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 STATEMENT OF DEFENSE

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INTRODUCTION

1. Pursuant to Annex 1 to the Procedural Order No. 1, as amended by the agreement of the Parties on February 16, 2022, the Kyrgyz Republic (the "**Republic**" or "**Respondent**") hereby submits its Statement of Defense (the "**SoD**" or "**Statement of Defense**") addressing the Statement of Claim (the "**SoC**" or "**Statement of Claim**") submitted on August 31, 2021 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 Statement of Defense is further accompanied by factual exhibits **R-1** to **R-84** and legal authorities **RL-1** to **RL-198**. A list of Respondent's factual exhibits and legal authorities is enclosed with this Rejoinder.

3. Together with its Statement of Defense, the Republic submits:

   3.1. An Expert Opinion on Kyrgyz Law by Judge Madina Davletbayeva, an attorney and a former judge ("**Davletbayeva EO on Kyrgyz Law 1**"), and

   3.2. A Damages Report by Ms. Anastasia Malyugina of the Berkley Research Group LLC ("**Malyugina EO on Damages 1**")

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

5. This Statement of Defense consists of the following seven Sections:

   5.1. Executive summary of the case (**Section I** below);

   5.2. Statement of Facts (**Section II** below);

   5.3. Respondent's objections to admissibility and jurisdiction (**Section III** below);

   5.4. Respondent's legal argument on the merits of Claimant's case (**Section IV** below)

   5.5. Quantum (**Section V** below);

   5.6. Specific performance (**Section VI** below); and

   5.7. Conclusion and Requests for Relief (**Section VII** below).

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. EXECUTIVE SUMMARY

7. Claimant, Garsu Pasaulis, is a secure printing company, whose business reputation has long been reportedly blemished by tax avoidance and investigations into illicit distribution of excise stamps and cross-border money laundering in its home Lithuania. Claimant has fallen further into disrepute when it was acquired, in 2014, by SEMLEX, a Belgian company reportedly connected to money laundering and corruption spanning two decades in a dozen of countries over two continents.[1]

8. In late 2018, Claimant decided to bid for a biometric passport manufacturing contract, organized by the State Registration Service of the Kyrgyz Republic. Indeed, a passport reform was long overdue in the Republic, and the intention was to carry out the tender in full transparency and in line with best practices of public procurement.

9. A total of five bidders, including Claimant, submitted their bids. Claimant's financial proposal was approx. USD 13.5 million – a hefty USD 3.6 million more than that of another bidder, Mühlbauer ID Services GmbH – a reputable secure printing business.

10. And yet, in February 2019, three out of five bidders were deemed disqualified on technical grounds, and Claimant was announced as 'winner' of the tender. This surprising outcome was immediately and forcefully disputed by the losing bidders via administrative, judicial and political means. Aside from contesting their disqualification and Claimant's experience, the complaints drew attention of the Kyrgyz authorities to Claimant's blemished international reputation.

11. Given the apparent national security concerns (manufacturing of over 1.5 million biometric passports for the Kyrgyz people), and the high value of the contract, the Kyrgyz State Committee of National Security deemed necessary to investigate this matter. Yet, despite

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[1] It would doubtless be tempting for Claimant to dismiss these assertions as unfound rumors, machinations of its competitors or some similar conspiracy. Yet most of those originate from reputable investigative journalists, such as OCCRP – the same cross-border investigative collective known for exposing multi-billion money laundering schemes, directly impacting AML / compliance policies around the world.

repeated invitations for questioning by the investigative committee, Claimant chose to hide in its home Lithuania. Claimant's decision had a corollary effect – its tender bid had simply lapsed by early April 2019. No contract was signed by then. As a result, the tender was declared as 'failed' by the Kyrgyz authorities, with no recourse available pursuant to the very tender documentation agreed to by Claimant.

12. Meanwhile, even faced with Claimant's reticence to contribute to the investigation, Kyrgyz authorities have established that:

    12.1. Claimant's representatives repeatedly and secretly met with State officials involved in the tender process, offering "*very significant compensation*" for arranging the tender in Claimant's favor;

    12.2. The tender was, in fact, procedurally rigged in Claimant's favor on multiple occasions;

    12.3. In return, at least one USD 20,000 cash payment took place, passed on from the then Chairperson of the State Registration Service to one of her subordinates involved in the tender rigging.

13. These findings were corroborated by several witnesses, and then embodied in three guilty pleas, and a guilty verdict that was never appealed. The investigation is still ongoing, but obstructed by Claimant's fleeing to Lithuania and sudden disappearance of that very Chairperson of the State Registration Service.

14. It is against this backdrop – having invested **nothing** and abandoned its 'failed', corrupted tender deal – that Claimant boldly sent out its February 2020 Notice of Arbitration, seeking an extraordinary EUR 62 million, of which laughable **EUR 9,384** on account of 'direct losses' and mind-boggling EUR 50 million on account of 'moral damages'… And even though the quantum of those claims has now deflated to a 'mere' EUR 17.5 million, the audacity, the impertinence and the opportunism of those claims remain.

15. To give at least some veneer of legitimacy to its claims (and obfuscate the Tribunal), Claimant deploys three techniques, which the Republic debunks across this Statement of Defense:

    15.1. **Deception**. At every juncture of its case, Claimant shamelessly misinterprets its own evidence and legal authorities.

15.2. **Conspiracy theories**. Absent evidence, Claimant advances general, unparticularized and sinister-sounding allegations apparently meant to fit any applicable legal standard. As a result, the Statement of Claim reads more like a Flat Earth Society's leaflet.

15.3. **Expert validation**. Of the three expert reports filed with the Statement of Claim, one stands out, by Dr. Crina Baltag, on public international law – an area, where the Tribunal members and counsel are expected to be well-versed. The main problem though lies in the fact that aside from lengthy descriptions of legal standards, Dr. Baltag's expert report simply repeats chunks of the factual allegations from Claimant's submissions and concludes – without **any** analysis whatsoever – that they prove the existence of every breach of international law alleged by Claimant.

16. The result is best described by how Claimant's business name, 'Garsu Pasaulis' translates from Lithuanian – a "world of sounds," in essence a cacophony. It is difficult to digest, and even more difficult to rebut with a straight face. And yet this is what Respondent has done. In the Sections that follow, we: (**i**) present the key facts surrounding the dispute, (**ii**) demonstrate why Claimant's claims are inadmissible and the Tribunal lacks jurisdiction over them; (**iii**) argue that in any event the Republic did not breach domestic, let alone international law towards Claimant; and (**iv**) explain that if all else falls, Claimant is entitled to zero compensation.

II. STATEMENT OF FACTS

18. In this Section, Respondent sets out the facts relevant to this dispute, namely:

18.1. The circumstances of the 2012 tender for e-passports, ID cards and population register, cancelled by the Kyrgyz Republic (**Sub-Section II.A** below);

18.2. Claimant's involvement in an unrelated project in the Kyrgyz Republic - manufacturing of excise stamps between 2013 and 2021 (**Sub-Section II.B** below);

18.3. The spotty reputation of Claimant and its parent company, SEMLEX (**Sub-Section II.C** below);

18.4. An overview of the Kyrgyz public procurement system (**Sub-Section II.D** below);

18.5. The circumstances of the 2018 tender for e-passports and supporting IT infrastructure, deemed failed (**Sub-Section II.E** below); and

18.6. The aftermath of the 2018 failed tender (**Sub-Section II.F** below).

A. The 2012 cancelled tender for e-passports, ID cards and population register

19. After devoting pages of its Statement of Claim to lengthy, hyperbolic, and generalized attacks on the Kyrgyz Republic, its alleged "*political corruption and cronyism issues*,"[2] and, specifically, the purportedly "*widespread*" corruption in the Kyrgyz "*passport system*,"[3] Claimant goes on to assert that it was "*very interested in all projects related to the Kyrgyz Republic*" and that it regarded the Republic "*as a very good jurisdiction for expansion of Garsu Pasaulis' products, services and investments*."[4]

20. Be that as it may, Claimant decided to participate in a tender for manufacturing of blank e-passports and ID cards, and setting up a centralized population register in the Kyrgyz Republic (the "**2012 Tender**"). This Tender was announced by the Kyrgyz State Registration

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2 Claimant's Statement of Claim, dated August 31, 2021 ("**Statement of Claim**"), ¶46 and generally Section II.B.

3 Statement of Claim, ¶60.

4 Statement of Claim, ¶66.

Service (the "**SRS**") on July 11, 2012 and required bidders to submit proposals by August 6, 2012.[5]

21. The key assertions that Claimant is making in relation to the 2012 Tender are that: (**i**) although Claimant's financial offer was over USD 11 million higher than that of the lowest bidder, Claimant's offer was "*potentially the best*;"[6] (**ii**) accordingly, the 2012 Tender "*was 'technically' won by* [Claimant];"[7] (**iii**) but the 2012 Tender was "*abruptly cancelled*" due to "*political turbulence and disagreements in the Government of the Kyrgyz Republic*" by "*local interests groups* [that have] *lobbied strongly to remain on private and lucrative contracts*."[8]

22. These assertions are characteristic of entire Claimant's case - bold, but baseless. Specifically:

    22.1. Claimant incorrectly describes the object, purpose and features of the 2012 Tender, relying on undated and unsigned "*tender documentation*" apparently prepared sometime in 2011, for a different procurement project (procurement of passport printing and personalization equipment, as opposed to blank passports themselves) that did not materialize.[9]

    22.2. Claimant speculates that two lower bids by its competitors (for USD 28.79 million and USD 41.03 million, vs. USD 49.93 million proposed by Claimant) "*should have been rejected*" as they "*did not comply with the tender regulations* […] *requir*[ing] *advance*

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5 **Exhibit CWS_Mieliauskas_1/13**, Tender documentation for "Procurement of services for the manufacture and supply of blank passports and ID cards for Kyrgyz citizens" dated August 06, 2012.

6 Statement of Claim, ¶77. *See also* **Exhibit CWS-2-1**, First Witness Statement of Vytautas Mieliauskas dated July 02, 2021, ¶29.

7 Statement of Claim, ¶82.

8 Statement of Claim, ¶¶78, 79 and **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶¶31-32.

9 *Cf.* **Exhibit R-1**, "2012 Tender Documentation" (undated) [Exhibit CWS_Lukosevicius_1/5, resubmitted with expanded translation], p. 1 ("*Tender documentation* [f]*or potential suppliers to prepare tender applications and participate in an open tender for the public procurement of* ***special equipment for the production of identity documents*** […] *with the* ***personalization of individual identification data*** *of individuals and their entry into identity documents, a microprocessor (chip) (if necessary) in accordance with the requirements of international standards, with licensed software and adaptation with the current information system for documentation, as well as sets of equipment for collecting data for registration points for documentation and registration of the population. Creation of the State Register of Population of the Kyrgyz Republic*") and **Exhibit CWS_Mieliauskas_1/13**, 2012 Tender Documentation, p. 1 ("*Procurement of services for the* ***manufacture and supply of blank (expendable materials)*** *for manufacture of the Kyrgyz Republic citizen passport and ID card*") [emphasis added]. *See also* **Exhibit R-1**, Tender documentation for procurement of ID equipment, ¶43, p. 18 ("*The tender proposals shall be provided to the organizer of the tender in person or via post* […] *until 3 October 2011* […] *which is the final deadlines for providing of the tender proposals*) and **Exhibit CWS_Mieliauskas_1/13**, 2012 Tender Documentation (specifying August 6, 2012 as the deadline).

payment from the Government."[10] Yet, under Kyrgyz law, only the final bid amounts, and not payment conditions or other financial details, are made public.[11] Quite how Claimant would learn the particulars of its competitors' bids - and then speculate on the outcome of the same - is unfathomable. Yet if one were to engage in a hypothetical evaluation of Claimant's bid for the 2012 Tender, it would have likely been outright rejected as it was only valid for 45 days, whereas the tender requirements stipulated a 60-day validity term.[12]

22.3. Claimant's allegation on involvement of "*some local Kyrgyz suppliers*" in the "*profitable business*" of passport manufacturing[13] is factually wrong - since 2005, the exclusive supplier of blank passports to the Kyrgyz Republic was De La Rue, a well-known British secure printing company.[14] Expectedly, Claimant provides zero evidence to back up its assertion that the cancellation of the 2012 Tender was prompted by local lobbying.[15]

23. The abundance of factual errors, bald allegations, logical lacunae and wild conclusions continues throughout Claimants' Statement of Claim, as the following Sub-Sections demonstrate.

B. Claimant's manufacturing of excise stamps to the Kyrgyz State Tax Inspectorate between 2013 and 2021

24. In October 2012, the Kyrgyz State Tax Inspectorate (the "**STI**") announced a tender for manufacturing of excise stamps to be used for alcohol and tobacco products sold in the

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10 **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶29.

11 *See* **Exhibit R-1**, Tender documentation for procurement of ID equipment, ¶24.2 ("*Upon opening of the bids, the following will be announced: names of participants, prices of the tender bids, recall of the tender bid (if applicable), changes to the tender bid, information on the presence or absence of the required guarantees* […]").

12 *Cf.* **Exhibit R-2**, Bid of Garsu Pasaulis (application) for the tender for procurement of services for the manufacture and supply of blanks for personalized documents of the citizens of the Kyrgyz Republic [Exhibit C-004, resubmitted with expanded translation] dated August 06, 2012, Annex No. 4 ("*This Tender bid is valid for* ***45 (forty-five) days*** *from the date, specified as the opening date of the tender bids*") and **Exhibit R-1**, Tender documentation for procurement of ID equipment, Annex 3, ¶14 ("*Validity term of the Tender bid -* ***60 days***") (emphasis added).

13 **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶30.

14 **Exhibit R-3**, 24.kg, "Ravshan Zheenbekov: with the selection of the producer of passports of the citizens of Kyrgyzstan the design of documents will possibly change" dated April 25, 2012; **Exhibit R-4**, Akipress, "Faces": Passport scandal had an impact on appointment of R. Atunbayeva to the Parliament" dated December 22, 2005.

15 *See* Statement of Claim, ¶¶78-89 and **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶¶31-32.

Kyrgyz Republic.[16] Claimant won this tender in early 2013, and entered into a four-year excise stamp supply contract with the STI in February 2013.[17] Approaching expiry of the contract, the STI announced a new tender, which was again won by Claimant. Accordingly, in February 2016, Claimant entered into a new, five-year excise stamp supply contact with the STI,[18] which expired on February 5, 2021.[19] In this arbitration, Claimant does not voice concerns as to how the STI conducted the 2012 and 2016 excise stamp tenders.

25. It is with respect to the *renewal* of the excise stamp supply contract - a public procurement process that the STI commenced in September 2020 and delayed for security and administrative reasons - that Claimant advances a conspiracy theory. Purportedly, "*due to* [Claimant's] *claims in the present arbitration case, the Kyrgyz Republic does not want* [Claimant] *to participate in the planned new tender for excise stamps and is looking for ways to expel* [Claimant] *again*."[20] However, the reality is far more banal and far less sinister that Claimant would wish to portray it:

    25.1. The excise stamp tender that STI announced in September 2020,[21] was cancelled in December 2020.[22] Claimant itself produces the official, publicly available, contemporaneous letter explaining that the tender was cancelled to reinforce the security requirements for the excise stamps.[23] Indeed, the STI itself announced this

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16 **Exhibit C-024**, Tender Documentation for the Procurement of Services of Delivery of Excise Stamps by the Unlimited Tender Method, dated 2012.

17 **Exhibit CWS_Lukosevicius_1/8**, Contract for the Supply of Services of Production and Delivery of Excise Stamps to the Kyrgyz Republic and Beyond dated February 01, 2013.

18 **Exhibit C-026**, Agreement for the supply of services for the manufacture and delivery of excise stamps to the Kyrgyz Republic and beyond between Garsu Pasaulis and the State Tax Service under the Government of the Kyrgyz Republic dated February 05, 2016.

19 **Exhibit R-5**, Letter No. ДСП-21/25 from the State Tax Inspectorate to the Center for Court Representation dated February 24, 2022.

20 Statement of Claim, ¶¶105-106 and **Exhibit CWS-1-1**, First Witness Statement of Andrius Lukosevicius dated June 28, 2021, ¶31.

21 For exhaustiveness, this is tender No. 200923245605138, announced on September 23, 2020. In its Statement of Claim, Claimant confuses this tender with another one, under No. 210105261086581, announced on January 5, 2021, following cancellation of tender No. 200923245605138. *Cf.* Statement of Claim, ¶104 and **Exhibit CWS_Lukosevicius_1/13**, Information on the Tender re Procurement of services of production and delivery of excise stamps for alcohol and tobacco products to the Kyrgyz Republic and beyond on self-financing terms dated September 23, 2020.

22 **Exhibit CWS_Lukosevicius_1/14**, Letter No. 17-2956 from Prime Minister of the Kyrgyz Republic to the State Tax Service under the Government of the Kyrgyz Republic dated November 12, 2020.

23 Ibid ("*But now, in consideration of many violations on the use of excise stamps by alcoholic product manufacturers determined by Law Enforcement Agencies and State Tax Service under the Kyrgyz Government, with the purpose to*

same rationale via a press release.[24] Confusingly, Claimant asserts immediately thereafter in its Statement of Claim that the tender was cancelled "*due to unknown reasons to Garsu Pasaulis.*"[25]

25.2. In January 2021, the STI relaunched the excise stamp tender with heightened security requirements.[26] While the initial bidding deadline was set for late January 2021, this date repeatedly slipped until August 2021.[27] Claimant's suggestion that this was a form of retribution by the Kyrgyz Republic against Claimant initiating this arbitration is implausible. It does not make any sense to risk a taxation revenue stream (excise stamps evidencing that tax has been paid to the State) or public safety (the same stamps also evidencing that the taxable product is genuine) for eight months, State-wide, just to annoy a private party. The reasons for the delay were twofold: (**i**) the fact that the STI was confronted with a stream of nearly 40 queries from potential bidders between January-April 2021,[28] and (**ii**) in the course of Summer 2021, the Kyrgyz Government decided to reclassify excise stamps as "*special State blanks*," i.e. templates of State-issued documents (licenses, certificates, permits, university diplomas, awards, etc.), which under Kyrgyz law can only be manufactured domestically, by State-owned or State-controlled companies.[29]

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exclude illegal sales or corruption related to alcohol business and increase budget income, the part of the requirements set by the above mentioned tender on strengthening protective elements and qualities of excise stamps must be investigated").

24 **Exhibit R-6**, State Tax Inspectorate Press Release, "The STI Cancelled the Tender for Manufacturing and Delivery of Excise Stamps for Alcohol and Tobacco Products" dated November 20, 2020.

25 Statement of Claim, ¶106, citing **Exhibit CWS-1-1**, Lukosevicius 1st WS, ¶31.

26 **Exhibit R-7**, State Tax Inspectorate Press Release, "The STI Announces a New Tender for manufacturing and delivery of excise stamps" dated January 12, 2021.

27 **Exhibit C-027**, Information on cancellation of Tender No. 21010561086581 dated January 05, 2021

28 **Exhibit R-8**, Tender No. 210105261086581, clarifications and pre-tender conference (2021) (listing the 38 queries received).

29 *See* **Exhibit R-9**, Ruling of the Cabinet of Ministers of the Kyrgyz Republic No. 9 "On making amendments to some decisions of the government of the Kyrgyz Republic in the sphere of excise stamps" dated July 29, 2021, Article 1 (amending Article 21 of the Regulation on the order of issue and usage of excise stamps in the Kyrgyz Republic, dated December 30, 2008, so that excise marks are now classified as "*special State blanks*") and Article 2 (amending Article 18 of the Decree of the Government of the Kyrgyz Republic No. 350 'On Approval of the Regulation on State Register of personalized documents of the Kyrgyz Republic and the List of documents of State importance, in circulation in the Kyrgyz Republic', dated May 29, 2002, for the same purpose). *See further* **Exhibit RLA-1**, Law of the Kyrgyz Republic No. 72 "On Public Procurement" (with December 18, 2020 amendments) dated April 03, 2015, Art. 2(3)(3), stipulating that the Law does not regulate State

25.3. Be that as it may, the STI has renewed the excise stamp manufacturing tender in September 2021, now open only to authorized Kyrgyz companies in compliance with the reclassification of excise stamps as 'special State blanks'.[30] Claimant could not have participated in this tender, and the contract was ultimately awarded to one of the authorized Kyrgyz companies.[31]

26. On February 5, 2021, Garsu Pasaulis' contract with the STI for manufacturing of excise expired,[32] and as of February 2022 no contractual relations exist between the STI and Garsu Pasaulis.[33] It is the Republic's understanding that this contract was duly performed, and that STI even issued a recommendation letter to Claimant for participation in a different tender on June 23, 2021.[34]

27. Thus, setting aside the obvious lack of rationale behind risking a supply of a publicly significant product just for the sake of retribution against a litigant company, the STI postponed and subsequently cancelled the tender for valid security reasons, which were communicated to Garsu Pasaulis. Claimant's perfunctory approach to its pleadings in this arbitration manifests well through Claimant's allegation against the STI, which rests entirely on Claimant's "*belie*[f]" and unspecified "*indications.*"[35]

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

28. In Section II.A of its Statement of Claim, Claimant describes itself as an "*internationally acclaimed investor into the e-government services and security printing*" and a "*highly regarded* […] *international company* […] [with] *the best reputation for its activities in the security printing and commercial printing industry.*"[36] That description is inaccurate. For avoidance of doubt, the Kyrgyz

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procurement related to manufacturing of special State blanks. *See further* **Exhibit R-10**, Decree of the Government of the Kyrgyz Republic No. 162 'On certain aspects of manufacturing and (or) personalization of documents of State importance and special State blanks' dated April 15, 2019, Article 2 (listing three Kyrgyz companies as authorized to manufacture those documents).

30 **Exhibit R-11**, Tender No. 210924297187620, Minutes of Public Procurement Procedure dated October 14, 2021.

31 *Ibid.*

32 **Exhibit R-5**, Letter No. ДСП-21/25 from the State Tax Inspectorate to the Center for Court Representation dated February 24, 2022

33 *Ibid.*

34 **Exhibit RLA-2**, Letter No. 23-5/7611 from the STI to Garsu Pasaulis dated June 23, 2021.

35 **Exhibit CWS-1-1**, Lukosevicius 1st WS, ¶31.

36 Statement of Claim, Section II.A, esp. ¶¶35 and 44.

Republic is not seeking to demonize Claimant, but deems it necessary to draw the Tribunal's attention to multiple reputational scandals surrounding Claimant, as well as its former and current beneficial owners - both before its activities in the Kyrgyz Republic and after.

1. 2013-2014: large-scale tax avoidance and fines in Lithuania, pre-trial investigations for illicit distribution of excise stamps, and cross-border money laundering investigations against Claimant and its former owner

29. According to Lithuanian press reports, in 2013, Claimant and its then-beneficial owner, Mr. Vytautas Vainikonis, attempted to evade tax on, respectively, LTL 2.8 million (approx. USD 1.12 million) and LTL 21 million (approx. USD 8.5 million) of income, and were fined, respectively, LTL 500,000 (approx. USD 200,000) and LTL 4.3 million (approx. USD 1.72 million). With respect to Claimant, it was its Director, Mr. Vitautas Mieliauskas, Claimant's witness in this arbitration, who was mentioned in the tax authority's order imposing the fine.[37] Another press report confirms that Claimant and Mr. Vainikonis were found guilty of tax evasion, quoting a spokesperson of the Lithuanian State Tax Inspectorate.[38] Notably, Mr. Vainikonis himself is a rather controversial figure, reportedly associated with organized crime.[39]

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37 **Exhibit R-12**, Alfa.lt, "The "Ring of Cyprus," a favourite of Vainikonis, the owner of Garsu Pasaulis, linked to the international mafia, is swarming around him" dated October 08, 2013.

38 **Exhibit R-13**, 15min.lt, "From tax evasion to bribe to president: 'Garsu Pasaulis' discusses potential international scandals" dated April 18, 2019.

39 Several books, authored by reputable investigative journalists and based on contemporaneous notes of the Lithuanian Ministry of Interior, have associated Mr. Vainikonis with the 'Vilnius Brigade,' a notorious Lithuanian criminal gang established in mid-80s, known for theft, racketeering, fraud, unlawful gambling, and even contract murders. Specifically, Mr. Vainikonis acted as Director of at least two legal entities known by the Lithuanian authorities to be established, in early 90s, by the 'Vilnius Brigade' as part of their plan to get a foothold in the post-Soviet Lithuanian economy. *See* **Exhibit R-14**, Dailius Dargis, "Kruvinasis mafijos maršrutas" ['The Bloody Mafia Route'] (2011)], pp. 183-184; **Exhibit R-15**, Egidijus Knispelis, "Ivykiai, sukrete Lietuva" ['Events, created in Lithuania'] (2012)], pp. 67-68 (reproducing an excerpt from the contemporaneous note of the Lithuanian Ministry of Interior). Tellingly, Claimant's former CEO and witness in this arbitration, Mr. Mieliauskas, disclosed in a 2015 interview to the Lithuanian press that he was relieved when Mr. Vainikonis sold Claimant to Semlex, a Belgian company: "*Mr Vainikonis, the former owner of* [Claimant]*, was linked to the 2012 alcohol stamp counterfeiting scandal and had links with the criminal world.* [Mr. Mieliauskas] *explains that the change of shareholders now brings more peace of mind. 'For us, the change of owner is also a psychological relief, because no one will hang anything on us, it will not be necessary to explain that when the Vilnius Brigade was crushed, I was still studying at school. When I became the head of* [Claimant]*, I experienced unpleasant episodes when I regret people and situations,' says* [Mr. Mieliauskas]" – *see* **Exhibit R-16**, Vz.lt, "Garsų pasaulis: New investors have created a backdoor and opened new markets" dated September 26, 2015.

30. Contemporaneous Lithuanian press reports also mention a pre-trial investigation in Lithuania against Claimant concerning illicit distribution of excise stamps to producers of counterfeit alcohol.[40]

31. Further, in 2014, a spokesperson for the Lithuanian Prosecutor General's Office confirmed to the local press that Claimant, together with several other entities, is being investigated jointly with Swiss and Dutch authorities for "*fraud, forgery of documents and money laundering.*"[41]

2. 2014: Acquisition of Claimant by SEMLEX

32. In late 2014, Claimant was acquired by SEMLEX Group, a Belgian company specialized in biometrics and identification systems.[42] At that point of time, SEMLEX and Claimant have been working together for four years already.[43]

33. In this arbitration, Claimant distances itself from SEMLEX, asserting that it "*conducted its activities on its own and mostly separately from SEMLEX*," and that SEMLEX "*did not participate in contracts or public tenders that were won by* [Claimant]."[44] This is inaccurate, at least because:

33.1. In June 2015, the government of the Democratic Republic of Congo ('**DRC**') entered into a passport manufacturing contract with the 'SEMLEX Consortium', comprising Claimant, SEMLEX Europe S.A. and two offshore vehicles. Claimant was represented by Mr. Karaziwan, the owner of SEMLEX, who has signed the contract on behalf of the whole consortium.[45]

33.2. In July 2019, amidst the events that give rise to this arbitration, SEMLEX issued a standalone, formal notice of dispute to the Kyrgyz Republic, threating to commence an investment arbitration and alleging that: (**i**) "[Claimant] *is part of SEMLEX*;" (**ii**) following the events that give rise to this arbitration, SEMLEX

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40 **Exhibit R-16**, Vz.lt, "Garsų pasaulis: New investors have created a backdoor and opened new markets" dated September 26, 2015.

41 **Exhibit R-13**, 15min.lt, "From tax evasion to bribe to president: 'Garsu Pasaulis' discusses potential international scandals" dated April 18, 2019.

42 **Exhibit R-17**, Tender Documentation for the Procurement of New-Generation Blank Passports of Citizens of the Kyrgyz Republic (General, Civil, Diplomatic and Service) According to the Single-Stage Method [resubmitted Exhibit C-2 with expanded translation] dated October 22, 2018.

43 **Exhibit R-18**, Vz.lt, "Garsu Pasaulis is in new hands now" dated December 22, 2014.

44 *See* Statement of Claim, ¶43 and **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶18.

45 **Exhibit R-19**, Reuters, Contract between the Government of the Democratic Republic of Congo and the SEMLEX Consortium dated June 11, 2015.

"*did not receive any official notice from the Kyrgyz Republic, nor an accusation against it, nor even requests for information*;" (**iii**) the actions of the Kyrgyz Republic "*damage the international reputation of SEMLEX*."[46]

3. SEMLEX and its documented corrupt practices

34. Throughout its existence - both before it acquired Claimant, and more so thereafter - SEMLEX was embroiled in more than ten corruption scandals. While Claimant succinctly mentions in its Statement of Claim that "*there were no criminal records on SEMLEX or its owner Mr. Albert Karaziwan whatsoever*,"[47] the reality is strikingly different.

35. By way of representative example, as supported by investigations of well-reputed journalists (i.e. Reuters, the Organized Crime and Corruption Reporting Project ('**OCCRP**'),[48] and Mediapart), and backed by documents leaked from SEMLEX itself and a Congolese bank:[49]

    35.1. From 2001 onwards, SEMLEX reportedly won a series of contracts in **Chad**, worth in total approx. EUR 40 million. In return, SEMLEX reportedly paid at least EUR 2.2 million to persons and entities associated with the President of Chad. In parallel, SEMLEX reportedly gained access to the local government IT systems for competitive advantage.[50]

    35.2. In 2006, SEMLEX won a contract to supply **Guinea-Bissau** with passports. Reportedly, this was achieved via a local intermediary who received at least EUR

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46 **Exhibit R-20**, Claim letter from SEMLEX to the Kyrgyz Republic dated July 08, 2019, ¶¶7, 15, 19, and 23.

47 Statement of Claim, ¶130, citing **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶21.

48 The Organized Crime and Corruption Reporting Project is an authoritative journalistic consortium that brings together investigative centers, journalists, media platforms from all over the world. Launched in 2006, OCCRP publishes more than 100 investigations per year (*see* **Exhibit R-21**, Overview of the Organized Crime and Corruption Reporting Project). By way of representative example, OCCRP has exposed money-laundering scheme of Russia's ruling elite being able to appropriate USD 4.6 billion. Those findings affected the EU-wide banking supervision, which also became a part of the European Commission's new anti-money laundering action plan (*see* **Exhibit R-22**, OCCRP - Largest Investigation Cases, pp. 6-7).

Both the OCCRP and Reuters use fact-checking tools and processes to ensure accuracy and credibility of published information (*see* **Exhibit R-23**, OCCRP - OCCRP's Fact-Checking Process dated January 21, 2021 and **Exhibit R-24**, Reuters - About Reuters Fact Check).

49 This is described in more detail in Sections 4.5 to 4.7 of **Exhibit RER-2-1**, Damages Report by Anastasia Malyugina dated March 11, 2022.

50 **Exhibit R-25**, OCCPR, "The Optimist Without Borders: Inside the Semlex CEO's Empire of Influence" dated December 15, 2020; **Exhibit R-26**, The Elephant, "Passports to riches: Semlex's dubious dealings with African governments" dated November 22, 2018.

80,000 throughout several years. SEMLEX' internal emails from 2010-2011 reveal that it has offered a 15-20% kickback to the authorities for the renewal of the contract.[51]

35.3. From 2006 onwards, SEMLEX entered into a passport manufacturing contract with the authorities of **Madagascar**. In exchange, SEMLEX reportedly paid at least USD 120,000 to a former high-level Malagasy official.[52]

35.4. From 2007 onwards, SEMLEX won a contract for manufacturing of passports in **Comoros**, a country of less than 1 million inhabitants. Notably, since 2008, over 2,800 Comoros diplomatic passports were issued (including to Mr. Karaziwan, his family and colleagues), of which 184 were sold to foreigners, for prices as high as EUR 100,000, facilitated by a company controlled by Mr. Karaziwan . Some of the people, who received Comoros diplomatic passports were high-level foreign politicians and, in several instances, to foreign nationals sanctioned by the United States.[53]

35.5. From 2009 until 2017, SEMLEX took care of **Mozambique** passports, under a contract that was reportedly entered into with the authorities without a public tender, in violation of local law. Curiously, when SEMLEX entered the picture, the cost of a passport for a local citizen reportedly increased from approx. USD 5-10 to USD 100. In 2017, the new Mozambique government terminated the contract with SEMLEX after an audit found the latter to be in violation of the contract. The government then announced an open tender for passport printing, which Claimant attempted, unsuccessfully, to win.[54]

35.6. In 2015, the SEMLEX consortium, including Claimant, entered into an e-passport manufacturing contract with the **DRC**, worth more than USD 220 million, without

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51 **Exhibit R-27**, Reuters, "How to make millions selling passports to Africa" dated December 22, 2017.

52 **Exhibit R-28**, OCCPR, "Belgian Passport-Maker Paid Bribes to Win Madagascar Contract" dated September 09, 2020.

53 **Exhibit R-27**, Reuters, "How to make millions selling passports to Africa" dated December 22, 2017.

54 **Exhibit R-29**, Club of Mozambique, "IDs, passports & DIREs: Semlex closes its operations in Mozambique – AIM report" dated October 24, 2017; **Exhibit R-27**, Reuters, "How to make millions selling passports to Africa" dated December 22, 2017; **Exhibit R-30**, Club of Mozambique, "Semlex accuses Mozambican government of "illegal termination of contract" dated August 24, 2017.

any public tender or competitive bidding.[55] This was reportedly followed by: (**i**) an approx. USD 58,400 payment by SEMLEX to the family of the DRC's Minister of Foreign Affairs, and (**ii**) a further USD 700,000 payment by offshore companies related to SEMLEX to an advisor of DRC's leadership. Later on, the Belgian authorities reportedly arrested an intermediary related to SEMLEX, with USD 400,000 in cash on him. As to the passports themselves - manufactured by Claimant - those ended up costing approx. USD 180 each to the Congolese people (reportedly, one of the most expensive passports in the world), of which USD 60 was reportedly re-transferred to an offshore company associated with high-level DRC officials.[56] Claimant responds to this serious fact pattern by alleging that "*SEMLEX* [] *won a legal case against Belgian state authorities and was awarded compensation for dissemination of false information and false allegations against SEMLEX*."[57] This is false. Indeed, SEMLEX sued the Belgian government for three episodes of dissemination by the Prosecutor's Office to the Belgian mass media of confidential information concerning the pending criminal investigation. The Belgian courts deemed that only such episode amounted to a wrongdoing and awarded mere EUR 15,000 in equitable compensation (*cf.* EUR 1.5 million claimed by SEMLEX).[58]

35.7. In 2016, SEMLEX entered into an ID document manufacturing contract with the **Gambian** authorities, reportedly, "*vague* […] *and ultimately disadvantageous* [to the State]," worth over USD 67 million, without any public bidding, but with facilitation of a high-level political figure.[59]

36. These representative examples were neatly summed up by the OCCRP in a September 2020 detailed investigation into SEMLEX' dealings:

> "OCCRP investigations have found that [SEMLEX] has used bribes, kickbacks and insider dealing to secure contracts around the world,

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55 **Exhibit R-19**, Reuters, Contract between the Government of the Democratic Republic of Congo and the SEMLEX Consortium dated June 11, 2015.

56 **Exhibit R-31**, Reuters, "Congo's pricey passport scheme sends millions of dollars offshore" dated April 13, 2017.

57 *See* **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶22.

58 **Exhibit CWS_Mieliauskas_1/11**, Semlex Europe & Mr. Albert Karaziwan v. Belgian State, Ruling of the French-speaking Court of First Instance in Brussels dated June 21, 2019, pp. 11-12.

59 **Exhibit R-32**, OCCPR, "The Gambian Government Continues Controversial Contract" dated July 19, 2018.

inflating the cost of vital documents for ordinary citizens while lining the pockets of wealthy elites."[60]

37. Against this backdrop, SEMLEX and its owner, Mr. Karaziwan, were subjects of at least the following investigations by the **Belgian authorities**:

37.1. Throughout 2012, both were reportedly investigated in relation to a money-laundering probe.[61]

37.2. In 2018, both were again investigated (and the office properties raided) following revelations by Reuters that SEMLEX won a contract in Congo by paying bribes.[62] An Interpol request by the Kyrgyz authorities to their Belgian counterparts confirmed that with respect to SEMLEX and Mr. Karaziwan, **three criminal cases** have been registered in Belgium for tax fraud and money-laundering.[63]

D. Overview of the Kyrgyz public procurement system

38. As this dispute centers around a tender for manufacturing of e-passports and supporting IT infrastructure that Claimant was involved in, the Kyrgyz Republic deems it useful to first provide an overview of the Kyrgyz public procurement system and, specifically, laws and regulations applicable to it at the relevant period in time.

39. Aside from general provisions of the Kyrgyz Civil Code,[64] the Kyrgyz public procurement system is regulated by the April 2015 Law No. 72 "On Public Procurement," which is regularly updated and refined (the "**Kyrgyz Law on Public Procurement**"). The Law was developed with valuable support from the World Bank, and in line with international standards of public procurement.[65] One of the main changes that the Law brought to the Kyrgyz public procurement system was a move to a centralized, transparent e-procurement platform (the "**E-procurement platform**"), through which all Kyrgyz State and municipal

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60 **Exhibit R-33**, OCCPR, "Biometric bribery: inside Semlex's global playbook" dated September 09, 2020.

61 **Exhibit R-25**, OCCPR, "The Optimist Without Borders: Inside the Semlex CEO's Empire of Influence" dated December 15, 2020; **Exhibit R-27**, Reuters, "How to make millions selling passports to Africa" dated December 22, 2017.

62 **Exhibit R-25**, OCCPR, "The Optimist Without Borders: Inside the Semlex CEO's Empire of Influence" dated December 15, 2020.

63 **Exhibit R-34**, Letter from National Bureau of Interpol in Bishkek to GKNB dated May 14, 2019.

64 *See*, e.g., **Exhibit RLA-3**, Civil Code of the Kyrgyz Republic dated May 08, 1996, Article 409.

65 **Exhibit R-35**, World Bank, "On the Path to Transparent and Efficient Public Procurement in the Kyrgyz Republic" dated June 17, 2015.

entities were henceforth required to conduct public procurement (and conversely, through which all bidders were henceforth required to submit their bids).[66]

40. The main actors of a complete public procurement cycle are:

40.1. The '**procuring entity**' or the '**buyer**' - a State or municipal entity that intends to procure goods or services through competitive bidding; each 'procuring entity' is required to form an internal '**procurement department**' that, *inter alia*, manages all public procurement needs of that organization;[67]

40.2. The '**tender commission**' is an *ad hoc* body created by the 'procuring entity' for every public procurement procedure.[68] It approves the tender documentation, analyzes the bids received and determines the winning bidder.[69]

40.3. The '**designated public authority on public procurement**'[70] is the Ministry of Finance of the Republic,[71] represented by the Department of Public Procurement of the Ministry of Finance,[72] which supervises public procurement State-wide, drafts public procurement regulations, and consults 'procuring entities' on public procurement issues.[73] The Department of Public Procurement is empowered to: (**i**) order the procuring entity to adopt a certain decision or revisit a decision it has previously taken; (**ii**) suspend the public procurement procedure; (**iii**) annul or

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66 **Exhibit RLA-4**, Law of the Kyrgyz Republic No. 72 "On Public Procurement" (with March 29, 2018 amendments) dated April 03, 2015, Article 3 ("*electronic format of public procurement is a procedure for organization and conduct of public tender, implemented with the use of the Internet web* […]"), **Exhibit RLA-5**, Regulation on rules for public procurement in electronic format, approved by the Order No. 175-p of the Ministry of Finance of the Kyrgyz Republic [Resubmitted Exhibit CER-2-Exh.-7] dated October 14, 2015, ¶¶7, 8.

67 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 10.

68 *Ibid*, Article 10(1).

69 *Ibid*, Article 10(3).

70 **Exhibit RLA-6**, Law of the Kyrgyz Republic No. 72 "On Public Procurement" (with January 11, 2019 amendments) dated April 03, 2015, Article 9.

71 **Exhibit RLA-7**, Regulation on the Ministry of Finance of the Kyrgyz Republic, Approved by Order of the Government of the Kyrgyz Republic No. 114 dated February 20, 2012, ¶1.

72 **Exhibit RLA-8**, Regulation on the Department of Public Procurement, Annex to the Order of the Government of the Kyrgyz Republic on the Department of Public Procurement No. 68 dated February 03, 2014.

73 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Articles 9(1)(1), 9(1)(2), 9(1)(5); **Exhibit RLA-8**, Regulation on the Department of Public Procurement, ¶8.

terminate the procedure; and (**iv**) disclose information on identified violations to the enforcement authorities.[74]

40.4. The 'Independent Interdepartmental Commission on complaints and protests and the inclusion of the companies in the database of unreliable and unscrupulous suppliers' (the "**Independent Interdepartmental Commission**") is an *ad hoc* independent body created by the Kyrgyz Government comprised of members of the public and experts on State procurement.[75] This body examines complaints submitted in the course of the public procurement process.[76]

41. While there are several methods of public procurement,[77] the most common is the 'one-stage' method, whereby: (**i**) the number of bidders is unlimited, (**ii**) the 'procuring entity' clearly understands the parameters of the goods or services it intends to acquire; and (**iii**) the goods or services intended to be acquired are not ready-made / off-the-shelf.[78]

42. The main steps of a 'one-stage' public procurement cycle are:

42.1. The 'procuring entity' drafts a yearly plan of public procurement. Importantly, a 'procuring entity' cannot purchase goods or services if those were not foreseen by the yearly plan (or the revised yearly plan).[79]

42.2. The 'procuring entity' establishes a 'tender commission'.[80]

42.3. The 'procuring entity' drafts tender documentation and requirements, based on the templates / standard documentation enacted by the Kyrgyz government.[81] Among the mandatory elements of any tender documentation and requirements are: (**i**) the validity period of the bids, commencing on the bid opening date (i.e. a commitment

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74 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 9(2).

75 *Ibid*, Article 49.

76 *Ibid. See also* **Exhibit RLA-9**, Regulation on the work of the IIC, approved by the Order of the Ministry of Finance of the Kyrgyz Republic, dated October 11, 2017, No. 140-p, as amended by the Order of the Ministry of Finance of the the Kyrgyz Republic No. 19-p, dated February 6, 2018 [Resubmitted Exhibit CER-2-Exh.-6], ¶28.

77 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Articles 16-19.

78 *Ibid*, Articles 17; *Cf. ibid*, Articles 18(1)(1), 18(1)(2).

79 *Ibid*, Articles 12(1), 12(4).

80 *Ibid*, Article 13(1).

81 *Ibid*, Articles 14(1), 14(2).

of the bidder to maintain its offer for a specific number of days after the bids are opened) and (**ii**) provision by the bidder of a 'bidding bank guarantee', i.e. a bank guarantee effective throughout the bid validity period, capped a 2% of the value of the contract.[82] The 'bidding bank guarantee' is mandatory to secure the 'procuring entity' from unscrupulous bidders, e.g., if they attempt to modify their bid after the cut-off date or refuse to sign the contract.

42.4. The 'procuring entity' publishes the tender announcement and tender documentation on the E-procurement platform,[83] setting, *inter alia*: (**i**) a deadline for submission of bids (minimum of 3 weeks from the publication of the tender announcement),[84] and (**ii**) the required validity period for the bids.[85]

42.5. Bidders can seek clarifications on the tender documentation from the 'procuring entity' up to five working days prior to the bid submission deadline.[86] Bidders usually upload their bids directly to the E-procurement platform, where they remain 'locked' (i.e. neither the price, nor other parameters are visible to anyone, including the 'procuring entity') until the bid submission deadline.

42.6. On the bid submission deadline, all bids received are automatically 'opened' by the E-procurement platform.[87] Specifically: (**i**) the 'tender commission' gains access to all bids and supporting documents, while (**ii**) the public gains access to automatically generated minutes of the bid opening (in a form of a summary table with the price offers of the bidders).[88]

42.7. Upon gaining access to the tender bids, the 'tender commission' conducts evaluation of the bids against the requirements stipulated in the tender

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82 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 14(2)(12), 14(2)(14), 24(8), and 26(1).

83 *Ibid*, Article 15(1).

84 *Ibid*, Article 15(2)(5), 24(2)(1),

85 *Ibid*, Article 14(2)(14).

86 *Ibid*, Article 23(4).

87 *Ibid*, Articles 28(1), 28(2).

88 *Ibid*, Article 28(10); **Exhibit RLA-5**, Regulation on rules of electronic public procurement, ¶39.

documentation,[89] pursuant to the methodology established by the Kyrgyz Law on Public Procurement and the Methodological instruction for evaluation of bids.[90]

42.8. Upon choosing the winning bid, the 'tender commission' has three working days to announce the name of the bidder and the proposed price on the E-procurement platform.[91]

42.9. Upon announcement of the winning bidder, a seven-day 'silence period' begins, during which other bidders can contest the results of the tender by petitioning the 'Independent Interdepartmental Commission'.[92]

42.10. Upon expiry of the 'silence period', and if no complaint has been filed, the 'purchasing organization' and the winning bidder have until the expiry of the validity period of the bid to enter into the contract.[93]

42.11. Upon entering into the contract, the 'procuring entity' has five working days to announce this on the E-procurement platform.[94]

43. Importantly, at any stage of the public procurement process, any bidder can file a complaint with the 'Independent Interdepartmental Commission'.[95] Upon receipt of a complaint by the Commission, the tender procedure - at whatever stage it is - is suspended for ten days.[96] The 'Independent Interdepartmental Commission' is empowered, *inter alia*, to annul any decision of the 'procuring entity' or even issue an order terminating the tender process.[97]

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89 *Ibid*, Article 29(3); **Exhibit RLA-10**, Methodological instruction for evaluation of bids, approved by the Order No. 175-p of the Ministry of Finance of the Kyrgyz Republic [resubmitted Exhibit CER-2-Exh.10 with extended translation] dated October 14, 2015, ¶9.

90 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 29; **Exhibit RLA-10**, Methodological instruction for evaluation of bids, e.g. ¶12.

91 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 32(1).

92 *Ibid*, Articles 32(2)(1), 48(1), 49(3).

93 *Ibid*, Article 32(3).

94 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 51(2).

95 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 48(1).

96 *Ibid*, Article 49(3).

97 *Ibid*, Article 49(5)(4).

The decisions of the Independent Interdepartmental Commission are appealable in the Kyrgyz courts.[98]

44. At any moment before the signing of the contract with the winning bidder, the 'procuring entity' can:

    44.1. cancel the tender, if in the view of the 'procuring entity' there is no longer a need for the goods or services sought,[99] or

    44.2. deem the tender 'failed', i.e. void, for instance when none of the bids satisfy the requirements of the tender, or when the validity period of the bids has expired.[100]

45. The only practical difference between the consequences of 'cancellation' of the tender or its 'failure', is that in the latter case, the 'procuring entity' shall organize a new tender, with revised tender parameters.[101]

46. For completeness, relevant for the case at hand are two versions of the Kyrgyz Law on Public Procurement: (**i**) the March 29, 2018 version, and (**ii**) the January 11, 2019 version, which entered into force on February 18, 2019.[102] The key amendments to the Law in the January 11, 2019 version pertained to:[103]

    46.1. The obligation for the 'designated public authority on public procurement' (as defined above) to: (**i**) inform the Kyrgyz enforcement organs about tender procedure violations, and (**ii**) cancel the tender upon the decision of the 'Independent Interdepartmental Commission' (as defined above);[104]

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98 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 51(2).

99 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 31(1); **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(1).

100 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 31(2); **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(2). *See also* **Exhibit RER-1-1**, Expert Report on Kyrgyz Law by Judge Madina Davletbayeva dated March 11, 2022, ¶¶72 – 74.

101 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 31(4); **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(4).

102 *See also* **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶49.

103 For ease of reference, a comparison of the wording of relevant provisions of the Law is submitted as **Exhibit RLA-11**, Comparative table of key amendments to the Law of the Kyrgyz Republic No. 72 "On Public Procurement" (versions of March 29, 2018 and January 11, 2019).

104 *See* **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Articles 9(2)(6) and 9(2)(7).

46.2. The automatic suspension of the period of the validity of the tender bids while the complaints of the bidders are considered by the 'Independent Interdepartmental Commission';[105]

46.3. The obligation for the for the 'procuring entity' (as defined above) to recognize the tender as failed in two additional cases: (**i**) if the validity period of the tender bid has expired; and (**ii**) if a violation of the procurement process was established.[106]

46.4. The refining of the cut-off period for the signing of the contract between the 'procuring entity' and the winning bidder: (**i**) in the earlier version of the Law, not earlier than seven business days from the public announcement of the winner, vs. (**ii**) in the newer version of the Law, not earlier than ten business days and no later than thirty business days from the public announcement of the winner.[107]

47. In the following Sub-Section, when Respondent refers to the Kyrgyz Law on Public Procurement, it is to the version then in force that the reference is made: (**i**) from October 23, 2018 (announcement of the tender) till February 18, 2019, it was the March 29, 2018 version of the Law that applied; and (**ii**) from February 18, 2019 onwards it was the January 11, 2019 version of the Law that applied.

E. The 2018 failed tender for e-passports and supporting IT infrastructure

48. In this Sub-Section, Respondent explains: (**i**) how the 2018 tender for e-passports and supporting IT infrastructure took place and the immediate outcome of that tender (**Sub-Section II.E.1** below), (**ii**) the multiple complains concerning the results of that tender (**Sub-Sections II.E.2** and **II.E.5** below), (**iii**) the alleged 'media campaign' against Claimant; (**Sub-Section II.E.3** below) (**iv**) failure to conclude the public procurement contract between Claimant and the SRS and the expiration of the Garsu Pasaulis' bid (**Sub-Sections II.E.4** and **II.E.6** below); (**v**) the timelines of the corruption investigation carried out by the Kyrgyz authorities (**Sub-Section II.E.7** below) and the administrative court proceedings contesting the outcome of the tender (**Sub-Section II.E.8** below), and (**vii**) the formal pronouncement of the tender as failed (**Sub-Sections II.E.9** below).

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105 *Ibid*, Article 26(1).

106 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Articles 31(2)(3), 31(2)(4).

107 *Ibid*, Article 32(2).

1. Announcement of the 2018 Tender and its results

49. On October 23, 2018, the SRS announced a tender for manufacturing of blank e-passports and supporting IT infrastructure (the "**2018 Tender**").[108] The tender documentation was based on the standard structure and templates provided by Kyrgyz public procurement law and contained, *inter alia*, the following provisions:

    49.1. Clause 4.1 of the 'Instruction to the Bidders' (Annex 1 to the Tender Documentation) stipulated that "[t]*he Bidder shall bear all costs associated with preparing and submitting the bid.* ***The Buyer shall not be liable or responsible for such costs***."[109]

    49.2. Clauses 27.4 and 27.5 of the same Instruction provided as follows: "***The Buyer shall not be liable before the bidders in the event of cancellation of the tender or in the event that the tender is declared failed****. The procuring entity shall notify the suppliers about the cancellation or deeming the tender failed* ***without providing evidence of validity of these grounds*** […]."[110]

50. By November 19, 2018, five bidders, including Claimant, submitted their bids.[111]

51. Contrary to Claimant's description of its Bid (the "**Claimant's Bid**") in the Statement of Claim,[112] the Bid was not based on the fact that Claimant had previously incorporated a local Kyrgyz company or that Claimant previously manufactured excise stamps for a different Kyrgyz State organ. The Bid did not even mention Claimant's excise stamp manufacturing experience in the Kyrgyz Republic.

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108 **Exhibit C-005**, Information on the results of Tender No. 181023129327015 dated February 01, 2019. *See further* **Exhibit R-17**, 2018 Tender Documentation.

109 **Exhibit R-17**, 2018 Tender Documentation, Annex 1, Clause 4.1 [emphasis added].

110 *Ibid*, Clauses 27.4, 27.5 [emphasis added].

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

112 *See*, e.g., Statement of Claim, ¶¶114, 115. *See further* **Exhibit CWS-1-1**, Lukosevicius 1st WS, ¶35 ("*this was a very important tender for Garsu Pasaulis.* […] *Garsu Pasaulis also had the necessary software and hardware,* ***had the local company*** *and trained personnel.* […] ***Based on Garsu Pasaulis' long experience with the excise stamps in the Kyrgyz Republic*** […]*, Garsu Pasaulis was confident that* [it] *will successfully execute the e-passports contract* […]" [emphasis added]).

52. As explained in Sub-Section II.D above, upon the expiry of the bid submission deadline, the E-procurement platform automatically publishes the price offers of the bidders. In the 2018 Tender, the price offers, in ascending order, were as follows:

52.1. Mühlbauer ID Services GmbH ("**Mühlbauer**"): KGS 686,772,250 (approx. USD 9.8 million);

52.2. Veridos GmbH ("**Veridos**"): KGS 936,347,750 (approx. USD 13.4 million);

52.3. **Garsu Pasaulis (Claimant): KGS 940,150,000 (approx. USD 13.5 million)**;

52.4. IDEMIA France SAS ("**IDEMIA**"): KGS 948,713,750 (approx. USD 13.6 million); and

52.5. the Republican state enterprise under the right of economic management "Banknote Factory of the National Bank of the Republic of Kazakhstan" ("**Banknote Factory NBRK**"): KGS 1,257,847,112.50 (approx. USD 18 million).[113]

53. The Tender Commission of the SRS analyzed the bids made by the five bidders from November 19, 2018 till February 1, 2019.

54. On February 1, 2019, the results of the 2018 Tender were published on the E-procurement platform. The Tender Commission found the following shortcomings in the bids of Mühlbauer, Veridos and the Banknote Factory NBRK, disqualifying them from the Tender:[114]

Documents / information missing from the bid	Mühlbauer	Veridos	BF NBRK
List of goods to be manufactured and delivery schedule	X	X	X
Copies of executed contacts or acceptance acts, attesting the bidder's experience in manufacturing e-passports	X	X	
Letter from the bidder, formally confirming that the person who has signed the bid was authorized to do so	X		X

113 **Exhibit C-005**, Information on the results of Tender No. 181023129327015 dated February 01, 2019.

114 *Ibid.*

Documents / information missing from the bid	Mühlbauer	Veridos	BF NBRK
Information on the equipment and subcontractors that the bidder intended to use for e-passport manufacturing	X		
Price table	X		
Documents confirming that the bidder has an open credit line sufficient to carry out the project			X
Compliant Power of Attorney			X

55. Of the two compliant bidders, Claimant and IDEMIA, the former's price offer was slightly lower and accordingly it was deemed the winning bidder of the 2018 Tender.

2. Complaints of Mühlbauer and IDEMIA against the results of the 2018 Tender to the Independent Interdepartmental Commission

56. As explained in Sub-Section II.D above, under the Law on Public Procurement, after the announcing of the winning bid, an unsuccessful bidder has seven days to file a complaint with the Independent Interdepartmental Commission.[115] Two such complaints were filed:

56.1. On February 5, 2019, Mühlbauer filed its complaint with the Independent Commission ("**Mühlbauer February 5, 2019 Complaint**"), noting, *inter alia*, that: (**i**) its price offer was approx. KGS 253.38 million less than Claimant's; (**ii**) it provided recommendation letters confirming its passport printing experience, whereas the contracts themselves are strictly confidential and cannot be shared with a third party (i.e. the Tender Commission); (**iii**) the tender bid did include information on the equipment to be used, the delivery schedule and the price table; and (**iv**) its understanding was that a formal confirmation letter was not required for this Tender.[116] In its complaint, Mühlbauer also highlighted several perceived shortcomings of Claimant's and IDEMIA's bids, including the underwhelming number and unsatisfactory technical features of e-passports that each company had previously manufactured.

56.2. On February 7, 2019, IDEMIA filed its own complaint with the Independent Interdepartmental Commission ("**IDEMIA February 7, 2019 Complaint**"),

115 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 32(2)(1).

116 **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.

pointing out, *inter alia*, the following: (**i**) Claimant's experience in e-passport manufacturing did not comply with the requirements of the 2018 Tender, as it personalized less than 2 million e-passports over the past five years; and (**ii**) Claimant's shareholder, SEMLEX Europe S.A., and its beneficial owner, Mr. Karaziwan are "*under investigation in Europe for corruption and traffic of passports*," as confirmed by publicly-available reports on the DRC and Comoro Islands episodes.[117]

57. In its Statement of Claim, Claimant complains that it has "*never received any notices or requests from the Tender Commission or the* [SRS]" in relation to those two complaints.[118] This is false. Upon receipt of the two Complaints, the Department of Public Procurement suspended the 2018 Tender. On February 11, 2019, all five bidders - including Claimant - were informed by the SRS of the suspension and were requested to extend the validity of their bids by 45 days.[119] On the very next day, Claimant acknowledged receipt of this letter and confirmed that its bid is extended by 45 days, i.e. until April 2, 2019.[120]

58. Aside from this, and in any event, Claimant could not have had any reasonable expectation to receive "*notices or requests from the Tender Commission or the* [SRS]" for two reasons:

    58.1. The Regulation of the Independent Interdepartmental Commission empower the Commission to request the relevant party (here, Claimant) to provide "*copies of any supporting documents*."[121] On its face, this is a *right* of the Independent Commission, not an *obligation*. As set out below, in the case at hand, the Independent Interdepartmental Commission was satisfied that the record before it, namely, all

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

118 Statement of Claim, ¶131.

119 **Exhibit R-36**, Letter of the SRS to the bidders dated February 11, 2019. Claimant's assertion that the suspension of the tender should be formalized by way of a separate decision of the Tender Commission (*see* Statement of Claim, ¶¶186-187, quoting **Exhibit CER-2-1**, Legal Opinion of Natalia Alenkina dated August 12, 2021, ¶¶108-112) is unfounded. As explained by Justice Davletbayeva in her expert report, no separate decision is required to be issued specifically by the Independent Interdepartmental Commission for suspension of the procurement procedure during examination of the bidders' complaints. Such decision is issued by the Secretariat of the Commission, which is the Department of Public Procurement. *See* **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶67.

120 **Exhibit R-37**, Letter of Garsu Pasaulis to the SRS dated February 12, 2019.

121 **Exhibit RLA-9**, Regulation on the work of the IIC, ¶45.

underlying documents of the tender process, the complaint and its supporting documents are sufficient to examine the complaint.

58.2. Further, the sessions of the Independent Interdepartmental Commission are "*open to the parties, as well as other persons interested in the objective examination of the case, upon agreement of the parties.*"[122] In the case at hand, Claimant could have - but did not - participate in any of the sessions of the Independent Interdepartmental Commission.[123]

59. As to the actual examination of the complaints by the Independent Interdepartmental Commission, the Mühlbauer February 5, 2019 Complaint was examined and partially dismissed on February 21, 2019.[124] Notably, the Independent Interdepartmental Commission: (**i**) deemed two out of five reasons for rejection of Mühlbauer's bid unfounded; and (**ii**) admitted that Claimant personalized approx. 1.8 million e-passports over the past five years (whereas the tender requirement was for at least 2 million personalized e-passports), but deemed this to be a "*minor inconsistency.*"[125]

60. In turn, the IDEMIA February 7, 2019 Complaint was examined and dismissed on February 19, 2019. As recorded in the minutes of the Independent Interdepartmental Commission: (**i**) IDEMIA's assertion that Claimant personalized less than 2 million e-passports over the past five years was deemed unfounded based on the documents confirming Claimant's experience that it provided with its tender bid; and (**ii**) IDEMIA's assertions concerning Claimant's shareholders were deemed unsupported by documentary evidence and dispelled by certificates of good standing that Claimant also provided with its tender bid.[126]

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122 *Ibid*, ¶53.

123 *See* **Exhibit CWS_Lukosevicius_1/23**, Protocol No. 148803110 re Review of complaint by the Independent Interdepartmental Commission dated February 19, 2019 and **Exhibit CWS_Lukosevicius_1/24**, Protocol No. 149153656 re Review of complaint by the Independent Interdepartmental Commission dated February 21, 2019, listing the participants of the sessions. Notably, the February 18, 2019 session of the Independent Interdepartmental Commission concerning the Mühlbauer February 5, 2019 Complaint was attended by, *inter alia*, an attaché from the German Embassy and a journalist.

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

125 *Ibid*, pp. 4, 5.

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

61. The minutes also reflect that the Independent Interdepartmental Commission requested the Department of Public Procurement to solicit the State Committee of National Security ("**GKNB**") and the State Financial Intelligence, relaying the "*information on corruption offences of the beneficial owners of the* [Claimant]*, set out in* [IDEMIA's] *complaint*" in view of the Kyrgyz AML legislation.[127] Evidently, neither Independent Interdepartmental Commission, nor the Department of Public Procurement have any investigative powers (or for that matter any powers outside of the public procurement process), but the latter is obligated to inform the enforcement authorities of any identified offences.[128]

62. The outcome of examination of the Mühlbauer February 5, 2019 Complaint and the IDEMIA February 7, 2019 Complaint was reported in the Kyrgyz press.[129]

3. Alleged 'media campaign' against Claimant

63. Claimant purports that the Mühlbauer February 5, 2019 Complaint and the IDEMIA February 7, 2019 Complaint coincided with an outright international media campaign against Claimant, prompting Claimant's representatives to organize, on February 14, 2019, a press-conference in Bishkek to address that media campaign.[130] This is materially exaggerated.

64. Claimant's own exhibits contain only <u>one</u> Kyrgyz press article preceding the February 14, 2019 press conference.[131] This can hardly be described as a 'media campaign', let alone against Claimant. With repeated political turmoil of the last decades, the Republic has

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127 *Ibid*, p. 3.

128 *See* **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 9(2)(6). Claimant's assertion that it had learned about the February 2019 request of the Independent Interdepartmental Commission for the Department of Public Procurement to solicit the GKNB only in or around mid-April 2019 (*see* Statement of Claim, ¶144, citing **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) is implausible. The February 2019 minutes of the Independent Interdepartmental Commission are publicly available and Claimant itself exhibits them to its Statement of Claim. The minutes expressly record the Independent Interdepartmental Commission's request to the Department of Public Procurement to reach out to the GKNB.

129 **Exhibit C-047**, Kaktus, "The Complaints Commission considered applicatoins for the tender for e-passports from participants" dated February 20, 2019 and **Exhibit R-38**, Vb.kg, Was SRS mistaken in consideration of the documents of the participants of "passport tender"? dated February 20, 2019.

130 Statement of Claim, ¶127 ("***<u>At the same time</u>***, *the negative articles started to pour into local and international media related to Garsu Pasaulis' Belgian shareholder Semlex*" [emphasis added]). *See further* ibid, ¶131; **Exhibit CWS-1-1**, Lukosevicius 1st WS, ¶¶45-47, 70; **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶¶47-48.

131 **Exhibit R-39**, Kaktus, "Scandalous glory of the company that won the tender for the production of E-passports in theKyrgyz Republic" dated February 11, 2019.

inherited vibrant media landscape. With Respondent "*consistently demonstrat*[ing] *the highest scores on freedom of speech and expression in Central Asia, including in sections on media independence and the expression of political views*"[132] and with "*pluralism of the Kyrgyz media*" being described as "*exceptional in Central Asia*,"[133] media in the country have historically been outspoken, and openly critical of different, often opposed, social groups, including the State and private actors. Therefore, Claimant's allegation that it was subjected to a smear media campaign is, yet again, entirely groundless.

4. Claimant's interactions with the SRS in February 2019

65. Claimant asserts in its Statement of Claim that following the announcement of the winner of the tender, "*no further negotiations* [of the contract] *were envisioned, and the parties just needed to sign* [it] *and start executing it immediately*," whereas "[Claimant] *and the* [SRS] *were only concerned with the technical details of the e-passports contract, such as communication addresses, names of responsible personnel, and all clerical details*."[134]

66. This is highly inaccurate. Even on Claimant's case, following the announcement of the tender results, Claimant had two email interactions with the SRS:

66.1. On February 4, 2019, the SRS requested that Claimant provide originals of its tender bid and informed it that the e-passport supply contract "*will be concluded according to the template annexed to the tender documentation, taking into consideration the approvals, edits and annexes of the Parties*."[135] In reply, Claimant asked the SRS to "*confirm that the draft of the contract will be sent by you and until that time we do not have to do anything.*" On February 6, 2019, the SRS informed Claimant that the draft contract "*is in the stage of internal approvals and will be sent to you in the coming days*."[136]

66.2. On February 21, 2019, upon the dismissal of Mühlbauer's and IDEMIA's complaints by the Independent Interdepartmental Commission, the SRS requested Claimant to fly out to the Kyrgyz Republic to sign the contract. In reply, Claimant: (**i**) confirmed on the same day that its representative can be in Bishkek by February

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132 **Exhibit R-40**, The Foreign Policy Centre, Dr. Elira Turdubaeva, "Media landscape in Kyrgyzstan: Caught between elite capture and control of political and business interests" dated February 28, 2021.

133 *Ibid.*

134 Statement of Claim, ¶¶135 and 137.

135 **Exhibit C-030**, Email exchanges between SRS and Garsu Pasaulis dated February 06, 2019.

136 *Ibid.*

> 25, 2019, (**ii**) requested to send over "*the draft* [contract] *so that we can coordinate it with our lawyers*," and (**iii**) inquired on whether the bank performance guarantee was required "*before signing the contract or a few days after*."[137]

67. Evidently, the parties intended to make amendments to the draft / template contract annexed to the tender documentation and were, in fact, far from actually entering into the contract. In early February 2019, the SRS did not send over the draft contract as the tender process was suspended in view of Mühlbauer's and IDEMIA's complaints. In late February 2019, as set out in the next Section, the tender process was *de facto* suspended in view of a corruption investigation into the 2018 Tender by the Kyrgyz authorities.

68. In fact, contemporaneous testimony of Mr. Uran Tynaev, a Director of Claimant's Kyrgyz subsidiary, given to the Kyrgyz authorities is clear on the sequence of the February 2019 events:

> "In February 2019, I spoke with Vitas Mieliauskas, who told me that they were supposed to arrive on Monday to discuss the contract and sign it with the SRS under the Government of the Kyrgyz Republic, however, he then called me back and told me that he will not come, as there are inquiries ongoing within the SRS with respect to the tender and the conclusion of the deal has been postponed."[138]

5. Further complaints of Mühlbauer and IDEMIA against the results of the 2018 Tender and opening of a corruption investigation in relation to the 2018 Tender

69. In addition to Mühlbauer's and IDEMIA's complaints to the Independent Interdepartmental Commission, 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.[139]

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137 **Exhibit C-029**, Email exchanges between SRS and Garsu Pasaulis dated February 21, 2019. February 21, 2019 was a Thursday. Claimant's representative wrote that he could be "*in Bishkek on Monday, in the morning*." The next Monday was February 25, 2019.

138 **Exhibit R-41**, Minutes of questioning of Mr. Tynaev U.S. dated March 04, 2019, p. 3.

139 **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,

70. 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.[140]

71. On February 25, 2019, the Main Office of Criminal Investigations at the GKNB assigned a team of investigators to the case.[141]

72. Throughout its Statement of Claim, Claimant repeatedly contends 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*,"[142] and that it purportedly learned about the investigation only sometime in April 2019 from the local press. This is untrue:

72.1. 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.[143] In fact, Mr. Tynaev acted as the Director of a local subsidiary of Claimant incorporated for its excise stamp manufacturing operations.

72.2. 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.[144] They did not do so, instead requesting the GKNB,

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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.

140 **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.

141 **Exhibit R-52**, Order on conducting the investigation by a group of investigators (on the creation of an investigation team) dated February 25, 2019.

142 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.

143 **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.

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

via their local counsel Mr. Zhumashev, to send over any questions to them in writing.[145] Claimant's local counsel then disclosed this move to Kyrgyz media.[146]

72.3. 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.[147] To the best of Respondent's knowledge, Claimant simply ignored this request.

73. In fact, Claimant's assertion that it only learned about the GKNB investigation sometime in April 2019 is chronologically unsound. On Claimant's case: (**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*."[148] If Claimant has only learned about the GKNB investigation in April 2019, this means that it had simply remained silent, without reaching out to the SRS or any other Kyrgyz State organ, urging them to proceed with the signature of the contract. This cannot be. It is far more plausible that Claimant became aware about the GKNB investigation in late February 2019, and decided to let the investigation run its course, without making any further attempts to sign the contract.[149]

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145 **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.

146 **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.

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

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

149 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.

6. The April 2019 expiration of the bids and - with it - the de jure *expiration of the 2018 Tender*

74. As set out at paragraph 57 above, in mid-February 2019, the 2018 Tender bidders - including Claimant - have agreed to extend their bids by 45 days, i.e. by April 2, 2019, in view of the pending complaints by two of the bidders.[150]

75. The 2018 Tender bidders - including Claimant - did not extend their bids beyond April 2, 2019. The contract between the SRS and Claimant could only be concluded up to that date.

76. Claimant dedicates considerable portion of Statement of Claim reiterating its assertion that the winning bid's expiration was "*not in accordance with the applicable law*."[151] Yet this position is seriously misguided and simply wrong as matter of Kyrgyz law.[152] As explained at paragraph 42.10 above, under the Kyrgyz law, the contract for public procurement between the winning bidder and the procuring entity can only be concluded within the validity period of the bid.[153] Accordingly, as confirmed by Judge Davletbayeva, the expiration of the bid of the winning bidder constitutes an unconditional bar to conclusion of the contract between the bidder and the procuring entity.[154] Further, as explained by Judge Davletbayeva, Law on Public Procurement, as amended on January 11, 2019,[155] stipulated that a tender shall be recognized as failed once the (winning) bid expires.[156]

77. In the case at hand, the contract between Claimant and the SRS was never concluded before April 2, 2019, with Garsu Pasaulis abstaining from reaching out to the procuring entity since their last exchange on February 21, 2019.

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150 *See* **Exhibit R-36**, Letter of the SRS to the bidders dated February 11, 2019; **Exhibit R-37**, Letter of Garsu Pasaulis to the SRS dated February 12, 2019.

151 Statement of Claim, *see*, e.g., ¶¶190, 192 – 194, 492.

152 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), applied to the 2018 Tender from February 18, 2019 onwards. *See* **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶70.1 – 70.3.

153 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 32(3). Yet the same requirement was stipulated in the previous edition of the Law. *See* **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 32(3).

154 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶70 – 71, 73; **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 32(3); **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 32(3).

155 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), *see* **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶49.

156 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶73 – 74; **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(2)(3).

78. The SRS made its position on the expiration of the bids - and of the impact that has on the whole tender procedure - crystal clear the same month, April 2019, by way of an 'official clarification' and as further reported in Kyrgyz media:[157]

> The validity of the tender applications of these companies expired on 2 April 2019, the contract with the successful tenderer UAB 'Garsu Pasaulis' (Lithuania) [i.e. Claimant] was not concluded, wherefore in accordance with the Law of the Kyrgyz Republic "On public procurement", **due to the expiration of the validity period of the tender applications [bids] and the absence of a concluded contract, - the tender held is deemed to not have taken place [failed]**.

79. Claimant now complains that it "*did not receive any further communication or notices or any information from the Tender Commission or the* [SRS] *regarding the fate of the 2018 Tender.*"[158] Plainly, the treatment Claimant expects to have received from the SRS is highly unrealistic: (**i**) Kyrgyz law does not provide for any individual notifications to the bidders, warning them that their bids are about to expire or that they have expired;[159] (**ii**) Claimant itself admits that it has seen the SRS's April 2019 press release declaring the Claimant's Bid expired;[160] and, (**iii**) as expounded by Judge Davletbayeva, under Kyrgyz law, since upon the expiry of the bid the right of the winning bidder to enter into public procurement contract is automatically terminated,[161] the tender *de jure* fails.[162]

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157 **Exhibit C-048**, Official clarification of the State Registration Service regarding the Procurement of Blank Biometric Passports for Travel Abroad dated April 17, 2019 [emphasis added]. Of note is that Claimant refers to the press release of the SRS, dated April 17, 2019 as 'Press release of April 17, **2020**' (*See* Statement of Claim, footnotes 190, 197, 200, 212, and 217). This is inaccurate: the publication dates back to 2019, which is confirmed by contemporaneous press reports. *See also* **Exhibit CWS_Lukosevicius_1/30**, Kloop.kg, "GRS: The tender for the purchase of passports was held in accordance with law" dated April 12, 2019, p. 1 (quoting SRS's ex-Chairperson, Ms. Shaikova: "*the contract with* [Claimant] *was not concluded because the deadline for the tender bid has expired*").

158 Statement of Claim, ¶195.

159 The Law on Public Procurement only requires the procuring entity to publish information on recognition of tender as failed or cancellation of tender on the e-procurement website. The Law makes no reference to any purported obligation of the procuring entity to contact each bidder directly to inform them of the recognition of the tender as failed. *See* **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(3).

160 Statement of Claim, ¶196, citing **Exhibit C-048**, Official clarification of the State Registration Service regarding the Procurement of Blank Biometric Passports for Travel Abroad dated April 17, 2019.

161 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶73.

162 *Ibid*, ¶¶70, 97, 101.

7. The timeline of the corruption investigation in relation to the 2018 Tender and Claimant's flawed description of that investigation

80. The GKNB investigation in relation to the 2018 Tender continued throughout 2019 and ended with a guilty verdict in early 2020 against three State officials: (**i**) Mr. Talant Abdullayev, the Director of Infocom State Enterprise, a State-owned IT integrator involved in the 2018 Tender; (**ii**) Mr. Daniyar Bakchiev, the State Secretary of the SRS, who supervised the Department of Public Procurement of the SRS, and (**iii**) Mr. Ruslanbek Sarybaev, the Deputy Chairman of the SRS and the Chairman of the Tender Commission in the 2018 Tender.[163] Messrs. Abdullayev and Sarybaev were found guilty of corruption, while Mr. Bakchiev was found guilty of assisting with corruption. All three gentlemen have plead guilty, entered into cooperation agreements with the investigative organs, and were sentenced to hefty fines.

81. In this arbitration, Claimant is raising a multitude of accusations against the Republic in relation to this corruption investigation. As Respondent demonstrates below, none of those accusations hold water.

82. **First**, Claimant relies on several local media articles attempting to portray the corruption investigation as concerning only a modest (approx. EUR 330) payment that it made to Mr. Almaz Bekenov, a Kyrgyz IT specialist, back in 2016 in reimbursement of his travel costs to meet with Claimant's representatives in Almaty.[164] This, Claimant continues, would be disproportionate to the KGNB "*arrest*[ing] *and det*[ention] [of] *employees of the* [SRS] *Tender Commission, raid*[s] [of] *their homes and offices*," as well as the "*raid*[s] [of] *homes and offices of* [Claimant's] *representatives and affiliates in the Kyrgyz Republic.*"[165]

83. The reality is that the corruption investigation has uncovered that the whole 2018 Tender was marred with flagrant breaches of Kyrgyz law. That much is evident from the publicly available December 26, 2019 Sentencing Decision of the Pervomaiskiy district court with respect to Messrs. Abdullayev, Bakchiev and Sarybaev.[166] Specifically, the corruption

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163 **Exhibit C-042**, Kaktus, "E-passports tender. The court found three SRS officials guilty and sentenced to a fine" dated January 08, 2020.

164 *See* Statement of Claim, ¶¶148-150.

165 *Ibid*, ¶151.

166 In the Kyrgyz Republic, court judgements in both civil and criminal cases are publicly available on the website of the Supreme Court (www.sot.kg). For criminal matters, the judgements are anonymized. The December 26, 2019 Sentencing Decision is available at: http://act.sot.kg/ru/delo/229419. For convenience, Respondent provides the non-anonymized copy of the Sentencing Decision, *see* **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district

investigation revealed (as admitted by Messrs. Abdullayev, Bakchiev and Sarybaev in their testimony) that:

83.1. In early Spring 2016, Mr. Abdullayev met with a Claimant's representative and one of Claimant's witnesses in this arbitration, Mr. Vitautas Mieliauskas, where the latter expressed Claimant's intention to participate in the forthcoming tender for the manufacturing of e-passports in the Kyrgyz Republic;[167]

83.2. In May-June 2016, Messrs. Abdullayev and Mieliauskas "*have established confidential relations concerning the forthcoming tender* […] *and the conditions of* [Claimant's] *participation in this tender were discussed beforehand*;"[168]

83.3. In June 2016, Messrs. Abdullayev and Mieliauskas met in Almaty, Kazakhstan, at Mr. Mieliauskas' expense, where he proposed "*very significant compensation*" for Mr. Abdullayev "*and other State officials*" for arranging the tender to be won by Claimant.[169] This Almaty meeting was off-books and attended and facilitated by Mr. Azamat Bekenov, a Kyrgyz IT specialist, and an acquaintance of Mr. Abdullayev.[170] Mr. Bekenov sought and obtained reimbursement of his travel expenses, which Claimant confirmed in this arbitration.[171]

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court in Case No. УД-1244/19.Б3 dated December 26, 2019. Evidently, Claimant's assertion at paragraph 172 of the Statement of Claim, that "[t]*here were no public reports on the exact facts or grounds that the verdict was based on*" is wrong.

167 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.Б3 dated December 26, 2019, p. 2.

168 *Ibid.* For exhaustiveness, the nature of these 'confidential relations' was described in greater detail in an interview of Mr. Azamat Bekenov, a Kyrgyz IT specialist, and an acquaintance of Mr. Abdullayev. Specifically, in May 2016, Mr. Bekenov and two SRS employees (upon instructions of Mr. Abdullayev) were flown to Riga, Latvia to a security printing conference. All expenses were paid by a Lithuanian partner company of Claimant. *See* **Exhibit R-64**, Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019, p. 4.

169 *Ibid.*

170 The minutes of Mr. Bekenov's interview with the GKNB elaborate on this June 2016 meeting in Almaty: (**i**) immediately prior to the meeting, Claimant's Mr. Mieliauskas asked Mr. Bekenov to "*have a word with Mr. Abdullayev and tell him not to be afraid and speak freely*;" (**ii**) during the Almaty meeting, Mr. Mieliauskas went as far as to propose to open bank accounts in Dubai to Mr. Abdullayev "*and his colleagues*" if they "*assist with awarding to* [Claimant] *the tender for new passports*;" (**iii**) Mr. Abdulayev and Mr. Mieliauskas discussed in detail the "*technical parameters of the tender.*" *See* **Exhibit R-64**, Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019, pp. 4, 5.

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

83.4. Thereafter, Mr. Abdullayev, "*under the influence of the proposal he received*," "*shared the requirements of the tender documentation and provided assistance to* [Claimant] *for them to secure a win in the forthcoming tender*."[172]

83.5. In Autumn 2018, when the tender was announced, the then-Chairperson of the SRS, Ms. Alina Shaikova, organized a group of high-level SRS employees, including Messrs. Abdullayev, Bakchiev and Sarybaev to "*receive illicit material assets*" (i.e. bribes).[173]

83.6. In November-December 2018, the SRS Tender Commission commenced to analyze the five tender bids it has received and realized that all five bids lacked certain documentation. This was supposed to result in a recognition of the tender as failed.[174] Yet, Mr. Sarybaev, as the Chairman of the Tender Commission, avoided signing the relevant procedural documentation and convinced other members of the Tender Commission to reconsider their decision. He was assisted by Mr. Bakchiev, the State Secretary of the SRS, who supervised the Department of Public Procurement of the SRS. Mr. Bakchiev arranged for a written opinion on the materiality of the documentation missing from all five bids, issued by the Department of Public Procurement. Armed with this written opinion, Messrs. Sarybaev and Bakchiev managed to re-convince the members of the Tender Commission so that the tender process could continue.[175]

83.7. 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, including that of Garsu Pasaulis. Crucially, the members of the working group did not have the required

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172 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.БЗ dated December 26, 2019, p. 2. Again, this is further elaborated on in the minutes of Mr. Bekenov's interview with the GKNB – *see* **Exhibit R-64**, Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019, pp. 5-6.

173 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.БЗ dated December 26, 2019, p. 13.

174 Pursuant to Article 31(2)(1) of Law on Public Procurement, a tender is recognized as failed if all the bids are rejected (which, *inter alia*, occurs due to non-compliance of the bids with the tender requirements stipulated in the tender documentation), *see* **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(2)(1).

175 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.БЗ dated December 26, 2019, pp. 5-6.

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.[176]

83.8. For his 'services' in relation to the 2018 Tender, Mr. Abdullayev received USD 20,000, in cash, from Ms. Shaikova.

83.9. 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 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.[177]

84. Importantly, the December 26, 2019 Sentencing Decision only concerns Messrs. Abdullayev, Bekenov and Sarybaev. Other investigations - including against Ms. Shaikova, the then-Chairperson of the SRS - are still ongoing. In fact, Ms. Shaikova would appear to be the only person who could shed further light on the corruption scheme deployed in the course of the 2018 Tender, with this even more so as Claimant have evaded GKNB interviews. Unfortunately, Ms. Shaikova, too, ignored the GKNB's interview requests and fled the country. In July 2019, a search warrant has been issued against her.[178] According to Interpol, she has last been seen in transit in Qatar.[179] Claimant's repeated, but vague

176 *Ibid*, pp. 6-7.

177 *Ibid*, pp. 7-8.

178 **Exhibit R-65**, Ruling on the placement on wanted list, the Head of the Main Investigative Directorate of the GKNB dated July 16, 2019.

179 **Exhibit R-66**, Letter from the National Center for Interpol of the Kyrgyz Republic to GKNB dated August 07, 2019.

insinuations that the Kyrgyz Republic might have had something to do with Ms. Shaikova's 'disappearance'[180] are offensive and are strongly denied by the Republic.

85. Evidently, awarding a USD 18 million project following a flawed and corrupt tender, in a country with an average monthly salary of USD 271[181] is a serious matter. Claimant's grievances about the scale of the GKNB investigation are misplaced, to say the least.

86. **Second**, Claimant alleges that Messrs. Marat Sagyndykov and Uran Tynaev, two Kyrgyz nationals that assisted Claimant in preparing and submitting its tender proposal, were subject to "*threats and pressure*" from, and even a "*witch-hunt*" by, the GKNB during the corruption investigation, as well as raids on their "*homes and offices*."[182]

87. The Kyrgyz Republic formally and firmly rejects these accusations. Messrs. Sagyndykov and Tynaev were, indeed, questioned, and their homes searched as part of the GKNB's corruption investigation - in compliance with Kyrgyz law and due process. Specifically:

87.1. On March 4, 2020, Mr. Tynaev was interviewed for a little over two hours by the GKNB over his relationship with Claimant and involvement in the 2018 Tender. At the outset of the interview, Mr. Tynaev confirmed in writing that he chooses to be interviewed without legal counsel. At the end of the interview, Mr. Tynaev was given the minutes of his interview and confirmed, in writing, that he agrees with its content and does not have any modifications or corrections to make.[183]

87.2. On the same day, the GKNB interviewed Mr. Sagyndykov for three hours. As with Mr. Tynaev, Mr. Sagyndykov confirmed in writing that he does not require legal counsel and, at the end of the interview, that he agrees with the minutes.[184] In this

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180 *See* Statement of Claim, ¶25 ("*Alina Shaikova was put on the wanted list, and her whereabouts are not known to this date*"); ¶171 ("*The Head of the* [SRS] *- Alina Shaikova, was dismissed, put on a wanted list, and later disappeared*" [internal citations omitted]); and ¶¶248-249 ("*On 5 August 2019, the former Head of GRS - Alina Shaikova was also immediately summoned for questioning by the GKNB, and an international arrest warrant was issued against her. She was put on the international wanted list. However,* ***Alina Shaikova has never showed up****. She has left her family in the Kyrgyz Republic, h****as gone out of sight and was never seen again in the Kyrgyz Republic or abroad****. ****Her whereabouts or her health condition are currently unknown***" [emphasis added]).

181 **Exhibit R-67**, Trading Economics, Kyrgyzstan Wages, from January 2021 until December 2021.

182 Statement of Claim, ¶¶153-161, 162; **Exhibit CWS-3-1**, First Witness Statement of Marat Sagyndykov dated August 22, 2021, ¶¶20 – 26; 29 – 31.

183 **Exhibit R-54**, Minutes of questioning of Mr. Sagyndykov dated March 04, 2019.

184 **Exhibit R-41**, Minutes of questioning of Mr. Tynaev U.S. dated March 04, 2019.

arbitration, Mr. Sagyndykov alleges that the GKNB would have "*take*[n] [his] *phone and deleted important evidentiary information about the threats that* [he] *and* [Claimant] *received from Mr. Azamat Bekenov*" - the Kyrgyz IT specialist who facilitated the 2016 off-the-books meeting between Claimant's representatives and Mr. Abdullayev, a State official intimately involved in the 2018 Tender.[185] This allegation lacks any logic, as the very purpose of the corruption investigation was to uncover the unlawful circumstances of the 2018 Tender. In reality, in the course of the interview, the GKNB investigators took copies of certain message exchanges from Mr. Sagyndykov's phone. One such exchange between Messrs. Tynaev and Sagyndykov from February 22, 2019 is revealing of their role in the dire irregularities of the 2018 Tender, and merits being reproduced in full:[186]

[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 ☺
[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 ☺

185 Statement of Claim, ¶158 and **Exhibit CWS-3-1**, Sagyndykov 1st WS, ¶¶22-23.

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

[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.

87.3. Implausible as this may be, Mr. Sagyndykov ensured the GKNB investigators in the course of another interview that he "*did not recall*" what this lively message exchange was about.[187]

87.4. On April 1, 2019, the GKNB conducted a house search of Mr. Sagyndykov. In its Statement of Claim, Claimant emphasizes that Mr. Sagyndykov "*ha*[s] *never been recognized as suspect*[] *in any crimes alleged by the KGNB and only had the status of* [a] *witness*[]."[188] That remark misses the point - Kyrgyz law, as most legal systems, allows searches to be carried out in the course of criminal investigations, and this without the owner of the premises being recognized as suspect.[189] For avoidance of doubt, the search in question: (**i**) was carried out based on a court order; (**ii**) lasted two hours less than Claimant now alleges; and (**iii**) was finalized by way of a protocol, signed, without any reservations, by Mr. Sagyndykov himself.[190]

87.5. On April 1, 2019, Messrs. Tynaev and Sagyndykov were interviewed again. In this arbitration, Mr. Sagyndykov alleges that the KGNB "*threatened and pressured*" him "*to testify against* [Claimant] *and to admit the false allegations of corruption put forward by the GKNB.*"[191] The Kyrgyz Republic firmly rejects these insinuations, which are even more improbable given that Mr. Sagyndykov was, this time, accompanied by legal counsel, who have also confirmed the interview minutes and did not express any reservations or objections to how the interviews were carried out.[192]

187 **Exhibit R-57**, Minutes of interrogation of Mr. Sagyndykov dated September 09, 2019.

188 Statement of Claim, ¶159.

189 **Exhibit RLA-12**, Criminal Procedure Code of the Kyrgyz Republic dated February 02, 2017, Article 205(1), 205(4).

190 **Exhibit R-69**, Minutes of Search (Sagyndykov) dated April 01, 2019.

191 Statement of Claim, ¶160 and **Exhibit CWS-3-1**, Sagyndykov 1st WS, ¶30.

192 **Exhibit R-56**, Minutes of questioning of Mr. Sagyndykov dated April 01, 2019.

88. **Third**, Claimant complains that "*it was not clear what sort of accusations were brought by the GKNB*" during their corruption investigation, and that the GKNB "*failed to provide any valid reasons*" for that investigation.[193] Here, Claimant ignores a basic principle of any pre-trial investigation - its details are confidential and can only be disclosed to the accused when the pre-trial investigation is over.[194] This specific corruption investigation ended with an accusation of Messrs. Abdullayev, Bakchiev and Sarybaev, not Claimant.

89. **Fourth**, Claimant accuses the GKNB of a "*smear campaign*" against it, which resulted in media articles "*filled with ungrounded accusations against* [Claimant]*, alleging in a totally vague manner,* [Claimant's] *inappropriate involvement in the 2018 Tender.*"[195] This, too, is false. In reality, Kyrgyz State organs, specifically, the GKNB has made a handful of press releases and public statements, succinctly describing the corruption investigation and the circumstances of the 2018 Tender:

89.1. On April 2, 2019, the GKNB issued a press released confirming that it has discovered "*facts of affiliation of certain SRS officials in the course of the* [2018 Tender]." The press released did not explicitly name Garsu Pasaulis, yet pointed out that the GKNB has collected evidence of those SRS officials "*ignoring the requirements of the* [Kyrgyz state procurement legislation]" and "*purposefully defending the interests* [of the winning bidder]."[196]

193 Statement of Claim, ¶¶152, 165. *See also* ibid, ¶172.

194 **Exhibit RLA-12**, Criminal Procedure Code, Article 160(1). *See* also *ibid*, 251-254.

195 Statement of Claim, ¶¶163-166, 175-179.

196 **Exhibit R-70**, Press release of the GKNB, "Anti-corruption Center of the GKNB: Facts of affiliation of specific public officials of the SRS in organizing the tender for procurement of biometric passports" dated April 02, 2019. Evidently, given the public resonance of the corruption investigation, this was picked up the same day by Kyrgyz media, *see* **Exhibit C-031**, Centralasian.org, "Kyrgyzstan is investigating a fact of 'corruption' in tender for the production of blank passports" dated April 02, 2019; **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; **Exhibit C-038**, Kloop.kg, "State Committee for National Security: SRS officials entered into an agreement with the winner of the tender for the production of passports" dated April 02, 2019; **Exhibit C-043**, Kaktus, "Adviser to the President and Head of the State Registration Service Shaikova are investigated in a criminal case with e-passports" dated April 02, 2019; **Exhibit R-71**, Sputnik, "The State Committee for National Security told the details of the case on the purchase of epassports" dated April 02, 2019; **Exhibit R-72**, Sputnik, "The winner of the tender paid for foreign trips to the staff of the State Registration Service - State Committee for National Security dated April 02, 2019; and **Exhibit R-73**, Kloop, "State committee for National Security: SRS officials entered into an agreement with the winner of the tender for the production of passports" dated April 02, 2019.

89.2. On April 19, 2019, the GKNB updated the public with two further press releases, confirming that Messrs. Abdullayev, Bakchiev and Sarybaev were detailed in the course of the corruption investigation, and outlining the main allegations against them.[197] Notably, all of those allegations were later on confirmed by the confessions of Messrs. Abdullayev, Bakchiev and Sarybaev and formed part of the December 26, 2019 Sentencing Decision summarized at paragraph 83 above.

89.3. On April 24, 2019, the then-Chairman of the GKNB, Mr. Idris Kadyrkulov, reported on the progress of the corruption investigation at the plenary session of the Kyrgyz parliament. Specifically, Mr. Kadyrkulov mentioned: (**i**) the multiple concerns that GNKB has with respect to the way the 2018 Tender was prepared and conducted (that have all been subsequently adopted in the December 26, 2019 Sentencing Decision); and (**ii**) the widely-reported corruption scandals that Claimant is associated with (as listed at paragraphs 35-37 above).[198] Strikingly, Claimant asserts in its Statement of Claim that Mr. Kadyrkulov "*failed to provide any valid reasons for the GNKB's investigation*,"[199] and yet this is precisely what he did over the course of his 11-minute speech to the Kyrgyz parliament.

89.4. On August 2 and 7, 2019, the GKNB informed the public that a search warrant has been issued against Mrs. Shaikova, the ex-Chairperson of the SRS, after she failed to show up for an interview.[200]

89.5. Lastly, on January 21, 2022, the GKNB updated the public on the outcome of the corruption investigation with respect to Messrs. Abdullayev, Bakchiev and Sarybaev, by way of a succinct summary of the December 26, 2019 Sentencing Decision. The press release noted that "*the investigative measures aimed at identification*

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197 **Exhibit R-74**, Press release of the GKNB No. 1 dated April 19, 2019; **Exhibit R-75**, Press release of the GKNB No. 2 dated April 19, 2019.

198 *See* **Exhibit C-039**, Transcript of the Zhogorku Kenesh Session, Speech of GKNB Chairman dated April 24, 2019 for the full transcript of Mr. Kadyrkulov's speech and **Exhibit CWS_Lukosevicius_1/33**, 24.kg, "Blank documents for E-passports. Head of the GKNB said for whom the tender was prepared" dated April 24, 2019 for an example of a news report on the same.

199 Statement of Claim, ¶165.

200 **Exhibit R-76**, GKNB Press Release, "Ms. Shaikova A. called for interrogation" dated August 02, 2019; **Exhibit R-77**, GKNB Press Release, "GKNB: the former head of the SRS Ms. Shaikova A. put on a wanted list" dated August 07, 2019.

and prosecution of all persons involved in corruption during the [e-passport] *tender continue to take place*."[201]

90. On its face, the GKNB diligently and succinctly updated the Kyrgyz public about the progress of a high-stakes corruption investigation. Claimant's description of this process as a "*smear campaign*" and a "*witch hunt*" are loud, but empty words.

91. For exhaustiveness, Respondent addresses Claimant's allegation that on October 6, 2019, "*the GKNB published a YouTube video showing* [Mr. Abdullayev, one of the three SRS officials later sentenced for corruption]," describing how Ms. Shaikova, the ex-Chairperson of the SRS gave him USD 20,000 for lobbying Claimant's interests.[202] As evident from the news reporting on that video, it was published anonymously, and not by the GKNB. More importantly, the video is an actual excerpt of the May 9, 2019 interview of Mr. Abdullayev with the GKNB. Respondent hereby produces the interview minutes, signed, without reservations, by Mr. Abdullayev, and his two legal counsel present during the interview.[203] The minutes detail the circumstances of Mr. Abdullayev receiving USD 20,000 from Ms. Shaikova, in January 2019, for advancing Claimant's interests in the 2018 Tender.

8. The administrative court proceedings concerning the outcome of the 2018 Tender

92. By way of preliminary remark, the overview of the 2019 Kyrgyz administrative court proceedings brought by one of the 2018 Tender bidders is provided for exhaustiveness only. To quote from Claimant's Statement of Claim, these administrative court proceedings "*did not have any material relevance to* [Claimant]"[204] and "*did not have any relevant to the results of the 2018 Tender or* [Claimant's] *rights thereof*."[205] Indeed, Garsu Pasaulis does not allege any standalone international law breach arising out of the administrative proceedings.

93. On April 1, 2019, Mühlbauer, one of the five bidders of the 2018 Tender, initiated administrative court proceedings against the SRS, the Department of Public Procurement, and the Independent Interdepartmental Commission, seeking to cancel: (**i**) the February 1,

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201 **Exhibit R-77**, GKNB Press Release, "GKNB: the former head of the SRS Ms. Shaikova A. put on a wanted list" dated August 07, 2019.

202 Statement of Claim, ¶175 and **Exhibit C-046**, Kaktus, "Alina Shaikova bribed ex-head of Infocom for Garsu Pasaulis? Video" dated October 07, 2019.

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

204 Statement of Claim, ¶227.

205 *Ibid*, ¶223.

2019 decision of the SRS' Tender Commission to award the tender to Claimant, and (**ii**) the February 21, 2019 decision of the Independent Interdepartmental Commission, dismissing Mühlbauer's complaint on the results of the tender.[206] Mühlbauer's statement of claim was accompanied by an injunction application, specifically an interdiction to the SRS and Claimant to "*carry out actions concerning the execution of the* [e-passport printing] *contract*."[207]

94. On April 9, 2019, the Inter-district Court of Bishkek summoned Claimant as a third party to the proceedings and granted, *ex parte*, Mühlbauer's application for an injunction.[208] Claimant now retrospectively attacks this injunction order by contrasting it with the SRS's position that the 2018 Tender has expired on April 2, 2019.[209] To Claimant, the fact that the SRS did not object to the injunction order means that it "*itself did not treat the tender application of* [Claimant] *as* […] *expired*."[210] That assertion defies logic: (**i**) the injunction order was taken on an *ex parte* basis, without the involvement of the SRS; (**ii**) the administrative court proceedings concerned Mühlbauer's claims to invalidate the February 1, 2019 Tender Commission decision and the February 21, 2019 decision of the Independent Interdepartmental Commission; and (**iii**) the SRS was under no obligation to petition the courts to correct or revisit their *ex parte* injunction order.

95. On May 29, 2019, after a contested hearing attended by, *inter alia*, Claimant's local legal counsel, the Inter-district Court of Bishkek fully upheld Mühlbauer's two claims (the "**May 29, 2019 First Instance Court Ruling**").[211] In its Statement of Claim, Claimant raises two concerns with respect to that court ruling, neither of which are valid:

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206 **Exhibit R-79**, Administrative claim of Mühlbauer against the State Registration Service, the Department of Public Procurement and the Independent Interdepartmental Commission to the Bishkek Inter-district Court dated April 01, 2019.

207 **Exhibit R-80**, Injunction application of Mühlbauer dated April 01, 2019.

208 **Exhibit R-81**, Order of the Inter-district Court of Bishkek on preparing the case for trial, case No. АД-576/19мбс7 dated April 09, 2019; **Exhibit R-82**, Injunction order of the Inter-district Court of Bishkek, case No. АД-576/19мбс7 dated April 09, 2019. Pursuant to Article 117(1) of the Arbitration Procedure Code of the Kyrgyz Republic, injunction hearings are held without giving prior notice to the respondent and other parties. *See* **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶107.2.

209 Statement of Claim, ¶¶188-190, relying on **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶¶110-112.

210 Statement of Claim, ¶189, quoting **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶110.

211 **Exhibit C-050**, Ruling of the Inter-District Court of Bishkek in Case No. АД-576/19мбс7 dated May 29, 2019.

95.1. **First**, Claimant refers to an April 17, 2019 public statement of the SRS, which confirmed that the 2018 Tender has *de jure* failed.[212] Claimant then seems to question the very purpose of the administrative court proceedings in light of that statement.[213] This is a non-starter for at least two reasons: (**i**) the court cannot be expected to be aware of all statements made by the press; and (**ii**) under the Kyrgyz law, the administrative court has to examine the case within the limits of the claims pleaded by the administrative claimant.[214]

95.2. **Second**, and building up on the first point, Claimant deems it "[n]*oteworthy*" that the court "*did not justify the Kyrgyz Republic's right to cancel the 2018 Tender.*"[215] This is anything but noteworthy. Again, the Republic's (more accurately, the SRS') "*right to cancel* [or recognize as failed] *the 2018 Tender*" was not raised - either by Mühlbauer, the administrative claimant, or by Garsu Pasaulis, the third party in the administrative proceedings and Claimant in this arbitration, and therefore was not before the court. Under Kyrgyz law, as under most adversarial legal systems, a court cannot raise new legal issues or claims *sua sponte*.[216]

96. Unsatisfied with the outcome of the first-instance administrative proceedings, Claimant appealed to the Bishkek City Court. On September 10, 2019, the appellate instance sided with Claimant, overturning the May 29, 2019 First Instance Court Ruling (the "**September 10, 2019 Bishkek City Court Ruling**").[217] At this juncture, Claimant raises further *post facto* concerns and unsubstantiated insinuations in its Statement of Claims:

96.1. **First**, Claimant deplores that "*notwithstanding*" the September 10, 2019 Bishkek City Court Ruling, "*there was no material result for* [Claimant] *since the 2018 Tender was already 'terminated' a long time ago*,"[218] i.e. in April 2019. First, this statement requires a

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212 **Exhibit C-048**, Official clarification of the State Registration Service regarding the Procurement of Blank Biometric Passports for Travel Abroad dated April 17, 2019.

213 Statement of Claim, ¶213.

214 **Exhibit RLA-13**, Administrative Procedure Code of the Kyrgyz Republic dated January 25, 2017, Article 173(6).

215 Statement of Claim, ¶214.

216 **Exhibit RLA-13**, APC of KR, Article 173(6).

217 **Exhibit C-051**, Ruling of the Bishkek City Court in Case No. АД-576/19мбс7 dated September 10, 2019.

218 Statement of Claim, ¶217.

clarification: the 2018 Tender has *de jure* failed, and was not "*terminated.*"[219] Second, in any event, that statement should find no sympathy as Claimant only voices this concern now, before an arbitral tribunal, instead of (at least first) raising it contemporaneously, before the administrative courts.

96.2. **Second**, Claimant insinuates that it had "*received requests for bribes in order for the Kyrgyz Supreme Court to adopt a decision unfavorable to its competitor Mühlbauer.*"[220] Without any further particularization, let alone evidence beyond a double-hearsay testimony by one of Claimant's witnesses,[221] this insinuation rings hollow.

97. For completeness, on November 25, 2019, the Kyrgyz Supreme Court quashed the September 10, 2019 Bishkek City Court Ruling and reinstated the May 29, 2019 First Instance Court Ruling (the "**November 25, 2019 Kyrgyz Supreme Court Ruling**"). Accordingly, both the February 1, 2019 decision of the SRS' Tender Commission to award the tender to Claimant, and the February 21, 2019 decision of the Independent Interdepartmental Commission, dismissing Mühlbauer's complaint on the results of the tender were annulled.

98. Claimant's sole grievance with respect to the November 25, 2019 Kyrgyz Supreme Court Ruling is duplicative of its earlier complaints - that the Ruling says nothing about the "*fate of the* [2018 Tender]."[222] And rightly so, as this was not before the administrative courts.

9. The pronouncement of the 2018 Tender as failed

99. On February 4, 2020, the SRS issued an order formally recognizing the 2018 Tender as failed due to the expiration of the bids ("**February 4, 2020 Order of the SRS**").[223] On the same day, this was reflected on the Kyrgyz public e-procurement website.[224]

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219 **Exhibit C-048**, Official clarification of the State Registration Service regarding the Procurement of Blank Biometric Passports for Travel Abroad dated April 17, 2019.

220 Statement of Claim, ¶¶219-221.

221 **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶60.

222 Statement of Claim, ¶¶224-225, citing **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶¶164, 167.

223 **Exhibit R-83**, Order No. 22 of the State Registration Service dated February 04, 2020. The Order formally recognized the 2018 Tender as failed, pursuant to Article 31(2)(3) of the Law on Public Procurement, as amended on January 11, 2019, according to which "[t]*he procuring entity shall declare the tender failed* [if]: […] *3) the validity period of the bid expired*," *see* **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(2)(3).

224 **Exhibit C-049**, Information on the E-Procurement Platform re: 2018 Tender dated February 04, 2020. Claimant asserts that paragraph 198 of its Statement of Claim that it would have only learned

100. Claimant's unfounded criticism of the February 4, 2020 Order of the SRS rests on (**i**) a technical discrepancy between its title ("*On cancellation of the Tender*") and the substance of the Order (declaring the tender failed);[225] (**ii**) the alleged impossibility of recognizing a tender failed due to the expiration of the winning bid;[226] and (**iii**) the allegation that grounds for declaring the tender failed "*did not meet the requirements of the Law*."[227] The latter two are essentially one and the same. In advancing this criticism Claimant turns a blind eye to the blackletter law on public procurement, and attempts to substitute it with its own peculiar interpretation of the Law on Public Procurement.

101. **First**, while the February 4, 2020 Order of the SRS contains a discrepancy between its title (cancellation of the tender) and substance (recognition of the tender as failed), the discrepancy stems from the Methodological instruction for evaluation of bids, one of the regulatory acts that SRS was guided by.[228] Paragraph 28 of the Methodological instructions stipulates that the procuring entity shall "*cancel*" the tender on the grounds by which the tender should actually be recognized as failed pursuant to Article 31(2) of the Law. Therefore, as explained by Judge Davletbayeva, "*the SRS issued the Order, dated February 4, 2020, in accordance with the applicable regulations.*"[229] Notably, Claimant's expert herself admits this regulatory discrepancy in her report.[230]

102. In any event, the above discrepancy was of no consequence, as the February 4, 2020 Order: (**i**) expressly referred to the provision of the Law on Public Procurement containing grounds for recognition of the tender as failed (Article 31(2)(3)), and (**ii**) expressly stated that the 2018 Tender **has failed**. The legal grounds of the Order were very clear.

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about the February 4, 2020 Order sometime later. This is improbable, as the order was posted on the public e-procurement website, at the same time as the page for the 2018 Tender was updated to reflect that the tender was deemed failed.

225 Statement of Claim, ¶200.

226 *Ibid*, ¶¶201 – 202.

227 *Ibid*, ¶¶204, 205, 208.

228 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶117, **Exhibit RLA-10**, Methodological instruction for evaluation of bids, approved by the Order No. 175-p of the Ministry of Finance of the Kyrgyz Republic [resubmitted Exhibit CER-2-Exh.10 with extended translation] dated October 14, 2015, ¶28.

229 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶62.

230 **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶62.

103. **Second**, Claimant repeatedly asserts that: (**i**) its bid "*could no longer 'expire' because the bidding was long over*;"[231] (**ii**) a finding that the bid has expired was "*not in accordance with the applicable law*;"[232] and accordingly (**iii**) the 2018 Tender could not fail on the ground of the expiration of the winning bid. This is a flawed argumentation based on incorrect understanding of the Kyrgyz law:

103.1. **First**, as expounded by Judge Davletbayeva, the above assertions of Claimant are profoundly misinformed.[233] They contradict, *inter alia*, Article 32(3) of the Law on Public Procurement, which states that a public procurement contract between the procuring entity and the winning bidder is concluded "*within the validity period of the bid*." Judge Davletbayeva points out that if the validity of the bid could not expire after selection of the winning bidder, as Claimant posits, then this provision would simply be moot.[234]

103.2. **Second**, Claimant engages in an odd interpretative exercise in relation to the grounds for recognition of tender as failed, as if it was a contested point of law or the law left the meaning of these grounds unclear or ambiguous: "*tenders are recognised as 'failed' when it is impossible to achieve the goal of a tender and to ensure competitiveness* […] *(**e.g., when** only one bidder takes part in the procurement).*" [235] This is not the case. The law is clear and contains **exhaustive list of grounds for recognition of tender as failed**, among which is **the expiration of the bid**.[236]

103.3. **Third**, Claimant seems to misinterpret findings of its own Kyrgyz law expert in a futile attempt to contest the validity of recognition of the 2018 Tender as failed. Claimant alleges that:

> "[…] the [SRS] declared the 2018 Tender 'invalid' [failed] due to the alleged 'expiration' of Garsu Pasaulis' bid, despite the fact that **the winner of the 2018 Tender was determined a year ago** and, accordingly, **the 2018 Tender**, as a stage of public procurement, **was completed**." [237]

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231 Statement of Claim, ¶¶203.

232 *Ibid*, ¶¶193.

233 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶70 – 70.3.

234 *Ibid*, ¶¶71.3, 92.

235 Statement of Claim, ¶¶201.

236 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(2)(3).

237 Statement of Claim, ¶202.

103.4. However, the 2018 Tender was far from 'completed' upon declaration of the winning bidder - a point that Claimant's own Kyrgyz law expert makes in her expert report: "*the tender* [**meaning, the stage of evaluation of bids and selection of the winning bidder**] *as a stage of public procurement was completed.*"[238] By **a** tender as a stage of public procurement the expert clearly refers to stages of evaluation, comparison of the bids and selection of the winning bidder under the Law,[239] and not the entire 2018 Tender itself. Thus, the 2018 Tender was still ongoing, and was at the stage of conclusion of the contract.[240] But, as explained at paragraph 77 above, the contract was never entered into and Claimant's bid expired.

104. Overall, the conspiracy theory that Claimant now advances with respect to the pronouncement of the 2018 Tender as failed is as wild, as it is illogical:

104.1. Claimant's suggestion that it had "*no reason to believe that the Tender Commission or the* [SRS] *would simply declare* [Claimant's] *winning bid as 'expired' or 'cancel' the 2018 Tender without any valid factual or legal basis and without any explanations*"[241] flies in the face of the following facts: (**i**) Claimant itself has agreed to extend the Claimant's Bid till April 2, 2019, did not object or question that extension, nor did it seek to extend the Claimant's Bid further;[242] (**ii**) the Kyrgyz law is clear on that a tender is deemed failed upon the expiration of the bids;[243] and (**iii**) the SRS publicly announced that it considered the tender failed for that same reason - the expiration of the bids - back in April 2019 (and Claimant has now confirmed that it was aware of such announcement at the time).[244]

104.2. Claimant's further suggestion that "*the Tender Commission and the GRS* [SRS] [were] *search*[ing] *but failed to find a valid reason and a valid legal basis to expel* [Claimant] *from the*

238 Claimant refers to paragraph 105 of Prof. Alenkina's expert report, but it is evidently an error, since it cites a preceding paragraph (104), *see* **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶104.

239 The Law on Public Procurement refers to stages of evaluation and comparison of bids and selection of the winning bidder as stages preceding the stage of conclusion of the contract, see **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Articles 11(7), 11(8).

240 **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Articles 11(9).

241 Statement of Claim, ¶205.

242 **Exhibit R-37**, Letter of Garsu Pasaulis to the SRS dated February 12, 2019.

243 **Exhibit RLA-6**, Kyrgyz Law on Public Procurement (January 11, 2019 version), Article 31(2)(3).

244 **Exhibit C-048**, Official clarification of the State Registration Service regarding the Procurement of Blank Biometric Passports for Travel Abroad dated April 17, 2019, and Statement of Claim, ¶185.

2018 Tender" and that "*due to the pressure from the GKNB or the Kyrgyz Government*"[245] again ignores the very straightforward chronology of the 2018 Tender: (**i**) on April 2, 2019 the bids expired, leading to a *de jure* failure of the tender - it was no more, as Claimant was perfectly aware; (**ii**) on April 17, 2019, the SRS made a public announcement to that effect;[246] and (**iii**) in February 2020, this was formalized by the SRS, by way of the Order and updating the public e-procurement website.[247]

F. The aftermath of the 2018 failed tender for e-passports and supporting IT infrastructure

105. In July 2019, the SRS signed a short-term contract for manufacturing of 500,000 passports with De La Rue PLC, a respected British secure printing company.[248] In this regard, Claimant makes two complaints in its Statement of Claim, neither of which are valid:

105.1. **First**, Claimant complains that this arrangement was not subject to a public tender procedure.[249] That is correct - and there was absolutely no obligation upon the SRS or, generally, the Kyrgyz Republic, to do so. In any event, this was clearly a temporary solution while the SRS worked on the documentation for a new, large tender for e-passports that took place in early 2020 (as described at paragraphs 106 *et seq.* below).

105.2. **Second**, Claimant draws an improbable conclusion that the "*Kyrgyz Government did not even intend to execute the contract won by* [Claimant] *or wait for the final ruling of the Kyrgyz Supreme Court* [issued in November 2019, in the administrative proceedings described in Sub-Section III.E.8 above]."[250] Yet, as explained at paragraph 77 above, the 2018 Tender was deemed failed back on April 2, 2019, with the expiration of the bids, as was clear to the SRS, the public and even the Claimant.

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245 Statement of Claim, ¶207. *See also ibid*, ¶¶208-209.

246 **Exhibit C-048**, Official clarification of the State Registration Service regarding the Procurement of Blank Biometric Passports for Travel Abroad dated April 17, 2019.

247 **Exhibit R-83**, Order No. 22 of the State Registration Service dated February 04, 2020 and **Exhibit C-049**, Information on the E-Procurement Platform re: 2018 Tender dated February 04, 2020.

248 **Exhibit C-056**, Kaktus, "SRS signed an agreement with De La Rue to print 500 thousand passports while a trial is in progress" dated July 11, 2019.

249 Statement of Claim, ¶256.

250 *Ibid*, ¶257.

There was simply no need to wait for the final resolution of the administrative proceedings that neither the SRS, nor any other State organ commenced.

106. In late February 2020, the SRS announced a new public tender for manufacturing of e-passports (the "**2020 Tender**").[251] Three foreign companies submitted their bids, the examination of those went smoothly, and Mühlbauer, a well-known German secure printing company was selected as the winner in late May 2020.[252] In another twist to its conspiracy theory, Claimant advances two false propositions:

106.1. **First**, Claimant alleges that the requirement of prior experience in printing e-passports would have been increased in the 2020 Tender (from 2 million e-passports in the 2018 Tender to 3 million), to purposely exclude Claimant from participating in that new tender.[253] Expectedly, this is nothing more than a wild theory, without a shred of documentary backup. More importantly, Kyrgyz law allows a potential bidder to contest the tender requirements[254] - a mechanism that was available to Claimant, but that it chose not to use.

106.2. **Second**, Claimant suggests that "[i]*t is in* [its] *knowledge*" that even Mühlbauer, the winner of the 2020 Tender, could not have satisfied those heightened requirements for previous experience, but has still mysteriously won the tender.[255] Given Claimant's history of story-telling and bending the reality, the evidentiary value of Claimant's 'knowledge' of Mühlbauer's alleged inexperience is zero.

107. A lengthy portion of Claimant's Statement of Claim is devoted to the alleged effect that the events set out above had on Claimant and its "[i]*mpeccable international reputation*."[256] Forcing one's way through the now-threadbare insinuations of lack of "*any explanations*," "*sudden*

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251 **Exhibit C-058**, Kaktus, "SRS has announced a new tender for printing new biometric passports. Why is it important?" dated February 26, 2020; and **Exhibit C-060**, Kaktus, "Finally! SRS and Muhlbauer ID Services signed a contract for the production of e-passports" dated May 29, 2020.

252 **Exhibit C-060**, Kaktus, "Finally! SRS and Muhlbauer ID Services signed a contract for the production of e-passports" dated May 29, 2020.

253 Statement of Claim, ¶258.

254 **Exhibit RLA-14**, Law of the Kyrgyz Republic No. 72 "On Public Procurement" (with June 26, 2019 amendments) dated April 03, 2015, Article 48; **Exhibit RLA-9**, Regulation on the work of the IIC, ¶28: "*Complaint and protest may be filed at any stage of the public procurement, namely: 1) Complaints and protests against the conditions (requirements) of the tender documentation* […] *shall be filed before the time of opening of the bids*."

255 Statement of Claim, ¶261.

256 *Ibid*, ¶¶262-278.

change in course," "*a smear campaign against* [Claimant]," "*political corruption scheme led by the most powerful Kyrgyz authorities*" that Claimant "*fell victim of*," and lack of any "*opportunity* [for Claimant] *to defend itself*"[257] (all of which have been dispelled in the preceding Section), Claimant's specific allegation is threefold:

107.1. **First**, Claimant suggests that "[m]*ajor commercial banks, whom* [Claimant] *has worked with for tens of years, requested* [Claimant] *to immediately close its accounts and refused to provide credit services or issue guarantees to* [Claimant] *specifically indicating the Kyrgyz allegations*."[258] One would expect this to be backed up by documentary evidence, and at first blush Claimant does not disappoint. The problem is that part of that evidence predates the 2018 Tender, and the remaining pieces are either silent, or at best ambiguous, as to the reasons for the banks' refusal to work with Claimant.[259]

107.2. **Second**, Claimant alleges that its contract for Schengen visa printing with the Swiss Government was terminated "*due to false Kyrgyz allegations*."[260] Yet what really is false is the purported reason for the termination of the contract. As the press reports that Claimant itself submitted in this arbitration clearly articulate, the 'Kyrgyz episode' related to the 2018 Tender is just the "*latest incident*," while others include the well-known (and summarized in Sub-Section II.E.3 above) run-ins with the law that Claimant and its parent company had in Belgium, Comoros, the DRC and even Switzerland itself.[261]

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257 *Ibid*, ¶¶262-266.

258 *See* Statement of Claim, ¶641, referring to **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶67.

259 *See* **Exhibit CWS_Lukosevicius_1/37**, Letters and email exchanges between Claimant and banks / currency exchange platforms (2017-2020), including: (**i**) an email exchange between AFEX, a currency exchange platform, and Claimant, dated April-May 2017 (i.e. **nearly 1 ½ years before the 2018 Tender was announced**), whereby AFEX refused to provide a currency account for Claimant "*due to the ownership*" of Claimant (i.e. its shareholder, described at paragraphs 34 *et seq.* above); (**ii**) an email exchange between GPSFX, another currency exchange platform and Claimant, dated October-November 2020, whereby GPSFX first requests information about Claimant's shareholding structure and then simply informs Claimant that the "*compliance offers* […] *responded that we would not be able to provide the services to you*;" and (**iii**) an April 25, 2019 letter from Luminor Bank, informing Claimant that following a restructuring of the bank's operations in January 2019, their "*business relationship*" is terminated "*due to a level of risk unacceptable to the Bank*" (with no further reasons or explanations).

260 Statement of Claim, ¶650, citing **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶68.

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

107.3. **Third**, Claimant asserts that the "*false allegations by the Kyrgyz Republic*" led to Claimant "*immediately*" losing its "*most important client - the Carlsberg group*."[262] Expectedly, this is contradicted by Claimant's own documentary evidence filed in this arbitration - the email between Carlsberg and Claimant, dated September 10, 2020: (**i**) succinctly informs Claimant that Carlsberg "*will not extend our current contract*," letting it expire at the end of the year; and (**ii**) for accuracy, is very clearly not timed "*immediately*" after the 'Kyrgyz scandal'.[263]

108. For exhaustiveness, Claimant's allegations that the same justification, i.e. the events surrounding the 2018 Tender, applies to the termination of its contracts with other companies, such as Baltic Tobacco Factory, Thermo Fisher, Telia Group "*and others*"[264] are not even supported by any evidence (let alone correct evidence).

109. In the following Section, Respondent sets out its arguments on the non-admissibility of Claimant's claims and the Tribunal's lack of jurisdiction to consider the same.

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262 Statement of Claim, ¶70, referring to **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶70.

263 **Exhibit CER-3-Exh.-19**, Email from Carlsberg to Garsu Pasaulis re Contract Expiration dated September 10, 2020.

264 Statement of Claim, ¶70, referring to **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶71.

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

110. Claimant's make-believe story about its misfortunes in the Kyrgyz Republic, thoroughly analyzed in Section II above, aims at concealing one very simple truth – it has no viable case in this arbitration. As will be demonstrated in this Section of the Statement of Defense, Claimant's case fails at the very first step of establishing the Tribunal's authority to hear the present dispute. Specifically, Claimant's claims arising out of the 2018 Tender are not based on any investment made in the Kyrgyz Republic, which deprives the Tribunal of jurisdiction *ratione materiae* under the BIT (**B**). In any event, Claimant's botched attempt at rigging the 2018 Tender in its favor, which was exposed by the Kyrgyz judiciary and law enforcement authorities, renders its claims inadmissible (**C**).

111. Before addressing these arguments in more detail, Respondent will make an overarching preliminary remark regarding the role of the so-called "*Expert Report*" of Dr. Crina Baltag, submitted by Claimant together with its Statement of Claim (**A**).[265] This preliminary remark applies not only to Respondent's submissions on jurisdiction and admissibility set out in this Section III, but also to its arguments on the merits of Claimant's claims, set out in Section IV below.

A. The 'Expert Report' of Dr. Crina Baltag is merely a continuation of the Claimant's written pleadings, not an independent expert report

112. Together with its Statement of Claim, Claimant submitted what it calls an "*expert report on international law*" of Dr. Crina Baltag.[266] Claimant argues that in her "*Expert Report*" Dr. Baltag, having "*thoroughly* ***investigated*** *the events concerning the* [2018 Tender], *confirms amongst other conclusions that Garsu Pasaulis is an investor who made an investment in accordance with the* [BIT]*, and that the Kyrgyz Republic is in breach of its obligations under the* [BIT]."[267] And indeed, opinions expressed in Dr. Baltag's "*Expert Report*" effectively cover the quasi-entirety of Claimant's legal case in this arbitration, including jurisdiction, merits and even the principles of quantum.[268]

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265 *See* Statement of Claim, ¶32 and **Exhibit CER-1-1**, "Legal expert report of Dr. Crina Baltag" dated August 25, 2021 (the "**Baltag Submission**").

266 *See* Statement of Claim, ¶32 and **Exhibit CER-1-1**, Baltag Submission.

267 Statement of Claim, ¶¶2 and 32 [emphasis added].

268 **Exhibit CER-1-1**, Baltag Submission, ¶2 (setting out the matters on which Dr. Baltag's opinion was requested).

113. Yet, for the reasons set forth below, Respondent respectfully submits that the document filed by Claimant under Dr. Baltag's authorship is manifestly **not** an expert report and should not be treated by the Tribunal as such.

114. **First**, in her submission Dr. Baltag provides opinions on issues that do not (and quite frankly cannot) require an expert assessment in the context of an investment arbitration. Article 5.1 of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"), which are applicable in the present proceedings pursuant to paragraph 13.1 of Procedural Order No. 1, provides that a Party "*may rely on a Party-Appointed Expert as a means of evidence on* ***specific issues***."[269] As explained by Nigel Blackaby and Alex Wilbraham, "*by definition,* [expert evidence] *is intended to illuminate a tribunal on issues with which it would not otherwise be familiar.*"[270] In the context of international arbitration, such issues traditionally include specific technical expertise (in the area of construction, for example), damages assessment, or questions of a particular local law, which neither the tribunal, nor the counsel, would be familiar with.

115. What the expert evidence is however **not** supposed to do is "*to argue questions of law within the tribunal's competence* [which is] *the role of counsel.*"[271] The roles of counsel and expert must be clearly distinguished, as aptly explained by Judge Christopher Greenwood in his Separate Opinion in the *Pulp Mills on the River Uruguay* case considered by the International Court of Justice:

> The distinction between the *evidence* of a witness or expert and the *advocacy* of counsel is fundamental to the proper conduct of litigation before the Court (as it is before other courts and tribunals). A witness or expert owes a duty to the Court which is reflected in the declaration required by Article 64 of the Rules of Court. The duties of someone appearing as counsel are quite different.[272]

116. In investment arbitration, it is axiomatic that both the arbitral tribunals and the counsel appearing on behalf of the parties are presumed to be familiar with public international law.

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269 **Exhibit RLA-15**, 2010 IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), Article 5.1 [emphasis added].

270 **Exhibit RLA-16**, N. Blackaby and A. Wilbraham, "Practical Issues Relating to the Use of Expert Evidence in Investment Treaty Arbitration" in M. Kinnear and C. McLachlan (eds.), ICSID Review – Foreign Investment Law Journal, OUP 2016, Vol. 31, Issue 3, pp. 655-669 ("**Blackaby and Wilbraham**"), p. 660.

271 *Id.*

272 **Exhibit RLA-17**, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment [2006], ICJ Rep 113 (Separate Opinion of Judge Greenwood), ¶27.

As noted by Andrew Newcombe, "*an international tribunal operating under international law is deemed to know the law (*jura novit curia*)*" and its role "*is to interpret and apply the international investment agreement in question in accordance with public international law.*"[273] This approach is shared by Blackaby and Wilbraham:

> Arbitrators appointed to tribunals in investment cases are usually experts in that law. Similarly, counsel employed to argue the case should be able to argue their points directly without the need to call in aid an international law expert. If a Party wants to incorporate the *gravitas* of a leading public international law figure, **then the more appropriate way to do so would be to include them as co-counsel**. There may occasionally be exceptions to this approach when **there is a difficult or untested question of investment law which has arisen and where a tribunal will have to decide from first principles**.[274]

117. In the present case, the "*Expert Report*" of Dr. Baltag does not seek to discuss any "*difficult or untested questions of investment law*" but rather to rubber-stamp Claimant's entire legal case in this arbitration. In Respondent's submission, this is both unhelpful and inappropriate:

    117.1. unhelpful because, with all respect due to Dr. Baltag and her expertise, she has hardly anything to teach the eminent Tribunal chaired by Professor Dr. Kaj Hobér about the definition of an 'investor', the scope of the 'fair and equitable treatment' standard, or how such legal categories should be applied to the facts of the present case;[275]

    117.2. inappropriate because, by submitting Dr. Baltag's "*Expert Report*," Claimant has *de facto* sought to elevate to the level of independent expert evidence what essentially is a "*legal submission in everything but name.*"[276]

118. **Second**, while in her "*Expert Report*" Dr. Baltag seeks to make a whole suit of legal conclusions regarding the events surrounding the 2018 Tender, she did not review virtually **any** documents comprising the factual background of the present dispute. That much Dr. Baltag bluntly addresses at the outset of her 'Expert Report' – she does "*no*[t] [have]

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273 **Exhibit RLA-18**, A. Newcombe, "The Strange Case of Expert Legal Opinions in Investment Treaty Arbitration" (Kluwer Arbitration Blog) dated March 18, 2010.

274 **Exhibit RLA-16**, Blackaby and Wilbraham, p. 661 [emphasis added].

275 *See* **Exhibit CER-1-1**, Baltag Submission, Sections 2.1, 2.3.1-2.3.6.

276 **Exhibit RLA-18**, A. Newcombe, "The Strange Case of Expert Legal Opinions in Investment Treaty Arbitration" (Kluwer Arbitration Blog) dated March 18, 2010.

independent knowledge of the facts of the case" and **fully** relies on the presentation of the facts made to her by Claimant's counsel.[277]

119. Here again, with respect, this is not how an expert report works. Such approach could be tolerated if Dr. Baltag's evidence was limited to matters of pure legal interpretation of the BIT or the standards of investment protection, in isolation from the facts of the present case. However, Dr. Baltag's opinions go much further than that.

120. Article 5.2(d) of the IBA Rules prescribes that an expert report "*shall contain* […] *a statement of the facts on which he or she is basing his or her expert opinions and conclusions.*"[278] Dr. Baltag's "*Expert Reports*" contains none. In fact, according to Dr. Baltag, in preparation of her "*Expert Report*" Claimant's Counsel provided her with only **two** factual exhibits, namely:[279]

    120.1. English translation of **Exhibit C-13** to the Notice of Arbitration (which is **Exhibit C-5** to the Statement of Claim) – a two-page printout from the Kyrgyz E-procurement platform reflecting the outcome of the 2018 Tender announced on February 1, 2019;[280] and

    120.2. English translation of **Exhibit C-18** to the Notice of Arbitration (which is **Exhibit C-29** to the Statement of Claim) – a one-page email exchange between Claimant's Mr. Lukoševicius and the State Secretary of the SRS Mr. Bakchiev on February 21, 2019, by which Mr. Bakchiev invited Claimant to arrive to Bishkek to enter into a contract following the dismissal of administrative complaints by Muhlbauer and IDEMIA by the Independent Interdepartmental Commission.[281]

121. The only other documents provided to Dr. Baltag by Claimant's Counsel are:[282]

    121.1. Claimant's Notice of Arbitration dated February 10, 2020. Tellingly, Claimant's Counsel chose **not** to provide Dr. Baltag with any exhibits to the Notice of Arbitration other than the two already mentioned immediately above. Even more

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277 **Exhibit CER-1-1**, Baltag Submission, ¶3.

278 **Exhibit RLA-15**, IBA Rules on the Taking of Evidence, Article 5.2(d).

279 *See* **Exhibit CER-1-1**, Baltag Submission, ¶4.

280 **Exhibit C-005**, Information on the results of Tender No. 181023129327015 dated February 01, 2019.

281 **Exhibit C-029**, Email exchanges between SRS and Garsu Pasaulis dated February 21, 2019.

282 *See* **Exhibit CER-1-1**, Baltag Submission, ¶4.

tellingly, Claimant's Counsel did not even share with Dr. Baltag the factual section of Claimant's Statement of Claim, which is substantially more developed than that of the Notice of Arbitration;[283]

121.2. Witness Statements of Mr. Andrius Lukoševicius and Mr. Vytautas Mieliauskas. Here again, tellingly, Claimant's Counsel chose **not** to provide Dr. Baltag with any of the 82 factual exhibits submitted together those two witness statements; and

121.3. The BIT (very liberally)[284] translated into English from Lithuanian by Claimant's Counsel.

122. Claimant's obvious discomfort in sharing the case record with its own international law expert speaks volumes of the confidence it has in its claims in this arbitration.

123. As a result, the factual background underpinning the conclusions of Dr. Baltag's 'Expert Report' consists of her paraphrasing or outright copy-pasting of Claimant's pleadings and the self-serving statements of its witnesses, which she readily accepts at face value, "*as presented.*"[285]

124. This leads to some truly audacious misrepresentations in Claimant's Statement of Claim. By way of example only:

124.1. At paragraph 531 of the Statement of Claim, Claimant suggests that the alleged breach by the Republic of the 'fair and equitable treatment' standard was "*carefully analyzed*" and "*confirmed*" by Dr. Baltag, quoting from paragraph 118 of her "*Expert Report*," as follows:

> Failure to Kyrgyzstan to ensure Claimant due process, including the opportunity to be heard, and to conduct the termination process of Claimant's acquired right under 2018 Tender constitutes a breach of the FET and FPS standards under Lithuania-Kyrgyzstan BIT.[286]

124.2. Yet, far from "*carefully analyzing*" anything, Dr. Baltag actually makes the above statement after simply copy-pasting chunks of Claimant's Notice of Arbitration and witness statements of Messrs. Lukoševicius and Mieliauskas at paragraphs 111

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283 Even by page-count, the statement of facts in Claimant's Statement of Claim (53 pages) is three times larger than in its Notice of Arbitration (18 pages).

284 On this, *see* paragraphs 275 *et seq.* below.

285 *See* e.g., **Exhibit CER-1-1**, Baltag Submission, ¶¶22, 73, 79, 117, 123, 132, and 148.

286 Statement of Claim, ¶531 and **Exhibit CER-1-1**, Baltag Submission, ¶118.

and 112 of her "*Expert Report*," without even a superficial scrutiny.[287] Indeed, Claimant *de facto* relies on its own submissions as evidence of the Republic's 'breach'.

125. Against this background, Claimant's assertion that Dr. Baltag "*thoroughly investigated the events concerning the* [2018 Tender]"[288] in not even an exaggeration – it's a shameless distortion of the reality aimed at misleading the Tribunal. Dr. Baltag's opinions are **entirely derivative from and contingent upon** Claimant's presentation of the facts of the present dispute – that is, if Claimant's statement of facts is inaccurate (which it very much is as explained at Section II above), the evidentiary value of Dr. Baltag's opinions is zero.

126. Considering the foregoing, Respondent respectfully submits that the document submitted by Claimant under Dr. Baltag's authorship does not meet the criteria of an expert report and shall not be regarded as such by the Tribunal. In the following sections of the Statement of Defense, Respondent will treat Dr. Baltag's "*Expert Report*" as part of Claimant's Counsel's submissions and will refer to it, where necessary, only as "**Dr. Baltag's Submission**."

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

127. In this Section, after setting out the criteria for the Tribunal's jurisdiction *ratione materiae* under the BIT and international law (**1**), the Respondent will demonstrate that Claimant fails to meet these criteria, since Claimant's short-lived success in the 2018 Tender does not constitute an 'investment' (**2**), while Claimant's reliance on its earlier unrelated projects in the Kyrgyz Republic in an attempt to link them to the present dispute must be rejected (**3**).

1. Criteria of the Tribunal's jurisdiction ratione materiae

128. By way of reminder, Article 8(1) of the BIT provides that only the disputes "*relating to* […] *investments*" of an investor of one contracting party "*made*" in the territory of the other contracting party can be referred to arbitration.[289] In turn, Article 1(1) of the BIT defines 'investment' as:

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287 *See* **Exhibit CER-1-1**, Baltag Submission, ¶111 quoting from Notice of Arbitration, ¶¶247-248 and ¶112 quoting from **Exhibit CWS-1-1**, Lukosevicius 1st WS, ¶54 and **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶49.

288 Statement of Claim, ¶¶2 and 32.

289 **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(1). The Republic hereby

> […] any type of assets invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the national legislation of the latter Contracting Party […] in particular: […]
>
> c) claims to money or to any other performance having an economic value; […]
>
> f) any right to engage in an economic activity under a contract and any licenses, including concessions for the exploration, extraction and exploitation of natural resources […][290]

129. Finally, Article 2(1) of the BIT further provides that each Contracting Party shall recognize investments "*in accordance with its national legislation.*"[291]

130. Accordingly, for the Tribunal to have jurisdiction *ratione materiae* over Claimant's claims under the BIT, the following **two** cumulative conditions must be fulfilled: (**a**) there must be a protected 'investment' within the meaning ascribed to it under the BIT and international law; and (**b**) the purported dispute must be "*relating to*" to such an investment. Each of these conditions is analyzed, in turn, below.

a. Criteria of a protected 'investment'

131. To be considered protected under the BIT, a purported investment must satisfy the following cumulative conditions.

132. **First**, the BIT prescribes that the investment must comprise an asset "*invested*" (and the investment itself must be "*made*")[292] "*in the territory of*" the host State.[293] As correctly noted by Claimant,[294] such wording distinguishes an active action to invest in a completed form (which is protected) from mere pre-investment activities (which are not).

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resubmits the BIT as its own legal authority for two reasons: first, Claimant incorrectly submitted the BIT on the record as a factual exhibit, rather than a legal authority; second, Claimant has materially mistranslated parts of the BIT. Specifically, Claimant's English translation of Article 14 of the BIT reads that the treaty was made "*in two copies in the Lithuanian, Kyrgyz and* ***English languages*** [and that] [i]*n the event of any disagreements between the Contracting Parties regarding the interpretation of provisions of this Agreement* ***the English text shall prevail***" [emphasis added]. The BIT has never been signed in English. What the quoted provision of the BIT actually says is that it was executed in Lithuanian, Kyrgyz and Russian languages and that it is the Russian original that shall prevail in case of discrepancies – *see* **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Article 14.

290 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Article 1(1).

291 *Ibid*, Article 2(1).

292 *Ibid*, Article 8(1).

293 *Ibid*, Article 1(1).

294 *See* Statement of Claim, ¶312 and **Exhibit CER-1-1**, Baltag Submission, ¶30.

133. This difference is by no means insignificant. A good faith interpretation reveals that by adding the verb "*invested*" ("инвестированных" in Russian) the drafters of the BIT chose to actively limit the treaty's protection to those investments that have been made and exist in a completed form, as opposed to those in the process of being made, or those only sought to be made. This is evident when comparing the BIT to other investment treaties, where drafters either took specific care in extending the protection to 'investments in the making', or did not add any limiting wording:

NAFTA	2012 U.S. Model BIT	1997 Kyrgyzstan-Germany BIT
"*investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that* ***seeks to make, is making or has made an investment***;"[295]	"*"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party,* ***that attempts to make, is making, or has made an investment*** *in the territory of the other Party*"[296]	"*The term "investor" with respect of a Contracting Party shall mean* […] *any legal person constituted or incorporated under the national legislation of the State of that Contracting Party* […]"[297]
"***investment*** *means:* *(a) an enterprise;* *(b) an equity security of an enterprise;* [etc.]"[298]	"*"****investment****" means every asset that an investor* ***owns or controls****, directly or indirectly* […]"[299]	"*The term "investment" shall mean every kind of asset or right in the territory of the state of one Contracting Party, and includes assets or rights consisting or taking the form of:* […]"[300]

134. The practice of international investment tribunals confirms this logic. For example, in *Saipem v. Bangladesh*, where the applicable treaty contained the definition of 'investment' similar to that of the BIT,[301] the tribunal noted that:

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295 **Exhibit RLA-20**, North American Free Trade Agreement (December 17, 1992), Article 1139 [emphasis added].

296 **Exhibit RLA-21**, 2012 U.S. Model Bilateral Investment Treaty, Article 1 [emphasis added].

297 **Exhibit RLA-22**, Agreement between Germany and the Kyrgyz Republic Concerning the Reciprocal Promotion and Protection of Investments dated August 28, 1997, Article 1.

298 **Exhibit RLA-20**, North American Free Trade Agreement (December 17, 1992), Article 1139.

299 **Exhibit RLA-21**, 2012 U.S. Model Bilateral Investment Treaty, Article 1 [emphasis added].

300 **Exhibit RLA-22**, Germany-Kyrgyzstan BIT, Article 1.

301 **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, ¶118: "*The term "investment" shall be construed to mean any kind of property invested before or after the entry into force of this Agreement* […]"

> It is common ground between the parties that the Tribunal's jurisdiction is conditioned upon Saipem **having made** an investment within the meaning of the BIT […][302]

135. Similarly, in *Nordzucker v. Poland*, where consent of the contracting parties to arbitrate only extended to disputes pertaining to "*investments made*" in the territory of the host State,[303] the arbitral tribunal reasoned as follows:

> For the purpose of this discussion, the Tribunal notes that the text of article 11 (1) as quoted refers to investments "*made*". This expression implies that in order to trigger the application of the dispute resolution provisions of article 11, an investment must be actually completed in order to qualify as an investment that has been "made".[304]

136. Eventually, the *Nordzucker* tribunal decided not to rely on the word "*made*" at article 11(1), because the controlling rule for the tribunal was the definition of 'investment' in the applicable treaty, which expressly covered "*all kind of assets that an investor of one Contracting Party* ***invests*** […]" (not "*invested*" or "*investments made*").[305]

137. Notably, such discrepancy is absent in the Kyrgyz-Lithuanian BIT, where both the definition of investment and the dispute settlement provision refer to assets "*invested*" and investments "*made.*"[306] For this reason in particular, Claimant's reliance on the *Nordzucker* decision to argue that a tender can constitute an "*investment in the making*" protected under the BIT is inapposite.[307]

138. **Second**, the BIT prescribes that in order to be protected, the purported investment must be made "*in accordance with the national legislation*" of the host State, and that the host State shall recognize investments "*in accordance with its national legislation.*"[308] Again, as correctly pointed out by Claimant,[309] here the reference to national legislation of the host State goes beyond

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302 *Ibid*, ¶119 [emphasis added].

303 **Exhibit E-015**, Nordzucker AG v. Poland, UNCITRAL, Partial Award dated December 10, 2008, ¶163: "*Any disputes pertaining to* ***the investments made*** *between the investor of one of the Contracting Parties and the other Contracting Party as regards the rights and obligations hereunder should be, wherever possible, resolved amicably between the parties to such dispute* […]" [emphasis added].

304 *Ibid*, ¶164.

305 *Ibid*, ¶165.

306 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Articles 1(1) and 8(1).

307 *See* Statement of Claim, ¶414; **Exhibit CER-1-1**, Baltag Submission, ¶61 and **Exhibit E-015**, Nordzucker v. Poland, ¶209.

308 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Articles 1(1) and Article 2(1).

309 Statement of Claim, ¶314; **Exhibit CER-1-1**, Baltag Submission, ¶32.

the mere issue of the legality of investment: in order to be protected under the BIT, the assets comprising the purported investment must be legally recognized and protected under the laws of the host State (i.e., the Republic). Accordingly, if Claimant were to argue, for instance, that its investment in the Republic comprises a "*right to engage in an economic activity*" within the meaning of Article 1(1)(f) of the BIT, it must demonstrate that such right actually exists and is recognized under Kyrgyz law. As explained by the *Nordzucker* tribunal, which was faced with a similarly-worded investment treaty:

> The Tribunal also notes that the definition given in article 1(1)(a) requires that the investor invests pursuant to the legislation of the other Contracting Party. Whereas the Tribunal does not consider that this reference to the host State's law allows a host State to determine unilaterally whether or not the "involvement" of an investor in its country amounts to an investment or not, the expression "pursuant to the legislation" of the host State, which also comes back in article 2.1 second sentence (see hereafter) in this Tribunal's opinion means more than just to exclude transactions which are illegal under the host State's law. It means that a tribunal, when deciding whether or not an investor invests in property, or shares or money claims or any other assets, **has to apply the host State's law in assessing whether the investor has duly acquired property, shares, claims to money or other assets**.[310]

139. The same logic has been upheld by multiple other tribunals.[311]

140. **Finally**, there is an increasing trend among both commentators and investment tribunals that, apart from satisfying the formal requirements set under the applicable investment treaty, the purported investment must fall within the inherent meaning of the term 'investment' interpreted in light of its basic economic features, which always include

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310 **Exhibit E-015**, Nordzucker v. Poland, ¶167 [emphasis added].

311 *See* e.g., **Exhibit E-005**, Saluka v. Czech Republic, UNCITRAL, Partial Award dated March 17, 2006, ¶204: "*The Tribunal notes in passing that, although not in terms part of the definition of an "investment", it is necessarily implicit in Article 2 of the Treaty that an investment must have been made in accordance with the provisions of the host State's laws. In relevant part, Article 2 stipulates that "*[e]*ach Contracting Party* […] *shall admit such investments in accordance with its provisions of law". Accordingly, and as both parties acknowledge, the obligation upon the host State to admit an investment by a foreign investor (i.e. in the present context, to allow the purchase of shares in a local company) only arises if the purchase is made in compliance with its laws*"; **Exhibit RLA-23**, EnCana v Ecuador, LCIA Case No. UN3481, Award dated February 03, 2006, ¶184: "*However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador*"; **Exhibit E-042**, Nagel v. The Czech Republic, SCC Case No. 049/2002, Final Award dated September 09, 2003, ¶300: "*It follows that, when read in their context, the terms "asset" and "investment" in Article 1 shall be considered to refer to rights and claims which have a financial value for the holder. This creates a link with domestic law, since it is to a large extent the rules of domestic law that determine whether or not there is a financial value. In other words, value is not a quality deriving from natural causes but the effect of legal rules which create rights and give protection to them.*"

elements of contribution, a certain duration and risk. Importantly, this requirement exists even outside ICSID arbitration, which seminal '*Salini* test' Claimant so readily disavows in its submissions.[312] As explained by the tribunal in *Romak v. Uzbekistan*:

> [T]he term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a **contribution** that extends over a **certain period of time** and that involves some **risk**. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals […] which consistently incorporates contribution, duration and risk as hallmarks of an "investment." By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But **if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in Article 1 does not transform it into an "investment."**[313]

141. It is noteworthy that the *Romak* decision was rendered under the Switzerland-Uzbekistan BIT, which contains a definition of investment that is largely similar to the one of the Kyrgyz-Lithuanian BIT, including "*every kind of assets*" under its ambit.[314] Other non-ICSID tribunals have followed the same approach.[315]

142. The existence of a contribution into the host State's economy is a precondition to the jurisdiction of an investment tribunal, as compellingly explained by Professor Zachary Douglas:

> 273 […] the most common investment treaty operates on the basis of a quid pro quo with potential third party beneficiaries. If the national of one contracting state **has invested its capital in the economy of another contracting state**, then that contracting state which **has benefited from this inflow of private capital** shall accord the international standards of minimum treatment to the investment of the foreign national and **shall consent to arbitration proceedings** at the suit of the foreign national with respect to disputes arising out of the investment. […]
>
> 335 The notion of a quid pro quo between a foreign investor and the host state is the cornerstone for the system of investment treaty arbitration. In exchange for contributing to the flow of capital into the economy of the host contracting state, the nationals of the other contracting state (or states in the case of a multilateral investment treaty) are given the right to bring

312 *See* Statement of Claim, ¶317 and **Exhibit CER-1-1**, Baltag Submission, ¶35.

313 **Exhibit RLA-24**, Romak S.A. v. the Republic of Uzbekistan, PCA Case No. AA280, Award dated November 26, 2009, ¶207 [emphasis in the original].

314 *See* **Exhibit RLA-24**, Romak v. Uzbekistan, ¶174.

315 *See* e.g., **Exhibit RLA-25**, Alps Finance and Trade AG v. The Slovak Republic, Ad Hoc, Award dated March 05, 2011, ¶241; **Exhibit RLA-26**, Ulysseas, Inc. v. The Republic of Ecuador, PCA Case No. 2009-19, Final Award dated June 12, 2012, ¶251.

> international arbitration proceedings against the host contracting state and to invoke the international minimum standards of treatment contained in the applicable investment treaty.
>
> 336 Given that the stated objective of investment treaties is to stimulate flows of private capital into the economies of the contracting states, the claimant must have contributed to this objective in order to attain the rights created by the investment treaty. This **contribution must be clearly ascertained by the tribunal** if its existence is challenged by the host state; for otherwise the procedural privilege conferred by the investment treaty might be utilised by a claimant who has not fulfilled its side of the bargain.[316]

143. The tribunal in *Ulysseas v. Ecuador* similarly concluded that for an investment to exist, the putative investor must make a contribution having an economic value:

> In order for an "investment" to arise in this sense, there must be an actual transfer of money of other economic value from a national (whether a physical or a judicial person) of a foreign State to the host State through the assumption of some kind of commitment ensuring the effectiveness of the contribution and its duration over a period of time.[317]

144. As will be demonstrated at Sub-Section III.B.2 below, Claimant's short-lived success in the 2018 Tender does not meet any of the above-set requirements of a protected 'investment', depriving the Tribunal of jurisdiction *ratione materiae*.

b. The putative dispute must be "relating to" a protected investment

145. Article 8(1) of the BIT provides that in order to be arbitrable under its dispute settlement provisions, a putative dispute must be "*relating to*" a protected investment. This means that the alleged violations of the BIT reproached to the host State must concern and directly affect the very asset and/or business project that is presented as the basis for the tribunal's jurisdiction *ratione materiae*. There must be a direct connection between the claim and the jurisdictional basis it rests upon.

146. Conversely, prior business projects operated or assets invested by the investor, which are not affected by the host State's contested measures, cannot be relied upon as the basis for the tribunal's jurisdiction *ratione personae*. This is the only logical interpretation of Article 8(1) of the BIT aligning with the ordinary meaning of its terms, in accordance with the principles of interpretation enshrined at Article 31(1) of the Vienna Convention on the Law of Treaties

316 **Exhibit RLA-27**, Z. Douglas, "The International Law of Investment Claims", 2009, ¶¶273-277 and 335-336 [emphasis added].

317 **Exhibit RLA-26**, Ulysseas v. Ecuador, Final Award, ¶252.

(the "**VCLT**").[318] Indeed, by definition, a dispute cannot "*relate*" to an investment when the measures at issue have no bearing on such an investment.

147. This interpretation of the words "*relating to*" has been upheld in arbitral case law. As put by the tribunal in *National Grid v. Argentina*:

> Thus the issue is not passing judgment on policy measures of a State or considering measures that simply affect an investment, but **whether the Measures had a direct bearing on the investment** and violated binding obligations between Argentina and the Claimant.
>
> The parties have discussed the meaning of "related to" and "with regard to" an investment. The Tribunal does not find the difference between these two expressions significant in the instant case; both refer to a connection, a relation to the word that follows them. **There has to be a connection between the Measures and the investment**. […][319]

148. Similarly, in *Cairn v. India* the tribunal found that it had jurisdiction *ratione materiae* after having established that the host State's alleged violations directly concerned claimant's investment:

> For the Tribunal to establish subject-matter jurisdiction, it suffices for this dispute to be "in relation to an investment". In the Tribunal's view, there is no doubt that this dispute relates to an investment, for the following reasons.
>
> First, as discussed in Section VI.C.1 above, the Tribunal has found that the Claimants hold an investment protected by the BIT. The present dispute arises out of taxation measures imposed by India on a reorganisation of that investment, specifically, on capital gains allegedly made by CUHL when transferring shares in CIHL to CIL, another company of the group. **In other words, the disputed measures were imposed on the economic consequences of a transaction relating to part of the Claimants' investment**, and more specifically on an internal reorganisation of that investment (which Article 1(b) of the BIT expressly considers as a qualifying investment).[320]

149. As will be demonstrated at Sub-Section III.B.3 below, Claimant's business ventures in the Republic pre-dating the 2018 Tender cannot be relied upon as the basis for the Tribunal's

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318 **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.*"

319 **Exhibit RLA-29**, National Grid P.L.C. v. Argentine Republic, UNCITRAL, Decision on Jurisdiction dated June 20, 2006, ¶¶138-139 [emphasis added].

320 **Exhibit RLA-30**, Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India, PCA Case No. 2016-07, Award dated December 21, 2020, ¶¶746-747.

jurisdiction *ratione materiae*, since the Republic's alleged violations do not relate to any of those ventures.

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

150. By way of reminder, Claimant bears the burden of establishing that its purported investment (in this case, rights and obligations allegedly acquired by Claimant after being announced as a winner of the 2018 Tender on February 1, 2019) is recognized and protected as an asset having an economic value under Kyrgyz law.[321] Should Claimant fail to discharge this burden, any further discussion as to the validity of its investment under other criteria of the BIT or international law is pointless.

151. Be it as it may, as will be set forth below, Claimant's purported investment fails at any test the Tribunal may be willing to apply to it, both under domestic (**a**) and international law (**b**).

a. 'Winning' of the 2018 Tender did not grant Claimant any protected economic rights under the Kyrgyz law

152. In its Statement of Claim, with reliance on the expert report of Prof. Natalia Alenkina (the "**Alenkina Expert Report**"), Claimant describes its 'winning' of the 2018 Tender in the following terms:

> Therefore, as explained by Prof. Alenkina, […] the bidder whose proposal meets the selection criteria established by the competitive bidding provider must be declared the winner, which, in turn, **grants him economic rights**.[322] […]
>
> This means that once Garsu Pasaulis' bid was announced as the winning bid, Garsu Pasaulis **unconditionally became entitled to the economic right** to execute the e-passports contract[323] […]
>
> Thus, by winning the 2018 Tender, Garsu Pasaulis acquired **automatic legal and factual right to execute the e-passports contract** and acquired the corresponding rights and obligations.[324] […]

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321 *See supra*, ¶132 *et seq.*

322 Statement of Claim, ¶369 referring to **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶34 [emphasis added].

323 Statement of Claim, ¶370 referring to **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶¶89-91 [emphasis added].

324 Statement of Claim, ¶383 [emphasis added]. Just what a "*factual right*" is is an entirely separate question altogether.

> Furthermore, as a winner of the 2018 Tender, Garsu Pasaulis' right to produce and maintain the e-passports system in the Kyrgyz Republic **was a substantive as opposed to procedural right**.[325] […]
>
> However, and more importantly, once Garsu Pasaulis acquired the abovementioned rights, **these rights could not be withdrawn or cancelled**.[326]

153. By way of a preliminary remark, none of the above-emphasized characteristics that Claimant gives to its own purported investment is confirmed by Prof. Alenkina's expert opinion. Indeed, Claimant includes those characteristics favoring its own narrative by either misinterpreting parts of the Alenkina Expert Report it refers to, or without any reference to the report at all. Claimant is seemingly only comfortable with actually relying on the opinions of its expert witnesses when those opinions are arrived at via the tunnel-vision of Claimant's own submissions.[327]

154. Be it as it may, Claimant's characterizations of its rights stemming from it 'winning' the 2018 Tender are simply wrong.

155. **First**, there was nothing "*economic*" about such rights. Claimant repeats this term *ad nauseam* throughout its Statement of Claim, creating an impression that having 'won' the 2018 Tender, it would immediately have been vested with rights of a party to a contract for the sale of passport blanks and related IT infrastructure.[328] This is plainly wrong. As explained by Judge Davletbayeva in her expert opinion, the right to conclude a contract that Claimant obtained after being declared the winning bidder "*is inherently procedural*" and Claimant could not have had any contractual rights up until the actual execution of the contract with the procuring entity.[329] The situation could have been different if the procurement contract in the present case was entered into by signing minutes of the tender results, which is equivalent to a contract.[330] Yet, this is not what happened in the present case, where only the right to conclude a contract was auctioned, not the contract itself.[331]

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325 *Ibid*, ¶362 [emphasis added].

326 Statement of Claim, ¶393 [emphasis added].

327 *See* Section III.A. above.

328 *See* e.g., Statement of Claim, ¶370.

329 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶60.

330 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶51 and **Exhibit RLA-3**, Civil Code of the Kyrgyz Republic, Article 409(5).

331 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶57.

156. Claimant tries hard to blur the above distinction by insisting that once the Tender winner was announced, "*no further negotiations or corrections were allowed.*"[332] This allegation is misleading and is belied by the factual record. As explained at paragraphs 65-68 above, after being proclaimed the winner of the 2018 Tender on February 1, 2019, Claimant actually had multiple exchanges with the procuring entity – the SRS – with regard to the content of the future contract. For example:

156.1. On February 4, 2019, the SRS requested that Claimant provide originals of its tender bid and informed it that the e-passport supply contract "*will be concluded according to the template annexed to the tender documentation, taking into consideration the approvals, edits and annexes of the Parties*."[333] In reply, Claimant asked the SRS to "*confirm that the draft of the contract will be sent by you and until that time we do not have to do anything.*" On February 6, 2019, the SRS informed Claimant that the draft contract "*is in the stage of internal approvals and will be sent to you in the coming days*."[334]

156.2. On February 21, 2019, upon the dismissal of Mühlbauer's and IDEMIA's complaints by the Independent Interdepartmental Commission, the SRS requested Claimant to fly out to the Kyrgyz Republic to sign the contract. In reply, Claimant: (**i**) confirmed on the same day that its representative can be in Bishkek by February 25, 2019, (**ii**) requested to send over "*the draft* [contract] *so that we can coordinate it with our lawyers*," and (**iii**) inquired on whether the bank performance guarantee was required "*before signing the contract or a few days after.*"[335]

157. Evidently, the parties intended to make amendments to the draft / template contract annexed to the tender documentation and were, in fact, far from actually entering into the contract. Claimant in fact admits this at paragraph 362 of the Statement of Claim, noting that "*Garsu Pasaulis' winning bid formed* [only] ***a part of the content of the contract*** *with the Government.*"[336]

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332 Statement of Claim, ¶370.

333 **Exhibit C-030**, Email exchanges between SRS and Garsu Pasaulis dated February 06, 2019.

334 *Ibid.*

335 **Exhibit C-029**, Email exchanges between SRS and Garsu Pasaulis dated February 21, 2019. February 21, 2019 was a Thursday. Claimant's representative wrote that he could be "*in Bishkek on Monday, in the morning.*" The next Monday was February 25, 2019.

336 Emphasis added.

158. Strikingly, Claimant's own expert on Kyrgyz law seems to admit that Claimant did not have any contractual rights after it was proclaimed the winner of the 2018 Tender. While in her expert report Prof. Alenkina suggests at one instance that Claimant had acquired "*the right to sell passport forms*"[337] (a statement that was expectedly picked up and quoted by Claimant in its Statement of Claim at every convenient instance),[338] elsewhere she actually admits that it was merely a right to *conclude* a contract.[339]

159. Furthermore, as explained by Judge Davletbayeva, the right of any winning bidder of a public procurement procedure is legally vulnerable, attesting to its procedural nature. For example, the procuring entity may cancel public procurement procedure **at any point in time** before conclusion of a contract, if it considers that there is no longer a need for such procurement, with no consequences for the procuring entity vis-à-vis the winning bidder.[340] A right is anything but contractual where the counterparty may simply say "*I changed my mind*" without any consequences. This is even more so apparent considering the limited legal remedies available to the winning bidder, which consist of merely bringing a claim to compel the procuring entity to conclude a contract.[341]

160. Finally, while throughout its submissions Claimant repeatedly asserts that its "*economic*" right stemming from 'winning' the 2018 Tender was a "*valuable*" one,[342] and even argues that such "*value*" amounted to EUR 12,000,000,[343] it at no point provides any evidence of this assertion under Kyrgyz law. Indeed, if Claimant was correct, then under Kyrgyz law Garsu Pasaulis would have been entitled to a claim for lost profits in the entire amount of the contract for the production of the passport blanks **even before** entering into the actual contract with the SRS. Evidently, no such remedy was available to Claimant, and it does not even suggest the contrary. In fact, under the Kyrgyz public procurement regulations, Claimant was not even entitled for compensation of expenses incurred in the preparation of its bid: as per Clause

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337 **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶80.

338 *See* e.g., Statement of Claim, ¶¶123, 182.

339 *See* e.g., **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶83: "*Thus, the Protocol of Procurement procedures, which announced the winner of the bidding of Garsu Pasaulis JSC, certifies its exclusive right to conclude a contract on the terms determined in the bidding process.*"

340 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶60 and **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 31(1).

341 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶60 and **Exhibit RLA-3**, Civil Code of the Kyrgyz Republic, Article 409(5)(2).

342 *See* e.g., Statement of Claim, ¶¶357, 401

343 *Ibid*, ¶322.

4.1 of the 'Instruction to the Bidders' (Annex 1 to the Tender Documentation), "[t]*he Bidder shall bear all costs associated with preparing and submitting the bid.* ***The Buyer shall not be liable or responsible for such costs***."[344] Accordingly, Claimant's rights as a winner of the 2018 Tender had no discernable value under Kyrgyz law.

161. **Second**, contrary to Claimant's allegations, Garsu Pasaulis' right to conclude the public procurement contract after being proclaimed as the 'winner' of the 2018 Tender was anything but "*unconditional*" or "*automatic*." This is in fact confirmed by Claimant itself who, after stating that its rights "*could not be withdrawn or cancelled*" at paragraph 393 of the Statement of Claim, in the very next paragraph lists no less than eight different grounds, based on which its right to conclude a public procurement contract could be terminated, including the procuring entity's 'changing of mind'.[345] Moreover, as emphasized by Judge Davletbayeva, any winning bidder's right to conclude a public procurement contract is limited in time and expires upon the expiration of the validity of its bid.[346] In other words, if for any reason the winning bidder and the procuring entity did not enter into a contract before the expiration of the validity of the winner's bid, and the winner did not take legal measures to compel the procuring entity to enter into the contract, its right to enter into that specific public procurement contract expires for good.

162. Accordingly, by 'winning' the 2018 Tender Claimant did not acquire any protected substantive economic right under Kyrgyz law and for that reason, it did not make an 'investment' within the meaning of Article 1(1) if the BIT.

b. 'Winning' of the 2018 Tender does not meet other criteria for an 'investment' under the BIT or international law

163. At paragraph 401 of the Statement of Claim, Garsu Pasaulis suggests that its 'winning' of the 2018 Tender constitutes an 'investment' under the BIT in the following terms:

> [T]he contractual right arising from winning the 2018 Tender is a valuable asset and constitutes a protected investment since it contains monetary claims or claims to perform an economic activity or a right to engage in economic activity under a contract in the Kyrgyz Republic having economic value (Article 1(1) of the [BIT]).

344 **Exhibit R-17**, 2018 Tender Documentation, Annex 1, Clause 4.1 [emphasis added].

345 Statement of Claim, ¶394 and **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶87.

346 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶62, 70, and 73.

164. The above statement is correct in one aspect: for there to be "*claims to money or to any other performance having an economic value*" or "*right to engage in an economic activity*" under the BIT, there must be a substantial **contractual right**. Yet, as thoroughly explained at Section III.B.2.a immediately above, Claimant's right to conclude a public procurement contract stemming from its 'winning' of the 2018 Tender is **not** a contractual right under Kyrgyz law. According to Judge Davletbayeva, such rights could only have been obtained by Claimant once it would have entered into a public procurement contract with the SRS.[347] She thus concludes that it is "*simply inappropriate*" to state that Garsu Pasaulis acquired any "*monetary claims*" or "*rights to engage in economic activity*" as Claimant suggests.[348]

165. Yet, even if one were to disregard the BIT's requirement for an asset to be recognized under national law to qualify as an investment, Claimant's claims would still fail at other steps of the applicable test.

166. **First**, Claimant's right to execute a public procurement contract was not an investment "*made*" within the meaning of Article 1(1) of the BIT in that it was not an investment in a completed form. At best, it is an 'investment in the making', which could eventually arrive at a proper contract (but did not); at worst, it is mere 'pre-investment' activity. As explained at paragraphs 132 *et seq.* above, neither is protected under the BIT.

167. The inherently pre-investment character of a tender was confirmed by the *Nordzucker* tribunal in the following terms:

> 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. Taking into account the fact that tenders open for privatization of State's assets (shares, business, real estate etc.) attract usually a large number of foreign bidders only one of whom can be successful, the State would be exposed to many international arbitration proceedings commenced by unsuccessful bidders. For this reason the States in principle (and specifically in the case of Germany and Poland) agree to grant the full Treaty protection only with regard to investments actually made and admitted in accordance with the law of the host State and not to intended investments.[349]

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347 *Ibid*, ¶60.

348 *Ibid.*

349 **Exhibit E-015**, Nordzucker v. Poland, ¶189.

168. Similarly, as explained by Professor Zachary Douglas:

> There is no reported arbitral award dealing with a breach of an obligation to an investor at a 'pre-investment' stage of its activities in the host state. It might be expected that reliance upon these pre-investment obligations is more likely to be used as leverage by prospective investors in negotiations with host states rather than as the basis of a claim in actual arbitration proceedings. The difficulty with the latter is the fashioning of an appropriate remedy for a breach of the obligation. Take what is likely to be a typical scenario where the putative investor faces discrimination in a tender process conducted by the host state. The most appropriate remedy would be an injunction to prevent the tender being awarded on the basis to a particular company that has profited from the discriminatory tender rules, but there is no mechanism to ensure that such an order by the tribunal would be enforced. Indeed, at least in relation to arbitrations conducted under the ICSID Convention, the Contracting States are only obliged to enforce 'pecuniary obligations' imposed by an arbitration award. **In relation to the remedy of damages, it might be expected that compensation would have to be limited to the expenses incurred by the putative investor in submitting its failed bid. The assessment of damages on the basis of the expected profit that the putative investor might have earned if it had been successful at the tender would be tantamount to reversing the host state's decision on the tender and awarding it to a different party. This would not be an equitable solution**.[350]

169. Claimant is of course fully conscious of this reality. This is why in its submissions it throws in a whole suit of legal authorities meant to "*distinguish*" the present case from 'pre-investment' activities and to demonstrate that rights under a tender can be considered a standalone investment. Those are addressed, in turn, below:

169.1. First, at footnote 368 of the Statement of Claim (footnote 42 of the Baltag Submission) Claimant sets out several authorities meaning to confirm that "*winning of the 2018 Tender is a protected right.*"[351] Yet, literally **each and every** one of those authorities confirm that this conclusion is dependent upon the status of such rights under domestic law of the host State.[352] As explained at Sub-Section III.B.2.a

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350 **Exhibit RLA-27**, Z. Douglas, "The International Law of Investment Claims", 2009, ¶288 [emphasis added].

351 Statement of Claim, ¶411 and **Exhibit CER-1-1**, Baltag Submission, ¶58.

352 *See* **Exhibit E-40**, Grimmer, "Love Me Tender: At Which Point in a Tender Process Is Investment Treaty Protection Attracted?", Hong Kong International Arbitration Centre (ed.), International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan, Kluwer Law International, 2018, pp. 488 and 501: "*In assessing whether a would-be investor has acquired such rights, **it is necessary to consider the relevant domestic law of the host State***" [emphasis added]; **Exhibit E-015**, Nordzucker v. Poland, ¶167: "*The Tribunal also notes that the definition given in article 1(1)(a) requires that the investor invests pursuant to the legislation of the other Contracting Party. Whereas the Tribunal does not*

above, Claimant's right to conclude a public procurement contract stemming from its 'winning' of the 2018 Tender is **not** a protected economic right under Kyrgyz law. As one of the scholars' commentaries referred to by Claimant aptly puts it:

> The essential problem for a claimant in demonstrating that it has made a qualifying investment is that commonly the tender documentation and domestic procurement law will provide that **no contract is formed until the project documentation is executed**, the **tender can be cancelled at any time** and the **host state accepts no responsibility for the costs associated with participating in the tender**.[353]

This is a perfect summary of the case the Tribunal has before it in the present dispute.

169.2. Second, Claimant's reliance on decisions in *Nordzucker v. Poland*, *Lemire v. Ukraine* and *Bosca v. Lithuania* to argue that "*a tender can generate rights which qualify as investments*"[354] is inapposite.

169.2.1. Regarding *Nordzucker v. Poland*, as discussed at paragraphs 135 *et seq.* above, the tribunal in that case was faced with a definition of the 'investment' in the applicable treaty that is different from that of the BIT and includes "*all kind of assets that an investor of one Contracting Party* ***invests*** […]" (not "*invested*" or "*investments made*"), and which

consider that this reference to the host State's law allows a host State to determine unilaterally whether or not the "involvement" of an investor in its country amounts to an investment or not, the expression "pursuant to the legislation" of the host State, which also comes back in article 2.1 second sentence (see hereafter) in this Tribunal's opinion means more than just to exclude transactions which are illegal under the host State's law. It means that a tribunal, when deciding whether or not an investor invests in property, or shares or money claims or any other assets, ***has to apply the host State's law in assessing whether the investor has duly acquired property, shares, claims to money or other assets***" [emphasis added]; **Exhibit E-042**, Nagel v. Czech Republic, ¶316; **Exhibit E-043**, Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary, ICSID Case No. ARB/12/2, Award dated April 16, 2014, ¶¶161-162: "*The need to identify a proprietary interest that has been taken is confirmed by the definition of 'investment' in the Treaties. In each case, the Treaty refers compendiously to 'every kind of asset*[s]*'. The Oxford English Dictionary definition of 'asset' is: (usually assets) an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies. The definitions in the Treaties go on to provide particular examples of types of property or rights that may constitute an asset for this purpose. But these examples are not exhaustive.* […] *In order to determine whether an investor/claimant holds property or assets capable of constituting an investment* ***it is necessary in the first place to refer to host State law***" [emphasis added]; **Exhibit E-044**, ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22, Award dated May 03, 2018, ¶150: "*if the Tribunal concludes that no valid contract was formed* ***under Kosovar law*** *as claimed by Axos this would be sufficient to dismiss Axos' main jurisdictional theory.*"

353 **Exhibit E-041**, J. Jenkins, "International Construction Arbitration Law", Kluwer Law International, 2021, 3rd edition, p. 392 [emphasis added].

354 Statement of Claim, ¶¶413-416 and **Exhibit CER-1-1**, Baltag Submission, ¶¶60-63.

accordingly allowed the tribunal to admit that a tender can constitute an "*investment in the making*" protected under the treaty.[355]

169.2.2. As to *Lemire v. Ukraine* and *Bosca v. Lithuania*, in both of those cases the applicable treaties expressly extended protection not only to investments themselves, but also to the "*associated activities,*" which was the exact basis for the tribunals in those cases to recognize their jurisdiction *ratione materiae*.[356] For the avoidance of doubt, the BIT does not extend its protection to any "*associated activities.*"[357]

169.3. Finally, at paragraph 64 of her submission, Dr. Baltag argues that the Tribunal "*must distinguish the present arbitration from the cases in which arbitral tribunals have held that so-called 'pre-investments' – usually in the phase of negotiating contracts – do not qualify as protected investments under the relevant treaty*" and that such "*'pre-investment' cases must be approached with caution, as suggested by the tribunal in Mihaly v. Sri Lanka.*" Yet the passage from the *Mihaly v. Sri Lanka* case quoted by Dr. Baltag contradicts her own argument.

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355 **Exhibit E-015**, Nordzucker v. Poland, ¶¶164-165 and 209.

356 **Exhibit E-046**, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award dated March 28, 2011, ¶¶90-91: "*If an investor claims that his investment, once made, was subsequently denied frequencies and broadcasting licences in violation of Ukraine's obligations as assumed in the BIT, this claim constitutes an "investment dispute" for purposes of Article VI of the BIT; the Centre has jurisdiction and the Tribunal competence to adjudicate it* […] *This conclusion is confirmed by the text of the BIT.* ***The BIT expressly extends protection to "associated activities"*** *which include "****access to*** *...licences, permits and other approvals* [as opposed to just "*licenses, permits and other approvals*"]*" (see Articles I.1 (e) and II.11 (b) of the BIT)*" [emphasis added]; **Exhibit E-047**, Luigiterzo Bosca v. Lithuania, PCA Case No. 2011-05, Award dated May 17, 2013, ¶172: "*Looking to the Protocol to the Agreement, which* ***includes among its provisions examples of "associated activities" to be treated as investments****, the Tribunal concludes that becoming the tender winner and negotiating the SPA can be likened to "making* [a] *contract*[]*." Thus,* ***the Tribunal finds that these activities between the Claimant and the SPF constitute an "associated activit*****[y]*****"*** *granting the Tribunal jurisdiction over the Claimant's claim. Applying for and winning the tender led the Claimant to the contract-negotiating table. The Tribunal notes in particular that, when they were terminated by the SPF, the negotiations were at an advanced stage in which only three terms remained for discussion, two of them already agreed between the Parties' representatives but still subject to confirmation by the Claimant. In the Tribunal's view,* ***the culmination of the tender process announcing the Claimant as the winner and commencing the negotiation of the SPA falls within the express terms and intended meaning of an associated activity***." [emphasis added]

357 Even more inapposite is Claimant's reference at paragraph 472 of the Statement of Claim to the decision on jurisdiction in *PSEG v. Turkey*. Indeed, that case concerned a concluded, valid and binding contract and therefore has no relevance in the present case – *see* **Exhibit E-059**, PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction dated June 04, 2004, ¶104.

The tribunal in that case in fact rejected the claimant's contention that its rights under a tender constituted a protected investment on the following basis:

> It is in this factual setting that the Tribunal has been asked to consider whether or not, the undoubted expenditure of money, following upon the execution of the Letter of Intent, in pursuit of the ultimately failed enterprise to obtain a contract, constituted "investment" for the purpose of the Convention. The Tribunal has not been asked to and cannot consider in a vacuum whether or not in other circumstances expenditure of moneys might constitute an "investment". A crucial and essential feature of what occurred between the Claimant and the Respondent in this case was that first, the **Respondent took great care in the documentation relied upon by the Claimant to point out that none of the documents, in conferring exclusivity upon the Claimant, created a contractual obligation for the building, ownership and operation of the power station. Second, the grant of exclusivity never matured into a contract**.[358] […]
>
> It may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationships obligations may arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent party to damages, or some other remedy. However, **these remedies do not arise because an investment had been made**, but rather because the requirements of proper conduct in relation to negotiation for an investment may have been breached. **That type of claim is not one to which the Convention has anything to say**. They are not arbitrable as a consequence of the Convention.[359]

The present case is materially similar to that faced by the *Mihaly* tribunal. First, as explained at paragraph 49 above, the documentation under the 2018 Tender expressly provided that: (**i**) the procuring entity is in no way responsible for the costs associated with preparing and submitting of the bidders' bids, and (**ii**) the procuring entity is in no way liable before the bidders in case of cancellation of the 2018 Tender or its recognition as failed.[360] Further, as explained at paragraphs 159 *et seq.* above and at paragraphs 55-64 of Judge Davletbayeva's expert opinion, the rights obtained by Claimant after 'winning' the 2018 Tender were not substantive or contractual in nature under this particular type of public procurement, but rather procedural. Further yet, as explained at paragraph 64 of Judge Davletbayeva's expert opinion, Claimant had remedies at its disposal to compel the procuring organization to enter into a contract and to claim compensation of losses caused by the procuring organization's avoidance

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358 **Exhibit E-049**, Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award dated March 15, 2002, ¶48 [emphasis added].

359 *Ibid*, ¶51 [emphasis added].

360 **Exhibit R-17**, 2018 Tender Documentation, Annex 1, Clauses 4.1, 27.4 and 27.5.

from entering into a contract. Finally, it is undisputed that no contract between Claimant and the procuring entity (SRS) was concluded in the present case.

170. Accordingly, whatever rights Claimant acquired by 'winning' the 2018 Tender, they do not constitute an 'investment' under the BIT as it is not an investment "*made*" by Claimant in the Kyrgyz Republic.

171. **Second**, and for the sake of completeness only, Respondent notes that Claimant's purported investment does not meet any of the elements pertaining to the inherent meaning of the term 'investment', comprising contribution, a certain duration and risk.[361] Indeed, by submitting its bid under the 2018 Tender and being announced as its 'winner' on February 1, 2019, Claimant did not commit a single penny into the Kyrgyz economy. Moreover, since until the conclusion of a procurement contract Claimant's venture was yet to start, there was no duration and Claimant has not yet taken up any risk.

172. To conclude, the rights acquired by Claimant by 'winning' the 2018 Tender does not constitute a protected investment under the BIT and international law.

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

173. Claimant is of course aware of the serious jurisdictional hurdles it faces with respect to its claims arising out of the 2018 Tender. In an attempt to circumvent these hurdles Claimant spends tens of pages in its Statement of Claim and the Baltag Submission describing its earlier (unrelated) ventures in the Kyrgyz Republic, pretending that together with the 2018 Tender they formed part of Claimant's business operation in the Kyrgyz Republic.[362] Claimant argues that:

> In particular, Garsu Pasaulis reiterates that its investments in the Kyrgyz Republic are three-fold: (a) the locally established company LLC Garsu Pasaulis, (b) the previous and current contracts with the Kyrgyz Republic executed by Garsu Pasaulis, (c) the economic right to execute the e-passports contract won in the 2018 Tender.[363]
>
> "Garsu Pasaulis' investments in the Kyrgyz Republic must be considered *in corpore*, including its shares in a local company, contracts with the Kyrgyz

361 *See supra*, ¶140 *et seq.*

362 *See* Statement of Claim, Sections II(C)(i)-(iii), IV(B) and IV(D); **Exhibit CER-1-1**, Baltag Submission, Sections II(2.2.1)-(2.2.3) and (2.2.5).

363 Statement of Claim, ¶399.

> Government, know-how and goodwill / business reputation. The Tribunal should look at Garsu Pasaulis' investments as a whole operation, where the rights acquired under the 2018 Tender would be one of the manifestations of Garsu Pasaulis' investments. […][364]

174. This theory fails both on law and facts.

175. **On the law**, Claimant's arguments are highly confused and self-contradictory. For instance, it makes sporadic references to the concept of "*entire operation*"[365] and argues that the present dispute meets the criteria of a dispute "*arising directly*" out of its investment in the Kyrgyz Republic.[366] Yet, both notions specifically concern establishment of the jurisdiction *ratione materiae* under Article 25 of the ICSID Convention and thus have zero relevance to the present case.[367] Then, within its arguments related to the word "*directly*," at paragraph 408 of the Statement of Claim, Claimant makes the following statement:

> A causal link must be established between the dispute and the investment; whether the governmental measure is specifically targeted at the investment in question is irrelevant and, therefore, Kyrgyz's measures at stake need not be specifically targeted at one particular investment of Garsu Pasaulis'.

176. Apart from the fact that this statement is internally self-contradictory, of the two arbitral decisions it refers to in the footnote one is an award on the merits which does **not** treat issues of jurisdiction at all, and the other has not been produced by Claimant.[368]

177. As explained at Sub-Section III.B.1 above, the wording of Article 8(1) of the BIT requires that in order to establish the Tribunal's jurisdiction *ratione materiae*, a putative dispute must be "*relating to*" a protected investment – that is, the alleged violations of the BIT reproached

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364 *Ibid*, ¶410.

365 Statement of Claim, ¶316 and **Exhibit CER-1-1**, Baltag Submission, ¶34.

366 Statement of Claim, ¶¶405-408.

367 *See* e.g., **Exhibit E-020**, Ceskoslovenska Obchodini Banka A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction dated May 24, 1999, ¶¶74-75: "*The foregoing analysis indicates that the term "directly", as used in Article 25(1) of the Convention, should not be interpreted restrictively to compel the conclusion that CSOB's claim is outside the Centre's jurisdiction and the Tribunal's competence merely because it is based on an obligation of the Slovak Republic which, standing alone, does not qualify as an investment. Hence, in deciding whether the obligation referred to in CSOB's requested relief forms part of an investment, the Tribunal has to determine whether the purported obligation of the Slovak Republic forms an integral part of a transaction which qualifies as an investment.*"

368 **Exhibit E-076**, Ceskoslovenska Obchodini Banka A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction dated May 12, 2005 and "*Total S.A. v Argentine Republic, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, Baltag Report,* ***E-61***" (in fact, the document produced under **Exhibit E-61** is the Decision on Liability in *Total v. Argentina*, dated December 27, 2010).

to the host State must concern and directly affect the very asset and/or business project that is presented as the basis for the tribunal's jurisdiction *ratione materiae*. This stems both from the proper interpretation of Article 8(1) of the BIT, and the practice of investment tribunals.[369]

178. **On the facts**, Claimant fails to demonstrate that its earlier ventures in the Kyrgyz Republic are "*relating to*" to the 2018 Tender or the present dispute. The partial award in *Nordzucker v. Poland* is yet again illustrative in demonstrating this, due to a number of similarities with the present case. Specifically, on the facts of the *Nordzucker* case, the tribunal had to consider whether it could find that "*"because the acquisition of the four Sugar Groups constituted a single project" for Nordzucker, it was also "one investment." The question is whether the Groups form one investment or whether each Group is an investment on its own.*"[370] The tribunal reasoned as follows:

> The link between the various public sales procedures for the different Sugar Groups which have been launched by Poland is the fact that they were all governed by the same Privatization Act and that it was the same Ministry of State Treasury which was involved in the supervision of the sales process and, in last instance, had to give its final approval to the sales, in its capacity of shareholder of the Sugar Holding Companies which were the sellers. However, each Group was the subject of a separate public sales procedure, with its own timetable and sometimes even its own rules.
>
> These limited common aspects of the sales procedures for Sugar Groups do not support the conclusion that the acquisition of more than one Group constitutes a single investment. The particular features of Nordzucker's acquisitions do not support that conclusion either.[371]

179. It is noteworthy that the tribunal rejected the investor's allegation that it had always looked at the acquisition of the four Sugar Groups as a single investment in the view of acquiring 20% of the Polish sugar market, holding that such intention was "*not sufficient either to make its successive acquisitions part of a single investment.*"[372] It further explained that:

> There is no evidence either that Poland actually promised that Nordzucker would acquire six plants from the Gdansk and Szczecin Groups if it first acquired plants comprised in the Poznan and Torun Groups. As mentioned, Poland designated many more Sugar Plants for privatization

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369 *See* e.g., **Exhibit RLA-29**, National Grid P.L.C. v. Argentine Republic, UNCITRAL, Decision on Jurisdiction dated June 20, 2006, ¶¶138-139; **Exhibit RLA-30**, Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India, PCA Case No. 2016-07, Award dated December 21, 2020, ¶¶746-747.

370 **Exhibit E-015**, Nordzucker v. Poland, ¶143.

371 *Ibid*, ¶¶146-147 [emphasis added].

372 *Ibid*, ¶149.

> and the foreign investors were free in their choice of the Sugar Group(s) they offered to buy shares of. The unilateral decision of a potential investor to acquire more than one Sugar Group could not in any case bind Poland which was in principle entitled to expect to receive for each Sugar Group bids from more than one interested candidate. Thus, if the scope of an "investment" could be determined by a candidate's intended acquisitions, this would create serious conflicts in the normal situation where there were several bidders.[373]

180. Finally, the tribunal cautioned against regarding multiple separate ventures of one investor in the same host State as a single investment for the purposes of establishing jurisdiction:

> Furthermore, if similar investments - actual and envisaged - by the same investor in the same country were to be considered as a single investment for purposes of finding arbitral jurisdiction as soon as a dispute regarding rights and obligations pertaining to an envisaged investment arises, **it would be sufficient for an investor to have made one investment in a country to be allowed to claim protection for all envisaged investments in that country which would not otherwise be subject to protection**. The ensuing discrimination between candidates for a future investment, in favour of the investor who had already made an earlier investment in that country, would be inacceptable.[374]

181. In the present case, Claimant's prior purported investments, namely: (**i**) establishment of a local Kyrgyz company 'Garsu Pasaulis' LLC in 2016,[375] (**ii**) winning and executing of two excise stamps production contracts in 2013 and 2016,[376] (**iii**) provision of training and know-how,[377] and (**iv**) business reputation[378] have no connection with the 2018 Tender and cannot be regarded as a single investment with the 2018 Tender.

182. **First**, the 2013 and 2016 excise stamps production contracts have no connection with the 2018 Tender. Those contracts were subject to two different public procurement tenders, which were organized by a different procuring entity – the Kyrgyz State Tax Service – and had a different subject matter than that of the 2018 Tender, which concerned the production of passport blanks.[379] Claimant's participation in the 2018 Tender was moreover in no way dependent on its past expertise in the production of the excise stamps, and the 2018 Tender

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373 *Ibid*, ¶151.

374 *Ibid*, ¶152 [emphasis added].

375 Statement of Claim, Section IV(B)(b).

376 *Ibid*, Section, II(C)(iii) and IV(B)(c).

377 *Ibid*, Section IV(B)(d).

378 *Ibid*, Section IV(D).

379 *Ibid*, ¶¶89-103.

did not contain any requirements for such expertise. Finally, as explained at paragraphs 25-27 above, the latest 2016 excise stamp contract validly expired in 2021 to the mutual satisfaction of both parties – indeed, Claimant does not raise any allegations of mistreatment on the part of the Kyrgyz State in relation to the excise stamps contracts.

183. **Second**, establishment of a local Kyrgyz company "Garsu Pasaulis" LLC in 2016 has no connection with the 2018 Tender. As Claimant itself explains in the Statement of Claim, establishment of the local company was necessary specifically within the context of the performance of the excise stamps production contracts:

> A local company was necessary because the excise stamps contract required that Garsu Pasaulis pay all the import duties (DPP), assume all of the responsibility, risk and costs associated with transporting of excise stamps to the Kyrgyz Republic, Garsu Pasaulis also needed specific and secure logistics in the Kyrgyz Republic, warehouses, technical assistance and service center, an office, local IT specialists and technicians.[380]

184. In other words, the establishment of 'Garsu Pasaulis' LLC had nothing to do with the 2018 Tender or the production of passports. This much is also evident from the fact that Claimant participated in the 2018 Tender itself, not through its local company, and that the tender documentation did not even require from the participants to have a local company in order to take part in the tender.

185. **Third**, Claimant's provision of training and know-how in the years preceding the 2018 Tender have nothing to do with the 2018 Tender. Claimant itself confirms that such training and know-how was provided specifically within the context of performing of the excise stamps contracts and had nothing to do with production or selling of passport blanks.[381]

186. **Finally**, Claimant does not explain in its submissions just what kind of "*business reputation*" it would have effectively invested in the context of the 2018 Tender. The answer is simple – none. Reputation is only ever effectively invested and put at stake within the context of a functioning business venture. Claimant has one such venture, namely production of excise stamps between 2013 and 2021. Evidently, such reputation has nothing to do with the production of passport blanks, and was not invested by Claimant within the context of the 2018 Tender.

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380 Statement of Claim, ¶95.

381 *See* e.g., Statement of Claim, ¶344.

187. To summarize, Claimant's prior business ventures in the Kyrgyz Republic were separate and independent from its participation in the 2018 Tender. Such ventures cannot even be considered "*successive acquisitions*" within the same field of business, as it was the case in *Nordzucker*, let alone parts of a single investment.

188. As to Claimant's assertions that "*the 2018 Tender was part and parcel of Garsu Pasaulis' long-term and consistent plan to invest and work in the Kyrgyz Republic and the CIS region, and to access the lucrative post-Soviet market by using the Kyrgyz Republic as a springboard*," the Tribunal should treat such allegations with extreme caution. Indeed, they are only raised now in the context of the present arbitration proceedings and are supported by nothing by Claimant's own words. Moreover, they are simply not logical – one wonders why would Claimant still require a "*springboard*" into other countries of the region in 2018, when it had already been working in the Kyrgyz Republic for over 5 years. The 2018 Tender was neither a precondition for the expansion of Claimant's activities in the Kyrgyz Republic and the wider CIS region, nor was it a logical continuation of prior projects – it was a separate and independent venture Claimant decided to attempt at its own risk and peril.

189. Lastly, Respondent notes that the claims Garsu Pasaulis is raising in the present arbitration concern solely and exclusively the handling of the 2018 Tender by the Kyrgyz Authorities. Claimant cannot prove that the measures it complains about somehow affected the performance of the 2016 excise stamp contract or the functioning of its local company. All it manages to put forward are some bizarre conspiracy theories about the cancelled 2020 excise stamps tender which were addressed above.[382]

190. Accordingly, Claimant's prior business ventures cannot be regarded as a single investment together with it 'winning' the 2018 Tender and therefore have no relation to the present dispute. Since Claimant's rights under the 2018 Tender also do not amount to an 'investment' under the BIT, as explained at Sub-Section III.B.2 above, the Tribunal lacks jurisdiction *ratione materiae* over the present dispute.

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

191. If the Tribunal were to consider that Claimant's rights as the 'winner' of the 2018 Tender do in fact qualify as an investment and the Tribunal does have jurisdiction, then at any rate Claimant's claims are inadmissible, as its 'winning' of the 2018 Tender was obtained through

382 *See supra*, ¶¶25-27.

bribing Kyrgyz public officials. Below, after recalling that (**1**) international arbitration only protects lawful and *bona fide* investments, and that (**2**) international arbitral tribunals have an ethical duty not to aid corruption, (**3**) the Republic addresses the evidentiary threshold to prove corruption and (**4**) demonstrates that Claimant's alleged investment has been secured through corruption.

1. International arbitration only protects lawful and bona fide *investments*

192. It is a general principle of international law that an investment procured in violation of host State law, through fraudulent or criminal conduct, in particular through bribery, or in violation of the fundamental requirements of good faith and fair dealing, is not entitled to the protections of international investment arbitration.

193. This general principle applies with particular force where, as here, the investment involves a matter of sovereign authority and national security, such as the production of State identity documents and where, as in the present case, the applicable treaty conditions the extension of its benefits and protections on the investor's compliance with host State law. Article 1(1) of the BIT thus defines 'investment' as:

> […] any type of assets **invested** by an investor of one Contracting Party in the territory of the other Contracting Party **in accordance with the national legislation of the latter Contracting Party** […] in particular: […]

194. This also transpires from at least twenty-seven other bilateral investment treaties that the Kyrgyz Republic entered into, starting from its very first BIT with Turkey (signed on April 28, 1992), all containing the provision that investments must be made in accordance with Kyrgyz domestic law.[383]

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383 *See* e.g., **Exhibit RLA-31**, Agreement between the Republic of Kyrgyzstan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investments dated April 28, 1992, Article 1.2 ("*The term 'investment', in conformity with the hosting Party's Laws and Regulations, shall include every kind of asset in particular, but not exclusively* […]"); **Exhibit RLA-32**, Agreement between the Government of the Republic of Kyrgyzstan and the Government of the People's Republic of China on Promotion and Reciprocal Protection of Investments dated May 14, 1992, Article 1.1 ("*The term 'investment' shall mean all material assets, invested in the territory of the Contracting Party receiving the investments, in accordance with its legislation, including, in particular* […]") and Article 2.1 ("*Each Contracting Party shall promote investors of the other Contracting Party to carry out the investments and shall accept such investments on its territory in accordance with its legislation*") [unofficial translation from Russian]; **Exhibit RLA-33**, Agreement between the Republic of Kyrgyzstan and the French Republic Concerning the Reciprocal Promotion and Protection of Investments dated June 02, 1994, Article 1.1 ("*It is understood that the said investments must have been invested in accordance with the domestic legislation of the contracting Party on the territory or the maritime zone on which the investment have been made, before or after the entry into force of the present Agreement*" [Translation by the Respondent's Counsel]); **Exhibit RLA-34**, Agreement between the

Republic of Kyrgyzstan and the Republic of Indonesia Concerning the Promotion and Protection of Investments dated July 19, 1995, Article 1.1 ("*The term 'investment' shall mean any kind of asset invested by nationals of one Contracting Party in the territory of the other Contracting Party in conformity with the laws and regulations of the latter*"); **Exhibit RLA-35**, Agreement between the Republic of Kyrgyzstan and the Government of Malaysia for the Promotion and Protection of Investments dated July 20, 1995, Article 1.2(i) ("*The term 'investments' referred to in paragraph 1(a) shall only refer to all investments that are made in accordance with the laws, regulations and national policies of the Contracting Parties*"); **Exhibit RLA-36**, Agreement between the Republic of Kyrgyzstan and the Islamic Republic of Pakistan dated August 26, 1995, Article 1.1(b) ("*'Investment' shall encompass all types of property values which the 'Investors' of either Party shall invest on the territory of either Party in conformity with its legislation*"); **Exhibit RLA-37**, Agreement between the Republic of Kyrgyzstan and the Islamic Republic of Iran dated July 31, 1996, Article 1.1 ("*the term 'investment' means any type of property or asset carried out by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter*" [Translation by Respondent's Counsel]); **Exhibit RLA-38**, Agreement between the Republic of Kyrgyzstan and the Republic of Azerbaijan dated April 23, 1997, Article 1.2 ("*The term "investment" means a monetary or material contribution in the field of economic or other activities, as well as the transfer of intellectual property rights by a Contracting Party, its legal entities and natural persons, carried out in accordance with the legislation of the other Contracting Party.*" [Translated by Respondent's Counsel]); **Exhibit RLA-39**, Agreement between the Republic of Kyrgyzstan and the Republic of Georgia dated May 22, 1997, Article 1.1 ("*The term "investment" will cover any monetary or material contribution made in connection with economic activity by an investor of one Party, in the territory of the other Party in accordance with the current legislation of the latter*" [Translated by Respondent's Counsel]); **Exhibit RLA-40**, Agreement between the Republic of Kyrgyzstan and the Republic of India for the Promotion and Protection of Investments dated May 16, 1997, Article 1(b) ("*"investment" means every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the Contracting Party in whose territory the investment is made*"); **Exhibit RLA-41**, Agreement between the Republic of Kyrgyzstan and the Swiss Federal Council on the Promotion and Reciprocal Protection of Investments dated January 29, 1999, Article 2 ("*The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after its entry into force.*"); **Exhibit RLA-42**, Agreement between the Republic of Kyrgyzstan and the Republic of Belarus dated March 30, 1999, Article 1.2 ("*"Investment" means any type of property which is the property of a natural or legal person of one Contracting Party which is invested in the territory of the other Contracting Party in accordance with the legislation of the latter Contracting Party*" [Translated by Respondent Counsel]); **Exhibit RLA-43**, Agreement between the Republic of Kyrgyzstan and the Republic of Moldova dated November 07, 2002, Article 1.1 ("*The term "investment" will cover any type of asset invested in connection with economic activities by an investor of a State of one Contracting Party in the territory of the State of the other Contracting Party under the laws and regulations in force in the latter Contracting Party*" [Translated by Respondent Counsel]); **Exhibit RLA-44**, Agreement between the Republic of Kyrgyzstan and the Republic of Finland on the Promotion and Protection of Investments dated April 03, 2004, Article 1.1 ("*The term "investment" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party*"); **Exhibit RLA-45**, Agreement between the Republic of Kyrgyzstan and the Republic of Latvia for the Promotion and Reciprocal Protection of Investments dated May 22, 2008, Article 1 ("*The term "investment" shall comprise every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter*"); **Exhibit RLA-46**, Agreement between the Republic of Kyrgyzstan and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments dated December 07, 2014, Article 1.2 ("*The term "investment" means every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations*"); **Exhibit RLA-47**, Agreement between the Republic of Kyrgyzstan and the Kingdom of Qatar dated May 28, 2015, Article 1.2 ("*The term "investment" means all types of property and assets invested by an investor of a State of one Contracting Party in the territory of the State of the other Contracting Party in accordance with the national law of the latter State*" [Translated by Respondent's Counsel]).

195. The Kyrgyz Republic's emphasis on the foreign investor's obligation to comply with its laws is consistent with international law and public policy.

196. As the tribunal in *SAUR v. Argentina* explained, "[t]*he requirement of not having committed a serious violation of the legal regime is a tacit condition, inherent in every BIT, because it cannot be understood under any circumstance that a State is offering the benefit of protection through investment arbitration when the investor, to obtain that protection, has committed an unlawful action*."[384] The tribunal further observed that "*the purpose of the investment arbitration system is to protect only lawful and bona fide investments*."[385]

197. Applying these principles, the tribunal in *Hamester v. Ghana* likewise confirmed that the requirement of legality and good faith exists as a principle of international law independent of the precise wording of the applicable treaty saying that "[a]*n investment will not be protected if it has been created in violation of national or international principles of good faith;* ***by way of corruption, fraud, or deceitful conduct****; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law* […] *These are general principles that exist independently of specific language to this effect in the Treaty*"[386]

198. Since then, the principle of legality of investment and the requirement that the investment be made in good faith have been confirmed on numerous occasions by arbitral tribunals:

198.1. In *Fraport v. Philippines II*, the tribunal ruled that "*even absent the sort of explicit legality requirement that exists here, it would be still be appropriate to consider the legality of the investment. As other tribunals have recognized, there is an increasingly well-established international principle which makes international legal remedies unavailable with respect to illegal investments, at least when such illegality goes to the essence of the investment.*"[387]

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384 **Exhibit RLA-48**, SAUR International SA v Republic of Argentina, ICSID Case No. ARB/04/4, Decision on Jurisdiction dated June 06, 2012, ¶308 (French original: "*La condition de ne pas commettre de violation grave de l'ordre juridique est une condition tacite, propre à tout APRI, can en tout état de cause, il est incompréhensible qu'un État offre le bénéfice de la protection par un arbitrage d'investissement si l'investisseur, pour obtenir cette protection, a agit à l'encontre du droit*" [Translation by Respondent's Counsel]).

385 *Ibid*, ¶308 (French original: "*Il entend que la finalité du système d'arbitrage d'investissement consiste à protéger uniquement les investissements licites et bona fide. Le fait que l'APRI entre la France et l'Argentine mentionne ou non l'exigence que l'investisseur agisse conformément à la législation interne ne constitue pas un facteur pertinent*" [Translation by Respondent's Counsel]).

386 **Exhibit RLA-49**, Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No. ARB/07/24, Award dated June 18, 2010, ¶¶123-124 [emphasis added].

387 **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, ¶328.

198.2. The tribunal in *AMPAL v. Egypt* acknowledged that "[i]*t is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State*."[388]

198.3. The tribunal in *Minotte v. Poland* ruled that "*it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection*."[389]

198.4. In *Flughafen Zürich v. Venezuela*, the tribunal concurred with previous jurisprudence in saying that "[e]*nd even if there is no explicit reference in the BIT, the requirement that no serious breach of the host State's legal system occurs would be a tacit condition, comprised in every BIT, since a State cannot be understood as offering the benefit of protection through investment arbitration when the investor, in order to achieve that protection, has committed serious illegalities.*"[390]

199. Based on the foregoing, it is largely uncontested that a general principle of law exists according to which an investor, which made an investment in serious breach of the host State's domestic law is not admissible to bring a claim to international arbitration as its investment is not worthy of protection.

200. The obligation to comply with host-State law applies with particular emphasis to corruption, which is strongly sanctioned by Kyrgyzstan.[391] Any *bona fide* investor is presumed to be aware that any corrupt conduct will deprive him of treaty protection.

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388 **Exhibit RLA-51**, Ampal-American Israel Corporation and others v Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction dated February 01, 2016, ¶301.

389 **Exhibit RLA-52**, David Minnotte & Robert Lewis v Republic of Poland, ICSID Case No. ARB (AF)/10/1, Award dated May 16, 2014, ¶131.

390 **Exhibit RLA-53**, Flughafen Zürich A.G and Gestión e Ingenería IDC S.A. v Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award dated November 18, 2014, ¶132 (original Spanish: "*Y aun si no existiera esta referencia expresa en los AAPRI, el requisito de no haber incurrido en una violación grave del ordenamiento jurídico del Estado receptor sería una condición tácita, ínsita en todo APRI, pues no se puede entender en ningún caso que un Estado está ofreciendo el beneficio de la protección mediante arbitraje de inversión cuando el inversor, para alcanzar esa protección, ha incurrido en una actuación gravemente antijurídica*." [Translation by Respondent's Counsel]).

391 Specifically, under Article 319 of the Kyrgyz Criminal Code, corruption is sanctioned by prison terms ranging from 10 to 12.5 years. This Criminal Code was adopted in 2017, redefining corruption-related crimes to bring the definitions and content in line with the UN Convention Against Corruption (to which the Republic is party to, as well as the UN Convention against Transnational Organized Crime). Between 2008 and 2018, the Republic advanced by 34 places in international anti-corruption ratings.

201. Investments secured through corruption have given rise to an abundant case law and are systematically sanctioned, either on jurisdiction, admissibility or merits grounds. The Republic briefly recalls below the landmark cases:

201.1. In ICC Case No. 1110,[392] the dispute related to the payment of commissions in relation to a supply contract in Argentina. Judge Lagergren held that such commissions were aimed at bribing officials and famously observed with regard to claims based on bribe payments that "[p]*arties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes*."

201.2. In ICC Case No. 3916,[393] the arbitrator noticed that the claimant obtained approvals from the Government of Iran on behalf of the respondent, a Greek entity, with unusual speed. The claimant refused to explain the nature of its interactions with the Government or the structure of its group. The arbitrator thus concluded that the claimant's activity could be deemed nothing more than the exercise of unlawful influence to obtain Governmental approvals, thus rendering the contract between the parties null and void. He dismissed claimant's claims.

201.3. In ICC Case No. 8891,[394] the dispute related to the payment of an agency fee under an advisory services agreement. The tribunal found that the considered fee of 18.5% was high and that the duration of the contract was relatively short. The tribunal also noted that the claimant provided inadequate explanations regarding the nature of its activities on behalf of the respondent. Thus, while the tribunal found that the allegation that bribes were paid was not established with certainty, it held that the witness testimony and evidence revealed that the true intention of the parties in concluding the contract was secure business through bribery of foreign officials. Claimant's claims were dismissed.

201.4. In ICC Case No. 12990,[395] a series of complex oil agreements had been concluded between three companies and an African State. Following a change of government

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

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

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

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

consecutive to a civil war, the new government terminated the agreements, considering that they had been concluded in abnormal circumstances that enriched the previous government. After examining usually admitted "red flags", namely lack of evidence of the services rendered, brevity of negotiations, disproportion of the compensation compared to the services rendered, endemic corruption in the country, secrecy and incrimination of the persons involved, the tribunal found evidence of corruption and dismissed the claims.

201.5. In ICC Case No. 13515,[396] the parties' contract provided for the claimant to be paid a commission of 40%, which the tribunal found excessive for an intermediary. While the tribunal held that a high commission was not by itself proof of corruption, it noted that the payments to the claimant were transferred abroad, rather than in the jurisdiction of performance of the services, thus raising further suspicions of corruption. It dismissed claimant's claims.

201.6. In *Word Duty Free v. Kenya*,[397] the investor openly admitted that it made a 'donation' ('Harambee') amounting to USD 2 million to the Kenyan President in order to secure the public procurement. The tribunal considered that, in reality, this 'donation' was to be treated as a bribe and dismissed all the claims. In finding that the claimant violated applicable national laws and international public policy by paying a bribe to obtain its investment, thus making it "*not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of* ex turpi causa non oritur *action*," the tribunal in *World Duty Free v. Kenya* remarked that arbitral tribunals routinely "*refuse* […] *to condone such practices*" by denying all of the claims on jurisdictional or admissibility grounds.[398]

201.7. In *Metal-Tech v. Uzbekistan*,[399] the tribunal found that Metal-Tech investment was made and operated corruptly. To reach its decision, the Tribunal relied on a number of red flags. First, the tribunal looked at the size of the payment to the third party

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

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

398 *Ibid*, ¶¶156, 179.

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

> compared to size of the claimant's capital investment: the consulting fee amounted to USD 3.5 million, i.e. nearly 20 per cent of the entire project cost, and was held disproportionate, especially in light of monthly salaries of consultants in Uzbekistan. Second, the tribunal noticed that the payments to the consultants were to be made irrespective of the services rendered. This was confirmed by the claimant's witness, that no proof of the services rendered was sought.[400] Third, the tribunal found that the payments made by Metal-Tech were not transparent as a majority of such payments were made through a Swiss company and the consultants' ownership interests were concealed through numerous off-shore holding companies.[401] Fourth, reviewing the credentials of each of the consultants, the tribunal determined that none of them possessed the professional qualifications necessary to perform the services for which they were allegedly retained.[402] Considering that all these 'red flags' evidenced Metal-Clad corruption, the tribunal decided it lacked jurisdiction and dismissed the investor claims.[403]

202. The principle according to which an investment is not worth protection if it has been secured through corruption is also widely supported by scholars.[404] For instance, Bernardo Cremades claims that "[t]*he concept of good faith is precisely one of the things that distinguishes continental law (civil law) from the common law. In order to operate in good faith, the claimant must have clean hands. It could therefore be concluded that investors who obtain permission for their investments in the host country by means of corruption are disqualified.*"[405]

203. More recently, the Basel Institute of Governance developed a toolkit for arbitrators and considered that:

> If an investment has been procured by corruption, the tribunal should consider whether this renders the claim inadmissible, whether on jurisdictional grounds (where the treaty requires the legality of the investment) or other grounds (such as by application of the "unclean hands" doctrine). In a case where a foreign investor has procured its

400 *Ibid*, ¶¶204-207.

401 *Ibid*, ¶¶219-224.

402 *Ibid*, ¶208.

403 *Ibid*, ¶¶204-207.

404 **Exhibit RLA-61**, Z. Douglas, 'The Plea for Illegality in Investment Treaty Arbitration' (2014) 29 1 ICSID Review, pp. 155-186.

405 **Exhibit RLA-62**, B. Cremades, 'Investment Protection and Compliance with Local Legislation' (2009) 24 2 ICSID Review, pp. 557-564.

> investment by offering, promising or paying bribes to public officials in the host state, the tribunal therefore may not have jurisdiction to hear its claims or claims may be inadmissible. Whilst this may be a harsh consequence for the investor, condoning investor's corruption undermines domestic and international efforts to overcome transnational corruption. **Investors who knowingly engage in illegal activity may forfeit any legitimate claim for protection under international dispute settlement mechanisms**.[406]

204. The Basel Institute further opined that:

> If there is no conclusive evidence that the investment itself was procured by corruption, but there is evidence that the corruption occurred during the performance of the investment, a balanced and proportionate approach seems appropriate. **The tribunal may for example consider that the investor should be deprived of access to and protection by international dispute settlement mechanisms only with regard to the part of the investment that is tainted by corruption.**[407]

205. It is therefore largely uncontested that a general principle of law exists according to which an investor, which made an investment through corruption is not admissible to bring a claim to international arbitration as its investment is not worthy of protection.

2. International arbitral tribunals have an ethical duty not to aid corruption

206. In international arbitration, it is widely accepted that "[a]*rbitrators should* […] *not let themselves be used as a tool for fraud*."[408] This assertion is justified as "[i]*f arbitration was to become a safe harbour for illegality or a tool for fraud, it would not only be rejected by states, but also cease to be useful to the business community and, hence, to be the normal way of resolving international business disputes.*"[409] Consequently, to safeguard the integrity of the arbitral process and to avoid arbitration to "*be used as a tool for fraud*," academics and practitioners consider that, in international arbitration, "[i]*n addition to specific duties imposed on arbitrators, either by the parties or by law, it is generally considered that an arbitrator has certain moral or ethical obligations*."[410]

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406 **Exhibit RLA-63**, Basel Institute on Governance, Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators (2019), p. 16 [emphasis added].

407 *Ibid* [emphasis added].

408 **Exhibit RLA-64**, A. Mourre, 'Arbitration and Criminal Law: Reflexion on the Duties of the Arbitrator' (2006) 22 1 Arbitration International, p. 114. *See also* **Exhibit RLA-65**, P. Hodges & J. Greenaway, 'Chapter 15: Duties of Arbitrators' in J. D. M. Lew, H. Bor, et al. (eds), Arbitration in England, with chapters on Scotland and Ireland (Kluwer Law International 2013), ¶15-43.

409 **Exhibit RLA-64**, Mourre – Arbitration and Criminal Law, p. 115.

410 **Exhibit RLA-66**, N. Blackaby, C. Partasides et al., Redfern and Hunter on International Arbitration (6th eds Kluwer Law International; OUP 2015), ¶5.79.

207. One of these ethical duties owed by arbitrators is to prevent the "[u]*se of arbitration for further criminal purposes*."[411] If a tribunal is facing a situation in which the arbitral process is being hijacked by a party for criminal purposes, arbitrators should act as "*guardian of the legality and good morals in international trade*."[412]

208. This principle notably finds an application with regards to corruption and bribery, as it is a general principle of law that arbitrators have a duty to help prevent corruption and bribery by investigating allegations pertaining to these crimes.[413]

209. Such duty is of great importance as otherwise the award rendered would be contrary to international public policy and will be set aside.[414] Academics and practitioners are therefore

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411 *Ibid*, Ch. 5(C)(d)(i).

412 **Exhibit RLA-64**, Mourre – Arbitration and Criminal Law, p. 115: "*The relationship between arbitration and criminal law is not and should not be one of confrontation. Indeed, international criminal law powerfully contributes to the constitution of a true transnational public order, which is in turn an element contributing to the creation of an arbitral order autonomous from national laws. International criminal law is therefore part of the arbitral legal order to the same extent as trade usages and fundamental principles of international law. From this standpoint, arbitrators can be viewed as the true guardians of legality and good morals in international trade. There is in fact no doubt that the duties of the arbitrators are not only to the parties who have appointed them, but also to the international business community at large. In a worldwide marketplace, good governance, ethics and transparency are indispensable for ensuring competitors fair access to markets and a global market playing field*."

413 As Professor Cremades noted, "[t]*he position today is that the international arbitrator has a clear duty to address issues of bribery* […] *or serious fraud whenever they arise in the arbitration and whatever the wishes of the parties and to record its legal and factual conclusions in its award. This is the only course available to protect the* […] *integrity of the institution of international commercial arbitration*" and today, also, investment arbitration (*see* B. Cremades as quoted in **Exhibit RLA-67**, C. Lamm, H. Pham & R. Moloo 'Fraud and Corruption in International Arbitration' in M. A. Fernàndez-Ballesteros & D. Arias Liber Amicorum Bernardo Cremades (La Ley 2010), p. 731). Professor Kathrin Betz also emphasizes that "*arbitrators decide about disputes that potentially involve huge amounts of money, and in particular in investment disputes, the awards also can have political impact. For the sake of the integrity of the international investment and commercial arbitration system, it is crucial that arbitrators take alleged or suspected criminal conduct seriously*" **Exhibit RLA-68**, Betz, Proving Bribery, Fraud and Money Laundering in International Arbitration, p. 308).

414 The toolkit for arbitrator developed in 2019 by the Basel Institute on Governance emphasizes that "*arbitrators have a duty to issue an enforceable award. If arbitrators ignore issues of corruption, there is a risk that their award will be challenged in front of state courts in set-aside proceedings or at the enforcement stage on the ground that it is contrary to the national or transnational public policy*" (**Exhibit RLA-63**, Basel Toolkit, p. 12) and that "*if a party alleges or arbitrators suspect that corruption was involved in the underlying dispute, arbitrators should consider investigating (also on a* sua sponte *basis) those issues. Arbitrators should do so even if the allegations or suspicions arise only at the final stages of the proceedings*" (*ibid*). The International Law Commission, when addressing "*the topic of public policy as a ground for refusing recognition and enforcement of international arbitral awards*" (**Exhibit RLA-69**, International Law Association 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2000) Committee on International Commercial Arbitration, 1), noted that "[f]*ollowing the 1997 OECD Convention on Combating the Bribery of Foreign Officials in International Transactions, which reflects the mounting international concern about the prevalence of corrupt trading practices, it is arguable that there is an international consensus that corruption and bribery are contrary to international public policy*." Doak Bishop is even stronger when affirming that "[i]*nternational public policy strongly and universally condemns corruption of virtually every kind, and properly so. It is universally illegal, it involves issues of public morality, it involves conflicts of interest in many situations, it is nontransparent, it tilts the playing field*

unanimous when confirming that there exists a "*global convergence of legal rules, authorities, and opinions condemning corruption, supporting the claim that there exists an international public policy, even a transnational public policy, against corruption*".[415]

210. Arbitral tribunals should therefore avoid aiding the commission of corruption through the enforcement of a corrupt contract, as by allowing a party, in a favorable award, to benefit from the proceeds of its corrupt activities, arbitrators are in fact promoting the accomplishment of these criminal actions contrary to international public policy.

211. This position was defended as soon as 1963 by Judge Lagergren in his famous award in ICC Case 1110 according to which:

> [U]nder French law **the arbitrators** are not merely prevented from entertaining cases reserved for the ordinary courts, but they **will also, in a general manner, like the courts, not lend their aid to enforce contracts based on grave offence to *bonos mores*, whether committed in France or abroad**. In view of these considerations and with regard to the nature of the adventure in which the parties to this dispute have engaged, French law cannot admit this case to be settled by arbitration, regardless of whether the adventure was located in France or elsewhere.[416]

212. More precisely, according to Judge Lagergren:

> [C]are must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other.[417]

213. Likewise, in *World Duty Free v. Kenya*, where the investor had procured its investment through corruption, the Tribunal held that:

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for private actors in favor of one party illicitly, and it causes economic distortions. All or any one of those reasons would be sufficient to properly condemn an act of corruption" (**Exhibit RLA-70**, D. Bishop 'Toward a More Flexible Approach to the International Legal Consequences of Corruption' (2010) 25 1 ICSID Review, p. 63).

415 **Exhibit RLA-71**, M. Hwang & K. Lim 'Corruption in Arbitration – Law and Reality' (2012) 8 1 Asian International Arbitration Journal, pp. 2-3.

416 **Exhibit RLA-54**, ICC Case No. 1110 of 1963, XXI Y.B. COMM. ARB. 47, 52 (1996), ¶8 [emphasis added].

417 *Ibid*, ¶21. *See also* **Exhibit RLA-70**, D. Bishop 'Toward a More Flexible Approach to the International Legal Consequences of Corruption' (2010) 25 1 ICSID Review, p. 66.

> [I]t would be 'an affront to public conscience' to grant to the Claimant the relief which it seeks because this Tribunal 'would thereby appear to assist and encourage the plaintiff in his illegal conduct'[418]

214. Recently, in the context of annulment proceedings of an award rendered against the Republic of Kyrgyzstan, the Paris Court of Appeal considered that allowing an investor to benefit from his criminal activities by issuing a favorable award, despite an investment made and operated in corruption, was contrary to international public policy and should therefore be set aside. Accordingly, the Paris Court of Appeal ruled that:

> Considering that the recognition or enforcement of the award undertaken, which would have the effect of allowing Mr. BELOKON to benefit from the proceeds of criminal activities, manifestly, effectively and concretely violates international public policy; that it is therefore appropriate to pronounce the annulment requested.[419]

215. As a result, it should be considered that arbitrators have a duty to prevent corrupt investors from benefiting of their criminal activities. If an arbitral tribunal was to issue an award in favor of a corrupt investor, it would aid acts of corruption, promoting its accomplishment, in violation of international public policy and international law, as provided by the United Nations Convention against Corruption entered into force on 29 September 2003 (the "UN Convention")[420] and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997 (the "OECD Convention").[421] It would also risk the annulment of its award. As summarized by Richard Kreindler:

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418 **Exhibit RLA-59**, World Duty Free v. Kenya, Award, ¶¶178-179.

419 **Exhibit RLA-72**, Valeri Belokon v. Kyrgyz Republic, PCA Case No. AA518, Paris Court of Appeal on Application to Set Aside Award, Judgment (French original with English translation) dated February 21, 2017, p. 15 (original in French: "*Considérant que la reconnaissance ou l'exécution de la sentence entreprise, qui aurait pour effet de faire bénéficier M. BELOKON du produit d'activités délictueuses, viole de manière manifeste, effective et concrète l'ordre public international; qu'il convient donc de prononcer l'annulation sollicitée;*" [Translated by Respondent's Counsel]).

420 Pursuant to its Article 23.1: "***Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*** […] *(b)* ***Subject to the basic concepts of its legal system****: (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; (ii) Participation in, association with or conspiracy to commit, attempts to commit and* ***aiding, abetting****, facilitating and counselling the commission of any of the offences established in accordance with this article*" [emphasis added].

421 Pursuant to its Article 1.2: "*Each Party shall take* ***any measures necessary*** *to establish that complicity in,* ***including*** *incitement,* ***aiding and abetting****, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party*" [emphasis added].

216. Failure or refusal to address an illegality or public policy issue head-on in arbitral proceedings could be seen as a toleration, or indeed perpetuation, of nefarious practices […] [T]he arbitrator should not condone or support hindrances to the elimination of those practices.[422]

3. Evidentiary threshold to prove corruption

217. The Republic first recalls that circumstantial evidence and the reference of 'Red Flags' are the standard of proof applicable in investor-State arbitration to prove corruption (**a**) and then describe the 'Red Flags' commonly admitted to prove corruption (**b**).

a. Allegations of corruption are to be proven with circumstantial evidence such as 'Red Flags'

218. Arbitral tribunals used to apply a high standard of proof with regards to allegations of corruption, requiring "*clear and convincing*" evidence that the investor engaged in corrupted activities. In the opinion of these tribunals, it used to be a general consensus among international tribunals and commentators supporting "*the need for a high standard of proof of corruption.*"[423]

219. However, in recent years, the evolution of international law reveals the will of States and international organizations to withstand the threat and hidden nature of corruption by concluding new treaties drafted to sanction corruption more efficiently,[424] by publicly reaffirming their will to fight the "*problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law*",[425] and by proposing new means to detect and prove corrupt activities. Particularly, in order to oppose the hidden nature of corruption and

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422 **Exhibit RLA-73**, R. Kreindler, 'Approaches to the Application of Transnational Public Policy by Arbitrators', (2003) 2 J. World Investment 239 dated January 01, 2003, p. 249.

423 **Exhibit RLA-74**, EDF (Services) Limited v Romania, ICSID Case No. ARB/05/13, Award dated October 08, 2009, ¶221; *See*, more generally, **Exhibit RLA-75**, E. Gaillard, 'La corruption saisie par les arbitres du commerce international' (2017) 3 Revue de l'Arbitrage, 834.

424 **Exhibit RLA-76**, UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422, adopted by the General Assembly, by its resolution 58/4, entered into for on December 14, 2005 (Kyrgyzstan, Lithuania and Sweden are parties to this convention); **Exhibit RLA-77**, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions dated December 17, 1997 (Lithuania and Sweden are parties to this convention); **Exhibit RLA-78**, Council of Europe, Criminal Law Convention on Corruption dated January 27, 1999 (Lithuania and Sweden are parties to this convention); and **Exhibit RLA-79**, Council of Europe, Civil Law Convention on Corruption dated November 04, 1999 (Lithuania and Sweden are parties to this convention).

425 **Exhibit RLA-76**, United Nations Convention Against Corruption, Preamble.

facilitate its sanctioning, States,[426] international organizations,[427] and arbitration courts[428] have employed the 'Red Flags' method.[429]

220. According to academics:

> '[R]ed flags' and similar indicia of corruption can be conceived as potential forms of circumstantial evidence that, once established, can lead to a shifting of the burden of proof, requiring the rebuttal of allegations by evidence to the contrary, failing which certain inferences and conclusions might be drawn. Indeed, circumstantial evidence, particularly when direct evidence of corruption is unavailable, is increasingly, albeit cautiously, accepted as a tool to evaluate allegations of corruption by arbitral tribunals.[430]

221. While the use of circumstantial evidence and 'Red Flags' has been widely recognized as a general principle of international law for a long time, its use by investor-State tribunals is more recent, albeit now established.[431]

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426 *See* for example, **Exhibit RLA-80**, Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, FCPA: A Resource Guide to the US Foreign Corrupt Practices Act dated November 14, 2012, p. 22; **Exhibit RLA-81**, Paris Court of Appeal, Société Alstom Transport SA et autres v Société Alexander Brother Ltd dated April 10, 2018; **Exhibit RLA-72**, Belokon, Paris Court of Appeal, and more generally **Exhibit RLA-82**, E. Gaillard, 'The Emergence of Transnational Responses to Corruption in International Arbitration' (2019) 35 1 Arbitration International, p. 4.

427 **Exhibit RLA-83**, 2016 OECD Guidelines on Preventing Corruption in Public Procurement, which detail a number of 'integrity risks' and 'red flags' to be considered in the procurement process; **Exhibit RLA-84**, World Bank, Warning Signs of Fraud and Corruption in Procurement (2019), which provides some warning signs which can help identify the risk of fraud, corruption, collusion or coercion in procurement.

428 **Exhibit RLA-85**, 2010 ICC Guidelines on Agents, Intermediaries, and Other Third Parties, which advise companies to be sensitive to circumstances that suggest bribery risks or 'red flags' and set out a series of illustrative examples of red flags warranting further review when selecting or working with a third party.

429 **Exhibit RLA-82**, Gaillard on Corruption, p. 4.

430 **Exhibit RLA-86**, A. Llamzon & A. C. Sinclair 'Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct' in A. Van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series 18 (Kluwer Law International; ICCA & Kluwer Law International 2015), p. 488.

431 **Exhibit RLA-68**, K. Betz, Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence (Cambridge University Press, 2017), p. 309.

222. In public international law, academics note that "*it is a general principle of law that proof may be administered by means of circumstantial evidence*".[432] For instance, the International Court of Justice held that:

> [T]he victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[433]

223. In other words, whenever a party is unable to support an allegation by a direct evidence because the alleged fact is hidden in nature (in the *Corfu Channel* Case, the United Kingdom was unable to prove the presence of mine in the territorial waters of Albania as it could not access it), it is a general principle of law that proof can be administered by circumstantial evidence, such as 'Red Flags'.[434] This is also emphasized in the Basel Toolkit for arbitrators developed in 2019.[435]

224. In investment arbitration, due to the hidden nature of corruption, cases where a State can prove, beyond a reasonable doubt, that an alleged investor engaged in corrupt activities are extremely rare. In only one case, *World Duty Free v. Kenya*, was an arbitral tribunal able to prove directly and with certainty corruption as it was openly admitted that the investor made a 'donation' amounting to USD 2 million to the Kenyan President which should be treated as a bribe.[436] However such cases are rare as it is widely recognized that:

> [I]llicit arrangements such as bribery and money laundering are typically carried out in private by tacit agreement or behind seemingly legal transactions. Furthermore, parties involved in such arrangements consistently endeavour not to leave any incriminating evidence of their

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432 **Exhibit RLA-87**, C. T. Kotuby & L. A. Sobota General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes (OSAIL 2017), p. 195.

433 **Exhibit RLA-88**, Corfu Channel case, Judgment of April 9, 1949: I.C.J. Reports 1949, p. 18; *see also* **Exhibit RLA-87**, C. T. Kotuby & L. A. Sobota General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes (OSAIL 2017), p. 195.

434 The International Court of Justice have confirmed its position in subsequent cases, *see* for example **Exhibit RLA-89**, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America). Merits, Judgment dated June 27, 1986, I.C.J. Reports 1986, p. 63 ¶111; *See further* **Exhibit RLA-90**, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of September 13, 1993, I.C.J. Reports 1993, p. 325, Separate opinion of Judge Lauterpacht, ¶45.

435 **Exhibit RLA-63**, Basel Toolkit, Tool 5.3, p. 13.

436 **Exhibit RLA-59**, World Duty Free v. Kenya, Award, ¶¶135-136.

> activities. […] The difficulty of deducing direct evidence of corruption and other forms of illegality is compounded by the fact that such practices can only rarely be proven through witness testimony.[437]

225. Hence, in order to prevent these grave improprieties from being unpunished, academics and practitioners widely support the assertion according to which:

> [I]n the absence of direct evidence of corruption, such as an oral or written testimony, arbitral tribunals may use circumstantial evidence; rely on 'indicia of corruption' or 'red flags', or use adverse inferences. […] With respect to circumstantial evidence or 'red flags' of corruption, arbitral tribunals often rely on these to investigate allegations of corruption, as admission or direct proof of corruption is extremely rare. Additionally, arbitral tribunals have limited power to compel a party to produce evidence, unlike domestic and criminal courts. As Bin Cheng explained in his treatise on general principles of law: 'In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence.[438]

226. Therefore, similarly to the principles established by the International Court of Justice in the *Corfu Channel* Case, investor-State Tribunals have relied on circumstantial evidence such as 'Red Flags' to prove corruption and compensate for its hidden nature.

227. The seminal case pertaining to the use of 'Red Flags' is *Metal-Tech v. Uzbekistan*. In *Metal-Tech*, the tribunal ruled that "[f]*or the application of the prohibition of corruption, the international community has established lists of indicators, sometimes called 'red flags'*."[439]

228. Since this case, multiple arbitral tribunals have followed the findings of the tribunal in *Metal-Tech* in considering that allegations of corruption should be proven by the mean of circumstantial evidences such as 'Red Flags':

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437 **Exhibit RLA-82**, Gaillard on Corruption, p. 3; *see also* **Exhibit RLA-50**, Fraport v. Philippines, Award, ¶479; **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.

438 **Exhibit RLA-92**, C. W. Von Wobeser Hoepfner 'The Corruption Defense and Preserving the Rule of Law' in Andrea Menaker (ed), International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series 19 (Kluwer Law International; ICCA & Kluwer Law International 2017), pp. 219-220; **Exhibit RLA-93**, C. Lamm, B. Greenwald & K. Young, 'From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption' (2014) 29 2 ICSID Review, p. 338; **Exhibit RLA-82**, Gaillard on Corruption; **Exhibit RLA-94**, L. Low, 'Dealing with Allegations of Corruption in International Arbitration' (2019) 113 AJIL, pp. 343-344; **Exhibit RLA-87**, C. T. Kotuby & L. A. Sobota General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes (OSAIL 2017), p. 195.

439 **Exhibit RLA-60**, Metal-Tech v. Uzbekistan, Award, ¶293.

228.1. For instance, the *Spentex v. Uzbekistan* award "*applied a method of 'connecting the dots', thereby assessing all individual indicia in detail and checking the plausibility of a potential picture emerging from putting them together*", concluding that the most compelling explanation of the facts it had considered was that there had been corruption involving the investor and Uzbek State officials;[440]

228.2. Following the findings of the *Spentex* tribunal, the tribunal, in *Glencore v. Indonesia*, ruled that "[i]*n fact, what Respondent labels as 'connecting the dots' is nothing else than the time-honoured methodology followed by tribunals in all jurisdictions to establish truth based on indicia or circumstantial evidence: if a party marshals evidence that proves the existence of certain indicia, and it is possible to infer from these indicia (using experience and reason) that a certain fact has occurred, the tribunal may take such fact as established. The Tribunal has followed this methodology.*"[441]

228.3. Concurring with these previous decisions, the tribunal in *Churchill Mining v. Indonesia* ruled that, "[i]*n the Tribunal's view, the evidence on record is insufficient to establish that the issuance of the disputed documents involved corrupt practices. It is true that corruption is inherently difficult to prove. However, even taking such difficulty into consideration, there must be facts on the record, at least in the form of some circumstantial evidence or so-called red flags, that signal the corruption.*"[442]

228.4. Similarly, the *Oostergetel v. Slovak Republic* award provided that "[…] *corruption can also be proven by circumstantial evidence.*"[443]

228.5. Facing allegation of corruption from the host State, the tribunal, in *Karkey v. Pakistan*, decided that "[…] *Respondent bears the burden of proof with respect to its allegations of corruption pursuant to the well-established principle* onus probandi incumbit actori *(the party that asserts must prove). However, the Tribunal finds that it can shift the burden of proof*

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440 *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.

441 *Ibid*, ¶¶669-670.

442 **Exhibit RLA-91**, Churchill Mining v. Indonesia, Award, ¶466.

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

with respect to corruption and fraud to Karkey should the Tribunal be satisfied that there is unequivocal (or unambiguous) prima facie evidence in this regard."[444]

228.6. Likewise, in *Niko v. Bengladesh*, the tribunal shared "[…] *the conclusion reached by Aloysius Llamzon in his comprehensive monograph devoted to the legal doctrine and cases concerning corruption in international investment arbitration, to which the Parties have frequently referred: … the less formalistic sensibility of* Rompetrol *and Metal-Tech towards the evidentiary rules to be applied to corruption issues is helpful. Because corruption is a serious charge with serious consequences attached, the degree of confidence a tribunal should have in the evidence of that corruption must be high. However, this does not mean that the standard of proof itself should necessarily be higher, or that circumstantial evidence, inferences, or presumptions and indicators of possible corruption (such as 'red flags') cannot come to the aid of the fact-finder. Tribunals are given the freedom and burden of choice, which they should not abdicate by rote reference to an abstract 'heightened standard of proof'.*"[445]

228.7. In *Libananco v. Turkey*, "*the Tribunal* [accepted] *that fraud is a serious allegation, but it does not consider that this (without more) requires it to apply a heightened standard of proof. While agreeing with the general proposition that 'the graver the charge, the more confidence there must be in the evidence relied on' (see paragraph 117(a) above), this does not necessarily entail a higher standard of proof. It may simply require more persuasive evidence, in the case of a fact that is inherently improbable, in order for the Tribunal to be satisfied that the burden of proof has been discharged.*"[446]

228.8. Referring to the findings of the *Libananco* tribunal, the arbitrators, in *Union Fenosa v. Egypt* ruled that "[a]*s has long been recognised, corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence. Circumstantial evidence of corruption is as good as direct evidence in proving corruption. There is*

444 **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.

445 **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.

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

no reason in this arbitration, which is not a criminal proceeding, to impose a higher standard of proof: see the Libananco award (2011)."[447]

228.9. In a similar fashion, the tribunal, in *Fraport II v. Philippine* held that "*considering the difficulty to prove corruption by direct evidence, the same may be circumstantial.*"[448]

228.1. Most recently, the tribunal in *Penwell v. Kyrgyz Republic* observed that "[i]*t 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.*"[449] The tribunal then held as follows:

> 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. 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.[450]

229. The abovementioned conclusions of investor-State tribunals reveal that the standard of "*clear and convincing*" evidence formerly required in order to prove corruption is no longer applicable. As the tribunal in *Kim v. Uzbekistan* observed, "*the international community and many nations have placed a high priority on combatting corruption and that it may be the case that the standard of proof is shifting in this area of law.*"[451]

230. Based on the foregoing, circumstantial evidence and the use of 'Red Flags' should now be considered as the applicable standard of proof with regards to allegations of corruption.

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447 **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.

448 **Exhibit RLA-50**, Fraport v. Philippines, Award, ¶479.

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

450 *Ibid*, ¶334.

451 **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.

231. Finally, a new trend is emerging on the annulment phase with regards to arbitral tribunals who refuse to sanction corruption which could be proven only with circumstantial evidence. For instance, considering that "*the prohibition of money laundering is one of the principles that cannot be violated in the French legal system*",[452] the Paris Court of Appeal set aside two awards, including one rendered against Kyrgyzstan, due to the violation of its international public policy. According to the French Court, in both these cases, the tribunals disregarded 'Red Flags' supported by "*serious, precise and consistent evidence*" showing that corruption was involved, thus annulling both awards.[453]

b. Typology of 'Red Flags' that can prove corruption

232. Regarding the criteria that are taken into account by investor-State tribunals and by international organizations, three main non exhaustive lists summarize the main 'Red Flags' used to detect corruption.

233. Firstly, the tribunal, in the *Metal-Tech* Case provided for a list of 'Red Flags' widely used in subsequent decisions and commentary.[454] According to the tribunal, constitute a 'Red Flag' the fact that:

> (1) 'an Adviser has a lack of experience in the sector;' (2) 'non-residence of an Adviser in the country where the customer or the project is located;' (3) 'no significant business presence of the Adviser within the country'; (4) 'an Adviser requests 'urgent' payments or unusually high commissions;' (5) 'an Adviser requests payments be paid in cash, use of a corporate vehicle such as equity, or be paid in a third country, to a numbered bank account, or to some other person or entity;' (6) 'an Adviser has a close personal/professional relationship to the government or customers that could improperly influence the customer's decision'.[455]

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452 **Exhibit RLA-72**, Belokon, Paris Court of Appeal (original in French: "*la prohibition du blanchiment est au nombre des principes dont l'ordre juridique français ne saurait souffrir la violation*" [Translation by Respondent's Counsel]).

453 **Exhibit RLA-81**, Paris Court of Appeal, Société Alstom Transport SA et autres v Société Alexander Brother Ltd dated April 10, 2018; **Exhibit RLA-72**, Belokon, Paris Court of Appeal.

454 **Exhibit RLA-93**, C. Lamm, B. Greenwald & K. Young, 'From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption' (2014) 29 2 ICSID Review, pp. 340-341; **Exhibit RLA-102**, S. Nappert 'Chapter 12: Raising Corruption as a Defence in Investment Arbitration', in D. Baizeau and R. Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, 13 (Kluwer Law International; International Chamber of Commerce (ICC) 2015), pp. 180-182.

455 **Exhibit RLA-60**, Metal-Tech v. Uzbekistan, Award, ¶293.

234. Secondly, in 2010, the International Chamber of Commerce issued the 2010 ICC Guidelines on Agents, Intermediaries and Other Third Parties providing a list of 'Red Flags' which can be used in order to detect corrupt activities committed by third parties similar to the *Metal-Tech*. This list includes, but is not limited to, 'Red Flags' such as:

- A reference check reveals the Third party's flawed background or reputation, or the flawed background or reputation of an individual or enterprise represented by the Third party;

- The operation takes place in a country known for corrupt payments (e.g., the country received a low score on Transparency International's Corruption Perceptions Index);

- The Third party has a close personal or family relationship, or business relationship, with a public official or relative of an official;

- The Third party does not reside or have a significant business presence in the country where the customer or project is located;

- Due diligence reveals that the Third party is a shell company or has some other non-transparent corporate structure (e.g. a trust without information about the economic beneficiary);

- The only qualification the Third party brings to the venture is influence over public officials, or the Third party claims that he can help secure a contract because he knows the right people;

- The Third party's commission or fee seems disproportionate in relation to the services to be rendered;

- The Third party requires payment of a commission, or a significant portion thereof, before or immediately upon the award of a contract;

- The Third party requests an increase in an agreed commission in order for the Third party to "take care" of some people or cut some red tape; or

- The Third party requests unusual contract terms or payment arrangements that raise local law issues, payments in cash, advance payments, payment in another country's currency, payment to an individual or entity that is not the contracting individual/entity, payment to a numbered bank account or a bank account not held by the contracting individual/entity, or payment into a country that is not the contracting individual/entity's country of registration or the country where the services are performed.[456]

[456] **Exhibit RLA-85**, 2010 ICC Guidelines on Agents, Intermediaries, and Other Third Parties, pp. 6-7.

235. Despite its absence of value in international law, according to academics, the ICC Guidelines on Agents, Intermediaries and Other Third Parties provides relevant examples of 'Red Flags' and can help an arbitral tribunal detect corruption.[457]

236. Thirdly and lastly, the Basel Institute on Governance released a toolkit in 2019 in order "*to help arbitrators who suspect, or are confronted with, alleged corruption or money laundering in relation to the underlying dispute, to address these issues in a systematic and comprehensive manner, and to find a solution in accordance with the applicable laws*."[458] Adding that "[a]*n arbitral award having been rendered by an arbitral tribunal using the toolkit should have a greater chance of enforcement*."[459] The Basel Institute favors the use of Red Flags in order to identify corrupt practices, the red flags identified by the Basel Institute are:

> i. the prevalence of corruptive behaviour in the country as revealed by certain international organizations or NGO's like Transparency International's Corruption Perceptions Index;
>
> ii. criminal investigations have been carried out prior to the arbitration proceedings, or in the meantime, by domestic authorities;
>
> iii. the attitude of the company towards newest regulation regarding compliance;
>
> iv. lack of code of conduct or certificates of the company providing a presumption of compliance with anti-money laundering obligations and compliance ones (for example mentioning its compliance with the UK Bribery Act of 2010, the United States Foreign Corrupt Practices Act of 1977, or the French Sapin II regulation); v. the company has already been convicted of such offences and does not provide any indication that it worked to address the issue.
>
> Further red flags include, but are not limited to, kickback payments (i.e., a payment back to the same entity that was the purchaser under the first contract) and overpayments. For arbitrators, if a fundamental or several of the above red flags are present and raise the suspicion of corruption, it is certainly worth taking a closer look.[460]

237. Therefore, in order to prove that Claimant made its investment by corruption, it is necessary to make the use of these 'Red Flags' with the addition of any indicia of corruption as these lists are not exhaustive.

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457 **Exhibit RLA-102**, Nappert, Raising Corruption as a Defence in Investment Arbitration, pp. 180-182.

458 **Exhibit RLA-63**, Basel Toolkit, p. 5.

459 *Ibid.*

460 *Ibid*, p. 8.

238. Finally, the fact that the host-State may not to have yet prosecuted the relevant act of corruption does not constitute an exonerating factor for the investor. Relevant case law pertaining to corruption allegations refuses to take into account the absence of prosecution from the host State in the investor's activities.[461] In fact, external aspects can interfere with the State's will to prosecute corruption from an investor before its domestic courts such as the impossibility to prove the corrupt activities beyond a reasonable doubt as it cannot have an easy access to the investor who lives or is incorporated in a foreign country.[462] One commentator notes that "[t]*o date, States have not been required to prosecute the alleged wrongdoers in order to raise successful jurisdictional and admissibility defenses based on corruption or other violations of law. In both World Duty Free (paras. 180-181) and Metal-Tech (paras. 308, 336), the tribunals held that corruption was proven and thus dismissed the claims on that basis, even though neither respondent State prosecuted the accused government officials or the individuals who allegedly made the corrupt payments*." [463]

239. The current state of international jurisprudence is well explained in the award rendered in *Fraport I v. Philippine*: "[a]*ssuming* […] *that the findings of the Prosecutor had dealt directly with* [the relevant criminal conduct] […] *such a finding would not constitute a res judicata because of a difference in the identity of the parties and the claim*. […] *Moreover, holdings of municipal legal institutions cannot be binding with respect to matters properly within the jurisdiction of this Tribunal*. […] [T]*he legality of the investment is a premise for this Tribunal's jurisdiction, the determination of such legality can only be made by the tribunal hearing the case, i.e. by this Arbitral Tribunal*."[464]

240. Therefore, even if the host State did not prosecute the allegedly corrupt activities of the investor, it can decide to raise a jurisdictional objection grounded on these corrupt activities before an investor-State tribunal.

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

241. In the present case, Respondent has established comfortably above the applicable evidentiary standard that Claimant's purported investment – namely its short-lived 'winning'

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461 **Exhibit RLA-59**, World Duty Free v. Kenya, Award, ¶¶180-181; **Exhibit RLA-60**, Metal-Tech v. Uzbekistan, Award, ¶¶ 308, 336.

462 **Exhibit RLA-103**, E. Tenier, 'L'office de l'arbitre d'investissement : le cas particulier de l'investissement illicite' (2019) 1 Revue de l'Arbitrage, pp. 149-150.

463 **Exhibit RLA-104**, B. Greenwald, 'The Viability of Corruption Defenses in Investment Arbitration When the State Does Not Prosecute' EJIL Talk dated April 15, 2015; **Exhibit RLA-103**, Tenier, L'office de l'arbitre d'investissement, pp. 149-150.

464 **Exhibit RLA-50**, Fraport v. Philippines, Award, ¶¶390-391.

of the 2018 Tender – was acquired through a corruption scheme involving bribery of multiple officials of the SRS. Unlike in some other arbitrations, in the present case the Tribunal has at its disposal not only circumstantial evidence, but a Kyrgyz court judgment condemning some of the protagonists of the said corruption scheme, further corroborated by signed testimonies and forensic evidence.

242. As explained at Sub-Section II.E.7 above, following the dismissal of the complaints of IDEMIA and Mühlbauer against the results of the 2018 Tender, 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,[465] and on February 25, 2019, the Main Office of Criminal Investigations at the GKNB assigned a team of investigators to the case.[466]

243. The GKNB investigation in relation to the 2018 Tender ended with a guilty verdict in early 2020 against three State officials – Messrs. Abdullayev, Bakchiev, and Sarybaev – who were found guilty of corruption and assisting with corruption in relation to the 2018 Tender.[467]

244. Specifically, the corruption investigation revealed (as admitted by Messrs. Abdullayev, Bakchiev and Sarybaev in their testimony) that:

244.1. In early Spring 2016, Mr. Abdullayev met with a Claimant's representative and one of Claimant's witnesses in this arbitration, Mr. Vitautas Mieliauskas, where the latter expressed Claimant's intention to participate in the forthcoming tender for the manufacturing of e-passports in the Kyrgyz Republic;[468]

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465 **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.

466 **Exhibit R-52**, Order on conducting the investigation by a group of investigators (on the creation of an investigation team) dated February 25, 2019.

467 **Exhibit C-042**, Kaktus, "E-passports tender. The court found three SRS officials guilty and sentenced to a fine" dated January 08, 2020.

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

244.2. In May-June 2016, Messrs. Abdullayev and Mieliauskas "*have established confidential relations concerning the forthcoming tender* […] *and the conditions of* [Claimant's] *participation in this tender were discussed beforehand*;"[469]

244.3. In June 2016, Messrs. Abdullayev and Mieliauskas met in Almaty, Kazakhstan, at Mr. Mieliauskas' expense, where he proposed "*very significant compensation*" for Mr. Abdullayev "*and other State officials*" for arranging the tender to be won by Claimant.[470] This Almaty meeting was off-books and attended and facilitated by Mr. Azamat Bekenov, a Kyrgyz IT specialist, and an acquaintance of Mr. Abdullayev.[471] Mr. Bekenov sought and obtained reimbursement of his travel expenses, which Claimant confirmed in this arbitration.[472]

244.4. Thereafter, Mr. Abdullayev, "*under the influence of the proposal he received*," "*shared the requirements of the tender documentation and provided assistance to* [Claimant] *for them to secure a win in the forthcoming tender*."[473]

244.5. In Autumn 2018, when the tender was announced, the then-Chairperson of the SRS, Ms. Alina Shaikova, organized a group of high-level SRS employees, including

469 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.Б3 dated December 26, 2019. For exhaustiveness, the nature of these 'confidential relations' was described in greater detail in an interview of Mr. Azamat Bekenov, a Kyrgyz IT specialist, and an acquaintance of Mr. Abdullayev. Specifically, in May 2016, Mr. Bekenov and two SRS employees (upon instructions of Mr. Abdullayev) were flown to Riga, Latvia to a security printing conference. All expenses were paid by a Lithuanian partner company of Claimant. *See* **Exhibit R-64**, Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019, p. 4.

470 *Ibid.*

471 The minutes of Mr. Bekenov's questioning with the GKNB elaborate on this June 2016 meeting in Almaty: (**i**) immediately prior to the meeting, Claimant's Mr. Mieliauskas asked Mr. Bekenov to "*have a word with Mr. Abdullayev and tell him not to be afraid and speak freely*;" (**ii**) during the Almaty meeting, Mr. Mieliauskas went as far as to propose to open bank accounts in Dubai to Mr. Abdullayev "*and his colleagues*" if they "*assist with awarding to* [Claimant] *the tender for new passports*;" (**iii**) Mr. Abdulayev and Mr. Mieliauskas discussed in detail the "*technical parameters of the tender.*" *See* **Exhibit R-64**, Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019, pp. 4, 5.

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

473 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.Б3 dated December 26, 2019, p. 2. Again, this is further elaborated on in the minutes of Mr. Bekenov's interview with the GKNB – *see* **Exhibit R-64**, Minutes of additional questioning of Mr. Bekenov A.K. dated April 01, 2019, pp. 5-6.

Messrs. Abdullayev, Bakchiev and Sarybaev to "*receive illicit material assets*" (i.e. bribes).[474]

244.6. In November-December 2018, the SRS Tender Commission commenced to analyze the five tender bids it has received and realized that all five bids lacked certain documentation. This was supposed to result in a recognition of the tender as failed.[475] Yet, Mr. Sarybaev, as the Chairman of the Tender Commission, avoided signing the relevant procedural documentation and convinced other members of the Tender Commission to reconsider their decision. He was assisted by Mr. Bakchiev, the State Secretary of the SRS, who supervised the Department of Public Procurement of the SRS. Mr. Bakchiev arranged for a written opinion on the materiality of the documentation missing from all five bids, issued by the Department of Public Procurement. Armed with this written opinion, Messrs. Sarybaev and Bakchiev managed to re-convince the members of the Tender Commission so that the tender process could continue.[476]

244.7. 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, including that of 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.[477]

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474 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.Б3 dated December 26, 2019, p. 13.

475 Pursuant to Article 31(2)(1) of Law on Public Procurement, a tender is recognized as failed if all the bids are rejected (which, *inter alia*, occurs due to non-compliance of the bids with the tender requirements stipulated in the tender documentation), *see* **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 31(2)(1).

476 **Exhibit R-63**, Sentencing Decision of the Pervomaiskiy district court in Case No. УД-1244/19.Б3 dated December 26, 2019, pp. 5-6.

477 *Ibid*, pp. 6-7.

244.8. For his 'services' in relation to the 2018 Tender, Mr. Abdullayev received USD 20,000, in cash, from Ms. Shaikova.[478]

244.9. 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 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.[479]

245. The guilty verdict was never appealed.

246. Crucially, investigations against other potential conspirators in the corruption scheme - including against Ms. Shaikova, the then-Chairperson of the SRS - are still ongoing. In fact, Ms. Shaikova would appear to be the only person who could shed further light on the corruption scheme deployed in the course of the 2018 Tender, with this even more so as Claimant, as explained at paragraphs 72 *et seq.* above, have evaded GKNB interviews.

247. Yet, 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.

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

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478 Which is attested, among other things, by the interview minutes, signed, without reservations, by Mr. Abdullayev, and his two legal counsel present during the interview – *see* **Exhibit R-78**, Minutes of questioning of Mr Abdullayev T. dated May 09, 2019.

479 *Ibid*, pp. 7-8.

IV. IN ANY EVENT, THE REPUBLIC DID NOT VIOLATE ANY PROVISIONS OF KYRGYZ LAW OR THE BIT

249. Even assuming the Tribunal does have jurisdiction to hear Claimant's claims and that they are admissible (*quod non*), they then must be dismissed for lack of merit. As will be set out further below, the Republic's actions did not violate Kyrgyz law (**A**) and were in conformity with the Republic's obligations under the BIT (**B**).

A. The Republic did not violate Kyrgyz law

250. Claimant argues that: (**i**) "*the illegal 'cancellation' of the 2018 Tender* […] *finds no justification* [under the Kyrgyz law]," (**ii**) "*Garsu Pasaulis was simply expelled from the 2018 Tender on a discriminatory basis*" and specifically, (**iii**) the 2018 Tender "*has never been "suspended" or "terminated" under the Kyrgyz law.*"[480] As set forth below, Claimant's conclusions are based on incorrect interpretation of the Kyrgyz law and intentionally partial presentation of the facts.

1. The 2018 Tender was validly suspended between February 5, 2019 and February 21, 2021

251. As explained at Sub-Section II.E.1 above, on February 1, 2019, Claimant was announced as the 'winner' of the 2018 Tender.[481] Claimant thus acquired an exclusive right[482] to enter into a contract with the Kyrgyz SRS for the production of passport blanks and the supporting IT infrastructure. As explained by Judge Davletbayeva in her expert opinion, and contrary to what is alleged by Claimant,[483] Garsu Pasaulis' entering into the public procurement contract was by no means "*unconditional*" or "*automatic*" and was in fact conditioned upon the accomplishment of several steps by the parties of the future contract, including the approval of the draft contract by the parties, Claimant's submitting notarized documents listed in its bid and depositing the contract performance guarantee.[484] This is in fact confirmed by the

480 Statement of Claim, Section VI(B).

481 **Exhibit C-005**, Information on the results of Tender No. 181023129327015 dated February 01, 2019.

482 'Exclusive' in the sense that during the validity period of that right, no other company was entitled to conclude that specific contract with the SRS.

483 *See* e.g., Statement of Claim, ¶¶369-370.

484 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶56-58, 63, and 86.

several exchanges that Claimant had with the SRS after being proclaimed the winner of the 2018 Tender.[485]

252. Furthermore, as explained by Judge Davletbayeva, during the period of 7 business days following Claimant's announcement as the 'winner' of the 2018 Tender, Claimant and the SRS could not have entered into a contract due to a mandatory "*silence period*" designed by the Kyrgyz Law on Public Procurement to provide other bidders with an opportunity to challenge the tender results.[486] On February 5, 2019 and February 7, 2019 respectively, Claimant's competitors Mühlbauer and IDEMIA did exactly that.[487]

253. Claimant argues that "[d]*espite the fact that Muhlbauer filed a complaint against the decision of the Tender Commission on February 5, 2019, there was no decision of the Tender Commission to suspend the tender procedures* [and that thus] *there is no evidence that the 2018 Tender was ever suspended.*"[488] This argument is legally misguided and factually wrong:

253.1. **First**, the tender commission had no obligation to issue a separate decision on the suspension of the 2018 Tender. As explained by Judge Davletbayeva, such decision lies within the authority of the Department for Public Procurement of the Ministry of Finance of the Kyrgyz Republic, which acts as the Secretariat of the Independent Interdepartmental Commission what was entrusted with considering the complaints filed by Mühlbauer and IDEMIA.[489]

253.2. **Second**, in the present case the proceedings were validly suspended by the Department for Public Procurement. On February 11, 2019, all five bidders – including Claimant – were informed by the SRS of the suspension and were requested to extend the validity of their bids by 45 days.[490] On the very next day,

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485 **Exhibit C-030**, Email exchanges between SRS and Garsu Pasaulis dated February 06, 2019; **Exhibit C-029**, Email exchanges between SRS and Garsu Pasaulis dated February 21, 2019.

486 *See* **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version)Article 32(2)(1) and **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶62 and 84.1.

487 *See supra*, ¶¶56-61; **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 and **Exhibit CWS_Lukosevicius_1/19**, IDEMIA February 7, 2019 Complaint.

488 Statement of Claim, ¶¶480-482.

489 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶67-68; *See* **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 49(3); **Exhibit RLA-9**, Regulation on the work of the IIC, ¶¶7(1), 21(1); **Exhibit RLA-7**, Regulation on the Ministry of Finance of KR, ¶1 and **Exhibit RLA-8**, Regulation on the Department of Public Procurement, ¶8.

490 **Exhibit R-36**, Letter of the SRS to the bidders dated February 11, 2019.

Claimant **acknowledged receipt** of this letter and **confirmed** that its bid is extended by 45 days, i.e. until April 2, 2019.[491] Claimant was thus aware of the suspension and did not raise any objections in that regard.[492]

254. Thus, as explained by Judge Davletbayeva, Claimant and the SRS were precluded from entering into a public procurement contract pending the consideration of the Mühlbauer's and IDEMIA's complaints by the Independent Interdepartmental Commission, i.e., until February 21, 2019.[493]

2. Claimant failed to exercise in relation to the conclusion of a public procurement contract between February 21, 2019 and April 2, 2019

255. As explained at paragraph 59 *et seq.* above, on February 20 and 21, 2019, the Independent Interdepartmental Commission ruled that the complaints of IDEMIA and Mühlbauer were without merit.[494] As explained by Judge Davletbayeva, from that moment onward the parties were free to undertake the necessary steps to conclude the public procurement contract before the expiration of the validity of Claimant's bid, i.e., until April 2, 2019.[495] Specifically, on February 21, 2019 Claimant's representative and witness in this arbitration Mr. Lukoševicius wrote to the SRS that he would be arriving to Bishkek "*on Monday*" i.e., on February 25, 2019.[496] Yet, the contract was not concluded.

256. In this arbitration Claimant and its witnesses allege that they decided not to come to Kyrgyzstan because they learned **from the local Kyrgyz press** that "*the notorious GKNB had disseminated false information*"[497] about Garsu Pasaulis, that "*the 2018 Tender was 'unofficially*

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491 **Exhibit R-37**, Letter of Garsu Pasaulis to the SRS dated February 12, 2019.

492 Specifically, the fact that the suspension of the 2018 Tender was not reflected in the minutes of public procurement cannot amount to a procedural violation where it does not affect the bidding results and, even more so, where the bidders were notified about the suspension of the public procurement procedure (as was in the present case) – *see* **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶69 and 79-81.

493 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶83, 84.2.

494 **Exhibit CWS_Lukosevicius_1/24**, Protocol No. 149153656 re Review of complaint by the Independent Interdepartmental Commission dated February 21, 2019; **Exhibit R-84**, Administrative complaint to the Independent Interdepartmental Commission on the February 1, 2019 Decision of the Tender Commission of the State Registration Service under the Government of the Kyrgyz Republic and the February 20, 2019 Ruling of the Independent Interdepartmental Commission by IDEMIA dated March 20, 2019.

495 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶84.3 and 86.

496 **Exhibit C-029**, Email exchanges between SRS and Garsu Pasaulis dated February 21, 2019.

497 Statement of Claim, ¶139.

halted"[498] and because they "*received a tip from the Lithuanian Ministry of Foreign Affairs not to travel to the Kyrgyz Republic.*"[499] Yet the press articles that Claimant allegedly learnt about all of this from date from mid- to end of April 2019, **two months** after Garsu Pasaulis was invited by the SRS to sign a public procurement contract.[500] Indeed, throughout its extensive 192-page long Statement of Claim, Garsu Pasaulis carefully evades the subject of what exactly it was doing between February 21, 2019 and April 2, 2019 – the only relevant and most crucial period during which it could materialize its "*valuable right*" to enter into a public procurement contract with the SRS.

257. In fact, the answer is found in a contemporaneous signed testimony of Mr. Uran Tynaev, a Director of Claimant's Kyrgyz subsidiary:

> In February 2019, I spoke with Vitas Mieliauskas, who told me that they were supposed to arrive on Monday to discuss the contract and sign it with the SRS under the Government of the Kyrgyz Republic, however, he then called me back and told me that **he will not come**, as **there are inquiries ongoing within the SRS with respect to the tender** and the conclusion of the deal has been postponed.[501]

258. Tellingly, Claimant's abrupt refusal to come to Kyrgyzstan coincided with the commencement of an investigation by the Kyrgyz Prosecutor General's Office and the Main Office of Criminal Investigations at the GKNB into possible episode of corruption within the framework of the 2018 Tender on February 22 and 25, 2021.[502]

259. Thus, the truth is that Claimant became aware of the inquiries into the legality of the 2018 Tender by various State organs of the Republic from the very beginning and immediately ceased any actions towards the conclusion of a public procurement contract with the SRS. And no wonder. As explained at paragraphs 83 *et seq.* above, the investigation concluded with a guilty verdict for three State officials involved in the 2018 Tender. It seems that it is only thanks to the convenient runaway of the former SRS head Ms. Shaikova and Claimant's

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498 **Exhibit CWS-1-1**, Lukosevicius 1st WS, ¶51; **Exhibit CWS-2-1**, Mieliauskas 1st WS, ¶47.

499 Statement of Claim, ¶142; **Exhibit CWS-1-1**, Lukosevicius 1st WS, ¶51.

500 **Exhibit CWS_Mieliauskas_1/28**, 15min.lt, "Garsu Pasaulis called absurd the allegations of corruption: applied to the State Security Department and is preparing a claim" dated April 25, 2019.

501 **Exhibit R-41**, Minutes of questioning of Mr. Tynaev U.S. dated March 04, 2019, p. 3.

502 *See supra*, ¶72 *et seq.*

own lack of cooperation with the investigative authorities, that Garsu Pasaulis has, to date, avoided being served with corruption charges itself.[503]

260. Be it as it may, as explained by Judge Davletbayeva in her expert opinion, there is no evidence that Claimant undertook **any** steps towards accomplishing the formalities necessary for the conclusion of a public procurement contract with the SRS between February 21, 2019 and April 2, 2019.[504] There is also no evidence that Claimant undertook any steps to compel the SRS, via Kyrgyz courts, to enter into a procurement contract during this time period, which it was free to do under Kyrgyz law.[505]

3. Claimant's bid expired on April 2, 2019, which was also contemporaneously reported on by the SRS

261. As explained in Sub-Section II.E.6, on April 2, 2019 the validity period of Claimant's bid had expired. Claimant was of course aware of this fact since, having itself previously agreed to extend the validity of its bid at the request of the SRS until April 2, 2019.[506]

262. As explained by Judge Davletbayeva, expiration of the validity of Claimant's bid meant that the 2018 Tender had failed as a matter of law, definitively precluding Claimant from entering into a public procurement contract with the SRS on the terms set by the 2018 Tender.[507] In this regard, Claimant's and its Kyrgyz law expert's assertions that the validity of Claimant's bid could not expire[508] are misguided and have been thoroughly addressed by Judge Davletbayeva.[509]

263. On April 17, 2019 the SRS issued a press-release, picked up by the Kyrgyz media, explaining exactly this:

> The validity of the tender applications of these companies expired on 2 April 2019, the contract with the successful tenderer UAB 'Garsu Pasaulis' (Lithuania) [i.e. Claimant] was not concluded, wherefore in accordance with the Law of the Kyrgyz Republic "On public procurement", **due to the expiration of the validity period of the tender applications [bids]**

503 *See supra*, ¶72 *et seq*.

504 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶86.

505 *Ibid*, ¶¶64.1, 85-86,

506 **Exhibit R-37**, Letter of Garsu Pasaulis to the SRS dated February 12, 2019.

507 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶88-96.

508 *See* e.g., Statement of Claim, ¶485; **Exhibit CER-2-1**, Alenkina Kyrgyz Law Opinion, ¶¶68-76, 108-112.

509 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶70.

and the absence of a concluded contract, - the tender held is deemed to not have taken place [failed].[510]

264. The State's position was thus clear and consistent with the law. Claimant's assertions in this arbitration that the fate of the 2018 Tender was somehow unclear to it or that the position of the Republic's organs was "*non-specific*"[511] are nothing but false pretenses meant to mislead the Tribunal.

4. The formal declaration of the 2018 Tender as failed on February 4, 2020 did not violated Kyrgyz law

265. As explained in Sub-Section II.E.9 above, on February 4, 2020, the SRS issued an order formally recognizing the 2018 Tender as failed due to the expiration of the bids and on the same day this was reflected on the Kyrgyz public e-procurement website.[512] As explained by Judge Davletbayeva, the order simply formalized the legal reality that had already existed since April 2, 2019.[513]

266. The Republic emphasizes that in accordance with the 2018 Tender Documentation, the SRS as the procuring entity did not have to explain the reasons for recognizing the 2018 Tender as failed and did not bear any responsibility before the bidders for such decision:

266.1. Paragraph 27.4 of the tender documentation provides that "[t]*he Buyer* [i.e., the SRS] *shall not be liable before the bidders in the event of cancellation of the tender or in the event that the tender is declared failed*;"[514] and

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510 *See* **Exhibit CWS_Lukosevicius_1/30**, Kloop.kg, "GRS: The tender for the purchase of passports was held in accordance with law" dated April 12, 2019, p. 1 (quoting SRS's ex-Chairperson, Ms. Shaikova: "*the contract with* [Claimant] *was not concluded because the deadline for the tender bid has expired*"); and **Exhibit C-048**, Official clarification of the State Registration Service regarding the Procurement of Blank Biometric Passports for Travel Abroad dated April 17, 2019 [emphasis added]. Of note is that Claimant refers to the press release of the SRS, dated April 17, 2019 as 'Press release of April 17, **2020**' (*See* Statement of Claim, fns. 190, 197, 200, 212, 217). This is inaccurate: the publication dates back to 2019, which is confirmed by contemporaneous press reports.

511 Statement of Claim, ¶478.

512 **Exhibit R-83**, Order No. 22 of the State Registration Service dated February 04, 2020. The Order formally recognized the 2018 Tender as failed, pursuant to Article 31(2)(3) of the Law on Public Procurement, as amended on January 11, 2019, according to which "[t]*he procuring entity shall recognize tender as failed if:* […] *3) the validity period of the bid expired.*", see **Exhibit RLA-4**, Kyrgyz Law on Public Procurement (March 29, 2018 version), Article 31(2)(3). *See* also **Exhibit C-049**, Information on the E-Procurement Platform re: 2018 Tender dated February 04, 2020.

513 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶112.

514 **Exhibit R-17**, 2018 Tender Documentation, ¶27.4.

266.2. Paragraph 27.5 of the tender documentation provides that "[t]*he procuring entity* [i.e., the SRS] *shall notify suppliers about the cancellation or declaring the tender failed without providing evidence of validity of these grounds and shall publish information on the Public Procurement Web-portal.*"[515]

267. Accordingly, the February 4, 2020 SRS Order was issued within the SRS' powers and in compliance with the applicable law. As to Claimant's attempts at nitpicking the content of the order in its Statement of Claim,[516] those have been exhaustively addressed by Judge Davletbayeva in expert opinion and do not alter this reality.[517]

268. In conclusion, Respondent did not violate Kyrgyz law and Claimant's losing of its right to conclude a procurement contract with the SRS was of its own making. As explained in the following Sub-Section, the Republic's actions did not violate any of its obligations under the BIT either.

B. The Republic did not violate the BIT

269. Claimant's legal case under international law is best described by the expression "*to throw everything at the wall to see what sticks*." Failing to demonstrate any real violation in the Republic's actions, Claimant 'fixes' the situation by taking a set of same unspecific and hyperbolized factual allegations and labelling them with every breach of international law imaginable. The result is tens of pages of description of legal standards in the Statement of Claim and the Baltag Submission, with no real application of those standards to the facts of the present case. This approach is as unimpressive as it is inefficient.

270. As will be demonstrated in the following sub-Sections:

270.1. the Republic did not breach the 'fair and equitable' standard ("**FET**") in any form (**1**);

270.2. the Republic also did not breach the 'full protection and security' standard ("**FPS**") (**2**);

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515 *Ibid.*, ¶27.5.

516 Statement of Claim, ¶¶483-493.

517 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶90-95.

270.3. the Republic did not expropriate Claimant's purported investment in the Kyrgyz Republic (**3**);

270.4. the Republic did not deny justice to Claimant (**4**); and

270.5. The Republic did not destroy Claimant's 'international business reputation' and Claimant is not entitled to compensation therefor (**5**).

1. The Republic did not breach the FET standard

271. Claimant's FET claim is highly confused and unspecific. While the relevant sub-Sections of Section VI(C)(i) of its Statement of Claim are entitled "*Kyrgyz Republic Disregarded Domestic Law and Policy*" and "*The Kyrgyz Republic imposed arbitrary and discriminatory measures, abused its administrative authority and based decisions on political expedience*," when reading those sub-Sections one finds allegations of breach of legitimate expectations,[518] discrimination of Claimant against some un-named third parties,[519] denial of justice[520] (addressed as a separate alleged breach at Sub-Section IV.B.4 below) and other nondescript violations.

272. To be clear, Claimant bears the burden of properly presenting and proving its claims in this arbitration and it is not Respondent's job (let alone the Tribunal's) to make sense out of the *pot pourri* Claimant decided to serve in guise of an FET claim. Accordingly, Respondent addresses Claimant's FET claim below to the extent it understands this claim and with full reservation of Respondent's rights.

273. After briefly addressing several elements of the FET standard relevant to the present dispute (**a**), Respondent demonstrates that on the facts of the present case Claimant does not establish any FET breach (**b**).

a. Relevant aspects of the FET standard

274. Respondent trusts that the learned Tribunal is sufficiently familiar with the FET standard and its constituting elements and that a lecture about the standard's meaning and scope is unnecessary. Respondent accordingly does not intend to address *in extenso* the description of the FET standard spelled out in the Statement of Claim. Below, Respondent focuses on the few aspects of the standard that are material for the consideration of Claimant's pleaded

518 Statement of Claim, ¶517.

519 *Ibid*, ¶540.

520 *Ibid*, ¶505.

case, specifically in the context of the alleged breach of Claimant's legitimate expectations (**a**) and alleged discrimination of Claimant by the Republic (**b**).

275. By way of a preliminary remark, at paragraphs 495-499 of its Statement of Claim and paragraphs 84-86 of the Baltag Submission, Claimant makes a prolonged exposition regarding the possible differences between the classic 'fair and equitable' treatment standard and the 'just and fair' standard which, as Claimant suggests, is the standard contained at Article 3(1) of the BIT. This discussion is completely unnecessary and results from Claimant's own mistranslation of the provisions of the BIT.

276. Article 3(1) in its prevailing Russian language version[521] provides in the relevant part as follows:

> Инвестициям и доходам инвесторов каждой Договаривающейся Стороны будет предоставляться **справедливый и равноправный режим** […][522]

277. The emphasized portion of the provision is a standard formula for bilateral investment treaties concluded in the Russian language and translates as "*fair and equitable treatment.*" This much is evident from the multitude of bilateral investment treaties concluded in Russian and English languages (including by the Kyrgyz Republic) where "*справедливый и равноправный режим*" is consistently translated as "*fair and equitable treatment.*"[523]

278. This is not the only material mistranslation Claimant makes in this portion of the BIT. Indeed, according to Claimant's **Exhibit C-1**, Article 3(1) of the BIT provides that "[i]*nvestments and returns of investors of one Contracting Party* ***in the territory of its home country*** *shall be subject to the just and fair treatment* […]" If one were to follow Claimant's translation, then the Republic would not be obliged to accord any "*just and fair treatment*" to Claimant,

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521 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Article 14.

522 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Article 3(1).

523 *See* e.g., **Exhibit RLA-46**, Agreement between the Republic of Kyrgyzstan and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments dated December 07, 2014, Article 3(1); **Exhibit RLA-105**, Agreement between the Government of the Kyrgyz Republic and the Government of the State of Kuwait for the encouragement and reciprocal protection of investments dated December 13, 2015, Article 3(2); **Exhibit RLA-106**, Agreement between the Government of the Russian Federation and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments dated March 03, 2015, Article 3(1).

and its FET claim in this arbitration would stop there. Obviously, this is not what the BIT actually says:

> Investments and returns of investors of each Contracting Party shall be accorded fair and equitable treatment and provided with full protection and security in the territory of the other Contracting Party […][524]

279. With this preliminary remark out of the way, Respondent now turns to the relevant aspects of the FET standard as regarding its legitimate expectations and non-discrimination elements.

i. The legitimate expectations component of the FET standard

The basis for expectations must be specific and unambiguous

280. In its Statement of Claim, while citing a selection of random arbitral awards upholding the protection of legitimate expectations in specific cases,[525] Claimant somehow fails to provide a proper standard against which the existence of legitimate expectations shall be measured. The Republic submits that the correct formulation of legitimate expectations is the one proposed by Newcombe and Paradell (and supported by the tribunal in *White Industries v. India*)[526] (the "**Newcombe Standard**"), which states:

> [L]egitimate expectations about the treatment of investments will arise 'based on the conditions offered by the host State at the time of the investment.' [Investment treaty] jurisprudence highlights that, to create legitimate expectations, State conduct needs to be specific and unambiguous. Encouraging remarks from government officials do not of themselves give rise to legitimate expectations. There must be an 'unambiguous affirmation' or a 'definitive, unambiguous and repeated assurances'. The conduct must be targeted at a specific person or identifiable group.[527]

281. The Newcombe Standard sets out clear definitive limbs which must be satisfied to create legitimate expectations on behalf of the investor: (**i**) unambiguous, definitive, and repeated assurances, (**ii**) which are made to a specific person, or identifiable group.

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524 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Article 3(1).

525 *See* generally, Statement of Claim, ¶¶512-530.

526 **Exhibit RLA-107**, White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award dated November 30, 2011, ¶10.3.7.

527 **Exhibit RLA-108**, Andrew Newcombe and Lluis Paradell, "Law and Practice of Investment Treaties: Standards of Treatment" (Kluwer Law International, 2009), pp. 281-282; **Exhibit RLA-107**, White Industries v. India, Award, ¶10.3.7.

282. Conversely, representations or assurances given in broad and undefined terms cannot give rise to legitimate expectations protected under the FET standard. In *AES Corporation v. Kazakhstan*, the tribunal deemed provisions on energy tariffs contained in an agreement between the investor and a Ministry of the host State **not** to be constitutive of protected legitimate expectations:

> As concerns Article 2.8 […] and Article 7.1 of the Altai Agreement […], the Arbitral Tribunal does not consider that these provisions were of a nature to give rise to a legitimate expectation protected under the FET standard as asserted by Claimants. Their wording is very broad and key terms such as 'market rates', 'competitive market' and 'blended tariffs' are not defined. The Parties have very different views as to what these terms mean and how they should be interpreted. In view of the stage of development of the Kazakh economy and the stage of legislative development in the field of electricity and competition, these provisions do not suffice to establish a 'legitimate expectation' protected and enforceable under the FET standard that Claimants would be entitled under any circumstances to apply 'market prices' in the sense of what they considered to be a 'competitive market price' or to use a trading company and sell goods at a 'blended tariff' irrespective of whether such practice may have breached applicable competition legislation.[528]

Reasonableness of legitimate expectations

283. For an expectation to be legitimate it must be objectively reasonable. In the words of the *Saluka v. Czech Republic* tribunal:

> [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. Moreover, the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. **Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances**. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.[529]

284. Conversely, subjective expectations are not sufficient. As per the *Suez v. Argentina* tribunal:

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528 **Exhibit RLA-109**, The AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award dated November 01, 2013, ¶292.

529 **Exhibit E-005**, Saluka v. Czech Republic, UNCITRAL, Partial Award dated March 17, 2006, ¶¶304-305 [emphasis added].

> [O]ne most not look single-mindedly at the Claimant's subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view.[530]

285. Similarly, in *Toto v. Lebanon*, the tribunal observed as follows:

> [L]egitimate expectations are more than the investor's subjective expectations. Their recognition is the result of a balancing operation of the different interests at stake, taking into account all circumstances, including the political and socioeconomic conditions prevailing in the host State.[531]

286. The requirement of reasonableness in the notion of legitimate expectations has two specific consequences:

286.1. First, an investor cannot have reasonable and legitimate expectations without having conducted thorough due diligence before deciding to invest:

286.1.1. As per the M.*C.I. v. Ecuador* tribunal, an investor cannot have legitimate expectations **based on its own ignorance of domestic law**; and it cannot include subjective assessments as to the impossibility of obtaining a satisfactory result through domestic judicial remedies, **when such remedies have not been properly pursued**.[532]

286.1.2. Similarly, in *Parkerings-Compagniet v. Lithuania*, the tribunal conditioned protection of an investor's legitimate expectations upon proper exercise of due diligence by that investor.[533] Hence, as per the *Rusoro*

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530 **Exhibit RLA-110**, Suez v. Argentina, Decision on Liability, ¶209.

531 **Exhibit RLA-111**, Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award dated June 07, 2012, ¶165.

532 **Exhibit RLA-112**, M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award dated July 31, 2007, ¶¶303-304.

533 **Exhibit E-074**, Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8,Award dated September 11, 2007, ¶¶329-333 ("*The* ***investor will have a right of protection of its legitimate expectations provided it exercised due diligence*** *and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment*") [emphasis added]. *See also* **Exhibit RLA-113**, South American Silver Ltd. v. Bolivia, Award, ¶648 (conditioning the entitlement of an investor to protection of its legitimate expectations to exercise by the investor of due diligence).

Mining v. Venezuela tribunal, performing "*appropriate pre-investment due diligence review*" is "*the investor's duty*."[534]

286.1.3. In terms of the depth of due diligence required, the standard is that of a prudent investor,[535] and the level of due diligence itself must be "*rigorous*," as most recently emphasized by the *Stadtweke v. Spain* and *FREIF v. Spain* tribunals.[536] Thus, adequacy of due diligence is, per the *Invesmart v. Czech Republic* tribunal, an integral part of the tribunal's evaluation of whether an expectation should be protected.[537]

286.2. Accordingly, failure by the investor to conduct appropriate due diligence prior to investing deprives the investor from the possibility to claim a breach of legitimate

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534 **Exhibit RLA-114**, Rusoro Mining Ltd. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5, Award dated August 22, 2016, ¶525, repeated in **Exhibit RLA-115**, Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award dated March 30, 2015, ¶¶671-672 according to which the investor had a duty of due diligence to inquire about the law applicable for required permits. *See further* **Exhibit RLA-116**, Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award dated July 26, 2018, ¶¶986 and 1012. *See also* **Exhibit RLA-117**, RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum dated December 30, 2019, ¶¶507 and 513 (whereby the tribunal quoted *Electrabel* for the proposition that "[f]*airness and consistency must be assessed against the background of information that the investor knew and should reasonably have known at the time of investment and the conduct of the host State*;" and observed that it is incumbent on the claimants to have performed discrete due diligence on the applicable law and regulations, which it finds they have not done).

535 **Exhibit RLA-118**, InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award dated August 02, 2019, ¶371 ("*To rule on this question the Tribunal will assess whether the Claimants – or their legal advisers – carried out an adequate review of the regulatory framework applicable to the renewable energy sector in Spain (and in particular to CSP producers), and including the case law of the Supreme Court of Spain. The Tribunal will also consider whether the Measures at Issue were foreseeable to a reasonably prudent investor with the benefit of an adequate due diligence*"). *See further* **Exhibit RLA-119**, SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. The Italian Republic, SCC Case No. V(2016/32), Final Award dated March 25, 2020, ¶714.

536 **Exhibit RLA-120**, Stadtwerke München GmbH, RWE Innogy GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award dated December 02, 2019, ¶264; repeated in **Exhibit RLA-121**, FREIF Eurowind Holdings Ltd (United Kingdom) v. Kingdom of Spain, SCC Case No. V 2017/060, Final Award dated March 08, 2021, ¶377.

537 **Exhibit RLA-122**, Invesmart B.V. v. Czech Republic, UNCITRAL, Award dated June 26, 2009, ¶254 ("[…] *the due diligence performed when the investor made its investment plays an important role in evaluating its expectation. A putative investor, especially one making an investment in a highly regulated sector such as financial services, as in the instant case, has the burden of performing its own due diligence in vetting the investment within the context of the operative legal regime*").

expectations (and therefore the FET standard), as recently confirmed by the *Consutel v. Algeria*[538] and *Stadtwerke v. Spain*[539] tribunals.[540]

286.3. Second, an expectation that the host State **will never change its regulations** is not a legitimate expectation, let alone a reasonable one. The FET standard – and specifically the legitimate expectations component – cannot be an insurance policy against any changes made by the host State in its regulatory space.[541] In the words of the *Parkerings v. Lithuania* tribunal:

> It is each State's undeniable right and privilege to exercise its sovereign legislative power. **A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time**. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.[542]

287. Further, in *El Paso v. Argentina*, the tribunal rejected the proposition that the FET standard implies stability of the legal and business frameworks, since economic and legal life is, by nature, evolutionary. Accordingly, the tribunal, relying on earlier case law, deemed that economic stability cannot be a legitimate expectation of any economic actor.[543]

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538 **Exhibit RLA-123**, Consutel Group S.p.A. in liquidazione v. People's Democratic Republic of Algeria, PCA Case No. 2017-33, Final Award dated February 03, 2020, ¶¶469-474.

539 **Exhibit RLA-120**, Stadtwerke v. Spain, Award, ¶308.

540 *See further* **Exhibit RLA-124**, Occidental Petroleum Corp. et al. v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award dated October 05, 2012, ¶383 (noting that the claimants cannot be found to have had a legitimate expectation where their failure to secure a required authorization was negligent).

541 *See* **Exhibit RLA-74**, EDF v. Romania, Award, ¶217; **Exhibit RLA-125**, Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Award dated July 21, 2017, ¶668 ("*The aspect of the fair and equitable treatment obligation that relates to legitimate expectations responds to change - usually in a State's changes to a regulatory regime upon which an investor relied in making its investment. It has also been consistently held that it* ***is not legitimate for investors to expect that a regulatory regime or laws will never change and that a State has the right to change its laws****. In doing so, it will not breach its obligation to treat investors fairly and equitably if it changes its laws in a legitimate exercise of its regulatory authority*") [emphasis added].

542 **Exhibit E-074**, Parkerings v. Lithuania, Award, ¶332 [emphasis added].

543 **Exhibit RLA-126**, El Paso v. Argentina, Award, ¶¶352 and 365-368 – repeated in **Exhibit RLA-127**, Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina SA v. The Argentine Republic, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability dated April 10, 2013, ¶¶928 and 950.

*Contractual obligations are **not** protected legitimate expectations in the contest of the FET standard*

288. It is trite that the FET standard, and specifically its legitimate expectations component only extends to sovereign acts, as opposed to acts of a "*contacting partner*."[544] This was distilled by Professors Dolzer and Schreuer in their analysis of relevant case law in the following terms:

> [Most tribunals] have found that a simple breach of contract by a state would not trigger a violation of the FET standard. Rather, 'a breach of FET requires conduct in the exercise of sovereign powers'.[545]

289. In similar vein, Dr. Michele Potestà noted as follows:

> [F]rustration of contractual expectations is not, **without something further**, susceptible of protection under the fair and equitable standard. This proposition is in harmony with general international law on State responsibility whereby a breach of contract with an alien is not **as such** considered to be a breach of international law.[546]

The investor must have relied on those expectations, and its reliance must have been reasonable

290. For a breach of legitimate expectations to violate the FET standard, the investor must demonstrate reliance on that expectation when it made the investment.[547] If an expectation, however legitimate, was not the predicate of an investment, there is nothing inequitable in

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544 *See*, e.g., **Exhibit RLA-111**, Toto v. Lebanon, Award, ¶162 ("*As was also stated in other decisions, only when the State acted as sovereign authority and not merely as a contracting partner – was there treaty protection of fair and equitable treatment*"). *See further* **Exhibit RLA-128**, Consortium RFCC v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Award dated December 22, 2003, ¶51, where the tribunal held – regarding a contract for the construction of a motorway – that only measures taken by Morocco in its sovereign capacity could potentially breach the FET standard, whereas a violation of contractual obligations that could have been committed by an ordinary contract partner would not rise to the level of a violation of the FET standard.

545 **Exhibit RLA-129**, Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (OUP, 2nd Ed., 2012), pp. 152-153.

546 **Exhibit RLA-130**, Michele Potestà, Legitimate Expectation in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept, ICSID Review – Foreign Investment Law Journal, Volume 28, Issue 1, Spring 2013, p. 102 [emphasis added].

547 **Exhibit RLA-131**, UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33 dated December 22, 2017, ¶835(iii); **Exhibit RLA-132**, Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award dated October 09, 2014, ¶256: "*In the Tribunal's opinion, this standard may be breached by frustrating the expectations that the investor may have legitimately taken into account when making the investment*"; **Exhibit RLA-133**, Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06, Award dated June 27, 2016, ¶¶217-218; **Exhibit RLA-134**, Isolux Infrastructure Netherlands, BV v. Kingdom of Spain, SCC Case No. V2013/153, Award dated July 12, 2016, ¶781; **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, ¶9.53, referring to multiple awards such as *Parkerings v. Lithuania*, *Glamis v. USA* and *Mobil v. Canada*.

the host State acting against it.[548] Furthermore, any claim based on the frustration of a legitimate expectation requires a claimant to prove that the legitimate expectation came into existence.[549]

ii. The non-discrimination component of the FET standard

291. Claimant does not provide any legal standard regarding its discrimination claim either in the Statement of Claim or as part of the Baltag Submission. Here again, it is not the Republic's job to fix Claimant's own deficiencies of its case. Yet, the Republic sets out the proper standard for discrimination claims that ought to be applied by the Tribunal out of abundance of caution.

292. Discrimination in particular is a narrowly-construed notion, and one that requires satisfaction of at least three criteria: (**i**) appropriate comparator; (**ii**) treatment by the host State of that comparator that is more favorable than that accorded to claimant; and (**iii**) lack of reasonable or objective justification for such different treatment.[550] Each of the criteria is examined in turn below.

293. **First**, a claimant alleging discrimination must identify relevant comparators placed in a similar situation as claimant itself.[551] A suitable comparator is a person or entity that is in a

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548 **Exhibit E-024**, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29 dated August 27, 2009, ¶190: "*The Tribunal must first determine the relevant time for the formation of the investor's expectations. Several awards have stressed that* ***the expectations to be taken into account are those existing at the time when the investor made the decision to invest***" [emphasis added]; **Exhibit RLA-135**, CEF Energia BV v. The Italian Republic, SCC Case No. V(2015/158), Award dated January 16, 2019, ¶¶186 and 191; **Exhibit RLA-123**, Consutel v. Algeria, Final Award, ¶421.

549 The burden of proving the existence of such specific commitment lies with the claimant. *See*, e.g., **Exhibit RLA-136**, International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Arbitral Award dated January 26, 2006, ¶¶196-197 (the tribunal found the relevant document did not create the contended expectation); **Exhibit RLA-137**, Agility Public Warehousing Company K.S.C. v. Republic of Iraq, ICSID Case No. ARB/17/7, Award dated February 22, 2021, ¶162; **Exhibit RLA-119**, SunReserve v. Spain, Final Award, ¶¶718 and 720.

550 *See* **Exhibit RLA-113**, South American Silver Ltd. v. Bolivia, Award, ¶¶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 and 542; In *Urbasser v. Argentina*, the tribunal also deemed that "*intent to harm the foreign investor and cause actual damage*" is required. *See* **Exhibit RLA-139**, Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, Award dated December 08, 2016, ¶1088.

551 *See*, e.g., **Exhibit E-061**, Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability dated December 27, 2010, ¶210 ("*In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situations*"). *See further* **Exhibit RLA-140**, AES Summit Generation Limited and AES-Tisza Erömü Kft. v. The Republic of Hungary, ICSID Case No. ARB/07/22, Award dated September 23, 2010, ¶10.3.53

materially similar situation as claimant so as to require identical treatment.[552] Failure to identify a relevant comparator leads to a swift rejection of the discrimination claim, as confirmed by the *Crystallex v. Venezuela* tribunal.[553]

294. **Second**, a claimant must demonstrate that the treatment applied to the comparator is materially different from the one applied to claimant, as a foreign investor.[554] Academic commentary underscores that the "*non-discrimination pillar of the FET standard prohibits only the specific targeting of a foreign investor on manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that evidently singles out (*de jure *or* de facto*) the foreign investor.*"[555] As per the tribunals in *Oxus v. Uzbekistan*,[556] *Crystallex v. Venezuela*,[557] and *Noble Ventures v. Romania*,[558] the obligation not to discriminate as a component of the FET standard refers primarily to discrimination based on nationality. Furthermore, the standard of discrimination is high, or in the words of the *Sempra v. Argentina* and *Enron v. Argentina* tribunals, differentiation must

("[d]*iscrimination necessarily implies that the state benefited or harmed someone more in comparison with the generality*").

552 **Exhibit E-071**, ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic, Award dated September 19, 2013, ¶¶4.832 to 4.839.

553 **Exhibit RLA-141**, Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award dated April 04, 2016, ¶616 (noting that "*no adequate comparator was presented to its attention which would justify a conclusive finding on discrimination*").

554 *See* **Exhibit RLA-142**, Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated January 14, 2010, ¶261 (agreeing that "*a measure must 'target*[ed] *Claimant's investments specifically as foreign investments*'" or the measure "*expose*[s] *the claimant to sectional or racial prejudice*").

555 **Exhibit RLA-143**, Daniel Rosentreter, Article 31(3)(c) of the Vienna Convention of the Law of Treaties and the Principle of Systemic Integration in International Investment Law (2015), p. 51, referring to **Exhibit E-057**, UNCTAD, Fair and Equitable Treatment – UNCTAD Series on Issues in International Investment Agreements II, New York/Geneva: United Nations, 2012, p. 82.

556 **Exhibit E-073**, Oxus v. Uzbekistan, Final Award, ¶794 ("*the standard of discrimination refers primarily to a discrimination based on nationality*").

557 **Exhibit RLA-141**, Crystallex v. Venezuela, Award, ¶616 ("[*t*]*o show discrimination the investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification, typically on the basis of its* ***nationality or similar characteristics***") [emphasis added].

558 **Exhibit RLA-144**, Noble Ventures v. Romania, Award, ¶180 ("*the Claimant has to demonstrate that a certain measure was directed specifically against a certain investor by reason of his, her or its nationality*").

be "*capricious, irrational or absurd.*"[559] Conversely, as per the *Total v. Argentina* tribunal, "[m]*ere differences of treatment do not necessarily constitute discrimination.*"[560]

295. **Third**, a purportedly discriminatory measure may be justified, in the analysis of the *Saluka v. Czech Republic* tribunal, if it "*bears a reasonable relationship to some rational policy*" and there is a "*rational justification of any differential treatment of a foreign investor.*"[561]

296. As set forth below, the Kyrgyz Republic has at all times accorded Claimant's investment fair and equitable treatment consistent with the standards articulated above, and Claimant's claim for violation of this Treaty provision must accordingly be rejected.

b. Claimant's FET claim is meritless

297. Claimant's case as to the Republic's specific actions allegedly amounting to an FET breach is incomprehensible. As with the remainder of its case in this arbitration, instead of pointing out specific acts or omissions on the part of the Republic which would constitute a breach of a specific standard, Claimant simply puts general, unparticularized and sinister-sounding allegations apparently meant to fit any applicable standard. As a result, Claimant's submission reads more like a Flat Earth Society's leaflet:

> In the present case, the Kyrgyz Republic did not want to formally alter its 2018 Tender, because it would have harmed its own interests to do so. Indeed, the Kyrgyz Republic had dedicated significant resources to the attraction of foreign investment into the country (and continues to do so today), in recognition of the substantial benefits that could be gained thereby. However, **powerful Kyrgyz public authorities** and even the **highest officials of the State** had their **own personal interests** and **pursued personal gain** in cooperation with various other foreign investors: namely, the **well connected foreign companies** who wished to gain access to the Kyrgyz' market **through the backdoor entrance and influence**, instead of participating in public tenders. Thus, GKNB officials simply chose to selectively disregard the country's applicable law and stated policy in the case of the 2018 Tender and find ways to expel Garsu Pasaulis **in favor of other backdoor participants** […]

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559 **Exhibit RLA-145**, Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award dated September 28, 2007, ¶319; **Exhibit RLA-146**, Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award dated May 22, 2007, ¶282.

560 **Exhibit E-061**, Total v. Argentina, Decision on Liability, ¶210 (quoting Oppenheim's International Law (R. Jennings & A. Watts, eds., 9th Ed. 1992), p. 378).

561 *See* **Exhibit E-005**, Saluka v. Czech Republic, Partial Award, ¶460, cited with approval in **Exhibit E-086**, Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award dated July 24, 2008, ¶693.

> In the present case, it is clear that the 2018 Tender Commission, the GRS [SRS] and the GKNB breached the Kyrgyz law and abused their authority by basing their decisions in the context of the 2018 Tender **on factors that they were not lawfully entitled to consider**, and by failing to afford Garsu Pasaulis due process of law. In turn, Garsu Pasaulis was robbed of its e-passports contract, the use and enjoyment of the substantial *know-how* and business reputation that it invested in the Kyrgyz Republic[…]
>
> On the other hand, it is clear that the reasons underlying the Kyrgyz Republic's conduct in this regard had **no basis in law, fact or logic**, but rather **reflected mere personal preference and political expedience**. In turn, the illegitimate nature of the Kyrgyz authorities' motivations constitutes an independent basis for concluding that their actions were arbitrary.[…]
>
> In the present case, the Kyrgyz Republic's handling of the 2018 Tender and 'cancellation' thereof, GKNB investigation and destruction of Garsu Pasaulis business reputation constitutes the culmination of a course of **conduct aimed at favoring personal and politically motivated interests over qualified foreign investors** like Garsu Pasaulis.[…]
>
> The record in this arbitration confirms that the GKNB's investigation, illegal expulsion of Garsu Pasaulis bid and illegal 'cancelation' of the 2018 Tender **were based on prejudice or preference rather than law, reason or fact**.[…][562]

298. A lot of loud statements, not a single reference to a specific measure or a piece of factual evidence. The height of absurdity of course is that the above *Manifesto* seems to be wholeheartedly supported by Claimant's 'expert' Dr. Baltag, who states, without reliance on any evidence, that:

> [T]he termination of the 2018 Tender for political reasons represents an arbitrary termination which, without doubt, constitutes a breach of the FET standard under Article 3(1) of the Lithuania-Kyrgyz BIT. 439 This conduct is also a breach of the second part of Article 3(1) of the Lithuania-Kyrgyzstan BIT, related to the prohibition to hinder the development of Claimant's investment "by any unjustified, ill-considered" measures.[563]

299. It is genuinely hard to answer such claims with a straight face. Yet this is what Respondent must do. As set forth below, on the facts of the present case Claimant fails to prove that the Republic breached any Claimant's legitimate expectations (**a**) or that Claimant was discriminated against (**b**).

i. No breach of legitimate expectations

562 Statement of Claim, ¶¶518, 544, 546, 548, 550 [emphasis added].

563 **Exhibit CER-1-1**, Baltag Submission, ¶125. *See also supra*, Section III.A.

300. Respondent's understanding of Claimant's legitimate expectations claim is as follows:

300.1. Claimant seems to argue that its legitimate expectation consisted of "*obtaining a valuable right to execute the e-passports contract with the Kyrgyz Republic through its participation and winning of the 2018 Tender.*"[564]

300.2. This legitimate expectation was apparently stemming from "[r]*epresentations made in bidding documents and applicable legal provisions during 2018 Tender process*," as well as "*more generally from the domestic legal framework; from the government's stated policies; and from the fundamental premise that the host state will deal with the investor and its investment consistently, transparently and in good faith.*"[565]

300.3. Finally, the above legitimate expectation was apparently breached by the Kyrgyz Republic because "*in breach of the applicable Kyrgyz law, the Kyrgyz Republic simply announced that Garsu Pasaulis bid had 'expired' and later on 'cancelled' the 2018 Tender without any legal basis whatsoever*[;] *cut-off any communication with Garsu Pasaulis, leaving the investor baffled and in a state of complete uncertainty*[;] *did not made any good faith efforts to resolve points of disagreement with Garsu Pasaulis or even provided an opportunity to provide its position to any allegations and smear campaign executed against Garsu Pasaulis.*"[566]

301. Claimant is wrong on all counts.

302. **First**, no legitimate expectation protected under international law could exist in the form described by Claimant. For starters, Claimant fails to point to any specific representation made by the Republic guaranteeing Claimant's entering into a procurement contract with the SRS, because none existed. Claimant's participation in the 2018 Tender was based on the tender documentation available to an unrestricted pool of potential participants, local and foreign, and did not target Claimant specifically. As explained above, general regulations and legal framework cannot give rise to legitimate expectation.

303. Further, no expectation could be based on Claimant's right to enter into a public procurement contract since, as explained above, contractual rights cannot form basis of a legitimate expectation – let alone **pre**-contractual rights. And even if they could, Claimant's expectation that it was entitled to enter into a contract with the SRS unconditionally is not

564 Statement of Claim, ¶517.

565 *Ibid*, ¶¶512-513.

566 Statement of Claim, ¶¶526-527.

a legitimate expectation. Indeed, as described above, Claimant's right was (**i**) limited in time, (**ii**) subject to it undertaking certain positive actions, and in any event (**iii**) could be cancelled by the procuring entity at any moment.

304. **Second**, and at any rate, the Republic did not frustrate Claimant's purported expectations. As thoroughly described at Sub-Section II.E.6 above, the 2018 Tender failed as a matter of law due to the expiration of Claimant's bid and was validly proclaimed as such by the SRS. Meanwhile, Claimant failed, willingly or not, to exercise its rights during the validity period of its bid to either undertake positive actions towards the conclusion of a public procurement contract or to compel the SRS to enter into a contract. Again, as explained by the *M.C.I. v. Ecuador* tribunal, an investor cannot have legitimate expectations **based on its own ignorance of domestic law**; and it cannot include subjective assessments as to the impossibility of obtaining a satisfactory result through domestic judicial remedies, **when such remedies have not been properly pursued**.[567]

305. **Finally**, and for the sake of completeness, the actions of GKNB within the framework of its investigations were carried out in accordance with the Kyrgyz law[568] and did not frustrate any Claimant's legitimate expectations, whatever those could be; the Republic is not responsible for any alleged "*smear campaign*" and Claimant has failed to prove otherwise.

306. Thus, Claimant's legitimate expectations claim must be dismissed.

ii. No discrimination

307. Claimant's articulation of its discrimination claim is even worse than that of its legitimate expectations claim. Indeed, Claimant's factual allegations with respect to this head of claim are limited to surreptitiously saying that "[a]*s of today's date, other better politically connected companies nevertheless execute e-passports contract with the Government. They benefit from a lucrative investment to which Garsu Pasaulis was rightfully and fully entitled.*"[569]

308. If one were to try deciphering Claimant's cryptic messages, it would appear that its discrimination claim concerns Mühlbauer winning the 2020 tender for the production of passport banks, which was launched after the 2018 Tender failed, and in which Claimant

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567 **Exhibit RLA-112**, MCI v. Ecuador, Award, ¶¶303-304.

568 *See supra*, Sub-Section II.E.7.

569 Statement of Claim, ¶553.

could not participate because it was not eligible under the new tender requirements.[570] Claimant fails to demonstrate there was any discrimination in this case. Indeed, as explained in Sub-Section II.F above, Claimant provides no evidence that Mühlbauer was in any way privileged in the context of the 2020 tender. As to the change of the new tender requirements, which made Claimant ineligible to participate, Judge Davletbayeva explains that the SRS was legally obliged to revise the technical parameters of the new tender after the 2018 Tender failed.[571] As a result, no discrimination took place and Claimant has failed to prove any FET violation.

2. The Republic did not breach the FPS standard

309. Claimant alleges that the Republic is in breach of the full protection and security obligations of the BIT by, *inter alia*, neglecting Claimant's physical security and failing to safeguard the legal security of its purported investment.[572] In doing so, Claimant not only greatly overstates the scope of the Republic's obligation to provide full protection and security, it also fails to present facts to show a breach of that demanding standard.

310. Below, we address in turn: (**a**) the principles underlying the full protection and security obligation, and (**b**) explain why Claimant has not met its burden to prove a breach of that obligation.

a. Principles underlying the Full Protection and Security Obligation

311. By way of reminder, Article 3(1) of the BIT provides:[573]

> Investments and returns of investors of each Contracting Party shall be accorded fair and equitable treatment and provided with full protection and security in the territory of the other Contracting Party […]

312. Claimant misconstrues this obligation in two ways:

313. **First**, Claimant incorrectly assets that "*treatment which is not fair and equitable necessarily constitutes an absence of full protection of security.*"[574] The characterization of the full protection and security standard as coterminous with the fair and equitable treatment standard has been dismissed

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570 *See supra*, ¶106.

571 **Exhibit RER-1-1**, Davletbayeva EO on Kyrgyz Law 1, ¶¶118-119.

572 Statement of Claim, Section VI(C)(ii).

573 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Article 3(1) [emphasis added].

574 Statement of Claim, ¶554.

time and again in jurisprudence.[575] For instance, in *Arif v. Moldova*, the tribunal, when confronted with the same method of argument Claimant deploys in the case at hand, observed as follows:

> Claimant's general argument that all of Moldova's acts and omissions in breach of FET also constitute breaches of Moldova's obligation to grant FPS is rejected. Claimant has to prove how the alleged acts and omissions are in breach of Respondent's alleged obligation to grant FPS.[576]

314. Similarly, as the tribunal observed in *Liman Caspian v. Kazakhstan*, "*the standard of most constant protection and security* […] *must have a meaning beyond, and distinct from, the standard of fair and equitable treatment*."[577]

315. This distinction between treaty standards is consistent with the *effet utile* principle.[578]

316. **Second**, there is no consensus on whether the full protection and security standard encompasses an obligation to provide both physical and legal security to its investment, as Claimant asserts.[579] Put differently, there is no consensus on what - if anything - beyond physical security is due under the full protection and security standard.[580]

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575 *See*, e.g., **Exhibit RLA-147**, Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States, ICSID Case No. ARB(AF)/04/3 & ARB(AF)04/04, Award dated June 16, 2010, ¶¶9-11; **Exhibit RLA-126**, El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award dated October 31, 2011, ¶524; and **Exhibit RLA-148**, Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Award dated June 03, 2021, ¶625.

576 **Exhibit RLA-149**, Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award dated April 08, 2013, ¶505.

577 **Exhibit RLA-150**, Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Award dated June 22, 2010, ¶289. *See further* **Exhibit RLA-151**, Brigitte Stern, 50 Years of the New York Convention: ICCA International Arbitration Conference (Vol. 14, 2009), p. 86 (observing that "*different* [treaty] *standards have to be distinguished. FET is not FPS, FET is not indirect expropriation. If different standards exist, they have to be differentiated and must play a diversified role*").

578 *See* in this regard **Exhibit E-045**, Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability dated November 30, 2012, ¶¶7.80 and 7.83 (finding that "[t]*he FET standard and this FPS standard are two distinct standards of protection under the ECT, dealing with two different types of protection for foreign investors*," and that, "*given that there are two distinct standards under the ECT, they must have, by application of the legal principle of 'effet utile', a different scope and role*").

579 Statement of Claim, ¶¶557 *et seq.*

580 **Exhibit RLA-110**, Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability dated July 30, 2010, ¶158; **Exhibit RLA-152**, Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Award dated April 09, 2015, ¶164.

317. One only needs to look at the well-established principles of international law, to realize that this obligation is much narrower than Claimant contends. The historical and accepted interpretation of this obligation holds that it is an obligation of due diligence that must be analyzed according to the circumstances under which the purportedly infringing actions were taken and not under a strict liability standard.[581]

318. Legal protection is not part of the customary international law standard of full protection and security. In rare cases tribunals have discussed the legal protection issue when analyzing whether intangible assets, and thus assets not capable of being physically harmed, could be deprived of full protection and security.[582] However, those cases are largely limited to cases in which the BIT at issue included more expansive wording, and thus a more expansive obligation than that in the present case.[583] Indeed, the BIT does not include wording that would allow the Tribunal to expand the obligation in such a way.

319. Moreover, in those exceptional situations in which legal protection was included as part of the obligation, the offense at issue related to the enactment and implementation of a law or regulation which was allegedly in breach of the full protection and security standard. This is the case in the *CME v. Czech Republic* Award, cited by Claimant in support of its allegation that the full protection and security obligation includes a duty to provide legal security.[584]

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581 **Exhibit RLA-144**, Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award dated October 12, 2005, ¶164; **Exhibit E-037**, Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award dated July 30, 2009, ¶81 (following Newcombe and Paradell and recognizing due diligence standard and objective nature thereof); **Exhibit RLA-153**, Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award dated September 03, 2001, ¶308 (also finding that the duty to provide full protection and security imposes a duty to exercise reasonable due diligence).

582 *See*, e.g., **Exhibit E-060**, Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award dated February 06, 2007, ¶303; **Exhibit E-085**, Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award dated July 14, 2006, ¶¶406-408.

583 For example, in the *Siemens* case, the tribunal employed this approach because "*the Treaty refers to 'legal security'*" (**Exhibit E-060**, Siemens v. Argentina, Award, ¶301). In this regard, *see also* **Exhibit RLA-154**, Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia, PCA Case No. 2015-40, Award dated March 29, 2019, ¶267 (noting that "[u]*nless 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*" and referring to extensive case law supporting this position); **Exhibit RLA-148**, Infinito Gold v. Costa Rica, Award, ¶623 ("*absent treaty language indicating that legal security is covered, the FPS standard is intended to ensure physical protection and integrity of the investor and its property within the territory of the host*").

584 *See* Statement of Claim, citing **Exhibit RLA-194**, CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL, Final Award dated March 14, 2003.

However, as Claimant has not alleged that the enactment of a law targeted its investment, that case is inapplicable here.

320. The Kyrgyz Republic also highlights the following two lacunae in Claimant's description of the full protection and security standard:

321. **First**, the duty of full protection and security is a due diligence obligation that requires host states to take measures that are reasonable in the specific circumstances of the case:[585]

> Although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard — the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstances in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.

322. Rudolph Dolzer and Christoph Schreuer explain the obligation and its objective nature in similar terms:[586]

> In terms of the law of state responsibility, the host state is not placed under an obligation of strict liability to prevent such violations. Rather, it is generally accepted that the host state will have to exercise 'due diligence' and will have to take such measures protecting the foreign investment as are reasonable under the circumstances.

323. Provision (or 'enjoyment') of 'full' protection and security should not be construed as a guarantee against all types of loss that could be suffered by an investor and do not convert the standard to one of strict liability.[587] Thus, in rejecting the argument that strict liability should apply, the *AAPL v. Sri Lanka* tribunal described the appropriate method of analysis as follows:[588]

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585 **Exhibit RLA-108**, Newcombe and Paradell, ¶6.4

586 **Exhibit RLA-129**, Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (OUP, 2nd Ed., 2012), pp. 149-150.

587 **Exhibit RLA-155**, Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award dated June 27, 1990, ¶¶45-46.

588 *Ibid. See further* **Exhibit E-068**, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 dated May 29, 2003, ¶177 (observing that the obligation to provide "*full protection and security is not absolute and does not impose strict liability*"); **Exhibit RLA-113**, South American Silver Limited v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award dated

> For sustaining said construction introducing a new type of objective absolute responsibility called 'without fault', the Claimant's main argument relies on the existence in the text of the Treaty of two terms: 'enjoy' and 'full', a combination which sustains, according to the Claimant, that the Parties intended to provide the investor with a 'guarantee' against all losses suffered due to the destruction of the investment for whatever reason and without any need to establish who was the person that caused said damage. In other words, the Parties substituted the 'due diligence' standard of general international law by a new obligation creating an obligation to achieve a result ('obligation de resultat') providing the foreign investor with a sort of 'insurance' against the risk of having his investment destroyed under whatever circumstances.
>
> The Tribunal is of the opinion that the Claimant's construction of [the full protection and security provision] as explained herein-above cannot be justified […]

324. Tribunals have also repeatedly confirmed that the obligation to provide full protection and security imposes a duty on the State to act with due diligence towards investments. The duty therefore requires a state to provide only the level of protection that is objectively reasonable under the circumstances.[589]

325. Thus, to determine whether there has been a violation of the full protection and security standard, a tribunal must compare the actions taken or not taken by a state with those that any other state would have taken or refrained from taking in the same situation. Such a comparison is necessary since, as stated above, the full protection and security obligation requires a state to take the "*reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.*"[590] Thus, it is clear, that a host state cannot be considered to be "*an insurer or a guarantor of* […] *security* […] [a State] *does not, and could hardly be asked to, accept an absolute liability for all injuries to foreigners.*"[591]

326. **Second**, acts taken in accordance with normal and lawful administrative, judicial or prosecutorial proceedings do not run afoul of the full protection and security obligation. As observed in the *CME v. Czech Republic* case, where a breach of this obligation has been

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August 30, 2018, ¶¶686-687 (noting that the obligation to afford full protection and security is an obligation of means and not of result); and **Exhibit RLA-156**, (DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar II, ICSID Case No. ARB/17/18, Award dated April 17, 2020, ¶¶300-301.

589 **Exhibit E-037**, Pantechniki v. Albania, Award, ¶81; **Exhibit RLA-144**, Noble Ventures v. Romania, Award, ¶164; and **Exhibit RLA-153**, Lauder v. Czech Republic, Final Award, ¶308.

590 **Exhibit RLA-157**, Alwyn V. Freeman, Responsibility of States for Unlawful Acts of their Armed Forces, Recueil des Cours de l'Academie de Droit International de la Haye (1957), pp. 15-16.

591 *Ibid*, p. 14.

proved, third parties or State entities acted outside the scope of their legal powers or acted outside the normal legal framework.[592] Conversely, where a State and its organs act in accordance with national legislation and in doing so respects the investor's due process rights, there can be no breach of full protection and security.

327. This proposition was discussed at length by the tribunal in *Lauder v. Czech Republic*. Faced with the task of determining whether a State entity acting within the scope of its legal powers could violate the State's duty to provide full protection and security, the tribunal found that such action did not violate the duty where:

> administrative proceedings were initiated because there were objective grounds for suspecting a breach of the law, especially when similar proceedings were commenced against others in a similar situation.[593]

328. In similar vein, when the State actors have a legitimate suspicion that the law has been breached, it cannot be doubted that the State has a right, and indeed a duty, to investigate that suspicion because a "*State may obviously exercise its sovereign powers to investigate and prosecute criminal action*s" without the threat of incurring international responsibility under an investment treaty.[594]

b. Claimant has not met its burden to prove a breach of Full Protection and Security

329. Learned tribunals have repeatedly acknowledged that the burden to prove a breach of a treaty's full protection and security obligation is a high one that must be supported by conclusive evidence.[595] In effect, in order to prove the liability of a state, a claimant must

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592 **Exhibit RLA-158**, CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award dated September 13, 2001, ¶613.

593 **Exhibit RLA-153**, Lauder v. Czech Republic, Final Award, ¶¶239, 248-249. *See also* **Exhibit RLA-159**, Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award dated August 06, 2019, ¶621 ("*the Tribunal does not find that this standard could protect investments against the State's right to legislate or regulate in a manner that negatively affects them*").

594 **Exhibit RLA-49**, Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No. ARB/07/24, Award dated June 18, 2010, ¶¶297-230; **Exhibit RLA-153**, Lauder v. Czech Republic, Final Award, ¶¶238, 248-249. *See also* **Exhibit RLA-160**, Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Award dated September 16, 2015, ¶594 ("*As the Tribunal has emphasized on several occasions, Bolivia has the sovereign prerogative to prosecute crimes on its territory, and such prerogative is not barred by the BIT or ICSID Convention*").

595 **Exhibit RLA-144**, Noble Ventures v. Romania, Award, ¶¶165-166; **Exhibit E-037**, Pantechniki v. Albania, Award, ¶83 ("[A] *claim before an international tribunal simply cannot be made good by casual references to general perception. Specific conduct must be alleged and proved. So must its purported effect*"). *See also* **Exhibit RLA-155**, Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award dated June 27, 1990, ¶¶56, 58 (where the tribunal noted that "*international responsibility of*

show that the whole state system has failed to afford the investor with the reasonable protection required by the obligation. Thus, before presenting a claim to an international tribunal, a claimant must give the state an opportunity, through its judicial and administrative organs, to remedy the situation.[596] If the State does correct the situation or finds that State officials acted in accordance with the law, and in doing so finds that there was no problem in need of correction, then no violation of the standard can be found.[597]

330. Further, not only must the putative claimant show that the acts it claims occurred actually did occur, it must also show that they are indicative of the State's failure to act with due diligence to protect the integrity of the claimant's investment.

331. In the case at hand, Claimant has failed to meet this burden. In fact - consistently with its other substantive claims - Claimant abstains from pointing to specific State acts and contends itself with vague insinuations. Specifically, Claimant asserts that the Kyrgyz Republic breached its obligation to provide full protection and security to Claimant by:

331.1. "*treatment of* [Claimant] *and its representatives at the hands of the Kyrgyz Republic's authorities*;"[598]

331.2. taking "*all measures available to* [the Kyrgyz Republic] *to harm and threaten* [Claimant] *and deprive* [Claimant] *of its investments*;"[599]

331.3. "*repeated*[ly] *attack*[ing] [Claimant] *and its investments in a manner that can only be described as punitive*;"[600]

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the State is not to be presumed" and as such a "*party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion*." Accordingly, the investor who invokes a violation of the full protection and security standard "*assumes a heavy burden of proof*."

596 **Exhibit RLA-161**, Ian Brownlie, Principles of Public International Law (OUP, 7th Ed., 2008), p. 523 ("*Where the state authorities cause injury to the alien visitor, for example in the form of brutality by police officials, then the legal position is clear. The host state is responsible, but, as a condition for the presentation of the claim by the state of the alien, the latter is required to exhaust the remedies available (where this is so) in the local courts. The reasons for this particular condition of admissibility are practical: small claims by individuals are handled better in municipal courts*" [internal citations omitted]).

597 **Exhibit RLA-162**, Eureko B.V. v. Republic of Poland, Partial Award dated August 19, 2005, ¶¶236-237.

598 Statement of Claim, ¶561.

599 *Ibid*, ¶562.

600 *Ibid.*

331.4. the GKNB "*attack*[ing]" Claimant;[601]

331.5. "*fail*[ing] *to safeguard* [Claimant] *against interference by use of State authority and political force*;"[602] and

331.6. Not ensuring "*protection* [of Claimant] *from interference with the basic legal framework upon which* [Claimant] *has relied in making its investment*" and, presumably, not honoring Claimant's "*basic expectation* […] *that the Government would sign and execute the e-passports contract with* [Claimant]."[603]

332. It is not Respondent's job to decipher or particularize Claimant's pleaded case. At present, the best that Respondent can do, with full reservation of its rights to rebut Claimant's legal arguments if or when they are properly made out, is to succinctly rebut the few assertions Claimant has made, that are slightly more specific than an abstract grievance that Claimant was somehow wronged by the host State:

332.1. Claimant was not "*attacked*" by the Kyrgyz Republic / Kyrgyz State organs in the mass media. As explained at paragraph 89 above, the GKNB and the SRS have made a handful of concise press releases, updating the public on a high-profile corruption investigation / status of the 2018 Tender.

332.2. Neither Claimant, nor its local representatives were "*attacked*" by the GKNB as part of the corruption investigation. As explained at paragraphs 72 and 86-87above: (**i**) Claimant was repeatedly invited to GKNB interviews but failed to attend; (**ii**) Claimant's two local representatives were interviewed several times as witnesses, in full compliance with Kyrgyz law and due process norms; and (**iii**) searches were carried out at the premises of those two local representatives, again in full compliance with Kyrgyz law and due process norms.

333. To conclude, Claimant's assertion that the Republic somehow failed to accord full protection and security to Claimant rings hollow.

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601 Statement of Claim, ¶563.

602 *Ibid*, ¶566.

603 *Ibid*, ¶567.

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

334. By way of a further alternative, Claimant argues that its purported rights as the 'winner' of the 2018 Tender were expropriated through actions of the Kyrgyz State organs.[604] This claim is hopeless both in terms of law (**a**) and facts (**b**).

a. Legal standard for expropriation claims

335. As with its submissions regarding the legal standard for FET claims, Respondent does not intend to address Claimant's lengthy developments in the Statement of Claim about the definition and the nature of expropriation and will focus on the few aspects of the legal standard relevant for Claimant's claims, and underplayed by Claimant.

336. **First**, for there to be an expropriation there must be a 'taking'. Article 4(1) of the BIT provides that "[n]*either Contracting Party shall* ***expropriate***, ***nationalize*** *or* ***adopt measures***, *having an equivalent effect* […] *upon investments of the investors of the other Contracting Party* […]."[605] Thus, contrary to Claimant's suggestion,[606] the BIT requires an active act to be undertaken by the host State for there to be an expropriation – mere inaction would not trigger the application of the provision.

337. **Second**, in order to constitute expropriation, the alleged behavior of the state must constitute a State act in its nature, whether deliberate or not. In this regard, the recent award in *Sehil v. Turkmenistan* explained that:

> [I]t must be proved that the acts complained of were exercised by the State in its sovereign capacity *(*its *puissance publique),* **not in the State's capacity as a contractual party**.[607]

338. **Third**, for there to be an expropriation, relevant rights must be capable of being expropriated. This criterion is especially important in the present case, where Claimant is alleging expropriation since the Kyrgyz Republic's purported violation with respect to

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604 Statement of Claim, Section IV(C)(iii).

605 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Article 4(1) [emphasis added].

606 Statement of Claim, ¶573.

607 **Exhibit E-22_Sehil v. Turkmenistan**, Muhammet Cap & Bankrupt Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No ARB/12/6, Award dated May 04, 2021, ¶809 [emphasis added]. Similarly, in *Carlos Rios v. Chile*, the tribunal decided that there was no indirect expropriation considering that the measures of the State were not taken in its sovereign capacity – *see* **Exhibit RLA-163**, Carlos Rios and Francisco Rios v. Republic of Chile, ICSID Case No. ARB/17/16, Award dated January 11, 2021, ¶449 (in Spanish).

Claimant's amorphous right as the 'winner' of the 2018 Tender to enter into a public procurement contract.

339. In this regard, the tribunal in *Eskosol v. Italy* considered that only a property right can be subject to expropriation and that, in an expropriation claim, the claimant has to establish a property right. The tribunal further held that the claimant failed to demonstrate a property right to obtain an enhanced value of its assets through participation in a particular tariff regime.[608]

340. Further, in *Eurus Energy v. Spain*, the tribunal held with regard to investor's legitimate expectations that, even if those can be frustrated or denied, they cannot be expropriated.[609] In this case, the tribunal rejected the expropriation claim because the right that was claimed to have been expropriated, – the public law right to feed-in tariffs – is not a right susceptible to expropriation.[610]

341. Finally, in *America Movil v. Columbia*, the tribunal noted that international law offers protection only against expropriation of a right which exists under municipal law, and that the existence of a right under municipal law is the indispensable requirement for that right to be able to enjoy the protection offered by international law.[611]

b. On the facts of the present case, there was no expropriation

342. Claimant argues that the Republic would have expropriated its "*free-standing right to execute the e-passports contract for a certain amount, for a specific period of time*" through "*illegal 'cancellation' of the already concluded 2018 Tender and by refusing to execute the e-passports contract with Garsu Pasaulis.*"[612] Claimant is wrong.

343. **First**, the right to execute a public procurement contract Claimant obtained by 'winning' the 2018 Tender is not a right capable of being expropriated. As thoroughly explained at paragraph 159 *et seq.* above, as well as paragraphs 56-61 of Judge Davletbayeva's expert

608 **Exhibit RLA-164**, Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award dated September 04, 2020, ¶472.

609 **Exhibit RLA-165**, Eurus Energy Holdings Corporation v. Kingdom of Spain, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability dated March 17, 2021, ¶256.

610 *Ibid*, ¶274.

611 **Exhibit RLA-166**, América Movil S.A.B. de C.V. v. Republic of Columbia, ICSID Case No. ARB(AF)/16/5, Award dated May 07, 2021, ¶¶319 and 327-329 (in Spanish).

612 Statement of Claim, ¶¶577 and 598.

opinion, under Kyrgyz law Claimant's right was inherently procedural and **non**-contractual in its nature, its existence was limited in time, and it was subject to withdrawal by the procuring entity at any moment in case it no longer needed the goods or services being auctioned. This much is also evident from the following provisions of the documentation under the 2018 Tender in accordance with which Claimant had accepted to bid:

343.1. Paragraph 4.1 of the tender documentation, which concerns the costs incurred by the bidders, provides that "[t]*he bidder shall bear all costs associated with preparing and submitting the bid. The Buyer* [i.e., the SRS] *is not liable or responsible for such costs*;"[613]

343.2. Paragraph 27.4 of the tender documentation provides that "[t]*he Buyer* [i.e., the SRS] *shall not be liable before the bidders in the event of cancellation of the tender or in the event that the tender is declared failed*;"[614]

343.3. Finally, paragraph 27.5 of the tender documentation provides that "[t]*he procuring entity* [i.e., the SRS] *shall notify suppliers about the cancellation or declaring the tender failed without providing evidence of validity of these grounds and shall publish information on the Public Procurement Web-portal.*"[615]

344. Accordingly, Claimant's reliance on an entire suit of arbitral awards recognizing possibility of expropriation of contractual rights are clearly inapposite in the present case.[616]

345. **Second**, Claimant fails to prove any 'taking' on the Republic's side. As explained in Sub-Section II.E.6 above and at paragraphs 88-96 of Judge Davletbayeva's expert opinion, Claimant's right to execute a public procurement contract with the SRS expired and ceased to exist as a matter of Kyrgyz law on April 2, 2019. Accordingly, the February 4, 2020 SRS Order only formalized the then existing legal reality. Similarly, the Republic did not "*refuse*" to execute a contract with Claimant while its bid was still valid. Claimant fails to point to **any** document whereby it would reach out to the SRS to advance on the preparation of the contract post February 21, 2019 when the administrative complaints of its competitors IDEMIA and Mühlbauer were dismissed by the Independent Interdepartmental Commission. In fact, the only available evidence suggest that it was **Claimant** who refused

613 **Exhibit R-17**, 2018 Tender Documentation, ¶4.1.

614 *Ibid*, ¶27.4.

615 *Ibid.*, ¶27.5.

616 *See* generally, Statement of Claim, ¶¶578-597.

to come to Bishkek to formalize the contract with the SRS as soon as it learned that inquiries were ongoing with regard to the legality of the 2018 Tender and Claimant's 'winning' it.[617]

346. No expropriation can be even alleged in such circumstances.

4. The Republic did not deny justice to Claimant

347. The Statement of Claim is peppered with abstract references to the 'denial of justice' and 'disregard of due process' concepts and vague insinuations that the Kyrgyz Republic would have somehow denied Claimant justice or failed to accord due process to Claimant.[618] By way of example, Claimant asserts that:

347.1. "*The proceedings to which* [Claimant] *was subjected demonstrate the Kyrgyz Republic's* ***willful disregard for due process****, and an* ***affront to the most basic sense of judicial propriety***."[619]

347.2. "[Claimant] *was deprived of this valuable (economic) right* [to execute and perform the contract] *in an illegal, irregular, and arbitrary way,* ***without ensuring due process***;"[620]

347.3. "[I]*t is clear that* ***the 2018 Tender Commission, the*** **[SRS]** ***and the GKNB breached the Kyrgyz law*** *and abused their authority by basing their decisions in the context of the 2018 Tender on factors that they were not lawfully entitled to consider, and* ***by failing to afford*** **[Claimant]** ***due process of law***."[621]

347.4. "**[Claimant]** ***expected*** *that after winning the 2018 Tender,* ***the e-passports contract*** *with the Government* ***would be performed in good faith and in accordance with due process*** *and the rule of law*."[622]

348. Tellingly, nowhere in the Statement of Claim is Claimant able to point a specific action attributable to the Republic that would be constitutive of a denial of justice or failure to accord due process. It is not for the Respondent to make Claimant's case for it, nor should

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617 *See supra*, ¶¶67-68 and **Exhibit R-41**, Minutes of questioning of Mr. Tynaev U.S. dated March 04, 2019, p. 3.

618 Statement of Claim, ¶¶505-511.

619 *Ibid*, ¶511 [emphasis added].

620 *Ibid*, ¶474(2) [emphasis added].

621 *Ibid*, ¶544 [emphasis added].

622 *Ibid*, ¶567 [emphasis added].

Respondent be made to spell out every possible State act that may be deemed a denial of justice or failure to accord due process, and then explain why none of those acts amounted to a breach of international law.

349. Yet, in the interests of expediency of proceedings, and to put to rest the (most abstract) claim that the Republic would have somehow denied justice to Claimant or failed to accord it due process, the Republic succinctly addresses below: (**i**) certain elements of the legal standard (**Sub-Section IV.B.4.a** below), and (**ii**) demonstrates that the only judicial proceeding concerning to the 2018 Tender, the administrative court proceedings brought by one of the unsuccessful bidders, did not and could not have denied justice to Claimant, and this even more so as Claimant recognizes their irrelevance to its claims (**Sub-Section IV.B.4.b** below).

a. The denial of justice standard

350. The denial of justice standard concerns itself, as its name unequivocally suggests, with the conduct of a State's judiciary. And not just any conduct – the standard addresses only circumstances in which the State's legal system as a whole has failed to provide the minimum standard of justice.

351. The standard presumes the integrity of a State's judiciary and its compliance with international law, and it requires the clearest and most compelling evidence to overturn that presumption. As Alwyn Freeman notes in his classic study of the subject, a State has discretion as to the manner in which it fulfills the international minimum standard of treatment:

> In fulfilling this requirement, each State enjoys a plenary margin of liberty. The organization of its courts, the procedure to be followed, the kind of remedies instituted, the laws themselves, are left to the State's own discretion. And although this delegation is not complete, it is – as we have seen – accompanied with a strong presumption that domestic institutions and laws comply with international duties.[623]

352. Similarly, Jimenez de Arechaga, a former President of the International Court of Justice, has explained:

> [I]t is unanimously agreed that in this subject there is one important presumption: that municipal judicial decisions are in conformity with both

623 **Exhibit RLA-167**, Alwyn V. Freeman, "The International Responsibility of States for Denial of Justice" ((Ed. Longmans, Green and Co. Ltd, 1938), p. 79.

> municipal and international law. The result of this presumption is that the onus of proof is on the claimant state to demonstrate that the acts of judicial organs are in violation of municipal or international law. The presumption also implies that in case of doubt, or in the absence of satisfactory proof, contested decisions must be considered to be in conformity with law. As Vattel rightly said, 'in all cases open to doubt a sovereign should not entertain the complaints of his subjects against a foreign tribunal.[624]

353. Accordingly, a claimant alleging a denial of justice bears a particularly heavy burden of proof to discharge.[625] This is evident in decisions of investment treaty tribunals, which have emphasized the presumption of regularity that attaches to court proceedings. In *Azinian v. Mexico*, for instance, the tribunal held that the claimant must show "*a pretence of form to achieve an internationally unlawful end*," i.e., "[a] *denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way* […]"[626] Similarly, in *Mondev v. United States*, the tribunal reiterated the high level of scrutiny required for any claim seeking to impugn the decisions of a national court:

> It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal.[627]

354. The tribunal went on to explain that an impugned court decision must be "*clearly improper and discreditable*" and that it must be arbitrary in the same sense of that word as articulated by the ICJ in the ELSI case, namely, a decision that "*displays 'a wilful disregard of due process of law,* […] *which shocks, or at least surprises, a sense of judicial propriety*.'"[628]

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624 **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.

625 **Exhibit RLA-167**, Freeman, Denial of Justice, p. 342. *See further* **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.

626 **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, ¶¶99, 102-103.

627 **Exhibit E-062**, Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award dated October 11, 2002, ¶126. *See also* **Exhibit E-079**, Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005 dated March 26, 2008, ¶80 ("*This Tribunal is not a court of appeal for the decisions of the Ukrainian courts* […]").

628 **Exhibit E-062**, Mondev v. US, Award, ¶127 (quoting *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (Judgment of 20 July) ¶128.

355. Further, the courts must have failed to such a degree that the failing is fundamental[629] or outrageous.[630] The result of what has been decided by national courts must amount to a "*manifest disrespect of due process [such] that they offend a sense of judicial propriety*" (in respect of procedural justice)[631] or "*clearly improper and discreditable*" (in respect of substantive justice).[632]

356. Thus, the fact that a court might reach a decision in error or follow procedures improperly does not give rise to a violation of international law. Put differently, it is not enough to show that decisions of the domestic courts were wrong. As was made clear in *Mondev v. United States*,[633] *Waste Management v. Mexico*[634] and *Azinian v. Mexico*,[635] international tribunals are not courts of appeal from decisions of local courts.

357. Because an adverse decision, even one in which errors of law may have been committed or normal procedures not perfectly followed, is not a denial of justice, the role of an international tribunal in assessing the decisions of local courts is accordingly limited. As Freeman explains:

> [T]he task of examining the judgment for culpable errors is extremely delicate and will be open to abuse. It must always be remembered that the function of an international tribunal is not, according to the traditional theory of responsibility, to sit in review as a municipal court of appeals, but solely to determine whether the judgment rendered was **so obviously wrong and unjustified as to amount to an international delinquency**. The distinction may prove difficult to apply in practice; but it exists and must be recognized.[636]

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629 **Exhibit RLA-149**, Arif v. Moldova, Award, ¶¶442 and 445, and recently repeated in *Infinito Gold*, **Exhibit RLA-148**, Infinito Gold v. Costa Rica, Award, ¶445.

630 **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.

631 **Exhibit RLA-149**, Arif v. Moldova, Award, ¶447.

632 **Exhibit E-062**, Mondev v. US, Award, ¶127 – quoted in *Amto v. Ukraine*, **Exhibit E-079**, AMTO v. Ukraine, Award, ¶76; **Exhibit RLA-171**, Philip Morris v. Urugway, Award, ¶¶500, 501.

633 **Exhibit E-062**, Mondev v. US, Award, ¶127 (observing that "*international tribunals are not courts of appeal*").

634 **Exhibit E-063**, Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3 dated April 30, 2004, ¶129 (observing that the tribunal "*is not a further court of appeal*").

635 **Exhibit RLA-170**, Azinian v. Mexico, Award, ¶99 ("*The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction*").

636 **Exhibit RLA-167**, Freeman, Denial of Justice, p. 325 [emphasis added].

358. Moreover, because a denial of justice impugns the integrity of the State's judicial system, that system must be given every opportunity to correct itself before a decision of a court may be deemed internationally unlawful. Thus, such a claim cannot arise until local remedies are exhausted, as explained by Jan Paulsson in his seminal treatise on denial of justice:

> States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct. […] National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected. […] There can be no denial before exhaustion. […] The very definition of the delict of denial of justice encompasses the notion of exhaustion of local remedies.[637]

359. Exhaustion occurs "*when the final judicial instance, which is plausibly available, has rendered its decision*."[638] Conversely, tribunals have noted that remedies cannot have been exhausted if the judicial or administrative failing is confined to an appealable first instance decision.[639] A state can only be held liable for denial of justice when it has not remedied this denial domestically.[640] A failure to exhaust is "per se *sufficient to exclude the States' responsibility in international law for actions or omissions of its judiciary international law for actions or omissions of its*

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637 **Exhibit RLA-172**, Jan Paulsson, Denial of Justice in International Law (CUP, 2005), pp. 100 and 125. *See further* **Exhibit RLA-129**, Rudolph Dolzer and Christoph Schreuer, Principles of International Investment Law (OUP, 2nd Ed., 2012), p. 154 ("*it is generally accepted that a claim for denial of justice is conditioned on a prior exhaustion of local remedies*").

638 **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.

639 **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.

640 **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.

judiciary."[641] In order for the judicial system to be tested, a claimant must have engaged with the system in a *bona fide* [642] attempt to resolve the matter.[643]

360. Recently, in *Infinito Gold v. Costa Rica*, the tribunal reminded the importance of exhaustion of local remedies in the following terms:

> The exhaustion of local remedies rule is a substantive component of the denial of justice breach. Because a denial of justice points to a systemic flaw in the State's administration of justice, there can be no denial of justice until the system had a full opportunity to correct itself.[644]

361. Finally, it has also been acknowledged that a claim for denial of justice cannot protect the investor that fails to exercise his rights within a legal system, or exercises its rights unwisely.[645]

b. No denial of justice during the administrative court proceedings

362. As mentioned in Sub-Section II.E.8 above, the only court proceedings concerning the 2018 Tender are the administrative court proceedings initiated in April 2019 by Mühlbauer, one of the unsuccessful bidders of the Tender, seeking to cancel the outcome of the Tender in

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641 **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).

642 **Exhibit E-072**, Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award dated September 16, 2003, ¶20.33.

643 **Exhibit E-080**, Jan de Nul v. Egypt, ¶258; **Exhibit RLA-179**, Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, Partial Award on the Merits dated March 30, 2010, ¶¶276 *et seq*. and **Exhibit RLA-176**, Toto v. Lebanon, Decision on Jurisdiction, ¶164. *See further* **Exhibit RLA-180**, Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award dated November 12, 2010, ¶293 ("*the notion of a denial of justice* […] *implies the requirement to exhaust local remedies*").

644 **Exhibit RLA-148**, Infinito Gold v. Costa Rica, Award, ¶260.

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

Claimant's favor. Importantly, Claimant repeatedly asserts in its Statement of Claim that those proceedings "*did not have any material relevance*" to the Claimant,[646] and has not so far spelled out in its legal argumentation that those proceedings constated a denial of justice.

363. Be that as it may, for exhaustiveness, these administrative court proceedings did not and could not have denied justice to Claimant for the following independent reasons:

363.1. The April 9, 2019 injunction order issued by the Interdistrict Court of Bishkek, prohibiting SRS and the Claimant to "*carry out actions concerning the execution of the* [e-passport printing] *contract*"[647] was indeed issued on an *ex parte* basis, without involvement of the parties, in compliance with Kyrgyz law.[648] If Claimant had any issue with the content of this order or the way it was issued, it could have contested it before the Kyrgyz courts, yet it failed to do so.

363.2. Claimant fully participated in all three instances (first, appellate and cassation) of the actual administrative court proceedings, by filing written pleadings, making oral submissions, filing an appellate complaint and even succeeding at that appellate juncture.[649] Again, at no point in time during the appellate proceedings did Claimant's local counsel voice any concerns that it was denied justice or not accorded due process.

364. Overall, assuming Claimant is actually making a standalone denial of justice claim (which is far from clear based on the current vague references to the legal concept, without any proper application of the law to the facts), the Republic did not deny justice to Claimant. The Republic expressly reserves its right to exhaustively rebut any and all further argumentation on this point, if made by Claimant.

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

365. In Section VI(C)(iv) of its Statement of Claim, Claimant asserts that: (**i**) the Kyrgyz Republic "*destroyed* [Claimant's] *international business reputation*," (**ii**) this was in breach of (an unspecified provision of) the BIT, and (**iii**) Claimant is entitled to compensation therefor.

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646 Statement of Claim, ¶¶223, 227.

647 **Exhibit R-80**, Injunction application of Mühlbauer dated April 01, 2019.

648 *See further* paragraph 94 above.

649 *See* paragraphs 95-98 above.

366. Consistently with Claimant's other heads of claim, Claimant's argumentation here is superficial and flawed. Specifically, Claimant appears to assert entitlement to compensation for damages to its "*international business reputation*" on two grounds:

366.1. As a form of 'moral damages', citing a modest selection of jurisprudence, where moral damages were considered and/or awarded to legal entities;[650] and

366.2. As a form of compensation for the destroyed "*business reputation*" of Claimant, which it deems is one type of 'investment' that it has made in the territory of the Kyrgyz Republic.[651]

367. The Republic addresses each of these two grounds in turn below.

a. No entitlement to moral damages

368. Claimant did not properly articulate the legal basis for its moral damages head of claim. The jurisprudence relied on by Claimant does not advance its case:

368.1. In the 1923 *Lusitania* cases,[652] the Umpire merely considered that that international law provides compensation for moral damages - which the Kyrgyz Republic does not dispute.

368.2. In turn, *Al-Kharafi v. Libya*,[653] where a corporate claimant was awarded USD 30 million of moral damages, is of little relevance to the present case, as it was based exclusively on domestic law, as opposed to public international law.[654] Furthermore, this case was widely panned in academic circles as being a "*highly unusual development*,"[655] with commentators highlighting "*significant difficulty in following the Tribunal's analysis and argumentation*," the succinct legal argumentation of the

650 Statement of Claim, ¶¶629-630.

651 *Ibid*, ¶¶631-633.

652 Statement of Claim, ¶629. The reference in FN499 of the Statement of Claim to Exhibit CLA-7 is incorrect. For exhaustiveness, the correct authorities are: **Exhibit E-108**, Opinion in the Lusitania Cases (US v. Germany) dated November 01, 1923, p. 40 and **Exhibit RLA-188**, James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2007) dated January 01, 2007, p. 252.

653 Statement of Claim, ¶630.

654 *See* **Exhibit CLA-024**, Mohamed Abdulmohsen Al-Kharafi & Sons Co. v.Libya et al., Award dated March 22, 2013, ¶¶365-366.

655 **Exhibit RLA-181**, UNCTAD, "Recent Developments in Investor-State Dispute Settlement (ISDS), dated April 2014, p. 21.

> Award and the fact that it is outside of the "*mainstream international investment arbitration jurisprudence*."[656]

369. Accordingly, it falls upon the Republic to articulate the legal standard of moral damages in investment law. The Republic makes the following two observations in this regard:

370. **First**, as with any other remedy, damage must be proven, and the burden of proof falls upon claimant.[657] In *Victor Pey Casado v. Chile* the arbitral tribunal noted that:

> [n]o attempt was made to advance, or to justify, a specific claim that moral damage had been suffered by the Foundation; **this claim can therefore immediately be set aside** […] But the most decisive factor of all is that a **claim to damages of a moral character does not escape the burden of proof** resting on a claimant […] the Claimants had simply failed to meet this burden, and that a mere likelihood that damage might have been suffered does not suffice. […] **The claim to moral damages must therefore be rejected**.[658]

371. **Second**, under international law, reputational, or moral damages, remain an exceptional remedy, which may only be awarded in exceptional circumstances.[659] The burden of proof is on the party claiming such damages, and the standard of proof is very demanding.[660] Indeed, it is well established in investment arbitration case law that in order for the moral damages to be granted, the conduct of the Respondent State must qualify as "*egregious*"[661] or "*malicious.*"[662]

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656 **Exhibit RLA-182**, Ahmad Ghouri, "Mohamed Abdulmohsen Al- Kharafi & Sons Co. v The Government of the State of Libya and others," Journal of World Investment and Trade 16(2) (2015), pp. 330, 332.

657 *See e.g.*, **Exhibit E-068**, Tecmed v. Mexico, Award, ¶¶190-198; **Exhibit E-073**, Oxus Gold v. Republic of Uzbekistan, UNCITRAL, Final Award dated December 17, 2015, ¶¶901-904.

658 **Exhibit RLA-183**, Victor Pey Casado and Foundation "Presidente Allende" v. The Republic of Chile, ICSID Case No. ARB/98/2, Award dated September 13, 2016, ¶243 [emphasis added].

659 *See e.g.*, **Exhibit E-046**, Lemire v. Ukraine, Award, ¶333; **Exhibit E-109**, Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award dated February 06, 2008, ¶289; **Exhibit RLA-149**, Arif v. Moldova, Award, ¶¶584 and 592.

660 **Exhibit E-082**, Anatolie Stati et al. v. The Republic of Kazakhstan, SCC Arbitration V (116/2010), Award dated December 19, 2013, ¶1782.

661 **Exhibit CLA-013**, Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award dated June 01, 2009, ¶545.

662 **Exhibit E-089**, Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8, Award dated March 01, 2012, ¶428; **Exhibit RLA-184**, Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, Final Award dated December 15, 2014, ¶653; **Exhibit E-109**, DLP v. Yemen, Award, ¶290.

372. In *DLP v. Yemen*, the tribunal set the bar high for an award of moral damages, namely "*the physical duress exerted on the executives of the Claimant* [that] *was malicious*."[663] In that case, the physical duress included a Government-led "*siege with heavy artillery*," that affected "*the physical health of the Claimant's executives and the Claimant's credit and reputation*."[664]

373. This high standard of proof for moral damages has been neatly summed up by the tribunal in *Lemire v. Ukraine*:

> [A]s a general rule, moral damages are not available to a party injured by the wrongful acts of a State, **but that moral damages can be awarded in exceptional cases, provided that**
>
> - the State's actions imply physical threat, illegal detention or another analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;
> - the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
> - both cause and effect are grave or substantial.[665]

374. This test was dubbed the 'Lemire requirements' and cited with approval in *Stati v. Kazakhstan*, where the tribunal agreed that a claimant "*must meet a very high threshold to show a liability for moral damages*."[666]

375. Following this standard, the tribunal in *Inmaris v. Ukraine* refused to award moral damages, since the State's actions "*were not malicious or driven by motives beyond the perceived need to change key components of the economic relationship*" and the tribunal did not find "*that any emotional or other harm Claimants may have suffered is sufficiently serious as to merit an award of additional compensation for moral damages*."[667]

376. It follows that when there are no "*extraordinary circumstances*," any purported moral aspect of injury to a claimant would be deemed covered by economic compensation, and that claimant must contend itself to this form of compensation.[668]

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663 **Exhibit E-109**, DLP v. Yemen, Award, ¶¶166 and 290.

664 *Ibid.*

665 **Exhibit E-046**, Lemire v. Ukraine, Award, ¶333.

666 **Exhibit E-082**, Stati v. Kazakhstan, Award, ¶1782.

667 **Exhibit E-089**, Inmaris v. Ukraine ,Award, ¶428.

668 *See e.g.*, **Exhibit RLA-185**, Marco Gavazzi and Stefano Gavazzi v. Romania, ICSID Case No. ARB/12/25, Award dated April 18, 2017, ¶297.

377. In the case at hand, Claimant is <u>not</u> entitled to moral damages as it did not even attempt to explain what "*extraordinary circumstances*" entitle it to such moral damages, and how the Kyrgyz Republic's conduct was "*egregious*" or "*malicious*." An abstract reference to Claimant's "*business reputation*" is not enough. And this is even more so, since, as described at Sub-Section II.C above and Sub-Section V.B below: (**i**) Claimant's business reputation prior to the 2018 Tender was very controversial; (**ii**) Claimant misled the Tribunal asserting that its business reputation deteriorated after the 2018 Tender; and (**iii**) in any event, there is no causal link between any putative deterioration of Claimant's business reputation and any actions of the Kyrgyz Republic.

378. Accordingly, Claimant's claim for moral damages shall be dismissed.

b. No entitlement to damages for destruction of 'business reputation' that was 'invested' in the Kyrgyz Republic

379. Claimant's assertion that it had a "*protected investment (business reputation)*" that was "*destroyed by the Kyrgyz Republic*" entitling Claimant to compensation[669] is merely another (rather creative) take on its moral damages claim. The Republic succinctly responds as follows:

379.1. As explained in Sub-Section III.B.2 above, Claimant did not invest its 'business reputation' in the Kyrgyz Republic;

379.2. As explained immediately above, there is no evidence that this 'business reputation' was destroyed, or in any event that the Kyrgyz Republic had anything to do with it.

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

669 Statement of Claim, ¶¶632-633.

V. GARSU IS NOT ENTITLED TO ANY COMPENSATION

381. Garsu is not entitled to any compensation in relation to its alleged investment because, as demonstrated above, Claimant has failed to establish that the Kyrgyz Republic breached Kyrgyz law, let alone the BIT. Even assuming *arguendo* that the Republic breached one or more provisions of the BIT, no compensation is owed for the following reasons:

381.1. Claimant failed to discharge the burden of establishing its losses with certainty (**Sub-Section V.A** below);

381.2. There is no causal link between the alleged breaches and Claimant's alleged losses (**Sub-Section V.B** below);

381.3. Claimant adopted a random valuation date, resulting in an artificial inflation of loss (**Sub-Section V.C** below);

381.4. In any event, the quantum of Claimant's alleged damages is entirely unreliable (**Sub-Section V.D** below); and

381.5. At best, Claimant is entitled to simple interest, running from February 2020 (**Sub-Section V.E** below).

382. At the outset, and for clarity, Claimant asserts that it is entitled to compensation under three heads of claim:

382.1. The alleged losses due to the "*expropriation of e-passports contract won by* [Claimant] *in the 2018 Tender*," which includes: (**i**) EUR 9.4 thousand on account of "*expenses incurred by* [Claimant] *in the 2018 Tender*;" and (**ii**) EUR 2.318 million on account of "*profit of the e-passports contract*" (the "**2018 Tender Contract Losses**");[670]

382.2. The alleged losses due to "*cancellation of contracts, which were cancelled for the sole reason of the Kyrgyz' scandal and false allegation*," amounting to EUR 5.649 million (the "**Ensuing Other Contract Losses**");[671] and

670 Statement of Claim, ¶725 and **Exhibit CER-3-1**, Expert Report by Dr. Jurgita Banyte, p. 31.

671 Statement of Claim, ¶728 and **Exhibit CER-3-1**, Banyte Damages Expert Report, p. 37.

382.3. The alleged losses due to "*loss of business reputation*," amounting to EUR 9.46 million (the "**Business Reputation Losses**").[672]

A. Claimant bears the burden of establishing its losses with certainty

383. As is typical with many BITs, the Kyrgyz-Lithuanian BIT provides only for a measure of damages in the event of a finding of expropriation, namely, for the market value of the expropriated investment valued immediately before the alleged expropriation.[673] Although the BIT does not provide for the measure of damages for breaches of other provisions of the BIT, Respondent agrees that the damages should compensate the investor for harm suffered as a direct result of the BIT violation.[674]

384. It is trite that the party propounding a fact bears the burden of proving that fact, and accordingly Claimant bears the burden of proving the quantum of damages it seeks.[675] In this respect, as the tribunal in *Amoco v. Iran* observed, "[o]*ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded*."[676]

385. While Claimant relies on ILC Article 36(2),[677] which provides that compensation must cover "*any financially assessable damages including loss of profits insofar as it is established*," in this context

672 Statement of Claim, ¶731 and **Exhibit CER-3-1**, Banyte Damages Expert Report, p. 39.

673 **Exhibit RLA-19**, Kyrgyz-Lithuanian BIT, Article 4(2).

674 *See* Statement of Claim, ¶¶660-661.

675 **Exhibit RLA-186**, Československá Obchodní Banka, A.S. (CSOB) v. Slovak Republic, ICSID Case No. ARB/97/4, Award dated December 29, 2004, ¶225 ("*The Tribunal shares the Parties' view that as a matter of principle, the burden of proof for CSOB's damage is on CSOB*"); **Exhibit E-068**, Tecmed v. Mexico, Award, ¶190 ("*The Arbitral Tribunal also considers that* […] *the burden to prove the investment's market value alleged by the Claimant is on the Claimant*"); **Exhibit E-107**, S.D. Myers, Inc. v. Government of Canada, UNCITRAL dated October 21, 2002, ¶173 (noting that "*a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof*").

676 **Exhibit RLA-187**, Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran et al., Partial Award No. 310-56-3, reprinted in 15 Iran-U.S. C.T.R. 189 (1988) dated July 14, 1987, ¶238. *See further* **Exhibit RLA-147**, Gemplus v. Mexico, Award, ¶12-56 (describing the claimant's burden of proof for proving damages and noting that if the claimant's "[…] *loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent*").

677 *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.

"*established*" means an amount proven without resort to speculation or uncertainty.[678] The ILC Commentary thus notes that, "[t]*ribunals have been reluctant to provide compensation for claims with inherently speculative elements*,"[679] citing, *inter alia*, the *Shufeldt (USA/Guatemala)* case,[680] *Amco Asia Corp. v. Indonesia*,[681] and Whiteman on Damages.[682]

386. As shown in the ensuing Sub-Sections, Claimant has failed to discharge its burden to prove its losses with sufficient certainty, and should therefore not be awarded any compensation, even in the unlikely event that the Tribunal was to find that Respondent breached its BIT obligations.

B. There is no causal link between the alleged breaches and Claimant's alleged losses

387. Even if Claimant succeeds in proving that it suffered losses related to its purported investment in the Kyrgyz Republic, it still cannot request any compensation from the Republic following the principle of causation.

388. Pursuant to internationally recognized standard of compensation, a party requesting the damages shall demonstrate the existence of **causal link** between its alleged losses and the State's alleged breaches of its obligations.

389. The Article 36(1) of the ILC Draft Articles on State Responsibility is accordingly drafted as follows:

> The State responsible for an internationally wrongful act is under an obligation to compensate for the damage **caused** thereby, insofar as such damage is not made good by restitution.[683]

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678 **Exhibit RLA-188**, James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2007) dated January 01, 2007, Art. 36(2), p. 218.

679 **Exhibit RLA-188**, Crawford, ILC Articles, p. 228.

680 **Exhibit RLA-189**, Shufeldt Claim (USA/Guatemala), Award, II RIAA (2006) dated June 25, 1930, pp. 1079-1102.

681 **Exhibit RLA-190**, Amco Asia Corporation, Pan America Development Ltd and P.T. Amco Indonesia. v. The Republic of Indonesia, Resubmitted Case: Award, reprinted in 1 ICSID REP. 569, 613 (1993) dated May 31, 1990.

682 **Exhibit RLA-191**, Marjorie M. Whiteman, Damages in International Law (1937), p. 1837.

683 **Exhibit CLA-007**, ILC Articles on State Responsibility, Art. 36(1) (emphasis added). *See also*, **Exhibit RLA-183**, Pey Casado v. Chile, Award, ¶217 ("…*the assessment of the reparation due under international law for the breach of an international obligation consists of three steps – the establishment of the breach, followed by the ascertainment of the* ***injury caused by the breach****, followed by the determination of the appropriate compensation for that injury*") [emphasis added].

390. Consequently, the allegedly deprived investor bears the burden of proof of establishing that the actions attributable to the State were the necessary cause of its losses.[684] It must be demonstrated that the losses claimed have arisen exactly from a breach by the State of its obligations under the relevant instrument and not from other causes.[685]

391. In the present case the Claimant did not satisfy the abovementioned standard for any of the three heads of claim summarized at paragraph 382 above, as explained in turn below.

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

392. For this head of damages, Claimant's pleaded case is as follows:

392.1. the alleged **'cause'** element is the "*expropriation of the e-passports contract won in the 2018 Tender*,"[686] specifically: (**i**) the "*illegal 'cancellation' of the already concluded 2018 Tender*," and (**ii**) the "*refus*[al] *to execute the e-passports contract with* [Claimant]."[687]

392.2. the alleged '**effect'** element is the loss of: (**i**) the "*expenses incurred by* [Claimant] *in the 2018 Tender*;" and (**ii**) the "*profit of the e-passports contract*" that Claimant would have been made if the contract were signed.[688]

393. Yet, this causation is flawed.

394. **First**, as explained in Sub-Section II.E.6 above, Claimant's Bid has expired on April 2, 2019, and from that date on Claimant could not have entered into a contract with the SRS. Yet, the act, or 'cause', that Claimant complains about is the February 4, 2020 Order of the SRS deeming the 2018 Tender as failed. Claimant is not arguing - nor could it - that the February

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684 *See e.g.*, **Exhibit E-064**, The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Award dated May 06, 2013, ¶190 ("*To the extent, however, that a claimant chooses to put its claim (as in the present Arbitration) in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and* ***the necessary causal link between the loss or damage and the treaty breach***") [emphasis added]. *See also* **Exhibit E-107**, S.D. Myers v. Canada, Second Partial Award, ¶140 ("…*the Tribunal determined that the damages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the* ***proximate*** *cause of harm*") [emphasis in original].

685 *See e.g.*, **Exhibit E-107**, S.D. Myers v. Canada, Second Partial Award, ¶316.

686 Statement of Claim, ¶718.

687 *Ibid*, ¶598.

688 *Ibid*, ¶725 and **Exhibit CER-3-1**, Banyte Damages Expert Report, p. 31.

4, 2020 Order would have somehow contributed to the expiry of its Bid that took place, on itself, back in April 2, 2019.[689]

395. **Second**, the purported "*refus*[al] *to execute the e-passports contract with* [Claimant]" has to be considered together with Claimant's own inaction - as explained at paragraphs 65 *et seq.* above, there is no evidence that Claimant undertook any action aimed at signing the contract between late February 2019 (when the complaints of two unsuccessful bidders were dismissed) and April 2, 2019 (when its bid expired). This is in light of Claimant's duty to mitigate its damages, a well-established legal principle applicable to damages calculations in investor-State disputes.[690]

396. **Third**, even if the two causes invoked by Claimant actually had any weight and were removed for a 'but for' analysis, the 'effect' for Claimant would not have been the entry into a contract with the SRS. Put differently, the answer to Claimant's question about "*how probable is it that* [Claimant] *would have executed the e-passports contract*" is not "*virtually certain*,"[691] but '**very unlikely**.' This is because Claimant's 'but for' analysis fails to take into consideration the outcome of the administrative court proceedings commenced by Mühlbauer, whereby the award of the tender to Claimant was annulled.[692]

397. **Finally**, with regard to the direct expenses incurred by Claimant for the participation in the 2018 Tender, any possible causal link is entirely extinguished by the provisions of the tender documentation accepted by Claimant, which provided that tender expenditures are **not** subject to compensation to the bidder under any circumstances: "[t]*he bidder shall bear all costs associated with preparing and submitting the bid. The Buyer* [i.e., the SRS] *is not liable or responsible for such costs.*"[693]

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689 The same logic would apply to the April 17, 2019 press-release of the SRS, confirming that Claimant's Bid has expired on April 2, 2019 (*see further* paragraph 78 above). That press release could not have been the 'cause' of the alleged loss, as it has merely articulated the existing state of affairs - the SRS cannot enter into a contract with Claimant because its Bid has already expired.

690 *See*, e.g., **Exhibit RLA-192**, William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada, PCA Case No. 2009-04, Award on Damages dated January 10, 2019, ¶204 ("*The duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty*"), cited with approval in **Exhibit RLA-30**, Cairn v. India, Award, ¶1887.

691 Statement of Claim, ¶¶681, 687.

692 *See* Sub-Section II.E.8 above.

693 **Exhibit R-17**, 2018 Tender Documentation, ¶4.1.

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

398. For this head of damages, Claimant's pleaded case is as follows:

398.1. The alleged '**cause'** is the "*disseminat*[ion] [of] *false information about the alleged meddling (through bribes and corruption) by* [Claimant] *with the results of the 2018 Tender*;"[694]

398.2. The alleged **'effect'** are losses that Claimant suffered from cancellation of contracts with four other clients ("**Other Contracts**").[695]

399. Here, too, the causation is deeply flawed.

400. In fact, while Claimant itself insists that the Other Contracts were all cancelled for the sole reason of "*the Kyrgyz'* [sic] *scandal and false allegations*,"[696] this is not corroborated by any documentary evidence. Taking the Other Contracts each in turn:

400.1. The contract between Claimant and **DALO** for production of e-passport booklets in Mozambique appears to have been terminated by DALO in view of the controversy surrounding Claimant and its parent company, SEMLEX, in Mozambique and other African countries, as described in Sub-Section II.C.3 above.[697]

400.2. The contract between Claimant and **BBL** for production and supply of Swiss visa stamps was, again, terminated given the "*much wider reputational issue involving Semlex and Garsu Pasaulis*," not solely (or even just explicitly) the events surrounding the 2018 Tender in the Kyrgyz Republic.[698]

400.3. As to the contract between Claimant and **Baltic Tobacco** for the sale of cigarette packages: (**i**) it was historically volatile, (**ii**) there is no backup either for the

694 Statement of Claim, ¶697.

695 *Ibid*, ¶719.

696 *Ibid*, ¶716(iii).

697 *See further* **Exhibit RER-2-1**, Malyugina EO on Damages 1, Section 8.5 and ¶8.5.9 ("*Overall, given the existing controversy surrounding Semlex and GP in Mozambique (as well as other African countries), connecting GP's subsequent contract cancellation "solely" with the situation in Kyrgyz Republic appears strenuous*").

698 *See further* **Exhibit RER-2-1**, Malyugina EO on Damages 1, Section 8.5 and ¶8.5.14 ("*Overall, media appears to connect the contract cancellation to a wide controversy surrounding Garsu Pasaulis and Semlex globally. The assumption that the contract was cancelled for the "sole reason of the Kyrgyz Scandal" is strenuous*").

assumption that it would have been extended,[699] or (**iii**) that it was terminated given the events surrounding the 2018 Tender in the Kyrgyz Republic.[700]

400.4. Lastly, the allegations concerning the contract between Claimant and **Carlsberg** for delivery of wet glue labels are even more frivolous. What Claimant produced in this arbitration is: (**i**) a two-year contract with Carlsberg from 2010;[701] and (**ii**) a December 2020 email exchange, where a Carlsberg representative refers to "*the Original Agreement signed 29.11.2017*" and the "*current contract, signed on 27.01.2020*."[702] Expectedly, the email exchange simply confirms that Carlsberg decided to let the current contract expire in December 2020, without stating any reasons.[703]

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

401. For this last head of damages, Claimant pleads the same cause, i.e. the 'false accusations' that the Kyrgyz Republic would have disseminated,[704] whereas the effect is a "loss[] *of business reputation* [translated into] *the company's loss of income in excess of the market trend for 2020/2018*."[705]

402. And again, this causation is as flawed, as unsupported by any documentary evidence. As explained by Respondent's quantum expert, Ms. Malyugina, there are at least four reasons why this causation is improbable:[706]

402.1. Claimant's actual revenue structure is not sufficiently detailed and substantiated to allow for reliable benchmarking;

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699 As asserted by Claimant's quantum expert, *see* **Exhibit CER-3-1**, Banyte Damages Expert Report, p. 7.

700 *See further* **Exhibit RER-2-1**, Malyugina EO on Damages 1, Section 8.5 and ¶8.5.18 ("*I note that the contract revenue had shown volatility in the past (with sales falling by some 45% in 2017), and so assuming it should have remained stable and growing "but for" the Kyrgyz Republic publicity has no basis*").

701 **Exhibit CER-3-Exh.-15**, Delivery Agreement betwee Carlsberg Breweries A/S and UAB Garsu Pasaulis (validity 01.02.2010-01.02.2012) concerning wet glue labels.

702 **Exhibit CER-3-Exh.-19**, Email from Carlsberg to Garsu Pasaulis re Contract Expiration dated September 10, 2020.

703 *See further* paragraph 107.3 above and **Exhibit RER-2-1**, Malyugina EO on Damages 1, Section 8.8 and ¶8.5.26 ("*Given the above t*[r]*end, and the absence of explanation as to why this contract is assumed to have been terminated / not extended due to the situation in Kyrgyz Republic, I find Dr Banyte's calculation as having no basis*").

704 Statement of Claim, ¶716(iii) and **Exhibit CER-3-1**, Banyte Damages Expert Report, p. 37.

705 Statement of Claim, ¶720.

706 *See* **Exhibit RER-2-1**, Malyugina EO on Damages 1, ¶9.6.4.

402.2. The selected benchmarks are not directly comparable to Claimant;

402.3. The revenue performance of the benchmarks is a wide range, and Claimant's revenue trend falls within that range; and

402.4. In any event, no event study has been performed to establish a direct link between revenue and the "Kyrgyz scandal", and to rule out the effect of any other internal or external events, which could differentiate GP from the market benchmarks.

C. Claimant adopted a random valuation date, resulting in an artificial inflation of loss

403. Claimant's Statement of Claim fails to address the valuation date for quantum calculations. Claimant's quantum expert uses December 31, 2020, which is arbitrary and "*leads to an artificial inflation of loss (as the expert compounds, instead of discounting, the losses for 2019 and 2020, and does so at a rate of over 20%).*"[707]

404. It is axiomatic that the valuation date is the date of the alleged breach. Purely for damages quantification purposes, Respondent deems that the correct valuation date would have been February 4, 2020, the date of the SRS Order recognizing the 2018 Tender as failed. It is, however, for Claimant, as the party bringing forward claims against the Republic to articulate what valuation date it proposes and the reasons therefor.

D. In any event, the quantum of Claimant's alleged damages is entirely unreliable

405. The quantum of alleged damages that Claimant is seeking is entirely unreliable and thus cannot be awarded. In this Sub-Section, Respondent will address, in turn, each of the three heads of Claimant's quantum claims.

1. The 2018 Tender Contract Losses

406. Respondent's quantum expert, Ms. Malyugina, has identified the following serious flaws in the Claimant's calculation of its 2018 Tender Contract Losses amounting to EUR 2.327 million:[708]

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707 *Ibid*, ¶2.3.4.

708 **Exhibit RER-2-1**, Malyugina EO on Damages 1, Sections 6 and 7.

406.1. For EUR 9.4 thousand of direct (sunk) costs allegedly incurred by Claimant in the course of the 2018 Tender:[709]

406.1.1. Most of those costs are without proof of payment and for services not clearly explained;

406.1.2. The remaining costs concern travel expenses that are either pre-project expenses and therefore cannot be claimed, or not directly related to Claimant's participation in the 2018 Tender,[710] but rather a trip to manage its media profile in the Kyrgyz Republic.

406.2. For EUR 2.318 million of purported profits Claimant would have made on the contract with SRS, Claimant's quantum report "*contains a number of unsupported and, often, extreme assumptions, which lead to a material inflation of the claimed loss*," namely:[711]

406.2.1. Overstated revenue due to an incorrect KGS / EUR exchange rate; a correction of the exchange rate would reduce that sub-head of claim by EUR 0.9 million;

406.2.2. Project costs based on instructions from Claimant as opposed to underlying documents or calculations;

406.2.3. Incorrect use of discounting and compounding that makes "*no economic sense*," whereby the net present value of allegedly lost cash flows is higher than their undiscounted value; and

406.2.4. Use of "extreme" 20% interest rate for compounding and wrong compounding calculations.

407. In light of the above, Ms. Malyugina concludes in her expert report as follows:[712]

> 7.6.6 Overall, Dr Banyte's calculation of lost profits is unreliable, unsubstantiated and materially overstated. In the absence of a credible cost budget, I am unable to provide an alternative calculation. I note that an increase of 23% or more in the cost budget, together with the forex

709 *Ibid*, ¶6.7.

710 See ¶¶49 *et seq.* above.

711 *See* **Exhibit RER-2-1**, Malyugina EO on Damages 1, ¶7.6.

712 **Exhibit RER-2-1**, Malyugina EO on Damages 1, ¶7.6.6.

adjustment to revenue above, leads to the project bringing **negative cash flow to[Claimant]** (and so **loss being nil**).

2. The Ensuing Other Contract Losses

408. As to the 5.649 million of Ensuing Other Contract Losses, Respondent's quantum expert, Ms. Malyugina, in addition to the multiple flaws listed at paragraphs 398 *et seq.* above, has identified the following problems with Claimant's calculation:[713]

408.1. No explanation provided as to how these four other contracts / clients of Claimants were selected for the calculations;

408.2. Calculations rely on Claimant's instructions as opposed to the backup documentation or aggregate financials, making the calculations unsubstantiated;

408.3. The compounding of allegedly lost profits at an interest rate in excess of 20% "*is incorrect as a matter of principle, and further inflates the loss*."

409. Ms. Malyugina concludes that without "*sufficient evidence to suggest that this loss was incurred*" it is impossible to come up with an alternative assessment of loss under the head of claim.[714]

3. The Business Reputation Losses

410. Lastly, as to largest head of claim, the EUR 9.46 million of Business Reputation Losses, Respondent's quantum expert, Ms. Malyugina explains that they are "*crude and unreliable*."[715] Aside from reasons set out at paragraphs 401 *et seq.* above, this is because:

410.1. Claimant's revenue has actually increased by 12% in 2019 (the year where the purported 'Kyrgyz scandal' would have already led to business reputation losses). This is better than Claimant's average historic performance, or than the market benchmarks that Claimant's quantum expert identifies.

410.2. In order to conclude that Claimant's revenue trend after the 2018 Tender is unusual, and evidences revenue lost due to the "Kyrgyz scandal," Claimant's quantum expert "*appears to reverse-engineer an analysis of market averages to fit her conclusions*," making the analysis "*unreliable*."

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713 *Ibid*, ¶8.11.

714 *Ibid*, ¶8.11.5.

715 **Exhibit RER-2-1**, Malyugina EO on Damages 1, ¶9.6.2.

410.3. The assumption of Claimant's quantum expert that the "*under-earning*" calculated for 2019 and 2020 (of EUR 1.4 million) would continue in perpetuity is "*extreme, and inflates the loss.*"

411. Ms. Malyugina accordingly concludes as follows:[716]

> I do not consider that Dr Banyte has been able to demonstrate any meaningful reduction in GP's revenues (or profits) as a direct result of the "Kyrgyz scandal". I therefore quantify the proven loss under this heading as **nil**.

E. At best, Claimant is entitled to simple interest, running from February 2020

412. Claimant asserts that it is entitled to an award of interest on the damages claimed, compounded annually, beginning from February 22, 2019.[717] Respondent takes issue both with the compounding of interest, and the interest start date.[718]

413. With respect to **compounding of interest**, there is simply no uniform practice in ordering compound interest, which Claimant is seeking in this arbitration.[719] On the contrary, arbitral tribunals routinely award simple interest, as far as it is sufficient and provides appropriate compensation.[720]

414. As explained by the tribunal in *Compañia del Desarrollo de Santa Elena v. Costa Rica,* "[…] *the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances*

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716 *Ibid*, ¶¶9.6.6.

717 Statement of Claim, Section VII.F.

718 The claimed interest rate US prime rate plus 2% (*see* Statement of Claim, ¶740) is not disputed.

719 *See* Statement of Claim, ¶734. *See*, e.g., **Exhibit RLA-193**, Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award dated February 17, 2000, ¶103 ("*No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case*"); **Exhibit RLA-194**, CME Czech Republic B.V. (The Netherlands) v. The Czech Republic, UNCITRAL, Final Award dated March 14, 2003, ¶¶642-647. *See further* **Exhibit RLA-188**, Crawford, ILC Articles, Art. 38, comment 9, p. 238 ("*But given the present state of international law it cannot be said that an injured State has any entitled to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation*") and **Exhibit RLA-195**, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5, Award dated November 21, 2007, ¶¶294-295.

720 **Exhibit RLA-196**, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award dated August 18, 2008, ¶457(the tribunal refused to apply compound interest under the applicable law, noting that "*the award of compound interest is not a principle of international law*"); **Exhibit E-109**, DLP v. Yemen, Award, ¶¶292-295 (considering the circumstances of the case the tribunal agreed with respondent that "*the appropriate rate of interest is the simple rate*"); **Exhibit RLA-197**, Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award dated June 30, 2009, ¶212.

of the case at hand […]."[721] Similarly, in *CME v. Czech Republic*, the tribunal deemed that the claimant failed to justify awarding compound interest, ordering simple interest on the principal amount of the award.[722]

415. Accordingly, Claimant does not have an automatic right to or the benefit of 'tradition' for an award of compound interest. Claimant must have, yet failed to, demonstrate particular circumstances justifying compound interest, and is therefore, at best, entitled to simple interest. This is even more so, as the Tribunal's Procedural Order No. 2 on the Claimant's Request for a Separate Award on Costs has awarded simple interest (and Claimant is content to agree to the interest rate ordered in the same Procedural Order No. 2, i.e. US prime rate plus 2%, as opposed to the initially sought 8%).[723]

416. With respect to the **interest start date**, it is well-established that pre-Award interest starts accruing from the date when the State is made aware of the allegedly unlawful conduct complained about by a claimant.[724] For instance, in *AAPL v. Sri Lanka*, the tribunal decided that the State's international responsibility has been engaged at the date of the request for arbitration and ordered pre-Award interest from this date.[725]

417. Claimant's only justification for using February 22, 2019 as the interest start date is that this purportedly was "*the date of* [the Republic's] *wrongful act*."[726] In all likelihood, Claimant has just selected the earliest possible date to benefit from a little extra interest (which it is not entitled to). In fact, February 22, 2019 is mentioned, in passing, in the Statement of Claim as the date when the GKNB commenced its corruption investigation.[727] Yet, Claimant is not pleading

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721 **Exhibit RLA-193**, Santa Elena v. Costa Rica, Award, ¶103.

722 **Exhibit RLA-194**, CME v. Czech Republic, Final Award, ¶¶646-647 ("*The Tribunal does not find any particular circumstances in this case justifying the award of compound interest. The calculation of the compensation itself already fully compensates Claimant for damage suffered. Awarding simple interest compensates the loss of use of the principal amount of the award in the period of delay* […]").

723 *See* Statement of Claim, ¶740 and Procedural Order No. 2, dated June 29, 2021, ¶¶64, 66(b).

724 **Exhibit RLA-194**, CME v. Czech Republic, Final Award, ¶630-635. *See also* **Exhibit E-107**, S.D. Myers v. Canada, Second Partial Award, ¶¶302-303; **Exhibit RLA-198**, Franz Sedelmayer v. Russia, SCC, Award dated July 07, 1998, pp. 113, 116 (the tribunal agreed with the claimant's first alternative submission on p. 116 that the interest should run two weeks after it submitted its Statement of Claim).

725 **Exhibit RLA-155**, AAPL v. Sri Lanka, Final Award, ¶114.

726 Statement of Claim, ¶737.

727 *See* Statement of Claim, ¶146. This has been addressed at paragraph 70 above.

that the actual commencement of that investigation was in breach of international law, let alone an expropriatory act.[728]

418. Accordingly:

418.1. Respondent's primary position is that the pre-Award interest on any damages award should run from February 10, 2020, the date of Claimant's Notice of Arbitration;

418.2. Alternatively, the interest start date should be February 4, 2020, the date of the Order of the SRS formally recognizing the 2018 Tender as failed.

419. To conclude, at best, Claimant is entitled to simple interest, running form February 10, 2020, alternatively February 4, 2020.

VI. GARSU IS NOT ENTITLED TO CLAIM SPECIFIC PERFORMANCE

420. As a final head of its claims Garsu Pasaulis requests "*public and prompt denial of all false statements, accusations and allegations*," namely the allegedly false statements by the Kyrgyz Republic and its authorities regarding Claimant's involvement in corruption and affiliation with the officials of the SRS within the context of the 2018 Tender.[729] Specifically, Claimant requests the Tribunal "*to declare that all such statements of the Kyrgyz Republic are unfounded and false and* […] *to order the Kyrgyz Republic to publicly and promptly deny such false statements, accusations, allegations.*"[730] This claim must fail both on the facts.

421. **First**, as explained at Sub-Section IV.B.4 above, there is more than enough evidence on the record of this arbitration for the Tribunal to conclude pursuant to the applicable standard

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728 *See* Statement of Claim, ¶716, whereby Claimant is seeking: (**i**) compensation of losses incurred "*due to expropriation of the e-passports contract* [...] in *the 2018 Tender*" (being the purportedly "*illegal 'cancellation' of the already concluded 2018 Tender*," i.e. the February 4, 2020 Order of the SRS deeming the 2018 Tender failed - *see* Statement of Claim, ¶598); (**ii**) compensation for the Ensuing Other Contract Losses (as defined at paragraph 382.2 above) due to the "*Kyrgyz'* [sic] *scandal and false allegations*" - a most vague term of art, failing to specify what specific actions are complained of; and (**iii**) compensation for the Business Reputation Losses (as defined at paragraph 382.3 above), due to Republic's purported "*disseminat*[ion] [of] *false information about the alleged meddling (through bribes and corruption) by* [Claimant] *with the results of the 2018 Tender*" (*see* Statement of Claim, ¶697) - as set out at paragraph 89.1 above, the earliest press release emanating from a Kyrgyz State organ, namely the GKNB, is dated April 2, 2019 (and in any event, as set out in Sub-Section IV.B.5 above, this did not amount to a breach of any applicable international law norm).

729 Statement of Claim, Section VIII.

730 *Ibid*, ¶747.

of proof that Claimant **was** in fact involved in corruption in the context of the 2018 Tender, which renders its claims in this arbitration inadmissible, together with its audacious specific performance claim.

422. **Second**, even if the Tribunal were not convinced by the evidence on the record that Claimant was involved in corruption, it would nevertheless lack the authority to make a positive statement that Claimant was **not** involved in corruption or to order the Republic to make such a statement. This is because, as explained at paragraph 84 above, the investigations by the Kyrgyz law enforcement authorities into the corruption scheme surrounding the 2018 Tender are still ongoing, so that new facts and evidence could emerge further evidencing Claimant's involvement with that scheme. While the investigation is pending, these criminal matters are reserved to the exclusive authority of the Kyrgyz law enforcement and judiciary. Indeed, such matters are simply not arbitrable as a matter of principle.

423. **Third**, and assuming the Tribunal does have jurisdiction to order the Republic to issue a denial of certain statements, it is undisputable that such denial can only concern statements made by the Republic's officials and authorities, **not** the various statements made about Claimant by Kyrgyz media. Indeed, the Republic cannot speak on behalf of unrelated private parties, and if Claimant feels that statements of such private parties caused it any prejudice, it is free to seek their denial by means of private legal actions.

424. This claim must be rejected in full.

VII. CONCLUSION AND REQUESTS FOR RELIEF

425. For the reasons set out in this Statement of Defense, the Kyrgyz Republic respectfully requests the Tribunal to:

425.1. DECLARE that it lacks jurisdiction over Claimant's claims and/or that Claimant's claims are inadmissible;

425.2. REJECT in full Claimant's claims on the merits;

425.3. DECLARE that Claimant is not entitled to any remedies it seeks;

425.4. 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

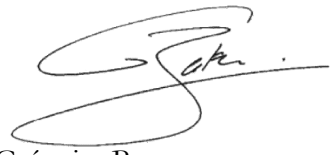
representation, fees and expenses of the PCA, and all other professional fees, disbursements, and expenses, plus interest thereon;

425.5. AWARD the Republic such further or other relief as the Tribunal sees fit.

426. 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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