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

OOO MANOLIUM-PROCESSING

Claimant

v.

REPUBLIC OF BELARUS

Respondent

RESPONDENT'S POST-HEARING BRIEF

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28 November 2019

WHITE & CASE
Counsel for Respondent

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I. INTRODUCTION

1. The Respondent submits this Post-Hearing Brief ("**PHB**") pursuant to Procedural Order No. 1 dated 17 May 2018, the Tribunal's letter to the Parties dated 8 August 2019 and Annex 1 to Procedural Order No. 1 as amended on 27 September 2019. Unless otherwise defined in this PHB, the Respondent adopts the defined terms in the Defence and the Rejoinder.

II. THE TRIBUNAL DOES NOT HAVE JURISDICTION

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE TEMPORIS*

1. The EEU Treaty does not apply retroactively

2. This is the first investment arbitration claim brought under the EEU Treaty.[1] The Parties agree that unless a different intention appears from the EEU Treaty:

   a) the substantive provisions of the EEU Treaty do not apply retroactively to acts or facts which took place before it entered into force;[2] and

   b) the Tribunal does not have jurisdiction over disputes which arose before the EEU Treaty entered into force.[3]

3. The Claimant has abandoned its position that the substantive provisions of the EEU Treaty apply retroactively.[4] The Claimant now only argues that the intention for the Tribunal to have jurisdiction over disputes which arose before the EEU Treaty entered into force should be inferred, notwithstanding the lack of an express provision for the treaty's retroactive application.[5] For the reasons already given in its written submissions and further explained in the hearing, the Respondent submits that no such

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1 HT Day 1 (Respondent's Opening), 141:24-142:3.

2 Reply, paragraph 391, **CS-V**; Claimant's PHB, paragraph 9, **CS-VI**; Defence, paragraph 392, **RS-18**; Rejoinder, paragraph 625, **RS-19**.

3 Claimant's PHB, paragraphs 9-10, **CS-VI**; HT Day 1, (Claimant's Opening), 77:24-78:10; Defence, paragraphs 377-382, **RS-18**; Rejoinder, paragraphs 625-640, **RS-19**.

4 In the Reply, the Claimant avers that the substantive provisions of the EEU Treaty apply retroactively (Reply, paragraphs 403-411, **CS-V**). In its PHB, the Claimant no longer makes this argument (Claimant's PHB, paragraph 7, **CS-VI**).

5 Claimant's PHB, paragraphs 9-10, **CS-VI**.

intention is apparent from the EEU Treaty and the Claimant's submissions in the PHB do not alter this.[6]

4. If the Tribunal concludes that it does not have jurisdiction over disputes which arose before the EEU Treaty entered into force, the Tribunal must determine whether the Termination Dispute and/or the Tax Dispute arose before this date.

2. The Termination Dispute and the Tax Dispute arose before the EEU Treaty entered into force

(a) The Termination Dispute arose before the EEU Treaty entered into force

5. It is not in issue that Mr Dolgov threatened to submit a claim to an international court seeking compensation for the cost of the New Communal Facilities in April 2012.[7] Accordingly, the Termination Dispute had arisen by this time – as Mr Dolgov himself appeared to admit at the hearing.[8] The Supreme Court decision of 27 January 2015, like the decision of the Jordanian Court of Appeal in *ATA v. Jordan*, was the natural progression of this dispute, rather than the source of a new dispute.[9]

6. The Claimant asserts that the Termination Dispute cannot have arisen before 27 January 2015 because a denial of justice occasioned by a judicial action only occurs when the final judicial instance renders its decision.[10] Even if the Claimant were to have formulated its claim as a denial of justice (which it has actively chosen not to do[11]), this would not assist the Claimant.[12] As the tribunal noted in *ATA v.*

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6 HT Day 1, (Respondent's Opening), 153:12-155:19; Rejoinder, paragraphs 622-664, **RS-19**; Defence, paragraphs 375-390, **RS-18**.

7 Meeting minutes of 3 April 2012, **Exhibit R-79**.

8 Rejoinder, paragraphs 696 and footnote 1107, **RS-19**; HT Day 1 (Respondent's Opening), 159:1-18; HT Day 2 (Dolgov cross), 338:23-339:2 ("*Q. And Minsk City also invited Mr Ekavyan to Minsk, to come for a meeting to discuss the disagreement and dispute; is that right? A. Yes, that is correct, if this follows from their letter*."); Letter from MCEC to Claimant dated 18 June 2012, page 2, final paragraph, **Exhibit R-89**; Respondent's opening statement slides, slides 2 and 5, **H-3**.

9 Rejoinder, paragraphs 696-706, **RS-19**; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 103 – 108, **Exhibit RL-32**.

10 HT Day 1 (Claimant's Opening), 90:3-15; Claimant's PHB, paragraph 41, **CS-VI**.

11 Claimant's opening statement slides (Claims), slide 31, **H-2.3**.

12 Rejoinder, paragraph 701, **RS-19**.

Jordan, the moment in time when a denial of justice occurs is irrelevant to the question of when the underlying dispute arose.[13]

7. The Claimant also continues to muddle up the distinction between when a breach occurs, and when a dispute arises.[14] Whether a series of actions culminates in a breach after a treaty enters into force is a distinct issue from whether the underlying dispute arises before that date.[15]

(b) The Tax Dispute arose before the EEU Treaty came into force

8. The obligation for Manolium-Engineering to pay land taxes arose in January 2013 as a result of amendments to the Tax Code – not in 2016, as the Claimant asserts in its PHB.[16] It is not in issue that, in February 2014, the District Tax Inspectorate demanded that Manolium-Engineering pay its land taxes, and that Manolium-Engineering refused to do so.[17] Accordingly, the Tax Dispute arose at this time.[18]

9. The principal authority on which the Claimant relies, *Duke Energy v. Peru*, does not assist the Claimant.[19] In that case, the dispute concerned the Peruvian tax authorities' calculation of alleged tax underpayments by Duke Energy International Egenor S.A.A. ("**DEI Egenor**"), which DEI Egenor appealed to the Peruvian Tax Court after the BIT had come into force.[20] The tribunal held that the dispute did not arise until DEI Egenor refused to pay the taxes and appealed.[21] In the present case, on the other

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13 *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 107, **Exhibit RL-32**.

14 Claimant's PHB, paragraphs 43-44, **CS-VI**.

15 For instance, the tribunal in *ATA v. Jordan* held that the dispute arose before the BIT entered into force, even though the decision of the Jordanian Court of Appeal was rendered after that date (*see* footnote 13 above).

16 HT Day 1, (Respondent's Opening), 166:1-20, 274:11-19; Defence, paragraphs 313-320, **RS-18**; Claimant's PHB, paragraph 20, **CS-VI**.

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

18 HT Day 1, (Respondent's Opening), 159:19-160:5; Rejoinder, paragraph 707, **RS-19**; Respondent's opening statement slides, slides 3 and 5, **H-3**.

19 Claimant's PHB, paragraphs 21 and 24, **CS-VI**. The Claimant has exhibited the Award to *Duke Energy*, even though it is relying on the Decision on Jurisdiction.

20 *Duke Energy International Peru Investments No. 1, Ltd v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, paragraphs 60-65 and 146-149, **Exhibit RL-138**.

21 *Duke Energy International Peru Investments No. 1, Ltd v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, paragraphs 60-65 and 146-149, **Exhibit RL-138**.

hand, the District Tax Inspectorate first demanded that Manolium-Engineering pay the land taxes – and Manolium-Engineering refused to do so – in early 2014. Accordingly, the Tax Dispute (*i.e.* the dispute over Manolium-Engineering's tax liability) arose before the EEU Treaty came into force.[22]

B. THE TERMINATION OF THE AMENDED INVESTMENT CONTRACT AND THE PRE-TREATY TAXES CANNOT VIOLATE THE EEU TREATY *RATIONE TEMPORIS*

1. The termination of the Amended Investment Contract cannot breach the EEU Treaty *ratione temporis*

10. If the Claimant's claim concerning the termination of the Amended Investment Contract were a claim for denial of justice, it is not in issue that a denial of justice occurs on the date that the final judicial instance renders its decision.[23] However, the Claimant has chosen not to bring a claim for denial of justice.[24]

11. As the Claimant is not bringing a claim for denial of justice, the date of the alleged breach is the date when the Claimant lost its contractual rights, because it is the loss of such rights (including its contingent contractual right to develop the Investment Object) which gives rise to the Claimant's FET and expropriation claims regarding the termination of the contract.[25]

12. It is not in issue that, as a matter of Belarusian law, the termination of the Amended Investment Contract came into legal effect on 29 October 2014.[26] From 29 October 2014, the Claimant no longer had any rights under the Amended

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22 HT Day 1, (Respondent's Opening), 162:7-21; Rejoinder, paragraphs 707-723, **RS-19.**

23 *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 107, **Exhibit RL-32**; Claimant's PHB, paragraph 41, **CS-VI.**

24 While the concept of denial of justice is comprised within the FET standard, it requires a different set of tests to be satisfied (Rejoinder, paragraphs 949 – 955, **RS-19**). The Claimant has opted not to bring a claim for denial of justice (Claimant's opening statement slides (Claims), Slide 31, **H-2.3**).

25 Rejoinder, paragraphs 740 and 744-751, **RS-19**.

26 HT Day 1, (Claimant's Opening), 86:19-24; Notice, paragraphs 479, **CS-1**; Rejoinder, paragraph 386, 740 and 745-746, **RS-19**; Civil Code, Article 423(3), **Exhibit RL-127**; Belarusian Code of Commercial Procedure, Article 204, **Exhibit RL-50**.

Investment Contract.[27] Accordingly, as the Claimant lost its contractual rights before the EEU Treaty entered into force, the loss cannot give rise to a claim under the EEU Treaty.

2. The Pre-Treaty Taxes cannot breach the EEU Treaty *ratione temporis*

13. Manolium-Engineering's land taxes which accrued in respect of the 1 January 2013-31 December 2014 period (the "**Pre-Treaty Taxes**") also cannot constitute a breach of the EEU Treaty, because the EEU Treaty was not in force at the time they accrued. As follows from the amendments to the Second Tax Audit Report, the Pre-Treaty Taxes total approximately US$ 9.3 million.[28]

3. Article 18 of the Vienna Convention does not warrant the retroactive application of the EEU Treaty

14. At the hearing, Claimant's counsel raised a new argument that the EEU Treaty can be applied retroactively on the basis of Article 18 of the Vienna Convention.[29] Article 18 of the Vienna Convention is an application of the principle of good faith to ensure that the object and purpose of a treaty are not defeated by acts or omissions of its contracting parties prior to its entry into force, and does not itself warrant the retroactive application of a treaty.[30] In the present case, the Respondent did not commit any acts or omissions which defeat the object and purpose of the EEU Treaty prior to its entry into force and no evidence has been submitted by the Claimant in support of its position. The EEU Treaty also does not apply retroactively.[31] Accordingly, Article 18 of the Vienna Convention does not assist the Claimant.

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27 Rejoinder, paragraph 386 and 746, **RS-19**.

28 Amendments to Second Tax Audit Report dated 18 May 2017, page 1, **Exhibit C-186**; Land tax liabilities of Manolium-Engineering by year, **Exhibit R-251.**

29 HT Day 1, (Claimant's Opening), 83:14-22; Claimant's PHB, paragraphs 46-49, **CS-VI**.

30 *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraph 108, **Exhibit RL-1**.

31 As noted in paragraph 3 above, the Claimant no longer pursues the argument that the substantive provisions of the EEU Treaty apply retroactively.

C. THE NEW COMMUNAL FACILITIES ARE NOT THE CLAIMANT'S INVESTMENT

15. The Tribunal has asked the parties to consider the significance of the source of the funds received by the Claimant.[32] It is not in issue that the source of funds received by the Claimant is irrelevant to the question of whether the Tribunal has jurisdiction *ratione materiae*. The crux of the Respondent's *ratione materiae* objection, however, is that the funds were *not* received by the Claimant.[33] Instead, the funds were transferred by third parties directly to Manolium-Engineering (bypassing the Claimant altogether), with the Claimant itself not contributing anything or bearing any risk in respect of the New Communal Facilities.[34] Accordingly, the New Communal Facilities are neither an investment of the Claimant according to the definition in the EEU Treaty,[35] nor as that term has been discussed in investment treaty jurisprudence.[36]

III. THE BELARUSIAN COURTS LAWFULLY TERMINATED THE AMENDED INVESTMENT CONTRACT

16. It is not in issue that the Amended Investment Contract was terminated by the Belarusian courts, as required under Clause 16.2.1.[37] Accordingly, in order for the Claimant to prevail in the Termination Dispute, it must prove that the actions of the courts themselves violated the EEU Treaty.[38] Only if the Tribunal considers that

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32 Letter from Tribunal to the Parties dated 8 August 2019, **A22**.

33 Respondent's opening statement slides, slide 8, **H-3**.

34 It is not in dispute that the Claimant made no contribution in respect of the construction of the New Communal Facilities (Claimant's PHB, Image 1, page 29, **CS-VI**). As Mr Dolgov conceded, the Claimant did not have the financial means to fund the construction works itself (HT Day 2, (Dolgov cross), 308:8-13; Balance sheet of Manolium-Engineering as at 1 January 2013, **Exhibit C-389**). The construction of the New Communal Facilities did not involve any risk on the part of the Claimant, because the Claimant did not make any contribution and it was Mr Ekavyan that acted as guarantor for the loans to Manolium-Engineering for the construction of the New Communal Facilities (HT Day 2, (Dolgov cross), 357:15-22).

35 Rejoinder, paragraphs 865-888, **RS-19**.

36 *Romak SA (Switzerland) v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No AA280, Award (26 November 2009), paragraphs 180, 207 ("*the term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a* ***contribution*** *that extends over* ***a certain period of time*** *and that* ***involves some risk***") (emphasis added), **Exhibit RL-140**.

37 Amended Investment Contract, Clause 16.2.1 (Respondent's translation), **Exhibit C-66**.

38 HT Day 1, (Respondent's Opening), 199:7-22; Defence, paragraphs 623-625, **RS-18**; Rejoinder, paragraphs 1009-1012 and 1073-1078, **RS-19**; *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 97

MCEC's enforcement of its contractual right to apply to the courts to terminate the contract, submitted over a year before the EEU Treaty entered into force, is itself capable of breaching the EEU Treaty, must the Tribunal consider the proportionality of MCEC's submission of an application to the courts.[39]

A. MCEC ACTED REASONABLY AND PROPORTIONATELY BY APPLYING TO THE COURTS TO TERMINATE THE AMENDED INVESTMENT CONTRACT PURSUANT TO CLAUSE 16.2.1

17. MCEC became entitled under Clause 16.2.1 to apply to the courts to terminate the Amended Investment Contract when the Final Commissioning Date passed on 1 July 2011.[40] Given that the Claimant and Manolium-Engineering had already delayed the completion date by over two years, it would have been entirely reasonable and proportionate for MCEC to do so.[41]

18. The Claimant seeks to create the impression that MCEC was under an obligation to accept the Claimant's proposals after the Final Commissioning Date passed.[42] In fact, MCEC was under no obligation to accept the Claimant's proposals, nor was the Claimant under an obligation to accept MCEC's proposals. The only reason why MCEC engaged with the Claimant in good faith discussions for a further two years after the Final Commissioning Date passed, rather than immediately apply to the courts for termination, was that it was in MCEC's interests to try to find a way of enabling the project with the Claimant to go ahead.[43] Only when it became clear to MCEC that the Claimant had lost the appetite to develop the Investment Object altogether, and was only seeking to get back what Manolium-Engineering said it had

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and 99, **Exhibit RL-14**; *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, paragraph 313, **Exhibit RL-59**.

39 Reply, paragraphs 549-577 and 631-632, **CS-V**.

40 HT Day 1, (Respondent's Opening), 190:6-193:14; Rejoinder, paragraph 67-86, 107-188 and 1088 A, **RS-19**; Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraphs 102-104, **CWS-5**; Defence, paragraphs 76-98 and 206, **RS-18**.

41 HT Day 1, (Respondent's Opening), 190:6-199:6; Rejoinder, paragraph 67-86, 109-188 and 1088 A, **RS-19**.

42 See, *e.g.*, Reply, paragraphs 215-243, **CS-V**.

43 HT Day 1, (Respondent's Opening), 193:15-194:10; Rejoinder, paragraph 1088(B), **RS-19**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 23, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 57-59, **RWS-4**.

spent on the project so far, was MCEC finally left with no choice but to apply to the courts for termination.[44]

19. At the hearing, Claimant's counsel continued to misrepresent the nature and legal effect of its proposals after the Final Commissioning Date passed, in particular its proposal on 4 July 2011 (the "**4 July 2011 Proposal**").[45]

20. Under the 4 July 2011 Proposal, the contractual term for developing the Investment Object would have been in line with the statutory construction term.[46] As follows from legislation in force at the time, the statutory construction term would have started to run from the time that on-site preparatory work for the construction works began,[47] which was in turn dependent on Manolium-Engineering having applied for and been issued a construction permit by Gosstroy.[48] The consequence of the 4 July 2011 Proposal, therefore, which Claimant's counsel conveniently sidestepped at the hearing, was that Manolium-Engineering would have been able to postpone the deadline for the commissioning of the Investment Object indefinitely by (i) dragging out the process of submitting the documents necessary for Gosstroy to issue its construction permit or (ii) delaying the start of on-site preparatory work.[49] Mr Akhramenko confirmed this at the hearing.[50]

21. The schedules referred to in paragraph 39 of the Claimant's PHB are addenda to Additional Agreement No. 6, and not schedules to draft additional agreements

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44 *See* paragraphs 78-80 below; HT Day 1, (Respondent's Opening), 194:11-197:4; Rejoinder, paragraphs 260-274, 288-308, 328 - 331 and 1088C-(D, **RS-19**; Letter from Manolium-Engineering to the President of the Republic of Belarus dated 7 May 2012, **Exhibit R-86**; Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit H-4** (originally submitted with incorrect translation as **Exhibit C-83**).

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

46 Draft Supplemental Agreement dated 4 July 2011, **Exhibit R-65**. The term can be translated as either "*statutory*" or "*normative*" construction term. Respondent's counsel explained the concept of the statutory construction term at the hearing (HT Day 1 (Respondent's opening), 210:14-211:3).

47 Technical Code of Established Practice (in force from 1 July 2009 to 1 November 2016), paragraph 3.1, **Exhibit RL-144**. The phrase "*construction term*" refers to the statutory construction term.

48 Technical Code of Established Practice (in force from 1 July 2009 to 1 November 2016), Annex A, **Exhibit RL-144**.

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

50 HT Day 2, (Akhramenko's cross), 420:12-421:21.

exchanged after the Final Commissioning Date as the Claimant suggests.[51] This follows from the documents themselves,[52] and was confirmed by Mr Akhramenko at the hearing.[53] The Claimant's last-minute speculation that the only thing preventing MCEC from extending the Amended Investment Contract after the Final Commissioning Date was the absence of Mr Ekavyan's signature from the construction schedules is therefore in blatant disregard of the evidence it seeks to rely on.[54] MCEC's decision not to postpone the deadline for commissioning the New Communal Facilities after the Final Commissioning Date has nothing to do with the absence of Mr Ekavyan's signature from the addenda to Additional Agreement No. 6.

B. THE BELARUSIAN COURTS LAWFULLY TERMINATED THE AMENDED INVESTMENT CONTRACT

22. At the hearing (including in the 274 slides it submitted), Claimant's counsel made no submissions on the Termination Proceedings, and reiterated that it is not bringing a claim for denial of justice, and avoided discussing the substance of the court decisions in the Termination Proceedings altogether.[55] The Claimant also ignores the Termination Proceedings in its PHB. By doing so, the Claimant has effectively confirmed that it is no longer pursuing its claim that the Termination Proceedings violated the EEU Treaty. In the absence of violations of international law on the part of the courts, the Tribunal may dispose of the Claimant's claims concerning the termination of the Amended Investment Contract in their entirety.[56]

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51 Claimant's PHB, paragraph 39, **CS-VI**; Schedule for completion of Road construction, **Exhibit R-62**; Schedule for completion of Depot construction, **Exhibit R-63**; Additional Agreement No. 6 (Respondent's translation), **Exhibit C-76**.

52 For instance, the commissioning date for the Depot according to the table in **Exhibit R-63** is 1 July 2011. This must therefore be the schedule to Additional Agreement No. 6, which postponed the deadline to 1 July 2011 (Defence, paragraph 98, **RS-18**).

53 HT Day 2, (Akhramenko's cross), 443:2-24; First Witness Statement of Mr Akhramenko, paragraph 31, **RWS-2.**

54 Claimant's PHB, paragraph 39, **CS-VI**.

55 HT Day 1, (Respondent's Opening), 201:18-24; Claimant's opening statement slides (Facts), **H-2.1**; Claimant's opening statement slides (Claims), Slide 31, **H-2.3**.

56 *See* footnote 38 above.

C. THE CLAIMANT AND MANOLIUM-ENGINEERING WERE NOT ENTITLED TO COMPENSATION UPON THE TERMINATION OF THE AMENDED INVESTMENT CONTRACT

23. At the hearing, Claimant's counsel admitted that neither the Claimant nor Manolium-Engineering were entitled to compensation by the Belarusian courts in the Termination Proceedings, and quite rightly made no claim for compensation at the time.[57] However, the Claimant raises a new argument in its PHB that Manolium-Engineering was entitled to compensation under Article 682 of the Belarusian Civil Code ("**Civil Code**"), on the basis that the Amended Investment Contract was a construction contract.[58]

24. Article 682 of the Civil Code provides that if a works contract is "*terminated on any statutory or contractual grounds before the customer accepts the result of the contractor's works* […], *the customer may require that the results of the contractor's uncompleted works should still be transferred to the customer with compensation to the contractor for the costs incurred*."[59] Under the Civil Code, a construction contract (or "construction work contract") is a type of works contract.[60]

25. Accordingly, as follows from its plain wording, in order for Manolium-Engineering to be entitled to compensation pursuant to Article 682 of the Civil Code, it is necessary for the Tribunal to conclude that:

a) the Amended Investment Contract was a construction contract, with MCEC acting as customer[61] and Manolium-Engineering as contractor in respect of the construction of the New Communal Facilities; and

b) MCEC enforced its right under Article 682 of the Civil Code to require Manolium-Engineering to hand over the incomplete New Communal Facilities.

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57 HT Day 1 (Claimant's opening), 136:17-20.

58 Claimant's PHB, paragraph 62, **CS-VI**.

59 Civil Code, Article 682, **Exhibit CL-155**.

60 Civil Code, Article 656(2), **Exhibit CL-155**.

61 The Russian word for customer is sometimes translated as 'employer' or 'client'.

26. The Claimant has provided no evidence that the Amended Investment Contract was a construction contract. In fact, all the evidence points to the conclusion that the Amended Investment Contract was not a construction contract, as Mr Akhramenko unequivocally confirmed at the hearing and as the Claimant is fully aware.[62]

27. In Belarus, like in most jurisdictions, not all contracts relating to the building of immovable objects are classified as construction contracts. The customer under a construction contract is required to:

a) finance the construction;[63]

b) engage contractor(s) and engineers (if necessary) to carry out the construction;[64]

c) obtain the right to use the land plot on which the construction is conducted (either ownership or lease or right of temporary use);[65]

d) obtain construction permits;[66] and

e) choose a designer, enter into a contract with it and ensure that the designer prepares the Design Specification and Estimate Documentation.[67]

28. Manolium-Engineering was required to enter into construction contracts with subcontractors,[68] obtain land and construction permits[69] and enter into arrangements

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62 HT Day 2 (Akhramenko's cross), 425:6-18 ("*Q.* […] *Tell me, please, under law, if a facility is being built for the City and it is not completed* […] *you terminate the Contract. Normally--don't you normally take* […] *uncompleted facility in the shape it is at the time of the termination of the contract? A. You cited an example that applies to construction subcontracting agreement. We have a totally different contract. This is an Investment Contract, which is significantly different from a construction subcontracting contract, in terms of the participants, in terms of its nature and commitments*").

63 Belarusian law "On architecture, city construction and construction activities in Belarus" dated 5 July 2004, Article 1, ("**Construction Law**"), **Exhibit RL-139**.

64 Construction Law, Article 1, **Exhibit RL-139**.

65 Regulation "On the employer [customer] in construction" approved by the Order of Ministry of the Architecture and Construction No. 174 dated 22 June 1999, clauses 8.1.1-8.1.12, **Exhibit RL-111**.

66 Regulation "On the employer [customer] in construction" approved by the Order of Ministry of the Architecture and Construction No. 174 dated 22 June 1999, clause 8.2.15, **Exhibit RL-111**.

67 Regulation "On the employer [customer] in construction" approved by the Order of Ministry of the Architecture and Construction No. 174 dated 22 June 1999, clauses 8.2.1, 8.2.3-8.2.5, **Exhibit RL-111**.

68 Amended Investment Contract, Clause 8.1 (Respondent's translation) ("*Manolium-Engineering shall* […] *implement the investment project according to the terms and conditions of this* [Investment]

with a designer for the preparation of the Design Specification and Estimate Documentation.[70] The Claimant and Manolium-Engineering were also required to finance the construction of the New Communal Facilities,[71] including the settlement of payments with contractors.[72] If MCEC were the customer, as the Claimant suggests, it would have been required to do so itself.

29. Accordingly, Manolium-Engineering acted as customer in respect of the construction of the New Communal Facilities, not MCEC. As the Amended Investment Contract was not a construction contract and MCEC was not the customer in respect of the New Communal Facilities, the Claimant is not entitled to compensation under Article 682 of the Civil Code.[73]

30. Given that the incomplete New Communal Facilities remained in Manolium-Engineering's ownership, there was also no enrichment on the side of MCEC. Accordingly, the law of unjust enrichment is inapplicable.[74]

31. Neither the Claimant nor Manolium-Engineering have ever applied to the Belarusian courts seeking compensation under Articles 682 of the Civil Code[75] or for unjust

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Contract […] *and* […] ***subject to*** […] ***construction contracts***" (emphasis added)) **Exhibit C-66**. As follows from the headings and recitals of its construction contracts, Manolium-Engineering acted as the customer (**Exhibits R-173**, **R-174**, **R-178**, **R-179**, **R-182**, **R-183**, **R-184**, **R-187**).

69 It is not in issue that Manolium-Engineering was required to obtain land and construction permits in respect of the New Communal Facilities and the land plots on which they were to be built (Claimant's PHB, paragraph 30, **CS-VI**; Amended Investment Contract, Clause 8.1 (Respondent's translation), **Exhibit C-66**).

70 Amended Investment Contract, Clauses 8.1, 8.2, 8.6, 8.7 and 8.10 (Respondent's translation), **Exhibit C-66**. At the hearing, Claimant's counsel admitted that designers were working for Manolium-Engineering under the Amended Investment Contract (HT Day 1 (Claimant's opening), 43:19-21).

71 Amended Investment Contract, Clauses 7.1, 7.3, 7.10, 8.2, 8.3, 8.7, 8.19 (Respondent's translation), **Exhibit C-66**.

72 Amended Investment Contract, Clause 8.7 (Respondent's translation), **Exhibit C-66**.

73 Even if the Amended Investment Contract were a construction contract – which, for the reasons already given, it was not – MCEC still would not have been under an "*obligation*" to compensate Manolium-Engineering, as the Claimant asserts. As follows from its plain wording, Article 682 of the Civil Code entitles the customer to require the contractor to hand over construction works upon the termination of the contract in exchange for compensation. After the termination of the Amended Investment Contract, the New Communal Facilities remained in Manolium-Engineering's ownership. Accordingly, even if Article 682 of the Civil Code were to apply, any contingent right to compensation on the part of Manolium-Engineering would never have arisen.

74 Claimant's PHB, paragraph 62, **CS-VI**. Tellingly, at the hearing Claimant's counsel admitted that unjust enrichment rules do not apply to the case at hand: (HT Day 1 (Claimant's opening) 137:7-10. "[MR. KHVALEI:] *Or, at least if the Party who could get all ownership or title to it was not a Party to the Contract,* ***which is not the case****, you still have provisional unjust enrichment.*").

75 Civil Code, Article 682, **Exhibit CL-155**.

enrichment.[76] This is because the Claimant does not genuinely believe that these provisions apply.

32. As the Amended Investment Contract was not a construction contract, and as there were no other specific regulations governing the termination of the Amended Investment Contract in Belarus, the general provisions on contractual termination under Article 423 apply to the Amended Investment Contract.[77] Pursuant to Article 423(1)-(4) of the Civil Code, the parties to the Amended Investment Contract were discharged of their obligations from the moment the decision of the Appeal Instance Court came into force on 29 October 2014.[78] Manolium-Engineering remained the owner of the incomplete New Communal Facilities upon termination, but was under no obligation to complete them or transfer them into municipal ownership. Equally, MCEC was under no obligation to accept the New Communal Facilities into municipal ownership or to pay compensation to Manolium-Engineering for them.[79]

IV. THE TAX MEASURES WERE LEGITIMATE

33. In order for the Claimant to succeed in its argument that the Respondent's application of tax measures in respect of Manolium-Engineering breached the EEU Treaty, the Claimant must prove that:

a) the Respondent applied its tax legislation arbitrarily, abusively or non-transparently in respect of Manolium-Engineering;[80]

b) the Respondent violated Manolium-Engineering's rights of due process in respect of the tax measures;[81] or

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76 Civil Code, Articles 971 and 974, **Exhibit CL-155**.

77 Civil Code, Article 423, **Exhibit RL-127**.

78 Civil Code, Article 423, **Exhibit RL-127**.

79 HT Day 1 (Respondent's opening), 148:3-19, 263:5-12; Defence, paragraphs 264-265**, RS-18**; Rejoinder, paragraphs, 381-386, 438, 806, 836, **RS-19**.

80 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paragraph 502-506, **Exhibit CL-30**; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, paragraph 628 and 630, **Exhibit CL-117**; *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, paragraphs 472-473, **Exhibit CL-119**.

81 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paragraph 504, **Exhibit CL-30**.

c) the Respondent had an obligation to refrain from enforcing Manolium-Engineering's tax liabilities.[82]

34. On the other hand, as the tribunal stated in *RosInvestCo. v. Russia*, it is "*undisputed* […] *that the normal application of domestic tax law in the host state cannot be seen as an expropriatory act*".[83]

A. THE LAND TAX MEASURES IN RESPECT OF MANOLIUM-ENGINEERING WERE LEGITIMATE

35. It is not in issue between the Parties that:

a) the Belarusian land tax regime applied to Manolium-Engineering[84] and that the changes to the Tax Code in 2013 were introduced in good faith;[85]

b) occupation of a land plot after the expiry of the statutory construction term results in the application of a doubled rate of land tax;[86]

c) occupation of a land plot without a valid land permit results in the application of a tenfold rate of land tax;[87]

d) Manolium-Engineering wilfully ignored the demands of the tax authorities in 2014 to comply with its land tax obligations;[88] and

e) Manolium-Engineering had the right to appeal the 2016 tax assessments and the 2016 Enforcement Proceedings, but did not do so.[89]

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82 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011, paragraph 506 ("*Claimant could not reasonably have expected that the Romanian authorities would refrain from resolving reasonable concerns they might have concerning Claimant's fulfilment of its tax obligations.*"), **Exhibit CL-30**.

83 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, paragraph 628, **Exhibit CL-117**.

84 Defence, paragraphs 313-320, **RS-18**; HT Day 1 (Respondent's Opening), 205:25-206:16.

85 Defence, paragraphs 317-318, **RS-18**; Rejoinder, paragraph 526, **RS-19**.

86 Claimant's PHB, paragraph 32, **CS-VI**; Defence, paragraph 315, **RS-18**.

87 Claimant's PHB, paragraph 32, **CS-VI**; Defence, paragraph 314, **RS-18**.

88 Defence, paragraph 321, **RS-18**; Witness Statement of Ms [redacted], paragraphs 26-38, **RWS-3**; Internal Mamorandum of Ms [redacted] to Mr Dolgov dated 15 March 2013, **Exhibit R-7**; Internal Mamorandum of Ms [redacted] to Mr Dolgov dated 20 February 2014, **Exhibit R-202**.

36. It is not in issue that the statutory construction term in respect of the New Communal Facilities expired long before 2013, when the liability to account for and pay separately the land tax arose.[90] Accordingly, the application of the double rate of land tax in respect of Manolium-Engineering was legitimate, because Manolium-Engineering continued to occupy the land plots on which the incomplete New Communal Facilities were located after this date.[91]

37. The application of the tenfold rate of land tax in respect of Manolium-Engineering was also applied legitimately, because Manolium-Engineering continued to occupy the land plots on which the New Communal Facilities were located after Manolium-Engineering's right to the land expired on 1 July 2011. As explained in this section:

a) Manolium-Engineering continued to occupy the land plots after 1 July 2011 (not in issue);

b) Manolium-Engineering never applied to extend its land permits before they expired on 1 July 2011, and never applied for new permits after that date (not in issue); and

c) the Claimant's contention that Manolium-Engineering could not have obtained the land permits after the termination of the Amended Investment Contract has no basis in fact or law.

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89 Defence, paragraph 323, 328-329, 331, 335, **RS-18**; Rejoinder, paragraphs 1166-1170, **RS-19**; HT Day 1 (Respondent's opening), 222:9-223:9.

90 HT Day 1 (Respondent's opening), 210:24-211:3. The statutory construction term for the Depot (the facility with the longest statutory construction term) was 27 months (Reply, footnote 43 to paragraph 40, **CS-V**), and started to run from the time that on-site preparatory work for the construction works began (although the Technical Code of Established Practice **Exhibit RL-144** referred to in paragraph 20 above entered into force on 1 July 2009, the regulation previously in force (Construction Rules and Regulations of 1991, SNiP 1.04.03-85) contained the same rule). The construction permit for the Depot was issued and the preparatory construction works began in mid-2007 (Construction permit for preparing the construction site dated 16 July 2007, **Exhibit R-32;** Defence, paragraphs 120-122, **RS-18**).

91 *See* paragraphs 49-55 below; Rejoinder, paragraphs 520-524, **RS-19**.

1. Regulation and application of land tax and its relationship with land permits

38. The Tribunal invited the parties to provide further briefing on the regulation and application of land tax in Belarus and its relationship with land permits.[92]

39. The Respondent describes the applicable tax regime in paragraphs 313-320 of the Defence and paragraphs 515-546 of the Rejoinder. Respondent's counsel reiterated the position at the hearing.[93] The Claimant repeatedly failed to articulate its position on the applicable tax regime until expressly requested to do so by the Tribunal. As is evident from paragraphs 25-29 and 31-32 of Claimant's PHB and paragraph 35 above, the Parties are generally in agreement with regard to the regulation and application of land taxes in Belarus. In this PHB, the Respondent sets out its position in relation to the issues on which the Parties disagree.

2. The issuance of land permits is not conditional upon the Amended Investment Contract being in force

40. It is not in issue that Manolium-Engineering's land permits for the plots on which the incomplete New Communal Facilities were located expired on 1 July 2011.[94] Having insisted throughout these proceedings that Manolium-Engineering applied for an extension of the land permits,[95] the Claimant and Mr Dolgov finally admitted at the hearing that it did not do so.[96] Instead, the Claimant now contends that the land

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92 Letter from the Tribunal to the Parties dated 8 August 2019, paragraph 3, **A22**.

93 HT Day 1 (Respondent's Opening), 148:3-152:1, 204:25-211:15.

94 Claimant's PHB, paragraph 30, **CS-VI**; HT Day 2 (Dolgov's re-direct), 353:5-8; HT Day 1 (Claimant's opening), 45:20-21; Reply, paragraph 340, **CS-V**; Rejoinder, paragraph 371, **RS-19**; Defence, paragraph 305, **RS-18**.

95 First Witness Statement of Mr Dolgov dated 10 May 2018, paragraph 52, **CWS-1;** Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraph 115, **CWS-5**; Reply, paragraphs 49(iii), 214, 232, 332, **CS-V**; Notice, paragraph 242, **CS-I**; Letters from White & Case to Baker McKenzie dated 23 and 25 July 2018, **Exhibits R-155** and **R-156**; Letters from Baker McKenzie to White & Case dated 24 and 27 July 2018, **Exhibits R-157** and **R-158**.

96 At the hearing Mr Dolgov argued that "[i]*t* [was] *impossible to request the* [land and construction] *permit*[s]", implying that Manolium-Engineering never applied for them (HT Day 2 (Dolgov's re-direct), 353:20); Claimant's opening statement slides (Facts), slide 46, **H-2.1**; HT Day 1 (Questions from the Tribunal), 277:21-278:7.

permits could not have been granted after the termination of the Amended Investment Contract.[97]

41. The Claimant's position that it could not have been granted an extension of its land permit after the termination of the Amended Investment Contract is unsupported save for its assertion that "*the land user* […] *must provide* '*documents certifying the right to the land plot*' *in its application*" [98] to extend the land permits pursuant to Clause 44 of the Regulation "On Withdrawal and Allotment of Land Plots" ("**Land Allotment Regulation**").[99]

42. Clause 44 of the Land Allotment Regulation concerns only the extension of land permits, which must be applied for at least two months before the current permits expire.[100] Accordingly, at the time that Manolium-Engineering was able to extend its permit pursuant to Clause 44 (*i.e.* by 1 May 2011), the Amended Investment Contract was still in force.

43. Moreover, the Amended Investment Contract does not fall within the scope of "*documents certifying the right to the land plot*" for the purposes of Clause 44 of the Land Allotment Regulation. Rather, the documents referred to are those confirming the applicant's current formal right to the land plots, such as current permits which are about to expire and are subject to extension. Clause 44 also does not require that the land user "*provide*" these documents, as they are already kept with the land registry. The information which the applicant needs to provide to get the permits extended is set out in Clause 45 (not in Clause 44 as the Claimant alleges) and it includes the reasoning for the extension and the duration of the extension requested.[101]

44. Twice during the lifetime of the project, Manolium-Engineering applied for and was granted extensions of the land permits after the contractual deadline for constructing the New Communal Facilities had passed, and before it was extended by a new

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97 HT Day 1 (Questions from the Tribunal), 277:21-278:7; Claimant's opening statement slides (Facts), slide 46, **H-2.1**; HT Day 2 (Dolgov's direct), 289:12-290:1.

98 Claimant's PHB, paragraph 30, **CS-VI**.

99 Land Allotment Regulation, Clause 44, **Exhibit CL-154**.

100 Land Allotment Regulation, Clause 45, **Exhibit CL-154**.

101 Land Allotment Regulation, Clause 45, **Exhibit CL-154**.

additional agreement.[102] Accordingly, Manolium-Engineering was fully aware of the procedure.

45. To obtain new land permits after the expiry of the existing permits on 1 July 2011, Manolium-Engineering had to submit an application based on Clause 35 of the Land Allotment Regulation. In its application, Manolium-Engineering had to set out the intended purpose for the issuance of the permits,[103] for example the construction or laying-up of the New Communal Facilities,[104] documents confirming its ownership of the facilities,[105] and other information such as the type of permit requested, the location of the land and the means of financing.[106] The granting of a new land permit was therefore not conditional either upon the Amended Investment Contract being in force, or upon Manolium-Engineering having valid construction permits.[107] In fact, as is apparent from contemporaneous evidence submitted in these proceedings, MCEC granted Manolium-Engineering new land permits after the expiry of its construction permits on several occasions.[108]

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102 HT Day 1 (Respondent's opening) 211:23-212:15; Additional Agreement No. 5 (Respondent's translation), **Exhibit C-72**; Decision of MCEC dated 3 September 2009, **Exhibit C-263**; Decision of MCEC dated 16 September 2010, **Exhibit C-267**; Additional Agreement No.6 (Respondent's translation), **Exhibit C-76**.

103 Land Allotment Regulation, Clause 35, Subsection 11.1, **Exhibit RL-119**.

104 Subsection 11.1 of the Land Allotment Regulation expressly provides that land permits are issued to legal entities: (i) for the purpose of carrying out construction works on the land; and (ii) which own laid-up (mothballed) buildings on the land (Land Allotment Regulation, subsection 11.1, **Exhibit RL-119**).

105 Land Allotment Regulation, Clause 35, **Exhibit RL-119**.

106 Land Allotment Regulation, Clause 35, **Exhibit RL-119**.

107 In any event, there was nothing preventing Manolium-Engineering from being granted a new construction permit after the expiry of its land permits. For example, Manolium-Engineering was issued new construction permits three times after its land permits had expired and the construction deadlines for the New Communal Facilities had passed: on 18 July 2011; 8 August 2011; and 3 October 2011 (Letter from Manolium-Engineering to MCEC dated 11 September 2008, bottom of page two, **Exhibit R-71**).

108 MCEC granted Manolium-Engineering a new land permit for the Depot on 16 September 2010, when Manolium-Engineering's construction permit for the Depot had expired on 31 August 2010 (Decision of MCEC dated 16 September 2010, **Exhibit C-267**; Construction permit issued by Gosstroy for constructing the Depot dated 21 April 2010, bottom of page 1, **Exhibit C-266**). MCEC also granted Manolium-Engineering a new land permit for the Road on 16 September 2010, when Manolium-Engineering's construction permit for the Road had expired on 30 August 2010 (Decision of MCEC dated 16 September 2010, **Exhibit C-75**; Information about the Road, page 1 ("*Permit issue history*"), **Exhibit R-36**).

46. In summary,[109] depending on its intentions as to the New Communal Facilities, Manolium-Engineering could have applied for an extension of the land permits (before 1 May 2011[110]) or new land permits (after 1 May 2011) with a view to:

a) complete the construction; or

b) if, it did not intend to complete the construction, to lay-up the facilities.

47. Upon applying for and being issued the land permits, Manolium-Engineering would have been relieved of the obligation to pay land taxes at a tenfold rate. It is not in issue that Manolium-Engineering never applied.

48. Finally, even if the Claimant were correct that it was necessary for the Amended Investment Contract to be in force for Manolium-Engineering to be granted a new land permit (which is denied, as explained above), Manolium-Engineering's liability to pay the land taxes at a tenfold increased rate between 1 January 2013 (when the amendments to the Tax Code came into force) and 29 October 2014 (when the Amended Investment Contract was terminated) is undisputed.[111]

3. Manolium-Engineering continued to occupy the land plots after 1 July 2011

49. Manolium-Engineering's failure to apply for an extension of the land permits beyond 2011, or apply for new permits after that date, resulted in an obligation to vacate the land plots and return them to MCEC.[112] Failure to return and vacate the land leads to further consequences.

50. The Claimant alleges that:

a) Manolium-Engineering did not "*use*" the land plots after mid-2012;[113] and

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109 Rejoinder, paragraphs 455-489, **RS-19**; HT Day 2 (Akhramenko's cross), 431:21-432:6, 435:2-4; Land Allotment Regulation, Clauses 35, 44-45 and subsection 11.1, **Exhibit RL-119**.

110 Two months before expiration of the land permits, as required by Clause 45 of Land Allotment Regulation, **Exhibit RL-119**.

111 Land tax liabilities of Manolium-Engineering by year, **Exhibit R-251**.

112 Land Code, Article 70, **Exhibit CL-152**.

113 Claimant's PHB, paragraph 34, **CS-VI**.

b) MCEC should have seized the land plots on its own motion.[114]

51. It is not in issue between the Parties that under Belarusian law unauthorized occupation means any use of the land without the right to do so.[115] Pursuant to Article 1 of the Belarusian Land Code ("**Land Code**"), "*land use*" is broadly defined as "*business and other activity, in the process of which the* […] *characteristics of the land* [and/or] *the land plots are being utilized and (or) affected*."[116] Accordingly, a land plot is deemed to be used if the property belonging to an entity or person is on the land.[117] However inconvenient or burdensome the Claimant may find it in hindsight, this was part of the legal regime that it accepted when it made its investment into Belarus.

52. Mr Dolgov's own letter to MCEC on 21 April 2016, in which he expressed concern that the New Communal Facilities had not been used in the interests of Minsk during the previous six years, also evidences that MCEC and Minkstrans were not using the New Communal Facilities.[118] The Claimant's suggestion to the contrary is therefore contradicted by its own evidence.[119]

53. For the first time in its PHB, the Claimant asserts that there was an obligation on the part of MCEC to provide Manolium-Engineering with notice as to the steps it should take to transfer the New Communal Facilities.[120] This allegation is unsupported and rests on a misinterpretation and misapplication of Article 72 of the Belarusian Land Code, which concerns only demolition and who bears the cost of demolition:

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114 Claimant's PHB, paragraphs 36-37, **CS-VI**.

115 Claimant's PHB, paragraph 31, **CS-VI**; Land Code, Article 72, **Exhibit CL-152**.

116 Land Code, Article 1, **Exhibit CL-152**. The Respondent has made certain minor amendments to the Claimant's translation.

117 Rejoinder, paragraphs 520-531, **RS-19**.

118 Letter from Mr Dolgov to MCEC dated 21 April 2016, **Exhibit C-161**.

119 Claimant's PHB, paragraph 34, **CS-VI**; HT Day 1 (Claimant's opening) 59:11-20, 61:2-10, 65:15-16, 99:19-22; Reply, paragraphs 276-277, 301, 306, 309, 314, 342(iii), 869(ii) **CS-V**.

120 Claimant's PHB, paragraph 37. During the written stage of the proceedings Claimant either alleged that (i) it applied for an extension of the land permits (Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraph 115, **CWS-5**; First Witness Statement of Mr Dolgov dated 10 May 2018, paragraph 52, **CWS-1**; Reply, paragraphs 49(iii), 214, 232, 332, **CS-V**; Notice, paragraph 242, **CS-I**); or (ii) after the expiration of the land permits, the right to use the land is automatically restored to the City (Reply, paragraph 340, **CS-5**).

[2] *A land plot occupied without authorization shall be returned to whomever it belongs, in the manner stipulated in Part 3 of this Article, and without any reimbursement being due to the party having incurred any costs over the time of using the land plot illegitimately. The land plot shall be restored to a condition making it fit for use as designated, and the structures located on the land plot shall be demolished, at the cost of the party having occupied it without authorization.*

[3] *The return of a land plot occupied without authorization shall take place on the basis of an appropriate decision made by the Minsk City, city (in cities of regional subordination), district, rural, or settlement executive committee in accordance with the latter's competence, ordering the return of the land plot occupied without authorization, the demolition of a structure erected without authorization, and the action required in order to restore the land plot to a condition making it fit for use as designated, and setting appropriate deadlines for the steps concerned.*

[4] *Should the party having occupied a land plot without authorization refuse to comply with the decision of the respective executive committee specified in Part 3 of this article, the executive committee shall demolish the structure erected without authorization and shall restore the land plot to a condition making it fit for use as designated.*

[5] *Reimbursement of expenses arising from the return of the land plot that had been occupied without authorization, demolition of the unauthorized structure and restoration of the land plot to a condition making it fit for use as designated shall be made through legal proceedings.*[121]

54. If MCEC had demolished the New Communal Facilities under Article 72 of the Land Code, it would have been entitled to seek reimbursement of the cost of doing so from Manolium-Engineering in court.[122] Instead of implementing this draconian measure, MCEC entered into good faith discussions with Manolium-Engineering regarding the possibility of buying the incomplete New Communal Facilities.[123] As Manolium-Engineering was unwilling to complete the construction or lay-up the facilities, this was the only option for MCEC other than to have the facilities demolished.

55. The Claimant speculates for the first time in its PHB that MCEC could have accepted the land plots not occupied by the Depot, Pull Station and Road.[124] Manolium-Engineering obtained land permits for five land plots for the construction of the New Communal Facilities. Contrary to what the Claimant now asserts, every one of these

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121 Land Code, Article 72, **CL-152**. The Respondent has made a minor change to the translation in the above quotation, changing "*for the account of the party*" to "*at the cost of the party*" in the second paragraph.

122 Land Code, Article 72, **CL-152**.

123 As described in Defence, paragraphs 264-298, **RS-18**; First Witness Statement of Mr Akhramenko, paragraphs 125-145, **RWS-2**.

124 Claimant's PHB, paragraph 38, **CS-VI**.

land plots was occupied by either infrastructure owned by Manolium-Engineering (pipes, asphalt, building materials, etc.) or the New Communal Facilities themselves. Accordingly, none of the land plots could have been accepted into municipal ownership, because they were all occupied by Manolium-Engineering's property.[125]

B. MR DOLGOV WAS AWARE OF MANOLIUM-ENGINEERING'S OBLIGATION TO PAY LAND TAX BUT DECIDED NOT TO PAY

56. In the course of these proceedings, the Claimant has provided three mutually-exclusive and contradictory explanations as to why Manolium-Engineering did not pay land taxes after 2013, namely that:

a) the land plots for construction of the New Communal Facilities were deemed to be automatically returned as soon as the land permits expired;[126]

b) Manolium-Engineering was relying on the decision of the District Court in the 2012 Administrative Proceedings;[127] and

c) Manolium-Engineering was released from paying land taxes by an unidentified presidential decree.[128]

57. The Respondent has already explained that the concept of automatic restoration of land upon the expiry of land permits does not exist in Belarus.[129] The Claimant has not provided any evidence to the contrary.

58. As for the 2012 Administrative Proceedings, the Respondent explains in the Rejoinder that the reason why the District Court concluded that Manolium-Engineering was

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125 As the Respondent explains in its submissions, the only way to return the land plots into municipal ownership was to transfer the New Communal Facilities simultaneously with the land. That could only happen if Manolium-Engineering completed the New Communal Facilities (while the Amended Investment Contract was in force) or if Manolium-Engineering and MCEC agreed on terms for the acquisition of the New Communal Facilities (after the termination of the Amended Investment Contract) (Defence, paragraphs 188, 301-303, **RS-18**; Rejoinder, paragraph 521-524 and 533, **RS-19**; HT Day 1 (Respondent's Opening), 214:5-10, 215:5-216:18). MCEC explained this to Manolium-Engineering in response to its "*requests*" to return the land (*See*, *e.g.*, Letter from MCEC to Manolium-Engineering dated 17 July 2012, **Exhibit C-337**).

126 Reply, paragraphs 339-340, **CS-V**. HT Day 2 (Dolgov's cross), 343:14-22.

127 Claimant's PHB, paragraph 34, **CS-VI**.

128 HT Day 1 (Claimant's opening), 139:3-17.

129 Rejoinder, paragraph 523-525, **RS-19**; HT Day 1 (Respondent's Opening), 213:23-214:4.

taking all measures to comply with administrative requirements was that at the time Manolium-Engineering had deliberately misled it in respect of the key facts regarding its permits.[130] Quite apart from this, the District Court's decision could not reasonably have been interpreted by Manolium-Engineering as a justification for it to continue occupying the land plots without paying land tax, because the decision had nothing to do with tax.[131] The amendments to the Tax Code had not even come into force at the time the District Court issued its decision.[132] The Claimant did not challenge the Respondent's position on the 2012 Administrative Proceedings in the hearing or in its PHB. Instead, it chooses to just repeat the same assertions which are entirely without basis and are not supported by any evidence.

59. Lastly, the Claimant has not offered any evidence that a presidential decree releasing it from paying land taxes ever existed. If such a benefit had been granted to Manolium-Engineering, it is not credible that there would be no evidence of it whatsoever given the extensive correspondence between the parties. On the contrary, there is plenty of evidence (none of which is challenged by the Claimant) that Mr Dolgov was aware that Manolium-Engineering had an obligation to pay land tax, but chose to ignore it, in particular that:

a) Manolium-Engineering's own chief accountant repeatedly told Mr Dolgov that Manolium-Engineering was required to pay land tax;[133]

b) the public land register records showed that Manolium-Engineering was using the land plots for the construction of the New Communal Facilities;[134] and

c) in 2014, Manolium-Engineering received demands from the tax authorities to pay land tax in respect of the land plots.[135]

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130 Manolium-Engineering misled the court into believing that it had applied for all of the necessary construction permits. In fact, Manolium-Engineering had yet again failed to comply with the formal procedure in respect of the construction permits, and never applied to extend or renew its land permits after 1 July 2011 (Rejoinder, paragraphs 495-503, **RS-19**).

131 Rejoinder, paragraphs 495-503, **RS-19**; Resolution of Pervomayskiy district court of Minsk dated 23 July 2012, **Exhibit C-346**.

132 Defence, paragraphs 313-320, **RS-18**.

133 Internal Memoranda of Ms [redacted] to Mr Dolgov dated 15 March 2013 and 20 February 2014, **Exhibits R-7** and **R-202**; Witness Statement of [redacted], paragraphs 30-33, **RWS-3**.

134 Witness Statement of [redacted], paragraph 28 ("*I also learned from public sources that those land plots were registered to Manolium-Engineering*"), **RWS-3**.

60. Accordingly, the Claimant's contention that Manolium-Engineering was unaware of its obligation to pay land tax is simply not credible.

61. The Claimant's suggestion that Manolium-Engineering had a legitimate expectation to be released from paying land tax on the basis that the tax authorities had "[i]*gnored the* [p]*urported Land Tax for* [y]*ears*" is also rejected.[136]

62. That Manolium-Engineering chose to ignore the demands of the tax authorities in 2014 did not mean that it was excused from having to pay the taxes or that its liabilities would cease to accrue. Moreover, as a general rule the Belarusian tax authorities are prohibited from interfering in the normal business operations of legal entities and conducting tax audits too frequently.[137] For example, the tax authorities are expressly prohibited, subject to certain exceptions, from conducting on-field tax audits more than once every five years.[138] Accordingly, there was no requirement under Belarusian law for the tax authorities to enforce Manolium-Engineering's outstanding taxes before 2016, around three years after the obligation arose and the taxes started to accrue.

C. THE RESPONDENT LEGITIMATELY ENFORCED MANOLIUM-ENGINEERING'S LAND TAXES

63. The Claimant has alleged at various times during the proceedings that the Respondent hatched a plan to expropriate its investment through the courts' termination of the Amended Investment Contract and the tax measures carried out in respect of Manolium-Engineering. The Claimant's position as to when this alleged plan was formed and for what reason has kept changing.

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135 Demands from the Tax Inspectorate for the Central District of Minsk dated 21 February 2014, **Exhibits R-111** and **R-112**.

136 The Claimant makes this allegation in the title to section B.3 of its PHB only, **CS-VI**.

137 President's Decree No. 510 dated 16 October 2009 "On Improvement of Control (Supervisory) Work in the Republic of Belarus" (edition in force from 8 May 2015 to 12 February 2016), clause 15, **Exhibit RL-141**. Presidents Directive No. 4 dated 31 December 2010 "On development of entrepreneurship initiative and stimulation of business activities in the Republic of Belarus", clause 5.2.1, **Exhibit RL-142**.

138 President's Decree No. 510 dated 16 October 2009 "On Improvement of Control (Supervisory) Work in the Republic of Belarus" (edition in force from 8 May 2015 to 12 February 2016), paragraph 3 of clause 7, **Exhibit RL-141**. In line with this, Manolium-Engineering's first tax audit was conducted on 13 July 2010, approximately 7 years after its incorporation (Second Tax Audit Report dated 24 March 2017, page 2, final paragraph-page 3, first paragraph, **Exhibit C-187**).

64. The Claimant now appears to have abandoned one of its dominant arguments that the plan to expropriate its investment emerged in 2011, following the alleged interrogation of Mr Dolgov by KGB officials.[139] The Claimant also appears to have abandoned its argument that Manolium-Engineering's tax liabilities were an "*instrument of the implementation of the President's official instruction*".[140] Instead, the Claimant now argues that the plan to expropriate the incomplete New Communal Facilities was put together in February 2016, when the Respondent allegedly created an "*artificial liability* […] *in an amount sufficient to justify its seizure of the New Communal Facilities without compensation.*"[141] This allegation is entirely unsupported and has no legal or factual basis.

65. By inviting the Tribunal to find that the Respondent created an "*artificial liability*", the Claimant seeks to divert attention from its demonstrative and complete disregard for provisions of local land tax law (supported by ample evidence in this proceedings[142]), which led to the enforcement of taxes against the New Communal Facilities.

66. The Claimant does not dispute that the tax audits were conducted in compliance with Belarusian tax law and that Manolium-Engineering's due process rights were respected at all relevant times.[143] Instead, the Claimant places great reliance on internal correspondence between MCEC, the Council of Ministers and the President's Administration in February 2016, in particular MCEC's letter to the Council of Ministers dated 29 February 2016.[144] However, nothing in this correspondence

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139 Reply, paragraphs 192-197, **CS-V**. Mr Dolgov's allegation regarding the KGB interrogations is also contradicted by his own statement at the hearing that the alleged problems with the project began after Mr Pavlov, ex-mayor of Minsk, stepped down from his position (HT Day 2 (Dolgov's cross), 336:23-338:2), which happened some two years before the alleged KGB interrogations.

140 Reply, paragraph 592, **CS-V**; Rejoinder, paragraphs 547 – 575, **RS-19**.

141 Claimant's PHB, paragraph 18, **CS-VI**.

142 Demands from the Tax Inspectorate for the Central District of Minsk dated 21 February 2014, **Exhibits R-111** and **R-112**; Internal Memoranda of Ms [redacted] to Mr Dolgov dated 15 March 2013 and 20 February 2014, **Exhibits R-7** and **R-202**; Witness Statement of [redacted], paragraphs 28, 30-33, **RWS-3**.

143 Defence, paragraphs 313-362, 323, 328-329, 331, 335 and 583-611, **RS-18**; Rejoinder, paragraph 1140-1141 and 1166-1172, **RS-19**; HT Day 1 (Respondent's opening), 222:9-223:9.

144 MCEC's letter of 29 February 2016 (**Exhibit R-140**), which the Claimant completely ignored in its written submissions, has now apparently become a central pillar of the Claimant's case (Claimant's PHB, paragraphs 15-18, **CS-VI**).

suggests, let alone supports the Claimant's speculation, that the Respondent applied its tax laws abusively or illegitimately in respect of Manolium-Engineering.

67. As already explained,[145] and as follows from MCEC's letter of 29 February 2016,[146] Mr Dolgov himself initiated the chain of correspondence which led to MCEC's letter of 29 February 2016 when he asked the President to "*take* […] *steps*" to resolve its disagreements with MCEC in September 2014.[147] In response to Mr Dolgov's direct and unsolicited approach, the President's Administration proposed in December 2014 that MCEC should respond to Mr Dolgov's letter and take control over the development of the situation in the "*interests of the state*".[148]

68. Approximately a year later, Mr Dolgov again wrote to the President seeking an in-person meeting to discuss the matter and threatening to apply to "*Stockholm arbitration*" with a claim for "*huge amounts*".[149] This led to a series of communications, including a letter from MCEC expressing an opinion that a meeting between the President and Mr Dolgov would be premature, because it was in the process of trying to determine a fair price for acquiring the incomplete New Communal Facilities.[150]

69. On 5 February 2016, the President's Administration asked the Council of Ministers to "*take control*" of settling the situation regarding the valuation and possible acquisition of the New Communal Facilities.[151] Nothing in the letter suggests that the President's Administration gave instructions to seize the New Communal Facilities using land

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145 Letter from Respondent to the Tribunal dated 15 August 2019.

146 In paragraph 3 of page 2 of **Exhibit R-140**, MCEC refers to Resolution of the President dated 26 December 2014 (**Exhibit R-245**), which, in turn, refers to an internal memorandum from the Head of the President's Administration dated 10 December 2014 (**Exhibit R-246**), prepared to address Claimant's letter to the President dated 19 September 2014 (**Exhibit R-247**).

147 Letter from Claimant to the President dated 19 September 2014, page 6, **Exhibit R-247**.

148 Internal memorandum from the Head of the President's Administration to the President dated 10 December 2014 (**Exhibit R-246**) approved by the President on 26 December 2014 (**Exhibit R-245**).

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

150 Letter from MCEC to the Ministry of Economy of Belarus dated 26 November 2015, **Exhibit R-129**; The Respondent describes the series of communications which led to MCEC's letter of 26 November 2015 in paragraphs 283 - 285 of the Defence, **RS-18**.

151 Letter from the Administration of the Republic of Belarus to the Council of Ministers dated 5 February 2016, **Exhibit R-244.** The Respondent describes the events which led up to this letter, including the disagreement between MCEC and the Ministry of Finance as to who should conduct the reassessment of Manolium-Engineering's costs, in paragraphs 286 – 291 of the Defence, **RS-18**.

taxes, as the Claimant alleges.[152] The sole purpose of the letter was to ask the Council of Ministers to oversee the various state organs in the interests of resolving the matter with Manolium-Engineering regarding the possible buy-out of the New Communal Facilities – an option which was seriously considered until it became apparent that Manolium-Engineering had a significant liability to the state budget and had no intention of settling it.[153]

70. Four days later, the Council of Ministers asked MCEC to update it on the "*resolution of the situation*" taking into account "*the work on determination of the amount of compensation*", *i.e.* the audit of the CAO of the Ministry of Finance and the Ministry of Architecture and Construction.[154] Contrary to what the Claimant alleges, the Council of Ministers cannot have been aware of the results of the audit, because the 2016 Memorandum was not issued until 22 February 2016.[155]

71. By its letter of 29 February 2016, MCEC responded that the 2016 Memorandum could not be used as a basis for calculating the acquisition price for the New Communal Facilities, because the audit had been performed improperly.[156] MCEC also noted that Manolium-Engineering's outstanding land tax liabilities were higher than Manolium-Engineering's costs as calculated in the 2016 Memorandum.[157]

72. The Claimant alleges that MCEC acted outside the scope of its responsibilities when it "*determined Manolium-Engineering's outstanding tax liability*".[158] In fact, MCEC did not determine Manolium-Engineering's tax liabilities itself, but made enquiries with the land service and the tax authorities in order to obtain this information.[159] It was reasonable for MCEC to make these enquiries before reporting back to the Council of Ministers, since any outstanding tax liabilities would have to be set-off against the value of the New Communal Facilities in the event that MCEC made the

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152 Claimant's PHB, paragraph 14, **CS-V**.

153 HT Day 2 (Akhramenko's cross), 427:10-12, 431:16-19.

154 Instruction of the Council of Ministers dated 9 February 2016, **Exhibit R-243**.

155 Claimant's PHB, paragraph 17, **CS-V**; 2016 Memorandum, **Exhibit TT-7**.

156 Letter from MCEC to the Council of Ministers of the Republic of Belarus dated 29 February 2016, **Exhibit R-140**.

157 Letter from MCEC to the Council of Ministers of the Republic of Belarus dated 29 February 2016, **Exhibit R-140**.

158 Claimant's PHB, paragraph 18, **CS-VI**.

159 HT Day 2 (Akhramenko's cross), 436:24-438:12.

acquisition.[160] There is also nothing under Belarusian law preventing MCEC from liaising with the tax and land authorities in this way – and the Claimant has provided no evidence in support of its suggestion to the contrary.[161]

73. Upon finding that Manolium-Engineering's tax liabilities were in fact higher than the costs it had incurred, MCEC no longer had any basis for proposing to make a payment to the Claimant for the acquisition of the New Communal Facilities or for continuing the discussions regarding the buy-out price.[162]

74. Since the buy-out price would have to be set-off against Manolium-Engineering's tax liabilities, MCEC proposed offering to release Manolium-Engineering from its outstanding land tax liabilities in exchange for the transfer of the New Communal Facilities into the communal ownership free of charge.[163] As Mr Akhramenko explained at the hearing, MCEC intended to do so by applying to the President, who under Belarusian law has the power to take measures to support businesses by granting tax and other benefits and relieving taxpayers from tax penalties.[164] Given, however, that Manolium-Engineering had made it clear that it was not interested in MCEC's offer, MCEC never applied to the President to grant Manolium-Engineering such an indulgence.[165]

75. Accordingly, nothing in the correspondence from 2016 on which the Claimant now heavily relies suggests that the Respondent applied its tax laws illegitimately, abusively or non-transparently in respect of Manolium-Engineering. What the Claimant now refers to as the secret plan to seize the New Communal Facilities was nothing more than the legitimate enforcement procedure that would inevitably have

160 HT Day 2 (Akhramenko's cross), 431:16-19.

161 Claimant's PHB, paragraph 18, **CS-V**.

162 HT Day 2 (Akhramenko's cross), 431:16-19.

163 Letter from MCEC to the Council of Ministers of the Republic of Belarus dated 29 February 2016, **Exhibit R-140**; HT Day 2 (Akhramenko's cross), 441:11-17. As already explained in paragraphs 53-54 above, the New Communal Facilities would have been demolished at the cost of Manolium-Engineering if the New Communal Facilities remained in Manolium-Engineering's ownership.

164 HT Day 2 (Akhramenko's cross), 441:11-442:16; President's Decree No. 520 dated 3 November 2005 "On Improvement of the Legal Regulation of Certain Economic Relations", paragraph 5 of clause 2.2 and paragraph 3 of clause 2.3, **Exhibit RL-143**. In practice, this provision is interpreted as allowing the President of Belarus to write-off tax debts. This type of tax amnesty is not uncommon in post-soviet countries. The President grants this type of benefit only where there exists a good reason, usually in the spirit of assisting or promoting commercial activity.

165 HT Day 2 (Akhramenko's cross), 440:16-441:2.

followed Manolium-Engineering's blatant disregard for the Respondent's domestic tax legislation, whether in 2016, before that date, or thereafter. The consequences of Mr Dolgov's choice not to pay tax would have been obvious to him, just as they were obvious to MCEC.[166]

V. QUANTUM

76. If, contrary to what is submitted above, the Tribunal finds that the Respondent breached the EEU Treaty, it must determine what loss (if any) the Claimant suffered as a result of such breach.

A. THE CLAIMANT IS NOT ENTITLED TO LOST PROFITS

77. If the Tribunal concludes that MCEC's application to the courts to terminate and/or the courts' termination of the Amended Investment Contract breached the EEU Treaty, the Tribunal must determine the loss that resulted from the breach, including whether the Claimant is entitled to Lost Profits.[167] It is striking that, at the hearing, Claimant's counsel chose not to cross-examine Mr Qureshi in respect of the quantification of the Lost Profits, even though there was ample time left for counsel to do so.[168] This is not surprising given how speculative the Lost Profits claim is.

1. The Claimant lost interest in developing the unprofitable Investment Object

78. The real reason why the Claimant was unwilling to engage with MCEC constructively after the Final Commissioning Date passed, even though most of the work on the New Communal Facilities was complete, was that the Claimant had lost the desire to develop the unprofitable Investment Object and, instead, appeared only interested in seeking to get back what Manolium-Engineering had spent on the project so far.[169]

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166 HT Day 1 (Respondent's Opening), 219:1-12.

167 Rejoinder, paragraphs 1307 – 1308, **RS-19**.

168 HT Day 3 (Qureshi cross), 569:2-637:5.

169 *See* footnote 44 above; HT Day 1 (Respondent's Opening), 145:7-20, 147:15-21 and 195:15-196:21; **Exhibit R-86**; Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit H-4** (originally submitted with incorrect translation as **Exhibit C-83**).

79. As Mr Qureshi noted, there was a crisis in the Belarusian real estate market and a surge in construction costs around the valuation date, which made the development of the Investment Object unprofitable.[170] This is confirmed by contemporaneous documents, in which Mr Dolgov stated that he considered the Amended Investment Contract to "*lack* […] *commercial profit*",[171] and that it made no "*economic sense*" to enter into a new investment contract for the development of the Investment Object.[172]

80. As the Investment Object was no longer profitable, the Claimant refocused its efforts on seeking to extract significantly over and above what Manolium-Engineering had spent on the incomplete and defective New Communal Facilities – and thereby to effectively reverse its decision to invest into Belarus.[173] However, there was no basis under the Amended Investment Contract or under Belarusian law for Manolium-Engineering to recoup monies spent.[174] The Claimant therefore seeks to rely on investment treaty protection as an insurance policy against its bad business judgment.

2. The Lost Profits claim is highly speculative

81. Damages which are speculative, uncertain or hypothetical in nature are not recoverable.[175] The Claimant's Lost Profits claim is highly speculative in nature, as:

a) construction of the Investment Object never began (and Manolium-Engineering never even acquired the right to begin construction);[176]

b) the market conditions for construction of the Investment Object were highly unfavourable;[177] and

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170 HT Day 3 (Qureshi presentation), 489:3-14; Second Expert Report of Mr Qureshi, paragraph 56, **RER-2**.

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

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

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

174 *See* paragraphs 23-32 above.

175 Rejoinder, paragraphs 1326-1329, **RS-19**.

176 Rejoinder, paragraphs 1316-1322, **RS-19**.

177 HT Day 3 (Qureshi presentation), 489:3-14; Second Expert Report of Mr Qureshi, paragraph 56, **RER-2**.

c) there is a lack of detailed design documentation, revenue projections and cost assessments in respect of the Investment Object.[178]

82. At the hearing, Mr Dolgov finally admitted that Manolium-Engineering never submitted the Design Specification and Estimate Documentation for the Investment Object.[179] In the absence of the Design Specification and Estimate Documentation, the experts are forced to derive their assumptions as to what the Investment Object would have been from an undetailed spreadsheet of area calculations,[180] the origin and date of which is unclear,[181] and which was never approved by MCEC.[182] Other than showing the square metre area for each component of the Investment Object, the spreadsheet sheds no light on many of the key characteristics of the development, making the analysis of its sales value and the costs of construction an inherently speculative exercise.[183]

83. In the absence of reliable contemporaneous evidence, Mr Taylor relies on the 2019 Colliers Report to calculate the Investment Object construction costs. The 2019 Colliers Report was prepared by the Claimant specifically for the arbitration.[184] Despite the Respondent's requests, the Claimant refused to provide information to the Tribunal on the instructions given to Colliers or the methodology adopted by Colliers in preparing the report.[185] Accordingly, neither the Respondent nor the Tribunal have been given an opportunity to challenge the methodology. The 2019 Colliers Report has numerous other shortcomings, including that:

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178 HT Day 3 (Qureshi presentation), 489:24-490:7.

179 HT Day 2 (Dolgov cross), 322:23-323:2; Rejoinder, paragraphs 189-192, **RS-19**.

180 Area calculation for the Investment Object, **Exhibit TT-10**.

181 HT Day 3 (Taylor cross), 545:13-547:14.

182 Rejoinder, paragraphs 207-209 and 1366, **RS-19**.

183 For example, the spreadsheet sheds no light on the number and size of shops in the retail area or the number of rooms in the hotel, both of which have significant implications on sales value of the development (HT Day 3 (Taylor presentation), 466:13-468:1; (Qureshi presentation), 496:10-498:7; (Taylor cross) 545:1-5.

184 HT Day 3 (Taylor cross), 521:4-20.

185 When Respondent's counsel asked for more information as to the methodology used, the data analysed and the instructions given in the 2019 Colliers Report, Claimant's counsel responded that the report "*contains sufficient information*". Accordingly, the methodology of the 2019 Colliers Report is unknown (Letter from White & Case to Baker McKenzie dated 22 March 2019, paragraphs 13-14, **Exhibit R-229**; Email from Baker McKenzie to White & Case dated 9 April 2019, paragraph 4, **Exhibit R-230**; HT Day 3 (Qureshi presentation), 493:21-25; Second Expert Report of Mr Qureshi, paragraph 35(b), **RER-2**).

a) no details are provided as to the types of construction costs that are included in each category or the key characteristics of the projects relied on;[186]

b) many of the residential, retail and hotel projects listed in the report appear incomparable with the Investment Object;[187]

c) no explanation is given as to why the construction costs for certain similar categories of property do not correlate year-on-year;[188]

d) no details are provided as to the exchange rate used when converting costs incurred in Belarusian rubles into US dollars;[189] and

e) the additional costs that a developer would have to inject to make a shell and core building ready-for-use are not reflected.[190]

84. Although the Construction Schedule (defined by Mr Taylor as the Schedule Graphic)[191] lacks sufficient detail,[192] Mr Qureshi relies on it as the only contemporaneous evidence relating to the Investment Object costs.[193] This in itself reflects the speculative nature of the Lost Profits.

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186 For example, the report does not specify whether costs for external works, landscaping, professional fees or rental payments are included (HT Day 3 (Qureshi presentation), 494:17-23; (Taylor cross), 535:21-25; Second Expert Report of Mr Qureshi, paragraph 35(c), **RER-2**). The report also does not specify the type of building or the gross building area, and the categories of real estate set out in the tables for construction costs and sales prices are not defined (Second Expert Report of Mr Qureshi, paragraphs 35(d) and 36(a), **RER-2**).

187 HT Day 3 (Qureshi presentation), 494:5-6; Second Expert Report of Mr Qureshi, paragraphs 35(e), **RER-2**.

188 HT Day 3 (Qureshi presentation), 494:24-495:9; Second Expert Report of Mr Qureshi, paragraphs 36(c), **RER-2**.

189 HT Day 3 (Taylor cross), 532:15-18.

190 2019 Colliers Report, page 2, paragraph 1-2, **Exhibit TT-69.** Mr Taylor confirmed that he did not know how much a developer would have to incur to bring a shell and core building to completion (HT Day 3 (Taylor cross), 531:4-21).

191 Construction Schedule, **Exhibit TT-11.**

192 First Expert Report of Mr Taylor, paragraph 5.4.1, **CER-1**; First Expert Report of Mr Qureshi, paragraphs 71 and 75, **RER-1**; HT Day 3 (Taylor cross), 519:7-8.

193 HT Day 3 (Qureshi presentation), 493:14-20.

3. Manolium-Engineering was required to make both the One-Time Payment and lease payments in order to develop the Investment Object

85. The Respondent has established that Manolium-Engineering would have been required under Belarusian law to make both the One-Time Payment and lease payments in order to develop the Investment Object.[194] By disregarding the cost of land, Mr Taylor understates the overall costs of the Investment Object and thus overstates the resulting Lost Profits.[195]

4. The amount paid by Astomaks is not comparable to the FMV of the New Communal Facilities

86. Astomaks acquired its right to develop the land on different terms and conditions to those on which Manolium-Engineering would have developed the land. Accordingly, the amount Astomaks paid is not comparable to the FMV of the right to develop the Investment Object.[196]

B. MR TAYLOR OVERSTATES THE VALUE OF THE INCOMPLETE AND DEFECTIVE NEW COMMUNAL FACILITIES

87. The New Communal Facilities were transferred into municipal ownership on 27 January 2017 to enforce against Manolium-Engineering's tax liabilities.[197] Since enforcement against the New Communal Facilities was the natural consequence of Manolium-Engineering's unpaid tax liability, the Tribunal must conclude that the taxes themselves violated the EEU Treaty if it is to award damages in respect of the loss of the New Communal Facilities.[198] If the Tribunal concludes that some but not

194 Rejoinder, paragraphs 97-103, **RS-19**.

195 First Expert Report of Mr Qureshi, paragraphs 189-194, **RER-1**; Second Expert Report of Mr Qureshi, paragraph 139(d), **RER-2**; HT Day 3 (Taylor cross), 535:7-14.

196 Claimant's PHB, paragraph 87, **CS-VI**; HT Day 3 (Qureshi presentation), 499:22-500:10; Rejoinder, paragraphs 606-615 and 1386, **RS-19**.

197 Defence, paragraph 349, **RS-18**; Rejoinder, paragraph 556, **RS-19**. The enforcement procedure and the reasons why the New Communal Facilities were transferred into municipal ownership as opposed to being auctioned are described in Defence, paragraphs 339-353, **RS-18**, and Rejoinder, paragraphs 551-575, **RS-19.**

198 HT Day 1 (Respondent's Opening), 233:23-235-17.

all of the taxes violated the EEU Treaty, then it must only award damages in respect of the losses caused by the taxes that were illegal.[199]

1. The 2016 Memorandum is not a reliable basis for calculating the value of the New Communal Facilities

88. At the hearing, Mr Taylor accepted that the costs recorded by an investor in its accounts may not correlate with value where the costs exceed what was originally contracted for or required or where there are quotes for works that were not performed.[200] In order to determine whether costs correlate with value, it is necessary to (i) review and analyse the primary documents supporting the actual expenses incurred; (ii) verify that each of the work components claimed to be done was in fact done; and (iii) whether it was done in compliance with the design documentation.[201]

89. Mr Taylor calculates the FMV of the New Communal Facilities with reference to the assessment of Manolium-Engineering's costs set out in the 2016 Memorandum.[202] There is no evidence that the Respondent ever agreed to be bound by the 2016 Memorandum in whole or in part.

90. Contrary to the instructions of the Council of Ministers,[203] the Ministry of Finance's review was performed on the basis of minimal sampling, the methodology of which is unknown,[204] the very limited number of measurements performed do not confirm the full extent of the work actually done,[205] and the method and extent of compliance analysis to the as-built documentation is not clear.[206] The 2016 Memorandum also records US$ 1.3 million for management fees, without explaining what these fees include or how they were calculated,[207] and appears to have largely taken

199 Rejoinder, paragraphs 1285-1302, **RS-19**.

200 HT Day 3 (Taylor cross), 564:22-25.

201 HT Day 3 (Qureshi presentation), 504:4-17; First Expert Report of Mr Qureshi, paragraph 220, **RER-1**.

202 2016 Memorandum, **Exhibit TT-7**.

203 Rejoinder, paragraph 443, **RS-19**.

204 HT Day 3 (Taylor cross), 563:21-24, 566:19-22; (Qureshi presentation), 502:5-8; First Expert Report of Mr Qureshi, paragraph 217, **RER-1**.

205 HT Day 3 (Taylor cross), 564:5-10; First Expert Report of Mr Qureshi, paragraph 217(b), **RER-1**.

206 HT Day 3 (Qureshi presentation), 502:10-16; First Expert Report of Mr Qureshi, paragraph 217(c), **RER-1**.

207 HT Day 3 (Qureshi presentation), 502:12-14 and 21-22; Second Expert Report of Mr Qureshi, paragraph 179(b), **RER-2**.

Manolium-Engineering's secondary accounting records at face value – which is insufficient for the present purposes.[208]

91. Mr Taylor also refers to two further reports, both of which are largely limited to an analysis of Manolium-Engineering's secondary accounting records and which the Respondent disputes.[209]

92. The Claimant has failed to provide in these proceedings the primary documents which would shed light on what the costs recorded in Manolium-Engineering's accounts, including the US$ 1.3 million management fees, were actually spent on.[210] Given the Respondent's challenge of Manolium-Engineering's accounting records as unreliable, their absence in these proceedings is telling. In view of the lack of Manolium-Engineering's primary documents and the very limited, if not entirely absent analysis of the actual works done and of compliance with design documentation, the Respondent submits that the audit reports relied on by Mr Taylor are an unreliable source for determining the value of the New Communal Facilities.

93. Mr Qureshi's preferred approach is to calculate the value of the New Communal Facilities (except for the Pull Station[211]) based on the 2005 and 2006 cost estimates, which Mr Qureshi adjusts to take account of changes in market prices during the period of actual construction.[212] This is the accepted methodology for estimating construction costs in Belarus and was relied on by the Ministry of Finance when analysing work acceptance certificates in respect of the Pull Station in the 2016 Memorandum.[213] As the Depot was not completed, Mr Qureshi relies on the findings of the Belcommunproject reports to ascertain which components of the Depot were never built, deducting the estimated expenses in respect of such components.[214]

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208 HT Day 3 (Taylor cross), 553:10-16.

209 Defence, paragraph 228 and 276, **RS-18**; Second Expert Report of Mr Qureshi, paragraph 184 and Appendix G, **RER-2**; HT Day 3 (Qureshi presentation), 502:14-16.

210 HT Day 3 (Qureshi presentation), 504:11-17.

211 With respect to the Pull Station, Mr Qureshi relies on costs specified in its act of acceptance dated 30 July 2010 (First Expert Report of Mr Qureshi, paragraphs 224(c) and 230, **RER-1**).

212 HT Day 3 (Qureshi presentation), 511:13-19.

213 HT Day 3 (Taylor cross), 555:10-25 and 557:4-19.

214 HT Day 3 (Qureshi cross), 609:11-13 ("*I think if something was listed as not being there, then we assumed it wasn't there. We took a very conservative approach*"); Second Expert Report of

94. Mr Taylor himself agrees that Mr Qureshi's approach would be reasonable in the absence of reliable records of the costs incurred by Manolium-Engineering or where the New Communal Facilities had not been completed.[215] The Respondent concurs: the unreliability of the three audit reports relied on by Mr Taylor, the absence of primary documentation behind Manolium-Engineering's expenses and the unfinished state of the Depot are the reasons why Mr Qureshi's approach should be adopted. Accordingly, the only issue between the Parties on this point is whether there is a reliable record of costs and whether the New Communal Facilities have been completed.

2. The NCF Losses should be calculated in Belarusian rubles and converted into US dollars at the exchange rate on the date of the breach

95. At the hearing, the Tribunal asked the Parties to consider who should bear the risk of currency devaluation, the Claimant or the Respondent.[216] The Claimant has opted not to address this issue in its PHB.

96. Given the requirement that compensation be paid in "*freely convertible currency*", together with the fact that interest is linked to a US dollar interbank rate, the Respondent does not dispute that damages should be paid in US dollars.[217] However, the Parties disagree over which exchange rate should be used for converting Manolium-Engineering's costs – which were incurred in Belarusian rubles – into US dollars.[218]

97. The Claimant's position is that Manolium-Engineering's costs should be converted into US dollars using the exchange rate of the National Bank of Belarus ("**NBB**") on

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Mr Qureshi, paragraph 190, **RER-2**. The Claimant complains in paragraph 78 of its PHB that the Respondent has provided only certain pages from **SQ-44**. Even though the Claimant's speculations are baseless and the Respondent has already exhibited all the relevant pages of **SQ-44**, the Respondent submits with this PHB a full translation for the benefit of the Tribunal.

215 Second Expert Report of Mr Taylor, paragraph 4.3.12, **CER-3**.

216 HT Day 3 (Tribunal's questions), 653:1-24.

217 HT Day 3 (Tribunal's questions), 654:1-18; Protocol 16 of the EEU Treaty, Article 81, **Exhibit CL-3**.

218 The 2016 Memorandum sets out Manolium-Engineering's costs in BYR on page 7 (2016 Memorandum, **Exhibit TT-7**). On July 1, 2016 the New Belarusian ruble (BYN) replaced the Belarusian ruble (BYR) at a ratio of 1:10,000 (https://www.xe.com/currency/byn-belarusian-ruble).

the final day of each calendar month on which the costs were incurred.[219] This is the approach taken in the 2016 Memorandum.[220]

98. By converting Manolium-Engineering's costs from Belarusian rubles into US dollars at the exchange rate on the date of the investment (*i.e.* the date Manolium-Engineering purportedly incurred the costs on the construction of the New Communal Facilities) rather than the date the alleged damage occurred, the Claimant seeks to transfer the risk of currency devaluation during the course of the investment onto the Respondent. It has been consistently confirmed by tribunals that investment treaty protection is not an insurance policy against such risks.[221] The risk of currency devaluation, together with other macroeconomic and business risks, are risks that an investor agrees to bear when it makes its investment.

99. Furthermore, it is an established rule of international law that damages are to be paid at the exchange rate of the date the damage occurred.[222] In the present case, the Claimant alleges that the Respondent expropriated its investment by transferring the New Communal Facilities into municipal ownership on 27 January 2017. Accordingly, Manolium-Engineering's costs in Belarusian rubles should be converted into US dollars using the NBB's exchange rate on 27 January 2017.[223] This reflects the amount it would cost in US dollars to build the incomplete New Communal Facilities on 27 January 2017.

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219 First Expert Report of Mr Taylor, paragraph 6.2.1, **CER-1**; 2016 Memorandum, **Exhibit TT-7**.

220 2016 Memorandum, pages 7 and 10-18 ("*The USD equivalent of the costs was calculated at the official foreign exchange rate to Belorusian ruble fixed by the national Bank of the Republic of Belarus for the final day of each calendar month*"), **Exhibit TT-7**.

221 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, paragraph 29, **Exhibit CL-59**; *Waste Management, Inc. v. United Mexican States ("No. 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paragraph 114, **Exhibit CL-17**.

222 *Amco Asia Corporation and others v. Republic of Indonesia*, Decision on Application for Annulment, ICSID Case No. ARB/81/1, 17 October 1990, paragraph 8.16, **Exhibit RL-145**.

223 On 27 January 2017, the exchange rate was BYN 1.9321 for every US$ 1 (National Bank BYN:US$ exchange rates (January 2017), **Exhibit R-250**). Accordingly, the Tribunal should apply this exchange rate in respect of the total costs in BYN as calculated: (i) by Mr Qureshi's report (BYN 3,520,387 / 1.9321 = US$ 1,822,052); or alternatively, if the Tribunal adopts Mr Taylor's approach, (ii) the 2016 Memorandum (BYN 6,727,199 / 1.9321 = US$ 3,481,807) (First Expert Report of Mr Qureshi, paragraphs 226 – 232 and Appendices H and I, **RER-1**; 2016 Memorandum, page 7, **Exhibit TT-7**).

3. The Library Payment should be excluded from the valuation of the New Communal Facilities

100. Mr Qureshi also excludes the Library Payment from his calculation of the FMV of the New Communal Facilities. Both experts agree that the way to arrive at the FMV of the New Communal Facilities is with reference to the costs that were spent on the New Communal Facilities.[224] In is not in issue that the Library Payment was not a cost spent on the New Communal Facilities.[225] Accordingly, the Library Payment should be excluded from the valuation of the New Communal Facilities.[226]

C. MR QURESHI APPLIES THE CORRECT INTEREST RATE

101. The Tribunal has asked the Parties to elaborate their positions as to the applicable interest rate.[227] Article 81 of Protocol 16 provides that interest shall be:

> "*calculated at the domestic interbank market rate for actually provided loans in US dollars for up to six months, but not below the rate of LIBOR* […]".[228]

102. The Respondent agrees that this should be construed as the US dollar interbank market rate of six months published by the central bank of the host State, but in any case not below the six month US dollar LIBOR.[229] It is not in issue that this precise rate does not exist in Belarus, because the NBB only publishes a blended interbank market rate for a period of over 60 days (the "**NBB Rate**").[230] The Respondent agrees with the Claimant that it is therefore necessary to apply a rate that is most in line with what the EEU Treaty provides.[231]

103. The Respondent's position is that the NBB Rate is the closest to what is stipulated in the EEU Treaty. The NBB Rate's maturity period of "*over*" sixty days complies with the up to six month period stipulated in the EEU Treaty,[232] and Mr Taylor's concerns

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224 First Expert Report of Mr Qureshi, paragraph 220, **RER-1**.

225 Claimant's PHB, paragraph 81, **CS-VI**.

226 Rejoinder, paragraphs 1447-1450, **RS-19**.

227 Letter from the Tribunal to the Parties dated 8 August 2019, paragraph 4, **A22**.

228 Protocol 16 of the EEU Treaty, Article 81, **Exhibit CL-3**.

229 HT Day 3 (Tribunal's questions), 642:24-643:5; 648:19-649:5; 647:13-22.

230 HT Day 3 (Tribunal's questions), 640:23-641:4; 648:6-11.

231 Claimant's PHB, paragraph 89, **CS-VI**.

232 Protocol 16 of the EEU Treaty, Article 81, **Exhibit CL-3**.

as to the different inflation expectations between the Euro and the US dollar appear overstated.[233] Where the NBB Rate drops below the US dollar LIBOR rate, LIBOR is adopted as the floor.[234]

104. The Claimant proposes that the Tribunal should adopt the six month US dollar LIBOR plus a premium of 6.5%, on the assumption that such a spread would be added by Belarusian banks when lending to each other in US dollars.[235] This would result in interest rates of up to 12% being applied for certain periods.[236]

105. The Tribunal asked the parties to look into whether banks in the EEU member states do indeed add a premium when lending to each other in US dollars, as the Claimant claims.[237]

106. As already noted, the only foreign currency rate published by the NBB is the blended NBB Rate. However, information published by the Central Russian Bank ("**CRB**") shows that Russian banks tend to lend to each other in US dollars at roughly the same rate as LIBOR, with the CRB rate regularly dropping below LIBOR in the last twelve months in respect of similar maturities.[238] There is no reason to believe that Belarusian banks would adopt a different approach to Russian banks by charging a blanket premium of 6.5% for all interbank lending in US dollars, as Mr Taylor suggests.

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233 First Expert Report of Mr Qureshi, paragraph 241(b), **RER-1**; Second Expert Report of Mr Qureshi, paragraph 209, **RER-2**; HT Day 3 (Tribunal's questions), 645:11-17.

234 HT Day 3 (Tribunal's questions), 649:1-5; National bank of Belarus rate vs LIBOR (2017 – 2019), **Exhibit R-252**.

235 Claimant's PHB, paragraphs 91-92, **CS-VI**; HT Day 3 (Tribunal's questions), 650:18-22.

236 Second Expert Report of Mr Taylor, Appendix H-1, page 1, interest rate for July 2006, **CER-3**.

237 HT Day 3 (Tribunal's questions), 643:23-644:16 ("*PRESIDENT FERNANDEZ-ARMESTO:* […] *And now the interesting question here is, do – banks in Belarus, when they make deposits among themselves, do they charge country risk? Because what you are doing is, you are putting in the Belarus default spread* […] *but, in the end, it is the country risk.* […] *If banks in Belarus or in Russia or in other countries to the Treaty – when they lend to each other in dollars, whether they do it at roughly the same rate as LIBOR or they do it at an increased rate because they look at the other bank and say, "Well, you are Belarusian. You are a risky debtor. So, I will not charge. I could lend it in London for LIBOR, but, to you, I will add a spread*").

238 Central Russian Bank rate vs LIBOR (2018 – 2019), **Exhibit R-253**. The CRB only publishes statistics consistently for US dollar interbank lending in respect of maturities of 1 day and 2 - 7 days. The Respondent has therefore compared the CRB's 2 - 7 day rate with the 1 week LIBOR.

107. According to the Claimant, the fact that the NBB Rate is generally higher than the 6 month LIBOR demonstrates that a risk spread is added for Belarusian lending.[239] However, the difference between the NBB Rate and LIBOR in the relevant periods is not material. In 2018, for instance, the average NBB Rate was the same as the average LIBOR rate.[240] Mr Taylor's position that, but for the depressive effect of Euros on the rate, the NBB's interbank rate in US dollars would have been 6.5% higher in 2018, does not appear credible.

108. As a matter of treaty interpretation, the Claimant's position also does not hold up.[241] If, as the Claimant suggests, interbank interest rates in EEU member states included a significant premium on top of LIBOR to take account of country risk, it would not have made any sense to include language to stop the applicable rate from dropping below LIBOR, as we see in Article 81 of Protocol 16.[242]

109. Mr Taylor's methodology for calculating the premium is also inappropriate. As Mr Qureshi notes, Professor Damodaran's rate is calculated by averaging data on default spreads with 10 year maturity periods, which is not in line with the up to six month maturity period stipulated by the EEU Treaty.[243] Mr Damodaran's rate is also calculated by averaging data from various countries, which may be more or less risky than Belarus.[244]

110. Finally, tribunals have generally been loath to apply interest rates which reflect the risk profile of the respondent State, as the Claimant is effectively proposing.[245] As the tribunal held in *Murphy v. Ecuador*, to adopt the State's external borrowing rate would mean the State's risk characteristics, rather than the investor's actual loss,

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239 Claimant's PHB, paragraph 91, **CS-VI**.

240 National Bank of Belarus rate vs LIBOR (2017 – 2019), **Exhibit R-252**. The average was 2.5% for both the NBB Rate and the LIBOR Rate.

241 Article 31 of the Vienna Convention provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

242 Protocol 16, Article 81, **Exhibit CL-3**.

243 First Expert Report of Mr Qureshi, paragraph 240(b), **RER-1**.

244 First Expert Report of Mr Qureshi, paragraph 240(a), **RER-1**.

245 HT Day 3 (Tribunal's questions), 644:1-4.

would be determinative of the amount of compensation.[246] This would run counter to the fundamental premise of compensation, which is to restore the position the Claimant would have been in, but for the breach.[247]

VI. REQUEST FOR RELIEF

111. The Respondent maintains its request for relief as formulated in the Defence.[248]

Respectfully submitted on
28 November 2019

White & Case LLP

246 *Murphy Exp. & Prod. Co. – Int'l v. Republic of Ecuador*, UNCITRAL, Partial Final Award, 6 May 2016, paragraph 516, **Exhibit RL-93**.

247 *Murphy Exp. & Prod. Co. – Int'l v. Republic of Ecuador*, UNCITRAL, Partial Final Award, 6 May 2016, paragraph 516, **Exhibit RL-93**.

248 Defence, paragraph 719, **RS-18**.