EXPERT WITNESS OPINION

OF

CATHERINE A. ROGERS

I. INTRODUCTION

1. I have been asked to provide an expert opinion regarding the applicable ethics rules and related considerations that apply when a party to an international arbitration is credibly accused of submitting false or fraudulent evidence to the arbitral tribunal.

2. Specifically, I have been asked to assess the ethical and professional obligations that apply to accountants, expert witnesses, attorneys, and arbitrators in the face of false statements or fraudulent evidence submitted in an international arbitration. I have also been asked to opine how these ethical obligations should affect analysis by national courts that review the award.

II. PROFESSIONAL BACKGROUND AND QUALIFICATIONS

3. I am a tenured law professor at Pennsylvania State University, School of Law, where I am the Paul and Marjorie Price Faculty Scholar and an affiliate faculty member of the School of International Affairs. I also hold a partial appointment as the Professor of Ethics, Regulation and the Rule of Law at Queen Mary, University of London, where I am the co-Director of the Institute for Ethics and Regulation. A complete copy of my Curriculum Vitae is attached as Annex A.

4. I have been teaching and writing in the area of international arbitration for over 20 years. My primary area of sub-specialization is ethics in international arbitration. I am the author of over 50 books, articles, book chapters, and essays in this area. For the purposes of this opinion, the most relevant among these publications is my book, ETHICS IN INTERNATIONAL ARBITRATION, which was published by Oxford University Press in 2014.

5. I hold numerous appointments in professional organizations and institutions, and I am actively involved in law reform efforts around the world. Among other professional appointments, I am a reporter on the American Law Institute's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, and a Member of the Academic Forum on ISDS, which contributes to the work of UNCITRAL Working Group III on issues regarding arbitrator ethics and third-party funding. I was a member of the International Bar Association (the "**IBA**") Task Force that drafted the IBA Guidelines on Party Representatives in International Arbitration and co-Chair, together with William W. Park and Stavros Brekoulakis, of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration. I am also the Founder and CEO of Arbitrator Intelligence, which aggregates and analyzes information to improve the arbitrator selection process.

6. I sit or have sat on several international institutional advisory boards, including the International Board of Advisors of the Vienna International Arbitration Centre, the Academic Forum on Investor-State Dispute Settlement at the Geneva Center for International Dispute Settlement; the Advisory Board of Investment Claims, Oxford University Press; the Board of Advisors of the New York International Arbitration Center; and (formerly) the Board of Advisors of the Lagos Court of Arbitration and the Court of Arbitration of the Jerusalem Arbitration Centre (JAC).

7. I am one of very few scholars who writes consistently in the area of ethics in international arbitration. As a result, with some degree of frequency, I am consulted by practitioners and arbitrators on questions of ethics in international arbitration. For personal and professional reasons, however, I have only on one other occasion accepted a formal appointment as an expert.

8. In this case, I agreed to serve as an expert because I believe that the relevant facts raise important and novel issues regarding accountant ethics, expert ethics, counsel ethics, and issues regarding the legitimacy of international arbitration and the rule of law more generally. Although I have been retained by the Republic of Kazakhstan in this case, the following analysis presents my independent professional judgment and is consistent with my professional opinions expressed in my academic publications.

III. STATEMENT OF FACTS

9. Many of the relevant facts in this matter are debated. The following summary is based on my review of materials provided to me (see attached Annex B), and materials from the record in the Arbitration provided to me on request by Herbert Smith Freehills. The following summary mostly identifies facts that, to my understanding, are undisputed. In some instances, it identifies facts that are disputed, but acknowledges the lack of agreement.

A. Facts Regarding KPMG and the Dispute

10. KPMG Audit LLC ("**KPMG**") was retained by Ascom Group S.A. ("**Ascom**"), Anatolie Stati and Gabriel Stati (the "**Stati Parties**") to audit and review the financial statements of Kazpolmunay LLP ("**KPM**"), Tolkynneftegaz LLP ("**TNG**") and Tristan Oil LTD ("**Tristan**") (collectively the "**Companies**") for the years ending 2007, 2008, and 2009 (the "**Audited Financial Statements**").[1]

[1] In addition to Auditing the Companies' Financial Statements, KPMG also reviewed the Companies' interim financials.

11. A dispute arose between Kazakhstan and the Stati Parties,[2] in which the Stati Parties alleged that their investment in Kazakhstan was wrongly interfered by the State, giving rise to several international law claims under the Energy Charter Treaty (the "**Arbitration**").

12. In the dispute, several key issues related directly and indirectly to the financial condition of the Companies, including:

    a) The proper valuation date, meaning the actual date of the effect of Kazakhstan's allegedly illegal actions;

    b) The facts that led to the Stati Parties' liquidity crisis and the acceptance of a loan under acutely onerous terms;

    c) The enterprise value, determined based on the market price of the Companies' shares and debt instruments as of the valuation date;

    d) The value of the Stati Parties' investment in the Borankol Liquefied Petroleum Gas Plant ("**LPG Plant**") in Kazakhstan, both as assessed by the Stati Parties' expert FTI Consulting ("**FTI**") and as assessed in the indicative bid that was submitted by KazMunaiGas Exploration Production JSC ("**KMG**") in September 2008 ("**Indicative Bid**") and later submitted by the Stati Parties as quantum evidence in the Arbitration;

    e) The cause of the reduction in value of the Stati Parties' investments, specifically whether the cause was the result of Kazakhstan's actions, as the Stati Parties alleged in the Arbitration, or as a result of financial improprieties by the Stati Parties, as Kazakhstan argued;

    f) The credibility of the parties, particularly in relation to cross-allegations of misconduct and financial improprieties.

13. In support of their arguments on the issues in the paragraph above relating to the corporate structure and financial status of the Companies, the Stati Parties relied on witness statements and live testimony from Mr. Arthur Lungu, the Chief Financial Officer of Ascom and Vice President of Tristan, and Mr. Anatolie Stati.

14. Among the topics on which Mr. Anatolie Stati and Mr. Lungu testified in their witness statements and their oral testimony in the Arbitration, they explained that the Stati Parties obtained complex emergency bridge financing for US$60 million from Laren Holdings Ltd. ("**Laren**") at a 35% interest rate. According to the evidence presented by the Stati Parties in the Arbitration, in addition to repaying the loan at a 35% interest, the Stati Parties also had

[2] Kazakhstan has used the term "Stati Parties" to include Terra Raf Trans Trading Ltd., a company registered in Gibraltar and owned in equal shares by Anatolie and Gabriel Stati.

to issue and provide Laren US$111.1 million in promissory notes at a 10.5% interest rate secured by the Companies (cumulatively the "**Laren Transaction**").

15. Mr. Stati described the lenders behind Laren as a "group of lenders" that was "ultimately found" by the financial advisor Renaissance Capital.[3] The Stati Parties' lawyers explicitly denied during the Arbitration that the Stati Parties had any affiliation with Laren:

> When Claimants were unable to make that repayment, the Laren Lenders — **who are not affiliated in any way with Mr. Stati** — kept the new notes.[4]

16. The tribunal in the final Award later referred to those lenders as "a group of venture capitalists."[5]

17. In summarizing Mr. Anatolie Stati's testimony, the Stati Parties' written submissions described the terms of the Laren Transaction as "horrendous"[6] and "terrible."[7] The submissions also repeatedly referred to the Laren lenders as "loan sharks" and the "equivalent of loan sharks"[8] who provided "desperation financing"[9] on "disastrous terms,"[10] and subject to "horrendous" and "extremely onerous conditions."[11]

18. The Stati Parties argued that "those were the best terms that Claimants [i.e. the Stati Parties] could obtain" and that "this rate is a reflection of the actual borrowing costs for funds that the claimants were forced to secure because of the respondent's conduct."[12] The Stati Parties' submissions repeated that they "had no choice but to accept those terms."[13] On several occasions, including in Mr. Lungu's and Mr. Stati's testimony and the Stati Parties' First Post-Hearing Brief in the Arbitration, they also argued that these unfavorable financial terms "were only necessary because of Kazakhstan's harassment campaign."[14]

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[3] *See* Second Witness Statement of Anatolie Stati in the Arbitration dated May 7, 2012, par. 43.

[4] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 355 (signed by Reginald Smith, Kenneth Fleurier, Alexandra Kotlyachkova) (emphasis added).

[5] Award, par. 461.

[6] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 217.

[7] Stati Parties' Reply Memorial on Jurisdiction and Liability in the Arbitration dated May 7, 2012, par. 384.

[8] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 356

[9] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 353.

[10] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 24.

[11] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 356.

[12] Transcript of the Hearing on Quantum in the Arbitration dated January 28, 2013, 1st Hearing Day, p. 118, lines 23-25.

[13] Stati Parties' Reply Memorial on Jurisdiction and Liability in the Arbitration dated May 7, 2012, par. 384.

[14] *See* Second Witness Statement of Artur Lungu in the Arbitration dated May 5, 2012, par. 7-9; Stati Parties' Reply Memorial on Jurisdiction and Liability in the Arbitration dated May 7, 2012, par. 409.

19. The Stati Parties alleged that the onerous conditions in the Laren Transaction, in turn, "caused further financial duress" to the Stati Parties, which in turn led to compensable harms.[15]

20. In support of their arguments regarding various financial issues, the Stati Parties also relied on evidence presented by FTI, its expert witness. In the Arbitration, FTI issued a total of four expert reports, and Mr. Howard Rosen of FTI testified in the arbitral hearings.

21. The Stati Parties relied on the Indicative Bid to claim compensation for the LPG Plant in their Statement of Claim,[16] their Reply Memorial on Jurisdiction and Liability,[17] their Reply Memorial on Quantum,[18] in oral argument,[19] and in their First Post-Hearing Brief.[20] For example, the Stati Parties' First Post Hearing Brief stated:

> 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.[21]
>
> 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 …[22]
>
> The third indicator of value for the Tribunal, and a very important one in claimants' view, is the indicative offers …[23]

[15] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 217.
[16] Stati Parties' Statement of Claim in the Arbitration dated May 18, 2011, par. 71.
[17] Stati Parties' Reply Memorial on Jurisdiction and Liability in the Arbitration dated May 7, 2012, par. 378.
[18] Stati Parties' Reply Memorial on Quantum in the Arbitration dated May 28, 2012, par. 66.
[19] Transcript of the Hearing on Jurisdiction and Liability in the Arbitration dated October 1, 2012, 1st Hearing Day, pp. 91 and 96.
[20] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 569.
[21] Stati Parties' Reply Memorial on Quantum in the Arbitration dated May 28, 2012, par. 66.
[22] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 569.
[23] Transcript of the Hearing on Quantum in the Arbitration dated January 28, 2013, 1st Hearing Day, p. 27, lines 10-12.

22. FTI also relied on the Indicative Bid in its expert reports for the Stati Parties:[24]

> 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.[25]

23. In testifying at the arbitral hearing on quantum, Mr. Rosen from FTI stated:

> 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.[26]

24. In FTI's Expert Report in the Arbitration dated May 17, 2011, FTI stated:

> 18.1 Information provided to us, upon whom our conclusions are based, is believed to be reliable. Any additional information and documents produced after the date of this report may have a material impact on the analyses and conclusions contained in this report.
>
> …
>
> 18.4 We reserve the right, but are under no obligation, to review the calculations referred to in this report, and if deemed necessary by us, to revise our analyses and conclusions in light of any information which becomes known to us subsequently.[27]

25. The Audited Financial Statements of the Stati Parties were appended to FTI's expert reports.

26. An award in the Arbitration was rendered on December 19, 2013 ("**Award**"). The Award rejected Kazakhstan's arguments on the merits and found it liable for US$497,685,101. The

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[24] FTI's Expert Report in the Arbitration dated May 17, 2011, FTI's Supplemental Expert Report in the Arbitration dated May 28, 2012, FTI's Amendments to the Expert Report in the Arbitration dated January 25, 2013, and FTI's Post-Hearing Expert Report in the Arbitration dated April 8, 2013.

[25] FTI's Supplemental Expert Report in the Arbitration dated May 28, 2012, par. 7.5.

[26] Transcript of the Hearing on Quantum in the Arbitration dated January 31, 2013, 4th Hearing Day, p. 57, lines 4–8.

[27] FTI's subsequent submissions contained similar provisos. Specifically, both FTI's Post-Hearing Expert Report in the Arbitration dated April 8, 2013 (par. 14.4) and FTI's Fourth Expert Report in the Arbitration dated June 3, 2013 (par. 7.4) contain the following identical reservations:

> I reserve the right, but am under no obligation, to review the calculations referred to in this report, and if deemed necessary by myself, to revise my analyses and conclusions in light of any information which becomes known to myself subsequently.

arbitral tribunal also ordered Kazakhstan to pay three quarters of the costs, and half of the Stati Parties' costs for legal representation or US$8,975,496.40.

27. For the issue of the valuation of the LPG Plant, the Award did not rely directly on the damages evidence presented by the Stati Parties' expert, FTI. Instead, the tribunal relied on the Indicative Bid, which had been prepared by KMG and submitted separately by the Stati Parties as quantum evidence in the Arbitration.

28. In determining damages, the arbitral tribunal expressly relied on the Indicative Bid, stating in the Award:

> [T]he Tribunal considers it to be of particular relevance that an offer was made for the LPG Plant by state-owned KMG at that time for USD 199 million. The Tribunal considers that to be the **relatively best source of information** for the valuation of the LPG Plant among the various sources of information submitted by the Parties regarding the valuation for the LPG Plant during the relevant period of the valuation date accepted by the Tribunal.[28]

29. In the parties' written and oral arguments, in the transcripts of the hearings, and in the Award, the Audited Financial Statements and the fact that KPMG had audited the Financial Statements were referenced repeatedly to support several of the Stati Parties' arguments on the merits and on damages issues. Several of these arguments made by the Stati Parties were then relied on by the tribunal in making the Award.[29]

B. Post-Award

30. After the Arbitration, in 2014 Kazakhstan submitted a petition to set aside the Award at the seat of arbitration in Sweden. While the set-aside proceedings were pending, Kazakhstan obtained access to evidence that it believed demonstrated that the Stati Parties misled the arbitral tribunal regarding various financial matters, including the true value investments the Stati Parties claim to have made in the construction of the LPG Plant.

31. Of particular concern to Kazakhstan was evidence that it believed demonstrated that the Stati Parties had created a shell company called Perkwood Investment Limited ("**Perkwood**") for the purpose of diverting funds that were purportedly spent on the construction of the LPG Plant. Kazakhstan believed that the purpose of the diversion was to inflate the construction costs of the LPG Plant, which were accounted for in the Audited Financial Statements.

32. In requesting set aside, Kazakhstan argued, and the Stati Parties contested, that the Indicative Bid relied on the Audited Financial Statements. In support of these arguments, Kazakhstan referred to KMG's reference in the Indicative Bid to the so-called Information

[28] Award, par. 1747 (emphasis added).
[29] *See infra* par. 63-67.

Memorandum ("**Information Memorandum**"), which had been prepared by Renaissance Capital, the party that purportedly introduced the Stati Parties to Laren.[30] Specifically, the Indicative Bid stated:

> In formulating our Indicative Offer, we have relied upon the information contained in the Information Memorandum and certain other publicly available information. Our valuation depends upon this information and assumptions being substantiated in the next round through due diligence materials and meetings.
>
> Due to lack of sensitive input data, we used comparative (transaction and trading multiples) method for valuation of Borankol and Tolkyn fields, whereas the LPG plant was valued using the combination of comparative and cost methods …
>
> … Historical costs of US $193 million were used as a base for cost method valuation.[31]

33. The "comparative and cost method" used to calculate the value of the LPG Plant, Kazakhstan argued in the post-award proceedings, expressly relied on "[t]he historical costs of US$193 million … as a base for cost method valuation."[32] This figure, Kazakhstan argued, was taken from the Information Memorandum, which in turn was based on the Audited Financial Statements audited by KPMG and unaudited interim financials prepared by KPMG:

> The financial information presented in this Information Memorandum is derived from the unaudited interim combined balance sheets and statements of income, cash flows and changes in shareholders' equity of KPM, TNG and Tristan Oil, as of and for the six months ended 30 June 2007 and 2008, and the audited combined balance sheets and statements of income, cash flows and changes in shareholders' equity of KPM, TNG and, with effect from its incorporation on 24 October 2006 and Tristan Oil, as of 31 December 2005, 2006 and 2007.[33]

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[30] *See supra* par. 12.

[31] The Indicative Bid of KazMunaiGas Exploration Production JSC, p. 3, provides:

> c) […] On the basis of the information contained in the Information Memorandum and publicly available information, subject to the conditions and assumptions set out elsewhere in this Indicative Offer and contingent upon further due diligence at Phase II of the sale process, we value the Company at US $754 million on a debt free and cash free basis [Enterprise Value] for expected completion of the Proposed Transaction in January 2009.
>
> d) […] We estimate the value […] of the LPG Plant at US$ 199 million.

[32] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 569.

[33] Information Memorandum, p. 4.

34. On December 9, 2016, the Svea Court of Appeal refused Kazakhstan's request to set aside the Award. In its reasoning, the Svea Court of Appeal noted that the arbitral tribunal had relied on the Indicative Bid, instead on the Stati Parties' witness and expert evidence on the valuation of the LPG Plant. As a consequence, the Svea Court reasoned, even considering Kazakhstan's allegations that the Companies' financials were tainted by false or fraudulent evidence, that evidence did not affect the outcome of the Arbitration. As to the Indicative Bid itself on which the tribunal relied for its damage valuation, the Svea Court concluded that:

> [The] Stati Parties had obtained the offer from a third party before the arbitration and thus the document per se cannot be regarded as false evidence, even if that offer was incorrect because it was based on intentional false information provided by the Stati Parties.[34]

35. On this basis, the Svea Court of Appeal refused to set aside the Award.[35] As further discussed below, the English High Court found that the Svea Court did not rule on "whether there has been the fraud alleged":[36]

> Neither the Swedish Court nor the US Court nor English Court has, although material has been put before those Courts that would allow them to decide that question.[37]

36. After the set aside proceedings, Kazakhstan discovered, and presented in various national court proceedings the Stati Parties had initiated to enforce the Award, new sources of evidence that Kazakhstan contends demonstrate fraud by the Stati Parties in the financial transactions underlying the Award.

37. In response, the Stati Parties and their counsel made numerous representations and statements to courts in which they expressly denied that false statements or false or fraudulent evidence had been presented to the arbitral tribunal or that any allegedly false or misleading testimony was material.

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[34] Second Witness Declaration of Alexander Foerster, the Swedish counsel of Kazakhstan, dated July 20, 2020, par. 61.

[35] The Republic of Kazakhstan v. Ascom Group, S.A. et. al., Case T 2675-14, Judgment dated December 9, 2016, Svea Court of Appeal, p. 45: ("Since the arbitral tribunal based its assessment on the indicative bid, the evidence invoked by the Investors in the form of witness testimony, witness affidavits and expert reports regarding the size of the investment cost – which evidence Kazakhstan has claimed was false – has not been of immediate importance for the outcome. In the Court of Appeal's opinion, already in these circumstances, such evidence per se – even if it were proven to be false – does not constitute sufficient reason to consider the arbitral award invalid. In the Court of Appeal's opinion, it is also not obvious that this evidence, through indirect influence on the arbitration tribunal, was decisive for the outcome of the case.").

[36] Anatolie Stati et. al. v. The Republic of Kazakhstan [2017] EWHC 1348 (Comm), par. 80.

[37] Anatolie Stati et. al. v. The Republic of Kazakhstan [2017] EWHC 1348 (Comm), par. 80.

38. With one exception, courts in various jurisdictions, including the Svea Court of Appeal, upheld the Award. The exception was an English court, which found that there was prima facie evidence both that the Award had been obtained by fraud and that "there was a fraud on the Tribunal." Based on these findings, the English High Court ordered further proceedings to determine the existence of fraud:

> In my judgment there is the necessary strength of prima facie case that the alleged fraud would have made a difference to the Tribunal. And that, in asking the Tribunal to rely on the KMG Indicative Bid in circumstances (concealed from the Tribunal, as from the bidder) of the alleged fraud, there was a fraud on the Tribunal.[38]

39. The English court also recognized that it had the power, despite the Svea Court's ruling, to evaluate the allegations of false and fraudulent evidence under the public policy exception:

> Where the Swedish Court as the supervisory court has held that its powers are limited so that it cannot intervene even if the arbitrators were deliberately misled by the Claimants' use of the KMG Indicative Bid it is important to record that the powers of the English Court, and the requirements of English public policy, are not so limited.[39]

40. The Stati Parties withdrew those proceedings before the English High Court conducted further examination or made any final determination regarding the alleged fraud. The Stati Parties' withdrawal was permitted by the English Court of Appeals on the condition that the Stati Parties agreed to give an undertaking to pay Kazakhstan's legal costs and to not attempt again to enforce the Award in England.[40] -

C. Events Leading up to KPMG's Withdrawal of its Audit Reports

41. On April 3, 2019, Mr. Lungu stated in a deposition in the U.S. under oath, inter alia, that:

    a) He signed "Representation Letters" (attached to Mr. Lungu's deposition as exhibits) along with Mr. Stati, which confirmed that they understood the meaning of the term "Related Party" and the meaning of "fraud" regarding failures to disclose. The letter also expressly verified "the completeness of the information provided to [KPMG] regarding the identification of related parties

[38] Anatolie Stati et. al. v. The Republic of Kazakhstan [2017] EWHC 1348 (Comm), par. 48. *See also* par. 92: ("I hold that the decision of the Swedish Court and the decision of the US Court do not create an estoppel, that the State is entitled to rely on the evidence obtained since the Award, and that there is a sufficient prima facie case that the Award was obtained by fraud.").

[39] Anatolie Stati et. al. v. The Republic of Kazakhstan [2017] EWHC 1348 (Comm), par. 89.

[40] Anatolie Stati et. al. v. The Republic of Kazakhstan [2018] EWCA Civ 1896, par. 33 and 67.

and regarding transactions with such parties that are material to the financial statements;"[41]

b) That the entities disclosed as related parties in the respective appendices of the Representation Letters omitted any reference to Perkwood;[42]

c) Failing to list Perkwood in the appendices of the Representation Letters was "a materially false omission," and its omission fit within the definition of fraud in the Representation Letters;[43]

d) In an authenticated August 2007 Sales and Purchase Agreement between Perkwood and Tolkynneftegaz LLP, Anatolie Stati's personal chauffeur, Mr. Eldar Kasumov, signed as "Director General" on behalf of Perkwood as seller;[44]

e) The use of a chauffeur to sign on corporate documents – in the capacity as director – was not an accepted practice and "raised red flags";[45]

f) Mr. Kasumov did not, as far as Mr. Lungu was aware, have any business training or experience, nor did Mr. Kasumov speak English;[46]

g) Mr. Kasumov's signature on behalf of Perkwood on the Sales and Purchase Agreement was "definitely a red flag to check further;"[47]

h) It was "rather disappointing" for Mr. Lungu to find out in 2013, when preparing his witness statement for a separate arbitration, that he had falsely represented to KPMG that Perkwood was in fact a related company;[48]

i) After the Stati Parties defaulted on the Laren loan (whose terms had been described by the Stati Parties in the Arbitration as "horrendous" and imposed by a "loan shark"),"[49] all the directors of Laren resigned; the person then designated as Director General of Laren was, once again, Mr. Anatolie Stati's personal chauffeur, Mr. Eldar Kasumov.[50]

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[41] The Oral Videotaped Deposition of Artur Lungu, In Re Application of Republic of Kazakhstan for Order Directing Discovery from Artur Lungu Pursuant to 28 U.S.C. § 1782, Misc. Action No. 4:19-mc-00423 (S.D. Tex. 2019), pp. 136-145 & Exhibit 13.
[42] *See id.* pp. 145-146.
[43] *Id.*, pp. 200-201.
[44] *Id.,* p. 221.
[45] *Id.,* pp. 221-222.
[46] *Id.,* p. 258
[47] *Id.,* pp. 221-222.
[48] *Id.,* pp. 147-149.
[49] *See supra* par. 15.
[50] Deposition of Arthur Lungu, *supra* note 14, pp. 256-257.

j) Mr. Lungu was represented at the deposition by Messrs. Kevin Mohr and Egishe Dzhazoyan of King and Spalding, the same law firm that represented the Stati Parties in the Arbitration; Mr. Mohr had also personally represented the Stati Parties in the Arbitration.[51] Mr. Dzhazoyan is one of the Stati Parties' attorneys in their post-award proceedings.

k) Mr. Lungu did not pay for his representation at the deposition.[52]

42. On August 21, 2019, KPMG withdrew its audit reports issued for the Audited Financial Statements of the Companies (the "**Audit Reports**") and subsequently refused multiple requests by the Stati Parties to reinstate the Audit Reports.[53]

43. In correspondence that eventually led to its withdrawal, KPMG notified the Stati Parties that it had become aware of certain facts that raised questions regarding the accuracy of its Audit Reports. The inaccuracies regarded, among other things, the construction costs for the LPG Plant.[54] Citing its obligations under the International Financial Reporting Standards ("**IFRS**") and International Standards on Auditing ("'**ISA**"), KPMG requested answers to a number of questions. The letter stated specifically:

> In case if we receive [sic] no explanations or additional representations, we remain [sic] our rights to seek to prevent future reliance on our audit reports and in particular to withdraw our audit reports and to inform about such withdrawal all parties who are still, in our view, relying on these reports, including but not limited, Ministry of Justice of the Republic of Kazakhstan and the Svea Court of Appeals.[55]

44. KPMG and the Stati Parties exchanged several additional letters, but KPMG concluded that it did not receive the explanations or additional representations it had requested from the Stati Parties.

45. In a later letter dated August 21, 2019, KPMG withdrew its Audit Reports of the Audited Financial Statements. In explaining the basis for its decision, KPMG stated that the withdrawal was predicated on:[56]

a) Statements made by the Stati Parties in court submissions that Perkwood is an "affiliate company" and banking records indicating that Perkwood was owned or controlled by Messrs. Anatolie Stati and Gabriel Stati;

[51] *Id.* pp. 21-22.
[52] *See id.*
[53] Letter from KPMG Audit LLC to A. Stati dated August 21, 2019.
[54] Letter from KPMG Audit LLC to A. Stati dated February 15, 2016, p. 1.
[55] *See id.*, p. 2.
[56] Letter from KPMG Audit LLC to A. Stati dated August 21, 2019, p. 1.

b) The fact that the Stati Parties did not deny that Perkwood was a related party of the Companies, or otherwise respond to KPMG's questions on this subject.

c) Mr. Lungu's "testimony, under oath in the U.S., that the management of Kazpolmunay LLP, Tolkynneftegaz LLP and Tristan Oil LTD made misrepresentations to KPMG Audit LLC;"

d) The fact that annual and interim financial statements for 2007, 2008, and 2009 did not disclose transactions during those years between TNG and Perkwood in accordance with IAS 24;

e) A determination by KPMG that the omission of these transactions was "material" both to the Audited Financial Statements and the Audit Reports.

46. In withdrawing its Audit Reports, KPMG stated:

> We are therefore writing to inform you that you should immediately take all necessary steps to prevent any further, or future, reliance on the following audit reports issued by KPMG Audit LLC … [t]his includes ensuring that anyone in receipt of the relevant financial statements and Reports is informed of this development.

47. To date, to the best of my knowledge, neither the Stati Parties nor their counsel have made efforts to inform third parties that the Audit Reports have been withdrawn, including the courts in which they have sought to have the Award enforced.

48. To date, to the best of my knowledge, FTI has not sought to retract or revise its expert reports presented in the Arbitration.

IV. EXECUTIVE SUMMARY

49. This expert Opinion analyzes the ethical and professional responsibilities of auditors, lawyers, expert witnesses, arbitrators, and courts when false statements or fraudulent evidence have allegedly been submitted to an arbitral tribunal. It also analyzes the materiality of those professional obligations and related evidence on the Award and the public policy exception.

50. The analysis in this Opinion is predicated on:

i. KPMG's August 2019 professional determination that it was obliged to withdraw its Audit Reports of the Companies because, it concluded, the Audit Reports were based on material omissions and misrepresentations by the Stati Parties;

ii. Mr. Lungu's sworn deposition testimony in 2019 in the U.S. in which he directly repudiates facts and testimony that was presented in the Arbitration and testifies to new facts that raise reasonable inferences that false or misleading

representations was presented to the tribunal in order to obscure underlying financial misconduct.

iii. Relevant evidence, party submissions, hearing transcripts, and the Award in the Arbitration.

A. Applicable Professional Obligations

51. **Auditors** are obliged by law, by professional accounting standards, and by professional codes of ethics to take action upon learning of material omissions or misrepresentations that call into question the accuracy of a financial audit they have performed. These obligations are an expression of accountants' gatekeeper function in preventing money laundering and protecting third parties from financial fraud.

52. **Attorneys** are ethically and legally prohibited either from knowingly making false statements or submitting false or fraudulent evidence to a court or tribunal, or from knowingly allowing a client to use their services in furtherance of an ongoing crime or fraud. The "knowing" requirement denotes actual knowledge, but that knowledge may be inferred from circumstances and does not necessarily require direct information. In other words, attorneys cannot avoid this obligation with willful blindness.

53. Under some national laws and ethics rules, lawyers are also required to take remedial measures when they discover later that they submitted to a court or tribunal materially false or fraudulent evidence or perjured testimony. Such remedial measures may include withdrawing the fraudulent evidence or perjured testimony or withdrawing from their representation in that matter. For those attorneys licensed in U.S. jurisdictions, I believe the obligation to take remedial measures should be interpreted as continuing to apply, both with respect to the Arbitration and with respect to evidence and representations subsequently submitted to national courts, through the end of set aside and enforcement proceedings.

54. Finally, in an increasingly global trend, many national and international laws impose gatekeeper obligations on attorneys with respect to suspected money laundering by their clients, in some instances even requiring reporting of such activities even if such reporting would otherwise violate the attorney's duty of confidentiality. Many national bar associations and the Council of Bars and Law Societies of Europe ("**CCBE**") oppose the most aggressive versions of these new laws as an intrusion on the lawyer-client relationship, but most bar associations also acknowledge that lawyers have some gatekeeping function.

55. **Expert Witnesses**, like any other witnesses, are prohibited from making false factual statements to a court or arbitral tribunal. While there is not generally any formal code of conduct for expert witnesses per se, it is increasingly recognized that they have ethical duties, which may include avoiding conflicts of interest, improper conduct, and making false statements to a court or tribunal. For these reasons, professional expert reports that are premised on facts or assumptions that have been provided to them by the parties often

include a written commitment to revise their expert reports in light of changed assumptions or evidence.

56. **Arbitral tribunals** have obligations to ensure the fairness, and protect the legitimacy, of arbitral proceedings. Increasingly, these obligations are recognized as including an obligation to respond affirmatively to the submission of false or fraudulent evidence or perjured testimony, and misconduct more generally. Such responses may include formally excluding the fraudulent evidence or perjury, drawing negative inferences regarding evidence submitted (either with respect to the party's credibility or substantive evidence), rejecting jurisdiction or dismissing claims on their merits, admonishing counsel or witnesses, or awarding costs and fees on the offending party.

57. **National courts** are enabled 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 material fraudulent evidence or perjury. In determining whether false or fraudulent evidence should result in a refusal to recognize or enforce an award, courts engage in a counter-factual analysis to determine whether, if the tribunal had known of the false or fraudulent evidence during the arbitration, that evidence would have had a material effect on the tribunal's decision.

58. In refusing to recognize or enforce awards that are predicated on false or fraudulent evidence, courts protect the integrity of international arbitration, the integrity of their own court systems, and national and international public policies that undergird the rule of law. If instead courts enforce those awards, national courts give legal effect to fraud-tainted awards and undermine the legitimacy of international arbitration. This role for national courts is uniquely important for arbitrations involving State parties, especially State parties that are actively combatting local corruption and working to promote their domestic rule of law.

B. Professional Obligations in this Dispute

59. After KPMG's withdrawal of the Audit Reports, the Financial Statements were no longer valid and could not appropriately have been relied upon, including by the Stati Parties or their attorneys. KPMG's decision to withdraw the Audit Reports provided an independent, professional assessment that the Stati Parties wrongfully concealed information relating to their Financial Statements. While not a formal adjudication, the professional assessment by KPMG is significant evidence regarding the reliability of the facts underlying its decision.

60. In response to KPMG's action, the Stati Parties alleged that KPMG only withdrew the Audit Reports as a result of inappropriate pressure from Kazakhstan. The Stati Parties also accused KPMG of breaching its professional and ethical obligations by withdrawing its Audit Reports. I am not aware of any concrete evidence proffered to support these allegations.

61. Professional and ethical rules of conduct exist to guide accountants in navigating difficult issues when challenges are raised by external third parties (such as the Stati Parties allege Kazakhstan committed) or by their own clients.

62. As an elite global accounting firm, KPMG has internal processes and controls to ensure compliance with its professional and ethical obligations. The gravity of these obligations and internal compliance controls should create a presumption that KPMG acted appropriately in withdrawing its Audit Reports. That presumption should only be legitimately called into question if specific factual allegations are made and supported with evidence.

63. In the Arbitration, the Stati Parties, their lawyers, and their expert witness had presented and relied on the Audited Financial Statements regarding: 1) issues on the merits (i.e., the alleged reasons for the Stati Parties cash flow problems), 2) issues relating to damages (i.e., the valuation date and the value of the Companies), 3) issues regarding the general credibility of the parties and their allegations (i.e., to bolster the reliability of the Stati Parties' financial arguments and to argue that Kazakhstan's allegations were either naive or insincere).

64. Applying the counter-factual test to determine whether the KPMG withdrawal would have affected the tribunal's decision, there are many bases to conclude that it would have.

65. If the tribunal in the Arbitration had known of KPMG's withdrawal of its Audit Reports and KPMG's admonition that the Audited Financial Statements should no longer be relied on, the tribunal would have been bound to respect that professional decision by KPMG. In light of the reasons prompting KPMG's withdrawal, the tribunal may have excluded entirely the Financial Statements and all references to, or evidence relying on them, including the Indicative Bid. Alternatively, it is possible that the tribunal may have permitted submission of the Financial Statements but afforded them little or no evidentiary weight in light of the fact that KPMG had made a professional determination that they were unreliable.

66. If FTI had known of KPMG's withdrawal of the Audit Reports and the Financial Statements that were appended to its opinions, FTI would likely have felt compelled to voluntarily withdraw or revise its expert reports on damages in order to preserve its integrity and credibility as an expert witness. Alternatively, the tribunal may have excluded the expert reports if it had excluded the Financial Statements or determined that they were unreliable.

67. In light of the fact that KPMG's conclusion that Audited Financial Statements were based on misstatements or omissions by the Stati Parties, the tribunal may also have drawn negative inferences about other aspects of the Stati Parties' financial evidence, and their credibility more generally.

68. The numerous direct and indirect references to KPMG and the Audited Financial Statements throughout the Arbitration indicate the centrality of the financial status and corporate governance issues to core issues in the dispute. For reasons elaborated below, it

is reasonable to assume that the exclusion of this evidence would have had a material effect on the tribunal's decision-making and should be considered under the public policy exception by any court reviewing the Award under the New York Convention.

V. OBLIGATIONS OF AUDITORS

69. As a general proposition, "an auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud."[57] This professional duty is owed not only to the client who retained the auditor, but also to third parties that may rely upon the audit.

70. External auditors perform a "gatekeeping function"[58] to ensure the accuracy of financial representations to the market regarding the financial statements of a company[59] and to prevent money laundering.[60] This gatekeeper function has been strengthened and expanded through changes in the regulation of the audit process over the years, particularly after the 2008 financial crisis. More recently, calls have been renewed to strengthen these obligations to ensure the integrity of global financial markets.[61]

71. Auditors' gatekeeping function is embodied in and made enforceable through a range of laws,[62] professional standards, and ethics rules that apply to accounting professionals. The most important source for professional standards and ethics rules are the ISA (International Standards on Auditing), pursuant to which KPMG conducted its audits. Beyond those obligations in the ISA, the International Ethics Standards Board for Accounting ("**IESBA**")

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[57] PUBLIC ACCOUNTING OVERSIGHT BOARD, Auditing Standard 1001: Responsibilities and Functions of the Independent Auditor (2015).

[58] *See, e.g.,* Directive 2006/43/EC, of the European Parliament and of the Council of May 17, 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, 2006 O.J. (L 157/87), 1, 9 ("Statutory auditors should adhere to the highest ethical standards. . . . The public-interest function of statutory auditors means that a broader community of people and institutions rely on the quality of a statutory auditor's work. Good audit quality contributes to the orderly functioning of markets by enhancing the integrity and efficiency of financial statements.").

[59] John C. Coffee, Jr, *Understanding Enron: "It's About the Gatekeepers, Stupid"*, 57 BUS. LAW. 1403, 1405 (2002) ("These services can consist of verifying a company's financial statements (as the independent auditor does)[.]").

[60] See*, e.g.,* Directive (EU) 2015/849, of the European Parliament and of the Council of May 20, 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141/73), art. 2: ("Article 2 1. This Directive shall apply to the following obliged entities: (1) credit institutions; (2) financial institutions; (3) the following natural or legal persons acting in the exercise of their professional activities: (a) auditors, external accountants and tax advisors[.]").

[61] See The Editorial Board, *Auditors have a duty to be alert to fraud: The Wirecard scandal has highlighted the urgent need for reform*, THE FINANCIAL TIMES, July 2, 2020.

[62] In addition to the professional obligations described in this Witness Statement, numerous national and international laws provide for reporting requirements when an accounting professional suspects or finds evidence of money laundering. These legal sources, which in some instances may also require disclosures by attorneys, are beyond the scope of this Opinion.

has issued enhanced standards to provide guidance on when a professional accountant should report wrongdoing by a client, even when there is no legal or regulatory requirement to do so.[63]

72. In this case, in its correspondence with the Stati Parties, KPMG explained that after a "thorough and independent assessment" it had "determined that information material to the accuracy of the audit reports and financial statements in respect of [the Companies]" had been misrepresented or omitted by the Stati Parties.[64] KPMG explained that its decision to withdraw its Audit Reports was based on its "professional obligation … to protect the quality of [its] audit work to [its] client and to the parties using [its] audit report" and its conclusion that the Stati Parties' material omissions or misrepresentations were inconsistent with the ISA. KPMG also instructed that the Stati Parties "should immediately take all necessary steps" in order "to prevent any further, or future, reliance on the … audit reports" and to inform "anyone in receipt of the relevant financial statements and Reports … of this development."

73. In sum, KPMG's decision to withdraw its Audit Reports, and its related instruction to the Stati Parties that they prevent further reliance on the Audit Reports, were undertaken pursuant to KPMG's professional obligations and within its professional authority.

74. As a consequence, neither the Stati Parties nor any court or tribunal should subsequently rely on the withdrawn Audit Reports; the Financial Statements should not be treated as "audited;" and the Financial Statements should be assessed in light of KPMG's determination that they are unreliable because they are based on material omissions and misrepresentations.

75. In my view, substantial weight should be given to KPMG's professional assessment that the Financial Statements are unreliable and its underlying reasons for withdrawing its Audit Reports. Those determinations are only made by accounting professionals when they are confident, pursuant to existing rules and codes of conduct, of the professional necessity of such actions.

VI. OBLIGATIONS OF ATTORNEYS

76. National legal systems universally prohibit attorneys from knowingly submitting false or fraudulent evidence to courts and tribunals. Many systems, and virtually all the systems in which attorneys in these present proceedings are licensed,[65] also oblige attorneys to take corrective measures upon learning that he or she has made false statements or submitted fraudulent evidence to a court or tribunal.

[63] INTERNATIONAL ETHICS STANDARDS BOARD FOR ACCOUNTANTS, Revised Code of Ethics for Professional Accountants (2005).
[64] Letter from KPMG Audit LLC to Herbert Smith Freehills Germany LLP dated August 21, 2019, p. 1.
[65] Attached as Annex C is a list of all attorneys who represent or have represented the Stati Parties.

A. Choice of Applicable Law

77. The applicability of professional and ethical obligations may vary depending on where the attorney is licensed and where the conduct takes place. In international arbitration, there is added ambiguity about whether and to what extent national ethical rules apply to conduct before an arbitral tribunal. There are also complex questions about which rules apply in cross-border activities when attorneys are licensed in more than one jurisdiction.[66] Despite these complexities and ambiguities, certain professional obligations are universally acknowledged.

78. The prohibition against knowingly making false or fraudulent statements to a court or tribunal is one ethical obligation that is universally acknowledged by national ethical rules and many international standards, guidelines, and codes of conduct. When an attorney later learns that he or she has unwittingly made false statements or submitted false or fraudulent evidence or perjurious testimony to a court or tribunal, the remedial measures an attorney is obliged to take differ from jurisdiction to jurisdiction but are increasingly recognized by international sources.

79. In the United States, the individual states promulgate their own codes of conduct, and establish licensure and disciplinary rules and procedures. Most individual states base their codes of ethics on some variation of the Model Rules of Professional Conduct, which are promulgated by the American Bar Association ("**Model Rules**"). Several attorneys for the Stati Parties are licensed in various U.S. jurisdictions. The analysis below focuses on the Model Rules, identifying relevant differences.

80. In addition to substantive rules, the Model Rules also have a choice-of-law provision that determines which ethics rules apply when an attorney is licensed in one jurisdiction but performs professional services in another. Model Rule 8.5 provides that, when a lawyer appears before a court or tribunal outside of the home licensing jurisdiction, the lawyer is

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[66] As I have explained in my book:

> Most international arbitrations are staffed by a team of lawyers who, both individually and collectively, are distinctively multinational. Individually, many international arbitration practitioners are licensed in more than one jurisdiction. As a result, they likely have more than one set of 'home' ethical rules that could apply in an international arbitration. Moreover, the teams of lawyers who staff international arbitration, almost inevitably, are licensed in several different jurisdictions. As a result, attorneys on the same team working for the same client may be subject to different home ethical rules, even if there remains significant uncertainty about whether home ethical rules actually apply.

CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 105 (2014); *see also* Catherine A. Rogers, Lawyers *Without Borders*, 30 U. Pa. J. Int'l L. 1035, 1058-1061 (2009); Catherine A. Rogers, *When Bad Guys are Wearing White Hats*, 1 STAN. J. COMPLEX LITIG. 487, 495 (2013) ("Rule 8.5 does not … provide meaningful guidance about which rules apply in transnational litigation or how attorneys should understand their ethical duties. The reasons for these inadequacies are not simply because of ambiguities in the text of the rule, but in special challenges that are raised in regulating transnational legal practice, particularly in transnational litigation[.]").

bound by the rules of the jurisdiction in which the tribunal sits unless the tribunal has its own rules.[67]

81. Under Model Rule 8.5, a U.S.-licensed lawyer appearing in an arbitration seated in Sweden would be subject to Swedish—not U.S.—ethics rules. Some jurisdictions, like New York and Texas,[68] take a different approach and continue to subject attorneys licensed in New York to New York ethics rules even for conduct abroad. For the purposes of the analysis below, however, it does not matter which rules apply because both U.S. and Swedish rules clearly prohibit the presentation of false or fraudulent evidence.

82. Similar to the Model Rules, in Europe the CCBE has developed a Code of Conduct (the "**CCBE Code**"), which applies to "all lawyers from the European Economic Area whatever Bar or Law Society they belong to in relation to their cross-border practice."[69] Like Model Rule 8.5, the CCBE Code provides that "[a] lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal."[70]

83. In addition to these sources, international ethics standards or guidelines may be deemed to apply, though these sources are not intended to supplant mandatory national ethics rules.[71]

84. While choice-of-law issues can be complex, for many aspects of this opinion, choice of applicable ethics rules (or related laws) is not particularly important because prohibitions against knowing presentation of fraudulent evidence are universal. There are, however, some important differences among sources regarding an attorney's obligations to take remedial measures after discovering previously submitted false or fraudulent evidence or perjured testimony.

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[67] MODEL RULES OF PRO. CONDUCT r. 8.5(b) (AM. BAR ASS'N 2020).

[68] The Texas Disciplinary Rules of Professional Conduct do not have any clear choice-of-law provisions similar to Model Rule 8.5, which implies that Texas Rules would apply to conduct in foreign jurisdictions. See TEX. DISP. R. PROF. CONDUCT r. 8.05.

[69] *See Council of Bars and Law Societies of Europe (CCBE), Summary of the Initiative, https://www.eesc.europa.eu/en/policies/policy-areas/enterprise/database-self-and-co-regulation-initiatives/72* (last visited Nov. 1, 2020).

[70] CCBE RULES OF CONDUCT, art. 4.1.

[71] IBA Guidelines on Part Representation in International Arbitration, Preamble p. 2 ("the Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation").

B. National and International Rules

85. Model Rule 3.3 is adopted in some version by all U.S. jurisdictions in which attorneys for the Stati Parties are licensed.[72] Specifically, Rule 3.3 prohibits an attorney from "knowingly":

> (1) mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
>
> (3) offer[ing] or us[ing] evidence that the lawyer knows to be false.[73]

86. Model Rule 3.3 also provides that:

> If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer *shall take reasonable remedial measures*, including, if necessary, disclosure to the tribunal. A lawyer may [also] refuse to offer evidence … that the lawyer reasonably believes is false.[74]

87. Under this rule, the term "knowingly" "denotes actual knowledge of the fact in question." An attorney's knowledge, however, "may be inferred from circumstances."[75] Thus, the rule applies when a lawyer knows directly that evidence is false or fraudulent (such as when a client expressly admits to lying or providing fraudulent evidence) or because circumstances create an obvious inference that the evidence is fraudulent.[76] The potential to infer knowledge from evidence means that an attorney cannot, in the face of objectively compelling evidence of fraudulent evidence or perjury, simply decide subjectively not to believe obvious facts.[77]

88. If a lawyer who subsequently discovers that material evidence or attorney statements submitted to a tribunal were false, under Model Rule 3.3, the lawyer is obliged to take remedial actions. The "remedial measures" required to be taken by attorneys who subsequently learn of the submission of false or fraudulent evidence include:

> [R]emonstrat[ing] with the client confidentially, advis[ing] the client of the lawyer's duty of candor to the tribunal and seek[ing] the client's cooperation

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[72] *See* NEW YORK RULES OF PRO. CONDUCT r. 3.3; TEXAS DISCIPLINARY RULES OF PRO. CONDUCT r. 3.03; DISTRICT OF COLUMBIA, RULES OF PRO. CONDUCT r.3.3; ILLINOIS RULES OF PRO. CONDUCT of 2010 R.3.3; GEORGIA RULES OF PRO. CONDUCT r. 3.3.

[73] MODEL RULES OF PRO. CONDUCT r. 3.3.

[74] MODEL RULES OF PRO. CONDUCT r. r. 3.3 (emphasis added).

[75] MODEL RULES OF PRO. CONDUCT r. 1.1(f).

[76] MODEL RULES OF PRO. CONDUCT r. 3.3., cmt. 8 (AM. BAR ASS'N 2020) (explaining that "although a lawyer should resolve *doubts about the veracity* of testimony or other evidence in favor of the client, the lawyer *cannot ignore an obvious falsehood*.") (emphasis added).

[77] Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 196 (2011).

with respect to the withdrawal or correction of the false statements or evidence.[78]

89. If the client refuses to withdraw the false or fraudulent evidence, an attorney has an obligation to "take further remedial action."[79] Such further remedial action may include withdrawal from the representation, if permitted, or making "disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be [confidential]."[80]

90. The justification for imposing on attorneys an obligation to take corrective measures, even if those measures may in some instances require disclosing client confidences, is that attorneys have a "special obligation as officers of the court to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process."[81]

91. These obligations are triggered not only by submission of false or fraudulent evidence, but also if a client "fail[s] to disclose information to the tribunal when required by law to do so."[82] In some circumstances "a person's omission of a material fact may constitute a crime or fraud on the tribunal."[83] Thus, attorneys' obligations to take corrective measures are not only triggered by identification of a specific false statement or document submitted to a tribunal. An attorney's "special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process" may extend to an attorney who knows that a client has wrongfully withheld a material fact.[84]

92. The Model Rules do not define "material." The term is generally understood to require something more than a "misstatement of fact … even though there obviously was nothing to be gained by lying about the matter[,]"[85] but less than proof that the evidence necessarily would have changed the court or tribunal's decision.[86]

93. The "materiality" requirement is met if there is evidence that has the potential to influence determination of an issue that is relevant and is actually pending before the court or tribunal.[87] For example, bar opinions, courts, and ethics commentators in the United States

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[78] Model RULES OF PRO. CONDUCT r. 3.3., cmt. 8.
[79] Model RULES OF PRO. CONDUCT r. 3.3., cmt. 10 (identical to New York Rules of Pro. Conduct r. 3.3; Texas Disciplinary Rules of Pro. Conduct r. 3.03; District of Columbia, Rules of Prof. Conduct r. 3.3.).
[80] See *id.*
[81] Model RULES OF PRO. CONDUCT r. 3.3., cmt. 12.
[82] *Id.*
[83] *Id.*
[84] MODEL RULES OF PRO. CONDUCT r. 3.3., cmt. 3 ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.").
[85] Michael R. Franck, *To the Editor,* PROF. LAWYER 5 (1994) (arguing "no materiality if 'a lawyer had referred to Friday, May 21, 1994, when in fact May 21 was a Saturday' when the day of the week is irrelevant to the decision.").
[86] *See, e.g., In re* Angwafo, 899 N.E.2d 778 (Mass. 2009).
[87] One definition might be facts that "relate to something a decision maker has the power to decide." Stephen H. Goldberg, *Heaven Help the Lawyer for a Civil Liar*, 2 GEO. J. LEGAL ETHICS 885 (1989).

have found false or fraudulent evidence to be material if: it "would or could significantly influence the hearer's decision-making process;"[88] "if, viewed objectively, it directly or circumstantially had a reasonable and natural tendency to influence a judge's determination;" or if it relates to "a matter of clear and weighty importance" to the case.[89]

94. The duties to disclose materially false or fraudulent evidence and to take remedial measures are ongoing obligations, which "continue to the conclusion of the proceeding."[90] A proceeding has concluded within the express meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.[91] Thus, under Model Rule 3.3, an attorney cannot during the appeal process continue to submit or rely on the evidence that an attorney knows is false or fraudulent. The Rule may also require notification to prior courts and tribunals to which such evidence has been submitted.

95. Applying this standard to the arbitration context, the obligation is best understood as continuing through award review for the purposes of recognition and enforcement. In international arbitration, there is no formal "appeal." More importantly, attorneys cannot notify the original tribunal after the close of proceedings because, under the doctrine of *functus officio*, an arbitral tribunal ceases to have any power after rendering the final award. Accordingly, unlike in national courts, the case cannot be reconsidered by the original tribunal if fraudulent evidence is later discovered during subsequent proceedings on the same case. Like appeals, however, proceedings to recognize and enforce an award provide the final review.

96. For these reasons, in my opinion the period for taking remedial measures in the international arbitration context is best understood as applying through judicial review of the award in set aside and recognition and enforcement proceedings.

97. Like the Model Rules in the United States, England imposes similar obligations on attorneys regarding the presentation of false or fraudulent evidence or perjury. As one treatise explains:

> As is well-known, solicitors are officers of the Court who are duty bound not to deceive or knowingly or recklessly mislead the Court. It is difficult to

[88] Kungys v. United States, 485 U.S. 759, 770 (1988) ("The most common formulation of that understanding is that a concealment or misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed."); United States v. Gaudin, 515 U.S. 506, 509 (1995).

[89] In *re Fisher*, 202 P.3d 1186, 1202 (Colo. 2009) (emphasis added). Notably, some ethics scholars in the United States have argued against having a "materiality" requirement is inappropriate because it effectively excused fraud on non-essential issues. *See* Chauncey M. DePree, Jr. & Rebecca K. Jude, *What Is an Immaterial Lie?, Prof. Law.*, Aug. 1994, at 4. no. 1, p. 10 (Nov. 1993) (arguing that "materiality" requirement permits self-serving manipulation by attorneys); but see Hodes, *Two Cheers for Lying (About Immaterial Matters)*, 5 The Professional Lawyer no. 3, p. 1 (May 1994).

[90] MODEL RULES OF PRO. CONDUCT r. 3.3. (c).

[91] RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY, Chapter 3.3, par. 3 (2018-2019 ed.).

> imagine a more serious allegation to make against the professional reputation of a solicitor than a willingness to pervert the course of justice by attempting to procure perjured evidence.[92]

98. These obligations on attorneys extend to when an attorney fails to correct a client's misstatement to the court, even if the attorney did not elicit the false statement or know it was false at the time.[93]

99. Similarly, the Swedish Code of Professional Conduct, which in some instances may be deemed applicable to U.S.-licensed attorneys under Model Rule 8.5,[94] provides that "[a]n Advocate must not make statements to the Court which the Advocate knows are false nor contest that which the Advocate knows to be true"[95] or "be complicit in the suppression or distortion of evidence."[96] As explained in the commentary, the Swedish rules prohibit an "advocate [from] knowingly call[ing] a witness who will commit perjury" or "submit[ting] or refer[ring] to forged written evidence or refers to inaccurate factual particulars."[97]

100. In addition to applicable national ethical rules, international and transnational ethical codes, standards, and guidelines similarly prohibit submission of fraudulent evidence to courts and tribunals and, with some variances, oblige attorneys to take remedial measures. For example, the CCBE Code provides that a "lawyer shall never knowingly give false or misleading information to the court."[98] Comments on the Code explain that this prohibition exists because "the lawyer can only successfully represent his or her client if the lawyer can be relied on by the courts and by third parties as a trusted intermediary and as a participant in the fair administration of justice."[99]

101. Similarly, the IBA promulgated the 2013 Guidelines on Party Representation in International Arbitration (the "**IBA Guidelines**"), which prohibit the submission of false or fraudulent evidence and impose an obligation to take corrective measures upon later discovery that false information was submitted. Specifically, Article 9 of the IBA Guidelines provides that a party representative "should not make any knowingly false submission of fact to the Arbitral Tribunal" and Article 10 provides that a party representative should not submit "[w]itness or Expert evidence that he or she knows to be false."[100]

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[92] Sooben v Badal [2017] EWHC 2638 (QB).
[93] *See* D. Burleigh, *John Francis Bridgwood and the Solicitor's Duty to Client and Court,* 26 LSG 11 (1989).
[94] *See supra* par. 79-81.
[95] Swedish Code of Professional Conduct, art. 6.2.1.
[96] Swedish Code of Professional Conduct, art. 6.2.2.
[97] Swedish Code of Professional Conduct, art. 5.4.
[98] Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, art. 4.4.
[99] Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, Principle (i).
[100] IBA Guidelines on Party Representation in International Arbitration, Arts. 9 & 10.

102. Both Articles also provide that if a party representative subsequently "learns that he or she previously made a false submission of fact" the representative should take corrective measures. "[S]ubject to countervailing considerations of confidentiality and privilege," those measures require the attorney "promptly correct such [false] submission." In addition, Article 10 of the IBA Guidelines specifies other potential remedial measures, including taking "reasonable steps to deter the Witness or Expert from submitting false evidence," urging "the Witness or Expert to correct or withdraw the false evidence," or withdrawing from representation of the client.[101]

103. Arbitral tribunals are generally empowered to enforce these obligations. Specifically, Article 26 of the IBA Guidelines provides that a tribunal may take any of the following actions in response to misconduct by party representatives:

> a. admonish the Party Representative;
>
> b. draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by the Party Representative;
>
> c. consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs; [and]
>
> d. take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.[102]

104. Similarly, the IBA Rules on the Taking of Evidence in International Arbitration provide in Article 9, paragraphs 6 and 7, that when a party inappropriately fails to submit information or evidence, a tribunal may "infer that such document would be adverse to the interests of that Party" or "may take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence."[103]

105. Another sign of increasing global consensus about regulation of counsel conduct in international arbitration is an Annex that was added in 2014 to the arbitral rules for the London Court of Arbitration ("**LCIA**" , "**LCIA Rules**" and "**LCIA Annex**"). The LCIA Annex, as it is known, is a list of seven rules that affirm core professional obligations of counsel in

[101] *See id.*
[102] IBA Guidelines on Party Representation in International Arbitration, Art. 26.
[103] IBA Rules on the Taking of Evidence in International Arbitration, Art. 9(6) & (7).

arbitrations administered by the LCIA and aim to promote "the good and equal conduct of the authorised representatives of the parties appearing by name within the arbitration."[104]

106. Paragraph 3 of the LCIA Annex provides that a representative "should not knowingly make any false statement to the Arbitral Tribunal" and Paragraph 4 provides that representatives "should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court." These provisions are designed to affirm and enhance, not supplant, core obligations from national legal systems.[105]

107. Under the LCIA Rules, if counsel knowingly presents or relies on false or fraudulent evidence, the tribunal may take any measure necessary to fulfil the tribunal's duty to maintain due process.[106]

108. Ethical obligations and breaches of domestic ethics rules are primarily a matter between an attorney and the bar authority or authorities that has or have licensed that attorney. In many domestic legal systems, however, national courts may also sanction attorneys under powers of contempt, under inherent powers, or pursuant to a court's role in reviewing and enforcing attorney discipline.

109. The IBA Guidelines on Party Representatives and the LCIA Annex build on existing debates in international arbitration and confirm that arbitral tribunals are increasingly expected to perform a quasi-regulatory function by responding to counsel misconduct that affects the efficacy and fairness of arbitral proceedings. The Restatement of the U.S. Law of International Commercial and Investor-State Arbitration has recognized that in the United States, arbitral tribunals are recognized as having the power to regulate attorney conduct as part of their broad powers to manage the proceedings.[107]

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[104] See Paragraph 1 of the LCIA Annex Paula Hodges, *Equality of Arms in International Arbitration: Who Is the Best Arbiter of Fairness in the Conduct of Proceedings?*, in Andrea Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, 19 ICCA Congress Series (2017) 599, 618 ("However, it is clear that these LCIA Guidelines have more teeth than the IBA Guidelines on Party Representation. This is because the parties, by adopting the LCIA Rules in their arbitration agreements, have agreed to apply these LCIA Guidelines and to allow the tribunal to take such measures as it considers necessary to sanction misconduct.").

[105] Paragraph 4 of the LCIA Annex ("Paragraph 4: An authorised representative should not knowingly procure or assist in the preparation of or rely upon any false evidence presented to the Arbitral Tribunal or the LCIA Court.").

[106] Article 18.6 of the LCIA Arbitration Rules ("If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the authorised representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.1(i) and (ii)."). Article 14.1 LCIA Arbitration Rules.

[107] *See* RESTATEMENT OF U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (Proposed Final Draft – April 24, 2019), Section 3.9 - Attorney Conduct in International Arbitration, Reporters' Note *c*:

> [C]ourts have observed that many types of direct and indirect remedies for misconduct are understood as being within the scope of arbitral competence. For example, arbitrators may

110. Finally, national and international laws and national ethics rules increasingly impose reporting obligations or "gatekeeper obligations" on lawyers in an effort to deter or prevent money laundering. These laws and rules often collide with lawyers' duty of confidentiality by requiring reporting against clients, which is why many bar associations have actively opposed such laws.[108]

111. Debate continues regarding the appropriate balance between lawyers' obligations to their clients and their obligations to protect the public against client criminality. However, "these new laws signal that lawyers are presumed to have some gatekeeping function in preventing ongoing money laundering."[109]

112. In the United Kingdom, the applicable law is the 2002 Proceeds of Crime Act ("**POCA**"),[110] which imposes an "obligation to report suspicious transactions to a designated money laundering reporting officer or to the National Criminal Intelligence Service" ("**NCIS**").[111] Under a strict reading of the statute, the mere suspicion of money laundering would require that a lawyer either directly report that suspicion to the NCIS or face severe criminal sanctions. The result has been a flood of reports by lawyers seeking to avoid criminal penalties, and a corresponding proliferation of guidance by regulators and The Law Society of England and Wales.[112]

113. In the United States, ethics rules may require lawyers to report their client's criminal conduct, even when the criminality is embedded in a privilege communication.[113] The Model Rules prohibit a lawyer from assisting a client in ongoing conduct that the lawyer knows is criminal or fraudulent.[114] Building on existing ethics rules, in 2010 the American Bar Association ("**ABA**") adopted the Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing and in 2013 it issued Formal

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> admonish counsel for misconduct, draw negative evidentiary inferences based on misconduct, and award costs and fees against a party whose counsel engaged in misconduct. Moreover, arbitrators are generally understood as having the power to control the proceedings before them, which may be understood as including the power to exclude individuals who may cause disruption that would affect the fairness of the proceedings or endanger the enforceability of the award.

(citing Polin v. Kellwood Co., 103 F. Supp. 2d 238 (S.D.N.Y. 2000), aff'd, 34 F. App'x 406 (2d Cir. 2002); Bak v. MCL Fin. Group, Inc., 88 Cal. Rptr. 3d 800, 806 (Cal. Ct. App. 2009); SOC-SMG, Inc. v. Day & Zimmermann, Inc., 2010 WL 3634204 (Del. Ch. 2010); Wurttembergische Fire Ins. Co. v. Republic Ins. Co., 1986 WL 7773 (S.D.N.Y. 1986).

[108] Lawton P. Cummings & Paul T. Stepnowsky, *My Brother's Keeper: An Empirical Study Of Attorney Facilitation Of Money Laundering Through Commercial Transactions*, 2011 PROF. LAW. 1 (2011).

[109] *See id.*

[110] *See* Maria Castilla, *Client Confidentiality and the External Regulation of the Legal Profession: Reporting Requirements in the United States and United Kingdom*, 10 CARDOZO PUB. POL. & ETHICS J. 321, 324 (2012).

[111] *See id.*

[112] *See* Delphine Nougayrede, *Anti-Money Laundering and Lawyer Regulation: The Response of the Professions*, 43 FORDHAM INT'L L. J. 321, 335-336 (2019).

[113] Carmina Franchesca S. Del Mundo, *How Countries Seek to Strengthen Anti-Money Laundering Laws in Response to the Panama Papers, and the Ethical Implications of Incentivizing Whistleblowers*, 40 NORTHWESTERN J. INT'L L. & BUS. 87, 110 (2019).

[114] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (d).

Opinion 463, which imposed an obligation of due diligence "to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity" whenever "accepting a new matter or for continuing a representation as new facts unfold."

114. More recently, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 491, which states:

> [W]here facts known to the lawyer establish a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer has a duty to inquire further to avoid advising or assisting such activity … Even if information … is insufficient to establish "knowledge" under [Model] Rule 1.2 (d), other rules may require the lawyer to inquire further in order to help the client avoid crime or fraud, to avoid professional misconduct, and to advance the client's legitimate interest.

115. Formal Opinion 491 has been interpreted as significantly expanding a lawyer's ethical obligations by imposing a duty of inquiry that goes beyond the basic knowledge requirements. Failure to make a reasonable inquiry is characterized as constituting "willful blindness," and thus within the definition of knowledge that may trigger disciplinary action.

116. Similarly, the EU adopted a series of anti-money-laundering directives that eventually, in the Third Anti-Money Laundering and Financing of Terrorism Directive (Commission Directive 2006/70/EC), extended obligations to lawyers. As in the US and UK, the CCBE has countered some efforts to impose reporting obligations.

117. These various national sources implement and compliment a number of international initiatives, the most important of which are the Recommendations of the Financial Action Task Force ("**FATF**"). The IBA, like national bar associations, has critiqued some of the most aggressive disclosure obligations, but also implemented guidance for lawyers that acknowledges they have some gatekeeper function.[115]

118. In sum, national ethics rules and international sources prohibit attorneys from making false statements or presenting false or fraudulent evidence or perjurious testimony. As professionals charged with promoting justice and respect for the law, attorneys are also often required to take corrective measures when they later learn of such evidence or perjury. These national obligations are complemented by an increasing body of international rules from various sources. In response, tribunals are increasingly recognized as having the power and perhaps even an obligation to respond to findings of violations of these obligations or related attorney or client wrongdoing, as elaborated below.

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[115] *See A Lawyer's Guide to Detecting and Preventing Money Laundering*, published by the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe, available at https://www.actec.org/assets/1/6/A-Lawyers-Guide-to-Detecting-and-Preventing-Money-Laundering-October-2014.pdf.

119. In a related vein, lawyers are also subject to a range of domestic and international rules and laws that impose special obligations when a client is or may be involved in money laundering or other criminal activities.

VII. EXPERT WITNESS OBLIGATIONS

120. Formal ethics regulation of expert witnesses is largely under-developed, particularly in international arbitration.[116] On the one hand, most experts are regulated through their primary professions as accountants, engineers, or the like. They are effectively "moonlighting" when they serve as an expert witness. The ethics rules that generally regulate their conduct when they are performing services in their primary professions (i.e., as an engineer or accountant) do not generally apply to their activities as an expert witness. On the other hand, expert "opinions" cannot generally be understood as "true" or "false," but instead as merely reliable or unreliable.[117]

121. In reaching their opinions, however, experts often rely on a given set of facts or assumptions, which are often provided to them by the parties or their counsel. For financial experts, the underlying facts and assumptions relied on most often include the financial statements and related factual representations regarding the financial status of the entities being assessed or upon which economic analysis depends.

122. Given the essential nature of the underlying factual premises and assumptions, under best practices expert witnesses generally state those facts and assumptions at the beginning of an expert opinion to be clear about the premises on which the opinion is based. By delineating these premises, expert witnesses implicitly, and in many instances explicitly, condition their expert opinion on the accuracy of the underlying facts and assumptions. Thus, if it is later determined that the facts or assumptions on which the expert opinion is based are materially different from those originally assumed or relied upon, the condition fails and the expert opinion, on its own terms, may be deemed unreliable.

123. In some instances, expert witnesses, particularly in financial and economic sectors, make this condition explicit in order to protect their professional reputations and, like accountants, to ensure that third parties do not inappropriately rely on their opinions.

VIII. ARBITRAL TRIBUNAL OBLIGATIONS

124. Arbitral tribunals generally have broad discretion over the conduct of proceedings and the admission of evidence in those proceedings. Increasingly, it is acknowledged that arbitrators neglect their professional duties if they do not address, directly and affirmatively, the submission of false or fraudulent evidence or perjurious testimony. An affirmative response to false or fraudulent evidence is increasingly regarded as part of

[116] *See* Rogers, ETHICS IN INTERNATIONAL ARBITRATION at par. 4.01-4.05.
[117] *See id.* at par. 4.73-4.74.

arbitrators' professional duties because adjudication premised on such evidence is understood as a "serious threat to society."[118]

125. Recently, several investor-State arbitral tribunals and international courts have firmly and emphatically condemned adjudicators' failure to directly address the submission of fraudulent evidence. Tribunals have reasoned that "conduct that involves fraud and an abuse of process deserves condemnation" because the submission of fraudulent evidence "pollute[s]" and "infect[s]" the entire case.[119] Unchallenged, fraudulent evidence damages "the administration of international justice"[120] and represents a "misuse of the law."[121]

126. Leading international arbitrators have, in their individual and sometimes personal capacity, criticized tribunals for failing to address affirmatively false or fraudulent evidence submitted to them. For example, Yves Fortier, who serves both as an ad hoc judge on the International Court of Justice ("**ICJ**") and as an arbitrator in investor-State arbitrations, wrote a vigorous dissent criticizing the ICJ for allowing the withdrawal of forged documents without any comment or condemnation:

> I believe that the Court should not simply disregard and fail to take into consideration this unprecedented incident. In my opinion, these documents have "polluted" and "infected" the whole of [the party's] case … I believe that the Court, in considering the Parties' conflicting versions of the facts in this case, *had a duty to do more than merely narrate the Parties' respective exchange of letters* following Bahrain's challenge of the authenticity of 82 documents which loomed as central to [the party's] case. I regret that it elected not to do so.[122]

127. Notably, Fortier's call to direct condemnation was vigorous and emphatic, even though it was clear that the ICJ did not actually rely on the fraudulent evidence, which had been voluntarily withdrawn by the misrepresenting party during the proceedings.

128. Similarly, Stephen Schwebel, who also serves both as a judge on the ICJ and arbitrator in investor-State arbitrations, has condemned the ICJ's exclusion, discounting, and excusing of what he believed was false or fraudulent evidence. Judge Schwebel's criticism "went beyond the question of whether the misrepresented evidence was material" to the Court's

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[118] Carolyn B. Lamm et al., *Fraud and Corruption in International Arbitration*, *in* LIBER AMICORUM BERNARDO CREMADES 699, 706 (Miguel Angel Fernandez-Ballester and David Arias Lozano eds., Kluwer 2010).

[119] Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No. ARB (AF)/07/2, Award, par. 180 (Aug. 13, 2009).

[120] *See* Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. 451, 452, par. 6 (Mar. 16) (separate opinion by, Fortier, J.).

[121] *See* Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, par. 169 (June 10, 2010).

[122] Qatar v. Bahr., 2001 I.C.J. (separate opinion by, Fortier, J.). at 6 (emphasis added).

theory of the case.[123] Like Fortier, Schwebel was aware that the ICJ's legal theory for its decision rendered the evidence irrelevant.[124] Nevertheless, Judge Schwebel characterized the court as having "chosen … to appear to lend its good name to [the Party's] misrepresentation of the facts."[125]

129. Fraudulent evidence submitted to international courts and tribunals presiding over State parties is particularly problematic. As scholar and leading arbitrator Professor W. Michael Reisman explains:

> [Fraudulent evidence] 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; in raising doubts about their accuracy of [an] international decision, *they diminish the future willingness of States to resort to Tribunals*.[126]

130. Thus, while arbitral tribunals have various powers to respond to false or fraudulent evidence, they are also regarded as having a duty to use those powers to protect the integrity of the proceedings. As noted above, they have several procedural powers and recognized inherent powers to respond to findings that false or fraudulent evidence or perjurious testimony was submitted to them.[127] Exercise of these powers to preserve the fairness and legitimacy of proceedings is an especially weighty obligation when tribunals are seeking to hold States accountable under international law.

131. Tribunals are also understood as having a role to play in deterring fraud and corruption by foreign investors more generally. In investor-State arbitration, the submission of false or fraudulent evidence by claimants can lead led to the dismissal of claims. Tribunals that have taken this approach based their decisions to disallow claims on the principles of good faith, clean hands, or on the finding that reliance on fraudulent evidence is contrary to public policy.[128]

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[123] W. MICHAEL REISMAN & CHRISTINA SKINNER, FRAUDULENT EVIDENCE BEFORE PUBLIC INTERNATIONAL TRIBUNALS: THE DIRTY STORIES OF INTERNATIONAL LAW 95 (Cambridge 2014).

[124] Years after the judgment was rendered, Stephen Schwebel wrote an article condemning the court. Stephen M. Schwebel, *Editorial Comment: Celebrating a Fraud on the Court*, 106 AJIL 102 (2012). One of Nicaragua's attorneys, Paul S. Reichler, vigorously protested Judge Schwebel's characterization of the facts and allegations that there was fraud on the court. Paul S. Reichler, *The Nicaragua Case: A Response to Judge Schwebel*, 106 AJIL 316 (2012) ("Judge Schwebel's editorial raises concerns not only for Nicaragua, but also for its counsel. As officers of the Court, we have an ethical obligation not to submit, or to allow a client to submit, false evidence. Judge Schwebel's editorial is susceptible of being read as implying that Nicaragua's counsel failed properly to exercise this obligation.").

[125] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 259, 273, par. 163 (June 27) (dissenting opinion by Schwebel, J.).

[126] REISMAN, *supra* note 124, at 95 (emphasis added).

[127] *See supra* par. 124-125.

[128] Lamm et. al., *supra* note 119, at 723: ("To the extent that a tribunal finds that a claimant is permitted to rely on the consent to arbitration provided in an investment treaty, a claimant that has unclean hands in relation to its

132. It is noteworthy that evidence at issue in this case appears to have been submitted to the tribunal in the Arbitration not only to prove the Stati Parties' affirmative case, but potentially also to obscure findings of underlying fraudulent or corrupt conduct by the Stati Parties. For example, to prove that the onerous conditions of the Laren Transaction were "the best terms that Claimants could obtain" and were procured at a rate that "reflect[ed] the actual borrowing costs for funds that the claimants were forced to secure because of the respondent's conduct,"[129] the Stati Parties and their counsel presented evidence and arguments that Laren was a "group of venture capitalists" introduced to the Stati Parties by a third-party, Renaissance Capital, and "not affiliated in any way with Mr. Stati."[130] Apart from its ostensible purpose, this evidence obscures the later-discovered fact that Anatolie Stati's personal chauffeur, Mr. Eldar Kasumov, was appointed as a Director General.[131]

133. Had this later-discovered fact about the ostensible head of Laren been known to the tribunal during the Arbitration, the justifications for the onerous loan terms and the facts giving rise to the Laren Transaction would not likely have seemed credible. Moreover, having a party's personal chauffeur stand in as the head of a purportedly unrelated entity could have raised concerns on the tribunal of possible money laundering or other financial impropriety in the underlying transactions.

IX. THE ROLE OF NATIONAL COURTS

134. The role of national courts in reviewing challenges to international arbitral awards is intentionally very circumscribed. Awards are presumed to be enforceable. They are only appropriately set aside or refused recognition and enforcement when there is a jurisdictional challenge or an extreme and egregious defect that affects the fundamental fairness of the arbitral proceedings or the final award.

135. Despite these exceedingly narrow grounds for award review, however, it is widely recognized that the New York Convention permits national courts to reject an award when materially false or fraudulent evidence has been submitted to the tribunal. The basis for

investment may not seek the protection of substantive legal rights contained in the applicable investment treaty. International legal scholars have long explained that, 'A Party who asks for redress must present himself with clean hands.' Under this principle, if an investor is shown to have engaged in significant misconduct directly related to its investment, it should not be able to pursue its claim.") (internal references omitted); Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40 Award, par. 493 (December 6, 2016): ("Moreover, particularly serious cases of fraudulent conduct, such as corruption, have been held to be contrary to international or transnational public policy. The common law doctrine of unclean hands barring claims based on illegal conduct has also found expression at the international level, although its status and exact contours are subject to debate and have been approached differently by international tribunals.") (internal references omitted).

[129] *See supra* par. 17.

[130] *See supra* par. 15.

[131] See *supra* par. 40.

this refusal to recognize and enforce an award is generally read into the public policy exception in Article V(2)(b) of the New York Convention.

136. Renowned arbitration scholar Professor Gary Born,[132] who is a leading proponent of the strong presumption in favor of the enforceability of arbitral awards, endorses the view that "a substantiated showing of material fraud in the arbitral proceedings, which was not and could not have been presented to the arbitrators, would provide grounds for non-recognition of an award."[133] Fraudulent evidence, Born explains, "vitiates the entire character of the arbitral proceeding."[134]

137. States have been allowed to challenge investor-State awards in light of false or fraudulent evidence. As an English court explained, if a court enforces an arbitral award despite proof of underlying fraud and fraudulent evidence, "[n]ot only is the integrity of the arbitration system threatened, but that of the court as well, since to enforce an award in such circumstances would implicate it in the fraudulent scheme."[135]

138. Particularly for State parties like Kazakhstan, which are working with international organizations, such as the Organisation for Economic Co-operation and Development ("**OECD**"), to introduce anti-corruption and rule-of-law boosting reforms, enforcement of an arbitral award that is materially tainted with false or fraudulent evidence sends completely the wrong message.

139. In an investor-State dispute, the tribunal's decision aims 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 the international rule of law on State parties. That aim is severely undermined, and the very legitimacy of investor-State arbitration called into question in the eyes of State parties, if awards premised on fraud-tainted evidence are enforced despite the strong international public policy against corruption. In this case, enforcement of an award apparently procured through false statements or fraudulent evidence, which may have been introduced to cover up underlying corruption or financial improprieties by a foreign investor, would undercut international efforts to encourage Kazakhstan to eradicate domestic corruption.[136]

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[132] Mr. Born testified in the Svea proceedings against setting aside that award. That testimony was provided before KPMG withdrew its Audit Report in 2019, and therefore could not have considered the information and reasoning presented in this Opinion.

[133] Born acknowledges that this is a near universal standard and "there are a few contrary decisions." GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3705 (2nd Kluwer 2014).

[134] *See id.*

[135] Federal Republic of Nigeria v. Process & Industrial Developments Ltd., [2020] EWHC 2379 (Comm).

[136] In 2019, the OECD's Anti-Corruption Network for Eastern Europe and Central Asia Anti-Corruption Division Directorate for Financial and Enterprise Affairs produced an *Update on Kazakhstan in the Istanbul Anti-Corruption*

140. In addition, recognizing and enforcing an award in which false or fraudulent evidence was presented also sends the wrong message to foreign investors. If fraud-tainted awards are nevertheless enforceable, the message to unscrupulous foreign investors is that there is little downside to defrauding an arbitral tribunal, as long as they can keep the falsehoods secret until after the award has been rendered.

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

A. The Causality or Materiality Requirement

142. The mere fact that false statements, fraudulent evidence or perjury have been submitted to an arbitral tribunal is not—in itself—a sufficient basis to set aside or refuse recognition and enforcement of an award. The false or fraudulent evidence must also be "material" or "causally related" to the final award.[137] This element is also sometimes called the "nexus" requirement. Although these terms are often used interchangeably, the precise definition of the terms is sometimes muddled in the relevant jurisprudence and the arbitration literature.[138]

143. The purpose of the materiality or causality requirement is to eliminate fraud-based challenges relating to peripheral or unimportant issues.[139] Some national courts appear to suggest that the causation or materiality requirement requires proof of "but for" causation, meaning that the party challenging the award must prove that "but for" the false or

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Action Plan Fourth Round of Monitoring. According to that report, Kazakhstan has made "progress" or "significant progress" in responding to a number of expert recommendations that had been made previously. Specifically, progress was made in response to recommendations regarding Assessment of Corruption, Integrity of the Civil Service, and Integrity of the judiciary. *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).

[137] *See* Oberster Gerichtshof [OGH] [Supreme Court], Jan. 26, 2005, 3 Ob 221/04b, XXX Y.B. Comm. Arb. 421, 428 (Austria) ("The mere allegation of a false witness statement in the arbitration is not a ground for refusing recognition and enforcement of the arbitral award pursuant to Article V(2)(b) New York Convention . . . ."); Majestic Woodchips, Inc. v. Donghae Pulp Co., Daebeobwon [S. Ct.], May 28, 2009, Case No. 2006 Da 20290, XXXVII Y.B. Comm. Arb. 259 (S. Kor.) (challenge to recognition on grounds that award was fraudulently procured requires showing that fraud is clear and convincing, was not discoverable during arbitration and was material to issues in dispute) (cited in BORN, *supra* note 134 at 3706, footnote 1573).

[138] 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 for which the applicant has to furnish proof. While arguably 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 tendency throughout the jurisdictions to lower the threshold*.") (emphasis added).

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

fraudulent evidence, the arbitral tribunal would have reached a different conclusion.[140] This approach is a minority view.

144. 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,"[141] or "that such evidence would have had an **important influence** on the result."[142] Similarly, courts have described the threshold as requiring "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,"[143] or that the fraudulent evidence or perjury "caused … substantial injustice in that the same procured or **substantially impacted** the making of the award."[144] Even Professor Born does not endorse the "but for" test, but instead suggests that the causality or materiality requirement may be satisfied as long as the fraudulent evidence is not on a tangential issue.[145]

145. As some commentators have explained, the objective definition of materiality or causation "makes sense because the test is whether a causal link objectively exists between the fraud and the award (as opposed to whether the tribunal would *actually* have reached a different decision had it known of the fraud)."[146] An English court took a stronger position against requiring subjective, but-for causation:

> 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

[140] Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) (requiring showing of materiality, but emphasizing that this element of the test for annulling an award "does not require the movant to establish that the result of the proceedings would have been different had the fraud not occurred").

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

[142] Westacre Investments Inc v. Jugoimport-SDRP Holding Company Ltd & Ors [1999] EWCA Civ 1401 (emphasis added) ("I have not considered fully 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.").

[143] 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)) (emphasis added).

[144] Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd [2009] SGHC 231 (emphasis added).

[145] Born, *supra* note 134, at 3706 ("Fraud occurring *solely in connection with an irrelevant or duplicative issue* will, despite being reprehensible, *not ordinarily* provide a basis for non-recognition….There is a risk that baseless fraud allegations will be used by disappointed award-debtors to delay recognition and enforcement of awards against them.") (emphasis added).

[146] Ray, Secomb, et al., *supra*, note 129 (emphasis added).

> to usurp the function of the arbitrators in the event that the matter was remitted to them.[147]

146. Thus, a reviewing court respects the tribunal's decision-making authority by verifying that false or fraudulent evidence *likely* had a significant or material effect on the tribunal's decision-making.

147. Making this determination (whether false or fraudulent evidence is sufficiently material to uphold a challenge to an award) requires a court to engage in a counter-factual analysis: if the later-discovered evidence had become known to the tribunal during the proceedings, was that new evidence of "sufficient cogency and weight" that it would have "had an important influence on" or "likely … have materially influenced the arbitrators' conclusion"?[148]

B. Relationship Among Professionals' Obligations

148. As discussed above, the term "materiality" is used in three different regulatory contexts to describe: 1) the threshold for when accountants must withdraw an audit,[149] 2) the threshold for when attorneys (in certain jurisdictions) must take corrective measures in light of later-discovered false or fraudulent evidence or perjury,[150] and 3) the threshold for when a court may refuse recognition and enforcement of an arbitral award under the public policy exception.[151]

149. Although the same term is used in all three contexts, the precise meaning of "materiality" is not the same in each context. These different materiality standards do, however, all have a similar purpose and a similar effect.

150. With respect to their similar purpose, the materiality standard in each context establishes a threshold for when false or fraudulent information can no longer be ignored by an individual professional or a national court. Once the information at issue is deemed material, the professional or court undermines their professional function if they ignore it.

151. With respect to their similar effect, the materiality standard also signals when an individual professional accountant or attorney, or a court or tribunal, is called on to act against the weight of their primary professional obligations. Upon a finding of materiality, the accountant must withdraw an audit performed for a client; the attorney may (or in some instances must) take remedial action that may include revealing client confidences they are otherwise charged with protecting; an expert witness should or must retract or amend a flawed opinion that has already submitted as evidence; an arbitral tribunal must exclude evidence that it is otherwise charged with substantively evaluating; and a reviewing court

[147] Chantiers de L'Atlantique S.A. (CAT) v Gaztransport & Technigaz S.A.S., [2011] EWHC 3383 (Comm), par. 61.
[148] *See supra* par. 57-58.
[149] *See supra* par. 69-71.
[150] *See supra* par. 85-90.
[151] *See supra* par. 136-141.

may or should refuse to recognize or enforce an arbitral award that it otherwise is obliged to enforce.

152. None of these professionals lightly acts against their primary professional obligations. Consequently, when an individual professional, tribunal, or court determines that the relevant materiality threshold has been satisfied, they are effectively putting the weight of their professional judgment on allegations of falsity or wrongdoing. Although separate, these assessments of materiality inevitably inter-relate across professions.

153. For example, at the most basic and direct level, once an accountant has withdrawn its audit, no attorney, a client, court, or tribunal can rely on that audit as evidence. As described above,[152] auditors make a determination to withdraw an audit on an independent basis, after assessment of their legal, professional, and ethical obligations, and at risk of financial or professional consequences for breach of those obligations. Accordingly, an auditor's withdrawal of an audit is a professional assessment that the contents of the audit are materially inaccurate or unreliable. That assessment should be entitled to considerable deference in the absence of countervailing facts.

154. In response to a withdrawal, an attorney would also be put on notice regarding the underlying misstatements or omissions that led to the withdrawal. An auditor's professional conclusion that financial statements are based on material misstatements or omissions does not necessarily mean that an attorney has "actual knowledge" of the factual accuracy of the reasons underlying the withdrawal, which would trigger the attorney's obligation to take corrective measures if the underlying reasons were false or fraudulent evidence presented to the tribunal. However, in my opinion, an attorney who ignores an auditor's professional conclusion, without any affirmative contravening evidence to suggest the auditor's decision was erroneous, would be engaging in willful blindness.[153]

155. An attorney who has actual knowledge (including knowledge imputed to them based on willful blindness) that false or fraudulent evidence had been presented to a tribunal, under applicable ethics rules the attorney would be obliged to take corrective measures. That obligation in the arbitration context should be interpreted as extending to enforcement proceedings in national courts.[154]

C. The Materiality of Fraudulent Evidence in the Arbitration

156. Since conclusion of the Arbitration, Kazakhstan has been pursuing and collecting evidence to support its allegations of fraud. Based on new evidence collected, Kazakhstan has accused the Stati Parties of fraud in the transactions underlying their claims in the Arbitration and of submitting false or fraudulent evidence to the arbitral tribunal and to various courts. The Stati Parties, through their attorneys, have denied these allegations and

[152] *See supra* par. 69-71.
[153] *See supra* par. 52 & 115.
[154] *See supra* par. 95.

were ultimately successful in persuading most subsequent courts not to consider the substance of Kazakhstan's arguments that false or fraudulent evidence had been submitted to the tribunal, or that the Stati Parties' alleged deception was material or had an effect on the tribunal's decision. As noted, this Opinion does not address these various sources and allegations.

157. In February 2016, years after the Award was rendered and had been challenged in several courts, KPMG became aware of the relevant facts that suggested the Audited Financial Statements were based on misstatements and omissions by the Stati Parties. For the reasons described above, in August 2019, KPMG determined in its independent professional judgment that it was required to withdraw its Audit Reports. This decision was based on KPMG's conclusion that the Stati Parties made material omissions or misrepresentations regarding the financial position of the Companies. In my opinion, KPMG's withdrawal of its Audit Reports has numerous important implications for the substantive case and arbitral proceedings, and would likely have had a material effect on the tribunal's decisionmaking.

158. In assessing whether false or fraudulent evidence submitted in arbitral proceedings had a material effect on the adjudication, as examined above,[155] reviewing courts generally employ a counter-factual analysis. In this case, the analysis would seek to determine whether, if the tribunal had learned during the Arbitration that KPMG had withdrawn the Audit Reports because it determined that they were based on material misstatements or omissions, that new evidence would *likely* have had a material effect on the tribunal's decision-making.[156] For the reasons elaborated below, my opinion is that the answer is yes.

159. Financial issues, and particularly the financial status and well-being of the Companies, were central to many aspects of the merits of the dispute, of the damages calculations, and more generally with respect to the credibility of the parties. Given the reasons for the withdrawal and the centrality of financial issues to various aspects of the Arbitration, it seems difficult to imagine that withdrawal of the Audit Reports, and related implications for the Financial Statements, would not have had a material effect on the tribunal's decision-making.

160. Had it become known during the Arbitration that KPMG withdrew the Audit Reports, it seems almost a certainty that that fact would have affected the arbitral proceedings and the tribunal's decision-making in the following ways:

    i. Inevitably, in deference to KPMG's professional statement that the Audit Reports should not be relied on by third parties, the tribunal would have excluded the numerous references throughout the arbitral proceedings and the final Award to the Audit Reports and to the fact that the Financial Statements had been audited by KPMG;

[155] *See supra* par. 147-148.
[156] *See supra* par. 144-147.

ii. The tribunal would likely have excluded the actual Financial Statements themselves given that KPMG's decision was based in its determination that the Financial Statements were unreliable. If the tribunal did not completely exclude the Financial Statements, the tribunal would likely have attributed them little or no evidentiary value; and

iii. The tribunal's assessment of the Stati Parties' credibility with respect to issues regarding their financial status and arguments on damages, including the valuation of the LPG Plant, would likely have been substantially affected because the withdrawal of the Audit Reports was based on findings by KPMG that its Audit Reports for the Financial Statements were predicated on improper omissions and material misstatements by the Stati Parties.

161. As Claimants, the Stati Parties ultimately bore the burden of proof in order to prevail on their claims. If the Financial Statements had been excluded or given little or no evidentiary weight, as elaborated below, the Stati Parties would have had considerable difficulty in proving the basis for various underlying factual assertions related to the Companies' financial well-being, as well as related questions regarding the causes of their financial distress, and various issues on damages, including the value of their investment in the LPG Plant.

162. The Stati Parties' ability to satisfy their burden of proof would have been further undermined because their credibility would have been called into question if the tribunal had known that the KPMG Audit Reports had been withdrawn based on KPMG's determination that they were based on material omissions and misrepresentations by the Stati Parties to KPMG.

163. The following paragraphs provide specific evidentiary issues that KPMG's withdrawal would have affected the tribunal's decision-making in the Arbitration.

1. Excluding the KPMG Audit Reports

164. The Stati Parties and their counsel relied repeatedly on the *mere fact* that their Financial Statements were audited by KPMG to establish the underlying reliability of the Financial Statements and general credibility of the parties. For example, in his opening statement in the Arbitration, counsel for the Stati Parties, Mr. Kevin Mohr, used the fact that the Financial Statements were audited by a prestigious accounting firm to emphasize their reliability as a source of proof of the value of KPM's and TNG's earnings between 2003 and 2008:

> As we've shown, the **financial statements** of KPM and TNG, **which were audited by "Big Four" accounting firms**, demonstrate that the companies retained nearly $400 million in earnings between 2003 and 2008.[157]

165. Similarly, the Stati Parties used the fact that KPMG had audited the Financial Statements more generally to undermine Kazakhstan's credibility and competence. For example, Mr. Mohr argued:

> Kazakhstan argues that claimants' investments were opaque, suggesting that they were structured to conceal profits and disguise who was the "real investor". This position either is **completely disingenuous, or the respondent understands nothing about finance**. These companies created annual financial statements between 2003 and 2009 **that were audited by "Big Four" accounting firms**.[158]

166. Neither Mr. Mohr nor any other attorney for the Stati Parties can today, consistent with their ethical obligations, make similar representations or arguments because of the withdrawal of the Audit Reports by KPMG.

167. Later in the proceedings, the Stati Parties again referred to the fact that the Financial Statements were audited by a reputable accounting firm:

> Finally, Kazakhstan also criticizes FTI's assessment of the investment value of the LPG Plant as simply relying on information provided by Claimants. That is not correct. FTI based its assessment of the book value of the LPG Plant as of October 14, 2008, on TNG's Third Quarter 2008 financial statements. Those financial statements **were prepared in the ordinary course of business, not for litigation, and were reviewed by KPMG** … Data from the Claimants' historical financial records, **particularly data from audited financial statements**, is perfectly reliable evidence.[159]

168. In these arguments, the Stati Parties relied on the fact that the Financial Statements were audited by KPMG to support their credibility, and to challenge Kazakhstan's credibility, regarding the financial status and corporate conduct of KPM and TNG.

169. These credibility issues were relevant to the tribunal's ultimate determination in the Award that the standards for Fair and Equitable Treatment in the Energy Charter Treaty had been violated. In reaching that conclusion, the tribunal determined that:

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[157] Transcript of the Hearing, on Jurisdiction and Liability in the Arbitration dated October 1, 2012, 1st Hearing Day, Opening Statement of Mr. Mohr, pp. 45, 48-49, 52 (emphasis added).
[158] Transcript of the Hearing on Jurisdiction and Liability in the Arbitration dated October 1, 2012, 1st Hearing Day, Opening Statement of Mr Mohr, pp. 45, 48-49, 52 (emphasis added).
[159] Stati Parties' Second Post Hearing Brief in the Arbitration dated June 3, 2013, par. 354 (emphasis added).

> Claimants' valuations of their investments are **fundamentally sound and credible**, as demonstrated by the fact that they are supported by **multiple contemporaneous valuations performed by sophisticated third parties**.[160]

170. The mere fact that KPMG, a "Big Four" accounting firm, audited the Financial Statements of the Companies had an impact on the tribunal's assessment of the relative credibility of the Stati Parties. If the tribunal in the Arbitration had known that KPMG withdrew the audits and declared them unreliable based on its assessment of material misstatements or omissions, the tribunal would inevitably have had a different assessment of the parties' credibility and the financial soundness of the Stati Parties' investments.

2. Evidentiary Rulings Regarding the Financial Statements

171. In addition to excluding any specific reference to KPMG's audit of the Financial Statements, the tribunal would likely have either excluded altogether or given little if any weight to the Financial Statements for which KPMG's Audit Reports were later withdrawn.

172. One of these two possible approaches seems likely because KPMG's withdrawal of the Audit Reports was expressly premised on its professional determination that the Financial Statements were unreliable and did not comport with industry standards because they were based on material misrepresentations or omissions by the Stati Parties. Reliability is a key consideration in determining both the admissibility of evidence and the weight to be afforded to it.[161]

173. If the tribunal had excluded or given little or no weight to the Financial Statements, the party with the burden of proof (the Stati Parties) would have had difficulty proving the value of KPM and TNG (including the value of the LPG Plant) and the Companies' retained earnings. The retained earnings of KPM and TNG were central to determining what caused the liquidity crisis that ultimately precipitated the unfavorable Laren Transaction terms, which in turn related to whether and when Kazakhstan caused the alleged harm to the Stati Parties.

174. Specifically, Kazakhstan argued that "KPM and TNG were overleveraged prior to state action."[162] In repudiating these arguments, the Stati Parties pointed to the conclusions of their financial expert, FTI, which had reviewed "the finances of KPM and TNG" and concluded that they "were in good financial condition."[163] In reaching this conclusion, FTI relied expressly on the Financial Statements, which were appended to its opinion.[164]

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[160] Award at par. 683 (emphasis added).

[161] IBA Rules on the Taking of Evidence, art. 9(2) ("The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.").

[162] Award at par. 1434.

[163] *Id.*

[164] *See supra* par. 24.

175. On this issue, the tribunal decided in favor of the Stati Parties.[165] Had the tribunal known that KPMG had withdrawn the Audit Reports as a result of its determination that they were based on material omissions or misstatements by the Stati Parties, it is reasonable to assume the tribunal's conclusion on this issue would have been affected.

176. On issues of damages, the Companies' Audited Financial Statements were also relevant to the tribunal's decision-making in several respects. Many of the valuation issues rested on the financial status of the Companies, including:

    i. What was the appropriate valuation date?

    ii. What was the value of the LPG Plant?

    iii. Were certain amounts earned by the Stati Parties before the valuation date, as Claimants contended, or after the valuation date, as Kazakhstan contended, and thus subject to deduction from the assessment of damages?

177. Each of these questions relates to or is predicated on the financial status of the Companies and the corporate conduct of the Stati Parties. If withdrawal of the Audit Reports were known to the tribunal, and the Financial Statements were either excluded or afforded little or no weight, it seems likely that the tribunal's assessment of these issues would have been affected.

178. The following paragraphs provide a number of specific examples, among others in the record, when the Stati Parties expressly relied on the Financial Statements to support their arguments on damages, the valuation of the LPG Plant, and the Companies' financial health Specifically, the Stati Parties asserted in the Arbitration:

> FTI used the net book value of the LPG plant as reflected in the Tristan **Consolidated Financial Statements** as at September 30, 2008, which was USD 208.5 million.[166]
>
> Likewise, Claimants completed 90% of their LPG Plant and invested, on their behalf and on behalf of Vitol, in excess of US$ 208.5 million in the LPG Plant.*
>
> > *… Tristan Oil **Consolidated Audited Financial Statements**, September 30, 2008, at 10 …[167]
>
> According **to KPMG's Auditors' Report**, the Management of Tolkynneftegaz LLP and Kazpolmunay LLP agreed to extend the payment terms for their

[165] Award, par. 1092, 1452-1458.
[166] Stati Parties' Statement of Claim in the Arbitration dated May 18, 2011, par. 420 (emphasis added).
[167] Stati Parties' Reply Memorial on Jurisdiction and Liability in the Arbitration dated May 7, 2012, par. 121 (emphasis added).

largest customers, Stadoil Ltd. and General Affinity Ltd., which are related parties, after they were informed that these customers would not be able to comply with existing contractual payment terms.[596] …

> [596] ***Audited Financial Statements*** attached to 2009 Annual Report of Tristan Oil, at F-3 …[168]

Additionally, Tristan Oil owed a substantial coupon payment (of around US $28 million) to the noteholders on December 31, 2009.[600] The assignment of receivables allowed Tristan to collect funds that otherwise may have been frozen in KPM's bank accounts, and Tristan made the coupon payment in full.[601] …

> [600] ***Audited Financial Statements*** Attached to 2009 Annual Report of Tristan Oil at F-73, R-37.6.
>
> [601] ***Audited Financial Statements*** Attached to 2009 Annual Report of Tristan Oil at F-70, F-73, R-37.6.[169]

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

> [620] ***Reviewed Financial Statements*** for Nine Months Ended September 30, 2008, attached to Tristan Oil Interim Report for the Nine Months Ended September 30, 2008, at F-69, F-105 …[170]

179. If the tribunal had excluded the Audited Financial Statements or given them little or no weight, the Stati Parties would not have been able to introduce meaningful evidence to support these assertions, particularly given the reasons for KPMG's withdrawal. FTI's expert report would likely have been withdrawn or revised voluntarily by FTI or excluded by the tribunal. These difficulties would have been further aggravated if, based on KPMG's withdrawal of its Audit Reports, the tribunal were to not only exclude evidence but also draw negative inferences about the Stati Parties' financial situation and their credibility.

3. Tribunal Knowledge of the Reasons for KPMG's Withdrawal

180. Finally, in addition to the mere fact of the KPMG withdrawal and its effect on admissibility of the Financial Statements, the tribunal would also have had evidence regarding the reasons why KPMG made such an extraordinary decision, namely its conclusion that the

[168] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 417 (emphasis added).
[169] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 419 (emphasis added).
[170] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 435 (emphasis added).

Stati Parties had made specific material misstatements and omissions to KPMG and had failed to respond satisfactorily to KPMG's subsequent inquiries.[171]

181. KPMG's independent professional assessment that there had been material misstatements and omissions by the Stati Parties would have raised serious, substantive inferences regarding both the Stati Parties' credibility and financial improprieties in the underlying transactions. Most expressly, KPMG's decision to withdraw the Audit Reports was in part based on evidence that Mr. Lungu admitted in sworn deposition testimony that his testimony for the Stati Parties in the Arbitration regarding various financial issues was false. KPMG's decision to withdraw the Audit Reports was based on its determination that this evidence was material enough under accounting standards[172] to render its Audit Reports unreliable. While KPMG's factual determinations would not have been expressly binding on the tribunal, given that they were assessments made pursuant to KPMG's professional obligations, they should have been and would likely have been afforded considerable weight.

182. Several other facts also suggest that other evidence submitted by and on behalf of the Stati Parties, and statements made by the Stati Parties' counsel, may have been false or fraudulent. For example, Anatolie Stati testified that the Laren lenders were a "group of lenders" introduced to the Stati Parties by Renaissance Capital.[173] The Stati Parties' attorneys underscored that Laren was "not affiliated in any way" to the Stati Parties.[174] These descriptions imply that Laren, the company that imposed financing terms on the Companies that Mr. Stati testified were "terrible"[175] and his attorneys characterized as "horrendous",[176] were imposed by a so-called stranger in the marketplace that was previously unknown to Mr. Stati.

183. That testimony and related inferences seem inconsistent with the later disclosure in Mr. Lungu's sworn testimony in the U.S. deposition that Laren was headed by Anatolie Stati's personal chauffeur, Mr. Eldar Kasumov, a man Mr. Lungu confirmed has no formal business training.[177] If this revelation were known to the tribunal, Mr. Stati's testimony would likely have appeared to the tribunal as intentionally misleading or simply false. In addition, the tribunal would also likely conclude that counsels' statement that the Laren Lenders "are not affiliated in any way with Mr. Stati" was also inaccurate.[178]

184. If the tribunal knew that Laren and the Stati Parties were affiliated through Mr. Stati's personal chauffeur, it would likely have viewed the exceptionally onerous nature of the Laren Transaction in a different light. At a minimum, the tribunal might have determined

[171] *See supra,* par. 45.
[172] *See supra*, par. 42-48.
[173] Second Witness Statement of Anatolie Stati in the Arbitration dated May 7, 2012, par. 43.
[174] *See supra*, par. 15 *et seq.*
[175] Second Witness Statement of Anatolie Stati in the Arbitration dated May 7, 2012, par. 43.
[176] Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013, par. 217.
[177] *See supra*, par. 41-a)j).
[178] *See supra,* par. 14-15.

that these new facts suggest that the onerous terms in the Laren Transaction were not proof of the Stati Parties' vulnerable financial position or the cause of its further financial decline. Instead, these new facts suggest either that Laren was a company whose personal affiliation with Mr. Anatolie Stati was inaccurately denied to the tribunal, or that Laren is a company intentionally set up as a sham and therefore a potential red flag for underlying financial improprieties.

185. Either way, knowledge of Mr. Stati's affiliation with Laren might have prompted an entirely new line of argument for Kazakhstan on key issues of causation and damages. Revelation of Mr. Stati's affiliation with Laren might have raised concerns about underlying financial misconduct that would contribute to an assessment of whether the Stati Parties had "unclean hands" in the underlying transaction. For these reasons, the misstatements regarding whether Laren was affiliated with Mr. Stati appear to be material to issues in the Arbitration.

186. If these misstatements are considered material and the arbitral tribunal had still been constituted when these revelations became known, under the U.S. Model Rules, the CCBE Rules, and the IBA Guidelines, the Stati Parties' counsel would have had an obligation to take corrective measures. Such measures would potentially have included notifying the tribunal or withdrawing the testimony and misstatements. As noted above,[179] however, counsel's corrective measures cannot include notifying the original tribunal after an award has been rendered because the doctrine of *functus officio* means that the original tribunal is no longer constituted.

187. The duty to take corrective measures generally extends through final resolution of the dispute, which as analyzed above should be understood as continuing throughout proceedings in national courts to set aside or recognize and enforce the Award.[180]

188. To the best of my knowledge, no attorney representing the Stati Parties has taken any corrective measures with respect to any of the national courts that have reviewed the Award. Even assuming hypothetically that the Stati Parties' counsel had not repeated any false or fraudulent statements to reviewing courts, but had only argued that false or fraudulent statements were irrelevant to those courts' narrow review of the Award or that that evidence was procedurally inadmissible in those courts, the obligation to take corrective measures still applies. The obligation pertains to any false statement or fraudulent evidence originally submitted to the arbitral tribunal, even if in the arbitral context the corrective measures can only be undertaken vis-à-vis the reviewing courts.

[179] *See supra,* par. 94-95.
[180] *See id.*

X. CONCLUSION

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. Recognizing 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."[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.[183]

195. Being in full agreement with the contents of this Statement, I hereby sign and acknowledge its contents on this day, January 17, 2021.

Catherine A. Rogers

[181] *See* BORN, *supra* note 133, at 3705.
[182] REISMAN, *supra* note 124, at 95.
[183] *See supra* par. 136-137.

CATHERINE A. ROGERS

PENN STATE LAW,
324 KATZ BUILDING
STATE COLLEGE, PENNSYLVANIA 16802
car36@psu.edu

QUEEN MARY, UNIVERSITY OF LONDON
67-69 LINCOLN'S INN FIELDS
LONDON WC2A 3JB

ACADEMIC APPOINTMENTS

PENN STATE LAW, State College, Pennsylvania
Professor of Law, Fall 2008-Present; Affiliate Faculty, School of International Affairs (2008-Present); sabbatical 2011-12; Paul & Marjorie Price Faculty Scholar, 2012-Present
Courses: International Commercial Arbitration, Global Lawyering, Civil Procedure, Professional Responsibility, International Litigation and Arbitration

QUEEN MARY, UNIVERSITY OF LONDON, London, England
Chair of Ethics, Regulation & The Rule of Law at *Center for Commercial Law Studies, Co-Director of Institute for Regulation & Ethics*, September 2013-Present (partial appointment)

LOUISIANA STATE UNIVERSITY LAW CENTER, Baton Rouge, Louisiana
Richard C. Cadwallader Professor of Law, Fall 2006-2008, *Richard C. Cadwallader Associate Professor of Law*, 2004-2005, *Associate Professor of Law*, 2003-2004, *Assistant Professor of Law*, 2000-2003.
Courses: International Litigation & Arbitration, International Law Seminar, Public International Law.

UNIVERSITÀ COMMERCIALE LUIGI BOCCONI, Milan, Italy
Professor of Law (ancillary), 2007-2010 Spring 2018; *Tenure-Track Assistant Professor*, Spring Semesters 2005-2007; *Long-Term Visiting Associate Professor of Law*, Spring Semesters 2002-2004
Courses: Law Degree Program: Introduction to American Commercial Law; *Degrees (undergraduate and graduate programs) in International Economics and Management:* Comparative Business Law; *PhD program in International Economic Law:* International Arbitration

OTHER TEACHING

INSTITUTO TECNOLÓGICO AUTÓNOMO DE MÉXICO (ITAM), Mexico City, Mexico, *Visiting Professor in International Arbitration Summer School*, June 2014-2018

EUROPEAN PATENT OFFICE SUMMER ACADEMY, with Università Bocconi, *Visiting Professor*, Alicante, Spain, July 2008; and NYU, New York, August 2010, Cleveland, Ohio, August 2018

PEPPERDINE SCHOOL OF LAW, Malibu, California
Visiting Professor, *Seminar on Ethics in International Arbitration*, January 2015, 2016 & 2017

GENEVA LLM IN DISPUTE SETTLEMENT (MIDS)
Visiting Professor, *Ethics in International Arbitration,* Geneva LLM in International Dispute Resolution, Geneva Switzerland, May 2015

SINGAPORE ARBIRATION ACADEMY, Singapore, *Visiting Professor*, December 2012

UNIVERSITÀ DEGLI STUDI DELL'INSUBRIA, Como, Italy & **UNIVERSITÀ di BOLOGNA**
Visiting Professor, Summers 2002-2006; American Contract Law in Comparative Perspective

CATHERINE A. ROGERS

PROFESSIONAL APPOINTMENTS & PUBLIC SERVICE

Founder and CEO, *Arbitrator Intelligence* (NGO (2014-2019) and Legal tech startup (2019-Present))

Member, Academic Forum on Investor-State Dispute Settlement, Geneva Center for International Dispute Settlement, 2017-Present

Reporter, RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION, American Law Institute, 2007-Present

Co-Chair (with William W. Park and Stavros Brekoulakis), ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, Spring 2013-2018

Member, International Board of Advisors, Vienna International Arbitration Centre, 2015-17

Member, Advisory Board of Investment Claims, Oxford University Press, 2017-Present

Member, Board of Advisors of the Lagos Court of Arbitration, Lagos, Nigeria, 2016-Present

Member, Board of Advisors, New York International Arbitration Center, 2014-Present

Member of the Court of Arbitration of the Jerusalem Arbitration Centre (JAC) (appointed by the ICC Palestine), 2014-2016

Convenor, Inaugural Detlev Vagts Roundtable on Transnational Law, American Society of International Law, Roundtable on Global Legal Ethics, 2015-16

Member, Board of Directors, International Judicial Academy, 2012-2017

Member, U.S. State Department Delegation, UNCITRAL Online Dispute Resolution Working Group II, 2012-2015

Expert Consultant, USAID-sponsored program on arbitrator ethics reforms, Tbilisi, Georgia, June 2014

Legal Expert, OECD, 16th Freedom of Investment Roundtable, Spring 2012

Member, International Bar Association (IBA) Task Force on Guidelines for Party Representatives, 2008-2013

Member, Academic Council, INSTITUTE FOR TRANSNATIONAL ARBITRATION (ITA), 2005-13, 2015-Present.

Co-Chair, ASIL-ITA Conference, *The Future of Investment Arbitration*, 2007

Co-Chair, ITA Annual Workshop, *Confronting Ethical Issues in International Arbitration*, Dallas, Texas, June 2009

Co-Chair, 6th Annual Americas Workshop, October 15, 2010, Bogotá, Columbia

Consultant for ICC Palestine on Capacity-Building for Palestinian lawyers, judges and arbitrators (2011-1015)

Member, AMERICAN SOCIETY OF INTERNATIONAL LAW *Task Force on Global Legal Ethics* chaired by Professor Detlev Vagts, 2006-08

Member, Arbitration Committee, *CPR International Institute for Conflict Prevention & Resolution*, 2007-2010

Special Consultant on Issues of Ethics for Reinsurance Arbitrators, ARIAS-US, 2007-2009

CATHERINE A. ROGERS

PUBLICATIONS

BOOKS

ETHICS IN INTERNATIONAL ARBITRATION (Oxford University Press, 2014)

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Arbitrator Challenges: Too Many, or Not Enough?, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2014) (with Idil Tumer)

The Ethics of International Arbitrators, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION (with Jeff Jeng)(2nd edition) (Juris 2014)

Transnational Litigation and Ethics, in INTERNATIONAL LITIGATION AND Strategies (with Detlev Vagts) (2nd edition) (Barton Legum, ed., 2014)

Guerilla Tactics and Ethics, *in* INTERNATIONAL ARBITRATION: ETHICS, PRACTICE AND REMEDIES (Günther Horvath and Stephan Wilske, eds., 2013)

The Restatement as "New Rules," in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2012)

Transnational Litigation and Ethics, in INTERNATIONAL LITIGATION AND STRATEGIES (with Detlev Vagts) (Barton Legum, ed., 2012)

International Arbitration's Public Realm, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2011)

The Ethics of Advocacy, *in* THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION (Juris Publishing 2010)

Cross-Border Bankruptcy as a Model for Regulation of International Attorneys, *in* MAKING TRANSNATIONAL LAW WORK IN A GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS (Cambridge University Press, 2010)

The Ethics of International Arbitrators, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION (Juris Publishing, 2008)

ARTICLES & ESSAYS

The World Is Not Enough: ethics in arbitration seen through the world of film, Arbitration International (2021), aiaa039, https://doi.org/10.1093/arbint/aiaa039.

Apparent Dichotomies, Covert Similarities; A Response to Joost Pauwelyn, 109 AJIL Unbound 294 (2016) (invited response)

International Arbitration, Judicial Education & Legal Elites, 2015 MO. J. OF DISP. RES. 71 (symposium contribution) (2015)

Third-Party Funding In International Arbitration: The ICCA Queen-Mary Task Force, AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION (2014) (with William W. "Rusty" Park)

Fraport v. Philippines, ICSID, and *Counsel Disqualification: The Power and the Praxi: Fraport AG Frankfurt Airport Services Worldwide v. The* Republic *of the Philippines*, Decision on Disqualification of Counsel, 18 September 2008, (case note) JOURNAL OF WORLD INVESTMENT AND TRADE (2014) (with Alexander Wiker)

A Reply to "Hollow Spaces," 62 BUFFALO LAW REV. 177 (2014)(invited response) (with George Bermann, Jack C. Coe and Christopher Drahozal)

The Politics of Investment Arbitrators, 12 SANTA CLARA J. INT'L L. 223 (symposium contribution) (2013)

When Bad Guys Are Wearing White Hats, 1 STANFORD J. COMPLEX LIT. 487 (symposium contribution) (2013)

Restating the U.S. Law of International Commercial Arbitration, 113 PENN ST. L. REV. 1333 (2009) (with George Bermann, Jack C. Coe and Christopher Drahozal)

Lawyers Without Borders, 30 U. PENN. INT'L L. REV. 1035 (2009)

- Reprinted in ANDREW KAUFMAN & DAVID B. WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (5th ed. 2009)

The Arrival of the Have-Nots *in International Commercial Arbitration*, 8 NEVADA L.J. 341 (2007) (symposium contribution)

Transparency in International Commercial Arbitration, 54 KANSAS L. REV. 1301 (2006) (symposium contribution)

Arbitrating Antitrust Claims in the United States and Europe, (with Niccolò Landi), 133-14 *CONCORRENZA E MERCATO* 455 (2005-06)

ARTICLES & ESSAYS (cont.)

The Vocation of International Arbitrators, 20 AM. U.J. INT'L L. 959 (2005)

Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct, 41 STAN. INT'L L. REV. 53 (2005)

- Selected for the 2004 Stanford-Yale Junior Faculty Forum in the category of Law and Humanities

Proposals to Expel Palestinians from the Occupied Territories as Catalyst for a Civil Adjudication Campaign, 7 IOWA J. GENDER RACE & JUST. 167 (2003)

Context and Institutional Structure in Attorney Discipline: Developing an Enforcement Regime for Ethics in International Arbitration, 39 STAN. INT'L L. REV. 1 (2002)

- Earlier version, then combined with companion article *Fit and Function*, selected for 2001 Stanford Yale-Junior Faculty Forum in category of Private International Law
- Recipient, with companion article *Fit and Function*, of the 20th Annual CPR Professional Article Award for 2002

Fit and Function in Legal Ethics: Developing a Code of Attorney Conduct for International Arbitration, 23 MICH. INT'L L.J. 341 (2002)

- Reprinted in CARRIE MENKEL-MEADOW *ET AL.*, APPROPRIATE DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL FOR DISPUTE AND CONFLICT (2004)

Gulliver' s Troubled Travels, or The Conundrum of Comparative Law, 67 GEO. WASH. L. REV. 159 (1998) (review essay)

The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China, 15 BERK. J. INT'L L. 329 (1997) (with Frederick Brown)

"And to the Republic for Which It Stands": Guaranteeing a Republican Form of Government, 23 HASTINGS CONST. L.Q. 1057 (1996) (with David L. Faigman)

PROFESSIONAL REPORTS AND RESTATEMENT

PAPER ON THIRD-PARTY FUNDING IN INVESTMENT ARBITRATION FOR ACADEMIC COUNCIL WORKING GROUP III (co-authored with Stavros Brekoulakis)

ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION JOINT REPORT (ICCA Reports Series, 2018) (co-editor and co-author with Stavros Brekoulakis and William Park)

RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION

AMERICAN SOCIETY OF INTERNATIONAL LAW TASK FORCE REPORT ON *Global Legal Ethics*, (primary author of draft report)(2008)

WORKS IN PROGRESS

The Devil's Arbitrator (on party-appointed arbitrators and the meaning of impartiality)

OTHER SELECTED PUBLICATIONS

The Key to Unlocking the Diversity Paradox in International Arbitration: Arbitrator Intelligence, http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/

Arbitrator Intelligence -- An Interview with its Founder and Director, Professor Catherine Rogers, 1 J. TECH. INT'L ARB.87 (2015)

Entry as Founder of *Arbitrator Intelligence*, in Gender-Oriented Implementation of ADR Instruments in the Western Balkans (financed by the German Federal Ministry for Economic Cooperation and Development and Deutsche Gesellschaft für Internationale Zussamenarbeit (GIZ) GmbH (2015).

Arbitrator Ethics entry in ENCYCLOPEDIA OF INTERNATIONAL ECONOMIC LAW (Edward Elgar 2017).

Arbitrator Intelligence: The Pilot Project and Beyond, Kluwer Arbitration Blog, http://kluwerarbitrationblog.com/blog/2015/01/20/arbitrator-intelligence-the-pilot-project-and-beyond/ (January 20, 2015)

The US Law of International Commercial Arbitration Restated, 21 No. Disp. Res. Mag. 8 (2014) (with Ank Santens and Suyash G. *Paliwal*)

The Jerusalem Arbitration Center, 106 Am. Soc'y Int'l L. Proc. 270 (2012)

The International Arbitrator Information Project: From an Ideation to Operation, Kluwer Arbitration Blog Post, http://kluwerarbitrationblog.com/blog/2012/12/10/the-international-arbitrator-information-project-from-an-ideation-to-operation/ (December 10, 2012)

The International Arbitrator Information Project: An Idea Whose Time Has Come, Kluwer Arbitration Blog Post, http://kluwerarbitrationblog.com/blog/2012/08/09/the-international-arbitrator-information-project-an-idea-whose-time-has-come/ (August 9, 2012)

Peace, One Dispute at a Time: The Jerusalem Arbitration Center, NEW YORK DISPUTE RESOLUTION LAWYER (Spring 2012)

Peace through Commerce?: The Idea of the Jerusalem Arbitration Center, International Law Grrls Blogpost, http://www.intlawgrrls.com/2011/11/peace-through-commerce-idea-of.html (Nov. 4, 2011)

International Arbitration Needs Enforceable Conduct Rules, 21 ALTERNATIVES TO HIGH COST LITIG. 97 (2003)

CATHERINE A. ROGERS

LEGAL EXPERIENCE

ORRICK, HERRINGTON & SUTCLIFFE LLP, San Francisco, California
Attorney, 1997-1999

Duties included: representation of Microsoft Corporation in *Sun Microsystems Inc. v. Microsoft Corporation*; representation of Affymetrix Inc. (bio-technology company) in domestic and international patent disputes; representation of Lucent Technologies in international technology arbitration; representation of the City of Monterey in U.S. Supreme Court appeal, *City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999); *pro bono* representation of low income tenants in landlord-tenant disputes.

COUDERT BROTHERS, New York; Hong Kong
Attorney, 1995 (New York), 1996-97 (Hong Kong)

Duties included: representation of clients in arbitrations seated throughout Asia and Europe and administered by various arbitral institutions; coordination of international litigation for Asian clients.

THE HONORABLE MELVIN BRUNETTI, United States Court of Appeals for the Ninth Circuit, Reno Nevada, *Judicial Law Clerk*, 1994-95

THE HONORABLE BARBARA A. CAULFIELD, United States District Court for the Northern District of California, San Francisco, California, *Judicial Extern*, Fall 1993

PROFESSIONAL QUALIFICATIONS

Member of the New York Bar (1996-Present)
Foreign Licensed Attorney, Hong Kong (1996-97)
Member of the California Bar (1997-Present) (inactive status since 2002)

EDUCATION

YALE LAW SCHOOL
Master of Laws, 2000; Recipient of the Howard M. Holtzmann Fellowship, 2001

UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW
Juris Doctor, 1994
Order of the Coif; Senior Executive Editor, *Hastings Law Journal*
Distinguished Service Award as a Board Member on the *Hastings Law Journal*

UNIVERSITY OF CALIFORNIA at BERKELEY
Bachelor of Arts in English Literature, 1991

CATHERINE A. ROGERS

SELECTED PRESENTATIONS

KEYNOTE SPEECHES & ENDOWED LECTURES

Schwartz Endowed Lecture, Ohio State University, February 4, 2020
Keynote, Stockholm Arbitration Day, Stockholm, Sweden, September 11, 2020
Keynote, Technology and Informatics as Great Democratizers in International Arbitration, Young ICCA Skills Training Workshop, (anticipated) April 16, 2020
Keynote, *Arbitrator Intelligence and the Turn to Data*, International Arbitration Conference, PepperHamilton, Philadelphia, October 11, 2019
Keynote, *Moneyball for Arbitrators*, GAR Live, Stockholm, Sweden, May 21, 2019
Keynote, *The World Is Not Enough*, Vienna Arbitration Days, Vienna, Austria, April 2, 2019
Keynote, *Technology and Arbitrator Selection*, Helsinki Arbitration Day, Helsinki, Finland, May 28, 2018
Keynote, *Is International Arbitration in a Race to the Top?*, Cambridge Arbitration Day, Cambridge, England, March 3, 2018
Keynote, *The World Is Not Enough*, 8th Annual Arbitration Conference: Strategic Choices in International Arbitration, *Les Jeune Avocats*, New York, New York, October 7, 2016
Keynote, *Third-Party Funding in International Arbitration*, Singapore Academy of Law, Singapore, November 23, 2015
Keynote, Vis Premoot at Austrian Supreme Court, Vienna, Austria, March 27, 2015
Keynote, Public Interest / Private Dispute—Transparency in Investment Arbitration, White & Case (co-sponsored by Sciences Po Law School Human Rights Clinic), Paris, France, November 12, 2014
Keynote, *The Role of Global Lawyers in Ensuring Social Responsibility, Human Rights and the International Legal Order*, HumAk Forum, Oslo, Norway, August 31, 2010

PRESENTATIONS

Presenter, *Technology and Diversity in International Arbitration*, Dutch Arbitration Day, October 18, 2018
Presenter, *Third-Party Funding in International Arbitration*, Tbilisi Arbitration Day, October 8, 2018
Convenor and Presenter, Launch of ICCA-Queen Mary Report on Third-Party Funding, ICCA Congress, Sydney, Australia, April 16, 2018
Presenter, *Revisiting Chromalloy: Enforcing Vacated Awards Under the New York Convention*, Sidley & Austin LLP, New York, New York, March 8, 2016
Presenter, *The Effect of the Legal Seat on Counsel Ethics in International Arbitration*, ABA Section on International Law, New York, New York, March 27, 2016
Co-Organizer, *Arbitrator Behavior Workshop*, and Presenter, *Information and Arbitrator Accountability*, PluriCourts, University of Oslo, Norway, May 23, 2016
Presenter, *Ethics in International Arbitration: Arbitrators Counsel and Expert Witnesses*, University of Stockholm, May 12, 2016
Counsel Ethics in International Arbitration, University of Southern California, Gould School of Law, California, April 15, 2016
Regulating Counsel in International Arbitration, Symposium by the Inter-American Bar Association (IABA), D.C. Chapter, in partnership with Georgetown International Arbitration Society (GIAS), Georgetown University Law Center, Washington, DC, April 11, 2016
Moderator and Convenor, Inaugural Detlev F. Vagts Roundtable, American Society of International Law Annual Meeting, April 1, 2016
Panelist, *Challenges to Developing International Arbitration in Africa*, Penn State International Arbitration Day, March 13, 2016

Commentator on draft revisions to UNIDROIT Principles of International Commercial Contracts, UNIDROIT Consultation Meeting, Oslo, Norway, March 4, 2016

Presenter, Panel on Legal Ethics 32nd AAA/ICC/ICSID Joint Colloquium, Washington, DC, December 11, 2015

Presenter, *Arbitrator Conflicts of Interest with Third-Party Funders*, IBA Conference on Third-Party Funders in International Arbitration, London, England, December 3, 2015

Presenter, *Arbitrator Ethics in Investment Arbitration*, 50th Anniversary of ICSID, Xi'an, China, November 26, 2015

Presenter, *Transparency in Arbitrator Selection*, 4th Asia Pacific ADR Conference, Seoul, Korea, November 3, 2015

Presenter, *Plenary Session on the Arbitrator Selection Process*, Annual Meeting of the College of Commercial Arbitrators, New York, New York, October 24, 2015

Presenter, *Third-Party Funding in International Arbitration*, ICC Conference, Vancouver, Canada, October 23, 2015

Presenter, *Counsel Ethics in International Arbitration*, Ethics Breakfast, New York International Arbitration Center, New York, September 22, 2015

Presenter, 10th Annual ICC Conference, New York, New York, September 21, 2015

Presenter, Transparency in Arbitrator Selection and *Arbitrator Intelligence*, Iguassu Falls, Brazil, September 14, 2015

Presenter, *Investment Arbitration and Legal Elites*, PluriCourts Conference, Oslo, Norway, August 27, 2015

Presenter and Panel Moderator, Ethics in International Arbitration, Ghana, (video) for July 16-17, 2015

Book Launch, Ethics in International Arbitration, World Bank, Washington DC (hosted by ICSID & ASIL), May 14, 2015

Presenter, Third-Party Funding in International Arbitration, American Bar Association, Section on International Law, Washington DC, April 29, 2015

Presenter and Panel Moderator, Penn State International Arbitration Day, New York, New York (hosted by White & Case), April 17, 2015

Faculty Workshop, Ethics in International Arbitration, University of Texas, Austin, Texas, April 2, 2015

Faculty Workshop, Ethics in International Arbitration, UCLA, Los Angeles, California, March 11, 2015

Co-Organizer and Speaker on Multiple Panels, Annual Palestine International Arbitration Conference, Ramallah, Palestine, February 25 & 27, 2015

Panelist, Vienna Arbitration Days, on Arbitrator Selection Process, Vienna, Austria, February 14, 2015

Presenter, What You Need to Know About Global Legal Ethics, Continuing Legal Education Program (co-sponsored by Pepperdine University and SheppardMullen law firm), Los Angeles, California, January 12, 2015

Presenter, Experts, Partisans & Hired-Guns: the Ethics of Expert Witnesses, Unione des Avocats Internationales, Florence, Italy, October 31, 2014

Panelist, Judicial *Education in International Arbitration*, University of Missouri Law School, Columbus, Missouri, October 10, 2014

Presenter, *Ethics in International Arbitration* (book presentation), Duke Law School, North Carolina, October 2, 2014

Conference Co-Organizer and Panel Moderator, *The Future of Counsel Ethics in International Arbitration*, Queen Mary University of London, London, September 11, 2014

Speaker and Co-Organizer, *Implementing Arbitrator Ethics,* Conference for USAID-sponsored project, Tblisi, Georgia, June 2014

Moderator, *Ethics Panel,* and Presenter, *Arbitrator Challenges: Too Many or Not Enough?*, Fordham Annual Arbitration and Mediation Conference, June 12-13, 2013, New York, New York

Book Presentation*, Ethics in International Arbitration*, New York International Arbitration Center, June 11, 2013, New York, New York

Commentator on Mahdev Mohan, *New Regulatory Space: Extractives, Human Rights & Investment Law in Southeast Asia,* June 5, 2014, Singapore

International Bar Association Toronto "International Arbitration Today," May 29, 2014, Toronto, Canada

Presenter and Discussion Leader, *International Arbitrator Information Project*, Center for International Legal Studies, Salzburg, Austria, May 22, 2014

Arbitrator Intelligence, International Arbitration Section of the New York City Bar, New York, New York, May13, 2014

Panel Moderator, 10th Annual Leading Arbitrators' Conference, April 14, 2014, Vienna, Austria

Panelist, *Closing Plenary* of Bi-Annual Congress of the International Council for Commercial Arbitration, Miami, Florida April 8, 2014

Discussion Leader, Presentation of Task Force on Third Party Funding to the Membership at the Bi-Annual Congress of the International Council for Commercial Arbitration, Miami, Florida, April 8, 2014

Discussant, Panel for International Arbitration Academic Interest Group, Bi-Annual Congress of the International Council for Commercial Arbitration, Miami, Florida, April 7, 2013

Presentation, Board of Governors of the International Council for Commercial Arbitration, April 6, 2014, Miami, Florida

Presenter, ABA Dispute Resolution Section, Florida April 4, 2014, Miami, Florida

Presenter, Georgetown Law School Faculty Workshop on forthcoming book *Ethics in International Arbitration*, March 18, 2014, Washington DC

Panel Moderator, *Jan Paulsson's The Idea of Arbitration*, February 13, 2014, London School of Economics, London, England

Program Organizer, *Interactive Skills Training Workshop on International Arbitration*, Ramallah, Palestine, December 9, 2013

Conference Organizer and Presenter, *The Jerusalem Arbitration Center: Challenges and Opportunities*, Ramallah, Palestine, December 8, 2013

Speaker, Faculty Workshop on *Developments in Legal Education,* Wellington, New Zealand, November 29, 2013

Speaker, AMINZ Breakfast Meeting, *Third-Party Funding in International Arbitration*, November 28, 2013, Wellington, New Zealand

Lecturer, *Global Legal Ethics*, Wellington Bar Society*,* November 27, 2013, Wellington, New Zealand

Special Lecturer, Annual New Zealand Dispute Settlement Lecture of 2013, *Arbitrator Selection, Transparency and Stakeholders' Interests*, Auckland New Zealand, November 26, 2013

Luncheon Speaker, *The IBA Guidelines on Party Representation in International Arbitration*, Bankside Chambers, Northern Club, Auckland, New Zealand, November 26, 2013

Speaker, *International Arbitrator Information Project*, Corporate Council International Arbitration Group, Paris, France, October 21, 2013

Speaker, *Council Ethics in International Arbitration*, College of Commercial Arbitrators, October 18, 2013 New Mexico

Presenter, *Third-Party Funding of International Arbitration*, Columbia Law School, September 20, 2013.

Presenter, *Arbitrator Selection and Ethics*, International Energy and Minerals Arbitration, September 17, 2013, Toronto, Canada.

Presenter, *Jurisdictional Challenges in International Arbitration*, ICC-Florence University Summer Program, Florence, Italy, July 22, 2013

Panelist, *The Future of International Law*, Conference on Joel Trachtman's Book, Swansea, Wales, June 7, 2013.

Presenter, *When the Bad Guys Are Wearing White Hats*, Symposium on Chevron-Ecuador Litigation, Stanford Law School, Palo Alto, California, February 8, 2013.

Faculty Workshop, *The Politics of Investment Arbitrators*, University of California, Hastings College of Law, California, February 4, 2012.

Presenter, *The Politics of Investment Arbitrators*, Symposium on the Law and Politics of Investment Arbitration, Santa Clara Law School, Santa Clara, California, February 1, 2012.

Panelist, Conference on the Jerusalem Arbitration Center, Columbia Law School, New York, New York, November 22, 2012.

Panelist, *Ethics in International Arbitration*, New Developments in International Arbitration, Annual Meeting of the College of Commercial Arbitrators, New York, New York, October 27, 2012.

Panelist, *The Jerusalem Arbitration Center*¸ Conference on Regionalism in International Arbitration, British Institute of International & Comparative Law, London, England, June 19, 2012.

Participant, *Judicial Delegation on International Arbitration for Chinese Judges*, International Judicial Academy, Training Sessions in Guangzhou and Beijing, April 11-17, 2012.

Panelist, *International Legal Ethics*, ASIL Annual Conference, March 31, 2012.

Presenter, *Ethics in International Arbitration*, Faculty Workshop, University of Iowa Law School, Iowa City, Iowa, March 29, 2012.

Expert, *Selection and Regulation of Investment Arbitrators,* OECD Freedom of Investment Roundtable, Paris, France, March 20, 2012.

Presenter and Conference Organizer, *Teach-In on International Arbitration,* Ramallah, Palestine, December 17-18, 2011

Panelist, *The Restatement as "New Rules,"* Sixth Annual Fordham Law School Conference on International Arbitration and Mediation, Fordham Law School, New York, New York, June 17, 2011.

Presenter, Workshop on Restatement Project to European practitioners, Shearman & Sterling, Paris, France, November 22, 2010

Co-Chair and Panel Moderator, *ITA -CCB Americas Workshop: Confronting Ethical Issues in International Arbitration*, Bogotá, Colombia, October 14-15, 2010.

Panelist, *Ideology in international arbitration: a debate* (with Emmanuel Gaillard), International Bar Association, Annual Meeting, Vancouver, British Columbia, October 7, 2010

Panelist, *Choice of Law in Global Legal Ethics*, International Legal Ethics Conference, Stanford Law School, Palo Alto, California, July 17-19, 2010

Panelist, *The Expansion of International Arbitration into Public Realms*, Fifth Annual Fordham Law School Conference on International Arbitration and Mediation, Fordham Law School, New York, NY, June 14, 2010

Presenter, *Guerilla Tactics in International Arbitration: Cultural Differences and Ethical Solutions*, *Arbitration Days*, Vienna, Austria, February 13, 2010

Panel Moderator, *The Ethics of International Investment* Arbitrators*,* British Institute of International and Comparative Law, Thirteenth Investment Treaty Forum Public Conf., London, September 11, 2009

Co-Chair and Panel Moderator, *Confronting Ethical Issues in International Arbitration*, Institute of Transnational Arbitration Annual Workshop, Dallas, Texas, June 18, 2009

Presenter on Ethics Panel, *Leading Arbitrators in International Arbitration,* Vienna, Austria, April 6, 2009.

Presenter, *Roundtable Regarding the Restatement of International Arbitration*, Princeton Law and Public Affairs, Princeton University, Princeton, New Jersey, February 21, 2009

Presenter, *Lawyers and the Public/Private Divide in International Law*, UNLV Law School, Las Vegas, Nevada, October 2009

Presenter, *The Global Advocate,* Globalization of the Legal Profession Conference, Harvard Law School, Cambridge, Massachusetts, November 21, 2009

Presenter, *Where Do We Go from Here?*, Investment Treaties and Alternatives of Investor State Dispute Resolution, UNCTAD in cooperation with the Ukrainian Ministry of Justice, Kiev, Ukraine, June 3, 2008

Presenter, *The Effect of Party Agreement on Statutory Standards for Arbitrator Bias*, International Law Weekend, New York, New York, October 26, 2007

The Role and Function of Ethics in International Arbitration, Annual Conference of the *Deutsch-Amerikanische Juristen-Vereinigung* (German-Am.Bar Association), Washington D.C., October 6, 2007

Defending Intellectual Property Rights in a Globalized Economy: Current Practices and Recent Trends, European Patent Office Seminar, "Growing Business with IP," Milan, Italy, July 10, 2007.

Arbitrators' Codes of Ethics: Various Perspectives, at the International Arbitration and Mediation "*Ius et Lex*" Institution Conference, Warsaw, Poland, June 14, 2007

Law Applicable in Determining Rights and Duties of Arbitrators, at 100th Anniversary of the Department of Law at Stockholm University, Symposium: *International Arbitrators: Private Judges, Service Providers or Both?*, Stockholm, Sweden, May 11, 2007

Attorney Ethics in Arbitration Panel Discussion, Leading Arbitrators' Conference, sponsored by JURIS PUBLISHING, Vienna, Austria, April 2, 2007

The Arrival of the Have-Nots in International Arbitration, University of Nevada Law School Symposium, Las Vegas, Nevada, January 28, 2007

The IBA Guidelines on Conflicts of Interest for International Arbitrators, The Practice of International Arbitration, SDA Bocconi & the Milan Chamber of National and International Arbitration, Milan, Italy, December 1, 2006

Cultural Clashes and Conflicting Ethics: The Professional Conduct of Attorneys in International Arbitration Practice, Bucerius Law School and the *Deutsch-Amerikanische Juristen-Vereinigung* (German-American Bar Association), Hamburg, Germany, June 22, 2006

Cultural Clashes and Conflicting Ethics: The Professional Conduct of Attorneys in International Arbitration Practice, the *Deutsch-Amerikanische Juristen-Vereinigung* (German-American Bar Association), Stuttgart, Germany June 28, 2006

Transparency in International Commercial Arbitration, Symposium, University of Kansas Law School, Lawrence, Kansas, November 15, 2005

Misbehaving Arbitrators and Consenting Parties: Enforcing Standards of Impartiality in International Arbitration, Ethics Workshop Series, Villanova Law School, Villanova, Pennsylvania, November 10, 2005

The Vocation of International Arbitrators, Faculty Workshop, Loyola Law School, Los Angeles, California, October 7, 2005

The Vocation of International Arbitrators, *Vanderbilt* International Law Roundtable, Nashville, Tennessee, September 15, 2005

Arbitration Clause Drafting for Project Finance, Lecture to in-house legal department, International Finance Corporation, Washington, D.C., April 6, 2005

Enforcement of Bias-Tainted Awards, Quinnipiac-Yale Dispute Resolution Workshop, Harford, Connecticut, April 4, 2005

Regulating International Arbitrators, The Stanford-Yale Junior Faculty Forum, Yale Law School, New Haven, Connecticut, June 4, 2004

The Effects of the Private Attorney General on U.S. Tort Law, Università di Brescia, Italy, April 27, 2004

The U.S. Tort System as a Regulatory Tool, Università Cattaneo, Castellanza, Italy, May 30, 2003 (in Italian).

Lessons for the Comparativist from the Louisiana Experience, Università degli Studi Dell'Insubria, Lake Como, Italy, May 23, 2003

Lawyer Ethics in Comparative Perspective, University of Detroit-Mercy Faculty of Law, Detroit, Michigan, December 6, 2002

Proposals to Expel Palestinians from the Occupied Territories as a Catalyst for a Civil Adjudication Campaign, University of Iowa Law School, Iowa City, Iowa, October 15, 2002

Between Cultural Boundaries and Legal Traditions: Ethics in International Arbitration, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, California, June 2, 2001

The Pros and Cons of International Arbitration, Presentation for Worldwide Conference of In-House Attorneys for Lucent Technologies, Murray Hill, New Jersey, October 12, 1999

AWARDS

Scholar in Residence, Wilmer, Cutler, Pickering, Hale & Dorr, Fall 2016, Spring 2019

Fellowship recipient, PluriCourts - Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, University of Oslo, Spring 2016

Invitee to the Stanford-Yale Junior Faculty Forum, 2004 (*in the field of law and humanities*)

Recipient, 20th Annual CPR Professional Article Award for 2002

Invitee to the Stanford-Yale Junior Faculty Forum, 2001 (*in the field of private international law*)

EDITORSHIPS & PEER REVIEW ACTIVITIES

External PhD Referee, University of Dundee, Scotland (2016)

Manuscript Referee (by invitation), OXFORD UNIVERSITY PRESS (2011, 2012 & 2015)

Manuscript Referee (by invitation), CAMBRIDGE UNIVERSITY PRESS (2013)

Manuscript Referee (by invitation), YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY (2009)

Manuscript Referee (by invitation), MELBOURNE JOURNAL OF INTERNATIONAL LAW (2005)

Manuscript Referee (by invitation), STANFORD LAW REVIEW (2012)

Manuscript Referee (by invitation), LEGAL ETHICS (New Zealand)(2010)

Special Volume Editor, TRANSNATIONAL DISPUTE MANAGEMENT (2013)

Associate Editor, TRANSNATIONAL DISPUTE MANAGEMENT (2007-Present)

LAW SCHOOL SERVICE

PENN STATE LAW

Co-Chair, University-wide Conflicts of Interest Task Force, 2015-16

Chair, Appointments Committee, 2009-10 & 2010-11

Member, Appointments Committee, 2012-13, 2018-19

Supervisor of multiple SJD dissertations and member of multiple SJD review panels

Member, Promotion & Tenure Committee, 2008-Present

Faculty Advisor for Penn State team in the WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT, Vienna, Austria, 2008-Present

Faculty Advisor, Penn State International Law Review, 2012-17

Faculty Sponsor, International Arbitration Student Association, 2014-Present

Member, Curriculum Committee, 2013-14

Member, International Programs Committee, 2013-14

Member, Transition Committee, 2013

LANGUAGES: English (native speaker) and Italian (conversational), French (basic).

List of Documents

1.	FTI's Expert Report in the Arbitration dated May 17, 2011
2.	Stati Parties' Statement of Claim in the Arbitration dated May 18, 2011
3.	Second Witness Statement of Artur Lungu in the Arbitration dated May 5, 2012
4.	Second Witness Statement of Anatolie Stati in the Arbitration dated May 7, 2012
5.	Stati Parties' Reply Memorial on Jurisdiction and Liability in the Arbitration dated May 7, 2012
6.	Stati Parties' Reply Memorial on Quantum in the Arbitration dated May 28, 2012
7.	FTI's Supplemental Expert Report in the Arbitration dated May 28, 2012
8.	Transcript of the Hearing on Jurisdiction and Liability in the Arbitration dated October 1, 2012, 1st Hearing Day
9.	FTI's Amendments to the Expert Report in the Arbitration dated January 25, 2013
10.	Transcript of the Hearing on Quantum in the Arbitration dated January 28, 2013, 1st Hearing Day
11.	Transcript of the Hearing on Quantum in the Arbitration dated January 28, 2013, 1st Hearing Day
12.	Transcript of the Hearing on Quantum in the Arbitration dated January 31, 2013, 4th Hearing Day
13.	Stati Parties' First Post Hearing Brief in the Arbitration dated April 8, 2013
14.	FTI's Post-Hearing Expert Report in the Arbitration dated April 8, 2013
15.	FTI's Fourth Expert Report in the Arbitration dated June 3, 2013
16.	Stati Parties' Second Post Hearing Brief in the Arbitration dated June 3, 2013
17.	Letter from KPMG Audit LLC to A. Stati dated February 15, 2016
18.	Letter from A. Stati to KPMG Audit LLC dated February 26, 2016
19.	Letter from KPMG Audit LLC to A. Stati dated March 10, 2016
20.	Letter from Stewarts Law LLP to King & Spalding International LLP in English enforcement proceedings dated June 26, 2020

21.	Expert Report of Dr. Patrik Schöldström in the Swedish setting aside proceedings dated January 13, 2017
22.	Stati Parties' Response to supplemental authority in the United States enforcement proceedings dated June 28, 2017
23.	Kazakhstan's Points of Claim in the English enforcement proceedings dated August 1, 2017
24.	Stati Parties' Points of Defence in the English enforcement proceedings dated September 26, 2017
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