

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

OOO MANOLIUM-PROCESSING

Claimant

v.

REPUBLIC OF BELARUS

Respondent

STATEMENT OF DEFENCE

19 November 2018

WHITE & CASE
Counsel for Respondent

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Under an Amended Investment Contract (as defined in paragraph 63 below) dated 8 February 2007, as consideration for the right to develop a plot of desirable land in the centre of Minsk, the Claimant agreed *inter alia*, to complete and commission a trolleybus depot and other supply facilities (defined in paragraph 65 below as the New Communal Facilities) and transfer them into the municipal ownership of Minsk. If the Claimant failed by an agreed deadline to have the completed and operational New Communal Facilities ready to be transferred into municipal ownership through its own fault, then Minsk City Executive Committee (“**MCEC**”) became entitled to submit a claim to the Belarus courts to terminate the Amended Investment Contract.
2. On 12 November 2013, following many months of unsuccessful attempts to resolve their dispute amicably with the Claimant, MCEC submitted a claim to terminate the Amended Investment Contract on this ground.¹ The termination of the Amended Investment Contract was upheld by the Belarus courts and came into effect on 29 October 2014.² The Treaty on the Eurasian Economic Union dated 29 May 2014 (the “**EEU Treaty**”), in accordance with which the Claimant initiated the present proceedings,³ came into force on 1 January 2015.
3. After the termination of the Amended Investment Contract, the Claimant’s Belarusian subsidiary, IP Manolium-Engineering (“**Manolium-Engineering**”), remained the owner of the incomplete facilities and the conditional obligation under the Amended Investment Contract for MCEC to allocate land plot in the centre of Minsk was extinguished. In 2013 – 2016, land taxes accrued in connection with Manolium-Engineering’s occupation of the land plots on which the New Communal Facilities were located, for which Manolium-Engineering was under an obligation to pay tax. As a result of Manolium-Engineering’s failure to file the relevant tax returns and refusal to pay the taxes due, statutory penalties were applied.

¹ Statement of claim in the Russian court proceedings to terminate the Investment Contract dated 12 November 2013, **Exhibit C-140**.

² Resolution of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, **Exhibit C-150**.

³ Terms of Appointment dated 10 May 2018, paragraph 31.

4. Since Manolium-Engineering had no other assets, the court granted an order for the New Communal Facilities to be transferred into municipal ownership to enforce against Manolium-Engineering's outstanding land tax liabilities on 27 January 2017.
5. In the present proceedings, the Claimant alleges that the Respondent breached the fair and equitable treatment (“FET”) standard and expropriated its investments through:
 - a) the acts of MCEC and Minsktrans (as defined in paragraph 9 below) in 2003 - 2013 that allegedly “*culminated*”⁴ in the termination of the Amended Investment Contract on 29 October 2014, claiming Lost Profits (as defined in paragraph 642 below) that the Claimant alleges it would have made if it had acquired the right to the land plot in the centre of Minsk, developed it and sold the developments;⁵ and
 - b) the acts of the Belarusian tax authorities and state courts in 2016 – 2017 that allegedly “*culminated*”⁶ in the transfer of the New Communal Facilities into municipal ownership on 27 January 2017, claiming the NCF Losses (as defined in paragraph 642 below) for the fair market value of the New Communal Facilities.⁷
6. Whilst the Respondent's position is that the Claimant's claims have no merit and are baseless, the Respondent respectfully submits that the Tribunal does not have jurisdiction for the following reasons.
7. **First**, the Respondent submits that the Tribunal does not have jurisdiction *ratione temporis* over the Termination Dispute (as defined in paragraph 405 below) and the Tax Dispute (as defined in paragraph 410 below) referred to it by the Claimant, since both disputes arose before the EEU Treaty entered into force on 1 January 2015. In the alternative, the Respondent submits that the substantive provisions of the EEU Treaty do not apply to the Termination Dispute, because the termination of the

⁴ Claimant's Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**.

⁵ Notice, paragraph 530(a), **CS-1**; Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 1.3.11, **CER-1**.

⁶ Claimant's Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**.

⁷ Notice, paragraph 530(b), **CS-1**; Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 1.3.11, **CER-1**.

Amended Investment Contract came into force on 29 October 2014 (the “**Ratione Temporis Objection**”) (*see* paragraphs 397 – 428 below).

8. **Second**, the Respondent submits that the Tribunal does not have jurisdiction over the Termination Dispute, because it relates to purely contractual conduct that does not involve any exercise of sovereign authority and is *prima facie* not capable of constituting a breach of the EEU Treaty or international law (the “**Contractual Objection**”) (*see* paragraphs 429 – 440 below).
9. **Third**, the Respondent submits that the actions of Communal Unitary Enterprise “Minsktrans” (formerly Unitary Enterprise “Transport and Communication Administration of MCEC”) (“**Minsktrans**”) are not attributable to the Respondent (*see* paragraphs 441 – 454 below).
10. If, after considering the Respondent’s jurisdictional objections, the Tribunal finds that it has jurisdiction over one or both of the disputes, the Tribunal should consider, as applicable:
 - a) whether the Claimant suffered a **denial of justice** (a claim which appears in the Claimant’s submissions under the guise of expropriation and FET but to which different criteria applies) in respect of:
 - i) the 2014 court proceedings terminating the Amended Investment Contract (*see* paragraphs 496 – 511 below); and/or
 - ii) the administrative proceedings which, according to the Claimant,⁸ led to the events that “*culminated*”⁹ in the transfer of the New Communal Facilities into municipal ownership (*see* paragraphs 512 – 520 below);
 - b) whether the Respondent has treated the Claimant **fairly and equitably** in respect of:

⁸ Notice, paragraph 493, CS-1.

⁹ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, CS-3.

- i) the actions of MCEC and Minsktrans leading up to the termination of the Amended Investment Contract (*see* paragraphs 525 – 575 below); and
 - ii) the actions of the tax authorities and state courts which led to the transfer of the New Communal Facilities (*see* paragraphs 576 – 613 below); and
 - c) whether the Respondent **expropriated** the Claimant’s investments through:
 - i) the termination of the Amended Investment Contract (*see* paragraphs 619 – 636 below); and/or
 - ii) the transfer of the New Communal Facilities into municipal ownership (*see* paragraphs 637 – 641 below).
11. If the Tribunal finds that the provisions of the EEU Treaty apply, the Respondent respectfully submits that it complied with its substantive obligations under the EEU Treaty. If, however, the Tribunal finds that the Respondent breached the EEU Treaty, then the Tribunal should proceed to determine the **quantification of damages** for:
- a) the termination of the Amended Investment Contract (*see* paragraphs 649 - 685 below); and/or
 - b) the transfer of the New Communal Facilities into municipal ownership (*see* paragraphs 686 – 718 below).
12. The Respondent submits this Statement of Defence (the “**Defence**”) in accordance with Article 21 of the UNCITRAL Rules as adopted in 2013. Unless expressly admitted in this Defence, the Respondent denies all of the Claimant’s allegations in the Notice of Arbitration dated 15 November 2017 (the “**Notice**”) and the Statement of Claim dated 10 May 2018 (the “**Statement of Claim**”).

II. FACTUAL BACKGROUND

A. THE TENDER

13. On 24 April 2003, MCEC initiated a tender (the “**Tender**”) to construct a development containing business, retail, residential and public space, as well as supporting infrastructure, on a large land plot located in Minsk city centre (the “**Investment Object**”).¹⁰ This was one of the first tenders of this kind conducted by MCEC.
14. The Investment Object would be located in one of the most desirable areas of Minsk. At the time of the Tender, the land intended for the Investment Object was occupied by Minsktrans,¹¹ IP Trolleybus Depot No. 1 and two other Belarusian entities.¹²
15. The winner of the tender would undertake to construct certain communal buildings described below as a consideration for the right to develop the Investment Object.¹³ At the time it was considered that the cost of designing and constructing the Communal Facilities (defined below) between 2003 and 2005 would be at least US\$15 million.¹⁴ The project would include the following :
 - a) construction in the outskirts of Minsk of a trolleybus depot for 220 trolleybuses (the “**Depot**”) in order to relocate the main facilities of the trolleybus depot No. 1;
 - b) reconstruction of a building located at 36 Mendeleeva Street, Minsk (the “**Building under Reconstruction**”); and

¹⁰ Tender Documents dated 24 April 2003, **Exhibit C-28**.

¹¹ On 26 November 2003, the following Unitary Enterprises joined to form Minsktrans: “Minskorelektrotrans”, “Department of Transport and Communication Administration of MCEC”, “Minskpassajiravtotrans” and “Minsk Subway”. As explained in Decision of MCEC dated 2 December 2004, **Exhibit C-40**. For the avoidance of doubt, references to Minsktrans relating to the period prior to 26 November 2003 include Unitary Enterprises “Department of Transport and Communication Administration of MCEC” – which was a party to the Investment Contract – and “Minskorelektrotrans” – which also had obligations under the Investment Contract.

¹² Exhibit 2 to the Tender Documents dated 24 April 2003, **Exhibit C-28**.

¹³ Tender Documents, Section II, Article 2.4.2; Appendix 2, item 3, Appendix 3, Article. 1.2, **Exhibit C-28**.

¹⁴ Tender Documents, Section II, Article 2.4.2; Appendix 3, Article. 1.2, **Exhibit C-28**.

- c) construction of a joint production base for motor pools Nos. 1 and 3 with the capacity for 450 buses (the “**Motor Transport Base**”);
- (together – the “**Communal Facilities**”).¹⁵
16. In addition, as a social contribution, a potential investor would render financial or other assistance to communal or republican entities located in Minsk which were in an poor financial state.¹⁶
17. On 27 April 2003, the Economic Committee of MCEC approved the tender documents (the “**Tender Documents**”).¹⁷ The design, construction and reconstruction of the Communal Facilities was to be done in accordance with the technical specifications appended to the Tender Documents as Annex 1 (the “**Technical Specifications**”).¹⁸ The Technical Specifications would allow the participants of the Tender to assess, *inter alia*, how much it would cost them to construct the Communal Facilities to the required specifications and whether the assessment that it should cost US\$15 million was right.
18. On 22 May 2003, the Claimant submitted an application to participate in the Tender to MCEC confirming that it has reviewed the requirements for the Tender.¹⁹
19. Three Belarusian companies – ODO Perspektiva-Invest Stroy, SP Aresa-Service-TS and IP Arvitfood – also submitted their respective applications.²⁰ Contrary to Mr Andrey Dolgov’s allegations in his First Witness Statement dated 10 May 2018 (“**First WS of Mr Dolgov**”)²¹ that other participants refused to participate in the Tender because the “*city of Minsk laid down the conditions of financing the*

¹⁵ Tender Documents, Section II, Article 2.4.2; Appendix 2, item 3, Appendix 3, Article. 1.2, **Exhibit C-28**.

¹⁶ Tender Documents, Section II, Article 2.4.4, **Exhibit C-28**; Letter from MCEC to the State Control Committee of the Republic of Belarus, **Exhibit R-22**.

¹⁷ Order of the Economy Committee of MCEC No. 30 dated 27 April 2003, **Exhibit R-10**. Tender Documents dated 24 April 2003, **Exhibit C-28**.

¹⁸ The Respondent notes that the Claimant has not filed a complete set of Tender Documents in these proceedings. Exhibit C-28 (Tender Documents) to the Notice is missing Annex 9 (Technical Specifications). Technical Specifications for the Communal Facilities, attached to the tender documents as Annex 9, **Exhibits R-11, R-12 and R-13**.

¹⁹ Claimant’s bid to participate in the Tender dated 22 May 2003, **Exhibit C-30**.

²⁰ Tables of assessment of the applications for the Tender conducted by the tender committee and ratings, **Exhibit R-17**

²¹ Mr Dolgov’s First Witness Statement, paragraph 11, **CWS-1**.

construction of other facilities not related to the Investment Object” all but one of the applicants IP Arvitfood²² confirmed their respective agreements to provide US\$1 million financial assistance to the communal or republican entities in line with Clause 2.4.4 of the Tender Documents.²³

20. On 27 May 2003, the tender committee held a meeting at which all four tender applicants were present, including the Claimant.²⁴ The tender committee opened the envelopes containing the potential investors’ proposals. The tender committee decided to announce the winner on 30 May 2003, because the members of the tender committee needed to review the proposals.
21. The Claimant’s offer received the highest score of 40 points from each member of the tender committee.²⁵ In its application the Claimant guaranteed it would invest US\$81,698,000 into the Investment Object.²⁶ The tender committee unanimously gave first place votes to the Claimant.²⁷ On 30 May 2003, the tender committee announced the Claimant the winner.²⁸
22. On 4 June 2003, MCEC notified each of the applicants, including the Claimant, of the Tender results.²⁹
23. On 5 June 2003, MCEC approved the Tender results.³⁰

²² Tables of assessment of the applications for the Tender conducted by the tender committee and ratings, **Exhibit R-17**

²³ Tables of assessment of the applications for the Tender conducted by the tender committee and ratings, **Exhibit R-17**. As discussed in paragraphs 28 – 33 below, subsequently the purpose of US\$1 million payment was changed.

²⁴ Minutes No. 1 of the tender committee on the Tender dated 27 May 2003, **Exhibit R-16**

²⁵ Tables of assessment of the applications for the Tender conducted by the tender committee and ratings, **Exhibit R-17**

²⁶ Tables of assessment of the applications for the Tender conducted by the tender committee and ratings, **Exhibit R-17**.

²⁷ Tables of assessment of the applications for the Tender conducted by the tender committee and ratings, **Exhibit R-17**

²⁸ Minutes No. 2 on the results of the Tender dated 30 May 2003, **Exhibit C-31**.

²⁹ Letter from MCEC to the Claimant dated 4 June 2003, **Exhibit C-32**; Letter from MCEC to ODO Perspectiva-Invest Stroy dated 4 June 2003; **Exhibit R-18**; Letter from MCEC to SP Aresa-Service-TS dated 4 June 2003, **Exhibit R-20**; Letter from MCEC to IP Arvitfood dated 4 June 2003, **Exhibit R-19**.

³⁰ Decision of MCEC on approving the results of the Tender dated 5 June 2003, **Exhibit C-33**.

B. THE INVESTMENT CONTRACT

24. Following the announcement of the Tender results on 30 May 2003, the Claimant, MCEC and Minsktrans worked on the terms of the draft of an investment contract appended to the Tender Documents as Annex 3. As a result, the parties significantly revised the draft of the investment contract.³¹
25. Notwithstanding the significant revisions to the draft investment contract,³² on 6 June 2003, just a week after the announcement of the Tender results, the Claimant, MCEC and Minsktrans executed the investment contract (the “**Investment Contract**”).
26. Under the Investment Contract, the Claimant, as part of the consideration for the right to develop the Investment Object, *inter alia*, agreed:
- a) by no later than 2006, to design and construct the Depot in Uruchye-6 microdistrict and to reconstruct the Building under Reconstruction;³³
 - b) within three years of the date of MCEC’s decision to allocate the Claimant with the land plot and the date of the construction permit, to design and construct the Motor Transport Base³⁴;
 - c) by no later than 2009, to design and construct the Investment Object;³⁵ and
 - d) by 1 September 2003, to arrange investment of US\$ 1 million into a R&D Centre to enable it to develop and establish the production of radio electronic devices for communication systems.³⁶
27. Under the Investment Contract, once the Depot and the Motor Transport Base were constructed and commissioned, the Claimant would transfer the buildings into Minsk’s municipal ownership. This would happen within one month of signing

³¹ A comparison between the draft of the investment contract attached to the Tender Documents as Annex 3 and the final version of the Investment Contract, **Exhibit R-9**.

³² Tender documents for the Tender dated 24 April 2003, **Exhibit C-28**.

³³ The Investment Contract, Clauses 2.1, 2.3 and 5.1, **Exhibit C-34**.

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

³⁵ The Investment Contract, Clause 5.3, **Exhibit C-34**.

³⁶ The Investment Contract, Clause 6.13, **Exhibit C-34**.

commissioning acts for the construction of the Depot and the Motor Transport Base.³⁷ In addition, the Claimant had an obligation to enter into the relevant agreements to reconstruct the Building under Reconstruction without purchasing it.³⁸

C. ADDITIONAL AGREEMENT NO. 1

28. On 10 October 2003, the parties to the Investment Contract concluded an additional agreement to the Investment Contract agreeing to change the purpose of the US\$1 million payment and to amend certain other terms of the Investment Contract (“**Additional Agreement No. 1**”)³⁹ as described in more detail below.
29. On 31 July 2003, following an inspection of the tender undertaken by the State Control Committee of the Republic of Belarus (the “**Belarusian SCC**”), the Belarusian SCC reported to the President of the Republic of Belarus that the Claimant’s obligation under Clause 6.13 of the Investment Contract to invest US\$1 million in the R&D Centre – a foreign investment entity – is not in line with the terms of the Tender Documents. Belarusian SCC recommended allocating the US\$1 million financial assistance to the construction of the National Library in Minsk (the “**National Library**”).⁴⁰ The President approved the Belarusian SCC’s recommendation on 7 August 2003.⁴¹
30. Consequently, on 10 October 2003, the parties to the Investment Contract concluded Additional Agreement No. 1⁴² pursuant which the Claimant agreed to, transfer by 30 December 2003 US\$ 1 million towards the construction of the National Library,⁴³ instead of investing the same amount into the R&D Centre.
31. The Claimant seeks to present Additional Agreement No. 1 as an “*imposition of obligations not covered by the [Investment] Contract*”.⁴⁴ The Claimant, however,

³⁷ The Investment Contract, Clauses 2.3 and 6.11, **Exhibit C-34**.

³⁸ The Investment Contract, Clause 2.3, **Exhibit C-34**.

³⁹ Additional Agreement No. 1, **Exhibit C-47**.

⁴⁰ Letter from the State Control Committee of the Republic of Belarus to the President of the Republic of Belarus dated 31 July 2003, page 3, **Exhibit C-44**.

⁴¹ Letter from MCEC to the State Control Committee of the Republic of Belarus dated 28 August 2003, **Exhibit R-22**.

⁴² Additional Agreement No. 1, **Exhibit C-47**.

⁴³ Additional Agreement No. 1, Clause 1, **Exhibit C-47**; Notice, paragraph 99, **CS-1**.

⁴⁴ Notice, paragraph 89, **CS-1**.

accepts that it “*was to invest USD 1 million*” under the Tender Documents.⁴⁵ The Respondent’s position is that Additional Agreement No. 1 only changed the recipient of the financial assistance which the Claimant had to pay under the Tender Documents and the Investment Contract. The Claimant agreed to that change.

32. In addition, the parties to the Investment Contract agreed to align the wording of Clause 6.3 of the Investment Contract with Clause 2.4.1 of the Tender Documents.⁴⁶ Pursuant to Clause 6.3 of the Investment Contract, the Claimant agreed to reimburse MCEC for the costs incurred in infrastructure development in connection with the design and construction of the Investment Object.
33. However, on 7 August 2003, the President, approved only the recipient of the US\$ 1 million financial assistance rather than all of the Tender results.⁴⁷ As a result, the parties agreed to extend certain deadlines under the Investment Contract in order to avoid breaching the Investment Contract while awaiting the President’s required approval of the Tender results.⁴⁸

D. ADDITIONAL AGREEMENT NO. 2

34. On 22 October 2003, the parties concluded an additional agreement to the Investment Contract (“**Additional Agreement No. 2**”)⁴⁹ replacing Additional Agreement No. 1.
35. In Additional Agreement No. 2, the parties agreed, *inter alia*, that MCEC would allocate to the Claimant the land plot for the construction of the Investment Object only after it had constructed (or reconstructed) the Communal Facilities.⁵⁰ This provided assurance to MCEC and Minsktrans that the Claimant would fulfil its obligations in relation to the Communal Facilities.
36. Under the Tender Documents it was never envisaged that a potential investor would construct the Investment Object concurrently with the Communal Facilities given that

⁴⁵ Notice, paragraph 81, **CS-1**;

⁴⁶ Tender documents for the Tender dated 24 April 2003 Clause 2.4.1; **Exhibit C-28**.

⁴⁷ Letter from MCEC to the State Control Committee of the Republic of Belarus dated 28 August 2003, **Exhibit R-22**.

⁴⁸ Additional Agreement No. 1, Clauses 3 and 4, Recitals, **Exhibit C-47**.

⁴⁹ Additional Agreement No. 2, **Exhibit C-48**.

⁵⁰ Additional Agreement No. 2, Clauses 2.3 and 2.9, **Exhibit C-48**.

completion of the Communal Facilities served as consideration for the right to build the Investment Object. The Additional Agreement No. 2 brought this in line with the spirit of the Tender.

37. On 30 October 2003, the Council of Ministers of the Republic of Belarus informed the President that Additional Agreement No. 2 addressed all the shortcomings of the Investment Contract and sought his approval of the Tender results.⁵¹ On 5 November 2003, the President approved the project implementation.⁵²

E. ADDITIONAL AGREEMENT NO. 3

38. On 25 November 2003, the parties concluded Additional Agreement No. 3 to the Investment Contract (“**Additional Agreement No. 3**”)⁵³ specifying the bank account details for the US\$ 1 million financial assistance and agreed that the Claimant’s owner, Cypriot company Manolium Trading Ltd, would make it.
39. On 30 December 2003, Manolium Trading Ltd paid US\$ 1 million to the Ministry of Finance of the Republic of Belarus (the “**Library Payment**”).⁵⁴

F. EVENTS LEADING TO THE AMENDED INVESTMENT CONTRACT (ADDITIONAL AGREEMENT NO. 4)

40. Following Additional Agreement No. 3, between 2004 and 2008, certain events took place as a result of which it became necessary to make material amendments to the Investment Contract.⁵⁵ As described in paragraphs 41 – 51 below, these events were: (1) the incorporation of Manolium-Engineering; (2) the removal of the Building under Reconstruction from the list of projects which the Claimant had agreed to implement under the Investment Contract; (3) the Ministry of Defence not transferring the land

⁵¹ Letter from the Council of Ministers of the Republic of Belarus to the President of the Republic of Belarus dated 30 October 2003, **Exhibit C-46**.

⁵² Resolution of the President of the Republic of Belarus to implementing the project under the Investment Contract dated 5 November 2003, **Exhibit C-45**.

⁵³ Additional Agreement No. 3, **Exhibit C-49**.

⁵⁴ Confirmation of the Library Payment dated 30 December 2003, **Exhibit C-50**.

⁵⁵ Decision of MCEC dated 2 December 2004, **Exhibit C-40**; Letter from the Economy Committee of MCEC to MCEC dated 28 July 2004, **Exhibit C-55**.

on which the Claimant had agreed to design and construct the Motor Transport Base into Minsk municipal ownership; and (4) the formation of Minsktrans.⁵⁶

1. The Claimant incorporated Belarusian subsidiary Manolium-Engineering

41. After the parties executed the Investment Contract and the relevant Additional Agreements, the Claimant – a foreign legal entity registered in the Russian Federation – decided to set up its wholly owned Belarusian subsidiary, IP Manolium-Engineering (“**Manolium-Engineering**”). According to the Claimant, it was “*not obliged to do so*”.⁵⁷ The Claimant alleges that it created Manolium-Engineering because the Claimant, as a foreign entity, was not entitled to “*have on lease or perform design and survey works on land plots on the territory of the Republic of Belarus*”.⁵⁸ This is not correct.
42. Pursuant to Article 43 of Belarusian Land Code of 1999:
- “Legal entities and individuals from Republic of Belarus, persons without citizenship, foreign legal entities and individuals, foreign states and international organizations may act as lessees”* (emphasis added)
43. Accordingly, the Claimant was entitled to have on lease the land plots in Belarus. Similarly, there is nothing under Belarusian law disallowing the Claimant to “*perform design and survey works*”.⁵⁹
44. At the same time, the Claimant conveniently forgets its own exhibit, which explains that at least at that time the Claimant explained to MCEC that it had incorporated Manolium-Engineering because under Russian currency control regulations in force at

⁵⁶ The Investment Contract, Clause 2.2, **Exhibit C-34**.

⁵⁷ Notice, paragraph 110, **CS-1**.

⁵⁸ To support its allegation, the Claimant exhibits Article 12 of the Belarusian Land Code of 2008, which regulates the ownership title of the land plots in Belarus, but not the lease. Pursuant to the Investment Contract however the Claimant was entitled to lease the land plot for construction and use of the Investment Object. Accordingly, Article 12 of the Belarusian Land Code is not applicable. 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.

⁵⁹ See footnote 58 above.

the time, Russian legal entities were required to obtain approval from Russian Central Bank for any transfer of assets from Russia to Belarus.⁶⁰

45. In view of the above, the Respondent respectfully submits that the Claimant incorporated Manolium-Engineering for reasons unrelated to Belarusian law.
46. Manolium-Engineering could not act under the Investment Contract because it was not a party to it. The parties, therefore, agreed to amend the Investment Contract accordingly so that Manolium-Engineering would be authorised to perform the Claimant's contractual obligations.⁶¹

2. It was no longer necessary to reconstruct the Building under Reconstruction

47. As described in paragraph 26.a) above, the Investment Contract provided that the Claimant, in exchange for the right to develop the Investment Object, *inter alia*, had to reconstruct the Building under Reconstruction by no later than 2006.⁶² Such Building under Reconstruction would house the administrative and management personnel of Unitary Enterprise "Minskogorelektrotrans" and a training centre for drivers of trolleybuses and trams.
48. However, as described in paragraph 53 below, following the execution of Additional Agreement No. 3, four Unitary Enterprises – including "Minskogorelektrotrans" – merged to form Minsktrans. As a result of the merger, 286 employees were made redundant and several departments and offices were closed. Thus, some of the administrative and production facilities became vacant. Minsktrans no longer required the Building under Reconstruction as it could use other buildings to accommodate its remaining administrative and management personnel.⁶³ The parties therefore agreed to amend the Investment Contract to release the Claimant from its obligations under Clauses 2.3 and 5.1.

⁶⁰ Letter from MCEC to the President dated 26 May 2006, **Exhibit C-35**.

⁶¹ Letter from the Committee for Economy to MCEC dated 28 July 2004, page 2, **Exhibit C-55**.

⁶² The Investment Contract, Clauses 2.3 and 5.1, **Exhibit C-34**.

⁶³ Letter from the Economy Committee of MCEC to MCEC dated 28 July 2004, **Exhibit C-55**.

49. The Claimant fails to mention that it knew of this change in circumstances on or around 21 January 2004 or earlier, when the parties met to discuss project implementation under the Investment Contract.⁶⁴

3. The Ministry of Defence did not transfer its land into Minsk municipal ownership

50. As described in paragraph 26.b) above, the Claimant, in exchange for the right to develop the Investment Object, *inter alia*, agreed to design and construct the Motor Transport Base on a land plot which MCEC would allocate by no later than 30 March 2004.⁶⁵ This land plot, however, was occupied by ‘Concrete Products Factory No. 214’ controlled by the Ministry of Defence of the Republic of Belarus (the “**Ministry of Defence**”).⁶⁶
51. Contrary to the Claimant’s allegation in paragraph 421 of the Notice, following the execution of the Investment Contract, MCEC took steps to arrange transfer of the land plot for the construction of the Motor Transport Base from the Ministry of Defence into Minsk municipal ownership.⁶⁷
52. The Ministry of Defence was responsible for preparing a draft Presidential order for the transfer of such land plot into municipal ownership. Although MCEC assisted the Ministry of Defence by trying to accelerate the process,⁶⁸ it was unable and had no means to compel the Ministry of Defence to complete the transfer.⁶⁹ As a result, MCEC could not allocate to the Claimant the land plot for the design and construction

⁶⁴ Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 21 January 2004, **Exhibit C-39**.

⁶⁵ The Investment Contract, Clauses 2.2, 5.2 and 7. 2, **Exhibit C-34**; Amended Agreement No. 2, Clause 2.2, **Exhibit C-48**.

⁶⁶ Letter from the Economy Committee of MCEC to MCEC dated 28 July 2004, page 2, **Exhibit C-55**.

⁶⁷ Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 3 December 2003, **Exhibit C-56**; Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 17 December 2003, **Exhibit C-57**; Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 4 February 2004, **Exhibit C-58**; Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 17 March 2004, **Exhibit C-59**; Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 24 June 2004, **Exhibit C-61**.

⁶⁸ Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 17 March 2004, **Exhibit C-59**; Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 24 June 2004, **Exhibit C-61**.

⁶⁹ Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 4 February 2004, **Exhibit C-58**; Letter from the Economy Committee of MCEC to MCEC dated 28 July 2004, page 2, **Exhibit C-55**.

of the Motor Transport Base. It was therefore necessary to amend the Investment Contract accordingly to release the Claimant from an obligation to build the Motor Transport Base on that particular piece of land and to release MCEC from an obligation to design, construct and commission the Motor Transport Base.

4. Reorganization of Minsktrans

53. On 26 November 2003, as a result of changes in the corporate structures of various relevant entities, Unitary Enterprises “Department of Transport and Communication Administration of MCEC”, “Minskgoelektrotrans”, “Minskpassajiravtotrans” and “Minsk Subway” merged to form Minkstrans.⁷⁰ Accordingly, the parties reflected this change in the Investment Contract.⁷¹

5. Approval of the amendments to the Investment Contract

54. In or around October – November 2004, the Economic Committee of MCEC, the Claimant and Manolium-Engineering prepared a draft of the amended Investment Contract to give effect to the changes described in paragraphs 40 – 50 above.⁷²
55. In the absence of express provision in the Tender Documents permitting transfer of the right to implement the investment project to an entity other than the winner of the Tender, any such transfer to an entity other than the Claimant was open to a challenge by other participants in the Tender.⁷³ It was therefore necessary to obtain approval of the draft amendment to the Investment Contract from the relevant state authorities and the President.
56. Manolium-Engineering, could not step into the shoes of the Claimant and perform the Claimant’s obligations under the Investment Contract and Additional Agreements

⁷⁰ Decision of MCEC dated 2 December 2004, **Exhibit C-40**.

⁷¹ Letter from the Economy Committee of MCEC to MCEC dated 28 July 2004, **Exhibit C-55**.

⁷² Letter from Manolium-Engineering to MCEC dated 19 May 2005, page 2, **Exhibit C-52**; Letter from Manolium-Engineering to MCEC dated 21 February 2005, page 2, **Exhibit C-62**.

⁷³ Letter from the Legal Department of MCEC to MCEC dated 3 June 2005, page 2, **Exhibit R-24**. Moreover, the Belarusian SCC and the Council of Ministers of the Republic of Belarus had approved the Tender results (Letter from the State Control Committee of the Republic of Belarus to the President of the Republic of Belarus dated 31 July 2003, **Exhibit C-44**; Letter from the Council of Ministers of the Republic of Belarus to the President of the Republic of Belarus dated 30 October 2003, **Exhibit C-46**) while the President had approved the project implementation (Resolution of the President of the Republic of Belarus to implementing the project under the Investment Contract dated 5 November 2003, **Exhibit C-45**).

Nos. 1 – 3. Accordingly, on 21 February 2005, Manolium-Engineering informed MCEC that it had suspended design works in respect of the Depot until the parties executed the amended Investment Contract.⁷⁴

57. In response MCEC sought to address this situation by seeking a legal opinion from its Legal Department on the steps it was required to take in such circumstances. On 14 June 2005 eleven days after MCEC had received the legal opinion of the MCEC Legal Department, MCEC sought approval from the Belarusian SCC of the amendments to the Investment Contract.⁷⁵ In paragraph 428 of the Notice, the Claimant alleges that “[o]nly after the Claimant approached the assistant to President of the Republic of Belarus [on 24 March 2006], MCEC finally asked the President for assistance in allowing Manolium-Engineering to become the party to the Investment Contract [...]” (emphasis added). This is misleading. MCEC had made the first request for approval of the draft amended Investment Contract to the relevant state authorities [more than a year] before the Claimant approached the President on 24 March 2006.⁷⁶
58. On 26 May 2006, MCEC sent a further letter to the President seeking approval of the following amendments to the Investment Contract:⁷⁷
- a) to add Manolium-Engineering as a party to the Investment Contract;
 - b) once Manolium-Engineering became entitled to exercise its right to construct the Investment Object, to permit Manolium-Engineering to use the land plot for construction of the Investment Object without putting it up for auction first;⁷⁸ and
 - c) to replace the Claimant’s obligation to construct the Communal Facilities with an obligation to construct the Depot and a pull station to supply electricity to the Depot and to a trolleybus line. The Claimant would spend at least

⁷⁴ Letter from Manolium-Engineering to MCEC dated 21 February 2005, page 3, **Exhibit C-62**.

⁷⁵ Letter from MCEC to the State Control Committee of the Republic of Belarus dated 14 June 2005, **Exhibit R-25**.

⁷⁶ Letter from the Claimant to the Assistant to President of the Republic of Belarus dated 24 March 2006, **Exhibit C-63**.

⁷⁷ Letter from MCEC to the President of the Republic of Belarus dated 26 May 2006, **Exhibit C-35**.

⁷⁸ Manolium-Engineering would continue having the obligation to reimburse land users for their losses in accordance with Belarusian law.

USD 15 million on these objects and would no longer have to construct the Motor Transport Base and reconstruct the Building under Reconstruction.

59. In paragraph 427 of the Notice, the Claimant alleges that “*MCEC even intended to sell the land plot for the Investment Object at a public auction in 2006*”. The Claimant however provides no proof to support that except for its own letter.
60. Under the new provisions of Belarusian land law, the right to lease the land plots designated for the construction of buildings in Minsk had to be sold through auctions. Legal entities which had already received construction permits by that time were exempt from this requirement. The Claimant, however, did not qualify for exemption because it would have received the required construction permits for the Investment Object only after it had constructed (or reconstructed) the Communal Facilities.⁷⁹ As a result, the Claimant would have to purchase the right to lease the land plot for the construction of the Investment Object at an auction. MCEC sought to address this issue and asked the President to exempt the Claimant from the application of the new provisions of Belarus land law.⁸⁰ In paragraph 125 of the Notice, the Claimant, however, purposely omits this information, listing only two of the three amendments which MCEC asked the President to approve.
61. Accordingly, not only did MCEC not “*intend [...] to sell the land plot for the Investment Object at a public auction*” but did everything to ensure that the Claimant and Manolium-Engineering would retain the same conditional right to develop the Investment Object as was agreed in the Investment Contract.
62. On 11 July 2006, the President approved the proposed amendments to the Investment Contract.⁸¹

G. THE AMENDED INVESTMENT CONTRACT (ADDITIONAL AGREEMENT NO. 4)

63. Additional Agreement No. 4 to the Investment Contract (the “**Amended Investment Contract**” or “**Additional Agreement No. 4**”) executed on 8 February 2007 was

⁷⁹ Additional Agreement No. 2, Clauses 2.3 and 2.9, **Exhibit C-48**; Letter from MCEC to the President of the Republic of Belarus dated 26 May 2006, pages 2 – 3, **Exhibit C-35**.

⁸⁰ Letter from MCEC to the President of the Republic of Belarus dated 26 May 2006, page 3, **Exhibit C-35**.

⁸¹ Resolution of the President of the Republic of Belarus dated 11 July 2006, **Exhibit C-64**.

necessitated by the changes described in paragraphs 40 – 53 above. It incorporated all previous amendments into a restated version of the Investment Contract and added the Claimant’s Belarusian subsidiary, Manolium-Engineering, as a party.⁸² In the event and as described below the Additional Agreement No. 4 was initiated by the Claimant.

64. Following the President’s approval that the parties may amend the Investment Contract as described in paragraphs 54 – 62 above, MCEC, Minsktrans and the Claimant negotiated the remaining terms of the draft amended Investment Contract. Contrary to the Claimant’s suggestion in paragraph 127 of the Notice, this was not a one-sided process during which “*MCEC and other of its controlled public bodies prepared their own draft additional agreement to be accorded with the Claimant.*”⁸³ As Manolium-Engineering stated in its Statement of Defence filed in the Economic Court of Minsk, the Claimant and Manolium-Engineering initiated a review of the Investment Contract because, according to them, the cost of constructing the Communal Facilities turned out to be more than the US\$15 million stated under the Investment Contract.⁸⁴
65. Under the Amended Investment Contract, the Claimant and Manolium-Engineering, in exchange for the right to develop the Investment Object, *inter alia*, agreed:
- a) to design and construct the Depot;⁸⁵
 - b) to construct a pull station to supply the Depot and a trolleybus line with electricity (the “**Pull Station**”),⁸⁶ and
 - c) to design and construct a section of a road from Gintovta Street to the entry into the Depot with general utilities and a trolleybus line (the “**Road**”)⁸⁷

⁸² Amended Investment Contract, Recitals, **Exhibit C-66**.

⁸³ The Claimant for example fails to mention that the parties executed the amended Investment Contract after the Claimant had reviewed it for 2 months. Letter from the Committee for Economy dated 17 January 2007, **Exhibit C-65**.

⁸⁴ Statement of Defence of Manolium-Engineering in Case No. 399-3/2013 before the Economy Court of Minsk, page 2, **Exhibit R-102**.

⁸⁵ Amended Investment Contract, Clause 2.1, **Exhibit C-66**.

⁸⁶ Amended Investment Contract, Clause 2.2, **Exhibit C-66**.

⁸⁷ Amended Investment Contract, Clause 2.3, **Exhibit C-66**.

(the Depot, the Pull Station and the Road, together – the “**New Communal Facilities**”).

66. 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 Claimant was released from its obligations to design and construct the Motor Transport Base and to reconstruct the Building under Reconstruction.⁸⁸ The Respondent’s position is that under the Amended Investment Contract the Claimant had to complete even fewer objects than it was originally required.
67. The Amended Investment Contract further extended the deadlines. The Claimant and Manolium-Engineering were now required to design, construct and commission (a) the New Communal Facilities - no later than December 2008;⁸⁹ and (b) the Investment Object – by December 2012.⁹⁰
68. The parties also agreed that in certain circumstances the deadlines for designing, constructing and commissioning the New Communal Facilities and the Investment Object could be extended even further, for a reasonable period required by the Claimant and/or Manolium-Engineering to fulfill their obligations under the Amended Investment Contract:
- a) in case of late performance by MCEC or Minsktrans of their obligations under the Amended Investment Contract; or
 - b) if actions (omissions) of Minsk’s authorised municipal entities prevented proper performance of the Amended Investment Contract.⁹¹
69. In addition, the Claimant, *inter alia*, agreed:
- a) to secure ongoing funding for the design and construction of the Investment Object and the New Communal Facilities;⁹²

⁸⁸ The Investment Contract, Clauses 2, 2.2 and 2.3, **Exhibit C-34**.

⁸⁹ Amended Investment Contract, Clause 6.1, **Exhibit C-66**.

⁹⁰ Amended Investment Contract, Clause 6.2, **Exhibit C-66**.

⁹¹ Amended Investment Contract, Clause 6.3, **Exhibit C-66**.

- b) to supervise Manolium-Engineering’s timely performance of its obligations under the Amended Investment Contract, including the obligations with respect to the New Communal Facilities;⁹³
- c) to secure the purchase by Manolium-Engineering of Minsktrans’s property located on the land plot designated for the construction of the Investment Object;⁹⁴
- d) to execute an agreement with MCEC to have on lease the land plot designated for the construction of the Investment Object;⁹⁵ and
- e) to cover all costs in connection with the design and construction of the New Communal Facilities, even if the costs exceeded US\$ 15 million.⁹⁶

70. Under the Investment Contract, Manolium-Engineering, *inter alia*, agreed:

- a) to execute an agreement with Minsktrans for the purchase of a building located at 3 Masherova Prospekt, Minsk and operated by Minsktrans (the “**Building at Masherova**”) within seven days of the date of MCEC’s resolution to sell it;⁹⁷
- b) to pay the contractors, surveyors and suppliers for the work performed on the Investment Object and the New Communal Facilities in accordance with design specification and estimate documentation;⁹⁸
- c) to secure the commissioning of the Investment Object and New Communal Facilities and arrange for the relevant commissioning acts;⁹⁹ and
- d) to transfer the New Communal Facilities into Minsk’s municipal ownership within one month from the date of execution and approval of the

⁹² Amended Investment Contract, Clause 7.1, **Exhibit C-66**.

⁹³ Amended Investment Contract, Clauses 7.2 and 7.7, **Exhibit C-66**.

⁹⁴ Amended Investment Contract, Clause 7.5, **Exhibit C-66**.

⁹⁵ Amended Investment Contract, Clause 7.9, **Exhibit C-66**.

⁹⁶ Amended Investment Contract, Clauses 7.10 and 8.19, **Exhibit C-66**.

⁹⁷ Amended Investment Contract, Clause 8.15, **Exhibit C-66**.

⁹⁸ Amended Investment Contract, Clause 8.7, **Exhibit C-66**.

⁹⁹ Amended Investment Contract, Clause 8.8, **Exhibit C-66**.

commissioning acts or from the date of the state registration of the New Communal Facilities.¹⁰⁰

71. Under the Amended Investment Contract, MCEC, *inter alia*, agreed:
- a) to issue design and construction permits for the Investment Object and New Communal Facilities in the prescribed manner;¹⁰¹
 - b) to allocate Manolium-Engineering with the land plot for construction of the Investment Object provided that:
 - i) Manolium-Engineering had performed its obligations with respect to designing, constructing and transferring the New Communal Facilities into Minsk municipal ownership in the prescribed manner and within the deadlines specified in the Amended Investment Contract;
 - ii) the Claimant had purchased the property located on the land plot designated for the construction of the Investment Object by Manolium-Engineering; and
 - iii) Manolium-Engineering had presented to MCEC approved Design Specifications and Estimate Documentation for the Investment Object.¹⁰²
 - c) to monitor performance of the Amended Investment Contract and assist Manolium-Engineering in designing and constructing the Investment Object and New Communal Facilities.¹⁰³ This obligation was contingent on Manolium-Engineering performing its obligation to transfer the New Communal Facilities to the municipal ownership; and
 - d) to issue a decision to sell the Building at Masherova and to secure the execution of the relevant sale agreement between Minsktrans and Manolium-Engineering within seven days from the date of execution and approval of the

¹⁰⁰ Amended Investment Contract, Clause 8.11, **Exhibit C-66**.

¹⁰¹ Amended Investment Contract, Clause 9.1, **Exhibit C-66**.

¹⁰² Amended Investment Contract, Clause 9.2, **Exhibit C-66**.

¹⁰³ Amended Investment Contract, Clauses 4 and 9.3, **Exhibit C-66**.

commissioning acts or from the date of state registration of the New Communal Facilities.¹⁰⁴

72. Minsktrans, *inter alia*, agreed to:

- a) approve the design specification and estimate documentation for the construction of the New Communal Facilities,¹⁰⁵ and
- b) execute an agreement with Manolium-Engineering for the purchase of the Building at Masherova within seven days of the date of MCEC's resolution to sell it.¹⁰⁶

73. The parties to the Amended Investment Contract agreed that the Claimant would spend at least US\$ 81,698,000 on designing and constructing the Investment Object.¹⁰⁷ As described in paragraph 69.e) above, the parties also agreed that if the costs relating to the New Communal Facilities exceeded US\$15 million the Claimant would bear the additional costs.¹⁰⁸ Accordingly, the total amount of the Claimant's investment under the Amended Investment Contract remained the same as under the Investment Contract (*i.e.* at least US\$ 97,698,000) with a possibility that it could increase.

74. The US\$15 million investment would cover (i) the Claimant's costs of constructing the New Communal Facilities; (ii) the costs of purchasing the Building at Masherova; and (iii) the costs incurred by the Claimant in compensating land users for their losses caused by the seizure and demolition of buildings located on the land plots designated for the construction of the Investment Object and New Communal Facilities.¹⁰⁹

75. Termination provisions remained the same as in the Investment Contract.¹¹⁰

¹⁰⁴ Amended Investment Contract, Clause 9.3.5, **Exhibit C-66**.

¹⁰⁵ Amended Investment Contract, Clause 10.1, **Exhibit C-66**.

¹⁰⁶ Amended Investment Contract, Clause 10.5, **Exhibit C-66**.

¹⁰⁷ Amended Investment Contract, Clause 11, **Exhibit C-66**.

¹⁰⁸ Amended Investment Contract, Clauses 7.10 and 8.19, **Exhibit C-66**.

¹⁰⁹ Amended Investment Contract, Clause 11, **Exhibit C-66**.

¹¹⁰ Amended Investment Contract, Clauses 15 – 16.4, **Exhibit C-66**.

H. ADDITIONAL AGREEMENT NO. 5

76. Additional Agreement No. 5 concerned the extension of deadlines for the construction of the New Communal Facilities. The Claimant blames the Respondent for the delays that led to the execution of the Additional Agreement No. 5. However, as described in paragraphs 77 – 82 below, its story does not add up.
77. As set out in paragraph 67 above, under the Amended Investment Contract, the Claimant agreed to complete the design, construction and commissioning of the New Communal Facilities by the end of December 2008.¹¹¹
78. The Claimant alleges that in 2008 MCEC “*hindered the construction*” of the New Communal Facilities by reassigning Belarusian construction companies working on the Depot as well as suppliers of building materials for the Depot to work on the Minsk-Arena for the Hockey World Cup and other scheduled Minsk facilities instead.¹¹² Manolium-Engineering made the same allegation in its letter to MCEC on 11 September 2008.¹¹³ In that same letter Manolium-Engineering also alleged difficulties in sourcing equipment for the New Communal Facilities. Manolium-Engineering provided no evidence then and the Claimant is not relying on any now to support these unsubstantiated allegations.¹¹⁴
79. Contrary to the impression the Claimant seeks to create, the real cause of the delays in 2008 were the financial difficulties the Claimant was having as a result of the financial crisis in Russia and Belarus.¹¹⁵ The Claimant’s failure to refer to its own and Manolium-Engineering’s correspondence on this issue is telling.¹¹⁶
80. On 14 October 2008, the Claimant wrote to MCEC referring to the “*catastrophic consequences of the financial crisis*” and sought to extend “*the term of the contract*”, meaning the term for commissioning the New Communal Facilities, by another year –

¹¹¹ Amended Investment Contract, Clause 6.1, **Exhibit C-66**.

¹¹² Notice, paragraphs 156(a) and (b), 448(a) and (b), **CS-1**.

¹¹³ Letter from Manolium-Engineering to MCEC dated 11 September 2008, **Exhibit C-71**.

¹¹⁴ Letter from Manolium-Engineering to MCEC dated 11 September 2008, **Exhibit C-71**.

¹¹⁵ The global financial crisis caused severe economic recession in Russia and Belarus in 2008.

¹¹⁶ Letter from the Claimant to MCEC dated 22 September 2008, **Exhibit R-38**; Letter from the Claimant to MCEC dated 14 October 2008, **Exhibit R-40**; Letter from Manolium-Engineering to MCEC dated 19 November 2008, **Exhibit R-41**; Letter from the Claimant to MCEC dated 1 December 2008, **Exhibit R-42**.

until the end of 2009.¹¹⁷ The Claimant, however, promised that it would commission the Road and the Pull Station by the end of 2008, as agreed under the Amended Investment Contract.¹¹⁸ However, on 1 December 2008, just seven weeks later, the Claimant wrote that it planned to commission the Road in the second quarter of 2009.¹¹⁹ In that letter, the Claimant once again asked that the deadlines for the New Communal Facilities should be postponed under an additional agreement until the end of 2009. The Claimant explained that the “*financial and economic crisis in Russia and other countries has significantly impaired OOO Manolium-Processing’s capability to finance the construction of the New Communal Facilities in a timely manner.*”¹²⁰

81. Manolium-Engineering was also struggling to pay what it owed to its contractors because of the same financial difficulties. On 10 December 2008, Mr Dolgov agreed at a meeting with MCEC to ensure that all debts owed to contractors would be repayed by 20 December 2008.¹²¹
82. Following several meetings and correspondence regarding Manolium-Engineering’s failure to commission the New Communal Facilities by December 2008,¹²² MCEC agreed to Manolium-Engineering’s request to extend the deadline. It was agreed, in particular, that Manolium-Engineering would ensure that the Pull Station would be commissioned by 1 January 2009¹²³ and that the parties would enter into an additional agreement to the Amended Investment Contract postponing the deadline for the

¹¹⁷ Letter from the Claimant to MCEC dated 14 October 2008, **Exhibit R-40**.

¹¹⁸ Letter from the Claimant to MCEC dated 14 October 2008, **Exhibit R-40**.

¹¹⁹ Letter from the Claimant to MCEC dated 1 December 2008, attaching draft Amended Agreement No. 5 and a schedule for the final phase of the construction of the Depot dated 24 November 2008, **Exhibit R-42**.

¹²⁰ Letter from the Claimant to MCEC dated 1 December 2008, attaching draft Amended Agreement No. 5 and a schedule for the final phase of the construction of the Depot dated 24 November 2008, **Exhibit R-42**.

¹²¹ Minutes of the meeting dated 19 December 2008 which was attended by MCEC, Minsktrans and Manolium-Engineering on 10 December 2008, paragraph 6, **Exhibit R-43**.

¹²² Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 7 October 2008, **Exhibit R-39**; Letter from the Claimant to MCEC dated 14 October 2008, **Exhibit R-40**; Letter from the Claimant to MCEC dated 1 December 2008, attaching draft Amended Agreement No. 5 and a schedule for the final phase of the construction of the Depot dated 24 November 2008, **Exhibit R-42**, Minutes of the meeting dated 19 December 2008 which was attended by MCEC, Minsktrans and Manolium-Engineering on 10 December 2008, **Exhibit R-43**.

¹²³ Minutes of the meeting dated 19 December 2008 which was attended by MCEC, Minsktrans and Manolium-Engineering on 10 December 2008, paragraph 4, **Exhibit R-43**.

design, construction and commissioning of the New Communal Facilities to no later than 3 July 2009.¹²⁴

83. On 16 December 2008, MCEC, Minsktrans, Manolium-Engineering and the Claimant entered into an additional agreement (“**Additional Agreement No. 5**”) agreeing to extend the deadline for the design, construction and commissioning of the New Communal Facilities to no later than 3 July 2009.¹²⁵ Contrary to what the Claimant suggests,¹²⁶ the Amended Investment Contract makes no provision for an extension of time for the implementation of the Investment Object in circumstances where the Claimant had delayed constructing the New Communal Facilities.

I. ADDITIONAL AGREEMENT NO. 6

84. Additional Agreement No. 6 (as defined in paragraph 98 below) concerned another extension of time for the construction of the New Communal Facilities.¹²⁷ The Claimant asserts that it was the Respondent’s fault that another extension was required, however, these assertions are untrue, as set out in paragraphs 85 – 97 below.
85. Almost immediately after the Additional Agreement No. 5 was executed, it became apparent that Manolium-Engineering was unable to fulfill its promises given on 10 December 2008 as described in paragraphs 81 – 82 above. On 31 December 2008, Mr Dolgov wrote to MCEC requesting to postpone the deadline for commissioning the Pull Station from 1 January 2009 (as had been agreed on 10 December 2008) to 1 March 2009.¹²⁸
86. On 27 March 2009, Mr Dolgov wrote to the Economic Committee of MCEC explaining that it was still having difficulty paying its contractors because of the financial crisis and asked until July 2009 to commission the Pull Station. Mr Dolgov

¹²⁴ Minutes of the meeting dated 19 December 2008 which was attended by MCEC, Minsktrans and Manolium-Engineering on 10 December 2008, paragraph 2, **Exhibit R-43**.

¹²⁵ Additional Agreement No. 5, Clause 1, **Exhibit C-72**.

¹²⁶ Notice, paragraphs 442 – 443, **CS-1**.

¹²⁷ Additional Agreement No. 6, **Exhibit C-76**.

¹²⁸ Letter from Manolium-Engineering to MCEC dated 31 December 2008, attaching a schedule for the final phase of the construction of the Depot dated 30 December 2008, **Exhibit R-44**.

also promised that Manolium-Engineering would endeavor to pay all outstanding debts to contractors in April – May 2009.¹²⁹

87. On 15 April 2009, Manolium-Engineering wrote to the Economic Committee of MCEC stating that it was unable to pay land taxes in respect of the land plots for the New Communal Facilities because of the financial crisis. In that letter Manolium-Engineering assured the Economic Committee of MCEC that it would pay the land taxes as soon as it has the money.¹³⁰
88. During a meeting held on 10 June 2009, a representative of Manolium-Engineering, Mr [REDACTED], assured MCEC that the construction works in relation to the Pull Station would be finished by 1 July 2009 “*subject to delay-free funding by the investor*”¹³¹. Notably, no other condition was mentioned.
89. However, on 25 June 2009, at a meeting with MCEC, Mr Dolgov again referred to the financial difficulties due to the financial crisis, promised to commission the Pull Station – now by 31 July 2009 – and requested an extension until the end of 2009 to design and construct the New Communal Facilities.¹³²
90. On 4 August 2009, after Manolium-Engineering missed the deadline of 3 July 2009 set by the Additional Agreement No. 5, another meeting was held, involving, *inter alia*, representatives of MCEC, Minsktrans and Manolium-Engineering. Among other things, it was resolved to postpone the deadline for the commissioning of the Pull Station and the Road to 1 October 2009. Subject to Manolium-Engineering’s compliance with this deadline, it was resolved to enter into another additional agreement to the Amended Investment Contract postponing the deadline for the commissioning of the New Communal Facilities to 10 May 2010.¹³³ However, Manolium-Engineering eventually failed to commission the Pull Station and the Road by 1 October 2009 so the parties did not enter into a new additional agreement in 2009.

¹²⁹ Letter from Manolium-Engineering to the Economic Committee of MCEC dated 27 March 2009, **Exhibit R-47**.

¹³⁰ Letter from Manolium-Engineering to MCEC dated 15 April 2009, **Exhibit R-48**.

¹³¹ Minutes of the meeting held on 10 June 2009, **Exhibit R-49**.

¹³² Minutes of the meeting held on 25 June 2009, **Exhibit R-50**.

¹³³ Minutes of the meeting held on 4 August 2009, **Exhibit R-52**.

91. On 20 April 2010, Manolium-Engineering wrote to Gosstroy:
- “due to temporary difficulties with funding the construction, caused by the financial and economic crisis in the Russian Federation, IP Manolium-Engineering is forced to postpone the deadline for finishing the construction of the [Depot] to the year 2010”.*¹³⁴
92. On 26 May 2010, Manolium-Engineering wrote to MCEC referring to *“unforeseen circumstances caused by the financial and economic crisis in the Russian Federation”* and sought to extend the permits to the land plots for construction of the Depot until 1 July 2011.¹³⁵
93. The Claimant alleges that MCEC *“hindered the construction of the New Communal Facilities”*¹³⁶ in 2010 by diverting the general contractor and other contractors working on the New Communal Facilities to perform works on priority amenities Minsk until September – October 2010.¹³⁷ According to the Claimant, this *“rendered the completion of the Claimant's project until 1 August 2010 almost impossible”* and *“[a]s a result, on 6 September 2010, Manolium-Engineering contacted MCEC to extend the period of land plots' temporary use for construction of the New Communal Facilities until 1 July 2011”*.¹³⁸
94. This is misleading. First, contrary to the Claimant's allegations, the first time Manolium-Engineering sought to extend the land plot permits until 1 July 2011 was on 26 May 2010, as set out in paragraph 92 above. The only reason Manolium-Engineering did so, as follows from its letter dated 26 May 2010, was the financial crisis.¹³⁹ Accordingly, already in late May 2010, Manolium-Engineering was aware that it would be unable to finish the construction of the New Communal Facilities before July 2011 because of financial difficulties. References in its letter of 6 September 2010¹⁴⁰ to the alleged relocation of contractors as the reason for

¹³⁴ Letter from Manolium-Engineering to Gosstroy dated 20 April 2010, **Exhibit R-54**.

¹³⁵ Letter from Manolium-Engineering to MCEC dated 26 May 2010, **Exhibit R-55**.

¹³⁶ Notice, paragraph 448, **CS-1**.

¹³⁷ Notice, paragraphs 160, 448, 450 – 451, **CS-1**. The Claimant has not explained how MCEC could have “relocated” or “dismissed” the employees contractually employed by Manolium-Engineering.

¹³⁸ Notice, paragraphs 160 – 161, **CS-1**.

¹³⁹ Letter from Manolium-Engineering to MCEC dated 26 May 2010, **Exhibit R-55**.

¹⁴⁰ Letter from Manolium-Engineering to MCEC dated 6 September 2010, **Exhibit C-74**.

Manolium-Engineering's failure to perform its obligations by 1 August 2010, are misplaced and factitious.

95. Second, the Claimant does not provide any evidence to support its allegation that MCEC “dismiss[ed] the [...] contractors that performed the construction of the New Communal Facilities and [relocated] them”.¹⁴¹ As far as the Respondent is aware, no such decision was made by MCEC. Accordingly, the actual reason for Manolium-Engineering's failure to perform its obligations by August 2010 was lack of funding.
96. By 1 August 2010, only the Pull Station was commissioned.¹⁴² The construction works with respect to the other New Communal Facilities, however, were stalled and there was no clarity whatsoever as to when the works could and would be finished.¹⁴³ Accordingly, it became necessary to review again the parties' agreement concerning the deadlines for construction.
97. As Mr Akhramenko explains in his witness statement, MCEC was in principle prepared to enter into a new amendment to the Amended Investment Contract to postpone the deadline for the commissioning of the New Communal Facilities to 1 July 2011.¹⁴⁴ However, in the absence of any assurances that Manolium-Engineering was capable of complying with the extended deadline this time, MCEC was looking to increase Manolium-Engineering and the Claimant's contractual liability for further delays.¹⁴⁵
98. On 20 April 2011, the parties made a final amendment to the Amended Investment Contract (“**Additional Agreement No. 6**”).¹⁴⁶ The final date for the construction and commissioning of the New Communal Facilities was set for 1 July 2011 (the “**Final Commissioning Date**”).¹⁴⁷ The Claimant and Manolium-Engineering also agreed to pay penalties in case of further delays.¹⁴⁸ The Claimant never requested to extend the

¹⁴¹ Notice, paragraph 160, **CS-1**.

¹⁴² Pull Station commissioning act dated 30 July 2010, **Exhibit C-100**.

¹⁴³ Letter of Minsktrans to MCEC dated 8 September 2010, **Exhibit R-56**.

¹⁴⁴ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 27, **RWS-2**.

¹⁴⁵ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 23 – 24, 28, **RWS-2**.

¹⁴⁶ Additional Agreement No. 6, **Exhibit C-76**.

¹⁴⁷ Additional Agreement No. 6, Clause 1, **Exhibit C-76**.

¹⁴⁸ Additional Agreement No. 6, Clause 2, **Exhibit C-76**.

deadline for implementation of the Investment Object at this time,¹⁴⁹ because it did not have the right to do so under the Amended Investment Contract.

J. DESIGN AND CONSTRUCTION OF THE NEW COMMUNAL FACILITIES AND DESIGN OF THE INVESTMENT OBJECT

99. Pursuant to the Amended Investment Contract, Manolium-Engineering was required to design, construct and commission all of the New Communal Facilities by no later than December 2008.¹⁵⁰ This deadline was subsequently postponed to 3 July 2009¹⁵¹ and 1 July 2011.¹⁵² Manolium-Engineering was also required to design, construct and commission the Investment Object by no later than December 2012.¹⁵³

1. General overview of the regulatory requirements under Belarusian law

100. The Claimant appears to suggest that after executing the Amended Investment Contract, Belarusian public bodies “*rendered [it] impossible*” to design and construct the New Communal Facilities and the Investment Object.¹⁵⁴ The Claimant seeks to give an impression that there were numerous delays by Belarusian public bodies which protracted the construction. This is incorrect.

101. The Claimant does not address the regulatory requirements for construction under Belarusian law which applied at all relevant times. Accordingly, in order to put the Claimant’s complaints into context and provide the Tribunal with relevant legislative framework within which a developer is required to operate when undertaking construction projects in Minsk, it is necessary to give an overview of the key steps Manolium-Engineering was required to take:

a) Land plot location selection act. In order to draw approximate boundaries of a land plot and to guarantee that the land plot is not assigned to anyone else whilst a developer prepares a set of documents containing design

¹⁴⁹ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 21, **RWS-2**.

¹⁵⁰ Amended Investment Contract, Clause 6.1, **Exhibit C-66**.

¹⁵¹ Additional Agreement No. 5, Clause 1, **Exhibit C-72**.

¹⁵² Additional Agreement No. 6, Clause 1, **Exhibit C-76**.

¹⁵³ Amended Investment Contract, Clauses 1 and 6.2, **Exhibit C-66**.

¹⁵⁴ Notice, paragraph 418, **CS-1**.

specifications and estimate for the construction (the “**Design Specification and Estimate Documentation**”), MCEC approves a document called “land plot location selection act”. Since 2007, the land plot location selection act, *inter alia*, serves as permission to develop the Design Specification and Estimate Documentation. Prior to 2007, MCEC would issue a separate decision (sometimes incorporated in its decision to approve the land plot location selection act) permitting the developer to prepare the Design Specification and Estimate Documentation;

- b) Design Specification and Estimate Documentation. The developer must prepare and submit for approval to MCEC Architecture and City Planning Committee (the “**Architecture Committee**”) the Design Specification and Estimate Documentation within the timeframe set out in the land plot location selection act. This timeframe may not be longer than two years.

Failure to submit the Design Specification and Estimate Documentation for Architecture Committee’s approval within the prescribed timeframe, will lead to loss of permission to develop the Design Specification and Estimate Documentation;

Following approval of the Design Specification and Estimate Documentation by the Architecture Committee, the developer is required to obtain an expert opinion confirming that the projected construction is safe and in line with statutory technical requirements (“**Expert Approval of Design Specifications and Estimate Documentation**”). Only then can the developer internally approve Design Specification and Estimate Documentation.

- c) Permit to the land plot and construction permit. After the steps described in (a) and (b) above the developer is required to obtain the permit to the land plot and the construction permit to commence construction.
- i) permit to the land plot. The developer must engage a land surveyor to prepare the detailed draft land plot allocation plan which is then submitted to MCEC together with a draft resolution granting the permit

to the land plot. Once MCEC grants the permit to the land plot, the developer must register its rights in the real estate register;

- ii) construction permit. The developer applies to the Inspectorate of the Department of Supervision over Construction for Minsk (“Gosstroy”) supported by Expert Approval of Design Specifications and Estimate Documentation and documents, confirming the developer’s ability and intention to undertake construction within a particular period of time. Gosstroy reviews the documents (taking into account all relevant circumstances such as the various deadlines set out in agreements between the developer and its contractors) and grants a construction permit.

- d) Commissioning. Once the construction is fully completed, the developer must:
 - i) set up a committee to commission the real estate object;
 - ii) obtain opinions of the relevant state entities;
 - iii) submit a list of documents necessary for the committee to take a decision on whether to commission the object; and
 - iv) obtain the commissioning act signed by all members of the committee.

- e) Registration of a newly built property. After the property is commissioned, the developer must apply for registration of the property and the developer’s title in the real estate register. As a matter of Belarusian law, the newly built property is deemed to come into existence from the date of its registration in the real estate register.

102. Belarusian state organs are not empowered to issue permits, licenses and approvals of their own volition without considering and assessing under Belarusian law an application submitted by an applicant and supported by all the required documentation.

2. Design and Construction of the Depot

103. It is not in issue between the parties that Manolium-Engineering has never commissioned the Depot.
104. Contrary to the Claimant's allegations,¹⁵⁵ however, the Respondent submits that failure to complete the Depot was due to the Claimant and Manolium-Engineering's own fault as explained below.

(a) Land plot location selection act for the Depot

105. On 15 July 2004, MCEC approved the land plot location selection act for the construction of the Depot and designated Manolium-Engineering as a developer for the purpose of constructing the Depot.¹⁵⁶ The Claimant alleges that the relevant MCEC's resolution "*contradicted the terms and conditions of the Investment Contract*", because it "*entailed making the land plot available to Minsktrans, rather than to the Claimant*".¹⁵⁷ This is misleading, since the Claimant (rather than its subsidiary Manolium-Engineering) has never applied to MCEC for the allocation of the land plot.

(b) Design Specification and Estimate Documentation for the Depot

106. The Claimant alleges that "*Belarusian authorities refused to issue a permit to [design¹⁵⁸] the Depot to Manolium-Engineering*", because at the time Manolium-Engineering was not a party to the Investment Contract.¹⁵⁹ This is plainly wrong and misleading. MCEC expressly permitted Manolium-Engineering to prepare the Design Specification and Estimate Documentation for the Depot in the same decision MCEC approved the land plot allocation selection act for Depot on 15 July 2004,

¹⁵⁵ Notice, paragraph 164, CS-1.

¹⁵⁶ Decision of MCEC dated 15 July 2004, **Exhibit C-53**

¹⁵⁷ Notice, paragraph 423, CS-1.

¹⁵⁸ It is not clear, to which permit the Claimant refers. Russian version of the Notice makes a reference to "*permit to design*" (i.e. permit to prepare Design Specification and Estimate Documentation for) the Depot. In the English translation of the Notice the Claimant refers to "*permit to construct*", which may be construed as the construction permit for the Depot. The Respondent understands that in paragraph 117 of the Notice the Claimant meant to refer to the permit to prepare Design Specification and Estimate Documentation for the Depot. In any event, however, as explained in 118 – 139 below, the Respondent submits that the issuance of the construction permits did not result in delays in construction of the Depot.

¹⁵⁹ Notice, paragraph 117, CS-1.

approximately 2.5 years before Manolium-Engineering became a party to the Amended Investment Contract.¹⁶⁰

107. On the Claimant's own facts, on 20 March 2007, almost three years after MCEC issued the permit, Manolium-Engineering prepared the Design Specification and Estimate Documentation for the Depot.¹⁶¹

(c) **Permit to the land plots for construction of the Depot**

(i) Issuance of the permit to the land plots for construction of the Depot

108. The Claimant alleges¹⁶² that MCEC gave the permit to the land plots for construction of the Depot “only” two months after Manolium-Engineering had prepared the relevant Design Specification and Estimate Documentation for the Depot on 20 March 2007.¹⁶³ This is wrong and misleading.
109. As explained in 101.c)i) above, under Belarusian law MCEC could issue the permit to the land plots only after MCEC received the land plot allocation plan together with the draft decision granting the permit to the land plot. The date on which Manolium-Engineering prepared the Design Specification and Estimate Documentation for the Depot is irrelevant.
110. On 27 March 2007, MCEC received the land plot allocation plan for the Depot.¹⁶⁴
111. On 24 May 2007, less than two months after receiving all the necessary documents, MCEC issued to Manolium-Engineering the permit to the land plots, valid until 1 August 2009. The permit concerned the land with a total area of 8.1407 ha for

¹⁶⁰ Decision of MCEC dated 15 July 2004, **Exhibit C-53**, which expressly states: “[t]o permit [Manolium-Engineering] to act as an employer for designing the [Depot] and perform design and survey works on the land plot”. Notably, in the Order of Manolium-Engineering dated 20 March 2007 approving the Design Specification and Estimate Documentation for the Depot, Manolium-Engineering refers to MCEC’s decision of 15 July 2004 as to the “decision [...] permitting” to prepare the Design Specification and Estimate Documentation for the Depot, **Exhibit C-67**.

¹⁶¹ Notice, paragraph 151, **CS-1**; Order of Manolium-Engineering dated 20 March 2007, **Exhibit C-67**.

¹⁶² Notice, paragraphs 151 – 152, **CS-1**.

¹⁶³ Order of Manolium-Engineering No. 1-C dated 20 March 2007, **Exhibit C-67**.

¹⁶⁴ Cover page of the land plot case file for the Depot, **Exhibit R-28**.

constructing the Depot, including the land plots 7.1623 ha, 0.0438 ha and 0.9346 ha each.¹⁶⁵

(ii) Registration of the right to use the land plots for construction of the Depot in the real estate register

112. On 29 June 2007, within days after Manolium-Engineering's applications for registration of its right to use the land plots for constructing the Depot,¹⁶⁶ the Republican Unitary Enterprise Minsk City Agency for State Registration and Land Cadastre (the "**Registration and Cadastre Agency**") registered the right of temporary use in the name of Manolium-Engineering.¹⁶⁷

(iii) Extensions and expiration of the permit to the land plots for the construction of the Depot

113. MCEC extended the permit to the land plots for the construction of the Depot several times, on applications by Manolium-Engineering.

114. It is not in issue between the parties that the permit to the land plots the construction of the Depot was never extended beyond the Final Commissioning Date. Under Belarusian law, the right to use the land plot expires at the same time as the relevant permit. Accordingly, after that date Manolium-Engineering continued to occupy the land plots without any legal basis.

115. The Claimant alleges that Manolium-Engineering made "*numerous requests*"¹⁶⁸ to extend the permits to the land plots for the construction of the New Communal Facilities. To support this allegation the Claimant refers to the letter from Manolium-Engineering to MCEC dated 24 November 2011.¹⁶⁹ In that letter, however, Manolium-Engineering did not seek an extension of the permit to the land plot for the construction of the New Communal Facilities. Rather, Manolium-Engineering was

¹⁶⁵ Decision of MCEC dated 24 May 2007, **Exhibit C-68**.

¹⁶⁶ Manolium-Engineering applied on 25 June 2007, as stated in the certificate of registration of the right of temporary use granted to Manolium-Engineering in respect of the land plots for construction of the Depot in Uruchye-6 dated 29 June 2007, **Exhibit C-69**.

¹⁶⁷ Certificate of registration of the right of temporary use granted to Manolium-Engineering in respect of the land plots for construction of the Depot dated 29 June 2007, **Exhibit C-69**.

¹⁶⁸ Notice, paragraph 242, **CS-1**.

¹⁶⁹ Letter from Manolium-Engineering to MCEC dated 24 November 2011, **Exhibit C-122**

asking MCEC to grant a permit to the plot on which the Investment Object would be built in due course. This is a different land plot located in another part of Minsk.

116. When the Respondent asked the Claimant to provide correct exhibits in these proceedings,¹⁷⁰ the Claimant replied that it was going to “*make corrections to either paragraph [242] or footnote[s] [208 and 209] of the Notice [...] in its next submission on the merits*”.¹⁷¹

117. Accordingly, as matters stand at the date of this submission, the Claimant does not appear to assert that it had applied to extend the permits to the land plots for the construction of the New Communal Facilities. Under Belarusian law, without a formal application supported by the requisite documentation by Manolium-Engineering the authorities were not in a position to extend the permits for construction of the New Communal Facilities on their own initiative.

(d) Construction permit for the Depot

(i) Issuance of construction permit for the Depot

118. The Claimant alleges that Manolium-Engineering obtained the construction permit for the Depot only on 15 October 2007¹⁷² and that this was one of the reasons why Manolium-Engineering “*was unable to hand over the [Depot] until 1 July 2011*”.¹⁷³ This is wrong and misleading.

119. The Claimant fails to mention that Manolium-Engineering had the right to start preparing the construction site from 16 July 2007.

120. On 16 July 2007, Manolium-Engineering applied to Gosstroy for a construction permit for the Depot¹⁷⁴ for a period until September 2008.

¹⁷⁰ Letters from White & Case to Baker McKenzie dated 23 and 25 July 2018, **Exhibit R-155** and **Exhibit R-157**.

¹⁷¹ Letters from Baker McKenzie to White & Case dated 24 and 27 July 2018 **Exhibits R-156** and **Exhibit R-158**.

¹⁷² Notice, paragraphs 154 and 431(a), **CS-1**.

¹⁷³ Notice, paragraph 164, **CS-1**.

¹⁷⁴ Letter from Manolium-Engineering to Gosstroy dated 16 July 2007, **Exhibit R-30**.

121. On the same day, Gosstroy:
- a) issued the construction permit allowing Manolium-Engineering to start preparing the construction site;¹⁷⁵ and
 - b) explained to Manolium-Engineering that under Belarusian law Gosstroy could not issue the construction permit for other works until Manolium-Engineering provided a copy of the agreement between Manolium-Engineering and its general contractor and rectified the shortcomings of the Design Specification and Estimate Documentation identified in the Expert Approval of the Design Specification and Estimate Documentation.¹⁷⁶
122. Until early October 2007 Manolium-Engineering had been preparing the construction site.¹⁷⁷ Accordingly, Manolium-Engineering's failure to obtain the construction permit for all the necessary works for the Depot has not affected Manolium-Engineering's ability to comply with the contractual deadlines. In any event, the Respondent submits that Manolium-Engineering failed to obtain the construction permit earlier through a fault of its own.
123. On 4 October 2007, almost three months after the first attempt, Manolium-Engineering re-applied to Gosstroy for the construction permit.¹⁷⁸ This time, whilst Manolium-Engineering did provide the agreements with its subcontractors, the shortcomings of the projected buildings identified in the Expert Approval of the Design Specification and Estimate Documentation remained unrectified. Instead, Manolium-Engineering assured Gosstroy that it would address the expert's comments by 30 January 2008 at latest.

¹⁷⁵ Construction permit for preparing the construction site dated 16 July 2007, **Exhibit R-32**.

¹⁷⁶ Letter from Gosstroy to Manolium-Engineering dated 16 July 2007, **Exhibit R-31**.

¹⁷⁷ Development management plan for the Depot dated 2005, **Exhibit R-23**; Confirmation that preparatory works are completed and the object is ready for construction dated 5 October 2007, **Exhibit R-34**.

¹⁷⁸ Letter from Manolium-Engineering to Gosstroy dated 4 October 2007, **Exhibit R-33**

124. On the basis of these assurances on 15 October 2007, Gosstroy issued the construction permit for the Depot permitting Manolium-Engineering to undertake construction until 30 January 2008.¹⁷⁹
125. Accordingly, the Claimant’s allegation that Gosstroy “*failed to discharge [its] obligations*” under the Amended Investment Contract because it “*issued a construction permit [...] only for three month*”¹⁸⁰ is wrong and misleading.
126. As explained in 101.c)ii) above, when issuing the construction permit, Gosstroy reviews the documents submitted by the applicant to ensure that the applicant intends and is able to undertake the construction during the period requested. Where the applicant’s documents only confirm that it intends and is able to continue the construction for shorter period than that requested, Gosstroy issues the permit for that shorter period only.
127. The Claimant does not provide any evidence that it has: (a) requested the construction permit; or (b) provided all the documents necessary to obtain the construction permit valid until December 2008.
128. Gosstroy had no obligation under the Amended Investment Contract since, *inter alia*, it was not a party to the Amended Investment Contract. In any event, the Respondent respectfully submits that in view of the documents and information Manolium-Engineering presented, and given the indulgence already afforded to Manolium-Engineering (despite its continuing failure to address the shortcomings identified in the Expert Approval of Design Specification and Estimate Documentation), it was only reasonable for Gosstroy not to issue the Construction Permit for a longer period.

(ii) Extensions and expiration of the construction permit for the Depot

129. The Claimant alleges that Manolium-Engineering had “*to repeatedly contact*” Gosstroy “*requesting to issue new [construction] permits that Gosstroy each time granted for various short periods*”.¹⁸¹ This, again, is wrong and misleading.

¹⁷⁹ Construction permit issued by Gosstroy for constructing the Depot dated 15 October 2007, **Exhibit C-70**.

¹⁸⁰ Notice, paragraph 431(b), CS-1.

¹⁸¹ Notice, paragraph 155, CS-1.

130. The Respondent submits that the numerous applications made by Manolium-Engineering to Gosstroy were the result of Manolium-Engineering's own failures or circumstances, for which Manolium-Engineering and the Claimant were responsible. Notably, Manolium-Engineering did not challenge the duration of the construction permit issued by Gosstroy with the competent authorities or the court, as it was entitled to do.
131. On 30 December 2011 the latest construction permit for the Depot expired.¹⁸²
132. On 9 January 2012, Manolium-Engineering informed Gosstroy that due to a "temporary lack of funds" Manolium-Engineering had suspended the construction of the Depot until 1 April 2012.¹⁸³
133. On 13 April 2012, Manolium-Engineering applied to Gosstroy seeking a construction permit for the Depot.¹⁸⁴ By that time the approved statutory deadlines for construction set out in the Design Specification and Estimate Documentation for the Depot had expired.¹⁸⁵ Under Belarusian law as in effect from 1 January 2012, Manolium-Engineering was required to provide to Gosstroy, *inter alia*: (i) an updated Expert Approval of the Design Specification and Estimate Documentation for the Depot; (ii) consent from MCEC to extend the statutory deadlines for construction; and (iii) agreements with its subcontractors, where applicable and to the extent not provided previously.
134. Manolium-Engineering failed to provide these documents with its application of 13 April 2012. Accordingly, Gosstroy had no choice but to refuse to issue the construction permit.¹⁸⁶
135. On 25 April 2012, Manolium-Engineering sent to Gosstroy another application, this time attaching the missing agreements with subcontractors and a confirmation that the Expert Approval of the Design Specification and Estimate Documentation for the

¹⁸² Construction permit for Depot dated 3 October 2011, **Exhibit R-71**.

¹⁸³ Letter from Manolium-Engineering to Gosstroy dated 9 January 2012, **Exhibit R-75**.

¹⁸⁴ Letter from Manolium-Engineering to Gosstroy dated 13 April 2012, **Exhibit R-81**.

¹⁸⁵ Development management plan for the Depot dated 2005, **Exhibit R-23**.

¹⁸⁶ Letter from Gosstroy to Manolium-Engineering dated 21 April 2012, **Exhibit C-127**.

Depot has been updated.¹⁸⁷ Yet, the consent from MCEC to extend the statutory deadlines for construction was still missing.

136. On 22 May 2012, only almost a month after Manolium-Engineering's second application to Gosstroy, MCEC received a letter from Manolium-Engineering, in which it was asking to issue a formal consent necessary for obtaining the construction permit.¹⁸⁸
137. Belarusian law provides for a particular procedure for issuing such permits.¹⁸⁹ Under the relevant rules, Manolium-Engineering should have provided a number of documents to enable MCEC to take an informed decision on the application, which Manolium-Engineering failed to do. This, expectedly, resulted in refusal of Manolium-Engineering's application.¹⁹⁰
138. Accordingly, Mr Dolgov's allegation that "*MCEC's representative Zhanna Eduardovna Birich, orally promised to extend the construction permit but the MCEC refused to issue any permits*"¹⁹¹ is misleading.
139. Manolium-Engineering should have applied for and obtained all the documents required under Belarusian law before applying for the permit. Mr Dolgov, having been involved in construction business in Belarus for as many year as he says he was, could not have understood otherwise.

(e) Commissioning of the Depot

140. On the one hand, the Claimant concedes that the construction of the Depot was not completed by 1 July 2011 – the deadline for completing the works on design, construction and commissioning of all of the New Communal Facilities agreed under Additional Agreement No. 6.¹⁹²

¹⁸⁷ Letter from Manolium-Engineering to Gosstroy dated 25 April 2012, **Exhibit R-84**.

¹⁸⁸ Letter from Manolium-Engineering to MCEC not dated (received on 22 May 2012), **Exhibit R-88**.

¹⁸⁹ Resolution of the Council of Ministers of Republic of Belarus dated 15 September 1998 No. 1450 and dated 17 February 2012 No. 156.

¹⁹⁰ Letter from MCEC to Manolium-Engineering dated 5 June 2012, **Exhibit R-90**.

¹⁹¹ Mr Dolgov's First Witness Statement, paragraph 55, **CWS-1**.

¹⁹² Notice, paragraphs 164 – 165, **CS-1**.

141. On the other hand, the Claimant alleges that “[n]otwithstanding the readiness of the Depot for operation in full”, MCEC and Minsktrans refused to accept the Depot into municipal ownership.
142. The Respondent’s position is that the Depot was not 100% ready and has never reached the stage for it to be commissioned. As Mr Dolgov himself explained to the press in 2012, around US\$5 – 6 million were still needed to complete the Depot.¹⁹³ Even in the Claimant’s letter to MCEC dated 19 March 2013, Mr Dolgov states that the “*technical availability*” of the Depot is 90%.¹⁹⁴
143. The Claimant alleges that Minsktrans “*accepted [...] two of the three buildings constituting the Depot*”, because on 14 November 2011, Manolium-Engineering and Minsktrans entered into an agreement for the gratuitous use of the administrative and accommodation block and the checkpoint.¹⁹⁵ This is misleading.
144. The Respondent submits that purpose of the gratuitous use agreements was to support Manolium-Engineering. While individual buildings of the Depot had no material use on their own, Minsktrans assumed obligations, *inter alia*, to maintain and operate those facilities until their transfer into the municipal ownership of Minsk, which resulted in additional expenses for Minsktrans.
145. The Respondent submits that MCEC was not required under Clause 9.3.9 of the Amended Investment Contract to accept the Depot into municipal ownership because the Depot (i) was never commissioned;¹⁹⁶ and (ii) has never become ready to be commissioned.
146. Further, Manolium-Engineering breached its obligation under the Amended Investment Contract and Additional Agreement No. 6 to design, construct and commission the Depot by 1 July 2011 due to its own fault, entitling MCEC to terminate the Amended Investment Contract pursuant to Clause 16.2.1.

¹⁹³ Website of news portal of Belarus ‘Naviny.by’, “*Minsk’s authorities are ready to scam the Russian investor*” dated 15 April 2012 // Available at: https://naviny.by/rubrics/economic/2012/04/15/ic_articles_113_177531, **Exhibit R-82**.

¹⁹⁴ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

¹⁹⁵ Gratuitous use agreement for the Depot, **Exhibit C – 82**.

¹⁹⁶ It is not in issue between the parties that Manolium-Engineering has never commenced the process of commissioning the Depot.

3. Design and Construction of the Road

147. The Respondent respectfully submits that Manolium-Engineering's failures to construct the Road by the deadlines set out in the Amended Investment Contract were caused by Manolium-Engineering's and the Claimant's own actions and/or inactions. The Respondent rejects all allegations that Belarusian state authorities are responsible for Manolium-Engineering's delays in construction as explained below.

(a) Land plot location selection act for the Road

148. On 24 May 2007, MCEC approved the land plot location selection act for the construction of the Road.¹⁹⁷

(b) Design Specification and Estimate Documentation for the Road

149. Just like with the Depot, MCEC permitted Manolium-Engineering to prepare the Design Specification and Estimate Documentation for the Road simultaneously with approving the land plot location selection act.¹⁹⁸

150. On the Claimant's own facts, on 20 March 2008, almost a year later, Manolium-Engineering prepared the Design Specification and Estimate Documentation for the Road.

(c) Permit to the land plots for the construction of the Road

(i) Issuance of the permit to the land plots for the construction of the Road

151. As with the Depot, the Claimant alleges¹⁹⁹ that MCEC provided the permit to the land plots for the construction of the Road "[o]nly" two months after Manolium-Engineering had prepared the Design Specification and Estimate Documentation for the Road on 20 March 2008.²⁰⁰ This is wrong and misleading.

¹⁹⁷ Paragraph 5 of the decision of MCEC dated 24 May 2007, **Exhibit R-29**.

¹⁹⁸ Paragraph 5 of the decision of MCEC dated 24 May 2007, **Exhibit R-29**

¹⁹⁹ Notice, paragraph 175, **CS-1**.

²⁰⁰ Order of Manolium-Engineering No. 1-C dated 20 March 2007, **Exhibit C-67**.

152. As explained in 101.c)i) above, the period for providing the permit to the land plots for the construction of the Road started running from the date MCEC received the land plots allocation plan.
153. On 11 April 2008, MCEC received the land plots allocation plan for the Road.²⁰¹
154. On 2 May 2008, less than a month after receiving all the necessary documents, MCEC issued the permit to the land plots for the construction of 1.4219 ha and 0.1550 ha for the construction of the Road. The permits were valid until 1 December 2008.²⁰²
- (ii) Registration of the right to use the land plots for the construction of the Road in the real estate register
155. The Claimant alleges that the right to use the land plots for constructing the Road was registered “[o]nly in August 2008, i.e. 5 months after the [Design Specification and Estimate Documentation’s] of the Road preparation”.²⁰³ This is wrong and misleading.
156. The date on which the Design Specifications and Estimate Documentation was prepared has no relevance to the registration of the right to use the land plots since the period starts running from the date on which an applicant submits its application to the Registration and Cadastre Agency.
157. Manolium-Engineering applied for state registration of its temporary right to use the land plots for constructing the Road on 8 August 2008, more than 3 months after MCEC granted the permit to the land plots for the construction of the Road to Manolium-Engineering.²⁰⁴ The Registration and Cadastre Agency registered such temporary right on 20 August 2008.

²⁰¹ Cover page of the land plot case file for the Road, **Exhibit R-45**.

²⁰² Decision of MCEC dated 2 May 2008, **Exhibit C-86**.

²⁰³ Notice, paragraph 178, **CS-1**. The Claimant makes the same allegation in paragraph 431(e) of the Notice.

²⁰⁴ Certificate of registration of the right of temporary use granted to Manolium-Engineering in respect of the land plots for construction the Depot in Uruchye-6 dated 20 August 2008, **Exhibit C-88**.

(iii) Extensions and expiration of the permit to the land plots for the construction of the Road

158. Similar to the permit to the land plots for the construction of the Depot, MCEC, upon applications from Manolium-Engineering, extended the permit to the land plots for the construction of the Road several times.
159. It is not in issue between the parties that the permits to the land plots for the construction of the New Communal Facilities have never been extended beyond 1 July 2011. As explained in 115 – 116 above, as matters stand at the date of this submission, the Claimant does not assert that it had applied to extend the permits to the land plots for the construction of the New Communal Facilities. Accordingly, the authorities were not in a position to extend the permits to the land plots.

(d) **Construction permit for the Road**

160. It is not in issue between the parties that on 29 May 2008, Gosstroy granted Manolium-Engineering the construction permit for the Road. The Claimant however omits to mention that such permit was granted on the same day Manolium-Engineering made the application to Gosstroy.²⁰⁵
161. According to the Claimant, Gosstroy issued a construction permit for the Road until 31 October 2008 which “*violated the period of construction established by the Amended Investment Contract*”.²⁰⁶ This is wrong and misleading.
162. Gosstroy has never been a party to the Amended Investment Contract. It had no obligation to issue the construction permit for the Road with a validity period lasting until the final deadline for completion of construction set out in the Amended Investment Contract.
163. As explained in 101.c)ii) above, where the applicant’s documents provide the requisite evidence with respect to a shorter period than that requested, Gosstroy issues the construction permit for that shorter period only.

²⁰⁵ Summary form, information about the Road, **Exhibit R-36**.

²⁰⁶ Notice, paragraph 431(c), **CS-1**.

164. The Claimant does not provide any evidence that it has (i) requested the construction permit and (ii) provided all the documents necessary to obtain the construction permit lasting until December 2008.
165. On 1 September 2011, the last construction permit for the Road has expired.²⁰⁷

(e) Commissioning of the Road

166. The Claimant alleges that on 1 July 2011, it²⁰⁸ “*completed the works on the Road and made a decision to create the [commissioning] committee for [commissioning of] the Road*”,²⁰⁹ but “*only on 13 December 2011, Minsktrans expressed its interest in accepting the Road into the [municipal] ownership*”.²¹⁰ The Claimant further alleges that “*after the provision of the requested information, Minsktrans failed to accept the Road into the [municipal] ownership*”.²¹¹ This is wrong and misleading.
167. First of all, the Claimant fails to distinguish between the commissioning of the Road and accepting it into municipal ownership. Commissioning of the building, as described in 101.d) above, is a statutory requirement necessary to complete the construction. It involves obtaining approvals from different entities and state bodies to ensure that the construction is safe and in line with statutory technical requirements.
168. Accepting the building into the municipal ownership, on the other hand, is a contractual obligation of the parties under the Amended Investment Contract. In order to accept the Road, first it needed to have been commissioned.
169. Second, the Claimant does not provide any evidence that the “*decision to create the [commissioning] committee*”²¹² has ever been communicated to any of the entities involved. The Respondent respectfully submits that Manolium-Engineering’s own decision that the Road has been completed cannot serve as confirmation that the

²⁰⁷ Summary form, information about the Road, **Exhibit R-36**.

²⁰⁸ Contrary to what the Claimant suggests, it was not the Claimant, but Manolium-Engineering, who “*made a decision to create the [commissioning] committee for [commissioning] the Road*”; Order of Manolium-Engineering No. 1-C dated 1 July 2011, **Exhibit C-91**.

²⁰⁹ Notice, paragraph 186, **CS-1**.

²¹⁰ Notice, paragraph 189, **CS-1**.

²¹¹ Notice, paragraph 190, **CS-1**.

²¹² Order of Manolium-Engineering No. 1-C dated 1 July 2011, **Exhibit C-91**.

construction of the Road has in fact been completed. In any event, Manolium-Engineering's internal decision does not trigger Minsktrans' or MCEC's obligation to accept the Road into the municipal ownership under the Amended Investment Contract.²¹³

170. Third, the Claimant's statement that Minsktrans "*expressed its interest in accepting the Road into the [municipal] ownership*" only on 13 December 2011, is wrong and misleading. Minsktrans was not in a position to accept the Road into municipal ownership, because at that time it has not yet been commissioned. Hence, the discussion whether Minsktrans "*expressed its interest*" is misplaced.
171. Moreover, to support its allegation the Claimant refers to a Letter from Minsktrans to Manolium-Engineering dated 13 December 2011.²¹⁴ This letter, however, is wholly irrelevant as it concerns the Pull Station and not the Road.
172. Similarly, none of the exhibits to which the Claimant refers support its allegation that "*even after the provision of the requested information, Minsktrans failed to accept the Road into the [municipal] ownership*"²¹⁵ or confirm that Manolium-Engineering ever provided the requested documents.

4. Design and Construction of the Pull Station

(a) Land plot used to construct the Pull Station

173. Contrary to what the Claimant suggests,²¹⁶ there was no separate land plot allocated for the design and construction of the Pull Station. The Pull Station was to be constructed on one of the land plots designated for the construction of the Depot.
174. The land plot location selection act was issued on 15 July 2004,²¹⁷ as described in paragraph 105 above. This land plot location selection act allowed Manolium-

²¹³ Rather, under Clauses 2 and 9.3.9 Amended Investment Contract the obligation to accept the New Communal Facilities into municipal ownership arose after Manolium-Engineering commissions all of the New Communal Facilities, **Exhibit C-66**.

²¹⁴ Notice, paragraph 189, footnote 161, **CS-1**. Letter from Minsktrans to Manolium-Engineering dated 13 December 2011, **Exhibit C-92**.

²¹⁵ Notice, paragraph 190 and footnote 162, **CS-1**.

²¹⁶ Notice, paragraph 194, **CS-1**.

²¹⁷ Decision of MCEC dated 15 July 2004, **Exhibit C-53**.

Engineering to prepare the Design Specification and Estimate Documentation both for the Depot and the Pull Station.

(b) Design Specification and Estimate Documentation for the Pull Station

175. On 10 April 2008, almost 4 years later on the Claimant's own facts,²¹⁸ Manolium-Engineering prepared the Design Specification and Estimate Documentation for the Pull Station.

(c) MCEC's permit to construct the Pull Station on one of the land plots for construction of the Depot

176. The Claimant alleges that on 30 May 2008 "*15 months after signing the [Amended Investment Contract]*" MCEC "*made available to Manolium-Engineering the land plots [...] for temporary use for the period of constructing the Pull Station*".²¹⁹ This is misleading.

177. The document, to which the Claimant refers²²⁰ is not a permit to the land plot, but rather MCEC's permission to construct the Pull Station on one of the land plots designated for the Depot.

178. MCEC was only able to issue that permit on the application from Manolium-Engineering. The Claimant has not provided any evidence as to when Manolium-Engineering applied to MCEC for a permit to construct the Pull Station on one of the land plots for the construction of the Depot. In any event, such an application could not have been made earlier than the date when Manolium-Engineering prepared the Design Specification and Estimate Documentation for the Pull Station. This, on the Claimant's own facts, happened on 10 April 2008.²²¹

179. On 30 May 2008, less than two months after the application, MCEC issued the permit to construct the Pull Station on one of the land plots for construction of the Depot.

²¹⁸ Notice, paragraph 193, CS-1; order of Manolim-Engineering dated 10 April 2008, **Exhibit C-96**.

²¹⁹ Decision of MCEC dated 30 May 2008, **Exhibit C-97**.

²²⁰ Notice, paragraph 194, CS-1; Decision of MCEC dated 30 May 2008, **Exhibit C-97**.

²²¹ Notice, paragraph 193, CS-1.

180. Notably, when discussing the land plots for constructing the Depot and the Road, the Claimant argues²²² that MCEC was late in granting those as it did so two months after Manolium-Engineering had prepared the relevant Design Specification and Estimate Documentation. When discussing the Land Plots for Constructing the Pull Station, the Claimant, however, chooses an earlier date and refers²²³ to the Amended Investment Contract as the starting point for calculating the period within which MCEC was required to grant the permit to the land plot for the construction of the Pull Station. As explained above, neither reference is correct because such periods start running from the date of Manolium-Engineering's application to MCEC for the permit to construct the Pull Station on one of the land plots designated for the Depot.

(d) Construction permit for the Pull Station

181. The Claimant alleges that Gosstroy issued the construction permit for the Pull Station “[o]nly on 19 August 2008, i.e. 4 months after coordinating [Design Specification and Estimate Documentation] and 4 months prior to the expiration of [the deadline set out in] the Amended Investment Contract”.²²⁴ This is wrong and misleading.

182. On 18 June 2008 Manolium-Engineering applied to Gosstroy for a construction permit for the Pull Station. The next day, on 19 June 2008 Gosstroy issued the construction permit.²²⁵

183. Exhibit C-98, to which the Claimant refers is a construction permit issued on 19 August 2009 (not 2008, as the Claimant states in the Notice). As is evident from the Claimant's own exhibit, it was one of the subsequent extensions granted to Manolium-Engineering.

²²² Notice, paragraphs 152 and 175, **CS-1**.

²²³ Notice, paragraph 194, **CS-1**.

²²⁴ Notice, paragraph 431(d), **CS-1**.

²²⁵ Summary form, information about the Pull Station, **Exhibit R-37**; last line of construction permit for the Pull Station dated 19 August 2009, **Exhibit C-98**.

(e) Commissioning the Pull Station and registering it with the real estate register

184. On 6 July 2010 the parties entered into an agreement for the gratuitous use of the Pull Station.²²⁶ As explained in 144 above, the purpose of the gratuitous use agreement was to support Manolium-Engineering.
185. It is not in issue between the parties that on 30 July 2010, the Pull Station was commissioned.²²⁷
186. On 1 October 2010²²⁸ it was registered with the real estate register.²²⁹

(f) Attempts to accept the Pull Station into the municipal ownership

187. The Claimant alleges that pursuant to Clause 9.3.9 of the Amended Investment Contract “*MCEC and Minsktrans were obliged to accept the [Pull Station] into the [municipal] ownership [...] from 30 July 2010*”.²³⁰ This is wrong.
188. Pursuant to Clause 9.3.9 of the Amended Investment Contract, MCEC had to procure the acceptance of the New Communal Facilities into municipal ownership “*within one month from execution and approval of the commissioning acts or from the state registration of the communal objects*” (emphasis added). The Respondent respectfully submits that this obligation was always contingent on the commissioning or registration of all of the New Communal Facilities. Since, as the Claimant accepts,²³¹ Manolium-Engineering did not commission and register all of the New Communal Facilities, this obligation has never arisen.
189. In 2009, Manolium-Engineering purchased equipment for the Pull Station which was different from what has been approved in the Design Specification and Estimate

²²⁶ Gratuitous use agreement for the Pull Station, **Exhibit C-99**.

²²⁷ Pull Station commissioning act dated 30 July 2010, **Exhibit C-100**. The Claimant alleges in paragraph 207 of the Notice that “*neither MCEC nor Minsktrans brought any claims in [commissioning] the Pull Station*”. This is misleading, because, as is evident from the commissioning act, MCEC has not taken part in the commissioning of the Pull Station at all.

²²⁸ Not on 8 October 2010, as the Claimant alleges in paragraph 203 of the Notice, as evident from the Claimant’s own exhibit.

²²⁹ Extract from the unified state register of immovable property with respect to the Pull Station, **Exhibit C-101**.

²³⁰ Notice, paragraph 204, **CS-1**.

²³¹ Notice, paragraph 164, **CS-1**.

Documentation. This caused Minsktrans concern as the equipment was different from the equipment used by Minsktrans at all other pull stations in Minsk. This, *inter alia*, meant that Minsktrans would need to use different spare parts and undertake additional training for its employees in order to operate the Pull Station.

190. Minsktrans had no choice but to eventually accept the change of the equipment subject to certain conditions. One such condition was that the warranty period on this new equipment would be not less than three years from the date on which the Pull Station is commissioned.²³² Manolium-Engineering has failed to satisfy this condition as the warranty period has expired even before the Pull Station has been commissioned.
191. In addition, there were a number of other defects with the Pull Station which made it impossible to accept the Pull Station into municipal ownership.²³³

5. Design of the Investment Object

192. Pursuant to the Amended Investment Contract, Manolium-Engineering had the right to prepare the Design Specification and Estimate Documentation for the Investment Object before commissioning of the New Communal Facilities.
193. As explained in 101.a) above, in order to start developing the Design Specification and Estimate Documentation, a developer must obtain the land plot location selection act.
194. The procedure for obtaining the land plot location selection act was, in general terms, as follows:
- a) the developer (Manolium-Engineering) applies to MCEC. MCEC grants its initial approval and identifies the land surveyor to be engaged by the developer;
 - b) the developer engages the land surveyor to prepare initial land planning documents;

²³² Letter from Minsktrans to Manolium-Engineering dated 27 July 2009, **Exhibit R-51**.

²³³ Letter from Minsktrans to Manolium-Engineering dated 6 July 2011, **Exhibit R-66**, Letter from Minsktrans to MCEC dated 14 November 2011, **Exhibit R-73**.

- c) the land surveyor prepares the documents and submits them to MCEC; and
 - d) MCEC issues the land plot location selection act.
195. In the Notice, the Claimant refers to the “*preliminary key technical and economic indexes of the Investment Object*”.²³⁴ The Claimant however does not explain the relevance of this document for the procedure of obtaining the land plot location selection act for the Investment Object (the “**Investment Object Location Act**”).
196. The Claimant also alleges that in 2005, MCEC used “*the fact that Manolium-Engineering was not a party to the Investment Contract [...] to refuse to issue a permit to develop the city-planning project of the Investment Object*”.²³⁵ The Claimant however does not explain the relevance of the “city-planning project” of the Investment Object for the procedure of obtaining the Investment Object Location Act. As explained in 41 – 46 above, the Respondent submits that the Claimant (not Manolium-Engineering) could have applied for the Investment Object Location Act (but in the event never did so).
197. On 5 November 2007, nine months after entering into the Amended Investment Contract, Manolium-Engineering applied to MCEC for the Investment Object Location Act.²³⁶ On 5 December 2007, MCEC confirmed to UP Belgiprozem, which served as the land surveyor for the purpose of preparing the initial land planning documents, its preliminary agreement to allocate the land plot.²³⁷
198. It took Manolium-Engineering and the land surveyor over a year to prepare the land planning documents and submit them to MCEC. On 27 February 2009, UP Belgiprozem sent the documents to MCEC.²³⁸ Less than a month later, on 25 March 2009 (not in June 2009, as the Claimant alleges),²³⁹ MCEC approved the Investment Object Location Act.²⁴⁰

²³⁴ Notice, paragraph 213, **CS-1**.

²³⁵ Notice, paragraph 214, **CS-1**.

²³⁶ Letter from Manolium-Engineering to MCEC dated 5 November 2007, **Exhibit C-114**.

²³⁷ Letter from MCEC to UP Belgiprozem dated 5 December 2007, **Exhibit R-35**.

²³⁸ Cover page to the Act of the selection of a land plot with Belgiprozem note dated 27 February 2009, **Exhibit R-45**.

²³⁹ Notice, paragraphs 224 and 438, **CS-1**.

²⁴⁰ The Investment Object Location Act, **Exhibit C-116**.

199. As stated in the Investment Object Location Act, within a year from the date on which MCEC approved it, Manolium-Engineering was required to submit the general plan of the Investment Object together with layout of the engineering facilities.²⁴¹ Manolium-Engineering failed to do so within the deadline or at all.
200. Within two years from the date on which MCEC approved the Investment Object Location Act, Manolium-Engineering was required to submit the Design Specification and Estimate Documentation.²⁴² As explained in 101.a) above, failure to do so leads to the loss of the right to prepare the Design Specification and Estimate Documentation.
201. Manolium-Engineering failed to present the Design Specification and Estimate Documentation for the Investment Object within the two-year period or at all. Accordingly, from 26 March 2011 Manolium-Engineering no longer had the right to develop the Design Specification and Estimate Documentation for the Investment Object. In order to continue developing the Design Specification and Estimate Documentation for the Investment Object after 26 March 2011, Manolium-Engineering was required to re-apply for the Investment Object Location Act.
202. The Claimant also alleges that on 26 April 2011, the Architecture Committee refused to consider Manolium-Engineering's construction plan²⁴³ for the demolition of the buildings located on the land plot for the Investment Object.²⁴⁴ The Claimant seeks to present this as something unusual and made in violation of Belarusian law. This is again misleading.
203. As the Architecture Committee explained in its letter to Manolium-Engineering,²⁴⁵ under Belarusian law, before submitting the construction plan Manolium-Engineering should have prepared and obtained an expert report on the architecture plan. Since Manolium-Engineering failed to do so, the Architecture Committee could not issue a resolution on the construction plan.

²⁴¹ Section 6 of the Investment Object Location Act, **Exhibit C-116**.

²⁴² Section 5 of the Investment Object Location Act, **Exhibit C-116**.

²⁴³ The construction plan is the second part of the Design Specification and Estimate Documentation, which should be prepared based on the architecture plan.

²⁴⁴ Notice, paragraph 238, **CS-1**.

²⁴⁵ Letter from the Architecture Committee to Manolium-Engineering dated 26 April 2011, **Exhibit C-121**.

204. On 14 March 2013, MCEC issued a formal order declaring the Investment Object Location Act expired.²⁴⁶ Given that Manolium-Engineering as a result of its own inaction lost the right to develop Design Specification and Estimate Documentation for the Investment Object already on 26 March 2011, the Respondent respectfully submits that this decision was a mere formality.
205. The Claimant alleges that on 15 August 2014 MCEC “*made the land plot for the Investment Object available*[²⁴⁷] to Minskstroy”.²⁴⁸ This is wrong. As is evident from the Claimant’s own exhibit,²⁴⁹ MCEC’s decision of 15 August 2014 concerns certain buildings located on the land plot, rather than the land plot itself. At that time, there was no decision in place to make the land plot for the Investment Object available to another investor.²⁵⁰

K. NEGOTIATIONS TO AGREE ON AN EXTENSION FOR THE CONSTRUCTION OF THE NEW COMMUNAL FACILITIES AFTER 1 JULY 2011

206. Since the Claimant and Manolium-Engineering had failed to complete the New Communal Facilities by the Final Commissioning Date (1 July 2011) due to their own fault, MCEC became entitled to submit a claim to terminate the Amended Investment Contract as at this date.²⁵¹ However, in order to avoid having to terminate the Amended Investment Contract, MCEC negotiated with the Claimant and Manolium-Engineering to try to agree an extension to the Amended Investment Contract.²⁵²
207. In parallel with the negotiations, MCEC and Minsktrans requested that the Claimant and Manolium-Engineering remedy their breach of the Amended Investment Contract

²⁴⁶ Decision of MCEC dated 14 March 2013, **Exhibit C-138**.

²⁴⁷ In the Russian version of the Notice the Claimant alleges that MCEC transferred the land plot to the operational management (which, under Belarusian law, is a nearest equivalent of the ownership title for the state entities) of Minskstroy.

²⁴⁸ Notice, paragraph 446, **CS-1**.

²⁴⁹ Decision of MCEC dated 15 August 2014, **Exhibit C-142**.

²⁵⁰ Witness statement of Mr Akhramenko, paragraph 119, **RWS-2**.

²⁵¹ Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

²⁵² Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 23 and 35, **RWS-2**.

by completing the construction of the New Communal Facilities.²⁵³ Contrary to what the Claimant asserts, MCEC and Minsktrans did not “[*compel*] the Claimant to continue construction in violation of Belarusian laws”.²⁵⁴ As already explained above, it was the responsibility of Manolium-Engineering to reapply to the relevant authorities for an extension of the necessary construction and land permits.²⁵⁵

208. The representatives of Manolium-Engineering confirmed on several occasions that they would continue to construct the New Communal Facilities.²⁵⁶ However, they failed to do so and construction works were frequently suspended.²⁵⁷ Mr Dolgov admitted that the Claimant was having trouble financing three investment projects in parallel in Belarus.²⁵⁸
209. Mr Dolgov insisted that Manolium-Engineering was entitled to compensation for all monies spent on the construction of the New Communal Facilities exceeding US\$15 million²⁵⁹ (this suggestion contradicted Clauses 7.10 and 8.19 of the Amended Investment Contract²⁶⁰) and asked MCEC for the “*land plot*” for implementing the Investment Object.²⁶¹ Minsktrans explained that Manolium-Engineering’s entitlement to the land plot for the Investment Object under Clause 2 of the Amended Investment Contract was conditional upon the construction and transfer into municipal ownership of the commissioned New Communal Facilities.²⁶²
210. On 4 July 2011, the Claimant and Manolium-Engineering proposed to postpone the deadline for the construction and commissioning of the New Communal Facilities to

²⁵³ See, e.g., Minsktrans Complaint to Claimant and Manolium-Engineering dated 21 October 2011, **Exhibit R-72**; MCEC Letter to Claimant and Manolium-Engineering dated 5 January 2012, **Exhibit R-35**; Minsktrans Complaint dated 3 February 2012, **Exhibit R-76**.

²⁵⁴ Notice, paragraph 431(f), **CS-1**.

²⁵⁵ See paragraphs 114 - 117 and 129 - 139 above.

²⁵⁶ Schedule to Complete Construction of the “Trolleybus Depot Accommodating 220 Trolleybuses in Urban District Uruchye-6”, Minsk, approved by MCEC Deputy Chair A.M. Borisenko on 5 August 2011, **Exhibit R-67**; Minutes of a meeting on the implementation of investment projects dated 9 January 2012, paragraph 2.2, **Exhibit C-125**; Claimant’s Letter to the MCEC w/date (in response to the MCEC Letter dated 18 June 2012), **Exhibit R-88**.

²⁵⁷ Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**.

²⁵⁸ Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 9 January 2012, **Exhibit C-125**.

²⁵⁹ Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 9 January 2012, **Exhibit C-125**.

²⁶⁰ Amended Investment Contract, Clauses 7.10 and 8.19, **Exhibit C-66**.

²⁶¹ Letter from Manolium-Engineering to MCEC dated 24 November 2011, **Exhibit C-122**.

²⁶² Letter from Minsktrans to Manolium-Engineering dated 6 December 2011, **Exhibit C-123**.

November 2011, and that the Investment Object should be implemented “*in accordance with normative construction terms.*”²⁶³ MCEC did not agree to this proposal, because, among other reasons, it provided little assurance that the Investment Object would be completed without delay.²⁶⁴

211. In early 2012, the Claimant and Manolium-Engineering sent another draft Supplemental Agreement to the Amended Investment Contract to Minsktrans and MCEC.²⁶⁵ In this draft, the Claimant and Manolium-Engineering proposed to:
- a) postpone the deadline for the design, construction and commissioning of the New Communal Facilities to 1 June 2012;
 - b) amend the wording agreed under Additional Agreement No. 6 so that interest for delays would only accrue upon the Claimant’s and Manolium-Engineering’s decision to suspend or ‘mothball’ the construction of the New Communal Facilities, rather than as soon as the agreed deadline was missed; and
 - c) submit all disputes to the Court of the Eurasian Economic Union to be resolved in accordance with international law.²⁶⁶
212. MCEC did not agree to these proposals, because they did not provide MCEC with the necessary assurances it was seeking that the project would be completed on time and because the provisions regarding jurisdiction and applicable law were unworkable in practice.²⁶⁷
213. At a meeting with the Claimant and Manolium-Engineering on 3 April 2013, MCEC proposed its version of the Supplemental Agreement to the Amended Investment Contract that would protect its interests.²⁶⁸ The draft provided, *inter alia*, that in the event that MCEC terminated the contract for breach by the Claimant or Manolium-

²⁶³ Draft Supplemental Agreement dated 4 July 2011, **Exhibit R-65**.

²⁶⁴ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 42, **RWS-2**.

²⁶⁵ Draft Supplemental Agreement, not dated, received by fax on 20 March 2012, **Exhibit R-78**.

²⁶⁶ Draft Supplemental Agreement, not dated, received by fax on 20 March 2012, **Exhibit R-78**.

²⁶⁷ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 44, **RWS-2**.

²⁶⁸ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**.

Engineering, the incomplete New Communal Facilities should be transferred into municipal ownership and the Claimant should transfer the necessary funds for the completion of the construction works to Minsktrans.²⁶⁹ On 6 April 2012, MCEC sent the same draft of the Supplemental Agreement to the Amended Investment Contract to the Claimant and Manolium-Engineering.²⁷⁰

214. Mr Dolgov refused to sign the draft Supplemental Agreement proposed by MCEC and announced that he would no longer report to MCEC on the status of the construction of the New Communal Facilities.²⁷¹ According to Mr Dolgov, there was no “*commercial profit*” in the project for the Claimant.²⁷² Mr Dolgov stated that the Claimant would submit a claim to an international court claiming compensation of its costs for the construction of the New Communal Facilities.²⁷³
215. On 30 April 2012, Manolium-Engineering once again refused to sign the draft Supplemental Agreement which MCEC had sent on 6 April.²⁷⁴ In a letter to MCEC Mr Dolgov stated on behalf of Manolium-Engineering that it had complied with the terms of the original tender which, according to Mr Dolgov, required it to invest only US\$15 million, and that Clauses 7.10 and 8.19 of the Amended Investment Contract, which required the Claimant and Manolium-Engineering to bear all costs in constructing the New Communal Facilities, were void.²⁷⁵ Mr Dolgov stated in the same letter that Manolium-Engineering saw no “*legal grounds for further investments in the project*”.²⁷⁶
216. Despite the fact that Mr Dolgov stated in his letter on behalf of Manolium-Engineering on 30 April 2012 that it did not intend to continue the project²⁷⁷ and

²⁶⁹ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**.

²⁷⁰ Letter from MCEC to the Claimant and Manolium-Engineering dated 6 April 2012, **Exhibit R-79**.

²⁷¹ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**.

²⁷² Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**; Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**.

²⁷³ Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**; Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**.

²⁷⁴ Letter from Manolium-Engineering to MCEC dated 30 April 2012, **Exhibit R-85**

²⁷⁵ Letter from Manolium-Engineering to MCEC dated 30 April 2012, **Exhibit R-85**; Amended Investment Contract, Clauses 7.10 and 8.19, **Exhibit C-66**.

²⁷⁶ Letter from Manolium-Engineering to MCEC dated 30 April 2012, **Exhibit R-85**.

²⁷⁷ Letter from Manolium-Engineering to MCEC dated 30 April 2012, **Exhibit R-85**.

despite the fact that he had written to the President of the Republic of Belarus on 7 May 2012 with the same message,²⁷⁸ on 18 May 2012, Mr Dolgov wrote on behalf of Manolium-Engineering seeking an extension of time to complete the Depot.²⁷⁹

217. On 18 June 2012, MCEC decided to send a letter directly to Mr Ekavyan, the director of the Claimant.²⁸⁰ MCEC asked Mr Ekavyan to “*intervene*” on behalf of the Claimant and to “*take all measures necessary*” to settle the dispute so that MCEC would not have to refer the dispute to the courts.²⁸¹ MCEC requested that Mr Ekavyan organize for the Supplemental Agreement to the Amended Investment Contract proposed by MCEC on 6 April 2012 to be signed and for the financing of the construction of the New Communal Facilities to be resumed by 10 July 2012.²⁸²
218. On the same day, the Claimant proposed that it would continue to finance the construction of the New Communal Facilities in exchange for the transfer of ownership of the land plot for the implementation of the Investment Object.²⁸³ This was unacceptable to MCEC because, among other reasons, the Amended Investment Contract provided that Manolium-Engineering would only have the right to lease the land plot for the implementation of the Investment Object, not to acquire it.²⁸⁴
219. On 26 July 2012, MCEC proposed to have a meeting in Minsk to discuss the proposed amendments further.²⁸⁵ The Claimant never responded to MCEC’s letter.

²⁷⁸ Letter from Manolium-Engineering to the President of the Republic of Belarus dated 7 May 2012, **Exhibit R-86**.

²⁷⁹ Letter from Manolium-Engineering to MCEC dated 18 May 2012 (received on 22 May 2012), **Exhibit R-88**.

²⁸⁰ Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**; Attachment to letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**.

²⁸¹ Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**; Attachment to letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**.

²⁸² Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**; Attachment to letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**.

²⁸³ Letter from the Claimant to MCEC (undated) received by MCEC on 18 June 2012, **Exhibit R-89**.

²⁸⁴ Letter from MCEC to the Claimant dated 26 July 2012, **Exhibit R-92**; Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 58, **RWS-2**.

²⁸⁵ Letter from MCEC to the Claimant dated 26 July 2012, **Exhibit R-92**; Letter from MCEC to the Claimant dated 28 September 2012, **Exhibit R-96**.

L. NEGOTIATION OF TERMINATION OF THE AMENDED INVESTMENT CONTRACT BY MUTUAL AGREEMENT

220. At a meeting with MCEC and Minsktrans on 2 August 2012, Mr Dolgov proposed that the parties should terminate the Amended Investment Contract by mutual agreement.²⁸⁶
221. By then, the Claimant had been in breach of its obligation to construct the New Communal Facilities for many months, MCEC could not accept the incomplete buildings into municipal ownership under the Amended Investment Contract and the future of the whole project looked uncertain.²⁸⁷ MCEC was willing to consider the option of terminating the Amended Investment Contract by mutual agreement and even to pay the Claimant for the New Communal Facilities in their incomplete state in order to find a new investor for the Investment Object and to avoid submitting a claim for termination to the court.²⁸⁸
222. As a result of that meeting on 2 August 2012, it was decided that Minsktrans would prepare a calculation of the costs incurred by Manolium-Engineering in constructing the New Communal Facilities and provide information on the remaining works to be performed.²⁸⁹ On 28 August 2012, Minsktrans informed Manolium-Engineering that, according to the data provided, the total amount of costs for the works performed and the equipment purchased was US\$13,521,464.²⁹⁰
223. On 11 September 2012, Manolium-Engineering provided an alternative calculation of US\$16,287,546.²⁹¹ According to Manolium-Engineering, the differences between the calculations were caused by, *inter alia*, the exchange rates used and Minsktrans' failure to include Manolium-Engineering's management costs of US\$1,255,564.²⁹²

²⁸⁶ Minutes of the meeting attended by MCEC, Minsktrans and Manolium-Engineering dated 2 August 2012, **Exhibit R-93**.

²⁸⁷ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 63, **RWS-2**.

²⁸⁸ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 63, **RWS-2**.

²⁸⁹ Minutes of the meeting attended by MCEC, Minsktrans and Manolium-Engineering dated 2 August 2012, **Exhibit R-93**

²⁹⁰ Letter from Minsktrans to Manolium-Engineering dated 28 August 2012, **Exhibit C-128**.

²⁹¹ Letter from Manolium-Engineering to Minsktrans dated 11 September 2012, **Exhibit R-94**.

²⁹² Letter from Manolium-Engineering to Minsktrans dated 11 September 2012, **Exhibit R-94**.

224. On 14 September 2012, Minsktrans wrote that part of the additional costs listed in Manolium-Engineering's letter dated 11 September 2012 could be included in the calculation, but objected to other costs proposed by Manolium-Engineering, including management costs of US\$1,255,564. Minsktrans proposed an amended estimate of US\$14,743,586.²⁹³
225. In order to resolve the differences between their respective assessments, Manolium-Engineering proposed constituting a committee comprising the representatives of MCEC, Manolium-Engineering and an independent audit company.²⁹⁴
226. The Claimant's allegation that "*MCEC did not accept the proposal*" is misleading.²⁹⁵ In fact, as shown in the letter of 3 October 2012 exhibited by the Claimant in support of its statement, MCEC did accept Manolium-Engineering's proposal, but additionally suggested that Minsktrans took part in the audit review.²⁹⁶ MCEC's suggestion was reasonable and justified taking into account that the purpose of the audit review declared by Manolium-Engineering was to resolve "*disagreements regarding the amount of costs*",²⁹⁷ which originally arose between Manolium-Engineering and Minsktrans.
227. Despite Manolium-Engineering proposing to involve representatives of MCEC, it decided to instruct OOO Paritet-Standart ("**Paritet-Standart**").²⁹⁸ However, Manolium-Engineering instructed Paritet-Standart to determine "*the amount of [costs] incurred by [Manolium-Engineering] for the entire period of the investment project*", rather than the actual costs spent on the New Communal Facilities.²⁹⁹

²⁹³ Letter from Minsktrans to MCEC dated 14 September 2012, **Exhibit R-95**

²⁹⁴ Letter from Manolium-Engineering to MCEC dated 20 September 2012, **Exhibit C-129**.

²⁹⁵ Notice, paragraph 245, **CS-1**.

²⁹⁶ Letter from MCEC to Manolium-Engineering dated 3 October 2012, **Exhibit C-130**.

²⁹⁷ Letter from Manolium-Engineering to MCEC dated 20 September 2012, **Exhibit C-129**.

²⁹⁸ Pursuant to Clause 11 of the Amended Investment Contract, the amount of investments for the design and construction of the New Communal Facilities is equivalent to US\$15 million. The Respondent notes, however, that pursuant to Clauses 7.10 and 8.19 of the Amended Investment Contract, the Claimant and Manolium-Engineering should have secured compensating all additional expenses in excess of US\$15 million (Amended Investment Contract, Clause 11, **Exhibit C-66**).

²⁹⁹ Paritet-Standart Report, page 1, **Exhibit C-131**.

228. On 5 November 2012, Paritet-Standart calculated that Manolium-Engineering had spent US\$18,313,846.96 “*towards the implementation of the investment project*”.³⁰⁰ The Paritet-Standart report did not set out the data it had examined. According to its annexes, the “*evidence*” relied on appeared to be limited only to the accounting records of Manolium-Engineering.³⁰¹ Accordingly, neither MCEC nor Minsktrans accepted the findings of the OOO Paritet-Standart report.

M. NEGOTIATION OF A NEW INVESTMENT CONTRACT FOR THE IMPLEMENTATION OF THE INVESTMENT OBJECT

229. Since the parties had been unable to agree on terminating the Amended Investment Contract by mutual agreement, MCEC proposed to terminate the Amended Investment Contract and agree a new investment contract with the Claimant and Manolium-Engineering.³⁰²

230. On 10 December 2012, MCEC sent Manolium-Engineering:

- a) a draft supplemental agreement on the termination of the Amended Investment Contract (together with subsequent drafts, the “**Agreement on Termination of the Amended Investment Contract**”); and
- b) a draft new investment contract in respect of the Investment Object (together with subsequent drafts, the “**New Investment Contract**”).³⁰³

231. Under this arrangement, the incomplete New Communal Facilities would be transferred into municipal ownership without charge and the Claimant together with Manolium-Engineering would enter into an agreement with the Republic of Belarus for the development of the Investment Object.³⁰⁴

³⁰⁰ Paritet-Standart Report, page 4, **Exhibit C-131**.

³⁰¹ Paritet-Standart Report, page 4 – 5, **Exhibit C-131**.

³⁰² Minutes of the meeting attended by MCEC and Manolium-Engineering dated 5 December 2012, **Exhibit R-97**.

³⁰³ Letter from MCEC to Manolium-Engineering dated 10 December 2012, **Exhibit C-132**; Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, **Exhibit R-98**.

³⁰⁴ Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, **Exhibit R-98**.

232. Even though the Claimant had not complied with its obligation under the Amended Investment Contract, MCEC's priority at this stage in the negotiations was to ensure that the Investment Object was developed as soon as possible and to finally resolve all issues and uncertainty regarding the incomplete New Communal Facilities.³⁰⁵ MCEC offered the Claimant and Manolium-Engineering various incentives to implement the Investment Object, including exemptions from VAT, land tax and customs duties.³⁰⁶ MCEC left blank the deadlines for the implementation of the Investment Object and the amounts of investment for the Claimant and Manolium-Engineering to fill in.³⁰⁷
233. On 18 December 2012, the Claimant and Manolium-Engineering sent amended drafts of the two agreements to MCEC.³⁰⁸ In the draft New Investment Contract, the Claimant and Manolium-Engineering proposed, *inter alia*, that:
- a) there should be no fixed start and end dates for the construction of the Investment Object;
 - b) the rate of interest payable for delays by the Claimant or Manolium-Engineering should be reduced by ten times the rate proposed by MCEC; and
 - c) the parties should have an option to refer disputes to the Moscow Court of Commercial Arbitration in addition to the Economic Court of Minsk.³⁰⁹
234. MCEC did not agree to these proposals, because it did not provide MCEC with the necessary assurance that the Investment Object would be completed on time.³¹⁰ Furthermore, certain provisions proposed by Manolium-Engineering and the Claimant were contrary to Belarusian law.³¹¹ Lastly, MCEC could not agree to the Claimant's

³⁰⁵ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 69 – 70, **RWS-2**.

³⁰⁶ Draft investment contract for the implementation of the Investment Object enclosed with MCEC's letter to Manolium-Engineering dated 10 December 2012, **Exhibit R-98**.

³⁰⁷ Draft investment contract for the implementation of the Investment Object enclosed with MCEC's letter to Manolium-Engineering dated 10 December 2012, **Exhibit R-98**.

³⁰⁸ Letter from Manolium-Engineering to MCEC dated 18 December 2012, **Exhibit C-133**; Attachments to letter from Manolium-Engineering to MCEC dated 18 December 2012, **Exhibit R-100**.

³⁰⁹ Letter from Manolium-Engineering to MCEC dated 18 December 2012, **Exhibit C-133**; Attachments to letter from Manolium-Engineering to MCEC dated 18 December 2012, **Exhibit R-100**.

³¹⁰ Letter from MCEC to Manolium-Engineering dated 18 January 2013, **Exhibit C-134**; Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 74, **RWS-2**.

³¹¹ Letter from MCEC to Manolium-Engineering dated 18 January 2013, **Exhibit C-134**.

proposal to include wording to the effect that the Claimant and Manolium-Engineering had complied with their respective obligations under the Amended Investment Contract, because this was not true.³¹² On 18 January 2013, MCEC provided comments on Manolium-Engineering's draft, explaining its position in relation to each of the proposed provisions.³¹³

235. MCEC, the Claimant and Manolium-Engineering continued to exchange drafts and comments on the New Investment Contract in late January and early February 2013. The main points of disagreement related to:

- a) the rate of interest payable for delays by the Claimant or Manolium-Engineering;
- b) the dispute resolution forum; and
- c) the completion date for the construction of the Investment Object.³¹⁴

236. MCEC reiterated the position set out in its letter of 18 January 2013 in relation to the amount of interest and the dispute resolution forum.³¹⁵ MCEC also commented that the Claimant's proposal to complete the construction of the Investment Object by December 2020 was unreasonable.³¹⁶

237. In early March 2013, rather than address MCEC's comments on the New Investment Contract, the Claimant sent a letter to MCEC in which it made two alternative proposals:

- a) that the incomplete New Communal Facilities should be transferred into municipal ownership and, in return, Manolium-Engineering should be provided with the "*right to implement [the Amended Investment Contract] in accordance with the terms of the tender*"; or

³¹² Letter from MCEC to Manolium-Engineering dated 18 January 2013, **Exhibit C-134**.

³¹³ Letter from MCEC to Manolium-Engineering dated 18 January 2013, **Exhibit C-134**.

³¹⁴ Letter from the Claimant to MCEC dated 31 January 2013, **Exhibit R-104**; MCEC Letter to the Claimant dated 4 February 2013, **Exhibit C-135**.

³¹⁵ MCEC Letter to the Claimant dated 4 February 2013, **Exhibit C-135**.

³¹⁶ MCEC Letter to the Claimant dated 4 February 2013, **Exhibit C-135**.

- b) that Minsktrans should “grant” Manolium-Engineering a land plot for the construction of five prefabricated apartment blocks, the proceedings from the sale of which would be used to pay off Minsktrans’ costs in finishing the construction of the incomplete New Communal Facilities.³¹⁷
238. The Claimant’s proposal (set out in a letter without any draft agreements attached) was vaguely worded and did not include any specific contractual terms for MCEC to consider. Moreover, as far as MCEC could understand the first proposal did not materially differ from MCEC’s proposal to enter into a New Investment Contract described in paragraph 229 above.³¹⁸ Accordingly, MCEC proposed that the parties should continue to negotiate a New Investment Contract.³¹⁹
239. As explained in paragraph 201 above, Manolium-Engineering from 26 March 2011 lost its right to develop the design and budget documents for the Investment Object as at 26 March 2011, because it had failed to present the Design Specification and Estimate Documentation for the Investment Object within two years from the approval of the Investment Object Location Act. On 14 March 2013, MCEC issued a formal order declaring that the Investment Object Selection Act had expired.³²⁰
240. On 19 March 2013, the Claimant stopped negotiating the New Investment Contract with MCEC, stating that it made “no economic sense” for it to enter into the New Investment Contract.³²¹ Instead, the Claimant suggested that MCEC should as soon as possible:
- a) accept the incomplete New Communal Facilities into municipal ownership;
 - b) transfer US\$30 million to the Claimant to compensate its costs; and
 - c) provide the right to use the territory for the Investment Object for Manolium-Engineering to use “at its discretion”.³²²

³¹⁷ Letter from the Claimant to MCEC dated 4 March 2013, **Exhibit C-136**.

³¹⁸ Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 89, **RWS-2**.

³¹⁹ Letter from MCEC to Manolium-Engineering dated 11 March 2013, **Exhibit C-137**.

³²⁰ Decision of MCEC dated 14 March 2013, **Exhibit C-138**.

³²¹ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

³²² Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

241. Such a proposal was wholly unacceptable to MCEC and showed that the Claimant had no intention to continue negotiating in good faith.³²³
242. Since the Claimant refused to continue negotiating the New Investment Contract with MCEC, from early April 2013 the parties turned back to negotiating a draft agreement to terminate the Amended Investment Contract by mutual agreement (without the Claimant entering into any new arrangement for the development of the Investment Object).
243. The Claimant and Manolium-Engineering continued to insist that they should be compensated US\$30 million in return for transferring the incomplete New Communal Facilities into municipal ownership.³²⁴ MCEC reiterated that Manolium-Engineering's demand for compensation of US\$30 million contradicted the agreed terms of the Amended Investment Contract.³²⁵
244. MCEC communicated to the Claimant and Manolium-Engineering on numerous occasions that it would be forced to terminate the Amended Investment Contract if the Claimant did not remedy its breach or agree to proceed with the project on the terms that were acceptable to both sides.³²⁶ After the Claimant made it clear that it made no "economic sense" for it even to develop the Investment Object on 19 March 2013,³²⁷ MCEC was left with no choice but to commence the process of terminating the Amended Investment Contract under Clause 16.2.1, as it had been entitled to do since the Final Commissioning Date.

³²³ Letter from MCEC to the Claimant and Manolium-Engineering dated 28 March 2013, **Exhibit R-105**; Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 93, **RWS-2**.

³²⁴ Letter from Manolium-Engineering to MCEC dated 3 April 2013, **Exhibit R-106**; Letter from the Claimant to MCEC dated 27 May 2013, **Exhibit C-93**; Letter from the Claimant to MCEC dated 27 June 2013, **Exhibit C-94**.

³²⁵ Letter from MCEC to Manolium-Engineering dated 9 April 2013, **Exhibit R-107**; Letter from MCEC to the Claimant dated 7 June 2013, **Exhibit R-108**.

³²⁶ Letter from MCEC to the Claimant and Manolium-Engineering dated 14 October 2010, **Exhibit R-27**; Letter from MCEC to the Claimant and Manolium-Engineering dated 18 June 2012, **Exhibit C-126**; Letter from MCEC to the Claimant and Manolium-Engineering dated 28 September 2012, **Exhibit R-50**.

³²⁷ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

245. On 19 September 2013, MCEC informed 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.³²⁸

N. TERMINATION OF THE AMENDED INVESTMENT CONTRACT

1. Procedural history and the parties' legal positions

246. On 12 November 2013, MCEC and Minsktrans submitted a claim to the Economic Court of Minsk seeking to terminate the Amended Investment Contract pursuant to Clause 16.2.1 of the Amended Investment Contract.³²⁹ This clause permitted MCEC to terminate the contract by applying to the court if the construction and commissioning of the New Communal Facilities was not done by the Final Commissioning Date and where the delay was due to the Claimant's fault.

247. The Economic Court of Minsk granted the claim and resolved to terminate the Amended Investment Contract.³³⁰ Manolium-Engineering subsequently appealed against the judgment of the Economic Court of Minsk to the Appeal Instance of the Economic Court of Minsk and to the Supreme Court of Belarus. Neither the Appeal Instance³³¹ nor the Supreme Court³³² found any grounds for setting aside the judgment of the first instance court.

248. Pursuant to Belarusian procedural legislation, civil proceedings in Belarus are adversarial. Each party to the dispute bears the burden of proof with regard to the facts it relies on. Accordingly, the claimants (MCEC and Minsktrans), which based their claim on Clause 16.2.1 of the Amended Investment Contract, had to prove that the Claimant had missed the agreed deadline for the construction and commissioning of the New Communal Facilities. In turn, the burden was on the Claimant and Manolium-Engineering to prove that they either had not missed the deadline or that they were not at fault for missing the deadline.

³²⁸ Letter from MCEC to the Claimant dated 19 September 2012, **Exhibit C-139**.

³²⁹ Statement of claim regarding the termination of the Amended Investment Contract dated 14 October 2013, **Exhibit C-140**.

³³⁰ Judgement of the Minsk Economic Court, dated 9 September 2014, **Exhibit C-147**.

³³¹ Resolution of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, **Exhibit C-150**.

³³² Resolution of the Supreme Court of Belarus dated 27 January 2015, **Exhibit C-152**.

249. In their statement of claim, MCEC and Minsktrans submitted that the Claimant and Manolium-Engineering had breached the Amended Investment Contract by missing the deadline for the construction and commissioning of the New Communal Facilities and that they did so through a fault of their own because they failed to provide stable and continuous funding of the project as required by Clause 7.1 of the Amended Investment Contract.³³³
250. In response to MCEC's and Minsktrans's claim, in the proceedings at the Economic Court of Minsk, Manolium-Engineering submitted a statement of defence. Manolium-Engineering asserted that before the Amended Investment Contract was executed in February 2007 the Claimant and Manolium-Engineering were "*as a matter of fact deprived of a possibility to build the New Communal Facilities*".³³⁴ However, Manolium-Engineering did not articulate its legal position and did not expand on that allegation. Manolium-Engineering's primary arguments came down to the following.
251. Manolium-Engineering admitted that only the Pull Station had been commissioned by the Final Commissioning Date. It also admitted that it had only partially completed the Depot by that date and that it was impossible to commission the part already constructed without the remaining part of the Depot. It argued, however, that on its interpretation of Clause 11 of the Investment Contract, having already invested more than US\$18 million into the design and construction of the New Communal Facilities, it had complied with its obligations under the Amended Investment Contract and, accordingly, there were no grounds for termination.³³⁵
252. Manolium-Engineering also relied on Clause 6.3 of the Amended Investment Contract, which provided, *inter alia*, the deadlines for designing, constructing and commissioning the New Communal Facilities would be extended for a reasonable period if actions (omissions) of Minsk's authorised municipal entities prevented proper performance of the Amended Investment Contract by the Claimant and Manolium-Engineering. Manolium-Engineering, however, failed to substantiate how it was prevented from performing the Amended Investment Contract. The only

³³³ Statement of claim regarding the termination of the Amended Investment Contract dated 14 October 2013, **Exhibit C-140**.

³³⁴ Manolium Engineering's Statement of Defence re case No. 399-3/2013, **Exhibit R-102**.

³³⁵ Manolium Engineering's Statement of Defence re case No. 399-3/2013, **Exhibit R-102**.

“failure” on the part of MCEC, to which Manolium-Engineering referred, was MCEC’s alleged refusal to extend the permits to the land plots for the construction of the New Communal Facilities in July 2011. Manolium-Engineering, however, did not explain how such alleged refusal prevented it from complying with the deadline, given that it occurred in July 2011 – after the expiry of term for the construction and commissioning of the New Communal Facilities.³³⁶

253. Upon considering the parties’ arguments and the evidence provided, the Economic Court of Minsk ruled to terminate the Amended Investment Contract.³³⁷ The court judgement was based on the following logic. The Claimant and Manolium-Engineering had failed to construct and commission the New Communal Facilities within the contractual deadline and failed to prove the existence of circumstances that, pursuant to the Amended Investment Contract, would allow an extension of time. Manolium-Engineering’s assertions that the Pull Station was ready to be transferred into municipal ownership, although disputed by MCEC and Minsktrans, were in fact irrelevant to the case as the Pull Station constituted only part of the New Communal Facilities. The court also found that the Claimant’s and Manolium-Engineering’s obligation under the Amended Investment Contract was to complete the New Communal Facilities and was not capped by any amount of investment. In support of this position, the court referred to clause 7.10 of the Amended Investment Contract, pursuant to which the Claimant had an obligation to cover any additional costs above US\$15 million if such costs were necessary to complete the New Communal Facilities. The court, therefore, found the Claimant’s and Manolium-Engineering’s argument that they had invested more than US\$15 million was irrelevant.³³⁸
254. Since the Economic Court of Minsk did not find that MCEC breached the Amended Investment Contract, there was no obligation under Belarusian law to compensate the Claimant and Manolium-Engineering for the costs they had incurred in connection with the unfinished construction of the New Communal Facilities.

³³⁶ Manolium Engineering’s Statement of Defence re case No. 399-3/2013, **Exhibit R-102**.

³³⁷ Judgement of the Economic Court of Minsk dated 9 September 2014, **Exhibit C-147**.

³³⁸ Judgement of the Economic Court of Minsk dated 9 September 2014, **Exhibit C-147**.

255. In its appeals against the judgment of the Economic Court of Minsk (an appeal to the Appeal Instance of the Economic Court of Minsk³³⁹ and a subsequent appeal to the Supreme Court of Belarus³⁴⁰), Manolium-Engineering argued that the first instance court had failed to establish the facts and resolve the case correctly. In its appeal applications Manolium-Engineering virtually restated the facts set out in its statement of defence submitted to the first instance court. The appeal applications did not refer to any particular alleged breaches by the first instance court, nor did they refer to any procedural irregularities. The Appeal Instance of the Economic Court of Minsk and the Supreme Court of Belarus upheld the judgment of the Economic Court of Minsk.

2. Expert examination

256. Simultaneously with the proceedings at the Economic Court of Minsk, settlement negotiations were still ongoing. As Mr Akhramenko explains in his Witness Statement, MCEC was, in principle, ready to consider acquiring the unfinished New Communal Facilities.³⁴¹ However, to agree on the price of acquisition, MCEC wanted to understand, among other things, how much Manolium-Engineering had actually spent on constructing the New Communal Facilities and how much it would cost to finish their construction.³⁴² Accordingly, in order for the settlement negotiations to continue, the parties agreed that MCEC would ask the court to appoint an expert to analyse these issues.³⁴³ The findings of the court-appointed expert were intended to be used for further negotiations between the parties. The parties also agreed that the Claimant and Manolium-Engineering would bear the costs of the expert examination.³⁴⁴

257. It was common ground between the parties that the amount spent on the New Communal Facilities was not the subject matter of the court proceedings.³⁴⁵ The court, however, granted the application to undertake an expert examination because, under

³³⁹ Appeal of Manolium-Engineering dated 9 October 2014, **Exhibit C-149**.

³⁴⁰ Cassation appeal of Manolium-Engineering dated 29 November 2014, **Exhibit C-151**.

³⁴¹ Witness Statement of Mr Akhramenko, paragraph 106, **RWS-3**.

³⁴² Witness Statement of Mr Akhramenko, paragraphs 65 and 126, **RWS-3**.

³⁴³ Minutes of the court hearing re case No. 399-3/2013 dated 29-30 July 2014, **Exhibit R-117**.

³⁴⁴ Minutes of the court hearing re case No. 399-3/2013 dated 29-30 July 2014, **Exhibit R-117**.

³⁴⁵ Witness Statement of Mr Akhramenko, paragraph 110, **RWS-3**.

Belarusian law, the court has an obligation to assist the parties in reaching settlement.³⁴⁶

258. In paragraphs 260 – 262 of the Notice of Arbitration, the Claimant submits:

“[the Economic Court of Minsk] [...] engaged [...] an expert to determine the amount of investments made by Manolium-Engineering into the New Communal Facilities.

In the absence of any legal grounds, Judge Grushetsky awarded the expenses on conducting a forensic expertise only on Manolium-Engineering in the amount of 455,178,600 Belarusian rubles (equivalent of US[\$]43,000).

To this effect, Manolium-Engineering refused to pay the value of such examination, and on 1 September 2014, Judge Grushetsky issued a decision to consider the case based on materials available”.

259. This is misleading. The representative of Manolium-Engineering expressly agreed during the court hearing that Manolium-Engineering and the Claimant alone would bear the costs of the expert examination.³⁴⁷ The court ruling to undertake an expert examination, *inter alia*, says:

*“The representative of [Manolium-Engineering] [...] did not object to the appointment of a forensic expert review and made a motion that the expenses for conducting it be assigned to [the Claimant and Manolium-Engineering]”.*³⁴⁸

260. Approximately a month after the court ordered that an expert examination should be undertaken, the Claimant filed a motion asking the court to cancel the expert examination, referring to the fact, *inter alia*, that the subject matter of the expert examination was irrelevant to the proceedings so the expert examination was unnecessary.³⁴⁹

261. The court granted the Claimant’s motion, which meant cancelling the expert examination, and ruled to resume the proceedings.³⁵⁰

262. Notably, in its subsequent appeals to higher courts, Manolium-Engineering never alleged that the first instance court had improperly distributed the costs of the expert

³⁴⁶ Economic Procedural Code of the Republic of Belarus, Article 4.

³⁴⁷ Ruling of the Economic Court of Minsk to carry out court examination, **Exhibit C-145**, Minutes of the court hearing re case No. 399-3/2013 dated 29-30 July 2014, **Exhibit R-117**.

³⁴⁸ Ruling of the Economic Court of Minsk to carry out court examination, **Exhibit C-145**.

³⁴⁹ Claimant’s motion to the Economic Court of Minsk (undated), **Exhibit R-118**, Ruling of the Economic Court of Minsk to resume the proceedings dated 1 September 2014, **Exhibit C-146**.

³⁵⁰ Ruling of the Economic Court of Minsk to resume the proceedings dated 1 September 2014, **Exhibit C-146**.

examination that eventually did not take place or that the parties' agreement in relation to the costs of the expert examination was different.³⁵¹

O. STATUS OF THE NEW COMMUNAL FACILITIES FOLLOWING THE TERMINATION OF THE AMENDED INVESTMENT CONTRACT

263. There is no dispute between the parties that the termination of the Amended Investment Contract became legally effective on 29 October 2014, when the Appeal Instance of the Economic Court of Minsk upheld the judgment of the Economic Court of Minsk.³⁵²
264. As a matter of Belarusian law, upon termination of the Amended Investment Contract the parties' mutual obligations under the Amended Investment Contract are extinguished. This meant that the Claimant and Manolium-Engineering were no longer under an obligation to complete and commission the New Communal Facilities and to transfer them into the ownership of MCEC and/or Minsktrans. MCEC and Minsktrans, in turn, were no longer under an obligation to accept the New Communal Facilities into municipal ownership once they were constructed and commissioned.
265. After the termination of the Amended Investment Contract, Manolium-Engineering remained the owner of the New Communal Facilities. It was left to MCEC's discretion to decide whether to acquire the incomplete New Communal Facilities from Manolium-Engineering and at what cost, taking into account that MCEC would have to spend additional funds in order to complete the construction works and commission them. If MCEC did not agree with the purchase price requested by Manolium-Engineering for the facilities, MCEC was under no obligation to accept the incomplete New Communal Facilities into municipal ownership.

³⁵¹ Appeal of Manolium-Engineering dated 9 October 2014, **Exhibit C-149**; Cassation appeal of Manolium-Engineering dated 29 November 2014, **Exhibit C-151**.

³⁵² Resolution of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, **Exhibit C-150**; Notice, paragraph 479, **CS-1**. As stated in paragraph 649 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.

P. REGISTRATION AND CADASTRE AGENCY ASSESSMENT

266. In light of the above, MCEC and Manolium-Engineering had started discussing the amounts spent on the unfinished New Communal Facilities in the context of their possible acquisition by MCEC.³⁵³
267. MCEC was aware that it was only the city of Minsk that reasonably could exploit the New Communal Facilities in accordance with its intended purpose (i.e. public transportation of passengers).
268. Therefore, MCEC was prepared to consider acquisition of the unfinished New Communal Facilities and discuss this possibility with the Claimant.³⁵⁴ However, it was MCEC's position that if the acquisition price was based on the actual costs spent by the Claimant and Manolium-Engineering on building the New Communal Facilities, such costs should not include the Claimant's and Manolium-Engineering's various operating expenditures (e.g. the costs of workers and facility expenses such as rent and utilities). Otherwise, MCEC would be looking at acquiring a collection of grossly over-priced assets needing, as the Claimant itself admitted, additional and not insignificant investment before MCEC would be able to use them.³⁵⁵
269. Accordingly, it was also important that any expenses incurred due to increased construction costs would not be included in the calculation of the acquisition price. It was MCEC's position that any such costs were caused by the Claimant's own failure to complete the New Communal Facilities within the timeframe set out by the Amended Investment Contract.³⁵⁶
270. Before the Supreme Court of Belarus upheld the lower court's decisions to terminate the Amended Investment Contract, the Claimant sent two identical letters to MCEC and the Administration of the President of Belarus with the following proposals:

³⁵³ Witness Statement of Mr Akhramenko, paragraphs 125 – 126, **RWS-3**.

³⁵⁴ Witness Statement of Mr Akhramenko, paragraphs 111, 113, 125 – 126, **RWS-3**.

³⁵⁵ Witness Statement of Mr Akhramenko, paragraph 126, **RWS-3**; Website of news portal of Belarus 'Naviny.by', "*Minsk's authorities are ready to scam the Russian investor*" dated 15 April 2012 // Available at: https://naviny.by/rubrics/economic/2012/04/15/ic_articles_113_177531, **Exhibit R-82**.

³⁵⁶ Witness Statement of Mr Akhramenko, paragraph 126, **RWS-3**.

- a) to transfer the Pull Station and the Road into the municipal ownership of the city of Minsk in their current state and free of charge;
- b) to lease the land plot on which the Depot was located to the Claimant for 99 years, in order for the Claimant to create there a hardware trading facility for its own use;
- c) to amend the detailed land planning documents relating to that land plot in order to enable the Claimant to set up a hardware trading facility;
- d) to adapt the Depot to the trading needs of the Claimant; and
- e) to exempt the Claimant from taxation and other liabilities until the commissioning of the hardware trading facility.³⁵⁷

271. MCEC could not agree to these proposals. Apart from the fact that the Amended Investment Contract was already terminated by the court, the Road and Pull Station could not be accepted, because they were only parts of what was supposed to be a complex object, including the key facility, i.e. the Depot. Furthermore, MCEC noted that the Road was not completed and not commissioned and, therefore, could not be accepted in any event. MCEC also reminded the Claimant that in any event the New Communal Facilities would require additional investment to get them completed. Lastly, MCEC could not accept the Claimant's proposal to adapt the land plot for the Claimant's hardware trading facility, because the city of Minsk was looking to house the new trolleybus park on that land.³⁵⁸

272. Since February 2015, the parties had been discussing the Claimant's costs of construction of the New Communal Facilities in the context of their possible acquisition by MCEC.³⁵⁹ At a meeting attended by the Claimant, MCEC and Minsktrans on 4 February 2015, MCEC proposed that the Registration and Cadastre Agency should assess the Claimant's actual costs. The Claimant accepted MCEC's proposal. The Claimant's proposal that the assessment should include not only the

³⁵⁷ Letter from the Claimant to MCEC dated 8 January 2015, **Exhibit R-119**; Letter from the Claimant to the Administration of the President of Belarus dated 8 January 2015, **Exhibit R-120**.

³⁵⁸ Letter from MCEC to the Claimant dated 20 January 2015, **Exhibit R-121**.

³⁵⁹ Witness Statement of Mr Akhramenko, paragraph 125, **RWS-3**.

costs directly related to the construction of the New Communal Facilities, but also the other “*accompanying costs*” was not accepted by MCEC.³⁶⁰

273. Accordingly, the Claimant, MCEC and Minsktrans agreed (1) that any “*compensation*” should be based on amounts “*confirmed by the documents*”, (2) that those amounts should have been spent “*directly [on] creating [the New C]ommunal [F]acilities*” (i.e. excluding other “*accompanying costs*”), and (3) that the New Communal Facilities should be able to “*be used in the interests of the city [of Minsk]*”.³⁶¹ As MCEC had explained on several occasions, the latter condition meant that any assessment should take into account that before MCEC would be able to use the unfinished New Communal Facilities, it would need making additional and not insignificant investment in finishing their construction.³⁶² Lastly, the parties decided at the same meeting that “*the issue of compensation of costs*” would be considered “*after obtaining the results of the assessment*”.³⁶³
274. The Claimant alleges that the parties “*reached an agreement to compensate the Claimant’s expenses*”³⁶⁴ at the meeting of 4 February 2015. This is misleading. At that meeting the parties did not go further than agreeing on the approach to the assessment of the Claimant’s costs.³⁶⁵
275. Contrary to the agreed approach discussed at the meeting of 4 February 2015, Manolium-Engineering asked the Registration and Cadastre Agency to undertake an assessment of all its costs, not only the direct costs of construction of the New Communal Facilities.³⁶⁶ Likewise, the services agreement between Manolium-Engineering and the Registration Cadastre Agency did not reflect the joint decisions made at the meeting of 4 February 2015 providing instead that the agency

³⁶⁰ Minutes of the meeting of the Claimant, MCEC and Minsktrans dated 4 February 2015, Clause 2.1, **Exhibit C-153**.

³⁶¹ Minutes of the meeting of the Claimant, MCEC and Minsktrans dated 4 February 2015, **Exhibit C-153**.

³⁶² Letter from MCEC to the Claimant dated 20 January 2015, **Exhibit R-121**; Letter from MCEC to Manolium-Engineering dated 4 September 2015, **Exhibit C-158**.

³⁶³ Minutes of the meeting of the Claimant, MCEC and Minsktrans dated 4 February 2015, paragraph 2.2, **Exhibit C-153**.

³⁶⁴ Notice, paragraph 482, **CS-1**.

³⁶⁵ Minutes of the meeting of the Claimant, MCEC and Minsktrans dated 4 February 2015, paragraphs 2.1 – 2.2, **Exhibit C-152**; Letter from MCEC to Manolium-Engineering dated 4 September 2015, page 1, **Exhibit C-158**.

³⁶⁶ Letter from Manolium-Engineering to the Registration and Cadastre Agency dated 24 February 2015, **Exhibit R-122**.

had to carry out a “*construction and technical audit*” in relation to the trolleybus park.³⁶⁷

276. On 16 June 2015, the Registration and Cadastre Agency 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 is US\$18,129,933.17.³⁶⁸ As expressly stated in the Registration and Cadastre Agency Report, that figure included the Claimant’s “*associated expenses*”, allegedly “*directly related to the construction of the [New Communal F]acilities*”.³⁶⁹ Additionally, it included the amount of the paid land taxes in the amount of US\$432,386.19.³⁷⁰ The Registration and Cadastre Agency Report was, therefore, defied the principles agreed by the parties at the meeting of 4 February 2015.
277. Having obtained the Registration and Cadastre Agency Report, Manolium-Engineering “*respectfully request[ed] that [MCEC] consider[ed] the issue of compensation of [its] costs [in the amount of US\$18,129,933.17 and the Library Payment] as soon as possible, so as to minimize losses toward [the Claimant]*”.³⁷¹ In its request, Manolium-Engineering referred to “*the results of a joint meeting [...] [of] 14 February 2015*”. The Respondent understands that Manolium-Engineering was referring to the meeting of 4 February 2015 described in paragraphs 272 – 273 above. The Respondent is not aware of any meeting of 14 February 2015 with either Manolium-Engineering or the Claimant.
278. At the same time as Manolium-Engineering requesting to “*consider the issue of compensation*”, it sent a letter to the President of the Republic of Belarus dated 30 June 2015.³⁷² In that letter, Mr Dolgov acting on behalf of Manolium-Engineering misrepresented the joint decisions made at the meeting of 4 February 2015 stating

³⁶⁷ Services agreement between Manolium-Engineering and the Registration and Cadastre Agency dated 25 February 2015, Clause 1.1, **Exhibit R-123**.

³⁶⁸ Registration and Cadastre Agency Report, Conclusions, **Exhibit C-154**.

³⁶⁹ Registration and Cadastre Agency Report, Conclusions, **Exhibit C-154**.

³⁷⁰ Registration and Cadastre Agency Report, Conclusions, **Exhibit C-154**.

³⁷¹ Notice, paragraph 276, **CS-1**; Letter from Manolium-Engineering to MCEC dated 17 June 2015, **Exhibit C-155**.

³⁷² Letter from Manolium-Engineering to the President of the Republic of Belarus dated 30 June 2015, **Exhibit R-R-125**.

instead that the management of the city of Minsk “*reported to [the President] that the sum [of US\$19,129,933.17] would be easily compensated*”.³⁷³ Notably, in that letter Mr Dolgov already blamed MCEC that “*the solution in this matter is being held back in every possible way*”,³⁷⁴ while at that time Manolium-Engineering had not yet received any response to its request from MCEC.

279. On 26 June 2015, the Registration and Cadastre Agency confirmed to MCEC that, based on Manolium-Engineering’s instructions and contrary to the agreed approach discussed at the meeting of 4 February 2015, the report also included other “*associated costs*”. Furthermore, the Registration and Cadastre Agency informed MCEC that Manolium-Engineering did not set the task to the agency of “*identifying individual cost items and analysing (assessing) the method of their calculation for the intended purpose [i.e. for the design and construction of the New Communal Facilities]*” and to “[take] *into account their construction readiness*”. According to the Registration and Cadastre Agency, these tasks would require an “*additional study*”.³⁷⁵
280. In addition to the letter from the Registration and Cadastre Agency, on 9 July 2015, the State Property Committee of Belarus, a higher authority than the Registration and Cadastre Agency, informed MCEC that the Registration and Cadastre Agency did not conduct an independent evaluation of the New Communal Facilities pursuant to Presidential Decree No. 615 dated 13 November 2006 “On valuation activities in the Republic of Belarus”. Instead, the Registration and Cadastre Agency merely followed Manolium-Engineering’s instructions given in its letter dated 24 February 2015 and the services agreement dated 25 February 2015.³⁷⁶
281. Based on the above information from the Registration and Cadastre Agency and the State Property Committee of Belarus, on 7 August 2015, MCEC informed Manolium-Engineering that its alleged costs could not be compensated on the basis of the

³⁷³ Letter from Manolium-Engineering to the President of the Republic of Belarus dated 30 June 2015, **Exhibit R-125**.

³⁷⁴ Letter from Manolium-Engineering to the President of the Republic of Belarus dated 30 June 2015, **Exhibit R-125**.

³⁷⁵ Letter from the Registration and Cadastre Agency to MCEC dated 26 June 2015, **Exhibit R-124**.

³⁷⁶ Letter from the State Property Committee of Belarus to MCEC dated 9 July 2015, **Exhibit R-126**; See paragraph 275 above.

Registration and Cadastre Agency Report.³⁷⁷ Accordingly, MCEC proposed that this issue should be resolved by the court.³⁷⁸

282. The Claimant alleges that MCEC did not accept the Registration and Cadastre Agency Report because “*the said agency did not provide for rendering “independent valuation’ services”*”.³⁷⁹ This is misleading. As explained in paragraphs 272 – 280 above, the primary reason for not accepting the report was that the basis on which it was prepared defied the agreement reached by the parties on 4 February 2015. The Claimant’s own failure to instruct the Registration and Cadastre Agency on the agreed approaches to valuation made the report produced unusable for the purpose it was intended. MCEC reiterated this position in its letter to Manolium-Engineering dated 4 September 2015.³⁸⁰

Q. MCEC’S FURTHER ATTEMPTS TO ARRANGE REASSESSMENT OF THE NEW COMMUNAL FACILITIES

283. On 12 November 2015, Mr Dolgov wrote on behalf of Manolium-Engineering once again to the President of Belarus seeking an in-person meeting to discuss the investment project and warning that should the President not be informed of this request, Manolium-Engineering will apply to “*Stockholm arbitration*” with a claim for “*huge amounts*”.³⁸¹
284. On 23 November 2015, the Prime-Minister of Belarus instructed MCEC, the Ministry of Economy and the Ministry of Justice to consider Manolium-Engineering’s request and inform the Respondent’s government and Manolium-Engineering on whether it was necessary to arrange a meeting between Manolium-Engineering and the President of Belarus.³⁸²

³⁷⁷ Letter from MCEC to Manolium-Engineering to MCEC dated 7 August 2015, **Exhibit C-156**.

³⁷⁸ Letter from MCEC to Manolium-Engineering to MCEC dated 7 August 2015, **Exhibit C-156**.

³⁷⁹ Notice, paragraphs 277 and 484, **CS-1**.

³⁸⁰ Letter from MCEC to Manolium-Engineering dated 4 September 2015, **Exhibit C-158**.

³⁸¹ Letter from Manolium-Engineering to the President of Belarus dated 12 November 2015, **Exhibit R-127**

³⁸² The Prime-Minister’s Instruction to MCEC, the Ministry of Economy and the Ministry of Justice dated 23 November 2015, **Exhibit R-128**

285. On 26 November 2015, MCEC informed the Ministry of Economy that it was having internal discussions with the Belarusian authorities regarding the potential acquisition of the New Communal Facilities. The discussions included, in particular, the arrangement for the reassessment of the value of the New Communal Facilities. According to MCEC, therefore, any meeting with Manolium-Engineering was premature until the amount of costs and the terms and conditions of the acquisition had been determined and agreed within the relevant competent authorities.³⁸³ Pursuant to the Prime-Minister's instruction, the Ministry of Economy communicated this position to the Respondent's Council of Ministers³⁸⁴ and Manolium-Engineering.³⁸⁵
286. In early December 2015, MCEC asked the Ministry of Architecture and Construction and the State Property Committee, *inter alia*, to propose assessment methods, a body, which would carry out the assessment, source and method of the financing of the assessment.³⁸⁶ On 8 December 2015, MCEC updated the Council of Ministers of the current status of the internal discussions between the various state authorities and asked the Council of Ministers to instruct the Control and Audit Office of the Ministry of Finance (the "CAO of the Ministry of Finance") and, where necessary, specialists from other competent authorities to undertake a reassessment of the costs of the New Communal Facilities. As Mr Akhramenko explains,³⁸⁷ the reassessment would be made pursuant to a method including, *inter alia*, the following:
- a) a check measurement of the New Communal Facilities in order to determine the actual volumes of the works performed;
 - b) an evaluation of the extent of depreciation of the New Communal Facilities;
- and

³⁸³ Letter from MCEC to the Ministry of Economy dated 26 November 2015, **Exhibit R-129**.

³⁸⁴ Letter from the Ministry of Economy to the Council of Ministers dated 27 November 2015, **Exhibit R-131**

³⁸⁵ Letter from the Ministry of Economy to Manolium-Engineering dated 27 November 2015, **Exhibit R-130**.

³⁸⁶ Letter from MCEC to the Ministry of Architecture and Construction and the State Property Committee dated 2 December 2015, **Exhibit R-132**

³⁸⁷ Witness Statement of Mr Akhramenko, paragraphs 132 – 139, **RWS-3**.

- c) a determination of whether the characteristics of the New Communal Facilities complied with the Design and Estimate Documentation.³⁸⁸
287. Furthermore, according to MCEC, the proposed reassessment should not take into account the following costs:
- a) costs not confirmed by properly executed payment orders and work completion certificates;
 - b) costs of works and materials not covered by the design documentation;
 - c) costs incurred by organisations other than the Claimant and Manolium-Engineering;
 - d) costs relating to the assessment; and
 - e) other costs, which did not comply with “*the purpose and conditions of the assessment*”.³⁸⁹
288. On 28 December 2015, however, the Ministry of Finance informed MCEC that the proposed reassessment did not fall within “[its] *tasks and functions*” as set out in Belarusian law.³⁹⁰
289. Nonetheless, on 30 December 2015, MCEC held a meeting concerning the reassessment with representatives of Minsktrans, the Ministry of Architecture and Construction, the Ministry of Justice, the Ministry of Finance, the Ministry of Economy, the State Property Committee, the State Standardisation Committee and Minsktrans. The meeting participants resolved to ask the Council of Ministers to direct that the reassessment be conducted by the CAO of the Ministry of Finance together with Republican Unitary Enterprise “Republican Scientific and Technical Centre for Pricing in Construction” of the Ministry of Architecture and Construction (“**RSTC**”). As proposed by MCEC, it was agreed that the reassessment was to be based on the method described in paragraphs 286 – 287 above.³⁹¹ On the same day,

³⁸⁸ Letter from MCEC to the Council of Ministers dated 8 December 2015, **Exhibit R-133**

³⁸⁹ Letter from MCEC to the Council of Ministers dated 8 December 2015, **Exhibit R-133**

³⁹⁰ Letter from the Ministry of Finance to MCEC dated 28 December 2015, **Exhibit R-134**

³⁹¹ Minutes of the meeting of 30 December 2015, **Exhibit R-135**; Witness Statement of Mr Akhramenko, paragraph 137 **RWS-3**.

MCEC updated the Council of Ministers on the outcome of the meeting seeking approval from the Council of Ministers of the proposed reassessment and asking it to instruct the Ministry of Finance and the Ministry of Architecture and Construction to undertake the reassessment.³⁹²

R. 2016 MEMORANDUM

290. On 27 January 2016, the Council of Ministers instructed the Ministry of Finance and the Ministry of Architecture and Construction to conduct an unscheduled audit of Manolium-Engineering, which was to include, in particular:
- a) a check measurement of the New Communal Facilities in order to determine the actual volumes of the works performed and whether those works complied with the design documentation; and
 - b) a determination of the amount of costs spent on the New Communal Facilities based on the check measurement and other assessment measures.³⁹³
291. On 3 February 2016, the Minister of Finance instructed RSTC's employees³⁹⁴ and the officers of the CAO of the Ministry of Finance to conduct the unscheduled audit.³⁹⁵
292. On or around 22 February 2016, a committee set up by the Minister of Finance prepared a memorandum which stated that "*the documented costs of [Manolium-Engineering] directed to the [New Communal Facilities] [...] (including the costs of construction management)*" were "*equivalent of*" US\$19,434,679 (the "**2016 Memorandum**").³⁹⁶
293. On 29 February 2016, MCEC held a meeting with the representatives of the Ministry of Economy, the Ministry of Architecture and Construction, the Ministry of Finance

³⁹² Letter from MCEC to the Council of Ministers dated 30 December 2015, **Exhibit R-135**; Witness Statement of Mr Akhramenko, paragraph 139, **RWS-3**.

³⁹³ Instruction of the Council of Ministers dated 27 January 2016, **Exhibit R-137**; Witness Statement of Mr Akhramenko, paragraphs 136 and 133 **RWS-3**.

³⁹⁴ On 2 February 2016, the Ministry of Architecture and Construction proposed the Ministry of Finance to involve RSTC's employees in the unscheduled audit of Manolium-Engineering (Letter from the Ministry of Architecture and Construction to the Ministry of Finance dated 2 February 2016, **Exhibit R-138**).

³⁹⁵ Instruction of the Minister of Finance dated 3 February 2016, **Exhibit R-139**; Witness Statement of Mr Akhramenko, paragraph 136, **RWS-3**.

³⁹⁶ 2016 Memorandum, page 16, **Exhibit C-160**.

and the State Property Committee to discuss the 2016 Memorandum.³⁹⁷ The meeting participants agreed that the committee failed to comply with the instructions of the Council of Ministers dated 27 January 2016³⁹⁸ and the Minister of Finance dated 3 February 2016.³⁹⁹

294. By way of example, the committee did not undertake the comprehensive check measurement of the New Communal Facilities as required by the above instructions.⁴⁰⁰ Instead, it randomly measured “*the volumes of the floor construction works*” in one of the buildings of the Depot.⁴⁰¹ Furthermore, in reassessing the value of the New Communal Facilities, the committee did not take into account the extent of the wear-and-tear.
295. Moreover, any analysis of the primary documentation (such as work acceptance certificates and as-built documentation) was done on a limited sampling basis only.⁴⁰² In particular, in reassessing the costs of construction of the Depot, the committee reviewed the work acceptance certificates only for the period from December 2011 to March 2012.⁴⁰³ The committee did not, however, explain in the 2016 Memorandum, why it chose only this particular period and did not examine all the others.
296. Finally, as follows from the 2016 Memorandum, the analysis was in fact limited to a comparison of the accounting data with the Registration and Cadastre Agency Report.⁴⁰⁴ Apart from the fact that the accounting documents were a secondary source of information and could not be relied on as definitive evidence of the actual costs incurred, the basis of the Registration and Cadastre Agency Report was already deemed by MCEC to defy the agreement reached at the meeting of 4 February 2015.⁴⁰⁵

³⁹⁷ Witness Statement of Mr Akhramenko, paragraph 143, **RWS-3**.

³⁹⁸ Instruction of the Council of Ministers dated 27 January 2016, **Exhibit R-137**.

³⁹⁹ Instruction of the Minister of Finance dated 3 February 2016, **Exhibit R-139**

⁴⁰⁰ Instruction of the Council of Ministers dated 27 January 2016, **Exhibit R-137**; Instruction of the Minister of Finance dated 3 February 2016, **Exhibit R-139**.

⁴⁰¹ 2016 Memorandum, page 17, **Exhibit C-160**.

⁴⁰² 2016 Memorandum, page 4, **Exhibit C-160**.

⁴⁰³ 2016 Memorandum, pages 12 – 13, **Exhibit C-160**.

⁴⁰⁴ 2016 Memorandum, page 14, **Exhibit C-160**.

⁴⁰⁵ See paragraphs 279 – 282 above.

297. The Claimant alleges that the 2016 Memorandum confirmed that “*Manolium-Engineering did not commit any violations in constructing the New Communal Facilities*”.⁴⁰⁶ This is misleading. As follows from the description of the unscheduled audit method,⁴⁰⁷ the 2016 Memorandum did not analyse whether Manolium-Engineering committed any breaches in constructing the New Communal Facilities. Indeed, the CAO of the Ministry of Finance and RSTC could not make such a finding given that they did not conduct the check measurement of the New Communal Facilities⁴⁰⁸ and did not analyse all the primary construction documents.⁴⁰⁹
298. In view of the facts described above, the Respondent respectfully submits that the 2016 Memorandum does not reflect what the Claimant and Manolium-Engineering had in fact spent on the construction of the New Communal Facilities.

S. ADMINISTRATIVE PROCEEDINGS FOR OCCUPYING LAND PLOTS WITHOUT PERMITS (THE “2016 ADMINISTRATIVE PROCEEDINGS”)

299. As described in paragraphs 114 – 117 and 159 above, the permits to the land plots for the construction of the New Communal Facilities expired on 1 July 2011. Contrary to the Claimant’s assertion,⁴¹⁰ Manolium-Engineering has never applied for the extension of the permits.⁴¹¹
300. Pursuant to the applicable Belarusian regulations, in order to extend a permit to land plots it is necessary to apply for such an extension no later than two months before

⁴⁰⁶ Notice, paragraph 285(a), **CS-1**.

⁴⁰⁷ 2016 Memorandum, pages 3 – 4, **Exhibit C-160**.

⁴⁰⁸ See paragraph 294 above.

⁴⁰⁹ See paragraph 295 above.

⁴¹⁰ Notice, paragraph 242, **CS-1**.

⁴¹¹ The Claimant alleges that it made “*numerous requests*” to extend the permits to the land plots and that MCEC refused to grant the extensions. In support of this allegation the Claimant relies on its letter to MCEC dated 24 November 2011, **Exhibit C-122**. In the letter, Manolium-Engineering is asking MCEC to allocate the land plot for construction of the Investment Object. That land plot is completely different to the ones where the New Communal Facilities were being constructed and has nothing to do with the permits to the land plots. It seems that the Claimant has mistakenly provided Exhibit C-122 in support of its allegation in paragraph 242. The Respondent asked the Claimant to provide the correct exhibits (Letters from White & Case to Baker McKenzie dated 23 and 25 July 2018, **Exhibits R-155** and **R-156**). The Claimant replied that it was going to “*make corrections to either paragraph [242] or footnote[s] [208 and 209] of the Notice*” (Letters from Baker McKenzie to White & Case dated 24 and 27 July 2018 **Exhibits R-157** and **R-158**). Accordingly, it is the Respondent’s understanding that the Claimant no longer submits that Manolium-Engineering made requests to extend the permits to the land plots and that MCEC refused to grant the extensions.

expiry of an existing permit.⁴¹² The same was stated in MCEC's decisions to grant the permits to the land plots to Manolium-Engineering.⁴¹³ In the absence of Manolium-Engineering's application to extend the permits to the land plots for the construction of the New Communal Facilities, Manolium-Engineering was under an obligation to return the land plots promptly after expiry of the relevant permits.⁴¹⁴ Such return was, however, legally impossible without the parties agreeing on the destiny of the New Communal Facilities for the following reasons.

301. Under Belarusian law, immovable property and the underlying land plot do not constitute a single object and their owner has separate titles to them. Pursuant to the legal principle of "the single destiny" of land plots and immovable property located on them,⁴¹⁵ the same person must own a land plot and the property located on it unless law provides otherwise. In exceptional situations permitted by law, where the land and property located on it, have different owners, the law requires that the owner of the immovable property has a legal right, other than ownership, to the relevant land plot (such as lease rights). The said legal requirements are driven by the practical consideration that immovable property is connected to the underlying land plot and the two cannot be used without one another.
302. Following the said legal principles, the "return" of land plots to MCEC while Manolium-Engineering still owned the New Communal Facilities located on the land plots was impossible from the legal standpoint. The "return" could not have taken place because it would have negatively impacted either MCEC's or Manolium-Engineering's legal title to the land plots or the New Communal Facilities, respectively.
303. If Manolium-Engineering wanted to "return" the land plots in compliance with Belarusian legislation the only way to do that was to transfer the New Communal Facilities into municipal ownership simultaneously with the return of the land plots. That could not happen before the parties would agree on the terms of the transfer of

⁴¹² Regulation "On withdrawal and Allotment of Land Plots" enacted by the President's Decree No.667 dated 27 December 2007, Article 45.

⁴¹³ See, e.g.: Decision of the MCEC dated 3 September 2009, **Exhibit C-73**, which provides that the land user is obliged either to return the land plot by the expiry of the permit or to apply for an extension of the permit no later than two months before the expiry of the permit.

⁴¹⁴ Belarusian Land Code, Article 70.

⁴¹⁵ Belarusian Land Code, Article 5.

the New Communal Facilities. In this context, the Claimant's allegation that it asked MCEC to accept the New Communal Facilities into municipal ownership and that this request remained unanswered⁴¹⁶ is misleading. The parties' negotiations on the terms of such acceptance were ongoing as described in more detail, *inter alia*, in paragraphs 266 – 282 above. Following the termination of the Amended Investment Contract, MCEC was no longer under an obligation to accept the New Communal Facilities even if their construction was finally completed. Neither was it under an obligation to accept the Claimant and Manolium-Engineering's arbitrary proposals on the terms of the transfer of the New Communal Facilities into municipal ownership.

304. In the meantime, the fact remained that Manolium-Engineering kept occupying the land plots without any legitimate basis. As described in paragraph 314 below, this constituted a ground for a significant increase of the land tax rate payable by Manolium-Engineering.⁴¹⁷ This also constituted a ground for administrative sanctions.
305. The only reason why Manolium-Engineering found itself in this situation was its failure to complete and commission the New Communal Facilities by the contractual deadline (i.e. before 1 July 2011 when the permits to the land plots expired). It is the Respondent's submission that it did not prevent Manolium-Engineering from complying with the deadline. On the contrary, on numerous occasions, MCEC agreed to postpone the deadlines. Accordingly, it is Manolium-Engineering alone which is responsible for the negative consequences that followed.
306. In March 2016, the Land Planning Service of MCEC (the "**Land Planning Service**") drew up administrative offence reports in relation to Manolium-Engineering for the failure to return the land plots and for occupying the land plots without a permit. In accordance with the applicable procedure, the Land Planning Service submitted the reports to the Pervomaysky District Court of Minsk (the "**District Court**").⁴¹⁸
307. On 5 April 2016, a court hearing took place at the District Court. Representatives of Manolium-Engineering and the Land Planning Service took part in the hearing. The District Court established that Manolium-Engineering occupied the land plots without

⁴¹⁶ Notice, paragraph 288, **CS-1**.

⁴¹⁷ As explained in paragraphs 317 – 319, Manolium-Engineering was subject to land tax before 2010 and then starting from 2013.

⁴¹⁸ Resolution of the Minsk City Court dated 13 May 2016, **Exhibit C-162**.

the permits but concluded that Manolium-Engineering had not committed the administrative offences, as it did not have the requisite intention to occupy the land plots without permit.⁴¹⁹

308. The District Court reached this conclusion based on Manolium-Engineering's submissions that it had undertaken all actions within its powers to comply with the legal requirements. In particular, Manolium-Engineering misled the court into believing that Manolium-Engineering had sought an extension of the permits to the land plots but its request had been denied. In this circumstances the court agreed that the alleged attempt of Manolium-Engineering to "return" the land plots to MCEC proved the lack of intention to commit the administrative offence.
309. The Land Planning Service appealed against the Resolution of the District Court to the Minsk City Court. Following a hearing on 13 May 2016, the Minsk City Court agreed that the District Court's conclusions were premature and ungrounded.⁴²⁰ Based on that, the Minsk City Court annulled the Resolution of the District Court. The Minsk City Court found that the District Court had failed to establish whether Manolium-Engineering had applied for an extension of the permits to the land plots within the prescribed time limit, as Manolium-Engineering's assertion that it did so was not supported by any documents. The Minsk City Court also found that the District Court had failed to consider "*the designated purpose of the land plots [...] as well as the conditions for [their] return*",⁴²¹ meaning that the District Court had not established whether MCEC could accept the land plots back from Manolium-Engineering while the latter's property, including the New Communal Facilities, was still located on the land plots.
310. Accordingly, contrary to what may appear from the Claimant's submissions⁴²², the Minsk City Court did not annul the Resolution of the District Court on its own initiative. This happened in the course of appellate proceedings in accordance with Belarusian procedural law. The Minsk City Court then sent the case back to the

⁴¹⁹ Resolution of the Minsk City Court dated 13 May 2016, **Exhibit C-162**.

⁴²⁰ Resolution of the Minsk City Court dated 13 May 2016, **Exhibit C-162**.

⁴²¹ Resolution of the Minsk City Court dated 13 May 2016, **Exhibit C-162**.

⁴²² Notice, paragraph 289, **CS-1**.

District Court for reconsideration by a different judge. This was in accordance with the standard practice in administrative proceedings.

311. On 17 May 2016, the District Court reconsidered the case now addressing the issues it had failed to consider for the first time.⁴²³ The District Court found that Manolium-Engineering in fact had never applied for an extension of the permits to the land plots. The District Court also concluded that Manolium-Engineering’s alleged attempts to “return” the land plots to MCEC were irrelevant given that its property was still located on the land plots. The District Court therefore resolved to impose administrative sanctions on Manolium-Engineering for occupying land plots without permits since 2 July 2011 (the “**Administrative Court Resolution**”).⁴²⁴ The court imposed a fine on Manolium-Engineering in the amount of 52,500,000 non-denominated Belarusian rubles (approximately, US\$2,726).
312. Manolium-Engineering filed an appeal against the Administrative Court Resolution. On 14 June 2016, the Minsk City Court denied Manolium-Engineering’s appeal and upheld the Administrative Court Resolution.⁴²⁵ Manolium-Engineering further filed an appeal to the President of the Minsk City Court. On 3 August 2016, the President of the Minsk City Court denied the appeal.⁴²⁶ Manolium-Engineering did not appeal the decision to the Belarusian Supreme Court.

T. LAND TAX LIABILITIES OF MANOLIUM-ENGINEERING

1. Summary of the Applicable Tax Legislation

313. Pursuant to Belarusian tax legislation, land plots in Belarus may be used on a paid basis only. Payment for land use may take the form of lease payments (if an entity holds land plots based on a lease agreement) or land tax (if an entity owns land plots or has been granted a permanent or a temporary – which was the case with Manolium-Engineering – permit to use them). Once the temporary permit to the land plots expires (and is not extended) the occupant of the land must “return” the land plots to

⁴²³ Resolution of the District Court dated 17 May 2016, **Exhibit C-182**.

⁴²⁴ Resolution of the District Court dated 17 May 2016, **Exhibit C-182**.

⁴²⁵ Resolution of the Minsk City Court dated 14 June 2016, **Exhibit C-163**.

⁴²⁶ Resolution of the President of the Minsk City Court dated 3 August 2016, **Exhibit C-184**.

the state or municipal body, as relevant.⁴²⁷ In practice, this means that the occupant has to remove all its property from that land plot and vacate it. Where an entity continues to occupy the land plots, such entity remains liable to land tax.⁴²⁸

314. Since 1 January 2001, where an entity continued to occupy the land plots after the expiry of a temporary right to use them it was liable to pay land tax on such land plots at a tenfold increased rate.⁴²⁹ This provision is in the current Tax Code.⁴³⁰
315. The Tax Code also provides that in relation to the land plots on which stand unfinished construction objects whose permitted term of construction has expired, the rate of land tax doubles.⁴³¹
316. These measures are part of an overall effort by the Belarusian governmental authorities to reduce the number of delayed construction projects and encourage the efficient use of land in Belarus.
317. Starting from 2010, Manolium-Engineering has been taxed under the simplified taxation system.⁴³² Before 2013, this meant that it was not under an obligation to account for and pay separately land tax. Accordingly, Manolium-Engineering, which used to pay land tax before 2010,⁴³³ stopped filing separate tax returns with respect to land tax.
318. However, from 2013 following amendments to the Tax Code, all entities taxed under the simplified taxation system, which occupied land plots exceeding 0.5 hectares in size had, *inter alia*, to file relevant tax returns and pay land tax.⁴³⁴

⁴²⁷ Land Code of the Republic of Belarus, Article 70.

⁴²⁸ Tax Code of the Republic of Belarus, Articles 192(1), 192(4), 193(1).

⁴²⁹ Law No. 1314-XII “On Payments for Land” dated 18 December 1991, revised edition in force since 1 January 2001

⁴³⁰ Tax Code of the Republic of Belarus, Article 197(2).

⁴³¹ Tax Code of the Republic of Belarus, Article 197(3)

⁴³² Witness Statement of Ms [REDACTED], paragraph 26, **RWS-2**. As Ms [REDACTED] explains in her Witness Statement: “*the simplified taxation system is a special tax regime which any company can apply for if they meet certain criteria based on, for example, number of employees, gross proceeds or some other criteria*”.

⁴³³ Letter from Manolium-Engineering to MCEC dated 15 April 2009, **Exhibit R-48**; Witness Statement of Ms [REDACTED], paragraph 27, **RWS-2**.

⁴³⁴ Tax Code of the Republic of Belarus, Article 286(3.14), revised edition in force since 1 January 2013.

319. As set out in paragraphs 114 – 117 and 159 above, Manolium-Engineering’s permit to the land plots for the construction of the New Communal Facilities expired in July 2011 and Manolium-Engineering never applied for an extension. As explained in paragraph 313 above, the land plots remained taxable because Manolium-Engineering continued to occupy them. The surface of the land plots held by Manolium-Engineering exceeded the threshold of 0.5 hectares, so the obligation to account for and pay land tax applied to Manolium-Engineering from 2013.
320. Ms [REDACTED], who was the chief accountant of Manolium-Engineering at the time, says in her witness statement that approximately in February 2013, she explained the nature of the said amendments, to the director of Manolium-Engineering, Mr Dolgov. Ms [REDACTED] also prepared tax returns with respect to land tax to be filed. According to Ms [REDACTED], she made numerous attempts to persuade Mr Dolgov that Manolium-Engineering had to pay land tax from then on.⁴³⁵ Mr Dolgov, however, refused to sign the tax returns prepared by Ms [REDACTED] and directed her not to pay the tax in breach of the law.⁴³⁶

2. 2016 Tax Audit

321. Since Manolium-Engineering failed to submit tax returns with respect to land tax for the year 2013 and onwards, in February 2014, the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Central District of Minsk (the “**District Tax Inspectorate**”) demanded that Manolium-Engineering comply with its obligations to submit land tax returns for the years 2013 and 2014.⁴³⁷ The demands remained unanswered.
322. On 17 May 2016, the District Tax Inspectorate carried out a desk tax audit of Manolium-Engineering’s activities for the years 2013 to 2015 and the first half of 2016 (the “**2016 Tax Audit**”). The subject matter of the 2016 Tax Audit was the payment by Manolium-Engineering of land tax. The Claimant’s emphasis that the tax audit was carried out “*without any order to conduct [it]*”⁴³⁸ suggests that it was

⁴³⁵ Witness Statement of Ms [REDACTED], paragraphs 30-38, **RWS-2**; Internal Memorandum of Ms [REDACTED] to Mr Dolgov dated 15 March 2013, **Exhibit R-7**.

⁴³⁶ Witness Statement of Ms [REDACTED], paragraphs 31, 32, 37, **RWS-2**.

⁴³⁷ Demands of the District Tax Inspectorate dated 21 February 2014, **Exhibits R-111 and R-112**.

⁴³⁸ Notice, paragraph 296, **CS-1**.

somehow improper for the District Tax Inspectorate to carry out the audit without “an order”. This is misleading, as Article 70(1) of the Belarusian Tax Code expressly provides that the tax authorities do not require any special order to conduct a desk tax audit. Given that Manolium-Engineering ignored the tax authorities’ demands to submit the requisite tax returns as set out in paragraph 321 above, it was in the proper exercise of their duties to carry out a desk tax audit. Accordingly, the 2016 Tax Audit was carried out in full compliance with Belarusian law. The legal grounds for the 2016 Tax Audit are set out in the First Tax Audit Report as defined below.

323. Following the 2016 Tax Audit, the District Tax Inspectorate issued a report (the “**First Tax Audit Report**”)⁴³⁹ for the years 2013 to 2015 and the first half of 2016, concluding that Manolium-Engineering owed land tax payments for the relevant period, as it occupied the Land Plots during the relevant period. The District Tax Inspectorate sent copies of the First Tax Audit Report to both Manolium-Engineering and the Claimant.⁴⁴⁰
324. In the Notice, the Claimant provides incorrect figures when describing the amount of outstanding tax payments set out in the First Tax Audit Report.⁴⁴¹ The Claimant, in particular, states that pursuant to the First Tax Audit Report, Manolium-Engineering was to pay “18,538,186.226 denominated Belarusian rubles (equivalent of US\$9,410,000) and the penalty of 4,380,990.859 denominated Belarusian rubles (equivalent of US\$2,225,000)”⁴⁴² in taxes. In fact, however, the First Tax Audit Report used the non-denominated Belarusian rubles.⁴⁴³ It concluded that the outstanding tax liability of Manolium-Engineering was 18,538,186,226 non-denominated Belarusian rubles and the penalty – 4,380,990,859,⁴⁴⁴ which at the time was equivalent to US\$962,473 and US\$227,454, respectively.⁴⁴⁵

⁴³⁹ First Tax Audit Report dated 17 May 2016, **Exhibit C-164**.

⁴⁴⁰ Letter of the District Tax Inspectorate to Manolium-Engineering dated 18 May 2016, letter of the District Tax Inspectorate to the Claimant dated 18 May 2016, **Exhibit R-141** and **Exhibit R-142**.

⁴⁴¹ Notice, paragraph 297, **CS-1**.

⁴⁴² Notice, paragraph 297, **CS-1**.

⁴⁴³ The denomination in Belarus took place on 1 July 2016 whereas the First Tax Audit Report was prepared on 17 May 2016. 10,000 non-denominated Belarusian rubles is equal to 1 denominated Belarusian ruble.

⁴⁴⁴ First Tax Audit Report dated 17 May 2016, **Exhibit C-164**.

⁴⁴⁵ As at 17 May 2016, US\$1 was equivalent to 19,261 non-denominated Belarusian rubles.

325. After the First Tax Audit Report was issued, the Land Planning Service notified the tax authorities that Manolium-Engineering owned the Depot under construction and that the term for its construction had expired.⁴⁴⁶ Accordingly, the relevant land plots should have been taxed at a double rate. The Land Planning Service also notified the District Tax Inspectorate of the Administrative Court Resolution.⁴⁴⁷ As described in paragraph 311, it was, *inter alia*, established in the Administrative Court Resolution that Manolium-Engineering occupied the land plots after the expiry of the requisite permits. Accordingly, the land plots should have been taxed at a tenfold rate.
326. On 21 June 2016, the District Tax Inspectorate amended the First Tax Audit Report to address the latest update from the Land Planning Service.⁴⁴⁸ Among other things, the District Tax Inspectorate now applied the tenfold and the double multipliers to the land tax rate on the relevant land plots. The District Tax Inspectorate did so on the basis that as a matter of fact (i) Manolium-Engineering continued to occupy the land plots after the expiry of the permits and (ii) unfinished construction objects, in relation to which the permitted term for the construction had expired, were located on some of the land plots.
327. Contrary to the Claimant's allegations,⁴⁴⁹ the Administrative Court Resolution was not the ground for the application by the District Tax Inspectorate of the increased land tax rates. That Resolution was simply a formal document through which the District Tax Inspectorate learned that Manolium-Engineering was occupying the Land Plots without the requisite permits as a matter of fact. This, in turn, was a ground for the District Tax Inspectorate to apply the increased tax rates.
328. The District Tax Inspectorate sent a document setting out the amendments and supplements to the First Tax Audit Report to Manolium-Engineering⁴⁵⁰ and to all known addresses of Manolium-Engineering's director Mr Dolgov.⁴⁵¹ The legal and the factual grounds for the amendments made to the First Tax Audit Report were set

⁴⁴⁶ Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**.

⁴⁴⁷ Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**.

⁴⁴⁸ Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**.

⁴⁴⁹ Notice, paragraphs 492 – 493, **CS-1**.

⁴⁵⁰ Letter from the District Tax Inspectorate to Manolium-Engineering dated 21 June 2016, **Exhibit C-165**.

⁴⁵¹ Letters from the District Tax Inspectorate to Mr Dolgov dated 21 June 2016, **Exhibit R-143**.

out in the document.⁴⁵² In particular, it provided references to the communications received by the District Tax Inspectorate from the Land Planning Service on 10 and 16 June 2016, as described in paragraph 325 above.⁴⁵³

329. A tax audit report is not an enforceable document under Belarusian law. It normally sets a term within which the taxpayer must comply with it voluntarily. Pursuant to Article 78(6) of the Belarusian Tax Code, the taxpayer also has 15 days to submit its objections to the tax audit report. If the taxpayer does not comply with the tax audit report voluntarily within the prescribed term and does not submit any objections to the tax audit report within 15 days, the tax authority may proceed to issuing a formal decision to recover the respective tax payments from the taxpayer and to enforcing such decision.⁴⁵⁴ It was expressly stated in the amendments and supplements to the First Tax Audit Report that a formal decision would be issued and that it would be enforceable starting from the next day after its dispatch to Manolium-Engineering if Manolium-Engineering fails to settle the liability voluntarily.⁴⁵⁵
330. Pursuant to the amended First Tax Audit Report the amount of the outstanding land tax liability of Manolium-Engineering was 200,464,789,168 non-denominated Belarusian rubles and the penalty amounted to 63,976,021,034 non-denominated Belarusian rubles.⁴⁵⁶ This was equal to 20,046,478.92 and 6,397,602.10 denominated Belarusian rubles and to approximately US\$10,161,950 and US\$3,243,069, respectively. Since Manolium-Engineering failed to settle the liability voluntarily and did not file any objections to the amended First Tax Audit Report within the prescribed time, on 19 July 2016, the District Tax Inspectorate, issued a decision to recover the same amounts from Manolium-Engineering (the “**Inspectorate Decision**”).⁴⁵⁷

⁴⁵² Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**.

⁴⁵³ Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**.

⁴⁵⁴ Tax Code of the Republic of Belarus, Article 78(8).

⁴⁵⁵ Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**

⁴⁵⁶ Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**.

⁴⁵⁷ Decision of the Tax Inspectorate No. 2-5/465 dated 19 July 2016, **Exhibit C-168**. Since the Inspectorate Decision was issued after the denomination that took place on 1 July 2016, the amounts in the Inspectorate Decision are stated in denominated Belarusian rubles.

331. The District Tax Inspectorate sent copies of the Inspectorate Decision to Manolium-Engineering⁴⁵⁸ and to all known addresses of Mr Dolgov⁴⁵⁹ on 19 July 2016. The Inspectorate Decision contained, *inter alia*, a statement that Manolium-Engineering had the right to appeal against the Inspectorate Decision both to a higher tax authority and to the court.⁴⁶⁰ The Claimant and Manolium-Engineering, however, never challenged the findings of the District Tax Inspectorate and did not file an appeal against the Inspectorate Decision.

3. Court order to enforce the land tax liabilities against the New Communal Facilities

332. The tax authorities in Belarus are authorised to adopt certain measures the purpose of which is to secure the enforcement of outstanding tax liabilities, including through attachment of taxpayers' assets.⁴⁶¹ On 5 July 2016, the District Tax Inspectorate issued an order for the attachment of the New Communal Facilities under construction, as they were the only known assets of Manolium-Engineering.⁴⁶²

333. The Belarusian tax authorities are authorised under Belarusian law to enforce tax liabilities directly against debtors' monetary funds or receivables.⁴⁶³ The tax authorities do not need to obtain a court order for this purpose. If, however, a debtor does not have money or receivables, as was the case with Manolium-Engineering, the tax authorities may apply to the court in order to enforce the tax liability against the

⁴⁵⁸ Decision of the District Tax Inspectorate No. 2-5/465 dated 19 July 2016, **Exhibit C-168**.

⁴⁵⁹ Letters of the District Tax Inspectorate to Mr Dolgov dated 19 July 2016, **Exhibit R-144**.

⁴⁶⁰ Decision of the Tax Inspectorate No. 2-5/465 dated 19 July 2016, **Exhibit C-168**.

⁴⁶¹ Tax Code of the Republic of Belarus, Article 54.

⁴⁶² Ruling of the District Tax Inspectorate No. 1110590 dated 5 July 2016 to attach property, **Exhibit C-167**. Pursuant to Article 4 of the Regulation "On accounting, safe-keeping, evaluation and sale of confiscated, attached or forfeited assets", the District Tax Inspectorate was required to set out in the Ruling an estimated value of the attached property as provided for in Manolium-Engineering's accounting records. According to Manolium-Engineering's latest accounting records (which were the records as of 1 July 2014) the amount of costs spent on the construction of the New Communal Facilities was 20,699,871.7 denominated Belarusian rubles. The District Tax Inspectorate used this figure as an estimated value of the New Communal Facilities for the purpose of the attachment. The District Tax Inspectorate later gave this amount as an estimated value of the New Communal Facilities to the court when it applied for an order to enforce Manolium-Engineering's land tax liabilities against the New Communal Facilities (*see* paragraph 333 below). This, however, did not mean that the District Tax Inspectorate or the court agreed with or somehow endorsed the said evaluation, as, in any event, pursuant to the legal requirements, the New Communal Facilities were appraised later during the enforcement procedure as described in paragraphs 339 – 353 below.

⁴⁶³ Tax Code of the Republic of Belarus, Articles 56-58.

debtor's other assets.⁴⁶⁴ On 20 July 2016, the District Tax Inspectorate applied to the Economic Court of Minsk for an order to enforce the land tax liabilities against the attached assets of Manolium-Engineering.⁴⁶⁵

334. The Claimant seeks to create a false impression that the amount of the land tax liabilities somehow inexplicably and arbitrarily changed in the time between the Inspectorate Decision dated 19 July 2016 and the Inspectorate's application for a court order dated 20 July 2016.⁴⁶⁶ In fact, however, the amount of tax payable as stated in the Inspectorate Decision (20,046,478.92 denominated Belarusian rubles) and in its application to the court (20,046,478.41 denominated Belarusian rubles) differs by 0.51 denominated Belarusian rubles.⁴⁶⁷ The only figure that has materially changed was the amount of the penalty. The Inspectorate Decision restated the amount of the penalty calculated as at the date of the amended First Tax Audit Report (i.e. 21 June 2016). The penalty on the outstanding amounts of tax, however, went on accruing in accordance with applicable law.⁴⁶⁸ The District Tax Inspectorate updated the calculation of the amount of penalty for the purpose of its application to the court (i.e. as at 20 July 2016). Between 21 June 2016 and 20 July 2016, the amount of penalty increased by 620,527.32 denominated Belarusian rubles.⁴⁶⁹ This is where the difference in figures between the Inspectorate Decision and the District Tax Inspectorate's application for a court order lies. This is explained in the Inspectorate's application for a court order.⁴⁷⁰
335. Manolium-Engineering failed to submit a defence to the application of the District Tax Inspectorate for a court order.⁴⁷¹ On 18 August 2016, the Economic Court of Minsk granted the order to enforce the land tax liabilities against the attached assets of

⁴⁶⁴ Tax Code of the Republic of Belarus, Article 59.

⁴⁶⁵ Application of the Tax Inspectorate to the Economic Court of Minsk dated 20 July 2016, **Exhibit C-169**.

⁴⁶⁶ Notice, paragraph 304, **CS-1**.

⁴⁶⁷ The reason for this 0.51 ruble difference is that the set-off of the amount of tax payable under the Tax Inspectorate Decision against the balance of Manolium-Engineering's account was 0.51 denominated Belarusian rubles as at the date of the Inspectorate Decision.

⁴⁶⁸ Tax Code of the Republic of Belarus, Article 52(3).

⁴⁶⁹ 7,018,129.42 denominated Belarusian rubles (as at 20 July 2016) – 6,397,602.10 denominated Belarusian rubles (as at 21 June 2016) = 620,527.32 denominated Belarusian rubles.

⁴⁷⁰ Application of the Tax Inspectorate to the Economic Court of Minsk dated 20 July 2016, page 2, **Exhibit C-169**.

⁴⁷¹ Order of the Economic Court of Minsk dated 18 August 2016, **Exhibit C-170**.

Manolium-Engineering – the New Communal Facilities.⁴⁷² The Claimant and Manolium-Engineering never challenged the actions of the District Tax Inspectorate nor appealed against the court order, although such a right was expressly set out in the court order.⁴⁷³

4. Administrative fine for the failure to submit tax returns and settle the outstanding tax liabilities

336. Failure to submit tax returns on time and to settle outstanding tax liabilities constitute administrative offences under Belarusian law. On 24 November 2016, a deputy head of the District Tax Inspectorate considered whether there were grounds to impose administrative sanctions to Manolium-Engineering. Manolium-Engineering was duly notified of the administrative proceedings but its representative did not attend the hearing.⁴⁷⁴
337. The deputy head of the District Tax Inspectorate found that the failure by Manolium-Engineering (i) to submit on time the tax returns with respect to land tax; and (ii) to settle the outstanding land tax liabilities (as established and confirmed, *inter alia*, by the amended First Tax Audit Report and the Inspectorate Decision) qualified as administrative offences under Articles 13.4(2) and 13.6(1) of the Belarusian Code of Administrative Offences.
338. The amount of liability was calculated based on the outstanding land tax liability of Manolium-Engineering that arose within the applicable limitation periods. Consequently, the deputy head of the District Tax Inspectorate resolved to impose an administrative fine of 4,667,379.72 denominated Belarusian rubles⁴⁷⁵ on Manolium-Engineering.⁴⁷⁶ Calculation of this amount is contained in the resolution of the District Tax Inspectorate. That resolution sets out the procedure for challenging it to a

⁴⁷² Order of the Economic Court of Minsk dated 18 August 2016, **Exhibit C-170**.

⁴⁷³ Order of the Economic Court of Minsk dated 18 August 2016, page 2, **Exhibit C-170**.

⁴⁷⁴ Resolution of the District Tax Inspectorate imposing administrative sanctions on Manolium-Engineering dated 24 November 2016, **Exhibit R-146**.

⁴⁷⁵ As at 24 November 2016, 4,667,379.72 denominated Belarusian rubles was equal to approximately US\$2,391,810.90 at the exchange rate set by the National Bank of Belarus (1.9514 denominated Belarusian rubles for US\$1).

⁴⁷⁶ Resolution of the District Tax Inspectorate imposing administrative sanctions on Manolium-Engineering dated 24 November 2016, **Exhibit R-146**.

higher tax inspectorate and the Economic Court of Minsk. However, Manolium-Engineering never filed an appeal.

5. Execution of the court order to enforce land tax liabilities against the New Communal Facilities

339. Belarusian legislation provides for a certain procedure to be followed where a court has ruled to enforce tax liabilities against the taxpayer's assets. The procedure is set out in the Regulation "On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets" (the "**Regulation**"). The Regulation was adopted by President's Decree No. 63 dated 19 February 2016.⁴⁷⁷ Both the Regulation and the Decree by which it was adopted are publically available. The Regulation is consistently applied by Belarusian state authorities.
340. According to to the Regulation, the assets that cannot be sold in order to settle the taxpayer's tax liability may be transferred into state or municipal ownership with the write-off of the tax liability in the corresponding part.⁴⁷⁸ Pursuant to the Regulation, an asset cannot be sold if either it is prohibited by law to sell such an asset on the open market or its qualities and usability make such sale impossible.⁴⁷⁹ The New Communal Facilities fell under the latter category as there was no prospect in selling them to a third-party buyer on the open market. The only way to enforce the tax liability against them was, therefore, to transfer them to a state or municipal ownership.
341. Pursuant to Article 165 of the Regulation, the transfer of real property into state or municipal ownership is only made effective by way of the President's order. The responsible state authorities prepare the draft order and submit it to the President's Administration for execution.⁴⁸⁰
342. The President's order itself is a culmination of the procedure and immediately precedes the actual transfer of the property into state or municipal ownership. In order for this to happen, various arrangements need to be made, including preparing an

⁴⁷⁷ President's Decree No. 63 dated 19 February 2016.

⁴⁷⁸ Regulation, Articles 17, 164, 165, 185.

⁴⁷⁹ Regulation, Article 2.

⁴⁸⁰ Regulation, Article 165.

inventory of the property⁴⁸¹ and arranging an evaluation of the property by an expert.⁴⁸² All these issues are expected to be resolved during the preparation of the draft order procedure and requires the involvement of a number of various authorities.

343. In the Notice, the Claimant refers to a letter attaching draft minutes of a meeting of the representatives of various state and municipal bodies.⁴⁸³ The Claimant relies on this letter in support of its contention that “*the President obliged numerous public authorities to conduct an additional evaluation of the New Communal Facilities for their gratuitous transfer into the ownership of Minsk*”.⁴⁸⁴ The meeting, however, was part of the ordinary procedure in the course of the preparation of draft President’s order pursuant to the Regulation.⁴⁸⁵ As follows from the draft minutes, the meeting concerned all the routine issues related to the transfer of the New Communal Facilities described in paragraph 342 above, including their inventory and expert evaluation of their market value.⁴⁸⁶
344. In accordance with the express provision in the Regulation,⁴⁸⁷ and not as directed by the President, as the Claimant suggests,⁴⁸⁸ the expert evaluation of the market value of the New Communal Facilities was carried out in November 2016.
345. Based on the expert evaluation, a statement of inventory and evaluation of the New Communal Facilities was prepared.⁴⁸⁹ The price of the New Communal Facilities for the purpose of enforcement of the tax liabilities was defined, pursuant to the Regulation,⁴⁹⁰ as the market value of the New Communal Facilities established by the expert, decreased by ten percent, which was equal to 27,287,748.05 denominated Belarusian rubles.⁴⁹¹

481 Regulation, Articles 248, 249.

482 Regulation, Article 44.

483 Letter from the Department of Humanitarian Activities dated 18 November 2016, **Exhibit C-172**.

484 Notice, paragraph 406, **CS-1**.

485 Witness Statement of Mr Akhramenko, paragraphs 148 – 153, RWS-3.

486 Letter from the Department of Humanitarian Activities dated 18 November 2016, **Exhibit C-172**.

487 Regulation, Articles 43 and 44.

488 Notice, paragraphs 311 and 406, **CS-1**.

489 Statement of inventory and evaluation dated 25 November 2016, **Exhibit R-147**

490 Regulation, Article 59.

491 Statement of inventory and evaluation dated 25 November 2016, **Exhibit R-147**

346. Pursuant to the formal procedure set out in the Regulation, once the price of the New Communal Facilities was established and other arrangements were made, the President executed the order to transfer the New Communal Facilities into the municipal ownership.⁴⁹²
347. The President's order is an administrative document forming part of the procedure set out in the publically available Regulation. The purpose of the President's order is to formally complete the procedure of the enforcement of tax liabilities, which was initiated and conducted pursuant to the court order of 18 August 2016. It follows from the Regulation that the President's order does not contain any materially new information but merely gives effect to the state authorities' decisions concerning the transfer of the New Communal Facilities into municipal ownership. The President's order is explicitly required by Article 165 of the Regulation, as explained in paragraph 341 above.
348. The President's order is not published because it is not a law-making instrument and is marked "for official use only". The Claimant alleges in the Notice that "[p]ublic officials of the Republic of Belarus are afraid of serving a copy of such order on the Claimant in connection with threatened wrongful acts on the part of their superiors".⁴⁹³ The Claimant does not explain or provide any ground for its misplaced allegation that Belarusian state officials are being threatened by their superiors or have a fear of unlawful actions by higher-ranking officials. The documents marked "for official use only" are non-disclosable to the public so any official who would provide a copy of the President's order to the Claimant would be acting beyond their authority.
349. On 27 January 2017, following the President's order, the New Communal Facilities were transferred to Minsktrans valued at 27,287,748.05 denominated Belarusian rubles.⁴⁹⁴ The same amount was set off against the land tax liabilities of Manolium-

⁴⁹² Witness Statement of Mr Akhramenko, paragraphs 150 – 156, **RWS-3**.

⁴⁹³ Notice, paragraphs 314 and 409, **CS-1**. The English translation of these paragraphs is ambiguous. Paragraphs 314 and 409 of the Notice in Russian contain an allegation that representatives of state authorities are afraid to provide a copy of the President's order to the Claimant because of fear of unlawful actions against them by higher-ranked officials.

⁴⁹⁴ Deed of transfer dated 27 January 2017, **Exhibit R-148**.

Engineering outstanding as at 20 January 2017 (the date of the President's order).⁴⁹⁵ Namely, the whole amount of the land tax payable for the years 2013 to 2015 and the first half of 2016 (20,046,478.41 denominated Belarusian rubles) was written off. Also the penalty was written off in part (7,241,269.64 denominated Belarusian rubles). The remaining part of the land tax liabilities as at 20 January 2017 was 1,649,762.17 denominated Belarusian rubles and constituted the remaining part of the penalty. Given that the whole amount of tax was settled, the penalty on the outstanding amount of land tax liability for 2013-2015 and first half of 2016 stopped accruing as of 20 January 2017.

350. The Claimant alleges that information about the exact amount of Manolium-Engineering's tax liabilities was not communicated to it.⁴⁹⁶ This is incorrect. Manolium-Engineering was notified of its total land tax liabilities at least as at 19 July 2016⁴⁹⁷ and it would have been aware of the amount of Manolium-Engineering's tax liabilities as at 10 November 2016.⁴⁹⁸ As to the adjusted amount of tax liability following the partial write-off, at the very least the Claimant would have learnt it in the course of the insolvency proceedings that were commenced in relation to Manolium-Engineering on 8 February 2017, as described in paragraphs 354 below.
351. The adjusted amount of tax liability following the write-off was communicated to Manolium-Engineering represented by the insolvency administrator in response to the insolvency administrator's request for information.⁴⁹⁹ The Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk District explained that pursuant to the Order of the Economic Court of Minsk of 18 August 2016, the New Communal Facilities were transferred into municipal ownership with a corresponding write-off of Manolium-Engineering's tax liabilities. The inspectorate further set out

⁴⁹⁵ Breakdowns of Manolium-Engineering's liabilities to the state as at 19 January 2017 and 20 January 2017, **Exhibit R-159** and **Exhibit R-26**. In addition to the outstanding tax liability of Manolium-Engineering, the breakdown shows the outstanding administrative fine as described in paragraph 338 above and state duty as described in paragraph 351 below.

⁴⁹⁶ Notice, paragraph 408, **CS-1**.

⁴⁹⁷ See paragraph 331 above; Decision of the Tax Inspectorate No. 2-5/465 dated 19 July 2016, **Exhibit C-168**.

⁴⁹⁸ In paragraph 401 of the Notice, the Claimant relies on the extract from the records of the Belarusian Ministry of Taxes and Levies in respect of Manolium-Engineering as at 10 November 2016 (**Exhibit C-171**).

⁴⁹⁹ Letter of the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk District dated 2 May 2017, **Exhibit R-151**.

that Manolium-Engineering's indebtedness to the state following the write-off amounted to 6,317,288.89 denominated Belarusian rubles. This amount consisted of the remaining amount of the penalty (1,649,762.17 denominated Belarusian rubles, as set out in paragraph 349 above), the administrative fine of 4,667,379.72 denominated Belarusian rubles (as described in paragraph 338 above) and the amount of state duty (147 denominated Belarusian rubles, as set out in the Order of the Economic Court of Minsk dated 18 August 2016⁵⁰⁰).

352. On 28 April 2017, the District Tax Inspectorate submitted an application to the insolvency administrator seeking to register the District Tax Inspectorate's claims to Manolium-Engineering in the insolvency proceedings.⁵⁰¹ The application contained a breakdown of Manolium-Engineering's outstanding liabilities together with the supporting documents. In addition to the amounts set out in paragraph 351 above, the application included a claim for safekeeping costs in the amount of 8,503.64 denominated Belarusian rubles. These costs related to the period between the attachment of the New Communal Facilities and their transfer into municipal ownership. During that period, the safekeeping of the New Communal Facilities was the responsibility of the state. In accordance with Belarusian law, such costs are recoverable from an entity which continues to have legal ownership of the asset, in this case – Manolium-Engineering⁵⁰²
353. In the Notice, the Claimant seeks to create an impression that the New Communal Facilities had been taken from it arbitrarily by way of a "secret" order of the President.⁵⁰³ As explained in paragraphs 333 – 335 and 339 – 349 above, this is wrong. The enforcement of the land tax liabilities against the New Communal Facilities was sanctioned by the order of the Economic Court of Minsk. Manolium-Engineering chose not to challenge the court's order. The subsequent procedure of evaluation and transfer of the New Communal Facilities into the municipal ownership was in strict compliance with the publically available Regulation and culminated in

⁵⁰⁰ Order of the Economic Court of Minsk dated 18 August 2016, **Exhibit C-170**.

⁵⁰¹ District Tax Inspectorate's application to the insolvency administrator dated 28 April 2017, **Exhibit R-150**.

⁵⁰² Pursuant to Article 59(5¹) of the Belarusian Tax Code, the taxpayer compensates to the state the costs of the enforcement of tax liability against the taxpayer's assets, including the appraisal, safekeeping and sale of such assets.

⁵⁰³ Notice, paragraphs 314, 407, 497 and 522, **CS-1**.

the President's order. The President's order was merely a formal procedural step necessary to give effect to the transfer of the New Communal Facilities.

U. MANOLIUM-ENGINEERING INSOLVENCY PROCEEDINGS AND 2017 TAX AUDIT

354. In October 2016, the Claimant, as the sole shareholder of Manolium-Engineering, resolved to commence a voluntary liquidation procedure in respect of Manolium-Engineering and appointed a liquidator.⁵⁰⁴ On 8 February 2017, upon an application of the liquidator, the Economic Court of Minsk ordered to stop the voluntary liquidation procedure and commence the insolvency proceedings.⁵⁰⁵ The court also appointed an insolvency administrator thereby replacing the liquidator.⁵⁰⁶ The insolvency proceedings are ongoing as at the date of this submission.
355. In March 2017, the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk Region (the "**Region Tax Inspectorate**") carried out a tax audit of Manolium-Engineering (the "**2017 Tax Audit**").⁵⁰⁷ A tax audit is always required under Belarusian law where an entity is subject to insolvency proceedings.⁵⁰⁸
356. Unlike the 2016 Tax Audit which was a desk tax audit and concerned solely the payment of land tax by Manolium-Engineering for the years 2013 to 2015 and the first half of 2016, the 2017 Tax Audit was a comprehensive audit of all tax liabilities of Manolium-Engineering starting from the year 2010 (the year in which the last full-scale tax audit of Manolium-Engineering took place).
357. On 24 March 2017, following the 2017 Tax Audit, the Region Tax Inspectorate issued its report (the "**Second Tax Audit Report**").⁵⁰⁹ The Second Tax Audit Report explained the legal basis for undertaking the 2017 Tax Audit and provided the detailed calculations. The Second Tax Audit Report stated that the Region Tax

⁵⁰⁴ Letter from the Executive Committee of Minsk Region to the liquidator of Manolium-Engineering dated 14 October 2016, **Exhibit C-8**.

⁵⁰⁵ Information from the website of the courts of general jurisdiction, **Exhibit C-179**.

⁵⁰⁶ Objections of the insolvency administrator to the Second Tax Audit Report dated 21 April 2017, **Exhibit R-149**.

⁵⁰⁷ Second Tax Audit Report dated 24 March 2017, **Exhibit C-187**.

⁵⁰⁸ President's Decree No. 510 dated 16 October 2009 "On Improvement of Controlling (Supervisory) Activities in the Republic of Belarus" (the "**Decree No. 510**"), Section 12.3.

⁵⁰⁹ Second Tax Audit Report dated 24 March 2017, **Exhibit C-187**.

Inspectorate has concluded that Manolium-Engineering owed the total of 16,530,306.38 denominated Belarusian rubles, which included⁵¹⁰:

- a) land tax in the amount of 10,456,525.94 denominated Belarusian rubles, including:
 - i) additional 4,326,092.19 denominated Belarusian rubles for the years 2013 to 2015 and the first half of the year 2016 – the period which was the subject matter of the 2016 Tax Audit;⁵¹¹
 - ii) 3,103,024.96 denominated Belarusian rubles for the second half of the year 2016, which was not the subject matter to the 2016 Tax Audit;
 - iii) 3,027,408.81 denominated Belarusian rubles for the first quarter of the year 2017 which was not the subject matter to the 2016 Tax Audit;
- b) property tax for the years 2013 to 2016 in the amount of 3,388,258.03 denominated Belarusian rubles;⁵¹²
- c) penalty in the amount of 1,360,991.76 denominated Belarusian rubles for the failure to pay the outstanding land tax;
- d) penalty in the amount of 1,324,530.65 denominated Belarusian rubles for the failure to pay the outstanding property tax.

358. A copy of the Second Tax Audit Report was sent to Manolium-Engineering represented by the insolvency administrator on 28 March 2017.⁵¹³ In the exercise of Manolium-Engineering's right to submit objections within 15 days, on 21 April 2017, the insolvency administrator of Manolium-Engineering filed objections to the Second

⁵¹⁰ Second Tax Audit Report dated 24 March 2017, **Exhibit C-187**.

⁵¹¹ A purpose of the all-encompassing 2017 Tax Audit was, *inter alia*, to check the correctness of the calculations of the 2016 Tax Audit. The 2017 Tax Audit concluded that there were certain inaccuracies in the First Tax Audit Report. The 2017 Tax Audit, therefore, corrected this. Therefore, the aggregate amount of land tax payable for the relevant period as established by the 2016 Tax Audit increased by 4,326,092.19 denominated Belarusian rubles.

⁵¹² As with land tax, following amendments to the Tax Code, Manolium-Engineering had to account for and pay property tax starting from 2013. Manolium-Engineering failed to do so despite the fact that Ms ██████ explained the relevant amendments to Mr Dolgov in early 2013. See: First Witness Statement of Ms ██████, paragraph 30, **RWS-2**.

⁵¹³ Second Tax Audit Report dated 24 March 2017, **Exhibit C-187**.

Tax Audit Report.⁵¹⁴ The objections concerned only the tax liabilities as calculated by the Region Tax Inspection for the first quarter of 2017. The administrator argued that the New Communal Facilities had been transferred to the municipal ownership on 27 January 2017, as described in paragraph 349 above, and the land plots automatically followed them. The administrator therefore argued that there was no ground for the Region Tax Inspection to conclude that Manolium-Engineering was liable to make tax payments for the entire first quarter of the year 2017.

359. The Region Tax Inspectorate accepted the objections of the insolvency administrator. It recalculated the amount of the tax payments for the year 2017 based on the fact that Manolim-Engineering transferred the New Communal Facilities to the municipal ownership and the land plots automatically followed them and Manolim-Engineering thereby stopped occupying the land plots on 27 January 2017. The Region Tax Inspectorate reissued the Second Tax Audit Report updated accordingly on 18 May 2017.⁵¹⁵ The adjusted total amount of Manolium-Engineering's tax liability pursuant to the amended Second Tax Audit Report was 14,525,203.07 Belarusian rubles. The amended Second Tax Audit Report explains the legal grounds for the amendments and provides detailed calculations.
360. Neither Manolium-Engineering nor the Claimant submitted any further objections to the findings of the Second Tax Audit Report.
361. During the insolvency proceedings, the insolvency administrator asked the tax authorities for updated information on Manolium-Engineering's outstanding liabilities to the state.⁵¹⁶ On 22 September 2017, the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk District responded setting out the aggregate amount of Manolium-Engineering's outstanding liabilities to the state as at 22 September 2017.⁵¹⁷ That letter stated that the total amount of Manolium-

⁵¹⁴ Objections of the insolvency administrator to the Second Tax Audit Report dated 21 April 2017, **Exhibit R-149**.

⁵¹⁵ Amendments to the Second Tax Audit Report dated 18 May 2017, **Exhibit C-186**.

⁵¹⁶ Letter of the insolvency administrator of Manolium-Engineering to the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk District dated 13 September 2017, **Exhibit R-154**.

⁵¹⁷ Letter from the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk District to the insolvency administrator of Manolium-Engineering dated 22 September 2017, **Exhibit C-189**.

Engineering's indebtedness to the state as at 22 September 2017 was 20,913,550.93 denominated Belarusian rubles, including the penalty in the amount of 4,411,009.14 denominated Belarusian rubles.

362. The Claimant suggests that the said letter contradicted the amended Second Tax Audit Report.⁵¹⁸ This is wrong. The amended Second Tax Audit Report contained the amount of the outstanding tax liabilities only. Contrary to the Claimant's allegation, the letter dated 22 September 2017 did not set out Manolium-Engineering's outstanding tax liability but Manolium-Engineering's total liability to the state, including the tax liability, the administrative fine as described in paragraph 338 above and certain other types of outstanding payments. In particular, the amount of 20,913,550.93 denominated Belarusian rubles included:

- a) 8,438,253.40 denominated Belarusian rubles – land tax (as per the amended Second Tax Audit Report)⁵¹⁹;
- b) 3,388,258.03 denominated Belarusian rubles – property tax (as per the amended Second Tax Audit Report)⁵²⁰;
- c) 4,667,379.72 denominated Belarusian rubles – administrative fine (as per the Resolution of the District Tax Inspectorate dated 24 November 2016, as described in paragraph 338 above)⁵²¹;
- d) 147 denominated Belarusian rubles – the state duty (as per the Order of the Economic Court of Minsk dated 18 August 2016, as described in paragraph 341 above);
- e) 8,503.64 denominated Belarusian rubles – safekeeping costs (as described in paragraph 352 above); and
- f) 4,411,009.14 denominated Belarusian rubles – penalty on the outstanding land and property tax payments as at 22 September 2017.

⁵¹⁸ Notice, paragraphs 320, 403, **CS-1**.

⁵¹⁹ Amendments to the Second Tax Audit Report dated 18 May 2017, **Exhibit C-186**.

⁵²⁰ Amendments to the Second Tax Audit Report dated 18 May 2017, **Exhibit C-186**.

⁵²¹ Resolution of the District Tax Inspectorate imposing administrative sanctions on Manolium-Engineering dated 24 November 2016, **Exhibit R-146**.

V. ALLEGED SALE OF THE LAND PLOT FOR THE INVESTMENT OBJECT

363. The Claimant alleges that “[i]n September 2017, the land plot for the Investment Object [...] was sold to another developer – A-100 Development – the company having no experience of construction in Minsk” for “17,050,000 denominated Belarusian rubles (equivalent of US\$8,650,000)”.⁵²²
364. According to the Claimant, “the said land plot is expected to host a residential complex composed of facilities of social and public importance and underground parkings”.⁵²³ The Claimant thus concludes that:
- “[...] the public bodies that wrongfully deprived the Claimant of the opportunity to construct the Investment Object on the territory of the Depot subsequently sold the land plot for the Investment Object to a third party without notifying the Claimant thereof and without offering the Claimant to purchase such land plot for construction.”⁵²⁴
365. Contrary to the Claimant’s assertion, the Respondent never “sold the land plot” for the Investment. The Respondent announced a public auction in relation to “the right for design and construction” on that land plot, which was of the same nature as the Claimant’s contingent right under the Amended Investment Contract.⁵²⁵
366. This auction was publicly announced on the official website of the Minsk City Centre of Immovable Property.⁵²⁶ According to the announcement, the starting price for the said right was set at 3,965,832.57 denominated Belarusian rubles, and the highest bidder would be the winner. The winner would then have to make a one-time payment for the right to enter into a lease agreement in relation to the land plot and, once such payment is made, to enter into a lease agreement and an “agreement on the exercise of the right for design and construction”.⁵²⁷

⁵²² Notice, paragraphs 293 – 294 and 500 – 501, CS-1.

⁵²³ Notice, paragraphs 295 and 502, CS-1.

⁵²⁴ Notice, paragraph 503, CS-1.

⁵²⁵ Amended Investment Contract, Clause 1, **Exhibit C-66**.

⁵²⁶ Announcement of the auction in relation to the right for design and construction on the Investment Object land plot // Available at: <http://mgcn.by/auctions/place/00001621.html>, **Exhibit R-152**.

⁵²⁷ Announcement of the auction in relation to the right for design and construction on the Investment Object land plot // Available at: <http://mgcn.by/auctions/place/00001621.html>, **Exhibit R-152**.

367. OOO Astomaks was declared the winner of the auction with the bid in the amount of 17.05 million denominated Belarusian rubles,⁵²⁸ which was equivalent to US\$8,865,432.61 at the official exchange rate of the National Bank of Belarus applicable on the day of the auction.⁵²⁹

III. THE TRIBUNAL DOES NOT HAVE JURISDICTION

368. As summarised in paragraphs 1 – 3 of Section I above, the claims referred to the Tribunal relate to acts and events which took place both before and after the EEU Treaty came into force on 1 January 2015.⁵³⁰

369. The Respondent's position is that the Tribunal does not have jurisdiction under the EEU Treaty over disputes which arose before 1 January 2015 and that, even if the Tribunal finds that it has jurisdiction, the substantive provisions of the EEU Treaty do not apply to acts and/or alleged breaches which took place before 1 January 2015.⁵³¹ The Respondent's position is that both the Termination Dispute (as defined in paragraph 405 below) and the Tax Dispute (as defined in paragraph 410 below) referred to the Tribunal both arose before 1 January 2015. In the alternative, the Respondent's position is that the acts which took place before 1 January 2015, including the termination of the Amended Investment Contract on 29 October 2014, cannot constitute a breach of the EEU Treaty.

370. The Claimant seeks to justify its retroactive application of the EEU Treaty by alleging that the Tribunal has jurisdiction over any dispute so long as the dispute is connected with investments made after 1991.⁵³² Further, the Claimant's position is that it has referred one dispute to the Tribunal, which arose on 25 April 2017 when the Claimant submitted its pre-arbitration notice to the Respondent.⁵³³ In the alternative, the

⁵²⁸ Minutes of the results of the auction dated 12 September 2017, **Exhibit R-153**

⁵²⁹ As at 12 September 2016, 17.05 million denominated Belarusian rubles was equal to US\$8,865,432.61 at the exchange rate set by the National Bank of Belarus (1.9232 denominated Belarusian rubles for US\$1).

⁵³⁰ The Claimant alleges that the termination of the Amended Investment Contract on 29 October 2014 constitutes an expropriation under the EEU Treaty. The Claimant also alleges that acts which took place before 1 January 2015 constitute a breach of the FET standard under the EEU Treaty, including the performance and termination of the Amended Investment Contract by MCEC and Minsktrans.

⁵³¹ See paragraphs 415 - 428 below.

⁵³² Statement of Claim, paragraphs 9 – 31, **CS-2**.

⁵³³ Statement of Claim, paragraphs 32 – 42, **CS-2**.

Claimant alleges that the EEU Treaty applies to all actions of the Respondent both before and after the entry into force of the EEU Treaty, because “*Belarus’ breach of the EEU Treaty continues*”.⁵³⁴

371. The *Ratione Temporis* Objection gives rise to the following questions for the Tribunal’s determination:

- a) Does the Tribunal have jurisdiction under the EEU Treaty over disputes which arose before 1 January 2015? (Question 1)
- b) Did the dispute(s) that the Claimant has referred to the Tribunal arise before 1 January 2015? (Question 2)
- c) Do the substantive provisions of the EEU Treaty apply to acts and/or alleged breaches which took place before 1 January 2015? (Question 3)
- d) Which acts that allegedly breached the EEU Treaty took place before 1 January 2015? (Question 4)

372. After considering Question 1, the Tribunal needs only proceed to consider Question 2 if it finds that it does not have jurisdiction over disputes which arose before 1 January 2015. The Tribunal needs only proceed to Question 3 and Question 4 if it finds that it has jurisdiction over one or both of the disputes.

373. If the Tribunal finds that it has jurisdiction over one or both of the disputes after considering the *Ratione Temporis* Objection, the Tribunal should proceed to determine the Contractual Objection. The Respondent’s position is that many of the Claimant’s claims relating to the performance and termination of the Amended Investment Contract are *prima facie* not capable of amounting to a breach of the EEU Treaty, because they relate to purely contractual conduct that does not involve any element of sovereign authority. The Claimant asserts that it has “*not made a single allegation that the Arbitral Tribunal has to decide on the purely contractual issues between Belarus and the Claimant or Manolium-Engineering.*”⁵³⁵

⁵³⁴ Statement of Claim, paragraphs 43 – 51, CS-2.

⁵³⁵ Statement of Claim, paragraph 63, CS-2.

374. If the Tribunal finds that it has jurisdiction over one or both of the disputes after considering the *Ratione Temporis* Objection and the Contractual Objection, the Tribunal should proceed to determine the Minsktrans Objection. The Respondent submits that the actions of Minsktrans that the Claimant alleges breached the EEU Treaty are not attributable to the Respondent. The Claimant alleges that the actions of Minsktrans are attributable to the Respondent.⁵³⁶

A. *RATIONE TEMPORIS* OBJECTION

1. The EEU Treaty does not apply retroactively

375. The Claimant commenced the present arbitration proceedings under Protocol 16 of the EEU Treaty (“**Protocol 16**”), Articles 84 and 85(3), which provide that:

“84. All disputes between a recipient state and an investor of another Member State arising in connection with an investment of that investor on the territory of the recipient state, including disputes regarding the size, terms or order of payment of the amounts received as compensation of damages pursuant to paragraph 77 of this Protocol and the compensation provided for in paragraphs 79-81 of this Protocol, or the order of payment and transfer of funds provided for in paragraph 8 of this Protocol, shall be, where possible, resolved through negotiations.

85. If a dispute may not be resolved through negotiations within 6 months from the date of a written notification of any of the parties to the dispute on negotiations, it may be referred to the following, at investor’s option:

[...]

3) ad hoc arbitration court, which, unless the parties to the dispute agree otherwise, shall be established and act in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL); [...].”⁵³⁷

376. It is necessary to distinguish between the Tribunal’s jurisdiction over disputes which arose before 1 January 2015 and the applicability of the substantive provisions of the EEU Treaty to acts and/or breaches which took place before that date.⁵³⁸ Accordingly, the Respondent shall address each issue separately below.

⁵³⁶ Statement of Claim, paragraphs 111 – 126, **CS-2**.

⁵³⁷ Protocol 16 of the EEU Treaty, Articles 84 and 85(3), **Exhibit RL-29**.

⁵³⁸ See, e.g., *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004, paragraph 176, **Exhibit RL-30**.

(a) The Tribunal does not have jurisdiction over disputes that arose before 1 January 2015

377. Tribunals have consistently held, in accordance with the principle of non-retroactivity enshrined under Article 28 of the Vienna Convention on the Law of Treaties 1969 (the “**Vienna Convention**”), that, in the absence of express words to the contrary, they do not have jurisdiction over disputes arising before the entry into force of the relevant treaty.

378. In *ATA v. Jordan*, Article VIII(I) of the Jordan-Turkey BIT provided that “*any dispute [...] concerning the interpretation or application of this Agreement*” could be referred to arbitration.⁵³⁹ Article IX(I) of the BIT provided that the BIT “*shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter*”.⁵⁴⁰ The tribunal held that:

*“a general principle of legality instructs interpreters to apply innovative legislation prospectively, unless the legislation clearly indicates that its creators intended to apply it retroactively and, even then, only if such application would not offend some fundamental and peremptory principle of justice. In the present circumstances, Article IX(1) of the BIT expressly makes the BIT retroactive with respect to “investments existing at the time of entry into force [...]”. The provision does not make the BIT retroactive with respect to disputes existing prior to the entry into force of the BIT. Under the plain meaning of Article IX(1), the Tribunal may only exercise jurisdiction *ratione temporis* over the Claimant’s claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006.”*⁵⁴¹

379. In *MCI v. Ecuador*, Article VI of the BIT provided that “*disputes arising out of or relating to*”, *inter alia*, an alleged breach of any right conferred by the BIT, could be referred to arbitration.⁵⁴² Article XII of the BIT provided that it “*shall apply to*

⁵³⁹ Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey concerning the reciprocal promotion and protection of investments of 2 August 1993, Article VIII(I), **Exhibit RL-31**.

⁵⁴⁰ Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey concerning the reciprocal promotion and protection of investments of 2 August 1993, Article IX(I), **Exhibit RL-31**.

⁵⁴¹ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 98, **Exhibit RL-32**.

⁵⁴² Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investment of 27 August 1993, Article VI, **Exhibit RL-33**.

investments existing at the time of entry into force as well as to investments made or acquired thereafter.”⁵⁴³ The tribunal held:

“In accordance with the norms of general international law codified in the Vienna Convention, and particularly in Article 28, the Tribunal notes that because of the fact that the BIT applies to investments existing at the time of its entry into force, the temporal effects of its clauses are not modified [...]

The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties.”⁵⁴⁴

380. In *Salini v. Jordan*, Article 9 of the BIT provided that “[a]ny disputes which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments” could be submitted to arbitration.⁵⁴⁵ The tribunal held “[s]uch language does not cover disputes which may have arisen before the entry into force of the BIT, but only to disputes arising after [...]”.⁵⁴⁶
381. In *Impregilo v. Pakistan*, Article 9 of the BIT applied to “[...] any disputes arising between a contracting Party and the investors of the other”.⁵⁴⁷ The tribunal held that “[s]uch language – and the absence of specific provision for retroactivity – infers that disputes that may have arisen before the entry into force of the BIT are not covered”.⁵⁴⁸

⁵⁴³ Treaty between the United States of America and the Republic of Ecuador concerning the encouragement and reciprocal protection of investment of 27 August 1993, Article XII, **Exhibit RL-33**.

⁵⁴⁴ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraphs 59 – 61, **Exhibit RL-1**.

⁵⁴⁵ Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments of 21 July 1996, Article 9, **Exhibit RL-34**.

⁵⁴⁶ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004, paragraph 170, **Exhibit RL-30**.

⁵⁴⁷ Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments of 19 July 1997, Article 9, **Exhibit RL-35**.

⁵⁴⁸ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 300, **Exhibit RL-36**.

382. The task for the Tribunal is therefore to determine whether there is any clear indication⁵⁴⁹ or a specific provision⁵⁵⁰ showing that the Member States of the EEU Treaty intended it to apply retroactively.

383. In the present case, Articles 84 and 85(3) of Protocol 16 provide that the parties may refer to arbitration:

“[a]ll disputes between a recipient state and an investor of another Member State arising in connection with an investment of that investor on the territory of the recipient state”.⁵⁵¹

384. Article 65 of Protocol 16 provides that the provisions of Protocol 16:

“shall apply to all investments made by investors of the Member States on the territory of another Member State starting from December 16, 1991”.⁵⁵²

385. Referring to Article 65 of Protocol 16, the Claimant alleges that, since it made its investment after 16 December 1991, “[t]here is no need to further assess when the dispute arose [...] given that the only temporal criterion is fulfilled”.⁵⁵³ The Claimant concludes that “disputes arising” in Article 84 of Protocol 16 “covers any dispute as long as the dispute is connected with investments made after 16 December [1991]”.⁵⁵⁴

386. The Claimant seeks to support its construction of Protocol 16 by referring to Article 12 of the Agreement on Mutual Agreement and Protection of Investments in the Member States of Eurasian Economic Community of 12 December 2008 (the “**EEC Investment Agreement**”), which expressly provides that “[t]he Agreement does not apply to disputes that arose before the entry of the Treaty into force.”⁵⁵⁵ According to the Claimant, the fact that Protocol 16 does not include such an express provision “clearly demonstrates”⁵⁵⁶ that the drafters of the EEU Treaty intended for it to be

⁵⁴⁹ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 98, **Exhibit RL-32**.

⁵⁵⁰ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 300, **Exhibit RL-36**.

⁵⁵¹ Protocol 16 of the EEU Treaty, Articles 84 – 87, **Exhibit RL-29**. The Respondent notes that the translation relied on by the Claimant incorrectly uses the words “arising **from or** in connection with an investment” in Article 84 of Protocol 16. The words “from or” are missing from the Russian original text.

⁵⁵² Protocol 16 of the EEU Treaty, **Exhibit CL-3**.

⁵⁵³ Statement of Claim, paragraph 16, **CS-2**.

⁵⁵⁴ Statement of Claim, paragraph 18, **CS-2**.

⁵⁵⁵ EEC Investment Agreement, Article 13, **Exhibit CL-35**.

⁵⁵⁶ Statement of Claim, paragraph 29, **CS-2**.

*“applied to all disputes connected with investments, whether they arose prior or after the Treaty entered into force.”*⁵⁵⁷

387. The Respondent disagrees. As the constitutive document for the Eurasian Economic Union, the EEU Treaty is an innovative piece of legislation the purpose of which was to establish new standards of protection that apply to the conduct of the Member States after its entry into force. This is in contrast to *Mavrommatis* (on which the Claimant relies),⁵⁵⁸ where the Permanent Court held that an “essential characteristic” of Protocol XII of the Treaty of Lausanne was “that its effects extend to legal situations dating from a time previous to its own existence”.⁵⁵⁹ Contrary to the Claimant’s assertion,⁵⁶⁰ the intention of the Member States to the EEU Treaty was for it to apply prospectively, not retroactively.
388. The absence in Protocol 16 of an express provision equivalent to Article 13 of the EEC Investment Agreement does not justify the Claimant’s far-reaching conclusion that the drafters of the EEU Treaty intended it to be “applied to all disputes connected with investments, whether they arose prior or after the Treaty entered into force.”⁵⁶¹ The intention of the parties to the EEU Treaty should be determined on the basis of the EEU Treaty, not on the basis of other treaties where the intention may have been different. The tribunal in *Walter Bau v. the Kingdom of Thailand* encountered a similar situation, holding that:

*“[t]he Mavrommatis dictum [...] may have led to many treaties (including many of the Respondent’s) containing an express provision against retrospective temporal operation. However, such practice can be seen as states acting under an abundance of caution. The practice is not a helpful guide to interpretation of this particular Treaty. This is particularly so when the Treaty replaced had no provision for investor-state claims.”*⁵⁶²

389. The drafting of Protocol 16 further supports the Respondent’s position that it was intended to apply prospectively, not retroactively. In order to indicate clearly and

⁵⁵⁷ Statement of Claim, paragraph 29, **CS-2**.

⁵⁵⁸ Statement of Claim, paragraph 33, **CS-2**.

⁵⁵⁹ *Mavrommatis Palestine Concessions case (Greece v. Britain)*, PCIJ Rep. Series A No. 2, Judgment, 30 August 1924, page 34, **Exhibit RL-9**.

⁵⁶⁰ Statement of Claim, paragraph 21, **CS-2**.

⁵⁶¹ Statement of Claim, paragraph 29, **CS-2**.

⁵⁶² *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, paragraph 9.70, **Exhibit RL-37**.

expressly⁵⁶³ that the Tribunal has jurisdiction over disputes arising before 1 January 2015, the drafters would have had to use the word “*having arisen*” or “*возникшие*” in Russian, rather than the ambiguous use of “*arising*” or “*возникающие*” as used in Article 84 of Protocol 16. Contrary to what the Claimant alleges, it is an established view that the temporal effects of a treaty will not be modified by the fact that the treaty applies to investments made before its entry into force.⁵⁶⁴ Accordingly, the fact that Protocol 16 applies to investments made from 1991 does not mean that its Member States intended for it to apply to disputes arising from 1991.⁵⁶⁵

390. For the above reasons, in the absence of express words to the contrary and taking into account the object and purpose of the EEU Treaty, the Respondent submits that the Tribunal has no jurisdiction over disputes arising before 1 January 2015.

(b) The substantive provisions of the EEU Treaty do not apply to acts and/or alleged breaches which took place before 1 January 2015

391. The Parties agree that there is no express provision in the EEU Treaty which provides that its substantive provisions can be applied retroactively to acts that took place before its entry into force.⁵⁶⁶ The task for the Tribunal is therefore to determine whether, in the absence of any express provisions providing for their retroactive application, the substantive provisions of the EEU Treaty apply to acts and/or alleged breaches which took place before the EEU Treaty entered into force.

⁵⁶³ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 98, **Exhibit RL-32**; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 300, **Exhibit RL-36**.

⁵⁶⁴ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraph 59, **Exhibit RL-1**; *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, paragraph 9.68, **Exhibit RL-37**; *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraphs 81 – 83, **Exhibit RL-8**; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 98, **Exhibit RL-32**; *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 460, **Exhibit RL-6**.

⁵⁶⁵ In *Chevron v. Ecuador*, on which the Claimant relies, the issue was discussed *obiter dicta*, since the tribunal held that the dispute had in any event arisen after the entry into force of the BIT (*Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (I), PCA Case No. 34877, Interim Award of 1 December 2008, paragraph 269, **Exhibit CL-34**).

⁵⁶⁶ The Claimant asserts in paragraphs 12 – 13 of the Statement of Claim, **CS-2**, that the “*only temporal limitation*” in Protocol 16 is set out in Article 65, which provides that its provisions “*shall apply to investments made [...] since December 16, 1991*”.

392. The basic principle under international law is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach.⁵⁶⁷ Tribunals have consistently upheld the principle of non-retroactivity enshrined in Article 28 of the Vienna Convention in arriving at the conclusion that the substantive provisions of a treaty do not apply retroactively to acts which took place before its entry into force, unless the treaty expressly provides for this. In *Tecmed v. Mexico*, the tribunal held:

*“Clearly, the basic principle in international law is that unless there is a different interpretation of the treaty or unless otherwise established in its provisions, such provisions are not binding in connection with an act or event which took place or a situation that ceased to exist before the date of its entry into force. The burden of proving the existence of any exception to the principle of non-retroactive application established therein naturally lies with the party making the claim.”*⁵⁶⁸

393. As already explained in paragraph 389 above, the fact that Article 65 of Protocol 16 states that its provisions shall apply to all investments made from 16 December 1991 does not modify the temporal effects of the EEU Treaty.

394. Furthermore, the drafting of Articles 68 and 79 of Protocol 16, on which the Claimant relies, reflects the intention of the drafters that these provisions should be applied prospectively to acts and/or breaches which take place in the future after the entry into force of the EEU Treaty:

a) Article 68 of Protocol 16 provides that “[e]ach Member State shall ensure on its territory the fair and equitable treatment [...]”; and

b) Article 79 of Protocol 16 provides that “[i]nvestments of investors of a Member State made on the territory of another Member State shall not be subject to direct or indirect expropriation [...]”.⁵⁶⁹

395. Given that the substantive obligations of Protocol 16 are drafted to apply to acts and/or breaches which take place after the entry into force of the EEU Treaty, the

⁵⁶⁷ Vienna Convention on the Law of Treaties 1969, Article 28, **Exhibit CL-13**; ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 13; **Exhibit RL-15**.

⁵⁶⁸ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 63, **Exhibit CL-32**.

⁵⁶⁹ Protocol 16 of the EEU Treaty, **Exhibit CL-3**.

Claimant's proposal to apply these obligations retroactively to acts which took place before 1 January 2015 would run counter to their ordinary meaning and purpose.⁵⁷⁰

396. For the above reasons, the Respondent submits that the substantive provisions of the EEU Treaty do not apply to acts which took place before 1 January 2015.

2. Both disputes that the Claimant has referred to the Tribunal arose before 1 January 2015

397. If the Tribunal agrees with the Respondent that it does not have jurisdiction over disputes which arose before the EEU Treaty came into force, the Tribunal's task is to determine whether the dispute(s) that the Claimant has referred to the Tribunal arose before the EEU Treaty entered into force.

398. The Claimant alleges that the Tribunal is faced with one dispute which "*arose only after the Claimant submitted the Pre-Arbitration Notice to Belarus on 25 April 2017, claiming the violations of the international law by the Respondent*".⁵⁷¹

399. The Respondent agrees with the Claimant's adoption of the *Mavrommatis* definition of a dispute as a "*disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*".⁵⁷² However, by asserting that the 'dispute' arose only when the Claimant framed its legal position in terms of a formal claim under the EEU Treaty, the Claimant appears to confuse the distinction between a dispute and a formal claim. As the tribunal held in *Maffezini v. Spain*, "*there is a difference between a dispute and a claim [...]. While a dispute may have emerged, it does not necessarily have to coincide with the presentation of a formal claim.*"⁵⁷³

400. In determining whether the Claimant has referred one or two disputes to the Tribunal, the key issue is whether the two disputes share the same subject-matter.⁵⁷⁴

⁵⁷⁰ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 65, **Exhibit CL-32**.

⁵⁷¹ Statement of Claim, paragraph 40, **CS-2**.

⁵⁷² *Mavrommatis Palestine Concessions case (Greece v. Britain)*, PCIJ Rep. Series A No. 2, Judgment, 30 August 1924, paragraph 19, **Exhibit RL-9**; Statement of Claim, paragraph 35, **CS-2**.

⁵⁷³ *Emilio Agustín Maffezini v. the Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paragraph 94, **Exhibit RL-10**.

⁵⁷⁴ See, e.g., *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paragraph 111, **Exhibit RL-38**; *Empresas Lucchetti, S.A. and*

401. In *CMS Gas v. Argentina*, the tribunal held that “[a]s long as [the two disputes] affect the investor in violation of its rights and cover the same subject matter, the fact that they may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct.”⁵⁷⁵ The tribunal further held that whether or not the supposed two disputes have the same background is not a deciding factor as to whether there are in fact one or two disputes.⁵⁷⁶
402. The tribunal in *Lucchetti v. Peru* also focused on subject matter and the “real cause” when determining whether it was faced with one or two disputes, holding that the task for the tribunal was to determine whether the facts or considerations that gave rise to the first dispute continued to be central to the second dispute.⁵⁷⁷ If the facts or considerations that gave rise to the two disputes are different, the tribunal held that the two disputes should be deemed to be distinct.
403. In the PCIJ case *Phosphates in Morocco*, the PCIJ drew a distinction between the “real causes of the dispute” and “subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute.”⁵⁷⁸ The PCIJ found that subsequent factors which presume the existence or are merely the confirmation or development of earlier situations or facts will not give rise to a new dispute.⁵⁷⁹ What matters is the real cause of the dispute.⁵⁸⁰
404. In the present case, the Respondent submits that the so-called ‘dispute’ that the Claimant alleges “arose [...] only after the Claimant submitted the Pre-Arbitration

Lucchetti Peru, S.A. v. The Republic of Peru, ICSID Case No. ARB/03/4, Award, 7 February 2005, paragraph 50, **Exhibit CL-36**.

⁵⁷⁵ *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paragraph 109, **Exhibit RL-38**.

⁵⁷⁶ *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paragraph 111, **Exhibit RL-38**.

⁵⁷⁷ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, paragraph 50, **Exhibit CL-36**.

⁵⁷⁸ *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

⁵⁷⁹ *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

⁵⁸⁰ *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

*Notice*⁵⁸¹ is made up of two separate disputes that arise out of distinct subject matter and a distinct set of facts and considerations.

405. The first dispute which the Claimant has referred to the Tribunal in the guise of a treaty claim relates to the actions of MCEC and Minsktrans that “*culminated in the illegal termination of the [...] Amended Investment Contract*”⁵⁸² (the “**Termination Dispute**”). The Termination Dispute relates to the following facts and considerations:
- a) alleged delays by MCEC and Minsktrans in performing their obligations under the Investment Contract and Amended Investment Contract;
 - b) the alleged failure by MCEC to transfer the incomplete New Communal Facilities into municipal ownership;
 - c) the submission of a claim by MCEC to terminate of the Amended Investment Contract on 12 November 2013; and
 - d) the decision of the Economic Court of Minsk to terminate the Amended Investment Contract on 9 September 2014, as upheld by the Appeal Instance Court on 29 October 2014.
406. As described above, the Claimant became entitled to develop the Investment Object under the Amended Investment Contract after, *inter alia*, securing the construction of the New Communal Facilities and transferring them into municipal ownership.⁵⁸³ If the Claimant failed to comply with its obligation to ensure the construction and commission the New Communal Facilities by the agreed deadline due to its own fault, then MCEC became entitled to submit a claim to terminate the Amended Investment Contract.⁵⁸⁴ On 12 November 2013, MCEC submitted a claim to terminate the Amended Investment Contract on this ground.⁵⁸⁵ The claim was upheld by three

⁵⁸¹ Statement of Claim, paragraph 40, **CS-2**.

⁵⁸² Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**.

⁵⁸³ Amended Investment Contract, Clause 2, **Exhibit C-66**.

⁵⁸⁴ Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

⁵⁸⁵ See paragraph 246 above.

levels of the Belarusian courts and the termination of the Amended Investment Contract came into force on 29 October 2014.⁵⁸⁶

407. In essence, the Claimant alleges that MCEC and Minsktrans acted in bad faith to make it “*impossible*” for the Claimant and Manolium-Engineering to fulfil their obligation to construct the New Communal Facilities⁵⁸⁷ and that MCEC “*wrongfully*” submitted a claim to terminate the Amended Investment Contract⁵⁸⁸ The Claimant therefore concludes that the termination of the Amended Investment Contract by the Belarusian courts on 29 October 2014 “*is equal to the effect of expropriation*”, because “*the Claimant was deprived of the opportunity to gain any economic benefit from its Investments.*”⁵⁸⁹ The claimant claims lost profits arising from the loss of its contingent contractual right to the Investment Object as a result of the termination of the Amended Investment Contract.⁵⁹⁰
408. At the earliest, the Termination Dispute arose in early 2012 after the Final Commissioning Date passed, since this was when the disagreement between the parties over their respective rights and obligations under the Amended Investment Contract first crystallized.⁵⁹¹ At the latest, the Termination Dispute had arisen by 12 November 2013, when MCEC submitted a claim to terminate the Amended Investment Contract to the Economic Court of Minsk.⁵⁹²
409. The Termination Dispute culminated on 29 October 2014, when the termination of the Amended Investment Contract came into force. After the termination of the Amended Investment Contract came into force, all rights which the Claimant had held under the Amended Investment Contract were extinguished. Accordingly, there cannot have been any interference with such rights such as to recrystallize the Termination Dispute after the EEU Treaty came into force.

⁵⁸⁶ See paragraph 263 above.

⁵⁸⁷ See, e.g., Notice, paragraphs 433, 445 and 451, CS-1.

⁵⁸⁸ Notice, paragraph 417(d), CS-1.

⁵⁸⁹ Notice, paragraph 524, CS-1.

⁵⁹⁰ Notice, paragraph 530(a), CS-1.

⁵⁹¹ See paragraph 209 above.

⁵⁹² See paragraph 246 above.

410. The second dispute which the Claimant has referred to the Tribunal relates to the actions of the Belarusian public authorities that “*culminated in the [...] seizure of the New Communal Facilities*”⁵⁹³ (the “**Tax Dispute**”). The Tax Dispute relates to the following facts or considerations:

- a) Manolium-Engineering’s occupation of the land plots for the New Communal Facilities since 2011, after the expiry of the permits to the land plots for the construction of the New Communal Facilities;
- b) Manolium-Engineering’s failure to pay land tax in respect of the land plots starting from 2013;
- c) the 2016 Administrative Proceedings relating to Manolium-Engineering’s occupation of the New Communal Facilities land plots without a permit;
- d) the tax assessments in respect of Manolium-Engineering’s land tax liabilities in 2016; and
- e) the transfer in 2017 of the New Communal Facilities into municipal ownership to enforce against Manolium-Engineering’s land tax liabilities.

411. In essence, the Claimant alleges that the Belarusian courts and tax authorities conducted a “*strategy*”⁵⁹⁴ to “*bring the Claimant to tax liability*”⁵⁹⁵ and thereby transfer the New Communal Facilities (which remained in Manolium-Engineering’s ownership after the termination of the Amended Investment Contract) into municipal ownership of Minsk to enforce against such liabilities.⁵⁹⁶ The Claimant alleges that the transfer of the New Communal Facilities constitutes an expropriation and seeks compensation for the fair market value of the New Communal Facilities. Unlike the Termination Dispute, the Tax Dispute is unrelated to any of the rights or obligations of the Claimant under the Amended Investment Contract.

⁵⁹³ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**.

⁵⁹⁴ Notice, paragraph 488, **CS-1**.

⁵⁹⁵ Notice, paragraph 488, **CS-1**.

⁵⁹⁶ Notice, paragraphs 488 – 497, **CS-1**.

412. While many of the facts or circumstances which form part of the Tax Dispute took place after the EEU Treaty entered into force on 1 January 2015, the dispute regarding Manolium-Engineering’s payment of land taxes for the New Communal Facilities land plots had already arisen by 21 February 2014, when the District Tax Inspectorate demanded that Manolium-Engineering comply with its obligations to submit land tax returns for the years 2013 and 2014.⁵⁹⁷ The tax assessments in 2016 merely confirmed or developed “*earlier situations or facts constituting the real causes of the dispute*”,⁵⁹⁸ namely that Manolium-Engineering did not pay land tax in respect of the land plots from 2013. Accordingly, these tax assessments did not recrystallize the Tax Dispute.
413. For the reasons set out above, the Respondent submits that the Tax Dispute and the Termination Dispute arise out of different subject-matter, relate to a different set of facts and considerations and affect different rights of the Claimant. The Tax Dispute and the Termination Dispute also give rise to distinct damages claims. Thus, the Termination Dispute and the Tax Dispute are separate disputes.
414. As already submitted in paragraphs 377 – 390 above, the Tribunal only has jurisdiction under the EEU Treaty over disputes “*arising*” after 1 January 2015. Accordingly, since both the Termination Dispute and the Tax Dispute arose before 1 January 2015, the Respondent respectfully submits that the Tribunal does not have jurisdiction over the disputes referred to it by the Claimant.

3. The substantive provisions of the EEU Treaty do not apply to the Termination Dispute

415. The Respondent’s primary position is that the Tribunal does not have jurisdiction over the Termination Dispute or the Tax Dispute, since both disputes arose before the EEU Treaty came into force. However, even if the Tribunal finds that it has jurisdiction, the Respondent submits that the substantive provisions of the EEU Treaty do not apply to the Termination Dispute, since the termination of the Amended Investment Contract took place before 1 January 2015.

⁵⁹⁷ Demands of the District Tax Inspectorate dated 21 February 2014, **Exhibit R-111** and **R-112**.

⁵⁹⁸ *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

416. The Claimant does not dispute that the termination of the Amended Investment Contract came into force on 29 October 2014, when the Appeal Instance Court upheld the decision of the Economic Court of Minsk to terminate the contract.⁵⁹⁹ However, the Claimant alleges that the “*the facts which formed the background of the Dispute has continued both before and after the EEU Treaty entry into force*”⁶⁰⁰ and that the “*situation related to the Dispute [...] is far from being ceased to exist*”.⁶⁰¹ The Claimant concludes that the Tribunal has jurisdiction over “*all acts of the Respondent prior and after the EEU Treaty’s entry into force*”,⁶⁰² because of the “*continuing character of Belarus’ wrongful conduct*”.⁶⁰³
417. The International Law Commission describes a continuing act as “*conduct of a State [...] which proceeds unchanged over a given period of time; in other words, an act which, after its occurrence, continues to exist as such and not merely in its effects and consequences.*”⁶⁰⁴
418. Similarly, the tribunal in *Société Générale v Dominican Republic* stated that:
- “[t]here might be situations in which the continuing nature of the acts and events questioned could result in a breach as a result of acts commencing before the critical date but which only become legally characterized as a wrongful act in violation of an international obligation when such an obligation had come into existence after the effective date of the treaty.”*⁶⁰⁵
419. The Respondent submits that the termination of the Amended Investment Contract is not a continuing act. The termination of the Amended Investment Contract on 29 October 2014 extinguished any rights that the Claimant held under the said contract. Accordingly, any violation of such contractual rights, if there was one, must have occurred no later than 29 October 2014, since after that date there were no longer any

⁵⁹⁹ Notice, paragraph 479, **CS-1**.

⁶⁰⁰ Statement of Claim, paragraphs 50 and 43 – 51, **CS-2**.

⁶⁰¹ Statement of Claim, paragraph 45, **CS-2**.

⁶⁰² Statement of Claim, paragraph 51, **CS-2**.

⁶⁰³ Statement of Claim, paragraph 51, **CS-2**.

⁶⁰⁴ Report of the International Law Commission on the Work of its Thirtieth Session, 8 May – 28 July 1978, Official Records of the General Assembly, Thirty-third session, Supplement No. 10, page 90, **Exhibit RL-40**.

⁶⁰⁵ *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraph 87, **Exhibit RL-8**.

contractual rights to violate. As noted by the International Law Commission, the fact that the effect of an act continues does not mean that it constitutes a continuing act.⁶⁰⁶

420. Accordingly, the Respondent submits that the substantive provisions of the EEU Treaty do not apply to the Termination Dispute, because Article 79 of the EEU Treaty was not in force at the time the termination of the Amended Investment Contract occurred or any of the acts which led towards and “*culminated*” in it.⁶⁰⁷

421. While the Claimant’s allegation is that “*Belarus’ breach of the EEU Treaty continues*”,⁶⁰⁸ as far as the Respondent can glean from the Claimant’s submissions, the Claimant appears to also be alleging that the Respondent committed a composite “series of acts” which spanned the period before and after the entry into force of the EEU Treaty. The Claimant alleges that the “*conduct [...] which finally resulted in an expropriation of the Claimant’s Investments and violation of FET obligations may be generally divided on [sic] [five] parts*”⁶⁰⁹. The Claimant alleges that these five parts are:

a. Conduct of MCEC and Minsktrans during the implementation of the Investment Agreement and Amended Investment Agreement;

b. Submission of the arbitral and ungrounded claims to the Belarusian courts for termination of the Amended Investment Contract;

c. Unfair legal proceedings in the Belarusian state courts;

d. Groundless tax claims of the Tax Inspectorate to Manolium-Engineering resulted in the bankruptcy of Manolium-Engineering;

e. Issuance of secret order of the President of Belarus which approved the transfer of Communal Facilities to the [municipal] ownership.”⁶¹⁰

422. The Claimant alleges that “[i]t is evident from the facts of the case that all these actions were only elements of the overall conduct of Belarus which has lead [sic] to violation of the Claimant’s rights. [...] Since there is not possibility simply to distinguish the facts as the facts took place before 1 January 2015 and the facts have

⁶⁰⁶ J. Crawford, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2002, Art 14(4) – (6), page 136, **Exhibit RL-41**.

⁶⁰⁷ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**.

⁶⁰⁸ Statement of Claim, subheading II.A(c), **CS-2**.

⁶⁰⁹ Statement of Claim, paragraph 48, **CS-2**.

⁶¹⁰ Statement of Claim, paragraph 48, **CS-2**.

*taken place after 1 January 2015, all actions of Belarus should be considered as a whole.”*⁶¹¹

423. Article 15 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, 2001 (the “**ILC Articles**”) sets out the concept of a “composite act”:

“1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

*2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”*⁶¹²

424. When determining whether a set of acts constitutes a composite process or an isolated series of events, the “*common thread weaving together each act*”⁶¹³ is a “*converging action towards the same result*”⁶¹⁴ or “*leading in the same direction*”,⁶¹⁵ not any “*subjective element or intent*”.⁶¹⁶

425. As already explained in paragraph 419 above, the Claimant no longer had any rights under the Amended Investment Contract after its termination came into force on 29 October 2014. Accordingly, the Respondent submits that there cannot have been a continuing series of acts culminating in the expropriation or violation of such rights after the entry into force of the EEU Treaty, since such rights no longer existed. Even if the Claimant were to substantiate its position that the transfer of the New Communal Facilities constitutes an expropriation under the EEU Treaty, which it has

⁶¹¹ Statement of Claim, paragraphs 49 – 50, **CS-2**.

⁶¹² ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 15, **Exhibit RL-15**.

⁶¹³ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 62, **Exhibit CL-32**.

⁶¹⁴ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 62, **Exhibit CL-32**.

⁶¹⁵ *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraph 91, **Exhibit RL-8**; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, paragraphs 494 and 499, **Exhibit RL-6**.

⁶¹⁶ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 62, **Exhibit CL-32**.

failed to do,⁶¹⁷ this would be a distinct act from the termination of the Amended Investment Contract.

426. Even when a composite series of acts is carried out which begins before and continues after a treaty enters into force, the obligations of the treaty in question still cannot be applied retroactively to the acts or events which took place before its entry into force. In such a situation, the obligations of the treaty will only apply to the acts constituting the final result of that composite series, and which have taken place after the treaty has come into force.⁶¹⁸ For the same reason, tribunals cannot award damages for acts that do not qualify as violations of a treaty because they occurred prior to its entry into force, even if they have the discretion to take such acts into account for the purpose of determining whether a breach took place after that date.⁶¹⁹

427. As the tribunal found in *MCI v. Ecuador*:

*“The Tribunal reiterates its views on the possibility of exercising Competence over all acts or omissions alleged by the Claimants to have occurred after the entry into force of the BIT and as having been in violation thereof. Acts or omissions prior to the entry into force of the BIT may be taken into account by the Tribunal in cases in which those acts or omissions are relevant as background, causal link, or the basis of circumstances surrounding the occurrence of a dispute from the time the wrongful act was consummated after the entry into force of the norm that had been breached. **The Tribunal, however, finds that it has no Competence to determine damages for acts that do not qualify as violations of the BIT as they occurred prior to its entry into force.**”⁶²⁰ (emphasis added)*

428. In the present case, the Claimant claims Lost Profits (as defined in paragraph 642 below) for the alleged loss of its contingent contractual right to develop the Investment Object when the Amended Investment Contract was terminated. Even if

⁶¹⁷ See paragraph 637 below.

⁶¹⁸ *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 66, **Exhibit CL-32**; *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraphs 87 – 88, **Exhibit RL-8**; *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paragraphs 68 - 69, **Exhibit CL-20**; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraph 93, **Exhibit RL-1**; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 311, **Exhibit RL-36**.

⁶¹⁹ Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, paragraph 629, **Exhibit RL-42**.

⁶²⁰ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraph 136, **Exhibit RL-1**.

(contrary to the Respondent’s position) the Tribunal finds that it has jurisdiction over the Termination Dispute under the EEU Treaty, the Respondent respectfully submits that the Tribunal does not have competence to award Lost Profits under the EEU Treaty for the termination of the Amended Investment Contract, because it took place before 1 January 2015.

B. CONTRACTUAL OBJECTION

429. If the Tribunal finds that it has jurisdiction over the claims relating to the performance and termination of the Investment Contract and Amended Investment Contract after considering the Respondent’s *Ratione Temporis* Objection, the Tribunal should proceed to determine the Contractual Objection.

430. The Respondent agrees with the Claimant that contractual claims and treaty claims have different legal bases and that “*the existence of contractual remedy [sic] available to the investor does not preclude it from submitting the dispute to arbitration*”.⁶²¹ Further, contrary to what the Claimant asserts, the Respondent is not challenging the Tribunal’s jurisdiction over these claims “*for the sole reason that [the] factual background of the dispute includes contractual relations between the parties*”.⁶²²

431. The Claimant alleges that the Tribunal has jurisdiction over its contractual claims because they are presented to the Tribunal in the form of “treaty claims”:

*“it is evident from the Claimant’s Notice of Arbitration, that the breaches claimed are treaty claims, namely, unlawful expropriation and violation of the fair and equitable treaty standard. This fact is sufficient to find that the claims are admissible before the investment arbitral tribunal.”*⁶²³

432. At the same time, the Claimant concedes that “*a failure to perform the investment contract may be qualified as a violation of the international treaty, if such violation constitutes [...] ‘[...] one which the State commits in the exercise of its sovereign*

⁶²¹ Statement of Claim, paragraph 75, CS-2.

⁶²² Statement of Claim, paragraph 71, CS-2.

⁶²³ Statement of Claim, paragraph 62, CS-2.

power” (emphasis added).⁶²⁴ The Respondent agrees with this principle. In *Impregilo v. Pakistan*, for example, the tribunal held that:

“[i]n order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behavior going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority (“*puissance publique*”), and not as a contracting party, may breach the obligations assumed under the BIT.”⁶²⁵

433. While the majority of tribunals have considered whether contractual claims amount to a treaty breach as a substantive issue, tribunals have also declined jurisdiction over purely contractual claims if such claims are *prima facie* not capable of constituting a breach of the relevant treaty because the alleged breach was not committed in the exercise of sovereign authority.⁶²⁶ Contrary to the Claimant’s assertion,⁶²⁷ the fact that the claims are presented as ‘treaty claims’ is not in itself sufficient to bring the claims within the Tribunal’s jurisdiction.⁶²⁸ The threshold to establish that the breach of a contract constitutes a breach of a treaty is a high one.⁶²⁹
434. In *Impregilo v. Pakistan*, the claimant alleged that the breach by a state body of contractual obligations to compensate the claimant for reasonable delays caused in the course of a construction project constituted a breach of Pakistan’s BIT obligation to treat the investor fairly and equitably. The tribunal found that the claimant’s claims in respect of delays were not capable of constituting a breach of the BIT.⁶³⁰ The tribunal held that “[t]hese are matters that concern the implementation of the Contracts, and do not involve any issue beyond the application of a contract, and the conduct of the contracting parties. In particular, the matter does not concern any exercise of

⁶²⁴ Notice, paragraph 506, **CS-1**.

⁶²⁵ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 260, **Exhibit RL-36**.

⁶²⁶ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paragraph 204, **Exhibit RL-43**; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 266 - 267, **Exhibit RL-36**.

⁶²⁷ Statement of Claim, paragraph 62, **CS-2**.

⁶²⁸ See, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paragraph 204, **Exhibit RL-43**; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 269, **Exhibit RL-36**.

⁶²⁹ See, e.g., *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 267, **Exhibit RL-36**.

⁶³⁰ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 268, **Exhibit RL-36**.

*'puissance publique'*⁶³¹ Accordingly, the tribunal declined jurisdiction over these claims, since they did not fall “*within the purview*” of the BIT.⁶³²

435. In *Burlington Resources Inc v. Republic of Ecuador*, the Claimant alleged that the breach of tax indemnification guarantees constituted a breach of Ecuador’s BIT obligation to treat the investor fairly and equitably. The tribunal found that the tax indemnification clause did not involve the exercise of sovereign power, noting that “*two private parties who have no power whatsoever over taxes could enter into an indemnification clause identical to those contained in the PSCs.*”⁶³³ Accordingly, the tribunal declined jurisdiction over the claim, holding that the facts alleged, even if proven, could not constitute a breach by Ecuador of its BIT obligations.⁶³⁴
436. The termination of a contract by a contracting party also cannot constitute an expropriation unless the termination is carried out in the exercise of sovereign power.⁶³⁵ In *Suez v. Argentina*, the tribunal stressed that, where a State exercises its right to terminate a contract as an ordinary contracting party, no expropriation has taken place and the investor has recourse only to the contractual framework.⁶³⁶ On the facts of the case, the tribunal found that Argentina’s actions “*were taken according to the rights it claimed under the Concession Contract and the legal framework*”⁶³⁷ and were “*not unlike the behavior of a private contracting party*”.⁶³⁸

⁶³¹ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 268, **Exhibit RL-36**.

⁶³² *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 269, **Exhibit RL-36**.

⁶³³ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paragraph 183, **Exhibit RL-43**.

⁶³⁴ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paragraph 204, **Exhibit RL-43**.

⁶³⁵ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraphs 8.132 – 133, **Exhibit RL-44**; R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2012 (2nd Ed.), pages 128 – 129, **Exhibit RL-45**.

⁶³⁶ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability, 30 July 2010, paragraph 143 - 144, **Exhibit CL-62**.

⁶³⁷ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability, 30 July 2010, paragraph 143 - 144, **Exhibit CL-62**.

⁶³⁸ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability, 30 July 2010, paragraph 143 - 144, **Exhibit CL-62**.

Accordingly, the *Suez* tribunal rejected the claimants' argument that Argentina's termination of the contract was an expropriatory exercise of sovereign authority.⁶³⁹

437. The Claimant alleges that “*in performing the Investment Contract and in violating its provisions [the Respondent] exercised its public powers*”⁶⁴⁰ because it used “*the Claimant's obligations to exercise the [sic] state functions*.”⁶⁴¹ The Claimant does not identify what “*state functions*” it is referring to, or substantiate how the performance of such functions by the Claimant amounts to an exercise of sovereign authority by MCEC or Minsktrans. In any event, the performance of “*state functions*” is distinct from the exercise of sovereign authority.⁶⁴²
438. The Respondent submits that the termination of the Amended Investment Contract did not involve any exercise of sovereign authority. The termination was not carried out by an executive decree or a legislative act, but rather through the legitimate exercise of MCEC's contractual right under Clause 16.2.1 of the Amended Investment Contract.⁶⁴³ In terminating the Amended Investment Contract, MCEC acted as any private contracting party could have done in the circumstances, acting in its best commercial interests.⁶⁴⁴ Accordingly, the Respondent submits that the Tribunal has no jurisdiction over the expropriation claim.
439. Moreover, a large part of the Claimant's FET claim relates to the performance of contractual obligations by MCEC and Minsktrans. In particular the Claimant alleges that MCEC and/or Minsktrans:
- a) delayed issuing construction permits and making available land plots for the construction of the Communal Facilities⁶⁴⁵ and the New Communal Facilities⁶⁴⁶ and failed to postpone the relevant deadlines;⁶⁴⁷

⁶³⁹ *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability, 30 July 2010, paragraph 143 - 144, **Exhibit CL-62**.

⁶⁴⁰ Notice, paragraph 507, **CS-1**.

⁶⁴¹ Notice, paragraph 508, **CS-1**.

⁶⁴² *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 170. **Exhibit RL-12**.

⁶⁴³ See paragraph 246 above.

⁶⁴⁴ See paragraphs 206 – 245 above.

⁶⁴⁵ Notice, paragraphs 419 – 430, **CS-1**.

- b) delayed making available land for designing the Investment Object⁶⁴⁸ and failed to postpone the relevant deadlines;⁶⁴⁹
- c) contributed to disrupting deadlines for constructing and transferring the New Communal Facilities into municipal ownership⁶⁵⁰ and failed to postpone the relevant deadlines;⁶⁵¹ and
- d) wrongfully terminated the Amended Investment Contract.⁶⁵²

440. While the Claimant repackages these claims as breaches of the FET standard, the claims are “*inextricably linked*” to the contractual obligations of MCEC and Minsktrans under the Amended Investment Contract.⁶⁵³ The obligations to (i) make available land plots for the Communal and New Communal Facilities⁶⁵⁴ and the Investment Object,⁶⁵⁵ and (ii) transfer the New Communal Facilities into municipal ownership,⁶⁵⁶ together with the rights to (i) an extension of the construction deadlines as a result of delays⁶⁵⁷ and (ii) terminate the Amended Investment Contract,⁶⁵⁸ all arise out of specific contractual provisions. Given that MCEC and Minsktrans did not commit any of these alleged breaches in the exercise of sovereign authority, the Claimant is referring purely contractual issues to the Tribunal that are not capable of constituting a breach of the FET standard. Accordingly, the Respondent submits that the Tribunal has no jurisdiction over these claims.

⁶⁴⁶ Notice, paragraphs 431 – 433, **CS-1**.

⁶⁴⁷ Notice, paragraphs 429 – 430 and 432 – 433, **CS-1**.

⁶⁴⁸ Notice, paragraphs 434 – 446, **CS-1**.

⁶⁴⁹ Notice, paragraphs 442 – 443, **CS-1**.

⁶⁵⁰ Notice, paragraphs 461 – 471, **CS-1**.

⁶⁵¹ Notice, paragraphs 470 – 471, **CS-1**.

⁶⁵² Notice, paragraphs 472 – 476, **CS-1**.

⁶⁵³ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 329, **Exhibit RL-46**.

⁶⁵⁴ Investment Contract, Clause 7.2.

⁶⁵⁵ Amended Investment Contract, Clause 5, **Exhibit C-66**.

⁶⁵⁶ Amended Investment Contract, Clause 9.3.9, **Exhibit C-66**.

⁶⁵⁷ Amended Investment Contract, Clause 6.3, **Exhibit C-66**.

⁶⁵⁸ Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

C. MINSKTRANS OBJECTION

441. If the Tribunal finds that it has jurisdiction over any of the Claimant's allegations against Minsktrans after considering the *Ratione Temporis* Objection and the Contractual Objection, the Tribunal should proceed to determine the Minsktrans Objection.

442. As set out in the Response to the Notice of Arbitration, the actions of Minsktrans are not attributable to the Respondent under Article 4 of the ILC Articles. The Claimant appears to concede this.⁶⁵⁹ However, the Claimant alleges that the actions of Minsktrans are attributable to the Respondent under Article 5 of the ILC Articles, which provides that:

*“[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”*⁶⁶⁰

443. The Respondent agrees with the Claimant that, in order for the actions of Minsktrans to be attributable to the Respondent under Article 5 of the ILC Articles, the Claimant must establish that:

- a) Minsktrans is empowered to exercise elements of governmental authority;⁶⁶¹ and
- b) the alleged breaches of the EEU Treaty were carried out by Minsktrans in the exercise of governmental authority.⁶⁶²

444. The Respondent submits that neither of these limbs is satisfied in the present instance.

⁶⁵⁹ Notice, paragraphs 374 – 378, **CS-1**; Statement of Claim, paragraph 111, **CS-2**.

⁶⁶⁰ ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 5, **Exhibit RL-15**.

⁶⁶¹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 163, **Exhibit RL-12**.

⁶⁶² *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 163, **Exhibit RL-12**.

1. Minsktrans is not empowered to exercise elements of governmental authority

445. The Claimant alleges that Minsktrans is empowered to exercise elements of governmental authority because Minsktrans is “*an exclusively state-owned entity and a public communal enterprise that is empowered [...] to ensure the functioning of the public transport system in Minsk.*”⁶⁶³ This is incorrect.
446. First, the fact that Minsktrans is a state-owned entity does not mean that Minsktrans is empowered to exercise elements of governmental authority under Article 5 of the ILC Articles. This has been confirmed by the 2001 Commentary on Article 5.⁶⁶⁴
447. Second, the Respondent submits that to ensure the “*functioning of the public transport system in Minsk*” does not require any exercise of governmental authority under Article 5 of the ILC Articles. As the tribunal found in *Jan de Nul v. Egypt*, a distinction is to be drawn between the provision of a public service, such as transportation services, and the exercise of governmental authority.⁶⁶⁵ The Claimant does not identify any element of governmental authority that Minsktrans is empowered to exercise.
448. Accordingly, the Respondent submits that the Claimant has failed to satisfy the first limb of the test under Article 5 of the ILC Articles.

2. Minsktrans performed its obligations under the Amended Investment Contract as any private contractor could have done

449. The Parties agree that Minsktrans will not have committed actions in the exercise of governmental authority if any private contractor could have acted in a similar manner under the circumstances.⁶⁶⁶ However, the Claimant fails to apply this test to the facts. The Claimant does not identify any obligations under the Amended Investment

⁶⁶³ Statement of Claim, paragraph 113, **CS-2**.

⁶⁶⁴ J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, 2002, Article 5(3), page 100, **Exhibit RL-41**.

⁶⁶⁵ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 170, **Exhibit RL-12**.

⁶⁶⁶ Statement of Claim, paragraphs 117 – 118, **CS-2**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 170, **Exhibit RL-12**.

Contract that Minsktrans performed in the exercise of governmental authority, nor does it identify any breaches of the EEU Treaty (if any) that were committed by Minsktrans in the exercise of governmental authority. Nevertheless, the Respondent shall briefly address the Claimant's position.

450. First, the Claimant alleges that “[t]here is no possibility to distinguish the actions of MCEC and those of Minsktrans in the performance of the Amended Investment Contract because both MCEC and Minsk[trans] acted in their public capacity.”⁶⁶⁷ The Claimant's suggestion that the actions of Minsktrans are attributable to the Respondent simply because it worked closely with MCEC in the performance of the Amended Investment Contract is farfetched. The test of attribution under Article 5 of the ILC Articles should be applied to Minsktrans in its own right as a distinct legal entity from MCEC, regardless of whether the two entities worked closely together.
451. Second, the Claimant alleges that Minsktrans exercised governmental authority because the New Communal Facilities were to be “constructed for public purposes”,⁶⁶⁸ including “providing the population with [trolleybuses] [sic] and other kinds of public transportation”.⁶⁶⁹ The Respondent submits that any private contractor can enter into a contract for the construction of facilities with “public purposes”. For example, private companies often enter into contracts to provide public transport facilities. Accordingly, even if the New Communal Facilities were constructed for “public purposes”, as the Claimant asserts, this does not support the Claimant's conclusion that Minsktrans exercised governmental authority in performing its obligations under the Amended Investment Contract.
452. Third, the Claimant alleges that Minsktrans exercised governmental authority because Minsktrans “consistently used the administrative support from the state organs”.⁶⁷⁰ The Respondent submits that any private contractor can enter into an agreement in which it relies on administrative support from state organs to perform its obligations. This does not mean that the private contractor itself exercises sovereign authority.

⁶⁶⁷ Statement of Claim, paragraph 116, CS-2.

⁶⁶⁸ Statement of Claim, paragraph 120, CS-2.

⁶⁶⁹ Statement of Claim, paragraph 121, CS-2.

⁶⁷⁰ Statement of Claim, paragraph 123, CS-2.

453. Lastly, the Claimant alleges that Minsktrans exercised governmental authority because the New Communal Facilities were to be transferred into public ownership.⁶⁷¹ The Respondent disagrees. Contrary to the Claimant’s assertions, any private contractor can enter into a tender for the construction and transfer of facilities into public, rather than private, ownership. According to the Claimant’s logic, Manolium-Engineering would also have exercised governmental authority in performing its obligations under the Amended Investment Contract, since it was also required under the Amended Investment Contract to ensure that the New Communal Facilities were transferred into municipal ownership.⁶⁷²
454. Accordingly, since the Claimant has failed to satisfy both the first and second limbs of the test under Article 5 of the ILC Articles, the Respondent respectfully submits that the Tribunal does not have jurisdiction over the allegations based on the actions of Minsktrans.

D. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER THE BELARUSIAN INVESTMENT LAW

455. The Claimant alleges that “*irrespective of the application of EEU Treaty, the Tribunal has jurisdiction based on Belarusian laws*”.⁶⁷³ In support of this allegation the Claimant refers to Article 13 of the Law of Belarus “On Investments” dated 13 July 2013 (the “**Belarusian Investment Law**”), which, according to the Claimant, “*also provides a right of the foreign investor to refer the dispute to international arbitration in accordance with UNCITRAL Rules*”.⁶⁷⁴
456. Article 13 of the Belarusian Investment Law provides that:

“Article 13. Settlement of Disputes between an Investor and the Republic of Belarus

⁶⁷¹ Statement of Claim, paragraph 125, **CS-2**.

⁶⁷² Amended Investment Contract, paragraph 8.11, **Exhibit C-66**.

⁶⁷³ Terms of Appointment dated 10 May 2018, paragraph 51(d).

⁶⁷⁴ Terms of Appointment dated 10 May 2018, paragraph 51(d). The Respondent notes that the English translation of the Belarusian Investment Law exhibited by the Claimant (Belarusian Investment Law, **Exhibit CL-3**) does not accurately reflect the original Russian text of the law. The Respondent therefore exhibits its own translation of the relevant excerpts from the Belarusian Investment Law (Excerpts from the Belarusian Investment Law, **Exhibit RL-47**).

Disputes between an investor and the Republic of Belarus arising in the course of the making of investments shall be settled under a pre-action procedure through negotiations, unless otherwise is provided by the legislative acts of the Republic of Belarus.

[...]

If disputes, which do not fall within the exclusive competence of courts of the Republic of Belarus, arising between a foreign investor and the Republic of Belarus are not settled in a pre-action procedure through negotiations within three months upon the day of the receipt of a written proposal for their settlement under a pre-action procedure, such disputes may, at the investor's option, be also referred to:

an arbitration court established for the settlement of each particular dispute pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), unless the parties agree otherwise;

the International Centre for Settlement of Investment Disputes (ICSID), if such a foreign investor is a citizen or a legal person of a member state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965.

If a treaty of the Republic of Belarus and (or) a contract entered into between an investor and the Republic of Belarus provide(s) otherwise in relation to the settlement of disputes between an investor and the Republic of Belarus arising in the course of the making of investments, the provisions of such a treaty of the Republic of Belarus and (or) a contract entered into between an investor and the Republic of Belarus shall apply.”⁶⁷⁵

457. Save for paragraph 51(d) of the Terms of Appointment dated 10 May 2018, the Claimant has made no submissions regarding the Tribunal's jurisdiction under the Belarusian Investment Law. To the extent the Claimant is permitted to make any submissions in this respect, the Respondent reserves its right to respond.
458. For the avoidance of doubt, however, the Respondent respectfully submits that the Tribunal does not have jurisdiction under the Belarusian Investment Law for the following reasons.
459. First, the Belarusian Investment Law does not apply to investments made before it came into force on 24 January 2014.⁶⁷⁶ Accordingly, it does not apply to the Claimant's investments (let alone to the disputes relating to such investments).

⁶⁷⁵ Excerpts from the Belarusian Investment Law, Article 13, **Exhibit RL-47**.

⁶⁷⁶ Pursuant to Article 23 of the Belarusian Investment Law, Articles 1 – 21 of this law came into force in 6 months upon its official publication, whereas Article 22 of the Belarusian Investment Law came into force upon its official publication (Excerpts from the Belarusian Investment Law, Article 23,

460. Second, the Tax Dispute⁶⁷⁷ and the Termination Dispute⁶⁷⁸ fall within the exclusive competence of Belarusian state courts and, therefore, are not covered by the Respondent's consent to arbitrate provided in the Belarusian Investment Law.

461. Lastly and in any event, the Tribunal does not have jurisdiction under the Belarusian Investment Law over the Termination Dispute, because it falls within the competence of the Economic Court of Minsk pursuant to the Amended Investment Contract, which takes precedence over the Belarusian Investment Law.

1. The Belarusian Investment Law does not apply to the Claimant's investments and to the disputes, which arose in connection with the Claimant's investments

462. The Respondent respectfully submits that the scope of the Belarusian Investment Law is limited to the investments made after its entry into force (i.e. 24 January 2014).

463. Article 2 of the Belarusian Investment Law provides that:

"Article 2. Scope of This Law

This Law applies to relationships associated with the making of investments in the territory of the Republic of Belarus." (emphasis added)⁶⁷⁹

464. Further, the preamble to the Belarusian Investment Law sets out its purpose as follows:

"This Law sets out the legal bases and fundamental principles of the making of investments in the territory of the Republic of Belarus and is directed at attracting investments in the economy of the Republic of Belarus, ensuring guarantees, rights and lawful interests of investors and their equal protection as well." (emphasis added)⁶⁸⁰

465. In light of the above, the Respondent respectfully submits that the purpose of the Belarusian Investment Law is to attract *new* investments. The Belarusian Investment Law introduced additional incentives to new foreign investors, such as the

Exhibit RL-47). The Belarusian Investment Law was officially published at the National Legal Internet Portal on 23 July 2013 (Information on the official publication of the Belarusian Investment Law, **Exhibit RL-48** // Available at: <http://pravo.by/document/?guid=3961&p0=H11300053>).

⁶⁷⁷ See paragraphs 405 – 409 above.

⁶⁷⁸ See paragraphs 410 – 413 above.

⁶⁷⁹ Excerpts from the Belarusian Investment Law, Article 2, **Exhibit RL-47**.

⁶⁸⁰ Excerpts from the Belarusian Investment Law, Preamble, **Exhibit RL-47**.

Respondent's prior consent to arbitrate the disputes arising "in the course of the making of investments".⁶⁸¹ The Respondent's consent to arbitrate has extended international dispute settlement mechanisms to all foreign investors, including those who are not nationals of the states, which signed bilateral or multilateral investment treaties with Belarus.

466. Further, the Respondent respectfully submits that in order for investments made before 24 January 2014 and disputes, which arose before that date, be covered by the Belarusian Investment Law, it must include express provisions to that effect.

467. This is supported by the principle of non-retroactivity set out in Article 67 of the Law of Belarus "On Normative Legal Acts" dated 10 January 2000:

"Article 67. Retroactive Effect of a Normative Legal Act

A normative legal act does not have retroactive effect, i.e. does not extend to the relationships, which arose before its entry into force, except when it removes or reduces liabilities of citizens, including individual entrepreneurs and legal entities, or where [such normative legal act] itself or an act on its entry into force expressly provides that [the normative legal act] shall apply to the relationships, which arose before its entry into force." (emphasis added)⁶⁸²

468. Given the absence of such express provisions and the purpose of the Belarusian Investment Law to attract *new* investments, the Respondent respectfully submits that it does not apply to the Claimant's investments made long before 24 January 2014. For the same reasons, the Belarusian Investment Law does not extend to disputes relating to the investments made before 24 January 2014, including the Claimant's investments.

2. The Tax Dispute and the Termination Dispute fall within the exclusive competence of Belarusian state courts

469. If the Tribunal finds that the Belarusian Investment Law applies to the Claimant's investments and to the disputes relating to such investments, the Respondent respectfully submits that the Tribunal has no jurisdiction under the Belarusian

⁶⁸¹ Excerpts from the Belarusian Investment Law, Article 13, **Exhibit RL-47**.

⁶⁸² Excerpts from the Law of Belarus "On Normative Legal Acts" dated 10 January 2000, Article 67, **Exhibit RL-49**.

Investment Law over the Tax Dispute and the Termination Dispute, because they fall within the exclusive competence of Belarusian courts.

470. As set out in paragraph 456 above, pursuant to the Belarusian Investment Law, only disputes, which “do not fall under the exclusive competence of courts of the Republic of Belarus”, may be referred to arbitration.

471. Pursuant to Article 236 of the Belarusian Code of Commercial Procedure, the following categories of disputes involving foreign persons, which are relevant to the present proceedings, fall within the exclusive competence of the Belarusian state economic courts:

“disputes, the subject-matter of which is immovable property, if it is located in the territory of the Republic of Belarus, including [disputes] regarding the establishment of the fact of possession of immovable property or the rights to it; [...]

disputes relating to the invalidation of non-regulatory legal acts of state bodies [...] of the Republic of Belarus.

Business (economic) disputes and other cases arising out of administrative legal relationships as well as other cases set out in Article 42 of this Code, which involve foreign persons, shall also fall within the exclusive competence of the economic courts of the Republic of Belarus.” (emphasis added)⁶⁸³

472. Further, Article 42 of the Belarusian Code of Commercial Procedure provides, *inter alia*, that:

“The economic courts shall resolve business (economic) disputes arising out of administrative and other public relationships and consider other cases [...] relating to:

invalidation of a non-regulatory legal act of a state body [...], another body or an official, which affect the rights and lawful interests of the applicant in the domain of entrepreneurial or other business (economic) activities;

appealing against actions (or omissions) of state bodies [...], another body or an official, which affect the rights and lawful interests of the applicant in the domain of entrepreneurial and other business (economic) activities;

collection from legal entities [...] of taxes, duties (levies) or other mandatory charges due to the republican and/or local budgets and to state extra-budgetary funds, as well as penalties provided for by legislation, unless

⁶⁸³ Excerpts from the Belarusian Code of Commercial Procedure, Article 236, **Exhibit RL-50**.

another procedure for collection thereof is established by the legislative acts.”
(emphasis added)⁶⁸⁴

473. Lastly, Article 237 of the Belarusian Code of Commercial Procedure provides that:

If the parties, at least one of which is a foreign person, entered into an agreement providing that [a Belarusian economic court] has competence over a present or future dispute relating to the carrying out of entrepreneurial or other business (economic) activities by [the parties], [such a Belarusian economic court] will have exclusive competence over such dispute provided that the agreement does not [affect] exclusive jurisdiction of a foreign court.

An agreement on competence of [Belarusian economic courts] shall be in writing.” (emphasis added)⁶⁸⁵

474. Therefore, the disputes, which under the Respondent’s domestic law fall within the exclusive competence of the Belarusian state courts, are not covered by the Respondent’s consent to arbitrate contained in Article 13 of the Belarusian Investment Law.

475. In the present case, the Claimant’s claims arising out of the Tax Dispute⁶⁸⁶ fall within the above categories of disputes. Specifically, the Tax Dispute concerns the “*non-regulatory acts*”⁶⁸⁷ and “*actions (or omissions) of state bodies*”⁶⁸⁸ which, according to the Claimant, formed a “*strategy*” to “*bring [it] to tax liability*”⁶⁸⁹ and thereby led the transfer of the New Communal Facilities into the municipal ownership of Minsk to enforce against such liabilities.⁶⁹⁰ Therefore, the Tax Dispute arises “*out of administrative legal relationships*”⁶⁹¹ and relates to “*collection from legal entities [...] of taxes, duties (levies) or other mandatory charges [...] as well as penalties provided for by legislation*”.⁶⁹²

476. Similarly, the Claimant’s claims arising out of the Termination Dispute⁶⁹³ concern, *inter alia*, the contingent rights to develop the Investment Object⁶⁹⁴ and to lease the

⁶⁸⁴ Excerpts from the Belarusian Code of Commercial Procedure, Article 42, **Exhibit RL-50**.

⁶⁸⁵ Excerpts from the Belarusian Code of Commercial Procedure, Article 237, **Exhibit RL-50**.

⁶⁸⁶ See paragraphs 410 – 412 above.

⁶⁸⁷ Excerpts from the Belarusian Code of Commercial Procedure, Articles 42 and 237, **Exhibit RL-50**.

⁶⁸⁸ Excerpts from the Belarusian Code of Commercial Procedure, Article 42, **Exhibit RL-50**.

⁶⁸⁹ Notice, paragraph 488, **CS-1**.

⁶⁹⁰ Notice, paragraphs 488 – 497, **CS-1**.

⁶⁹¹ Excerpts from the Belarusian Code of Commercial Procedure, Article 236, **Exhibit RL-50**.

⁶⁹² Excerpts from the Belarusian Code of Commercial Procedure, Article 42, **Exhibit RL-50**.

⁶⁹³ See paragraphs 405 – 409 above.

land plot for the construction of that object,⁶⁹⁵ both of which relate to “immovable property [...] in the territory of the Republic of Belarus”.⁶⁹⁶

477. Furthermore, the Termination Dispute concerns the alleged “[c]onduct of MCEC and Minsktrans during the implementation of the [...] Amended Investment [Contract]”.⁶⁹⁷ MCEC, Minsktrans, the Claimant and Manolium-Engineering agreed that “[a]ny disputes [under the Amended Investment Contract] [...] shall be considered by the economic court of Minsk”.⁶⁹⁸ Therefore, pursuant to Article 237 of the Belarusian Code of Commercial Procedure⁶⁹⁹ read together with the Belarusian Investment Law, the court has exclusive competence over the Termination Dispute.
478. In view of the above, the Respondent respectfully submits that both the Termination Dispute and the Tax Dispute fall within the exclusive competence of the Belarusian state courts and, therefore, are not covered by the Respondent’s consent to arbitrate in Article 13 of the Belarusian Investment Law.

3. The Termination Dispute falls within the competence of the Economic Court of Minsk pursuant to the Amended Investment Contract

479. If the Tribunal finds that the Termination Dispute does not fall within the exclusive competence of the Belarusian state courts pursuant to the Belarusian Code of Commercial Procedure, the Respondent respectfully submits, in the alternative, that the Tribunal has no jurisdiction under the Belarusian Investment Law over the Termination Dispute, because the parties to the Amended Investment Contract made an express choice to refer this dispute to the Economic Court of Minsk,⁷⁰⁰ and this choice takes precedence over the Belarusian Investment Law.

⁶⁹⁴ Amended Investment Contract, Clause 1, **Exhibit C-66**.

⁶⁹⁵ Amended Investment Contract, Clause 7.9, **Exhibit C-66**.

⁶⁹⁶ Excerpts from the Belarusian Code of Commercial Procedure, Article 236, **Exhibit RL-50**.

⁶⁹⁷ Statement of Claim, paragraph 48(a), **CS-2**.

⁶⁹⁸ Amended Investment Contract, Clause 26, **Exhibit C-66**.

⁶⁹⁹ See paragraph 473 above; Excerpts from the Belarusian Code of Commercial Procedure, Article 237, **Exhibit RL-50**.

⁷⁰⁰ Amended Investment Contract, Clause 26, **Exhibit C-66**.

480. As set out in paragraph 456 above, “[i]f [...] a contract entered into between an investor and the Republic of Belarus provide[s] otherwise in relation to the settlement of disputes between an investor and the Republic of Belarus arising in the course of the making of investments, the provisions of such [...] a contract [...] shall apply.” (emphasis added).⁷⁰¹
481. As explained in paragraph 477 above, MCEC, Minsktrans, the Claimant and Manolium-Engineering expressly chose the Economic Court of Minsk as the competent forum for resolving any disputes under the Amended Investment Contract,⁷⁰² including the Termination Dispute. Accordingly, the Amended Investment Contract “provide[s] otherwise in relation to the settlement of disputes” between the Claimant and the Respondent “arising in the course of the making of investments” and, therefore, takes precedence over the Belarusian Investment Law.⁷⁰³

E. THE CLAIMANT FAILED TO PROVE THAT INVESTMENT MADE THROUGH MANOLIUM-ENGINEERING BELONGS TO THE CLAIMANT

482. It is further submitted that the Claimant has failed to adduce sufficient evidence that it is the beneficial owner of the sums invested through Manolium-Engineering, which benefits from the protection of the EEU Treaty.
483. Indeed, on the Claimant’s own account, “[t]he Claimant was and continues to be the sole participant in the charter capital of Manolium-Engineering,”⁷⁰⁴ and “Manolium-Engineering exercised the function of the Claimant’s investment facility on the territory of the Republic of Belarus and implemented the Investment Contract as instructed by the Claimant”.⁷⁰⁵
484. However, as Ms [REDACTED] explains, Manolium-Engineering did not itself turn a profit and “existed on funds obtained from third parties,” which it attained through a number of loans on favourable terms (*i.e.* minimal interest rates, with the interest only

⁷⁰¹ Excerpts from the Belarusian Investment Law, Article 13, **Exhibit RL-47**.

⁷⁰² Amended Investment Contract, Clause 26, **Exhibit C-66**.

⁷⁰³ Excerpts from the Belarusian Investment Law, Article 13, **Exhibit RL-47**

⁷⁰⁴ Notice, paragraph 16, **CS-1**.

⁷⁰⁵ Notice, paragraph 17. **CS-1**.

repayable at the end of the term of each agreement, after the return of the principal sum).⁷⁰⁶

485. Moreover, Ms [REDACTED] crucially clarifies that such loans mostly came from “foreign (non-Belarusian) companies,” and that “[l]enders would almost always be non-Russian companies”.⁷⁰⁷ Furthermore, Monolium-Engineering received such loans in “foreign currency [...] mostly in US\$,” and upon receipt of those funds, Monolium-Engineering either paid for building works or (more often) “transferred those funds to other Belarusian companies”.⁷⁰⁸

486. In light of the above, it is clear that the Claimant has failed to show that it is the beneficial owner of the sums invested through Manolium-Engineering, as it is clear that other entities (*i.e.* the foreign entities referred to above) are the beneficial owners of those investment. Therefore, the Claimant has failed to adduce sufficient evidence thus far that its investment should be viewed as a “qualifying investment” falling within the ambit of the EEU Treaty.

IV. THE CLAIMANT DID NOT SUFFER A DENIAL OF JUSTICE

487. Where an investor has exhausted local remedies, and his claim has been held invalid as a matter of domestic law, he must establish that he was subject to a denial of justice in the judicial system in order to prevail in his claims.⁷⁰⁹ Similarly, a governmental authority cannot be reproached for acting in accordance with a decision taken by the state’s own courts, so long as such court decisions themselves comply with international legal standards and do not amount to a denial of justice.⁷¹⁰

488. While the Claimant has presented its claims in terms of ‘expropriation’ and ‘fair and equitable treatment’, the Respondent submits that, in essence, the Claimant’s

⁷⁰⁶ First Witness Statement of Ms [REDACTED], paragraph 18, **RWS-2**.

⁷⁰⁷ First Witness Statement of Ms [REDACTED], paragraph 19, **RWS-2**.

⁷⁰⁸ First Witness Statement of Ms [REDACTED], paragraph 19, **RWS-2**.

⁷⁰⁹ McLachlan, Shore and Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 7.147, **Exhibit RL-44**; *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 95 – 100, **Exhibit RL-14**.

⁷¹⁰ *See, e.g. Limian Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paragraph 433, **Exhibit RL-51**.

allegations against the Respondent in the present case amount to a disguised claim for denial of justice.

489. The first part of the Claimant's FET⁷¹¹ and expropriation⁷¹² claims relate to the actions of MCEC and Minsktrans that "*culminated in the illegal termination of the [...] Amended Investment Contract*".⁷¹³ The Claimant alleges that MCEC and Minsktrans performed their obligations under the Investment Contract and Amended Investment Contract in bad faith⁷¹⁴ between 2003 – 2013 and "*wrongfully*" submitted a claim⁷¹⁵ to terminate the Amended Investment Contract, which was subsequently approved by the Belarusian courts and came into force on 29 October 2014.⁷¹⁶
490. The second part of the Claimant's FET⁷¹⁷ and expropriation⁷¹⁸ claims relate to the actions of the Belarusian public authorities that "*culminated in the [...] seizure of the New Communal Facilities*".⁷¹⁹ The Claimant alleges that the Belarusian courts and tax authorities selected a "*strategy*"⁷²⁰ in 2016 – 2017 to "*bring the Claimant to tax liability*"⁷²¹ and thereby transfer the New Communal Facilities, which remained in Manolium-Engineering's ownership after the termination of the Amended Investment Contract, into the municipal ownership of Minsk to enforce against such liabilities.⁷²² The Claimant alleges that the tax assessments in 2016 which led to the transfer of the New Communal Facilities were "*based on*" the 17 May 2016 judgment of the District Court, in which Manolium-Engineering was held administratively liable for its occupation of the land plots for the New Communal Facilities after the expiry of its permit.⁷²³

⁷¹¹ Notice, paragraphs 415 – 476, CS-1.

⁷¹² Notice, paragraphs 512 – 546, CS-1.

⁷¹³ Claimant's Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, CS-3.

⁷¹⁴ Notice, paragraph 417, CS-1.

⁷¹⁵ Notice, paragraph 417(d), CS-1.

⁷¹⁶ See paragraph 263 above.

⁷¹⁷ Notice, paragraphs 488 – 497, CS-1.

⁷¹⁸ Notice, paragraph 530(b), CS-1.

⁷¹⁹ Claimant's Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, CS-3.

⁷²⁰ Notice, paragraph 488, CS-1.

⁷²¹ Notice, paragraph 488, CS-1.

⁷²² Notice, paragraphs 488 – 497, CS-1.

⁷²³ Notice, paragraph 493, CS-1.

491. While the Respondent addresses each of the above allegations in the FET and expropriation sections that follow, the Respondent submits that the claims as currently presented must fail unless the Claimant can prove that it suffered a denial of justice. The claims relating to the performance by MCEC and Minsktrans of the Amended Investment Contract in 2003 – 2013 culminated in proceedings in the Belarusian courts, in which the termination was upheld by the courts. The claims relating to the actions of the tax authorities and transfer of the New Communal Facilities into municipal ownership in 2016 – 2017 were, according to the Claimant, “based on” on the 27 May 2016 judgment of the District Court.⁷²⁴
492. It is commonly accepted that, due to the gravity of the charge, claiming denial of justice requires an elevated standard of proof⁷²⁵ and that the burden of proof lies with the party claiming the denial of justice.⁷²⁶ As the tribunal held in *Oostergetel v Slovakia*, “[t]o meet the applicable test, ***it will not be enough*** to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption” (emphasis added).⁷²⁷ A denial of justice can be claimed “if and when the judiciary breached the [fair and equitable treatment] standard by ***fundamentally*** unfair proceedings and ***outrageously*** wrong, final and binding decisions” (emphasis added).⁷²⁸
493. The standard to prove a procedural denial of justice is to demonstrate that “*the procedural irregularities were in fact severe improprieties with an impact on the outcome of the case, to the point that the entire procedure becomes objectionable*”.⁷²⁹

⁷²⁴ Notice, paragraph 493, **CS-1**.

⁷²⁵ *Philip Morris Brands SARL, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paragraph 499, **Exhibit RL-13**.

⁷²⁶ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 274, **Exhibit CL-21**.

⁷²⁷ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 273, **Exhibit CL-21**.

⁷²⁸ *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraph 445, **Exhibit RL-52**.

⁷²⁹ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 287, **Exhibit CL-21**.

Tribunals have found that only conduct which shocks and offends a sense of judicial propriety will constitute a denial of justice.⁷³⁰

494. As to a substantive denial of justice, the Claimant has to prove that the findings of the relevant courts were “*so bereft of a basis in law that the judgment was in effect arbitrary and malicious*”⁷³¹. It is generally accepted that a mere erroneous decision of a court cannot be considered denial of justice; arbitral tribunals are not courts of appeal.⁷³² As set out in Dolzer and Schreuer, “*a line [...] between an ordinary error and a gross miscarriage of justice, which may no longer be considered as an exercise of the rule of law*” will be crossed where “*it is impossible for a third party to recognize how an impartial judge could have reached the result in question.*”⁷³³
495. Given the particularly demanding standard for establishing a denial of justice, it is not surprising that the Claimant has sought to frame its claims in terms of expropriation and FET. The Respondent submits that the Claimant falls manifestly short of satisfying this demanding standard.

1. The termination of the Amended Investment Contract by the Belarusian courts does not constitute a denial of justice

496. In *Azinian v. Mexico*, the claimant pleaded expropriation arising from the termination of their contracts for waste disposal in Mexico. The contract itself was expressly governed by Mexican law and subject to the jurisdiction of the Mexican courts. It had been held invalid by three levels of Mexican courts. The tribunal held that a finding

⁷³⁰ *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paragraph 127, **Exhibit CL-20**; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 291, **Exhibit CL-21**.

⁷³¹ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 292, **Exhibit CL-21**.

⁷³² *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 273, **Exhibit CL-21**; *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paragraph 126, **Exhibit CL-20**; *Philip Morris Brands SARL, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paragraph 500, **Exhibit RL-13**; *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraph 99, **Exhibit RL-14**; McLachlan, Shore and Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 7.109, **Exhibit RL-44**.

⁷³³ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Ed), page 182, **Exhibit RL-45**.

that the contractual party had incorrectly terminated the contract was “not enough” to constitute an expropriation.⁷³⁴ The tribunal observed:

*“A governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level [...] What must be shown is that the court decision itself constitutes a violation of the treaty. Even if the Claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end.”*⁷³⁵

497. Since the claimants in *Azinian v. Mexico* failed to establish that their treatment by the Mexican courts constituted a denial of justice, the tribunal found that their claim had to fail.⁷³⁶ The tribunals in *Waste Management v. Mexico*⁷³⁷ and *Limian Caspian Oil v. Kazakhstan*⁷³⁸ adopted the same approach.
498. In the present case, the Claimant became entitled to develop the Investment Object under the Amended Investment Contract after, *inter alia*, securing the construction of the New Communal Facilities and transferring them into municipal ownership.⁷³⁹ If the Claimant failed to comply with its obligation to ensure the construction and commissioning of the New Communal Facilities by the agreed deadline through its own fault, then MCEC became entitled to submit a claim to terminate the Amended Investment Contract.⁷⁴⁰ On 12 November 2013, MCEC submitted a claim to terminate the Amended Investment Contract on this ground.⁷⁴¹ The claim was upheld

⁷³⁴ *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraph 97, **Exhibit RL-14**.

⁷³⁵ *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 97 - 99, **Exhibit RL-14**.

⁷³⁶ *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraph 100, **Exhibit RL-14**.

⁷³⁷ *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002, paragraph 47 **Exhibit RL-53**.

⁷³⁸ *Limian Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paragraph 433, **Exhibit RL-51**.

⁷³⁹ Amended Investment Contract, Clause 2, **Exhibit C-66**.

⁷⁴⁰ Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

⁷⁴¹ See paragraph 251 above.

by three levels of the Belarus courts and the termination of the Amended Investment Contract came into force on 29 October 2014.⁷⁴²

499. In essence, the Claimant alleges that MCEC and Minsktrans acted in bad faith to make it “*impossible*” for the Claimant and Manolium-Engineering to fulfil their obligation to construct the New Communal Facilities⁷⁴³ and that MCEC “*wrongfully*” submitted a claim to terminate the Amended Investment Contract.⁷⁴⁴ The Claimant therefore concludes that the termination of the Amended Investment Contract by the Belarusian courts on 29 October 2014 “*is equal to the effect of expropriation*”, because “*the Claimant was deprived of the opportunity to gain any economic benefit from its Investments.*”⁷⁴⁵
500. The Respondent has already submitted in Section III.A that the Tribunal does not have jurisdiction *ratione temporis* over the claims relating to the performance and termination of the Amended Investment Contract because, *inter alia*, all the acts complained of took place before the EEU Treaty came into force on 1 January 2015. Further, the Respondent has submitted in Section III.B that these claims relate to purely contractual conduct without any exercise of sovereign authority. Accordingly, they are not capable of amounting to a breach of international law. However, if the Tribunal disagrees with the Respondent and considers it necessary to address these claims on the merits, the Respondent’s position is that, in order to prevail, the Claimant must demonstrate that the termination of the Amended Investment Contract in the Belarusian courts constitutes a denial of justice.
501. The Claimant does not expressly claim that it suffered a denial of justice, but alleges that the decision of the Economic Court of Minsk dated 9 September 2014 to terminate the Amended Investment Contract:

“[i]n addition to numerous errors in terms of content [...] basically omitted the statement of reasons of why the judge made such conclusions, as well as lacked the analysis of acts of the Claimant and Manolium-Engineering in accordance with Belarusian laws and the provisions of the Amended Investment Contract, which evidenced an obvious prejudice of the court

⁷⁴² See paragraph 263 above.

⁷⁴³ See, e.g., Notice, paragraphs 433, 445 and 451, CS-1.

⁷⁴⁴ Notice, paragraph 417(d), CS-1.

⁷⁴⁵ Notice, paragraph 524, CS-1.

towards the Claimant and an intention to issue a decision in favor of Belarusian public bodies."⁷⁴⁶

502. The Claimant fails to specify what “*numerous errors*” were made in the judgment, because there were none.⁷⁴⁷ Further, the Claimant’s allegation that the judgment did not contain any reasoning for the decision made is simply untrue.⁷⁴⁸
503. In the proceedings before the Economic Court of Minsk, the Claimant and Manolium-Engineering admitted that they had not completed the construction of the New Communal Facilities by the deadline of 1 July 2011 agreed under Additional Agreement No. 6.⁷⁴⁹ However, the Claimant and Manolium-Engineering alleged that they were not in breach of the Amended Investment Contract because they had spent more than US\$15 million on the design and construction of the New Communal Facilities and that, accordingly, MCEC was not entitled to submit a claim to terminate the Amended Investment Contract under Clause 16.2.1.⁷⁵⁰ The Claimant and Manolium-Engineering also argued that they were unable to comply with the contractual deadline because of MCEC’s and/or Minsktrans’s actions.⁷⁵¹
504. The Economic Court of Minsk found that the amount spent by the Claimant and Manolium-Engineering did not excuse them from complying with their obligation to construct and commission the New Communal Facilities, because they had expressly agreed in the Amended Investment Contract to bear all costs in constructing the New Communal Facilities.⁷⁵² The Claimant and Manolium-Engineering chose not to provide any evidence or even explanation in support of their allegation that MCEC and Minsktrans had prevented them from complying with the contractual deadline.⁷⁵³ Accordingly, the courts correctly concluded that the Claimant and Manolium-Engineering had failed to prove that they were unable to comply with the Amended Investment Contract because of MCEC’s and/or Minsktrans’s actions.⁷⁵⁴

⁷⁴⁶ Notice, paragraph 478, **CS-1**.

⁷⁴⁷ See paragraphs 246 – 255 above.

⁷⁴⁸ Judgement of the Minsk Economic Court, dated 9 September 2014, **Exhibit C-147**.

⁷⁴⁹ See paragraph 251 above.

⁷⁵⁰ See paragraph 251 above.

⁷⁵¹ See paragraph 252 above.

⁷⁵² See paragraph 253 above.

⁷⁵³ See paragraph 252 above.

⁷⁵⁴ See paragraph 253 above.

505. A panel of three judges of the Appeal Instance of the Economic Court of Minsk and a panel of three judges of the Supreme Court of Belarus reviewed and upheld the first instance court judgment on termination of the Amended Investment Contract.⁷⁵⁵
506. In these circumstances, the Claimant has failed to establish that the decisions of the Belarusian courts were wrong as a matter of Belarusian law, let alone that these decisions constitute a “*gross miscarriage of justice, which may no longer be considered as an exercise of the rule of law*”.⁷⁵⁶
507. The Claimant further seems to suggest that there was a certain procedural irregularity in the fact that the Economic Court of Minsk ruled that the Claimant and Manolium-Engineering were to bear the costs of the expert examination.⁷⁵⁷ This is misleading because, among other reasons, Manolium-Engineering had itself agreed that the costs should be borne by the Claimant and Manolium-Engineering.⁷⁵⁸ In any event, the Claimant has failed to explain how the decision that the Claimant and Manolium-Engineering had to bear the costs of the expert examination (which was unrelated to the issues in dispute in the main proceedings as explained in paragraph 256 above) could have had any impact on the decision of the courts to terminate the Amended Investment Contract.
508. Lastly, the Claimant states that it is “*noteworthy*” that on 4 July 2016, Judge Grushetskiy, who had rendered the decision of the Economic Court of Minsk terminating the Amended Investment Contract, was “*found guilty, in particular, of accepting bribes, fraudulent conduct on a large scale and instigation for [sic] giving bribes and was sentenced to 11 years in a correctional facility.*”⁷⁵⁹
509. These allegations are irrelevant and do not assist the Claimant in satisfying the high standard for proving denial of justice. The charges brought against Judge Grushetskiy had nothing to do with the court proceedings in question. Accordingly, it is unclear

⁷⁵⁵ See paragraph 255 above.x

⁷⁵⁶ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Ed), page 182, **Exhibit RL-45**.

⁷⁵⁷ Notice, paragraphs 260 – 262, **CS-1**.

⁷⁵⁸ See paragraph 259 above.

⁷⁵⁹ Notice, paragraph 266, **CS-1**.

how these charges are supposed to prove that the termination of the Amended Investment Contract was ungrounded, as the Claimant appears to be suggesting.

510. As the tribunal held in *Oostergetel v. Slovakia*, “[a]s regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law. [...] The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.”⁷⁶⁰
511. For the above reasons, the Respondent submits that the Claimant falls manifestly short of establishing that the decision of the Belarusian courts to terminate the Amended Investment Contract constitutes a denial of justice. As already explained, in the absence of any illegality on the part of the Belarusian courts, the Respondent respectfully submits that the Claimant’s claims relating to the performance and termination of the Amended Investment Contract fail.⁷⁶¹

2. The 2016 Administrative Proceedings do not constitute a denial of justice

512. In *Limian Caspian v. Kazakhstan*, the claimant alleged that the annulment in the Kazakh courts of the transfer of a license constituted an expropriation. The tribunal rejected the claim, finding that the Kazakh court decisions did not constitute a denial of justice because they were not “arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking due process, even if they might have been incorrect as a matter of Kazakh law”.⁷⁶² The tribunal also held, citing *Azinian*, that the subsequent re-transfer of the licence by a governmental authority could not constitute an expropriation:

⁷⁶⁰ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 296, **Exhibit CL-21**.

⁷⁶¹ McLachlan, Shore and Weiniger, *International Investment Arbitration*, (2nd Ed.), paragraph 7.147; *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 95 – 100, **Exhibit RL-14**; *Limian Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paragraph 433, **Exhibit RL-51**; *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002, **Exhibit RL-53**.

⁷⁶² *Limian Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paragraph 431, **Exhibit RL-51**.

*“With regard to the action of the Ministry of Energy, the Tribunal agrees with the reasoning of the Azinian tribunal holding that a governmental authority cannot be reproached for acting in accordance with a decision taken by the state’s own courts. This is at least so if, as found above, such court decisions are irreproachable and have to be accepted from the perspective of international law.”*⁷⁶³

513. In the present case, as described in paragraph 490 above, the second part of the Claimant’s expropriation and FET claims relate to the conduct of the Belarusian state courts and tax authorities in 2016 – 2017, which allegedly “*culminated*”⁷⁶⁴ in the transfer of the New Communal Facilities (which remained Manolium-Engineering’s property after the termination of the Amended Investment Contract)⁷⁶⁵ into municipal ownership in 2017 to enforce against Manolium-Engineering’s land tax liabilities.
514. The Claimant alleges that in 2016 the Belarusian state authorities “*selected a strategy [...] to bring the Claimant to tax liability*”.⁷⁶⁶ According to the Claimant, this ‘campaign’ was made up of three stages:
- a) On 17 May 2016, the District Court issued the Administrative Court Resolution imposing administrative sanctions on Manolium-Engineering for occupying the land plots without a permit and imposing a fine of approximately US\$2,668;⁷⁶⁷
 - b) On 21 June 2016, the District Tax Inspectorate amended the First Tax Audit Report, finding that Manolium-Engineering owed 20,046,478.92 and 6,397,602.10 denominated Belarusian rubles for land tax in the period 2013 – 2016 and penalties, respectively;⁷⁶⁸ and

⁷⁶³ *Limian Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paragraph 433, **Exhibit RL-51**.

⁷⁶⁴ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**.

⁷⁶⁵ See paragraphs 264 – 265 above.

⁷⁶⁶ Notice, paragraph 488, **CS-1**.

⁷⁶⁷ Notice, paragraph 491, **CS-1**.

⁷⁶⁸ Notice, paragraph 493, **CS-1**.

- c) On 27 January 2017, the New Communal Facilities were transferred into municipal ownership to enforce against the land taxes and penalties owed by Manolium-Engineering.⁷⁶⁹

515. In order to try to link these three stages, the Claimant alleges that the amendments to the First Tax Audit Report on 21 June 2016 were “*based on*” the Administrative Court Resolution,⁷⁷⁰ which the tax authorities “*made use of [...] to generate the grounds to bring Manolium-Engineering to tax liability*”.⁷⁷¹ As the Respondent explains in paragraphs 327 above and 593 below, this is incorrect; the amendments to the First Tax Audit Report on 21 June 2016 were not “*based on*” the Administrative Court Resolution. Moreover, even before these amendments the District Tax Inspectorate had found that Manolium-Engineering owed land tax payments for the period 2013 – 2015 and the first half of 2016.
516. If, however, according to the Claimant’s position, the amendments to the First Tax Audit Report were “*based on*” the Administrative Court Resolution, and that the tax liabilities arising from these amendments were then enforced against the New Communal Facilities, the Claimant must establish that the Administrative Court Resolution itself constitutes a denial of justice if it is to prevail in its claims relating to the “*seizure of the New Communal Facilities*”.⁷⁷²
517. The Claimant does not expressly claim that it suffered a denial of justice as a result of the Administrative Court Resolution. However, the Claimant alleges that these proceedings were part of a “*strategy of exerting pressure on the Claimant*”.⁷⁷³ Further, the Claimant alleges that in its ruling of 17 May 2016 bringing Manolium-Engineering to administrative liability and imposing an administrative fine, the “*court of Pervomaysky district arrived to completely different conclusions [...] in respect of the protraction by Manolium-Engineering of the construction of the New Communal Facilities and violation of laws in respect of returning the land plots*” than the same

⁷⁶⁹ Notice, paragraph 497, CS-1.

⁷⁷⁰ Notice, paragraph 493, CS-1.

⁷⁷¹ Notice, paragraph 492, CS-1.

⁷⁷² Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, CS-3.

⁷⁷³ Notice, paragraph 488, CS-1.

court did on 5 April 2016.⁷⁷⁴ The Claimant alleges that “[a]ll attempts of Manolium-Engineering to challenge the above decision on bringing the latter to administrative liability failed.”⁷⁷⁵

518. As already described in paragraphs 299 – 311 above, the Administrative Court Resolution of the District Court was the culmination of a string of proceedings that took place in 2016:

- a) On 5 April 2016, at a hearing in which representatives of Manolium-Engineering participated, the District Court declined to impose administrative sanctions on Manolium-Engineering for occupying the land plots for the New Communal Facilities after the expiry of the permit (although the District Court established that Manolium-Engineering was occupying the land plots without the requisite permits).⁷⁷⁶ The court based its finding on, *inter alia*, the finding that Manolium-Engineering had requested an extension of the permit, which had been denied.⁷⁷⁷ The Land Planning Service appealed the decision;⁷⁷⁸
- b) On 13 May 2016, in the appellate proceedings, the Minsk City Court agreed with the Land Planning Service that the District Court’s judgment on 5 April 2016 had been premature and ungrounded, because, among other reasons, Manolium-Engineering had not provided evidence that it had applied to extend the land permits.⁷⁷⁹ The Minsk City Court therefore sent the case back to the District Court for consideration by a different judge;⁷⁸⁰
- c) On 17 May 2016, the District Court reconsidered the case in accordance with the directions of the Minsk City Court and imposed administrative sanctions on Manolium-Engineering for occupying the land plots for the New Communal Facilities without a permit, in the form of a fine of around US\$2,726.⁷⁸¹ The District Court reached its decision, *inter alia*, based on the

⁷⁷⁴ Notice, paragraph 291, CS-1.

⁷⁷⁵ Notice, paragraph 292, CS-1.

⁷⁷⁶ See paragraph 307 above.

⁷⁷⁷ See paragraph 308 above.

⁷⁷⁸ See paragraph 309 above.

⁷⁷⁹ See paragraph 309 above.

⁷⁸⁰ See paragraph 310 above.

⁷⁸¹ See paragraph 311 above.

fact that Manolium-Engineering failed to prove that it had applied for an extension of the permits to the land plots.⁷⁸² Manolium-Engineering appealed against the decision of the District Court to the Minsk City Court and to the President of the Minsk City Court, but both appeals were denied.⁷⁸³

519. Contrary to what the Claimant appears to suggest,⁷⁸⁴ the fact that the judge in the Administrative Court Resolution arrived at a different conclusion to the judge in the District Court judgment dated 5 April 2016 does not constitute a denial of justice. In the Administrative Court Resolution, the judge reconsidered the case in view of the directions of the higher Minsk Court and, as it was required to do in accordance with procedural law. Representatives of Manolium-Engineering were present at each stage of the proceedings and had the opportunity to present their case.⁷⁸⁵ Further, Manolium-Engineering had the opportunity to appeal the 17 May 2016 decision of the District Court to two higher instances. The fact that the higher instances did not grant Manolium-Engineering's appeals does not constitute a denial of justice, contrary to what the Claimant appears to suggest.⁷⁸⁶
520. For the above reasons, the Claimant falls short of establishing that the 2016 Administrative Proceedings were incorrect as a matter of Belarusian law or procedure, let alone that they rise to the level of a denial of justice. If, as the Claimant asserts, the subsequent tax assessments were “based on”⁷⁸⁷ the findings in the 2016 Administrative Proceedings, then the conduct of the tax authorities cannot constitute a violation of international law either. As the tribunal found in *Limian Caspian v. Kazakhstan*, “a governmental authority cannot be reproached for acting in accordance with a decision taken by the state’s own courts”.⁷⁸⁸

⁷⁸² See paragraph 311 above.

⁷⁸³ See paragraph 311 above.

⁷⁸⁴ Notice, paragraph 291, **CS-1**.

⁷⁸⁵ Only the last appeal in these proceedings, which Manolium-Engineering submitted to the President of the Minsk City Court was considered in the absence of the parties’ representatives, as the procedural law does not provide for a possibility to hold a hearing involving the parties’ representatives at this stage of the proceedings.

⁷⁸⁶ Notice, paragraph 292, **CS-1**; Witness Statement of A. Dolgov, paragraphs 89 – 91, **CWS-1**.

⁷⁸⁷ Notice, paragraph 493, **CS-1**.

⁷⁸⁸ *Limian Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paragraph 433, **Exhibit RL-51**.

V. **BELARUS TREATED THE CLAIMANT FAIRLY AND EQUITABLY**

521. Article 68 of Protocol 16 of the EEU Treaty provides that:

*“Each Member State shall ensure on its territory fair and equitable treatment to investments and investment-related activities conducted by investors of other Member States.”*⁷⁸⁹

522. Even if the Tribunal disagrees with the Respondent that the Claimant needs to establish a denial of justice to prevail in its claims on the merits, the Respondent submits in this section that even according to the standards proposed by the Claimant, the Respondent did not breach its FET obligations under the EEU Treaty.

523. As already described in paragraphs 489 – 490 above, the Claimant’s FET claims relate to:

- a) the actions of MCEC and Minsktrans in 2003 – 2013 that “*culminated*” in the termination of the Amended Investment Contract;⁷⁹⁰ and
- b) the actions of the courts and the tax authorities in 2016 – 2017 which “*culminated*” in the transfer of the New Communal Facilities into municipal ownership to enforce against Manolium-Engineering’s tax liabilities.⁷⁹¹

524. The Claimant seeks to link the two parts of its claims by alleging that the “*conduct of Belarus was a whole campaign with the purpose to get as much profit from the Claimant as possible*”.⁷⁹² To date, the Claimant has not provided any evidence in support of its allegations of bad faith or explained how the performance of contractual obligations by MCEC and Minsktrans in 2003 – 2013 is linked with the alleged actions of the tax authorities and state courts in 2016 – 2017. Accordingly, the Respondent shall address the allegations separately in the following sections.

⁷⁸⁹ Protocol 16 of the EEU Treaty, Article 68, **Exhibit CL-3**.

⁷⁹⁰ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**; Notice, paragraphs 417 – 487, **CS-1**.

⁷⁹¹ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**; Notice, paragraphs 487 – 497, **CS-1**.

⁷⁹² Statement of Claim, paragraph 47, **CS-2**.

A. MCEC AND MINSKTRANS PERFORMED THEIR OBLIGATIONS UNDER THE INVESTMENT CONTRACT AND AMENDED INVESTMENT CONTRACT IN GOOD FAITH

525. The Respondent agrees with the Claimant that the FET standard includes a duty on the Respondent to act in good faith in respect of the Claimant.⁷⁹³ As set out in Dolzer and Schreuer:

“good faith is a broad principle that is one of the foundations of international law in general and of foreign investment law in particular. Arbitral tribunals have confirmed that good faith is inherent in FET. [...] The FET standard in general, and the obligation to act in good faith in particular, include the obligation not to inflict damage upon an investment purposefully.”
(emphasis added)⁷⁹⁴

526. Deliberate acts by State bodies designed to harm the interests of an investor will amount to a breach of the FET standard.⁷⁹⁵ On the other hand, a good faith effort on the part of State agencies to fulfil the requirements of host State law will be a “powerful indication” that the FET standard has been met.⁷⁹⁶

527. There is a high standard of proof for establishing bad faith, in particular if the bad faith is to be established on the basis of circumstantial evidence.⁷⁹⁷

528. In *Rumeli v. Kazakhstan*, the tribunal held that the unilateral termination of an investment contract by the Kazakh investment committee, without recourse to the Kazakh courts, violated the BIT’s FET provisions, because it was “arbitrary, unfair,

⁷⁹³ Notice, paragraphs 383 – 392 and 411 – 414, **CS-1**.

⁷⁹⁴ R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2012 (2nd Ed), page 156, **Exhibit RL-45**.

⁷⁹⁵ *Waste Management Inc v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paragraph 138, **CL-17**; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, paragraph 299, **Exhibit RL-54**.

⁷⁹⁶ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 7.227, **Exhibit RL-44**.

⁷⁹⁷ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paragraphs 143 **Exhibit RL-55**; *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010, paragraph 137, **Exhibit RL-56**; *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paragraphs 109 and 115 **Exhibit CL-17**.

*unjust, lacked in due process and did not respect the investor’s reasonable and legitimate expectations.”*⁷⁹⁸

529. In *Bayindir v. Pakistan*, the claimant alleged that a Pakistani government authority and the Pakistani government had conspired to misuse the provisions of a contract entered into with the claimant to expel the claimant from Pakistan.⁷⁹⁹ The tribunal rejected the claimant’s allegations of bad faith, holding that it was not sufficient for the claimant to “*infer bad faith from its reading of the chronology*”⁸⁰⁰ in circumstances when there was “*no evidence showing bad faith*”.⁸⁰¹
530. In *Waste Management v. Mexico*, the tribunal held that it was “*clear that the City failed in a number of respects to fulfil its contractual obligations*”,⁸⁰² but that there was no violation of the FET standard because the City municipality had not “*acted in a wholly arbitrary way or in a way that was grossly unfair*”, and had “*sought alternative solutions to the problems both parties faced, without finding them*”, in a “*situation of genuine difficulty*”.⁸⁰³
531. In the present case, the Claimant alleges:

“The bad faith conduct of the public bodies of the Republic of Belarus took the following forms:

- a. MCEC and Minsktrans protracted the process of issuing construction permits and making available land plots for constructing the Communal Facilities and New Communal Facilities;*
- b. MCEC protracted the process of making available the land plot for designing the Investment Object;*

⁷⁹⁸ *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, paragraph 615, **Exhibit CL-22**.

⁷⁹⁹ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paragraphs 202 – 204, **Exhibit RL-55**.

⁸⁰⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, paragraph 375, **Exhibit RL-55**.

⁸⁰¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, paragraph 375, **Exhibit RL-55**.

⁸⁰² *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paragraph 109, **Exhibit CL-17**.

⁸⁰³ *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paragraph 115, **Exhibit CL-17**.

- c. MCEC and Minsktrans contributed to disrupting the deadlines of constructing and transferring the New Communal Facilities into the [municipal] ownership; and
- d. The public bodies of the Republic of Belarus unreasonably required the Claimant to continue building the New Communal Facilities and wrongfully terminated the Amended Investment Contract.”⁸⁰⁴

532. In order to become entitled to develop the Investment Object, the Claimant was obliged, *inter alia*, to secure the design and construction of the New Communal Facilities and transfer them into the municipal ownership of Minsk.⁸⁰⁵ The construction of the New Communal Facilities therefore constituted the consideration for the right to develop the Investment Object. The Claimant alleges that the ‘bad faith’ conduct of MCEC and Minsktrans made it “*impossible*” for it to fulfil its obligation to construct the New Communal Facilities,⁸⁰⁶ and seeks compensation for the lost profits that it allegedly ‘would have’ made had it acquired the right to develop the Investment Object, constructed it and sold it at a profit.⁸⁰⁷

533. The Respondent’s position is that the Claimant’s failure to construct the New Communal Facilities by the agreed deadlines was caused by its own delays, and in particular by its inability to fund the construction works as a result of the onset of the financial crisis in Russia in 2008 – 2009.⁸⁰⁸

534. As described below, the Claimant has failed to provide any evidence in support of its allegations of bad faith against MCEC and Minsktrans. Absent any evidence of bad faith, the Respondent submits that the Claimant’s claims relate to purely contractual issues that do not involve any element of sovereign authority and are not *prima facie* capable of constituting a breach of the EEU Treaty.⁸⁰⁹ Even if the Tribunal finds that it has jurisdiction over such contractual claims (contrary to the Respondent’s position in paragraphs 429 – 440 above), the Respondent submits that such claims do not rise to the level of a violation of international law.

⁸⁰⁴ Notice, paragraph 417, **CS-1**.

⁸⁰⁵ Amended Investment Contract, Clause 2, **Exhibit C-66**.

⁸⁰⁶ See, e.g., Notice, paragraph 433, **CS-1**.

⁸⁰⁷ Notice, paragraph 530(a), **CS-1**.

⁸⁰⁸ See paragraphs 77 – 98 above.

⁸⁰⁹ See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, paragraphs 372 – 376, **Exhibit RL-55**; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, paragraphs 329 – 331, **Exhibit RL-46**.

1. **In 2003 – 2007, MCEC and Minsktrans sought solutions to the problems faced in the implementation of the Investment Contract and took steps to accelerate the process of signing the Amended Investment Contract**

535. The Claimant alleges that in 2003 – 2007, MCEC and Minsktrans “*deliberately*”⁸¹⁰ caused delays in issuing land plots for the construction of the Motor Transport Base and the Depot under the Investment Contract and “*avoided signing the draft Amended Investment Contract in every way possible*”.⁸¹¹ This is not the case.
536. First, the Claimant’s assertion that MCEC and Minsktrans “*failed to take any acts to perform their obligations under the Investment Contract*”⁸¹² in respect of the Motor Transport Base is incorrect as a matter of fact. MCEC took active steps following the execution of the Investment Contract in 2003 to arrange the transfer of the land plot for the Motor Transport Base into the municipal ownership of Minsk so that the Claimant could perform its obligations under the Investment Contract. This included assisting the Ministry of Defence and monitoring its work in preparing a draft Presidential order for the transfer.⁸¹³
537. Second, MCEC did not “*protract*”⁸¹⁴ the process of transferring the land plot for the construction of the Depot.⁸¹⁵ Contrary to what the Claimant appears to suggest, developing the “*design stages*” for the construction of the Depot did not entitle the Claimant or Manolium-Engineering to the land plot for the Depot.⁸¹⁶ As already explained, it was only on 27 March 2007 (after the Amended Investment Contract had been signed) that Manolium-Engineering first applied for the land plot for the

⁸¹⁰ Notice, section 6.2.3(i), CS-1, is entitled “*MCEC and Minsktrans deliberately protracted the process of issuing [...] land plots [...]*”.

⁸¹¹ Notice, paragraph 427, CS-1.

⁸¹² Notice, paragraph 421, CS-1.

⁸¹³ See paragraphs 50 – 52 above.

⁸¹⁴ Notice, paragraph 417(a), CS-1.

⁸¹⁵ Notice, paragraphs 417(a) and 422 – 423, CS-1.

⁸¹⁶ Notice, paragraph 424, CS-1.

Depot.⁸¹⁷ MCEC issued Manolium-Engineering the permit to the land plots less than two months later.⁸¹⁸

538. Third, it is plainly incorrect that MCEC and Minsktrans “*avoided signing the draft Amended Investment Contract in every way possible*”.⁸¹⁹ As already explained, MCEC sought approval for the amendments to the Investment Contract as soon as it was made aware of this requirement.⁸²⁰ Contrary to what the Claimant asserts, MCEC never “*intended to sell*”⁸²¹ the land plot for the Investment Object to another investor during this period.⁸²²
539. Lastly, when the Amended Investment Contract was signed on 8 February 2007, Manolium-Engineering and the Claimant were given until the end of December 2008 to design, construct and commission the New Communal Facilities, even though the scope of the New Communal Facilities was less extensive than the Communal Facilities.⁸²³ Accordingly, contrary to the Claimant’s assertions,⁸²⁴ when the Amended Investment Contract was signed, the Claimant was put in the position it would have been in but for the issues encountered in the implementation of the Investment Contract.
540. In such circumstances, the Claimant has failed to establish that MCEC or Minsktrans breached their obligations under the Investment Contract, let alone that they acted in bad faith. MCEC sought alternative solutions to the problems faced in the implementation of the Investment Contract, which were caused by circumstances outside of its control. In any event, the deadline for the construction of the New Communal Facilities was proportionately extended in order to put the Claimant in the same position it would have been in but for these delays. Accordingly, the actions of

⁸¹⁷ See paragraph 110 above.

⁸¹⁸ See paragraph 111 above.

⁸¹⁹ Notice, paragraph 427, CS-1.

⁸²⁰ See paragraph 57 above.

⁸²¹ Notice, paragraph 427, CS-1.

⁸²² See paragraph 59 – 61 above.

⁸²³ See paragraph 57 above.

⁸²⁴ Notice, paragraph 430, CS-1.

MCEC and Minsktrans did not render the construction of the New Communal Facilities “*impossible*”, as the Claimant alleges.⁸²⁵

541. The Claimant appears to suggest that the Respondent is responsible for “*significant growth of the cost*” in constructing the New Communal Facilities in 2003 – 2007 as a result of inflation in Belarus.⁸²⁶ The Claimant cannot rely on the EEU Treaty to protect it against such risks. As the tribunal found in *CMS v. Argentina*, “*treaties cannot entirely isolate foreign investments from the general economic situation of a country*”.⁸²⁷

2. In 2007 – 2011, the Claimant was responsible for the delays which led to the failure to transfer the New Communal Facilities into municipal ownership by the agreed deadlines

542. The Claimant alleges that after the Amended Investment was signed on 8 February 2007, the ‘bad faith’ conduct of the Respondent in 2007 – 2011 made it “*impossible*” for the Claimant and Manolium-Engineering to fulfil their obligation to design, construct and commission the New Communal Facilities by the agreed deadlines.⁸²⁸ In particular, the Claimant alleges that:

- a) Gosstroy delayed issuing Manolium-Engineering permits for the construction of the New Communal Facilities;⁸²⁹
- b) MCEC “*hindered*” the construction of the New Communal Facilities by relocating construction companies in 2008 and dismissing the general contractor in 2010;⁸³⁰ and
- c) MCEC “*deliberately protracted*” making the land plot available to Manolium-Engineering for designing the Investment Object.⁸³¹

⁸²⁵ Notice, paragraph 433, CS-1.

⁸²⁶ Notice, paragraph 426, CS-1.

⁸²⁷ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paragraph 29, **Exhibit RL-38**.

⁸²⁸ See, e.g., Notice, paragraphs 445 and 451, CS-1.

⁸²⁹ Notice, paragraph 431, CS-1.

⁸³⁰ Notice, paragraphs 448 – 451, CS-1.

⁸³¹ Notice, paragraphs 424 – 446, CS-1.

543. The Claimant has failed to provide any evidence to support its allegations of bad faith. Moreover, contrary to the picture that the Claimant tries to paint, the Claimant and Manolium-Engineering were themselves responsible for the failure to secure the design, construction and commissioning of the New Communal Facilities by the agreed deadlines.
544. In particular, the Claimant was unable to fund the construction works and pay its contractors as a result of the onset of the financial crisis in Russia in 2008 – 2009.⁸³² This was the real reason why the Claimant had to request to extend the deadlines for the construction of the New Communal Facilities in 2008⁸³³ and 2011,⁸³⁴ and ultimately left MCEC with no choice but to apply to terminate the Amended Investment Contract in 2013 when it became clear that the Claimant would not comply with its obligations under the Amended Investment Contract and had no intention to even develop the Investment Object.⁸³⁵
545. On 1 December 2008, for example, the Claimant proposed that the deadlines for all of the New Communal Facilities should be extended under an Additional Agreement from the end of December 2008 until the end of 2009, explaining that the “*financial and economic crisis in Russia and other countries has significantly impaired OOO Manolium-Processing’s capability to finance the construction of the New Communal Facilities in a timely manner.*”⁸³⁶ MCEC and Minsktrans agreed to extend the deadline for the design, construction and commissioning of the New Communal Facilities until July 2009, in order to give the Claimant more time to fulfil its contractual obligations.⁸³⁷
546. However, the Claimant still failed to fulfil its obligations to construct the New Communal Facilities within the period of the extended deadline due to its financial difficulties and its inability to pay its contractors.⁸³⁸ On 25 June 2009, referring again

⁸³² See paragraphs 77 – 98 above.

⁸³³ See paragraphs 77 – 83 above; Additional Agreement No. 5, Clause 1, **Exhibit C-72**.

⁸³⁴ See paragraphs 85 – 98 above; Additional Agreement No. 6, **Exhibit C-76**.

⁸³⁵ See paragraphs 240 – 245 above.

⁸³⁶ Letter from the Claimant to MCEC dated 1 December 2008, attaching draft Amended Agreement No. 5 and a schedule for the final phase of the construction of the Depot dated 24 November 2008, **Exhibit R-42**.

⁸³⁷ Additional Agreement No. 5, Clause 1, **Exhibit C-72**.

⁸³⁸ See paragraphs 85 – 98 above.

to financial difficulties due to the financial crisis, Mr Dolgov requested an extension until the end of 2009 to design and construct the New Communal Facilities.⁸³⁹ However, the Claimant continued to delay and the construction works were frequently stalled.⁸⁴⁰ On 20 April 2011, MCEC agreed to extend the deadline for the design, construction and commissioning of the New Communal Facilities until the Final Commissioning Date.⁸⁴¹

547. Accordingly, the Claimant’s suggestion that in the period 2007 – 2011 MCEC made it “*impossible*” for the Claimant and Manolium-Engineering to comply with their obligations within the agreed deadlines is misleading and incorrect. The Claimant and Manolium-Engineering were themselves responsible for the delays because, among other reasons, they were unable to finance the construction of the New Communal Facilities after the financial crisis hit in 2008 – 2009. The EEU Treaty is not an insurance policy to protect the Claimant against such risks.⁸⁴²

548. In light of the above, the Respondent submits that the Claimant’s claims regarding the alleged ‘delays’ caused by MCEC and Gosstroy are merely an attempt to divert attention from its own financial difficulties. Nevertheless, the Respondent shall briefly address each of the Claimant’s allegations.

(a) Gosstroy did not cause delays

549. The Claimant alleges that on two occasions Gosstroy delayed issuing construction permits to Manolium-Engineering or granted the permits in respect of periods which “*violated the period for construction*” under the Amended Investment Contract.⁸⁴³ The Claimant plainly misrepresents the facts.

550. The numerous applications Manolium-Engineering made to Gosstroy were the result of failures or circumstances, for which Manolium-Engineering and Claimant were

⁸³⁹ Minutes of the meeting held on 25 June 2009, **Exhibit R-50**

⁸⁴⁰ See paragraph 96 above.

⁸⁴¹ See paragraph 98 above; Additional Agreement No. 6, **Exhibit C-76**.

⁸⁴² See, e.g., *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paragraph 29, **Exhibit RL-38**; *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paragraph 114, **Exhibit CL-17**.

⁸⁴³ Notice, paragraphs 431(a) – (d), **CS-1**.

responsible.⁸⁴⁴ Notably, Manolium-Engineering made no objections to the competent authorities or to the court against the duration of the construction permits issued by Gosstroy.⁸⁴⁵

551. The reason why Gosstroy only issued a construction permit in respect of the Depot on 15 October 2007 was that Manolium-Engineering had failed to submit the correct documents in its application.⁸⁴⁶ As far as the Respondent is aware, Gosstroy did not issue a construction permit in respect of the Pull Station on 19 August 2008.⁸⁴⁷ If the Claimant is referring to Manolium-Engineering's application on 18 June 2018, Gosstroy issued the permit in good time on the day following the application.⁸⁴⁸
552. The Claimant alleges that the Registration and Cadastre Agency issued the right to use the land plots for the Road “[o]nly in August 2008, i.e. 5 months after the [design and budget documents] of the Road preparation”.⁸⁴⁹ This is misleading. Manolium-Engineering only applied for state registration of its temporary right to use the land plot for constructing the Road on 8 August 2008. Accordingly, the Registration and Cadastre Agency registered such temporary right in good time on 20 August 2008.⁸⁵⁰

(b) The Claimant failed to pay the contractors working on the New Communal Facilities

553. The Claimant blames the alleged relocation of contractors by MCEC in 2008 and the dismissal of the general contractor in 2010 for allegedly making it “*impossible*” for Manolium-Engineering to construct the New Communal Facilities according to the agreed deadlines.⁸⁵¹ This is incorrect and misleading.
554. To date, the only document that the Claimant has provided relating to the relocation of contractors in 2008 is a letter from Manolium-Engineering to MCEC dated 11

⁸⁴⁴ See paragraphs 129 – 139 above.

⁸⁴⁵ See paragraph 130 above.

⁸⁴⁶ See paragraphs 123 – 124 above.

⁸⁴⁷ See paragraphs 181 – 183 above.

⁸⁴⁸ See paragraphs 181 – 183 above.

⁸⁴⁹ Notice, paragraph 178, CS-1.

⁸⁵⁰ See paragraph 157 above.

⁸⁵¹ Notice, paragraph 451, CS-1.

September 2008.⁸⁵² In addition to referring to the alleged relocation of contractors to the Minsk-Arena, Manolium-Engineering explained that it was having trouble sourcing equipment for the New Communal Facilities.⁸⁵³ The Claimant does not explain the extent to which each of these factors impacted its ability to comply with its obligations, if at all.

555. Moreover, the Claimant has not provided any evidence that MCEC made a decision to “dismiss the [...] contractors that performed the construction of the New Communal Facilities”.⁸⁵⁴

556. Tellingly, the Claimant fails to mention that it was the Claimant’s and Manolium-Engineering’s own failure to pay their debts that was the cause of the delays. In particular, from late 2008 until at least June 2009,⁸⁵⁵ Manolium-Engineering was unable to pay its outstanding debts to the contractors working on the New Communal Facilities, even though Mr Dolgov promised on several occasions that he would do so.⁸⁵⁶

(c) MCEC did not delay making the land plot available to Manolium-Engineering for designing the Investment Object

557. The Claimant alleges that MCEC “deliberately protracted” making the land plot available to Manolium-Engineering for designing the Investment Object and asserts that the deadline for implementing the Investment Object should have been extended when the parties agreed Additional Agreement No. 5 and Additional Agreement No. 6.⁸⁵⁷ This is not correct.

558. First, it is incorrect that MCEC delayed making the land plot for the Investment Object available to Manolium-Engineering. As already explained, after Manolium-Engineering applied for the Investment Object Location Act on 5 December 2007, it

⁸⁵² See paragraph 78 above; Letter from Manolium-Engineering to MCEC dated 11 September 2008, **Exhibit C-71**.

⁸⁵³ Letter from Manolium-Engineering to MCEC dated 11 September 2008, **Exhibit C-71**.

⁸⁵⁴ Notice, paragraph 160, **CS-1**.

⁸⁵⁵ Minutes of the meeting held on 10 June 2009, **Exhibit R-49**.

⁸⁵⁶ See paragraphs 81 – 86 above; Minutes of the meeting dated 19 December 2008 which was attended by MCEC, Minsktrans and Manolium-Engineering on 10 December 2008, **Exhibit R-43**; Letter from Manolium-Engineering to the Economic Committee of MCEC dated 27 March 2009, **Exhibit R-47**

⁸⁵⁷ Notice, paragraphs 434 – 446, **CS-1**.

took Manolium-Engineering and the land surveyor over a year to prepare the necessary documents and submit them to MCEC on 27 February 2009.⁸⁵⁸ MCEC approved the Investment Object Location Act one month later, which allowed the Claimant to start designing the Investment Object.⁸⁵⁹ Accordingly, the Claimant's assertion that MCEC "*deliberately protracted*"⁸⁶⁰ this process is plainly wrong.

559. Second, the Claimant's allegation that the deadline for implementing the Investment Object should have been proportionately extended is baseless.⁸⁶¹ The Amended Investment Contract did not provide for an extension for the implementation of the Investment Object in circumstances where the Claimant had delayed constructing the New Communal Facilities.⁸⁶² Moreover, as far as the Respondent is aware, the Claimant never requested to extend the deadline for implementation of the Investment Object when the parties signed Additional Agreement No. 5 and Additional Agreement No. 6.⁸⁶³

3. From 1 July 2011, the Claimant and Manolium-Engineering were in breach of Clause 6.1 of the Amended Investment Contract

560. As already described, the Claimant would have become entitled to develop the Investment Object under the Amended Investment Contract after it had, *inter alia*, secured the design, construction and commissioning of all the New Communal Facilities (including the Road, Pull Station and Depot) and their transfer into the municipal ownership of Minsk.⁸⁶⁴ Under Additional Agreement No. 6, the Claimant agreed to complete the New Communal Facilities by the Final Commissioning Date.⁸⁶⁵ If it failed to meet this deadline through its own fault, MCEC became entitled to submit a claim to terminate the Amended Investment Contract.⁸⁶⁶

⁸⁵⁸ See paragraphs 197 – 198 above.

⁸⁵⁹ See paragraph 198 above.

⁸⁶⁰ Notice, paragraph 434, **CS-1**.

⁸⁶¹ Notice, paragraphs 442 – 443, **CS-1**.

⁸⁶² Amended Investment Contract, **Exhibit C-66**.

⁸⁶³ See paragraphs 83 and 98 above.

⁸⁶⁴ Amended Investment Contract, Clause 2, **Exhibit C-66**.

⁸⁶⁵ Additional Agreement No. 6, **Exhibit C-76**.

⁸⁶⁶ Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

561. It is undisputed that Manolium-Engineering never completed the construction of or commissioned the Depot.⁸⁶⁷ However, the Claimant appears to suggest that the Depot could have been transferred into municipal ownership because of its “*readiness [...] for operation in full*”.⁸⁶⁸ Contrary to what the Claimant suggests, the Depot was not ready for operation by the Final Commissioning Date or at any time while the Amended Investment Contract was in force. In 2012, Mr Dolgov himself admitted that the Depot would require another US\$5 – 6 million to complete.⁸⁶⁹ As late as 19 March 2013, Mr Dolgov conceded that the “*technical availability*” of the Depot was 90%.⁸⁷⁰ Accordingly, Manolium-Engineering never initiated the procedure for commissioning the Depot nor could it do so unless it was 100% completed.
562. As already explained, the Claimant was responsible for the delays in constructing the New Communal Facilities because, among other reasons, it was unable to finance the construction.⁸⁷¹ Accordingly, since the New Communal Facilities were not constructed and commissioned by the Final Commissioning Date, and since it was “*through the [Claimant’s] fault*”, MCEC became entitled to terminate the Amended Investment Contract as at the Final Commissioning Date.⁸⁷²
563. The Claimant addresses at some length the acceptance of the Road and the Pull Station into the municipal ownership of Minsk.⁸⁷³ The Claimant has failed to explain how this is relevant to the case or to its claim for damages. Since the Claimant only became entitled to develop the Investment Object after having transferred all three New Communal Facilities into municipal ownership as consideration for this right,⁸⁷⁴ the Claimant still would not have become entitled to develop the Investment Object if MCEC had transferred the Road and Pull Station into municipal ownership separately from the Depot (which would have been in breach of Clause 8.11 of the Amended

⁸⁶⁷ See paragraph 251 above; Witness Statement of A. Dolgov, paragraph 57, **CWS-1**; Notice, paragraph 457, **CS-1**; Manolium Engineering’s Statement of Defence re case No. 399-3/2013, **Exhibit R-102**.

⁸⁶⁸ Notice, paragraph 458, **CS-1**.

⁸⁶⁹ Website of news portal of Belarus ‘Naviny.by’, “*Minsk’s authorities are ready to scam the Russian investor*” dated 15 April 2012 // Available at: https://naviny.by/rubrics/economic/2012/04/15/ic_articles_113_177531, **Exhibit R-82**.

⁸⁷⁰ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

⁸⁷¹ See paragraphs 544 – 547 above.

⁸⁷² Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

⁸⁷³ Notice, paragraphs 172 – 212 and 459 – 469, **CS-1**.

⁸⁷⁴ Amended Investment Contract, Clause 2, **Exhibit C-66**.

Investment Contract).⁸⁷⁵ Similarly, even if the Road and the Pull Station had been transferred into municipal ownership, MCEC still would have become entitled to terminate the Amended Investment Contract from 1 July 2011, since the Depot had failed to be constructed and commissioned due to the Claimant's fault.⁸⁷⁶

564. For the avoidance of doubt, however, the Respondent denies that the Road and Pull Station should have been transferred into municipal ownership, as already explained.⁸⁷⁷

4. In 2011 – 2013, MCEC and Minsktrans negotiated with the Claimant in good faith to try to enable the project to go ahead and terminated the Amended Investment Contract on valid grounds

565. The Claimant alleges that after the Final Commissioning Date passed, MCEC “refused to consider”⁸⁷⁸ the “alternative options”⁸⁷⁹ proposed by the Claimant and “insisted”⁸⁸⁰ on terminating the Amended Investment Contract. This is incorrect and misleading. The Claimant omits most of the evidence regarding the negotiations from the period 2011 – 2013 from its description of the communications between the parties, thereby misrepresenting the situation.⁸⁸¹

566. Even though MCEC was entitled to terminate the Amended Investment Contract (as described in paragraphs 561 – 562 above), it sought various solutions to resolve the dispute.⁸⁸² From late 2011, MCEC tried to agree an extension to the deadlines under the Amended Investment Contract with the Claimant and Manolium-Engineering.⁸⁸³

567. When MCEC proposed terms that would sufficiently protect its position and ensure that the New Communal Facilities were constructed without delay, the Claimant became un-cooperative and refused to negotiate further with MCEC.⁸⁸⁴ Instead, the

⁸⁷⁵ Clause 8.11 of the Amended Investment Contract, **Exhibit C-66**.

⁸⁷⁶ Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

⁸⁷⁷ See paragraphs 166 – 172 and 184 – 191 above.

⁸⁷⁸ Notice, paragraph 476, **CS-1**.

⁸⁷⁹ Notice, paragraph 475, **CS-1**.

⁸⁸⁰ Notice, paragraph 476, **CS-1**.

⁸⁸¹ Notice, paragraphs 472 – 476, **CS-1**.

⁸⁸² See paragraphs 206 – 245 above.

⁸⁸³ See paragraphs 206 – 219 above.

⁸⁸⁴ See paragraphs 214 – 215 above.

Claimant unreasonably demanded that it would only continue to finance the construction of the New Communal Facilities in exchange for the transfer of ownership of the land plot for the Investment Object.⁸⁸⁵ When MCEC proposed holding meetings in Minsk to discuss the proposals further, the Claimant never responded.⁸⁸⁶

568. In parallel with the negotiations, MCEC requested that the Claimant and Manolium-Engineering remedy their breach of the Amended Investment Contract by completing the construction of the Depot.⁸⁸⁷ Despite promising on several occasions that they would do so, neither the Claimant nor Manolium-Engineering took any action to comply with their obligations.⁸⁸⁸ As far as the Respondent understands, the reason was that the Claimant was unable to finance the construction of the New Communal Facilities in parallel with its other projects in Belarus.⁸⁸⁹
569. It was the responsibility of Manolium-Engineering to reapply to the relevant authorities for the necessary construction and land permits, which had expired on the Final Commissioning Date. Even though Manolium-Engineering could have extended its construction permit for the New Communal Facilities, it did not provide state authorities with all documents required under Belarusian law.⁸⁹⁰ As far as the Respondent is aware, Manolium-Engineering never applied to extend the land permit for the New Communal Facilities,⁸⁹¹ contrary to what the Claimant asserts.⁸⁹²
570. From December 2012 – March 2013, MCEC proposed to terminate the Amended Investment Contract and enter into the New Investment Contract to implement the Investment Object.⁸⁹³ MCEC offered the Claimant and Manolium-Engineering various incentives to enter into the New Investment Contract, including exemptions

⁸⁸⁵ See paragraph 218 above.

⁸⁸⁶ See paragraph 219 above.

⁸⁸⁷ See paragraphs 207 – 208 above.

⁸⁸⁸ See paragraphs 214 – 215 above.

⁸⁸⁹ See paragraph 208 above; Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 9 January 2012, **Exhibit C-125**.

⁸⁹⁰ See paragraphs 132 – 139 above.

⁸⁹¹ See paragraph 115 above.

⁸⁹² Notice, paragraph 473, **CS-1**.

⁸⁹³ See paragraphs 229 – 245 above.

from VAT, land tax and customs duties.⁸⁹⁴ However, the Claimant and Manolium-Engineering refused to negotiate with MCEC constructively and instead demanded unreasonable terms and deadlines.⁸⁹⁵

571. In March 2013, Claimant refused to continue negotiating the New Investment Contract with MCEC altogether, stating that it did not make “*economic sense*” for it to develop the Investment Object.⁸⁹⁶ Remarkably, even though the Claimant chose to stop negotiating with MCEC because it made no “*economic sense*” to develop the Investment Object, the Claimant now seeks compensation in the present proceedings for the Lost Profits (as defined in paragraph 642 below) that it claims it would have made from the Investment Object if it had acquired this right.⁸⁹⁷
572. Mr Dolgov suggests that in early 2013, Manolium-Engineering “*repeatedly attempted to transfer the New Communal Facilities, but was denied*”.⁸⁹⁸ Mr Dolgov refers, *inter alia*, to the letter it sent to MCEC on 19 March 2013, in which the Claimant proposed that it should transfer the incomplete New Communal Facilities into municipal ownership in exchange for US\$30 million and the land plot for the Investment Object for use “*at its discretion*”.⁸⁹⁹ Such a proposal was highly unreasonable in circumstances where the Claimant had breached its obligation to construct the New Communal Facilities and MCEC would have to spend additional money to get them into a functioning state for commissioning.
573. Accordingly, the Claimant’s assertion that MCEC “*refused to consider*”⁹⁰⁰ the Claimant’s proposals and “*insisted*”⁹⁰¹ on terminating the Amended Investment Contract is misleading. It was the Claimant that refused to consider MCEC’s proposed terms for the New Investment Contract, which were reasonable, justified and in line with the original bargain of the parties. On the other hand, the Claimant’s

⁸⁹⁴ See paragraph 576 above.

⁸⁹⁵ See paragraphs 237 – 242 above.

⁸⁹⁶ See paragraph 240 above; Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

⁸⁹⁷ Notice, paragraph 530(a), **CS-1**.

⁸⁹⁸ Witness Statement of A. Dolgov, paragraph 69, **CWS-1**.

⁸⁹⁹ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

⁹⁰⁰ Notice, paragraph 476, **CS-1**.

⁹⁰¹ Notice, paragraph 476, **CS-1**.

demand for the land plot for the Investment Object to use “*at its discretion*” was unreasonable and unjustified.⁹⁰²

574. MCEC communicated to the Claimant and Manolium-Engineering on numerous occasions that it would be forced to terminate the Amended Investment Contract if the Claimant did not remedy its breach or agree to proceed with the project on terms that were acceptable to MCEC.⁹⁰³ Since it was not possible to agree a solution that was acceptable to both sides, MCEC was left with no choice but to submit a claim to the Economic Court of Minsk to terminate the Amended Investment Contract in accordance with Clause 16.2.1 of the Amended Investment Contract, as it had been entitled to since the Final Commissioning Date.⁹⁰⁴
575. For the reasons set out in paragraphs above, the Respondent respectfully submits that the Respondent treated the Claimant and Manolium-Engineering fairly and equitably at all relevant times in the period 2003 – 2013.

B. BELARUSIAN STATE AUTHORITIES ACTED TRANSPARENTLY AND IN GOOD FAITH IN RESPECT OF THE CLAIMANT IN 2016 - 2017

576. The Respondent agrees that, in addition to the duty to treat investors in good faith, the FET standard includes a duty for the Respondent to act transparently with respect to the Claimant.⁹⁰⁵ As noted in *McLachlan, Shore and Weiniger*, two types of transparency may be distilled from the relevant authorities:
- a) The obligation of *publicity*, *i.e.* that the host State make readily available in an accessible and comprehensible form, the legal and administrative requirements applicable to the investor. The law must be accessible and so far as possible intelligible, clear and predictable;
 - b) The obligation of *candour*, *i.e.* that the State, when taking a decision which affects an investor in the exercise of its public administration, must act in good

⁹⁰² See paragraph 572 above.

⁹⁰³ See paragraph 244 above.

⁹⁰⁴ See paragraph 245 above.

⁹⁰⁵ Notice, paragraph 383 – 392 and 393 – 399, CS-1.

faith. Where reasons are given, they must be stated clearly and consistently and not deceptively.⁹⁰⁶

577. The Claimant relies on the definition of transparency in *LG&E v. Argentina* and *Metaclad Corporation v. Mexico*, namely that “*all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under an investment treaty should be capable of being readily known to all affected investors.*”⁹⁰⁷ As noted in McLachlan, Shore and Weiniger, this strict legal test for transparency requires some qualification:

*“A positive requirement of total transparency, as proposed in Tecmed and Metaclad, may go too far if taken literally. It envisages a standard of public administration that no State could reasonably be expected to meet all of the time. Rather, in order to amount to an international delict, the tribunal is concerned to determine whether the State’s failure to provide transparency is fundamental, in the sense that it is indicative of either a larger failure in the operation of the regulatory system or a lack of good faith or arbitrary decision-making directed against the particular investor.”*⁹⁰⁸

578. The tribunal in *Spyridon v Romania* considered whether certain control actions and tax assessments carried out by the Romanian tax authorities were in violation of Romania’s FET obligation. The tribunal found that there was no breach of the FET standard, because “*the controls and decisions of the Tax Authorities were consistent with common tax accounting principles, and consequently [...] none of them was arbitrary.*”⁹⁰⁹ The tribunal also noted that

*“Romania’s tax treatment appears to have been consistent with existing law. The tax authorities’ decisions were taken in the proper exercise of the tax authorities’ responsibilities. Claimant received notice of the decisions and had the opportunity to challenge the findings of the tax authorities before administrative bodies and eventually before impartial judicial courts.”*⁹¹⁰

⁹⁰⁶ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 7.205, **Exhibit RL-44**.

⁹⁰⁷ Notice, paragraph 399, **CS-1**; *LG&E Energy Corp., LG&E Capital Corp, and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paragraph 128, **Exhibit CL-26**; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)97/1, Award, 30 August 2000, paragraph 76, **Exhibit CL-15**.

⁹⁰⁸ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 7.207, **Exhibit RL-44**.

⁹⁰⁹ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paragraph 502, **Exhibit CL-30**.

⁹¹⁰ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paragraph 504, **Exhibit CL-30**.

579. The tribunal therefore concluded that the tax assessments did not breach the FET standard.⁹¹¹ In addition, the tribunal dismissed the claimant’s claim that the tax authorities’ behavior in conducting too numerous tax controls and assessing too severe and too many tax liabilities amounted to a breach of the FET standard. The tribunal held that the “*tax regulations which led to the incriminated decisions existed and were enforceable by law at the time of the investment. Each of the controls and decisions was based on Romanian legal provisions.*”⁹¹²

580. The legitimate expectations of an investor may also be a relevant factor in determining whether a State has complied with the FET standard. Such expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations considering all circumstances.⁹¹³ Accordingly, the legitimate expectations of investors necessarily vary between countries. As the tribunal in *Generation Ukraine v. Ukraine* pointed out:

*“The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls.”*⁹¹⁴

581. In the present case, the second part of the Claimant’s FET claim relates to the actions of the Belarusian public authorities that “*culminated in the [...] seizure of the New Communal Facilities*”.⁹¹⁵ The Claimant alleges that the Belarusian courts and tax authorities conducted a “*strategy*”⁹¹⁶ in 2016 – 2017 to “*bring the Claimant to tax liability*”⁹¹⁷ and thereby transfer the New Communal Facilities into the municipal

⁹¹¹ *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paragraph 507, **Exhibit CL-30**.

⁹¹² *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paragraph 506, **Exhibit CL-30**.

⁹¹³ *El Paso Energy v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paragraphs 364 and 358 – 363, **Exhibit RL-57**.

⁹¹⁴ *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paragraph 20.37, **Exhibit RL-58**.

⁹¹⁵ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**; Notice, paragraphs 488 – 499, **CS-1**.

⁹¹⁶ Notice, paragraph 488, **CS-1**.

⁹¹⁷ Notice, paragraph 488, **CS-1**.

ownership of Minsk to enforce against such liabilities.⁹¹⁸ According to the Claimant, this “*strategy*” was made up of three stages:

- a) On 17 May 2016, the District Court issued a judgment finding that Manolium-Engineering was administratively liable for occupying the [Land Plots] without a permit and imposing a fine of approximately US\$2,668;⁹¹⁹
- b) On 21 June 2016, the District Tax Inspectorate amended the First Tax Audit Report, finding that Manolium-Engineering owed 20,046,478.92 and 6,397,602.10 denominated Belarusian rubles for land tax in the period 2013 – 2016 and penalties, respectively;⁹²⁰ and
- c) On 27 January 2017, the New Communal Facilities were transferred into municipal ownership to enforce against the land taxes and penalties owed by Manolium-Engineering.⁹²¹

582. Contrary to the Claimant’s assertions, the tax assessments in respect of Manolium-Engineering were not “*unreasonable*”⁹²² or “*arbitrary*”.⁹²³ As set out in paragraphs 583 – 613 below, the tax authorities acted in the proper exercise of their duties, in good faith and in accordance with Belarusian law. Contrary to the impression the Claimant tries to give, the New Communal Facilities were not transferred into municipal ownership arbitrarily “*as secretly instructed*”⁹²⁴ by the President of the Republic of Belarus, but were transferred to enforce against Manolium-Engineering’s outstanding tax liabilities in accordance with the relevant procedures under Belarusian law.⁹²⁵ Unless the Claimant can establish that the tax assessments themselves were illegal (which the Respondent respectfully submits it cannot), the Belarusian authorities cannot be reproached for enforcing against these liabilities in the ordinary course of their duties.

⁹¹⁸ Notice, paragraphs 488 – 497, CS-1.

⁹¹⁹ Notice, paragraph 491, CS-1.

⁹²⁰ Notice, paragraph 493, CS-1.

⁹²¹ Notice, paragraph 497, CS-1.

⁹²² Notice, paragraph 404, CS-1.

⁹²³ Notice, paragraph 405, CS-1.

⁹²⁴ Notice, paragraph 407, CS-1.

⁹²⁵ See paragraphs 332 – 353 above.

1. Manolium-Engineering owed land taxes in respect of the land plots for the New Communal Facilities starting from 2013

583. As already described, Mr Dolgov was aware that, starting from 2013, as a result of amendments to the Tax Code, Manolium-Engineering was required to pay land taxes in respect of the land plots for the New Communal Facilities that it continued to occupy after the termination of the Amended Investment Contract.⁹²⁶
584. In around February 2013, Ms [REDACTED], the chief accountant of Manolium-Engineering, explained the nature of these amendments to Mr Dolgov and prepared the relevant tax returns for Manolium-Engineering to file.⁹²⁷ According to Ms [REDACTED], she made numerous attempts to persuade Mr Dolgov that Manolium-Engineering had to pay land taxes.⁹²⁸ However, Mr Dolgov refused to sign the tax returns and directed Ms [REDACTED] not to pay the land taxes on behalf of Manolium-Engineering.⁹²⁹
585. In February 2014, the District Tax Inspectorate demanded the Manolium-Engineering comply with its obligations to submit land tax returns for 2013 and 2014.⁹³⁰ Manolium-Engineering never responded.⁹³¹
586. On 17 May 2016, in the First Tax Audit Report, the District Tax Inspectorate found that for the years 2013 – 2015 and the first half of 2016, Manolium-Engineering owed the equivalent of US\$962,473 and US\$227,454 for land taxes and penalties, respectively.⁹³² The District Tax Inspectorate sent copies of the First Tax Audit Report to both Manolium-Engineering and the Claimant.⁹³³
587. As far as the Respondent can glean from the Claimant's submissions, the Claimant does not dispute that Manolium-Engineering was required under the Tax Code to pay

⁹²⁶ See paragraphs 318 – 325 above.

⁹²⁷ See paragraph 320 above.

⁹²⁸ First Witness Statement of Ms [REDACTED], paragraphs 30-38, **RWS-2**; Internal Memorandum of Ms [REDACTED] to Mr Dolgov dated 15 March 2013, **Exhibit R-7**.

⁹²⁹ First Witness Statement of Ms [REDACTED], paragraphs 31 and 37, **RWS-2**.

⁹³⁰ See paragraph 321 above; Demands of the District Tax Inspectorate dated 21 February 2014, **Exhibit Exhibits R-111 and R-112**.

⁹³¹ See paragraph 321 above.

⁹³² See paragraph 324 above; Tax Inspectorate report dated 17 May 2016, **Exhibit C-164**.

⁹³³ Letter of the District Tax Inspectorate to Manolium-Engineering dated 18 May 2016, letter of the District Tax Inspectorate to the Claimant dated 18 May 2016, **Exhibit R-141 and Exhibit R-142**.

land taxes in respect of the land plots starting from 2013. However, Mr Dolgov states that:

*“Notwithstanding the repeated requests and offers from Manolium-Engineering, the MCEC continuously refused to accept the temporarily allocated land plots back into the communal lands of the City of Minsk and to accept the real estate items on those land plots for ownership of Minsk. Subsequently, exactly on those land plots and real estate items the taxes were charged for the period from 2013 till 2017.”*⁹³⁴

588. As explained in paragraphs 263 – 265 above, after the termination of the Amended Investment Contract, Manolium-Engineering remained the owner of the New Communal Facilities and it was left to MCEC’s discretion to decide whether to acquire the incomplete New Communal Facilities from Manolium-Engineering and at what cost, taking into account that MCEC would have to spend additional funds in order to complete the construction works and commission them. The reason why MCEC did not acquire the incomplete New Communal Facilities was that it was unable to agree on the purchase price with Manolium-Engineering.⁹³⁵
589. Accordingly, contrary to what Mr Dolgov appears to be suggesting, the fact that Manolium-Engineering made “requests” to return the land plots to municipal ownership did not excuse Manolium-Engineering from paying land taxes in respect of them in the period 2013 – 2015 and 2016.

2. The District Tax Inspectorate conducted the tax assessments in accordance with Belarusian law and in the proper exercise of its responsibilities.

590. Contrary to the Claimant’s assertion, the tax assessments in respect of Manolium-Engineering following the 2016 Proceedings were not “unreasonable”⁹³⁶ or “arbitrary”.⁹³⁷ As already explained, the District Tax Inspectorate amended the First Tax Audit Report for the following reasons:
- a) First, after the Land Planning Service informed the District Tax Inspectorate that the Depot was still under construction and that the construction permit had

⁹³⁴ Second Witness Statement of A. Dolgov, paragraph 8, CWS-2.

⁹³⁵ See paragraphs 263 – 298 above.

⁹³⁶ Notice, paragraph 404, CS-1.

⁹³⁷ Notice, paragraph 405, CS-1.

expired, the District Tax Inspectorate was required under Belarusian law to apply a doubled rate of land tax in respect of the relevant land plots occupied by Manolium-Engineering;⁹³⁸

- b) Second, after the Land Planning Service informed the District Tax Inspectorate that Manolium-Engineering continued to occupy the land plots for the New Communal Facilities after the expiry of its land permits, the District Tax Inspectorate was required under Belarusian law to apply a tenfold rate of land tax in respect of the relevant land plots occupied by Manolium-Engineering.⁹³⁹

591. After applying the increased tax rates, the District Tax Inspectorate correctly and legitimately found that Manolium-Engineering owed the equivalent of US\$10,161,950 and US\$3,243,069 for land taxes and penalties, respectively.⁹⁴⁰
592. As far as the Respondent understands from the Claimant's submissions, the Claimant does not dispute that the District Tax Inspectorate applied the amendments in accordance with the Belarusian Tax Code. Rather, the Claimant alleges that the tax assessments were part of a "*strategy*"⁹⁴¹ to "*bring the Claimant to tax liability*".⁹⁴² To date, however, the Claimant has not offered any concrete evidence of bad faith conduct on the part of the tax authorities to support its contentions. Instead, the Claimant seeks to "*infer bad faith from its reading of the chronology*."⁹⁴³ As the tribunal found in *Bayindir v. Pakistan*, this is not sufficient to satisfy the high standard of proof for a bad faith claim to succeed.⁹⁴⁴
593. Contrary to what the Claimant suggests, the District Tax Inspectorate's tax amendments on 21 June 2016 were not "*based on*" the Administrative Court

⁹³⁸ See paragraphs 315 and 325 - 326 above.

⁹³⁹ See paragraphs 314 and 325 - 326 above.

⁹⁴⁰ See paragraph 330 above.

⁹⁴¹ Notice, paragraph 488, **CS-1**.

⁹⁴² Notice, paragraph 488, **CS-1**.

⁹⁴³ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, paragraph 375, **Exhibit RL-55**.

⁹⁴⁴ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, paragraph 375, **Exhibit RL-55**.

Resolution.⁹⁴⁵ The District Tax Inspectorate applied the tenfold land tax to Manolium-Engineering based on the fact that Manolium-Engineering had continued to occupy the land plots for the New Communal Facilities after the expiry of its land permits (of which it learned through the Administrative Court Resolution), rather than because Manolium-Engineering had been found administratively liable by the District Court *per se*.⁹⁴⁶ Further, the District Tax Inspectorate’s application of the twofold land tax rate on 21 June had nothing to do with the Administrative Court Resolution.⁹⁴⁷

594. In any event, as the Respondent has already submitted in paragraphs 512 – 520 above, the 2016 Administrative Proceedings, including the Administrative Court Resolution, were conducted in good faith and in accordance with Belarusian legal procedure.⁹⁴⁸ Accordingly, even if the District Tax Inspectorate had “*based*” its amendments on the Administrative Court Resolution, as the Claimant alleges, then these amendments would still have been irreproachable from the perspective of international law.
595. The Inspectorate Decision applying the increased tax rates contained an explanation about Manolium-Engineering’s right to appeal the decision both to a higher tax authority and to the court.⁹⁴⁹ However, neither the Claimant nor Manolium-Engineering challenged the findings of the District Tax Inspectorate or filed an appeal against the Inspectorate Decision.⁹⁵⁰

3. The Economic Court of Minsk granted the District Tax Inspectorate’s application for Manolium-Engineering’s land tax liabilities to be enforced against the New Communal Facilities in accordance with Belarusian law

596. The Claimant seeks to portray that the New Communal Facilities were arbitrarily taken from Manolium-Engineering and transferred into municipal ownership “*as*

⁹⁴⁵ Notice, paragraph 493, CS-1.

⁹⁴⁶ See paragraph 327 above.

⁹⁴⁷ See paragraph 325 above.

⁹⁴⁸ See paragraphs 512 – 520 above.

⁹⁴⁹ Decision of the Tax Inspectorate No. 2-5/465 dated 19 July 2016, **Exhibit C-164**.

⁹⁵⁰ See paragraph 331 above.

*secretly instructed*⁹⁵¹ by the President of the Republic of Belarus. This is misleading and not true.

597. Since Manolium-Engineering did not have any cash funds or receivables, under the Tax Code the District Tax Inspectorate had to apply to the Economic Court of Minsk for an order to enforce the land tax liabilities against the debtor's attached assets, in this case the New Communal Facilities. On 20 July 2016, the District Tax Inspectorate submitted its application to the Economic Court of Minsk, which was granted on 18 August 2016. The President played no part in this ordinary and common procedure through the Belarusian court. Neither the Claimant nor Manolium-Engineering ever challenged the court order of 18 August 2016. Accordingly, if the Claimant "*failed to secure its legal defence*",⁹⁵² this was the Claimant's own choice.
598. The document to which the Claimant is referring as the "*secret instruction*"⁹⁵³ of the President is the signed presidential order required as a matter of Belarusian legal procedure for any transfer of real property into state or municipal ownership where such transfer is to enforce tax liabilities.⁹⁵⁴ Contrary to what the Claimant alleges, the order, which is a procedural document, merely gave effect to the prior decisions of the District Tax Inspectorate of 21 June 2016 and the Economic Court of Minsk of 18 August 2018.
599. In support of its contention that the "*the President obliged numerous public authorities to conduct an additional evaluation of the New Communal Facilities for their gratuitous transfer into the ownership of Minsk*",⁹⁵⁵ the Claimant refers to a letter attaching draft minutes of a meeting of the representatives of various state and municipal bodies.⁹⁵⁶ As already explained, the meeting referred to was part of the standard procedure that precedes the preparation of the President's draft order under Belarusian law.⁹⁵⁷ Accordingly, this letter does not support the Claimant's far-

⁹⁵¹ Notice, paragraph 407, CS-1.

⁹⁵² Notice, paragraph 408, CS-1.

⁹⁵³ Notice, paragraph 497, CS-1.

⁹⁵⁴ See paragraphs 339 – 348 above.

⁹⁵⁵ Notice, paragraph 406, CS-1.

⁹⁵⁶ Letter from the Department of Humanitarian Activities dated 18 November 2016, **Exhibit C-172**.

⁹⁵⁷ See paragraph 343 above.

reaching conclusion that the President “*obliged*” the public authorities to transfer the New Communal Facilities into municipal ownership.

600. The Claimant alleges that “[*p*]ublic officials of the Republic of Belarus are afraid of serving a copy of such order on the Claimant in connection with threatened wrongful acts on the part of their superiors”.⁹⁵⁸ This is incorrect.
601. The Claimant does not explain or provide any ground for its misplaced allegation that Belarusian state officials are being threatened by their superiors or have a fear of unlawful actions by higher-ranking officials. The documents marked ‘for official use only’ are non-disclosable to the public so any official who would provide a copy of the President's order to the Claimant would be acting beyond their authority.⁹⁵⁹
602. Given that Mr Dolgov had been living and working in Belarus since the early 1990s, he would have been aware that the orders of the President marked “for official use only” are non-disclosable under Belarusian law.⁹⁶⁰ It is misleading for the Claimant to now suggest that such elements of Belarusian law and procedure violate its reasonable legitimate expectations and the FET standard.⁹⁶¹
603. The Claimant’s assertion that it was not notified of the “*exact amount*”⁹⁶² of Manolium-Engineering’s tax liabilities is also misleading. Manolium-Engineering was notified of its total land tax liabilities as at 19 July 2016⁹⁶³ and 10 November 2016,⁹⁶⁴ and could have requested the tax authorities for the updated amount of accrued penalties at any time up until and after the New Communal Facilities were transferred into municipal ownership on 27 January 2017. Furthermore, during the insolvency proceedings commenced on 8 February 2017, the tax authorities notified Manolium-Engineering’s insolvency administrator of the exact amount of Manolium-

⁹⁵⁸ Notice, paragraphs 314, 409, **CS-1**.

⁹⁵⁹ See paragraph 348 above.

⁹⁶⁰ Witness Statement of A. Dolgov, paragraph 4, **CWS-1**.

⁹⁶¹ See, e.g., *El Paso Energy v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paragraphs 364 and 358 – 363, **Exhibit RL-57**.

⁹⁶² Notice, paragraph 408, **CS-1**.

⁹⁶³ See paragraph 331 above; Decision of the Tax Inspectorate No. 2-5/465 dated 19 July 2016, **Exhibit C-164**.

⁹⁶⁴ See paragraph 350 above.

Engineering's land tax liabilities after their partial set-off following the transfer of the New Communal Facilities into municipal ownership.⁹⁶⁵

604. For the above reasons, the Respondent submits that Manolium-Engineering's land tax liabilities were enforced against the New Communal Facilities on 27 January 2017 in accordance with Belarusian law and procedure. Accordingly, unless the Claimant can establish that the tax assessments themselves were illegal (which the Respondent respectfully submits it cannot), the Belarusian authorities cannot be reproached for enforcing against these debts in the ordinary course of their duties.

4. The 2017 tax assessments in respect of Manolium-Engineering were conducted transparently and in good faith

605. The Economic Court of Minsk granted an order to initiate insolvency proceedings in respect of Manolium-Engineering on 8 February 2017.⁹⁶⁶ In accordance with Belarusian law, the Region Tax Inspectorate was therefore required to carry out an additional tax audit in respect of Manolium-Engineering.⁹⁶⁷

606. Referring to the tax assessments from the period March – September 2017 following the initiation of Manolium-Engineering's insolvency, the Claimant alleges that the Region Tax Inspectorate "*repeatedly changed the amount of indebtedness of Manolium-Engineering [...] without any substantiation*"⁹⁶⁸ and that the "*absence of [...] proper interpretation of numerous changes to the amount of indebtedness demonstrates that the mechanism of calculation of fines and penalties is totally non-transparent and arbitrary.*"⁹⁶⁹ As already explained in paragraphs 354 – 362 above, this is incorrect.

607. The Claimant refers to extracts from the records of the Ministry of Taxes in respect of Manolium-Engineering as at 10 November 2016,⁹⁷⁰ according to which Manolium-Engineering owed 28,227,544.14 denominated Belarusian rubles (including

⁹⁶⁵ See paragraph 351 above.

⁹⁶⁶ See paragraph 354 above.

⁹⁶⁷ See paragraph 355 above.

⁹⁶⁸ Notice, paragraph 403, CS-1.

⁹⁶⁹ Notice, paragraph 405, CS-1.

⁹⁷⁰ Notice, paragraph 401, CS-1.

20,046,478.41 for land taxes and 8,181,065.73 for penalties accrued on the outstanding tax liabilities).

608. The Claimant alleges that subsequently, the Tax Inspectorate “repeatedly changed”⁹⁷¹ the amount of tax that was outstanding “without any substantiation.”⁹⁷² In particular, the Claimant refers to:

- a) the Second Tax Audit Report on 24 March 2017, according to which Manolium-Engineering owed 16,530,306.38 denominated Belarusian rubles in taxes;⁹⁷³
- b) the amendments to the Second Tax Audit Report dated 18 May 2017, according to which Manolium-Engineering owed 14,525,203.07 denominated Belarusian rubles in taxes,⁹⁷⁴ and
- c) the letter of the Tax Inspectorate to Manolium-Engineering dated 22 September 2017, according to which Manolium-Engineering owed 20,913,550.93 denominated Belarusian rubles to the state.⁹⁷⁵

609. As explained in paragraphs 357 – 362 above, each of the assessments or amendments referred to by the Claimant were calculated in accordance with Belarusian tax legislation and procedure. The reason why the amounts differed was either because they were calculated on a different basis,⁹⁷⁶ or, with respect to the amendments of 18 May 2017, because it was calculated to take account of the objections of Manolium-Engineering’s insolvency administrator on 21 April 2017.⁹⁷⁷ Contrary to what the

⁹⁷¹ Notice, paragraph 403, **CS-1**.

⁹⁷² Notice, paragraph 404, **CS-1**.

⁹⁷³ See paragraph 357 above; Notice, paragraph 403(a), **CS-1**; Second Tax Audit Report dated 24 March 2017, **Exhibit C-187**.

⁹⁷⁴ See paragraph 359 above; Notice, paragraph 403(b), **CS-1**; Amendments to the Second Tax Audit Report dated 18 May 2017, **Exhibit C-186**.

⁹⁷⁵ See paragraph 361 above; Notice, paragraph 403(c), **CS-1**; Letter from the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk District to the insolvency administrator of Manolium-Engineering dated 22 September 2017, **Exhibit C-189**.

⁹⁷⁶ Whereas the records in November 2016 referred to by the Claimant included only Manolium-Engineering’s land tax liabilities, the Second Tax Audit Report also included outstanding property tax. Similarly, the letter of the Tax Inspectorate to Manolium-Engineering dated 22 September 2017 reflected Manolium-Engineering’s total liability to the state, including tax liabilities, administrative fines and certain other types of outstanding payments.

⁹⁷⁷ See paragraph 358 above.

Claimant appears to suggest, the fact that the Region Tax Inspectorate decreased its calculation of Manolium-Engineering's liabilities to take account of such objections does not amount to a breach of the FET standard.

610. The Claimant's assertion that the calculations of tax set out in paragraph 608 above were "*without any substantiation*" is incorrect.⁹⁷⁸ Both the Second Tax Audit Report of 24 March 2017⁹⁷⁹ and the amendments to the Second Tax Audit Report of 18 May 2017⁹⁸⁰ explained the legal grounds for the assessment and set out the relevant calculations. In its letter of 22 September 2017, the Tax Inspectorate responded setting out the aggregate amount of Manolium-Engineering's outstanding liabilities to the state as at 22 September 2017, in response to the insolvency administrator's request.⁹⁸¹ If the insolvency administrator had wanted the Tax Inspectorate to provide a more detailed breakdown, it could have asked for this.

611. In light of the above facts, the Respondent respectfully submits that the tax assessments in respect of Manolium-Engineering after the initiation of its insolvency proceedings were transparent and carried out in accordance with Belarusian law and procedure.

5. The Claimant did not have any rights in respect of the land plot for the Investment Object in 2017

612. The Claimant alleges that in September 2017 "*public bodies [...] sold the land plot for the Investment Object to a third party without notifying the Claimant thereof and without offering the Claimant to purchase such land plot for construction.*"⁹⁸² This is incorrect. As already described, OOO Astomaks acquired at public auction the right to develop the land plot on which the Investment Object was originally to be located

⁹⁷⁸ Notice, paragraph 404, CS-1.

⁹⁷⁹ Second Tax Audit Report dated 24 March 2017, **Exhibit C-187**.

⁹⁸⁰ Amendments to the Second Tax Audit Report dated 18 May 2017, **Exhibit C-186**.

⁹⁸¹ See paragraph 361 above; Letter from the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk District to the insolvency administrator of Manolium-Engineering dated 22 September 2017, **Exhibit C-189**.

⁹⁸² Notice, paragraph 503, CS-1.

for the equivalent of US\$8,865,432.61.⁹⁸³ Contrary to the Claimant's assertions, the Respondent never "sold" the rights to the land plot *in rem* to OOO Astomaks.

613. The Claimant's suggestion that the Respondent was under an obligation to "[notify] the Claimant" of the sale is also misleading.⁹⁸⁴ As the Respondent has already explained in paragraphs 263 – 265 above, the Claimant lost its contingent right to develop the Investment Object when the Amended Investment Contract was terminated on 29 October 2014. After this date, the respective rights and obligations of the parties to the Amended Investment Contract were extinguished [and MCEC was free to deal with the land plot for the Investment Object as it wished].

VI. BELARUS DID NOT EXPROPRIATE THE INVESTMENT

614. Article 79 of Protocol 16 of the EEU Treaty provides that:

*"Investments of investors of a Member State made on the territory of another Member State shall not be subject to direct or indirect expropriation, nationalisation and other measures with consequences equivalent to those of expropriation or nationalisation (hereinafter "expropriation"), except in cases where such measures are taken for the public benefit in the procedure determined by the legislation of the recipient state, are not discriminatory and involve prompt and adequate compensation."*⁹⁸⁵

615. The Claimant's bases its expropriation claims on two alleged 'sequences' of events.
616. First, the Claimant alleges that the actions of MCEC and Minsktrans that "*culminated in the illegal termination of the [...] Amended Investment Contract*"⁹⁸⁶ constitute an expropriation of its contingent contractual right to develop the Investment Object.⁹⁸⁷
617. Second, the Claimant alleges that the actions of the Belarusian public authorities that "*culminated in the [...] seizure of the New Communal Facilities*"⁹⁸⁸ constitute an expropriation of the New Communal Facilities.⁹⁸⁹

⁹⁸³ See paragraphs 363 – 367 above.

⁹⁸⁴ The Claimant asserts (incorrectly) in paragraph 503 of the Notice that the Claimant "sold" the land plot "without notifying the Claimant".

⁹⁸⁵ Protocol 16 of EEU Treaty, Article 79, **Exhibit CL-3**.

⁹⁸⁶ Claimant's Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**.

⁹⁸⁷ Notice, paragraph 513 and 530(a), **CS-1**.

618. If, contrary to the Respondent’s position, the Tribunal finds that it has jurisdiction over either of these claims, the Respondent submits that they fail on the merits for the reasons set out below.

A. THE TERMINATION OF THE AMENDED INVESTMENT CONTRACT DOES NOT CONSTITUTE AN EXPROPRIATION

619. As already explained, the Claimant became entitled to develop the Investment Object under the Amended Investment Contract after, *inter alia*, securing the construction of the New Communal Facilities and transferring them into municipal ownership.⁹⁹⁰ If the Claimant failed to construct and commission the New Communal Facilities by the agreed deadline through its own fault, then MCEC became entitled to submit a claim to terminate the Amended Investment Contract.⁹⁹¹ On 12 November 2013, MCEC submitted a claim to terminate the Amended Investment Contract on this ground, which was approved by the Belarusian courts.⁹⁹²

620. The Claimant’s alleges that it “*performed its obligation*”⁹⁹³ to construct the New Communal Facilities, but that it never received the land plot for the construction of the Investment Object because MCEC “*failed to accept [the New Communal Facilities] into [municipal] ownership*”.⁹⁹⁴ The Claimant therefore alleges that the “*termination of the Investment Contract is equal to the effect of expropriation*”,⁹⁹⁵ because it “*released the Republic of Belarus from performing its obligations under the Investment Contract*”⁹⁹⁶ and “*deprived [the Claimant] of the opportunity to gain any economic benefit from its Investments.*”⁹⁹⁷

⁹⁸⁸ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2015, paragraph 33, **CS-3**.

⁹⁸⁹ Notice, paragraph 530(b), **CS-1**.

⁹⁹⁰ Amended Investment Contract, Clause 2, **Exhibit C-66**.

⁹⁹¹ Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

⁹⁹² See paragraphs 246 – 255 above.

⁹⁹³ Notice, paragraph 518, **CS-1**.

⁹⁹⁴ Notice, paragraph 521, **CS-1**.

⁹⁹⁵ Notice, paragraph 524, **CS-1**.

⁹⁹⁶ Notice, paragraph 523, **CS-1**.

⁹⁹⁷ Notice, paragraph 524, **CS-1**.

621. The Claimant seeks by way of damages lost profits that it allegedly would have made if it had acquired the right to develop the Investment Object, constructed it and sold it on at a profit.⁹⁹⁸
622. The Respondent submits that the termination of the Amended Investment Contract does not constitute an expropriation under Article 79 of the EEU Treaty for the reasons set out below.

1. The Belarusian courts legally terminated the Amended Investment Contract

623. A predicate for alleging judicial expropriation is unlawful activity by the court itself.⁹⁹⁹
624. In *Azinian v. Mexico*, the tribunal held that “[a] governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level [...] What must be shown is that the court decision itself constitutes a violation of the treaty.”¹⁰⁰⁰ The tribunals in *Waste Management v. Mexico*¹⁰⁰¹ and *Limian Caspian Oil v. Kazakhstan*¹⁰⁰² adopted the same principle.
625. The tribunal in *Swisslion v. Macedonia* also found that a “predicate for alleging judicial expropriation is unlawful activity by the court itself.”¹⁰⁰³ The tribunal stated:

*“In the Tribunal’s view, the courts’ determination of breach of the Share Sale Agreement and its consequential termination did not breach the Treaty and therefore was not unlawful. **The internationally lawful termination of a contract between a State entity and an investor cannot be equated to an expropriation of contractual rights simply because the investor’s rights have***

⁹⁹⁸ Notice, paragraph 530(a), CS-1.

⁹⁹⁹ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 8.85, **Exhibit RL-44**.

¹⁰⁰⁰ *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 97 - 99, **Exhibit RL-14**.

¹⁰⁰¹ *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002, , paragraph 47 **Exhibit RL-53**.

¹⁰⁰² *Limian Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paragraph 433, **Exhibit RL-51**.

¹⁰⁰³ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, paragraph 313, **Exhibit RL-59**.

been terminated; otherwise, a State could not exercise the ordinary right of a contractual party to allege that its counterparty breached the contract without the State's being found to be in breach of its international obligations. Since there was no illegality on the part of the courts, the first element of the Claimant's expropriation claim is not established." (emphasis added)¹⁰⁰⁴

626. In the present case, the Respondent has already submitted in paragraphs 496 – 511 that the termination of the Amended Investment Contract in the Belarusian courts was in accordance with Belarusian law and does not constitute a denial of justice. Given that the actions of the state courts were themselves legal, the Respondent respectfully submits that the termination of the Amended Investment Contract does not constitute an expropriation under the EEU Treaty.¹⁰⁰⁵

2. MCEC had valid contractual grounds to terminate the Amended Investment Contract

627. The Claimant alleges that the Claimant "*performed its obligation*"¹⁰⁰⁶ to construct the New Communal Facilities but that MCEC and Minsktrans "*did their best to prevent [...] acceptance*"¹⁰⁰⁷ of the New Communal Facilities into municipal ownership. The Claimant's position is meritless.

628. First, the Claimant did not perform its obligation to construct and commission the New Communal Facilities.¹⁰⁰⁸ Even Mr Dolgov himself conceded that the construction of the Depot was not complete, even long after the Final Commissioning Date passed.¹⁰⁰⁹

¹⁰⁰⁴ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, paragraph 314, **Exhibit RL-59**.

¹⁰⁰⁵ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 8.85, **Exhibit RL-44**; *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 97 and 99, **Exhibit RL-14**; *Limian Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, paragraph 433, **Exhibit RL-51**; *Waste Management Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, paragraph 47 **Exhibit RL-53**; *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, paragraph 313, **Exhibit RL-59**.

¹⁰⁰⁶ Notice, paragraph 518, **Exhibit CS-1**.

¹⁰⁰⁷ Notice, paragraph 519, **Exhibit CS-1**.

¹⁰⁰⁸ See paragraph 561 above.

¹⁰⁰⁹ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

629. Second, the Claimant’s allegations that MCEC and Minsktrans “*did their best to prevent [...] acceptance*”¹⁰¹⁰ are unsubstantiated and baseless. The Claimant was itself responsible for failing to construct the New Communal Facilities by the Final Commissioning Date, even though MCEC had twice extended the deadline at the Claimant’s request.¹⁰¹¹
630. Since the Claimant had failed to construct and commission the New Communal Facilities by the Final Commissioning Date through its own fault, MCEC submitted a claim to terminate the Amended Investment Contract under Clause 6.2.1 on valid contractual grounds.¹⁰¹² Moreover, the Claimant never became entitled to the Investment Object, because it failed to construct and transfer the New Communal Facilities into municipal ownership as consideration for this right.¹⁰¹³
631. In such circumstances, the termination of the Amended Investment Contract does not constitute an expropriation of the Claimant’s contingent right to the Investment Object.

3. MCEC did not terminate the Amended Investment Contract in the exercise of sovereign authority

632. Even in situations (unlike the present case) where a breach of contract with an investor is attributable to a State, this will not constitute an expropriation unless the breach is carried out in the exercise of sovereign power.¹⁰¹⁴
633. In *Suez v. Argentina*, the tribunal found that Argentina’s termination of a concession agreement was performed “*according to the rights it claimed under the Concession Contract and the legal framework*”¹⁰¹⁵ and was “*not unlike the behavior of a private*

¹⁰¹⁰ Notice, paragraph 519, **Exhibit CS-1**.

¹⁰¹¹ See paragraphs 542 – 559.

¹⁰¹² See paragraph 562 above.

¹⁰¹³ Amended Investment Contract, Clause 2, **Exhibit C-66**.

¹⁰¹⁴ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraphs 8.132 – 133, **Exhibit RL-44**; R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2012 (2nd Ed.), page 128 – 129, **Exhibit RL-45**.

¹⁰¹⁵ *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability, 30 July 2010, paragraph 154, **Exhibit CL-62**.

contracting party".¹⁰¹⁶ Accordingly, the *Suez* tribunal rejected the claimants' argument that Argentina's termination of a contract was an expropriatory exercise of sovereign authority.¹⁰¹⁷

634. In *Tulip v. Turkey*, the tribunal rejected the claimant's argument that the State's termination of a contract constituted an illegal expropriation, holding that "*the evidence offered by the Claimant falls short of establishing a violation of the BIT, inasmuch as the termination was pursued within the framework of the Contract and in [the State party's] perceived commercial best interests*".¹⁰¹⁸
635. The Respondent has already submitted in paragraphs 429 – 438 above that MCEC terminated the Amended Investment Contract in accordance with its contractual rights as any other private contracting party could have done in the circumstances. MCEC's termination of the Amended Investment Contract did not involve any element of sovereign authority.
636. Accordingly, even if the Tribunal finds that it has jurisdiction over this claim (contrary to the Respondent's position), the Respondent submits that the termination of the Amended Investment Contract by MCEC does not rise to the level of an expropriation under the EEU Treaty.

B. THE ENFORCEMENT OF MANOLIUM-ENGINEERING'S LAND TAX LIABILITIES AGAINST THE NEW COMMUNAL FACILITIES DOES NOT CONSTITUTE AN EXPROPRIATION

637. The Claimant alleges that the transfer of the New Communal Facilities into municipal ownership on 27 January 2017 to enforce against Manolium-Engineering's land tax liabilities constitutes an expropriation of this asset.¹⁰¹⁹ To date, the Claimant has

¹⁰¹⁶ *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability, 30 July 2010, paragraph 154, **Exhibit CL-62**.

¹⁰¹⁷ *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability, paragraph 154, 30 July 2010, paragraph 156, **Exhibit CL-62**.

¹⁰¹⁸ *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, paragraph 417, **Exhibit RL-60**.

¹⁰¹⁹ Notice, paragraph 530(b), **CS-1**.

failed to substantiate this claim. If and when the Claimant chooses to do so, the Respondent reserves its right to respond.

638. For the avoidance of doubt, the Respondent submits that the transfer of the New Communal Facilities into municipal ownership does not constitute an expropriation.
639. Taxation measures may amount to an expropriation if the collection of taxes is determined to be part of a set of measures designed to effect a dispossession of an investor's assets outside the normative constraints and practices of the taxing authorities.¹⁰²⁰ The threshold for establishing allegations of bad faith is a demanding one.¹⁰²¹
640. As already explained in paragraphs 583 – 599, the tax authorities conducted the tax assessments of Manolium-Engineering that led to the transfer of the New Communal Facilities into municipal ownership in the proper exercise of their responsibilities and in accordance with Belarusian law.
641. Given that the Claimant has failed to provide any evidence that the tax assessments and administrative proceedings leading to the transfer of the New Communal Facilities into municipal ownership were conducted in bad faith, the Respondent respectfully submits that the transfer does not constitute an expropriation under the EEU Treaty.

VII. QUANTUM

642. The Claimant alleges that as a result of the Respondent's breaches of the EEU Treaty, it has suffered:
- a) lost profits arising from the loss of its contingent contractual right to the Investment Object as a result of the termination of the Amended Investment

¹⁰²⁰ *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, paragraph 48, **Exhibit RL-61**.

¹⁰²¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paragraphs 143; **Exhibit RL-55**.

Contract in the amount of **US\$171,300,000** or, alternatively, **US\$8,650,000** (“**Lost Profits**”);¹⁰²² and

- b) losses arising as a result of the transfer of the New Communal Facilities into municipal ownership in the amount of **US\$36,900,000** (“**NCF Losses**”).¹⁰²³

643. Paragraph 80 of Protocol 16 provides that the standard of compensation for an expropriation:

“shall correspond to the market value of investments expropriated from investors on the date immediately preceding the date of their actual expropriation or the date when it becomes known about the upcoming expropriation.

[...]

In case of a delayed payment of compensation, interest shall be accrued in the period from the date of expropriation till the date of actual payment of the compensation, to be calculated at the domestic interbank market rate for actually provided loans in US dollars for up to 6 months, but not below the rate of LIBOR, or in the procedure determined by agreement between the investor and the Member State.”¹⁰²⁴ (emphasis added)

644. Since Protocol 16 does not set out the standard of compensation for breach of the FET standard, the Tribunal has the discretion to determine a measure of compensation that it considers appropriate to the specific circumstances of the case.¹⁰²⁵

645. If the cumulative nature of a series of breaches of the FET standard amounts to a total deprivation of an asset or investment and is tantamount to expropriation, then in certain circumstances it may be appropriate for the standard of compensation to correspond to the fair market value of the asset in question.¹⁰²⁶ Otherwise, the

¹⁰²² Notice, paragraph 530(a), **CS-1**; Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraphs 1.3.11 and 4.2.1, **CER-1**.

¹⁰²³ Notice, paragraph 530(b), **CS-1**; Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraphs 1.3.11 and 4.2.1, **CER-1**.

¹⁰²⁴ Protocol 16 of the EEU Treaty, Article 80, **Exhibit CL-3**.

¹⁰²⁵ See, e.g., *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award on the Merits, 13 November 2000, paragraphs 309 and 315, **Exhibit RL-62**.

¹⁰²⁶ See, e.g., *CMS Gas Transmission Company v. The Argentine Republic*, Case No. ARB/01/8, Award, 12 May 2005, paragraph 410, **Exhibit RL-63**.

standard of compensation for breaches of the FET standard should correspond to the amount of ‘actual loss’ directly caused by the breach in question.¹⁰²⁷

646. The Claimant has made no submissions as to what standard of compensation should be applied for breaches of the FET standard. The Claimant simply states that “[w]hether the Arbitral Tribunal agrees with the [expropriation claim], the [FET claim], or with both, does not change the quantum”.¹⁰²⁸ If and when the Claimant substantiates its claim for damages arising from breach of the FET standard, the Respondent reserves its right to address the Claimant’s position and whatever standard of compensation it proposes.
647. As far as the Respondent can understand from the Claimant’s assertion quoted in the above paragraph, the Claimant currently seeks damages arising from expropriation or breaches of the FET standard tantamount to expropriation. Therefore, if the Tribunal finds that there is no expropriation or breach of the FET standard tantamount to expropriation, the Claimant cannot seek damages as currently pleaded.
648. The Respondent addresses the Claimant’s claims for Lost Profits and NCF Losses below.

A. LOST PROFITS

649. The Claimant alleges that it suffered the Lost Profits as a result of the termination of the Amended Investment Contract on 29 October 2014.¹⁰²⁹ In particular, the Claimant seeks Lost Profits in connection with the loss of its contractual right to develop the Investment Object, which was contingent upon the Claimant and Manolium-Engineering having fulfilled their obligations to, *inter alia*, construct the New Communal Facilities.¹⁰³⁰

¹⁰²⁷ See, e.g., *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paragraphs 35 – 36 and 45, **Exhibit RL-64**.

¹⁰²⁸ Claimant’s Observations on Application for Bifurcation on Quantum dated 25 June 2018, paragraph 34, **CS-3**.

¹⁰²⁹ Notice, paragraph 530(a), **CS-1**; Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraphs 1.3.11 and 4.2.1, **CER-1**.

¹⁰³⁰ Notice, paragraphs 524 and 530(a), **CS-1**; Amended Investment Contract, *inter alia*, Clauses 2 and 6.1, **Exhibit C-66**.

650. MCEC submitted a claim to terminate the Amended Investment Contract because it did not receive the New Communal Facilities as consideration for the right to develop the Investment Object. After the Amended Investment Contract was terminated, the Respondent sold the right to develop the Investment Object to OOO Astomaks for the equivalent of US\$8.65 million.¹⁰³¹
651. In assessing the fair market value of the Investment Object as at 29 October 2014,¹⁰³² Mr Taylor uses an income approach to calculate the anticipated cash flows from the “finished product” of the Investment Object, which he calculates using a capitalization rate.¹⁰³³ Mr Taylor attempts to corroborate the value of the Investment Object calculated under his income capitalization approach with the use of alleged comparables for developed properties, which he asserts are similar to the Claimant’s proposed property (had it been built).¹⁰³⁴
652. The Respondent’s position is that the Tribunal has no jurisdiction *ratione temporis* over the Termination Dispute, because it arose before 1 January 2015 (*see* paragraphs 397 – 409 above). In the alternative, the Respondent’s position is that the Tribunal has no competence to award Lost Profits for the termination of the Amended Investment Contract, because the EEU Treaty was not in force at the time the termination occurred (*see* paragraphs 426 – 428 above).
653. Even if the Tribunal finds that it has jurisdiction over the claims, the Respondent’s position is that the termination of the Amended Investment Contract does not constitute a denial of justice (*see* paragraphs 496 – 511 above) breach of the FET standard (*see* paragraphs 525 – 575 above) or an expropriation (*see* paragraphs 619 – 636 above) under the EEU Treaty.
654. If the Tribunal disagrees with the Respondent and finds it necessary to proceed to the quantification of damages arising from the termination of the Amended Investment

¹⁰³¹ Contrary to what the Claimant asserts in paragraph 293 of the Notice, the rights to the land plot for the Investment Object *in rem* were never “sold to another developer”, since LLC Astonaks, like the Claimant, had a separate duty to pay for the rent for that land plot under a separate lease agreement.

¹⁰³² The Claimant instructs its quantum expert, Mr Travis Taylor, to adopt a valuation date of 29 October 2014, when the termination of the Amended Investment Contract came into force. Mr Taylor refers to 29 October 2014 as the “Expropriation Date” (Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraphs 1.3.7 and 2.1.4, **CER-1**).

¹⁰³³ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 4.4.5, **CER-1**.

¹⁰³⁴ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 4.5.1, **CER-1**.

Contract, the Respondent submits that the Claimant's claim for Lost Profits fails for the following reasons.

1. The Claimant has failed to establish the necessary causation between the alleged breaches of the EEU Treaty and the Lost Profits

655. Where a claimant anticipates it might in future obtain a contractual right but does not yet possess it because gaining that right is contingent on the outcome of some still unfulfilled event, this 'hoped for' right is not capable of giving rise to a lost profits claim unless the relevant conditions have been met or if it is certain that they would have been met but for the breach of the treaty.¹⁰³⁵
656. In *Burlington v Ecuador*, Burlington alleged that Ecuador had expropriated its contingent right to an extension of a hydrocarbon production sharing agreement and sought compensation for lost profits in connection with this right. The tribunal rejected the claim, holding that the right was contingent upon various consents from the Ecuadorian authorities and therefore was not guaranteed.¹⁰³⁶ In order to succeed, the tribunal held that Burlington would have had to prove "*with the reasonable certainty that international law requires for a lost profits claim*" that an extension "*would in fact have materialized from its right to negotiate*".¹⁰³⁷
657. In *CCL v Kazakhstan*, the tribunal considered whether a right to first refusal granted under an investment agreement to purchase shareholdings in a Kazakh company was expropriated when the agreement was terminated. The tribunal decided that this right could not have been expropriated, because it was contingent upon the State deciding to sell its shares to the claimant. The tribunal found that "*the loss of a conditional contractual right of this uncertain nature and of uncertain value would not normally give rise to a damages claim. The only conceivable exception would be if in reality*

¹⁰³⁵ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paragraphs 271 – 278, **Exhibit RL-65**; *CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Final Award, 2004, paragraph 49, **Exhibit RL-66**; *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, paragraph 149, **Exhibit RL-67**.

¹⁰³⁶ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paragraph 271 and 278, **Exhibit RL-65**.

¹⁰³⁷ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paragraph 278, **Exhibit RL-65**.

*there is certainty, or a very high degree of probability, that the state would decide to sell its shares”.*¹⁰³⁸

658. In order to claim for Lost Profits in the present case, the Claimant must therefore establish that there is certainty, or a very high degree of probability, that, but for the alleged breaches of the EEU Treaty by the Respondent, it would have:
- a) acquired the right to develop the Investment Object;
 - b) constructed the Investment Object; and
 - c) sold the Investment Object at a profit.
659. If the Claimant’s own actions also caused the failure to acquire the right to develop the Investment Object, as the Respondent has already submitted in paragraphs 76 - 98, then this will break the chain of causation between the alleged breaches by the Respondent and the failure to acquire the right to develop the Investment Object.¹⁰³⁹
660. To date, the Claimant has not even attempted to establish the necessary causation between the alleged breaches of the EEU Treaty and the Lost Profits. This is not surprising given that the Claimant was itself to blame for failing to construct the New Communal Facilities.
661. In order to become entitled to develop the Investment Object, the Claimant was obliged, *inter alia*, to construct and transfer of the New Communal Facilities into the municipal ownership of Minsk.¹⁰⁴⁰
662. Even if, contrary to the Respondent’s position in paragraphs 542 – 548 above, the Tribunal finds that the alleged delays by MCEC and Minsktrans in performing their obligations under the Investment Contract in 2003 – 2007 constitute a breach of the EEU Treaty, the Respondent submits that it is impossible to do more than speculate as to whether the Claimant would have built the Communal Facilities, acquired the right to develop the Investment Object and completed the construction of the Investment

¹⁰³⁸ *CCL v. Republic of Kazakhstan*, SCC Case No. 122/2001, Final Award, 2004, paragraph 49, **Exhibit RL-66**.

¹⁰³⁹ See, e.g., *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, paragraphs 163 – 172, **Exhibit RL-68**.

¹⁰⁴⁰ Amended Investment Contract, Clause 2, **Exhibit C-66**.

Object, let alone make a profit from it. Even after the deadline for constructing the New Communal Facilities was proportionately extended in 2007, putting the Claimant in the position it would have been in but for the early delays in the implementation of the Investment Contract, the Claimant still failed to construct the New Communal Facilities by the agreed deadline.¹⁰⁴¹

663. Even if, contrary to the Respondent's position in paragraphs 542 – 559 above, the Tribunal finds that the alleged delays by Gosstroy and the alleged relocation of contractors by MCEC in 2007 – 2010 constitute a breach of the EEU Treaty, the Claimant must establish that but for such alleged delays, the Claimant would have acquired the right to develop and would have completed the construction of the Investment Object. The Respondent submits that the Claimant would not have done so. It was the Claimant's own financial difficulties which resulted in the failure to construct the New Communal Facilities by the agreed deadlines and which resulted in the parties having to sign Additional Agreement No. 5 and Additional Agreement No. 6 in 2008 and 2011, respectively.¹⁰⁴²
664. Lastly, even if, contrary to the Respondent's position in paragraphs 566 – 581, the Tribunal finds that the termination of the Amended Investment Contract itself constitutes a breach of the EEU Treaty, the Claimant must establish that but for the termination, the Claimant would have acquired the right to develop and would have completed the construction of the Investment Object. The Respondent submits that the Claimant would not have done so. After the Claimant missed the agreed deadline, MCEC sought to persuade the Claimant and Manolium-Engineering to complete the construction of the New Communal Facilities¹⁰⁴³ and agree a contractual extension to the construction deadlines with the Claimant and Manolium-Engineering in order not to have to terminate the Amended Investment Contract.¹⁰⁴⁴ Since the Claimant had no intention to fulfil its obligations under the Amended Investment Contract or even to implement the Investment Object (which required a significant injection of funds that

¹⁰⁴¹ See paragraph 540 above.

¹⁰⁴² See paragraphs 542 – 559 above.

¹⁰⁴³ See paragraph 568 above.

¹⁰⁴⁴ See paragraph 567 above.

the Claimant did not have), MCEC was left with no choice but to submit a claim to the courts.¹⁰⁴⁵

665. Accordingly, the Respondent submits that but for the alleged breaches of the EEU Treaty which “*culminated in the illegal termination of the [...] Amended Investment Contract*”, the Claimant would still not have acquired the right to develop the Investment Object, let alone completed construction of the Investment Object and made a profit from it. Since the Claimant has failed to establish the necessary causal link between the alleged breaches and the losses allegedly suffered, the Lost Profits claim must fail.

2. The Lost Profits are highly speculative

666. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.¹⁰⁴⁶

667. In *Siag v. Egypt*, the tribunal rejected the proposed adoption of a discounted cash flow approach to calculate the loss suffered by the claimant in respect of a property comprising residential buildings, hotels and a casino that was still under development. The tribunal explained that there was a higher degree of uncertainty in valuing a “*business opportunity*” that was still under development than a business that has been operating for several years,¹⁰⁴⁷ citing the “*numerous moving parts*”¹⁰⁴⁸ which contribute to a discounted cash flow analysis. The tribunal concluded that “*points such as those just mentioned tend to reinforce the wisdom in the established reluctance of tribunals such as this one to utilize DCF analyses for “young” businesses lacking a long track record of established trading.*”¹⁰⁴⁹

¹⁰⁴⁵ See paragraph 574 above.

¹⁰⁴⁶ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 36(27), page 104, **Exhibit RL-69**; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)97/1, Award, 30 August 2000, paragraph 120, **Exhibit CL-15**.

¹⁰⁴⁷ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paragraph 567, **Exhibit RL-70**.

¹⁰⁴⁸ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paragraphs 568 – 569, **Exhibit RL-70**.

¹⁰⁴⁹ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paragraph 570, **Exhibit RL-70**.

668. In *Biloune v. Ghana*, the tribunal rejected the claimant’s claim for future lost profits in connection with a hotel resort complex, the construction of which had been suspended.¹⁰⁵⁰ The tribunal found no basis on which to calculate future profits because the claimants could not provide any realistic estimate of them.¹⁰⁵¹ The tribunal specifically emphasized that at the time of the breach, the project remained uncompleted and inoperative and was generating no revenue, still less profits.¹⁰⁵² Similarly in *SPP v. Egypt*, the tribunal rejected the discounted cash flow approach because the project in question had been “*in its infancy*” and had “*very little history on which to base the projected revenues*”.¹⁰⁵³
669. In *Wena Hotels v. Egypt*, the tribunal rejected a claim for lost profits as a result of the expropriation of two hotels in respect of which the claimant had held long-term leases.¹⁰⁵⁴ The tribunal considered that the approach was too speculative, reasoning that (i) Wena had operated one of the hotels for less than 18 months and had not completed the renovation of the other hotel at the time of the seizure;¹⁰⁵⁵ (ii) it was questionable whether Wena had sufficient finances to fund the renovation and operation of the hotels;¹⁰⁵⁶ and (iii) there was a large disparity between the requested amount and Wena’s stated investment in the two hotels.¹⁰⁵⁷
670. In the present case, the Claimant seeks Lost Profits based on anticipated cash flows from the ‘finished product’ of the Investment Object, in circumstances where the Claimant had not even provided the necessary consideration to acquire the right to

¹⁰⁵⁰ *Antoine Biloune, Marine Drive Complex Ltd. v. Ghana Investments Centre, the Government of Ghana*, UNCITRAL, Award on Damages and Costs, 30 June 1990, pages 227 – 229, **Exhibit RL-71**.

¹⁰⁵¹ *Antoine Biloune, Marine Drive Complex Ltd. v. Ghana Investments Centre, the Government of Ghana*, UNCITRAL, Award on Damages and Costs, 30 June 1990, page 228, **Exhibit RL-71**.

¹⁰⁵² *Antoine Biloune, Marine Drive Complex Ltd. v. Ghana Investments Centre, the Government of Ghana*, UNCITRAL, Award on Damages and Costs, 30 June 1990, page 228, **Exhibit RL-71**.

¹⁰⁵³ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, paragraphs 188 – 190, **Exhibit RL-72**.

¹⁰⁵⁴ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraphs 123 – 130, **Exhibit RL-73**.

¹⁰⁵⁵ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraphs 123 – 124, **Exhibit RL-73**.

¹⁰⁵⁶ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraph 124, **Exhibit RL-73**.

¹⁰⁵⁷ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraph 124, **Exhibit RL-73**.

develop the Investment Object,¹⁰⁵⁸ let alone finish constructing it.¹⁰⁵⁹ Furthermore, the Claimant failed to even submit to MCEC the design documents and general plan for the Investment Object that were required under the Investment Object Location Act.¹⁰⁶⁰ Instead, Mr Taylor relies on an undetailed, internal construction schedule that was never approved by MCEC.¹⁰⁶¹

671. Given the lack of detailed design documentation for the Investment Object, Mr Taylor bases his calculation of Lost Profits on a set of unsubstantiated and vague assumptions based on the Claimant’s ‘hopes and dreams’ for the development of the Investment Object.¹⁰⁶² For example, Mr Taylor states that he “*understand[s] from discussions with Manolium that the Investment Object was to be constructed to very high quality specifications*”.¹⁰⁶³ This is at best speculative, given that, as Mr Dolgov himself admits, the Claimant’s experience in the development business when it entered into the Investment Contract was limited to the construction of “*three residential houses*”.¹⁰⁶⁴
672. Given the above, even if (contrary to its position) the Tribunal finds that the Claimant would have acquired the right to develop the Investment Object but for the Respondent’s breach, the Respondent submits that there is far too much uncertainty as to what would have been constructed, how much it would cost to construct and the ultimate value of the Investment Object for the Claimant to be entitled to the ‘anticipated’ profits arising from it.
673. Similarly, Mr Taylor’s attempt to “*cross-check*”¹⁰⁶⁵ the fair market value of the Investment Object, as calculated using the income approach, with the use of alleged

¹⁰⁵⁸ Under the Amended Investment Contract, it was agreed that the Claimant and Manolium-Engineering would, *inter alia*, construct the New Communal Facilities as consideration for the right to develop the Investment Object (Amended Investment Contract, Clause 2, **Exhibit C-66**).

¹⁰⁵⁹ Even where hotels and luxury properties have been constructed, tribunals have been reluctant to award lost profits in circumstances where the anticipated profits from such properties are too speculative (e.g., *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraphs 123 – 130, **Exhibit RL-73**).

¹⁰⁶⁰ See paragraph 199 above.

¹⁰⁶¹ Schedule Graphic, April 2011, **Exhibit TT-11**; Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 3.3.3, **CER-1**.

¹⁰⁶² Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 3.3.3, **CER-1**.

¹⁰⁶³ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 5.3.4, **CER-1**.

¹⁰⁶⁴ First Witness Statement of A. Dolgov dated 10 May 2018, paragraph 8, **CWS-1**.

¹⁰⁶⁵ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 4.5.1, **CER-1**.

comparables for other developed properties is inappropriate given that the Claimant never even acquired the right to *begin* developing the Investment Object. The use of the market approach is highly speculative in the absence of reliable, detailed data as to what the Claimant actually would have constructed if it had acquired the right to develop the Investment Object under the Amended Investment Contract.

3. The Claimant is not entitled to seek compensation for the value of the Investment Object and the New Communal Facilities

674. In order to become entitled to develop the Investment Object under the Amended Investment Contract, the Claimant and Manolium-Engineering were obliged, *inter alia*, to secure the design, construction and commissioning of the New Communal Facilities by the agreed deadlines.¹⁰⁶⁶ The Claimant and Manolium-Engineering agreed that they would bear all costs in the construction of the New Communal Facilities.¹⁰⁶⁷ Since the Claimant and Manolium-Engineering did not directly pay MCEC or Minsktrans for the right to develop the Investment Object, the construction of the construction and transfer of the New Communal Facilities¹⁰⁶⁸ plus US\$1 million for the Library Payment¹⁰⁶⁹ constituted the consideration for right to develop the Investment Object.

675. In the present case, the Claimant seeks compensation for:

- a) Lost Profits from the loss of its contingent right to develop the Investment Object; and
- b) NCF Losses for the loss of the New Communal Facilities.

676. In practice, however, it is inconceivable that the Claimant could have acquired the right to develop the Investment Object *and* retained the New Communal Facilities at the same time, since the construction of the New Communal Facilities constituted the consideration for the right to develop the Investment Object. Accordingly, the Respondent submits that the Claimant is not entitled to claim for the Lost Profits

¹⁰⁶⁶ Amended Investment Contract, Clauses 2 and 6.1, **Exhibit C-66**.

¹⁰⁶⁷ Amended Investment Contract, Clauses 7.10 and 8.19, **Exhibit C-66**.

¹⁰⁶⁸ Amended Investment Contract, Clause 2, **Exhibit C-66**.

¹⁰⁶⁹ See paragraphs 28 – 29 above.

together with the NCF Losses, since this would result in the unjust enrichment of the Claimant. In effect, the Claimant is now seeking to put itself in the position it would have been in had it acquired the right to develop the Investment Object without bearing the costs of constructing the New Communal Facilities.

4. The Claimant’s alternative claim to Lost Profits in the amount of US\$8,650,000 is unsubstantiated

677. The Claimant seeks compensation for losses of US\$8,650,000 in the alternative to US\$171,300,000 as a result of the termination of the Amended Investment Contract.¹⁰⁷⁰ To date, neither the Claimant nor Mr Taylor have explained how they arrived at this calculation. If and when the Claimant substantiates this calculation and the Tribunal allows it to do so at this late stage in the proceedings, the Respondent reserves the right to respond.
678. As far as the Respondent can glean from the Claimant’s submissions, the Claimant appears to be referring to the value at which the right to develop the land plot on which the Investment Object was originally to be located was sold at public auction to OOO Astomaks in 2017.¹⁰⁷¹ Contrary to what the Claimant asserts, the rights to the land plot *in rem* were never “sold to another developer”,¹⁰⁷² since LLC Astonaks, like the Claimant, had a separate duty to pay for the rent for that land plot under a separate lease agreement.
679. If the Claimant’s position is that the fair market value of the right to develop the Investment Object should be set at US\$8,650,000 [and US\$171,300,000], then the Claimant should spell this out.

5. Even applying the approach proposed by the Claimant, the Investment Object would not have been profitable

680. Even if (contrary to the Respondent’s position) the Tribunal considers that the Claimant is entitled to claim the projected future profits that it could have made if it

¹⁰⁷⁰ Notice, paragraph 530(a), CS-1.

¹⁰⁷¹ See paragraphs 363 – 367 above; According to the news portal website TUT.BY, which the Claimant refers to, the rights to develop the land plot were sold to OOO Astomaks for US\$8.865 million, not 8.650 million (Official website of news portal of Belarus TUT.BY, **Exhibit C-185**).

¹⁰⁷² Notice, paragraph 293, CS-1.

had acquired the right to develop and had constructed the Investment Object, the Respondent's position is that the sale of the Investment Object would not have been profitable for the Claimant.

681. When calculating the Lost Profits, Mr Qureshi uses a similar income approach as Mr Taylor for assessing the market value of the residential, retail and office area of the Investment Object, but adopts a different set of assumptions.¹⁰⁷³ Due to the unavailability of the relevant data, Mr Qureshi uses a market approach for the hotel area of the Investment Object, instead of the income approach utilised by Mr Taylor.¹⁰⁷⁴
682. As a result of this analysis, Mr Qureshi arrives at the conclusion that the cash inflow (the projected sales value for the Investment Object) would be lower than calculated by Mr Taylor.¹⁰⁷⁵
683. When calculating the costs which the Claimant incurred in developing the Investment Object, Mr Qureshi takes into consideration the cost of the land plot on which the Investment Object was supposed to be located, and revises the construction costs.¹⁰⁷⁶ As a result, Mr Qureshi arrives at a higher figure than Mr Taylor for the total cash outflows.¹⁰⁷⁷
684. Finally, Mr Qureshi noted that there would have been additional pre-investment costs that the Claimant would have needed to incur if it were to ever have the right to construct the Investment Object, including, in particular, the costs necessary to complete the New Communal Facilities, and the Library Payment.¹⁰⁷⁸
685. Considering that the Lost Profits are equal to zero, Mr Qureshi does not calculate any interest on it.¹⁰⁷⁹

¹⁰⁷³ Expert Report of A. S. Qureshi dated 15 November 2018, paragraph 26, **RER-1**.

¹⁰⁷⁴ Expert Report of A. S. Qureshi dated 15 November 2018, paragraph 28, **RER-1**.

¹⁰⁷⁵ Expert Report of A. S. Qureshi dated 15 November 2018, paragraphs 168 – 184, **RER-1**.

¹⁰⁷⁶ Expert Report of A. S. Qureshi dated 15 November 2018, paragraphs 185 – 194, **RER-1**.

¹⁰⁷⁷ Expert Report of A. S. Qureshi dated 15 November 2018, paragraph 195, **RER-1**.

¹⁰⁷⁸ Expert Report of A. S. Qureshi dated 15 November 2018, paragraphs 202 – 203, **RER-1**.

¹⁰⁷⁹ Expert Report of A. S. Qureshi dated 15 November 2018, paragraph 243, **RER-1**.

B. NCF LOSSES

686. The Claimant alleges that it suffered the NCF Losses as a result of the transfer of the New Communal Facilities from Manolium-Engineering into the municipal ownership of Minsk on 27 January 2017.¹⁰⁸⁰ The Claimant instructs Mr Taylor to calculate the fair market value of the New Communal Facilities, for which Mr Taylor adopts the costs approach.¹⁰⁸¹
687. The Respondent's position is that the Tribunal has no jurisdiction *ratione temporis* over the Claimant's claims relating to the transfer of the New Communal Facilities into municipal ownership, because the Tax Dispute arose before the EEU Treaty entered into force (*see* paragraphs 397 – 414 above). In the alternative, the Respondent has submitted that the transfer of the New Communal Facilities into municipal ownership does not constitute a breach of the FET standard (*see* paragraphs 576 – 604 above), nor does it constitute an expropriation (*see* paragraphs 637 – 641 above) under the EEU Treaty.
688. If the Tribunal disagrees with the Respondent and finds it necessary to proceed to the quantification of the losses arising from the transfer of the New Communal Facilities into municipal ownership, the Respondent submits that the Claimant's claim to NCF Losses fails for the following reasons.

1. The Claimant has failed to establish the necessary causation between the alleged breaches of the EEU Treaty and the NCF Losses

689. Where the breach of a treaty standard does not lead to the total loss of an investment, the standard of compensation for breaches of the FET standard should correspond to the amount of “actual loss” directly caused by the breach in question.¹⁰⁸²

¹⁰⁸⁰ Notice, paragraph 530(b), **CS-1**; Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraphs 1.3.11 and 4.2.1, **CER-1**.

¹⁰⁸¹ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraphs 4.2.1 and 4.6.1, **CER-1**.

¹⁰⁸² See, e.g., *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paragraphs 35 – 36 and 45, **Exhibit RL-64**.

690. In *GAMI v Mexico*, a US investment company claimed that Mexico’s maladministration of the sugar market amounted to a breach of NAFTA’s provisions on FET. While the tribunal agreed that this alleged wrongdoing would have caused harm in the form of a “*decline in the value of its shares*”, it decided that it could only award damages for “*specific and quantifiable prejudice*”.¹⁰⁸³ The claimant had wrongly proceeded “*on the basis that the entire value of its investment had been destroyed*” by the unfair and unequitable treatment, leaving the tribunal with a choice that “*seems to be all or nothing*”.¹⁰⁸⁴ The tribunal therefore rejected the claim, noting that it “*would have been in no position to award damages even if it had found a violation [of FET]*”.¹⁰⁸⁵ It was key that the “*prejudice must be particularised and quantified*” in light of “*credible cause-and-effect analysis*”.¹⁰⁸⁶
691. In the present case, the Claimant has failed to substantiate its allegation that the transfer of the New Communal Facilities itself constitutes an expropriation.¹⁰⁸⁷ Instead, the Claimant addresses the transfer in the context of its FET claim,¹⁰⁸⁸ alleging that, in 2016, the Belarusian state authorities “*selected the strategy [...] to bring the Claimant to tax liability*”,¹⁰⁸⁹ which culminated in the transfer of the New Communal Facilities into municipal ownership to enforce against this tax liability.
692. The Claimant alleges that this ‘campaign’ was made up of three stages:
- a) On 17 May 2016, the Pervomaysky District Court issued a judgment finding that Manoliium-Engineering was administratively liable for occupying the land plots for the New Communal Facilities without a permit and imposed a fine of approximately US\$2,668;¹⁰⁹⁰

¹⁰⁸³ *GAMI Investments Inc v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, paragraph 83, **Exhibit RL-74**.

¹⁰⁸⁴ *GAMI Investments Inc v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, paragraphs 84 – 85, **Exhibit RL-74**.

¹⁰⁸⁵ *GAMI Investments Inc v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, paragraph 85, **Exhibit RL-74**.

¹⁰⁸⁶ *GAMI Investments Inc v. The Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, paragraph 85, **Exhibit RL-74**.

¹⁰⁸⁷ Notice, paragraph 530(b), **CS-1**.

¹⁰⁸⁸ Notice, paragraphs 488 – 503, **CS-1**.

¹⁰⁸⁹ Notice, paragraph 488, **CS-1**.

¹⁰⁹⁰ Notice, paragraph 491, **CS-1**.

- b) On 21 June 2016, the District Tax Inspectorate amended the First Tax Audit Report, finding that Manolium-Engineering owed 20,046,478.92 and 6,397,602.10 denominated Belarusian rubles for land tax in the period 2013 – 2016 and penalties, respectively;¹⁰⁹¹ and
- c) On 27 January 2017, the New Communal Facilities were transferred into municipal ownership to enforce against the land taxes and penalties owed by Manolium-Engineering.¹⁰⁹²
693. If, contrary to the Respondent’s position in paragraphs 583 – 604, the Tribunal finds that the above events were part of a bad faith ‘campaign’ which culminated in the transfer of the New Communal Facilities into municipal ownership, and that the cumulative nature of such acts is tantamount to an expropriation, then it may be appropriate for the standard of compensation to correspond to the fair market value of the New Communal Facilities.
694. If, on the other hand, the Tribunal finds that some but not all of the acts in question were illegal, the Claimant’s ‘all or nothing’ analysis is inappropriate. In such a situation, the Respondent respectfully submits that the standard of compensation for breaches of the FET standard should correspond to the amount of ‘actual loss’ directly caused by the breach in question.¹⁰⁹³
695. For example, if the Tribunal finds that the judgment of the Pervomaysky District Court on 17 May 2016 constitutes a breach of the EEU Treaty, then the Respondent submits that the Claimant should only be entitled to claim compensation for the administrative fine arising from that judgment.
696. Similarly, if the Tribunal finds that the amendments to the First Tax Audit Report on 21 June 2016 violate the EEU Treaty, then the Claimant should only be entitled to claim the amount by which Manolium-Engineering’s land tax liabilities were increased as a result of those amendments.

¹⁰⁹¹ Notice, paragraph 493, CS-1.

¹⁰⁹² Notice, paragraph 497, CS-1.

¹⁰⁹³ See, e.g., *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paragraphs 35 – 36 and 45, **Exhibit RL-64**.

697. The Claimant tries to link the sequence of events set out in paragraph 692 above by asserting that the District Tax Inspectorate's finding on 21 June 2016 was "*based on the judgment of the court of the Pervomaysky district dated 17 May 2016*".¹⁰⁹⁴ As already described, this is misleading.

- a) First, the District Tax Inspectorate applied the tenfold land tax rate on 21 June 2016 based on the fact that Manolium-Engineering had continued to occupy the land plots for the New Communal Facilities after the expiry of its land permits (of which it learned through the District Court's Resolution of 21 June 2016), rather than because Manolium-Engineering had been found administratively liable by the District Court *per se*.¹⁰⁹⁵
- b) Second, the District Tax Inspectorate applied the twofold land tax rate on 21 June based on the fact that there was unfinished construction work on the land plots, whose permitted term of construction has expired (of which it had been informed by the Land Planning Service). Thus, this increase had nothing to do with the District Court's Resolution of 17 May 2016.¹⁰⁹⁶
- c) Third, a portion of Manolium-Engineering's land tax liabilities had already arisen for the years 2013 – 2015 and the first half of 2016 when the District Tax Inspectorate issued its First Tax Audit Report on 17 May 2016.¹⁰⁹⁷

698. In light of the above, the Claimant must establish that each of the above calculations or recalculations of Manolium-Engineering's land tax liability were themselves illegal under the EEU Treaty for its 'all or nothing' claim to the NCF Losses to succeed. To date, the Claimant has failed to do so. If and when the Claimant substantiates its position, the Respondent reserves the right to respond.

¹⁰⁹⁴ Notice, paragraph 493, **CS-1**.

¹⁰⁹⁵ See paragraph 327 above.

¹⁰⁹⁶ See paragraphs 325 – 326.

¹⁰⁹⁷ Expert Report of A. S. Qureshi dated 15 November 2018, paragraph 222, **RER-1**.

2. The Respondent disputes the assessment of costs in the 2016 Memorandum

699. If, contrary to the Respondent's position, the Tribunal finds that the transfer of the New Communal Facilities into municipal ownership on 27 January 2017 constitutes an expropriation or a measure tantamount to expropriation, then the Tribunal's task is to determine the fair market value of the incomplete New Communal Facilities on the date immediately preceding the transfer.¹⁰⁹⁸ The Respondent agrees with the Claimant that the most appropriate way of calculating the fair market value of the New Communal Facilities is the costs approach.
700. The Claimant instructs Mr Taylor to assume that the costs assessed in the 2016 Memorandum are "*undisputed between the Parties*".¹⁰⁹⁹ This is incorrect. The Respondent's position is that the 2016 Memorandum does not represent a reliable source of information for estimating the costs incurred by Manolium-Engineering in the construction of the New Communal Facilities.
701. In particular, as already explained in paragraphs 290 – 298 above, the Ministry of Finance's analysis in the 2016 Memorandum was mainly limited to comparing Manolium-Engineering's accounting data with the Registration and Cadastre Agency Report. Apart from the fact that the accounting documents were a secondary source of information and could not be relied on as evidence of the actual costs, the Registration and Cadastre Agency Report was previously stated by MCEC to be inappropriate and unreliable evidence of such costs.¹¹⁰⁰
702. In particular, the Registration and Cadastre Agency Report included all associated costs incurred by Manolium-Engineering, in addition to the costs directly related to the construction of the New Communal Facilities.¹¹⁰¹
703. In the present case, the standard of compensation (if the Tribunal finds that the transfer of the New Communal Facilities constitutes an expropriation or an act tantamount to expropriation) is the fair market value of the New Communal

¹⁰⁹⁸ Protocol 16 of the EEU Treaty, Article 80, **Exhibit CL-3**.

¹⁰⁹⁹ Expert Report of Mr. A. P. Taylor dated 24 April 2017, paragraph 6.2.2, **CER-1**.

¹¹⁰⁰ See paragraph 296 above.

¹¹⁰¹ See paragraph 279 above.

Facilities.¹¹⁰² In calculating the fair market value of the New Communal Facilities, the Respondent's position is that it would be inappropriate to take into account costs incurred by Manolium-Engineering or the Claimant which were unrelated to the construction of the New Communal Facilities.

704. In light of the above, and given the absence of primary documents (since they remain in the Claimant's possession) evidencing the actual expenses incurred by Manolium-Engineering in constructing the New Communal Facilities, Mr Qureshi proposes to assess the fair market value of the New Communal Facilities based on the anticipated cost of constructing the New Communal Facilities, relying on, *inter alia*:

- a) the primary design documentation for the period 2005 – 2009; and
- b) the detailed listing of the projected construction costs as approved by the competent authorities and as adjusted based on the applicable construction price indices relating to the relevant periods of construction.¹¹⁰³

705. If and when the Claimant provides the primary documents supporting the actual expenses incurred by Manolium-Engineering in constructing the New Communal Facilities, the Respondent reserves the right to rely on such primary evidence in the calculation of the NCF Losses.

3. The Claimant is not entitled to claim inflated costs that result from its own delays

706. The Respondent agrees with the Claimant that the most appropriate way of calculating the fair market value of the New Communal Facilities is the costs approach. However, the Respondent submits that the Claimant should not be entitled to recoup inflated costs that resulted from its own delays while the Amended Investment Contract was in force.

707. The tribunal enjoys a wide discretion to reduce damages awards on the basis of the Claimant's own wrongs. In *MTD Equity v. Chile*, the tribunal found that Chile had breached its obligation to afford investors fair and equitable treatment under the BIT

¹¹⁰² Protocol 16 of the EEU Treaty, Article 80, **Exhibit CL-3**.

¹¹⁰³ Expert Report of A. S. Qureshi dated 15 November 2018, paragraph 222, **RER-1**.

by rejecting a real estate development which it had previously approved. In examining the compensation payable, the tribunal took care to distinguish between those losses caused by Chile's breach, and those which were caused by the claimant's own actions:

*"BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimant's took irrespective of Chile's actions."*¹¹⁰⁴

708. As a result of the claimants needing to bear part of the damages suffered, the tribunal reduced the compensation payable by a percentage that it considered appropriate taking into account all the circumstances.¹¹⁰⁵
709. In the present case, the Respondent has already submitted in paragraphs 542 – 559 that it was the Claimant, not MCEC or Minsktrans, that was responsible for the delays in constructing the New Communal Facilities in the years 2007 – 2011. Given that there was a significant growth in the cost of constructing the New Communal Facilities during this period, the Respondent submits that these delays should be taken into account when assessing the level of the Claimant's costs and the compensation to which the Claimant is entitled.
710. The 2016 Memorandum, on the other hand, does not take into account the extent to which the costs incurred by Manolium-Engineering were increased by the Claimant's and Manolium-Engineering's own actions. Accordingly, the Respondent submits that the 2016 Memorandum is an inappropriate source for valuing the compensation to which the Claimant is entitled.
711. Even if, contrary to the Respondent's position, the Tribunal considers it appropriate to rely on the assessment of Manolium-Engineering's costs set out in the 2016 Memorandum, the Respondent respectfully requests that the Tribunal take into account the extent to which such costs may have been increased by the Claimant's

¹¹⁰⁴ See, e.g., *MTD Equity Sdn Bhd v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paragraph 178, **Exhibit RL-75**.

¹¹⁰⁵ See, e.g., *MTD Equity Sdn Bhd v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paragraph 243, **Exhibit RL-75**.

own actions and, if the Tribunal considers it appropriate in the circumstance, to apply an appropriate reduction to the damages awarded to the Claimant.

4. The Library Payment should be excluded from the assessment of the fair market value of the New Communal Facilities

712. If, contrary to the Respondent's position, the Tribunal finds that the transfer of the New Communal Facilities into municipal ownership constitutes an expropriation or a measure tantamount to expropriation, the Tribunal's task is to assess the fair market value of the New Communal Facilities as at the date of the transfer.¹¹⁰⁶ The Parties agree that the costs approach is the most appropriate method of valuing the incomplete New Communal Facilities.

713. Mr Taylor includes in his assessment of Manolium-Engineering's costs in constructing the New Communal Facilities the US\$1 million payment that the Claimant paid on 30 December 2003 as part of the consideration for the right to develop the Investment Object.¹¹⁰⁷ Mr Taylor does not explain why he includes this US\$1 million payment. Contrary to what Mr Taylor asserts,¹¹⁰⁸ the Library Payment was not one of the New Communal Facilities as set out in the Amended Investment Contract.¹¹⁰⁹

714. Given that the Library Payment does not constitute part of the New Communal Facilities or the costs incurred in constructing the New Communal Facilities, the Respondent submits that it should be excluded from the NCF Losses.

5. Pre-Award interest should be calculated on the NCF Losses from 27 January 2017

715. Article 80 of Protocol 16 of the EEU Treaty provides that when calculating pre-award interest on damages for an expropriation, "*interest shall be accrued in the period from the date of expropriation till the date of actual payment of the compensation*".¹¹¹⁰

¹¹⁰⁶ Protocol 16 of the EEU Treaty, Article 80, **Exhibit CL-3**.

¹¹⁰⁷ See paragraphs 31 and 39 above; Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 6.2.1, **Exhibit CER-1**; Additional Agreement No. 1, Clause 1, **Exhibit C-47**.

¹¹⁰⁸ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 7.1.4, **Exhibit CER-1**.

¹¹⁰⁹ Amended Investment Contract, Clause 2, **Exhibit C-66**.

¹¹¹⁰ Protocol 16 of the EEU Treaty, Article 80, **Exhibit CL-3**.

Accordingly, if the Tribunal finds (contrary to the Respondent's position), that the transfer of the New Communal Facilities into municipal ownership constitutes an expropriation or a measure tantamount to an expropriation, pre-award interest should be calculated from 27 January 2017.

716. In his report, Mr Taylor assesses pre-award interest on the NCF Losses from three alternative dates until an assumed hearing date of 31 March 2017:

- a) from 29 October 2014;¹¹¹¹
- b) from the dates that the New Communal Facilities and the Library Payment were allegedly "*transferred to the State*";¹¹¹²
- c) from the dates that the expenses were allegedly incurred according to the 2016 Memorandum.¹¹¹³

717. The Claimant does not explain why it instructs Mr Taylor to adopt these dates for calculating pre-award interest on the alleged loss of the New Communal Facilities given that the New Communal Facilities were transferred into municipal ownership on 27 January 2017. If the Claimant's position is that the expropriation of the New Communal Facilities occurred on one of these alternative dates, then it should spell this out.

6. Mr Qureshi's Calculation of the NCF Losses

718. For the above reasons, if (contrary to the Respondent's position) the Tribunal finds that the transfer of the New Communal Facilities into municipal ownership constitutes an expropriation or a measure tantamount to expropriation, the Respondent

¹¹¹¹ As described in paragraph 263 above, 29 October 2014 is the date the termination of the Amended Investment Contract came into force.

¹¹¹² Mr Taylor assumes that (a) the Library Payment was made on 30 December 2003; (b) the Depot was transferred on 14 November 2011; (c) the Pull Station was transferred on 6 July 2010; and (d) the Road was transferred on 2 July 2010. As set out in paragraphs 560 to 564 above, the New Communal Facilities were never transferred into municipal ownership, because they were never completed or commissioned.

¹¹¹³ 2016 Memorandum, **Exhibit C-160**.

respectfully requests the Tribunal to adopt Mr Qureshi's valuation of the NCF Losses.¹¹¹⁴

VIII. RELIEF SOUGHT

719. For the foregoing reasons, the Respondent requests the following relief:

- a) an award declining the jurisdiction over all the Claimant's claims; or, alternatively
- b) to the extent the Tribunal finds jurisdiction over all or part of the Claimant's claims, a declaration dismissing the Claimant's claims in full; or, alternatively
- c) to the extent the Tribunal does not dismiss all of the Claimant's claims on the merits, a declaration that the Claimant suffered no loss; or, alternatively
- d) to the extent the Tribunal finds that the Claimant suffered some loss, an award calculating the Claimant's loss on the assumptions and in the amounts as submitted by the Respondent; and
- e) an order that the Claimant pay the costs of these arbitral proceedings, including the costs of the Tribunal and the legal and other costs incurred by the Respondent as a result of the Claimant's meritless claims, on a full indemnity basis; and
- f) interest on any costs awarded to the Respondent, in an amount to be determined by the Tribunal.

720. The Respondent reserves the right to modify or supplement the claims and arguments in this submission as permitted by the Tribunal.

Respectfully submitted on
19 November 2018



White & Case LLP

¹¹¹⁴ Expert Report of A. S. Qureshi dated 15 November 2018, paragraphs 36 and 232, **RER-1**.