IN THE MATTER OF AN ARBITRATION UNDER THE 1976 RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

PCA CASE NO. 2020-59

BETWEEN:

UAB "GARSU PASAULIS"

Claimant

- and -

THE KYRGYZ REPUBLIC

Respondent

RESPONDENT'S REJOINDER

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INTRODUCTION

1. Pursuant to Annex 1 to the Procedural Order No. 1, as most recently amended by the agreement of the Parties on February 17, 2023, the Kyrgyz Republic (the "**Republic**" or "**Respondent**") hereby submits its Rejoinder (the "**Rejoinder**") addressing the Statement of Reply (the "**Reply**") submitted on October 31, 2022 by UAB "Garsu Pasaulis" ("**Garsu Pasaulis**" or "**Claimant**"). The Republic and Garsu Pasaulis are collectively referred to as the "**Parties**."

2. References below are to the factual exhibits and legal authorities attached to the Parties' earlier submissions. This Rejoinder is further accompanied by factual exhibits **R-86** to **R-145** and **R-219** to **R-225** and legal authorities **RL-200** to **RL-220**. A list of Respondent's factual exhibits and legal authorities is enclosed with this Rejoinder.

3. Together with its Rejoinder, the Republic submits:

   3.1. A Second Expert Opinion on Kyrgyz Law by Judge Madina Davletbayeva, an attorney and a former judge ("**Davletbayeva EO on Kyrgyz Law 2**"), and

   3.2. A Second Damages Report by Ms. Anastasia Malyugina of the Berkley Research Group LLC ("**Malyugina EO on Damages 2**").

4. Unless stated otherwise, capitalized terms shall have the meaning ascribed to them in the Respondent's earlier submissions.

5. This Rejoinder consists of the following six Sections:

   5.1. Statement of Facts;

   5.2. Inadmissibility of Claimant's claims and Tribunal's lack of jurisdiction *ratione materiae*;

   5.3. Merits;

   5.4. Quantum;

   5.5. Specific performance;

   5.6. Conclusion and Requests for Relief.

6. For the avoidance of doubt, the fact that this submission may not address any factual and/or legal allegation made by Claimant cannot be construed as an admission thereof. All allegations of Claimant are denied unless expressly admitted.

I. STATEMENT OF FACTS

7. By way of both a preliminary remark and an executive summary, respondent appeals to the wisdom of Mark Twain:

"IF YOU HAVE NOTHING TO SAY, SAY NOTHING"

8. Claimant's Reply opens with a massive 127-pages long section purporting to be delivering a "*Statement of facts*" – something Claimant was supposed to exhaustively set out as early as in its Statement of Claim. Yet, the Reply's factual section is the best representation of the saying 'more does not always mean better' – Claimant's submission is replete with flagrant misrepresentations of facts, mistranslations and misrepresentations of documents, misquotations and misrepresentations of Respondent's arguments in this arbitration, as well as new allegations which contradict Claimant's own earlier submissions.

9. One gets the impression that Claimant's strategy in these proceedings is to simply inundate the Tribunal with a sway of audacious, inconsistent, and irrelevant statements so that the arbitrators side with Claimant just out of sheer confusion. Respondent is not minded allowing this to happen, and the present Section II of the Rejoinder will set the record of the relevant factual circumstances of the case straight. It goes without saying that, should this Section not address any factual allegation, reference, quotation, or description set out in Claimant's Reply, this shall not be interpreted as an admission thereof. Rather, Respondent submits that the selected examples of Claimant distorting the record set out in this Section of the Rejoinder should be sufficient for the Tribunal take **anything** Claimant says with a huge grain of salt.

10. In this context, and by way of a preliminary remark, Claimant's statement at paragraph 5 of the Reply that "[n]*ot a single fact witness* ***agreed to testify*** *to Respondent's story*" is most ironic.[1] **First**, it is a classic example of Claimant's manipulation of facts – to assert that someone did not "*agree to testify*," without even knowing whether Respondent has actually sought to support its statement of facts by witness evidence. Claimant relies on such manipulations profusely just to put a certain idea in the Tribunal's mind, without any intention to be accountable for its own words.

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1 Emphasis added.

11. **Second**, Respondent reminds Claimant that in international arbitration, the form of evidence used is not only witness testimony, but also documentary evidence. If the Republic chose not to file any witness testimony, it is simply because its case is that Claimant's claims are rebutted by documents only. Accordingly, the Republic is not required to file any witness testimony, and Claimant does not get 'brownie points' for pleading its case differently.

12. **Third**, and contrary to Claimant's belief, the Republic submits that it is better to have no witness statement at all than the ones served by Messrs. Mieliauskas, Lukosevicius and Sagyndykov in this arbitration. As demonstrated by Respondent's Statement of Defense and will be further highlighted in this Rejoinder, a major part of the allegations of those gentlemen regarding Garsu Pasaulis' misfortunes in the Kyrgyz Republic is belied by contemporaneous evidence. In the normal circumstances this would lead to a witness withdrawing the statements that turned out to be false, with an apology. Not in the case of Claimant's witnesses however, who prefer to stick to their stories.[2] Respondent is very much looking forward to cross-examining Messrs. Mieliauskas, Lukosevicius and Sagyndykov during the June 12-16, 2023 Hearing.

13. The ensuing Sub-Sections will thus address: the irregularities in the conduct of the 2018 Tender, which led to the declaration of Claimant as the 2018 Tender's winner (**Sub-Section II.A** below); the alleged 'media campaign' and Claimant's novel conspiracy theory involving foreign governments and its own competitors (**Sub-Section II.B** below); the corruption investigation in relation to the 2018 Tender and Claimant's refusal to cooperate (**Sub-Section II.C** below): expiration of Claimant's bid and the declaration of the 2018 Tender as failed (**Sub-Section II.D** below); holding of the new tender for the sale of passport forms in 2020 (**Sub-Section II.E** below); and Claimant's spotty international reputation both before and after the 2018 Tender (**Sub-Section II.F** below).

14. As Claimant's Reply does not address Respondent's description of the circumstances surrounding the 2012 cancelled tender for e-passports, ID cards and population register set out in Section II.A of the Statement of Defense, Respondent does not rehash the same in this Rejoinder. Similarly, Claimant's Reply largely does not contest the accuracy of Respondent's overview of the Kyrgyz public procurement system set out in Section II.D of the Statement of Defense – accordingly, Respondent does not repeat its arguments in this Rejoinder, save for when there are disagreements between the Parties' reading of the Kyrgyz

2 *See*, e.g., *infra*, ¶¶64-69.

laws on public procurement. With respect to Claimant's involvement in the manufacturing of excise stamps in the Kyrgyz Republic between 2013 and 2021 – a project completely unrelated to the present dispute[3] – Claimant's allegations set out in Section II.F of the Reply are addressed directly in the context of Respondent's objections to the Tribunal's jurisdiction *ratione materiae* at Section III.A.1 below. Finally, Claimant's allegations concerning the purported impact of the 2018 Tender scandal on its international business and reputation set out at Section II.C of the Reply are discussed in the context of Respondent's arguments on quantum at Section V.B below.

A. The irregularities in the conduct of the 2018 Tender

15. In a manner that is characteristic of the entirety of Claimant's Reply, at Sections II.A.i-II.A.ii and II.D.v-II.D.vi of its submission Claimant goes to great lengths in dispelling the allegations purportedly advanced by Respondent that: (**i**) "*the members of the Tender Commission* […] *lacked sufficient competence and independence, as well as were 'subservient and incapable of making independent and autonomous decisions'*" (the latter phrase is even falsely presented as a quote from Respondent's Statement of Defense);[4] and that (**ii**) there was "*involvement of Claimant and/or its affiliates*" in the appointment and work of the Interdepartmental Working Group, the Tender Commission, the Working Group, or the Independent Interdepartmental Commission.[5] With meticulous references to a heap of official minutes of appointment and meetings of the above-mentioned bodies it obtained through document production, Claimant time and again concludes with satisfaction, for instance, that its representatives were not part of the Interdepartmental Working Group that developed the 2018 Tender documentation,[6] that it did not receive an invitation to join the 2018 Tender Commission,[7]

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3 *See* Statement of Defense, Section II(B).

4 In reality, Claimant itself coined this phrase at the document production stage – *see*, e.g., Procedural Order No. 3, dated June 30 2022, Annex A, Claimant's Document Request No. 4, Section B, ¶2 ("*This evidence will rebut the Respondent's contention that the members of the Tender Commission lacked sufficient competence and independence as well as were subservient and incapable of making independent and autonomous decisions in the 2018 Tender*").

5 Reply, ¶23, referring to Statement of Defense, ¶¶83.6 and 244.6. *See also*, e.g., Reply, ¶¶24, 25, 28, 29, 31, 41, 44, 63, 253, 256, 267, 271, 273, 274, 278. A related, oft-repeated proposition Claimant advances in its Reply is that various decisions of the Tender Commission were made "*without any alleged out-of-room influence or control*," relying on the official minutes of meetings of the Tender Commission (Reply, ¶¶28, 29, 31 and 63). Again, the effort is quixotic, as the contrary – in the vast majority of instances – is not being advanced by Respondent.

6 Reply, ¶253.

7 *Ibid*, ¶¶270-271.

or that Claimant or its affiliates were not part of the Independent Interdepartmental Commission.[8]

16. Claimant is fighting windmills. None of those propositions are being advanced by Respondent in this arbitration. Rather, Respondent highlighted: (**1**) the improper advance sharing of the draft 2018 Tender documentation with Claimant by certain (now convicted) **State officials**, (**2**) a specific violation of the procedure of the 2018 Tender process instigated by the **same State officials** to avoid the cancellation of the 2018 Tender, (**3**) the influence exerted by yet again the same **State officials** on the technical working group of the Tender Commission and, later, (**4**) the Independent Interdepartmental Commission to advance Claimant's interests for it to be proclaimed the winner of the 2018 Tender.

17. The above facts have been established by the December 26, 2019 Sentencing Decision of the Pervomaiskiy district court of Bishkek, which recognized three Kyrgyz State officials – Mr. Talant Abdullayev,[9] Mr. Daniyar Bakchiev,[10] and Mr. Ruslanbek Sarybaev[11] guilty of corruption in the context of the 2018 Tender.[12] The December 26, 2019 Sentencing Decision of the Pervomaiskiy District Court was rendered based on a lengthy November 5, 2019 Sentencing Act prepared by the Prosecutor's Office,[13] itself the result of a lengthy and exhaustive GKNB investigation (spanning nearly 30 volumes of case material, including testimonies of dozens witness and extensive documentary evidence) and admissions of the accused.

18. It is self-evident that, given the inherently concealed nature of the irregularities set out above, one would not find Claimant's name in, for instance, the official minutes of meeting of the 2018 Tender Commission discussing, among other things, Claimant's own bid in the 2018 Tender. Such propositions – which Claimant itself advances and rebuts in the Reply – are absurd. Rather, as has been demonstrated at Section III.C.4 of the Statement of Defense, the irregularities involving the advancement of Claimant's interests in the 2018 Tender were instigated by the very State officials that were overseeing the 2018 Tender on behalf of the

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8 *Ibid*, ¶274.

9 The Director of Infocom – a State-owned IT integrator involved in the 2018 Tender.

10 The State Secretary of the SRS, who supervised the Department of Public Procurement of the SRS.

11 The Deputy Chairman of the SRS and the Chairman of the Tender Commission in the 2018 Tender.

12 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.БЗ dated December 26, 2019, p. 2.

13 **Exhibit R-90,** Sentencing Act dated November 05, 2019.

procuring entity – the SRS – and did so in exchange for a significant monetary compensation that was promised **by Claimant**.

19. In the Sub-Sections that follow, Respondent will summarize the account of the relevant events as they took place and will further expand upon the abundant witness and documentary evidence corroborating this account in Section III.B.2 of this Rejoinder.

1. Improper advance sharing of the 2018 Tender documentation with Claimant

20. As explained by Respondent at paragraphs 83.1-83.4 and 244.1-244.4 of the Statement of Defense, as well as Section III.B.2.a below, in the Spring-Summer of 2016, Mr. Abdullayev, as well as Mr. Abdullayev's acquaintance Mr. Azamat Bekenov – a Kyrgyz IT specialist – had several meetings with Claimant's representatives and officers, including one of Claimant's witnesses in this arbitration, Mr. Vitautas Mieliauskas. Specifically, in May 2016, Mr. Bekenov and two other SRS officials attended a conference in Riga, Latvia at the expense of Claimant.[14] Around the same time, Mr. Abdullayev and Mr. Dastan Dogoev, a former Chairman of the SRS, travelled to another conference in London, where they met Mr. Mieliauskas.[15]

21. On the back of these two encounters, in June 2016, Messrs. Abdullayev and Bekenov had an off-the-books meeting with Mr. Mieliauskas in Almaty, Kazakhstan, paid by Claimant, where Mr. Mieliauskas proposed "*very significant compensation*" to Mr. Abdullayev "*and other State officials*" for arranging the forthcoming tender to be won by Claimant.[16] The two gentlemen also discussed in detail the "*technical parameters of the tender*" and agreed that "*they will continue negotiations concerning the forthcoming tender*," whereby Mr. Mieliauskas promised to Mr. Abdullayev "*consultations on the technical part* [of the tender] *and, if needed, certain remuneration if his company wins.*"[17]

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14 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019; **Exhibit R-91,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 06, 2019; **Exhibit R-92,** Minutes of questioning of Aliyeva G.S. dated April 01, 2019.

15 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019.

16 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019; **Exhibit R-91,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 06, 2019.

17 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019; **Exhibit R-91,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 06, 2019.

22. Subsequently, Mr. Abdullayev communicated with Mr. Mieliauskas and other Claimant's representatives, including Claimant's other witness in this arbitration Mr. Andrius Lukosevicius,[18] through Mr. Bekenov via email and electronic messaging systems, soliciting Mr. Mieliauskas' and Mr. Lukosevicius' advice on the technical parameters of the forthcoming 2018 Tender.[19] For instance, on June 11, 2016, Mr. Bekenov messaged to Mr. Mieliauskas: "*Good morning, Vitas. I have the latest* [specifications] *and report of Helar Laasik* [an independent expert that the Kyrgyz authorities employed to prepare the 2018 Tender documentation].[20] *I have sent it via email.*"[21] Contemporaneous internal drafts of the technical specifications, marked as commented by Claimant, were later found stored on Mr. Abdullayev's work computer.[22]

23. In the course of 2018, Mr. Bekenov met with Mr. Mieliauskas as well as Mr. Marat Sagyndykov (Claimant's representative in the Kyrgyz Republic and Claimant's third witness in this arbitration) and Mr. Uran Tynaev (director of Claimant's local company Garsu Pasaulis LLC). During the said meeting Mr. Sagyndykov assured Mr. Bekenov that Claimant had "*good contacts in the Kyrgyz Government, which will assist in the forthcoming tender concerning passports.*"[23]

24. On May 3, 2018, less than six months before the announcement of the 2018 Tender, Mr. Bekenov relayed draft tender specifications to Mr. Lukosevicius, urging him to "*correct*

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18 As confirmed by Ms. Olga Zhuykova, an advisor at Infocom, Mr. Lukosevicius "*gave comments on the initial steps of development of the* [technical] *specifications in 2016*" – see, **Exhibit R-93,** Minutes of additional questioning of Zhuykova O.V. dated May 02, 2019, p. 3.

19 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019; **Exhibit R-91,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 06, 2019.

20 Claimant itself describes the role of Mr. Laasik at paragraphs 258-269 of its Reply.

21 **Exhibit R-94,** WhatsApp exchanges extracted from Mr. Bekenov's phone (March 2019 questioning).

22 *See* **Exhibit R-95,** Minutes of inspection of documents and property of Mr. Abdullayev dated April 27, 2019, ¶1, recording that the document entitled "2016-08-25 Specs E-pasport final Helar Erki_3A-AA_Comments from GP" [i.e. Garsu Pasaulis] was located on Mr. Abdullayev's work computer. Two further documents with similar names (referring to Garsu Pasaulis and its sister company, X Infotech), and identical date were also located on the same computer.

23 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019; **Exhibit R-91,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 06, 2019.

anything that will be an issue for us," and informing him that the formal tender process would be announced soon.[24]

25. On October 23, 2018, Mr. Bekenov personally notified Mr. Lukosevicius about the announcement of the 2018 Tender.[25]

2. Failure to cancel the 2018 Tender in violation of the applicable procedure

26. As explained at paragraphs 83.6 and 244.6 of the Statement of Defense, as well as at Section III.B.2.b below, on December 7, 2018, the SRS Tender Commission discovered that all five bids received under the 2018 Tender lacked the bidders' acceptance of the General and Specific Contractual Conditions. Those were two mandatory documents forming part of the tender documentation, that had to be signed on every page by each bidder and submitted to the Commission as part of the bid. This deficiency in the bidders' bids was reflected in an "*evaluation form*," signed by all members of the Commission.[26]

27. Following this, on December 10, 2018, the SRS Tender Commission prepared a "*final procurement protocol*," whereby all five bidders were deemed to have failed to satisfy the qualification requirements.[27] This should have led to the declaration of the 2018 Tender as failed. However, the Chairman of the SRS Tender Commission, Mr. Sarybayev, did not sign the 'final procurement protocol.'

28. Instead, Mr. Sarybaev reported to the then Head of the SRS Ms. Alina Shaikova about the SRS Tender Commission's decision in the presence of Mr. Bakchiev and Mr. Ulan Baltabayev – the head of the State procurement department of the SRS.[28] Ms. Shaikova then instructed Mr. Bakchiev to prepare a letter to the Ministry of Finance's Department for

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24 **Exhibit R-94,** WhatsApp exchanges extracted from Mr. Bekenov's phone (March 2019 questioning).

25 **Exhibit R-94,** WhatsApp exchanges extracted from Mr. Bekenov's phone (March 2019 questioning).

26 **Exhibit R-96,** Evaluation Form concerning the Tender Participants dated December 07, 2018, lines 16 and 17.

27 **Exhibit R-97,** Final Procurement Protocol dated December 10, 2018, pp. 16-17 (stipulating that all five bidders did not provide signed General and Specific Contractual Conditions)..

28 **Exhibit R-98,** Minutes of additional questioning of Sarybayev R.R. dated April 22, 2019; **Exhibit R-99,** Minutes of additional questioning of Sarybayev R.R. dated August 27, 2019; **Exhibit R-100,** Minutes of additional questioning of Baltabayev U.T. dated April 01, 2019; **Exhibit R-101,** Minutes of additional questioning of Baltabayev U.T. dated April 10, 2019.

Public Procurement (a.k.a. 'DGZ') inquiring on whether the lack of the missing documents in the bids was material and instructed Mr. Sarybayev not to sign the SRS Tender Commissions' 'final procurement protocol'.[29] As later testified by Mr. Baltabayev, the letter to the DGZ was prepared in a hurry and under "*serious duress*" from Ms. Shaikova, Mr. Bakchiev, and Mr. Sarybayev, which convinced him that "*there were evident indicia of collusion for the tender process to be completed*" and that Ms. Shaikova and Mr. Bakchiev were "*interested by and lobbied the interests of a certain company, namely Garsu Pasaulis.*"[30] As confirmed by Mr. Baltabayev, as well as other contemporaneously interviewed witnesses, it was unlawful for the SRS to send an inquiry letter to the DGZ in the circumstances where SRS Tender Commission had already decided to recognize the tender as failed.[31]

29. Accordingly, on December 11, 2018, the SRS issued a letter to the DGZ inquiring whether (**i**) the fact that the bidders did not provide signed General and Specific Contractual Conditions was a material shortcoming; and (**ii**) whether, in case the bidders were willing to remedy this shortcoming, this could be accepted by the SRS.[32]

30. On December 12, 2018, a draft response from the DGZ was prepared, stating that it was up to the SRS as the procuring entity to decide whether a certain shortcoming in the tender

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29 **Exhibit R-98,** Minutes of additional questioning of Sarybayev R.R. dated April 22, 2019; **Exhibit R-99,** Minutes of additional questioning of Sarybayev R.R. dated August 27, 2019; **Exhibit R-100,** Minutes of additional questioning of Baltabayev U.T. dated April 01, 2019; **Exhibit R-101,** Minutes of additional questioning of Baltabayev U.T. dated April 10, 2019.

30 **Exhibit R-100,** Minutes of additional questioning of Baltabayev U.T. dated April 01, 2019; **Exhibit R-101,** Minutes of additional questioning of Baltabayev U.T. dated April 10, 2019.

31 **Exhibit R-98,** Minutes of additional questioning of Sarybayev R.R. dated April 22, 2019; **Exhibit R-99,** Minutes of additional questioning of Sarybayev R.R. dated August 27, 2019; **Exhibit R-100,** Minutes of additional questioning of Baltabayev U.T. dated April 01, 2019; **Exhibit R-101,** Minutes of additional questioning of Baltabayev U.T. dated April 10, 2019; **Exhibit R-102,** Minutes of questioning of Abdymomunova S.R. dated September 09, 2019; **Exhibit R-103,** Minutes of additional questioning of Abdymomunova S.R. dated September 16, 2019; **Exhibit R-104,** Minutes of questioning of Soltonbekov Kh.M. dated April 01, 2019; **Exhibit R-105,** Minutes of additional questioning of Soltonbekov Kh.M. dated April 25, 2019; **Exhibit R-106,** Minutes of questioning of Tasmanbekov U.A. dated April 19, 2019; **Exhibit R-107,** Minutes of questioning of Ishenbekov N.I. dated April 01, 2019; **Exhibit R-108,** Minutes of additional questioning of Ishenbekov N.I. dated April 25, 2019; **Exhibit R-109,** Minutes of additional questioning of Dosaliev B.A. dated April 19, 2019; **Exhibit R-110,** Minutes of additional questioning of Kenzhetayev Zh.T. dated May 03, 2019.

32 **Exhibit C-069,** Letter No. 2-13/1058 from SRS to Department of State Procurement dated December 11, 2018.

documentation was material or not.[33] The draft was signed by the Deputy Head of the Department, Mr. Duysheev.

31. On the same day, Ms. Shaikova left several WhatsApp audio messages to Mr. Ozumbekov, the Head of the Department, requesting him to "*write that the absence of signed Specific Contractual Conditions does not amount to material shortcomings*" and that "*a clarification from the bidders can be sought on whether they agree with the* [Contractual Conditions]."[34] As later testified by Mr. Duysheev, Mr. Ozumbekov instructed Mr. Duysheev to hold off the response to the SRS that Mr. Duysheev had drafted on December 12, 2018 and later withheld the original document.[35]

32. Instead, on December 14, 2018, another version of the response, this time signed by the Head of the Department Mr. Ozumbekov, was sent to SRS, now confirming that the SRS could request the bidders to remedy the shortcomings in their bids.[36] Later, when questioned by GKNB investigators about this situation, the DGZ confirmed that it was inappropriate for the SRS to send queries to the Department by way of its December 11, 2019 letter and that the initial version of the Department's response to that letter dated December 12, 2019 was more accurate.[37]

33. The response sent by DGZ to the SRS on December 14, 2018 was then relied upon by Messrs. Bakchiev, Baltabaev, and Sarybayev before the SRS Tender Commission so that the tender could proceed.[38] It is noteworthy that the members of the Tender Commission were not presented with either the original letter from the SRS, nor the Department's response, but rather their content was conveyed to them by Mr. Sarybayev.

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33 **Exhibit C-071,** Drafts of the response of the Public Procurement Department under the Ministry of Finance dated December 12, 2018.

34 **Exhibit R-111,** Transcript of WhatsApp Audio Messages, extracted from Mr. Ozumbekov's phone (December 12, 2018) dated December 12, 2018.

35 **Exhibit R-112,** Minutes of additional questioning of Duysheev M.I. dated May 03, 2019.

36 **Exhibit C-071,** Drafts of the response of the Public Procurement Department under the Ministry of Finance dated December 12, 2018. *See further* **Exhibit C-070,** Letter No. 20-2-2/3266 from the Public Procurement Department to SRS dated December 17, 2018.

37 **Exhibit R-113,** Letter from Department of State Procurement to GKNB dated September 11, 2019.

38 **Exhibit R-98,** Minutes of additional questioning of Sarybayev R.R. dated April 22, 2019; **Exhibit R-99,** Minutes of additional questioning of Sarybayev R.R. dated August 27, 2019; **Exhibit R-114,** Minutes of additional questioning of Mr. Bakchiev dated July 05, 2019.

34. As later testified by a member of the SRS Tender Commission Ms. Pratova, she deemed the SRS sending a letter to the DGZ *after* the Tender Commission had decided to reject all bids as "*nonsensical*" and as "*interference of SRS' management in the work of the tender commission.*"[39] Her account was endorsed by other members of the Tender Commission.

35. The above chain of events is damning. Claimant's main comment with respect to the SRS' baling the 2018 Tender out in this manner in the Reply is that Claimant did not receive any privileged treatment and that the continuation of the tender concerned all of its participants.[40] This is, however, irrelevant. One wonders why the SRS management would go to such lengths in pushing the 2018 Tender forward when it would have been much easier to just cancel the procurement and announce a new tender for the rule of law to be fully complied with. The only plausible answer is that the SRS' management had a hidden agenda of advancing Claimant's interests in the 2018 Tender, which would have been more difficult if a new tender had been announced, as in that case the tender requirements would have to be different.[41] This conclusion is further confirmed by the events that followed.

3. The technical examination of the bids of IDEMIA and Claimant by the Tender Commission's working group was superficial

36. As explained at paragraphs 83.7 and 244.7 of the Statement of Defense, as well as paragraphs 157-158 below, in December 2018 – January 2019, when the bids of three applicants were rejected on formalistic grounds, Ms. Shaikova ordered the establishment of a technical working group for the evaluation of the two remaining bids, namely those of IDEMIA and Garsu Pasaulis. Crucially, the members of the working group did not have the required qualification and evaluated the two bids superficially. Yet even that superficial evaluation revealed shortcomings in Garsu Pasaulis' tender proposal. Under Mr. Abdullayev's influence on the members of the working group, those shortcomings were ignored and Garsu Pasaulis was declared the winner of the 2018 Tender.[42]

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39 **Exhibit R-115,** Minutes of additional questioning of Pratova M.K dated June 14, 2019

40 Reply, ¶¶35-57.

41 In fact, pursuant to Article 31(4) of the Law on Public procurement, in case of a tender cancellation the procuring entity **must** revise the tender's technical requirements when announcing a new public procurement – see **Exhibit RLA-14,** Law of the Kyrgyz Republic No. 72 "On Public Procurement" (with June 26, 2019 amendments) dated April 03, 2015, Article 31(4).

42 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.Б3 dated December 26, 2019, pp. 6-7.

37. In its Reply Claimant yet again deflects the issue by arguing that the working group did not include Claimant, that it was composed only of officers from the SRS and Infocom and there was no "*out-of-room influence*" on the work of that body.[43] Yet these allegations miss the point: there was no need for any "*out-of-room influence*" when the inexperienced members of the technical working group could be influenced *in-the-room* by Mr. Abdullayev. As later testified by Mr. Konushbaev, the appointed head of the technical working group, he "[did] *not have the experience, qualifications and knowledge to carry out a technical requirements evaluation*," and the working group "*did not carry out evaluation of the technical requirements, but merely a comparison of the documents provided* [by the bidders] *with the technical requirements*."[44] Similar admissions on the lack of qualifications and the formalistic approach of the sub-Committee's work were made by its other members.[45]

38. Yet, even the superficial "*comparison*" of the bidders' documents revealed that IDEMIA's bid was completer and more superior to that of Claimant in multiple respects.[46] However, instead of selecting IDEMIA's bid as the winning one the working group instead, here again, went through the burden of requesting clarifications from Garsu Pasaulis for it to be later selected as the winner of the 2018 Tender just based on a minor price difference with IDEMIA's bid.[47]

4. The SRS officials influenced the Independent Interdepartmental Commission to dismiss the February 2019 complaints from IDEMIA and Mühlbauer

39. As explained at paragraphs 83.9 and 244.9 of the Statement of Defense, upon receipt of the Mühlbauer February 5, 2019 Complaint and the IDEMIA February 7, 2019 Complaint, Ms. Shaikova, Mr. Abdullayev and Mr. Bakchiev have influenced the members of the Independent Interdepartmental Commission, ensuring that the two complaints are dismissed. Among other things, Mr. Bakchiev wrote to the Independent Interdepartmental

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43 Reply, ¶¶58-67.

44 **Exhibit R-116,** Minutes of questioning of Konushbaev B.A. dated June 14, 2019

45 **Exhibit R-117,** Minutes of additional questioning of Mats I.R. dated June 12, 2019; **Exhibit R-118,** Minutes of additional questioning of Ergeshov M.S. dated June 17, 2019; **Exhibit R-78,** Minutes of questioning of Mr Abdullayev T. dated May 09, 2019.

46 See **Exhibit C-073,** Working Group's working documents, "*Evaluation of tender applications*", lines 10, 11, 33, 35, 36, 50, 80, 83, 110 all noting that IDEMIA either provided more information regarding its goods and services or was certified to higher standards than Garsu Pasaulis.

47 **Exhibit C-073,** Working Group's working documents. *See also* **Exhibit C-005,** Information on the results of Tender No. 181023129327015 dated February 01, 2019.

Commission, assuring them that Claimant was correctly selected as the winner of the 2018 Tender, and that, *inter alia*, it had sufficient experience in e-passport personalization over the past two five years. In turn, Mr. Abdullayev attended the meeting of the Independent Interdepartmental Commission, successfully convincing it to dismiss the two complaints.[48]

40. In the Reply, Claimant denies reality by yet again pointing to an unhelpful fact that the protocols of the consideration of the two complaints "*are silent as to whether these persons made any attempts to approach and/or manipulate the members of the Independent Interdepartmental Commission*"[49] as well as calling Mr. Bakchiev's letter advocating against Mühlbauer as "*additional information* […] *on Mühlbauer's complaint.*"[50] The reality however is very much different.

41. In fact, upon the receipt of Mühlbauer's and IDEMIA's complaints Ms. Shaikova organized a meeting at her office with Mr. Bakchiev, Mr. Baltabaev and other SRS officials. During that meeting Ms. Shaikova instructed Mr. Baltabaev to prepare answers to them and then to attend the Independent Commissions' in-person meetings together with Mr. Bakchiev,[51] while discussing with the attendees the identities of the members of the Independent Commissions and the ways in which the SRS could influence them.[52]

42. As later testified by Mr. Baltabaev, Mühlbauer's concerns about Claimant's lack of experience and failure to abide by the requirement of having produced 2 million e-passport with polycarbonate pages were legitimate, but when Mr. Baltabaev shared his assessment with Mr. Sarybayev, Mr. Bakchiev, and Ms. Shaikova, they told him to "*keep it silent and stick to the decision on the tender made by the SRS*."[53]

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48 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.Б3 dated December 26, 2019, pp. 7-8.

49 Reply, ¶71.

50 Ibid, ¶77.

51 **Exhibit R-114,** Minutes of additional questioning of Mr. Bakchiev dated July 05, 2019.

52 *Ibid*; **Exhibit R-102,** Minutes of questioning of Abdymomunova S.R. dated September 09, 2019; **Exhibit R-103,** Minutes of additional questioning of Abdymomunova S.R. dated September 16, 2019.

53 **Exhibit R-100,** Minutes of additional questioning of Baltabayev U.T. dated April 01, 2019; **Exhibit R-101,** Minutes of additional questioning of Baltabayev U.T. dated April 10, 2019; **Exhibit R-98,** Minutes of additional questioning of Sarybayev R.R. dated April 22, 2019; **Exhibit R-99,** Minutes of additional questioning of Sarybayev R.R. dated August 27, 2019.

43. On February 15, 2019 Mr. Bakchiev and Mr. Baltabaev attended the in-person meeting of the Independent Commission where Mr. Baltabaev assured the commission's members that Claimant had the requisite passport manufacturing experience.[54] Yet during that meeting the commission nevertheless internally decided to cancel the SRS's decision to award the 2018 Tender to Claimant.[55]

44. Then, Ms. Shaikova instructed Messrs. Bakchiev and Baltabaev to prepare and backdate a letter from the SRS to the Independent Commission, refuting the issues raised in Mühlbauer's and IDEMIA's Complaints.[56] In turn, Ms. Shaikova was personally inquiring with the Independent Interdepartmental Commission by (**i**) calling its members to ensure that the SRS's decision to award the 2018 Tender to Claimant was legitimate,[57] (**ii**) making inquiries via one of the members of the Interdepartmental Commission as to the decision they intended to take (which was qualified by one of the members of the commission as "*duress*")[58] and (**iii**) relaying written explanations as to why SRS's decision to award the 2018 Tender to Claimant was correct.[59]

45. In the end, both IDEMIA's and Mühlbauer's complaints were dismissed by the Interdepartmental Commission, which means that Ms. Shaikova's team's efforts were successful. Following this development, the two companies, directly and via third parties, wrote to the President, Prime-Minister, Speaker of the Parliament, leaders of Parliamentary factions, various MPs, the French and German Ambassadors to the Kyrgyz Republic, the Secretary of the Kyrgyz Security Council, and the Kyrgyz Ministry of Foreign Affairs.[60]

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54 **Exhibit R-114,** Minutes of additional questioning of Mr. Bakchiev dated July 05, 2019.

55 **Exhibit R-119,** Minutes of questioning of Tupchibaeva A.A. dated April 13, 2019.

56 **Exhibit R-114,** Minutes of additional questioning of Mr. Bakchiev dated July 05, 2019; [2019-04-13 [УД_Vol.21] Протокол допроса Тупчибаевой А.А.].

57 **Exhibit R-119,** Minutes of questioning of Tupchibaeva A.A. dated April 13, 2019.

58 **Exhibit R-120,** Minutes of questioning of Kapushenko A.V. dated April 01, 2019.

59 *Ibid.*

60 **Exhibit R-42**, Letter of Mühlbauer to the Kyrgyz Republic dated February 12, 2019; **Exhibit R-43**, Complaint of IDEMIA to the Secretary of the Security Council of the Kyrgyz Republic dated February 21, 2019; **Exhibit R-44**, Letter of IDEMIA to the Speaker of Jogorku Kenesh dated February 21, 2019; **Exhibit R-45**, Letter from IDEMIA to the Kyrgyz Republic dated February 21, 2019; and **Exhibit R-46**, Letter from the French Embassy in the Kyrgyz Republic to the Ministry of Internal Affairs of the Kyrgyz Republic dated February 22, 2019; **Exhibit R-47**, Mühlbauer's administrative complaint with the Independent Interdepartmental Commission dated March 15, 2019; **Exhibit R-48**, Mühlbauer's administrative complaint with the Independent Interdepartmental Commission dated March 22, 2019; **Exhibit R-49**, Administrative complaint of Mühlbauer with the

46. On February 22, 2019, the Kyrgyz Prosecutor General's Office registered these complaints as a possible episode of corruption in the Unified Registry of Crimes and Misdemeanors, a law enforcement database that allows tracking of investigations and other pre-trial proceedings.[61]

B. The alleged 'media campaign' and Claimant's novel conspiracy theory

47. By way of reminder, in its Statement of Claim Claimant maintained albeit a completely unproven and highly implausible, but at least a rather consistent theory that its misfortunes following the 'victory' in the 2018 Tender were prompted by the acts of the "*offended*" former head of GKNB, Mr. Idris Kadyrkulov, who allegedly had its own prospects of who should have won the 2018 Tender. Claimant drummed this idea into the Tribunal's minds at paragraphs 5, 14-26, 138-139, 230-250 and 264 of the Statement of Claim, as well as at paragraph 56-59 of the First Witness Statement of Mr. Lukosevicius.

48. In the Reply however,[62] Claimant decided to completely part with logic and let its imagination run wild. What was at first a story of one sorry man's grievance against an innocent foreign company turned into a blockbuster of "*pressures of* […] *many interest groups, including local state officers (e.g., chief of the GKNB), foreign companies and governments* [which] *achieved Claimant's removal from the 2018 Tender* [by employing] *the Kyrgyz state apparatus and state-controlled media* [as well as] *other means of pressure against the results of 2018 Tender* [while] *the highest executive authorities of the Kyrgyz Republic coordinated this process through secret meetings with the representatives of IDEMIA; the meetings of which Claimant learned much later.*"[63]

49. Suddenly, it's the whole world against Claimant. A modest Lithuanian company against the harsh reality of the cruel and corrupt world. Needless to say, this new tale does not withstand even a superficial scrutiny. As will set forth below, Claimant's new conspiracy theory is inconsistent, self-contradictory and simply flies in the face of the facts and documents Claimant itself relies upon.

DPP dated March 30, 2019; and **Exhibit R-50**, Administrative complaint of IDEMIA with the DPP dated March 30, 2019.

61 **Exhibit R-51**, Report of the General Prosecutor's Office of the Kyrgyz Republic dated February 22, 2019. *See further* **Exhibit C-034**, Kaktus, "The State Committee for National Security told the details of the case on the purchase of e-passports" dated April 02, 2019.

62 See in particular, Reply, Sections II.A.iii and II.B.

63 Reply, ¶¶129-131.

50. **First**, Claimant has failed to establish the existence of the alleged "de facto *State-controlled media*" campaign against it. At paragraphs 133-139 of the Reply Claimant purports to reconstitute minute-by-minute the sinister smear campaign deployed by the Kyrgyz State media kraken following Claimant's 'victory' in the 2018 Tender. However, Claimant fails to prove either that **any** of the media outlets mentioned had any connection with the Kyrgyz State, or that **any** of the articles referred to had been ordered or otherwise directed by Respondent:

50.1. At paragraph 133 of the Reply Claimant alleges that "[t]*he Kyrgyz* ***media itself acknowledges*** *that media outlets 24.kg and VB [Vecherny Bishkek] are controlled by the Government of Kyrgyz State.*"[64] Yet, as is usual with Claimant's tales, this allegation is divorced from reality.

With regard to **24.kg**, Claimant relies on an article from another Kyrgyz media outlet Radio Azattyk from September 2015 (over three years prior to the events of the 2018 Tender) which merely relays the words of a former Kyrgyz official Mr. Mamatoktorov (and not those of Radio Azattyk's editorial team for example) that "*the same people* [Mr. Mamatoktorov does give any specifics] *who seized Vecherny Bishkek* ***could take over*** [thus, uncertain and in the future] *24.kg.*"[65] The only reason for Mr. Mamatoktorov's thoughtful speculations was the alleged "*softening the position of the agency in relation to the authorities and removing criticism of them.*"[66] Finally, Claimant conveniently omits to mention that the same article contains an unequivocal denial by the 24.kg's head Ms. Anara Mamytova that the media had become pro-government.[67]

Respondent submits that if this kind of articles are sufficient for Claimant to allege that a certain media outlet is "*controlled by the Government of Kyrgyz State*", then the claims of Claimant's rampant criminal and corrupt practices as reported by the media from all over the world[68] (including with respect to Claimant's attempt to

64 Emphasis added.

65 **Exhibit C-090,** Azattyk, Has the government taken over 24.kg news agency dated September 21, 2015.

66 *Ibid.*

67 *Ibid.*

68 *See infra*, Section II.F.

bribe its way into winning the 2018 Tender) should be treated as established beyond reasonable doubt, putting a rather simple end to these arbitration proceedings.

As regarding **"Vecherniy Bishkek" (or "VB")** Claimant refers to an article by yet another media outlet Internews, which reports on the circumstances surrounding the change of ownership of VB in 2015 and yet again relays the words of a third person – namely the former owner of VB Mr. Kim – who says that the change of ownership was "*an illegal takeover*" and "*reckon*[s] [i.e., speculates] *that the team of the head of state Almazbek Atambayev claimed the independent private media business.*"[69]

50.2. At paragraph 134 of the Reply, Claimant alleges, with cross-reference to paragraph 288 of the Reply, that "*as U.S. Government confirmed, in the Kyrgyz Republic, offices of independent media, except the state-controlled [24.kg, VB],* ***are closing*** *due to their criticism of the Government of journalistic investigations of corrupt practices by government officers.*"[70] Paragraph 288 of the Reply, in turn, contains a block-quote from a human rights report which does not contain any reference to either "*offices of independent media* […] *closing*" or the alleged privileged position of either 24.kg or VB.

50.3. Claimant then enumerates at paragraphs 135-139 of the Reply a sequence of articles that appeared in the Kyrgyz press following Claimant's 'winning' the 2018 Tender, and which discuss Claimant's and its parent company Semlex' past corruption scandals, as well as question Claimant's fitness to be the supplier of passports in the Kyrgyz Republic given its dubious past. Claimant dramatically refers to these articles as a "*witch hunt* […] *launched largely by the Kyrgyz State-controlled media sources.*" Yet out of the 12 articles mentioned by Claimant,[71] 6 were published by the media outlets that even Claimant does not allege are State-controlled (namely, AkiPress,[72]

69 **Exhibit C-091,** Internews, A criminal proceeding initiated into illegal takeover of publishing house Vecherniy Bishkek dated December 12, 2018.

70 Emphasis added.

71 Namely **Exhibit C-092,** AkiPress, Day 5 February : Passports will be printed dated February 05, 2019 to **Exhibit C-100,** 24.kg, The State Committee for National Security will check passports dated February 20, 2019.

72 **Exhibit C-092,** AkiPress, Day 5 February : Passports will be printed dated February 05, 2019.

KaktusMedia,[73] Radio Azattyk,[74] K-News[75] and AiF.kg[76]), while the others are authored by journalists of VB and 24.kg which, as established at paragraph 50.1 above, are **not** state-controlled.

51. Claimant's half-baked story about a "de facto *State-controlled media*" in the Reply is even more so untenable considering that, just a few pages after accusing the media outlets such as VB in a State-sponsored smear campaign in February 2019, it refers to the **very same** media outlets as "*independent journalists*", when discussing articles published in April 2019 with the criticisms of the GKNB investigation into the 2018 Tender.[77] Just how a "*state-controlled media*" could shapeshift into "*independent journalists*" in a matter of months remains unexplained by Claimant.

52. In fact, Claimant's falling into the trap of its own lies proves one simple thing – Kyrgyz media is independent and outspoken, and does not hesitate to raise criticism and voice concerns where necessary, whoever the target of such criticism is.

53. There is thus strictly zero evidence that the alleged 'media campaign' was somehow directed or instigated by Respondent. Rather, the reasons for such an acute interest from Kyrgyz local press towards Claimant following its 'winning' of the 2018 Tender are two-fold: on the one hand, public procurement is a topic of heightened interest for the Kyrgyz press which does not hesitate to put the procurement proceedings under close scrutiny (especially when the matter is of supplying the country's citizens with modern biometric identification documents). On the other hand, and despite Claimant's desperate attempts to deny or downplay this fact in the Reply, a long trail of corruption scandals that Claimant and its

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73 **Exhibit C-093,** KaktusMediam - E-passports in Kyrgyzstan dated February 06, 2019; **Exhibit R-39,** Kaktus, "Scandalous glory of the company that won the tender for the production of E-passports in the Kyrgyz Republic" dated February 11, 2019.

74 **Exhibit C-097,** Azattyk, Dissatisfaction with the results of the tender dated February 14, 2019.

75 **Exhibit C-098,** Knews Was the tender for the purchase of blank new generation passports dated April 14, 2019.

76 **Exhibit C-099,** Aif, Supplier of passports to Kyrgyzstan suspected of Dishonesty dated February 20, 2019.

77 See Reply, ¶¶157-158 referring to articles by KaktusMedia (**Exhibit C-104,** KaktusMedia, A kloop.kg journalist was summoned for interrogation dated April 01, 2019), Radio Azattyk (**Exhibit C-105,** Azattyk, Activists Ask President to Stop 'Intimidation' on the Passport Tender dated April 02, 2019 and **Exhibit C-107,** Azattyk, Advisor to the President of Kyrgyzstan summoned for interrogation dated May 09, 2019) **and** VB (**Exhibit C-108,** VB, "Are they trying to snuff out the case on the passport tender" dated April 17, 2019) and collectively labelling them as "*stories of independent journalists.*"

parent company Semlex had embroiled themselves into over the years,[78] follows Claimant wherever it goes and naturally attracts the attention of any half-competent journalist.

54. **Second**, Claimant's theory about the alleged involvement of "*foreign government**s***" in Respondent's handling of the 2018 Tender is a hoax that is not supported by single shred of evidence. In fact, the **only** document Claimant refers to as the evidence of this alleged involvement of foreign government**s** is a letter of the French Embassy in the Kyrgyz Republic sent on February 22, 2019 to the Kyrgyz Ministry of Foreign Affairs with a copy to the Kyrgyz Prime-Minister Mr. Boronov, as well as Head of the Department for Strategic Development Policy, Economy and Finance of the Office of the President of the Kyrgyz Republic Mr. Imanaliev.[79] In this letter, referring to a "*the working group held on February 8, 2019 in the framework of bilateral French-Kyrgyz consultations*," the Embassy simply transmits for its addressees' "*information*" (**i**) IDEMIA February 7, 2019 Complaint,[80] (**ii**) the February 19, 2019 protocol of the review of IDEMIA's complaint by the Independent Interdepartmental Commission,[81] and (**iii**) IDEMIA's February 19, 2019 letter to the Kyrgyz Prime Minister concerning the results of the 2018 Tender.[82]

55. Claimant quickly jumps the opportunity to blow the content of this letter out of proportion, alleging that "***from 8 February 2019, Respondent was secretly discussing the 2018 Tender results with the French Embassy***", that "***even the Government and the Office of the President of the Kyrgyz Republic have been involved in examining the 2018 Tender results at least from 8 February 2019, when the French Embassy held the first round of secret negotiations with the aforementioned subjects and the Ministry of Foreign Affairs of the Kyrgyz Republic***" resulting in "*political examination of the 2018 Tender results.*"[83] Of course, the French Embassy's February 22, 2019 letter does not point to any of the above conclusions which exist only in Claimant's imagination.

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78 *See infra*, Section II.F.

79 **Exhibit R-46,** Letter from the French Embassy in the Kyrgyz Republic to the Ministry of Internal Affairs of the Kyrgyz Republic dated February 22, 2019.

80 **Exhibit CWS_Lukosevicius_1/19,** Claim Letter No. 19-02-007 from IDEMIA to the Independent Interdepartmental Commission dated February 07, 2019.

81 **Exhibit CWS_Lukosevicius_1/23,** Protocol No. 148803110 re Review of complaint by the Independent Interdepartmental Commission dated February 19, 2019.

82 **Exhibit R-45,** Letter from IDEMIA to the Kyrgyz Republic dated February 21, 2019.

83 Reply, ¶¶141-143 [emphasis in the original].

56. In fact, there is nothing in the said letter that would confirm the allegation that the February 8, 2019 meeting of the Kyrgyz-French working group was dedicated to "*secret discussions*" of the 2018 Tender. Rather, the results of the 2018 Tender appear to be one of the many topics that were discussed "*in the framework of bilateral French-Kyrgyz consultations.*" Surely, there is more to the delegations of the two countries to discuss than a passport manufacturing tender.

57. In any event, there was strictly nothing improper in the French embassy sending its February 22, 2019 letter. It is common for the diplomatic and consular representatives to advocate for the interests of their compatriots established in the foreign country and get involved when their compatriots consider they have been treated improperly (as IDEMIA certainly did in the aftermath of the 2018 Tender). In fact, the Embassy of Germany in the Kyrgyz Republic did the same in the interest of Mühlbauer by, for example, sending a verbal note to the Ministry of Foreign Affairs of the Kyrgyz Republic on March 4, 2019 regarding the results of the 2018 Tender,[84] and attending the meeting for the consideration of Mühlbauer's complaint to the Independent Interdepartmental Commission on February 18, 2019.[85] Of course, none of the above means that representatives of the foreign embassies played any role in Respondent's action regarding the handling of the 2018 Tender.

58. All of this should not come as a surprise to Claimant which employed exactly the same toolkit to promote itself and its interests in the Kyrgyz Republic. Thus, during the February 14, 2019 press-conference held by Claimant in Bishkek, it invited Mr. Stasis Vidugiris, honorary consul of Lithuania in the Kyrgyz Republic, to speak before the press and advocate for Claimant's interests.[86] Yet somehow Claimant does not allege that its own government was involved in the influencing on the results of the 2018 Tender. Claimant's unsubstantiated conspiracy theory must thus be rejected.

59. **Third**, Claimant's complaints regarding actions of its competitors – IDEMIA and Mühlbauer – in the aftermath of the 2018 Tender are irrelevant and have nothing to do with the Republic.[87] These companies have as many rights as Claimant to conduct their activities

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84 **Exhibit R-121,** Verbal Note No. 39/2019 from the Germany Embassy to Kyrgyzstan to the Ministry of Foreign Affairs dated March 04, 2019.

85 **Exhibit CWS_Lukosevicius_1/24,** Protocol No. 149153656 re Review of complaint by the Independent Interdepartmental Commission dated February 21, 2019

86 **Exhibit R-122,** Vesti.kg, "It is "Garsu Pasaulis" that prints passports for Lithuania and 15 more countries" dated February 14, 2019.

87 *See* Reply, ¶¶136 and 140.

in the Kyrgyz Republic as they see fit, as long as they respect the Kyrgyz law. In any event, Respondent denies that IDEMIA's and Mühlbauer's letters to various Kyrgyz state organs amount to any "*pressure*" which has influenced the consideration of the 2018 Tender and Claimant has not provided any evidence of the contrary.

60. Instead, at paragraphs 176-177 of the Reply Claimant appears to concoct yet another conspiracy theory alleging that (**i**) both IDEMIA and Mühlbauer had some dubious ties with GKNB through a certain Mr. Daniyar Zakirov and Mr. Azamat Bekenov respectively,[88] (**ii**) complaining about Mühlbauer's tender pricing strategies[89] and (**iii**) alleging both IDEMIA and Mühlbauer were allegedly implicated in corruption scandals.[90]

61. Claimant does not explain why any of those allegations raised for the first time in the Reply are relevant and does not advance any claims against Respondent based on those allegations. Rather, it complains in resentment that despite the above alleged facts about IDEMIA and Mühlbauer, "[n]*o one raised any questions, no one investigated them.*"[91] Respondent calls upon the Tribunal to leave such complaints without attention.

62. **Finally**, in the Reply Claimant does not forget to mention Mr. Idris Kadyrkulov, a former head of the GKNB, in the roster of its suspects, though since the Statement of Claim Mr. Kadyrkulov's role has diminished from the primary villain to a support cast character that "*also had its own interests in 2018 Tender*" but did not deserve more than a one-paragraph mention in the Reply.[92] This fact alone speaks volumes about Claimant's GKNB conspiracy tale which must also be rejected by the Tribunal without hesitation.

C. Criminal investigation into the 2018 Tender

63. At Sections II.E.5 and II.E.7 of the Statement of Defense, the Republic exhaustively set out the chronology of the GKNB investigation into the 2018 Tender, the investigation's results leading to the sentencing of three Kyrgyz State officials for crimes of corruption committed in the context of the 2018 Tender, as well as Claimants persistent lack of cooperation with the investigators despite the repeated invitations sent directly to Claimant, as well as relayed through its local Kyrgyz representatives. Indeed, Claimant's repeated allegations in the

88 Reply, ¶176(a)-(b).

89 *Ibid*, ¶176(d).

90 *Ibid*, ¶176(f).

91 *Ibid*, ¶177.

92 *Ibid*, ¶144.

Statement of Claim that "*to the present day,* [it] *has not received any official notices or inquiries from the Kyrgyz Republic or the GKNB regarding any criminal investigation*,"[93] and that it purportedly learned about the investigation only sometime in April 2019 from the local press are belied by the following facts:

63.1. On March 4, 2019, the GKNB interviewed Messrs. Marat Sagyndykov and Uran Tynaev, two Kyrgyz nationals that assisted Claimant in preparing and submitting its tender proposal and then closely followed up Claimant's February 2019 interactions with the SRS.[94] In fact, Mr. Tynaev acted as the Director of a local subsidiary of Claimant incorporated for its excise stamp manufacturing operations.

63.2. On April 9, 2019, the GKNB wrote directly to Claimant, requesting two members of its management (in fact, Claimant's witnesses in this arbitration) to present themselves for an interview.[95] They did not do so, instead requesting the GKNB, via their local counsel Mr. Zhumashev, to send over any questions to them in writing.[96] Claimant's local counsel then disclosed this move to Kyrgyz media.[97]

63.3. On April 17, 2019, the GKNB renewed its request for an interview of Claimant's management, rejecting the proposal that they answer questions in writing.[98] To the best of Respondent's knowledge, Claimant simply ignored this request.

63.1. Lastly, Claimant's assertion that it only learned about the GKNB investigation sometime in April 2019 is chronologically unsound in light of its other allegations,

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93 Statement of Claim, ¶¶139 and 147. *See further* **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶53; **Exhibit CWS-1-1**, Lukosevicius 1st WS, ¶51; **Exhibit R-53**, Transcript of an interview with Vytautas Mieliauskas with Radio Azattyk dated April 04, 2019, pp. 1 – 2.

94 **Exhibit R-54**, Minutes of questioning of Mr. Sagyndykov dated March 04, 2019; **Exhibit R-41**, Minutes of questioning of Mr. Tynaev U.S. dated March 04, 2019; **Exhibit R-55**, Minutes of questioning of Mr. Tynayev dated April 01, 2019; **Exhibit R-56**, Minutes of questioning of Mr. Sagyndykov dated April 01, 2019; **Exhibit R-57**, Minutes of interrogation of Mr. Sagyndykov dated September 09, 2019. *See further* Statement of Claim, ¶¶153-158.

95 **Exhibit R-58**, Letter of the GKNB to Garsu Pasaulis dated April 09, 2019.

96 **Exhibit R-59**, Application of the lawyer to Garsu Pasaulis on the interrogation questions dated April 12, 2019. In fact, Mr. Zhumashev also acted for Messrs Sagyndykov and Tynaev, filing certain procedural requests on their behalf in the course of the criminal investigation. *See*, e.g., **Exhibit R-60**, Ruling on upholding the application of the lawyer dated April 10, 2019; **Exhibit R-61**, Ruling upholding application of the defender dated April 10, 2019.

97 **Exhibit C-033**, Kaktus, "Lawyer: Representatives of Garsu Pasaulis were summoned for interrogation at the State Committee for National Security. But they are abroad" dated April 17, 2019.

98 **Exhibit R-62**, Letter of GKNB to legal counsel of Garsu Pasaulis dated April 17, 2019.

namely that (**i**) on February 21, 2019, the SRS requested Claimant to fly out to the Kyrgyz Republic to sign the contract; (**ii**) Claimant's representatives then started making travel arrangements (planning to arrive by February 25, 2019); but (**iii**) cancelled their travel plans having "*learned from the local Kyrgyz press that the notorious GKNB had disseminated false information that* [Claimant] *was somehow involved in bribery of the members of the Tender Commission*."[99] Accordingly, Claimant became aware about the GKNB investigation in late February 2019.[100]

64. In its Reply, Claimant has partially changed its story, now arguing that it "*actively monitored* [the criminal investigation] *throughout February-April 2019*."[101] Yet, notwithstanding direct evidence to the contrary on the record of this arbitration, Claimant keeps insisting that "*neither in February 2019, nor later in 2019, nor today has Claimant or its employees or affiliates received any official communication or requests for information from the Kyrgyz authorities in respect of the pre-trial criminal investigation into 2018 Tender.*"[102] Incredibly, both Claimant and its witnesses continue to deny having either received the April 9, 2019 letter from the GKNB,[103] having instructed the preparation and dispatch of the response to that letter by Claimant's local counsel dated April 12, 2019,[104] or having received the second GKNB letter[105] dated April 17, 2019.[106]

65. Claimant's statements are implausible. **First**, there is no doubt that Claimant received and familiarized itself with the April 9, 2019 letter from GKNB, since that letter bears a handwritten acknowledgement of receipt dated April 10, 2019 signed by Mr. Marat Sagyndykov – one of Claimant's representatives in the Kyrgyz Republic.[107] A suggestion that Mr. Sagyndykov would have received a letter from GKNB directed to Messrs. Lukosevicius

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99 Statement of Claim, ¶¶138-139, 143.

100 This is also consistent with the testimony of Mr. Tynaev, the Director of Claimant's Kyrgyz subsidiary, *see* **Exhibit R-41**, Minutes of questioning of Mr. Tynaev U.S. dated March 04, 2019, p. 3.

101 *See*, e.g., Reply, ¶150.

102 Reply, ¶151.

103 **Exhibit R-58**, Letter of the GKNB to Garsu Pasaulis dated April 09, 2019.

104 **Exhibit R-59**, Application of the lawyer to Garsu Pasaulis on the interrogation questions dated April 12, 2019.

105 **Exhibit R-62**, Letter of GKNB to legal counsel of Garsu Pasaulis dated April 17, 2019.

106 Reply, ¶168; **Exhibit CWS-1-2**, Lukosevicius 2nd WS, ¶¶22-23 and **Exhibit CWS-2-2**, Mieliauskas 2nd WS, ¶29.

107 **Exhibit R-58**, Letter of the GKNB to Garsu Pasaulis dated April 09, 2019.

and Mieliauskas and then concealed it from them would be completely implausible and in any event is not (yet) advanced by Claimant.

66. **Second**, the above is further confirmed by the fact that on April 12, 2019 Mr. Zhumashev, Claimant's local Kyrgyz counsel, sent a response to the April 12, 2019 letter, addressed to GKNB on behalf of Messrs. Lukosevicius and Mieliauskas, as well as Ms. Ana Janauskiene, Claimant's General Director, and requesting the investigators to send any questions they may have for his clients in writing, as them being abroad makes it difficult to appear for questioning at GKNB.[108] Surprisingly, at paragraph 168(b) of the Reply Claimant alleges that "*Mr. Zhumashev Baktybek has acted for Claimant's interests only in the administrative proceedings and has acted for employees of a local Kyrgyz company, but has never represented and was never authorized to represent Claimant in any pre-trial investigation.*"[109] This is, again, false. In fact, Claimant's statement is belied by the contents of the power of attorney issued on April 8, 2019 in favor of Mr. Zhumashev by Claimant's General Director Ms. Ana Janauskiene, and which authorizes Mr. Zhumashev to:

> [R]epresent the interests of the "Garsu Pasaulis" company in all state, judicial, **law enforcement** and supervisory authorities […] with all the rights granted by the corresponding procedural legislation of the Kyrgyz Republic to a […] suspect, accused, third party, interested party or **a witness** [with the right to] receive judgments, decisions, resolutions and determinations of the courts of the Kyrgyz Republic, **investigators and prosecutors** […] **represent the interests of the client in investigative and inquiry bodies**, review the case materials, file complaints against any actions of the person conducting the investigation or inquiry, as well as file complaints against the judgment, court decision, investigator or prosecutor's decision.[110]

67. Accordingly, Mr. Zhumashev more than sufficiently habilitated not only to maintain correspondence with GKNB on behalf of Claimant and its employees, but to fully represent their interests in the investigation. Again, a suggestion that Mr. Zhumashev would have just acted as he did without the instructions of Mr. Lukosevicius, Mr. Mieliauskas or Ms. Janauskiene mere days after he was retained as their council is completely implausible.

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108 **Exhibit R-59**, Application of the lawyer to Garsu Pasaulis on the interrogation questions dated April 12, 2019.

109 Reply, ¶168(b).

110 **Exhibit R-123,** Power of Attorney of Mr. Zhumashev dated April 08, 2019 [emphasis added].

68. **Third**, there can be no doubt that Claimant received and familiarized itself with the second letter from GKNB dated April 17, 2019.[111] This is because the letter was sent to Mr. Zhumashev whom Claimant itself appointed as its legal counsel in the Kyrgyz Republic less than 10 days before.[112] Here again, a suggestion that Mr. Zhumashev would have concealed this letter from its client is completely implausible, would most likely result in violation of Mr. Zhumashev's ethical obligations as a lawyer and, in any event, is not (yet) advanced by Claimant.

69. To sum up, contrary to Claimant's unproven statements in the Reply, it was fully aware of the ongoing GKNB investigation into the 2018 Tender, received notifications from GKNB and respondent thereto via its local lawyer, but ultimately refused to cooperate with the investigators.

70. Further details regarding GKNB's investigation into the 2018 Tender are set out at Section III.B.2 below when discussing Respondent's admissibility objections.

D. Expiration of Claimant's bid and the declaration of the 2018 Tender as failed

71. In the meantime, as set out at Sections II.E.4 and II.E.6 of the Statement of Defense, the validity period of Claimant's bid came to expiry on April 2, 2019 resulting in Claimant losing its rights as the 'winner' of the 2018 Tender and the declaration of the 2018 Tender as failed. Specifically, as explained in the Statement of Defense and confirmed by Respondent's expert on Kyrgyz law Judge Madina Davletbaeva:[113]

    71.1. Following the filing on February 5 and 7, 2019, respectively, of the complaints by Mühlbauer and IDEMIA against the results of the 2018 Tender, the procurement procedure under the Tender was suspended, and the SRS notified the bidders its request to extend the validity of their bids, together with the bid security by 45 days – from February 16, 2019 to April 2, 2019. During the suspension of the procurement procedures, Garsu Pasaulis and SRS could not conclude a contract for the supply of passport forms.[114]

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111 **Exhibit R-62**, Letter of GKNB to legal counsel of Garsu Pasaulis dated April 17, 2019.

112 **Exhibit R-123,** Power of Attorney of Mr. Zhumashev dated April 08, 2019 [emphasis added].

113 *See* **Exhibit RER-1-1**, Davletbaeva EO on Kyrgyz law 1.

114 Statement of Defense, ¶¶56-62 and **Exhibit RER-1-1**, Davletbaeva EO on Kyrgyz law 1, ¶¶32-35, 49, 66-69, 73-74, 78-81 и 84.

71.2. On February 20 and 21, 2019, respectively, the IDEMIA and Mühlbauer complaints were dismissed by the Independent Interdepartmental Commission. The procurement procedures under the 2018 Tender thus resumed. However, from February 21, 2019 onwards, Claimant stopped taking any actions towards the signature of the public procurement contract with SRS, be it by reaching out to the SRS officials to proceed with the conclusion of the public procurement contract, by posting the requisite contractual performance guarantee, or by initiating a legal action in the Kyrgyz courts in order to compel the SRS to conclude the public procurement contract with Claimant.[115]

71.3. Accordingly, on April 2, 2019, the validity period of the bid of Garsu Pasaulis and other bidders under the 2018 Tender expired. Under the provisions of the Law of KR "On Public Procurement", after that date, the SRS and Garsu Pasaulis could no longer enter into a contract for the supply of passport forms and the 2018 had Tender failed. The SRS published a corresponding clarification on April 17, 2019.[116]

71.4. On February 4, 2020, the SRS issued a formal order declaring the 2018 Tender as failed due to the expiry of the validity period of the bids, thus formalizing the legal situation that had existed since April 2, 2019.[117]

72. In the Reply, Claimant largely does not contest the above chronology, but rather argues that, (**i**) on the one hand, the procurement procedure under the 2018 Tender was never validly suspended[118] and (**ii**), on the other hand, that the recognition of the 2018 Tender as failed was unlawful.[119] Claimant is wrong on both counts.

73. **First**, in order to prove that the procurement procedure under the 2018 Tender was, in fact, never suspended, Claimant refers in much detail at paragraphs 88-123 of the Reply to its correspondence with SRS during the period of February 1 – 21, 2019, arguing that both the

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115 Statement of Defense, ¶¶65-68 and **Exhibit RER-1-1**, Davletbaeva EO on Kyrgyz law 1, ¶¶64, 84-87 and 95.

116 Statement of Defense, ¶¶74-79 and **Exhibit RER-1-1**, Davletbaeva EO on Kyrgyz law 1, ¶¶70-74 and 88-96.

117 Statement of Defense, ¶¶99-104 and **Exhibit RER-1-1**, Davletbaeva EO on Kyrgyz law 1, ¶¶54 and 112-117.

118 Reply, ¶¶88-123 and 184-185.

119 Reply, ¶¶186-196.

SRS and Claimant behaved as if no suspension took place and that the parties were "*at the very final stages of signing.*"[120] This is to no avail.

74. In fact, as explained by Respondent's Kyrgyz law expert Judge Davletbaeva, the nature of the correspondence between the parties did not suggest that they were going to actually enter into the public procurement contract before the consideration of the complaints by Mühlbauer and IDEMIA was completed, but rather used the time to sort out the logistics and prepare the necessary documents which they of course had every right to do.[121] However, this does not change the fact that the procedure was suspended pursuant to the provisions of the Law of KR "On public procurement", following the filing of complaints by Mühlbauer and IDEMIA with the Independent Interdepartmental Commission against the results of the 2018 Tender, as later notified by the SRS itself in its letter to Claimant dated February 11, 2019.[122]

75. Moreover, in its now usual manner Claimant blatantly misinterprets the documents it relies upon in order to give its position credibility. For instance, at paragraphs 113-116 of the Reply, Claimant purports to argue that the suspension of the 2018 Tender would have been "*disregarded by Respondent itself*", because in mid-February 2019 Claimant was preparing a trip to Bishkek, which it took on February 13-15, 2019 "*to comply with all the contract signing procedures*", "*because both parties maintained their intent to sign the e-passports contract*". Yet it is not disputed that not only Claimant did not sign the public procurement contract with SRS during its February 13-15, 2019 trip, it did not even meet with any of the SRS officials. Rather, Claimant's own contemporaneous agenda for the Bishkek trip reveals that the purpose of the trip was limited to holding a press-conference for the Kyrgyz journalists.[123] Even the power of attorney necessary for the signing of the public procurement contract was only issued to Claimant's Andrius Lukosevicius after the conclusion of the February 13-15, 2019 trip.[124]

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120 Reply, ¶111.

121 **Exhibit RER-1-2**, Davletbaeva EO on Kyrgyz law 2, ¶¶34-39.

122 **Exhibit R-36**, Letter dated February 11, 2019 from the SRS to the Bidders [resubmitted]. *See also*, **Exhibit RER-1-2**, Davletbaeva EO on Kyrgyz law 2, ¶¶27-39.

123 **Exhibit C-80**, Email exchange between officers of Claimant and Infocom dated February 7-11, 2019 on the Questionnaire; **Exhibit C-83**, Information regarding presentation dated February 13, 2019.

124 **Exhibit C-84**, Email exchange dated 17-18 February 2019 with annexes.

76. Be it as it may, upon the dismissal of IDEMIA and Mühlbauer complaints by February 21, 2019 the suspension was no more and Claimant was free to take necessary actions to sign the public procurement contract with the SRS.[125]

77. **Second**, Claimant argues that the reasons for the declaration of the 2018 Tender as failed were unlawful as the tender bid's validity period allegedly could not run or expire after the announcement of the winner of the 2018 Tender. Essentially, to Claimant, after it was announced as the 'winner' of the 2018 Tender, its right to conclude a public procurement contract with SRS was essentially perpetual.[126] Of course, this is not how public procurement works. As explained by Judge Davletbaeva in her Second Expert Opinion, the validity period of the tender bid continues to run (and therefore may expire) even after the tender results have been announced. This is because under the Kyrgyz Law "On public procurement" a contract with the winner of a tender must be concluded within the validity period of the bid which is one of the *sine qua non* conditions for a public procurement contract to be validly formed.[127] Judge Davletbaeva explains that this conclusion is true under both versions of the Kyrgyz Law "On public procurement" that were applicable during the events of the 2018 Tender, and that Claimant's and its expert's suggestions to the contrary simply go against the wording of the Kyrgyz Law "On Public Procurement".[128]

78. Judge Davletbaeva notes that her conclusions are actually corroborated by Claimant's own behavior which, for instance, agreed on February 12, 2019 to extend the validity period of its bid with specific references to the provision of the Kyrgyz Law "On Public Procurement" thus acknowledging that the validity period of its bid continued to have legal relevance even after the announcement of the 2018 Tender results.[129] In the Reply Claimant now tries to downplay this action alleging that it agreed to extend the validity of its bid "*to facilitate the signing of the e-passports contract*" yet this belated explanation finds no support in the record and also is simply nonsensical.

79. Accordingly, on April 2, 2019 the validity of Claimant's bid expired and it was up to Claimant to take action before that date to enforce its right as the 'winner' of the 2018 Tender against

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125 *See* **Exhibit RER-1-2**, Davletbaeva EO on Kyrgyz law 2, ¶¶40-44.

126 Reply, ¶¶186-197.

127 **Exhibit RER-1-2**, Davletbaeva EO on Kyrgyz law 2, ¶48.

128 *Ibid*, ¶48.3.

129 **Exhibit RER-1-2**, Davletbaeva EO on Kyrgyz law 2, ¶48.2 and **Exhibit R-37**, Letter of Garsu Pasaulis to the SRS dated February 12, 2019.

the SRS. Yet Claimant was simply sitting idle purportedly waiting for the SRS' response to its last email of February 21, 2019 without daring to even send a follow-up and instead cancelling and rescheduling flight tickets for a trip that would never happen.[130] This is a most bizarre behavior coming from a purported 'winner' of the 2018 Tender, as confirmed by Judge Davletbaeva in her Second Expert Report.[131]

80. At paragraph 154 of the Reply Claimant proposes an explanation that it allegedly could not initiate any legal action against the SRS in the Kyrgyz courts as "[t]*here existed no proper administrative acts that could in theory be challenged.*" Yet as explained by Judge Davletbaeva, this statement does not make any sense, as under Kyrgyz law (as any other law in fact) in general and under the specific legislation regulating public procurement in particular, Claimant could initiate legal proceedings precisely due to the **inaction** of the SRS and to compel it to enter into the public procurement contract.[132] It is noteworthy that even Claimant's own expert Ms. Alenkina does not endorse in her expert reports Claimant's extravagant interpretation of its own rights.

81. Accordingly, the 2018 Tender failed as of April 2, 2019. On February 4, 2020 the SRS issued an order formalizing this situation.

E. The new 2020 tender for the sale of passport forms

82. As explained at Section II.F of the Statement of Defense, in 2020 the SRS announced and held a new tender for the manufacturing of e-passport forms which was won by Mühlbauer. By way of reminder, Claimant never formally challenged neither the way in which the 2020 Tender was held, nor its results. Moreover, in this arbitration Claimant is not advancing any separate claim based on the 2020 Tender.

83. However, at Section II.B of the Reply Claimant cannot held itself but delve into another conspiracy speculation suggesting that Respondent deprived Claimant of its rights a 'winner' of the 2018 Tender specifically to award the public procurement contract to Mühlbauer. This allegation is as barebones as the remainder of Claimant's highly creative conspiracy tales.

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130 Reply, ¶188.

131 **Exhibit RER-1-2**, Davletbaeva EO on Kyrgyz law 2, ¶42.

132 **Exhibit RER-1-2**, Davletbaeva EO on Kyrgyz law 2, ¶43; **Exhibit RLA-13**, Administrative Procedure Code of the Kyrgyz Republic, Article 109(2) para. 3: "[...] *a claim to enforce the obligation, which requires the respondent to take an administrative act or perform certain acts.*"

84. In fact, this novel theory of Claimant is based on the single fact that Mr. Azamat Bekenov, a person who served as a liaison between the SRS officials and Claimant during the period leading up to the 2018 Tender,[133] later got hired by Mühlbauer and served as the company's advisor during the 2018 Tender. While Claimant strains hard to draw some sinister consequence from this fact, all it manages to do is to claim without any basis that Mr. Bekenov "*was the one to illicitly use his ties with Kyrgyz authorities in winning the 2018 Tender*",[134] without pointing to a single even, document or testimony that would corroborate its story.

85. But the pinnacle of Claimant's warped imagination is its allegation at paragraphs 206-209 of the Reply that Mr. Bekenov was "*appointed*" to "*oversee*" the 2020 Tender, which fact in Claimant's view confirms the large-scale conspiracy aimed at kicking Claimant out from the 2018 Tender. Yet in reality, the newspaper article Claimant relies on in support of this allegation describes the 2020 Tender and quotes Mr. Bekenov as a self-proclaimed "*expert who **observed** the tender*" without any mentioning of Mr. Bekenov having been "*appointed*" by anyone.[135] By abundance of caution, the Kyrgyz Republic confirms that Mr. Bekenov, of course, had no role as an "*expert*," let alone "*appointed*" by the Kyrgyz authorities, in relation to the 2020 Tender. So much for Claimant's yet another attempt to twist the facts. Claimant's grievances about the 2020 Tender results are thus completely baseless.

F. The spotty reputation of Claimant and its parent company, SEMLEX

86. As explained by Respondent at Section II.C of the Statement of Defense, Claimant's premise that the 2018 Tender scandal could have somehow tarnished its allegedly spotless international reputation is untenable, as there is overwhelming evidence that Claimant and its affiliates have been embroiled in multiple corruption and other illegality scandals both long before and after the 2018 Tender.

87. In the Reply, Claimant makes an unwieldy attempt to contest this reality by exhibiting a table of hand-picked positive press-coverage of its activities prior to the 2018 Tender scandal "*helpfully provided*" by its quantum expert Dr. Banyte.[136] Yet the reality is that anyone capable

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133 *See supra*, ¶¶20-25.

134 Reply, ¶200.

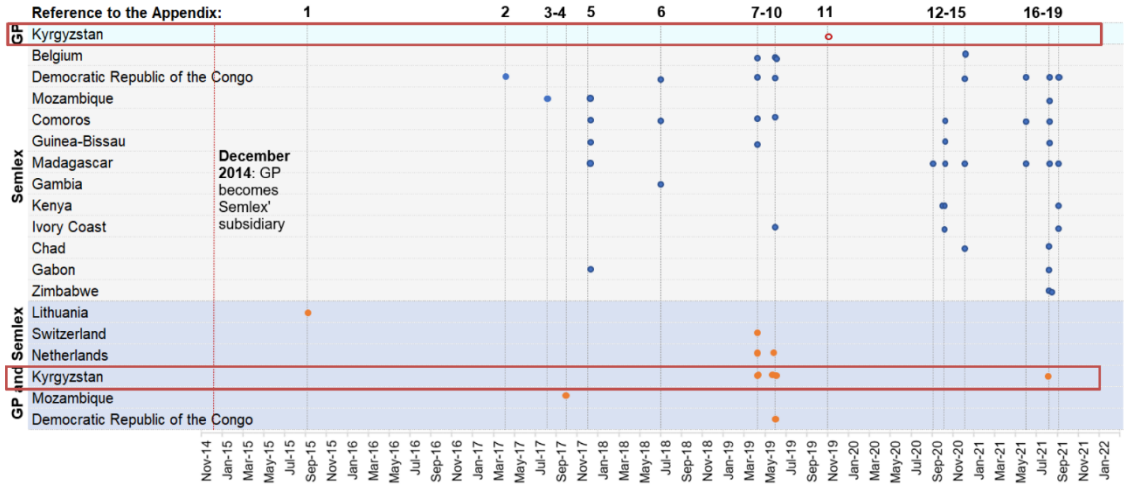
135 **Exhibit C-119,** Azattyk, "German Muhlbauer won the tender for the production of biometric passports dated April 30, 2020 (the correct translation from Russian would be "*observed*," not "*oversaw*").

136 Reply, ¶216; **Exhibit CER-3-2**, 2nd Banyte Second Damages Expert Report, p. 47.

of using internet is able to confirm that Claimant's 'spotless' international reputation is just another fantasy created for the purposes of this arbitration

88. In fact, Claimant's quantum expert Ms. Malyugina made an exhaustive analysis of the press-coverage, concluding that negative press-coverage is something that has tailed along Claimant's business for years and way before Claimant decided to bid for the 2018 Tender in the Kyrgyz Republic:[137]

Figure 2-1. GP and Semlex negative media coverage timeline



89. The alleged implications of the 2018 Tender scandal on Claimant's reputation are discussed more in detail at Section V.B below, as well as in Mr. Malyugina's Second Exert Report.

90. Finally, Claimant's attempts at embellishing its own, as well as its current and former shareholders' reputation in the Reply[138] are completely undermined by Claimant's flagrant non-compliance with the Tribunal's document production orders in this arbitration.[139]

91. Respondent now moves to its jurisdictional and admissibility objections.

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137 **Exhibit RER-2-2**, Malyugina EO on Damages 2, Fig. 2-1 and Annex C. Individual press articles that served as data entries for this diagram are submitted as exhibits to Ms. Malyugina's Second Expert Report.

138 *See*, e.g., Reply, Section II.D.

139 **Exhibit R-142,** Letter from Faber Inter Legal re Semlex / Albert Karaziwan dated August 11, 2022; **Exhibit R-143**, Email exchange between Parties' Counsel concerning document production dated November 04, 2022; **Exhibit R-144**, Email exchange between Parties' Counsel concerning document production dated July 30, 2022; **Exhibit R-145**, Request for Information from Motieka to Faber Inter re Semlex dated July 25, 2022.

II. CLAIMANT'S CLAIMS ARE INADMISSIBLE AND THE TRIBUNAL LACKS JURISDICTION OVER THEM

92. Claimant's case still cannot lift off the ground, as the Tribunal lacks jurisdiction *ratione materiae* (**Sub-Section II.A** below), and in any event Claimant's claims are inadmissible as it secured its investment in the Kyrgyz Republic through corruption (**Sub-Section II.B** below).

A. Claimant's claims do not concern any 'investment' made in the Kyrgyz Republic, excluding the Tribunal's jurisdiction *ratione materiae*

93. In Section III.B of the Statement of Defense, Respondent set out the relevant criteria of the Tribunal's jurisdiction *ratione materiae*, and why Claimant's short-lived success in the 2018 Tender does not constitute an investment, while Claimants' earlier activities in the Kyrgyz Republic are unrelated to the 2018 Tender and the present dispute. Yet, Claimant maintains in its Reply that it has made "*numerous and significant investments*" in the Kyrgyz Republic thus giving this Tribunal jurisdiction *ratione materiae* under the BIT.[140] Claimant's argumentation is flawed, as we detail in the ensuing Sub-Sections.

1. Criteria of the Tribunal's jurisdiction ratione materiae

94. For the Tribunal to have jurisdiction *ratione materiae* in the case at hand, the following relevant, cumulative criteria must be satisfied:

94.1. There must be an asset "*invested*" (Art. 1(1) of the BIT) / an investment "*made*" (Art. 8(1) of the BIT);

94.2. That investment must be made "*in accordance with the national legislation*" of the host State (Art. 1(1) and Art. 2(1) of the BIT);

94.3. That investment must also conform to the hallmark criteria under international law, such as contribution and risk; and

94.4. The dispute brought before an arbitral tribunal must be "*relating to*" that very investment (Art. 8(1) of the BIT).

95. We address each in turn below.

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140 Reply, Section III.C.

a. An asset 'invested' or an investment 'made' as opposed to 'to be made' or 'in the process of making'

96. In its Reply, Claimant places emphasis on the broad definition of 'investment' in Article 1(1) of the BIT, arguing that it would include "*everything of economic value, virtually without limitation*."[141] Yet this is not the thrust of Respondent's objection to the Tribunal's jurisdiction *ratione materiae*. The text of the BIT is clear that an asset should be "*invested*" (Art. 1(1)) and an investment should be "*made*" (Art. 8(1)). As Claimant itself argued in its Statement of Claim, this "*require*[s] *the action to invest, usually in a completed form*."[142]

97. Some legal instruments, e.g. NAFTA or the 2012 U.S. Model BIT, do not contain that restriction and would cover an investor that "*seeks to make, is making or has made an investment*."[143] Claimant's attempt to demote this comparison by emphasizing that both NAFTA and the 2012 U.S. Model BIT expressly stipulate what is <u>not</u> deemed an investment,[144] again misses the point. The question is not how broad the categories of what falls into the term 'investment' in a given legal instrument are. Rather, the question is whether an investor must actually make an investment, as opposed to contemplate it.

98. Other legal instruments, such as the 1989 Poland-Germany BIT, featured in *Nordzucker v. Poland*, protect both the investments that were actually made, and – to a much lesser extent – investments 'in the making'. Indeed, the *Nordzucker* tribunal distinguished:

    98.1. Investments that were actually made, and that benefit from the full protection of the treaty, including access to dispute resolution;[145] and

    98.2. "*Intended investments likely to be admitted in accordance with the host State's law*" or "*investments in the making or about to be made*,"[146] which could only benefit from the

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141 Reply, ¶¶339, 342.

142 Statement of Claim, ¶312.

143 **Exhibit RLA-20,** North American Free Trade Agreement (December 17, 1992), Article 1139. *See also* **Exhibit RLA-21,** 2012 U.S. Model Bilateral Investment Treaty, Article 1 ("'*investor of a Party' means a Party or state enterprise thereof, or a national or an enterprise of a Party,* ***<u>that attempts to make, is making, or has made</u>*** *an investment in the territory of the other Party*" [emphasis added]).

144 *See* Reply, ¶347.

145 **Exhibit E-015,** Nordzucker AG v. Poland, UNCITRAL, Partial Award dated December 10, 2008, ¶175.

146 **Exhibit E-015**, Nordzucker v. Poland, ¶¶182-185.

host State's obligation to promote and admit them, and also treat them fairly and equitably.[147]

99. The Lithuania-Kyrgyzstan BIT on which this arbitration is based does not fit in either category. That BIT only covers investments that were *actually* made. The rationale for this treaty drafting approach was aptly summed up by the same *Nordzucker* tribunal:[148]

> It is not surprising that the host States that waive a part of their sovereign rights by their agreement to arbitrate the disputes **concerning the investments made** and admitted in accordance with their legislation do not agree to arbitration of disputes related to **pre-investment relations** with **persons merely intending to invest**.

100. This did not deter Claimant from an attempt to read into Article 8 of the Lithuania-Kyrgyzstan BIT (governing dispute resolution) what is plainly not there. Per Claimant: (**i**) the Russian-language phrase 'на чьей территории инвестиции осуществлялись' translates as 'in whose territory the investments **were being made**'; and (**ii**) that somehow indicates "*a process rather than a result*," so that 'investments in the making' satisfy the jurisdiction *ratione materiae* threshold.[149] Both of those propositions are wrong:

100.1. The translation of the Lithuanian-language version of the BIT initially produced by Claimant with its Statement of Claim used "*made*,"[150] not "*were being made*" (as now suggested in the Reply). Respondent's translation of the Russian-language version of the BIT also uses "*made*."[151] The documentary record of the arbitration does not support Claimant's 11th hour attempt at re-translating the BIT to its convenience.

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147 **Exhibit E-015**, Nordzucker v. Poland, ¶¶179-184, 208. For exhaustiveness, the Germany-Poland BIT contained a FET provision in the same sub-clause as the investment admission obligation – *see ibid*, ¶176. Claimant's suggestion, at paragraph 356 of its Reply, that in *Nordzucker*, the tribunal found that "*non-acquisition of two out of four factories for which the investor was the successful bidder were 'investments in the making' which qualified for the protection of the applicable treaty*" is misleading. The 1989 Poland-Germany BIT, interpreted by the *Nordzucker* tribunal, granted only limited protections to 'investments in the making': (**i**) admission of investments, and (**ii**) fair and equitable treatment, which, unusually, was stipulated in the same BIT clause concerning admission of investments. This is not the case for the Lithuania-Kyrgyzstan BIT.

148 **Exhibit E-015**, Nordzucker v. Poland, ¶189 [emphasis added].

149 Reply, ¶¶353-355.

150 *See* **Exhibit C-001,** Agreement between the Government of the Republic of Lithuania and the Government of the Kyrgyz Republic for the Promotion and Protection of Investments (Lithuanian original and Claimant's English translation) dated May 15, 2008, p. 4 of the PDF, Article 8.

151 **Exhibit RLA-19,** Agreement between the Government of the Republic of Lithuania and the Government of the Kyrgyz Republic for the Promotion and Protection of Investments [Exhibit C-1 resubmitted with corrected translation] dated May 15, 2008, Article 8.

100.2. Be that as it may, the word 'осуществлялись' ('made') is used in a very specific context of identifying the Contracting Party that shall be notified of the dispute / in the courts of which the investment dispute may be heard. This has nothing to do with the definition of 'investment' or even 'investment dispute.'

101. Equally unpersuasive is Claimant's reliance on the *Deutsche Telekom v. India* case, where the tribunal dismissed India's pre-investment objection.[152] In that case, India argued that the relevant BIT is an 'admission clause model treaty,' i.e. that only foreign investments admitted by India qualify for BIT protection.[153] The tribunal disagreed with India's interpretation of the BIT, and found that it merely contains a 'legality of investment' provision.[154]

102. It is in this context that the tribunal considered India's related jurisdictional objection that Deutsche Telekom did not obtain an important license. The tribunal determined that this issue did not affect its jurisdiction as "*the Treaty's definition of 'investment' is not restricted to going concerns holding all the relevant authorizations to carry out their business*."[155] Factually, however, the tribunal highlighted that Deutsche Telekom: (**i**) made substantive equity contributions on the project (c. 100m USD), and (**ii**) had a "*binding agreement contemplating the lease of valuable satellite spectrum*".[156] Evidently, this is not comparable to the case at hand.[157]

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152 *See* Reply, ¶357, citing **Exhibit CLA-040,** Deutsche Telekom v. India, PCA Case No. 2014-10, Interim Award dated December 13, 2017, ¶179.

153 **Exhibit CLA-040**, Deutsche Telekom v. India, Interim Award, ¶158.

154 *Ibid*, ¶¶174-175.

155 *Ibid*, ¶179.

156 *Ibid*, ¶¶178, 181.

157 In similar vein, Claimant incorrectly relies on *CMC v. Mozambique* to suggest that the Tribunal "*does not need to assess whether the contract came to fruition – the exact amount of damages and/or benefits owed to Claimant under the illegally cancelled tender will be assessed when dealing with the merits of the case*" (Reply, ¶396, citing **Exhibit CLA-045,** CMC Muratori Cementisti et al. v. Republic of Mozambique, ICSID Case No. ARB/17/23, Award dated October 24, 2019, ¶173). Yet, the facts of *CMC* are distinct from the present case: (**i**) claimants had a valid and binding road construction contract, which the Tribunal recognized as an investment; (**ii**) a dispute arose with respect to a settlement agreement signed pursuant to that road construction contract, and the tribunal concluded that the settlement agreement "*if actually agreed to, would represent a 'credit for sums of money [...] connected with an investment,' in that the settlement agreement purported to resolve the Claimants' claims for additional payments for their work on the* [road construction contract];" (**iii**) importantly, the Tribunal went on to observe that it "*does not, for purposes of ruling on the Respondent's objection to the Tribunal's jurisdiction, need to decide whether the Claimants and the Respondent actually reached a binding agreement to settle the Claimants' claims for compensation for their work on* [the road construction project]." *See* **Exhibit CLA-045**, CMC v. Mozambique, Award, ¶¶173-174.

Likewise, Claimant's reliance on *Phoenix v. Czech Republic* to assert that "[t]*he development of economic activities must be foreseen or intended, but need not necessarily be successful, especially when the problems the investor*

b. An investment made 'in accordance with the national legislation' of the Kyrgyz Republic

103. Claimant confuses in its Reply the relevance of the host State's law in assessing whether the investor has made an investment with the admission of an investment by the host State.[158] It is the former, not the latter, that Respondent maintains forms part of the 'in accordance with the national legislation' part of the term 'investment.'[159] In effect, Claimant itself repeatedly highlights that its 'investment' in the Kyrgyz Republic constituted an "*immediate and legally enforceable right to execute the e-passports contract*" under Kyrgyz law.[160]

104. As such, any attempt to suggest, as Claimant does, that "*Kyrgyz law plays no significant role in shaping the* [BIT's] *notion of 'investment'*"[161] is ill-grounded. The same goes for a rather clumsy attempt to suggest that the notion of 'investment' would include not only "*monetary claims*" (which is not disputed), but also "*requests to carry out any other actions of economic value* […] *or any rights to engage in economic activities*."[162] The BIT is silent with respect to those rudimentary and vague categories.

105. Of relevance is a recent finding of the tribunal in *Infinito Gold v. Costa Rica*:

> As this claim has been framed by the Parties, the Tribunal must first determine whether the Claimant […] held rights capable of being expropriated. If no valid rights exist under domestic law, there can be no expropriation.[163]

106. Plainly, to establish the existence of a protected 'investment', its existence must first be confirmed under Kyrgyz law.

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faces in the development of its activities come from the host State's actions" is in vain (*see* Reply, ¶402, citing **Exhibit CLA-001,** Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award dated April 15, 2009, ¶133). In *Phoenix*, claimant acquired two Czech companies, whose operations came to a standstill because of State's actions. The tribunal first recognized the acquisition as an investment, and only then considered whether an operation was made in order to develop an economic activity in the host State (*see* **Exhibit CLA-001**, Phoenix Action v. Czech Republic, Award, ¶123).

158 *See* Reply, ¶¶363-367.

159 *See* Statement of Defense, ¶¶138-139.

160 *See*, e.g., Reply, ¶361. *See further* ibid, ¶¶12, 13, 90, 218, 395, 403, 471(3), and 480.

161 Reply, ¶364.

162 *Ibid.*

163 **Exhibit RLA-148,** Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Award dated June 03, 2021, ¶705.

c. Hallmark criteria of 'investment' under international law

107. Claimant is eager to demote the hallmark criteria of 'investment' under international law to an unnecessary detail, emphasizing that the present arbitration is a non-ICSID one, thus requiring the Tribunal to strictly follow the black letter of the BIT.[164] This approach is most superficial. ICSID or not, an 'investment' has inherent meaning under international law, and a Tribunal must ensure that the putative asset conforms to such an inherent meaning.

108. On a related note, Claimant is once again misunderstanding (or worse, knowingly misinterpreting) the thrust of Respondent's case. Respondent is not "*insist*[ing] *on the application of the ICSID standards*," nor does Respondent argue that "*the BIT's reference to ICSID serves to incorporate some type of hybrid application of the ICSID Convention in a non-ICSID arbitration.*"[165] Hence Claimant's rhetorical query on whether Respondent also "*accepts the application of Articles 52-54 of the ICSID Convention*" and its own suggestion that "*Respondent will of course remain silent on the issue*" is infantile.[166] But Claimant is of course free to continue shadow boxing against imaginary arguments.

109. To further substantiate Respondent's proposition that an investment must be conform not only to its formal definition in the BIT, but also to certain hallmark criteria under international law – an approach consistent with the interpretative rules enshrined in Articles 31 *et seq*. of the Vienna Convention on the Law of Treaties[167] – we point to additional jurisprudence:[168]

    109.1. *Alps Finance v. Slovak Republic*, an *ad hoc* arbitration, where the tribunal established that "*when the claim arises from a contract, the contract itself should qualify as an investment*

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164 Reply, ¶¶379-391.

165 *Ibid*, ¶¶381, 383.

166 *Ibid*, ¶384.

167 **Exhibit RLA-28,** Vienna Convention on the Law of Treaties, Article 31(1): "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

168 In addition to *Romak v. Uzbekistan* (which, contrary to Claimant's unsupported insinuation, is neither "*infamous*," nor "*highly criticized*" – *see* Reply, ¶380), *Alps Finance v. The Slovak Republic*, *Ulysseas v. Ecuador*, and the academic opinion of Prof. Zachary Douglas – *see* Statement of Defense, ¶¶140-143; **Exhibit RLA-24,** Romak S.A. v. the Republic of Uzbekistan, PCA Case No. AA280, Award dated November 26, 2009, ¶¶ 174, 207; **Exhibit RLA-25,** Alps Finance and Trade AG v. The Slovak Republic, Ad Hoc, Award dated March 05, 2011, ¶241; and **Exhibit RLA-26,** Ulysseas, Inc. v. The Republic of Ecuador, PCA Case No. 2009-19, Final Award dated June 12, 2012, ¶251. Claimant's suggestion that Respondent "*fail*[ed] *to present any authority*" for its proposition save for the *Romak* case (*see* Reply, ¶380) is, expectedly by now, just empty words.

[which] *in turn implies that the contract satisfies certain minimum requirements, such as duration, contribution and risk*."[169]

109.2. *KT Asia v. Kazakhstan*, where the tribunal found that the ordinary meaning of the term 'investment' is "*inherent*" to that term, "*irrespective of the application of the ICSID Convention*."[170] Notably, the tribunal in *KT Asia* cited with approval *Romak*,[171] the case that Claimant dismissingly and without any substantiation refers to as "*infamous and highly criticized*" in its Reply.[172]

109.3. *Caratube II v. Kazakhstan*, where the tribunal similarly noted that "[t]*he inherent meaning of the term investment identified by tribunals and commentators includes existence of a contribution over a period of time and requiring some degree of risk.* ***Such minimum requirements have been identified*** *not only by ICSID tribunals, but also* ***in investment treaty arbitrations not based on the ICSID Convention***."[173]

109.4. *Nova Scotia Power v. Venezuela II*, where the tribunal determined, with reference to *Romak*, as follows:[174]

> The Tribunal is of the view that in examining whether or not an investment is present, **the definition of 'investment' in the BIT cannot be considered self-sufficient**. Indeed, one might query if the language attached to 'investment' in the BIT can even be properly described as a definition (i.e. a term which offers an exact description of the item in question); this also indicates its limitations. In ascertaining the ordinary meaning of 'investment', the Tribunal must do more than

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169 **Exhibit RLA-25,** Alps Finance and Trade AG v. The Slovak Republic, Ad Hoc, Award dated March 05, 2011, ¶¶230-231.

170 **Exhibit RLA-201,** KT Asia Investment Group B. V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, Award dated October 17, 2013, ¶165.

171 *See* **Exhibit RLA-24**, Romak v. Uzbekistan, ¶¶180, 184-185 ("*The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT* […] [T]*he Arbitral Tribunal finds that a mechanical application of the categories listed in Article 1(2) of the BIT would produce 'a result which is manifestly absurd or unreasonable.' Such an outcome is contrary to Article 32(b) of the Vienna Convention. First, said interpretation would eliminate any practical limitation to the scope of the concept of 'investment.' In particular, it would render meaningless the* ***distinction between investments, on the one hand, and purely commercial transactions, on the other***") [emphasis added].

172 Reply, ¶380.

173 **Exhibit RLA-202,** Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12, Award dated June 05, 2012, ¶360 [emphasis added].

174 **Exhibit RLA-203,** Nova Scotia Power Incorporated (Canada) v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/1) dated April 30, 2014, ¶¶77-82 [emphasis added].

> simply look to the list of examples offered in Article I(f) of the BIT. The reasons for this are threefold.
>
> First, the list of examples in Article I(f) [of the BIT] is clearly non-exhaustive on its own terms. The open-ended nature of this part of the purported definition of investment calls for **recourse to inherent features**. […]
>
> Second, the interplay between Article I(f) and Article I(g) of the BIT, and the terms 'investment' and 'investor' generally, support the necessity of recourse to inherent features. 'Investor' operates as a gateway for 'investment.' The 'investor' 'make[s] the investment.' […] **By its plain meaning, the language in the BIT makes it necessary to address the question of what it is to 'make' an investment. This question in turn requires recourse to the inherent features of an investment**.
>
> Third, the Tribunal is not convinced by the Claimant's argument that because Article 2(a) of the ICSID Additional Facility Rules does not impose additional requirement to establish an 'investment' beyond that contained in the BIT (in contrast to Article 25 of the ICSID Convention), the Tribunal should not look any further than the (self-contained) definition of investment in Article I(f) of the BIT. […] [T]he BIT itself calls for the consideration of inherent features. **What the ICSID Additional Facility Rules or the ICSID Convention do or do not impose is not relevant in this regard. It cannot be the case that the scope of "investment" in a bilateral investment treaty changes depending on the arbitral forum. No matter what the forum, the ordinary meaning of investment in the relevant bilateral investment treaty derives from something more than a list of examples and calls for an examination of the inherent features of an investment**. […]
>
> [T]he Claimant has argued that as the purpose of the BIT is to promote and protect investments, the protection of those investments via the dispute resolution mechanisms in the BIT should not be too hastily withdrawn by a narrow reading of 'investment.' The Tribunal disagrees with this. **The dispute resolution mechanisms provided for under Article XII of the BIT are exceptional**. An untenable situation would result were this not so. **Neither the definition of investment, nor the BIT, should function as a Midas touch for every commercial operator doing business in a foreign state who finds himself in a dispute**. None of the dispute resolution mechanisms provided for in Article XII could bear the **over-proliferation of claims that would result from boundless interpretations of the term 'investment.'**

109.5. In similar vein, *Air Canada v. Venezuela*, where the tribunal cited *Nova Scotia Power* with approval and emphasized that:[175]

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175 **Exhibit RLA-204,** Air Canada v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/17/1, Award dated September 13, 2021, ¶293.

> [T]e term 'investment', as part of its ordinary meaning, carries inherent characteristics that **must be taken into account in establishing jurisdiction under the BIT**. In this context, the fact that the present arbitration is not governed by the ICSID Convention, but initiated under the ICSID AF Rules, is not a reason to dispense with an examination of the existence of the inherent elements of an investment.

109.6. *Grupo Hernando v. Guinea*, where the tribunal deemed it necessary to "*resort to criteria that facilitate the identification of an investment through the characteristics inherent to the ordinary and generic notion of 'investment' expressed in a Treaty*" and highlighted that "*an interpretative scheme*" predominates in case law "*as a formula to validate the existence of an investment,*" expressly citing *Salini*.[176]

110. The jurisprudence cited by Claimant does not support its case to the contrary:

110.1. In *Mytilineos Holdings v. Serbia*, while the tribunal first noted that the *Salini* criteria are "*specific to the ICSID Convention*," it went on to observe that "*none of the Parties – not even Claimant – had argued that this would be the correct approach*," which made the tribunal "*compelled to make some remarks on its jurisdiction* ratione materiae *if such jurisdiction would be based not solely on the definition of investment under the applicable BIT*."[177]

110.2. Similarly, in *White Industries v. India*, the tribunal first noted that "*the so-called* Salini Test […] [is] *simply not applicable here*" as "[t]*he present case* […] *is not subject to the ICSID Convention*," but then went on to address each element of the test to show how claimant satisfied it.[178] Moreover, the tribunal's finding that the *Salini* criteria were "*developed in order to determine whether an 'investment' has been made for the purposes of the ICSID Convention*"[179] is inaccurate as pointed out by subsequent tribunals: "*the* Salini *factors do not constitute jurisdictional requirements, even in cases under the ICSID Convention*."[180]

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176 **Exhibit RLA-205,** Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea, ICSID Case No. ARB(AF)/12/2, Award on Jurisdiction dated December 04, 2015, ¶139.

177 **Exhibit E-32,** Mytilineos Holdings v. The State Union of Serbia & Montenegro and Republic of Serbia, UNCITRAL, Partial Award o dated September 08, 2006, ¶¶117, 119.

178 **Exhibit CLA-042,** White Industries Australia Limited v. The Republic of India, Final Award dated November 30, 2011, ¶¶7.4.9-7.4.19.

179 *Ibid*, ¶7.4.8.

180 **Exhibit RLA-204**, Air Canada v. Venezuela, Award, FN301, citing **Exhibit RLA-206,** Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Decision on Jurisdiction dated July 02, 2013, ¶206.

111. In this regard, Respondent emphasizes the well-settled position in investment arbitration jurisprudence that ordinary commercial contracts, even if concluded with a State agency, do not by default qualify as investments:

111.1. In *Joy Mining v. Egypt*, the purported 'investment' consisted of a contract for supply and maintenance of complex mining equipment. The tribunal made the following helpful observations: (**i**) even though the contract provided for "*a number of additional activities* […] *and incidental services such as supervision of installation, inspection, testing and commissioning, training and technical assistance*," this "*does not transform the* [c]*ontract into an investment*;" (**ii**) the contractual terms were "*entirely normal commercial terms*" without any "*reference to investment*;" (**iii**) "*if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment*."[181]

111.2. In *Romak v. Uzbekistan*, the underlying element of the claimant's purported investment was a wheat supply contract. The tribunal: (**i**) distinguished between contributions in kind (which may constitute an 'investment') and "*mere transfer*[s] *of title over goods in exchange for full payment*;" (**ii**) deemed that the duration of deliveries under the contract "*does not reflect a commitment* […] *beyond a one-off transaction*;" and (**iii**) concluded that claimant's "*rights were embodied in and arise out of a sales contract, a one-off commercial transaction pursuant to which* [claimant] *undertook to deliver wheat against a price to be paid by the Uzbek parties*."[182]

111.3. In *Global Trading v. Ukraine*, claimant asserted that a series of poultry sales contracts constituted an 'investment.' This was rejected by the tribunal that qualified those contracts as "*pure commercial transactions*" "*of limited duration, for the purchase and sale of goods*," and rejected claimant's claims for manifest lack of legal merit.[183]

111.4. In *Nova Scotia Power v. Venezuela II*, the tribunal determined that a coal supply contract did not meet "*the established criteria of contribution, risk, and duration*." Those criteria aside, the tribunal deemed that a host of case law and commentary

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181 **Exhibit RLA-207,** Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction dated August 06, 2004, ¶¶15, 55, 56, 58.

182 **Exhibit RLA-24**, Romak v. Uzbekistan, ¶¶222, 227, 242.

183 **Exhibit RLA-208,** Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11, Awar dated December 01, 2010, ¶¶38-39, 56-57.

> ""*positively state that a contract for the sale of goods cannot usually be an investment* […] *As a general proposition, sale of goods agreements have been repeatedly rejected as investments*."[184]

112. It therefore remains the case that an 'investment' must also conform to well-defined hallmark criteria under international law, and not just the black letter of the corresponding term in the applicable BIT.

d. A dispute 'relating to' a specific investment

113. Claimant does not appear to contest that a dispute must be "*relating to*" an investment for this Tribunal to have jurisdiction over it.[185] For Claimant, however, "*the Tribunal should always assess the aggregate of the investor's operations in the host State which, sometimes, together constitute an investment, even if individually they might not qualify as such*."[186] Despite citations to an extensive body of jurisprudence, Claimant's proposition is incorrect.

114. First, Respondent reiterates that the very concept of 'entire operation' of an investment is strictly relevant in determining compliance with Article 25 of the ICSID Convention, whereas this is an *ad hoc* arbitration.[187] Indeed, in an ICSID arbitration setting, an arbitral tribunal would first establish jurisdiction *ratione materiae* under Article 25 of the Convention (being an objective criterion / the outer limit of an ICSID tribunal's jurisdiction that the parties cannot override), and only then under the applicable legal instrument.[188] Claimant provided no authority supporting its proposition that the 'entire operation' concept could migrate from the first step of the two-barrel test (compliance with the objective criteria of

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184 **Exhibit RLA-203**, Nova Scotia II v. Venezuela, ¶113.

185 *See further* Statement of Defense, ¶¶145-149.

186 Reply, ¶370.

187 *See* Statement of Defense, ¶175.

188 *See*, e.g., **Exhibit RLA-207**, Joy Mining v. Egypt, Award on Jurisdiction, ¶¶49-50 ("*The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. In other words, it means that there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals. The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision*"). *See further* **Exhibit RLA-209,** Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award dated November 01, 2006, ¶25.

investment under Art. 25 of the ICSID Convention) to the second (compliance with the definition of investment under the applicable legal instrument).

115. For exhaustiveness, the 'entire operation' concept is not a catch-all mechanism allowing an investor to claim that its fragmented investments are an integral whole, protected by the applicable legal instrument. The criterion has been spelled out by the *CSOB v. Slovak Republic* tribunal: "*a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the* ***particular transaction forms an integral part of an overall operation*** *that qualifies as an investment*."[189]

116. Furter, and in any event, examining the case law Claimant appeals to:

116.1. In *Sehil v. Turkmenistan*, context, factual narrative and homogeneity of projects are key: claimant entered into over 60 construction contracts in Turkmenistan, valued together at over USD 800 million, and spanning 9 years of operations. Claimant in that case also moved its top management to Turkmenistan, hired over 1,000 local employees and acquired significant construction equipment. It further incorporated a local subsidiary and rented offices and other facilities in the host State.[190] All this was deemed by the tribunal to represent a "*series of increasingly large contracts over several years*," and thereby a "*commitment*," and "*establishment*."[191] The more than 30 construction contracts that claimant had disputes under with various Turkmen State employers were accordingly deemed 'investments'.

116.2. In *Saipem v. Bangladesh*, the tribunal adopted the 'entire operation' approach to determining whether there was a protected investment.[192] There is nothing extraordinary in this, as the 'entire operation', on its face, comprised of a construction contract, the construction project itself, related warranty documents,

189 **Exhibit RLA-210,** Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated May 24, 1999, ¶72.

190 **Exhibit E-22,** Muhammet Cap & Bankrupt Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No ARB/12/6, Award dated May 04, 2021, ¶¶667, 672-675.

191 *Ibid*, ¶673.

192 **Exhibit E-023,** Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction dated March 21, 2007, ¶110.

unpaid retention funds and a non-honored commercial arbitration award – clearly all elements of a single investment project.[193]

116.3. In *Bayindir v. Pakistan*, the question before the tribunal was, *inter alia*, whether a large-scale long-term construction project satisfied the *Salini* criteria of commitment, duration, risk, and contribution to the host State's development.[194] The 'entire operation' concept was neither raised by the parties, nor addressed by the tribunal.

116.4. In *CSOB v. Czech Republic*, the Tribunal considered claimant's development of banking operations and the ensuing loans to a local entity closely connected and moreover regulated by an overarching Consolidation Agreement,[195] therefore, "***an integral part of an overall operation that qualifies as an investment***."[196] A near-identical conclusion was reached in *Joy Mining*.[197]

117. What this case law shows is straightforward: even when the 'entire operation' concept is relevant (so, strictly in ICSID arbitrations, but not in this *ad hoc* arbitration) an examination of a claimant's other activities in the host State that are not directly related to the dispute is a fact-centric matter; what is required to establish is whether those activities form an integral part of the 'overall operation' of the investor in the host State.

118. In the ensuing Sub-Sections, Respondent demonstrates that neither Claimant's short-lived 'winning' of the 2018 Tender, nor its other, unrelated activities in the Kyrgyz Republic constitute a protected 'investment', excluding the Tribunal's jurisdiction *ratione materiae*.

2. Claimant's short-lived 'winning' of the 2018 Tender is not an 'investment'

119. The Kyrgyz Republic has exhaustively explained in Section III.B.2 why neither under Kyrgyz law, nor under international law did Claimant acquire any protected substantive economic

193 **Exhibit E-023**, Saipem v. Bangladesh, Decision on Jurisdiction, ¶110.

194 **Exhibit RLA-211,** Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction dated November 14, 2005, ¶¶130-138.

195 **Exhibit RLA-210**, CSOB v. Slovakia, Decision on Jurisdiction, ¶80.

196 *Ibid*, ¶72.

197 **Exhibit RLA-207**, Joy Mining v. Egypt, Award on Jurisdiction, ¶¶40, 50.

right by 'winning' the 2018 Tender, thereby rendering its claim to have made a protected 'investment' within the meaning of Article 1(1) of the BIT ring hollow.

120. Claimant's Reply merely rehashes the same flawed propositions already voiced in the Statement of Claim.[198] In sum, Claimant continues to assert that by 'winning' the 2018 Tender it acquired "*a protected economic right under Kyrgyz law*",[199] namely a "*right to supply passport forms*", albeit not "*directly, but through the necessity to conclude the contract according to the results of the Tender*".[200] In Claimant's words this is sufficient to qualify for the purposes of jurisdiction *ratione materiae* and, in any event, the 'winning' of the 2018 Tender "*meets all criteria of an 'investment' under the Agreement and/or international law.*"[201] Claimant is wrong.

121. As explained by Judge Davletbaeva in her second expert opinion, under Kyrgyz law Claimant did not acquire any 'monetary claim', 'a right to perform an economic activity' or 'the right to sell passport forms' as those terms correspond to the rights of a party to an existing contract, which Claimant was not.[202] In particular, Judge Davletbaeva refuted unsupported allegations of Claimant's expert Prof. Alenkina that Claimant's rights after 'winning' the 2018 Tender would be similar to those of a party to a preliminary contract.[203] Rather, Claimant's right was limited to the faculty of entering into a public procurement contract, which was **separate** from the rights it would have received, had the public procurement contract been concluded.[204]

122. Further, under international law, Claimant's purported "*contractual right arising from the winning of the 2018 Tender*"[205] does not meet the following hallmark criteria of investment:

    122.1. Claimant did not make any **contribution** to acquire the 'contractual right' (since it the 2018 Tender was a public procurement procedure where no payments were

198 Reply, ¶¶398-410.

199 *Ibid*, ¶398.

200 **Exhibit CER-2-2,** Second Legal Opinion of Natalia Alenkina dated October 30, 2022, ¶24.

201 Reply, ¶¶405-407.

202 **Exhibit RER-1-2,** Second Expert Report on Kyrgyz Law by Judge Madina Davletbayeva dated February 17, 2023, ¶25.

203 **Exhibit CER-2-2**, Alenkina Kyrgyz Law Second Opinion, ¶11.c, 57, 98; **Exhibit RER-1-2**, Davletbayeva Second EO on Kyrgyz Law, ¶25.

204 **Exhibit RER-1-2**, Davletbayeva Second EO on Kyrgyz Law, ¶21.

205 Statement of Claim, ¶401.

required to win the contract). Claimant did not invest any assets in due course of performance of the contract (since the contract did not exist at all);

122.2. Nothing has been invested in the **territory** of the Kyrgyz Republic. Claimant's negligeable costs of preparing the bid application and travel expenses are, at best, pre-investment expenses.

122.3. Legality:

122.3.1. Claimant does not dispute that a valid and binding contract for the sale and purchase of e-passports has never been signed and therefore, under Kyrgyz law, has never existed.

122.3.2. Absent a valid and binding contract, there are no contractual rights, out of which monetary claims, claims to perform economic activity, or a right to engage in economic activity under a contract in the Kyrgyz Republic having an economic value could arise.

123. On a related factual note, the Kyrgyz Republic recalls that Claimant and the SRS very still very far from entering into the contract, as explained in Judge Davletbaeva's Second Expert Report.[206] Further, as detailed in Sub-Section III.A.3 below, Claimant's involvement in the 2018 Tender was unrelated to its previous projects in the Kyrgyz Republic, and therefore any "*long-term and consistent plan to invest and work in the Kyrgyz market and the CIS region*"[207] is at best Claimant's post facto fantasy or an unrealized aspiration.

124. Accordingly, Claimant's short-lived 'winning' of the 2018 Tender is not a protected 'investment' for the following independent reasons: (**i**) it was not 'made' in the Kyrgyz Republic, nor does it constitute an asset 'invested' in the Kyrgyz Republic; (**ii**) it was not made in accordance with Kyrgyz law, in the sense that it is far from a substantial contractual right; (**iii**) it lacks the hallmark criteria / inherent features of an investment, such as contribution. On this last point, even if characterized as a contractual right under Kyrgyz law, Claimant's short-lived 'winning' of the 2018 Tender would at best be an ordinary commercial transaction, the likes of which are routinely excluded from investment treaty protection.

206 **Exhibit RER-1-2**, Davletbaeva EO on Kyrgyz law 2, ¶¶16-26.

207 Reply, ¶404.

3. Claimant's other purported investments in the Kyrgyz Republic are unrelated to the present dispute or the 2018 Tender and therefore cannot be relied upon as basis for the Tribunal's jurisdiction ratione materiae

125. As explained in Section III.B.3 of the Statement of Defense, Claimant's other purported investments in the Kyrgyz Republic, namely: (**i**) the local company it established; and (**ii**) its other Kyrgyz projects are unrelated to the dispute before this Tribunal, which therefore does not "*relate to*" those investments, as required by Article 8 of the BIT.

126. Claimant's attempts to plead the contrary in its Reply[208] are unavailing:

127. With respect to the **locally-incorporated company**, Claimant's case is still solely based on the self-serving witness testimony of its officer, Mr. Lukosevicius, who is suggesting that the execution of the Contract "[s]*urely* […] *would have required* [Claimant] *to increase its personnel in the Kyrgyz Republic, take care of specific and secure logistics, warehouses, ensure day-to-day technical assistance, provide training to local civil servants, etc.*"[209]

128. This statement is speculative, unsupported, and in any event wrong. Claimant does not address in its Reply the following straightforward points: (**i**) Claimant's own case is that the incorporation of a local subsidiary was necessary for performing its other projects in the Kyrgyz Republic;[210] (**ii**) the 2018 Tender documentation did not require establishing a local subsidiary, warehouses or local staff;[211] and (**iii**) expectedly, Claimant's Bid did not even refer to its local subsidiary, warehouses or local staff, but did contain a detailed capacity statement with respect to its hardware and software in Riga, as well as its Riga-based staff.[212]

129. With respect to **Claimant's other projects in the Kyrgyz Republic**, Claimant's case still stalls around vague suggestions that its supply of excise stamps was a "*crucial investment in the country's digital transformation*" and played a "*crucial role in the 2018 Tender.*"[213] No specifics are provided beyond that. In reality: (**i**) the 2018 Tender documentation does not refer to or require the tender participant's earlier experience in the Kyrgyz Republic, be it in the unrelated excise stamp manufacturing sphere, or elsewhere; and (**ii**) expectedly, Claimant

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208 *See* Reply, ¶¶411-428.

209 **Exhibit CWS-1-1,** First Witness Statement of Andrius Lukosevicius dated June 28, 2021, ¶35.

210 Statement of Claim ¶95.

211 *See* Statement of Defense, ¶184.

212 **Exhibit C-028,** Garsu Pasaulis' Bid in Tender no. 181023129327015 dated November 19, 2018.

213 Reply, ¶¶421-422.

did not mention a word about its Kyrgyz excise stamp work in the Claimant's Bid, and (**iii**) even Claimant's staff that it intended to involve in the e-Passport manufacturing project did not list the excise stamp project(s) in their experience lists.

130. To reiterate, the fact that Claimant supplied excise stamps for several years in the Kyrgyz Republic cannot be conveniently tied to its fleeing 'winning' of the unrelated 2018 Tender. This is even more so as no claim has been formulated in relation to the excise stamp projects before this Tribunal, and therefore no 'dispute' "*relates to*" those projects, as required by Article 8 of the BIT.

B. In any event, Claimant's claims are inadmissible as it secured its investment in the Kyrgyz Republic through corruption

131. It is visibly difficult for Claimant not to accept the proposition that an investment procured through corruption is not entitled to benefit from investment treaty protections and investor-State dispute settlement mechanisms.[214] Expectedly, Claimant focuses its efforts on suggesting in its Reply that a 'clear and convincing evidence' standard must be used for such admissibility objections,[215] before venturing into a superficial analysis of the available evidence to assert that it did not engage in any corrupt activities in relation to the 2018 Tender. Both suggestions are incorrect, as explained in turn below.

1. Circumstantial evidence, such as 'Red Flags', is the standard of proof to be used for admissibility objections on the illegality of investment in an investment arbitration setting

132. As Respondent demonstrated in its Statement of Defense, requiring 'clear and convincing' evidence of an investor engaging in corrupt activities to deem its claims inadmissible, is largely a thing of the past in an investment arbitration setting. Rather, circumstantial evidence, such as 'Red Flags', is the more commonly used standard of proof for inadmissibility objections.[216]

133. Claimant's Reply does not seriously contest this, rather highlighting several arguments that take Claimant's case of a heightened evidentiary standard for illegality-based inadmissibility objections nowhere:

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214 *See* Statement of Defense, Sections III.C.1 and III.C.2.

215 Reply, Section III.D.ii.

216 Statement of Defense, Section III.C.3.

133.1. Claimant suggests that "*perhaps*" a tribunal could "*accept a somewhat lower evidentiary bar*" where the host State "*has only recently found out about the alleged bribery*," but conversely "*where a State has been 'investigating' corruption*" for some time, there is "*no reason to lower the threshold*."[217] No jurisprudential or doctrinal support is presented for this differential treatment.

133.2. Claimant further suggests that "*Respondent conveniently copy-pasted its long research about corruption that it undertook in the Belokon case*."[218] This suggestion is most awkward, not least because to the best of the Kyrgyz Republic's knowledge, Claimant (or its counsel) are not privy to the parties' pleadings in that unrelated case.

133.3. Claimant then relies on a nearly 30-year-old Iran-US claims tribunal case, *Dadras v. Iran* to argue that "*accusations like corruption and forgery must not be accepted lightly*."[219] Leaving aside the obvious fact that the age of this case law demonstrates Respondent's point that there is a recent trend against heightened evidentiary standards in corruption matters, *Dadras* concerns a party's allegation that certain evidence before the tribunal was forged.[220] Moreover, the tribunal did not actually rely on an enhanced standard with respect to forgery allegations, concluding that "*Respondents have not proved by clear and convincing evidence, or even by a preponderance of evidence, that the Contract* [was] *forged*."[221] Claimant's reliance on *Siag v. Egypt*,[222] a case from 2009, suffers from similar shortcomings.

133.4. Claimant's block quote, without any further explanation or argumentation, from *Sanum v. Laos* is also unhelpful to its case.[223] In that case, the tribunal at best applied a slightly more rigorous test / heightened burden of proof to a corruption allegation, following Judge Higgins' famous observations in the Oil Platforms case

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217 Reply, ¶445.

218 *Ibid*, ¶449. *See further* ibid, ¶¶10, 456, and 458.

219 Reply, ¶450, citing **Exhibit CLA-046,** Dadras International v. Iran, Case No. 567-213/215-3, Award dated November 07, 1995, ¶¶123-124.

220 **Exhibit CLA-046**, Dadras v. Iran, Award, ¶123.

221 *Ibid*, ¶241.

222 Reply, ¶451, citing **Exhibit CLA-047,** Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award dated June 01, 2009, ¶326.

223 Reply, ¶452, citing **Exhibit CLA-048,** Sanum Investments Limited v. Lao People's Democratic Republic, UNCITRAL, PCA Case No. 2013-13, Award dated August 04, 2019, ¶¶107-108.

that the "*graver the charge, the more confidence there must be in the evidence relied on*"[224] – far from the near-criminal evidentiary standard Claimant is advocating in this case.

134. One of the many recent cases highlighted in the Statement of Defense and left unaddressed in Claimant's Reply is *Penwell v. Kyrgyz Republic*. In that case, the distinguished tribunal (Prof. Pierre Mayer, Prof. Dr. Klaus Sachs, and Prof. Brigitte Stern) unanimously adopted the 'Red Flags' evidentiary standard to the Respondent's inadmissibility defense based on corruption:[225]

> **It is undeniable that the red flags methodology is increasingly used by arbitral tribunals to consider the circumstances before them with an intellectually honest and pragmatic eye, reading between the lines where necessary, and/or 'connecting the dots', in order to grasp the true picture and expose the fraudulent activities involved**. This is exemplified, notably, by the published awards referred to in paras. 169 and 194-195 of Respondent's Rejoinder [i.e. ICC Case No. 1110,[226] ICC Case No. 3916,[227] ICC Case No. 8891,[228] ICC Case No. 12990,[229] ICC Case No. 13515,[230] *World Duty Free v. Kenya*,[231] *Metal-Tech v. Uzbekistan*,[232] *Spentex v. Uzbekistan*,[233] *Glencore v. Indonesia*,[234] *Churchill Mining v. Indonesia*,[235]

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224 **Exhibit CLA-048**, Sanum v. Laos, Award, ¶108, citing Higgins Oil Platforms Separate Opinion, ¶856.

225 **Exhibit RLA-100,** Penwell Business Limited v. the Kyrgyz Republic, PCA Case No. 2017-31, Final Award dated October 08, 2021, ¶¶323, 325, 331-334.

226 **Exhibit RLA-54,** ICC Case No. 1110 of 1963, XXI Y.B. COMM. ARB. 47, 52 (1996), ¶23.

227 **Exhibit RLA-55,** ICC Award No. 3916, Coll. ICC Arb. Awards 1982, pp. 507 *et seq.*

228 **Exhibit RLA-56,** ICC Award No. 8891, Coll. ICC Arb. Awards 1996-2000, pp. 560 *et seq.*

229 **Exhibit RLA-57,** ICC Case No. 12990 (2013) 24 ICC International Court of Arbitration Bulletin – Special Supplement, pp. 52 *et seq.*

230 **Exhibit RLA-58,** ICC Case No. 13515 (2013) 24 ICC International Court of Arbitration Bulletin – Special Supplement, pp. 66 *et seq.*

231 **Exhibit RLA-59,** World Duty Free Co. Ltd. v Republic of Kenya, ICSID Case No. ARB/00/7, Award dated October 04, 2006, ¶¶156, 179.

232 **Exhibit RLA-60,** Metal-Tech Ltd. v Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award dated October 04, 2013, ¶¶199, 204-207.

233 *Spentex Netherlands, B.V v Republic of Uzbekistan*, ICSID Case No. ARB/13/26 as quoted in **Exhibit RLA-95,** Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia, ICSID Case No. ARB/16/6, Award dated August 27, 2019, ¶669.

234 **Exhibit RLA-95**, Glencore v. Colombia, Award, ¶¶669-670.

235 **Exhibit RLA-91,** Churchill Mining PLC and Planet Mining Pty Ltd v Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Award dated December 06, 2016, ¶466.

Oostergetel v. Slovak Republic,[236] *Karkey v. Pakistan*,[237] *Niko v. Bangladesh*,[238] *Libananco v. Turkey*,[239] *Union Fenosa v. Egypt*,[240] *Fraport II v. Philippines*,[241] and *Kim v. Uzbekistan*[242]] […]

The Arbitral Tribunal agrees with the approach taken in these awards. […]

If arbitral practice is to guide this Arbitral Tribunal, as both sides appear to agree, then this Arbitral Tribunal finds that the most recent practice is to be preferred over the traditional approach. […] [A] **majority view appears to have emerged in favour of the 'red flags' approach**, as noted by the late Professor Gaillard, who went as far as qualifying the practice as a 'general principle' or 'transnational rule'[243]] […]

The international community as a whole has indeed made noticeable efforts in recent years to tackle corruption. Some efforts go to the prevention and deterrence of corruption, by imposing compliance procedure and tools, which also use the terminology of 'red flags'.

This Arbitral Tribunal does not see any convincing reason why, outside the field of criminal law, a heightened standard of proof should apply to allegations of illegality. In the field of criminal law, the standard must be high because what is at stake is the risk of unjustly sanctioning an innocent person. Outside that field, **what is at stake is the respective interests of two persons, the claimant and the respondent, and it would be paradoxical to impair the interests of the latter by reason of the seriousness of the alleged misbehaviour of the former**. Facts must be convincingly proven, whether these facts are fraud or not.

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236 **Exhibit E-090,** Jan Oostergetel and Theodora Laurentius v The Slovak Republic, UNCITRAL, Final Award dated April 23, 2012, ¶303.

237 **Exhibit RLA-96,** Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award dated August 22, 2017, ¶497.

238 **Exhibit RLA-97,** Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Decision on the corruption claim dated February 25, 2019, ¶806.

239 **Exhibit RLA-98,** Libananco Holdings Co. Limited v Republic of Turkey, ICSID Case No. ARB/06/8, Award dated September 23, 2011, ¶125.

240 **Exhibit RLA-99,** Unión Fenosa Gas, S.A. v Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award (extracts) dated August 31, 2018, ¶7.52.

241 **Exhibit RLA-50,** Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines (II), ICSID Case No. ARB/11/12, Award dated December 10, 2014, ¶479.

242 **Exhibit RLA-101,** Vladislav Kim and others v Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction dated March 08, 2017, ¶544.

243 Citing **Exhibit RLA-82,** E. Gaillard, 'The Emergence of Transnational Responses to Corruption in International Arbitration' (2019) 35 1 Arbitration International, pp. 9-10 ("*The arbitral case law plainly demonstrates the emergence of a general principle, or transnational rule, that arbitrators may apply when assessing evidence of corruption and other illicit activities. Arbitrators adjudicating claims under contracts governed by a variety of laws, as well as claims arising under international investment treaties, have consistently applied the red flags methodology as a principled response to inherent difficulties of proving corruption and other illicit practices. This practice should be applauded as an appropriate contribution of arbitrators' inherent factfinding powers to the global fight against corruption*").

> The Arbitral Tribunal's conviction can be made on the basis of circumstantial evidence or 'red flags'. **The absence of direct evidence should not be a bar, where the red flags are such that they convince the Arbitral Tribunal of the reality of the allegations**.

135. If any doubt is left that *this* is the standard of proof the Tribunal should adopt in ruling upon Respondent's admissibility objection before it, Respondent also draws the attention of the Tribunal to:

135.1. A May 2022 Award in *BSG Resources v. Guinea*, where the tribunal resorted to "intime conviction *or reasonable certainty*" in analyzing evidence of corruption as "*corruption is a matter of international public policy and because the activity involving corruption is difficult to prove by nature.*"[244] In light of that last reason, the tribunal further agreed with earlier jurisprudence relying on circumstantial evidence, specifically 'red flags' or 'connecting the dots' approach, pointing out that "*not all of them need to be present for a pattern of corruption to emerge and that some may carry more weight than others.*"[245]

135.2. A December 2022 Award in *Rutas de Lima v. Lima*, where the tribunal adopted the 'red flags' / 'connecting the dots' approach to an allegation of corruption, noting that "*in those cases where there is no direct evidence of acts of corruption, an arbitral tribunal may take into account circumstantial evidence*," given that the tribunal must have "*a personal conviction that it is more likely than not that corruption existed*" based on the available evidence.[246]

136. Accordingly, this Tribunal is respectfully requested to follow the trend of case law and doctrinal writings and apply a standard of proof allowing all available evidence (including circumstantial) and requiring that the Tribunal itself be personally convinced that corruption has taken placed based on the evidence available. In the following sub-Section, Respondents again demonstrates that this is indeed the case with Claimant's alleged 'investment'.

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244 **Exhibit RLA-212,** BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea, ICSID Case No. ARB/14/22, Award dated May 18, 2022, ¶494.

245 *Ibid*, ¶¶495-498, citing **Exhibit E-118,** Methanex Corporation v. United States of America, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits dated August 03, 2005, Part III, Chapter B, ¶38 and other cases.

246 **Exhibit RLA-213,** Rutas de Lima v. Municipalidad Metropolitana de Lima (II), Award dated December 16, 2022, ¶¶273-277.

2. In the present case, Claimant secured its alleged 'investment' through corruption

137. As explained in Sections II.E.7 and III.C of the Statement of Defense, and further expanded in this Section, it has been established by the Kyrgyz courts that Claimant's short-lived 'winning' of the 2018 Tender, i.e. its 'investment' – was acquired through a corruption scheme involving collusion of several high-ranking SRS officials for undue gains. This is comfortably above the evidentiary standard for corruption that the Tribunal is respectfully requested to apply in this case to adjudicate Claimant's claims as inadmissible.

138. The crux of Claimant's defense is that: (**i**) there is no evidence showing "*corruption on behalf of Claimant*;" (**ii**) Claimant was never "*officially charged or suspected of any crime in the Kyrgyz Republic*," and (**iii**) GKNB's investigation was one-sided, and the evidence secured was "*patchy*."[247] Tellingly, Claimant repeats these mantras throughout its Reply, as if repetition makes its case stronger. It does not.

139. The reality is strikingly different. The December 26, 2019 Sentencing Decision of the Pervomaiskiy District Court against three top SRS officials was rendered on the back of a meticulous November 5, 2019 Sentencing Act prepared by the General Prosecutor's Office, which laid out the criminal case against the accused, extensively backed up by testimonial and documentary evidence.[248] The conclusions of the Sentencing Act are confirmed by the admissions of the accused. Yet, the General Prosecutor's Office came to its conclusions independently, and based on evidence, gathered by the GKNB. For reference, the investigative file spans nearly 30 volumes of case material.

140. The relevant factual findings of the December 26, 2019 Sentencing Decision are summarized below, with extensive references to relevant evidence from the investigation files.

a. 2016-2018 off-books meetings involving Claimant's representatives Kyrgyz facilitators; Claimant's 'early access' and 'editing rights' on the 2018 Tender documentation

141. In Q1-Q2 2016, Mr. Abdullayev, the Director of Infocom State Enterprise, a State-owned IT integrator involved in the 2018 Tender, repeatedly met with Claimant's representatives and officers (one of whom is Claimant's witness in this arbitration, Mr. Mieliauskas). During those meetings, Claimant's representatives and officers expressed Claimant's intention to

247 Reply, ¶¶433, 435.

248 **Exhibit R-90,** Sentencing Act dated November 05, 2019.

participate in the forthcoming e-passport manufacturing tender. Mr. Mieliauskas kept contact with Mr. Bekenov, including on the technical terms of the forthcoming tender. This is confirmed by Signed minutes of Mr. Bekenov's testimony, whereby he attested that: (**i**) in Spring 2016, he met Mr. Mieliauskas, who asked him to get introduced to SRS officials; (**ii**) him, Mr. Mieliauskas, Mr. Abdullayev and Ms. Zhuykova, and advisor at Infocom, met and discussed the forthcoming e-passport tender; (**iii**) Mr. Mieliauskas and Mr. Bekenov continued to exchange messages and emails, including on the technical terms of the forthcoming tender.[249]

142. In May 2016, Mr. Bekenov and two other SRS officials attended a conference in Riga, Latvia at the expense of Claimant. This is corroborated by:

142.1. Signed minutes of Mr. Bekenov's testimony, whereby he confirmed his attendance of the Riga conference together with two SRS officials, paid by Claimant and an affiliated company;[250]

142.2. Signed minutes of the testimony of Ms. Alieva, an SRS employee, who confirmed that she accompanied Mr. Bekenov to the Riga conference.[251]

143. Around the same time, Mr. Abdullayev and Mr. Dogoev, a high-ranking State official, travelled to another conference in London, where they met Mr. Mieliauskas, as corroborated by signed minutes of Mr. Bekenov's testimony.[252]

144. On the back of these two encounters, in June 2016, Messrs. Abdullayev and Bekenov had an off-books meeting with Mr. Mieliauskas in Almaty, Kazakhstan, paid by Claimant, where Mr. Mieliauskas proposed "*very significant compensation*" for Mr. Abdullayev "*and other State officials*" for arranging the forthcoming tender to be won by Claimant. This is corroborated by:

144.1. Signed minutes of Mr. Bekenov's testimony, whereby he attested that: (**i**) he facilitated a meeting between Mr. Abdullayev and Mr. Mieliauskas in Almaty; (**ii**)

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249 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019; **Exhibit R-91,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 06, 2019.

250 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019; **Exhibit R-91,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 06, 2019.

251 **Exhibit R-92,** Minutes of questioning of Aliyeva G.S. dated April 01, 2019.

252 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019.

the costs of the meeting were borne by Mr. Mieliauskas; (**iii**) immediately prior to the meeting, Mr. Mieliauskas asked Mr. Bekenov to "*have a word with Mr. Abdullayev and tell him not to be afraid and speak freely*;" (**iv**) during the meeting, Mr. Mieliauskas proposed to open bank accounts in Dubai for Mr. Abdullayev "*and his colleagues*" if they "*assist with awarding to* [Claimant] *the tender for new passports*;" (**v**) the two gentlemen then discussed in detail the "*technical parameters of the tender*" and agreed that "*they will continue negotiations concerning the forthcoming tender*," whereby Mr. Mieliauskas promised to Mr. Abdullayev "*consultations on the technical part* [of the tender] *and, if needed, certain remuneration if his company wins*."[253]

144.2. Signed minutes of the face-to-face questioning of Messrs. Bekenov and Abdullayev, whereby the latter attested that he is "*certain*" that at the Almaty meeting, Mr. Mieliauskas "*attempted to lure us* [i.e. Mr. Abdullayev and Mr. Bekenov *with money*."[254]

144.3. Signed minutes of testimonies of: (**i**) Ms. Alieva, an SRS employee, who confirmed that she accompanied Mr. Bekenov on the Almaty trip, where he met with Mr. Mieliauskas,[255] and (**ii**) Mr. Kim, a private driver, who confirmed that he drove Mr. Bekenov, Ms. Alieva and another gentleman from Bishkek to Almaty for the meeting described above.[256]

144.4. Excerpts from the Kyrgyz border crossing database, confirming that Mr. Bekenov, Mr. Abdullayev, and Ms. Alieva made the Bishkek-Almaty round trip described above;[257]

144.5. Claimant's admission in this arbitration that such meeting took place, and that Mr. Bekenov sought and obtained compensation of his expenses from Claimant.[258]

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253 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019; **Exhibit R-91,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 06, 2019.

254 **Exhibit R-124,** Minutes of face-to-face questioning of Messrs. Bekenov and Abdullayev dated April 01, 2019.

255 **Exhibit R-92,** Minutes of questioning of Aliyeva G.S. dated April 01, 2019.

256 **Exhibit R-125,** Minutes of questioning of Kim V.V. dated April 08, 2019.

257 **Exhibit R-126,** Request from GKNB re border crossings dated March 27, 2019.

258 Statement of Claim, ¶148; **Exhibit C-036,** Payment Order from Garsu Pasaulis to Azamat Bekenov dated June 29, 2016.

145. Subsequently, Mr. Abdullayev communicated with Mr. Mieliauskas via Mr. Bekenov via email, soliciting Mr. Mieliauskas' advice on the technical parameters of the forthcoming 2018 Tender. This is corroborated by signed minutes of the testimonies of Mr. Bekenov[259] and Ms. Zhuykova, and advisor at Infocom,[260] contemporaneous WhatsApp exchanges between Mr. Bekenov and Mr. Mieliauskas,[261] and contemporaneous internal drafts of the technical specifications, marked as commented by Claimant, and stored on Mr. Abdullayev's work computer.[262]

146. In the course of 2018, Mr. Bekenov met with Mr. Mieliauskas as well as Messrs. Sagyndykov and Tynaev, both Kyrgyz representatives of Claimant. At that meeting, Mr. Sagyndykov ensured Mr. Bekenov that they have "*good contacts in the Kyrgyz Government, which will assist in the forthcoming tender concerning passports*," as per the signed minutes of Mr. Bekenov's testimony.[263]

147. The following two WhatsApp exchanges between Messrs. Bekenov, Mieliauskas and Lukosevicius from the same period are self-explanatory:

147.1. In May 3, 2018, Mr. Bekenov relayed draft tender specifications to Mr. Mieliauskas, urging him to "*correct anything that will be an issue for us*," and informing him that the formal tender process will be announced soon:[264]

> [Bekenov] Hello, how are you? Have you seen the [specifications]? Do you have any comments?

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259 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019.

260 **Exhibit R-93,** Minutes of additional questioning of Zhuykova O.V. dated May 02, 2019, p. 3 ("*Question: What relation to the development of technical specifications for the passport* [project] *does Mr. Andrius* [Lukosevicius]*, a representative of Garsu Pasaulis LLC, have? Answer: I know that he gave comments on the initial steps of development of the specifications in 2016; I do not know and cannot recall why did he give comments or which comments were those*").

261 **Exhibit R-94,** WhatsApp exchanges extracted from Mr. Bekenov's phone (March 2019 questioning) For instance, on June 11, 2016, Mr. Bekenov messaged to Mr. Mieliauskas: "*Good morning, Vitas. I have the latest* [specifications] *and report of Helar Laasik* [an independent expert that the Kyrgyz authorities employed to prepare the 2018 Tender documentation]. *I have sent it via email.*"

262 *See* **Exhibit R-95,** Minutes of inspection of documents and property of Mr. Abdullayev dated April 27, 2019, ¶1, recording that the document entitled "2016-08-25 Specs E-pasport final Helar Erki_3A-AA_Comments from GP" [i.e. Garsu Pasaulis] was located on Mr. Abdullayev's work computer. Two further documents with similar names (referring to Garsu Pasaulis and its sister company, X Infotech), and identical date were also located on the same computer.

263 **Exhibit R-64,** Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019.

264 **Exhibit R-94,** WhatsApp exchanges extracted from Mr. Bekenov's phone (March 2019 questioning).

> [Mieliauskas] Hello! Yes, we have received [the specifications], but I did not have the time to look through. Why, is something being prepared?
>
> [Bekenov] A tender will happen soon. A preparatory period is under way.
>
> [Mieliauskas] As I understand, comments are expected from us? Can we correct anything else?
>
> [Bekenov] I need to understand what particular details have they included. Yes, comments. You need to correct anything that will be an issue for us.
>
> [Mieliauskas] OK, I will try to look through this today and let you know.
>
> [Bekenov] Yes please, I am very eagerly waiting.
>
> [Mieliauskas] Query – is it only the supply of blank e-passports that is within the framework of this project? No personalization, no hardware, nothing else (software, hardware)?
>
> [Bekenov] Just the passport blanks
>
> [Mieliauskas] OK

147.2. In October 2018, Mr. Lukosevicius, requested Mr. Bekenov to meet "*our representative, Marat* [Sagyndykov]," who has "*full powers to resolve all our issues,* ***even the most confidential financial ones***."[265]

148. Later in 2018, per Mr. Bekenov's signed testimony, he met with Mr. Abdullayev, who: (**i**) warned him to stay away from the forthcoming 2018 Tender, (**ii**) informed him that Ms. Shaikova is on good terms with Mr. Nurbek Abaskanov, the former head of the State Committee on IT and Communications, who in turn is a good friend of Mr. Sagyndykov, Claimant's local representative.[266]

149. Per Mr. Abdullayev's signed testimony, Ms. Shaikova later confined to him that in December 2018, she was indeed approached by Mr. Abaskanov and Mr. Meder Kurmanbekov, a former Deputy head of the State Committee on IT and Communications, who "*represented Garsu's interests*" and proposed that Ms. Shaikova "*assist in lobbying Garsu's interests in the context of the e-passports tender.*"[267]

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265 *Ibid.*

266 *Ibid.*

267 **Exhibit R-127,** Minutes of additional questioning of Abdullayev T.T. dated May 07, 2019.

b. At the initial stages of the 2018 Tender, the SRS Tender Commission had grounds to reject all bids and recognize the tender as failed, but was persuaded by SRS' superiors to continue with the tender process, ultimately leading to Claimant 'winning' the Tender

150. On December 7, 2018, the SRS Tender Commission discovered that all five bids received under the 2018 Tender lack the bidders' acceptance of the General and Specific Contractual Conditions – two mandatory documents forming part of the tender documentation, that had to be signed on every page by each bidder and submitted to the Commission as part of the bid. This was reflected in an "*evaluation form*," signed by all members of the Commission.[268] Accordingly, on December 10, 2018, the SRS Tender Commission prepared a "*final procurement protocol*," whereby all five bidders were deemed to have failed to satisfy the qualification requirements.[269] Notably, the Chairman of the SRS Tender Commission, Mr. Sarybayev, did not sign the 'final procurement protocol.'

151. Rather, per Mr. Sarybayev's signed minutes of testimonies: (**i**) Mr. Sarybayev informed Ms. Shaikova about the SRS Tender Commission's decision orally, in her office, in the presence of Messrs. Bakchiev and Baltabaev; (**ii**) Ms. Shaikova then instructed Mr. Bakchiev to prepare a letter to the Ministry of Finance's Department for Public Procurement (a.k.a. 'DGZ') inquiring on whether the lack of those documents in the bids is material; she also demanded that Mr. Sarybayev do not sign the SRS Tender Commissions' 'final procurement protocol'; and (**iii**) Mr. Baltabaev confined to Mr. Sarybayev that it was "*incorrect*" and "*unlawful*" to issue such a letter given that the SRS Tender Commission has already decided to recognize the tender as failed.[270]

152. These facts were corroborated and clarified by further witness testimony:

152.1. Per the signed minutes of testimonies of Mr. Baltabaev: (**i**) the letter from the SRS to the Department of Public Procurement of the Ministry of Finance was prepared under "*serious duress*" from Ms. Shaikova, Mr. Bakchiev, and Mr. Sarybayev, which convinced him that "*there were evident indicia of collusion for the tender process to be*

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268 **Exhibit R-96,** Evaluation Form concerning the Tender Participants dated December 07, 2018, lines 16 and 17.

269 **Exhibit R-97,** Final Procurement Protocol dated December 10, 2018, pp. 16-17 (stipulating that all five bidders did not provide signed General and Specific Contractual Conditions).

270 **Exhibit R-98,** Minutes of additional questioning of Sarybayev R.R. dated April 22, 2019; **Exhibit R-99,** Minutes of additional questioning of Sarybayev R.R. dated August 27, 2019.

completed;" (**ii**) he then began to suspect that Ms. Shaikova and Mr. Bakchiev are "*interested by and lobbied the interests of a certain company, namely Garsu Pasaulis*;" (**iii**) Mr. Bakchiev repeatedly followed up with and hurried the Department of Public Procurement concerning their answer to the SRS's letter; and (**iv**) on several occasions, the SRS Tender Commission reunited in absence of certain of its members, which went against Kyrgyz regulations, and of which Mr. Baltabaev informed his higher-ups, Messrs. Sarybayev and Bakchiev;[271]

152.2. Per Mr. Bakchiev's signed minutes of testimony: (**i**) Mr. Baltabaev indeed informed him about the missing documentation among all the bids; (**ii**) following this, a meeting took placed at Ms. Shaikova's office, in the presence of Messrs. Baltabaev and Sarybayev; and (**iii**) Ms. Shaikova frustratingly instructed him and SRS staff to prepare a letter to the Department of Public Procurement of the Ministry of Finance;[272]

152.3. Per the signed minutes of testimonies of Ms. Abdymomunova, an expert to the Kyrgyz Ministry of Finance, specialized in public procurement: (**i**) in December 2018, Ms. Shaikova sought clarifications from Ms. Abdymomunova on whether the lack of certain documents in all of the bidders' proposals is a material shortcoming; (**ii**) yet, Ms. Shaikova concealed from Ms. Abdymomunova the fact that the SRS Tender Commission has already decided in writing to reject all bids, making it impossible, per the Kyrgyz Law on Procurement, for the 'procuring entity' (i.e. SRS) to request any further clarifications from the bidders, or even the Department of Public Procurement of the Ministry of Finance.[273]

152.4. In their signed minutes of testimonies, Messrs. Soltonbekov, Tasmanbekov and Ishenbekov, all from the procurement department of the SRS: (**i**) confirmed the others' testimonies concerning the SRS Tender Commission's initial decision to recognize the tender as failed, (**ii**) further confirmed Ms. Shaikova's instructions

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271 **Exhibit R-100,** Minutes of additional questioning of Baltabayev U.T. dated April 01, 2019; **Exhibit R-101,** Minutes of additional questioning of Baltabayev U.T. dated April 10, 2019.

272 **Exhibit R-114,** Minutes of additional questioning of Mr. Bakchiev dated July 05, 2019.

273 **Exhibit R-102,** Minutes of questioning of Abdymomunova S.R. dated September 09, 2019; **Exhibit R-103,** Minutes of additional questioning of Abdymomunova S.R. dated September 16, 2019.

for a letter to the Department of Public Procurement be drafted, whereas she "*did not have the right to interfere in the work of the tender commission*;"[274]

152.5. Per the signed minutes of testimonies of Messrs. Dosaliev and Kenzhetaev, both from the Department of Public Procurement of the Ministry of Finance, it is against the Kyrgyz Law on Procurement, for the 'procuring entity' (i.e. the SRS) to request any further clarifications from the bidders once the tender bids were opened.[275]

153. Accordingly, under the strict instructions of the SRS's superiors, on December 11, 2018, a letter was issued to the Department of Public Procurement of the Ministry of Finance, inquiring whether: (**i**) the fact that the bidders did not provide signed General and Specific Contractual Conditions is a material shortcoming; and (**ii**) if the bidders are willing to remedy this shortcoming, can it be accepted by the SRS?[276]

154. Incredulously, two versions of the Department's reply to the SRS exist:

154.1. In the December 12, 2018 version, the Department succinctly opined that it is for the SRS, as the procuring entity, to decide whether a certain shortcoming is material or not.[277] This version was signed by the Deputy Head of the Department, Mr. Duysheev, who, before handing it over to SRS, called his superior, Mr. Ozumbekov, for a green light. Mr. Ozumbekov instructed Mr. Duysheev to hold on to the response and later withheld the original document, as per the signed minutes of testimony of Mr. Duysheev.[278]

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274 **Exhibit R-104,** Minutes of questioning of Soltonbekov Kh.M. dated April 01, 2019; **Exhibit R-105,** Minutes of additional questioning of Soltonbekov Kh.M. dated April 25, 2019; **Exhibit R-106,** Minutes of questioning of Tasmanbekov U.A. dated April 19, 2019; **Exhibit R-107,** Minutes of questioning of Ishenbekov N.I. dated April 01, 2019; **Exhibit R-108,** Minutes of additional questioning of Ishenbekov N.I. dated April 25, 2019.

275 **Exhibit R-109,** Minutes of additional questioning of Dosaliev B.A. dated April 19, 2019; **Exhibit R-110,** Minutes of additional questioning of Kenzhetayev Zh.T. dated May 03, 2019.

276 **Exhibit C-069,** Letter No. 2-13/1058 from SRS to Department of State Procurement dated December 11, 2018.

277 **Exhibit C-071,** Drafts of the response of the Public Procurement Department under the Ministry of Finance dated December 12, 2018.

278 **Exhibit R-112,** Minutes of additional questioning of Duysheev M.I. dated May 03, 2019.

154.2. In the December 14, 2018 version, signed by the Head of the Department, it was confirmed that the SRS can request the bidders to remedy the shortcoming.[279] It is this version of the letter that was deployed by Messrs. Bakchiev, Baltabaev, and Sarybayev before the SRS Tender Commission so that the tender could proceed, as confirmed in signed minutes of testimonies of Messrs. Sarybayev and Bakchiev.[280]

155. Solicited by the GKNB investigators, the Department of Public Procurement subsequently confirmed that: (**i**) it was "*inappropriate*" for the SRS to query the Department by way of its December 11, 2018 letter; and (**ii**) the Department's December 12, 2018 version of its reply was more accurate.[281]

156. The following circumstances of the Department's *volta face* are pertinent:

156.1. The Head of the Department of Public Procurement of the Ministry of Finance, Mr. Ozumbekov, was formerly Ms. Shaikova's deputy, and was formally proposed for the role at the Department by her, as attested by then-Minister of Finance of the Kyrgyz Republic in his signed minutes of testimony;[282]

156.2. In the afternoon of December 12, 2018, Ms. Shaikova left several WhatsApp audio messages to Mr. Ozumbekov instructing him to "*write that the absence of signed Specific Contractual Conditions does not amount to material shortcomings*" and that "*a clarification from the bidders can be sought on whether they agree with the* [Contractual Conditions];"[283]

156.3. Per the signed minutes of testimonies of the employees of SRS's procurement department, Messrs. Soltonbekov, Tasmanbekov, and Ishenbekov, it was based on the Department's amended response that "*the tender for the purchase of the new-generation*

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279 **Exhibit C-071,** Drafts of the response of the Public Procurement Department under the Ministry of Finance dated December 12, 2018. *See further* **Exhibit C-070,** Letter No. 20-2-2/3266 from the Public Procurement Department to SRS dated December 17, 2018.

280 **Exhibit R-98,** Minutes of additional questioning of Sarybayev R.R. dated April 22, 2019; **Exhibit R-99,** Minutes of additional questioning of Sarybayev R.R. dated August 27, 2019; **Exhibit R-114,** Minutes of additional questioning of Mr. Bakchiev dated July 05, 2019.

281 **Exhibit R-113,** Letter from Department of State Procurement to GKNB dated September 11, 2019.

282 **Exhibit R-128,** Minutes of questioning of Kasymaliev A.A. dated September 06, 2019.

283 **Exhibit R-111,** Transcript of WhatsApp Audio Messages, extracted from Mr. Ozumbekov's phone (December 12, 2018) dated December 12, 2018.

passport blanks continued and ultimately Garsu Pasaulis was deemed as the winner."[284] Importantly, the members of the SRS Tender Commission were not shown either the SRS's letter to the Department, nor the Department's answer – rather it was Ms. Sarybayev, who merely described both documents to the Committee members.

156.4. Consistent with this, in her signed minutes of testimony, Ms. Pratova, one of the members of the SRS Tender Commission attested that: (**i**) the Commission initially decided to reject all bids received and declare the tender as failed for the bidders' failure to provide mandatory documents with their bids; (**ii**) nevertheless, shortly thereafter Messrs. Sarybayev and Baltabaev gathered the SRS Tender Commission and informed them that the SRS queried the Department of Public Procurement on the suggested course of action, and the Department replied that the SRS can requested the bidders to provide additional documents; (**iii**) she deems the SRS sending a letter to the Department *after* the Tender Commission decided to reject all bids as "*nonsensical*" and as "*interference of SRS's management in the work of the tender commission*."[285] Ms. Pratova's evidence was endorsed in signed minutes of testimony of Messrs. Cherikchiev, Junusov, Dzhunushev, and Shabyev – all members of the SRS Tender Commission.

157. Accordingly, the SRS Tender Commission requested all bidders to confirm their agreement with the General and Specific Contractual Conditions, and then proceeded with the evaluation of the bidders' proposals. Of the five bidders, two – Claimant and IDEMIA – advanced to the technical evaluation of their proposals. To carry out this technical evaluation, the Head of SRS, Ms. Shaikova, ordered in late December 2018 that a sub-Committee be established from the members of the SRS Tender Committee.[286]

158. The signed minutes of testimonies of the sub-Committee members reveal that their work was superficial:

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284 **Exhibit R-104,** Minutes of questioning of Soltonbekov Kh.M. dated April 01, 2019; **Exhibit R-105,** Minutes of additional questioning of Soltonbekov Kh.M. dated April 25, 2019; **Exhibit R-106,** Minutes of questioning of Tasmanbekov U.A. dated April 19, 2019; **Exhibit R-107,** Minutes of questioning of Ishenbekov N.I. dated April 01, 2019; **Exhibit R-108,** Minutes of additional questioning of Ishenbekov N.I. dated April 25, 2019.

285 **Exhibit R-115,** Minutes of additional questioning of Pratova M.K dated June 14, 2019.

286 **Exhibit C-072,** Documents related to the appointment of the Working Group and its members.

158.1. Mr. Konushbaev, the appointed Head of the sub-Committee attested that: (**i**) he "*does not have the experience, qualifications and knowledge to carry out a technical requirements evaluation*," and (**ii**) the sub-Committee "*did not know the methodology of carrying out a technical evaluation*" and "*did not carry out evaluation of the technical requirements, but merely a comparison of the documents provided* [by the bidders] *with the technical requirements*;"[287]

158.2. Similar admissions on the lack of qualifications and the formalistic approach of the sub-Committee's work were made by its other members. [288]

c. Days prior to announcement of Claimant as the 'winner' of the 2018 Tender, the SRS Chairman Ms. Shaikova hands over USD 20,000 to Mr. Abdullayev, one of her associates, as 'a kind of thank you […] from one of the bidders, Garsu [Pasaulis]'

159. Days before Claimant was announced as the 'winner' of the 2018 Tender, in late January 2019, Ms. Shaikova met with Mr. Abdullayev in her office, and gave him USD 20,000 "*for the work done in carrying out the tender*," as confirmed in Mr. Abdullaev's signed minutes of testimony.[289] Of note, Mr. Abdullaev's and Ms. Shaikova's official salaries were several hundred USD per month. In the same minutes of testimony, Mr. Abdullayev confirmed that he took the USD 20,000 as "*a kind of thank you from the company, from one of the bidders, Garsu*."[290]

160. The fact that Mr. Abdullayev possessed a significant sum of cash in January 2019 is corroborated by the signed minutes of testimony of Ms. Akkozova, Mr. Abdullaev's spouse, and four other individuals, who confirmed that they have received USD in cash from Mr. Abdullayev at that period of time. Mr. Abdullayev forfeited the unspent portion of the money he received from Ms. Shaikova – USD 1,700 – to the authorities in the course of GKNB's investigation.

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287 **Exhibit R-116,** Minutes of questioning of Konushbaev B.A. dated June 14, 2019.

288 **Exhibit R-117,** Minutes of additional questioning of Mats I.R. dated June 12, 2019; **Exhibit R-118,** Minutes of additional questioning of Ergeshov M.S. dated June 17, 2019; **Exhibit R-78,** Minutes of questioning of Mr Abdullayev T. dated May 09, 2019.

289 **Exhibit R-78,** Minutes of questioning of Mr Abdullayev T. dated May 09, 2019

290 *Ibid.*

d. The SRS senior executives conspire to influence the Independent Interdepartmental Commission to dismiss the February 2019 Complaints of Mühlbauer and IDEMIA

161. By way of reminder, on February 5 and 7, 2019, Mühlbauer and IDEMIA, respectively, filed their complaints with the Independent Interdepartmental Commission against the outcome of the 2018 Tender.[291] Both complaints identified material shortcomings in Claimant's bid, including its lack of relevant e-passport manufacturing experience.

162. There is overwhelming evidence that Ms. Shaikova, Mr. Abdullayev, and Mr. Bakchiev conspired to influence the Independent Interdepartmental Commission so that the two Complaints be dismissed:

163. **First**, as confirmed in Mr. Bakchiev's signed minutes of testimony, Ms. Shaikova organized a meeting at her office with Mr. Bakchiev, Mr. Baltabaev, other SRS officials and an external consultant from the Ministry of Finance, specialized in public procurement to review the Complaints, and instructed Mr. Baltabaev to prepare answers to them and then to attend the Independent Commissions' in-person meetings together with Mr. Bakchiev.[292] At the same meeting in Ms. Shaikova's office, the attendees discussed the identities of the Independent Commissions' members that will be considering the Complaints, their lack of experience with State procurement, and the influence that certain SRS officials may exercise on them.[293]

164. This is further corroborated in Ms. Abdymomunova's signed minutes of testimony, whereby she attested that Ms. Shaikova: (**i**) made extensive inquiries with her concerning each member of the Independent Commission, and (**ii**) asked Ms. Abdymomunova to influence the Independent Commission so that the SRS's decision on the outcome of the tender (awarding it to Claimant) is supported.[294]

165. **Second**, per Mr. Baltabaev's signed minutes of testimony: (**i**) Mühlbauer's concerns about Claimant's lack of experience and failure to abide by the requirement of having produced 2 million e-passport with polycarbonate pages were legitimate; (**ii**) he relayed these concerns

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291 *See* Statement of Defense, ¶56 *et seq.*; **Exhibit CWS_Lukosevicius_1/20,** Complaint of Muhlbauer on the February 1, 2019 Decision of the Tender Commission in Tender No. 181023129327015 dated February 05, 2019; **Exhibit CWS_Lukosevicius_1/19,** Claim Letter No. 19-02-007 from IDEMIA to the Independent Interdepartmental Commission dated February 07, 2019.

292 **Exhibit R-114,** Minutes of additional questioning of Mr. Bakchiev dated July 05, 2019.

293 *Ibid.*

294 **Exhibit R-102,** Minutes of questioning of Abdymomunova S.R. dated September 09, 2019; **Exhibit R-103,** Minutes of additional questioning of Abdymomunova S.R. dated September 16, 2019.

to Mr. Sarybayev, Mr. Bakchiev, and Ms. Shaikova, who demanded that he "*keep it silent and stick to the decision on the tender made by the SRS*."[295]

166. This is further corroborated by the signed minutes of testimony of Mr. Sarybayev, whereby he attested that Mr. Baltabaev confined to him at the time that Claimant did not have the necessary experience in producing polycarbonate passport pages, a fact that Mr. Sarybayev relayed to Mr. Bakchiev and Ms. Shaikova, who in turn did not take any action.[296]

167. **Third**, per Mr. Bakchiev's signed minutes of testimony, he and Mr. Baltabaev attended the February 15, 2019 in-person meeting of the Independent Commission upon Ms. Shaikova's instructions.[297] At the meeting, as instructed, Messrs. Bakchiev and Baltabaev reported on the conduct of the tender, and Mr. Baltabaev ensured the Independent Commission members that Claimant has the necessary passport manufacturing experience.[298] Yet, per the signed minutes of testimony of Ms. Tupchibaeva, a member of the Independent Commission, the Commission internally decided to cancel the SRS's decision awarding the 2018 Tender to Claimant.[299]

168. Further, per Mr. Bakchiev's signed minutes of testimony, when he and Mr. Baltabaev reported on the outcome of the Independent Commission's meeting back to Ms. Shaikova, she was somehow already aware of the Commission's internal decision, telling them that the Commission was not convinced of their presentation.[300] Accordingly, Ms. Shaikova instructed the two gentlemen to immediately prepare and backdate a letter from the SRS to the Independent Commission, refuting the issues raised in Mühlbauer's and IDEMIA's Complaints. All the while Ms. Shaikova and another State official were keeping an eye on the internal communications between the Independent Commission members that were forwarded to them; at one point, Ms. Shaikova called one of the Independent Commission

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295 **Exhibit R-100,** Minutes of additional questioning of Baltabayev U.T. dated April 01, 2019; **Exhibit R-101,** Minutes of additional questioning of Baltabayev U.T. dated April 10, 2019.

296 **Exhibit R-98,** Minutes of additional questioning of Sarybayev R.R. dated April 22, 2019; **Exhibit R-99,** Minutes of additional questioning of Sarybayev R.R. dated August 27, 2019.

297 **Exhibit R-114,** Minutes of additional questioning of Mr. Bakchiev dated July 05, 2019.

298 *Ibid.*

299 **Exhibit R-119,** Minutes of questioning of Tupchibaeva A.A. dated April 13, 2019.

300 *Ibid.*

members, ensuring her that the SRS's decision to award the 2018 Tender to Claimant was correct.[301]

169. This is further corroborated by signed minutes of testimony of Ms. Kapushenko, another member of the Independent Committee, in charge of the Mühlbauer Complaint. Specifically, Ms. Shaikova further attempted to ensure that dismissal of that Complaint by the Independent Committee by: (**i**) making inquiries, via one of the members of the Independent Committee as to the decision they intend to take (which Ms. Kapushenko qualified as "*duress*"); and (**ii**) relaying written suggestions as to why the SRS's decision to award the 2018 Tender to Claimant was correct.[302]

170. That Mühlbauer's and IDEMIA's criticisms of Claimant's lack of experience were justified is further confirmed in a March 29, 2019 letter from the Department of State Procurement to the GKNB, detailing all the shortcomings the Department identified in the course of the 2018 Tender.[303]

e. Upon the dismissal of Mühlbauer's and IDEMIA's Complaints, Claimant's local representatives expressed their satisfaction in a clandestine message exchange and discussed a payment of 'no more than 10k' to 'express our gratitude' to certain 'advisors'

171. As highlighted at paragraph 87 of the Statement of Defense and left completely unaddressed by Claimant in the Reply, on February 22, 2019, upon the dismissal of Mühlbauer's and IDEMIA's Complaints, the following exchange via Signal, a secure messenger service, took place between Messrs. Tynaev and Sagyndykov, Claimant's local representatives:[304]

[Tynaev]	Mara[t], by the way. We mention no one about this Eldar. And generally, that someone is helping us.
[Sagyndykov]	OK
[Tynaev]	Mara[t], I just had a thought. Fuck this shit. We're hyping up, but **they have nothing on us**, what we did. They can check and re-check. I'm meeting the guys in one hour and want to tell them: go fuck yourselves ☺

301 *Ibid.*

302 **Exhibit R-120,** Minutes of questioning of Kapushenko A.V. dated April 01, 2019.

303 **Exhibit R-129,** Letter from the Department of State Procurement to the GKNB dated March 29, 2019.

304 **Exhibit R-68,** Screenshots of message exchanges between Messrs. Tynaev and Sagyndykov dated February 22, 2019.

[Sagyndykov]	☺ **No unnecessary moves and we should express our gratitude to the guys, including Eldar, just for their friendship and so forth. We're not talking about large sums of money.**
[Tynaev]	I'm joking. I just want to say that we have nothing to fear, that **we will express our gratitude for the information and thank them. I think it's no more than 10k.**
[Sagyndykov]	Yep
[Tynaev]	*Kaynata* [father-in-law] told me yesterday - **what are you worrying about? Did someone see you giving the money or causing damage[?]** He says - who are you, at all? He says - don't worry at all
[Sagyndykov]	Yes, of course) Who should worry are the commission, the [independent] interdepartmental [commission], and others - we are fine ☺
[Tynaev]	Well shit. **There's no direct connection at all with the advisors and so on.**
[Sagyndykov]	Yep
[Tynaev]	So all this can go to hell. We can fucking party. Let's get drunk on Monday.

172. Respondent infers that the "*advisors*" that were "*helping*" Claimant's local representatives and to whom "*gratitude*" was planned to be expressed of "*no more than 10k*" are Messrs. Abaskanov and Kurmanbekov, who, as elaborated at paragraph 149 above, reached out to Ms. Shaikova in December 2018 seeking to "*represent*" and "*lobby*" Claimant's interests.

173. The involvement of Claimant's representatives or entities acting in Claimant's interests in the dismissal of IDEMIA's Complaint is also inferred from Mr. Sagyndykov's Signal message to Messrs. Lukosevicius, Mieliauskas, and Tynaev:[305]

> Good morning. Idemia started harassing the Department of Procurement this morning concerning the faith of their complaint[;] all deadlines have expired[;] what is the decision[;] **our guys** intend to inform them at 17.45 that the complaint is ungrounded.

f. Claimant's local representatives were also kept informed in near-real time about a further tender-related complaint and a

[305] **Exhibit R-130,** Signal message exchanges extracted from Mr. Sagyndykov's phone.

confidential report from the Prosecutor General's office to the GNKB requesting a criminal investigation be opened

174. On February 22, 2018, the Embassy of France in the Kyrgyz Republic wrote to the Kyrgyz Ministry of Foreign Affairs, relaying IDEMIA's earlier complaints.[306] On the same day, the General Prosecutor's office sent a confidential report to the Main Investigative Department of the GKNB, requesting that a criminal investigation be opened on the outcome of the 2018 Tender.[307]

175. Claimant's local representatives, Messrs. Tynaev and Sagyndykov discussed both those documents via Signal messaging platform in near-real time. An inference is to be made that they were provided this confidential information by accomplices within Kyrgyz State organs:[308]

Fri 18:19	[Tynaev]	You should let Medik [i.e. Mr. Meder Kurmanbekov, former Deputy head of the State Committee on IT and Communications, who 'lobbied' Claimant's interests before Ms. Shaikova], immediately
Fri 18:20	[Sagyndykov]	I already have and not bringing [him] anything.
Fri 18:20	[Tynaev]	Shall we wait for his answer?
Fri 18:21	[Sagyndykov]	Yes
Fri 18:22	[Tynaev]	I have a feeling like it's the GKNB who stopped everything
Fri 18:24	[Sagyndykov]	Well, fuck
Fri 18:24	[Tynaev]	What a wonderful fucking country we have

306 **Exhibit R-46,** Letter from the French Embassy in the Kyrgyz Republic to the Ministry of Internal Affairs of the Kyrgyz Republic dated February 22, 2019.

307 **Exhibit R-131,** Letter from the General Prosecutor's Office to the GKNB dated February 22, 2019; **Exhibit R-51,** Report of the General Prosecutor's Office of the Kyrgyz Republic dated February 22, 2019.

308 **Exhibit R-68,** Screenshots of message exchanges between Messrs. Tynaev and Sagyndykov dated February 22, 2019.

Fri 18:30	[Sagyndykov]	Well, fuck
[…]	[Sagyndykov]	I think I should not have gone
Fri 18:41	[Tynaev]	Who the hell knows

g. Conclusion

176. The chronology of events leading to the 2018 Tender, its progression and conclusion confirm that there was impropriety in Claimant's securing its purported 'investment' :

176.1. Prior to the 2018 Tender, Claimant clandestinely sought and secured access to the key State officials and the tender documentation, promising significant financial gains to whomever assists it in 'winning' the Tender;

176.2. Throughout the 2018 Tender, multiple shortcomings could have and should have led to its annulment. Rather, the SRS top management conspired to ensure that the Tender moves forward and that Claimant is ultimately pronounced as 'winner'. This is notwithstanding that: (**i**) Claimant's financial proposal was substantially higher than some of the other bidders; and (**ii**) Claimant did not conform to the mandatory experience requirements.

176.3. There is evidence of: (**i**) money changing hands among the SRS top management to ensure that the correct bidder – Claimant – wins the 2018 Tender, and (**ii**) Claimant's local representatives intending to "gratify" their "advisors" who ensured the correct outcome of the Tender. But even if this evidence is put aside, the only plausible motive for the SRS top management to steer the 2018 Tender towards Claimant winning it is some undue gain.

h. Rebuttal of Claimant's criticism concerning the available evidence

177. Claimant's criticisms of Respondent's case on corruption are superficial.

178. **First**, Claimant highlights that "*nowhere*" in the December 26, 2019 Sentencing Decision of the Pervomaiskiy District Court "*is Claimant named as a suspect or charged with anything.*"[309] This

309 Reply, ¶433(d). *See further* Ibid, ¶459.

is correct, as the Sentencing Decision concerns Messrs. Abdullayev, Bakchiev, and Sarybayev. However:

178.1. on October 29, 2019, the investigative authorities in charge of the case decided to separate the investigation against Ms. Shaikova, other officials from the SRS and the Department of State Procurement, the members of the Independent Committee and "*other persons unidentified by the investigation*" into separate pre-trial proceedings;[310]

178.2. this investigation is obstructed by Ms. Shaikova being on the run (and officially wanted by the State) and Claimant's representatives ignoring repeated requests of the Kyrgyz investigative authorities for interviews (see further paragraph 178.5 below);

178.3. Claimant, as per the official communication from the Kyrgyz investigative authorities to their Lithuanian counterparts via Interpol is an entity "*related to*" the investigation into the circumstances of the 2018 Tender;[311]

178.4. In turn, Claimant's Messrs. Mieliauskas, Lukosevicius, Sagyndykov and Tynaev are "*persons named in the investigation*," as per the materials of the investigative file.[312]

178.5. These separate pre-trial proceedings are suspended given that Ms. Shaikova is on the run. In turn, Claimants' executives refused to be questioned by the Kyrgyz investigative authorities back in April 2019, but they are of course more than welcome to present themselves in Bishkek for questioning. There are no effective means of cross-border assistance in criminal matters, as Lithuania and the Kyrgyz Republic have not signed a mutual legal assistance treaty. Moreover, Claimant issued a trigger letter under the BIT in late May 2019, and per legal advice (in respect of which privilege is not waived), an internal decision was made not to proactively pursue Claimant / its executives so as not to be seen as a party aggravating the dispute.

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310 **Exhibit R-132,** Order on separation of investigation into separate pre-trial proceedings dated October 29, 2019.

311 **Exhibit R-133,** Letter No. 15/5813 from GKNB to INTERPOL Bishkek dated June 19, 2019.

312 **Exhibit R-134,** Request from GKNB to Ministry of Internal Affairs (forensic department) dated April 25, 2019.

179. A related rhetorical question raised by Claimant is as follows: "[i]*f Kyrgyz authorities* […] *do not believe there is a point in investigating Respondent's allegations, why should the Tribunal waste its time on this fruitless task?*"[313] Yet this overlooks: (**i**) the fact that Claimant itself repeatedly refused to testify before the Kyrgyz investigative authorities; (**ii**) the fact that within the Kyrgyz Republic, the resources of the authorities are exhausted, as the principal person involved in the corruption scandal, Ms. Shaikova, is on a cross-border run; (**iii**) the Kyrgyz authorities, evidently, operate on a different standard of proof given the criminal nature of their investigation.

180. **Second**, Claimant is critical of the testimony given to the Kyrgyz investigative authorities by Mr. Bekenov, a Kyrgyz IT specialist and an acquaintances of Mr. Abdullayev, asserting that he was "*hand-picked to testify by the GKNB*" and gave "*a very abstract testimony*,"[314] including about "*the imaginary meeting between Claimant and Mr. Abdullayev*."[315] Claimant also highlights Mr. Bekenov's role as a representative of Mühlbauer, going as far as to pull out of thin air an allegation that Mr. Bekenov "*illicitly use*[d] *his ties with Kyrgyz authorities to assist Mühlbauer in winning the 2018 Tender*" by "*engag*[ing] *in bribes*" and other "*whatever potentially illegal actions he committed*" [sic].[316] These criticisms are misplaced:

180.1. Claimant does not care to explain how Mr. Bekenov were to be "*hand-picked to testify*" by the Kyrgyz investigative authorities. He was among the dozens of witnesses interviewed during the investigation. Expectedly, he was among the first witnesses interviewed, as the investigation was prompted by, *inter alia*, Mühlbauer's complaints to various Kyrgyz authorities.[317]

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313 Reply, ¶459.

314 Reply, ¶433(f).

315 Reply, ¶176(b).

316 *Ibid*, ¶¶200, 203-204.

317 *See* **Exhibit R-42,** Letter of Mühlbauer to the Kyrgyz Republic dated February 12, 2019; **Exhibit R-43,** Complaint of IDEMIA to the Secretary of the Security Council of the Kyrgyz Republic dated February 21, 2019; **Exhibit R-44,** Letter of IDEMIA to the Speaker of Jogorku Kenesh dated February 21, 2019; **Exhibit R-45,** Letter from IDEMIA to the Kyrgyz Republic dated February 21, 2019; and **Exhibit R-46,** Letter from the French Embassy in the Kyrgyz Republic to the Ministry of Internal Affairs of the Kyrgyz Republic dated February 22, 2019; **Exhibit R-47,** Mühlbauer's administrative complaint with the Independent Interdepartmental Commission dated March 15, 2019; **Exhibit R-48,** Mühlbauer's administrative complaint with the Independent Interdepartmental Commission dated March 22, 2019; **Exhibit R-49,** Administrative complaint of Mühlbauer with the DPP dated March 30, 2019; and **Exhibit R-50,** Administrative complaint of IDEMIA with the DPP dated March 30, 2019; **Exhibit R-51,** Report of the General Prosecutor's Office of the Kyrgyz Republic dated February 22, 2019. *See further* **Exhibit C-034,** Kaktus, "The State Committee for

180.2. Claimant itself admitted that a meeting between Messrs. Bekenov, Abdullayev and Mieliauskas took place in Almaty. The same is confirmed by numerous witnesses and documentary evidence.

180.3. Claimant's slander of Mr. Bekenov and Mühlbauer (one of Claimant's more successful competitors) is, expectedly, unsupported by any evidence aside from the self-serving and post-facto witness statement of Claimant's representative, Mr. Sagyndykov.[318] In turn, Claimant's characterization of Mr. Bekenov as an "'*independent' expert" "appointed*" or "*allow*[ed]" by the "*Kyrgyz law enforcement authorities*" to "*oversee the subsequent tenders*," including the 2020 Tender on e-passports[319] is yet another product of Claimant's vivid imagination. Indeed, the newspaper article Claimant relies on describes the 2020 Tender and quotes Mr. Bekenov as a self-proclaimed "*expert who observed the tender.*"[320] By abundance of caution, the Kyrgyz Republic confirms that Mr. Bekenov, of course, had no role as an "*expert*," let alone "*appointed*" by the Kyrgyz authorities, in relation to the 2020 Tender. So much for Claimant's yet another attempt to twist the facts.

181. **Third**, Claimant is also critical of the testimony given to the Kyrgyz investigative authorities by Mr. Abdullayev, the Director of Infocom State Enterprise (the State-owned IT integrator involved in the 2018 Tender), asserting that he "*could not present any details at all*" and that the answers he did give were "*clearly forced.*"[321] Here, too, Claimant's criticisms ring hollow. Looking past Claimant's disparagement of the investigative methods of the Kyrgyz authorities (which, for avoidance of doubt, is false), Claimant, understandably, has difficulty accepting Mr. Abdullayev's evidence that he received USD 20,000 from Ms. Shaikova "*for the work done in carrying out the tender*" and "*a kind of thank you from the company, from one of the*

National Security told the details of the case on the purchase of e-passports" dated April 02, 2019. *See further* Statement of Defense, ¶¶69-70. Mr. Bekenov was first questioned by the Kyrgyz investigative authorities on February 27, 2019. In the course of that testimony he detailed Mühlbauer's grievances concerning the outcome of the 2018 Tender, as laid out in Mühlbauer's earlier complaints and letters. *See* **Exhibit R-135,** Minutes of questioning of Bekenov A.K. dated February 27, 2019.

318 *See* **Exhibit CWS-3-1,** First Witness Statement of Marat Sagyndykov dated August 22, 2021, ¶23.

319 Reply, ¶¶206-207.

320 **Exhibit C-119,** Azattyk, "German Muhlbauer won the tender for the production of biometric passports dated April 30, 2020 (the correct translation from Russian would be "*observed*," not "*oversaw*").

321 Reply, ¶433(g), citing **Exhibit R-78,** Minutes of questioning of Mr Abdullayev T. dated May 09, 2019. *See further* Reply, ¶461.

bidders, Garsu."[322] The fact that he received this hefty sum, materially exceeding his official annual salary, is confirmed by other witness testimony, as set out at paragraphs 159-160 above. The timing of this "*kind of thank you*" payment is also self-explanatory: as set out at paragraphs 150-158 above, it took place: (**i**) after the SRS Tender Commission was duped into carrying on with the 2018 Tender despite there being grounds to reject all bids and recognize the tender as failed; (**ii**) after three out of five bids (including Mühlbauer's, that offered a price substantively lower than Claimant) were dismissed; (**iii**) after the technical sub-Committee superficially validated Claimant's compliance with the technical requirements of the 2018 Tender; and (**iv**) immediately prior Claimant was announced 'winner' of the 2018 Tender.

182. **Fourth**, Claimant is brandishing the flawed proposition that Respondent "*failed to provide anything of evidentiary value*" in the course of document production pertaining to "*specific evidence supporting its corruption allegations*."[323] Yet, the real issue is how Claimant itself has phrased its document production requests and which of those requests were granted by the Tribunal:

182.1. In its Request No. 14, Claimant sought documents "*(1) confirming whether any criminal investigation has been initiated against the Claimant and/or its legal affiliates before or after the 2018 Tender and in the past 10 years; (2) proving that the Claimant and/or its legal affiliates have been notified on the allegations of corruption or other illegal actions against them*." Respondent duly disclosed the relevant documents, including: (**i**) the Kyrgyz investigative authorities' repeated requests for Claimant's representatives to attend questioning as part of a criminal investigation into corruption related to the 2018 Tender;[324] (**ii**) the refusal of Claimant, via its Kyrgyz counsel, to attend questioning;[325] and (**iii**) the exchanges between Lithuanian and Kyrgyz Interpol bureaus concerning Claimant.[326]

322 **Exhibit R-78,** Minutes of questioning of Mr Abdullayev T. dated May 09, 2019.

323 Reply, ¶437. *See further* Reply, Section II.G and Reply, ¶462.

324 **Exhibit R-58,** Letter of the GKNB to Garsu Pasaulis dated April 09, 2019; **Exhibit R-62,** Letter of GKNB to legal counsel of Garsu Pasaulis dated April 17, 2019/

325 **Exhibit R-59,** Application of the lawyer to Garsu Pasaulis on the interrogation questions dated April 12, 2019.

326 **Exhibit R-136,** Letter from INTERPOL Bishkek to GKNB dated May 24, 2019; **Exhibit R-133,** Letter No. 15/5813 from GKNB to INTERPOL Bishkek dated June 19, 2019.

182.2. Claimant's Request No. 15 covering "[p]*roof (documents) of alleged criminal offences (bribing the officers of the Respondent's authorities) executed by the Claimant and/or its legal affiliates, as well as the officers of the Respondent's authorities before, during or after the 2018 Tender*" was deemed "*excessively broad and vague*" and accordingly dismissed by the Tribunal.[327]

182.3. Lastly, in its Request No. 16, Claimant sought "[d]*irect proof (documents) of criminal offences committed by Messrs. Sagyndykov and/or Tynaev as well as documents confirming that criminal proceedings have been initiated against them*." Respondent did not produce any documents in response to this request, as there is, yet, no "*direct proof*" of Messrs. Sagyndykov and Tynaev committing criminal deeds. The circumstantial proof of the same has been set out above. Nor have these gentlemen been designated, yet, as suspects in pre-trial criminal investigations. They are, however, "*persons named in the investigation*," as explained at paragraph 178.4 above.

183. The reality is that Claimant was very careful in wording its document production requests. Expectedly, it was solely interested in direct documentary evidence of corruption incriminating Claimant. This is the proverbial smoking gun that, as set out in Section III.B.1 above, is not the correct standard of proof for admissibility objections in an investment arbitration setting. Tellingly, Claimant did not ask for circumstantial evidence – of which, as set out in Section III.B.2 above, there is an abundance of – on the same topic.

184. In light of the foregoing, Claimant's claims must be dismissed as inadmissible.

III. IN ANY EVENT, THE REPUBLIC DID NOT VIOLATE ANY PROVISIONS OF THE BIT

185. In its Reply, Claimant persists with blending random bits and pieces of the applicable legal standards with a flow of generalized factual insinuations. Claimant's legal case under the BIT continues to be incoherent. It is neither Respondent's nor the Tribunal's role to sieve through it and guess what specific act(s) attributable to Respondent Claimant deems to be a breach of what element of a given legal standard. Accordingly, the Reply does not call for much rebuttal, beyond pointing to obvious fallacies in Claimant's understanding of the legal standards and their rudimentary application to (skewed) facts.

327 Annex A to Procedural Order No. 3, p. 64.

A. The Republic did not breach the FET standard

186. Claimant misunderstands or misrepresents the relevant elements of the FET standard, and is still unable to articulate its case on FET beyond vague statements. Accordingly, in this Sub-Section we only deal with the legal side of the FET standard, not its practical application to the facts of the case, which remains unchanged as from Section IV.B.(b) of the Statement of Defense.

187. In its Reply, Claimant raises several disconnected propositions with respect to the 'legitimate expectations' component FET standard, none of which help Claimant's case.[328]

188. **First**, Claimant is harshly critical of the well-settled characterization of the FET standard's legitimate expectations' component. For instance, Claimant suggests that "*Respondent seeks to skew the FET standard, attempting to limit Claimant's legitimate expectations to instances where an investor was somehow repetitively promised a specific benefit by some local politicians*."[329] This would be Claimant's very liberal interpretation of the well-accepted and balanced formulation by Newcombe and Paradell, which distills the 'legitimate expectations' component of the FET standard to "*State conduct*" that took the form of "*definitive, unambiguous and repeated assurances*" given to a "*specific person or identifiable group*."[330] Investment arbitration tribunals have routinely found that representations or assurances given in broad and undefined terms cannot give rise to a claim for breach of 'legitimate expectations'.[331]

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328 *See* Reply, ¶¶474-487. As a side note, even when discussing the legal standard, Claimant could not contain itself from clumsily misrepresenting Respondent's argument that contractual obligations are not protected legitimate expectations (*see* Statement of Defense, ¶124) as Respondent's "*recogni*[tion] *that there existed a contractual relationship based on Claimant tender victory*" and "*commend*[ing]" Respondent for that – *see* Reply, ¶484. Evidently, this was Respondent's description of the legal standard, and not qualification of Claimant's "rights" under the 2018 Tender. Several paragraphs down, Respondent recalled that at best those rights were of "*pre-contractual*" nature (*see* Statement of Defense, ¶303).

329 Reply, ¶474, referring to Statement of Defense, ¶¶280-281.

330 **Exhibit RLA-108,** Andrew Newcombe and Lluis Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009), pp. 281-282, cited with approval in **Exhibit RLA-107,** White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award dated November 30, 2011, ¶10.3.7. *See also* **Exhibit RLA-214,** Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44 dated January 21, 2020, ¶517 ("*The Claimants' expectation must be assessed at the time the investment was made and the Claimants' investment must originate from some affirmative action of Spain in the form of specific commitments made by Spain to the investor, or by representations made by Spain, which encouraged the investment*").

331 **Exhibit RLA-215,** Total v. Argentina, ICSID Case No. ARB/04/1, Decision on Liability dated December 27, 2010, ¶¶177-178; **Exhibit RLA-126,** El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award dated October 31, 2011, ¶375.

189. **Second**, Claimant is also uncomfortable with the required reasonableness of any legitimate expectations. It goes as far as to ascribe to Respondent the "*opportunistic*" and "*inapposite*" suggestion that Claimant could not have had an "*expectation that it would not be discriminated against and deprived of the economic benefits after winning the 2018 Tender.*"[332] Plainly, no suggestion of that sort was ever made by Respondent, and Claimant's 'quote' it attributed to Respondent comes from the *Saluka v. Czech Republic* Partial Award.[333]

190. **Third**, and more importantly, Claimant seems to fundamentally misunderstand the concept of 'legitimate expectations'. Indeed, it proffers that its "*legitimate expectations*" that "*the Kyrgyz regulatory system would be consistent, transparent, fair, reasonable…*" were "*not based on an individual negotiation*" but are rather the "*common level of legal comfort which any protected foreign investor could expect.*"[334] However: (**i**) the argument itself is circular, as consistency, transparency, fairness are already components of the FET standard; and (**ii**) it is questionable whether a general legislative framework is a sufficient basis to form a legitimate expectation.[335]

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332 Reply, ¶474.

333 **Exhibit E-005,** Saluka v. Czech Republic, UNCITRAL, Partial Award dated March 17, 2006, ¶¶304-305 ("[W]*hile* [the Tribunal] *subscribes to the general thrust of these and similar statements* [that legitimate expectations are an element of the fair and equitable treatment standard], *it may be that, if their terms were to be taken too literally, they would impose upon host States' obligations which would be inappropriate and unrealistic.*")

334 Reply, ¶475, citing **Exhibit E-046,** Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award dated March 28, 2011.

335 *See* **Exhibit RLA-141,** Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award dated April 04, 2016, ¶552 ("**[A]** ***simple general 'expectation' of the state's compliance with its laws may not always and as such form the basis of a successful FET claim****. It would form such a basis if evidence is given that a specific representation as to a substantive benefit has been frustrated, or there is proof of arbitrary, or nontransparent conduct in the application of the laws in question or some form of abuse of power. Otherwise, it is necessary for the investor to take into consideration that, in the administrative decision-making process, considerations of public interest or going to the specific circumstances of the case may counterbalance what the investor would view as an expectation. Laws are general and impersonal in nature; they will usually leave some degree of discretion to the state agencies for the making of their case specific decisions and, in fact, are rarely unconditional in their provisions so that the investor would have difficulty founding an actual expectation akin to a vested right*") [emphasis added].

See further **Exhibit RLA-216,** LSF-KEB Holdings SCA and others v. Republic of Korea, ICSID Case No. ARB/12/37, Award dated August 30, 2022, ¶718 ("[F]*or* [the 'legitimate expectations'] *standard to apply, there must be some form of representation or assurance by the government itself, upon which the investor thereafter relied in making its decision to invest. This standard is not satisfied by the Claimants' reliance on Korea's alleged deviation from domestic laws and procedures. Primarily, the Claimants rely on vague notions, such as 'transparency,' 'consistency,' 'stability,' 'even-handedness' and 'rule of law,' ignoring the requirement that the investor must 'legitimately have been led by [the host State] to expect' that the State would act—or refrain from acting—in a certain way.*")

191. As a side note, Claimant does not set out its views on the non-discrimination component of the FET standard set out at paragraphs 291-296 of the Statement of Defense, namely that it is a narrow concept: (**i**) requiring Claimant to propose a suitable comparator; (**ii**) demonstrate that the treatment of that comparator was more favorable; and (**iii**) establish lack of justification for such treatment.[336]

192. Similarly, although Claimant is quick to qualify every misfortune it encountered with the 2018 Tender as "*arbitrary*,"[337] the notion of 'arbitrary treatment' as a component of the FET standard is not spelled out. The notion of arbitrariness has been well explained by Prof. Schreuer, acting as legal expert to the EDF v. Romania tribunal – any measure which (a) causes damage to the investor without any apparent legitimate purpose; (b) is not based on an established legal basis but on subjective opinion or any form of discretion; (c) is guided by motives different from those stated by its author; and (d) is taken in disregard of any form of procedure and the principles of due process of law.[338]

193. As set forth in Section IV.B.1 of the Statement of Defense, coupled with rebuttals of Claimant's new factual allegations set out in Section II above, the Kyrgyz Republic has at all times accorded Claimant's investment fair and equitable treatment, be it from the perspective of 'legitimate expectations', non-discrimination or any other component of the standard. Claimant's claim for violation of fair and equitable treatment standard must therefore be rejected.

B. The Republic did not breach the FPS standard

194. The Parties are in disagreement as to whether the full protection and security standard extends to the legal security of an investment. Nothing in Claimant's Reply change the Respondent's position that this standard only encompasses physical security.[339]

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336 *See* Statement of Defense, ¶292, citing **Exhibit RLA-113,** South American Silver Limited v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award dated August 30, 2018, ¶¶710-711; **Exhibit RLA-138,** Cengiz Insaat Sanayi ve Ticaret A.S. v. The State of Libya, ICC Case No. 21537/ZF/AYZ, Award dated November 07, 2018, ¶¶525, 542; and **Exhibit RLA-149,** Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award dated April 08, 2013, ¶1088.

337 Reply, ¶¶466, 471(3), 475, 487, 515, 517, and 529.

338 **Exhibit RLA-74,** EDF (Services) Limited v Romania, ICSID Case No. ARB/05/13, Award dated October 08, 2009.

339 *See* Statement of Defense, Section IV.B.2(a).

195. The rationale behind confining the full protection and security standard to physical protection is that of *effet utile*. An interpretation to the contrary, as noted by Dr. Stanimir Alexandrov, based on review of case law, "*would blur the line between full protection and fair and equitable treatment*."[340] In fact, Claimant itself falls in this trap by pleading that "[c]*learly, a State that undertakes to provide both FET and full protection and security, and does so in the same Section of Article 3 of the* [BIT]*, cannot say that its obligations are limited to ensuring physical protection only*"[341] and concluding that the full protection and security standard was breached in view of the "*facts analysed under the heading above (FET)*."[342]

196. The *effet utile* rationale behind the restricted scope of the full protection and security protection has been highlighted in *Enron v. Argentina*,[343] *Suez v. Argentina*,[344] and *Crystallex International Corporation v. Venezuela*.[345] More recently, the tribunal in *IMFA v. Indonesia* cited *Crystallex* with approval and decided that:

> [T]he standard of full protection and security requires the host state to exercise due diligence in the provision of physical protection to foreign investments. Unless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security.[346]

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340 **Exhibit RLA-217,** S. A. Alexandrov, "Chapter 23: The Evolution of the Full Protection and Security Standard", in M. Kinnear, G. R. Fischer et al., Building International Investment Law: The First 50 Years of ICSID, Kluwer Law International, 2015, p. 328. **Exhibit RLA-141**, Crystallex v. Venezuela, Award, ¶634 and **Exhibit E-045**, Electrabel v. Hungary, ¶¶7.80 and 7.83.

341 Reply, ¶490.

342 *Ibid*, ¶496.

343 **Exhibit RLA-146**, Enron v. Argentina, Award, ¶286 ("*The Tribunal cannot exclude as a matter of principle that there might be cases where a broader interpretation could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation*").

344 **Exhibit RLA-110**, Suez v. Argentina, Decision on Liability, ¶167 ("*This Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm*").

345 **Exhibit RLA-141**, Crystallex v. Venezuela, Award, ¶634 ("*As already noted, the Tribunal is of the view that the more 'traditional' interpretation better accords with the ordinary meaning of the terms. Furthermore, as rightly observed by a number of previous decisions, a more extensive reading of the 'full protection and security' standard would result in an overlap with other treaty standards, notably FET, which in the Tribunal's mind would not comport with the 'effet utile' principle of interpretation. The Tribunal is thus unconvinced that it should depart from an interpretation of the 'full protection and security' standard limited to physical security*").

346 **Exhibit RLA-154,** Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia, PCA Case No. 2015-40, Award dated March 29, 2019, ¶267.

197. Further, Claimant enthusiastically jumps at Respondent's proposition that the full protection and security obligation is a reasonable one and should be evaluated in the circumstances of each case.[347] Claimant presents this as a "*cynical*[] *alle*[ation] *that Claimant could not expect safety of its investment given the state of affairs*" in Kyrgyzstan.[348] Evidently, Respondent is suggesting nothing of the sort.[349] Claimant again is arguing with itself by first inventing an opponent's assertion and then rejecting it.

198. In substance, Claimant's Reply does not rebut the Statement of Defense or provide any further argumentation on *how* Respondent would have breached the full protection and security standard towards Claimant. The claim should therefore be dismissed.

C. The Republic did not expropriate Claimant's purported investments

199. By way of a further alternative, Claimant still argues that its purported rights as the "*winner*" of the 2018 Tender were expropriated through actions of the Kyrgyz State organs.[350] Claimant did not engage with most of the legal and factual arguments set out in the Statement of Defense, demonstrating that no expropriation took place.[351]

200. Claimant merely makes an attempt to interpret the wording of Article 4 of the BIT ("*adopt measures, having an equivalent effect*") to argue that a 'taking' is not required for there to be an expropriation.[352] Claimant then goes on to describe what an 'indirect' or 'creeping' expropriation is.[353] Yet, this is not the thrust of Respondent's argument – only an active act, not mere inaction, could be constitutive of an expropriation.[354]

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347 *See* Statement of Defense, ¶321, citing **Exhibit RLA-108,** Andrew Newcombe and Lluis Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009), ¶6.4.

348 Reply, ¶491.

349 *Cf.* Statement of Defense, ¶321, citing **Exhibit RLA-108,** Andrew Newcombe and Lluis Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009), ¶6.4 misrepresented as a quote from Respondent's submission at Reply, ¶491. Moreover, the 'contrast' that Claimant seeks to draw between this proposition (falsely ascribed to Respondent), and Respondent's affirmation on the pluralism of media in the Kyrgyz Republic (*see* Reply, ¶492) is a strained comparison that takes Claimant's case nowhere.

350 Reply, ¶¶497-505.

351 Statement of Defense, Section IV.B.3.

352 Reply, ¶499.

353 Reply, ¶500, citing **Exhibit E-068,** Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 dated May 29, 2003, ¶154.

354 *See* Statement of Defense, ¶336.

201. In the case at hand, Claimant's proposition that its "*right to execute a public procurement contract*" was "*expropriated*"[355] is clearly contradicted by its own Kyrgyz law expert, Prof. Alenkina:[356]

> (a) After the public announcement of the results of the Tender, **the bidder whose bid was declared the winner acquires the right to sell the passport forms**, through the conclusion of the public procurement contract […];
>
> In the current situation, **it is rather difficult to make a conclusion to determine the basis on which Garsu Pasaulis' rights as the winner of the Tender were terminated, and whether they were terminated at all**, for the following reasons:
>
> - The absence of acts (inaction) on the part of Garsu Pasaulis that would entail the termination of its rights […];
> - Garsu Pasaulis was not excluded from the Tender […];
> - The Tender was not cancelled and the procurement procedures were not terminated […].

202. While Respondent overall disagrees that Claimant had any substantive right capable of expropriation, Claimant's case on expropriation folds if its own Kyrgyz law expert's views are adopted.ну

D. The Republic did not deny justice to Claimant

203. Claimant's standalone claim of denial of justice remains flawed both on law and on fact.[357]

204. With respect to the **legal standard**, the following is uncontested by Claimant:

204.1. The burden of proof is on Claimant, and the standard of proof is extremely high, in view of, *inter alia*, the deference to the State's judiciary, its integrity and compliance with international law.[358]

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355 Reply, ¶502.

356 **Exhibit CER-2-2,** Second Legal Opinion of Natalia Alenkina dated October 30, 2022, ¶5(a)-(b).

357 *See* Statement of Defense, Section IV.B.4.

358 *See* Statement of Defense, ¶¶350-354, citing **Exhibit RLA-167,** Alwyn V. Freeman, "The International Responsibility of States for Denial of Justice" ((Ed. Longmans, Green and Co. Ltd, 1938), pp. 79, 342; **Exhibit RLA-168,** E. J. de Arechaga, "International Responsibility of States for Acts of the Judiciary", in Essays in Honor of Philip C. Jessup (Columbia University Press, 1972), p. 182; **Exhibit E-081,** Mohammad Ammar Al-Bahloul v. Republic of Tajikistan, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated September 02, 2009, ¶¶227, 232 and 242; **Exhibit RLA-169,** OAO Tatneft v. Ukraine, UNCITRAL, Award on the Merits dated July 29, 2014, ¶¶350-361; **Exhibit RLA-170,** Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2 dated November 01, 1999, ¶¶102-103; **Exhibit E-062,** Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2,

204.2. Justice may be denied only in case of a fundamental or outrageous failing of the system.[359]

204.3. Exhaustion of local remedies is a strict requirement with very few exceptions that, again, Claimant bears the burden of proving.[360] Denial of justice cannot take place

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Award dated October 11, 2002, ¶126; **Exhibit E-079**, AMTO v. Ukraine, Award, ¶80; **Exhibit E-062**, Mondev v. US, Award, ¶127

359 *See* Statement of Defense, ¶¶355-357, citing **Exhibit RLA-149**, Arif v. Moldova, Award, ¶¶442, 445, and 447; **Exhibit RLA-148**, Infinito Gold v. Costa Rica, Award, ¶445; **Exhibit RLA-171,** Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award dated July 08, 2016, ¶¶500-501; **Exhibit E-062**, Mondev v. US, Award, ¶127; **Exhibit E-079**, AMTO v. Ukraine, Award, ¶76; **Exhibit E-063,** Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3 dated April 30, 2004, ¶120; **Exhibit RLA-170**, Azinian v. Mexico, Award, ¶99; **Exhibit RLA-167**, Freeman, Denial of Justice, p. 325.

360 *See* Statement of Defense, ¶¶358-359, citing **Exhibit RLA-172,** Jan Paulsson, Denial of Justice in International Law (CUP, 2005), pp. 100, 125; **Exhibit RLA-129,** Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (OUP, 2nd Ed., 2012), p. 154; **Exhibit RLA-173,** ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2, Award dated May 18, 2010, ¶107; **Exhibit E-080,** Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 dated November 06, 2008, ¶259; **Exhibit RLA-149**, Arif v. Moldova, Award, ¶443; **Exhibit RLA-174,** Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, PCA Case No. 2009-23, Second Partial Award on Track II dated August 30, 2018, ¶7.117; **Exhibit RLA-175,** Corona Materials, LLC v. Dominican Republic, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in accordance with Article 10.20.5 of the DR-CAFTA dated May 31, 2016, ¶248; **Exhibit RLA-176,** Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction dated September 11, 2009, ¶164; **Exhibit RLA-25**, Alps Finance v. Slovakia, Award, ¶251; *see also* **Exhibit RLA-177,** The Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award dated March 26, 2003, ¶154 ("*No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system*"); **Exhibit RLA-176**, Toto v. Lebanon, Decision on Jurisdiction, ¶164 ("[A] *state can only be held liable for denial of justice when it has not remedied this denial domestically*"); **Exhibit RLA-173**, ATA Construction v. Jordan, Award, ¶107 ("[D]*espite the fact that exhaustion is not required by BITs, the principle seems now to have been carried over specifically for denial of justice claims*"); **Exhibit E-079**, AMTO v. Ukraine, Award, ¶76 ("*The investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law*"); **Exhibit E-037**, Pantechniki v. Albania, Award, ¶96 ("*Denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole*"); **Exhibit RLA-178,** Chevron Corporation (U.S.A.) and Texaco Petroleum Corp. (U.S.A.) v. The Republic of Ecuador [I], PCA Case No. 2009-23, Interim Award dated December 01, 2008, ¶233 ("*Th*[e] *exhaustion requirement can be viewed as a necessary element* [ ] *for a denial of justice under customary international law* […]"); **Exhibit E-080**, Jan de Nul v. Egypt, ¶195 (finding that there is a requirement to exhaust local remedies in cases of denial of justice).

if the purportedly aggrieved party fails to exercise its rights within the legal system – either properly, or at all.[361]

205. Claimant's reliance on several cases to support the proposition that justice can be denied outside of the judiciary system is flawed:

205.1. *National Grid v. Argentina* does not even support Claimant's proposition that States are responsible "*for the actions of their law enforcement systems, especially where those actions involve judicial impropriety and malfunctions in the administration of justice*."[362] *National Grid* says nothing about denial of justice and due process. Evidently, as a matter of attribution, a State is liable for the actions of its State organs, be in law enforcement or the judiciary. But this is not equal to liability under the denial of justice standard.

205.2. In *Siag v. Egypt* the tribunal did decide that "*failure to provide due process constituted an egregious denial of justice*,"[363] but this related precisely to numerous shortcomings within Egypt's judiciary – a caveat that Claimant omits.[364] The same goes with respect to *Loewen v. USA*.[365]

205.3. In *Tokios Tokeles v. Ukraine*, the tribunal did not, as Claimant suggests, deem "*violations of basic principles of conduct of criminal proceedings as a manifestation of denial of justice*."[366] The Award is silent on denial of justice, but rather treats criminal proceedings from the viewpoint of expropriation, FET, and FPS standards.[367]

205.4. The same goes for *Metalclad v. Mexico*, which concerned a refusal of administrative authorities to issue a permit and which Claimant falsely casts as a denial of justice case.[368]

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361 **Exhibit E-079**, AMTO v. Ukraine, Award, ¶76.

362 Reply, ¶509, citing **Exhibit E-87,** National Grid v. Argentina, Award dated November 03, 2008, ¶173.

363 **Exhibit CLA-047,** Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award dated June 01, 2009, ¶¶453, 454, and 455.

364 Reply, ¶510.

365 **Exhibit CLA-008,** The Loewen Group v. United States of America, ICSID Case No. ARB(AF)/98/3, Award dated June 26, 2003, ¶132, cited in Reply, ¶511.

366 Reply, ¶512, citing **Exhibit CLA-054,** Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award dated July 26, 2007, ¶133.

367 **Exhibit CLA-054**, Tokios Tokelès v. Ukraine, Award, ¶¶117-137.

368 Reply, ¶513, citing **Exhibit E-96,** Metalclad v. Mexico, Award dated August 30, 2000.

206. On the merits, Claimant has tried to particularize its denial of justice claims beyond the *pot pourri* of general statements that featured in its Statement of Claim.[369] Yet, to no avail:

206.1. Claimant's allegation that the Kyrgyz investigative authorities "*did* [not] *even properly inform claimant of* [the] *allegations and* [the] *investigation, did not allow Claimant to be heard and did not even request any explanations or documents from Claimant*"[370] is farcical. As set out in Section II.C above, Claimant was informed about the investigation into the 2018 Tender, repeatedly requested to attend questioning, yet ignored those requests and chose the Baltics over Bishkek.

206.2. Claimant also takes issue with how the same investigation (and ensuing criminal proceedings against Messrs. Abdullayev, Bakchiev and Sarybayev) were conducted, alleging "*judicial impropriety and malfunction in the administration of justice*."[371] These criticisms are misplaced and, in any event, incorrect, as set out in Section II.B.2 above: the Kyrgyz investigative authorities acted thoroughly and the identified Kyrgyz officials responsible for the shortcomings of the 2018 Tender were either convicted or are being searched for. More fundamentally, though, while Claimant's concern for these individuals is laudable, *Claimant* itself could not have been denied justice.

206.3. Lastly, the circumstances of declaring the 2018 Tender as 'failed' did not fall short of "*basic principles of proper administration of justice*," as Claimant suggests.[372] As set out in Section II.D above, that administrative process cannot be qualified as 'administration of justice', whereas Claimant itself had – but did not exercise – the right to bring administrative claims in Kyrgyz courts.

207. Accordingly, the Tribunal should not be misled by Claimant's frivolous reading of the denial of justice standard. In any event, Claimant completely fell short of demonstrating in what sense Claimant suffered denial of justice.

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369 *Cf.* Reply, ¶¶514-515 and the Claimant's denial of justice case summarized in Statement of Defense, ¶347.

370 Reply, ¶514(a).

371 *Ibid*, ¶514(b).

372 *Ibid*, ¶514(c).

E. The Republic did not destroy Claimant's 'international business reputation' and Claimant is not entitled to compensation therefor

208. In Section IV.B. 5 of its Statement of Defense, the Republic explained why Claimant is not entitled to any compensation for the purported destruction of its 'international business reputation' both on law and on facts. In essence, there is no legal basis for Claimant to seek non-pecuniary damages in an investment arbitration setting.[373] Tellingly, Claimant had strictly nothing to say about this in its Reply.

209. On facts, it remains Respondent's case that: (**i**) Claimant neither invested in its 'business reputation' in the Kyrgyz Republic; (**ii**) there is no evidence that Claimant's 'business reputation' was affected, let alone destroyed in the aftermath of the 2018 Tender – one reason being that Claimant's reputation was already far from spotless, especially after Claimant was acquired by Semlex; (**iii**) in any event, there is no causal link between any impact on Claimant's reputation and the Kyrgyz Republic's purportedly unlawful actions.

210. Claimant is therefore not entitled to any compensation for destruction of its 'business reputation'.

373 *See* Statement of Defense, Section IV.B.5.a.

IV. CLAIMANT IS NOT ENTITLED TO ANY COMPENSATION

211. The Kyrgyz Republic has demonstrated in Section V of its Statement of Defense that Claimant is not entitled to any compensation in relation to its alleged investment for failure to establish: (**i**) its purported losses with any certainty, and (**ii**) the causal link between such losses and the alleged breaches. Claimant also adopted a random valuation date, leading to an inflation of claimed damages. Overall, Claimant's damages calculation, as well as its claim for interest, is simply unreliable. Nothing in Claimant's Statement of Reply and the Second Expert Report of Dr. Banyte affect these criticisms, as we demonstrate below.

A. Burden of proof and legal standard

212. Claimant does not contest that as a party advancing a proposition or claim, it bears the burden of proving that.[374]

213. Parties are also largely in agreement as to the legal standard for compensation, rooted in the *Chorzow Factory* case and ILC Article 36(2),[375] and specifically the requirement that speculative or uncertain damages cannot be awarded.[376] Indeed, Claimant is very prominent in asserting in its Reply that it has "*established its losses with certainty*"[377] and even "*extremely high precision*."[378]

214. For avoidance of doubt, Claimant either innocently misreads or casually misrepresents the Respondent's position on the legal standard of compensation, by suggesting that "*Respondent seeks to apply national Kyrgyz law (provisions of the tender documentation) to argue that Claimant is not subject to compensation 'under any circumstan*ces'."[379] In reality, Respondent relied (and maintains its reliance) on a provision of the 2018 Tender Documentation (not 'national Kyrgyz law' provisions) on non-liability of SRS for tender participants' costs in preparing the tender.[380]

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374 *See* further Reply, ¶384 and referenced cited therein.

375 *See* Statement of Claim, ¶668, citing, *inter alia* **Exhibit CLA-007,** 2001 Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/RES/56/83 (2001), 53 UN GAOR Supp. (No. 10) at 43, Supp. (No. 10) A/56/10 (IV.E.1), Article 36; Reply, ¶¶527-528 and referenced cited therein.

376 *See* Statement of Defense, ¶¶384-384 and referenced cited therein.

377 Reply, p. 205.

378 *Ibid*, ¶532.

379 *Ibid*, ¶526.

380 *See* Statement of Defense ¶397.

Moreover, this reliance was expressly limited to recoverability of Claimant's purported 'direct expenses', rather than other categories of damages sought by Claimant.[381]

215. One further – material – observation with respect to the legal standard. The bulk of Claimant's damages claim is for the purported loss of business with certain customers (i.e. the 'Ensuing Other Contract Losses')[382] and "*loss of business reputation*" (i.e. the 'Business Reputation Losses').[383] In its earlier submissions, Claimant did not take a clear stance on how it qualifies such heads of damages. In its Reply, Claimant asserts that "*loss of reputation is compensable*" and qualifies as a "*non-pecuniary loss*."[384] Both statements are incorrect.

215.1. Claimant's reliance on *AAPL v. Sri Lanka* in asserting that "*loss of reputation is compensable*"[385] is misplaced. The tribunal in that case did not take a stance on whether 'loss of reputation' or, more accurately, goodwill is compensable. It merely noted that goodwill requires a minimum period of presence on the market and substantial business development expenses.[386] The tribunal then went on to dismiss claimant's entire head of damages including, 'intangible assets', 'future earnings' and goodwill as their existence was not proven "*with a sufficient degree of certainty*."[387] In similar vein, *Metalclad v. Mexico* that Claimant also relies on in support of the same proposition, is entirely silent on whether 'loss of business reputation' is compensable.[388] We note that Claimant had nothing to say in its lengthy Reply to Respondent's well-supported arguments in Section IV.5 of the Statement of Defense that Claimant is not entitled to any 'loss of reputation' compensation or 'moral damages'.[389]

215.2. Claimant also relies on the Concurring and Dissenting Opinion of Prof. Gary Born in *Biwater v. Tanzania*, to assert that "*loss of reputation is a pecuniary, not a non-pecuniary*

381 *Ibid.*

382 *See* Statement of Defense, ¶382.2.

383 *Ibid,* ¶382.3.

384 Reply, ¶562.

385 *Ibid*, ¶562, citing **Exhibit CLA-049,** AAPL v. Sri Lanka, Award dated June 27, 1990, ¶104.

386 **Exhibit CLA-049,** AAPL v. Sri Lanka, Award dated June 27, 1990, ¶103.

387 *Ibid*, ¶¶106, 108.

388 **Exhibit E-96,** Metalclad v. Mexico, Award dated August 30, 2000, ¶¶119-121.

389 *See* Statement of Defense, Section IV.5.

loss."[390] Yet, in that case, Prof. Born disagreed with the majority's decision to only grant declaratory relief to a claimant, noting that he would have "*instead ma*[de] *an award of costs*" in favor of claimant. Expectedly, Prof. Born's Opinion does not discuss 'loss of reputation', let alone whether it is a pecuniary or non-pecuniary loss.

216. 'Loss of reputation' is a form of moral damages and thus a pecuniary loss. Per the *Tecmed v. Mexico* Award:[391]

> The Arbitral Tribunal finds no reason to award compensation for moral damage, as requested by the Claimant, due to the **absence of evidence proving that the actions attributable to the Respondent** that the Arbitral Tribunal has found to be in violation of the Agreement **have also affected the Claimant's reputation and therefore caused the loss of business opportunities for the Claimant**. In addition, the Arbitral Tribunal has **not found that the adverse press coverage for Tecmed** or Cytrar of the events regarding the Landfill, **was fostered by the Respondent or that it was the result of actions attributable to the Respondent**.

B. No causal link between the alleged breaches and Claimant's alleged losses

217. Claimant is right not to suggest in its Reply that its purported losses must be caused by the Respondent's purported breaches.[392] In fact, this point is even more acute for heads of claim unrelated to the purportedly business venture / investment in the host State, such as the investor's other business ventures or opportunities:

217.1. In *Tecmed v. Mexico*, the tribunal dismissed for lack of evidence a claim for "*loss of business opportunities*" that were purportedly affected by the impact of acts attributable to the host State on Claimant's reputation.[393]

217.2. In *Metalclad v. Mexico*, claimant sought compensation for alleged negative impact that the host State's unlawful conduct had on claimant's other business operations. The tribunal rejected that claim arguing that a variety of factors, not necessarily

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390 Reply, ¶562, citing **Exhibit RLA-218,** Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Concurring and Dissenting Opinion of G. Born.

391 **Exhibit E-068,** Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 dated May 29, 2003, ¶198.

392 *See further* Statement of Defense, ¶¶388-390 and references cited therein.

393 **Exhibit E-068**, Tecmed v. Mexico, Award, ¶198.

related to the investment at issue, caused the decrease. The Tribunal emphasized that:

> The causal relationship between Mexico's actions and the reduction in value of Metalclad's other business operations are too remote and uncertain to support this claim. This element of damage is, therefore, left aside.[394]

218. On the facts, Claimant still failed to establish that there was a causal link between the alleged breaches and Claimant's alleged three heads of claim, as we detail below.

1. No causal link between the alleged 'expropriation' of Claimant's investment and the 2018 Tender Contract Losses

219. It remains Respondent's case that there is no causal link between the purported 'expropriation' of Claimant's investment and the 2018 Tender Contract Losses for **three** independent reasons:

220. **First**, Claimant's Bid has expired on April 2, 2019, much earlier than the February 2020 cancellation of the 2018 Tender by SRS, which is the very expropriatory act as per Claimant's own case.[395] The relevance (and propriety) of the April 2019 expiration of Claimant's Bid has been addressed in Section II.D above.

221. **Second**, Claimant was passive between February and April 2019, when it had a window to proactively take steps and sign the contract. Again, Claimant's additional counter-arguments to that effect have been addressed in Section II.D above.

222. **Third**, Claimant maintains ignorance of the event that breaks its chain of causation: the administrative court proceedings commenced by Mühlbauer in April 2019, which led to the cancellation of the February 1, 2019 decision of the SRS Tender Commission to award the tender to Claimant.[396] Put differently, 'but for' the purported expropriatory act, the outcome of the 2018 Tender would have still been cancelled (and Claimant is not asserting any standalone breach with respect to the administrative court proceedings).

223. Claimant's suggestion that those administrative court rulings "*say nothing about the fate of the 2018 Tender*" is technically correct, but practically beside the point. With Claimant's status as

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394 **Exhibit E-96**, Metalclad v. Mexico, Award, ¶112.

395 *See* Statement of Claim, ¶598.

396 *See further* Statement of Defense, Section II.E.8.

the 'winner' of the 2018 Tender effectively quashed by the courts, the "fate" of the 2018 Tender becomes irrelevant.

224. Separately, and for avoidance of doubt, the Kyrgyz Republic maintains that even Claimant's very modest direct expenses incurred for the participation in the 2018 Tender cannot, by virtue of causation, be linked to any expropriatory action as Claimant agreed to bear all such direct costs.[397]

2. No causal link between the purported 'false allegations' made against Claimant and the Ensuing Other Contract Losses

225. Claimant persists with its proposition that the "*exclusive*" and "*sole*" reason for the "*cancellation*" of its "*profitable contracts*" with four customers (i.e. the Ensuing Other Contract Losses arising from 'lost' contracts with DALO, BBL, Baltic Tobacco, and Carlsberg) was the vaguely-dubbed "*Kyrgyz scandal.*"[398] Faced with an evident evidentiary void in this respect, Claimant proffers self-serving witness testimony of its own executives that conveniently confirm the same.[399] As we demonstrate below, Claimant's witnesses are accomplished liars.

226. Claimant goes on to suggest that "*Respondent cannot expect documentary proof where* [its customers] *would explain in very detail and in writing the reason for terminating the contractual relationship on such a sensitive matter.*"[400] It would have been more accurate to say that Respondent cannot expect such proof from Claimant. So, Respondent had to secure that proof itself.

227. Concerning **Baltic Tobacco**, Claimant entered into a contract for manufacturing of cigarette packaging on December 19, 2003. Per the last amendment, it was set to expire on March 31, 2020.[401] Claimant's case is that "*immediately after the Kyrgyz scandal, in 2019, the contract started to* ***decrease*** *and finally the contract was* ***cancelled*** *in 2020.*"[402] Respondent's quantum expert, Ms. Malyugina, demonstrated in her First Report that the contract was historically volatile[403] – a point ignored both by Claimant and its quantum expert. There is also an obvious disconnect between the documented fact that the contract was set to simply expire

397 *See* Statement of Defense, ¶397.

398 *See* Reply, ¶¶548-560.

399 **Exhibit CWS-1-2**, Lukosevicius 2nd WS, ¶26 and **Exhibit CWS-2-2**, Mieliauskas 2nd WS, ¶34.

400 Reply, ¶553.

401 Exhibits CER–3–Exh.– 11, CER–3–Exh.– 12, CER–3–Exh.– 13 to the First Banyte Report.

402 Reply, ¶231(c), referring to CER-3-2 [emphasis added].

403 **Exhibit RER-2-1,** Damages Report by Anastasia Malyugina dated March 11, 2022, ¶8.5.18.

versus the propositions made both by Claimant's witnesses and experts that it was somehow "*cancelled*"[404] or "*total*[ly] *terminat*[ed]."[405]

228. More importantly, Respondent recently wrote to Baltic Tobacco, asking it to confirm or deny Claimant's contentions about the "*termination*" of their contract, and the "*sole reason*" for termination being the "*Kyrgyz scandal*."[406] Baltic Tobacco's official response was straightforward:[407]

> UAB Garsu Pasaulis supplied packing material to Baltic Tobacco Factory LLC from 2003 onwards based on Contract No. GP\BTF\02'02, dated December 19, 2003. The last order was delivered in October 2019.
>
> In 2020, Baltic Tobacco Factory LLC switched to a Russian printing house given the breakout of the COVID-19 pandemic, the closure of borders and cross-border logistical difficulties.

229. With respect to **Carlsberg**, Claimant entered into a 'Frame Supply Agreement', dated November 29, 2017 and extended, via an amendment, till December 31, 2020.[408] Here, again, Claimant, its witnesses and quantum expert maintain that contract was "*cancelled*" or "*terminated*,"[409] and that Carlsberg "*refused to work with Claimant exactly after the news started to roll out about the allegations in the Kyrgyz Republic*."[410] To substantiate these dramatic propositions, Claimants rely on:

229.1. July 2019 correspondence between a Carlsberg employee and Claimant's employees, whereby Carlsberg asked Claimant to complete a 3rd party screening survey following unspecified "*news on the media about Garsu Pasaulis*."[411] Claimant did not disclose in this arbitration the actual survey it shared with Carlsberg.

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404 **Exhibit CWS-2-2**, Mieliauskas 2nd WS, ¶34.

405 **Exhibit CER-3-2,** Second Expert Report by Dr. Jurgita Banyte dated October 21, 2022, p. 18.

406 **Exhibit R-137,** Letter from Willkie to Baltic Tobacco dated January 20, 2023.

407 **Exhibit R-138,** Letter from Baltic Tobacco to Willkie dated January 30, 2023, dated January 30, 2023.

408 **Exhibit CER-3-Exh. 58**, pp. 160 and 194.

409 Reply, ¶¶548, 557; **Exhibit CWS-2-2**, Mieliauskas 2nd WS, ¶34; **Exhibit CER-3-2**, Banyte Second Damages Expert Report, p. 19.

410 Reply, ¶557. Confusingly, in the same paragraph, Claimant suggests that Carlsberg "*refused to extend*" the contract, as opposed to "*terminated*" it.

411 **Exhibit CER-3-Ex.59**, p. 4.

229.2. August 2019 follow up query from Carlsberg, asking details and updates on: (**i**) the Reuters and OCCRP's investigations into Semlex and Claimant (which did cover Claimant's misdeeds in the Kyrgyz Republic);[412] (**ii**) Claimant's correspondence with SonntagsZeitung, a Swiss newspaper, presumably about an article on the BBL contract termination;[413] and (**iii**) an "*ongoing investigation*" into claimant by the Lithuanian Prosecutor General's Office.[414] Expectedly, Claimant did not disclose in this arbitration its response to Carlsberg's queries.

229.3. September 2020 email from Carlsberg to Claimant entitled "Contract expiration" informing Claimant that Carlsberg "*will not extend our current contract*," which accordingly "*will end on 31.12.2020*."[415] Despite the fact that the two email chains (from July-August 2019 and September 2020) are evidently disconnected, Claimant and its quantum expert do not shy away from suggesting the contrary, as if the reason for Carlsberg's decision to let the contract expire had anything to do with Claimant's misdeeds a year earlier in Kyrgyzstan.[416] One would expect if Carlsberg had concerns about Claimant's reputation (specifically, following the 'Kyrgyz scandal,' as Claimant purports), it would have taken Carlsberg less than a year to pull the trigger.

230. Here, too, Respondent has recently written to the Carlsberg executive who was in correspondence with Claimant back in 2019-2020 to clarify the reasons for Carlsberg's non-extension of the contract. Expectedly, there was nothing sinister:[417]

> We had a historic contract with Garsu Pasaulis and decided not to renew or extend it, as we are legally entitled to do. There was no obligation to renew or extend the contract beyond the relevant date.

412 **Exhibit CWS AL 1-21.28**; **Exhibit** CWS VM 1-9.

413 **Exhibit CWS AL 1-40.**

414 **Exhibit CER-3-Ex.59**, p. 2.

415 **Exhibit CER-3-Ex.59**, p. 1.

416 Reply, ¶557; **Exhibit CER-3-2**, Banyte Second Damages Expert Report, p. 20. Mr. Mieliauskas is more explicit: "*Garsu Pasaulis' most valuable and important contracts with Carlsberg Group* […] *were cancelled* ***exclusively and for the sole reason*** *of the Kyrgyz scandal and because of the false allegations put forward by the Kyrgyz Republic*" (**Exhibit CWS-2-2**, Mieliauskas 2nd WS, ¶34 [emphasis added]).

417 **Exhibit R-139,** Email exchange between Willkie and Mr. Drik Friedmann of Carlsberg Supply CompanyAG, dated January 20-23, 2023.

231. With respect to **DALO** (Mozambique), in December 2017, Claimant signed an agreement to supply 100,000 e-passports with another Mozambique company, SOLUX, acting on behalf of DALO.[418] Another 200,000 passports were supplied throughout 2018 without an agreement, based on invoices and letters of credit directly with Dalo.[419] Claimant's assertion, based on the self-serving testimony of its Mr. Lukosevicius is that:[420]

> Before the Kyrgyz scandal, Garsu Pasaulis supplied Mozambique (DALO) with e-passports and had excellent and profitable contractual relationships for years. However, DALO decided to terminate its business relationship specifically indicating the Kyrgyz scandal and has never mentioned any other reasons […] It was confirmed to me personally by DALO.

232. In reality, there is no evidence of termination or reasons therefor, let alone any link the so-called 'Kyrgyz scandal'. Rather:

232.1. In or around May 2017, Mozambique unilaterally terminated its 2009 e-passport contract with Claimant's parent company, Semlex for, *inter alia*, multiple breaches of contract. By late September 2017, Semlex wound down all its operations in the country.[421]

232.2. Shortly after the Semlex contract termination, Mozambique launched an open tender, where Claimant also participated. By August 2017, the competition narrowed down to Claimant and Mühlbauer, with the latter winning the tender.[422]

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418 **Exhibit R-140,** Agreement between SOLUX and Claimant, dated 2017. A January 22, 2018 Commercial Invoice from Claimant to Dalo refers to this contract as dated December 18, 2017. Claimant disclosed this document in *inter partes* correspondence upon Respondent's request in January 2023.

419 **Exhibit R-141,** Dalo Letters of Credit (2018). These documents, too, were disclosed by Claimant to Respondent in January 2023. *See further*: (**i**) Commercial Invoice No. A NR.60117 from Garsu to DALO, dated January 22, 2018; (**ii**) Commercial Invoice No. A NR. 60173 from Garsu to DALO, dated March 8, 2018; (**iii**) Commercial Invoice No. A NR.60328 from Garsu to DALO, dated July 11, 2018; (**iv**) Commercial Invoice No. A NR.50486 from Garsu to DALO, dated October 10, 2018; (**v**) Commercial Invoice No. A NR.60725 from Garsu to DALO, dated April 2, 2019; (**vi**) Commercial Invoice No. A NR.60738 from Garsu to DALO, dated April 12, 2019 – [CER-3-Exh.-50], pp. 1312 - 1328.

420 **Exhibit CWS-1-2**, Lukosevicius 2nd WS, ¶26.

421 **Exhibit R-29,** Club of Mozambique, "IDs, passports & DIREs: Semlex closes its operations in Mozambique – AIM report" dated October 24, 2017

422 **Exhibit R-220,** Lusa, "Mozambican government takes over production of identification documents" dated November 04, 2017.

232.3. In November 2017, Mühlbauer signed a long-term concession with Mozambique, including for manufacturing of e-passports,[423] yet work did not commence immediately as significant preparation steps were required.[424]

232.4. Around the same time, the Mozambican Ministry of Interior announced that the government "*has taken over the production of biometric identification documents*."[425] As set out above, in December 2017, Dalo – which is owned by the Ministry of Interior, entered (via SOTUX) into a short-term e-passport supply agreement with Claimant.[426]

232.5. Throughout 2018, as set out above, Claimant supplied Mozambique with 300,000 e-passports under the supply agreement and standalone invoices / letters of credit.

232.6. In early 2019, Mühlbauer launched its e-passport manufacturing operations in Mozambique under its long-term concession contract.[427]

233. Evidently, Claimant's role in Mozambique was merely that of a stop-gap, to cover the e-passport demand between Semlex's ousting from the country and Mühlbauer's commencement of operations under the concession it won via open tender. Quite how did Claimant secure its short-term e-passport supply contract without any tender (while being a subsidiary of a company that was just ousted out of the country and, in parallel, participating in a larger tender process in competition with Mühlbauer) remains unknown.[428] What is clear, however, is that Claimant's case concerning Dalo is a farce and Claimant's witnesses are comfortable with lying on the record: (**i**) Claimant could not have had "*contractual relationships*

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423 **Exhibit R-221,** Club of Mozambique, "German company producing passports and ID documents" dated January 30, 2019.

424 **Exhibit R-222,** Muhlbauer, "MÜHLBAUER'S GOVERNMENT SOLUTIONS FOR MOZAMBIQUE" dated July 29, 2020.

425 **Exhibit R-220,** Lusa, "Mozambican government takes over production of identification documents" dated November 04, 2017.

426 **Exhibit R-140,** Agreement between SOLUX and Claimant, dated 2017.

427 **Exhibit R-221,** Club of Mozambique, "German company producing passports and ID documents" dated January 30, 2019.

428 Dr. Banyte mentions in her Second Report that "[a]*ccording to Garsu Pasaulis, this specific Contract [with Dalo] was obtained by direct agreement, not by tender. In the case of the Contract* […]*, Garsu Pasaulis was approached by the Honorary Consul of Mozambique in Lithuania, who later put Garsu Pasaulis in contact with the contracting Organization*" (*see* [2nd Banyte], p. 21). There is no mention of this in none of Claimant's witness statements or written submissions, let alone documentary evidence.

for years" with Mozambique,[429] as it supplied e-passports for approx. 1 year, between Semlex and Mühlbauer; (**ii**) Dalo did not "*decide*[] *to terminate its business relationship*" with Claimant;[430] rather Claimant's stop-gap role came to an end when Mühlbauer commenced operations under its long-term concession; (**iii**) in similar vein, there could be no expectation (let alone a reasonable one) that Dalo / Mozambican Ministry of Interior would have continued contractual relations with Claimant beyond the band-aid solution put in place in unclear circumstances.

234. Lastly, **BBL**, a Swiss authority, concluded a Schengen visa supply contract with Claimant in October 2017.[431] The contract was set to expire in December 2020,[432] but was terminated by the Swiss authorities in or around June 2019, based on press reports submitted by Claimant.[433] Here, too, Claimant's case is that the "*profitable*" BBL contract was purportedly terminated "*exclusively and for the sole reason of the Kyrgyz scandal.*"[434] This is false:

234.1. A BBL spokesperson confirmed to Swiss media that the BBL contract was terminated as a "*reaction to existing allegations of corruption.*"[435] The same press report lists Claimant's and its parent company Semlex' corruption issues in several African states, police searches in Belgium, implication in a bribery scandal in Switzerland, and finally Claimant's misdeeds in the Kyrgyz Republic (which is far from the 'sole and exclusive reason' for contract termination, let alone a reason *named* by the BBL).

234.2. For exhaustiveness, the suggestion that the contract was "*profitable*" is opportunistic. As Ms. Malyugina notes in her Second Report, "*Dr Banyte's calculation suggests that the BBL contract was on break-even terms, and expected to generate free cash flow*

429 **Exhibit CWS-1-2**, Lukosevicius 2nd WS, ¶26.

430 *Ibid.*

431 CER-3-Exh. 20 to the First Banyte Report.

432 CER-3-Exh. 20 to the First Banyte Report, page 10.

433 **Exhibit CWS_Lukosevicius_1/40,** Sonntagszeitnung.ch, "The Federal Government must stop printing for Schengen visas" dated June 02, 2019.

434 Reply, ¶552; **Exhibit CWS-2-2**, Mieliauskas 2nd WS, ¶34.

435 **Exhibit CWS_Lukosevicius_1/40,** Sonntagszeitnung.ch, "The Federal Government must stop printing for Schengen visas" dated June 02, 2019, p. 3.

(before discounting / compounding) of below EUR 4,000 for the Claimant in the 'but-for' scenario."[436]

3. No causal link between the purported 'false allegations' made against Claimant and the Business Reputation Losses

235. Aside from the simplistic and inherently unsound calculation methodology for this head of claim (addressed in Section V.D below), Claimant is still unable to overcome a more conceptual flaw – that of lack of causation.

236. Claimant did not demonstrate that any of the actions it attributes to the Kyrgyz Republic – and not the myriad of public / media concerns about its questionable business practices, the COVID-19 pandemic, or other internal / external factors. Claimant's quantum expert, Dr. Banyte, also only briefly notes in her Second Report that "*the deviation of Garsu Pasaulis' income* [i.e. the Business Reputation Losses] […] ***had to be related*** *to the Kyrgyz scandal.*"[437] That is speculation *par excellence*.

237. Claimant and its quantum expert Dr. Banyte are also fundamentally inconsistent in their approach as to the relevance of media articles for different aspects of the case. As Respondent's expert Ms. Malyugina observes:[438]

> Dr Banyte takes issue with me relying on media articles in analysing GP's reputation, without necessarily having access to all supporting documentation and the methodology underlying the allegations mentioned in the media.[439] […]
>
> **The negative media surrounding the 'Kyrgyz scandal' is likewise unsupported by 'proper evidence' as Dr Banyte puts it, and untrue based on the Claimant's claim**. **It is however the basis of the Claimant's claim for reputational damages, and of Dr Banyte's material damages calculation**.
>
> It is not clear to me on what basis Dr Banyte proposes to calculate material damages for the Claimant based on certain media articles (those in respect

436 **Exhibit RER-2-2**, Malyugina EO on Damages 2, ¶8.5.2.

437 **Exhibit CER-3-2**, Banyte Second Damages Expert Report, p. 23 [emphasis added].

438 **Exhibit RER-2-2**, Malyugina EO on Damages 2, ¶¶3.4.1-3.4.3. *See further* ibid, ¶2.2.4 ("*I am unclear what Dr Banyte's position is as to the relevance – or lack of relevance – of adverse media generally. On the one hand, she criticises me for referring to adverse media in respect of the Claimant and Semlex which, according to her, lacks concrete evidence of wrongdoing. On the other hand, some 87% of her loss calculations, including in respect of the Cancelled Contracts and her reputational 'loss', are claimed to be a sole and direct result of the adverse media coverage of the 'Kyrgyz scandal'. To the extent the adverse media is indeed irrelevant as Dr Banyte suggests, the Claimant could not have suffered any reputational 'loss', or loss from the Cancelled Contracts due to the 'Kyrgyz scandal' as claimed*")

439 **Exhibit CER-3-2**, Banyte Second Damages Expert Report, pp. 45-46.

> of the 'Kyrgyz scandal'), but at the same time disregard all other media articles (those in respect of other scandals involving the Claimant and its owners).

238. Further, an exhaustive analysis of what is purported to be a furry of negative media reports about the "Kyrgyz scandal" implicating or referring to Claimant paints a much more muted picture. As. Ms. Malyugina summarizes:[440]

> I have performed additional Google search analysis into media coverage of the "Kyrgyz scandal" and GP specifically. I conclude that the publicity allegedly causing GP multi-million damages has been contained, mostly limited to 2019, and mostly limited to information about arrests and resignations of Kyrgyzstan government officials (Appendix D).
>
> Overall, given the large volume of negative media surrounding the Claimant and its owners both before and after the Tender, I am unable to attribute specific prominence to the negative media surrounding the "Kyrgyz scandal" in particular. The wider "data universe" of negative information above Semlex and GP would have been considered by GP's customers, of which Kyrgyzstan issues are one (of many) datapoints. […] **Claiming that these and other customers stopped working with GP solely due to the "Kyrgyz scandal" is misleading, and contrary to available evidence. Claiming that GP's reputation would have been "excellent" but for the "Kyrgyz scandal" is not factually correct**.

C. Claimant's valuation date is random and results in an artificial inflation of loss

239. Respondent explained in Section V.C of its Statement of Defense that Claimant's chosen valuation date – December 31, 2020 – is random and results in an artificial inflation of loss. Neither the Statement of Reply, nor the Second Report of Dr. Banyte, Claimant's expert, change this conclusion.

240. Per Sergey Ripinsky, it is trite that the valuation date "*can* […] *have a powerful impact on an investment's estimated value*," as "*the FMV of an asset is assessed by reference to information available at that date*" and "*a valuation date serves as the starting date for the calculation of interest*."[441]

241. Axiomatically, the valuation date in investment arbitrations is either the date of the breach (in which case, the *ex ante* approach to available information is used) or, in certain circumstances, the date of the award (in which case, the *ex post* approach to available

440 **Exhibit RER-2-2**, Malyugina EO on Damages 2, ¶¶2.2.5-2.2.6.

441 **Exhibit E-100,** Ripinsky & Williams, Damages in International Investment Law, p. 243.

information is used, allowing some hindsight).[442] Claimant's approach, however, is neither here, nor there.

242. Respondent maintains its position on the plausible valuation date (e.g. February 4, 2020, being the date when the SRS recognized the 2018 Tender as failed),[443] and that it is for Claimant to substantiate the valuation date it proposes to adopt[444] – a task that Claimant continues to fail in.

D. The quantum of Claimant's alleged damages is still entirely unreliable

243. Claimant's case on quantum fares marginally better in the Reply than in the Statement of Claim, but is still entirely unreliable. An overarching point is that the efforts of Claimant's quantum expert to calculate every head of claim to the penny, "*with extremely high precision*,"[445] do not help its case on quantum. Precision does not equal reliability. Unverified costs, flawed methodology, unsupported assumptions, and inconsistent treatment of available *ex post* information – all the traits that Claimant's quantum case features – may lead to a precise, but completely unreliable figure that can only be rejected by this Tribunal.

244. As regards the **2018 Tender Contract Losses**:

244.1. Claimant's remark that the queries raised in the First Report of Ms. Malyugina, Respondent's quantum expert, about the purpose and proof of certain claimed costs are "*completely insignificant arguments*"[446] is telling of Claimant's careless attitude to properly proving the reliability of its quantum case. Even more telling is the fact that Claimant's quantum expert, Dr. Banyte, "*decided to avoid further discussion of these insignificant costs' differences and revised* [i.e. reduced]" this head of claim.[447]

244.2. Accordingly, the direct (sunk) costs that Claimant asserts during the 2018 Tender have now decreased from EUR 9,383 to EUR 7,590. Following Dr. Banyte's change in methodology (from claiming sunk costs *per se* to claiming loss of

442 *See* **Exhibit RER-2-2**, Malyugina EO on Damages 2, ¶¶5.4.4-5.4.5

443 *See further* Statement of Defense, ¶404.

444 *Ibid.*

445 Reply, ¶532.

446 *Ibid*, ¶574.

447 *Ibid*, ¶575.

opportunity to invest those sunk costs elsewhere), even that modest sum has been further decreased to around EUR 2,000.[448]

244.3. There are still serious issues with the sunk costs claimed: (**i**) certain categories qualify as pre-project expenses, not sunk costs;[449] (**ii**) other categories pertain to Claimant managing its PR profile in the Kyrgyz Republic, as opposed to costs incurred in the course of the 2018 Tender *stricto sensu*;[450] (**iii**) no meaningful response was provided by Claimant or its quantum expert in light of the glaring disparity between the sunk costs and lost profits claimed;[451] (**iv**) Dr. Banyte's new methodology of converting sunk costs into loss of opportunity is "*substandard*," in particular because "[t]*he projects that the Claimant would have invested these funds are not specified*."[452]

244.4. Claimant's 'lost profits' in relation to the 2018 Tender have been revised downwards from EUR 2.318 million to EUR 2.213 million due to a change in Dr. Banyte's discounting/compounding methodology,[453] yet still suffer from multiple fundamental flaws: (**i**) her KGS/EUR exchange rate approach uses a five-year average despite the known year-on-year volatility of KGS;[454] (**ii**) the costs and margin calculations, although now beefed up with over 5,000 pages of invoices from Claimant's suppliers, remain unreconciled, making it impossible to verify whether the margins claimed are accurate;[455] (**iii**) Dr. Banyte continues to apply the "*substandard*" discounting/compounding approach, whereby cashflows are first discounted to December 2018, and then compounded using an extreme 20+% interest rate.[456] For illustrative purposes only, Ms. Malyugina recalculated this head of claim (by reducing the profit margin to Claimant's actual ones and adopting

448 *See* **Exhibit RER-2-2**, Malyugina EO on Damages 2, ¶¶6.2.1-6.2.3.

449 **Exhibit RER-2-2**, Malyugina EO on Damages 2, ¶6.5.4.

450 *Ibid*, ¶6.7.1-6.7.2.

451 *Ibid*, ¶¶6.3.4-6.3.5.

452 *Ibid*, ¶6.3.7.

453 *Cf.* **Exhibit CER-3-1**, Banyte Damages Expert Report, page 31, Table 41 (lines "*indirect losses*") and **Exhibit CER-3-2**, Banyte Second Damages Expert Report, page 38, Table 39.

454 **Exhibit RER-2-1**, Malyugina EO on Damages 1, ¶7.1.6.

455 *Ibid*, ¶¶7.1.13-7.1.15

456 *Ibid*, ¶¶¶7.1.16-7.1.18.

correct currency exchange rates) to EUR 1.258 million.[457] And if the cost budget, which remains unverified, is actually 23+% higher than Claimant purports, the loss would be nil, per Ms. Malyugina's First Report.[458]

245. With respect to the **Ensuing Other Contract Losses**, Dr. Banyte revised her figures from EUR 5.649 million to EUR 5.066 million due to a revised compounding/discounting methodology. This figure is still entirely unreliable as:

245.1. The revenue or profit margin data, despite now being accompanied by thousands of pages of invoices, remains irreconciled and therefore unverifiable.[459]

245.2. The same flawed discounting/compounding approach is applied, which Ms. Malyugina deems "*substandard*," as summarized above.[460]

245.3. Fundamentally, Dr. Banyte's economic assumptions from the 'Other Contracts' (with Dalo, BBL, Carlsberg, and Baltic Tobacco) are "*unsupported, whereby the profitability* [Dr. Banyte] *assumes would have been received by the Claimant 'but for' contract non-extension or termination is based on the Claimant's representations and is not supported or verified.*"[461]

246. Lastly, the **Business Reputation Losses** of EUR 9.46 million remains "*simplistic*," as it is based on "*a number of reverse-engineered mathematical permutations*" and an assumption that Claimant "*under-received profit of EUR 1.4 million in 2020 due to the 'Kyrgyz scandal'*," which would then remain lost year-on-year, in perpetuity.[462] Ms. Malyugina concludes in her Second Report as follows:[463]

> Over half (57%) of Dr Banyte's total loss calculation, or EUR 9.46 million, relates to the alleged reputational 'loss'. Dr Banyte's calculation of reputational 'loss' is double counted with the other heads of loss she quantifies, and is not based on any evidence of a deterioration in performance as a direct result of the 'Kyrgyz scandal'. [Claimant] booked strong profits in both 2020 and 2021, at levels consistent with 2018-2019,

457 Ibid, ¶7.3.2.

458 **Exhibit RER-2-1**, Malyugina EO on Damages 1, ¶7.6.6.

459 **Exhibit RER-2-2**, Malyugina EO on Damages 2, ¶¶8.1.2-8.1.3.

460 *Ibid*, ¶8.2.9.

461 *Ibid*, 8.7.2. *See further* ¶¶8.3.5-8.3.7, 8.3.19-8.3.20, 8.4.6, 8.5.11, 8.6.4

462 *Ibid*, ¶9.1.1.

463 *Ibid*, ¶9.5.1.

> and at a margin in excess of its historic levels. Its financial statements show no evidence of an artificial depression of profits.

E. At best, Claimant is entitled to simple interest, running from February 2020

247. The Kyrgyz Republic maintains that at best, Claimant is entitled to simple (as opposed to compound) interest, running from February 2020 (as opposed to from February 2019).

248. The application by tribunals of compounding interest is by no means automatic since it requires the requesting party to demonstrate special circumstances justifying such approach.[464]

249. This was recently reaffirmed in *Strabag v. Libya*, where the tribunal held that:[465]

> A further question is whether interest should be simple or compound. It is true that compound interest is a feature of contemporary commercial and economic life, and that many tribunals have seen it to be warranted in order to provide full compensation for losses. Other tribunals, however, have not followed this approach. **Hence, there cannot be said to be a uniform international practice in this regard**. The Tribunal is also mindful of the ILC's Commentary to Article 38 of the State Responsibility Articles (reflecting the critical perspective of the distinguished rapporteur, Judge Crawford). The Commentary takes the view that compound interest should be awarded only where there are **'special circumstances which justify some element of compounding as an aspect of full reparation.'**

250. Claimant did not demonstrate any 'special circumstances' in that case, and accordingly the tribunal deemed that simple interest "*provide*[d] *a more appropriate measure of compensation*."[466]

251. Here, too, Claimant does not demonstrate any 'special circumstances' that entitles it to anything but simple interest.

252. With respect to the interest start date, Respondent reiterates that interest starts accruing from either: (**i**) the date when the State is made aware of the allegedly unlawful conduct complained about, i.e. date of the request for arbitration; or (**ii**) the date of claimed breach.[467]

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464 Statement of Defense, ¶¶414-415.

465 **Exhibit RLA-220,** Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award dated June 29, 2020, ¶962 [emphasis added]. In the same vein, *see* **Exhibit RLA-149**, Arif v. Moldova, Award, ¶619 ("*Claimant has not justified compound interest, and given the nature of the damages in this case, the Tribunal considers simple interest is more appropriate*").

466 **Exhibit RLA-220**, Strabag v. Libya, Award, ¶963.

467 Statement of Defense, ¶416.

253. Respondent's primary case on interest start date is further supported by *Swembalt v. Latvia*, where tribunal ordered that interest should start running from the date of the notice of arbitration. This is even though: (**i**) claimant's vessel had been expropriated five years earlier, and (**ii**) claimant had itself to pay interest for the loan it had contracted to acquire the ship. The tribunal did not consider these to be "*exceptional circumstances"* justifying an earlier starting date for the payment of interest. It held that:[468]

> [A] rate of interest shall be applied in this case from the day on which SwemBalt has initiated proceedings for repayment of debts, unless the court decides that in exceptional circumstances, interest shall be payable from an earlier date [Interest is] payable from 9 April 1999, when Latvia was informed of the proceedings, up until the day payment is made in full.

254. In its Reply, Claimant maintains that the interest start date should be February 22, 2019, specifying that this is when the Kyrgyz investigative authorities initiated a criminal investigation into the 2018 Tender.[469] Yet, Claimant is not pleading creeping expropriation, but rather a direct taking of its purported right – never, in fact, specifying what specific action it characterizes as an expropriatory act – on the date of which interest should, on Claimant's case, start to run.

255. The correct approach, Respondent maintains, is to adopt either the date of Claimant's Notice of Dispute (February 10, 2020), or, at the earliest, the date when the SRS has formally recognized the 2018 Tender as failed (February 4, 2020).[470]

V. CLAIMANT IS NOT ENTITLED TO CLAIM SPECIFIC PERFORMANCE

256. In its Reply, Claimant maintains its request for "*public and prompt denial of all false statements, accusations and allegations*."[471]

257. As set out in the Statement of Defense, Respondent is opposed to this request for several reasons. Unlike what Claimant purports, nothing proves "*without doubt*" that "*Claimant was never involved in any alleged corruption*."[472]

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468 **Exhibit R-219,** Swembalt AB, Sweden v. The Republic of Latvia, UNCITRAL, Court of Arbitration, Decision dated October 23, 2000, ¶47.

469 Reply, ¶¶¶607, 610.

470 *See* Statement of Defense, ¶418.

471 Reply, Section VI.

472 Reply, ¶617.

258. **First**, is sufficient evidence demonstrating that Claimant was involved in the corruption scheme implicating the bribing of SRS officials in order to influence the results of the 2018 Tender. This is not only supported by several factual elements of this case but also by the Sentencing Decision of the Pervomaiskiy district court which found guilty the same officials, for corruption and assistance thereof and which was never appealed.[473]

259. **Second**, contrary to Claimant's contention, Respondent is perfectly entitled to rely upon the ongoing criminal investigations in order to refuse to publicly deny the purported false statements harming Claimant's reputation.

260. In this regard, Claimant extrapolates Respondent's statements affirming that "*Respondent itself confirmed that it has no evidence to charge Claimant with anything*"[474] whereas, what Respondent asserted was that: "*the fact that the Republic might* ***not today have enough evidence at its disposal to formally charge Claimant and its officers with corruption*** *does not mean that the Tribunal cannot, based on the lowered (as compared to criminal cases) standard of proof and the record before it, conclude that Claimant was undeniably involved in rigging the 2018 Tender in its favor.*"[475]

261. Again, as extensively shown above, notwithstanding the absence of a formal conviction with respect to Claimant and its executives, several "*Red Flags*" tilt against Claimant.

262. **Finally**, Respondent reiterates that in any event, it is by no means liable for any statement made by the Kyrgyz media and that only statements made by its proper officials and authorities could give rise to a denial.

263. It follows that the factual evidence of the case leaves no place for the Tribunal to order Respondent to proceed to any public statement and therefore this claim should be rejected in full.

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473 Statement of Defense, ¶83.

474 Reply, ¶619.

475 Statement of Defense, ¶247 [emphasis added]

VII. CONCLUSION AND REQUESTS FOR RELIEF

265. For the reasons set out in this Rejoinder as well as in the Statement of Defense, the Kyrgyz Republic respectfully requests the Tribunal to:

265.1. DECLARE that it lacks jurisdiction over Claimant's claims and/or that Claimant's claims are inadmissible;

265.2. REJECT in full Claimant's claims on the merits;

265.3. DECLARE that Claimant is not entitled to any remedies it seeks;

265.4. AWARD Respondent the costs associated with this arbitration, including, but not limited to, fees and expenses of the Tribunal, costs of expert advice, costs of legal representation, fees and expenses of the PCA, and all other professional fees, disbursements, and expenses, plus interest thereon;

265.5. AWARD the Republic such further or other relief as the Tribunal sees fit.

266. The Kyrgyz Republic expressly reserves the right to supplement and/or amend its arguments and the relief it is seeking in whole or in part at a later stage of these arbitral proceedings, including declaratory relief and counterclaims.

* * *

Respectfully submitted on behalf of the Kyrgyz Republic,

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