In the name of the King **[stamp of THE DISTRICT COURT OF AMSTERDAM]**

judgment

DISTRICT COURT OF AMSTERDAM

Private Law Section, Civil-Law Preliminary Relief Judge

case number/petition number: 634969 / KG RK 17-1581 MW/JT

Judgment of 8 September 2017

in the case of

1. **ANATOLIE STATI**,
residing in Chisinau, Moldova,
2. **GABRIEL STATI**,
residing in Chisinau, Moldova,
3. the company under foreign law
ASCOM GROUP S.A.,
having its registered office in Chisinau, Moldova,
4. the company under foreign law
TERRA RAF TRANS TRAIDING LTD.,
having its registered office in Gibraltar,
petitioners,
attorneys: *mr.* G.J. Meijer and *mr.* J.M. Hummelen, practising in Amsterdam,

v.

1. the public-law legal entity under foreign law
THE REPUBLIC OF KAZAKHSTAN,
having its seat in Astana, Kazakhstan,
2. the public-law legal entity under foreign law
THE REPUBLIC OF KAZAHKSTAN (NATIONAL FUND OF THE REPUBLIC OF KAZAKHSTAN),
having its seat in Astana, Kazakhstan,
3. the company under foreign law
SAMRUK-KAZYNA JSC,
having its registered office in Astana, Kazakhstan,
respondents.

1. Course of the proceedings

The petitioners submitted a petition for prejudgment attachment against the respondents and on shares on 23 August 2017. On 25 August 2017, the Court Clerk asked (the attorney for) the petitioners to provide more details of this in a modified petition. The petitioners submitted a

modified petition on 31 August 2017, which petition is attached to this judgment.

2. The petition

2.1. Briefly put, the petitioners were the (indirect) owners of two oil and gas producers: Kazpolmunay LLP (hereinafter: KPM) and Tolkynneftegaz LLP (hereinafter: TNG). KPM and TNG held exploitation rights in respect of oil fields in Kazakhstan. KPM was active in the Borankoil oil field and TNG in the Tolkyn oil field and the Tabyl Block. The petitioners invested substantial amounts in making the aforementioned oil regions profitable.

2.2. The petitioners contend - briefly put - that the State of Kazakhstan appropriated all of the petitioners' investments.

2.3. In response to the actions of the State of Kazakhstan, the petitioners instituted arbitration proceedings against the State of Kazakhstan with the arbitration institute of the Stockholm Chamber of Commerce. Their claim was based on a breach of Kazakhstan's obligations pursuant to the Energy Charter Treaty. The award (hereinafter: the Arbitral Award) was handed down in those proceedings on 19 December 2013. The State of Kazakhstan was ordered to pay the petitioners the sum of USD 497,685,101.00 in damages, with interest and procedural costs.

2.4. In a supplementary arbitral award (hereinafter: the Supplementary Arbitral Award), the arbitral tribunal specified the costs of the arbitration and fixed them at EUR 1,069,470.98. Based on the operative part of the Arbitral Award, the State of Kazakhstan was ordered to pay three-quarters of that sum, which is EUR 802,103.24, to the petitioners.

2.5. No appeal against the aforementioned Arbitral Awards is possible. The State of Kazakhstan instituted proceedings with the competent Swedish court for the setting aside of both Arbitral Awards. By judgment of 9 December 2016, the Swedish court denied the claim for the setting aside of the Arbitral Awards in full. No appeal against that judgment is possible, either. The State of Kazakhstan filed an extraordinary remedy with the Swedish Supreme Court. The petitioners do not expect a ruling in these proceedings in the foreseeable future. Despite repeated demands, the State of Kazakhstan has not complied with the Arbitral Awards.

2.6. The petitioners will submit a request for the recognition and execution of the Arbitral Awards to the competent Dutch court in order to subsequently execute the Arbitral Awards in the Netherlands.

2.7. By way of security for the recovery of their claim, which, based on the Arbitral Award and the Supplementary Arbitral Award, amounts to USD 506,660,597.40 and EUR 802,103.24, respectively, plus the customary surcharge for interest and costs, the petitioners wish to levy conservatory attachment against the respondents at a bank and some 10 other third parties, and on shares.

2.8. The petitioners contend - briefly put - that the requested goods to be attached have a commercial use and thus do not have a public use and can thus be attached.

3. The assessment

3.1. For now, the petitioners' claim is prima facie sound. The question, however, is whether the attachment sought is compatible with the Dutch State's international law obligations.

3.2. It follows from the judgment of the Supreme Court of 30 October 2016 (ECLI:NL:HR:2016:2236) that state assets with a public use are not eligible for a forced execution. It follows from that same judgment that the creditor who levies the attachment or wishes to do so must assert and convincingly argue that and to what extent the monies and funds to be attached are also eligible for attachment and execution. That is only the case if:

a. the State agreed to the attachment,
b. the State has designated or reserved assets to satisfy the claim, or
c. it has been established that the assets will be used or are intended to be used in particular by the State for other than non-commercial government purposes.

3.3. The instances at a. and b. above are expressly not at issue here. Therefore, before leave is now granted it must be at least (prima facie) plausible that the situation referred to at c. exists. The petitioners were therefore given an opportunity to submit a modified petition to clarify / provide supporting arguments that the attached assets are not used or intended for public purposes.

3.4. In respect of the attached assets as referred to in paragraphs 45 and 46 (attachment at Procon Europe B.V.), paragraphs 55 and 56 (attachment at The Bank Of New York Mellon SA/NV), and paragraph 76 (attachment of shares in KMB Kashagan B.V.) of the (modified) petition, it is for now (prima facie) plausible that these attached assets are not used or intended to be used for public purposes and that the situation referred to at 3.2(c) thus exists. Leave can also be granted in respect of these attached assets, notwithstanding, incidentally, the process server's statutory obligations and the possibility of the Minister issuing a notification .

3.5. In respect of the attached assets as referred to in paragraphs 55 and 56 (attachment at The Bank of New York Mellon SA/NV) however, the following applies. In principle, attachment at a foreign bank based in the Netherlands is possible, so that the requested attachment at the branch of The Bank of New York Mellon SA/NV in Amsterdam will be granted. In paragraph 55 at a, b and c however, leave is also sought to levy attachment at the branches of the aforementioned bank in Brussels (Belgium), Astana (Kazakhstan) and London (the United Kingdom). For the substantiation, please see page 50 of the *beslagsyllabus*. However, in light of the territorial effect of conservatory attachment, the leave to attach applies in principle only to items located in the Netherlands or to financial claims payable in the Netherlands. In the Netherlands, therefore, only this may be seized/attached). If a petitioner wants attachment at a bank - if that attachment is recognised abroad - to also include funds administered at a branch of that bank based abroad, the petitioner must state in the petition for attachment in what countries and at which branch funds of the judgment debtor funds are available (cf. Court of Appeal of Amsterdam, 10 April 2012, ECLI:NL:GHAMS:2012:BW3378). However, that does not apply for this petition, in which the bank is based in Belgium and the Dutch branch, as a foreign branch, is the attached third party. Nor does the petition include a request for leave for attachment referred to on page 50 of the *beslagsyllabus* based on the Recast Brussels I Regulation or a European bank attachment. Taking all of this into account, no leave will be granted to levy attachment at the bank branches not based in the Netherlands referred to in paragraph 55 at a, b and c.

3.6. In respect of the attached assets referred to in paragraphs 63 and 64 (attachment at nine Dutch companies), the following also applies. The Preliminary Relief Judge does not deem it plausible at present that the assets that said third parties hold for the State of Kazakhstan are entirely and directly intended for commercial, non-public uses. That is because, as the petitioners have explained, the claims that the State of Kazakhstan has against said third parties consist of both tax payments and non-tax payments. It is for now not plausible that 75.2% of these claims are automatically intended for the Savings Fund as referred to in paragraph 52 of the (modified) petition like - as the Preliminary Relief Judge understands it - the petitioners argue. Consequently, no leave will be granted to levy attachment at these nine Dutch companies.

3.7. This leads to the following judgment.

4. The judgment

The Preliminary Relief Judge

4.1. Grants the petitioners leave to levy the requested prejudgment attachment referred to in paragraphs 45, 46, 55, 56 and 76 against the respondents, on the understanding that no leave will be granted for the bank attachment referred to in paragraph 55 at the bank branches not based in the Netherlands referred to at a, b and c.

4.2. Estimates the claim for which the leave is granted, including interest and costs, at USD 557,656,650.00 (in words: five hundred and fifty-seven million, six hundred and fifty-six thousand, six hundred and fifty US Dollars) and EUR 992,520.00 (nine hundred and ninety-two thousand, five hundred and twenty euros).

4.3. Attaches to the leave the condition that the claim in the main action be instituted within 12 days after the first attachment.

4.4. Declares this judgment to this extent to be immediately enforceable.

4.5. Refuses the requested declaration of enforceability on any day and at any time.

4.6. Dismisses any additional or different requests.

This judgment was handed down by *mr.* M. van Walraven, Preliminary Relief Judge, assisted by *mr.* J.E. Tiddens, Court Clerk, on 8 September 2017.

[signature] [signature]

ISSUED AS A TRUE COPY
The Clerk of the Amsterdam District Court
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