EXPERT OPINION

OF

PROFESSOR BERNARD HANOTIAU,

MEMBER OF THE

BRUSSELS AND PARIS BARS

IN RE.:

ANATOLIE STATI, GABRIEL STATI, ASCOM GROUP SA

AND TERRA RAF TRANS TRADING LTD

V.

KAZAKHSTAN

(SCC CASE NO. V 116/2010)

1. This expert opinion is filed by the undersigned, Bernard Hanotiau, as instructed by the law firms Herbert Smith Freehills LLP and Liedekerke Wolters Waelbroeck Kirkpatrick, as part of the appeal proceedings between Messrs. Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd, and the State of Kazakhstan, concerning the exequatur of an arbitration award (the "Award") issued on 19 December 2013 in a dispute between the parties, under the Arbitration Rules of the Stockholm Chamber of Commerce.

2. As an arbitration expert, I have been asked to give my expert opinion about whether the facts and evidence discovered after the Award could have affected the arbitration proceedings and the Arbitral Tribunal's Awards, had these facts and documents been known during the arbitration proceedings, and more specifically, if they could have impacted the Tribunal jurisdiction and the assessment of any liability, the causal link and the quantum of damages.

3. In particular, I have been given the following instructions:

"Taking into account the law applicable to an investor-state dispute submitted to an Arbitral Tribunal appointed under the Energy Charter and taking into account your extensive practical experience as an arbitrator sitting in investor-state disputes, , please explain the impact, if any, on the arbitration proceedings between Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd and the State of Kazakhstan (SCC Case No. V116/2010) and the Award issued by the Arbitral Tribunal, the facts and evidence invoked by the Republic of Kazakhstan, as summarised in paragraphs 73 to 108 of George Bermann's opinion of 17 January 2021 (and detailed in Appendix III of this opinion) and in the Republic of Kazakhstan's written submission filed as part of its appeal petition of 17 February 2020 in the Belgian exequatur proceedings, and the Stati Parties' response in their written submissions on 26 February 2021, , had these facts and pieces of evidence had been raised during the arbitration proceedings, on the following issues which have been settled by the Arbitral Tribunal in the award:
i) Jurisdiction and arbitrability;
ii) Liability;
iii) Causality;
iv) Quantum; and
v) Any other aspects, such as the assessment of the facts and the weight given to witnesses and experts".

4. I am a lawyer at the Brussels and Paris Bars and a Professor Emeritus at the Universities of Louvain-la-Neuve and Namur, where I successively taught a range of courses covering private international law, public international law, international trade law and comparative law. In particular, up to the end of my academic career at the University of Louvain, I ran the international arbitration course at the University of Louvain. For a number of years, I have been a visiting professor at the National University of Singapore, where I have been teaching a course called "Complex Arbitrations". I have also been invited to teach the same course at a Shanghai university starting from this year. My entire career has been focused on arbitration. Over the course of more than forty years of practicing law, in different capacities and in different parts of the world, I have participated in 600 arbitration proceedings, under the auspices of a number of arbitration institutions, including 67 investment arbitrations, with 42 under ICSID Rules and 25

under UNCITRAL and ICC arbitration rules. I am a member of the Court of Arbitration of the Singapore International Arbitration Centre, a member of the Advisory Board of the Hong Kong International Arbitration Centre and of the Korean International Arbitration Centre, a former vice-chairman of the Dubai International Arbitration Centre, the Board of Directors of CEPANI, the London Court of International Arbitration and the Institute for Transnational Arbitration in Dallas, Texas (USA). I am also a member of the Institute of the International Chamber of Commerce in Paris. I have written more than 120 articles on international commercial law and arbitration, and a number of books, in particular "Complex Arbitrations: Multi-Party, Multi-Contract and Multi-Issue", the second edition of which was just published by Kluwer in September 2020. My curriculum vitae is attached to this report.

5. I accessed the following documents for the preparation of this opinion:

1. The Arbitral Award of 19 December 2013.
2. The Correction to the Award of 17 January 2014.
3. The Deloitte Report dated 12 January 2017.
4. The TPA Global Report dated 6 February 2019.
5. The transcript of the Oral Deposition of Artur Lungu, Ascom's former Chief Financial Officer, dated 3 February 2019.
6. The Affidavit of Matthew Kirtland, from Norton Rose Fulbright, dated 9 May 2019.
7. "*Review of the Reliability of the Financial Statements* " PwC Expert Report of 19 August 2019 (PwC I).
8. KPMG's letter to the counsels of the Republic of Kazakhstan, dated 21 August 2019.
9. KPMG's letter to the counsels of Mr. Anatolie Stati, dated 21 August 2019.
10. KMPG's correspondence from 2016 to 2019 produced following the Court Order of 17 October 2019 and the ruling of 25 October 2019.
11. The BDO Report.
12. The Opinion of Professor C. Schreuer, dated 21 January 2020.
13. The PwC's Expert Report of "*Review of KPMG correspondence* " dated 21 January 2020 (PwC II).
14. The Republic of Kazakhstan's Notice of Appeal dated 17 February 2020 against the exequatur order dated 20 December 2019.
15. A. Layton QC's Opinion
16. The "*Review of the application of TNG and KPM funds by the Stati Parties* " PwC Expert Report, dated 29 July 2020 (PwC III).
17. The "*Review of transactions by the Stati Parties for characteristics of money laundering risks* " PwC Expert Report dated 29 July 2020 (PwC IV).
18. Mukhit Yeleuov's Opinion dated 30 July 2020.
19. Stefan Cassella's Opinion dated 30 July 2020.
20. Dr. Patrik Schöldström's Opinion dated 23 August 2020.
21. Professor Catherine Rogers' Opinion dated 17 January 2021.
22. Professor George Bermann's Opinion and its 5 Appendices, dated 17 January 2021.
23. The Stati Parties' submissions of 26 February 2021in the ongoing exequatur proceedings before the Brussels Court of Appeal.
24. The Belgian Exequatur Order dated 11 December 2017.

25. The Judgment of the French-speaking Brussels Court of First Instance dated 20 December 2019, confirming the Exequatur Order.
26. The Brussels Court of Appeal's Judgment of 17 November 2020 on the admissibility of the Appeal brought against the Exequatur Judgment of 20 December 2019.
27. The Amsterdam Court of Appeal's Judgment of 14 July 2020, confirming the Exequatur Order.
28. The Svea Court of Appeal's Judgment of 9 December 2016.
29. The Swedish Supreme Court's Judgment of 24 October 2017.
30. The Svea Court of Appeal's Judgment of 9 March 2020, dismissing the second application for the annulment of the Arbitral Awards.
31. The Swedish Supreme Court's Judgment of 18 May 2020, dismissing the second application for the annulment of the Arbitral Awards.
32. The UK High Court's Judgment of 6 June 2017.
33. The London Court of Appeal's Judgment on the Stati Parties' request to discontinue the Exequatur Order proceedings of 10 August 2018.
34. The Exequatur Order of the US District Court of the District of Columbia dated 11 May 2016.
35. The Order of the same court dated 23 March 2016.
36. The Order of the same court dated 30 March 2019.
37. The District of Columbia Court of Appeal's Judgment of 19 April 2019.
38. The United States Supreme Court's Judgment of 15 October 2019, refusing to reconsider the enforcement order application.
39. The District of Columbia Court of Appeal's Judgment of 21 February 2020.
40. The Order of the US District Court for the District of Columbia of 19 March 2021.
41. The Luxembourg Court Order of 30 August 2017, authorizing the exequatur of the Arbitration Award.
42. The Luxembourg Court of Appeal's Judgment of 19 December 2019, conforming the Exequatur Order.
43. The Luxembourg Supreme Court's Judgment of 11 February 2021, reversing the Judgment of 19 December 2019.
44. The Rome Court of Appeal's Judgment of 27 February 2019.

6. My opinion is divided into two parts. In the first part, I will examine the impact that fraud, in its different forms and at its different levels, can have in general on the arbitration proceedings in terms of jurisdiction and the assessment of the merits of the claims, the duties of the Arbitral Tribunal when there is presumed fraud and the options open to the Arbitral Tribunal when faced with suspicion of fraud.

7. In the second part, I will analyze the impact that the massive fraud perpetrated by the Stati Parties would have had on the Award, had the Arbitral Tribunal been aware of the evidence discovered after it had rendered its ruling. This second part will be divided into six sections.

8. In the first section, I will summarize what I perceive to be the facts, as established by the Arbitral Tribunal in the arbitration proceedings.

9. In the second and third parts, I will examine the facts as they currently appear, based on the evidence discovered after the notification of the Award and the massive fraud by the Stati Parties that this evidence reveals.

10. In the fourth, fifth and sixth parts, I will explore the extent to which the Arbitral Tribunal's decisions might have been different if the Tribunal had had the evidence before it which could have been gathered after the notification of the Award was made.

I. FRAUD IN INTERNATIONAL INVESTMENT ARBITRATION

Allegations of fraud and the impact they may have on the arbitration proceedings.

11. Fraud, unlawful conduct and corruption occasionally occur in international arbitration and, in particular, in international investment arbitration. In some cases, the respondent State asserts that the investor, the claimant to the arbitration, made the investment illegally, for example by paying secret commissions to a government official or by providing false information to the Host State in order to obtain certain operating permits. In other cases, the claimant asserts that it has experienced unfair and unequal treatment or harassment from the Host State after refusing to pay any secret commissions to certain government officials. It is also common for issues of fraud to arise in the course of the arbitration proceedings, for example, when one party asserts that the other party has falsified one or more documents, has filed documents whose content does not reflect the actual situation, or has given false testimony in order to invoke certain rights.

12. These very serious accusations must be examined very closely by the Arbitral Tribunal. Failure to investigate and identify fraudulent conduct would be tantamount to assisting corrupt practices by turning a blind eye to illegal activity. However, the Arbitral Tribunal may not be able to conduct these investigations, for example, when the fraud committed, comprising the submission of falsified documents or evidence, is only discovered after the arbitration's conclusion.

13. In either case, the arbitration proceedings and the Award issued are tainted by illegality. In the first scenario, by disregarding the illegal conduct, the Award legitimizes it. In the second scenario, the Award itself is the product of fraud and gives effect to illegal conduct, albeit unintentionally. Both cases jeopardize the arbitration proceedings as a whole.

14. This is why fraud, unlawful conduct and corruption must be thoroughly investigated by Arbitral Tribunals. When this is not possible during the arbitration proceedings, as a result of careful concealment by the perpetrating party, the national court at the seat of the arbitration or its exequatur judge is responsible for giving effect to the public policy regulations which prohibit these types of actions or conduct.

15. In the following sections, I will set out how instances of fraud, corruption, money laundering and illegal activities can affect the decision-making process, depending on when the alleged conduct occurs, i.e.:

    (i) at the time when the investor makes the investment;

(ii) after the investment has been made, when the investor is managing their investment in the Host State; and
(iii) during the arbitration.

16. I will also clarify why and how Arbitral Tribunals are required to be proactive and must investigate instances of fraud, corruption or other illegal activities, even when neither party raises an issue.

I. Fraud, corruption and illegality at the time when the investor makes the investment

17. It is universally recognized in investment arbitration practice that where an investor makes an illegal investment (through corruption, fraud or another illegality), he or she cannot have recourse to the arbitration proceedings established through the investment treaties in order to seek enforcement of their unlawfully acquired rights. As Professor Wälde, a leading scholar in investment arbitration, wrote: *"There is ample jurisprudence that a legitimate expectation cannot be created if deception, fraud or other unlawful means were used to obtain the governmental assurance or other rights obtained from the government in this way. There can be no international treaty protection for rights obtained by unlawful means".*[1]

18. Instances of fraud, corruption and other unlawful conduct are usually investigated by the tribunals through one of the following three doctrines: the "unclean hands" doctrine, transnational public policy and the doctrine of legality.[2]

19. The "unclean hands" doctrine (which is an application of the the *nemo auditur turpitudinem suam allegans* principle) embodies the principle that an international investment tribunal cannot award compensation to a claimant if their claim is based on illegal or immoral grounds.[3]

20. Many tribunals have also relied on the concept of international public policy, i.e. the broad consensus among States that certain values deserve special protection,[4] to defeat claims of investors who have acquired their investment through fraud, corruption or money laundering.[5]

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[1] *"There is ample jurisprudence that a legitimate expectation ... cannot be created if deception, fraud or other illicit means were used to obtain the governmental assurance or other rights obtained from the government in this way. There can be no international treaty protection for rights obtained by illicit means". International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), Award, 26 January 2006, Separate Opinion of Prof. Wälde, 1 December 2005, 112.

[2] Aloysius Llamzon, "Chapter 2: On Corruption's Peremptory Treatment in International Arbitration", in DOMITILLE BAIZEAU AND RICHARD KREINDLER (EDS.), ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION, Files of the ICC Institute of World Business Law, Volume 13 (Kluwer Law International; International Chamber of Commerce (ICC) 2015), p. 34.

[3] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/11/12), Award, 10 December 2014, 328: *"Investment treaty cases confirm that such treaties do not afford protection to illegal investments either based on clauses of the treaties, as in the present case according to the above analysis, or, absent an express provision in the treaty, based on rules of international law, such as the 'clean hands' doctrine or doctrines to the same effect".*

[4] Legal doctrine has defined transnational public policy as *"the reflection of the global consensus on fundamental economic, legal, moral, political and social values. It is a collection of universal standards, shared norms, and general principles that are widely accepted by the international community. For example, activities are regarded as contra bonos mores virtually the worldover' including: 'piracy, terrorism, genocide, slavery, smuggling, drug*

21. Finally, the doctrine of legality is based on the principle that an investment made illegally cannot benefit from the protection of international treaties, as States are not deemed to have agreed to give access to the international arbitration system to investors who have made an investment in violation of their laws. Many Arbitral Tribunals and many authors consider that this principle applies even in there is no specific wording to that effect in the treaty in question. [6]

22. Irrespective of the doctrine guiding the tribunals, they all lead to the same result: dismissal of the claims based on the Arbitral Tribunal's lack of jurisdiction (or ineligibility, as determined by specific courts). As stated by the Arbitral Tribunal in the *Inceysa v. El Salvador* case :

> *"238. El Salvador gave its consent to the Centre's jurisdiction, presupposing good faith behavior on the future investors' part. El Salvador did not have any basis to suppose that Inceysa would submit false information and would commit fraudulent acts for the purpose of establishing a legal relationship with MARN, which was embodied in the Contract that gives rise to this dispute.*
> *239. By falsifying the facts, Inceysa violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadoran law. Faced with this situation, this Tribunal can only declare its lack of jurisdiction to hear Inceysa's complaint, since its investment cannot benefit from the BIT's protection as established by the parties during the agreement's negotiations and execution".* [7]

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trafficking,' trading of stolen property, and trafficking of human organs."("*Legal doctrine has defined transnational public policy as "a reflection of global consensus on fundamental economic, legal, moral, political, and social values. It is a collection of universal standards, shared norms, and general principles that are widely accepted by the international community. For example, '[c]ertain activities are regarded as contra bonos mores virtually the worldover' including: 'piracy, terrorism, genocide, slavery, smuggling, drug trafficking,' trading of stolen property, and trafficking of human organs.*" (CB Lamm, HT Pham, R. Moloo, Fraud and Corruption in International Arbitration, in: Liber Amicorum Bernardo Cremades (M.Á. Fernández-Ballesteros, D. Arias eds. 2010), p. 707).

[5] *World Duty Free Company v Republic of Kenya* (ICSID Case No. ARB/00/7), Award, 4 October 2006, 157: *"In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal".* Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal").

[6] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award, 27 August 2008, 138, 139: *"Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the Investment's conformity with a particular law. However, this does not mean that the protections stipulated by the ECT cover all kinds of investments, including those contrary to domestic or international law. ... Consequently, the ECT should be interpreted in a manner consistent with its pursued aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law".* (*"Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law. ... Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law"*).

[7] *"238. El Salvador gave its consent to the jurisdiction of the Centre, presupposing good faith behavior on the part of future investors. El Salvador did not have any basis to suppose that Inceysa would submit false information and*

2. *Fraud, corruption and unlawful conduct during the investment management phase*

23. The case law of international investment tribunals enshrines the principle that, if an investor is guilty of fraud, corruption or illegal activities during the investment management phase (after the investment is acquired legally), this does not stop the Arbitral Tribunal from assuming jurisdiction over the claims submitted to it. However, the investor's conduct will be taken into account by the tribunal in its rulings on the major issues (i.e. as to whether the State is liable and if so, what damages may be awarded to the investor taking into account their respective conduct).

24. This was set out by the Arbitral Tribunal in the *Hamester c. Ghana* case:

> *"126. In this case, Article 10 of the BIT[8] contains an express requirement for compliance with the host State's legislation. It states that:*
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> *'[t]his Treaty shall also apply to investments made prior to [the Treaty's] entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation.' (Emphasis added). '*
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> *127. The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal's jurisdiction) - albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue".*[9]

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would commit fraudulent acts for the purpose of establishing a legal relationship with MARN, which was embodied in the Contract that gives rise to this dispute.

239. By falsifying the facts, Inceysa violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadoran law. Faced with this situation, this Tribunal can only declare its incompetence to hear Inceysa's complaint, since its investment cannot benefit from the protection of the BIT, as established by the parties during the negotiations and the execution of the agreement". Inceysa Vallisoletana SL v. Republic of El Salvador (ICSID Case No. ARB/03/26), Award, 2 August 2006, at 238, 239.

[8] The Germany-Ghana Bilateral Treaty.

[9] *"126. In this case, Article 10 of the BIT contains an express requirement for compliance with the host State's legislation. It states that:*

'[t]his Treaty shall also apply to investments made prior to [the Treaty's] entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation.' (Emphasis added).

127. The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ("made") and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT

25. The principles set out above apply even if the treaty in question does not contain an explicit legality clause similar to the clause in Article 10 of the Germany-Ghana Bilateral Treaty. For example, in the *Fraport v. Philippines* Award, the Arbitral Tribunal also ruled that illegal conduct by the investor after the investment is acquired is taken into account in the Tribunal's decision on the merits:

> *"344. With respect to the temporal extension of the condition in the relevant provisions of the BIT, it has been contended by the Respondent and some of its experts that an investment, in order to maintain jurisdictional standing under the BIT, must not only be 'in accordance' with relevant domestic law at the time of commencement of the investment but must continuously remain in compliance with domestic law, such that a departure from some laws or regulations in the course of the operation of the BIT would deprive a tribunal under the BIT of jurisdiction.*
> *345. Although this contention is not relevant to the analysis of the problem which the Tribunal has before it, namely the entry of the investment and not the way it was subsequently conducted, the Tribunal would note that this part of the Respondent's interpretation appears to be a forced construction of the pertinent provisions in the context of the entire Treaty. The language of both Articles 1 and 2 of the BIT emphasizes the initiation of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction".* [10]

(and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue". Gustav FW Hamester GmbH & Co KG v. Republic of Ghana (ICSID Case No. ARB/07/24), Award, 18 June 2010, at 126, 127.

[10] *"344. With respect to the temporal extension of the condition in the relevant provisions of the BIT, it has been contended by the Respondent and some of its experts that an investment, in order to maintain jurisdictional standing under the BIT, must not only be 'in accordance' with relevant domestic law at the time of commencement of the investment but must continuously remain in compliance with domestic law, such that a departure from some laws or regulations in the course of the operation of the BIT would deprive a tribunal under the BIT of jurisdiction.*
345. Although this contention is not relevant to the analysis of the problem which the Tribunal has before it, namely the entry of the investment and not the way it was subsequently conducted, the Tribunal would note that this part of the Respondent's interpretation appears to be a forced construction of the pertinent provisions in the context of the entire Treaty. The language of both Articles 1 and 2 of the BIT emphasizes the initiation of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction". Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I) (ICSID Case No. ARB/03/25), Award, 16 August 2007, 344, 345.

26. Similarly, in the *Lao Holdings v. Laos* case, where I was a co-arbitrator, the Arbitral Tribunal clarified that the alleged serious unlawful conduct by the investor during the management of the investment should be taken into consideration when assessing the merits of the dispute, as they relate to the issues of liability and compensation for damage:

> *"[S]erious financial misconduct by the Claimants incompatible with their good faith obligations as investors in the host country (such as criminality in defrauding the host Government in respect of an investment) is not without Treaty consequences, both in relation to their attempt to rely on the guarantee of fair and equitable treatment, as well as their entitlement to relief of any kind from an international tribunal."* [11]

The specific investigative duty imposed upon Arbitral Tribunals in the event of suspected fraud, corruption or serious unlawful conduct, and the related implications

27. It is a rule in international arbitration that in the event of suspicions of fraud, corruption or money laundering in the course of the arbitration proceedings, arbitrators have a specific duty to investigate whether such suspicions are well-founded .[12] This duty arises even if no allegations of fraud, corruption or money laundering have been raised by the parties themselves. It is part of the duty of any arbitral tribunal to protect the rule of law and to sanction any conduct that would contravene public policy.

28. The *Metal-Tech v. Uzbekistan* case illustrates this well.[13] In this case, neither party had claimed in its written submissions that the investment had been obtained by way of corruption. However, during the hearing, Metal-Tech's chairman testified that he had paid USD 4 million to three "consultants" before the investment. These "consultants" included an official from the Uzbek government and the prime minister's brother. As a result, the Arbitral Tribunal raised questions about whether the consultancy agreements could have concealed illegal payments. Although there was no request from the parties, it subsequently decided to investigate whether this was not the case. Specifically, the Tribunal ordered the investor to produce proof of the consultancy

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" *Lao Holdings NV v. Lao People's Democratic Republic* (ICSID Case No. ARB (AF)/12/6), PCA Case No. 2013-13, Award, 6 August 2019, 106.

[12]Nasib Ziadé, 'Chapter 7: Addressing Allegations and Findings of Corruption', in D. BAIZEAU, R. KREINDLER (EDS), ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION, Files of the ICC Institute of World Business Law, Volume 13 (Kluwer Law International; International Chamber of Commerce (ICC) 2015), p. 121: *"[I] f an arbitral tribunal disregards the potential existence of corruption and issues an award without probing ex officio the existence of corruption, the award risks being set aside by the court of the seat of arbitration or by a foreign court on public policy grounds, both national and international. It is generally accepted that considerations of international public policy should take precedence over other legal principles. [...] There is another policy consideration that should encourage arbitrators to investigate issues of corruption sua sponte. Arbitrators are not solely manifestations of party autonomy they also perform a public function, namely that of rendering decisions having the same force as judgments issued by national courts. They cannot therefore allow illicit activities to circumvent legal accountability." Il est généralement accepté que les considérations d'ordre public international doivent l'emporter sur les autres principes juridiques ... Il y a une autre considération d'ordre public qui devrait encourager les arbitres à investiguer de leur propre chef les questions de corruption. Les arbitres ne sont pas seulement des manifestations de l'autonomie des parties, ils exercent également une fonction publique, celle de rendre des décisions qui ont la même force que les jugements rendus par les tribunaux étatiques. Ils ne peuvent dès lors autoriser les activités illicites»).*

[13] *Metal-Tech Ltd. v. Republic of Uzbekistan* (ICSID Case No. ARB/10/3), Award, 4 October 2013.

agreements and the payments made, and proof of what the services provided by the "consultants" involved. Despite the Tribunal's insistence, the claimants were unable to prove what the services allegedly provided by the "consultants" involved and entailed. The Tribunal felt that this inability to provide the evidence requested was significant and that, in light of the circumstances surrounding the conclusion of the consultancy agreements, it could be argued that the payments made were in fact illegal payments. On this basis, the Tribunal ruled that it had no jurisdiction and dismissed the investor's claims.

29. Conversely, where a Tribunal fails to fulfil its duty to investigate suspected fraud, corruption or money laundering, its award may be annulled or refused recognition and enforcement by a national court in the proceedings following the award. This was the case in the ICC award made in the *Alexander Brothers v. Alstom* case, which was not recognized and enforced in France on the grounds of breach of public policy. The Arbitral Tribunal had refused to investigate an instance of corruption, believing that the allegations made along these lines did not meet the "clear and convincing evidence" test under Swiss law. The Swiss Federal Court refused to reconsider the Arbitral Tribunal's conclusions. However, the Paris Court of Appeal, in its judgment of 10 April 2018, ruled that:

> *"It is for the court seized on the basis of the provisions of sections 1525 and 1520(5) of the Code of Civil Procedure in the appeal against the enforcement order over an award made abroad, to seek, in law and in fact, all facts that would help with assessing whether recognizing or enforcing the award clearly, effectively and specifically violates the French concept of international public policy; it is not bound, in this investigation, either by the assessments made by the arbitral tribunal, or by the law chosen by the parties."*
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> *"An arbitration award giving effect to a contract involving insider influence or bribery runs counter to international public policy and cannot be enforced; [...] to this end, any possible bad faith by the debtor is irrelevant, since this issue only involves the French legal system's refusal to provide legal assistance with enforcing an unlawful contract".*[14]

The options available for an Arbitral Tribunal when faced with suspicions of fraud

30. It may occur that, during the arbitration, a party intentionally files false, forged or fraudulent documents or testimonies, or make false written or verbal statements. What are the consequences of this?

31. First of all, it should be noted that Arbitral Tribunals do not have the extensive investigative and sanctioning powers that national courts frequently have. Their jurisdiction is based on the parties' consent. Their powers are therefore limited to the parties to the proceedings. Therefore, Arbitral Tribunals cannot order, but only invite third parties to appear before them to give evidence or produce documents. Generally, they cannot seek assistance from administrative authorities in clarifying various factual matters either. Furthermore, testimony is generally not

[14] Paris Court of Appeal (Pôle 1-Ch. 1), Judgment of 10 April 2018, *Société Alstom Transport SA and others v Alexander Brothers Ltd.*, Arbitration Review 2018 - No. 3, p. 580.

given under oath or under penalty of criminal or civil sanctions, but only on the basis of a solemn promise by the witness to tell the truth, the whole truth and nothing but the truth.

32. Combining this with the fact that arbitral awards cannot generally be appealed, it must be inevitably concluded that the requirement for the parties to act in good faith during the arbitration proceedings is particularly important, even more important than in proceedings in national courts. Furthermore, this requirement to cooperate in good faith with the Arbitral Tribunal is widely recognized in most national legal systems. It includes the duty to refrain from willfully deceiving the tribunal, for example, by filing as intentionally false evidence or by making false statements.

33. As eminent authors have clarified: "*Fraud can be present not only through misrepresentation in the underlying transaction but also present during the proceedings if a party submits false documents or misleads the tribunal. The condemnation of fraud in international arbitration derives from a convergence in national laws, broad international conventions, arbitral case law, general principles of international law, and scholarly opinion.*" [15]

34. However, where it is suspected that the parties have not complied with their obligation to act in good faith and have submitted false testimony or physically or intellectually falsified documents (whose content does not correspond to reality), what are the options available to the Arbitral Tribunal?

35. Before answering this question, it should be emphasized that international arbitration hearings follow a completely different procedure from that which prevails in civil courts. The proceedings are largely those prevailing in common law tribunals, which follow the English model. The hearings are longer, typically lasting one to two weeks, or even much longer. On the other hand, oral pleadings generally do not exceed more than a few hours per party. In fact, almost all hearings are devoted to eliciting the truth through the examination and cross-examination of witnesses who have filed written testimonies and technical and/or financial experts who have filed reports.

36. After the parties have briefly presented their positions, often for an hour or two per party, sometimes longer, the rest of the hearings usually focus on the examination and cross-examination of witnesses and experts. For each of them, the party who filed the testimony or the expert report asks a number of introductory questions. This is followed by a cross-examination by the opposing party, which will generally last for a number of hours, or even a day or more. During this cross-examination, the witness will be challenged with testimonies from other witnesses and documents which have been filed in the case and will have to answer any questions posed by the opposing party's counsel. The Tribunal may also question the witness. The same process will then be followed for each witness and each expert.

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[15] "*Fraud can be present not only through misrepresentation in the underlying transaction but also present during proceedings if a party submits false documents or misleads the tribunal. The condemnation of fraud in international arbitration derives from a convergence in national laws, broad international conventions, arbitral case law, general principles of international law, and scholarly opinion.*" CB Lamm, HT Pham, R Moloo, Fraud and Corruption in International Arbitration, in LIBER AMICORUM BERNARDO CREMADES (M.Á. FERNÁNDEZ-BALLESTEROS, D. ARIAS EDS. 2010), pp. 715, 716.

37. Witnesses and experts are cross-examined in order to thoroughly test the credibility and truthfulness of each testimony or expert report; in other words, in order to establish whether and to what extent the Arbitral Tribunal can rely upon what the witness or expert is saying regarding the evidence supporting the presenting party's position.

38. After these examinations and cross-examinations, which extend over almost the entirety of the hearings, the hearings most often come to an end. Counsels will sometimes make a brief closing statement, summarizing what the examinations and cross-examinations have contributed to supporting their position or disproving the opposing party's position. However, these closing statements will be most often replaced by post-hearing written submissions that seek to perform the same function.

39. Where there are any suspicions that a document has been physically forged, the party who filed the document will be asked to produce the original, which will be submitted to a handwriting expert for verification, if necessary. For example, the tribunal did this in the *Churchill Mining v. Indonesia* case in order to determine whether the signatures on the various licenses and documents were authentic. Based on the expert report, the court held that the signatures had been forged. Even though it was found that the claimants themselves were not aware of the forgery, the Tribunal added that the false documents were essential to the investment and that the claimants could not have disregarded them:

> *"The Tribunal agrees with the Respondent that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy."*[16]

40. Conversely, if the original of the document requested by the Arbitral Tribunal is not presented to it, the Tribunal will exclude the document from the debate and no weight will be given to it. The credibility of the party involved will also be tainted, which may have an impact on the assessment of the other evidence produced by the party. This occurred for example in the *Europe Cement v. Turkey*[17] case, where the Arbitral Tribunal had ordered the claimant to submit the original deeds of purchase for inspection, which it was using to demonstrate that it had made the investment. As the claimant did not produce them, the Arbitral Tribunal held that the claimant's claim that it had purchased shares in certain companies was fraudulent and declared itself incompetent to hear the claim.

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[16] *"The Tribunal agrees with the Respondent that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy." Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40), Award, 6 December 2016.

[17] *Europe Cement Investment & Trade SA v. Republic of Turkey* (ICSID Case No. ARB (AF)/07/2), Award, 13 August 2009.

41. Conversely, where it is suspected that the documents produced do not reflect the reality (intellectual fraud), such as falsified annual accounts, the opposing party may produce documents or testimonies tending to establish the actual circumstances and the fraudulent nature of the document or demonstrate that the information is false by cross-examining witnesses or experts of the party in question. Where the (opposing party) successfully does so, the falsified document can no longer be used wholly or partly as evidence. This will also apply to anything based on the falsified document. Furthermore, the credibility of the party who produced the document will be affected, which may have an effect on how the Tribunal assesses its other evidence.

42. This will also apply where false testimony is suspected. The opposing party may produce contradictory witness statements and establish that the falsity of his or her assertions during a cross-examination by challenging him or her with other testimonies or documents submitted in the file. If it is the falsity of the testimony is established, its content cannot be used as evidence and the credibility of the witness and the party who produced it will be tainted.

43. In other words, once there is suspected fraud in arbitration proceedings, there are a number of options for both the Arbitral Tribunal and the parties to establish that a document is physically or intellectually false or that the content of a testimony or a statement is false.

44. I would also like to add that, based on my forty years of experience in arbitration, once an Arbitral Tribunal suspects that a party attempts to deceive it by submitting false documents or false witness testimonies, it will generally scrutinize every piece of evidence and every claim from the party in question. If the Tribunal decides that this party has tried to deceive it, its chances of being successful in the proceedings will more often than not decrease or even disappear completely.

45. Following these observations concerning fraud during international arbitration and the Tribunal's role in this area, I will now examine the extent to which the foregoing statements should be applied in the arbitration case between the Stati Parties and the Republic of Kazakhstan.

II. THE MASSIVE FRAUD PERPETRATED BY THE STATI PARTIES AND ITS POTENTIAL IMPLICATIONS ON THE AWARD

46. To prepare this expert report, I reviewed a considerable number of documents, identified in §5 above. I found that that a significant amount of fundamental evidence had not been discovered until after the arbitration proceedings. As a result, this evidence had not been submitted to the Arbitral Tribunal and could therefore not have been subject to a contradictory debate.. Having assessed this new evidence on the basis of my experience as an international arbitrator, I believe that it reveals that there has been massive fraud perpetrated by the Stati Parties. In the remainder of this opinion, I will examine how this new evidence would have affected the arbitration proceedings had it been available to the Arbitral Tribunal.

47. In this second part, I will first briefly summarize the facts, as identified by the Arbitral Tribunal, as well as its main submissions. I will then examine how the new evidence was gradually

discovered and what it proves, namely that the Stati Parties are guilty of large-scale fraud, which could not have been subject to a contradictory debate before the Arbitral Tribunal.

48. In the following sections, I will analyze how the facts now known could have an impact on the Arbitral Tribunal's jurisdiction and its assessment of the evidence, liability, causality and quantum.

1 Summary of the facts as established by the Arbitral Tribunal

49. Between 1999 and 2004, Anatolie Stati and his son Gabriel Stati invested in two companies in Kazakhstan, Tolkynneftegaz LLP ("TNG") and Kzapolmunay LLP ("KPM"), through Ascom Group SA ("Ascom") and Terra Raf Trans Trading ("Terra Raf"). TNG is a wholly-owned subsidiary of Terra Raf and KPM is a wholly-owned subsidiary of Ascom. KPM and TNG were specialized in oil and gas exploration, development and production, and held subsoil use contracts with Kazakhstan for this purpose.

50. In 2006, TNG entered into an agreement with Vitol, an independent Dutch company ("Vitol"), in order to jointly build and operate a liquid gas production plant (the "LPG Plant").

51. During the same year, the Stati Parties raised funds on the financial markets to finance KPM and TNG's operations. To this end, they established a British Virgin Islands ("BVI") company known as Tristan Oil Ltd. ("Tristan") for the sole purpose of issuing promissory notes (the "Tristan promissory notes") to a number of investors (the "Tristan promissory note holders"). The Tristan promissory notes were secured by the KPM and TNG shares. The issue of these promissory notes was secured under a contract (know as an "Indenture") (the "Contract") between Tristan and Wells Fargo Bank ("Wells Fargo"). This Contract required the Stati Parties to provide to the Tristan promissory notes holders, among other things and on a quarterly and annual basis, specific financial information about KPM, TNG and Tristan audited by independent chartered accountants. The Stati Parties had retained the services of KPMG Audit LLC ("KPMG") for this purpose. The Contract also stipulated that the Stati Parties could not use the funds they had raised to finance dealings between related parties, unless they obtained prior approval subject to extremely strict procedures. In total, Tristan raised funds totaling USD 531 million.

52. During summer 2008, the Stati Parties started the process of selling their investment in Kazakhstan, KPM, TNG and the LPG Plant, with the exception of certain holdings (under a specific contract, Contract 302). To this end, they retained Renaissance Capital to assist them in this transaction, known as the "Zenith Project". Renaissance Capital sent an initial invitation to 129 potential buyers, including the Kazakhstan state-owned company KMG. An information memorandum was prepared based on KPM's and TNG's financial statements (the "Information Memorandum") for the 41 potential investors who had expressed an interest in the transaction. In addition, on 29 August 2008, KPMG drew up a Due Diligence Report (the "Due Diligence Report") for these same potential investors.

53. On 25 September 2008, based on the information provided by the Stati Parties, KMG submitted an indicative and non-binding offer for the acquisition (the "KMG Indicative Bid"). It included a USD 199 million bid for the LPG Plant.

54. In October 2008, Anatolie Stati was forced to leave the country following the receipt of a letter from the then President of Moldova, Mr. Vladimir Voronin, asserting that he was using the proceeds from the sale of mineral resources from Kazakhstan to invest in countries subject to United Nations sanctions, such as South Sudan. Kazakhstan also conducted a number of financial investigations into the Stati Parties' activities in order to determine whether KPM and TNG's operations were covered by the required licenses and complied with various legislation on tax, labor law, environmental protection and subsoil use. Financial audits on KPM and TNG were also conducted and proceedings were initiated about the type of license used by KPM and TNG.

55. In December 2008, Kazakhstan withdrew the consent that it had given in 2007 for Terra Raf's acquisition of its investment. This withdrawal was announced in an INTERFAX press release, which alerted Credit Suisse of this development while it was in discussions with the Stati Parties at the time with the view to concluding a loan. Credit Suisse demanded clarification from the Stati Parties.

56. In 2009, the Stati Parties and Kazakhstan met in order to discuss a potential amicable resolution of the various issues mentioned above. However, no agreement was reached and the proceedings initiated by Kazakhstan continued. In April 2009, criminal proceedings were initiated against the CEO of KPM (Mr. Cornegruta) and KPM and TNG's subsoil use contracts were seized.

57. In May 2009, construction on the LPG Plant was halted due to financial difficulties. At around the same time, KPM and TNG's bank accounts were seized by Kazakhstan due to unpaid taxes.

58. On 16 June 2009, the Stati Parties entered into a loan with a company named Laren (the "Laren Loan"), on very onerous terms: 35% interest on a USD 60 million promissory note, in addition to the issue of further Tristan promissory notes with a face value of USD 111 million to Laren, at a discount rate of at least 73%.

59. While these developments were occurring, the Zenith Project continued. KMG withdrew from it in July 2009, after concluding that the acquisition of KPM and TNG was not commercially profitable due to their debt levels. Various other potential investors also pulled out of the transaction. However, a Starleigh company made a bid in October 2009 and another was made by Grand Petroleum in November 2009.

60. In September 2009, Mr. Cornegruta was convicted of illegal business activities and was sentenced to four years in prison. KPM was ordered to pay approximately USD 145 million in illegal revenue into the State budget. The ruling was later upheld on appeal. KPM subsequently became the subject of enforcement proceedings and in January 2010, it was declared bankrupt. KPM.

61. In February 2010, the Stati Parties negotiated the sale of their investments in KPM and TNG to a Cliffson company. However, the transaction was not finalized.

62. In June 2010, inspections of KPM and TNG were conducted by various government authorities. On 14 July 2010, Kazakhstan notified KPM and TNG that they were in breach of their subsoil use contracts, and the State terminated these contracts on 21 July 2010. KMG subsequently took over these contracts and the corresponding revenues.

63. Based on these findings, the Arbitral Tribunal decided, among other things, that:

(i) The Stati Parties had indeed made an investment in Kazakhstan;

(ii) Kazakhstan was guilty of a campaign of harassment that violated the Fair and Equitable Treatment clause contained within the Energy Charter;

(iii) As a result of the campaign of harassment, the Stati Parties had run out of cash, which prevented them from entering into a loan agreement with Credit Suisse and had forced them to enter into an extremely disadvantageous Laren Loan;

(iv) It was Kazakhstan's conduct, rather than the Stati Parties' actions, that had led to the collapse of KPM and TNG;

(v) The compensation to be awarded to the Stati Parties should have been based on the fair market value of their investments, assessed immediately before the impending takeover was known;

(vi) The Valuation Date should have been 30 April 2009; and

(vii) The best source of information for determining the LPG Plant's value was the current bids that potential buyers had made and, in particular, KMG's indicative bid.

2 *The gradual discovery of new evidence, after the Award was rendered*

64. It subsequently emerged that the above Arbitral Tribunal's findings were based on completely falsified and fraudulent evidence and false statements by the Stati Parties throughout the arbitration proceedings.

65. Over a period of seven years, after the notification of the Award was rendered, and after very challenging investigations, it emerged that the Stati Parties had used a very elaborate structure of more than 80 related companies, incorporated in tax havens, in order to illegally siphon off their investments worth hundreds of millions of dollars in KPM and TNG in Kazakhstan.

66. It thus emerged that:

(i) In June 2015, a US court issued an order for production of documents, following which it emerged that the Stati Parties had substantially inflated the alleged investments made for the LPG Plant's construction, and had done so by concealing the fact that Perkwood, the seller of the equipment intended for the LPG Plant, was a company owned by the Stati Parties;[18]

(ii) In August 2015, testimony from Tractebel revealed that the German company that had supplied the equipment had sold it to Ascom for USD 35 million and had never heard of Perkwood; [19]

(iii) Documents from the Latvian bank Rietumu provided in autumn 2016 revealed that Anatolie and Gabriel Stati held general powers of attorney over Perkwood's bank accounts; [20]

(iv) Various documents provided during the Award's exequatur proceedings in England, in February and June 2018, revealed, among other things, that:
   a. Perkwood had entered into a contract with a company named Azalia for the LPG equipment's purchase;
   b. Anatolie Stati had not informed KPMG (KPM, TNG and Tristan's auditors) that Perkwood was a related company;
   c. Artur Lungu had explicitly instructed KPMG to change all references to Perkwood as being a company related to the Stati Parties in KPMG's Due Diligence Report, so that it could appear as a separate third company, and it had complied with these instructions; and
   d. The Stati Parties had drawn up two sets of internal accounting documents for the LPG Plant's CAPEX costs, which displayed different investment amounts;

(v) In April 2019, Kazakhstan was able to obtain the deposition in the United States of Artur Lungu, the former Chief Financial Officer of Ascom, one of the Defendants, (the "Lungu Deposition of April 2019") in which he admitted that:
   a. in October 2008, the Stati group of companies experienced a short to medium term cash-flow crisis caused by, among other things, planned investment activity in Iraq / Kurdistan worth 200 to 250 million US dollars, and not by Kazakhstan's actions;
   b. Anatolie Stati had always known that Perkwood was a related party but had concealed this fact in the documents sent to KPMG;
   c. KPM, TNG and Tristan's financial accounts during the period 2008-2010 were factually incorrect, as they did not identify Perkwood as a related party; and
   d. Artur Lungu had explicitly asked KPMG to refer to Perkwood as an independent third company in the Due Diligence Report; [21]

[18] Bermann Report, Annex III, §§ 36-37.
[19] Idem, §§ 39-40.
[20] Idem, § 41.
[21] Idem, §§ 47-48.

(vi) During summer 2019, different bank accounts held at the Latvian bank Rietumu by three dozen shell companies owned and controlled by the Stati Parties (the "Rietumu bank statements") were discovered. These revealed that the Stati Parties had used a hidden and complex network of related companies, incorporated in tax havens, in order to siphon off hundreds of millions of dollars from KPM and TNG in Kazakhstan and transfer them into these tax havens; [22]

(vii) In August 2019, after having learned the contents of the Lungu Deposition and having conducted its own investigation independently, KPMG decided to withdraw its audit reports about KPM, TNG and Tristan's annual and quarterly financial statements for the years 2007, 2008 and 2009, due to the omissions identified in these financial statements, which KPMG felt were substantial, as specified in their letter dated 21 August 2019; [23]

(viii) In October 2019, further correspondence between KPMG and the Stati Parties was discovered. This correspondence dated from (a) February-March 2016, containing requests from KPMG for clarifications about Perkwood and challenging the legitimacy of the construction costs for the LPG Plant as shown in the audited financial statements; (b) and August-September 2019, relating to the same issues; [24]

67. This new evidence clearly establishes that the Stati Parties perpetrated large-scale fraud, by using companies incorporated in tax havens to illegally divert hundreds of millions of dollars from KPM and TNG for their own personal enrichment;

3 ***New evidence establishes that the Stati Parties perpetrated large-scale fraud***

68. The Stati Parties perpetrated large-scale fraud by:

(i) Diverting funds obtained from Tristan investors and intended for KPM and TNG to other parties related to them;

(ii) Offering unfavorable financial terms to KPM and TNG;

(iii) Skimming off the amounts obtained when selling crude oil and gas;

(iv) Artificially inflating the LPG Plant's construction costs;

(v) Falsifying KPM, TNG and Tristan's financial statements, the Information Memorandum and the Due Diligence report;

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[22] Idem, §§ 49-53.
[23] Idem, §§ 54-66.
[24] Idem, §§ 66-70.

(vi) Arranging the Laren Loan; and

(vii) Potentially laundering money.

a. The transfer of funds obtained from Tristan investors and intended for KPM and TNG to other parties related to them

69. As set out above, at the start of 2006, the Stati Parties raised funds on the financial markets through their company Tristan with the alleged aim of repaying KPM and TNG's debts, and of financing their working capital and other company expenses. One of this company's uses of the funds raised through the Tristan promissory notes was issuing loans to KPM and TNG, as well as to Terra Raf.

70. In 2006 and 2007, Tristan loaned USD 76 million to Terra Raf, through two loans of USD 6 million and USD 70 million, respectively. PwC reviewed the documents establishing the flow of funds obtained through these loans and concluded that Terra Raf had transferred the entire USD 76 million to other parties related to the Stati Parties. However, PwC found no evidence that these funds ever reached KPM and TNG, despite the fact that the Tristan promissory notes had been issued to finance KPM and TNG's operations and the fact that KPM and TNG had guaranteed that these promissory notes would be repaid through their share-ownership structure.[25]

71. Further loans were issued to Tristan and Terra Raf over subsequent years, resulting in Terra Raf owing Tristan USD 118.4 million as at 31 December 2010. The vast majority of these funds never reached KPM and TNG's accounts. PwC only discovered the trail worth USD 24 million, paid through other related parties, to KPM and TNG.[26]

72. In other words, out of the loans worth USD 194.4 million provided by Tristan to Terra Raf, in principle to finance KPM and TNG's operations (loans secured by KPM and TNG shares), only USD 24 million (12.35%) was actually received by the Kazakh companies. The Stati Parties pocketed the rest of the funds.

73. Additionally, as noted by Mr. Stefan Cassella, a former federal prosecutor with thirty years of experience at the United States Department of Justice, specializing in money laundering and garnishment of assets, some of the funds loaned to Terra Raf were used for purposes unrelated to the Stati Parties' investment in Kazakhstan, for example, in order to pay for a property in Moldova known as the "Stati Castle". [27]

74. None of the above information was available to the Arbitral tribunal.

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[25] PwC III, at 4.22; PwC Report, Review of transactions by the Stati Parties for characteristics of money laundering risks ("PwC IV"), at 3.26.
[26] PwC III, at 4.23.
[27] S. Cassella's expert opinion, p. 7.

b. The unfavorable financial terms offered by Tristan to KPM and TNG, as opposed to the terms offered to Terra Raf

75. By analyzing the Rietumu bank statements, PwC also concluded that Tristan provided loans to KPM and TNG on incredibly unfavorable financial terms, as opposed to the terms offered to Terra Raf. This is another way that the Stati Parties used KPM and TNG to illegally siphon off large sums of money for their own benefit.

76. In particular, in December 2006, Tristan loaned KPM and TNG USD 201 million at an annual interest rate of 17.65%. In June 2007, Tristan loaned KPM and TNG an additional USD 114 million at an annual interest rate of 16%. However, Tristan itself only paid an interest rate of 10% on the Tristan promissory notes, which is roughly half of the interest rate applied to KPM and TNG. PwC concluded that KPM and TNG would have paid USD 61.87 million less in interest had Tristan applied an interest rate of 10.5% to KPM and TNG. Even more shocking is the fact that the loan of USD 76 million offered by Tristan to Terra Raf was interest-free.[28] PwC was unable to identify the reason for this.[29]

77. The majority of this crucial information was not available to the Arbitral Tribunal.

c. The embezzlement of sums from the sales of crude oil and gas condensate

78. The Stati Parties also diverted to their related entities hundreds of millions of dollars that would normally be payable to KPM and TNG for sales of crude oil and gas condensate.

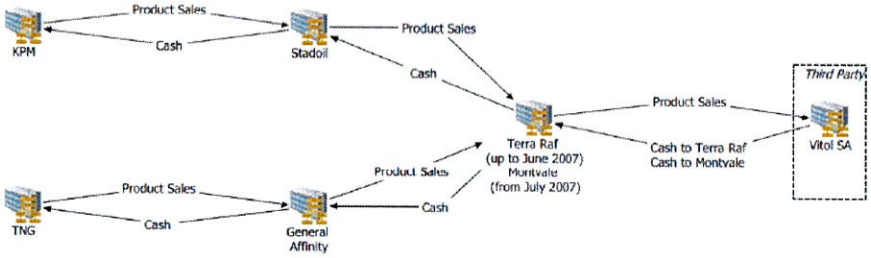
79. In practical terms, instead of selling the crude oil and gas condensate directly to third parties (and to Vitol, in particular), KPM and TNG sold it to various related parties, who then sold the crude oil and gas condensate to third parties (including Vitol). This enabled the various related parties interposed in the sale to keep a significant amount of the price paid by Vitol instead of paying these amounts to KPM and TNG.[30]

80. After reviewing the Rietumu bank statements, PwC concluded that the export sales of crude oil and gas condensate had first been made to General Affinity (a party related to the Stati Parties), before these were passed to Terra Raf and, from July 2007, to Montvale (which is also a party related to the Stati Parties). KPM first sold crude oil and gas condensate to Stadoil (a party related to the Stati Parties), before these were passed to Terra Raf and, from July 2007, to Montvale. Terra Raf and Montvale were the entities that ultimately sold the crude oil and gas condensate to Vitol. [31] General Affinity, Stadoil, Montvale and Terra Raf were all shell companies owned by the Stati Parties. In his Deposition of April 2019, Artur Lungu, Ascom's Chief Financial Officer, testified that, apart from the contracts with Montvale and TNG, General Affinity and Stadoil engaged in no other activities.[32] In other words, the only "service" provided by General Affinity and Stadoil was channeling funds to the Stati Parties.

[28] PwC III, §§ 4.24-4.31.
[29] PwC IV, § 3.23.
[30] PwC III, §§ 5.9-5.21.
[31] PwC III, §§ 5.12-5.14.
[32] Lungu Deposition of April 2019, pp. 160-161.

81. The illustration below, included in PwC's third report, clearly illustrates the scheme devised and used by the Stati Parties to sell crude oil and gas from KPM and TNG:

Figure 5.1: Illustration of the export sales process for crude oil and gas condensate



Source: Rietumu Bank statements for Stadoil, General Affinity, Terra Raf and Montvale. Exhibits PwC-047, PwC-031, PwC-049, PwC-039.

82. This unnecessarily complicated structure which interposes different related parties between the crude oil and gas sellers (KPM and TNG) and the buyer (Vitol) enabled the different parties related to the Stati Parties to keep a significant amount of the purchase price paid by Vitol and divert these sums away from KPM and TNG. After reviewing the Rietumu bank statements, PwC concluded that "*in total, USD262.9 million of the amounts paid by Vitol for the sale of products supplied by KPM and TNG were ultimately kept by the related parties and did not directly end up with TNG and KPM* ".[33] However, during the same period (from 1 August 2005 to 31 July 2010), KPM and TNG received only 1,095.9 million dollars for the crude oil and gas condensate that they had produced.[34] This means that roughly 20% of the total price of crude oil and gas produced by KPM and TNG was skimmed off by the Stati Parties through their network of companies, and then transferred to Hayden (another Stati company) and Ascom.[35]

83. According to PwC, these amounts *"are disproportionate to the underlying sales value"*[36] and cannot justify the services provided by the intermediaries. This is because there is no way that these amounts could be justified, bearing in mind that the intermediaries interposed between Vitol and KPM and TNG were shell companies that engaged in absolutely no activity whatsoever.

84. None of this information was available to the Arbitral Tribunal.

d. <u>The artificial inflation of the costs incurred for the LPG Plant's construction</u>

[33] PwC III, 5.20.
[34] Id.
[35] PwC III, 5.21.
[36] PwC III, 5.20.

85. The Stati Parties used a similar scheme of cleverly concealed interpositions of related parties in transactions that could have been undertaken directly by KPM and/or TNG with a third party for acquiring equipment for the LPG Plant. As a result, TNG's costs for the LPG Plant's construction were artificially inflated.[37]

86. In practical terms, rather than buying the equipment for constructing the Plant directly from the German manufacturer, the company Tractebel Gas Engineering GmbH ("Tractebel"), the Stati Parties caused TNG to conclude a contract with Perkwood Investment Ltd ("Perkwood"). Perkwood had allegedly acquired the same equipment from another company, Azalia Ltd. ("Azalia"), which had also allegedly contracted with Tractebel for this equipment. Both Azalia and Perkwood were shell companies owned and controlled by the Stati Parties. The Stati Parties argued that Perkwood was a separate and fully operational company, while it was actually a shell company, with no premises or employees, which paid no taxes, wages or rents, and which filed dormant-company accounts.[38] Mr. Lungu, Ascom's Chief Financial Officer, claimed in his Deposition of April 2019 that the same applied to Azalia.[39]

87. The interposition of Azalia and Perkwood, two companies which engaged in no activity and had no employees, resulted in massive inflation of the LPG Plant's equipment costs. While TGE provided engineering and design services, as well as the Plant's main components, for a total of approximately USD 35 million, Azalia sold Perkwood the same TGE equipment for at least USD 91 million. Perkwood then resold TNG the same equipment for a total of approximately USD 93 million (the "Perkwood Contract").[40] TNG made other payments to Perkwood under the Perkwood Contract, including:

    (i) a second payment of approximately USD 22 million for the same Tractebel equipment, which was misrepresented in Appendix 14 of the Perkwood Contract as being a different set of equipment;

    (ii) charges of approximately USD 72 million for other equipment that did not exist;

    (iii) a fictitious "management fee" of approximately USD 44 million which the High Court of England held was "simply paid at will",[41] given that Perkwood had not provided any management services; and

    (iv) interest on the above amounts.[42]

88. Of the amounts paid by TNG to Perkwood for equipment for the LPG Plant, PwC concluded that approximately USD 67.4 million was diverted to Hayden, a Stati group company, via Azalia.[43]

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[37] Deloitte Report dated 12 January 2017, § 28 (e).
[38] Lungu Deposition of April 2019, p. 161.
[39] Id..
[40] TPA Global, Expert opinion on transfer pricing aspects of intercompany transactions between Azalia, Perkwood and TNG, 19-22.
[41] Reasons for Judgment, 29 August 2014, 39 [*Vitol FSU BV v. Ascom Group SA*, In the High Court of Justice, Queen's Bench Division, Commercial Court, 2014 FOLIO 406].
[42] Deloitte Report dated 12 January 2017, 28; PwC III, 4.33-4.38.
[43] PwC III, 4.39, 4.40.

89. It should be noted that the Perkwood Contract, as well as the contracts entered into between Tractebel and Azalia, and between Azalia and Perkwood, were not produced by the Stati Parties during the arbitration proceedings, despite the clear instructions from the Arbitral Tribunal to produce every document that was in their possession or under their control "*specifying the construction and assembly costs, the operational costs and the fine-tuning costs for the LPG Plant*".[44]

90. With this in mind, it is worth noting that the Perkwood transaction defrauded the Tristan promissory notes holders. Under the contract governing the investment made by these promissory note holders, a number of restrictions applied to inter-party relationships. The Perkwood Contract would have triggered the highest level of restrictions, namely:

(i) the transaction should have been conducted under normal conditions ("on an arm's length basis");

(ii) the transaction should have been approved by a board of directors resolution, along with a statement from a director that a majority of the disinterested members of the board of directors and at least one independent director had approved it; and

(iii) the transaction should have been accompanied by an independent opinion issued by an accounting firm or a national investment bank, confirming that the transaction was reasonable for Tristan, KPM or TNG. [45]

91. Artur Lungu admitted in his Deposition of April 2019 that by failing to disclose that Perkwood was a related company, the Stati Parties had managed to avoid these restrictions being applied.[46]

92. In the financial statements and the Due Diligence Report, and therefore during their investment, the Stati Parties misrepresented that Perkwood was a separate and fully operational third party. It was not until 2015, following the aforementioned t Production Order of the United States Court, that Kazakhstan learned that Perkwood was an affiliate of the Stati Group.[47] In his Deposition of April 2019, Artur Lungu claimed that he learned that Perkwood was related to the Statis in 2013, when he was preparing his testimony for a parallel arbitration with Vitol. This written testimony was filed in October 2013. Notwithstanding the fact that the arbitration proceedings were ongoing at this time, neither Artur Lungu nor the Stati Parties communicated this important fact to the Arbitral Tribunal (or to Kazakhstan).[48]

e. <u>The falsification of KPM, TNG and Tristan's financial statements, the Information Memorandum and the Due Diligence Report</u>

[44] Annex II of Procedural Order No. 2 concerning the Production of Documents, 3 February 2012, Kazakhstan Document Production Request No. 108, cited in the Bermann Report, §112.
[45] Bermann Report, Annex III, §§ 117-121.
[46] Lungu Deposition of April 2019, pp. 133, 134, 180, 241, 242.
[47] Bermann Report, Annex III, § 37.
[48] Lungu Deposition of April 2019, pp. 116, 148.

93. A significant part of the Stati Parties' strategy, which was to siphon off money from KPM and TNG, involved falsifying various financial documents (KPM, TNG and Tristan's financial statements, the Information Memorandum and the Due Diligence Report) in order to hide the fact that KPM and TNG mainly traded with other parties related to the Statis, under very disadvantageous financial terms.

94. These falsifications included the following in particular:

(i) The Stati Parties' deliberate false statement in their financial statements and letters of representation to KPMG that Perkwood was an independent third party; thereby concealing the fact that Perkwood was a related party and that the Perkwood Contract was a contract with a related party. This affected the quarterly and annual financial statements of TNG and Tristan for the years 2006 to 2009, the Information Memorandum and the Due Diligence Report;
(ii) The Stati Parties' intentional failure to disclose other inter-party transactions in their audited financial statements, amounting to more than USD 187.2 million.

The misrepresentation that Perkwood was an independent third party while it was a related party

95. The Stati Parties intentionally made a false statement by not disclosing that Perkwood was an entity owned by Stati in the financial statements of TNG and Tristan, in the Information Memorandum and in the Due Diligence Report. This enabled them to record largely inflated construction costs for the LPG Plant in the financial statements and artificially increase the value of TNG and the LPG Plant to outside bidders.

96. As admitted by Artur Lungu, former Chief Financial Officer of Ascom, in his Deposition of April 2019: (i) Perkwood has always been an entity related to the Stati Group, a fact that was well known to Anatolie Stati;[49] (ii) the Stati Parties falsified their letters of representation to KPMG, in which they were required to honestly disclose all of their related parties as well as related party transactions, and thereby concealed the fact that Perkwood was a related entity, and that the Perkwood Agreement was an inter-party agreement, in the quarterly and annual financial statements of TNG or Tristan or their consolidated financial statements for the years 2006, 2007, 2008 and 2009;[50] (iii) the Stati Parties did not disclose that Perkwood was a related party during the arbitration proceedings;[51] (iv) the obligation to prepare correct financial statements, *i.e.* financial statements which are free from misrepresentation, is an obligation imposed on the management of the company concerned, not on the auditors;[52] (v) the financial statements of TNG and Tristan were prepared in accordance with International Financial Reporting Standards ("IFRS"), which require disclosure of related parties and related party transactions;[53] and (vi) the absence of such disclosure is a misrepresentation, which can be characterized as fraud.[54]

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[49] Deposition, p. 116.
[50] Id., Pp. 144, 145.
[51] Id, pp. 145-149, 168.
[52] Id, p. 140.
[53] Id, pp. 139, 183.
[54] Id, pp. 183, 143.

97. Furthermore in his Deposition, Artur Lungu admitted that in related party transactions, such as transactions between Azalia and Perkwood, and between Perkwood and TNG, the financial statements could only mention the fair market value of the transaction, as opposed to the amount actually paid under the agreement.[55]

98. In other words, the financial statements of TNG and Tristan could only legally reflect the actual price paid by TNG to Perkwood for the LPG Plant equipment if that price reflected the fair market value of the equipment. However, as TPA Global indicated in its Expert Opinion on the transfer pricing aspects of inter-company transactions between Azalia, Perkwood and TNG (the "TPA Global Opinion"), the fair market value of the LPG Plant equipment and therefore the maximum value that could be recorded in TNG's financial statements for the equipment was USD 35 million, *i.e.* the price invoiced by Tractebel.[56]

99. In contrast, TNG's financial statements reveal the following total capitalized costs for the LPG Plant's construction: USD 193 million as of 30 June 2008; and USD 248 million as of 31 December 2009.[57] I would like to point out that approximately USD 67 million of these amounts were transferred to Hayden, a related party incorporated in a tax haven and having no relation to the investment carried out in Kazakhstan.

100. As a result, by intentionally failing to disclose in TNG and Tristan's financial statements that Perkwood was a related party and that the Perkwood Contract was a contract with a related party, the Stati Parties circumvented the application of the restriction imposed by the IFRS standards and artificially inflated TNG's costs.

101. Furthermore, according to TPA Global, the significant and unexplained increase in the price paid for the equipment at the LPG Plant, purchased by Azalia from Tractebel, and then sold by Azalia to Perkwood and by Perkwood to TNG, *"establishes a prima facie case of false statement of taxable income"*.[58] TPA concluded that the Stati Parties' intention was not to report any taxable income or very low taxable income in various countries, including Kazakhstan, where the taxable base has been fraudulently reduced.[59] TPA considers that the Stati Parties' conduct could expose them to administrative fines and potentially also to criminal charges.[60]

102. The falsification of TNG and Tristan's financial statements was only the first step in this fraudulent process.

103. In accordance with the terms of the Contract which governed the investment made by the Tristan promissory notes holders, the Statis had the obligation to transmit to them the quarterly and annual financial statements of Tristan, KPM and TNG, as well as the audit reports drawn up by

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[55] Id, p. 234.
[56] TPA Global Opinion, §§ 29-38.
[57] PwC Expert Report, Review of the Reliability of the Financial Statements ("PwC I"), 26.
[58] TPA Global Opinion, 108.
[59] Id., 102.
[60] Id., 108.

an independent chartered accountant. Given that the financial statements contained false statements, the Statis deceived their auditor, KPMG.

104. In his Deposition of April 2019, Artur Lungu admitted that: (i) KPMG was unaware that Perkwood was a related party;[61] (ii) Anatolie Stati intentionally deceived KPMG by not informing them that Perkwood was a related party;[62] (iii) the management letters provided to KPMG were false in that they did not identify Perkwood as a related party nor the Perkwood Contract as an inter-party transaction;[63] and (iv) the list of related parties in KPMG's audit reports corresponded to what Artur Lungu and Anatolie Stati had reported, i.e. it did not include Perkwood.[64] Due to the Statis' misrepresentation, KPMG issued audit reports which did not properly reflect the financial state of KPM, TNG and Tristan but, on the other hand, gave the appearance of truth to the Stati Parties' fraud.

105. The PwC I report confirms that " *TNG's audited Combined Statements and Company Statements as of 31 December , 2006, 2007, 2008 and 2009, and TNG's Combined Interim Statements and Company Interim Statements as of 30 June 2008 do not meet the requirements of IAS 24*[65] *in all the years where transactions between TNG and Perkwood took place, and outstanding balances to/from Perkwood exist".*[66]

106. All this continued during the summer of 2008, when the Stati Parties decided to consider the sale of KPM, TNG and the LPG Plant, in an operation called "Project Zenith". In order to attract investors, the Stati Parties retained the services of Renaissance Capital, which sent preliminary offers to potential investors and subsequently distributed the Information Memorandum to parties who had expressed an interest in the purchase.[67] In his April 2019 Deposition, Artur Lungu expressly acknowledged that the Information Memorandum was drafted on the basis of information provided by the Statis and expressly relied on fraudulent audit reports and financial statements.[68] Indeed, the Information Memorandum falsely specified that as of 1 July 2008, TNG had invested USD 193 million in the LPG Plant's construction - amount derived from the financial statements.

107. In the sale process, the Stati Parties used KPMG's services to prepare the Due Diligence Report. The Report's purpose was to provide external bidders with an independent assessment of the financial condition of KPM and TNG and the LPG Plant's value. Ultimately, it was another instrument in the fraudulent process perpetrated by the Statis. In the Due Diligence Report's first draft, which was transmitted to the Statis, KPMG identified Perkwood as a related party. However, as Artur Lungu admitted in his Deposition of April 2019, he intervened and expressly

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[61] p. 154.
[62] Id., Pp. 132, 133, 144-148.
[63] p. 152.
[64] p. 157.
[65] IAS 24 "Related Party Disclosures", the objective of which is" *to ensure that an entity's financial statements contain the disclosures necessary to draw attention to the possibility that its financial position and profit or loss may have been affected by the existence of related parties and by transactions and outstanding balances with such parties*" (PwC I, 29).
[66] PwC I, 35.
[67] Award, §421..
[68] Deposition, pp. 238-245.

instructed KPMG to change all references to Perkwood in the Due Diligence Report by no longer stating that it was a related party but an independent third party, which KPMG did.[69]

108. In other words, at the time of the Zenith Project, the Statis had ensured that the financial statements of TNG and Tristan, the Information Memorandum and the KPMG Due Diligence Report incorrectly represented to potential investors that Perkwood was a completely independent third party which entered into transactions with TNG under normal conditions ("on an arm's length basis") when precisely the opposite was true. The Statis clearly intended to artificially inflate the value of their assets to hundreds of millions of dollars, to the detriment of potential investors. As the PwC report clarified, this was a material misrepresentation, which rendered all of these documents completely unreliable.[70]

109. KPMG only first became aware that it had been deceived in February 2016, after learning from the testimony provided by Artur Lungu in the Arbitration with Vitol, that Perkwood was a company owned by the Statis. KPMG wrote to the Statis on 16 February 2016, requesting confirmation that Perkwood was indeed a related party and asking why this had not been disclosed at the time of the audit. KPMG then asked various questions regarding the significant difference between the value of the LPG Plant equipment billed to TNG by Perkwood and the cost actually billed by Tractebel.[71] The Statis avoided answering these questions. It appears that KPMG did not continue its investigation in 2016.

110. KPMG contacted the Stati Parties again in August 2019, after being made aware of, among other things, the Lungu Deposition of April 2019 and the Rietumu bank statements, which unmistakably demonstrated that Perkwood had always been a party related to the Statis. KPMG again asked the Statis various questions . However, instead of answering these questions, the Statis again refused to provide any information and instead questioned KPMG's ethical standards. In the absence of any significant response, , KPMG decided, to withdraw its audit reports on 21 August 2019, deeming the Statis' failure to reveal Perkwood as a party related to KPM, TNG and Tristan "*material, both to the financial statements of Tolkynneftegaz LLP the years ending 31 December 2007, 2008 and 2009 and to the combined financial statements of Kazpolmunay LLP, Tolkynneftegaz and Tristan for the same period*".[72] KPMG also informed the Stati Parties that they should take all necessary measures to prevent anyone from placing any further or future reliance on its audit reports.[73]

111. The aforementioned correspondence between KPMG and the Stati Parties is extremely revealing of the latter's bad faith. It also indisputably demonstrates the extreme gravity of the situation. In its Report of 21 January 2020, PwC ("PwC II") confirms that the decision taken by KPMG to withdraw its audit reports is "*highly unusual and serious*" and constitutes action which is only taken by the auditors as a "*last resort and in rare circumstances*".[74] In particular, PwC noted that

[69] Deposition, pp. 262-275.
[70] PwC I, 50-57.
[71] Letter from KPMG to the Statis, 15 February 2016.
[72] Letter from KPMG to Mr. Stati, 21 August 2019.
[73] *Id.*
[74] PwC II, 31, 33.

this had only happened in its practice once in 15 years, after it had issued tens of thousands of opinions.

Other related party transactions that were not disclosed

112. PwC confirmed, after reviewing the Rietumu bank account statements, that many other related party transactions were recorded in the accounts of KPM and TNG but were not presented as such in the corresponding financial statements. These additional transactions amount to USD 187.2 million.[75]

113. This shows once again that the Stati Parties perpetrated a large-scale fraud to siphon off hundreds of millions of dollars from KPM and TNG.

f. The conclusion of the Laren loan

114. Still with the same aim of siphoning funds from KPM and TNG, the Stati Parties concluded the Laren Loan.

115. In the arbitration proceedings, the Statis asserted that they were forced to concludethe Laren Loan, due to Kazakhstan's alleged harassment campaign, as Credit Suisse had refused to provide them with a bridging loan. The Statis claimed that although the terms of the Laren Loan were "terrible"[76] for them (i.e. 35% interest on a USD 60 million promissory note, plus the issue of USD 111 million of new Tristan promissory notes to Laren at a discount rate of at least 73%), it was "*the best deal they could get*".[77]

116. However, the documents obtained in the disclosure proceedings before the English High Court 2018 and Artur Lungu's Deposition of April 2019 revealed that Laren was a Stati-related company and that in fact it was Ascom itself that had decided not to conclude the loan offered by Credit Suisse on normal terms and to take out the Laren Loan instead.[78] While being disadvantageous for KPM and TNG, the Laren Loan was immensely profitable for the Stati Parties. In his April 2019 Deposition, Mr. Lungu admitted that in 2011, Laren's manager was Mr. Eldar Kasumov, Mr. Anatolie Stati's personal chauffeur.[79]

g. The potential risks of money laundering

117. PwC reviewed the new evidence detailed above and concluded that many transactions presented credible indications ("red flags") that the Statis had been guilty of money laundering. In particular, PwC expressed concern about the following:

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[75] PwC III, 6.21.
[76] Award, §384.
[77] *Id.*
[78] Bermann Report, Annex III, 134; Lungu Deposition of April 2019, pp. 190-192.
[79] Id., pp. 255, 256.

(i) KPM and TNG mainly entered into transactions with related parties, not with independent companies;

(ii) This structure allowed significant amounts of third party funds from crude oil and gas sales to be diverted from KPM and TNG, through related parties, and transferred to other Stati parties, to be used to inflate the costs of the LNG Plant equipment purchased from third parties by related parties, and then sold to TNG"[80] - in other words, the funds were siphoned off from KPM and TNG by interposing parties related to Stati in transactions with third parties;

(iii) The funds embezzled were transferred to other States and used to cover significant, apparently personal, expenses and costs of members of the Stati family.[81]

118. These conclusions were confirmed by Stefan Cassella's expert report. Mr. Cassella concluded that:

> *"The Stati Parties perpetrated a series of schemes to loot two Kazakh oil and gas companies [...] of hundreds of millions of dollars, to the detriment of the companies' creditors (including U.S. investors in notes issued in the United States to fund oil and gas exploration by the companies), and the Government of Kazakhstan [...].*
>
> *In large part, the schemes were perpetrated by engaging in transactions with entities (including shell companies) incorporated in jurisdictions that do not require the identification of the actual or 'beneficial owners' of the entities or their assets. In this way, the Stati Parties were able to transfer millions of dollars from or belonging to the Kazakh companies, which they owned, to seemingly unrelated entities that the Stati Parties secretly owned or controlled as well. As a result, the Kazakh companies suffered a financial collapse that caused underfinancing of contractual obligations of the Kazakh companies under their respective subsoil use contracts.*
>
> *As a result of these schemes, the Stati Parties were able to retain hundreds of millions of dollars of fraudulently obtained funds in the names of the seemingly unrelated entities. They proceeded to use those funds, which were held in numerous bank accounts controlled by the Stati Parties at Rietumu Bank in Latvia, to pay bribes to public officials in countries where the Stati Parties had economic interests, to acquire luxury items, and to finance a luxurious lifestyle, including the construction of a castle in Moldova, while concealing the ownership of those funds, their location, and their connection to the scheme to defraud the Kazakh Government and other victims."*[82]

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[80] *Id.*

[81] PwC IV, 3.74.

[82] ("The Stati Parties perpetrated a series of schemes to loot two Kazakh oil and gas companies [...] of hundreds of millions of dollars , to the detriment of the companies' creditors (including US investors in notes issued in the United States to fund oil and gas exploration by the companies), and the Government of Kazakhstan [...].
In large part, the schemes were perpetrated by engaging in transactions with entities (including shell companies) incorporated in jurisdictions that do not require the identification of the actual or 'beneficial owners' of the entities or their assets. In this way, the Stati Parties were able to transfer millions of dollars from or belonging to the Kazakh

119. According to Mr. Cassella, the Statis' conduct potentially violates the anti-money laundering laws of Latvia and United States.

120. It should be noted in this regard that a significant part of the funds illegally siphoned off from KPM and TNG by the Stati Parties were used to make various payments to politicians, including from Kazakhstan. PwC noted in particular that payments of USD 1,254 million had been made by the Statis (through Hayden and Getter, another entity of the Statis) to the daughter of Lyazzat Kiinov, who was the deputy minister of energy and mineral resources of Kazakhstan between 2003 and 2010 and deputy minister of oil and gas in 2010-2011. In an attempt to hide their illicit nature, these payments were recorded as "*scholarship payments*" or "*tuition fees*".[83]

III. THE IMPACT OF THE DISCOVERY OF NEW EVIDENCE CONCERNING THE NATURE OF THE INVESTMENT BY THE STATI PARTIES AND ON THE JURISDICTION OF THE ARBITRAL TRIBUNAL

121. The evidence discovered after the arbitration proceedings demonstrated incontrovertibly that the Statis Parties were guilty of large-scale fraud, siphoning off hundreds of millions of dollars (which would normally have been retained by KPM and TNG for their operations) for the benefit of various entities related to them, set up in tax havens, always with the aim of enriching themselves personally. The Statis achieved this by falsifying numerous documents financial statements and making false and fraudulent statements to their investors, auditors and Kazakhstan.

122. The facts reported above demonstrate that the Stati Parties never ceased to use any opportunity offered to them to siphon hundreds of millions of dollars from KPM and TNG by illicit means. In other words, they demonstrate a pattern of conduct from which it can be inferred that when they acquired KPM and TNG, they did not do so with a view to carrying out business activities in good faith but to use the two companies as their personal slot machines. This is not the good faith conduct that is expected of an investor. Quite the contrary. This is the type of investment made in bad faith that investment treaties are not intended to protect.

123. In this context, I refer to my comments in §17 above, stressing that international investment tribunals uniformly consider that investments made by means of corruption, fraud, bad faith or illegally are not likely to benefit from the protection of investment treaties.

Companies, which they owned, to seemingly unrelated entities that the Stati Parties secretly owned or controlled as well. As a result, the Kazakh Companies suffered a financial collapse that caused underfinancing of contractual obligations of the Kazakh Companies under their respective subsoil use contracts.
As a result of these schemes , the Stati Parties were able to retain hundreds of millions of dollars of fraudulently obtained funds in the names of the seemingly unrelated entities . They proceeded to use those funds, which were held in numerous bank accounts controlled by the Stati Parties at Rietumu Bank in Latvia, to pay bribes to public officials in countries where the Stati Parties had economic interests, to acquire luxury items, and to finance a luxurious lifestyle, including the construction of a castle in Moldova, while concealing the ownership of those funds, their location, and their connection to the scheme to defraud from the Kazakh Government and other victims . "[82] [emphasis added]. Opinion of S. Cassella, p. 4.

[83] PwC IV, § 3.71 and more generally PwC IV, §§ 3.60-3.72.

124. In the *Plama v. Bulgaria* case, the Arbitral Tribunal, which was also seized on the basis of the Energy Charter, decided that the absence of a provision in the Charter requiring that investments be made legally could not be interpreted as meaning that all investments are worthy of protection, even if they are made illegally or in bad faith. The Arbitral Tribunal also ruled that under Article 26(6) of the Energy Charter, it had the power to apply not only the text of the Treaty but also the applicable rules and principles of international law. One of these principles is that of *nemo auditur propriam turpitudinem allegans,* which prevents courts from granting protection to investments made illegally or in bad faith. In this case, the investor having concealed his identity from the host State, the Arbitral Tribunal decided that he could not avail itself of the protections offered by the Energy Charter:

> *"138. Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.*
>
> *[...]*
>
> *139. In accordance with the introductory note to the ECT "the fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [...]". Consequently, the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law.*
>
> *140. The Tribunal finds that the investment in this case violates not only Bulgarian law, as noted above, but also "applicable rules and principles of international law", in conformity with Article 26(6) of the ECT which states that "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law". [...]*
>
> *[...]*
>
> *143. Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protections provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle nemo auditur propriam turpitudinem allegans invoked above. It would also be contrary to the basic notion of international public policy - that a contract obtained by wrongful means (fraudulent misrepresentation) should not (sic) be enforced by a tribunal.*

144. The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law - as indicated above at paragraphs. 135-136 - but also of international law - as noted by the tribunal in the Inceysa case."[84]

125. Similarly, the Arbitral Tribunal refused to grant investment treaty protection applicable to an investment made in bad faith in the *Phoenix Action v. Czech Republic*case , that is to say, not with the aim of carrying out genuine commercial transactions but with a view to obtaining access to international investment arbitration. The Tribunal ruled that, in principle, investments made in bad faith are contrary to international law and are not eligible for protection under an investment treaty :

"101. In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal's view that this condition – the conformity of the establishment of the investment with the national laws – is implicit even when not expressly stated in the relevant BIT. [...]

[...]

106. In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general

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[84]"138. Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law.
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140. The Tribunal finds that the investment in this case violates not only Bulgarian law, as noted above, but also 'applicable rules and principles of international law', in conformity with Article 26 (6) of the ECT which states that '[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law '. [...]
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143. Claimant, in the present case, is requesting the Tribunal to grant its investment in Bulgaria the protections provided by the ECT. However, the Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy - that a contract obtained by wrongful means (fraudulent misrepresentation) should not (sic) be enforced by a tribunal .
144. The Tribunal finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law - as indicated above at paragraphs. 135-136 - but also of international law - as noted by the tribunal in the *Inceysa* case. [emphasis added] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB / 03/24), Award, 27 August 2008, §§ 138-140, 143, 144.

principles of international law, among which the principle of good faith is of utmost importance.

107. The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties 'to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage. This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused. This is stated for example by Hersch Lauterpacht:

"There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused".

[...]

109. The Washington Convention as well as the BIT have to be construed with due regard to the international principle of good faith. The principle of good faith is also recognized in most, if not all, domestic legal systems. It appears therefore as a kind of "Janus concept", with one face looking at the national legal order and one at the international legal order. And in most cases, but not in all, a violation of the international principle of good faith and a violation of the national principle of good faith go hand in hand."[85]

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[85]"101. In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws . If a State, for example, restricts foreign investment in a sector of its economy and a foreign investor disregards such restriction, the investment concerned cannot be protected under the ICSID/BIT system. These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process. And it is the Tribunal's view that this condition - the conformity of the establishment of the investment with the national laws - is implicit even when not expressly stated in the relevant BIT . [...]
[...]
106. In the Tribunal's view, States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith. The protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance .
107. The principle of good faith has long been recognized in public international law, as it is also in all national legal systems. This principle requires parties 'to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage...'. This principle governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under a treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused. This is stated for example by Hersch Lauterpacht:
'There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.'
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109. The Washington Convention as well as the BIT have to be construed with due regard to the international principle of good faith. The principle of good faith is also recognized in most, if not all, domestic legal systems. It therefore appears as a kind of "Janus concept", with one face looking at the national legal order and one at the international legal order. And in most cases, but not in all, a violation of the

126. Even more than in *Plama*, the Stati Parties have been guilty of deceptive conduct on a large scale. It is unquestionably contrary to the principle of good faith and disqualifies their investment from any protection under the Energy Charter. It is also illegal under Kazakh law.[86]

127. As I have already mentioned, the evidence gathered since the Award, demonstrating without any possible doubt the fraudulent conduct of the Stati Parties, was not known to the Arbitral Tribunal since it was only gradually discovered after the Award was rendered. As a result, Kazakhstan could not argue before the Arbitral Tribunal that the investment by the Stati Parties in Kazakhstan had been made in bad faith, in violation of the applicable rules and principles of international law. The dispute heard by the Arbitral Tribunal did not therefore correspond to the reality of the facts as they were revealed by the evidence newly gathered after notification of the Award. In other words, due to the Stati Parties' inaccurate and fraudulent statements and the fact that they withheld numerous evidence during the arbitration proceedings, Kazakhstan was deprived of its right to be heard on this fundamental issue.

128. The Arbitral Tribunal did not therefore not necessarily, and could not, examine whether the Stati Parties' conduct was in accordance with the principle of good faith. However, as the Tribunal decided in the *Plama* case, the principle of good faith under international law applies to all disputes governed by the Energy Charter in accordance with its Article 26(6), according to which:

> *"A tribunal established under subsection (4) shall decide the matters in dispute in accordance with this Treaty and the applicable rules and principles of international law."*

129. I therefore conclude that, if the Arbitral Tribunal had had before it the evidence gathered since the notification of the Award, these would have had a fundamental impact on the issue of whether the Tribunal had jurisdiction to hear the dispute. It is in fact highly probable that, in line with other Tribunals' previous decisions, the Arbitral Tribunal would have declined its jurisdiction, as the Stati Parties had made their investment in violation of the principle of good faith.

IV. THE IMPACT OF THE DISCOVERY OF NEW FACTUAL ELEMENTS ON THE ARBITRAL TRIBUNAL'S ASSESSMENT OF EVIDENCE

130. As specified in § 41 above, if an Arbitral Tribunal is confronted with falsified or fraudulent evidence, it will generally, by virtue of its obligation to protect the integrity of the proceedings, exclude such evidence from the case record or assign them very little or no weight.

131. Based on my experience as an arbitrator or expert in 600 arbitration proceedings, it is my opinion that if the Arbitral Tribunal had had before it the evidence gathered today:

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international principle of good faith and a violation of the national principle of good faith go hand in hand. " [internal citations omitted] [emphasis added] *Phoenix Action, Ltd. v. The Czech Republic* (ICSID Case No. ARB / 06/5), Award, 15 April 2009, 101, 106, 107, 109.

[86] Opinion of M. Yeleuov, July 30, 2020.

(i) In particular on the basis of KPMG's letter to the Statis of 21 August 2019, withdrawing their audit report, the Arbitral Tribunal would have excluded from the case the financial statements of the TNG and Tristan as well as their consolidated financial statements, both quarterly and annual, for the years 2007, 2008 and 2009. Indeed, all the evidence detailed above and in particular the KPMG's professional assessment that no weight can be given to the financial statements because they contain false declarations on important points, would have had an extremely persuasive effect for the Arbitral Tribunal, which would probably have reached the same conclusions. Alternatively, the Arbitral Tribunal would not have assigned any weight to these financial statements. It seems to me impossible to come to another conclusion.

(ii) Considering that as clarified by Artur Lungu in his Deposition of April 2019, the Information Memorandum was drawn up on the basis of the information provided by the Statis and expressly relied on the fraudulent financial statements and KPMG's audit reports, the Arbitral Tribunal would probably have excluded this Information Memorandum from the case or would not have assigned it any weight.

(iii) For the same reasons, taking into consideration the fact that the Due Diligence Report was also based on the fraudulent financial statements and did not present Perkwood as a related party, as admitted by Artur Lungu in his Deposition, the Arbitral Tribunal would also have excluded this report from the case or would not have assigned it any weight.

(iv) In line with the foregoing, the Arbitral Tribunal would have excluded all references to the financial statements, the KMPG audit report, the Information Memorandum and the Due Diligence Report or would have assigned no weight to the arguments tending to give effect to these documents. This would have excluded from the case record a number of statements made by the counsels of the Stati Parties tending to demonstrate the reliability of their financial statements by reference to KPMG audits.

132. It should be noted in this regard that the expert reports submitted by the Statis in the arbitration proceedings (the "FTI Reports") were also based on the same financial statements mentioned above. I am convinced that if FTI had known that KPMG had withdrawn its audit reports on the financial statements because of material misrepresentation, FTI would have acted in a manner that protected its professional reputation. In other words, they would either have refused their appointment as experts or would have fundamentally revised their reports so as not to rely on the fraudulent financial statements. It seems unthinkable to me that, knowing what we know today, FTI would have maintained its conclusions. If, against all odds, they had not done so, the Arbitral Tribunal would not have given their reports any weight.

133. With regard to KMG's Indicative Offer, submitted by the Statis and on which they based their argument in the arbitration proceedings, I note that it expressly stated that it was based on the financial information contained in the Memorandum Information (i.e. on falsified financial information) and other information of a public nature:

"In formulating our Indicative Offer, we have relied upon the information contained in the Information Memorandum and certain other publicly available information. Our valuation

depends upon this information and assumptions being substantiated in the next round through due diligence materials and meetings.
Due to lack of sensitive input data, we used comparative (transaction and trading multiples) method for valuation of Borankol and Tolkyn fields, whereas the LPG plant was valued using the combination of comparative and cost methods. ... Historical costs of US $193 million were used as a base for cost method valuation." [87]

134. In other words, at least in part, the KMG Indicative Offer was based on fraudulent documents and falsified data.

135. I do not believe that had it known, the Arbitral Tribunal would have decided to rely on the KMG Indicative Offer as being persuasive. In other words, it seems to me unlikely that it would have considered it, as it did in the Award, as being "*relatively the best source of information for the valuation of the LPG Plant among the various sources of information submitted by the parties regarding the assessment of this plant during the relevant period*".[88]

136. In this regard, I fully agree with the assessment made in his judgment by English Judge Knowles J regarding what would have happened in the arbitration if the new evidence available to us today had been known. He held:

"42. The Information Memorandum, prepared in August 2008, was expressly based on the information found in audited (and unaudited) financial statements of KPM and TNG which in turn showed construction costs for the LPG Plant at the levels asserted by the Claimants.
43. 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 a value of US$205 million based on assumed sales).
[...]
47. 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 of their application, there is the necessary strength of prima facie case that the Tribunal would no longer (to use its words) consider it as taking a place of "particular relevance" within "the relatively best source of information for the valuation of the LPG Plant"; still less being the one offer from which they took the damages figure. ...

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[87] "In formulating our Indicative Offer, we have relied upon the information contained in the Information Memorandum and certain other publicly available information. Our valuation depends upon this information and assumptions being substantiated in the next round through due diligence materials and meetings.
Due to lack of sensitive input data, we used comparative (transaction and trading multiples) method for valuation of Borankol and Tolkyn fields, whereas the LPG plant was valued using the combination of comparative and cost methods...
... Historical costs of US $ 193 million were used as a base for cost method valuation. [emphasis added].
The KMG Indicative Offer, referred to in Professor C. Rogers' Opinion, § 32.

[88] Award, § 1747.

48. Mr Sprange QC submits that "it 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"[89]

137. I believe that if the Arbitral Tribunal had had before it the evidence available to us today, it would have drawn negative inferences as to the credibility of the Stati Parties in general. Knowing the extent of their fraudulent misrepresentation, it would have treated their testimony as completely unreliable. This would have affected in particular their fraudulent testimony that they were forced to consent to the Laren Loan.

V. THE IMPACT OF THE DISCOVERY OF NEW EVIDENCE ON THE DETERMINATION BY THE ARBITRAL TRIBUNAL OF ISSUES OF LIABILITY AND CAUSATION

138. I am convinced that the evidence which became known after notification of the Award would have had a material impact on the Arbitral Tribunal's determination of the issues of liability and causation, had it been aware of it.

139. With regard to causation, the Arbitral Tribunal reached the following conclusions:

(i) Laren was a group of "venture capitalists" with no relationship to the Stati Parties.[90]

(ii) It is the measures that were adopted by Kazakhstan that prevented the Stati Parties from continuing their investment and affected their search for a bridging loan. More specifically,

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[89] "*42. The Information Memorandum, prepared in August 2008, was expressly based on the information found in audited (and unaudited) financial statements of KPM and TNG which in turn showed construction costs for the LPG Plant at the levels asserted by the Claimants.*
43. 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 $193 million 'adopted balance sheet value of outstanding construction' and a value of US$ 205 million based on assumed sales.)
[...]
47. If the KMG Indicative Bid was in fact the result of the Claimants' dishonest misrepresentation then it seems to me, at this stage of scrutiny on the English Application, there is the necessary strength of prima facie case that the Tribunal would no longer (to use its words) consider it as taking a place of 'particular relevance' within 'the relatively best source of information for the valuation of the LPG Plant'; still less being the one offer from which they took the damages figure ...
48. 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 " . English High Court judgment of June 6, 2017, §§ 42, 43, 47, 48.

[90] Award, § 461.

the Tribunal considered it proven that Credit Suisse had refused to provide a bridging loan to the Stati Parties until they resolved their disputes with Kazakhstan:

"1369. The Parties agree that, on 18 December 2008, INTERFAX issued a press release alleging that the Claimants had altered documents in order to defraud the State of its pre-emptive right to purchase the companies.

1370. Immediately after its publication, Credit Suisse sent Mr. Lungu of Ascom the INTERFAX press release and requested an explanation (C-625). After discussions, Credit Suisse informed Claimants that it would not provide the bridge loan until Claimants resolved their disputes with Kazakhstan (C-II ¶ 381; CPHB2 ¶ 117, 210-211; WS Lungu 1 ¶ 7).

[...]

1408. [...] [T]he Tribunal considers that Respondent's series of actions starting in October 2008, [...] which were publicized beginning in December 2008, harmed Claimants' investments and prevented Claimants from proceeding with their investment from that moment, forward.

1409. This affected Claimants' search for bridge financing, which they began in November 2008 on recommendation from Renaissance Capital. Bridge financing, they state, was necessary at that time in order to obtain a partial advance on the proceeds of the sale in order to reinvest them into other projects as soon as possible and, as Mr. Lungu, to protect against falling oil and gas prices.

[...]

1413. Further, the Tribunal is not persuaded by Respondent's argument that Claimants have not proven that the MEMR's actions [to initiate criminal proceedings against KPM] caused the Credit Suisse loan to fall through. Moody's and Fitch confirmed that the MEMR's actions against KPM and TNG raised concerns about the companies' ability to service their existing debt. The Tribunal agrees with Claimants that it would have been surprising if any lender would have gone forward with the new financing without resolution of Claimants' conflicts with the government of Kazakhstan."[91]

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[91] "1369. The Parties agree that, on 18 December 2008, INTERFAX issued a press release containing allegations that the Claimants had altered documents in order to defraud the State of its pre-emptive right to purchase the companies.
1370. Immediately after its publication, Credit Suisse sent Mr. Lungu of Ascom the INTERFAX press release and requested an explanation (C-625). After discussions, Credit Suisse informed Claimants that it would not provide the bridge loan until Claimants resolved their disputes with Kazakhstan (C-II ¶ 381; CPHB2 ¶¶ 117, 210-211; WS Lungu 1 ¶ 7).
[...]
1408. [...] [T] he Tribunal considers that Respondent's series of actions starting in October 2008, [...] which were publicized beginning in December 2008, harmed Claimants' investments and prevented Claimants from proceeding with their investment from that moment, forward.

(iii) It was Kazakhstan's conduct that caused the Stati Parties to enter into the disastrous Laren Loan as there was no other loan option on the table:

"1416. What the Parties dispute is whether Respondent's actions caused Claimants to enter into the Laren Facility. The Tribunal finds that the Laren Facility, with its onerous terms, was arranged in June 2009 because it was necessary for KPM and TNG to secure these funds and because Respondent's actions prevented them from doing so sooner. By June 2009, ordinary lenders would not lend to these companies on commercial terms. Although Claimants drove the best bargain they could, the cumulative effect of the barrage of inspections and the very public revelation in December 2008 of the alleged forgery and fraud said to have been committed in relation to the transfer to Terra Raf, as indicated above, led to the severe downgrades by Moody's and Fitch rating agencies. While the worldwide economic crisis was affecting these companies in late 2008 and early 2009, the State's aggressive and concerted actions, including the inspections, the criminal charges, and the asset seizures – even before Mr. Cornegruta's trial in August and September 2009 – forced Claimants to accept the 'horrendous' Laren Facility."[92]

(iv) Kazakhstan had failed to prove that the Stati parties were responsible and had contributed in any way to the damage affecting their investment:

"1454. The evidence considered in the chapter above on the causation by Respondent's actions is so strong that, taking into account the above cited legal principles, the Tribunal concludes that the burden of proof has shifted to Respondent to show that, in spite of the causation by its own actions, Claimants caused or contributed in a relevant way to the damages that incurred to Claimants' investment. The Respondent has not been able to provide sufficient proof in this regard.

1409. This affected Claimants' search for bridge financing, which they began in November 2008 on recommendation from Renaissance Capital. Bridge financing, they state, was necessary at that time in order to obtain a partial advance on the proceeds of the sale in order to reinvest them into other projects as soon as possible and, as Mr. Lungu explained, to protect against falling oil and gas prices.
[...]
1413. Further, the Tribunal is not persuaded by Respondent's argument that Claimants have not proven that the MEMR's actions [to initiate criminal proceedings against KPM] caused the Credit Suisse loan to fall through. Moody's and Fitch confirmed that the MEMR's actions against KPM and TNG raised concerns about the companies' ability to service their existing debt. The Tribunal agrees with Claimants that it would have been surprising if any lender would have gone forward with the new financing without resolution of Claimants' conflicts with the government of Kazakhstan." Award, §§ 1369, 1370, 1408, 1409, 1413.

[92] *"1416. What the Parties dispute is whether Respondent's actions caused Claimants to enter the Laren Facility. The Tribunal finds that the Laren Facility, with its onerous terms, was arranged in June 2009 because it was necessary for KPM and TNG to secure these funds and because Respondent's actions prevented them from doing so sooner. By June 2009, ordinary lenders would not lend to these companies on commercial terms. Although Claimants drove the best bargain they could, the cumulative effect of the barrage of inspections and the very public revelation in December 2008 of the alleged forgery and fraud said to have been committed in relation to the transfer to Terra Raf, as indicated above, led to the severe downgrades by Moody's and Fitch rating agencies. While the worldwide economic crisis was affecting these companies in late 2008 and early 2009, the State's aggressive and concerted actions, including the inspections, the criminal charges, and the asset seizures - even before Mr. Cornegruta's trial in August and September 2009 - forced Claimants to accept the 'horrendous' Laren Facility* . Award, §1416.

1455. As Claimants concede, KPM and TNG experienced a short-term liquidity shortage in the first half of 2009. But the Tribunal considers that this shortage was magnified by Kazakhstan's actions, and in any event did not lead to the failure of the companies. There is no convincing evidence to that KPM and TNG were over-leveraged prior to October 2008. [...]

1456. Weighing the evidence submitted by the Parties, the Tribunal is not persuaded by the testimony of Prof. Olcott (who is not an economic expert) that the annual interest payment on the Tristan notes caused continuous and negative financial impact on KPM and TNG's operations."[93]

140. All these conclusions are directly contradicted by the evidence obtained after the notification of the Award:

(i) Evidence obtained in the proceedings before the English High Court in February and June 2018, as well as the Lungu Deposition of April 2019, revealed that Laren was a company related to the Statis. As Artur Lungu admitted, Laren's director was none other than Anatolie Stati's personal chauffeur.[94] In the arbitration proceedings, Anatolie Stati had referred to Laren as a "group of lenders" which had been discovered by Renaissance Capital. In addition, the Stati Parties' lawyers had falsely represented to the Arbitral Tribunal that the Laren lenders were in no way affiliated with the Stati Parties.[95]

(ii) The new evidence discovered has also shown that it was not possible to obtain the loan from Credit Suisse not because of the actions of Kazakhstan (as decided by the Arbitral Tribunal) but because the Stati Parties themselves had made the decision to enter into the Laren Agreement.[96] Considering that Laren was from its inception a company belonging to the Statis, and that Anatolie Stati's personal chauffeur was the director, this is in fact another process by which the Statis illegally siphoned money from KPM and TNG.

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[93] *"1454. The evidence considered in the chapter above on the causation by Respondent's actions is so strong that, taking into account the above cited legal principles, the Tribunal concludes that the burden of proof has shifted to Respondent to show that, in spite of the causation by its own actions, Claimants caused or contributed in a relevant way to the damages that incurred to Claimants' investment. The Respondent has not been able to provide sufficient proof in this regard.*
1455. As Claimants concede, KPM and TNG experienced a short-term liquidity shortage in the first half of 2009. But the Tribunal considers that this shortage was magnified by Kazakhstan's actions, and in any event did not lead to the failure of the companies. There is no convincing evidence to that KPM and TNG were over-leveraged prior to October 2008. [...]
1456. Weighing the evidence submitted by the Parties, the Tribunal is not persuaded by the testimony of Prof. Olcott (who is not an economic expert) that the annual interest payment on the Tristan notes caused continuous and negative financial impact on KPM and TNG's operations. " Award, §1454-1456.

[94] Deposition, pp. 255, 256.

[95] Opinion of Professor Catherin Rogers, §15, made reference to the First Post-Hearings Brief of the Stati Parties dated 8 April 2013, §355, which stated: " *When the Plaintiffs were unable to repay, the Laren Lenders - who are in no way affiliated with Mr. Stati - kept the new promissory notes*".

[96] Bermann Report, Annex III, § 134; Lungu Deposition of April 2019, pp. 190-192.

It is also interesting to note that in arriving at the incorrect conclusion that Credit Suisse had refused to conclude the loan, the Arbitral Tribunal relied solely on the writings of the Stati Parties and the testimony of Artur Lungu:

"1370. [...] After discussions, Crédit Suisse informed Claimants that it would not provide the bridge loan until Claimants resolved their disputes with Kazakhstan" *(C-II ¶ 381; CPHB2 ¶¶ 117, 210-211; WS Lungu 1 ¶ 7). "*[97]

The Stati Parties, it seems, had not produced any document proving Credit Suisse's alleged refusal to provide the financing. Kazakhstan had noted it but the Tribunal had not accepted it:

" *1413. [...] [T] he Tribunal is not persuaded by Respondent's argument that Claimants have not proven that the MEMR's actions caused the Credit Suisse loan to fall through."*[98]

If the Arbitral Tribunal had had the evidence available today, it would certainly not have reached the same conclusions. Rather, it would have concluded that it was the Stati Parties who had taken the independent decision not to enter into the Credit Suisse loan and instead to enter into the Laren Agreement.

(iii) The new evidence which were discovered after the Award shed a totally different light on the terms on which the Laren Loan was made. The Arbitral Tribunal was convinced that the horrendous conditions of the Laren Loan were a direct consequence of Kazakhstan's actions. Had it known that Laren was a Stati-related entity and not an independent entity offering usurious loans, it certainly would not have concluded that the poor financial terms of the loan were the result of Kazakhstan's actions. It is likely that the Tribunal would rather have sought why, at a time when they were experiencing a liquidity crisis, the Stati Parties had offered their companies loan terms comparable to those of usurious loans, namely 35% interest on a USD 60 million promissory note, plus the issuance of USD 110 million of new Tristan promissory notes to Laren at a discount rate of at least 73%. I am convinced that in the light of the new evidence, the Arbitral Tribunal would have concluded that, although disadvantageous for KPM and TNG, the Laren Loan was very profitable for the Stati Parties and had been concluded in bad faith.

(iv) The new evidence also clearly demonstrates that the Stati Parties used every opportunity at their disposal to siphon money from KPM and TNG. Whether through many transactions with related parties, where KPM and TNG paid prices considerably above the market price (the LPG Plant's equipment) or received a price considerably below the market price (sales of oil and gas), or through loans taken out on extremely disadvantageous terms (the Laren Loan, the Tristan loans offered to KPM and TNG at an

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[97]"1370. [...] After discussions, Crédit Suisse informed Claimants that it would not provide the bridge loan until Claimants resolved their disputes with Kazakhstan (C-II ¶ 381; CPHB2 ¶¶ 117, 210-211; WS Lungu 1 ¶ 7). " [emphasis added] Award, §1370.

[98]"1413. [...] [T] he Tribunal is not persuaded by Respondent's argument that Claimants have not proven that the MEMR's actions caused the Credit Suisse loan to fall through. " [emphasis added] Award, § 1413.

interest rate above 16%, almost double the interest paid by Tristan on the same amount and in contrast to the interest-free loans granted at Terra Raf), the Stati Parties siphoned off several hundred million dollars, if not more, from KPM and TNG and diverted the funds to tax havens.

In addition, as Artur Lungu admitted in his Deposition of April 2019, in 2008-2009, KPM and TNG suffered from a short, medium and term fund shortfall of approximately 250 to 300 million US dollars , which was caused by the other projects of the Stati Parties in Kurdistan/Iraq.[99]

None of this evidence was brought to the Arbitral Tribunal's attention. Had it been aware of it, it is unlikely that it would have come to the conclusion that Kazakhstan had not sufficiently proved that "the Claimants caused, or contributed to the damage which affected their investment".[100] It is rather likely that the Arbitral Tribunal would have sought to determine precisely to what extent the Stati Parties had embezzled money from KPM and TNG. It would also have taken those amounts into consideration in determining the quantum.

141. In conclusion, if the Arbitral Tribunal had had the evidence available today, it would not have reached the same conclusions on the issue of causation. It would have concluded that the Laren Loan was not the consequence of the actions of Kazakhstan but rather the consequence of an independent decision made by the Stati Parties. Moreover, in view of the evidence of fraudulent maneuvers perpetrated by the Stati Parties, the Arbitral Tribunal would not have reached the conclusion that Kazakhstan failed to prove that the Stati Parties had themselves caused, or contributed to the damage suffered by their investment.

VI. THE IMPACT OF THE DISCOVERY OF NEW EVIDENCE ON THE DETERMINATION OF THE QUANTUM BY THE ARBITRAL TRIBUNAL

142. Had it been brought to the attention of the Arbitral Tribunal at the time of the arbitration proceedings, the new evidence discovered after the notification of the Award would also have had a significant impact on the Arbitral Tribunal's determination with regard to the quantum. More precisely:

(i) It would have excluded documents from the case or would have given no weight to the consolidated financial statements of TNG and Tristan, both quarterly and annual for the years 2007, 2008 and 2009.

(ii) It would have excluded all references to the aforementioned documents that might in any way have given them legal effect.

(iii) It would have excluded from the case or would not have assigned any weight to the Information Memorandum and the Due Diligence Report.

[99] Lungu Deposition of April 2019, pp. 250-252.
[100] Award, §1454.

(iv) FTI would have withdrawn from the case in order to protect its professional reputation or filed substantially revised reports. Alternatively, the Arbitral Tribunal would have given no weight to the FTI Reports, as they were based on fraudulent financial statements.

(v) It would either have given no weight to KMG's Indicative Offer, considering that it was based on fraudulent information or - at the very least - it would not have concluded that this offer was the best source of information for the valuation of the LPG Plant. In this hypothesis, it would undoubtedly have sought if there was other evidence such as to give credit to KMG's Indicative Offer.

(vi) It would have concluded that the Stati Parties' testimony was completely unreliable, including in particular their testimony regarding the circumstances surrounding the Laren Loan.

143. It is obvious that if the documents mentioned above, which was the basic evidence upon which the Stati Parties relied in order to prove their damage, had been excluded from the case or had been given little or no weight, it would undoubtedly have been more difficult for the Stati Parties to prove the quantum of their alleged harm.

144. In addition, now having proof that the Stati Parties perpetrated large-scale fraud:

(i) the Arbitral Tribunal would have concluded that the Laren Loan was not caused by Kazakhstan's conduct but by the Stati Parties' own decision. Moreover, realizing that the Stati Parties' had falsely declared that Laren was an independent lender, the Arbitral Tribunal would not have concluded that:

"1540. The Laren debt was caused by the conduct of Respondent which this Tribunal now found to be a breach of the ECT. Furthermore, it has been repaid as testified by Mr. Lungu... The Tribunal sees no reason why it should be deducted from the damages awarded."[101]

On the contrary, realizing that this Loan was part of the procedures put in place by the Statis to siphon off money from KPM and TNG, the Arbitral Tribunal would have deducted from the damage assessment the amounts paid to Laren.

(ii) the Arbitral tribunal would have sought to determine the extent to which the fraud perpetrated by the Statis and their projects in Iraq had contributed to the loss for which they were claiming compensation. In other words, the Arbitral Tribunal would have sought to establish the extent of the amounts siphoned off from KPM and TNG by the Statis and would have deducted these amounts in its calculation of the quantum.

[101] "1540. The Laren debt was caused by the conduct of Respondent which this Tribunal now found to be a breach of the ECT. Furthermore, it has been repaid as Mr. Lungu testified (Tr. Hearing January 2013, day 1 p.191). The Tribunal sees no reason why it should be deducted from the damages awarded. Award, §1540.

Similarly, had Kazakhstan had the documents and the evidence of which it is now aware, it would have been able to give further instructions to its expert in charge of preparing the quantum report.

It is in any case certain that the Arbitral Tribunal would have concluded that the Stati Parties had made a significant contribution to the damage for which they were claiming compensation and would have reduced the total amount that it might have awarded them accordingly.

145. It is obviously difficult to determine the extent to which the amount of damage would have differed from that awarded in the Award, or whether the Arbitral Tribunal would have granted any remedy whatsoever. In this regard, I will note the following:

- The Laren Loan: it seems to me that the sums paid by virtue of the Laren Loan would have been deducted from the damage assessment.

- The contributory fault of the Statis: considering the massive fraud of which the Statis are guilty, the Arbitral Tribunal would have deducted from the damage assessment the amounts that they had siphoned off from KPM and TNG, these amounts being of the order of hundreds of millions of dollars.

- The value of the LPG Plant: realizing that KMG's Indicative Bid was based in part on fraudulent financial statements, it is likely that the Arbitral Tribunal would not have taken this document as a basis on which to establish the market value of the LPG Plant; or it would in any case have sought other evidence to establish this value.

146. The amount of KMG's Indicative Offer was calculated as the arithmetic average of two amounts obtained respectively by applying the comparative method and the cost method. KMG had added these two amounts and then divided them by two.[102] However, the cost method was solely based on the historical costs recorded in TNG's fraudulent financial statements, *i.e.* an amount of USD193 million (established on the basis of the Perkwood Contract, also fraudulent). If the historical costs had been honestly presented in TNG's financial statements, in accordance with IFRS rules, that is to say on the basis of fair market value, the costs would have been much lower. [103] The Arbitral Tribunal would also have taken into consideration the assessments made by Kazakhstan's financial experts, based on a full and real picture of the financial situation of KPM and TNG.

147. In other words, if the Arbitral Tribunal had had in its possession all the documents and the evidence available today, it would have reached different conclusions regarding the assessment of damage.

VII. CONCLUSION

[102] Deloitte Report of 12 January 2017, at 28.
[103] TPA Global Report, §§ 29-38; Lungu Deposition, p. 234.

148. For the reasons set out in this opinion, it seems obvious to me that if the documents and evidence obtained after the notification of the Award had been in the possession of the Arbitral Tribunal, they would have had a material and fundamental impact on the Award.

149. Demonstrating the material impact of a fraud on the decision of an Arbitral Tribunal is totally different from a review of the merits of its conclusions, which is not admissible. The exequatur judge is not competent to review the merits of the Award whose enforcement is requested. However, it has the jurisdiction and is mandatorily required to ascertain whether fraudulent documents or evidence had a material impact on the award with a view to properly determining whether the award concerned should be refused enforcement due to international public policy.

150. As the Paris Court of Appeal stated in its *European Gas Turbines* judgment of 30 September 1993:[104]

> *"The recognized power in international arbitration of the arbitrator to assess the legality of a contract with regard to the rules of international public policy and to sanction its illegality by pronouncing in particular its nullity implies, in the context of an action for annulment based on the incompatibility of the recognition or enforcement of the arbitral award with the international public policy (Article 1502-5 NCPC), a review of the award, by the annulment judge, coveringin law and in fact all the elements enabling to justify the application or not of the rule of international public policy and, if so, to assess the legality of the contract in the light of this; to decide otherwise would result in depriving the judge's review of all effectiveness and, therefore, of its raison d'être.*
> *Pursuant to the general principle of law according to which fraud is an exception to all rules, the fraudulent maneuvers carried out by one of the parties during the arbitration proceedings which partly determined the arbitrators' decision are in conflict with French international public policy and therefore lead to partial annulment of the award".*

151. It should also be noted that all proceedings, whether for annulment or enforcement, are a single and independent proceeding. The judge responsible for determining whether an international award should be incorporated into its system, is bound only by the concepts which prevail in the State in which he or she sits. It does not matter what decisions have been rendered in other jurisdictions, whether it is the Court seized with an application for annulment at the seat of the arbitration or other jurisdictions before which proceedings for the recognition and enforcement of the award have been initiated. It is not because the Courts of one State refuse to set aside an award or that those of another State accept to recognize and enforce it, that it must be the same in all jurisdictions. It frequently happens that an award recognized in one State is not recognized in other States or that an award annulled in one State is recognized as enforceable in another.

152. As clearly explained by the Court of Appeal of Paris in the *Alstom* case:

> *"It is for the Court, seized on the basis of the provisions of sections 1525 and 1520(5) of the Code of Civil Procedure, with the appeal against the exequatur order of an award rendered abroad, to seek, in law and in fact, all the elements making it possible to assess whether the*

[104] *Company European Gas Turbines SA c. Westman International Ltd.* , Arbitration Review, 1994, 359.

recognition or enforcement of the award manifestly, effectively and concretely violates the French concept of international public policy; it is not bound, in this examination, either by the assessments made by the Arbitral Tribunal or by the law chosen by the parties. ...
The purpose of the review by the exequatur judge is not to verify that contractual stipulations - including the rules of compliance - have been correctly executed, but only to ensure that the recognition and enforcement of the judgment do not have the effect of giving force to a contract of corruption".[105]

153. And as Professors Seraglini and Ortscheidt clarify in their book "Droit de arbitrage internet et international",[106] international public policy is violated in the event of an award obtained by fraud. It also worth adding that "*the Paris Court of Appeal specified that fraud in the award, otherwise known as fraud in arbitration "implies that false documents have been produced, that false testimonies have been gathered or that documents relevant to the solution of the dispute were fraudulently concealed from the arbitrators so that the latter's decision was impaired"*[107]*; in other words, one party deceived the tribunal."*

154. In the present case, if the new elements and evidence discovered since the notification of the Award had been known at the time of the arbitration proceedings, both Kazakhstan and the Arbitral Tribunal would have been dealing with a dispute of a totally different nature and content. The new documents and evidence would have had a fundamental impact on the arbitration proceedings and on the Award.

155. First of all, there would have been a real contradictory debate on these new documents and evidence. Kazakhstan would have confronted the Statis' witnesses and could themselves have presented other testimonies. FTI, the Stati Parties' experts responsible for assessing the damage invoked by the latter, would very likely have withdrawn to protect their reputation, or alternatively, would have necessarily and fundamentally amended their reports. The information allegedly available to the experts from Kazakhstan would also have led them to draw up a totally different report on the assessment of damages.

156. The new documents and evidence would therefore have had a fundamental impact on the overal assessment of evidence. The Arbitral Tribunal would have given no credibility, or at most, little weight to the testimonies, financial statements, assertions and other erroneous or falsified documents produced by the Stati Parties.

157. Consequently, it is certain that the content of the Award and the findings of the Arbitral Tribunal regarding its jurisdiction, liability, causation and the quantum would have been totally different.

158. Taking into account all of these elements, I consider, given the seriousness and importance of the fraudulent procedures used by the Stati Parties, which had not been brought to the attention of the Arbitral Tribunal, that the Arbitral Award whose recognition is sought, cannot be granted

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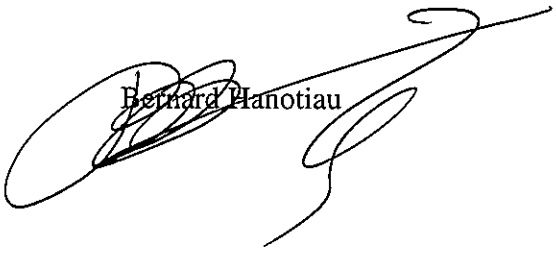
[105] Paris Court of Appeal (Pôle 1-CH.1) Judgment of 10 April 2018, *Société Alstom Transport SA and other v. Société Alexander Brothers Ltd.* , Review of Arbitration 2018-N ° 3, pp. 580, 581.
[106] LGDJ, 2nd edition, 2019, p. 991.
[107] Quoting Paris, 1 July 2010, Revue de l'Arbitrage 2010, p. 857, note B. Audit.

exequatur in Belgium because of a manifest and fundamental violation of international public policy.

Brussels, 29 April 2021



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