IN ACCORDANCE WITH THE PROVISIONS OF
THE TREATY ON THE EURASIAN ECONOMIC UNION OF 29 MAY 2014
UNDER THE 2013 UNCITRAL ARBITRATION RULES

***Manolium-Processing* LLC**

Claimant

v.

Republic of Belarus

Respondent

STATEMENT OF REPLY

CS-V

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28 February 2019

Baker McKenzie.

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LIST OF DEFINITIONS

Definition	Description
2015 Registration and Cadastre Agency Report or **Registration and Cadastre Agency Report** **Exhibit C-154**	The second audit of the Claimant's construction of the New Communal Facilities produced on 16 June 2015 by the Republican Unitary Enterprise Minsk City Agency for State Registration and Land Cadaster at the State Property Committee of the Republic of Belarus
Amended Investment Contract **Exhibit C-66**	Additional Agreement No. 4 to the Investment Contract of 8 February 2007
Arrested Property	New Communal Facilities arrested on 5 July 2016 pursuant to the resolution of the Tax Inspectorate to cover the debt of Manolium-Engineering before the budget of the Republic of Belarus
Arbitral Tribunal	Arbitral tribunal in arbitration proceedings between the Claimant and the Republic of Belarus constituted in accordance with the UNCITRAL Arbitration Rules
Building under Reconstruction	Communal Facility (building located at: Mendeleeva Street, 36, Minsk) that the Claimant was to reconstruct in accordance with the provisions of the Investment Contract
CAO of the Ministry of Finance	Controller and Auditor Office of the Ministry of Finance of the Republic of Belarus
CAO of the Ministry of Finance Report **Exhibit C-160**	Report prepared by the Controller and Auditor Office of the Ministry of Finance of the Republic of Belarus and RSTC in respect of examining financial and business operations of Manolium-Engineering of 22 February 2016
Claimant or **Manolium-Processing**	*Manolium-Processing* LLC

Definition	Description
Depot	Communal Facility and New Communal Facility of the "*Trolleybus depot with the capacity of 220 trolleybuses in the Uruchye-6 microdistrict*" that the Claimant was to design and construct in accordance with the provisions of the Investment Contract, and from 8 February 2007 – Manolium-Engineering in accordance with the Amended Investment Contract
Depot Administrative Building	One of the buildings in the Trolleybus Depot complex
Depot Checkpoint or **Checkpoint**	One of the buildings in the Trolleybus Depot complex
Depot Production Building	One of the buildings in the Trolleybus Depot complex
Dispute	Dispute between the Republic of Belarus and Manolium-Processing in accordance with the provisions of the Treaty on the Eurasian Economic Union of 29 May 2014
EEC Investment Agreement	Eurasian Economic Community of 12 December 2008
EEU Treaty	Treaty on the Eurasian Economic Union of 29 May 2014
FET Standard	Fair and equitable treatment of any EEU member-state in respect of investments and investment-related activities conducted by investors of other member states in accordance with Protocol No. 16 to the EEU Treaty
First Tax Audit Report **Exhibit C-164**	Tax audit report performed by the Tax Inspectorate to examine Manolium-Engineering operations of 17 May 2016

Definition	Description
First T. Taylor Report **CER-1**	First Expert Report of Travis Taylor (Navigant) of 24 April 2017
FMV	Fair market value
Gosstroy	Inspectorate of the Department of Control and Supervision over Construction for Minsk
ILC Articles on State Responsibility **Exhibit CL-11**	Articles on State Responsibility for Internationally Wrongful Acts of the UN International Law Commission adopted by Resolution of the UN General Assembly No. 56/589 of 12 December 2001
Investment Contract **Exhibit C-34**	Investment Contract entered into by and between the Republic of Belarus and the Claimant of 3 June 2003
Investment Law of the Republic of Belarus **Exhibit CL-10**	Law on Investment of the Republic of Belarus of 12 July 2013
Investment Object	Investment construction project for the shopping, cultural and entertainment center within streets Kiseleva-Krasnaya-Nezavisimosti-Masherova in the center of Minsk authorized to be implemented in accordance with the terms and conditions of the Tender
Investment Object Construction Schedule	Construction schedule for the Investment Object approved by the Claimant in April 2011
Investment Object Location Selection Act	MCEC's act of selection the location of the land plot for the Investment Object in the center of Minsk of 25 March 2009
KGB	Belarusian State Security Committee

Definition	Description
Library Payment	Claimant's payment of USD 1,000,000, to construct the National Library
Manolium-Engineering	Foreign enterprise *Manolium-Engineering*
MCEC	Minsk City Executive Committee
Ministry of Finance	Ministry of Finance of the Republic of Belarus
Minsk Architecture and City Planning Committee	Architecture and City Planning Committee of the Minsk City Executive Committee
Minsk Land Planning Service	Minsk Land Planning and Geodetic Service of the Minsk City Executive Committee
Minskstroy	State Production Association "*Minskstroy*"
Minsktrans	State Enterprise "*Minsktrans*" (as of the date of the Tender – Unitary Enterprise "*Transport and Communications Office*")
Motor Transport Base	Communal Facility that the Claimant was to design and construct in accordance with the Investment Contract
National Library	National Library in Minsk
New Communal Facilities	Depot, Pull Station and the Road that Manolium-Engineering was to design and construct in accordance with the provisions of the Amended Investment Contract of 8 February 2007
Notice of Arbitration	Notice of arbitration of *Manolium-Processing* LLC of 15 November 2017
CS-I	

Definition	Description
Paritet-Standart	Auditor *Paritet-Standart* LLC
Paritet-Standart Report **Exhibit C-131**	Report prepared by audit firm *Paritet-Standart* LLC to assess the investments made by Manolium-Engineering in implementation of the provisions of the Amended Investment Contract of 5 November 2012
Parties	Claimant and Respondent
Pre-Arbitration Notice **Exhibit C-190**	Pre-arbitration notice of *Manolium-Processing* LLC of 25 April 2017
Protocol No. 16 to EEU Treaty **Exhibit CL-3**	Protocol on Trade in Services, Incorporation, Activities and Investments (Annex 16) to the Treaty on the Eurasian Economic Union of 29 May 2014
Pull Station	New Communal Facility entitled "*Pull substation to supply electricity to the trolleybus depot and trolley line along Gintovta Street in Uruchye-6*" that Manolium-Engineering was to design and construct in accordance with the provisions of the Amended Investment Contract
PwC First Report **RER-1**	Report of the Respondent's quantum expert, Mr. Abdul Sirshar Qureshi of 15 November 2018
Registration and Cadastre Agency	Republican Unitary Enterprise Minsk City Agency for State Registration and Land Cadastre
Respondent	Republic of Belarus

Definition	Description
Revolutionary Building	An old residential building on Revolutionary Street which was to be redeveloped into an apartment-hotel based on the Revolutionary Contract
Revolutionary Contract **Exhibit C-282**	Contract between *Tekstur* and Minsk City Executive Committee of 28 November 2003
Revolutionary Project	Project on redevelopment of the Revolutionary Building
Road	New Communal Facility entitled "*Section of Gorodetskaya Street from Gintovta Street up to the entry to the trolleybus depot with utilities and trolleybus line*" that Manolium-Engineering was to design and construct in accordance with Additional Agreement No. 4 or the Amended Investment Contract
RSDC or **RSTC**	Republican Unitary Enterprise "*Republican Scientific and Technical Centre for Pricing in Construction"* of the Ministry of Architecture and Construction of the Republic of Belarus
Second Tax Audit Report **Exhibit C-187**	Report of the unscheduled on-site tax audit performed by the Tax Inspectorate in respect of Manolium-Engineering operations of 24 March 2017
Second T. Taylor Report **CER-3**	Second Expert Report of Travis Taylor (Versant) of 28 February 2019
Statement of Reply **CS-V**	Statement of Reply of *Manolium-Processing* LLC of 28 February 2019

Definition	Description
Tax Inspectorate	Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus
Tekstur	*Tekstur* LLC, Belarusian construction company, which implemented the Revolutionary Project under the Revolutionary Contract
Tender	Tender for investment projects for the right to shared construction of public and communal facilities initiated on 24 April 2003
Trolleybus Depot No. 1	Unitary Enterprise Trolleybus Depot No. 1
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules of 2013
VCLT	Vienna Convention on the Law of Treaties of 1969

A. INTRODUCTION

1. The Claimant hereby submits its Statement of Reply (the "**Statement of Reply**" or "**CS-V**") pursuant to the provisions of Procedural Order No. 1 of 17 May 2018 and Procedural Timetable B.1 as amended on 19 February 2019.

2. For the avoidance of doubt, the Claimant emphasizes that the lack of comment regarding any of the Respondent's statements or positions does not mean the Claimant's agreement with such statement or position, and the Claimant reserves all rights in this regard.

3. This arbitration arose due to numerous violations of the Claimant's rights by the Respondent in connection with the Investment Contract, entered into by the Parties in 2003, pursuant to which the Claimant was authorized to construct a large commercial and entertainment complex in the center of Minsk in exchange for investments in the construction of the New Communal Facilities.

4. However, in the course of implementation of the Investment Contract, the Republic of Belarus failed to render the required assistance, and in numerous cases created obstacles to the construction of the New Communal Facilities by failing to timely provide land plots, refusing to timely issue the necessary permits and approvals and by imposing additional obligations, not part of the Investment Contract, on the Claimant.

5. In 2015, the Investment Contract was terminated in court proceedings initiated in the Belarusian courts by the Republic of Belarus, despite the fact that the New Communal Facilities had been almost built, and the termination of the Investment Contract after near complete performance by the Claimant was disproportionate and unreasonable.

6. In 2016-2017, after termination of the Investment Contract, the Respondent initiated improper tax audits of the Claimant's investment vehicle Manolium-Engineering. These audits imposed an unjustified tax obligation in an amount almost equal to the full amount of the actual expenses incurred by the Claimant for the construction of the New Communal Facilities.

7. The Respondent used this inflated and illegal tax liability as an instrument to obtain the New Communal Facilities from the Claimant for free.

8. These actions of the Respondent constitute unlawful expropriation of the Claimant's investments and violate the fair and equitable treatment standard of the EEU Treaty and the Belarusian Investment Law.

9. As a result of these wrongful acts by the Republic of Belarus, the Claimant has lost its investment and has incurred significant damages in the form of direct damages and lost profits.

10. The Respondent attempts to avoid any responsibility for its actions and objects to the jurisdiction of the Arbitral Tribunal to resolve the Dispute.

11. The Respondent's jurisdictional objections should fail for the following reasons.

12. ***First***, the Arbitral Tribunal has temporal jurisdiction over the Dispute.

13. ***Second***, the Dispute is an investment Dispute under the provisions of the EEU Treaty, not a mere contractual dispute as the Respondent mistakenly claims.

14. ***Third***, the Claimant is an investor who made investments in the territory of Belarus after 16 December 1991, as prescribed by the EEU Treaty.

15. ***Finally***, the Arbitral Tribunal also has jurisdiction over the actions of Minsktrans which exercised its governmental authority in implementation of the Investment Contract.

B. FACTUAL CIRCUMSTANCES OF THE DISPUTE IN THE LIGHT OF THE RESPONDENT'S STATEMENT OF DEFENCE

I. THE RESPONDENT'S ATTEMPTS TO MISREPRESENT THE ESSENCE OF THE DISPUTE BETWEEN THE PARTIES SHOULD BE REJECTED

16. In short, the Respondent's position hinges on its claim that the Claimant was obligated under the Investment Contract to complete the New Communal Facilities and transfer them to the Respondent's ownership by 1 July 2011.[1] Based on this mistaken premise, the Respondent claims that because the Claimant had not completed the project by this time and did not provide sufficient guarantees to the Respondent that it would finish it in future, the Respondent was entitled to terminate the Investment Contract, thus, depriving the Claimant of its right to implement the Investment Object in the center of Minsk.[2] The Respondent further claims that the New Communal Facilities were transferred to the ownership of the Respondent because of purported breaches of Belarusian tax laws.[3]

17. The Respondent's arguments miss the point.

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[1] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 146, 187-188, 206, 305, 563.
[2] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 198-205, 210-219, 229-245, 246-255.
[3] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 306-312, 321-331, 332-335, 339-353.

18. The Dispute is **not** a contractual dispute regarding whether the Claimant has completed the New Communal Facilities,[4] or who is responsible for the delay in construction.[5]

19. Rather, the Dispute before this Arbitral Tribunal is **an investment dispute** based on the EEU Treaty, and, thus, the key question before this Tribunal is whether the Respondent breached its obligations related to the FET Standard and non-expropriation of the Claimant's investments under the EEU Treaty when:

    (i) The Respondent's Supreme Court finally terminated the Investment Contract on 27 January 2015;[6] and

    (ii) The Respondent expropriated the Claimant's right to implement the Investment Object and investments made in the New Communal Facilities without any compensation.[7]

20. As it will be demonstrated below:

    (i) Under the Investment Contract, the Claimant could lose its right to implement the Investment Object **only** if it did not provide financing in the amount of USD 15 million.[8] Under the Investment Contract, as revised by Addendum No. 4 of 8 February 2007, the Claimant was to provide additional financing sufficient to complete the construction of the

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[4] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 140-146, 166-172, 206, 305.
[5] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 79-98, 560-564.
[6] **Exhibit C-147.** Judgment of the Economic Court of Minsk of 9 September 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk of 29 October 2014. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.
[7] **Exhibit C-142.** Decision of Minsk City Executive Committee of 15 August 2014. **Exhibit C-143.** Letter from Minsktrans to Manolium-Engineering of 19 September 2014. **Exhibit C-144.** Official website of State Production Association Minskstroy, *About Association*. **Exhibit R-148.** Deed of transfer of 27 January 2017.
[8] *See paras. 21-27*. **Exhibit C-34.** Investment Contract of 6 June 2003, Clause 13.

New Communal Facilities (*i.e.* above USD 15 million),[9] which was estimated at that time in the amount not to exceed USD 1-1.5 million;

(ii) The Claimant met and exceeded this requirement by investing into the New Communal Facilities approximately USD 4.5 million in addition to the originally required USD 15 million;[10]

(iii) Although not obligated to do so under the Investment Contract, the Claimant was also prepared to invest an additional USD 3 million to complete the New Communal Facilities.[11] Without valid explanation, the Respondent rejected this proposal because at that time the Respondent already had decided to expropriate the Claimant's rights and investments.

[9] *See paras. 35-41*. **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clauses 7.10, 8.19, 17.

[10] *See paras. 42-49*. **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16. **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file). **Exhibit C-216.** Loan agreements and confirmations of loan transfers from Bradley Enterprises Ltd. to Manolium-Engineering. **Exhibit C-217.** Loan agreements and confirmations of loan transfers from Lascker Ltd. to Manolium-Engineering. **Exhibit C-218.** Loan agreements and confirmations of loan transfers from Nomal Oil Ltd. to Manolium-Engineering**. Exhibit C-219.** Loan agreements and confirmations of loan transfers from Manolium Trading Ltd. to Manolium-Engineering. **Exhibit C-220.** Loan agreements and confirmations of loan transfers from Foreign LLC Manolium Processing to Manolium-Engineering.

[11] **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014.

II. THE RESPONDENT WAS NOT ENTITLED TO DEPRIVE THE CLAIMANT OF ITS RIGHT TO IMPLEMENT THE INVESTMENT OBJECT

2.1. The Investment Contract Allowed the Forfeiture of the Claimant's Right to the Investment Object Only if the Claimant Failed to Finance Construction of the New Communal Facilities

21. When the Claimant won the Tender,[12] the key terms were:

(i) A potential investor must invest USD 15 million in the design, construction and reconstruction of the Communal Facilities[13] to be implemented in 2003-2005 and transferred to the Respondent's ownership when complete;[14]

(ii) In addition, a potential investor must provide certain financial or other assistance to the Respondent's enterprises that were in unsatisfactory financial standing.[15] This obligation was later changed to require a donation of USD 1 million to the National Library;[16]

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[12] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003. **Exhibit R-10.** Order of Economy Committee of Minsk City Executive Committee No. 30 of 27 April 2003.

[13] As stated in **CS-I**, initially the Claimant was to design, construct and reconstruct **the Communal Facilities** - the Depot, Motor Transport Base and Building under Reconstruction). However, because of the Respondent's failure to perform its obligations under the Investment Contract, on 11 July 2006, the Respondent's President approved the amendments to the list of Communal Facilities (**Exhibit C-64.** Resolution of the President of the Republic of Belarus of 11 July 2006) and, on 8 February 2007, the Parties executed the Amended Investment Contract by which they agreed **the New Communal Facilities**: the Depot, Road and Pull Station (**Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007). *See*, **CS-I**, **Claimant's Notice of Arbitration of 15 November 2017**, paras. 76-77, 109-122, 123-129.

[14] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003, clause 2.4.2.

[15] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003, clause 2.4.4.

[16] **Exhibit C-47.** Additional Agreement No. 1 to Investment Contract of 10 October 2003, Clause 1. **Exhibit C-48.** Additional Agreement No. 2 to Investment Contract of 22 October 2003, Clause 2.5. **Exhibit C-49.** Additional Agreement No. 3 to Investment Contract of 25 November 2003.

(iii) In exchange for satisfying these two requirements, a potential investor was to have received a right to implement the Investment Object in the center of Minsk, which promised a high return on investment.[17]

22. The Tender terms[18] and draft Investment Contract attached to the Tender documents of 24 April 2003[19] were exhaustive:

(i) They did not require that the investor invest more than USD 15 million in the New Communal Facilities. This remained true whether the Facilities cost USD 20 million or USD 30 million.[20] The investor was simply not obligated to inject unlimited funding; and

(ii) The investor was not required to pay any additional payments for the lease rights on the land plot where the Investment Object was to be located, as the Respondent is arguing now.[21]

23. The Claimant entered into the project in reliance on these two core promises by the Belarusian state — each of which the Respondent seeks to ignore now. The Claimant expected to receive in return the right to develop the Investment Object in exchange for investments of USD 16 million.[22]

[17] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003, p. 3-7.
[18] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003.
[19] **Exhibit R-9.** 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. As of the date of this Claimant's submission the exhibit is available in Russian only.
[20] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003, clauses 2.4.2, 2.4.4.
[21] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 678, footnote 1031 (p. 189). **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, paras. 99-103. **Exhibit SQ-8.** Letter of Land Service of Minsk City Executive Committee of 16 January 2015.
[22] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003, p. 3, clauses 2.4.2, 2.4.4. **Exhibit C-34.** Investment Contract of 6 June 2003, Clauses 2, 3, 6.13.

24. The Investment Contract, as revised by Addendum No. 4 of 8 February 2007, provided that the Claimant would lose its rights to the Investment Object **only** if the Claimant were to breach its financial obligations:[23]

> "*17. In case of a failure to perform financial obligations in accordance with Sub-Clauses 7.10 and 8.19, as well as Clauses 11 and 12 hereof through the fault of the Investor or FE Manolium-Engineering, the Investor and FE Manolium-Engineering shall be deprived of the right to implement the investment project*." [Claimant's emphasis]

25. The relevant clauses of the Investment Contract, as revised by Addendum No. 4 of 8 February 2007, read as follows:[24]

> "*7.10. In the event that the cost of designing and building the communal facilities listed in Sub-Clauses 2.1-2.3 hereof calculated in accordance with the legislation of the Republic of Belarus falls below the amount equivalent to fifteen (15) million US dollars at the exchange rate established by the National Bank of the Republic of Belarus as of the date of the relevant payments, the Investor shall secure remitting the difference to the budget of Minsk, and if the cost of designing and building such facilities exceeds the above amount, the Investor shall secure compensating all additional expenses.*
>
> *8. FE Manolium-Engineering shall:*
>
> *[…]*

[23] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 17.
[24] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Sub-Clauses 7.10, 8.19, Clauses 11-12.

8.19. in the event that the cost of designing and building the communal facilities calculated in accordance with the legislation of the Republic of Belarus falls below the amount equivalent to fifteen (15) million US dollars at the exchange rate established by the National Bank of the Republic of Belarus as of the date of the relevant payments, FE Manolium-Engineering undertakes, at the expenses of the Investor, to remit the difference to the budget of Minsk, and if the cost of designing and building such facilities exceeds the above amount, the Investor shall secure compensating all additional expenses.

[…]

11. The investments for the design and construction of the communal facilities listed in Sub-Clauses 2.1-2.3 hereof is the amount equivalent to fifteen (15) million US dollars at the exchange rate established by the National Bank of the Republic of Belarus as of the date of making the relevant payments.

The said amount of investment comprises all expenses in respect of the communal facilities, as well as the costs of purchasing the building at pr. Masherova, 3 (no other property shall be purchased) located on the land plot indicated in Clause 1 of this contract and all the expenses stipulated by laws of the Republic of Belarus to be incurred by the Investor in connection with obtaining the above land plot, including indemnification of losses to land users (holders, owners and tenants of land plots) caused by the forfeiture of land plots, demolition of structures in the zone of building the facilities.

12. The investment for building the public facilities listed in Clause 1 hereof is the amount equivalent to at least eighty-one point six hundred

and ninety-eight (81.698) million US dollars at the exchange rate established by the National Bank of the Republic of Belarus as of the date of making the relevant payments." [Claimant's emphasis]

26. Therefore, the question before this Tribunal is not whether there was delay in constructing the New Communal Facilities or whether the New Communal Facilities were completed because neither of these circumstances authorize termination. Rather, the only relevant question is whether the Claimant breached its obligation to invest USD 15 million in the New Communal Facilities, or, more "*if the cost of designing and building such facilities exceeds the above amount, the Investor shall secure compensating all additional expenses*."[25]

27. As it is demonstrated below,[26] the Claimant did not breach its obligation to provide this funding. Nevertheless, due to the Respondent's breach, the Claimant lost its right to implement and invest in the Investment Object.

2.1.1 Claimant's Obligation to Secure Financing to Cover Costs of the New Communal Facilities over USD 15 Million Was Not Unlimited

28. On 4 June 2003, the Claimant learned that it won the Tender.[27] On 6 June 2003, the Parties signed the Investment Contract.[28] No material development of the project began until 8 February 2007 because:

[25] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Sub-Clause 7.10.
[26] *See paras. 42-49.*
[27] **Exhibit C-31.** Protocol 2 on the results of the Tender of 30 May 2003. **Exhibit C-32.** Letter from Minsk City Executive Committee to the Claimant of 4 June 2003.
[28] **Exhibit C-34.** Investment Contract of 6 June 2003.

(i) The Respondent failed to provide the Claimant with the land plot for the construction of the Motor Transport Base because the Respondent's Ministry of Defense occupied the same land plot;[29] and

(ii) The Minsk City Executive Committee issued to Manolium-Engineering the permit to the land plot for the Depot only on 24 May 2007[30] and the construction permit for the Depot only on 15 October 2007.[31]

29. The Respondent does not dispute these facts.[32]

30. Thus, the Claimant could not even start construction for years after signing the Investment Contract, although at that time the Claimant had already invested approximately USD 3 million into the design of the New Communal Facilities and Investment Object.[33]

31. During this period of delay caused by the Respondent, the cost of construction in Belarus increased significantly. For example, according to international real-estate company Colliers, in the 2003 to 2007 period the cost of construction of office buildings in USD increased by 180%.[34]

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[29] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 119-122. **Exhibit C-34.** Investment Contract of 6 June 2003, Clause 2.2. **Exhibit C-48.** Additional Agreement No. 2 of 22 October 2003. **Exhibit C-56.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 3 December 2003. **Exhibit C-57.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 17 December 2003. **Exhibit C-58.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 4 February 2004. **Exhibit C-59.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 17 March 2004. **Exhibit C-60.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 7 April 2004. **Exhibit C-61.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 24 June 2004.

[30] **Exhibit C-68.** Decision of Minsk City Executive Committee of 24 May 2007.

[31] **Exhibit C-70.** Construction permit issued by Gosstroy for constructing the Depot of 15 October 2007.

[32] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 50-52, 111, 124.

[33] **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file).

[34] **Exhibit TT-69.** Colliers, Construction Costs and Sales Prices in Minsk, 2012 to 2018, p. 1.

32. It became clear that this dramatic increase in prices would have a serious impact on the construction costs of the New Communal Facilities. This would be magnified if there was further delay.

33. On 8 February 2007, changes were made to the Investment Contract to reflect that if the real construction costs of the New Communal Facilities were less than USD 15 million, the Claimant would pay the difference to the Respondent. However, the same amendments stated that if the costs were to end up higher, the Claimant would cover such additional costs at its own expense.[35]

34. This amendment significantly worsened the initially agreed upon terms because instead of investing a **maximum** of USD 15 million in the Communal Facilities,[36] the Claimant was now obligated to invest more than USD 15 million to complete the New Communal Facilities if costs continued to increase.[37]

35. The Respondent will claim that the Claimant voluntarily entered into this Addendum No. 4 to Investment Contract of 8 February 2007. This is not the case — the contract was signed under extreme duress brought about through the coercive powers of the Respondent.

36. As mentioned above,[38] the Claimant at that time had already invested roughly USD 3 million in this project — and the construction work had not even started.

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[35] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Sub-Clauses 7.10, 8.19.

[36] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003, clauses 2.4.2, 2.4.4. **Exhibit C-34.** Investment Contract of 6 June 2003, Clause 2.

[37] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Sub-Clauses 7.10, 8.19.

[38] *See para. 30*. **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file). **Exhibit C-216.** Loan agreements and confirmations of loan transfers from Bradley Enterprises Ltd. to Manolium-Engineering. **Exhibit C-217.** Loan agreements and confirmations of loan transfers from Lascker Ltd. to Manolium-Engineering. **Exhibit C-218.** Loan agreements and confirmations of loan transfers from Nomal Oil Ltd. to Manolium-Engineering**. Exhibit C-219.** Loan agreements and confirmations of loan transfers from Manolium Trading Ltd. to Manolium-Engineering. **Exhibit C-**

37. Moreover, as far back as 2006, the Respondent took the position that a contract provision requiring that the Claimant's investments be "*not less than USD 15 million*" must be included in Addendum to the Investment Contract,[39] and that the Claimant must either accept this extended obligation or the Respondent would terminate the Investment Contract.[40]

38. Thus, the Claimant had no choice but to accept these terms because otherwise the Claimant would lose the entire USD 3 million that it had already invested.

39. Indeed, in 2007, the Claimant had already had a similar experience with the Respondent on the "*Revolutionary Project*" in Minsk (see below).[41] The Claimant thus had no doubt that the Respondent would refuse to compensate it even a penny for what was already invested if the Claimant refused to sign the Addendum to the Investment Contract.

40. Thus, on 8 February 2007, the Claimant signed Addendum No. 4 to the Investment Contract. However, the Claimant signed it taking into account the following facts:

    (i) The Respondent reduced the initial scope of work;[42]

    (ii) The extended obligation was assumed taking into account this reduced scope of work existing at that time. At that time, it was estimated that in the worst case scenario, taking into account the planned term for

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220. Loan agreements and confirmations of loan transfers from Foreign LLC Manolium Processing to Manolium-Engineering.

[39] **Exhibit C-221.** Letter from Minsk City Executive Committee to Claimant of 5 January 2006 (with draft Addendum to the Investment Contract).

[40] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 9.

[41] *See paras. 138-169.*

[42] **Exhibit C-64.** Resolution of the President of the Republic of Belarus of 11 July 2006. **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 2.

construction (27 months)[43] additional financing needed to build the New Communal Facilities would not exceed USD 1-1,5 million (in addition to the USD 15 million provided in the Investment Contract). Thus, the Claimant accepted this risk based on the assumption conveyed to it by the Respondent that the total amount of investments in the New Communal Facilities would not exceed USD 16-16,5 million;[44] and

(iii) This extended financial obligation would not be applicable to any additional work on the New Communal Facilities (which the Respondent would impose on the Claimant at a later stage) or to any increase of construction costs caused by factors for which the Claimant was not responsible.[45]

41. The Claimant's witness, Mr. Dolgov, commented:[46]

> "*10. We were against the provision in question, because it was at variance with the terms and conditions of the 2003 tender. I raised that point with the Chairman of the Minsk City Executive Committee, Mikhail Pavlov. He assured me, however, that the increase might tentatively be no more than 10% of the initial cost*.

[43] The Claimant's designer indicated in the architectural design of the Depot the term of 25 months for the construction, on 15 September 2005, the Respondent's state expert review (Republican Unitary Enterprise Belgosekspertiza) approved the same architectural design already with 27 months indicated as the term for construction of the Depot. **Exhibit C-222.** Architectural design, *Organization of construction of the Trolleybus Depot*, Volume 2, Unitary Enterprise *Avtorempromproekt* at the Ministry of Industry of the Republic of Belarus, 2005. **Exhibit C-223.** Report of Republican Unitary Enterprise *Belgosekspertiza* [Belarusian state expert review] *of the Ministry of Construction and Architecture of the Republic of Belarus* of 17 September 2005.

[44] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 10-13. **Exhibit C-221.** Letter from Minsk City Executive Committee to Claimant of 5 January 2006 (with draft Addendum to the Investment Contract).

[45] *See paras. 50-122*.

[46] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 10, 17.

[…]

17. But the Belarusian side subsequently started interpreting the new provision of the Investment Contract in a manner suggesting that Manolium-Processing had to make as much investment in the project as they [the Belarusian authorities] wanted and that even if they desired to have something along the lines of the Taj Mahal, Manolium- Processing was still to pay for everything."

2.1.2 Claimant Over Performed Its Financial Obligations for the New Communal Facilities

42. The Respondent makes extensive attempts to demonstrate that the Claimant did not perform its financial obligations under the Investment Contract. These must fail.

43. The Respondent refers to Mr. Dolgov's emotional statements that he was not going to finance the project,[47] or that some sub-contractors suspended performance of works because of a lack of funding by the Claimant.[48]

44. These statements mean nothing. Any alleged breach by the Claimant of its financial obligations must be measured against what was actually **done** by the Claimant, and **not** what was **said** by Mr. Dolgov. The Claimant's actions speak

[47] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 216. **Exhibit R-85.** Letter from Manolium-Engineering to Minsk City Executive Committee of 30 April 2012. **Exhibit R-86.** Letter from Manolium-Engineering to the President of the Republic of Belarus of 7 May 2012. **Exhibit C-126.** Letter from Minsk City Executive Committee to the Claimant of 18 June 2012.

[48] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 81, 86, 208. **Exhibit R-43.** Minutes of the meeting prepared on 19 December 2008 which was attended by Minsk City Executive Committee, Minsktrans and Manolium-Engineering on 10 December 2008. **Exhibit R-46.** Letter from CUP UDMSiB to Economy Committee of Minsk City Executive Committee of 11 March 2009. **Exhibit R-47.** Letter from Manolium-Engineering to Minsk City Executive Committee of 27 March 2009. **Exhibit R-49.** Minutes of the Minsk City Executive Committee meeting of 10 June 2009.

louder than words—and demonstrate that the Claimant complied with all of its obligations.

45. As mentioned above,[49] the Claimant had an obligation to finance the construction of the New Communal Facilities in the amount of only USD 16-16.5 million.

46. The Claimant significantly exceeded this obligation by investing USD 19,434,679 into the New Communal Facilities (plus USD 1 million for the Library Payment).[50]

47. These investments were not disputed until this arbitration. Indeed, on 22 February 2016, the Respondent's Ministry of Finance confirmed this amount of the Claimant's investments into the New Communal Facilities.[51]

48. To avoid any doubt regarding the real amount of investments, the Claimant provides below a summary of the investments made in Belarus by the Claimant's group of companies.

[49] *See paras. 28-41*.
[50] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.
[51] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016.

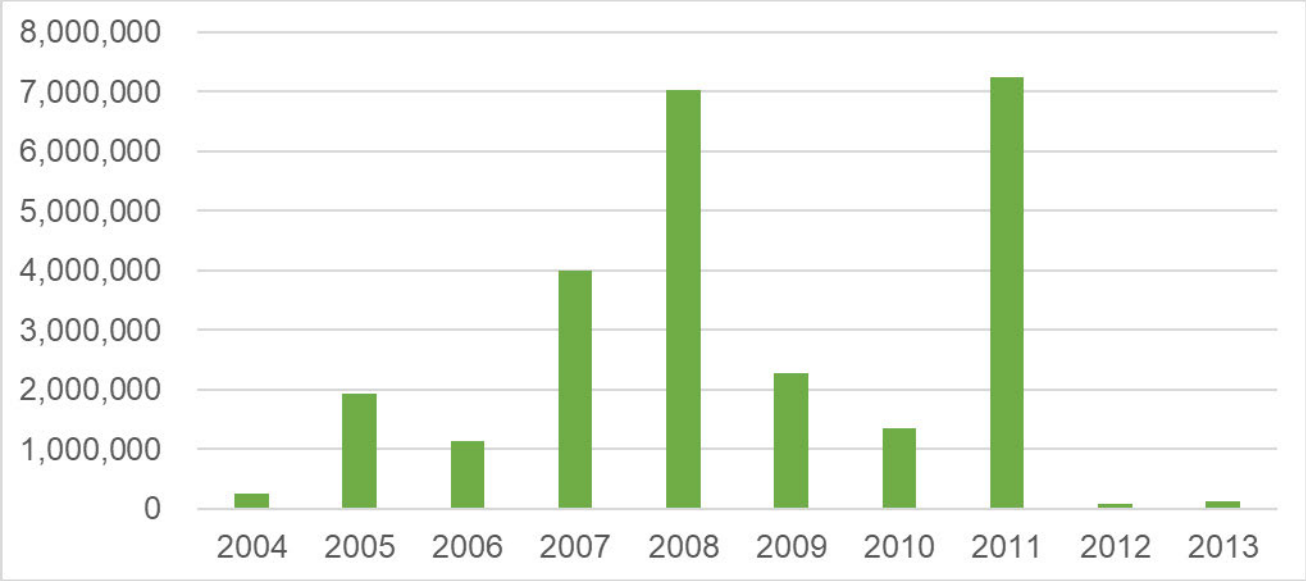
Table 1. List of Loans Effected by the Claimant-Affiliated Companies to the Account of Manolium-Engineering in 2004-2013[52]

Payment Date	Payment Amount	Agreement No.
Bradley Enterprises Ltd (in USD)		
1/7/09	1,500,000	12-01 of 30.06.09
13/8/09	299,990	16-01 of 31.07.09
16/10/09	323,990	17-01 of 15.10.09
20/11/09	149,990	18-01 of 19.11.09
20/4/10	355,990	19-01 of 19.04.10
15/12/10	499,990	19-02 of 08.12.10
16/12/10	499,990	19-02 of 08.12.10
9/2/11	499,990	19-02 of 08.12.10
6/4/11	999,990	19-02 of 08.12.10
20/4/11	1,499,990	19-02 of 08.12.10
28/7/11	1,499,990	19-03 of 26.07.11
4/11/11	499,990	19-04 of 28.10.11
Total	**8,629,890**	
Lascker LTD (in USD)		
9/6/08	1,400,000	10-11 of 04.02.08
Total	**1,400,000**	
NOMAL OIL LIMITED (in USD)		
13/4/11	264,500	134/11 of 12.04.11
15/4/11	400,000	134/11 of 12.04.11
20/4/11	480,000	134/11 of 12.04.11
25/4/11	354,990	134/11 of 12.04.11
28/7/11	753,000	134/11 of 12.04.11
Total	**2,252,490**	
Manolium Trading LTD (in USD)		
24/3/05	300,000	247/03 of 24.07.03
22/4/05	445,000	247/03 of 24.07.03
16/8/04	100,000	247/03 of 24.07.03
29/12/04	150,000	247/03 of 24.07.03
18/10/05	650,000	710/05 of 07.10.05

[52] **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file). **Exhibit C-216.** Loan agreements and confirmations of loan transfers from Bradley Enterprises Ltd. to Manolium-Engineering. **Exhibit C-217.** Loan agreements and confirmations of loan transfers from Lascker Ltd. to Manolium-Engineering. **Exhibit C-218.** Loan agreements and confirmations of loan transfers from Nomal Oil Ltd. to Manolium-Engineering. **Exhibit C-219.** Loan agreements and confirmations of loan transfers from Manolium Trading Ltd. to Manolium-Engineering. **Exhibit C-220.** Loan agreements and confirmations of loan transfers from Foreign LLC Manolium Processing to Manolium-Engineering.

30/12/05	400,000		212/05 of 21.12.05
6/8/07	990,000		11-21 of 01.08.07
4/9/07	350,000		11-20 of 31.07.07
4/10/07	990,000		11-23 of 06.09.07
16/10/07	320,000		11-24 of 20.09.07
14/11/07	345,000		10-02 of 08.10.07
21/12/07	990,000		10-01 of 02.10.07
31/1/08	440,000		10-07 of 25.11.07
7/3/08	990,000		10-06 of 05.11.07
3/4/08	1,400,000		10-08 of 05.12.07
3/4/08	1,200,000		10-09 of 08.01.08
15/7/08	1,399,975		10-12 of 14.07.08
17/12/08	194,990		10-13 of 28.08.08
Total	**11,654,965**		
Manolium Processing Foreign LLC (in USD)			
27/12/06	10,800		212/06 of 20.12.06
28/12/06	525,000		212/06 of 20.12.06
29/12/06	454,260		212/06 of 20.12.06
29/12/06	150,000		212/06 of 20.12.06
5/1/07	8,000		212/06 of 20.12.06
Total	**1,148,060**		
Manolium Processing Foreign LLC (in BEL RUB)			
	BEL RUB	**USD**	
6/6/05	300,000,000	139,535	306/05 of 03.06.05
25/4/12	620,000,000	77,500	254/12 of 25.04.12
10/8/12	40,000,000	4,796	254/12 of 25.04.12
31/8/12	70,000,000	8,323	254/12 of 25.04.12
13/9/12	11,000,000	1,308	254/12 of 25.04.12
21/9/12	10,000,000	1,186	254/12 of 25.04.12
18/3/13	50,000,000	5,814	254/12 of 25.04.12
19/4/13	920,000,000	106,236	254/12 of 25.04.12
12/9/13	62,000,000	6,851	129/13 of 12.09.13
Total	**2,083,000,000**	**351,549**	
Total loans to Manolium-Engineering	**$ 25,436,954.03**		

Chart 1. Total Loans Provided to Manolium-Engineering by Claimant-Affiliated Companies in 2004-2013 (USD)[53]



49. Three important conclusions follow from this data:

(i) The total amount of investments made by the Claimant into Belarus **is more than USD 25 million**. The evaluation made by the Respondent's Ministry of Finance of the New Communal Facilities[54] was therefore a conservative one, primarily because it did not include all of the Claimant's indirect costs;

(ii) The Claimant made significant investments at the time when, according to the Respondent,[55] the Claimant had problems with financing (*i.e.* in 2008-2009); and

[53] **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file).
[54] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.
[55] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 79-83, 85-98.

(iii) Most importantly, the major part of the financing came in 2011, when the Respondent did not agree to extend the rights to use the land plots for the New Communal Facilities to Manolium-Engineering.

2.2. The Costs of the New Communal Facilities Increased because of the Respondent's Actions

2.2.1 Respondent Is Responsible for Construction Delays and Resulting Costs

50. The agreed term for construction of the New Communal Facilities was only 27 months, *i.e.*, slightly over 2 years.[56] The Claimant was to commission the Depot and transfer it to the Respondent no later than in 2006.[57]

51. However, nothing except design of the Depot was done from 2003 to 2007. This was entirely the result of the Respondent's actions (or failures to act).

52. Therefore, after 8 February 2007, the Parties twice agreed on an extension of the deadlines under the Investment Contract:

(i) **First**, from December 2008 to 3 July 2009;[58] and

(ii) **Second**, from 3 July 2009 to 1 July 2011.[59]

[56] **Exhibit C-222.** Architectural design, *Organization of construction of the Trolleybus Depot*, Volume 2, Unitary Enterprise *Avtorempromproekt* at the Ministry of Industry of the Republic of Belarus, 2005. **Exhibit C-223.** Report of Republican Unitary Enterprise *Belgosekspertiza* [Belarusian state expert review] *of the Ministry of Construction and Architecture of the Republic of Belarus* of 17 September 2005.
[57] **Exhibit C-34.** Investment Contract of 6 June 2003, Clause 5.1.
[58] **Exhibit C-72**. Additional Agreement No. 5 to Investment Contract of 16 December 2008, Sub-Clause6.1.
[59] **Exhibit C-76**. Additional Agreement No. 6 to Investment Contract of 20 April 2011, Sub-Clause 6.1.

53. The Respondent misleads the Arbitral Tribunal when it claims that the extensions of deadlines for construction of the New Communal Facilities were caused by the Claimant's fault:[60]

> "*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. 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*."[61] [Claimant's emphasis]

54. In fact, the extensions were caused by the Respondent's own actions or inaction, as discussed more fully below.[62]

55. **First**, until 5 November 2003, the Parties were awaiting approval from the President of Belarus to implement the project under the Investment Contract.[63] It was not until 19 November 2003 that the Minsk City Executive Committee informed the Claimant that the President permitted the Minsk City Executive Committee to implement the project under the Investment Contract.[64] Due to this delay, Minsktrans and the Claimant did not execute the contract for conditions of design and construction of the Communal Facilities until 9 December 2003.[65]

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[60] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 76-98, 560-564.
[61] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 562.
[62] *See paras. 50-122*.
[63] **Exhibit C-44.** Letter from the State Control Committee of the Republic of Belarus to the President of the Republic of Belarus of 31 July 2003. **Exhibit C-45.** Resolution of the President of the Republic of Belarus to implementing the project under the Investment Contract of 5 November 2003. **Exhibit C-46.** Letter from the Council of Ministers of the Republic of Belarus to the President of the Republic of Belarus of 30 October 2003.
[64] **Exhibit C-224.** Letter from Minsk City Executive Committee to Claimant of 19 November 2003.
[65] **Exhibit C-225.** Contract for conditions of design and construction of Communal Facilities between Minsktrans and Claimant of 9 December 2003.

The Investment Contract stipulated that such contract should have been executed on 14 July 2003.[66] Therefore, 6 months were lost because of the Respondent's own inactions in granting approvals to begin.

56. **Second**, the Minsk City Executive Committee failed to receive a right to the land plot for the Communal Facility *Motor Transport Base* and transfer it to the Claimant because the Respondent's Ministry of Defense occupied the same land plot.[67] The Claimant was to commission the Motor Transport Base from the date of the decision of the Minsk City Executive Committee on providing the land plot and permitting construction.[68] The responsibility to obtain this plot fell solely on the Respondent — and the Respondent admitted it.[69] This Communal Facility was not removed from the Investment Contract until 8 February 2007.[70]

57. **Third**, the Respondent failed to provide a land plot or construction permit for Manolium-Engineering for the Depot until 8 February 2007.[71]

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[66] **Exhibit C-34.** Investment Contract of 6 June 2003, Clauses 6.14, 8.2.

[67] **Exhibit C-56.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 3 December 2003. **Exhibit C-57.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 17 December 2003. **Exhibit C-40.** Decision of Minsk City Executive Committee of 2 December 2004. **Exhibit C-58.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 4 February 2004. **Exhibit C-59.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 17 March 2004. **Exhibit C-60.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 7 April 2004. **Exhibit C-61.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 24 June 2004. **Exhibit C-55.** Letter from the Committee for Economy to Minsk City Executive Committee of 28 July 2004.

[68] **Exhibit C-34.** Investment Contract of 6 June 2003, Clause 5.2.

[69] **Exhibit C-221.** Letter from Minsk City Executive Committee to Claimant of 5 January 2006 (with draft Addendum to the Investment Contract).

[70] **Exhibit C-35.** Letter from Minsk City Executive Committee to the President of the Republic of Belarus of 26 May 2006. **Exhibit C-64.** Resolution of the President of the Republic of Belarus of 11 July 2006. **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 2.

[71] **Exhibit C-53.** Decision of Minsk City Executive Committee of 15 July 2004.

58. In violation of the Investment Contract, the Minsk City Executive Committee provided the land plot for the Depot to Minsktrans and not to the Claimant or Manolium-Engineering after the architecture (construction) design of the Depot was approved.[72]

59. Eventually, it took until 24 May 2007 for Manolium-Engineering to receive the right to use the land plot for the construction of the Depot.[73] It took even longer, until 15 October 2007, to receive the construction permit.[74]

60. **Fourth**, the Claimant and Manolium-Engineering faced numerous problems with the Respondent's state authorities that were constantly changing their decision. Consequently, these changes in approach regarding the inclusion of Manolium-Engineering in the Investment Contract resulted in at least 2.5 years of negotiations regarding an Addendum to the Investment Contract.[75]

61. This happened notwithstanding the fact that (i) on 28 July 2004, the Respondent had already admitted that there was no problem with Manolium-Engineering implementing the project under the Investment Contract[76] and, (ii) on

[72] **Exhibit C-34.** Investment Contract of 6 June 2003, Clause 5.2.
[73] **Exhibit C-68.** Decision of Minsk City Executive Committee of 24 May 2007.
[74] **Exhibit C-70.** Construction permit issued by Gosstroy for constructing the Depot of 15 October 2007.
[75] **Exhibit C-55.** Letter from the Committee for Economy to Minsk City Executive Committee of 28 July 2004. **Exhibit C-40.** Decision of Minsk City Executive Committee of 2 December 2004. **Exhibit C-226.** Minsktrans letter to Minsk City Executive Committee of 13 January 2005. **Exhibit C-52.** Letter from Manolium-Engineering to Minsk City Executive Committee of 19 May 2005. **Exhibit R-24.** Letter from the Legal Department of Minsk City Executive Committee to Minsk City Executive Committee of 3 June 2005. **Exhibit R-25.** Letter from Minsk City Executive Committee to the State Control Committee of the Republic of Belarus of 14 June 2005. **Exhibit C-63.** Letter from the Claimant to the Assistant to President of the Republic of Belarus of 24 March 2006. **Exhibit C-35.** Letter from Minsk City Executive Committee to the President of the Republic of Belarus of 26 May 2006. **Exhibit C-64.** Resolution of the President of the Republic of Belarus of 11 July 2006. **Exhibit C-51.** Order of Minsk City Executive Committee of 29 September 2006. **Exhibit C-65.** Letter from the Committee for Economy of 17 January 2007.
[76] **Exhibit C-55.** Letter from the Committee for Economy to Minsk City Executive Committee of 28 July 2004.

2 December 2004, the Minsk City Executive Committee Chairman instructed his Deputy to execute the Addendum to the Investment Contract that would include Manolium-Engineering as a party.[77]

62. Further, the Respondent's statement that the Claimant decided without any valid reason[78] to make an investment via its Belarusian subsidiary is simply non-sense. Of course, if the Claimant did not face a lot of difficulties in operating in Belarus (such as currency restrictions or uncertainties in VAT applications), the Claimant would never have established Manolium-Engineering in Belarus.

63. The problems continued also after 2007, when the Addendum to the Investment Contract was finally signed. Years more were therefore lost as a result of the Respondent's bureaucratic delays and unjustified changes in position.

(i) *The Delay in Providing the Land Plot for the Depot Is Attributable to the Respondent*

64. On 27 March 2007, the Minsk Land Planning and Geodetic Service of the Minsk City Executive Committee (the "**Minsk Land Planning Service**") received an application for allocation of a land plot to Manolium-Engineering for the Depot.[79]

65. Under Belarusian law, this decision was to be issued within 10 days of receipt of this application (*i.e.*, by 6 April 2007).[80] However, on 26 April 2007, the Minsk City Executive Committee refused to grant the right to use the land plot to

[77]. **Exhibit C-40.** Decision of Minsk City Executive Committee of 2 December 2004.
[78] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 47-48.
[79] **Exhibit R-28**. Cover page of the land plot case file for the Trolleybus Depot.
[80] **Exhibit CL-78.** Decree of the President of the Republic of Belarus of 28 January 2006 No. 58 (as amended on 19 March 2007), *On Some Issues of Seizure and Provision of Land Plots*, Chapter 4, Clause 28.

Manolium-Engineering, explaining that the land plot should be granted not for the right of temporary use, but rather *for rent*.[81]

66. Nevertheless, on 24 May 2007, the Minsk City Executive Committee issued the decision on provision of the land plot for the Depot under the right of *temporary use*.[82]

67. This action by the Respondent caused a delay of more than one month in construction of the Depot.

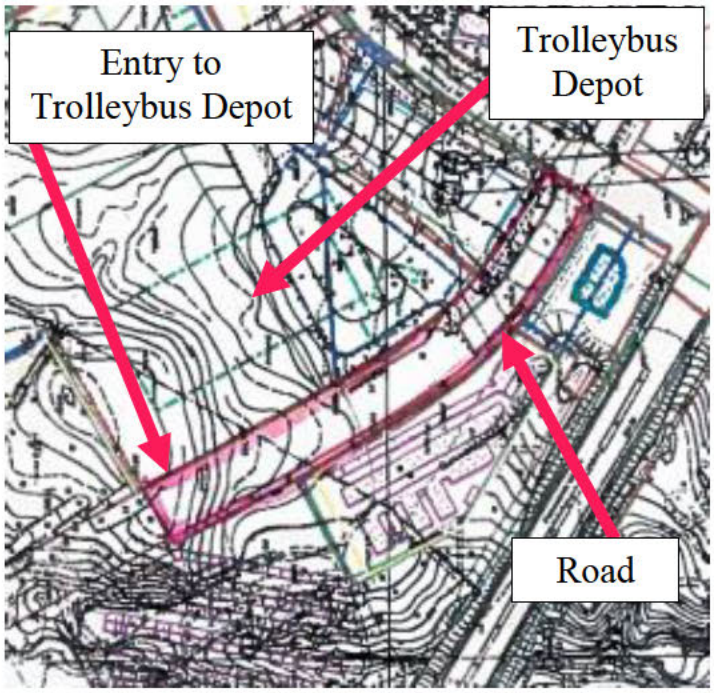
(ii) *Delay in Constructing the Road due to the Unplanned Deforestation*

68. According to the Investment Contract (as revised on 8 February 2007), Manolium-Engineering was obligated to construct the road on Gorodetskaya Street only up to the entry to the Depot.[83]

69. This is confirmed by the Architectural Plan issued by the Architecture and City Planning Committee of the Minsk City Executive Committee (the "**Minsk Architecture and City Planning Committee**") on 14 June 2007 (marked in red in the image below):[84]

[81] **Exhibit C-227.** Letter from Manolium-Engineering to Minsk City Executive Committee of 4 May 2007**. Exhibit C-228.** Letter from Minsk Land Management and Geodetic Service to Manolium-Engineering of 7 May 2007**.**
[82] **Exhibit C-68**. Decision of Minsk City Executive Committee of 24 May 2007.
[83] **Exhibit C-66**. Amended Investment Contract, Clause 2.3.
[84] **Exhibit C-229**. Architectural Planning task for the Road of 14 June 2007, page 2.

Image 1. Architectural Plan of the Road issued by the Minsk Architecture and City Planning Committee on 14 June 2007[85]



70. However, the designers later decided to extend the Road further (marked in yellow):[86]

[85] **Exhibit C-229**. Architectural Planning task for the Road of 14 June 2007, page 2.
[86] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 43-46. **Exhibit C-230.** Letter from Manolium-Engineering to Minsk City Executive Committee of 15 December 2009.

Image 2. General View of the Land Plots for the New Communal Facilities before Deforestation as of 3 April 2004[87]

71. As Mr. Dolgov explained, the reason for this change in plans was that some high ranking KGB officers had their personal garages in the nearest garage block, which required the use of inconvenient access roads. Through this project, these KGB officers decided to improve the accessibility to their personal garage facilities by extending the newly built road at the expense of Manolium-Engineering.[88]

72. This increased the costs for construction. But it was not the main problem.

73. The main problem was that the land plots where the Road was to be extended were occupied by a park. Turning part of the park into industrial use in the city of Minsk (as in any other city in the world) required additional permissions. These permissions proved difficult to obtain.

[87] **Exhibit C-231.** General view of land plots for the New Communal Facilities before deforestation as of 3 April 2004 (Google Earth shot).
[88] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 45.

74. On 4 February 2008, the Minsk Architecture and City Planning Committee approved the project documentation for the Road.[89]

75. On 13 March 2008, Manolium-Engineering asked the Minsk District Executive Committee to allow the deforestation of trees necessary for further construction of the Road.[90] On 9 April 2008, the Minsk District Executive Committee issued permission for deforestation.[91]

76. On 11 April 2008, Manolium-Engineering approached the state owned company *Minsk Forest Household* to request issuance of the required forest felling license.[92] On 2 May 2008, the forest felling license was granted.[93]

77. On 29 May 2008, the State Agency responsible for construction permits (Gosstroy) issued the construction permit for the Road.[94]

78. At the same time, the work could not begin until the municipal company responsible for maintaining nature in the city of Minsk actually removed the trees — the Claimant could not do so itself. This was not completed until July 2008 — five months after the approval process for the plans for the Road began.[95] The removed trees are marked in yellow lines on the image below:

[89] **Exhibit C-232**. Opinion of Minsk Architecture and City Planning Committee of Minsk City Executive Committee of 4 February 2008.
[90] **Exhibit C-233**. Letter from Manolium-Engineering to Minsk District Executive Committee of 13 March 2008.
[91] **Exhibit C-234**. Decision of Minsk District Executive Committee of 9 April 2008.
[92] **Exhibit C-235**. Letter from Manolium-Engineering to Minsk Forest Household of 11 April 2008.
[93] **Exhibit C-236**. Forest felling license of 2 May 2008.
[94] **Exhibit C-87**. Construction permit issued by Gosstroy of 29 May 2008.
[95] **Exhibit C-154**. Registration and Cadastre Agency Report of 16 June 2015, pages 192-193.

Image 3. General View of the Land Plots for the New Communal Facilities after Deforestation as of 13 July 2008[96]

79. It was impractical and economically inefficient to mobilize specialized equipment to construct only one part of the Road, and then do the same again for the other part after this deforestation was finally complete. Therefore, Manolium-Engineering could not start construction work on the Road until July 2008 when the series of delays created by the Respondent and its associated entities were finally resolved and the trees were removed.

80. This caused a delay in construction of the Road for at least 5 months. The sole responsibility for this delay rests with the Respondent.

[96] **Exhibit C-237.** General view of land plots for the New Communal Facilities after deforestation as of 13 July 2008 (Google Earth shot).

(iii) *Continuous Amendments to the Project Documentation of the New Communal Facilities Caused Additional Delays*

81. The construction of the New Communal Facilities also was delayed due to numerous mistakes in the project documents caused by the Respondent.

82. When announcing the tender and approving the project documentation for the Depot, the Minsk City Executive Committee based the design on the old Soviet project for trolleybus depots, which was used everywhere in the Soviet Union.

83. However, this Soviet project documentation was prepared long ago, and some of the materials it required were no longer available. Nevertheless, these materials may not be substituted without approval of the project designer (*i.e.*, the state companies under Respondent's control). This approval process, which would have been avoided had the Respondent developed a proper project documentation, caused significant delays.

84. In addition to that, Minsktrans' appetite was huge and hardly justified. Mr. Dolgov commented:[97]

> "*Initially, Minsktrans wanted the Trolleybus Depot to comprise, among others, a conference hall for 300 seats, a forging and hardening shop, a steam bath, a psychological release room, and a health unit on 100 square meters. It later withdrew those requirements, but their initial inclusion is enough to see the appetites of Minsktrans at the time.*"

85. Examples of the changes in the design documentation that the Claimant requested include:

[97] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 23. **Exhibit C-238.** Technical specification of Minsktrans for design and construction of the Trolleybus Depot of 24 November 2003.

(i) On 4 September 2007, Manolium-Engineering requested that the designer approve a change of the specific steel because the type specified in the drawings was no longer produced in Belarus, Ukraine or Russia.[98]

(ii) On 14 September 2007, Manolium-Engineering requested that the designer approve a change to correct a mistake with the location of certain cables in the drawings.[99]

(iii) On 13 July 2009, Manolium-Engineering asked the designer to amend the Road project documentation because it was not compatible with the Depot project documentation.[100]

(iv) On 17 May 2010, Manolium-Engineering asked the designer to make changes to the design regarding the foundation and columns received from one of the contractors.[101]

(v) On 1 March 2011, one of the suppliers requested a change to the project documentation because the radiators required by the project documentation were no longer manufactured.[102]

86. These are just a few of many examples. The Claimant was repeatedly forced to request changes to the project drawings due to the outdated or mistaken design.[103]

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[98] **Exhibit C-239**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 4 September 2007.

[99] **Exhibit C-240**. Letter from Manolium-Engineering to Unitary Enterprise MinskIngProject of 24 September 2008.

[100] **Exhibit C-241**. Letter from Manolium-Engineering to Unitary Enterprise MinskIngProject of 13 July 2009.

[101] **Exhibit C-242**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 17 May 2010.

[102] **Exhibit C-243**. Letter from CJSC Trest Bel PSP-stroy to Manolium-Engineering of 1 March 2011.

[103] **Exhibit C-244**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 3 August 2007. **Exhibit C-245**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 15 April 2008. **Exhibit C-246**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 12 June 2008. **Exhibit C-247**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 13 June 2008. **Exhibit C-248**. Letter from Manolium-

Each of these changes caused additional delays and costs — and each could have been avoided had the Respondent created accurate project documentation.[104]

(iv) The Delay in Construction of the Depot due to Discovered Water Pipes

87. In September 2007, during the preliminary work on the Depot, Manolium-Engineering discovered water pipes from the nearby fire station, which were not reflected in the project documentation and which were required to be removed from the site before construction could continue.[105]

88. On 13 September 2007, Manolium-Engineering asked the Minsk City Executive Committee to remove these pipes.[106] However, the Minsk City Executive Committee ignored this request until March 2008, when Manolium-Engineering again asked the Minsk City Executive Committee to resolve the problem.[107]

89. Eventually, this work began with a contractor hired by the fire station. But this contractor damaged the Depot fence and electric networks while removing the water pipes.[108]

90. This caused another six months of delay in construction of the Depot.

Engineering to Unitary Enterprise Autorempromproject of 21 August 2008. **Exhibit C-249**. Letter of Manolium-Engineering to Unitary Enterprise Autorempromproject of 5 May 2009. **Exhibit C-250**. Letter of Manolium-Engineering to Unitary Enterprise Autorempromproject of 8 June 2010. **Exhibit C-251**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 26 August 2010.

[104] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 21-23, 31-36.

[105] **Exhibit C-252**. Letter from Manolium-Engineering to Minsk City Executive Committee of 5 March 2008.

[106] **Exhibit C-253**. Letter from Manolium-Engineering to Minsk City Executive Committee of 13 September 2007.

[107] **Exhibit C-252**. Letter from Manolium-Engineering to Minsk City Executive Committee of 5 March 2008.

[108] **Exhibit C-254**. Letter from Manolium-Engineering to OJSC Stroytrest of 28 March 2008.

(v) The Delays in Construction of the New Communal Facilities due to Re-Allocation of Contractors and Materials Were Caused by the Respondent

91. In May 2009, it was announced that the city of Minsk would host the 2014 ice hockey World Championship. This was an important event for Belarus, especially when taking into account that the President of the Republic of Belarus is a big fan of ice hockey — and even plays occasionally with professionals.[109]

92. The problem, however, was that Belarus had never hosted similar events and therefore did not have the necessary stadiums, hotels, and other infrastructure to accommodate such an event.

93. Unsurprisingly, the President of the Republic of Belarus was determined to make this event a success. He decreed that all construction resources in Belarus must prioritize work related to construction of the facilities for this tournament above all other work. Other projects were ignored, notwithstanding the requirements of their contracts.

94. This, unfortunately, had a detrimental impact on the Claimant's project under the Investment Contract. Manolium-Engineering repeatedly lost its contractors through unauthorized removals to other projects in Minsk.[110] This, of course, caused substantial delays.

[109] **Exhibit C-255**. Official website of the Republic of Belarus, Press-release Belarus *President's Team Outplays Hockey Legends of the USSR in Friendly*, 20 May 2014. // Available at: https://www.belarus.by/en/press-center/press-release/belarus-presidents-team-outplays-hockey-legends-of-the-ussr-in-friendly_i_0000011932.html.

[110] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 52-57.

95. The Claimant experienced similar problems with the supply of materials, as those materials were diverted by their suppliers to other projects like the construction of sports facilities.[111] This also caused further delays.

96. Manolium-Engineering regularly reported these events. For example, on 11 September 2008, Manolium-Engineering reported to the Minsk City Executive Committee that the contractors for the New Communal Facilities were regularly transferred to the construction of the stadium "*Minsk-Arena*" and suppliers regularly delayed in their deliveries to Manolium-Engineering due to their need to prioritize supplies to for other projects in Minsk.[112]

97. On 6 September 2010, Manolium-Engineering again reported to the Minsk City Executive Committee that four contractors were transferred from the Road construction to other projects in Minsk from April to October 2010.[113] All four contractors were state companies under the control of the Minsk City Executive Committee.

98. Then, from August to October 2011, another state-controlled contractor delayed supplying columns necessary for power wire networks because those supplies were required for work on sport facilities. This required Manolium-Engineering to make three separate requests to speed up the delivery to the Depot.[114]

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[111] **Exhibit C-256.** Letter from Manolium-Engineering to Minsk City Executive Committee of 6 September 2010. **Exhibit C-257.** Letter from Manolium-Engineering to Gosstroy of 18 July 2011.
[112] **Exhibit C-71**. Letter from Manolium-Engineering to Minsk City Executive Committee of 11 September 2008.
[113] **Exhibit C-256.** Letter from Manolium-Engineering to Minsk City Executive Committee of 6 September 2010.
[114] **Exhibit C-258**. Letter from Manolium-Engineering to Minsk City Executive Committee of 24 August 2011. **Exhibit C-259**. Letter from Manolium-Engineering to Minsk City Executive Committee of 5 September 2011. **Exhibit C-260**. Letter from Minsktrans to contractor of 6 October 2011.

(vi) Gosstroy Unreasonably Reduced the Construction Period in the Construction Permits

99. Belarusian law, like the laws of many other jurisdictions, prohibits construction work without a construction permit issued by the state construction supervisory body.[115] In the Republic of Belarus, this authority is known as Gosstroy.

100. Gosstroy repeatedly and unreasonably issued construction permits for shorter periods than requested by Manolium-Engineering. As a result, Manolium-Engineering was forced to continuously and unnecessarily apply to Gosstroy for new permits that would not have been necessary had Gosstroy granted the permits for the time period originally requested by Manolium-Engineering..

101. Examples of the delays caused by this improper approval process are provided below.

a) Construction Permits for the Depot

Gosstroy Issued a Permit Until 1 September 2008 Instead of 1 August 2009

102. On 24 May 2007, the Minsk City Executive Committee authorized Manolium-Engineering to perform construction on the Depot until 1 August 2009.[116]

103. In December 2008, the Parties confirmed the extension of the construction period for the New Communal Facilities until 3 July 2009 in the Investment Contract.[117]

[115] **Exhibit CL-79.** Resolution of the State Committee for Standardization of the Republic of Belarus of 28 February 2008 No. 11, *Instruction on the Procedure for Issuing Permits by State Construction Supervision Authorities for Construction and Installation Works*, Clause 4.
[116] **Exhibit C-68**. Decision of Minsk City Executive Committee of 24 May 2007.
[117] **Exhibit C-72**. Additional Agreement No. 5 to Investment Contract of 16 December 2008.

104. On 30 January 2008, Manolium-Engineering asked Gosstroy to extend the valid construction period for the 25-month duration of the construction period stated in the project documentation, *i.e.* before 1 August 2009.[118]

105. However, on 7 February 2008, contrary to the Minsk City Executive Committee's prior authorization and contrary to the request from Manolium Engineering, Gosstroy issued a permit that was valid only until 1 September 2008.[119] Without any explanation, Gosstroy thus reduced the construction period for 1 year from the requested and contractually authorized period.

Gosstroy Issued a Permit Until 31 August 2010 Instead of 31 December 2010

106. On 3 September 2009, the Minsk City Executive Committee authorized Manolium-Engineering to perform construction of the Depot until 1 August 2010.[120]

107. On 24 December 2009, Manolium-Engineering therefore asked Gosstroy to extend the construction permit until 31 December 2010.[121] This request was not granted.

108. On 20 April 2010, Manolium-Engineering requested that Gosstroy add new contractors to the permit and again asked Gosstroy to extend the period of the construction permit until 31 December 2010.[122]

[118] **Exhibit C-261**. Letter from Manolium-Engineering to Gosstroy of 30 January 2008.
[119] **Exhibit C-262**. Construction permit issued by Gosstroy for constructing the Depot of 7 February 2008.
[120] **Exhibit C-263**. Decision of Minsk City Executive Committee of 3 September 2009.
[121] **Exhibit C-264**. Letter from Manolium-Engineering to Gosstroy of 24 December 2009.
[122] **Exhibit R-54**. Letter from Manolium-Engineering to Gosstroy of 20 April 2010.

109. However, on 25 January 2010[123] and on 21 April 2010,[124] Gosstroy issued a permit valid only until 31 August 2010. Without any explanation, Gosstroy had thus reduced the period for construction by 4 months compared to the requested and contractually-approved period.

Gosstroy Issued a Permit Until 31 December 2010 Instead of 1 July 2010

110. On 16 September 2010, the Minsk City Executive Committee authorized Manolium-Engineering to perform construction of the Depot until 1 July 2011.[125]

111. On 29 October 2010, Manolium-Engineering therefore requested that Gosstroy extend the construction period in its permit until 1 July 2011 to match this date.[126]

112. However, on 20 December 2010, Gosstroy issued a permit which was valid only until 31 December 2010, *i.e.* for only 11 days.[127] This was nonsensical and without any justification.

113. Thus, Gosstroy reduced the requested construction period for 6 months—again without any justification or basis to do so.

[123] **Exhibit C-265**. Construction permit issued by Gosstroy for constructing the Depot of 25 January 2010.
[124] **Exhibit C-266**. Construction permit issued by Gosstroy for constructing the Depot of 21 April 2010.
[125] **Exhibit C-267**. Decision of Minsk City Executive Committee of 16 September 2010.
[126] **Exhibit C-268**. Letter from Manolium-Engineering to Gosstroy of 29 October 2010.
[127] **Exhibit C-269**. Construction permit issued by Gosstroy for constructing the Depot of 20 December 2010.

114. This forced Manolium-Engineering to request another extension on 19 January 2011.[128] On 27 January 2011, Gosstroy issued a construction permit that was valid until 1 July 2011.[129]

b) Construction Permits for the Road - Gosstroy Issued a Permit until 31 October 2008 instead of 31 December 2008

115. On 2 May 2008, the Minsk City Executive Committee authorized Manolium-Engineering to perform construction work on the Road until 1 December 2008.[130]

116. On 22 May 2008, Manolium-Engineering thus requested that Gosstroy issue a construction permit valid until 31 December 2008 to match this authorization.[131]

117. However, on 29 May 2008, Gosstroy issued a permit valid only until 31 October 2008.[132] Again, there was no justification for this shortening of the authorized construction period.

(vii) The Respondent Is Responsible for Gosstroy's Violations

118. Respondent wrongfully alleges that "*Gosstroy had no obligation under the Amended Investment Contract since, inter alia, it was not a party to the Amended Investment Contract*".[133]

119. This statement is mistaken for two reasons:

[128] **Exhibit C-270**. Letter from Manolium-Engineering to Gosstroy of 19 January 2011.
[129] **Exhibit C-271**. Construction permit issued by Gosstroy for constructing the Depot of 27 January 2011.
[130] **Exhibit C-86**. Decision of Minsk City Executive Committee of 2 May 2008.
[131] **Exhibit C-272**. Letter from Manolium-Engineering to Gosstroy of 22 May 2008.
[132] **Exhibit C-87**. Construction permit issued by Gosstroy of 29 May 2008.
[133] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 128.

(i) **First**, this is not a contractual dispute. This is an investment dispute and the Respondent is liable for actions of all state controlled agencies or companies performing public functions.[134] Gosstroy is a state agency responsible for state regulation in Belarus in the area of construction. Thus, the Respondent is liable for all wrongs committed by Gosstroy, regardless of whether Gosstroy is a formal party to the Investment Contract

(ii) **Second**, according to the Investment Contact, the Minsk City Executive Committee is responsible for "*acts (omission) on the part of competent communal bodies of Minsk preventing proper performance of the investment project*".[135] Because Gosstroy is a competent communal body of Minsk, therefore, the Minsk City Executive Committee is responsible for acts (omissions) of Gosstroy even under a contractual theory.

120. The Respondent has also claimed that "*[Gosstroy] 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*".[136]

121. This statement is a perfect example of the unjustified bureaucratic hurdles imposed by the Respondent that prevented the timely completion of this project. Common sense and commercial prudence dictate that a required permit be issued for a period to match the construction that is expected to occur. Moreover, since delay is common in construction projects all over the world, such permits are often issued for even longer than the expected construction period. The Respondent refused to do so. Instead, it issued permits only for an arbitrarily

[134] **Exhibit CL-11.** ILC Articles on State Responsibility, Article 4(1).
[135] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 6.3.
[136] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 162.

short time, without any reasoning or justification, and created significant obstacles to the Claimant's timely completion of this project.

122. As vividly described by Mr. Dolgov:[137]

> "*40. The whole thing looked as follows:*
>
> *(i) Gosstroy grants a permit valid for only three months, although it could have well issued one to last for one year;*
>
> *(ii) The contractor launches construction works, but soon discovers that the design specification documentation calls for the use of certain materials that were no longer produced, and suspends the construction works pending the approval of the required changes to the project;*
>
> *(iii) We apply to a state designer and wait for its response;*
>
> *(iv) Meanwhile, the construction permit expires, making it impossible to resume the construction works once more and causing us to go to Gosstroy yet again for the permit's extension.*
>
> *41. To sum it all up, we found ourselves on a kind of bureaucratic carousel, with state officers sending you from office to office, without being themselves responsible for anything.*"

2.2.2 Work Performed by the Contractors on the New Communal Facilities

123. The Respondent's witness misleadingly claims that "*in the past many contractors did not want to work with Manolium-Engineering, because Manolium-Engineering did not pay its contractors regularly for their services*" and "*[f]or*

[137] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 40-41.

that reason, we had serious doubts about Manolium-Engineering's business reputation".[138]

124. Yet there are no actual facts to support this attack on Manolium-Engineering's reliability. The only example provided by the Respondent[139] is related to the stated owned company *UDMSiB*, which on 11 March 2009 informed the Minsk City Executive Committee that as of 1 January 2009, the debt of Manolium-Engineering to its subsidiary (*SSU-2*), amounted to BYR 405,310,007 (approximately USD 185,000).

125. Yet the reporting company, *UDMSiB*, performed work and supplied materials for the Depot in 2008.[140] It **continued** performing work and supplying materials for the Depot in January, June, July, August, September, October, and November of 2009,[141] September 2010,[142] and October, November, and December of 2011[143] despite these purported complaints that the Respondent now claims led it to doubt Manolium-Engineering's trustworthiness.

126. Moreover, *SSU-2* (a subsidiary of *UDMSiB*) also performed work and supplied materials for the Depot[144] and for the Road [145] in 2008, and continued performing

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[138] **RWS-2.** First Witness Statement of Mr. Akhramenko of 19 November 2018, para. 22.
[139] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 81, 86. **Exhibit R-43.** Minutes of the meeting prepared on 19 December 2008 which was attended by Minsk City Executive Committee, Minsktrans and Manolium-Engineering on 10 December 2008. **Exhibit R-46.** Letter from CUP UDMSiB to Economy Committee of Minsk City Executive Committee of 11 March 2009. **Exhibit R-47.** Letter from Manolium-Engineering to Minsk City Executive Committee of 27 March 2009. **Exhibit R-49.** Minutes of the Minsk City Executive Committee meeting of 10 June 2009.
[140] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, pp. 71, 80, 88, 95, 100, 101, 105, 106, 111, 115.
[141] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, pp. 119, 121, 122, 123, 125, 128, 129, 131.
[142] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, p. 144.
[143] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, pp. 172, 175, 176.
[144] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, pp. 72, 77, 82, 91, 97, 103, 109, 112, 113, 115, 116.
[145] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, pp. 193, 194, 195.

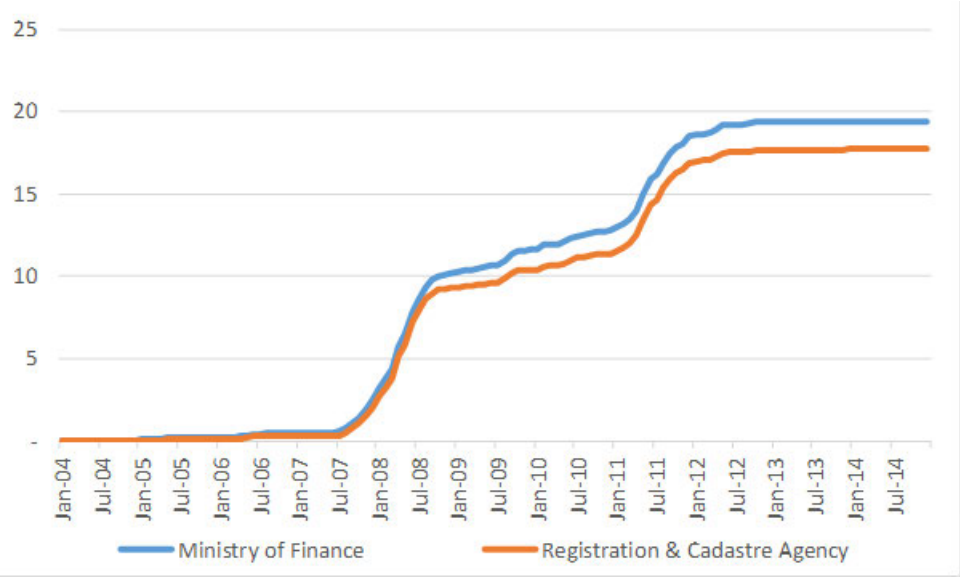
work and supplying materials for the Depot in June 2011,[146] May 2012;[147] and for the Road in August, September, and October of 2009,[148] June, July, and November of 2010,[149] and May 2011.[150]

127. Thus, the single "*example*" that the Respondent claims demonstrates a lack of trustworthiness or a failure to pay contractors is nothing of the sort. Had those contractors truly lacked trust in Manolium-Engineering, they surely would not have continued to work with Manolium-Engineering and supply materials to it for several **years** after the reported debt (which ultimately was paid) to which the Respondent refers. This misleading attack should be ignored.

128. As follows from two reports on the evaluation of the Claimant's investments, prepared by the CAO of the Respondent's Ministry of Finance on 22 February 2016 and by the Registration and Cadastre Agency on 16 June 2015 (the "**2015 Registration and Cadastre Agency Report**"), in fact, the works on New Communal Facilities never stopped at any time after July 2007.

[146] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, p. 160.
[147] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, p. 184.
[148] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, pp. 196, 197.
[149] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, pp. 199, 200.
[150] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, p. 200.

Chart 2. New Communal Facilities Cost of Construction (USD million)[151]



129. Although there were some periods of time where the works were slowed down, this was attributable to issues caused by the Respondent.

2.2.3 Disagreements with Aram Ekavyan Related to the Financing of the Project under the Investment Contract

130. The Respondent notes that Mr. Dolgov made reference to the financial crisis of 2008 as a reason for lack of sufficient funding on certain occasions.[152] Yet it is

[151] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, Section 4.3, Figure 2, Appendix J.

[152] **Exhibit R-38.** Letter from Claimant to Minsk City Executive Committee of 22 September 2008. **Exhibit R-39.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 7 October 2008. **Exhibit R-40.** Letter from Claimant to Minsk City Executive Committee of 14 October 2008. **Exhibit R-41.** Letter from Manolium-Engineering to Minsk City Executive Committee of 19 November 2008. **Exhibit R-43.** Minutes of the meeting of 19 December 2008 which was attended by Minsk City Executive Committee, Minsktrans and Manolium-Engineering on 10 December 2008. **Exhibit R-44.** Letter from Manolium-Engineering to Minsk City Executive Committee of 31 December 2008, attaching a schedule for the final phase of the construction of the Depot of 30 December 2008. **Exhibit R-47.** Letter from Manolium-Engineering to Minsk City Executive Committee of 27 March 2009. **Exhibit R-50.** Minutes of the Minsk City Executive Committee meeting of 25 June 2009. **Exhibit R-53.** Letter from Manolium-Engineering to Gosstroy of 24 December 2009. **Exhibit R-54.** Letter from Manolium-Engineering to Gosstroy of 20 April 2010. **Exhibit R-55.** Letter from Manolium-Engineering to Minsk City Executive Committee of 26 May 2010. **Exhibit R-61.** Letter from Manolium-Engineering to Gosstroy of 21 December 2010.

actions, not words, that must be the measure of performance. Despite these potential funding difficulties, the Claimant still fully funded the project (and, in fact, provided millions more than required).[153]

131. The delay in financing at that time referred to by Mr. Dolgov was caused by certain disagreements between Mr. Dolgov and Mr. Ekavyan (the ultimate beneficiary of the Claimant and most all of the Claimant-affiliated companies that provided funding to Manolium-Engineering).[154] It was not an issue of limited resources.

132. Mr. Ekavyan always had sufficient resources to invest in this project—and in fact did so in amounts greater than what was contractually required.

133. In 1993-2000, Mr. Ekavyan was the director of the Russian company, *PromNafta*. Starting in 2001, Mr. Ekavyan, was the CEO of the Claimant and began to develop the Claimant's oil processing activities. In 2003, Forbes listed the Claimant in its list of major non-public companies, with revenues of approximately USD 200 million.[155]

134. From the beginning of the 2000's, Mr. Ekavyan was also a shareholder and Board member of one of the major oil processing companies in Russia, JSC *Salavatnefteorgsintez*. In 2006, Mr. Ekavyan sold an approximately 30% stake

[153] *See paras. 42-49*. **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file). **Exhibit C-216.** Loan agreements and confirmations of loan transfers from Bradley Enterprises Ltd. to Manolium-Engineering. **Exhibit C-217.** Loan agreements and confirmations of loan transfers from Lascker Ltd. to Manolium-Engineering. **Exhibit C-218.** Loan agreements and confirmations of loan transfers from Nomal Oil Ltd. to Manolium-Engineering**. Exhibit C-219.** Loan agreements and confirmations of loan transfers from Manolium Trading Ltd. to Manolium-Engineering. **Exhibit C-220.** Loan agreements and confirmations of loan transfers from Foreign LLC Manolium Processing to Manolium-Engineering.

[154] **Exhibit C-273.** Scheme of affiliation in the Claimant's group of companies.

[155] **Exhibit C-274.** Website of news portal Politics of Orenburg, *Orenburg Businessmen Joined the Ranks of Beneficiaries of Russol*, 16 January 2017. // Available at: http://orenpolit.ru/recently/item/2732-orenburgskie-biznesmeny-voshli-v-chislo-benefitsiarov-russoli.

(owned by the companies affiliated with him) in JSC *Salavatnefteorgsintez* for approximately USD 1 billion. This stake also included 6 % of the shares in JSC *Salavatnefteorgsintez*, which Mr. Ekavyan owned personally.[156]

135. Mr. Ekavyan currently is one of the beneficial owners of the major salt production company *Russol* (*i.e. Russian Salt*) LLC and a co-owner of Russian commercial bank *Forshtadt*, the assets of which exceed 14,6 billion of Russian roubles (approximately USD 200 million).[157]

136. There can be no doubt that the investors had sufficient funds to invest. The delay was not due to lack of funds, but rather because Mr. Ekavyan understandably did not want to continue injecting money into the project in the absence of firm guarantees and protections from the Respondent. It was based on his strong and well-founded belief that the Respondent would not honor its obligations.

2.3. Respondent Has a Long Record of Cheating Foreign Investors

137. Unfortunately, this situation is not unique. Belarus has repeatedly deprived foreign investors of their investments as it has done here. A few examples include:

(i) In 2001, the biggest Russian brewing company *Baltika* agreed to invest to update the entire production chain of the Belarusian brewery *Krinitsa* in exchange for 50% of the shares of the company. However, after approximately USD 10 million had been invested into *Krinitsa*, the Belarusian government first unilaterally reduced the proposed sale to

[156] **Exhibit C-275.** Website of newspaper Kommersant, *New Candidate for Salavatnefteorgsintez, Enterprise Could Be Received By Rosneft*, 14 November 2006. // Available at: https://www.kommersant.ru/doc/721588.

[157] **Exhibit C-276.** Website of news portal Russian Business Consulting, *Owners of Russol Broke through Offshores, the Major Russian Producer of Salt Disclosed All Beneficiaries*, 13 January 2017. // Available at: https://www.rbc.ru/newspaper/2017/01/16/5878a25f9a7947e50628d3a2.

30% of the shares, and then prohibited it altogether. In addition, Baltika was forced to invest in the construction of an ice hockey stadium in Belarus without any compensation.[158]

(ii) In 2007, the Lithuanian company *UBIG* agreed to invest in construction of a shopping and business center, an indoor sports arena, a football stadium, a hotel, and a parking lot on the premises of the *Tractor* stadium and surrounding area. The investor expected to recoup these costs by building housing in several districts of the City of Minsk. However, later, at the request of the Minsk City Prosecutor, the Minsk Economic Court invalidated the decision of the Minsk City Council to transfer the *Tractor* stadium to the investor's company. No compensation was paid.[159]

(iii) In the mid-2000s, the US citizen Marat Novikov invested in the development of the two largest confectioneries in Belarus - *Kommunarka* (Minsk) and *Spartak* (Gomel). In 2010-2011, companies affiliated with Mr. Novikov owned controlling stakes in these companies. However, in 2012, the President of the Republic of Belarus visited *Kommunarka* and stated that this confectionery shall be the property of the people. Kommunarka was immediately taken under full state control.[160]

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[158] **CER-2.** Expert Report of Elena Tonkacheva of 25 February 2019, paras. 52-57. **Exhibit ET-29.** Website of *Belgazeta*, *BALTIKA WILL BE IN BELARUS. So Be It?*, 18 February 2002. // Available at: http://www.belgazeta.by/ru/2002_02_18/tema_nedeli/3681/. **Exhibit ET-30.** Website of *Ekonomicheskaya Gazeta*, *Is Baltika Stranded in the Shallows in Belarus?*, 15 February 2002. // Available at: https://neg.by/novosti/otkrytj/baltika-sela-v-belarusi-na-mel-281. **Exhibit ET-31.** Website of expert association of Belarus *Nashe Mnenie*, *Belarus: Conflicts with Major Investors*, 19 October 2012. // Available at the address: https://nmnby.eu/news/analytics/4979.html.

[159] **CER-2.** Expert Report of Elena Tonkacheva of 25 February 2019, paras. 62-66. **Exhibit ET-34.** Website of news portal TUT.BY, *The Businessman Romanov, Who Lost a Bank in Lithuania, Craves Satisfaction in Belarus*, 5 March 2013. // Available at: https://news.tut.by/economics/337706.html.

[160] **CER-2.** Expert Report of Elena Tonkacheva of 25 February 2019, paras. 67-72. **Exhibit ET-35.** Information portal *Ezhednevnik*, *Made in Belarus. Food Industry: The Failure of Baltika, Novikov's Holding Company and a Sugary Come Back*, 19 December 2017. // Available at the address: https://ej.by/legends/food/2017/12/19/sdelano-v-belarusi-pischevaya-promyshlennost-proval-

(iv) In 2012, the Ukrainian joint-stock company Motor Sich and Belarusian closed joint-stock company Investment and Innovation Systems acquired, respectively, 59.5% and 39.7% of the shares of open joint-stock company Orsha Aircraft Repair Plant (OARP) and invested in the development of the plant. However, at the end of April 2018, the General Prosecutor's Office began to investigate the actions of the main shareholders of OARP. The prosecutors concluded that serious violations of the law were committed by the former management of the plant. In July 2018, the President of Belarus declared that the plant is a state company "*starting from today*".[161]

2.4. Respondent Had Already Cheated the Claimant with the Revolutionary Project

138. The Respondent might claim that the examples provided above are not relevant because they are not related to this project under the Investment Contract (as the Respondent stated before with regard to the examples provided in the Request for Interim Measures)[162].

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baltiki.html. **Exhibit ET-36.** Website of news portal TUT.BY, *Presidential Revolution among Confectioners: Power - to the State, Candy - to Venezuela*, 12 October 2012. // Available at: https://news.tut.by/economics/315575.html.

[161] **CER-2.** Expert Report of Elena Tonkacheva of 25 February 2019, paras. 83-89. **Exhibit ET-39.** Website of news portal *Belarusian Partisan*, *Nationalization: Motor Sich is Ready to Return the Shares of the Orsha Aircraft Repair Plant to Belarus*, 3 May 2018. // Available at: https://belaruspartisan.by/economic/423810. **Exhibit ET-40.** Website of news portal TUT.BY, *"This is a State-Owned Company Starting Today." Lukashenko Decided the Fate of the Orsha Aircraft Repair Plant*, 11 July 2018. // Available at: https://news.tut.by/economics/600330.html. **Exhibit ET-41.** Information site Reform.by, *Lukashenko Nationalized the Orsha Aircraft Repair Plant*, 11 July 2018. // Available at: https://reform.by/lukashenko-nacionaliziroval-orshanskij-aviaremontnyj-zavod. **Exhibit ET-42.** Official website of the press outlet of the Government of the Russian Federation, *Lukashenko Replaced the Owner at the Aircraft Repair Plant*, 11 July 2018. // Available at: https://rg.ru/2018/07/11/lukashenko-smenil-sobstvennika-na-aviaremontnom-zavode.html.

[162] **C-26. Claimant's Comments to Respondent's Response to Claimant's Interim Measures Request of 5 October 2018**, paras. 36-50. **Exhibit C-209.** Reuters website, *From Potash Powerbroker to Minsk Prison, the Cost of Crossing Belarus*, 8 September 2013. // Available at: https://www.reuters.com/article/usuralkali-ceo/from-potash-powerbroker-to-minsk-prison-the-cost-

139. This is wrong. These prior experiences demonstrate the Respondent's *modus operandi*. If the Respondent deprived the other investors of their rights and nationalized their property, it would be naïve to think that the Respondent would have any qualms doing the same to the Claimant's investments here.

140. Even more importantly, the Claimant itself was previously a victim of the Respondent's misdeeds. This story, described below, leaves no doubt that the Republic of Belarus does not honor its obligations. Unfortunately, this experience did not dissuade the Claimant from this investment.

141. In 2003, Mr. Dolgov, the director of Manolium-Engineering, implemented another investment project in Minsk via *Tekstur* LLC (Belarusian construction company - "**Tekstur**").[163] The funding for this project was provided by Aram Ekavyan via different companies (*i.e.*, not through Manolium Engineering).

142. Initially, this looked to be a very lucrative project. It focused on an old residential building in the center of Minsk, on Revolutionary Street, which could be redeveloped as an apartment-hotel (the "**Revolutionary Project**").

143. However, the building was occupied by residents and in need of renovations. Accordingly, the potential investor was required to relocate the residents of the building to other parts of Minsk. In exchange, the investor would receive this

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of-crossing-belarusidUSBRE98703G20130908. Exhibit C-210. RadioFreeEurope RadioLiberty website, *Russia Puts Uralkali Chief Under House Arrest*, 10 December 2013. // Available at: https://www.rferl.org/a/russia-uralkali-ceo-house-arrest/25196085.html. **Exhibit C-211.** ICSID website, *GRAND EXPRESS Non-Public Joint Stock Company v. Republic of Belarus*, ICSID Case No. ARB(AF)/18/1, Case Details. // Available at: https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)%2f18%2f1. (Accessed on 4 October 2018). **Exhibit C-212.** Decision of Court of Appeal of Athens, Greece of 14 September 2018. **Exhibit C-213.** News Tut.by website, *European Parliament Members Has Condemned Harassment and Detention of Journalists in Belarus*, 4 October 2018 // Available at: https://news.tut.by/economics/610406.html (Accessed on 5 October 2018).

[163] **Exhibit C-277.** Article of incorporation of Tekstur of 25 August 2006. **Exhibit C-278.** Protocol No. 2 of extraordinary meeting of participants of Tekstur of 1 December 2014.

building for redevelopment into an apart-hotel (the "**Revolutionary Building**").[164]

144. Tekstur won the tender and on 28 November 2003 signed a contract with the Minsk City Executive Committee (the "**Revolutionary Contract**").[165]

145. Under the Revolutionary Contract:[166]

(i) Tekstur was to purchase new apartments for inhabitants of the Revolutionary Building;[167]

(ii) Then the Minsk City Executive Committee was to evaluate the Revolutionary Building and the apartments purchased by Tekstur. After this evaluation, the Minsk City Executive Committee would transfer the Revolutionary Building to Tekstur's ownership. The price of the apartments was to be set-off from the value of the Revolutionary Building;[168] and

(iii) Tekstur was to complete reconstruction of the Revolutionary Building by 30 December 2007.[169]

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[164] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 58-101.
[165] **Exhibit C-279.** Extract from Protocol No. 14 of meeting of administration of Central district of Minsk of 23 April 2003. **Exhibit C-280.** Extract from Protocol No. 15 of meeting of administration of Central district of Minsk of 22 July 2003. **Exhibit C-281.** Decision of Minsk City Executive Committee of 7 August 2003. **Exhibit C-282.** Contract-obligation between Minsk City Executive Committee and Tekstur on reconstruction of the Revolutionary Building of 28 November 2003.
[166] **Exhibit C-282.** Contract-obligation between Minsk City Executive Committee and Tekstur on reconstruction of the Revolutionary Building of 28 November 2003.
[167] **Exhibit C-282.** Contract-obligation between Minsk City Executive Committee and Tekstur on reconstruction of the Revolutionary Building of 28 November 2003, clause 4.2.1.
[168] **Exhibit C-282.** Contract-obligation between Minsk City Executive Committee and Tekstur on reconstruction of the Revolutionary Building of 28 November 2003, clause 4.1.6, 4.1.7.
[169] **Exhibit C-283.** Addendum No. 1 to Contract-obligation between Minsk City Executive Committee and Tekstur on reconstruction of the Revolutionary Building of 26 April 2005.

146. In December 2005, Tekstur purchased new apartments for the inhabitants of the Revolutionary Building, and requested that the Minsk Fund of State Property evaluate the Revolutionary Building as agreed.[170]

147. However, notwithstanding the requests of Tekstur,[171] the Respondent did not transfer the Revolutionary Building to Tekstur, arguing that such transfer could be done only after direct approval from the President of the Republic of Belarus.[172]

148. The tender terms did not contain this condition. Nor was there any indication when the contract was entered that this would be required.

149. As a result, Tekstur was forced to wait until the President of the Republic of Belarus approved the transfer of the Revolutionary Building.

150. This approval took more than four years. Finally, it was granted in February 2010.[173]

151. In the meantime, while the investor was awaiting this approval, the Minsk City Executive Committee took several actions demonstrating that it had no intention of honoring its contract.

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[170] **Exhibit C-284.** Act of acceptance of technical passports and documents of entitlement to apartments for resettle inhabitants of Revolutionary Building of 8 December 2005. **Exhibit C-285.** List of cost of apartments purchased by Tekstur in accordance with Contract-obligation between Minsk City Executive Committee and Tekstur on reconstruction of the Revolutionary Building of 28 November 2003 as of the transfer date of apartments. **Exhibit C-286.** Letter from Tekstur to Minsk City Executive Committee of 9 December 2005. **Exhibit C-287.** Letter from Tekstur to Minsk City Territory Fund of State Property of 9 December 2005.

[171] **Exhibit C-288.** Letter from Tekstur to Minsk City Executive Committee of 12 December 2006.

[172] **Exhibit C-289.** Letter from Communal Unitary Enterprise *Minskaya Spadchina* to Tekstur of 26 September 2005. **Exhibit CL-80.** Decree of President of the Republic of Belarus of 16 November 2006 No. 677 *On Particular Issues Related to Disposition of Property in Communal Ownership and Purchase of Property in Ownership of Administrative Divisions*.

[173] **Exhibit C-290.** Resolution of President of the Republic of Belarus on transfer of the Revolutionary Building to Tekstur of 24 February 2010. **Exhibit C-291.** Decision of Minsk City Executive Committee of 25 February 2010.

152. On 12 December 2006, Tekstur requested that the Minsk City Executive Committee transfer the Revolutionary Building to the ownership of Tekstur.[174]

153. But instead of transferring the building as was required by the Revolutionary Contract, on 16 January 2007, the Minsk City Executive Committee informed Tekstur that it intended to terminate the contract.[175] There was no justification to do so.

154. Because Tekstur had already performed its obligations under the contract by purchasing the apartments necessary to relocate the tenants, Tekstur rejected this "*proposal*".[176]

155. Further, because of the significant amount of time that passed awaiting approval from the Belarusian President, the prices in Belarus significantly increased. Belarusian authorities therefore demanded that the price for the Revolutionary Building be increased as well.

156. On 13 February 2008, Respondent's state entity *Proektrestavratsiya* appraised the Revolutionary Building for the amount of BYR 1,031,705,054 (approximately USD 480,000).[177] The appraisal confirmed that Tekstur was to pay nothing for the Revolutionary Building because the value of the apartments purchased by Tekstur in December 2005 was BYR 1,071,000,000 (approximately USD 498,000).[178]

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[174] **Exhibit C-288.** Letter from Tekstur to Minsk City Executive Committee of 12 December 2006.
[175] **Exhibit C-292.** Letter from Minsk City Executive Committee to Tekstur of 16 January 2007.
[176] **Exhibit C-293.** Internal briefing paper of Minsk City Executive Committee, *On Application of Tekstur LLC*, 26 January 2007.
[177] **Exhibit C-294.** Evaluation report of Unitary Enterprise *Proektrestavratsiya* of 13 February 2008.
[178] **Exhibit C-284.** Act of acceptance of technical passports and documents of entitlement to apartments for resettle inhabitants of Revolutionary Building of 8 December 2005. **Exhibit C-285.** List of cost of apartments purchased by Tekstur in accordance with Contract-obligation between Minsk City Executive Committee and Tekstur on reconstruction of the Revolutionary Building of 28 November 2003 as of the transfer date of apartments. **Exhibit C-286.** Letter from Tekstur to Minsk

157. Notwithstanding the fact that in November 2007 the Respondent's Registration and Cadastre Agency appraised then current value of the apartments which Tekstur purchased in 2005, the Respondent eventually insisted that the value of the apartments as of December 2005 should be used instead. Thus, the Respondent refused to consider the 2007 values of the apartments, but insisted on valuing the Revolutionary Building at those 2007 prices.

158. On 6 March 2008, the Minsk City Executive Committee proposed that Tekstur purchase the Revolutionary Building for BYR 5,407,680,000 (five times more than the previous appraisal of the Building).[179] It changed this demand on 21 March 2008 to BYR 3,109,416,000 (three times more than the appraisal of the Building).[180]

159. Not surprisingly, Tekstur rejected both proposals as contradictory to the provisions of the Revolutionary Contract.[181]

160. Tekstur argued that the Respondent could not re-value just one side of the deal (*i.e.*, the Revolutionary Building) while ignoring the other side (*i.e.*, the apartments).

161. Yet the Belarusian authorities refused to apply this basic principle of fairness and commercial reasonableness. Tekstur had already spent significant resources to buy the apartments in expectation of receiving and redeveloping the

City Executive Committee of 9 December 2005. **Exhibit C-287.** Letter from Tekstur to Minsk City Territory Fund of State Property of 9 December 2005.

[179] **Exhibit C-295.** Extract from Protocol No. 44 of meeting of Commission of Minsk City Executive Committee of 6 March 2008. **Exhibit C-296.** Letter from Communal Unitary Enterprise *Minskaya Spadchina* to Tekstur of 14 March 2008.

[180] **Exhibit C-297.** Extract from Protocol No. 45 of meeting of Commission of Minsk City Executive Committee of 21 March 2008.

[181] **Exhibit C-298.** Letter from Tekstur to Minsk City Executive Committee of 9 June 2008.

Revolutionary Building. It was now left as a hostage with no choice but to accept the draconian terms imposed by the Respondent.

162. The Respondent took full advantage of the unfair situation it had created. It prepared a draft decision to completely withdraw from Tekstur the right to the land plot on which the Revolutionary Building was built.[182]

163. After demonstrating to the investor that it could take everything without compensation, the Respondent "*relented*" by agreeing to continue the project on the condition of the insertion of new draconian terms into the Revolutionary Contract: if Tekstur did not complete redevelopment within a short period of time, it would lose altogether the right to develop the Revolutionary Project and receive no compensation for the apartments it had already purchased.[183]

164. These were ridiculous terms, but Tekstur was left with no choice but to accept them. Unfortunately, due to various bureaucratic and other obstacles for which Tekstur was not responsible, the reconstruction of the Revolutionary Building was not completed on time. Tekstur's investment was completely lost.

165. Recourse to Belarusian courts was not a realistic option. As will be explained below,[184] Belarusian courts never decide against the state — and all parties knew it.

166. Thus, it was not surprising that after losing his entire investment as a result of these breaches of obligations and manifest disrespect of contractual rights by the Republic of Belarus, Mr. Ekavyan was hesitant to throw "*good money after bad*", and preferred to walk away from the project with the Communal Facilities.

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[182] **Exhibit C-299.** Letter from Minsk City Executive Committee to Tekstur of 2 September 2008.
[183] **Exhibit C-300.** Sale Contract of Revolutionary Building between Communal Unitary Enterprise *Minskaya Spadchina* and Tekstur of 3 June 2010, clause 5.6.
[184] *See paras. 698-708.*

167. However, Mr. Dolgov, who was leading the project, still hoped that Belarus would follow through on its obligations and therefore tried to convince Mr. Ekavyan to stay the course. Unfortunately, Mr. Ekavyan's first instincts were right — the Respondent has mistreated him here as it did before.

168. Of course, it would not be appropriate to reveal these internal disagreements (caused, ironically, by the Respondent's own actions) between investors to the Minsk City Executive Committee. Accordingly, Mr. Dolgov referred instead to difficulties caused by the financial crisis of 2008 to explain Mr. Ekavyan's delay in investing.

169. As Mr. Dolgov himself commented this situation:[185]

> "*102. The situation made Aram Yekavyan finally lose faith in the intent of the Belarusian side to perform its obligations under the Investment Contract, which was why he repeatedly voiced apprehensions about the project's implementation from 2008 through its effective abandonment in the middle of 2012. He would tell me that "if they cheated with Revolyutsionnaya* [Revolutionary Project]*, then they will cheat here."*
>
> *103. That was why I had to conduct negotiations simultaneously with my partner, the principal investor in the project, and with the Belarusian side. I realized that the project could not be wound up after already absorbing our considerable investment, and continued to insist on its continued implementation.*
>
> *104. It is for that reason that I referred to the financial crisis and to problems with financing the project: I needed time to persuade my*

[185] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 102-105.

partner to make further capital injections, because the project was exceptionally important to me.

105. In addition, by only referring to the lack of funding I could restrain the Belarusian side's constantly growing funding demands to cover costs outside the scope of the project."

170. Motivations and statements aside, one simple fact remains. Despite all of these difficulties, the Claimant continued to finance the project and provided all required financing.

171. Moreover, it is telling that the Respondent terminated the Investment Contract only after almost all investments had been made — not when the Claimant was slow in financing the project (in 2009-2010).[186]

172. This confirms that the Respondent's real reason for termination of the Investment Contract was not a lack of financing or "*sufficient assurances*" that the Claimant would continue to invest. This is especially true in light of the fact that the amount of the remaining investments (USD 3 million at best) was much lower than the invested amount (more than USD 20 million).[187] Had the Respondent truly had concerns about financing that justified termination, it would have acted on those concerns long ago before that financing had been provided. It did not, because that project would be much less valuable than the funded investment ultimately seized.

173. Thus, the Respondent's use of alleged financing concerns to seize a fully-funded investment should be rejected.

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[186] *See paras. 42-49*. **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file).

[187] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16. **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file).

2.5. Respondent's Hidden Agenda

174. All private businesses in Belarus are under constant pressure from the Belarusian authorities. If a business is viewed as supporting the political opposition, however, this pressure is dramatically increased and the business would be immediately destroyed by authorities under control of Belarusian State Security Committee (the "**KGB**").

175. The KGB and its past exploits in the Soviet Union are well known. It was a top secret organization responsible for the imprisonment of thousands of dissidents and countless other secret acts on behalf of the government and to advance its agenda.

176. After the collapse of the Soviet Union, most former Soviet Republics dissolved the KGB to erase this dark heritage. Belarus did not do so. The Republic of Belarus not only kept the name of this agency, but also the people and, inevitably, their style of work:[188]

> "*Opinions of the role and performance of the Belarus KGB are far from uniform. On June 1, 1992, the Postfactum news service reported that the Belarus Supreme Soviet's Commission on National Security Issues had concluded the Belarus KGB "should not be engaged in combating crime and corruption", presumably because other government agencies were already performing these tasks. It confirmed that the KGB should continue guarding government buildings and embassies, as well as*

[188] **Exhibit C-301.** Martin Ebon, *KGB: Death and Rebirth*, Greenwood Publishing Group, 1994 (extracts), pp. 135-136. // Available at: https://books.google.ru/books?id=kqcM5V3NXVoC&pg=PA135&lpg=PA135&dq=belarusian+kgb+role&source=bl&ots=_vKHBZklQr&sig=ACfU3U3M3F7Om1dMmidRF9ksTm28Z1iQuQ&hl=ru&sa=X&ved=2ahUKEwje1e2ZwbTgAhUM2oMKHfsKDLwQ6AEwCnoECAMQAQ#v=onepage&q=belarusian%20kgb%20role&f=false.

communications facilities. The news service added, "Meanwhile, opposition parties issued a statement which describes the KGB as a gangster-type organization and demands that the republican KGB be completely disbanded." [Claimant's emphasis]

177. The KGB remains alive and well in Belarus. And it has become famous for its "*clearing*" operations to pressure private business at the behest of the government of Belarus.

178. For example, on 11 March 2016, the KGB detained Yury Chyzh, one of the richest businessmen (at that time) in Belarus, and a former close associate of the President.[189]

179. On 16 September 2016, the KGB released Mr. Chyzh from a KGB detention facility after Mr. Chyzh repaid the "*losses*" to the Belarusian budget he was alleged to have caused — totaling approximately USD 12-13 million.[190]

180. Mr. Chyzh is not alone. The following businessmen in Belarus were also subject to harassment or imprisonment by the KGB related to their business dealings:[191]

(i) **Victor Prokopenya** – allegedly received USD 650 thousand in revenue from alleged illegal activities, released in December 2015 from the KGB detention facility after payment of the alleged damages to Belarus;

[189] **Exhibit C-302.** Website of newsportal UDF.BY, *Why Belarus KGB Detained the Country's Former Top Businesman*, 18 March 2016. // Available at: https://udf.by/english/main-story/136523-why-belarus-kgb-detained-the-countrys-former-top-businesman.html.

[190] **Exhibit C-303.** Website of news portal TUT.BY, *KGB: Chyzh Confessed and Refunded the Losses*, 16 September 2016. // Available at: https://news.tut.by/economics/512362.html?utm_source=news.tut.by&utm_medium=news-bottom-block&utm_campaign=relevant_news.

[191] **Exhibit C-304.** Website of news portal TUT.BY, *Chronicles of Business Clearing: Top-10 Stories*, 15 November 2016. // Available at: https://news.tut.by/economics/519638.html.

(ii) **Oleg Zuhovitsky** – The KGB suspected him of receiving illegal revenue, siphoning assets outside of Belarus and avoiding taxes; in 2015, the KGB released him after payment of "*losses*" calculated by Belarus in the approximate amount of USD 3.5 million;

(iii) **Andrey Pavlovskiy** – the KGB arrested Mr. Pavlovskiy and sent him to its detention facility based on charges of tax evasion; in March 2016, the KGB announced that the President granted the release of Mr. Pavlovskiy because he refunded the "*losses*" of USD 20 million;

(iv) **Evgeniy Baskin** – The KGB suspected Mr. Baskin of tax evasion and arrested him; he was released in March 2015 after paying USD 25 million of "*losses*".

181. These examples demonstrate a consistent pattern of jailing of businessmen without trial and release of those same parties only after a coerced payment to the government. These cases are grave and unacceptable. But they pale in comparison to the situation of the political opponents of Alexander Lukashenko and the KGB's role in these dramatic events.

182. On 19 December 2010, elections for the President of Belarus were held.

183. The official results showed that the current President, Mr. Lukashenko, received 72.03% of the vote. However, on 20 December 2010, the European Parliament stated that the elections failed to meet international standards of free, fair and transparent elections, and called for new elections to be held under free and democratic conditions.[192]

[192] **Exhibit C-305.** Resolution of the European Parliament of 20 January 2011 on the situation in Belarus. // Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0022+0+DOC+XML+V0//EN&language=EN.

184. Prior to this, on 19 December 2010, the results of the elections pushed more than 40,000 of the Belarusian people (led by the opposition) to protest against the results of the elections.[193] The people demanded that Alexander Lukashenko not participate in the new elections.

185. The protests were led by the leaders of the political opposition, who were also candidates for the President of Belarus - Vladimir Neklyayev, Andrey Sannikov, Vitaliy Ryimashevskiy, Grigoriy Kostuyev and Nikolay Statkevich.[194]

186. On 19 December 2010, Belarusian law enforcement forces used excessive measures to stop the protests. These illegal actions against innocent civilians were documented by photo reports of numerous journalists that were present that day, some of which are reproduced below.[195]

[193] **Exhibit C-306.** Website of newsportal CBC, *Belarus Election Ends with Violent Protests*, 19 December 2010. // Available at: https://www.cbc.ca/news/world/belarus-election-ends-with-violent-protests-1.916848.

[194] **Exhibit C-307.** Website of Voice of America, *Break Up of the Opposition's Rally in Minsk: What I Saw*, 19 December 2010. // Available at: https://www.golos-ameriki.ru/a/minsk-protests-2010-12-19-112162374/191498.html.

[195] **Exhibit C-308.** Website of news portal TUT.BY, *Square, 19 December 2010, How It Was*, 20 December 2010. // Available at: https://news.tut.by/elections/208944.html.

Image 4. Belarusian Law Enforcement Forces Breaking-Up the Political Protest in the Center of Minsk of 19 December 2010[196]

Image 5. Belarusian Law Enforcement Forces Breaking-Up the Political Protest in the Center of Minsk of 19 December 2010[197]

[196] **Exhibit C-308.** Website of news portal TUT.BY, *Square, 19 December 2010, How It Was*, 20 December 2010. // Available at: https://news.tut.by/elections/208944.html.

[197] **Exhibit C-308.** Website of news portal TUT.BY, *Square, 19 December 2010, How It Was*, 20 December 2010. // Available at: https://news.tut.by/elections/208944.html.

Image 6. Belarusian Law Enforcement Forces Breaking-Up the Political Protest in the Center of Minsk of 19 December 2010[198]

Image 7. Belarusian Law Enforcement Forces Breaking-Up the Political Protest in the Center of Minsk of 19 December 2010[199]

[198] **Exhibit C-308.** Website of news portal TUT.BY, *Square, 19 December 2010, How It Was*, 20 December 2010. // Available at: https://news.tut.by/elections/208944.html.

[199] **Exhibit C-308.** Website of news portal TUT.BY, *Square, 19 December 2010, How It Was*, 20 December 2010. // Available at: https://news.tut.by/elections/208944.html.

187. During the protests, Belarusian law enforcement forces seriously injured and then arrested Andrey Sannikov, Vitaliy Ryimashevskiy, Grigoriy Kostusev and Nikolay Statkevich.[200] The injury and arrest of these opposition leaders was no coincidence.

188. Subsequently, on 20 December 2010, the KGB kidnapped one of these opposition leaders, Vladimir Neklyayev, from the hospital where he was recovering from the severe injuries inflicted by Belarusian law enforcement forces.[201]

189. Eventually, almost all of these opposition leaders were sentenced to 2-6 years in prison.[202]

190. After that, the KGB conducted numerous raids not only on the opposition leaders, but also on people who were supporting or simply in communication with them.[203] In total roughly 600 people were detained and more than 150 searches were conducted in the offices of companies, journalists and human rights defenders.[204]

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[200] **Exhibit C-307.** Website of Voice of America, *Break Up of the Opposition's Rally in Minsk: What I Saw*, 19 December 2010. // Available at: https://www.golos-ameriki.ru/a/minsk-protests-2010-12-19-112162374/191498.html.

[201] **Exhibit C-309.** Website of Pulitzer Center, *Dark Days in Belarus*, Virginia Quarterly Review, 11 December 2010. // Available at: https://pulitzercenter.org/reporting/dark-days-belarus.

[202] **Exhibit C-310.** Website of BelarusFeed, *The Last Large Protest: 19 Dec Marks Six Years Since Belarus 2010 Election Riot*. // Available at: http://belarusfeed.com/the-last-large-protest-19-dec-marks-six-years-since-belarus-2010-election-riot/.

[203] **Exhibit C-311.** Website of news portal VIASNA, *Police and KGB Raid Apartments and Offices. Tatsiana Reviaka's flat NOT raided*, 25 December 2010. // Available at: https://spring96.org/en/news/40150. **Exhibit C-312.** Website of news portal RadioFreeEurope/RadioLiberty, *KGB Raid on Belarusian Activist's Home Captured in 45-Minute Recording*, 12 January 2011. // Available at: https://www.rferl.org/a/anatomy_of_kgb_raid_belarus/2273294.html.

[204] **Exhibit C-313.** Website of news portal CHESNOK, *Committee Almighty: What is beyond KGB Arrests*, 26 July 2018. // Available at: https://4esnok.by/mneniya/komitet-vsemogushhij-chto-stoit-za-zader/.

191. Mr. Dolgov also had informal communications with one of the candidates to presidency, Mr. [redacted].[205]

192. Against this backdrop, in the spring of 2011, KGB officers arrived at the office of Mr. Dolgov. They requested that Mr. Dolgov follow them to their car.

193. This was understood by Mr. Dolgov as a clear implied threat because some opposition leaders had disappeared in Belarus under suspicious circumstances. Thus, Mr. Dolgov told KGB officers that his office is just 200 meters from the KGB building and proposed to walk there on foot. But the KGB officers insisted that Mr. Dolgov must go with them to their car.[206]

194. Once in the KGB office, one the officers asked questions regarding the President's elections and Mr. Dolgov's contacts with [redacted], one of the leaders of political opposition.[207]

195. Mr. Dolgov informed them that at the end of 2010, he had some informal and social communications with Mr. [redacted] in the apartments of Mr. [redacted] (a neighbor of Mr. Dolgov, and at that time a member of the political team of Mr. [redacted]). Nothing was said by him during that conversation that could possibly be of interest to the Belarusian KGB.

196. At the end of the meeting, the KGB officers told Mr. Dolgov that he had "*done great harm*" to himself and that he would have huge problems because of his meetings with [redacted].[208]

197. These words would ring true. After this meeting with the KGB, the project was stuck and the Claimant started to face problems that it never experienced before.

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[206] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 106.
[207] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 107.
[208] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 108-111.

It was no coincidence that the repeated and unfair actions taken by the Respondent correspond with the involvement of the KGB.

2.6. The Respondent Put the Claimant in a Situation Where the Claimant Could Not Have Performed Its Obligations

198. By 1 July 2011, the project with the New Communal Facilities was at least 90% complete,[209] the financing provided by the Claimant had reached its maximum level,[210] and the approvals needed to continue construction had expired. There was thus an impasse about how to move forward.

199. There were two possible scenarios that could have resolved this situation:

[209] **Exhibit R-67.** Schedule to Complete Construction of the "*Trolleybus Depot Accommodating 220 Trolleybuses in Urban District Uruchye-6*", Minsk, approved by Minsk City Executive Committee Deputy Chair A.M. Borisenko of 5 August 2011. **Exhibit C-314.** Act of Acceptance of 5 September 2011. **Exhibit C-315.** Act of Acceptance of 14 October 2011. **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 168-171. **Exhibit C-79.** Letter from Manolium-Engineering to Minsk City Executive Committee of 7 September 2011. **Exhibit C-80.** Letter from Manolium-Engineering to Minsk City Executive Committee of 12 October 2011. **Exhibit C-81.** Letter from Minsktrans to Manolium-Engineering of 27 October 2011. **Exhibit C-82.** Depot Facilities Gratuitous Use Agreement of 14 November 2011. **Exhibit C-83.** Letter from the Claimant to Minsk City Executive Committee of 19 March 2013. **Exhibit R-109.** Letter from the Claimant to the President of the Republic of Belarus of 4 September 2013. **Exhibit C-316.** Letter from Manolium-Engineering to Minsk City Executive Committee of 20 February 2014.
Exhibit C-91. Order of Manolium-Engineering No. 1-C of 1 July 2011. **Exhibit C-317.** Order of Manolium-Engineering No. 1-C of 1 September 2011. **Exhibit C-79.** Letter from Manolium-Engineering to Minsk City Executive Committee of 7 September 2011. **Exhibit C-318.** Test protocol of State Enterprise *Department of road-bridges construction and municipal improvement of the Minsk City Executive Committee* on pavement of the Road of 22 August 2012. **Exhibit C-319.** Letter from Manolium-Engineering to Minsk City Executive Committee of 28 October 2013.
CS-I. **Claimant's Notice of Arbitration of 15 November 2017,** paras. 199-203. **Exhibit C-99.** Pull Station Gratuitous Use Agreement of 6 July 2010. **Exhibit C-100.** Acceptance Act in respect of the Pull Station of 30 July 2010. **Exhibit C-101.** Registration of the Pull Station as a permanent structure of 1 October 2010. **Exhibit R-109.** Letter from the Claimant to President of the Republic of Belarus of 4 September 2013.
[210] *See paras. 42-49*. **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file).

(i) The Claimant could have completed the construction of the New Communal Facilities itself, after receiving an extension of the land and construction permits; or

(ii) The Respondent could hire and pay other contractors to complete the construction of the New Communal Facilities.

200. Neither of these solutions would serve the Respondent's hidden agenda to get everything for free while destroying the Claimant's business to punish if for, in the Respondent's view, *"colluding"* with political opposition.

201. The Respondent now blames the Claimant for failing to apply for an extension of the construction permit.[211] This is not the case.

202. Because the Claimant's temporary right to use the land plots for the New Communal Facilities expired on 1 July 2011, Manolium-Engineering requested that the Minsk City Executive Committee and Minsktrans extend the deadlines under the Investment Contract to "*not later than November 2011*".[212]

203. On 30 December 2011, the last construction permit for the Depot expired.[213]

204. On 18 January 2012, Manolium-Engineering and Minsktrans had a meeting where it was agreed that the construction permit for Manolium-Engineering would be extended and the schedule of work would be amended with a new completion deadline of 1 May 2012.[214]

205. On 20 March 2012, the Claimant provided another draft Addendum to the Investment Contract which proposed to extend the deadline for the New

[211] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 117, 159.
[212] **Exhibit R-65.** Draft Supplemental Agreement of 4 July 2011.
[213] **Exhibit R-71.** Construction permit for Depot of 3 October 2011.
[214] **Exhibit C-320.** Protocol of meeting between Minsktrans and Manolium-Engineering of 18 January 2012.

Communal Facilities to 1 June 2012.[215] Minsktrans was, in principle, prepared to grant this extension,[216] but the Minsk City Executive Committee refused to do so.[217]

206. The same agreements on the extension of the construction permit for Manolium-Engineering were reached during another meeting between Manolium-Engineering and Minsktrans on 23 March 2012.[218]

207. On 13 April 2012, Manolium-Engineering requested that Gosstroy extend the construction permit until 1 July 2012.[219]

208. On 17 April 2012, Manolium-Engineering requested that the Minsk City Executive Committee extend the deadlines for construction of the New Communal Facilities.[220]

209. On 21 April 2012, Gosstroy requested that Manolium-Engineering provide contracts with its contractors and, more importantly, informed Manolium-Engineering that that the decision of the Minsk City Executive Committee on the extension of the construction deadline should be submitted.[221]

210. On 25 April 2012, Manolium-Engineering submitted to Gosstroy the requested contracts with its contractors.[222]

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[215] **Exhibit R-78.** Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012.
[216] **Exhibit C-321.** Letter from Minsktrans to Manolium-Engineering of 26 January 2012. **Exhibit R-78.** Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012.
[217] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 212.
[218] **Exhibit C-322.** Protocol of meeting between Minsktrans and Manolium-Engineering of 23 March 2012.
[219] **Exhibit R-81.** Letter from Manolium-Engineering to Gosstroy of 13 April 2012.
[220] **Exhibit R-83**. Letter from Manolium-Engineering to Minsk City Executive Committee of 17 April 2012.
[221] **Exhibit C-127.** Letter from Gosstroy to Manolium-Engineering of 21 April 2012.
[222] **Exhibit R-84. L**etter from Manolium-Engineering to Gosstroy of 25 April 2012.

211. On 18 May 2012, Manolium-Engineering requested that the Minsk City Executive Committee extend the deadlines for construction of the New Communal Facilities until the commission date of the Facilities.[223]

212. On 22 May 2012, the Claimant confirmed to the Minsk City Executive Committee its readiness to finance and complete the construction of the New Communal Facilities and requested an amendment of the deadline in the work schedule to 31 December 2012.[224]

213. However, on 5 June 2012, the Construction and Investments Committee of the Minsk City Executive Committee rejected the extension application of Manolium-Engineering on an extremely formalistic ground – a purported lack of information and documents to make the decision.[225]

214. Thus, the Respondent did not extend the right to use the land to the Claimant and did not extend the construction permit, making it impossible to complete the construction.

2.7. The Respondent Refused to Provide the Claimant with the Extension Of the Amended Investment Contract

215. On 4 July 2011, the Claimant proposed to extend the deadlines for completing the New Communal Facilities from 1 July 2011 to "*not later than November 2011*".[226] Thus, the Claimant requested an extension for the New Communal Facilities of only 5 months.

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[223] **Exhibit R-87**. Letter from Manolium-Engineering to Minsk City Executive Committee (received on 22 May 2012) of 18 May 2012.
[224] **Exhibit R-88.** Claimant's letter to Minsk City Executive Committee w/date (in response to Minsk City Executive Committee letter of 18 June 2012).
[225] **Exhibit R-90.** Letter from Minsk City Executive Committee to Manolium-Engineering of 5 June 2012.
[226] **Exhibit R-65.** Draft Supplemental Agreement of 4 July 2011.

216. At that time, the project under the Investment Contract had already lasted 8 years. A five month extension was not material in this time frame.

217. Moreover, there was no urgency from the Respondent which would justify the refusal for extension. Indeed, the Respondent is still not using the New Communal Facilities.

218. In fact, the Respondent did not even resume the construction until 2 October 2018. This work is to be financed from the state budget with plans to complete it by the end of May 2019.[227] Surely, had the Respondent truly believed there was urgency to this project, it would not have waited years after seizure to even start the construction.

[227] **Exhibit C-323.** Website of news portal *Blizko*, *Construction of Trolleybus Depot in Uryuch'e Was Resumed – Its Construction Was Frozen*, 14 December 2018. // Available at: http://blizko.by/notes/v-uruchie-prodolzhili-stroitelstvo-trolleybusnogo-depo-ego-vozvedenie-bylo-zamorozheno.

Image 8. The Current View of the Depot Administrative Building[228]

219. Had the Respondent honored its obligations to the Claimant, this construction could have been finished long ago. Indeed, while Minsktrans signed the draft Addendum, circulated by the Claimant on 4 July 2011 providing for an extension, the Minsk City Executive Committee refused to sign.[229]

220. The Respondent now argues that the refusal was justified as this proposal "*provided little assurance that the Investment Object would be completed without delay*".[230]

221. This after-the-fact justification is unconvincing:

[228] **Exhibit C-323.** Website of news portal *Blizko*, *Construction of Trolleybus Depot in Uryuch'e Was Resumed – Its Construction Was Frozen*, 14 December 2018. // Available at: http://blizko.by/notes/v-uruchie-prodolzhili-stroitelstvo-trolleybusnogo-depo-ego-vozvedenie-bylo-zamorozheno.
[229] **Exhibit R-65.** Draft Supplemental Agreement of 4 July 2011.
[230] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 210. **RWS-2.** First Witness Statement of Mr. Akhramenko of 19 November 2018, para. 42.

(i) **First**, it is not clear what kind of "*assurance*" the Respondent believes the Claimant should have provided;

(ii) **Second**, there was no requirement in the Investment Contract to provide any kind of "*assurance*";

(iii) **Third**, no *"assurance"* was provided by the Claimant in the past when two extensions were granted, and the Respondent never expressed any concern with this approach or made any request for an assurance; and

(iv) **Finally**, the fact that the Claimant had at that time already invested more than USD 20 million on this project, was a sufficient "*assurance*" that the Claimant was indeed prepared to invest further USD 3 million.

222. After several meetings with the Minsk City Executive Committee and Minsktrans held in January 2012 where Manolium-Engineering again confirmed its readiness to resume the financing,[231] the Claimant provided another draft Addendum to the Investment Contract which proposed to extend the deadline for the New Communal Facilities to 1 June 2012.[232]

223. While Minsktrans was again, in principle, prepared to grant this extension,[233] the Minsk City Executive Committee "*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*".[234] Ironically, if the Respondent had agreed

[231] **Exhibit C-125.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 9 January 2012. **Exhibit C-320.** Protocol of meeting between Minsktrans and Manolium-Engineering of 18 January 2012. **Exhibit C-321.** Letter from Minsktrans to Manolium-Engineering of 26 January 2012.
[232] **Exhibit R-78.** Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012.
[233] **Exhibit C-321.** Letter from Minsktrans to Manolium-Engineering of 26 January 2012. **Exhibit R-78.** Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012.
[234] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 212.

to the previous extension request that it unjustifiably rejected, the project would have already been completed at that time.

224. On 3 April 2012, the Claimant again confirmed that it was prepared to complete the New Communal Facilities and to provide the required financing.[235]

225. On 6 April 2012, the Minsk City Executive Committee proposed to extend the time of completion until 1 July 2012, but only on the following *draconian* terms:[236]

> "*If the Contract is terminated through the fault of OOO Manolium-Processing and/or IP Manolium-Engineering, including if MCEC unilaterally repudiates the Contract under sub-clause 16.2 of clause 16, the communal facilities referred to in clauses 2.1, 2.2, and 2.3 (including property and construction materials they are created from, construction in progress that has been mothballed, as well as documents underlying the construction) shall be transferred into the municipal ownership of Minsk* ***free-of-charge*** *from the Contract termination date*." [Claimant's emphasis]

226. This was a thinly-veiled attempt to contractually authorize the future nationalization of the New Communal Facilities that the Respondent was planning. Because the completion of the project was largely dependent on the Respondent, it was a near certainty that the Respondent would create some artificial barriers to completion so that it could seize the investment (as it did anyway).

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[235] **Exhibit R-79.** Minutes of a meeting on the implementation of an investment project of 3 April 2012.

[236] **Exhibit R-80.** Letter from Minsk City Executive Committee to the Claimant and Manolium-Engineering of 6 April 2012.

227. Specifically, as the Claimant had unfortunately learned from its past experience (as demonstrated above),[237] the process of obtaining land use rights and construction permits from the Respondent would likely take months. This delay would be in addition to the numerous other delays, also discussed above,[238] that were likely to arise from the Respondent's actions.

228. The Claimant thus requested some guarantees from the Respondent to ensure that the Respondent would honor its obligations after the Claimant completed the project.

229. On or around 18 June 2012, Mr. Ekavyan stated that the Claimant could resume the financing of the works on the New Communal Facilities in exchange for receiving the title to the land plot on which the Investment Object was located after completion of construction:[239]

> "*1. According to the Works and Funding Schedule, the budgeted cost for completing construction amounts to 29,887,248,974 Belarusian rubles. We are ready to finance this amount if it is final*.
>
> *2. The above Schedule should be amended to bring it in line with the Funding Schedule for the 6 months until 31 December 2012.*
>
> *3. Upon completion of construction on the land plot within Kiseleva – Krasnaya Streets and Masherova Prospect – Nezavisimosti Prospect in Minsk, OOO Manolium-Processing should obtain title to own that property, as well as title to own the land plot*." [Claimant's emphasis]

[237] *See paras. 64-67; 99-117*.
[238] *See paras. 50-122*.
[239] **Exhibit R-88.** Claimant's Letter to the Minsk City Executive Committee w/date (in response to the Minsk City Executive Committee Letter of 18 June 2012).

230. The Respondent rejected this proposal,[240] thereby refusing to provide a guarantee to the Claimant for what the Respondent had initially promised to the Claimant under the Investment Contract.

231. Mr. Dolgov commented on this situation:[241]

> "*To our surprise, on 26 July 2012, the Minsk City Executive Committee informed us that it was ready to extend the term to 31 December 2012 in order to complete the construction of the New Communal Facilities; however, it disagreed with the condition on the transfer of the ownership right to the land plot for the Investment Object. In other words, their logic was rather simple: you give us the money, and in return we promise you nothing!*"

2.8. The Respondent Refused the Claimant's Offer of a Further Investment of USD 3 Million to Complete the Project under the Investment Contract

232. As demonstrated above,[242] the project was stuck because the Respondent did not extend the rights to use land plots to the Claimant. Thus, the Claimant could not obtain a construction permit to complete the construction of the New Communal Facilities.

233. In order to resolve this deadlock created by the Respondent, the Claimant several times offered to resume financing of the project by injecting, in particular, an additional USD 3 million to complete the Facilities.[243] This number was not

[240] **Exhibit R-92.** Letter from Minsk City Executive Committee to the Claimant of 26 July 2012. **Exhibit R-96.** Letter from Minsk City Executive Committee to the Claimant and Manolium-Engineering of 28 September 2012.
[241] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 132.
[242] *See paras. 215-231*.
[243] **Exhibit C-125.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 9 January 2012. **Exhibit R-79.** Minutes of a meeting on the implementation of an investment project of 3 April 2012. **Exhibit R-88.** Claimant's letter to Minsk City Executive

chosen out of thin air — the Respondent itself had previously identified this amount as sufficient funding to finish the project:[244]

> "*1. Listened to:*
>
> *[…]*
>
> *1.3. L.T. Papenok on the need of additional financing from FE "Manolium-Engineering" to complete the communal facilities' construction under the investment contract of 6 June 2003 (in accordance with the calculation – in amount of 3 USD million)…*"

234. Despite agreeing that USD 3 million was sufficient to complete the project, the Respondent rejected the Claimant's offer of this additional financing on multiple occasions, as explained below.[245]

235. On or around 18 June 2012, Mr. Ekavyan offered to resume the financing of the New Communal Facilities.[246]

236. On 18 July 2014, the Claimant again proposed to the Respondent to transfer the New Communal Facilities into the communal ownership and to pay USD 3 million to the Respondent's budget to complete the construction of the Facilities:[247]

Committee w/date (in response to Minsk City Executive Committee letter of 18 June 2012). **Exhibit C-324.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and Manolium-Engineering of 9 August 2012. **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014.

[244] **Exhibit C-125.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 9 January 2012.

[245] *See paras. 235-237.*

[246] **Exhibit R-88.** Claimant's Letter to the Minsk City Executive Committee w/date (in response to the Minsk City Executive Committee Letter of 18 June 2012).

[247] **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014.

"*On our turn, from our side we propose to take the following steps for improvement of the contract terms for the city of Minsk:*

1. To transfer the facility of incomplete construction (depot) to the communal ownership and to transfer USD 3 million to CUE "Minsktrans" for works' completion and commissioning of the facilities." [Claimant's emphasis]

237. This proposal, again, was conditional on the Respondent providing the land plot for the construction of the Investment Object.[248]

238. The Claimant also proposed that the Respondent change the Investment Object as follows:[249]

"*To issue a decision of Minsk City Executive Committee that would permit "Manolium-Processing" LLC (Moscow) to amend the design of detailed planning of territory within streets Kiseleva-Krasnaya-Masherova with placement of luxury accommodation and shopping center*."

239. The Respondent's witness, Mr. Akhramenko now incorrectly claims that this part of the proposal was a significant change of plans:[250]

"*102. In particular, Mr Dolgov fails to mention that his proposal involved significant change in what would comprise the Investment Object. Instead of a modern complex the likes of which does not, according to Mr Dolgov, exist in Minsk even now, Manolium-Engineering and the*

[248] **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014.
[249] **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014.
[250] **RWS-2.** First Witness Statement of Mr. Akhramenko of 19 November 2018, paras. 102-103.

Claimant would build an "accommodation and shopping centre"[77] on a site in the city centre.

103. In any case, by that time we had doubts that the Claimant could complete the construction of even the alternative Investment Object referred to in the Claimant's letter dated 18 July 2014."

240. **First**, this was not a significant change in the Investment Object, because the initial plan also included accommodations and a shopping center.[251]

241. **Second**, and in any case, this was a much better proposal than any that the city of Minsk had at that time from others (if there were any such proposals at all).

242. The reality is that the abandoned old Trolleybus Depot No. 1 continues to deteriorate, has not been used since the early 2000's and is still not in use today.[252] The poor current condition of this land is demonstrated by the photos below:

[251] **Exhibit C-110.** Composition and the key technical and economic indexes for the Investment Object of 25 February 2005. **Exhibit TT-52.** Graphic Design of Investment Object, 2010, pp. 4(1), 4(2), 17(1).
[252] **Exhibit C-36.** Photoreport: an abandoned trolleybus depot in the center of Minsk, 20 August 2014.

Image 9. The View of the Land Plot for the Investment Object, 20 September 2018[253]

[253] **Exhibit C-325.** Photographs of the land plot within streets Kiseleva-Krasnaya-Masherova intended for the construction of Investment Object, currently occupied by old Trolleybus Depot No. 1 (not in use), 20 September 2018.

Image 10. The View of the Land Plot for the Investment Object, 20 September 2018[254]

243. The fact that this land is not used, but was refused to the Claimant, confirms that the Respondent's justifications for destruction of the Claimant's investment were false. As demonstrated herein, the destruction of the investment was politically and economically motivated — the Respondent desired to punish a political opponent, and to receive the benefit of the prior USD 20 million in investments in doing so. This Arbitral Tribunal should not let the Respondent succeed with this scheme.

[254] **Exhibit C-325.** Photographs of the land plot within streets Kiseleva-Krasnaya-Masherova intended for the construction of Investment Object, currently occupied by old Trolleybus Depot No. 1 (not in use), 20 September 2018.

2.9. Termination of the Investment Contract

244. On 2 August 2012, Mr. Dolgov proposed terminating the Investment Contract by mutual agreement during personal meeting with the Minsk City Executive Committee and Minsktrans.[255]

245. On 9 August 2012, the Minsk City Executive Committee, Minsktrans and the Claimant agreed to conduct a review of the Claimant's investments in the New Communal Facilities.[256] As the Respondent confirms in this arbitration, the Respondent at that time "*was willing even to pay the Claimant for the New Communal Facilities in their incomplete state*."[257]

246. From September to November 2012, the Parties attempted to reach agreement on the amount of the Claimant's investments. Minsktrans valued them as USD 14,743,586,[258] while the Claimant valued them as USD 16,287,546.[259]

247. Finally, the Parties agreed to engage the independent auditor *Paritet-Standart* to resolve this difference.[260] On 5 November 2012, that independent auditor decided that the costs of the Claimant's investments were USD 18,313,846.96.[261]

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[255] **Exhibit R-93.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and Manolium-Engineering of 2 August 2012.
[256] **Exhibit C-324.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and Manolium-Engineering of 9 August 2012.
[257] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 221.
[258] **Exhibit R-95.** Letter from Minsktrans to Minsk City Executive Committee of 14 September 2012. **Exhibit C-326.** Letter from Minsktrans to Manolium-Engineering of 14 September 2012.
[259] **Exhibit R-94.** Letter from Manolium-Engineering to Minsktrans of 11 September 2012.
[260] **Exhibit C-128.** Letter from Minsktrans to Manolium-Engineering of 28 August 2012. **Exhibit R-94.** Letter from Manolium-Engineering to Minsktrans of 11 September 2012. **Exhibit R-95.** Letter from Minsktrans to Minsk City Executive Committee. **Exhibit C-129.** Letter from Manolium-Engineering to Minsk City Executive Committee of 20 September 2012. **Exhibit C-130.** Letter from Minsk City Executive Committee to Manolium-Engineering of 3 October 2012.
[261] **Exhibit C-131.** Paritet-Standart Report of 5 November 2012, p. 2.

248. The amount calculated by the independent auditor was higher than the Claimant's calculation of the investment amount put forward in negotiations. This is because the Claimant did not include all costs, including indirect costs in its own conservative calculation. This demonstrates the reasonableness of the Claimant's position and its genuine desire to compromise on to resolve this dispute.

249. Notably, the Respondent **accepted** the independent evaluation made by *Paritet-Standart* and referred to it on 28 March 2013.[262] In fact, the Respondent did not raise any objection to the independent *Paritet-Standart* valuation until 2015.[263]

250. On 5 December 2012, the Minsk City Executive Committee proposed terminating the Investment Contract[264] and executing a new investment contract for the land plot where the Investment Object was planned. The new terms of that proposed contract are summarized as follows:[265]

(i) **With respect to the Investment Contract:**

a) The role as developer for the New Communal Facilities is transferred from the Claimant to Minsktrans;[266]

b) **All payments made by the Claimant and Manolium-Engineering under the investment project and the New**

[262] **Exhibit C-85.** Claimant's letter to Minsk City Executive Committee of 19 March 2013. **Exhibit R-105.** Letter of Minsk City Executive Committee to Manolium-Engineering of 28 March 2013.
[263] *See paras. 850-852*.
[264] **Exhibit R-97.** Minutes of the meeting attended by Minsk City Executive Committee and Manolium-Engineering of 5 December 2012.
[265] **Exhibit C-132.** Letter from Minsk City Executive Committee to Claimant of 10 December 2012. **Exhibit R-98.** Draft investment contract for the implementation of the Investment Object enclosed with letter of Minsk City Executive Committee to Manolium-Engineering of 10 December 2012.
[266] **Exhibit C-132.** Letter from Minsk City Executive Committee to Claimant of 10 December 2012, clause 2.

Communal Facilities are transferred to the Respondent's ownership;[267] and

c) The Investment Contract is terminated;[268]

(ii) **With respect to the new investment contract for the Investment Object:**

a) The Respondent was entitled to withdraw the land plot for the Investment Object if the Claimant violated any construction timeframes;[269]

b) The Claimant was required to demolish at its own expense certain real structures in the event that the Respondent withdrew the land plot;[270] and

c) In the event of termination, the Respondent was not required to compensate the Claimant for the Claimant's costs incurred in the course of implementation of the investment project.[271]

251. In other words, the proposal was that the Respondent would get for free all investments made by the Claimant up to that date. Also, if the Claimant

[267] **Exhibit C-132.** Letter from Minsk City Executive Committee to Claimant of 10 December 2012, clause 3.
[268] **Exhibit C-132.** Letter from Minsk City Executive Committee to Claimant of 10 December 2012, clause 1.
[269] **Exhibit R-98.** Draft investment contract for the implementation of the Investment Object enclosed with letter of Minsk City Executive Committee to Manolium-Engineering of 10 December 2012, Sub-Clause 9.4.
[270] **Exhibit R-98.** Draft investment contract for the implementation of the Investment Object enclosed with letter of Minsk City Executive Committee to Manolium-Engineering of 10 December 2012, Sub-Clause 6.7.
[271] **Exhibit R-98.** Draft investment contract for the implementation of the Investment Object enclosed with letter of Minsk City Executive Committee to Manolium-Engineering of 10 December 2012, Clause 27.

experienced any delays in the construction of the New Investment Project, the Respondent would be entitled to take the entire project without compensation.

252. The Minsk City Executive Committee requested that the Claimant execute the contract embodying these terms within 10 calendar days. If the Claimant did not do so, the Respondent would terminate the Investment Contract.[272]

253. The Claimant justifiably refused to accept these draconian terms (in fact, no reasonable investor would do so). This proposal, had it been accepted, would mean that the Respondent could terminate the project at any time without any compensation to the investor. The Claimant's past difficulties with the Respondent's state agencies and state companies during the construction of the New Communal Facilities rendered this proposal even more unreasonable because it demonstrated that the Respondent would likely impose additional obstacles in the future.[273]

254. In the end of 2012 and 2013, the Parties again unsuccessfully explored a mutual termination of the Investment Contract.[274] The Respondent continued to insist on the unfair and unreasonable conditions discussed above.

[272] **Exhibit C-132.** Letter from Minsk City Executive Committee to Claimant of 10 December 2012.
[273] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 31-36, 37-41, 52-57.
[274] **Exhibit C-133.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 December 2012. **Exhibit R-100.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 December 2012. **Exhibit R-101.** Letter from Minsk City Executive Committee to Manolium-Engineering of 19 December 2012. **Exhibit R-103.** Letter from the Claimant and Manolium-Engineering to Minsk City Executive Committee of 10 January 2013. **Exhibit C-134.** Letter from Minsk City Executive Committee to Manolium-Engineering of 18 January 2013. **Exhibit R-104.** Letter from Claimant to Minsk City Executive Committee of 31 January 2013. **Exhibit C-135.** Letter from Minsk City Executive Committee to Claimant of 4 February 2013. **Exhibit C-136.** Letter from Claimant to Minsk City Executive Committee of 4 March 2013. **Exhibit C-137.** Letter from Minsk City Executive Committee to Claimant of 11 March 2013.

255. On 11 March 2013, the Minsk City Executive Committee proposed continuing negotiations for a new investment contract for the Investment Object.[275] Nevertheless, the Respondent invalidated the Land Plot Selection Act for the Investment Object just three days later.[276]

256. This unilateral decision demonstrated that the Respondent was no longer interested in the Claimant's implementation of the Investment Object. Notably, the decision was made without waiting for a court decision on termination of the Investment Contract.

257. From March to September 2013, the Parties nevertheless continued their negotiations for a potential new contract.[277]

258. As part of these negotiations, the Claimant requested that the Respondent accept ownership of the New Communal Facilities, pay USD 30 million in compensation to the Claimant and provide the land plot for the Investment Object for use by the Claimant at its discretion.

259. The Claimant's request for USD 30 million in compensation was a reasonable measure of the value of the New Communal Facilities because:

[275] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 238. **Exhibit C-137.** Letter from Minsk City Executive Committee to Claimant of 11 March 2013.
[276] **Exhibit C-138.** Decision of Minsk City Executive Committee of 14 March 2013.
[277] **Exhibit C-83.** Letter from Claimant to Minsk City Executive Committee of 19 March 2013. **Exhibit R-105.** Letter from Minsk City Executive Committee to Manolium-Engineering and Claimant of 28 March 2013. **Exhibit R-106.** Letter from Manolium-Engineering to Minsk City Executive Committee of 3 April 2013. **Exhibit R-107.** Letter from Minsk City Executive Committee to Manolium-Engineering of 9 April 2013. **Exhibit C-93.** Letter from Claimant to Minsk City Executive Committee of 27 May 2013. **Exhibit R-108.** Letter from Minsk City Executive Committee to Claimant of 7 June 2013. **Exhibit C-94.** Letter from Claimant to Minsk City Executive Committee of 27 June 2013. **Exhibit C-139.** Letter from Minsk City Executive Committee to Claimant of 19 September 2013.

(i) The Claimant made investments in the New Communal Facilities of USD 20,4 million (without interest), plus the Library Payment;[278]

(ii) The total amount of funds invested in the Project by the Claimant exceeded USD 25 million;[279]

(iii) On 12 September 2017, the Respondent sold at a public auction "*the right for design and construction*" on the same land plot for the Investment Object to another investor for USD 8,865,432.61.[280] In addition to that, the winner would have to make a one-time payment for the right to enter into a lease agreement of more than USD 23 million.[281] Thus, the successful bidder for the land plot for the Investment Object must necessarily believe that the land plot has a fair market value (the "**FMV**") in excess of USD 31.87 million it would be required to pay. [282]

260. Despite this evidence of the value of the Claimant's investments and the clear terms of the Investment Contract, the Respondent insisted that the Claimant transfer to it the New Communal Facilities **for free**.[283]

[278] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.
[279] **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file).
[280] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 363-367. Exhibit R-153.
[281] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 366. **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, para. 194. **Exhibit R-152.** Announcement of the auction in relation to the right for design and construction on the Investment Object land plot of 12 September 2017. // Available at: http://mgcn.by/auctions/place/00001621.html.
[282] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.2.5, 3.11.6, footnotes 21, 304.
[283] **Exhibit R-108.** Letter from Minsk City Executive Committee to Claimant of 7 June 2013. **Exhibit C-94.** Letter from Claimant to Minsk City Executive Committee of 27 June 2013.

261. After attempts to find a compromise failed, the Minsk City Executive Committee and Minsktrans filed a claim with Minsk Economic Court seeking termination of the Investment Contract on 14 October 2013.[284]

262. On 9 September 2014, the Economic Court of Minsk, the court of first instance, terminated the Investment Contract.[285]

263. The Respondent relies heavily on its claim that the Claimant did not seek an expert determination during the court proceedings, implying that such an evaluation would have provided a fair result for both Parties.[286]

264. However, this argument does not advance the Respondent's case. The Minsk City Executive Committee proposed and the court considered as a potential expert the Registration and Cadastre Agency.[287]

265. While this proposal was not accepted by the Claimant within the court proceedings,[288] the same Agency was proposed later by the Minsk City Executive Committee and accepted by the Claimant on 4 February 2015.[289]

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[284] **Exhibit C-140.** Statement of claim regarding the termination of the Amended Investment Contract of 14 October 2013.
[285] **Exhibit C-147.** Judgment of the Economic Court of Minsk of 9 September 2014.
[286] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 256-263. **RWS-2.** First Witness Statement of Mr. Akhramenko of 19 November 2018, paras. 109-121. **Exhibit R-114.** Minsktrans Motion No. 11/2-02-8/913 of 1 July 2014. **Exhibit R-115.** Minsk City Executive Committee Motion of 9 July 2014 to conduct a valuation in Case No. 399-3/2013 of 9 July 2014. **Exhibit R-116.** Minsk City Executive Committee Motion No. 1/2-11/UI-3112 to conduct an expert appraisal in Case No. 399-3/2013 and suspend proceedings in the case of 28 July 2014.
[287] **Exhibit R-116.** Minsk City Executive Committee Motion No. 1/2-11/UI-3112 to conduct an expert appraisal in Case No. 399-3/2013 and suspend proceedings in the case of 28 July 2014. **Exhibit R-117.** Minutes of the court hearing re Case No. 399-3/2013 of 30 July 2014. **Exhibit C-145.** Ruling of the Economic Court of Minsk on scheduling a forensic expertise and suspending court proceedings of 30 July 2014.
[288] **Exhibit R-118.** Claimant's motion to the Minsk Economic Court of 29 August 2014. **Exhibit C-146.** Ruling of the Economic Court of Minsk on resuming court proceedings of 1 September 2014.
[289] **Exhibit C-153.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 4 February 2015.

266. On 16 June 2015, the Registration and Cadastre Agency produced its report valuing the Claimant's investments at USD 18,129,933.17.[290]

267. Thus, even if the Claimant had accepted the expert within the court proceedings, the result would be the same.

268. Ironically, the Respondent disputes in this arbitration the valuation report produced by its own state agency that was proposed by the Minsk City Executive Committee to serve as a valuation expert.[291]

269. Further, it would be naïve to believe that the Minsk Economic Court would deviate from its "*mission*", to create an appearance of legality of expropriation measures taken by that time by the Respondent.

270. Eventually, the court concluded that the Claimant failed to construct and transfer the New Communal Facilities to the Respondent's ownership before 1 July 2011 and that, therefore, the Investment Contract should be terminated.[292]

271. In reaching this conclusion, the Respondent's court of first instance improperly failed to:

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[290] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, p. 43.

[291] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 272-282. **RWS-2.** First Witness Statement of Mr. Akhramenko of 19 November 2018, paras. 125-129. **Exhibit R-121.** Letter from Minsk City Executive Committee to Claimant of 20 January 2015. **Exhibit R-122.** Letter from Manolium-Engineering to the Registration and Cadastre Agency of 24 February 2015. **Exhibit R-125.** Services agreement between Manolium-Engineering and the Registration and Cadastre Agency of 25 February 2015. **Exhibit C-155.** Letter from Manolium-Engineering to Minsk City Executive Committee of 17 June 2015. **Exhibit R-124.** Letter from the Registration and Cadastre Agency to Minsk City Executive Committee of 17 June 2015. **Exhibit R-125.** Letter from Manolium-Engineering to the President of Belarus of 30 June 2015. **Exhibit R-126.** Letter from State Property Committee of Belarus to Minsk City Executive Committee of 9 July 2015. **Exhibit C-156.** Letter from Minsk City Executive Committee to Manolium-Engineering of 7 August 2015 **Exhibit C-158.** Letter from Minsk City Executive Committee to Manolium-Engineering of 4 September 2015.

[292] **Exhibit C-147.** Judgment of the Economic Court of Minsk of 9 September 2014.

(i) Analyze the effect of the delays in construction for which the Claimant was not responsible; and

(ii) Consider that the Investment Contract provides that the Claimant may lose its right to the Investment Object in the center of Minsk only upon non-performance of its financial obligations,[293] which the Claimant indisputably satisfied (and in fact over-performed).

272. Despite these failures, the court of appeal and the Supreme Court upheld the decision of 9 September 2014 and sided with the Respondent.[294]

III. EXPROPRIATION OF THE NEW COMMUNAL FACILITIES

3.1. The Respondent Refused to Accept the New Communal Facilities

273. Incredibly, the Respondent refused to formally accept the New Communal Facilities when they were completed. This, of course, demonstrates that the Respondent had no intention of performing under the contract, but instead wanted everything for free.

274. The Respondent claims that it could not formally accept ownership of the New Communal Facilities because they were not 100 % complete and the Respondent was not obliged to take them in parts.[295] This fails.

275. These litigation-created statements contradict the position of the Respondent's authorities at the time. For example, during the meeting held between Manolium-

[293] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 17.
[294] **Exhibit C-149.** Appeal of Manolium-Engineering of 9 October 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk of 29 October 2014. **Exhibit C-151.** Cassation appeal of Manolium-Engineering of 29 November 2014. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.
[295] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 188.

Engineering and Minsktrans on 23 March 2012, Minsktrans instructed Manolium-Engineering to start preparing the documents to transfer the Depot.[296]

276. The truth is that the Respondent actually did, as a matter of fact, accept almost all of the New Communal Facilities (with the exception of the Depot Production Building as defined in para. 300 below). The Respondent even began to use them, but nevertheless refused to formally accept them.

3.1.1. New Communal Facility "Pull Station"

277. On 6 July 2010, Manolium-Engineering transferred the Pull Station to Minsktrans under the Pull Station Gratuitous Use Agreement.[297] The obligations of Minsktrans under this agreement included the obligation to maintain and operate the Pull Station until its transfer to the communal ownership.[298]

278. On 30 July 2010, the Pull Station was accepted by an act of the commissioning committee (including Minsktrans representatives).[299]

279. On 1 October 2010, the Pull Station was registered as a real estate property[300] and was 100% completed.

280. On 21 October 2010, Manolium-Engineering requested that the Respondent formally accept ownership of the Pull Station.[301]

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[296] **Exhibit C-322.** Protocol of meeting between Minsktrans and Manolium-Engineering of 23 March 2012.
[297] **Exhibit C-99.** Pull Station Gratuitous Use Agreement of 6 July 2010.
[298] **Exhibit C-99.** Pull Station Gratuitous Use Agreement of 6 July 2010, Sub-Clauses 1.1, 6.1.
[299] **Exhibit C-100.** Acceptance Act in respect of the Pull Station of 30 July 2010.
[300] **Exhibit C-101.** Registration of the Pull Station as a permanent structure of 1 October 2010. **CS-I. Claimant's Notice of Arbitration of 15 November 2017**, paras. 199-203.
[301] **Exhibit C-103.** Letter from Manolium-Engineering to Minsk City Executive Committee of 21 October 2010.

281. On 28 October 2010, Manolium-Engineering once again reminded the Minsk City Executive Committee that Manolium-Engineering had previously submitted the materials for the transfer of the Pull Station to the Respondent's ownership.[302]

282. On 8 November 2010, Minsktrans informed the Minsk City Executive Committee and on 17 November 2010 - Manolium-Engineering[303] - that the transfer of the Pull Station to the Respondent's ownership should be considered after the expiration of one year of operation of the Pull Station, i.e. in July 2011.[304] There is nothing in the Investment Contract to support this proposal, but Minsktrans insisted on this nevertheless. As demonstrated above, this was consistent with the past behavior of the Respondent in disregarding its contractual and other obligations.

283. On 6 and 22 July 2011, Minkstrans requested that Manolium-Engineering repair certain defects at the Pull Station.[305] Because these defects were caused by improper use of the Pull Station by the Respondent, the Claimant had no obligation to repair them. Further, the transfer of the title to the Pull Station and the potential remedy of any defects were legally unrelated issues. Again, this was of no concern to Belarusian authorities.

284. Mr. Dolgov commented on this accident:[306]

> "*26. In October 2010, a technical accident at the Pull Station caused cut-outs at transformers start a fire.*

[302] **Exhibit C-119.** Letter from Manolium-Engineering of 28 October 2010.
[303] **Exhibit C-104.** Letter from Minsktrans to Manolium-Engineering of 17 November 2010.
[304] **Exhibit C-327.** Letter from Minsktrans to Minsk City Executive Committee of 8 November 2010.
[305] **Exhibit R-66.** Letter from Minsktrans to Manolium-Engineering of 6 July 2011. **Exhibit C-78.** Letter from Minsktrans to Manolium-Engineering of 22 July 2011.
[306] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 26-29. **Exhibit C-328.** Letter from Minsktrans to Manolium-Engineering of 14 October 2010. **Exhibit C-329.** Act of technical investigation of accident on Pull Station of 29 November 2010.

27. The commission investigating the incident, which included a representative of the manufacturer of the equipment, determined that the accident had been a result of its improper operation.

28. Even though Minsktrans thus had been at fault, we replaced the burned-out equipment at our own cost.

29. Minsktrans took that as a sign of our readiness to make concessions and started making ever further additional requirements. In July 2011, for example, it demanded that Manolium-Engineering should provide the Pull Station with extra spare parts, tools, and accessories – yet again for our own account, even though those supplies had not initially been included in the scope of our obligations."

285. On 11 August 2011, Manolium-Engineering again requested that the Minsk City Executive Committee accept ownership of the Pull Station.[307]

286. On 19 September 2011, Minsktrans informed Manolium-Engineering that the issue of transfer of the Pull Station to the Respondent's ownership should be considered only after the Depot was commissioned.[308]

287. On 11 October 2011, Manolium-Engineering again requested that the Minsk City Executive Committee accept ownership of the Pull Station.[309]

[307] **Exhibit C-106.** Letter from Manolium-Engineering to Minsk City Executive Committee of 11 August 2011.
[308] **Exhibit C-105.** Letter from Minsktrans to Manolium-Engineering of 19 September 2011.
[309] **Exhibit C-107.** Letter from Manolium-Engineering to Minsk City Executive Committee of 11 October 2011.

288. On 27 October 2011, Minsktrans informed Manolium-Engineering that "*in order to accept to the balance [the Pull Station], [Minsktrans] requests [Manolium-Engineering] to provide the executive documents*".[310]

289. On 31 October 2011, Minsktrans informed Manolium-Engineering that Minsktrans was ready to accept the Pull Station "*if the conditions of the replacement of equipment are fulfilled*".[311] Again, this was related to replacement of the equipment that was damaged by Minsktrans because of improper use for which the Claimant was not responsible.

290. On 13 December 2011, Minsktrans informed Manolium-Engineering that it must provide a calculation of its costs on the Pull Station through 15 December 2011 in order to complete the ownership transfer.[312]

291. On 27 March 2012, Minsktrans requested that Manolium-Engineering renovate the exterior of the Pull Station in connection with "*preparation of the transfer of the pull station in the communal ownership of the city*".[313] Thus, Minsktrans *de facto* was using this building, but asked the Claimant to make a renovation.

292. On 19 July 2012, Claimant once again explained to the Minsk City Executive Committee that Minsktrans had by that time been using the Pull Station for a second year and that all documentation had been transferred. But the Pull Station was still not formally accepted.[314]

[310] **Exhibit C-81.** Letter from Minsktrans to Manolium-Engineering of 27 October 2011.
[311] **Exhibit C-109.** Letter from Minsktrans to Manolium-Engineering of 31 October 2011.
[312] **Exhibit C-92.** Letter from Minsktrans to Manolium-Engineering of 13 December 2011.
[313] **Exhibit C-330.** Letter from Minsktrans to Manolium-Engineering of 27 March 2012.
[314] **Exhibit R-91.** Letter from Claimant to Minsk City Executive Committee of 19 July 2012.

293. On 19 March 2013, Manolium-Engineering confirmed again to the Minsk City Executive Committee its readiness to transfer immediately the Pull Station to the Respondent's ownership.[315]

294. On 28 October 2013, Manolium-Engineering once again requested that the Minsk City Executive Committee accept ownership of the Pull Station.[316]

295. However, despite numerous requests, the Respondent still refused to accept title to the Pull Station. This, of course, would interfere with the Respondent's plan to get everything for free.

3.1.2. New Communal Facility "Depot"

296. Manolium-Engineering was to complete the construction work of the Depot Administrative Building and Checkpoint of the Depot (the "**Depot Checkpoint**") by September 2011, and to complete work on the Depot Production Building by October 2011.[317]

297. On 29 June 2011, Manolium-Engineering informed the Minsk City Executive Committee that the administrative building of the Depot (the "**Depot Administrative Building**") was almost ready and therefore proposed that it be commissioned.[318]

298. On 22 July 2011, Minsktrans informed Manolium-Engineering that Minsktrans considered it unreasonable to commission the Administrative Building

[315] **Exhibit C-83.** Letter from Claimant to Minsk City Executive Committee of 19 March 2013.
[316] **Exhibit C-319.** Letter from Manolium-Engineering to Minsk City Executive Committee of 28 October 2013.
[317] **Exhibit R-67.** Schedule to Complete Construction of the "Trolleybus Depot Accommodating 220 Trolleybuses in Urban District Uruchye-6", Minsk, approved by Minsk City Executive Committee Deputy Chair A.M. Borisenko of 5 August 2011.
[318] **Exhibit C-77.** Letter from Manolium-Engineering to Minsk City Executive Committee of 29 June 2011.

separately from the Depot because Minsktrans claimed that the function of the Depot Administrative Building was to ensure the use of the Depot in full.[319]

299. On 5 September 2011, Manolium-Engineering accepted delivery of the Depot Checkpoint from the general contractor.[320]

300. On 12 October 2011, Manolium-Engineering requested that the Minsk City Executive Committee provide the Depot Administrative Building and Checkpoint with required personnel and informed the Minsk City Executive Committee that these facilities were ready for commissioning and that the construction work on the production building of the Depot (the "**Depot Production Building**") was almost complete.[321]

301. On 14 November 2011, both the Depot Administrative Building and Checkpoint were transferred to Minsktrans, which means that they were 100% complete.[322]

302. The Depot Production Building was more than 85% complete at the time.[323]

303. On 19 March 2013, Manolium-Engineering again confirmed to the Minsk City Executive Committee its readiness to transfer immediately ownership of the Depot to the Respondent.[324]

[319] **Exhibit C-78.** Letter from Minsktrans to Manolium-Engineering of 22 July 2011.
[320] **Exhibit C-314.** Act of Acceptance of 5 September 2011.
[321] **Exhibit C-80.** Letter from Manolium-Engineering to Minsk City Executive Committee of 12 October 2011.
[322] **Exhibit C-82.** Depot Facilities Gratuitous Use Agreement of 14 November 2011. **Exhibit C-84.** Agreement on terminating the Depot Facilities Gratuitous Use Agreement of 30 December 2014.
[323] **Exhibit C-316.** Letter from Manolium-Engineering to Minsk City Executive Committee of 20 February 2014
[324] **Exhibit C-83.** Letter from Claimant to Minsk City Executive Committee of 19 March 2013.

304. Minsktrans did not accept ownership. Rather, until 30 December 2014, Minsktrans continued using the Depot Administrative Building and Depot Checkpoint for free without formally accepting title.[325]

3.1.3. New Communal Facility "Road"

305. On 1 July 2011, Manolium-Engineering completed the work on the Road and initiated the commissioning process of the Road.[326]

Image 11. General View of the Land Plots for the New Communal Facilities as of 29 May 2011[327]

306. As demonstrated by the above, the Road was already in public use at that time.

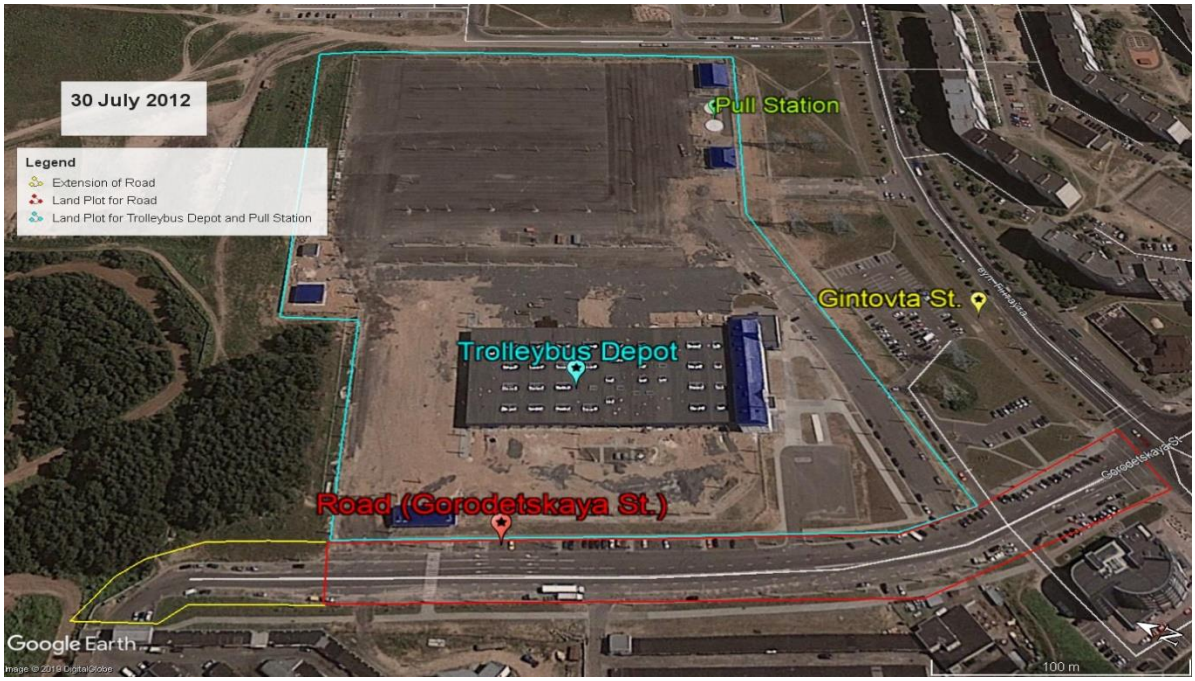
[325] **Exhibit C-84.** Agreement on terminating the Depot Facilities Gratuitous Use Agreement of 30 December 2014.
[326] **Exhibit C-91.** Order of Manolium-Engineering No. 1-C of 1 July 2011.
[327] **Exhibit C-331.** General view of land plots for the New Communal Facilities as of 29 May 2011 (Google Earth shot).

307. On 1 September 2011, Manolium-Engineering again initiated the commissioning process for the Road.[328]

308. On 7 September 2011, Manolium-Engineering informed the Minsk City Executive Committee that the construction work on the Road was completed.[329]

309. The Respondent refused to formally accept the road, although it continued to be in public use:

Image 12. General View of the Land Plots for the New Communal Facilities as of 30 July 2012[330]



[328] **Exhibit C-317.** Order of Manolium-Engineering No. 1-C of 1 September 2011.
[329] **Exhibit C-79.** Letter from Manolium-Engineering to Minsk City Executive Committee of 7 September 2011.
[330] **Exhibit C-332.** General view of land plots for the New Communal Facilities as of 30 July 2012 (Google Earth shot).

310. On 22 August 2012, State Enterprise *Department of road-bridges construction and municipal improvement of the Minsk City Executive Committee* issued a report which confirmed that the pavement of the Road met the requirements.[331]

311. On 19 March 2013, Manolium-Engineering confirmed to the Minsk City Executive Committee its readiness to transfer immediately ownership of the Road to the Respondent and informed the Respondent that Minsktrans failed to issue confirmation that the overhead contact system work on the Road had been completed.[332]

312. On 4 September 2013, the Claimant informed the President of Belarus that the Road was 100% complete.[333]

313. On 28 October 2013, Manolium-Engineering once again reminded the Minsk City Executive Committee that the Respondent was using the Road starting in 2011.[334]

314. However, since that time, the Respondent has continued to use the Road while refusing to formally accept ownership:[335]

[331] **Exhibit C-318.** Test protocol of State Enterprise *Department of road-bridges construction and municipal improvement of the Minsk City Executive Committee* on pavement of the Road of 22 August 2012.
[332] **Exhibit C-83.** Letter from Claimant to Minsk City Executive Committee of 19 March 2013.
[333] **Exhibit R-109.** Letter from the Claimant to President of the Republic of Belarus of 4 September 2013.
[334] **Exhibit C-319.** Letter from Manolium-Engineering to Minsk City Executive Committee of 28 October 2013.
[335] **Exhibit C-333.** Video of the Road in Minsk, 20 February 2019.

Image 13. General View of the Land Plots for the New Communal Facilities as of 18 September 2014[336]

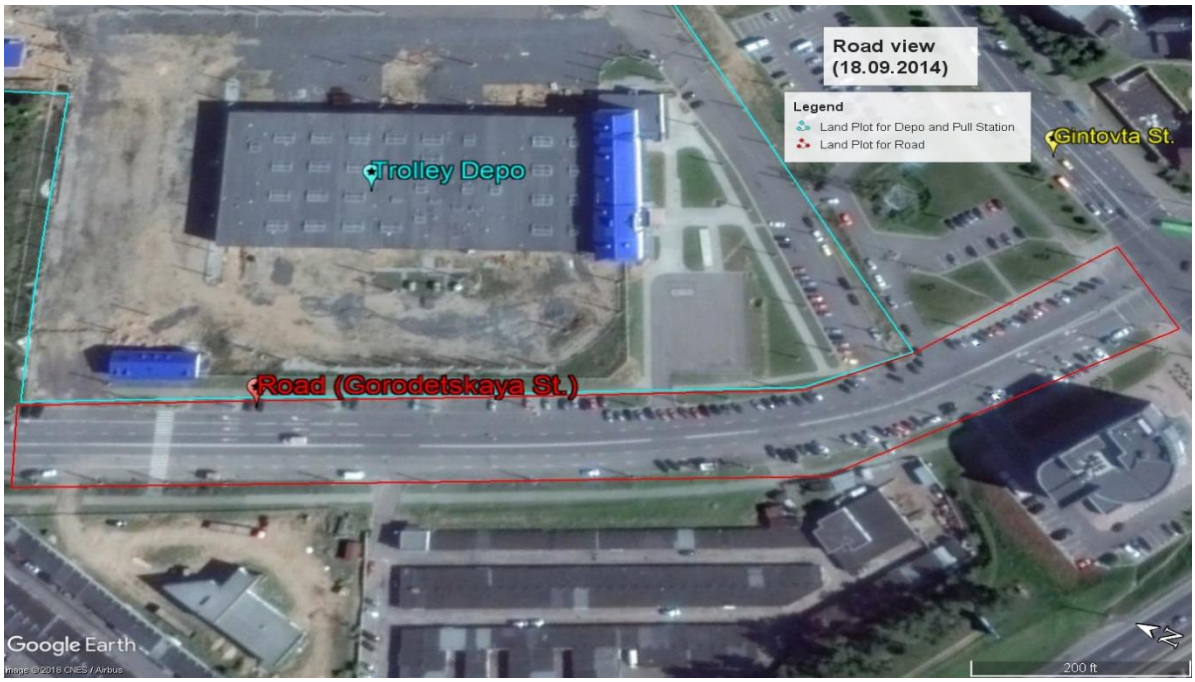


Image 14. View of the Road as of 20 September 2018[337]

[336] **Exhibit C-334.** General view of land plots for the New Communal Facilities as of 18 September 2014 (Google Earth shot).
[337] **Exhibit C-335.** Photographs of New Communal Facilities of 20 September 2018 and 20 February 2019.

Image 15. View of the Road as of 20 February 2019[338]

3.1.4. The Respondent Refused to Formally Accept the Land Plots Where the New Communal Facilities Are Located

315. The Minsk City Committee refused to extend the right to use the land where the New Communal Facilities are located past 1 July 2011.[339] Logically, if the time period for the right to use the land is not extended, the lessee (*i.e.*, the Claimant) loses all right to the land and the land reverts to the lessor (*i.e.*, the Respondent).

316. However, basic logic does not hold true in Belarus. Instead, the Belarusian authorities demanded a formal document confirming this obvious point of reversion of the land.

[338] **Exhibit C-335.** Photographs of New Communal Facilities of 20 September 2018 and 20 February 2019.
[339] **Exhibit C-75.** Decision of Minsk City Executive Committee of 16 September 2010. **Exhibit C-267.** Decision of Minsk City Executive Committee of 16 September 2010.

317. On 11 June 2012, Manolium-Engineering informed the Minsk City Executive Committee that Manolium-Engineering returned the land plots where the New Communal facilities were located because the Investment Contract was not extended.[340]

318. On 17 July 2012, the Minsk Land Planning Service informed Manolium-Engineering that the land plots for the New Communal Facilities could not be returned to the Respondent, because the New Communal Facilities (not completed construction objects) were still located on these land plots.[341] Thus, despite refusing to grant to the Claimant the right to continue working on the land, the Respondent refused to accept the land itself.

3.1.5. The Respondent Refused to Formally Accept the New Communal Facilities

319. On 4 March 2013, Manolium-Engineering proposed to the Minsk City Executive Committee that within a month Minsktrans accept ownership of the Communal Facilities and a month later accept grant to Manolium-Engineering the right to implement the Investment Object.[342]

320. On 11 March 2013, the Minsk City Executive Committee rejected this proposal and informed Manolium-Engineering that the New Communal Facilities must be transferred to the Respondent's ownership as soon as possible.[343]

321. On 19 March 2013, Manolium-Engineering again requested the Minsk City Executive Committee to accept ownership of the New Communal Facilities,

[340] **Exhibit C-336.** Letter from Manolium-Engineering to Minsk City Executive Committee of 11 June 2012.
[341] **Exhibit C-337.** Letter from Minsk Land Planning Service to Manolium-Engineering of 17 July 2012.
[342] **Exhibit C-136.** Letter from the Claimant to Minsk City Executive Committee of 4 March 2013.
[343] **Exhibit C-137.** Letter from Minsk City Executive Committee to the Claimant of 11 March 2013.

compensate the Claimant USD 30 million for the value of its investment and transfer the land plot for the Investment Object to the Claimant.[344]

322. In return, on 26 March 2013, Minsktrans again demanded that Manolium-Engineering transfer to the Respondent the New Communal Facilities **for free**.[345]

323. On 28 March 2013, the Minsk City Executive Committee requested that Manolium-Engineering complete the construction of the New Communal Facilities, and transfer the Facilities to the Respondent's ownership before 10 April 2013.[346]

324. On 27 May 2013, Manolium-Engineering confirmed to the Minsk City Executive Committee its readiness to transfer immediately the New Communal Facilities to the Respondent's ownership.[347]

325. However, on 7 June 2013, the Minsk City Executive Committee requested again that the Claimant transfer the New Communal Facilities to the Respondent for free.[348]

326. This proposal was unacceptable. Therefore, on 27 June 2013, the Claimant requested that the Respondent clarify the transfer mechanism for the New Communal Facilities **in exchange** for the land plot for the Investment Object.[349] This was fully in line with the Investment Contract.

327. On 18 July 2014, the Claimant again confirmed to the Minsk City Executive Committee its readiness to transfer the New Communal Facilities to the

[344] **Exhibit C-83.** Letter from the Claimant to Minsk City Executive Committee of 19 March 2013.
[345] **Exhibit C-338.** Letter from Minsktrans to Manolium-Engineering of 26 March 2013.
[346] **Exhibit C-339.** Letter from Minsk City Executive Committee to Manolium-Engineering of 28 March 2013.
[347] **Exhibit C-93.** Letter from the Claimant to Minsk City Executive Committee of 27 May 2013.
[348] **Exhibit R-108.** Letter from Minsk City Executive Committee to the Claimant of 7 June 2013.
[349] **Exhibit C-94.** Letter from the Claimant to Minsk City Executive Committee of 27 June 2013.

Respondent's ownership and to inject an additional USD 3 million for constructing and commissioning the Facilities and requested, *inter alia*, to provide the land plot for the Investment Object and decide that Minsktrans should complete the construction of the Facilities.[350]

328. On 20 August 2015, the Claimant again requested that the Minsk City Executive Committee accept ownership of the New Communal Facilities.[351]

329. On 4 September 2015, the Minsk City Executive Committee again demanded that the Claimant transfer the New Communal Facilities to the Respondent **for free**.[352]

330. On 21 April 2016, Manolium-Engineering again requested that the Minsk City Executive Committee accept ownership of the New Communal Facilities.[353]

331. On 19 September 2016, Manolium-Engineering sent another request to the Minsk City Executive Committee and reminded it that according to the established procedure, the Minsk City Executive Committee was to instruct the Land Surveying Service to terminate the right of temporary use of the land plot and withdraw the same land plot **within three days after the Minsk City Executive Committee rejected the extension of the right for temporary use of the land plot**.[354]

[350] **Exhibit C-95.** Letter from the Claimant to Minsk City Executive Committee of 18 July 2014.
[351] **Exhibit C-157.** Letter from Manolium-Engineering to Minsk City Executive Committee of 20 August 2015.
[352] **Exhibit C-158.** Letter from Minsk City Executive Committee to Manolium-Engineering of 4 September 2015.
[353] **Exhibit C-161.** Letter from Manolium-Engineering to Minsk City Executive Committee of 21 April 2016.
[354] **Exhibit C-340.** Letter from Manolium-Engineering to Minsk City Executive Committee of 19 September 2016.

332. On 29 September 2016, the Minsk City Executive Committee repeated to Manolium-Engineering its mistaken position that Manolium-Engineering had failed to request that the Minsk City Executive Committee extend the temporary right of use for the land plots, unlawfully occupied the plot and failed to return the land plots to the Minsk City Executive Committee.[355]

333. Thus, through the end of 2016, the Minsk City Executive Committee repeatedly rejected numerous proposals for acceptance of ownership of the land plots, even though it was obligated to accept ownership under Belarusian law. Of course, the true reason for this refusal was the Respondent's desire to obtain the New Communal Facilities for free by alleging non-payment of taxes as a basis to seize the property without compensation.

3.2. Respondent Withdrew the Land Plots from Manolium-Engineering without Expressing Any Concern that the New Communal Facilities Were Not Completed

334. Ironically, on 1 December 2016, after imposition of taxes for allegedly illegal use of the land by the Claimant, the Minsk City Executive Committee decided to take back the land plots on which the New Communal Facilities were located.[356]

335. The fact that the New Communal Facilities were not completed was apparently no longer of any concern. All that mattered was that the Respondent had now created for the Claimant a "*no escape*" situation and the pretext it needed to seize this investment without compensation.

[355] **Exhibit C-341.** Letter from Minsk City Executive Committee to Manolium-Engineering of 29 September 2016.
[356] **Exhibit C-173.** Decision of Minsk City Executive Committee of 1 December 2016.

3.3. The Respondent's Actions Precluded the Claimant from Complying With the Respondent's Tax Laws

336. Even if the Respondent were entitled to terminate the Investment Contract (which it was not), the Respondent still would have been required to pay compensation to the Claimant for the New Communal Facilities.

337. The Respondent refused to do so. Instead, it chose to expropriate the New Communal Facilities based on the pretext of alleged non-payment of taxes. This alleged nonpayment was caused entirely by the Respondent.

338. After 1 July 2011, when the time for completion of the New Communal Facilities had lapsed, the Claimant and Manolium-Engineering sent numerous requests to the Respondent to reclaim the land plots and accept legal title to the New Communal Facilities.[357]

[357] **Exhibit C-103.** Letter from Manolium-Engineering to Minsk City Executive Committee of 21 October 2010. **Exhibit C-119.** Letter from Manolium-Engineering of 28 October 2010. **Exhibit C-77.** Letter from Manolium-Engineering to Minsk City Executive Committee of 29 June 2011. **Exhibit C-106.** Letter from Manolium-Engineering to Minsk City Executive Committee of 11 August 2011. **Exhibit C-107.** Letter from Manolium-Engineering to Minsk City Executive Committee of 11 October 2011. **Exhibit C-108.** Letter from Manolium-Engineering to the State Control Committee of the Republic of Belarus of 21 October 2011. **Exhibit C-336.** Letter from Manolium-Engineering to Minsk City Executive Committee of 11 June 2012. **Exhibit R-91.** Letter from Claimant to Minsk City Executive Committee of 19 July 2012. **Exhibit C-136.** Letter from the Claimant to Minsk City Executive Committee of 4 March 2013. **Exhibit C-83.** Letter from Claimant to Minsk City Executive Committee of 19 March 2013. **Exhibit C-93.** Letter from the Claimant to Minsk City Executive Committee of 27 May 2013. **Exhibit C-342.** Claimant's decision of 12 June 2013. **Exhibit C-319.** Letter from Manolium-Engineering to Minsk City Executive Committee of 28 October 2013. **Exhibit C-95.** Letter from the Claimant to Minsk City Executive Committee of 18 July 2014. **Exhibit R-119.** Letter from the Claimant to Minsk City Executive Committee of 8 January 2015. **Exhibit R-120.** Letter from the Claimant to the Administration of the President of Belarus of 8 January 2015. **Exhibit C-161.** Letter from Manolium-Engineering to Minsk City Executive Committee of 21 April 2016. **Exhibit C-340.** Letter from Manolium-Engineering to Minsk City Executive Committee of 19 September 2016.

339. Legally, the land plot was provided to the Claimant for temporary use only because Belarusian law requires that the contractor obtain the right to use the land plot for the term of the construction.

340. Therefore, when the time for use of the land for construction expired on 1 July 2011 (the construction permit was not extended by the Respondent),[358] the Claimant had no further right to use the land, and, in fact, it did not use it. Therefore, in essence, the right to the land was automatically restored to the Minsk City Executive Committee by expiration of the Claimant's right of use.

341. However, the Respondent, relying on the fact that it did not **formally** accept the New Communal Facilities, alleged that the Claimant illegally occupied the land and therefore imposed upon the Claimant taxes for illegal use of the land (which, in fact, was not actually used by the Claimant).[359]

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[358] **Exhibit C-75.** Decision of Minsk City Executive Committee of 16 September 2010. **Exhibit C-267.** Decision of Minsk City Executive Committee of 16 September 2010.

[359] **Exhibit C-343.** Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 17 of 18 March 2016. **Exhibit C-344.** Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 20 of 18 March 2016. **Exhibit C-345.** Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 21 of 18 March 2016. **Exhibit C-162.** Decision of the Economic Court of Minsk of 13 May 2016. **Exhibit C-182.** Resolution of the court of the Pervomaysky district of Minsk of 17 May 2016 (operative part and statement of reasons). **Exhibit C-164.** First Tax Audit Report of 17 May 2016. **Exhibit C-165.** Letter from the Tax Inspectorate to Manolium-Engineering of 21 June 2016. **Exhibit C-166.** Amendments and supplements to the First Tax Audit Report of 21 June 2016. **Exhibit C-167.** Order of the Tax Inspectorate for arrest of the land plots of 5 July 2016. **Exhibit C-168.** Decision of the Tax Inspectorate of 19 July 2016. **Exhibit C-184.** Resolution of the Minsk City Court of 3 August 2016. **Exhibit C-170.** Judgment of the Economic Court of Minsk of 18 August 2016. **Exhibit C-171.** Extract from the records of the Ministry of Taxes in respect of the indebtedness of Manolium-Engineering as of 10 November 2016. **Exhibit C-172.** Letter from the Department of Humanitarian Activities of the Administrative Office of the President of the Republic of Belarus of 18 November 2016. **Exhibit R-146.** Resolution of the District Tax Inspectorate imposing administrative sanctions on Manolium-Engineering of 24 November 2016. **Exhibit R-147.** Statement of inventory and evaluation of 25 November 2016. **Exhibit R-148.** Deed of transfer of 27 January 2017. **Exhibit R-159.** Breakdown of Manolium-Engineering's liabilities to the state as at 19 January 2017, 2018. **Exhibit R-26.** Breakdowns of Manolium-Engineering's liabilities to the state as at 20 January 2017, 2018. **Exhibit C-187.** Second Tax Audit Report of 24 March 2017. **Exhibit R-149.** Objections of the insolvency administrator to the Second Tax Audit Report of 21 April 2017. **Exhibit**

342. Thus, the Respondent had put the Claimant in a trap:

(i) The Claimant could not finish the construction, because the Respondent did not agree to extend the land rights to the Claimant necessary to allow the Claimant to complete the construction;[360]

(ii) The Respondent refused to accept the payments offered by the Claimant that would allow the Respondent to complete the construction through the use of other contractors;[361]

(iii) Because the construction could not be completed, the Belarusian authorities refused to formally accept the New Communal Facilities (although *de facto* they used them without complaint);[362]

R-150. District Tax Inspectorate's application to the insolvency administrator of 28 April 2017. **Exhibit R-151.** Letter of the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Minsk District of 2 May 2017. **Exhibit C-186.** Amendments to the Second Tax Audit Report of 18 May 2017. **Exhibit C-189.** Letter from the Tax Inspectorate to Manolium-Engineering of 22 September 2017.

[360] **Exhibit R-65.** Draft Supplemental Agreement of 4 July 2011. **Exhibit R-71.** Construction permit for Depot of 3 October 2011. **Exhibit C-320.** Protocol of meeting between Minsktrans and Manolium-Engineering of 18 January 2012. **Exhibit C-322.** Protocol of meeting between Minsktrans and Manolium-Engineering of 23 March 2012. **Exhibit R-81.** Letter from Manolium-Engineering to Gosstroy of 13 April 2012. **Exhibit R-83**. Letter from Manolium-Engineering to Minsk City Executive Committee of 17 April 2012. **Exhibit C-127.** Letter from Gosstroy to Manolium-Engineering of 21 April 2012. **Exhibit R-84. L**etter from Manolium-Engineering to Gosstroy of 25 April 2012. **Exhibit R-87**. Letter from Manolium-Engineering to Minsk City Executive Committee (received on 22 May 2012) of 18 May 2012. **Exhibit R-88.** Claimant's letter to Minsk City Executive Committee w/date (in response to Minsk City Executive Committee letter of 18 June 2012). **Exhibit R-90.** Letter from Minsk City Executive Committee to Manolium-Engineering of 5 June 2012. **Exhibit R-92.** Letter from Minsk City Executive Committee to Claimant of 26 July 2012.

[361] **Exhibit C-125.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 9 January 2012. **Exhibit C-320.** Protocol of meeting between Minsktrans and Manolium-Engineering of 18 January 2012. **Exhibit C-321.** Letter from Minsktrans to Manolium-Engineering of 26 January 2012. **Exhibit R-79.** Minutes of a meeting on the implementation of an investment project of 3 April 2012. **Exhibit R-88.** Claimant's letter to Minsk City Executive Committee w/date (in response to Minsk City Executive Committee letter of 18 June 2012). **Exhibit C-324.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and Manolium-Engineering of 9 August 2012. **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014.

[362] *See paras. 273-333*.

(iv) Because the Respondent did not formally accept the New Communal Facilities, the Respondent refused to sign the documents stating that the use of the land had returned to them;[363] but

(v) The Respondent imposed on the Claimant taxes for the land which the Claimant in fact did not, and could not, use as a result of the Respondent's actions.

343. The Claimant had no escape. Even if the Claimant decided to demolish the New Communal Facilities, it could not avoid tax liability. To demolish the Facilities the Claimant would need to get a permit from the Respondent. And in an event, there was no guarantee that the Respondent would ever formally take back the land plots, leaving the Claimant in a limbo where it could accrue tax liability but had no way to pay it because it could not use the land to complete construction.

344. This trap was specifically devised by the Claimant to allow it to expropriate the Claimant's investments. There was no escape, even in theory.

3.4. The Taxes Imposed Were Arbitrary and Calculated to Justify Nationalization without Compensation

345. On 22 February 2016, the Respondent's Ministry of Finance valued the Claimant's investments in the New Communal Facilities at USD 19,434,679.[364]

[363] **Exhibit C-336.** Letter from Manolium-Engineering to Minsk City Executive Committee of 11 June 2012. **Exhibit C-337.** Letter from Minsk Land Planning Service to Manolium-Engineering of 17 July 2012.
[364] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.

346. On 2 March 2016, the Minsk Land Planning Service, under **instruction of the Minsk City Executive Committee,** initiated a formal proceeding alleging illegal use of land by Manolium-Engineering.[365]

347. Notably, on 5 April 2016, the judge of the court of the Pervomaysky district of Minsk decided that Manolium-Engineering did not commit any administrative offence because Manolium-Engineering had no ability to return the land plots because of the Respondent's refusal to take them back.[366]

348. The same court made the same decision on the same ground again in 2012.[367]

349. However, on 13 May 2016, the Economic Court of Minsk, acting as a court of appeal, reversed the judgment and sent the case back to the first level court. This time, it was assigned without justification to **another judge**[368] — one that the Respondent knew would do its bidding.

350. On 17 May 2016, just 4 days later, that new judge did as expected by rejecting the prior two rulings and concluding that Manolium-Engineering had illegally used the land since 1 July 2011.[369]

351. On the same day, the Respondent's Tax Inspectorate issued the First Tax Audit Report on "*improper use of the land plot*".[370] There would be no way the

[365] **Exhibit C-343.** Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 17 of 18 March 2016. **Exhibit C-344.** Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 20 of 18 March 2016. **Exhibit C-345.** Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 21 of 18 March 2016.
[366] **Exhibit C-162.** Decision of the Economic Court of Minsk of 13 May 2016.
[367] **Exhibit C-346.** Resolution of Pervomayskiy district court of Minsk of 23 July 2012.
[368] **Exhibit C-162.** Decision of the Economic Court of Minsk of 13 May 2016.
[369] **Exhibit C-182.** Resolution of the court of the Pervomaysky district of Minsk of 17 May 2016 (operative part and statement of reasons).
[370] **Exhibit C-164.** First Tax Audit Report of 17 May 2016.

authorities could issue this ruling so quickly unless they know precisely how the judge would rule (and when the ruling would come).

352. The Tax Inspectorate declared without justification that Manolium-Engineering shall pay in total approximately **USD 1,189,927** for allegedly unpaid land taxes for 2013-2016, plus an associated penalty.[371]

353. Later, on 21 June 2016, the Tax Inspectorate recalculated the amount of taxes it claimed were due. This time, the Tax Inspectorate claimed that the penalty should be calculated by multiplying the taxes by 10.[372]

354. Thus, the Respondent demanded that Manolium-Engineering pay approximately **USD 13,405,019** in allegedly unpaid taxes, plus penalties.

355. On 24 November 2016, the Respondent's Tax Inspectorate imposed an additional administrative fine in the approximate amount of **USD 2,391,810.9** on Manolium-Engineering for its failure to pay these allegedly outstanding taxes.[373]

356. Thus, in total, the amount of taxes demanded by the Respondent was approximately **USD 17 million**. Yet this was still not enough for the Respondent to justify its taking by offsetting the alleged taxes against the value of the building determined by the Respondent's own Ministry of Finance (**USD 19,434,679**).[374]

357. The "*solution*" was quickly found: after several internal meetings, the Belarusian authorities finally came to the conclusion that the value of the New Communal Facilities was not the more than USD 19 million that they had previously

[371] **Exhibit C-164.** First Tax Audit Report of 17 May 2016.
[372] **Exhibit C-165.** Letter from the Tax Inspectorate to Manolium-Engineering of 21 June 2016. **Exhibit C-166.** Amendments and supplements to the First Tax Audit Report of 21 June 2016.
[373] **Exhibit R-146.** Resolution of the District Tax Inspectorate imposing administrative sanctions on Manolium-Engineering of 24 November 2016.
[374] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.

calculated, but rather just **USD 13,880,000** (BYN 27,287,748.05).[375] This new value had no basis in reality. But it served the Respondent's purpose, because it was well below the purported tax debt and thus served as a convenient pretext to justify the Respondent's expropriation.

3.5. Secret Presidential Order

358. On 20 January 2017, the President of the Republic of Belarus executed a secret order transferring ownership of the New Communal Facilities to the Respondent.[376]

359. Although this order is undeniably a key document because it forms the basis of the expropriation of the Claimant's investments at issue in this arbitration, the Respondent has steadfastly refused to disclose it to the Tribunal or to the Claimant.

360. The Respondent has no basis to do so. Its attempted justification is that the secret order is not a "*law-making*" instrument and is marked "*for official use only*":[377]

> "*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*

[375] **Exhibit C-172.** Letter from the Department of Humanitarian Activities of the Administrative Office of the President of the Republic of Belarus of 18 November 2016. **Exhibit R-147.** Statement of inventory and evaluation of 25 November 2016. **Exhibit R-148.** Deed of transfer of 27 January 2017. **Exhibit R-159.** Breakdown of Manolium-Engineering's liabilities to the state as at 19 January 2017, 2018. **Exhibit R-26.** Breakdowns of Manolium-Engineering's liabilities to the state as at 20 January 2017, 2018.
[376] **CS-I, Claimant's Notice of Arbitration of 15 November 2017**, para. 313. **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 349.
[377] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 347-348.

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*". [Claimant's emphasis]

361. This disregard for the Claimant's rights and lack of respect for this process is astonishing.

362. The Respondent's argument, in essence, would have the Tribunal believe that the document by which the expropriation in this case was undertaken, issued by the highest authority in Belarus is of no importance. Belarus is a country where the President controls everything, including the judges, and not even a minor decision is taken without his approval. Indeed, the vey President who made this

decision has been called by media "*the last dictator in Europe*".[378] The suggestion that this decision is of no significance defies all reason.

363. No one in Belarus would believe it. And this Tribunal should not either. The Presidential Decree of expropriation was absolutely illegal.

C. JURISDICTION OF THE ARBITRAL TRIBUNAL

IV. THE TRIBUNAL HAS JURISDICTION *RATIONE TEMPORIS* OVER THE DISPUTE

364. The Respondent's primary jurisdictional objection is that the Arbitral Tribunal does not have jurisdiction *ratione temporis* to decide the Dispute.

365. This is mistaken because (i) the expropriatory and discriminatory actions at issue occurred not only before the EEU Treaty was enacted, but also after it, and (ii) even had they not, the EEU Treaty's express terms cover acts from before enactment.

366. The Respondent bases its jurisdictional position on its arguments that:

(i) The EEU Treaty does not apply retroactively, and, as a result:

i. The Arbitral Tribunal does not have jurisdiction over disputes that arose before 1 January 2015;[379]

[378] **Exhibit C-347.** Website of Washington Post, *Why Europe's Last Dictatorship Keeps Surprising Everyone*, 25 March 2017. // Available at: https://www.washingtonpost.com/news/democracy-post/wp/2017/03/25/why-europes-last-dictatorship-keeps-surprising-everyone/?noredirect=on&utm_term=.8307bb1ea189.

[379] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 377-390.

ii. The substantive provisions of the EEU Treaty do not apply to acts and/or alleged breaches which took place before 1 January 2015. [380]

(ii) The Dispute actually consists of two distinct Disputes - the Termination and Tax Disputes, which arose before 1 January 2015;[381]

(iii) The substantive provisions of the EEU Treaty do not apply to the Termination Dispute.[382]

367. Each of these arguments are wrong.

368. **First**, the retroactivity argument is irrelevant because the key expropriatory and discriminatory actions occurred after the EEU Treaty entered into force, i.e. after 1 January 2015:[383]

(i) The Investment Contract was irreversibly terminated on **27 January 2015**;[384]

(ii) The land plot on which the Investment Object was to be located was sold to the other investor in **September 2017**;[385]

(iii) The transfer of the New Communal Facilities to communal ownership (which the Respondent has named the "Tax Dispute") occurred two years later, on **27 January 2017**.[386]

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[380] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 391-396.
[381] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 397-414.
[382] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 415-428.
[383] **Exhibit C-1.** Official website of the Eurasian Economic Commission, "*The Treaty on the Eurasian Economic Union entered into force."*
[384] **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.
[385] **Exhibit C-185.** Official website of news portal of Belarus TUT.BY, "Almost fivefold of the initial price. A-100 acquired the section of the trolleybus depot in the center of Minsk. // Available at: https://news.tut.by/economics/559888.html. **Exhibit R-153.** Minutes of the results of the auction of 12 September 2017.
[386] **Exhibit R-148.** Deed of Transfer of the New Communal Facilities of 27 January 2017.

369. The claim that the EEU Treaty was not in force when the Respondent's misdeeds occurred is simply false.

370. **Second**, contrary to the Respondent's claims, the EEU Treaty ***does*** apply retroactively. Section VII (Investments) of Protocol No. 16 to the EEU Treaty applies to "*all investments [made] since December 16, 1991*".[387] Thus, even if the Respondent were correct that certain of the measures giving rise to the Dispute occurred before the effective date of the EEU Treaty, that would not advance the Respondent's case unless the Respondent could also show that the Claimant's investments were made before 16 December 1991. The Respondent has not made and cannot make this showing. The Respondent has not made and cannot make this showing.

371. Each of these arguments are explained in more detail below.

4.1. All Disputes before the Tribunal Arose After the EEU Treaty Entered into Force

372. The Respondent's jurisdictional argument fails because it cannot show that the Dispute presented before the Arbitral Tribunal consists of two separate disputes that each arose before entry into force of the EEU Treaty.[388] In its attempt to make this showing, the Respondent improperly subdivides the dispute into the following two disputes:

(i) The "*Termination Dispute*" – defined by the Respondent as the claims related to the actions of the Minsk City Executive Committee and

[387] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Clause 65.
[388] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 404-405, 410.

Minsktrans that resulted in termination of the Investment Contract. This occurred on **27 January 2015**[389];

(ii) The "*Tax Dispute*" – defined by the Respondent as the claims related to the actions of the Belarusian public authorities that resulted in the seizure of the New Communal Facilities. This occurred on **27 January 2017**.[390]

373. As explained below, there is a single Dispute comprising all of the Respondent's wrongful actions. This is because the Respondent's violations were linked in one single process and were not a mere sequence of isolated events. This Dispute (as defined in the Notice of Arbitration of 15 November 2017[391]) unequivocally arose after the EEU Treaty entered into force.

374. Moreover, even if the Tribunal concludes that the single Dispute should be analyzed as two smaller disputes, this will not change the outcome. This is so because (i) each of those sub-disputes arose after the 1 January 2015 effective date of the EEU Treaty,[392] and (ii) even had they not, the each arose in connection with investments made after the 16 December 1991 retroactivity date incorporated into the EEU Treaty.[393]

4.2.1. There is Only One Dispute before the Arbitral Tribunal

375. This single Dispute does not become two simply because it is comprised of a series of inter-related wrongful acts by the Respondent. The fact that the Claimant's analysis on quantum is organized in two elements (lost profit for loss

[389] **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.
[390] **Exhibit R-148.** Deed of Transfer of the New Communal Facilities of 27 January 2017.
[391] **CS-I. Claimant's Notice of Arbitration of 15 November 2017**, p. 6.
[392] **Exhibit C-1.** Official website of the Eurasian Economic Commission, "*The Treaty on the Eurasian Economic Union entered into force.*" // Available at: http://www.eurasiancommission.org/ru/nae/news/Pages/01-01-2015-1.aspx
[393] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Clause 65.

of right to develop the Investment Object and direct damages for expropriation of the New Communal Facilities) [394] similarly does not require that the Tribunal sub-divide this Dispute. The fact is, this is a single Dispute giving rise to a single arbitration. The Dispute, like any other complex dispute of this nature, is necessarily based on more than a single isolated action. This does not divest the Tribunal of jurisdiction.

376. This common sense position was adopted by the tribunal in *CMS v Argentina*, which rejected the Respondent's argument that a dispute should be divided into numerous smaller disputes because the Claimant presented multiple claims related to numerous breaches.[395] In concluding that all of these wrongful actions formed part of the same dispute, the *CMS* tribunal explained:[396]

> "*[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*."

377. The reasoning from *CMS* applies here. The Claimant entered into an agreement with the Minsk City Executive Committee and Minsktrans under which the Claimant would receive the right to build the Investment Object in exchange for

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[394] *See para. 871*.

[395] **Exhibit CL-38.** *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003, para. 111. **Exhibit CL-36.** *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, paras. 50, 115, 121, 127,

[396] **Exhibit RL-38.** *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction of 17 July 2003, para. 111. **Exhibit CL-36.** *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, paras. 50, 115, 121, 127,

the Claimant providing USD 15 million in financing for the New Communal Facilities and the payment of an additional USD 1 million to the state.[397]

378. That promise was repudiated, and the Claimant's investments were destroyed, as a result of a series of interlinked actions by the Respondent. These included, *inter alia*:

(i) Wrongful conduct of the Minsk City Executive Committee and Minsktrans during the implementation of the Investment Contract;[398]

(ii) Submission of the arbitral and ungrounded claims to the Belarusian state courts for termination of the Investment Contract and unfair legal proceedings in the Belarusian state courts;[399]

(iii) Withdrew of the land intended for the Investment Object[400] and subsequent transferring of the land plot to another investor;[401]

(iv) Refusal by the Respondent to pay to the Claimant compensation due for the New Communal Facilities that were already constructed in accordance with the Investment Contract and assertion of groundless tax claims by the Tax Inspectorate against Manolium-Engineering and imposition of tax

[397] **Exhibit C-34.** Investment Contract of 6 June 2003. **Exhibit C-66.** Additional Agreement No. 4 (Amended Investment Conract) of 8 February 2007.
[398] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 109-212; 241-255. S*ee paras. 50-122; 628-631*.
[399] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 256-282; 282-292. *See paras. 244-272; see paras. 530-577.*
[400] *See paras. 334-335*.
[401] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 293-295. **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 363-367. **Exhibit C-185.** Official website of news portal of Belarus TUT.BY, *Almost fivefold of the initial price. A-100 acquired the section of the trolleybus depot in the center of Minsk*. // Available at: https://news.tut.by/economics/559888.html. **Exhibit R-153.** Minutes of the results of the auction dated 12 September 2017.

liability almost equal to the costs of construction of the New Communal Facilities, resulting in the bankruptcy of Manolium-Engineering;[402]

(v) Issuance of a secret order by the President of Belarus that approved the transfer of the New Communal Facilities to communal ownership.[403]

379. Each of these acts were not taken in isolation. They were part of a chain of event that builds upon the prior actions in furtherance of a common goal—destruction of the Claimant's investments. Accordingly, because all of the breaches comprise a single sequence of actions, they must be considered as one Dispute. And because that Dispute arose after the effective date of the EEU Treaty, it is within the jurisdiction of this Tribunal.

4.2.2. The Dispute Arose After 1 January 2015

380. As explained above, the Claimant's claims in this arbitration are based on a single Dispute which arose after the effective date of the EEU Treaty. But even if the Respondent is correct that there were actually two separate disputes—the Termination Dispute and the Tax Dispute as the Respondent has named them—each of those disputes arose after the effective date of the EEU Treaty.

381. The Respondent claims that the Termination Dispute arose by 29 October 2014[404] and that the Tax Dispute arose by 21 February 2014.[405] The Respondent is wrong because it confuses the disputes on the national level, which are not before this Tribunal, with the international investment Dispute that is.

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[402] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 296-320. *See paras. 337-358; 579-597.*
[403] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** para. 407. *See paras.* 358-363.
[404] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 409.
[405] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 412.

382. At least two reasons demonstrate that the investment Dispute arose after 1 January 2015.

383. **First,** the Termination Dispute (as the Respondent calls it) arose and ripened only after the Supreme Court of the Republic of Belarus dismissed Manolium-Engineering's cassation appeal for the decision of the lower Belarusian courts on termination of the Investment Contract on 27 January 2015.[406] This is so because until that moment, the Claimant had not been irreversibly deprived of it right to implement the Investment Object in accordance with the Investment Contract.[407] Only upon this ruling was the right permanently and irreversibly destroyed.

384. The same logic regarding the moment of expropriation through a judicial act was applied in *Rumeli v Kazakhstan*, where the tribunal found that "*[t]he final act of 'taking' as regards Claimants' investment (i.e. their shares in Kar-Tel) was the decision of the Presidium of the Supreme Court affirming the compulsory redemption of those shares.*"[408]

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[406] **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus dated 27 January 2015.
[407] See: **Exhibit CL-80.** *Decree of President of the Republic* of Belarus of 16 November 2006 No. 677 On Particular Issues *Related to Disposition of Property in Communal Ownership and Purchase of Property in Ownership of Administrative Divisions*
Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 417: "In the case where indirect or "*creeping*" expropriation has taken place or, as the Santa Elena tribunal put it, "*the date on which the governmental 'interference' has deprived the owner of his rights or has made those rights practically useless*", it will be much more difficult for the tribunal to establish the exact time of the expropriation. The difficulty is no less severe, unless the decision is based on a single act creating liability, when the Tribunal concludes that an investor has not received fair and equitable treatment or that it has been subjected to arbitrary treatment or that the host State has not provided the investor the full protection and security guaranteed by the BIT. The Iran-U.S. Claims Tribunal, in one of its awards, decided that "*where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property"*, the date of the expropriation is *"the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events*"." [Claimant's emphasis]
[408] **Exhibit CL-22.** *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para. 705.

385. Further, the decision of the Supreme Court did not deal with the issue whether the Claimant lost its right to the Investment Object. As explained in more detail below,[409] this issue was not analyzed by the Supreme Court at all. Thus, the Claimant had finally lost even an opportunity to realize the Investment Object only when it was sold to the other investor in September 2017.[410]

386. The Claimant initiated the investment Dispute under the EEU Treaty only in November 2017,[411] more than 2 years after all domestic remedies were irreversibly exhausted on 27 January 2015.[412] Therefore, the investment Dispute (which is based on improper termination of the Contract and awarding the land for the Investment Object to the other investor) arose after 1 January 2015.

387. **Second,** the Tax Dispute (as the Respondent calls it) is actually part of the Dispute related to unlawful expropriation of the New Communal Facilities because the unlawful tax formed the purported basis for the unlawful transfer. The New Communal Facilities were transferred to the Minsk municipal ownership on 27 January 2017,[413] more than two years after the 1 January 2015 effective date of the EEU Treaty.[414]

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[409] *See below paras. 529-577; 615-639.*

[410] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 293-295. **Exhibit C-185.** Official website of news portal of Belarus TUT.BY, "*Almost fivefold of the initial price. A-100 acquired the section of the trolleybus depot in the center of Minsk.*" // Available at: https://news.tut.by/economics/559888.html. **Exhibit R-153.** Minutes of the results of the auction of 12 September 2017.

[411] **CS-I. Claimant's Notice of Arbitration of 15 November 2017**.

[412] **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus dated 27 January 2015.

[413] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 349. **Exhibit R-148.** Deed of transfer dated 27 January 2017.

[414] **Exhibit C-1.** Official website of the Eurasian Economic Commission, "*The Treaty on the Eurasian Economic Union entered into force.*" // Available at: http://www.eurasiancommission.org/ru/nae/news/Pages/01-01-2015-1.aspx.

4.2. The Dispute Resolution Clause of the EEU Treaty Applies to the Disputes Connected with Investments Made Prior to the EEU Treaty's Entry into Force

388. The Claimant accepts that there are two temporal aspects of application of a treaty, each of which are satisfied here:

(i) *Ratione temporis* jurisdiction of the arbitral tribunal under the dispute resolution clause of the treaty and may arise prior to or after the treaty's entry into force;[415]

(ii) *Ratione temporis* applicability of substantive provisions of the treaty to actions and breaches that allows the state to be held liable only for breaches of provisions which applied at the time of violation.[416]

389. The Respondent's position on the Tribunal's *ratione temporis* jurisdiction is mistaken.

390. The Respondent claims that arbitral tribunals "*do not have jurisdiction over disputes arising before the entry into force of the relevant treaty*" "*in the absence of express words to the contrary*".[417] [Claimant's emphasis] The Respondent also emphasizes that Article 28 of the Vienna Convention on the Law of Treaties of 1969 (the "**VCLT**") establishes a general principle that international treaties do not apply retroactively.

391. However, the same article of the VCLT provides an important exception to the general rule:

[415] **Exhibit CL-82.** *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, Award of 8 May 2008, para. 423.
[416] **Exhibit CL-82.** *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2, Award of 8 May 2008, para. 427.
[417] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 377.

"*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*." [Claimant's emphasis]

392. Thus, as the Respondent must concede, the treaty may apply retroactively if the intention of the parties, as reflected in the treaty or otherwise, demonstrates that they intended it to do so.

393. Protocol No. 16 to the EEU Treaty, on which the Claimant relies, expresses precisely such an intention of retroactivity:[418]

"*65. The provisions of this section shall apply to all investments made by investors of the member States in the territory of another member State since December 16, 1991*." [Claimant's emphasis]

"*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:

[418] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Clauses 65, 84 and 85(3).

[…]

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); […]."

394. By its plain language, Protocol No. 16 to the EEU Treaty directly provides that all of the guarantees in the relevant Section VII (Investments), including the dispute resolution clause, are applicable to all investments made since December 16, 1991.[419] This is as straightforward of an intent for retroactivity as could possibly be imagined. The Respondent concedes that all of the Claimant's investments were made after 16 December 16, 1991. They are thus protected by the EEU Treaty.

395. The EEU Treaty's language also demonstrates an intent that its dispute resolution provisions are intended to apply to disputes which arose before entry into force of the EEU Treaty. Had the drafters intended to exclude such prior arising disputes, they would have specifically provided that this dispute resolution mechanism is not applicable to disputes that arose before entering into force of Protocol No. 16 to the EEU Treaty. There is no such wording in the EEU Treaty.

396. In other words, the relevant time period for application of the dispute resolution clause is when the investment was made. The tribunal in *Chevron v Ecuador*,

[419] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Clause 65.

which interpreted a similar provision of the Ecuador-USA investment treaty,[420] expressed the same view:[421]

> "*265. The BIT's temporal restrictions refer to "investments" and not disputes. Thus, the BIT covers any dispute as long as it is a dispute arising out of or relating to "investments existing at the time of entry into force.*"" [Claimant's emphasis]

397. The Respondent has no response to this clear statement, dismissing it only as obiter dicta, and not the primary legal conclusion of the *Chevron v. Ecuador* tribunal.[422] Yet the Respondent's attacks cannot change the clear logic and reasoning of the tribunal, nor can they render inappropriate the application of that logic to this case.

398. Indeed, Clause 65 of the EEU Treaty refers to *"all investments [made] since December 16, 1991"* as the only criterion that should be taken into account when deciding on the issues of application of the investment-related Section VII of Protocol No. 16 to the EEU Treaty. Had the parties intended to limit the protection provided by this clause to the disputes which arose after the EEU Treaty entered into force, they would have clearly said so. The parties knew how to do this, as they imposed exactly such a limitation in the Agreement on mutual agreement and protection of investments in the states — members of the Eurasian Economic Community of 12 December 2008 (the "**EEC Investment**

[420] **Exhibit CL-83.** Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, Art. XII(1): "*This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of tan years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.*" [Claimant's emphasis]

[421] **Exhibit CL-34.** *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I),* PCA Case No. 34877, Interim Award of 1 December 2008, para. 265.

[422] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** p. 110, footnote 565.

Agreement").[423] The choice to exclude this language from the EEU Treaty should be respected and taken into account in interpretation of the EEU Treaty.

399. The EEC Investment Agreement was signed as part of the framework of the Eurasian Economic Community and entered into force on 11 January 2016. The Eurasian Economic Community is the integration organization which was the predecessor to the Eurasian Economic Union and which united the Russian Federation, the Republic of Belarus, Kyrgyzstan, Kazakhstan and Tadzhikistan for 13 years (from 2001 until 2014).[424]

400. Unlike the EEU Treaty, The EEC Investment Agreement contains a specific and express clause on the temporal limitations of its application:[425]

> "*The Agreement applies to all investments made by investors of one Contracting Party on the territory of the other Contracting Party since 1 January 1992.*
>
> *The Agreement does not apply to disputes that arose before the entry of the Treaty into force*." [Claimant's emphasis]

401. This treaty, unlike the EEU Treaty, specifically disclaims applications to *"disputes that arose before entry of the Treaty into force."*[426] When the same parties later drafted the retroactivity provision of the EEU Treaty, they consciously chose to say that it applies to "*all investments made by investors of*

[423] **Exhibit CL-35.** EEC Investment Agreement, Art. 13 (Unofficial translation). // Available in Russian at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2997.
[424] **Exhibit C-197.** Eurasian Economic Community, About EurAsEC. // Available at: http://www.evrazes.com/en/about/. **Exhibit CL-84.** Treaty on the Establishment of the Eurasian Economic Community of 9 October 2000.
[425] **Exhibit CL-35.** EEC Investment Agreement, Art. 13 (Unofficial translation). // Available in Russian at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2997.
[426] **Exhibit CL-35.** EEC Investment Agreement, Art. 13 (Unofficial translation). // Available in Russian at: http://investmentpolicyhub.unctad.org/Download/TreatyFile/2997.

the member States in the territory of another member State since December 16, 1991."[427]

402. This conscious choice of different language in the subsequent EEU Treaty by the same parties as the EEC Treaty should be respected. Each treaty means what it says—the EEC Treaty applies to disputes that arose in the relevant time frame. The EEU Treaty applies to investments made in the relevant time frame and, as explained by the Chevron v. Ecuador tribunal,[428] it matters not when the dispute actually arises.

4.3. The Substantive Protections of the EEU Treaty Apply to Breaches That Occurred Before the EEU Treaty Entered into Force

403. The Respondent claims that *"[t]he 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*."[429]

404. The Respondent seeks to justify its submission regarding non-retroactivity of substantive provisions of the EEU Treaty by reference to the common rule regarding non-retroactive application of the treaties, plus the wording of Protocol No. 16 to the EEU Treaty. This reliance is mistaken.

405. First, the Respondent relies on the courtesy English translation of Clauses 68 and 79 of the EEU Treaty that is published on the United Nations' website:[430]

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[427] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Clause 65.
[428] **Exhibit CL-34.** *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I),* PCA Case No. 34877, Interim Award of 1 December 2008, para. 265.
[429] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 391.
[430] This version of the EEU Treaty is available at: http://www.un.org/en/ga/sixth/70/docs/treaty_on_eeu.pdf. **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Clauses 68, 79.

"*[e]ach Member State shall ensure on its territory the fair and equitable treatment […];*

[…]

[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 […]" [Respondent's emphasis]

406. The Respondent assumes that such drafting *"reflects the intention of the drafters that these provisions should be applied prospectively*."[431]

407. This is incorrect.

408. The official language of the EEU Treaty is Russian.[432] The wording of Clauses 68 and 79 respectively of Protocol No. 16 to the EEU Treaty in the official Russian have a different reading, and state as follows:

"68. *Каждое государство-член обеспечивает на своей территории справедливый и равноправный режим в отношении инвестиций и деятельности в связи с инвестициями, осуществляемых инвесторами других государств-членов.*

[…]

79. Инвестиции инвесторов одного государства-члена, осуществленные на территории другого государства-члена, не могут быть подвергнуты прямо или косвенно экспроприации, национализации, а также иным мерам, равносильным по

[431] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 394.
[432] **Exhibit CL-85.** The Treaty on the Eurasian Economic Union of 29 May 2014 (excerpts), p. 137: "*In case of divergence of interpretations of the Treaty, the text in the Russian language shall prevail.*"

последствиям экспроприации или национализации (далее – экспроприация) […]."[Claimant's emphasis]

409. The literal translation of these provisions is as follows:

> "*68. Each Member State* ***ensures*** *on its territory fair and equitable treatment to investments and investment-related activities conducted by investors of other Member States.*
>
> *[…]*
>
> *79. Investments of investors of a Member State made on the territory of another Member State* ***may not be subject to*** *direct or indirect expropriation, nationalisation and other measures with consequences equivalent to those of expropriation or nationalisation (hereinafter "expropriation").*" [Claimant's emphasis]

410. The original and official Russian version of the EEU Treaty thus uses the word *"ensures"* instead of *"shall ensure,"* and *"may not be subject to"* instead of *"shall not be subject to."* Ensure has a broader meaning than shall—it suggests an outright and all-encompassing obligation of protection, while shall suggests only refraining from certain actions. This obligation of the states to *"ensure"* the right of the investor thus covers not only future obligations, but guarantees that the state would also be responsible for any breach of the investor's rights which were made before entering the EEU Treaty in force.

411. There is thus nothing in the wording of the EEU Treaty that limits retroactive application of Protocol No. 16 to the EEU Treaty. The Respondent's position to the contrary should be rejected.

4.4. The Arbitral Tribunal Has Jurisdiction over Creeping Expropriation as a Composite Act

412. The primary clam of the Claimant relates to the creeping expropriation of the Claimant's investments by the Respondent, as will be in detail described below.[433]

413. Newcombe and Paradell define the creeping expropriation as *"an indirect expropriation that occurs as a result of a series of measures taken over time that cumulatively have an expropriatory effect rather than a single measure or group of measures that occur at one time"*[434] and stated that *"state responsibility for creeping expropriation is reflected in the concept of a composite act."*[435]

414. The concept of a composite act is defined in Article 15 of the ILC Articles on State Responsibility:[436]

> "*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.*" [Claimant's emphasis]

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[433] *See paras. 518-605*.
[434] **Exhibit CL-86.** A. Newcombe, L. Paradell; Law and Practice of Investment Treaties: Standards of Treatment, 2012, p. 343.
[435] **Exhibit CL-86.** A. Newcombe, L. Paradell; Law and Practice of Investment Treaties: Standards of Treatment, 2012, p. 343.
[436] **Exhibit CL-11.** ILC Articles on State Responsibility, Art. 15.

415. The Commentary to this article clarifies that *"[c]omposite acts give rise to continuing breaches, which extend in time from the first of the actions or omissions in the series of acts making up the wrongful conduct.*"[437]

416. The breach which has a continuing character in turn *"extends over the entire period during which the act continues and remains not in conformity with the international obligation."*[438]

417. In light of the fact that actions of the Respondent shall qualify as a creeping expropriation, such actions have a continuing character and violate the EEU Treaty as long as such acts continue.

418. The Respondent is not seek for justified in stating that the "*Tax Dispute*" and *"Termination Dispute"* (as the Respondent calls them) arose before the EEU Treaty effective date and ignoring the facts.

419. In other words, the Respondent tries to persuade the Tribunal that if it started the wrongful actions before the EEU Treaty entered into force, it was entitled to complete the illegal campaign already after the EEU Treaty effective date

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[437] **Exhibit CL-87.** United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), p. 62.

[438] **Exhibit CL-11.** ILC Articles on State Responsibility, Art. 14(2). See also: **Exhibit CL-80.** *Decree of President of the Republic* of Belarus of 16 November 2006 No. 677 On Particular Issues *Related to Disposition of Property in Communal Ownership and Purchase of Property in Ownership of Administrative Divisions*

Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 417: "In the case where indirect or "*creeping*" expropriation has taken place or, as the Santa Elena tribunal put it, "*the date on which the governmental 'interference' has deprived the owner of his rights or has made those rights practically useless*", it will be much more difficult for the tribunal to establish the exact time of the expropriation. The difficulty is no less severe, unless the decision is based on a single act creating liability, when the Tribunal concludes that an investor has not received fair and equitable treatment or that it has been subjected to arbitrary treatment or that the host State has not provided the investor the full protection and security guaranteed by the BIT. The Iran-U.S. Claims Tribunal, in one of its awards, decided that "*where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property",* the date of the expropriation is *"the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events*"." [Claimant's emphasis]

without any responsibility. Such bad faith and speculative approach should not be allowed.

V. THE RESPONDENT'S CONTRACTUAL OBJECTION SHOULD BE REJECTED

420. The Respondent also objects to the jurisdiction of the Arbitral Tribunal based on its claim that the Arbitral Tribunal may not consider claims related to the actions of the Minsk City Executive Committee and Minsktrans and other state agencies related to implementation and termination of the Investment Contract and the Investment Contract because of their allegedly *"purely contractual conduct that does not involve any exercise of sovereign authority"*[439] (the "**Contractual Objection**"). This is wrong.

421. The Respondent first invoked this mistaken argument in its Response to the Notice of Arbitration. There, the Respondent raised an ambiguous objection regarding the alleged contractual nature of the Claimant's claims and pointed out that the same dispute had already been considered by Belarusian courts.[440]

422. In the Statement of Claim, the Claimant refuted both objections by explaining that:[441]

(i) All of the claims presented by the Claimant are treaty claims, not contractual ones;[442]

(ii) The "*fork-in-the-road*" clause should not be applied in the present case.[443]

[439] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 8, 429-440.
[440] **RS-1. Response to the Notice of Arbitration of 16 December 2018,** paras. 36-41.
[441] **CS-II. Claimant's Statement of Claim of 10 May 2018,** paras. 52-110
[442] **CS-II. Claimant's Statement of Claim of 10 May 2018,** paras. 57-76.
[443] **CS-II. Claimant's Statement of Claim of 10 May 2018,** paras. 77-110.

423. Notably, the Respondent has abandoned its *"fork-in-the-road"* arguments in the Statement of Defence. The Claimant will therefore not elaborate on this issue in the Statement of Reply, but reserves its right to further address this argument should the Respondent raise it again in its further submissions.

424. While it has rightfully conceded the *"fork-in-the-road"* point, the Respondent continues to incorrectly maintain that the Claimant's claims are contractual claims *"repackaged […] as breaches of the FET standard"*.[444] That is incorrect.

425. All of the claims presented by the Claimant are treaty claims and the Arbitral Tribunal therefore has jurisdiction over them for the following reasons:

(i) The Claimant submitted its claims under the international treaty, namely, Protocol No. 16 to the EEU Treaty; and

(ii) The Respondent acted in its sovereign power during its breaches of Protocol No. 16 to the EEU Treaty.

426. The tribunal in *Crystallex v Venezuela* rejected a similar jurisdictional objection by Venezuela related to allegedly *"contractual claims"* and found jurisdiction over claims based on the Government's termination of claimant's mine operation contract for a gold deposit:[445]

[444] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 440.
[445] **Exhibit CL-38.** *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, paras. 473-474, 483. See also: **Exhibit CL-88.** *Impregilo S.p.A. v. Argentine Republic (I),* ICSID Case No. ARB/07/17, Award of 21 June 2011, para. 182. "*[…] Impregilo's main claims in this arbitration concern acts that are alleged to constitute expropriation, unfair treatment and discrimination, which are all claims that go beyond mere contractual breaches even if the factual basis of the two types of claims may to a large extent coincide.*"

"473. […] many investment disputes brought under a bilateral or multilateral investment treaty may involve a set of facts for which there may be a contractual relationship in place between the Parties. […]

474. The fact that a contract may exist between the Parties and that issues relating to its performance or termination may play a role in the Parties' pleadings, does not per se entail that the Tribunal is faced with contract claims rather than treaty claims."

427. In fact, it is commonplace and widespread for investment disputes like this to originate from the contractual relations between the parties. As Prof. Zachary Douglas fairly noted:[446]

> "*A great number of important foreign investments are memorialised in agreements with the host state or its emanations and thus it is hardly surprising that a great number of investment disputes are intertwined with a contractual relationship of this nature. […]*"

428. Thus, contrary to the Respondent's position, the connection between the parties' contract and the treaty claims does not prevent the international tribunal from considering such treaty claims. Quite the contrary, this relationship is customary and expected.

429. In addition to the customary relationship between a contract and treaty claims arising therefrom, the fact that these claims are treaty claims is supported by at least two additional grounds. First, the legal ground for the claims is based on the EEU Treaty. Second, the breaches were committed by the Respondent through use of its sovereign power.

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[446] **Exhibit CL-89.** Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, para. 447.

430. The ***first*** criterion that determines the nature of the claims is the legal ground for such claims.

431. The simple fact that the Claimant submitted its claim on the basis of the investment treaty, not the contract, is sufficient to establish prima facie jurisdiction over such claims. This is confirmed by ample investment arbitration jurisprudence.

432. For example, in *Bayindir v Pakistan*, the tribunal concluded as follows:[447]

> "*In the present case, Bayindir has abandoned the Contract Claims and pursues exclusively Treaty Claims. When an investor invokes a breach of a BIT by the host State (not itself party to the investment contract), the alleged treaty violation is by definition an act of 'puissance publique'. The question whether the actions alleged in this case actually amount to sovereign acts of this kind by the State is however a question to be resolved on the merits*."

433. As in the *Bayindir v. Pakistan* case, the claims, despite the fact they could be related to the implementation and termination of the Investment Contract are treaty claims because the Claimant submitted them on the basis of the EEU Treaty and does not rely on the Investment Contract.

434. The ***second*** criterion establishing that the claims are treaty claims is the fact that the breaches were committed by the Respondent in the exercise of its sovereign power.[448]

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[447] **Exhibit CL-41.** *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, para. 183. *See also:* **Exhibit CL-52.** *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, paras. 73-74.

[448] *See, e.g.*, **Exhibit RL-36.** *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005, para. 260.

435. Here, all actions of the Minsk City Executive Committee and Minsktrans were exercises of sovereign power in derogation of the Claimant's contractual rights.

436. This is so because the whole project was related to the exercise of sovereign power: organization of public transport in the capital of the Respondent and attraction of investment for the purpose of investment in the land belonging to the local authorities.

437. The fact that Minsktrans and Minsk City Executive Committee were the party to the Investment Contract does not render the Respondent's actions outside of its sovereign power because both Minsktrans and Minsk City Executive Committee are the Respondent's agencies.

438. The facts demonstrate that the Respondent, acting through the Minsk City Executive Committee and Minsktrans, did not act as an ordinary contracting party. Rather, during the entire period of implementation of the Investment Contract, Belarus acted in its sovereign power by taking actions that were far outside the ordinary of a normal contracting party. Examples of these actions include the following:

(i) Any action of the Minsk City Executive Committee was drafted as a formal decision. Just to name few:

a) On 5 June 2003, the Minsk City Executive Committee issued a decision on the tender of investment project which was subsequently won by the Claimant;[449]

[449] **Exhibit C-33.** Decision of the Minsk City Executive Committee of 5 June 2003.

b) Each amendment was also introduced upon issuance of the decision of the Minsk City Executive Committee[450] and was discussed among several departments of the Minsk City Executive Committee.[451]

(ii) The Minsk City Executive Committee issued decisions on the granting and further extensions of the lease rights for the land plots for construction of the New Communal Facilities.[452] Doing so, the Minsk City Committee exercised the power granted to it by the Charter of the City of Minsk,[453] namely, power to manage the communal property.

(iii) The Minsk City Committee also acted in the framework of such authority in refusing to accept the New Communal Facilities to the communal ownership;[454]

(iv) The same authority to manage the communal property was exercised by the Minsk City Executive Committee when it deprived the Claimant of the right to develop the Investment Object on the land plot intended for it in 2013. [455]

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[450] *See, e.g.,* **Exhibit C-40.** Decision of the Minsk City Executive Committee of 4 December 2004.

[451] *See, e.g.,* **Exhibit C-55.** Letter of the Committee for Economics of the Minsk City Executive Committee of 28 July 2004. **Exhibit C-65.** Letter of the Committee for Economics of the Minsk City Executive Committee of 17 January 2007.

[452] **Exhibit C-68.** Decision of Minsk City Executive Committee of 24 May 2007. **Exhibit C-86.** Decision of Minsk City Executive Committee of 2 May 2008 **Exhibit C-97.** Decision of Minsk City Executive Committee of 30 May 2008. **Exhibit C-89.** Decision of Minsk City Executive Committee of 22 January 2009. **Exhibit C-75.** Decision of Minsk City Executive Committee of 16 September 2010.

[453] **Exhibit CL-90.** Charter of the City of Minsk of 26 June 2011 (excerpts), Article 22.

[454] **Exhibit C-103.** Letter from Manolium-Engineering to Minsk City Executive Committee of 21 October 2010. **Exhibit C-119.** Letter from Manolium-Engineering of 28 October 2010. **Exhibit C-104.** Letter from Minsktrans to Manolium-Engineering of 17 November 2010. **Exhibit C-327.** Letter from Minsktrans to Minsk City Executive Committee of 8 November 2010. **Exhibit R-66.** Letter from Minsktrans to Manolium-Engineering of 6 July 2011. **Exhibit C-78.** Letter from Minsktrans to Manolium-Engineering of 22 July 2011.

[455] **Exhibit C-138.** Decision of Minsk City Executive Committee of 14 March 2013. **Exhibit C-173.** Decision of Minsk City Executive Committee of 1 December 2016.

439. In fact, the public nature of the Investment Contract was evident from the very outset of the project.

440. First, the entire project is related to the governmental transportation function because it included the construction of the Depot, the Road, and the Pull Station as a related facility for organization of transport in city of Minsk. Public transport is a classic governmental function.

441. Public nature of the New Communal Facilities confirm the importance of the project to Minsk.

442. Moreover, a number of the obligations of the Minsk City Executive Committee related to the exercise of governmental functions, including the following:[456]

> "*9.3.1. secure issuing schemes for developing graphic design projects within five (5) days of FE Manolium-Engineering's contacting the Committee for Architecture, Urban Planning and Land Management of Mingorispolkom [Minsk City Executive Committee];*
>
> *9.3.2. secure approving graphic designs projects within thirty (30) days of FE Manolium-Engineering's submitting reference designs and opinions in respect of them to the Committee for Architecture, Urban Planning and Land Management of Mingorispolkom[Minsk City Executive Committee] ;*
>
> *9.3.3. secure the approval of the architectural (construction) designs within thirty (30) days of FE Manolium-Engineering's submitting duty executed design specifications and estimates*." [Claimant's emphasis]

[456] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clauses 9.3.1 - 9.3.3.

443. These are not obligations or actions that may be undertaken by an ordinary contractual party. Rather, their public nature (including relations with the state agencies responsible for approval of design, while these agencies were departments of the Minsk City Executive Committee) requires the exercise of sovereign power.

444. The important note here is that Minsk City Executive Committee and Minsktrans were not the only state agencies which participated in implementation of the Investment Contract, as will be demonstrated below.

445. Apparently, nothing may happen in Belarus without significant participation of the executive power, including the President of Belarus.

446. As an example, foreign investments in Belarus have long been attracted through the personal invitation and guarantee of the President of the Republic of Belarus A. Lukashenko.[457] This was the case here. The Investment Contract was subject to the approval of the President of the Republic of Belarus, again demonstrating governmental involvement.[458]

447. Additionally, the terms and conditions of the Investment Contract itself and subsequent amendments were discussed and debated by numerous public bodies. For example, in 2003, the Belarusian SCC proposed that the President of Belarus to introduce the obligation to pay the National Library Payment in the amount of USD 1,000,000, and the President approved such amendment to the Investment

[457] **Exhibit C-27.** Official website of news portal Business Gazette, "*Lukashenko invites investors to Belarus and issues guarantees to them.*" // Available at: http://bdg.by/news/economics/18964.html.
[458] **Exhibit C-45.** Resolution of the President of the Republic of Belarus to implementing the project under the Investment Contract dated 5 November 2003

Contract by its resolution.[459] The National Library Payment itself was also largely a "*personal*" project of the President of Belarus.[460]

448. Later in 2003, the Respondent's Government decided to impose on the Claimant an additional obligation to indemnify the Minsk City Executive Committee against expenses to be incurred in creating the infrastructure in connection with implementation of the investment project. As a result of such interventions, the Additional Agreement No. 1 was signed. [461]

449. In 2006, the President of the Republic of Belarus approved the amendments to the Investment Contract, which provided for the Claimant to obtain ownership of the Investment Object only upon completion of the New Communal Facilities.[462]

450. Notably, the actual decision to terminate the Investment Contract was taken in 2014 by the President of the Republic of Belarus, when he directed to transfer the land plots for the Investment Object from Minsktrans to another Minsk state entity "*Minskstroy*" (state entity in charge of construction in Minsk).[463]

451. After the termination of the Investment Contract, the Claimant and Manolium-Engineering negotiated with the Minsk City Executive Committee and

[459] See **CS-I. Claimant's Notice of Arbitration of 15 November 2017**, para. 95. **Exhibit C-44.** 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-45.** Resolution of the President of the Republic of Belarus to implementing the project under the Investment Contract dated 5 November 2003.
[460] **Exhibit C-47.** Additional Agreement No. 1 to Investment Contract of 10 October 2003, Clause 1. **Exhibit C-48.** Additional Agreement No. 2 to Investment Contract of 22 October 2003, Clause 2.5. **Exhibit C-49.** Additional Agreement No. 3 to Investment Contract of 25 November 2003. **Exhibit C-224.** Letter from Minsk City Executive Committee to Claimant of 19 November 2003.
[461] **Exhibit C-47.** Additional Agreement No. 1 to the Investment Contract of 10 October 2003.
[462] **CS-I. Claimant's Notice of Arbitration of 15 November 2017**, para. 126. **Exhibit C-64.** Resolution of the President of the Republic of Belarus dated 11 July 2006. **Exhibit C-48.** Additional Agreement No. 2 to Investment Contract of 22 October 2003.
[463] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 152-156. **Exhibit C-142.** Decision of Minsk City Executive Committee of 15 August 2014. **Exhibit C-143.** Letter from Minsktrans to Manolium-Engineering of 19 September 2014.

Minsktrans regarding terms and conditions of compensation for the costs for construction of the New Communal Facilities.[464] The decision to assess the Claimant's investment was made after *"internal discussions with the Belarusian authorities regarding the potential acquisition of the New Communal Facilities."*[465] As a result of such discussions, the representatives of the Minsk City Executive Committee, Minsktrans, the Ministry of Architecture and Construction, the Ministry of Justice, the Ministry of Finance, the Ministry of Economy, the State Property Committee and the State Standardization Committee sought the Respondent's Council of Ministers to direct the *"reassessment"* to be conducted by the CAO and RSTC (Republican Unitary Enterprise Republican Scientific and Technical Center for Pricing in Construction of the Ministry of Architecture and Construction).[466]

452. Based on such request, the Ministry of Finance of Belarus, under the instruction of the Government, instructed its Controller and Audit Office to perform an audit of the business operation of Manolium-Engineering related to construction of the New Communal Facilities.[467]

453. Notably, a lot of letters of the Minsk City Executive Committee directly stated that it acts *"further to instructions"* of the Administration of the President or the President itself. For example, on 18 June 2012, the Minsk City Executive Committee informed Mr. Aram Ekavyan about the problems in implementation

[464] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 172-192. **CS-I. Claimant's Notice of Arbitration of 15 November 2017**, paras. 271-282.
[465] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 285. **Exhibit R-129.** Letter from Minsk City Executive Committee to the Ministry of Economy of the Republic of Belarus of 26 November 2015.
[466] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 289. **Exhibit R-135.** Letter from Minsk City Executive Committee to the Council of Ministers of 30 December 2015. **Exhibit R-136.** Minutes of the meeting of 30 December 2015.
[467] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016.

of the Investment Contract and requested for his interference *"further to instructions of the Administration of the President of the Republic of Belarus."*[468]

454. The Claimant was perfectly aware of such direct influence of the President and Government to the project, and several times applied directly to the President.[469]

455. Finally, the New Communal Facilities were ultimately transferred to the Minsk communal ownership under the decision of the President of the Republic of Belarus of 20 January 2017.[470]

456. For all of these reasons, the actions of the Respondent and its agencies during the signing, amending, performance and termination of the Investment Contract were exercises of the sovereign power of the state. This renders these actions within the jurisdiction of this Arbitral Tribunal.

VI. THE MINSKTRANS JURISDICTIONAL OBJECTION IS MISTAKEN BECAUSE MINSKTRANS' ACTIONS ARE ATTRIBUTABLE TO THE RESPONDENT

457. The Respondent's claim that Minsktrans' actions are not attributable to the Respondent is mistaken. The Respondent bases this claim on two incorrect arguments: (i) Minsktrans is not empowered to exercise elements of

[468] **Exhibit C-126.** Letter from Minsk City Executive Committee to Claimant of 18 June 2012.
[469] See: **Exhibit C-63.** Letter from Claimant to Assistant to President of the Republic of Belarus of 24 March 2006. **Exhibit R-86.** Letter from Manolium-Engineering to the President of the Republic of Belarus. **Exhibit R-109.** Letter from the Claimant to the President of the Republic of Belarus dated 4 September 2013. **Exhibit R-120.** Letter from the Claimant to the Administration of the President of Belarus of 8 January 2015. **Exhibit R-125**. Letter from Manolium-Engineering to the President of Belarus of 30 June 2015. **Exhibit C-366.** Letter of Manolium-Engineering to President of the Republic of Belarus of 12 October 2015. **Exhibit R-127.** Letter from Manolium-Engineering to the President of Belarus of 12 November 2015.
[470] **CS-I. Claimant's Notice of Arbitration of 15 November 2017**, paras. 407-408. **RS-IV**. Statement of Defence of 19 November 2018, paras. 597-602.

governmental authority;[471] and (ii) Minsktrans performed its obligations under the Investment Contract as any private contractor could have done.[472]

458. The Parties agree that Article 5 of the ILC Articles on State Responsibility governs. That article provides:[473]

> "*The 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.*"

459. The Respondent should be responsible for the actions and omissions of Minsktrans under this article for two reasons:

(i) Minsktrans is empowered to perform and does perform governmental functions;

(ii) Minsktrans exercised this authority and acted in its sovereign capacity in its relations with the Claimant during the implementation of the Investment Contract.

6.1. Minsktrans is Empowered to Perform Governmental Functions

460. Minsktrans is empowered to exercise governmental authority in the sphere of public transportation services.

[471] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 445-448.
[472] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 449-454.
[473] **Exhibit CL-11.** ILC Articles on State Responsibility, Article 5.

461. **First**, Minsktrans is a wholly state-owned state entity that was created specifically to ensure public transportation in Minsk.[474]

462. While the Claimant recognizes that state ownership alone is not the decisive criterion for governmental authority,[475] it is an important factor.

463. **Second**, state enterprise Minsktrans was created only in October 2003 through a merger of several other state enterprises - Minskgorelectrotrans (*i.e.*, the Minsk state enterprise in charge of electrical transport), Minskpassazhiravtotrans (*i.e.*, the Minsk state enterprise in charge of passenger motor transportation) and the Department of transport and communication of the Minsk City Executive Committee.[476] The Department of transport and communication of the Minsk City Executive Committee was the initial party to the Investment Contract as concluded on 6 June 2003. [477]

464. The very name of Department of the Minsk City Executive Committee underscores the governmental function of this entity. The merger of it with the other entities further supports the governmental authority of the new company.

465. **Third**, Minsktrans is empowered to exercise elements of governmental authority, through, *inter alia*, participating in the process of negotiating transportation tariffs alongside state organs and finally approving such tariffs once negotiated.[478]

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[474] **CS-II. Claimant's Statement of Claim of 10 May 2018,** paras. 112-113. **CS-I. Notice of Arbitration of 15 November 2017**, paras. 374-378. **Exhibit C-175.** Official website of Minsktrans, "General information".

[475] **Exhibit CL-91.** *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) I.C.J. Reports 1970, p. 3, Judgment of 5 February 1970, para. 39.

[476] **Exhibit C-348.** Website of Minsktrans, History of the Enterprise and of Transport in the City of Minsk // Available at: http://www.minsktrans.by/ru/about/history.html.

[477] **Exhibit C-34.** Investment Contract of 6 June 2003, p. 1.

[478] **Exhibit C-349.** Interfax.by website, The *City Transport Tariffs in Minsk Will Increase by 38.7% up to 1.3 BYR"* // Available at: https://www.interfax.by/news/belarus/1101054

466. For the reasons stated above, Minsktrans is therefore empowered to exercise elements of governmental authority in accordance with Article 5 of the ILC Articles on State Responsibility.

6.2. Minsktrans Acted in Its Sovereign Capacity in Its Relations with the Claimant

467. Minkstrans also satisfies the second condition of Article 5 of the ILC Articles on State Responsibility because it acted in its sovereign capacity in its relations with the Claimant.

468. The Respondent's claim that the subject matter of the Investment Contract is irrelevant for this purpose is wrong.

469. This same argument was rejected by the tribunal in Garanti Koza v Turkmenistan, which pointed out that *"[r]oad and bridge construction is in any event a core function of government"*.[479]

470. The Claimant submits that the assurance of the public transportation in the city is a governmental function equally important to road and bridge construction. Therefore, the fact that the Investment Contract related to the provision of public transportation demonstrates that Minsktrans behavior is a governmental function.

471. Moreover, the governmental function of Minkstrans is further demonstrated by the fact that it received constant administrative support from the Minsk City Executive Committee, the Ministries of the Republic of Belarus and the President of the Republic of Belarus. [480]

[479] **Exhibit CL-39.** *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20. Award of 19 December 2016, para. 335.
[480] *See paras. 438-456.*

472. In addition, under provisions of the Investment Contract, the New Communal Facilities were to be transferred to the communal ownership[481] and used by Minsktrans. Thus, Minsktrans was the ultimate beneficiary of the New Communal Facilities and was to use (and, actually, is currently using) the New Communal Facilities for performance of its governmental function.[482]

VII. THE ARBITRAL TRIBUNAL HAS JURISDICTION UNDER THE BELARUSIAN INVESTMENT LAW

473. The Respondent's objection to the jurisdiction of the Arbitral Tribunal under the Belarusian Investment Law fails just like its other jurisdictional objections.

474. The Respondent relies on three equally mistaken arguments in support of its position.

475. The Belarusian Investment Law does not apply to investments made before it came into force on 24 January 2014; [483]

(i) Following the Respondent's mistaken division of the Dispute into a Termination Dispute and a Tax Dispute, both the Termination Dispute and Tax Dispute fall within exclusive competence of Belarusian state courts and are not subject to arbitration;[484]

(ii) The Termination Dispute falls within the competence of the Minsk Economic Court in accordance with the Investment Contract, which prevails over the Belarusian Investment Law. [485]

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[481] **Exhibit C-34.** Investment Contract of 6 June 2003, Clause 2.3, para. 2.
[482] **Exhibit C-82.** Depot Facilities Gratuitous Use Agreement of 14 November 2011. **Exhibit C-99.** Pull Station Gratuitous Use Agreement of 6 July 2010.
[483] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 462-468.
[484] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 469-478.
[485] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 479-481.

476. Respondent is wrong because:

(i) The Belarusian Investment Law shall apply to existing investments;

(ii) The Belarusian courts do not have exclusive competence over the Dispute and, thus, the Dispute may be referred to international arbitration;

(iii) The existence of the dispute resolution clause in the Investment Contract does not preclude the jurisdiction of the Arbitral Tribunal.

7.1. The Belarusian Investment Law Applies to Existing Investments

477. The Belarusian Investment Law entered into force on 24 January 2014.[486]

478. The Respondent tries to substantiate its allegation that the Belarusian Investment Law is not applicable to investments made before that date by claiming incorrectly that the Belarusian Investment Law provides for the attraction and protection of only new investments.[487]

479. To support this incorrect argument, the Respondent relies on three particular provisions of the Belarusian Investment Law, namely (i) the preamble, (ii) the scope of law provision and (iii) the dispute resolution provision. None of these clauses supports the Respondent's position.

480. **First**, nothing in the Belarusian Investment Law prevents application to investments made prior to its entry into force.

481. The preamble of the Belarusian Investment Law provides as follows:

[486] **Exhibit RL-48.** Information on the official publication of the Belarusian Investment Law.
[487] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 459, 462-468.

"*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*."[488] [Claimant's emphasis]

482. Thus, as with the EEU Treaty, the plain language of the Belarusian Investment law demonstrates that it is intended to both attract investments and also ensure the guarantees, right and interests of investors in relation to existing investments. Because it is intended to protect existing investments, it must necessarily cover investments made prior to its entry into force.

483. The Respondent's interpretation would lead to arbitrary and unfair results. If the Respondent's interpretation were accepted, the Respondent would be empowered to discriminate against all existing investments without recourse. This surely could not have been the result intended by a law stating that it was enacted to *"ensure"* the protection of investments.

484. This interpretation is especially absurd in light of the fact that the Belarusian Investment Law is not the first law protecting investments in the Republic of Belarus. Prior to the current Belarusian Investment Law, there were two other pieces of legislation devoted to investment protection and legal guarantees to the investors, namely:

(i) Law on Foreign Investments on the Territory of the Republic of Belarus of 14 November 1991 No. 1242-XII, which was in force until 22 June 2001;[489]

[488] **Exhibit RL-47.** Excerpts from the Belarusian Investment Law, Preamble.
[489] **Exhibit CL-92.** Law on Foreign Investments on the Territory of the Republic of Belarus of 14 November 1991.

(ii) Investment Code of the Republic of Belarus No. 37-Z of 22 June 2001 (was in force until the Belarusian Investment Law entered into force on 24 January 2014).[490]

485. Both these laws protected investments and investors in the territory of Belarus and guaranteed national treatment,[491] guaranteed protection from unlawful measures of the state,[492] and protected against unlawful nationalization (expropriation), with a requirement of compensation in the case of any expropriation.[493]

486. In addition to these specific provisions, the Constitution of the Republic of Belarus also protects all types of ownership:[494]

> "*The State shall grant equal rights to all to conduct economic and other activities, other than those prohibited by law, and guarantee equal protection and equal conditions for the development of all forms of ownership.*"

487. Taking into account the continuous promises of protection in the previous legislation, the protection of only new investments under the Belarusian Investment Law would be contrary to the purpose of the investment protection.

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[490] **Exhibit CL-93.** Investment Code of the Republic of Belarus of 22 June 2001.
[491] **Exhibit CL-92.** Law on Foreign Investments on the Territory of the Republic of Belarus of 14 November 1991, Art. 34. **Exhibit CL-93.** Investment Code of the Republic of Belarus of 22 June 2001, Art. 79.
[492] **Exhibit CL-93.** Investment Code of the Republic of Belarus of 22 June 2001, Art. 9 and 11. **Exhibit CL-92.** Law on Foreign Investments on the Territory of the Republic of Belarus of 14 November 1991, Art. 35 and 35-1.
[493] **Exhibit CL-93.** Investment Code of the Republic of Belarus of 22 June 2001, Art. 11 and 12. **Exhibit CL-92.** Law on Foreign Investments on the Territory of the Republic of Belarus of 14 November 1991, Art. 35.
[494] **Exhibit CL-94.** Constitution of the Republic of Belarus of 1994, Art. 13.

It would be an absurd result against this long backdrop of investor protections to interpret a new law to remove those past protections from existing investments.

488. **Second**, the reference to *"making of investment"* in the Belarusian Investment Law does not divest existing investments of protection.

489. The definition of *"making an investment"* should fairly include the whole range of investment operations, because the process of investment is not a single-day operation. If it is limited to future investments, the start of the investment process will lose protection, and the investment will only be partially protected.

490. Thus, the Claimant submits that the Belarusian Investment Law also protects the existing investments which were made prior to entry of the law into force.

7.2. <u>The Belarusian Courts Do Not Have Exclusive Competence over the Dispute</u>

491. The Respondent asserts that the claims presented before the Arbitral Tribunal fall within jurisdiction of the Belarusian state courts because the Belarusian legislation provides for exclusive competence of the state courts.

492. In support, the Respondent refers to the following types of disputes which shall be submitted to the Belarusian courts:[495]

(i) "*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; […]*"

[495] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 471-472. **Exhibit RL-50.** Excerpts from the Belarusian Code of Commercial Procedure, Articles 236, 42.

(ii) "*disputes relating to the invalidation of non-regulatory legal acts of state bodies […] of the Republic of Belarus;*"

(iii) "*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.*"

(iv) Cases related to "*collection from legal entities […] of taxes, duties (levies) or other mandatory charges due to the republican and/or local budgets and to state extrabudgetary funds, as well as penalties provided for by legislation.*"

493. The Dispute before the Arbitral Tribunal does not fall into these categories because:

(i) The subject matter of the Dispute is <u>not</u> immovable property or rights to immovable property. The subject-matter of the Dispute is violation of the rights of the Claimant as a foreign investor by the Respondent;

(ii) The Dispute is not aimed at invalidation of any "*non-regulatory legal acts*" of the Respondent and does not "*appeal*" against the actions or omissions of state bodies. The Claimant does not request restitution *in integrum* but instead requests compensation for the violations of the international investment treaty by the Respondent;

(iii) The Dispute does not relate to the collection of taxes by the state but relates to violation of the rights of the Claimant through a stepped campaign, where the imposition of taxes was only one step in the whole process.

494. For these reasons, the Dispute does not fall within the exclusive competence of the Belarusian courts and the Claimant was entitled to refer the Dispute to arbitration under the Belarusian Investment Law. This Dispute is therefore within the jurisdiction of this Arbitral Tribunal.

7.3. <u>The Dispute Resolution Clause in the Investment Contract Does Not Preclude the Jurisdiction of the Arbitral Tribunal</u>

495. The Respondent also alleges that, in accordance with the national laws of the Republic of Belarus, the Dispute falls within the exclusive jurisdiction of the Economic Court of Minsk under the Investment Contract. [496]

496. In support, the Respondent refers to the provision of the Belarusian Investment Law which provides as follows:[497]

> "*[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.*"

497. The Investment Contract also contained a provision on dispute resolution that states as follows:[498]

[496] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 479-481.
[497] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 480. **Exhibit RL-47.** Excerpts from the Belarusian Investment Law, Article 13.
[498] **Exhibit C-34.** Investment Contract of 6 June 2003, Clause 21. **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 26.

"*Any disputes hereunder shall be considered by the Parties, and, where the Parties fail to reach a settlement, by the Economic Court of Minsk. The law applicable to this Contract is the law of the Republic of Belarus.*"

498. The Dispute between the Claimant and the Republic of Belarus is not a dispute under the Investment Contract. The Dispute before the Arbitral Tribunal is based on breaches committed by the Republic of Belarus as a state under the EEU Treaty, not on contractual violations alone.

499. Thus, the Respondent's argument fails to acknowledge the difference between a purely contractual dispute and an investment dispute like this.

500. For these reasons, the dispute resolution provision appeared in the Investment Contract does not preclude the jurisdiction of the Arbitral Tribunal. Accordingly, the Respondent's jurisdictional objection should be rejected.

VIII. THE CLAIMANT IS AN INVESTOR WHO HAS MADE INVESTMENTS IN THE REPUBLIC OF BELARUS

501. Finally, the Respondent's vague objection to the jurisdiction of the Arbitral Tribunal because "*the Claimant failed to prove that investment made through Manolium-Engineering belongs to the Claimant*"[499] should also be rejected.

502. The Respondent bases its position on the allegation that the Claimant did not prove that it is the beneficial owner of the sums invested through Manolium-Engineering and, thus, the investment does not enjoy protection under the EEU Treaty.

[499] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 482-484.

503. This argument must be rejected because the Respondent failed entirely to provide any legal ground for this objection to jurisdiction. And for good reason, there is no such support.

504. In fact, under Protocol No. 16 to the EEU Treaty all investments are subject to protection, whether the investments were made by using the investor's own resources or not. This refutes the Respondent's position.

505. In accordance with Clause 6 of Protocol No. 16 (para. 7):[500]

> "*7) "investments" means tangible and intangible assets invested by an investor of a Member State into subjects of entrepreneurial activity on the territory of another Member State in accordance with the legislation of the latter, including:*
>
> - *funds (cash), securities and other property;*
> - *rights to engage in entrepreneurial activities granted under the legislation of the Member States or under a contract, including, in particular, the right to exploration, development, production and exploitation of natural resources;*
> - *property rights and other rights having monetary value*".

506. Additionally, Clause 6 of Protocol No. 16 to the EEU Treaty (para. 8) provides the following definition of an investor:[501]

[500] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Clause 6, para. 7.
[501] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Clause 6, para. 8.

"*8) "investor of a Member State" means any person of a Member State making investments on the territory of another Member State in accordance with the legislation of the latter*."

507. Thus, the definition of "*investor*" is not limited to only an investor who contributed its own funds as the Respondent claims.

508. Many investment tribunals have also confirmed that an investor is not required to fund an investment through its own resources in order to meet the requirement of jurisdiction *ratione materiae*:

(i) For example, in *Tradex v Albania*, Albania argued that the investment was funded by an "*offshore company of unspecified identity and nationality, or by the Greek State and the European Community*" to support its argument that there was no foreign investment. The arbitral tribunal rejected this claim and concluded as follows: "*111. On the basis of the above considerations, the Tribunal concludes here that the sources from which the investor financed the foreign investment in Albania are not relevant for the application of the 1993 Law as long as an investment is proved, which the Tribunal will examine hereafter.*"[502]

(ii) Moreover, in *Wena Hotels v Egypt*, the state argued that the majority of the Egyptian investment came from affiliates of Wena rather than from Wena. The arbitral tribunal rejected that argument as follows: "*The Tribunal is not persuaded by the relevance of the Respondent's contention that much of the Egyptian investment came from affiliates of Wena rather than from Wena. Instead the panel takes the view that whether the investments were made by Wena or by one of its affiliates, as long as those*

[502] **Exhibit CL-95.** *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award of 29 April 1999, paras. 109-111.

investments went into the Egyptian hotel venture, they should be recognized as appropriate investments. The panel was persuaded from the testimony it received that it is a widely established practice for hotel enterprises to adopt allocation measures, which spread the profits from the group operations into various jurisdictions where there are tax advantages to the group as a whole."[503]

(iii) Additionally, in *Saipem v Bangladesh*, the Claimant's investment project was sponsored by the World Bank and financed to a large extent by the International Development Association. In addition, Petrobangla (the state oil company) had also made contractual progress payments to the Claimant during the construction. Based on these facts, Bangladesh disputed the *ratione materiae* jurisdiction of the tribunal. The tribunal noted, however: "*[i]t is true that the host State may impose a requirement that an amount of capital in foreign currency be imported into the country. However, in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant.*"[504]

(iv) Finally, in *Eiser v Spain*, the state alleged that the Claimants had not contributed their own funds to make the investment, but instead that funds were provided and the risk was incurred by pension funds from various countries which did not participate in the proceedings (some of which were even undisclosed). The arbitral tribunal stated as follows: "*Respondent*

[503] **Exhibit RL-73.** *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, para. 126.
[504] **Exhibit CL-96.** *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, paras. 104-105.

urged that the funds invested were not the Claimants' own, and were derived from the limited partners in EGIF. However, the origins of capital invested by an Investor in an Investment are not relevant for purposes of jurisdiction."[505]

509. Investment jurisprudence also allows a foreign investor to submit direct claims based on assets of a company it *controls*.

510. For example, in the recent *Mera Investment Fund v Serbia* case, Serbia raised a jurisdictional objection alleging that the assets were not invested by a protected investor, but instead were the assets of the local company in the host state owned by the Claimant.[506] The arbitral tribunal interpreted the broad asset-based definition in the applicable investment treaty, which did not exclude the indirect investments from the scope of protection, and concluded as follows:

> "[…] *the assets held by the local company, Mera Invest, constitute protected investments pursuant to the BIT, in respect to which the Claimant as its shareholder may bring claims not only for the impairment of the value of its shares in its subsidiary, but also for the impairment of its subsidiary's assets.*"[507]

511. The arbitral tribunal in *Mera Investment Fund v Serbia* also acknowledged the conclusions of the previous tribunals regarding the indirect investments and noted that "*it is in fact not unusual that an investor, who wants to make an*

[505] **Exhibit CL-97.** *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award of 4 May 2017, para. 228.
[506] **Exhibit CL-98.** *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction of 30 November 2018, paras. 111-114.
[507] **Exhibit CL-98.** *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction of 30 November 2018, para. 135.

investment abroad, uses a company as a vehicle, thereby investing in the host country."[508]

512. Indeed, similar conclusions about the entitlement of a foreign investor to present direct claims related to assets of its subsidiary were made by the tribunals in the *EURAM v. Slovak Republic*,[509] *Von Pezold v Zimbabwe*,[510] *Telefonica v Argentina*[511] and *Azurix v Argentina*[512] cases.

513. The relevant facts here lead to the same conclusion as in these many other cases.

514. **First**, the Claimant owns 100% of the shares in Manolium-Engineering (Minsk).[513] This fact alone is sufficient to entitle the Claimant to claim damages related to all of the assets of Manolium-Engineering.

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[508] **Exhibit CL-98.** *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction of 30 November 2018, paras. 129.

[509] **Exhibit CL-99.** *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction of 22 October 2012, para. 321: "*The Tribunal is not persuaded, however, that the [bilateral investment treaty] requires that the investor be the direct owner of the asset. Article 1(1) makes no reference to ownership. Rather, it stipulates that 'the term 'investment' shall mean all assets which an investor of one Contracting Party invests in the territory of the other Contracting Party in accordance with its legislation.*"

[510] **Exhibit CL-100.** *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award of 28 July 2015, para. 321: "*[t]his principle – that where a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the assets of the former – has, as the von Pezold Claimants submit, since gained currency in investment treaty arbitration.*"

[511] **Exhibit CL-47.** *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction of 25 May 2006, para. 76.

[512] **Exhibit CL-101.** *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic of 1 September 2009, para. 108: "*[e]ven where a foreign investor is not the actual legal owner of the assets constituting an investment […] that foreign investor may nonetheless have a financial or other commercial interest in that investment. This is so, irrespective of whether the actual legal owner of the assets […] is a wholly or partly owned subsidiary of the investor […].*" And further: "*[a]n investment protection treaty having this effect does not alter the legal nature of the investor's interest nor that of the legal owner of the investment, nor does it ignore the separate legal personalities and separate legal rights and obligations of the shareholder and the company. Rather, it merely ensures that whatever interest, legal or otherwise, that the investor does have will be accorded certain protections"*

[513] **Exhibit C-3.** Certificate of registration of Manolium-Processing and extract from the register of legal entities Manolium-Engineering. **Exhibit C-5.** Certificate of state registration of Manolium-

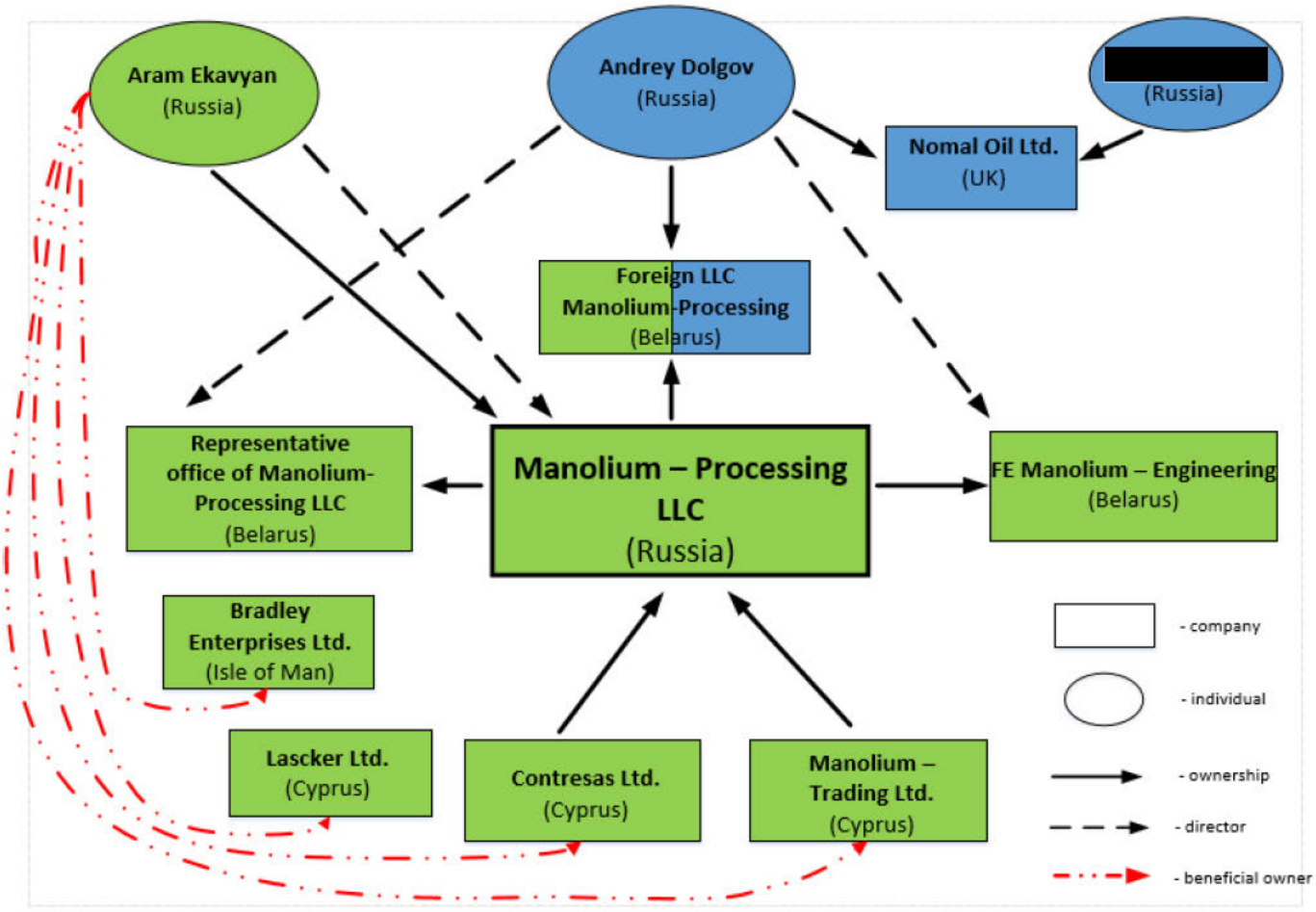
515. **Second**, the Claimant's investment process was structured through affiliated companies which provided the loans to Manolium-Engineering—each of which are also foreign.

516. Specifically, the Claimant transferred the funds to Manolium-Engineering via the following companies: Bradley Enterprise Ltd (the Isle of Man), Manolium Trading (Cyprus), Lasker Ltd (Cyprus) and Nomal Oil Limited (the United Kingdom),[514] as shown in the figure below:

Engineering in the Unified State Register of Legal Entities and Individual Entrepreneurs dated 18 March 2004. Exhibit C-6. Certificate of state registration of Manolium-Engineering in the Unified State Register of Legal Entities and Individual Entrepreneurs dated 16 April 2004. **Exhibit C-7.** Charter of Manolium-Engineering dated 16 April 2004.

[514] **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file). **Exhibit C-216.** Loan agreements and confirmations of loan transfers from Bradley Enterprises Ltd. to Manolium-Engineering. **Exhibit C-217.** Loan agreements and confirmations of loan transfers from Lascker Ltd. to Manolium-Engineering. **Exhibit C-218.** Loan agreements and confirmations of loan transfers from Nomal Oil Ltd. to Manolium-Engineering**. Exhibit C-219.** Loan agreements and confirmations of loan transfers from Manolium Trading Ltd. to Manolium-Engineering. **Exhibit C-220.** Loan agreements and confirmations of loan transfers from Foreign LLC Manolium Processing to Manolium-Engineering.

Image 16. Structure of the Loans Provided by the Claimant to Manolium-Engineering in 2003-2013



517. Because the money came from outside of the country, and was ultimately transferred to Manolium-Engineering, the entire amount of the invested funds qualify as an investment. The Respondent's jurisdictional objection to the contrary should be rejected.

D. THE RESPONDENT BREACHED THE RIGHTS OF THE CLAIMANT UNDER THE EEU TREATY AND THE BELARUSIAN INVESTMENT LAW

IX. THE RESPONDENT EXPROPRIATED THE CLAIMANT'S INVESTMENTS

518. The EEU Treaty protects investors from precisely the type of expropriation that has occurred here. Specifically, Article 79 of Protocol No. 16 to the EEU Treaty, reads as follows:[515]

> "*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.*"

519. A similar provision is contained in Article 12 of the Belarusian Investment Law:[516]

> "*Property being investments or being created as a result of carrying out investments may not be gratuitously nationalized or requisitioned.*"

520. The Claimant submits that the Respondent unlawfully expropriated the Claimant's investments without any compensation in breach of this provision.

[515] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Article 79.
[516] **Exhibit CL-10.** Investment Law of the Republic of Belarus, Article 12.

521. The Respondent mischaracterizes the expropriation that occurred as referring to "*two 'sequences' of events*".[517] This is wrong. The Claimant refers to one sequence of events, which finally resulted in termination of the Investment Contract and in deprivation of the New Communal Facilities.

522. A single dramatic action is not required for an expropriation. Rather, the Respondent's wrongful actions provide a classic example of the type of creeping expropriation which has routinely been accepted as an expropriation by investment tribunals and defined as follows:

(i) ***Generation Ukraine v Ukraine*****:** "*[creeping expropriation] is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.*"[518] [Claimant's emphasis]

(ii) ***Siemens v Argentina:*** "*[b]y definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation*."[519] [Claimant's emphasis]

(iii) ***Roussalis v. Romania:*** "*a series of acts and/or omissions that, in sum, result in a deprivation of property rights.*"[520] [Claimant's emphasis]

[517] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 615-617.
[518] **Exhibit RL-58.** *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award of 16 September 2003, para. 20.22. Cited also by: **Exhibit CL-22.** *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para. 700.
[519] **Exhibit CL-102.** *Siemens A.G. v. Argentine Republic*, *ICSID* Case No. ARB/02/8, Award, 6 February 2007, para. 263.
[520] **Exhibit CL-30.** *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 1 December 2011, para. 329.

(iv) ***Crystallex v Venezuela:*** "*a specific form of expropriation that results from a series of measures taken over time that cumulatively have an expropriatory effect, rather than from a single measure or group of measures that occur at one time.*" [521] [Claimant's emphasis]

523. The Respondent cannot escape liability by arguing that the different stages of expropriation were undertaken at various times by different state actors. This is because all actions were coordinated and aimed at one result: the deprivation of the Claimant's right to develop the Investment Object without any compensation. Unfortunately, the Respondent succeeded.

524. The Respondent attempts to excuse its wrongful actions by claiming incorrectly that each element of a creeping expropriation must be satisfied by the same act and purposefully divide the Claimant's claim in several parts considering each of them separately. This is wrong.

525. As explained by the tribunal in *Burlington Resources v Ecuador*, a creeping expropriation may be employed when "*no single measure is in itself expropriatory.*"[522]

526. Moreover, the tribunal in *Vivendi v. Argentina* recognized that "*It is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached*."[523]

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[521] **Exhibit CL-38.** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, para. 667.
[522] **Exhibit CL-103.** *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, para. 345.
[523] **Exhibit CL-104.** *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, Case No. ARB/97/3, Award 20 August 2007, para 7.5.31.

527. So too here. The Respondent's wrongful actions must not be analyzed in isolation. Rather, their cumulative effect must be assessed.

528. The Respondent's attempt to justify its actions by reference to local law of the terms of the Investment Contract must be rejected. As explained herein, the (i) termination of the Investment Contract and (ii) subsequent imposition of the tax liability resulting in confiscation of the New Communal Facilities establish an unlawful creeping expropriation.

9.1. Termination of the Investment Contract

529. The Respondent improperly attempts to escape liability by claiming that:

(i) The Investment Contract was terminated pursuant to the proper legal procedure;[524]

(ii) The Minsk City Executive Committee had valid contractual grounds to terminate the Investment Contract;[525]

(iii) The Minsk City Executive Committee did not act in exercise of its sovereign authority in termination of the Investment Contract. [526]

530. As demonstrated below, this argument fails because:

(i) The Respondent exercised and acted within its sovereign authority when terminating the Investment Contract;

(ii) The Respondent's use of its own local courts cannot immunize its violations of international law;

[524] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 623-626.
[525] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 627-631.
[526] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 632-636.

(iii) The Respondent had no valid ground for termination of the Investment Contract; and

(iv) The termination of the Investment Contract was disproportional and in bad faith.

9.1.1. The Respondent Acted in its Sovereign Authority in Termination of the Investment Contract

531. The Respondent, once again, mistakenly portrays the Dispute as merely a contractual dispute rather than a one addressing the grave violations of international law at issue.[527] Following this logic, the Respondent focuses its attention on the actions and role of the Minsk City Executive Committee in the process of termination of the Investment Contract.

532. The termination of the Investment Contract was no ordinary exercise of the Minsk City Executive Committee's contractual rights. Rather, it was state action that continued a longstanding campaign of harassing the Claimant, initiated, in fact, by the President of the Republic of Belarus:

(i) The President of the Republic of Belarus decided to deprive the Claimant of its right to develop the Investment Project. This decision was taken in summer 2014, before initiation of any court proceedings;[528]

[527] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 632-636.
[528] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 152-156. **Exhibit C-363.** Website of news portal TUT.BY, *Lukashenko Instructed to Revise the Investment Project on the Construction of Multifunctional Center of Squares of Horizon in Minsk*, 4 August 2014. // Available at: https://news.tut.by/economics/409738.html. **Exhibit C-364.** Website of news portal TUT.BY, *Depot on the Horizon or How the Authorities Are Planning to Use Two Dainty Land Plots in the Center of Minsk?*, 10 March 2017. // Available at: https://news.tut.by/economics/534232.html?crnd=44397.

(ii) Following the President's decision, the Minsk City Executive Committee transferred the land plot intended for construction of the Investment Object to Minskstroy from Minsktrans[529] (this prevented the transfer of the plot to the Claimant by Minsktrans as planned). This was also done before any court decision on termination of the Investment Contract;

(iii) In issuing their pre-ordained opinion, the Belarusian courts did not identify any alleged failure by the Claimant to perform any financial obligations, notwithstanding the fact that the only way the Claimant could lose the rights for the Investment Project was through such a breach;[530]

(iv) The Minsk City Executive Committee sold the right to develop the Investment Project to another investor, destroying any ability the Claimant may have had to reclaim or exercise this right.[531]

533. As the tribunal in *Eureko B.V. v. Poland* concluded, "*[t]here is an amplitude of authority for the proposition that when a State deprives an investor of the benefit*

[529] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 152-156. **Exhibit C-142.** Decision of Minsk City Executive Committee of 15 August 2014. **Exhibit C-143.** Letter from Minsktrans to Manolium-Engineering of 19 September 2014.

[530] **Exhibit C-147.** Judgment of the Economic Court of Minsk of 9 September 2014. **Exhibit C-149.** Appeal of Manolium-Engineering of 9 October 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk of 29 October 2014. **Exhibit C-151.** Cassation appeal of Manolium-Engineering of 29 November 2014. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.

[531] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 293-295. **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 363-367. **Exhibit C-185.** Official website of news portal of Belarus TUT.*BY, "Almost fivefold of the initial price. A-100 acquired the section of the trolleybus depot in the center of* Minsk. // Available at: https://news.tut.by/economics/559888.html. **Exhibit R-153.** Minutes of the results of the auction dated 12 September 2017.

of its contractual rights, directly or indirectly, it may be tantamount to [expropriation]."[532]

534. This is precisely such a deprivation here.

9.1.2. The Respondent Cannot Justify its Illegal Acts by Using Local Courts

535. The Respondent wrongly claims that "*a predicate for alleging judicial expropriation is unlawful activity by the court itself.*"[533] The law is to the contrary.

536. Legality under local law is irrelevant. Investment tribunals have explained that a judicial act qualifies as expropriation when the judicial process was instigated by the state, irrespective of the purported legality under domestic law of actions of the courts.[534]

537. Here, the Respondent decided to expropriate the Claimant's rights before initiation of court proceedings, and completely understood that. Indeed, Mr. Dolgov recalls as follows:[535]

> "[A]*t the meeting of the Minsk City Executive Committee, which took place before the decision made by the Minsk City Executive Committee to seize the land plot to be used for the Investment Object, Ms. Zhanna Birich, Deputy Chair of the Minsk City Executive Committee, got up at the meeting and said "What are we doing? We have not even won the case in the court*".

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[532] **Exhibit CL-105.** *Eureko B.V. v. Poland, Ad Hoc* Arbitration, Partial Award of 19 August 2005, para. 241.
[533] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 623-626.
[534] **Exhibit CL-22.** *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 704-707.
[535] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 157.

538. Thus, the actions in the state courts were simply a sham through which the Respondent now seeks to immunize itself from liability through the appearance of legality.

539. Yet even if legality under local law were a defense—which it most assuredly is not—it would still not save the Respondent's case. This is because the Belarusian courts, including the Supreme Court of the Republic of Belarus, unlawfully terminated the Investment Contract because they failed to analyse the following crucial facts of the dispute:

(i) The Claimant provided more funding than was required under the Investment Contract;[536]

(ii) The Claimant was prepared to inject an additional USD 3 million to finish construction of the New Communal Facilities, although not legally obligated to do so; and [537]

(iii) The Respondent itself was responsible for the increase in costs of construction by causing delays and changing the scope of work.[538]

540. Thus, the decision of the Supreme Court was not a justification for the Respondent's actions, but merely the culmination of a long chain of wrongs of the Belarusian authorities aimed at expropriating the Claimant's investment.

541. As the tribunal stated in *Sistem v. Kyrgyz Republic*, "*[i]t is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an expropriation of property by that State.*

[536] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.
[537] *See paras. 232-243*. **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014.
[538] *See paras. 50-122*.

The Court decision deprived the Claimant of its property rights in the hotel just as surely as if the State had expropriated it by decree."[539]

542. The unlawful opinions of the Belarusian courts applying local law cannot excuse the Respondent's violations of international law.

9.1.3. The Respondent Had No Valid Ground for Deprivation of the Claimant of the Right to Develop the Investment Object

543. The Respondent alleges that the Claimant had not performed its obligations under the Investment Contract, and that this constituted a formal contractual ground justifying termination of the Investment Contract.[540] That is wrong.

544. As demonstrated above, the Investment Contract included only one basis which would justify the loss of the right to the Investment Object: failure to invest USD 15 million in the design, construction and reconstruction of the New Communal Facilities[541] and to donate USD 1 million to construction of the National Library.[542]

545. The Claimant invested USD 19,434,679 (plus USD 1 million for the Library Payment). This exceeded the Claimant's investment obligation by roughly USD 2 million.[543] The Claimant was even prepared to invest a further USD 3 million above its obligations, but was prevented from doing so.

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[539] **Exhibit CL-106.** *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic,* ICSID Case No. ARB(AF)/06/1, Award of 9 September 2009, para. 118.
[540] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 627-631.
[541] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003. **Exhibit R-10.** Order of Economy Committee of Minsk City Executive Committee No. 30 of 27 April 2003. **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007
[542] **Exhibit C-47.** Additional Agreement No. 1 to the Investment Contract of 10 October 2003, Clause 1. **Exhibit C-48.** Additional Agreement No. 2 to the Investment Contract of 22 October 2003, Clause 2.5. **Exhibit C-49.** Additional Agreement No. 3 to the Investment Contract of 25 November 2003.
[543] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.

546. Because these investments were actually made, the right to develop the Investment Object was guaranteed to Claimant. Notably, Belarusian courts failed to consider this obvious fact but simply took the Respondent's allegations for granted.

547. The tribunal in *Karkey v Pakistan* rejected a state's similar attempt to hide behind decisions of its local courts. There, the tribunal determined that "*[d]eficiencies relating to the substance of the [Supreme Court] Judgment, in certain circumstances, may amount to a breach of international law. In particular, an international tribunal may decide not to defer to an arbitrary judicial decision which is, as such, incompatible with international law*."[544] The tribunal then reviewed the decision of the Supreme Court of Pakistan and found that it had ignored material facts, lacked sound evidential and legal basis, and made inconsistent holdings.[545] The tribunal therefore found the decision to be arbitrary and irrational, and did not consider itself bound by its findings.[546]

548. Similarly, the decision of the Belarus Supreme Court is equally without merit and should not be considered binding by the Tribunal. Instead, this decision was part of the "*general pattern of breaches of the BIT*"[547] and should be disregarded.

9.1.4. The Termination of the Investment Contract Was Disproportionate and in Bad Faith

[544] **Exhibit CL-107.** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. Arb/13/1, Award of 22 August 2017, para. 550.
[545] **Exhibit CL-107.** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. Arb/13/1, Award of 22 August 2017, paras. 553-61.
[546] **Exhibit CL-107.** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. Arb/13/1, Award of 22 August 2017, paras. 553-61.
[547] **Exhibit CL-107.** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. Arb/13/1, Award of 22 August 2017, para. 560.

549. As explained herein, the Claimant submits that there was no contractual ground for termination of the Investment Contract and for deprivation of the Claimant's right to the Investment Object. But even if there was, the decision of the Supreme Court of the Republic of Belarus was disproportionate and made in bad faith.

550. The tribunal in *Occidental v Ecuador (II)* extensively analysed proportionality in relation to contract termination.[548] There, the tribunal found an unlawful expropriation of Occidental's interest in Block 15 of the Ecuadorian Amazon region by the state's declaration of *caducidad* (cancelling the contract) of the claimant's participation contract because it was disproportionate in the given circumstances.[549]

551. In particular, the tribunal noted as follows:[550]

> "*[T]he overriding principle of proportionality requires that any such administrative goal must be balanced against the Claimants' own interests and against the true nature and effect of the conduct being censured. The Tribunal finds that the price paid by the Claimants – total loss of an investment worth many hundreds of millions of dollars – was out of proportion to the wrongdoing alleged against OEPC, and similarly out of proportion to the importance and effectiveness of the "deterrence*

[548] **Exhibit CL-108.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II),* ICSID Case No. ARB/06/11, Award of 5 October 2012, paras. 384-455.

[549] **Exhibit CL-108.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II),* ICSID Case No. ARB/06/11, Award of 5 October 2012, paras. 453-455. The Award was upheld in that part by: **Exhibit CL-109.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II),* ICSID Case No. ARB/06/11, Decision on Annulment of the Award of 2 November 2015. *See also:* **Exhibit CL-110.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II),* ICSID Case No. ARB/06/11. Dissenting Opinion of Professor Brigitte Stern (Award), para. 1.

[550] **Exhibit CL-108.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II),* ICSID Case No. ARB/06/11, Award of 5 October 2012, paras. 450.

message" which the Respondent might have wished to send to the wider oil and gas community."

552. The tribunal ultimately concluded that the *caducidad* decree was "*in breach of Ecuadorian law, in breach of customary international law and in violation of the [Ecuador - United States of America BIT].*" [551]

553. A similar analysis of proportionality in termination of a contract was later made by the tribunal in *Vigotop v Hungary*, which refused to classify the termination of a concession contract as a disproportionate response because the contract was terminated due to the investor's breaches on the very first stage of the project. The tribunal distinguished the situation there from the one in *Occidental v Ecuador* and stated as follows:[552]

> "*[T]he Tribunal is of the view that this case is unlike the case of Occidental Petroleum v. Ecuador […] in which the investor's contract was terminated after Occidental performed the Contract, or at least substantially performed it, spending hundreds of millions of dollars exploring for oil, drilling wells, producing oil, and marketing it. Because of the advanced stage of contract performance, the Occidental Tribunal was required to determine if the termination was proportional to the breach. By contrast, since contract performance in this case involved only the first, threshold step for performance, which was never consummated, no proportionality analysis can or need be performed.*"[Claimant's emphasis]

[551] **Exhibit CL-108.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II),* ICSID Case No. ARB/06/11, Award of 5 October 2012, paras. 452. [Footnotes omitted]
[552] **Exhibit CL-111.** *Vigotop Limited v. Hungary,* ICSID Case No. ARB/11/22, Award of 1 October 2014, para. 631.

554. The case at hand is a perfect example of disproportionate termination of the Investment Contract at the advanced stage of performance, and thus the Tribunal should analyse the issue of proportionality.

555. Proportionality is increasingly invoked by both international and domestic courts and tribunals to assess the legality of state conduct.

556. There are four elements of proportionality developed in international law:[553]

(i) The legitimacy and/or importance of the aim pursued;

(ii) Suitability (whether the measure at issue is suitable or appropriate or rationally connected to achieve the objective it pursues, requiring a causal relationship between the measure and its object);

(iii) Necessity (no alternative measure exists that is both less restrictive than the measure being reviewed and equally effective in achieving the objective pursued, with varying levels of review, *e.g.*, reasonable or rational relation); and

(iv) Proportionality *stricto sensu* (whether the effects of a measure are disproportionate or excessive in relation to the interests involved—*i.e.,* does the benefit from realising the objective exceed the harm to the relevant right). [554]

[553] **Exhibit CL-112.** Carmen Martinez Lopez and Lucy Martinez, 'Proportionality in Investment Treaty Arbitration and Beyond: An "Irresistible Attraction"?', BCDR International Arbitration Review, Kluwer Law International 2015, Volume 2 Issue 2**,** pp. 261-262 (p.1).

[554] **Exhibit CL-108.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II),* ICSID Case No. ARB/06/11, Award of 5 October 2012, paras. 384-455. **Exhibit CL-113.** *AWG Group v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010,* paras. 236-237.

557. The Respondent must prove that its actions satisfy all four elements of the proportionality four-step test.

558. For the reasons below, the Respondent cannot meet its burden to show that the termination of the Investment Contract was a proportional response to the Claimant's alleged breaches of the Investment Contract.

559. The first factor of the proportionality test is the legitimacy and/or importance of the aim. The Respondent has not even attempted to put forth a legitimate aim for its termination of the Investment Contract. Should the Respondent identify a purportedly legitimate aim in the future, the Claimant reserves the right to respond.

560. If the Respondent alleges that the aim was to complete performance of the Investment Contract and to provide Minsk with important transportation facilities through completion of the New Communal Facilities, the Claimant concedes that such an aim could be regarded as important. However, termination of the Investment Contract did not result in completion of the New Communal Facilities. In fact, they are in the same construction condition now as they were in 2011 but are deteriorating due to the time passing.[555] Thus, this potential justification must fail, as the Respondent's actions actually prohibited achievement.

561. Suitability of the measure is the second factor. Termination of the Investment Contract was not suitable to achieve the goal of successfully completing performance under the Investment Contract because, as a result of termination, the construction of the Depot was not completed, and the Claimant was deprived of its right to develop the Investment Object.

[555] **Exhibit C-36.** Photoreport: an abandoned trolleybus depot in the center of Minsk, 20 August 2014.

562. The third factor, necessity, examines whether any alternative measure exists to achieve the declared objective. Here, there were many.

563. There were many alternative options to achieve the assumed goal of resolving the conflict with the Claimant and receiving the New Communal Facilities. In fact, each of them was proposed by the Claimant during the negotiations in 2011-2013.

564. **First,** the Respondent could have extend the deadline for construction of the New Communal Facilities and extended the right to temporarily use the land plot, thus allowing the Claimant to complete construction of the Trolley Depot.

565. In fact, this was the first proposal from the Claimant's side soon after expiration of the temporary use right on 1 July 2011. On 4 July 2011, the Claimant proposed to extend the deadlines for completing the New Communal Facilities from July 2011 to "*not later than November 2011*."[556] The requested extension was very short compared with the overall length of the project, which at the time had been going for 8 years. The requested extension was neither unreasonable nor unrealistic taking into account that the Depot was approximately 90% complete.[557]

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[556] **Exhibit R-65.** Draft Supplemental Agreement of 4 July 2011.

[557] The Depot Administrative Building and Checkpoint were 100 % completed. The Depot was completed for 90% and the Depot Production Building for more than 85%. **Exhibit R-67.** Schedule to Complete Construction of the "*Trolleybus Depot Accommodating 220 Trolleybuses in Urban District Uruchye-6*", Minsk, approved by Minsk City Executive Committee Deputy Chair A.M. Borisenko of 5 August 2011. **Exhibit C-314.** Act of Acceptance of 5 September 2011. **Exhibit C-315.** Act of Acceptance of 14 October 2011. **CS-I**. **Claimant's Notice of Arbitration of 15 November 2017,** paras. 168-171. **Exhibit C-79.** Letter from Manolium-Engineering to Minsk City Executive Committee of 7 September 2011. **Exhibit C-80.** Letter from Manolium-Engineering to Minsk City Executive Committee of 12 October 2011. **Exhibit C-81.** Letter from Minsktrans to Manolium-Engineering of 27 October 2011. **Exhibit C-82.** Depot Facilities Gratuitous Use Agreement of 14 November 2011. **Exhibit C-83.** Letter from the Claimant to Minsk City Executive Committee of 19 March 2013. **Exhibit R-109.** Letter from the Claimant to the President of the Republic of Belarus of 4 September 2013. **Exhibit C-316.** Letter from Manolium-Engineering to Minsk City Executive Committee of 20 February 2014. **Exhibit C-323.** Website of news portal *Blizko*,

566. The reasonableness of such extension is confirmed by the fact that the Respondent twice extended the deadline for construction: from December 2008 to 3 July 2009[558] and from 3 July 2009 to 1 July 2011[559] without any issue.

567. However, the Minsk City Executive Committee refused in 2011 to sign the extension agreement, and only now tries to justify its actions under the far-fetched pretext of an alleged lack of "*assurance*."[560] Notably, the Minsk City Executive Committee had previously twice provided an extension without asking for any "*assurance.*" It was even stranger to ask for the "*assurance*" in 2011, when the amount of financing made by the Claimant in the first half of 2011 exceeded the amounts invested in any of the previous years.[561] This refusal was mere pretext.

568. After the first attempt, in March 2012, the Claimant again proposed to extend the deadline for completion of the New Communal Facilities to 1 July 2012.[562] Again, this proposal was rejected by the Respondent without any basis.

569. **Second,** the Respondent could have asked the Claimant to transfer a payment for completion of the New Communal Facilities, to accept ownership of the Facilities, and to complete construction on its own.

570. This alternative was rejected by the Respondent when the Claimant proposed it at the beginning of 2012 by declaring its readiness to make the payment of USD

Construction of Trolleybus Depot in Uryuch'e Was Resumed – Its Construction Was Frozen, 14 December 2018. // Available at: http://blizko.by/notes/v-uruchie-prodolzhili-stroitelstvo-trolleybusnogo-depo-ego-vozvedenie-bylo-zamorozheno.

[558] **Exhibit C-72.** Addendum No. 5 to the Investment Contract of 16 December 2008.

[559] **Exhibit C-76.** Addendum No. 6 to the Investment Contract of 20 April 2011.

[560] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 210. **RWS-2.** First Witness Statement of Mr. Akhramenko of 19 November 2018, para. 42.

[561] **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file).

[562] **Exhibit R-78.** Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012.

3 million for completion of the New Communal Facilities in exchange for the right to develop the Investment Object. [563] The Claimant proposed the same in June 2012[564] and in July 2014 with a condition of provision of the land plot for the Investment Object.[565] However, the Minsk City Executive Committee refused, without justification, to accept any of these proposals.

571. **Third,** the Respondent could have simply sought damages from Claimant for its alleged breaches of the Investment Contract related to the delays, rather than terminating the Investment Contract as a whole. Indeed, the contractual remedy for suspension in construction provides for a penalty of 0.1% of the scheduled construction costs of the New Communal Facilities.[566] Importantly, however, imposition of such penalty does not release any of the parties from performance of their obligations under the Investment Contract.[567] The Respondent chose to fully terminate the Investment Contract and ignore the previously agreed upon penalties.

572. As evident from the facts, the Respondent had no intent to find a mutually acceptable solution. Instead, the Respondent intended only to deprive the Claimant of his right to the Investment Object and ignored all reasonable alternatives to this extreme action.

573. Accordingly, the Respondent cannot prove the *"necessity"* of its actions.

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[563] **Exhibit C-125.** Minutes of the meeting attended by Minsk City Executive Committee, Minsktrans and the Claimant of 9 January 2012. **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014.
[564] **Exhibit R-88.** Claimant's Letter to the Minsk City Executive Committee w/date (in response to the Minsk City Executive Committee Letter of 18 June 2012).
[565] **Exhibit C-141.** Letter from Manolium-Engineering to Minsk City Executive Committee of 18 July 2014
[566] **Exhibit C-66.** Additional Agreement No. 4 (Amended Investment Conract) of 8 February 2007, Clause 18.
[567] **Exhibit C-66.** Additional Agreement No. 4 (Amended Investment Conract) of 8 February 2007, Clause 19.

574. The "*proportionality stricto sensu*" factor is also not satisfied because the termination of the Investment Contract at the final stage of implementation, after the Claimant had entirely performed its financial obligations under the Contract, was not balanced and reasonable.

575. The original terms of the Investment Contract were simple: the Claimant shall pay USD 15 million for construction of the Communal Facilities plus USD 1 million to a certain Respondent's enterprise, and in return shall receive the right to develop the Investment Object.[568] After the amendments, the core obligations remained the same: the right for the Investment Object was granted on condition of financing the New Communal Facilities Construction and the additional National Library Payment.[569]

576. Termination of the Investment Contract, after 11 years of performance, USD 20 million of the Claimant's investments into the project, and with the New Communal Facilities on the verge of completion was on its face unbalanced and disproportional *stricto sensu*. Simply put, the Claimant had complied with all of its obligations to date, and the Respondent nevertheless seized the Claimant's rights after accepting all of the benefits of the Claimant's performance.

577. On the basis of the above analysis, the Claimant submits that the termination of the Investment Contract was a disproportional measure and for this reason, in addition to others, should be considered an expropriation.

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[568] **Exhibit C-28.** Tender documents for the Tender of 24 April 2003. **Exhibit R-10.** Order of the Economy Committee of Minsk City Executive Committee No. 30 of 27 April 2003.

[569] **Exhibit C-47.** Additional Agreement No. 1 to the Investment Contract of 10 October 2003, Clause 1. **Exhibit C-48.** Additional Agreement No. 2 to the Investment Contract of 22 October 2003, Clause 2.5. **Exhibit C-49.** Additional Agreement No. 3 to the Investment Contract of 25 November 2003. **Exhibit C-66.** Additional Agreement No. 4 (Amended Investment Conract) of 8 February 2007, Clauses 11-12.

*9.2. **The Respondent's Expropriatory Imposition of a False Tax Liability***

578. Instead of making a good faith payment of compensation for the expropriation, the Respondent deprived the Claimant of the New Communal Facilities without any payment.

579. The New Communal Facilities were formally transferred to the Minsk communal ownership (i.e., to the Respondent) in accordance with the secret Presidential Order of 20 January 2017.[570]

580. As is often the case, the Respondent attempts to excuse its actions as legitimate measures by the State to collect taxes. As the tribunal in *Quasar de Valors v Russia* explained, this attempt to mask expropriation as regulation should be rejected:

> "*[i]t is no answer for a state to say that its courts have used the [word] 'taxation' –any more than the word 'bankruptcy' – in describing judgments by which they effect the dispossession of foreign investors. If that were enough, investment protection through international law would likely become an illusion, as states would quickly learn to avoid responsibility by dressing up all adverse measures, perhaps expropriation first of all, as taxation*."[571]

581. Other examples where states have tried, but failed, to pass off their expropriation as merely taxation include the *Yukos* sequence of cases (*Hulley Enterprises v.*

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[570] *See paras. 358-363*. **CS-I. Claimant's Notice of Arbitration of 15 November 2018,** para. 497. **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 344-349. **Exhibit C-142.** Decision of Minsk City Executive Committee of 15 August 2014. **Exhibit C-143.** Letter from Minsktrans to Manolium-Engineering of 19 September 2014. **Exhibit C-144.** Official website of State Production Association Minskstroy, "*About Association*". **Exhibit R-148.** Deed of transfer of 27 January 2017.

[571] **Exhibit RL-61.** *Quasar de Valors SICAV S.A. and others (formerly Renta 4 S.V.S.A and others) v. Russian Federation,* SCC Case No. 24/2007, Award of 20 July 2012, para. 179.

Russia, Yukos v. Russia, Veteran Petroleum v. Russia)[572], *RosInvestCo v. Russia,*[573] *Burlington Resources Inc. v. Republic of Ecuador* case, [574] and *Meerapfel Sohne v. Central African Republic.* [575]

582. The Respondent argues that "*[t]axation 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 investors assets outside the normative constraints and practices of the taxing authorities.*"[576]

583. The key test, however, is not whether taxes were imposed in accordance with the "*normative constraints and practices of the taxing authorities*", but rather whether by imposing taxes the state acted in breach of its FET obligations and whether the imposition of taxes was aimed at expropriation of the investor's rights. Further, the Arbitral Tribunal can find a breach of treaty obligations even if the tax proceedings did not necessarily breach Belarussian law.[577]

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[572] **Exhibit CL-114.** *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Final Award of 18 July 2014. **Exhibit CL-115.** *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award of 18 July 2014. **Exhibit CL-116.** *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award of 14 July 2014.

[573] **Exhibit CL-117.** *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award of 12 September 2010.

[574] **Exhibit CL-103.** *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, paras. 394-395.

[575] **Exhibit CL-118.** *M. Meerapfel Söhne AG v. Central African Republic,* ICSID Case No. ARB/07/10, Excerpts of Award (French).

[576] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 639.

[577] **Exhibit RL-61.** *Quasar de Valors SICAV S.A. and others (formerly Renta 4 S.V.S.A and others) v. Russian Federation*, SCC Case No. 24/2007, Award of 20 July 2012, paras. 159-60, 178-86 (finding that the actions did not breach Russian law, but that there had been an expropriation which required adequate compensation).

584. Useful guidance on tax measures as an instrument of expropriation is contained, *inter alia*, in the award in the *Ryan v Poland* case, where the tribunal stated as follows:[578]

> "*472. In order to determine if certain measures constitute expropriation, what is to be seen is whether, as claimed by the Claimants, there was an "abuse of tax law." The guise of taxation will not save the Host State from liability for actions, based on an abuse of tax laws, if these resulted in the total loss or substantial impairment of the investment tantamount to expropriation.[…]*"

585. The Respondent's actions fall squarely within the definition of the "*confiscatory tax measures*" or "*abuse of tax law*."

586. As was described in detail above,[579] the Respondent created the situation wherein the Claimant was unable to avoid the tax liability after expiration of the construction permission for the Depot on 1 July 2011. It cannot now benefit from this situation.

587. Indeed, after 1 July 2011, the Claimant was in a trap of Respondent's making without any escape:[580]

(i) The Claimant could not finish the construction because the Respondent did not agree to extend the land rights to the Claimant;

(ii) The Respondent refused to formally take the New Communal Facilities in order to complete construction;

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[578] **Exhibit CL-119.** *Vincent J. Ryan, Schooner Capital LLC and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award of 24 November 2015, para. 472.
[579] *See paras. 336-344*.
[580] *See paras. 336-344*.

(iii) The Respondent refused to accept the payments offered by the Claimant to complete such construction; but

(iv) The Respondent imposed on the Claimant taxes for the land which the Claimant in fact did not use, as no construction was possible after 1 July 2011.

588. All the above problems were artificially created by the Respondent with the sole purpose of finding Manolium-Engineering liable for tax violations. Indeed, in 2016, after imposing taxes for illegal use of land, the Minsk City Executive Committee did not face any problems in accepting the land plots back to the communal ownership.[581]

589. None of the arguments raised by the Respondent in this arbitration (that the New Communal Facilities were not completed, that the Respondent is not under obligation to accept them by parts, etc.[582]) played any role in 2016-2017, when the Minsk City Executive Committee returned the land plots to its possession without any issue. [583] Moreover, in fact, the title to the land always formally belonged to the Minsk City Executive Committee, and it had *de facto* control over the land plot since 2 July 2011, when the Claimant formally abandoned the construction site.

590. Thus, the alleged impossibility of taking back the land plots was caused by the bad faith actions of the Respondent designed to create a situation where the

[581] **Exhibit C-172.** Letter from the Department of Humanitarian Activities of the Administrative Office of the President of the Republic of Belarus of 18 November 2016. **Exhibit C-173.** Decision of Minsk City Executive Committee of 1 December 2016. **Exhibit R-148.** Deed of transfer of 27 January 2017.
[582] **RS-18. Respondent's Statement of Defence of 19 November 2019**, para. 560-564.
[583] **Exhibit C-172.** Letter from the Department of Humanitarian Activities of the Administrative Office of the President of the Republic of Belarus of 18 November 2016. **Exhibit C-173.** Decision of Minsk City Executive Committee of 1 December 2016. **Exhibit R-148.** Deed of transfer of 27 January 2017.

Claimant would be deprived of compensation for its investments through a manifest abuse of local tax law.

591. The targeting of the Respondent's tax measures on the Claimant with aim to get the New Communal Facilities for free is evident from the discussions of the state authorities of the issue.

592. Indeed, the decision to transfer the New Communal Facilities gratuitously to the communal ownership was made, again, by the President of the Republic of Belarus who issued the corresponding instruction back on 10 October 2016.[584] Thus, the tax liability, in fact, was an instrument of implementation of the President's official instruction.

593. The effect of the taxation measures is also relevant here. As the tribunal in *Burlington Resources v Ecuador* stated: "*the most important factor to distinguish permissible from confiscatory taxation is the effect of the tax.*"[585] Thus, a tax is an expropriation if the effect of the tax measure is expropriatory.[586]

594. This is the case here. As a result of the tax liability, the Claimant was deprived of the New Communal Facilities which it had constructed and, even more importantly, lost any chance to receive any compensation, let alone prompt and adequate compensation, for such deprivation. The effect of the tax measures is clearly expropriatory.

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[584] **Exhibit C-172.** Letter from the Department of Humanitarian Activities of the Administrative Office of the President of the Republic of Belarus of 18 November 2016.
[585] **Exhibit CL-103.** *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, paras. 394-395.
[586] **Exhibit CL-103.** *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, paras. 394-96.

595. In addition to the impact of the tax, the State's intent is also relevant."[587] The Respondent specifically intended to deprive the Claimant of its investments, not to legitimately enforce its tax laws.[588]

596. The Respondent cannot justify its expropriation through reference to domestic law. Quite the contrary, the purported tax measures which the Respondent claims excuse its misdeeds actually demonstrate the depths of its illegality. The Claimant's investments were unlawfully expropriated without compensation, and the purported tax liability was a key part of that process.

9.3. <u>The Respondent's Actions Resulted in the Total Deprivation of the Claimant's Investments</u>

597. The Claimant submits that the totality of the Respondent's wrongful actions resulted in a total, permanent, and unlawful deprivation of the Claimant's rights. This is supported in large part by the economic effect of the measures.

598. The conclusion of tribunal in *UP and C.D. v Hungary* is particularly instructive :[589]

> "*[A]ny 'measures' have to be considered, irrespective of whether they are legislative, administrative, or other measures undertaken by the State. What is relevant is whether such measures had the effect of dispossessing Claimants, directly or indirectly, of their investment. Therefore, the test is not which measure caused which effect, but whether the 'measures'*

[587] **Exhibit CL-103.** *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, para. 401 (citing **Exhibit CL-120**. *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award of 29 March 2005, p. 55; **Exhibit CL-117.** *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award of 12 September 2010, para. 620(e)).
[588] *See paras. 174-197; 198-214; 345-357*.
[589] **Exhibit CL-121.** *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award of 9 October 2018, para. 331.

taken together as a package resulted in the dispossession. For the present case, this means that the Tribunal need not examine whether Respondent's taxation changes, administrative decisions taken, or the introduction of the Erzsebet voucher and the SzEP Card, each by themselves, caused a dispossession. Rather, the Tribunal must examine whether these measures together had the effect of dispossession."

599. Other tribunals have set out a similar standard in finding an expropriation.[590] For example, in *RosInvestCo v Russia*, the tribunal stated that "*in determining whether a measure (or set of measures) is 'equivalent to' expropriation, the Tribunal should evaluate whether the 'net effect of the measure (or set of measures) is the same as an outright expropriation, i.e., a substantial or total deprivation of the economic value of an asset*."[591] The tribunal must look at the totality of the circumstances and their cumulative effect.[592]

600. Thus, contrary to the approach suggested by the Respondent, there is no need to assess every wrongful measure of the Respondent separately. Rather, it is sufficient to determine the cumulative effect of such measures.

601. It is widely accepted that an expropriation occurs when there has been a substantial deprivation of the investor's rights.[593] This applies equally to contractual rights.

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[590] **Exhibit RL-61.** *Quasar de Valors SICAV S.A. and others (formerly Renta 4 S.V.S.A and others) v. Russian Federation*, SCC Case No. 24/2007, Award of 20 July 2012, para. 158. **Exhibit CL-122.** *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award of 18 April 2013, para. 610.

[591] **Exhibit CL-117.** *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award of 12 September 2010, paras. 624.

[592] **Exhibit CL-117.** *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award of 12 September 2010, paras. 612-621.

[593] **Exhibit CL-32.** *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, paras. 113-116.

602. For example, in *Bosh v Ukraine*, the tribunal noted that to establish the effect of the state's conduct, it should decide whether there was "*an interference that caused a substantial deprivation of the Claimant's rights under the […] Contract.*"[594]

603. In *Urbaser v Argentina*, the tribunal also understood the expropriation of contractual rights as "*depriving the investor of all or significant parts of its rights, including properties and contractually acquired rights, which represent the investment.*"[595]

604. In the present case, as was described above, the Claimant was totally deprived of its rights under the Investment Contract as a result of the following actions by the Respondent:

(i) Termination of the Investment Contract;[596]

(ii) Imposition of the tax liability and seizure of the New Communal Facilities;[597]

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[594] **Exhibit CL-123.** *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award of 25 October 2012, para. 218.

[595] **Exhibit CL-124.** *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 1000.

[596] **Exhibit C-147.** Judgment of the Economic Court of Minsk of 9 September 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk of 29 October 2014. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.

[597] **Exhibit C-164.** First Tax Audit Report dated 17 May 2016. **Exhibit C-165.** Letter from the Tax Inspectorate to Manolium-Engineering dated 21 June 2016. **Exhibit C-166.** Amendments and supplements to the First Tax Audit Report dated 21 June 2016. **Exhibit C-167.** Order of the Tax Inspectorate for arrest of the land plots dated 5 July 2016. **Exhibit C-168.** Decision of the Tax Inspectorate dated 19 July 2016. **Exhibit C-169.** Application of the Tax Inspectorate dated 20 July 2016. **Exhibit C-171.** Extract from the records of the Ministry of Taxes in respect of the indebtedness of Manolium-Engineering as of 10 November 2016. **Exhibit C-187.** Second Tax Audit Report of 24 March 2017. **Exhibit C-186.** Amendments to the Second Tax Audit Report dated 18 May 2017. **Exhibit C-188.** Decision of the Tax Inspectorate in respect of the Second Tax Audit Report and amendments dated 18 May 2017 to the Second Tax Audit Report dated 13 June 2017.

(iii) Subsequent transfer of the New Communal Facilities to the communal ownership under the Presidential Decree;[598]

(iv) Selling the right to develop the land plot intended for the Investment Object to another investor. [599]

605. Thus, the Claimant submits that the Respondent expropriated the Claimant's investment in violation of Article 79 of the EEU Treaty and Article 12 of the Belarusian Investment Law.

X. VIOLATION OF FAIR AND EQUITABLE TREATMENT STANDARD

606. In addition to expropriation, the Claimant's wrongful actions also violate the FET protections of the EEU Treaty.

607. Fair and equitable treatment (FET) is guaranteed by Article 68 of Protocol No. 16 to the EEU Treaty, as follows:[600]

> "*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*."

608. As explained in *Tecmed v. Mexico*, the fair and equitable treatment standard requires that the state deal with an investor in a way that "*does not affect the*

[598] *See paras. 359-364*. **Exhibit R-148.** Deed of transfer dated 27 January 2017.
[599] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 293-295. **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 363-367. **Exhibit C-185.** Official website of news portal of Belarus TUT.*BY, "Almost fivefold of the initial price. A-100 acquired the section of the trolleybus depot in the center of* Minsk. // Available at: https://news.tut.by/economics/559888.html. **Exhibit R-153.** Minutes of the results of the auction dated 12 September 2017.
[600] **Exhibit CL-3.** Protocol No. 16 to the EEU Treaty of 29 May 2014, Article 68,

[investor's] basic expectations" concerning its investment."[601] These expectations "*include the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination*."[602]

609. FET also requires "*consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fullfill the justified expectations of the foreign investor*."[603]

610. "*Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment*"[604] and such conduct is which "*manifestly violate[s] the requirement of consistency, transparency, even-handedness and non-discrimination*."[605] A state's conduct is unreasonable where it bears no "*reasonable relationship to [a] rational policy*."[606]

611. Importantly, Respondent agrees that it has these obligations including, *inter alia*, the requirement to act in good faith and in a transparent manner.[607] However, Respondent argues that it has met this standard.

612. The Respondent's position is encapsulated as follows:

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[601] **Exhibit CL-32.** *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 154.
[602] **Exhibit CL-16.** *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 303.
[603] **Exhibit CL-26.** *LG&E Energy Corp. et. al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 3 October 2006, para. 131.
[604] **Exhibit RL-63.** *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 290.
[605] **Exhibit CL-16.** *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 307.
[606] **Exhibit CL-137.** *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award of 24 July 2008, para. 693.
[607] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 525.

(i) The actions of the Minsk City Executive Committee and Minsktrans in 2003-2013 do not amount to violation of good faith element of the FET Standard;[608] and

(ii) The actions of the courts and the tax authorities in 2016-2017 also do not amount to a violation of the FET Standard. [609]

613. The Respondent's attempt to limit this case to actions that occurred after 1 January 2015 should be rejected. All of the Respondent's actions from 2003 until 2017 constitute one interlinked chain of breaches aimed at depriving the Claimant of the benefits provided by the Investment Contract. These events included numerous breaches committed after 1 January 2015, such as:

(i) **27 January 2015**: The Supreme Court issued its decision which failed to remedy the breaches that occurred before 1 January 2015;[610]

(ii) **September 2017:** Transferring the land plot, which was intended for the Investment Object to be implemented by the Claimant, to another investor;[611] and

(iii) **20 January 2017:** Expropriation of the New Communal Facilities by the secret order of the President of the Republic of Belarus.[612]

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[608] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 525-575.
[609] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 576-618.
[610] *See paras. 244-272*. **CS-I. Claimant's Notice of Arbitration of 15 November 2017**, para. 270. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus dated 27 January 2015.
[611] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 293-295. **Exhibit C-185.** Official website of news portal of Belarus TUT.BY, *Almost fivefold of the initial price. A-100 acquired the section of the trolleybus depot in the center of Minsk*. // Available at: https://news.tut.by/economics/559888.html. **Exhibit R-153.** Minutes of the results of the auction dated 12 September 2017.
[612] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 349. **Exhibit R-148.** Deed of transfer dated 27 January 2017.

614. Further, the Respondent has at all times acted in a non-transparent manner, which included the secret instruction, issued by the President of the Republic of Belarus in the summer 2014 to deprive the Claimant of its right to the Investment Object,[613] and the secret order of the President of the Republic of Belarus to expropriate the New Communal Facilities. These are all links in one chain and their expropriatory effect must be analyzed together.

10.1. The Respondent's Courts Breached Good Faith Standard by Terminating the Investment Contract

615. "*Good faith is a supreme principle, which governs legal relations in all of their aspects and content*."[614] The Claimant agrees with the Respondent that an obligation to act in good faith includes "*the obligation not to inflict damage upon an investment purposefully*."[615]

616. The Claimant relies, in particular, on the following articulation of the good faith principle by the tribunal in *Frontier Petroleum v Czech Republic*:[616]

> "*Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment based on local favouritism. Reliance by a government on its internal structures*

[613] **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 152-156.
[614] **Exhibit CL-125.** *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, para. 230.
[615] **RS-18**. Respondent's Statement of Defence of 19 November 2018, para. 525. **Exhibit CL-127.** R. Dolzer and C. Schreuer, *Principles of International Investment Law (2nd Ed)*, Oxford University Press, 2012, page 156.
[616] **Exhibit CL-126.** *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award of 12 November 2010, para. 300.

to excuse non-compliance with contractual obligations would also be contrary to good faith." [Claimant's emphasis]

617. Moreover, "*it is well established that a State cannot rely on its internal law to justify an internationally wrongful act*."[617]

618. Compliance with the FET Standard is even broader than that. It includes not only mere passive behaviour, "*but rather entails a proactive statement from the host state that goes beyond the avoidance of prejudicial conduct.*"[618]

619. In other words, the state itself must not only abstain from affirmative wrongdoing, but must also remedy any damage that an investor suffers as a result of the consequences of actions of the state.

620. The Respondent attempts to excuse its violations of international law by adopting the common tactics of relying on domestic law. This does not save the Respondent's case.

621. The breach of the good faith obligation was committed not only by Minsk City Executive Committee and Minsktrans, but also by the Belarusian courts (including the Supreme Court of the Republic of Belarus), which failed to cure

[617] **Exhibit CL-13.** Vienna Convention on the Law of Treaties dated 23 May 1969, Article 27. **Exhibit RL-52.** *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, para. 547(c). *See also* **Exhibit CL-128.** *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award of 7 July 2011, para. 190.

[618] **Exhibit CL-127.** R. Dolzer and C. Schreuer, *Principles of International Investment Law (2nd Ed)*, Oxford University Press, 2012, page 143. **Exhibit CL-129.** R. Kläger, Fair and Equitable Treatment' in International Investment Law, Cambridge University Press, 2013 p. 294. **Exhibit CL-23.** *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, para. 113. The Award was upheld in the **Exhibit CL-130.** *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7. Decision on Annulment of 21 March 2007. **Exhibit CL-82.** *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008, para. 372.

the numerous violations committed by the Respondent's state bodies and state entities in the course of implementation of the Investment Contract.

622. Even if the Respondent could prove that the Supreme Court followed Belarusian local law (and it did not), this would not advance the Respondent's case. As explained above, the obligation to act in good faith also includes an obligation of the state to remedy itself any damage that an investor suffered from the actions of the state before.

623. The Supreme Court upheld the wrongful, expropriatory and illegal decisions of the lower courts and failed to remedy the previous breaches. This included, in particular, the decision to terminate the Investment Contract, despite the fact that:

(i) The delays in construction of the New Communal Facilities occurred primarily because of the Respondent;[619]

(ii) Termination of the Investment Contract was not an appropriate and proportional remedy, as at that time the Claimant had performed 90% of the work and was prepared to continue performance to complete the project. Under Belarusian law and the terms of the Investment Contract, the more appropriate remedy in such a case would be to apply a penalty for delay or to award damages caused by delay, but not to terminate the contract altogether;

624. The decision to terminate the Investment Contract affected the Claimant's right to the Investment Object. Under the Investment Contract, the Claimant was to lose this right only if it could not provide funds sufficient to complete the project.[620] The courts (including the Supreme Court) ignored the Claimant's

[619] *See paras. 50-136.*
[620] **Exhibit-C-66.** Amended Investment Contract of 8 February 2007, Clause 17.

ability to finance the project and, in doing so, did not analyse the following crucial facts:

(i) The Claimant provided more funding than was required under the Investment Contract;

(ii) The Claimant was prepared to inject an additional USD 3 million to finish construction of the New Communal Facilities, although legally Claimant was not obligated to do so, and

(iii) The Respondent should have taken responsibility for increases to the costs of construction caused by its delays and changes to the scope of work.

625. Further, the Respondent negotiated in bad faith with the Claimant and Manolium-Engineering regarding the extension of the Investment Contract and the extension of the deadline for the Depot's construction.[621]

626. The Respondent also acted in bad faith by continuously refusing to accept the transfer of the New Communal Facilities to the communal ownership, which resulted in accrual of taxes on occupied land plots and the expropriation of the New Communal Facilities.[622]

10.1.1. The Respondent Significantly Contributed to the Delays in Construction of the New Communal Facilities

627. The Supreme Court failed to properly allocate fault for delays in the construction of the New Communal Facilities between the Parties.

[621] *See paras. 198-243.*
[622] *See paras. 337-358.*

628. Rather, the Supreme Court merely parroted the same mistaken conclusion as the lower courts by attributing to the Claimant all fault for the delays in construction of the New Communal Facilities, despite the evidence that the delays were actually the fault of the Respondent.[623]

629. The circumstances of the delays are described in detail above.[624] As just a few examples, the Respondent was responsible for the following causes of delays:

(i) The regular delays in the provision of the construction permissions by Gosstroy;[625]

(ii) The delay in the provision of the land plot for the Trolley Depot from 27 March 2007 until 24 May 2007 by the Minsk Land Management and Geodetic Service;[626]

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[623] *See paras. 244-272; 724-735.* **Exhibit C-147.** Judgment of the Economic Court of Minsk of 9 September 2014. **Exhibit C-149.** Appeal of Manolium-Engineering of 9 October 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk of 29 October 2014. **Exhibit C-151.** Cassation appeal of Manolium-Engineering of 29 November 2014. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.

[624] *See paras. 50-136.*

[625] *See paras. 99-122.* **Exhibit C-245.** Letter of Manolium-Engineering to Gosstroy of 30 January 2008. **Exhibit C-246.** Construction permit issued by Gosstroy for constructing the Depot of 7 February 2008. **Exhibit C-247.** Decision of Minsk City Executive Committee of 3 September 2009. **Exhibit C-249.** Letter of Manolium-Engineering to Gosstroy of 24 December 2009. **Exhibit R-54.** Letter from Manolium-Engineering to Gosstroy of 20 April 2010. **Exhibit C-250.** Construction permit issued by Gosstroy for constructing the Depot of 25 January 2010. **Exhibit C-251.** Construction permit issued by Gosstroy for constructing the Depot of 21 April 2010. **Exhibit C-248.** Decision of Minsk City Executive Committee of 16 September 2010. **Exhibit C-252.** Letter of Manolium-Engineering to Gosstroy of 29 October 2010. **Exhibit C-253.** Construction permit issued by Gosstroy for constructing the Depot of 20 December 2010. **Exhibit C-255.** Letter of Manolium-Engineering to Gosstroy of 19 January 2011. **Exhibit C-256.** Construction permit issued by Gosstroy for constructing the Depot of 27 January 2011. **Exhibit C-86.** Decision of Minsk City Executive Committee of 2 May 2008. **Exhibit C-254.** Letter of Manolium-Engineering to Gosstroy of 22 May 2008. **Exhibit C-87.** Construction permit issued by Gosstroy of 29 May 2008.

[626] *See paras. 64-67.* **Exhibit R-28**. Cover page of the land plot case file for the Trolleybus Depot. **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file). **Exhibit C-216.** Loan agreements and confirmations of loan transfers from Bradley Enterprises Ltd. to Manolium-Engineering. **Exhibit C-217.** Loan agreements and confirmations of loan transfers from Lascker Ltd. to Manolium-Engineering. **Exhibit C-218.** Loan agreements and confirmations of loan transfers from

(iii) The four-month delay in the construction of the Road due to the need for unplanned deforestation in March 2008 - July 2008;[627]

(iv) The six-month delay in the construction of the Trolley Depot due to newly discovered water pipes in September 2007 - March 2008;[628]

(v) The regular and numerous delays due to the outdated construction project of the Trolley Depot since August 2007 until March 2011;[629]

Nomal Oil Ltd. to Manolium-Engineering**. Exhibit C-219.** Loan agreements and confirmations of loan transfers from Manolium Trading Ltd. to Manolium-Engineering. **Exhibit C-220.** Loan agreements and confirmations of loan transfers from Foreign LLC Manolium Processing to Manolium-Engineering.
Exhibit C-228. Letter from Minsk Land Management and Geodetic Service to Manolium-Engineering of 7 May 2007**. Exhibit C-68**. Decision of Minsk City Executive Committee of 24 May 2007.

627 *See paras. 68-80.* **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 43-46. **Exhibit C-229**. Architectural Planning task for the Road of 14 June 2007, page 2. **Exhibit C-230.** Letter from Manolium-Engineering to Minsk City Executive Committee of 15 December 2009. **Exhibit C-231.** General view of land plots for the New Communal Facilities before deforestation as of 3 April 2004 (Google Earth shot). **Exhibit C-232**. Opinion of Minsk Architecture and City Planning Committee of Minsk City Executive Committee of 4 February 2008. **Exhibit C-233**. Letter from Manolium-Engineering to Minsk District Executive Committee of 13 March 2008. **Exhibit C-234**. Decision of Minsk District Executive Committee of 9 April 2008. **Exhibit C-235**. Letter from Manolium-Engineering to Minsk Forest Household of 11 April 2008. **Exhibit C-236**. Forest felling license of 2 May 2008

628 *See paras. 87-90.* **Exhibit C-252**. Letter from Manolium-Engineering to Minsk City Executive Committee of 5 March 2008. **Exhibit C-253**. Letter from Manolium-Engineering to Minsk City Executive Committee of 13 September 2007. **Exhibit C-254**. Letter from Manolium-Engineering to OJSC Stroytrest of 28 March 2008.

629 *See paras. 81-86.* **Exhibit C-244**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 3 August 2007. **Exhibit C-245**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 15 April 2008. **Exhibit C-246**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 12 June 2008. **Exhibit C-247**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 13 June 2008. **Exhibit C-248**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 21 August 2008. **Exhibit C-240**. Letter from Manolium-Engineering to Unitary Enterprise MinskIngProject of 24 September 2008. **Exhibit C-249**. Letter of Manolium-Engineering to Unitary Enterprise Autorempromproject of 5 May 2009. **Exhibit C-250**. Letter of Manolium-Engineering to Unitary Enterprise Autorempromproject of 8 June 2010. **Exhibit C-251**. Letter from Manolium-Engineering to Unitary Enterprise Autorempromproject of 26 August 2010.

(vi) The delay resulting from the relocation of the contractors for construction of the other objects under orders of the Minsk City Executive Committee.[630]

630. The Belarusian state courts, including the Supreme Court of the Republic of Belarus, totally failed to examine and assess any of the circumstances of delays that occurred through the fault of the Minsk City Executive Committee. For this and other reasons, the rulings from these courts should be given no weight and cannot justify the unlawful termination of the Investment Contract.

10.1.2. Termination of the Investment Contract Was Not an Appropriate and Proportional Remedy

631. As explained above, the Claimant submits that the decision to terminate the Investment Contract was not an appropriate and proportional measure because it does not correspond to the proportionality criteria: legitimacy and/or importance of the aim, suitability of the measure for such aim, necessity of such measure and proportionality *stricto sensu*.

632. These factors were addressed in detail above in Section 9.1.4 in relation to the expropriation claim. The analysis for the FET claims is the same.

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[630] *See paras. 91-98*. **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 52-57. **Exhibit C-255**. Official website of the Republic of Belarus, Press-release Belarus *President's Team Outplays Hockey Legends of the USSR in Friendly,* 20 May 2014. // Available at: https://www.belarus.by/en/press-center/press-release/belarus-presidents-team-outplays-hockey-legends-of-the-ussr-in-friendly_i_0000011932.html. **Exhibit C-256.** Letter from Manolium-Engineering to Minsk City Executive Committee of 6 September 2010. **Exhibit C-257.** Letter from Manolium-Engineering to Gosstroy of 18 July 2011. **Exhibit C-71**. Letter from Manolium-Engineering to Minsk City Executive Committee of 11 September 2008. **Exhibit C-258**. Letter from Manolium-Engineering to Minsk City Executive Committee of 24 August 2011. **Exhibit C-259**. Letter from Manolium-Engineering to Minsk City Executive Committee of 5 September 2011. **Exhibit C-260**. Letter from Minsktrans to contractor of 6 October 2011.

10.1.3. The Respondent Incorrectly Applies the Provisions of the Investment Contract

633. The Respondent has failed to satisfy the single ground that would allow termination of the Investment Contract.

634. Clause 17 of the Investment Contract is clear in this regard:[631]

> "*17. <u>If case of a failure to perform financial obligations</u> in accordance with Sub-Clauses 7.10 and 8.19, as well as Clauses 11 and 12 hereof through the fault of the Investor or FE Manolium-Engineering, the Investor and FE Manolium-Engineering shall be deprived of the right to implement the investment project.*"

635. Thus, the only reason that could justify termination of the right to proceed with implementation of the Investment Object is the failure of the Claimant to perform its <u>financial</u> obligations, namely, the obligation to invest an "*amount equivalent to fifteen (15) million US dollars*" for the design and construction of the communal facilities, and to donate USD 1 million for construction of the National Library. [632]

636. The financial obligations of the Claimant and Manolium-Engineering were clearly delineated in the Investment Contract:

> "*7.10. In the event that the cost of designing and building the communal facilities listed in Sub-Clauses 2.1-2.3 hereof calculated in accordance with the legislation of the Republic of Belarus falls below the amount equivalent to fifteen [USD](15) at the exchange rate established by the National Bank of the Republic of Belarus as of the date of the relevant*

[631] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 17.
[632] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 17.

payments, the Investor shall secure remitting the difference to the budget of Minsk, and if the cost of designing and building such facilities exceeds the above amount, the Investor shall secure compensating all additional expenses."

637. Despite these clear terms, the Minsk City Executive Committee submitted its statement of claim with regard to termination of the Investment Contract under Sub-Clause 16.2.1. That clause reads as follows:[633]

"*16. The Contract shall be terminated: […]*

6.2. at the initiative of Mingorispolkom [the Minsk City Executive Committee] in court proceedings, if: […]

16.2.1. construction of the facilities was not performed within the periods indicated in Sub-Clauses 6.1 and 6.2 of this contract through the Investor's fault subject to the conditions in Sub-Clause 6.3 of this contract."

638. The Minsk City Executive Committee did not raise a single objection in the court proceedings with regard to the amount invested by the Claimant and Manolium-Engineering, but rather alleged only the alleged breach of construction deadlines.[634] Even in the Statement of Defence, the Respondent still does not claim that the financial obligations were breached by the Claimant. This concession that the financial obligations were met should end the inquiry—there was no valid ground to terminate the Investment Contract.

[633] **Exhibit C-66.** Amended Investment Contract (Addendum No. 4) of 8 February 2007, Clause 16.2.
[634] **Exhibit C-140.** Statement of claim regarding the termination of the Amended Investment Contract of 14 October 2013.

639. Because the Supreme Court of the Respondent failed to review the provisions of the Investment Contract and to apply it correctly, in addition to other reasons, the ruling of the Supreme Court cannot justify the Respondent's actions.

10.1.4. The Respondent Failed to Negotiate in Good Faith With the Claimant and Manolium-Engineering Regarding Extension of the Investment Contract and an Extension for the Deadline for the Depot's Construction

640. The Supreme Court in its Resolution of 27 January 2015 improperly approved the Respondent's unreasonable and disproportionate request for termination of the Investment Contract.[635] The fact that this approval was improper, and that the application on which it was based was mistaken, is demonstrated by the application itself and the Respondent's actions with regard thereto.

641. On 4 July 2011, the Claimant applied for a short additional extension under the Investment Contract to complete the construction of the Trolley Depot. This brief extension, when compared to the 8-year construction term, was imminently reasonable. If the Minsk City Executive Committee was actually interested in completion of the New Communal Facilities and further development of the Investment Contract, it would therefore have agreed to this extension.

642. The Minsk City Executive Committee refused to do so. Without any justification, it rejected the reasonable extension request. As a result, the New Communal Facilities have never been completed.

643. These actions are inconsistent with the Respondent's alleged purpose to promptly complete the New Communal Facilities and transfer them to the Minsk

[635] **Exhibit R-65.** Draft Supplemental Agreement of 4 July 2011.

communal ownership. This demonstrates that the Respondent's purported justification is mere pretext.

10.1.5. The Respondent May Not Justify its Actions by its Alleged Attempt to Resolve the Matter

644. The Respondent relies on investment jurisprudence stating that attempts of a state to resolve the issues faced by an investor exclude the possibility of finding bad faith actions.[636] While this may be a correct statement of the law, the Respondent did not genuinely attempt to resolve the issues and therefore may not rely on this line of authority to excuse its breaches.

645. The Respondent assumes that it was entitled to terminate the Investment Contract, but nevertheless "*sought various solutions to resolve the dispute*"[637] in good faith. The Respondent did not do so.

646. The mere existence of negotiations does not equate to a genuine attempt to resolve a dispute. Indeed, a review of the Respondent's proposals demonstrates that neither of the Respondent's alleged attempts to resolve the matter were made *bona fide* and with the true intention to find a solution.

647. In 2012, the Respondent consistently proposed adding draconian terms to the Investment Contract, and was even prepared to compel the Claimant to them.[638]

648. Specifically, in April 2012, the Minsk City Executive Committee proposed a draft additional agreement that provided, in particular, that in the event of termination of the Investment Contract due to breach by the Claimant or by

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[636] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 565-575.
[637] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 566; 206-246.
[638] *See paras. 215-231*. **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 124-132. **Exhibit R-80.** Letter from Minsk City Executive Committee to the Claimant and Manolium-Engineering of 6 April 2012.

Manolium-Engineering, the New Communal Facilities shall be transferred to the communal ownership of Minsk, and the Claimant shall make an additional payment to the Minsk City Executive Committee for completion of the New Communal Facilities' construction.[639] This would have had the effect of entirely depriving the Claimant of its investment without any compensation.

649. The draft additional agreement of 18 June 2012, which the Minsk City Executive Committee sent to Mr. Ekavyan, contained additional, equally unfair provisions, including: [640]

(i) An obligation of the Claimant and Manolium-Engineering to gratuitously transfer the New Communal Facilities to the Minsk communal ownership in the event of termination of the Investment Contract by the Minsk City Executive Committee without any refund of payments to the budget and to communal entities;

(ii) A new obligation of the Claimant and Manolium-Engineering to make a payment for completion of the New Communal Facilities' construction in an amount determined by the "*commission*" (most likely, under the aegis of the Minsk City Executive Committee) in the case of termination of the Investment Contract;

(iii) The ability of the Respondent to unilaterally terminate the Investment Contract in the case of a breach of the deadlines for construction by 30 days.

[639] **Exhibit R-79.** Minutes of a meeting on the implementation of the investment project dated 3 April 2012.

[640] **Exhibit R-89.** Attachment to letter from the Minsk City Executive Committee to the Claimant dated 18 June 2012, pp. 4-5.

650. Thus, by its very terms, the draft agreement expressly contemplated and authorized expropriation of the New Communal Facilities upon the occurrence of any minor breach by the Claimant. Because no rational investor would agree to such terms, it was unsurprising that the Claimant refused to sign.

651. In stark contrast to the unreasonable demands of the Respondent, the Claimant proposed a more balanced solutions. The Claimant repeatedly confirmed that it was ready to invest additional USD 3 million for completion of the New Communal Facilities in exchange for the land plot on which the Investment Object was to have been constructed.[641] This proposal was rejected.

652. The Respondent now asserts that it was legally impossible to transfer the land plot for the Investment Object to the Claimant. However, at the time of the proposal, the Respondent did not suggest any amendments to the draft or to propose any realistic alternative, for example, to providing the land plot for the Investment Object in a form of legal title other than ownership.

653. The Respondent's refusal to provide a realistic proposal, coupled with its unjustified rejection of the Claimant's proposal, demonstrate that it was not negotiating in good faith.

[641] **Exhibit R-88.** Claimant's Letter to Minsk City Executive Committee w/date (in response to the Minsk City Executive Committee Letter dated 18 June 2012)

10.2. The Respondent Also Acted in Bad Faith by Repeatedly Refusing to Accept the New Communal Facilities to the Communal Ownership, Which Resulted in the Accrual of Taxes on Occupied Land Plots and the Eventual Expropriation of the New Communal Facilities

654. As was described in detail in paras. 336-344 above, the Respondent itself created a situation where the Claimant was unable to avoid tax liability after expiration of the construction permission for the Depot on 1 July 2011.

655. However, the Respondent continuously refused to formally accept the New Communal Facilities to its ownership, while, in fact, using them. [642]

656. Thus, the situation of impossibility to accept the New Communal Facilities was artificially created by the Respondent in order to manufacture a tax liability that the Respondent would later use to justify its expropriation.

10.3. The Respondent Acted in Bad Faith by Requiring Payment of the Land Tax for the Land Plot for the Investment Object

657. In January 2015, shortly before the final termination of the Investment Contract by the Supreme Court of the Republic of Belarus, the Respondent's Land Surveying Service calculated the cost of land for the land plot for construction of the Depot and for the land plot for development of the Investment Object.[643]

658. Yet the purported requirement to pay for the cost of land is inconsistent with the Investment Contract. Rather, it is a bad faith attempt to extract an additional

[642] *See paras. 198-231; 273-334*. **Exhibit C-99.** Pull Station Gratuitous Use Agreement of 6 July 2010. **Exhibit C-82.** Depot Facilities Gratuitous Use Agreement of 14 November 2011.
[643] **Exhibit SQ-8.** Letter of Land Service of Minsk City Executive Committee dated 16 January 2015.

USD 20 million[644] from the Claimant, on top of the millions the Claimant had already invested.

659. Contrary to here, the Respondent has explicitly required the payment for land in other similar contracts. This includes, for example, the contract between the Minsk City Executive Committee and OOO *Tekstur*. [645]

660. In the contrast, after the relevant requirement to pay for the land appeared in the Belarusian legislation, the Respondent started to include provision on release from such obligation. For example, a corresponding tax deduction was proposed by the Respondent in the draft investment contract proposed by the Respondent in December 2012.[646]

661. Moreover, as the Respondent states, the calculation of the cost of land was made in accordance with Presidential Decree No. 101 dated 1 March 2010 "*On collection of rental payments for land plots under state ownership.*"[647]

662. This was not part of the investment framework at the time the Claimant made its investment and therefore did not form a part of the investor's reasonable expectations. This after the fact imposition of a requirement to pay the cost of land, and the calculation of such payment under the Decree of 2010, which was issued 7 years after conclusion of the Investment Contract, is therefore an independent violation of the FET standard.

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[644] **Exhibit SQ-8.** Letter of Land Service of Minsk City Executive Committee dated 16 January 2015, p. 2.
[645] **Exhibit R-99.** Contract between Minsk City Executive Committee and OOO *Tekstur* for the exercise of the right design and construct a facility of 13 December 2012.
[646] **Exhibit R-98.** Draft investment contract for the implementation of the Investment Object enclosed with letter of Minsk City Executive Committee to Manolium-Engineering dated 10 December 2012, Clause 7.4.
[647] **Exhibit SQ-7.** Presidential Decree No. 101 dated 1 March 2010 "*On collection of rental payments for land plots under state ownership*."

10.4. <u>The Respondent Acted in a Non-Transparent Manner</u>

663. The Parties agree that the FET Standard includes the obligation of the host state to act in a transparent manner.

664. Indeed, the guarantee of transparency is consistently acknowledged as one of the key elements of the investor's protection. Prof. Dolzer and Schreuer rely on the following understanding of transparency:

665. "*Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework.*"[648]

666. Put another way, the obligation to act transparently requires the state to ensure that "*all relevant legal requirements for the purposes of initiating, completing and successfully operating investments made, or intended to be made under an investment treaty [are] capable of being readily known to all affected investors*…."[649] Tribunals confirm that "*the investor also has a legitimate expectation in the [host state legal] system's stability to facilitate rational planning and decision making*."[650]

667. The non-transparent actions of the Respondent's top officials negatively and substantially damaged the Claimant's investments. The most troubling examples of the Respondent's bad faith actions are described below.

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[648] **Exhibit CL-127.** R. Dolzer and C. Schreuer, *Principles of International Investment Law (2nd Ed)*, Oxford University Press, 2012, page 149.
[649] **Exhibit CL-15.** *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 76.
[650] **Exhibit CL-126.** *Frontier Petroleum Services Ltd. v. The Czech Republic*, Final Award of 12 November 2010, para. 285.

10.4.1. Presidential Decision Regarding the Seizure of the Land Plot Intended for the Investment Object was Made Non-Transparently

668. In August 2014, Mr. Dolgov was summoned to the Minsk City Executive Committee to report about the development of the Investment Object. As Mr. Dolgov was informed, this information was necessary for reporting to the President of the Republic of Belarus.

669. Later, the Claimant was informed that the President decided to develop the land plot intended for the Investment Object together with another nearby land plot as part of a single project. That meant that the land plot soon would be transferred to another investor or to the communal ownership.

670. This plan quickly was put into effect. On 15 August 2014, the Minsk City Executive Committee issued a decision transferring the land plot for the Investment Object to the management of the state construction company "*Minskstroy*".[651] Thus, based solely on the President's decision, the land plot that was allocated for the Claimant's project was now unavailable.

671. This decision was an arbitrary exercise of executive authority that was issued non-transparently and without the justification of any legal procedure.

10.4.2. Presidential Order Regarding Transfer of the New Communal Facilities to the Communal Ownership Was Issued Non-Transparently

672. The Respondent has failed entirely to justify the purported legality of the Presidential Order of 20 January 2017 which transferred the New Communal Facilities to the Minsk communal ownership.

[651] **Exhibit C-142.** Decision of Minsk City Executive Committee of 15 August 2014. **Exhibit C-143.** Letter from Minsktrans to Manolium-Engineering dated 19 September 2014.

673. The Presidential Order is required to contain the grounds for the transfer of the New Communal Facilities, any specific provisions of the transfer procedure, and any other provisions directly relevant to the Claimant's rights. This requirement has not been satisfied.

674. The Presidential Order has never been provided to the Claimant. As a result, the Claimant has still not been provided with any legal justification purportedly supporting the transfer of the New Communal Facilities to Minsk ownership.

675. Incredibly, the Respondent maintains its refusal to provide this order to the Claimant or the Arbitral Tribunal even in these proceedings.

676. The Respondent cannot justify the concealment of this crucial document. It claims only that the Order is "*an administrative document forming part of the procedure set out in the publically available Regulation*"[652] and that the Order "*is marked 'for official use only'*"[653].

677. It is undisputed that the Presidential Order is a "*decision affecting*"[654] the Claimant. It thus must be available to the Claimant under basic principles of fairness and transparency.

678. The Respondent's steadfast refusal to provide this document must lead the Arbitral Tribunal to only one conclusion—the document either does not exist or its contents are unfavorable to the Respondent. In either instance, the document cannot support the Respondent's position.

679. However, irrespective of the particular content of the Presidential Order, the fact that (i) the Presidential Order served as a ground for transfer of the New

[652] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 347.
[653] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 348.
[654] **Exhibit CL-127.** R. Dolzer and C. Schreuer, *Principles of International Investment Law (2nd Ed)*, Oxford University Press, 2012, page 149.

Communal Facilities and, thus, affected the Claimant's rights; and (ii) was not made available to the Claimant even at the present time, constitutes a breach of the requirement for transparency that is part of the FET standard. The Respondent must be made to answer for this and its other breaches.

XI. DENIAL OF JUSTICE

680. The Respondent's final salvo in its attempt to escape responsibility is to re-characterize the Claimant's claims as related only to denial of justice.[655]

681. This is wrong for the following reasons.

682. First, denial of justice is not the exclusive way for the Claimant to present its claims;

683. Second and in any event, the Respondent's actions amount to a denial of justice here.

684. The Claimant's position is explained in detail below.

11.1. Denial of Justice is Not the Only Way To Present the Claimant's Claims

685. The Respondent argues that the Arbitral Tribunal should ignore the expropriation and FET claims and analyse only whether there has been a denial of justice because of the involvement of the courts of the Republic of Belarus.

686. This is wrong.

[655] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 487-495.

687. The actions of Belarusian courts are far from the only actions which contributed to the losses suffered by the Claimant. And even if they were, the FET standard and expropriation standards would still be relevant.

11.2. <u>The Claimant Suffered a Denial of Justice from the Respondent</u>

688. Notwithstanding the fact that denial of justice is not the <u>exclusive</u> means to relief, there is no doubt that it is an <u>available</u> means of relief.

689. Investment tribunals have described denial of justice in the following terms:

690. In *Liman Caspian v Kazakhstan*, the tribunal stated that the denial of justice may be found if it is proved that "*the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.*"[656]

691. Prof. Jan Paulsson identifies denial of justice in international law as "*involving the failure of a national judicial system, taken as a whole.*"[657] As a result, "*the concept therefore involves a duty to "create and maintain a system of justice which ensures that unfairness to foreigners either does not happen, or is corrected.*"[658]

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[656] **Exhibit RL-51.** *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14. Award of 22 June 2010, para. 279.
[657] **Exhibit CL-132.** Jan Paulsson, Denial Of Justice In International Law, p. 7.
[658] **Exhibit CL-131.** *Grand River Enterprises Six Nations, Ltd. and others v. United States of America*, UNCITRAL, Award of 12 January 2011**,** para. 223. **Exhibit CL-132.** Jan Paulsson, Denial Of Justice In International Law, p. 7.

692. The tribunal in *Oostergetel v Slovak Republic* described denial of justice as "*the failure of the [court] system not of a single court.*"[659]

693. The tribunal in the *Arif v Moldova* case stated that "*the conduct of the whole judicial system is relevant*" for determination of the denial of justice violation, and that the State shall be found liable for denial of justice when "*the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions.*"[660]

694. In *Corona v. Dominican Republic*, the tribunal noted that *"the international delict of denial of justice rests upon a specific predicate, namely, the systemic failure of the State's justice system; when a claim is successfully made out at international law, it is because the international court or tribunal accepts that the respondent's legal system as a whole has failed to accord justice to the claim."*[661]

695. Thus, in accordance with the above interpretation of denial of justice, the actions of the whole judicial system are relevant for evaluation of a denial of justice.

696. The standard of denial of justice is satisfied in the present case because the whole system of the Belarusian courts failed to treat the Claimant in accordance with the international judicial standards and, more importantly, failed to correct the mistakes of the system. This resulted in an unjustified deprivation of the Claimant's vested contractual rights.

697. This is true for at least two reasons:

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[659] **Exhibit CL-21.** *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (redacted version) of 23 April 2012, para. 225.
[660] **Exhibit RL-52.** *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, para. 445
[661] **Exhibit CL-133.** *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award of 31 May 2016, para. 254.

(i) **First**, the judicial system of the Respondent does not comply with international standards of justice;

(ii) **Second**, the courts denied the Claimant justice and failed to remedy the wrongs of the lower courts and actions of state bodies.

11.2.1. The Judicial System of the Respondent Does Not Satisfy International Standards of Justice

698. The judicial system of the Respondent falls manifestly short from being an impartial and independent judicial system as required to survive a denial of justice claim.

699. Indeed, the crucial problems with the court system in Belarus have been consistently recognized by international governmental and non-governmental organization:

700. **First**, the *Heritage Foundation* in its "*Index of Economic Freedom*" described the judicial system of Belarus as "*ineffective*" and the whole economy of Belarus as on the edge of "*mostly unfree*" and "*repressed*" until 2017 and "*mostly unfree*" in 2018. [662] One of the reasons for this low rating is judicial ineffectiveness, which rates close to *"repressed*" on the index.

701. **Second**, the Index of Economic Freedom also confirms that "*[t]he constitution [of Belarus] vests most power in the president, giving him control of the government, the courts, and even the legislative process by stating that*

[662] **Exhibit ET-14.** Website of the *Heritage Foundation* research institution, *2017 Index of Economic Freedom, Belarus*, access date: 29 January 2019 // Available at the address: https://www.heritage.org/index/pdf/2017/book/index_2017.pdf.

presidential decrees have a higher legal force than ordinary legislation."[663] [Claimant's emphasis]

702. **Third**, the Fraser Institute in its "*Economic Freedom of the World*" 2018 annual report for Belarus assessed "*impartial courts*" indicator of the "*rule of law*" index as the lowest (4.2 out of 10).[664] The indicator of integrity of the legal system was also found to be very low and was assessed at 5.83 of 10.[665]

703. **Fourth**, the assessment of rule of law for Belarus, which includes the index of the quality of the judicial system by the World Bank, is also low and at its highest reaches 34 out of 100. Notably, Belarus's rule of law rating has remained extremely low since 2003.[666]

704. **Finally**, the dire state of the Belarusian court system was confirmed by the American non-governmental organization Freedom House in its search of democracy development in the nations of transit.[667] Specifically, the overall

[663] **Exhibit ET-16.** Website of the *Heritage Foundation* research institution, *2018 Index of Economic Freedom, Belarus*, access date: 29 January 2019 // Available at the address: https://www.heritage.org/index/pdf/2018/book/index_2018.pdf.

[664] **Exhibit ET-17.** Website of the Fraser Institute, Economic Freedom of the World: 2018 Annual Report. Fraser Institute, access date: 29 January 2019 // Available at the address: https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2018.pdf.

[665] This component is based on the International Country Risk Guide Political Risk Component I for Law and Order: "Two measures comprising one risk component. Each sub-component equals half of the total. The 'law' sub-component assesses the strength and impartiality of the legal system, and the 'order' subcomponent assesses popular observance of the law". **Exhibit ET-17.** Website of the Fraser Institute, Economic Freedom of the World: 2018 Annual Report. Fraser Institute, access date: 29 January 2019 // Available at the address: https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2018.pdf.

[666] **Exhibit ET-18.** *World Bank* website, *Rule of Law*, access date: 29 January 2019 // Available at the address: http://info.worldbank.org/governance/wgi/#reports.

[667] **Exhibit ET-21.** *Freedom House* website, *Nations in Transit 2017, Belarus*, publication date: 3 April 2017 // Available at the address: https://freedomhouse.org/report/nations-transit/2017/belarus.

democracy score of the Republic of Belarus is 6.61 out of 7, where 7 is the least democratic score.[668]

705. The "*judicial framework and independence*" index is the lowest possible, indicating that this portion of the society is not democratic at all.[669] The index identifies the following fundamental problems in the judicial system of the Republic of Belarus: [670]

(i) The president has virtually unlimited powers in the appointment of judges and reorganizing courts;

(ii) While the independence of the courts is formally guaranteed by the law, courts are dependent on the executive bodies in practice.

706. The Alternative report of the Belarusian national human rights coalition summarized the problems in the judicial sphere of Belarus as follows:[671]

> " *a) As previously, the final decisions on key issues of the judiciary are made by the executive branch as represented by the President of the Republic of Belarus and his administration. The presidential administration actually performs functions that in states with the rule of law fall within the competence of independent bodies, consisting mainly*

[668] **Exhibit ET-21.** *Freedom House* website, *Nations in Transit 2017, Belarus*, publication date: 3 April 2017 // Available at the address: https://freedomhouse.org/report/nations-transit/2017/belarus.
[669] **Exhibit ET-21.** *Freedom House* website, *Nations in Transit 2017, Belarus*, publication date: 3 April 2017 // Available at the address: https://freedomhouse.org/report/nations-transit/2017/belarus.
[670] **Exhibit ET-21.** *Freedom House* website, *Nations in Transit 2017, Belarus*, publication date: 3 April 2017 // Available at the address: https://freedomhouse.org/report/nations-transit/2017/belarus.
[671] **Exhibit ET-9.** Official website of the Directorate of the United Nations High Commissioner for Human Rights, "*Alternative Report of the National Human Rights Coalition on the Implementation of the International Covenant on Civil and Political Rights by the Republic of Belarus,*" p. 14 and 15, publication date - June 13, 2018 // Available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/BLR/INT_CCPR_CSS_BLR_31288_R.pdf?fbclid=IwAR0kk50bBJThZVgD-onmrsSeB5mT3SCRwXxhyceDOIUO7wzAGTQCG0iEa-Y#viewer.action=download.

of judges. In particular, the presidential administration examines candidates for judges when deciding whether to reappoint them and forwards the relevant request to the Security Council of the Republic of Belarus, which organizes a check of the candidates through the special services. The appointment or reappointment of a judge is possible only upon receipt of a positive opinion from the Security Council;

b) The selection process for candidates and the appointment of judges takes place in a closed process. Only the decrees on the appointment and release of judges are published. With the exception of the general requirements for candidates listed in the Code on the Judicial System and the Status of Judges , the criteria that guides the president and the Security Council when checking candidates and making decisions are unknown and they are not communicated to those who are candidates to become judges or to the public;

c) The legal status of judges has now worsened in terms of ensuring the principle of irremovability, even in comparison with the Law "On the Judicial System and the Status of Judges," that was in effect until 2007, pursuant to which judges were appointed initially for five years, and then - indefinitely. Now "judges shall be appointed for a term of five years and may be appointed for a new term or indefinitely." Thus, the question of whether to appoint a judge for a new five-year term or indefinitely is decided arbitrarily and without clear criteria established by law. From the analysis of presidential decrees on the appointment of judges for the period from January 2014 to March 2017, it is clear that 353 judges, or 87% of all those appointed, were appointed for a period of 5 years. If we add this number to 25 judges appointed for the period when another judge was on social benefit leave, one can notice that 378 judges, or 93%

of all appointed judges, are appointed for a specific term. During the period named, only 30 judges were appointed for an indefinite term;

d) The president has a wide range of powers to dismiss a judge. Thus, a judge can be dismissed when taking up a new position, upon the expiration of the term of office, when being appointed for a new term and when the next qualification class is assigned to the judge, when applying disciplinary sanctions and during regular and extraordinary certification, which are done almost any time a judge moves to a new position and during appointment for a new term. The rule of the Code on the Judicial System and the Status of Judges on the appointment of a judge for an indefinite term is actually minimized by the provision on extraordinary certification once every five years, as a result of which the judge can be dismissed. Among other reasons, the authorities of a judge may be terminated if there are systematic disciplinary violations (more than twice within one year), or a single gross violation of official duties or misconduct incompatible with being in state service;

e) The President has special authorities to impose subject a judge to disciplinary sanctions responsibility upon a judge: he is entitled to sanction impose responsibility or dismiss any judge without initiating disciplinary proceedings. Furthermore, the decision of the President to terminate the authorities of a judge can be taken either at the suggestion of the Chairman of the Supreme Court or without a suggestion. The Code on the Judiciary does not provide for the possibility of a judge to appeal against the decisions of the president on applying a disciplinary measure. Thus, given that the criteria for a gross violation of official duties or misconduct incompatible with the title of judge are not clearly defined in the law, the president has the right to dismiss any judge at any time at his

own discretion without conducting a fair procedure by his sole decision, which is final;

f) The size of the official salaries of judges is not determined by law, but by the Decree of the President of the Republic of Belarus "On Organizing the Compensation of Judges, and Logistics and Staffing Support of the Courts of the Republic of Belarus" ."[672]

707. Unfortunately, the Claimant's experience with the courts of Belarus is not unique. The materials above demonstrate a widespread recognition of the inadequacy of the judicial system of the Republic of Belarus. This demonstrates a failure to comply with international standards of due process and a corresponding denial of justice.

708. The particular implication of overall dependence of the Respondent's courts on the executive is demonstrated by the fact the chairman of the Economic Court of Minsk regularly participated in the meetings of the Minsk City Executive Committee, and the Chair of the Minsk City Executive Committee used to provide the judge with instructions on "*how to resolve cases,*" especially when the governmental interests were at stake. As Mr. Dolgov testified:[673]

"*160. Similar decisions made by the Belarusian courts, unfortunately, turned out not to be a surprise to me. I've been working in Belarus for a long time, and I was constantly attending the meetings of the Minsk City Executive Committee.*

[672] **CER-2.** Expert report of Elena Tonkacheva of 25 February 2019, para. 14.
[673] **CWS-5**. Fourth Witness Statement of A. Dolgov of 28 February 2019, paras. 160-163.

161. At all of these meetings, employees of the Public Prosecutor's Office, the Ministry of Internal Affairs, KGB, and also the Chair or Deputy Chair of the Economic Court of Minsk have been present.

162. I recall a case when the Chairman of the Minsk City Executive Committee, Nikolay Ladutko, issued a rebuke to the Chairman of the Economic Court, stating that in the specific court case, he had rendered a decision in favor of the businessman, and not of the Minsk City Executive Committee. Ladutko got up and said: "What side are you on? Whose interests are you protecting, the state or businessmen?". The court's Chairman made no comment on this, but the message sent by Mr. Ladutko was understood: it was the guidelines for actions.

163. Therefore, when the Minsk City Executive Committee and Minsktrans submitted to us a claim for termination of the Investment Contract, we did not nourish illusions that we would win this, because the Chair of the Economic Court of Minsk was continuing to sit at the meetings of the Minsk City Executive Committee and receive instructions from the authorities as to how to consider cases correctly."

11.2.2. The Courts Denied the Claimant Justice and Failed to Remedy the Wrongs Caused by Actions of the Lower Courts and Actions of State Bodies

709. The main issue with the Respondent's judicial system, namely the overall dependence of the courts on the executive branch, played a huge role in the violation of the Claimant's rights here.

710. The facts demonstrate that all of the Respondent's courts acted in coordination with the Minsk City Executive Committee and the Government.

711. **First,** the court proceedings from before this dispute arose that addressed administrative liability of Manolium-Engineering for alleged non-payment of land taxes demonstrate the coordination between the executive state bodies and the courts.

712. When the issue of administrative liability for alleged illegal occupation of the land plots was raised back in 2012, the judge of the Pervomaysky district court concluded that there was no administrative offence by Manolium-Engineering. Instead, the judge correctly concluded that Manolium-Engineering was in a no-escape situation and had neither possibility to return the land plots nor transfer the New Communal Facilities to the communal ownership of Minsk.[674]

713. For four years, thereafter, this issue was ignored by the Respondent.

714. However, in the winter of 2016, when the negotiations between the Claimant and the Respondent regarding fair compensation for the construction costs for the New Communal Facilities began to break down, the Respondent decided it would simply take the New Communal Facilities without any compensation.

715. On 22 February 2016, the Respondent's Ministry of Finance completed the evaluation of the Claimant's investments in the New Communal Facilities in the amount of USD 19,434,679.[675]

716. Shortly after that, on 2 March 2016, the Respondent's Land Surveying Agency under **instruction of the Minsk City Executive Committee** initiated a formal proceedings for illegal use of land by Manolium-Engineering.

717. Notably, on 5 April 2016, the judge of the court of the Pervomaysky district of Minsk decided again that Manolium-Engineering did not commit any

[674] **Exhibit C-346.** Resolution of Pervomayskiy district court of Minsk of 23 July 2012.
[675] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.

administrative offence as Manolium-Engineering had no possibility to return the land plots because of the Respondent's refusal to take back such land plots. This decision was similar to the decision of the judge of the Pervomaysky district court. As before, it was the correct decision.

718. But the Respondent then intervened. On 13 May 2016, the Economic Court of Minsk, sitting as a court of appeal, reversed the judgment and sent the case back to a **new judge** on the lower court. There was no justification for this reassignment—other than the clear desire of the Respondent to obtain a different result.

719. Unsurprisingly, just days later, the new judge made the decision that the Respondent demanded. On 17 May 2016, the new judge contradicted the two prior rulings on the same issue and concluded that Manolium-Engineering had been illegally using the land since 1 July 2011.

720. **On the same day**, the Respondent's Tax Inspectorate issued the First Tax Audit Report on "*improper use of the land plot.*" This timing strongly demonstrates that the tax authorities knew exactly which decision would be reached by the new judge.

721. Shortly after that, on 10 October 2016, the President of the Republic of Belarus issued the instruction to transfer the New Communal Facilities gratuitously to the communal ownership.[676] Thus, the tax liability, in fact, was an instrument of implementation of the President's official instruction.

722. The circumstances of such coordinated and prompt actions of different of state bodies demonstrates the dependence of the court system on the governmental

[676] **Exhibit C-172.** Letter from the Department of Humanitarian Activities of the Administrative Office of the President of the Republic of Belarus of 18 November 2016.

instructions. The courts reached one decision twice over a four year period. Once the dispute arose, the Respondent intervened, and that decision was changed in a matter of days. The Claimant submits that this is no coincidence.

723. **Second,** the actions of the Belarusian state courts, including the Supreme Court of the Republic of Belarus, in the proceedings related to the termination of the Investment Contract similarly constitute a denial of justice.

724. The Claimant concurs with the statement that "*the general notion of denial of justice leads to State liability whenever an uncorrected national judgment is vitiated by fundamental unfairness*" and "*[t]here has to be discreditable legal outcome or one that offends judicial propriety and not merely an incorrect outcome.*"[677]

725. In the circumstances of the present case, the Belarusian state courts manifestly breached the notion of justice and left numerous violations uncorrected.

726. The Pervomaysky district court of Minsk, the Minsk City Court and the Supreme Court of the Republic of Belarus manifestly failed to provide the Claimant with justice in the court proceedings.

727. The courts entirely failed to assess the issues crucial for resolution of the dispute related to termination of the Investment Contract. These ignored issues include, but are not limited to the following facts.[678]

728. **First,** the Claimant provided millions more in funding than was required under the Investment Contract.

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[677] **Exhibit CL-134.** Alexandra Diehl, The Core Standard of International Investment Protection, International Arbitration Law Library, Volume 26, Kluwer Law International 2012, p. 456.
[678] **Exhibit C-147.** Judgment of the Economic Court of Minsk of 9 September 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk of 29 October 2014. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.

729. **Second,** the Claimant was prepared to inject an additional USD 3 million to finish the construction of the New Communal Facilities, although legally it was not obligated to do so; and

730. **Finally,** the Respondent was responsible for the increase of costs of the construction by causing delays and changing the scope of works.

731. These and other facts lead to the inevitable conclusion that all of court proceedings were merely an instrument to justify, after the fact, the seizure of the Claimant's investment.

732. When the Supreme Court of the Republic of Belarus upheld the termination of the Investment on 27 January 2015, one of the direct consequences was the complete and permanent deprivation of the Claimant's right to implement the Investment Object.[679]

733. Yet this issue had been decided long ago when the President of the Republic of Belarus decided to deprive the Claimant of its rights by deciding to implement another project on the land plot intended for the Investment Object.

734. In such circumstances, the decision of the courts was obvious - the court had no option other than to create an appearance of legitimacy of the termination of the Investment Contract and, consequently, of termination of the Claimant's right. This attempt to justify a pre-determined action by the Respondent cannot be allowed to stand. This is a denial of justice.

[679] **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.

E. QUANTUM

735. The Respondent's wrongful actions have caused the Claimant to suffer substantial damages.

736. The Claimant structures its claims for damages as follows:

(i) Claim for USD 68.9 million in lost profits resulting from losing the right to perform the Investment Contract (plus appropriate interest);[680] **AND** USD 20.4 million in direct losses caused by the expropriation of the New Communal Facilities (plus appropriate interest).[681]

(ii) Alternatively, USD 31.87 million in lost profits resulting from losing the right to perform the Investment Contract (plus appropriate interest).[682]

737. Following such structure of claims, the Claimant is entitled to receive an award for both the lost profits resulting from losing the right to develop the Investment Object and the direct losses caused by expropriation of the New Communal Facilities.

738. If the Arbitral Tribunal does not accept such logic, the Claimant will structure its claims on the alternative basis as follows:

[680] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, 2.3.6, 3.11.4, Tables 18.
[681] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.3.2, 2.3.7, 4.1.1 - 4.1.3, Table 22.
[682] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.2.5, 3.11.6, footnotes 21, 304.

(i) USD 68.9 million in lost profits resulting from losing the right to perform the Investment Contract (plus appropriate interest);[683] OR

(ii) USD 31.87 million in lost profits resulting from losing the right to perform the Investment Contract (plus appropriate interest);[684] OR

(iii) USD 20.4 million in direct losses caused by the expropriation of the New Communal Facilities (plus appropriate interest).[685]

739. The Claimant relies on the Second Expert Report of Travis Taylor (Versant) of 28 February 2019 (the "**Second T. Taylor Report**") which updates the First Expert Report of Travis Taylor (Navigant) of 24 April 2017 (the "**First T. Taylor Report**").[686]

740. The Respondent's disagreement with the calculation of damages should be rejected.

741. **First**, the Claimant has proven with reasonable certainty that Respondent's breaches caused Claimant's damages.

742. **Second**, the Claimant has also established causation because the Respondent's breaches and the damages are not too remote and Claimant's own actions did not cause the damages it suffered.

743. **Finally**, the Respondent's quibbles with certain assumptions in the Claimant's valuation model which even *prima facie* are not credible, as the Respondent's

[683] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, 2.3.6, 3.11.4, Tables 18.
[684] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.2.5, 3.11.6, footnotes 21, 304.
[685] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.3.2, 2.3.7, 4.1.1 - 4.1.3, Table 22.
[686] **CER-1.** First Expert Report of Travis Taylor (Navigant) of 24 April 2017.

expert does not even in theory accept that this project would be profitable[687] (which means that any real estate business in Minsk should have already collapsed, but it has not happened so far). As it is demonstrated by the Second T. Taylor Report, the sale of the Investment Object would generate significant profit, but for the Respondent's interference.

744. The Parties agree that the standard for compensation for expropriation is the fair market value of investments expropriated. Indeed, the Respondent does not challenge the Claimant's cost approach, but rather quibbles with several of the Claimant's assumptions and asserts that the Claimant's valuation must also be discounted due to the Claimant's own delays.[688]

745. The Respondent's position is not supported by international law. As set out below, the Claimant's lost profits have a sufficient causal link to the Respondent's unlawful acts and have been proven with reasonable certainty. This is all that is required.

746. Contrary to the Respondent's argument, the Claimant did not cause the delays to the New Communal Facilities and even if it had contributed to delays in some way, its actions were not willful or negligent as required.

747. Finally, any uncertainty as to damages must be construed against the wrongdoer, the Respondent, who cannot benefit from the uncertainty it has created through its own bad faith unlawful conduct to escape its obligation to pay full compensation.

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[687] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, para. 195. **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 680-685.
[688] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 706-711.

XII. THE CLAIMANT'S DAMAGES MAY BE MEASURED BY FAIR MARKET VALUE FOR BOTH ITS FET AND EXPROPRIATION CLAIMS

748. The Parties agree that the EEU Treaty does not speak to the standard of compensation for a breach of the FET Standard.[689]

749. The Parties also agree that the standard for compensation for an expropriation is the market value of the Investments.[690]

750. The Parties' agreement ends there.

751. The Respondent asserts that the market value standard does not apply to Claimant's FET claim.[691] That is wrong-- fair market value is also the appropriate standard for the Respondent's breaches of FET just as it is with expropriation.

752. To support its argument, the Respondent asserts that the EEU Treaty's silence on this issue means that the standard for compensation for a breach of the FET standard is "*the amount of 'actual loss' directly caused by the breach in question*."[692] This is incorrect.

753. It is widely accepted that when the applicable Treaty does not address the standard for compensation, "*the Tribunal is required to apply the default standard contained in customary international law […]*"[693]

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[689] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 644.
[690] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 693-694.
[691] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 645.
[692] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 645.
[693] **Exhibit CL-80**. *Decree of President of the Republic* of Belarus of 16 November 2006 No. 677 On Particular Issues *Related to Disposition of Property in Communal Ownership and Purchase of Property in Ownership of Administrative Divisions*
Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 483.

754. This standard was famously articulated by the Permanent Court of International Justice in the *Chorzow Factory* case, and has been reaffirmed by many tribunals[694] since:

> "*The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*."[695]

755. This principle has also been codified in the ILC Articles of State Responsibility, Article 31(1), which provides that "*the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*."[696] [Claimant's emphasis]

756. Reparations consist of either restitution, which requires the State "*to re-establish the situation which existed before the wrongful act was committed*" or, when restitution is not possible, damages.[697]

757. Restitution is not possible in this case because:

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[694] **Exhibit CL-80**. *Decree of President of the Republic* of Belarus of 16 November 2006 No. 677 On Particular Issues *Related to Disposition of Property in Communal Ownership and Purchase of Property in Ownership of Administrative Divisions*
Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006, paras. 486-493 (reviewing the cases which have reaffirmed the *Chorzow Factory* principle).
[695] **Exhibit CL-136.** *Case Concerning the Factory at Chorzów (Germany v. Poland),* Judgment of 13 September, 1928 P.C.I.J., ser. A, No. 17 at 47.
[696] **Exhibit CL-11.** ILC Articles on State Responsibility, Art. 31(1).
[697] **Exhibit CL-11.** ILC Articles on State Responsibility, Arts. 35, 36. *See also* **Exhibit CL-136.** *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment of 13 September, 1928 P.C.I.J., ser. A, No. 17 at 47: "*payment of a sum corresponding to the value which a restitution in kind would bear…*"

(i) The Investment Object was sold to a third party and therefore can no longer be returned;[698] and

(ii) The New Communal Facilities were designed to be used by the Minsk City Executive Committee as such. [699]

758. Therefore, Claimant is entitled to full compensation.

759. As the tribunal in *Lusitania* explained,[700] and the tribunal in *CMS v. Argentina* reaffirmed, "*the fundamental concept of 'damages' is […] reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole*."[701] Compensation is therefore "*designed to cover any 'financially assessable damage including loss of profits insofar as it is established*'" and the "*general concept upon which commercial valuation of assets is based is that of 'fair market value*."'[702]

760. The tribunal in *Biwater* explained this standard further: "*arbitral tribunals appear to have simply deployed the fair market value of the investment in question as the measure of damages both for claims of expropriation and breaches of other treaty standards*."[703]

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[698] **CS-I. Claimant's Notice of Arbitration of 15 November 2017,** paras. 293-295. **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 363-367.
[699] **Exhibit C-66.** Amended Investment Contract of 8 February 2007, Clause 2, Sub-Clauses 8.11 and 9.3.9.
[700] **Exhibit CL-87.** United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)**,** Commentary to Article 36.
[701] **Exhibit RL-63.** *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 401, footnote 216.
[702] **Exhibit RL-63.** *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, paras. 401-402.
[703] **Exhibit CL-137**. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, para. 777.

761. There are many examples applying the full compensation standard to FET breaches.

762. For example, in *CMS v. Argentina*, the tribunal determined that the standard for compensation was the market value of the investment due to the cumulative nature of the breaches.[704] In reaching this conclusion, the tribunal noted that "*[w]hile this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses*."[705] Notably, the tribunal in *CMS* applied the fair market value standard despite explicitly stating that "*this is not a case of expropriation […]*."[706]

763. Similarly, in *Azurix v. Argentina*, the tribunal determined that Argentina had breached several provisions of the applicable treaty, including FET, but did not find that there had been an expropriation.[707] When determining the standard for compensation, however, the Tribunal concluded that "*a compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over*."[708]

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[704] **Exhibit RL-63.** *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 410.
[705] **Exhibit RL-63.** *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 410.
[706] **Exhibit RL-63.** *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 410.
[707] **Exhibit CL-80.** *Decree of President of the Republic* of Belarus of 16 November 2006 No. 677 On Particular Issues *Related to Disposition of Property in Communal Ownership and Purchase of Property in Ownership of Administrative Divisions*
Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006, paras. 332, 377.
[708] **Exhibit CL-80.** *Decree of President of the Republic* of Belarus of 16 November 2006 No. 677 On Particular Issues *Related to Disposition of Property in Communal Ownership and Purchase of Property in Ownership of Administrative Divisions*
Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006, paras. 419-424.

764. So too here. As was described above,[709] the Claimant was totally deprived of his rights under the Investment Contract as a result of the following actions:

(i) Termination of the Investment Contract;[710]

(ii) Imposition of the tax liability and seizure of the New Communal Facilities;[711]

(iii) Subsequent transfer of the New Communal Facilities to the communal ownership under the Presidential Decree;[712]

(iv) Selling the land plot intended to the Investment Object to the other investor.[713]

765. Several tribunals have applied the same standard for compensation of fair market value when analyzing together an expropriation and FET claim, just as the tribunal should do here.

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[709] *See paras. 598-606*.

[710] **Exhibit C-140.** Statement of claim to terminate the Investment Contract. **Exhibit C-147.** Judgment of the Economic Court of Minsk dated 9 September 2014. **Exhibit C-149.** Appeal of Manolium-Engineering dated 9 October 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk dated 29 October 2014. **Exhibit C-151.** Cassation appeal of Manolium-Engineering dated 29 November 2014. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus dated 27 January 2015.

[711] **Exhibit C-164.** First Tax Audit Report dated 17 May 2016. **Exhibit C-165.** Letter from the Tax Inspectorate to Manolium-Engineering dated 21 June 2016. **Exhibit C-166.** Amendments and supplements to the First Tax Audit Report dated 21 June 2016. **Exhibit C-167.** Order of the Tax Inspectorate for arrest of the land plots dated 5 July 2016. **Exhibit C-168.** Decision of the Tax Inspectorate dated 19 July 2016. **Exhibit C-169.** Application of the Tax Inspectorate dated 20 July 2016. **Exhibit C-171.** Extract from the records of the Ministry of Taxes in respect of the indebtedness of Manolium-Engineering as of 10 November 2016. **Exhibit C-187.** Second Tax Audit Report dated 24 March 2017. **Exhibit C-186.** Amendments to the Second Tax Audit Report dated 18 May 2017. **Exhibit C-188.** Decision of the Tax Inspectorate in respect of the Second Tax Audit Report and amendments dated 18 May 2017 to the Second Tax Audit Report dated 13 June 2017.

[712] **Exhibit R-148.** Deed of transfer dated 27 January 2017.

[713] **Exhibit C-185.** Official website of news portal of Belarus TUT.BY. **Exhibit R-152.** 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-153.** Minutes of the results of the auction dated 12 September 2017.

766. Indeed, in *Gemplus v Mexico*, the tribunal explicitly stated that "*the Tribunal should be guided by the same measure for breach of the FET standards in the two BITs, as for unlawful expropriation under the BITs […]*."[714]

767. As another of many examples, the tribunal in *Tecmed v. Mexico* applied the "*principle that compensation of such loss must amount to an integral compensation for the damage suffered, including lost profits*" to apply market value to both the expropriation and FET claim.[715]

768. The only case that the Respondent cites in support of its position that fair market value may not be used for FET breaches, *LG&E v. Argentina*, is easily distinguishable.[716] In that case, the tribunal found that the effect of Argentina's breach was not permanent and that LG&E's main asset, the Licenses, was still in force and that its value had even rebounded since the economic crisis.[717]

769. That is not the case here. Rather, as a result of the sequence of the Respondent actions, the Claimant was totally deprived of its investments, namely:

(i) The Investment Contract was terminated;[718]

(ii) The New Communal Facilities were transferred to the communal ownership under the secret Presidential Order;[719]

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[714] **Exhibit CL-138.** *Gemplus S.A., et al. v. The United Mexican States*, ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, paras. 12-52.
[715] **Exhibit CL-32.** *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB/00/2, Award of 29 May 2003, paras. 188, 195.
[716] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 645, n.1027.
[717] **Exhibit RL-64.** *LG&E Energy Corp., et. al. v. The Argentine Republic*, ICSID Case no. ARB/02/1, Award of 25 July 2007, paras. 35-36, 47.
[718] **Exhibit C-147.** Judgment of the Economic Court of Minsk dated 9 September 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk dated 29 October 2014. **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus dated 27 January 2015.
[719] **Exhibit R-148.** Deed of transfer dated 27 January 2017.

(iii) The right to develop the Investment Object had been irreversibly lost after the land plot intended for the Investment Object was sold to another investor;[720]

(iv) Compensation for construction costs for the New Communal Facilities has never been paid.

770. In addition, even the tribunal in *LG&E* noted that "*when addressing the question of the absence of applicable treaty compensation standards for breaches other than expropriation, recent tribunals have opted to apply FMV*."[721] In other words, even the case on which the Respondent relies recognizes that fair market value is the appropriate and accepted standard for compensation in this case pursuant to either the expropriation or FET claim.

771. To conclude, the Respondent's attempt to bifurcate the damages standards should be rejected.

XIII. THE CLAIMANT IS ENTITLED TO LOST PROFITS AS COMPENSATION FOR RESPONDENT'S UNLAWFUL ACTIONS RESULTING IN THE LOSS OF THE RIGHT TO PERFORM THE INVESTMENT CONTRACT

772. The Respondent mistakenly attempts to challenge the Claimant's claims for lost profits resulting in the loss of the right to perform the Investment Contract alleging as follows:

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[720] **Exhibit C-185.** Official website of news portal of Belarus TUT.BY. **Exhibit R-152.** 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-153.** Minutes of the results of the auction dated 12 September 2017.

[721] **Exhibit RL-64.** *LG&E Energy Corp., et. al. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 39.

(i) The Claimant did not establish a causal link between the Respondent's breaches and the damages;[722]

(ii) The lost profit claims are speculative;[723]

(iii) The Investment Object would not have been profitable.[724]

773. In addition, the Respondent disagrees with the Claimant's alternative claim to Lost Profit for USD 8,650,000.[725]

774. The Respondent's position is incorrect, as demonstrated below.

13.1. The Claimant has Established a Sufficient Causal Link between the Respondent's Unlawful Actions and the Claimant's Lost Profits

775. The Claimant recognizes that it must show that "*there is sufficient causal link between the actual breach of the BIT and the loss sustained*."[726]

776. Yet this standard does not require the certainty that the Respondent demands.[727] Rather, so long as the Claimant can demonstrate a "*persuasive factual basis*" between the breach and damages, "*total certainty should not be required […]*."[728] "*Other ways of expressing the same concept might be that the harm must not be*

[722] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 655-665.
[723] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 666-673.
[724] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 680-685.
[725] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 677-679.
[726] **Exhibit CL-137.** *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award of 24 July 2008, para. 779.
[727] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 655.
[728] **Exhibit CL-139.** *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Final Award of 8 June 2010, para. 39.

too remote, or that the breach of the specific [Treaty] provision must be the proximate cause of the harm."[729]

777. However, remoteness here is related to the attenuation of the breach to the damages and not foreseeability, as that term is usually applied in contract law.[730] As the ILC Commentary on Article 31 explains:

> "*Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses 'attributable [to the wrongful act] as a proximate cause', or to damage which is 'too indirect, remote, and uncertain to be appraised', or to 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. This causality in fact is a necessary but not a sufficient condition of reparation. There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule. In other words, the requirement of a causal link is not necessarily the same in relation to every beach of an international obligation. In international as in national law, the question of remoteness of damage 'is not a part of the law which can be satisfactorily solved by search for a*

[729] **Exhibit CL-140.** *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (NAFTA), Second Partial Award of 21 October 2002, para. 140.
[730] **Exhibit CL-140.** *S.D. Myers, Inc. v. Government of Canada,* UNCITRAL (NAFTA), Second Partial Award of 21 October 2002, para. 159.

single verbal formula'. The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.[731] [Claimant's emphasis]

778. Despite this standard, the Respondent mistakenly argues that the Claimant is not entitled to lost profits for the Investment Object because the right to develop and sell the Investment Object was a "'*hoped for right*" and, the Respondent alleges, it is not certain that the relevant conditions required to exercise that right would have been met.[732]

779. The Respondent's authorities on this point are each readily distinguishable. Unlike here, each of the cases relied upon by the Respondent relate to conditional rights depending on outside factors that are substantively different than the Claimant's mature right here. Specifically, the right to develop the Investment Object was conditioned only on sufficient financing the New Communal Facilities—a condition with which the Claimant has over performed despite the Respondent's continued obfuscation.

780. On the other hand, the rights deemed remote in the Respondent's cases are far more attenuated, uncertain, or subject to the State's complete discretion than the right destroyed here.

781. For example, in *Burlington v Ecuador*, the claimant attempted to recover lost profits for the loss of the opportunity to negotiate in good faith an extension of the agreement which would have allowed Burlington to continue its investment

[731] **Exhibit CL-87.** United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 36.
[732] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 655.

for another 8 years.[733] The Tribunal denied this claim because "*the clear and unambiguous terms*" of the agreement did not give Burlington "*an entitlement to a contract extension that could have been taken or destroyed as a result of Ecuador's expropriation. All that it had, and all that it lost, was a right to negotiate such an extension*."[734] The Tribunal found that the State had absolute discretion over granting that right through negotiations, so there was nothing to take away from the claimant.[735]

782. Here, in this case, the right destroyed was not a mere right to negotiate, but rather a mature contractual right to develop the Investment Object.

783. Indeed, the only reason for loss of the right to proceed with implementation of the Investment Object is the failure of the Claimant to perform its financial obligations, namely, obligation to invest "*amount equivalent to fifteen (15) million US dollars*" for the design and construction of the communal facilities and to donate USD 1 million for construction of the National Library. [736]

784. However, the Claimant exceeded the amount of investments to be made to obtain the right to construct the Investment Object and contributed USD 19,434,679.[737] Taking into account full compliance of the Claimant with its financial obligations under the Investment Contract, the right to develop the Investment Object matured.

785. Similarly, in *CCL v Kazakhstan*, the claimant was denied lost profits in regards to its "*right of first refusal, which was made expressly conditional upon the*

[733] **Exhibit RL-65.** *Burlington Resources Inv. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paras. 235, 271.
[734] **Exhibit RL-65.** *Burlington Resources Inv. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, para. 271.
[735] **Exhibit RL-65.** *Burlington Resources Inv. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paras. 273-78.
[736] **Exhibit C-66.** Amended Investment Contract of 8 February 2007, Clause 17.
[737] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 15.

owner's decision whether to sell" and omitted important terms, such as the purchase price.[738] The tribunal therefore concluded that the loss of such a conditional contractual right was too uncertain to recover for unless the claimant could show with "*a very high degree of probability, that the state would decide to sell its shares in the course of the five-year contract period*."[739]

786. Here, the destroyed right was not conditional on a discretionally decision to sell any property. It was a firm obligation from the Minsk City Executive Committee to provide the Claimant with the right to develop the Investment Object.

787. Finally, in *Merrill v Canada*, one of the claimant's claims was an "*expropriation of the Investor's intangible property right to realize a fair market value for its logs in the international market*" due to the regulatory regime.[740] The Tribunal held that "*[w]hile an intangible investment is certainly capable of expropriation under international law, the issue here is that the right as defined does not appear to arise from a contract that might be considered directly related to the investment made. In fact, it is only a potential interest that may or not materialize under contracts the Investor might enter into with its foreign customers*."[741] In other words, claimant cannot say that it had "*an actual and demonstrable entitlement… under an existing contract or other legal instrument*" to the right to realize a fair market value for its logs in the international market.[742] The NAFTA Treaty, the tribunal further elaborated, was not an "*insurance policy*,

[738] **Exhibit CL-141.** *CCL v. Republic of Kazakhstan,* SCC Case 122/2001, Final Award of 1 January 2004 (Stockholm International Arbitration Review (2004)), at 167.
[739] **Exhibit CL-141.** *CCL v. Republic of Kazakhstan,* SCC Case 122/2001, Final Award of 1 January 2004 (Stockholm International Arbitration Review (2004)), at 167.
[740] **Exhibit CL-142.** *Merrill & Ring Forestry L.P. v. The Government of Canada,* Award of 31 March 2010, para. 56.
[741] **Exhibit CL-142.** *Merrill & Ring Forestry L.P. v. The Government of Canada,* Award of 31 March 2010, para. 140.
[742] **Exhibit CL-142.** *Merrill & Ring Forestry L.P. v. The Government of Canada,* Award of 31 March 2010, paras. 142-44.

guaranteeing that every investor exporter will get for its products the best price available…."[743]

788. Again, the case at hand is different because the right to develop the Investment Object **was** a tangible contractual right.

789. Unlike in these cases, the Claimant had a guaranteed entitlement to develop the Investment Object as set out in the Investment Agreement.[744] The only condition to that absolute right was that the Claimant finance construction the New Communal Facilities.[745] And, as the Claimant has already set out above:

(i) The Claimant over performed its obligation regarding amount of financing;[746]

(ii) The Respondent acted in bad faith to delay the construction of the New Communal Facilities;[747]

(iii) The Respondent acted in bad faith in refusing to accept the New Communal Facilities to the communal ownership and, thus, preventing the Claimant from formal compliance with obligation to transfer the New Communal Facilities to the communal ownership. [748]

790. Thus, but for the Respondent's unlawful conduct, the Claimant has shown that it would have developed the Investment Object and that the Respondent has thus deprived the Claimant of its Investment.

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[743] **Exhibit CL-142.** *Merrill & Ring Forestry L.P. v. The Government of Canada,* Award of 31 March 2010, para. 144.
[744] **Exhibit C-66.** Amended Investment Contract, Clause 17.
[745] **Exhibit C-66.** Amended Investment Contract, Clause 17.
[746] *See paras. 42-49.*
[747] *See paras. 50-136.*
[748] *See paras. 273-334.*

791. As discussed in more detail below, a number of other tribunals have awarded to claimants compensation for investments that were similarly young and without a track record of profits due to the value of the opportunity lost. In this regard, the Claimant need not show that profits are certain, but need only show that they were "*reasonably anticipated*" or "*probable*."[749]

792. The Claimant now submits its Second T. Taylor Report. This report is based on:

(i) Actual prices for comparable property in Belarus at comparable period of time;[750] and

(ii) Actual prices for construction for comparable property in Belarus at comparable period of time.[751]

793. Therefore, the Claimant's calculation of lost profit is based on actual analyzes of Belarusian market at relevant period of time, thus, it is certain.

794. Finally, the Respondent argues that Claimant is to blame for the delays in finishing the New Communal Facilities and was not in a financial position to be able to develop the Investment Object.[752] However, "*[n]ot every action or omission which contributes to the damage suffered is relevant for this purpose. Rather article 39 [of the ILC Articles] allows to be taken into account only those actions or omissions which can be considered as willful or negligent, i.e. which*

[749] **Exhibit CL-87.** United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary on Article 36, at para. 27.
[750] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 2.2.6, TT-70.
[751] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 2.2.6, TT-70.
[752] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 662-64.

manifest a lack of due care on the part of the victim of the breach for his or her own property or rights…."[753]

795. It is also the Respondent's burden, not the Claimant's, to prove that the Claimant would not have been able to finance the Investment Object in the amount provided in the Investment Contract and to complete the construction.[754] The Respondent has failed to do so.

796. Contrary to that, the Claimant has demonstrated that it had invested more than it was required.[755] The Claimant was prepared to invest further (although not legally obliged),[756] but was denied an opportunity to do so.

797. For these reasons, the Claimant has established a sufficient causal link between the Respondent's unlawful acts and its claimed lost profits, and the Respondent's arguments to the contrary should be rejected.

13.2. <u>The Claimant Must be Awarded Lost Profits to be Made Whole and Erase the Harm from the Respondent's Breaches</u>

798. The Respondent also incorrectly asserts that the Claimant cannot sufficiently prove its lost profits because the Investment Object was never developed and therefore such profits are too speculative to be awarded.[757]

799. This is wrong. As established in *Sapphire v Iran*: "*It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when*

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[753] **Exhibit CL-87.** United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary on Article 39.
[754] **Exhibit CL-143.** *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award of 17 December 2015, para. 244. (Responsibility of Respondent to prove the allegation that it wishes the Tribunal to accept).
[755] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016.
[756] *See paras. 21-49.*
[757] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 666-670.

such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage."[758]

800. It is widely established that "*a claimant should not be required to prove its exact quantification with the same degree of certainty. This is because any future damage is inherently difficult to prove*."[759] Rather, as the tribunal in *Gold Reserve* stated, "*the appropriate standard of proof is the balance of probabiities*…."[760]

801. *Crystallex v Venezuela* is particularly instructive here. In that case, the claimant had purchased the right to explore and exploit a gold mining concession.[761] The claimant, however, never did begin mining operations due to Venezuela's unlawful actions that impeded its ability to do so ultimately resulting in expropriation of the concession.[762] Yet, the claimant was still awarded over $1 billion in compensation for its lost profits.[763] The tribunal determined that in order to prove that the claimant was deprived of profits that would have been earned only "*require[d] proving that there is sufficient certainty that it had engaged or would have engaged in a profitmaking activity but for the Respondent's wrongful act, and that such activity would have indeed been profitable.*"[764] The tribunal then concluded that since the claimant had

[758] **Exhibit CL-144.** *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company.*
[759] **Exhibit CL-38.** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4 April 2016, paras. 867-868.
[760] *Gold Reserve, Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 661.
[761] **Exhibit CL-38.** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4 April 2016, paras. 6, 12.
[762] **Exhibit CL-38.** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4 April 2016, paras. 708-9, 718, 877.
[763] **Exhibit CL-38.** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4 April 2016, para. 917.
[764] **Exhibit CL-38.** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4 April 2016, para. 875.

established that the concession was likely to be profitable, the claimant had provided a reasonable basis for determining lost profits notwithstanding its inability to quantify them with certainty.[765]

802. The Respondent's reliance on *Siag v Egypt* to argue that tribunals are reluctant to award lost profits for young businesses without an establish track record is misplaced.[766] Crucially, the Respondent omits that the tribunal in that case ultimately adopted another market-based valuation method which assessed lost profits—comparable sales valuation.[767] The tribunal thus ultimately awarded claimant USD 150 million, well over the USD 30 million that the claimant had invested into the property.[768] *Siag v. Egypt* does not preclude, and in fact supports, an award of full lost profits here.

803. The Respondent's also could not rely on *Gemplus v Mexico* in substantiation of its position. There, the concession at issue had been operative for no more than five weeks and therefore had no significant or reliable track-record as a business.[769] Moreover, although the tribunal rejected the use of the DCF model, the tribunal also rejected the notion that claimants were only owed the value of their shares because "*this was to be a lucrative investment for the Claimants, albeit subject to high risks*."[770] The tribunal noted that "*the concept of certainty is both relative and reasonable in its application, to be adjusted to the*

[765] **Exhibit CL-38.** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4 April 2016, paras. 877-81.
[766] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** para. 667.
[767] **Exhibit CL-145.** *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009, paras. 572-74.
[768] **Exhibit CL-145.** *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009, paras. 574, 631.
[769] **Exhibit CL-138.** *Gemplus S.A., et al. v. The United Mexican States,* ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, paras. 13-69, 13-70.
[770] **Exhibit CL-138.** *Gemplus S.A., et al. v. The United Mexican States,* ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, paras. 13-72, 13-73.

circumstances of the particular case."[771] The tribunal therefore concluded that in awarding lost profits, the tribunal should assess future events that would have occurred and attempt to quantify them because this is not "*an exercise in certainty, as such; but it is, in the circumstances, an exercise in 'sufficient certainty'*…."[772]

804. Although some tribunals have been wary to utilize a DCF valuation or were not presented with one, each recognized that complete certainty is not required. Moreover, other tribunals have applied a DCF valuation to an investment that was ultimately not operational and therefore did not have a history of cash flows.[773] The Arbitral Tribunal should do the same and should not hesitate to rely on the Claimant's valuation presented in its Second Expert Report.

805. Furthermore, as noted above, "*it is well-settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred*."[774] This is because, as articulated by the tribunal in *Gavazzi v Romania*, that "*[t]he existence of… a difficulty [in quantifying damages], even in an extreme form, provides no justification in refusing any compensation to an innocent party, leaving the wrongful party with the fruits of its wrongdoing. Tribunals have traditionally resolved such difficulties applying a rule of reason, rather than a rule requiring absolute certainty in calculating compensation*."[775]

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[771] **Exhibit CL-138.** *Gemplus S.A., et al. v. The United Mexican States,* ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, para. 13-83

[772] **Exhibit CL-138.** *Gemplus S.A., et al. v. The United Mexican States,* ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, para. 13-91.

[773] **Exhibit CL-146.** *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, para. 830.

[774] **Exhibit RL-72.** *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 215.

[775] **Exhibit CL-147.** *Marco Gavazzi and Stegano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award of 18 April 2017, para. 121. **Exhibit CL-148.** *Marco Gavazzi and Stegano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Rectification of 13 July 2017. *See*

806. Therefore, once the fact of damages has been established, as it has been in this case, any ambiguity as to the amount should be resolved against the wrongdoer, the Respondent. The Respondent cannot be allowed to profit from its own wrongdoing by creating uncertainty through a series of wrongful acts. As explained by the tribunal in *Gavazzi v. Romania*, "*[t]he alternative of simply dismissing the claim for want of sufficient proof is not regarded as a fair or appropriate result*."[776]

807. And in fact, as already stated, the Claimant has provided the Arbitral Tribunal with a more than sufficient basis upon which to fairly and appropriately arrive at a compensation that would make the Claimant whole. The Respondent should not be allowed to escape this obligation.

13.3. The Investment Object Would Have Been Profitable

808. Alternatively to the above, the Respondent puts forth Mr. Qureshi to argue that the Claimant has not proved that it is entitled to lost profits because the Investment Object would not have been profitable.[777]

809. Notably, the Respondent's expert applies the same income approach as Mr. Taylor, except for in relation to the hotel area wherein Mr. Qureshi adopts the market approach, but adopts a different set of assumptions.[778] Thus, the parties are largely in agreement as to how to measure the Claimant's lost profits, even if they are not in agreement as to the amount.

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also **Exhibit CL-138.** *Gemplus S.A., et al. v. The United Mexican States,* ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, para. 13-92.

[776] **Exhibit CL-147.** *Marco Gavazzi and Stegano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award of 18 April 2017, para. 124.

[777] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 680-85.

[778] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 680.

810. As Mr. Taylor points out in the Second T. Taylor Report, Mr. Qureshi's analysis "*fails a basic sense-check i.e., that an investor would not be willing to spend USD 15.0 million on the New Communal Facilities to obtain the right to execute a loss-making development*."[779] In addition, Mr. Qureshi significantly overstates assumed construction costs, includes land lease payments in his measure of costs that Claimant would not have needed to make, and applies an inappropriate discount rate.[780] These are some of the key areas of disagreement amongst the experts and are addressed in turn.

811. First, although Mr. Qureshi agrees that the Schedule Graphic lacks sufficient detail and does not provide reliable evidence, he still chooses to rely on it.[781] The Schedule Graphic has fundamental weaknesses, aside from its lack of detail, which merit rejecting reliance on the document wholesale.[782] Mr. Taylor has found a far more reliable source of evidence for estimating the construction costs, the 2019 Colliers Report, and thus relies on it for his analysis instead.[783]

812. Second, Mr. Qureshi avers that Mr. Taylor did not properly consider the cost of land or a possible rent-free period offered to tenants.[784] However, there was no contractual requirement to pay rent in respect of the land for the Investment

[779] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 2.2.4.
[780] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.2.4-2.2.7.
[781] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, paras. 71, 75. Second Report, paras. 2.2.6, 3.2.2.
[782] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.2.6, 3.2.2-3.3.3.
[783] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.2.6, 3.2.4, 3.8.12-3.8.23.
[784] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, para. 98.

Object.[785] Further, as Mr. Taylor aptly points out, Mr. Qureshi is incorrect to assume that rent-free periods should affect the valuation here.[786]

813. Third, Mr. Qureshi and Mr. Taylor disagree about the applicable discount rate. There are several reasons why Mr. Qureshi's discount rate is overinflated, but primarily it is because Mr. Qureshi chose to apply a cost of equity discount rate.[787] As Mr. Taylor explains, this "*is not the approach typically used for a valuation using the FMV standard*."[788] In addition, even calculating WACC based on Mr. Qureshi's flawed 15.56 percent cost of equity, Mr. Taylor arrives at 12.74 percent—lower than Mr. Taylor's conservative discount rate of 13 percent.[789]

814. As one example of how these and other differences bear out, in regard to the Hotel & Conference Centre Sales Value, Mr. Qureshi asserts that Mr. Taylor did not consider costs in his valuation.[790] However, as Mr. Taylor explains, "*the expectations of costs are built in to the yield and the capitalisation rate*."[791]

815. Mr. Qureshi also challenges that the hotel would only have 250 rooms, but Mr. Taylor explains that due to the weight of the evidence it is more reasonable to assume that there would be 310.[792]

816. Most strikingly, Mr. Qureshi rejects the use of the income approach because of an alleged dearth of data to reliably apply this approach.[793] However, by

[785] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 3.8.9-3.8.11, 3.10.1-3.10.2.
[786] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 3.8.9-3.8.11, 3.10.1-3.10.2.
[787] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 3.9.8-3.9.12.
[788] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 3.9.11.
[789] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 3.9.14.
[790] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, para. 60.
[791] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, 3.6.8-3.6.10.
[792] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, 3.6.12-3.6.16.
[793] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, para. 168.

choosing to then utilize the market approach, Mr. Qureshi notes that there is very limited data from which to find comparable transactions.[794] This is inconsistent.

817. More importantly, the allegedly comparable transactions do not in fact appear to be comparable.[795] Looking at the most comparable transactions in Mr. Quareshi's own data, Mr. Taylor surmises a significantly higher value per room.[796] Thus, updating the valuation with more reliable information and retaining those assumptions that remain supported by the evidence or where the experts agree, Mr. Taylor arrives at a valuation of USD 88.1 million for the Hotel & Conference Centre Sales Value, compared to Mr. Qureshi's understated USD 60.2 million.[797]

818. In his Second Report, Mr. Taylor provides a reasonable basis upon which the Arbitral Tribunal can compensate the Claimant. Mr. Taylor's Second Report shows that the Investment Object would not only have been profitable, but that the Claimant is owed a significant amount in compensation for the Respondent's unlawful acts.

819. Adopting some of Mr. Qureshi's analysis, updating some assumptions based on newly available information, and taking the appropriate costs as well as value into account, Mr. Taylor arrives at a reasonable, if not conservative, pre-interest valuation of loss at USD 68,900,000, as demonstrated in the table below:[798]

[794] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, paras. 168, 170.
[795] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, 3.6.12-3.6.19.
[796] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, 3.6.15-3.6.19.
[797] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, 3.6.20-3.6.22.
[798] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.3.6, 3.11.4. Tables 2 and 18.

Table 2. Summary of Claimant's Loss in Respect of the Investment Object (USD million)

	2015	2016	2017	2018
Cash Outflows	(28.7)	(75.4)	(87.1)	(51.8)
Cash Inflows	-	-	-	398.9
Net Cash Flows	(28.7)	(75.4)	(87.1)	347.1
Discounted Cashflows	(27.0)	(63.3)	(65.2)	224.5
Total	**68.9**			

820. The Arbitral Tribunal should award this amount to the Claimant.

XIV. THE CLAIMANT IS ENTITLED, IN THE ALTERNATIVE, TO USD 31.87 MILLION AS LOST PROFIT

821. The Claimant's alternative submission is that the Claimant is entitled to the amount which any other investor would pay for the right to develop an investment object on the land plot intended for the Investment Object.

822. The Claimant has a clear reference for such calculation. In September 2012, the Minsk City Executive Committee held an auction for the right to develop and construct on the land plot which was previously intended for the Investment Object.

823. The winner of the auction - OOO "*Astomaks*" - undertook an obligation to pay BYR 17,050,000.00 (approximately USD 8.87 million) for such right.[799]

[799] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 363-367. **Exhibit R-153.** Minutes of the results of the auction dated 12 September 2017, Clause 2.

824. In addition, the winner was to pay the lease payment under the terms of the auction.[800] Mr. Qureshi estimates to have a present value of the lease payment for the land plot as of over USD 23 million.[801]

825. Thus, using the calculation of Mr. Qureshi, the fair market value (namely, the amount which the winner of the auction for the right to develop the land plot previously intended for the Investment Object had to pay) amounts to approximately USD 31.87 million (*i.e.* 8.87 + 23). [802]

826. Thus, the Claimant is alternatively entitled for compensation of the fair market value of the land plot intended for the Investment Object as a result of deprivation to develop the Investment Object.

XV. THE CLAIMANT IS ENTITLED TO DIRECT DAMAGES FOR THE NEW COMMUNAL FACILITIES

827. As mentioned above, the Respondent does no dispute that if the Claimant has made out a claim for expropriation, which it has, then the appropriate standard of compensation is the market value of the New Communal Facilities and that the most appropriate way to reach this value is through the costs approach.[803]

828. Yet, the Respondent argues for a different approach to assessing the Claimant's costs. As detailed below, the Respondent's alternative approach to costs must be rejected.

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[800] **Exhibit R-153.** Minutes of the results of the auction dated 12 September 2017, Clause 5.
[801] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 366-367; **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, para. 194.
[802] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 2.2.5, 3.11.6, footnotes 21, 304.
[803] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 693, 699.

829. In addition, the Respondent argues that "*Claimant has failed to substantiate its allegation that the transfer of the New Communal Facilities itself constitutes an expropriation*" and therefore attempts to re-characterize the Claimant's position as an FET claim without sufficient causation.[804]

830. However, as the Claimant set out above,[805] the Respondent's actions amount to an indirect expropriation and therefore the only matter left for the Tribunal to consider is the market value of the New Communal Facilities.

831. Unlike the two cases cited by Respondent—*GAMI v. Mexico* and *LG&E v. Argentina*—the Claimant no longer has title or any use of the New Communal Facilities and therefore there is no question that the Respondent's unlawful actions fully deprived the Claimant of its investment.

832. Finally, the Respondent attempts to blame the Claimant for the failure to finish development of the New Communal Facilities.[806]

833. As set above,[807] this is contrary to the established facts.

834. Further, as already explained, only acts or omissions that are willful or negligent may potentially be held against the Claimant as relates to causation. There are no such facts here. In fact the Respondent in bad faith prevented the Claimant from completing the New Communal Facilities.

835. Thus, the Respondent's arguments in this regard are meritless too.

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[804] **RS-18**. **Respondent's Statement of Defence of 19 November 2018,** paras. 691-94.
[805] *See paras. 519-606*.
[806] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 706-11.
[807] *See paras. 50-136*.

15.1. The 2016 Ministry of Finance Audit Report Is the Most Reliable Evidence of the Claimant's Costs

836. The Respondent challenges the reliability of the 2016 Ministry of Finance Audit Report and proposes, through its expert, that the Claimant's costs should instead be measured by estimating the anticipated costs of constructing the New Communal Facilities. [808]This approach should be rejected for the following reasons.

837. This assessment was done specifically for the purpose of paying compensation to the Claimant.

838. In November-December 2015, the Minsk City Executive Committee was holding "*internal discussions with the Belarusian authorities regarding the potential acquisition of the New Communal Facilities*"[809] and asked the Belarusian Government to instruct the Control and Audit Office (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*".[810]

839. On 30 December 2015, the representatives of the Minsk City Executive Committee, Minsktrans, the Ministry of Architecture and Construction, the Ministry of Justice, the Ministry of Finance, the Ministry of Economy, the State Property Committee and the State Standardization Committee sought the

[808] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 293-298. **RWS-2.** First Witness Statement of Mr. Akhramenko of 19 November 2018, paras. 130-145. **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, paras. 215-218.
[809] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 285. **Exhibit R-129.** Letter from Minsk City Executive Committee to the Ministry of Economy of the Republic of Belarus of 26 November 2015.
[810] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 286. **Exhibit R-133.** Letter from Minsk City Executive Committee to the Council of Ministers of the Republic of Belarus No. 1/2-18/5437 of 8 December 2015. **RWS-2.** First Witness Statement of Mr. Akhramenko of 19 November 2018, para. 135.

Respondent's Council of Ministers to direct the "*reassessment*" to be conducted by the CAO and Republican Unitary Enterprise *Republican Scientific and Technical Center for Pricing in Construction* of the Ministry of Architecture and Construction (the "**RSTC**").[811]

840. On 27 January 2016, the Belarusian Government instructed the Ministry of Finance and the Ministry of Architecture and Construction to conduct an audit of Manolium-Engineering's activities "*for Minsk City Executive Committee to subsequently use this information in adopting a decision on the compensation of the* [Manolium-Engineering's] *costs in return for the transfer of the facilities*".[812]

841. On 3 February 2016, the Minister of Finance instructed the representatives of the CAO and RSTC to conduct the audit of Manolium-Engineering for the period from 5 April 2004 until 25 January 2016.[813]

842. Now, the Respondent attempts to dispute the evaluation of the Respondent's own Ministry of Finance of the Claimant's investments (USD 19,434,679) by relying on the report of the Respondent's quantum expert, Mr. Abdul Sirshar Qureshi of 15 November 2018 (the "**PwC First Report**").[814]

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[811] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 289. **Exhibit R-135.** Letter from Minsk City Executive Committee to the Council of Ministers of 30 December 2015. **Exhibit R-136.** Minutes of the meeting of 30 December 2015.

[812] **Exhibit R-137.** Instruction of the Council of Ministers of the Republic of Belarus No. 39/1078r of 27 January 2016.

[813] **Exhibit R-138.** Letter from Ministry of Architecture and Construction to the Ministry of Finance of 2 February 2016. **Exhibit C-158.** Order of the Ministry of Finance of 3 February 2016. **Exhibit R-139.** Instruction of the Ministry of Finance of the Republic of Belarus No. 8 of 3 February 2016.

[814] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, paras. 32-33, 215-219, 220-232.

843. **First**, the sole fact that the Respondent is trying to dispute its own evaluation[815] demonstrates that its position is lacking in credibility. This is particularly true when taking into account that this report was made:

(i) By the special division of the Ministry of Finance and specialized agency of the Ministry of Ministry of Architecture and Construction (RSTC);[816]

(ii) Under the Instruction of the Respondent's Prime-Minister and Minister of Finance;[817]

(iii) For the purpose of evaluating the amount of compensation to be paid to the Claimant for the New Communal Facilities;[818]

(iv) During a full-time audit of the company's activities for the period from 5 April 2004 until 25 January 2016 conducted in the office of Manolium-Engineering;[819]

(v) After checking the results of the evaluation of the costs of Manolium-Engineering made by the Registration and Cadastre Agency in its Report of 16 June 2015[820] with the accounting data of Manolium-Engineering

[815] **RS-18. Respondent's Statement of Defence of 19 November 2018**, paras. 293-298.
[816] **Exhibit C-158.** Order of the Ministry of Finance of 3 February 2016. **Exhibit R-139.** Instruction of the Ministry of Finance of the Republic of Belarus No. 8 of 3 February 2016. **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 1.
[817] **Exhibit R-137.** Instruction of the Council of Ministers of the Republic of Belarus No. 39/1078r of 27 January 2016. **Exhibit C-158.** Order of the Ministry of Finance of 3 February 2016. **Exhibit R-139.** Instruction of the Ministry of Finance of the Republic of Belarus No. 8 of 3 February 2016.
[818] **RS-18. Respondent's Statement of Defence of 19 November 2018**, para. 285. **Exhibit R-129.** Letter from Minsk City Executive Committee to the Ministry of Economy of the Republic of Belarus of 26 November 2015. **Exhibit R-130.** Letter from the Ministry of Economy to Manolium-Engineering of 27 November 2015.
[819] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 1. **CWS-5.** Fourth Witness Statement of A. Dolgov of 28 February 2019, para. 187.
[820] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, p. 42.

and, in particular, after sample inspection of the documents confirming works performed and expenses incurred;[821] and

(vi) In accordance with the Belarusian laws.[822]

844. **Second**, the PwC First Report, as it will be demonstrated in more details below, is a perfect example of the "*hired gun*" expert work. This document expressly created for the purpose of this arbitration should be given little weight when compared with contemporaneous documentation complied in the ordinary course.

845. The Respondent's expert, Mr. Qureshi, did not even attempt to analyze the actual costs of the New Communal Facilities, but rather simply speculates about how much the New Communal Facilities could cost in theory.[823]

846. This speculation is based on old fashioned Soviet methodology where all construction costs are calculated by using 1991 year basic prices, which are then

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[821] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, pp. 4, 14 (*see* also the data on pp. 19-28):"*The audit was conducted by way of: comparing the records, documents or facts of certain operations with the records, documents or facts of other related operations;other control activities associated with the review of financial and commercial activities of the enterprise.*
This audit included sample inspection of contracts, statements of works performed and associated expenses, certificates of acceptance of construction or other special works, design and as-built documentation, primary records, waybills and consignment notes, payment orders and any other documents or information carriers kept by Foreign Enterprise Manolium-Engineering. The audit relied on the information reflected in 1C: Accounting Suite version 7.7 software, CIC integrated cost estimation system (developed by RSDC [Republican Unitary Enterprise *Republican Scientific and Technical Center for Pricing in Construction* of the Ministry of Architecture and Construction]*), other software products.*
[…]
This audit included reconciliation of the data of enterprise's expenses on the erection of communal facilities reflected in expert opinion No. 3 of 16 June, 2015 as prepared by the Republican Unitary Enterprise Minsk City Agency for State Registration and Land Cadaster, and the accounting data of the Foreign Enterprise Manolium-Engineering.
As a result, it was found that the said expenses were accepted and reflected in the accounting records of the Foreign Enterprise Manolium-Engineering".

[822] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, pp. 3, 15-16.

[823] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, paras. 220-232.

adjusted in accordance with statistical indexes published by the Belarusian Government and which were far from the real market prices.[824] There is no basis to apply this outdated and inaccurate methodology here.

847. As Mr. Taylor notes, "*[i]t does not appear reasonable for Mr. Qureshi and Respondent to reject a report which was produced by Respondent's own Finance Ministry in accordance with the audit regulations which Respondent has put in place*."[825] The fact remains that Audit Report is the best available contemporaneous evidence of the costs incurred by Claimant and Respondent has not provided good reason for its wholesale rejection.[826] Further, the Respondent cannot credibly argue that an estimate of costs could be more reliable valuation than actual costs contained in the 2016 Ministry of Finance Audit Report (especially given the unreliability of partially translated documents on which that estimate is based).[827]

848. Contrary to the Respondent's approach, the 2016 Ministry of Finance Audit Report was prepared on the basis of contemporaneous documentation.[828]

849. Further, the evaluation of the Ministry of Finance Audit Report is consistent with and made references to two previous and separate reports for the costs incurred

[824] **RER-1.** Expert Report of A.S. Qureshi (PwC) of 15 November 2018, paras. 222, 224-232, Appendix H. **Exhibit SQ-27.** A trolleybus depot with 220 trolleybus in Uruchye-6 microdistrict in Minsk. Architectural design. Cost estimate documentation. Volume 5.2. **Exhibit SQ-28.** Cost estimate. Object № 07.126. Road along Gorodetskaya street from Gintovta street to entrance to the trolleybus depot with high-voltage cable line and trolley line. **Exhibit SQ-29.** Cost estimate. Facility № 04.93.1. Pull station in Gintovta st. with high-voltage cable lines. **Exhibits SQ-30 to SQ-41.** Orders of the Ministry of Architecture and Construction of the Republic of Belarus in orders "*On Cost Change Indices for Construction and Installation, Design, Engineering and Start-up Works*". **Exhibit SQ-46.** Note from the Manolium Engineering on constriction progress of the Road No. 612/09 of 21 November 2008.

[825] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 4.3.6.

[826] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 4.3.1-4.3.9.

[827] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 4.3.10-4.3.12.

[828] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, paras. 4.3.8.

by the Claimant: (i) Paritet-Standart Report of 5 November 2012 and (ii) the Registration and Cadastre Agency Report of 16 June 2015.[829]

850. The first report on evaluation of the Claimant's construction costs, the 2012 Paritet-Standart Report was prepared by independent audit firm "*Paritet-Standart*" further to proposal and recommendation of the Minsk City Executive Committee.[830] The 2012 Paritet-Standart Report confirmed costs associated with the "*design and construction of the communal facilities*" of USD 18,313,814.96 as of 31 October 2012.[831]

851. The audit was carried out in accordance with auditing rules prescribed by the Republic of Belarus.[832] The audit found that accounting records conformed with Belarusian legislation requirements, no unrelated business activities were observed, and there was apparently sufficient information to support the audit opinion.[833]

852. The Respondent did not challenge the 2012 Paritet-Standart Report and in March 2013 even referred to it in response to the Claimant who requested USD 30 million compensation of damages in the course of negotiations.[834]

853. The second audit of the Claimant's construction costs was held in February 2015 by the another Respondent entity, the Republican Unitary Enterprise Minsk City Agency for State Registration and Land Cadaster at the State Property

[829] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 4.3.2.
[830] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, page 5.
[831] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, pages 5-6; **Exhibit C-131.** Paritet-Standart Report of 5 November 2012, pages 4-5.
[832] **Exhibit C-131.** Paritet-Standart Report of 5 November 2012, page 1.
[833] **Exhibit C-131.** Paritet-Standart Report of 5 November 2012, pages 2, 4.
[834] **Exhibit C-85.** Claimant's letter to Minsk City Executive Committee of 19 March 2013. **Exhibit R-105.** Letter of Minsk City Executive Committee to Manolium-Engineering of 28 March 2013.

Committee of the Republic of Belarus, that produced its report on 16 June 2015 (*i.e.* the "**2015 Registration and Cadastre Agency Report**").[835]

854. The 2015 Registration and Cadastre Agency Report was prepared by "*specifically trained in the field of construction technology examinations*" *and* confirmed "*the amount of costs borne by the Investor in the course of construction works under the terminated Investment Contract that involved erection of communal facilities, including the associated costs of the Investor immediately related to the erection of the said facilities amounted to an equivalent of USD 18,129,933.17*".[836] At 235 pages, the 2015 Registration and Cadastre Agency Report is a substantial document which details a significant range of documentation which was submitted for examination.[837] The audit confirmed that the expenses were "*accepted and reflected in the accounting records*".[838]

855. Finally, as was demonstrated above, the 2016 Ministry of Finance Audit Report should be considered conservative, as the total amount of funds invested by the Claimant's affiliated companies to Belarus was USD 19,434,679.[839] The actual amount invested by the companies affiliated with the Claimant is higher than the one established by the 2016 Ministry of Finance Audit Report because it:

(i) Did not count all indirect costs and overheads; and

(ii) Took into account only actual costs based on their book value without taking into account inflation.

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[835] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, page 6; **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015.
[836] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, page 6; **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015.
[837] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015., page 2.
[838] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, page 6.
[839] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 15.

856. To conclude, the 2016 Ministry of Finance Audit Report remains the best evidence of the Claimant's costs. Given that Mr. Qureshi's valuation of the New Communal Facilities is not based on the most reliable evidence of the Claimant's costs, it must be rejected in favor of Mr. Taylor's assessment.

15.2. The Claimant Is Entitled to Costs for the Delays in 2007-2011 Because They Were The Result of the Respondent's Wrongful Actions

857. The Respondent maintains that the Claimant must bear the responsibility for delays in constructing the New Communal Facilities in the years 2007 – 2011.[840]

858. The Claimant has already set out above how such delays were the result of actions attributable to the Respondent, not to the Claimant.[841]

859. Further, as mentioned above, the Claimant's damages should only be reduced if the Tribunal finds that any actions by the Claimant which caused a delay were willful or negligent (and they were not).[842]

860. The Respondent's reliance on *MTD Equity v Chile* is misplaced.[843] In that case, the tribunal found that the claimant had failed to do even the most rudimentary due diligence before deciding to invest in Chile—a country it was wholly unfamiliar with—on the basis of representations by a business partner that had a conflict of interest.[844] The claimants were also warned by government officials about the difficulties with their proposed rezoning of the land and did not engage

[840] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 709-11.
[841] *See paras. 50-136*.
[842] **Exhibit CL-87.** United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary on Article 39.
[843] **RS-18. Respondent's Statement of Defence of 19 November 2018,** para. 707.
[844] **Exhibit CL-23.** *MTD Equity Sdn. Bhd. and MTD Chile S.A*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 169-77.

any experts before proceeding with this highly risky investment.[845] This complete failure to conduct due diligence and continued investment into the project despite numerous warnings to the contrary was the reason why the tribunal reduced the damages owed to the claimants.[846] No such facts exist here.

861. On the other hand, tribunals have routinely found that so long as the claimant did some due diligence or took some precautions in making its investment, the respondent cannot be relieved of its responsibility to honor its contractual commitments.[847]

862. Such is the case here. The Claimant could not have reasonably foreseen the steps the Respondent would take to avoid its commitments when making its investment.[848] The Claimant relied on the firm contractual obligations of the Minsk City Executive Committee and Minsktrans under the Investment Contract. Moreover, the Respondent may not rely on foreseeability of its own violation of the Investment Contract.

863. Accordingly, the Respondent cannot blame the Claimant for its own misdeeds.

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[845] **Exhibit CL-23.** *MTD Equity Sdn. Bhd. and MTD Chile S.A*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 169-77.
[846] **Exhibit CL-23.** *MTD Equity Sdn. Bhd. and MTD Chile S.A*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 242-46.
[847] **Exhibit CL-149.** Nykomb Synergetics Tech. Holding AB v. Latvia, SCC, Award of 16 December 2003, para. 4.3.3. **Exhibit CL-16.** *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 330.
[848] **Exhibit CL-16.** *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 330. *See also* **Exhibit CL-108.** *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award of 5 October 2012, para. 546 ("to relegate a wrongful act, to the category of 'background' change or 'business risk' would be to allow the [state] to profit from its own wrongdoing, contrary to the general principles of international law explicitly proscribing this.").

864. As a result, the Claimant is entitled for damages resulted of the expropriation of the New Communal Facilities in amount of 19,434,679 as confirmed by the 2016 Ministry of Finance Audit Report. [849]

15.3. Pre-Award Interest Date

865. The Respondent maintains that the Valuation Date is 27 January 2017 and claims that Mr. Taylor has assessed pre-award interest using the wrong dates.[850]

866. To clarify, Mr. Taylor has updated his valuation to be from 27 January 2015 and discounted cashflows to 31 January 2015.[851]

867. Additionally, Mr. Taylor has updated his assessment to an assumed award date of 31 January 2019 (the figure will be updated after the award is rendered):[852]

Table 3. Summary of Claimant's Damages (USD million)[853]

	Loss	Pre-Award Interest	Total
Lost Profits of the Investment Object	68.9	24.6	93.5
Loss of the New Communal Objects			
Alternative 1. Pre-Award Interest from Valuation Date	20.4	6.7	27.1
Alternative 2. Pre-Award Interest from NCO Transfer Dates	20.4	15.4	35.8
Alternative 3. Pre-Award Interest from Date of Expense	20.4	21.6	42.0
Alternative 4. Pre-Award Interest from Expropriation Date	20.4	3.1	23.5

[849] **Exhibit C-160.** CAO of the Ministry of Finance Report, p. 15.
[850] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 715-17.
[851] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 2.3.1.
[852] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 2.3.8.
[853] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, Tables 3 and 21.

15.4. Alternative Valuation Dates for Pre-Award Interest

868. The Respondent raised an objection regarding the alternative dates of assessment of pre-award interest regarding the expropriation of the New Communal Facilities.[854] The Respondent challenges the dates of transfer of the New Communal Facilities to the Respondent and of termination of the Investment Contract.

869. The alternative dates which are used by the Claimant for calculation of the pre-award interest for the New Communal Facilities are as follows:

(i) 27 January 2015 is the date when the Supreme Court of Belarus irreversibly terminated the Investment Contract;[855]

(ii) The dates of the factual transfer of the New Communal Facilities to the communal ownership, *i.e.*:

a) The Trolleybus Depot: 14 November 2011, when the Depot was transferred for use by Minsktrans under the Gratuitous Use Agreement;[856]

b) 6 July 2010 for the Pull Station, when Manolium-Engineering transferred the Pull Station to Minsktrans under the Pull Station Gratuitous Use Agreement;[857]

c) 22 August 2012 for the Road, when the State Enterprise Department of road-bridges construction and municipal improvement of the Minsk City Executive Committee approved the pavement of the

[854] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 715-717.
[855] **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.
[856] **Exhibit C-82.** Depot Facilities Gratuitous Use Agreement of 14 November 2011.
[857] **Exhibit C-99.** Pull Station Gratuitous Use Agreement of 6 July 2010.

Road.[858] This was the last piece of confirmation that the Road was absolutely ready for use, and the only obstacle for its transfer to the communal ownership was the refusal of the Minsk City Executive Committee to accept it.

15.5. Library Payment

870. The Respondent disputes the inclusion of the Library Payment in the assessment of Claimant's costs.[859] However, as Mr. Taylor points out, the Library Payment was not discussed in his First Report, other than to highlight that it was a necessary cost to obtain the right to construct the Investment Object.[860] Thus, it is not an issue that effects Mr. Taylor's valuation.

[858] **Exhibit C-318.** Test protocol of State Enterprise *Department of road-bridges construction and municipal improvement of the Minsk City Executive Committee* on pavement of the Road of 22 August 2012.
[859] **RS-18. Respondent's Statement of Defence of 19 November 2018,** paras. 712-14.
[860] **CER-3.** Second Expert Report of Travis Taylor (Versant) of 28 February 2019, para. 4.2.9.

F. PRAYERS FOR RELIEF

871. For the reasons stated in the Notice of Arbitration, the Statement of Claim, and the Statement of Reply, the Claimant respectfully requests the Arbitral Tribunal:

I. To dismiss the Respondent's jurisdictional objections and find jurisdiction to consider the Dispute;

II. To issue an arbitral award on the Dispute declaring that the Republic of Belarus violated its obligations in relation to the Claimant under the Belarusian laws and EEU Treaty, and ordering that the Republic of Belarus:

a) Has unlawfully expropriated the Claimant's investments;

b) Has violated the FET Standard toward the Claimant and its investments;

c) Is obligated to compensate the Claimant for:

(i) Damages caused by the Respondent in the form of:

a. The Lost Profits for **USD 155.9 million** or any other amount the Tribunal finds justified; AND

b. The Loss of the New Communal Facilities for **USD 20.4 million**;

(ii) **Alternatively**, damages caused by the Respondent in the form of the Lost Profits for **USD 31.87 million**;

(iii) Pre-award and post-award interest accrued on the amounts awarded by the Arbitral Tribunal;

(iv) Arbitration costs, including legal costs; and

(v) Grant the Claimant any such other relief the Arbitral Tribunal deems just and appropriate in the Dispute.

872. The Claimant reserves its right to amend or supplement its prayers for relief at any further stage of the proceedings as the Claimant may consider appropriate or necessary to enforce/and or defend its rights.

Respectfully submitted on behalf of the Claimant

V. Khvalei,
Baker McKenzie CIS Limited, Partner

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Exhibit C-221. Letter from Minsk City Executive Committee to Claimant of 5 January 2006 (with draft Addendum to the Investment Contract)

Exhibit C-222. Architectural design, *Organization of construction of the Trolleybus Depot*, Volume 2, Unitary Enterprise *Avtorempromproekt* at the Ministry of Industry of the Republic of Belarus, 2005

Exhibit C-223. Report of Republican Unitary Enterprise *Belgosekspertiza* [Belarusian state expert review] *of the Ministry of Construction and Architecture of the Republic of Belarus* of 17 September 2005

Exhibit C-224. Letter from Minsk City Executive Committee to Claimant of 19 November 2003

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Exhibit C-255. Official website of the Republic of Belarus, Press-release *Belarus President's Team Outplays Hockey Legends of the USSR in Friendly*, 20 May 2014

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Exhibit C-276. Website of news portal Russian Business Consulting, *Owners of Russol Broke through Offshores, the Major Russian Producer of Salt Disclosed All Beneficiaries*, 13 January 2017

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Exhibit C-308. Website of news portal TUT.BY, *Square, 19 December 2010, How It Was*, 20 December 2010

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