

**IN THE MATTER OF AN ARBITRATION**

**AND IN THE MATTER OF THE UNCITRAL ARBITRATION RULES 1976**

**B E T W E E N:**

**MARIA LAZAREVA**

**Claimant**

**- and -**

**THE STATE OF KUWAIT**

**Respondent**

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**CLAIMANT'S APPLICATION FOR INTERIM MEASURES  
UNDER ARTICLE 26(1)**

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**27 March 2019**

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## I. INTRODUCTION

1. This Application for Interim Measures under Article 26(1) (the “**Application**”) is submitted on behalf of Claimant, Ms. Maria Lazareva, pursuant to Article 26(1) of the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the “**Rules**”) against the State of Kuwait (“**Kuwait**” or the “**Respondent**”, the Claimant and the Respondent each a “**Party**” and collectively the “**Parties**”).
2. As set out in Claimant’s Notice of Arbitration dated 10 July 2018 (the “**NOA**”), this dispute principally concerns Respondent’s campaign to undermine the investments of one of Kuwait’s most successful foreign female investors, occasioning breaches of the *Agreement between the Russian Federation and the State of Kuwait on the Encouragement and Mutual Protection of Investments* (the “**Agreement**”). This campaign began with vague unsubstantiated charges levelled against Ms. Lazareva, and escalated to improper travel bans, harassment, and improper detention in abject conditions. As also noted in the NOA, this ultimately led to a seriously flawed judgment and conviction for a ten-year hard-labour custodial sentence.
3. In order to be able effectively to pursue these proceedings, Claimant respectfully requests an interim measure that the Tribunal order Ms. Lazareva’s release on bail during the pendency of this arbitration on the grounds discussed below.
4. This Application is accompanied by the witness statements of:
  - (i) Lord Carlile Of Berriew CBE QC Lld FKC;
  - (ii) Mr. Vladimir Sidorov; and
  - (iii) Mr. Louis J. Freeh.
5. It is further accompanied by exhibits C-2 through C-50 and authorities CLA-1 through CLA-21.

## II. BACKGROUND

6. Ms. Lazareva is a Russian national<sup>1</sup> and Vice Chairman and CEO of KGL Investment K.S.C.C. (“**KGLI**”), a Kuwaiti company.<sup>2</sup> She developed and managed the creation of The Port Fund L.P. (“**TPF**”), a Cayman Islands limited partnership established in March 2007<sup>3</sup> with subsequent investments in the Philippines, Egypt and elsewhere. KGLI was an investor in TPF itself, and also managed the solicitation of other investors.<sup>4</sup> Investors in TPF also include the Kuwaiti state entities Kuwait Ports Authority (“**KPA**”)<sup>5</sup> and the Kuwait Public Institution for Social Security (“**PIFSS**”).
7. Since 2012, Ms. Lazareva has faced numerous charges from the Kuwaiti General Prosecutor and other government organs.<sup>6</sup> The central charges to the NOA and this Application are:
  - (i) Case number 1496/2012: allegations of siphoning KPA’s funds invested in TPF. This led to US\$ 496 million from TPF’s investment exit being frozen at Noor Bank in the Emirate of Dubai in late 2017; and
  - (ii) Case number 1942/2015: allegations of embezzlement regarding KGLI’s provision of advisory services to KPA.
8. As noted in the NOA, Ms. Lazareva was arrested on 28 November 2017.<sup>7</sup> Specifically, her arrest was with regard to case 1942/2015, for which an Accusation Report was

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<sup>1</sup> Passport of Maria Lazareva (C-25). Claimant notes that this passport expired in April 2018. Ms. Lazareva’s passport has been confiscated and she has been unable to request a renewal.

<sup>2</sup> KGL Investment Commercial Registration Licence (C-26); Letter from the Deputy Minister for Commerce and Industry, dated 26 October 2017 (C-22); Certificate of the Board of Directors, dated 23 September 2014 (C-23).

<sup>3</sup> The Port Fund Private Placement Memorandum, dated April 2007, sec. 1.1, 4.1-4.6 (C-28).

<sup>4</sup> Placement Agreement between Port Link GP Ltd. and KGL Investment Co., dated April 2007 (C-27).

<sup>5</sup> Subscription and Participation Agreement between KPA and KGL Investment Co., dated 14 July 2010 (C-20).

<sup>6</sup> See Witness Statement of Lord Carlile of Berriew CBE QC LID FKC, dated 22 March 2019 (“Lord Carlile Witness Statement”), para. 6; Notice of Arbitration, dated 10 July 2018 (“Notice of Arbitration”), paras. 29-30, 33-34, 38.

<sup>7</sup> Notice of Arbitration, para. 27.

released on 19 December 2017 by Mr Dirar Al-Assousi, the Attorney General of Kuwait.<sup>8</sup>

9. Ms. Lazareva was convicted in case 1942/2015 on 6 May 2018 by the verdict of Judge Mataeb Faleh Mohamed Al Aredi,<sup>9</sup> the circumstances of which in part form the basis for Claimant's claims under Articles 2(2) and 2(8) of the Agreement.<sup>10</sup> Ms. Lazareva was sentenced to 10 years hard labour, repayment of KWD 11 million allegedly embezzled and payment of a fine.<sup>11</sup> She is seeking to appeal that verdict in appeal case 1596/2018, and is presently incarcerated in the women's prison in the Central Prison Complex in Sulaibiya, Kuwait.
10. An Accusation Report was issued on 26 April 2017 in the case 1496/2012 (joined with cases 547/2013 and 1719/2014, also concerning accusations of mismanagement of Kuwait state funds invested with TPF) by the Attorney General of Kuwait.<sup>12</sup> However, that case has progressed more slowly than case 1942/2015 and remains a matter of the first instance criminal court in Kuwait.

### **III. THE TEST FOR INTERIM MEASURES**

11. In general, the Tribunal has broad powers to order interim measures under Article 26(1) of the Rules:

*At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.*

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<sup>8</sup> Accusation Report presented by the Public Prosecution to the Criminal Court, Case No. 1942/2015, dated 17 December 2017 (C-2).

<sup>9</sup> Verdict, Case No. 1942/2015, dated 6 May 2018 (C-5).

<sup>10</sup> Notice of Arbitration, para. 40(a), (c).

<sup>11</sup> Verdict, Case No. 1942/2015, dated 6 May 2018, at 29 (C-5).

<sup>12</sup> Accusation Report presented by the Public Prosecution to the Criminal Court, Case No. 1946/2015, dated 26 April 2017 (C-3).

12. Interim measures are quite common-place in international arbitration generally, including in proceedings following international law and involving State parties. They have a long established test to be granted comprising five conditions:<sup>13</sup>
- i. The Arbitral Tribunal must be *prima facie* competent to hear the merits of the case;
  - ii. The measure requested must intend to preserve rights that relate to the investment dispute;
  - iii. The measure must be necessary;
  - iv. The measure must be urgent; and
  - v. The measure must be proportional.<sup>14</sup>

#### IV. *PRIMA FACIE* CASE FOR JURISDICTION

13. The Tribunal may grant interim measures as long as there is not a “*clear lack of jurisdiction*[;]”<sup>15</sup> more specifically, if “*the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the [tribunal] might be founded*[.]”<sup>16</sup>

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<sup>13</sup> *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20 (Decision on the Application for Provisional Measures submitted by the Claimants dated 9 December 2009), para. 39 (CLA-12).

<sup>14</sup> *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28 (Order on Provisional Measures dated 3 March 2016), para. 3.37 (“In granting provisional measures, the Tribunal must consider the proportionality of the provisional measures requested. Specifically, the Tribunal must balance the harm caused to the Claimants by the criminal proceedings and the harm that would be caused to the Respondent if those proceedings were stayed.”) (CLA-5); *Mohammed Munshi v. The State of Mongolia*, SCC Case No. EA 2018/007 (Award on Emergency Measures 5 February 2018), para. 54 (CLA-13).

<sup>15</sup> Translated from the French “*d’une incompétence manifeste*”: *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2 (Decision on Provisional Measures dated 25 September 2001), para. 11 (CLA-17).

<sup>16</sup> *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL (Order on Interim Measures, dated 2 September 2008), para. 47 (quoting *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US), 1984 I.C.J. Rep. 169, para. 24 (Provisional Measures Order dated 10 May 1984) (internal quotations omitted).) (CLA-16).

**A. Ms. Lazareva is an Investor with an Investment under the Agreement**

14. As noted above, Ms. Lazareva is a Russian national. Although Ms. Lazareva has lived in Kuwait for many years, she is not a dual national. Under the Agreement's Article 1(2), the definition of an "investor" is satisfied "*in relation to each of the Contracting Parties ... [by] any individual who is a citizen or subject of this Contracting Party in accordance with its legislation.*" Ms. Lazareva is therefore clearly an "investor" as so defined.
15. Article 1(1) of the Agreement sets out the definition of "investment" broadly, as "*every kind of asset owned or controlled by an investor of one Contracting Party and invested in the territory of the other Contracting Party in accordance with its legislation.*" It includes "*shares, bonds or other securities, as well as deposits and any other forms of participation in a company or enterprise.*"
16. The Agreement sets out further interpretive guidance at paragraph 1 to its Protocol, signed on the same day as the Agreement itself:

*The term "investment" includes investments controlled directly by investors of the Contracting Party as well as investments controlled indirectly by such investors through investors of a third state. The foregoing also applies to investments "owned" as used in Article 1, paragraph 1 of the said Agreement.*

*The Contracting Parties also acknowledge that the question whether control exist will depend on the factual circumstances of the particular case. To this end consideration should be given, inter alia, to whether there is:*

*a) a substantial interest in the investment, taking into account the extent of equity or other forms of financial interest;*

*b) the ability to exercise substantial influence over the management and operation of the investment; or*

*c) the ability to exercise substantial influence over the composition of the board of directors or over the composition of any other managing body.*

17. While TPF is a Cayman Islands entity and central to this dispute, an investment in Kuwait is at issue, one which itself had a role in controlling how TPF was to benefit its investors, including majority ownership by Kuwait government entities: KGLI.

18. Ms. Lazareva is in her own right a shareholder in KGLI.<sup>17</sup> She also provided it a loan (subsequently repaid) of 1,220,000 KWD in March 2016.<sup>18</sup> She therefore clearly satisfies the requirements of an “investor” contained in Article 1 of the Agreement. Further, as Vice Chairman and CEO of KGLI, she also controlled KGLI before her incarceration, in that she had “*the ability to exercise substantial influence over the management and operation of the investment.*” For example, she has the power to execute agreements on behalf of KGLI.<sup>19</sup>
19. Therefore, under the terms of the Agreement, the NOA relates to claims brought by an investor regarding her treatment in the context of her management of an investment and of her investment itself under the relevant definitions in Article 1. Kuwait has consented to UNCITRAL arbitration for disputes arising out of alleged breaches of the Agreement relating to an investment under Article 9.

#### **B. The Application Requests Measures Connected to the Dispute**

20. As a further threshold consideration, a tribunal may order a provisional measure if the actions of the opposing party and the requested measures to curtail that conduct “*relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters.*”<sup>20</sup> The measure sought in this Application is directly related to the claims in the NOA. Ms. Lazareva’s detention and incarceration are a consequence of a judgment of the Kuwait courts directly impugned as a breach of the Agreement.<sup>21</sup>

#### **C. Article 9 of the Agreement and Pre-Arbitration Negotiation**

21. Pursuant to Article 9(2) of the Agreement, an investor may refer a dispute to UNCITRAL arbitration if “*such a dispute cannot be settled within six months from the date either party to the dispute requested amicable settlement...*” Such terms are commonly known

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<sup>17</sup> KGL Investment Company Memorandum of Association, dated 6 November 2006, at 36, 60 (C-18).

<sup>18</sup> Loan Agreement between KGL Investment Co. and Maria Lazareva, dated 31 March 2016 (C-24); Letter from KGL Investment, dated 3 December 2018 (C-21).

<sup>19</sup> KGL Investment Company Articles of Association, dated 31 October 2006, art. 21 (C-19); Certificate of the Board of Directors, dated 23 September 2014 (C-23); Placement Agreement between Port Link GP Ltd. and KGL Investment Co., dated April 2007 (which was signed on behalf of KGLI by Ms. Lazareva) (C-27).

<sup>20</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Procedural Order No. 2 dated 28 October 1999), para. 23 (CLA-10).

<sup>21</sup> Notice of Arbitration, paras. 27, 38(c), 40(a)-(c).

as “negotiation clauses,” intended to offer the opportunity for settlement discussions before formal proceedings are initiated in event of a dispute.

22. As acknowledged in the NOA,<sup>22</sup> Claimant anticipates that there may be an objection to the Tribunal’s acting in this arbitration centered on Article 9(2). However, this is no barrier to the Tribunal’s considering the Application. That is because any debate on this matter would not pose “*such a facially obvious defect as to render [the] Tribunal without even prima facie jurisdiction to proceed to a provisional measures analysis.*”<sup>23</sup> There is no suggestion that, in the circumstances where the definitions of an investor and investment are satisfied, the *prima facie* jurisdiction of a tribunal could be undermined by consideration of a preliminary settlement negotiation step under the relevant treaty.
23. Moreover, it may be noted that in *Kompozit*, the Emergency Arbitrator held that regardless of a similar 6 month negotiation clause, owing to the attitude of the respondent State of Moldova subsequent to a notice of dispute the claimant could proceed to arbitration.<sup>24</sup> Similar sentiments are echoed in other cases that the attitude of a respondent State subsequent to the commencement of an arbitration may render the clause futile.<sup>25</sup>
24. The Emergency Arbitrator in *Kompozit* also held that the language of the clause in the relevant treaty invoked negotiation “*so far as possible*” and that if it were not realistic, an investor became entitled to proceed to arbitration.<sup>26</sup> Similarly, Article 9(1) of the Russia-Kuwait BIT declares that disputes “*shall, as far as possible, be settled in an amicable way.*” By Article 9(2), that attempt, “*as far as possible*”, is begun by a proposal to settle by either the investor or Contracting Party. There have been many entreaties on behalf of Ms. Lazareva to resolve the dispute.

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<sup>22</sup> Notice of Arbitration, para. 40(d).

<sup>23</sup> *Nova Group Investments, B.V. v. Romania*, ICSID Case No. ARB/16/19 (Procedural Order No. 7 dated 29 March 2017), para. 263 (CLA-14).

<sup>24</sup> *Kompozit LLC v. Republic of Moldova*, SCC Case No. 2016/095 (Emergency Award on Interim Measures dated 1 June 2016), paras. 55-56 (CLA-6).

<sup>25</sup> See, e.g., *Lauder v. Czech Republic*, UNCITRAL (Final Award dated 3 September 2001), paras. 189-90 (CLA-8); *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (Decision on Jurisdiction and Admissibility dispatched 4 August 2011), para. 564 (CLA-1).

<sup>26</sup> *Kompozit LLC v. Republic of Moldova*, Emergency Award on Interim Measures, paras. 55-56 (CLA-6).

25. Shortly before Ms. Lazareva's arrest in November 2017, and as a consequence of the charges raised in the accusation report in case 1496/2012 dated 26 April 2017, TPF sent letters to KPA and PIFSS seeking to settle the prosecution.<sup>27</sup> This correspondence received no constructive reply and it was at this time that TPF's funds were frozen in the Emirate of Dubai before they could be distributed to its investors, and Ms. Lazareva was jailed for over three months from the time of her arrest until she was later granted bail in early February 2018 (*see* below at VII.A). Within a matter of months after being granted bail, Ms. Lazareva was convicted.
26. Since the NOA was issued in July 2018, many efforts have been made to engage with Kuwaiti authorities regarding Ms. Lazareva's case and incarceration. They are described in further detail in the witness statement of Lord Carlile,<sup>28</sup> and have involved interventions by British and American luminaries of the law, politics and criminal justice including himself, as well as the former Russian ambassador to the State of Kuwait. One fruitful result has emerged to date, which is that the funds frozen in the Emirate of Dubai were released in February 2019.<sup>29</sup> The investors of TPF, including KPA and PIFSS, have therefore now been fully repaid their investments and their profit shares.<sup>30</sup>
27. However, as described below in section VII, Ms. Lazareva is no further towards her release or the retraction of the accusations made against her, nor has Respondent made any attempt to reconcile and compensate her for the damage to her and KGLI's reputation and ability to conduct business. In these circumstances, Respondent is fully aware of the contours of the dispute, has been since before the NOA was filed, and has been repeatedly petitioned to come to terms to no avail.

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<sup>27</sup> Email from Marsha Lazareva to Meshal Al-Othman, dated 20 November 2017, with attachments (C-43); Letter from The Port Fund Secretary of State for Housing, Secretary of State for Services, and Chairman of the Board of Directors of Kuwait Port Authority, dated 22 November 2017, with attachment (C-44).

<sup>28</sup> Lord Carlile Witness Statement, para. 20.

<sup>29</sup> Email from Louis Freeh to the Minister of Foreign Affairs, dated 21 February 2019 (C-42).

<sup>30</sup> *Id.*

28. Accordingly, it is submitted *prima facie* jurisdiction for the proposed interim measures is satisfied.

**V. THE NEED TO PRESERVE RIGHTS, IRREPARABLE HARM AND NECESSITY**

29. The rights involved in Claimant's Application include:

- i. The non-aggravation of the dispute; and
- ii. The ability to put forth Claimant's case (the availability of Ms. Lazareva as a material and essential witness and her access to counsel).

30. Provisional measures in response to criminal proceedings will often require a finding of "*instances of intimidation or harassment.*"<sup>31</sup> But it is certainly the case that the interaction of the instant arbitration proceedings and the criminal matter can be taken into account, and most particularly the cooling effect on Ms. Lazareva's ability to put on her case.<sup>32</sup>

31. That a claimant should be able to seek legal advice and advance their case freely and without interference is a fundamental principle in all arbitration cases:<sup>33</sup> "*basic procedural fairness, respect for confidentiality and legal privilege . . . [and] the right of parties both to seek advice and to advance their respective cases freely and without interference [ . . . ] are indeed fundamental principles. . . .*"<sup>34</sup> And: "*The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment*

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<sup>31</sup> *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40 (Procedural Order No. 14 dated 22 December 2014), para. 72 (CLA-4).

<sup>32</sup> *Quiborax SA, Non Metallic Minerals SA, and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Decision on Provisional Measures dated 26 February 2010), para. 146 (CLA-20).

<sup>33</sup> *Mohammed Munshi v. The State of Mongolia*, SCC Case No. 2018-007 (Award on Emergency Measures dated 5 February 2018), para. 46 (CLA-13).

<sup>34</sup> *Libananco Holding Co. Ltd. v. Turkey*, ICSID Case No. ARB/06/8 (Decision on Preliminary Issues dated 23 June 2008), para. 78 (CLA-9).

*arbitration, and to all parties, including States (even in the exercise of their sovereign powers).”*<sup>35</sup>

32. In general terms, necessity is connected to irreparable harm. Several investment tribunals state irreparable harm means harm that is not compensated by monetary damages.<sup>36</sup> The tribunal in *PNG Sustainable v. Papua New Guinea* described ‘irreparable’ harm as:

*requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally ‘irreparable’ in what is sometimes regarded as the narrow common law sense of the term. The degree of ‘gravity’ or ‘seriousness’ of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party. . . .*<sup>37</sup>

33. Circumstances of incarceration can provide ample evidence of such harm. For example, the ICJ has stated: “[the] *continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm[.]*”<sup>38</sup> In the context of investment treaty arbitration, the *Mohammed Munshi* Emergency Arbitrator stated that because the claimant was incarcerated in one of Mongolia’s strictest prisons, the “*Claimant’s access to both Mongolian counsel and international counsel is severely limited*” and this amounts to a “*grave breach of access to justice, and a breach of international law. . . .*”<sup>39</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. Republic of Ecuador* ICSID Case No. ARB/06/11 (Decision on Provisional Measures dated 17 August 2007), para. 92 (CLA-15); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/04 (Order dated 6 September 2005), para. 46 (CLA-18); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Decision on a Request by the Respondent for an order Prohibiting the Claimant from Revealing Information regarding ICSID Case ARB(AF)/97/1 dated 27 October 1997), para. 8 (CLA-11).

<sup>37</sup> *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33 (Decision on the Claimant’s Request for Provisional Measures dated 21 January 2015), para. 109 (CLA-19).

<sup>38</sup> *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), [1979] I.C.J. 7, 20 (15 December) (Order on Request for the Indication of Provisional Measures) (CLA-21).

<sup>39</sup> *Mohammed Munshi v. The State of Mongolia*, Award on Emergency Measures, para. 46 (CLA-13).

34. The *Nova Group Investments* tribunal found that the necessity requirement was met because the claimant was a “*material and necessary witness*”<sup>40</sup> in the case and that he was the “*only one who could meaningfully instruct counsel and direct them regarding the development of its case.*”<sup>41</sup> Therefore, the tribunal in that case understood that by not issuing the provisional measure enjoining Romania from seeking an international arrest warrant and extradition, the claimant would not be able to “*continue to perform the key functions of Nova’s party representative from incarceration in Romania.*”<sup>42</sup> Specifically, the tribunal stated the determining factor was that:

[w]ithout reliable, confidential access to the inevitable and ongoing stream of email or telephone communications arising from a complex, investor-state arbitration, or the ability to meet frequently in person on relatively short notice and for extended periods of time, it is difficult to see how such functions effectively could be performed[, or to] assist counsel with final preparations for [] hearings.<sup>43</sup>

#### **A. Application**

35. The kinds of factors which motivated prior tribunals are clearly present in this case.

36. Ms. Lazareva will inevitably be required as a witness in these proceedings. Specific allegations going to her experience during the General Prosecutor’s investigations and various court hearings, as related and alleged in the NOA,<sup>44</sup> will go to all allegations of breach of the Agreement therein.

37. Moreover, the allegations in the cases brought against her described above are financial crimes.

38. In case 1942/2015, the first defendant, Abdullah Bader Mohamed Al-Shamali, former CFO at KPA, was charged with unjustifiably facilitating the embezzlement of 17 million

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<sup>40</sup> *Nova Group Investments, B.V. v. Romania*, Procedural Order No. 7, para. 286 (CLA-14).

<sup>41</sup> *Id.*, para. 307.

<sup>42</sup> *Id.*, paras. 307-08.

<sup>43</sup> *Id.*, para. 307.

<sup>44</sup> Notice of Arbitration, paras. 29-30, 33-34, 38.

KWD owned by his former employer.<sup>45</sup> Ms. Lazareva, as the fourth defendant, along with Saeed Ismail Ali Dashti as third defendant, fellow board member of KGLI, was accused of aiding him in agreeing to the transfer of part of those funds and by submitting requests to transfer the money from the KPA to KGLI.<sup>46</sup>

39. The conviction of Ms. Lazareva in case 1942/2015 thus centres around financial records of the KPA and allegations that KGLI did not provide services under an advisory services agreement which would have justified payments from KPA.<sup>47</sup> Ms. Lazareva, as Managing Director of KGLI, is directly condemned in the verdict of being part of a scheme to defraud by sending fraudulent letters requesting payment.<sup>48</sup> Indeed, although Ms. Lazareva has been in no position to review the evidence relied upon by the General Prosecutor, the prosecution relied upon thousands of pages of documents in the case.<sup>49</sup>
40. Demonstrating to this Tribunal not just the allegations of the nature of the investigation and trial procedure – for which Ms. Lazareva’s direct testimony is required – but that the allegations were fundamentally faulty in any event, is central to the proceedings.
41. As the Accusation Report regarding case 1496/2012 illustrates, the allegations against her are with regard to a variety of transactions over several years concerning the management of TPF, and more specifically going to her role as an authorized signatory on bank accounts connected to TPF and KGLI.<sup>50</sup> Demonstrating the history of the actual management of TPF both to the Kuwaiti courts and this Tribunal is inherently complex, and Ms. Lazareva’s managerial role will require her testimony, ability to instruct counsel effectively, and access to documents. Indeed, as well as Ms. Lazareva’s officer role in KGLI noted above, she held officer and management positions in the other key entities in the TPF management structure: she was from inception and until recently a director of

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<sup>45</sup> Accusation Report presented by the Public Prosecution to the Criminal Court, Case No. 1942/2015, dated 17 December 2017, at 1-2 (C-2).

<sup>46</sup> *Id.* at 3.

<sup>47</sup> Verdict, Case No. 1942/2015, dated 6 May 2018, at 6-7 (C-5).

<sup>48</sup> *Id.* at 8-11, 22.

<sup>49</sup> Lord Carlile Witness Statement, paras. 18(iv), 34.

<sup>50</sup> Accusation Report presented by the Public Prosecution to the Criminal Court, Case No. 1946/2015, dated 26 April 2017, at 1-4 (C-3).

Port Link GP Limited, the General Partner of TPF,<sup>51</sup> and of KGL Investment Cayman Limited, the Investment Manager of TPF.<sup>52</sup> Her departure from these roles is a consequence of TPF's purpose now winding down and her incarceration. She was also a member of the Advisory Board of TPF itself.<sup>53</sup>

42. Claimant has been able to instruct experts in order to review the charges in both cases for submission of reports to the Kuwaiti courts.<sup>54</sup> Both reports confirm what is apparent from the above: these are allegations which involve a great many documents. The reports provide initial conclusions that the charges are not merited, as Ms. Lazareva has consistently maintained to Kuwaiti authorities when questioned. However, it is not known whether the Kuwaiti courts will admit this evidence.
43. It should be noted that both the reports and the conclusions drawn by the experts were – and could only – be prepared on the basis of a review and analysis of documents alone.<sup>55</sup> This is unsatisfactory. Counsel cannot adequately examine Ms. Lazareva's central role in the management of KGLI without the opportunity to consult with her in private. Similarly, experts (whether the authors of these reports or otherwise) must be afforded the opportunity to test their independent conclusions against her own evidence. Absent these opportunities, it cannot meaningfully be said that Ms. Lazareva will be given a fair hearing in these proceedings.
44. Simply put, if she remains incarcerated, Ms. Lazareva cannot fulfill her role in these proceedings.
45. A report by the Kuwait Society for Human Rights in August 2011 stated regarding prison conditions in Kuwait:

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<sup>51</sup> Register of Directors of Portlink, dated 8 March 2007 (C-29); The Port Fund Private Placement Memorandum dated April 2007, at 7 (C-28).

<sup>52</sup> Register of Directors of KGLI Cayman Ltd., dated 8 March 2007 (C-30); The Port Fund Private Placement Memorandum, dated April 2007, at 8 (C-28).

<sup>53</sup> Terms of Reference for The Advisory Board to the Port Fund, dated 20 October 2011 (C-31); The Port Fund Private Placement Memorandum, dated April 2007, at 8 (C-28).

<sup>54</sup> Financial Report Regarding Financial Transactions by Baker Tilly, dated December 2018 (C-32); Expert Report of Daniel Gill, dated 14 February 2019 (C-33).

<sup>55</sup> Financial Report Regarding Financial Transactions by Baker Tilly, dated December 2018, sec. 1.2 (C-32); Expert Report of Daniel Gill, dated 14 February 2019, at 4-5 (C-33).

*Jails are overcrowded so that prisoners cannot have sufficient space, adding the dire need of services.*<sup>56</sup>

and

*[E]xpatriate women not speaking the Arabic language are increasingly worried as security men can submit reports against them to the minister of interior before these expatriate [sic] women file complaint against them.*<sup>57</sup>

46. That impression persists to the present day from international reports. The United States State Department Annual Report on Human Rights Practices for 2017 noted:

*[T]here continued to be reports of torture and ill-treatment by police and security forces during prolonged detention of persons in cases relating to terrorism, and against detained members of minority groups and noncitizens.*<sup>58</sup>

*According to the Parliamentary Committee Report on Central Prison Conditions, the prisons lacked the minimum standards of cleanliness and sanitation, were overcrowded, and suffered from widespread corruption in management leading to drug abuse and prisoner safety issues. An international organization that visited the Central Prison corroborated some of the findings from the report.*<sup>59</sup>

Beatings of foreign nationals have been reported, and some prisoners have been denied medical treatment for injuries.<sup>60</sup>

*[C]ells in the female prison held six to eight; inmates reportedly lived in moderately overcrowded conditions. Although the total capacity of the women's prison was not reported, both prison authorities and nongovernmental organizations (NGOs) that have visited the facility mentioned overcrowding at the women's prison, which currently houses 192 inmates.*<sup>61</sup>

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<sup>56</sup> Kuwait Society for Human Rights Report, Shadow Report on The Second Periodic Report of the State of Kuwait to the concerned committee on The International Covenant on Civil and Political Rights, dated August 2011, at 2 (C-15).

<sup>57</sup> *Id.* at 4.

<sup>58</sup> U.S. Department of State, Kuwait 2017 Human Rights Report at 1-2 (C-14).

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2-3.

*The Parliamentary Committee Report on Central Prison Conditions indicated there was discrimination between prisoners according to national origin and citizenship status. Bribery of prison workers and poor supervision resulted in a black market trading in drugs, cigarettes, cellphones, electronics, as well as makeshift weapons. Some prisoners complained of having cells raided by unidentified masked men.*<sup>62</sup>

*Diplomatic representatives observed that in some detention cases, authorities permitted lawyers to attend legal proceedings but did not allow direct contact with their clients. Detainees were routinely denied access to their lawyers and translators in advance of hearings. Defendants who do not speak or understand Arabic often learned of charges against them after the trial as they did not have access to a translator when the charges were pressed against them.*<sup>63</sup>

47. Similarly, an Information Pack for British Prisoners in Kuwait published on 9 May 2018 advised:

*Ex-prisoners say that nothing is guaranteed, things can change on a whim, so the advice of more experienced prisoners, plus your own common sense, is essential.*<sup>64</sup>

And

*Prison conditions in all of the detention facilities in Kuwait are well below UK standards. Overcrowding can be a problem, you cannot expect a single cell as a matter of course. A mattress and blanket should be provided.*<sup>65</sup>

48. Ms. Lazareva has reported similar personal conditions to those indicated above, sharing a room with several other women thus lacking any privacy to consider her case, and has been subjected to intimidation, harassment,<sup>66</sup> and long hours of interrogation.<sup>67</sup>
49. Ms. Lazareva does not have private access to a telephone, or the ability to meet frequently in person with her counsel in order to prepare for hearings and review

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<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Id.* at 5.

<sup>64</sup> British Embassy Kuwait, Information Pack for British Prisoners in Kuwait, dated 9 May 2018, at 7 (C-16).

<sup>65</sup> *Id.* at 8.

<sup>66</sup> Lord Carlile Witness Statement, paras. 38-39.

<sup>67</sup> *Id.*, para. 8.

evidence together.<sup>68</sup> She cannot meet privately with counsel at all.<sup>69</sup> Her international counsel have no guarantee of being able to visit her.<sup>70</sup> Counsel cannot even bring documents with them when visiting her.<sup>71</sup> She has not previously been provided with documents in translation relied upon by the General Prosecutor in Kuwait court, so that she can properly examine them.<sup>72</sup> She can have no computer or hard copy documents with her in prison.<sup>73</sup> Recently, the appeal court in case 1942/2015 has granted permission for elements of the file to be translated into Russian, at her own expense.<sup>74</sup> That is of little help given none of her counsel speak and read Russian, and it is not a language relevant to the dispute either in Kuwaiti court or in these proceedings.

50. A further and unusual aspect of this case is that Ms. Lazareva has a four year old son, Yvan Lazarev, who is presently separated from his mother. Ms. Lazareva is a single mother, and her elderly parents, both nearly eighty years old, are currently caring for him.<sup>75</sup> The continued separation of mother and son alone clearly amounts to “*privation, hardship, anguish . . . and thus to a serious possibility of irreparable harm.*”
51. Finally, Claimant brings a claim in expropriation.<sup>76</sup> Although Claimant’s case will undoubtedly be reframed now that the US\$ 496 million of funds regarding TPF frozen in the Emirate of Dubai have been released,<sup>77</sup> issues with regard to claims for relief connected to TPF remain. Moreover, Ms. Lazareva and KGLI had intended to pursue other and similar projects to TPF for which claims in damages will be sought. For example, in 2014 KGLI began the process of promoting the intended GCC Infra-Logistics Fund.<sup>78</sup> That fund was never created because TPF and KGLI were already

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<sup>68</sup> *Id.*, para. 36.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*, para. 33.

<sup>73</sup> *Id.*, para. 36.

<sup>74</sup> *Id.*, para. 33.

<sup>75</sup> *10 Years of Detention for Maria Lazareva: When Will the Russian Citizen Be Released from the Kuwaiti Prison*, NEWIZV.RU (4 March) (C-17).

<sup>76</sup> Notice of Arbitration, para. 40(e).

<sup>77</sup> *Id.*, para. 38(c); Email from Louis Freeh to the Minister of Foreign Affairs, dated 21 February 2019 (C-42).

<sup>78</sup> KGLI III: GCC Infra-Logistics Funds, dated April 2014 (C-12); Letter from Fahmi Al-Ali to Marsha Lazareva, dated 20 April 2014 (C-13).

being undermined by the General Prosecutor’s harassment.<sup>79</sup> Given the central role Ms. Lazareva would have continued to play in this regard, both her ability to give evidence and consult with counsel on the framing of her case in damages is essential.

52. Ms. Lazareva’s release is therefore a necessary step for her, as Claimant in these proceedings and as a “*material and necessary witness*,” to be able to access her counsel in a secure, reliable, and confidential manner and to avoid a “*grave breach of access to justice*” should she remain incarcerated.

## VI. URGENCY

53. In order to be granted, the provisional measure must be urgent: “[i]t must be proven that if the measures are not ordered rapidly, there are serious risks that the rights of the applicant[] will be jeopardized.”<sup>80</sup> One tribunal stated that urgency is met when “a question cannot await the outcome of the award on the merits [. . . ] [and] that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision. . . .”<sup>81</sup>
54. Furthermore, “the level of urgency required depends on the type of measure which is requested.”<sup>82</sup> Threat to the ability to put forward a claimant’s case is an appropriate ground to find urgency as much as to find necessity and irreparable harm.<sup>83</sup>

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<sup>79</sup> Notice of Arbitration, paras. 29, 38.

<sup>80</sup> *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20 (Decision on the Application for Provisional Measures Submitted by the Claimants dated 9 December 2009), para. 48 (CLA-12).

<sup>81</sup> *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/5 (Procedural Order No. 1 dated 29 June 2009), para. 73 n.13 (CLA-3).

<sup>82</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (Procedural Order No. 1 dated 31 March 2006), para. 76 (CLA-2); *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, Procedural Order No. 1, para. 73 (quoting *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Procedural Order No. 1 para. 76) (“In the Arbitral Tribunal’s view, the degree of ‘urgency’ which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award.”) (CLA-3).

<sup>83</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Phurinational State of Bolivia*, Decision on Provisional Measures, para. 153 (CLA-20); *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, Procedural Order No. 14, para. 90 (CLA-4).

55. The issues raised under irreparable harm and necessity are equally relevant to a finding of urgency in this case. As these proceedings progress, it can be easily anticipated that it will become a matter of irreparable harm and necessity if Ms. Lazareva is not able to meet effectively with counsel and prepare her case. Accordingly, it is thus inevitable that such circumstances should now be rectified as a matter of urgency in order that the preparation of Ms. Lazareva's case not be prejudiced.

## VII. PROPORTIONALITY

56. The *Nova Group Investments* tribunal stated: “[t]he mere fact that a particular recommendation would impose on sovereign discretion thus cannot be sufficient basis for finding the measure disproportionate.”<sup>84</sup>

57. In *Quiborax*, a criminal proceeding was interfering with the claimant's access to evidence to present its case. The Tribunal concluded that a stay of criminal proceedings was warranted, observing there that “a mere stay of the criminal proceedings would not affect Respondent's sovereignty nor require conduct in violation of national law[,]” and that “the harm that such a stay would cause to Bolivia is proportionately less than the harm caused to Claimants if the criminal proceedings were to continue their course.”<sup>85</sup>

### A. Application

58. Just as in *Quiborax*, Respondent's conduct is inhibiting Claimant's ability to access evidence to put on her case, as described above in section V.A.

59. After extensive investigation and incarceration,<sup>86</sup> Ms. Lazareva was initially released on joint bail of 9 million KWD on 4 February 2018 with Mr. Dashti and Mr. Al-Shamali, which was paid on 7 February 2018.<sup>87</sup>

60. This bail figure was unusually high, even for a financial case.<sup>88</sup> Ms. Lazareva had previously been released on bail during Respondent's earlier investigations of case

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<sup>84</sup> *Nova Group Investments, B.V. v. Romania*, Procedural Order No. 7, para. 315 (CLA-14).

<sup>85</sup> *Quiborax S.A., Non Metallic minerals S.A. and Allan Fosk Kaplún v. Phurinational State of Bolivia*, Decision on Provisional Measures, para. 165 (CLA-20).

<sup>86</sup> Notice of Arbitration, paras. 29, 33-34; *see also* Lord Carlile Witness Statement, paras. 8, 10, 26.

<sup>87</sup> Receipts for Collected Cheque Fees (C-8).

1496/2012 in 2016 for the far more typical sum of 5,000 KWD.<sup>89</sup> In contrast, the 9 million KWD sum paid in February 2018 has been publicly reported to have been the highest bail figure ever set in Kuwait,<sup>90</sup> which highlights the politically contentious nature of Respondent’s investigations and prosecutions of Ms. Lazareva as asserted in the NOA.<sup>91</sup>

61. By the 6 May 2018 verdict Ms. Lazareva and Mr. Dashti were ordered to “return” 11 million KWD allegedly embezzled from KPA.<sup>92</sup> An additional 2 million KWD was paid into court in June 2018 on behalf of Ms. Lazareva and Mr. Dashti.<sup>93</sup> Accordingly, a sum equivalent to that at issue in the verdict is in the custody of the Kuwaiti courts at this time, beyond the original bail figure. Not only has bail already been posted in this case, but the key financial component of the verdict presently rendered cannot be risked by Ms. Lazareva’s temporary release.
62. Thus, any notion of harm to Respondent is clearly “*proportionately less than the harm caused to [Claimant] if the criminal proceedings were to continue their course.*”
63. Article 219 of Law No. 17 of 1960, the code of criminal procedure of Kuwait, makes clear that either the originating court or the court of appeal has discretion to grant bail during appeal:

*The court which rendered the initial judgment of imprisonment, and the court before which this judgment was appealed, may order its immediate execution or may demand that the sentenced person submits a personal or financial bail if there no concern about his escape.*

*If the sentenced person is in detention under remand in the case at the time of rendering the initial judgment, the judgment shall be immediately executed, unless the court that rendered this judgment*

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<sup>88</sup> Lord Carlile Witness Statement, para. 28.

<sup>89</sup> *Id.*; Investigation Report (C-6).

<sup>90</sup> *The Release of Dashti, Lazareva, and Shamali, in the Case of KGL, on 9 Million Dinars Bail*, AL-RAI MEDIA (5 February 2018) (C-9).

<sup>91</sup> Notice of Arbitration, paras. 23, 28, 31, 37.

<sup>92</sup> Verdict, Case No. 1942/2015, dated 6 May 2018, at 29 (C-5).

<sup>93</sup> Receipts for Collected Cheque Fees (C-8).

*or the court before which the judgment was appealed orders the release of the sentenced person against a personal or financial bail or without bail if there is no concern about his escape.*

*If the court which rendered the initial judgment orders its immediate execution, the Court of Appeal may, any time during the examination of the lawsuit before it, release the sentenced person at his request, against a personal or financial bail or without bail if there is no concern about his escape.*<sup>94</sup>

64. As article 219 indicates, the primary test is whether a concern exists that the defendant would flee, if released. Ms. Lazareva has previously been placed on travel bans requested by the General Prosecutor of Kuwait on three separate occasions (once for over a year between 2016 and 2017, which was then renewed a matter of months later in April 2017), and never violated them.<sup>95</sup> Indeed, with respect to the travel ban issued in April 2017, Ms. Lazareva was visiting Europe on business at the time and returned to Kuwait to once again attempt to clear her name.<sup>96</sup> She did not leave Kuwait after being granted bail in February 2018, and of course appeared in court on 6 May 2018, when she was convicted and returned to prison. All the evidence is that she has respected the orders of the Kuwaiti justice system as they have been made, and would continue to respect the terms of any release, including remaining in Kuwait if her temporary release was granted again on that basis.
65. There is therefore no argument that this Tribunal, in making an order for the temporary release of Ms. Lazareva at this time, would “*require conduct in violation of national law.*”
66. Ms. Lazareva’s Kuwaiti counsel’s numerous requests to the Court of Appeal to seek her release on bail since the verdict have been unavailing. The witness statement of Lord Carlile records their various efforts to petition the Court of Appeal in this regard.<sup>97</sup> Those petitions have been summarily rejected or ignored, including in hearings on 10 March

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<sup>94</sup> Kuwait Law No. 17/1960 issued on 2 June 1960, art. 219 (CLA-7).

<sup>95</sup> Notice of Arbitration, para. 30; Lord Carlile Witness Statement, para. 9.

<sup>96</sup> *10 Years of Detention for Maria Lazareva: When Will the Russian Citizen Be Released from the Kuwaiti Prison*, NEWIZV.RU (4 March) (C-17).

<sup>97</sup> Lord Carlile Witness Statement, para. 31.

2019 and 24 March 2019, where, as discussed in the witness statements of Vladimir Sidorov and Louis Freeh, the presiding judge made it summarily clear that bail would not be granted.<sup>98</sup> It is notable that there is no evidence that there has been any comment or opposition from the prosecution in response to any of these requests for bail.<sup>99</sup>

67. There are other matters in this case which suggest that Respondent would not be prejudiced by the granting of this Application. While Claimant does not invite the Tribunal to make findings of fact prematurely which will undoubtedly inform the merits of the dispute in this arbitration, the following is an indisputable fact: Respondent itself, at the urging of the intervenors for Ms. Lazareva noted above, sought the unfreezing of funds in the Emirate of Dubai as far back as September 2018.<sup>100</sup> That occurred on 5 February 2019, and KPA and PIFSS, the two Kuwait state enterprises which invested in TPF, have received their returned investment.<sup>101</sup> These are the same funds that are the subject of the embezzlement allegations associated with Case number 1496/2012. This and other facts in this case demonstrate the lack of prejudice to Respondent if Ms. Lazareva is allowed the freedom to pursue the present arbitration proceedings effectively, and that the result could ultimately benefit the proper application of justice in Kuwait.

## **VIII. RELIEF REQUESTED**

68. Claimant therefore requests the Tribunal make the following orders for interim measures:
- i. That Respondent be directed to order the release of Ms. Lazareva on existing bail on a temporary basis, without a travel ban. Ms. Lazareva will undertake to return to Kuwait as required by the justice system upon such order and release;

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<sup>98</sup> Witness Statement of Vladimir Sidorov, dated 27 March 2019 (“Sidorov Witness Statement”), para. 7; Witness Statement of Louis J. Freeh, dated 25 March 2019 (“Freeh Witness Statement”), paras. 13-14.

<sup>99</sup> Lord Carlile Witness Statement, para. 32; Sidorov Witness Statement, para. 7; Freeh Witness Statement, paras. 13-14.

<sup>100</sup> Letter from Jaber Al-Mubarak Al-Hamad Al-Sabah, Prime Minister of Kuwait, to His Highness Sheikh Mohammed Bin Rashid Al-Maktoum, Vice President and Prime Minister of Dubai, United Arab Emirates, dated 18 September 2018 (C-50).

<sup>101</sup> Email from Louis Freeh to the Minister of Foreign Affairs, dated 21 February 2019 (C-42).

- ii. In the alternative, that Respondent be directed to order Ms. Lazareva released on existing bail, and remain in Kuwait;
  - iii. In the alternative, a direction to the General Prosecutor of Respondent to make a joint application to the court regarding bail terms for Ms. Lazareva.
69. Pursuant to the Tribunal's power at Article 26(2), Claimant requests that the Tribunal make its order by way of an interim award, in order to establish both the enforceability of the order, and to register the necessity of the measure.

Respectfully submitted,

For and on behalf of the Claimant

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27 March 2019