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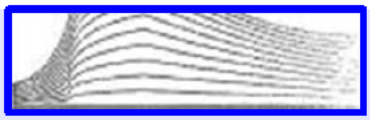

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Court of

Brussels

Stop

17th Chamber -
Civil Matters

Presented on
Not recordable

Because of :

REPUBLIC OF KAZAKHSTAN, represented by its Minister of Justice, whose Ministry is located at 010000 ASTANA - KAZAKHSTAN, Left Bank, Mangilik El Street 8, House of Ministries 13,

Appellant,

represented by Maîtres NUYTS Arnaud, HOUBBEN Michaël and DEGROOF Julien, lawyers at 1000 BRUSSELS, Boulevard de l'Empereur 3,

pleaders: Maîtres NUYTS Arnaud and HOUBBEN Michaël,

Against:

1. **STATI Anatolia**, residing in CHISINAU, MD-2008 - MOLDAVIA, Dragomina street, 20,

2. **STATI Gabriel**, residing in CHISINAU, MD-2008 - MOLDAVIA, Ghioceilor street, 1 A,

3. **ASCOM GROUP S.A.**, a company under foreign law with registered office in CHISINAU, MD-2009 - MOLDAVIA, Mateevici street, 75 A,

4. **TERRA RAF TRANS TRAIDING LTD**, a company incorporated under foreign law with its registered office at GIBRALTAR, Line Wall Road, 13/1

Respondents,

represented by Maîtres JACMAIN Sophie, van DROOGHENBROECK François and BRIJS Stan, lawyers at 1000 BRUSSELS, chaussée de La Hulpe, 120,

pleaders: Maîtres van DROOGHENBROECK François and JACMAIN Sophie.

Having regard to the documents in the proceedings, in particular:

- the exequatur order, issued by the French-speaking Court of First Instance of Brussels on 11 December 2017;
- the third-party notice of February 2, 2018;
- the judgment, rendered by the French-speaking court of first instance of Brussels on 20 December 2019;
- the appeal petition, filed with the court clerk's office on February 17, 2020;
- the interlocutory judgment of November 17, 2020;
- the deposited documents.

The dispute essentially concerns the nullification of the exequatur order of 11 December 2017.

The Republic of Kazakhstan (hereinafter Kazakhstan) requests (in summary) to

- declare that the arbitral award of 19 December 2013, rectified by the award of 17 January 2014, could not and cannot be recognised or enforced in Belgium;
- Order the annulment and retraction of the exequatur order of 11 December 2017;
- declare the cross-appeal of the Stati unfounded;
- order Stati to pay the costs of both sets of proceedings, including procedural damages of EUR 13 000 per set of proceedings.

The Stati consorts, the Ascom Group and Terra Raf Trans Traiding (hereinafter referred to as the Stati) claim that

Primarily: dismiss the main appeal of Kazakhstan and allow the cross-appeal of the Statutes;

- *In the alternative: dismiss Kazakhstan's main appeal;*
- *In any case, therefore :*
  - *whether by substituting its own reasons or by confirming in whole or in part the judgment appealed from, confirm in full the exequatur of 11 December 2017;*
  - *order Kazakhstan to pay the costs of both proceedings,*

Expenses :

- *Costs of service of the exequatur order: 19.946,87 EUR*

- *Compensation for the proceedings at first instance: EUR 36,000*
- *Costs of service of the Judgment including appeal of 20 December 2019: 4.105,30 EUR*
- *Compensation for the appeal proceedings:*

EUR 39,000 TOTAL: EUR 99,052.17

1. The pleas of inadmissibility put forward by the Member States

1.1. Res judicata effect of the arbitral award

The current dispute does not call into question the award. The court is not reviewing the award on its merits.

Contrary to what the Stati claim, Kazakhstan's appeal is not for the reversal or revision of the award, but for the denial of enforceability. The subject matter of this request differs essentially from the requests made by Kazakhstan in the proceedings before the arbitral tribunal.

It also differs fundamentally from the subject matter of the dispute that led to this court's judgment of June 29, 2021, in which the court did not rule on the issue of exequatur.

The authority of res judicata enjoyed by the award does not therefore prevent the court from examining the grounds for refusal of the exequatur, irrespective of what other courts seized of an application to set aside the arbitral award or an application for recognition and enforcement of the arbitral award have decided.

With regard to decisions on exequatur, the Stati also state: *'Decisions on the recognition or refusal of an exequatur have binding effect only in the jurisdiction where the exequatur has been requested. The other courts*
- including Belgian courts - are therefore not bound by this English judgment ('exequatur on exequatur is not valid')'.

It is obvious that this consequence applies equally well to exequatur decisions in other countries.

The control of the court as exequatur judge does not concern (the intrinsic value of) the arbitral award, which - in case of refusal of exequatur and thus refusal of

the integration of the arbitral award into the Belgian legal order, which is in no way irreconcilable with the res judicata effect of the arbitral award, will remain unchanged.

Stati's argument that the arbitral tribunal is obliged to investigate the fraud alleged by one of the parties and that it must itself take the initiative when the documents produced in the course of the proceedings are of such a nature as to suggest that fraudulent acts contrary to international public policy are involved necessarily implies that the arbitrators are properly informed and that if audited financial statements are produced whose reliability is highlighted, they can rely on them and examine the arguments of the parties in the light of this information which has been presented as correct.

It is obvious that if it turns out later that the arbitrators have been misled by one of the parties, this will result in a violation of the rights of defence of the party who was not able to organize his defence in full knowledge of the facts before the arbitral tribunal.

The fact that the arbitrators did not *expressis verbis* use the term '*audited financial statements*' does not justify the conclusion that the arbitrators would have given no weight to the audited nature of the financial statements produced. Since the financial statements were presented as audited, the arbitrators need not have insisted on them: they could consider them as such and base their analysis on the merits on those financial statements which they considered reliable and correct.

As to the fact that it is up to the exequatur judge to respect the conclusions of the arbitral tribunal and its sovereign decision with regard to a possible fraud investigated in the arbitration proceedings, it does not prevent the exequatur judge in the context of this procedure independent of the arbitration proceedings and subsequent annulment proceedings from examining whether fraudulent manoeuvres and/or new elements unknown to the arbitrators and deliberately concealed by one of the parties could have had a significant impact on the decision of the arbitral tribunal to the extent that the exequatur was refused.

It follows from the foregoing that this dismissal cannot succeed.

1.2. The res judicata effect of Swedish decisions

The Swedish decisions in question are the following:

the judgment of the Svea Court in Stockholm, hereinafter 'the Svea Court', of 9 December 2016 the judgment of the Supreme Court of 24 October 2017

the decision of the Svea Court of 9 March 2020 the decision of the Supreme Court of 18 May 2020.

Kazakhstan invokes article 2 of the Code of Private International Law (CODIP) as the basis for its contention that in this case the provisions of the CODIP should not apply.

Rightly and for just reasons set out under point 3.2.a of the judgment a quo, pp. 15-16, which the court considers as being taken up here with regard to the 4 aforementioned decisions which aimed at annulling the arbitration award, the first judge decided that the suppletive rules provided for by the CODIP apply.

This finding does not prevent the enforcement judge from exercising his control over the question of the enforcement of the arbitral award in Belgium.

The res judicata effect of Swedish decisions does not extend to claims that have not been the subject of debate. However, the request for annulment of a decision is not the same as the request for enforcement of that same decision.

The fact that an appeal to set aside an arbitral award has been declared unfounded and that an appeal for review of a decision to refuse to set aside the arbitral award in the country where the arbitration was held has been dismissed does not imply that the arbitral award must automatically be granted enforcement in Belgium. It does not deprive the enforcement judge, who is obliged to investigate whether - taking into account the concrete circumstances of the case - there are grounds for refusing enforcement in Belgium, of his right to examine whether the arbitral award and/or its enforcement are contrary to public policy (see Article 1723, 2° of the applicable Code of Civil Procedure).

The court which decides on the enforceability of the arbitral award shall not be bound by a foreign decision rejecting the setting aside of the same award.

The 2016 and 2017 decisions predate the discovery of the new *'admittedly false'* evidence and/or fraudulent conduct relied upon by Kazakhstan in the current debate.

It is thus established that in those decisions the Swedish courts did not rule on the existence of fraudulent conduct discovered later.

As for the Swedish decisions of 2020, they also do not rule on the new evidence of illegal and fraudulent acts invoked by Kazakhstan, which became aware of them after the award.

In its decision of March 9, 2020, the Svea Court rejected the second application to set aside the arbitral award after considering that the information provided by Kazakhstan shows that the action is based on *"circumstances which could have been relied on in the previous case" (*Stati Exhibit 2.9), which proves that the Svea Court did not take cognizance of the KPMG correspondence of 2019, including

- KPMG's decision to treat the audit reports it had prepared as financial statements that cannot be relied upon,

KPMG's express request to *'take all necessary steps immediately to prevent any further or future reliance on audit reports issued by KPMG' (*Kazakhstan Exhibit 9.10)

the deposition of Mr. Artur Lungu in 2019 (see Exhibit 8 of Kazakhstan).

In the Swedish annulment proceedings, the Stati have also deliberately concealed the truth about the matter:

- KPMG's worrying concerns already expressed in the letter of 26 February 2016 (Kazakhstan Exhibit 9.2.), which had led KPMG to request explanations and supporting evidence about the following issues:

As presented by Ascom Group S.A. at the hearings [in Sweden], the construction costs of the LPG Plant, as reflected in TNG's financial statements, included, inter alia, a management fee of USD 43,852,108 charged by Perkwood Investment Ltd ("Perkwood"), which was the main supplier of materials and equipment for the construction of the LPG Plant.
2. As presented by Ascom Group S.A. at the hearings [in Sweden], Perkwood is a related party of TNG, which is owned by Ascom Group S.A., and is controlled by you.
3. Perkwood was not an operating entity filing dormant accounts and the actual supplier of the LPG Plant equipment was TGE Gas GmbH and the costs of that equipment were significantly different from the corresponding costs charged by Perkwood to TNG.

reserving the right *'to prevent any reliance being placed in the future on our audit reports*

and in particular to withdraw our audit reports and to inform of this withdrawal all parties who, in our opinion, continue to give credence to these reports, including, without limitation, the Kazakh Ministry of Justice and the SVEA Court of Appeal.

and its reply containing a questionnaire not on the substance but on KPMG's sources of information, communications about the issues raised by KPMG in its previous letter, not without - in no uncertain terms - reminding KPMG of its *'professional obligations and (your) responsibilities to your clients'* and threatening to hold KPMG liable *'should you choose not to cooperate with us and/or withdraw your audit reports'* (Kazakhstan Exhibit 9.3 of Kazakhstan), a response which Stati did not return to afterwards so that KPMG never obtained the requested information.

This statement clearly demonstrates that Stati realised the importance of KPMG's audit reports in safeguarding the credibility of their argument developed in the Swedish annulment proceedings of 2016 (Stati Exhibit 2.1., pp.21 and 24).

In so doing, Stati misled KPMG, first, in the preparation of the audit reports on the financial statements produced in the arbitration proceedings, but also the Swedish courts, which Stati had led to believe that, in the preparation of TNG's annual financial statements, KPMG had all the correct and necessary information for that purpose and was aware of Perkwood's actual status.

It follows that - even if the Swedish courts did not annul the arbitral award and rejected on purely procedural grounds the applications for review lodged by Kazakhstan - these decisions do not prevent the court from examining the pleas for exequatur put forward by Kazakhstan and on which no debate was held before the Swedish courts, which did not rule on this.

Neither the arbitral tribunal nor the court in Svea took into account KPMG's decision to *'withdraw'* its audit reports, as this information was unknown at the time. Nor could they take into account the deception of the Stati who deliberately misled the Swedish courts and who - knowingly - prevented the courts from being able to judge on the basis of all available information and evidence.

The Stati argue - primarily - that it is not for the Court to *'review'* the decisions of the Swedish courts. That assertion is not disputed or contestable.

The present dispute does not concern the setting aside of the arbitral award. Its subject matter is different: The court is judging as an appellate judge on the grounds for refusal of enforceability.

Contrary to what the Stati claim, the res judicata effect of the Swedish decisions does not justify the conclusion that the court, as the judge of the exequatur, cannot examine the grounds for refusing the exequatur, and all the less so in so far as those grounds are based precisely on data of capital importance which were concealed in full knowledge of the facts by the Stati, so that neither the arbitrators nor the Swedish courts were able to take them into account.

As for the so-called *'crucial'* importance of the Swedish decisions for the assessment by the court of appeal of the grounds for refusing the exequatur articulated by Kazakhstan, the court emphasised that this argument based on *'the most authoritative doctrine in matters of international arbitration'* and recognised in *'numerous other judicial decisions'* does not imply that - given the concrete circumstances of the case - the court of appeal cannot conclude that the exequatur should be refused in Belgium on the basis of all the exhibits and arguments invoked before the court, some of which are new.

In this respect the Court notes in particular the following:

Stati claim that no court would have found that there had been fraud and that *'on the contrary, the Svea Court (whose decision of 9 December 2016 is res judicata), the Swedish Supreme Court on two occasions, the Rome Court of Appeal, the District Court of Columbia, the Amsterdam Court of Appeal, the two Belgian exequatur judges and the Belgian seizure judge all rejected Kazakhstan's allegations of fraud'* (Stati's final submissions, p. 157, point 549).

However, it should be noted that :

1) it was by letter of 21 August 2019 (Kazakhstan Exhibit 9.11) that KPMG informed Kazakhstan of its decision to *'withdraw'* its audit reports and it was by letter of the same date (Kazakhstan Exhibit 9.10 from Kazakhstan) that it informed the Stati of this, instructing them to immediately take all necessary steps to prevent any further - or future - credit being given to the audit reports issued by KPMG which implies ensuring that anyone who has received a copy of the relevant financial statements and audit reports is made aware of this development and that. only subsequently - in October 2019 - was Kazakhstan able to obtain a copy of the correspondence between the Stati and KPMG in 2016 and 2019,

and that Stati never produced that 2016 correspondence before the annulment judges in the context of the sole proceedings which gave rise to the examination of the application for annulment of the arbitration award (Stati's Exhibit 2.1), the three subsequent proceedings not having given rise to a fresh examination of the case on the basis of the elements of fraud discovered years later (Stati's Exhibits 2.2, 2.9 and 2.11 of Stati); As for this decision of KPMG, contested by Stati, KPMG underlined the total absence of collaboration on the part of Stati which led it to proceed to the *'complete withdrawal' of* the audit reports: Exhibit 9.16 of Kazakhstan, an action qualified by PricewaterhouseCoopers (PwC) as a *'last resort'* for an auditor occurring only in extremely rare circumstances rendering the financial statements totally unreliable: Exhibit 12.8 of Kazakhstan.

2) the English exequatur judge ruled that *prima facie* there was sufficient evidence that the award had been obtained by fraud: Kazakhstan Exhibits 5.8 and 5.9, §92, that, in the view of the English judge, the Svea court was unlikely to have considered the question of the indirect impact of the fraud on the award and that *'evidence of the alleged fraud could not with reasonable diligence have been discovered prior to the award' (*Kazakhstan *Exhibit* 5.8 and 5.9, §79);

The subsequent proceedings - in which the Stati were obliged to produce a multitude of documents - led the Stati to withdraw their application for exequatur in England, which initially led the High Court in London to consider that 'the *real reason for the notice of withdrawal is that the Stati do not wish to risk the trial leading to findings against them and in favour of the State'* (Kazakhstan exhibit 5.16, §25 of Kazakhstan) and then to allow the Stati to terminate the exequatur proceedings in England on the condition that they definitively renounce further enforcement of the arbitral award in England: Exhibit 5.21 of Kazakhstan ;

3) as regards the exequatur procedure in Luxembourg, Stati refer to the judgment of the Luxembourg Court of Appeal of 19 December 2019. This judgment does not support Stati's argument insofar as it was quashed by judgment of the Court of Cassation of 11 February 2021 precisely because *'the contested judgment,*

dismissing the appeal brought by the Republic of Kazakhstan and ordering it to pay the costs, and in so doing confirming the declaration of enforceability of the Arbitral Award,

held in this case that "the allegations made by the appellant, even if established, and the fact that KPMG withdrew its reports on the financial statements of TNG, KFM and Tristan for the years 2007 to 2009, are not such as to constitute fraud

They are not such as to affect the jurisdiction of the Arbitral Tribunal" (page 35 of the Judgment under appeal). They are therefore not such as to affect the jurisdiction of the Arbitral Tribunal" (page 35 of the judgment under appeal);

and that 'both the fraud arguments already alleged before the SVEA Court and the few new pieces of evidence adduced before the Court of Appeal, as well as the new element currently being adduced relating to the letter from KPMG, are intended to establish that KMG's indicative offer is based on false elements and could not therefore be used by the arbitrators to assess the damages for the LPG plant' (page 40 of the judgment under appeal);

whereas in doing so, the Court of Appeal based its decision on elements that were not debated by the parties, thus violating the principle of adversarial proceedings and therefore the right to a fair trial.

the Court of Appeal took into consideration two documents not submitted to the adversarial debate in order to analyse them as to their impact on the outcome of the dispute, violating the principle of contradiction enshrined in Article 65 of the New Code of Civil Procedure;

In addition, in the criminal part of the case, the investigation following the complaint with civil action of Kazakhstan of 27 May 2019 concerning the fraud allegedly implemented by the Stati is still in progress and that in this context, the District Court of and in Luxembourg has stayed the proceedings in the dispute concerning the application for release of the seizures made under the judgment of 19 December 2019 after considering:

'In its criminal complaint with civil action filed on 27 May 2019, the REPUBLIC OF KAZAKHSTAN claims that the Arbitral Tribunal would have awarded the STATI consorts USD 497,685,101.00 and USD 8,975,496.40, of which USD 199 million for the LPG plant. Several documents produced by the STATI consortium in the arbitration proceedings are said to be forgeries, in particular the financial statements of Tristan Oil Ltd, KPM and ING, the "Information Memorandum" and the "KPMG Due Diligence Report". The STATI consortium is alleged to have knowingly presented false evidence to the Arbitral Tribunal with the purpose of deliberately misleading the arbitrators in order to obtain a title against the REPUBLIC OF KAZAKHSTAN. The documents and information concealed by the STATI consortium would have had a decisive influence on the arbitral award. The Arbitral Tribunal would never have granted the STATIs' claims, if it had been aware of

of their criminal and tortious actions at the time. The actions of the STAT! consortium are said to fall under criminal law. They knowingly and fraudulently misled the Arbitral Tribunal regarding the costs of the construction of the LPG plant in order to have the REPUBLIC OF KAZAKHSTAN ordered to pay them damages for losses that were never actually experienced. These damages were allegedly calculated on the basis of fictitious costs and investments, if not intentionally inflated for fraudulent purposes. They were also documented by fictitious contracts and false documents, as well as by expert reports constituting intellectual forgeries, insofar as the latter were established on the basis of these same false documents and fictitious contracts. The arbitral award would therefore be the product of the offences of fraud, forgery and use of forgeries and its use by the STAT! consorts in the context of the seizure and enforcement procedures would constitute fraudulent manoeuvres within the meaning of Article 496 of the Criminal Code. The use of the arbitral award by the STATI consortium in the context of the seizure and garnishment procedures would constitute the offence of money laundering.

The STATI consorts maintain that judgment No 133/19 - VIII - Exequatur of 19 December 2019 of the Luxembourg Court of Appeal confirming the exequatur is res judicata.

Judgment number 133/19- VIII - Exequatur of 19 December 2019 of the Court of Appeal of Luxembourg, rendered on appeal by the REPUBLIC OF KAZAKHSTAN against order number 40/2017 of 30 August 2017 by which the arbitral award was declared enforceable in the Grand Duchy of Luxembourg, holds that:

"In order to be contrary to public policy, the Award must have been obtained by manifest and decisive fraud.

The burden of proof shall be on the party opposing the exequatur on the ground of fraud.

(...)

In this case, the alleged fraud is not the result of the decision of the Arbitral Tribunal, nor of the decision of the SVEA (Stockholm Court of Appeal) or the Supreme Court of Sweden, nor of a decision of a criminal court or of a court of another State.

In so far as the fraud must be manifest, it is not for the Court, on an application for enforcement, to take evidence to establish the existence of the alleged fraud.

(...)

Even if established, the alleged fraud would not have affected the decision of the arbitrators as to Kazakhstan's liability, but would only relate to a portion of the damages at issue, namely the damages relating to the LPG plant.

If it is accepted that the exequatur judge is a civil judge within the meaning of article 3 of the Code of Criminal Procedure, the application for a stay of proceedings can only be granted if the facts denounced as constituting the offence have a direct bearing on the cause of refusal of exequatur and the criminal decision to be taken is likely to influence the civil decision.

However, it has been held above that the alleged fraud and, therefore, the facts denounced as constituting the offence, have no direct bearing on the exequatur.

Consequently, there is no reason to stay the proceedings.

Res judicata is defined as all the effects attached to a judicial decision, such as the force of legal truth (see Gérard Cornu, Vocabulaire juridique, PUF, 8th edition 2007, verbo autorité)

It should be noted that the judgment of the Luxembourg Court of Appeal of 19 December 2019 does not exclude that the alleged fraud may have an influence on the damages awarded in relation to the LPG plant, which amount, under the terms of the arbitration award, to USD 199,000,000.00.

The Tribunal notes that the issue of quantum of damages is, however, of paramount importance in the context of this garnishment validation proceeding.

It must be concluded that the principle of res judicata attached to Judgment No 133/19 - VIII - Exequatur of 19 December 2019 of the Court of Appeal of Luxembourg does not therefore preclude a stay of proceedings.

It should also be noted that, even if the STATI consorts had committed the offences of which they are accused by the REPUBLIC OF KAZAKHSTAN, this circumstance would necessarily have an impact on the application for validation of the garnishments levied.

In view of the foregoing, it must be held that the criminal action and the civil action for validation of the attachment in the present proceedings are closely linked and that it is necessary to

There is a risk of contradiction between the decisions to be taken, so that the second condition of the stay of proceedings is, in this case, given.

It is common ground that a final decision on the prosecution has not yet been taken, so that the last condition of the stay of proceedings is also met.

4) in the Netherlands, the Public Prosecutor at the Court of Cassation *(Hoge Raad)* recommended, in an opinion issued at the hearing of 4 June 2021 (Exhibit 6.10 of Kazakhstan), to overturn the decision of the Amsterdam Court of Appeal of 14 July 2020 admitting the exequatur of the Award in the Netherlands. If the Dutch Court of Cassation follows the opinion of its Attorney General (at a hearing scheduled for 21 November 2021), a new trial will also take place in the Netherlands on the fraud committed by the Stati.

5) In the United States, the decisions on Stati's application for exequatur do not address fraudulent conduct discovered only in 2019, on the contrary, the US courts refused to examine the fraud charges considering - obviously wrongly - that Kazakhstan aimed at reconsidering the discussion decided by the arbitral tribunal while the alleged fraud had not yet been discovered at that time and even the Swedish courts had not taken cognizance of it in the context of the annulment proceedings, only the first of which had resulted in a decision on the merits (Svea Court judgment of 9 December 2016) (see exhibits 3.1- 3.2. of the Stati);

As for the civil complaint dismissed by the District Columbia courts by decisions (respectively) of 30 March 2019 and 21 February 2020, it is entirely independent of the exequatur application in Belgium. The judges' decisions and considerations, in particular insofar as they relate to *'the full opportunity (for Kazakhstan) to make its case in the context of the appeals in Sweden'*, and insofar as they find that its allegations have been rejected (see Stati's final submissions, p. 148), are not binding on the court below. They clearly demonstrate that no account was taken of the new elements of fraud discovered only in 2019;

6) With regard to the exequatur decision in Italy, the Court noted that Kazakhstan's first complaint, rejected by the Court of Appeal in Rome (exhibit 3.15 of the Stati), concerned '*the compatibility of the award with the domestic legal system'.* The Court specified that it had verified '*the compatibility of the "effects" of the award in the Italian legal system and that in order to do so it was necessary 'to decide whether these effects are abnormal in*

our system (= the Italian system) because they openly contradict the set of values and laws that govern the matter (see Cassation SU 16601/2017)'.

It is obvious that the Court of Appeal is not bound by the decision of the Italian exequatur judge or by the considerations that support his decision regarding the compatibility (of the effects) of the arbitration award with the Italian legal system.
As for the reference to the Swedish annulment decisions, it is no more convincing insofar as the Court of Appeal in Rome by its judgment of 27 February 2019, which is the subject of an appeal in cassation that is still pending, limits itself to noting that the Swedish Courts *'examined the arguments that are in substantial agreement with the grounds invoked before this Court (see the judgment handed down in the Swedish proceedings opposing the Award, at 8, docs. 5 and 5-bis for the related English translation, exequatur procedure file), with an unfavourable decision for the Claimant, essentially pointing out the irrelevance, for the purposes of the decision, of the allegations of fraud against Stati Anatolie and Stati Gabriel'* adding that *'in any event, the alleged falsity of the evidence on which the Award was based does not appear in any resjudicata judgement (art. 395 n°2 of the CPC)'.*

7) The decision on the third-party proceedings in respect of the exequatur in Belgium is the subject of this appeal.

As for seizure decisions, the court recalls:

that the decision of the attachment judge granting the application for renewal of the protective attachment of the Stati has no bearing on the exequatur. It is not relevant here;
that the decision of the Court of Cassation of 29 June 2021 following the third party opposition and opposition to the order for authorisation of seizure of 11 October 2017 and the seizure carried out on 13 October 2017 is based on a *prima facie* assessment, which the Court has emphasised more than once (see, inter alia, on page 15 of the Judgment, point 4.2.2, exhibit 4.8 of the Stati) and that the decision with respect to the opposition filed against the seizure- execution of June 12, 2018 has not yet been rendered.

In view of the foregoing, this objection is unfounded.

1.3. Prohibition on relying on an irregularity of which Kazakhstan was aware

before the arbitral tribunal but refrained from raising the issue

The Stati base this refusal on Article 1679 (new) of the Judicial Code, which states
A party who knowingly and without legitimate reason fails to invoke an irregularity before the arbitral tribunal in due time shall be deemed to have waived the right to invoke it', allegedly applicable as already recognized as a *'general principle'* under the former law.

By its judgment of 17 November 2020 the Court decided that the proceedings in question are subject to the provisions of Part VI of the Judicial Code as in force before the adoption of the Act of 24 June 2013: see p. 11 of that judgment.

Contrary to what the Stati claim, article 1679 (new) C.J.C. is not the result of the pure and simple codification of a principle generally accepted under the old law.

The idea of procedural fairness existed but not as a general principle justifying the inadmissibility of an application for refusal of enforcement.

See in this sense:

Caprasse, O, Introduction au nouveau droit belge de l'arbitrage, in Actualités en droit judiciaire, 2013, 420, n°93;

Stein, E., Article 1679 in Arbitration in Belgium- A practitioner's Guide, 2016, 46, no. 2:
"In the Old B.L.A., there was no general rule dedicated to waiver. Instead, there were only two specific instances where waiver was invoked, namely: (i) in Article 1704, 4° Old B.J.C., where a party loses its right to assert a ground for annulment of
... an award when it learned of the ground over the course of the arbi al procedure and did not raise it; and (ii) in Article 1717, 4° Old B.J.C., where a party may waive its right to set aside an award.
In *the former 6th part of the Judicial Code there was no general rule on renunciation. On the contrary, there were only two specific situations in which renunciation was mentioned, namely (i) in the former Article 1704,4° C.Jud., where a party loses its right to assert a ground for setting aside an award when that party had learned of that ground during the arbitration proceedings but had not invoked it;*
and (ii) in the former Article 1717,4°C.jud., where a party may waive its right to set aside the arbitral award'.

Article 1704, §4, of the Judicial Code, referred to by the above-mentioned authors, is not applicable in this case either.

This article provides that *"The cases provided for in paragraph (2) (c), (d) and (f) shall not be considered as grounds for setting aside the award [or for refusing enforcement] if the party relying on them became aware of them during the arbitral proceedings and did not invoke them at that time.*

Assuming that it can be applied to the grounds for refusing enforcement, whereas it explicitly refers to "*grounds for setting aside the award"*, it should be noted that the situations referred to in this article are not invoked in the present proceedings.

In view of the foregoing and without it being necessary to examine the other arguments put forward by the Stati which cannot lead to any other result, this dismissal is rejected.

2. Means of refusing exequatur

According to Article 1723 (former) of the Code of Judicial Procedure, the court shall refuse to grant enforcement if it is established that there is a cause for annulment under Article 1704 (former) of the Code of Judicial Procedure.

Article 1704.3(a) (old) of the Code of Judicial Procedure provides that the court shall refuse to enforce an arbitral award if it was obtained by fraud.

Article 1704.3(b) (old) C.J. provides that an arbitral award may be set aside if it is based on evidence declared false by a final court decision or on evidence found to be false.

Evidence recognized as false is that which emanates from a person who, betraying the common trust in the writing, seeks to obtain, for himself or for another, an advantage or a profit, of any kind, which would not have been obtained if the truth or sincerity of the writing had been respected. (Cass. 27 January 2010, RG P.09.0770.F)

The words "*admittedly false" in* Judicial Code section 1704, §3(b) *"refer to evidence admittedly false by the party who relied on it or by the party in whose favor it was given.*

of which this evidence has been used". (G. Keutgen and G.-A. Dal, *L'arbitrage en droit belge et international,* tome I: "Le droit belge", 2nd edition, Brussels, Bruylant, 2006, p. 485).

The provision does not impose any specific formality on this acknowledgement, which may therefore cover any confession in the common sense of the term.

In other words, the award must be considered to be based on evidence that is known to be false if that evidence has in any way influenced the decision of the arbitral tribunal.

An arbitral award based on false evidence cannot be given effect, inasmuch as it is not permissible to allow one of the parties to alter the truth and to betray the common trust in the writing for the purpose of obtaining for himself an advantage which he would not have obtained in the absence of such devices.

Article 1704.3(c) provides that an arbitral award may be set aside *'if, since the award was made, any document or other evidence has come to light which would have had a decisive influence on the award and which had been withheld by the opposing party.*

In support of their contention the Stati cite the judgment of the Hon'ble Court dated June 29, 2021 in which the Court is said to have held *prima facie* that:

"To the extent that there could be a question of fraud committed by the Stati, there is to date no *evidence of a causal link between the fraud and the arbitral decisions on the one hand and the Belgian exequatur decision on the other"* (Exhibit 4.8, p. 19).

This quotation must be read and understood in the context of the subject matter of the litigation, which is fundamentally different from the subject matter of the current litigation.

Not only did the court limit itself to a *prima facie* case review, but it also held that:

> To *date,* the alleged fraud has not led to the annulment of the arbitral awards or the reversal of the enforcement decision;
> *prima facie* the fraudulent practices advanced by Kazakhstan do not outweigh the final determinations establishing Stati's claim;
> the influence of the fraudulent conduct invoked on decisions in annulment or exequatur proceedings is *'uncertain;*

-the court does not have to rule on the validity of the annulment/exequatur decisions, considerations which do not allow one to conclude - as the Stati wrongly do - that the court would be *'in substance' of the* same opinion as the exequatur judge in the judgment a quo of 20 December 2019.

Fraud occurs when the arbitral tribunal is misled, deceived by a false statement or by concealment of a material fact so that the arbitral tribunal is not properly informed.

The award was *'obtained'* by fraud within the meaning of Article 1704.3(a) of the Judicial Code if the fraudulent conduct in question led the arbitrators to decide as they did, if, in other words, this conduct had a definite impact on the award, which without the fraud invoked would not have been made in the same way.

Requiring that fraud be *the 'determining cause' of* the award adds a requirement without legal basis.

An examination of the documents in the file and the explanations of the parties show that Stati committed acts that qualify as fraud and deception that had a definite impact on the arbitration award, which - without these fraudulent manoeuvres - would not have been made in the way the arbitrators did and that they used evidence that was recognized as false:
The Stati produced in the arbitration KMG's Indicative Offer, which they knew to have been made on the basis of several items including the financial statements of Tistan, KPM and TNG from 2007 to 2009 (Kazakhstan's Exhibits C-706-709, Exhibit 1.1). These financial statements are said to be prepared in accordance with IFRS: Kazakhstan's Exhibit 1.83, p.1, second paragraph; p.2, first bullet; p.4, bullet 8; Kazakhstan's Exhibits 1.140 and 1.142.

The evidence in the file shows that the transactions between Perkwood, a related company, but - in the context of the arbitration procedure - presented by the Stati and without casting doubt on the veracity of that information, which was supported by the audited financial statements - as a *'third party' (*Stati Exhibit 1.1)
and TNG are not included in these financial statements and that this omission is based on a well thought-out strategy by Stati (see Kazakhstan Exhibits 1.85, 1.87 and 1.88) which allowed them to present the costs of the LPG plant in a way that was much more advantageous for them.

KPMG considered this omission to be *a 'material misstatement': 'Our audit documentation indicates that TNG entered into transactions with Perkwood in 2007, 2008 and 2009. These transactions should have been disclosed in these annual and interim financial statements covering these reporting periods in accordance with 17AS 24. Having carried out an independent review of the documents provided by Herbet Smith Freehills (counsel to RoK) and our own working papers, we consider this omission to be material, both to TNG's financial statements for the years ended 31 December 2007, 2008 and 2009 and to the consolidated financial statements of KPMG, TNG and Tristan for those periods'* (Kazakhstan Exhibit 9.10).

On this basis, KPMG has decided that no reliance should be placed on audit reports issued by KPMG Audit LLC and has instructed the Stati to *'immediately take all necessary steps to prevent any reliance being placed on audit reports issued by KPMG now or in the future'.*

According to the Stati, this decision is 'illegal'. The court disregards this claim, which is not based on a decision by a competent court.

This faulty information was in turn the basis of other documents produced in the arbitration proceedings *'presented as reliable'*, but in reality based on faulty premises and therefore unreliable in their turn, such as the Due Diligence Report of KPMG, in which Perkwood also appears as *'(main) third party'* (p. 11 and 72 of Kazakhstan's Exhibit 1. 88), thus allowing to inflate the investments for the construction of the LPG Plant.

Thus the Stati produced in the arbitration a document entitled *'Project Zenith - Confidential Information Memorandum - Renaissance Capital - August 2008' (*Kazakhstan Exhibit 1.84). This document states that the combined and individual financial statements of Tristan Oil, KPM and TNG were prepared in accordance with IFRS: see p. 59 and 60 of this document and that they were audited by Deloitte first and then by KPMG *'following the best practice to change auditors periodically'*, *which* considerably increased the credibility of this information. On p. 66 of the same document it is stated that if a transaction is contemplated for which the consideration exceeds USD 10 million, it is necessary to provide 'an *independent fairness* opinion'.

However, by not including Perkwood in the financial statements, the Stati did not comply with IFRS.
As for the change of auditor, Stati's explanation is not at all confirmed by the documents in the file, quite the contrary.

Finally, the Stati deliberately concealed the transactions between Perkwood and TNG in order to avoid the need for *an* independent *fairness* opinion.
These actions demonstrate bad faith and a clear intent to deceive in order to that the arbitrators make an award favourable to them. As to the fact that:

> Perkwood was indeed a related company within the meaning of IFRS; the Stati realized that an independent 'fairness' opinion was required, unless Perkwood was presented as a third party, a deception admitted by Mr. Artur Lungu in his deposition under Exhibit 8.5 of Kazakhstan: p. 242
>
> the Stati were well aware of this;

the depositions of Stati's former Chief Financial Officer, Mr Artur Lungu (Kazakhstan Exhibit 8.5, pp. 263-271) in combination with Stati's summary submissions in the Luxembourg proceedings (Kazakhstan Exhibit 6.7, p. 138) leave no room for doubt.

With regard to the acts of recognition of Mr. Artur Lungu, the Court noted that Artur Lungu was the Vice-President of Ascom, one of the claimants in the arbitration proceedings.
In this capacity, he was responsible for developing and implementing financial management systems and overseeing the financial management and sales activities of Ascom/Tristan and their operating subsidiaries.

Artur Lungu played a major role in the arbitration proceedings. He filed, on behalf of Stati, two witness statements (Kazakhstan Exhibits 2.23 and 2.28) in which he stated that he was *"intimately familiar with the history, operations, holdings, contracts, finances and corporate structure of Ascom and its subsidiary, Terra Raf [.."* and "*intimately familiar with the history, operations, holdings, contracts, finances and corporate structure of the two Kazakh companies that were owned and controlled by Ascom and Terra Raf [KPM and TNG].* (Kazakhstan Exhibit 2.23, item 3).

He appeared at the hearings to be examined and cross-examined alongside the Stati, leading to the conclusion that he can be identified with the Stati within the meaning of Judicial Code sections 1704, §3, b) and 1723, 3°.

Whether in these witness statements or during the hearings, Artur Lungu expressly referred to the documents that he has now acknowledged to be false, namely the financial statements (Kazakhstan Exhibit 2.35, p. 183), the KPMG Due Diligence Report (Kazakhstan Exhibit 2.23, point 30) and the Information Memorandum (Kazakhstan Exhibit 2.23, point 31):
'(...J We also retained the services of KPMG to perform vendor financial and tax due diligence in connection with the process. KPMG issued a complete Vendor Due Diligence presentation for Project Zenith in August of 2008. KPMG made a full 'Vendor - Due diligence presentation for Project Zenith in August of 2008'.)

The arbitral tribunal based its decision at least in part on the above-mentioned evidence which has now been recognized as false by the Stati. As stated above, a tribunal must be considered to have relied on evidence that has been found to be false as soon as that evidence has had a definite influence on the content of the arbitral tribunal's decision. In the present case, the above-mentioned admittedly false evidence had an influence on the arbitral award both at the stage of assessing the causal link between Kazakhstan's liability and the damage and at the stage of assessing the quantum of the damage claimed by Stati.

The award relates to an investment arbitration.

The financial situation of the investment, i.e. the financial situation of KPM and TNG, was reflected in the financial statements prepared by the Stati and audited between 2007 and 2009 by KPMG. These statements state that the Stati conducted the bulk of their "investment" through related company transactions: "*A substantial part of the business of the Companies [Tristan, KPM and TNG] is conducted through transactions with related companies and the effect of these, on the basis determined between the related companies, is shown below The ultimate controlling party of the Companies is Anatolia Stati.* (Kazakhstan Exhibit 1.1, pp. 62, 225 and 392)

Later, Stati acknowledged that the section on related party transactions, the core of their alleged investment, was *materially misstated,* that this section was false.

ISA 320 states that misstatements are material "*when it is reasonable to expect that, individually or in the aggregate, they could influence the economic decisions that users of the financial statements make based on*

these" (Kazakhstan Exhibit 11.3, point 2). In the course of the arbitration, the arbitral tribunal became one of these users. The Stati had repeatedly invited it to rely on their false financial statements.

On the issue of causation, the Stati's contention was (see Mr. Anatolie Stati's second written witness statement in the arbitration) , that *"Kazakhstan's actions caused a severe liquidity crisis within TNG and KPM in the first half of 2009"* (Kazakhstan Exhibit 2.29, ¶ 41). Artur Lungu added in his second witness statement as well, *"Kazakhstan's harassment campaign also caused a liquidity crisis within TNG and KPM in the spring and summer of 2009"* (Kazakhstan Exhibit 2.28, point 7).

The Stati then used their financial statements to dispute Kazakhstan's claim that the Stati had themselves driven their Kazakh companies into bankruptcy before the start of the alleged "*Kazakhstan harassment campaign",* i.e. before mid-October 2008:
"The core of Kazakhstan's causation argument is that KPM and TNG were overleveraged before any state action, which doomed them to bankruptcy when oil prices fell during the global financial crisis. There is no credible evidence to support this argument, which is belied by all objective facts. If KPM and TNG experienced a liquidity shortage in the first half of 2009, it was temporary and surmountable. Moreover, Kazakhstan itself contributed significantly to this problem. Kazakhstan does not present any credible evidence that KPM and TNG were overleveraged prior to October 14, 2008" (Kazakhstan Exhibit 2.44, paragraphs 249-250).

At the jurisdictional and liability hearing, Stati insisted on the reliability of their financial statements to demonstrate the reality and legality of their investment:
"Kazakhstan argues that the [Stati] investments were opaque, suggesting that they were structured to hide profits and disguise the "real investor." Either this position is completely disingenuous or the [RoK] does not understand finance. These companies filed annual financial statements between 2003 and 2009 that were audited by Big Four audit firms. They raised money in the public debt markets, and banks like Goldman Sachs and UBS deemed these companies transparent and reliable enough to lend them hundreds of millions of dollars. 1...] The fact is that the [Stati] made substantial investments in KPM and TNG in the form of their acquisition of the shares, shareholder loans to the companies, reinvestment of profits, and then risking their investments to guarantee the companies' debts" (Kazakhstan Exhibit 2.33, item 45:1-46:4).

- Before the arbitrators, Stati insisted on the relevance, complete reliability, seriousness and credibility of the information provided to determine the value of the LPG Plant: see Kazakhstan's Exhibit 2.35, pp. 28-29, stressing that Kazakhstan had not suggested the slightest inaccuracy or deficiency in the information contained in the Information Memorandum distributed to potential purchasers and the reliability of the offers, which were indicative but presented indications of the potential value of the assets for companies whose seriousness and reliability cannot be disputed and all of which are active in the oil and gas sector.

Stati also insisted on the reliability of their financial statements in that they were prepared *in tempore non suspecto, 'in the ordinary course of business, not for the purpose of the litigation'* and that the data from their financial records, especially the data from audited financial statements, is perfectly reliable evidence.

This argument is reproduced in the Award (Stati's Exhibit 1.1, p. 390, No. 1700) and is based on it.

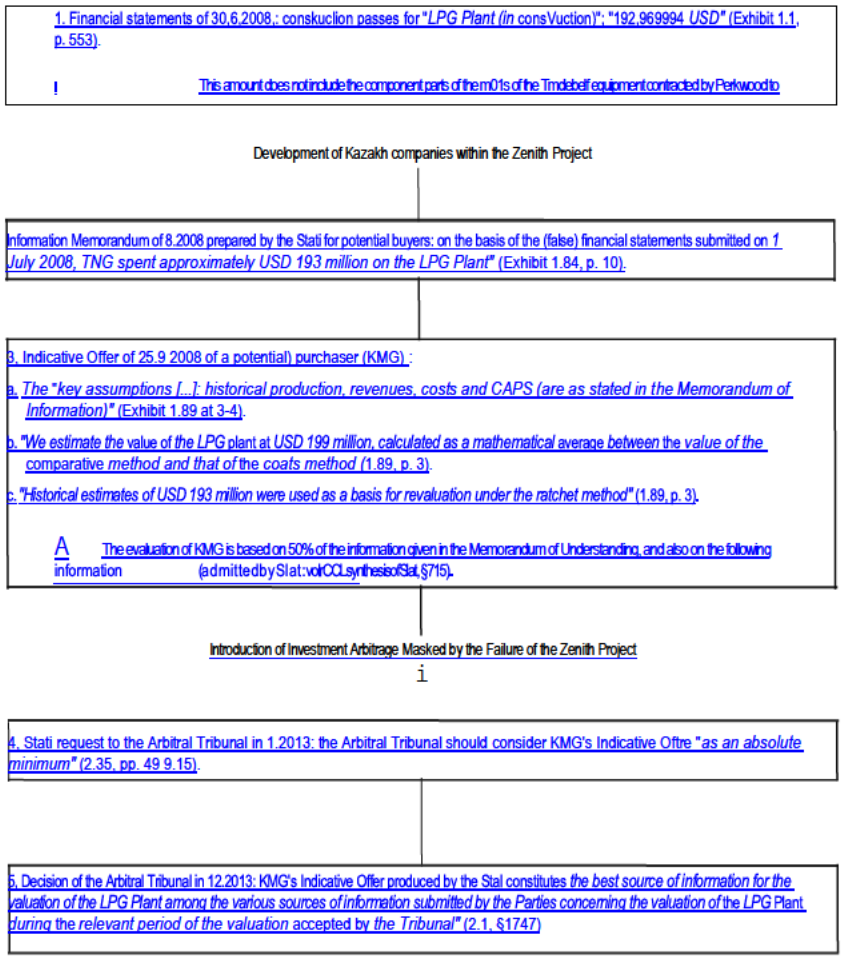
There is no question that :
Had the arbitrators been aware that the documents produced by Stati were based on financial statements containing such crucial inaccuracies and deficiencies as to have obliged KMPG to decide that no reliance should be placed on the audit reports issued by KPMG Audit LLC, they would at least have allowed Kazakhstan to take a position on this - just as Kazakhstan has done in the current proceedings: see pp. 115-125 of Kazakhstan's latest submissions - with the consequence that this argument would undoubtedly have been reflected in the arbitral award, which would not have been made in the same way,
and that, therefore, documents and evidence discovered after the notification of the award would have had a fundamental impact on the sentence.

Still relying on their financial statements, and in particular the section on related party transactions, Stati argued in their post-hearing submissions that their Kazakh companies "*were far from insolvent*" (Kazakhstan Exhibit 2.44, paragraph 254). They explained that the accumulation of debts by the related companies owing KPM and TNG was due to external factors beyond the control of Stati:

"Kazakhstan's insinuation that the extension of payment terms for buyers of [oil and liquefied gas] was anything other than a reasonable decision in the normal course of business is unfounded. According to the KPMG auditors' report, "the management of Tolkynneftegaz LLP and Kazpolmunay LLP agreed to extend the payment terms of their largest customers, Stadoil Ltd. and General Affinity Ltd. which are related companies, after being informed that these customers would not be able to meet the existing contractual payment terms." It is not surprising that with the onset of the global financial crisis and the resulting rapid decline in prices in 2009, late payments and defaults have become widespread in the industry. (Kazakhstan's insinuation that the extension of credit terms for the liquid buyers was anything other than a reasonable decision in the ordinary course of business is unfounded. According to KPMG 's Auditors' Report, "the management of Tolkynneftegaz LLP and Kazpolmunay LLP agreed to extend the payment terms for their largest customers, Stadoil Ltd. and General Affinity Ltd. which are related parties, after they were informed that these customers would not be able to comply with existing contractual payment terms." It is hardly surprising that with the onset of the glpbal ftnancial crisis and the associated rapid price declines in 2009, slow payments and defaults cascaded through the industiry) (Kazakhstan Exhibit 2.39, p.156, para 417).

Without having been able to realize it, the arbitrators relied on the financial statements of the Stati, which they considered to be a faithful reflection of the financial situation of the Stati, to decide the question of the causal link: see in this respect the diagram entitled *'Causality concerning the quantum of the LPG Plant'* (exhibit 35 + annexes to the Kazakhstan hearing file):

Causality regarding the quantum of the LPG Plant



when those financial statements were materially misstated, and that Stati had deliberately deleted Perkwood from its financial statements and had concealed the existence of the Perkwood contract in order to avoid having to subject the transactions between Perkwood and TNG to independent scrutiny.

The Stati withheld exhibits that would likely have had a significant impact on the award, including the following correspondence between the Stati and KPMG: the Perkwood retainer, Kazakhstan Exhibit 1.20, the representation letters to KPMG: Kazakhstan Exhibits 1.83, 1.122, 1.140, and 1.142, which would have revealed that the Stati knowingly misled their auditor in order to legitimize their financial statements in the eyes of others.

If the arbitrators had been aware of these practices, they could have taken them into account when examining the file and they could have considered the consequences of these actions for the resolution of the dispute.

With regard to the LPG Plant, the Stati expressly invited the arbitral tribunal to rely on the indicative offers they had submitted, including that of KMG, because these offers *"present indications of potential asset values for companies that no one can dispute are serious and credible, and they are all in the oil and gas business. There's really a nice cross-section of companies that you look at. You have a state-controlled company with KMG (...)"* (Kazakhstan Exhibit 2.35, pp. 31-32) The Stati concluded their statement of claim at the hearing by stating that KMG's Indicative Offer should be "*an absolute minimum"* for valuing their assets (Kazakhstan Exhibit 2.35, p 49).

Stati insisted on the reliability of their financial statements, arguing in particular that they had been prepared "*in the ordinary course of business, and not for litigation"* against Kazakhstan: *"TNG's 2009 financial statements, which are the source of the annual report, establish the net book value of the LPG Plant at USD 248 million as of December 31, 2009, which corroborates FTI's valuation of USD 245 million. The data from the financial records [of the Stati , especially the data from the audited financial statements, is perfectly reliable evidence, and* it is *not just FTI copying the Stati like a parrot"* (Kazakhstan Exhibit 2.44., point 354).

The Arbitral Tribunal relied on Stati's arguments and the evidence to which they referred (audited financial statements, KPMG Due Diligence Report, Information Memorandum and KMG's Indicative Offer) in assessing the value of the LPG Plant as it reproduced them in the Award (points 1699 and 1700 of the Award). As expressly requested by Stati, the Arbitral Tribunal relied on the *"undisputed indicative offers made by interested purchasers in 2008"* and decided that KMG's Indicative Offer of USD 199 million constituted *"the best relative source of information for the valuation of the Centrale LPG among the various sources of information submitted by the Parties regarding the valuation of the Centrale LPG during the relevant period of time from the valuation date accepted by the Tribunal"* (see Award, points 1746-1747).

In reaching such a conclusion, the arbitral tribunal necessarily relied on evidence that is now known to be inaccurate and materially misstated.

In its Indicative Offer, KMG had expressly stated that it had relied on several *"key assumptions"*, including that *"historical production, revenues, costs and capital expenditure [CAPEX] are consistent with those set out in the Information Memorandum"* (Kazakhstan Exhibit 1.89 at 3-4).

At the quantum hearing, Stati's financial expert, Mr. Rosen, confirmed that KMG had relied precisely on the historical construction costs reported by Stati in its financial statements and in the Information Memorandum. Rosen, confirmed that KMG had relied precisely on the historical construction costs reported by Stati in their financial statements and in the Information Memorandum: "*I also noted that in KMG's value analysis for their indicative bid, they had also addressed the LPG Plant on a cost basis, and at the date of valuation, they were closer to USD 200 million, because that was the cost information for the plant at that time"* (Kazakhstan Exhibit 238, p. 57).

According to the Information Memorandum, all financial data, including the historical expenses of USD 193 million that Stati claimed to have already incurred, were taken from Stati's financial statements. According to the Information Memorandum, the financial statements of KPM and TNG had been "*prepared in accordance with IFRS"*, which Stati had stated in the financial statements themselves.

Since then, the Stati have acknowledged that the financial statements they had presented as *"compliant /FR" to* KMG (Kazakhstan Exhibit 1.84, p. 60) and as
"They have admitted that they concealed Perkwood from their customers, but they have not done so. They have admitted to concealing Perkwood from their

This is a significant admission, especially when one considers that Perkwood was the principal shareholder of TNG and that the company was the only one to have its financial statements prepared in accordance with the IFRS standards. This is a significant admission, especially considering that Perkwood was the primary
"supplier" for the construction of the LPG Plant and therefore the main source of
"historical capital expenditure" on which KMG based its offer.

Had the Arbitral Tribunal been aware of all this, it is likely that it would not have accepted Stati's contention that the indicative offers provided an indication of the value of the LPG Plant "*the seriousness and credibility of which no one can dispute*" (Kazakhstan Exhibit 2.35, p. 32) and that KMG's Indicative Offer was to be an "*absolute minimum*" (Kazakhstan Exhibit 2.35, p. 49), and that it would not have concluded that the indicative offers were
"undisputed" (Kazakhstan Exhibit 2.1, item, 1746).

On the contrary, the Arbitral Tribunal could have found that the Stati had deliberately concealed the true status of Perkwood, the main "supplier" of the LPG Plant, to avoid third party scrutiny of the transactions between Perkwood and TNG. It could have inferred that most of the capital expenditure declared by Stati in the Information Memorandum on which KMG based its Indicative Offer was unreliable. Therefore, it might not have accepted KMG's Indicative Bid as "*the best relative source of information for the evaluation of the LPG Plant*" (Kazakhstan Exhibit 2.1, paragraph 1747).

The court concluded that due to the manoeuvres of the Stati, the concealment of information, the arbitrators were misled. They were not able to take cognizance of the real financial situation of Stati, which was essential to be able to decide.

Their decision was based on erroneous data, which did not accurately reflect the situation of the Stati companies.

The evidence that has been gathered since the Award, demonstrating beyond doubt the Stati's fraudulent conduct, was not known to the Arbitral Tribunal since it was only gradually discovered after the Award had been made. As a result, Kazakhstan was unable to argue before the arbitral tribunal that the Stati investment in Kazakhstan was made in bad faith. The dispute before the arbitral tribunal did not correspond to the reality of the facts as revealed by the evidence newly collected after the notification of the

sentence. In other words, due to the Stati's inaccurate and fraudulent statements and the fact that they hid numerous pieces of evidence during the arbitration proceedings, Kazakhstan was deprived of its right to be heard on this fundamental issue.

The arbitral tribunal therefore necessarily did not, and could not, consider whether Stati's conduct was in accordance with the principle of good faith.

The evidence gathered since the notification of the award would undoubtedly have had an impact on the decision.

The facts uncovered after the award was notified and KPMG's letter of 21 August 2019 to the Stati *'withdrawing'* their audit reports based on materially flawed financial statements are particularly revealing as to the strategy put in place by the Stati to influence the arbitrators to obtain a favourable award.

It is clear that if the arbitrators had been able to examine the case on the basis of correct information and had known that the financial statements produced by Stati, touted for their reliability in that they had been audited by highly reputable auditors: *'audited by Big Four audit firms'* (Exhibit 2.33 of Kazakhstan), were found to be worthless, as Stati had deceived these same auditing firms, they would never have reached the same conclusion on the issue of causation, and they would not have decided that Kazakhstan remained in default of proving that Stati had itself caused, or contributed to, the damage suffered by Stati's investment.

If the arbitrators had been aware of the facts, documents and evidence concerning the real financial situation of Stati, if they had been aware of the fraudulent and deceptive actions of Stati, the debate before the arbitrators would have proceeded differently and would have allowed the parties and the experts and/or witnesses to be confronted with these new elements.

In view of the foregoing, and without it being necessary to examine the other grounds for refusing enforcement, the appeal is well founded.

3. Service of process

The costs of service shall be borne by Stati, the unsuccessful party who has incurred them unnecessarily.

4. Costs

The costs are to be borne by the Stati who succumb.

In view of the nature and complexity of the dispute, the procedural indemnity due to Kazakhstan should be fixed at 13,000 euros, i.e. the maximum amount, pursuant to Article 1022 of the Judicial Code.

BY THESE REASONS,

THE COURT,

Ruling contradictorily,

Having regard to article 24 of the law of 15 June 1935 on the use of languages in judicial matters ;

Declares the principal appeal of the Republic of Kazakhstan well-founded;

Reverses the judgment a quo, except insofar as it declared admissible the third party opposition against the exequatur order of 11 December 2017 ;

Ruling again within these limits:

Declares the third party opposition to the exequatur order of 11 December 2017 to be well founded;

Reverses the exequatur order of December 11, 2017;

Declares the cross-appeal of the Stati consorts, the Ascom Group and the Terra Raf Trans Traiding company unfounded;

Dismisses the respondents;

Rules that the costs of serving the judgment a quo are to be borne by the parties

Stati, Ascom Group and Terra Raf Trans Traiding;

Orders the Stati consorts, the Ascom Group and Terra Raf Trans Traiding to pay the costs,

which are to be settled as follows

in the head of the Republic of Kazakhstan:

- citation fee: 591,91 euros
- IP first instance: 13,000 euros
- duty for listing (appeal), amount to be paid to the Belgian State, SPF Finances, pursuant to Article 2691 of the Code of Registration, Mortgage and Court Fees: 400 euros
- FB: 20 euros;
- Appeal IP: 13,000 euros;

in the case of the Stati consorts, Ascom Group and Terra Raf Trans Traiding:

- n i h i l .

Thus judged and delivered at a public civil hearing of the seventeenth chamber of the Brussels Court of Appeal on 16 NOV. 2021

where were present :

Mrs Dominique DEGREEF, Counsellor, Mrs
Patricia DELGUSTE, Registrar,

P. ELGUST D. DEGREEF