OPINION OF PROFESSOR GEORGE A. BERMANN

in the case of

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

versus

the Republic of Kazakhstan

January 17, 2021

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I. INTRODUCTION

1. I have been asked by counsel for the Republic of Kazakhstan to assess the conduct of Anatolie Stati, Gabriel Stati, Ascom Group SA ("**Ascom**") and Terra Raf Trans Traiding Ltd ("**Terra Raf**") (collectively, the "**Statis**"), under the standards of integrity and truthfulness applicable to party conduct, in connection with the arbitral and judicial proceedings in the case of *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010 (the "**Arbitration**"). I focus on the conduct underlying the arbitral proceedings in this case, the arbitral proceedings themselves, the resulting award of December 19, 2013 (the "**Award**") and the proceedings that were initiated after the completion of the Arbitration in various jurisdictions, including Sweden, the United States, the United Kingdom, Italy, Belgium, the Netherlands and Luxembourg (collectively, the "**post-Award Proceedings**").

2. This Opinion supplements and should be read in conjunction with the opinion I offered in this matter dated January 21, 2020.

3. The facts on which this Opinion is based are set forth in detail in Annex 3 to this Opinion. These facts are supported by contemporaneous documentation, including written submissions, transcripts of hearings, court orders and decisions. For purely factual descriptions of the various post-Award Proceedings, I also have relied on declarations of the lead counsel for Kazakhstan in each jurisdiction, all of which are included in Annex 4.[1]

4. The relevant facts have also been assessed independently by the following experts, on whose opinions I rely to the extent stated herein: Professor Dr. Christoph Schreuer, Mr. Alex Layton QC, Dr. Patrik Schöldström, Mr. Stefan D. Cassella (a former prosecutor at the U.S. Department of Justice, now with StreamHouse AG), Transfer Pricing Associates Global B.V. ("**TPA Global**"), BDO Mälardalen AB ("**BDO**"), PricewaterhouseCoopers LLP ("**PwC**") and Deloitte & Touche GmbH ("**Deloitte**"). The Statis have not submitted any expert reports on the questions of fraud in any of the post-Award Proceedings.

5. This Opinion is organized as follows:

   (i) Section II describes my background and qualifications;

   (ii) Section III contains an executive summary;

   (iii) Section IV has two subsections: the first sets out the applicable standards of integrity and truthfulness in arbitral and judicial proceedings, as observed in case law, soft law and legal literature, while the second analyzes the relevant standards under the United Nations Convention on the Recognition and

[1] **Sweden** (Declarations of Mr. Alexander Foerster, May 5, 2019 and July 20, 2020); **England** (Witness Statement of Mr. Philip Carrington, April 1, 2019); **Italy** (Affidavit of Ms. Daniele Geronzi and Ms. Cecilia Carrara, March 29, 2019); **Netherlands** (Witness Statement of Mr. Albert Marsman, October 14, 2020); **Luxembourg** (Witness Declaration of Mr. François Kremer, December 3, 2020); **Belgium** (Witness Declaration of Mr. Arnaud Nuyts, October 30, 2020); **United States** (Affidavit of Mr. Matthew Kirtland, January 17, 2021).

Enforcement of Foreign Arbitral Awards ("**New York Convention**"), and more particularly fraud as a public policy defense;

(iv) Section V describes the Statis' patterns of conduct in the three relevant phases (before, during and after the Arbitration) and assesses such patterns against the standards of integrity and truthfulness; and

(v) Section VI contains my conclusions.

(vi) Annexes 1 to 4 are an integral part of this Opinion and are organized as follows:

(i) Annex 1 is the *Dramatis Personae* containing a brief identification of the main actors;

(ii) Annex 2 presents a Glossary of Acronyms and Definitions. It should be noted that many of the acronyms in this case are similar and easily confused. In particular, the following three acronyms refer to three very different entities: (1) "**KPM**" refers to Kazpolmunay LLP, a company owned by the Statis that operated in Kazakhstan; (2) "**KPMG**" refers to the international accounting firm that audited and/or reviewed financial statements of the Statis, including those of KPM; and (3) "**KMG**" refers to KazMunayGas Exploration and Production JSC, a Kazakhstan state-owned entity;

(iii) Annex 3 sets out the detailed factual background on which this Opinion is based; and

(iv) Annex 4 contains a list, in chronological order, of all documents relied upon in preparing this Opinion, including those that are referenced in Annex 3.

(v) Annex 5 contains copies of my complete CV and a shorter CV specific to international arbitration.

II. MY BACKGROUND AND QUALIFICATIONS

6. I am Professor of Law at Columbia Law School in New York, where I hold the Jean Monnet Professorship in European Union Law and the Walter Gellhorn Professorship. As a member of the Columbia faculty since 1975, I have taught, among others, the following subjects: international commercial and investment arbitration, transnational litigation, conflicts of law, international contracts, European Union law, and WTO law.

7. I am a member of the bar of the State of New York and formerly an associate in the New York office of the law firm Davis Polk & Wardwell. I hold a B.A. degree from Yale College and a J.D. degree from Yale Law School.

8. At Columbia, I founded and direct the Center for International Commercial and Investment Arbitration (CICIA). I also founded and was the first director of the European Legal Studies Center (ELSC). I am co-editor-in-chief of the *American Review of International Arbitration* (ARIA), which is produced at Columbia, as well as President of the Executive Editorial Board of the *Columbia Journal of European Law* (CJEL), which I also established.

9. I have other regular teaching engagements at the Institut des Sciences Politiques (Sciences Po) in Paris, where I am *professeur affilié* and teach in the LL.M. program in international dispute resolution. I also teach regularly in the Masters of International Dispute Settlement (MIDS) program at the University of Geneva. In addition, I currently teach as an adjunct professor at the University of Miami School of Law and taught for several years at the Georgetown University Law Center in Washington, D.C.

10. Over the past 40 years, I have sat as arbitrator in scores of international arbitrations, both commercial and investor-State cases conducted under all the major international arbitral institutions, as well as *ad hoc*.

11. I am Chief Reporter of the American Law Institute's (ALI) Restatement of the U.S. Law of International Commercial and Investment Arbitration, which received final approval in May 2019. I am also the author of numerous books, including most recently the UNCITRAL Guide to the New York Convention (co-authored with E. Gaillard) (2016); International Arbitration and Private International law (General Course in Private International Law of Hague Academy of International Law) published by the Academy in *Recueil des cours* of Academy and in paperback by Brill Nijhoff) (2017); Interpretation and Application of the New York Convention by National Courts (Springer Pub. 2017); Mandatory Rules in International Arbitration (2d. ed., Juris Pub. 2020); and Cases and Materials on European Union Law (West Pub. 4th ed. 2016) (co-authored).

12. I am the author of numerous articles in the international arbitration field, including *Understanding ICSID Convention Article 54*, 35 ICSID Rev. (2020); *The Energy Charter Treaty and European Union Law*, in International Arbitration in the Energy Sector (M. Scherer, ed., 2018); *What Does it Mean to be "Pro-Arbitration?*," 34 Arb. Int'l 341 (2018); *The Role of National Courts at the Threshold of Arbitration*, 28 Am. Rev. Int'l Arb. 291 (2018); *European Union Law as a Jurisdictional and Substantive Defense to Investor-State*

Liability (in F. Ferrari, ed., The Impact of EU Law on International Arbitration, Juris Pub. 2017); *Res Judicata in International Arbitration*, in A. Bjorklund, F. Ferrari & S. Kroll, eds., Cambridge Compendium of International Commercial and Investment Arbitration (forthcoming 2021); *International Standards as a Choice of Law Option in International Arbitration*, 28 Am. Rev. Int'l Arb. 423 (2017); *The Yukos Annulment: Answered and Unanswered Questions*, 27 Am. Rev. Int'l Arb. 1 (2016); *Limits to Party Autonomy in Composition of the Arbitral Panel*, in Limits to Party Autonomy in International Commercial Arbitration 83 (F. Ferrari, ed., Juris Pub. 2016); *International Commercial Arbitration: Present Challenges and Future Prospects*: Festschrift for John Beechey (2017); *The "Gateway Problem" in International Commercial Arbitration*, 37 Yale J. Int'l L. 1 (2012); *Navigating EU Law and the Law of International Arbitration*, 28 Arb. Int'l 397 (2012); and *Arbitrability Trouble*, 23 Am. Rev. Int'l Arb. 367 (2012).

13. As a member of the international arbitration community, I hold and have held positions in numerous international arbitration institutions. These include chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC), founding member of the Governing Board of the International Court of Arbitration at the International Chamber of Commerce (ICC) in Paris, and member of the ICC's Standing Committee and International Arbitration Commission. At the American Arbitration Association (AAA), I am a member of the Council, and at the Center for Conflict Prevention and Resolution (CPR) a member of the Board of Directors.

14. Over my career, I have rendered a very large number of expert opinions for courts and arbitral tribunals. These opinions have covered a wide range of issues in the fields of international contracts, European Union law, and the law of multiple European jurisdictions. However, the vast majority of the opinions I have rendered pertain to issues of international commercial and investment arbitration as well as transnational litigation.

15. I hold honorary degrees from the University of Fribourg, Switzerland; Universitê de Versailles-St. Quentin, France; Universidad Cesar Vallejo, Lima, Peru; and Universidade Nova de Lisboa, Lisbon, Portugal.

16. Attached in Annex 5 are copies of my complete CV and a shorter CV specific to international arbitration.

III. EXECUTIVE SUMMARY

The Award

17. As described in Annex 3, the tribunal in the Arbitration (the "**Tribunal**") issued an Award in favor of the Statis and against Kazakhstan on December 19, 2013.[2] With respect to liability, the Tribunal concluded that Kazakhstan had violated the fair and equitable treatment standard in Article 10(1) of the Energy Charter Treaty ("**ECT**").[3] In reaching this conclusion, the Tribunal accepted several crucial assertions made by the Statis, including: (a) that they were bona fide investors in Kazakhstan through the operations of two Kazakh companies they had purchased, Tolkynneftegaz LLP ("**TNG**") and Kazpolmunay LLP ("**KPM**");[4] and (b) that various regulatory investigations and legal actions taken by Kazakhstan with respect of these two companies constituted an unjustified "*campaign of harassment*."

18. The Tribunal awarded the Statis compensation in the sum of $497,685,101.[5] This included $199 million for an unfinished Liquefied Petroleum Gas Plant ("**LPG Plant**"). In making this award, the Tribunal again accepted several crucial assertions made by the Statis, including: (a) that the audited financial statements for TNG and KPM ("**Financial Statements**") were truthful and legitimate; and (b) that a $199 million indicative offer obtained by the Statis for the LPG Plant from a state-owned entity KazMunayGas Exploration and Production JSC ("**KMG**" and "**KMG Indicative Offer**") was a neutral and fair basis on which to value the LPG Plant.[6]

19. In early 2014, after the Award was issued, Kazakhstan initiated set-aside proceedings at the seat of the Arbitration, Sweden (the "**Set-Aside Proceedings**").[7] Also in early 2014, the Statis initiated recognition and enforcement proceedings in the United States and England.

Discovery of new evidence after the Award was issued

20. In mid-2015, one-and-a-half years after the Arbitration ended, Kazakhstan began to discover information showing that the Statis had engaged in multiple false and/or fraudulent schemes, having important relevance to the present case, both inside and outside the Arbitration. Kazakhstan was not aware of these facts before, as it did not have access to this information, and the Statis never disclosed any of the relevant documents, which are discussed immediately below, during the Arbitration, despite the fact that they would have played a crucial role in the Tribunal's decision making (*infra*, Part V.B.).

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[2] Annex 3, ¶ 27. The Tribunal issued a minor correction on quantum in January 2014. *Id.*
[3] *See id.*, ¶¶ 10-11.
[4] *Id.*, ¶ 4.
[5] *Id.*, ¶ 28. The total sum awarded included a $10,444,899 offset for debts owed by TNG and KPM.
[6] *Id.*, ¶¶ 21-22.
[7] *Id.*, ¶¶ 142 *et seq.*

21. This information did not emerge all at once, as the Statis were not forthcoming with the true record of events (*infra*, Part V.C.1.); rather, it was discovered piecemeal during the period from mid-2015 to present. This time period overlapped with certain of the post-Award Proceedings. Kazakhstan is still engaged in a process of attempting to fully understand the Statis' fraudulent schemes.

22. The information discovered by Kazakhstan, and the sequence in which it was discovered, are detailed in **Annex 3**. Summarized here are some of the key events:

    (i) In the summer of 2015, Kazakhstan discovered that the Statis had materially falsified the construction costs of the LPG Plant. Kazakhstan obtained this information, over the Statis' objections, from a third-party (the law firm Clyde & Co. LLP) via 28 U.S.C. §1782 discovery proceedings in New York, NY.[8] The information consisted of documents from a separate, confidential arbitral proceeding between the Statis and their former joint venture partner, Vitol FSU B.V. ("**Vitol**").[9] These documents revealed that in these parallel arbitral proceedings, the Statis claimed investment costs in the construction of the LPG Plant in an amount considerably less than what they represented in their Financial Statements and claimed against Kazakhstan in the Arbitration. KMG (*see supra*, ¶ 18) expressly relied on the Statis' falsified LPG Plant construction costs in calculating its $199 million KMG Indicative Offer. Despite knowing this, the Statis falsely, but successfully, convinced the Tribunal that the KMG Indicative Offer should be used to award them $199 million in compensation for the LPG Plant.

    (ii) These documents also revealed that the Statis had made material misrepresentations concerning a company called Perkwood Investment Ltd ("**Perkwood**") that figures prominently in the discussion that follows. Despite affirming that the Financial Statements were prepared in accordance with the International Financial Reporting Standards ("**IFRS**"), in those Statements the Statis concealed that Perkwood was a related party. Subsequently, it was revealed that Perkwood was a shell company that had been set up by the Statis but presented by them as an independent English company.[10]

    (iii) In August 2016, Kazakhstan discovered further information confirming that Perkwood was a sham company set up and used by the Statis as part of their fraudulent schemes. This was revealed when Kazakhstan obtained disclosure of Latvian bank account information of the Statis, including general powers of attorney confirming that Perkwood was secretly set up and used by the Statis to inflate their investment costs in construction of the LPG Plant.[11]

[8] *Id.*, ¶¶ 34-37.
[9] This term is used collectively for Vitol FSU B.V. and Vitol SA.
[10] Annex 3, ¶ 37.
[11] *Id.*, ¶ 41.

(iv) In February and June 2018, in the context of post-Award Proceedings in England, the Statis disclosed more than 70,000 documents per a court order.[12] These included further documents that supported Kazakhstan's fraud allegations.

(v) In April 2019, Kazakhstan obtained the sworn deposition of the Statis' former Chief Financial Officer ("**CFO**"), Mr. Artur Lungu, pursuant to 28 U.S.C. §1782.[13] Mr. Lungu's testimony revealed that the Statis had made material misrepresentations to their statutory auditor, KPMG Audit LLC ("**KPMG**"), in connection with its audits of the Statis' Financial Statements. Specifically, the Statis had provided KPMG with a falsified schedule to cover up both the fact that Perkwood was a Stati company and that all of Perkwood's transactions with the Statis were related-party transactions. On the basis of these misrepresentations, KPMG issued audit reports (the "**Audit Reports**") stating that the Financial Statements were materially true and accurate when, in fact, they were materially false and inaccurate.

(vi) In summer 2019, Kazakhstan obtained further Latvian bank account records of the Statis. These confirmed that the Statis had unlawfully stripped hundreds of millions of dollars from their Kazakh operating companies. This asset-stripping caused these companies suffer a liquidity crisis that, in the Arbitration, the Statis falsely, but successfully, attributed to actions of Kazakhstan. These new Latvian banking documents further showed that certain of these stripped monies were used by the Statis for unlawful payments to politicians and public officials in Northern Iraq (Kurdistan), Congo, Moldova, South Sudan and Kazakhstan.[14]

(vii) In August 2019, KPMG notified Kazakhstan in writing that, due to the discovered material misrepresentations in the Financial Statements, it invalidated and withdrew all the Audit Reports relating to them ("**KPMG-Kazakhstan Notice**"). KPMG took this action on the basis of an independent assessment of its own records and evidence Kazakhstan had provided, including but not limited to the transcript of Mr. Lungu's deposition in the U.S., and after the Statis failed to respond to KPMG's demand for explanations.[15]

(viii) In October 2019, Kazakhstan further discovered, through ongoing criminal investigations, that KPMG had more than three years prior, in February 2016, engaged in other communications with the Statis concerning the Audit Reports for the Financial Statements. In this correspondence, unknown to Kazakhstan until October 2019, KPMG had questioned the legitimacy of the LPG Plant construction costs recorded in the Financial Statements, and in particular asked why the Statis had paid a $44 million management fee to Perkwood, why

[12] *Id.*, ¶¶ 43-46.
[13] *Id.*, ¶¶ 47-48; *see also* 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), 3:2-10 ("**Lungu Deposition**").
[14] Annex 3, ¶¶ 49-52.
[15] *Id.*, ¶ 56.

Perkwood, a dormant company, had passed through equipment costs that were "*significantly different from the corresponding cost*" charged by the actual supplier of the equipment, and why the Statis had presented Perkwood as an independent third party to KPMG, when in fact it was a Stati company.[16] KPMG warned that if it did not receive sufficient answers, it reserved its rights to "*withdraw [its] audit reports*" and inform "*all parties who are still, in [its] view, relying on these reports, including but not limited, to [the] Ministry of Justice of the Republic of Kazakhstan and the Svea Court of Appeals*" (where the Set-Aside Proceedings were then pending).[17] In response, the Statis evaded KPMG's questions, demanded to know how it had obtained its evidence, and threatened to hold it "*accountable*" if it proceeded to "*withdraw [its] audit reports*."[18] This threat appears to have succeeded given that, as noted above, KPMG did not ultimately withdraw its Audit Reports until August 2019.

Assessment of the totality of new evidence

23. The totality of the new evidence discovered by Kazakhstan shows that the Statis made a substantial number of assertions on critical issues in the Arbitration that they knew to be false. These include the following:

- that the Financial Statements were accurate and reliable, and could properly be used as a basis for their damage claims and expert evidence, when in fact the Statis had materially falsified them;[19]

- that the Audit Reports issued by KPMG confirmed the validity of the Financial Statements, when in fact the Statis knew that they had obtained these Audit Reports on the basis of material misrepresentations;[20]

- that the Statis had invested $245 million in the construction of the LPG Plant, when in fact they knew this amount was grossly inflated by means of sham related-party transactions;[21]

- that the KMG Indicative Offer was a neutral and fair basis on which to value the LPG Plant, when in fact the Statis knew that KMG had based its calculations on the falsified Financial Statements;

- that Kazakhstan's "*campaign of harassment*" caused a "*liquidity crisis*" at TNG and KPM that, in turn, caused substantial damage to these companies, when in

[16] *Id.*, ¶¶ 58.
[17] *Id.*, ¶ 60 (quoting Letter from KPMG Audit LLC to A. Stati, February 15, 2016).
[18] *Id.*, ¶ 61.
[19] *Id.*, ¶ 8.
[20] *Id.*
[21] *Id.*, ¶ 16 *et seq*.

fact the Statis knew that they themselves created this lack of liquidity by deliberately stripping TNG and KPM of hundreds of millions of US dollars;[22]

- that Kazakhstan's "*campaign of harassment*" forced the Statis to obtain a loan on "*horrendous terms*" via a company called Laren Holdings Ltd. ("**Laren**") ("**Laren Transaction**"),[23] when in fact Laren was another covert off-shore Stati shell company, the Statis manufactured the Laren Transaction for their own financial gain, and they only entered into the Laren Transaction after they voluntarily turned down an alternate lending facility that Credit Suisse had offered on standard commercial terms;[24] and

- that Kazakhstan's "*campaign of harassment*" was unjustified, when in fact the Statis knew that all of their operations in Kazakhstan were riddled with unlawful activities.

24. In my opinion, had the Statis not made these false assertions during the Arbitration, and instead discharged their duty of truthfulness and candor, the outcome of the Arbitration would have been significantly different.

Post-Award Proceedings

25. As discussed further in Part V.C. of this Opinion, the Statis continued their pattern of conduct during the post-Award Proceedings, in Sweden, the United States, the United Kingdom, Italy, Belgium, the Netherlands and Luxembourg. The leitmotif in all these court proceedings is systematic misrepresentation and suppression of crucial evidence, just as occurred in the Arbitration itself. In short, the Statis repeatedly made assertions they knew to be false, suppressed vital evidence so that it could not be considered by the courts, and misrepresented the findings of one court to another. Through this consistent pattern of misconduct, and its "snowballing effect, the Statis made it impossible for the courts to make a proper inquiry into the substance of the alleged fraud. This misconduct, combined with the very narrow window that exists in most jurisdictions for invalidation or denial of recognition of an international arbitral award, resulted in the courts refusing to invalidate the Award in Sweden and confirming or recognizing the Award in Italy, the United States, Belgium, Luxembourg, and the Netherlands.[25]

26. Only in one jurisdiction – England – did the courts manage to overcome the Statis' violation of their duty of truth and candor and make findings on the merits of Kazakhstan's fraud allegations. There, in a June 2017 decision of Justice Knowles in enforcement proceedings initiated by the Statis, the court found that Kazakhstan had established a *prima facie* case that the Statis had both obtained the Award by fraud. The court set the matter for full trial in October/November 2018, but rather than attempt to prove their innocence, the Statis voluntarily dismissed their own enforcement action, a maneuver that the English courts

[22] *Id.*, ¶¶ 11-12,
[23] *Id.*, ¶ 131-134.
[24] *Id.*, ¶ 134.
[25] *Id.*, ¶¶ 136 *et seq*. Appeal proceedings in these confirmation/recognition proceedings are currently pending in Italy, Belgium, Luxembourg and the Netherlands.

accepted only upon the Statis agreeing to harsh conditions, *i.e.*, reversal of the preliminary court order they had obtained *ex parte* declaring the Award enforceable, an undertaking by the Statis never again to attempt to enforce the Award in England and their payment of the substantial legal costs of Kazakhstan. The only logical reason why the Statis would have borne these harsh conditions was because, as alleged, they in fact did commit the alleged fraud and were desperate to avoid trial, the result of which would have in all likelihood confirmed the court's *prima facie* finding that the Award was obtained by fraud.

Assessment of totality of new evidence by other experts

27. The new evidence that Kazakhstan only discovered in stages, starting in mid-2015 and continuing through 2020, has also been analyzed by other experts. The number of experts, their reputation and their independent analyses confirm the validity of the fraud allegations made by Kazakhstan:

- In 2015 and 2017, **Deloitte** provided an assessment of the initial evidence of fraud that was obtained by Kazakhstan. Deloitte opined, *inter alia*, that the "*historical costs*" of the LPG Plant construction were inflated "*[b]y an amount of up to approx. USD 130 million*."[26]

- In February 2019, **Stefan Huibregtse**, the CEO and managing partner of **TPA Global**,[27] a global network of over 5,000 tax professionals, concluded that the Statis' procurement arrangement for the construction of the LPG Plant was "*clearly a sham*" and in violation of the standards of reporting taxable income in the relevant countries.[28]

- In August 2019, **PwC** issued a report ("**PwC I (financial statements)**"), in which it concluded that "*TNG's auditors were provided with false representations*," and that such "*material misstatements and the serious impairment of the integrity of TNG's management would render [the Financial Statements] unreliable*."[29] (It should be noted that, in addition to this report, PwC issued three other reports, described immediately below)

- In November 2019, **BDO**, an international network of public accounting, tax, consulting and business advisory firms, issued an expert opinion concluding that KPMG's August 21, 2019 decision to withdraw its Audit Reports was made on the basis of proper investigation and application of the International Accounting Standards ("**IAS**").[30]

[26] *Id.*, ¶ 71 (quoting Expert Report of Deloitte, January 12, 2017, ¶ 28(e) [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070]).
[27] *Id.*
[28] *Id.* (quoting Expert Opinion of TPA Global, February 6, 2019, ¶¶ 107-109).
[29] PwC I (financial statements), ¶¶ 52, 57.
[30] Annex 3, ¶ 71.

- In January 2020, **Professor Christoph Schreuer**, a leading expert in the field of international investment law and arbitration, opined that the evidence of the Statis' fraud "*would have been critical for the determination of [the Tribunal's] jurisdiction, the admissibility of the Stati Parties' claims and the liability of Kazakhstan*."[31]

- In July 2020, **Alexander Layton QC**, an English barrister at Twenty Essex chambers specializing in private international law, cross-border disputes and commercial law, confirmed that the English High Court, in the June 2017 judgment of Justice Knowles, reached the view that there was sufficient evidence of fraud to warrant a trial of the fraud allegation for the purpose of setting aside an order for enforcement of a foreign arbitration award.[32] Further, he opined that the judgment of Justice Knowles is final and binding, and entitled to *res judicata* effect with regard to the issues it necessarily decided including that the evidence of fraud was so strong that if examined at trial it would reasonably be expected to be decisive, and, if it remained unanswered, would have that effect.[33]

- In January 2020, **PwC** issued another report ("**PwC II (KPMG correspondence)**") confirming that KPMG's decision to invalidate the Audit Reports issued for the Financial Statements had affected "*KPMG's report on the TNG financial statements to 30 June 2008 that formed the basis of the costs and EBITDA figures that fed into the calculation of the Awarded Amount*."[34]

- In July 2020, **PwC** issued two further reports. The first found that the Statis had diverted hundreds of millions of dollars from their Kazakh operations to tax haven jurisdictions ("**PwC III (application of funds)**").[35] The second found[36] that these transactions raised "*red flags*" indicative of money laundering ("**PwC IV (money laundering risks)**").[37]

- In July 2020, **Stefan D. Cassella**, an expert on asset forfeiture and money laundering and former Deputy Chief of the U.S. Justice Department's Asset Forfeiture and Money Laundering Section, opined that there is evidence that the Statis "*could be prosecuted criminally in Latvia for money laundering offenses involving the proceeds of the Tristan Notes scheme, the Sales of Oil and Gas scheme, and the Perkwood scheme, and in the United States and in other jurisdictions for conducting any future financial transaction involving the Award from the Tribunal in the ECT Arbitration*."[38]

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[31] *Id.* (quoting Legal Opinion of Professor C. Schreuer, January 21, 2020, ¶¶ 71, 72).
[32] *Id.*
[33] *Id.*
[34] *Id.* (quoting PwC II (KPMG correspondence), ¶ 31).
[35] PwC III (application of funds).
[36] PwC III (application of funds).
[37] *Id.* (quoting PwC IV (money laundering risks), ¶¶ 3.54-3.59).
[38] *Id.* (quoting Legal Opinion of Stefan Cassella of Streamhouse AG, July 30, 2020, 20-21).

- **Dr. Patrik Schöldström**, currently a Judge of the Svea Court of Appeal, concluded that in the Swedish Set-Aside Proceedings, the court "*did not consider*" the allegations of fraud "*in its assessment at all*."[39] In August 2020, he also concluded there is "*credible evidence that the Stati Parties procured the [ECT] Award by actions and omissions that under Swedish law amount to criminal fraud*," [40] and that, during the Set-Aside Proceedings, the Statis "*violated the duty to tell the truth and the duty not to litigate 'against better knowledge*."[41] In consequence, he concluded, "*the Svea Court did not have a correct and truthful basis for its 2016 Decision*" and that the Award should not now be enforced.[42]

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28. This Opinion focuses on the fraudulent conduct of the Statis in connection with (a) the underlying transactions, (b) the Arbitration and (c) the post-Award Proceedings. However, it is important to note that at the time the Award was issued in December 2013, the Statis already knew that it was a product of their fraud. This is because, at a minimum, the Tribunal awarded the Statis $199 million in compensation for the LPG Plant on the basis of the KMG Indicative Offer (*see supra*, ¶ 18), which in turn the Statis had presented to the Tribunal as a neutral and fair basis for valuation but which, in fact, the Statis knew was based on their falsely inflated construction costs.

29. The account of the Statis' conduct presented here reveals, from beginning through the present, a pervasive dishonesty and lack of integrity. This constitutes an abuse of the investor-State dispute resolution system, as well as the system for recognition and enforcement of international arbitral awards established by the New York Convention.

IV. APPLICABLE STANDARDS OF PARTY CONDUCT

30. International arbitration's legitimacy depends on the integrity of all those who participate in it. Among the core components of integrity in the context of international arbitration are truthfulness and honesty. This is especially pronounced in international investment arbitration, where one of the parties is a sovereign which consents to arbitration only under certain stated conditions, one of which is that the investment is legal and bona fide.

31. In this part, I set out in **Section A**, the legal framework applicable to the standards of proper party conduct in international arbitral proceedings. It is my opinion that such standards are also relevant to parties' conduct in post-award proceedings in national courts. In **Section B**, I discuss the New York Convention and its public policy defense to enforcement. There

[39] *Id.* (quoting Legal Opinion of Dr. Patrik Schöldström, January 13, 2017, ¶ 13).
[40] Legal Opinion of Dr. Patrik Schöldström, August 23, 2020, ¶ 82.
[41] *Id.*, ¶ 82.
[42] *Id.*, ¶¶ 87-88.

I show that there is an overall consensus among legal systems that the commission of fraud is contrary to public policy and requires that the affected award be denied enforcement.

A. Basic Standards of Integrity and Truthfulness in Conducting Arbitral and Judicial Proceedings

32. Like litigation, international arbitration is predicated on an assumption that parties observe basic standards of truthfulness and honesty in their conduct in those proceedings. Lapses in this respect not only compromise the judgment or award that is eventually rendered, but also damage confidence in the international dispute resolution system as a whole. In this section, I consider the most significant normative sources by which the ethics of party conduct in international arbitration may be gauged. These are (1) case law, (2) soft law, and (3) legal literature. I also consider the duty of good faith as it applies in these circumstances.

1. Case Law

33. Case law shows the commitment of both arbitral tribunals and reviewing courts to the integrity of the arbitral process from beginning to end, and their disapproval of arbitral proceedings and awards that result from a lack of integrity on the part of participants in that process, including not only arbitrators and counsel, but parties as well. In this section, I examine decisions taken by both international arbitral tribunals and national courts.

34. Arbitral tribunals regularly invoke the principle of good faith,[43] and its corollaries "unclean hands,"[44] and "abuse of rights,"[45] in assessing the conduct of parties in international arbitration, especially in investor-State arbitration. The following sample of awards is indicative:

> *Good faith is a supreme principle, which governs legal relations in all of their aspects and content*.[46]
>
> ***

[43] Aloysius Llamzon and Anthony Charles Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct," *in* Albert Jan Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 (Kluwer Law International, 2015), at 455.

[44] *See Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 317; *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case No. ARB/10/18, Decision on Jurisdiction, August 19, 2013, ¶ 484.

[45] Chester Brown, "The Relevance of the Doctrine of Abuse of Process in International Adjudication," 2 TDM (2011), at 6-7; Michael Byers, "Abuse of Rights: An Old, Principle, A New Age," 47 McGill L. J. 389 (2002); Eric De Brabandere, "'Good faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims," 3 Journal of International Dispute Settlement (2012, no. 3), at 11.

[46] *Inceysa v. El Salvador*, ICSID Case No. ARB/03/26, Award, August 2, 2006, ¶ 230.

> *[The theory of abuse of process] is another manifestation of the general principle that one does not benefit from treaty protection when underlying conduct is deemed improper*.[47]
>
> ***
>
> *Parties to an arbitration proceeding must conduct themselves in good faith. This duty, as the* Methanex *tribunal found, is owed to both the other disputing party and to the Tribunal[.]*[48]
>
> ***
>
> *It is indisputable, and this Arbitral Tribunal can do no more than confirm it, that the safeguarding of good faith is one of the fundamental principles of international law and the law of investments*.[49]
>
> ***
>
> *It is well established that the bad faith conduct of the investor is relevant to the grant of relief under an investment treaty*.[50]

35. In order to be protected, an investment must be bona fide and lawful. Bad faith on the part of an investor or the illegality of an investment not only renders a claim inadmissible, but also deprives a tribunal of jurisdiction. Again, the awards to this effect are very numerous. By way of example:

> *An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law*.[51]
>
> ***
>
> *An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state [sic], has brought*

[47] *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, December 6, 2016, ¶ 492.
[48] *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, September 17, 2009, ¶ 153.
[49] *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011, ¶ 116.
[50] *Sanum Investments Limited v. the Lao People's Democratic Republic*, PCA Case No 2013-13, Award, August 6, 2019, ¶ 175.
[51] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 123.

itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.[52]

36. National courts are equally wedded to the importance of good faith in international arbitration. As discussed in greater detail below (*infra*, at ¶¶ 57–66), prominent among the forms of misconduct in arbitration condemned by the courts is fraud. A highly instructive case is *European Gas Turbines SA v. Westman International Ltd*,[53] in which European Gas Turbines alleged that an ICC award rendered against it was based on a fraudulent report of expenses submitted by Westman in the underlying arbitration, and that this fraud "*necessarily affected*" the decision of the tribunal.[54] Finding that "*the dispositions of the arbitral award [were] affected by the fraud committed by Westman in the arbitral proceedings*," the Court of Appeal of Paris found that "*enforcement would lead to sanctioning a fraud committed by Westman during the arbitral proceedings*."[55]

37. Similarly, in *Aoude v. Mobil*,[56] the U.S. Court of Appeals for the First Circuit held that, in fabricating a purchase agreement with a franchisor and authorizing his counsel to annex the bogus agreement to its complaint, the prevailing party had committed "*fraud on the court*[.]"[57] As further explained in the decision, fraud on the court occurs:

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[52] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, ¶ 1352.

[53] Cour d'Appel [CA] Paris, Sep. 30, 1993 (Fr.).

[54] *Id.*, ¶ 23.

[55] *Id.*, ¶¶ 22, 29. *See also* in the context of judgments obtained through fraud:

(a) *Specialized Indus. Servs. Corp. v. Carter*, 68 A.D.3d 750, 751-752 (N.Y. Sup. Ct. 2009) (internal citations omitted):

Generally, a party who has lost a case as a result of alleged fraud or false testimony cannot collaterally attack the judgment in a separate action for damages against the party who adduced the false evidence, and the plaintiff's remedy lies exclusively in moving to vacate the default judgment. Under an exception to that rule, a separate lawsuit may be brought where the alleged perjury or fraud in the underlying action was 'merely a means to the accomplishment of a larger fraudulent scheme' which was 'greater in scope than the issues determined in the prior proceeding.'

(b) *Chevron Corp. v. Donziger,* 866 F. Supp. 2d 235, 285-286 (S.D.N.Y. 2012) (internal citations omitted):

When courts are asked to grant relief from or to decline to recognize a prior judgment on the ground of fraud, a central question is whether such an outcome is appropriate to 'protect the fairness and integrity of litigation.' Hence, a litigant making such a claim need not prove that the outcome of the prior case would have been different absent the fraud. It ordinarily must show only that the fraud 'prevented the losing party from fully fairly presenting his case or defense' or otherwise significantly tainted the process. Implicit in this criterion is a requirement of materiality, as judgments will not be set aside or denied recognition where the only impact of the misconduct or other taint is to prevent a litigant from presenting cumulative evidence, to deceive as to a peripheral issue, or the like.

[56] 892 F.2d 1115, 1118-1119 (1st Cir. 1989).

[57] *Id.* In the United States, numerous courts have held that forgery is a "*species*" of fraud and that alleged forgery "*can serve as a predicate 'misrepresentation' in a fraud cause of action*." *Nirvana Int'l, Inc. v. ADT Sec. Servs., Inc.*, 881 F. Supp. 2d 556, 563 (S.D.N.Y. 2012) (holding that forgery could serve as a misrepresentation for a fraud claim, but

> *where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense*.[58]

38. In sum, good faith is a principle fundamental to the integrity of international arbitration and judicial proceedings that may ensue. This is due to the paramount importance of truthfulness and honesty on the part of parties no less than arbitrators and counsel.

2. Soft Law

39. There does not exist a great deal of soft law that bears directly on the proper conduct of parties, as distinct from counsel or tribunal members, in arbitration, or on the consequences of their improper conduct for the resulting award. It is assumed that tribunals and courts themselves have the means and the will, in the presence of serious misconduct by parties, to take the appropriate steps, without need of soft law. The cases cited immediately above support that assumption.

40. One exception, in regard to awards rendered on the basis of serious misconduct, is the American Law Institute's recently adopted Restatement of the U.S. Law of International Commercial and Investor-State Arbitration. The accompanying notes provide in part as follows:

> *It is axiomatic that an award whose making was materially affected by fraud, corruption, or other undue means is not legitimate and therefore not entitled to recognition or enforcement. Section 10(a)(1) of the FAA, which governs non-Convention awards, codifies this principle, which is also embedded in the Convention grounds that ensure the procedural fairness of Convention awards*.[59]

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that the plaintiff in this case did not rely on it) (internal citations omitted); *see also, e.g*., *Padilla v. Padilla*, 278 So.3d 333, 335 (Fla. Dist. Ct. App. 2019) ("*Forgery is, indeed, a species of fraud*."); *John Hancock Life Ins. Co. of New York v. Solomon Baum Irrevocable Family Life Ins. Tr.*, 357 F. Supp. 3d 209, 217 (E.D.N.Y. 2018) ("*[F]orgery is a species of fraud*."); *Fortis Benefits Ins. Co. v. Pinkley*, 926 So. 2d 981, 988 (Ala. 2005) (same); *Life Ins. Co. of Georgia v. Smith*, 719 So. 2d 797, 809 (Ala. 1998) (same); *Cooper v. Floyd*, 177 S.E.2d 442, 445 (N.C. 1970) ("*[F]raud is the gist of forgery*.").

[58] *Id.* at 1118; *see also China Minmetals Materials Import & Expert Co. Ltd v. Chi Mei Corp.*, 334 F. 3d 274, 286-88, (3d. Cir. 2003) (vacating district court order confirming foreign arbitral award and remanding for further proceedings to determine whether alleged arbitration agreement was product of forgery because such forgery would establish valid New York Convention defense to enforcement of award); Switzerland: *X (formerly A) v. Company Y, in liquidation and others*, Bundesgericht [BGer] [Federal Supreme Court] Oct. 6, 2009, 4A_596/2008, in which the Swiss Federal Supreme Court annulled an ICC award on the ground that a criminal investigation in another country had determined that "*several false written and oral testimonies*" had been presented to the tribunal. The Court held that this fraud misled the arbitrators into upholding an agreement that was in fact null and void.

[59] Restatement of the U.S. Law of International Commercial Arbitration § 4.17, Reporters' note *a* (Am. Law Inst., Proposed Final Draft 2019) [hereinafter "Restatement"]. On the denial of recognition and enforcement of awards on public policy grounds more generally, see Restatement § 4.16.

41. But while there is little by way of formal international standard governing ***party*** conduct in arbitration, there is much soft law on the standards to which ***counsel*** in international arbitration are held. There is no reason why parties to arbitration should not be held to the same standards applicable to the counsel who represent them. It is therefore reasonable to expect parties in arbitration to respect ethical principles that are broadly analogous to those to which counsel in arbitration themselves are held. To consult those standards is not to assume that parties' failures in this regard may be ascribed to their counsel. It is only to apply those standards by analogy to parties themselves.

42. The field of international dispute resolution is actually awash in standards of conduct by counsel. These criteria are spelled out in a broad range of soft law instruments.[60] Many of them are framed in highly general ethical terms and apply chiefly to conduct in connection with court proceedings. For example, according to a Council of Europe Recommendation:

> *Lawyers should respect the judiciary and carry out their duties towards the court in a manner consistent with domestic and international legal and other rules and professional standards. Any abstention by lawyers from their professional activities should avoid damage to the interests of clients or others who require their services.*[61]

43. Also relevant are the following instruments:

(i) UN Basic Principles on the Role of Lawyers, Principle 12: "*Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice*;"[62]

(ii) Council of Bars and Law Societies of Europe ("**CCBE**"), Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, Core Principle (d) ("*the dignity and honor of the legal profession, and the integrity and good repute of the individual lawyer*")[63] and Core Principle (i) ("*respect for the rule of law and the fair administration of justice*");[64]

(iii) The CCBE Charter also states the following commentary on Core Principle (d):

> *[T]he lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession. … [H]e or she must not engage in disgraceful conduct, whether in legal practice or in other business activities[.]*[65]

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[60] For a good survey, see Peter Halprin & Stephen Wah, *Ethics in International Arbitration*, 2018 J. Disp. Res. 87 (2018).
[61] Council of Europe Recommendation No. R(2000)21, Principle III(4).
[62] UN Basic Principles on the Role of Lawyers, Principle 12.
[63] Council of Bars and Law Societies of Europe (CCBE), Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers, Core Principle (d).
[64] *Id.*, Core Principle (i).
[65] *Id.*, Core Principle (d).

44. Certain principles are addressed specifically to counsel in arbitration, as distinct from litigation, and directed specifically to fraud. Most prominent among them is Guideline 9 of the IBA Guidelines on Party Representation in International Arbitration, which provides:

> *A party representative should not make any knowingly false submission of fact to the Arbitral Tribunal.*[66]

45. In her seminal work on ethics in international arbitration, Catherine A. Rogers observes that "*systems whose procedures include information or documentary exchanges impose on attorneys specific ethical obligations to ensure the integrity of the process. One of the basic obligations is to comply with a valid document request, even if it requires turning over to an adversary documents that are harmful to a party's case or interests*."[67]

46. Arbitral institutions also address fraud in the conduct of arbitration. For example, an annex to the recently adopted London Court of International Arbitration ("**LCIA**") Rules prohibits the making of false statements, the use of false evidence and the concealment of documents:

> *[…]*
>
> *(3) An authorised representative should not knowingly make any false statement to the Arbitral Tribunal or the LCIA Court.*
>
> *(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.*
>
> *(5) An authorised representative should not knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal.*[68]

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[66] IBA Guidelines on Party Representation in International Arbitration, Guideline 9.

[67] Catherine A. Rogers, Ethics in International Arbitration, 117-118 (2013).

[68] LCIA Arbitration R. (2020) Annex ¶¶ 3-5. The prohibition on the making of false statements, the use of false evidence, or the concealment of document is of course as applicable to those appearing before courts as before arbitral tribunals. The commentary to Core Principle (i) of the Council of Bars and Law Societies of Europe (CCBE) Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers states as follows:

> *A lawyer must never knowingly give false or misleading information to the court, nor should a lawyer ever lie to third parties in the course of his or her professional activities*.

Similarly, Article 4.4 of the CCBE's Code of Conduct for European Lawyers, entitled "Relations with the Courts – False or Misleading Information," provides: "*A lawyer shall never knowingly give false or misleading information to the court*."

47. There is also a close connection between submission of false evidence in arbitration, on the one hand, and deprivation of the right to be heard, on the other. Guarantees of procedural due process are ubiquitous among the rules of international arbitral institutions.[69]

3. Legal Literature

48. Legal literature is fully in line with the view that an award procured through fraud is unworthy of recognition or enforcement. As noted by two commentators, "*While corruption is universally proscribed in national law, arbitrators and commentators have increasingly classified it also as a violation of transnational (or 'truly international') public policy, as well as a violation of public international law*."[70] Further, Gary Born has noted:

> *[i]t is reasonably clear that fraud is a ground for annulling an award under virtually all national arbitration regimes.*
>
> *[…]*
>
> *Fraud is almost always confined to cases involving a party's use of perjured testimony or fabricated evidence during the arbitral proceedings. [...] 'Intentionally giving false testimony in an arbitration proceeding would constitute fraud.' Some courts have also suggested that deliberately and wrongfully withholding material evidence that a party has been ordered to disclose may also be analogous to providing perjured testimony.*[71]

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[69] AAA R. 22(a) ("*The arbitrator shall . . . [while] safeguarding each party's opportunity to fairly present its claims and defenses.*"); AAA R. 32(a) ("*[E]ach party has the right to be heard and is given a fair opportunity to present its case*"); CIETAC Art. 35(1) ("*Under all circumstances, the arbitral tribunal shall act impartially and fairly and shall afford a reasonable opportunity to both parties to present their case*."); HKIAC Art. 13.1 (". . . *provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case*"); HKIAC Art. 13.5 ("*The arbitral tribunal and the parties shall do everything necessary to ensure the fair and efficient conduct of the arbitration*."); ICC R. 22(4) ("*In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case*."); ICDR R. 20(1) ("*[E]ach party has the right to be heard and is given a fair opportunity to present its case*."); LCIA Arbitration R. (2020) R. 14.4(i) ("*Arbitral Tribunal's general duties at all times during the arbitration shall include . . . giving each [party] a reasonable opportunity of putting its case and dealing with that of its opponent(s)*."); PCA Art. 17(1) ("*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case*."); SCC Art. 23(2) (". . . *giving each party an equal and reasonable opportunity to present its case*"); UNCITRAL Rules Art. 17(1) ("*Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case*."); VIAC Art. 28(1) ("*The parties shall be granted the right to be heard at every stage of the proceedings*.").

[70] Aloysius Llamzon and Anthony Charles Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct," *in* Albert Jan Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 (Kluwer Law International, 2015), at 462.

[71] Gary Born, International Commercial Arbitration 3335, 3336-3337 (2d ed., 2014) (citing *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co.* (U.K.)); *see also*:

49. Commentators also have not failed to draw a close connection between fraud and denial of due process as grounds for denying recognition or enforcement of awards. For example, the late V.V. Veeder, a leading international arbitration authority, posited that counsel in arbitration have a positive obligation not to mislead a tribunal, observing further that this:

Cyrus Benson, *Can Professional Ethics Wait - The Need for Transparency in International Arbitration*, 3 Disp. Resol. Int'l 78, 82, 90-91 (2009):

> *[V]irtually all [national codes of professional conduct] require that lawyers not make false and misleading statements or engage in the creation, use or preservation of false or fraudulent evidence.*
> *[…]*
> *A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.*
> *[…]*
> *A lawyer who receives information clearly establishing that the client has, in the course of the arbitration, perpetrated a fraud upon the tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the tribunal.*
> *[…]*
> *The lawyer shall not knowingly participate in the creation, preservation or use of fraudulent, false, altered or perjured testimony or evidence in any manner whatsoever.*

Raymond Doak Bishop & Margrete Stevens, *Document Exchanges and the Collision of Ethical Duties of Counsel from Different Legal Systems*, *in* Dossier of the ICC Institute of World Business Law: Players' Interaction in International Arbitration 24, 30 (2012):

> *In the [case under discussion], the claimant was taken to task by the tribunal for the way its case had been argued . . . . While the main criticism of the tribunal was directed at the claimant, counsel conduct was also implicated with respect to certain omissions, implicitly raising the question whether counsel, in the tribunal's view, . . . was simply required to be more thorough in ascertaining the correctness of legal argument so as to avoid misleading the tribunal.*

Stephan Wilske, *Sanctions against Counsel in International Arbitration - Possible, Desirable or Conceptual Confusion*, 8 Contemp. Asia Arb. J. 141, 171 (2015) (quoting *Prospect Capital Corp. v. Enmon*, 2010 WL 2594633 (S.D.N.Y. June 23, 2010)):

> *In this age, where law firms have become bottom line oriented, it is important for lawyers to be reminded that there are certain lines lawyers cannot cross in their endeavor to increase the bottom line, and that their duty of candor towards the Court cannot be sacrificed to please a client.*

To the same effect, see Horacio Alberto Grigera Naón, *What Duties Do Counsel Owe to the Tribunal and Why?*, *in* Dossier of the ICC Institute of World Business Law: Players' Interaction in International Arbitration 10, 16 (2012) (referring to the obligation of "*loyalty courtesy integrity dignity good faith conduct and professionalism*"); Catherine A. Rogers, Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration, 23 Mich. J. Int'l L. 341, 403, n.296 (2002) (referring to the obligation of "*candor*" to the tribunal).

> *matters first because it can easily breed procedural unfairness in the particular case, and it matters generally because it attacks the integrity of the system of international arbitration.*[72]

50. Other commentators emphasize that fairness in arbitration requires access to truthful information (*i.e.*, free from fraud) and procedural due process, including "*full disclosure of the parties and claims made, [on the one hand] […][and the] right […]to raise material and procedural defenses/ and objections, and to bring new claims/ and raise new defenses [on the other]*."[73]

51. This body of commentary reflects the rather obvious point that a party confronted with false evidence is presented with evidence that is less favorable – perhaps substantially less favorable – to its case than evidence that reflects the true state of affairs. This deprives a party, including a respondent State in an investment arbitration, of the opportunity to present its case because its defenses are, by definition, formulated and developed in response to the claims presented and evidence disclosed by an investor claimant. If the claimant has fabricated its allegations, falsified the evidence underlying those allegations and/or failed to disclose relevant evidence that would show the truth, the respondent cannot properly defend itself and its due process rights will accordingly have been violated.

52. Confirming this point, the drafters of the New York Convention included defenses to enforcement framed both in terms of due process *and* public policy. As one commentator has observed, the drafters "*thought it necessary to ensure that, no matter how 'public policy' was interpreted in the future […], there would be no uncertainty as to the fundamental importance of […]the right to be heard*."[74]

B. The New York Convention and its Public Policy Defense

53. Violation of the public policy of the place where enforcement is sought is one of the New York Convention's most important defenses, even if it is seldom established.[75] Every one of the jurisdictions to which the Award in this case has been brought is a Convention State and necessarily treats violation of public policy as a basis for denying enforcement of an award.[76]

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[72] V.V. Veeder, *The 2001 Goff Lecture: The Lawyer's Duty to Arbitrate in Good Faith*, 18(4) Arb. Int'l 431, 437, 442 (2014).

[73] Matti S. Kurkela & Santtu Turunen, Due Process in International Commercial Arbitration 187-188 (2010).

[74] James Allsop, *International Arbitration and Conformity with International Standards of Due Process and the Rule of Law*, 19 ICCA Congress Series: International Arbitration and the Rule of Law: Contribution and Conformity 763, 774 (2017). Allsop describes the Convention's public policy ground (Article V(2)(b)) as a way of ensuring that "*additional aspects of due process, natural justice, and procedural fairness may be protected to ensure fairness, equality, and the protection of the rule of law, and recogniz[ing] that procedural public policy is far broader than the right to be heard*." *Id.*, at 781-782.

[75] New York Convention, art. V(2)(b).

[76] *See, e.g.*, Supreme Court of Cassation, February 4, 2020, No. 2564 (Italy); Hof Amsterdam, September 9, 2018, GHAMS:2018:3755, 200.219.927/01 m.nt (Neth.); *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

54. Public policy is broadly viewed as embodying the most fundamental principles of morality and justice prevailing in the jurisdiction whose public policy is under consideration.[77] By all accounts, the New York Convention's public policy exception is to be narrowly construed, that is, limited to those highly exceptional circumstances in which enforcement of an award would offend a jurisdiction's most basic values.[78] Adopting a suitably narrow understanding of public policy in this context is part of the larger "*pro-arbitration*" philosophy that presumptively favors the enforcement of both arbitration agreements and arbitral awards.

55. It is rightly feared that too expansive a notion of public policy would threaten the effectiveness of arbitration as a means of international dispute resolution. For that reason too, a party invoking the Convention's public policy defense to enforcement bears a heavy burden of proving that enforcement of an award would offend the public policy of the jurisdiction where enforcement is sought.[79] Still, though international arbitral awards are only very exceptionally denied enforcement on public policy grounds, there are circumstances, fortunately rare, in which an award is unworthy of enforcement for reasons of public policy. Commission of fraud in procurement of an award is one such circumstance, as detailed in the following sub-section. While it is ordinarily "*pro-arbitration*" for courts to enforce arbitral awards, it is ***not*** "*pro-arbitration*" for them to enforce awards contaminated by fraud.[80]

56. The "*pro-arbitration*" philosophy that underlies the narrow construction of the public policy exception, and the heavy burden borne by a party invoking it, is based on a presumption that parties (as well as arbitrators and counsel) will conduct themselves both in good faith and in compliance with public policy. Upon colorable allegations of fraud a court must conduct a serious examination of the matter. But it is not possible for a court to do so unless the parties discharge their obligation of truthfulness and candor, and the court has before it a complete and truthful record. In the present case, as noted throughout my opinion and summarized above (*supra*, ¶ 25), the Statis did not conduct themselves with truthfulness and candor, and accordingly the courts were deprived of a complete and truthful record.

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[77] *Parsons & Whittemore Overseas*, 508 F.2d at 974.

[78] *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 (March 23, 2013) (Aust.), ¶ 105; *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, Court of Final Appeal, Hong Kong, February 9, 1999, [1999] 2 HKC 205, at 12, 13; *OAO "Gazprom" v. Repub. of Lithuania*, Civil Case No. 3K-7-458-701/2015 (Sup. Ct. Lith. Oct. 23, 2015), ¶ 73.

[79] *Bloomberry Resorts & Hotels Inc. v. Global Gaming Phil. LLC*, No. 1432/2017 (SGH, Jan. 3, 2020) (Sing.), ¶¶ 97-98 (discussing cases therein); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 289 (5th Cir. 2004); *Sui S. Gas Co. v. Habibullah Coastal Power Co. (Pte)*, No. 248/2009 (SGHC, Feb. 23, 2010), ¶ 48; Hof Amsterdam, September 9, 2018, GHAMS:2018:3755, 200.219.927/01 m.nt (Neth.).

[80] *See generally* George A. Bermann, *What Does it Mean to be "Pro-Arbitration?*," 34 Arb. Int'l 341 (2018).

1. Fraud as a Violation of Public Policy

57. That enforcement of an award obtained by fraud is contrary to public policy is well established in case law across jurisdictions,[81] including, for example, the United States,[82] England,[83] Australia,[84] France,[85] Germany,[86] Lithuania,[87] the Netherlands,[88] and

[81] *See, e.g.*, *Karaha Bodas Co.*, 364 F.3d at 306 ("*Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud*") (United States); *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd (No 2)* [2012] FCA 276 (March 23, 2013) (Aust.), ¶¶ 87-88 (holding that enforcement of an award that was induced or affected by fraud or corruption would be contrary to public policy and that a court may refuse enforce the tainted award); Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., January 16, 2018, 15/21703 (Fr.) (annulling an award because the title to property was obtained through fraudulent administrative authorization); Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 30, 2013, III ZB 40/12 (Ger.), ¶¶ 12, 19-20 (recognizing that an award obtained through Claimant's procedural fraud would be a ground to refuse enforcement under art. V(2)(B) of the New York Convention); *OAO "Gazprom" v. Repub. of Lithuania*, Civil Case No. 3K-7-458-701/2015 (Sup. Ct. Lith. Oct. 23, 2015) (holding that the concept of "*public policy*" should be interpreted as "*international public policy*" and "*violation of public policy exists . . . when the arbitral award or arbitral agreement has been obtained by coercion, fraud, threat, etc*."); *Bloomberry Resorts & Hotels Inc. v. Global Gaming Phil. LLC*, No. 1432/2017 (SGH, Jan. 3, 2020) (Sing.) ("*Fraud, corruption and bribery would generally fall within the rubric of being "contrary to public policy. . . . Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside*." (citation omitted)).

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

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

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

[85] Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 16, 2018, 15/21703 (Fr.) (annulling an award because the title to property was obtained through fraudulent administrative authorization).

[86] Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 30, 2013, III ZB 40/12 (Ger.), ¶¶ 12, 19-20 (recognizing that an award obtained through Claimant's procedural fraud would be a ground to refuse enforcement under art. V(2)(B) of the New York Convention).

[87] *OAO "Gazprom" v. Repub. of Lithuania*, Civil Case No. 3K-7-458-701/2015 (Sup. Ct. Lith. Oct. 23, 2015) (holding that the concept of "*public policy*" should be interpreted as "*international public policy*" and "*violation of public policy exists . . . when the arbitral award or arbitral agreement has been obtained by coercion, fraud, threat, etc*.").

[88] Hof Amsterdam, September 9, 2018, GHAMS:2018:3755, 200.219.927/01 m.nt (Neth.) ("*[P]ublic policy precludes enforcement only in exceptional circumstances. Fraud itself constitutes such a circumstance and public policy may prevent the enforcement of a foreign arbitration award rendered under the influence of fraud*.").

Singapore.[89] So widely held is the proposition that enforcement of an award obtained by fraud is contrary to public policy that it has become virtually a transnational principle of international arbitration law.[90]

58. The situation in *England* is especially clear, as the susceptibility of an award to denial of enforcement for fraud is firmly established in that jurisdiction, and the examples are many.[91] As earlier noted, in this very case, Justice Knowles in the English High Court so held:

> *It will do nothing for the integrity of arbitration as a process or its supervision by the Courts, or the New York Convention, or for the enforcement of arbitration awards in various countries, if the fraud allegations in the present case are not examined at a trial and decided on their merits, including the question of the effect of the fraud where found. The interests of justice require that examination.*[92]

59. In *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp.*,[93] IPCO (Nigeria) Ltd. ("**IPCO**") entered into a contract under which it undertook to design and construct a petroleum export terminal for the Nigerian National Petroleum Corporation ("**NNPC**"). The contract was governed by Nigerian law with disputes to be resolved under the Nigerian Arbitration and Conciliation Act of 1990. When a contractual dispute between the parties arose, IPCO launched an arbitration leading to a $152 million award in its favor. NNPC challenged the award before the Nigerian Federal High Court on the ground, among others, that IPCO had procured the award by fraudulent inflation of its damages on the basis of falsified documents. The English High Court found that "*NNPC had a good prima facie case that IPCO practiced a fraud on the Tribunal which undermined the validity of the whole Award*,"[94] but nevertheless declined to annul the award. However, the Court of Appeal concluded that the lower court had applied "*too strict a test*" and remanded the case

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[89] *Bloomberry Resorts & Hotels Inc. v. Global Gaming Phil. LLC*, No. 1432/2017 (SGH, Jan. 3, 2020) (Sing.) ("*Fraud, corruption and bribery would generally fall within the rubric of being 'contrary to public policy' . . . . Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside*." (internal citations omitted)); *Sui S. Gas Co. v. Habibullah Coastal Power Co. (Pte)*, No. 248/2009 (SGHC, Feb. 23, 2010) (Sing.), ¶ 48 (finding that "*egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice*[,]" would violate public policy and justify setting aside of award).

[90] [90] *See* Aloysius Llamzon and Anthony Charles Sinclair, "Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct," *in* Albert Jan Van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Volume 18 (Kluwer Law International, 2015), at 522:

> *[T]here appears to be sufficient authority to conclude that a transnational public policy exists proscribing bribery and corruption, at least, in the context of an investment treaty dispute. Authority also exists, albeit that it is thin, on fraudulent misrepresentation and other investor misconduct.*

[91] *IPCO (Nigeria) Ltd v. Nigerian Nat'l Petroleum Corp* [2015] EWCA Civ. 1144 (Eng.); *see also supra*, note 83.

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

[93] [2015] EWCA Civ. 1144 (Eng.).

[94] *Id.*, ¶ 104.

to the lower court to determine whether sustaining the award would offend English public policy.[95]

60. In another case involving the Federal Republic of Nigeria, the English High Court explicitly found that to enforce an arbitral award that was obtained through fraud "*would implicate*" the arbitration system and "*that of the court*" in the "*fraudulent scheme.*"[96]

61. The situation is no different in the *Netherlands*. In the case of *Serena Equity Ltd./Fincantieri S.p.A.*,[97] the court held:

> *[P]ublic policy precludes enforcement only in exceptional circumstances. Fraud itself constitutes such a circumstance and public policy may prevent the enforcement of a foreign arbitration award rendered under the influence of fraud*.

62. There is nothing whatsoever to suggest that the law in *Belgium*,[98] *Luxembourg*, or *Italy* is any different. In the present case, every one of the courts in these countries was prepared to entertain the prospect that an award obtained by fraud is an award whose enforcement would be contrary to public policy.

63. It is unquestionable that under *United States* law, fraud in the obtaining of an award justifies a refusal to enforce the award. U.S. law expressly makes fraud a basis for annulment of an award. The Federal Arbitration Act itself specifically provides as follows:

> *In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means[.]*[99]

64. Because an award can be annulled in the U.S. on the basis of fraud, it necessarily follows that an award obtained fraudulently cannot be enforced.[100]

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[95] *Id.*, ¶ 190. On remand, and after further proceedings concerning security for costs, the High Court set a trial on the fraud issue in 2018. Thereafter, according to a May 2019 article in The Nation, a Nigerian newspaper, NNPC settled the case by making a payment of $37.7 million to IPCO. *See* https://thenationonlineng.net/court-orders-firm-to-refund-1-6b-to-nnpc-subsidiary/.

[96] *Process and Indus. Dev. Ltd. v. Ministry of Petroleum Resources of the Federal Republic of Nigeria* [2020] EWHC 2379 (Comm), ¶ 273 ("*Not 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.*").

[97] Hof Amsterdam, September 9, 2018, GHAMS:2018:3755, 200.219.927/01 m.nt (Neth.).

[98] This was implicitly confirmed in the Belgian Exequatur Judgment of December 20, 2019 where the court ruled that although Belgian law does not explicitly include fraud as a self-standing ground for denying the enforcement of a foreign arbitral award, "*it is neither disputed nor disputable that fraud may contribute to a breach of public policy*." Decision of the French-language court of First Instance of Brussels, Belgium Exequatur Proceedings, December 20, 2019, 22.

[99] 9 U.S.C. §10(a).

[100] *Id.* § 9.

65. In fact, there are numerous U.S. cases in which a court has squarely held that an award tainted by fraud is unworthy of enforcement. According to one court, "*[e]nforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud*."[101]

66. It follows from this consistent case law that an enforcing court, faced with credible evidence of fraud in the obtaining of an award, can be expected to conduct a meaningful inquiry into that matter. The seriousness of fraud in the obtaining of an award demands nothing less. In the absence of such an investigation, a responsible determination as to whether enforcement of the award would offend a jurisdiction's public policy cannot properly be made.

2. Public Policy at the Place of Enforcement

67. Article V(2)(b) of the New York Convention states that what constitutes a violation of public policy must be ascertained under the law of the specific jurisdiction where enforcement of the award is sought.

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

Thus, every jurisdiction must make for itself an assessment of what its public policy requires and whether what it requires has been satisfied.

68. This principle has been applied correctly in certain, but not all, of the enforcement actions in this case. Mr. Justice Knowles in the English High Court, finding for Kazakhstan, specifically and properly observed that England's notion of public policy was not the same as Sweden's, and that an English court is accordingly not bound by the Svea Court of Appeals' decision that Swedish public policy was or was not offended:

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

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

the content of Swedish public policy must be different from that of its English counterpart."[102]

3. The Effect of Annulment Outside the Seat

69. Even though Article V(1)(e) of the New York Convention makes annulment of an award at the seat a basis on which a court elsewhere *may* deny recognition of the award, courts in a number of jurisdictions nevertheless allow a court in exceptional circumstances to recognize an award notwithstanding its annulment at the seat. In other words, the decision by a court at the seat to annul an award is ordinarily entitled to respect and will ordinarily lead to a denial of recognition elsewhere, but there are circumstances in which an award may be enforced, notwithstanding its annulment. This is the case in the *United States*.[103] It is also the case in the other jurisdictions where the Award in this case was brought for recognition.[104]

70. If that is so, the converse must also be true, *i.e.*, a decision by a court of the seat *not* to annul an award does not preclude a court of another State from denying enforcement of that award if it finds the award to be contrary to its *own* public policy.[105] There is no reason for a court to give greater respect to a decision of a court at the seat *to refuse to annul* an award than it gives to a decision of court at the seat *to annul* an award.

71. It goes without saying that if the courts of every jurisdiction are to approach the public policy defense on the basis of their own public policy – and if enforcement of an award tainted by fraud would violate that jurisdiction's public policy – then each of them must also decide for itself what does and does not constitute fraud under its law within the meaning of that defense, and whether what occurred amounted to fraud so defined.

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72. The preceding sections seek to identify the standards of conduct applicable to parties in both arbitral and judicial proceedings. The standards set out in case law, soft law and legal literature are consistent among themselves as well as with the requirements of public policy

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

[103] *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V v. Pemex Exploracion y Produccion*, 832 F.3d 92 (2d Cir. 2016).

[104] That is the position of the courts in Italy, as confirmed by a large body of literature. *See, e.g.*, L.G. Radicati di Brozolo, *I rimedi contro le interferenze statali con l'arbitrato internazionale*, in *Rivista dell'Arbitrato* 1-16 (2015); C. Carrara, *New York Convention 60 years later: a neverending search for a balance beteween* comitas *and internationality,* in *Rivista dell'Arbitrato* 41-59 (2018). It is also the case in Sweden. *See* Swedish Supreme Court case NJA 1998, at 820-826; Bogdan, M., *Svensk internationell privat- och processrätt*, JUNO ed. 8, at 65. U.K. courts take the same position. *Yukos Capital SarL v OJSC Oil Company Rosneft* [2014] EWHC 2188 (Comm), ¶ 22; *Maximov v Open Joint Stock Co Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm), ¶ 64. The same is true in the Netherlands. HR 24 november 2017, NJ 2019, 223 m.nt. H.J. Snijders (Verzoeker/NLMK) (Neth.); HR 26 september 2014, NJ 2015, 478 m.nt. (Gazprombank). This is also true in Belgium. *Sonatrach v. Ford*, Bacon & Davis Inc., Journal des tribunaux, 1993, obs. by G. Keutgen, at 685 (note that this case was not governed by the New York Convention because, at the time, the country of the seat of the award (Algeria) was not a party to it); Brussels Court of Appeal, January 9, 1990, Journal des tribunaux 1990, at 386.

[105] Radicati di Brozolo, *supra*; C. Carrara, *supra*.

under the New York Convention. Parties, no less than arbitrators and counsel, are under an obligation to participate in those proceedings at all times with good faith, which in turn requires that they conduct themselves with truthfulness and honesty. Parties that commit fraud in proceedings before arbitral tribunals and courts violate that obligation, and under Article V(2)(b) of the New York Convention, enforcement of the resulting award would constitute a violation of public policy as the requirements of public policy are understood in the enforcing States.

V. THE STATIS' PATTERN OF CONDUCT

73. This section assesses the relevant facts of this case in relation to the standards identified above in Section IV. These facts are set out in detail in Annex 3 to this Opinion and supported by the documents included in Annex 4.

74. There are three principal phases in the life cycle of a dispute in arbitration: (a) the transactions underlying the dispute, (b) the procedure by which a tribunal adjudicates that dispute, and (c) the review of the resulting award by national courts that are asked to annul or enforce it.

75. These three phases are closely joined in this case because among the functions of arbitral adjudication is to perform an honest inquiry into the circumstances that implicate, in turn, the honesty of the parties' underlying conduct. Meanwhile, the function of post-award actions in national courts is to ensure that an arbitral adjudication and the resulting award are untainted.

76. Based on my assessment of the facts set out in Annex 3, I find that the Statis' conduct in all three phases have something in common, namely, a serious and deeply disturbing lack of truthfulness and honesty. Each of these moments is reviewed briefly in turn.

A. Phase 1: The Statis' Conduct Underlying the Dispute

77. The Statis' conduct in the Arbitration needs to be viewed in the specific context of investor-State arbitration and the investment protection afforded by international investment agreements. The Statis turned to the Tribunal invoking such protection, but the protection afforded by the ECT is reserved to investments fulfilling the specified criteria of a "*protected*" investment.[106] To earn protection, an investment must not only satisfy certain criteria – which depending on the agreement may require a substantial contribution of capital, pursuit of regular profits and returns, an assumption of risk, and a significant contribution to the development of the host state – but also be a lawful one.[107]

[106] ECT arts. 1(6) (definition of "*investment*"), 17(2)(b) (denial of benefits to investments); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, August 27, 2008, ¶ 138.
[107] Dumberry, P., State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award, in Journal of World Investments and Trade, Volume 17 (2016), at 236 (referencing *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 Aug. 2008), ¶ 143).

78. The facts set out in Annex 3 demonstrate that the Statis' Kazakh operations from the start were not conducted lawfully. The Statis raised substantial funds from lenders in Kazakhstan and on the international capital markets ostensibly to finance the operations of their two Kazakh operating companies, KPM and TNG. But in doing so, they established and deployed sham corporate structures, fictitious and/or fraudulently inflated transactions, and knowingly false Financial Statements and Audit Reports – all for the purpose of presenting their Kazakh operations as far more valuable than they knew them to be, as well as enabling them to strip KPM and TNG of cash, manufacture an artificial liquidity crisis, and channel the funds out of Kazakhstan for their own personal benefit.[108]

79. Annex 3 documents the Statis' use of the following devices to achieve their aims:

(i) a deceptive corporate structure;

(ii) fictitious transactions and sham agreements;

(iii) falsified Financial Statements; and

(iv) unlawfully procured Audit Reports.

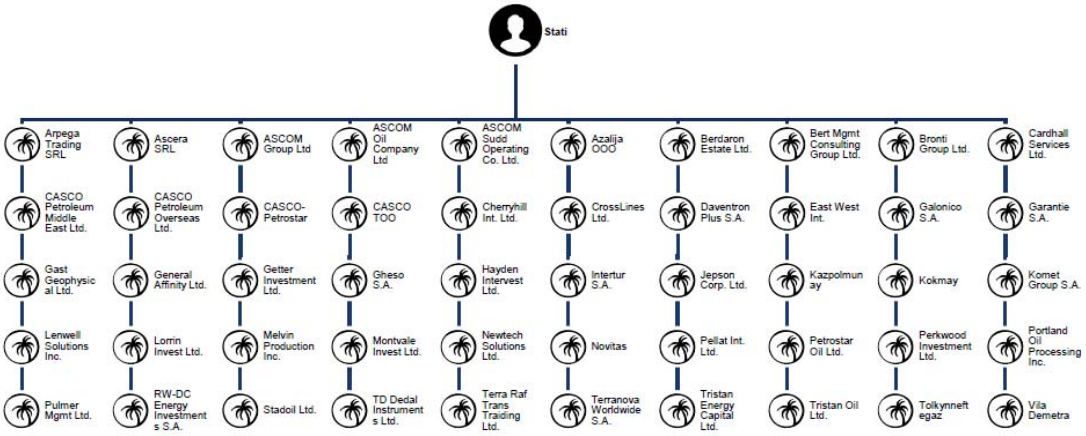
80. Each of these devices is addressed in turn.

1. A Deceptive Corporate Structure

81. Annex 3 describes the corporate structure of the Statis as far as it has been uncovered so far. Upon entering the Kazakh market, the Statis established an ostensibly legitimate constellation of controlled entities behind which they could secretly engage in systematic misconduct, detailed in a later section.

[108] *See Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶ 139 (27 Aug. 2008) (concluding that "*the substantive protections of the ECT cannot apply to investments that are made contrary to law*"); *Khan Resources Inc. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, ¶ 383 (25 Jul. 2012) ("*An investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the ECT only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim* nemo auditur propriam turpitudinem allegans."); *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, ¶ 182 (6 Jul. 2007) (recognizing that "*'[p]rotection of investments' under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State. A State thus retains a degree of control over foreign investments by denying BIT protection to those investments that do not comply with its laws*."); *see also* Energy Charter Secretariat, *An Introduction to the Energy Charter Treaty*, The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation, at 14 ("*The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law . . . .*"); Energy Charter Secretariat, *Chairman's Statement at Adoption Session on 17 December 1994*, The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation 158 ("*The Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose*.").

82. Evidence shows that the Statis owned and/or controlled over 80 legal entities. Many of them were registered in the world's so-called "*tax haven*" jurisdictions. Below are the companies that have been identified in the Panama Papers[109] as "*Stati companies*."



83. Two of the entities at the heart of the Statis' project in this case were Perkwood (*see supra*, ¶ 22) and Azalia Ltd. ("**Azalia**"), both Stati-controlled. As will be seen, these were the vehicles for a chain of phony transactions in connection with the purchase of equipment for construction of the LPG Plant. The phony transactions produced a false inflation of the LPG Plant investment costs "*[b]y an amount of up to approx. USD 130 million*."[110] This false inflation can perhaps be seen most clearly in the gap between the $35 million actual value of the equipment delivered by the German supplier Tractebel Gas Engineering GmbH ("**Tractebel**"), on the one hand, and the $245 million that the Statis falsely represented that they had invested in construction of the LPG Plant, on the other. These false representations were made by the Statis in their Financial Statements, to their auditors KPMG, to the Tribunal and to courts in all the post-Award Proceedings.

84. To conceal this false inflation, the Statis engaged in a series of deceptions to hide the fact that Perkwood was, covertly, a Stati sham company. The Statis falsely portrayed Perkwood as an independent and fully operational company engaging in legitimate, arms-length transactions with TNG to supply the LPG Plant equipment. When Kazakhstan in 2015, more than a year after the Arbitration had concluded, discovered that this was false, the Statis consistently denied the truth, forcing Kazakhstan to go to great lengths to unravel the system they had created. More than a year later, only when the Statis and their lawyers were confronted with irrefutable evidence of Perkwood's true nature, were they compelled to admit that Perkwood was a Stati company[111] and that it had no employees or premises,

[109] The "*Panama Papers*" are a database of leaked legal and financial documents compiled and maintained by the International Consortium of Investigative Journalists. *See* https://www.icij.org/about/.
[110] Expert Report of Deloitte, January 12, 2017, ¶ 28(e) [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].
[111] Annex 3, ¶ 157.

and paid no taxes, salaries or rent.[112] Perkwood thus was shown to be a sham company that could not possibly have performed the management services that the Statis imputed to them, much less management services in the amount of $43 million as the Statis claimed.

85. The Statis' deceptive corporate structure in respect of their Kazakhstan operations was not limited to Perkwood and Azalia. Five other Stati shell companies – General Affinity Ltd. ("**General Affinity**"), Stadoil Ltd. ("**Stadoil**"), Hayden Intervest Ltd. ("**Hayden**"), Montvale Ltd. ("**Montvale**"),[113] and **Terra Raf** (*see* Annex 3, ¶ 113) – were central to the Statis' "*oil sales*" fraudulent scheme. General Affinity and Stadoil were shell companies registered in the U.K. and owned or controlled by the Statis and their associates. Montvale and Hayden were shell companies registered in the BVI and controlled by Anatolie and/or Gabriel Stati. Terra Raf is a Stati shell company registered in Gibraltar and owned in equal shares by Anatolie and Gabriel Stati.

86. The particulars of the "*oil sales*" scheme are set forth in Annex 3 and have been confirmed by PwC (*see supra*, ¶ 27, citing PwC IV (money laundering risks)). In this scheme, the Statis structured the sale of oil and gas from their Kazakh operating companies (TNG and KPM) in such a way as to unlawfully skim a substantial portion of the revenue from these sales into their own pockets.[114]

87. The end purchaser of the TNG and KPM oil and gas was Vitol – a legitimate, independent energy trader (*see supra*, ¶ 22). Instead of selling directly to Vitol, however, the Statis put in place a complicated trail of paper transactions in which, first, TNG and KPM sold the oil and gas to General Affinity and Stadoil – the two U.K. shell companies (*see supra*, ¶ 85); second, Stadoil and General Affinity sold the oil and gas to Terra Raf – the Gibraltar shell company, (*see infra*, ¶ 95), and from July 2007 forward, to Montvale – the BVI shell company (*see supra*, ¶ 85); and third, Terra Raf and Montvale sold the oil and gas to Vitol.

88. Instead of channeling all of the same proceeds back to KPM and TNG, however, the Statis diverted a substantial proportion of it ($286.1 million) to Hayden (the BVI shell company secretly controlled by the Statis). Specifically, Montvale paid a net amount of $158 million to Hayden, and Terra Raf paid a net amount of $128.1 million to Hayden.[115] The Statis then used these diverted monies for their own personal and often illicit purposes, including making payments to politicians, government officials, and persons connected to them in Kazakhstan, Moldova, Congo, South Sudan, and Northern Iraq (Kurdistan).[116]

89. This diversion of $286.1 million in revenue caused a liquidity crisis at the Statis' two Kazakh operating companies (TNG and KPM). In the Arbitration, the Statis falsely blamed Kazakhstan for this liquidity crisis and claimed resulting damages. Kazakhstan, which did not discover the unlawful skimming until mid-2019, almost six years after the Arbitration concluded, was thereby prevented from presenting the truth to the Tribunal. In

[112] Statis' Points of Defence, English Recognition Proceedings, September 26, 2017, ¶ 11; Annex 3, ¶ 82.
[113] PwC III (application of funds), ¶¶ 5.11-5.13.
[114] Annex 3, ¶ 111 *et seq.*
[115] PwC III (application of funds), ¶ 5.21.
[116] PwC IV (money laundering risks), ¶¶ 3.62-3.71.

consequence, the Tribunal accepted the Statis' false representations and awarded the sum of $497,685,101 in compensation to the Statis.[117]

90. An essential feature of this deceptive corporate structure was concealment of the fact that the true beneficiaries of the funds passing through these sham companies were Anatolie and Gabriel Stati themselves. To facilitate this, the Statis had their accountant and personal chauffeur act as directors of their companies. Thus, the "*E. Ozerov*" who signed the agreement whereby Perkwood purported to sell the LPG Plant equipment to TNG (the "**Perkwood Agreement**") under a general power of attorney, was Elena Ozerov, an accountant who worked in the "*accounting department*" of Ascom,[118] while the "*E. Kazumov*" who signed various annexes to the Perkwood Agreement on behalf of Perkwood and the Laren Transaction settlement agreement on behalf of Laren,[119] was Eldar Kasumov, Anatolie Stati's personal chauffeur.[120]

91. By means of this corporate structure, the Statis, upon entering the Kazakh market, put in place a system that enabled them to unlawfully enrich themselves at the expense of others. It is clear from the evidence known today that the Statis never intended to make a bona fide investment in Kazakhstan within the meaning of the ECT.

2. Fictitious Transactions and Sham Agreements

92. Within the framework of this deceptive corporate structure, the Statis performed a web of fictitious transactions whose purpose was to greatly inflate the value of their "*investments*" and unlawfully divert to themselves the funds they had procured from outside investors for financing the Kazakh operations of KPM and TNG.

93. The evidence that has been uncovered shows that the Statis engaged in three distinct sets of fraudulent transactions.

94. *First*, the Statis falsely claimed to have invested $245 million in equipment and services for construction of the LPG Plant, as the amount the Statis actually paid to Tractebel for the LPG Plant equipment was only $35 million. The details are set forth in Annex 3, and can be summarized as follows:

    (i) The Statis purchased three key pieces of LPG Plant equipment under a contract with Tractebel ("**Tractebel Contract**") for circa $35 million, but in routing the purchase first through a sham contract between Azalia and Perkwood (the "**Azalia Agreement**"), and then through another sham contract between Perkwood and TNG (the "**Perkwood Agreement**"), the Statis tripled the stated price to circa $93 million.[121]

[117] Award, ¶ 1859. The total sum awarded included a $10,444,899-offset for debts the Statis owed to Kazakhstan. *Id.*
[118] Lungu Deposition, 229:14-20.
[119] Annex 3, ¶¶ 131-134.
[120] Lungu Deposition, 256:2-5.
[121] Annex 3, ¶ 76-78.

(ii) The following chart directly compares the actual price of these three items of Tractebel equipment with the fictitious, inflated price at which the Statis purportedly "re-sold" this equipment to themselves through the sham Azalia and Perkwood Agreements, showing in the last column the amount by which the cost of each item was falsely inflated:[122]

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

(iii) In addition, the Statis billed for the same equipment twice, which added a further circa $22 million in false price inflation to the stated LPG Plant construction costs. The Statis did this by inserting into the Perkwood Agreement a new annex ("**Annex 14**") pursuant to which they made it appear that Perkwood was "selling" to TNG three items of equipment at a total cost of $21,884,989 whose purchase was already recorded in a different annex (Annex 2 to the Perkwood Agreement). In order to disguise this double-billing, the Statis used differently worded descriptions in Annex 14 as well as different prices.[123]

(iv) The Statis also included charges for equipment that did not exist.[124] Specifically, as of December 31, 2009, almost four years after the Tractebel Contract was executed, the Statis capitalized the amount of approximately $72,003,345 for LPG Plant equipment that, in fact, did not exist.[125] This falsely inflated the stated LPG Plant construction costs by the amount of $72,003,345.

[122] *Id.*, ¶ 87.
[123] *Id.*, ¶ 91; Expert Report of Ernst Kallweit of Tractebel, January 12, 2017, ¶¶ 63-90 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].
[124] Expert Report of Ernst Kallweit of Tractebel, Swedish Set-Aside Proceedings, June 2, 2016, ¶ 6.2.6.
[125] Expert Report of Thomas Gruhn of Deloitte, Swedish Set-Aside Proceedings, October 1, 2015, ¶¶ 21, 48.

(v) As shown, the Statis concealed this cost inflation by falsely presenting Perkwood as an independent English company, conducting arms-length transactions with the Stati company, TNG.

(vi) No less problematic is the so-called "*management fee*" in the amount of over $43 million that the Statis allege TNG paid to Perkwood under the Perkwood Agreement.[126] The Statis have provided no evidence to substantiate this, and the English High Court of Justice has found no evidence that Perkwood performed any management services at all:

> *An agreement has been disclosed which makes no mention of any management fee nor of any formula for calculating it. It appears from other evidence that there was a mark up on prices for equipment supplied to the LPG Plant. It appears therefore that this "fee" was simply paid at will.*[127]

(vii) Kazakhstan did not begin to uncover this scheme until well after the Arbitration had concluded when, in August 2015, Mr. Franjo Zaja, the Tractebel engineer personally involved in the construction of the LPG Plant, recognized Tractebel's own equipment in the sham Perkwood Agreement.[128]

95. *Second*, the Statis deployed the same *modus operandi* in connection with the above-described "oil sales" fraud (*see supra*, ¶ 85 *et seq.*). There, through another series of fictitious transactions involving five previously-mentioned Stati-owned companies – General Affinity Ltd., Stadoil, Montvale, Terra Raf and Hayden – the Statis managed to strip TNG and KPM of proceeds from the sale of oil and gas totaling around $268 million.[129] In so doing, the Statis manufactured an artificial liquidity crisis at TNG and KPM that, subsequently in the Arbitration, they falsely blamed on actions of Kazakhstan.

96. *Third*, the Statis misapplied the proceeds from the issuance of so-called notes that were issued by the Statis' special purpose vehicle Tristan Oil Ltd., registered in the BVI ("**Tristan**") and that were secured and guaranteed by the assets of TNG and KPM ("**Tristan Notes**") and diverted away from them to their companies registered in tax haven jurisdictions.[130]

97. *Fourth*, in June 2009, the Statis entered into what is referred to as the Laren Transaction (*see supra*, ¶ 23). In the Arbitration, the Statis claimed that they were forced by Kazakhstan's "*campaign of harassment*" to enter into this transaction, which they described as a loan on very unfavorable, indeed "*horrendous terms*" with Laren (*see supra*, ¶ 23), which the Statis referred to as a "*loan shark*." The Tribunal accepted these assertions,

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[126] Annex 3, ¶ 95 *et seq.*
[127] Reasons for Judgment, August 29, 2014, ¶ 39 [*Vitol FSU BV v. Ascom Group SA*, In the High Court of Justice, Queen's Bench Division, Commercial Court, 2014 FOLIO 406].
[128] Annex 3, ¶ 81.
[129] *Id.*, ¶ 111 *et seq.*
[130] *Id.*, Part IV.C.2.

finding that the Laren Transaction, "*with its onerous terms*," was arranged and necessary because of the "*Respondent's actions*."[131]

98. In fact, as Kazakhstan discovered in June 2018, more than four years after the Arbitration ended, Laren was yet another company secretly formed by the Statis, and the Statis themselves dictated the terms of the Laren Transaction.[132] In short, the "*loan shark*" that allegedly victimized the Statis was itself a Stati company. Not only this, but the Statis voluntarily decided not to proceed with a credit facility that was offered by a recognized financial institution (*i.e.*, Credit Suisse) on standard commercial terms and instead put in place the supposed "*horrendous*" terms with Laren for their own covert financial benefit.[133]

99. All of the above-referenced schemes (*i.e.*, oil sales, Tristan Notes, and Laren Transaction) were presented to the Gibraltar Supreme Court by the liquidator of TNG in his action against some of the Statis (*i.e.*, Terra Raf, Anatolie and Gabriel Stati, and Tristan).[134] The court allowed for the action to proceed vis-à-vis the Statis, finding that there is "*a serious issue to be tried*" with "*real prospects of success*."[135]

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100. On the basis of these facts and the documents reviewed, it appears that the Statis made their apparent "*investment*" in Kazakhstan to unlawfully enrich themselves at the expense of third parties, including in particular their own investors and Kazakhstan itself.

3. Falsified Financial Statements

101. The Statis purported to prepare their Financial Statements in accordance with the IFRS (International Financial Reporting Standards). However, in fact, they materially falsified these statements by (a) including the inflated LPG Plant construction costs; (b) concealing the fact that Perkwood was in fact a Stati company; and (c) concealing that all transactions with Perkwood were related-party transactions. Doing so defeats the very purpose of the IFRS, which is to ensure through, among other things, the truthful disclosure of related parties and related-party transactions, that all expenses recorded on a company's balance sheet reflect fair and honest expenditures. The Statis concealed the fact that Perkwood was a related company and that their transactions with Perkwood were related-party transactions precisely in order to keep KPMG unaware of the fact that the Azalia and Perkwood Agreements were shams and enabled the construction costs of the LPG Plant to be grossly inflated.

[131] Award, ¶ 1416.
[132] Annex 3, Part IV.D.
[133] *Id.*, ¶¶ 131-134.
[134] Judgement of the Supreme Court of Gibraltar, November 27, 2020 [*Tolkynneftegaz LLP, Orynbasar Kybygul v. Terra Raf Trans Traiding Ltd., Anatolie Stati, Gabriel Stati, Tristan Oil Limited*, in the Supreme Court of Gibraltar, 2020/ORD/072].
[135] *Id.*, ¶ 277.

4. Unlawfully Obtained Audit Reports

102. In order to legitimize the falsified Financial Statements, and thereby exploit them in their transactions, the Statis engaged auditors from a reputable accounting firm, KPMG, to review and audit them.[136] It is clear from the evidence that the Statis made repeated material misstatements to KPMG in connection with their audits. Truthful disclosure of related parties and related party transactions is important because it serves to ensure that all expenses recorded on a company's balance sheet reflect fair and honest expenditures. Here, in particular, the Statis falsified the representation letters they provided to KPMG by not disclosing either that Perkwood was a Stati company or that all transactions between Perkwood and TNG were related-party transactions. It is on the basis of these misrepresentations that KPMG issued Audit Reports stating that the Financial Statements were materially correct when in fact they were materially false.

103. The Statis also failed to disclose a number of other material facts to KPMG, including:

    (i) that Perkwood received from TNG the so-called "*management fee of USD 43,852,108*;"

    (ii) that "*Perkwood was not an operating entity submitting dormant accounts and the actual supplier of the equipment for the LPG Plant was [Tractebel] and costs for such equipment are significantly different from the corresponding cost charged to TNG by Perkwood*."[137]

104. Years later, in April 2019, Artur Lungu, the former CFO of Ascom, testified in a deposition under oath in the United States (*see supra*, ¶ 22(v)) that KPMG had in fact been provided with materially false information by Mr. Anatolie Stati. This testimony, KPMG's own independent assessment of the evidence and the Statis' repeated failure to respond to KPMG's questions regarding the matter, caused KPMG in August 2019 to invalidate all of their Audit Reports for the Financial Statements (*see infra*, ¶¶ 139–147).[138]

105. It is therefore, in my view, evident that the Statis obtained the Audit Reports by way of deceit.

106. In advance of the Arbitration, the Statis used the falsified Financial Statements and the corresponding Audit Reports in multiple ways. Two particularly relevant instances should be noted.

107. *First*, the Statis distributed the falsified Financial Statements and unlawfully obtained Audit Reports to their outside investors who purchased the Tristan Notes ("**Noteholders**").[139] The details are as follows:

[136] Annex 3, ¶ 25.
[137] Letter from KPMG Audit LLC to A. Stati, February 15, 2016.
[138] Annex 3, ¶¶ 68-68.
[139] *Id.*, Part IV.C.

(i) As noted in Annex 3, the Statis financed their Kazakh operations in part by selling Tristan Notes[140] to outside investors, the Noteholders,[141] through Tristan, their special-purpose BVI entity (*see supra*, ¶ 96).[142] This investment was governed by an Indenture entered into between Tristan and Wells Fargo Bank, N.A. on December 20, 2006.[143] The stated purpose of the Tristan Notes was to finance the Kazakh operations of those companies.[144] Tristan issued Notes in an aggregate principal amount of $300 million on or about December 2006 and an additional principal amount of $120 million on or about June 7, 2007.[145] The Tristan Notes were guaranteed by KPM and TNG, and were signed by Anatolie Stati on behalf of KPM and TNG.[146]

(ii) The Indenture required that the Statis, among other things, furnish the Noteholders with the Financial Statements on a quarterly and annual basis, as well as audit reports by a certified independent accountant.[147] In these reports, the auditors were required to state that "*in making the examination necessary for certification of such financial statements, nothing has come to their attention that would lead them to believe that [Tristan] has violated any provisions of [the Indenture] or, if any such violation has occurred, specifying the nature and period of existence thereof.*"[148] These provisions included the Indenture's restrictions on transactions with affiliates.

(iii) To comply with the terms of the Indenture, it thus was necessary for the Financial Statements to be audited, as well as true and accurate. However, what the Statis

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[140] *Id.*, ¶ 117; PwC III (application of funds), ¶ 4.5.

[141] PwC III (application of funds), ¶ 3.2 *et seq*.

[142] A number of investors purchased the Tristan Notes. These included Argo Capital Investors Fund SPC, Argo Distressed Credit Fund, Black River Emerging Markets Fund Ltd., Black River Emerging Markets Credit Fund Ltd., Black River EMCO Master Fund, Ltd., BlueBay Multi-Strategy (Master) Fund Limited, BlueBay Specialised Funds: Emerging Market Opportunity Fund (Master), CarVal CVI GVF (Lux) Master S.a.r.l., Deutsche Bank AG London, Goldman Sachs International, Gramercy Funds Management LLC, Latin America Recovery Fund LLC, Outrider Management LLC, Standard Americas, Inc., and Standard Bank Plc. *See Republic of Kazakhstan v. Stati et al*., No. 17-cv-02067 (D.D.C. 2017), ECF 1, October 5, 2017, ¶ 45.

[143] Indenture between Tristan Oil Ltd, Kazpolmunay LLP, and Tolknneftegaz LLP, December 20, 2006 ("**Indenture**").

[144] Tristan Notes Offering Circular, November 30, 2006, at 1 ("*The net proceeds from the sale of the Notes will be used to repay certain existing indebtedness of TNG, make a shareholder distribution and for working capital and general corporate purposes of KPM and TNG*.").

[145] Statis' First Post-Hearing Brief, ECT Arbitration, April 8, 2013, ¶ 75.

[146] Indenture, §11.01(a).

[147] *Id.*, § 4.03.

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

provided the Tristan Noteholders were the falsified Financial Statements and the unlawfully obtained Audit Reports.[149]

108. Second, the Statis used the falsified Financial Statements and the corresponding Audit Reports to obtain inflated bids for their Kazakh operations, bids which the Statis then presented to the Arbitral Tribunal to obtain an award of $199 million for the LPG Plant, as detailed below. The details, set forth in Annex 3, are as follows:

(i) In June 2008, the Statis engaged in an operation for the stated purpose of selling their Kazakh operations. Through a financial advisor, Renaissance Capital ("**Ren Cap**"), the Statis distributed a "teaser" offer to potential purchasers throughout the United States, Europe, the Middle East, and Asia. The teaser offer stated that $160 million had been spent on the LPG Plant, and a total of approximately $230 million in capital expenditures was expected through 2008.[150] These figures incorporated the falsely inflated costs identified above (*see supra*, ¶ 94 *et seq*.).

(ii) Shortly thereafter, Ren Cap, on behalf of the Statis, sent interested parties a Project Zenith Confidential Information Memorandum (the "**Information Memorandum**"), which contained key financial information concerning the Statis' Kazakh operations. It too referred to, and relied upon, the false Financial Statements and the Audit Reports, including the inflated LPG Plant construction costs. The Information Memorandum falsely stated that as of July 1, 2008, TNG had invested $193 million in construction of the LPG Plant.[151]

(iii) One of the eight prospective purchasers of the Statis' operations was the stated-owned company, KMG, identified earlier (*see supra*, ¶ 18). The KMG Indicative Offer, dated September 25, 2008, specified that its bid on the LPG Plant was based on the Statis' stated construction costs, and on the assumption that these costs were accurate.[152] The Statis, therefore, knew that the KMG Indicative Offer was a direct product of their falsified Financial Statements and the Audit Reports.[153]

B. Phase 2: The Statis' Conduct during the Arbitration

109. In the Arbitration, initiated on July 26, 2010, the Statis knowingly furnished the Tribunal the false and deceptive information identified herein, and expressly attested to its truth and accuracy. They relied on that information in every form of submission that they proffered to the Tribunal throughout the Arbitration. These include memorials, witness statements, expert reports, oral argument and post-hearing briefs.

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[149] The audited Financial Statements for the years 2007, 2008, and 2009 reported as costs of construction $142,530,039, $223,165,685, and $248,084,113, respectively.
[150] Annex 3, ¶ 102.
[151] *Id.*, ¶ 103.
[152] *Id.*, ¶ 104.
[153] Approved Judgment of Justice Knowles, June 6, 2017, ¶¶ 41-44 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

110. On the very first day of the Arbitration hearings, the Statis affirmed the following:

> *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.*[154]

111. Just as egregiously, the Statis asserted to the Tribunal that the KMG Indicative Offer was a neutral and fair basis on which to value the LPG Plant, despite knowing that KMG's $199-million valuation was a direct product of the falsified LPG Plant investment costs set forth in the Information Memorandum and, by extension, the Financial Statements. For example, the Statis asserted:

> *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.*[155]

112. The Statis also violated the Tribunal's order to produce all documents in their possession, custody or control "*specifying the cost of construction and assembly operations, start-up and adjustment works in respect of [the LPG Plant's] basic facilities*," by not producing the contracts with Perkwood, Azalia and Tractebel. These documents were plainly covered by that order, but the Statis produced none of them.[156]

113. Instead, the Statis produced documents that they themselves knew to be false, including the audited Financial Statements, the Information Memorandum, the Project Zenith "*teaser*" letter, the KPMG Vendor Due Diligence Report,[157] and the KMG Indicative Offer. These are the very documents on which the Statis' expert in the Arbitration, FTI Consulting, based its damages reports. But those reports were no more valid than the sources on which they were based. Because Kazakhstan had no basis to distrust the

[154] Hearing on Jurisdiction and Liability, ECT Arbitration, October 1, 2012, Day 1, Opening Statement on Jurisdiction by Kevin Mohr, Transcript of the Hearing, 45.
[155] Statis' Reply Memorial on Quantum, ECT Arbitration, May 28, 2012, ¶ 66.
[156] Annex II to the Procedural Order 2 on Production of Documents, February 3, 2012, Kazakhstan Document Production Request No. 108.
[157] Annex 3, ¶¶ 106-110. The Statis intended to distribute the KPMG Vendor Due Diligence Report ("**VDD Report**") to prospective purchasers during the 2008 sale of 100% of TNG, KPM and Tristan. Documents and correspondence discovered by Kazakhstan in 2018 revealed that early drafts of the VDD Report identified Perkwood as a Stati company. However, Artur Lungu confirmed in his April 2019 deposition that he requested that KPMG change all such references to say (falsely that Perkwood was an independent third party, which KPMG did. Despite thus falsifying the final VDD Report, the Statis submitted it in the Arbitration and post-Award Proceedings.

accuracy of the evidence presented by the Statis in the Arbitration, its experts likewise based their reports on the Statis' falsified material.

114. As a result of the Statis' deception and concealment of vital material, the Tribunal ultimately awarded the Statis damages on the basis of the KMG Indicative Offer that was a direct product of the Statis' fraud.[158] The Statis knowingly misled the Tribunal, without either the Tribunal or Kazakhstan having any basis on which to doubt, much less refute, the Statis' asserted valuation.[159]

115. While the impact of the Statis' dishonesty on the Tribunal's damages award is evident, its impact on the Tribunal's assessment of Kazakhstan's liability under the ECT cannot be ignored either. The Tribunal accepted the Statis' assertions that Kazakhstan had violated the ECT's FET standard by pursuing a string of harassment measures against TNG and KPM, which caused the financial distress of these companies and which, in turn, finally led Kazakhstan to terminate the companies' contractual oil and gas exploitation rights. The evidence supporting liability came chiefly from testimony of Anatolie Stati and Artur Lungu which, in both cases, has now been shown to have been profoundly untruthful. It is reasonable to assume that had the falsity of this testimony on matters relating to damages been known, the Tribunal would have seriously questioned the trustworthiness of the witnesses' testimony on liability as well, notably the proposition that Kazakhstan engaged in a "*campaign of harassment*" against the Statis.[160]

116. It is also now known from the newly discovered evidence[161] that the Statis deceived the Tribunal on the reasons for TNG's and KPM's financial distress. The evidence shows that, contrary to what they submitted to the Tribunal, the Statis had themselves stripped hundreds of millions of dollars from their Kazakh operating companies through fictitious transactions relating to oil sales and proceeds from the issuance of bonds (the so-called Tristan Notes, *see supra*, ¶ 96).[162]

117. Moreover, the Statis asserted that they could not obtain financing on commercial terms because of the actions taken by Kazakhstan, which had significantly worsened their economic situation.[163] The Tribunal accepted the Statis' assertion in its finding on Kazakhstan's liability.[164] The documents discovered in 2018 clearly show that the Statis

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[158] Annex 3, ¶¶ 29.

[159] C. Schreuer in his Legal Opinion of January 21, 2020, confirmed the same at ¶¶ 69 and 72:

> *In investment arbitration, the submission of false or fraudulent evidence by claimants has invariably led to the dismissal of claims […] The evidence that has now become available, including the KPMG Correspondence and the false Financial Statements, clearly demonstrates the Stati Parties' illicit conduct and bad faith. The availability of this evidence to the Arbitral Tribunal would have been critical for the determination of its jurisdiction, the admissibility of the Stati Parties' claims and the liability of Kazakhstan.*

[160] Annex 3, ¶ 27.

[161] *Id.*, Part III.

[162] *Id.*, Parts IV.B, IV.C.

[163] Award, ¶ 1334.

[164] *Id.*, ¶ 1398.

had in fact decided on their own not to go forward with financing from a reputable financial institution (Credit Suisse) due to their own objections to its conditions.[165]

118. The Statis also alleged that because of Kazakhstan's conduct they had to agree to the "*horrendous*" terms of the so-called Laren Transaction (*see supra*, ¶ 23).[166] The terms of the transaction were described in the witness statements of Anatolie Stati and Artur Lungu,[167] as well as in the exhibited documents.[168] It has now been established on the basis of direct evidence that these terms were the Statis' own creation, and due in no measure to anything done by Kazakhstan.[169] Thus, the Statis deceived the Tribunal on causation as well.

119. In other words, had the Tribunal known of the true facts and not been deceived by the Statis, there would be no basis for it to find a causal link between the financial distress and Kazakhstan's conduct.

120. Furthermore, apart from proving the Statis' assertions to be intentionally false, the new evidence would have put Kazakhstan's defense in a completely different light. Here are, in my opinion, the most relevant statements made by Kazakhstan during the Arbitration that would have likely not been disregarded by the Tribunal if Kazakhstan had known of the evidence and provided it to the Tribunal:

> *Since this Arbitration was commenced, the Republic has learned rather more about KPM and TNG and Mr Stati, though perhaps not enough fully to explain the decline of KPM and TNG. However, what it has learned has re-inforced its view that fundamentally the Claimants are seeking to use international arbitration to shield them from the consequences of their wrongdoing in Kazakhstan and perhaps from matters outside Kazakhstan as well.*[170]
>
> *In the Republic's respectful submission, the Tribunal should not allow its power to be abused either to protect the Claimants from the Republic's legitimate reaction to KPM and TNG's illegal conduct or from the apparent wider troubles of Mr Stati's buiness [sic] empire in which the Republic plays no part.*[171]

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[165] Annex 3, ¶ 134.
[166] *Id.*, ¶¶ 133.
[167] Second Witness Statement of Anatolie Stati, ECT Arbitration, May 7, 2012, ¶ 43; Second Witness Statement of Artur Lungu, ECT Arbitration, May 5, 2012, ¶ 7.
[168] Facility Agreement for Laren Holdings LTD arranged by Renaissance Advisory Services Limited with Stichting Security Trustee, June 11, 2009 (submitted by the Statis during the ECT Arbitration as Exhibit C-733); Note Transfer Agreement between Laren Holdings LTD and Avelade Holdings LTD, Renaissance Securities (Cyprus) Limited, GLG Atlas Macro Fund, GLG Atlas Value & Recovery Fund, Sputnik Group LTD, Vision Advisors III LTD, June 15, 2009 (submitted by the Statis during the ECT Arbitration as Exhibit C-734).
[169] Annex 3, Part IV.
[170] Award, ¶ 4.
[171] *Id.*

> *Claimants, as foreign subsoil use contractors in Kazakhstan, were not respecting the laws that Kazakhstan had enacted in order to safeguard its interests and ensure its subsoil use policies. The Republic's audits, inspections and investigations were the lawful reaction to Claimants' illegal conduct. This is not harassment but the legitimate measures any state in the position of the Republic would have taken.*[172]

121. With the newly discovered evidence of the Statis' fraud, it is clear that the above statements were true, namely that (a) the Republic played no part in the decline of the Statis' "business," (b) the Statis "*were not respecting the laws*" of Kazakhstan, and (c) Kazakhstan had adopted "*legitimate measures any state in the position of the Republic would have taken*." In my view, there is no reason why the Tribunal would not have accepted these defenses had the Statis not misled it on the true course of events.

122. The Tribunal also would have seen in an entirely different light the Statis' argument that they were not afforded "fair and equitable treatment" as per Article 10(1) of the ECT,[173] had it known that the Statis had (a) falsified the Financial Statements (*see supra*, ¶ 102), (b) deceived their statutory auditors (*see supra*, ¶¶ 102 *et seq.*), (c) submitted false evidence to the Tribunal (s*ee supra*, ¶¶ 109 *et seq.*),[174] (d) actively misled the Tribunal on a variety of issues (*see supra*, ¶ 109 *et seq.*), (e) diverted hundreds of millions of dollars out of the Kazakh operations, thereby self-inflicting the financial distress on the companies (*see supra*, ¶¶ 92–100), and (f) made suspicious and potentially corrupt payments in the amounts of millions to foreign public officials out of the proceeds of the Kazakh operations.[175]

123. The Statis' misconduct thus thoroughly compromised the legitimacy of the Arbitration and resulting Award, both as to liability and damages.

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124. In sum, the pattern of the Statis' conduct is clear. The kind of deception and fraud that the Statis perpetrated in their underlying business operations in Kazakhstan did not stop there. It continued throughout the arbitral proceedings before the Tribunal, with outcome-determinative consequences.

125. The Statis' general pattern of deceptive procedural conduct was confirmed by the English High Court of Justice in 2014:

> *I am satisfied on the basis of all the material put before me that Mr Stati not only has a propensity to move assets around his group companies as he thinks fit but he and Ascom has a propensity to give information to the tribunal or*

[172] *Id.*
[173] *Id.*, ¶¶ 891-919.
[174] Annex 3, Part IV.
[175] *Id.*, ¶ 52.

the court about its assets according to what he or it thinks suits its interests at the time.[176]

C. Phase 3: The Statis' Post-Arbitration Conduct before National Courts

126. The evidence shows that the Statis' pattern of fraud and deception continued past the arbitration phase of this case and that they had no compunctions about deceiving the national courts as well in the post-Award Proceedings that started in early 2014.

127. Not only have the Statis presented to those courts the same body of false information that they had laid before the Tribunal, but on the basis of information that only began to emerge between mid-2015 and late 2019, *i.e.*, well after the Tribunal issued its Award in December 2013, it is clear that the Statis presented the courts with fresh misinformation as well. This has come to light only piecemeal, even as the national court cases were proceeding, and the full truth is likely still not known. The Statis' own testimony, the testimony of their witnesses and experts, and the legal submissions made on their behalf contaminated the court proceedings just as they had the arbitral proceedings that preceded them.

128. When the new evidence began to emerge, the Statis systematically sabotaged any attempt by Kazakhstan to have that evidence brought to the courts' attention so that they could be truthfully and fully informed. These details are set forth in Annex 3, and summarized below (*infra*, ¶ 131 *et seq.*).

129. The Statis added a further layer of misrepresentation by deploying the decision in the Swedish Set-Aside Proceedings (*see supra*, ¶ 25) to mislead the Italian, U.S., Belgian, Dutch, and Luxembourg courts before which the Award later came for enforcement. They not only adduced the judgment of the Svea Court of Appeal rejecting Kazakhstan's set-aside application, knowing that the court had issued its judgment on the basis of the intentionally incomplete and untruthful record the Statis had presented to it, but they also mischaracterized the judgment itself. In addition, they falsely characterized the Svea Court of Appeal as having decided the merits of Kazakhstan's fraud allegations, knowing that the court had not done so – all in order to create the appearance that another court had already scrutinized the evidence of fraud and rejected it, thereby causing later courts to consider the matter settled. Going in this vein from one court to the other, the Statis created the illusion of a broad judicial consensus in favor of the legitimacy of the Award.

130. The pattern of conduct revealed by the facts set out in Annex 3 includes:

(i) deliberate procedural maneuvers and systematic suppression of evidence;

(ii) systematic and deliberate misrepresentations to the courts; and

(iii) systematic misrepresentation of prior court decisions.

[176] Reasons for Judgment, August 29, 2014, ¶ 43 [*Vitol FSU BV v. Ascom Group SA*, In the High Court of Justice, Queen's Bench Division, Commercial Court, 2014 FOLIO 406].

1. Deliberate Procedural Maneuvers and Systematic Suppression of Evidence

131. From the facts set out in Annex 3, there emerges a clear pattern.[177]

132. *First*, the Statis deliberately avoided and continue to avoid engaging on the substance of Kazakhstan's fraud allegations, instead taking refuge in procedural maneuvers and shifting narratives, all to disable the courts from examining those allegations on the merits. This started with the Statis' opposition to Kazakhstan's request for § 1782 discovery. When, following issuance of the Award, Kazakhstan urged the Svea Court of Appeal and later the English High Court to admit the new evidence, the Statis strongly opposed the request.[178]

133. Other instances abound. The Statis opposed the admission of any evidence of fraud in the enforcement action in U.S. court.[179] When in October 2019 Kazakhstan obtained the critical correspondence between KPMG and the Statis that took place in 2016 (the "**2016 KPMG Evidence**") and in 2019 (the "**2019 KPMG Evidence**"), in which KPMG seriously questioned the accuracy of the represented financial information (collectively, the "**New KPMG Evidence**") (*see supra*, ¶¶ 22(vii)–22(viii)), and attempted to bring it to the attention of the courts in Belgium and Luxembourg, the Statis objected. Because the proceedings were so far advanced, this prevented the evidence from being considered by those courts.[180] In the Netherlands, Kazakhstan repeatedly requested the Statis to correct the record and to inform the court of the New KPMG Evidence that had become known to Kazakhstan only after the hearing.[181] Kazakhstan was prevented by strict rules of Dutch procedural law from informing the court itself. Being fully aware of this limitation, the Statis refused to address the court. As a result, the Dutch court issued an exequatur being unaware of most of the New KPMG Evidence and how materially it affected the validity of the Award.[182]

134. A conspicuous example was the Statis' conduct in the English High Court, which, after a two-day evidentiary hearing, determined that the Award was *prima facie* obtained by fraud and ordered a full trial on the matter (*see supra*, ¶ 26). Faced with that ruling, the Statis not only initiated proceedings without delay in multiple other jurisdictions where they envisaged better results, but also sought to abandon the English proceedings altogether, basing that request on the spurious ground that they lacked the resources to proceed to a trial of Kazakhstan's fraud claim. They transparently did so to avoid a full trial on the fraud, which would very likely have produced a decision in favor of Kazakhstan.[183] The maneuver

[177] Annex 3, ¶ 73.
[178] *Id.*, ¶¶ 151.
[179] *Id.*, ¶ 208.
[180] *Id.*, ¶¶ 239 *et seq.*, 263 *et seq.*
[181] *Id.*, ¶ 228-229.
[182] *Id.*, ¶¶ 230-232.
[183] Justice Knowles of the English High Court held, "*[T]he real reason for the notice of discontinuance is that the [Statis] do not wish to take the risk that the trial may lead to findings against them and in favour of [Kazakhstan]*." Decision of Mr. Justice Knowles, High Court of Justice of England and Wales, May 11, 2018, ¶ 25 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

benefited the Statis. In *Italy*, the hearing took about twenty minutes, and in the *United States*, no hearing on the merits of the fraud was held at all.[184]

135. *Second,* the Statis systematically raised allegations without any evidentiary support, while at the same time failing to rebut the evidence, in the form of witness testimony, expert reports, and documentation, adduced by Kazakhstan. This included evidence from Deloitte on the economic impact of the Statis' fraud and first-hand testimony of Mr. Zaja of Tractebel concerning construction of the LPG Plant.[185] As it discovered new evidence, Kazakhstan laid that evidence before fact witnesses and experts for independent scrutiny and assessment; their reports and testimony all confirmed the underlying fraud and its impact on the Award.[186] In response, the Statis provided no rebuttal evidence, only unsupported assertions that themselves were false – *e.g.*, the false assertion that the difference between the real cost of the LPG Plant equipment ($35 million) and their claimed cost for the LPG Plant ($245 million) was due to transport, insurance and storage costs (*see infra*, ¶ 157(iv)). When this was disproved, the Statis sought to attribute the difference to "*transfer pricing*."[187] Thus, the Statis never attempted to rebut (a) PwC's opinion on the false Financial Statements (*see supra*, ¶ 27), (b) Professor Christoph Schreuer's opinion that the evidence of the Statis' fraud "*would have been critical for the determination of [the Tribunal's] jurisdiction, the admissibility of the Stati Parties' claims and the liability of Kazakhstan*,"[188] (*see supra*, ¶ 27) or (c) Stefan Cassella's opinion that the Statis "*could be prosecuted criminally in Latvia for money laundering offenses involving the proceeds of the Tristan Notes scheme, the Sales of Oil and Gas scheme, and the Perkwood scheme, and in the United States and in other jurisdictions for conducting any future financial transaction involving the Award from the Tribunal in the ECT Arbitration*,"[189] (*see supra*, ¶ 27).

136. Notably, the Statis never offered testimony by Artur Lungu, their former CFO, in any of the post-Award Proceedings. Rather, he was compelled by Kazakhstan to give testimony in a deposition in the U.S.,[190] and therein confessed that the Statis made material misrepresentations in the Financial Statements and concealed their falsity from KPMG during their audits.[191]

137. *Third*, the Statis purposefully seized courts in numerous jurisdictions, using their specific procedural rules to their advantage and playing one against the other. For example, when the English High Court found after a two-day evidentiary hearing that the Award was *prima facie* obtained by fraud, and ordered a full trial on the fraud, the Statis did two things. First, they embarked on a campaign of initiating judicial proceedings in other jurisdictions:

[184] Annex 3, ¶¶ 209, 220.
[185] *Id.*, ¶¶ 71-81.
[186] *See id.*, ¶¶ 71-72.
[187] *Id.*, ¶ 223(ii).
[188] Legal Opinion of Professor C. Schreuer, January 21, 2020, ¶ 72.
[189] Legal Opinion of Stefan Cassella of Streamhouse AG, July 30, 2020, 20-21.
[190] *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).
[191] Annex 3, ¶ 48.

Sweden, *Luxembourg*, *Italy*, *Belgium* and the *Netherlands*.[192] Second, as discussed (*supra*, ¶ 134) the Statis then abandoned the English enforcement proceedings on spurious grounds.[193] It is apparent that this was a maneuver to avoid the full trial on the fraud, which would likely have led to a decision on the merits in favor of Kazakhstan, and instead turn to the courts of other countries having procedural rules that entailed a substantially lesser degree of scrutiny. Using multiple courts in multiple jurisdictions also allowed the Statis to distract one court's attention from exercising its own scrutiny of the Award by falsely claiming that scrutiny had already been performed by another court, which was not the case.

138. *Finally*, the Statis engaged in the direct and systematic suppression of new evidence, with the result that that evidence has, at least up to now, escaped attention by the courts. This is evidence that would have revealed the scale of the Statis' deception and its impact on the Arbitration and post-Award Proceedings thus far.

139. The clearest example of this relates to the New KPMG Evidence. As described above (*see supra*, ¶ 133) and in Annex 3,[194] Kazakhstan learned in October 2019 that more than three years prior, in February 2016 (when the Set-Aside Proceedings were still pending), KPMG had written to the Statis and seriously questioned the truthfulness of the Statis' Financial Statements.[195] In this correspondence, KPMG notified the Statis that it had recently become aware of certain facts that called into question the legitimacy of its prior Audit Reports, notably:

    (i) that there were serious doubts that the recorded LPG Plant construction costs were legitimate;

    (ii) that serious doubts surrounded the $44 million management fee that TNG allegedly paid to Perkwood which served to elevate the apparent total construction cost of the LPG Plant to the circa $245 million recorded in TNG's financial statements for the year ending December 31, 2009;[196]

    (iii) that Perkwood was not the "*actual supplier of the equipment for the LPG Plant*," but instead was a dormant company that was passing through costs that were "*significantly different from the corresponding cost*" charged by the actual supplier of the equipment, *i.e.*, Tractebel; and

[192] *Id.*, ¶ 140.
[193] *Id.*, ¶ 138.
[194] *Id.*, ¶ 58.
[195] Letter from KPMG Audit LLC to A. Stati, February 15, 2016. KPMG stated that it wrote this letter after being provided "*supporting evidence*" by Kazakhstan's outside legal counsel, the law firm of Norton Rose Fulbright LLP ("Norton Rose"). KPMG did not inform Norton Rose that it had contacted the Statis in 2016.
[196] *Id.*

(iv) that, while the Statis had presented Perkwood as an independent third party, Perkwood was in fact fully a Stati company.[197]

140. In light of the facts that had come to its attention and the suspicions that it had acquired, KPMG demanded that the Statis provide "*explanations and supporting evidence*" in response to a series of six questions regarding these issues.[198] KPMG also put the Statis on notice of the provisions of International Accounting Standards ("**IAS**") 580 – "*Written Representations*" – and their statement that "*written representations by management and by those charged with governance are a necessary part of audit evidence required in connection with an audit*."[199]

141. Being aware of the fact that Kazakhstan had initiated proceedings to set aside the Award before the Svea Court of Appeal, KPMG closed by warning the Statis that if it did not receive the requested "*explanations or additional representations*," it reserved its rights to "*seek to prevent future reliance on [its] audit reports and in particular withdraw [its] audit reports and inform about such withdrawal all parties who are still, in [its] view, relying on these reports, including but not limited, to [the] Ministry of Justice of the Republic of Kazakhstan and the Svea Court of Appeals*."[200]

142. The Statis never answered KPMG's questions and instead issued a threat if KPMG proceeded to withdraw its Audit Reports:

> *[W]e expressly reserve the right to hold your firm accountable should you choose not to co-operate with us and/or proceed to withdraw your audit reports.*[201]

143. Based on this correspondence, the Statis could have had no doubt that KPMG did not believe that its Audit Reports were based on a true and accurate basis.

144. The Statis received KPMG's February 15, 2016 letter while the Set-Aside Proceedings were ongoing (*see supra*, ¶ 19), but instead of disclosing it to the Svea Court of Appeal or to Kazakhstan,[202] they continued to rely on the Audit Reports as evidence of the veracity of their Financial Statements, stating for example:

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[197] PwC II (KPMG correspondence) makes a finding that identifying related parties and related-party transactions is important due to the heightened risk that transactions between related parties may not reflect normal market conditions. In view of the risk that transactions with related parties can seriously distort the profit or loss and financial position of an entity, it is essential that company management truthfully identify to its auditors all related parties and related-party transactions. *See also* PwC I (financial statements), ¶¶ 29-30.
[198] Letter from KPMG Audit LLC to A. Stati, February 15, 2016.
[199] *Id.*
[200] *Id*.
[201] Letter from A. Stati to KPMG Audit LLC, February 26, 2016, 2.
[202] Annex 3, ¶¶ 150-153.

> *During the review of the annual financial accounts, TNG's auditors, KPMG, had full access to all accounting records. KPMG was aware of Perkwood's function.*[203]

145. Making matters worse, the Statis then repeated this knowingly false assertion in courts in the enforcement actions they brought in *England*, the *United States*, *Belgium*, the *Netherlands*, *Luxembourg* and *Italy*, *i.e.*, in *every* jurisdiction in which they sought enforcement of the Award. Some of those assertions follow:

> *In the Swedish Court proceedings, Petitioners denied that any false or misleading information was contained within the consolidated annual reports of Tristan Oil, KPM and TNG, and demonstrated to the Swedish Court that the Perkwood Agreement was not a sham agreement – as the ROK alleged – and that, contrary to the ROK's assertion that TNG misled its own auditors (KPMG) during their audit of the company, KPMG had full access to all of the company's records and was aware of Perkwood's role in the LPG plant. Swedish Judgment (Doc. No. 42-2) at 22-23.*[204]
>
> *[…]*
>
> *[…] During the examination of the annual financial accounts, TNG's auditors, KPMG, had full access to all the accounting records. KPMG was aware of Perkwood's function. During the arbitration the Investors submitted several documents in which Perkwood's role in the LPG Plant project was described.*[205]
>
> *[…]*
>
> *It should be noted in passing that the seriousness of the allegations ("forgery") that Kazakhstan supports (Kazakhstan's conclusions of 30 November 2018, §349) amounts to seriously questioning the role played by KPMG, which would have been, to follow Kazakhstan, manipulated from beginning to end by the Stati without piping a word. However, the Stati are not aware of any action that Kazakhstan has brought against KPMG based on these allegations*.[206]

146. In *Luxembourg*, the Statis issued perhaps the most egregious version of this statement:

> *TNG […] was also independently audited by KPMG, who had access to all of the accounting records concerning Perkwood. KPMG never issued the*

[203] Statis' Comments on the Court's Recitals, Swedish Set-Aside Proceedings, May 18, 2016.
[204] Statis' Response to Kazakhstan's Notice of Supplemental Authority at 7, U.S. proceedings, June 28, 2017.
[205] Statis' Motion after Interim Judgment, Dutch Exequatur Proceedings, April 16, 2019, ¶ 221.
[206] Statis' Second Submission, Belgian Exequatur Proceedings, January 31, 2019, ¶ 252.

slightest remark regarding the existence of Perkwood or the incriminating contract.[207]

147. Three years later – when KPMG finally withdrew its Audit Reports in August 2019 – the Statis' not only repeated the pattern of suppressing the relevant evidence and mischaracterizing it in the courts, but also refused to correct the record in all the court proceedings in which they were relying on the Audit Reports in defiance of KPMG's express direction to do so.[208] The relevant timeline is set forth above (*see supra*, ¶ 22(vii)–22(viii)) and in Annex 3,[209] but warrants a brief recap. On August 21, 2019, KPMG positively concluded that the Statis had made material misrepresentations to KPMG and in the Financial Statements, and notified Kazakhstan that in consequence it had withdrawn all of its Audit Reports for the Financial Statements.[210] In this notice to Kazakhstan, KPMG stated that it had commanded the Statis (a) to inform all parties to whom they had given the Audit Reports that they had been withdrawn and (b) to make no further use of those reports going forward. However, in violation of this command, the Statis *did not* inform any of the courts (or any other parties apparently) of KPMG's withdrawal. That they continued to rely on the Audit Reports in the courts is easily established.

148. In the *Netherlands*, on August 22, 2019, Kazakhstan informed the Amsterdam Court of Appeal of the notice it had received from KPMG reporting its withdrawal of the Audit Reports. However, on August 27, 2019, during the hearing, the Statis objected that Kazakhstan's late submission of the letter "*deprived the Stati parties of the opportunity to respond properly [to this letter], for example by submitting earlier correspondence between KPMG and the Stati Parties from 2016, which correspondence would have put the aforementioned letter from KPMG in the right context*."[211] This remark was deceptive because the correspondence exchanged between KPMG and the Statis in 2016 (the "**2016 KPMG Correspondence**"), as indicated above, established KPMG's doubts over the veracity of the Financial Statements and revealed that the Statis had refused to answer KPMG's questions. Plainly, the Statis were not, as they claimed, deprived of any opportunity to respond.

149. In October 2019, Kazakhstan then obtained the New KPMG Evidence. This consisted of two tranches of information: (i) the 2016 KPMG Evidence and (ii) the 2019 KPMG Evidence (*see supra*, ¶ 133). Previously, all that Kazakhstan had in its possession was the August 21, 2019 notice that KPMG sent to Kazakhstan (*see supra*, ¶ 22(vii)), but not the separate and different August 21, 2019 notice that KPMG sent to the Statis or the correspondence between KPMG and the Statis surrounding that notice. In consequence of

[207] Statis' Submission, Luxembourg Exequatur Proceedings, June 6, 2019, ¶ 150.
[208] On September 6, 2020, the Statis demanded that KPMG reverse its decision to withdraw the Audit Reports. *See* Letter from G. Pisica to KPMG Audit LLC, September 6, 2019. After further correspondence, KPMG properly refused this request, and noted that the Statis had never answered its questions. *See* Letter from A. Clarke, KPMG Audit LLC, to G. Pisica, October 3, 2019.
[209] Annex 3, ¶¶ 98-101.
[210] Letter from A. Clarke, KPMG Audit LLC, to Dr Patricia Nacimiento of Herbert Smith Freehills LLP (at the time Herbert Smith Freehills Germany LLP), August 21, 2019.
[211] Witness Statement of Albert Marsman, Dutch Counsel for Kazakhstan, October 14, 2020, ¶ 1.5.

the New KPMG Evidence, Kazakhstan requested that the Statis correct their false statements in the Dutch exequatur proceedings and bring the new evidence to the attention of the court.[212] The Statis refused to do so, knowing that Kazakhstan was prevented from doing so itself without the Statis' consent because of applicable Dutch Rules of Procedure and Professional Conduct.[213] This procedural maneuver by the Statis was successful, as the Dutch court did not take the KPMG-Kazakhstan Notice (*see supra*, ¶ 22(vii)) into account at all in its judgment of July 14, 2020.[214]

150. In the *Luxembourg* exequatur proceedings, the Statis objected to the admission of the New KPMG Evidence (*i.e.*, the new evidence that Kazakhstan obtained in October 2019) and the KPMG-Kazakhstan Notice (collectively, the "**KPMG Evidence**"), thus depriving the court of the crucial evidence of the Statis' fraud.[215] In so doing, the Statis engaged in further misrepresentations and procedural deception. Specifically, on September 24, 2019, the Statis stated:

> *As written in our conclusions, KPMG's audit reports, which have not been revoked, are not "at the heart of the matter", and are not the "cornerstone of the whole arbitration".*[216]

151. In fact, KPMG had revoked its Audit Reports more than one month prior, on August 21, 2019. Then, when Kazakhstan requested that the court re-open the examination of the case to take into account the New KPMG Evidence that it obtained in October 2019, the Statis again objected as follows:

> *Once again, the elements put forward by the opposing party have not had any impact on the monetary sentence which Kazakhstan has been refusing to honour for almost six years by recycling the same allegations of fraud before all the courts to which the case is referred (unsuccessfully).*[217]

152. In the attachment proceedings in *Luxembourg*,[218] on December 2, 2020, Kazakhstan sent a letter to the Luxembourg court explaining that a court in Gibraltar, in proceedings initiated by the liquidator of TNG against Anatolie and Gabriel Stati and their company Terra Raf, decided that the allegations of fraudulent conduct by the Statis "*are a serious issue*" and warrant trial in Gibraltar.[219] In its letter, Kazakhstan requested leave from the Luxembourg

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[212] *Id.*, ¶ 1.7.
[213] *Id.* ¶ 1.8. Rules of Professional Conduct for Dutch lawyers, Rule 21, ¶ 3 ("*Once judgment has been passed, the advocate may not address the court without the opposing party's consent.*" (informal translation from Dutch. *See* https://www.advocatenorde.nl/document/nova-code-of-conduct-gedragsregels-2018.)).
[214] Witness Statement of A. Marsman, the Dutch Counsel for Kazakhstan, October 14, 2020, ¶ 1.15.
[215] Annex 3, ¶ 264.
[216] Letter from the Statis to the Luxembourg Court of Appeal, September 24, 2019 (emphasis added).
[217] Letter from the Statis to the Luxembourg Court of Appeal, November 21, 2019, 2.
[218] Annex 3, ¶ 277.
[219] Letter from Kazakhstan to the District Court of Luxembourg, Luxembourg Attachment Proceedings, December 2, 2020.

court to address this decision of the Gibraltar court.[220] On December 3, 2020, the Statis sent a letter to the Luxembourg court where they objected to Kazakhstan's request, relying on their usual contentions.[221] This deprived Kazakhstan of the opportunity to bring to the attention of the Luxembourg court a decision rendered by another court directly related to the Statis' alleged fraud.

153. In the exequatur proceedings in *Belgium*, the Statis engaged in yet another procedural maneuver to suppress the KPMG Evidence (as described in paragraphs 16-20 of the affidavit of Belgian counsel, Mr. Arnaud Nuyts). Under Belgian procedural law, Kazakhstan was not allowed to bring in the KPMG Evidence without the consent of the Statis. Accordingly, Kazakhstan repeatedly asked the Statis' counsel for such consent, both in writing before the oral exequatur hearing and at the hearing itself. The Statis consistently refused to give such consent, both (a) in writing before the hearing and (b) at the beginning of the hearing before Kazakhstan started its oral pleadings. It was only ***after*** Kazakhstan had concluded its oral pleadings, that the Statis consented to admission of the KPMG Evidence,[222] while at the same time insisting that, in any case, the Tribunal never relied on the Financial Statements.

> *Contrary to what Kazakhstan claims, the letter of KPMG Audit LLC (Kazakhstan) dated 21 August does in no way invalidate the financial statements of the Statis for the year 2007, 2008, and 2009. This letter simply invites the Statis to "take all the steps necessary to prevent any further or future reliance". Kazakhstan only takes an intellectual shortcut by pretending that the fact that KPMG Audit LLC (Kazakhstan) would been unaware that Perkwood was a related party would necessarily mean (1) that the financial statements of TNG would be false or even (2) that it would be a matter of fraud.*[223]

154. As a consequence of this maneuver of the Statis, Kazakhstan was not allowed to address the new KPMG Evidence at the hearing itself or in its pre-hearing submissions. And this maneuver worked: the Belgian court, in its exequatur decision, gave no consideration to the KPMG Evidence or to the merits of Kazakhstan's fraud allegations more generally.[224] In other words, just as they did in the Dutch proceedings (*supra* ¶¶ 148-49), the Statis exploited a local rule of procedure to suppress critical evidence of their fraud. Then, to make matters worse, the Statis falsely asserted in an *ex parte* application in subsequent

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[220] Judgment of the Supreme Court of Gibraltar, November 27, 2020 [In between *Tolkynneftegaz LLP (a limited liability partnership incorporated in Kazakhstan and in bankruptcy), Orynbasar Kubygul (as bankruptcy manager of Tolkynneftegaz LLP)* and *Terra Raf Trans Traiding Ltd, Anatolie Stati, Gabriel Stati and Tristan Oil Limited (a company incorporated in the British Virgin Islands*)]; Annex 3, ¶ 269.
[221] Letter from the Statis to the District Court of Luxembourg, Luxembourg Attachment Proceedings, December 3, 2020.
[222] Annex 3, ¶ 244.
[223] Statis' Letter to the Belgian Court of First Instance, Belgian Exequatur Proceedings, October 25, 2019, at 3
[224] Annex 3, ¶¶ 245-248.

garnishment proceedings that the Belgian court had fully considered the KPMG Evidence.[225]

155. In *Sweden*, in 2019 and 2020, Kazakhstan attempted on three occasions to bring the new evidence of the Statis' fraud, including the KPMG Evidence, to the attention of the courts.[226] Here, as in *Belgium*, the Statis insisted that, in any event, "*the annual report from KPM's, TNG's and Tristan Oil did not form the basis of the arbitral tribunal's assessment of the value of the LPG-plant and did therefore not affect the outcome of the Arbitration award*."[227]

156. The Statis contended both in *Belgium* and *Luxembourg* that the KPMG Evidence "*is the result of 'pressure' exerted by Kazakhstan on KPMG 'first in 2016 and then in 2019.'*"[228] However, the Statis offered no evidence in support of that accusation. The evidence that does exist shows that Kazakhstan's attorneys did nothing more than provide KPMG with the documents demonstrating the Statis' material misrepresentations to KPMG.[229]

2. Systematic and Deliberate Misrepresentations to the Courts

157. The facts set forth in Annex 3 expose another pattern of misconduct by the Statis before the courts. On those occasions on which the Statis did not manage to get the evidence dismissed or to otherwise avoid having to address it, they resorted to deliberate misrepresentations of the facts. A few examples follow:

(i) During the Set-Aside Proceedings, Kazakhstan asked whether Perkwood was a Stati company. The Statis responded as follows:

> *The investors have not asserted that Perkwood was "freestanding from the Investors' sphere". What has been stated by the Investors is that they do not concede to the fact that Perkwood was an affiliate in some – yet unspecified by Kazakhstan – way.*[230]

(ii) The Statis then stated that they "*could neither deny nor confirm that Perkwood is in any particular way an affiliated company to the Investors*."[231] When Kazakhstan finally uncovered irrefutable evidence that Perkwood was indeed a Stati company through powers of attorney, the Statis, on the first day of the hearing after the written pleadings in the Set-Aside Proceedings were completed, admitted the truth. Counsel for the Statis did so by interrupting Kazakhstan's opening statement and saying:

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[225] Witness Declaration of Arnaud Nuyts, Belgian Counsel for Kazakhstan, October 30, 2020, ¶ 27.
[226] Annex 3, ¶¶ 168-171.
[227] Statis' Submission, Swedish Enforcement Proceedings, January 20, 2020, ¶ 18.
[228] Witness Declaration of Arnaud Nuyts, Belgian Counsel for Kazakhstan, October 30, 2020, ¶ 25.
[229] Annex 3, ¶¶ 54-56.
[230] Statis' Submission, Swedish Set-Aside Proceedings, July 15, 2016, 1.
[231] Statis' Submission, Swedish Set-Aside Proceedings, August 30, 2016, ¶ 4.

> *MR NILSSON [Counsel to the Statis]: The [powers of attorneys] that we have, those documents that you are presenting here, we are not contesting that it is an affiliate company. We don't need to argue on this case, because it is an affiliate company. They have granted that from opposing counsel*.[232]

(iii) Thereafter, in the same proceedings in Sweden and in all other post-Award Proceedings, the Statis falsely asserted that they had never attempted to conceal the fact that Perkwood was a Stati company. They did so despite KPMG having, months earlier, explicitly inquired why they had not disclosed that Perkwood was a related party.[233]

(iv) When the Statis were required to explain the difference between the real cost of the LPG Plant equipment ($35 million) and their total claimed construction costs ($245 million), the Statis first asserted, without evidence, that the difference was due to transport, insurance and storage costs.[234] However, Kazakhstan was thereafter able to uncover evidence that directly refuted this assertion through documents showing that the Statis' own calculation of such costs amounted to approximately $4.9 million.[235] The Statis then asserted, but again without evidence, that the difference was due to "transfer pricing" (*see supra*, ¶ 135).[236] However, transfer pricing only arises as a result of transactions within a group of companies where value is added by one company, thereby leading to higher costs. In this case, there is no evidence that Perkwood added any value to the LPG Plant transactions, nor could it have without having any employees, premises or operations.[237]

158. Perhaps the most egregious example is the Statis' representation that there was no causal link between any alleged fraud and the Award. In *Belgium*, the Statis stated the following:

> *In any event, the causal link that Kazakhstan attempts to artificially manufacture – against the Swedish decisions – between the so-called "fraud" and the Arbitral Award (see RoK's Submissions dated November 30th, 2018, §§410 to 438 and §§457 to 467) is at the very least indirect, or even too tenuous, to establish a causal relationship, a fortiori a "decisive" causal relationship.*[238]

159. In *Luxembourg*, the Statis declared more directly:

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[232] Hearing Transcript, Svea Court of Appeal, Swedish Set-Aside Proceedings, Day 1, September 8, 2016, at 31:12-16.
[233] Annex 3, ¶¶ 58 *et seq.*
[234] *Id.*, ¶ 45.
[235] *Id.*
[236] *Id.*, ¶ 223 *et seq.*
[237] Expert Opinion of TPA Global, February 6, 2019.
[238] Statis' Second Submission, Belgian Exequatur Proceedings, January 31, 2019, ¶ 230.

> *[...] a purported "fraud" was not the cause (a fortiori not the determining cause) of the Arbitration Award.*[239]

160. In *England*, the Statis provided more detail on this argument:

> *Any pleaded causal link between the Claimants' conduct and the outcome of the Arbitration (whether with respect to quantum, liability or otherwise) is indirect and/or too remote, as it, inter alia, contains a number of intervening factors which break the causation chain, given the lack of any direct and/or sufficient causation with respect to any of: (i) the Claimants' conduct prior to and in the course of the Arbitration on the financial statements of KPM, TNG and Tristan Oil respectively and/or (ii) the financial statements of KPM, TNG and Tristan Oil on the Information Memorandum and/or (iii) the Information Memorandum on the KMG Indicative Bid and/or (iv) the KMG Indicative Bid on the Tribunal's conclusions on liability or quantum and/or the outcome of the Arbitration on the whole respectively.*[240]

161. It is beyond my understanding how the Statis can maintain that the falsely inflated level of investment in the LPG Plant had no impact on the Award. I have never in my career seen a causal connection clearer than this one. KMG (*see supra*, ¶ 18) unquestionably based its Indicative Offer on the Statis' falsified Financial Statements.[241] Had this falsity been known, KMG would have made a substantially lower Indicative Offer or no offer at all,[242] and the Tribunal would not in any event have relied on the KMG Indicative Offer as a fair and neutral basis for valuation of the LPG Plant. The Tribunal would certainly not have awarded the Statis the sum of $199 million for the LPG Plant.

162. I am not alone in this opinion. Justice Knowles of the English High Court reached the same conclusion:

> *If construction costs were not US$245 million because that figure was fraudulently inflated by the Claimants to the extent alleged by the State, then, because the KMG Indicative Bid valued the LPG Plant using a calculation that brought costs of US$193 million into an arithmetical average there is the clearest argument that the KMG Indicative Bid would have been lower. (An "LPG Plan Assessment" by KMG shows the US$199 million KMG Indicative Bid to have been the midway point between US$193 million "adopted balance sheet value of outstanding construction" and value of US$205 million based on assumed sales.)*[243]

[239] Statis' Reply to Kazakhstan's Second Rejoinder, Luxembourg Exequatur Proceedings, February 4, 2019, ¶ 112.
[240] Statis' Points of Defence, English Recognition Proceedings, September 26, 2017, ¶ 49.
[241] Witness Statement of Nuran Kairakbayev, April 2, 2020, ¶ 14.
[242] *Id.*, ¶¶ 15-16.
[243] Approved Judgment of Justice Knowles, June 6, 2017, *Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070, ¶ 43 (emphasis added).

163. Professor Schreuer reached the same conclusion as well:

> *In the present case, the conclusion seems inevitable that the KPMG Correspondence would have had a material impact on the ECT Arbitration and the Award. […] The evidence that has now become available, including the KPMG Correspondence and the false Financial Statements, clearly demonstrates the Stati Parties' illicit conduct and bad faith. The availability of this evidence to the Arbitral Tribunal would have been critical for the determination of its jurisdiction, the admissibility of the Stati Parties' claims and the liability of Kazakhstan*.[244]

164. Reputable auditors agreed. Deloitte stated as follows:

> *We conclude that these historical costs are massively inflated in several ways without recognizable cause or justification. This unjustified inflation had a direct impact on KMG's indicative offer amount and, consequently, on the amount awarded by the Arbitral Tribunal.*[245]

165. PwC also reached the same conclusion in light of the KPMG Evidence:

> *KPMG's report on the TNG financial statements to 30 June 2008 that formed the basis of the costs and EBITDA figures that fed into the calculation of the Awarded Amount.*[246]

3. Systematic Misrepresentation of Prior Court Decisions

166. The Statis further adopted the practice of misrepresenting in each national court the judgments previously rendered in the courts of other jurisdictions. The major misrepresentation was that one or more of those courts had addressed Kazakhstan's fraud allegations on the merits and rejected them. In truth, with the single exception of the English court, no national court in the post-Award Proceedings made any such determination. Through this means, the Statis led courts to believe that other courts had already scrutinized the evidence of fraud, creating in turn the appearance of a wide consensus that no fraud had been committed.

167. The courts in *Sweden* made no determination as to whether fraud had or had not been committed.[247] Rather, the Svea Court of Appeal strictly limited itself to the question of the strength of the causal link between the alleged fraud and the outcome of the Arbitration.[248] Even that determination was flawed. The court considered it sufficient that the Indicative Offer was made by a party independent of the Statis before the Arbitration, thus ignoring the fact that that offer was itself a direct product of the Statis' own falsified Financial

[244] Legal Opinion of Professor C. Schreuer, January 21, 2020, ¶¶ 71-72.
[245] Expert Report of Deloitte, January 12, 2017, ¶ 27.
[246] PwC II (KPMG correspondence), ¶ 31.
[247] Judgment of the Svea Court of Appeal, Swedish Set-Aside Proceedings, December 9, 2016.
[248] Annex 3, ¶¶ 162-165.

Statements and had been submitted by the Statis as reliable evidence in the arbitration.[249] As noted above, Patrik Schöldström, an expert in Swedish law, and also a judge in the Svea Court of Appeal, concluded that, in its December 2016 decision denying Kazakhstan's request to set aside the Award, the Svea Court of Appeal "*did not consider*" the allegations of fraud "*in its assessment at all*,"[250] and that the decision of the Swedish Supreme Court "*does not and cannot disprove the existence of the Stati Parties' fraud*."[251] The Statis nevertheless falsely portrayed the Swedish courts as having made a substantive assessment of Kazakhstan's fraud allegations and having rejected them.

168. It is on the basis of this portrayal that the district court in the United States considered the question of fraud to have been decided in Sweden and then declined to consider Kazakhstan's evidence on the matter:[252]

> *[P]etitioners emphasized that respondent presented its "fraud case in full" to the Svea Court of Appeal, the seat of the arbitral award, which concluded "[t]hat the Award was not the product of fraud," and its ruling was left undisturbed by the Swedish Supreme Court.*[253]
>
> *[…]*
>
> *While the Court acknowledges that the legal standards to be applied in each situation are different, the fact that the Svea Court of Appeal heard and*
>
> *rejected respondent's fraud claims, and that its ruling was upheld by the Swedish Supreme Court, lends force to this Court's view that it would not be contrary to the public policy of the United States, and it would not violate this country's "most basic notions of morality and justice," […] to let the Court's May 11, 2016, Order stand and decline to hear the evidence again in the limited context of this enforcement proceeding.*[254]

169. Ultimately, the district court found that it would not be "*in the interests of justice*" to determine "*whether petitioners did or did not mislead the foreign arbitral panel when it presented evidence related to the value of the plant in question*."[255] The court reached this conclusion on the basis of the Statis' argument that "*this issue*," *i.e.*, the issue of the Statis'

[249] The Svea Court of Appeal's inquiry is limited to finding that the Tribunal's valuation was based on the Indicative Offer and that such offer was tendered by an entity independent from the Statis. Pursuant to the Svea Court of Appeal, because the Indicative Bid was created by a third party, it is irrelevant in relation to the Swedish public policy that the third party based its offer on the false information provided by the Statis and that the Statis, knowing that the bid was based on their falsifications, offered it to the Tribunal as an alleged "*neutral valuation metric*" and thereby obtained a $199 million award for the LPG Plant.
[250] Legal Opinion of Dr. Patrik Schöldström, January 13, 2017, ¶ 13.
[251] Legal Opinion of Dr. Patrik Schöldström, August 23, 2020, ¶ 75.
[252] Annex 3, ¶¶ 206-214.
[253] Memorandum Opinion of the U.S. District Court for the District of Columbia, US enforcement proceedings, March 23, 2018, 9-10.
[254] *Id.*, at 18.
[255] Order of the U.S. District Court for the District of Columbia, US enforcement proceedings, May 11, 2016, 3.

fraud concerning the LPG Plant, "*has already been presented to the Swedish authorities*."[256]

170. So too in *Italy*. There, the Statis falsely asserted that "*[t]he [Svea] Court of Appeal has reviewed and addressed all the claims of fraud*."[257] The Italian court simply accepted this assertion, and on that basis made no determination of its own:[258]

> *[I]t appears from the documentation forming part of the proceedings that both the Stockholm Court of Appeal and the Swedish Supreme Court, in the application brought before them to set aside the award, considered arguments that substantially fall within the grounds relied on before this Court […] that were decided against [Kazakhstan] in these proceedings, substantially showing the irrelevance for the purposes of the decision of the alleged fraudulent conduct of Anatoli Stati and Gabriel Stati.*[259]

171. The Italian court thus made no assessment of the evidence of fraud on the Statis' part and proceeded to grant exequatur after a hearing that lasted 20 minutes.[260]

172. In *Belgium*, the Statis falsely asserted that they "*have always produced evidence and arguments refuting the fraud-allegations, especially during the Swedish proceedings*."[261] The Statis so stated despite knowing that they had at no point in the Swedish proceedings submitted any witness or expert evidence on fraud, but on the contrary had withheld the crucial 2016 KPMG Evidence from the Swedish courts. The Belgian decision of December 20, 2019 did not address the substance of Kazakhstan's fraud claim either.[262] It simply held that, as a matter of Belgian law, there was no causal link between the alleged fraud and the outcome of the Arbitration.[263] As for the Luxembourg court, it too did not examine Kazakhstan's fraud case at all, as it found that it "*it is not the responsibility of the Court, hearing the request for exequatur, to proceed with investigative measures to verify the existence of the alleged fraud*."[264]

173. In the *Netherlands,* the Amsterdam Court of Appeal held that it could be inferred from the record that the Statis made payments for which no factual or legal basis existed.[265] However, the court took the position that since the alleged fraud was perpetrated prior to the Arbitration, and without the immediate intent to deceive the Tribunal, it could not

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[256] *Id.*, at 4.
[257] Statis' Rebuttal Submission, Italian Exequatur Proceedings, December 7, 2018, ¶122.
[258] Annex 3, ¶¶ 215-221.
[259] Judgment of the Rome Court of Appeal (No. 1490/2019), Italian Exequatur Proceedings, February 27, 2019, 4; *see also* Affidavit of Daniele Geronzi and Cecilia Carrara, March 29, 2019, 3-4.
[260] Annex 3, ¶ 220.
[261] Statis' Submissions, Belgian Conservatory Garnishment Appeal Proceedings, January 14, 2019, ¶ 54.
[262] Annex 3, ¶ 262 *et seq.*
[263] *Id.*, ¶ 270.
[264] Judgment of the Luxembourg Court of Appeal, Luxembourg Exequatur Proceedings, December 19, 2019, 36-37 (informal translation).
[265] Judgment of the Amsterdam Court of Appeal, Dutch Exequatur Proceedings, July 14, 2020, ¶ 3.14.

constitute procedural fraud on the Tribunal sufficient to deny exequatur under Dutch law.[266] This is not a determination as to whether the Statis had or had not committed the alleged fraud. And even this ruling, it should be noted, was not made on the basis of a complete and truthful record because the Statis suppressed the 2016 KPMG Evidence during the Dutch proceedings (*see supra*, ¶¶ 148–149).

174. Notably, in the framework of the attachment proceedings, another *Dutch* court did expose other of the Statis' lies and expressly found them to be in breach of their duties to be truthful.[267] This happened when, in 2017–2018, the Statis tried to attach the assets of the Kazakh central bank in the Netherlands, without informing the court that they were denied attachment of these same assets earlier in 2015 on the basis sovereign immunity.[268] The Dutch court ordered the Statis to append this judgment to any further attempt to attach the assets of the central bank "*[s]ubject to penalty payment of EUR 1 million for*" each time they fail to do so.[269]

175. In truth, the only jurisdiction that actually made an actual finding on fraud, on a prima facie basis before the Statis discontinued the proceedings, was the *United Kingdom* (*supra*, ¶ 26). There too the Statis represented that the Swedish courts had considered and rejected Kazakhstan's allegations of fraud:

> *[…] the Evidence which was said to support the Defendant's case that the Award was procured by fraud had been fully deployed in the Swedish court at the seat of the arbitration in aide of the same allegations of fraud, had been dealt with at length occupying the majority of a 3-week hearing, including oral evidence and cross-examination of witnesses and experts, and had been conclusively rejected by the Swedish Court.*[270]

176. The English High Court was not deceived. It rightly confirmed that the Svea Court of Appeal had *not* in fact made a determination of the fraud issue:

> *[…] it is not accurate to suggest that the Swedish Court rejected all the evidence before it. In fact with limited exceptions the Swedish Court did not in the event form a view on the evidence and material before it. I examined the Swedish judgment at Judgt [60]-[66] and the US judgment at Judgt [50]-[54] in order to identify what had been decided and what had not.*[271]

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[266] *Id.*
[267] Annex 3, ¶¶ 233-234.
[268] Judgment of the Amsterdam District Court, Dutch Attachment Proceedings, January 23, 2018, ¶ 5.4.
[269] *Id.*, ¶ 7.2.
[270] Statis' Grounds of Appeal, English Recognition Proceedings, June 12, 2017, ¶ 8.2 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].
[271] Reasons of Mr. Justice Knowles (Form N460HC), High Court of Justice of England and Wales, June 27, 2017 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].

177. When the English court then turned on its own to the evidence and made its own assessment, it concluded that "*there is a sufficient prima facie case that the Award was obtained by fraud*."[272]

178. It is no coincidence that of all the European enforcement actions that the Statis brought, the English action is the one and only one they chose to abandon. Doing so enabled them to avoid a full trial in England on the question of fraud (though at the price of reimbursing Kazakhstan its substantial costs and agreeing never again to seek enforcement of the Award in England). Justice Knowles fully understood the Statis' motivation, expressly observing that "*the real reason for the [n]otice of [d]iscontinuance is that the [Statis] do not wish to take the risk that the trial may lead to findings against them and in favour of the State*."[273] The Statis rightly supposed that none of the courts in the other jurisdictions would conduct extended hearings, with witnesses and expert testimony, as the English court would have done.

179. The English court clearly understood this. As Justice Knowles observed:

> *If, as I should, I take the decision of the Swedish Court as showing Swedish public policy in the context of this case then I find, as a matter of law, that English public policy is not the same. Mr Ali Malek QC (appearing with Mr Christopher Harris and Mr Paul Choon Kiat Wee for the State) puts it this way, and I agree: "It is apparent from the outcome in Sweden alone that the content of Swedish public policy must be different from that of its English counterpart."*[274]

180. After carefully reviewing the approach the Svea Court of Appeal had taken in connection with the KMG Indicative Offer, Justice Knowles found as follows:

> *Where the Swedish Court as the supervisory court has held that its powers are limited so that it cannot intervene <u>even if the arbitrators were deliberately misled by the Claimants' use of the KMG Indicative Bid</u> it is important to record that the powers of the English Court, and the requirements of English public policy, are not so limited.*[275]

181. On the merits, Justice Knowles determined, *prima facie*, that the Statis had knowingly misled the Tribunal:

> *If the KMG Indicative Bid was in fact the result of the Claimants' dishonest misrepresentation then it seems to me, at this stage of scrutiny on the English Application, there is the necessary strength of prima facie case that*

[272] Approved Judgment of Justice Knowles, June 6, 2017, ¶ 92 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].
[273] Decision of Justice Knowles, High Court of Justice of England and Wales, May 11, 2018, ¶ 25 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].
[274] Approved Judgment of Justice Knowles, June 6, 2017, ¶ 86 [*Stati et al. v. The Republic of Kazakhstan*, In the High Court of Justice, Queen's Bench Division, Commercial Court, CL-2014-000070].
[275] *Id.*, ¶ 89 (emphasis added).

> *the Tribunal would no longer (to use its words) consider it as taking a place of "particular relevance" within "the relatively best source of information for the valuation of the LPG Plant"; still less being the one offer from which they took the damages figure. The Tribunal showed its interest in "undisputed indicative offers made by interested buyers in 2008". It looked at them critically, so as to assess whether these were "strategic offers to gain access to the data room", concluding that they were not.*
>
> *Mr Sprange QC submits that "[I]t is absurd to suggest that the alleged fraud was a fraud on the Tribunal […], or would have made a difference to the Tribunal". I do not find it possible to accept that submission. In my judgment there is the necessary strength of prima facie case that the alleged fraud would have made a difference to the Tribunal. And that, in asking the Tribunal to rely on the KMG Indicative Bid in circumstances (concealed from the Tribunal, as from the bidder) of the alleged fraud, there was a fraud on the Tribunal.*[276]

182. It is no wonder that, upon reading the judgment of Justice Knowles, the Statis decided to escape from the U.K. proceedings.

183. In sum, the Statis consistently avoided judicial scrutiny of the fraud issue in national courts by falsely representing that it had already been adjudicated on the merits by other national courts. By convincing national courts that another court had found that no fraud had occurred, the Statis enabled those courts to avoid deciding whether obtaining an award through fraud would offend those countries' own public policy.

184. It is worth pointing out in this connection that whatever position the Swedish courts might take on public policy, that position was not binding on the other national courts. The New York Convention could not be clearer that a court in which enforcement of a foreign award is sought may deny enforcement on public policy grounds only if enforcement of the award would be contrary to "*the public policy of that country*."[277] The courts in each country are expected to make a public policy determination on the basis of their *own*, and only their own, public policy.

185. That the Statis continue the pattern of misrepresenting judgments of one court before other courts can be seen from the Statis' recent *ex parte* petition in the Belgian attachment court in which they represent that the KPMG Evidence had been discussed "*in detail*" by the Belgian exequatur court in its judgment of December 20, 2019, which is manifestly not the case.[278]

186. The problem is of course greatly exacerbated by the fact that neither the Tribunal in the Arbitration nor any of the national courts in the post-Award Proceedings on whose decisions later courts relied had before them a truthful and complete record. In recognizing a prior arbitral award, courts operate on the assumption that the tribunal rendering the

[276] *Id.*, ¶¶ 47-48.
[277] New York Convention, art. V(2)(b) (emphasis added).
[278] Witness Declaration of A. Nuyts, Belgian Counsel for Kazakhstan, October 30, 2020, ¶ 37.

award heard and adjudicated the dispute on the basis of a full and honest record. Based on the Statis' repeated and highly significant misrepresentations to the Tribunal set out above and in Annex 3, this was clearly not the case here. Accordingly, the Award in this case was not a basis on which a national court conducting post-award review could safely rely. Further, the judgment of that national court in turn is not a basis on which other national courts conducting post-award review can safely rely. The net result is an illusory quasi-unanimous affirmation of a seriously flawed award.

VI. CONCLUSION

187. The legitimacy of arbitral proceedings and awards is critical to the well-being of the investment protection system operated today. That legitimacy in turn depends on – even presumes – the good faith of all participants. These include not only arbitrators and counsel, but parties themselves. All are the front-line actors in ensuring the integrity of the process. While parties, like counsel, are entitled to pursue their case zealously, they are not entitled to do so dishonestly.

188. National courts also play an essential role in safeguarding the integrity of an arbitral proceeding and arbitral award. They cannot do so if they operate on the basis of an untruthful arbitral record or, no less serious, an untruthful record of their own.

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

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

191. To mask their deceptive corporate structure and to lend an apparent legitimacy to the underlying fictitious transactions, the Statis created false Financial Statements. Then, by making materially false representations to their auditors, the Statis obtained audit reports that validated those false statements. In 2019, when KPMG was provided evidence of the Statis' fraud, KPMG took the extraordinary step of withdrawing all of their audit reports for all of the Stati financial statements.

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

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

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

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

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

197. The Statis not only deceived the Tribunal in all these respects, but affirmatively – on the record – assured the Tribunal that the information they provided, including the "audited" Financial Statements, were perfectly reliable, when they knew it was not. By making those representations, the Statis breached the fundamental duties of truth and candor they owed to the Tribunal.

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

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

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

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

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

203. In fact, the fraud did not end with the Kazakh operations, the Arbitration or the post-Award Proceedings. It is continuing today by ongoing misrepresentations in the actions pending in various courts.

204. I return to where I began. The legitimacy of international arbitration depends on the honesty and truthfulness of those who participate in the arbitral process. When for any reason that fails, we count on national courts to rectify the situation. But that too presupposes truthfulness and integrity on the litigants' part. Based on the documents I have reviewed and the facts of which I have been informed, the Statis' conduct in this case, from start to finish, falls dramatically below that standard.

205. For all these reasons, and with the full appreciation of the fact that the Award has already been recognized in a number of jurisdictions, I am confident that the Award in this case is

a product of gross deceit and is unworthy of recognition or enforcement under the New York Convention.

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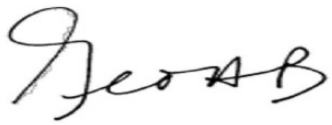

George A. Bermann

January 17, 2021