

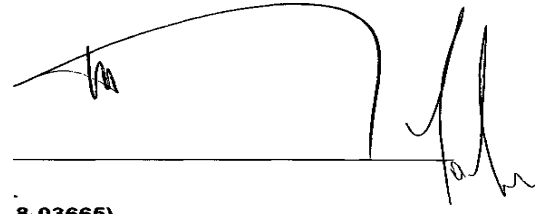
Civil Judgement No. 2021TALCH11/00001 (XI Chamber)

Public hearing on Friday, the eighth of January, Two Thousand Twenty-one.

Roll Numbers TAL-2018-03665 and TAL-2018-03667

Composition:

Paule MERSCH, Vice-President,
Joe ZEIMETZ, Senior Judge,
Stéphane SANTER, Judge,
Arnold LAHR, Registrar.

A handwritten signature in black ink is written over a horizontal line. Below the line, the number '2021' is printed in a small font.

I.
(TAL-2018-03665)

BETWEEN:

1.) **The company under Moldovan law Ascom Group S.A.**, established and having its registered office at MD-2009 Chisinau (Moldova), 75 Mateevici Street, represented by its current Chairman, or by any other body authorised for this purpose, registered under number 1002600006034,
2.) **Anatolie STATI**, businessman, residing at MD-2008 Chisinau (Moldova), 20 Dragomirna Street,
3.) **Gabriel STATI**, businessman, residing at MD-2008 Chisinau (Moldova), 1A, Ghiocelilor Street,
4.) **the company incorporated in Gibraltar, Terra Raf Trans Trading Ltd**, established and having its registered office in Gibraltar, British Overseas Territory, 13/1 Line Wall Road, represented by its current *Director* or by any other body authorised for that purpose, registered under number 68609,

plaintiffs under the terms of a notice of garnishment with summons to validate the garnishment of the judicial officer Véronique REYTER of Esch-sur-Alzette of 7 December 2017,

appearing by the limited liability company NAUTADUTILH AVOCATS LUXEMBOURG LLC, established and having its registered office at L-1233 Luxembourg, 2, rue Jean Bertholet, represented by Maître Antoine LANIEZ, lawyer at the Court, residing in Luxembourg,

AND:

The REPUBLIC OF KAZAKHSTAN, represented by its President of the Republic currently in office and, as appropriate, by its Prime Minister currently in office, or by any other body empowered for that purpose, acting through the *Department for provision of courts' activity under the Supreme Court of the Republic of Kazakhstan (administrative office of the Supreme Court of the Republic of Kazakhstan)*, at its address at Dinmukhamed Qonayev Street 39, Astana 010000, Kazakhstan,

defendant for the purposes of the aforesaid notice of garnishment with summons to validate the garnishment REYTER,

appearing by the public limited company ARENDT & MEDERNACH, established and having its registered office at L-2082 Luxembourg, 41A, avenue J.F. Kennedy, represented by François KREMER, lawyer at the Court, residing in Luxembourg.

II.

(TAL-2018-03667)

BETWEEN:

1.) Ascom Group S.A., a company incorporated under Moldovan law, established and having its registered office at MD-2009 Chisinau (Moldova), 75 Mateevici Street, represented by its current Chairman, or by any other body authorised for this purpose, registered under number 1002600006034,

2.) Anatolie STATI, businessman, residing at MD-2008 Chisinau (Moldova), 20

Dragomirna Street,

3.) **Gabriel STATI**, businessman, residing at MD-2008 Chisinau (Moldova), 1A, Ghiocelilor Street,

4.) **the company incorporated in Gibraltar, Terra Raf Trans Traiding Ltd**, established and having its registered office in Gibraltar, British Overseas Territory, 13/1 Line Wall Road, represented by its current *Director* or by any other body authorised for that purpose, registered under number 68609,

claimants under the terms of a notice of garnishment with summons to validate the garnishment of the judicial officer Véronique REYTER of Esch-sur-Alzette of 22 August 2017,

appearing by the limited liability company NAUTADUTILH AVOCATS LUXEMBOURG LLC, established and having its registered office at L-1233 Luxembourg, 2, rue Jean Bertholet, represented by Mr Antoine LANIEZ, lawyer at the Court, residing in Luxembourg,

AND:

The REPUBLIC OF KAZAKHSTAN, represented by its President of the Republic currently in office and, as appropriate, by its Prime Minister currently in office, or by any other body empowered for that purpose, prosecutions and proceedings by the *Department for provision of courts' activity under the Supreme Court of the Republic of Kazakhstan (administrative office of the Supreme Court of the Republic of Kazakhstan)*, at its address at Dinmukhamed Qonayev Street 39, Astana 010000, Kazakhstan,

defendant for the purposes of the aforesaid notice of garnishment with a summons to validate the garnishment REYTER,

appearing by the public limited company ARENDT & MEDERNACH, established and having its registered office at L-2082 Luxembourg, 41A, avenue J.F. Kennedy, represented by François KREMER, lawyer at the Court, residing in Luxembourg.

THE COURT

Having regard to the closing orders of 11 December 2020.

Having regard to the notices of determination of 9 December 2020 by which the agents of the parties were informed of the composition of the Court.

The cases were taken under advisement at the hearing of 11 December 2020, by senior judge Joe ZEIMETZ, delegated for these purposes.

Having heard the Moldovan company Ascom Group S.A., Anatolie STATI, Gabriel STATI and the Gibraltar-law company Terra Raf Trans Traiding Ltd., through their representative Mr Antoine LANIEZ, the appointed lawyer.

Having heard the REPUBLIC OF KAZAKHSTAN through its representative Mr François KREMER, the appointed lawyer.

FACTS AND ANTECEDENTS

Pursuant to an arbitral award issued by the Stockholm Chamber of Commerce on 19 December 2013, amended by an amending arbitral award of 17 January 2014 (hereinafter "the Arbitral Award"), the Moldovan company Ascom Group SA, Anatolie STATI, Gabriel STATI and the Gibraltar-based company Terra Raf Trans Traiding Ltd. had a garnishment order executed on 16 August 2017 in the hands of:

- the limited liability company Eurasian Resources Group LLC,
- the public limited company ArcelorMittal SA,
- the public limited company Cameco Luxembourg SA,
- the limited liability company Tengizchevroil Finance Company LLC,

on all sums, dividends, money, assets, securities, bonds, debts or objects whatsoever, insofar as not covered by State immunity, which they have or will have, may or may hold, pay or receive, owe or shall owe to or on behalf of the REPUBLIC OF KAZAKHSTAN, in any capacity and for any reason whatsoever, as well as

on all shares or stocks of the companies Eurasian Resources Group LLC, ArcelorMittal SA, Cameco Luxembourg SA and Tengizchevroil Finance Company LLC, which belong to the REPUBLIC OF KAZAKHSTAN,

to have security, preservation of their rights and payment of the total amount of 434,914,531.20 EUROS corresponding to the principal amount of 497,685,101.00 USD, plus the interest due on 16 August 2017 of 8,571,504.61 USD, the fixed amounts of 8,975,496.40 USD and 802,103.24 EUROS (reimbursement of procedural costs, including lawyer's fees incurred in the arbitration proceedings), as well as the amount of 50,000.00 EUROS as a provision for additional interest, currency fluctuation and court costs.

This garnishment was reported to the REPUBLIC OF KAZAKHSTAN by bailiff's writ of 22 August 2017, this writ also containing a summons to validate the garnishment and a request for an order against the REPUBLIC OF KAZAKHSTAN to pay a procedural indemnity of 5,000 EUROS on the basis of Article 240 of the New Code of Civil Procedure, as well as the costs and expenses of the proceedings, including translation costs.

The counter-notice was served to the third parties seized by writ of summons dated 23 August 2017.

This case has been entered as roll number TAL-2018-03667.

Pursuant to the Arbitral Award, the Moldovan company Ascom Group SA, Anatolie STATI, Gabriel STATI and the Gibraltar-based company Terra Raf Trans Trading Ltd (hereinafter "the STATI parties") had a garnishment order executed on 1 December 2017 in the hands of:

- the Bank of New York Mellon (International) Limited, Luxembourg Branch,
- the Bank of New York Mellon SA/NV, Luxembourg Branch,
- the public limited company BNY Mellon Fund Management (Luxembourg) SA,
- the limited liability company BNY Mellon GSS Holdings (Luxembourg) sàrl,

on all sums, dividends, moneys, assets, securities, bonds, debts or objects whatsoever, insofar as not covered by State immunity, which they have or will have, may or may hold, pay or receive, owe or shall owe to or on behalf of the REPUBLIC OF KAZAKHSTAN, in any capacity and for any reason whatsoever,

to have security, preservation of their rights and payment of the total amount of 441,149,085.56 EUROS corresponding to the principal amount of 497,685,101.00 USD,

plus the interest due on 1 December 2017 of 10,000,571.85 USD, the fixed amounts of 8,975,496.40 USD and 802,103.24 EUROS (reimbursement of procedural costs, including lawyer's fees incurred in the arbitration proceedings), as well as the amount of 100,000.00 EUROS as a provision for additional interest, currency fluctuations and court costs.

This garnishment was reported to the REPUBLIC OF KAZAKHSTAN by bailiff's writ of 7 December 2017, this writ also containing a summons to validate the garnishment and a request for an order against the REPUBLIC OF KAZAKHSTAN to pay a procedural indemnity of 10,000 EUROS on the basis of Article 240 of the New Code of Civil Procedure, as well as the costs and expenses of the proceedings, including translation costs.

The counter-notice was served to the third parties seized by writ of 12 December 2017.

This case has been entered as roll number TAL-2018-03665.

By Presidential Order number 40/2017 issued on 30 August 2017, the Arbitral Award was declared enforceable in the Grand Duchy of Luxembourg.

On 27 May 2019, the REPUBLIC OF KAZAKHSTAN lodged a complaint with a civil claim, dated 24 May 2019, with the investigating judge in Luxembourg against the STATI parties for acts qualified as:

- forgery and use of forgery, respectively attempted forgery and use of forgery within the meaning of Articles 196 and 197 of the Criminal Code,
- fraud or attempted fraud within the meaning of Article 496 of the Criminal Code,
- money laundering or attempted money laundering within the meaning of Article 506-1 of the Criminal Code.

By judgement number 133/19 - VIII - Exequatur of 19 December 2019 of the Court of Appeal of Luxembourg, the appeal of 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, was dismissed.

On appeal against an order of 9 October 2019, by which the investigating judge in Luxembourg declared himself territorially incompetent to investigate the facts underlying the criminal complaint with a civil party claim by the REPUBLIC OF KAZAKHSTAN, the Council Chamber of the Court of Appeal of Luxembourg declared by judgement number 95/20 of 28 January 2020, that *"the investigating judge at the District Court of and in Luxembourg is territorially competent to investigate the facts underlying the complaint with a claim for damages of 24 May 2019"*.

CLAIMS AND PLEADINGS OF THE PARTIES

The STATI parties argue that by judgement dated 19 December 2019, the Luxembourg Court of Appeal dismissed the appeal of the REPUBLIC OF KAZAKHSTAN against the enforcement order of 30 August 2017 declaring the Arbitral Award enforceable. The title would therefore now be enforceable in Luxembourg, notwithstanding any appeal to the Supreme Court. In the Arbitral Award, the REPUBLIC OF KAZAKHSTAN was allegedly found guilty of *"a series of coordinated harassment measures"*, which caused the STATI parties to lose their entire investment in Kazakhstan. The arbitral court decided that the REPUBLIC OF KAZAKHSTAN had violated its obligations to treat foreign investors in a *"fair and equitable"* manner under the ECT. The Arbitral Award would not be subject to appeal and would therefore be final. In the absence of voluntary execution by the REPUBLIC OF KAZAKHSTAN, the STATI parties would have been forced to initiate enforcement proceedings in several countries in order to obtain payment of the sums due. The STATI parties have thus initiated enforcement proceedings in the United States, England, the Netherlands, Belgium, Sweden, Italy and the Grand Duchy of Luxembourg.

The REPUBLIC OF KAZAKHSTAN contests the request of the STATI parties, arguing that the Arbitral Award, as well as the judgement of the Court of Appeal of Luxembourg of 19 December 2019 dismissing the appeal brought by the REPUBLIC OF KAZAKHSTAN against the order of enforcement of the Arbitral Award, were allegedly obtained by fraud.

The REPUBLIC OF KAZAKHSTAN contends that the STATI parties deliberately misled the Arbitral Court and the Luxembourg Court of Appeal by submitting documents they knew to be false and manipulated. The Claimants' actions would have affected not only the entire arbitration proceedings, but also all related proceedings. Evidence discovered by the REPUBLIC OF KAZAKHSTAN in recent years and particularly in 2019 has been submitted to independent experts.

In order to establish its claims, the REPUBLIC OF KAZAKHSTAN refers to the findings of Dr Schöldström, Judge at the Svea Court of Appeal, Professor Christoph Schreuer, Professor George Bermann of Columbia University, PricewaterhouseCoopers International, and a *"former U.S. attorney who now works for the anti-corruption agency Stream House A.G."*.

The REPUBLIC OF KAZAKHSTAN contends that it is currently presenting evidence relating to fraud by the STATI parties which could not have been presented before the Luxembourg Court of Appeal in the exequatur procedure, as the investigation of the case was closed before the discovery of that evidence.

With regard to the background to the dispute, the REPUBLIC OF KAZAKHSTAN explains that Anatolie STATI and Gabriel STATI are allegedly entrepreneurs of Moldovan and Romanian nationality, who acquired all the shares of two Kazakh companies, namely Kazpolmunay LLP (hereinafter "KPM") and Tolkyneftegaz LLP (hereinafter "TNG"). Prior to the acquisition by the STATI parties, KPM and TNG would have obtained authorization from the REPUBLIC OF KAZAKHSTAN to explore and develop various oil and gas deposits in Kazakhstan pursuant to subsoil use agreements. In 2006, the STATI parties, *via* their company TNG, allegedly initiated the project to build a liquefied petroleum gas plant in Kazakhstan (hereinafter "LPG plant"). At the end of 2008, the Kazakh authorities reportedly highlighted several serious violations in the activities carried out by KPM and TNG. As a result of these violations, the Ministry of Oil and Gas of the REPUBLIC OF KAZAKHSTAN reportedly terminated the subsurface use contracts, which were awarded to KPM and TNG in July 2010. Alleging a violation of the Energy Charter Treaty (hereafter "the ECT"), the STATI parties initiated arbitration proceedings, which resulted in the Arbitration Award. In this context, the STATI parties claimed to have invested more than 245 million USD in the construction of the LPG plant and to have been the victims of a campaign of harassment initiated by the REPUBLIC OF KAZAKHSTAN, which led to the financial asphyxiation of TNG and KPM.

The REPUBLIC OF KAZAKHSTAN states that the Arbitral Court concluded that the actions of the REPUBLIC OF KAZAKHSTAN had an adverse effect on the financial situation of TNG and KPM. The evidence discovered by the REPUBLIC OF KAZAKHSTAN, however, would establish that this financial situation was solely the result of misappropriation of funds by the STATI parties.

The REPUBLIC OF KAZAKHSTAN contends that the fraud set up by the STATI parties had an impact on the jurisdiction of the arbitral court, on the liability of the REPUBLIC OF KAZAKHSTAN upheld by the Arbitral Court, as well as on the *quantum* of the alleged damages awarded by the Arbitral Court. The STATI parties allegedly deliberately misled the Arbitral Court by providing documents which they knew were created on the basis of false information. The STATI associates allegedly set up various fraudulent schemes aimed in particular at artificially inflating the construction costs of the LPG plant. The STATI parties then allegedly used the result of these fraudulent schemes to deliberately mislead the Arbitral Court. The fraud relating to the *quantum* of the damage would have been confirmed by an affidavit before a US court by "Mr Lungu" and by KPMG in a letter dated 21 August 2019. In this letter, KPMG indicated that it would withdraw all audit reports prepared on behalf of TNG and KPM.

The REPUBLIC OF KAZAKHSTAN notes that in determining the *quantum* of the damage, the Arbitral Court relied on an indicative offer of 25 September 2008. This indicative offer was made on the basis of the annual accounts of TNG, which owned the LPG plant. However, these accounts would have been artificially inflated, thereby distorting the amount of the bid. The Arbitral Court would thus have relied on a document, which the STATI parties would have known to be a forgery. This document would also have been presented in the context of the exequatur procedure in Luxembourg. This would mean that the exequatur decision obtained in Luxembourg would constitute a criminal fraud.

The REPUBLIC OF KAZAKHSTAN refers to its criminal complaint with a civil claim, filed on 27 May 2019, with the investigating judge in Luxembourg. It argues that the public action is said to be in motion and that the investigation is still ongoing. The outcome of the criminal case would have consequences for the present proceedings. If the Tribunal were to validate the garnishments, it would allow the realisation of elements constituting criminal offences and the perfection of the fraud implemented by the STATI parties.

Pursuant to Article 3 of the Code of Criminal Procedure, the REPUBLIC OF KAZAKHSTAN requests a stay of proceedings in the cases registered under roll numbers TAL-2018-03665 and TAL-2018-03667 pending the decision to intervene in the criminal case brought

as a result of the criminal complaint with a civil claim, filed on 27 May 2019.

The REPUBLIC OF KAZAKHSTAN requests that the garnishments of 16 August 2017 and 1 December 2017 be declared invalid, otherwise inadmissible, if not unfounded, arguing that the immunity from execution, which the REPUBLIC OF KAZAKHSTAN would enjoy as a sovereign State, has not been respected.

The REPUBLIC OF KAZAKHSTAN still requests the suspension of the cases registered under roll numbers TAL-2018-03665 and TAL-2018-03667 pending the decision of the Court of Cassation to intervene, following the appeal to the Court of Cassation lodged against the decision of the Luxembourg Court of Appeal of 19 December 2019.

The REPUBLIC OF KAZAKHSTAN argues that there is no current title allowing validation of the garnishments. According to a case-law precedent of the Luxembourg Court of Appeal of 21 March 2018 "*it is possible that a garnishment carried out on the basis of a title is no longer necessary or that the execution of the document on the basis of which it was carried out is no longer effective due to the existence of new facts*".

The REPUBLIC OF KAZAKHSTAN requests the unconditional release of the garnishments made on 16 August 2017 and 1 December 2017.

In any event, the REPUBLIC OF KAZAKHSTAN objects to the award of procedural compensation to the STATI parties.

In the cases registered under roll numbers TAL-2018-03665 and TAL-2018-03667, the REPUBLIC OF KAZAKHSTAN seeks an order that the STATI parties be ordered to pay it jointly and severally, if not *in solidum*, then each for his part, procedural damages of 100,000 EUROS on the basis of Article 240 of the New Code of Civil Procedure for each case.

The REPUBLIC OF KAZAKHSTAN requests that the STATI parties be ordered to pay the costs and expenses of the proceedings, with order to pay expenses in favour of the petitioner's lawyer at the Court who requests it, claiming to have made the advance payment.

The STATI parties first of all state that they have granted release of the garnishment in the hands of the limited liability company Tengizchevroil Finance Company LLC, which declared, on 2 February 2018, that it owes no debt to the REPUBLIC OF KAZAKHSTAN

and does not hold any assets on its behalf.

The STATI parties dispute that there was fraud in obtaining the Arbitral Award. They argue that in no country would any fraud have been judicially recognized. All the courts before which allegations of fraud were allegedly brought have systematically rejected this argument. They refer in this context to judgements of the Supreme Court of Sweden of 24 October 2017, of the Court of Appeal of Rome of 27 February 2019, of the Court of Appeal for the District of Columbia of 19 April 2019, the Luxembourg Court of Appeal of 19 December 2019 and a judgement of the Court of First Instance of Brussels of 20 December 2019.

The STATI parties state that by judgement of the Supreme Court of Sweden of 18 May 2020, the application for review brought by the REPUBLIC OF KAZAKHSTAN was dismissed. The application for review was lodged in Sweden on 3 April 2020 and was based on the discovery of new evidence, namely the KPMG report and the testimony of "*Mr LUNGU*".

The STATI parties note that the allegations of fraud and breach of public policy contained in the submissions of the REPUBLIC OF KAZAKHSTAN were definitively rejected by the judgement of 19 December 2019 of the Luxembourg Court of Appeal in the exequatur proceedings. The appeal to the Court of Cassation lodged by the REPUBLIC OF KAZAKHSTAN against this ruling would not have suspensive effect and would not be likely to alter the assessment of the Court of Appeal on the facts, which would remain sovereign in this matter. In the context of the present proceedings, the Court of First Instance would be seized of an application for validation and would have to confine itself to establishing the existence of an enforceable title on Luxembourg territory. In this case, this title would have existed since 19 December 2019, so that garnishments would have to be validated.

The STATI parties dispute that garnishments would be made on assets that could be covered by immunity from execution, which would incidentally never be absolute. Furthermore, the REPUBLIC OF KAZAKHSTAN would have waived the benefit of immunity from execution by signing the ECT and participating in the arbitration proceedings.

The STATI parties oppose the request of the REPUBLIC OF KAZAKHSTAN to suspend the cases registered under the roll numbers TAL-2018-03665 and TAL-2018-03667 pending the decision of the Luxembourg Court of Cassation to intervene, arguing that in civil matters the appeal to overturn the judgement would not have a suspensive effect. The

contested decision should therefore be complied with, until such time as it is annulled.

The STATI parties contest the request for a stay of proceedings made by the REPUBLIC OF KAZAKHSTAN on the basis of Article 3 of the Code of Criminal Procedure, pointing out that there are no new elements relating to the content of the criminal complaint lodged in the context of the present dispute and the exequatur appeal procedure in Luxembourg. The enforceability of the title invoked in support of the application for validation of the garnishments was confirmed by the judgement of the Luxembourg Court of Appeal of 19 December 2019. In this decision, the Court of Appeal decided that *"the allegations made by the appellant, even if they were established, and the fact that KPMG withdrew its reports on the financial statements of TNG, KPM and Tristan for the years 2007 to 2009, are not such as to constitute fraud tainting the very basis of the respondents' investment in Kazakhstan, which began long before the manoeuvres criticized by the appellant. They are therefore not such as to affect the jurisdiction of the Arbitral Court. (...) The appellant does not justify that the alleged fraud would have influenced the decision regarding its liability. (...) The allegations of fraud against the Stati parties, if established, are thus irrelevant to the Award"*. The allegations of fraud were thus rejected by the Luxembourg Court of Appeal. This decision to confirm the exequatur would have the force of *res judicata*. The Court of Appeal also held in this decision that *"the alleged fraud and, therefore, the facts denounced as constituting the offence, do not have a direct impact on the exequatur"*. The STATI parties submit that the outcome of the criminal proceedings in Luxembourg could thus have no influence on the validity of the enforcement order presented in support of the application for validation of garnishments. The Court of First Instance could not call into question the conclusions of the Luxembourg Court of Appeal, which would not be upset by Judgement No 95/20 delivered on 28 January 2020 by the Council Chamber of the Luxembourg Court of Appeal. This decision would relate solely to the admissibility of the criminal complaint and would not add anything to the content of the criminal complaint, which would have been known to the Luxembourg Court of Appeal when it handed down the judgement of 19 December 2019. Finally, the STATI parties contest, in the light of the above, the risk of decisions being overturned.

The STATI parties request the provisional execution of the present judgement without security, if not with security.

In the cases registered under roll numbers TAL-2018-03665 and TAL-2018-03667, the STATI parties are increasing their claims for procedural compensation to the amount of 25,000 EUROS for each case.

The STATI parties contest the application of the REPUBLIC OF KAZAKHSTAN for the release of the garnishments made.

GROUNDS FOR THE DECISION

The cases registered under the numbers TAL-2018-03665 and TAL-2018-03667 should be joined because of their connection for the purposes of the proper administration of justice.

Pursuant to Article 3 of the Code of Criminal Procedure, the REPUBLIC OF KAZAKHSTAN requests a stay of proceedings in the cases registered under roll numbers TAL-2018-03665 and TAL-2018-03667 pending the decision to be made in the criminal case brought as a result of the criminal complaint with a civil claim, filed on 27 May 2019.

The principle expressed by the adage "*criminal law takes precedence over civil law*" is of public policy in the sense that the judge hearing the civil action is bound, even *ex officio*, to stay the proceedings from the moment that the public action is instituted if, because of the identity of the facts before the civil and criminal courts, the decision handed down by one court cannot fail to influence the decision of the other. (Court of Appeal, 11 May 1997, roll no. 19561)

The rule that "*criminal law takes precedence over civil law*" in Article 3, paragraph 2, of the Code of Criminal Procedure invoked is intended to avoid conflict between the decisions handed down on civil and public actions in the event of a common fact. It does not, however, require as a condition of application the identity of object and cause, but only that the decision to be taken on the public action is likely to influence that which will be rendered by the civil court (see Court of Appeal, 4 February 1998, roll no. 15167; TAL [Administrative Court of Luxembourg] 4 July 2012, Pas. 36, p.180).

In order for the rule "*criminal law takes precedence over civil law*" to apply, the two actions must relate to the same facts or, to put it another way, the decision to intervene in the public action must be able to influence the decision to be made by the civil court. Case law tends to broaden the concept of identity of facts. Currently, it decides that there need not be identity of subject-matter, parties or even identity of cause for the stay to be imposed.

It is sufficient that there is a common issue between the two actions which the court cannot decide without establishing the offence committed and consequently without risking to contradict the criminal court (see Stéfani and Levasseur, Criminal Procedure, No. 210; 3rd Civ. 27 May 1975, D. 1975, Inf. 213).

Article 3, paragraph 2, of the Code of Criminal Procedure provides that if the civil action is brought before the civil courts, the exercise of the right to bring a civil action is suspended until a final ruling has been made on the public action brought before or during the pursuit of the civil action. It is indeed desirable that the criminal justice system and the civil justice system dealing with two actions arising out of the same facts should not be led, as a result of the difference in procedure, to give different interpretations leading to contradictory judgements. It is because the criminal decision, once pronounced, has an absolute authority which is binding on the civil judge that this contradiction will be avoided; that the civil judge has waited for the result to which he will have to conform his own judgement (Jurisclasseur de Procédure pénale: Actions arising out of the criminal offence under arts. 1 - 5, fasc. IV no. 87).

A stay of proceedings is only necessary if there is a fairly close link between the two actions and creates a risk of contradiction between the decisions to be taken. There must be a certain or possible influence of the criminal decision on the outcome of the civil action (Jurisclasseur de Procédure Pénale loc. cit. n^{os}. 108 and 113).

In order for the rule "*criminal law takes precedence over civil law*" to apply, three conditions are required: 1) The public action must actually be in motion; 2) The public action and the civil action must be closely linked; 3) The public action must not have been finally decided (Jurisclasseur de Procédure Pénale loc. cit. no. 96).

On 27 May 2019, the REPUBLIC OF KAZAKHSTAN filed a criminal complaint dated 24 May 2019 with a civil claim with the investigating judge in Luxembourg against the STATI parties. In accordance with the order of the investigating judge of 29 May 2019 ordering the deposit of the amount of 1,000 EUROS before 5 July 2019, this amount was deposited by the REPUBLIC OF KAZAKHSTAN on 6 June 2019 at the "Caisse de Consignation".

By order of 9 October 2019, the investigating judge in Luxembourg declared himself territorially incompetent to investigate the facts on which the criminal complaint was based and to bring a civil action.

However, by a judgement number 95/20 of 28 January 2020, the Council Chamber of the

Luxembourg Court of Appeal declared that "*the investigating judge at the district court of and in Luxembourg is territorially competent to investigate the facts underlying the complaint with a civil claim of 24 May 2019*".

In the light of the foregoing developments, the public action has indeed been set in motion, so that the first condition for a stay of proceedings has been met.

It is then necessary to analyse whether there is a fairly close link between the criminal action and the present proceedings, creating a risk of contradiction between the decisions to be made.

In the Arbitral Award, the Arbitral Court found that the REPUBLIC OF KAZAKHSTAN had breached its obligations under the ECT with respect to the investments of the STATI parties and decided that the REPUBLIC OF KAZAKHSTAN should pay the STATI parties an amount of 497,685,101.00 USD plus default interest (of which 199,000,000.00 USD as damages for the LPG plant).

Pursuant to paragraph 1095 of the Arbitral Award, the Arbitral Court found that the measures of the REPUBLIC OF KAZAKHSTAN, taken in context against each other and compared to the treatment of the investments of the STATI parties prior to the Order of the President of the Republic of 14/16 October 2008, constituted a series of harassment measures coordinated by numerous institutions of the REPUBLIC OF KAZAKHSTAN. These measures were to be considered as a breach of the obligation to treat investors in a fair and equitable manner in accordance with Article 10(1) of the ECT.

The REPUBLIC OF KAZAKHSTAN, in its criminal complaint with a civil claim filed on 27 May 2019, claims that the Arbitral Court would have awarded the STATI parties an amount of 497,685,101.00 USD and 8,975,496.40 USD, including 199 million USD for the LPG plant. Several documents produced by the STATI parties in the arbitration proceedings are allegedly false, in particular the financial statements of Tristan Oil Ltd, KPM and TNG, the "*Information Memorandum*" and the "*KPMG Due Diligence Report*". The STATI parties allegedly submitted knowingly false evidence to the Arbitral Court with the aim of deliberately misleading the arbitrators in order to obtain a title against the REPUBLIC OF KAZAKHSTAN. The documents and information concealed by the STATI parties would have had a decisive influence on the Arbitral Award. The Arbitral Court would never have granted the requests of the STATI parties if it had been aware of their criminal and delinquent conduct at the time. The actions of the STATI parties fall under criminal law. The STATI parties allegedly knowingly and fraudulently misled the Arbitral Court 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 never actually suffered. These damages would have been calculated on the basis of fictitious costs and investments, otherwise inflated intentionally for fraudulent purposes. They were also documented by fictitious contracts and false documents, as well as by expert reports constituting false intellectuals, insofar as the latter were drawn up on the basis of those 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 STATI parties in the context of garnishment and exequatur procedures would constitute fraudulent manoeuvres within the meaning of Article 496 of the Criminal Code. The use of the Arbitral Award by the STATI parties within the framework of garnishment procedures would constitute the offence of money laundering.

The STATI parties maintain that the Luxembourg Court of Appeal's judgement number 133/19 - VIII - Exequatur of 19 December 2019 confirming the exequatur would have the force of *res judicata*.

Judgement No. 133/19 -VIII - Exequatur of 19 December 2019 of the Luxembourg Court of Appeal, issued on appeal by the REPUBLIC OF KAZAKHSTAN against Order No. 40/2017 of 30 August 2017 by which the Arbitral Award was declared enforceable in the Grand Duchy of Luxembourg, states that:

"In order for public policy to be disturbed, the Award must have been obtained by clear and decisive fraud.

The burden of proof lies with the party opposing enforcement on the ground of fraud.

(...)

In the present case, the alleged fraud is not the result of the decision of the arbitral court, the decision of the SVEA [Stockholm Court of Appeal] or the Supreme Court of Sweden, or a decision of a criminal court or a court of another State.

In so far as the fraud must be manifest, it is not for the court, when seized of an application for enforcement, to take measures of inquiry in order to establish the existence of the alleged fraud.

(...)

Even if it had been established, the alleged fraud would not have influenced the decision of the arbitrators as to the liability of Kazakhstan, but would have affected only part of the damages at issue, in this case the damages relating to the LPG plant.

(...)

If it is accepted that the enforcement judge is a civil judge within the meaning of Article 3 of the Code of Criminal Procedure, the application for a stay of proceedings may be granted only if the facts denounced as constituting the offence have a direct bearing on the grounds for refusal of enforcement, 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, do not have a direct impact on the exequatur.

There is, therefore, no reason to stay the proceedings.”

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

It should be noted that the judgement 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 respect of the LPG plant, which, according to the Arbitral Award, amount to 199,000,000.00 USD.

The Court of First Instance emphasizes that the question of the *quantum* of the prejudice is, however, paramount in the context of these proceedings for the validation of garnishments.

It must be concluded that the principle of *res judicata* attached to the judgement number 133/19 - VIII - Exequatur of 19 December 2019 of the Luxembourg Court of Appeal does not preclude a stay of proceedings.

It should also be pointed out that, assuming that the STATI parties committed the offences of which they were accused by the REPUBLIC OF KAZAKHSTAN, this circumstance would necessarily have an impact on the application for validation of the garnishments made.

In the light of the foregoing developments, it should be borne in mind that the criminal action and the civil action for validation of the garnishment of the present proceedings are closely linked and that there is a risk of contradiction between the decisions to be taken, so that the second condition for staying the proceedings is, in the present case, met.

It is an established fact that the public action has not yet been definitively decided, so that the last condition of the stay of proceedings is also fulfilled.

In the light of the foregoing developments, it is appropriate to stay the proceedings pending the outcome of the criminal action and to reserve the rights of the parties and the costs.

ON THESE GROUNDS:

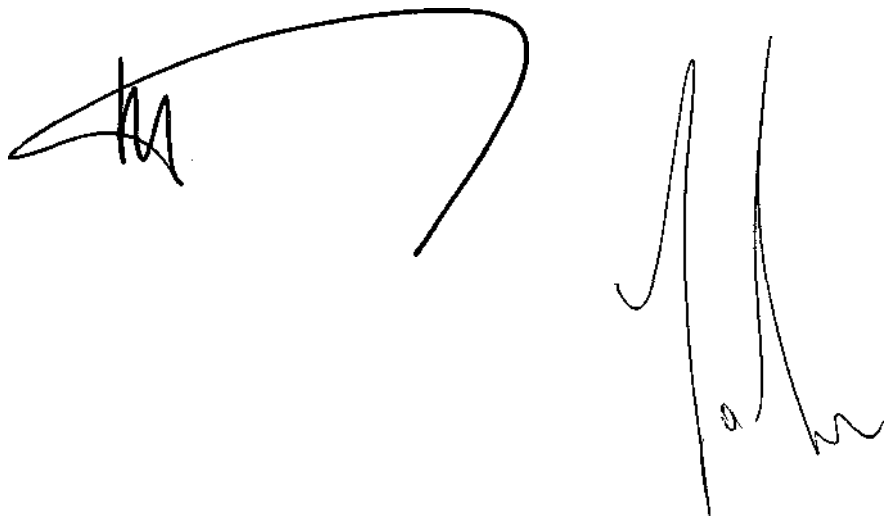
the District Court of and in Luxembourg, Eleventh Chamber, sitting in civil matters, giving judgement after hearing the parties on both sides of the case,

orders the joinder of the cases listed under roll numbers TAL-2018-03665 and TAL-2018-03667,

stays the proceedings pending the outcome of the criminal action,

reserves the rights of the parties and the costs,

puts the case on hold.

The image shows two handwritten signatures in black ink. The signature on the left is a large, sweeping, cursive mark that starts with a vertical stroke, loops around, and ends with a long horizontal tail. The signature on the right is more vertical and consists of several distinct, overlapping strokes, including a prominent vertical line and a smaller, more intricate mark below it.