prima facie case that the Tribunal would no longer (to use its words) consider it as taking a place of "particular relevance" within "the relatively best source of information for the valuation of the LPG Plant"; still less being the one offer from which they took the damages figure. The Tribunal showed its interest in "undisputed indicative offers made by interested buyers in 2008". It looked at them critically, so as to assess whether these were "strategic offers to gain access to the data room", concluding that they were not.

Mr Sprange QC submits that "[I]t is absurd to suggest that the alleged fraud was a fraud on the Tribunal [...], or would have made a difference to the Tribunal". I do not find it possible to accept that submission. 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. " [85]

Not surprisingly, on reading Judge Knowles' decision, the Stati decided to opt out of the English proceedings (at the cost of reimbursing Kazakhstan for its substantial costs and agreeing never to seek enforcement of the award in England again).

Knowles J. understood the Stati's motivation perfectly, expressly observing that "*the real reason for the [n]otice of [d]iscontinuance is that the [Stati] do not wish to take the risk that the trial may lead to findings against them and in favour of the State*[86].

D. Expert evidence of fraud

The Republic of Kazakhstan has commissioned a number of expert reports from eminent independent specialists, which unanimously confirm the fraud committed.

1. <u>Professor Christoph Schreuer confirms that the withdrawal of the KPMG reports would have had a decisive impact on the Award</u>

[84] *Approved Judgment of Justice Knowles*, 6 June 2017, *Stati et al. v. The Republic of Kazakhstan*, *In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070*, paragraph 43.
[85] *Idem* paragraphs 47-48.
[86] Decision of *Justice Knowles, High Court of Justice of England and Wales*, 11 May 2018, paragraph 25 [*Stati et al. v. The Republic of Kazakhstan*, *In the High Court of Justice, Queen's Bench Division, Commercial Court*, CL-2014-000070].

MACHINE TRANSLATION

The impact of KMPG's withdrawal of its audit reports on the financial statements of the Stati is further confirmed by Professor Christoph Schreuer, the world's leading expert in the field of investor-state arbitration, who states in an opinion attached as **Arendt Exhibit 161** that:

"71. In the present case, the conclusion seems inevitable that the KPMG Correspondence would have had a material impact on the ECT Arbitration and the Award. The unusual and serious step of auditors withdrawing their audits, because their client has provided them with false information, renders the entire financial information relating to the investment unreliable and thus deprives the Award providing compensation for losses relating to such investment of any reliable basis.

72. The evidence that has now become available, including the KPMG Correspondence and the false Financial Statements, clearly demonstrates the Stati Parties' illicit conduct and bad faith. The availability of this evidence to the Arbitral Tribunal would have been critical for the determination of its jurisdiction, the admissibility of the Stati Parties' claims and the liability of Kazakhstan. "

It follows from this opinion that, given the fraudulent manoeuvres of Stati, confirmed by the withdrawal of its reports by KPMG, the dispute should not even have been admissible in arbitration from the outset.

2. **<u>Professor George A. Bermann confirms that the Arbitral Tribunal was deliberately misled by the Stati both in terms of Kazakhstan's liability, and in terms of quantum</u>**

The Republic of Kazakhstan submitted evidence of the Stati's fraudulent conduct before and during the ECT Arbitration to Professor George Bermann, who reached the following conclusions: **Exhibit 151 Arendt**

"189. The Statis' conduct in this case reveals a pervasive lack of integrity and thus falls decisively short of the standards of truthfulness applicable to parties in arbitration and litigation. Reported here are not isolated acts, but rather a full-scale and systematic pattern of deception that began at the start of their Kazakh operations and continued through both the Arbitration and the post-Award Proceedings.

190 In Kazakhstan, one of the Statis' main objectives was to unlawfully extract and divert significant funds from the proceeds of their Kazakh operations to their offshore accounts. This pattern of conduct is evident in the sale of oil and gas, the issuance of the Tristan Notes and the construction of the LPG Plant - all of which allowed the Statis to pocket hundreds of millions of dollars through numerous fictitious transactions with undisclosed affiliates registered in tax haven jurisdictions.

191. To mask their deceptive corporate structure and to lend an apparent legitimacy to the underlying fictitious transactions, the Statis created false Financial Statements. Then, by making materially false representations to their auditors, the Statis obtained audit reports that

validated those false statements. In 2019, when KPMG was provided evidence of the Statis' fraud, KPMG took the extraordinary step of withdrawing all of their audit reports for all of the Statis financial statements.

192. Clearly, as any other State, Kazakhstan did not, when joining the ECT, commit to providing international law protection to bad faith "investors" like the Statis. It is obvious, on the basis of the evidence, that the largest part of the Statis' "investment" into Kazakhstan was only pretense masking a re-shuffling of funds among the Statis' own group of companies and in the process defrauding other parties.

193. The Statis' fraudulent conduct during the operation of the investment, as well as during the Arbitration itself, was critical to the Tribunal's finding of causation and liability and its determination of damages.

194. I have established on the basis of more than credible evidence that the Statis misled the Tribunal on the causation of the alleged liquidity crisis of their Kazakh companies. The evidence shows that the Statis themselves had stripped the Kazakh companies of assets through related party transactions amounting to hundreds of millions of US dollars, diverting the funds to their investment operations in South Sudan and Northern Iraq (Kurdistan). The evidence further shows that part of the money that came from the Kazakh operations was used to extend financial benefits to politicians and high-ranking governmental employees in Kazakhstan, South Sudan, Moldova, Northern Iraq (Kurdistan), and the Democratic Republic of Congo.

195. On the valuation of damages, the Statis presented the Tribunal with critically important information that they themselves had falsified, invoking before the Tribunal a set of fictitious transactions through which they dramatically inflated their investment in the LPG Plant. The Statis presented the inflated figure to the Tribunal as their true level of investment in the LPG Plant, purporting to support it with the KPMG Audit Reports that, unknown to the Tribunal, were obtained by the Statis through material misrepresentations to KPMG and based on the Financial Statements that the Statis themselves knew to be false.

196. The Statis deliberately failed, when ordered by the Tribunal to produce all documents relating to construction and operation of the LPG Plant, and to provide key documents falling squarely within the scope of the Tribunal's order, because they knew that disclosure of those documents would undermine their case. Instead, they provided the Tribunal, as supposedly neutral and fair evidence of the value of the LPG Plant, an Indicative Offer for purchase of the LPG Plant that, with the Statis' knowledge, was a direct product of the Financial Statements that the Statis themselves had falsified and Audit Reports that the Stati had obtained under false pretenses. They reinforced this deception through oral argument, as well as fact and expert witness testimony given under oath.

197. The Statis not only deceived the Tribunal in all these respects, but affirmatively - on the record - assured the Tribunal that the information they provided, including the "audited" Financial Statements, were perfectly reliable, when they knew it was not. By making those

representations, the Statis breached the fundamental duties of truth and candor they owed to the Tribunal.

198. The fact that the Statis intentionally submitted false evidence to the Tribunal on such essential matters renders the Award unworthy of enforcement. Moreover, the causal link between the Statis' fraud and the Tribunal's findings is crystal clear. The Tribunal had accepted, almost verbatim, the Statis' case on causation, which is now proven to be the product of deceit. At the Statis' urging, the Tribunal also relied on a product of the Statis' fraud, namely the KMG Indicative Offer, for its decision on the quantum of the damages relating to the construction of the LPG Plant.

199. The natural conclusion is very simple: had the Tribunal been aware of the full measure of the Statis' fraudulent conduct, it would have most likely come to the conclusion that the Statis unlawfully stripped the Kazakh companies of hundreds of millions of dollars, blamed Kazakhstan for the financial distress of these companies and unjustifiably requested theTribunal to order Kazakhstan pay compensation for these "lost" funds. I am confident that under these circumstances the outcome of the Arbitration would have been dramatically different.

200. The Statis exhibited a similar pattern of dishonesty in the post-Award Proceedings that ensued, dishonesty that robs the resulting court decisions of credibility. I do not rehearse here the many acts that collectively establish this pattern. But perhaps the most telling is the Statis' continued reliance on the audit reports issued by KPMG, despite being aware that KPMG raised serious concerns about the accuracy of the Financial Statements as early as in February 2016, affirmatively withdrew those reports in August 2019, and admonished the Statis to no longer rely on them and inform all parties to whom they had provided them of their withdrawal. Not only did the Statis defy this admonition, they engaged in procedural maneuvers and deception to suppress evidence of KPMG's withdrawal of the reports in the exequatur courts.

201. The evidence set forth in this Opinion, and more extensively in Annex 3, clearly demonstrates that the Statis systematically misled the national courts on a number of critical issues. Operating under a presumption of parties' good faith, coupled with a generally proarbitration approach, the national courts - other than those of the U.K. - assumed the truthfulness of the information provided by the Statis and ruled in favour of them, without realizing the extent to which the Statis' case, as well as their presentation of it, were the product of fraud.

202. Making matters worse, the Statis repeatedly misrepresented the findings of one court to another, for example by asserting that the Swedish courts denied Kazakhstan's fraud allegations on the merits and on the basis of a complete and truthful and accurate record. when the opposite was true. The Statis thus leveraged the results of their improper conduct from one court to another, producing a "snowball" effect. "

3. **Professor Catherine A. Rogers is of the opinion that recognising an award obtained by fraud results in the State where recognition is sought participating in the fraud**

The evidence of the Stati's fraudulent conduct before and during the ECT Arbitration was also assessed by Professor Catherine Rogers, another leading expert in international arbitration, of Pennsylvania State University, who, after analysing the relevant facts, concluded as follows: **(Arendt Exhibit 168)**

"189. In conclusion, there are several sources that suggest false statements and fraudulent evidence was presented to and relied on by the tribunal on several key issues regarding both merits and damages in the Arbitration. This opinion has aimed to parse those specific issues that would have been affected if, under a counter-factual analysis, the tribunal had knowledge of KPMG's decision to withdraw the Audit Reports and other related facts revealed by Mr. Lungu's testimony. But the forest should not be lost for the trees.

190 It is difficult to imagine or innumerate all the ways that the tribunal's decision-making would have been affected by a determination by the Stati Parties' own independent professional auditors that their financials were completely unreliable and had been procured through material misstatements or omissions. Suffice it to say that, had these facts surrounding the KPMG withdrawal come to light, they would have significantly altered the scope and nature of the evidence that the Stati Parties could have presented to the tribunal in support of their case. These facts would also have cast serious doubt on numerous substantive financial aspects of the relevant transactions and the Stati Parties' credibility more generally. In addition, it is also possible that this new evidence would have raised independent concerns that the Stati Parties had engaged in underlying fraud and corruption that should preclude them altogether from bringing claims in investment arbitration.

191. KPMG was required under professional standards to withdraw its long-completed audits because in its professional judgment the audits were premised on material omissions or misstatements that rendered the Audit Reports unreliable. This extraordinary remedy is considered essential to ensure the reliability of false financial records and protect financial markets. It is also essential, however, to ensure that auditors and their work are not used to perpetrate financial fraud. For this reason, in its letter withdrawing its Audit Reports, KPMG stated that the Stati Parties "should immediately take all necessary steps to prevent any further, or future, reliance on the [...] audit reports issued by KPMG Audit LLC."

192. Recognising and enforcing an award despite the fact that several of the Stati Parties' underlying arguments expressly relied on the now-withdrawn KPMG Audit Reports would indirectly give effect to and perpetuate reliance on those Audit Reports, despite KPMG's instruction.

193. Moreover, if the tribunal had known that, instead of "not [being] affiliated in any way with Mr. Stati," Laren was in fact headed by Mr. Stati's personal chauffeur, the tribunal would likely have had a different assessment of the "loan shark" terms of the Laren Loan, the

financial consequences of that transaction, and the effect of those consequences on the merits and damages calculations.

194. As Professor Gary Born has explained, enforcing an award that is predicated on false or fraudulent evidence "vitiates the entire character of the arbitral proceeding." As Professor Michael Reisman has explained, enforcing such an award "mar[s] the noble vision and ennobling practice of sovereign States voluntarily submitting their disputes to courts and tribunals for the peaceful resolution in accordance with international law." Giving effect to a fraud-tainted award would "implicate [the enforcing court] in the fraudulent scheme" and undermine Kazakhstan's efforts to improve its own justice system and commitment to the rule of law."

4. **Stefan D. Cassella confirms the existence of massive money laundering**

The expert report by Stefan D. Cassella, a former US federal prosecutor and money laundering expert, supports the Republic of Kazakhstan's position that the Stati not only used false and falsified documents in the ECT arbitration proceedings and deliberately misled the Arbitral Tribunal, but also engaged in massive money laundering.

In the context of the Stati misleading the Arbitral Tribunal in Paris, France, where the ECT Arbitration hearing took place, Stefan Cassella concludes on page 19 of his report of 30 July 2020 that: **(Arendt Exhibit 166)**

"If as the evidence suggests, the Award in the ECT Arbitration was obtained by means of a fraud perpetrated on the Tribunal, the Award would constitute the proceeds of that criminal offense in violation of French law, and any later financial transaction involving the ECT Award could constitute a money laundering offense.

Accordingly, any financial transaction involving the $500 million Award that occurs in any country that recognises the perpetration of fraud upon the Tribunal in the ECT Arbitration in violation of French law as a predicate offense for money laundering could be prosecuted as a money laundering offense in such country, assuming the mens rea elements of the offense are satisfied. In particular, any collection of the ECT Award by the Stati Parties could constitute a money laundering offense because the Stati Parties are aware that the Award was obtained by fraud".

5. **Professor Bernard Hanotiau is of the opinion that the arbitral award cannot be enforced in Belgium due to a clear and fundamental violation of international public policy**

Professor Hanotiau, a lawyer at the Brussels and Paris Bars and Professor Emeritus at the Universities of Louvain-la-Neuve and Namur, who has devoted his entire career to arbitration, gave an expert opinion on whether the facts and elements discovered after the notification of the Award could have had an impact on the ECT arbitration proceedings and the decisions rendered by the Arbitral Tribunal, and in particular whether they could have had an impact on the jurisdiction of the Arbitral Tribunal, the assessment of liability, causation and quantum of damages **(Arendt Exhibit 169).**

His conclusion is clear:

"For the reasons set out in this opinion, it seems clear to me that, had the documents and evidence obtained after the notification of the Award been in the possession of the Arbitral Tribunal, they would have had a material and fundamental impact on the Award.
[…]
I consider, in view of the seriousness and importance of the fraudulent procedures used by the Stati Consortium, which were not brought to the attention of the Arbitral Tribunal, that the Arbitral Award, the recognition of which is sought, cannot be enforced in Belgium because of a manifest and fundamental violation of international public policy.

V. IN LAW: Public policy as a ground for refusing enforcement of the Award: Article V(2)(b) of the New York Convention

The Republic of Kazakhstan appealed against Order No. 40/2017 of 30 August 2017 declaring enforceable in Luxembourg the Award rendered in Stockholm on 19 December 2013 and amended on 17 January 2014, on the basis of Articles IV and V of the New York Convention, alternatively on the basis of Articles 1250 and 682 of the New Code of Civil Procedure (hereinafter, the "**NCPC"**).

A. The public policy exception of the New York Convention

1. Principle of non-recognition if contrary to public policy

The New York Convention provides in Article V.2.b that recognition and enforcement of an award may be refused where this would be contrary to the public policy of that country:

> *"Recognition and enforcement of an arbitral award may also be refused if the competent authority of the country where recognition and enforcement is sought finds that : […]*
>
> *(b) recognition or enforcement of the award would be contrary to the public policy of that country. "*

It is therefore up to the Luxembourg judge to verify whether the recognition and enforcement of the Award is likely to undermine Luxembourg public policy, which under the New York Convention is understood to be international public policy.

It is indeed clearly established by the case law that :

> *"The review by the court addressed must focus first on whether the awards in question were made following a procedure which sufficiently protected the rights of the defence and secondly, whether the law applied to the merits of the awards is compatible with its international public policy. (Court of Appeal (Civil) 28 January 1999, Pas. 31, 95).*

These principles were further confirmed by the Court in a judgment of 26 July 2005 (Pas. 33, 117).

In the past, case law has already had many opportunities to emphasise the importance of the concept of international public policy in the enforcement of foreign decisions.

International public policy is defined as *"that part of internal, national public policy which is so fundamental that any foreign law normally applicable which disregards it is precluded"* (Journal des Tribunaux Luxembourg, no. 45, p. 67).

Luxembourg case law considers that "*international public policy is defined as everything that affects the essential rights of the administration of justice or the implementation of contractual obligations, or even everything that is considered essential to the established moral, political and economic order*" (Clunet 1977, p.114).

This definition has been confirmed in several decisions, including a judgment of 24 November 1993 (roll no. 14983) and a judgment of the Luxembourg Court of Appeal of 6 March 2003 (roll no. 26639), as well as by Luxembourg doctrine (J-C Wiwinius, Le droit international privé, 3rd edition, p. 403).

Furthermore, the Luxembourg Court of Appeal in a more recent judgment considered that there would be a violation of Luxembourg's international public policy "*where the award or its enforcement would unacceptably offend the legal order of the requested State in that it would undermine a fundamental principle*" (Court of Appeal, 17 October 2013, roll no. 37973).

In order to review the compliance of the award with international public policy, the judge will have to examine the award in law and in fact without re-trying the case on the merits.

On the basis of the above, it is therefore only a question of ensuring that the arbitration award can be enforced in Luxembourg without undermining what is essential to the established moral, political or economic order.

There is therefore absolutely no reason to criticise the fact that the Republic of Kazakhstan presented the Court with relevant facts (*i.e.* the fraud perpetrated by the Stati) to enable it to exercise its control.

2. <u>The recommendations of the International Law Association (ILA)</u>

In 1996, the International Law Association (hereinafter, "**ILA"**) undertook a six-year study of public policy issues facing enforcement courts. As a result of this study, the ILA Committee agreed on a number of recommendations regarding the application of public policy by state courts. These are presented in the ILA's final report, which is accompanied by comments[87].

In its final report, the ILA Committee defined what it considers to be public policy, the violation of which could justify the refusal of enforcement by a state court. The ILA report confirms, inter alia, that :

Firstly, the commission of fraud to obtain an arbitral award renders the award unenforceable on public policy grounds.

Secondly, it is widely accepted that the principle of good faith and the prohibition of abuse of rights is a matter of international public policy, the violation of which could justify a court refusing to enforce an award.

Thirdly, the duty of a State to respect its obligations to other States under international conventions is a matter of international public policy and may justify a court's refusal to enforce an award.

3. <u>State obligations under the UN Convention against Corruption</u>

The ILA supports recommendation 4 of its final report on public policy as an obstacle to the enforcement of awards, according to which a court may refuse to recognise or enforce an award where such recognition or enforcement constitutes a breach by the State of its obligations to other States or to international organisations.

The legal literature is fully in line with this.

In this case, the ILA Committee's commentary on Recommendation 4 refers by way of example to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and states that where a State has ratified this Convention, it "*must take measures to deter and prosecute such bribery*. It cannot enforce an award based on bribery.

At the same time, the ILA Committee explains that a consensus on what constitutes a fundamental principle could be proven by international conventions.

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[87] Pierre Mayer and Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Arbitration International, 19(2) (2003) 249, at 249.

Luxembourg is a signatory and has ratified the United Nations Convention against Corruption (hereinafter "**UNCAC"**). In accordance with the UNCAC implementation review mechanism, Luxembourg is currently undergoing the second review cycle. During this cycle, Luxembourg's compliance with the UNCAC provisions on preventive measures and asset recovery is being assessed.

The mandate of the UNCAC is broad and aims to be a comprehensive legal instrument in the fight against corruption. As such, Article 3 (1) of UNCAC provides that the Convention applies to "the prevention, investigation and prosecution of corruption and the freezing, seizure, confiscation and return of proceeds of offences established in accordance with this Convention".

Article 14 of UNCAC sets out various requirements for the implementation of money laundering prevention measures. Article 23 of UNCAC, on "laundering of proceeds of crime", obliges UNCAC member states to enact laws criminalising money laundering as a criminal offence. In addition, Article 23 (1) obliges Member States to treat a money laundering offence as contrary to the fundamental principles of that Member State's domestic law. Its provision states in relevant terms:

"*Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally [...]."*

Articles 506-1 to 506-8 of the Luxembourg Criminal Code (Penal Code) make money laundering a criminal offence. Under Article 23 of the UNCAC, the offence of money laundering is one of the fundamental principles of domestic law in Luxembourg. In accordance with the public policy ground for refusal of recognition or enforcement in the New York Convention, the offence of money laundering is a matter of public policy in Luxembourg.

Furthermore, if a court allows the award to be enforced, this act in itself may constitute a money laundering offence. This view is confirmed by a former US federal prosecutor and money laundering expert, Stefan Cassella of *StreamHouse*.

If a Luxembourg court were to recognise or enforce such an award, it would expose Luxembourg to the risk of violating its international obligations under the UNCAC.

In this respect, a court has the discretion under the New York Convention not to recognise or enforce such an award on the grounds that such recognition or enforcement would be contrary to public policy.

B. Public policy of the place of enforcement (Luxembourg)

Article V(2)(b) of the New York Convention provides that what constitutes a violation of public policy is to be determined according to the law of the specific jurisdiction where enforcement of the award is sought.

Thus, each court must assess what 'its' public policy requires and whether what it requires has been respected.

This principle was correctly applied by Knowles J of the High Court who specifically and correctly observed that English public policy is not the same as Swedish public policy, and that an English court is therefore not bound by the decision of the Svea Court of Appeal:

> *"If, as I should, I take the decision of the Swedish Court as showing Swedish public policy in the context of this case then I find, as a matter of law, that English public policy is not the same. Counsel for Kazakhstan] puts it this way, and I agree: 'It is apparent from the outcome in Sweden alone that the content of Swedish public policy must be different from that of its English counterpart.* [88]

C. Enforcement of awards obtained by fraud is a violation of public policy

1. **Uniform practice of the member States of the New York Convention**

The New York Convention allows national courts to reject an arbitral award where false or fraudulent statements have been made or where false or fraudulent evidence has been submitted to the arbitral tribunal.

The basis for this refusal is usually the public policy exception in Article V(2)(b) of the New York Convention.

Thus, the enforceability of an arbitral award is refused on the basis of the infringement of public policy "*if the successful party has produced false evidence before the court or if the award has been obtained by fraud* (...). *Such fraud vitiates the entire arbitral proceedings, and constitutes a defence to the recognition of the resulting award*"[89]. Under the New York Convention, fraud is a ground for refusing enforcement in case of "*deliberate deception concerning facts which are material to the decision of the arbitrator*", including "*the use of false or fabricated documents*" or "*false testimony*"[90].

Professor Gary Born[91], who is among the 'pro' award enforcers, supports the view that '*a substantiated showing of material fraud in the arbitral proceedings, which was not and could*

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[88] *Approved Judgment of Justice Knowles*, 6 June 2017, paragraph 86 [*Stati et al. v. The Republic of Kazakhstan*, *In the High Court of Justice, Queen's Bench Division, Commercial Court*, CL-2014-000070].

[89] G. BORN, *International Commercial Arbitration,* 2nd edn, Kluwer Law International, 2014, pp. 3704-3705, relying on US case law. *Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was produced by fraud* (...). *Fraud of this character vitiates the entire character of the arbitral proceeding, and should be a defence to recognition of the resulting award*".

[90] G. BORN, *ibid.* , p. 3705. *Fraud as a basis for non-recognition requires deliberate falsity with regard to facts that were material to the tribunal's decision. The use of forged or fabricated documents, or perjured testimony, and the deliberate and fraudulent violation of discovery orders, are classic examples of fraud which may potentially provide grounds for non-recognition*.

[91] Mr Born gave evidence in the proceedings to set aside the Award in Sweden. His testimony was given before KPMG withdrew its audit reports in 2019, and therefore could not have taken into account certain information.

not have been presented to the arbitrators, would provide grounds for non-recognition of an award"[92]. Fraudulent evidence, says Born, taints the entire arbitral proceedings[93].

The principle that enforcement of an award obtained by fraud is contrary to public policy is well established by case law in several jurisdictions,[94] including the -United States, [95]England, [96]Australia, [97]France, [98]Germany, [99]Lithuania,[100] the Netherlands[101] and

[92] Mr Born confirms that this is almost a universal principle and that "*there are a few contrary decisions*". Gary Born, International Commercial Arbitration, (2nd edn, Kluwer 2014), 3705.

[93] *See ibid.*

[94] *See,* for *example, Karaha Bodas Co.* , 364 F.3d at 306 ("*Enforcement of an arbitration award may be denied if the prevailing party provided perjured evidence to the court or if the award was obtained by fraud*") (United States); *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 (23 March 2013) (Australia), paras 87-88 (holding that enforcement of an award induced or affected by fraud or corruption would be contrary to public policy and that a court may refuse to enforce the tainted award) ; Paris Court of Appeal, 1st Ch, 16 January 2018, 15/21703 (France) (annulling an award because title to property was obtained by fraudulent administrative authorisation); Bundesgerichtshof [BGH] 30 January 2013, III ZB 40/12 (Ger.), paras 12, 19-20 (recognising that an award obtained through procedural fraud by the applicant would be a ground for refusing enforcement under Art. V(2)(b) of the New York Convention); *OAO "Gazprom" v. Republic of Lithuania*, Civil Case No. 3K-7-458-701/2015 (Supreme Court of Lithuania, 23 October 2015) (considering that the concept of "public *policy"* should be interpreted as "*international public policy"* and that "*violation of public policy exists [...] when the arbitral award or arbitration agreement was obtained by coercion, fraud, threat, etc. "*); *Bloomberry Resorts & Hotels Inc. v. Global Gaming Phil. LLC*, No. 1432/2017 (GHS, Jan. 3, 2020) (Sing.) *("Fraud, bribery, and corruption would generally fall under the rubric of 'contrary to public policy' ... Thus, cases such as bribery, corruption, or fraud and similar serious cases would constitute grounds for annulment.*").

[95] *Enron Nigeria Power Holding, Ltd. v. Federal Republic of Nigeria,* 844 F.3d 281, 288 (D.C. Cir. 2016) (enforcement of an award based on a contract tainted by fraud violates public policy); *Karaha Bodas Co.* 364 F.3d at 306 ("*Enforcement of an arbitration award may be denied if the prevailing party provided perjured evidence to the court or if the award was obtained by fraud. Courts apply a three-part test to determine whether an arbitration award is so affected by fraud: (1) the petitioner must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable by the exercise of reasonable diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud is materially related to an issue in the arbitration.*"); *ARMA, S.R.O. v. BAE Systems Overseas, Inc.* , 961 F.Supp.2d 245, 254-255 (D.D.C. 2013).

[96] *IPCO (Nigeria) Ltd v Nigerian Nat'l Petroleum Corp* [2015] EWCA Civ. 1144 (Eng.), para 184 ("*[T]he proposition that fraud vitiates the whole award ... finds support in principles of English law*"); *IPCO (Nigeria) v Nigerian Nat'l Petrol. Corp.* [2014] EWHC (Comm) 576 (Eng.) (holding that fraud is sufficient to refuse to enforce part of an award because fraud on the court "*undermines the validity of the whole award*"); *HJ Heinz Co. v. EFL Inc* [2010] EWHC (Comm) 1203 (Eng.), para 33 (holding that in cases of fraud, "*after analysis of the facts, an approach more favourable to the aggrieved party in respect of what is due ... may be adopted"); HJ Heinz Co. v. EFL Inc. ; Double K Oil Prods. 1996 Ltd. v. Neste Oil OYJ* [2009] EWHC (Comm) 3380, para 15 (Eng.) (An award may be set aside if it was "*obtained by fraud or if the award or the manner in which it was obtained is contrary to public policy*"); *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co Ltd* [2000] QB (CA) 288 (Eng.) (where there is decisive evidence of fraud that was not available to a party at the time of trial, refusal to enforce the award would be justified).

[97] *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 (23 March 2013) (Aust.), para 87 (holding that enforcement of an award that was induced or affected by fraud or corruption would be contrary to public policy and that a court may refuse to enforce the tainted award).

[98] Paris *Court of* Appeal, 1st Ch., 16 January 2018, 15/21703 (annulment of an award on the grounds that title was obtained by fraudulent administrative authorisation).

[99] *Bundesgerichtshof* [BGH] 30 January 2013, III ZB 40/12 (Ger.), paras 12, 19-20 (recognising that an award obtained through procedural fraud by the applicant would be a ground for refusal of enforcement under Art. V(2)(b) of the New York Convention).

[100] *OAO "Gazprom" v. Republic of Lithuania*, Civil Case No. 3K-7-458-701/2015 (Sup. Ct. Lit. 23 October 2015) (considering that the concept of "*public policy*" should be interpreted as "*international public policy*" and that "*violation of public policy exists [...] when the arbitral award or agreement was obtained by coercion, fraud, threat, etc. "*).

[101] Hof Amsterdam, 9 September 2018, GHAMS:2018:3755, 200.219.927/01 m.nt ("*[Public policy] prevents enforcement only in exceptional circumstances. Fraud itself constitutes such a circumstance and public policy may prevent the enforcement of a foreign arbitral award made under the influence of fraud*").

Singapore[102]. It has virtually become a transnational principle of international arbitration[103] law.

Fraud is not only contrary to the fundamental values of morality and justice, but it also undermines the ability of arbitration to achieve its fundamental objective of ensuring the fair and just resolution of disputes. For arbitration to be considered a legitimate means of resolving international disputes, its reputation for due process and integrity of its procedures must not be compromised, as is the case when an award is obtained on the basis of evidence known to be fraudulent.

The situation in England is particularly clear as the refusal to enforce an award for fraud due to a breach of public policy is firmly established there, and examples are numerous[104]. In a case involving Nigeria, the English *High Court made it* clear that enforcement of an award obtained by fraud would involve the arbitration system and the court in the fraudulent scheme[105].

Similarly, in the United States, fraud in obtaining an award justifies a refusal to enforce the award. US law expressly makes fraud a ground for setting aside an award. The Federal Arbitration Act itself expressly provides that an award may be set aside if it was obtained by bribery, fraud or improper means[106]. There are numerous cases in which US courts have held that an award tainted by fraud cannot be enforced; "*[e]ffectiveness of an arbitration award may be denied if the prevailing party provided perjured evidence to the court or if the award was obtained by fraud*[107]

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[102] *Bloomberry Resorts & Hotels Inc. v. Global Gaming Phil. LLC*, No. 1432/2017 (SGH, Jan. 3, 2020) (Singapore) ("*Fraud, bribery and corruption would generally fall under the rubric of 'contrary to public policy' .... Thus, cases such as bribery, corruption or fraud and similar serious cases would constitute grounds for cancellation*"; *Sui S. Gas Co. v. Habibullah Coastal Power Co. (Pte)*, No. 248/2009 (SGHC, 23 February 2010) (Singapore), para. 48 (finding that "*egregious circumstances such as bribery, corruption or fraud, which would violate the most basic notions of morality and justice [...*]" would violate public policy and warrant setting aside the award).

[103] *See* Aloysius Llamzon and Anthony Charles Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct", *in* Albert Jan Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 (Kluwer Law International, 2015), page 522: "*[T]here appears to be sufficient authority to conclude that there is a transnational public policy proscribing bribery and corruption, at least in the context of an investment treaty dispute. There is also authority, albeit thin, on fraudulent misrepresentation and other misconduct by investors.*

[104] *IPCO (Nigeria) Ltd v Nigerian Nat'l Petroleum Corp* [2015] EWCA Civ. 1144.

[105] *Process and Indus. Dev. Ltd. v. Ministry of Petroleum Resources of the Federal Republic of Nigeria* [2020] EWHC 2379 (Comm), para 273 ("*Not only is the integrity of the arbitration system threatened, but also that of the tribunal, since enforcement of an award in such circumstances would implicate it in the fraudulent scheme*").

[106] 9 U.S.C. §10(a).

[107] *Karaha Bodas Co.* 364 F.3d at 306; *see also Enron Nigeria Power Holding*, 844 F.3d at 288 (enforcement of arbitration award based on fraudulent contract violates public policy); *Bonar v. Dean Witter Reynolds, Inc.* 835 F.2d 1378, 1383 (11th Cir. 1988) (finding that perjury by a witness during an arbitration hearing required vacating the punitive damages portion of the award because there was clear and convincing evidence of perjury, the party could not have discovered the fraud during the arbitration hearing, and the witness's testimony was materially related to whether punitive damages should be awarded); *Int'l Brotherhood of Teamsters, Local 519 v. United Parcel Serv, Inc.* 335 F.3d 497, 503-504 (6th Cir. 2003) (adopting the three-part test applied in *Bonar*); *ARMA, S.R.O.* , 961 F. Supp. 2d at 254-255 (D.D.C. 2013) (same).

The situation is no different in the Netherlands. The court in Serena Equity Ltd./Fincantieri S.p.A. held that public policy can prevent the enforcement of a foreign arbitral award made under the influence of fraud[108].

French law and case law also sanction fraud as a violation of international public policy:

"Procedural fraud, if it is such as to make it possible, exceptionally, to revoke an arbitral award that is affected by it, may also be sanctioned with regard to the international public order of procedure, so that the action for annulment provided for by Article 1502.5° of the new Code of Civil Procedure remains open"[109].

In another judgment, it was held that the existence of fraud in arbitration, contrary to public policy, likely to lead to the annulment of the award, may be deduced by the trial judges from a set of indicators relating to the conditions in which the arbitration was decided, organised and conducted[110].

Furthermore, the Paris Court of Appeal, in a decision of 25 June 2013, annulled an exequatur order of a foreign arbitral award, as the award had been obtained by fraud. The Court clearly held that an arbitral award based on fraudulent elements violates [111]international public policy in any event.

In Luxembourg, the question of whether fraud could be sanctioned by the exception of public policy was put to the Court of Appeal on 15 July 2015. The Court dismissed the appeal against the enforcement order on the grounds that fraud was not constituted in this case, thus admitting that it could be sanctioned under public policy under the New York Convention. It is interesting to note that in the dispute in question, it was alleged that the award was made on the basis of false accounting documents provided by the sellers to the arbitrators[112].

It follows from this case law that an enforcement court, faced with evidence of fraud, can be expected to conduct a serious investigation into the matter.

Moreover, in application of the principle of "*fraus omnia corrumpit*", the doctrine has deduced from the decision of the Luxembourg Court of Appeal of 24 November 1993 that fraud should make it possible to sanction an award that has given effect to deception or fraudulent behaviour (J.-B. Racine, L'arbitrage commercial international et l'ordre public, LGDJ, n°893).

The principle of *fraus omnia corrumpit is* indeed a fundamental principle of the Luxembourg legal system.

[108] Hof Amsterdam, 9 September 2018, GHAMS:2018:3755, 200.219.927/01 m.nt.
[109] Cass. 1st civ. 19 December 1995, no. 93-20863
[110] Cass. 1st civ. 4 November 2015, n°14-22630.
[111] Paris Court of Appeal, Pôle 1, Ch. 1, 25 June 2013, n° 12/01461.
[112] JTL, No. 45, 5 June 2016, p. 80.

For states such as Kazakhstan, which work with international organisations such as the Organisation for Economic Co-operation and Development (hereinafter, "**OECD"**) to introduce reforms to combat corruption and strengthen the rule of law, the enforcement of an arbitral award that is materially tainted by false or fraudulent evidence sends a completely wrong message.

In an investor-state dispute, the tribunal's decision is intended to give effect to substantive international law and is enforceable under the international standards and procedures established by international conventions, including the New York Convention. In this sense, investor-state arbitration ultimately aims to promote the international rule of law and to impose it on state parties. This objective is seriously undermined, and the very legitimacy of investor-state arbitration is called into question in the eyes of state parties, if awards based on fraudulent evidence are enforced despite strong international public policy against corruption. In this case, the enforcement of an award apparently obtained through false statements or fraudulent evidence, which may have been introduced to conceal underlying corruption or financial irregularities by a foreign investor, would undermine international efforts to encourage Kazakhstan to eradicate [113]domestic corruption.

Furthermore, recognising and enforcing an award in which fraudulent statements or evidence have been presented also sends the wrong message to foreign investors. If fraudulent awards are nevertheless enforceable, unscrupulous foreign investors will feel that there is little downside to defrauding an arbitral tribunal, as long as they can keep the lies secret until the award is made.

For these reasons, national courts should refuse enforcement of such awards where the applicable criteria are met and despite the narrowness of the public policy exception.

2. False statements and evidence constitute "fraud on the arbitral tribunal

2.1 Principle applied by all member states of the New York Convention

It is recognised in the New York Convention and in some jurisprudence that :

- Making false statements or claims, either in writing or orally; and/or

[113] In 2019, the Financial and Enterprise Affairs Directorate of the OECD Anti-Bribery Network for Eastern Europe and Central Asia produced an update on Kazakhstan as part of the fourth monitoring cycle of the Istanbul Anti-Bribery Action Plan. According to the report, Kazakhstan has made "progress" or "significant progress" in response to a number of expert recommendations that were made earlier. Specifically, progress has been made in response to recommendations regarding corruption assessment, civil service integrity and judicial integrity. *Update on Kazakhstan in the Istanbul Anti-Corruption Action Plan Fourth Round of Monitoring,* available at: https://www.oecd.org/corruption/acn/OECD-ACN-Kazakhstan-Progress-Update-2019-ENG.pdf (last visited 9 December 2020).

- The presentation of false or misleading evidence in arbitral proceedings constitutes fraud on the arbitral tribunal[114].

National courts have found various forms of deceptive conduct, such as submitting false expense reports "*to give the impression that [a party] had incurred high expenses*" [115]and "*deliberately destroying or withholding evidence*"[116].

For example, the German Federal Supreme Court has ruled that "*an (arbitral) decision obtained through an intentionally false statement ('fraud') violates German public policy*"[117].

The South Korean court in the *Majestic Woodchips* case reasoned that:

"A]lthough it was objectively clear that Majestic's assertions in the arbitration diverged from the facts, Majestic made false assertions and submitted false evidence and obtained the Second Arbitral Award and the Final Award from an arbitrator it had deceived. Hence, there were grounds for denying recognition and enforcement under Art. V(2)(b) of the New York Convention. " [118]

In the *Westacre Investments* case, the English court had to deal with perjured evidence given to the arbitral tribunal: "*i.e., where the very issue before the arbitrators was whether the witness or witnesses were lying*"[119].

The US courts have ruled that "*[i]ntentionally giving false testimony in an arbitration proceeding would constitute fraud*" which justifies setting aside the award[120].

A court in Singapore referred to a fraud against public policy resulting from the "*non-disclosure or concealment of material documents*"[121].

When the Tribunal ordered them to produce all documents relating to the construction and operation of the LPG Plant and to provide key documents directly within the scope of the Tribunal's order, Stati deliberately failed to do so because they knew that disclosure of these documents would be damaging to them.

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[114] *Seller v. Buyer*, Oberlandesgericht, Thuringia, 4 Sch 04/03, 8 November 2004, *Majestic Woodchips, Inc. v. Donghae Pulp Co, Daebeobwon*, 28 May 2009, Case No. 2006 Da 20290, *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [2000] QB 288 (CA); *Karaha Bodas Co, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d (5th Cir. 2004).

[115] *European Gas Turbines v. Westman International*, Paris Court of Appeal, 30 September 1993, paragraph 26.

[116] *Bloomberry Resorts and Hotels Inc and Others v Global Gaming Philippines LLC and Others* [2020] No 1432/2017 (SGH, 3 Jan 2020), para 97, referring to *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 ("Beijing Sinozonto"), para 41.

[117] *Seller v. Buyer*, Oberlandesgericht, Thuringia, 4 Sch 04/03, 8 November 2004, paragraph 9.

[118] *Majestic Woodchips, Inc. v. Donghae Pulp Co, Daebeobwon* [S. Ct.], 28 May 2009, Case No. 2006 Da 20290, XXXVII Y.B. Comm. Arb. 259, paragraph 25.

[119] *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288 (CA), 15.

[120] *National Oil Corp. v. Libyan Sun Oil Co.* , 733 F. Supp. 800 (D. Del. 1990).

[121] *Bloomberry Resorts and Hotels Inc and others v Global Gaming Philippines LLC and others* [2020] No 1432/2017 (SGH, 3 January 2020) (Sing.), para 106.

The Paris Court of Appeal held in 2017 that money laundering on the claimant's side can defeat a claim, noting that investment protection is not intended to benefit criminals or investments based on or pursued by criminal activity[122].

In an earlier decision, the same French court condemned the submission of false expense claims:

"Under these circumstances, Westman's drawing up and submitting an erroneous report to create the false impression that it had borne high expenses for performing its task under the contract of 11 December 1985 is a fraud and not a sleight of hand. " [123]

"Further, this fraud - which also reveals that Westman did not bear any of the expenses on which it relied [...] The fraud committed by Westman in the arbitral proceedings, which influenced the arbitrators' evaluation of the commission, is also such as to affect [Westman's] right to payment of the commission[124].

Luxembourg case law similarly confirms that procedural fraud can take many forms, including "*false statements, concealment of documents, corruption of witnesses,* etc".

This position is shared by various authors and commentators. For example, in his extensive publication on international commercial arbitration, Professor Born states that "[*t]he use of forged or fabricated documents, or perjured testimony, and the deliberate and fraudulent violation of discovery orders, are classic examples of fraud which may potentially provide grounds for non-recognition*"[125].

In this case, it is established that the Stati made false and fraudulent statements and provided false evidence during the ECT Arbitration.

2.2 No distinction between liability and quantum issues

Nothing in the New York Convention suggests that for an award obtained by fraud to fall within the public policy exception, the fraud on the court must relate to the court's assessment of liability, as opposed to quantum.

Bearing in mind that the only remedy awarded in investor-state arbitration is compensation for the allegedly wrongful acts of states, this result would not only be absurd, but would encourage rogue investors to mislead the courts on issues of quantum before enforcing damages awarded in Luxembourg courts.

Contemporary commentaries on New York Convention law confirm in no uncertain terms that "*an award granting unlawful relief may violate public policy*".

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[122] *Belokon v. Kyrgyz Republic*, Paris Court of Appeal, 21 February 2017 (No. 15/01650), p. 7.
[123] *Idem* paragraph 26.
[124] *Idem* paragraph 28.
[125] Gary Born, *International Commercial Arbitration* (Third Edition 2021).

This principle has been correctly applied by Mr Justice Knowles in enforcement proceedings in England, where the enforcement of an award obtained by fraud is firmly established. Mr Justice Knowles of the English *High Court* stated:

> "*If construction costs were not US$245 million because that figure was fraudulently inflated by the Claimants to the extent alleged by the State, then, because the KMG Indicative Bid valued the LPG Plant using a calculation that brought costs of US$193 million into an arithmetical average there is the clearest argument that the KMG Indicative Bid would have been lower.* [126]
>
> *"If the KMG Indicative Bid was in fact the result of the Claimants' dishonest misrepresentation then it seems to me, at this stage of scrutiny on the English Application, there is the necessary strength of prima facie case that the Tribunal would no longer (to use its words) consider it as taking a place of 'particular relevance' within 'the relatively best source of information for the valuation of the LPG Plant'; still less being the one offer from which they took the damages figure. The Tribunal showed its interest in 'undisputed indicative offers made by interested buyers in 2008'. It looked at them critically, so as to assess whether these were 'strategic offers to gain access to the data room', concluding that they were not. […]*
>
> *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."* [127]

Judge Knowles' judgment leaves no doubt that the enforcement of a damages award obtained by fraud violates public policy.

In any event, as demonstrated above, Stati committed a fraud affecting both the assessment of quantum and the principle of liability.

3. <u>The modalities of enforcement by the enforcement courts</u>

3.1 Enforcement tribunals must thoroughly investigate credible evidence of fraud to obtain an award

Although national courts are rather "pro-arbitration", it is not "pro-arbitration", but rather "anti-arbitration", that national courts enforce awards obtained by fraud.

As noted above, in the same case, Knowles J of the English *High Court* stated:

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[126] *Approved Judgment of Justice Knowles*, 6 June 2017, *Stati et al. v. The Republic of Kazakhstan, In the High Court of Justice, Queen's Bench Division, Commercial Court*, CL-2014-000070, paragraph 43.

[127] *Idem* paragraphs 47-48.

MACHINE TRANSLATION

> *"It will do nothing for the integrity of arbitration as a process or its supervision by the Courts, or the New York Convention, or for the enforcement of arbitration awards in various countries, if the fraud allegations in the present case are not examined at a trial and decided on their merits, including the question of the effect of the fraud where found. The interests of justice require that examination"*[128].

An enforcement court faced with evidence of fraud in obtaining an award is expected to conduct a serious investigation into the matter.

The "pro-arbitration" philosophy under the New York Convention is based on the presumption that parties (and arbitrators and counsel) will conduct themselves both in good faith and in accordance with public policy. Where there are credible allegations of fraud, an enforcing court must give the matter serious consideration.

In the present case, it is all the more important to conduct a serious investigation into fraud as the Swedish court before which the annulment of the Award was sought did not determine whether or not[129] fraud had actually been committed. Thus, the question of whether the Award in this case was obtained by fraud was never determined on the merits, except in the *prima facie* findings of the English *High Court.* As Judge Knowles of the English *High Court* correctly observed, the proper course of justice requires that the allegations of fraud in this case be considered at trial and decided on the merits, notwithstanding the Swedish judgment.

Furthermore, the Swedish court did not have a complete record of the facts, as further evidence came to light after the Swedish court refused to annul the case in December 2016.

KPMG's withdrawal of its audit reports on Stati's financial statements due to their falsity came in August 2019, almost two years after the end of the proceedings in the Swedish court.

In addition, important correspondence between Stati and KPMG has not been disclosed by Stati during the Swedish court proceedings. This correspondence reveals that KPMG raised questions about the fraud in 2016, but that Stati appears to have evaded these questions and their consequences (until August 2019, when KPMG withdrew its audit reports)[130] .

Conducting a thorough investigation into fraud in obtaining an award (once credible evidence of fraud is brought forward) should not be confused with a review of the merits of an award. Enforcement courts cannot conduct a de novo review of the merits of an award. But an investigation into fraud in obtaining an award is quite different from a review of the merits of a case. Such an investigation is necessary precisely to ensure that the recognition and enforcement of an award on the merits is justified.

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[128] *Approved Judgment of Justice Knowles*, 6 June 2017, paragraph 93 [*Stati et al. v. The Republic of Kazakhstan*, *In the High Court of Justice, Queen's Bench Division, Commercial Court*, CL-2014-000070].

[129] *The Republic of Kazakhstan v. Ascom Group, S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd.* case no. T 2675-14, decision of the Svea Court of Appeal of 9 December 2016, p. 45.

[130] *Ibid*, paragraph 46 *et seq.*

3.2 The absence of a requirement of a "manifest" violation of public policy

Although the New York Convention considers violation of public policy as a ground for refusing enforcement of an award, and although enforcement of an award obtained by fraud is a violation of public policy in most jurisdictions, the Convention does not provide for an evidentiary requirement for fraud allegations.

Thus, nothing in the Convention suggests that fraud, as a violation of public policy, must be 'manifest', established by 'clear and convincing evidence' or 'beyond a reasonable doubt', or established by reference to criminal law standards, which are generally stricter than the standards applied in civil law.

This was confirmed by the Final Report of the ILA Commission on Public Policy as an Impediment to the Enforcement of International Arbitral Awards.

In its final report, the ILA Committee agreed that the violation of public policy must generally be relatively obvious or clear. However, it also pointed out that consideration of the facts of the case may be warranted in certain circumstances (see recommendation 3(c)) and that it would therefore not be appropriate to include 'manifestly' in recommendation 1(b)[131].

In any event, recognition or enforcement of the Award in Luxembourg would be manifestly contrary to public policy for the reasons described above, namely that the Stati obtained the Award by fraud from the Arbitral Tribunal.

3.3 Enforcement courts should be guided by the practice of other courts in the application of public policy

The objective of the New York Convention is to provide uniform procedures for the enforcement of foreign arbitral awards, while minimising the effect of differences between countries.

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[131] *See* Pierre Mayer and Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Arbitration International, 19(2) (2003) 249, at 253. Recommendation 1(b) states: "*Such exceptional circumstances may, inter alia, be considered to exist if the recognition or enforcement of the international arbitral award is contrary to international public policy.*"

[131] However, the Court of Appeal concluded that the lower court had applied "too strict a test" and referred the case back to a lower court to determine whether or not upholding the award was contrary to English public policy. However, the Court of Appeal concluded that the lower court had applied "*too strict a test*" and remitted the case to a lower court to determine whether or not upholding the award was contrary to English public policy. *See* [2015] EWCA Civ. 1144, paras 104 and 190. On remand, and after further proceedings on the costs award, the *High Court* set a trial on the fraud issue in 2018. Subsequently, according to a May 2019 article in *The Nation*, a Nigerian newspaper, NNPC settled the case by making a payment of $37.7 million to IPCO. See https://thenationonlineng.net/court-orders-firm-to-refund-1-6b-to-nnpc-subsidiary/.

In its final report on public policy, the ILA expressly encourages enforcement courts to look at the practice of courts in other jurisdictions with regard to the application of public policy, in order to reach a consensus and a consistent approach[132].

3.4 The impact of annulment court decisions on enforcement courts

Under the New York Convention, the refusal by a court at the seat of the arbitration to set aside an award on grounds of public policy does not prevent a court in another jurisdiction from refusing to enforce the award on grounds of public policy.

The New York Convention expressly provides that a court may refuse enforcement of an award if enforcement would be contrary to the public policy of the "*country where recognition and enforcement are sought*"[133]. In other words, a court before which a public policy defence is raised to defeat enforcement is instructed to apply its own public policy, not the public policy of another court, including the court of the seat[134]. The concept of public policy varies from court to court. The drafters of the Convention therefore ensured that no court could impose its own concept of public policy.

Thus, the question of whether the enforcement of this Award would be contrary to public policy in one jurisdiction should not be affected by whether the Award is or is not contrary to public policy in another jurisdiction, in this case Sweden. This is especially true since the Swedish annulment court did not have the benefit of a complete record, since material evidence, such as the withdrawal of the audit reports by KPMG, was not known at the time.

This is exactly the position taken by the English *High Court.* The Stati argued that the *High Court* was bound by the decision of the Swedish courts. Judge Knowles did not follow this position, holding that :

> *"No court has decided the question whether there has been the fraud alleged [...]. Neither the Swedish Court nor the US Court nor English Court has, although*

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132 Pierre Mayer and Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Arbitration International, 19(2) (2003) 249, at 255.

133 New York Convention, Art. V(2)(b).

134 Restatement of U.S. Law of International Commercial and Investment Arbitration (proposed final draft, April 24, 2019): "*§ 4.8. Effect of prior judicial determinations on availability of post-award actions: d. Effect of different law applied in prior determination: Whether a prior judicial determination has preclusive effect in a post-award action may, in some circumstances, depend on the law that governed the determination in the prior action. With respect to certain grounds for granting or denying post-award relief - such as the invalidity of the arbitration agreement - the law applicable to that ground is likely to be the same, whether that ground is invoked to dismiss a motion to compel arbitration, to set aside the resulting award, or to oppose confirmation, recognition or enforcement of the award. Where the applicable law is the same, the earlier decision can easily have a preventive effect. The same applies to allegations that a party was not given an opportunity to be heard, that a tribunal exceeded its powers or that a tribunal impermissibly disregarded the parties' agreement on the composition of the tribunal or the arbitral procedure. However, with respect to other grounds, the law governing the availability of post-award relief requires the application of a different law than that applied by the court that previously considered the analogous ground. Different courts may have to consider, at different stages of the arbitration life cycle, whether a dispute is arbitrable or whether enforcement of an arbitration agreement or award would violate public policy. In principle, each court faced with such challenges applies its own domestic law on non-arbitrability and public policy.*"

material has been put before those Courts that would allow them to decide that question." [135]

However, Judge Knowles went even further:

"The New York Convention is addressed, at Article V(2)(b), to the public policy of the country of enforcement. Relevant public policy can and does differ from country to country. It is correct to say that the Swedish Court did not decide whether under English law public policy required the application to enforce the Award in this jurisdiction to be refused." [136]

"If, as I should, I take the decision of the Swedish Court as showing Swedish public policy in the context of this case then I find, as a matter of law, that English public policy is not the same. Counsel for ROK] put[] it this way, and I agree: 'It is apparent from the outcome in Sweden alone that the content of Swedish public policy must be different from that of its English counterpart'. [137]

"[E]ven had the basis of an issue estoppel been made out, the English court would still have to decide whether enforcement of the Award should be permitted because English public order must ultimately be a matter for the English Court." [138]

The English *High Court* specifically (and correctly) held that the compliance of the Award with Swedish public policy had no bearing on whether enforcement of the Award would be contrary to English public policy. It found that the possibility that enforcement of the Award would be contrary to English public policy was sufficiently important to justify a trial on that issue.

In *Alexander Brothers v. Alstom,* an ICC arbitration award was refused recognition and enforcement in France on the grounds of breach of public policy. The arbitral tribunal had refused to consider the issue of corruption. The Swiss Federal Court refused to challenge the arbitral tribunal's findings. But the Paris Court of Appeal, in its judgment of 10 April 2018, decided that :

"It is for the court, seized on the basis of the provisions of Articles 1525 and 1520, 5° of the Code of Civil Procedure, of an appeal against the order of exequatur of an award made abroad, to seek, in law and in fact, all the elements making it possible to assess whether the recognition or enforcement of the award violates in a manifest, effective and concrete manner the French conception of international public policy; that it is not bound, in this examination, either by the assessments made by the arbitral tribunal, or by the law chosen by the parties".

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[135] *Anatolie Stati, Gabriel Stati. Ascom Group S.A. and Terra Raf Trans Traiding Ltd,* Case no. CL-2014-000070 6 June 2017, paragraph 80.

[136] *Ibid.* paragraph 84.

[137] *Ibid.* paragraph 86.

[138] *Ibid.* paragraph 87.

> *"An arbitral award giving effect to a contract of influence peddling or bribery offends international public policy and cannot be granted exequatur; [...] in this respect, the possible bad faith of the debtor party is irrelevant, since the only issue is the refusal of the French legal system to provide legal aid for the enforcement of an illegal contract".* [139]

In conclusion, under the New York Convention, a court must determine whether the enforcement of the award is contrary only to its own public policy.

4. **The requirement of materiality (or causation): the false statements or evidence must be "likely" to have had an effect on the decision of the arbitral tribunal**

To be taken into account, false statements and false or fraudulent evidence must be "material" or have a "causal link" with the final sentence[140].

This element is also sometimes referred to as the "linkage" requirement. Although these terms are often used interchangeably, their precise definition is sometimes confused in the case law and [141]arbitration literature.

The aim is to eliminate challenges based on fraud on peripheral or unimportant[142] issues.

Some national courts seem to suggest that the causation or materiality requirement requires proof of "*but for"* causation, meaning that the party challenging the award must prove "*but for"* false or fraudulent statements or evidence, the arbitral tribunal would have come to [143]a different conclusion. This minority approach is not correct.

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[139]Paris Court of Appeal (Chamber 1), Judgment of 10 April 2018, *Société Alstom Transport SA et autre c/ société Alexander Brothers Ltd.* Revue de l'arbitrage 2018 - N° 3, p. 580.

[140] *Oberster Gerichtshof* [OGH] Jan. 26, 2005, 3 Ob 221/04b, XXX Y.B. Comm. Arb. 421, 428 (Austria) ("*Mere allegation of perjury in arbitration is not a ground for refusing recognition and enforcement of the arbitral award pursuant to Article V(2)(b) of the New York Convention"*); *Majestic Woodchips, Inc. v. Donghae Pulp Co, Daebeobwon*, May 28, 2009, Case No. 2006 Da 20290, XXXVII Y.B. Comm. Arb. 259 (S. Kor.) (challenging recognition on the grounds that the award was fraudulently obtained requires showing that the fraud is clear and convincing, was not discoverable during the arbitration, and was material to the issues in dispute) (cited in Gary Born, International Commercial Arbitration, (2nd edn, Kluwer 2014), 3706, fn. 1573.)

[141] Aloke Ray, Matthew Secomb, et al, *A Mountain Too High: The Challenge of Setting Aside an Arbitral Award on the Basis of Fraud in Different Jurisdictions, 11 German Arbitration Journal* 20, 31 (2013): '*Each jurisdiction uses slightly different wording to describe the standard of causation to be proven by the claimant. While it could be argued that the burden of proof would require the party seeking to set aside an award to submit full proof of causation, there seems to be a trend across jurisdictions to lower the threshold*."

[142] *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221 (nexus requirement is "*designed to eliminate technical and unfounded challenges*"); *Odeon Capital Grp. LLC v. Ackerman,* 864 F.3d 191, 197 (2d Cir. 2017) ("*If the alleged fraud involved only a collateral issue, or one that did not influence the arbitrators' conclusions, then that fraud cannot serve as a basis for vacating the award because the award was not 'obtained by fraud'"*).

[143] *Bonar v. Dean Witter Reynolds, Inc.* 835 F.2d 1378, 1383 (11th Cir. 1988) (requiring a showing of materiality, but noting that this element of the test for vacating an award "does not require the petitioner to establish that the result of the proceeding would have been different if the fraud had not occurred").

Instead of "*but for"* causation, most national courts define the materiality or causation requirement as requiring proof "*that the fraud materially related to an issue in the arbitration*," [144]or "*that such evidence would have had an important influence on the result*.[145] Similarly, courts have described the threshold as "*that the evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing*," [146]or that the fraudulent exhibit "*caused ... substantial injustice in that the same procured or substantially impacted the making of the award*." [147]. Even Professor Born (who is one of the main proponents of the strong presumption in favour of the enforceability of arbitral awards) does not endorse the "*but for"* test, but rather suggests that the causation or materiality requirement is satisfied as long as the fraudulent evidence does not relate to a tangential issue[148].

As some authors have explained, the objective definition of materiality or causality "*makes sense because the test is whether a causal link objectively exists between the fraud and the award (as opposed to whether the court would actually have reached a different decision had it known of the fraud)*"[149].

An English court has taken a stronger stance against the requirement of a '*but for'* causal link:

"*Of course, the test cannot be as high as that the evidence would have affected the result, not least because, for the court to reach that conclusion, would be to usurp the function of the arbitrators in the event that the matter was remitted to them.* " [150]

Thus, a court will respect the arbitral tribunal's power of decision by verifying that false or fraudulent statements or evidence are likely to have had a significant or material effect on the tribunal's decision.

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[144] *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306-07 (5th Cir. 2004).

[145] *Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd & Ors [*1999] EWCA Civ 1401 ("*I have not fully considered what the position is now that the 1996 Act is in force, but in this context it is difficult to think that if under section 68(2)(g) it was suggested an award had been obtained by fraud and that relief under section 68(3) should be granted, the court would not insist on the same condition i.e. unavailability of the evidence produced as at the time of the arbitration, and that such evidence would have had an important influence on the result*").

[146] *Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd. and others* [1998] 4 All ER 570 ("*The introduction of fresh evidence in order to disturb an English award is subject to requirements similar to those relating to the introduction of fresh evidence to challenge an English judgment. In particular, the fresh evidence must be of sufficient cogency and weight to be likely to have influenced the arbitrator's conclusion and the evidence must not have been available or reasonably available at the time of the hearing*") (cited in *Gater Assets Ltd v Naftogaz Ukraine* [2008] EWHC 237 (Comm))

[147] *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2009] SGHC 231.

[148] Gary Born, International Commercial Arbitration 3705 (2nd Kluwer 2014) at 3706 ("*Fraud occurring solely in connection with an irrelevant or duplicative issue, while reprehensible, will not ordinarily provide a basis for non-recognition ... There is a risk that baseless allegations of fraud will be used by disappointed award debtors to delay recognition and enforcement of awards against them*").

[149] Aloke Ray, Matthew Secomb, et al, *A Mountain Too High: The Challenge of Setting Aside an Arbitral Award on the Basis of Fraud in Different Jurisdictions*, 11 German Arbitration Journal (2013) 20, at 31.

[150] *Chantiers de L'Atlantique S.A. (CAT) v Gaztransport & Technigaz S.A.S., [*2011] EWHC 3383 (Comm), paragraph 61.

In order to determine whether false or fraudulent statements or evidence are sufficiently material to justify challenging an award, the enforcing court must engage in a counterfactual analysis: if the subsequently discovered evidence had come to the attention of the arbitral tribunal during the arbitral proceedings, was the new evidence *"sufficiently convincing and material*" to have "a *significant influence on*" or "*likely to have a significant influence on*" *the arbitrators' conclusion?* [151]

In any event, the Stati's liability and quantum fraud issues had a direct effect on the Arbitral Tribunal's decision. The Arbitral Tribunal adopted almost verbatim the Stati's erroneous allegations on Kazakhstan's liability and its consequences under the ECT.

Furthermore, the Stati submitted and relied on KMG's indicative offer, which the Stati knew to be erroneous and based on false financial information, whereas the Arbitral Tribunal - at the Stati's request - considered the indicative offer as "*the relatively best source of information*"[152].

In conclusion, the Stati intentionally concealed relevant information during the arbitration, deliberately made false statements and led the Arbitral Tribunal to rely on documents, created on the basis of artificial data.

It is clear from the above pleadings and the documents in issue that the Stati have defrauded the Arbitral Tribunal both as to Kazakhstan's liability under the ECT and as to quantum.

The fraud of the Stati directly determined the decision of the Arbitral Tribunal. It affects the entire Award as it is based on purely fictitious elements and therefore cannot be recognised and enforced in Luxembourg.

VI. STAY OF PROCEEDINGS (ART. 3 CPP)

In the alternative, if the Court were not to reject the request for exequatur of the arbitral award, the Republic of Kazakhstan submits that it filed a criminal complaint with civil action dated May 27, 2019 in the hands of the Investigating Judge against the Stati (**Exhibit No. 111 Arendt**):

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[151] Rogers Opinion of 17 January 2021, at paragraphs 57-58: "*57. National courts are empowered under the public policy exception of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") to refuse recognition and enforcement of an award that is tainted by fraudulent or perjurious material evidence. In determining whether false or fraudulent evidence should result in a refusal to recognise or enforce an award, courts conduct a counterfactual analysis to determine whether, had the court known of the false or fraudulent evidence during the arbitration, that evidence would have had a material effect on the court's decision. 58. By refusing to recognise or enforce awards based on false or fraudulent evidence, courts protect the integrity of international arbitration, the integrity of their own judicial systems and the domestic and international public policies that underpin the rule of law. If, instead, they enforce such awards, national courts give legal effect to fraudulent awards and undermine the legitimacy of international arbitration. This role of national courts is particularly important for arbitrations involving States Parties, especially States Parties that are actively fighting local corruption and promoting their national rule of law*.

[152] *Idem* paragraph 1747.

- for forgery and use of forgeries, respectively attempted forgery and use of forgeries committed within the meaning of Articles 196 and 197 of the Criminal Code,
- for fraud, respectively attempted fraud as defined in article 496 of the Penal Code,
- for money laundering, respectively attempted money laundering as defined in article 506-1 of the Penal Code.

Public action is underway, and the investigation is underway.

By an order of 9 October 2019, Investigating Judge Filipe Rodrigues had declared himself territorially incompetent to investigate the facts at the basis of the complaint.

On appeal by the civil party Republic of Kazakhstan, the Council Chamber of the Court of Appeal, by a judgment dated 28 January 2020 (judgment No. 95/20 Ch.c.C of 28 January 2020 / Not. 15480/19/CD) (**Exhibit No. 182 Arendt**), reversed the decision of the investigating judge and declared that the investigating judge has territorial jurisdiction to investigate the facts underlying the civil party complaint of 24 May 2019.

The Council Chamber noted that certain allegedly forged documents such as the *KPMG Due Diligence report* and *the Information Memorandum* were taken up and used in the Stati's submissions in the exequatur proceedings that led to the judgment of 19 December 2019. It also retained the importance of KPMG's letter of 21 August 2019 as a basis for its decision.

In the present case, there is no doubt that the offences alleged against the Stati, should they be upheld by the criminal courts, would have a direct influence on the present proceedings, particularly in view of the potential involvement of your Court in the commission of these offences which a validation of the seizure could entail.

This is confirmed by Catherine Rogers in her opinion of 17 January 2021:

194. As Professor Gary Born has explained, enforcing an award that is predicated on false or fraudulent evidence "vitiates the entire character of the arbitral proceeding. "181 As Professor Michael Reisman has explained, enforcing such an award "mar[s] the noble vision and ennobling practice of sovereign States voluntarily submitting their disputes to courts and tribunals for the peaceful resolution in accordance with international law."182 Giving effect to a fraud-tainted award would "implicate [the enforcing court] in the fraudulent scheme" and undermine Kazakhstan's efforts to improve its own justice system and commitment to the rule of law.

As a result, the outcome of this criminal case will clearly have an impact on the present case, since it concerns exactly the same facts that are invoked in the present exequatur case, so that, pursuant to Article 3 of the Code of Criminal Procedure, it is appropriate to pronounce a stay of proceedings pending the outcome of the criminal case.

MACHINE TRANSLATION

VII. AS TO COSTS AND PROCEDURAL INDEMNITY

The application for exequatur is to be rejected with costs to be borne by the Stati.

In view of the costs incurred by the Republic of Kazakhstan and not included in the costs, the Court is asked to order the Stati to pay the Republic of Kazakhstan the sum of EUR 500,000.00 on the basis of Article 240 NCPC.

In view of the foregoing, all the Stati's claims, including their claim for procedural damages, should be dismissed.

THEREFORE

and all others to be deducted in the course of the proceedings and to be substituted, even of its own motion, and subject to the express and formal reservation of the right to change, add to and modify the present submissions in the course of the proceedings, the limited liability company Arendt & Medernach, for its part, claims that

PLEASE THE COURT

to accept the appellant's claim as a matter of form and, as to the substance, to declare it well founded and justified;

principally, to declare that the Arbitral Award of 19 December 2013 rendered by the Arbitral Tribunal at the Arbitration Institute of the Stockholm Chamber of Commerce composed of Prof. Karl-Heinz BÖCKSTIEGEL, Chairman, David R. HAIGH, QC, co-arbitrator, and Prof. Sergei N. LEBEDEV, co-arbitrator, comprising 414 pages, corrected by an award rendered under the same composition on 17 January 2014, comprising 2 pages, is contrary to Luxembourg public policy, whereas it is the product of an infringement, respectively fraud;

declare that the fraud committed by the respondents is established by the documents submitted by the appellant and, in particular, the various expert opinions, and, insofar as necessary, give notice to the appellant that it offers to prove by all other legal means and, in particular, by expert opinion, the various elements constituting the fraud committed by the respondents and described in the body of these documents;

consequently, on the basis of Article V(2) b) of the New York Convention, if not alternatively of Articles 1251(2), 1244(10) and 1244(12) NCPC, the exequatur of the Arbitral Award should be refused and to order the consequent reversal or revocation of the enforcement

order issued on 30 August 2017 by Mr Thierry HOSCHEIT, First Vice-President of the District Court of and in Luxembourg, and to declare that it may not produce any effect whatsoever on the territory of the Grand Duchy of Luxembourg;

in the alternative, give notice to the appellant of the filing of its criminal complaint with the Examining Magistrate dated 27 May 2019 and the payment of the required deposit;

Therefore, the Court of Appeal has decided to stay the present exequatur proceedings in application of the principle that "the criminal is the civil";

in any case,

order the respondents jointly and severally, if not jointly and severally, to pay all costs and expenses of the proceedings and to order their distribution to the benefit of the applicant lawyer who claims to have advanced them;

order the respondents to pay, jointly and severally, if not in solidum, if not each for the whole, to the appellant the amount of 500.000,- euros on the basis of article 240 of the NCPC, whereas it would be inequitable, in view of the circumstances, to leave to the charge of the appellant all the legal costs and fees which it had to incur because of the behaviour of the respondents;

to give notice to the appellant of all other rights, dues, pleas and actions to be asserted at the appropriate time and place and as may be appropriate.

For original,

François Kremer
For Arendt & Medernach S.A.

Notified and subject to all reservations to NautaDutilh Avocats Luxembourg S.à r.l. represented for the purposes of the present by Mr Antoine Laniez, who dated and stamped the present, for receipt of the copy, in Luxembourg, on

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p. NautaDutilh Avocats Luxembourg Sàrl
Antoine Laniez