PCA Case No. 2020-59

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

UAB "GARSU PASAULIS"
(Lithuania)

Claimant

v.

THE KYRGYZ REPUBLIC

Respondent

PROCEDURAL ORDER NO. 2

DECISION ON THE CLAIMANT'S REQUEST FOR A SEPARATE AWARD ON COSTS

Tribunal

Prof. Dr. Kaj Hobér (Presiding Arbitrator)
Mr. Ian Laird
Prof. Nina Vilkova

Tribunal Secretary

Dr. Joel Dahlquist

29 June 2021

I. PROCEDURAL HISTORY

1. In Section 18.3 of its Procedural Order No. 1, dated 5 March 2021, the Tribunal ordered the Parties to each pay €225,000 as advance on costs (corresponding to 50% of the total advance of €450,000) for this Arbitration no later than 19 March 2021.

2. The Claimant paid its share of the advance on costs on 17 March 2021, as confirmed by the Permanent Court of Arbitration (the "**PCA**"), the manager of the deposits, on 18 March 2021.

3. On 24 March 2021, the Tribunal communicated to the Parties that the Respondent had not yet paid its share on the advance on costs. The Tribunal also invited the Respondent to comment, by 31 March 2021, on whether it intended to do so.

4. On 1 April 2021, the Tribunal communicated to the Parties that the Respondent had not yet paid it share of the advance on costs, nor had it replied to the Tribunal's invitation to comment by 31 March 2021. The Tribunal therefore invited the Claimant to pay the Respondent's share of the advance of cost (€225,000.00), as per Section 18.3 of Procedural Order No. 1.

5. The Claimant noted the Tribunal's invitation in an email on 1 April 2021, and in the same email indicated its intention to pay the Respondent's share of the advance on cost. The Claimant also reserved "its rights to seek appropriate remedies due to the Respondent's failure to pay its share of the advance of costs, including but not limited to a request of a separate award awarding the amounts paid on behalf of the Respondent as their share of costs of these proceedings".

6. On 7 April 2021, the Claimant informed that it had paid the Respondent's share of the advance on costs. On the next day, 8 April 2021, the PCA confirmed to the Tribunal and the Parties that it had received the Claimant's payment.

7. On 16 April 2021, the Claimant submitted its Request to Issue a Separate Award on Costs (the "**Request**").

8. On the Tribunal's invitation, the Respondent submitted its Objection to the Claimant's Request to Issue a Separate Award on Costs (the "**Objection**") on 6 May 2021.

9. On 9 May 2021, the Tribunal invited the Claimant to respond, by 24 May 2021, to the Respondent's Objection.

10. In an email on 17 May 2021, the Respondent drew to the Tribunal's attention that the Claimant had been afforded the opportunity to "present its case twice" by the Tribunal's 9 May invitation. The Respondent requested the right to respond to the Claimant's future second submission within the same time granted to the Claimant to respond to the Respondent's Objection. On 18 May 2021, the Tribunal informed the Respondent that it would be invited to comment on the Claimant's second submission once/if it had been submitted.

11. On 24 May 2021, the Claimant submitted its Second Submission on Separate Award on Costs ("**the Claimant's Second Submission"**).

12. On the Tribunal's invitation, the Respondent submitted its Second Submission on Objection to Claimant's Request to Issue a Separate Award on Costs ("**the Respondent's Second Submission**") on 7 June 2021.

II. THE PARTIES' POSITIONS

13. The Tribunal has carefully reviewed and considered all aspects of the Parties' written submissions, which are briefly recounted in the below.

A. THE CLAIMANT'S POSITION

14. The Claimant has requested the following relief:

> "a) an order that the Kyrgyz Republic immediately and in any way before the end of this Arbitration pay to Garsu Pasaulis €225,000.00 being the Kyrgyz Republic's share of the advance on costs paid by Claimant on the Kyrgyz Republic's behalf;
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> b) an order that the Kyrgyz Republic pay to Garsu Pasaulis interest calculated from 8 April 2021 at a rate according to Articles 6 and 9 of the Swedish law of interest (Räntelag 1975:635) until payment is effected by the Kyrgyz Republic."[1]

[1] Request ¶ 44.

1. The Tribunal's Authority

15. In the Claimant's submission, the Tribunal has the authority to render a "separate award" compelling the Respondent to reimburse the Claimant for the €225,000 it paid to cover the Respondent's share of the costs.

16. According to the Claimant, the fact that the 1976 UNCITRAL Rules are silent with respect to the power to grant separate costs awards "must not dissuade the Tribunal" from granting such an award, as its power stems from the Parties' obligation to pay their respective shares of the advance on costs – as ordered by the Tribunal in its Procedural Order No.1 – coupled with the Tribunal's general authority under the Swedish Arbitration Act.[2]

17. Article 29 of the Swedish Arbitration Act, which applies by virtue of Stockholm being the designated legal seat of this Arbitration,[3] entitles the Tribunal to issue separate awards on any issue "which is of significance to the resolution of the dispute", except for matters related to set off defences, the Claimant says.[4] Swedish courts have also confirmed that such awards against a defaulting party are enforceable under Swedish law.[5]

18. The Claimant further argues that guidance should be sought from the SCC Rules, which unlike the 1976 UNCITRAL Rules applicable here, contain a specific rule authorizing tribunals to make separate awards for the reimbursement made by a party which has made an advance payment on behalf of the other party.[6] The Claimant says that the SCC Rules are designed to be "fully compatible with […] Swedish law", which the Claimant argues means that the Swedish Arbitration Act does not prohibit the issuance of separate cost awards; if it did, the SCC Rules would not contain an explicit rule endorsing this power.[7]

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[2] Request ¶¶ 8-10; 18-23.
[3] Procedural Order No.1, Section 6.1.
[4] Request ¶ 14.
[5] Request ¶ 17, referencing *Consafe IT Ab v Auto Connect Sweden AB,* Svea Court of Appeal judgment, Case No Ö 280-09.
[6] SCC Rules Article 51(5).
[7] Request ¶¶ 15-16; Claimant's Second Submission ¶¶ 22-23.

19. Furthermore, the Tribunal has the general power, to which the Respondent has consented by way of its agreement to apply the 1976 UNCITRAL Rules, to "conduct the arbitration in such manner as it considers appropriate".[8]

20. The Claimant rejects the Respondent's argument that Articles 40(1) and 41(4) of the 1976 UNCITRAL Rules prohibit separate awards on costs. Article 40(1) is clear in granting the Tribunal the "utmost freedom" to apportion the costs as it deems appropriate, the Claimant says, while Article 41(4) does not address the Tribunal's powers at all, but rather the consequences of either party failing to make the payment of the advance.[9]

21. The Claimant emphasizes that it is not asking the Tribunal to order the Respondent to bear the Claimant's costs at this stage, but rather to compel the Respondent to "fully participate and equally contribute to the proceedings"; the ultimate apportioning of the costs of arbitration is for a later stage.[10]

2. The Reasons to Grant the Request

22. The Claimant argues that the Respondent has consented to "unconditionally comply with the Tribunal's directions as long as the equality of arms as between the parties is preserved", an undertaking which the Respondent did not respect when it did not comply with the Tribunal's order in Section 18.3 of Procedural Order No. 1.[11]

23. Furthermore, the Claimant says, the Respondent's failure to pay its share of the advance constitutes a breach of the Kyrgyzstan – Lithuania BIT, as well as of a contractual obligation towards the Claimant. Thus, the Respondent's failed payment is a "matter of substance" on which the Tribunal may render the requested decision.[12]

24. The Claimant also points out that the Respondent is a "much stronger party" than the Claimant, and should not be allowed to exert financial pressure on the Claimant by refusing to carry out the Tribunal's order. Despite never objecting to its obligation to pay its share

[8] Request ¶ 26, referencing Article 15(1) of the UNCITRAL Rules.
[9] Claimant's Second Submission ¶¶ 17-19.
[10] Claimant's Second Submission ¶¶ 20-21.
[11] Request ¶ 27.
[12] Request ¶¶ 28-34.

of the advance, the Respondent seems to hope that its non-payment would end this Arbitration, which the Claimant asks the Tribunal not to allow.[13]

3. The Requested Interest

25. The Claimant also requests that the Respondent is ordered to pay interest on the claimed amount.

26. According to the Claimant, the interest should accrue from the date the Claimant paid the Respondent's share of the advance, *i.e.* 8 April 2021.[14]

27. With respect to the applicable interest rate, the Claimant argues that the rate provided by the law of the seat applies. According to Articles 6 and 9 of the Swedish law on Interest, interest is payable at the Swedish Riksbank's reference rate plus eight percentage points.[15] The Claimant is requesting that the Tribunal order the Respondent to pay interest at this rate.

B. THE RESPONDENT'S POSITION

28. The Respondent has requested that the Tribunal:

> "(a) […] dismiss entirely the Claimant's Request to Issue a Separate Award on Costs; and,
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> (b) […] order the Claimant to bear all arbitration costs and legal costs of the Respondent related to the adjudication of the Claimant's ungrounded Request to Issue a Separate Award on Costs or to take it into account during the apportion the costs between the parties at the appropriate stage of the arbitration.

1. The Tribunal's Authority

29. The Respondent argues that its consent, which it says is a "cornerstone for the exercise of jurisdiction by any tribunal", covers arbitration under the 1976 UNCITRAL Arbitration Rules, which do not allow for the type of order sought by the Claimant. In the Respondent's

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[13] Request ¶¶ 28, 35.
[14] Request ¶¶ 38-40.
[15] Request ¶¶ 41-43.

submission, Article 41(4) lists the "exhaustive legal consequences" of non-payment of an advance on costs, *viz.* (i) the opportunity for the other party to pay in the non-paying party's stead, and (ii) the suspension or termination of the proceedings.[16]

30. The 1976 UNCITRAL Arbitration Rules do not provide for any other consequences of a non-payment, the Respondent argues. The Tribunal has followed Article 41(4) by inviting the Claimant to pay the Respondent's share, and the only other remedy available to the Claimant is ultimately to recover the paid sum as part of the Tribunal's final cost decision at a later stage of the proceedings, the Respondent says.[17]

31. Any reference to the 2010 UNCITRAL Rules or the SCC Rules is irrelevant, the Respondent argues, because it has not consented to arbitration under either of these set of rules. If anything, if the Tribunal were to find that Article 41(4) is ambiguous, the fact that these other rules contain rules explicitly authorizing this type of order while the 1976 UNCITRAL Arbitration Rules do not, should be interpreted as support for the Respondent's position that the 1976 UNCITRAL Arbitration Rules prohibit such orders.[18]

32. Furthermore, the Respondent argues, Article 40(1) of the 1976 UNCITRAL Rules regulates when awards on costs should be issued and how the apportionment of costs should be made. In the Respondent's submission, it is clear from this Article that the Tribunal has no authority to render cost awards at the current stage, and that the apportionment of costs can only be made when it is known which party is deemed to be the successful one.[19]

33. The Respondent also rejects the Claimant's contention that Article 15(1) of the 1976 UNCITRAL Rules allows the Tribunal the discretion to issue the requested order. Importantly, the Respondent says, the discretion afforded by the Tribunal is limited by the phrase "subject to these Rules" at the outset of Article 15(1). In the Respondent's submission, "these Rules" limit the Tribunal's discretion by exhaustively stipulating the consequences of a non-payment in Article 41(4). By inviting the Claimant to pay the

[16] Objection ¶¶ 3-11.
[17] Objection ¶¶ 13, 20.
[18] Objection ¶¶ 11-20, 54-60.
[19] Objection ¶¶ 21-33.

Respondent's share, the Tribunal has observed the consequences provided for in Article 41(4), and cannot now rely on Article 15(1) to go beyond what is contemplated by Article 41(4), the Respondent says.[20]

34. As for the Swedish Arbitration Act, the Respondent points out that Section 37 provides that "*[i]f a party fails to provide its share of the requested security within the period specified by the arbitrators, the opposing party may provide the entire security. If the requested security is not provided, the arbitrators may terminate the proceedings, in whole or in part.*" In this respect, the Respondent argues, the Swedish Arbitration Act does not provide for a separate award on costs in the case of non-payment, but rather contains the same legal consequence as the 1976 UNCIRAL Rules, *i.e.* the other party may pay in the non-paying party's stead, or the Tribunal may terminate the proceedings.[21]

35. The Swedish Arbitration Act also contains provisions on the final allocation of costs between the parties, while explicitly making clear that the parties may "agree otherwise". In this case, the Parties have agreed to apply the 1976 UNCITRAL Arbitration Rules, which thus prevail over the Swedish Arbitration Act in this respect. As discussed above, the Rules prohibit the Tribunal from deciding any allocation of costs at this stage of the proceedings, the Respondent says.[22]

36. Finally, the Respondent rejects the Claimant's argument that its failure to pay the advance is a substantive breach of a contractual obligation, an argument which it says rests on incorrect assumptions about the nature of investment treaty arbitration.[23]

III. THE TRIBUNAL'S ANALYSIS

A. THE TRIBUNAL'S AUTHORITY

37. The Tribunal begins its analysis by discussing a few preliminary points relevant for its decision.

[20] Objection ¶¶ 61-65.
[21] Objection ¶¶ 42-47.
[22] Objection ¶¶ 48-50.
[23] Objection ¶¶ 66-83.

38. As per the Tribunal's Procedural Order No. 1, this Arbitration is governed by the 1976 UNCITRAL Arbitration Rules, as well as the Swedish Arbitration Act, in its capacity as the law of the seat of arbitration (Stockholm). [24] Both Parties accept these starting points and have based their arguments thereon.

39. Both Parties also recognize that the 1976 UNCITRAL Arbitration Rules do not contain any express provision dealing with the Tribunal's authority in the present situation. The Parties disagree, however, as to the consequences of this fact.

40. In the Tribunal's view, the fact that the 1976 UNCITRAL Arbitration Rules do not expressly authorize the Tribunal to order the Respondent to compensate the Claimant for having paid the Respondent's share of the advance of costs does not necessarily mean that the Tribunal lacks the authority to issue such an order.

41. The 1976 UNCITRAL Arbitration Rules were drafted to be flexible, and are not designed to envision every potential procedural development. It is in the nature of rules tailored for *ad hoc* arbitration that a tribunal will face situations for which the rules provide no express guidance. Generally speaking, the fact that a particular type of procedural decision is not expressly authorized by the UNCITRAL Arbitration Rules cannot be taken to mean that the decision in question is unavailable to a tribunal.

42. At the same time, in such a situation the Tribunal must satisfy itself that it does have the authority to issue the decision in question. As pointed out by the Claimant, the Tribunal's wide discretion to conduct the arbitration as it deems appropriate is expressly recognized by Article 15(1) of the 1976 UNCITRAL Arbitration Rules, but this discretion does not necessarily entitle a tribunal to entertain every procedural request.

43. Given the open-ended nature of the 1976 UNCITRAL Arbitration Rules, the Tribunal finds it useful to turn to the Swedish Arbitration Act, which by virtue of its status as *lex loci arbitri* complements the applicable arbitration rules.

44. The Claimant has argued that Section 29 of the Swedish Arbitration Act authorizes the Tribunal to issue a "separate award" in the present situation. In the Tribunal's view, this is

[24] Procedural Order No. 1, Sections 5 and 6.

a doubtful proposition. Section 29 requires for its application that the issue to be resolved by a separate award is one "which is of significance to the resolution of the dispute". The present situation does not involve such an issue; the Tribunal has not been asked to determine, for example, its jurisdiction to hear the Claimant's substantive claims, nor has it been asked to decide any issue which is relevant for the merits of this Arbitration.

45. Nevertheless, the Tribunal is satisfied that it has the authority to grant the Claimant's request under the Swedish Arbitration Act. A fundamental principle underpinning the Swedish Arbitration Act is that a tribunal has a wide authority to conduct the proceedings as it sees fit, provided that it respects party autonomy and certain basic principles, such as impartiality, practicality and speed.[25] This wide authority applies to a wide variety of procedural matters. As a consequence, the Swedish Arbitration Act contains few specific rules of procedure,[26] instead leaving it to the tribunal to determine in the circumstances of the individual case whether a specific order is necessary.

46. The form which the Tribunal's decisions may take is provided by Section 27 of the Swedish Arbitration Act. This Section provides, in relevant parts:

> 27(1) The issues referred to the arbitrators shall be decided in an award. If the arbitrators terminate the arbitral proceedings without deciding such issues, this shall also be done through an award, except for cases referred to in the third paragraph.
>
> […]
>
> 27(3) Other determinations, which are not decided in an award, are designated as decisions. The dismissal of an arbitration takes the form of a decision. The provisions of this Act that concern arbitral awards also apply to such decisions, to the extent applicable.

47. Thus, the Swedish Arbitration Act distinguishes between awards and decisions, with the former being reserved for "the issues referred to the arbitrators" – essentially the merits of the dispute. All determinations and rulings which are not "awards" constitute "decisions", in the terminology of the Swedish Arbitration Act.

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[25] *See* Section 21 of the Swedish Arbitration Act.
[26] Kaj Hobér, *International Commercial Arbitration in Sweden,* OUP, 2nd ed., para. 6.02.

48. Further to this wide general tribunal authority to issue procedural decisions, although limited in the sense that it may not be done in the form of an "award", one specific provision of the Swedish Arbitration Act is relevant to the determination of the present Request. Section 25(4) of the Act provides that:

> Unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that, during the proceedings, the opposing party must undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators […]

49. This provision is an illustration of a tribunal's wide authority to decide procedural matters. In the Tribunal's view, the provision is relevant to the present situation, where the Tribunal has already ordered the Parties to each pay an advance on costs in order to ensure that this Arbitration may proceed, but the Respondent has failed to do so.

50. The authority which the Swedish Arbitration Act bestows upon the Tribunal to issue the requested order is not displaced by the Parties' choice of the 1976 UNCITRAL Arbitration Rules, as those rules do not expressly provide that the Tribunal may not issue an order of this kind (nor do they, to recall, expressly provide that the Tribunal *may* issue such an order).

51. Thus, the Tribunal finds that the Swedish Arbitration Act authorizes the Tribunal to issue the requested order, albeit not in the form of a separate *award*.

B. THE APPROPRIATENESS OF THE REQUESTED MEASURES

52. Having satisfied itself that it has the authority to order the Respondent to compensate the Claimant for having paid the Respondent's share of the advance of costs, the Tribunal now turns to the question whether it is appropriate to exercise this authority in the present case.

53. Neither Party has advanced much by way of arguments with respect to the appropriateness of the requested measure *in this specific case*. The Tribunal is therefore left with broader considerations about the appropriateness of the requested measures more generally.

54. In its Procedural Order No. 1, the Tribunal decided that "[t]he Parties shall cover the direct costs of the arbitration in equal shares, without prejudice to the final decision of the

Tribunal as to the allocation of costs in accordance with the UNCITRAL Rules."[27] The Tribunal also decided that the initial advance on costs in this Arbitration should be €450,000, to be paid in equal parts by the Parties, and designated the PCA to manage the amounts deposited.[28]

55. The fact that the Claimant was invited to pay the Respondent's share, and ultimately did so, does not automatically extinguish the Respondent's obligation to comply with Section 18 of Procedural Order No. 1.

56. The Tribunal's order on the payment of advance on costs emanates from the Parties' agreement to refer their dispute to arbitration, according to which both Parties have consented to participate in the proceedings. In the light of this agreement, the Claimant should not be asked to finance the Respondent's participation in the arbitration.

57. Indeed, this basic principle appears to be the reason why many arbitration rules – such as the SCC Rules,[29] the LCIA Rules[30] and the ICC Rules[31] – contain provisions authorizing the Tribunal to order a defaulting party to reimburse the paying party, in order to offer temporary relief to the party which has paid both shares of the advance.

58. In a very limited set of circumstances, the defaulting party may be able to demonstrate that the circumstances of the individual case justify an exception from its obligation to reimburse the paying party. However, while it is possible that the Respondent has a plausible explanation for not paying its share of the advance in this case, none has been brought to the Tribunal's attention, and in any event it appears unlikely that there are circumstances which would justify an exemption from its obligation.

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[27] Procedural Order No. 1, Section 18.1.
[28] Procedural Order No. 1, Section 18.2.-18.3.
[29] Ragnwaldh, Andersson and Salinas Quero, *A Guide to the SCC Arbitration Rules,* Wolters Kluwer 2020, p. 163.
[30] Wade, Clifford and Clanchy, *A Commentary on the LCIA Arbitration Rules 2014*, Sweet & Maxwell 2015, pp. 274-275, noting that under the LCIA Rules the defaulting party's debt to the paying party is "immediately due and payable […] together with any interest".
[31] Fry, Greenberg and Mazza, *The Secretariat's Guide to ICC Arbitration*, International Chamber of Commerce 2012, paras. 3-1494 and 3-1595, noting that the Tribunal may use cost decisions at any stage of the proceeding, and may use this authority in order to "send a strong message to the parties at an early stage of the proceedings, dissuading them from using dilatory tactics".

59. It is of course possible that the Respondent is ultimately found to be the successful party in this Arbitration. If so, the Respondent may request the repayment of its advance on costs from the Claimant, as part of the Respondent's final claims for costs.

60. In these circumstances, the Tribunal fails to see what potential risk the Respondent is facing by now being asked to comply with its obligation to contribute to the advance on costs. Thus, the Tribunal finds on balance that the importance of respecting the Tribunal's original order outweighs whatever potential interest the Respondent may have in not complying with it. The Tribunal will therefore order the Respondent to pay the Claimant €225,000, corresponding to its share of the advance of costs which the Claimant paid on 8 April 2021.

61. With respect to any interest on this sum, the Respondent has not disputed the requested interest (save for its general request that the Tribunal "dismiss entirely" the Claimant's request). However, the Tribunal is not convinced that the Claimant is correct in relying on the Swedish Law on Interest in this respect.

62. Under Swedish arbitration law, questions concerning interest are governed by the law applicable to the merits – typically the law applicable to the disputed contract – and not by the *lex loci arbitri*.[32] The fact that Stockholm is the legal seat of this Arbitration does not, therefore, necessarily mean that the Swedish Law on Interest is applicable.

63. In the present case, the law applicable to the merits of the dispute is presumably public international law, and the Agreement Between the Government of the Republic of Lithuania and the Government of the Kyrgyz Republic on the Promotion and Protection of the Investments, but the question of applicable law has not yet been subject to any pleadings by the Parties.

64. In these circumstances, and in the absence of the Parties' submissions on this point, the Tribunal is reluctant to order the requested interest applicable under the Swedish Law on Interest, which pursuant to Articles 6 and 9 of that Act would amount to the comparatively high interest rate of 8%. Instead, the Tribunal finds that the interest rate is to be calculated

[32] *See* Kaj Hobér, *International Commercial Arbitration in Sweden,* OUP, 2nd ed., para. 7.75.

at the US prime rate plus 2 %, which in the Tribunal's view is more in line with the interest rates generally used in investment treaty arbitrations governed by international law.

65. Finally, the Tribunal wishes to emphasize that it is not deciding the allocation of costs at this stage. As both Parties have pointed out – and as expressly provided for by Section 18.1 of Procedural Order No. 1 – that decision will come later. Any dispositions with respect to the deposited advance on costs are without prejudice to the Tribunal's final decision as to the allocation of costs, pursuant to the considerations provided by the 1976 UNCITRAL Arbitration Rules in this respect.

IV. THE TRIBUNAL'S DECISIONS

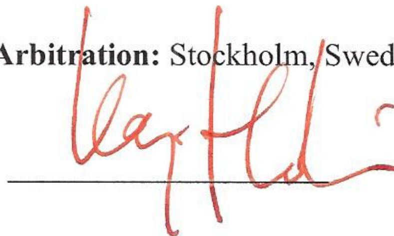
66. The Tribunal ORDERS as follows:

a. The Kyrgyz Republic shall pay €225,000.00 to UAB Garsu Pasaulis, corresponding to the Kyrgyz Republic's share on the advance on costs in this Arbitration;

b. The Kyrgyz Republic is ordered to pay UAB Garsu Pasaulis interest on the amounts unpaid, as calculated at the US prime rate plus 2 % from 8 April 2021 until full payment is performed by the Kyrgyz Republic;

c. The allocation of costs related to this Request is deferred to a later stage of the proceedings.

Place of Arbitration: Stockholm, Sweden



Kaj Hobér
Presiding Arbitrator

(On behalf of the Tribunal)