

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

OOO MANOLIUM-PROCESSING

Claimant

v.

REPUBLIC OF BELARUS

Respondent

RESPONSE TO THE CLAIMANT'S INTERIM MEASURES REQUEST

21 September 2018

WHITE & CASE
Counsel for Respondent

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I. INTRODUCTION

1. In accordance with communication A9 of the Tribunal dated 30 July 2018 and communication A10 of the Tribunal dated 1 August 2018, the Respondent hereby submits its Response to the Claimant’s Interim Measures Request dated 28 July 2018 (the “**Application**”). Unless otherwise specified, the Respondent adopts the defined terms set out in the Response to the Notice of Arbitration dated 15 December 2017.
2. In the Application, the Claimant requests the Tribunal to order the Respondent to:
 - A. abstain from initiation of any criminal proceedings and/or suspend any current criminal proceedings with regard to the former and current officials and employees of the Claimant and Manolium-Engineering related to the arbitration until completion of the arbitration (the “**First Order**”);
 - B. refrain from contacting the shareholders, officials and employees of the Claimant and Manolium-Engineering without express consent of the Claimant and prior authorisation of the Tribunal (the “**Second Order**”);
 - C. refrain from any other actions that could further aggravate the dispute and violate the integrity of the arbitration proceedings (the “**Third Order**”).
3. As shall be set out below, the Claimant has failed to establish that its Application meets the requirements for granting interim measures under Article 26 of the UNCITRAL Rules as adopted in 2013 (the “**UNCITRAL Rules 2013**”).
4. The Claimant seeks to justify its Application on various spurious grounds, but focuses in particular on the most recent [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] that had been making inquiries into the non-payment of tax by Manolium-Engineering in Belarus in 2013 – 2017 (the “**Pre-Investigation Inquiries**”). Under Belarusian law, the authorities must make such inquiries in certain circumstances to consider whether there is sufficient evidence to

commence criminal proceedings against the managers or other officers of the entity in question for tax evasion.

5. The Respondent has the sovereign right to conduct inquiries in good faith to determine whether criminal conduct has taken place on its territory, so long as it respects the rights of the Claimant and the procedural integrity of the arbitration. As shall be demonstrated further in this Response, the Pre-Investigation Inquiries complied with this requirement.

6. [REDACTED]

7. As shall be demonstrated below, the Claimant has sought to justify its Application based on vague and unsubstantiated allegations that are unsupported by any concrete evidence and without applying the correct tests for granting interim measures under Article 26 of the UNCITRAL Rules 2013. In particular, from the first paragraphs of the Application, the Claimant is trying to create an impression that it has taken the decision to file the Application based on some recent developments that were completely new for the Claimant.¹ This is misleading. As shall be explained, the Claimant has been aware of the Pre-Investigation Inquiries since at least the summer of 2017, around five months before the commencement of the arbitration proceedings. However, rather than bringing these concerns to the Tribunal’s attention at the earliest

¹ The Claimant asserts that it “has recently learned that Respondent has taken actions that may aggravate the Dispute between the Parties and violate the integrity of the arbitration proceedings [...]” (Application, paragraph 3, CS-4).

opportunity in the Notice of Arbitration dated 15 November 2017 or at the preliminary conference call of 10 April 2018, the Claimant has waited until eight months into the arbitration – in the period when the Respondent is preparing its Statement of Defence – to submit its allegedly “urgent” Application.

8. Since the Pre-Investigation Inquiries were conducted by a different governmental department to those in charge of the arbitration proceedings and in the ordinary course of their duties, the Pre-Investigation Inquiries were not brought to the attention of counsel for the Respondent until the Claimant submitted the Application. If the Claimant had genuine and urgent concerns, it would have been appropriate for counsel for the Claimant to have approached counsel for the Respondent to raise these with the Respondent. Only in the absence of a satisfactory response from the Respondent would it have been proper to submit the Application to the Tribunal for determination. Instead, the Respondent has been forced to incur unnecessary costs responding to the Application and explaining to the Tribunal factual circumstances most of which are known to the Claimant and for the most part have no relevance to the arbitration proceedings.
9. The fact that the Claimant chose not to approach the Respondent before submitting its Application to the Tribunal is unsurprising given that it had been aware of the Pre-Investigation Inquiries long before [REDACTED] and it did not genuinely believe that the Pre-Investigation Inquiries posed any threat to the integrity of the arbitration proceedings. The Claimant, however, has conveniently used the [REDACTED] [REDACTED] as an excuse to submit the Application to derail the Respondent from preparing its Statement of Defence, which is due on 1 November 2018. Moreover, the Respondent believes that the Claimant may be using the Application as a pretext to seek a wide order from the Tribunal unrelated to the factual circumstances set out in the Application, to which the Claimant is not entitled and which would obstruct the Respondent from exercising its sovereign functions in good faith.

II. FACTUAL BACKGROUND

A. [REDACTED]
[REDACTED]

10. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

11. [REDACTED]
[REDACTED] As explained below, the DDFI was required under Belarusian law to make such inquiries in order to consider whether there was sufficient evidence to commence criminal proceedings against the managers or other officers of Manolium-Engineering for tax evasion.

12. As explained in paragraphs 21 – 23 and 55 below, contrary to the Claimant’s assertions the Respondent has not sought to use “*criminal proceedings to search for harmful information about Claimant it could use in these proceedings.*”²

1. The commencement of the Pre-Investigation Inquiries

13. In March 2017, the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk Region (the “**Tax Inspectorate**”) conducted a tax audit of Manolium-Engineering (the “**Tax Audit**”). The Tax Audit was obligatory under Belarusian law in view of the insolvency proceedings in respect of Manolium-Engineering.³

14. During the Tax Audit, the Tax Inspectorate found that Manolium-Engineering owed 11,826,511.43 Belarusian rubles as taxes (excluding fines).⁴ Since the tax liabilities exceeded 23,000 Belarusian rubles, the Tax Inspectorate was required under

² Application, paragraph 37, **CS-4**.

³ President’s Decree No. 510 dated 16 October 2009 “On Improvement of Controlling (Supervisory) Activities in the Republic of Belarus” (the “**Decree No. 510**”), Paragraph 1, Sub-section 12.3, Section 12. The Respondent is not exhibiting Belarusian legislation to this Response on the understanding that the content of Belarusian legislation is not disputed by the Claimant. However, the Respondent will exhibit the relevant legislation if this would be of use to the Tribunal.

⁴ Amendments to the Second Tax Audit Report dated 18 May 2017, **Exhibit C-186**.

Belarusian law to inform the DDFI about Manolium-Engineering's failure to pay tax and identify the names and positions of the individuals whose actions or failure to act may have caused such non-payment of tax.⁵

15. On 15 June 2017, the Tax Inspectorate therefore sent the Tax Audit to the DDFI and listed the following persons who had exercised the functions of CEO of Manolium-Engineering at any time between 2013 and 2017 (i.e. the period during which Manolium-Engineering had failed to pay tax):⁶
- A. Mr Andrey Dolgov;⁷
 - B. Mr Aram Ekavyan;⁸
 - C. the liquidator of Manolium-Engineering;⁹ and
 - D. the insolvency administrator of Manolium-Engineering.¹⁰
16. Upon receipt of the information from the Tax Inspectorate, the DDFI was required under Belarusian law to initiate the Pre-Investigation Inquiries to consider whether there was sufficient evidence to initiate criminal proceedings against the managers or other officials of Manolium-Engineering for tax evasion.¹¹ The responsible officer of a company with outstanding tax liabilities of over 1,000 "basic units"¹² may be held liable for tax evasion under Article 243 of the Belarusian Criminal Code (the

⁵ Regulation "On the Procedures of Conducting and Organization of Audits" as approved by Decree No. 510, Section 76. The obligation to inform the DDFI under this provision arises if the outstanding tax liability of a company exceeds 1,000 "basic units". "Basic unit" is an amount set by the Belarusian Government from time to time. In 2017, one basic unit equaled 23 Belarusian rubles. Similarly, in 2016, following an earlier tax audit, the DDFI had commenced pre-investigation inquiries into Manolium-Engineering's management, [REDACTED].

⁶ Letter from the Tax Inspectorate to the DDFI dated 15 June 2017, **Exhibit R-1**.

⁷ Mr Dolgov was the director of Manolium-Engineering from 5 April 2004 to 20 May 2016. Contrary to the Claimant's assertions in paragraphs 4, 8 and 13 of the Application (**CS-4**) and Mr Dolgov's assertions in paragraphs 1 and 20 of his First Witness Statement (**CWS-1**) and paragraph 2 of his Second Witness Statement (**CWS-2**), the Claimant replaced Mr Dolgov as director of Manolium-Engineering on or around 21 May 2016.

⁸ Mr Ekavyan is the director of the Claimant, which was appointed to manage Manolium-Engineering from 21 May 2016 to 11 October 2016.

⁹ The liquidator managed Manolium-Engineering from 12 October 2016 to 7 February 2017.

¹⁰ The insolvency administrator took over the management of Manolium-Engineering on 8 February 2017 when the insolvency proceedings were instituted.

¹¹ Criminal Procedure Code of the Republic of Belarus, Articles 166(3) and 167(1).

¹² In 2017, one basic unit equaled 23 Belarusian rubles. The relevant threshold was therefore 23,000 Belarusian rubles.

“Criminal Code”) if, *inter alia*, he or she intentionally has committed tax evasion. Like in most jurisdictions, there is a high evidentiary burden for proving that an individual has the requisite intention to commit tax evasion under Belarusian law.

17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Indeed, on Mr Dolgov’s own account, he was aware of the Pre-Investigation Inquiries since at least the summer of 2017.¹⁴

2. [REDACTED]

18. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

19. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

20. In the Application, the Claimant states that Mr Dolgov “*had to leave Belarus after initiation of the arbitration [on 15 November 2017] and now resides in Russia because of the risk of undue measures against him from the Belarusian authorities*”.¹⁶ In fact, however, at least by July 2017, Mr Dolgov was already not resident in

¹³ In accordance with Belarusian law and practice, the liquidator was appointed by the Claimant and would have remained in close contact with it.

¹⁴ Second Witness Statement of Mr Dolgov, paragraph 14, CWS-2. [REDACTED]
[REDACTED]

¹⁵ [REDACTED]

¹⁶ Application, paragraph 39, CS-4.

Belarus.¹⁷ [REDACTED]
[REDACTED]

21. [REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED]
[REDACTED]

22. [REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]

23. The Claimant’s assertion that the Respondent was using the Pre-Investigation Inquiries to “*search for harmful information about Claimant it could use in these proceedings*”²² is plainly incorrect. [REDACTED]
[REDACTED] were unrelated to the issues in the arbitration, which had not even commenced at that time.

¹⁷ That Mr Dolgov had already left Belarus by November 2017 is confirmed, *inter alia*, by the fact that Mr Dolgov himself provided an address in Moscow as his “residence address” [REDACTED], as will be explained in paragraphs 24 - 25 below.

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Application, paragraph 37, CS-4.

3. [REDACTED]

24. [REDACTED]

25. [REDACTED]

26. The subject matter of the 2012 Administrative Decision was Manolium-Engineering's failure to return the land plots for the construction of the New Communal Facilities.²⁸ As Mr Dolgov would have been aware, Manolium-Engineering's liability to pay taxes was unaffected by the 2012 Administrative Decision. [REDACTED]

23 Second Witness Statement of Mr Dolgov, paragraph 14, CWS-2.

24 [REDACTED]

25 Second Witness Statement of Mr Dolgov, paragraph 4, CWS-2.

26 [REDACTED]

27 [REDACTED]

28 The 2012 Administrative Decision related to whether Manolium-Engineering was administratively liable for the late return of land plots for the construction of the New Communal Facilities.

[REDACTED]

4. [REDACTED]

27. [REDACTED]

28. [REDACTED]

29. [REDACTED]

30. [REDACTED]

29 Second Witness Statement of Mr Dolgov, paragraph 6, CWS-2.
30 [REDACTED]
31 [REDACTED]
32 [REDACTED]
33 [REDACTED]
34 [REDACTED] Second Witness Statement of Mr Dolgov, paragraphs 6 – 7, CWS-2.

35 Second Witness Statement of Mr Dolgov, paragraph 11, CWS-2.

[REDACTED]

31. [REDACTED]

5. [REDACTED]

32. [REDACTED]

33. [REDACTED]

34. [REDACTED]

36 [REDACTED]
37 [REDACTED]
38 **Exhibit R-6.**
39 **Exhibit R-6.**

40 Criminal Procedural Code of the Republic of Belarus, Article 173.3(2).

[REDACTED]

B. MEETING WITH MR VIKENTIY KOROBAN AT THE OFFICE OF THE MINSK CITY EXECUTIVE COMMITTEE

35. For the avoidance of doubt, the Respondent's submissions in this Response regarding the meeting attended by Mr Koroban in July 2018 and any reference to other meetings involving representatives of White & Case are made without any waiver of privilege.
36. In July 2018, Mr Vikentiy Koroban met with representatives of MCEC and White & Case at MCEC's office in Minsk as part of the Respondent's preparation of its Statement of Defence in the present proceedings. Contrary to the Claimant's assertion that the "*meeting suggests that Respondent is using its powers to collect evidence from Claimant's employees outside of the arbitral process*",⁴¹ Mr Koroban has not been employed by Manolium-Engineering for at least four years. As far as the Respondent is aware, Mr Koroban is not a witness for the Claimant, but in any event, there is no property in a witness.
37. According to Mr Dolgov, certain colleagues at Manolium-Engineering informed him that the meeting was attended by "*the representative of the foreign law firm*" and that Mr Koroban was asked "*questions concerning the conclusion of the Investment Contract made upon the results of the Tender for investment projects in 2003*".⁴² Mr Dolgov is perfectly aware that this "*foreign law firm*" was White & Case, which represents the Respondent in these proceedings. Despite this, Mr Dolgov alleges that he is "*unaware of [...] the legal grounds for such meeting, or of the intended use of the information obtained during the meeting.*"⁴³
38. The Claimant also appears to intentionally misrepresent the facts by alleging that Mr Koroban was "*summoned for questioning*"⁴⁴ so that the Respondent might "*collect evidence from Claimant's employees outside of the arbitral process*".⁴⁵ As members

⁴¹ Application, paragraph 17, **CS-4**.

⁴² Second Witness Statement of Mr Dolgov, paragraph 18, **CWS-2**.

⁴³ Second Witness Statement of Mr Dolgov, paragraph 19, **CWS-2**.

⁴⁴ Application, paragraph 15, **CS-4**.

⁴⁵ Application, paragraph 17, **CS-4**.

of a regulated profession, the representatives of White & Case present had no concerns about how the meeting was conducted. If the Claimant intends to make allegations against the Respondent's legal representatives, it is invited to provide specific details as to what these are forthwith.

39. In fact, Mr Koroban willingly offered to tell his side of the story to the Respondent, as did other former employees of Manolium-Engineering. All of them knew why they were meeting with representatives of White & Case and were informed that they were under no obligation to give any information if they did not wish to do so. Contrary to Mr Dolgov's assertion, Mr Koroban was never asked "*whether [Mr Dolgov] bribed any of the governmental authorities of the Republic of Belarus*".⁴⁶
40. As far as the Respondent is aware, Mr Dolgov failed to settle Mr Koroban's salary at the time Mr Koroban left Manolium-Engineering. Mr Dolgov nonetheless called Mr Koroban in July 2018 to ask him about "*the conversation he had there and the subject matter of the questions asked*".⁴⁷ In the circumstances, Mr Koroban's reluctance to discuss with Mr Dolgov the details of his meeting with the Respondent's legal representatives does not justify Mr Dolgov's far-reaching conclusion that Mr Koroban is "*concerned about his safety in the Republic of Belarus*".⁴⁸

C. THE RESPONDENT'S REQUEST FOR MR DOLGOV TO PROVIDE DETAILS OF HIS ADDRESS IN HIS WITNESS STATEMENT

41. Paragraph 35 of Procedural Order No. 1 dated 17 May 2018 ("**POI**") provides that:
- "Each witness statement shall state the witness's name, date of birth, present address and involvement in the case. In the witness statement and prior to giving oral evidence at the hearing, each witness shall affirm that his or her written and oral statements are true, correct, and materially complete."*⁴⁹
42. In his First Witness Statement dated 10 May 2018, Mr Dolgov omitted to state his present address or confirm that the witness statement was "*true, correct, and materially complete*".⁵⁰ On 22 June 2018, White & Case asked the Claimant for a

⁴⁶ Second Witness Statement of Mr Dolgov, paragraph 18, **CWS-2**.

⁴⁷ Second Witness Statement of Mr Dolgov, paragraph 20, **CWS-2**.

⁴⁸ Second Witness Statement of Mr Dolgov, paragraph 21, **CWS-2**.

⁴⁹ Procedural Order No. 1 dated 17 May 2018, paragraph 35.

⁵⁰ First Witness Statement of Mr Dolgov, paragraph 96, **CWS-1**.

signed declaration from Mr Dolgov conforming to the requirements in paragraph 35 of PO1, which the Claimant provided on 29 June 2018. The Claimant is aware of the requirements under paragraph 35 of PO1, not least because it was the Claimant itself that proposed these requirements when it submitted its mark-up of PO1 before the preliminary conference call of 10 April 2018.⁵¹ Nonetheless, the Claimant asserts that the “*insistence of Respondent’s counsel on including Mr. Dolgov’s address in his witness statement further indicates that the Respondent is preparing some action against Mr. Dolgov outside of this arbitration.*”⁵²

43. The suggestion that White & Case asked for Mr Dolgov’s present address in order to harm Mr Dolgov is particularly ludicrous given that Mr Dolgov had himself provided both his “residence” and “registered” addresses [REDACTED].⁵³ Accordingly, as the Claimant is itself aware, the Respondent already had Mr Dolgov’s address.

III. THE APPLICATION DOES NOT MEET THE STANDARD FOR GRANTING INTERIM MEASURES

44. In the following sections, the Respondent will demonstrate that (i) it has exercised its sovereign functions (including the Pre-Investigation Inquiries) in good faith and respecting the Claimant’s rights, as it is entitled to do; and (ii) the Application does not meet the requirements for granting interim measures.
45. In the Application, the Claimant provides a vague and unsubstantiated legal analysis based on mere conjecture that falls manifestly short of the high standard of proof for granting interim measures. The Claimant consistently misrepresents the facts and cases relevant to the Tribunal’s determination of the Application to paint the Respondent in a bad light and to fit its purpose.
46. In addition, the Claimant fails to even apply the correct tests for granting interim measures under Article 26 of the UNCITRAL Rules 2013, instead relying on tests

⁵¹ Email from Baker McKenzie to the Tribunal dated 3 April 2018 attaching Claimant’s mark-up of PO1. The Claimant’s proposed insertion of the relevant requirements is reflected in paragraph 31 of the redline of PO1 attached to the Claimant’s email.

⁵² Application, paragraph 20, CS-4.

⁵³ [REDACTED]

adopted by tribunals acting under other sets of rules.⁵⁴ While it may be helpful for the Tribunal to see how other tribunals have applied other tests for granting interim measures, the primary test to be applied in the present proceedings is set out in the UNCITRAL Rules 2013. The Claimant's decision not to do so is not surprising, since the Claimant is unable to satisfy the high standard of proof for granting interim measures under Article 26 of the UNCITRAL Rules 2013. Nonetheless, the Respondent shall demonstrate that even according to the less demanding tests suggested by the Claimant, the Application flatly fails to merit the granting of interim measures.

A. THE RESPONDENT HAS EXERCISED ITS SOVEREIGN FUNCTIONS IN GOOD FAITH AND RESPECTING THE CLAIMANT'S RIGHTS

47. The Respondent has the right to exercise its normal sovereign functions on its territory so long as it does so in good faith and respecting the Claimant's rights. As the tribunal in *SGS Société Générale de Surveillance SA v. Pakistan* held:

*"We cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes."*⁵⁵

48. In the present case, such sovereign functions include, *inter alia*, the conduct of the Pre-Investigation Inquiries. As the tribunal held in *Quiborax v. Bolivia*:

*"Bolivia has the sovereign power to prosecute conduct that may constitute a crime on its own territory, if it has sufficient elements justifying prosecution. Bolivia also has the power to investigate whether Claimants have made their investments in Bolivia in accordance with Bolivian law and to present evidence in that respect. But such powers must be exercised in good faith and respecting Claimants' rights, including their prima facie right to pursue this arbitration."*⁵⁶

49. The Claimant's assertion that tribunals "*consistently confirm that the sovereign rights of the state are not violated if criminal proceedings are only suspended, not*

⁵⁴ Even in the absence of relevant case law relating to interim measures decisions under the UNCITRAL Rules 2013, the Claimant should have explained how the conclusions reached by tribunals constituted under other sets of rules would have been different if the UNCITRAL Rules 2013 had been applied.

⁵⁵ *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2, 16 October 2002, page 301, **Exhibit RL-22**.

⁵⁶ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 123, **Exhibit CL-71**.

terminated” is therefore misleading.⁵⁷ As reflected in the authorities below (on which the Claimant relies heavily in the Application⁵⁸), tribunals have granted interim measures in relation to criminal proceedings when the proceedings are conducted in bad faith or harm the Claimant’s rights in the arbitration.

50. In *Quiborax v. Bolivia*, the tribunal found that Bolivia had commenced criminal prosecutions targeting the claimants because they had initiated the arbitration⁵⁹ and that Bolivia was using the criminal proceedings as a “*defense strategy*”⁶⁰ to deny the condition of the claimants as foreign investors under the BIT and force the claimants to give up their claims in the arbitration.⁶¹ Accordingly, the tribunal ordered that the criminal proceedings should be suspended until the end of the arbitration.
51. In *City Oriente v. Ecuador*, the tribunal found that Ecuador was using criminal prosecution (which had been initiated during the pendency of the interim measures application⁶²) “*as a means to coactively secure payment of the amounts allegedly owed by City Oriente pursuant to Law No. 2006-42*”, which was precisely the subject of the dispute in the arbitration.⁶³ Accordingly, the tribunal ordered that Ecuador should refrain from instituting or prosecuting criminal proceedings in connection with this subject matter until the end of the arbitration.
52. In *Hydro v. Albania*, the tribunal held that the possible incarceration of two of the claimants in Albania posed an “*imminent risk*” to the claimants’ “*ability to effectively*

⁵⁷ Application, paragraph 55, **CS-4**. If the Claimant’s statement were correct, tribunals would always grant interim measures in relation to criminal proceedings, regardless of the proportionality requirement under Article 26(3)(a) of the UNCITRAL Rules 2013.

⁵⁸ Application, paragraphs 33, 36, 47, 48, 56, 57, **CS-4**.

⁵⁹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 164, **Exhibit CL-71**.

⁶⁰ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 122, **Exhibit CL-71**.

⁶¹ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 46, **Exhibit CL-71**.

⁶² *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, paragraph 15, **Exhibit CL-72**.

⁶³ *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, paragraphs 62 – 63, **Exhibit CL-72**.

participate in the arbitration".⁶⁴ Accordingly, the tribunal found that staying the criminal proceedings until the end of the arbitration would, on balance, be proportionate in favour of protecting the claimants' rights, notwithstanding the high threshold for granting such measures.⁶⁵

53. The present circumstances are to be clearly distinguished from the cases relied on by the Claimant for the following reasons.

54. **First**, in each of the cases described above, the tribunals were faced with criminal proceedings that were ongoing at the time of the interim measures decision. In the present case, by contrast, no criminal proceedings have been commenced against any of the managers or officers of Manolium-Engineering. In view of this, the First Order falls far short of satisfying the demanding tests of "necessity", "urgency" and "proportionality" under the UNCITRAL Rules 2013, as explained in paragraphs 77 - 88 below.

55. **Second**, the Pre-Investigation Inquiries were conducted in good faith. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The present case is to be clearly distinguished from *Quiborax v. Bolivia* and *City Oriente v. Ecuador*, in which the tribunals found that the criminal proceedings had been commenced directly in connection with the arbitration, either as a "defense strategy"⁶⁷ or as a way for the state authorities to "take justice into their own hands".⁶⁸ The present case is further

⁶⁴ *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, paragraph 3.29, **Exhibit CL-77**.

⁶⁵ *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, paragraphs 3.16, 3.41, **Exhibit CL-77**.

⁶⁶ Application, paragraph 37, **CS-4**.

⁶⁷ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 122, **Exhibit CL-71**.

⁶⁸ *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos Del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, 19 November 2007, paragraph 62, **Exhibit CL-72**.

distinguished by the fact that the Pre-Investigation Inquiries were commenced in [REDACTED], around [REDACTED] months before the Claimant commenced the arbitration on 15 November 2017.⁶⁹

56. **Third**, the Pre-Investigation Inquiries do not pose and never have posed any risk to the Claimant's rights in the arbitration, including Mr Dolgov's or Mr Ekavyan's ability to effectively participate in the arbitration. The Claimant places heavy emphasis on its allegation that the Pre-Investigation Inquiries "*severely restrict availability of Claimant's witness [sic] and Claimant's access to the arbitration proceedings*",⁷⁰ but fails to provide any concrete evidence in support of its position. The Claimant falls manifestly short of demonstrating that its procedural right to continue with the present arbitration is precluded by the Pre-Investigation Inquiries.⁷¹ As explained in paragraph 80 below, the Claimant's allegations of witness "intimidation" also do not withstand scrutiny.

57. For the reasons set out above, the Respondent submits that [REDACTED]. In addition, the Respondent has the sovereign right to conduct any other functions in the interests of the state (besides the Pre-Investigation Inquiries) so long as it exercises such conduct in good faith and respecting the Claimant's rights. As shall be explained below, the Respondent believes that the Claimant may be using the broad and vague wording of the Second Order and Third Order to seek a wide order from the Tribunal that is unrelated to the factual circumstances set out in the Application and which would severely obstruct the Respondent from exercising such sovereign functions as it is entitled to do.

B. STANDARD FOR GRANTING INTERIM MEASURES

58. According to Article 26 of the UNCITRAL Rules 2013:

⁶⁹ The Claimant submitted its Notice of Arbitration on 15 November 2017.

⁷⁰ Application, paragraph 50, **CS-4**.

⁷¹ In *Caratube v. Kazakhstan*, the tribunal found that the claimant had failed to show that "*its procedural right to continue with [the] ICSID arbitration*" would be "*precluded*" by the criminal proceedings that had been commenced. Accordingly, the tribunal held that request was not sufficiently urgent and that the claimant did not meet the "*particularly high threshold*" for granting interim measures in relation to criminal proceedings (*Caratube International Oil Company LLP and Mr Devincti Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision regarding Claimant's Application for Provisional Measures, 31 July 2009, paragraphs 137 - 139, **Exhibit RL-23**).

"1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

[...]

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination."

59. Parties seeking interim measures under Article 26 of the UNCITRAL Rules 2013 must therefore demonstrate: (a) *prima facie* case on jurisdiction and the merits; (b) necessity (risk of harm); (c) urgency; and (d) proportionality. The Respondent submits that these criteria are not met in the case at hand.⁷²

1. **Prima Facie case on jurisdiction and on the merits**

60. The Respondent agrees with the Claimant that the Claimant has the burden of establishing only a *prima facie* case on jurisdiction and on the merits for the purpose of the Application. However, Claimant fails to apply the correct test under Article 26(3)(b) of the UNCITRAL Rules 2013, according to which interim measures shall only be granted if "[t]here is a reasonable possibility that the requesting party will succeed on the merits of the claim" (emphasis added).⁷³ Instead, the Claimant applies

⁷² Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International, 2017, paragraphs 6 – 22, **Exhibit CL-68**.

⁷³ "It is rightly said that such a requirement now follows from article 26(3)(b) [...] 'that the tribunal have both a reasonable possibility of possessing jurisdiction over the claim and a reasonable possibility that the substance of the claim is meritorious'" (Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration*, Kluwer Law International, 2017, paragraph 10, **Exhibit CL-68**.)

a less strict test adopted by a tribunal acting under the UNCITRAL Rules 1976, according to which the tribunal “needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal”.⁷⁴

61. The Respondent does not believe that this Response is the appropriate time to set out its position on jurisdiction and the merits in detail or that it is necessary for the Tribunal to address these issues before both Parties have had the opportunity to set out their positions. The Respondent shall submit its full position on jurisdiction and the merits in the Statement of Defence. Nonetheless, the Respondent submits that the Claimant has failed to satisfy the burden of establishing that it has “reasonable possibility of success” on jurisdiction and on the merits in the Application.
62. The Claimant alleges that it has satisfied the burden of establishing that the Tribunal has *prima facie* jurisdiction “taking into account the several legal instruments on which the Claimant relies, and that the EEU Treaty has a direct retroactive application provision.”⁷⁵ As the Respondent shall submit in the Statement of Defence, the Belarusian Law on Investments dated 12 July 2013 (the only “instrument” on which the Claimant relies other than the Treaty on the Eurasian Economic Union dated 29 May 2014 (the “**EEU Treaty**”) does not provide a basis for the Tribunal’s jurisdiction in the present proceedings. Moreover, as the Respondent has already explained,⁷⁶ Protocol 16 of the EEU Treaty⁷⁷ is silent as to its retroactive application, and in the absence of express wording to the contrary, the principle of non-retroactivity of treaties under Article 28 of the Vienna Convention on the Law of Treaties 1969 applies.⁷⁸ Contrary to the Claimant’s assertion, the EEU Treaty does not have a “direct retroactive application provision.”⁷⁹

⁷⁴ The Claimant relies on the test adopted by the tribunal in *Sergei Paushok v. Mongolia* (Application, paragraph 27, **CS-4**).

⁷⁵ Application, paragraph 26, **CS-4**.

⁷⁶ Respondent’s Application for Bifurcation on Quantum dated 11 June 2018, paragraph 63, **RS-2**.

⁷⁷ EEU Treaty, Protocol 16, **CL-3**.

⁷⁸ EEU Treaty, Protocol 16, **CL-3**.

⁷⁹ Application, paragraph 26. The Claimant appears to be referring to Article 65 of Protocol 16 of the EEU Treaty, which provides that “[t]he provisions of this section shall apply to all investments made [...] starting from December 16, 1991” (EEU Treaty, Protocol 16, Article 65, **CL-3**). As the Respondent shall set out in the Statement of Defence, tribunals have consistently noted that the temporal effects of a treaty are not modified by virtue of the fact that the treaty applies to investments made before its entry into force.

63. The Claimant alleges that it has satisfied the burden of establishing that it has demonstrated a *prima facie* case on the merits by citing three statements which it asserts the Respondent “*does not dispute*”.⁸⁰ Contrary to the Claimant’s assertion, the Respondent has disputed each of the statements set out by the Claimant in its submissions to date.⁸¹ Moreover, the Respondent shall set out in detail in its Statement of Defence why each of these statements are incorrect. Accordingly, the Claimant has sought to mislead the Tribunal by suggesting that these statements are undisputed.
64. In any event, even if the Tribunal finds that it has *prima facie* jurisdiction and that the Claimant has demonstrated a *prima facie* case on the merits, the Tribunal still has the discretion to refrain from exercising their jurisdiction to issue interim measures. For example, if a request for interim measures is “*made in bad faith to delay the proceedings or harass the opposing party*”, such a “*manifestly abusive request should be rejected quickly*” despite a finding of *prima facie* jurisdiction.⁸²
65. As the Respondent has explained, the Claimant has intentionally distorted the facts and failed to disclose relevant information of which it is aware in order to present the Respondent in a poor light and mislead the Tribunal.⁸³ This, combined with the fact that the Claimant waited until eight months into the arbitration to bring the Pre-Investigation Inquiries to the Tribunal’s attention, even though the Claimant was aware of them since at least the summer of 2017, strongly indicates that the Claimant’s real motive for submitting the Application is to interfere with the Respondent’s preparation of its Statement of Defence due on 1 November 2018, not to protect the procedural integrity of the arbitration or any other rights that the Claimant alleges are under threat. The Respondent submits that this in itself provides the Tribunal with the ground to refrain from exercising its jurisdiction to issue interim measures.

⁸⁰ Application, paragraph 28, **CS-4**.

⁸¹ See, e.g. Respondent’s Application for Bifurcation on Quantum dated 11 June 2018, paragraphs 27 - 28, 39, 41 - 42, **RS-2**.

⁸² David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules, A Commentary*, Second Edition, p. 523, **Exhibit RL-24**.

⁸³ See, e.g., paragraphs 7, 20, 23 – 26, 35 – 43 above.

2. Necessity

66. Articles 26(2)(b) and 26(3)(a) of the UNCITRAL Rules 2013 requires the party seeking interim measures to establish that (a) there is a risk of “*current or imminent harm*” or “*prejudice to the arbitral process itself*”;⁸⁴ (b) it is “*likely*” that such harm will occur;⁸⁵ and (c) the harm must be “*not adequately reparable by an award of damages*.”⁸⁶ The Claimant fails to apply the correct tests under Articles 26(2)(b) and 26(3)(a) of the UNCITRAL Rules 2013. Instead, the Claimant relies on a less demanding test of “necessity” adopted by tribunals acting under the ICSID Convention and UNCITRAL Rules 1976, according to which “[a]n interim measure is considered necessary if it is ‘required to avoid harm or prejudice being inflicted upon the applicant’”.⁸⁷
67. Tribunals have held that there is a high evidentiary burden for establishing that an interim measure is “necessary”. For example, the tribunal in *Churchill Mining v. Indonesia* found that “[a]n allegation that the status quo has been altered or that the dispute has been aggravated needs to be buttressed by concrete instances of intimidation or harassment.”⁸⁸ The tribunal found that “it is not sufficient to allege, without more, that the possibility of being the target of a criminal investigation is intimidatory to obtain protection through provisional measures.”⁸⁹
68. Similarly, the tribunal in *Occidental Petroleum v. Ecuador* found that “[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions”.⁹⁰ The burden of proof is on the

⁸⁴ UNCITRAL Rules 2013, Article 26(2)(b).

⁸⁵ UNCITRAL Rules 2013, Article 26(2)(b).

⁸⁶ UNCITRAL Rules 2013, Article 26(3)(a).

⁸⁷ The Claimant relies on the test adopted by, *inter alia*, the tribunal in *Quiborax v. Bolivia* and *Sergei Paushok v. Mongolia* (Application, paragraph 29, **CS-4**).

⁸⁸ *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, paragraph 72, **Exhibit RL-25**.

⁸⁹ *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, paragraph 77, **Exhibit RL-25**.

⁹⁰ *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 89, **Exhibit CL-70**.

Claimant to establish that the harm it invokes is sufficiently imminent and likely to occur.⁹¹

3. Urgency

69. Under Article 26(2) of the UNCITRAL Rules 2013, the party requesting an interim measure must demonstrate that the tribunal's intervention cannot await "*the award by which the dispute is finally decided*".⁹² Tribunals have held that interim measures will not be urgent when the applicant is aware of the facts on which it bases its application since before the commencement of the arbitration but delays bringing them to the tribunal's attention until a later stage in the proceedings.⁹³
70. The Respondent agrees with the Claimant that interim measures shall be urgent if they are required to protect the procedural integrity of the arbitration.⁹⁴ However, as explained in paragraph 79 below, this is not the case in the current proceedings.

4. Proportionality

71. According to Article 26(3)(a) of the UNCITRAL Rules 2013, the party requesting an interim measure must demonstrate that the harm it invokes "*substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted*" (emphasis added).⁹⁵ The Claimant fails to apply the correct test under Articles 26(3)(a) of the UNCITRAL Rules 2013. Instead, the Claimant relies on a less demanding test of "proportionality" adopted by a tribunal acting under the UNCITRAL Rules 1976, according to which "*the Tribunal is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties*".⁹⁶

⁹¹ *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 90, **Exhibit CL-70**.

⁹² UNCITRAL Rules 2013, Article 26(2).

⁹³ *Tokios Tokelès v. Ukraine*, Case No. ARB/02/18, Order No. 3, 18 January 2005, paragraph 13, **Exhibit CL-75**; *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, paragraph 25, **Exhibit CL-69**.

⁹⁴ Application, paragraph 46, **CS-4**.

⁹⁵ UNCITRAL Rules 2013, Article 26(3)(a).

⁹⁶ The Claimant relies on the test adopted by the tribunal in *Sergei Paushok v. Mongolia* (Application, paragraph 52, **CS-4**).

72. In balancing the proportionality of interim measures, tribunals will consider the extent to which the requested measure obstructs the sovereign interests of the State. Tribunals have consistently found that there is a particularly high standard to be met for interim measures to be granted in relation to criminal proceedings.⁹⁷ As the tribunal held in *Hydro v. Albania*:

*“It is trite to say that criminal law and procedure are a most obvious and undisputed part of a State’s sovereignty. That (trite) fact supports the approach adopted here by the Tribunal, namely that any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is absolutely necessary.”*⁹⁸

73. In balancing the proportionality of interim measures, tribunals have also considered the breadth of the requested measures and rejected requests which are “*too broad, vague and uncertain in scope*”.⁹⁹

C. THE FIRST ORDER DOES NOT MEET THE REQUIREMENTS FOR GRANTING INTERIM MEASURES

74. In its First Order, the Claimant seeks an order from the Tribunal that the Respondent:

“abstain from initiation of any criminal proceedings and/or suspend any current criminal proceedings with regard to the former and current officials and employees of Claimant and Manolium-Engineering related to the arbitration until completion of the arbitration”.¹⁰⁰

75. The Respondent respectfully requests the Tribunal to dismiss the First Order for the reasons set out below.

⁹⁷ See, e.g., *Caratube International Oil Company LLP and Mr Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision regarding Claimant’s Application for Provisional Measures, 31 July 2009, paragraph 137, **Exhibit RL-23**; *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, paragraph 298, **Exhibit CL-69**; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, paragraph 190, **Exhibit RL-26**.

⁹⁸ *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, paragraph 3.16, **Exhibit CL-77**.

⁹⁹ *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, paragraph 366, **Exhibit CL-69**.

¹⁰⁰ Application, paragraph 59(i), **CS-4**.

1. The First Order is moot

76. The Respondent submits that the First Order is moot because the Respondent has [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED], the Respondent submits that the First Order did not meet the criteria for granting interim measures for the reasons set out below.

2. The First Order is not necessary

77. As explained in paragraph 66 above, the Claimant has failed to apply the correct test of “necessity” to the First Order. In particular, the Claimant does not address whether the First Order is necessary to prevent “*current or imminent*” harm that is “*likely*” to occur under Article 26(2)(b) of the UNCITRAL Rules 2013.

78. In any event, the First Order is not “necessary” even according to the less demanding test cited by the Claimant.¹⁰¹

79. The Claimant alleges that the First Order is necessary because the Respondent’s actions “*threaten the integrity of this proceeding by using inappropriate means to receive evidence through the enforcement authorities and thereby avoiding the arbitration procedure to which the Respondent consented*”.¹⁰² As explained in paragraphs 13 – 31 and 55 above, this is incorrect; the Pre-Investigation Inquiries were conducted in good faith and were unconnected with the arbitration. The Claimant fails to explain how the Respondent could “*use*”¹⁰³ in the arbitration the [REDACTED]
[REDACTED], which were irrelevant to the issues in the arbitration.¹⁰⁴ For the same reason, the Claimant’s allegation that the Respondent “*severely infringes*

¹⁰¹ See paragraph 66 above.

¹⁰² Application, paragraph 32, CS-4.

¹⁰³ Application, paragraph 37, CS-4.

¹⁰⁴ Application, paragraph 37, CS-4.

the equality of the Parties”¹⁰⁵ by using the Pre-Investigation Inquiries to “*obtain evidence*”¹⁰⁶ should be dismissed.

80. In addition, the Claimant alleges that the First Order is necessary because the Pre-Investigation Inquiries “*aggravate the dispute*”.¹⁰⁷ The Claimant places heavy emphasis on the allegation that the Pre-Investigation Inquiries have had an “*adverse effect*”¹⁰⁸ on witnesses and that the Respondent is “*intimidating witnesses*”.¹⁰⁹ But the only way in which the Claimant seeks to support its position is by referring to Mr Koroban’s “*contradictory behavior*”¹¹⁰ and asserting that Mr Dolgov “*had to leave Belarus after initiation of the arbitration [...] because of the risk of undue measures against him from the Belarusian authorities*”.¹¹¹ As demonstrated in paragraphs 20 and 40 above, these allegations are misleading. The Claimant fails to provide any concrete evidence in support of its position that the Pre-Investigation Inquiries aggravate the dispute, let alone satisfy the high standard of proof required to establish that “*intimidation*” has occurred according to *Churchill Mining v. Indonesia*.¹¹²

81. Accordingly, even according to the less strict standard proposed by the Claimant, the First Order would flatly fail the “*necessity*” test.

3. The First Order is not urgent

82. The Claimant alleges that interim measures will be urgent if they are required to protect the procedural integrity of the arbitration, citing *Quiborax v. Bolivia* and *City Oriente v. Ecuador*.¹¹³ While the Respondent agrees with this in principle, the cases relied on by the Claimant are to be distinguished from the facts in the present case, as explained in paragraphs 50 – 56 above.

83. The Claimant submits that the First Order is urgent because “*[i]f the requested measures are not granted, Respondent may further proceed with criminal proceedings*

¹⁰⁵ Application, paragraph 41, CS-4.

¹⁰⁶ Application, paragraph 42, CS-4.

¹⁰⁷ Application, paragraph 40, CS-4.

¹⁰⁸ Application, paragraph 38, CS-4.

¹⁰⁹ Application, paragraph 32, CS-4.

¹¹⁰ Application, paragraph 38, CS-4.

¹¹¹ Application, paragraph 39, CS-4.

¹¹² See paragraph 67 above.

¹¹³ Application, paragraphs 47 – 48, CS-4.

and severely restrict availability of Claimant’s witness and Claimant’s access to the arbitration proceedings.”¹¹⁴ However, as explained in paragraph 56 above, the Pre-Investigation Inquiries do not pose and have never posed any risk to Mr Dolgov’s or Mr Ekavyan’s ability to effectively participate in the arbitration, nor does the Claimant provide any evidence in support of its vague assertions.

84. In addition, as explained in paragraph 17 above, the Claimant has been aware of the Pre-Investigation Inquiries since at least the summer of 2017, around five months before the commencement of the arbitration proceedings.¹¹⁵ However, rather than bringing these concerns to the Tribunal’s attention at the earliest opportunity in the Notice of Arbitration dated 15 November 2017 or at the preliminary conference call of 10 April 2018, the Claimant has waited eight months into the arbitration – in the period when the Respondent is preparing its Statement of Defence – to raise such concerns. The Claimant fails to substantiate how the most recent [REDACTED] [REDACTED] or any of the other factual circumstances on which it relies in the Application have changed the *status quo ante* existing at the time the arbitration was commenced. This supports the Respondent’s position that the First Order is not urgent.¹¹⁶

85. Accordingly, the First Order would fall far short of satisfying the test of “urgency”.

4. The First Order is not proportionate

86. As explained in paragraphs 49 and 71 above, the Claimant not only fails to apply the correct test of “proportionality” under the UNCITRAL Rules 2013, but also draws incorrect principles from the cases it cites.

87. If granted, the First Order would interfere with the Respondent’s sovereign right to investigate and prosecute criminal conduct on its territory in good faith and respecting

¹¹⁴ Application, paragraph 50, **CS-4**.

¹¹⁵ [REDACTED]

¹¹⁶ *Tokios Tokelès v. Ukraine*, Case No. ARB/02/18, Order No. 3, 18 January 2005, paragraph 13, **Exhibit CL-75**; *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, paragraph 25, **Exhibit CL-69**.

the Claimant's rights. Such interim measures should only be granted in "exceptional circumstances"¹¹⁷ and where "absolutely necessary".¹¹⁸

88. For the reasons set out in the preceding paragraphs, the Claimant has failed to demonstrate that any of its rights will be harmed if the First Order is not granted, let alone satisfy the high burden of proof required under Article 26(3)(a) of the UNCITRAL Rules 2013. Thus, the Respondent submits that even according to the less demanding test of "proportionality" cited by the Claimant¹¹⁹ the "balance of inconvenience" would fall strongly in favour of not granting the First Order.

D. THE SECOND ORDER DOES NOT MEET THE REQUIREMENTS FOR GRANTING INTERIM MEASURES

89. In its Second Order, the Claimant seeks an order from the Tribunal that the Respondent:

*"refrain from contacting the shareholders, officials and employees of Claimant and Manolium-Engineering without express consent of Claimant and prior authorization of the Arbitral Tribunal".*¹²⁰

90. The Claimant does not even attempt to apply the tests of necessity, urgency or proportionality to the Second Order.¹²¹ For this reason, the Second Order should be dismissed.

91. As far as the Respondent can glean from what is written in the Application, the only basis on which the Claimant has sought to justify the Second Order is the meeting between Mr Koroban, MCEC and White & Case in July 2018, which, according to the Claimant, suggests that the Respondent "is using its powers to collect evidence from Claimant's employees outside of the arbitral process"¹²² and that the Respondent is seeking to "intimidate Mr Koroban into silence".¹²³ As explained in paragraphs 35 –

¹¹⁷ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, paragraph 190, **Exhibit RL-26**.

¹¹⁸ *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures, 3 March 2016, paragraph 3.16, **Exhibit CL-77**.

¹¹⁹ See paragraph 60 above.

¹²⁰ Application, paragraph 59(ii), **CS-4**.

¹²¹ Application, paragraphs 29 – 51, **CS-4**.

¹²² Application, paragraph 17, **CS-4**.

¹²³ Application, paragraph 18, **CS-4**.

40 above, the Claimant has plainly misrepresented the nature of Mr Koroban's meeting with MCEC and his subsequent phone conversation with Mr Dolgov to paint the Respondent in a bad light.¹²⁴ Accordingly, the Claimant has failed to establish any basis on which the Second Order should be granted.

92. The Respondent submits that the Second Order is "*broad, vague and uncertain in scope.*"¹²⁵ If granted, the Second Request would prevent the Republic of Belarus, including all of its sovereign organs, from contacting the shareholders, officials and employees of Claimant and Manolium-Engineering without express consent of Claimant and prior authorization of the Arbitral Tribunal during the course of the arbitration, regardless of what such activities might include. As set out in paragraph 47 above, the Respondent has the sovereign right to conduct activities necessary to its functioning as a state in good faith and respecting the Claimant's rights. Since the Claimant has failed to establish that any harm will result if the Second Order is not granted, the Respondent respectfully submits that granting the Second Order would disproportionately obstruct the Respondent's sovereign interests.
93. As explained in the Respondent's letter to the Tribunal of 2 August 2018, the Second Order appears to be part of the Claimant's strategy to interfere with the Respondent's legitimate gathering of information and evidence for the Statement of Defence.

E. THE THIRD ORDER DOES NOT MEET THE REQUIREMENTS FOR GRANTING INTERIM MEASURES

94. In its Third Order, the Claimant seeks an order from the Tribunal that the Respondent:
- "refrain from any other actions that could further aggravate the dispute and violate the integrity of the arbitration proceedings"*¹²⁶
95. The Claimant has failed to explain what such a broad and vague measure, if taken, adds to the general right of the parties to non-aggravation of the dispute and integrity of arbitration proceedings.

¹²⁴ As explained in paragraph 36 above, Mr Koroban has not been employed by Manolium-Engineering for at least four years.

¹²⁵ *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Interim Award, 7 July 2017, paragraph 366, **Exhibit CL-69**.

¹²⁶ Application, paragraph 59(iii), **CS-4**.

96. The Claimant has also failed to explain how such an order from the Tribunal is necessary, urgent or proportionate in the present circumstances, let alone apply the tests for granting interim measures under Article 26 of the UNCITRAL Rules 2013 to the Third Order. Since it is common ground that the parties to arbitration have the right to non-aggravation of dispute and integrity of proceedings, and since “provisional measures are not meant to protect against any potential or hypothetical harm to result from uncertain actions”,¹²⁷ the Respondent respectfully requests the Tribunal to dismiss the Third Order.

IV. RELIEF SOUGHT

97. For the reasons set out above, the Respondent respectfully requests that the Tribunal dismiss the Application.

98. Irrespective of the Tribunal’s decision on the merits, the Respondent reserves the right to recover costs incurred in connection with the Application on an indemnity basis.

Respectfully submitted on
21 September 2018

White & Case LLP

¹²⁷ *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, paragraph 89, **Exhibit CL-70**.