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

SVEA HOVRÄTT
020117
INKOM: 2024-07-26
MÅLNR: T 10588-24
AKTBIL: 1

- between -

UAB "GARSU PASAULIS"
(Lithuania)

(the "Claimant")

- and -

THE KYRGYZ REPUBLIC

(the "Respondent", and together with the Claimant, the "Parties")

AWARD

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

Tribunal Secretary
Mr. Tim Robbins

Date of dispatch to the Parties: 8 April 2024

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DRAMATIS PERSONAE

Abbreviation	Description of Individual/Entity
Banknote Factory NBRK	The Republican state enterprise under the right of economic management "Banknote Factory of the National Bank of the Republic of Kazakhstan", one of the five bidders for the 2018 Tender
Garsu Pasaulis LLC	'Garsu Pasaulis' LLC, a local subsidiary established by the Claimant in the Kyrgyz Republic in 2016.
GKNB	The State Committee for National Security of the Kyrgyz Republic.
IDEMIA	IDEMIA France SAS, one of the five bidders for the 2018 Tender.
IIC	The Independent Interdepartmental Commission, responsible for reviewing official complaints filed in relation to the 2018 Tender.
Mr. Abdullayev	Mr. Talant Abdullayev, the Director of Infocom State Enterprise, a State-owned IT Integrator; plead guilty to a charge of corruption in relation to the 2018 Tender.
Mr. Bakchiev	Mr. Daniyar Bakchiev, the State Secretary of the SRS, who supervised the Department of Public Relations at SRS; plead guilty to a charge of assisting with corruption in relation to the 2018 Tender.
Mr. Kadyrkulov	Chairman of the GKNB during the 2018 Tender.
Mr. Sarybaev	Mr. Suslandbek Sarybaev, the Deputy Chairman of the SRS and the Chairman of the Tender Commission in the 2018 Tender; plead guilty to a charge of corruption in relation to the 2018 Tender.

Mühlbauer	Mühlbauer ID Services GmbH, one of the five bidders for the 2018 Tender.
SRS	The Kyrgyz State Registration Service, intended counterparty to the e-passports contract.
STI	The Kyrgyz State Tax Inspectorate.
Tender Commission	A commission formed on 3 October 2018 which would be responsible for the preparation and oversight of a new tender for the manufacturing of blank e-passports and supporting IT infrastructure.
Veridos	Veridos GmbH, one of the five bidders for the 2018 Tender.

I. THE PARTIES

(A) The Claimant

1. The Claimant is UAB "Garsu Pasaulis" ("**Garsu Pasaulis**" or the "**Claimant**"), a company constituted and incorporated under the laws of the Republic of Lithuania.

2. The Claimant is represented in this arbitration by:

PLP Motieka & Audzevicius
Attn: Rimantas Daujotas / Denis Parchajev
Gyneju Street 4, Vilnius 01109
Lithuania

Email: rimantas.daujotas@motieka.com / denis.parchajev@motieka.com
Tel: +370 5 2 000 777 / +370 5 2 000 888

(B) The Respondent

3. The Respondent is the Kyrgyz Republic (the "**Respondent**").

4. The Respondent is represented in this arbitration by:

Willkie Farr & Gallagher LLP
Attn: Grégoire Bertrou / Sergey Alekhin / Dmitry Bayandin
21 boulevard Marlesherbes
75008 Paris
France

Email: gbertrou@willkie.com / salekhin@willkie.com / dbayandin@willkie.com
Tel: +33 1 53 43 45 00

Center for Court Representation of the Cabinet of Ministry of Justice of the Kyrgyz Republic
Attn: Salavat Ashirbekov
59, Razzakova street
720040 Bishkek
The Kyrgyz Republic

Email: court.center2022@gmail.com

Mr. Nurbek Sabirov
Business center "Avrora", 7th floor
1A, Igemberdieva street
720020 Bishkek

The Kyrgyz Republic

Email: sabirov.nurbek@gmail.com

5. Throughout this Final Award, the Claimant and the Respondent, each a "**Party**" and jointly referred to as the "**Parties**".

II. THE TRIBUNAL AND TRIBUNAL SECRETARY

6. The arbitrator appointed by Claimant is Mr. Ian A. Laird, whose contact details are as follows:

Mr. Ian A. Laird
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
United States

7. The arbitrator appointed on behalf of the Respondent is Prof. Nina Vilkova, whose contact details are as follows:

Prof. Nina Vilkova
Apt. 322. 34/a, Leninsky Prospect
Moscow, 119334
Russian Federation

Email: vilkova.a.n.g@gmail.com

8. The Presiding Arbitrator, jointly appointed by the co-arbitrators, is Prof. Dr. Kaj Hobér, whose contact details are as follows:

Prof. Dr. Kaj Hobér
3 Verulam Buildings, Gray's Inn
London WC1R 5NT
United Kingdom

Email: kaj.hober@outlook.com

9. Upon the proposal of the Tribunal, and agreement of the parties, Mr. Tim Robbins was appointed as Tribunal Secretary for this matter on 16 February 2023. Mr. Robbins'

contact details are as follows:[1]

Tim Robbins
Jan Pieterszoon Coenstraat 7
The Hague, 2595 WP, The Netherlands

E-mail: tim@robbinsarbitration.com

III. PROCEDURAL HISTORY

10. According to the Claimant, a dispute has arisen between the Parties under 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 of 15 June 2008 (the "**BIT**"). By Notice of Arbitration dated 10 February 2020 (the "**Notice**"), the Claimant commenced arbitration proceedings against the Respondent pursuant to Article 8 of the BIT.

11. In the Notice, the Claimant noted that the Parties had not previously designated an appointing authority and proposed, pursuant to Articles 3(4)(a) and 6(1) of the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**"), that the Secretary-General of the Permanent Court of Arbitration at The Hague (the "**PCA**") be designated as the appointing authority for the arbitration. The Claimant also noted that the Parties had not agreed upon a seat of the arbitration, and proposed The Hague, The Netherlands, as the seat of the arbitration, and that the language of the arbitration be English.

12. On 2 June 2020, the Respondent responded to the Notice stating, *inter alia*, that no agreement was concluded between the Claimant and the State Registration Service under the Government of the Kyrgyz Republic (the "**SRS**"), and that the Claimant did not make any investments in the Kyrgyz Republic.

13. On 16 June 2020, the Claimant gave notice of its appointment of Mr. Ian A. Laird as its party-appointed arbitrator pursuant Articles 5 and 7 of the UNCITRAL Arbitration Rules.

[1] The Tribunal Secretary originally appointed for this matter was Mr. Joel Dahlquist. On 6 February 2023, the Tribunal informed the Parties that Mr. Dahlquist was changing his employer and would no longer be able to serve as Tribunal Secretary.

14. On 29 July 2020, the Claimant filed a request for designation of an appointing authority to the PCA for the designation of the second arbitrator, proposing that the Secretary General of the PCA be designated as the appointing authority in this arbitration.

15. On 30 July 2020, the PCA invited the Respondent's comments on the Claimant's proposal by 10 August 2020. The Respondent did not provide any comments within the time limit granted.

16. On 18 August 2020, pursuant to Article 8 of the BIT and Article 7(2)(b) of the UNCITRAL Rules, the Secretary General of the PCA designated Judge Geert J. M. Corstens as appointing authority for this arbitration (the "**Appointing Authority**").

17. On 19 August 2020, on behalf of the Appointing Authority, the PCA sought additional comments from the Parties by 31 August 2020 on the Claimant's request for the appointment of a second arbitrator.

18. The Claimant provided its comments on 26 August 2020 on the request for an appointment of a second arbitrator.

19. On 28 August 2020, the Respondent wrote to the Appointing Authority to, *inter alia*, raise jurisdictional objections with regard to the Claimant's claims, and to state that it is not possible to appoint a second arbitrator on behalf of the Kyrgyz Republic at this time.

20. On 31 August 2020, on behalf of the Appointing Authority, the PCA acknowledged receipt of the Parties' respective correspondence, and invited further comments from the Claimant by 7 September 2020 and from Respondent by 14 September 2020.

21. The Claimant provided its further comments on 7 September 2020, reiterating its request for the appointment of the second arbitrator, and the Respondent filed its further comments on 14 September 2020 reiterating its position from its correspondence dated 28 August 2020.

22. The Claimant followed up on 15 September 2020, noting that as the Respondent has failed to provide any arguments or comments in respect of the Claimant's request to appoint a second arbitrator, the Claimant insisted that the Appointing Authority proceed with the appointment of a second arbitrator on behalf of the Respondent.

23. On 16 September 2020, the Respondent wrote to the Secretary General of the PCA with further details in support of its jurisdictional objections, requesting that the Secretary General issue a decision finding that the arbitral tribunal does not have jurisdiction to consider this matter.

24. By letter dated 25 September 2020, the PCA informed the Parties that the role of the Secretary General is limited to the functions described in the UNCITRAL Rules, and that objections to jurisdiction are to be decided by the arbitral tribunal, once constituted, in accordance with Article 21 of the UNCITRAL Rules.

25. On 28 September 2020, the PCA wrote to the Parties on behalf of the Appointing Authority to inform them that, *inter alia*, the Appointing Authority considers that he is competent to proceed with the Claimant's request that he appoint a second arbitrator in this matter, and will do so in due course.

26. On 29 September 2020, the Respondent wrote to the Appointing Authority stating that it appoints Prof. Nina Vilkova as its party-appointed arbitrator.

27. On 1 October 2020, on behalf of the Appointing Authority, the PCA invited the Claimant's comments on the Respondent's correspondence of 29 September 2020.

28. On 5 October 2020, the Claimant stated that it did not object to the appointment of Prof. Nina Vilkova as second arbitrator, subject to confirmation of her independence and impartiality.

29. On 6 October 2020, on behalf of the Appointing Authority, the PCA informed the parties that the Appointing Authority had invited the PCA to contact Prof. Vilkova in order to ascertain her independence and impartiality.

30. On 12 October 2020, the PCA provided a declaration of impartiality and independence from Prof. Vilkova.

31. On 14 October 2020, the Respondent wrote to the co-arbitrators to request that they appoint a presiding arbitrator with knowledge of Russian, and to select Russian as the language of the arbitration.

32. On 22 October 2020, the party-appointed arbitrators wrote to the Parties regarding the procedure for appointment of the President of the Tribunal by 2 November 2020.

33. On 23 October 2020, the Claimant provided its comments on the proposed procedure, but no response was received from the Respondent within the time limit granted.

34. On 6 November 2020, the party-appointed arbitrators informed the Parties that they would proceed in accordance with Article 7(3) of the UNCITRAL Rules to agree on the choice of the Presiding of the Tribunal.

35. On 10 November 2020, the party-appointed arbitrators informed the Parties that they agreed to the appointment of Prof. Dr. Kaj Hobér as President of the Tribunal.

36. On 3 December 2020, the Tribunal wrote to the parties to circulate draft Procedural Order No. 1, and to propose that Mr. Joel Dahlquist be appointed as tribunal secretary.

37. On 3 December 2020, the Respondent filed a letter dated 24 November 2020 in which it requested that Mr. Laird disclose any circumstances which may give rise to justifiable doubts regarding his impartiality or independence in the matter. On even date, Mr. Laird provided a declaration of his impartiality and independence.

38. On 24 December 2020, the Respondent submitted its comments on draft Procedural Order No. 1 including, *inter alia*, proposing that the language of the arbitration is Russian and that Moscow, Russia be the seat of arbitration. The Respondent had no objection to the appointment of Mr. Dahlquist as tribunal secretary, although it invited the PCA to appoint a tribunal secretary with Russian language skills.

39. Subsequently on 24 December 2020, the Claimant filed its comments on draft Procedural Order No. 1 including, *inter alia*, its proposal that the language of the arbitration be English and that The Hague, The Netherlands be the seat of arbitration. The Claimant had no objection to the appointment of Mr. Dahlquist as tribunal secretary.

40. On 4 January 2021, the Tribunal wrote to the Parties to propose dates for the case management conference.

41. On 6 January 2021, the Respondent wrote to the Tribunal to reiterate its position that the language of the arbitration should be Russian.

42. On 7 January 2021, the Tribunal confirmed that the language of the case management conference on 25 February 2021 would be held for practical purposes in English, but that

this does not pre-judge the Tribunal's decision that may need to be taken concerning the language of the arbitration.

43. On 2 February 2021, the Tribunal circulated an updated draft Procedural Order No. 1 for discussion at the case management conference and invited the Parties to reach agreement on certain items in advance.

44. The Respondent provided further comments on the draft Procedural Order No. 1 on 16 and 22 February 2021, and the Claimant provided further comments on 23 February 2021.

45. A case management conference was held on 25 February 2021. On 5 March 2021, taking into account the Parties' submissions in writing and at the conference, the Tribunal issued Procedural Order No. 1 dated 5 March 2021 ("**PO1**"), which incorporated its decisions that the seat of the arbitration is Stockholm, Sweden, and the language of the arbitration is English.

46. By letter dated 8 March 2021, the PCA (as fundholder) requested that the Parties pay an initial deposit of €450,000 (€225,000 from each Party) to cover the Tribunal's fees and expenses by 19 March 2021.

47. The PCA confirmed receipt of the Claimant's share of the initial deposits of €225,000 on 18 March 2021, while no payment was received from the Respondent within the time limit granted.

48. On 1 April 2021, the Tribunal invited the Claimant to pay the Respondent's share of the deposits pursuant to Section 18.3 of PO1. The PCA confirmed receipt of the Claimant's payment for the Respondent's share of the initial deposits of €225,000 on 8 April 2021.

49. On 16 April 2021, the Claimant filed a Request to Issue a Separate Award on Costs ("**Interim Costs Application**"), requesting an order that the Respondent reimburse the Claimant for the Respondent's share of the initial deposits of €225,000.

50. On 7 May 2021, the Respondent filed its objection to the Interim Costs Application dated 6 May 2021. The Claimant filed further comments on the Interim Costs Award on 24 May 2021, followed by further comments from the Respondent on 7 June 2021.

51. The Tribunal issued Procedural Order No. 2 on 29 June 2021 ("**PO2**"), in which the Tribunal granted the Interim Costs Application, ordering that: (i) the Respondent shall pay

€225,000 to the Claimant; (ii) the Respondent shall pay to the Claimant interest on the amounts unpaid at the US prime rate plus 2% from 8 April 2021 until full payment is made; and (iii) the allocation of costs related to the Interim Costs Application is deferred to a later stage of the proceedings.

52. On 31 August 2021, the Claimant filed its Statement of Claim ("**Statement of Claim**"), along with supporting exhibits and legal authorities, and the following witness statements and expert reports:

    (i) Witness Statement of [redacted] dated 28 June 2021;

    (ii) Witness Statement of [redacted] dated 2 July 2021;

    (iii) Witness Statement of [redacted] dated 23 August 2021;

    (iv) Expert Report of Dr. Crina Baltag dated 25 August 2021;

    (v) Expert Report of Professor Natalia Alenkina dated 12 August 2021; and

    (vi) Expert Report of Dr. Jurgita Banyte dated 23 August 2021.

53. On 24 September 2021, Willkie Farr & Gallagher LLP appeared as counsel for the Respondent.

54. On 16 February 2022, the Respondent informed the Tribunal that the Parties had agreed to an 11-day extension for filing of the Respondent's Statement of Defence.

55. On 12 March 2022, the Respondent filed its Statement of Defence ("**Statement of Defence**"), along with supporting exhibits and legal authorities, as well as the following expert reports:

    (i) Expert Report of Judge Madina Davletbayeva dated 11 March 2022; and

    (ii) Expert Report of Ms. Anastasia Malyugina of the Berkely Research Group dated 11 March 2022.

56. On 31 May 2022, the Parties filed their respective Requests for Document Production to the Tribunal.

57. On 30 June 2022, the Tribunal issued Procedural Order No. 3 ("**PO3**") with its decisions on the Parties' Requests for Document Production. The Claimant wrote to the Tribunal on

31 July 2022 alleging that the Respondent had refused to comply with most of the documents it was ordered to produce pursuant to PO3.

58. On 31 July 2022, the Respondent wrote to the Tribunal to deny the Claimant's allegation, and alleged that it was the Claimant that had failed to comply with PO3.

59. On 9 August 2022, Willkie Farr & Gallagher informed the Tribunal that they had suspended their representation of the Respondent in this matter. They requested that all future correspondence be directed to the Respondent's representatives at the Center for Court Representation under the Minister of Justice of the Kyrgyz Republic, keeping Willkie Farr & Gallagher in copy.

60. On 7 September 2022, Willkie Farr & Gallagher informed the Tribunal that they had resumed representation of the Respondent, which was confirmed by the Center for Court Representation.

61. On 21 October 2022, the Claimant informed the Tribunal that the Parties had agreed that in the event that none of the Tribunal members are limited in their ability to travel to the European Union, that Stockholm should be the hearing venue. In the event any members of the Tribunal would be subject to travel restrictions, the Parties suggested Istanbul as the hearing venue.

62. On 25 October 2022, the President of the Tribunal wrote to the Parties to inform them that he is serving as co-arbitrator in an unrelated matter in which the president of the tribunal, Mr. Ramūnas Audzevičius, is a partner at the same law firm as counsel for the Claimant. While none of the Tribunal members viewed the development as compromising the President's ability to hear and decide the present dispute independently and impartiality, the President informed the Parties in the spirit of transparency.

63. On 31 October 2022, the Claimant filed its Statement of Reply ("**Reply**"), along with supporting exhibits and legal authorities, and the following witness statements and expert reports:

(i) Second Witness Statement of [redacted] dated 28 October 2022;

(ii) Second Witness Statement of [redacted] dated 28 October 2022;

(iii) Second Expert Report of Professor Natalia Alenkina dated 30 October 2022; and

(iv) Second Expert Report of Dr. Jurgita Banyte dated 21 October 2022.

64. On 3 November 2022, the Respondent wrote to the Tribunal with regard to the President's disclosure made on 25 October 2022. The Respondent took note of and accepted the President's statement, but to avoid any risk of conflict of interest and to preserve the integrity of these proceedings, the Respondent requested that a written statement be obtained from Mr. Audzevičius that to date he has not had any involvement in the present arbitration proceedings, as well as an undertaking that he will not have any such involvement in the future. On 10 November 2022, the Tribunal circulated a written statement from Mr. Audzevičius dated 9 November 2022 to that effect.

65. On 25 November 2022, following consultation with the Parties, the Tribunal amended the dates of the hearing to 12 – 16 June 2022.

66. On 28 December 2022, the Parties informed the Tribunal that they had agreed to a two-week extension for the Rejoinder Memorial to be filed by 14 February 2023. Further extensions were agreed by the Parties until 17 February 2023, and subsequently until 19 February 2023.

67. On 3 January 2022, the Tribunal informed the Parties that the hearing shall take place in Stockholm, Sweden.

68. On 6 February 2023, the Tribunal informed the Parties that the Tribunal Secretary, Mr. Joel Dahlquist, would be changing employment as of 20 February 2023 and, as a result, would no longer be able to act as Tribunal Secretary in the present matter. The Tribunal proposed that Mr. Dahlquist be replaced by Mr. Tim Robbins as Tribunal Secretary.

69. On 6 and 14 February 2023, the Claimant and the Respondent, respectively, confirmed that they did not object to Mr. Robbins' appointment, whose appointment the Tribunal confirmed on 16 February 2023.

70. On 19 February 2023, the Respondent filed its Rejoinder Memorial, along with supporting exhibits and legal authorities, and the following expert reports:

(i) Second Expert Report of Judge Madina Davletbayeva dated 17 February 2023; and

(ii) Second Expert Report of Ms. Anastasia Malyugina of the Berkely Research Group dated 16 February 2023.

71. Following consultation between the Parties, on 7 March 2023 the Respondent filed an amended Rejoinder Memorial ("**Rejoinder**") with agreed non-substantive edits to the submissions and certain exhibits and legal authorities.

72. On 31 March 2023, the Parties notified each other of the witnesses and experts that they intend to cross-examine at the hearing.

73. On 12 April 2023, the Tribunal circulated a draft Procedural Order No. 4 regarding further directions for the hearing, and invited the Parties to consult on the draft and revert to the Tribunal. On 21 April 2023, the Parties provided their agreed edits to the proposed hearing directions. On even date, the Tribunal issued Procedural Order No. 4 ("**PO4**").

74. On 27 April, 10 and 23 May 2023, the Claimant provided updates to the Tribunal with regard to the ability of certain of its witnesses and experts to obtain visas to attend the hearing in person.

75. On 26 April 2023, the PCA invited the parties to transfer supplementary deposits in the amount of €150,000 (*i.e.* €75,000 from each party). The PCA acknowledge receipt of payment of €75,000 from the Claimant by letter dated 16 May 2023.

76. On 26 May 2023, the Respondent informed the Tribunal that it would not be paying for its share of the supplementary deposits on the basis of, *inter alia*, that the Respondent has a history of foreign investors failing to satisfy costs awards made against them.

77. On 31 May 2023, the PCA invited the Claimant to make the requested payment on behalf of the Respondent. On 2 June 2023, the PCA acknowledged receipt of the second half of the supplementary deposit of €75,000 from the Claimant.

78. On 29 May 2023, the Parties circulated their respective list of participants for the hearing. The Claimant circulated the e-hearing bundles on 30 May 2023, with a consolidated index for the bundles uploaded on 2 June 2023.

79. The evidentiary hearing took place in Stockholm, Sweden, from 12 to 15 June 2023. In addition to the Tribunal and the Tribunal Secretary, the following individuals were present on behalf of each Party:

(i) Claimant:

a. Witnesses: [redacted] attended remotely);

b. Experts: Ms. Jurgita Banytė and Ms. Natalia Alenkina; and

c. Legal Counsel: Mr. Rimantas Daujotas, Mr. Denis Parchajev, Mr. Dmitrij Mačiugin and Mr. Saulius Kleveckas (all of Motieka and Audzevičius, PLP).

(ii) Respondent:

a. Representatives: H.E. Aiaz Baetov (Minister of Justice of the Kyrgyz Republic), and Mr. Kanybek Koshokov;

b. Experts: Ms. Anastasia Malyugina and Ms. Madina Davletbaeva; and

c. Legal Counsel: Mr. Grégoire Bertrou, Mr. Sergey Alekhin, Mr. Dmitry Bayandin, Ms. Alexandra Koliakou, Mr. Alexander Mironov (all of Willkie Farr & Gallagher LLP), and Mr. Nurbek Sabirov (Mr. Sabirov attended remotely).

80. The following documents were filed during the course of the evidentiary hearing: (a) Respondent's additional legal authority [RLA-221]; (b) Claimant's additional translations of exhibits [R-109], [R-110], [R-117], [R-118] and [R-135]; and (c) the Parties' respective opening statements ("**Claimant's Opening Statement**" and "**Respondent's Opening Statement**"); and (d) Respondent's written answer to Mr. Laird's question to the Respondent at the end of its opening statement.

81. As directed by the Tribunal at the conclusion of the hearing, the Parties informed the Tribunal on 20 June 2023 of an agreed procedure for post-hearing and costs submissions.

82. On 6 July 2023, the Respondent submitted the finalized hearing transcripts, as agreed by the Parties.[2]

83. On 9 August 2023, the Parties filed their respective post-hearing submissions ("**Claimant's Post-Hearing Submissions**" and "**Respondent's Post-Hearing Submissions**").

84. On 18 August 2023, the Claimant filed its submissions on costs ("**Claimant's Costs Submissions**").

85. On 19 August 2023, the Respondent objected to the Claimant filing its submissions on costs, on the basis that the Tribunal had reserved the opportunity to revert to the Parties if a further round of submissions was deemed necessary. The Claimant responded on 20 August 2023, rejecting the Respondent's position and proposing procedural directions.

86. On 23 August 2023, the Tribunal wrote to the Parties to: (i) inform the Parties that the Tribunal had no questions for the Parties at this time; (ii) invite the Respondent to comment on the new wording introduced to the Claimant's relief at paragraph 235(e) of the Claimant's Post-Hearing Submissions; and (iii) issue directions for costs submissions.

87. On 1 September 2023, the Respondent provided its comments on the new wording introduced to the Claimant's relief at paragraph 235(e) of the Claimant's Post-Hearing Submissions, as well as filed its costs submission ("**Respondent's Costs Submissions**").

88. On 8 September 2023, the Parties filed their respective comments on the other side's costs submissions ("**Claimant's Comments on Costs**" and "**Respondent's Comments on Costs**").

89. On 8 March 2024, the Tribunal closed the proceedings pursuant to Article 29 of the UNCITRAL Rules.

IV. FACTUAL BACKGROUND

90. Before considering the Claimant's case, it is helpful to set out a brief summary of the factual background. Although it has reviewed in detail all of the Parties' factual allegations and the evidence that has been submitted in support of them, the Tribunal has only undertaken in this section to provide a summary of relevant facts to provide an

[2] References to the transcript shall be made in the following format: Transcript Day [X], [page:line]-[page:line].

introduction to the dispute, and in order to provide context for the claims. The Parties' respective positions vary substantially with regard to particular aspects of the facts relevant to the dispute, which will explored and set out in more detail in the course of the summaries of the Parties' submissions and the Tribunal's analysis in Section VI and VII below.

Garsu Pasaulis

91. The Claimant is a Lithuanian company engaged in security printing, including the production of anti-counterfeit documents such as biometric passports (or e-passports), identity cards and tax stamps, as well as the implementation and maintenance of related IT systems. The Claimant has been in operation since 1994.[3]

92. According to the Claimant, it was first approached by representatives of the Kyrgyz Republic government in 2011 with regard to modernization efforts for the production of passports, ID cards and related citizen identification systems in the Kyrgyz Republic.[4]

93. In 2014, the Claimant was acquired by a [redacted], which similarly is involved in providing services relating to passports and national identification cards.[5]

Prior Tenders

94. On 11 July 2012, the Kyrgyz State Registration Service ("**SRS**") announced a tender for manufacturing of blank e-passports and ID cards, and the setting up of a centralized population register in the Kyrgyz Republic (the "**2012 Tender**").[6] The Claimant participated in the 2012 Tender, however the tender was cancelled shortly after announcement.[7]

95. In October 2012, the Kyrgyz State Tax Inspectorate ("**STI**") announced a tender of exercise stamps to be used for alcohol and tobacco products sold in the Kyrgyz Republic. The Claimant won the tender in early 2013, and signed a four-year contract with the STI.

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[3] Statement of Claim at paras. 35-38.
[4] Statement of Claim at paras. 63-64; [redacted] Witness Statement at para. 25; [redacted] Witness Statement at para. 19.
[5] Statement of Claim at para. 42.
[6] Exhibit C-005; Statement of Defense at para. 49; Statement of Claim at para. 71.
[7] Statement of Claim at para. 78-80.

The Claimant won a further tender in February 2016 for a five-year exercise stamp supply contract with STI, which expired on 5 February 2021. A subsequent tender was announced in September 2020, but was cancelled in December 2020. Although the tender was relaunched in January 2021, the date for bid submissions was delayed until August 2021. In September 2021, the Kyrgyz Government decided to reclassify exercise stamps, following which they could only be produced domestically by Kyrgyz companies pursuant to Kyrgyz law.[8] During the course of, and for the purposes of carrying out, the excise stamp contracts, in 2016 the Claimant had established a local company in the Kyrgyz Republic, Garsu Pasaulis LLC.[9]

The 2018 Tender

96. A commission was formed on 3 October 2018 which would be responsible for the preparation and oversight of a new tender for the manufacturing of blank e-passports and supporting IT infrastructure (the "**Tender Commission**"). The Tender Commission was composed of officers of the Kyrgyz Republic from various authorities, including the Ministry of the Interior, the Ministry of Foreign Affairs, the State Border Service and SRS.[10]

97. On 23 October 2018, the SRS announced the tender for manufacturing of blank e-passports and supporting IT infrastructure (the "**2018 Tender**").[11] By 19 November 2018, five bidders had submitted bids for the 2018 Tender, including the Claimant's bid dated 19 November 2018 ("**2018 Tender Bid**").[12] The other bids were submitted by the following four entities: Mühlbauer ID Services GmbH ("**Mühlbauer**"); Veridos GmbH ("**Veridos**"); IDEMIA France SAS ("**IDEMIA**"); and the Republican state enterprise under the right of economic management "Banknote Factory of the National Bank of the Republic of Kazakhstan" ("**Banknote Factory NBRK**").[13]

98. During a Tender Commission meeting held on 21 November 2018, a working group was created which would be responsible for examining the bids' compliance with technical

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[8] Statement of Claim at paras. 89-108; Statement of Defense at paras. 24-25.
[9] Statement of Claim at para. 95; CWS [redacted] 1-11.
[10] Exhibit C-066; Reply at paras. 23-24.
[11] Exhibit CWS_[redacted]_1/13; Statement of Defense at para. 20.
[12] Exhibit C-008; Statement of Claim at paras. 111-115; Statement of Defence at para. 50.
[13] Statement of Claim at para. 116; Statement of Defence at para. 52.

requirements under the 2018 Tender ("**Tender Working Group**").[14] On 17 December 2018, following internal consultation with other government entities, the Tender Commission decided to request clarification from the bidders concerning the qualifications requirements following which the bidders accepted the General and Special Terms and Conditions of the e-passports contract.[15]

99. In a meeting held on 20 December 2018, the Tender Commission decided to reject the bids of Mühlbauer, Veridos and Banknote Factory NBRK on the basis of shortcomings in their bids, and decided to admit the Claimant and IDEMIA to the next assessment stage with the Tender Working Group.[16] The technical evaluation of the Claimant's and IDEMIA's bids was carried out by the Tender Working Group in December 2018 and January 2019.[17]

100. The results of the 2018 Tender were published on the Kazak government's E-procurement platform on 1 February 2019. The Tender Commission announced that it had found various shortcomings in the bids of Mühlbauer, Veridos and the Banknote Factory NBRK, disqualifying them from the 2018 Tender. Of the two remaining bidders, the Claimant's price offer was slightly lower than that of IDEMIA, and therefore the Claimant was selected as the winner of the 2018 Bid.[18] Claimant received a notification email from Tender Commission's public procurement portal informing it that that it had officially won the 2018 Bid.[19] According to the Claimant, it was at this point that a negative media campaign was commenced against the Claimant.[20] Correspondence was exchanged during the period of 1 to 21 February 2019 between SRS and its related agencies and the Claimant regarding the e-passport contract, including exchanges of drafts, technical requirements, annexes, and discussion of logistics for signing.[21]

101. On 5 and 7 February 2019, respectively, Mühlbauer and IDEMIA filed complaints with the Independent Interdepartmental Commission ("**IIC**") raising issues in relation to the

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[14] Exhibit C-067; Reply at paras. 27-28.

[15] Exhibit C-067; Exhibit C-069; Exhibit C-070; Reply at para. 29-30, 49-50. The facts leading up to the 17 December 2018 correspondence are disputed between the Parties: see Reply at paras. 29-30, 42-55; Rejoinder at paras. 26-35.

[16] Exhibit C-067; Reply at paras. 31-32.

[17] Reply at paras. 58-62.

[18] Exhibit C-005; Statement of Claim at paras. 121-122; Statement of Defense at para. 54-55.

[19] Exhibit C077.

[20] Statement of Claim at paras. 124, 127-128; CWS [redacted] 1-22; Reply at para. 135-137.

[21] Reply at paras. 88-108; 118-122.

conduct of the 2018 Tender and its selection of the Claimant as the winner (the "**Mühlbauer Complaint**" and the "**IDEMIA Complaint**").[22] Following receipt of the Mühlbauer Complaint and the IDEMIA Complaint, the Department of Public Procurement suspended the 2018 Tender, of which all five bidders were informed of on 11 February 2019.[23] The bidders were requested to extend the validity of their bids by 45 days, which the Claimant did by reply letter dated 12 February 2019.[24]

102. On 14 February 2019, the Claimant held a press-conference in Bishkek to address recent media reports relating to the Claimant's selection as winner of the 2018 Tender.[25]

103. Following a review by the IIC, the IDEMIA Complaint was dismissed on 19 February 2019, and the Mühlbauer Complaint was partially dismissed on 21 February 2019.[26]

104. Following other alleged complaints filed by and on behalf of Mühlbauer and IDEMIA to various Kazakh Government entities, on 22 February 2019 the Kyrgyz Prosecutor General's Office registered these complains as a possible episode of corruption in the Unified Registry of Crimes and Misdemeanors ("**2018 Tender Investigation**").[27] On 25 February 2019, the Main Office of Criminal Investigations at the State Committee for National Security of the Kyrgyz Republic ("**GKNB**") assigned a team of investigators to the case.[28]

105. According to the Respondent, all five bids for the 2018 Tender, which had been in mid-February 2019 due to the suspension, expired on 2 April 2019. No contract with regard to the services bid for under the 2018 Tender was concluded between the Claimant and SRS prior to that date.[29]

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[22] Statement of Claim at paras. 125-126; Statement of Defense at para. 56.
[23] Exhibit R-36; Statement of Defense at para. 57
[24] Exhibit R-37; Statement of Defense at para. 57; Reply at para. 114.
[25] Statement of Defense at para. 63.
[26] CWS_[redacted]_1/23 and 1/24; Statement of Claim at para. 133; Statement of Defense at paras. 59-60.
[27] Exhibit R-51; Statement of Defense at paras. 69-70.
[28] Exhibit R-52; Statement of Defense at para. 71.
[29] Statement of Defense at para. 76. The expiration of the 2018 Tender is disputed by the Claimant: see Reply at paras. 189-190.

106. On 4 February 2020, following completion of the administrative court proceedings discussed below, the SRS issued an order which allegedly formally recognized that the 2018 Tender had failed due to the expiration of the bids ("**SRS Order**").[30]

Administrative court proceedings concerning the 2018 Tender

107. Mühlbauer initiated administrative court proceedings on 1 April 2019 against the SRS, the Department of Public Procurement, and the IIC, seeking to cancel: (i) the 1 February 2019 decision to award the Claimant the 2018 Tender; and (ii) the 21 February 2019 decision of the IIC dismissing the Mühlbauer Complaint. Mühlbauer also filed an injunction application preventing the SRS and Claimant from carrying out any actions concerning the conclusion of the e-passport printing contract.[31]

108. On 9 April 2019, the Inter-district Court of Bishkek summoned the Claimant as a third party to the proceedings and granted, *ex parte*, Mühlbauer's application for an injunction.[32] On 29 May 2019, following a hearing, the Inter-district Court of Bishkek fully upheld Mühlbauer's two claims ("**Bishkek First Instance Ruling**").[33] Following an appeal by the Claimant, the Bishkek City Court overturned the Bishkek First Instance Ruling on 10 September 2019 ("**Bishkek City Court Ruling**").[34] Upon further appeal, on 25 November 2019, the Kyrgyz Supreme Court quashed the Bishkek City Court Ruling and reinstated the Bishkek First Instance Ruling upholding Mühlbauer's claims ("**Kyrgyz Supreme Court Ruling**").[35]

2018 Tender Investigation

109. The 2018 Tender Investigation took place during the course of 2019, during which period the GKNB conducted various interviews in relation to the 2018 Tender Investigation, including [36] The Claimant was also invited by the GKNB in April 2019 for its representatives to attend for

[30] Exhibit C-049; Statement of Defense at para. 99.
[31] Exhibit R-79.
[32] Exhibit R-81.
[33] Exhibit C-050.
[34] Exhibit C-051.
[35] C-052; Statement of Claim at para. 222; Statement of Defense at para. 97.
[36] Statement of Claim at paras. 154; Statement of Defense at para. 72.

questioning, during which the Respondent declined the Claimant's request to response to queries in writing.[37] The Parties' accounts of the conduct 2018 Tender Investigation vary substantially, and will be discussed in greater detail in sections VI and VII below. The 2018 Tender Investigation led to the issuing of the Sentencing Decision of the Pervomaiskiy district court in case no. Case No. УД-1244/19.БЗ dated 26 December 2019 ("**Sentencing Decision**"), and which gave rise to the following:[38]

(i) Mr. Talant Abdullayev plead guilty to a charge of corruption. Mr. Abdullayev was the Director of Infocom State Enterprise, a State-owned IT Integrator involved in the 2018 Tender;

(ii) Mr. Daniyar Bakchiev plead guilty to a charge of assisting with corruption. Mr. Bakchiev was the State Secretary of the SRS, who supervised the Department of Public Relations at SRS; and

(iii) Mr. Ruslanbek Sarybaev plead guilty to a charge of corruption. Mr. Sarybaev was the Deputy Chairman of the SRS and the Chairman of the Tender Commission in the 2018 Tender.

Events following the alleged failure of the 2018 Tender

110. On 24 April 2019, a speech was given by Mr. Idris Kadyrkulov, the Head of the GKNB, at a public hearing of the Kyrgyz Parliament regarding the 2018 Tender. The Claimant submits that during this speech, Mr. Kadyrkulov spoke unfavorably about the Claimant without valid reason.[39]

111. In July 2019, the SRS signed a short-term contract for manufacturing of 500,000 passports with De la Rue PLC, a British company.[40]

112. The SRS announced a new public tender for manufacturing of passports in late February 2020 (the "**2020 Tender**"). Three companies submitted bids for the 2020 Tender, including Mühlbauer which was selected as the winner of the tender in late May 2020.[41] The Claimant did not participate in the 2020 Tender due to heightened experience

[37] Rejoinder at para. 63.2.
[38] Exhibit R-63, Sentencing Decision; Statement of Defense at para. 80.
[39] C-039; Statement of Claim at para. 165.
[40] Statement of Defense at para. 105.
[41] Statement of Defense at para. 106.

requirements, which the Claimant alleges were "*designed to exclude Claimant and award it to Mühlbauer*."[42]

113. As a result of the alleged media campaign by the Respondent against the Claimant, the Claimant submits its domestic and international reputation suffered, leading to loss of commercial contracts, loss of credit conditions and of other benefits, and loss of market share.[43]

V. RELIEF SOUGHT BY THE PARTIES

114. The Claimant's requests for relief, as finally articulated, are found at paragraph 235 of its Post-Hearing Submissions:

> "*235. Garsu Pasaulis respectfully requests the Arbitral Tribunal to:*
>
> *(a) Declare that the Kyrgyz Republic has breached its obligations as set out in Article 2, 3, and 4 of the Agreement, as described above;*
>
> *(b) Award monetary damages of not less than EUR 16,740,000.00 (sixteen million seven hundred forty thousand euros) in compensation for the loss sustained as a result of the Kyrgyz Republic's measures that are inconsistent with its obligations under the Agreement and under general international law, including, inter alia, losses related to the cancellation of the e-passports contract, losses related to cancellation of Garsu Pasaulis' profitable contracts and losses related to loss of Garsu Pasaulis' business reputation;*
>
> *(c) Order the Kyrgyz Republic to bear the costs and expenses of the arbitration, including fees and expenses of counsel, experts, consultants, and witnesses, and the fees and expenses of the Tribunal, plus such further costs and expenses as the Tribunal may find are owed under applicable law;*
>
> *(d) Award interest on the damages in the amount described above at a rate of US prime rate plus 2%, compounded on an annual basis, beginning from 22 February 2019 until the Tribunal's award is fully complied with;*

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[42] Statement of Claim at para. 261; Reply at para. 208.

[43] Statement of Claim at paras. 262-278.

(e) Order the Kyrgyz Republic to announce in English language on the official website of the Government of the Kyrgyz Republic (https://www.goc.kg.en) or similar publicly available official communication channel of the Government of the Kyrgyz Republic the following statement:

"The Government of the Kyrgyz Republic confirms to any party concerned that neither Lithuanian company UAB "Garsu Pasaulis" nor any of its former or current employees were ever investigated or charged with corruption or any other crime in the Kyrgyz Republic. No criminal investigation or criminal case is pending or was ever initiated against UAB "Garsu Pasaulis" or any of its former or current employees in the Kyrgyz Republic. As of this day, neither UAB "Garsu Pasaulis" nor any of its former or current employees were ever included in the list of unreliable suppliers in the Kyrgyz Republic."

This statement shall be announced within 10 calendar days of the issuance of this Award and kept publicly accessible on the Kyrgyz Government's or an alternative official website, as described above, for no less than 10 working days. The Kyrgyz Republic's failure to comply with this order of the Tribunal shall not prejudice Garsu Pasaulis's rights to enforce this order via competent courts."

115. The Respondent's relief, as finally articulated, is found at paragraph 83 of its Post-Hearing Submissions:

"*83. For the reasons set out in this Post-Hearing Brief, as well as the Kyrgyz Republic's earlier submissions, the Kyrgyz republic respectfully requests the Tribunal to:*

83.1. DECLARE that it lacks jurisdiction over Claimant's claims and/or that Claimant's claims are inadmissible;

83.2. REJECT in full Claimant's claims on the merits;

83.3. DECLARE that Claimant is not entitled to any remedies it seeks;

83.4. 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,"

116. In light of the fact that the Respondent has raised jurisdictional objections in respect of all of the Claimant's claims, the issue of jurisdiction is addressed first in the section which follows.

VI. JURISDICTION

117. The accounts of the Parties' positions incorporated into the Tribunal's analysis and decisions, in both this section on jurisdiction and the following sections on the merits, are intended as summaries only and not as comprehensive restatements of every argument or allegation made by the Parties. The Tribunal has considered all arguments and evidence that formed part of the record in this matter. Whilst the Tribunal's decisions are based on the entire record in this matter, in this Final Award the Tribunal addresses the contentions made by the Parties and the evidence on record only to the extent relevant to its decisions.

118. The Claimant has commenced this arbitration pursuant to Article 8 of the BIT, which provides as follows:[44]

"***Article 8***

Settlement of investment disputes

"1. Disputes between one Contracting Party and the other Contracting Party's investor relating to the latter's investments in the territory of the Contracting Party's home country where appropriate shall be settled amicably. The investor shall notify of the arising dispute in writing the Contracting Party in whose territory investments were made, and shall also provide detailed information.

2. In the event of the failure to settle the dispute amicably within six (6) months from the day on which the written notification referred to in paragraph 1 of this Article is received, the investor shall have the right to submit the dispute for settlement to the following instances:

[44] C-001, Translation of BIT from Lithuanian into English provided by the Claimant.

- A competent court or an arbitral tribunal (national commercial arbitration institutions) of the Contracting party in whose territory investments were made;

- The International Centre for Settlement of Investment Disputes (ICSID) set up according to the Convention on the settlement of investment disputes between states and nationals of other states; Submitted: 18 March 1965, Washington; the Conciliation and Arbitration under the ICSID Arbitration Proceedings, provided that both Contracting Parties have accessed this Convention, or

- The ad hoc arbitral tribunal set up under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), unless the parties to the dispute have agreed otherwise.

3. The arbitral award shall be final and binding on the parties to the dispute. Both Contracting Parties must promptly take such decisions, recognise them according to the national legislation of the respective Contracting Party and ensure their effective enforcement in the territory of their country.

4. As a party to a dispute, the Contracting party at any stage of legal proceedings or enforcement of the award may not rely on the fact that the other Contracting Party's investor was or will be compensated for all or part of incurred damage under the insurance contract."

119. The Claimant availed itself of the third option under Article 8(2), namely to initiate proceedings by way of an *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in 1976 ("**UNCITRAL Rules**").

120. The BIT does not identify a seat of arbitration. Article 16(1) of the UNCITRAL Rules provides that unless the parties agreed where the arbitration is to be held, "*such place shall be determined by the Arbitral Tribunal*". As set forth in the Procedural History above, following consultation with the Parties the Tribunal selected Stockholm, Sweden, as the seat of arbitration.

121. The Respondent does not contest the existence of the BIT, nor that the Claimant theoretically meets the definition of an investor. However, it is the Respondent's position

that the Claimant's claims are inadmissible under the BIT or otherwise, and that the Tribunal lacks jurisdiction on the basis of the following arguments:

(i) The Claimant's claims do not concern any 'investment' made in the Kyrgyz Republic, thus excluding the Tribunal's jurisdiction *ratione materiae*; and

(ii) In any event, the Claimant's claims are inadmissible as it secured its investments through corruption.

122. The Parties' positions with respect to each of these objections are briefly summarized in the following sub-section, followed by the Tribunal's analysis and decision on jurisdiction.

123. Prior to addressing those arguments, the Tribunal briefly addresses the Respondent's objections to the Expert Report of Dr. Crina Baltag ("**Baltag Report**").

124. The Respondent argues that the Baltag Report is merely a continuation of the Claimant's written pleadings, and is not an independent expert report. The opinions expressed therein effectively cover the entirety of the Claimant's legal case in this arbitration – including merits, jurisdiction and even principles of quantum – and as such it is manifestly not an expert report and should not be treated as such. The Respondent submits that Dr. Baltag has provided opinions on issues which do not require an expert assessment in the context of investment arbitrations. Further, the Respondent argues that Dr. Baltag did not review virtually any of the documents comprising the factual background of the dispute.[45]

125. The Claimant rejects the Respondent's criticism of the Baltag Report, stating that the Parties clearly have the right to assist the Tribunal with expert evidence on crucial aspects of the case, which does not depend on the arbitrator's skill level and by no means implies that the tribunal is incapable of understanding something without the assistance of an expert. The Claimant submits that the facts and evidentiary record show that all of the assumptions relied on by Dr. Baltag are completely true and correct.[46]

126. The Tribunal does not consider it necessary to make any general determination with regard to the evidentiary weight or admissibility of the Baltag Report. The Tribunal is aware of the Respondent's concerns regarding the materials provided to Dr. Baltag upon which her report is based, and the scope of the opinions expressed in the report. The Tribunal is more

[45] Statement of Defence at paras. 112-126.
[46] Reply at paras. 317-329.

than capable of assessing the contents of the Baltag Report against the record of this arbitration as a whole, and shall refer to and/or rely on the contents thereof as it considers appropriate in its analysis.

(A) Respondent's First Objection: The Claimant's claims do not concern any "*investment*" made in the Kyrgyz Republic, thus excluding the Tribunal's jurisdiction *ratione materiae*

Respondent's position

127. The Respondent submits that the Claimant has failed to meet the necessary criteria for the Tribunal's jurisdiction *ratione materiae*, under both the BIT and under international law. It does so on two points: first, the Claimant's "short-lived success" in the 2018 Tender does not constitute an 'investment' and, secondly, the Claimant's reliance on its earlier unrelated projects in the Kyrgyz Republic cannot be linked to the current dispute.[47]

(i) Definition of investment

128. In light of the language at Articles 8(1) and 2(1) of the BIT, the Respondent submits that in order for the Tribunal to have jurisdiction *ratione materiae* over Claimant's claims under the BIT, the following two 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*" such an investment.[48]

129. With respect to condition (a), the Respondent states that under the BIT, in order to be a protected investment, the following conditions must be met:

(i) The BIT prescribes that the investment must comprise an asset "*invested*" (and the investment itself must be "*made*") in the territory of the host State. The words used distinguish an active action to invest in a completed form (which is protected), from mere pre-investment activities (which are not protected).[49]

(ii) The BIT also requires 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*

[47] Statement of Defence at para. 127.
[48] Statement of Defence at paras. 128-130.
[49] Statement of Defence at paras. 132-137; Rejoinder at paras. 96-102.

national legislation". Therefore, 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.[50]

(iii) The purported investment must fall within the inherent meaning of the term 'investment' interpreted in light of its basic features, which always includes elements of contribution, a certain duration and risk. This element has been increasingly recognized both among commentators and investment tribunals.[51]

130. With respect to condition (b), the Respondent submits that Article 8(1) of the BIT requires that a putative dispute must be "*relating to*" a protected investment. There must be a direct connection between the claim and the jurisdictional basis it rests upon. 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*. The Respondent argues that the "entire operation" concept is not a catch -all mechanism allowing an investor to claim that its fragmented investments are an integral whole, protected by the applicable legal instrument.[52]

(ii) Claimant's alleged investment

131. Applying the foregoing conditions to the present dispute, the Respondent argues that the Claimant's purported investment fails as it did not have any protected rights under Kyrgyz law, as required by the BIT. The Respondent submits that the Claimant's attempted characterization of its rights stemming from it 'winning' the 2018 Tender are incorrect for the following reasons:[53]

(i) There was nothing "*economic*" about the Claimant's rights in relation to the 2018 Tender. The right to conclude a contract 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. The parties intended to make amendments to the draft/template contract annexed to the tender documentation, and were far from actually entering into

[50] Statement of Defence at paras. 138-139; Rejoinder at paras. 103-106.
[51] Statement of Defence at paras. 140-144; Rejoinder at paras. 107-112.
[52] Statement of Defence at paras. 145-149; Rejoinder at paras. 113-118.
[53] Statement of Defence at paras. 152-161; Rejoinder at paras. 119-

the contract. Further, the procuring entity (*i.e.* SRS in this case) may cancel procurement 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. Under Kyrgyz law, upon being selected as the winning bid, the Claimant was not even entitled to reimbursement of expenses incurred in the bidding process.

(ii) The Claimant's alleged right to conclude the public procurement contract after being proclaimed as the 'winner' of the 2018 tender was anything but "*unconditional*" or "*automatic*". 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.

(iii) The Claimant's purported "*contractual rights arising from the winning of the 2018 Tender*" does not meet the following hallmark criteria of investment: (i) the Claimant did not make any contribution to acquire the 'contractual right', nor did the Claimant invest any assets in due course of performance of the contract (which did not exist at all); (ii) nothing has been invested in the territory of the Kyrgyz Republic, as the Claimant's negligible costs in preparing the tender bid are, at best, pre-investment expenses; (iii) absent a valid and binding contract, there are no contractual rights out of which monetary claims, claims to perform economic activity or a right to engage in economic activity under a contract in the Kyrgyz Republic having an economic value could arise.

132. Further, the Respondent argues that the 'winning' of the 2018 Tender does not meet any other criteria for an 'investment' under the BIT nor international law. Beyond the fact that there was no contractual right to conclude a public procurement contract from 'winning' the 2018 Tender, this alleged right to execute the contract does not qualify as an "*investment*" made within the meaning of Article 1(1) of the BIT in that it was not an investment made in completed form. At best, the Respondent argues, 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.[54]

133. The documentation for 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. The Respondent argues that the rights obtained by the Claimant after 'winning' the 2018 Tender were not substantive of contractual in nature, but rather procedural, and that the Claimant had remedies at its disposal to compel the procuring organization to enter into the contract. The Respondent notes that the 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. Further, by submitting its bid under the 2018 Tender and being announced the 'winner', the Respondent submits that the Claimant did not commit a single penny into the Kyrgyz economy.[55]

134. The Respondent rejects the argument that the Claimant's earlier investments in the Kyrgyz Republic can be relied upon as a basis for the Tribunal's jurisdiction *ratione materiae*. The wording of Article 8(1) of the BIT requires that a putative dispute must be "*relating to*" a protected investment, in that the alleged violations of the BIT 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*. In the present case, the Respondent argues that the Claimant has failed to demonstrate that its earlier ventures in the Kyrgyz Republic are "*relating to*" the 2018 Tender or the present dispute:[56]

   (i) The 2013 and 2016 excise stamps production contracts have no connection with the 2018 Tender. They were subject to two different public procurement tenders, organized by a different procuring entity, with a different subject matter than the 2018 Tender.

   (ii) The establishment of a local Kyrgyz company, Garsu Pasualis LLC, has no connection with the 2018 Tender. This company was established specifically

[54] Statement of Defence at paras.163-168.
[55] Statement of Defence at paras. 169-172.
[56] Statement of Defence at paras. 173-189; Rejoinder at paras. 125-130.

within the context of the performance of the exercise stamps production contracts.

(iii) The Claimant's provision of training and know-how in the years preceding the 2018 Tender had nothing to do with the 2018 Tender; as the Claimant itself has confirmed this was provided specifically within the context of performing the exercise stamp contracts.

(iv) The Claimant does not clearly explain what kind of "*business reputation*" it would have effectively invested in the context of the 2018 Tender. In any event, such reputation would have been in the context of the excise stamp production and would have nothing to do with the production of blank passports.

(v) The 2018 Tender was neither a precondition for the expansion of the 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 that the Claimant decided to attempt at its own risk and peril.

135. Accordingly, the Respondent submits that the 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. As a consequence thereof, the Tribunal lacks jurisdiction *ratione materiae* over the present dispute.[57]

Claimant's position

(i) Definition of Investment

136. The Claimant argues that the BIT takes a broad approach to the notion of investment, as reflected in the language at Article 1(2) thereof, which is understood to include "*everything of economic value, virtually without limitation*." It is the Claimant's position that the BIT: (i) applies to the broadest possible range of investments; (ii) covers both complete investments and "*investments in the making*"; (iii) sets no minimum price tag on the covered investment; and (iv) does not require that the present dispute arise directly out of investments, only that it relates to the Claimant's investments in the Kyrgyz Republic.

[57] Statement of Defence at para. 190.

The Claimant notes that the UNCITRAL Rules do not impose any further requirements on the notion of 'investment'.[58]

137. The Claimant submits that tribunals have consistently concluded that the physical presence of an investment within the host State is not critical when the investment has no tangible form, and that tribunals favour an inclusive approach to the existence of an investment by considering the "*entire operation*" of the investor.[59]

138. It is the Claimant's position that it made numerous and significant investments which give rise to the Tribunal's jurisdiction, as the BIT has a very broad definition of investment, which affords protection to investments at an early stage. Claimant submits that both the "*entire operation*" of Claimant's investment in the Kyrgyz Republic as well as the right to execute and perform the contract as per the 2018 Tender possess all hallmarks of an 'investment' and grant the Tribunal *ratione materiae* jurisdiction under the BIT.[60]

139. The Claimant argues that it had an economic right to execute and perform the e-passports contract, and that this was not a pre-investment activity. The parties to the BIT chose not to restrict the scope of protection to certain types of investments, and therefore it applies to everything of economic value invested within their respective territories. Even if the Tribunal agreed with the Respondent that the Claimant's economic right was an "*investment in the making*", such an investment would still fall within the scope of the BIT. The Respondent's contention that the use of the term "*invested*" in Article 1(1) of the BIT should be limited to "*investments that have been made and exist*" should be dismissed.[61] Article 3(1) of the BIT expressly prohibits "*unjustified, ill-considered or discriminatory measures*" affecting the "*development*" of investors' investments.[62] According to the Claimant, the development of economic activities must be foreseen or intended, but not necessarily be successful, especially when the problems the investor faces in the development of its activities come from the host State's actions.[63]

140. The Claimant states that Kyrgyz law plays no significant role in shaping the BIT's notion of "*investment*", and that all it is required is for the Claimant to show that, as a matter of

[58] Statement of Claim at paras. 306-310; Claimant's Post-Hearing Submissions at paras. 9-21.
[59] Statement of Claim at paras. 315-316.
[60] Reply at para. 336.
[61] Statement of Claim at paras. 413-418; Reply at paras. 337-362.
[62] Exhibit [C-001] at Article 3(1).
[63] Statement of Claim at paras. 356.

Kyrgyz law, it had monetary claims or requests to carry out any other actions of economic value, intellectual property rights, know-how, business reputation or any rights to engage in economic activities. In other words, the Claimant submits that its right does not have to constitute an investment under Kyrgyz law. [64]

141. The Claimant rejects the Respondent's attempts to have the Tribunal ignore the Claimant's previous long-standing investments, including investments into the development of e-government services in the Kyrgyz Republic, the well-established goodwill and know-how. A proper interpretation of the BIT favours an inclusive approach to the existence of "*investment*", and as such a tribunal should assess the aggregate of the investor's operations in the host State which, sometimes, together constitute an investment, even if individually they might not qualify as such. This is particularly so when the investment in question was used to expand the Claimant's existing investment, such as in the present case. [65] The Claimant further rejects the Respondent's attempts to import into the BIT the ICSID *Salini* criteria, and also the controversial criterion of 'contribution to the local economy'.[66]

(ii) Claimant's alleged investment

142. It is the Claimant's position that the throughout the years of its operations in the Kyrgyz Republic, the Claimant made several significant investments corresponding to the various types of assets expressly included in the in the list at Article 1(2) of the BIT. These included the investment of substantial funds and know-how into the Kyrgyz Republic in relation to the excise stamp printing, and contribution to the success of the Kyrgyz digitalization efforts in accordance with various contracts concluded with the Kyrgyz government. The Claimant also formed a Kyrgyz company, Garsu Pasaulis LLC, and remains its main shareholder. These investments correspond to the various types of assets included in the list under Article 1(1) of the BIT, which includes: shares in corporate business, monetary claims or requests to carry out any other actions of economic value, intellectual property rights, know-how, business reputation, and any rights to engage in economic activities under contract and any license. The Claimant alleges that there was an ongoing arrangement that Garsu Pasaulis LLC would be used for the 2018 e-passport

[64] Reply at paras. 363-367
[65] Reply at paras. 368-378.
[66] Statement of Claim at para. 317; Reply at paras. 379-392.

contract once the latter was executed, and had made specific costs projections in its business plans for additional employees of the local company for work associated with the 2018 Tender.[67]

143. In 2018, the Claimant sought significantly to increase its investment activities in the Kyrgyz Republic by executing and performing the e-passport contract won during the course of the 2018 Tender. When ascertaining the Claimant's economic rights for the purposes of *ratione personae*, the Tribunal does not need to assess whether the contract came to fruition. Instead, the Claimant argues that for the purposes of jurisdiction, it is sufficient that the Claimant satisfies the very low threshold of the BIT in that it possessed a right of economic value. The Claimant argues that as a result of its successful participation in the 2018 Tender, the Claimant acquired a new and very specific economic right to execute the e-passports contract for a very specific amount, for a very specific period of time. The Claimant submits that by winning the 2018 Tender, it received an immediate and legally enforceable right to execute the e-passport contract without any further negotiations envisioned, and that this qualified as a stand-alone investment under the BIT under the ambit of "*requests to carry out any other actions of economic value*" as per Article 1(1) of the BIT. Upon winning the 2018 Tender, the Claimant alleges that the terms of the e-passport contract were finalized, and that no amendments were allowed. The Claimant further submits that it took all necessary steps to sign the e-passports contract, and that the SRS was ready to sign the contract on behalf of the Kyrgyz government before the "*bogus criminal investigation*" was set in action.[68]

144. It is the Claimant's position that under Kyrgyz law the Claimant gained legal rights once it was declared the winner of the 2018 Tender, which could only by terminated in certain circumstances, none of which existed in the present case.[69]

145. While the Claimant disputes the application of the *Salini* test in non-ICSID cases, it argues that this test is nonetheless satisfied in the current case: (a) the Claimant's substantial contribution is reflected by the establishment of a local company and execution of contracts for the Kyrgyz government for the establishment and development of e-government services; (b) the Claimant's investments were made in a period spanning over

[67] Statement of Claim at paras. 318-321; Reply at paras. 393-394; Claimant's Post-Hearing Submissions at paras. 22-52.

[68] Statement of Claim at para. 362; Reply at paras. 395-404; Claimant's Post Hearing Submissions at paras. 53-58.

[69] Statement of Claim at paras. 384-395.

eight years; (c) the activities carried the requisite degree of risk; and (d) the investment activities contributed to Kyrgyz economic development.[70]

146. The Claimant points out that in contrast to other investment arbitration cases, the Claimant's participation in the 2018 Tender was not a one-off, first-time attempt to make an investment in an entirely new market. The 2018 Tender was part of the Claimant's long-term plan to invest and work in the Kyrgyz market and the CIS region.[71] It is the Claimant's position that winning the 2018 Tender meets all of the criteria of an "*investment*" under the BIT and/or under international law. The Claimant's right to execute the e-passports contract is the type of "*economic rights*" defined under the terms of the BIT. The Claimant denies that the Respondent is able to rely on provisions of the 2018 Tender which purport to absolve the procuring entity of responsibility for legal cancelling the tender, in particular in cases like the present one where the Claimant was illegally deprived of its ability to obtain the benefits of its tender victory.[72]

147. The Claimant also submits that the incorporation of Garsu Pasaulis LLC, which is clearly a qualifying investment under Article 1(2) of the BIT, is relevant for the present dispute. Implementation of the e-passports contract would have required extensive use of the local company, its personnel, offices and know-how and all that would be used for the purposes of the e-passports contract. The Claimant not only invested substantial amounts, but also provided substantial know-how, product design, counterfeit expertise, installation and maintenance of IT systems and training to Kyrgyz's public officials. Systems installed and developed by the Claimant in the Kyrgyz Republic are successfully used to this date. The Claimant argues that without the successful implementation of the previous contracts and the years of investment and development of know-how, the Claimant would not have had any chance of successful participation in the 2018 Tender and execution of the e-passports contract. It is well-established that qualified personnel and know-how brought by a contractor to the host State are considered investments.[73]

148. The Claimant further contends that its 'international reputation' is a protected investment, which has been destroyed by the Respondent not just in the Kyrgyz Republic but also

[70] Statement of Claim at para. 402.
[71] Statement of Claim at paras. 322, 358; Reply at para. 404.
[72] Statement of Claim at paras. 353-363; Reply at paras. 405-410.
[73] Statement of Claim at paras. 325-352; Reply at paras. 420-428.

around the world. The Claimant notes that Article 1(1) of the BIT specifically includes business reputation. The Claimant alleges that it invested years and vast amounts of money to build up a respectable reputation in the very specific global market of e-government services and security printing, including within the Kyrgyz Republic.[74]

Tribunal's decisions

149. The first of the Respondent's objections to jurisdiction is on the basis that the Claimant's claims do not concern any "investment" made in the Kyrgyz Republic within the terms of the BIT. The Tribunal notes that the Respondent does not dispute that the Claimant itself meets the definition of an investor under the BIT, but has instead focused this objection on the nature of the Claimant's alleged investments. For good order, the Tribunal notes that the Claimant is a company incorporated in Lithuania, one of the Contracting Party States under the BIT. The Tribunal is therefore satisfied that the Claimant meets the definition of "Investor" within the meaning of Article 1(2)(b) of the BIT, which reads: "*2. 'Investor' means in respect of both Contracting Parties: … b) Legal persons incorporated or constituted under national legislation of the Contracting Party*."

150. The starting point for the analysis of the term ¨investment¨ is the language of the BIT, wherein the definition of Investment can be found at Article 1(1). The Parties have also made reference to Article 8(1). The Parties' respective translations of those provisions of the BIT are substantially similar, although the Tribunal sets out both versions below as there is some dispute as to the precise translations.

Claimant's translation[75]	**Respondent's translation[76]**
"***Article 1*** ***Definitions*** *For the purposes of this Agreement:* *1. 'Investment' means any type of assets invested by an investor of one Contracting Party in the territory of the*	"***Article 1*** ***Definitions*** *For the purposes of this Agreement:* *1. 'Investment' means any type of assets invested by an investor of one Contracting Party in the territory of the*

[74] Statement of Claim at paras. 422-438.
[75] Exhibit [C-1].
[76] Exhibit [RLA-0019].

other Contracting Party in accordance with the national legislation of the latter Contracting Party (of the host country of the Contracting Party), including, but not limited to, in particular: *a) movable and immovable property and other rights, such as mortgage claims, liens, pledges and similar rights;* *b) shares, debentures and other forms of participation in corporate business,* *c) monetary claims or requests to carry out any other actions of economic value;* *d) intellectual property rights, in particular, copyrights, industrial property rights (such as rights to patents, industrial designs and models, trade marks, trade names) and know-how (non-patented practical information);* *e) business reputation;* *f) any right to engage in economic activities under contract and any licenses, including concessions for exploring, extracting and exploiting natural resources.* …	*other Contracting Party in accordance with the national legislation of the latter Contracting Party (of the host country of the Contracting Party), including, but not limited to, in particular:* *a) movable and immovable property and other rights, such as mortgage claims, liens, pledges and similar rights;* *b) shares, debentures and other forms of participation in corporate business,* *c) claims to money or to any other performance having an economic value;* *d) intellectual property rights, in particular, copyrights, industrial property rights (such as rights to patents, industrial designs and models, trademarks, trade names) and know-how (non-patented practical information;* *e) business reputation;* *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.* …
Article 8 ***Settlement of investment disputes*** *1. Disputes between one Contracting Party and the other Contracting Party's*	***Article 8*** ***Settlement of investment disputes*** *1. Disputes between one Contracting Party and the other Contracting Party's*

investor relating to the latter's investments in the territory of the Contracting Party's home country where appropriate shall be settled amicably…"	*investor relating to the latter's investments made in the territory of the Contracting Party's home country where appropriate shall be settled amicably…*"

151. Based on the foregoing provisions, in order to meet the definition of "investment" and qualify for protection under the BIT, the Tribunal finds that the investment must: (i) satisfy the definition of "assets" in Article 1(1), including by reference to the non-exhaustive categories set out therein; (ii) must be in accordance with the applicable national law; and (iii) the investment must be in "the territory of the Other Contracting Party", *i.e.* in the Kyrgyz Republic. These elements will be discussed in more detail in the subsequent sections.

152. The Tribunal will apply this analysis to the Claimant's alleged investment(s), starting with the Claimant's primary investment claim, namely the Claimant's "winning" of the bid for the 2018 Tender.

(A) 2018 Tender

(i) Whether the alleged investment satisfies the definition of Investment in Article 1(1)

153. At the outset, the Tribunal notes that Article 1(1) of the BIT contains a non-exhaustive list of assets which may qualify as investments. The operative part of the Article provides that the definition of "Investment" will cover "*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*". Pursuant to this provision, "*any type of assets*" which have been invested, in accordance with the laws of the Contracting Party State in which those assets were invested, will qualify as a protected investment. This is a broad definition. The use of the word "any" in "any type of asset" indicates the absence of limitations or restrictions on assets which may qualify as an Investment under the BIT. This type of broad asset definition is not unusual in BITs, and language such as "every

kind of asset" suggests that the term "*embraces everything of economic value, virtually without limitation*".[77]

154. The Claimant's primary argument is that its rights in connection with winning the 2018 Tender qualify as a protected investment under the BIT. In support of this, the Claimant has relied on the first part of sub-clause 1(1)(f) – "*any right to engage in an economic activity under [a] contract*". The Tribunal notes that the Parties' respective translations of this part differ slightly, with Claimant providing "*activity under contract*" and the Respondent providing "*activity under a contract*". However, the Parties have not placed any weight on this distinction, and the Tribunal does not consider it to be an important factor for its consideration when interpreting the clause.

155. According to the Tender Documentation[78] which governed the 2018 Tender, winning the tender for the e-passports contract is described in the following way:

> "***26. Criteria for the award of the Contract***
>
> *26.1 Except as provided for in Art. 25 of this instruction, <u>the Buyer shall award the Contract to the tenderer</u> whose Tender Application is found to be in substance meeting the requirements of the tender documentation and who has offered the lowest assessed value of the tender application provided that this tender is recognized:*
>
> > *a) eligible in accordance with this instruction;*
> >
> > *b) meeting the relevant qualification requirements in accordance with this instruction;*
> >
> > *c) on the basis of compliance with the criteria established in the tender documentation.*" (emphasis added)

156. It follows from this language that the winner of the Tender shall be awarded the Contract. Although the Tender Documentation does not define "the Contract", it is clear from its cover page that it refers to the contract for e-passports. Put differently: the winner of the Tender has obtained the right to sign the contract for e-passports.

157. In the view of the Tribunal such a right is covered by the language in Article 1(1)(f) of the BIT - "*any right to engage in an economic activity under contract*", as interpreted on the basis of Article 31(1) of the Vienna Convention on the Law of Treaties, where the ordinary

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[77] UNCTAD, Scope and Definition, UNCTAD Series on Issues in International Investment Agreements II (United Nations, 2011) [E-12] at p.24.
[78] Exhibit [C-2].

meaning of a treaty term is always the starting point for treaty interpretation. The treaty text means what it says: any right means any right. The other elements to be taken into account under Article 31(1) of the Vienna Convention – good faith, context and the object and purpose of the treaty – support this interpretation of Article 1(1)(f) of the BIT. The winner of the 2018 Tender, *i.e.* the Claimant, has obtained the right to sign the contract for the production of e-passports, which in turn is an "economic activity".

158. The Tribunal notes that the Respondent does not appear to contest that the winning of the 2018 Tender may potentially fall within the scope of the language at sub-clause 1(1)(f) as a "right" to engage in economic activity. The Respondent argues, however, that such rights do not qualify as a protected Investment under the BIT, because such rights "*do not have any distinct economic value under Kyrgyz law*".[79] The Claimant's right – so the Respondent says – was limited to the right to enter into a public procurement contract, such right being separate and different from the rights it would have received had the e-passports contract been concluded. The Tribunal will address this argument in Section VIII below. At this stage of the analysis, the Tribunal concludes that when the Claimant won the 2018 Tender, it obtained a right to "*engage in an economic activity under contract*" as stipulated in Article 1(1)(f) of the BIT.

(ii) Whether the Investment was made in accordance with the national legislation of the Respondent

159. The Respondent has argued that any Investment that the Claimant may have had in the Kyrgyz Republic was obtained through corruption and that the Tribunal therefore lacks jurisdiction and/or that the Claimant's claims are inadmissible. The corruption argument put forward by the Respondent does not go to the definition of Investment in Article 1 of the BIT. The Tribunal will deal with the question of corruption in Section VI (B) below.

160. The Tribunal has reviewed and considered the evidence relating to the conduct of the 2018 Tender, up to and including the announcement of the Claimant as the winning bidder on 1 February 2019, and finds that it was done in accordance with the applicable regulations and relevant laws. This conclusion is based on, *inter alia*, the following observations:

[79] Respondent's Post-Hearing Submissions, para. 52.

(i) The Tender Commission was properly appointed in accordance with the applicable regulations on 3 October 2018.[80]

(ii) The 2018 Tender was approved on 19 October 2018 and launched on 23 October 2018 in accordance with regulations and in a transparent manner.[81]

(iii) The process by which clarifications were sought from the bidders by the Working Group concerning qualifications requirements was transparent and justified.[82] The Tribunal does not consider that it was necessary or in violation of Kyrgyz law for the Tender Commission to declare that the 2018 Tender was failed due to the absence of the bidders having consented to the General and Special terms of the e-passport contract.

a. There was no harm to the process, and no delay, in requesting the existing bidders to provide this confirmation. The decision to do so was taken after internal consultations within the SRS, including having heard from legal experts. The Tribunal does not consider the conclusions reached in the Sentencing Decision to be sufficiently justified in light of the evidence. The fact that the SRS sought to remedy the "defect" in the bids, rather than cancel the entire process, does not support a finding of corruption or criminal intent.[83]

b. Article 29(2) of the Law on Public Procurement expressly permits the SRS to, in the course of assessing and comparing bids, to request clarifications from the bidders. The Tribunal does not find any evidence that Article 31(2)(1) of the Law on Public Procurement, which provides that a tender shall be recognised as invalid if "*[a]ll bids were rejected*", was triggered.[84] The continuation of the 2018 Tender following the request for the bidders to confirm their consent appears to have been the most logical and the most efficient way for the 2018 Tender to be conducted in the circumstances. The Tribunal does not consider this

[80] See Exhibit [C-066], Order no. 297 dated 3 October 2018.
[81] Exhibit [C-067], Minutes No. 1 dated 19 October 2018.
[82] Exhibit [C-067], Minutes No. 3 dated 17 December 2018.
[83] Exhibit [R-063], Sentencing Decision at p. 5.
[84] Exhibit [CER-2-Exh-4], Kyrgyz Law on Public Procurement (29 March 2018 version) ("**Law on Public Procurement**").

confirmation of the 2018 Tender as evidence to establish corrupt motives working in favour of the Claimant.[85]

(iv) The Tribunal finds that the rejection of the bids of Banknote Factory NBRK, Veridos and Mühlbauer were transparent and on the basis of objective criteria and shortcomings in their bids, and that the selection of the Claimant as the winning bidder was transparent and based on objective criteria.[86]

161. The Tribunal does not conclude that the process undertaken by the SRS and the Tender Commission was in violation of the applicable regulations and guidelines in the way that it conducted the 2018 Tender leading up to the Claimant being awarded. Further, as the Claimant has noted, the 2018 Tender was conducted by agents of the Respondent across different parts of the government, and the Respondent cannot now rely on its own alleged mistakes to invalidate the process.

162. Subsequent to the Claimant having been declared the winner of the 2018 Tender, the Tender was purportedly cancelled by the Respondent. The Claimant challenges that any lawful cancellation of the Tender took place. The purported cancellation of the 2018 Tender seems to have been based on the same or similar concerns that led the Respondent to initiate its corruption investigation. The Tribunal will deal with the purported cancellation of the 2018 Tender in section VII (A) below.

163. Therefore, for purposes of the definition of Investment in Article 1 of the BIT, the Tribunal concludes that up, until and including the announcement of the winner of the 2018 Tender, the Tender was objectively organized in a transparent manner and in accordance with relevant laws and regulations in the Kyrgyz Republic.

164. The Tribunal thus finds that this requirement in Article 1 of the BIT has been met.

(iii) Whether the Investment has been invested in the territory of the Kyrgyz Republic

165. The Respondent is arguing based on Article 1 of the BIT that the Investment must be "invested" in the territory of Kyrgyzstan. It also refers to Article 8 of the BIT, dealing with the settlement of disputes, rather than the definition of Investment, arguing that an Investment must be "made" in the territory of the host State. The Respondent's argument

[85] Exhibit [C-067], Minutes No. 3 dated 17 December 2018.
[86] See Exhibit [C-067], Minutes No. 4 dated 20 December 2018; Exhibit [C-5] Information about 2018 Tender.

is based on the idea that only an investment which is in completed form is protected under the BIT, as opposed to a pre-investment activity which is not so protected in Respondent's view.

166. The Tribunal finds that the Respondent's submission that the investment must be "made" is not helpful in distinguishing between qualifying and non-qualifying investments in the BIT. Article 1 has a broad scope, covering "*any type of assets invested* in the territory of the Other Contracting Party¨, including a non-exhaustive list of categories of potential investments, such as "*any right to engage in economic activities under the contract …*".

(i) The language of this clause does not impose a requirement that an investment has been "made" in a "completed form". The clause expressly extends the definition of investment to a right to "*engage in economic activities under contract*" without any additional requirement. As such, if an investor has acquired rights to engage in economic activity in the territory of the host State, without having necessarily "made" or "completed" an investment, that satisfies the language of Article 1(1)(f) of the BIT. It is not possible to add requirements which are not found in the text of a treaty, in this case the BIT.

(ii) The comparisons to the language of NAFTA, 2012 US Model BIT and 1997 Kyrgyzstan-Germany BIT are not of assistance to the Respondent on this point. Simply because other treaties set out additional language in relation to investments such as "seeks to make", "attempts to make" or "is making", this does not lead to the conclusion that an omission of similar language in the BIT means that only "completed" investments will qualify for protection.

(iii) The Respondent's reliance on *Saipem v. Bangladesh* is similarly unhelpful. While the definition of investment was similar in that treaty to the BIT, the tribunal in that case noted that its jurisdiction was conditioned upon the Claimant "*having made an investment within the meaning of the BIT*". The key phrase here is "*within the meaning of the BIT*". Put differently: it is the definition of investment and the other provisions within the treaty in question which will, and must, govern whether an investment qualifies as a protected investment under that treaty. The Tribunal can only focus on the relevant language of the BIT, to wit Article 1(1)(f).

167. Accordingly, the Respondent's attempt to distinguish between an investment in the making and an investment made is not helpful for determining whether the Claimant's investment is a qualifying one under the BIT. The Tribunal is not seeking to determine whether the Claimant was merely contemplating an investment as opposed to having completed an investment; the Tribunal is seeking to determine whether the Claimant has obtained rights which are subject to legal protection and qualify as an Investment under the BIT.

168. Similarly, the Respondent's arguments that the term "Investment" must be interpreted so as to incorporate elements of contribution, a certain duration, and risk are neither helpful nor necessary for the Tribunal's analysis.

169. The Tribunal is also not persuaded by the Respondent's submissions that other Salini-esque criteria should, or indeed could, be introduced in this case. The plain language of the BIT does not impose such additional criteria for an investment to qualify for protection. The Tribunal cannot add language or qualifications to the BIT which are not to be found in the BIT.

170. For the foregoing reasons, the Tribunal finds that the Claimant's alleged investment – the winning of the bid for the 2018 Tender and the resulting right to engage in economic activity under contract – satisfies the definition of investment in Article 1(1) of the BIT.

(iv) Whether the Claimant acquired legal rights under the applicable national law

171. The Respondent has argued that in order to be protected, the investment *"must be legally recognized and protected under the laws of the host State."* This is on the basis of the language of Article 1(1) of the BIT stating that an investment should be "*in accordance with the national legislation of the latter Contracting Party…*" In its submissions, the Respondent appears to agree that if the Claimant is able to establish that it obtained a legally recognized right under Kyrgyz law *vis à vis* a protected investment under Article 1(1)(f), that would be sufficient for the investment to qualify.[87]

172. The Respondent argues that the Claimant's purported investment fails as it did not have any protected rights under Kyrgyz law, as required by the BIT. The Respondent takes the position that any rights obtained were procedural in nature, and that the Claimant could

[87] Statement of Defence at para. 138.

not have any contractual rights up until the signing of the actual contract concerning the production of e-passports.

173. In this context, the Tribunal notes that the parties' respective experts appear to agree that the tender which was won constituted something with economic value under Kyrgyz law. At the hearing, as well as in their respective reports, both experts appeared to confirm this agreement:

(i) The Claimant's expert, Prof. Alekina, took the clear position that the winner of the 2018 Tender acquired an economic right that was protected in law:

a. "*[A]ccording to the results of the Tender, Garsu Pasaulis acquired an exclusive right to conclude the contract, which is a property right and is legally enforceable in the event of an infringement.*"[88]

b. "*The winner of the bid acquired the right to sell the forms of the passport through the signing the agreements for public procurement. I believe that this right has an economic value and is protected by law, and this right, the right to sell the passport forms, appears to the winners not directly, but through the need to conclude an agreement as a result of the tender procedure.*"[89]

c. "*As you can see from this statement by Madina Davletbayeva, there are no significant evasions between our conclusions that that the winner of the tender acquired rights as a result of the tender. Both of us believe that this right did exist. The difference between us is the value or is about the value of the right. I believe that GP acquired this right and this right was taken from GP incorrectly. The second expert believes that the right did exist but the right was suspended as a result of the legislation. So the key issue where our opinions diverge is the basis for the suspension or the terms of taking this right from the winner of the tender.*"[90]

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[88] Alekina Second Report at paras. 24.

[89] Transcript Day 3, 38:11-38:17.

[90] Transcript Day 3, 39:1-39:14.

(ii) This agreement appears to be confirmed by the evidence provided by Ms. Davletbayeva, both in her written reports and at the hearing:

a. "*I do not deny that the Claimant's rights as the winner of the Tender for procurement of passports were inherently proprietary rights, 'that exist in civil law, have a value and are subject to legal remedies.' My main idea is that such rights must be clearly distinguished from the rights that Garsu Pasaulis would have acquired following the conclusion of the public procurement contract, as they have different content, levels of protection and, accordingly, different 'value'.*"[91]

b. *"...after the Claimant was declared the winner of the Tender for procurement of passports on February 1, 2019, he acquired the exclusive right to enter into a public procurement contract with the procuring entity, the SRS. The right had its own legal regime as defined by the provisions of the law of KR "On Public Procurement" and was distinct from the 'right to supply passport forms', which would only arise once (and only) together with the conclusion of the public procurement contract.*"[92]

c. "*If you are the winner in the tender, assuming what you said, then this right has a certain value which pertains rather to reputational value. So what is economic value. It is the possibility to extract some kind of profit. It is clear that entrepreneurs enter such relationships in order to earn money. Since in this case it's possible only after conclusion of a contract and performance of such contract, so until the contract is concluded, you can't speak about economic value.*"[93]

d. "*Q: Once the procuring entity announces the winner of the tender, does it acquire any obligations?*

[91] Davletbayeva Second Opinion at para. 23.
[92] Davletbayeva Second Opinion at para. 26
[93] Transcript Day 3, 103:7-103:16.

A: By declaring the winner? Of course, they accept an obligation to conclude a contract in the future within the time limits and on the terms envisaged in the tender document and in the law of the country.

Q: And if I can take you to paragraph 43 of your second expert report, you suggest that Garsu Pasaulis had the right to bring an action in court to compel the signing of the contract; is that correct?

A: Yes, they had such right. Moreover, in this item I continue to say that they had several avenues to protect their rights. That is, for example, filing an administrative claim, returning to an administrative court, and as far as I know, neither of the claims had been launched by Garsu Pasaulis."[94]

174. From the above passages, the Tribunal concludes that Ms. Davletbayeva has clearly expressed the opinion that the Claimant acquired legally protected rights by winning the 2018 Tender, but that such rights are distinct from the rights the Claimant would have acquired upon signing the e-passports contract. She distinguishes those two rights by taking the position that the right that the Claimant acquired upon winning the 2018 Tender had its own legal regime as defined by the provisions of the law of Kyrgyz Republic "On Public Procurement". From this, Ms. Davletbayeva takes the position that so long as this right was dealt with through the relevant provisions of Kyrgyz law, that there would be no breach of the obligations of the Respondent.

175. However, the Tribunal notes that it is not necessary for it to consider whether the right obtained by the Claimant was "*dealt with through the relevant provisions of Kyrgyz law*" at this stage of the analysis. For the purposes of jurisdiction, the Tribunal is seeking to determine whether the Claimant acquired sufficient economic rights under Kyrgyz law so as to have a qualifying investment under Article 1(1) of the BIT.

176. In consideration of the Parties' submissions, including the views of the experts, the Tribunal finds that the Claimant obtained rights upon winning the 2018 Tender that are recognized and protected under Kyrgyz law. Whether those rights were taken away or otherwise violated in breach of the BIT is an analysis of the merits of the case, which the

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[94] Transcript Day 3, 105:9-106:24.

Tribunal will undertake in the relevant section of this Award below. In the case before us, it is clear that once the Claimant was named winner of the 2018 Tender it acquired concrete economic rights under Kyrgyz law. This included, at a minimum, the right for the Claimant to proceed to execute the e-passports contract in accordance with the relevant provisions and procedures under Kyrgyz law. Such right qualifies as an Investment under Article 1(1)(f) of the BIT.

(B) Claimant's other alleged investments

177. The Claimant has raised other alleged investments to establish jurisdiction, including: (i) the establishment of a local company, Garsu Pasaulis LLC; (ii) the 2013 and 2016 excise stamp production contracts; (iii) the Claimant's provision of training and know how in the Kyrgyz Republic; and (iv) the development of the Claimant's business reputation. As the Tribunal has already established its jurisdiction in this matter in relation to the 2018 Tender, it will not address these other alleged investments in great detail.

178. With regard to the establishment of Garsu Pasaulis LLC in the Kyrgyz Republic, the Tribunal considers that it is clear that this qualifies as an investment for the purposes of the BIT. Under the definition of investment at Article 1(1)(b), the holding of shares in a company may qualify as an investment. It is not disputed that the Claimant founded this company, and that the Claimant remains the majority shareholder, nor is it in dispute that shares in a company located in the host state attract protection under national law.

179. It is the Claimant's evidence that Garsu Pasaulis LLC was originally established for the purposes of execution of local contracts with the Kyrgyz Government, as a local company. The incorporation of a local company was required because the Claimant was required to pay import duties, assume the risks and costs associated with the transportation of products to the Kyrgyz Republic, provide training in relation to the products being provided and to establish and develop its business domestically. These are the type of activities which the Tribunal would expect a locally incorporated company to undertake, and the Tribunal accepts that the Claimant intended to use the local company for the purposes of the e-passports contract.

180. As required by Article 8(1), the Parties agree that a dispute must be "relating to" a qualifying investment for an arbitral tribunal to have jurisdiction. The Respondent submits that this requires that the alleged violations of the BIT by the State must be "relating to"

a protected investment, in that there is a direct connection between the claim and the jurisdictional basis it rests upon.[95]

181. The Tribunal does not draw any distinction between existing or new investments, so long as there exists a connection between the actions of the State and the investment, and the latter otherwise qualifies under the BIT. At a minimum, as required by Article 8(1) of the BIT, the Tribunal accepts that to qualify for protection the alleged dispute must "relate" to the investment. However, the Respondent's arguments go beyond the language of the clause in asserting that in order to establish jurisdiction over an alleged protected investment, the alleged violations of the BIT must concern and directly affect the very asset and/or business project that is presented as the basis for the Tribunal's jurisdiction. The Tribunal considers that the term "relate" is different from terms such as "concerns", "directly affects" or "is based on", in that "relate" requires less of a connection between the investment and the dispute before the Tribunal. In the Tribunal's opinion, it is sufficient to establish jurisdiction for a qualifying investment if it relates to the dispute at hand.

182. While the Respondent argues that the establishment of Garsu Pasaulis LLC and the associated activities it undertook had no connection with the 2018 Tender and the dispute, the Tribunal does not accept that this accurately reflects the facts. As far as the Claimant is concerned, the work that was supposed to be done for the e-passports contract pursuant to the 2018 Tender, both related to and would be carried out in part by Garsu Pasaulis LLC. The Tribunal finds that this is sufficient to establish that the locally incorporated company and its activities in the Kyrgyz Republic "relate" to the present dispute before the Tribunal, and therefore qualify as investments for the purposes of Article 1(1) of the BIT.

(B) Respondent's Second Objection: The Claimant's claims are inadmissible on the basis that they were secured in the Kyrgyz Republic through corruption

Respondent's position

183. The Respondent alleges that the Claimant's claims are inadmissible, as its 'winning' of the 2018 Tender was obtained through bribing Kyrgyz officials. It is a general principle

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[95] Statement of Defence at para. 145-149.

of international law that an investment procured in violation of host State law, through fraudulent or criminal conduct, in particular bribery, or in violation of the fundamental requirements of good faith and fair dealing, is not entitled to the protections of international investment and arbitration.[96] Further, it should be considered that arbitrators have a duty to prevent corrupt investors from benefiting of their criminal activities, and should therefore avoid aiding the commission of corruption by allowing a party, in a favourable award, to benefit from the proceeds of its corrupt activities.[97]

184. It is the Respondent's position that allegations of corruption are to be proven with circumstantial evidence such as 'Red Flags', which has been widely recognized as a general principle of international law for a long time and more recently established in investor-State disputes. The Respondent submitted the following description of how "Red Flags" operate in its submissions:[98]

> "*'[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.*"

185. The Respondent submits that there are "*three main non exhaustive lists*" which summarize the main "Red Flags" used to detect corruption:[99]

(i) The Tribunal in *Metal-Tech v. The Republic of Uzbekistan* stated that the following constitute "Red Flags": (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

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[96] Statement of Defence at paras. 191-205.
[97] Statement of Defence at paras. 206-216.
[98] Statement of Defence at para. 200.
[99] Statement of Defence at para. 232.

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'.[100]

(ii) The 2010 ICC Guidelines on Agents, Intermediaries and Other Third Parties provided a list of "Red Flags", which included, but was not limited to:[101]

a. 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;

b. 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);

c. The Third party has a close personal or family relationship, or business relationship, with a public official or relative of an official;

d. The Third party does not reside or have a significant business presence in the country where the customer or project is located;

e. 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);

f. 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;

g. The Third party's commission or fee seems disproportionate in relation to the services to be rendered;

h. The Third party requires payment of a commission, or a significant portion thereof, before or immediately upon the aware of a contract;

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[100] *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 October 2013 [RLA-60] ("***Metal-Tech***").

[101] 2010 ICC Guidelines on Agents, Intermediaries, and Other Third Parties [RLA-85] pp.6-7.

i. 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

j. The Third party requests unusual 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 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.

(iii) The Basel Institute on Governance released a toolkit for arbitrators in 2019 which identified the following "Red Flags":[102]

a. The prevalence of corruptive behaviour in the country as revealed by certain international organizations or NGO's like Transparency International's Corruption Perceptions Index;

b. Criminal investigations have been carried out prior to the arbitration proceedings, or in the meantime, by domestic authorities;

c. The attitude of the company towards newest regulation regarding compliance;

d. 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);

e. The company has already been convicted of such offences and does not provide any indication that it worked to address the issue.

[102] Basel Institute on Governance Toolkit [RLA-63], p.5.

Further red flags identified by the Basel Institute 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.

186. Due to the hidden nature of corruption, the Respondent argues that cases where a State can prove, beyond a reasonable doubt, that an alleged investor engaged in corrupt activities are extremely rare. As such, circumstantial evidence and the use of 'Red Flags' should now be considered as the applicable standard of proof with regards to allegations of corruption. Even in cases where the host State did not prosecute the allegedly corrupt activities of the investor, it can still decide to raise a jurisdictional objection grounded on these corrupt activities before an investor-State tribunal.[103]

187. The Respondent submits that it has established comfortably above the applicable evidentiary standard that the Claimant's purported investment – the 'winning' of the 2018 Tender – was acquired through a corruption scheme involving bribery of multiple officials of the SRS. The Respondent makes these allegations primarily on the basis of the Sentencing Decision rendered following the 2018 Tender Investigation, the signed minutes of interviews conducted by the GKNB which lead to the Sentencing Decision, as well as other circumstantial evidence. It is the Respondent's case that those sources establish the following alleged facts and circumstances:[104]

(i) In early Spring 2016, Mr. Abdullayev met with [redacted], the Claimant's representative, where the Claimant expressed its intention to participate in the forthcoming 2018 Tender. Through May and June 2016, further meetings were held at which it is alleged discussions of "*very significant compensation*" was offered to Mr. Abdullayev and other government officials for arranging for the 2018 Tender to be won by the Claimant. Mr. Abdullayev also sought the Claimant's advice on the technical parameters for the 2018 Tender, and the 2018 Tender documents were shared with the Claimant in advance.[105]

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[103] Statement of Defence at paras. 217-240.

[104] Statement of Defence at paras. 241-244; Rejoinder at paras. 141-170.

[105] In support of these allegations, the Respondent relies primarily on the Sentencing Decision [R-63] and the Minutes of Additional Questioning of Mr. [redacted] [R-64]. The Respondent also refers to Whatsapp exchanges between [redacted] [redacted] and [redacted] [R-94] as well as evidence of the 2018 Tender documents being found on Mr. Abdullayev's computer containing comments received from the Claimant [R-95].

(ii) In Autumn 2018, when the 2018 Tender was announced, Ms. [redacted] (then Chairperson of the SRS) organized a group of high-level SRS employees, including Messrs. Abdullayev, Bakchiev and Sarybaev to "*receive illicit material assets*" (*i.e.* bribes).[106]

(iii) Between November 2018 and January 2019, various irregularities occurred during the analysis process for the 2018 Tender. This included: (i) undue influence by Ms. [redacted] and others, on behalf of the Claimant, to allow the 2018 Tender process to continue despite deficiencies in all five initial bids; and (ii) the formation of the Working Group by Ms. [redacted] to analyze the two remaining bids, compromised of individuals who did not have the required qualifications and who performed a superficial review that resulted in the Claimant being selected.[107]

(iv) For his 'services' in relation to the 2018 Tender, Mr. Abdullayev received USD 20,000 in cash from Mr. [redacted] as a 'thank you' from the Claimant.[108]

(v) Upon receipt of the Mühlbauer Complaint and the IDEMIA Complaint, Ms. [redacted] and Messrs. Abdullayev and Bakchiev exerted influence on the members of the Independent Interdepartmental Commission, ensuring that the two complaints were dismissed.[109]

188. It is the Respondent's case that that the foregoing factual allegations are not only supported by circumstantial evidence, but also by the Sentencing Decision which condemns some of the individuals involved in the above corruption scheme, further

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[106] In support of this allegation, the Respondent relies primarily on the Sentencing Decision [R-63] at pp. 5-6. The Respondent also refers to the Final Procurement Protocol dated 10 December 2018 [R-97], and the Minutes of Questioning Mr. Sarybaev [R-98] at pp. 4-5 and the Additional Minutes of Questioning Mr. Sarybaev [R-99] as well as alleged corroborations from Mr. Baltabaev ([R-100] at pp. 2-3 and [R-101], Mr. Bakchiev ([R-114], pp.2-3, 6-7) and Ms. Abdymomunova, expert to Kyrgyz Ministry of Finance ([R-103] and [R-103]).

[107] In support of these allegations, the Respondent relies primarily on the Sentencing Decision [R-63] at pp. 6-7. The Respondent also refers to signed testimony of members of the Working Group ([R-116], [R-117] and [R-118]).

[108] In support of this allegation, the Respondent relies primarily on the Sentencing Decision [R-63], as well as the Minutes of Interview with Mr. Abdullayev [R-78]. The Respondent also relies on evidence from Mr. Abdullayev's spouse and four others who stated that they received cash from Mr. Abdullayev at the relevant point in time [Statement of Defence at para. 160].

[109] In support of these allegations, the Respondent relies primarily on the Sentencing Decision [R-63] and the Interview Minutes of Mr. Abdullayev [R-78] at pp.7-8. The Respondent also refers to interview with other officials, including: Mr. Backiev ([R-114] at pp.6-8, 11); Ms. Abdymomunova ([R-102] at p.5); and Ms. Tupchilbaeva ([R-119] at p.4); Mr. Kapushenko ([R-120] at p.3]). The Respondent also refers to an exchange between [redacted] and [redacted] following dismissal of the Complaints [R-68].

corroborated by signed testimonies and forensic evidence, and from the fact that the guilty verdicts which followed were never appealed. While the Kyrgyz Republic may not have enough evidence at its disposal to formally charge the Claimant and its officers with corruption, the Respondent submits that this does not prevent the Tribunal, based on the lower standard of proof and the record before it, from concluding that the Clamant was undeniably involved in rigging the 2018 Tender in its favour.[110]

Claimant's position

189. The Claimant does not contest the Respondent's suggestion that a tribunal in an investor-State case has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the State. However, the Claimant submits that this principle has no relevance to the present case, as the Respondent has failed to prove its "*baseless*" corruption allegation. The Claimant argues that no evidence of corruption was presented by the Respondent, and that the documentation relied upon is insufficient to support the allegations of corruption.[111] The Claimant also argues that the Respondent effectively "abandoned" its corruption allegations at the evidentiary hearing, based on the comments given by the Minister of Justice of the Kyrgyz Republic, and the failure to cross examine the Claimant's witnesses on the events relating to the alleged corruption.[112]

190. In light of the Respondent's admissions that it could not bring formal criminal charges, the Claimant states that it is clear that the Respondent never had and could not have any convincing evidence for its vast corruption allegations, which evidence simply does not exist. The Claimant argues that, having been ordered by the Tribunal to produce specific evidence supporting its corruption allegations,[113] the Respondent has failed to provide anything of evidentiary value.[114]

191. The Claimant submits that corruption allegations must meet the standard of "*clear and convincing evidence*", and that the Respondent's attempts to lower the evidentiary bar to

[110] Statement of Defence at paras. 241, 245-247.
[111] Reply at paras. 433-435.
[112] Claimant's Post-Hearing Submissions at paras. 70-84.
[113] As part of the document production phase, the Respondent was ordered, *inter alia*, to produce documents: (a) related to the criminal investigation of the 2018 Tender proceedings; (b) proving that the Claimant and/or its legal affiliates have been notified on the allegations of corruption or other illegal actions against them (see Tribunal's decision on Claimant's Document Request No. 14 at Appendix A to the Tribunal Order dated 30 June 2022).
[114] Reply at paras. 436-439.

the "*means or circumstantial evidence*" or "*red flags*" should be rejected.[115] Even if a lower standard of proof is applied, the Claimant argues that no finding of corruption can result from the patchy evidence presented by the Respondent. The Claimant argues that a substantial part of the Respondent's corruption allegations rest on a forced testimony of a witness, Mr. ██████ who could not provide any details of alleged meetings or other relevant facts. According to the Claimant, the Respondent's continuing insistence on its false corruption allegations, even after its investigation came up empty, only bolsters the Claimant's case.[116]

192. The Claimant relies on, *inter alia* the following points in support of its dismissal of the Respondent's corruption allegations:

(i) The Claimant and its affiliates had no undue or any other influence over the organization of the 2018 Tender, and this is shown by the Respondent's own documents. Designation and approval of the 2018 Tender documentation were exclusively controlled by Respondent's authorities or those under its authorities' control. Neither the Claimant nor its affiliates were members of the commissions which were in charge of development of parts of the 2018 Tender documentation. Aside from being approved by government agencies (including the SRS, GKNB and State Committee on Information Technology and Communication), international organisations were consulted (including the Organization for Security and Co-operation in Europe (OSCE)). The Claimant and its affiliates neither participated nor exerted influence over the internal organization of the 2018 Tender.[117]

(ii) The allegations that the Tender Commission was unduly influenced in the Claimant's favour are baseless and manipulative. The record in the arbitration shows that the Tender Commission found that all bidders had failed to provide their consent to the General and Special Terms & Conditions and that, following internal consultations and opinions from Kyrgyz legal experts, the Tender Commission submitted requests to all five bidders to accept the General and Special Terms & Conditions. At no point did the Tender Commission decide to

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[115] Reply at paras. 176; 440-458.
[116] Reply at paras. 459-465.
[117] Reply at paras. 252-281.

"*annul*" or "*cancel*" the 2018 Tender. It has also been demonstrated that the three bids which were rejected during the 2018 Tender – those of Banknote Factory NBRK, Veridos and Mühlbauer – were rejected on the basis of shortcomings in their bids.[118]

(iii) In the course of his interview with the GKNB, Mr. Abdullayev did not present any details at all about the alleged bribing, as to who exactly gave him the money, or when or why. With regard to the alleged exchange of money with Ms. [redacted] Mr. Abdullayev stated that "*there were no details mentioned all, or clarifications, explanations from where, why who, etc., i.e., it was a very dry statement, here you go, 20, and there was a reference to the first meeting, but at the same time there were no details where from, why, no such details were said by her*."[119]

(iv) There is no evidence that there was any improper influence of the members of the IIC. The Protocols issued by the IIC are silent as to whether the relevant individuals made any attempts to approach and/or manipulate the members of the IIC during the in-person examination of the Mühlbauer Complaint and the IDEMIA Complaint. SRS's correspondence with the IIC similarly does not contain any such evidence, and Mr. Abdullayev's attendance at the meetings of the IIC does not mean that he influenced the IIC's decisions.[120]

(v) The contents of the Sentencing Decision lead to a "*strong rejection of any proof against Claimant*". Nowhere in the decision is the Claimant named as a suspect or charged with anything. The Claimant was never invited to participate in the criminal case, and no court decision can have any impact on third-party rights if that third party was not even invited to participate in the case. The fact that the Sentencing Decision in question has not led to any investigation against the Claimant in three years, shows that there was no corruption on behalf of the Claimant.[121] Further, the legitimacy of the Sentencing Decision is called into question by the fact that the three individuals sentenced therein – Messrs.

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[118] Reply at paras. 35-54.
[119] Reply at para. 433-434.
[120] Reply at paras. 71-85.
[121] Reply at para. 433

Abdullayev, Sarybaev and Bakchiev – escaped with minor penalties while allegedly retaining funds. According to the Sentencing Decision, Mr. Abdullayev had only to return USD 1,700 and pay a USD 3,000 fine. There should be real doubts about whether a court would allow a person to make in excess of USD 15,000 profit from an alleged corruption scheme if such scheme is real.[122]

Tribunal's decisions

193. The Parties are in agreement that a tribunal in an investor-State case has no jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the State.[123] However, the Claimant disputes that the Respondent has established this in the present circumstances, noting that corruption allegations have become a commonplace defence used by States, although rarely successfully.

194. The Tribunal accepts the Respondent's contention that "Red Flags" are relevant and helpful to the analysis of the Tribunal in order to establish corruption. The Tribunal also agrees that even in cases where a host State has not prosecuted the alleged corrupt activities of the investor, the Tribunal is able find that it does not have jurisdiction on the basis of corruption involved in the investment. With respect to the standard of proof to be applied, the Tribunal does not believe it need conclude whether its assessment of the evidence must reach the criminal law standard of "*beyond a reasonable doubt*", the lower civil law standard of "*balance of probabilities*", or the intermediary standard of "*clear and convincing evidence*" (as proposed by Claimant).

195. Upon a review of the submissions and the evidence, the Tribunal does not consider that the Respondent has reached the basic evidentiary threshold of a "*balance of probabilities*" in the current case. In particular, despite lengthy and in-depth criminal investigations by Kyrgyz authorities (of a scale that is not usual in international investment arbitrations), and applying the "Red Flag" approach set out by Respondent, the evidence is simply insufficient to draw the connections necessary to conclude that the investment was obtained by corruption.

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[122] Claimant's Closing Submissions at para. 79.
[123] Reply at para. 430.

(i) With regard to the allegations that the Claimant's representatives met repeatedly with the Respondent's representatives prior to the issuance of the 2018 Tender, including in relation to the offer of "very significant compensation" and the sharing of the tender requirements with the Claimant in advance, the Tribunal does not consider the evidence relied upon to be sufficient:

a. The portions of the Sentencing Decision relied upon refer to Mr. Abdullayev "*by virtue of his position…for the purpose of illicit financial gain sought opportunities to meet with foreign companies that were intending to participate in the forthcoming tender and offer them his services in exchange for illegal material remuneration*".[124] However, the facts relied upon in the Sentencing Decision for this conclusion appear to be based primarily on the Minutes of Interview of Mr. ███[125] Not only has Mr. ███ not been offered as a witness in these arbitral proceedings, the Tribunal considers the testimony to be unsubstantiated by evidence, and is in conflict with the Claimant's witnesses evidence (in particular that of ███).

b. The Respondent's reliance on Whatsapp messages[126] and an inspection of Mr. Abdullayev's computer[127] as evidence to show that 2018 Tender documentation was shared with the Claimant in advance, are insufficient for the Tribunal to conclude it to be a "Red Flag" of corruption and/or bribery. The Respondent has not identified how such evidence, even if established, constitute a "Red Flag" according to the criteria submitted by the Respondent.

(ii) With regard to the allegations that Ms. ███ and others, for the Claimant's benefit, unduly influenced the 2018 Tender process: (i) to allow it to continue in violation of Kyrgyz law, and (ii) to have formed a Working Group with inadequate experience to the benefit of the Claimant, the Tribunal does not consider that the evidence relied upon establishes this.

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[124] Exhibit [R-63] at p. 2.
[125] Exhibit [R-64].
[126] Exhibit [R-94].
[127] Exhibit [R-95].

a. As will be discussed further below in Section VII(B), the Tribunal does not consider that it was necessary for the Tender Commission to declare that the 2018 Tender was failed due to the absence of the bidders having consented to the General and Special terms of the e-passport contract. Further, the evidence relied upon by the Respondent, consisting primarily of several interviews conducted by the GKNB, does not establish any impropriety or connection to the Claimant.[128] Further, the Respondent has not explained how these allegations satisfy any of the criteria in relation to the "Red Flags" relied on by it.

b. The evidence submitted by the Respondent to support its allegations that the Working Group performed superficial work and that they were not qualified to carry out the technical valuations does nothing to establish any connection to or improper conduct on the part of the Claimant.[129] Again, the Respondent has not explained how these allegations satisfy any of the criteria in relation to the "Red Flags" relied on by it.

(iii) With regard to the allegation that Mr. Abdullayev received USD 20,000 in cash from Ms. [redacted] the evidence relied upon is insufficient to establish the Claimant's involvement in any corrupt activities. Mr. Abdullayev's interview with the GKNB is of questionable value, given his inability to recall many important details regarding where the money came from, why it was given or otherwise, and indeed his evidence suggested he considered it to be a reward for his work: "*Before and after handing over the money, there were no requests [to conduct] any other work on her part, so I personally perceived the transfers of money as a gift, as a reward. But there were no special conditions or requirements that I had to comply with in exchange, so I took it as a gift, i.e. as a reward that is, a reward for the work…*".[130] While the Tribunal acknowledges that the bribing of officials may qualify as a "Red Flag" indicative of corruption,

[128] Minutes of Interview with Mr. Sarybayev [R-99]; Minutes of Interview with Mr. Baltabaev [R-100] and [R-101]; Minutes of Interview with Mr. Bakchiev [R-114]; Minutes of Interview with Ms. Abdymomunova [R-102] and [R-103]; Minutes of Interview with Ms. Pratova [R-115].

[129] Minutes of Interview with other Working Group members [R-116], [R-117], and R[118].

[130] Minutes of Interview with Mr. Abullayev [R-78].

the Respondent has failed adequately to establish the facts relating to the alleged payment to Mr. Abdullayev, and in particular has provided no credible evidence that the Claimant was involved in the payment of these funds.

(iv) Concerning the allegations that there was undue influence on the IIC when reviewing the Mühlbauer Complaint and the IDEMIA Complaint in order to confirm the Claimant's win of the 2018 Tender, none of the evidence relied upon provides any connection to the Claimant. At most, the evidence in relation to Ms. ██████ actions demonstrates her efforts to ensure that the results of the 2018 Tender were upheld, which the Tribunal does not consider as suspicious. The text exchange relied upon between ████████ and ██████[131] appears to contain some questionable statements between those individuals. However, absent more context, specifics or corroborating evidence, the Tribunal is unable to regard this as a "Red Flag" evidencing corruption on the part of the Claimant in the alleged bribing of Mr. Abdullayev. The Tribunal also notes that ████████ gave evidence of being pressured by the GKNB to give false testimony about the Claimant, and alleged that the GKNB deleted evidence from his phone,[132] which raises questions regarding the collection of evidence by the GKNB.

196. It follows from the foregoing that the Respondent has not provided sufficient evidence to establish that the Claimant's investment was obtained by corruption. The Respondent did not bring any witnesses to provide evidence on this subject, instead relying primarily on the evidence collected during the 2018 Tender Investigation. The Tribunal does not find that this evidence establishes that the Claimant was involved in corrupt activities in relation to being named the winner of the 2018 Tender. The evidence relied upon by the Respondent relates primarily to meetings held between 2016 and 2018 involving representatives of the Kyrgyz Republic, including allegations of discussions of "very significant compensation" and the intention to provide SRS employees with "illicit material assets". This evidence is insufficient to establish that the Claimant undertook to bribe SRS officials in order to win the 2018 Tender and secure the e-passports contract.

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[131] Exhibit [R-68].

[132] █████ Statement at paras. 26, 30.

197. It has not been established with any certainty whether USD 20,000 was paid at all, let alone that the Claimant was the source of those funds. The individual who should have been the key witness for the Respondent on this subject is Ms. ██████ who has not been available for questioning by the Respondent's authorities nor to provide evidence in these proceedings. As she was the individual who allegedly passed the funds to Mr. Abdullayev, she is the individual who would be able to provide evidence as to the source of those funds and other relevant details. There is insufficient evidence on hand to establish that the Claimant directed those funds to Ms. ██████ and that those funds were paid to Mr. Adbullayev in return for efforts to ensure that the Claimant won the 2018 Tender. The burden of proof is on the Respondent to establish that it was the Claimant that directed the payment of these funds. The Tribunal finds that the Respondent has not provided any evidence that the Claimant did so.

198. The Respondent alleges that the Claimant has failed to address the accusations and provide the evidence as requested in the 2018 Tender Investigation (being the investigation opened on 24 February 2020 into the corruption allegations relating to the 2018 Tender). However, the Tribunal is satisfied based on the record that the Claimant's representatives had legitimate fears about travelling to the Kyrgyz Republic following the initiation of the investigation by the GKNB. Further, according to ██████████, he had offered to speak to the investigators by virtual means, but he did not receive a response to this offer.[133] The Tribunal also notes that the Respondent decided not to ask ████ ████████████████████ questions during cross-examination about the events which the Respondent relies upon as evidence of corruption.

199. The Respondent has amassed substantial interviews, reports and evidence from the 2018 Tender Investigation, many of which have been filed in this arbitration. However, the Respondent has not presented evidence to the Tribunal which in fact links the allegations to the Claimant. This matter has been in the Respondent's hands since 2018. The Tribunal considers it relevant that since that time, following all of the investigations undertaken, there has been no corruption case brought against the Claimant or any of its representatives. The Sentencing Decision does not establish any wrongdoing on the part of the Claimant.

[133] T2/141:12-142:9.

It is focused primarily on the wrongdoing of state officials of the Kyrgyz Republic and their convictions.

200. The Respondent further relies on the various alleged “irregularities” which occurred during the process for the 2018 Tender, as well as the fact that the Claimant “won” the 2018 Tender. However, the reality is that the Claimant did not in the end actually win the e-passports contract, as it was ultimately prevented from signing the e-passports contract, and was unable to participate in the subsequent tender. While the Tribunal accepts that there may have been some irregularities in the conduct of the 2018 Tender, nothing referred to on this point by the Respondent establishes that the Claimant bribed officials or acted in a corrupt manner as alleged to secure its success in being awarded the 2018 Tender.

201. As stated above, the Tribunal accepts that the "Red Flag” methodology has gained traction amongst investment tribunals looking to assess allegations of illegality and corruption. However, in the present case, the Tribunal does not consider the alleged “Red Flags” as sufficient to meet the basic evidentiary threshold. The Respondent has not explained how the evidence on which it relies falls within the categories of “Red Flags” which are set out at paragraph 185 above.

202. Upon a review of the lists of potential “Red Flags”, the Tribunal is unable to conclude that the allegations made by the Respondent are sufficient to establish corruption in this case. There has been no suggestion that the Claimant was insufficiently qualified to provide the services required under the e-passports contract. The Claimant had business operations established in the Kyrgyz Republic, and had previously won a tender and performed services for the Kyrgyz Republic with no evidence or allegations of any improper influence or corrupt activities in relation to those previous services. The Claimant’s proposed costs for performance of the e-passports contract were competitive with other bidders, and there have been no allegations that the payment terms were in any way suspicious. The previous cases in which corruption was addressed and on which the Respondent has relied on were primarily focused on cases involving so-called “consultants”, who had questionable relationships to government decision-makers, and who received excessive and suspicious payments in the form of consulting fees. Those types of “Red Flags” are not present in the case before us.

203. The Tribunal also notes that in his opening statement, the Minister for Justice of the Kyrgyz Republic appeared to state that they were "*not pursuing the corruption issue…We are saying that like artificial understanding of the investment is not there because nothing was there*".[134] While this statement is not sufficient for the Tribunal to consider that the Respondent has abandoned its corruption argument, it does appear to weaken the Respondent's stance.

204. Accordingly, in view of the foregoing, the Tribunal finds that the Respondent has failed to establish that the Claimant's investment was acquired through illegal means, and that therefore the Tribunal retains jurisdiction to consider the merits of the Claimant's claims.

(C) Summary of the Tribunal's findings on jurisdiction

205. For the reasons set out above, the Tribunal finds that the Claimant's winning of the 2018 Tender is a qualifying investment under the BIT, on the basis of the findings of the Tribunal that the Claimant's winning of the 2018 Tender satisfies the definition of "investment" within Article 1(1) of the BIT.

206. The Tribunal is also satisfied that the Claimant's locally incorporated company, Garsu Pasaulis LLC, constitutes a protected investment under the BIT, and that its business activities are sufficiently related to the Claimant's operations in the Kyrgyz Republic which would have been used for the performance of the e-passports contract.

207. The Tribunal also finds that the Respondent has failed to establish that the Claimant obtained its investment through corruption, and therefore rejects the Respondent's arguments on this point.

VII. THE TRIBUNAL'S ANALYSIS AND DECISIONS ON THE MERITS

Introduction to the Claimant's claims

208. The Claimant's case is that the Respondent's unlawful conduct in carrying out and cancelling the 2018 Tender violated the protections and guarantees set out in the BIT. Specifically: (i) Article 3(1) of the BIT[135] requires the Respondent to ensure the fair and

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[134] T1/116:12-116:23.

[135] [C-001] at Article 3(1): "1. Investments and returns of investors of one Contracting Party in the territory of its home country shall be subject to the just and fair treatment, also ensuring their full protection and security in the territory of the country of the other Contracting Party. The Contracting Parties may not hinder the management,

equitable treatment of the Claimant and its investments in the Kyrgyz Republic and prohibits the application of unjustified and discriminatory measures; (ii) Article 3(1) of the BIT also requires the Respondent to ensure full protection and security of the Claimant and its investments in the Kyrgyz Republic; (iii) Article 4 of the BIT prohibits the direct and indirect expropriation of the investments of Lithuanian investors save for limited and well-defined instances; and (iv) Article 3 of the BIT, read in conjunction with Article 1 thereof, obligates the Respondent to protect the Claimant's business reputation.[136]

209. The Claimant highlights three key factors which it states are important when considering the breach of its rights and of the guarantees provided under the BIT:[137]

(i) The 2018 Tender process and the 'cancellation' thereof were clearly tainted by interferences from the Kyrgyz authorities and political organs, including, in particular, the GKNB;

(ii) The Claimant, announced as the winner of the 2018 Tender, has acquired specific legal and valuable rights (the right to conclude the e-passport contract) for a specific duration and the specific price as provided for. The Claimant was deprived of this valuable (economic) right in an illegal, irregular, and arbitrary way, without ensuring due process; and

(iii) The public smear campaign executed against the Claimant, which intentionally destroyed the Claimant's international business reputation and caused significant damage. This smear campaign was orchestrated by the Kyrgyz public authorities, who themselves had private interests for personal gain.

210. The Claimant also submits that in order properly to assess issues relating to the 2018 Tender, the Tribunal must take into account the Kyrgyz Republic's "*political corruption and cronyism issues*", which include, *inter alia*, the following:[138]

(i) Transparency International has noted that political corruption, cronyism and nepotism stand in the way of economic development of the Kyrgyz Republic, and that its judiciary remains one of the country's most corrupt institutions.

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maintenance, use, possession, development or disposal of such investments by any unjustified, ill-considered or discriminatory measures."

[136] Statement of Claim at paras. 464-468.

[137] Statement of Claim at paras. 474-477.

[138] Statement of Claim at paras. 46-58.

Transparency International's 2020 Corruption Perceptions Index (CPI) ranks the Kyrgyz Republic 124 out of the 180 countries and territories assessed, with a score of 31 out of 100.

(ii) The Claimant alleges that corruption is widespread in all sectors of the economy and at all levels of the state apparatus, manifesting itself in various forms including political corruption, misuse of power. Freedom House (2021) reported that corruption in the Kyrgyz Republic is pervasive in politics and in the government, and that the alleged anti-corruption office within the GKNB has been primarily used to target the administration's political enemies.

(iii) Foreign investors are often the targets of the corrupt judiciary, which has even been acknowledged by local authorities in the Kyrgyz Republic. By way of example, the expert of the Council for Business Development and Investment, Mr. Azamat Akeneev, has publicly acknowledge that foreign investors are often pressured by security officials, and that checks, arrests and interrogations of foreign investors severely damage the investment climate of the Kyrgyz Republic.

Introduction to the Respondent's case

211. The Respondent denies that its actions are in violation of the BIT or otherwise entitle the Claimant to any of the relief sought. The Respondent alleges that the Claimant's reputation has long been blemished by tax avoidance and investigations into illicit distribution of excise stamps and cross-border money laundering in its home-State of Lithuania, and that the Claimant fell further into disrepute when it was acquired by [redacted] [redacted] reportedly connected to money laundering and corruption spanning two decades in a dozen countries.[139]

212. Despite the Claimant's bid for the 2018 Tender being significantly higher than that of Mühlbauer, another bidder with a reputable secure printing business, the Claimant was declared the winner of the 2018 Tender after three other bidders were disqualified on technical grounds. Following complaints from the other bidders regarding the process and the Claimant's qualifications and, given the national security concerns involved, the

[139] Statement of Defence at para. 7.

Respondent deemed it necessary to investigate this matter. Despite repeated invitations for questioning by the investigative authorities, the Respondent alleges that the Claimant simply chose to hide in Lithuania, during which time its tender bid had lapsed and the 2018 Tender was deemed as "failed" by the Kyrgyz authorities.[140]

213. It is the Respondent's case that the 2018 Tender Investigation established, *inter alia*, that: (i) the 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 favour; (ii) the tender was procedurally rigged in the Claimant's favour on multiple occasions; and (iii) in return, at least one USD 20,000 cash payment took place, passed on from the then Chairperson of the SRS to one of her subordinates involved in the tender rigging. Having invested nothing and abandoned its failed, corrupted tender deal, the Claimant now seeks an extraordinary € 62 million dollars.[141]

(A) Whether the Respondent violated Article 3 of the BIT

Claimant's position

(i) Fair and Equitable Treatment

214. The Claimant argues that the relevant doctrine and jurisprudence confirm that the fair and equitable treatment ("**FET**") standard entails the protection of the "*basic expectations on the basis of what the foreign investor decided to make the investment.*" The FET standard means fairness and equity of treatment as these terms are generally understood; alternatively, the Claimant argues that the FET standard means that investors shall be treated in a manner commensurate to the international minimum standard for investors. This should be considered with all due regard to the surrounding circumstances.[142] The Claimant submits that representations made in bidding documents and applicable legal provisions in the 2018 Tender should be considered, as investor's protected expectations also arise 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 investments consistently, transparently and in good faith.[143]

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[140] Statement of Defence at paras. 8-11.
[141] Statement of Defence at paras. 12-14.
[142] Statement of Claim at paras. 495-504.
[143] Statement of Claim at paras. 512-513.

215. In violation of Article 3 of the BIT, the Claimant submits that the Respondent has imposed arbitrary and discriminatory measures, abused its administrative authority and based decisions on political expedience. A measure that is ostensibly within the confines of legitimate administrative decision may be arbitrary if it was actually "*based on prejudice or preference rather than on reason or* fact." The terms "*unjustified*" or "*discriminatory*" in the second sentence of the provision are, according to the Claimant, substantially identical to the more commonly used terms "*arbitrary or discriminatory measures*" and "*unreasonable or discriminatory measures*". In the investment treaty context, the Claimant submits that the prohibition of arbitrary and discriminatory measures is often subsumed within, or overlaps with, the state's FET obligation.[144]

216. The Claimant alleges that the SRS and the GKNB breached Kyrgyz law and abused their authority by basing their decision in the context of the 2018 Tender on factors that they were not lawfully entitled to consider. According to the Claimant, it is clear that the reasons underlying the Respondent's conduct in this regard had no basis in law, fact or logic, but rather reflected mere personal preference and political expedience.[145]

217. The Claimant has referred to, *inter alia*, the following events leading up to and following the "cancellation" of its winning of the 2018 Tender as evidence of the alleged breach of the BIT:

(i) Following the announcement of the Claimant as the winner of the 2018 Tender on 1 February 2019, a negative media campaign was commenced against the Claimant. Once Mühlbauer and IDEMIA filed complaints in relation to the 2018 Tender results, negative articles started to pour into local and international media related to the Claimant's ██████ shareholder, ██████. The Claimant's representatives flew to the Kyrgyz Republic to conduct an open press conference to respond to allegations.[146]

(ii) The Claimant alleges that the Respondent activated a "*de facto State-controlled media*" to start forming a negative public opinion about the Claimant, and that the evidence shows that other competitors started using other means to

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[144] Statement of Claim at paras. 532-543.
[145] Statement of Claim at paras. 544-553
[146] Statement of Claim at paras. 121-132; Claimant's Post-Hearing Submissions at paras. 109-113.

challenge the results of the 2018 Tender, including secret meetings between high-ranking members of the Respondent with representatives of IDEMIA.[147]

(iii) Following the rejection of the Mühlbauer Complaint and the IDEMIA Complaint, the SRS re-invited the Claimant to sign the e-passports contract. No further negotiations were envisioned, and the parties merely needed to sign the contract and start with its execution. The SRS urged the Claimant to fly to the Kyrgyz Republic to sign e-passports contract in person, and the Claimant made travel arrangements accordingly.[148]

(iv) Prior to travelling to sign the e-passports contract, the Claimant learned from the local Kyrgyz press that the GKNB had disseminated false information that the Claimant was somehow involved in bribery of the members of the Tender Commission. The Claimant also received information from the Lithuanian Ministry of Foreign Affairs not to travel to the Kyrgyz Republic to sign the e-passports contract because there was a high risk that the Claimant's representatives could be arrested.[149]

(v) There was no further communication from the Tender Commission nor from the SRS. In view of the circumstances, the Claimant's representatives had no choice but to cancel their travel plans to the Kyrgyz Republic and wait to see how the situation developed.[150]

(vi) The Claimant submits that it was the Prime Minister of the Kyrgyz Republic that directed the GKNB to review the 2018 Tender results, following IDEMIA's pressure via the French Embassy. IDEMIA had strong ties with the GKNB, with a former GKNB officer, Mr. Daniyar Zakirov, working in IDEMIA during the course of the 2018 Tender.[151]

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[147] Reply at paras. 129-131; 141-143; Letter of the French Embassy in the Kyrgyz Republic dated 22 February 2019 [R-046].

[148] Statement of Claim at paras. 133-137; Correspondence from SRS in February 2019 [C-29, C-30].

[149] Statement of Claim at paras. 138-142. [redacted] Witness Statement at para. 53 [CWS-2-1]; [redacted] Witness Statement at para. 51 [CWS-1-1].

[150] Statement of Claim at para. 143.

[151] Reply at para. 147, 176; Post of BespredelKG dated 3 April 2019 [C-110]; Post of BespredelKG dated 24 April 2019 [C-109].

(vii) On 22 February 2019, the General Prosecutor's office of the Kyrgyz Republic initiated a criminal pre-trial investigation on the alleged corruption arising from the 2018 Tender (*i.e.*, the 2018 Tender Investigation). In the course of the 2018 Tender Investigation the GKNB, on unknown grounds, arrested and detained employees of the Tender Commission and conducted raids of their homes and offices.[152]

(viii) The GKNB also targeted employees of the Claimant, including [redacted] and [redacted], who were interrogated and had their homes searched. They also had their phones taken, on which important evidence was deleted which contained information about threats which the Claimant's representatives had received from Mr. [redacted] Further, [redacted] and [redacted] were threatened and pressured by officers of the GKNB to testify against the Claimant.[153]

(ix) The Respondent continued its negative media campaign against the Claimant, in which both local and international media were filled with ungrounded accusations about the Claimant. On 24 April 2019, Mr. Idris Kadyrkulov, the head of the GKNB, gave a speech at a public hearing of the Kyrgyz Parliament about the 2018 Tender Investigation, in which he referred to the Claimant as "*not a good company*", but failed to provide valid reasons for that statement or for the GKNB's investigation.[154]

(x) Three individuals from the Tender Commission and SRS were found guilty on corruption related to the 2018 Tender, but only had to pay fines of € 3,000. A video was subsequently published by the GKNB on YouTube of Mr. Abdullayev alleging that Ms. [redacted] (the former head of the SRS) had given him USD 20,000 for lobbying on behalf of the Claimant, without any further details of where the money came from or why.[155]

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[152] Statement of Claim at paras. 146-153; Media Article of 2 April 2019 [C-34]

[153] Statement of Claim at paras. 153-162; Sagyndykov Witness Statement [CWS-3-1] at paras. 14-30.

[154] Statement of Claim at paras. 163-165; Reply at paras. 148-155; 24 April 2019 Idris Kadrykulov Parliament Speech [C-39]; Negative Articles about the Claimant and [redacted] [CWS [redacted] 1-21].

[155] Statement of Claim at paras. 168-177; Media Article of 7 October 2019 [C-46].

218. The Claimant submits that the foregoing alleged facts establish that the Respondent has imposed arbitrary and discriminatory measures, abused its administrative authority and based decisions on political expedience. It is also the Claimant's position that the Respondent's destruction of the Claimant's investment was illegal as a matter of Kyrgyz law. The Claimant rejects that the 2018 Tender was ever "*suspended*" or "*terminated*" under Kyrgyz law, as the Law on Public Procurement[156] sets out the specific procedures by which tender proceedings can be suspended, none of which took place. There was no decision of the Tender Commission to suspend the procedures, nor was any information about the suspension and resumption of the 2018 Tender reflected in the Protocol of Procurement Procedures, which is required by Article 30(1)(16) of the Law on Public Procurement.[157]

219. The Claimant submits that the 2018 Tender was not properly declared "*invalid*" by order of the SRS dated 4 February 2020. The order not only incorrectly indicates the date of the 2018 Tender announcement, but it also contains a discrepancy between the name of the act which indicates the subject matter of what the order regulates, and its contents. The Claimant also argues that the basis for the 'failure' of the 2018 Tender – the expiry of the tender offers – is invalid, as the Claimant's tender offer did not and could not expire.[158]

220. The Claimant argues that the Respondent's expert has confirmed that the SRS had the duty (not the right) to sign the e-passport contract, and that the legal basis relied on by the Respondent to excuse its failure to sign was flawed and inconsistent with Kyrgyz law. While the Respondent placed a lot of emphasis at the hearing that it could terminate the 2018 Tender "*if it considers that the procurement is no longer necessary*", the Claimant submits that this potential ground for cancelling the 2018 Tender has no relevance in the present case as it was never the basis for which the 2018 Tender was cancelled. The issuing of an administrative "act" one year later, after the Claimant had initiated this dispute, cannot operate to legitimize the cancelling of the Claimant's rights. The Respondent's expert further confirmed that the Kyrgyz courts offered no effective remedy to the Claimant, which is in itself a failure of domestic law.[159]

[156] Law on Public Procurement [RLA-4].
[157] Statement of Claim at paras. 479-482.
[158] Statement of Claim at paras. 483-493.
[159] Claimant's Post-Hearing Submissions at paras. 87-97.

221. The Claimant also alleges that the GKNB's use of its apparatus prevented the SRS from signing the e-passports contract, including by its arbitrary investigation that was completely lacking in due process, which also violated the FET standard. The due-process related violations on which the Claimant relies include, *inter alia*: (a) the fact that the Respondent has admitted that the GKNB used its apparatus to prevent the SRS from signing the 2018 e-passports contract; (b) the GKNB's investigation was completely arbitrary, in which it labeled the Claimant *de facto* as a corrupt company without any opportunity to vindicate its rights; (c) the GKNB's investigation showed a complete lack of due process, which included threats against witnesses who were pressured to give false testimony; and, (d) the leaking by the GKNB of the interview of Mr. Abdullayev on YouTube.[160]

222. The Claimant alleges that the evidence from the hearing supports the foregoing facts, and the conclusion that the GKNB used its apparatus to prevent the SRS from signing the e-passports contract. In view of the foregoing, the Claimant submits that as a matter of Kyrgyz law, the Respondent had no legal grounds to avoid signing the e-passports contract with the Claimant, as the winner of the 2018 Tender, but that the Respondent did so anyway.[161]

(ii) Full Protection and Security

223. The Claimant submits that the obligation to accord full protection and security ("**FPS**") requires the host State to exercise due diligence in the protection of foreign investments. This is to be assessed on an objective standard and requires the State to afford the degree of protection and security that should be legitimately expected to be secured by a "*reasonably well-organized modern state*". The Claimant submits that such responsibility extends to actions perpetrated by its organs.[162]

224. The FPS standard encompasses not only the physical security of foreign investors and their investments, which the Claimant alleges were woefully neglected in this case, but also extends to the legal security in which the investment operates. The Claimant argues that the host State is obligated to ensure that neither by amendment of its laws nor by

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[160] Claimant's Post-Hearing Submissions at paras. 100-109.
[161] Statement of Claim at para. 493.
[162] Statement of Claim at paras. 554-556; Claimant's Post-Hearing Submissions at para. 118.

actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment to be withdrawn.[163]

225. The Claimant submits that its treatment, and that of its representatives, at the hands of the Kyrgyz Republic's authorities is irreconcilable with the right to full protection and security, as the Respondent took all measures available to it to harm and threaten the Claimant and to deprive it of its investments. The Claimant alleges that the GKNB applied pressure on the Claimant's local personnel and other persons they deemed related to the Claimant, asking them to give false testimony against the Claimant.[164] These actions, along with other factual circumstances on which the Claimant relies, are set out above at paragraph 217.

226. The Claimant submits that the obligation to ensure full protection and security extends to protection from interference with the basic legal framework upon which an investor has relied in making its investment. The Claimant's basic expectation was that the Kyrgyz government would sign and execute the e-passports contract after the Claimant was declared the winner of the 2018 Tender, and that the contract would be performed in good faith and in accordance with due process and the rule of law. However, the e-passports contract was never executed.[165]

227. The Claimant asserts that the following of its allegations also constitute breaches of the FPS Standard: (i) arbitrary treatment by the Respondent during the 2018 Tender and thereafter, and the illegal steps taken by the SRS (as detailed in paragraph 217 above); and (ii) the lack of due process in relation to the 2018 Tender (as detailed in paragraph 221 above).

(iii) Denial of justice

228. The Claimant submits that it is widely understood that the duty not to deny justice constitutes part of the FET standard, as well as standing as an independent principle under public international law. The Claimant goes on to argue that while it is unnecessary for it to prove a denial of justice in order to establish a breach of the FET standard, a denial of justice clearly took place in this case. The Claimant alleges that the Respondent has

[163] Statement of Claim at paras. 557-560.
[164] Statement of Claim at paras. 561-563; Claimant's Post-Hearing Submissions at para. 120.
[165] Statement of Claim at paras. 567-569; Claimant's Post-Hearing Submissions at paras. 121-122.

manifestly breached its duty not to deny the Claimant justice, as the proceedings to which the Claimant was subjected demonstrate the Respondent's willful disregard for due process and were an affront to the most basic sense of judicial propriety.[166]

229. The Claimant points to, *inter alia*, the following instances in which the Respondent and its institutions have failed in the administration of justice:

(i) While disseminating allegations that the Claimant had been involved in serious and significant crimes, including bribery and corruption, the GKNB did not properly inform the Claimant of such allegations, nor allow the Claimant to be heard or to provide explanations or documentation. Further, the GKNB's investigation and case against its own politicians and state offices was based on the flawed and fabricated evidence of Mr. ██████ Mühlbauer's representative, as well as on the questioning of Mr. Abdullayev, whose evidence is totally abstract and unconvincing.[167]

(ii) The way in which the 2018 Tender was 'cancelled' or declared as 'failed' did not adhere to the basic principles of proper administration of justice. No proper administrative procedures were followed, including the erroneous 'expiration' of the Claimant's bid and *post-facto* 'formalization' of the fate of the 2018 Tender by way of the Order of the SRS dated 4 February 2020. The latter effectively precluded Claimant from bringing any administrative or civil claims in national courts, because the fate of the 2018 Tender and the Claimant's e-passports contract remained completely unclear. There existed no proper administrative acts that could in theory be challenged.[168]

230. At the hearing, the Claimant argued that it was confirmed that it was not afforded any effective domestic remedy once its investment was expropriated. The administrative decision to cancel the Claimant's right was only issued after the Claimant had commenced these proceedings, as an attempt by the Respondent to "legitimise" the cancelation and,

[166] Statement of Claim at paras. 505-511.
[167] Reply at paras. 514.a and 514.b.
[168] Reply at para. 514.c.

further, the Respondent's expert admitted that once the Claimant's economic right was taken away, there was no effective recourse or remedy available in local courts.[169]

(iv) Failure to Protect the Claimant's Business Interests

231. The Claimant alleges that the actions of the Respondent had destructive effects on the long-established international reputation of the Claimant throughout the world and in a very specific area of e-government services and security printing. These actions, along with other factual circumstances on which the Claimant relies, are set out above at paragraph 217 above. As a result, the Claimant alleges it is at risk of being expelled in numerous countries around the world and has already incurred significant monetary damages. The Claimant's losses include significant consequential damages, which are comprised of lost opportunities, loss of credit conditions and of other benefits, lost profits, and loss of market share.[170]

232. The Claimant argues that it is indisputable that business reputation is a qualifying investment as it is included in the list of assets in Article 1(1) of the BIT. The Claimant submits that damages related to business reputation may be "*very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated.*" The Claimant's business relies on its business reputation, which it has developed locally in the Kyrgyz Republic in addition to its international business reputation. Therefore, the Claimant submits, the Claimant clearly had a protected investment, consisting of its business reputation, which was destroyed by the Respondent.[171]

233. The Claimant submits that the damages to its reputation should be compensated either in the form of a pecuniary loss, flowing from the claim that its reputation is a protected investment, or in the form of a non-pecuniary loss that could be redressed by way of moral damages. In the latter case, the Claimant submits that moral damages are available under international law such that a party could be compensated for "*serious impairment of an investment*" or for "*an injury inflicting resulting in loss of social position or injury to credit or to reputation*." The Claimant argues that there is no basis for applying the standards of proof for moral damages in cases submitted by the Respondent, as the Claimant is not

[169] Claimant's Post-Hearing Submissions at paras. 126-128.
[170] Statement of Claim at paras. 625-627.
[171] Statement of Claim at paras. 629-633.

claiming for physical ill-treatment or illegal detainment, and as such the Claimant's reputational losses are completely different in their nature.[172]

Respondent's position

(i) Fair and Equitable Treatment

234. The Respondent denies the allegation that it has breached the FET standard. The Respondent notes that the Claimant bears the burden of properly presenting and proving its claims, which the Respondent submits the Claimant has failed to do, in addition to failing properly to set out the applicable legal principles for an FET claim.[173] The Respondent submits that the relevant aspects of the FET standard are as follows:

(i) The legitimate expectations component of the FET standard:

a. The correct formulation of legitimate expectations is the 'Newcombe Standard', which sets out clear definitive limbs which must be satisfied to create legitimate expectations on behalf of the investor: (a) unambiguous, definitive, and repeated assurances, (b) which are made to a specific person, or identifiable group. Representations or assurances given in broad and undefined terms cannot give rise to legitimate expectations protected under the FET standard.[174]

b. Further, for an expectation to be legitimate it must be objectively reasonable. This has two consequences: (a) an investor cannot have reasonable and legitimate expectations without having conducted thorough due diligence before deciding to invest; and (b) an expectation that the host State will never change its regulations is not a legitimate expectation, let alone a reasonable one.[175]

c. For a breach of legitimate expectations to violate the FET standard, the investor must demonstrate reliance on that expectation when it made the

[172] Statement of Claim at paras. 708-713; Claimant's Post-Hearing Submissions at paras. 207-210.
[173] Statement of Defence at paras. 271-278.
[174] Statement of Defence at paras. 280-282.
[175] Statement of Defence at paras. 283-289.

investment.[176]

(ii) The non-discrimination component of the FET standard:

a. The Respondent argues that discrimination in particular is a narrowly-construed notion, and one that requires satisfaction of at least three criteria:

1. The claimant alleging discrimination must identify relevant comparators placed in a similar situation as claimant itself, who must be in a materially similar situation as claimant so as to require identical treatment. Failure to identify a relevant comparator leads to a swift rejection of the discrimination claim.[177]

2. A claimant must demonstrate that the treatment applied to the comparator is materially different from the one applied to the claimant, as a foreign investor. The obligation not to discriminate as a component of the FET standard refers primarily to discrimination based on nationality. The standard of discrimination is high, requiring differentiation to be "*capricious, irrational or absurd*".[178]

3. A purported discriminatory measure may be justified, if it "*bears a reasonable relationship to some rational policy*" and there is a "*rational justification of any differential treatment of a foreign investor.*"[179]

235. Based on the foregoing standard, the Respondent argues that the Claimant's FET claim is meritless on the basis of, *inter alia*, the following points:

(i) No legitimate expectation protected under international law could exist in the form described by the Claimant. The Claimant fails to point to any specific representation made by the Respondent guaranteeing the Claimant's entering

[176] Statement of Defence at para. 290.
[177] Statement of Defence at para. 293
[178] Statement of Defence at para. 294.
[179] Statement of Defence at paras. 295

into a procurement contract with SRS, because none existed. The Claimant's alleged expectation that it was entitled to a contract with the SRS unconditionally is not a legitimate expectation, in particular because the Claimant's alleged right was: (a) limited in time, (b) subject to it undertaking certain positive actions, and in any event (iii) could be cancelled by the procuring entity at any moment.[180]

(ii) The Respondent did not frustrate the Claimant's purported expectations, as the 2018 Tender failed as a matter of law due to the expiration of the Claimant's bid. Further, the actions of the GKNB within the framework of its investigations were carried out in accordance with Kyrgyz law, and did not frustrate any of the Claimant's legitimate expectations.[181]

(iii) In the event that the Claimant's discrimination claim concerns Mülhbauer winning the 2020 tender for the production of e-passports, the Claimant provides no evidence that Mühlbauer was in any way privileged in the context of the 2020 tender. While the Claimant was unable to participate in the 2020 tender as it was not eligible under the new requirements, the SRS was legally obligated to revise the technical parameters of the new tender after the 2018 Tender failed.[182]

236. Further to not having breached the FET standard, the Respondent submits that the claims must be dismissed for lack of merit on the basis that the Respondent's actions did not violate Kyrgyz law. The Respondent argues that the Claimant's conclusions on this are based on an incorrect interpretation of Kyrgyz law and on an intentionally partial presentation of the facts.[183] The Respondent relies on, *inter alia*, the following submissions in support of these contentions:

(i) The 2018 Tender was validly suspended between 5 February 2019 and 21 February 2019:

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[180] Statement of Defence at paras. 302-303.

[181] Statement of Defence at paras. 304.

[182] Statement of Defence at para. 308.

[183] Statement of Defence at paras. 249-250.

a. Following the Claimant being named the 'winner' of the 2018 Tender, the Claimant's 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. This included approval of the drafts by the parties, the Claimant's submission of notarized documents listed in its bid and depositing the contract performance guarantee.[184]

b. During the period of seven business days following the Claimant's announcement as the 'winner' of the 2018 Tender, the Claimant and the SRS could not have entered into a contract due to a mandatory "*silence period*" under Kyrgyz law to provide other bidders with an opportunity to challenge the tender results. Both Mühlbauer and IDEMIA submitted such complaints, on 5 and 7 February 2019 respectively.[185]

c. Contrary to the Claimant's submission, the Tender Commission had no obligation to issue a separate decision on the suspension of the 2018 Tender. Such decision lies within the authority of the Department for Public Procurement of the Ministry of Finance of the Kyrgyz Republic. In the present case, the 2018 Tender was validly suspended by the Department for Public Procurement. On 11 February 2019, all five bidders, including the Claimant, were informed by the SRS of the suspension and were requested to extend the validity of their bids by 45 days. The Claimant acknowledged receipt of this and confirmed the extension, and therefore was aware of the extension and did not raise any objection.[186]

(ii) The Claimant failed to exercise its rights in relation to the conclusion of a public procurement contract between 21 February 2019 and 2 April 2019:

a. From 21 February 2019, following the dismissal of the Mühlbauer Complaint and the IDEMIA Complaint, the Claimant and the SRS were free to take the necessary steps to conclude the e-passports contract before

[184] Statement of Defence at para. 251.
[185] Statement of Defence at para. 252.
[186] Statement of Defence at para. 253.

the expiration of the validity of the Claimant's bid expired on 2 April 2019. No contract was concluded.[187]

b. The Respondent challenges the Claimant's allegation that its representatives decided not to come to the Kyrgyz Republic because they learned from the Kyrgyz media that the GKNB had disseminated false information about the Claimant, and that they had been advised by the Lithuanian Ministry of Foreign Affairs not to travel to the Kyrgyz Republic. The press articles on which the Claimant relies were dated from mid- to end-April 2019, which is two months after the Claimant was invited by SRS to sign the e-passport contract. The Respondent alleges that the Claimant became aware of the inquiries into the legality of the 2018 Tender, and immediately ceased any actions towards the conclusion of the e-passports contract.[188]

c. There is no evidence that the Claimant undertook any steps towards accomplishing the formalities necessary for the conclusion of the e-passports contract with SRS between 21 February 2019 and 2 April 2019. There is also no evidence that the Claimant took any steps to compel the SRS, via the Kyrgyz courts, to enter into the e-passports contract during this period, which it was free to do under Kyrgyz law.[189]

(iii) The expiration of the Claimant's bid on 2 April 2019 was contemporaneously reported on by the SRS in a press release. The formal declaration of the 2018 Tender as failed on 4 February 2020 did not violate Kyrgyz law, but merely formalized the legal reality that had already existed since 2 April 2019.[190]

237. The Respondent submits that it did not violate Kyrgyz law and that the Claimant's losing of its right to conclude a procurement contract with the SRS was of its own making. There was no breach of the FET standard.

(ii) Full Protection and Security

[187] Statement of Defence at para. 255.
[188] Statement of Defence at para. 256-259.
[189] Statement of Defence at para. 260.
[190] Statement of Defence at paras. 265-267.

238. The Respondent denies the allegation that it has breached the FPS standard. The Respondent argues that the Claimant has greatly overstated the scope of the Respondent's obligation to provide full protection and security, in addition to failing to present facts to show a breach of that standard.[191] The Respondent submits the following arguments with regard to the FPS standard:

(i) The Claimant is incorrect to assert that "*treatment which is not fair and equitable constitutes an absence of full protection and security*." The characterization of the FPS standard as coterminous with the FET standard has been dismissed time and time again in jurisprudence, and this distinction is consistent with the *effet utile* principle.[192]

(ii) There is no consensus on whether the FPS standard encompasses an obligation to provide both physical and legal security to an investment. There is therefore no consensus on what – if anything – beyond physical security is covered by the FPS standard. Legal protection is not part of the customary international law standard of FPS.[193]

(iii) The duty of FPS is a due diligence obligation that requires host States to take measures that are reasonable in the specific circumstances of the case. It should not be construed as a guarantee against all types of loss that could be suffered by an investor and it cannot be converted into a standard of strict liability. To determine whether there has been a violation of the FPS 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.[194]

(iv) Acts taken in accordance with normal and lawful administrative, judicial or prosecutorial proceedings do not run afoul of the full protection and security obligation. Where 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.[195]

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[191] Statement of Defence at para. 309.
[192] Statement of Defence at paras. 313-315.
[193] Statement of Defence at paras. 316-319.
[194] Statement of Defence at paras. 321-325.
[195] Statement of Defence at paras. 326-328.

239. Applying the foregoing, the Respondent submits that the Claimant has not met its burden to prove a breach of the FPS standard, which standard is a high one and one that must be supported by conclusive evidence. The Claimant has abstained from pointing to specific State acts and instead relies on vague insinuations.[196] Without attempting to decipher or particularize the Claimant's case, the Respondent contests the following allegations of the Claimant in relation to the alleged breach of the FPS standard:[197]

(i) The Claimant was not "*attacked*" by the Kyrgyz Republic or Kyrgyz State organs in mass media. The GKNB and SRS have made a handful of concise press releases, updating the public on the 2018 Tender and the 2018 Tender Investigation.

(ii) Neither the Claimant nor its local representatives were "*attacked*" by the GKNB as part of the 2018 Tender Investigation. The facts established are: (i) the Claimant was repeatedly invited to GKNB interviews but failed to attend, (ii) two of its local representatives were interviewed several times as witnesses in full compliance with Kyrgyz laws; (iii) searches were carried out at the premises of those two local representatives, again in full compliance with Kyrgyz law.

(iii) Denial of justice

240. The Respondent rejects that there was a denial of justice to the Claimant, stating that the Claimant did not point to a specific action attributable to the Respondent that would be constitutive of a denial of justice or a failure to accord due process.[198] The Respondent makes the following points with regard to the standard to be met for a denial of justice:[199]

(i) The denial of justice standard, as the name unequivocally suggests, concerns itself with the conduct of a State's judiciary. 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.

(ii) Prior cases suggest that a claimant alleging a denial of justice bears a particularly heavy burden of proof to discharge, and suggest that an impugned

[196] Statement of Defence at paras. 329-331.
[197] Statement of Defence at para. 332.
[198] Statement of Defence at paras. 347-348.
[199] Statement of Defence at paras. 351-360; Rejoinder at para. 204.

court decision must be "*clearly improper and discreditable*" and that it must be arbitrary.

(iii) The courts must have failed to such a degree that the failing is fundamental or outrageous. 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. A system must also be given every opportunity to correct itself before a decision of a court is deemed internationally unlawful. A claim cannot therefore arise until local remedies are exhausted. It has 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.

241. Applying the foregoing principles, the Respondent submits that there has been no denial of justice during the administrative court proceedings initiated by Mühlbauer following the dismissal of its complaint, which are the only court proceedings relating to the 2018 Tender. The 9 April 2019 injunction issued by the Interdistrict Bishkik Court was issued in full compliance with Kyrgyz law, despite the fact that it was issued *ex parte*. The Claimant could have contested it before the Kyrgyz courts, but it chose not to. The Claimant fully participated in all three instances (first, appellate and cassation) of the administrative court proceedings, by filing written pleadings, making oral submissions, and filing a successful appellate complaint (which was subsequently reversed upon further appeal). At no point during these proceedings did the Claimant's local counsel voice concerns that it was denied justice or not accorded due process.[200]

(iv) Failure to Protect the Claimant's Business Interests

242. The Respondent notes that the Claimant appears to assert entitlement to compensation for damages to its "*international business reputation*" on two grounds: (i) as a form of 'moral damages', and (ii) as a form of compensation for the destroyed 'business reputation' of the Claimant, which it deems to be a type of 'investment' that has been made in the Kyrgyz Republic. In response, the Respondent denies that it destroyed Claimant's 'international business reputation' and the Claimant is not entitled to compensation therefor.[201]

[200] Statement of Defence at paras. 95-98, 362-364; Rejoinder at para. 206.
[201] Statement of Defence at paras. 365-366.

243. With regard to moral damages, the Respondent submits that the Claimant has not properly articulated the legal basis for its claim. As with any other remedy, damage must be proven, and the burden of proof falls upon the claimant. Under international law, reputational, or moral, damages remain an exceptional remedy which may only be awarded in exceptional circumstances. Based on case law, it is well established that in order for moral damages to be granted, the conduct of the respondent State must qualify as "*egregious*" or "*malicious*". 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 content itself to this form of compensation.[202]

244. In the case at hand, the Respondent submits that the Claimant is not entitled to moral damages as it did not even attempt to explain what "*extraordinary circumstances*" entitle it to such moral damages, and how the Respondent's conduct was "*egregious*" or "*malicious*". The Respondent states that abstract reference to the Claimant's "*business reputation*" is not enough, particular in light of the following facts: (i) the Claimant's business reputation prior to the 2018 Tender was very controversial; (ii) the Claimant misled the Tribunal asserting that its business reputation deteriorated after the 2018 Tender; (iii) in any event, there is no causal link between any putative deterioration of the Claimant's business reputation and any actions of the Respondent.[203]

245. The Respondent also argues that the Claimant is not entitled to damages for alleged destruction of its "business reputation" on the basis of claiming it was an investment, as the Claimant did not invest its "business reputation" in the Kyrgyz Republic. In any event, there is no evidence that this "business reputation" was destroyed, nor that the Respondent had anything to do with it.[204]

Tribunal's decisions

(i) Fair and Equitable Treatment

246. The Tribunal must now assess whether the Respondent's actions have breached the BIT, commencing with the Claimant's allegations of breach of Article 3(1) of the BIT and the FET standard. The Respondent has stated that, in relation to the evaluation of the FET

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[202] Statement of Defence at paras. 368-376.
[203] Statement of Defence at paras. 377.
[204] Statement of Defence at paras. 379-380.

standard, one must establish both a violation of legitimate expectations and a violation of the non-discrimination component. The Respondent further submits that in order to create legitimate expectations on behalf of the investor, there must have been unambiguous, definitive and repeated assurances, which are made to a specific person, or identifiable group. For an expectation to be legitimate, according to the Respondent, it must be objectively reasonable, meaning that the investor must have conducted thorough due diligence before deciding to invest, and an expectation that the host State will never change its regulations is not a legitimate one.

247. With regard to the non-discrimination component, the Respondent argues that the Claimant must identify relevant comparators, and demonstrate that the treatment applied to the comparator is materially different from the one applied to the claimant as a foreign investor. A purported discriminatory measure may be justified if it "*bears a reasonable relationship to some rational policy*" and there is a "*rational justification of any differential treatment of a foreign investor*."

248. The Tribunal agrees with the Respondent that arbitrary and discriminatory treatment is one aspect of the FET standard which may be analyzed together with legitimate expectations. The Tribunal does not agree, however, with the Respondent's view as to what is required to create legitimate expectations. Stated in general terms, legitimate expectations are made up of the treatment by the host State that a prudent and reasonable investor would have anticipated, given the specific circumstances of the individual case. Such expectations can be based on the host State's legal framework and regulations – and that they are applied in a predictable, consistent and non-discriminatory manner – as well as on undertakings and representations made explicitly or implicitly by the host State.

249. For the reasons set out below, the Tribunal finds that the Respondent has breached the FET standard in the BIT. First, by frustrating the Claimants legitimate expectations. Secondly, by subjecting the Claimant to arbitrary and discriminatory treatment.

(a) Legitimate expectations

250. The determination of whether the Claimant's legitimate expectations have been frustrated must be made on the basis of the BIT and international law. A relevant factual aspect of this analysis is to assess the Respondent's actions or omissions on the basis of Kyrgyz law. It must be noted, however, that even if the actions or omissions of the Respondent had

been in full compliance with Kyrgyz law, such actions or omissions could still constitute a violation of the Respondent's international obligations flowing from the BIT and from customary international law.

251. At a minimum, the Claimant had a legitimate expectation that the 2018 Tender would be carried out fairly and in accordance with relevant Kyrgyz law and the applicable procedures. As will be explained in the following paragraphs, the Respondent did not conduct the 2018 Tender in compliance with Kyrgyz law, and breached the Claimant's rights under the BIT with respect to the actions and omissions it took or failed to take in order to prevent the Claimant from executing the e-passports contract.

252. The Claimant, as the winner of the 2018 Tender, had obtained legally recognized rights, and had legitimate expectations that these rights would not be taken away otherwise than in accordance with appropriate due process. The Claimant had a legitimate expectation that it would proceed to execute and perform the e-passports contract, which expectation was confirmed by the actions and correspondence with the SRS (an entity of the Respondent) following the awarding of the 2018 Tender to the Claimant up until the commencement of the 2018 Tender Investigation.

253. The Respondent takes the position that the Claimant's claims must be dismissed as the Respondent's actions and omissions did not violate Kyrgyz law, and the Claimant's loss of its right to enter into the e-passport contract was in accordance with appropriate procedures and regulations. The Respondent has alleged that the 2018 Tender was validly suspended between 5 February and 21 February 2021, during the period which the Mühlbauer Complaint and the IDEMIA Complaint were being decided. The Tribunal notes that suspension of the bidding process is permitted pursuant to Article 49(3) of the Law on Public Procurement, although the provision only provides for a 10-day suspension of the procurement procedures.[205] All five of the bidders, including the Claimant, were informed by the SRS by letter dated 11 February 2019 of the pending complaints and suspension of the 2018 Tender pending the determination of those complaints. That letter also requested that the bidders extend the validity of their bids by 45 days in order to allow time for the complaints to be addressed and decided.[206]

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[205] Exhibit [CER-2-Exh-4], Article 49(3) "The independent interdepartmental committee shall promptly notify the procuring entity of the receipt of the complaint and suspend the procurement procedure for ten days…"
[206] Exhibit [R-036].

254. It is the actions following the determination of the complaints on 20 and 21 February 2019 which the Tribunal is most concerned with. The Respondent alleges that the Claimant and SRS were free to take the necessary steps to conclude the e-passports contract before the new expiry date of the Claimant's bid (being 2 April 2019), but that no such contract was concluded before the Claimant's bid expired.

255. The Tribunal does not consider the situation to be so straightforward, however. The Tribunal must examine the reasons underlying why the Claimant did not execute the e-passports contract with the SRS, including the Respondent's actions which influenced or affected this. It is the Claimant's submission that the 2018 Tender process and the 'cancellation' thereof were clearly tainted by interferences from the Kyrgyz authorities and political organs, including, in particular, the GKNB.

256. In assessing this issue, it is helpful for the Tribunal to set out the relevant factual background leading up to and following the 2018 Tender:

(i) The Claimant was announced as the winner of the 2018 Tender on 1 February 2019. On even date, the Claimant received a notification from the public procurement portal confirming the same, including the statement: "*You can sign the supply contract or revoke it by clicking on the following links*." The Claimant received a subsequent message on the same day stating the following: "*Dear [redacted], you confirmed your readiness to sign the supply contract. Please download the electronic version of the contract. You need to sign the contract in 2 copies and send it to the contracting authority by courier*."[207]

(ii) The Claimant proceeded with pre-contract signing activities, including reviewing the texts of the e-passports contract provided via the portal to compare it the version incorporated in the 2018 Tender documentation. This is evidenced by the email exchange dated 2 February 2019 between representatives of the Claimant.[208] This email expressly noted that while there were differences between the two versions, it was concluded that there was no

[207] Exhibit [C-078].
[208] Exhibit [C-077].

problem executing the version of the contract which was sent through the portal, and that there were only a few minor points to confirm with the SRS.

(iii) On 4 February 2019, the chief of the Public Procurement Division of the SRS, Ulan Baltabayev, requested the Claimant to provide originals of all documents contained in the Claimant's tender bid, and to submit technical requirements via email. The Claimant confirmed receipt of the request on the same day, stating that the originals would be provided by 5 February 2019, and submitting an electronic version of the technical requirements. The originals of the Claimant's tender bid documents were sent by courier on 5 February 2019.[209]

(iv) On 5 February 2019, the Mühlbauer Complaint was filed.

(v) On 6 February 2019, Mr. Baltabayev informed the Claimant that the e-passports contract was in the stage of internal approval and the SRS would send it to the Claimant in the coming days. Subsequently on 6 February 2019, [redacted] informed SRS that he would be the person responsible on behalf of the Claimant for the project, which was acknowledged that day by Mr. Baltabayev.[210]

(vi) On 7 February 2019 the IDEMIA Complaint was filed.

(vii) Also on 7 February 2019, the Claimant received an email from Infocom sending a questionnaire detailing the technical parameters of the Claimant's bid. The Claimant acknowledged receipt of this email on 8 February 2019, stating that it was working on the questionnaire and that its representatives were able to meet with Infocom's officers the week of 10 February 2019 in person in Bishkek if necessary.[211]

(viii) On 11 February 2019, SRS informed the bidders of the Mühlbauer Complaint, stating that the Department for Public Procurement of the Ministry of Finance suspended the 2018 Tender proceedings, and that the bidders were requested to extend the validity period of their bids, and the period of bid security, for 45

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[209] See email exchanges between SRS and the Claimant at Exhibit [C-079].
[210] *Ibid*.
[211] See email exchanges between Infocom and the Claimant at Exhibit [C-080].

days from 16 February 2019.[212] While the Claimant has argued that this department had no authority to suspend the tender proceedings, the Tribunal has noted that Article 49(3) of the Law on Public Procurement provides for a suspension of the procurement proceedings upon receipt of a complaint or challenge.[213]

(ix) Despite the 11 February 2019 notice from the SRS, the Claimant's representatives maintained their travel plans for Bishkek from 13 to 15 February 2019 to sign the e-passports contract, and checked in for their flight to Bishkek on 12 February 2019.[214]

(x) On 12 February 2019, the Claimant responded and agreed to the SRS's request to extend the validity of their bid security for 45 days from 16 February 2019.[215]

(xi) On 14 February 2019 the Claimant's representatives held a press conference in Bishkek.[216]

(xii) On 17-19 February 2019, the Claimant's team was working on submitting additional documents requested to the SRS.[217]

(xiii) The IDEMIA Complaint was dismissed on 19 February 2019 and the Mühlbauer Complaint was dismissed on 21 February 2019.

(xiv) On 21 February 2019, the SRS wrote to the Claimant to inform it that the complaints had been dismissed, and requested that the Claimant urgently travel to the Kyrgyz Republic to sign the e-passports contract. The Claimant responded less than two hours later stating, *inter alia*, that representatives could be in Bishkek on Monday 25 February 2019 in order to sign the contract. The Claimant also requested a copy of the final e-passports contract for review and for details required for the implementation of the bank guarantee.[218]

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[212] Notice from SRS dated 11 February 2019 at Exhibit [C-081].
[213] Exhibit CER-2-Exh-4, Article 49(3).
[214] Exhibit [C-082].
[215] Exhibit [R-037].
[216] Exhibit [C-083].
[217] Exhibit [C-084].
[218] Exhibit [C-029].

(xv) The Claimant received no response to its email of 21 February 2019, nor did it receive any further correspondence from the SRS.

(xvi) On 22 February 2019, the Kyrgyz government announced the commencement of the 2018 Tender Investigation,[219] and on 25 February 2019 the GKNB assigned a team of investigators to the case.[220]

(xvii) The Claimant postponed its travel plans to Bishkek on several occasions, before ultimately cancelling them.[221]

257. Upon a review of the evidence and consideration of the Parties' respective submissions, the Tribunal finds that the actions and omissions of the Respondent, in particular those starting with the announcement of the 2018 Tender Investigation by the GKNB on 22 February 2019, were the primary reason the e-passports contract was not signed. The Tribunal does not consider that the actions and omissions of the Respondent's representatives, which effectively prevented the Claimant from executing the e-passports contract, were undertaken in accordance with Kyrgyz law but instead appeared to have their genesis in conflicting motivations between different factions within the government of the Kyrgyz Republic.

258. The Respondent and its expert, Ms. Davletbayeva, lean heavily on the presumption that the Claimant willingly did not pursue signing of the contract, and that it allegedly had avenues it could have pursued to sign the contract with the SRS. However, the Tribunal finds that Ms. Davletbayeva's analysis does not adequately consider the consequences of the commencement of the GKNB investigation, the abrupt silence from members of the SRS that followed, and the resulting apprehension this caused to the Claimant.[222] The fact that the e-passports contract was not ultimately signed is difficult to attribute to Claimant. Given the sudden commencement of the 2018 Tender Investigation by the GKNB on 22 February 2019 and the corresponding silence of the SRS, the Tribunal considers it reasonable for the Claimant to have been apprehensive about travelling to Bishkek to sign the e-passports contract.

[219] Exhibit [C-034].
[220] Exhibit [R-052].
[221] Exhibits [C-088], [C-089].
[222] T3/105:3-106:14. See also T3/117:22-117:24: "But I'm discussing based on what I see, but what were the motives of the winning bidder, I do not know."

259. The evidence presented to the Tribunal establishes that both the Claimant and the SRS were actively working towards executing the e-passports contract at all times prior to the commencement of the 2018 Tender Investigation. While this progress was suspended briefly during the period in which the Mühlbauer Complaint and the IDEMIA Complaint were being evaluated, upon the resolution of those complaints the SRS and Claimant immediately restarted the process for executing the e-passports contract. While no direct evidence has been submitted to provide an explanation for the silence of the SRS following the announcement of the 2018 Tender Investigation, the Tribunal finds that the actions of the GKNB likely played a major role in this.

260. The Tribunal acknowledges that the Respondent was entitled to terminate the tender in the event "*it considers that the procurement is no longer necessary*". However, the Respondent has not provided any evidence to support any assertion that it considered the 2018 Tender as "no longer necessary" at the relevant time. Logically, the fact that the Contract was later awarded in 2020 to a competing bidder, shows that the procurement continued to be viewed by Respondent "as necessary". In any event, such argument that Respondent had the discretion to cancel the tender is undermined by the clear communications from the SRS requesting that the Claimant sign the e-passports contract. The Tribunal equally does not find that the other potential grounds provided for in the Law on Public Procurement for validly terminating the 2018 Tender and/or the Claimant's winning thereof are available in the circumstances for the Respondent to rely on. These grounds include those set out in Prof. Alenkina's First Report, such as: a recall of the tender application by the bidder before expiration of its validity, the suspension of the bidder from participation due to violation of applicable procedures or presence of a conflict of interest, or termination of the tender by the procuring entity or a court due to violations committed by employees of the procuring entity or members of the Tender Commission of rules on conflicts of interest.[223]

261. The "formalization" of the declaration of the 2018 Tender as failed, by way of Order no. 22 dated 4 February 2020 issued by the SRS,[224] has no relevance to the Tribunal's analysis. The Tribunal has already determined that the Respondent's actions taken following the announcement of the Claimant as the winner of the 2018 Tender not to have been in

[223] See Alenkina First Report at para. 87.
[224] Exhibit [R-083].

accordance with Kyrgyz law and the applicable regulations. Accordingly, any attempt by the Respondent subsequently to "formalize" actions that were in violation of Kyrgyz law cannot operate to validate such actions or otherwise render them in compliance with Kyrgyz law.

262. Based on the foregoing, the Tribunal finds that the actions of the Kyrgyz authorities effectively prevented the Claimant from finalizing and executing the e-passports contract with the SRS. This amounts to a violation of the Claimant's legitimate expectations and therefore of the FET standard of protection to which the Claimant is entitled to under the BIT.

263. As to the Respondent's arguments relating to a requirement that the Claimant undertake thorough due diligence, it should be noted that the Claimant was, for several years, active on the Kyrgyz market, having participated in previous tender procedures and was presumably well aware of legislation, regulations and business practices in its line of business in the Kyrgyz Republic.

264. Also, it is not clear whether the Respondent is alleging that the Claimant should have been aware that, when submitting its bid for the 2018 Tender, representatives of the Kyrgyz Republic could take unlawful steps to prevent it from executing the e-passports contract in the event the Claimant was selected as the winner. In any case, it would be inappropriate for the Respondent to rely on its own mistakes and/or inappropriate actions and escape liability on the basis that the Claimant should have been aware of this possibility.

(b) Discriminatory treatment

265. The Tribunal does not consider it difficult for the Claimant to satisfy the requirement of discrimination as part of the FET test in the present circumstances, even in the case of requiring the differentiation to be "*capricious, irrational or absurd*", as interpreted by the Respondent. No other bidder was subjected to the same treatment as the Claimant in the present circumstances, which included the negative statements made against the Claimant in the Kyrgyz parliament and the conduct of the 2018 Tender Investigation by the GKNB which resulted in the prevention of the SRS and Claimant executing the e-passports contract. The Tribunal notes that the Claimant was effectively excluded from participating in the subsequent tender bid for the e-passports contract, due to a change to the

requirements from the 2018 Tender, which was ultimately won by a competing bidder from the 2018 Tender process, Mühlbauer.

266. Accordingly, in view of the foregoing, the Tribunal finds that the Respondent breached the FET standard in relation to the Claimant's investment.

(ii) Full Protection and Security and Denial of Justice

267. As the Tribunal has found that the Respondent has violated the FET standard, it does not consider it necessary for it to make a determination on a violation of the FPS standard. The Tribunal notes that there is disagreement between the Parties as to the scope of the FPS standard, in particular with regard to the Respondent's position that there is no consensus that the FPS standard encompasses an obligation to provide legal security to an investment, and as such there is no consensus that it encompasses any requirement beyond physical security.

268. As with the FPS standard, in light of the Tribunal's finding that the Respondent has violated the FET standard, it does not consider it necessary for it to make a determination in relation to the Claimant's allegations of a denial of justice. The Tribunal does briefly note that a finding of a denial of justice is primarily concerned with the actions of the host State's judiciary, and that there is a high threshold which must be met in order to establish a breach of this provision.

(iii) Failure to Protect the Claimant's Business Interests

269. The Claimant has forwarded two related claims arising from the alleged "destruction" of its business reputation. The first is a claim based on the Claimant's framing of its business reputation as a protected investment under the BIT, while the second is a claim for moral damages.

270. Allegations of damage to reputation are challenging to prove, and particularly so when the facts relate to the international reputation of a company where a large number of factors may have played a role. The Tribunal notes that much of the negative international coverage related to the Claimant's former shareholder, [redacted]. Further, much of the facts relating to [redacted] existed prior to the 2018 Tender, and involved activities and news coverage in jurisdictions other than the Kyrgyz Republic.

271. The Tribunal notes that the evidence relied upon by the Claimant primarily consists of media reports, none of which can be clearly attributed to the Respondent, in particular those outside of the Kyrgyz Republic.[225] The Tribunal does not find it peculiar that local media were publishing information about the 2018 Tender Investigation and allegations of corruption. Even if the source of these articles were attributed solely to Respondent (a fact which the Claimant has not been able to establish), the contents of those articles are generally restricted to reporting on related events without drawing conclusions as to the Claimant's involvement in any corrupt activities. This is insufficient to establish that the Respondent is responsible for the alleged destruction of the Claimant's international reputation.

272. It is also clear that it was not only the media in the Kyrgyz Republic which had reported on allegations of corruption or wrongdoing of [redacted] and the Claimant, as the Claimant itself made reference to such media coverage in Lithuania and Belgium.[226]

273. During his testimony at the hearing, [redacted] was unable to dispel the likely possibility that there were factors unrelated to the Respondent's actions which resulted in the negative coverage and impact on the Claimant's business reputation.[227] While the Claimant and its expert have attempted to establish a clear point in time as to when the Respondent began its "media campaign" against the Claimant, and the resulting damage to the Claimant's reputation, the Tribunal is unable to draw such a conclusion based on the evidence presented to it. Although the Tribunal would not generally expect perfect and clear evidence in such a case, what is before the Tribunal is not sufficient to meet the evidentiary requirements. There is a distinction to be drawn between correlation and causation. While the former may exist in the present case, the latter does not. Without causation there is no legal basis for finding that the Respondent has damaged the Claimant's business reputation.

274. As to the Claimant's framing of its claim in terms of moral damages, as will be explained below, the Tribunal is unable to conclude that the Claimant is entitled to such a remedy.

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[225] CWS [redacted] 1 Exhibits 23, 24, 32, 33, 34, 35, 36, 37.
[226] CWS [redacted] 1 at para. 22; CWS [redacted] 2 at paras. 11-12. See also Reuters coverage of allegations of corruption in the Democratic Republic of Congo involving [redacted] at [R-31].
[227] T2/113:13-138:4.

275. Historically, moral damages were not a prominent feature of investment arbitrations, which typically address purely economic and material damages. More recently, however, investors have been increasingly seeking compensation for non-material damages. The principle of moral damages is recognized by most national laws, and is reflected expressly in Article 31 of the ILC Articles, which includes compensation for injuries "*whether material or moral*". Such damages can generally be categorised into three types: (a) damages to personality rights of individuals (including individual pain and suffering); (b) damage to reputation; and (c) legal damage (*i.e.* harm that results *ipso facto* from the violation of an international obligation).

276. While tribunals have been willing to recognize the rights to moral damages, *per se,* they have generally not been willing to award such damages due to the high threshold that has been established in jurisprudence. It is generally agreed that moral damages are only to be awarded in "exceptional circumstances", although there is no specific definition of what constitutes such exceptional circumstances. A number of cases refer to the elements set out in the *Lemire* case, which established the following criteria (upon a review of prior cases) in which exceptional circumstances may exist that justify an award of moral damages:[228]

(i) the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;

(ii) 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

(iii) both cause and effect are grave or substantial.

277. Other cases in which moral damages have been awarded have generally involved "malicious" or similar behaviour. In the present circumstances, the Tribunal is unable to conclude that the alleged actions of the Respondent in relation to the Claimant's business reputation are sufficient to justify an award of moral damages. While the Tribunal appreciates that the circumstances relied upon by the Claimant – the alleged destruction

[228] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 Award dated 28 March 2011 [E-46].

of its international business reputation – are distinct from the factual scenarios in other cases addressing moral damages, the evidence relied upon by the Claimant is insufficient both in terms of the cause, *i.e.* the Respondent's actions and statements relating to the Claimant's business reputation, and the effect, *i.e.* the alleged damage to the Claimant's business reputation.

278. Accordingly, for the foregoing reasons, the Tribunal denies the Claimant's claims relating to the destruction of its business reputation.

(B) Whether the Respondent breached Article 4 of the BIT – Expropriation

Claimant's position

279. Pursuant to Article 4 of the BIT, the Claimant submits that the Respondent guaranteed not to expropriate and nationalize investments of the Claimant or apply any measures to such investments leading to similar consequences unless such measures were: (1) undertaken for public needs and in compliance with the national legislation; (2) undertaken on non-discriminatory grounds; and (3) accompanied by prompt, adequate and effective compensation. The Claimant argues that the coverage of Article 4 is broad, as the expropriatory measures can involve a positive act or a negative act, are not limited to a particular type or category of State organ, or a specific type of measure such as administrative or governmental.[229]

280. The Claimant asserts that rights or assets acquired under a host State's law accords certain protections, and that an action of a host State on such acquired right or asset can be characterized as an expropriation, including intangible interests. Claimant submits that the failure to recognize and investor's entitlement is a measure equivalent to expropriation. The term "*measure*", in its ordinary sense, is wide enough to cover any acts, steps or proceedings, and imposes no particular limit on their material content or on the aim pursued thereby.[230]

281. It is not an essential element that the expropriation of the Claimant's investment be taken for the direct benefit of the Respondent. The standard for determining whether a State's conduct amounts to expropriation is the actual effect of the measures on the investor's

[229] Statement of Claim at paras. 570-573.
[230] Statement of Claim at paras. 579-597

property. Expropriation occurs when the actual effect of a State's actions is to deprive the investor of parts of the value of the investment or of the use of reasonably-to-be-expected economic benefit of property.[231] Indirect expropriation occurs when there is no physical taking of property, which can include "*covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*"[232]

282. The Claimant alleges that the Respondent violated Article 4 when it arbitrarily and illegally annulled the Claimant's right to execute the e-passports contract, and then transferred this right to another company. The Respondent's conduct amounted to the appropriation of the Claimant's investment by the illegal 'cancellation' of the already concluded 2018 Tender and by refusing to execute the e-passports contract with the Claimant. [233]

283. The Claimant asserts that the Respondent has either directly expropriated the Claimant's investment by an open, deliberate and acknowledged taking of property or, in the alternative, the Respondent has indirectly expropriated the Claimant's investment. In either case, the Claimant alleges that the Respondent has failed to comply with the requirements of Article 4:[234]

(i) The Respondent has not acted for a legitimate public purpose. The extinguishment of the Claimant's right to execute the e-passports contract was not in the national or public interest of the Kyrgyz Republic. Even though the Respondent signed an e-passport contract with Mühlbauer, there is a passport crisis in the Kyrgyz Republic and thousands of citizens cannot get passports. Further, the negative handling of the 2018 Tender was so egregious that even the head of the GKNB, who orchestrated both the smear campaign against the Claimant and abused its authority to launch an investigation to expel the Claimant, had to resign from office.

[231] Statement of Claim at paras. 599-601.
[232] Statement of Claim at paras. 602-603.
[233] Statement of Claim at paras. 579, 598
[234] Statement of Claim at paras. 609-624.

(ii) The Respondent has failed to act on a non-discriminatory basis.

(iii) The Respondent has failed to pay the Claimant prompt, adequate and effective compensation. There is no question in the circumstances that the Kyrgyz Republic did not provide the Claimant with compensation under international standards for the losses it sustained as a result of being deprived of the right to execute the e-passport contract.

Respondent's position

284. The Respondent denies that it expropriated the Claimant's purported investments. The Respondent sets out the legal principles for expropriation relevant to the Claimant's claim as follows:[235]

(i) For there to be an expropriation, there must be a 'taking'. Article 4(1) of the BIT requires an active act to be undertaken by the host State for there to be an expropriation – mere inaction would not trigger application of the provision.

(ii) In order to constitute expropriation, the alleged behavior of the State must constitute a State act in its nature, whether deliberate or not.

(iii) For there to be an expropriation, relevant rights must be capable of being expropriated. Other tribunals have considered that: only a property right can be subject to expropriation; with regard to legitimate expectations, even if they can be frustrated or denied, they cannot be expropriated; and that international law offers protection only against expropriation of a right which exists under municipal law.

285. Applying these principles to the facts of this case, the Respondent submits that there was no expropriation. According to the Respondent, the right to execute a public procurement contract that Claimant obtained by 'winning' the 2018 Tender is not a right capable of being expropriated. Under Kyrgyz law, the 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. The Respondent further argues that the Claimant has failed to

[235] Statement of Defence at paras. 335-341.

prove any 'taking' on the Respondent's side, as the Claimant's right to execute the e-passport contract with the SRS expired and ceased to exist as a matter of Kyrgyz law on 2 April 2019.[236]

Tribunal's decisions

286. The Tribunal has found in the foregoing section that the Respondent has violated the FET standard and therefore is in breach of Article 3 of the BIT. The Tribunal will now assess whether the Respondent is in breach of Article 4 of the BIT, which addresses expropriation.

287. The Respondent has set out the following requirements for an expropriation to have taken place within the meaning of the BIT: (a) for there to be an expropriation, there must be a "taking", requiring an active act undertaken by the host State; (b) the alleged behaviour must constitute a State act in nature; and (c) only property rights are capable of being expropriated while legitimate expectations cannot, and as such international law offers protection only against expropriation of a right which exists under municipal law.

288. Accepting – as a matter of principle – the requirements suggested by the Respondent, the Tribunal finds that the Claimant has established indirect expropriation in the present case. The Tribunal has already found in paragraphs 153 to 158 above, that by winning the 2018 Tender, the Claimant obtained rights protected under the BIT, in particular under Article 1(1)(f) referring to "*any right to engage in economic activity under contract*".

289. The Tribunal has also reviewed in detail the circumstances surrounding the 2018 Tender and how the Respondent's actions effectively prevented the Claimant from executing the e-passports contract (see paragraphs 255 to 262 above). These actions were taken by government employees in their official capacities, including by way of the speech in parliament by Mr. Kadyrkulov and government press statements, but in particular the actions undertaken in relation to the 2018 Tender Investigation and the subsequent silence of the SRS. These actions were undertaken by duly authorized representatives of the State.

290. The Tribunal is satisfied that the Respondent, through its representatives, interfered with the Claimant's rights in such a manner as to deprive the Claimant of the economic benefit of the rights it had acquired by winning the 2018 Tender. It is unnecessary for the Tribunal to conclude that such actions were for the obvious benefit of the Respondent, but instead

[236] Statement of Defence at paras. 342-346.

the Tribunal must merely find that the Respondent's conduct amounted to an indirect expropriation of the Claimant's investment. The Tribunal considers this to have occurred in the present circumstances, including based on the press releases and other statements issued by the Respondent's representatives, the conduct of the GKNB in carrying out the 2018 Tender Investigation, and the effective silencing of the SRS, which had the collective effect of preventing the Claimant from executing the e-passports contract. This constitutes indirect expropriation of the Claimant's investment.

291. It is not contested by the Respondent that the actions which it took that form the basis of the expropriation were not accompanied by any compensation.

292. Accordingly, for the foregoing reasons, the Tribunal finds that the Respondent has expropriated the investment of the Claimant, and therefore the Respondent is in breach of Article 4 of the BIT.

(C) Claimant's Claim for Specific Performance

Claimant's position

293. The Claimant's original relief sought was for an order requiring the Respondent to issue a public and prompt denial of all false statements, accusations, and allegations made by the Kyrgyz Republic. The Claimant argues that the Tribunal is free and has jurisdiction to decide upon such requests. As it was the Respondent's authorities (mostly the GKNB) that disseminated false allegations against the Claimant, followed by the media disseminating such information, the Claimant argues that it is only correct that the Respondent deny their fabricated allegations. The Claimant submits that this claim is supported by Articles 29, 30, 35 and 37 of the ILC Articles on State Responsibility. The Respondent, having wrongfully accused the Claimant, has an obligation to perform under the BIT, to cease destroying the Claimant's reputation and to make restitution or give satisfaction for the injury caused to the Claimant's reputation.[237]

294. In its Post-Hearing Submissions at paragraph 235(e), the Claimant requested that the Respondent be ordered to issue the following statement:

[237] Statement of Claim at paras. 742-749; Reply at paras. 616-623.

"*The Government of the Kyrgyz Republic confirms to any party concerned that neither Lithuanian company UAB "Garsu Pasaulis" nor any of its former or current employees were ever investigated or charged with corruption or any other crime in the Kyrgyz Republic. No criminal investigation or criminal case is pending or was ever initiated against UAB "Garsu Pasaulis" or any of its former or current employees in the Kyrgyz Republic. As of this day, neither UAB "Garsu Pasaulis" nor any of its former or current employees were ever included in the list of unreliable suppliers in the Kyrgyz Republic*."

Respondent's position

295. The Respondent submits that the Claimant's claim for a "*public denial of all false statements, accusations and allegations*" must fail for, *inter alia*, the following reasons:[238]

(i) There is more than enough evidence on record for this Tribunal to conclude, pursuant to the applicable standard of proof, that the Claimant was in fact involved in corruption in the context of the 2018 Tender, which renders it claims in the arbitration inadmissible, including the specific performance claim.

(ii) Even if a Tribunal were not convinced by the evidence on the record that the Claimant was involved in corruption, it would nevertheless lack the authority to make a positive statement that the Claimant was <u>not</u> involved in corruption or to order the Respondent to make such a statement. As the investigations by the Kyrgyz authorities into the corruption scheme are still ongoing, new facts and evidence could emerge which would evidence the Claimant's involvement with the scheme. As such matters are reserved to the exclusive authority of the Kyrgyz law enforcement and judiciary, they are not arbitrable as a matter of principle.

(iii) Assuming the Tribunal does have jurisdiction to order the Respondent to issue a denial of certain statements, it is undisputable that such denial can only concern statements made by the Respondent's officials and authorities, not the various statements made about the Claimant in the Kyrgyz media.

[238] Statement of Defence at paras. 420-424; Reply at paras. 256-263.

296. As to the wording of the specific statement sought by the Claimant in the relief in its Post-Hearing Submissions, the Respondent submits that the Tribunal cannot grant that relief for, *inter alia*, the following reasons:[239]

(i) The statement requested concerns an unspecified number of unknown persons who are not parties to this arbitration, including concerning "*any…former or current employees*" of the Claimant. None of such employees is a party to this arbitration, and the Tribunal therefore lacks jurisdiction to order the Respondent to make any statements covering such persons.

(ii) The statement requested is factually inaccurate and, accordingly, cannot be made by the Respondent. The investigation by the Kyrgyz authorities into the corruption allegations surrounding the 2018 Tender is currently suspended, and is obstructed by Ms. [redacted] being on the run, as well as by the Claimant's representatives ([redacted]) having ignored requests of the Kyrgyz investigative authorities for interviews. Those representatives are "*persons named in the investigation*" as per the materials of the investigation file, following the interviews of the Claimant's local representatives in the Kyrgyz Republic ([redacted]) by the GKNB as witnesses in the context of the investigation into the 2018 Tender.

(iii) The portion of the requested statement declaring that the Claimant was never included in the list of unreliable suppliers in the Kyrgyz Republic is unnecessary, as the relevant information has either been provided by the Respondent or is publicly available. The Respondent also produced a document during the document production phase of the arbitration stating this, Exhibit C-103, which the Claimant is at liberty to share by the means it deems necessary.

Tribunal's decisions

297. The Claimant is seeking an order requiring the Respondent to issue a public statement in which the Respondent, *inter alia*, confirms that neither the Claimant nor any of its representatives has been investigated or charged with any crime in the Kyrgyz Republic, nor have they been included in the list of "unreliable suppliers" in the Kyrgyz Republic.

[239] Respondent's Comments on the Claimant's Amended Request for Relief filed on 1 September 2023.

As the basis for this claim, the Claimant relies on various provisions of the ILC Articles on State Responsibility including: Article 29 ("*Continued duty of performance*"); Article 30 ("*Cessation and non-repetition*"); Article 35 ("*Restitution*"); and Article 37 ("*Satisfaction*").

298. Upon a consideration of the relevant provisions and the Parties' submissions, the Tribunal does not consider it appropriate to grant the relief sought by the Claimant under this head. Based upon a review of the provisions of the ILC Articles on State Responsibility on which the Claimant has relied, the Tribunal is not convinced that it has the authority to order the Respondent to issue a statement concerning facts which the Respondent disputes and which have not been established by the Tribunal.

299. Accordingly, for the foregoing reasons, the Tribunal denies the Claimant's request that the Respondent be ordered to issue a public statement in the form of the statement requested at paragraph 235(e) of the Claimant's Post-Hearing Submissions.

(D) Claimant's claims arising from other cancelled contracts

Claimant's position

300. The Claimant alleges that "*but for*" the Respondent's illegal acts, the Claimant would have continued to enjoy the benefits under four contracts with the following entities: , , , and . The Claimant submits that it suffered significant losses under these four contracts resulting from the Respondent's breach of the BIT, specifically due to the systematic media campaign started by the GKNB against the Claimant. The Claimant alleges that the GKNB was feeding the media repetitive lies about the Claimant, which resulted in severe reputation losses of business for the Claimant.[240]

301. The Claimant rejects the Respondent's suggestion that other factors may have triggered the termination of these contracts. The Claimant points to a change in media coverage commencing after the Kyrgyz scandal, following which orders for the Claimant's products and services were discontinued. The Claimant alleges that the Kyrgyz scandal was the only trigger for such decline, which also resulted in a probe and further media coverage

[240] Claimant's Post-Hearing Submissions at paras. 168-170.

into the Claimant's ownership by [redacted]. Even though the Claimant's four business partners named additional reasons for discontinuing their contracts, the Claimant argues that this does not affect the Claimant's case on the casual link.[241]

(i) [redacted]

302. The Claimant submits that the [redacted] contract was successfully performed from 19 December 2003, until October 2019. The final order was placed on 16 July 2019 (delivered in October 2019), despite the fact that the contract was to run until 31 March 2020. The Claimant rejects the Respondent's reliance on Willkie's correspondence with [redacted], in which [redacted] suggested that the contract was terminated due to COVID, as COVID did not cause any transportation or travel restrictions in Lithuania or Russia at the time at which the orders stopped from [redacted]. The Claimant also suggests that [redacted] correspondence with Willkie was simply an attempt to avoid litigation and to remain uninvolved in the present dispute.[242]

(ii) [redacted]

303. The Claimant submits that the [redacted] contract was successfully performed from 1 February 2010, and that the evidence shows that on 11 July 2019, following the start of the Kyrgyz scandal, the Claimant received a letter from [redacted] requiring a KYC check "*due to the news in the media*". Thereafter, the Claimant alleges that [redacted] started to make arrangements to discontinue its relationship with the Claimant. The Claimant rejects the Respondent's allegation that the contemporaneous correspondence from [redacted] undermines the casual link.[243]

(iii) [redacted]

304. The Claimant submits that the [redacted] contract was successfully performed from 30 October 2017 until 12 June 2019, and that causation is clear in this instance. The Claimant alleges that at the relevant time, the [redacted] media and politicians started to question whether [redacted] could work with the Claimant after the Kyrgyz scandal arose. There is no other explanation for why the [redacted] authorities and government immediately

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[241] Claimant's Post-Hearing Submissions at paras. 171-172.
[242] Claimant's Post-Hearing Submissions at paras. 182-186.
[243] Claimant's Post-Hearing Submissions at paras. 190-192.

terminated their cooperation and refused to order any further products from the Claimant.[244]

(iv) [redacted]

305. The Claimant submits that the [redacted] contract was terminated due to the Kyrgyz scandal, and denies the Respondent's suggestion that the contract simply "ran its course". The Claimant alleges that this contract was initially signed for 100,000 passports, with an agreement to place an additional 100,000 per year until Mühlbauer (who won a 2019 tender in [redacted]) would take over to supply "new generation" passports. The contract was successfully performed from 17 December 2017 until 12 April 2019, right after the start of the Kyrgyz scandal. The evidence shows that Mühlbauer did not start producing the "new generation" passports in either 2019 or 2020. Therefore, the Claimant submits that "but for" the Kyrgyz scandal, the Claimant would have received at least two more orders under the [redacted].[245]

Respondent's position

306. The Respondent submits that the Claimant's allegation that the other contracts were all cancelled for the sole reason of the "*Kyrgyz scandal*" and "*false allegations*" is not corroborated by the documentary evidence. In the face of an "*evident evidentiary void in this respect*", the Respondent argues that the Claimant proffers self-serving witness testimony of its own executives that conveniently confirms its allegations.[246]

307. The Respondent criticizes the Claimant's approach to the evidentiary and causational weight of media articles pertaining to various aspects of its case: while all adverse media reporting on the Claimant and [redacted] unrelated to the 2018 Tender is dismissed for purported lack of specificity or authority, the few articles mentioning the Claimant in the context of the 2018 Tender are presented as the sole and direct cause of the bulk of the Claimant's damages.[247]

(i) [redacted]

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[244] Reply at para. 556.

[245] Claimant's Post-Hearing Submissions at paras. 173-181.

[246] Statement of Defence at para. 398-400; Reply at paras. 225-226.

[247] Respondent's Post-Hearing Submissions at para. 66.4.

308. The Respondent submits that the [redacted] contract was historically volatile, and there was no support either for the assumption that it would have been extended or that it was terminated given the events surrounding the 2018 Tender in the Kyrgyz Republic. Further, in recent correspondence between the Respondent and [redacted] regarding the reasons for the termination of the contract with the Claimant, [redacted] responded that in "*2020,* [redacted] *switched to a Russian printing house given the breakout of the COVID-19 pandemic, the closure of borders and cross-border logistical difficulties*."[248]

(ii) [redacted]

309. The Respondent submits that the Claimant's allegations concerning its contract with [redacted] are frivolous, given the Claimant has only produced: (i) a two-year contract with [redacted] from 2010; and (ii) a December 2020 email exchange, where a [redacted] representative refers to "*the Original Agreement signed 29.11.2017*" and the "*current contract, signed on 27.01.2020*". The Respondent argues that this exchange simply confirms that [redacted] decided to let the current contract expire in December 2020, without stating any reasons.[249]

310. As to the correspondence in July-August 2019 in which [redacted] requested that the Claimant complete a 3rd party screening survey concerning "*news on the media about Garsu Pasaulis*", the Respondent argues that this is not connected to the correspondence from [redacted] in September 2020 informing the Claimant that the contract would not be renewed after it expired. This conclusion is supported by recent correspondence between the Respondent and [redacted], in which the latter confirmed that it had decided not to renew its contract, which it was legally entitled to do.[250]

(iii) [redacted]

311. The Respondent submits that the contract between the Claimant and [redacted] for the production and supply of [redacted] visa stamps was terminated given the "*much wider reputational issues involving* [redacted] *and Garsu Pasaulis*", not solely (or even just explicitly) the events surrounding the 2018 Tender in the Kyrgyz Republic. This was

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248 Statement of Defence at para. 400.3; Reply at paras. 227-228.

249 Statement of Defence at para. 400.4.

250 Reply at paras. 229-230.

confirmed by a spokesperson for [redacted] to the [redacted] media, which report referred to [redacted] corruption issues in several African states, police searches in Belgium, and implication in a bribery scandal in Switzerland.[251]

(iv) [redacted]

312. The Respondent argues that the contract between the Claimant and [redacted] for the production of e-passport booklets in [redacted] appears to have been terminated by [redacted] in view of the controversy surrounding the Claimant and its parent company, [redacted] in [redacted] and other African countries. In any event, based on the evidence, the Claimant's role in [redacted] was merely that of a stop-gap to cover e-passport demands between [redacted] ousting from the country and Mühlbauer's commencement of operations under the concession it won via open tender.[252]

Tribunal's decisions

313. The Claimant has argued that "but for" the Respondent's actions, the Claimant would have continued to enjoy the benefits of four other commercial contracts with [redacted] [redacted]. However, the Tribunal has already denied the Claimant's claims that the Respondent is responsible for the destruction of the Claimant's business reputation at paragraphs 269 to 278 above. This included finding that the Claimant had failed to establish that the Respondent was responsible for a "media campaign" against the Claimant, and that there were factors unrelated to the Respondent which likely contributed to the Claimant's allegations regarding damage to its international business reputation. In light of this, the Tribunal is unable to find a casual link between the Respondent's actions and the Claimant's alleged losses in relation to the other contracts.

314. Further and in any event, each of the terminated contracts has plausible alternative explanations for why they may have been terminated:

(i) When asked for the reason for terminating its relationship with the Claimant, [redacted] stated that they switched to a Russian printing house given the restrictions imposed during the COVID-19 pandemic. While orders may have

[251] Statement of Defence at para. 400.2; Reply at para. 234.
[252] Statement of Defence at para. 400.1; Reply at paras. 231-233.

stopped prior to the start of the pandemic (the final order was placed in July 2019) and the contract was set to expire only in March 2020, the Tribunal does not consider that as sufficient evidence that the Respondent's actions were the cause of non-renewal of the Claimant's commercial relations with ████ ██████.

(ii) The Claimant's relationship with ██████, which commenced in 2017, appears to have expired in December 2020. While the Tribunal notes that ██████ requested a screening by the Claimant concerning "*news in the media*", this was in July-August 2019. The evidence before the Tribunal suggests that a second agreement was signed afterwards in January 2020, following which the contract expired at the end of 2020 (see the email from ██████ to the Claimant dated 10 September 2020 at Exhibit CER-3-Exh-19).

(iii) It appears likely from the evidence that the reason for ████ termination were not directly linked to the media coverage relating to the 2018 Tender, but in relation to broader reputational issues involving █████.

(iv) With respect to the ████ contract, the evidence indicates that the Claimant was merely acting as a temporary service provider, in the period between when █████ was removed from working in the country until a new company could be appointed to the role following an open tender process. In any event, in light of the wider negative media coverage of █████[253] the Tribunal would be unable to conclude that media coverage relating to the 2018 Tender affected the Claimant's contracts with ████ in any meaningful way.

315. Accordingly, the Tribunal denies the Claimant's claims relating to the cancellation of third party contracts, on the basis that causation has not been established.

VIII. QUANTUM

316. At the outset, the Tribunal notes that it shall only be addressing the Claimant's damages claim in relation to the e-passports claim. As the Tribunal has denied the Claimant's claims relating to the cancellation of third party contracts (see paragraphs 313 to 315 above), the Tribunal therefore denies the Claimant's related damages from those claims. Further, on

[253] See *e.g.* Exhibits [R-31], [R-32], [R-33].

the basis of the Tribunal's findings with regard to the denial of the Claimant's claims relating to the Respondent's destruction of the Claimant's business relationship (see paragraphs 269 to 278 above), the Tribunal denies the Claimant's claim for damages arising from its alleged loss of reputation. The Tribunal has found, inter alia, that there is insufficient evidence to establish that the Respondent was the primary reason for the alleged "media campaign" against the Claimant and that the Respondent had been responsible for negative media coverage internationally.

Claimant's Position

317. As its primary case, the Claimant is seeking €16,740,000 in damages comprising of the following losses: (a) losses arising from the 2018 Tender; (b) losses arising from other contracts; and (c) loss of reputation. The Claimant has provided alternative valuations depending on the Tribunal's decision on the valuation date and the rate of return on investment.[254]

318. The Claimant submits that the standard applicable in the present case is as set forth in the *Chorzow Factory* case, which is intended to "*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*." The Claimant takes the position that this customary international law standard should be applied to the exclusion of national Kyrgyz law provisions.[255]

(A) Losses arising from the 2018 Tender

319. It is the Claimant's position that "*but for*" the Kyrgyz Republic's expropriation of the Claimant's rights to the 2018 Tender e-passports contract, the Claimant would have earned profit from the e-passports contract. The Claimant alleges that it has demonstrated that, but for the Respondent's violation of the BIT, the Respondent was ready to sign the e-passports contract and the terms of the contract could no longer be amended. The Claimant argues that such profits would have been further invested and would have made an additional profit for the Claimant.[256]

320. The Claimant submits that the Respondent cannot rely on Kyrgyz law provisions to escape liability for its violation of the BIT, and even if the 2018 Tender rules and/or local law

[254] Claimant's Post-Hearing Submissions at paras. 222-229.
[255] Claimant's Post-Hearing Submissions at para. 139.
[256] Claimant's Post-Hearing Submissions at paras. 141-142, 149-150.

applied, the Tribunal should still order the Respondent to provide full compensation as the Respondent did not lawfully cancel the 2018 Tender and therefore cannot take advantage of domestic law provisions.[257]

321. The Claimant's valuation expert, Dr. Banyte, provided her calculations for the losses stemming from the 2018 Tender in her two expert reports. Her primary calculation used 31 December 2020 as the valuation date, on the basis that this was the last date for which the financial data existed at the time of making her first expert report. She reasoned that using this date avoided additional assumptions, and using the latest valuation date results in a more accurate calculation of damages. While Article 4(2) of the BIT provides that compensation "*shall correspond to the market value of the expropriated investment before the expropriation…*", the Claimant argues that case law indicates that the Tribunal can deviate from Article 4(2) and is at liberty to choose the most appropriate valuation date. In any event, the Claimant notes that the Respondent's expert has reached a similar calculation using a date of 31 December 2018 as the valuation date.[258]

322. Dr. Banyte calculated "direct losses" (*i.e.* sunk costs from the 2018 Tender) at € 7,590.25, which value the Claimant submits that both Parties' experts have agreed. However, the Claimant agrees that in the event that it is awarded the lost profits claimed, the sunk costs should not be added to the calculation of damages.[259]

323. Dr. Banyte's calculations of indirect losses (*i.e.* lost profits) arising from the cancellation of the e-passports contract, calculated as of 31 December 2020, amount to € 2,213,000. Dr. Banyte reached this figure on the following basis:

(i) Dr. Banyte determined the income for the e-passports contract based on the prices and products it offered in the 2018 Tender, which are set out at Table 7 of the Banyte First Report. Personal passports (Type 1) in the amount of 1.5 million passports were to be delivered in eight batches of 200,000 and one batch of 100,000, over the course of 2019 through 2022. Other passports, specimens and booklets were scheduled to be produced and submitted within "any period of six months". As the e-passports contract did not specify the deadline for these

[257] Claimant's Post-Hearing Submissions at paras. 144-148.
[258] Claimant's Post-Hearing Submissions at paras. 151-155.
[259] Banyte Second Report [CER-3-2] Sections 1 and 2, pp. 11-14; Claimant's Post-Hearing Submissions at paras. 157-159.

other products, Dr. Banyte included their production in the first six months of the contract. The total income for these products came to KSG 940,150,000.[260]

(ii) Dr. Banyte converted the income from KSG to EUR, using the average exchange rate from 2016 to 2020 of EUR 1 = KSG 83.00670, which provide a figure of € 11,326,000 for income from the e-passports contract.[261]

(iii) Dr. Banyte then calculated the expected operating costs to be incurred by the Claimant for the production, based on information provided by the Claimant, which totaled € 8,500,240. A high-level breakdown of these costs is set out at Table 11 of the Banyte First Report.[262] Further evidence of these costs, CER-3-Exh-57, was filed along with the Banyte Second Report.

(iv) The operating costs were allocated from 2019 through 2022, and deducted from the annual income to calculate the EBIT for each year (see Table 37 of the Banyte First Report). Dr. Banyte then deducted income tax to calculate the "Free Cash Flow" or profit for each year (see Table 18 of the Banyte Second Report).[263]

(v) Dr. Banyte then calculated the accumulated losses for the 2019-2020 period by applying a return on investment ("**ROI**") rate of 21.70% for 2019 and nil for 2020.[264] This resulted in total accumulated losses for the years 2019-2020 (as at the valuation date of 31 December 2020) in the amount of € 1,452,000.[265]

(vi) To calculate the "present value" of the losses for 2021-2022, Dr. Banyte applied a discount rate of 21.46%, which provided for accumulated losses for the years 2021-2022 (as at 31 December 2020) of € 761,000.[266] Therefore, together with the losses for 2019-2020 (as at the valuation date of 31 December 2020), the indirect losses for the e-passports contract amount to € 2,213,000.

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[260] Banyte First Report [CER-3-1] at Section 8.2.1, pp. 5-7.

[261] *Ibid.*, see Table 10.

[262] *Ibid.*, see Table 11.

[263] Banyte First Report [CER-3-1] at Section 12.1, p. 29; Banyte Second Report [CER-3-2] at Section 9.2, p.30.

[264] In the Banyte First Report, Dr. Banyte applied an ROI rate of 20.45% for 2019 and 21.70% for 2020. This was amended in the Banyte Second Report to an ROI rate of 21.70% for 2019 and no rate applied for 2020, as reflected at paragraph 162 of Claimant's Post-Hearing Submissions.

[265] Banyte First Report [CER-3-1] at Section 12.1, p. 30.

[266] *Ibid.* at pp. 30-31.

324. Dr. Banyte made the following further observations in relation to the valuations performed by herself and by the Respondent's expert, Ms. Malyugina, in relation to the e-passport losses:

(i) Dr. Banyte relied on an average of historical currency exchange rates between KGS and EUR, using data available from 2016 to 2020. She criticized Ms. Malyugina's approach, which relied on forecasts of USD/KGS exchange rates, and which differed significantly from the actual rates. Dr. Banyte took the position that the latter approach is inappropriate for a currency as volatile as the Kyrgyz som.[267]

(ii) In calculating the costs for performing the e-passports contract, Dr. Banyte relied on the actual estimates of the Claimant's costs (as provided by the Claimant in CER-3-Exh-57). Dr. Banyte criticized Ms. Malyugina's approach, which was to apply the Claimant's alleged historical profit margin of 17% across all projects. Dr. Banyte notes that the Claimant's operating profitability ranged from 15 to 30 percent from 2016 to 2020.[268]

(iii) The ROI rate used by Dr. Banyte is based on an average of historical data of the Claimant (as set out at Exhibit CER-3-Exh-40). Further, Dr. Banyte notes that while Ms. Malyugina was critical of Dr. Banyte's high compounding rate, Ms. Malyugina nonetheless adopted the same discount rate of 21.46%, and thus implicitly validated Dr. Banyte's rates.[269]

(B) Interest

325. The Claimant submits that it is entitled to an interest award on the damages sought in order fully to compensate it for the Respondent's wrongful breach of international law. The Claimant argues that the payment of interest under Article 38 of the ILC Articles on State Responsibility "*is to remedy the concrete damage incurred by the injured party*." The Claimant submits that interest should be compounded, since this is more in accordance with the reality of financial transactions and comes closer to the standard to remunerate the use of money in modern finance than simple interest does. The Claimant argues that

[267] Banyte Second Report [CER-3-2] at Section 5.1, p. 16.
[268] Banyte Second Report [CER-3-2] at Section 5.2, pp. 16-17.
[269] Banyte Second Report [CER-3-2] at Section 5.3, p. 17.

awarding simple interest would benefit the Respondent, and that compound interest is necessary to avoid such further disruptive practices of the Respondent, and that such conclusions have been reached by many other recent tribunals.[270]

326. As to the relevant date, the Claimant submits that interest should start to run from 22 February 2019, the date of the wrongful act. This was the date on which the GKNB announced that it would open a criminal investigation into the 2018 Tender results, which was the action that "*officially started all the subsequent actions (non-response, investigations, smear campaign, etc.) that led to the breach of the Agreement, including expropriation of e-passports contract*." The Claimant submits that the rate should be the same interest rate applied by the Tribunal in Procedural Order No. 2, being US prime rate plus 2%, which is generally used in investment treaty arbitrations governed by international law.[271]

327. The Claimant therefore seeks interest on the damages awarded at a rate of US prime rate plus 2%, compounded on an annual basis, beginning from 22 February 2019 until the Tribunal's award is fully complied with.[272]

Respondent's Position

328. The Respondent agrees that the damages should compensate the investor for harm suffered as a direct result of the BIT violation. However, the Respondent argues that there can be no reparation for speculative or uncertain damages, and that the Claimant has failed to discharge its burden to prove its losses with sufficient certainty, and therefore should not be awarded any compensation, even in the event the Tribunal were to find that the Respondent breached its BIT obligations.[273]

329. It is the Respondent's position that, even if the Claimant succeeds in proving that it suffered losses relating to its purported investment in the Kyrgyz Republic, it still cannot request any compensation from the Respondent due to a failure to demonstrate the existence of a causal link between its alleged losses and the Respondent's alleged breaches of its obligations. The Claimant bears the burden of proof of establishing that the actions

[270] Statement of Claim at paras. 732-736; Reply at paras. 598-605.
[271] Statement of Claim at paras. 737-739; Reply at paras. 607-615.
[272] Statement of Claim at para. 740.
[273] Statement of Defence at paras. 383-386.

attributable to the Respondent were the necessary cause of its losses, and not from other causes, which the Respondent argues the Claimant has failed to do.[274]

330. The Respondent also raised a number of criticisms of Dr. Banyte's work including, *inter alia*:[275]

(i) Dr. Banyte's work was not in accordance with "*industry standards*" or "*methodology*", as demonstrated by her explanations of her use of a five-year average of KGS/EUR exchange rates, despite the known year-on-year volatility, and her inability to describe such standards used.

(ii) While Dr. Banyte acknowledged that her findings on the purported damages "*correlate*" to the so-called "Kyrgyz scandal", this did not stop her from claiming several times that the Claimant's relationships with the four parties for which contracts were cancelled were "*terminated due to the Kyrgyz scandal*".

(iii) Despite presenting her findings as a result of an extensive and well-thought through investigation, Dr. Banyte failed to make reasonable inquiries with the Claimant as to the evidence that would support (or, more likely, go against) her findings. Her findings were, in fact, very far from any sort of independent "investigation", and in most occasions she was content with simply following the Claimant's instructions as to the context and relevance of certain documents backing up her damages calculations.

(iv) When pressed on calculations, Dr. Banyte's default fallback position during cross-examination where she did not have a convenient answer was that the amount in question was insignificant. When faced with evidence going against her findings (or instructions), Dr. Banyte was unwilling to accept the reality and stated that she needed to do "*further investigation*".

(A) Losses arising from the 2018 Tender

[274] Statement of Defence at paras. 387-391; Reply at paras. 217-218.
[275] Respondent's Post-Hearing Submissions at paras. 68-76.

331. The Respondent submits that there is no causal link between the alleged "expropriation" of the Claimant's investment and the losses relating to the 2018 Tender e-passports contract. The Respondent relies on, *inter alia*, the following:[276]

(i) The Claimant's bid for the 2018 Tender expired on 2 April 2019, and from that date the Claimant could not have entered into a contract with the SRS. However, the act, or "cause", that the Claimant complains about is the 4 February 2020 order from the SRS deeming the 2018 Tender as failed. However, the Claimant is not arguing, nor is it possible for the Claimant to argue, that the 4 February 2020 order somehow contributed to the expiry of its bid in April 2019.

(ii) The purported refusal to execute the e-passports contract has to be considered together with the Claimant's own inaction, as there is no evidence that the Claimant undertook any action aimed at signing the contract between late February 2019 (when the complaints of the two unsuccessful bidders were dismissed) and 2 April 2019 (when its bid expired). This is in light of the Claimant's duty to mitigate its damages, a well-established legal principle applicable to damages calculations in investor-State disputes.

(iii) Even if the two causes invoked by the Claimant actually had any weight and were removed for a 'but for' analysis, the 'effect' for the Claimant would not have been the entry into a contract with the SRS. Put differently, the answer to the Claimant's question about how probable it was that the Claimant would have executed the e-passports contract is not "*virtually certain*", but instead "*very unlikely*". This is because the 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 the Claimant was annulled.

332. In any event, the Respondent argues that the quantum of the alleged damages that the Claimant is seeking is entirely unreliable and cannot be awarded. The Respondent alleges that the Claimant's unverified costs, flawed methodology, unsupported assumptions and

[276] Statement of Defence at paras. 392-396; Reply at paras. 219-224.

inconsistent treatment of available *ex post* information lead to a completely unreliable figure that can only be rejected by the Tribunal.[277]

333. The Respondent's expert, Ms. Malyugina, alleges that she has identified serious flaws in the Claimant's calculation of its 2018 Tender losses, including:

(i) The revenue from the e-passports contract is overstated, as Dr. Banyte's use of a historical conversion rate of KGS to EUR from 2016-2020 is incorrect. Correcting Dr. Banyte's calculation for actual conversion rates in 2019 and 2020, and forecast rates as of 31 December 2020 for 2021 and 2022, decreases the claimed revenue assessed by Dr. Banyte by € 900,000 (equivalent to more than one third of the loss she calculates). Ms. Malyugina's calculations are illustrated at Table 7-2 of the Malyugina First Report.[278]

(ii) The costs on which Dr. Banyte relies for the e-passports contract valuation are unsupported. They are not based on any contemporaneous documentation but rather appears to be based on instructions from the Claimant, and no testing of the reasonableness of the costs has been performed. It is impossible to reliably quantify loss if no cost budget for the project had been prepared at the time of the 2018 Tender. Ms. Malyugina submits that an increase of 23% or more to the costs budget, along with a forex adjustment, brings the e-passport project to a negative cash flow.[279]

(iii) Dr. Banyte's approach to compounding her estimated lost profit, instead of discounting it, makes little economic sense, and results in the net present value of allegedly lost cash flows being higher than their undiscounted value. Dr. Banyte's choice of interest rate of between 20.45% and 21.75% to perform this compounding is extreme, and not an industry norm. Further, she accrued two full years of interest for profits allegedly lost in 2019 and 2020, which is incorrect given that profits could not be expected to be received on 1 January of each year.[280] Ms. Malyugina states that in her experience, for pre-award interest,

[277] Rejoinder at para. 243.
[278] RER-2-1 at Section 7.3, pp. 38-39.
[279] RER-2-1 at Section 7.4, pp. 39-40.
[280] RER-2-1 at Section 7.5, p. 40.

normal commercial rates of interest at between LIBOR +1% or LIBOR + 2% are most commonly used for this purpose.[281]

(iv) The valuation date of 31 December 2020, as selected by Dr. Banyte, is arbitrary. Typically, the date of the claimed breach is adopted as the valuation date and, alternatively, the date of the award is adopted, with analysis performed on an ex-post basis. Neither the Claimant nor Dr. Banyte has explained why 31 December 2020 was selected as a valuation date. The Respondent submits that the valuation date of 4 February 2020 (being the date when the SRS recognized the 2018 Tender as failed) is the correct date.[282]

(v) Performing an illustrative recalculation as of 31 December 2018, reducing the Claimant's "counterfactual" profit margin to 17% (based on the Claimant's average profits in the three years preceding the 2018 Tender) and adopting a correct KGS/EUR projection as of 31 December 2018, Ms. Malyugina calculates the losses from the e-passports contract to be € 1,258,000.[283]

(B) Interest

334. The Respondent takes issue with both the compounding of interest and the start date claimed by the Claimant. The Respondent argues that there is no uniform practice in ordering compound interest, and that tribunals routinely award simple interest as sufficient and appropriate compensation. Further, the Respondent submits that the Claimant must, but has failed to, demonstrate particular circumstances justifying compound interest.[284]

335. With respect to the interest start date, the Respondent submits that 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 of by a claimant. The Respondent rejects the Claimant's justification of 22 February 2019 as the start date, being the date of the purported wrongful act of the State in commencing the 2018 Tender Investigation. However, the Claimant is not pleading that the actual commencement of that investigation was in breach of international law, let alone an expropriatory act. The Respondent submits

[281] RER-2-1 at Section 5.5, p. 24.
[282] RER-2-2 at Section 5.4, pp. 23-24; Reply at paras. 239-242.
[283] RER-2-2 at Section 2.6, p. 8, and Section 7.2, pp. 35-36.
[284] Statement of Defence at paras. 413-415.

that the start date is that pre-Award interest on any damages should run from 10 February 2020, the date of the Claimant's Notice of Arbitration. Alternatively, the Respondent submits that interest should start from 4 February 2020, the date of the order from the SRS formally recognizing the 2018 Tender as failed.[285]

Tribunal's decisions

(A) Losses arising from the 2018 Tender

336. The damages under this issue relate to losses arising from the 2018 Tender, notably the loss of the e-passport contract. While the Respondent does not contest that the breaches of the BIT which have been alleged by the Claimant are related to the Claimant's investment by way of winning the 2018 Tender, the Respondent maintains the argument that causation is not made out between the alleged "expropriation" of the Claimant's investment and the losses claimed for the e-passport contract. These breaks in causation relate to: the expiry of the Claimant's bid on 2 April 2019; the Claimant's alleged "passive" behaviour between February and April 2019; and the administrative court proceedings commenced by Mühlbauer in April 2019, which led to the cancellation of the 2018 Tender. The Tribunal does not find that any of these events break the chain of causation in relation to the Claimant's loss of the e-passports contract. The Tribunal has set out the relevant facts leading up to the Claimant's winning of the 2018 Tender and the events which followed (see paragraph 256 above). As the Tribunal found at paragraphs 257-262 above, it was the actions and omissions of the Respondent which were the primary reason for which the e-passports contract was not signed. The Tribunal finds that causation is established in relation to the Claimant's claims for damages arising from the 2018 Tender and failure to enter into the e-passports contract. The Tribunal must now assess the Claimant's damages flowing from the 2018 Tender and the loss of the e-passport contract.

337. The Parties agree that, in the absence of a measure of damages provided for under the BIT (which only provides for a measure for compensation for lawful expropriation at Article 4(1)), damages should compensate the Claimant for harm suffered as a result of the breaches of the BIT.[286] The Claimant is therefore entitled to damages for the harm which it suffered in relation to the loss of the e-passports contract. Under this head of claim, the

[285] Statement of Defence at paras. 416-419; Reply at paras. 247-255.
[286] Statement of Defence at paras. 383-386.

Claimant is seeking €2,213,000 for indirect damages (*i.e.* lost profits), the calculations for which have been prepared by the Claimant's expert Dr. Banyte.[287]

338. In performing this exercise, the Tribunal is necessarily constrained by the submissions of the Parties and their respective experts. While the Respondent's expert, Dr. Malyugina, has not performed a separate independent valuation, she has provided various critiques of Dr. Banyte's analysis, including on the following issues: (i) the valuation date; (ii) the exchange rate; (iii) the calculation of costs for the e-passport production; and (iv) the discount rate. The Tribunal shall address these in turn.

339. With respect to the *valuation date*, the Tribunal does not accept Dr. Banyte's position that 31 December 2020 is the correct date to use. This date is unrelated to the breaches underlying the Claimant's claims. The Tribunal does not consider that the fact that there may be more data available at that time to be a sufficient reason to justify its selection as the valuation date. As the Tribunal has discussed above at paragraphs 257-258, the date of 22 February 2019 is the date on which the GKNB announced its investigation, which is one of the primary actions of the Respondent which lead to the Claimant's loss of the e-passports contract. Further, the Tribunal notes that the Claimant has taken the position that interest should start from 22 February 2019, being the date of the "wrongful act". The Tribunal finds that that 22 February 2019 is the relevant valuation date.

As far as the *exchange rate* is concerned, the Tribunal finds it more appropriate to adopt Mr. Malyugina's approach of using actual conversion rates for 2019 and 2020, and forecast conversion rates for 2021 and 2022. Dr. Banyte's use of a five-year average rate does not appear appropriate in light of the volatility of the Kyrgyz Som in recent years. The Tribunal finds the use of actual and forecast rates to be more accurate and appropriate in the circumstances. The Tribunal therefore adopts Ms. Malyugina's conversion calculations of sales revenue of €10.407 million at Table 7-2 of her Second Report. While the Tribunal appreciates that Ms. Malyugina's conversions use a date of 18 December 2018, as her "illustrative recalculation" was done as of 31 December 2018, the Tribunal does not consider that the Tribunal's finding of 22 February 2019 as the valuation date prevents it from using Mr. Malyugina's calculations in this respect. The Tribunal finds it

[287] Claimant's Post-Hearing Submissions at para. 162; The Tribunal notes that in the Banyte Second Report this sum is €2,215,000 at para. 10.3 (Table 29). The Tribunal has used the figure from the table set out in the Claimant's Post-Hearing Submissions at para. 162.

reasonable to assume that the prediction as per 31 December 2018 is relevant to use for the valuation date of 22 February 2019, which is less than two months later.

340. With respect to the assessment of the *costs for the e-passports contract*, the Tribunal finds it troubling that the Claimant has not provided contemporaneous documents in support of these figures. The Tribunal would expect that business plans, financial evaluations or similar documents would be prepared prior to a company participating in a substantial tender such as the 2018 Tender. Dr. Banyte has provided a table of costs in her report which estimate the costs to be incurred in carrying out the e-passports contract to be €8,500,243, and that the calculation of these costs was based on information provided by the Claimant, including the information in CER-3-Exh-57, submitted with the Banyte Second Report. Dr. Banyte was cross-examined on the source of figures in CER-3-Exh-57 and how they relate to the costs set out at Table 11 of the Banyte First Report.[288] The Respondent's counsel appeared to suggest that Dr. Banyte was given figures of costs from the Claimant, and that Dr. Banyte "reverse engineered" those figures to construct the costs at Table 11, and that the supporting exhibit was not the basis for her calculations. However, the cross-examination did not manage to establish this, nor to undermine the connection between CER-3-Exh-57 and Table 11 and the figures therein. When questioned by the Tribunal, Dr. Banyte could not provide any information about how or when this document was created, simply stating that the document is "*like a working document, the analysis of what they can do with this tender. So that's why it's look a bit messy, because it's like projection of costs*."[289] The Claimant did not provide any clarity on the contents of CER-3-Exh-57 in its Post-Hearing Submissions.

341. In view of the foregoing, the Tribunal has some difficulty in establishing the basis for the costs calculation of €8,500,243 based on the information in CER-3-Exh-57 and the explanations provided by Dr. Banyte. The figures and line items in CER-3-Exh-57 do not match the figures and line items at Table 11 of the First Banyte Report, and it has not been made clear to the Tribunal how or whether they are meant to align. What appear to be summary tables on pages 1 and 2 of the exhibit highlight two amounts that when added together total € 7,785,820, which is € 714,423 short of the amount of costs calculated by

[288] T4/28:12-44:4.
[289] T4/61:6-63:3.

Dr. Banyte. The individual line items (being Materials, Package, Work and Facilities) do not correlate to the itemized costs at Table 11 of the Banyte First Report.

342. Ms. Malyugina has criticized the Claimant's costs calculation, which results in a profit of approximately 25% of revenue, and proposes instead a profit margin of 17%. Ms. Malyugina has done so on the basis of the Claimant's average net profit margin in the three years preceding the breach from 2016 to 2018.[290] In light of the inadequate evidence of costs presented by the Claimant, the Tribunal finds it appropriate to adopt Ms. Malyugina's use of the average profit margin of 17%.

343. With respect to the *discount rate*, Dr. Banyte has used a rate of 21.46% in her calculations, which the Respondent has criticized. While the Tribunal is of the view that this is a high discount rate in the circumstances, it notes that Ms. Malyugina has nonetheless used this figure in her "alternative illustrative recalculation" of the e-passport losses in Section 7.2 of her Second Report, and the Respondent has not presented a different rate. Against this background, the Tribunal finds it appropriate to accept the use of the discount rate of 21.46% for the valuation of the e-passports contract losses.

344. Following from the foregoing decisions, the Tribunal therefore calculates the losses from the e-passports contract as €1,257,910, as calculated at Table 7-3 of Ms. Malyugina's Second Report:

(i) Total sales revenue 2019-2022: KGS 940,150,000,000

(ii) Total sales revenue 2019-2022 in EUR (converted using actual and forecast forex conversion rates): EUR 11,219,000

(iii) Net profit (applying profit margin of 17%): EUR 1,907,260

(iv) Net present value (as of 31 December 2018) of the e-passports contract (applying discount rate of 21.46%): EUR 1,257,910

345. For the foregoing reasons the Respondent will therefore be ordered to pay the Claimant €1,257,910 in damages for its breaches of the BIT.

(B) Interest

[290] Malyugina Second Report at paras. 7.1.9-7.1.15.

346. The Claimant seeks interest on the damages at a rate of US prime plus 2%, compounded on an annual basis, from the date of 22 February 2019.[291]

347. The Tribunal finds it appropriate to award interest to the Claimant on the damages which have been awarded. It is generally accepted in international law that where damages accrue, interest is required in order to grant full reparation to the aggrieved party.

348. With regard to the rate of interest, the Claimant has not provided any legal basis or rationale for the selection of US prime rate plus 2%. However, in the absence of any argument to the contrary from the Respondent, the Tribunal is willing to accept this rate as reasonable in the circumstances.

349. As to the start date for the interest to begin accruing, the Tribunal finds that the date of 22 February 2019 is the relevant date being the date of breach. The 2018 Tender Investigation announced on 21 February 2019, which was the date from which the SRS ceased communication with the Claimant in relation to the signing of the e-passports contract. This was the start of the events which effectively prevented the Claimant from executing the e-passports contract. Accordingly, the Tribunal finds that the Respondent shall pay interest at a rate of US prime plus 2%, compounded annually, on the sum of € 1,257,910 from 22 February 2019 until the date of full payment.

IX. COSTS OF THE ARBITRATION

Applicable principles for the determination and allocation of legal fees and costs of the arbitration

350. Articles 38 to 40 of the UNCITRAL Rules provide, in relevant part, as follows:

> "***Article 38***
> *The arbitral tribunal shall fix the costs of the arbitration in its award. The term "costs" includes only:*
>
> *(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;*
>
> *(b) The travel and other expenses incurred by the arbitrators;*
>
> *(c) The costs of expert advice and of other assistance required by the arbitral tribunal;*

[291] Claimant's Post-Hearing Submissions at para. 230.

> (d) *The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
>
> (e) *The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*
>
> (f) *Any fees and expenses of the appointing authority as well as the expenses of the Secretary -General of the Permanent Court of Arbitration at The Hague.*
>
> ***Article 39***
>
> *1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.*
>
> *…*
>
> ***Article 40***
>
> *1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
>
> *2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*
>
> *3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.*
>
> *4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.*"

351. The BIT does not contain any provisions as to the allocation or costs between the Parties, with the exception of cases apportioning costs in cases between two Contracting Parties, which is not applicable here. Accordingly, the Tribunal shall be guided by the UNCITRAL Rules.

352. It is a widely accepted rule that the costs of an arbitration are to be in principle borne by the unsuccessful party. An arbitral tribunal may, however, take into account the specific circumstances of the case. Both of the Parties, in their respective Costs Submissions, confirm that the Tribunal has wide discretion to allocate the costs in consideration of the

circumstances of the case, while acknowledging the application of the general principle that "costs follow the event".

Claims for Legal fees and disbursements

353. Pursuant to the Claimant's Statement of Costs, the Claimant claims €1,641,677.22 (excluding payments towards the advance on costs), consisting of the following:

(A) Costs of legal representation and expenses: €1,382,146.79

(B) Expert costs: €247,968.53

(C) Travel expenses of witnesses: €3,100.91

(D) Hearing expenses: €8,460.99

354. The Claimant seeks the following interest on its costs:

(i) On its legal costs and expenses, the Claimant seeks interest at the US prime rate plus 2% compounded annually, from the date of this Award until the date of full payment;

(ii) On the sum of €225,000 (which the Parties were each directed to pay towards the advance on costs on 17 March 2021 and which the Claimant paid in substitution for the Respondent on 7 April 2021), the Claimant seeks interest at the US prime rate plus 2% compounded annually, from 8 April 2021 until the date of full payment;

(iii) On the sum of €375,000 (being the balance of the Claimant's payments toward the advance on costs), the Claimant seeks interest at the US prime rate plus 2% compounded annually, from the date of this Award until the date of full payment.

355. Pursuant to the Respondent's Statement of Costs, the Respondent claims USD 1,759,203.85, consisting of the following:

(A) Costs of legal representation: USD 1,450,000.00

(B) Expenses (including travel and hearing expenses): USD 107,043.01

(C) Expert fees of Ms. Davletbayeva: USD 39,000.00

(D) Expert fees of Ms. Malyugina: USD 163,160.84

356. The Respondent seeks 5% interest per annum on its costs, from the date of the Award until the date of full payment.

Tribunal's decisions on claims for legal fees and disbursements

357. As provided for in the UNCITRAL Rules and confirmed in the Parties' submissions, the Tribunal has wide discretion to allocate the costs in light of the specific circumstances of the case, while taking account of the general principle that "costs follow the event". In the present case, while the Tribunal does not consider that there has been a clear "winner", as both the Claimant and the Respondent have been successful and unsuccessful on portions of their respective cases. However, the Claimant was overall successful on its jurisdictional arguments and on its claim in relation to the 2018 Tender and the loss of the e-passports contract. The Tribunal considers that the claims relating to the 2018 Tender were the central aspects of the Claimant's case and likely the genesis of this entire arbitration.

358. It is not possible, nor necessary, for the Tribunal to engage in a detailed analysis of the time and costs allocated to each individual issue in order to allocate the costs incurred by the parties in relation to the issues that they "won" and "lost". However, upon a consideration of the Tribunal's findings, the Tribunal considers that the Claimant should be entitled to receive reimbursement for 60% of its costs sought in the arbitration. As the amounts of the Parties' respective costs are similar in size (€1,641,677.22 versus USD 1,759,203.85), the Tribunal considers that the Claimant's costs incurred were proportionate and reasonable in the circumstances.

359. Accordingly, in view of the foregoing and in exercise of its wide discretion, the Tribunal will order that Respondent reimburse the Claimant for 60% of the Claimant's legal and other costs in the amount of €985,006.33.

Costs of the Arbitration

360. The Tribunal hereby fixes the Costs of Arbitration as follows:

(i) Tribunal's fees and expenses of €451,576.16, comprising of:

a. Fees of Mr. Laird of €133,737.50 and expenses of €6,023.41

b. Fees of Prof. Vilkova of €108,550.00 and expenses of €5,015.25

c. Fees of Prof. Hobér of €198,250.00

(ii) Other Tribunal expenses (including Tribunal Secretary's fees and expenses: €57,196.70

(iii) PCA registry and other fees: €4,144.50

TOTAL: €512,917.36

361. The Claimant has paid a total of €600,000 towards the advance on costs, while the Respondent has not contributed any funds. For the reasons stated above in relation to the Parties' legal costs, the Tribunal finds it appropriate to allocate the costs of the arbitration equally between the parties (*i.e.* €256,458.68 each). However, since the Claimant paid the Respondent's share of the advance on costs, the Respondent is therefore directed to pay the Claimant €256,458.68 as reimbursement for the Respondent's share of the costs of arbitration. The PCA shall reimburse the remaining deposit of €87,082.64 to the Claimant.

Interest on legal fees, disbursements and costs

362. The Claimant is seeking interest on its legal and other costs at the US prime rate plus 2%, from the date of the award until date of full payment. The Tribunal has already accepted this rate as applicable for the Claimant's damages, and likewise considers it appropriate to apply to the Claimant's legal and other costs.

363. The Tribunal therefore directs the Respondent to pay the Claimant interest on the sum of €985,006.33 at the US prime rate plus 2%, from the date of this Award until date of full payment.

364. With regard to the payments towards the advance on costs, the Claimant has paid the full amount of the costs of the arbitration in the amount of €512,917.36, half of which the Respondent has been ordered to reimburse the Claimant (*i.e.* €256,458.68).

365. The Tribunal considers it appropriate for the Claimant to be awarded interest on its share of the costs of arbitration. The Tribunal therefore directs the Respondent to pay the Claimant interest on the sum of €256,458.68 at the US prime rate plus 2%, from the date of this Award until date of full payment.

X. AWARD

366. For the reasons set forth above, the Tribunal hereby makes the following Award:

A. Denies the objections to the Tribunal's jurisdiction under the BIT over the Claimant's claims.

B. Holds that the Tribunal has jurisdiction over the Claimant's claims.

C. Declares that the Respondent has breached its obligations under Articles 3 and 4 of the BIT.

D. Orders the Respondent to pay the Claimant damages in the sum of €1,257,910.

E. Orders the Respondent to pay interest on €1,257,910 at the US prime rate plus 2%, from 22 February 2019 until the date of full payment.

F. Orders the Respondent to reimburse the Claimant for the latter's legal and other costs in the amount of €985,006.33.

G. Orders the Respondent to pay interest on €985,006.33 at the US prime rate plus 2%, from the date of this Award until the date of full payment.

H. Directs that the Respondent shall bear its own legal and other costs.

I. Orders the Respondent to reimburse the Claimant for the Respondent's share of the costs of arbitration in the amount of €256,458.68.

J. Orders the Respondent to pay interest on €256,458.68 at the US prime rate plus 2%, from the date of this Award until date of full payment.

K. All other claims and requests for relief are denied.

A Party may apply to amend the award regarding the decision on the fees of the arbitrators. Such application should be filed with the District Court of Stockholm within two months from the date when the Party received this award.

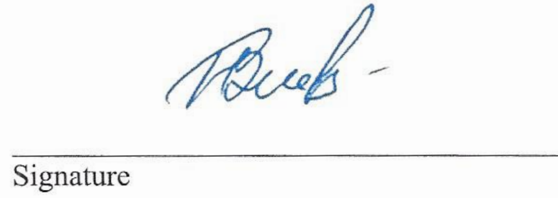
Place of arbitration: Stockholm, Sweden

Date: 8 April 2024

Prof. Dr. Kaj Hobér
Presiding Arbitrator
Date:

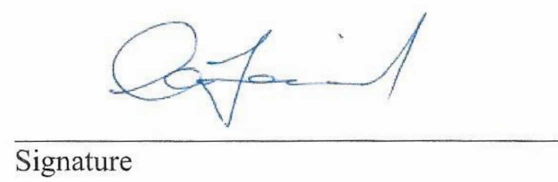
Signature

Prof. Nina Vilkova
Date:



Signature

Mr. Ian A. Laird
Date:



Signature