UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA AND THE GOVERNMENT OF THE KYRGYZ REPUBLIC ON THE PROMOTION AND PROTECTION OF THE INVESTMENTS OF 15 JUNE 2008

BETWEEN

UAB "GARSU PASAULIS"

Claimant/Investor

v.

THE KYRGYZ REPUBLIC

Respondent

NOTICE OF ARBITRATION

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10 February 2020

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I. INTRODUCTION

1. The Kyrgyz Republic, through acts of officials of the Government, the State Committee for National Security Prosecution, general prosecution and courts of the Kyrgyz Republic caused substantial losses to UAB "Garsu Pasaulis" (hereinafter – "**Garsu Pasaulis**" or the "**Claimant**") through expropriatory, unlawful, unfair and discriminatory treatment in relation to the public tender process and refusal to execute passport printing contract awarded to Garsu Pasaulis. Although Garsu Pasaulis had made numerous efforts to negotiate with the Kyrgyz Government, nevertheless, the Government of the Kyrgyz Republic has refused to resolve this dispute amicably.

2. Accordingly, Claimant hereby initiates recourse to arbitration with the submission of this Notice of Arbitration (hereinafter – "**Notice of Arbitration**") against the Kyrgyz Republic (hereinafter – "**the Kyrgyz Republic**" or the "**Respondent**" or the "**Government**") pursuant to Article 8 of 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 (hereinafter – the "**Agreement**")[1], to which Agreement the Kyrgyz Republic is a Contracting Party, and pursuant to Articles 3 and 18 of the Arbitration Rules of the United Nations Commission on International Trade Law, RESOLUTION 31/98 Adopted by the U.N. General Assembly on 15 December, 1976 (hereinafter - "**UNCITRAL Arbitration Rules**")[2].

3. Pursuant to Article 8(2) of the Agreement and Article 3(3)(a) of the UNCITRAL Arbitration Rules, the Claimant hereby demands that the dispute between Garsu Pasaulis and the Respondent be referred to arbitration under the UNCITRAL Arbitration Rules.

[1] 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. Ex. **C-1**.

[2] Arbitration Rules of the United Nations Commission on International Trade Law, RESOLUTION 31/98 Adopted by the U.N. General Assembly on 15 December, 1976. Ex. **C-2**.

II. PARTIES TO THE ARBITRATION

CLAIMANT

4. The Claimant, Garsu Pasaulis, is an investor in the Kyrgyz Republic. Garsu Pasaulis is a company constituted and incorporated under the laws of the Republic of Lithuania. Garsu Pasaulis has, for a number of years, successfully participated in public government tenders and contracts around the world, including ones organized by the Kyrgyz Republic. Garsu Pasaulis has for many years invested substantial financial amounts and *know-how* into the Kyrgyz Republic based on contracts with the Government. In addition, Garsu Pasaulis invested in the Kyrgyz' security printing market by incorporating a local Kyrgyz company LLC "Garsu Pasaulis", which was actively involved in the Kyrgyz Government's digital transformation efforts.

The Claimant is represented in this arbitration by:

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This Notice of Arbitration shall serve as the communication in writing to the Respondent concerning notice of the above-named Counsel as the representatives of the Claimant, pursuant to UNCITRAL Arbitration Rules Article 4.

Accordingly, all communications in this arbitration to the Claimant should be directed to Counsel for the Claimant at the above referenced addresses.

RESPONDENT

THE KYRGYZ REPUBLIC

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III. REFERENCE TO THE ARBITRATION CLAUSE THAT IS INVOKED

5. The Claimant invokes Article 8 of the Agreement as the jurisdictional basis for this arbitration. Article 8 of the Agreement sets out the provisions for the resolution of disputes between investors and a Contracting State to the Agreement as follows:

> **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:
>
> (…)
> – 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.

IV. GENERAL NATURE OF THE CLAIM

6. Garsu Pasaulis' claim arises out of its ongoing participation and investment in the modernization of Kyrgyz security printing industry, country's digital transformation, as well as national citizen identification systems (production and maintenance of passports and the related systems), production and delivery of tax stamps on excisable items indicating payment of taxes and other duties, and maintenance of related IT systems. .

7. This dispute revolves around the conduct of the Kyrgyz Republic, including acts of officials of the Government, the State Committee for National Security Prosecution and the Kyrgyz Republic's abuse of public tender procedures that expropriated Garsu Pasaulis' investments without compensation, including unlawful, unfair and discriminatory treatment, as well as loss of business reputation. Garsu Pasaulis seeks damages for harm that has arisen out of the Kyrgyz Republic's failure to meet its obligations under the Agreement and under general international law.

8. As stated in its Preamble, the purpose of the Agreement between Lithuania and the Kyrgyz Republic is to „establish improved economic cooperation between the two Countries", and in particular for investors from the other country seeking, through "stimulating business ventures" to make investments. As the title of the Agreement reiterates, the objective of the treaty is for the "Promotion and protection of foreign investments".

9. Garsu Pasaulis is one such entrepreneurial investor which has worked diligently to promote and stimulate Lithuanian investment in the Kyrgyz Republic. However, through no fault of its own, the investor is now reluctantly forced to seek the protections and international law remedies provided by the Agreement.

10. Article 1 of the Agreement contains a broad and non-exclusive definition of „investment":

> 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 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.

Changes in the form of investment shall not affect their type as long as such changes are in compliance with national legislation of the Contracting Party's host country.

11. Garsu Pasaulis has, for a number of years, successfully invested in the Kyrgyz Republic.

12. First, upon invitation by the Kyrgyz Republic, in 2012 Garsu Pasaulis participated in the public tender of the Government of the Kyrgyz Republic for production and maintenance of passports and the related systems. However, this tender was later terminated by the Government due to political interference in the tender procedure.

13. Garsu Pasaulis then invested in the Kyrgyz Republic in February 2013, when it had signed and executed a public contract with the Government for production and maintenance of tax stamps on excisable items indicating payment of excise tax and other duties. The value of the contract was 8'921'700 USD.

14. In 2016, Garsu Pasaulis participated in yet another public tender of the Government of the Kyrgyz Republic for the production and maintenance (including IT systems) of tax stamps on excisable items indicating payment of excise tax and other duties (Tender No. 15111383003-01). Garsu Pasaulis won this tender as the best offeror and to date successfully executes the contract with the Government, which is due to expire in the year of 2021. The planned value of the contract is 16'800'000 USD.

15. In June 2016 Garsu Pasaulis again invested in the Kyrgyz Republic when it has established its privately-owned company LLC "Garsu Pasaulis" to coordinate the management of contracts concluded with the Kyrgyz Government for production of tax stamps.

16. In 2018, Garsu Pasaulis sought to expand its activities in the Kyrgyz Republic by participating in yet another tender for production of passports (tender No. 181023129327015) (hereinafter – the "**2018 Tender**").

17. Garsu Pasaulis won the 2018 Tender as the best offeror thereby obtaining 12 million EUR right to execute the contract with the Government.

18. However, the Kyrgyz Republic, through acts of its Government officials, the State Committee for National Security Prosecution, courts and various other institutions refused to give effect to the rights Garsu Pasaulis has lawfully obtained with respect to winning the 2018 Tender.

19. Instead, the Kyrgyz Republic refused to execute the contract with Garsu Pasaulis and publicly smeared Garsu Pasaulis whilst severely damaging Garsu Pasaulis' international reputation. In this manner, Garsu Pasaulis' contract was taken from it through arbitrary, unlawful and discriminatory Government measures, and then given to another company favored by Government officials without any public tender whatsoever.

20. The present dispute thus revolves around a twofold issue. First, it is the denial of Garsu Pasaulis' right to execute the passport printing contract and receive the benefit of 2018 Tender contract – a right to which Garsu Pasaulis was legally and lawfully entitled, and which would have enabled Garsu Pasaulis to expand its existing security printing industry investments in the Kyrgyz Republic and to earn very clearly defined income and profits. In this context,

Garsu Pasaulis' claim concerns an investment within the meaning of the Agreement, as it relates to the rights Garsu Pasaulis acquired as an investor and the return on those rights and assets that have been denied to it.

21. The second issue is the manifest breach of Garsu Pasaulis' rights to international reputation, which was destroyed by the actions of the Kyrgyz Republic. Not only has the Kyrgyz Republic destroyed Garsu Pasaulis' business reputation in the Kyrgyz Republic, but the Kyrgyz Republic's actions had a snow-ball effect on Garsu Pasaulis' international reputation all around the world. Such actions of the Kyrgyz Republic severely crippled Garsu Pasaulis' business activity in all of its markets in more than 55 countries where Garsu Pasaulis operates. This, effectively, caused massive damages to Garsu Pasaulis.

22. Thus, by unlawfully and discriminatorily preventing Garsu Pasaulis from proceeding as the winner of the 2018 Tender, thus depriving Garsu Pasaulis of the legal right to execute the passport printing contract and to receive the substantial benefit it would have received thereby, and by severely damaging Garsu Pasaulis' international reputation, the Kyrgyz Republic, through acts of the responsible Kyrgyz officials, breached the foreign investment protections guaranteed by the Kyrgyz Republic in the Agreement. Moreover, Garsu Pasaulis has not been compensated for the harm it suffered as a result of the Government's wrongful conduct regarding the 2018 Tender.

23. Article 8 of the Agreement requires the parties to attempt to reach an amicable resolution of their disputes during a six-month negotiation period. As it will be explained in more detail below, Garsu Pasaulis has on three (3) occasions notified the Kyrgyz Republic in writing of the existence of a dispute arising under the Agreement. The six-month period from the date of Garsu Pasaulis first written notice having expired in November 2019 without any resolution of the parties' dispute, Claimant hereby commences arbitration against the Kyrgyz Republic.

24. In this arbitration, Claimant seeks damages for the unlawful deprivation of its right to execute the 2018 Tender contract, including the benefits of that right and damages for the complete destruction of Garsu Pasaulis' international

reputation, which has caused severe damages to Garsu Pasaulis business all around the world.

V. RELEVANT FACTS

A. The investor – internationally acclaimed printing company

25. Garsu Pasaulis is one of the largest and most modern security printing-houses in the North-Eastern EU Region. It is also one of the leading commercial printers in the Baltic States. The company has been in operation since 1994 and is very well known internationally.

26. Garsu Pasaulis was established on 7 June 1994 and initially started with the reproduction and distribution of audiovisual recording. In 1996, Garsu Pasaulis launched the production of security printing items: production of counterfeit-proof document forms secured by special security features.

27. In 2004, Garsu Pasaulis built and launched one of the most modern printing houses with office premises in Europe. Number of highly-regarded certifications attest to the reliability and excellence of Garsu Pasaulis' high quality standards. First, Garsu Pasaulis meets the quality management system requirements of the ISO 9001 standard. The company's environmental management system (EMS) is also certified in accordance with the requirements of the ISO 14001 standard and is awarded a certificate. The company's secure print management system was one of the first in the world to be certified in accordance with the high security printing requirements of a new international standard – CWA 14641.

28. In 2009, Garsu Pasaulis signed an international Code of Ethics for Postage Stamp Security Printers. Three years later, in 2012, Garsu Pasaulis was certified in accordance with the requirements of the ISO 27001 standard. In 2014, Garsu Pasaulis was additionally certified in accordance with the requirements of the Forest Stewardship Council (FSC) standard for chain of custody certification.

29. In 2015, the secure print management system of Garsu Pasaulis was certified in accordance with the government level requirements of the ISO 14298 standard. This standard replaced the CWA 14641 standard. In 2017, the Occupational Health and Safety Management System of Garsu Pasaulis was certified according to the requirements of OHSAS 18001 standard.

30. Furthermore, Garsu Pasaulis has an official government certification for working with secret information both in Lithuania and throughout the European Union.

31. Garsu Pasaulis is officially authorized to work with information marked as "EU-Secret" and is officially licensed to print safe (security) documents.

B. The Kyrgyz Republic's bureaucratic and political corruption, cronyism and nepotism

32. As noted by Transparency International, the challenge of facing bureaucratic and political corruption, cronyism and nepotism stand in the way of economic development of the Kyrgyz Republic. While countering corruption has been a recurrent promise made by the country's most recent rulers, results have been poor[3].

33. Transparency International further notes that the judiciary remains one of the country's most corrupt institutions, lacking legitimacy and independence. Substantial, albeit insufficient, legal reforms have taken place, and recent efforts, such as judicial reforms, emphasis on digitization and joining the Open Government Partnership, are auspicious signs. However, the organizational system for countering corruption remains ineffective, undermining any long-term anti-corruption agenda[4].

34. Transparency International's 2018 Corruption Perceptions Index (CPI) ranks the Kyrgyz Republic 132 out of the 180 countries and territories assessed. Its score – 29 out of 100 – has remained stagnant compared to the 2017 edition of the CPI. Within the World Bank's Worldwide Governance Index, the Kyrgyz Republic posts a score of 13 (out of 100) in the control of corruption indicator[5].

[3] Transparency International. Kyrgyzstan: Overview of corruption and anti-corruption, 3 July 2019, Ex. **C-3**.
[4] Ibid.
[5] Ibid.

As with the rule of law indicator (17 out of 100), the improvement has been very slow over the past five years (World Bank 2017)[6].

35. Corruption is named as the third biggest obstacle to companies seeking to do business in the Kyrgyz Republic, behind political instability and the informal sector. Over half of the firms surveyed by the World Bank and the International Finance Corporation alleged that they were asked for (or expected to) pay a bribe when soliciting public services, permits or licences, bringing the country's graft index' to 53.5 per cent (World Bank 2013). When securing a government contract, over 56 per cent of companies are expected to give gifts, while 65 per cent of them are expected to do so to obtain an import license[7].

36. Corruption is widespread in all sectors of the economy and at all levels of the state apparatus. It manifests itself in various forms, including political corruption, nepotism and misuse of power, and both petty and grand forms of corruption are prevalent. For example, recent corruption scandals involved major infrastructure projects funded by the Chinese government under the Belt and Road Initiative. High-level officials, including ministers and former prime ministers have been implicated in embezzlement schemes on road construction projects and on the modernization of the Bishkek Heat and Power Plant. Millions of dollars were misappropriated due to opaque procurement processes and insufficient control systems[8].

37. Freedom House (2019) considers that the Kyrgyz judiciary is not independent and remains dominated by the executive branch, with widespread corruption among judges. Within the Global Competitiveness Index, the lack of judicial independence is seen as a major obstacle for doing business in the Kyrgyz Republic, with the country being ranked 102 among the 137 countries. Corruption in the judicial system is a very high risk for companies in the Kyrgyz Republic. The reported recurrence of bribes and irregular payments in relation to judicial decisions is among the highest in the world[9].

[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Klaus Schwab, World Economic Forum. The Global Competitiveness Report 2015–2016. Ex. **C-4**.

38. Many attorneys report that bribes to judges are more effective for determining the outcome of trials than legal arguments[10]. Businesses are also likely to experience political interference. The prevalence of political interference was illustrated when the government of the Kyrgyz Republic revoked a license by the company CJSC to develop one of the largest gold mines in 2010 and the Supreme Court dismissed the company's appeal to litigate the government's decree. In this way, the judicial system does not act as an independent arbiter for resolving disputes, especially when the interests of the Kyrgyz government are involved[11].

39. It is noted that foreign investors, such as Garsu Pasaulis, in particular, are the most often targets of corrupt judiciary system in the Kyrgyz Republic. This is even echoed by local authorities of the Kyrgyz Republic.

40. For example, the expert of the Council for Business Development and Investment under the Government of the Kyrgyz Republic, Azamat Akeneev, publicly acknowledges that foreign investors are often pressured by security officials. He noted that checks, arrests, interrogations of foreign investors severely damage investment climate of the country – "The main problem that discourages investors is pressure by law enforcement agencies. This has become a key factor hampering the development of the economy." He adds that – "Pressure can be expressed in a variety of forms. From numerous inspections, seizure of documents, interrogation calls to direct arrest of accounts, property of investors themselves, as well as their employees"[12].

41. It is publicly acknowledged that when investing in the Kyrgyz Republic, the business understands that it will have to face corruption, the weak potential of government agencies, a dissatisfied population, complex and non-transparent procedures, lack of infrastructure and other factors that worsen the working environment[13].

42. The head of the Adilet, a legal clinic, Cholpon Dzhakupova recently sent the president of the country Sooronbai Jeenbekov an open letter where she also

[10] Country Reports on Human Rights Practices for 2015 United States Department of State. Bureau of Democracy, Human Rights and Labor. Kyrgyz Republic. Ex. **C-5**.
[11] GAN. Business anti-corruption portal. Kyrgyzstan Corruption Report. July 2016. Ex. **C-6**.
[12] 2019-10-28 Press article. Ex. **C-7**.
[13] Ibid.

stated that there can be no talk of attracting foreign investment to the Kyrgyz Republic, because "law enforcement agencies, prosecutors and judges pervert laws to please their personal selfish interests"[14].

43. As it will be observed in this Notice of Arbitration, the context of wide-spread corruption in the Kyrgyz Republic is particularly relevant in the present arbitration, in particular, while considering the ill-treatment of Garsu Pasaulis and its investments.

C. Garsu Pasaulis' investments in the Kyrgyz Republic and the 2018 Tender

i. Garsu Pasaulis' history of successful participation in Government tenders

44. As it was already mentioned, Garsu Pasaulis, being one of the first in the world to be certified in accordance with the high security requirements of a new international standard – CWA 14641 (now ISO 14298), constantly participates in government tenders all over the world. In particular, Garsu Pasaulis has won numerous public tenders for security printing items, maintenance of sophisticated IT systems and production of counterfeit-proof document forms secured by special security features, such as biometric passports, identity cards, Schengen visas, tax stamps, etc. To date, Garsu Pasaulis cooperated with more than 55 countries around the world.

45. Similarly, Garsu Pasaulis has, for a number of years, successfully participated in public Government tenders and contracts organized by the Kyrgyz Republic.

46. First, upon invitation by the Kyrgyz Republic in 2012, Garsu Pasaulis participated in the public tender of the Government of the Kyrgyz Republic for production and maintenance of passports and the related systems. However, the tender procedure was later terminated[15] due to political interference from Kyrgyz Parliament members.

47. In 2013, Garsu Pasaulis participated in another public tender of the Government of the Kyrgyz Republic for the production and maintenance of tax

[14] 2019-10-23 Press article. Ex. **C-8**.
[15] 2012-04-28 Notice of termination. JF412-p tender. Ex. **C-9**.

stamps on excisable items indicating payment of excise tax and other duties. Garsu Pasaulis won this tender as the best offeror and has fully and successfully executed the contract with the Government[16]. The value of the contract was 8'921'700 USD.

48. After execution of the tax stamps contract with the Government, Garsu Pasaulis was also actively involved in discussions and training of the Kyrgyz public officials on national ID cards' identification systems, implementation and maintenance of the related IT systems. However, later on the Kyrgyz Government has decided not to do a public tender for the national ID cards and instead implemented the eID project in cooperation with KOMSCO and Ubivelox (Korea) and Emperor Technology (China)[17].

49. In 2016, Garsu Pasaulis participated in yet another public tender of the Government of the Kyrgyz Republic for the production and maintenance of tax stamps on excisable items indicating payment of excise tax and other duties (Tender No. 15111383003-01)[18]. Garsu Pasaulis won this tender as the best offeror and to date successfully executes the contract with the Government, which is due to expire in the year of 2021. The planned value of the contract is 16'800'000 USD.

ii. The 2018 Tender for the production of electronic passports (e-passports)

50. In 2018, Garsu Pasaulis participated in another public tender of the Government of the Kyrgyz Republic for production of e-passports to Kyrgyz citizens. The value of the contract was 12'000'000 EUR.

51. The tender procedure began on 23 October 2018, as the Government of the Kyrgyz Republic announced the tender No. 181023129327015 (the 2018 Tender)[19].

52. On 19 November 2018, Garsu Pasaulis submitted its offer, competing against other 4 tender participants[20].

[16] 2012-12-18 Notice of winning tender of 2012, Ex. **C-10**.
[17] See for example: http://www.securitydocumentworld.com/article-details/i/13251/
[18] 2016 Contract with the Kyrgyz Republic regarding tax stamps and systems, Ex. **C-46**.
[19] 2018-10-22 Information about tender No. 181023129327015, Ex. **C-11**.
[20] 2018-11-19 Garsu Pasaulis submission for tender No. 181023129327015, Ex. **C-12**.

53. The other 4 participants where the same constant competitors of Garsu Pasaulis: 2 companies from Germany („Mühlbauer ID Services GMBH“ and „Veridos GmbH“), one company from France („IDEMIA France“) and one company from Kazakhstan (National Bank of Kazakhstan - “Banknotnaya fabrika Natsional'nogo banka Kazakhstana”).

54. Based on offer prices, the list of biding offers was the following[21]:

    1. „Mühlbauer ID Services GMBH“ (686‘772‘250 soms);
    2. „Veridos GmbH“ (936‘347‘750 soms);
    3. Garsu Pasaulis (940‘150‘000 soms);
    4. „IDEMIA France“ (948‘713‘750 soms);
    5. National Bank of Kazakhstan (1‘257‘847‘112,50 soms).

55. On 1 February 2019, the State Registry Commission of the Kyrgyz Republic (“**Commission**”) declared that offers provided by participants „Mühlbauer ID Services GMBH“, „Veridos GmbH“ and the National Bank of Kazakhstan were not complete and not satisfactory, as documents and tender documentation provided by these companies were not in accordance with the 2018 Tender procedures[22].

56. Therefore, offers provided by participants „Mühlbauer ID Services GMBH“, „Veridos GmbH“ and the National Bank of Kazakhstan were excluded, leaving only two fully-compliant offers of Garsu Pasaulis and „IDEMIA France“.

57. While taking into account that Garsu Pasaulis’ offer was lower than that of „IDEMIA France“, on 1 February 2019 Garsu Pasaulis was pronounced winner of the 2018 Tender. As the winner of the 2018 Tender, Garsu Pasaulis had acquired a legal right to execute the e-passport printing contract and commence performance thereof immediately.

58. However, just after the announcement of Garsu Pasaulis as the winner of the 2018 Tender, the two other participants have filed complaints to the Commission.

[21] 2019-04-17 Results of tender No. 181023129327015, Ex. **C-13**.
[22] Ibid.

59. „Mühlbauer ID Services GMBH“ filed a complaint against its removal from the tender due to failure to meet the necessary qualifications[23]. „IDEMIA France“, on the other hand, has filed complaints against Garsu Pasaulis, alleging that Garsu Pasaulis was somewhat unreliable provider[24].

60. The Commission has examined and rejected both complaints of „Mühlbauer ID Services GMBH“[25] and „IDEMIA France“ as ungrounded[26].

61. Just after rejecting complains of „Mühlbauer ID Services GMBH“ and „IDEMIA France“ the Commission on 21 February 2019 has again invited Garsu Pasaulis to sign the e-passport printing contract[27].

62. Meanwhile, while officials of Garsu Pasaulis were arranging travel to sign the passport printing contract, public smear campaign was started against Garsu Pasaulis in the Kyrgyz mass media alleging vague and false allegations that Garsu Pasaulis was involved in bribing the members of the Commission[28].

iii. Termination of the 2018 Tender, raids, investigations and threats

63. Few days after Garsu Pasaulis was pronounced the winner of the 2018 Tender, the tender procedure was “unofficially halted”, because of the involvement of various public authorities of the Kyrgyz Republic (the State Committee for National Security Prosecution and others)[29].

64. It must be noted right away that Garsu Pasaulis to this date was never informed in any form or shape of any of the actions or investigations of the Kyrgyz authorities concerning the allegations expressed in the media. Garsu Pasaulis was never informed that the tender procedure was “unofficially halted” or otherwise terminated. Garsu Pasaulis to this date has never received any notifications or related information[30].

[23] 2019-02-05 „Mühlbauer ID Services GMBH“ complaint., Ex. **C-14**.
[24] 2019-02-07 „IDEMIA France“ complaint, Ex. **C-15**.
[25] 2019-02-05 Decision on „Mühlbauer ID Services GMBH“ complaint, Ex. **C-16**.
[26] 2019-02-08 Decision on „IDEMIA France“ complaint, Ex. **C-17**.
[27] 2019-02-21 Invitation to sign the passport printing contract, Ex. **C-18**.
[28] Compilation of negative media articles about Garsu Pasaulis, Ex. **C-19**.
[29] 2019-04-02 Public media article, Ex. **C-20**.
[30] Only almost a year after the 2018 Tender, on February 04, 2020 the public procurement website was updated with information that the 2018 Tender has “expired”.

65. As it emerged from local public press, on 22 February 2019, the General Prosecutor's office of the Kyrgyz Republic has initiated criminal pre-trial investigation on the allegation of corruption. The investigation was conducted by the State Committee for the National Security Prosecution. In the course of this orchestrated investigation, authorities of the Kyrgyz Republic have arrested and detained employees of the Commission, raided their homes and offices[31].

66. In addition, authorities of the Kyrgyz Republic have also raided homes and offices of Garsu Pasaulis' representatives and affiliates.

67. In the Kyrgyz media, public reports had emerged that Garsu Pasaulis was publicly accused of maintaining allegedly inappropriate connections with the members of the Commission, bribing them by paying for their trips abroad some years ago[32].

68. As it will be explained below, it later became clear that the allegations of bribery were nothing more than a hoax fabricated by the State Committee for National Security Prosecution in order to illegally expel Garsu Pasaulis from the 2018 Tender.

69. After few days later, the media articles clarified that the "bribe" allegation actually pertained the payment made years ago by Garsu Pasaulis (of 334 EUR) for travel expenses of private person, who was at the time a potential IT systems partner for Garsu Pasaulis and who is now a representative of „Mühlbauer ID Services GMBH", one of the main competitors of Garsu Pasaulis[33]. As it was already mentioned, in 2016 Garsu Pasaulis was actively involved in discussions and training of the Kyrgyz public officials on national ID cards' identification systems, implementation and maintenance of the related IT systems. Therefore, this payment for travel concerned Garsu Pasaulis efforts to promote its national ID cards' identification system and had absolutely nothing to do with the 2018 Tender.

70. Meanwhile, as it latter emerged from public press, on 5 April 2019, the Regional Court of Bishkek has issued a court ruling by which it suspended the

[31] 2019-04-02 Public media article, Ex. **C-21**.
[32] Compilation of negative media articles about Garsu Pasaulis, Ex. **C-19**.
[33] 2019-04-19 Public media article, Ex. **C-22**; 2016-06-29 Payment for travel of Almaz Bekenov, Ex. **C-23**.

conclusion of e-passport printing contract between the Commission and Garsu Pasaulis[34] (see further section V. D .ii).

71. Even more, on 12 April 2019, the head of the Commission Alina Shaikova publicly stated that "there was never any contract with Garsu Pasaulis" and on 17 April 2019 it was publicly announced in the mass media that the 2018 Tender procedure was terminated since the offer of Garsu Pasaulis has allegedly "expired"[35].

72. Obviously, in accordance with the 2018 Tender regulations and the Kyrgyz law, the Commission either should have signed the contract or should have asked for extension of the term of Garsu Pasaulis' bid[36]. This was never done. Garsu Pasaulis was also never informed about the alleged "termination" of the 2018 Tender procedure or the alleged "expiration" of its winning bid.

73. Only almost a year after the 2018 Tender, on February 04, 2020 the public procurement website was updated with information that the 2018 Tender has "expired".

74. As mentioned, Garsu Pasaulis, as the winner of the 2018 Tender, and having complied with all the tender regulations and acted in good faith, had no reason to believe that the Commission and the Kyrgyz Republic would simply "terminate" the 2018 Tender without any valid reason or explanation. The Commission never asked for the extension of the term of Garsu Pasaulis' bid as it should have. Garsu Pasaulis was also never informed of the cancellation of the 2018 Tender or the alleged "expiration" of its winning offer.

D. Aftermath of the termination of 2018 Tender

i. The real interests behind the 2018 Tender and disappearance of the head of the Commission

75. Later, it become clear that Garsu Pasaulis' victory in the 2018 Tender has negatively impacted some very powerful people in the Kyrgyz Republic, who apparently had their own plan for the 2018 Tender and the winner thereof.

[34] 2019-04-17 Public media article, Ex. **C-24**.
[35] 2019-04-12 Public media article, Ex. **C-25**.
[36] Articles 24-26, 32 of the Law on Public procurement of the Kyrgyz Republic, see also 2018-10-22 Information about tender No. 181023129327015, Ex. **C-11**.

76. In May 2019, Ms. Alina Shaikova, the chairman of the Commission, has publicly acknowledged that Mr. Idris Kadyrkulov – the head and chief of one of the most severe and powerful Kyrgyz institutions – the State Committee for National Security Prosecution was “offended” with the results of the 2018 Tender, because he personally had his own idea of how the 2018 Tender should be executed[37].

77. Ms. Alina Shaikova explained that before the announcement of the 2018 Tender, Mr. Idris Kadyrkulov invited her and Dastan Dogoyev (another member of the Commission) to a secret meeting with Mr. Idris Kadyrkulov himself and the representatives of KBA-NotaSys, the Swiss security printing manufacturer and a subsidiary of Germany-headquartered press manufacturer KBA. KBA-NotaSys is well known for its notorious bribery cases all around the world[38].

78. In this meeting which was held in the luxury FRUNZE restaurant in Bishkek, Mr. Idris Kadyrkulov negotiated, on behalf of KBA-NotaSys, in order to conclude a long-term cooperation between the Commission and KBA-NotaSys in the passport printing area[39].

79. As stated by Ms. Alina Shaikova – “We did not know about the purpose of the meeting, he [Idris Kadyrkulov] introduced us on the spot to two businessmen representing a European company for the production of passports. The conversation concerned the production of biometric passports and other documents of national importance. We immediately indicated that the tender process has already been launched for the purchase of passport blanks, the Commission also had no need for equipment offered”. With regard to the production of other types of documents, “We also informed them that the draft Law on Public Procurement provides for a norm that allows enterprises with a state share of more than 51% to produce them without tendering. That is, we made it clear that we did not see any options for interaction with this company”[40].

[37] 2019-05-13 Public media article, Ex. **C-26**.
[38] 2017-02-24 Public media article, Ex. **C-27**.
[39] 2019-05-13 Public media article, Ex. **C-26**.
[40] Ibid.

80. After Shaikova's revelations about this meeting, on 14 May 2019, Idris Kadyrkulov publicly acknowledged that he has indeed organized this meeting[41].

81. Naturally, a public uproar emerged in the Kyrgyz Republic, where hundreds of people gathered in protest of the nepotism of the State Committee for National Security Prosecution[42].

82. Therefore, Idris Kadyrkulov, who had forcefully terminated the 2018 Tender and who called Garsu Pasaulis "not a good company" during his speech in the Kyrgyz Parliament[43] and who had no problem being a bridge for KBA-NotaSys, had to resign under pressure amid widespread allegations of corruption and doubts about Kadyrkulov's objectivity in the 2018 Tender investigation[44].

83. Idris Kadyrkulov said that he decided to resign to end rumors alleging that he was interested in a certain result of investigations launched into purchase of blank biometric passports from a foreign country[45].

84. Naturally, talking against the head and chief of one of the most severe and powerful Kyrgyz institutions did not end well for Ms. Alina Shaikova.

85. Ms. Alina Shaikova was immediately summoned to for questioning by the State Committee for National Security Prosecution. Later, an arrest warrant was issued against her and she was put on the wanted list[46].

86. However, Ms. Alina Shaikova has never showed up. She has gone out of site and was never seen again in the Kyrgyz Republic or abroad. Her whereabouts or her health condition is currently unknown.

87. To this end, Garsu Pasaulis hopes that it will be possible to locate Ms. Alina Shaikova and she will give a thorough explanation to this Tribunal of the events at the 2018 Tender and her conflict with Idris Kadyrkulov.

ii. Legal case before the Courts of the Kyrgyz Republic

88. Although few weeks after the 2018 Tender it was publicly announced that the 2018 Tender procedure was "terminated" since the offer of Garsu Pasaulis has

[41] 2019-05-14 Public media article, Ex. **C-28**.
[42] 2019-05-14 Public media article, Ex. **C-29**.
[43] Video of Parliament hearing, Ex. **C-30**. Also available at: https://www.facebook.com/watch/?v=2557226384330090
[44] 2019-05-16 Public media article, Ex. **C-31**.
[45] Ibid.
[46] 2019-08-05 Public media article, Ex. **C-32**.

"expired", the Kyrgyz courts started to examine a claim of „Mühlbauer ID Services GMBH" against the results of the 2018 Tender.

89. „Mühlbauer ID Services GMBH" appealed the decision of the Commission on the defectiveness of its tender submission to the Bishkek Inter-District Court and requested that the results of 2018 Tender shall be annulled.

90. Therefore, the Kyrgyz court issued a court ruling by which it suspended the already terminated 2018 Tender and enjoined Garsu Pasaulis as a third party in the proceedings.

91. On May 29, 2019 the Bishkek Inter-District Court has issued a ruling by which it has satisfied the appeal of „Mühlbauer ID Services GMBH" and annulled the results of 2018 Tender. By this ruling, the decision of the Commission to award the contract to Garsu Pasaulis was again declared invalid[47].

92. However, then Garsu Pasaulis appealed this ruling of the Bishkek Inter-District Court and on September 10, 2019 the Bishkek City Court upheld Garsu Pasaulis' complaint against the decision of the Inter-District Court [48]. Notwithstanding this victory, there was no material result for Garsu Pasaulis, since the 2018 Tender was already "terminated" long time ago.

93. After Garsu Pasaulis won the case in the Bishkek City Court, a video emerged in the social networks and the Kyrgyz local media where the ex-head of the state-owned enterprise Infocom Talant Abdullayev alleged that the former chairman of the Commission, Alina Shaikova, allegedly gave him 20 thousand USD for lobbying the interests of Garsu Pasaulis. The State Committee for National Security Prosecution responded with a statement that it had nothing to do with this video[49].

94. Garsu Pasaulis' representatives later received "of the record" message from Kyrgyz prosecution officers that making and announcing this video was purposed to influence the decision of the Kyrgyz Supreme Court and to pressure Garsu Pasaulis not to refer to international arbitration. Garsu Pasaulis has also received requests for bribes in order for the Kyrgyz Supreme Court to

[47] 2019-05-29 Bishkek Inter-District Court ruling, Ex. **C-33**.
[48] 2019-09-10 Bishkek City Court ruling, Ex. **C-34**.
[49] 2019-10-07 Public media article, Ex. **C-35**.

adopt a decision unfavorable to its competitor „Mühlbauer ID Services GMBH“ regarding the 2018 Tender.

95. Surely, Garsu Pasaulis has not responded to any such requests and has trusted the legal system and the authority of the Kyrgyz Supreme Court to issue unbiased decision.

96. As it latter emerged, Garsu Pasaulis' refusal to give any bribes or incentives for unfavorable ruling to its competitor „Mühlbauer ID Services GMBH“ was not left unheard. On November 25, 2019 the Kyrgyz Supreme Court upheld the decision of the first instance and has once again annulled the results of the 2018 Tender, because of „Mühlbauer ID Services GMBH“ complaint[50].

iii. Secretly awarding passport-printing contract to English and Russian companies

97. In the meantime, although there was still no final ruling of the Kyrgyz Supreme Court in respect of the „Mühlbauer ID Services GMBH“ complaint, the new head of the Commission Almaz Mambetov announced that the Commission has signed a non-public contract with De La Rue plc - a British company headquartered in Basingstoke, England that manufactures paper and security printed products including banknotes, passports and tax stamps[51].

98. It was announced at a press conference by the chairman of Commission that the Commission concluded an agreement to print 500 thousand passports with De La Rue plc [52]. However, the Commission has never revealed what were the terms of this new and non-public agreement. Indeed, this new agreement seemed even more suspicious, because additional 500 thousand passports is a very large number of passports, which would cover the need of Kyrgyz nationals for further 3-4 years.

99. At the same time, rumors had begun to spread that the Commission had decided to cooperate with the Russian company Goznak for production of e-passports. When asked at the press conference Mr Almaz Mambetov did not refute this data[53].

[50] 2019-11-25 Kyrgyz Supreme Court ruling, Ex. **C-45**.
[51] 2019-07-11 Public media article, Ex. **C-36**.
[52] Ibid.
[53] 2019-08-02 Public media article, Ex. **C-37**.

100. Indeed, no public tender was ever announced for these new arrangements with the Kyrgyz Government for production of passports to Kyrgyz nationals.

101. The newly signed agreements for production of passports, while complaints in respect of the 2018 Tender were still considered in Courts, evidences the fact that the Kyrgyz Government did not even intend to execute the contract won by Garsu Pasaulis.

102. Indeed, after the Kyrgyz Supreme Court upheld the decision of the first instance and has again annulled the results of the 2018 Tender, the new head of the Commission, Almaz Mambetov, announced that there is no need for a new tender[54].

103. Therefore, instead of allowing to execute the contract won by Garsu Pasaulis in a public 2018 Tender, the Kyrgyz Republic concluded secret passport printing contracts with other companies favored by the Government and has completely destroyed the valuable right held by Garsu Pasaulis.

E. The smear campaign against Garsu Pasaulis

104. As the winner of the 2018 Tender, and having complied with all the tender regulations and acted in good faith in attempting to execute the e-passport printing contract with the Kyrgyz Government, Garsu Pasaulis had no reason to believe that the Kyrgyz Republic would terminate the 2018 Tender after Garsu Pasaulis was pronounced winner, without any valid reason.

105. Garsu Pasaulis could not have reasonably anticipated that the Kyrgyz Republic would refuse to execute the contract, much less that it would do so without offering any explanation for its sudden change of course.

106. Sadly, as it latter emerged, Garsu Pasaulis was caught in the pure nepotism by the Kyrgyz's most powerful authorities, which had their own interests in the 2018 Tender. In addition, the authorities of the Kyrgyz Republic started a smear campaign against Garsu Pasaulis and its international business, significantly damaging Garsu Pasaulis' international reputation. The Kyrgyz

[54] 2019-11-25 Public media article, Ex. **C-38**.

Republic called Garsu Pasaulis criminals, bribe givers and conspirators in public press statements and even in the Parliament hearings[55].

107. These unfounded and damaging statements were made without ever consulting with Garsu Pasaulis, without any requests for information or explanations. Garsu Pasaulis was never given an opportunity to defend itself against such grave accusations.

108. Impeccable international reputation was always the most significant attribute of Garsu Pasaulis. International reputation is one of the main criteria for Garsu Pasaulis' successful participation in international tenders for production and supply of security printing items, counterfeit-proof document forms secured by special security features and similar products.

109. The smear campaign against Garsu Pasaulis by the Kyrgyz Republic has already significantly damaged Garsu Pasaulis' international reputation. Actions of the Kyrgyz Authorities already have and will continue to cause huge losses for Garsu Pasaulis in its international business.

110. As it will be explained below, such actions by the Kyrgyz Republic are a clear breach of the fair and equitable treatment and full protection and security standard provided in Article 3 of the Agreement.

F. Raids, criminal investigations, arrests and threats

111. Having started a smear campaign against Garsu Pasaulis, the authorities of the Kyrgyz Republic did not stop there.

112. The Kyrgyz Republic has taken even more drastic and unprecedented measures against the investor and its representatives.

113. Without any explanation, notice or advance warning, authorities of the Kyrgyz Republic raided homes and offices of Garsu Pasaulis' representatives and even raided offices of Garsu Pasaulis' legal representatives.

114. Through the course of arbitration, the Tribunal will hear in very detail the witnesses and their statements on their account of aggressive actions taken by the Kyrgyz Republic. For the purposes of this Notice of Arbitration, Garsu

[55] 2019-04-24 Public media article, Ex. **C-39**.

Pasaulis provides short excerpts of the statements of Garsu Pasaulis representatives:

English translation:

"(…) We are still sitting and waiting for what other surprises in our lives will come from the security services. Through our acquaintances we are informed by the investigation men that if we do not cooperate with them, we will be sent to prison like three officials of the Commission and no one will help us. We would like to help them find the truth, but we are becoming more and more convinced that the investigation has different goals and to achieve it they use their own truth, which is absolutely contrary to all laws, rules and ethical standards. Unfortunately, this affects our health quite strongly, from April 1 to today, due to unrest, various illnesses caused by severe pressure from prosecution, I lost 15 kg in weight. But we have already begun to get used to this way of life. In the end, we hope that this horror will end soon, and without your influence, without the involvement of international arbitrators, justice can hardly prevail. We deeply regret that our law enforcement and judicial systems do not inspire confidence, we only feel grief and shame before our partners in Lithuania (…)"

English translation:

"(...) when I took up the legal protection of Garsu Pasaulis, an illegal entry of unknown persons into my office was carried out in my absence (...)"

115. The above are only few of the accounts of the actions of the Kyrgyz authorities, names of which are not yet revealed for their own safety and security. To the best of Garsu Pasaulis' knowledge, officers of the State Committee for the National Security Prosecution maintain surveillance of all Garsu Pasaulis' operations and all operations of Garsu Pasaulis' representatives. To this date, representatives of Garsu Pasaulis and their families do not feel safe in the Kyrgyz Republic. They are constantly threatened by the officers of the State Committee for the National Security Prosecution and are unsure of their future.

116. Garsu Pasaulis' representatives receive direct threats from the State Committee for the National Security Prosecution of the Kyrgyz Republic forcing them to admit totally false accusations or face indefinite detention. As mentioned, this has already manifested by the video released (see section V. D. ii.).

117. Pressure from the Kyrgyz Republic manifested in threats of illegal detention and such ill-treatment contravenes the norms according to which civilized nations are expected to act. Such actions of the Kyrgyz Republic caused a deterioration of health, stress, anxiety, other mental suffering, humiliation, shame and degradation, or loss of reputation, credit and social position.

118. As will be explained below, such actions by the Kyrgyz Republic are a clear breach of the fair and equitable treatment and full protection and security standard provided in Article 3 of the Agreement.

G. Further steps to remove Garsu Pasaulis from the Kyrgyz Republic

119. Apart from destroying Garsu Pasaulis' international reputation and illegally terminating the 2018 Tender already won by the investor, the Kyrgyz Republic employed further steps to remove Garsu Pasaulis from the Kyrgyz Republic.

120. Upon totally ungrounded complaints of Garsu Pasaulis' main competitors, authorities of the Kyrgyz Republic are now publicly contemplating including Garsu Pasaulis in a public list of untrustworthy companies, i.e. a blacklist of companies which could no longer participate in any government procurement procedures or public tenders.

121. Obviously, for Garsu Pasaulis, whose main activity is production of security printing items and counterfeit-proof document forms, inclusion into such blacklist would effectively entail a total destruction of Garsu Pasaulis' business model and investments in the Kyrgyz Republic and beyond. As mentioned, Garsu Pasaulis to date successfully performs contracts with the Kyrgyz Republic regarding production and maintenance of tax stamps on excisable items indicating payment of excise tax and other duties, which is due to end in the year of 2021. Termination of this contract would also cause significant losses for Garsu Pasaulis.

122. In addition, Garsu Pasaulis cooperates with more than 55 countries world-wide, therefore, such incentives of the Kyrgyz Republic would not only significantly damage Garsu Pasaulis' international reputation, but would also significantly damage Garsu Pasaulis future prospects of winning public tenders in the Kyrgyz Republic and abroad.

123. Therefore, further incentives to remove Garsu Pasaulis and its business from the Kyrgyz Republic are a clear breach of the fair and equitable treatment and full protection and security standard provided in Article 3 of the Agreement and entail indirect expropriation of Garsu Pasaulis' investments in a discriminatory manner, without immediate, full and effective compensation, as required by Article 4 of the Agreement.

H. The effect of the Kyrgyz Republic's violations on Garsu Pasaulis' investments

124. Invalid and ungrounded actions of the Kyrgyz Republic have immediate and significant negative effect on Garsu Pasaulis and its investments in the Kyrgyz Republic and abroad.

125. Actions the Kyrgyz Republic have destructive effects to the long-established international reputation of Garsu Pasaulis throughout the world and in a very specific area of security printing. Because of the illegal actions of the Kyrgyz Republic, Garsu Pasaulis is at risk to be blacklisted in numerous countries around the world and faces significant monetary damages, which also include loss of future profits. In particular, most of the security printing tenders around the world are organized by an exclusive "invite only" basis, i.e. first the company needs to be invited to participate in the tender, before it is able to submit its bid. Thus, because of actions of the Kyrgyz Republic, Garsu Pasaulis risks to be eliminated altogether from all government tenders around the world.

126. Apart from destructive effects to a long established international reputation and the related monetary losses, actions of the Kyrgyz Republic also entail loss of economic right of Garsu Pasaulis to execute the e-passport printing contract with the Kyrgyz Republic pursuant to the 2018 Tender and to receive the

amounts which would have been received by Garsu Pasaulis if the 2018 Tender procedure would not have been illegally terminated.

127. In addition, actions of the Kyrgyz Republic also entail loss of economic rights of Garsu Pasaulis to execute already concluded contracts and receive the amounts, which would otherwise be received from the Kyrgyz Republic and other countries.

128. Furthermore, actions the Kyrgyz Republic also entail significant losses in respect of all consequential damages, which are comprised of lost commercial opportunities, loss of credit conditions or of other benefits, lost profits, and loss of market share.

129. The protection of an investor‘s legitimate expectations, as subsumed within the standard of fair and equitable treatment, requires the Kyrgyz Republic to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.

130. The protection of legitimate expectations requires the state to act in a fully predictable and transparent manner in relation to the investor to assure compliance with the standard for fair and equitable treatment. Moreover, the duty of transparency requires not only that the host state establish a clear legal framework and abide by its own laws, but also that it keeps the investor properly informed of developments and governmental actions that may affect the investor and its investment.

131. Nothing close to this standard was provided in the Kyrgyz Republic. Conversely, as it is now clear, actions of the Kyrgyz Republic were illegal under its own law, totally unpredictable, non-transparent. The Kyrgyz Republic did not establish a clear legal framework, did not abide even its own laws. Nor did the Kyrgyz Republic allow Garsu Pasaulis to execute the e-passport printing contract nor kept the investor informed of any actions and investigations that affected the investor and its investment.

132. The Kyrgyz Republic did not provide the investor with procedural due process and did not exercise its broad regulatory authority within the confines of the law to assure respect for the rights of Garsu Pasaulis and its investments. In

particular, Garsu Pasaulis did not receive a right to procedural propriety, including the right to receive adequate notice of measures that will affect the investment, and a fair opportunity to defend against such measures in a transparent judicial or administrative proceeding.

133. Such actions by the Kyrgyz Republic are a clear breach of the fair and equitable treatment and full protection and security standard provided in Article 3 of the Agreement and entail indirect expropriation of Garsu Pasaulis' investments in a discriminatory manner, without immediate, full and effective compensation, as required by Article 4 of the Agreement.

134. Instead, Garsu Pasaulis continues to be smeared in the mass media by the Authorities of the Kyrgyz Republic and constantly receives threats from the Kyrgyz Republic's officers. Authorities of the Kyrgyz Republic also ignore any requests of Garsu Pasaulis for provision of information.

VI. THE TRIBUNAL HAS JURISDICTION OVER GARSU PASAULIS' CLAIMS AND THOSE CLAIMS ARE ADMISSIBLE

135. It is clear that the Tribunal has jurisdiction and is competent to determine the present dispute. As also previously set out in the Notice of Intent, the preconditions for establishing jurisdiction under the Agreement are satisfied:

a) Lithuania and the Kyrgyz Republic have ratified the Agreement;

b) Garsu Pasaulis is an investor with an investment in the Kyrgyz Republic;

c) Garsu Pasaulis and the Kyrgyz Republic have consented to submit this dispute to arbitration under the Arbitration Regulations of the United Nations Commission on the International Trade Law ("UNCITRAL Rules");

d) Garsu Pasaulis has complied with pre-arbitration requirements of the Agreement; and

e) Garsu Pasaulis' claim was made in a timely manner under the Agreement and international law.

A. Lithuania and the Kyrgyz Republic have ratified the Agreement

136. Lithuania and the Kyrgyz Republic have both signed and ratified the Agreement. The Contracting Parties (Lithuania and the Kyrgyz Republic) signed the Agreement on 15 May 2008 and it entered into force on 20 February 2009. As set out in its Preamble, the Contracting Parties signed the Agreement based on a number of fundamental objectives frequently mentioned in such agreements, as follows:

> "*Wishing* to develop economic cooperation of both countries;
>
> *Committed* to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the country of the other Contracting Party on the basis of equal treatment and mutual benefits; and
>
> *Recognizing* that the promotion and protection of foreign investment contribute to the development of private business and economic prosperity in the countries of both Contracting Parties"

137. This is clearly an explicit recognition by the Kyrgyz Republic of its desire to encourage and protect investments of Lithuanian investors, such as Garsu Pasaulis, all as a means to stimulate business ventures and foster the prosperity of both Contracting Parties.

B. Garsu Pasaulis is an investor with an investment in the Kyrgyz Republic

i. Requirements under the Agreement

138. As set out below, Garsu Pasaulis and the Kyrgyz Republic have consented to submit this dispute by agreement formed by the Kyrgyz Republic's standing offer as contained in Article 8 of the Agreement and Garsu Pasaulis' acceptance and choice of UNCITRAL Rules arbitration pursuant to Article 8(2) of the Agreement as expressed in this Notice of Arbitration.

139. Article 8 provides as follows:

> 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:
>
> – 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.

140. The dispute arises directly out of investments made in the Kyrgyz Republic by Garsu Pasaulis, which as Lithuanian company qualifies as an investor under the Agreement. The Agreement provides a specific definition of an "investment", which is set out in Article 1(1) of the Agreement, as follows:

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 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.

Changes in the form of investment shall not affect their type as long as such changes are in compliance with national legislation of the Contracting Party's host country.

ii. Garsu Pasaulis is a Lithuanian company

141. Article 1(2) of the Agreement defines the term "investor" as follows:

2. 'Investor' means in respect of both Contracting Parties:

a) Natural persons who are citizens of the country of one of the Contracting Parties and persons without citizenship under national legislation of such Contracting Party who permanently reside in the territory of the country of one of the Contracting Parties;

b) Legal persons incorporated or constituted under national legislation of the Contracting Party.

142. Garsu Pasaulis is a legal person under the Agreement and accordingly qualifies as an "investor".

143. Specifically, Claimant is today and has always been a legal national of Lithuania, constituted and organized in accordance with its laws. Ample proof exists of its Lithuanian nationality, the main of which is the Certificate of company registration[56].

[56] 2004-12-17 Garsu Pasaulis certificate of company registration, Ex. **C-40**.

144. The Certificate of company registration also constitutes *prima facie* evidence of nationality as a matter of international law and is a conclusive proof of Garsu Pasaulis' Lithuanian nationality.

145. Claimant accepts that it bears the burden of proof that it is Lithuanian national for the purposes of establishing this Tribunal's jurisdiction under the Agreement. This burden has been discharged by the documentary evidence – Garsu Pasaulis Certificate of company registration.

iii. Garsu Pasaulis' investments

146. Under Article 1(1) of the Agreement, the Contracting Parties agreed that the broad and non-exclusive definition of investment includes *"any type of assets invested by an investor of one Contracting Party in the territory of the other Contracting Party".* This definition includes investments and property that are both tangible and intangible and can be described as unusually broad by international investment law standards. In particular, "investment" is defined as also including:

- monetary claims or requests to carry out any other actions of economic value;
- 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);
- business reputation;
- any right to engage in economic activities under contract and any licenses, including concessions for exploring, extracting and exploiting natural resources.

147. Article 1(1) further states that "*Changes in the form of investment shall not affect their type*". In other words, the Contracting Parties recognized that even though the form of the investment may change over time, such a change does not allow one to conclude that fundamental nature of the investment, as a defined "investment", has ceased to exist as an investment under the Agreement.

148. As set out below, not only did Garsu Pasaulis invest substantial financial amounts and *know-how* into the Kyrgyz Republic, but also found the Kyrgyz company LLC “Garsu Pasaulis” in its role as the main shareholder. As it will be explained below, Garsu Pasaulis provided extensive *know-how* to contribute to the success of the Kyrgyz’ digitalization efforts in accordance with various contracts concluded with the Kyrgyz Government.

149. In 2018, Garsu Pasaulis sought to significantly increase its investment activities in the Kyrgyz Republic by executing a further 2018 Tender contract with the Kyrgyz Government for production of e-passports to Kyrgyz citizens and in this way to generate the necessary capacity to expand the markets of Garsu Pasaulis both in the Kyrgyz Republic and its neighbor countries. During the 2018 Tender procedure, Garsu Pasaulis acquired a legal right of significant economic value in the amount of 12’000’000 EUR. As shown in more detail in section V of this Notice of Arbitration, due to the blatant and conscious violation of Kyrgyz law by the Respondent, this economically valuable right was taken from Garsu Pasaulis, preventing Garsu Pasaulis from producing e-passports to Kyrgyz citizens and while at the same time destroying Garsu Pasaulis’ international reputation on a global scale.

a. Garsu Pasaulis’ continuing investment in the Kyrgyz Republic

150. The Claimants' investment in this case can be looked at in at least two ways. First, it suffices to note that the Claimant found the Kyrgyz company LLC “Garsu Pasaulis” in 2016 in its role as the main shareholder, and this company or shares thereof are assets constituting a covered investment under the Agreement [57]. However, the contracts concluded and executed with the Government constitute the main and substantial investment activity of Garsu Pasaulis in the Kyrgyz Republic. Operation of local company and previously won tenders of Garsu Pasaulis, together with contracts concluded with the Kyrgyz Republic also constitute economic rights protected by the Agreement. Alternatively, the Claimant's investment is also an economic right to produce

[57] 2016-06-02 LLC “Garsu Pasaulis” incorporation act, Ex. **C-41**.

e-passports to Kyrgyz citizens arising from the won 2018 Tender. This, too, is a covered investment under the Agreement. Both viewpoints are correct.

b. Garsu Pasaulis investments – local company and contracts with the Kyrgyz Republic

151. As it was mentioned, the Claimant found the Kyrgyz company LLC "Garsu Pasaulis" in 2016 in its role as the main shareholder. Those shares are "assets" that qualify as a covered "investment" under the Agreement.

152. Alternatively, the Claimant's investment is its interest in the LLC "Garsu Pasaulis" as a business operation, comprising all of its value, including its indirect interest in the legal rights and assets held by Garsu Pasaulis under the Kyrgyz law.

153. However, the main and substantial investment activity of Garsu Pasaulis is execution of contracts with the Kyrgyz Government regarding ongoing investment in the modernization of Kyrgyz security printing industry, country's digital transformation, i.e. production and delivery of tax stamps on excisable items indicating payment of taxes and other duties, and maintenance of related IT systems. In accordance with these contracts, Garsu Pasaulis not only invested substantial amounts without any front-payment by the Government, but also provided substantial *know-how*, product design, counterfeit expertise, installation and maintenance of IT systems and training to Kyrgyz' public officials. In accordance with these contracts, Garsu Pasaulis developed and maintained systems of tax stamps and other duties, maintenance of IT systems and provided the printed items on a loan basis to the Government[58].

154. In addition, previously won tenders, together with high value contracts concluded with the Kyrgyz Republic, also constitute economic rights protected by the Agreement. Viewed in this sense too, some of them which are still in force as at the date of this Notice of Arbitration are covered "investments" under the Agreement.

[58] 2016 Contract with the Kyrgyz Republic regarding tax stamps and systems, Ex. **C-46**.

155. Furthermore, the Claimant's investments are capable of giving rise to an expropriation claim under the Agreement. It is well-established as a matter of international law that indirect expropriation may affect a broad range of intangible assets with economic value, including *inter alia* tangible and intangible rights held by the investor.

156. The Kyrgyz Republic's actions had a direct bearing not only on the value of the Claimant's shareholding investment and in its interest in LLC "Garsu Pasaulis" as an enterprise or business operation, but also severely impacted the value of its investments in the Kyrgyz security printing market. The dispute therefore arises directly out of the Claimant's investment that was impacted by the Kyrgyz Republic's measures.

157. In addition, the circumstances described above relating to the previous won tenders and execution of contracts with the Kyrgyz Republic by Garsu Pasaulis, all demonstrate that Garsu Pasaulis was and still is an investor who made an "investment" in the Kyrgyz Republic (as defined in Article 1(1) of the Agreement) in the period prior to, and during, the 2018 Tender process.

158. Garsu Pasaulis' continuing investment in the Kyrgyz Republic was closely intertwined with, and largely indistinguishable from, its activities related to Government contracts, as well as the guiding force behind the local Kyrgyz company as the shareholder directly responsible for overseeing the continuing activities of all things Garsu Pasaulis in the Kyrgyz Republic. The 2018 Tender process was simply a continuation of these activities.

159. Moreover, the previous and current contracts with the Kyrgyz Republic are "investments" that Garsu Pasaulis made in the Kyrgyz Republic, pursuant to which it contributed its extensive *know-how*[59].

160. Although this is not an ICSID arbitration, and thus is not subject to the definition of "investment" as applied under the ICSID Convention, it can be argued that

[59] Article 1 explicitly confirms that the term "investment" comprises in particular ..... know-how..." The concept of "know-how" as an investment is one that has been recognized by numerous tribunals. *See Mitchell v. Democratic Republic of Congo,* ICSID Case No. ARB/99/7 (Decision on the Application for Annulment of the Award dated 27 October 2006). The Tribunal (at para. 27, footnote 7) relied on the following case examples: *Holiday Inns S.A. and others v. Kingdom of Morocco,* ICSID Case No, ARB/72/1 (Decision on Jurisdiction dated 12 May 1974), described by Pierre Lalive in *The first 'World Bank' Arbitration (Holiday Inns v. Morocco) — Some Legal Problems,* 51 BRITISH Y.B. INT'L L. 123 (1980); *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1 (Decision Annulling the Award dated 16 May 1986); *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4 (Decision on Jurisdiction dated 23 July 2001); 129 J. DU DROIT INT'L 196 (2002) (English translations of French original in 42 ILM 609 (2003), 6 ICSID REP. 400 (2004)).

even applying the standard used by ICSID tribunals, such as that applied by the *ad hoc* annulment committee in *Mitchell v. Congo*[60], it is clear that Garsu Pasaulis' activities under the previous and current contracts with the Kyrgyz Republic would be an investment. In particular, there is no doubt that Garsu Pasaulis' contribution to the modernization of the Kyrgyz Republic's tax systems is a successful operation, which contributed to the economy of the host state and was the result of a significant contribution of work by Garsu Pasaulis over a lengthy period of time, and was one that entailed risk because Garsu Pasaulis may never have been paid if these projects were not a success - all which meets the strictest tests of an "investment". The LLC "Garsu Pasaulis" company is a separate project, which is in itself a clear and simple example of a traditional foreign investment — it involved the establishing of new company, the hiring of local personnel and the making and distribution of a highly complicated and significant products for the host-state.

161. Garsu Pasaulis for years has transferred substantial *know-how* to the Kyrgyz Republic and has in fact made a substantial contribution to the Kyrgyz Republic's development, in particular, to its digitalization efforts. Therefore, Garsu Pasaulis' investments also satisfy other conditions of the notion of investment (i.e. the *Salini test*[61]).

162. In sum, Garsu Pasaulis' contribution of capital, work and *know-how* to the Kyrgyz Republic must accordingly be considered as "investments" under the terms of Article 1 of the Agreement.

c. Garsu Pasaulis' investment arising under the won 2018 Tender

163. It was already explained that Garsu Pasaulis has for a number of years successfully participated in public Government tenders and contracts.

164. The definition of investment provided Article 1(1) of the Agreement includes monetary claims or claims to perform any other economic activity, practical

[60] *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, 1 Nov 2006, Decision on the Application for Annulment of the Award.

[61] See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001 § 52. See also *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, July 23, 2001, § 53; *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, § 91; *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, October 17, 2006, § 77; *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007, §§ 73-74.

experience, business reputation, any right to engage in economic activity under a contract and any license.

165. It is clear that the previous and current contracts with the Kyrgyz Republic and the right acquired in the successful 2018 Tender do fall within definition of investment provided in Article 1(1) of the Agreement.

166. On the other hand, as a result of the successful 2018 Tender process, Garsu Pasaulis acquired new and very specific right to produce e-passports to Kyrgyz nationals for a very specific amount, for a very specific period of time.

167. The fact that Garsu Pasaulis' investment, as concerns its right to produce e-passports to Kyrgyz citizens stemming from the won 2018 Tender, is not yet profitable cannot disqualify an economic operation as an investment.

168. The development of economic activities must be foreseen or intended, but need not necessarily be successful, especially when the problems the investor faces in the development of its activities come from the host State's actions. This was also confirmed by the *Phoenix Action v. the Czech Republic*[62] tribunal:

> „The Tribunal is therefore inclined to accept that, although there were no significant activities performed by the Czech companies owned by Phoenix since it acquired them, this alone would not be sufficient to disqualify the operation as an investment, provided that, and this caveat is fundamental, the Claimant had really the intention to engage in economic activities, and made good faith efforts to do so and that its failure to do so was a consequence of the State's interference"

169. As shown in this Notice for Arbitration, due to the blatant and conscious violations of the Agreement by the Kyrgyz Republic, Garsu Pasaulis' economically valuable rights were taken from the Investor, robbing Garsu Pasaulis of a new and very specific right to produce e-passports to Kyrgyz nationals for a very specific amount, for a very specific period of time.

170. In contrast to the situation in some other investment arbitration cases, Garsu Pasaulis participation in the 2018 Tender was not a one-off, first-time attempt

[62] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5;

to make an investment in an entirely new market. As shown in the previous sections, the 2018 Tender was part and parcel of Garsu Pasaulis' long-term and consistent plan to invest and work in the Kyrgyz printing market and the CIS region, and to access the lucrative post-soviet state's markets by using the Kyrgyz Republic as a springboard. Having already been involved in the Kyrgyz Republic market through previous and current contracts with the Kyrgyz Government, Garsu Pasaulis had the knowledge and means, as well as the intent, to realize its goals for the expansion of Garsu Pasaulis business in the Kyrgyz Republic and beyond.

171. Garsu Pasaulis' participation in the 2018 Tender and the facts surrounding the illegal annulment of Garsu Pasaulis' right to produce e-passports establish that Garsu Pasaulis acquired rights under the Kyrgyz law that had significant and very specific economic value. These kinds of "economic rights" are defined as "investments" under the terms of the Agreement. Accordingly, Garsu Pasaulis possessed an investment with respect to the won 2018 Tender.

172. The fact that Respondent's violations of Kyrgyz and international law were directly targeted at Garsu Pasaulis' specific legal rights accrued with respect to the producing of e-passports to Kyrgyz nationals further confirms the fact that Garsu Pasaulis had acquired a valuable economic right under the Kyrgyz law.

173. As noted above, the Agreement provides that the definition of "investment" includes "any economic rights accruing by a contract". A plain meaning interpretation of this phrase forces one to conclude that this refers to rights accorded under the contract and the law of the host state, in this case the laws of the Kyrgyz Republic.

174. Arbitral jurisprudence indicates that the existence of a specific right under the law of the host state will satisfy the requirement of an 'investment' and that the mere conduct of negotiations does not amount to such a right. However, in this case, by winning the 2018 Tender, Garsu Pasaulis has not merely acquired a right to further negotiations with the Kyrgyz government. Instead, by winning the 2018 Tender Garsu Pasaulis has already passed that bar and was officially

announced as entitled to produce e-passports to Kyrgyz citizens for a specific price, in accordance with specific terms and for a specific period of time.

175. Therefore, in this case and in contrast to some investor-state arbitration cases, Garsu Pasaulis did not acquire a right to negotiate some possible future contract, but in fact did acquire the valuable right to an automatic conclusion of the contract with the Government and production of e-passports to Kyrgyz nationals.

176. There were no additional legal obligations concerning Garsu Pasaulis' right to execute the contract with the Kyrgyz government. In addition, announcement of Garsu Pasaulis as the winner of the 2018 Tender meant that Garsu Pasaulis did not need to meet any other or additional legal obligations to produce e-passports for Kyrgyz citizens.

177. Thus, the present case involves the existence of a specific set of rights under the Kyrgyz law that qualifies as an "economic right". This was not the case, in contrast to other investor-state cases, where there were still negotiations to be held between the investor and the host-state. This is critical to the assessment of Garsu Pasaulis' rights under the Kyrgyz law and the Agreement.

178. In fact, Garsu Pasaulis' refusal to proceed with production of e-passports after it was announced the winner of 2018 Tender would be considered as a breach of the contract with the Government and would have imposed severe fines upon Garsu Pasaulis, including the loss of the 250'000,00 EUR bid guarantee requested under the terms of the 2018 Tender.

179. Arbitral jurisprudence indicates that the existence of a specific right under the law of the host state will satisfy the requirement of an "investment". Moreover, as indicated in the *Mihaly* ruling[63], special circumstances will have to be taken into account; in this respect, the pronouncement of Garsu Pasaulis as the winner of 2018 Tender and the fact of no further negotiations involved must be considered.

180. As *SEG Global Inc. v. Republic of Turkey*[64] confirmed – an existing contract amounted to an investment, even though some commercial terms of the

[63] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2.
[64] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5.

investment question remained open. In this case, however, no commercial terms of the investment in question remained open.

181. As regards Garsu Pasaulis situation, it must be recognized that the investor was in a position where it had already acquired a right which allowed it to proceed with the factual investment in a manner prescribed in the contract with the Government. There were no other obligations or points that remained or ought to be clarified by the parties.

182. Obviously, in such a situation, the investor is in a position that is materially different from the one in which an investor continues to negotiate in spite of the fact that the host state refuses to accede to any one of various proposals made by the investor, as was true in the *Mihaly* case. Thus, a special element characterizes the legal position of the present Claimant at the time of the termination of the 2018 Tender by the Kyrgyz authorities: by being announced as the winner of the 2018 Tender, Garsu Pasaulis acquired an automatic and very specific right – to produce e-passports to Kyrgyz citizens in accordance with the terms of 2018 Tender.

183. It is in line with the object and the purpose of the Agreement, in such circumstances, to treat the Claimant as an "investor" of an "investment" given that the signing of the contract was a mere formality and that the evidence clearly suggests that the Claimant and the host-state even had a legal obligation to execute this formality. Had the Kyrgyz authorities not terminated already concluded tender procedure in an unlawful manner, the Claimant would have been able and to execute the contract.

184. The tribunal in *Lemire v. Ukraine* addressed a case in which the Claimant had undoubtedly made an investment, in a radio business, and subsequently attempted to expand this business by way of participating in a tender process. While this award addresses treaty issues pertaining to substantive standards to be applied to a bidding procedure, it did not have to address in detail the concept of an "investment". However, the Tribunal noted:

> „Mr. Lemire’s claim related to tenders for frequencies and broadcasting licences does not refer to, and cannot be considered as, a pre-investment activity. Pre-investment activities are those which precede the actual investment. Whether pre-investment activities merit treaty protection is

debatable. But it is irrelevant for the purpose of adjudicating Claimant's claims in this arbitration, since the Tribunal has already established that Mr. Lemire has made investments in Gala Radio and is Gala's sole shareholder, and that these investments qualify for protection under the BIT. 90. If an investor claims that his investment, once made, was subsequently denied frequencies and broadcasting licences in violation of Ukraine's obligations as assumed in the BIT, this claim constitutes an "investment dispute"[65]

185. Furthermore, as a winner of the 2018 Tender, Garsu Pasaulis' right to produce e-passports to Kyrgyz citizens was a substantive as opposed to procedural right. Garsu Pasaulis winning bid formed a part of the content of the contract with the Government with substantive rights enforceable by the Kyrgyz courts. As a legitimate winner of the 2018 Tender, Garsu Pasaulis was entitled to fully benefit from the right it conferred upon it.

186. But for the Kyrgyz Republic's breach of Garsu Pasaulis' right to produce e-passports, Garsu Pasaulis would have gained the specific benefit arising under the contract with the Government. Garsu Pasaulis had legal rights, which, had they been respected, would have left Garsu Pasaulis successfully executing the contract. If the Tribunal wipes away the wrongful conduct of the Kyrgyz Republic, Garsu Pasaulis will be left with the entitlement to the benefit it would have received.

d. Garsu Pasaulis' investments are protected under the BIT and international law

187. The tribunals approach the interpretation of the Agreements such as in this case in accordance with the classic rules laid down in Articles 31 & 32 of the Vienna Convention on the Law of Treaties of 1969. This requires the tribunal to begin with "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (Article 31, paragraph 1). The remainder of Article 31 defines what is meant by the "context" and specifies other materials to be taken into account, and Article 32 deals with

[65] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 14 JAN 2010, Decision on Jurisdiction and Liability, paras 89-90.

"supplementary means of interpretation" which may be employed in certain circumstances.

188. The Tribunal's task of interpretation can be accomplished by application of the basic rule cited in the preceding paragraph, without the need for supplementary means. For that purpose, the Tribunal may take the "object and purpose" of the Agreement to be "the encouragement and reciprocal protection of investment" in their territories, on the basis of a "stable framework for investment", as a contribution to "greater economic cooperation between" the two States, as recited in the preamble to the Agreement. The Agreement, in other words, was conceived as having not just a protective role, but a dynamic one in encouraging and stimulating future investment.

189. Accordingly, the Claimant endorses authorities suggesting that Agreement definitions of 'investment' should be interpreted broadly in accordance with their plain language[66].

190. In particular, Garsu Pasaulis reiterates that its investments in Kyrgyz Republic are three-fold: (a) the locally established company LLC "Garsu Pasaulis", (b) the previous and current contracts with the Kyrgyz Republic executed by Garsu Pasaulis, (c) the economic right to produce e-passports to Kyrgyz citizens under the 2018 Tender.

191. All of these investments of Garsu Pasaulis are covered 'investments' under the Agreement and are sufficient for this Tribunal to confirm its jurisdiction *ratione materiae.*

192. In addition, the contractual right arising from winning the 2018 Tender is a valuable asset and constitutes a protected investment since it contains monetary claims or claims to perform economic activity or a right to engage in economic activity under a contract in Kyrgyz Republic having economic value (Article 1(1) of the Agreement).

193. Although this is not an ICSID case, it must be noted that even addressing the elements of the Salini test, Claimant's investments qualify as investment for the purpose of the ICSID Convention as well: (a) Claimant's substantial

[66] *Jan Oostergetel & Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010; *Tradex Hellas S.A. v Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999; *Fedax N.V. v Republic of Venezuela*¸ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997.

contribution is reflected in the establishing local company and execution of contracts for the Kyrgyz government for the establishment and developments of national tax program in the Kyrgyz Republic; (b) Garsu Pasaulis' investments were made in a period spanning over 8 years; (c) the activities carried the requisite degree of risk; and (d) the investment activities contributed to Kyrgyz economic development, since the Claimant brought best industry practices from its experiences around the world.

194. As a general matter of both international and Kyrgyz law, contractual rights are capable of being expropriated and, as evident, Garsu Pasaulis' right to produce e-passports to Kyrgyz citizens was expropriated.

195. Rights *in rem* are not a prerequisite to an expropriation claim and they may also extend to contractual rights. An indirect expropriation may also be caused by a violation of non-contractual rights.[67]

196. Thus the current dispute arises out of the Kyrgyz Republic's breach of Garsu Pasaulis' rights and is a dispute "arising directly" out of Claimants' investment: (a) Arbitral practice and commentary[68] have consistently held that the term "arising directly" should be construed liberally, and what it is required is that the relevant dispute be reasonably closely connected. In this regard, the dispute concerning the rights enjoyed by Garsu Pasaulis is a dispute arising directly of Garsu Pasaulis' business operations in the Kyrgyz Republic regardless of whether individual rights under the previous or current contracts and in respect of the contractual rights arising from 2018 Tender, standing alone, would qualify as an investment.

197. The rights were an integral part of an overall operation that qualifies as an investment. The dispute need not arise out of physical property of the investor as it can emanate from the investment itself or the operations of the investment[69] or even concern a transaction that does not itself constitute an investment[70].

[67] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States,* ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007.
[68] Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn, 2009), 106.
[69] *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.
[70] *Československa obchodní banka, a.s. v Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999.

198. Bearing in mind the natural and ordinary meaning of the word “directly”, which means “with nothing or no one in between”, and with support of arbitral practice, it is plain, as a matter of common English usage that State’s measures that affect the core objectives of an investment, such as its sustainability or profitability are clearly related to the investment.

199. A causal link must be established between the dispute and the investment; whether the governmental measure is specifically targeted at the investment in question is irrelevant and therefore Kyrgyz’s measures at stake need not be specifically targeted at one particular investment of Garsu Pasaulis’[71].

200. As with other aspects of the modern law of contracts, there is no room for a mechanistic approach. In the simplest situations it may be enough to look for an offer matched by an acceptance, or a counter-offer, and so forth, but for complex commercial transactions a more flexible method is required. Whilst care must be taken not to build fragments into an incomplete whole, the entire course of the exchanges must be examined to see whether they disclose a continuing intention to make a binding contract, reflected in a sufficient accumulation of terms on which both are agreed, even if they are not all gathered together at a single place and time.

201. As has been shown, in this case Garsu Pasaulis had reached a point in the 2018 Tender where it was already announced that Garsu Pasaulis is entitled to produce e-passports to Kyrgyz citizens for a specific price, in accordance with specific terms and for a specific period of time. There were no further discussions or negotiations envisaged. Both sides understood the commitment of a fully enforceable contract.

202. In conclusion, Garsu Pasaulis was directly subjected to, and legally and economically affected by, the measures taken by the Kyrgyz Republic in respect of the 2018 Tender. Kyrgyz’s measures violated commitments made to, or rights enjoyed by, Garsu Pasaulis, and thereby violated Kyrgyz’s treaty obligations towards their investment. That disagreement arises directly out of the investment impacted by Kyrgyz’s measures.

[71] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 and *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006.

C. Garsu Pasaulis' international reputation as protected investment

203. As it was explained, the present dispute revolves around twofold issue, first is the denial of Garsu Pasaulis' right to receive the benefit of 2018 Tender contract, a right to which it is entitled, and which would have enabled Garsu Pasaulis to expand its existing security printing industry investments in the Kyrgyz Republic and to earn very clearly defined income and profits.

204. The second issue is the manifest breach of Garsu Pasaulis' rights to international reputation, which was destroyed by the actions of the Kyrgyz Republic.

205. Not only has the Kyrgyz Republic destroyed Garsu Pasaulis' reputation in the Kyrgyz Republic, but the Kyrgyz Republic's actions had a snow ball effect on Garsu Pasaulis international reputation all around the world, thus severely crippling Garsu Pasaulis' business activity in all of its markets in more than 55 countries where Garsu Pasaulis operates. This, effectively, caused massive damages to Garsu Pasaulis.

206. The definition of investment provided Article 1(1) of the Agreement includes not only monetary claims or claims to perform any other economic activity, but also specifically includes business reputation.

207. International business reputation is significant economic factor, often now considered within organizations as an intangible asset. It is, undoubtedly, one of the most valuable assets of any company, and particularly of a globally operating company, such as Garsu Pasaulis. Indeed, most organizations have come to consider reputation as their most vulnerable asset. Most scholars and practitioners seem to agree with Warren Buffet, CEO, Berkshire Hathaway, that "It takes twenty years to build a reputation and five minutes to destroy it."[72]

208. Similarly, it took more than 25 years for Garsu Pasaulis to become global player with excellent global reputation in the in a very specific area of security printing and it took literally one day for the Kyrgyz Republic to destroy Garsu Pasaulis' reputation.

[72] Gaultier-Gaillard, Sophie, and Jean-Paul Louisot. "Risks to reputation: A global approach." *The Geneva Papers on Risk and Insurance-Issues and Practice* 31.3 (2006): 425-445.

209. As it was mentioned, actions of the Kyrgyz Republic had destructive effects to the long established international reputation of Garsu Pasaulis throughout the world and in a very specific area of security printing. Garsu Pasaulis' reputation was damaged by public knowledge of false allegations presented by the Kyrgyz officials.

210. Because of the illegal actions of the Kyrgyz Republic, Garsu Pasaulis is at risk to be blacklisted in numerous countries around the world and faces significant monetary damages, which also include loss of future profits.

211. Reputation certainly has an economic value. This is evidenced by the fact that the purchase price for a company typically not only reflects the physical assets of the company, but also the goodwill attached to it.

212. Garsu Pasaulis invested years and huge amounts of money to build up a respectable reputation in the very specific global market of security printing. It has done so also in the Kyrgyz Republic, which has paid off with conclusion of previous and present contracts with the Kyrgyz government.

213. However, as it will be explained below, due to blatant violations Garsu Pasaulis' rights under the Agreement, Garsu Pasaulis will need to re-establish its global reputation in the market after it has been severely damaged. This economic value of reputation necessarily leads to the conclusion that loss of reputation is a pecuniary, not a non-pecuniary loss.

214. In this case, it will not be difficult to ascertain the financial consequences of damage to Garsu Pasaulis and its main shareholder's global reputation. It will not be difficult for Garsu Pasaulis and its main shareholder to establish which contracts with new customers were never concluded because of the damaged reputation or which high value contracts were cancelled or what further loss of future income will be suffered based on global turnovers of Garsu Pasaulis and its main shareholder.

215. As is will be explained below, the Claimant will request compensation for moral damages it had suffered, which are particularly concerned with loss of global reputation. Moral damages are the damages to the reputation and image of Garsu Pasaulis and its main shareholder.

216. In a highly competitive and complex global market of security printing respectable reputation is of essence. Any negative rumor can affect the company's image and consequently its position in the security markets for the worse. In this case, however, the actions of the Kyrgyz Republic were unprecedented and involved global dissemination of false accusations against Garsu Pasaulis and its main shareholder, which was spread just because of some interests of Kyrgyz officials.

217. As it was held in *the Lusitania* cases, non-material damages 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"[73]. It is also generally recognized that a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation.

218. As established by the *ad hoc* tribunal in *Al-Kharafi & Sons Co v. the Government of Libya and others* (where the claimant was awarded US$30 million for reputational damage) – "in the same manner that international arbitral jurisprudence established compensation for material damages and lost profits, it also outlined compensation for damages to reputation and image (moral damages), taking into account that we currently live in a world led by media institutions and social networking websites, where any rumor could damage the Claimant's status within its international scope of work."[74]

219. Therefore, Garsu Pasaulis clearly had a protected investment in the context of the Agreement and it was destroyed by the Kyrgyz Republic.

D. Garsu Pasaulis and Lithuania Have Consented to Submit this Dispute to Arbitration Under the UNCITRAL Rules

220. Both parties have consented to submit this dispute to arbitration under the UNCITRAL Rules. The Kyrgyz Republic consented in the Agreement to arbitrate disputes arising out of covered investments before an *ad hoc*

[73] *US. v. Germany*, November 1923, Vii Riaa 32, At P. 42, Quoted with approval in James Crawford, ILC Articles On State Responsibility at p. 223 et seq.
[74] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, 22 Mar 2013, Final Arbitral Award.

Arbitration Tribunal, in compliance with the Arbitration Regulations of the UN Commission on the International Trade Law (UNCITRAL).

221. It is well settled in international investment jurisprudence that an investor's request for arbitration constitutes its acceptance of the host state's standing offer to arbitrate contained in a treaty or other instrument of consent.

222. In this case, the Claimant's Notice of Arbitration constitutes its acceptance of the Kyrgyz Republic's offer to arbitrate disputes under the Agreement. This Notice of Arbitration fully complied with the UNCITRAL Rules and as such, was effective in providing Garsu Pasaulis acceptance of the Kyrgyz Republic's offer to arbitrate this dispute.

E. Garsu Pasaulis has complied with pre-arbitration requirements of the Agreement

223. Under Article 8(2) of the Agreement the parties to the dispute should initially seek a resolution through consultation and negotiation and may have recourse to arbitration only after six months from the date that the dispute arose.

224. Garsu Pasaulis has first delivered notice of the existence of an investment dispute under the Agreement to the President of the Kyrgyz Republic and the Government on 8 May 2019[75]. It this notice, Garsu Pasaulis has explained in very detail the extraordinary factual circumstances surrounding the 2018 Tender, the breach of fair and equitable treatment standard, failure to provide full protection and security, arbitrary treatment, breach of due process, illegal revocation of Garsu Pasaulis valuable rights without compensation and with no cognizable public purpose. In addition, Garsu Pasaulis invited the Government of the Kyrgyz Republic to good faith negotiations in order to attain an amicable resolution of the parties' dispute.

225. However, Garsu Pasaulis had never received any response whatsoever to its 8 May 2019 notice.

226. On 22 July 2019 Garsu Pasaulis sent a second notice to the President of the Kyrgyz Republic and the Government explaining that Garsu Pasaulis has not

[75] 2019-04-30 Garsu Pasaulis' Notice of Intent, Ex. **C-42**.

received any response of the Kyrgyz Republic and that Garsu Pasaulis' communications had gone unheeded and attempts to negotiate with the Kyrgyz Republic were ignored[76].

227. Similarly, Garsu Pasaulis had never received any response whatsoever to its second notice of 22 July 2019.

228. On 31 October 2019 Garsu Pasaulis sent a third and final pre-arbitration notice to the President of the Kyrgyz Republic and the Government[77]. In the third notice, Garsu Pasaulis again expressed its intent to good faith negotiations with the Government in order to attain an amicable resolution of the parties' dispute on "without prejudice" basis.

229. However, again and again Garsu Pasaulis' communications had gone unheeded and Garsu Pasaulis has not received any response of the Kyrgyz Republic.

230. Garsu Pasaulis, therefore, reserved all its legal rights under the Agreement, while the Kyrgyz Republic made no reply at all. The Kyrgyz Republic did not even challenge the account the notices gave of the course of the 2018 Tender and the breach of rights of Garsu Pasaulis.

231. The three (3) notices sent to the Kyrgyz Republic left no doubt as to the existence of a dispute arising under the Agreement, and as to Claimant's intention of submitting the dispute to arbitration if a settlement were not reached within six months, which was all that Article 8(2) of the Agreement required.

232. Therefore, the Tribunal should be satisfied that the Claimant attempted to resolve the dispute through consultation or negotiation and failed.

233. On the other hand, while Garsu Pasaulis has tried again and again to reach out to the President and the Government of the Kyrgyz Republic, the authorities of the Kyrgyz Republic had become even more aggressive and pursued their smear campaign against Garsu Pasaulis even further.

234. Instead of engaging in meaningful negotiations, Garsu Pasaulis was confronted with illegal offers of the authorities of the Kyrgyz Republic to buy

[76] 2019-07-10 Garsu Pasaulis' Second Notice, Ex. **C-43**.
[77] 2019-10-16 Garsu Pasaulis' Third Notice, Ex. **C-44**.

favorable court decisions in the Kyrgyz Republic related to 2018 Tender and even threatened with fraudulent video recordings alleging Garsu Pasaulis' involvement into bribery activities.

235. Although the Kyrgyz Republic could have provided a reasonable opportunity for the parties to resolve their dispute, however, thus Garsu Pasaulis' attempt to reach amicable agreement was attacked and Garsu Pasaulis received even more arbitrary treatment.

236. Government that is bound by the standard of fair and equitable treatment of foreign investors, however, cannot avoid paying due regard to the good faith efforts of a foreign investor. The seriousness of any negotiations with Garsu Pasaulis was thereby undermined relatively early on when there was still time for alternative cooperative solutions. The failure to develop a workable cooperative solution in good time led to a situation where Garsu Pasaulis was forced to refer to international arbitration.

237. Therefore, the Kyrgyz Republic has also breached its obligation to negotiate in good faith as required by Article 8(2) of the Agreement. The Kyrgyz Republic failed to deal with Garsu Pasaulis in an unbiased and even-handed way.

238. The Kyrgyz Republic's conduct may also be characterized as simply strange, because it made it impossible for Garsu Pasaulis to articulate a possible amicable settlement, because the Kyrgyz Republic simply gave up communicating with Garsu Pasaulis and downgraded the parties' communication to zero.

239. In any case, Garsu Pasaulis still believes that the parties may still make a good faith effort to resolve their differences and reach agreement amicably and without the necessity of third-party dispute resolution.

VII. THE KYRGYZ REPUBLIC HAS VIOLATED THE PROTECTIONS GRANTED TO GARSU PASAULIS UNDER THE AGREEMENT

A. General overview

240. In this section, Garsu Pasaulis will demonstrate that the Kyrgyz Republic's unlawful conduct in carrying out the 2018 Tender, as described in section V of this Notice of Arbitration, violated the protections and guarantees set out in Articles 2-4 of the Agreement.

241. Article 3 of the Agreement requires the Kyrgyz Republic to ensure the fair and equitable treatment of Garsu Pasaulis and its investments in the Kyrgyz Republic and prohibits the application of unjustified and discriminatory measures (sub-sections i & ii).

242. In addition, Article 3 of the Agreement requires the Kyrgyz Republic to ensure full protection and security of Garsu Pasaulis and its investments in the Kyrgyz Republic. Full protection and security guarantee provided in the Agreement implies the Kyrgyz Republic’s guarantee to Lithuanian investors of stability in a secure environment, both physical, commercial and legal. Thus, the Kyrgyz Republic must ensure that Lithuanian investors and their investments receive international standards of protection and security (sub-section iii).

243. Furthermore, Article 4 of the Agreement permits the direct or indirect expropriation of the investments of Lithuanian investors under certain express conditions, including that such measure must be for public purpose, completed upon immediate, full and effective compensation, and done in a non-discriminatory manner – in conformity with all legal conditions (sub-section iv).

244. As it will be demonstrated below, the Kyrgyz Republic has clearly breached the Agreement by applying unjustified and discriminatory measures, by failing to provide stable and secure environment, both physical, commercial and legal.

245. Furthermore, the Kyrgyz Republic breached the investor‘s legitimate expectations and expropriated Garsu Pasaulis’ investments in a discriminatory manner, without immediate, full and effective compensation.

246. As the *Lemire*[78] and *PSEG*[79] awards show, tribunals have been sympathetic to investors' claims that they have expended considerable resources participating in tenders that ultimately fail to produce a project.

247. Applying that standard, as it will be evidenced below, the Tribunal will be in a position to clearly conclude that the 2018 Tender process was irregular, arbitrary and discriminatory and ultimately frustrated Garsu Pasaulis' undoubtedly legitimate expectations that Garsu Pasaulis would be able to expand its investments in the Kyrgyz Republic.

248. In this case, three key factors are important when considering the breach of Garsu Pasaulis' rights and guarantees provided in the Agreement: first is that the 2018 Tender process and termination thereof were clearly tainted by interferences from the Kyrgyz authorities and political organs (organs of the state), including the Parliament of the Kyrgyz Republic, courts, prosecution and, in particular, the State Committee for the National Security Prosecution of the Kyrgyz Republic; the second is the fact that Garsu Pasaulis, being pronounced as the winner of 2018 Tender, has acquired a very specific and valuable right (right to print e-passports to Kyrgyz citizens) for a certain amount for a certain time period. This valuable right was taken away from Garsu Pasaulis in irregular, arbitrary, and discriminatory way and instead awarded to companies favored by the Government without any public tender; and third is the smear campaign executed against Garsu Pasaulis, which has intentionally destroyed Garsu Pasaulis' international reputation and caused significant damage. This smear campaign was orchestrated by the Kyrgyz' public authorities who themselves had private and interchanged interests with Garsu Pasaulis' competitors.

249. As it will be evidenced below, the Agreement was seriously breached by what can be described above as the "roller-coaster" effect of the smear campaign imposed on Garsu Pasaulis.

250. Thus, while any of the three above features alone stigmatize the entire 2018 Tender process as arbitrary, there is also evidence that these features ended

[78] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18.
[79] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5.

up mutually reinforcing each other against Garsu Pasaulis. In this case the tribunal may take a “totality of the circumstances” approach to find against the state or analyze every individual act, omission or procedural shortcoming which, standing alone, would also support liability.

251. All manifestations of serious administrative negligence, inconsistent administrative acts and abuse of authority lead to a conclusion that the fair and equitable treatment, full security and protection standards have been breached, and that these breaches are serious enough as to attract liability. Including the bad faith, there is in the present case first an evident negligence on the part of the Kyrgyz Republic in the handling of the 2018 Tender.

B. The Kyrgyz Republic breached the Agreement

252. As it was explained above and will be further explained below, the Kyrgyz Republic has breached its obligations under the Agreement by failing to provide Garsu Pasaulis the fair and equitable treatment and full protection and security guaranteed under Article 3 of the Agreement. The Kyrgyz Republic has also breached its obligations under the Agreement by indirectly expropriating Garsu Pasaulis’ investments in a discriminatory manner, without immediate, full and effective compensation, as required by Article 4 of the Agreement, *inter alia*:

(1) by executing a smear campaign against Garsu Pasaulis and significantly damaging Garsu Pasaulis’ international reputation, without any lawful reason or proof and by taking steps to remove Garsu Pasaulis from the Kyrgyz Republic market;

(2) by executing raids, criminal investigations, arrests and making threats towards Garsu Pasaulis and its representatives;

(3) by illegally terminating the 2018 Tender won by Garsu Pasaulis and by expropriating Garsu Pasaulis’ valuable right to execute the contract with the government.

i. Fair and equitable treatment

253. In Article 3 of the Agreement, Respondent guaranteed that it would at all times ensure just and fair treatment of the investments of investors of the other Contracting Party. The meaning of "just and fair treatment" as employed in

Article 3 must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[80] According to the ordinary meaning of the terms in the context of Article 3, treatment is "just" when it is: "Consonant with the principles of moral right or of equity; righteous; equitable; fair."[81] In turn, treatment is "fair" when it is: "Free from bias, fraud, or injustice; equitable, legitimate"[82].

254. In view of the ordinary meaning of the terms, "just and fair treatment" should be construed as functionally identical to the other common formulation of "fair and equitable treatment" provided for in a large number of investment protection treaties. Indeed, as recognized by the tribunal in *Total v. Argentina*[83]*:*

> "The undertaking of the host country to provide fair and equitable treatment to the investors of the other party and their investments is a standard feature in BITs, although the exact language of such undertakings is not uniform."

255. The tribunal in *Parkerings v. Lithuania*[84] reached the same conclusion when it decided to "identically interpret the notion 'equitable and reasonable' [the formulation provided for in the Lithuania-Norway BIT] and the standard 'fair and equitable". The *Parkerings* tribunal set forth its analysis of this issue as follows:

> "[T]he "standard of 'fair and equitable' has been interpreted broadly by Tribunals and, as a result, a difference of interpretation between the terms 'fair' and 'reasonable' is insignificant. The Claimant did not show any evidence which could demonstrate that, when signing the BIT, the Republic of Lithuania and the Kingdom of Norway intended to give a different protection to their investors than the protection granted by the 'fair and equitable' treatment standard."

256. The same analysis is equally applicable here with respect to the terms, "just" and "equitable."

257. In view of the foregoing, the significant body of investment doctrine and jurisprudence addressing the standard for fair and equitable treatment ("FET")

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[80] Vienna Convention on the Law of Treaties, Art. 31.
[81] Oxford English Dictionary, def. 3(a).
[82] Id., def. 10 (as applied to "conduct, actions, arguments, methods.").
[83] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Para. 106.
[84] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8.

is and must be considered highly relevant to the tribunal's application of Article 3 in this case. In turn (and notwithstanding that the standard must always be applied with due regard to the facts of the specific case)[85], the relevant doctrine and jurisprudence confirm that FET entails the protection of the "basic expectations on the basis of which the foreign investor decided to make the investment."[86]

258. Indeed, the *Saluka* tribunal even characterized the notion of legitimate expectations as the "dominant element" of the FET standard, concluding that by virtue of agreeing to an FET obligation, a host state must be regarded as having "assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations."[87]

259. The fair and equitable treatment standard means fairness and equity of treatment as these terms are generally understood. Alternatively, the fair and equitable standard can mean that investors shall be treated in a manner commensurate to the international minimum standard for investors.

260. In either case, the phrase ‘fair and equitable treatment’ is imprecisely defined, thereby permitting arbitrators to apply the necessary standards to the dispute in question in light of the factual matrix before them. The fair and equitable standard ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors.

261. Certain principles have emerged in the arbitral jurisprudence that help tribunals define or identify fair and equitable treatment, or unfair and inequitable treatment[88].

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[85] *See Lemire v. Ukraine,* ICSID Case No. ARB/06/18 (Decision on Jurisdiction and Liability dated 14 January 2010), para. 284 ("The FET standard defined in the BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis."); *see also Mondev Intl Ltd. v. USA,* ICSID Case No. ARB(AF)/99/2 (Award dated 11 October 2002), para. 118; *Rumeli Telekom A.S. and Telsim Mobile Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16 (Award dispatched 29 July 2008), para. 610 (citing Peter Muchlinski).

[86] *Tecnicas Medioambientales Tecmed SA v. United Mexican States,* ICSID Case No. ARB(AF)/00/2 (Award dated 29 May 2003), para. 154; *see also Rumeli,* para. 609 ("The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations."); *CMS Gas Transmission Co. v. Argentine Republic,* ICSID Case No. ARB/01/8 (Award dated 13 May, 2005), para. 267.

[87] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, para. 302.

[88] i. The host state must act in good faith (*Tecmed*, *Waste Management*, *Rumeli* and *Spyridon*); ii. The host state’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process (*Waste Management*, *Rumeli* and *Spyridon, SD Myers*, and *Occidental*); iii. The host state must act in a transparent manner (*Metalcad*, *Siemens*, *LG&E*, *Saluka*, *Tecmed*, *Maffezini*, *Waste Management*, *Rumeli* and *Spyridon*); iv. The host state’s conduct cannot breach the investor’s

262. It is widely understood that the duty not to deny justice constitutes part of the fair and equitable treatment standard, as well as standing as an independent principle under public international law. Although it is unnecessary to prove a denial of justice in order to establish a breach of the fair and equitable treaty standard, as it was evidenced above, a denial of justice clearly took place.

263. The jurisprudence of international tribunals reveals that a denial of justice is generally procedural. Yet, there may be cases where proof of the failed process may be substantiated by a suspicion so blatantly wrong that no honest or competent prosecution or similar institution could possibly have rendered it.

264. Tribunals have also held that collusion, either between a State, judicial authorities and a local party, or among organs of the State, can amount to a denial of justice.

265. The judicial system of the host State must be driven by the principle of due process, a fundamental principle of law for the administration of justice, the breach of which can also amount to a denial of justice. Due process is a course of legal proceedings according to the rules and principles that have been established to guarantee fairness and for the enforcement and protection of private rights.

266. Procedural denial of justice thus corresponds to fundamental breaches of due process adversely affecting a party. These irregularities must be acts which *per se* cause damage due to their rendering a just decision impossible. The notion of procedural denial of justice as an attack on judicial propriety has also been confirmed by the arbitral tribunal in *Loewen*, which held that procedural denial of justice amounted to "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."[89]

267. Examples of irregularities constituting a procedural denial of justice include, as set forth by the Presiding Commissioner in the *Chattin* case:

> "absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges

legitimate expectations (*Tecmed*, *Saluka*, *Azurix*, and *ADC*); and v. The host state must act consistently vis-à-vis the investor (*CME*, *MTD Equity*, and *El Paso*).

[89] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003.

brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court."[90]

268. In its clear that in the present case the Kyrgyz Republic has manifestly breached its duty not to deny Garsu Pasaulis' justice. The proceedings to which Garsu Pasaulis was subjected demonstrate the Kyrgyz Republic's willful disregard for due process, and an affront to the most basic sense of judicial propriety.

a. The Kyrgyz Republic Disregarded Domestic Law and Policy

269. Representations made in bidding documents during a tender process should be considered as assurances given by the host state to the foreign investor for purposes of assessing whether there has been a violation of the state's obligation to provide fair and just treatment. An 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 investment consistently, transparently and in good faith. Thus, the tribunal in *OEPC v. Ecuador*[91] affirmed that, "the stability of the legal and business framework is "an essential element of fair and equitable treatment...". The *Saluka*[92] tribunal concluded that: "The expectations of foreign investors certainly include the observation by the host State of such well-established fundamental principles as good faith, due process, and nondiscrimination" and that a foreign investor may "properly expect" that a host state "implements its policies *bona fide* by conduct that is, as far as it affects the investor's investment, reasonably justifiable by public policies".

270. Similarly, the *Lemire*[93] tribunal concluded that the claimant in that case was "entitled to expect that the Ukrainian regulatory system ... would be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions," and that his investment "would be allowed to expand on its own

[90] *United States v. United Mexican States* (B. E. Chattin Case), Award (July 23, 1927), Reports of International Arbitral Awards, United Nations, Volume IV, pp. 282-312.
[91] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467.
[92] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL.
[93] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18.

merits, in parallel with the growth of the private radio industry in Ukraine." Moreover, the *Lemire* tribunal clarified that "these legitimate expectations were not based on an individual negotiation between [claimant] and the Ukrainian State; they represent the common level of legal comfort which any protected foreign investor in the radio sector could expect."

271. The *Metalclad*[94] tribunal applied these same factors in concluding that the respondent state in that case (Mexico) had violated its obligations under the North American Free Trade Agreement ("NAFTA") because it: "failed to ensure a transparent and predictable framework for Metalclad's business planning and investment," through conduct that demonstrated "a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly".

272. The *TECMED*[95] tribunal reaffirmed in more fulsome terms the importance of protecting investor expectations that arise from the applicable laws and policies, and from basic principles of transparency and good faith in administrative procedures. Thus, in articulating the contours of host state conduct that would illegitimately "affect the basic expectations that were taken into account by the foreign investor to make the investment," the *TECMED* tribunal noted that these "basic expectations" include an expectation for the host state "to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor;" and "to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments".

273. Here, as in the *Eureko*[96] case, the claimant was a qualified foreign investor with a legitimate expectation of obtaining a valuable right to print e-passports to Kyrgyz citizens through its participation in the 2018 Tender. Here, as there, political expedience prevailed over the commitments that had been assumed by the state, and over the investor's legitimate expectations. In this case, however, the Respondent's conduct was significantly more insidious. Unlike in *Eureko,* where the Polish government pursued a change in policy due to general sectoral concerns, and ultimately issued a legal resolution to formally

[94] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1.
[95] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.
[96] *Eureko B.V. v. Republic of Poland*.

declare that control over PZU would not be ceded to foreign investors the Respondent here attempted to accomplish the same result in a purely *de facto* — *i.e.,* non-transparent — fashion.

274. In the present case, the Kyrgyz Republic did not want to formally alter its 2018 Tender, because it would have harmed its own interests to do so. Indeed, the Kyrgyz Republic had dedicated significant resources to the attraction of foreign investment into the country (and continues to do so today), in recognition of the substantial benefits that could be gained thereby. However, certain members of the Government had their own interests and pursued personal gain in cooperation with various foreign investors: namely, the well-connected foreign companies who wished to gain access to Kyrgyz market through the backdoor entrance and influence on the Kyrgyz officials, instead of participating in public tenders. Thus, those officials simply chose to selectively disregard the country's applicable law and stated policy in the case of the 2018 Tender and find ways to expel Garsu Pasaulis in favor of other backdoor participants.

275. In Claimant's submission, if a *legally sanctioned* change in policy (such as the one at issue in *Eureko, e.g.)* may violate an investor's legitimate expectations of investment expansion, then an *arbitrary and unlawful* disregard for the extant strategy and policy (such as the one at issue here) must by necessity do so.

276. Indeed, the *Lemire* tribunal arrived at this exact same conclusion when it noted that "a blatant disregard of applicable tender rules, distorting fair competition among tender participants," necessarily constitutes a violation of the FET standard.

277. Therefore, where the host state has violated its own laws in its treatment of a foreign investor, it should be prohibited from benefiting from its own wrongdoing. And yet the Kyrgyz Republic’s complete disregard for its own laws and policy is merely the first basis of its failure to protect Garsu Pasaulis' legitimate expectations.

278. In addition to its mishandling of the 2018 Tender and associated abuse of power, Respondent's lack of good faith in communicating and executing a contract with Garsu Pasaulis constitutes an independent basis for its violation of the FET standard. In this regard, the investor's basic expectations that host state conduct will be — in the words of the *Lemire* tribunal — "consistent,

transparent, fair [and] reasonable," extend not only to the state's application of extant laws, regulations and policies in its role as administrator, but also to its conduct in carrying out effective communication with the investor. Thus, the *PSEG*[97] tribunal confirmed that the respondent state in that case (Turkey) had breached its FET obligation to the claimants as a result of "evident negligence on the part of the administration in the handling of the negotiations with the Claimants." In particular, the tribunal concluded that, even though the claimants had never managed to reach an agreement with the respondent state on certain key contractual terms required to move their project forward, they were nevertheless "entitled to expect that the negotiations would be handled competently and professionally". In turn, the conduct of the Turkish administration fell short of that expectation inasmuch as the government officials did not maintain clear channels of communication with the investor, and did not appear to have made good faith efforts to resolve key points of disagreement so that the investor's project could effectively move forward.

279. In the present case, however, Garsu Pasaulis was put into substantially worse situation than PSEG. The conduct of the Kyrgyz Republic fell short of any expectations inasmuch as the Government officials simply cut-off any channels of communication with the investor, did not made any good faith efforts to resolve points of disagreement with Garsu Pasaulis or even provided an opportunity to provide its position to any allegations and smear campaign executed against Garsu Pasaulis.

280. In a similar vein, the *Saluka*[98] tribunal concluded that the Czech Republic had in that case violated the FET standard by failing to deal with proposals made during the course of negotiations by the claimant and its local enterprise, IPB, "in an unbiased, even-handed, transparent and consistent way;" and by "unreasonably refusing to communicate with IPB and Saluka/Nonnura in an adequate manner."

281. Garsu Pasaulis' expectation that it would execute the contract for printing passports was at least as legitimate for international law purposes as it was for Kyrgyz law purposes. In any event, it is beyond doubt that, *at a very minimum,*

[97] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5.
[98] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL.

Garsu Pasaulis was entitled to expect that the Respondent would not begin a smear campaign against the investor, refuse any communication with the investor and ultimately refuse to execute the contract in a manner that was "unjustifiable," "in bad faith" and "unfair."

282. Unfortunately, Garsu Pasaulis' expectations in that regard were violated and it resulted in a total destruction of Garsu Pasaulis international reputation and the loss of his valuable right to execute the contract with the government.

b. The Kyrgyz Republic imposed arbitrary and discriminatory measures, abused its administrative authority and based decisions on political expedience

283. Just as the terms "just and fair" in the first sentence of Article 3 are substantially identical to FET, the terms "unjustified" or "discriminatory" measures in the second sentence of the provision are substantially identical to the more commonly used terms, "arbitrary or discriminatory measures," and "unreasonable or discriminatory measures."

284. As explained in this section, tribunals applying the terms "arbitrary" and "unreasonable" to challenged state conduct have generally done so with reference to the plain meaning of the terms. Thus, a measure is characterized as "arbitrary" whenever it "depends on individual discretion" or is "founded on prejudice or preference rather than on reason or fact."[99]

285. In the Claimant's submission, this formulation of the term "arbitrary" could and should be equally applicable to the term "unjustified," as used in the second sentence of Article 3.

286. Indeed, to "justify" conduct is not to give any reason whatsoever for the conduct, but rather to show that it was "just, right, or proper," *i.e.,* that there was a *legitimate* reason behind it.

287. In the investment treaty context, the prohibition of arbitrary and discriminatory measures is often subsumed within, or to overlap with, the state's FET obligation. Thus, the *Lemire* tribunal described a formulation such as that found in Article 3 of the Agreement (a guarantee of fair and equitable treatment,

[99] *Lauder v. Czech Republic*, Ad hoc — UNCITRAL (Final Award dated 3 September 2001), para. 221 (quoting Black's Law Dictionary 100 (7th ed. 1999)); see also *Siag and Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15 (Award dated 11 May 2009), para. 459 (construing "unreasonable" on the basis of its "ordinary meaning").

coupled with a guarantee against arbitrary or discriminatory measures) as entailing "a positive and a negative obligation: the positive is to accord FET to the protected foreign investments, and the negative is to abstain from arbitrary or discriminatory measures affecting such investments." The tribunal went on to explain that: "Any arbitrary or discriminatory measure, by definition, fails to be fair and equitable . .. The prohibition of arbitrary or discriminatory measures is thus an example of possible violations of the FET standard."[100]

288. The *Lemire* tribunal's conclusion in this regard conforms to that of many other tribunals. For example, the *CMS v. Argentina*[101] tribunal affirmed that "any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment".

289. Similarly, the *Rumeli*[102] tribunal confirmed that "the fair and equitable treatment standard encompasses *inter alia* the following concrete principles: ... the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process."

290. Likewise, the tribunal in *Waste Management*[103] indicated that: "[T]the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."

291. Moreover, as already explained in section VII. B. ii. of this Notice of Arbitration, the weight of arbitral jurisprudence confirms that the FET obligation also entails the protection of legitimate expectations; and that protected investors legitimately expect that their investments will not be subject to arbitrary or discriminatory treatment. It follows that state conduct that is arbitrary or discriminatory — such as that discussed in this section — violates not only the

[100] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, para. 259.
[101] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, para. 290.
[102] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, para. 609.
[103] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2.

second sentence of Article 3 of the Agreement, but also the first sentence of that same provision. Thus, to the extent not already expressly mentioned therein, all the arguments set out in the present section are incorporated by reference into section VII. B. ii.

292. In addition to the tribunal in *PSEG*[104], other investment arbitration tribunals have found that when an administrative agency exceeds its authority to the detriment of the investor, a violation of FET will result. For example, in the *Metalclad*[105] case, the tribunal concluded that the respondent state (Mexico) had violated its FET obligation when the municipality in which the claimant's investment project was located denied the claimant's application for a construction permit on the basis of "environmental impact considerations."

293. According to the tribunal, "the authority of the municipality only extended to appropriate construction considerations" and its reliance on environmental reasons to deny the claimant's permit application was therefore "improper."[106]

294. In addition, the *Metalclad*[107] tribunal also found it relevant that the claimant was "given no opportunity to appear" at the meeting in which the permit was denied, thus implicating the claimant's right to administrative due process. As recognized by other tribunals, the investor's right to due process is indeed an integral part of the host state's FET obligation. In this regard, the *Saluka* tribunal referred to past arbitral practice in concluding that "according to the 'fair and equitable treatment' standard, the host State must never disregard the principles of procedural propriety and due process..."[108]

295. In the present case, it is clear that the 2018 Tender Commission and the State Committee for the National Security Prosecution abused their authority by basing their decisions in the context of the 2018 Tender on factors that they were not lawfully entitled to consider, and by failing to afford Garsu Pasaulis due process of law. In turn, Garsu Pasaulis was impaired in its use and enjoyment of the substantial *know-how* that it invested and continues to employ in successfully executing contracts with the Kyrgyz government.

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[104] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5.
[105] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1.
[106] Ibid.
[107] Ibid.
[108] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL.

296. As already explained above, in the absence of the unsubstantiated and unlawful conduct in the context of the 2018 Tender, Garsu Pasaulis success in execution of the contract with the Government would have been inevitable.

297. On the other hand, it is clear that the reasons underlying the Kyrgyz Republic's conduct in this regard had no basis in law, fact or logic, but rather reflected mere personal preference and political expedience. In turn, the illegitimate nature of the Kyrgyz authorities' motivations constitutes an independent basis for concluding that their actions were arbitrary. As borne out by the arbitral jurisprudence, the prohibition of arbitrary measures targets not only the nature of the host state's conduct *(e.g.,* in violation of law or without due process of law), but also the reasons underlying that conduct. Thus, a measure may be arbitrary even where the reasons put forward by the decision maker are legitimate, if it is apparent that these were not the *real* reasons for which the measure was taken.

298. Similarly, a measure that is ostensibly within the confines of legitimate administrative discretion may nevertheless be arbitrary if it was actually "based on prejudice or preference rather than on reason or fact."[109] This was exactly the case of Garsu Pasaulis in the Kyrgyz Republic.

299. In this case, the Kyrgyz Republic's handling of the 2018 Tender following its improper rejection of Garsu Pasaulis from the 2018 Tender *(i.e.,* its decision not to execute the contract with Garsu Pasaulis, but rather to execute the contract with other favored company without any public tender) constitutes the culmination of a course of conduct aimed at favoring politically connected, local investors over qualified foreign investors like the Claimant. Thus, the Kyrgyz Republic's actions in respect of the other companies who now execute the contract with the Kyrgyz Republic serve to confirm the arbitrariness of Claimant's dismissal from the 2018 tender and refusal to execute the contract for printing e-passports.

300. Moreover, the Kyrgyz Republic's treatment of the English and Russian printing companies *vis-a-vis* its treatment of Claimant is also in and of itself discriminatory. A "discriminatory" measure occurs when the claimant's case is

[109] *Lauder*, para. 221 (quoting Black's Law Dictionary 100 (7th ed. 1999)). See also *Siag and Vecchi*, para. 459 (construing "unreasonable" on the basis of its "ordinary meaning").

"treated differently from similar cases without justification," or when a respondent state "provide[s] the foreign investment with a treatment less favorable than domestic investment."[110]

301. In conclusion, Garsu Pasaulis' situation — like in the *Lemire* case — is one in which "weaknesses in the legal procedure" and "lack of transparency" in the tender resulted in an arbitrary advantage to other investors with greater political clout. Here, as in *Lemire,* Garsu Pasaulis, "precisely because it was a foreigner and lacked the close political connections that the [local groups] had, was pushed aside and deprived of the opportunity to compete with local investors on a level playing field."[111]

302. Therefore, based on the analysis of the facts and law, the actions taken by the Respondent cannot be characterized as evenhanded, as consistent, as respecting the legitimate expectations of the Claimant or as observing the purpose of the rules governing the 2018 Tender. As a result, the actions here in question are not in conformity with the duty of the Kyrgyz Republic to accord the Claimant just and fair treatment as required by Article 3 of the Agreement.

303. As a result, Garsu Pasaulis' plans to expand and transform its investment in the Kyrgyz Republic and CIS countries were unfairly thwarted. As of today's date, and despite the conclusions of the Kyrgyz judicial branches, other better politically connected companies nevertheless execute passport printing contract with the Government without even having participated in any public tender. They benefit from a lucrative investment to which Claimant was rightfully and fully entitled.

ii. Legitimate expectations

304. It is a long established practice of arbitral tribunals that the foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.

[110] In this regard, see *Metalclad*, paras. 94-97 (noting that the municipal government's actions following its denial of a construction permit to the claimant indicated that it "lacked confidence in its right to deny [the] permission" and "support[ed] the Tribunal's finding ... that the Municipality's insistence upon and denial of the construction permit in this instance was improper.").
[111] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18.

The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities[112].

305. The protection of an investor‘s legitimate expectations, as subsumed within the standard of fair and equitable treatment, requires the Kyrgyz Republic to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.

306. The protection of legitimate expectations requires the state to act in a fully predictable and transparent manner in relation to the investor to assure compliance with the standard for fair and equitable treatment. Moreover, the duty of transparency requires not only that the host state establish a clear legal framework and abide by its own laws, but also that it keep the investor properly informed of developments and governmental actions that may affect the investor and its investment.

307. In the present case, having complied with all the 2018 Tender regulations and acted in good faith, Garsu Pasaulis had no reason to believe that the Commission and the Kyrgyz Republic would simply cancel the 2018 Tender procedure without any valid reason or explanation. Garsu Pasaulis was also never informed about the cancellation of the 2018 Tender procedure or the alleged “expiration” of its winning proposal.

308. Actions of the Kyrgyz Republic were totally unpredictable, totally non-transparent, the Kyrgyz Republic did not establish a clear legal framework and did not abide even its own laws. Nor the Kyrgyz Republic kept the investor properly informed of developments and governmental actions that substantially affected the investor and its investment.

309. Therefore, as a result, the actions here in question are not in conformity with the duty of the Kyrgyz Republic to accord the Claimant just and fair treatment as required by Article 3 of the Agreement.

[112] *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003.

iii. Full protection and security

310. It is widely understood that treatment which is not fair and equitable necessarily constitutes an absence of full protection and security.

311. The obligation to accord full protection and security requires the host State to exercise due diligence in the protection of foreign investments. International law has interpreted this due diligence to impose an objective standard of vigilance and thus to require 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.

312. The State has a primary obligation to exercise due diligence to provide adequate protection, failure to comply with which creates international responsibility.

313. The full protection and security standard not only encompasses the physical security of foreign investors and their investments, which was woefully neglected in this case, but also the legal security in which the investment operates.

314. While cases such as *Biwater v. Tanzania*[113] appear to echo this view, the extension of full protection and security to a regulatory exercise of state powers had been established in *CME v. Czech Republic*[114] in 2001. In this case, the Czech Media Council, a regulatory body, was found to have created a legal situation that enabled the investor's local partner to terminate the contract on which the investment depended. The tribunal found that the Czech Republic had breached the obligation in the Czech-Netherlands BIT to accord full protection and security. It stated: The Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic… The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn. The tribunal in *Azurix v. Argentina*[115] confirmed that "full protection and security may be breached even

[113] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.
[114] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL.
[115] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12.

if no physical violence or damage occurs". In *Siemens v. Argentina*[116] the tribunal found additional authority for the proposition that "full protection and security" goes beyond physical security from the fact that the applicable BIT's definition of investment applied also to intangible assets. The tribunal concluded that the initiation of renegotiations for the sole purpose of reducing costs for the host state, unsupported by any declaration of public interest, affected the legal security of Siemens' investment. The tribunal in *Compañia de Aguas and Vivendi v. Argentina*[117] was also clear in its rejection of the argument that the protection and security standard was limited to physical interference. It stated as follows:

> „If the parties to the BIT had intended to limit the obligation to "physical interferences," they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment. Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized."

315. The statement of the *Vivendi* tribunal contains an important message for states. If states choose to draft their obligations toward investors using broad language such as "full protection and security" without expressly limiting its scope, then a tribunal can give these words their ordinary (and expansive) meaning. The *Biwater v. Tanzania*[118] tribunal followed the approach in *Vivendi v. Argentina* and *Azurix v. Argentina*. The tribunal stated: "The Arbitral Tribunal adheres to the *Azurix* holding that when the terms "protection" and "security" are qualified by "full," the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure

[116] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8.
[117] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic).
[118] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments".

316. This was followed also by *National Grid v. Argentina*[119], in which the tribunal concluded that the phrase "protection and constant security" as related to the subject matter of the Treaty did not carry with it the implication that this protection is inherently limited to protection and security of physical assets. More recently, in *Siag v. Egypt*[120], the tribunal found the Egyptian authorities' failure to follow Egyptian court decisions breached the duty of protection and security, thus confirming that the duty of protection and security can be found to include the need to provide a legal framework that offers legal protection to investors. The duty to have a well-functioning system of courts and legal remedies available to the investor was also recently confirmed in *Frontier v. Czech Republic*[121].

317. In the present case, treatment of Garsu Pasaulis and its representatives at the hands of the Kyrgyz Republic authorities is irreconcilable with the right to full protection and security.

318. Indeed, rather than protecting Garsu Pasaulis, the Kyrgyz Republic took all measures available to it to harm and threaten Garsu Pasaulis and deprive Garsu Pasaulis of its investments, thereby breaching its obligation to provide full protection and security. The lack of good governance and the failure of the rule of law do not justify the Kyrgyz Republic's repeated attacks on a foreign investor and its investments in a manner that can only be described as punitive.

319. The egregiousness of the Kyrgyz Republic's conduct is strengthened by the fact that Garsu Pasaulis was attacked by the State Committee for the National Security Prosecution – an institution whose main purpose and function is to protect local and foreign investors against such illegal and intolerable acts and instead to ensure full protection and security.

[119] *National Grid plc v. The Argentine Republic*, UNCITRAL.
[120] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15.
[121] *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL.

320. The Kyrgyz Republic failed to ensure that Garsu Pasaulis and its investments received full protection and security as required by Article 3 of the Agreement, which imposes an obligation of due diligence on the part of the Kyrgyz Republic to protect Garsu Pasaulis and its investments from both physical and legal or illegal assault, including any international smear campaigns.

321. As noted by *AMT v. Congo*[122] the obligation to ensure investors full protection and security is: "an obligation of vigilance, in the sense that [the host State] shall take all measures necessary to ensure the full enjoyment of protection and security of its [the Claimant's] investments and should not be permitted to invoke its own legislation to detract from any such obligation. [The host State] must show that it has taken all measures of precaution to protect the investment of [the Claimant] in its territory".

322. As described in section V above, by its conduct, the Kyrgyz Republic has not only failed to safeguard Garsu Pasaulis against interference by use of authority and political force, but has perpetrated its own breach of the full protection and security standard.

323. Since the obligation to ensure full protection and security also extends to legal protection and security, including protection from interference with the basic legal framework upon which an investor has relied in making its investment, Garsu Pasaulis' basic expectation was, at least, that the Government would sign and execute the contract with Garsu Pasaulis. Garsu Pasaulis expected that after winning the 2018 Tender the contract with the Government would be performed in good faith and in accordance with due process and the rule of law. However, the contract was never executed, independently of any legitimate process.

324. Therefore, as a result, the actions here in question are not in conformity with the duty of the Kyrgyz Republic to accord the Claimant full protection and security as required by Article 3 of the Agreement.

iv. Expropriation

325. In Article 4 of the Agreement, Respondent guaranteed not to take any measures that would deprive Claimant of the value of his investments unless

[122] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1.

such measures were: (1) undertaken in the public interest; (2) accompanied by payment of full and effective compensation; (3) non-discriminatory; and (4) in accordance with law. Specifically, Article 4 provides:

> 1. Neither of the Contracting Parties shall expropriate and nationalise investments of the other Contracting Party's investors or apply any measures to such investments leading to similar consequences (hereinafter – expropriation), unless:
>
> a) The expropriation is undertaken for public needs and in compliance with the national legislation;
>
> b) The expropriation is undertaken on non-discriminatory grounds;
>
> c) Prompt, adequate and effective compensation is granted.
>
> 2. Compensation referred to in item c) of paragraph 1 of this Article shall correspond to the market value of the expropriated investment before the expropriation or public announcement of the pending expropriation, but not earlier, and shall be paid without undue delay. Compensation shall include interest calculated from the expropriation date until full payment applying London Interbank Offered Rate (LIBOR).
>
> 3. Investors affected by expropriation, without prejudice to their rights provided for under Article 8 of this Agreement and in observance of national legislation of the expropriating Contracting Party shall have the right to request that a judicial or another competent and independent authority of the country of such Contracting Party immediately examine their case and determine the investment value according to provisions of this Article.

326. As explained in section V of this Notice of Arbitration, Garsu Pasaulis has engaged in a series of related activities in the Kyrgyz Republic over the course of more than 8 years. Viewed in their totality, these activities constitute an investment operation with the overall aim of investing into development of the Kyrgyz Republic's security printing industry and digitalization efforts.

327. On the other hand, many of the individual contributions made by Garsu Pasaulis in furtherance of this investment operation, as well as rights acquired

by it in connection therewith, constitute qualifying "investments" under the Agreement in and of themselves.

328. This is consistent with the notion that: "an investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing"[123].

a. The Kyrgyz Republic expropriated Garsu Pasaulis' economic right

329. With regard to the guarantee against expropriation, it was particularly Claimant's free-standing right to execute the contract for printing e-passports to Kyrgyz citizens for a certain monetary amount, for a certain period of time — an "economic right accruing by law" — that formed the subject of the Respondent's breach.

330. In the specific circumstances of the investor, at the final stage of its investment operation as the winning bidder, the investor had acquired a right which the Government could no longer unilaterally withdraw without violating the investor's right. Thus, while Respondent's breaches of Article 3 — as discussed above — implicated broader aspects of Garsu Pasaulis' investments and associated activities, it was the right to execute the contract awarded by winning the 2018 Tender that was directly appropriated by the Respondent, and it is the taking of this particular right to which the requirements of Article 4 must be applied.

331. As set out below, the Kyrgyz Republic violated Article 4 of the Agreement when it arbitrarily and illegally annulled Garsu Pasaulis' right to execute the contract for printing e-passports and then transferred this right to the English company, which did not even participate in any public tender.

332. There is no doubt that Respondent's obligation to expropriate assets only for a legitimate public purpose and with prompt, adequate and effective compensation extends not only to tangible assets, but also to any rights having economic value. First and foremost, this is a necessary consequence of the fact that "economic rights" are specifically included within the definition of

[123] *ATA Construction v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2 (Award dated 12 May 2010), para. 96.

protected "investments" under the Agreement and thus, perforce, are subject to the guarantee set out in Article 4.

333. Furthermore, this conclusion comports with that of the vast majority of tribunals and commentators to have considered the issue of expropriation over the past century. Indeed, the notion that intangible interests can be the subject of an unlawful expropriation was confirmed by the Permanent Court of International Justice. It is long-established as a matter of international law, since at least the 1922 award concerning the *Norwegian Shipowners' Claims* [124] that an investor's contractual rights may be expropriated. This principle is well-established in the jurisprudence of ICSID tribunals.

334. In *SPP v. Egypt*, the tribunal declared that: "contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore.... it has long been recognized that contractual rights may be indirectly expropriated".[125]

335. It may be further recalled in this context that arbitral tribunals have repeatedly recognized and applied the principle that not only rights *in rem* may be expropriated but also intangible rights including contractual rights.[126]

336. In turn, this principle has been uniformly embraced by investment arbitration tribunals. In the words of the *Wena v. Egypt* tribunal: a "It is also well established that an expropriation is not limited to tangible property rights"[127]. As the panel in *SPP v. Egypt* explained, "there is considerable authority for the proposition that Contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation"[128]. Therefore, in that case, the tribunal had "no difficulty finding" that claimant's contractual rights to operate certain state-owned hotels had been expropriated by the Egyptian government when it allowed employees of a state-owned company to enter and occupy the hotels for a significant period of time.

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[124] Norwegian Shipowners' Claims, *Norway v United States*, Award, (1922) I RIAA 307, ICGJ 393 (PCA 1922), 13th October 1922, Permanent Court of Arbitration.
[125] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3.
[126] Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment on the Merits (1926); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Award dated 8 December 2000), para. 98 (citing *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3).
[127] Ibid.
[128] Ibid.

337. Similarly, in the *Metalclad* case[129], the tribunal determined that the claimant's acquired legal right to operate a landfill was expropriated when the municipal government arbitrarily refused to grant the company a construction permit for the project.

338. Subsequent investment tribunals have continued to conclude, largely without question, that an extinguishment of acquired rights amounts to an expropriation. Thus, the *ADC v. Hungary*[130] tribunal concluded that an expropriation had taken place where the Respondent state issued a decree nullifying certain rights that had previously been granted to the claimants' investment company through agreement with a state-owned entity.

339. In the case of *Eureko v. Poland*[131], the tribunal concluded that the respondent state had violated the guarantee of non-expropriation contained in the Dutch-Polish BIT by refusing to conduct an IPO after it had committed to the claimant that it would do so. As aptly explained by the *Eureko* tribunal: "[U]nder the terms of the First Addendum, [the claimant] acquired rights in respect of the holding of the IPO and [ ] these rights are `assets.' Since the RoP deprived Claimant of those assets by conduct which the Tribunal has found to be inadmissible, it must follow that Eureko has a claim against the RoP under Article 5 [nonexpropriation] of the Treaty"[132].

340. And, more recently, in the case of *Kardassopoulos v. Georgia*[133], the tribunal determined that the state's extinguishment of the claimant's contractual rights constituted "a classic case of direct expropriation."

341. Furthermore, tribunals have also expressly distinguished between measure which entail the deprivation of substantially all the rights involved in an overall investment operation, and those which entail a deprivation only of certain, discrete rights within that larger enterprise. The *Waste Management* tribunal explained this distinction in some detail, noting that even if the respondent state's measures could not be considered as "tantamount to the expropriation of Acaverde as an enterprise" the state's "persistent refusal or inability to pay

[129] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1.
[130] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16.
[131] *Eureko B.V. v. Republic of Poland*.
[132] Ibid.
[133] *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18.

sums due" under a contract might nevertheless involve an expropriation of the actual sums due[134].

342. Significantly, the *Waste Management* tribunal noted its view in this regard that: "[T]he outright refusal by a State to honour a money order or similar instrument payable under its own law may well constitute either an actual expropriation or at least a measure tantamount to an expropriation of the value of the order."[135]

343. As confirmed by this reasoning, a measure depriving an investor of a discrete right is no less expropriatory in character than one which deprives the investor of the value of its entire investment operation: in each case, the amount of compensation will correspond to the value of what was taken.

344. The analysis employed by the *ATA* tribunal[136] is equally applicable here. Garsu Pasaulis had a valid and very specific right, conferred by Kyrgyz law, to execute the contract for printing e-passports to Kyrgyz citizens for a certain amount, for a certain duration of time. This right constituted a valuable asset and — as set out in the following subsection — Respondent has deprived Garsu Pasaulis of that asset in violation of Article 4 of the Agreement.

345. The Kyrgyz Republic's conduct amounted to the expropriation of Garsu Pasaulis investment by termination of the already concluded 2018 Tender and by refusing to execute the contract with Garsu Pasaulis.

346. It is not an essential element of an expropriation that Garsu Pasaulis investment may or may not have been taken for the direct benefit of the Kyrgyz Republic. In *AMCO Asia v. Indonesia*,[137] an ICSID tribunal observed that: "It is generally accepted in international law, that a case of expropriation exists not only when a state takes over private property but also when the expropriating state transfers ownership to another legal person or natural person".

347. The standard for determining whether a State's conduct amounts to an expropriation is the actual effect of the measures on the investor's property.

[134] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2.
[135] Ibid.
[136] *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2.
[137] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

348. An expropriation occurs when the actual effect of a State's actions is to deprive the investor of parts of the value of his investment or of the use or reasonably-to-be-expected economic benefit of property.

349. Indirect expropriation occurs even where there is no physical taking of property - some measures short of physical takings may also amount to takings in that they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way. Similarly, legal title will not necessarily be affected, a deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.

350. While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.

351. The form of expropriation is of no importance; international law looks to the effect of the expropriatory measure on the investor's property.

352. The Kyrgyz Republic has either directly expropriated Garsu Pasaulis' investment, by an open, deliberate and acknowledged taking of property or, in the alternative, the Kyrgyz Republic has indirectly expropriated Garsu Pasaulis' investment. In either case, the Kyrgyz Republic has failed to comply with the following requirements of Article 4:

- the Kyrgyz Republic has not acted for a legitimate public purpose;

- the Kyrgyz Republic has failed to act on a non-discriminatory basis; and

- the Kyrgyz Republic has failed to pay Garsu Pasaulis' prompt, adequate and effective compensation.

353. Beyond the obligation that the Kyrgyz Republic pay prompt, adequate and effective compensation, the failure of the Kyrgyz Republic to comply with the other conduct requirements of Article 4 places the Kyrgyz Republic in breach of Article 4, thus invoking its international responsibility and, in principle,

entitling Garsu Pasaulis to seek full *restitutio in integrum* or its monetary equivalent.

354. Garsu Pasaulis' investment has been expropriated, or effectively expropriated by measures having effect equivalent to expropriation by the Kyrgyz Republic's termination of the already concluded 2018 Tender and by refusing to execute the contract with Garsu Pasaulis. Garsu Pasaulis right acquired by winning the 2018 Tender constitutes an asset qualifying as an investment for the purposes of the Agreement and therefore may be expropriated.

355. Actions the Kyrgyz Republic also entail loss of economic rights of Garsu Pasaulis to execute the e-passport printing contract with the Kyrgyz Republic under the 2018 Tender, which was already won by the investor and receive the amounts which would have been received by Garsu Pasaulis if the 2018 Tender procedure would not have been illegally terminated. In these specific circumstances, Garsu Pasaulis acquired a right, which the Kyrgyz Republic could no longer unilaterally withdraw without violating the investor's right. It was the right to execute the e-passport printing contract that was directly appropriated by the Kyrgyz Republic.

356. In this case, the Agreement does not include "economic damage" as a requirement for expropriation, and the Arbitral Tribunal does not consider that it must or should be imported.

357. Furthermore, as it was explained in V section above, actions of the Kyrgyz Republic had destructive effects to the long-established international reputation of Garsu Pasaulis throughout the world and in a very specific area of security printing.

358. Because of such illegal actions of the Kyrgyz Republic, Garsu Pasaulis is at risk to be expelled in numerous countries around the world and faces significant monetary damages, which also include loss of future profits. Furthermore, actions the Kyrgyz Republic may also entail significant losses in respect of all consequential damages, which may be comprised of lost commercial opportunities, loss of credit conditions or of other benefits, lost profits, and loss of market share.

b. The Kyrgyz Republic Failed to Comply with Any of the Requirements of Article 4 of the Agreement

359. As noted above, Article 4 dictates that any expropriatory measure must be undertaken (i) for public purposes or national interest; (ii) on a non-discriminatory basis; (iii) in conformity with all legal provisions, procedures and orders handed down by Courts or Tribunals having jurisdiction; and (iv) in exchange for immediate, full and effective compensation. It is clear from the plain language of Article 4 that these requirements are cumulative; thus, the failure to meet any one of them entails a violation of the Agreement.

360. In this case, none of the four requirements have been met. First, the extinguishment of Garsu Pasaulis right to execute the contract for printing e-passports to Kyrgyz citizens was not in the national or public interest of Kyrgyz Republic. While Respondent may be entitled to some measure of discretion in undertaking decisions concerning the public interest, there is no need for the Tribunal to concern itself with how broad a margin should be afforded in this case.

361. Indeed, no "second-guessing" on the part of the Tribunal is necessary here, given that Kyrgyz people themselves have already determined that the Kyrgyz Republic's decision to reject Garsu Pasaulis and instead conclude a non-public contract with the English company harmed the public interest of Kyrgyz Republic and international reputation[138].

362. Indeed, the negative impact of the handling of the 2018 Tender was so egregious that the chief of the State Committee for National Security Prosecution who orchestrated both the smear campaign against Garsu Pasaulis and has abused its authority to launch an investigation into 2018 Tender in order to expel Garsu Pasaulis had to resign from office. In view of the foregoing, Respondent cannot now argue that its decision to eliminate Garsu Pasaulis from the already won contract and to conclude new non-public contract with English company was in the public interest of the Kyrgyz Republic.

[138] 2019-05-14 Public media article, Ex. **C-29**.

363. Furthermore, even if viewed from an *ex-ante* perspective, the State Committee for National Security Prosecution knew it was acting contrary to the law at the time it took those decisions, and it cannot reasonably claim to have believed that the only (or even the best) means of protecting the public interest of the Kyrgyz Republic was through violation of the country's own laws.

364. In addition, the Kyrgyz Republic's expropriatory measures in the context of the 2018 Tender were also illegal because, as just mentioned, they were undertaken in violation of its own domestic laws.

365. As noted in the *Helnan v. Egypt* decision, where an international tribunal has to consider an issue of domestic law that has previously been ruled upon by a domestic tribunal, the former "will accept the findings of the local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice."[139]

366. The *Helnan* tribunal went on to underscore that while a decision by a national court does not have *res judicata* effect with regard to subsequent claims raised under international law.

367. In view of the foregoing, Respondent is precluded from arguing that rejection of Garsu Pasaulis' right to execute the contract with the Government, or the subsequent transfer of its right to another company, was in conformity with the applicable Kyrgyz law.

368. As already discussed above at length in section V of this Notice of Arbitration, Respondent's treatment of Garsu Pasaulis and its investment in the context of the 2018 Tender was blatantly discriminatory. Indeed, no sooner was Garsu Pasaulis deprived of its right to execute the contract with the Government than the same right was directly and secretly transferred, in violation of the applicable law, to politicly connected competitor.

369. Finally, there is no question that Respondent did not provide Garsu Pasaulis with "immediate, full and effective" compensation under international

[139] *Helnan v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19 (Award dated 7 June 2008), paras. 105-106.

standards for the losses it sustained as a result of being deprived of the right to execute the contract with the Government.

370. In summary, the Kyrgyz Republic has failed to abide by Article 4 of the Agreement. It has deprived Garsu Pasaulis of its right to execute the passport printing contract and has failed to comply with *any* of the requirements of a legal expropriation. As a result, Garsu Pasaulis is entitled to damages, as set out in the following section of this Notice of Arbitration.

VIII. QANTUM AND DAMAGES

A. General principles: the Agreement and the customary principles of international law govern the damages award in this claim

371. This Tribunal is governed by the Agreement as well as the customary principles of international law in awarding Claimant the full amount of damages it suffered as a result of the unlawful acts committed by Respondent. The Agreement directs any arbitral tribunal settling a dispute between an investor and any of the "Contracting Parties" — in this case the Kyrgyz Republic — to apply all of the provisions of the Agreement as well as the principles of international law recognized by the two Contracting Parties when rendering its decision.

372. It is evident that by violating the Agreement, Respondent violated its obligations under international law, which subjects this case to the customary laws of state responsibility.

373. As outlined in sections V and VII of this Notice of Arbitration, the Respondent breached its obligation under the Agreement (i) by failing to accord the Claimant fair and equitable treatment and subjecting Claimant and it's investments to unjustified and discriminatory measures, (ii) by failing to accord the Claimant full protection and security and (iii) violating its obligation to not expropriate Claimant's investments without a legal justification and immediate, full and effective compensation.

374. Because the Kyrgyz Republic violated the Agreement as well as its own domestic law, its expropriation was not lawful.

375. In Article 4, the Agreement provides a standard for calculating compensation for lawful expropriation. It prohibits the Kyrgyz Republic from expropriating Lithuanian investor of its investment within its territory unless done lawfully and immediate, full and effective compensation is paid to the investor. Article 4 does further provide that the standard for assessing damages for unlawful expropriation must be based on market value of the investment before the expropriation took place. Accordingly, the standards for compensation upon lawful expropriation are no different to those for unlawful expropriation.

376. The seminal case of *the Chorzow Factory* recites the well-recognized principle of international law for awarding damages:

> "[A] principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, 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. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[140]

377. Thus, international law follows the principle of awarding restitution damages for expropriation: sufficient damages to put the claimant in the position he would have been in had the investment not been expropriated. Restitution in kind is preferred but often impossible. In lieu of in kind restitution, the claimant is entitled to a monetary damages award in the amount equivalent to the benefit of the bargain he would have had if the respondent had not wrongfully expropriated his property.

378. Although the *Chorzow Factory* case concerned an unlawful expropriation, the famous statement of the Permanent Court deals with the consequences of "illegal acts" generally. As noted by Ripinsky and Williams, "... arbitral tribunals confronted with non-expropriatory violations typically referred to the general principle that a claimant should be fully compensated for the loss of the unlawful state conduct. Full compensation is viewed as putting the investor into a position that would have existed but for the breach."[141]

379. Citing as only a few examples numerous famous arbitral decisions, the tribunal in *Biloune v. Ghana* confirms this long-standing and customary principle of international law: "The standard for compensation in cases of expropriation is restoration of the claimant to the position he would have enjoyed but for the

[140] *Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (13 Sept.).
[141] Sergey Ripinsky, Damages in International Investment Law 89 (2008) (citing *American Manufacturing and Trading v. Zaire*, ICSID Case No. ARB/93/1 (Award dated 21 February 1997), para. 6.21; *SD Myers*, Partial Award of 13 November 2000, para. 315; *Petrobart Ltd. v. Kyrgyz Republic*, S.C.C. No. 126/2003 (Award dated 29 March 2005), para. 78).

expropriation. This principle of customary international law is stated in many recent awards of international arbitral tribunals." [142]

380. The Kyrgyz Republic committed an internationally wrongful act by breaching its international obligations under the Agreement.

381. The legal consequences of a state's commission of an international wrong is the obligation to make full reparation for the injury caused by the internationally wrongful act, which includes damages. Full reparation may take the form of restitution, compensation and satisfaction in that order of preference, made singly or in combination so as to fully compensate the injured.

382. The ILC Articles also provide that restitution — or the "re-establish[ment of] the situation which existed before the wrongful act was committed" — should be the primary remedy if it is not impossible or disproportionately burdensome. To the extent that the injury is not compensated by such restitution, the ILC Articles require the state "to compensate [the injured party] for the damage caused thereby," which "compensation shall cover any financially assessable damage including loss of profits insofar as it is established."[143]

383. The ILC Articles formulation of reparation in the form of compensation is consistent with the principles of restitution laid out in *The Chorzow Factory* and under international law.

384. The Kyrgyz Republic must put Garsu Pasaulis in the same position in which it would have been had the Kyrgyz Republic not wrongfully refused to execute the contract under the 2018 Tender.

385. Even if the Tribunal were able to oblige the Kyrgyz Republic to conclude the contract with Garsu Pasaulis, for Garsu Pasaulis it would not serve as full or even adequate compensation. Full reparation of Claimant's injury includes the awarding of monetary restitution under general international law principles, or

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[142] *Biloune and Marine Drive Complex, Ltd. v. Ghana Investments Centre and the Government of Ghana*, Ad hoc- UNCITRAL (Award on Jurisdiction and Liability dated 27 October 1989), reprinted in 95 INT'L L. REPORTS 183, 228 (1994) (citing *Texaco Overseas Petroleum v. Libya*, in IV YEARBOOK 177-187 (1979); *Sedco Inc v. The National Iranian Oil Co*, Award No. ITL 59-129-3, 10 IRAN-US CLAIMS TRIBUNAL REP. 180, 184-89 (1986) and separate of opinion of Judge Brower in id,; *Amoco International Finance Corp v. Islamic Republic of Iran*, Award No 310-56-3, 15 IRAN-US CLAIMS TRIBUNAL REP. 189, paras. 183-209 (1987).

[143] See Kantor at 66; see also *S.D. Myers*, First Partial Award and Separate Opinion, paras. 306-313 (finding that the treaty standard of compensation only applies to lawful expropriation and that because respondent unlawfully deprived claimant of the value of his investment, it must fully compensate claimant under the Chorzow Factory and ILC Articles principles of international law for all the economic harm claimant sustained); *LG&F. Energy Corp.*, paras. 31, 36 (stating that under Chorzow Factory and ILC Articles, full reparation in the form of actual damages to the claimant must be paid and that the standard provided in the treaty must apply only to lawful expropriation and is therefore inapplicable in calculating damages).

synonymously, compensation as described under the ILC Articles. This damages award would not only include the contract value, but also include compensation for consequential losses. Needless to say, Garsu Pasaulis must also be compensated for the loss of international business reputation, which was caused by severe actions of the Kyrgyz Republic. Thus, the Tribunal must compensate Garsu Pasaulis for all of the damages that it suffered as a result of Kyrgyz' illegal actions.

B. Quantum

386. The principles described above direct this Tribunal to award to Claimant damages that would place Garsu Pasaulis in the same financial situation it would have been in had the unlawful acts not been committed.

387. Garsu Pasaulis must be fully compensated for the full amount of damages it suffered as a result of the Kyrgyz Republic breaching its obligations under the Agreement and wrongfully depriving Garsu Pasaulis from execution of passport printing contract, as well as for substantially damaging Garsu Pasaulis reputation. The date of the unlawful act and the date of the award are the two valuations points that must be used for comparing the hypothetical situations of Claimant.

388. The Kyrgyz Republic's breach of the Agreement occurred on 22 February 2019, when it wrongfully and unjustifiably refused to execute the e-passport printing agreement with Garsu Pasaulis. The future value of this contractual right and Garsu Pasaulis international reputation at that time must therefore be assessed as of the valuation date. The focus of calculating damages is not its foreseeability, as it would be in a contracts case, but rather its causation — and Claimant is entitled to all damages caused by Respondent's wrongful act.

389. This also includes taking into account all consequential damages, which may be comprised of lost commercial opportunities, loss of credit conditions or of other benefits, if this is necessary in order to put the injured party in the same financial position it would have been in, if the illegal act had never been committed.

390. Garsu Pasaulis seeks damages for the Kyrgyz Republic's unlawful deprivation of it right to execute the passport printing contract. Claimant is entitled to the

sufficient quantum of damages that would put it in the position it would have been in had it executed the e-passport printing contract and had the impeccable international reputation in the global security printing market. This includes the value of e-passport printing contract, as well as any resulting losses Garsu Pasaulis suffered as a result of being wrongfully deprived of its right execute the contract and having its international reputation destroyed.

391. The damages also include, but are not limited to: (i) the lost synergies that would have resulted from combining the contracts and businesses Garsu Pasaulis already had, such as increased buying power, reduction in overheads, costs of raw materials and other inputs, increased distribution capacity, increased export capacity, increased goodwill in the global markets and increased margins; (ii) the loss of immediate ability to expand existing operations or conclude new contracts, which, at the time of the 2018 Tender, were incredibly favorable to Garsu Pasaulis; (iii) loss of the subsequent increase in market value of the company, lost profits, and loss of market share, (iv) loss of contracts and income which was caused by the loss of global business reputation.

i. Garsu Pasaulis is entitled to compensation for direct economic harm and lost profits

392. As mentioned, the Agreement does specify the manner in which compensation must be calculated – the market value of the investment before it was expropriated, including interest, which is similar to the general principles of international law, which are summarized by the ILC Articles on State Responsibility.

393. In must be noted, however, that the *Chorzow Factory* dictum is not about merely putting the wronged investor back in the same position he or she was in before the expropriation or wrongful act. This is of course the standard for a lawful expropriation, for example as set out in Article 4 of the Agreement.

394. In contrast, the *Chorzow Factory* standard is intended to "wipe out *all the consequences* of the illegal act *and reestablish the situation which would, in all probability, have existed if that act had not been committed*." This is the customary international law standard that should be applied in the case of an unlawful expropriation, or other breaches of international protections such as

the fair and equitable treatment standard. The ultimate timing of the valuation for an illegal act is thus flexible and may be set as of the date of the award, if that is more advantageous to the victim of the illegal act in the facts of the case. In other words, the victim should be awarded any greater value the investment has gained up to the date of the award, which accordingly includes any consequential damages.

395. The *Chorzow Factory* approach accordingly requires that the Tribunal go beyond an assessment of the *status quo ante* and determine what position the injured party *would have been in* had the injurious act not occurred. As summarized by Dr. Sabahi, "… the Court set out the general principle of reparation by explaining that reparation must as far as possible eliminate the consequences of an illegal act and re-establish the situation that would have existed, in all probability, in the absence of (or but for) the commission of the illegal act."[144]

396. In other words, in accordance with the *Chorzow Factory* case, this Tribunal must determine the probable "but for," hypothetical position of the victim in this case, Garsu Pasaulis, to determine what compensation would be appropriate. The direct and sole consequence of Respondent's illegal refusal to execute the contract with Garsu Pasaulis was that Garsu Pasaulis was deprived of a certain contractual right with a certain contractual value. In addition, the loss of international reputation caused Garsu Pasaulis to loose current and future contracts with specific amounts globally.

397. Thus the tribunal in this case will not need to determine a hypothetical position, but assess rather very concrete and specific contractual arrangements of Garsu Pasaulis, which were severely impacted by wrongful actions of the Kyrgyz Republic. What one will be forced to conclude from the evidence which will be presented in this case is that, *if Respondent had acted lawfully*, Garsu Pasaulis would have executed the e-passport printing contract and would have

[144] Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration, 1185-86 (2011), at 50; see also Mark Kantor, Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence 52 (2008). Kantor notes that the Chorzow Factory case "focuses on putting the investor back in a position as if the investment had been made but the injury had never occurred." As described by the *Lemire* tribunal, "the actual calculation of damages cannot be made in the abstract, it must be case specific: it requires the definition of a financial methodology for the determination of a sum of money which, delivered to the investor, produces the equivalent economic value which, in all probability, the investor would enjoy, 'but for' the State's breach." *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Award dispatched 28 Mar. 2011), para. 152.

singed many more similar contracts around the world as it did before the 2018 Tender.

398. The close look how the Kyrgyz Republic impacted the 2018 Tender will demonstrate that the execution of contract with Garsu Pasaulis under the 2018 Tender was not merely probable, it was virtually certain. The only intervening cause that prevented the execution of the contract was the illegal conduct of the Respondent.

399. Similarly, it will be evidenced how the Kyrgyz Republic impacted the loss of international reputation of Garsu Pasaulis, which has caused loss of substantial ongoing business of Garsu Pasaulis and prevention of very specific future contracts and income globally. Again, the only intervening cause was the illegal conduct of the Respondent.

400. The illegal actions of the Kyrgyz Republic resulted in the interference with, and complete deprivation of, an "investment," as defined under the Agreement. That "investment" included, amongst other elements, an economic right accruing by law & business reputation. This case does not require the Tribunal to address the question of a breach of contract, or lost profits *per se* from a breach of contract. It is about the deprivation of an investment which entails an economic right under Kyrgyz law, and the consequences of that deprivation. This right had very specific economic value as it would have led to very specific income to Garsu Pasaulis. Similarly, international reputation of Garsu Pasaulis too had very specific value reflected by contracts concluded and to be concluded by Garsu Pasaulis globally.

401. This is not a case in which blame can be attributed to both parties. The fact there was no execution of e-passport printing contract and other contracts globally should not prevent this Tribunal from awarding damages for a treaty breach. For the Tribunal to rely on the plain fact that the contract was not executed, and permit Respondent's directly related illegal conduct to be the basis for that uncertainty, is clearly inconsistent with international law principle of *ex injuria jus non oritur* (or the "clean hands" doctrine). This well accepted international law principle is viewed as prohibiting a party from benefitting from its own illegal action. Since the direct and sole intervening event resulting in the

non-execution of the contract was the illegal conduct of Respondent, it would be a direct violation of the clean hands doctrine.

402. Accordingly, the initial "but for" position in which Claimant in this case must be placed is that of the successful execution of the e-passport printing contract by Garsu Pasaulis and best international reputation of Garsu Pasaulis globally. Any other result would be a travesty of justice.

403. The next step under the *Chorzow Factory* dictum is for the Tribunal to determine "*the situation which would, in all probability, have existed if*" the breaches by the Kyrgyz Republic had not occurred, i.e. the e-passport printing contract would have been executed by Garsu Pasaulis and the global business reputation intact. Claimant does not disagree with the broad proposition that damages should reflect the losses incurred as a result of an international wrongful act. The damages claimed in this case are the sole and direct result of Respondent's illegal conduct intended to deprive Claimant of execution of e-passport printing contract and destruction of Garsu Pasaulis' international reputation. There were no intervening causes or factors attributable to Claimant or other parties.

404. The question then is - how probable is it that Claimant would have executed the e-passport printing contract? The only conclusion based on the evidence to be presented is that the execution of the e-passport printing contract would have been concluded for certain. Since it is now known that the Respondent permitted another UK based company to print passports to Kyrgyz citizens without any public tender, it is reasonable on its face for this Tribunal to conclude that Respondent would similarly otherwise have permitted Garsu Pasaulis to execute the e-passport printing contract *but for* its arbitrary and discriminatory conduct.

405. The company coming from United Kingdom had no problem receiving a contract without any public tender from the Kyrgyz government. Moreover, there are no circumstances or convincing argument that Claimant would have otherwise been prevented from executing the contract. The ultimate consequence of Respondent's illegal conduct is that Claimant was prevented from executing the e-passport printing contract and other contracts globally while using its international reputation. As similarly described by the tribunal in

the *Lemire* case, the damages due to the Claimant can be established as the difference between the value of the business Claimant now owns, and "[the business] which he had planned, and which he had not been able to achieve" due to Respondent's wrongful acts. This is the passport printing contract and good business reputation "but for" value. The *Lemire* tribunal characterized this correctly when it summarized as follows, "Claimant is requesting *lucrum cessans*, compensation for an asset or profit which he never acquired, but which, absent the wrongdoing, he would have earned."[145]

406. Thus, international law follows the principle of awarding restitution damages for expropriation: sufficient damages to put the claimant in the position he would have been in had the investment not been expropriated.

407. In lieu of in kind restitution, Garsu Pasaulis is entitled to a monetary damages award in the amount equivalent to the benefit of the bargain he would have had if the Kyrgyz Republic had not wrongfully expropriated its property, i.e. terminated the 2018 Tender already won by Garsu Pasaulis. The estimate value of the harm caused in this respect is preliminary calculated to be the amount of the Garsu Pasaulis winning bid, i.e. a minimum of EUR 12 million, which will also include interest.

408. In addition, in cases where the loss of future profit can be difficult to quantify with absolute certainty because the project had to be abandoned following a State's unlawful act, arbitral tribunals are fully empowered to award compensation for such a loss. The concept of loss of business opportunity or loss of chance are recognised in a number of national systems and were also codified in UNIDROIT Principles of International Commercial Contracts, which provide in article 7.4.3(2) that "[c]ompensation may be due for the loss of a chance in proportion to the probability of its occurrence."

409. The arbitral tribunal in the *Sapphire case*[146] applied this concept and awarded damages for the loss of chance to make profits. There, the tribunal noted that the investor had to prove only a degree of probability of the chance of success.

[145] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18.
[146] *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*, 35 ILR 136 (1963).

410. Therefore, Garsu Pasaulis will also seek damages regarding the failed businesses and tenders, which were impacted solely due to unlawful actions of the Kyrgyz Republic.

411. Finally, Garsu Pasaulis will also claim all litigation costs which Garsu Pasaulis had and will have to incur in the Kyrgyz Republic and in international arbitration.

ii. Garsu Pasaulis is entitled to compensation for destruction of its international business reputation and moral injury

412. Garsu Pasaulis is convinced, based upon examination of the relevant jurisprudence and doctrine that while taking into account the Kyrgyz Republic's breaches of its obligations pursuant to the Agreement, Garsu Pasaulis is entitled to significant monetary compensation for the very serious (non)pecuniary damages suffered due to actions of the Kyrgyz Republic.

413. In fact, it is very difficult to imagine a stronger case for reputational and moral damages than this one in the context of an investment treaty arbitration.

414. Moral damages arise in the context of the infringement of personality rights – physical injury, violence, wrongful harassment and wrongful imprisonment or deportation. Compensation for moral damages is widely accepted across a variety of legal traditions, as well as in international law.

415. Moral damages in the context of investment arbitration are mostly discussed in connection with loss of reputation. In the current discussion in public international law, loss of reputation is commonly deemed to be a non-pecuniary loss that could only be redressed by way of moral damages.

416. However, the current debate concerning the loss of reputation by the investor suffers from basic misunderstandings of the notions of loss of reputation and loss of profit which in private law are clearly distinguished and well elaborated.

417. The notion of loss of profit covers every potential increase in assets which was prevented by the breach. Loss of profit may be actual and readily proven such as contracts already entered into or it may lie in the future. Although in some cases future loss of profit may be hard to quantify, this, however, does not

justify encompassing loss of profit under the heading of moral damages. Rather, this is nothing more than a question of proof.

418. As concerns the loss of reputation, again, a closer look at the developments in comparative private law may shed valuable light on this issue. It is nowadays unanimously held at the international level – especially in light of the general principle of full compensation – that loss of reputation is compensable.

419. Business reputation certainly has an economic value. As mentioned, this is evidenced by the fact that the purchase price for a company typically not only reflects the physical assets of the company, but also the goodwill attached to it. Furthermore, huge amounts of money are spent by companies to build up a respectable reputation in the market or to re-establish their reputation in the market after it has been damaged. This economic value of reputation necessarily leads to the conclusion that loss of reputation is a pecuniary, not a non-pecuniary loss.

420. Gary Born has notably argued, in his dissenting opinion in *Biwater*, that an "*unacceptable breach of fundamental international rights and protections*" by the state warranted an award of costs, be it for moral damages or otherwise, and that such award "*better advances the objectives of BITs and the ICSID Convention*."[147]

421. It is noted that a highly competitive and complex global market of security printing respectable reputation for Garsu Pasaulis is of essence. Any negative rumor can affect the company's image and consequently its position in the security markets for the worse. In this case, however, the actions of the Kyrgyz Republic were unprecedented and involved global dissemination of false accusations against Garsu Pasaulis and its main shareholder, which was spread just because of private interests of Kyrgyz officials.

422. In the present case, the financial consequences of damage to Garsu Pasaulis reputation are not difficult to ascertain. As mentioned, it is not difficult to establish which contracts with past and present clients were damaged due to loss of business reputation, which public tenders never attended or not

[147] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 18 Jul 2008, Concurring and Dissenting Opinion.

successful or what new contracts were never concluded due to loss of business reputation. In addition, it will not be difficult to calculate further loss of future income which was and will be suffered based on global turnovers of Garsu Pasaulis and its main shareholder.

423. Thus, again, the central issue is the standard of proof to be applied. This may well be influenced by the nature of the breach and the behavior by the State in breach of the investment treaty. However, there is no doubt that loss of reputation shall be compensated either in the form of a non-pecuniary loss that could be redressed by way of moral damages or loss of profit.

424. International recognition of the duty of a state to compensate for moral damages suffered as a result of its internationally wrongful act(s) is recorded in the ILC Articles. Providing guidance as to what constitutes 'moral damages', the commentary of the ILC Articles' states as follows:

> "[m]oral damage' includes such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life."

425. In the present case, the Agreement affords protection to the investor as well as to the investment. Thus Garsu Pasaulis' personality rights are directly related to the investment. In *Desert Line*[148], the tribunal recognized that a legal person (as opposed to a natural one) may also be awarded moral damages. It moreover recognized that damages suffered by the claimant's executives could be the subject of moral damages. The *Desert Line* tribunal did not distinguish between the injury suffered by physical persons (the claimant's employees), and the damages suffered by the claimant corporation itself. Instead, it employed a practical approach to the damages suffered by the employees and awarded the claimant company compensation for those damages.

426. Certain arbitral tribunals have examined the nature of the host state's conduct towards an investor, and not just the consequences of its actions, when quantifying damages. In doing so, they have expressed their concerns about that host state's treatment of foreign investors, seeking to do more than simply

[148] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17.

remediate the actual damage suffered. As one author has put it; "*in some cases, under the guise of compensation, a mild form of sanction has been imposed to induce the delinquent government to improve its administration of justice*."[149]

427. A number of commentators have also argued outright that particularly condemnable governmental actions towards foreign investors should have a bearing not just on the requisite standard of proof but on the quantification itself of the amount of compensation to be awarded for moral damages. It has been argued, "*the goal is not only to remediate the actual damages suffered but also to send a 'clear message' to the host state*."[150]

428. Previous decisions of tribunals can also offer valuable guidance to the Tribunal. The *Lusitania* case[151] underlines the long-established availability of moral damages under international law, specifying that an aggrieved party could be compensated for 'an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation'. In *Diallo*[152], a diplomatic protection case involving violations of international law including arrest, detention and expulsion of Mr Diallo, a Guinean citizen, from the Democratic Republic of Congo, the ICJ further established that there is no need to present specific evidence of moral injury and that 'the quantification of the compensation' can be based on equitable considerations.

429. In *Sola Tiles, Inc. v. Iran*[153], the Iran-US Claims Tribunal pointed to the importance in relation to a company's value of "its business reputation and the relationship it has established with its suppliers and customers".

430. In *Desert Line*[154], the first international investment treaty arbitration in which a tribunal awarded compensation for moral damages, the tribunal recalled the principle, set out in the *Lusitania cases* and in James Crawford's commentary on the ILC Articles, that non-material damages may be "very real, and the

[149] E. Jimenez de Arechaga, International Responsibility, Manual of Public International Law 571 (M. Sorensen ed., 1968) (referring to the following cases: Janes, 1926, IV U.N.R.I.A.A. 89; Putnam, 1927, IV U.N.R.I.A.A. 151; Massey, 1927, IV U.N.R.I.A.A. 155; Kennedy, 1927, IV U.N.R.I.A.A. 194).
[150] P. Dumberry, Compensation for Moral Damages in Investor-State Arbitration Disputes, in M.J.Moser & D.T.Tascher (eds), Journal of International Arbitration, Kluwer Law International, 2010, Vol 27(3).
[151] *The Lusitania Cases*, US v. Germany, 1 November 1923, VII RIAA 32.
[152] *Ahmadou Sadio Diallo* (Guinea v. Congo) Judgment of June 19, 2012.
[153] *Sola Tiles Inc v Iran*, Award of 22 April 1987, 14 Iran-US CTR 223.
[154] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.

mere fact that they are difficult to estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated."[155] Furthermore, the tribunal explained that it awarded moral damages based on evidence that "the physical duress exerted on executives of the Claimant was malicious and because "it affected the physical health of the Claimant's executives" as well as Desert Line's credit and reputation.

431. In addition, recently ICSID tribunals have awarded moral damages for serious impairment of an investment. In *S.A.R.L. Benvenuti and Bonfant v. People's Republic of Congo*[156], an ICSID tribunal awarded moral damages to an Italian corporation for the loss of commercial opportunities in its home country under conditions involving harm to its employees and credit sources. The Congolese military occupied the Claimant's property, its employees were forced to leave Congo, and it lost the opportunity to do business in Italy because its banks and suppliers refused to provide credit.

432. Thus, international tribunals note that investors are entitled to be compensated for an injury inflicted resulting in mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to credit or to reputation[157].

433. In the ICSID case *Lemire*[158], the tribunal debated whether Mr. Lemire's treatment by Ukraine constituted the type of 'exceptional circumstances' that warrant an award of moral damages, as set out in *Desert Line*. Upon examining the case law, the tribunal identified three cumulative criteria that would meet the 'exceptional circumstances' test:

(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

[155] Ibid.
[156] *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2.
[157] Opinion in *the Lusitania Cases*, US v. Germany, 1 November 1923, VII RIAA 32, 36.
[158] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB(AF)/98/1, Award, 18 September 2000.

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

434. Other international investment treaty tribunals have subsequently adopted this test.

435. In the present case, there are numerous similarities between the extraordinary circumstances of previous investor-state cases and the claims asserted by Claimant in this case.

436. It is clear that Garsu Pasaulis is entitled to moral damages from the Kyrgyz Republic. The nature of the damages suffered by Garsu Pasaulis fall squarely within the types of harm contemplated as qualifying for moral damages in arbitral jurisprudence and doctrine, including, but not limited to, the following:

(i) reputational harm to Garsu Pasaulis and its representatives (loss of reputation, credit and social position);

(ii) emotional harm to Garsu Pasaulis and its representatives (feelings of indignity, humiliation, shame, defamation, injury to reputation); and

(iii) pathological damage (mental stress, anxiety, anguish, nervous strain, shock, fright, fear and threat).

437. The nature of the Kyrgyz Republic authorities' conduct, which represented egregious breaches of multiple basic standards of protection under the Agreement, will be taken into account by an arbitral tribunal when seeking to quantify such moral damages. An international arbitral tribunal would also be sensitive to the Kyrgyz Republic's international reputation of treating foreign investors, which would undoubtedly compound its quantification of moral damages.

438. In light of the above and based on preliminary calculations, which shall be further assessed by international experts in arbitration, Garsu Pasaulis is owed at least EUR 50 million in moral damages, which represents the loss of good name and international reputation, for the personal injuries, emotional harm and pathological damage to Garsu Pasaulis and its representatives.

439. This quantified amount, is in harmony with other cases, such as the *Fabiani Case*[159] or the *ad hoc* tribunal in *Al-Kharafi & Sons Co v. the Government of Libya and others* which awarded the claimant US$30 million for reputational damage[160].

C. Interest

440. Claimant is entitled to an interest award on the raw damages amount described above in order to fully compensate it for Respondent's wrongful breach of its domestic and international law. In damages cases the principle of full reparation is central which means that interest should remedy the concrete loss incurred by the injured party because of the delayed payment.

441. The obligation to pay interest begins at the time the wrongful act by the state gives rise to the payment obligation and ends when the payment is actually made. The tribunal in *Biloune v. Ghana*[161] confirms: "Interest is required to be awarded in order fully to compensate the victim of an expropriation for the delay in payment of the value of the expropriated property, calculated from the time of taking to the time of payment of the award."

442. The payment of interest under the state responsibility duty and ILC Article 38 "is to remedy the concrete damage incurred by the injured party." Interest must be compounded, since that "is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor." Furthermore awarding interest functions to prevent the wrongdoer's unjust enrichment and encourages timely dispute resolution.

443. Thus, the Respondent must pay interest on the amount owed to Claimant beginning from 22 February 2019, the date of its wrongful act. Claimant has *de facto* been forced to loan to the Kyrgyz government the money for the execution of the e-passport printing contract that it is rightfully entitled to. In particular, for compensation for lawful expropriation, the Agreement itself requires that interest be based on the London LIBOR standard.

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[159] In *the Fabiani* case, for example, the moral damages awarded were one-third of the principal claim. Antoine Fabiani Case, Balston's Report, p. 81.
[160] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*.
[161] *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Damages and Costs - 30 July 1990.

444. Therefore, Garsu Pasaulis will request to apply the average rate the Kyrgyz Republic paid on its government debt.

D. Summary

445. Claimant is entitled to damages of approximately EUR 62,000,000 under the Agreement and the general principles of international law for Respondent's breach of its international law obligations.

IX. GARSU PASAULIS IS ENTITLED TO PUBLIC AND PROMPT DENIAL OF ALL FALSE STATEMENTS, ACCUSATIONS AND ALLEGATIONS

446. As it was explained, actions of the Kyrgyz Republic had destructive effects to the long-established international reputation of Garsu Pasaulis on the global scale.

447. False statements by the Kyrgyz Republic and its authorities in respect of Garsu Pasaulis or statements on the alleged “bribes” go beyond stating facts all the way to condemning Garsu Pasaulis without any single proof or evidence.

448. As it was explained, any statements of the Kyrgyz Republic about the alleged affiliation with the management of the Commission are totally false and misleading. If there were any meetings, these meetings of Garsu Pasaulis with the officials of the Commission were usual part of work duties.

449. These are very serious accusations against Garsu Pasaulis and these accusations are absolutely unsubstantiated and false. Unfounded and misleading statements are harmful and the damages caused by them are irreparable.

450. The fact that such statements have been made through international media agencies only exacerbates Garsu Pasaulis‘ situation, because Garsu Pasaulis is at risk to be expelled in numerous countries around the world and faces significant monetary damages.

451. Therefore, Garsu Pasaulis is entitled to public and prompt denial of all false statements, accusations and allegations made by the Kyrgyz Republic. Garsu Pasaulis specifically requests the arbitral tribunal to declare that all such

statements of the Kyrgyz Republic are unfounded and false and also requests the arbitral tribunal to order the Kyrgyz Republic to publicly and promptly deny all such false statements, accusations and allegations.

452. The tribunal in *Enron* v. *Argentina*[162] found that it had the power to order specific performance against the host-state: “An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available”.

453. Therefore, the Kyrgyz Republic shall be estopped from making false, unfounded, and misleading statements to the media and ordered to deny of all false statements, accusations and allegations it made about Garsu Pasaulis.

X. PROCEDURAL MATTERS

A. Appointment of the Tribunal

454. Garsu Pasaulis proposes that the Arbitral Tribunal shall be composed of three arbitrators. Garsu Pasaulis further proposes that: (a) each party shall appoint one arbitrator in accordance with Article 9 of the UNCITRAL Rules; and (b) the third arbitrator, who will act as the President of the Arbitral Tribunal, shall be appointed by agreement of the parties within 30 days of the appointment of the second arbitrator.

455. Garsu Pasaulis shall shortly make its appointment of an arbitrator in accordance with Article 9 of the UNCITRAL Rules.

456. The Parties have not previously designated an appointing authority.

457. Pursuant to Articles 3(4)(a) and 6(1) of the UNCITRAL Rules, Garsu Pasaulis proposes that the Secretary-General of the Permanent Court of Arbitration at The Hague be designated as the appointing authority for this arbitration.

[162] *Enron Corp. and Ponderosa Assets, LP* v. *Argentine Republic*, Decision on Jurisdiction, 14 January 2004.

458. Garsu Pasaulis notes that, failing agreement between the Parties, the appointing authority shall (if required) be designated in accordance with Article 7(2)(b) of the UNCITRAL Rules.

B. Seat of the Arbitration

459. The Parties have not agreed upon a seat of the arbitration.

460. Garsu Pasaulis proposes that the parties agree upon a place of arbitration in a neutral country that is a Contracting State under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

461. Therefore, Garsu Pasaulis invites the Government of the Kyrgyz Republic to agree The Hague, Netherlands as the seat of the arbitration.

462. Garsu Pasaulis recognizes that absent agreement it is for the Tribunal to determine the seat of the arbitration in accordance with Article 16(1) of the UNCITRAL Rules.

463. Garsu Pasaulis will make submissions to the Tribunal as to the appropriate neutral and well-recognised arbitral venue in due course, should that prove necessary.

464. By virtue of Article 16(2) of the UNCITRAL Rules, the fixing of the seat does not of course require the Tribunal to hold hearings at the place of the seat.

C. Language

465. The written submissions including the Statement of Claim shall be filed as directed by the arbitrators in accordance with the UNCITRAL Arbitration Rules.

466. The Agreement is silent on the question of the language of the arbitration, and the parties have not discussed or reached an agreement on this issue.

467. Garsu Pasaulis proposes English as the language of the arbitration.

468. Failing agreement, Garsu Pasaulis will request the Arbitral Tribunal to determine English as the language of this arbitration pursuant to Article 19 of the UNCITRAL Rules.

XI. RESERVATION OF RIGHTS

469. Garsu Pasaulis notes that all procedural and substantial requirements under the Agreement and the UNCITRAL Arbitration Rules are met.

470. Garsu Pasaulis hereby reserves the right to amend or supplement the Notice of Arbitration, make additional requests for relief or revisions to its requests for relief, and submit such further written submissions, evidentiary materials and legal authorities as may be necessary and appropriate to establish its claims against the Kyrgyz Republic, or as required to do effective justice in this case.

XII. CLAIMANT'S REQUEST FOR RELIEF

471. For the reasons set forth in this Notice of Arbitration, Garsu Pasaulis respectfully requests that the Arbitral Tribunal award the following relief:

(a) a declaration that the Kyrgyz Republic is in violation of its treaty obligations under, among other things, Articles 2, 3 and 4 of the Lithuania – Kyrgyz Republic BIT;

(b) an order that the Kyrgyz Republic pay to Garsu Pasaulis damages resulting from the violations of its treaty obligations, which are estimated to be in excess of EUR 62 million and will be further quantified at the appropriate time in this arbitration;

(c) an order that the Kyrgyz Republic pay to Garsu Pasaulis interest calculated from the date of the breach until the date of full and final payment;

(d) an order that the Kyrgyz Republic publicly and promptly deny of all false statements, accusations and allegations it made about Garsu Pasaulis;

(e) an order that the Kyrgyz Republic pay to Garsu Pasaulis all costs and expenses of the arbitration including, without limitation, the Arbitral Tribunal's fees and expenses and Garsu Pasaulis' legal costs, in-house costs, expert costs, witness costs and any other costs and expenses incurred for the preparation and conduct of this Arbitration;

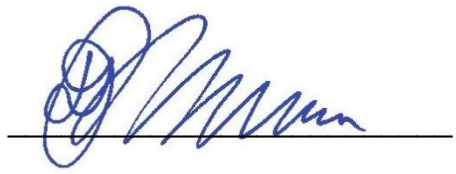
(f) such further and other relief as the Arbitral Tribunal determines to be just and proper in this arbitration.

* * *

That said, Garsu Pasaulis confirms its intention to negotiate an amicable resolution of this dispute in good faith with the Kyrgyz Republic.

All of which is respectfully submitted for and on behalf of Garsu Pasaulis by duly authorized legal counsel.

10 February 2020, Vilnius, Lithuania



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XIII. LIST OF EXHIBITS ATTACHED:

Exhibit No.	Exhibit
C-1	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 2008-06-15
C-2	Arbitration Rules of the United Nations Commission on International Trade Law, RESOLUTION 31/98 Adopted by the U.N. General Assembly on 1976-12-15
C-3	Transparency International. Kyrgyzstan: Overview of corruption and anti-corruption, 2019-07-03
C-4	Klaus Schwab, World Economic Forum. The Global Competitiveness Report 2015–2016
C-5	Country Reports on Human Rights Practices for 2015 United States Department of State. Bureau of Democracy, Human Rights and Labor. Kyrgyz Republic.
C-6	GAN. Business anti-corruption portal. Kyrgyzstan Corruption Report. 2016-07.
C-7	2019-10-28 Press article.
C-8	2019-10-23 Press article.
C-9	2012-04-28 Notice of termination. JF412-p tender.
C-10	2012-12-18 Notice of winning tender of 2012.
C-11	2018-10-22 Information about tender No. 181023129327015.
C-12	2018-11-19 Garsu Pasaulis submission for tender No. 181023129327015.
C-13	2019-04-17 Results of tender No. 181023129327015.
C-14	2019-02-05 „Mühlbauer ID Services GMBH“ complaint.
C-15	2019-02-07 „IDEMIA France“ complaint.
C-16	2019-02-05 Decision on „Mühlbauer ID Services GMBH“ complaint.
C-17	2019-02-08 Decision on „IDEMIA France“ complaint.
C-18	2019-02-21 Invitation to sign the passport printing contract.
C-19	Compilation of negative media articles about Garsu Pasaulis.
C-20	2019-04-02 Public media article.
C-21	2019-04-02 Public media article.
C-22	2019-04-19 Public media article.
C-23	2016-06-29 Payment for travel of Almaz Bekenov.
C-24	2019-04-17 Public media article.
C-25	2019-04-12 Public media article.
C-26	2019-05-13 Public media article.

C-27 2017-02-24 Public media article.

C-28 2019-05-14 Public media article.

C-29 2019-05-14 Public media article.

C-30 Video of Parliament hearing.

C-31 2019-05-16 Public media article.

C-32 2019-08-05 Public media article.

C-33 2019-05-29 Bishkek Inter-District Court ruling.

C-34 2019-09-10 Bishkek City Court ruling.

C-35 2019-10-07 Public media article.

C-36 2019-07-11 Public media article.

C-37 2019-08-02 Public media article.

C-38 2019-11-25 Public media article.

C-39 2019-04-24 Public media article.

C-40 2004-12-17 Garsu Pasaulis certificate of company registration.

C-41 2016-06-02 LLC “Garsu Pasaulis” incorporation act.

C-42 2019-04-30 Garsu Pasaulis’ Notice of Intent.

C-43 2019-07-10 Garsu Pasaulis’ Second Notice.

C-44 2019-10-16 Garsu Pasaulis’ Third Notice.

C-45 2019-11-25 Kyrgyz Supreme Court ruling.

C-46 2016 Contract with the Kyrgyz Republic regarding tax stamps and systems.

C-47 Representation agreement