**THE 2013 ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

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OOO MANOLIUM-PROCESSING

***Claimant***

v.

REPUBLIC OF BELARUS

***Respondent***

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**APPLICATION FOR BIFURCATION ON QUANTUM**

**RS-2**

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**11 June 2018**

WHITE & CASE
Counsel for Respondent

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## I. INTRODUCTION

1. In accordance with Procedural Order No. 1 dated 17 May 2018 ("**Procedural Order No. 1**"), the Respondent hereby submits its Application for Bifurcation on Quantum (the "**Application**"). The Respondent respectfully asks the Tribunal to bifurcate these proceedings so that the Tribunal's determination on quantum of the Claimant's claim is deferred until after the Tribunal's determinations on jurisdiction and liability and to apply Procedural Timetable B.3 of Annex I and paragraphs 26 – 27 of Procedural Order No. 1.

2. This submission is set out as follows:

**Section I**: Introduction;

**Section II**: The Tribunal has the Power to Bifurcate the Proceedings;

**Section III**: Summary of the Relevant Factual Background;

**Section IV**: Summary of the Claims;

**Section V**: The Respondent's Application Meets the Criteria for Granting Bifurcation in respect of Quantum; and

**Section VI**: Request for Relief.

3. The dispute before the Tribunal (the "**Dispute**") arises out of an investment contract entered into between (a) OOO Manolium-Processing (the "**Claimant**"); (b) Minsk City Executive Committee ("**MCEC**"); and (c) Communal Unitary Enterprise "Minsktrans" (formerly Unitary Enterprise "Department of Transport and Communication Administration of MCEC") ("**Minsktrans**") dated 6 June 2003 (the "**Investment Contract**"), as restated on 8 February 2007 to join the Claimant's Belarusian subsidiary IP Manolium-Engineering ("**Manolium-Engineering**") as a party and subsequently amended (the "**Amended Investment Contract**").[1]

4. On 15 November 2017, the Claimant commenced these proceedings by submitting a Notice of Arbitration[2] (together with the English translation, the "**Notice**") under Articles 84 and 85(3) of Protocol No. 16 (the "**Protocol**") to the Treaty on the

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1 *See* paragraph 20 below.

2 The English translation of the Notice was subsequently provided to the Respondent on 1 April 2018.

Eurasian Economic Union dated 29 May 2014[3] and Article 3 of the 2013 UNCITRAL Arbitration Rules (the "**UNCITRAL Arbitration Rules**").[4]

5. The Claimant alleges in the Notice that the Respondent has breached Article 68 of the Protocol by failing to ensure fair and equitable treatment on its territory in respect of the Claimant (the "**FET Claim**") and Article 79 of the Protocol by indirectly expropriating the Claimant's investment (the "**Expropriation Claim**", together with the FET Claim, the "**Claim**").[5]

6. On 15 December 2017, the Respondent submitted its Response to the Notice (the "**Response**"), *inter alia*, challenging the jurisdiction of the Tribunal.

7. On 10 May 2018, the Claimant filed its Statement of Claim (the "**Statement of Claim**"), making submissions solely in relation to jurisdiction. On 17 May 2018, the Claimant confirmed that "*the Claimant treats the Notice of Arbitration of 15 November 2017 together with its exhibits as part of the Statement of Claim for the purposes of Article 20(1) of the UNCITRAL Arbitration Rules 2013*".[6]

8. The Respondent's position is that the Tribunal constituted in these proceedings lacks jurisdiction and that, in any event, the Respondent has not violated any of its obligations under the Protocol. The Respondent will file a detailed Statement of Defence in due course, setting out, *inter alia*, its comprehensive position in relation to jurisdiction.

9. In this Application, the Respondent respectfully submits that deferring consideration of quantum until after the Tribunal determines jurisdiction and liability will save time and costs and result in more efficient proceedings altogether.

10. Capitalised terms used in this Application but not defined shall have the meaning ascribed to them in the Response.

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3 The Protocol, **Exhibit CL-3**.

4 Notice, paragraph 1.

5 Notice, paragraphs 383 and 510. The Claimant also cites the provisions of Articles 72, 75 and 76 of the Protocol (Notice, paragraphs 362, 363 and 360, respectively) as well as Articles 11 and 12 of the Belarusian Law on Investments dated 12 July 2013 (Notice, paragraphs 364 and 356 respectively). However, the Claimant does not allege that there were breaches of these provisions.

6 Letter from Claimant to the Tribunal dated 17 May 2018, paragraph 6.

## II. THE TRIBUNAL HAS THE POWER TO BIFURCATE THE PROCEEDINGS

11. The Respondent respectfully submits that the Tribunal has the authority to bifurcate these proceedings and conduct this arbitration in phases, deferring the quantum phase until after it rules on jurisdiction and liability.[7]

12. As highlighted by Redfern and Hunter in their treatise on arbitral practice:

> "*In many modern disputes […], particularly in relation to construction projects […] the quantification of claims is a major exercise. It may involve both the parties and the arbitral tribunal in considering large numbers of documents, as well as complex technical matters involving experts appointed by the parties, or by the arbitral tribunal, or both. In such cases, it may involve savings in costs and overall efficiency if the arbitral tribunal determines questions of liability first. In this way, the parties avoid the expense and time involved in submitting evidence and argument on detailed aspects of quantification that may turn out to be irrelevant following the arbitral tribunal's decision on liability*."[8]

13. Bifurcation of proceedings (on either jurisdiction or quantum) is a common means employed by tribunals to make the proceedings more cost and time efficient overall. While applications to bifurcate on jurisdiction tend to be more common, nevertheless, where appropriate (as the Respondent believes is the case in these proceedings), tribunals may also grant bifurcation on quantum.[9]

14. In this Application, the Respondent has endeavoured to provide the Tribunal with a sufficient level of detail on the underlying dispute for it to be in a position to make an informed decision on a quantum bifurcation application at this early stage in the proceedings. For this reason, in **Section III** below, the Respondent has set out a more detailed summary of the relevant factual background than might be the case for a bifurcation application in respect of jurisdiction.

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7 UNCITRAL Arbitration Rules, Article 17, **Exhibit CL-4**; 2016 UNCITRAL Notes on Organizing Arbitral Proceedings (2016), 11(b), paragraphs 69 – 70, **Exhibit RL-16**.

8 Nigel Blackaby, Constantine Partasides et al., *Redfern and Hunter on International Arbitration (Sixth Edition)*, (6th edition, Oxford University Press, 2015), 6.54, **Exhibit RL-17**.

9 See, for example, *Methanex Corporation v. United States*, UNCITRAL, Procedural Order, 2 June 2003, **Exhibit RL-18**.

## III. SUMMARY OF RELEVANT FACTUAL BACKGROUND

### A. PERFORMANCE OF THE INVESTMENT CONTRACT AND THE AMENDED INVESTMENT CONTRACT (JUNE 2003 – DECEMBER 2011)

15. On 6 June 2003, after winning a tender initiated by MCEC for the construction of a shopping and recreation centre in Minsk (the "**Investment Object**"), the Claimant, MCEC and Minsktrans entered into the Investment Contract. Under the Investment Contract, the Claimant, in exchange for the right to develop the Investment Object, *inter alia*, agreed:

A. by no later than 2006, to construct the complex of buildings constituting a trolleybus depot for 220 trolleybuses (the "**Depot**") and to reconstruct the Building under Reconstruction (as defined in paragraph 76(c) of the Notice);[10]

B. within three years from the date of MCEC's decision to provide the Claimant the land plot and the date of the construction permit, to construct a joint production base for motor pools Nos. 1 and 3 with the 450 buses capacity (the "**Motor Transport Base**")[11]

(the Depot, the Building under Reconstruction and the Motor Transport Base, together – the "**Communal Facilities**");

C. by no later than 2009, to construct the Investment Object;[12] and

D. by 1 September 2003, to arrange investment of USD 1 million into a research and development centre (the "**R&D Centre**") in order to develop and establish the production of radio electronic devices for communication systems.[13]

16. On 10 October 2003, the parties to the Investment Contract concluded an additional agreement to the Investment Contract dated 10 October 2003 ("**Additional Agreement No. 1**").[14] Pursuant to Additional Agreement No. 1, the Claimant would

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10 The Investment Contract, Clause 5.1, **Exhibit C-34**.

11 The Investment Contract, Clause 5.2, **Exhibit C-34**.

12 The Investment Contract, Clause 5.3, **Exhibit C-34**.

13 The Investment Contract, Clause 6.13, **Exhibit C-34**.

14 Additional Agreement No. 1, **Exhibit C-47**.

make a payment of USD 1 million towards the construction of the National Library in Minsk,[15] instead of investing the same amount into the R&D Centre.

17. The Claimant seeks to present Additional Agreement No. 1 as an "*imposition of obligations not covered by the [Investment] Contract*".[16] The Claimant, however, does not deny that the obligation to make the USD 1 million payment was included in the tender documentation.[17] The Respondent's position is that Additional Agreement No. 1 only changed the recipient of the USD 1 million payment which the Claimant had to pay under the tender documents and the Investment Contract. The parties also agreed to extend certain deadlines under the Investment Contract.[18]

18. On 22 October 2003, the parties concluded an additional agreement to the Investment Contract dated 22 October 2003 ("**Additional Agreement No. 2**").[19] In Additional Agreement No. 2, the parties agreed, *inter alia*, that MCEC would provide the Claimant with the land plot for the construction of the Investment Object only after it had constructed and reconstructed the Communal Facilities.[20]

19. On 25 November 2003, the parties concluded Additional Agreement No. 3 to the Investment Contract ("**Additional Agreement No. 3**").[21] In Additional Agreement No. 3, the parties specified the bank account details for the USD 1 million payment and agreed that the Claimant's owner, a Cypriot company, Manolium Trading Ltd, would make the payment.

20. On 8 February 2007, the parties concluded Additional Agreement No. 4 to the Investment Contract, incorporating the previous amendments into a restated version of the Investment Contract and adding the Claimant's Belarusian subsidiary Manolium-Engineering as a party.[22]

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15 Additional Agreement No. 1, Clause 1, **Exhibit C-47**, Notice, paragraph 99.

16 Notice, paragraph 89.

17 Notice, paragraph 81; Tender documents dated 24 April 2003, Clause 2.4.4, **Exhibit C-28**.

18 Additional Agreement No. 1, Clauses 3 and 4, **Exhibit C-47**.

19 Additional Agreement No. 2, **Exhibit C-48**.

20 Additional Agreement No. 2, Clauses 2.3 and 2.9, **Exhibit C-48**.

21 Additional Agreement No. 3, **Exhibit C-49**.

22 Amended Investment Contract, **Exhibit C-66**.

21. Under the Amended Investment Contract, the Claimant and Manolium-Engineering undertook to construct the following communal facilities (the "**New Communal Facilities**"):

A. the Depot;[23]

B. a pull station to supply the Depot with electricity (the "**Pull Station**");[24]

C. a section of a road from Gintovta street to the entry into the Depot with general utilities and trolleybus line (the "**Road**").[25]

22. Accordingly, the parties agreed that, instead of constructing all of the Communal Facilities, the Claimant and Manolium-Engineering would only build the Depot and two facilities which would support the operation of the Depot. The Respondent's position is that under the Amended Investment Contract the Claimant had to construct even fewer objects for the same investment, than it was previously required. In the Amended Investment Contract, the parties further extended the deadlines under the Investment Contract.

23. On 16 December 2008, the parties entered into another additional agreement to the Amended Investment Contract ("**Additional Agreement No. 5**").[26] In Additional Agreement No. 5, the parties once again extended the deadlines for construction of the New Communal Facilities.

24. On 20 April 2011, the parties made a final amendment to the Amended Investment Contract ("**Additional Agreement No. 6**").[27] The final date for the construction of the New Communal Facilities and their transfer into communal ownership was set for 1 July 2011 and the Claimant's permit to use the relevant land plots was to be extended until the same date (the "**Constructions Transfer Date**").[28] The Claimant

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23 Amended Investment Contract, Clause 2.1, **Exhibit C-66**.

24 Amended Investment Contract, Clause 2.2, **Exhibit C-66**.

25 Amended Investment Contract, Clause 2.3, **Exhibit C-66**.

26 Additional Agreement No. 5, **Exhibit C-72**.

27 Additional Agreement No. 6, **Exhibit C-76**.

28 Additional Agreement No. 6, Clause 1, **Exhibit C-76**.

and Manolium-Engineering also agreed to pay penalties in case of further delays in construction.[29]

25. The Respondent's position is that in each case the deadlines had to be extended because of delays caused by the Claimant.

26. The land permit has never been extended beyond the Constructions Transfer Date. The Claimant alleges that Manolium-Engineering made "*numerous requests*" to do so.[30] The Respondent maintains that Manolium-Engineering failed to provide MCEC with all the documents required by Belarusian law to extend the permit.

27. It is not in issue between the parties that, as at the Constructions Transfer Date, the New Communal Facilities had not been transferred into communal ownership. According to the Claimant, it had completed the construction of (a) the Road on 1 July 2011,[31] (b) the Pull Station in June 2010,[32] and (c) some, but not all of the buildings of the Depot, in October 2011.[33] However, the parties disagree as to whether the construction of the New Communal Facilities ever reached a stage of being able to be accepted into communal ownership and who was responsible for the delays.[34]

28. The Claimant provided various explanations for the failure to complete the construction of the New Communal Facilities, including that: (a) it lacked funding, and (b) there were delays on the sub-contractors' side.

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29 Additional Agreement No. 6, Clause 2, **Exhibit C-76**.

30 The Claimant alleges that Manolium-Engineeering made "*numerous requests*" to extend the land permit (Notice, paragraph 242). To support that allegation the Claimant refers only to the letter from Manolium-Engineering to MCEC dated 24 November 2011, **Exhibit C-122**. In that letter, however, Manolium-Engineering did not ask to extend the permit to use the land plots for construction of the New Communal Facilities. Rather, Manolium-Engineering was asking MCEC to provide the land plot in order to start construction of the Investment Object, a completely different land plot located in another part of Minsk.

31 Notice, paragraph 186.

32 Notice, paragraph 199.

33 Notice, paragraph 167.

34 The Claimant alleges that each of the New Communal Facilities should have been accepted into communal ownership shortly after its construction. The Respondent maintains that it was unable to accept the New Communal Facilities into communal ownership because (a) there were various defects in the construction; and (b) in any event, it was not possible to accept what had been constructed into communal ownership until all of the New Communal Facilities were constructed and commissioned.

29. From approximately late 2011, the Claimant also began arguing that it had already invested more than USD 15 million into the construction of the New Communal Facilities and was not obliged to invest more. MCEC has always maintained that under the Amended Investment Contract, the parties agreed that if the costs of constructing the New Communal Facilities exceeded USD 15 million, the Claimant would pay the difference.[35]

## B. ATTEMPTS TO SETTLE THE DISPUTE AND TERMINATION OF THE AMENDED INVESTMENT CONTRACT (DECEMBER 2011 – OCTOBER 2014)

30. From at least December 2011, MCEC and Minsktrans engaged in negotiations with the Claimant and Manolium-Engineering in an attempt to settle the Dispute. MCEC proposed various solutions to enable the project to go ahead. However, instead of adopting a constructive approach and continuing to perform its obligations under the Amended Investment Contract, as MCEC and Minsktransk were suggesting, the Claimant and Manolium-Engineering sought to exert pressure on MCEC by writing to higher officials accusing MCEC of numerous wrongdoings.

31. On 19 September 2013, after MCEC had provided the Claimant with numerous opportunities to remedy its breach of the Amended Investment Contract and following unsuccessful attempts to settle the Dispute with the Claimant, MCEC informed the Claimant for the last time that it would submit a claim to the Economic Court of Minsk seeking to terminate of the Amended Investment Contract.[36] The Respondent's position is that until late 2013, MCEC waited for the Claimant and Manolium-Engineering to remedy the breaches of the Amended Investment Contract so that the project could continue. The Claimant failed to remedy the breaches, leaving MCEC and Minsktrans with no choice but to seek termination of the Amended Investment Contract.

32. On 14 October 2013, MCEC submitted a claim to the Economic Court of Minsk seeking termination of the Amended Investment Contract.[37] On 9 September 2014,

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35 Amended Investment Contract, Clause 7.10, **Exhibit C-66**.

36 Letter from MCEC to the Claimant dated 19 September 2013, **Exhibit C-139**.

37 Statement of claim regarding the termination of the Amended Investment Agreement dated 14 October 2013, **Exhibit C-140**.

the Amended Investment Contract was terminated by the Economic Court of Minsk.[38] The parties agree that the termination became legally effective on 29 October 2014, when the Appeal Instance of the Economic Court of Minsk (the "**Appeal Court**") upheld the judgment of the Economic Court of Minsk.[39]

### C. NEGOTIATIONS REGARDING THE AMOUNTS THE CLAIMANT SPENT ON CONSTRUCTION OF THE NEW COMMUNAL FACILITIES (MID-2012 – FEBRUARY 2016)

33. The parties disagree on the amounts spent by the Claimant and Manolium-Engineering on the construction of the New Communal Facilities.

34. From around mid-2012, the parties had been discussing how much the Claimant had spent on the construction of the New Communal Facilities and how much more needed to be spent to complete the construction.

35. On 28 August 2012, based on the documents the Claimant and Manolium-Engineering provided to Minsktrans, Minsktrans calculated that the Claimant spent approximately USD 13.5 million in connection with the construction of the New Communal Facilities.[40] Manolium-Engineering disagreed with that estimate.

36. On or around 22 October 2012, Manolium-Engineering instructed OOO Paritet-Standart to prepare an audit report to determine the amount invested under the Amended Investment Contract.[41] According to the audit report of 5 November 2012 prepared two weeks later, Manolium-Engineering had spent approximately USD 18.3 million on constructing the New Communal Facilities.[42] MCEC has not accepted this report for various reasons, not least because the report was done solely on the instructions of Manolium-Engineering without consultations with MCEC.

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38 Judgment of the Economic Court of Minsk dated 9 September 2014, **Exhibit C-147**.

39 Resolution of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, **Exhibit C-150**; Notice, paragraph 479. As stated in paragraph 49 below, the Claimant alleges in the Notice that the expropriation occurred on 29 October 2014 and instructs its quantum expert to rely on 29 October 2014 as the valuation date for the expropriation in the Claimant's Quantum Report.

40 Letter from Minsktrans to Manolium-Engineering dated 28 August 2012, **Exhibit C-128**.

41 Paritet-Standart Report, page 3, **Exhibit C-131**.

42 Paritet-Standart Report, page 2, **Exhibit C-131**.

37. On 19 March 2013, the Claimant demanded USD 30 million to compensate its alleged costs under the Amended Investment Contract.[43] MCEC has always maintained that it had no obligation to pay this amount whether pursuant to the Amended Investment Contract or under Belarusian law.

38. On 16 June 2015, the Republican Unitary Enterprise Minsk City Agency for State Registration and Land Cadastre prepared a report (the "**Registration and Cadastre Agency Report**") which states that the amounts the Claimant had spent in connection with construction works done under the Amended Investment Contract amount to approximately USD 18.1 million.[44] The Respondent's position is that this report took into account, at the Claimant's direction, costs that were unrelated to the construction of the New Communal Facilities.

39. On or around 22 February 2016, a commission set up by the Ministry of Finance prepared a memorandum which stated that, according to the documents provided by Manolium-Engineering, the expenditures of Manolium-Engineering in connection with the construction of the New Communal Facilities, including management expenses, amounted to approximately USD 19.4 million (the "**2016 Memorandum**").[45] MCEC has always maintained that the 2016 Memorandum was based on incorrect assumptions and materials. Accordingly, the Respondent's position is that the 2016 Memorandum does not reflect what the Claimant had in fact spent on the construction of the New Communal Facilities.

## D. ADMINISTRATIVE AND TAX PROCEEDINGS AGAINST MANOLIUM-ENGINEERING AND SUBSEQUENT EVENTS (MAY 2016 – NOVEMBER 2017)

40. On 17 May 2016, the Pervomaysky District Court of Minsk (the "**District Court**") imposed a fine on Manolium-Engineering for occupying the Land Plots without a permit from 1 July 2011.[46] On 14 June 2016, the Minsk City Court confirmed the decision on appeal,[47] and, on 3 August 2016, the President of the Minsk City Court denied Manolium-Engineering's application to appeal against the decision of 14 June

43 Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

44 Registration and Cadastre Agency Report, Conclusion, page 42, **Exhibit C-154**.

45 2016 Memorandum, page 16, **Exhibit C-160**.

46 Resolution of the District Court dated 17 May 2016, **Exhibit C-182**.

47 Resolution of the Minsk City Court dated 14 June 2016, **Exhibit C-163**.

2016.[48] Manolium-Engineering did not appeal the decision to the Belarusian Supreme Court.[49]

41. On 17 May 2016, the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Central District of Minsk (the "**Tax Inspectorate**") issued a Tax Inspectorate report,[50] as supplemented,[51] for the years 2013 to 2016, concluding that Manolium-Engineering owed land tax payments for the relevant period (the "**Tax Liabilities**"). Manolium-Engineering never challenged the findings of the Tax Inspectorate.[52]

42. On 5 July 2016, as there were no other means to secure the enforcement of the Tax Liabilities, the Tax Inspectorate issued an order for the attachment of the property located on the Land Plots.[53] The Tax Inspectorate, on 19 July 2016, issued a formal decision to recover the amounts due, as required by Belarusian law,[54] and, on 20 July 2016, applied to the Belarusian courts for a court order to recover the Tax Liabilities[55] (which was granted on 18 August 2016).[56] The Claimant and Manolium-Engineering never challenged the actions of the Tax Inspectorate nor appealed against the court order.

43. On 1 December 2016, MCEC made a formal decision to bring the land plots of the New Communal Facilities under its control.[57]

44. On 8 February 2017, the Minsk Region Commercial Court commenced the bankruptcy proceedings of Manolium-Engineering.[58]

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48 Resolution of the President of the Minsk City Court dated 3 August 2016, **Exhibit C-184**.

49 Response, paragraph 17.

50 Tax Inspectorate report dated 17 May 2016 (the "**Tax Inspectorate Report**"), pages 2 – 4, **Exhibit C-164**.

51 On 21 June 2016, the Tax Inspectorate Report was supplemented to address the District Court's findings made in its Resolution of 17 May 2016, **Exhibit C-166**.

52 Response, paragraph 18.

53 Ruling of the Tax Inspectorate No. 1110590 dated 5 July 2016 to arrest property, **Exhibit C-167**.

54 Decision of the Tax Inspectorate No. 2-5/465 dated 19 July 2016, pages 10 – 11, **Exhibit C-164**.

55 Application of the Tax Inspectorate to the Economic Court of Minsk dated 20 July 2016, **Exhibit C-169**.

56 Order of the Economic Court of Minsk dated 18 August 2016, **Exhibit C-170**.

57 Decision of the MCEC dated 1 December 2016, **Exhibit C-173**.

58 Official portal of the Belarusian courts of general jurisdiction, **Exhibit C-179**.

45. On 15 November 2017, the Claimant submitted the Notice against the Respondent and, on 10 May 2018, it submitted its Statement of Claim.

## IV. SUMMARY OF CLAIMS

### A. RESPONDENT'S JURISDICTIONAL OBJECTIONS

46. As set out in the Response,[59] the Respondent's position is that:

A. the Tribunal does not have jurisdiction over any dispute that arose before the Protocol came into force on 1 January 2015;[60]

B. the Dispute arose no later than on 19 September 2013, when MCEC notified the Claimant for the last time of its intention to submit a claim to the Economic Court of Minsk to terminate the Amended Investment Contract;[61]

C. the Tribunal does not have jurisdiction in relation to the claims against MCEC and Minsktrans that arise from alleged breach of contract;[62] and

D. the actions of Minsktrans are not attributable to the Respondent because Minsktrans does not exercise public authority.[63]

47. In the Statement of Claim, the Claimant addresses each of the Respondent's jurisdictional objections and alleges that the Tribunal has jurisdiction over the Dispute.[64]

### B. JURISDICTION UNDER BELARUSIAN LAW

48. The Claimant initiated these arbitration proceedings under Articles 84 and 85(3) of the Protocol. At a later stage, when providing the summary of the Claimant's position to be included into the Terms of Appointment, the Claimant supplemented its position, alleging that "*irrespective of the application of [the Protocol], the Tribunal*

59 Response, paragraphs 22 – 48.
60 Response, paragraphs 27 – 31.
61 Response, paragraph 34.
62 Response, paragraphs 36 – 41.
63 Response, paragraphs 42 – 48.
64 Statement of Claim, paragraphs 6 – 126.

*has jurisdiction based on Belarusian laws*".[65] However, the Claimant has not substantiated its position with regard to the Tribunal's jurisdiction under Belarusian law whether in the Notice or in the Statement of Claim. This is despite the Claimant's assertion on the Procedural Conference Call of 10 April 2018 that it intended to do so. In any event, the Respondent's position is that the Tribunal has no jurisdiction under Belarusian law.

### C. EXPROPRIATION CLAIM

49. The Claimant alleges in its Expropriation Claim that the termination of the Amended Investment Contract on 29 October 2014 amounts to an indirect expropriation of its investment in Belarus.[66] As set out in the Response, the Respondent rejects the Expropriation Claim.[67] The Respondent will set out its full position in the Statement of Defence.

### D. FET CLAIM

50. The Claimant alleges in its FET Claim that the Respondent failed to act in respect of the Claimant:

A. in a transparent manner;[68] and

B. in good faith.[69]

51. The Claimant's allegation that the Respondent failed to act in a transparent manner in respect of the Claimant relates to the tax audits conducted in 2016 – 2017 by the Tax Inspectorate concerning Manolium-Engineering's occupation of the Land Plots.[70]

52. The Claimant's allegation that the Respondent did not act in good faith in respect of the Claimant relates to (a) the performance of the Investment Contract and the Amended Investment Contract by MCEC and Minsktrans between June 2003 and

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65 Terms of Appointment dated 10 May 2018, paragraph 51(d).

66 Notice, paragraphs 510 – 526, 513.

67 Response, paragraphs 64 – 65.

68 Notice, paragraphs 393 – 410.

69 Notice, paragraphs 411 – 503.

70 Notice, paragraphs 400 – 405.

December 2011, as described in **Section III.A** above;[71] (b) the attempts to settle and termination of the Amended Investment Contract between December 2011 and October 2014, as described in **Section III.B** above; (c) the negotiations between the Claimant, Manolium-Engineering, Minsktrans and MCEC between mid-2012 and February 2016 regarding the possibility of compensating the costs incurred by Manolium-Engineering in constructing the New Communal Facilities, as described in **Section III.C** above;[72] and (d) the administrative and tax proceedings against Manolium-Engineering between May 2016 and November 2017,[73] as described in **Section III.D** above.

53. As set out in the Response, the Respondent rejects the FET Claim.[74] The Respondent will set out its full position in the Statement of Defence.

### E. CLAIMANT'S QUANTIFICATION OF DAMAGES

54. Relying on an expert report by Travis Taylor of Navigant (the "**Quantum Expert**") dated 24 April 2017 (the "**Quantum Report**"),[75] the Claimant alleges that the expropriation of its investment by the Respondent has caused the Claimant to suffer losses in the amount of USD 208.2 million or, alternatively, USD 45.55 million,[76] namely:

A. losses in the form of lost profits resulting from the loss of the right to perform the Amended Investment Contract (including interest accrued) in the amount of USD 171.3 million or, alternatively, USD 8.65 million ("**Lost Profits**");[77] and

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71 Notice, paragraphs 419 – 479.

72 Notice, paragraphs 480 – 487.

73 Notice, paragraphs 488 – 498.

74 Response, paragraph 62.

75 Letter from Claimant to the Tribunal dated 17 May 2018, paragraph 3.

76 Notice, paragraph 530.

77 Notice, paragraph 530(a).

B. direct losses caused by the alleged expropriation of the New Communal Facilities (including accrued interest) in the amount of USD 36.9 million ("**Direct Losses**").[78]

55. In arriving at these figures, the Claimant has instructed its expert to rely on a valuation date of 29 October 2014 (the "**Claimant's Valuation Date**"),[79] when the termination of the Amended Investment Contract was upheld by the Appeal Court.[80] The Claimant has instructed its expert to conduct a fair market evaluation of the losses arising from the Expropriation Claim.[81]

56. In the Notice and the Statement of Claim, the Claimant does not seek to quantify, let alone substantiate any quantification of, its alleged losses in respect of its FET Claim.

## V. THE RESPONDENT'S APPLICATION MEETS THE CRITERIA FOR GRANTING BIFURCATION

57. In deciding whether or not to bifurcate these proceeding in respect of quantum, the task for the Tribunal is to balance the benefits in procedural fairness and efficiency against any risks of delay, increase in cost and prejudice.[82] Accordingly, tribunals may consider factors including:

A. whether bifurcation in respect of quantum will result in a material reduction of time and costs expended in the quantum phase;

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78 Notice, paragraph 530(b).

79 Claimant's Quantum Report, paragraph 1.3.7, **Exhibit C-14**.

80 Claimant's Quantum Report, **Exhibit C-14**, *Glossary of Terms and Abbreviations*, pages 5 – 6: The Claimant's Quantum Expert writes, in defining "*Valuation Date*"/"*Expropriation Date*", that 29 October 2014 is "*[t]he date on which the New Communal Objects and Investment Object are alleged to have been formally expropriated. I am instructed that this date corresponds to the date the [Amended] Investment Contract was terminated by the Minsk City Court [sic]*".

81 Claimant's Expert Report, paragraph 4.3.1, **Exhibit C-14**; Article 80 of the Protocol provides: "*[t]he compensation referred to in paragraph 79 of this Protocol shall correspond to the market value of investments expropriated from investors on the date immediately preceding the date of their actual expropriation.*"

82 *Emmis International Holding, B.V. and others v. Hungary*, ICSID Case No. ARB/12/2, Decision on Application for Bifurcation, 13 June 2013, paragraphs 48 – 49, **Exhibit RL-19**; *Apotex Hldgs. Inc. and Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, paragraph 10, **Exhibit RL-20**.

B. whether the facts and issues relevant to liability and jurisdiction are so distinct from the facts and issues relevant to quantum that having a single proceeding would not result in a material time and cost saving; and

C. whether bifurcating in respect of quantum will increase the overall fairness, economy and efficiency of the proceedings.[83]

58. Taking into account each of these factors, the Respondent believes that bifurcating the proceedings in respect of quantum will be the most efficient way to proceed and will likely achieve considerable time and cost savings.

59. As set out in **Section V.A** below, the Respondent believes that bifurcation will result in a significant reduction in the number of issues to be considered at the quantum phase. The Respondent is confident that it has a strong case on both jurisdiction and liability and believes that its objections will dispose of the Claim. The Respondent further submits that even if the Tribunal does not dismiss the Claim at the first stage, the Tribunal's decision on liability will significantly narrow the scope of issues to be addressed at the quantum stage.

60. As set out in **Section V.B** below, the jurisdictional facts and issues are closely related to those on liability, while the facts and issues relevant to the quantum are distinct from the earlier stages. Furthermore, as set out in **Section V.C** below, the Respondent believes that the quantum proceedings will be a costly and time-consuming exercise for both parties, much or all of which can be avoided after the Tribunal has made its decision on jurisdiction and liability.

61. For the avoidance of doubt, in asking the Tribunal to bifurcate the proceedings in respect of quantum, the Respondent is not asking the Tribunal to make pre-judgments on the issues of jurisdiction or liability. The Respondent will submit its full position on jurisdiction and the merits at the appropriate time. However, even at this stage in the proceedings, the Respondent believes it can demonstrate that it has *prima facie* a good case that hearing jurisdiction together with liability as a first stage in the proceedings will dispose of the Claim or, at a minimum, narrow the scope of the issues to be decided at the quantum stage.

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83 *Glamis Gold, Ltd. v. United States*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, paragraph 12(c), **Exhibit RL-21**.

## A. BIFURCATION WILL RESULT IN A SIGNIFICANT REDUCTION IN THE NUMBER OF ISSUES TO BE CONSIDERED IN THE QUANTUM PHASE

### 1. The Respondent's jurisdictional objections will dispose of an essential part if not all of the Claim

62. As set out in the Response,[84] the Respondent's primary jurisdictional objection is that the Tribunal does not have jurisdiction *ratione temporis* over the Dispute, because the Dispute arose before the Protocol came into force.

63. The Respondent disagrees with the Claimant's position in the Statement of Claim that the Protocol applies to any dispute that is connected with qualifying investments under the Protocol, i.e. investments which were made after 16 December 1991,[85] even if the dispute arose before the Protocol came into force.[86] The Respondent believes that it would be a far stretch to conclude, without a clear provision to that effect in the Protocol, that the Tribunal should have jurisdiction to rule on disputes arising as far back as 1991,[87] and believes that Article 28 Vienna Convention on the Law of Treaties 1969 supports this position.[88]

64. Furthermore, the Respondent disagrees with the Claimant's position in the Statement of Claim that the Dispute arose "*only after the Claimant submitted the Pre-Arbitration Notice to Belarus on 25 April 2017.*"[89] The Respondent's position is that the Dispute arose not later than on 19 September 2013, when after numerous attempts to resolve it, MCEC notified the Claimant for the last time of its intention to submit a claim to the Economic Court of Minsk seeking termination of the Amended Investment Contract (following the Claimant's continuous failure to remedy its breaches under the Amended Investment Contract).[90]

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84 Response, paragraphs 27 – 35.

85 Article 65 of the Protocol, **Exhibit CL-3**.

86 Statement of Claim, paragraph 30.

87 See, for example, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, paragraph 468, **Exhibit RL-6**.

88 Vienna Convention on the Law of Treaties, 1969, Article 28, **Exhibit RL-5**.

89 Statement of Claim, paragraphs 40 and 32 – 42.

90 Response, paragraph 34.

65. The Respondent's position is that, in any event, the Tribunal does not have jurisdiction over the claims against Minsktrans and MCEC, because (a) they are purely contractual in nature and the alleged breaches were not effected in exercise of sovereign authority; and (b) the actions of Minsktrans are in any event not attributable to the Respondent.[91] The Respondent will substantiate this jurisdictional objection in full, together with its objection *ratione temporis,* in the Statement of Defence.

66. In view of the jurisdictional objections summarized above, the Respondent respectfully submits that in determining whether it has jurisdiction over the Dispute, or, alternatively, over which parts of the Claim, the Tribunal will need to consider, *inter alia*:

A. whether the Tribunal has jurisdiction over a dispute which arose before the Protocol came into force;

B. whether on the facts the Dispute arose before the Protocol came into force;

C. whether the Tribunal has jurisdiction over the claims against MCEC and Minsktrans that are based on alleged breach of contract; and

D. whether the actions of Minsktrans are attributable to the Respondent.

67. The Respondent respectfully submits that the parties should address these questions in detail at the first stage in the proceedings when issues of liability are considered, before (if any claims remain, which the Respondent does not believe that they will) proceeding to a quantum stage. The Respondent's position is that its jurisdictional objections will dispose of the Claim at the first stage in the proceedings, thereby avoiding the need to proceed to the quantum stage.

### 2. <u>The Claimant's position on issues relevant to quantum is inconsistent</u>

68. As set out in the Response, it is the Respondent's case that any claims alleged by the Claimant not disposed of on jurisdictional grounds will be disposed of on the merits,

[91] Response, paragraphs 36 – 48.

avoiding the need to proceed to the quantum stage.[92] The Respondent will submit its position on liability in full in the Statement of Defence. However, the Respondent respectfully submits that even if (contrary to the Respondent's position), the Tribunal does not dismiss the Claim at the first stage, the Tribunal's decision on liability will significantly narrow the scope of issues to be addressed at the quantum stage.

69. The Claimant's approach thus far leads the Respondent to believe that the Claimant, in the face of the Respondent's jurisdictional objections raised in its Response, has deliberately introduced ambiguity to its case with its most recent submission in the Statement of Claim.

70. The Claimant's position in the Notice was that "*the [Respondent] illegally expropriated the Claimant's Investmentsas [sic] a result of the termination of the Amended Investment Contract*".[93] The Claimant alleges that the expropriation occurred on 29 October 2014, the date the termination of the Amended Investment Contract was upheld by the Appeal Court,[94] and instructs its Quantum Expert to rely on 29 October 2014 as the Claimant's Valuation Date.[95]

71. In the Statement of Claim, however, the Claimant alleges that "*the conduct of Belarus was a whole campaign with the purpose to get as much profit from the Claimant as possible*"[96] According to the Claimant, this "*campaign*" "*may be generally divided on [sic] [five] parts*",[97] and "*all these [parts] were […] elements of the overall conduct of Belarus*"[98] which "*finally resulted in an expropriation […] and violation of the*

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92 Response, paragraphs 50 – 67. While the Respondent has characterized its claims in terms of expropriation and failure to ensure fair and equitable treatment, the Respondent's position is that, in essence, the Claimant's allegations amount to a claim for denial of justice against the Respondent. The Respondent believes that the Claimant has deliberately characterized its claims in this way because it is unable to satisfy the high standard for establishing a claim for denial of justice.

93 Notice, paragraph 512.

94 Decision of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, **Exhibit C-150**.

95 Claimant's Quantum Report, paragraph 1.3.7. **Exhibit C-14**. Further, in the *Glossary of Terms and Abbreviations* at pages 5 – 6 of the Quantum Report, the Claimant's Quantum Expert writes, in defining "*Valuation Date*"/"*Expropriation Date*", that 29 October 2014 is "*[t]he date on which the New Communal Objects and Investment Object are alleged to have been formally expropriated. I am instructed that this date corresponds to the date the [Amended] Investment Contract was terminated by the Minsk City Court [sic]*".

96 Statement of Claim, paragraph 47.

97 Statement of Claim, paragraph 48.

98 Statement of Claim, paragraph 49.

*FET obligations.*"[99] However, the Claimant's position as set out in the Notice remains unchanged, with 29 October 2014 being the Claimant's sole Valuation Date.

72. Furthermore, while the Claimant devotes the majority of the Notice to its FET Claim,[100] the Claimant does not seek to quantify, let alone substantiate its quantification of alleged damages arising from the FET Claim in the Notice and the Claimant's Quantum Expert makes no reference to the FET Claim.

73. This leads the Respondent to believe that, if the Tribunal rejects the Respondent's application for bifurcation on quantum, the Claimant will seek to supplement its position on quantum significantly in its Statement of Reply, including by submitting alternative valuation dates and by pleading damages arising from its FET Claim for the first time. The Respondent will then have to address the Claimant's updated position on quantum for the first time in its Statement of Rejoinder, in response to which the Claimant might require additional expert evidence, incurring further costs and delay.

74. The Respondent respectfully submits that by narrowing issues such as the date of breach at the jurisdiction and liability phase, the time and cost expended during the quantum phase could be significantly reduced, if not avoided altogether.

### 3. Potential outcomes and their effects on quantum

75. In light of the foregoing discussion, the following non-exhaustive list illustrates some of the possible scenarios that the Respondent would have to instruct its quantum expert to consider if the Tribunal rejects this Application:

A. The Tribunal accepts jurisdiction over the Expropriation Claim only, and finds:

i) unlawful expropriation by the Respondent with the expropriation date being 29 October 2014;[101] or

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99 Statement of Claim, paragraph 48.

100 In the Notice the Claimant devotes 118 paragraphs to pleading its FET Claim, but only 15 paragraphs to pleading its Expropriation Claim.

101 Notice, paragraph 513; Claimant's Quantum Report, paragraphs 1.2.3 and 1.3.7, **Exhibit C-14**.

ii) unlawful expropriation by the Respondent with an alternative expropriation date; or

B. the Tribunal rejects jurisdiction over the Expropriation Claim but accepts jurisdiction over the FET Claim, and finds:

i) that the Respondent violated its FET obligation by failing to act transparently; or

ii) that the Respondent violated its FET obligation by failing to act in good faith; or

iii) that the Respondent violated its FET obligation by failing to act transparently and by failing to act in good faith; or

C. the Tribunal accepts jurisdiction over the Claim, and finds:

i) unlawful expropriation by the Respondent with one of the expropriation dates set out in paragraphs 75.A.i) and 75.A.ii) above; and/or

ii) that the Respondent violated its FET obligation by committing one or several actions described in paragraphs 75.B.i) to 75.B.iii) above.

76. The Respondent submits that, if the proceedings are not bifurcated in respect of quantum, it shall have to instruct a quantum expert to assume a number of alternative valuation dates to take into account all the possible outcomes on jurisdiction and liability, each of which would give rise to a different outcome on quantum. The Respondent respectfully submits that it would be an onerous exercise and a waste of time and cost for it to have to invest significant resources in a quantum expert report that considers all of these possible variations, only to find at a later stage that the Tribunal lacks jurisdiction over the Dispute or that the Claim is dismissed on grounds of liability.

## B. THE FACTS AND ISSUES RELEVANT TO JURISDICTION AND LIABILITY ARE DISTINCT FROM THE FACTS AND ISSUES RELEVANT TO THE QUANTUM PROCEEDINGS

77. The Respondent submits that the facts and issues relevant to jurisdiction and liability are distinct from the facts and issues relevant to quantum.

78. To address the Claimant's Lost Profits claim, for example, the Respondent's quantum expert would need to consider, *inter alia*:

A. the method by which the value of the alleged loss was determined;

B. the specific assumptions and variables that were applied in order to obtain the figure of the loss (such as cash flows and the discount rate); and

C. the assumptions applied in the calculations of the alleged interest rate applicable to the alleged losses.

79. At the same time, the Respondent believes that when determining the key jurisdictional questions, as summarised in paragraph 66 above, the Tribunal will examine the same facts and evidence that it will examine when determining whether there has been a breach of the Protocol. In view of this, the Respondent believes that there are greater costs savings to be gained by bifurcating in respect of quantum.

80. Furthermore, since the issues on quantum are distinct from the issues on jurisdiction and liability, the possible cost savings in hearing quantum together with jurisdiction and liability are minimal in comparison to the possible costs savings to be gained by avoiding the quantum stage altogether (i.e. if the claims are dismissed at the jurisdictional and liability stage), or having the benefit of the Tribunal's findings of fact before instructing the experts.

## C. BIFURCATION WILL INCREASE THE FAIRNESS, ECONOMY AND EFFICIENCY OF THE PROCEEDINGS

81. In this specific case, the quantification of the Claimant's damages claims (if these do not fall away) will be a complex and time-consuming exercise. The Claimant's

Quantum Report, on the other hand, is a high-level summary on quantum that simplifies the issues and relies on largely unsupported assumptions.

82. In calculating Lost Profits, for example, the Claimant's Quantum Expert applies the income approach in the valuation of the Investment Object based on anticipated cash flows even though the Investment Object never entered into the initial stages of development.[102]

83. In calculating the Direct Losses, the Claimant's Quantum Expert relies on an incorrect assumption that the "*New Communal [Facilities] were to cost [the Claimant] no more than USD 15 million*",[103] when under the Amended Investment Contract Manolium-Engineering expressly agreed to pay the difference if costs overran USD 15 million.[104] Furthermore, the Claimant's Quantum Expert relies solely on the 2016 Memorandum[105] which, according to the Respondent, was based on incorrect assumptions and materials.

84. Finally, the Claimant's Quantum Expert does not calculate damages arising in relation to the FET Claim, even though the Claimant's FET Claim takes up most of the Claimant's Notice.[106]

85. Taking into account all these circumstances, the quantification of the Claimant's alleged losses will be far from straightforward, despite the Claimant's attempts to demonstrate the contrary. The Respondent respectfully submits that it would be prejudiced if it had to invest substantial time and resources into quantifying claims that may (and the Respondent submits – will) fall away at the jurisdiction and liability stage.

## VI. RELIEF SOUGHT

86. The Respondent respectfully requests that the Tribunal order bifurcation and appropriate directions for the determination of quantum issues arising out of the Claimant's Claim after the Tribunal renders its award on the jurisdiction and liability

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102 Claimant's Quantum Report, paragraphs 5.2.1 – 5.2.3, **Exhibit C-14**.

103 Claimant's Quantum Report, paragraph 1.3.4, **Exhibit C-14**.

104 Amended Investment Contract, paragraph 7.10, **Exhibit C-66**.

105 Claimant's Quantum Report, paragraphs 6.2.1 – 6.2.2, **Exhibit C-14**.

106 See footnote 100 above.

parts of this Dispute, and applies, accordingly, Procedural Timetable B.3 of Annex I and paragraph 26 – 27 of Procedural Order No. 1.

Respectfully submitted on
11 June 2018

**White & Case LLP**