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

PCA Case No. 2020-59

BETWEEN

UAB "GARSU PASAULIS"

Claimant/Investor

v.

THE KYRGYZ REPUBLIC

Respondent

S T A T E M E N T O F C L A I M

PLP Motieka & Audzevicius
Gyneju Street 4 Vilnius LT-01109
+370 5 2 000 777
+370 5 2 000 888
Counsel for Claimant,
UAB "Garsu Pasaulis"

31 August 2021

TABLE OF CONTENTS

DEFINITIONS

Abbreviation	Term
Agreement	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, **C-1**.
Alina Shaikova	Former Head of the State Registration Service of the Kyrgyz Republic (GRS)
2012 Tender	Tender for services for the manufacture and supply of blank (expendable materials) for manufacture of the Kyrgyz Republic citizen passport and ID card No. GN27-07/12.
2018 Tender	Tender for production of e-passports No. 181023129327015 organized by the Kyrgyz Republic
2018 Tender regulations	Tender regulations for Tender for production of e-passports No. 181023129327015 organized by the Kyrgyz Republic, **C-2**.
Alenkina Report	Expert Report of Prof. Natalia Alenkina, **CER-2-1**.
Baltag Report	Expert Report of Dr. Crina Baltag, **CER-1-1.**
Claimant	Garsu Pasaulis
Contracting Parties	The Parties to the Agreement, Lithuania and the Kyrgyz Republic
Damages Report	Expert Report of Dr. Jurgita Banyte, **CER-3-1.**
Dr. Baltag	Dr. Crina Baltag
Dr. Banyte	Dr. Jurgita Banyte
e-passports contract	E-passports contract with the Kyrgyz Government pursuant to the results of 2018 Tender
FET	Fair and Equitable treatment
Garsu Pasaulis	JSC Garsu Pasaulis
Garsu Pasaulis LLC	Garsu Pasaulis company in the Kyrgyz Republic
Government	The Government of the Kyrgyz Republic
GKNB	The State Committee for National Security Prosecution of the Kyrgyz Republic
GRS	The State Registration Service of the Kyrgyz Republic

ILC Articles	United Nations, Responsibility of States for Internationally Wrongful Acts, Y.B. OF INT.L. COMM'N. Vol. II (Part Two) (2001)
Idris Kadyrkulov	Former Head of the Kyrgyz Republic's State Committee for National Security Prosecution
Lithuania	The Republic of Lithuania
Lukosevicius	Andrius Lukosevicius
Lukosevicius Witness Statement	Witness Statement of Andrius Lukosevicius, **CWS-1-1.**
Mieliauskas	Vytautas Mieliauskas
Mieliauskas Witness Statement	Witness Statement of Vytautas Mieliauskas, **CWS-2-1.**
Muhlbauer	Mühlbauer ID Services GmbH
Prof. Alenkina	Prof. Natalia Alenkina
Respondent	The Kyrgyz Republic
Sagyndykov	Marat Sagyndykov
Sagyndykov Witness Statement	Witness Statement of Marat Sagyndykov, **CWS-3-1.**
Tender Commission	Tender Commission of the State Registration Service under the Government of the Kyrgyz Republic
Tribunal	This arbitral tribunal
UNCITRAL Rules	The Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in 1976

I. INTRODUCTION

A. Summary

1. In this Statement of Claim, JSC Garsu Pasaulis ("Garsu Pasaulis" or "Claimant") sets out its substantial claim against the Kyrgyz Republic (or "Respondent") amounting to **EUR 17'436'000,00**[1] for damages and compensation for the Kyrgyz Republic's breaches 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* (the "Agreement")[2].

2. The Kyrgyz law expert Prof. Natalia Alenkina ("Prof. Alenkina") and international investment law expert Dr. Crina Baltag ("Dr. Baltag") have thoroughly investigated the events concerning the 2018 public tender for the production of e-passports No. 181023129327015 organized by the Kyrgyz Republic (the "2018 Tender")[3] and concluded that the Kyrgyz Republic's actions in denying Garsu Pasaulis' right to conclude and execute the e-passports contract with the Kyrgyz Government pursuant to the results of the 2018 Tender ("e-passports contract") were illegal under the Kyrgyz law and breached the guarantees provided in the Agreement.

3. The following quotes will assist the Arbitral Tribunal ("Tribunal") in getting its bearings and navigating through the present Statement of Claim:

Prof. Natalia Alenkina:

> *"the procuring entity had to sign a contract with the winner of the tender."*[4] *(…) "the tender was cancelled / declared invalid on the grounds that did not meet the requirements of the Law."*[5]

[1] Damages Report, **CER-3-1**.
[2] The Agreement, **C-1.**
[3] 2018 Tender regulations, **C-2**.
[4] Alenkina Report, para 98, **CER-2-1**.
[5] Alenkina Report, para 107, **CER-2-1**.

Dr. Crina Baltag:

> *"Failure of Kyrgyzstan to ensure Claimant due process, including the opportunity to be heard, and to conduct the termination process of Claimant's acquired right under 2018 Tender constitutes a breach of the FET and FPS standards under Lithuania-Kyrgyzstan BIT."* [6] *(…) "given the arbitrariness of Kyrgyzstan's actions, motivated by political reasons and lacking due process and transparency, the termination of the 2018 Tender breaches the FET and FPS standards under the Lithuania-Kyrgyzstan BIT."*[7]

Andrius Lukosevicius:

> *"Based on my more than 20 years of experience in public tenders around the world, the Kyrgyz 2018 Tender and the surrounding scandal, false allegations, disappearance of people and lack of any due process was the worst experience I have ever had. Nowhere in the world did the state apparatus got involved into public tender procedures for the benefit of particular state officials."*[8]

4. These quotes neatly summarize the basic case before this Tribunal — although Garsu Pasaulis, for years, has successfully invested substantial financial amounts and *know-how* into the development of the e-government systems in the Kyrgyz Republic – the Kyrgyz Republic has forcefully expropriated high-value economic rights of Garsu Pasaulis. This right was legitimately acquired by Garsu Pasaulis under the applicable Kyrgyz law.

5. This forceful taking was coupled with severe damage to Garsu Pasaulis' global business reputation, which was nurtured by Garsu Pasaulis for more than 20 years. The true reason for such a forceful taking were the secret self-interests of the highest-ranking Kyrgyz State officials, who used the notorious Kyrgyz state' apparatus, fully at their disposal, to expel Garsu Pasaulis from the 2018 Tender and the Kyrgyz Republic.

[6] Baltag Report, para 118, **CER-1-1**.
[7] Baltag Report, para 132, **CER-1-1**.
[8] Lukosevicius Witness Statement, para 60, **CWS-1-1**.

6. The international prestige and the foreign investment climate in the Kyrgyz Republic were once again severely damaged by these illegal actions. The Kyrgyz Republic was not able to live up to its own rules and regulations. Although Garsu Pasaulis expected to be treated justly and fairly, the Kyrgyz Republic failed to follow the rule of law and gave way to severe abuse of State power against its foreign investor.

7. The Kyrgyz Republic also breached Garsu Pasaulis' expectation to be treated justly and fairly. This legitimate expectation is recognized under international law and the Agreement. In particular, Article 3(1) of the Agreement obligated the Kyrgyz Republic to ensure „*just and fair treatment, also ensuring full protection and security*" of Garsu Pasaulis' investments and returns on investments. The Agreement also obligated the Kyrgyz Republic "*not to hinder the management, maintenance, use, possession, development or disposal of such investments by any unjustified, ill-considered or discriminatory measures*". Finally, the Agreement required the Kyrgyz Republic not to expropriate Garsu Pasaulis' investments without proper compensation (Article 4).

8. Garsu Pasaulis is alleging breaches of each of these obligations and seeks damages in relation to each breach by the Kyrgyz Republic.

9. There should be no doubt that, based on the record available to this Tribunal, the measures taken by the Kyrgyz officials breached the law of the Kyrgyz Republic as well as the Agreement and international law.

B. State's illegal and arbitrary conduct throughout the e-passports project in the Kyrgyz Republic

10. As it will be explained in more detail in Section II of this Statement of Claim, the e-passports project in the Kyrgyz Republic was planned already in 2011[9].

[9] Information for bidders in the upcoming tender for e-passports and citizen registry of the Kyrgyz Republic in 2011, **C-3**.

11. In 2012, the Kyrgyz Republic organized a public tender for e-passports and the related investments into e-government and digital citizen registry systems[10].

12. Garsu Pasaulis has participated in this 2012 Tender. Having offered the best price (~50 million USD)[11] and 100% upfront investment into the Kyrgyz' e-government systems, Garsu Pasaulis did not get the contract because of the involvement of local Kyrgyz interest groups (who wanted to maintain their private and profitable contracts and succeeded in subsequent termination of the 2012 Tender.)[12]

13. In 2018, Garsu Pasaulis again won the 2018 Tender for e-passports with the best price[13]. However, once again, the 2018 Tender and the conclusion of the e-passports contract with the Kyrgyz Republic was abruptly halted and eventually terminated in breach of the local Kyrgyz law.

14. This time, the signing of the e-passports contract was obstructed due to the secret and personal interests of notorious Kyrgyz' state officials. Unlike the first time, the Kyrgyz Republic employed the full force of domestic national security agency against Garsu Pasaulis.

15. In particular, the secret and personal interests of notorious Kyrgyz' state officials were publicly admitted[14]. Most prominently, Mr. Idris Kadyrkulov – then the Head of the Kyrgyz Republic's most powerful State Committee for National Security Prosecution or more commonly known in the Kyrgyz Republic by its Russian acronym, the GKNB ("GKNB") – was mentioned as being responsible for these illegal activities.

16. Idris Kadyrkulov's ulterior interests, personal involvement in the 2018 Tender, and measures taken to terminate the 2018 Tender are clearly evident. Media reports[15] and political uproar[16] of the time prominently

[10] 2018 Tender regulations, **C-2**.
[11] 2012-08-06 Garsu Pasaulis' bid in the 2012 Tender, **C-4**.
[12] Mieliauskas Witness Statement, para 30-32, **CWS-2-1**.
[13] Information about tender No. 181023129327015 (2018 Tender), **C-5**.
[14] Media article of 16 May 2019, **C-6**.
[15] Media article of 16 May 2019, **C-6**; Media article of 13 May 2019, **C-7**
[16] Media article of 15 May 2019, **C-8**.

featured evidence of Idris Kadyrkulov's intervention in what was supposed to be a transparent and independent process of a public tender organized by the State Registration Service of the Kyrgyz Republic (locally known as "GRS") and GRS' public tender commission ("Tender Commission").

17. As noted in numerous media reports and comments provided by Ms Alina Shaikova – the Head of the GRS ("Alina Shaikova") – just after the announcement of the 2018 Tender, on 6 December 2018, Idris Kadyrkulov invited Alina Shaikova and the adviser to the President of the Kyrgyz Republic to one of the most expensive restaurants in Bishkek[17].

18. During that meeting, Idris Kadyrkulov introduced the invitees to foreign businessmen, discussing the possibility of creating in the Kyrgyz Republic a base for the production of documents of national importance. As explained by Alina Shaikova:

> *"During the meeting, there was no open request. But the fact that the meeting was organized by Kadyrkulov and introduced to the representatives of the European company is a fact. Representatives of this company were ready to discuss the development of their business in Kyrgyzstan. But I cannot confirm that this meeting is related to the investigative actions that began later. This should be studied by a special public or deputy commission*."[18]

19. Alina Shaikova further explained:

> *"We immediately indicated that the tender process has already been launched for the purchase of blanks [forms], the GDS [GRS] also has no need for equipment, since donors have already purchased 2 sets of equipment for personalizing the blanks [forms]. As for the production of other types of documents, we were also informed that the draft Law "On Public Procurement" provides for a norm that allows enterprises with state shares 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*."[19]

[17] Media article of 15 May 2019, **C-8**.
[18] Ibid.
[19] Media article of 13 May 2019, **C-7**.

20. Numerous press reports confirm that after this meeting with the Head of the GRS and her refusal to consider offers provided, the Head of the GKNB – Idris Kadyrkulov, felt insulted and offended[20].

21. While replying to the accusations of this clear attempt to influence the 2018 Tender, the GKNB itself publicly admitted the following:

> *"Indeed, at an unofficial meeting, Shaikova and Dogoev refused to consider the issue of organizing local own production of DGZ, justifying this as a deliberately unprofitable production, as well as in connection with the purchase of blank products by the GRS from private companies*."[21]

22. As discussed below in Section II of this Statement of Claim, a conflict with the Head of the GRS and the personal interests of the insulted Head of the GKNB had a devastating effect on both Alina Shaikova, and, unfortunately, on Garsu Pasaulis, who did not take part in the meeting, but whose win in the 2018 Tender stood in the way of Mr. Kadyrkulov's plans. Idris Kadyrkulov then employed the notorious apparatus of the GKNB to attack the 2018 Tender and, in particular, the winner of the 2018 Tender – Garsu Pasaulis; and took away the e-passports contract from Garsu Pasaulis. The GKNB also attacked and prosecuted the members of the Tender Commission and also the former Head of GRS – Alina Shaikova.

23. Such a powerful figure as the Head of the GKNB in the Kyrgyz Republic has many tools at his disposal. It appears clear from the record in this arbitration that Idris Kadyrkulov used them all – from intimidation to raids and arrests, from forced confessions to criminal prosecution and confiscations, from public slander and *kompromat* to public accusations before the Kyrgyz Parliament.

24. One of the most powerful Kyrgyz' state officials – Idris Kadyrkulov ousted Garsu Pasaulis from the 2018 Tender and took all means available to destroy Garsu Pasaulis' international reputation and expropriate the e-passports contract won by Garsu Pasaulis.

[20] Media article of 13 May 2019, **C-7**.
[21] Media article of 14 May 2019, **C-9**.

25. To say that the 2018 Tender was controversial and divisive would be an understatement. After confessing to his personal involvement in the 2018 Tender and termination thereof, Idris Kadyrkulov had to resign from the office. Alina Shaikova was put on the wanted list, and her whereabouts are not known to this date. However, the 2018 Tender scandal had a snowball effect on Garsu Pasaulis' business world-wide.

26. The extreme controversy surrounding the 2018 Tender, including the secret personal interests extending to the highest ranks of the Kyrgyz Government, provides important context for this Tribunal to understand Garsu Pasaulis' claims in this arbitration.

27. Garsu Pasaulis worked diligently to promote and stimulate Lithuanian investments in the Kyrgyz Republic. However, through no fault of its own, Garsu Pasaulis is now reluctantly forced to seek protection and invoke the remedies provided by the Agreement.

28. The present dispute, thus, revolves around a twofold issue. First, the denial of Garsu Pasaulis' right to execute the e-passports contract and receive the benefit of the 2018 Tender contract – a right to which Garsu Pasaulis was lawfully entitled. The second issue is the manifest breach of Garsu Pasaulis' rights to international reputation, which was destroyed by the actions of the Kyrgyz Republic.

29. Garsu Pasaulis seeks justice under the treaty Agreement and international law. It respectfully requests that this Tribunal carefully consider the record before it and confirm the Respondent's breach of the Agreement by awarding Garsu Pasaulis damages for its losses.

C. Structure of this Statement of Claim

30. This Statement of Claim is produced by Claimant pursuant to the timetable set out in the Tribunal's Procedural Order No. 1, dated 5 March 2021.

31. Statement of Claim expands upon the merits of Garsu Pasaulis' claims as initially put forward in the Notice of Arbitration on 10 February 2020. Statement of Claim is accompanied by three witness statements, as follows:

> **Witness Statement of Mr. Vytautas Mieliauskas** dated 2 July 2021, a Lithuanian national and former CEO of Garsu Pasaulis, who describes Garsu Pasaulis' investments in the Kyrgyz Republic and events that ufolded in the 2018 Tender and its aftermath ("Mieliauskas Witness Statement")[22],
>
> **Witness Statement of Mr. Andrius Lukosevicius** dated 28 June 2021, a Lithuanian national and current employee of Garsu Pasaulis who describes Garsu Pasaulis investments into e-government services in the Kyrgyz Republic, 'cancellation' of the 2018 Tender and its aftermath ("Lukosevicius Witness Statement")[23] and,
>
> **Witness Statement of Mr. Marat Sagyndykov** dated 23 August 2021, a Kyrgyz national and former representative of Garsu Pasaulis in the Kyrgyz Republic who describes what measures were taken by the GKNB against him and Garsu Pasaulis ("Sagyndykov Witness Statement")[24].

32. Statement of Claim is also supported by three expert reports, issued by the following independent experts:

> **Expert Report of Dr. Crina Baltag** dated 25 August 2021. Dr. Crina Baltag ("Dr. Baltag") is one of the foremost experts in

[22] Mieliauskas Witness Statement, **CWS-2-1**.
[23] Lukosevicius Witness Statement, **CWS-1-1**.
[24] Sagyndykov Witness Statement, **CWS-3-1**.

international investment law. In her expert report on international law, she confirms amongst other conclusions that Garsu Pasaulis is an investor who made an investment in accordance with the Agreement, and that the Kyrgyz Republic is in breach of its obligations under the Agreement ("Baltag Report")[25].

Expert Report of Professor Natalia Alenkina dated 12 August 2021. Professor Natalia Alenkina (“Prof. Alenkina”) is an associate professor at the American University of Central Asia in the Kyrgyz Republic. Prof. Alenkina provides a helpful assessment of the issues discussed in this arbitration from the standpoint of the Kyrgyz law and, in particular, the law on public procurement of the Kyrgyz Republic ("Alenkina Report")[26].

Expert Report on the Valuation of Damages by Dr. Jurgita Banyte dated 23 August 2021. Dr. Jurgita Banyte’s Report ("Dr. Banyte") is focused on applied economic and financial modeling. She provides her objective and independent conclusion regarding the amount of damages Garsu Pasaulis suffered as a result of the Kyrgyz Republic’s actions in the context of the 2018 Tender ("Damages Report")[27].

33. This Statement of Claim is also accompanied by a separate (consolidated) List of Exhibits specifying the date and description of each exhibit and a (consolidated) List of Legal Authorities specifying the date and description of each legal authority.

34. Statement of Claim is structured in Sections as follows:

Section II sets out the factual background of the dispute.

Sections III-V address the Tribunal's jurisdiction.

Section VI provides an explanation of the Kyrgyz Republic’s violations of the Agreement.

[25] Baltag Report, **CER-1-1**.
[26] Alenkina Report, **CER-2-1**.
[27] Damages Report, **CER-3-1**.

Section VII then sets out the facts and legal principles governing Garsu Pasaulis' entitlement to compensation and damages. The quantum of Garsu Pasaulis' claim rests upon the independent appraisal of Dr. Banyte.

Finally, **Sections VIII-X** set out the relief sought by Garsu Pasaulis.

II. STATEMENT OF FACTS

A. Garsu Pasaulis – internationally acclaimed investor into the e-government services and security printing

35. Garsu Pasaulis is one of the largest and technologically advanced security printing-houses in the North-Eastern EU Region. As explained by Mr. Vytautas Mieliauskas ("Mieliauskas"), the former CEO of Garsu Pasaulis:

> *"Garsu Pasaulis has become one of the largest and most modern printing-houses in the Baltic States and a leader in terms of security printing worldwide[28]. Until the scandal in Kyrgyz Republic, the company was also one of the leading commercial printers in the Baltic States"*[29]

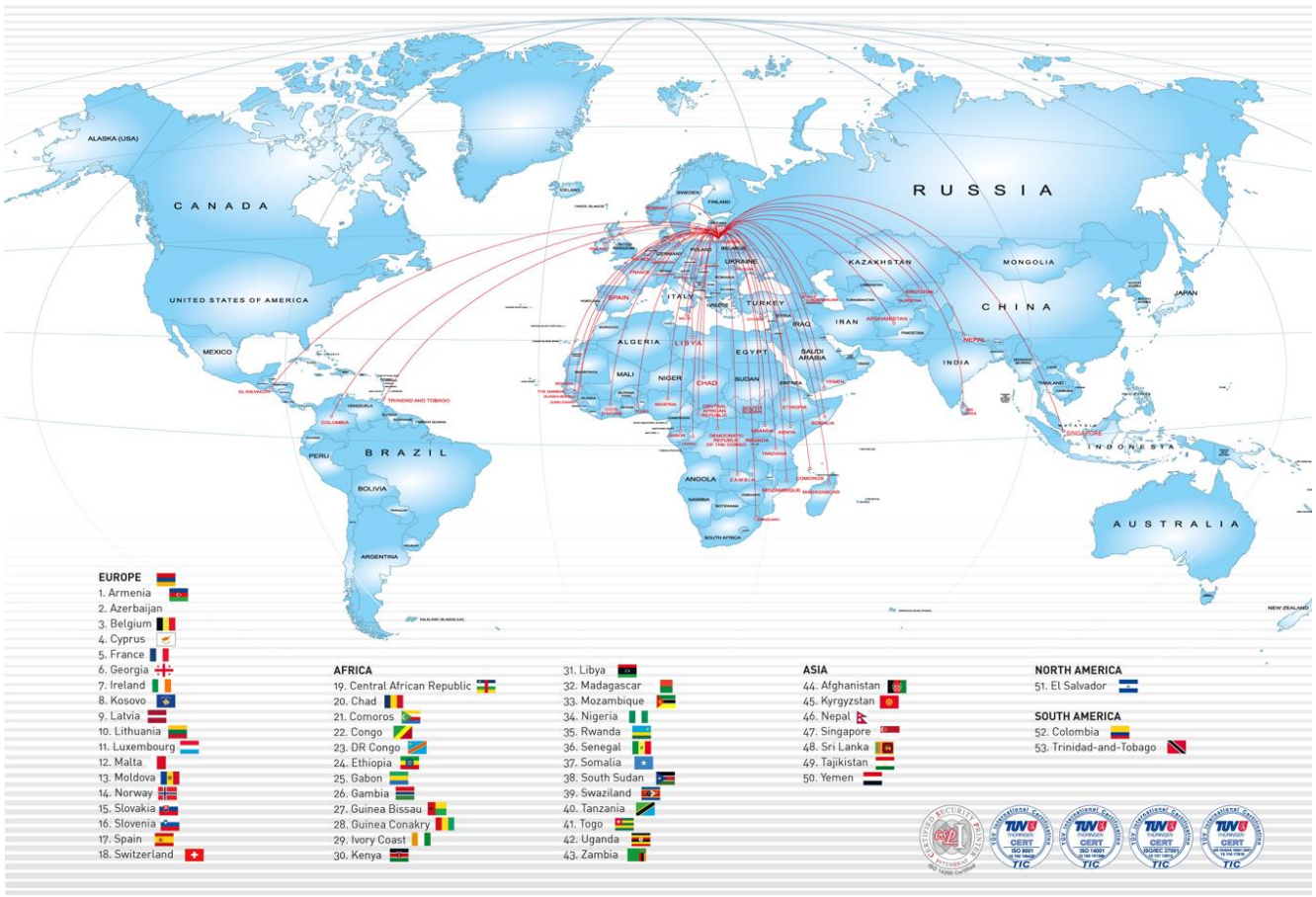
36. Garsu Pasaulis has been in operation since 1994 and is very well known internationally for its investments into the e-government services[30].

37. More than 20 years ago, Garsu Pasaulis started a local business specialising in the reproduction and distribution of audiovisual recording (CDs, DVDs, etc.). With the change of technology and decreasing demand for the initial product, in 1996, Garsu Pasaulis re-focused its efforts on a niche market and launched production of security printing items: production of counterfeit-proof document forms secured by special security features; and later started to supply the related

[28] Garsu Pasaulis' presentation, **CWS Mieliauskas 1-2**.
[29] Mieliauskas Witness Statement, para 12, **CWS-2-1**.
[30] Garsu Pasaulis' presentation, **CWS Mieliauskas 1-2**.

software and hardware systems for various kinds of e-government services, such as e-passports, citizen registry, tax registry, licenses, tracking of taxable goods, etc.[31]

38. 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)[32], 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[33]:



[31] Ibid.
[32] Garsu Pasaulis' certifications, **CWS Lukosevicius 1-3**.
[33] Map of activities and contracts of Garsu Pasaulis, **C-10**.

39. As explained by Mr. Andrius Lukosevicius ("Lukosevicius"), the current director of the security printing division at Garsu Pasaulis:

> *"Over the last 20 years, I have supervised Garsu Pasaulis' winning tenders, investing and successfully executing contracts with governments around the globe. For example, I have overseen contracts and investments with Singapore (visas), Nepal (excise stamps), Sri-Lanka (post stamps), Yemen (visas), Georgia (passports and excise stamps), Azerbaijan (excise stamps), Kyrgyz Republic (excise stamps, e-passports), Moldova (e-passports), Schengen visas (for Lithuania, Switzerland, Norway, Iceland, Ireland, Malta, Cyprus, Latvia, France), Spain (pharmacy passports), Rwanda (passports), Kenya (excise stamps), Mozambique (e-passports and ID cards), Madagascar (e-passports and ID cards), The Comoros (e-passports and ID cards), Côte d'Ivoire (e-ID cards), Gambia (e-ID cards, driver licenses), El Salvador (passports), Trinidad and Tobago (post stamps), Colombia (ID cards) and many others.*
>
> *These are only few examples and most of them also came together with investments and provision of software (IT) and hardware systems and the related training to governments for the efficient operation of public government services*."[34]

40. In 2004, Garsu Pasaulis built and launched one of the most modern printing houses in Europe. A number of highly regarded certifications attest to the reliability and excellence of Garsu Pasaulis' high-quality standards[35].

41. Furthermore, Garsu Pasaulis has an official government certification for working with secret information both in Lithuania and throughout the European Union. Garsu Pasaulis is officially authorized to work with the information marked as "EU-Secret", "NATO-Secret" and is officially

[34] Lukosevicius Witness Statement, para 14-15, **CWS-1-1**.

[35] 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. 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. 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.

licensed to print safe (security) documents[36]. Garsu Pasaulis also cooperates in joint projects with the United Nations (e.g. passports in Afghanistan[37] and El Salvador[38]).

42. In 2014, Garsu Pasaulis was acquired by a new shareholder and strategic investor from Belgium – Semlex Group[39]. Semlex Group provides improved services to populations around the globe, such as national identification documents (civil acts, passports, driver's licenses, and national identity cards) secured by biometrics[40]. Semlex has partnerships with international organizations such as Interpol, the United Nations, ICAO, and the European Union[41].

43. However, as explained by Mieliauskas, despite the ownership by Semlex, Garsu Pasaulis conducted its activities on its own and mostly separately from Semlex[42]:

> *"Semlex has exclusive printing rights with Garsu Pasaulis' facility and in some cases Garsu Pasaulis has participated in joint ventures with Semlex, but mostly as printing facility, having responsibility for production only. On the other hand, Garsu Pasaulis always managed the company on its own, i.e., Semlex did not participate in contracts or public tenders that were won by Garsu Pasaulis. Since the change of ownership in 2014, even the management remained the same – to this date Semlex never appointed any people of their own into management of Garsu Pasaulis and is not actively involved in Garsu Pasaulis' activities*[43]."

44. Therefore, Garsu Pasaulis, especially before the Kyrgyz scandal, was a highly regarded and successful international company, investing into the e-government systems all around the world and having the best reputation for its activities in the security printing and commercial printing industry.

---

[36] Security Clearance Certificates, **CWS Lukosevicius 1-4**.
[37] Contract No. NPA/MoF/95/ICB/G-1 133 between Ministry of Finance of Afghanistan and Garsu Pasaulis of 6 December 2016, **CWS Mieliauskas 1-3**.
[38] Contract No. 2012/035 between El Salvador authorities and Garsu Pasaulis of 14 August 2014, **CWS Mieliauskas 1-4**.
[39] Media article of 22 December 2014, **C-11**.
[40] Semlex Presentation, **CWS Mieliauskas 1-7**.
[41] Ibid.
[42] Mieliauskas Witness Statement, para 18, **CWS-2-1**.
[43] Extract from the Register of Legal Entities of 19 August 2021, **CWS Mieliauskas 1-8**.

45. However, all of this has changed due to the Kyrgyz scandal, which was caused due to ulterior personal interests extending to the highest ranks of the Kyrgyz Government.

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

46. In order to properly assess the 2018 Tender scandal, the Tribunal must take into account the Kyrgyz Republic's political corruption and cronyism issues.

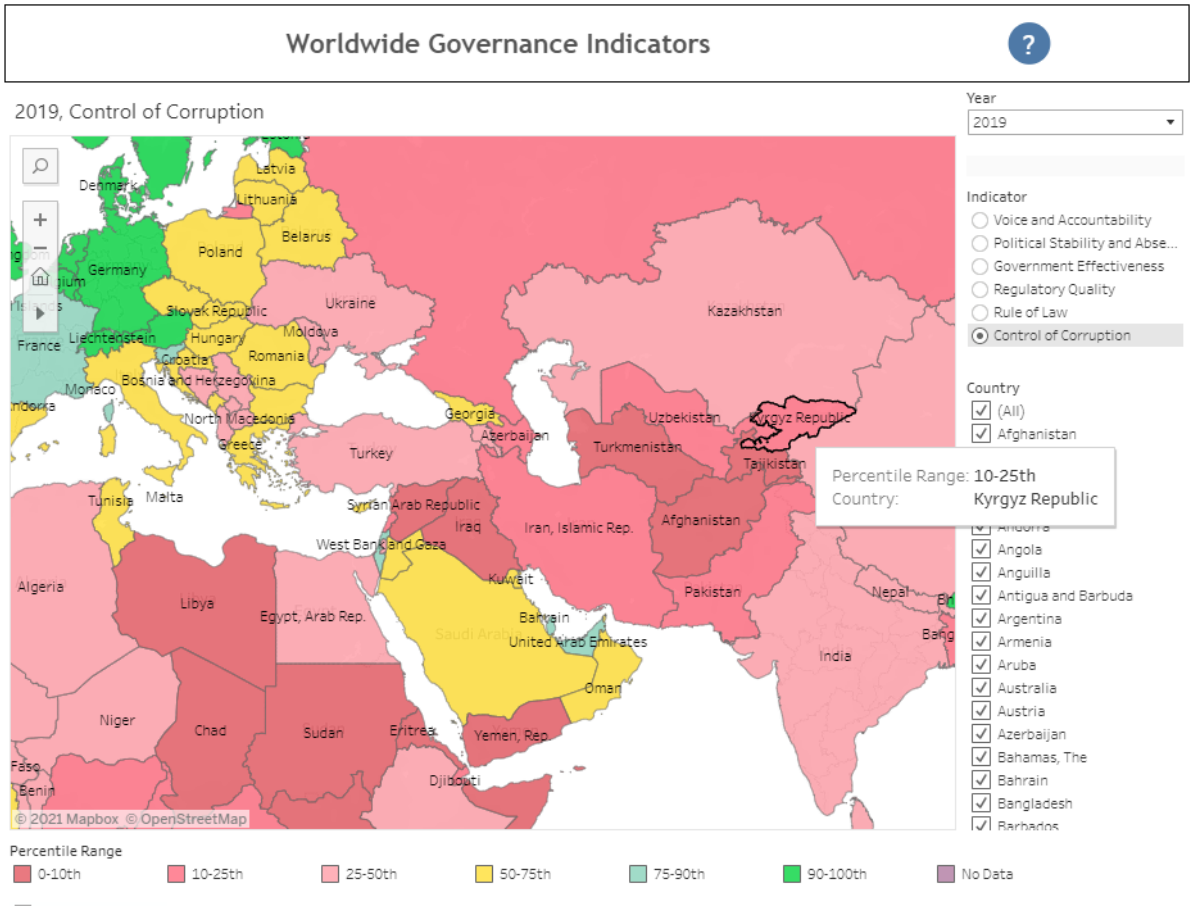
47. As noted by Transparency International, the challenge of facing bureaucratic and political corruption, cronyism, and nepotism stand in the way of the economic development of the Kyrgyz Republic. While countering corruption has been a recurrent promise made by the country's most recent rulers, results have been poor[44].

48. 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 encouraging signs. However, the organizational system for countering corruption remains ineffective, undermining any long-term anti-corruption agenda[45].

49. Transparency International's 2020 Corruption Perceptions Index (CPI) ranks the Kyrgyz Republic 124 out of the 180 countries and territories assessed, with a score – 31 out of 100[46].

[44] Transparency International. Kyrgyzstan: Overview of corruption and anti-corruption, 3 July 2019, **C-12**.
[45] Ibid.
[46] Transparency International. Country data, **C-13**.

50. Within the World Bank's Worldwide Governance Index, the Kyrgyz Republic scored the percentile rank of 10-25 (out of 100)[47] in the control of corruption indicator (World Bank 2019)[48].



51. 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 licenses, 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[49].

[47] Percentile Rank (0-100) indicates rank of country among all countries in the world. 0 corresponds to lowest rank and 100 corresponds to highest rank.
[48] World Bank Report, **C-14**.
[49] Transparency International. Kyrgyzstan: Overview of corruption and anti-corruption, 3 July 2019, **C-12**.

52. 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, with both petty and grand forms of corruption being prevalent. For example, detentions and aggressive tactics against private businesses have even increased in the past years, raising serious concerns among foreign investors about the security of their investments. In May 2021, the Kyrgyz Government levied a $3 billion fine against the country's largest foreign investor, Centerra Gold Inc, and interfered with its management[50].

53. Freedom House (2021) reported that corruption in the Kyrgyz Republic is pervasive in politics and the Government. Political elites use Government resources to reward clients – including organized crime figures – and punish opponents. An anti-corruption office within the GKNB was formed in 2012, but has primarily been used to target the administration's political enemies in the parliament and municipal governments. Former prime ministers Sapar Isakov and Jantoro Satybaldiyev, who were aligned with former president Atambayev, were arrested on corruption charges in 2018; both were convicted and received prison sentences in December 2019[51].

54. 2019 international investigation led by the Organized Crime and Corruption Reporting Project (OCCRP) implicated former customs official Raimbek Matraimov and his family in an operation that siphoned hundreds of millions of dollars out of the Kyrgyz Republic[52]. Later that year, Chinese Uighur businessperson Aierken Saimaiti, who collaborated in the operation and served as a source for news articles on the subject, was murdered in Istanbul shortly before the OCCRP report was released[53]. In June, the GKNB also accused the journalists who reported on the Matraimov case of corruption[54].

[50] 2021 US Gov. Investment Climate Report on Kyrgyz Republic, **C-15**.
[51] 2021 FreedomHouse Report on the Kyrgyz Republic, **C-16**.
[52] OCCRP investigation report on Matraimov, **C-17**.
[53] OCCRP investigation report on Saimaiti, **C-18**.
[54] Media article of 3 June 2020, **C-19**.

55. Therefore, corruption and the use of GKNB's unlimited powers is a very high risk for companies in the Kyrgyz Republic.

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

57. 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 the 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 – "*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*"[55].

58. As it will be explained further in this Statement of Claim, the context of widespread corruption in the Kyrgyz Republic and the use of the GKNB for personal interests are particularly relevant in the present arbitration while considering the ill-treatment of Garsu Pasaulis and its investments.

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

i. The 2012 Tender for e-passports and citizen registry

59. Since the fall of the Soviet Union, the Kyrgyz Republic has mostly continued the Soviet Union's systems for registering personal information. Births, marriages, and deaths were registered by local register offices (ZAGS) or by municipal authorities, while passports and national ID cards were issued by separate passport offices

[55] Media article of 28 October 2019. **C-20**.

(OVIR/UPVR). Passports and ID documents were required to access legal employment, public services, and social / economic rights[56].

60. The Kyrgyz Republic introduced national ID cards and machine-readable passports / travel documents that meet the international standards for security in 2004-2006. A series of changes have since been made in the passport system in order to increase document security. However, corruption continued to be very widespread. This meant that it was both costly and time-consuming for citizens to obtain passports / ID cards, and fake passports were still a problem[57].

61. Therefore, the Kyrgyz Republic, like other post-Soviet states, was in need of modern and digital citizen identification systems that would comply with international security standards.

62. Garsu Pasaulis knew that eventually, the Kyrgyz Republic will need to modernize its e-government services and closely monitored any public tenders to be announced in the Kyrgyz Republic.

63. As explained by Mieliauskas, Garsu Pasaulis was first approached by the Kyrgyz delegation sometime in 2011:

> *"I remember that the Kyrgyz delegation came to Lithuania sometime in 2011. The delegation included members of the Kyrgyz national register council or the so-called "GRS" and members of the Kyrgyz government. Kyrgyz officials wanted to know and learn the Lithuanian experience regarding production and maintenance of passports, ID cards and the related citizen identification systems and e-government services."*[58]

64. This was also confirmed by Mr. Lukosevicius:

> *"I remember they were interested in Lithuanian post-Soviet experience in digitalization of state services, passports and ID cards systems and excise stamps systems. The Kyrgyz delegation had then indicated to us that they also planned to modernize and digitalize their public services and that they were planning to announce international tenders soon."*[59]

[56] 20 February 2013 Landinfo Report Kyrgyzstan: Passports and ID documents, **C-21**.
[57] Ibid.
[58] Mieliauskas Witness Statement, para 25, **CWS-2-1**.
[59] Lukosevicius Witness Statement, para 19, **CWS-1-1**.

65. As explained by Mieliauskas and Lukosevicius, Garsu Pasaulis always had plans for expansion and investments into the CIS Region and, in particular, to the former Soviet States. Garsu Pasaulis knew that these States are still developing their e-government systems and will be in need of modern identification systems, which Garsu Pasaulis could offer[60].

66. Garsu Pasaulis was very interested in all projects related to the Kyrgyz Republic because Garsu Pasaulis saw their need for modern security printing products and systems. Garsu Pasaulis also regarded the Kyrgyz Republic as a very good jurisdiction for expansion of Garsu Pasaulis' products, services and investments into the neighboring States – Kazakhstan, Turkmenistan, Tajikistan, Uzbekistan, and others. Therefore, Garsu Pasaulis was willing to offer the best prices, systems, services, knowledge, and otherwise invest into the Kyrgyz Republic in hopes for long-term and successful activities there[61].

67. Indeed, the Kyrgyz Republic had plans to establish a State-wide population register together with the provision of e-passports (biometric passports).

68. Following the request of 23 November 2011 from the GRS to provide assistance in the establishment of a State-wide population register, the OSCE Office for Democratic Institutions and Human Rights (OSCE ODIHR) visited the Kyrgyz Republic from 6 to 7 December 2011. In a meeting with GRS officials, an agreement was reached on a joint work plan for an assessment of the requirements for the establishment of a computerized population registration system as part of ongoing population registration reforms in the Kyrgyz Republic[62].

69. During the assessment, GRS conveyed to the ODIHR experts the Kyrgyz Republic's commitment to undertake key measures to implement a state-wide population register. In light of these efforts, GRS intended to include the establishment of a fully computerized population

[60] Mieliauskas Witness Statement, para 24, **CWS-2-1**; Lukosevicius Witness Statement, para 20, **CWS-1-1.**
[61] See, e.g., Mieliauskas Witness Statement, para 24, **CWS-2-1**; Lukosevicius Witness Statement, para 20, **CWS-1-1.**
[62] July 2012 Kyrgyz Republic Assessment on the Prospects for the Establishment of a Population Register. **C-22**.

register as part of a forthcoming tender for the production of biometric passports. The required equipment on the central and local levels for the population registration system would become an integral part of bidders' proposals[63].

70. As part of a forthcoming tender, it was envisioned that bidders would be invited to propose an appropriate solution for the implementation of a computerized population register, and GRS would decide - upon review of the bids – which proposal best suits the circumstances of the Kyrgyz Republic[64].

71. In 2011, the Kyrgyz Republic published the first tender documentation for the upcoming 2012 Tender for public procurement of special equipment for the production of identity documents (passport of a citizen of the Kyrgyz Republic, electronic passport of a citizen of the Kyrgyz Republic, ID-identification card of a citizen of the Kyrgyz Republic, birth certificate in the territory of the Kyrgyz Republic) with personalization of individual identification data and identity documents with microprocessor (chip) in accordance with the requirements of international standards and licensed software[65]. The 2012 Tender also envisioned the adaptation of the new system with the current information documentation system, as well as sets of equipment for data collection and registration of the population and creation of the State Register of Population of the Kyrgyz Republic[66].

72. The 2012 Tender also required 100% up-front investment at the expense of the supplier's own or borrowed funds[67].

73. As explained by Mieliauskas[68]:

> *"The tender provided for an investment project, rather than a simple commercial trade. It envisioned that the winning party shall first invest 100% of their own funds into the development of the related passport and registry systems and only after that the Kyrgyz Government would pay the*

[63] Ibid.
[64] Ibid.
[65] 2012 tender documentation, **CWS Mieliauskas 1-12**.
[66] Ibid.
[67] Information on 2012 tender, **CWS Mieliauskas 1-13**.
[68] Mieliauskas Witness Statement, para 27, **CWS-2-1.**

> *investor for provision of such services to the Government."*[69]

74. Having the necessary qualifications, *know-how,* and experience in similar projects around the world, Garsu Pasaulis decided to participate in the 2012 Tender and submitted their bid[70].

75. Garsu Pasaulis' full bid amounted to 49'930'400 USD and was the third-lowest offer as compared to other bids submitted:

IRIS	61'747'000 USD
Comsco	76'371'357 USD
OSD	53'341'680 USD
Muehlbauer	28'790'000 USD
Morpho	41'031'918 USD
Garsu Pasaulis	49'930'400 USD

76. As explained by Mieliauskas:

> *"I remember that German (Muehlbauer) and French (Morpho) companies then also submitted their offers which were lower in price than Garsu Pasaulis' offer, but German and French bids did not comply with the tender regulations (German and French companies required advance payment from the Government, which was not in accordance with the tender requirements)[71]. I remember that the bids by German and French companies should have been rejected and Garsu Pasaulis' offer was the best offer in terms of price."*[72]

77. Having seen the non-compliant bis of German and French companies, Garsu Pasaulis expected that German and French bis will be rejected and, therefore, Garsu Pasaulis' bid was potentially the best offer in terms of price and full commitment to invest 100% upfront. Garsu Pasaulis rightfully expected to sign this high-value investment contract with the Kyrgyz Republic in 2012.

---

[69] 2012 tender documentation, **CWS Mieliauskas 1-12**.
[70] Garsu Pasaulis bid in the 2012 Tender, **C-4**.
[71] Ibid.
[72] Mieliauskas Witness Statement, para 29, **CWS-2-1.**

78. However, just after the announcement of the bids submitted, the 2012 Tender was abruptly cancelled.

79. As explained by Mieliauskas:

> *"suddenly and before announcement of the winner of the tender, the tender was cancelled due to political turbulence and disagreements in the Government of the Kyrgyz Republic"*[73] *(…) "local interest groups had lobbied strongly to remain on private and lucrative contracts with the Kyrgyz Government and that is why the 2012 tender was terminated"* [74]

80. Garsu Pasaulis received a notice of termination of the 2012 Tender on 2 April 2012[75]. The termination notice just simply provided that:

> *"The State Registration Service under the Government of the Kyrgyz Republic hereby reports that, under article No 5 of the decree of the Government of the Kyrgyz Republic No 412-p, the tender on the implementation of an investment project for supply of passport documents (ID cards of citizen of the Kyrgyz Republic, passport of citizen of the Kyrgyz Republic and electronic passport of the Kyrgyz Republic) of new generation and creation of the state register of population of the Kyrgyz Republic, taking into account the modern automated system for documentation of population, was cancelled, and the decree of the Government of the Kyrgyz Republic No 128-p was revoked."*[76]

81. However, it was clear that in the 2012 Tender, local and private interests outweighed the benefits of foreign investments, transparent and global experience that Garsu Pasaulis was ready and capable to invest in the Kyrgyz Republic.

82. Although Garsu Pasaulis invested a lot of time and effort into the preparation of its bid in the 2012 Tender, which was 'technically' won by Garsu Pasaulis (who provided the best offer), Garsu Pasaulis decided not to appeal the decision on termination of the 2012 Tender. Garsu Pasaulis did not believe, at the time, that an appeal to the courts or

[73] Mieliauskas Witness Statement, para 31, **CWS-2-1.**
[74] Mieliauskas Witness Statement, para 32, **CWS-2-1.**
[75] 2012-04-28 Notice of termination of the 2012 Tender, **C-23**.
[76] Ibid.

arbitration tribunal would be the best option in the circumstances. As painful as it was, the cancellation of the 2012 Tender did not tarnish Garsu Pasaulis' reputation, which allowed Garsu Pasaulis to successfully participate once again.

83. Surely, Garsu Pasaulis could not have expected that a similar pattern, although on a much larger and destructive scale, would follow in the 2018 Tender.

ii. The identification cards (IDs) project

84. As explained by Mieliauskas, the Kyrgyz Republic was also interested in developing its national ID cards.

85. Mieliauskas met with Kyrgyz' public representatives in various conferences related to security printing[77]:

> *"I have also met with the Kyrgyz representatives in various professional conferences related to security printing. I remember meeting the Kyrgyz representatives in London (UK), Riga (Latvia) and Almaty (Kazakhstan). In particular, I remember that development of ID cards for Kyrgyz nationals were also discussed in meetings in Almaty (Kazakhstan).*
>
> *Naturally, having an objective to represent Garsu Pasaulis and its products, I have made presentations regarding Garsu Pasaulis' activities in those events. I remember that I have also traveled to the Kyrgyz Republic, made presentations in the Kyrgyz capital Bishkek[78]"*

86. As explained by Mieliauskas, he has spent a lot of time providing *know-how* and training to the Kyrgyz' representatives regarding modern e-government solutions that could be employed by the Kyrgyz Republic[79].

87. However, later, the Kyrgyz Government has decided not to announce a public tender for the national ID cards and instead implemented the

[77] Mieliauskas Witness Statement, para 36, **CWS-2-1.**
[78] Information on business trips to the Kyrgyz Republic, **CWS Mieliauskas 1-15**.
[79] Mieliauskas Witness Statement, para 37, **CWS-2-1.**

ID project in cooperation with KOMSCO and Ubivelox (South Korea), and Emperor Technology (China).

iii. The 2013 Tender for excise stamps

88. Although the 2012 Tender was abruptly terminated without any explanation by the Kyrgyz Republic, Garsu Pasaulis still closely monitored other Kyrgyz tenders related to investments into e-government services.

89. In 2013, the Kyrgyz Republic announced a tender for the provision of excise stamps to the Kyrgyz' tax authority[80]. The overall value of the contract was USD 8'921'700,00[81].

90. This excise stamps tender again envisioned a model of '*investment first - return later*'[82]. The winning company had to install and develop the excise stamps system in the Kyrgyz Republic at its own expense and the company's return on investment would only come after it provides and sells excise stamps to the tax authority[83].

91. Although Garsu Pasaulis already had a negative experience with public tenders in the Kyrgyz Republic, Garsu Pasaulis still decided to invest into the Kyrgyz Republic and thoroughly prepared for this excise stamps tender.

92. Eventually, having offered the best price, Garsu Pasaulis won this excise stamps tender as the best offeror[84].

93. As explained by Lukosevicius:

> *"the excise stamps contract not only involved just provision and delivery of excise stamps. It also included provision of the necessary software (IT) systems and hardware for efficient operation of excise stamps system in the Kyrgyz Republic. The contract envisioned payment only for the excise stamps actually issued by the Kyrgyz tax authority[85],*

[80] 2013 Tender documentation for excise stamps, **C-24**.
[81] Contract of 1 February 2013 for excise stamps, **CWS Lukosevicius 1-8**.
[82] 2013 Tender documentation for excise stamps, **C-24**.
[83] Ibid.
[84] Contract of 1 February 2013 for excise stamps, **CWS Lukosevicius 1-8**.
[85] Ibid.

> *i.e., Garsu Pasaulis has not received any advance payments and Garsu Pasaulis needed to invest and build the necessary infrastructure from scratch. This meant that Garsu Pasaulis needed to invest its own funds into Kyrgyz Republic first, i.e., to install and develop the "Track and Trace" system*[86] *purposed for tracking of all the goods labelled with excise stamps in the Kyrgyz Republic, provide the hardware and software systems, connect them to the Kyrgyz public government systems, train and provide know-how to the state personnel and public servants and provide day-to-day service to the Kyrgyz Republic"*[87]

94. For the purposes of execution of the excise stamps contract, Garsu Pasaulis had first invested around USD 200'000 of its own funds for the system[88] before Garsu Pasaulis even shipped any printed excise stamps to the Kyrgyz Republic.

95. As explained by Lukosevicius, Garsu Pasaulis had also established a local company called "Garsu Pasaulis LLC" in the Kyrgyz Republic[89]. A local company was necessary because the excise stamps contract required that Garsu Pasaulis pay all the import duties (DDP), assume all of the responsibility, risk and costs associated with transporting of excise stamps to the Kyrgyz Republic[90]. Garsu Pasaulis also needed specific and secure logistics in the Kyrgyz Republic, warehouses, technical assistance and service center, an office, local IT specialists, and technicians[91].

96. As further explained by Mieliauskas, the modern *Track and Trace* system installed by Garsu Pasaulis is still used by the Kyrgyz Republic today, even when Garsu Pasaulis' excise stamps contract is now over[92].

97. Pursuant to the excise stamps contract, for years, Garsu Pasaulis had also trained the local Kyrgyz' public personnel to use and manage this

[86] Information on Track and Trace system and investments thereof, **CWS Lukosevicius 1-9**.
[87] Lukosevicius Witness Statement, para 25, **CWS-1-1.**
[88] Information on Track and Trace system and investments thereof, **CWS Lukosevicius 1-9**.
[89] Lukosevicius Witness Statement, para 28, **CWS-1-1**; Certificates regarding establishment of a subsidiary of the Garsu Pasaulis in Kyrgyz Republic, **CWS Lukosevicius 1-11**.
[90] Contract of 1 February 2013 for excise stamps, **CWS Lukosevicius 1-8**.
[91] Lukosevicius Witness Statement, para 28, **CWS-1-1.**
[92] Mieliauskas Witness Statement, para 41, **CWS-2-1.**

system, updated security systems, updated industrial designs, and provided constant service for the system[93].

98. As explained by Lukosevicius[94]:

> *"Me personally and Garsu Pasaulis' team have travelled all around the Kyrgyz Republic with training visits to all major Kyrgyz cities, where Garsu Pasaulis has trained public servants how to use and manage this system[95]. I recall that I have visited the Kyrgyz Republic more than 10 times.[96]"*

99. The 2013 excise stamps contract was a success. While Garsu Pasaulis had invested substantial amounts of its own funds, it contributed significantly to the development of e-government services in the Kyrgyz Republic. Garsu Pasaulis successfully implemented the excise stamps contract until 2016, i.e. until the contract term has expired.

100. When the contract for excise stamps with Garsu Pasaulis was approaching the end of the contract term, in 2015, the Kyrgyz Republic announced a new tender for excise stamps – Tender No. 15111383003-01)[97]. The planned value of the contract was USD 16'800'000,00[98].

101. Garsu Pasaulis participated and again won this new tender with the best price because Garsu Pasaulis was in the best position to offer favorable terms to the Government[99].

102. As explained by Lukosevicius:

> *"Since, at that time, Garsu Pasaulis had already invested substantial amounts of time and funds to get Garsu Pasaulis' system going, Garsu Pasaulis was able to offer the best price and Garsu Pasaulis has also won the 2016 tender"[100]*

[93] Lukosevicius Witness Statement, para 27, **CWS-1-1.**
[94] Lukosevicius Witness Statement, para 27, **CWS-1-1.**
[95] Information on trainings in the Kyrgyz Republic and business trips, **CWS Lukosevicius 1-10**.
[96] Ibid.
[97] 2016 Tender documentation, **C-25**.
[98] Ibid.
[99] 2016 Contract with the Kyrgyz Republic regarding tax stamps and systems, **C-26**.
[100] Lukosevicius Witness Statement, para 30, **CWS-1-1.**

103. Garsu Pasaulis successfully executed the second excise stamps contract, which is due to expire this year, i.e. in 2021.

104. In autumn of 2020, the Kyrgyz Republic announced a new tender for the excise stamps (Tender No. 210105261086581)[101]. The planned value of the contract was more than 7'000'000,00 USD[102]. Surely, Garsu Pasaulis was willing to participate again.

105. However, the 2020 Tender was cancelled in December 2020[103] and again reopened in 2021. Unusually, in 2021, the Tender was postponed 12 times[104].

106. As explained by Lukosevicius:

> *"A new tender for excise stamps was announced in autumn of 2020, but due to unknown reasons to Garsu Pasaulis, it was cancelled after submission of the bids. In the beginning of 2021, it was re-announced, but after submission of the bids, the procedure of opening of the bids has been postponed for more than 12 times by the Kyrgyz Republic. We believe that Garsu Pasaulis' conflict with the Kyrgyz Republic is the reason for that. We have indications that, due to our claims in the present arbitration case, the Kyrgyz Republic does not want Garsu Pasaulis to participate in the planned new tender for excise stamps and is looking for ways to expel Garsu Pasaulis again."*[105]

107. Eventually, after numerous postponements, on 16 August 2021, the new tender for exise stamps was cancelled by the Kyrgyz Republic[106].

108. In any case, the excise stamps contracts successfully executed by Garsu Pasaulis for 8 consequtive years and contributed significantly to the digitalization efforts of the Kyrgyz Republic. Systems developed and implemented by Garsu Pasaulis are still successfully used by the Kyrgyz Republic to this date. The training and *know-how* provided by Garsu Pasaulis to the Kyrgyz Republic contributed significantly to the

[101] Information on tender for excise stamps of 2020, **CWS Lukosevicius 1-13**.
[102] Ibid.
[103] Letter No. 17-2956 of 11 December 2020 of the Prime Minister of the Kyrgyz Republic regarding cancellation of the 2020 tender for supply of services for the manufacture and delivery of excise stamps, **CWS Lukosevicius 1-14**.
[104] Information on postponement of the 2021 tender for excise stamps, **CWS Lukosevicius 1-15**.
[105] Lukosevicius Witness Statement, para 31, **CWS-1-1.**
[106] Information on cancellation of the 2021 tender for excise stamps, **C-27**.

development of the e-government services and will continue to have a positive impact on the Kyrgyz Republic for years to come.

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

109. After the disappointing termination of the 2012 Tender for e-passports and the related systems in the Kyrgyz Republic, Garsu Pasaulis has patiently waited for the new tender to be announced in the Kyrgyz Republic.

110. As explained by Mieliauskas:

> *"the Kyrgyz Republic still needed e-passports and the necessary system that could operate nation-wide and the related service provider. Therefore, Garsu Pasaulis has waited for another international tender for e-passports in the Kyrgyz Republic."*[107]

111. On 23 October 2018, the Kyrgyz Republic officially announced the new tender for e-passports and related systems (Tender No. 181023129327015 – the 2018 Tender)[108]. All of the 2018 Tender announcements and submission of bids were made through the Kyrgyz e-tender system (online)[109].

112. The 2018 Tender envisioned the provision of e-passports (blanks) and the related systems to the Kyrgyz Republic (biometric passports, embedded with a microchip containing information that can be read and authenticated electronically). The 2018 Tender also required investments into installation and various configurations of IT systems to get the e-passports system going in the Kyrgyz Republic.[110] The value of the e-passports contract was EUR 12'000'000,00.[111]

[107] Mieliauskas Witness Statement, para 44, **CWS-2-1.**
[108] Information about tender No. 181023129327015 (2018 Tender), **C-5**.
[109] www.zakupki.gov.kg
[110] 2018 Tender regulations, **C-2**.
[111] Ibid.

113. Garsu Pasaulis thoroughly prepared for the 2018 Tender. Lukosevicius personally traveled to Bishkek from 17 November 2018 to 20 November 2018[112] to take care of all local documentation needed, e.g., official approval of documents and translations therefor by the notary and other related clerical matters. Later, Garsu Pasaulis had more visits to the Kyrgyz Republic and bought IT consulting services regarding the modification and configuration of the developed applications to operate in the Kyrgyz Republic's information system environments[113].

114. As explained by Lukosevicius:

> *"this was a very important tender for Garsu Pasaulis. Garsu Pasaulis had all of the necessary know-know, expertise and experience to develop e-passports systems in the Kyrgyz Republic. Garsu Pasaulis also had the necessary software and hardware, had the local company and trained personnel. Surely, execution of the e-passports contract would have required Garsu Pasaulis to increase its personnel in the Kyrgyz Republic, take care of specific and secure logistics, warehouses, ensure day-to-day technical assistance, provide training to local civil servants, etc. Also, Garsu Pasaulis envisioned how to ensure that Garsu Pasaulis' software and hardware for e-passports integrates with the local Kyrgyz e-government systems. Based on Garsu Pasaulis' long experience with the excise stamps in the Kyrgyz Republic and installation of e-passport systems around the world, Garsu Pasaulis was confident that Garsu Pasaulis will successfully execute the e-passports contract if Garsu Pasaulis can win it with the best price"*[114]

115. On 19 November 2018, Garsu Pasaulis submitted its offer, competing against the other 4 tender participants[115].

116. The other 4 participants were 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")[116].

---

[112] Lukosevicius Witness Statement, para 33, **CWS-1-1.**
[113] Damages Report, **CER-3-6**.
[114] Lukosevicius Witness Statement, para 35, **CWS-1-1.**
[115] 2018-11-19 Garsu Pasaulis bid submission in 2018 Tender, **C-28**.
[116] Information about tender No. 181023129327015 (2018 Tender), **C-5**.

117. When the submitted bids were announced (letters opened), the offers became public.

118. Based on offer prices, the list of biding offers was the following[117]:

    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).

119. Garsu Pasaulis’ price offer was quite consistent with the others. However, once again, and similarly as in the 2012 Tender, Garsu Pasaulis was again surprised with such a low dumping price offer of German company „Mühlbauer ID Services GMBH“ (“Muhlbauer”).

120. At that time, the winner was not yet announced, because the Tender Commission has started the standard procedure of examining the submitted bids in accordance with the 2018 Tender regulations. It had to review all the required documentation submitted (legal qualifications, samples, proofs of experience in similar projects, etc.).

121. On 1 February 2019, the Tender Commission announced that offers submitted by participants Muhlbauer, „Veridos GmbH“ and the National Bank of Kazakhstan were not complete and not satisfactory, as their documents and bid documentation did not satisfy the 2018 Tender regulations[118]. As such, the bids submitted by Muhlbauer, „Veridos GmbH“ and the National Bank of Kazakhstan were rejected, leaving only two fully-compliant bids of Garsu Pasaulis and „IDEMIA France“[119].

122. Since Garsu Pasaulis’ offer was lower than that of „IDEMIA France“, Garsu Pasaulis was very pleased to know that Garsu Pasaulis has won the 2018 Tender. On the same day, on 1 February 2019, Garsu Pasaulis was pronounced the winner of the 2018 Tender[120].

[117] Ibid.
[118] Ibid.
[119] Ibid.
[120] Ibid.

123. As explained by the Kyrgyz law Professor Natalia Alenkina ("Prof. Alenkina"):

> *"After the public announcement of the results of the competitive bidding, the bidder of the competitive bidding, whose application was recognised as the winner, acquires* ***the right to sell passport forms,*** *preceded by the conclusion of a public procurement contract. This follows from the definition of the tender as one of the methods of public procurement that serve to grant property rights to the winner of the tender, including the right to conclude a contract"*[121]

124. However, as noted by Lukosevicius – "*that was the moment when all negative media and accusations started to fly towards Garsu Pasaulis in the Kyrgyz Republic.*"[122]

125. First, Muhlbauer filed a complaint against its removal from the 2018 Tender due to failure to meet the necessary qualifications[123].

126. A few days later, „IDEMIA France" has also filed a complaint against Garsu Pasaulis to the Tender Commission, alleging that Garsu Pasaulis was an allegedly unreliable provider[124]. „IDEMIA France" has relied on some old articles about Garsu Pasaulis' Belgian shareholder Semlex and its past contracts with the Democratic Republic of the Congo (DRC)[125].

127. At the same time, the negative articles started to pour into local and international media related to Garsu Pasaulis' Belgian shareholder Semlex[126].

128. As explained by Lukosevicius:

> *"We were of course very surprised and shocked, because our Belgian shareholder Semlex had absolutely nothing to do with the 2018 Tender and the Kyrgyz Republic in general. Semlex was and still is a passive shareholder and is not involved at all in Garsu Pasaulis' activities or affairs."*[127]

[121] Alenkina Report, para 80, **CER-2-1**.
[122] Lukosevicius Witness Statement, para 43, **CWS-1-1.**
[123] Muhlbauer complaint of 5 February 2019, **CWS Lukosevicius 1-20**.
[124] IDEMIA complaint of 7 February 2019, **CWS Lukosevicius 1-19**.
[125] Ibid.
[126] Negative articles about Garsu Pasaulis and Semlex, **CWS Lukosevicius 1-21**.
[127] Lukosevicius Witness Statement, para 45, **CWS-1-1.**

129. This was further confirmed by Mieliauskas:

> *"Definitely, Semlex never participated in any contracts or tenders involving the Kyrgyz Republic. In fact, start of Garsu Pasaulis' activities in the Kyrgyz Republic was before change of shareholding in Garsu Pasaulis"*[128]

130. Furthermore, as explained by Mieliauskas, Garsu Pasaulis' shareholder Semlex, years before, was drawn into a smear campaign initiated by Semlex's competitors. However, and in fact, there were no criminal records on Semlex or its owner Mr. Albert Karaziwan whatsoever[129].

131. Garsu Pasaulis itself has never received any notices or requests from the Tender Commission or the GRS. However, while seeing the negative media and flying accusations towards Garsu Pasaulis[130], Garsu Pasaulis decided to fly directly to the Kyrgyz Republic and do an open press conference, invite all the local journalists and answer any questions they have[131].

132. As explained by Lukosevicius:

> *"Me personally and Garsu Pasaulis' team travelled to the Kyrgyz Republic in February of 2019. On 14 February 2019, we made an open press conference, explained Garsu Pasaulis' activities, shared our experience in similar projects, answered any questions to the media and rebutted all the ungrounded allegations*[132]*. The Kyrgyz media seemed satisfied and we returned back to Lithuania."*[133]

133. On 19 and 21 February 2019, the Tender Commission has examined and rejected both complaints of Muhlbauer[134] and „IDEMIA France" as ungrounded[135].

---

[128] Mieliauskas Witness Statement, para 19, **CWS-2-1.**
[129] Mieliauskas Witness Statement, para 21, **CWS-2-1.**
[130] Negative articles about Garsu Pasaulis and Semlex, **CWS Lukosevicius 1-21**.
[131] Lukosevicius Witness Statement, para 46, **CWS-1-1**; Mieliauskas Witness Statement, para 50, **CWS-2-1**; Information about the Kyrgyz press conference of 14 February 2019, **CWS Lukosevicius 1-22**.
[132] Information about the Kyrgyz press conference of 14 February 2019, **CWS Lukosevicius 1-22**.
[133] Lukosevicius Witness Statement, para 47, **CWS-1-1.**
[134] Protocol No. 149153656 of the Tender Commission of 05-02-2019 on Mühlbauer ID Services GmbH complaint, **CWS Lukosevicius 1-24**.
[135] Protocol No. 148803110 of the Tender Commission of 08-02-2019 on IDEMIA complaint, **CWS Lukosevicius 1-23**.

134. After Garsu Pasaulis' press conference in the Kyrgyz Republic and rejection of complaints by other bidders, the GRS, on 21 February 2019, has again invited Garsu Pasaulis to sign the e-passports contract[136].

135. According to the 2018 Tender regulations and the Kyrgyz law, no further negotiations were envisioned, and the parties just needed to sign the e-passports contract and start executing it immediately[137].

136. As explained by Prof. Alenkina:

> *"The public procurement contract with the winner of the tender is concluded in accordance with the terms of the tender application[138]. In other words, the terms of the competitive bidding after determining the winner and awarding the contract must remain unchanged.*
>
> *The public procurement contract is actually a set of conditions proposed by the purchasing organisation and which are part of the Tender documentation, and the conditions contained in the application of the bidder the winner of the tender. By submitting a tender application in accordance with the terms of the tender, the bidder thereby agrees to the terms of the draft contract[139], their change is not allowed."[140]*

137. The latter is confirmed by the fact that after announcement of the results of the 2018 Tender, Garsu Pasaulis and the GRS were only concerned with the technical details of the e-passports contract, such as communication addresses, names of responsible personnel, and all clerical details[141].

138. While the GRS urged Garsu Pasaulis to fly to the Kyrgyz Republic to sign the e-passports contract in person[142] and while Garsu Pasaulis planned their travel arrangements to travel to the Kyrgyz Republic to

---

[136] 2019-02-21 Invitation to sign the e-passports contract, **C-29**.
[137] "Under the conditions laid down, the generally accepted personal passport of a citizen of the Kyrgyz Republic was to be delivered in eight batches (seven batches of 200,000 each and a final batch of 100,000) every six months. Such a plan would mean that Type 1 passports were planned to be produced during 2019-2022." Damages Report, p. 5, **CER-3-1**.
[138] Article 32(3) of the Law of the Kyrgyz Republic "On Public Procurement", Alenkina Report, **CER-2-Exh.-4**.
[139] General Terms of the Agreement, Appendix No. 3 to the 2018 Tender documentation, Alenkina Report, **CER-2-Exh.-2**.
[140] Alenkina Report, para 41, **CER-2-1**.
[141] 2019 February Communication with the GRS, **C-30**.
[142] 2019-02-21 Invitation to sign the e-passports contract, **C-29**.

sign the e-passports contract, within days, Garsu Pasaulis learned from the local Kyrgyz press that the notorious GKNB had disseminated false information that Garsu Pasaulis was somehow involved in bribery of the members of the Tender Commission[143].

139. Garsu Pasaulis knew about the GKNB involvement only from the local Kyrgyz media[144]. In fact, to the present day, Garsu Pasaulis has not received any official notices or inquiries from the Kyrgyz Republic or the GKNB regarding any criminal investigation.

140. These allegations disseminated in the media were, of course, shocking and unbelievable. As explained by Mieliauskas:

> *"We were of course shocked when we learned about these accusations. I have never met any members of the Tender Commission in my life and did not even know who those members were."*[145] *(…) "This was extremely strange for us. Garsu Pasaulis did not have any possibility to rebut such accusations, because Garsu Pasaulis did not receive any formal complaints or even requests for information or explanations."*[146]

141. Lukosevicius also recalled that "*it was a shock and disbelief that this sequence of events turned so rapidly and unexpectedly against Garsu Pasaulis.*"[147]

142. Garsu Pasaulis then also received a tip from the Lithuanian Ministry of Foreign Affairs not to travel to the Kyrgyz Republic to sign the e-passports contract because there was a high risk that Garsu Pasaulis' representatives could be arrested and never come back from the Kyrgyz Republic[148].

143. There was no further communication from the Tender Commission or the GRS. Considering the circumstances, Garsu Pasaulis then had no choice but to cancel their plans to travel to the Kyrgyz Republic to sign

[143] Media article of 2 April 2019, **C-38**.
[144] Ibid.
[145] Mieliauskas Witness Statement, para 48, **CWS-2-1.**
[146] Mieliauskas Witness Statement, para 49, **CWS-2-1.**
[147] Lukosevicius Witness Statement, para 51, **CWS-1-1.**
[148] Mieliauskas Witness Statement, para 53, **CWS-2-1**; Lukosevicius Witness Statement, para 51, **CWS-1-1**; Media article of 10 April 2019, **C-32**.

the e-passports contract and wait and see how the situation in the Kyrgyz Republic develops.

v. The GKNB investigation, raids, and threats

144. Garsu Pasaulis learned from the local press that, once the complaints of other participants in the 2018 Tender were rejected, the Interdepartmental Commission for the Consideration of Complaints and Protests sent a request to the Department of Public Procurement under the Ministry of Finance with a request to apply to the GKNB and provide a legal assessment of the facts set forth in the participant's complaints in order to verify the beneficial owners of Garsu Pasaulis in accordance with the Law on Combating the Financing of Terrorist Activities and legalization (laundering) of criminal proceeds[149].

145. Meanwhile, investigations, raids, and arrests by the GKNB started in the Kyrgyz Republic.

146. Garsu Pasaulis learned from the local Kyrgyz press that on 22 February 2019, the General Prosecutor's office of the Kyrgyz Republic had initiated a criminal pre-trial investigation on the allegation of corruption. The investigation was conducted by the GKNB[150].

147. Although Garsu Pasaulis, to the present day, has not received any official notices or inquiries from the Kyrgyz Republic or the GKNB regarding any criminal investigation, in the Kyrgyz media, public reports had emerged that Garsu Pasaulis was publicly accused of maintaining allegedly inappropriate connections with the members of the Tender Commission and bribing them by paying for their trips abroad some years ago[151].

148. Later, local media articles clarified that the "bribe" allegation actually pertained to the payment made in 2016 by Garsu Pasaulis (of EUR 334)

[149] Media article of 17 April 2019, **C-33**.
[150] Media article of 2 April 2019, **C-34**.
[151] Negative articles about Garsu Pasaulis and Semlex, **CWS Lukosevicius 1-21**.

for travel expenses of a private person Mr. Almaz Bekenov, who was, at the time, a potential IT systems partner for Garsu Pasaulis and who is now a representative of Muhlbauer in the Kyrgyz Republic – one of the main competitors of Garsu Pasaulis[152].

149. As it was already mentioned, in 2016, Garsu Pasaulis was actively involved in discussions and training related to Kyrgyz national ID cards' project, implementation and maintenance of the related IT systems[153]. Therefore, this payment for travel of private consultant related to the presentation of Garsu Pasaulis' experience in ID cards projects and had absolutely nothing to do with e-passports and the 2018 Tender.

150. In fact, payment for travel expenses, even for public servants (which was not the case with this payment), including those from the Kyrgyz Republic, at some point was a totally normal practice in the security printing industry in order to facilitate and promote one's products in international conferences to potential clients. This was practiced by many companies working in this industry[154].

151. However, based on unknown grounds, in the course of the 2018 Tender investigation, officers of the GKNB have arrested and detained employees of the Tender Commission, raided their homes and offices[155].

152. At that time, it was not clear what sort of accusations were brought by the GKNB against the members of the Tender Commission. It was simply announced that members of the Tender Commission were investigated for alleged corruption and violation of requirements of the Kyrgyz law[156].

153. The GKNB has also raided homes and offices of Garsu Pasaulis' representatives and affiliates in the Kyrgyz Republic.

154. The GKNB specifically targeted Garsu Pasaulis' representatives in the Kyrgyz Republic – Mr. Marat Sagyndykov ("Sagyndykov"), who worked

[152] Media article of 19 April 2019, **C-35**; 2016-06-29 Payment for travel of Almaz Bekenov, **C-36**.
[153] See paras 84-87 of this Statement of Claim.
[154] Media article of 31 October 2014, **C-37**.
[155] Media article of 2 April 2019, **C-38**.
[156] Media article of 2 April 2019, **C-34**.

as a local Garsu Pasaulis' consultant in the Kyrgyz Republic, and Mr. Uran Tynaev, who was the CEO and minority shareholder of Garsu Pasaulis local Kyrgyz' company Garsu Pasaulis LLC[157].

155. As explained by Sagyndykov:

> *"a full-scale attack on Garsų Pasaulis began in the local media with false information about alleged fraud and corruption on the part of the company. There were many outright lies, ranging from the fact that the company corrupted 15 African countries to the fact that the founder of Garsų Pasaulis, Albert Karaziwan, is an Armenian of Syrian origin, and how can a Syrian from Aleppo produce Kyrgyz passports?"*[158]

156. Sagyndykov explained that, in order to rebut all the flying accusations about Garsu Pasaulis, he himself asked for an audience at the GKNB at the end of February 2020. However, instead of clarifying the position of Garsu Pasaulis, officers of the GKNB interrogated Sagyndykov off-the-record[159]:

> *"The interrogation left no doubt that I was being interrogated as a suspect, despite the fact that officially no suspicions were presented to me. Eldar* [GKNB] *made it clear that he was confident in the guilt of Garsų Pasaulis. Eldar* [GKNB] *was not particularly interested in my detailed answers and explanations"*[160]

157. On 4 March 2020, Sagyndykov and Mr. Uran Tynaev were summoned for interrogation for the second time and this time officially as witnesses[161].

158. Sagyndykov explained that during the interrogation, officers of the GKNB have taken their phones and deleted important evidentiary information about the threats that Sagyndykov and Garsu Pasaulis received from Mr. Azamat Bekenov (see para 148). As explained by

[157] Certificates regarding establishment of a subsidiary of the Garsu Pasaulis in Kyrgyz Republic, **CWS Lukosevicius 1-11**.
[158] Sagyndykov Witness Statement, para 14, **CWS-3-1.**
[159] Sagyndykov Witness Statement, para 18-19, **CWS-3-1.**
[160] Sagyndykov Witness Statement, para 20, **CWS-3-1.**
[161] Sagyndykov Witness Statement, para 26, **CWS-3-1.**

Sagyndykov, Mr. Azamat Bekenov offered his consulting services to Garsu Pasaulis, but he was rejected[162].

159. Although Sagyndykov or Mr. Uran Tynaev have never been recognized as suspects in any crimes alleged by the GKNB and only had the status of witnesses, on 1 April 2019, the GKNB conducted house searches of both Sagyndykov and Mr. Uran Tynaev [163] . As explained by Sagyndykov:

> *"On 1 April 2019, Monday, at 7.00 a.m., the door bell to my house rang (…) four people came to my house, showing the search warrant and the identity cards of the GKNB officers. (…) My wife and children were terrified. I was terrified, too. I just did not understand what was happening. In the process, I learned that one of those who came was an investigator, the other three were operations officers. They were all athletic, with unidentified items in their bags over their shoulders. One of them was filming everything with a video camera from the very beginning. The search began in the hallway and gradually moved on to the basement and the attic. The whole house was overturned, from tea bags to turning socks inside out, lining of luggage bags, every pocket of clothes. Every object and every crevice in the house, including the attic, were examined. The search ended at 2.00 p.m. All this time, I was forbidden to leave a single step from the visitors. As a result, 4 laptops, my 2 mobile phones, 7 flash cards, 2 external drives, all my personal documents, including receipts, documents for the house and other property, business cards were collected on the table in the hall. Minutes were drawn up, all things were sealed in several packages and I was asked to go with them."*[164]

160. At the offices of the GKNB, Sagyndykov and Mr. Uran Tynaev were threatened and pressured by the officers of the GKNB to testify against Garsu Pasaulis and to admit the false allegations of corruption put forward by the GKNB:

> *"He [GKNB] that, despite the fact that Vytas was in Lithuania, they would extradite him through Interpol and imprison him, arrest the foreign accounts of Garsų Pasaulis, etc. He said that several officials were already being convoyed to the detention center of the State Committee for*

[162] Sagyndykov Witness Statement, para 22-23, **CWS-3-1.**
[163] Sagyndykov Witness Statement, para 29, **CWS-3-1.**
[164] Sagyndykov Witness Statement, para 29, **CWS-3-1.**

> *National Security, and that we would go after them, said that they all know that we only got involved in these matters at the end, and that we were unlucky to have relations with Garsų Pasaulis. We were told that we could help ourselves if we testify against Garsų Pasaulis. If we refuse, then we will sit for a couple of months "in the basement" and then we will change our minds. We said once again that there had been no bribes, we had not participated in any conversations about bribes and had not heard anything about it"*[165]

161. Fortunately, Sagyndykov and Mr. Uran Tynaev found the strength to resist the threats and pressure put forward by the officers of the GKNB and did not admit any false allegations drawn up against Garsu Pasaulis.

162. However, it is known to Garsu Pasaulis that, to this date, Sagyndykov and Mr. Uran Tynaev receive threats to be detained or imprisoned by the GKNB for any witness testimony against the Kyrgyz Republic or the GKNB in this arbitration. Garsu Pasaulis can only hope that the Kyrgyz Republic will not initiate another witch-hunt of Garsu Pasaulis' witnesses and representatives after the submission of this Statement of Claim. Garsu Pasaulis reserves all available rights to protect its witnesses.

163. Notwithstanding the above, the GKNB continued the smear campaign against Garsu Pasaulis. Local Kyrgyz media articles and, later, international media were filled with ungrounded accusations against Garsu Pasaulis, alleging in a totally vague manner, Garsu Pasaulis' inappropriate involvement in the 2018 Tender[166].

164. As explained by Lukosevicius: "*It did not make any sense for us. Garsu Pasaulis had no connections or contacts with the members of the Tender Commission whatsoever.*"[167]

165. On 24 April 2019, Mr. Idris Kadyrkulov – the Head of the GKNB, gave a speech at the Kyrgyz Parliament public hearing about the 2018

[165] Sagyndykov Witness Statement, para 30, **CWS-3-1.**
[166] Negative articles about Garsu Pasaulis and Semlex, **CWS Lukosevicius 1-21**.
[167] Lukosevicius Witness Statement, para 53, **CWS-1-1.**

Tender scandal. In his 11 minutes of speech, Idris Kadyrkulov called Garsu Pasaulis "*not a good company*", but failed to provide any valid reasons for the GKNB's investigation. Mr. Idris Kadyrkulov just voiced vague concerns of Kyrgyz' passports being used on the black market, which had nothing to do with Garsu Pasaulis or the 2018 Tender[168].

166. Notwithstanding the latter, to this date, Garsu Pasaulis did not receive any further information regarding the GKNB's investigation or any formal allegations made towards Garsu Pasaulis.

167. It later emerged in the local Kyrgyz press that the heads of the Infocom State Enterprise, members of the Tender Commission and the GRS were detained and placed in the detention center of the GKNB[169].

168. Within the framework of the initiated criminal case, Mr. Talant Abdullayev – the Head of Infocom State Enterprise, Mr. Daniyar Bakchiev – the State Secretary, and Mr. Ruslanbek Sarybaev – a Deputy Chairman of the GRS, were detained[170].

169. The State Secretary, Mr. Daniyar Bakchiev, supervised the state procurement department of the GRS, the deputy chairman of the GRS Mr. Ruslanbek Sarybaev was the Chairman of the Tender Commission. Mr. Talant Abdullaev was not a member of the Tender Commission and did not perform any actions within the framework of the activity of the Tender Commission[171].

170. Later, it was publicly announced that all three of them were found guilty but only had to pay fines amounting to less than 3'000 Eur[172]. The detained officials were charged with corruption and violation of requirements of the law during the 2018 Tender. Public reports indicated that the investigation revealed "*signs of corruption*" in arranging and conducting the 2018 Tender[173].

[168] 24 April 2019 Idris Kadyrkulov parliament speech (audio and transcript), **C-39**.
[169] Media article of 16 April 2019, **C-40**.
[170] Ibid.
[171] Media article of 17 April 2019, **C-41**.
[172] Media article of 8 January 2020, **C-42**.
[173] Ibid.

171. The Head of the GRS – Alina Shaikova, was dismissed[174], put on a wanted list[175] and later disappeared[176].

172. Again, it is still not clear what "*signs of corruption*" were identified. There were no public reports on the exact facts or grounds that the verdict was based on. As already mentioned, Garsu Pasaulis or any employees or representatives of Garsu Pasaulis were never indicted with any crimes alleged by the GKNB or the media.

173. When Garsu Pasaulis decided to defend its rights in international arbitration pursuant to the Agreement, Garsu Pasaulis, on 30 April 2019, sent a Notice of Intent to the Kyrgyz Republic. There were further communications between the Kyrgyz Republic and Garsu Pasaulis regarding the negotiations and peaceful resolution of the present dispute.

174. However, instead of engaging in *bona fide* negotiations, the Kyrgyz Republic respondent with yet another provocation against Garsu Pasaulis.

175. On 6 October 2019, the GKNB published a YouTube video showing the director of the Infocom State enterprise, Mr. Talant Abdullaev, where he stated that the former chairwoman of the GRS – Alina Shaikova, allegedly gave him USD 20,000 for lobbying the interests of Garsu Pasaulis[177].

176. The video did not explain any further details of who allegedly gave him bribes or when and why.

177. As explained by Lukosevicius:

> *"Garsu Pasaulis regarded such a video and public release of it as a poorly made-up provocation by the Kyrgyz State Committee for National Security Prosecution. We believe it was a response to our Notice of Intent. If fact, Garsu Pasaulis has never (and to date) received any notices or requests for information or data from the Kyrgyz authorities*

[174] Media article of 2 April 2019, **C-43**.
[175] Media article of 19 April 2019, **C-44**.
[176] Media article of 6 August 2019, **C-45**.
[177] Media article of 7 October 2019, **C-46**.

> *regarding events described in the YouTube "confession"."*[178]

178. Surely, the YouTube video and the negative media articles that followed once again tarnished Garsu Pasaulis' international reputation and caused more negative and false media articles around the globe against Garsu Pasaulis[179].

179. This release of the YouTube video was the last episode of the GKNB's strategy move against Garsu Pasaulis.

vi. The flawed „cancellation" of the 2018 Tender

180. In parallel, and within the context of the GKNB's investigation of the 2018 Tender, Garsu Pasaulis' victory in the 2018 Tender and Garsu Pasaulis' valuable right to execute the e-passports contract were taken away without any valid reason or legal basis.

181. As already mentioned, on 1 February 2019, Garsu Pasaulis was pronounced the winner of the 2018 Tender[180] and, on 19 and 21 February 2019, the Tender Commission has examined and rejected both complaints of Muhlbauer[181] and „IDEMIA France" as ungrounded[182] and, on 21 February 2019, GRS has again invited Garsu Pasaulis to sign the e-passports contract[183].

182. As explained by the Kyrgyz law expert Prof. Alenkina:

> *"After the public announcement of the results of the competitive bidding, the bidder of the competitive bidding, whose application was recognised as the winner, acquires* ***the right to sell passport forms,*** *preceded by the conclusion of a public procurement contract."*[184]

[178] Lukosevicius Witness Statement, para 65, **CWS-1-1.**
[179] Negative articles about Garsu Pasaulis and Semlex, **CWS Lukosevicius 1-21**.
[180] Information about tender No. 181023129327015 (2018 Tender), **C-5**.
[181] Protocol No. 149153656 of the Tender Commission of 05-02-2019 on Mühlbauer ID Services GmbH complaint, **CWS Lukosevicius 1-24.**
[182] Protocol No. 148803110 of the Tender Commission of 08-02-2019 on IDEMIA complaint, **CWS Lukosevicius 1-23**.
[183] 2019-02-21 Invitation to sign the e-passports contract, **C-29**.
[184] Alenkina Report, para 80, **CER-2-1**.

> *"the Protocol of Procurement procedures [185], which announced the winner of the bidding of Garsu Pasaulis JSC, certifies its exclusive right to conclude a contract on the terms determined in the bidding process*"[186]

183. Although on 20 February 2019 it was announced in the media that the signing of the e-passports contract with Garsu Pasaulis was "postponed"[187] – there was never any decision made by the Tender Commission or the GRS to "suspend" or "postpone" the signing of the e-passports contract with Garsu Pasaulis[188]. Garsu Pasaulis was also never informed of any decision to "suspend" or "postpone" the signing of the e-passports contract.

184. As explained by Prof. Alenkina:

> *"Despite the fact that Mühlbauer ID Services GmbH filed a complaint against the decision of the Tender Commission on 5 February 2019, there was no decision of the IIC to suspend the procedures.*
>
> *Moreover, by virtue of Article 30(1)(16) of the Law on Public Procurement, information about the suspension and resumption of procedures should have been reflected in the protocol of procurement procedures. In this case, there is no such mark in the protocol.*
>
> *Thus, there is no evidence that tender No. 181023129327015 was suspended. Accordingly, the procuring entity had to sign a contract with the winner of the tender*."[189]

185. In a press release of 17 April 2020, the GRS claimed that Garsu Pasaulis' tender application (bid) had expired on 2 April 2019 with no contract being signed and that, as a result, the 2018 Tender had not been concluded[190]. It was also said that an "*independent audit*" and examination by a review commission found that no violations of tender procedures had taken place[191].

---

[185] Alenkina Report, **CER-2-Exh.-2**.
[186] Alenkina Report, para 83, **CER-2-1**.
[187] Media article of 20 February 2019, **C-47**.
[188] Media article of 2 April 2019, **C-31**.
[189] Alenkina Report, para 98, **CER-2-1**.
[190] GRS Press release of 17 April 2020, **C-48**.
[191] Ibid.

186. However, as explained by Prof. Alenkina, in accordance with the 2018 Tender regulations and the applicable Kyrgyz law, Garsu Pasaulis' bid was valid for 90 days. Furthermore, because of the complaints submitted by other bidders, the validity of Garsu Pasaulis' bid should have been extended in accordance with the time frame necessary to examine such complaints, and the Tender Commission should have issued a decision to suspend the validity of the bids submitted. No such decision was ever adopted[192].

187. Therefore, in accordance with the 2018 Tender regulations and the applicable Kyrgyz law, there was no legal basis or grounds to suspend or postpone the signing of the e-passports contract with Garsu Pasaulis[193].

188. This is further confirmed by the fact that, further to a complaint filed by Muhlbauer to the local Kyrgyz court against the decision of the Tender Commission regarding the rejection of its complaint, on 9th April 2019, the Bishkek inter-district court had applied interim measures to suspend conclusion of the e-passports contract with Garsu Pasaulis[194]. The interim measures were applied notwithstanding the fact that GRS claimed that Garsu Pasaulis' bid has allegedly "expired".

189. As noted by Prof. Alenkina, "*the procuring entity itself did not treat the tender application of Garsu Pasaulis JSC as an expired application.*"[195]

190. Prof. Alenkina further noted:

> *"Since Garsu Pasaulis JSC, at the time when the application for participation in the competitive bidding remained in force, was declared its winner, it is incorrect to talk about the expiration of its application period. The application of Garsu Pasaulis JSC was accepted by the purchasing organisation, thereby giving rise to its right to conclude a supply contract."*[196]

[192] Alenkina Report, para 108-112, **CER-2-1**.
[193] Alenkina Report, para 112, **CER-2-1**.
[194] 2019-04-17 Media article, **C-33**.
[195] Alenkina Report, para 110, **CER-2-1**.
[196] Alenkina Report, para 112, **CER-2-1**.

191. Although, on 17 April 2019, it was publicly announced by GRS that the 2018 Tender procedure was terminated due to the fact that the bid of Garsu Pasaulis has allegedly "expired"[197], this totally contradicted the factual and legal situation that has developed in the 2018 Tender.

192. Garsu Pasaulis' bid did not and could not "expire". The Kyrgyz law did not provide for a possibility to declare a bid "expired" when Garsu Pasaulis' bid was already accepted as the winning bid in the 2018 Tender, awarding Garsu Pasaulis a valuable right to execute the e-passports contract.

193. As explained by the Kyrgyz law expert Prof. Alenkina, the alleged "expiration" of Garsu Pasaulis winning bid was not in accordance with the applicable law[198].

194. Further to the illegal attempt to pronounce Garsu Pasaulis' tender bid "expired", the Kyrgyz Republic's attempt to declare the 2018 Tender as 'terminated' was also severely flawed under the applicable Kyrgyz law.

195. As already explained above, after inviting Garsu Pasaulis to sign the e-passports contract on 21 February 2019[199], Garsu Pasaulis did not receive any further communication or notices or any information from the Tender Commission or the GRS regarding the fate of the 2018 Tender.

196. Garsu Pasaulis only saw the flawed press release of the GRS by which it had declared Garsu Pasaulis' bid as "expired" [200]. No further information was announced or modified on the Kyrgyz' e-procurement website.

197. Only a year after the 2018 Tender, on 4 February 2020, the public e-procurement website was updated with information that the 2018 Tender has "expired"[201]. This, of course, did not make any sense in accordance with the applicable Kyrgyz law.

[197] GRS Press release of 17 April 2020, **C-48**.
[198] Alenkina Report, para 112, **CER-2-1**.
[199] 2019-02-21 Invitation to sign the e-passports contract, **C-29**.
[200] GRS Press release of 17 April 2020, **C-48**.
[201] Information from Kyrgyz e-procurement portal, **C-49**.

198. Garsu Pasaulis only later learned that, by order of the GRS No. 22 "*On the cancellation of competitive bidding*" dated 4 February 2020, the 2018 Tender was declared invalid[202].

199. The 4 February 2020 Order of the GRS provides the following:

> *"On the Cancellation of the Tender*
>
> *In accordance with Art. 31(2)(3) of the Law of the Kyrgyz Republic "On Public Procurement", as well as on the basis of the Regulation on the State Registration Service under the Government of the Kyrgyz Republic, approved by the Resolution of the Government of the Kyrgyz Republic No 128 of 20 February 2012, I hereby order:*
>
> *1. To recognize the tender announced by the State Registration Service under the Government of the Kyrgyz Republic 181023129327015 of 23 February 2018 for the procurement of "New-generation blank passports of citizens of the Kyrgyz Republic" to be invalid*
>
> *2. The Department of Public Procurement of the State Registration Service under the Government of the Kyrgyz Republic to take all necessary measures in accordance with the legislation of the Kyrgyz Republic in pursuance of Art. 1 of this order (…)"[203].*

200. However, as noted by Prof. Alenkina:

> *"in this order, there is a discrepancy between the name of the act indicating the subject matter of the regulation of the order and its contents. The name indicates the cancellation of competitive bidding, and Paragraph 1 of the order indicates its recognition as invalid. Meanwhile, by virtue of Article 31 of the Law on Public Procurement, these are two independent circumstances that have different nature, grounds for invocation, and consequences"*[204]

201. In accordance with the Kyrgyz law, the 'cancellation' of the tender is possible where violations occur during the procurement process or where the tender becomes no longer relevant (i.e., the goods or services are no longer required). On the other hand, tenders are recognised as 'failed' when it is impossible to achieve the goal of a

[202] Order of the GRS "On the cancellation of competitive bidding" dated 4 February 2020, Alenkina Report, **CER-2-Exh.-3**.
[203] Ibid.
[204] Alenkina Report, para 101, **CER-2-1**.

tender and to ensure competitiveness during the tender process (e.g., when only one bidder takes part in the procurement)[205].

202. Therefore, as noted by Prof. Alenkina, on 4 February 2020, the GRS declared the 2018 Tender 'invalid' due to the alleged 'expiration' of Garsu Pasaulis' bid, despite the fact that the winner of the 2018 Tender was determined a year ago and, accordingly, the 2018 Tender, as a stage of public procurement, was completed[206].

203. It is important to once again highlight that the 2018 Tender winner was already announced, and the only way forward was to sign the e-passports contract. Garsu Pasaulis' bid could no longer 'expire' because the bidding was long over.

204. Therefore, according to Prof. Alenkina – "*the tender was cancelled / declared invalid on the grounds that did not meet the requirements of the Law*"[207]

205. As already mentioned, Garsu Pasaulis, as the winner of the 2018 Tender, and having complied with all the 2018 Tender regulations and acted in good faith, had no reason to believe that the Tender Commission or the GRS would simply declare Garsu Pasaulis' winning bid as 'expired' or 'cancel' the 2018 Tender without any valid factual or legal basis and without any explanations.

206. As further noted by Prof. Alenkina – "*the winner of the tender, as well as other bidders, were in a state of uncertainty for a year, due to the lack of a clear position of the procuring entity regarding the fate of the tender*".[208]

207. As it is now clear, due to the pressure from the GKNB or the Kyrgyz Government, the Tender Commission and the GRS have searched but failed to find a valid reason and a valid legal basis to expel Garsu Pasaulis from the 2018 Tender and to take away Garsu Pasaulis' valuable right to execute the e-passports contract. The Kyrgyz Republic

[205] Alenkina Report, para 102, **CER-2-1**.
[206] Alenkina Report, para 105, **CER-2-1**.
[207] Alenkina Report, para 107, **CER-2-1**.
[208] Alenkina Report, para 106, **CER-2-1**.

knew *WHAT* it wanted to do but did not know *HOW* to do it. So it chose to put together some sort of flawed reasoning that could at least 'formally' justify the expropriation of the e-passports contract.

208. No valid and legal basis could be found. That is why the basis and grounds of declaring Garsu Pasaulis' winning bid as 'expired' and the 'cancellation' of the 2018 Tender were legally and factually flawed.

209. For the purpose of expropriating Garsu Pasaulis' rights, the Kyrgyz Republic even chose to ignore and breach its own laws and regulations.

vii. Legal case before the administrative Courts of the Kyrgyz Republic

210. In parallel with the GKNB investigation, one of the rejected bidders in the 2018 Tender – Muhlbauer – has appealed the decision of the Tender Commission of 1 February 2019, by which the bid of Muhlbauer was rejected (due to the non-compliance with the 2018 Tender regulations and criteria established thereof). Muhlbauer's bid was rejected by the Tender Commission based on the following flaws[209]:

- Lack of proof of bidders experience;
- Lack of information about the types of equipment that will be used for the production of forms and information about subcontractors;
- Failure to provide a list of purchased goods, a delivery schedule (Form No. 1);
- Failure to provide a price table (Form No. 5);
- Failure to provide a confirmation letter from the manufacturer (Form No. 11).

211. As explained by Prof. Alenkina, a right to judicial appeal against the decisions of the purchasing organisation and an independent

[209] Alenkina Report, para 126, **CER-2-1**.

Interdepartmental Commission is provided for in Article 50 of the Law on Public Procurement[210].

212. Parties to the administrative case proceedings were Muhlbauer, GRS, and the Department of Public Procurement under the Ministry of Finance of the Kyrgyz Republic. Garsu Pasaulis was also involved in the case as a third party[211].

213. The administrative case was examined despite the fact that, on 17 April 2019, it was publicly announced by the GRS that the 2018 Tender procedure was already terminated[212].

214. On 29 May 2019, the Bishkek Inter-District Court (first instance) has issued a ruling by which it has satisfied the appeal of Muhlbauer and invalidated the decision of the Tender Commission dated 1 February 2019 and the decision of the Tender Commission on consideration of complaints and protests dated 21 February 2019[213]. Noteworthy, the court of the first instance did not justify the Kyrgyz Republic's right to cancel the 2018 Tender.

215. Garsu Pasaulis appealed this ruling of the Bishkek Inter-District Court. On 10 September 2019, the Bishkek City Court (second instance) upheld Garsu Pasaulis' complaint against the decision of the Inter-District Court[214].

216. The Bishkek City Court overturned the decision of the court of the first instance[215]. The Court held the non-compliance of Muhlbauer's tender application with the requirements of the 2018 Tender was significant: the qualification data of the supplier, contrary to the requirements of Article 27 of the Law on Public Procurement, remained unconfirmed. The argument that Muhlbauer offered the lowest price among other bidders was not relevant since, in addition to the price, other criteria for participation (schedule and reliability of delivery) are established in the tender, therefore, by virtue of Part 9 of Article 29 of the Law on Public

[210] Alenkina Report, para 128, **CER-2-1**.
[211] Alenkina Report, para 129, **CER-2-1**.
[212] GRS Press release of 17 April 2020, **C-48**.
[213] 2019-05-29 Bishkek Inter-District Court ruling, **C-50**.
[214] 2019-09-10 Bishkek City Court ruling, **C-51**.
[215] Ibid.

Procurement, before proceeding to price comparison, the tender application had to meet all other requirements[216].

217. Notwithstanding this Court victory, there was no material result for Garsu Pasaulis since the 2018 Tender was already "terminated" a long time ago, i.e., almost 6 months after GRS announced that the 2018 Tender is cancelled / terminated[217].

218. Just after the ruling of the Bishkek City Court (second instance) was announced, on 6 October 2019, the GKNB published the infamous YouTube video of the so-called "confession" of Talant Abdullaev[218]. Interestingly, the GKNB then responded with a statement that it had nothing to do with this video[219].

219. Garsu Pasaulis' local representatives later received "*off 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 adopt a decision unfavorable to its competitor Muhlbauer.

220. As explained by Mieliauskas:

> *"There were also some strange requests that Garsu Pasaulis received through Garsu Pasaulis' local agents for bribes to win the Kyrgyz court case. However, Garsu Pasaulis regarded such requests just as a further provocation against Garsu Pasaulis and did not react all to such incentives*"[220]

221. 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 an unbiased decision.

---

[216] Ibid.
[217] GRS Press release of 17 April 2020, **C-48**.
[218] 2019-10-07 Media article, **C-46**.
[219] Ibid.
[220] Mieliauskas Witness Statement, para 60, **CWS-2-1.**

222. On 25 November 2019, the Kyrgyz Supreme Court quashed the ruling of the appellate instance and upheld the decision of the court of the first instance[221].

223. However, as it was already explained, the ruling of the Kyrgyz Supreme Court did not have any relevance to the results of the 2018 Tender and Garsu Pasaulis' rights thereof.

224. As explained by Prof. Alenkina:

> *"Despite the fact that the claims were actually aimed at invalidating the results of the bidding, the court's decision did not affect this issue (Article 410 of the Civil Code of the Kyrgyz Republic). Thus, it does not follow from the court's decision whether the competitive bidding itself was declared invalid, failed, or whether it was cancelled."*[222]

225. Furthermore, as noted by Prof. Alenkina – "*The decision of the Supreme Court of the Kyrgyz Republic dated 22 November 2019, does not say anything about the fate of the tender.*"[223]

226. Indeed, the Order of GRS of 4 February 2020 was adopted without any reference to the Kyrgyz Court decisions that were adopted. As mentioned above, the Order of GRS on cancellation of the 2018 Tender was based on a different legal ground – the alleged 'expiration' of the 2018 Tender application[224].

227. Therefore, the Kyrgyz administrative Court proceedings did not have any material relevance to Garsu Pasaulis and its valuable right acquired by winning the 2018 Tender.

[221] 2019-11-25 Kyrgyz Supreme Court ruling, **C-52**.
[222] Alenkina Report, para 164, **CER-2-1**.
[223] Alenkina Report, para 167, **CER-2-1**.
[224] Order of the GRS "On the cancellation of competitive bidding" dated 4 February 2020, Alenkina Report, **CER-2-Exh.-3**.

viii. The ulterior interests behind the 2018 Tender and expulsion of Garsu Pasaulis

228. The facts and events described above clearly indicate that any means available were employed to expel Garsu Pasaulis from the 2018 Tender and expropriate Garsu Pasaulis' legitimate right to execute the e-passports contract so as to offer this right to someone else. It is evident that the expulsion of Garsu Pasaulis was executed in breach of the applicable tender regulations and the applicable Kyrgyz law, while also employing the notorious apparatus of the GKNB. Furthermore, the expulsion of Garsu Pasaulis was executed in a manner that has severely damaged Garsu Pasaulis' international business reputation.

229. Surely, there must have been a motive for such an aggressive attack on Garsu Pasaulis. This motive has come into light after the "cancellation" of the 2018 Tender and expropriation of Garsu Pasaulis' right to execute the e-passports contract. It has become clear that the allegations of bribery and corruption against Garsu Pasaulis were nothing more than a façade and false *kompromat* fabricated by the GKNB in order to illegally expel Garsu Pasaulis from the 2018 Tender and take away its e-passports contract.

230. Apparently, Garsu Pasaulis' victory in the 2018 Tender disappointed some very powerful figures in the Kyrgyz Republic, who had their own personal plan for the supply of passports to the Kyrgyz Republic.

231. In May 2019, Alina Shaikova, the former Head of the GRS, has publicly acknowledged that Idris Kadyrkulov – the Head and chief of one of the most severe and powerful Kyrgyz institutions – the GKNB, was "offended" with the results of the 2018 Tender, because he personally had his own idea of how the Kyrgyz Republic should be supplied with e-passports[225].

232. Alina Shaikova explained that, just after the announcement of the 2018 Tender, on 6 December 2018, Idris Kadyrkulov invited her and Mr.

[225] Media article of 13 May 2019, **C-7**.

Dastan Dogoyev to a secret meeting with himself and the representatives of KBA-NotaSys, the Swiss security printing manufacturer and a subsidiary of Germany-headquartered press manufacturer KBA. KBA-NotaSys is known for its notorious bribery cases[226].

233. In this meeting, which was held in FRUNZE – one of the most expensive restaurants in Bishkek, Idris Kadyrkulov negotiated, on behalf of KBA-NotaSys, in order to conclude a long-term cooperation contract between the GRS and KBA-NotaSys for the supply of passports to the Kyrgyz Republic[227].

234. In that meeting, Idris Kadyrkulov introduced the invitees to foreign businessmen, discussing the possibility of creating in the Kyrgyz Republic its own base for the production of documents of national importance[228]. As explained by Alina Shaikova:

> *"There was no open request during the meeting. But the fact that the meeting was organized by Kadyrkulov and introduced to the representatives of the European company is a fact. Representatives of this company were ready to discuss the development of their business in Kyrgyzstan. But I cannot confirm that this meeting is related to the investigative actions that began later. This should be studied by a special public or deputy commission."*[229]

235. Alina Shaikova further explained:

> *"We immediately indicated that the tender process has already been launched for the purchase of forms, the GRS also has no need for equipment, since donors have already purchased 2 sets of equipment for personalizing the forms. As for the production of other types of documents, they were also informed that the draft Law "On State Procurements" provides for a provision that allows enterprises with state shares of more than 51% to produce them without holding tenders. That is, we made it clear that we do not see any options for interacting with this company*."[230]

[226] 2017-02-24 Media article of 24 February 2017, **C-53**.
[227] Media article of 16 May 2019, **C-6**; Media article of 13 May 2019, **C-7**.
[228] Ibid.
[229] 2019-05-15 Media article, **C-8**.
[230] Media article of 13 May 2019, **C-7**.

236. Numerous press reports confirm that, after the meeting with the Head of the GRS and her refusal to consider his offers provided, Idris Kadyrkulov felt insulted and offended[231].

237. After Shaikova's revelations about this meeting, on 14 May 2019, Idris Kadyrkulov publicly acknowledged that he has indeed organized this meeting[232].

238. As explained by Lukosevicius:

> *"This was an eye-opener for us. Suddenly, it made sense why the Kyrgyz State Committee for National Security Prosecution was involved in the 2018 Tender and this has clarified for us the real interests behind all the actions to sabotage the 2018 Tender and* attacks against Garsu Pasaulis."[233]

239. While replying to the accusations of this clear attempt of political corruption and influence on the 2018 Tender, the GKNB itself publicly admitted the following:

> *"Indeed, at an unofficial meeting, Shaikova and Dogoev refused to consider the issue of organizing local own production of DGZ, justifying this as a deliberately unprofitable production, as well as in connection with the purchase of blank products by the GRS from private companies*."[234]

240. Naturally, a public uproar emerged in the Kyrgyz Republic, where hundreds of people gathered in protest of the attempted political corruption by Idris Kadyrkulov, the Head of GKNB, by employing the State powers for illegitimate private gain[235].

241. As explained by Mieliauskas:

> *"This was again the déjà vu moment from the 2012 tender. Yet again the local interest groups (this time the Kyrgyz State Committee for National Security Prosecution itself)*

[231] Ibid.
[232] Media article of 14 May 2019, **C-9**.
[233] Lukosevicius Witness Statement, para 56, **CWS-1-1**.
[234] Media article of 14 May 2019, **C-9**.
[235] Media article of 14 may 2019, **C-54**; Media article of 30 April 2019, **C-55**.

> *lobbied against the results of a public tender in order to take away a contract won by Garsu Pasaulis."*[236]

242. It was only due to the pressure amid the widespread allegations of political corruption and doubts about his objectivity in the 2018 Tender investigation that Idris Kadyrkulov – who had forcefully interfered with the 2018 Tender and its results, and who called Garsu Pasaulis "*not a good company*" during his speech in the Kyrgyz Parliament[237] and who had no problem being a bridge for KBA-NotaSys – had to resign[238].

243. Idris Kadyrkulov himself said that he decided to resign to end rumors alleging that he was interested in a specific result of investigations launched into the 2018 Tender[239].

244. However, this conflict between the insulted Idris Kadyrkulov and Alina Shaikova had a devastating effect on both Alina Shaikova and Garsu Pasaulis. Idris Kadyrkulov employed the notorious apparatus of the GKNB to attack the winner of the 2018 Tender – Garsu Pasaulis and its representatives and to take away Garsu Pasaulis' e-passports contract. The GKNB also attacked and prosecuted the members of the Tender Commission and the GRS[240].

245. The GKNB used intimidation, raids and arrests, forced 'confessions', criminal prosecutions and confiscations, public slander and *kompromat,* and public accusations before the Kyrgyz Parliament.

246. The means employed by the GKNB and one of the most powerful Kyrgyz' state officials – Idris Kadyrkulov – were the direct cause of expropriation of Garsu Pasaulis' valuable right to execute the e-passports contract won in the 2018 Tender. These measures taken by the GKNB also destroyed Garsu Pasaulis' international reputation.

247. As explained by Lukosevicius:

---

[236] Mieliauskas Witness Statement, para 56, **CWS-2-1.**
[237] 24 April 2019 Idris Kadyrkulov parliament speech, **C-39**. Video of Kyrgyz Parliament hearing also available at: https://www.facebook.com/watch/?v=2557226384330090
[238] Media article of 16 May 2019, **C-6**.
[239] Ibid.
[240] See paras 165-179 of this Statement of Claim.

> *"Based on my more than 20 years of experience in public tenders around the world, the Kyrgyz 2018 Tender and the surrounding scandal, false allegations, disappearance of people and lack of any due process was the worst experience I have ever had. Nowhere in the world did the state apparatus got involved into public tender procedures for the benefit of particular state officials."*[241]

248. On 5 August 2019, the former Head of GRS – Alina Shaikova was also immediately summoned for questioning by the GKNB, and an international arrest warrant was issued against her. She was put on the international wanted list[242].

249. However, Alina Shaikova has never shown up. She has left her family in the Kyrgyz Republic, has gone out of sight and was never seen again in the Kyrgyz Republic or abroad. Her whereabouts or her health condition are currently unknown.

250. To this date, representatives of Garsu Pasaulis and their families also do not feel safe in the Kyrgyz Republic[243]. They are constantly threatened by the officers of the GKNB and are unsure of their future in the Kyrgyz Republic. Garsu Pasaulis' representatives receive direct threats from the GKNB, forcing them to admit totally false accusations or face indefinite detention. As mentioned, this has already manifested by the YouTube video released by the GKNB[244].

251. 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 deterioration of health, stress, anxiety, other mental sufferings, humiliation, shame, loss of reputation as well as credit and social status.

252. As it will be explained further in Section **VI(C)(i)** of this Statement of Claim, these actions, led by the highest authorities of the Kyrgyz

[241] Lukosevicius Witness Statement, para 60, **CWS-1-1**.
[242] Media article 5 August 2019, **C-45**.
[243] Sagyndykov Witness Statement, para 32, **CWS-3-1.**
[244] Media article 7 October 2019, **C-46**.

Republic, are a clear breach of the fair and equitable treatment and full protection and security standard provided in Article 3 of the Agreement.

ix. The new 2020 Tender for e-passports

253. While the Kyrgyz administrative courts still examined Muhlbauer's claims, on 11 July 2019, the new Head of the GRS announced that the GRS had signed a non-public contract with De La Rue PLC - a British company that manufactures paper and security printed products including banknotes, passports, and tax stamps[245]. It was announced that the GRS had concluded an agreement to print 500 thousand passports with De La Rue plc [246].

254. However, the GRS has never revealed what were the terms of this new and non-public agreement. Indeed, this new agreement seemed strange, 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.

255. At the same time, news began to spread that the GRS had decided to cooperate with the Russian company Goznak for the production of e-passports. When asked at the press conference, the GRS did not refute this data[247].

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

257. The newly signed agreements for the production of passports, while Muhlbauer's complaint in respect of the 2018 Tender was still examined in the Kyrgyz courts, evidences the fact that the Kyrgyz Government did not even intend to execute the contract won by Garsu Pasaulis or wait for the final ruling of the Kyrgyz Supreme Court.

[245] Media article 11 July 2019, **C-56**.
[246] Ibid.
[247] Media article of 2 August 2019, **C-57**.

258. However, in February 2020, the Kyrgyz Republic announced yet another public tender for e-passports[248]. This time, the new 2020 tender' conditions were changed. While the 2018 Tender required proof of concluded contracts for e-passports in the amount of 2 million passports[249], the new 2020 Tender required proof of concluded contracts for e-passports in the amount of 3 million passports[250]. From Garsu Pasaulis' bid submitted in 2018, the GRS knew that Garsu Pasaulis could only provide proof of concluded contracts for e-passports in the amount of 2 million passports and could not provide proof for the 3-million-mark.

259. Therefore, Garsu Pasaulis was precluded from participation in the new 2020 e-passports tender, because it would be impossible for Garsu Pasaulis to satisfy the new 2020 tender requirements. Entering into new disputes regarding the reasonableness of such new requirements was also not feasible.

260. In the new 2020 tender for e-passports, three companies took part – IDEMIA (France), Muhlbauer (Germany), and Banknote Factory of Kazakhstan. These were all the same companies that have participated in the 2018 Tender, except Garsu Pasaulis.

261. This time, Muhlbauer – the same company which has participated in the Kyrgyz tenders for e-passports of 2012 and 2018, has won the 2020 tender[251]. It is in the knowledge of Garsu Pasaulis that Muhlbauer could not have satisfied the increased requirements of the 2020 tender. Thus, it is still unclear how Muhlbauer has managed to win the 2020 tender.

D. The aftermath and direct effect of the 2018 Tender scandal and the smear campaign against Garsu Pasaulis

262. As the winner of the 2018 Tender, and having complied with all the 2018 Tender regulations, Garsu Pasaulis had no reason to expect that

[248] Media article of 26 February 2020, **C-58**.
[249] 2018 Tender regulations, **C-2**.
[250] 2020 Tender for e-passports (regulations), **C-59**.
[251] 2020-05-29 Media article, **C-60**.

the Kyrgyz Republic would terminate the 2018 Tender in breach of its own[252] and international law.

263. Garsu Pasaulis could not have reasonably anticipated that the Kyrgyz Republic would refuse to execute the e-passports contract, much less that it would do so without offering any explanations for its sudden change of course and while also starting a smear campaign against Garsu Pasaulis.

264. Sadly, as it later emerged, Garsu Pasaulis fell victim to a political corruption scheme led by the most powerful Kyrgyz authorities, including the Head of the GKNB, who had its own personal interests in the 2018 Tender.

265. In addition to the expropriation of Garsu Pasaulis' valuable right to execute the e-passports contract, through its powerful authorities, the Kyrgyz Republic started a smear campaign against Garsu Pasaulis. This smear campaign completely destroyed Garsu Pasaulis' international reputation. The Kyrgyz Republic called Garsu Pasaulis criminals, bribe givers, and conspirators in public press statements and even in the Kyrgyz Parliament hearings[253].

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

267. As explained by Mieliauskas:

> *"The Kyrgyz tender scandal and fake allegations disseminated by the Kyrgyz Republic against Garsu Pasaulis were picked up by international media and distributed worldwide. Without any factual or legal basis, Garsu Pasaulis was labeled as corrupt and criminal company. This had a negative snowball effect on Garsu Pasaulis' international reputation and caused Garsu Pasaulis major and significant losses."*[254]

[252] See, e.g., Alenkina Report, para 107, **CER-2-1**.
[253] Negative articles about Garsu Pasaulis and Semlex, **CWS Lukosevicius 1-21**; 24 April 2019 Idris Kadyrkulov parliament speech, **C-39**.
[254] Mieliauskas Witness Statement, para 65, **CWS-2-1.**

268. Impeccable international reputation was always the most significant asset and an attribute of Garsu Pasaulis. International reputation is one of the main criteria for Garsu Pasaulis' successful participation in international tenders for production and investments into e-government systems and security identifications systems all around the world. To this date, Garsu Pasaulis suffers from the smear campaign led by the Kyrgyz Republic and its powerful authorities[255].

269. In addition, the scandal in the Kyrgyz Republic precludes Garsu Pasaulis from participating in other public tenders around the globe. Due to Kyrgyz allegations, Garsu Pasaulis is perceived as an untrustworthy and corrupt company[256].

270. Obviously, for Garsu Pasaulis, whose main activity is in investments and production of security printing items, having a (false) stain of corruption effectively entails total destruction of Garsu Pasaulis' business model. Garsu Pasaulis cooperates with more than 55 countries worldwide. Therefore, false Kyrgyz allegations significantly damage Garsu Pasaulis' future prospects of winning public tenders in the Kyrgyz Republic and abroad[257].

271. As explained by Lukosevicius:

> *"due to the Kyrgyz scandal, Garsu Pasaulis is now precluded to participate in the public tenders around the world. Garsu Pasaulis is no longer considered as a reliable provider with good reputation. On the other hand, Garsu Pasaulis' former clients are now refusing to extend any contractual relationship with Garsu Pasaulis."*[258]

272. As it will be explained in more detail in Section VI(C)(iv) of this Statement of Claim, illegal and ungrounded actions of the Kyrgyz Republic had an immediate and significant negative effect on Garsu Pasaulis and its investments in the Kyrgyz Republic and abroad. Aggressive actions of the Kyrgyz Republic against Garsu Pasaulis also

[255] See Section VII. D. of this Statement of Claim.
[256] Ibid.
[257] Lukosevicius Witness Statement, para 72-81, **CWS-1-1**.
[258] Lukosevicius Witness Statement, para 78, **CWS-1-1**.

had a destructive effect on the long-established international reputation of Garsu Pasaulis and caused significant monetary losses.

273. Apart from the destructive effects on Garsu Pasaulis' international reputation and the related monetary losses, actions of the Kyrgyz Republic also entailed expropriation of the economic right of Garsu Pasaulis to execute the e-passports contract won by Garsu Pasaulis in the 2018 Tender. Garsu Pasaulis would have received the income and profit to which Garsu Pasaulis was legally entitled but for the illegal termination of the 2018 Tender[259].

274. In addition, actions of the Kyrgyz Republic also entailed losses of other economic rights of Garsu Pasaulis, such as losses related to long-term contracts which would have been successfully executed but for the fake allegations of corruption disseminated by the Kyrgyz Republic around the world. These losses include consequential damages, which are comprised of lost commercial contracts, loss of credit conditions and of other benefits; lost profits, and loss of market share. All the losses incurred by Garsu Pasaulis are explained in more detail in Section VII of this Statement of Claim.

275. In any case, 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 investors and their investments treatment that does not affect the basic expectations of due process and fair treatment.

276. The standard of protection of legitimate expectations requires the state to act in a fully predictable and transparent manner in relation to the investor[260]. 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[261].

[259] Damages Report, **CER-3-1**.
[260] Baltag Report, **CER-1-1**.
[261] Baltag Report, **CER-1-1**.

277. Nothing close to this standard was provided by the Kyrgyz Republic for Garsu Pasaulis. Conversely, as it is now clear, actions of the Kyrgyz Republic were illegal under its own law, totally unpredictable, non-transparent, without due process. The Kyrgyz Republic expropriated Garsu Pasaulis' right to execute the e-passports contract and kept Garsu Pasaulis in the dark as to any actions and investigations that affected Garsu Pasaulis and its economic rights.

278. 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.

III. THE TRIBUNAL HAS *RATIONE PERSONAE* JURISDICTION OVER GARSU PASAULIS' CLAIMS, AND THOSE CLAIMS ARE ADMISSIBLE

279. 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 Rules 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

280. As is well-known, foreign direct investment (FDI) plays a pivotal role in economic development of the States. It provides access to a number of economic factors which are indispensable in this context. These include capital, technology and *know-how*.

281. As explained in Section II of this Statement of Claim, the Kyrgyz Republic was eager to welcome the influx of new technology and *know-how* of experienced internationally respected companies (investors), such as Garsu Pasaulis.

282. To attract this foreign investment, in addition to guarantees contained in domestic law, the Kyrgyz Republic itself invited Garsu Pasaulis and

offered Garsu Pasaulis international legal guarantees. It did so by signing the Agreement with Garsu Pasaulis' home State. The Agreement contains substantive as well as procedural guarantees to investors from Lithuania.

283. 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"*[262]

284. 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

285. Article 1(2) of the Agreement provides for the following:

> *"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*

[262] The Agreement, **C-1**.

> *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.*

286. Further, Article 8(1) of the Agreement refers to the following types of disputes which fall under the competence of an arbitral tribunal constituted under the Agreement:

> *"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 […]"*[263]

287. As this present arbitration takes place under the provisions of Article 8(2) of the Agreement – *ad-hoc* arbitration under the UNCITRAL Rules, these Rules do not impose any requirements on the notion of 'investor'. As such, one must give full and exclusive effect to the provisions of the Agreement.[264]

288. As Dr. Crina Baltag explains in her Expert opinion[265], in light of the rules of treaty interpretation as codified by the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention"), specifically Articles 31-33, a treaty must be interpreted "*in accordance with the ordinary meaning to be given to the terms of the treaty*", unless *"[a] special meaning shall be given to a term if it is established that the parties so intended*" (Article 31(4)) or "*the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable*" (Article 32). As such, an interpretation of the provisions of the Agreement can only be done by first observing its text.

289. Consequently, in reading Articles 1(2) and 8 of the Agreement, it must be understood that the only requirement imposed on a legal person to

[263] The Agreement, **C-1**.
[264] See *A11Y Ltd v Czech Republic*, ICSID Case No. UNCT/15/1, Award of 29 June 2018, para. 139 ("The Tribunal recalls that this case is proceeding pursuant to the UNCITRAL Rules. These Rules have no equivalent to Article 25 of the ICSID Convention."), Baltag Report, **E-3**.
[265] Baltag Report, para 11, **CER-1-1**.

qualify as 'investor' under the Agreement is to be incorporated or constituted under the laws of the respective Contracting Party. There is no provision in the Agreement suggesting a different interpretation.

290. This conclusion is also supported by the constant practice of investment arbitration tribunals, which uphold the literal interpretation of the provisions of the investment treaties, in accordance with the Vienna Convention, which do not expressly impose any requirements in addition to the incorporation test.[266]

291. In *Saluka v. Czech Republic*, the tribunal considered Article 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed on 29 April 1991, referring to the fact that the competence to make use of the arbitral process provided for in Article 8 is possessed by "investors" in respect of their "investments" and that these terms are defined in Article 1 of the Treaty.[267] The tribunal highlighted that:

> *"The parties had complete freedom of choice in this matter, and they chose to limit entitled "investors" to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of "investor" other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add".*[268]

292. In *Tokios Tokelés v. Ukraine*, the majority of the tribunal concluded that "[t]he Treaty contains no additional requirements for an entity to qualify as an "investor" of Lithuania."[269] The Agreement between the

[266] See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, (Oxford University Press, 2012, 2nd edition), p. 48 ("In cases in which the relevant treaties provide for incorporation as the relevant criterion, tribunals have refused to pierce the corporate veil in order to look at the nationality of the company's owners."), Baltag Report, **E-4**.
[267] *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award of 17 March 2006, paras 196-197, Baltag Report, **E-5**.
[268] *Saluka v. Czech Republic*, Partial Award, para. 241.
[269] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004, para. 28, Baltag Report, **E-6**.

Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments entered into force on 27 February 1995 provides in Article 1(2)(a), in a similar language to the Agreement, that an investor is "*any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations*". The majority of the tribunal in *Tokios Tokelés v. Ukraine* further explained that "*it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition*."[270] Based on this, the majority of the tribunal in *Tokios Tokelés* declined "*to look beyond (or through) the Claimant to its shareholders or other juridical entities that may have an interest in the claim*."[271]

293. In *Yukos v. Russia,* the tribunal emphasized that the tribunal was bound to interpret the applicable treaty as it is written, and not as it might have been written:

> *"The Tribunal is bound to interpret the terms of the ECT including Article 1(7), not as they might have been written but as they were actually written. … The Tribunal is not entitled, by the terms of the ECT, to find otherwise. … The parties had complete freedom of choice in this matter, and they chose to limit entitled 'investors' to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of 'investor' other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add. The Tribunal knows of no general principles of international law that would require investigating how a company or another organization operates when the applicable treaty simply requires it to be organized in accordance with the laws of a Contracting Party. The principles of international law, which have an unquestionable importance in treaty interpretation, do not allow an arbitral tribunal to write new, additional requirements—which the drafters did not include—into a*

[270] *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, para. 36.
[271] *Tokios Tokelés v. Ukraine,* Decision on Jurisdiction, para. 40.

> *treaty, no matter how auspicious or appropriate they may appear."*[272]

294. In *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, the tribunal referred to the fact that Article 1(b)(ii) of the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Federal Republic of Yugoslavia, dated 29 January 2002, "defines the term 'investors' as comprising with regard to either Contracting State to the BIT 'legal persons constituted under the law of that Contracting Party.' As explained by the tribunal,

> *"It is uncontroverted that MNSS is a legal person constituted under the laws of the Netherlands. It is equally uncontroverted that RCA is a legal person constituted under the laws of Curaçao to which the BIT was extended. The Claimants dispute as a matter of fact the allegation that they are shell companies and argue that the BIT has no further requirements for legal persons to be protected as investors under the BIT. The place of constitution of the company is the determinant factor without any other conditions to be met to qualify as an investor. The States parties to the BIT could have introduced such conditions, as some States have done, to avoid protecting companies with no link to the country of incorporation other than the incorporation itself. But the State parties to this BIT did not. It is not for the Tribunal to subject the definition of legal persons considered as protected investors under the BIT to undetermined conditions not contemplated in the BIT".*[273]

295. The Permanent Court of International Justice in the *Acquisition of Polish Nationality* Advisory Opinion has also upheld the literal interpretation of a treaty, concluding that *"[t]o impose an additional condition for the acquisition of Polish nationality, a condition not provided for in the Treaty …, would be equivalent not to interpreting the Treaty, but to reconstructing it*."[274]

---

[272] Yukos *Universal Limited* v. *The* Russian *Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility of 30 November 2009, paras 413-415, Baltag Report, **E-7**.
[273] *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award of 4 May 2016, para. 176, Baltag Report, **E-8**.
[274] *Acquisition of Polish Nationality* Advisory Opinion of 15 September 1923, PCIJ Series B, No. 7, p. 20, Baltag Report, **E-9**.

296. Further, the Agreement does not include a so-called 'denial of benefits' clause based on which the host State of the investment may deny the benefits of the BIT to certain investors.[275] This is an issue discussed by the majority of the tribunal in *Tokios Tokelés v. Ukraine*:

> *"These investment agreements confirm that state parties are capable of excluding from the scope of the agreement entities of the other party that are controlled by nationals of third countries or by nationals of the host country. The Ukraine-Lithuania BIT, by contrast, includes no such "denial of benefits" provision with respect to entities controlled by third-country nationals or by nationals of the denying party. We regard the absence of such a provision as a deliberate choice of the Contracting Parties. … An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition".*[276]

297. Furthermore, continuous nationality of investor is not a requirement under the Agreement and, in any case, Garsu Pasaulis has always maintained and currently maintains its nationality 'during the course of the investment'.

298. The fact that Garsu Pasaulis has continuously won public tenders for provision of investments, goods and services (including *know-how*) in the Kyrgyz Republic, and it has established a local company in the Kyrgyz Republic to help deal with its Kyrgyz operations are aspects which would be relevant in the context of establishing the existence on an investment.

299. Concluding on this point, with respect to the notion of 'investor' under the Agreement, Articles 1(2) and 8(1) of the Agreement require that a legal person be incorporated or constituted under the laws of a Contracting Party. No additional requirements are contemplated in these provisions nor in any other provision of the Agreement. Consequently, for the purpose of establishing the jurisdiction *ratione personae* of the Tribunal, **Garsu Pasaulis' incorporation or**

[275] For more on 'denial of benefits' clauses, see Loukas Mistelis and Crina Baltag, *Denial of Benefits Clause,* Max Planck Encyclopedias of International Law [MPIL], Oxford Public International Law, OUP, July 2019, Baltag Report, **E-10**.
[276] *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, para. 36.

constitution in Lithuania is necessary and **sufficient** and, as presented, Garsu Pasaulis is an investor under the Agreement.

ii. Garsu Pasaulis meets the only Agreement requirement of an 'investor' – it is a legal person incorporated or constituted under national legislation of Lithuania

300. 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."*

301. Garsu Pasaulis is a 'legal person' in the sense of Article 1(2) of the Agreement and, accordingly, it qualifies as an 'investor'.

302. Specifically, Garsu Pasaulis is today and has always been a legal person constituted and organized in accordance with the laws of Lithuania. Ample proof exists of Garsu Pasaulis' Lithuanian nationality, the main of which is the Certificate of company registration[277].

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

304. Garsu Pasaulis accepts that it bears the burden of proof that it is a 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.

305. In any event, the Kyrgyz Republic has never questioned Garsu Pasaulis' nationality or its status as a legal person of Lithuania. Nor

[277] 2004-12-17 Garsu Pasaulis' certificate of company registration, **C-61**.

could it. There is no circumstance that could even remotely affect this leg of the jurisdiction test.

IV. THE TRIBUNAL HAS *RATIONE MATERIAE* JURISDICTION OVER GARSU PASAULIS' CLAIMS, AND THOSE CLAIMS ARE ADMISSIBLE

A. Garsu Pasaulis made an investment in the Kyrgyz Republic

i. Requirements under the Agreement

306. Article 1(2) of the Agreement provides for the following:

> *"'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 rights 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."*

307. Article 2(1) of the Agreement provides, similar to Article 1(2), that "*[o]ne Contracting Party … shall recognize such investments according to its national legislation.*"

308. Article 8(1) of the Agreement refers to "*[d]isputes between one Contracting Party and the other Contracting Party's investor relating to the latter's investments in the territory*".

309. As explained in Dr. Baltag's Expert opinion[278], at para. 287, the UNCITRAL Rules do not impose any further requirements on the notion of 'investment'. As such, one must give full and exclusive effect to the provisions of the Agreement.

310. The Agreement, comparable to other investment treaties, takes a broad approach to the notion of 'investment'.[279] This broad wording is understood to include "*everything of economic value, virtually without limitation*."[280]

311. Article 1(1) of the Agreement offers a non-exhaustive enumeration of the kinds of assets covered by the notion of 'investment'.[281] The definition refers to any kind of asset "invested" by an investor in accordance with the laws of the host State of the investment and in the territory of the host State. Further, any changes in the form of investment shall not affect the existence of the investment if such changes are made in compliance with national legislation of the host State of the investment.

---

[278] Baltag Report, para 10, **CER-1-1**.
[279] See in general on this, Kenneth J. Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation*, (Oxford University Press, 2010), p. 137, Baltag Report, **E-11**.
[280] UNCTAD, *Scope and Definition,* UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2011, p. 24, Baltag Report, **E-12**; Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2012), p. 32 ("A variety of other contractual arrangements, particularly long-term arrangements between persons in different countries, may also qualify as investments to the extent that they require one party to commit capital or money to a venture with the expectation of receiving a return at a later time. Thus, concession contracts …, mineral exploration and development agreements, construction contracts, land purchase agreements, and innumerable other contractual devices may all be considered international investments.") Baltag Report, **E-13**.
For examples of investments retained by arbitral tribunals, see Christoph H. Schreuer, *The ICSID Convention: A Commentary*, (Cambridge University Press, 2001, 1st edition), para. 119 ("They include the building and operation of hotels, the production of fibres and textiles, the mining of minerals, the construction of a hospital ward, the exploration, exploitation and distribution of petroleum products, the manufacture of plastic bottles, the construction and operation of a fertilizer factory, the construction of housing units, the operation of a cotton mill, aluminium smelter, forestry, the conversion, equipping and operation of fishing vessels, the production of weapons, tourism resort projects, maritime transport of minerals, a synthetic fuels project, shrimp farming, banking, agricultural activities, the construction of a cable TV system and the provision of loans.") Baltag Report, **E-14**.
[281] See Jeswald W. Salacuse, *The Law of Investment Treaties*, p. 160 ("The word 'asset' in most dictionaries is defined as 'anything of value' or a 'valuable item that is owned'. Thus, it can be seen that the concept of 'asset' is very broad indeed.").

312. Article 1(1) of the Agreement first refers to assets "*invested*". It is generally understood that this and other similar wordings, such as "*made*", "*investment by*", require the action to invest, usually in a completed form, as opposed to a pre-investment action.[282]

313. Concerning the reference to "*in accordance with the national legislation*" of the host State, the understanding is that investments which are illegal in the territory of the host State are not protected under the Agreement.[283] Consequently, where an investment was illegally made in the territory of the host State, this does not mean that there is no investment within the ordinary meaning of the term, but such investment is not protected under the specific BIT and thus, the jurisdiction of the arbitral tribunals shall not extend to such investment disputes. In *Salini v. Morocco*, Morocco challenged the jurisdiction of the tribunal, among other grounds, based on the non-compliance of investor's investment with Moroccan law, as required by the applicable treaty. The *Salini* tribunal concluded that "[i]n focusing on "*the categories of invested assets (…) in accordance with the laws and regulations of the aforementioned party,*" this provision refers to the validity of the investment and not to its definition."[284]

314. Further, the reference to the investment "*in accordance with the national legislation*" goes beyond the legality of an investment. This means that a tribunal must assess the assets which constitute the investment against the laws of the host State to determine whether they are legally protected under the law. As explained by the tribunal in *Nordzucker v. Poland*,

---

[282] See *Nordzucker AG v. Poland*, UNCITRAL, Partial Award of 10 December 2008, para. 164 ("This expression implies that in order to trigger the application of the dispute resolution provisions of article 11, an investment must be actually completed in order to qualify as an investment that has been "made".") Baltag Report, **E-15**; *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, para. 228 ("First, as noted above, the Contracting Parties' focus was on increasing "investment by nationals and companies of one State in the territory of the other State." "By" here signifies that the company of the first State is the actor, and implies an active role of some kind for that company."), Baltag Report, **E-16**.

[283] Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration. Substantive Principles,* (Oxford University Press, 2017, 2nd edition), para. 6.97 ("The plain meaning of this phrase is that investments which would be illegal upon the territory of the host State are disqualified from the protection of the BIT"), Baltag Report, **E-17**.

[284] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 16 July 2001, para. 46, Baltag Report, **E-18**.

> *"The Tribunal also notes that the definition given in article 1(1)(a) requires that the investor invests pursuant to the legislation of the other Contracting Party. Whereas the Tribunal does not consider that this reference to the host State's law allows a host State to determine unilaterally whether or not the "involvement" of an investor in its country amounts to an investment or not, the expression "pursuant to the legislation" of the host State, which also comes back in article 2.1 second sentence (see hereafter) in this Tribunal's opinion means more than just to exclude transactions which are illegal under the host State's law. It means that a tribunal, when deciding whether or not an investor invests in property, or shares or money claims or any other assets, has to apply the host State's law in assessing whether the investor has duly acquired property, shares, claims to money or other assets."*[285]

315. Article 1(1) of the Agreement refers to "*any type of assets invested … in the territory of the other Contracting Party*", while Article 8(1) of the Agreement refers to "*[d]isputes between one Contracting Party and the other Contracting Party's investor relating to the latter's investments in the territory*". As explained by Dr. Baltag, one should retain a certain degree of flexibility with respect to this wording[286]. Arbitral tribunals have consistently concluded that the physical presence of an investment in the host State is not critical when the investment has no tangible form. The tribunal in *Fedax v. Venezuela* determined that "*[t]he important question is whether the funds made available are utilized by the beneficiary of the credit … so as to finance its various governmental needs*".[287] In *CSOB v. Slovakia*, the tribunal held that "*a transaction can qualify as an investment even in the absence of a physical transfer of funds*".[288] In *LESI-DIPENTA v. Algeria*, the tribunal also emphasized that the physical presence of the investment in the territory of the host state is "*not an absolute condition*".[289]

[285] *Nordzucker v. Poland*, Partial Award, para. 167, Baltag Report, **E-15**.
[286] Baltag Report, para 33, **CER-1-1**.
[287] *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction of 11 July 1997, para. 41, Baltag Report, **E-19**.
[288] *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999, para. 78, Baltag Report, **E-20**.
[289] *Consortium Groupement L.E.S.I.- DIPENTA v.* République Algérienne Démocratique et populaire, ICSID Case No. ARB/03/08, Award of 10 January 2005, II.14.(1), Baltag Report, **E-21**.

316. Further, it is posited that arbitral tribunals favour an inclusive approach to the existence of an investment by considering the "*entire operation*" of the investor. As such, investor may have various operations in the host State which together constitute an investment, although, individually might not qualify as such.[290]

317. Also, as noted by Dr. Baltag, the Agreement contains no qualification of the 'investment' other than the elements mentioned above. As such, an interpretation of Article 1(2) of the Agreement attempting to import the so-called *Salini* test[291] would not be justified under the rules of treaty interpretation as codified by the Vienna Convention.[292] Even if the Tribunal is to consider the applicability of the *Salini test,* which it should not, the Tribunal should be mindful to that fact the "*test has received varied applications by investment treaty tribunals and doctrinal writings*",[293] and, consequently, one has to settle on one approach or the other. This, in itself, suggests that the *Salini* test must be considered with caution. Some tribunals maintain the view that the so-called *Salini* test does not constitute a jurisdictional requirement and, thus, the absence of one element should not imply lack of jurisdiction.[294] As it will

---

[290] *Muhammet Çap &* Sehil *Inşaat Endustri ve Ticaret Ltd. Sti.* v. Turkmenistan, ICSID Case No. ARB/12/6, Award of 4 May 2021, para. 681, Baltag Report, **E-22**; Saipem *S.p.A.* v. *The People's Republic of* Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction of 21 March 2007, para. 110, Baltag Report, **E-23**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, para. 133, Baltag Report, **E-24**; *CSOB v. Slovakia*, Decision on Objections to Jurisdiction, para. 72 etc.

[291] *Salini v. Morocco*, Decision on Jurisdiction, para. 52:
The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction ... . In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

[292] See Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia, PCA Case No. 2011-17, Award of 31 January 2014, para. 364, Baltag Report, **E-25**; Flemingo DutyFree Shop Private Limited v. Republic of Poland, UNCITRAL, Award of 12 August 2016, para. 298, Baltag Report, **E-26**; Jin Hae Seo v. Republic of Korea, HKIAC Case No. HKIAC/18117, Award of 27 September 2019, paras 98-100, Baltag Report, **E-27**, etc.

[293] Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction of 2 July 2013, para. 206, Baltag Report, **E-28**.

[294] *Philip Morris v. Uruguay*, Decision on Jurisdiction, para. 206 ("They are typical features of investments under the ICSID Convention, not "a set of mandatory legal requirements". As such, they may assist in identifying or excluding in extreme cases the presence of an investment but they cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case."); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award of 2 March 2015, para. 197 ("… the Tribunal considers that the principal legal framework to determine the existence of an "investment" must lie in the will of the Parties as set forth in the definition of an "investment" under the BIT as long as such will is compatible with Article 25 of the ICSID Convention. The Salini criteria may be useful to describe typical characteristics of an investment, but they cannot, as a rule, override the will of the parties, given the undefined and somewhat flexible term used by the drafters of the ICSID Convention.") Baltag Report, **E-29**.

be explained in the following sections, even if the so-called *Salini* test would be applicable – which should not be, - Garsu Pasaulis' investments satisfy this test, given their contribution, duration, risk and contribution to the development of the Kyrgyz Republic[295].

B. Garsu Pasaulis' investments in the Kyrgyz Republic

318. As thoroughly explained in Section II(C) of this Statement of Claim, throughout the years of Garsu Pasaulis' operation in the Kyrgyz Republic, Garsu Pasaulis made several significant investments in the Kyrgyz Republic corresponding to various types of assets expressly included in the list of Article 1(2) of the Agreement, including shares in corporate business, monetary claims or requests to carry out any other actions of economic value, intellectual property rights, *know-how*, business reputation, and any rights to engage in economic activities under contract and any licenses.

319. 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".* As mentioned, this broad definition must be interpreted to include "*everything of economic value, virtually without limitation*."[296]

See also, Christoph H. Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention. A Commentary*, (Cambridge University Press, 2009, 2nd edition), para. 153 ("These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention."), Baltag Report, **E-30**.

[295] Baltag Report, para 35, **CER-1-1**.

[296] UNCTAD, *Scope and Definition,* UNCTAD Series on Issues in International Investment Agreements II, United Nations, 2011, p. 24, Baltag Report, **E-12**; Jeswald W. Salacuse, *The Law of Investment Treaties*, (Oxford University Press, 2012), p. 32 ("A variety of other contractual arrangements, particularly long-term arrangements between persons in different countries, may also qualify as investments to the extent that they require one party to commit capital or money to a venture with the expectation of receiving a return at a later time. Thus, concession contracts …, mineral exploration and development agreements, construction contracts, land purchase agreements, and innumerable other contractual devices may all be considered international investments."), Baltag Report, **E-13**.

For examples of investments retained by arbitral tribunals, see Christoph H. Schreuer, *The ICSID Convention: A Commentary*, (Cambridge University Press, 2001, 1st edition), para. 119 ("They include the building and operation of hotels, the production of fibres and textiles, the mining of minerals, the construction of a hospital ward, the exploration, exploitation and distribution of petroleum products, the manufacture of plastic bottles, the construction and operation of a fertilizer factory, the construction of housing units, the operation of a cotton mill, aluminium smelter, forestry, the conversion, equipping and operation of fishing vessels, the production of weapons, tourism resort projects, maritime transport of minerals, a synthetic fuels project, shrimp farming, banking, agricultural activities, the construction of a cable TV system and the provision of loans.") Baltag Report, **E-14**.

320. 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 the fundamental nature of the investment, as a defined "investment", has ceased to exist as an investment under the Agreement.

321. As it was already explained and further set out below, not only did Garsu Pasaulis invest substantial financial amounts and *know-how* into the Kyrgyz Republic, it also founded a Kyrgyz company LLC "Garsu Pasaulis" and remains its main shareholder. Garsu Pasaulis also provided extensive *know-how* to contribute to the success of the Kyrgyz digitalization efforts in accordance with various contracts concluded with the Kyrgyz Government.

322. In 2018, Garsu Pasaulis sought to significantly increase its investment activities in the Kyrgyz Republic by executing a further e-passports contract in the 2018 Tender with the Kyrgyz Government for the production of e-passports to Kyrgyz citizens and investments into the related software and hardware systems. This new investment would have offered Garsu Pasaulis a more significant foothold both in the Kyrgyz Republic and its neighboring 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 VI of this Statement of Claim, due to the blatant and conscious violation of the Kyrgyz law by the Kyrgyz Republic, this economically valuable right was taken from Garsu Pasaulis, preventing Garsu Pasaulis from executing the e-passports contract and while at the same time destroying Garsu Pasaulis' international reputation on a global scale.

a. Continuous Garsu Pasaulis' investment in the Kyrgyz Republic satisfied the Agreement requirements on multiple levels

323. The Garsu Pasaulis' investments in the Kyrgyz Republic can be analyzed in at least two ways. First, it suffices to note that Garsu Pasaulis founded the Kyrgyz company LLC "Garsu Pasaulis" in 2016 and remains its main shareholder. This local company or shares thereof are assets constituting a covered investment under the Agreement[297].

324. However, it is the contracts concluded and executed with the Kyrgyz Government that constitute the main and substantial investment activity of Garsu Pasaulis in the Kyrgyz Republic. Operation of the local company and previously won tenders of Garsu Pasaulis, together with substantial contracts concluded with the Kyrgyz Republic also constitute economic rights protected by the Agreement. Alternatively, Garsu Pasaulis' investment is also an economic right to execute the e-passports contract arising from the 2018 Tender, which Garsu Pasaulis won. This, too, is a covered investment under the Agreement. Both viewpoints are correct.

b. Local company as a protected investment of Garsu Pasaulis

325. As it was mentioned, Garsu Pasaulis founded a Kyrgyz company conveniently named LLC "Garsu Pasaulis" in 2016, and it remains its main shareholder. Those shares are "assets" that qualify as a covered "investment" under the Agreement.

326. Alternatively, Garsu Pasaulis' 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.

[297] Certificates regarding establishment of a subsidiary of the Garsu Pasaulis in Kyrgyz Republic, **CWS Lukosevicius 1-11**.

327. Article 1(2)(b) of the Agreement is clear in providing that "*shares … in corporate business*" are types of assets that qualify as investment under the Agreement.

328. As Dr. Baltag explains[298], scholars agree that *"[p]articipation in companies and shareholding constitutes a frequently invoked form of investment*."[299]

329. The Agreement does not provide for any qualification of this asset – for example, whether only direct shareholding constitutes an 'investment' or whether Garsu Pasaulis should own a minimum number of shares.[300]

330. As mentioned in the Witness Statement of Andrius Lukosevicius, LLC Garsu Pasaulis was established for the purpose of execution of the contracts with the Kyrgyz Government:

> *"For the purposes of implementation of the excise stamps contract, Garsu Pasaulis has also established Garsu Pasaulis' local Garsu Pasaulis LLC company in the Kyrgyz Republic[301]. Local company was necessary, because excise stamps contract required that Garsu Pasaulis pays all the import duties (DDP), assume all of the responsibility, risk and costs associated with transporting of excise stamps to the Kyrgyz Republic[302]. Garsu Pasaulis also needed specific and secure logistics in the Kyrgyz Republic, warehouses, technical assistance and service center, an office, local IT specialists and technicians"*[303]

331. Garsu Pasaulis' shareholding in this Kyrgyz company constitutes an investment under the Agreement.

---

[298] Baltag Report, para 38, **CER-1-1**.
[299] Christoph H. Schreuer et al., *The ICSID Convention. A Comme* acknowledging this type o *ntary*, para. 150 and footnote 198, p. 126, referring to the "considerable" number of cases investment., Baltag Report, para 38, **CER-1-1**.
[300] Claims from minority shareholders are generally accepted by arbitral tribunals. See more on this in Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 2003-2007,* OUP 2009, pp 333-334, Baltag Report, **E-31**; Christoph H. Schreuer et al, *The ICSID Convention. A Commentary*, para. 150.
[301] Certificates regarding establishment of a subsidiary of the Garsu Pasaulis in Kyrgyz Republic, **CWS Lukosevicius 1-11**.
[302] Contract of 1 February 2013 for excise stamps, **CWS Lukosevicius 1-8**.
[303] Lukosevicius Witness Statement, para 28, **CWS-1-1**.

c. Contracts won and executed by "Garsu Pasaulis" in the Kyrgyz Republic are investments under the Agreement

332. Garsu Pasaulis made a substantial investment in the Kyrgyz Republic by executing contracts with the Kyrgyz Government in a bid to modernize the Kyrgyz e-government services.

333. This was a crucial investment in the 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. As it was already explained in Section II(C) of this Statement of Claim, 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, secured the maintenance of IT systems, and provided the printed items on a loan basis to the Government[304]. Systems installed and developed by Garsu Pasaulis in the Kyrgyz Republic are still successfully used by the Government to this date.

334. In addition, previously won tenders, together with high-value contracts concluded with the Kyrgyz Republic, also constitute economic rights protected by the Agreement.

335. 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.

[304] Contract of 1 February 2013 for excise stamps, **CWS Lukosevicius 1-8**; Contract of 5 February 2016 for excise stamps, **CWS Lukosevicius 1-12**.

336. Article 1(1)(f) of the Agreement expressly includes in the non-exhaustive list of assets "*any right to engage in economic activities under contract*". Contracts are a common form of investment.[305]

337. As explained by Dr. Baltag[306], investment treaty arbitration practice offers diverse examples of contracts qualifying as investments under the relevant treaty, from concession contracts to cooperation agreements, energy supply contracts, management contracts, etc. As noted by the tribunal in *Mytilineos Holdings v. The State Union of Serbia & Montenegro and Republic of Serbia*, "*tribunals have in fact accepted a broad range of economic activities under the notion of investment*."[307]

338. In *SGS v. Paraguay*, SGS entered into a service contract with the Ministry of Finance of Paraguay, by which SGS performed pre-shipment inspections and certifications of imports to Paraguay, and for which Paraguay would pay SGS for such services. The tribunal held:

> *"[c]ontract itself, and certainly in conjunction with the services performed under it and the offices in Paraguay, constitutes a covered investment under Article 1(2) of the BIT."*[308]

339. The tribunal also highlighted:

> *"[w]hile the Contract and SGS's rights thereunder may be intangible, they are proprietary to SGS and they have economic value that accrues to SGS. Likewise, the liaison office is a tangible manifestation of SGS's activities under the Contract. … the question of what constitutes an asset (whether tangible or intangible) must be viewed more broadly, in terms of the item's economic value, rather than limited to the potentially artificial confines of accounting treatment."*[309]

---

[305] See also K.J. Vandevelde, *Bilateral Investment Treaties. History, Policy and Interpretation*, p. 142 ("The contract need not be a concession agreement to be considered an investment."); UNCTAD, *Scope and Definition,* p. 31 ("The performance of a contract in a host country by a foreign entity may involve the creation of an investment and, as such, would be a natural element of a definition of investment. Indeed, contracts such as turnkey, construction, management, production, concession, revenue-sharing and other similar contracts are routinely included in a definition of investment. However, the fact that some IIAs also included "claims to money and claims to any performance under contract having a financial value" has led some tribunals to recognize even ordinary one-off sales and services contracts as investments."), Baltag Report, para 41, **CER-1-1**.
[306] Baltag Report, para 42, **CER-1-1**.
[307] Mytilineos Holdings v. The State Union of Serbia & Montenegro and Republic of Serbia, UNCITRAL, Partial Award of 8 September 2006, para. 113, Baltag Report, **E-32**.
[308] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction of 12 February 2010, para. 83, Baltag Report, **E-33**.
[309] *SGS v. Paraguay,* Decision on Jurisdiction, para. 83.

340. In *Salini v. Morocco*, the tribunal concluded that "[*t]he construction contract creates a right to a "contractual benefit having an economic value" for the Contractor*"[310]

341. In *İçkale v. Turkmenistan*, the investor opened a branch office in Turkmenistan and engaged in fifteen contracts with the government. The tribunal held that investor had an investment under the applicable BIT. As explained by the tribunal:

> *"the Claimant effectively established a business venture in Turkmenistan in 2004, by way of opening a branch office and engaging in a series of substantial construction projects. … The evidence also shows that the Claimant has committed significant assets of its own, in the form of money, machinery and equipment, to perform the Projects. In the circumstances, the Tribunal does not find it appropriate to consider each of the Contracts concluded by the Claimant individually when determining whether the Claimant has made an "investment" in Turkmenistan; they form part of a whole, which is the Claimant's business venture in Turkmenistan. In view of the scale, duration and number of the projects, and the commitment of capital by the Claimant in their performance, the Tribunal concludes that the Claimant must be considered to have made an "investment" in Turkmenistan within the meaning of both Article 25 of the ICSID Convention and Article I(2) of the BIT.*[311]

342. As explained above, already in 2012 Garsu Pasaulis made substantial investments in the Kyrgyz Republic by executing contracts with the Kyrgyz Government in a bid to modernize the Kyrgyz e-government services. This included, among other things, training of public officials, implementation and maintenance of the related IT systems and all other related tasks to get the e-government systems going and keep them in place even to this date.

343. Therefore, such contracts, won and executed or still to be executed in full or in part by Garsu Pasaulis, and of substantial amount, constitute

[310] *Salini v. Morocco,* Decision on Jurisdiction, para. 45, emphasis in original, Baltag Report, **E-18**.
[311] *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, para. 293, Baltag Report, **E-34**.

an investment within the meaning of this term under Article 1(1)(f) of the Agreement. The arbitral practice and scholars support this conclusion[312].

d. Provision of training and provision of *know-how* by Garsu Pasaulis to the Kyrgyz Republic as investments under the Agreement

344. As already explained in Section II(C) of this Statement of Claim, in addition to other forms of investment, Garsu Pasaulis provided substantial *know-how*, product design, counterfeit expertise, installation and maintenance of IT systems and training to Kyrgyz' public officials. In accordance with won 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[313].

345. Article 1(1) of the Agreement refers to "*any right to engage in economic activities under contract" (Article 1(1)(f)) and to "know-how*" (Article 1(1)(d)). No other limitations are placed on this definition of investment.

346. Dr. Baltag explains[314] that in international commerce, "*know how*" refers to knowledge that has economic value.[315] It is well-established that qualified personnel and *know-how* brought by a contractor to the host State are considered investments.[316]

347. In *Bayindir v. Pakistan*, where the Agreement Between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal

[312] Baltag Report, para 50, **CER-1-1**.
[313] Contract of 1 February 2013 for excise stamps, **CWS Lukosevicius 1-8**; Contract of 5 February 2016 for excise stamps, **CWS Lukosevicius 1-12**.
[314] Baltag Report, para 52, **CER-1-1**.
[315] Suzanne F. Greenberg, The WIPO Model Laws for the Protection of Unpatented Know-How: A Comparative Analysis, 3 International Tax and Business Lawyer 52 (1985), pp. 61-63, Baltag Report, **E-35**. See also Zachary Douglas, *The International Law of Investment Claims,* (Cambridge University Press, 2009), para. 406C, p. 198 ("The know-how represented by a manufacturing process which is contributed to a manufacturing plant in the host state by the claimant might, therefore, qualify as an investment.") Baltag Report, **E-36**.
[316] *Pantechniki S.A. v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009, para. 35; *Bayındır v. Pakistan*, Decision on Jurisdiction, para. 116, Baltag Report, **E-37**, etc.
See Simon Klopschinski, Christopher S. Gibson, and Henning Grosse Ruse-Khan, *The Protection of Intellectual Property Rights under International Investment Law*, (Oxford University Press, 2021), para. 4.03 ("The practice of recognizing intellectual property as a *potential* form of investment to be protected under an IIA dates from the earliest bilateral investment treaty (BIT) between Germany and Pakistan in 1959.", emphasis in original) Baltag Report, **E-38**.

Promotion and Protection of Investments of 16 March 1995 contained similar provisions to the Agreement, the tribunal held that *"[c]onsidering Bayindir's contribution both in terms of know how, equipment and personnel and in terms of injection of funds, the Tribunal considers that Bayindir did contribute "assets" within the meaning of the general definition of investment set forth in Article I(2) of the BIT*."[317]

348. In *Sehil v. Turkmenistan*, claimants submitted that investor invested *know-how* and goodwill in their construction operations in Turkmenistan.[318] The tribunal found that the company established by investor in the host State and the contracts with the host State successfully performed constitute an investment, and added that "*to undertake construction work of the kind covered by the Contracts subject to this Arbitration, Claimants required the knowledge, skill and experience necessary to undertake these projects.*"[319]

349. Garsu Pasaulis is an investor acting in a highly specialized industry where *know-how* is, indeed, a strategic asset.[320]

350. As already explained, Garsu Pasaulis was, indeed, 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.

351. Although Garsu Pasaulis eventually did not get to execute contracts for e-passports and ID cards in the Kyrgyz Republic, this does not prevent the Tribunal to acknowledge the existence of Garsu Pasaulis' investments, in particular when the investment is an intangible right which does not require registration or authorization. In particular, the way the previous tenders and the 2018 Tender processes were set up and Garsu Pasaulis had to organize its investments, as required by such tenders, supports the position that *know-how* was an essential investment required from Garsu Pasaulis.

---

[317] *Bayındır* v. *Pakistan*, Decision on Jurisdiction, para. 116.
[318] *Sehil v. Turkmenistan*, Award, para. 432.
[319] *Sehil v. Turkmenistan*, Award, para. 680.
[320] Security Clearance Certificates, **CWS Lukosevicius 1-4**; Garsu Pasaulis' certifications, **CWS Lukosevicius 1-3**.

352. As concluded by Dr. Baltag, there is no doubt that, in the light of the facts presented, the provision of training and provision of *know-how* by Garsu Pasaulis to the Kyrgyz Republic regarding implementation of identification systems and relevant software constitute investments under the Agreement: "*any right to engage in economic activities under contract*" (Article 1(1)(f) of the Agreement) and to as "*know-how*" (Article 1(1)(d) of the Agreement)[321].

C. Winning in the 2018 Tender of the e-passports contract as a protected investment

353. As was already explained, it is clear that Garsu Pasaulis' 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.

354. On the other hand, as a result of the successful 2018 Tender process, Garsu Pasaulis acquired new and very specific economic right to execute the e-passports contract for a very specific amount, for a very specific period of time.

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

356. 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*[322] 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*

[321] Baltag Report, para 51, **CER-1-1**.
[322] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, para. 133, **CLA-1**.

> *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"*

357. As shown in this Statement of Claim, due to the blatant and conscious violations of the Agreement and the Kyrgyz law by the Kyrgyz Republic, Garsu Pasaulis' economically valuable rights were expropriated, robbing Garsu Pasaulis of its right to execute the e-passports contract. This right was for a specific amount and for a very specific period of time, and it was guaranteed to the Garsu Pasaulis by local Kyrgyz law (see Section VI(B) of this Statement of Claim) and international law (see Section VI(C) of this Statement of Claim).

358. 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 to make an investment in an entirely new market. As clearly shown in the previous Sections (see Section II(C) of this Statement of Claim), the 2018 Tender was part and parcel of Garsu Pasaulis' long-term and consistent plan to invest and work in the Kyrgyz market and the CIS region, and to access the lucrative post-Soviet 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' investments in the Kyrgyz Republic and beyond.

359. Garsu Pasaulis' participation in the 2018 Tender and the facts surrounding the illegal annulment of Garsu Pasaulis' right to execute the e-passports contract, 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 e-passports contract which it had won in the 2018 Tender.

360. There were no additional legal obligations concerning Garsu Pasaulis' right to execute the e-passports contract with the Kyrgyz Government. In addition, the 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 execute the e-passports contract.

361. In fact, Garsu Pasaulis' refusal to proceed with execution of the e-passports contract after Garsu Pasaulis was announced the winner of the 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.

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

363. But for the Kyrgyz Republic's breach of Garsu Pasaulis' rights, Garsu Pasaulis would have gained the specific benefit arising under the e-passports 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.

i. Winning in the 2018 Tender granted Garsu Pasaulis economic rights under the Kyrgyz law

364. As was already explained, the Kyrgyz Republic announced Garsu Pasaulis as winner of the 2018 Tender and invited Garsu Pasaulis to sign the e-passports contract. This section will demonstrate that it was at the moment when Garsu Pasaulis was announced a winner of the

2018 Tender that Garsu Pasaulis acquired a protected economic right under the Kyrgyz law. This section will go on to show that the illegal 'cancellation' of Garsu Pasaulis' economic right was made in breach of the Kyrgyz law, constituting not only a violation of the Agreement, but also an illegal act under the local law.

a. Garsu Pasaulis became entitled to an economic right the moment its 2018 Tender bid was announced the best offer

365. As explained by Prof. Alenkina, Article 29 of the Kyrgyz Law on Public Procurement establishes the following alternative criteria for evaluating the winner of the tender[323]:

- with the lowest price, if the only criterion is the price;
- with the lowest estimated cost, taking into account the established criteria, if the Tender documentation provides for other assessment criteria along with the price.

366. Thus, public procurement can be carried out on the terms of bidding, where the winner is the person who offered the best price, or on the terms of the competitive bidding, the winner of which is determined by the totality of the proposed conditions. The type of public procurement is determined in the tender documentation[324].

367. Paragraph 25.3 of the 2018 Tender regulations (Instructions for Bidders)[325] provides that when the Purchaser evaluates the tender application, in addition to the price of the application, one or more criteria specified in the Special Conditions will be taken into account. In turn, pursuant to Article 25.3 of the Special Conditions to the Instructions for Bidders[326], it is established that the following criteria will

[323] Alenkina Report, para 30, **CER-2-1**.
[324] Ibid.
[325] Instructions for Bidders, Appendix No. 1 to the 2018 Tender documentation, Alenkina Report, **CER-2-Exh.-2**.
[326] Special conditions for the Instructions for Bidders, Appendix No. 2 to the 2018 Tender documentation, Alenkina Report, **CER-2-Exh.-2**.

be taken into account when assessing the tender application, in addition to the price of the application[327]:

- completeness of the submitted tender application;
- compliance with the qualification requirements of the Tender documentation;
- the quality of the delivered goods and their compliance with technical requirements.

368. There were no other criteria for selecting the winner of the 2018 Tender established by the legislation and the terms of the 2018 Tender.

369. Thus, as explained by Prof. Alenkina, the price, in the case of 2018 Tender, was not the only selection criterion. The tender application was evaluated according to a set of conditions, using additional criteria in addition to the price. The winner of the competitive bidding is not the person who offered the lowest price[328]. This person is capable of an optimal solution to the task set by the competitive bidding provider, meeting the State's need for the purchase of new-generation passport forms. Therefore, the bidder whose proposal meets the selection criteria established by the competitive bidding provider must be declared the winner, which, in turn, grants him economic rights[329].

370. Importantly, once the bids were made and assessed by the Kyrgyz Republic, no further negotiations or corrections were allowed. The fate of the 2018 Tender rested entirely on the participant's bids. This means that once Garsu Pasaulis' bid was announced as the winning bid, Garsu Pasaulis unconditionally became entitled to the economic rights to execute the e-passports contract (produce, supply and maintain the new generation passports to the Kyrgyz citizens)[330].

---

[327] Alenkina Report, para 32, **CER-2-1**.
[328] This can also be traced at the level of the terminology used by the Law. Thus, for competitions in which the price is the only evaluation criterion, Article 29 of the Law uses the term *"**the lowest** price*." For the same competitions, where the winner is determined by a set of conditions, the term *"**the lowest** estimated value" is used.* Thus, in the latter case, the winner of the competition may not be the bidder who offered the lowest price of all the bidders of the competition, but his price is the lowest of those who meet the entire set of evaluation criteria, Alenkina Report, para 34, **CER-2-1**.
[329] Alenkina Report, para 34, **CER-2-1**.
[330] Alenkina Report, para 89-91, **CER-2-1**.

371. Under the Kyrgyz law, a public procurement contract with the winner of the tender is concluded in accordance with the terms of the tender application[331]. In other words, the terms of the competitive bidding after determining the winner and awarding the contract must remain unchanged[332].

372. The public procurement contract is actually a set of conditions (i) proposed by the purchasing organisation and which are part of the Tender documentation, and (ii) the conditions contained in the application of the bidder – the winner of the tender. Thus, by submitting a tender application in accordance with the terms of the tender, the bidder thereby agrees to the terms of the draft contract[333], their change is not allowed.

373. Thus the other part of the contract represents the conditions proposed by the winner of the competitive bidding in its application[334]. All changes to the tender application are possible before the deadline for submitting the tender application:

> *"No changes should be made to the tender applications after the deadline set for submitting applications[335] has expired."*

374. Moreover, in the event of a change in the terms of the tender application by the bidder after opening the envelopes with the tender applications, the procuring entity retains the guarantee of the tender application[336].

375. As explained by Prof. Alenkina, theoretically, changes to the draft contract would be possible if it was mentioned in the tender documentation. Generally, the tender documentation may provide for the possibility of changing the volume of deliveries by the purchasing

---

[331] Part 3 of Article 32 of the Law of the Kyrgyz Republic "On Public Procurement", Alenkina Report, **CER-2-Exh.-4**.
[332] Alenkina Report, para 40, **CER-2-1**.
[333] General Terms of the Agreement, Appendix No. 3 to the 2018 Tender documentation, Alenkina Report, **CER-2-Exh.-2**.
[334] Alenkina Report, para 42, **CER-2-1**.
[335] Paragraph 18.3 of the Instructions for Bidders, Appendix No. 1 to the 2018 Tender documentation, Alenkina Report, **CER-2-Exh.-2**.
[336] Part 5 of Article 26 of the Law of the Kyrgyz Republic "On Public Procurement", Alenkina Report, **CER-2-Exh.-4**.

organisation at the time of conclusion of the contract, if this is explicitly stated in the Special Conditions to the Instructions for Bidders:

> *"If necessary, the Purchaser reserves the right at the time of conclusion of the contract to increase or decrease the number of goods specified in the List of purchased goods, if the condition is specified in the Special Conditions to the Instructions for Bidders without changing the price per unit of production or other conditions within the saved funds from the planned amount[337]."*

376. However, there is no such condition in the Special Conditions for the Instructions for Bidders[338].

377. Thus, neither the Kyrgyz legislation nor the terms of the 2018 Tender provide for the stage of negotiations after the announcement of the winner. Such negotiations are not comparable with the norms of the legislation[339].

378. Also, the Kyrgyz law does not provide for so-called "bidding with re-negotiation" when bidders have the opportunity to improve their bids after the envelopes are opened and the competitors' proposals become known. Moreover, such an opportunity is not provided at the stage after the announcement of the winner of the competitive bidding[340].

379. Following the provisions of Article 26(5) and Article 32(4) of the Kyrgyz Law on Public Procurement, refusal to sign a contract on the terms provided for in the winner's tender application is a violation and serves as a basis for the procurement organisation to retain the guarantee security and conclude a contract with the supplier who took the second place in the rating of the winners of the competitive bidding[341].

[337] Paragraph 28.1 of the Instructions for Bidders, Alenkina Report, **CER-2-Exh.-2**.
[338] Alenkina Report, para 45, **CER-2-1**.
[339] When answering this question, I did not consider the cases of making changes to the contract already concluded with the winner of the competition as not relevant to the question posed. See, for example, Article 53 of the Law of the Kyrgyz Republic "On Public Procurement", Alenkina Report, **CER-2-Exh.-4**; or Paragraph 14 (Amendment of the applicable legislation) Instructions for Bidders, Alenkina Report, **CER-2-Exh.-2**.
[340] Alenkina Report, para 89, **CER-2-1**.
[341] Alenkina Report, para 90, **CER-2-1**.

380. Thus, in the 2018 Tender, there was no opportunity to initiate negotiations to change the terms of the e-passports contract in this case.

381. Once announced the winner of the 2018 Tender, the main obligation of Garsu Pasaulis, as mentioned above, was to sign the e-passports contract and provide security for the fulfilment of obligations under the contract.

382. In accordance with the Kyrgyz law, the stage of selecting the winner in the public procurement procedure is followed by the stage of concluding (signing) a contract[342]. The legislation does not provide for any other stages for Garsu Pasaulis to fulfil its rights and obligations.

383. Thus, by winning the 2018 Tender, Garsu Pasaulis acquired automatic legal and factual right to execute the e-passports contract and acquired the corresponding rights and obligations.

b. Legal rights obtained by Garsu Pasaulis under the Kyrgyz law once declared the winner of 2018 Tender

384. As explained, the stage of selecting the winner of the tender is followed by the stage of signing of the contract[343].

385. After the public announcement of the results of the competitive bidding, the participant of the competitive bidding, whose application was recognised as the winning one, acquires *the right to execute the e-passports contract,* mediated by the conclusion of a public procurement contract. This follows from the definition of the tender as one of the methods of public procurement that serve to grant economic rights to the winner of the tender, including the right to conclude a contract[344]:

> *"Competitive bidding - selection by which the winner is determined for the supply of goods, works and services,*

[342] Article 11 of the Law of the Kyrgyz Republic "On Public Procurement", Alenkina Report, **CER-2-Exh.-4**.
[343] Article 11 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.
[344] See, e.g., Alenkina Report, para 89-91, **CER-2-1**.

> *and advisory services in accordance with the procedure provided for by this Law."*[345]

386. A right to conclude a contract as a special subject of bidding is also mentioned in Article 409(5) of the Kyrgyz Civil Code:

> *"If only a right to conclude a contract is played out under the terms of the competitive bidding, such a contract must be signed by the parties no later than twenty days or another period specified in the notification after the completion of the bidding and the execution of the protocol. "*[346]

387. As explained by Prof. Alenkina, the Kyrgyz judicial practice of different years confirms the guarantee and the inviolability of the right of the party that won the tender to conclude a contract with it. It is ensured by forcing the provider of tender, who evades the conclusion of the contract, to conclude the contract. The Kyrgyz courts see this as an exception to the principle of freedom of contracts established by law (Article 382 of the Kyrgyz Civil Code).[347]

388. Thus, the Protocol of Procurement procedures[348], which announced Garsu Pasaulis as the winner of the competitive bidding, certifies Garsu Pasaulis' exclusive right to conclude the e-passports contract on the terms determined in the bidding process.

389. This right to conclude a contract is urgent: the contract must be concluded 7 days after completing the tender[349].

390. Simultaneously, with the right of the winner of the tender to conclude a contract, he is obliged to enter into this contract, which is ensured by the possibility of the provider of tender to retain the guarantee of the tender application:

---

[345] Alenkina Report, para 80, **CER-2-1**.
[346] Alenkina Report, para 81, **CER-2-1**.

[347] See, for example: The decision of the Arbitration court of Bishkek city, 7 June 2001 in the case of No. Б-01-348/2001-с9пр"В", Alenkina Report, **CER-2-Exh.-14**; the decision of the judicial Board on administrative and economic cases of the Supreme court of the Kyrgyz Republic of March 12, 2015, in the case of No. ЭД-1006/14 мчс 5, Alenkina Report, **CER-2-Exh.-15**.
[348] Alenkina Report, **CER-2-Exh.-2**.
[349] Part 2 of Article 32 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.

> *"5. The guarantee provision of the tender application by the procuring entity is withheld in the following cases:*
>
> *1) refusal to sign the contract on the terms stipulated in the winner's tender application;"*[350]

391. During this period, the winner of the tender has the following obligations related to signing of the contract:

- submit to the purchasing organisation notarized documents included in the tender application[351];
- deliver the signed contract to the purchasing organisation[352];
- make a guarantee for the performance of the contract[353]

392. Thus, there can be no doubt that Garsu Pasaulis gained economic rights as soon as it was announced the winner of the 2018 Tender. Under normal circumstances, i.e., without the undue interference from the Kyrgyz Republic (the GKNB and GRS) Garsu Pasaulis could have enforced such right via the courts.

393. However, and more importantly, once Garsu Pasaulis acquired the abovementioned rights, these rights could not be withdrawn or cancelled.

394. The rights of Garsu Pasaulis, who was declared the winner of the 2018 Tender, could be terminated only in the following cases provided for by the Kyrgyz law:

---

[350] Paragraph 1 of Part 5 of Article 26 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.

[351] Paragraph 52 of the Regulations on the rules for conducting electronic public procurement, approved by the order of the Ministry of Finance of the Kyrgyz Republic dated October 14, 2015, No. 175-p/Erkin, dated October 23, 2015, No. 103-104, Alenkina Report, **CER-2-Exh.-7**.

[352] Paragraph 29.3 of the Instructions for Bidders (IFB), Appendix No. 1 to the Standard tender documentation for the purchase of goods by one-stage, two-stage, simplified methods and the method for lowering the price, approved by the order of the Ministry of Finance of the Kyrgyz Republic dated October 14, 2015, No. 175-p/Erkin, dated October 23, 2015, No. 103-104, Alenkina Report**, CER-2-Exh.-9**.

[353] Paragraph 53 of the Regulations on the rules for conducting electronic public procurement, approved by the order of the Ministry of Finance of the Kyrgyz Republic dated October 14, 2015, No. 175-p/Erkin, dated October 23, 2015, No. 103-104, Alenkina Report, **CER-2-Exh.-7**; Paragraph 34 of the Methodological Instructions for the evaluation of competitive applications approved by the order of the Ministry of Finance of the Kyrgyz Republic dated October 14, 2015, No. 175-p/Erkin, dated October 23, 2015, No. 103-104, Alenkina Report, **CER-2-Exh.-10**.

a) failure to sign the contract by Garsu Pasaulis within the established time frame[354];

b) failure to provide a guarantee by Garsu Pasaulis for the performance of the contract;

c) withdrawal of the tender application by Garsu Pasaulis after its opening and before the expiration of its validity[355];

d) suspension of Garsu Pasaulis from participation in public procurement for violation of the rules of participation in public procurement procedures or the presence of a conflict of interests[356];

e) cancellation by the purchasing organisation of the tender (public procurement procedure) if there is no need for further acquisition[357];

f) cancellation of the competition in case of violation of the rules on the prevention of conflicts of interest[358];

g) termination of procurement procedures by a decision of the procuring entity or a court due to violations committed by employees of the procuring entity or members of the Tender Commission of the rules on the absence of a conflict of interests[359];

h) cancellation by the IIC of a decision of the purchasing organisation, which violates the terms of the tender procedure and/or makes a decision to terminate the procurement procedures[360].

---

[354] Part 3 of Article 32 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.
[355] Paragraph 3 of Part 5 of Article 26 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.
[356] Paragraph 8 of Part 2 of Article 10 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.
[357] Part 1 of Article 31 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.
[358] Part 9 of Article 6 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.
[359] Part 1 of Article 6 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.
[360] Part 5 of Article 49 of the Law of the Kyrgyz Republic "On Public Procurement of the Kyrgyz Republic", Alenkina Report, **CER-2-Exh.-4**.

395. As explained by Prof. Alenkina, in the current situation, it is impossible to conclude that the economic rights of Garsu Pasaulis were terminated on either of the bases above for the following reasons[361]:

- absence of actions (inaction) on the part of Garsu Pasaulis entailing the termination of its rights (Subparagraphs a-c of Paragraph 394 above);
- Garsu Pasaulis was not suspended from participating in the competition (Subparagraph "d" of Paragraph 394 above);
- the tender was not cancelled, and the procurement procedures were not terminated in accordance with Subparagraphs "e-h" of Paragraph 394 above).

ii. Winning in the 2018 Tender granted Garsu Pasaulis economic rights protected under the Agreement

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

397. 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,

[361] Alenkina Report, para 87-88, **CER-2-1**.

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.

398. Accordingly, Garsu Pasaulis endorses authorities suggesting that Agreement definitions of 'investment' should be interpreted broadly in accordance with their plain language[362].

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

400. 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*.

401. 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 an economic activity or a right to engage in economic activity under a contract in the Kyrgyz Republic having economic value (Article 1(1) of the Agreement).

402. Although this is not an ICSID case, and although the *Salini* test does not apply, it must be noted that even addressing the elements of the *Salini* test, Garsu Pasaulis' investments qualify as an investment: (a) Garsu Pasaulis' substantial contribution is reflected by the establishment of local company and execution of contracts for the Kyrgyz government for the establishment and developments of e-government services; (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

[362] *Jan Oostergetel & Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, Baltag Report, **E-90**; *Tradex Hellas S.A. v Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, **CLA-2**; *Fedax N.V. v Republic of Venezuela*¸ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, Baltag Report, **E-19**.

economic development since the Garsu Pasaulis brought best industry practices from its experience from around the world.

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

404. 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.[363]

405. Thus, the current dispute arises out of the Kyrgyz Republic's breach of Garsu Pasaulis' rights and is a dispute "*arising directly*" out of Garsu Pasaulis' investment: (a) Arbitral practice and commentary[364] 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 out 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.

406. The rights were an integral part of an overall operation that qualifies as an investment. The dispute need not arise out of the physical property of the investor as it can emanate from the investment itself or the operations of the investment[365] or even concern a transaction that does not itself constitute an investment[366].

407. 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 the arbitral practice, it is plain to see that, as a matter of common

[363] *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, **CLA-3**.
[364] Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn, 2009), **CLA-4**.
[365] *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, Baltag Report, **E-6**.
[366] *Československa obchodní banka, a.s. v Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, Baltag Report, **E-20**.

English usage, State's measures that affect the core objectives of an investment, such as its sustainability or profitability are clearly related to the investment.

408. 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'[367].

409. 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 execute the e-passports contract 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.

410. Garsu Pasaulis' investments in the Kyrgyz Republic must be considered *in corpore*, including its shares in a local company, contracts with the Kyrgyz Government, *know-how* and goodwill / business reputation. The Tribunal should look at Garsu Pasaulis' investments as a whole operation, where the rights acquired under the 2018 Tender would be one of the manifestations of Garsu Pasaulis' investments. In support to this, Article 3(1), second part, of the Agreement expressly prohibits "*unjustified, ill-considered or discriminatory measures*" affecting the "*development*" of investor's investments. The interpretation of this provision in the Agreement evidences that the Agreement is meant to promote and protect investors' developments and expansions of their investments, and not only to promote and protect new investments.

411. Nonetheless, the winning of the 2018 Tender with the invitation to sign the e-passport contract constitutes, in itself, an investment under Article 1(1)(c) of the Agreement and under the Kyrgyz law such participation

[367] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Baltag Report, **E-76,** and *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, Baltag Report, **E-61**.

and winning of the 2018 Tender is a protected right.[368] Article 1(1)(c) refers to "*monetary claims or requests to carry out any other actions of economic value", while Article 1(1) refers to "assets invested … in accordance with the national legislation of the [host State]*". As such, since the winning of the 2018 Tender generates rights under the Kyrgyz law, this must be acknowledged as a protected investment.

412. The Agreement does not require that monetary claims be associated with an investment. This must be distinguished from cases where the investment treaty specifically required this.[369]

413. Various cases come to confirm that a tender can generate rights which qualify as investments under the applicable treaty.

---

[368] See Sarah Grimmer, Love Me Tender: At Which Point in a Tender Process Is Investment Treaty Protection Attracted?, in Hong Kong International Arbitration Centre (ed.), International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan, (Kluwer Law International, 2018), pp 488 and 501 ("In assessing whether a would-be investor has acquired such rights, it is necessary to consider the relevant domestic la of the host State.") Baltag Report, **E-40**; Jane Jenkins, International Construction Arbitration Law, (Kluwer Law International, 2021, 3rd edition), p. 393, Baltag Report, **E-41**. See also, *Nordzucker v. Poland*, Partial Award, para. 167 ("The Tribunal also notes that the definition given in article 1(1)(a) requires that the investor invests pursuant to the legislation of the other Contracting Party. Whereas the Tribunal does not consider that this reference to the host State's law allows a host State to determine unilaterally whether or not the "involvement" of an investor in its country amounts to an investment or not, the expression "pursuant to the legislation" of the host State, which also comes back in article 2.1 second sentence (see hereafter) in this Tribunal's opinion means more than just to exclude transactions which are illegal under the host State's law. It means that a tribunal, when deciding whether or not an investor invests in property, or shares or money claims or any other assets, has to apply the host State's law in assessing whether the investor has duly acquired property, shares, claims to money or other assets."). In *Nagel v. Czech Republic*, the tribunal has made it clear that domestic law is relevant when interpreting the notions of 'investment' and 'asset', although a treaty should be interpreted in accordance with the rules of public international law (*William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award of 9 September 2003, para 316, Baltag Report, **E-42**. See also *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award of 16 April 2014, paras 161-162 ("The need to identify a proprietary interest that has been taken is confirmed by the definition of 'investment' in the Treaties. In each case, the Treaty refers compendiously to 'every kind of asset[s]'. The Oxford English Dictionary definition of 'asset' is: (usually assets) an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies. The definitions in the Treaties go on to provide particular examples of types of property or rights that may constitute an asset for this purpose. But these examples are not exhaustive. … In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law.") Baltag Report, **E-43**. See also *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22, Award of 3 May 2018, para. 150 ("if the Tribunal concludes that no valid contract was formed under Kosovar law as claimed by Axos this would be sufficient to dismiss Axos' main jurisdictional theory.") Baltag Report, **E-44**.

[369] In *Electrabel v. Hungary*, the applicable treaty defined the term "investment" to include claims to money that were "associated with an investment" and the tribunal found that this constituted a "limitation" and that the claim to money is not itself an independent "investment."*Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, paras 5.52-5.53 ("Sub-paragraph (c) of Article 1(6) treats as an 'investment' contractual claims to money or performance, having an economic value and associated with an investment. The Tribunal agrees with the Claimant's submission that the PPA comprises contractual claims to money … as well as contractual claims to performance by MVM. It is also clear that these claims have an economic value. However, the phrase 'associated with an investment' found in subparagraph (c) constitutes a limitation on the notion of investment'.... Under the Vienna Convention, the correct interpretation must give effect to the terms in their context and avoid obscure results. To this end, as a matter of common sense, it is necessary to understand 'investment' in sub-paragraph (c) to mean an investment other than the one addressed in this same sub-paragraph... In other words, the Tribunal agrees with the Respondent's submission and decides that this category of investment is dependent on the overall investment.") Baltag Report, **E-45**.

414. In *Nordzucker v. Poland*, the tribunal held that the non-acquisition of two out of four factories for which investor was the successful bidder, are "*investments in the making*" which qualify to the protection of the applicable treaty.[370]

415. In *Lemire v. Ukraine*, the tribunal held that the unsuccessful participation of the investor in several tender processes in Ukraine qualified as a protected investment under the relevant treaty. In doing so, the tribunal relied on the provisions of the Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment, entered into force on 16 November 1996 and, in particular, on the wording of the treaty covering "*access to … licenses*", as well as protecting the "*expansion … of investments*".[371]

416. In *Bosca v. Lithuania*, Lithuania "*unilaterally, unjustifiably and unlawfully annulled the tender*" that had been awarded to investor in October 2003.[372] By 1997, the claimant, together with his local business partner, Dr. Gintaras Skorupskas, incorporated the Lithuanian company, Boslita, the first private alcohol company in Lithuania to be granted permission to produce alcohol up to 22 degrees. In September 1999, claimant signed a Service Providing Agreement with Boslita under which claimant would provide extensive and valuable *know how* to Boslita between 2000 and 2009. In early February 2003, Lithuania announced the privatization of Alita, a well-established sparkling wine producer and market leader in Lithuania. Claimant was declared the

[370] *Nordzucker v. Poland*, Partial Award, para. 209 ("The Arbitral Tribunal therefore considers that the Gdansk Group was from a practical point of view as close to a sale, but for the last formal step of the GAM's approval, as the Szczecin Group was. Both Groups came within the category of the "investments in the making" for which the host State had limited obligations under the first and third sentences of article 2 (1) of the BIT.")

[371] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, para. 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" for purposes of Article VI of the BIT; the Centre has jurisdiction and the Tribunal competence to adjudicate it.") and 91 ("This conclusion is confirmed by the text of the BIT. The BIT expressly extends protection to "associated activities" which include "access to ...licences, permits and other approvals...." (see Articles I.1 (e) and II.11 (b) of the BIT). Article II.3 (b) moreover provides that "Neither Party shall in any way impair by arbitrary or discriminatory measures the ... expansion ... of investments". The allocation of frequencies was a condition for Claimant's ability to expand his investment. Claimant's allegations related to tenders for frequencies and licences thus fall within the scope of the BIT.") Baltag Report, **E-46**.

[372] *Luigiterzo* Bosca v. Lithuania, UNCITRAL, PCA Case No. 2011-05, Award of 17 May 2013., Baltag Report, **E-47**.

winning bidder and there have been rounds of negotiations on certain terms of the share purchase agreement. After refusals on the side of the claimant, on 10 October 2003, the State authority in charge with the privatization annulled the results of the tender. The tribunal held that claimant was devoting resources to a commercial venture in Lithuania with the expectation of profit as early as the time of the Service Agreement with Boslita and that this contract was more than an "*ordinary contract for the supply of services*".[373] In particular, the tribunal had no doubt that claimant contributed considerable *know how* to Boslita during the duration of the Service Agreement and such *know how* was covered by Article 1(1)(d) of the applicable treaty.[374] Further, as concluded by the tribunal, this Service Agreement had the necessary elements of contribution, risk and duration typically considered basic characteristics of an investment.[375] As to the tender, the tribunal took into consideration the fact that the relevant treaty referred to "*associated activities*" to be treated as investments, and, on this basis, "*becoming the tender winner and negotiating the SPA can be likened to 'making [a] contract'*", which grant the tribunal jurisdiction over the claimant's claim.[376]

417. As explained by Dr. Baltag, the Tribunal must distinguish the present arbitration from the cases in which arbitral tribunals have held that so-called 'pre-investments' – usually in the phase of negotiating contracts – do not qualify as protected investments under the relevant treaty.[377] Such 'pre-investment' cases must be approached with caution, as suggested by the tribunal in *Mihaly v. Sri Lanka*:

> *"It is in this factual setting that the Tribunal has been asked to consider whether or not, the undoubted expenditure of money, following upon the execution of the Letter of Intent, in pursuit of the ultimately failed enterprise to obtain a contract, constituted "investment" for the purpose of the Convention. The Tribunal has not been asked to and cannot consider in a vacuum whether or not in other circumstances*

[373] *Bosca v. Lithuania*, Award, para. 168.
[374] *Bosca v. Lithuania*, Award, para. 168.
[375] *Bosca v. Lithuania*, Award, para. 168.
[376] *Bosca v. Lithuania*, Award, para. 172.
[377] See on this, Crina Baltag, *Admission of Investments and the ICSID Convention*, Transnational Dispute Management, Vol. 6, issue 1, March 2009, Baltag Report, **E-48**.

> *expenditure of moneys might constitute an "investment". A crucial and essential feature of what occurred between the Claimant and the Respondent in this case was that first, the Respondent took great care in the documentation relied upon by the Claimant to point out that none of the documents, in conferring exclusivity upon the Claimant, created a contractual obligation for the building, ownership and operation of the power station. Second, the grant of exclusivity never matured into a contract.* [378]

418. As explained above, in accordance with the 2018 Tender regulations and the Kyrgyz law, winning of the 2018 Tender by Garsu Pasaulis provided Garsu Pasaulis an immediate and legally enforceable right to execute the e-passports contract with not further negotiations envisioned.

419. Thus the winning by Garsu Pasaulis of the 2018 Tender constitutes a "*monetary claim or requests to carry out any other actions of economic value*" as per Article 1(1)(c) of the Agreement, and such right is recognised under Kyrgyz law. The arbitral practice and scholars support this conclusion.

420. Nonetheless, one must take into consideration that this point concerns the "*monetary claims or requests to carry out other actions of monetary value*" in relation to the 2018 Tender as a distinct, individual investment of Garsu Pasaulis. However, as mentioned, Garsu Pasaulis' various investments in the Kyrgyz Republic, and the 2018 Tender would be one of the manifestations of Garsu Pasaulis' investments.

421. 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 the Kyrgyz's treaty obligations towards their investment. That disagreement arises directly out of the investment impacted by the Kyrgyz's measures.

[378] *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award of 15 March 2002, para. 48, **E-49**.

D. Garsu Pasaulis' international reputation as a protected investment

422. As it was already explained, the present dispute revolves around a twofold issue, first is the denial of Garsu Pasaulis' right to receive the benefit of the e-passports contract won in the 2018 Tender, a right to which Garsu Pasaulis was legally and factually entitled, and which would have enabled Garsu Pasaulis to expand its existing e-government investments in the Kyrgyz Republic and to earn very clearly defined income and profits.

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

424. Not only has the Kyrgyz Republic destroyed Garsu Pasaulis' reputation in the Kyrgyz Republic, but the Kyrgyz Republic's actions had a snowball effect on Garsu Pasaulis' international reputation all around the world. It 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.

425. The definition of investment provided by 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.

426. International business reputation is a 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. 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*."[379]

[379] 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, **CLA-5**.

427. Similarly, it took more than 20 years for Garsu Pasaulis to become a global player with an excellent global reputation in a very specific area of investments into e-government services and security printing, and it took literally one day for the Kyrgyz Republic to destroy Garsu Pasaulis' reputation.

428. However, Garsu Pasaulis' business reputation was damaged by the public knowledge of false allegations presented by the Kyrgyz officials.

429. Because of the illegal actions of the Kyrgyz Republic, Garsu Pasaulis is at risk of being blacklisted in numerous countries around the world and already incurred significant monetary damages (see Section VII of this Statement of Claim).

430. Business reputation is protected by the Agreement, because business reputation certainly has an economic value.

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

432. From the standpoint of the Agreement, Article 1(1)(e) of the Agreement expressly includes "*business reputation*" as covered investment. "*Business reputation*" or "*goodwill*"[380] is commonly included in the definition of investment under investment treaties.[381] As explained by scholars, *"[c]ertain investment agreements also list goodwill separately, indicating that a company's reputation may be deemed a distinct 'investment'*."[382]

[380] The New Oxford American Dictionary, (Oxford University Press, 2005, 2nd edition), p. 726, Baltag Report, **E-50**, defines "goodwill" as "the established reputation of a business regarded as a quantifiable asset".
[381] See for a survey of the definition of investment under investment treaties, showing the inclusion of goodwill or business reputation, OECD, *Definition of Investor and Investment in International Investment Agreements*, 2008, Baltag Report, **E-51**; Lahra Liberti, *Intellectual Property Rights in International Investment Agreements: An Overview*, OECD Working Papers on International Investment, 2010/01, Baltag Report, **E-52**. Rachel A Lavery, *Coverage of Intellectual Property Rights in International Investment Agreements: An Empirical Analysis of Definitions in a Sample of Bilateral Investment Treaties and Free Trade Agreements,* Transnational Dispute Management, volume 6, issue 2, 2009, Baltag Report, **E-114**. See also Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 17 Berkeley Cent. L. & Tech. 1 (2006), Baltag Report, **E-53**, in particular on goodwill protected by trademark law.
[382] Enikő Horváth and Severin Klinkmüller, *The Concept of 'Investment' in the Digital Economy: The Case of Social Media Companies*, Journal of World Investment & Trade 20 (2019) 577–617, pp 601-602, Baltag Report, **E-54**.

433. Goodwill is understood as "*for instance, customer relationships, significant contracts, brand value created through a company's operations*".[383]

434. In *A11Y Ltd. v Czech Republic* the tribunal held that investor's goodwill and *know-how* in providing assistive technologies for the visually impaired constituted investments under the applicable treaty. Claimant's assets, as presented, consisted mainly of know-how and goodwill: *"[i]n respect of know-how, even the Respondent's technical experts agreed at the Hearing that A11Y possessed know-how. Such know-how includes the expertise of A11Y's employees, such as Mr. Hanke, and its owner, Mr. Buchal, in providing cutting-edge assistive technologies and holistic solutions for the visually impaired. As Mr. Tollefsen, the Claimant's expert testified, the Claimant's training handbooks are "among the best learning materials" he has seen and would have required "a lot of work and technical knowledge to prepare.*"[384] As to the goodwill, the tribunal noted that "*the record is replete with evidence concerning the loyalty of the Claimant's customers and Mr. Buchal's stellar reputation in this field. The evidence of goodwill is overwhelming*."[385] The tribunal concluded that:

> *"these assets, namely the know-how and the goodwill, transferred from BRAILCOM to A11Y, belong to A11Y, and thus represent an investment by the Claimant in the Czech Republic under the Treaty".*[386]

435. In *Tidewater v. Venezuela*, the tribunal acknowledged that the terms of the applicable treaty and of the Venezuelan investment law included "*goodwill and know-how as well as other tangible and intangible assets, including contractual rights*."[387]

---

[383] M. Alexis Maniatis, Fabricio Nunez, Ilinca Popescu and Jack Stirzaker, *Accounting-Based Valuation Approach*, in John A. Trenor, *The Guide to Damages in International Arbitration*, (Law Business Research, 2021, 4th edition), 261-276, p. 269, Baltag Report, **E-55**.
[384] *A11Y v. Czech Republic*, Award, para. 145.
[385] *A11Y v. Czech Republic*, Award, para. 146.
[386] *A11Y v. Czech Republic*, Award, paras 144–146, 150. Article 1(a)(iv) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and. the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments with Protocol, signed on 10 July 1990 refers to "intellectual property rights, goodwill, know-how and technical processes" as investments.
[387] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award of 13 March 2015, para. 118. Baltag Report, **E-117**.

436. In *Chemtura v. Canada*, the tribunal held that goodwill can also be considered as accessories to an investment: "*goodwill or market position may indeed be seen as accessories of an "enterprise", which is per se an investment under Article 1139 of NAFTA*."[388]

437. Garsu Pasaulis regards its business reputation as being undoubtedly, one of the most valuable assets of any company, and particularly of a globally operating company, such as Garsu Pasaulis.

438. Therefore, the wording of Article 1(1)(e) of the Agreement unequivocally covers the business reputation or goodwill of an investor as a protected investment. In particular, for a business such as Garsu Pasaulis', business reputation is, without doubt, an essential investment.

V. RATIONE VOLUNTATIS

439. In addition to the satisfaction of *ratione personae & ratione materiae* requirements, the present Arbitration also meets the *ratione voluntatis* test. Both parties to this Arbitration have given their consent to the Tribunal's jurisdiction, and Garsu Pasaulis has met all the admissibility (pre-arbitration) requirements.

A. Garsu Pasaulis and the Kyrgyz Republic Have Consented to Submit this Dispute to Arbitration Under the UNCITRAL Rules

440. 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* arbitration tribunal, in compliance with the UNCITRAL Rules.

441. It is well settled in international investment jurisprudence that an investor's request for arbitration constitutes its acceptance of the host

[388] *Chemtura Corporation v. Government of Canada*, UNCITRAL (formerly *Crompton Corporation v. Government of Canada*), Award of 2 August 2010, para. 243. Baltag Report, **E-116**.

State's standing offer to arbitrate contained in a treaty or other instrument of consent.

442. In this case, the Garsu Pasaulis' Notice of Arbitration constituted its acceptance of the Kyrgyz Republic's offer to arbitrate disputes under the Agreement. The Notice of Arbitration fully complied with the UNCITRAL Rules and, as such, was effective in establishing Garsu Pasaulis' acceptance of the Kyrgyz Republic's offer to arbitrate.

443. It is well-accepted in practice that institution of investment arbitration proceedings against the host State perfects the parties' consent to arbitration and makes it irrevocable.

444. The binding and irrevocable nature of consent to the Tribunal's jurisdiction is a manifestation of the maxim "*pacta sunt servanda*" and applies to undertakings to arbitrate in general. This maxim applies where an offer of consent is contained in national legislation or in a treaty and has been accepted by the investor.

445. The irrevocability of consent operates only after the consent has been perfected. In the case of national legislation and treaty clauses providing for the Tribunal's jurisdiction, the investor must have accepted the consent in writing to make it irrevocable. This may be done by a simple letter addressed to the host State. Alternatively, the investor may accept the offer of consent simply by instituting arbitration proceedings.[389]

446. This means, once Garsu Pasaulis sent Notice of Arbitration, where it unequivocally confirmed acceptance of the Tribunal's jurisdiction to hear this dispute, the parties' arbitration agreement (consent to arbitration) has become irrevocable.

[389] See, e.g., UNCTAD, 2.3 Consent to Arbitration, p. 37,**CLA-6**.

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

447. 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.

448. Garsu Pasaulis has first delivered the 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[390]. In this notice, Garsu Pasaulis has explained in 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 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.

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

450. 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 received any response and that Garsu Pasaulis' communications had gone unheeded and attempts to negotiate with the Kyrgyz Republic were ignored[391].

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

452. On 31 October 2019, Garsu Pasaulis sent a third and final pre-arbitration notice to the President of the Kyrgyz Republic and the Government[392]. In the third notice, Garsu Pasaulis again expressed its intent to good faith negotiations with the Government in order to attain

[390] 2019-04-30 Garsu Pasaulis' Notice of Intent.
[391] 2019-07-10 Garsu Pasaulis' Second Notice.
[392] 2019-10-16 Garsu Pasaulis' Third Notice.

an amicable resolution of the parties' dispute on "*without prejudice*" basis.

453. However, again and again, Garsu Pasaulis' communications fell on deaf ears, and Garsu Pasaulis has not received any response from the Kyrgyz Republic.

454. 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.

455. 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 Garsu Pasaulis' intention of submitting the dispute to arbitration if a settlement was not reached within six months. This fully satisfies Article 8(2) of the Agreement.

456. Therefore, the Tribunal should be satisfied that Garsu Pasaulis attempted to resolve the dispute through consultation or negotiation and failed solely due to the inaction of the Kyrgyz Republic.

457. 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 harder.

458. Instead of engaging in meaningful negotiations, Garsu Pasaulis was confronted with illegal offers to "buy" favorable court decisions in the Kyrgyz Republic related to 2018 Tender and even threatened with fraudulent video recordings alleging Garsu Pasaulis' involvement in bribery activities.

459. Although the Kyrgyz Republic could have provided a reasonable opportunity for the parties to resolve their dispute, however, thus far, Garsu Pasaulis' attempt to reach an amicable agreement was attacked and, instead of good faith reciprocal actions, Garsu Pasaulis received even more arbitrary treatment.

460. The Government that is bound by the standard of fair and equitable treatment of foreign investors must never avoid paying due regard to the good faith efforts of a foreign investor. And thus, the seriousness of any negotiations with Garsu Pasaulis was undermined relatively early on, when there was still time for alternative cooperative solutions. The failure to develop a workable cooperative solution, in time, led to a situation where Garsu Pasaulis was forced to refer to international arbitration.

461. Therefore, it was the Kyrgyz Republic who breached its obligation to negotiate in good faith as required by Article 8(2) of the Agreement. Garsu Pasaulis used every opportunity to establish a productive dialogue, but the Kyrgyz Republic chose not to deal with Garsu Pasaulis in an unbiased and even-handed way.

462. 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. The Kyrgyz Republic simply refused to communicate with Garsu Pasaulis and downgraded the parties' communication to zero.

463. In any case, Garsu Pasaulis still believes that the parties may resolve their differences and reach an agreement amicably and without the necessity of third-party dispute resolution, but now the ball is in the Kyrgyz Republic's hands.

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

A. General overview

464. In this section, Garsu Pasaulis will demonstrate that the Kyrgyz Republic's unlawful conduct in carrying out and 'cancelling' the 2018 Tender, as described in Section VI(B) of this Statement of Claim, violated the protections and guarantees set out in Articles 2-4 of the Agreement.

465. 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 (Section VI(C)(i)).

466. 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 a stable and secure environment, guaranteeing physical, commercial, and legal protection thereof. The Kyrgyz Republic must have ensured that Lithuanian investors and their investments enjoy international standards of protection and security (Section VI(C)(ii)) .

467. Furthermore, Article 4 of the Agreement prohibits the direct or indirect expropriation of the investments of Lithuanian investors save for limited and well-defined instances. Such instances include measures taken for a public purpose and accompanied with immediate, full, and effective compensation, as well as being done in a non-discriminatory manner (Section VI(C)(iii)).

468. Finally, Article 3 of the Agreement, read in conjunction with Article 1 of the Agreement, obligates the Kyrgyz Republic to protect Garsu Pasaulis' business reputation (Section VI(C)(iv)).

469. As it will be demonstrated below, the Kyrgyz Republic has clearly breached the Agreement by failing to ensure due process, by applying unjust and discriminatory measures, by failing to provide a stable and secure environment in physical, commercial, and legal sense.

470. In addition, the Kyrgyz Republic breached the investor's legitimate expectations and expropriated Garsu Pasaulis' investments in a discriminatory manner, without immediate, full and effective compensation.

471. Furthermore, the Kyrgyz Republic has effectively destroyed Garsu Pasaulis' international reputation and caused Garsu Pasaulis substantial damages.

472. As the *Lemire*[393] and *PSEG*[394] awards show, tribunals have been sympathetic to investors' claims, where despite expending considerable resources while participating in tenders, the Respondent States ultimately prevent the investors from benefiting from a project.

473. Applying that standard, the Tribunal will be in a position to clearly conclude that the 2018 Tender process and 'cancelation' thereof was irregular, arbitrary, and discriminatory. The Kyrgyz Republic has ultimately frustrated Garsu Pasaulis' undoubtedly legitimate expectations that Garsu Pasaulis would be able to expand its investments in the Kyrgyz Republic, properly execute the e-passports contract, and further build its business reputation.

474. In this case, three key factors are important when considering the breach of Garsu Pasaulis' rights and guarantees provided in the Agreement:

    1) the 2018 Tender process and the 'cancellation' thereof were clearly tainted by interferences from the Kyrgyz authorities and

[393] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Baltag Report, **E-46**.
[394] *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, Baltag Report, **E-59**.

political organs (organs of the state), including, in particular, the GKNB;

2) Garsu Pasaulis, being pronounced as the winner of the 2018 Tender, has acquired specific legal and valuable rights (right to execute and (thereafter) perform the e-passports contract) for a specific duration and the specific price as provided for in the e-passports contract. Garsu Pasaulis was deprived of this valuable (economic) right in an illegal, irregular, and arbitrary way, without ensuring due process; and

3) the public smear campaign executed against Garsu Pasaulis, which has intentionally destroyed Garsu Pasaulis' international business reputation and caused significant damages. This smear campaign was orchestrated by the Kyrgyz public authorities, who themselves had private interests for personal gain.

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

476. Thus, while any of the three above features alone stigmatize the entire 2018 Tender process and the 'cancelation' thereof as arbitrary, there is also evidence that these features ended up mutually reinforcing each other against Garsu Pasaulis. In this case, the Tribunal must assess the "totality of the circumstances", which will result in an award against the State. Even if the Tribunal was to analyze every individual act, omission, or procedural shortcoming separately, the end result would be the same.

477. All manifestations of serious abuse of authority, administrative negligence and inconsistent legal acts lead to a conclusion that the fair and equitable treatment, full security and protection standards have been breached by the Kyrgyz Republic. These breaches caused significant damages and entail the Kyrgyz Republic's liability.

B. The destruction of Garsu Pasaulis' investment was illegal as a matter of Kyrgyz law

478. The Kyrgyz Republic took series of actions, which ultimately led to the destruction of the Garsu Pasaulis' investment together with the Garsu Pasaulis' reputation. Among those actions was the illegal 'cancellation' of the 2018 Tender, which, even under the Kyrgyz law, finds no justification. Garsu Pasaulis was simply expelled from the 2018 Tender on a discriminatory basis. Despite being told that the 2018 Tender was "*declared invalid*" or "*failed*", or "*cancelled*"[395] – the position of the Kyrgyz Republic was always non-specific – nothing of this sort happened. The Kyrgyz Republic simply eliminated Garsu Pasaulis after announcing it as the winner and moved on to conclude a contract with other companies.

i. The 2018 Tender has never been "suspended" or "terminated" under the Kyrgyz law

479. As explained by Prof. Alenkina[396], according to the Law on Public Procurement, tender procedures are suspended in the following cases:

a) by the decision of the purchasing organisation or the court in case of violation by employees of the purchasing organisations or members of the Tender Commission of the provisions of Article 6(1) of the Law (conflict of interests);

b) by the decision of the authorised state body for public procurement on the suspension of the tender process, due to violations of the legislation of the Kyrgyz Republic in the field of procurement identified during the monitoring process (Article 9(2)(2) of the Law);

[395] Order of the GRS "On the cancellation of competitive bidding" dated 4 February 2020, Alenkina Report, **CER-2-Exh.-3**.
[396] Alenkina Report, para 95, **CER-2-1**.

c) by the decision of the Tender Commission in the event of a complaint (Article 49(3) of the Law).

480. Despite the fact that Muhlbauer filed a complaint against the decision of the Tender Commission on February 5, 2019, there was no decision of the Tender Comission to suspend the tender procedures.

481. Moreover, by virtue of Article 30(1)(16) of the Law on Public Procurement, information about the suspension and resumption of the tender should have been reflected in the protocol of procurement procedures. In this case, there is no such record in the protocol.

482. Thus, there is no evidence that the 2018 Tender was ever suspended. Accordingly, the procuring entity had to sign the e-passports contract with the winner of the 2018 Tender – Garsu Pasaulis[397].

ii. The 2018 Tender has never been "terminated"

483. By the Order of GRS of 4 February 2020, the 2018 Tender was declared 'invalid' (or as 'failed')[398].

484. Firstly, as explained by Prof. Alekina, the specified order incorrectly indicates the date of the 2018 Tender announcement[399].

485. Secondly, and as already explained in Section VI(B)(i) of this Statement of Claim, Garsu Pasaulis bid (offer) has not and could not 'expire'.

486. In addition, in this Order of GRS of 4 February 2020, there is a discrepancy between the name of the act, which indicates the subject matter what the order regulates, and its contents.

487. Prof. Alenkina explained that the 'cancellation' of the tender is possible due to violations committed in the procurement process or due to the absence of the need for holding a tender, whereas

[397] Alenkina Report, para 98, **CER-2-1**.
[398] Order of the GRS "On the cancellation of competitive bidding" dated 4 February 2020, Alenkina Report, **CER-2-Exh.-3**.
[399] Alenkina Report, para 100, **CER-2-1**.

biddings are recognised 'invalid', as a rule, when it is impossible to achieve the goal of bidding to ensure competitiveness and competition during their conduct. If the bidding is declared 'invalid', repeat biddings are held, or purchases are made by the method of direct conclusion of the contract. In case of 'cancellation' of the tender, the Kyrgyz Law does not establish the obligation to hold new tender[400].

488. Thirdly, the basis for declaring the tender 'invalid', in accordance with the abovementioned Order, is Article 31(2)(3) of the Law on Public Procurement – the 'expiration' of the tender application[401].

489. Thus, on February 4, 2020, the GRS declared the 2018 Tender 'invalid' due to the 'expiration' of the 2018 Tender application, despite the fact that the winner of the 2018 Tender was determined a year ago, and, accordingly, the 2018 Tender, as a stage of public procurement, was completed[402].

490. Therefore, the position of the procuring entity (the GRS) regarding the results of the 2018 Tender was totally flawed. It was not clear when was the 2018 Tender 'cancelled' (declared 'invalid') by the purchasing organisation? The decision of the Supreme Court of the Kyrgyz Republic and the Order of the GRS are presented as two independent and unrelated acts of state bodies.

491. Thus, Garsu Pasaulis – the legitimate winner of the 2018 Tender, as well as other bidders, were in a state of uncertainty for a year, due to the lack of a clear position of the procuring entity regarding the fate of the 2018 Tender.

492. Summing up, the legal ground for the 'cancellation' or recognition of the 2018 Tender as 'invalid' due to the 'expiration' of the 2018 Tender application, is not legally and factually appropriate. Consequently, as a matter of the Kyrgyz law, the 2018 Tender was

[400] Alenkina Report, para 102, **CER-2-1**.
[401] Order of the GRS "On the cancellation of competitive bidding" dated 4 February 2020, Alenkina Report, **CER-2-Exh.-3**.
[402] Alenkina Report, para 104, **CER-2-1**.

'cancelled' or declared 'invalid' on the grounds that did not meet the Kyrgyz law requirements.

493. This means, as a matter of the Kyrgyz law, the Kyrgyz Republic had no legal grounds to avoid signing the e-passports contract with the winner of the 2018 Tender – Garsu Pasaulis. The Kyrgyz Republic did so anyway. It did so arbitrarily, in the most public, humiliating, and damaging way for the investor.

C. The destruction of Garsu Pasaulis' investment was illegal as a matter of Kyrgyz Republic's Agreement obligations

494. The State's responsibility extends to actions perpetrated by its organs[403]. 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 and its investments 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 illegally expropriating Garsu Pasaulis' valuable right to execute the e-passports contract and illegal 'cancellation' of the 2018 Tender won by Garsu Pasaulis, coupled with serious abuse of authority, lack of due process, administrative negligence and inconsistent legal acts.

(2) by executing a smear campaign against Garsu Pasaulis, significantly damaging Garsu Pasaulis' international business

[403] See the International Law Commission's Articles on State Responsibility, **CLA-7**:
Article 4: Conduct of organs of a State
1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

reputation and causing Garsu Pasaulis massive damages, without any lawful reason or proof;

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

i. Fair and equitable treatment

495. In Article 3 of the Agreement, the Kyrgyz Republic 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."[404] 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."[405] In turn, treatment is "fair" when it is: "Free from bias, fraud, or injustice; equitable, legitimate"[406].

496. As further explained by Dr. Baltag:

> *"The FET provides a broad protection to investors which includes protection of investor's legitimate expectations; protection against denial of justice; freedom from coercion and harassment; transparency; non-discrimination; protection from arbitrariness and discrimination."*[407]

497. 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*[408]*:*

[404] Vienna Convention on the Law of Treaties, Art. 31.
[405] Oxford English Dictionary, def. 3(a).
[406] Id., def. 10 (as applied to "conduct, actions, arguments, methods.").
[407] Baltag Report, para 87, **CER-1-1**.
[408] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Para. 106., Baltag Report, **E-61**.

> *"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."*

498. The tribunal in *Parkerings v. Lithuania* [409] 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."*

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

500. In view of the foregoing, the significant body of investment doctrine and jurisprudence addressing the standard for fair and equitable treatment 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)[410], 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.*"[411]

---

[409] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Baltag Report, **E-74**.

[410] *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).

[411] *Tecnicas Medioambientales Tecmed SA v. United Mexican States,* ICSID Case No. ARB(AF)/00/2 (Award dated 29 May 2003), para. 154; Baltag Report, **E-68**. *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."); Baltag Report, **E-75**. *CMS Gas Transmission Co. v. Argentine Republic,* ICSID Case No. ARB/01/8 (Award dated 12 May, 2005), para. 267., Baltag Report, **E-76**.

501. 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.*"[412]

502. 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.

503. 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.

504. In addition, certain principles have emerged in the arbitral jurisprudence that help tribunals define or identify fair and equitable treatment, or unfair and inequitable treatment[413].

505. 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.

[412] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, para. 302, Baltag Report, **E-5**.
[413] 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 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*).

506. 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.

507. 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.

508. 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.

509. 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.*"[414]

510. 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 brought against him, undue delay of the proceedings, making the hearings in*

[414] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, **CLA-8**.

> *open court a mere formality, and a continued absence of seriousness on the part of the Court."*[415]

511. 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

512. Representations made in bidding documents and applicable legal provisions during 2018 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.

513. 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*[416] affirmed that, "*the stability of the legal and business framework is "an essential element of fair and equitable treatment...*". The *Saluka*[417] tribunal further 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*

[415] *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, **CLA-9**.
[416] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, **CLA-10**.
[417] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Baltag Report, **E-5**.

is, as far as it affects the investor's investment, reasonably justifiable by public policies".

514. Similarly, the *Lemire*[418] 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 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.*"

515. The *Metalclad*[419] 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"*.

516. The *TECMED*[420] 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*

[418] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Baltag Report, **E-46**.
[419] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Baltag Report, **E-96**.
[420] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Baltag Report, **E-68**.

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*".

517. Here, as in the *Eureko*[421] case, the claimant was a qualified foreign investor with a legitimate expectation of obtaining a valuable right to execute the e-passports contract with the Kyrgyz Republic through its participation and winning of 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 the Kyrgyz Republic'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 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.

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

[421] *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **CLA-11**.

519. In Garsu Pasaulis' 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.

520. 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.

521. In the present case, the Kyrgyz law expert Prof. Alenkina confirmed that the handling of the 2018 Tender and 'cancelation' thereof, illegal termination of Garsu Pasaulis' right to execute the e-passports contract were clearly illegal and in breach of the applicable Kyrgyz law[422].

522. 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.

523. In addition to its mishandling of the 2018 Tender and 'cancelation' thereof and associated abuse of power, the Respondent's lack of good faith in communicating and executing the e-passports contract with Garsu Pasaulis constitutes an independent basis for its violation of the FET standard.

524. 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* [423] tribunal

[422] Alenkina Report, para 79-86 & 107, **CER-2-1**.
[423] *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, Baltag Report, **E-59**.

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.

525. In the present case, however, Garsu Pasaulis was put into substantially worse situation than PSEG.

526. As explained by Prof. Alenkina, in the present case, by winning of the 2018 Tender, Garsu Pasaulis automatically acquired a right to execute the e-passports contract, no further negotiations or change of contract terms were envisioned by the applicable law[424]. However, in breach of the applicable Kyrgyz law, the Kyrgyz Republic simply announced that Garsu Pasaulis bid has 'expired' and later on 'cancelled' the 2018 Tender without any legal basis whatsoever[425]. In addition, the Kyrgyz Republic cut-off any communication with Garsu Pasaulis, leaving the investor baffled and in a state of complete uncertainty.

527. This conduct of the Kyrgyz Republic fell short of any expectations inasmuch as the Government officials simply cut-off any channels of communication with the Garsu Pasaulis, did not made any good faith efforts to resolve points of disagreement with Garsu Pasaulis or even

[424] Alenkina Report, para 89-91, **CER-2-1**.
[425] Alenkina Report, para 107, **CER-2-1**.

provided an opportunity to provide its position to any allegations and smear campaign executed against Garsu Pasaulis.

528. In a similar vein, the *Saluka*[426] 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.*"

529. Garsu Pasaulis' expectation that it would execute the e-passports contract 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,* Garsu Pasaulis was entitled to expect that the the Kyrgyz Republic would not start a smear campaign against Garsu Pasaulis, refuse any communication and ultimately refuse to execute the e-passports contract in a manner that was "unjustifiable," "in bad faith" and "unfair."

530. Unfortunately, Garsu Pasaulis' expectations in that regard were violated and it resulted in expropriation of Garsu Pasaulis' valuable economic right and in a total destruction of Garsu Pasaulis international reputation that caused Garsu Pasaulis even further damages.

531. Breach of the FET standard by the Kyrgyz Republic was also carefully analyzed by Dr. Baltag, who confirmed that "*failure of Kyrgyzstan to ensure Claimant due process, including the opportunity to be heard, and to conduct the termination process of Claimant's acquired right under 2018 Tender constitutes a breach of the FET and FPS standards under Lithuania-Kyrgyzstan BIT"*[427].

[426] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Baltag Report, **E-5**.
[427] Baltag Report, para 118, **CER-1-1**.

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

532. 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."

533. 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."[428]

534. In Garsu Pasaulis' 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.

535. 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.

536. 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, 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*

[428] *Lauder v. Czech Republic*, Ad hoc — UNCITRAL (Final Award dated 3 September 2001), para. 221 (quoting Black's Law Dictionary 100 (7th ed. 1999)) **CLA-12**; see also *Waguih Elie George Siag and Clorinda Vecchi v. The 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") **CLA-13**.

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.*"[429]

537. The *Lemire* tribunal's conclusion in this regard conforms to that of many other tribunals. For example, the *CMS v. Argentina*[430] tribunal affirmed that "*any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment*".

538. Similarly, the *Rumeli*[431] 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*."

539. Likewise, the tribunal in *Waste Management*[432] 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.*"

540. Moreover, as already explained in Section VI(C)(i) of this Statement of Claim, 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

[429] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, para. 259, Baltag Report, **E-46**.
[430] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, para. 290, Baltag Report, **E-76**.
[431] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, para. 609, Baltag Report, **E-75**.
[432] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Baltag Report, **E-63**.

discussed in this section — violates not only the 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 VI(C)(ii).

541. In addition to the tribunal in *PSEG*[433]*,* 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*[434] 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."

542. 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."[435]

543. In addition, the *Metalclad*[436] 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...*"[437]

544. In the present case, it is clear that the 2018 Tender Commission, the GRS and the GKNB breached the Kyrgyz law and abused their authority by basing their decisions in the context of the 2018 Tender

[433] *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, Baltag Report, **E-59**.
[434] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Baltag Report, **E-96**.
[435] Ibid.
[436] Ibid.
[437] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Baltag Report, **E-5**.

on factors that they were not lawfully entitled to consider, and by failing to afford Garsu Pasaulis due process of law. In turn, Garsu Pasaulis was robbed of its e-passports contract, the use and enjoyment of the substantial *know-how* and business reputation that it invested in the Kyrgyz Republic.

545. 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 e-passports contract with the Kyrgyz Government and use of its business reputation around the wordl would have been inevitable.

546. 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.

547. 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.*"[438] This was exactly the case of Garsu Pasaulis in the Kyrgyz Republic.

548. In the present case, the Kyrgyz Republic's handling of the 2018 Tender and 'cancellation' thereof, GKNB investigation and destruction of Garsu Pasaulis business reputation constitutes the culmination of a course of conduct aimed at favoring personal and

[438] *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").

politically motivated interests over qualified foreign investors like Garsu Pasaulis.

549. As further explained by Dr. Baltag:

> *"the termination of the 2018 Tender for political reasons represents an arbitrary termination which, without doubt, constitutes a breach of the FET standard under Article 3(1) of the Lithuania-Kyrgyz BIT.*[439] *This conduct is also a breach of the second part of Article 3(1) of the Lithuania-Kyrgyzstan BIT, related to the prohibition to hinder the development of Claimant's investment "by any unjustified, ill-considered" measures."*[440]

550. The record in this arbitration confirms that the GKNB's investigation, illegal expulsion of Garsu Pasaulis bid and illegal 'cancelation' of the 2018 Tender were based on prejudice or preference rather than law, reason or fact.

551. 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 treatment. 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."[441]

552. Therefore, based on the analysis of the facts and law, the actions taken by the Kyrgyz Republic 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

---

[439] The tribunal in *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, paras 262-263 (Baltag Report, **E-46)**, concluded thatArbitrariness has been described as "founded on prejudice or preference rather than on reason or fact"; *"...contrary to the law because...[it] shocks, or at least surprises, a sense of juridical propriety"; or "wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety"; or conduct which "manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination*". Professor Schreuer has defined (and the Tribunal in EDF v. Romania has accepted) as "arbitrary":
"*a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;*
b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
c. a measure taken for reasons that are different from those put forward by the decision maker;
d. a measure taken in wilful disregard of due process and proper procedure."
Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law. (emphasis omitted)
[440] Baltag Report, para 125, **CER-1-1**.
[441] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Baltag Report, **E-46**.

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.

553. As a result, Garsu Pasaulis' plans to expand and transform its investments in the Kyrgyz Republic and CIS countries were unfairly thwarted. As of today's date, other better politically connected companies nevertheless execute e-passports contract with the Government. They benefit from a lucrative investment to which Garsu Pasaulis was rightfully and fully entitled.

ii. Full protection and security

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

555. 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[442].

556. The State has a primary obligation to exercise due diligence to provide adequate protection, failure to comply with which creates international responsibility. The host State's duty is not restricted to preventing damaging acts by private actors. The State's responsibility extends to actions perpetrated by its organs[443].

[442] *Biwater Gauff v Tanzania*, Award, 24 July 2008, para 730, Baltag Report, **E-86**; *AAPL v Sri Lanka*, Award, 21 June 1990, 4 ICSID Rep 246, **CLA-14**; *AMT v Zaire*, Award, 21 February 1997, 5 ICSID Rep 11, **CLA-15**; *Eureko B.V. v Poland*, Partial Award, 19 August 2005, **CLA-11**.

[443] See the International Law Commission's Articles on State Responsibility (**CLA-7**):
Article 4: Conduct of organs of a State
1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

557. 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 (raids and arrests by the GKNB), but also the legal security in which the investment operates.

558. While cases such as *Biwater v. Tanzania*[444] 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*[445] 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*[446] confirmed that "full protection and security may be breached even if no physical violence or damage occurs". In *Siemens v. Argentina*[447] 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*[448] was

[444] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.
[445] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, **CLA-16.**
[446] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Baltag Report, **E-85**.
[447] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Baltag Report, **E-60**.
[448] *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), **CLA-17**.

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."*

559. 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*[449] 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 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*".

560. This was followed also by *National Grid v. Argentina*[450], in which the tribunal concluded that the phrase "protection and constant security"

[449] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Baltag Report, **E-86**.
[450] *National Grid plc v. The Argentine Republic*, UNCITRAL, Baltag Report, **E-87**.

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*[451], 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*[452].

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

562. 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 Garsu Pasaulis and its investments in a manner that can only be described as punitive.

563. The egregiousness of the Kyrgyz Republic's conduct is strengthened by the fact that Garsu Pasaulis was attacked by the GKNB – 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.

564. 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

[451] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, **CLA-13**.
[452] *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, **CLA-18**.

Pasaulis and its investments from both physical and legal or illegal assault, including any international smear campaigns.

565. As noted by *AMT v. Congo*[453] 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*".

566. By its conduct, the Kyrgyz Republic has not only failed to safeguard Garsu Pasaulis against interference by use of State authority and political force, but has perpetrated its own breach of the full protection and security standard.

567. 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 e-passports contract with Garsu Pasaulis. Garsu Pasaulis expected that after winning the 2018 Tender, the e-passports contract with the Government would be performed in good faith and in accordance with due process and the rule of law. However, the e-passports contract was never executed, independently of any legitimate process.

568. As further explained by Dr. Baltag:

> *"both FET and FPS cover host State's abusive conduct towards investment, even when non-physical force is used (…) the termination of the 2018 tender followed by raids and threats, public accusations and allegations against Claimant and its personnel by the public authorities of the Kyrgyz Republic is in breach of the FET and FPS standards under Lithuania-Kyrgyzstan BIT."*[454]

[453] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, **CLA-15**.
[454] Baltag Report, para 127-128, **CER-1-1**.

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

iii. Expropriation

570. In Article 4 of the Agreement, the Kyrgyz Republic guaranteed not to expropriate and nationalize investments of Garsu Pasaulis or apply any measures to such investments leading to similar consequences (expropriation) unless such measures were: (1) undertaken for public needs and in compliance with the national legislation; (2) undertaken on non-discriminatory grounds; (3) accompanied by prompt, adequate and effective compensation. Specifically, Article 4 provides:

> *"1. Neither of the Contracting Parties shall expropriate and nationalize 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."*

571. Dr. Baltag explains in her expert report that Article 4 of the Agreement does not provide for a definition of "expropriation". This is a common situation for investment treaties[455].

572. She explains that arbitral practice has provided guidance on this. In *Fireman v. Mexico*, the tribunal concluded the following:

> *"NAFTA does not give a definition for the word "expropriation." In some ten cases in which Article 1110(1) of the NAFTA was considered to date, the definitions appear to vary. Considering those cases and customary international law in general, the present Tribunal retains the following elements.*
>
> *(a) Expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by the NAFTA.*
>
> *(b) The covered investment may include intangible as well as tangible property.*
>
> *(c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).*
>
> *(d) The taking must be permanent, and not ephemeral or temporary.*
>
> *(e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).*
>
> *(f) The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation.*
>
> *(g) The taking may be de jure or de facto.*
>
> *(h) The taking may be «direct» or «indirect.»*
>
> *(i) The taking may have the form of a single measure or a series of related or unrelated measures over a period of time (the so-called "creeping» expropriation").*

[455] Baltag Report, para 136, **CER-1-1**.

> *(j) To distinguish between a compensable expropriation and a non-compensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.*
>
> *(k) The investor's reasonable "investment-backed expectations" may be a relevant factor whether (indirect) expropriation has occurred."*[456]

573. As drafted, Article 4 of the Agreement suggests that the expropriatory measure can involve a positive act or a negative act.[457] Further, the Agreement does not limit the expropriatory measures to a particular type or category of State organ,[458] not to a specific type of measure, such as only administrative or only governmental. As it is, Article 4 of the Agreement offers the broadest coverage[459].

574. As explained in Section II(C) of this Statement of Claim, 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 e-government services for Kyrgyz citizens the overall digitalization efforts.

575. 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.

---

[456] *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/ 02/1, Award of 17 July 2006, para. 176, footnotes omitted, Baltag Report, **E-91**.
[457] *CME v. Czech Republic*, Partial Award, para. 605 ("it makes no difference whether the deprivation was caused by actions or by inactions"); Generation Ukraine. v. Ukraine, Award, para. 20.29 ("… a governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation.") etc.
[458] Article 26 of the Vienna Convention provides that "the treaty must be performed by the parties. It is to be applied by all organs of the State whereby its rights and obligations are put into effect." See also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties,* (Martinus Nijhoff, 2009), p. 366, para. 7, Baltag Report, **E-92**.
[459] Baltag Report, para 138, **CER-1-1**.

576. 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*"[460].

a. The Kyrgyz Republic expropriated Garsu Pasaulis' economic right

577. With regard to the guarantee against expropriation, it was Garsu Pasaulis' free-standing right to execute the e-passports contract for a certain monetary amount, for a specific period of time — a "*right to engage in economic activities under contract* " — that formed the subject of the Kyrgyz Republic's illegal actions.

578. In the specific circumstances of Garsu Pasaulis, at the final stage of its investments operation, as the winning bidder, Garsu Pasaulis has acquired (by law and fact) a right which the Government could no longer unilaterally withdraw or cancel without violating Garsu Pasaulis' right. Thus, while the Kyrgyz Republic'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 e-passports contract awarded by winning the 2018 Tender that was directly appropriated by the Kyrgyz Republic, and it is the taking of this particular right to which the requirements of Article 4 must be applied.

579. 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 e-passports contract and then transferred this right to another company.

580. There is no doubt that the Kyrgyz Republic's obligation to expropriate assets only for a legitimate public purpose and with prompt, adequate, and effective compensation extends not only to tangible

[460] *ATA Construction v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2 (Award dated 12 May 2010), para. 96, **CLA-19**.

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

581. Similarly, Dr. Baltag concluded that "*When the investor validly acquires a right or asset under host State's law, a treaty "accords certain protections to property rights created according to municipal law."*[461] *As such, an action of the host State on such acquired right or asset can be characterized as an expropriation*."[462]

582. 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*[463] that an investor's contractual rights may be expropriated. This principle is well-established in the jurisprudence of ICSID tribunals.

583. 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*".[464]

584. It may be further recalled in this context that arbitral tribunals have repeatedly recognized and applied the principle that not only rights *in*

[461] *Emmis v. Hungary*, Award, para. 162.
[462] Baltag Report, para 146, **CER-1-1**.
[463] Norwegian Shipowners' Claims, *Norway v United States*, Award, (1922) I RIAA 307, ICGJ 393 (PCA 1922), 13th October 1922, Permanent Court of Arbitration, **CLA-20**.
[464] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Baltag Report, **E-94**.

rem may be expropriated but also intangible rights, including contractual rights.[465]

585. In turn, this principle has been uniformly embraced by investment arbitration tribunals. In the words of the *Wena v. Egypt* tribunal: "*It is also well established that an expropriation is not limited to tangible property rights*"[466]. 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*" [467]. 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.

586. Similarly, in the *Metalclad* case[468], 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.

587. Subsequent investment tribunals have continued to conclude, largely without question, that extinguishment of acquired rights amounts to expropriation. Thus, the *ADC v. Hungary*[469] tribunal concluded that 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.

588. In the case of *Eureko v. Poland*[470]*,* the tribunal concluded that the respondent state had violated the guarantee of non-expropriation

[465] 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) **CLA-21**.
[466] Ibid.
[467] Ibid.
[468] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Baltag Report, **E-96**.
[469] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Baltag Report, **E-101**.
[470] *Eureko B.V. v. Republic of Poland,* **CLA-11**.

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*"[471].

589. And, more recently, in the case of *Kardassopoulos v. Georgia*[472], the tribunal determined that the state's extinguishment of the claimant's contractual rights constituted "*a classic case of direct expropriation*."

590. Furthermore, tribunals have also expressly distinguished between measures that 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 sums due*" under a contract might nevertheless involve expropriation of the actual sums due[473].

591. 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*."[474]

592. 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:

[471] Ibid.
[472] *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, **CLA-22**.
[473] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Baltag Report, **E-63**.
[474] Ibid.

in each case, the amount of compensation will correspond to the value of what was taken.

593. As Dr. Baltag explains, Article 4 does not define the term "measure"[475]. The term "measure" "*in its ordinary sense the word is wide enough to cover any acts, step or proceedings, and imposes no particular limit on their material content or on the aim pursued thereby*."[476]

594. It cannot be disputed that contractual rights can be expropriated.[477] Further arbitral practice is abundant in such examples. In the judgment of the Permanent Court of International Justice concerning *Certain German Interests in Polish Upper Silesia*, the Court ruled that, by taking possession of a factory, Poland had also "*expropriated the contractual rights" of the operating company. … Decisions of international claims tribunals have been to the same effec*t."[478] In *SPP v. Egypt*, the tribunal conclusively stated that "*it has been long been recognized that contractual rights may be indirectly expropriated*". In *Bayindir v. Pakistan*, the tribunal concluded that expropriation covers contractual rights, as they have an economic value.[479] Similarly, in *Biloune v. Ghana*, the tribunal held that that contractual rights can be subject to indirect expropriation.[480] In *Siemens v. Argentina*, the tribunal took into consideration the definition of investment under the applicable treaty and concluded that *"[t]here is a long judicial practice that recognizes*

[475] Baltag Report, para 139, **CER-1-1**.
[476] *Fisheries Jurisdiction (Spain v. Canada)*, Judgement of 4 December 1998, I.C.J REPORTS (1998), pp. 432-460, para. 66, Baltag Report, **E-93**.
[477] See *Emmis v. Hungary*, Award, para. 163 ("There is no doubt, as the Treaty definitions emphasise, that the notion of property or assets is not to be narrowly circumscribed. For this reason, tribunals have rejected a restriction to tangible property, emphasising that expropriation may equally protect intangible property. So, too, tribunals have held that the rights protected from expropriation as not limited to rights in rem. This is confirmed by the Treaties which include within their definition of assets qualifying as investments numerous other rights in addition to 'movable and immovable property as well as any other rights in rem'."), Baltag Report, **E-43**.
[478] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, paras 165-166, Baltag Report, **E-94**.
[479] *Bayindir v. Pakistan,* Award, para. 456 ("the Tribunal starts by observing that the assets allegedly subject to expropriation are Bayindir's rights under the Contract, including those relating to the payment for works completed. Such rights have an economic value and can potentially be expropriated. "), Baltag Report, **E-24**..
[480] Biloune and Marine Drive Complex LTD v. Ghana Investments Centre and the Government of Ghana, UNCITRAL, Award on Damages and Costs of 30 June 1990, p. 207 et seq, Baltag Report, **E-95**.

that expropriation is not limited to tangible property" and that *"[t]here is nothing unusual in this regard*".[481]

595. Scholars and tribunals highlight that while it is well established that contractual and other intangible rights can be expropriated, what is important is that such rights exist.[482] In *Emmis v. Hungary*, the tribunal noted that

> *"the loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. The claimant must own the asset at the date of the alleged breach. It is the asset itself - the property interest or chose in action - and not its contractual source that is the subject of the expropriation claim. Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation."*[483]

596. On the same note, the failure to recognize an investor's entitlement is a measure equivalent to expropriation. There is no difference between the cancelation of a right and the non-recognition of a right arising e*x lege*, as the investor, in both cases, is deprived of the economic right which is entitled to.

597. The analysis employed by the *ATA* tribunal[484] is equally applicable here. Garsu Pasaulis had a valid, legally binding and very specific right, conferred by Kyrgyz law, to execute the e-passports contract for a certain amount, for a certain duration of time. This right constituted a valuable asset, and — as set out in the following

---

[481] *Siemens v. Argentina*, Award, para. 267 ("The Contract falls under the definition of "investments" under the Treaty and Article 4(2) refers to expropriation or nationalization of investments. Therefore, the State parties recognized that an investment in terms of the Treaty may be expropriated. There is nothing unusual in this regard. There is a long judicial practice that recognizes that expropriation is not limited to tangible property. The Tribunal will refer, for the sake of brevity, to the findings of the Permanent Court of Arbitration ("PCA") in the case of the Norwegian Shipowners' Claims and the Permanent Court of International Justice ("PCIJ") in the Factory at Chorzów Case."), Baltag Report, **E-60**.
For the expropriation of other intangible property, see for example the NAFTA cases dealing with access to markets as a protected tight. In *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award of 26 June 2000, para. 96, the tribunal concluded that investment's access to the US market is a property interest subject to protection under NAFTA, **CLA-23**.

[482] August Reinisch and Christoph Schreuer, International Protection of Investments. The Substantive Standards, p. 31, Baltag Report, **E-56**.

[483] *Emmis v. Hungary*, Award, para. 169, Baltag Report, **E-43**.

[484] *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, **CLA-19**.

subsection — the Kyrgyz Republic has deprived Garsu Pasaulis of that asset in violation of Article 4 of the Agreement.

598. The Kyrgyz Republic's conduct amounted to the expropriation of Garsu Pasaulis' investment by the illegal 'cancelation' of the already concluded 2018 Tender and by refusing to execute the e-passports contract with Garsu Pasaulis.

599. It is not an essential element of 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*,[485] 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*".

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

601. 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.

602. 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 the legal title to the property is not affected.

603. As provided by Dr. Baltag, indirect expropriation has been described as "*covert or incidental interference with the use of property which*

[485] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, cited in *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 97, **CLA-21**.

has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[486] The emphasis is, as such, on the consequences of the measures taken by the host State: "*there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinction of ownership irrelevant*." [487] A form of indirect expropriation is '*creeping expropriation'* explained by arbitral tribunals as being "*is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property*."[488]

604. Expropriation occurs when the "*actual effect*" of the host State's actions deprives the investor of the "*reasonably-to-be-expected economic benefit of the property*".[489] This is supported by arbitral practice:

> *"indirect expropriation to occur when property or property rights were interfered with so substantially by the acts of a State that it resulted in substantial, irreversible and permanent deprivation of the value of the investment or effective loss of the use, control or management of that investment. In the Tribunal's view, to constitute expropriation, the acts, omissions and interferences must affect the value of the whole investment, not just part(s) of it.*
>
> *Accordingly, to be successful in this Arbitration, Claimants must show that there were (i) sovereign acts of Turkmenistan which interfered with their investment, and (ii) the interference resulted in substantial, permanent and irreversible deprivation of the use, management, control and benefit of their investments. Accordingly, in order to*

[486] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, para. 103, Baltag Report, **E-96**.
[487] Waste Management v. Mexico, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, para. 143, Baltag Report, **E-97**.
[488] *Generation Ukraine v. Ukraine*, Award, para. 20.22, Baltag Report, **E-72**.
[489] *Metalclad v. Mexico*, Award, para. 103 ("Thus, expropriation ... includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of the property which has the effect of depriving the owner, in whole or significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.), Baltag Report, **E-96**.

> *determine if expropriation occurred, the Tribunal will consider "the actual effect of the measures on the investor's property." The Tribunal will not take into account the State's intent, i.e. whether or not it benefited from the taking, as it is irrelevant to a finding of expropriation. If the Tribunal finds that there was indirect expropriation on the part of Respondent, it will then consider the lawfulness of the expropriation, in accordance with the requirements in Article III BIT."*[490]

605. As to investor's vested right and the expropriation of such right by the host State, the practice in international law and investment arbitration is well established. In *German Settlers in Poland*, the Permanent Court of International Justice concluded that "*the purchaser had rights to the land even before Auflassung [i.e. abandonment, a formality required to perfect rights of ownership]. He gave valuable consideration in money and in cultivation for the acquisition of this interest, and it was an interest recognised by law and which might be safeguarded by legal proceedings. The purchaser acquired a jus ad rem, and after Auflassung had a jus in re*." [491] The Court held that the settlers' private rights were enforceable against Poland.[492]

606. When the investor validly acquires a right or asset under host State's law, a treaty "*accords certain protections to property rights created according to municipal law*."[493] As such, an action of the host State on such acquired right or asset can be characterized as an expropriation. In *Sistem Muhendislik v. Kyrgyz Republic*, in which investor's ownership rights were abrogated by a decision of host State's courts, the arbitral tribunal held that such conduct was "tantamount to an expropriation by that State", given that the judicial

[490] *Sehil v. Turkmenistan*, Award, paras 809-810, Baltag Report, **E-22**.
[491] *German Settlers in Poland*, Advisory Opinion of 10 September 1923, P.C.I.J. SERIES B No. 6, p. 33, Baltag Report, **E-115**.
[492] German Settlers in Poland, pp. 36-40.
[493] *Emmis v. Hungary*, Award, para. 162, Baltag Report, **E-43**.

decision "deprived the Claimant of its property rights in the hotel surely as if the State had expropriated it by decree".[494]

607. While the 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.

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

609. 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.

610. 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

[494] *Sistem Mühendislik Inaat Sanayi ve Ticarat A. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009, paras. 118-119 ("That abrogation was effected by an organ of the Kyrgyz State, for which the Kyrgyz Republic is responsible. It is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an expropriation of property by that State. The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree. … That abrogation of the Claimant's property rights amounts to a breach of the Article lll of the Turkey-Kyrgyz BIT, which forbids the expropriation of property unless it is done for a public purpose, in a non-discriminatory manner, and upon payment of prompt, adequate and effective compensation. Those conditions are not satisfied in this case: in particular, no compensation has been paid. The Respondent is accordingly obliged to make reparation for that breach of the BIT.") Baltag Report, **E-98**.

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.

611. Garsu Pasaulis investment has been expropriated by measures having an effect equivalent to expropriation by the Kyrgyz Republic's ‘cancellation’ of the already concluded 2018 Tender and by refusing to execute the e-passports 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.

612. Actions the Kyrgyz Republic also entail a loss of an economic right of Garsu Pasaulis to execute the e-passports contract with the Kyrgyz Republic under the 2018 Tender, which was already won by the investor, and an economic right to 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-passports contract that was directly appropriated by the Kyrgyz Republic.

613. 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.

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

614. As noted above, Article 4 dictates that any expropriatory measure must be undertaken (1) for public needs and in compliance with the national legislation; (2) undertaken on non-discriminatory grounds; (3) accompanied by prompt, adequate and effective compensation.

615. 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.

616. In this case, none of the four requirements have been met. First, the extinguishment of Garsu Pasaulis right to execute the e-passports contract was not in the national or public interest of Kyrgyz Republic. While the Kyrgyz Republic 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.

617. 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 'cancel' the 2018 Tender and initiate the GKNB's investigation harmed the public interest of Kyrgyz Republic and international reputation [495]. Furthermore, even the new contract was signed with German company, to date there is a real passport crisis in the Kyrgyz Republic and thousands of citizens cannot get passports. The unsystematic nature of Government agencies not only keeps Kyrgyz citizens hostage to the situation, but also deprives them of the opportunity to get a job, enter a foreign university, and reunite with loved ones[496]. Apparently, the German company is not able to properly install and configure its e-passports software and hardware systems with the Government systems[497]. That was of course of no issue to Garsu Pasaulis.

618. Indeed, the negative impact of the handling of the 2018 Tender was so egregious that even the Head of GKNB, 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, the Kyrgyz Republic cannot now argue that its decision to

[495] Media article of 14 May 2019, **C-54**; Media article of 30 April 2019, **C-55**.
[496] Media article of 30 March 2021, **C-62**.
[497] Ibid.

eliminate Garsu Pasaulis from the already won contract and to conclude new contract with German company was in the public interest of the Kyrgyz Republic.

619. Furthermore, even if viewed from an *ex-ante* perspective, the GKNB and GRS knew they were acting contrary to the Kyrgyz law at the time they took those decisions, and they 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.

620. 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. This was confirmed by the Kyrgyz law expert Prof. Alenkina[498].

621. In view of the foregoing, the Kyrgyz Republic is precluded from arguing that rejection of Garsu Pasaulis' right to execute the e-passports contract with the Government was in conformity with the applicable Kyrgyz law.

622. As already discussed above at length in Section VI(C)(i) of this Statement of Claim, the Kyrgyz Republic's treatment of Garsu Pasaulis and its investments in the context of the 2018 Tender was blatantly discriminatory and unfair.

623. Finally, there is no question that the Kyrgyz Republic did not provide Garsu Pasaulis with "immediate, full and effective" compensation under international standards for the losses it sustained as a result of being deprived of the right to execute the e-passports contract with the Government.

624. 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 e-passports contract and has failed to comply with *any* of the requirements of a legal expropriation. As a result, Garsu Pasaulis is

[498] Alenkina Report, para 107, **CER-2-1**.

entitled to damages, as set out in Section VII of this Statement of Claim.

iv. The Kyrgyz Republic destroyed Garsu Pasaulis' international business reputation

625. Furthermore, as it was explained in Section II(D) above, actions of the Kyrgyz Republic had destructive effects on the long-established international reputation of Garsu Pasaulis throughout the world and in a very specific area of e-government services and security printing.

626. Because of illegal actions of the Kyrgyz Republic, Garsu Pasaulis is at risk of being expelled in numerous countries around the world and already incurred significant monetary damages, which also include loss of future profits (see Section VII of this Statement of Claim). Furthermore, actions of the Kyrgyz Republic also entailed significant losses in respect of all consequential damages, which are comprised of lost commercial opportunities, loss of credit conditions and of other benefits, lost profits, and loss of market share.

627. In this case, it is not difficult to ascertain the financial consequences of damage to Garsu Pasaulis' global reputation. It is not difficult for Garsu Pasaulis to establish which contracts with past and new clients were terminated or never concluded because of the damaged reputation (see Section VII of this Statement of Claim).

628. In a highly competitive and complex global market of e-government services and security printing, a respectable reputation is of the essence. Any negative rumor can affect the company's image and consequently its position in 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, which was spread just because of some private interests of Kyrgyz officials.

629. As it was held in *the Lusitania* cases, damages related to business reputation may be "*very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated*"[499]. It is also generally recognized that a legal person (as opposed to a natural one) may be awarded damages, including loss of reputation.

630. 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."*[500]

631. Garsu Pasaulis' business essentially relies on its business reputation. Such business reputation has developed locally in the Kyrgyz Republic, in addition to its international business reputation. It is undisputable that the Agreement expressly includes business reputation in the list of assets that constitute an investment. As such, similar to the cases cited above and in particular the *A11Y Ltd. v Czech Republic*, Garsu Pasaulis' reputation is essential to its investment not only in the Kyrgyz Republic, but around the world.

632. The effects of the Kyrgyz Republic's allegations and conduct had also a direct effect on Garsu Pasaulis' entire business operations, including on its commercial printing activities, as explained in the Witness Statements of Mieliauskas and Lukosevicius[501].

---

[499] *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, **CLA-7**.
[500] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, 22 Mar 2013, Final Arbitral Award, **CLA-24**.
[501] Mieliauskas Witness Statement, para 65-74, **CWS-2-1**; Lukosevicius Witness Statement, para 72-81, **CWS-1-1**.

633. Therefore, under the Agreement, Garsu Pasaulis clearly had a protected investment (business reputation) and it was destroyed by the Kyrgyz Republic.

VII. DAMAGES AND QUANTUM

A. Actions of the Kyrgyz Republic caused substantial damages to Garsu Pasaulis

634. As explained in Sections VI(B) and VI(C) of this Statement of Claim, the Kyrgyz Republic has breached the Agreement and even its own law in order to expropriate Garsu Pasaulis' right to execute the e-passports contract and to expel Garsu Pasaulis from the Kyrgyz Republic. Illegal actions of the Kyrgyz Republic also destroyed Garsu Pasaulis' international reputation, which is specifically protected by the Agreement[502].

635. These actions of the Kyrgyz Republic have caused substantial damages to Garsu Pasaulis, its international business and business reputation.

636. As explained by Lukosevicius:

> *"After the 2018 Tender scandal, we felt as if Garsu Pasaulis was robbed of its e-passports contract. It was Garsu Pasaulis' valuable economic right that was taken away from Garsu Pasaulis violently and without any due process by the Kyrgyz authorities."*[503]

637. As it will be explained in more detail below, the 2018 Tender scandal caused by the Kyrgyz Republic not only resulted in the expropriation of the e-passports contract but also caused Garsu Pasaulis even more significant losses.

638. Due to fake Kyrgyz allegations of Garsu Pasaulis' alleged corruption and bribery in the 2018 Tender, Garsu Pasaulis lost its long-term and

[502] Article 1 of the Agreement, **C-1**.
[503] Lukosevicius Witness Statement, para 67, **CWS-1-1**.

valuable contracts and income thereof and lost its international reputation. The latter caused Garsu Pasaulis even more losses directly attributable to the actions of the Kyrgyz Republic.

639. As explained by Mieliauskas:

> *"The Kyrgyz tender scandal and fake allegations disseminated by the Kyrgyz Republic against Garsu Pasaulis were picked up by international media and distributed worldwide. Without any factual or legal basis, Garsu Pasaulis was labeled as corrupt and criminal company[504]. This had a negative snowball effect on Garsu Pasaulis' international reputation and caused Garsu Pasaulis major and significant losses."*[505]

640. First of all, just as the 2018 Tender scandal erupted, Garsu Pasaulis has immediately started to receive a wave of questions and inquiries from its international partners, major clients, certification agencies, public institutions, and commercial banks[506].

641. Immediately, major commercial banks, whom Garsu Pasaulis has worked with for tens of years, requested Garsu Pasaulis to close its accounts and refused to provide credit services or issue guarantees to Garsu Pasaulis, specifically indicating the Kyrgyz allegations[507].

642. As explained by Lukosevicius, Garsu Pasaulis was explicitly told that banks cannot hold accounts of Garsu Pasaulis, because banks do not want to have any connection whatsoever with Garsu Pasaulis due to fraud and corruption stain Garsu Pasaulis had due to the Kyrgyz scandal[508].

643. Termination of relationships with commercial banks immediately caused another significant problem for Garsu Pasaulis. 90% of all public government tenders around the world require to provide bank

[504] Ibid.
[505] Mieliauskas Witness Statement, para 65, **CWS-2-1.**
[506] Mieliauskas Witness Statement, para 66, **CWS-2-1.**
[507] Communication with banks, **CWS Mieliauskas 1-38**; Communication with banks **CWS Lukosevicius 1-37**; Communication with banks regarding bank guarantee, **CWS Lukosevicius 1-38**.
[508] Lukosevicius Witness Statement, para 73-74, **CWS-1-1**.

guarantees from reputable commercial banks in order to be allowed to participate in public tenders[509].

644. Due to Kyrgyz allegations, Garsu Pasaulis is (to date) precluded from participating in major international tenders, because Garsu Pasaulis is not able to receive such bank guarantees.

645. As explained by Lukosevicius:

> *"Garsu Pasaulis is not able to participate in new public tenders, because Garsu Pasaulis cannot provide bank guarantees. Recently, this has happened in Liberia, Nepal and Bangladesh where Garsu Pasaulis wanted to participate in public tenders regarding provision of passports and various identification systems, but could not, because of bank guarantee requirements."*[510]

646. While being expelled from major commercial banks, Garsu Pasaulis also tried to receive credit lines from other international credit institutions, but to no avail. Garsu Pasaulis was told again and again that financial institutions could not work with Garsu Pasaulis due to its tarnished international reputation[511].

647. Second, due to the severely damaged international reputation, Garsu Pasaulis risks losing its certifications, which are also required in 95% of all public government tenders around the world. As explained by Lukosevicius, after the Kyrgyz scandal, the international certification agency, whose certification is requested in 95% of all public tenders around the world for security printing, threatens to take away Garsu Pasaulis' certification if the allegations in the Kyrgyz scandal are not rebutted[512]. Losing the necessary certification would entail the end to Garsu Pasaulis' business[513].

[509] See, e.g., Lukosevicius Witness Statement, para 73, **CWS-1-1**.
[510] Lukosevicius Witness Statement, para 78, **CWS-1-1**.
[511] Communication with banks, **CWS Mieliauskas 1-38**; Communication with banks **CWS Lukosevicius 1-37**; Communication with banks regarding bank guarantee, **CWS Lukosevicius 1-38**.
[512] Communication with Intergraf, **CWS Lukosevicius 1-39**.
[513] Lukosevicius Witness Statement, para 75, **CWS-1-1**.

648. Third, due to fake Kyrgyz allegations, Garsu Pasaulis has lost its most valuable and long-term contracts with governments and multinational companies.

649. Just after the 2018 Tender scandal erupted, in Switzerland, Garsu Pasaulis' long-term client for Schengen visas – the Swiss Government – was accused by local politicians of working with 'criminal' and 'corrupt' company [514] . Immediately, the Swiss government terminated its orders for any new products from Garsu Pasaulis [515] . Now the contract with the Swiss government is defunct[516].

650. As explained by Mieliauskas:

> *"To be able to perform the Swiss contract, Garsu Pasaulis had invested substantial amounts to acquire complex printing equipment, had to invest into production specifically purposed for the Swiss contract, also invested substantial amounts into design, testing and materials. All of Garsu Pasaulis' investments related to the Swiss contract and the projected income from the Swiss contract is now gone due to false Kyrgyz allegations."*[517]

651. As explained by Mieliauskas and Lukosevicius, similar pattern followed with other major clients of Garsu Pasaulis [518] . Garsu Pasaulis has immediately lost its profitable contract with Mozambique, which refused to order any new products from Garsu Pasaulis due to Kyrgyz scandal and allegations thereof[519]. Garsu Pasaulis later lost even more important contracts with the international Carlsberg Group[520] and the Baltic Tobacco Factory in Kaliningrad[521]. These major clients also refused to work with Garsu Pasaulis due to the Kyrgyz allegations[522].

---

[514] Media Articles regarding Swiss contract, **CWS Mieliauskas 1-39**;
[515] Ibid.
[516] Mieliauskas Witness Statement, para 68, **CWS-2-1.**
[517] Mieliauskas Witness Statement, para 69, **CWS-2-1.**
[518] Mieliauskas Witness Statement, para 69, **CWS-2-1**; Lukosevicius Witness Statement, para 76, **CWS-1-1**.
[519] Damages Report, **CER-3-1**; Communication with Carlsberg Group, **CWS Mieliauskas 1-41**.
[520] Damages Report, **CER-3-1**.
[521] Damages Report, **CER-3-1**.
[522] Mieliauskas Witness Statement, para 70, **CWS-2-1.**

652. As explained by Mieliauskas:

> *"This meant that Garsu Pasaulis eventually had to close its highly profitable commercial printing department. Commercial printing department has generated income and profit for Garsu Pasaulis since 1995. But now, due to false Kyrgyz allegations, it is gone and Garsu Pasaulis needs to figure out how to survive with contracts and accounts that still work with Garsu Pasaulis."*[523]

653. Therefore, due to the Kyrgyz scandal, the majority of Garsu Pasaulis' biggest clients in the commercial printing department have cancelled their cooperation with Garsu Pasaulis, specifically due to the Kyrgyz allegations. The whole commercial printing department is now being shut down. Garsu Pasaulis' business reputation is tarnished, and Garsu Pasaulis is precluded from participating in government tenders around the world[524].

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

654. This Tribunal is governed by the Agreement as well as the customary principles of international law in awarding Garsu Pasaulis the full amount of damages it has suffered as a result of the unlawful acts committed by the Kyrgyz Republic.

655. 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.

656. It is evident that by violating the Agreement, the Kyrgyz Republic violated its obligations under international law, which subjects this case to the customary laws of State responsibility[525].

---

[523] Mieliauskas Witness Statement, para 72, **CWS-2-1.**
[524] Lukosevicius Witness Statement, para 80, **CWS-1-1**.
[525] United Nations, Responsibility of States for Internationally Wrongful Acts, II Y.B. OF INT'L L.COMM'N (2001) (hereinafter "ILC Articles"). The principles of attribution contained therein (Articles 4-I I) are generally accepted to

657. As outlined in Sections VI(C) of this Statement of Claim, the Kyrgyz Republic breached its obligations under the Agreement (i) by failing to accord Garsu Pasaulis fair and equitable treatment and subjecting Garsu Pasaulis and its investments to unjustified and discriminatory measures, (ii) by failing to accord Garsu Pasaulis full protection and security and (iii) violating its obligation to not expropriate Garsu Pasaulis' investments without a legal justification and immediate, full and effective compensation.

658. Because the Kyrgyz Republic violated the Agreement as well as its own domestic law[526], its expropriation was not lawful.

659. The Kyrgyz Republic further breached the Agreement by destroying Garsu Pasaulis' international reputation, specifically protected by the Agreement[527].

660. 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 expropriation must be based on the market value of the investment before the expropriation took place. Accordingly, the standards for compensation upon lawful expropriation are no different from those for unlawful expropriation.

661. As further explained by Dr. Baltag:

> *"It is established that, where the relevant treaty is silent on the issue of damages, a breach of a substantive standard under an investment treaty requires the host State to provide full reparation. This applies to expropriation as well as to the other standards envisaged by the applicable treaty, including the FET and FPS"*[528]

be a codification of customary international law applicable to the present dispute and are helpfully set out, together with the ILC's Commentary, in J. CRAWFORD, The International Law Commission's Articles On State Responsibility (2002).

[526] Alenkina Report, para 107, **CER-2-1**.

[527] Article 1 of the Agreement, **C-1**.

[528] Baltag Report, para 149, **CER-1-1**.

662. 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."*[529]

663. 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[530]. 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.

664. 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."*[531]

---

[529] *Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (13 Sept.).
[530] Mark Kantor, Valuation For Arbitration: Compensation Standards, Valuation Methods And Expert Evidence, (2008); see also Monroe Leigh, Judicial Decisions, 82 AM. J. INT'L L. 351, 360 (1988) (summarizing Amoco Intl Fin. Corp. v. Islamic Republic of Iran, Award No. 310-56-3, Iran-United States Claims Tribunal (24 July 1987), which found that under the application of the Chorzow Factory principle, claimant is entitled to all damages that would wipe out the consequences resulting from unlawful expropriation, including lost profits).
[531] 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, **CLA-15**; *SD Myers*,

665. 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 expropriation. This principle of customary international law is stated in many recent awards of international arbitral tribunals."* [532]

666. The Kyrgyz Republic committed an internationally wrongful act by breaching its international obligations under the Agreement[533].

667. 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[534]. 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[535].

668. 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[536]. 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.*"[537]

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), **CLA-25**.

[532] *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), Baltag Report, **E-104;** *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).

[533] Actions or omissions that "constitute a breach of an international obligation of the State" constitute an "internationally wrongful act." See ILC, Art. 2(ii), **CLA-7.**

[534] ILC, Art. 31.

[535] ILC Arts. 34-37.

[536] ILC Art. 35.

[537] ILC Art. 36.

669. 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[538].

670. The Kyrgyz Republic must put Garsu Pasaulis in the same position in which it would have been had the Kyrgyz Republic (i) not expropriated the e-passports contract won by Garsu Pasaulis in the 2018 Tender, (ii) not disseminated false allegations of corruption and bribery against Garsu Pasaulis.

671. Even if the Tribunal was able to oblige the Kyrgyz Republic to conclude the e-passports contract with Garsu Pasaulis (which was already awarded to other company in 2020 Tender), for Garsu Pasaulis, it would not serve as full or even adequate compensation.

672. Full reparation of Garsu Pasaulis' injury includes the awarding of monetary restitution under general international law principles, or synonymously, compensation as described under the ILC Articles. This damages award would not only include:

    (i) compensation of the lost income of the e-passports contract that would have been received by Garsu Pasaulis, but for the illegal actions of the Kyrgyz Republic;

    (ii) compensation of consequential losses – lost profits of Garsu Pasaulis' profitable contracts terminated due to actions of the Kyrgyz Republic, and

    (iii) compensation for the loss of business reputation of Garsu Pasaulis, which was destroyed due to the allegations of the Kyrgyz Republic.

673. Thus, the Tribunal must compensate Garsu Pasaulis for all of the damages that it suffered as a result of Kyrgyz illegal actions.

[538] 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), Baltag Report, **E-107**; *LG&E. 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), Baltag Report, **E-69**.

C. Direct causal link between the breach of the Agreement and Garsu Pasaulis' losses

674. First, Garsu Pasaulis seeks damages for the Kyrgyz Republic's unlawful deprivation of Garsu Pasaulis' economic right to execute the e-passports contract.

675. Garsu Pasaulis is entitled to the sufficient quantum of damages that would put Garsu Pasaulis in a position it would have been in had it fully executed the e-passports contract.

676. It 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 lawful expropriation, for example, as set out in Article 4 of the Agreement.

677. 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 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.

678. 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."[539]

679. 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 the Kyrgyz Republic's expropriation of the e-passports contract was that Garsu Pasaulis was deprived of a certain contractual right with a certain contractual value and projected income and profit.

680. 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 expropriated by wrongful actions of the Kyrgyz Republic. What one will be forced to conclude from the evidence presented in this case is that, *if the Kyrgyz Republic had acted lawfully*, Garsu Pasaulis would have successfully executed the e-passports contract and would have executed and singed many more similar contracts around the world as it did before the 2018 Tender.

681. As already explained in Section IV(C) of this Statement of Claim, the execution of the e-passports contract by Garsu Pasaulis was not merely probable; it was virtually certain. The only intervening cause that prevented Garsu Pasaulis from execution of the e-passports contract and receiving profit thereof was the illegal conduct of the Kyrgyz Republic.

[539] Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration, 1185-86 (2011), at 50, Baltag Report, **E-39**; see also Mark Kantor, Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence 52 (2008), **CLA-26**. 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, Baltag Report, **E-46.**

682. 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 acquired by law and 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 the Kyrgyz law, and the consequences of that deprivation. This right had a very specific economic value as it would have led to very specific income and profit to Garsu Pasaulis.

683. Similarly, international reputation of Garsu Pasaulis too had a very specific value reflected by contracts concluded and to be concluded by Garsu Pasaulis globally.

684. This is not a case in which blame can be attributed to both parties. The fact there was no execution of e-passports contract and cancellation of 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 e-passports 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 passports contract and cancellation of other profitable contracts of Garsu Pasaulis was the illegal conduct of the Kyrgyz Republic, it would be a direct violation of the clean hands doctrine.

685. Accordingly, the initial "but for" position in which Garsu Pasaulis must be placed is that of the successful execution of the e-passports contract by Garsu Pasaulis, successful execution of long-term contracts, and the best international reputation of Garsu Pasaulis globally. Any other result would be a travesty of justice.

686. 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-passports contract would have been executed by Garsu Pasaulis, long-term contracts not cancelled and the global business reputation intact. Garsu Pasaulis does not disagree with the broad proposition that damages should reflect the losses incurred as a result of an internationally wrongful act. The damages claimed in this case are the sole and direct result of the Kyrgyz Republic's illegal conduct intended to deprive Garsu Pasaulis of execution of the e-passports contract and destruction of Garsu Pasaulis' international reputation. There were no intervening causes or factors attributable to Garsu Pasaulis or other parties.

687. The question then is – how probable is it that Garsu Pasaulis would have executed the e-passports contract? The only conclusion based on the evidence presented and based on the specific Kyrgyz law obligations is that the execution of the e-passports contract would have been concluded for certain. Since it is now known that the Kyrgyz Republic awarded the e-passports contract to another company, it is reasonable on its face for this Tribunal to conclude that the Kyrgyz Republic would similarly otherwise have permitted Garsu Pasaulis to execute the e-passports contract *but for* its arbitrary and discriminatory conduct.

688. There are no circumstances or convincing arguments that Garsu Pasaulis would have otherwise been prevented from executing the e-passports contract. As similarly described by the tribunal in the *Lemire* case, the damages due to Garsu Pasaulis can be established as the difference between the value of the business Garsu Pasaulis now owns, and "[the business] which he had planned, and which he had not been able to achieve" due to the Kyrgyz Republic's wrongful acts. This is the e-passports contract, profitable contracts 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.*"[540]

689. 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.

690. In lieu of in-kind restitution, Garsu Pasaulis is entitled to a monetary damages award in the amount equivalent to the benefit he would have had if the Kyrgyz Republic had not wrongfully expropriated its property, i.e., expropriated the e-passports contract already won by Garsu Pasaulis, and had not tarnished Garsu Pasaulis' international reputation.

691. 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.*"

692. The arbitral tribunal in the *Sapphire case*[541] 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.

693. However, as it will be explained below, Dr Banyte, in her Damages Report, was able to calculate Garsu Pasaulis' damages with extremely high precision.

[540] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Baltag Report, **E-46.**.
[541] *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*, 35 ILR 136 (1963), **CLA-27**.

D. Direct causal link between the breach of the Agreement and destruction of Garsu Pasaulis' business reputation

694. 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.

695. 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, i.e., damage to Garsu Pasaulis' business reputation.

696. The Kyrgyz Republic severely impacted the loss of international business reputation of Garsu Pasaulis, which has caused loss of substantial ongoing business of Garsu Pasaulis. Again, the only intervening cause was the illegal conduct of the Kyrgyz Republic.

697. Had the Kyrgyz Republic not disseminated false information about the alleged meddling (through bribes and corruption) by Garsu Pasaulis with the results of the 2018 Tender, Garsu Pasaulis would have had an excellent business reputation.

698. 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.

699. In fact, moral damages in the context of investment arbitration are mostly discussed in connection with the 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 [542]. However, the economic value of reputation necessarily leads to the conclusion that loss of reputation is a pecuniary, not a non-pecuniary loss.

[542] Schwenzer, I., & Hachem, P. (2011). Moral damages in international investment arbitration (pp. 411-430). Kluwer Law International, **CLA-28**.

700. 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[543].

701. The notion of loss of profit covers every potential increase in assets that was prevented by the breach. Loss of profit may be actual and readily proven, such as contracts already entered into, or it may accrue in the future. As it will be explained below, Garsu Pasaulis claims lost profits from the e-passports contract and the long-term contracts cancelled due to Kyrgyz Republic's conduct. Garsu Pasaulis does not intend to encompass these lost profits under the heading of reputational (moral) damages.

702. As far as it concerns the loss of Garsu Pasaulis' reputation, 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[544].

703. For reputational damage, the *Helnan v. Egypt* tribunal concluded that *"[s]hould damage to Helnan's reputation be established, the Arbitral Tribunal considers that monetary compensation would be an adequate remedy".*[545] In *Chorzów Factory*, the Permanent Court of International

[543] Reputational loss and loss of goodwill as a result of breach of contract can be recovered. The calculation of the loss of reputation should take into account, for example, the size of the company, the market, the value of the trademark and the necessary costs to re-establish the reputation. See CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74, Rapporteur J Gotanda, Comment 7.1 (**CLA-29**); P Schlechtriem/P Butler, UN Law on International Sales (Springer, Heidelberg, 2009) para. 299a; U Magnus in J von Staudingers Kommentar zum Bürgerlichen Recht Vol. XIV (15th ed, De Gruyter, Berlin, 2018) Article 74 para. 27; I Schwenzer in Schwenzer Commentary on the UN Convention on the International Sale of Goods (4th ed, 2016) Article 74 para. 36.; Schwenzer in Schwenzer Commentary on the UN Convention on the International Sale of Goods (4th ed, 2016) Article 74 para. 36.

[544] See for example, *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, 27 June 1990, ICSID Case No. ARB/87/3, para. 104., **CLA-14**; In *Sola Tiles, Inc. v. Iran* (1987) (14 Iran-US C.T.R. 224, 240-42;83 I.L.R. 460, 480-81), 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". Similarly in *Asian Agricultural Products v Sri Lanka* (4 ICSID Reports 246 (1990) at 292), another ICSID Tribunal observed, in dealing with the comparable problem of the assessment of the value of good will, that its ascertainment "requires the prior presence on the market for at least two or three years, which is the minimum period needed in order to establish continuing business connections".

[545] *Helnan International Hotels A.S. v. Arab Republic of Egypt,* ICSID Case No. ARB/05/19, Decision on Claimant's Request for Provisional Measures of 17 May 2006, para 34, Baltag Report, **E-104**.
In *SD Myers v. Canada*, Second Partial Award, para. 171, the tribunal acknowledged that the consequences of respondent's actions on investor's goodwill "must be put into the equation" when assessing the compensation to be awarded to claimant. In *Methanex Corporation v. United States of America,* UNCITRAL*,* Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005, paras 16-17, Baltag Report, **E-118**, the tribunal, noting that

Justice instructed the expert to consider "goodwill" in assessing the value of the factory.[546]

704. Business 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. 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[547].

705. It is noted that in a highly competitive and complex global market of investments into security identification systems and security printing, a respectable reputation is of the essence. Any negative news can affect the company's image and consequently its position in the security identification business 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, which was spread just because of the private and personal interests of Kyrgyz' officials.

706. As explained by Lukosevicius:

> *"due to the Kyrgyz scandal, Garsu Pasaulis is now precluded to participate in the public tenders around the world. Garsu Pasaulis is no longer considered as a reliable provider with good reputation."*[548] *(…) "Garsu Pasaulis is not even invited to participate in major security printing tenders around the world."*[549]

707. There is no doubt that Garsu Pasaulis suffered substantial damage to its business reputation, which has materialized through the expulsion of

---

the investor submitted that it has lost its customer base, goodwill and market share, while the US contended that none of these qualify as investments under Article 1139 of NAFTA, concluded, relying on the expert evidence, that "items such as goodwill and market share may … constitute … an element of the value of an enterprise and as such may have been covered by some of the compensation payments".

[546] *Factory at Chorzow*, 1928 P.C.I.J. (series A) No. 17 (September 13), p. 51, **CLA-30**.

[547] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 18 Jul 2008, Concurring and Dissenting Opinion,
Baltag Report, **E-86**.

[548] Lukosevicius Witness Statement, para 78, **CWS-1-1**.

[549] Ibid.

Garsu Pasaulis from major markets, projects, and contracts around the world.

708. There is also no doubt that loss of reputation shall be compensated[550]. As explained, it can be compensated either in the form of pecuniary loss or a non-pecuniary loss that could be redressed by way of moral damages.

709. In the present case, the Agreement affords protection to the investor as well as to the investment and specifically protects business reputation. Thus, Garsu Pasaulis' personality rights are directly related to the investment. In *Desert Line*[551], 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.

710. Previous decisions of tribunals can also offer valuable guidance to the Tribunal. The *Lusitania* case [552] 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*[553], 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.

[550] See, e.g., *Tidewater Inc v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, para. 145 (13 March 2015) (noting that 'goodwill and know-how' constitute part of the investment and thus are protected by the treaty), Baltag Report, **E-117**.
[551] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Baltag Report, **E-109**.
[552] *The Lusitania Cases*, US v. Germany, 1 November 1923, VII RIAA 32, **CLA-31**.
[553] *Ahmadou Sadio Diallo* (Guinea v. Congo) Judgment of June 19, 2012, **CLA-32**.

711. 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*[554], 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.

712. Similarly, moral damages were awarded in other cases, such as the *Fabiani Case*[555] 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[556]. International tribunals note that investors are entitled to be compensated for an injury inflicted resulting in loss of social position or injury to credit or to reputation[557].

713. As it will be explained below, in the present case, the financial consequences of damage to Garsu Pasaulis' business reputation are not difficult to ascertain. As explained by Dr. Banyte in her Damages Report, the basis of the calculation of loss of reputation of Garsu Pasaulis is the company's loss of income in excess of the market trend for 2020/2018[558].

E. Quantum

i. Introduction

714. 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.

---

[554] S*.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, **CLA-33**.
[555] 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.
[556] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, **CLA-24**.
[557] Opinion in *the Lusitania Cases*, US v. Germany, 1 November 1923, VII RIAA 32, 36, **CLA-31**.
[558] Damages Report, **CER-3-1**.

715. 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 of executing the e-passports contract, as well the lost profits Garsu Pasaulis would have received from its profitable contracts terminated due to the false Kyrgyz allegations and compensation for the destruction of Garsu Pasaulis' business reputation[559].

716. Dr. Banyte, in her Damages Report, has thoroughly investigated and calculated with extreme precision the losses incurred by Garsu Pasaulis on three separate heads:

(i) the amount of losses incurred by Garsu Pasaulis due to expropriation of e-passports contract won by Garsu Pasaulis in the 2018 Tender;

(ii) the amount of losses incurred by Garsu Pasaulis due to cancellation of contracts, which were cancelled for the sole reason of the Kyrgyz' scandal and false allegations;

(iii) the amount of losses incurred by Garsu Pasaulis due to the loss of business reputation.

717. In summary, Dr Banyte arrived at the following conclusions:

The answer to the first fold	The loss suffered by Garsu Pasaulis in connection with the 2018 Tender and investments related thereto is **EUR 2'327 thousand (two million three hundred and twenty-seven thousand euros)** as of the date of calculating the loss, which is 31 December 2020[560].

[559] Kantor at 54 (describing S.D. Myers, First Partial Award and Separate Opinion, which found that the respondent violated its treaty obligations of fair and equitable treatment when it closed the border and conducted a detailed analysis of the individual loss to the investor. Those losses included "calculating the investor's net income stream lost to third party competitors during the temporary closure period, the net income stream lost to third parties after the closure period but attributable to the adverse impact on the investors' position caused by the closure, and the lost net income stream during the closure period for business the investor failed to fulfill by virtue of the closing but not lost to third parties." See also Biloune at 228 (agreeing with the principle of awarding lost profits), **CLA-26**.

[560] Damages Report, pp. 2-7, 28-31, **CER-3-1**.

The answer to the second fold	The loss suffered by Garsu Pasaulis as a result of the cancellation of longterm and profitable contracts is **EUR 5'649 thousand (five million six hundred and forty-nine thousand euros)** as of the date of calculating the loss, which is 31 December 2020[561].
The answer to the third fold	Garsu Pasaulis' business reputation loss is **EUR 9'460 thousand (nine million four hundred and sixty thousand euros)** as of the date of calculating the loss, which is 31 December 2020[562].

ii. Description of Garsu Pasaulis' losses

718. First, Garsu Pasaulis claims losses incurred due to the expropriation of the e-passports contract won in the 2018 Tender. These losses are calculated by summing all direct losses and adding the estimated indirect losses. Direct losses are expenses incurred by Garsu Pasaulis in the 2018 Tender. Indirect losses are the free cash flow (profit) of the e-passports contract, which is calculated based on information about the planned income from the e-passports contract and the costs associated thereof[563].

719. Second, Garsu Pasaulis claims losses related to the cancellation of Garsu Pasaulis profitable contracts with (i) OOO "Baltijskaja tabačnaja fabrika", (ii) Carlsberg Breweries Group, (iii) Bundesamt für Bauten und Logistik BBL and (iv) DALO Construções S.A. Losses from these cancelled contracts were calculated based on income and costs received under these contracts for the period from 2016 to 2018 inclusive. Unearned free cash flow (profit) was calculated according to the same principle as the unearned profit from the e-passports contract for 2019-2020[564].

720. Third, Garsu Pasaulis claims losses of business reputation. The basis of the calculation of loss of business reputation of Garsu Pasaulis is the company's loss of income in excess of the market trend for 2020/2018.

[561] Damages Report, pp. 7-9, 31-37, **CER-3-1**.
[562] Damages Report, pp. 9-10, 37-39, **CER-3-1**.
[563] Damages Report, pp. 2-7, 28-31, **CER-3-1**.
[564] Damages Report, pp. 7-9, 31-37, **CER-3-1**.

The costs were calculated using historical average data from 2016 to 2020[565].

iii. Methodology of loss calculation

721. Garsu Pasaulis' losses were calculated based on lost profits or diminution of value. Loss values are set for 31 December 2020.

722. Dr. Banyte based her calculations on the following analysis:

(i) Market analysis – the market analysis was performed to determine how the revenues in the commercial printing market and Garsu Pasaulis changed after 2018 (after the 2018 Tender scandal). The market analysis covered 25 European commercial printing companies in Western and Eastern Europe, including Garsu Pasaulis. In addition, EUROSTAT statistics and Swiss visa issuance volumes were analyzed[566].

(ii) Risk analysis – the risk analysis was performed to assess the profitability ratios, costs of capital, average annual sales growth, return on investment of Garsu Pasaulis, and to calculate the discount and capitalization rates for the transformation of free cash flow into loss values. The averages of the indicators for 2016-2018, 2016-2019 and 2016-2020 were calculated[567].

(iii) Free cash flows – all losses were calculated using a principal formula that is designed to determine free cash flow. Cash flows available to pay out to capital holders after funding operations of the business and making necessary capital investments. Damages Report considers the free cash flow was not received and / or lost by Garsu Pasaulis due to the 2018 Tender scandal[568].

[565] Damages Report, pp. 9-10, 37-39, **CER-3-1**.
[566] Damages Report, p 11, **CER-3-1**.
[567] Damages Report, pp. 11-14, **CER-3-1**.
[568] Damages Report, pp. 14-16, **CER-3-1**.

iv. Garsu Pasaulis' losses due to expropriation of the e-passports contract

723. In her Damages Report, Dr. Banyte has calculated the losses related to the expropriation of the e-passports contract won by Garsu Pasaulis in the 2018 Tender by summing all direct losses and adding the estimated indirect losses. Direct losses are expenses incurred by Garsu Pasaulis to participate in the 2018 Tender. Indirect losses are the free cash flow (profit) of the e-passports contract won in the 2018 Tender, which are calculated based on information about the planned income from the e-passports contract and the costs associated thereof[569].

724. While calculating Garsu Pasaulis' losses related to expropriation of the e-passports contract, Dr. Banyte applied the following formula:

Stage 1: direct costs associated with the e-passports contract were summed up.

Stage 2: the e-passports contract's income was converted into euros from the Kyrgyz som.

Stage 3: EBIT was calculated.

Stage 4: the income and expenses were distributed over four years.

Stage 5: profit of the e-passports contract was calculated.

Stage6: the portion of profit for 2019 and 2020 that would bring additional income in case of reinvestment was calculated. The value of the profit as of 31st December 2020 has been determined.

Stage 7: lost profits for the future period were calculated, i.e., in 2021 and 2022. Estimated free cash flow was discounted to their present value on 31st December 2020.

[569] Damages Report, pp. 2-7, 28-31, **CER-3-1**.

Stage 8: both reinvested cash flows for 2019–2020 and discounted cash flows for 2021–2022 were aggregated. Direct costs are also added to the result obtained.

725. Based on the formula described above, Dr. Banyte has found that Garsu Pasaulis' losses related to the expropriation of the e-passports contract is EUR 2'327 thousand (two million three hundred and twenty-seven thousand euros) at the date of calculating the loss, thereby on 31st December 2020[570].

v. Garsu Pasaulis' losses due to cancellation of profitable contracts

726. In her Damages Report, Dr. Banyte has also calculated Garsu Pasaulis' losses related to cancelation of contracts with (i) OOO "Baltijskaja tabačnaja fabrika", (ii) Carlsberg Breweries Group, (iii) Bundesamt für Bauten und Logistik BBL and (iv) DALO Construções S.A. Losses from contracts' cancellation were calculated as of 31st December 2020. Losses were calculated based on income and costs received under contracts for the period from 2016 to 2018 inclusive[571].

727. While calculating Garsu Pasaulis' losses related to cancelation of contracts, Dr. Banyte applied the following formula:

Stage 1: Assumptions, based on which EBIT was determined.

Stage 2: EBIT calculation.

Stage 3: Assumptions based on which the free cash flow (profit) under the contracts were determined.

Stage 4: The profit for each contract was calculated. It was determined how much additional income this unearned profit for 2019 and 2020 would have brought if it had been invested.

[570] Ibid.
[571] Damages Report, pp. 7-9, 31-37, **CER-3-1**.

Stage 5: Losses for all contracts were summed up. The amount of losses as of 31st December 2020 was determined.

728. Based on the formula described above, Dr. Banyte has found that Garsu Pasaulis' losses related to cancelation of contracts is EUR 5'649 thousand (five million six hundred and forty-nine thousand euros) at the date of calculating the loss, thereby on 31st December 2020[572].

vi. Garsu Pasaulis' losses due to destruction of Garsu Pasaulis' business reputation

729. In her Damages Report, Dr. Banyte has also calculated Garsu Pasaulis' loss of reputation. The basis of the calculation of loss of reputation is the company's loss of income in excess of the market trend for 2020/2018. The costs were calculated using historical average data from 2016 to 2020. Loss of reputation was calculated as of 31st December 2020[573].

730. While calculating Garsu Pasaulis' losses related to the loss of reputation, Dr. Banyte applied the following formula:

Stage 1: The performance of Garsu Pasaulis for the period of 2020/2018 is compared with the performance of the market.

Stage 2: Assumptions based on which EBIT was determined.

Stage 3: EBIT calculation.

Stage 4: Free cash flow (profit) calculation.

Stage 5: Losses for all contracts are summed up. The amount of losses as of 31st December 2020 has been determined.

731. Based on the formula described above, Dr. Banyte has found that Garsu Pasaulis' loss related to loss of business reputation is EUR 9'460 thousand (nine million four hundred and sixty thousand euros) at the date of calculating the loss, thereby on 31st December 2020[574].

[572] Ibid.
[573] Damages Report, pp. 9-10, 37-39, **CER-3-1**.
[574] Ibid.

F. Interest

732. Garsu Pasaulis is entitled to an interest award on the damages amount described above in order to fully compensate it for the Kyrgyz Republic'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.

733. 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*[575] 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."*

734. The payment of interest under the State responsibility duty and ILC Article 38 *"is to remedy the concrete damage incurred by the injured party."*[576] 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."*[577] Compound interest, which has become the standard to remunerate the use of money in modern finance, comes closer to achieving this purpose than simple interest. Indeed, being deprived of the use of the money to which it was entitled, a creditor may have to borrow funds or may forego investments, for which it would pay or earn compound interest[578].

[575] *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, Award on Damages and Costs - 30 July 1990, Baltag Report, **E-95**..
[576] ILC, Art. 38, **CLA-7.**
[577] *Biloune*, para. 230.
[578] See, for instance: *Continental Casualty v. Argentina*, Award of 5 September 2008, **CLA-34**, para 313 (finding that "full reparation to Continental should include compound interest on the compensation due from but unpaid by Argentina"), and *Occidental v. Ecuador II*, Award of 5 October 2012, para 840 (holding that awarding compound interest "accords with the Chorzów principle as an award of compound interest will usually reflect the actual damages suffered"). See also*: El Paso v. Argentina*, Award of 31 October 2011, para 745; *Vivendi v. Argentina II*, Award of 20 August 2007, para 9.2.6; *Wena v. Egypt*, Award of 8 December 2000, para 129.

735. Furthermore, awarding interest functions to prevent the wrongdoer's unjust enrichment and encourages timely dispute resolution.

736. Dr. Baltag further explains:

> *"that when determining the interest, a tribunal will take into consideration the principles of international law, namely the rule of full reparation and compensation for the injured party, where the treaty is silent. Recourse to the principles of national law when determining interest is not appropriate"*[579]

737. Thus, the Kyrgyz Republic must pay interest on the amount owed to Garsu Pasaulis beginning from 22 February 2019, the date of its wrongful act. Garsu Pasaulis has *de facto* been forced to loan to the Kyrgyz' Government the money (profit) it would have received for the execution of the e-passports printing contract, for the execution of the profitable contracts and profit earned while utilizing its international reputation. The main purpose of an award of interest is "*to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive*"[580]

738. For compensation for lawful expropriation, the Agreement itself requires that interest must be paid[581].

739. As for the rate of interest, Garsu Pasaulis requests the to apply the same interest rate applied by this Tribunal by Procedural Order No. 2 – US prime rate plus 2%, which is generally used in investment treaty arbitrations governed by international law.

740. Therefore, Garsu Pasaulis requests for an interest award on the damages amount described above at a rate of US prime rate plus 2%, compounded on an annual basis, beginning from 22 February 2019 until the Tribunal's award is fully complied with.

---

[579] Baltag Report, para 160, **CER-1-1**.
[580] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, **CLA-17**, para. 9.2.3.
[581] The Agreement, Article 4, **C-1**.

G. Summary

741. Garsu Pasaulis is entitled to damages of EUR 17’436’000,00 plus interest under the Agreement and the general principles of international law for the Kyrgyz Republic’s breach of its international law obligations.

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

742. 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.

743. 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.

744. As it was explained, any statements of the Kyrgyz Republic about the alleged affiliation with the management of the Tender Commission or the GRS are totally false and misleading.

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

746. The fact that such statements have been made through international media agencies only exacerbates Garsu Pasaulis’ situation because Garsu Pasaulis is at risk of being expelled in numerous countries around the world and faced significant monetary damages.

747. Therefore, Garsu Pasaulis is entitled to a public and prompt denial of all false statements, accusations, and allegations made by the Kyrgyz Republic. Garsu Pasaulis specifically requests the Tribunal to declare that

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

748. The arbitral tribunal in *Enron* v. *Argentina*[582] 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".*

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

IX. RESERVATION OF RIGHTS

750. Garsu Pasaulis reserves the right to 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.

[582] *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic*, Decision on Jurisdiction, 14 January 2004, **CLA-35**.

X. RELIEF OF REMEDY SOUGHT

751. Garsu Pasaulis respectfully requests the Arbitral Tribunal to:

(a) Declare that the Kyrgyz Republic has breached its obligations under the terms of the Agreement, as described above;

(b) Award monetary damages of not less than EUR 17'436'000,00 (seventeen million four hundred thirty-six thousand euros) in compensation for the loss sustained as a result of the Kyrgyz Republic's measures that are inconsistent with its obligations under the Agreement and under general international law, including, *inter alia,* losses related to the expropriation of the e-passports contract, losses related to cancelation of Garsu Pasaulis' profitable contracts and losses related to loss of Garsu Pasaulis' business reputation;

(c) Order the Kyrgyz Republic to bear the costs and expenses of the arbitration, including fees and expenses of counsel, experts, consultants, and witnesses, and the fees and expenses of the Tribunal, plus such further costs and expenses as the Tribunal may find are owed under applicable law;

(d) Award interest on the damages in the amount described above at a rate of US prime rate plus 2%, compounded on an annual basis, beginning from 22 February 2019 until the Tribunal's award is fully complied with;

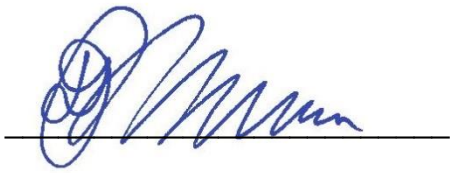
(e) Order the Kyrgyz Republic to publicly and promptly deny all false statements, accusations, and allegations it made about Garsu Pasaulis;

(f) Award such other relief that Counsel for Garsu Pasaulis may advise and that the Tribunal may deem appropriate.

* * *

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

31 August 2021, Vilnius, Lithuania



Dr. Rimantas Daujotas

Denis Parchajev

PLP Motieka & Audzevicius

Gyneju Street 4 Vilnius LT-01109

+370 5 2 000 777

+370 5 2 000 888

Counsel for Claimant,

UAB "Garsu Pasaulis"