

memorandum

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To: Maria Istomina

Date: 16 September 2019

Re: Legal advice regarding Mr Sergey Fishchenko's international investment arbitration rights against Kyrgyzstan

Dear Maria

You have requested us to advise you on the investment treaty and international arbitration rights of your father, Mr Sergey Fishchenko, vis-à-vis the Kyrgyz Republic ('**Kyrgyzstan**'). This concerns Mr Fishchenko's investment in AKIF LLC, a local meat retail business in the Osh Bazaar in Bishkek, Kyrgyzstan. Based on the documentation and information provided to us by you so far, we set out our preliminary views and advice below.

Factual background

We understand that Mr Fishchenko holds 19% shares in AKIF LLC, a limited liability company incorporated in 2009 in Bishkek, Kyrgyzstan. In November 2013, AKIF LLC obtained a non-revolving line of credit for USD2.640m from the Russian Investment Bank ('**Rosinbank**').¹ In March 2016, the other shareholders of AKIF LLC, namely Mr Ismar Maisyzov, Ms Kymbat Bozbaeva and Mr Rustem Kuvatbekov, purportedly transferred 81% of their shares to Ms Farida Abliamitova in exchange of Ms Abliamitova's discharge of the non-existent debt in the amount of USD2.5m allegedly owed to her by AKIF LLC under the secured loan agreement dated 2 August 2013.² This loan agreement between Ms Abliamitova and AKIF LLC together with the underlying documentation, including the financial receipt allegedly signed by Mr Fishchenko, were later held to be fictitious and backdated.³ We understand Mr Fishchenko had neither signed the shareholders resolution authorising the loan nor been present in Kyrgyzstan at the time of the alleged funds transfer.⁴

On 4 April 2016, Mr Maisyzov instigated a criminal complaint of fraud against Mr Fishchenko before the Senior Investigator of the Department of Interior of the Investigative Department of the State Service of Counteraction to Economic Offence ('**ID SSCEO**').⁵ In November 2016, this criminal investigation was transferred by the General Prosecutor's Office from the ID SSCEO to the Main Investigative Department of the Ministry of Internal Affairs ('**MID of MIA**') '*due to the distrust*' in the ID SSCEO, and subsequently, the criminal case was

¹ By 2017, AKIF LLC had accrued a debt of USD 4,325,978.96 to Rosinbank. See Credit Agreement No 29-04/232 KL, 18 November 2013; Mortgage Agreement No 29-05/235, 18 November 2013; Statement of Debt, 13 September 2017.

² See Agreement on the transfer of share in the authorised capital of The 'Firm AKIF' Kyrgyz-Russian Limited Liability Company, 11 March 2016; Loan agreement with a pledge security, 2 August 2013.

³ See Resolution on termination of the criminal case, 25 April 2017; Resolution on termination of the criminal case, 22 July 2018.

⁴ This was subsequently confirmed in a series of resolutions by the Investigative Department of the State Service of Counteraction to Economic Offence, including the Resolution on termination of the criminal case, 25 April 2017 and the Resolution on termination of the criminal case, 22 July 2018.

⁵ Resolution on initiation of the criminal case, 4 April 2016.

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suspended.⁶ On 20 February 2017, the MID of MIA opened a criminal case against the individuals involved in the above fictitious loan transfer, including Mr Maisyzov, and the criminal case against Mr Fishchenko was also resumed.⁷

On 20 March 2017, the MID of MIA suspended the proceedings against Mr Fishchenko, but this decision was subsequently cancelled and the case was forwarded to the ID SSCEO.⁸ On 25 April 2017, this criminal case was terminated by the ID SSCEO due to the absence of the requisite elements of the underlying crime allegations and the loan agreement with Ms Abliamitova was deemed fraudulent.⁹ In August 2017, the Senior Prosecutor Mr E. Adbymanapov reopened the criminal proceedings against Mr Fishchenko pursuant to the decision of the Pervomayskiy District Court rendering the termination of the criminal case invalid due to inadequacies of evidential records.¹⁰ This decision appears to be notable as it copied word for word the reasoning and findings of fraud in relation to the loan transfer from the earlier investigative acts but nonetheless ordered to renew the investigation against Mr Fishchenko.

In November 2017, the criminal investigation against Mr Fishchenko was again suspended.¹¹ However, in January 2018, the General Prosecution cancelled the suspension and forwarded the case to the MID of the State Committee for National Security ('SNS') which again suspended the criminal case.¹² Yet again in June 2018, the General Prosecutor's Office ordered the cancellation of the suspension and transferred the case to the ID SSCEO.¹³ The ID SSCEO again terminated the criminal case and identified the loan agreement and all cash receipts and vouchers as falsified.¹⁴ This decision was upheld by the Pervomaiskiy District Court.¹⁵

In November 2018, the General Prosecutor's Office again sent the case to the ID SSCEO and in December 2018 the Senior Investigator Mr A. Sabirov of the ID SSCEO unilaterally decided to reopen the criminal case against Mr Fishchenko.¹⁶ Mr Sabirov then proceeded to order the detention of Mr Fishchenko, refused a petition against the detention, and gave a '*notice of a new suspicion*' of fraud against Mr Fishchenko.¹⁷ In February 2019, the General Prosecutor's Office refused a request by Mr Fishchenko's lawyers to transfer the case from the ID SSCEO to the MID of MIA. The Oktiabrsky District Court considered this groundless and illegal, and ordered for the case to be transferred to the competent authority, the MID of MIA.¹⁸ This was affirmed by the Bishkek City Court on 25 March 2019.¹⁹ Earlier in March, Mr Fishchenko wrote to the General Prosecutor's office, asking for the case to be transferred to the SNS, however the General Prosecutor, without giving any consideration to this request, formally replied that the request ought to have

⁶ See discussion in Resolution on termination of the criminal case, 25 April 2017.

⁷ See discussion in Resolution on termination of the criminal case, 25 April 2017.

⁸ See discussion in Resolution on termination of the criminal case, 25 April 2017 and Resolution on cancellation of the suspension of the criminal case, renewal of investigation under the case and setting the new term of investigation, 3 August 2017.

⁹ See Resolution on termination of the criminal case, 25 April 2017.

¹⁰ See Resolution on cancellation of the suspension of the criminal case, renewal of investigation under the case and setting the new term of investigation, 3 August 2017.

¹¹ See discussion in Resolution on termination of the criminal case, 22 July 2018.

¹² See discussion in Resolution on termination of the criminal case, 22 July 2018.

¹³ See discussion in Resolution on termination of the criminal case, 22 July 2018.

¹⁴ See discussion in Resolution on termination of the criminal case, 22 July 2018.

¹⁵ See discussions in Resolution on termination of the criminal case, 22 July 2018; Order on leaving the claim without satisfaction, 22 August 2018.

¹⁶ Resolution on admission of the criminal case to the proceedings, 7 December 2018.

¹⁷ See Order on detention of the suspected, 28 January 2019; Resolution on refusal to satisfy the stated petition, 28 January 2019; Notice of new suspicion, 30 January 2019.

¹⁸ Order of the Presiding judge of the Oktiabrsky District Court of Bishkek City, 1 March 2019.

¹⁹ Decision by Judicial board on criminal cases and offence of the Bishkek City Court, 25 March 2019.

been sent through the State Service for Execution of Punishment.²⁰ This action of the General Prosecutor's office was held to be illegal by the Oktiabrsky District Court on 5 April 2019 as the request by Mr Fishchenko ought to have been registered in the Unified Register of Crimes and Offenses ('URCO'). The court also considered that Mr Fishchenko had been illegally detained and his status appears to have changed from a 'victim' to a 'suspect' without any substantiation. In rendering the refusal by the General Prosecution to register and consider Mr Fishchenko's complaint about, among other things, Mr Sabirov's actions illegal, the court noted the following arguments by Mr Fishchenko's defence lawyers:

Meanwhile, S Fishchenko, who the investigator A Sabirov illegally transferred from the victim to the category of suspected, in accordance with Article 45 of the Criminal Procedure Code of the Kyrgyz Republic has the right to have an advocate and complain about actions (inaction) and decisions of the inquiry bodies, investigator, prosecutor and court .

In accordance with Article 40 of the Constitution of the Kyrgyz Republic, everyone is guaranteed with judicial protection of his rights and freedoms provided for by this Constitution, laws, international treaties to which the Kyrgyz Republic is a party, generally accepted principles and norms of international law.

The state ensures the development of extrajudicial and pre-trial methods, forms and methods of protecting the rights and freedoms of a person and citizen.

Everyone has the right to protect their rights and freedoms by all means not prohibited by law. Everyone has the right to receive qualified legal assistance.

At the same time, Article 47 of the Constitution of the Kyrgyz Republic gives everyone the right to apply to state authorities, local self-government bodies and their officials, who are liable to provide a reasoned response within the time limit established by law.

It is believed that by doing so, the General Prosecutor's Office directly violated the requirements of the Constitution of the Kyrgyz Republic, the Law 'On the Procedure for the Treatment of Citizens', the Code of Criminal Procedure of the Kyrgyz Republic without considering the application of S.Fishchenko, and did not provide him with a reasonable answer.

Moreover, illegally leaving the application without consideration, he sent it to the State Service for Execution of Punishment for an official investigation, although it is unclear to us how this Service will conduct such an investigation and on what grounds.

In addition, the executives from the General Prosecutor's Office with their far-fetched and unsubstantiated comments from the Laws, which in their hierarchy of normative legal acts are below the Constitution of the Kyrgyz Republic, and thereby effectively limited S. Fishchenko about further appeals to the state authorities regarding our violated legal rights, freedoms and interests that is unacceptable.

In addition, the General Prosecutor's Office didn't consider the application of S.Fishchenko to initiate pre-trial proceedings, in fact, refused to register the application for the AIS Unified Register of Crimes and Offenses.

Meanwhile, in accordance with Article 33 of the Criminal Procedure Code of the Kyrgyz Republic, the prosecutor doesn't have any of the powers of the prosecutor to leave the application without reviewing and not registering it with the URCO which grossly violated the requirements of the law.²¹

²⁰ See discussion in Order of the Investigative judge of the Oktiabrsky District Court of Bishkek City, 5 April 2019.

²¹ See discussion in Order of the Investigative judge of the Oktiabrsky District Court of Bishkek City, 5 April 2019, emphasis added.

Moreover, there were seven criminal cases against AKIF LLC which were not accepted by the General Prosecutor's office.²²

Despite these court orders, Mr Sabirov of the ID SSCEO indicted Mr Fishchenko in a new criminal case.²³ Furthermore, Mr Sabirov appointed a new attorney Mr Kurmanbek Abdraimov to legally represent Mr Fishchenko in these criminal proceedings. However, a query to the Ministry of Justice revealed that Mr Abdraimov had been suspended from practising advocacy on 18 December 2018.²⁴

We are of the opinion that all these actions undertaken by the General Prosecutor's Office and the ID SSCEO are attributable to the Kyrgyz Republic as a matter of public international law.²⁵ They arguably constitute a serious breach of protections that Mr Fishchenko is entitled to under the Agreement on Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community (the '**Eurasian Investment Agreement**' or the '**Agreement**'), to which both Kyrgyzstan and Russia are parties. Under this Agreement, investors of one State party (here, Mr Fishchenko, a Russian national) may directly bring claims against another State party to the Agreement (here, Kyrgyzstan).

Application of the Eurasian Investment Agreement and jurisdiction

The Eurasian Investment Agreement entered into force on 11 January 2016. It applies to qualifying investments made by investors of the State of one Party (such as Russian investors) in the territory of the State of the other Party after 1 January 1992. This temporal requirement is met in this case since AKIF LLC was incorporated in 2009.

The Eurasian Investment Agreement does not apply to disputes which occurred before it entered into force on 11 January 2016. We consider that there is no temporal restriction in this case since the State conduct for which Kyrgyzstan is responsible and which breaches the Agreement took place after 11 January 2016.

The substantive protections and arbitration right in the Eurasian Investment Agreement may only be relied on if the jurisdictional requirements of the Agreement are satisfied. It seems very likely that Mr Fishchenko would qualify as a Russian 'investor' (defined to include a Russian citizen) protected under Article 1(a) of the Agreement. This is notwithstanding his holding only 19% of the shares in AKIF LLC as the Agreement has no minimum shareholding requirement.²⁶ Indeed, we recently acted on a case where a 10% shareholding was deemed sufficient to protect a minority shareholder as an investor under an investment treaty.

An 'investment' protected under Article 1(b) of the Agreement includes:

²² See discussion in Order of the Investigative judge of the Oktiabrsky District Court of Bishkek City, 5 April 2019.

²³ Criminal Indictment, 15 April 2019.

²⁴ See Letter of Attorney's Inquiry from B.A. Zaidov to the Ministry of Justice of the Kyrgyz Republic, 17 April 2019; Letter from the Ministry of Justice of the Kyrgyz Republic to B.A. Zaidov, 22 April 2019.

²⁵ Article 4(1) of the International Law Commission ('ILC') Articles on State Responsibility provides that '*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercised 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.*' Importantly, Article 4 of the ILC Articles on State Responsibility forms part of customary international law. See *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, ¶¶ 192-195; *Gustav F W Hamster GmbH & Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Award, 18 June 2010, ¶¶ 174, 180; *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No ARB/01/8, Award on Jurisdiction, 17 July 2003, ¶ 108; *Flemingo DutyFree Shop Private Limited v Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 424.

²⁶ Eurasian Investment Agreement, Article 1(a): '*investor*' - with reference to the state of each Party:

any individual who is a citizen of the state of one of the Parties, making investments in the territory of the state of the other Party in accordance with the legislation of the latter;

any legal entity established (created) and registered in the territory of the state of one of the Parties, making investments in the territory of the state of the other Party in accordance with the legislation of the latter'.

tangible and intangible assets invested by the investor of the state of one Party in the objects of entrepreneurial activity in the territory of the state of the other Party in accordance with the legislation of the latter, including:

cash (money), securities, other property;

rights to engage in entrepreneurial activity granted on the basis of the legislation of the States of the Parties or by agreement, including, in particular, the rights to explore, develop, extract and exploit natural resources;

property and other rights having a monetary value.

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Mr Fishchenko's shares in AKIF LLC would likely qualify as an 'investment' within the scope of the Agreement as an asset invested in the local meat retail business in Kyrgyzstan as part of 'entrepreneurial activity', and we understand that Mr Fishchenko has made significant cash contributions to it at various points in time.

Accordingly, our preliminary view is that Mr Fishchenko is likely to meet the investor (*ratione personae*), investment (*ratione materiae*) and temporal (*ratione temporis*) requirements of the Eurasian Investment Agreement so as to benefit from protection under the Agreement.

Potential breaches

We consider that the following substantive protections under the Eurasian Investment Agreement may have been violated by Kyrgyzstan:

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1. Fair and equitable treatment

The Agreement provides in Article 4(1) that:

[e]ach Party shall ensure in the territory of its state a fair and equitable treatment of investments and activities in connection with investments made by investors of the States of other Parties.

'Fair and equitable treatment' under this provision would indicate a 'commitment... [which] is an expression and part of the bona fide principle recognized in international law.'²⁷ It binds a State to ensure its foreign investors such treatment that does not violate important guarantees of investment protection. The fair and equitable treatment standard is breached by conduct:

- (a) that is arbitrary, discriminatory, or in bad faith;
- (b) that fails to afford due process;
- (c) that constitutes a denial of justice;
- (d) that does not respect the investors' legitimate expectations; or
- (e) that fails to ensure appropriate levels of transparency or stability.²⁸

At this preliminary stage, we are of the opinion that the facts reveal violations of due process in the Kyrgyz legal system (as well as potentially denial of justice²⁹), as well as arbitrary action taken in what

²⁷ *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, ¶ 153.

²⁸ See *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003, ¶ 132; *Marfin Investment Group Holdings S.A. and others v Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, ¶ 1211; *Cambodia Power Company (CPC) v Kingdom of Cambodia and Electricité du Cambodge (EDC)*, ICSID Case No ARB/09/18, Decision on Jurisdiction, 22 March 2011, ¶ 332; *Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/14/1, Award, 18 January 2019; *Thunderbird v Mexico*, UNCITRAL, Award, 26 January 2006, ¶ 194; *MTD Equity SDN.BHD. and other v The Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, ¶ 109; *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, ¶ 154.

²⁹ The parameters and potential applicability of a denial of justice claim in the context of the finality of impugned decisions (finality generally considered to be a requirement for a denial of justice claim - as a substantive matter) will need to be considered and analysed further in due course in light of the latest facts.

appears to be bad faith, which would constitute a breach of the obligation to accord fair and equitable treatment under the Eurasian Investment Agreement:

- (i) violation of due process in the Kyrgyz legal system is indicated by the continuous suspensions, resumptions and transfers of the criminal case against Mr Fishchenko by the General Prosecutor's office and the ID SSCEO, despite several court orders considering such resumption of criminal proceedings and inability to transfer the case to the MIA of MID as being illegal;
- (ii) further violations of due process (and potentially denial of justice) are indicated by the refusal of the General Prosecutor's office to consider any of Mr Fishchenko's requests for transfer to appropriate State authorities, which means that Mr Fishchenko has been denied his right to access justice and right to be heard. His right to representation – another element of denial of justice - also appears to have been violated by the forcible assignment to the case of Mr Abdraimov, a lawyer who was disqualified from practising before Kyrgyz courts; and
- (iii) arbitrariness and bad faith may be indicated by the repeated renewals of criminal proceedings against Mr Fishchenko despite the many suspensions and terminations of the case, as well as the orders of the various district courts observing that the documents used to implicate Mr Fishchenko have been falsified. Arbitral tribunals have previously considered that the fair and equitable treatment standard is breached when the relevant arbitrary State action '*shocks, or at least surprises, a sense of juridical propriety.*'³⁰

2. Expropriation

There also appear to be potential arguments for the violation of the expropriation standard under Article 6(1) of the Agreement, which provides as follows:

Investors' investments of the state of one Party made on the territory of the state of the other Party, and the income of such investors may not be directly or indirectly expropriated, nationalized, as well as other measures equivalent to the consequences of expropriation or nationalization (hereinafter referred to as expropriation), except when such measures are taken in the public interest in the manner prescribed by the legislation of the recipient state, they are not discriminatory and are accompanied by a prompt, adequate compensation payment.

The court decisions targeted against Mr Fishchenko appear to have affected the functioning of AKIF LLC to such an extent that they may be deemed 'measures equivalent to the consequences of expropriation or nationalization'. A previous arbitral tribunal assessing similar facts against Kyrgyzstan has clarified that expropriation may exist where the underlying criminal charges are '*unreasonable, discriminatory or arbitrary*' without any evidence to justify the continuation of the criminal proceedings, to the effect that the investor's investment was arbitrarily destroyed and his ability to manage his investment was curtailed.³¹ We will be able to comment on whether such expropriation exists in the present case as well once we have all documents related to the current status of AKIF LLC and the restriction of the rights of Mr Fishchenko in relation to AKIF LLC.

3. Guarantee of right to use and manage the investment

Article 7(1) of the Agreement provides an additional obligation on Kyrgyzstan to guarantee to investors:

³⁰ *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, ¶ 154, citing *Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, Judgment, 0 July 1989, ICJ Reports 1989, ¶ 128. Also used in *Alex Genin et al. v Estonia*, Award, ICSID Case No ARB/99/2, 25 June 2001, ¶ 371; *Mondev v USA*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002, ¶ 127; and *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No ARB(AF)/98/3, Award, 26 June 2003, ¶ 131.

³¹ *Valeri Belokon v Kyrgyz Republic*, PCA Case No AA518, Award, 24 October 2014, ¶¶ 270-272.

the right to use and manage the revenues received as a result of investment for any purpose not prohibited by the legislation of the recipient state;

the right to freely transfer to any country at the discretion of the investor transfers of funds (money) and payments related to investments, in particular:

revenues;

funds paid to repay loans and credits recognized by the Parties as investments;

funds received by the investor in connection with the partial or complete liquidation of a commercial organization, or the sale of investments;

funds received by the investor as compensation for damage in accordance with Article 5 of this Agreement and compensation provided for in Article 6 of this Agreement;

salaries and other remuneration received by investors and citizens of the states of other Parties who are allowed to work in connection with investments in the territory of the recipient state;

royalty fees (royalties) and license payments arising from intellectual property rights paid by investors.'

Although not clear cut, this provision may also have been violated in this case in the circumstances of Mr Fishchenko's detention and inability to make use of his returns from AKIF LLC. It is also possible that an argument may be made for Mr Fishchenko not being able to freely transfer his profits to Russia, though we would again require further documentation as to the status of AKIF LLC and the restriction of rights of Mr Fishchenko in relation to AKIF LLC in order to be able to provide a more definite opinion on these points.

Based on the initial documents and information received and at this preliminary stage, we consider that M Fishchenko has likely suffered breaches of the Eurasian Investment Agreement, which he can enforce in international arbitration (with reference to the UNCITRAL arbitration rules) against Kyrgyzstan.³²

We note that there are some potential risks to the case. Primarily, we would need to demonstrate that the situation is not that of internal rivalry amongst the shareholders of AKIF LLC, but rather State actions to substantially deprive Mr Fishchenko of his investment, which is a high standard to satisfy. Secondly, we would also need to show that the criminal prosecution of Mr Fishchenko was unlawful and that there is no merit to the accusations levelled against him, as well as that the State measures had a direct effect on the functioning of AKIF LLC, as the Eurasian Investment Agreement only guarantees the substantive protections discussed above for the 'investment', not the 'investor'.

Next steps

As a next step, we recommend that a notice of dispute be sent to the Kyrgyz government in the first instance. Under Article 9 of the Eurasian Investment Agreement, there exists a menu of options for arbitration against the Kyrgyz government which may only be commenced after six months of attempted negotiations have passed from the date of sending the notice of dispute. Serving the notice of dispute on Kyrgyzstan will escalate the pressure on the Kyrgyz government and could potentially prompt an attempt to negotiate and settle. Should negotiations fail, there would be the possibility for Mr Fishchenko to commence international investment treaty arbitration against the Kyrgyz Republic under the UNCITRAL Arbitration Rules.

³² The Eurasian Investment Agreement provides qualifying investors with various dispute resolution options, including the possibility of ICSID arbitration (which however won't be applicable here as Russia is not a party to the ICSID Convention).

We look forward to further information from your side and remain available for more detailed advice to this end.

Yours sincerely

Withers LLP

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