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

***Manolium-Processing* LLC**

Claimant

v.

Republic of Belarus

Respondent

POST-HEARING BRIEF

CS-VI

---

3 October 2019

Baker McKenzie.

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1. Claimant submits this Post-Hearing Brief (the "**Claimant's PH Brief**" or "**CS-VI**") pursuant to Procedural Order No. 1 of 17 May 2018 and Procedural Timetable B.1 as amended on 27 September 2019. Terms and abbreviations used herein have the same meaning as in the previous Claimant's submissions.[1]

2. Claimant's PH Brief is submitted in response to the Tribunal's 8 August 2019 instruction to the Parties that[2]:

> "*The briefs should contain a general evaluation of the evidence presented during the Hearing – not a general restatement of each Party's position and arguments.*"

3. It also addresses the questions posed by the Tribunal in that communication and at the hearing.

4. Section I of Claimant's PH Brief summarizes the evidence and legal authorities establishing that the Tribunal has jurisdiction over the entirety of this Dispute. There is no temporal restriction in the EEU Treaty. Even if there were a temporal restriction, the claims asserted in this Arbitration are timely because they are based on wrongful actions of Respondent after entry into force of the EEU Treaty. Specifically,

   (i) Section I.A explains that there is no temporal restriction in the EEU Treaty, as indicated by the use of the present continuous tense and the comparison of the EEU Treaty to a similar treaty by the same parties;

   (ii) Section I.B explains that the Tribunal has jurisdiction over the Tax Dispute because the key acts which were the culmination of that dispute

[1] The Claimant's Notice of Arbitration of 15 November 2017 (**CS-I**), the Claimant's Statement of Claim of 10 May 2018 (**CS-II**), the Claimant's Statement of Reply of 28 February 2019 (**CS-V**).
[2] The Arbitral Tribunal's Communication A22 to the Parties of 8 August 2019.

indisputably occurred after entry into force of the EEU Treaty and, in any event, were part of a series of continuing breaches;

(iii) Section I.C explains that the Tribunal has jurisdiction over the Termination Dispute because the culmination of Respondent's long standing scheme which permanently destroyed the Claimant's rights occurred after entry into force of the EEU Treaty and, again, the Termination Dispute was a continuous series of breaches;

(iv) Section I.D explains that the Tribunal may consider actions that occurred between signing of the EEU Treaty and entry into force in assessing Respondent's liability because the Vienna Convention imposes upon Respondent an obligation to respect the terms of the EEU Treaty and act in good faith in that interim period; and

(v) Section I.E explains that the source of funds for Claimant's investment is irrelevant and that, in any event, Claimant has made numerous qualifying investments sufficient to invoke the protections of the EEU Treaty.

5. In Section II, Claimant addresses issues and evidence related to the quantum of damages suffered by Claimant as a result of Respondent's Treaty violations. Specifically, Section II explains that the only reliable evidence at the hearing, consisting of Respondent's own audits, establishes that the value of the New Communal Facilities that were seized by the Respondent is USD 20,434,679. Section II also demonstrates that Mr. Taylor's valuation of the Lost Profits for the Investment Object is more reliable than that of Mr. Qureshi. Finally, Section II explains that the appropriate interest rate is the Libor plus risk spread rate applied by Mr. Taylor.

I. THE TRIBUNAL HAS JURISDICTION OVER ALL CLAIMS

6. The EEU Treaty does not include a temporal restriction. But even if a temporal restriction is read into the Treaty, Claimant's Treaty claims are timely.

7. The EEU Treaty was signed by Belarus on 29 May 2014.[3] It entered into force on 1 January 2015. The Parties agree that the Tribunal has jurisdiction over both (a) breaches occurring after 1 January 2015 and (b) breaches that began before 1 January 2015 but continued thereafter.[4] The table below shows the dates of the key actions by Respondent that breached the Treaty:

Date	Event	Treaty Breach
27 January 2015	Termination of Amended Investment Contract based on Supreme Court ruling[5]	Indirect/Creeping Expropriation (Art. 79); Disproportionate response, breach of FET (Art. 69)
January 2015 - April 2016	Negotiations for compensation for NCF[6]	Breach of good faith/FET (Art. 69)
February 2016	Respondent decided to expropriate NCF through illegitimate tax measures[7]	Breach of good faith, transparency (Art. 69); beginning of indirect expropriation (Art. 79)

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

[4] **RS-18**, **Respondent's Statement of Defence of 19 November 2018**, paras. 390 (tribunal has jurisdiction over disputes arising after 1 January), 426; **HT Day 1** (Respondent's Opening), 165:7-15 (Respondent's counsel agreeing that the events before the treaty that continue may be part of a creeping expropriation); **Exhibit RL-8**, para. 91.

[5] **Exhibit C-152**.

[6] **Exhibit R-121**. **Exhibit C-153**. **Exhibit R-122**. **Exhibit C-154**. **Exhibit C-155**. **Exhibits R-124-R-126**. **Exhibit C-156**. **Exhibit R-206**. **Exhibit C-157**. **Exhibit R-207**. **Exhibit C-158**. **Exhibits R-129-R-137**. **Exhibit C-159**. **Exhibit R-243**. **Exhibit C-160**. **Exhibit C-161**.

[7] **Exhibit R-244**. **Exhibit R-243**. **Exhibit R-140**. **Exhibit R-248**.

Date	Event	Treaty Breach
18 March 2016	Minsk City Land Planning Service audits NCF land and reports it is being illegally occupied[8]	Breach of good faith, transparency (Art. 69)
17 May 2016	Court levies administrative penalty for Manolium-Engineering's unlawful occupation of NCF land plots[9]	Breach of good faith, FET (Art. 69)
17 May 2016	First Tax Assessment[10]	Breach of good faith, transparency (Art. 69)
21 June 2016	Second Tax Assessment[11]	Breach of good faith, transparency (Art. 69)
1 December 2016	MCEC seized NCF land plots[12]	Breach of good faith, transparency (Art. 69)
27 January 2017	Transfer of NCF to Respondent[13]	Indirect Expropriation (Art. 79); Breach of good faith, transparency (Art. 69)
12 September 2017	Respondent auctions the right to develop the Investment Object to a third-party at public auction[14]	Breach of good faith/FET (Art. 69)

8. Respondent's assertion that later breaches are not actionable because they do not "*recrystallize or transform*" prior disputes is mistaken.[15] As noted above, and discussed below, Respondent committed material, independently actionable breaches after the EEU Treaty's entry into force. This is sufficient to confer jurisdiction on the Tribunal.

[8] **Exhibit C-343**. **Exhibit C-344**. **Exhibit C-345**.
[9] **Exhibit C-162**. **Exhibit C-182**.
[10] **Exhibit C-164**.
[11] **Exhibit C-166**.
[12] **Exhibit C-173**.
[13] **Exhibit R-242**. **Exhibit R-148**.
[14] **Exhibit R-152**. **Exhibit R-153**.
[15] **HT Day 1** (Respondent's Opening), 161:9-10; 161:20; 162:3.

A. There Is No Temporal Restriction in the EEU Treaty

9. The EEU Treaty does not contain a temporal restriction. This is true notwithstanding the fact that Claimant recognizes treaties generally do not apply retroactively "*[u]nless a different intention appears from the treaty or is otherwise established…* ."[16] The circumstances of the EEU Treaty "*otherwise established*" an intent for retroactivity.

10. The best evidence of the parties' intent is the same parties' approach to retroactivity in a prior treaty, the EEC Investment Agreement.[17] Unlike the EEU Treaty, the EEC Investment Agreement stated it did not apply retroactively:

EEU Treaty (2014: Belarus, Kazakhstan, Russia) (CL-3)	**Eurasian Economic Community Investment Agreement** (2008: Belarus, Kazakhstan, Russia) (CL-35)
Article 65: "*The provisions of this section shall apply to all investments made by investors of the Member States on the territory of another Member State starting from December 16, 1991*."	Article 12: "*The Agreement applies to all investments made by investors of one Contracting Party on the territory of the other Contracting Party since 1 January 1992.* *The Agreement does not apply to disputes that arose before the entry of the Treaty into force*."

11. The most logical explanation for this is that the drafters believed customary international law might allow for retroactive application. Because the drafters desired that not to be the case for the EEC Investment Agreement, they included an explicit disclaimer. But for the EEU Treaty a few years later, the same parties

[16] **Exhibit CL-13.** Vienna Convention on the Law of Treaties dated 23 May 1969, Art. 28.

[17] *See* **Exhibit CL-35.** EEC Investment Agreement dated 12 December 2008, Art. 12, compared with **Exhibit CL-3.** Protocol No. 16 to EEU Treaty dated 29 May 2014, Art. 65. Respondent incorrectly asserted at the hearing that the drafters of the prior EEC Investment Agreement were different than those of the EEU Treaty (**HT Day 1** (Respondent's Opening), 155:2-9). Not so. The original members (*i.e.*, drafters) were the same for both—Belarus, Russia, and Kazakhstan. The other members of the EEC Investment Agreement—Armenia and the Kyrgyz Republic—signed the EEC Investment Agreement later and thus played no role in its drafting. **Exhibit C-1**.

with the same understanding of retroactivity did not do so for the EEU Treaty. Claimant submits this was because the parties intended for the EEU Treaty to apply retroactively.

12. As additional evidence of intent, and as Respondent's counsel conceded at the hearing, Section 84 of the EEU Treaty (regarding settlement of investment disputes) uses the present continuous, rather than future, tense.[18] Future tense, of course, would be the natural choice of a party intending an instrument to apply only to future disputes.[19] Present continuous tense, on the other hand, suggests existing disputes are also intended to be included—otherwise, the "*present*" and "*continuous*" would have no meaning.

13. Respondent claims this interpretation would expand the EEU Treaty to all disputes since the dissolution of the Soviet Union.[20] This is not so. The dispute must exist at the time the EEU Treaty entered into force, and must relate to an investment made after 31 December 1991.[21] And in any event, the only inquiry relevant here is whether the parties intended that this dispute fall within the Treaty's coverage (and the Tribunal's jurisdiction)—the effect on other hypothetical disputes is irrelevant. The Parties had this intent, and this dispute falls within the Treaty's scope.

[18] **Exhibit CL-3.** Protocol No. 16 to EEU Treaty, Art. 84. "*All disputes between a recipient state and an investor of another Member State arising from or in connection with an investment of that investor on the territory of the recipient state* […]". **HT Day 1** (Respondent's Opening), 164:4-14 ("*MS. ZAGONEK: It is present continuous… ARBITRATOR ALEXANDROV: Present continuous. Okay. I agree.*").
[19] *See* **Exhibit CL-32**. *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, 29 May 2003, para. 65.
[20] **HT Day 1** (Respondent's Opening), 155:10-15.
[21] **Exhibit CL-3.** Protocol No. 16 to EEU Treaty dated 29 May 2014, Art. 6, Sections 84-87.

B. The Tribunal Has Jurisdiction over the "Tax Dispute"

B.1. Respondent Did Not Actually Impose and Attempt To Enforce the Purported Land Tax Until After Entry into Force of the Treaty

14. Respondent's decision to improperly use a purported "*land tax*" to seize the New Communal Facilities was made and given effect after entry into force of the EEU Treaty. This gives the Tribunal jurisdiction over the Tax Dispute.

15. This is demonstrated by a document provided by Respondent after the hearing at the Tribunal's request.[22] This document, Exhibit R-244, demonstrates that on 5 February 2016, the office of the President of the Republic of Belarus informed the First Deputy Prime-Minister to "*take control over settling*" the situation with Claimant pursuant to the "*information of the Council of Ministers of 28 January 2016*".[23]

[22] **HT Day 1** (Questions from the Tribunal), 250:11-16; 255:5-18. **Exhibit R-140.** Letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-11/1084-2 (in Russian with English translation) of 29 February 2016.

[23] **Exhibit R-244**. Instruction of the Administrative Office of the President of the Republic of Belarus No. 09/124-185 (in Russian with English translation) 5 February 2016.

[*Heading in Belarusian*] [*logo*] Administration of the President of the Republic of Belarus

The information of the Council of Ministers of 28 January 2016 No. 39/105-772/29 has been noted.

To: V. S. Matiushevskiy

Dear Vasiliy Stanislavovich!

The existing situation has been reported to the Head of the state.

Please take control over settling it.

Report back on 1 March 2016.

[*Seal*]

N. G. Snopkov

5 February 2016

16. Four days later, on 9 February 2016, the Council of Ministers of the Republic of Belarus instructed the Minsk City Executive Committee to, *inter alia*[24]:

    (i) Inform the Government "*about the resolution of the situation*"; and

    (ii) "*Provide a draft response to the Administration of the President*".

17. At that time, although the Ministry of Finance report on valuing the New Communal Facilities at USD 19,434,679 was not issued until 22 February 2016,[25] the Council of Ministers was already aware of "*the results of the work on the determination of the amount of compensation*" to Manolium-Engineering[26]:

[24] **Exhibit R-243.** Instruction of the Council of Ministers of the Republic of Belarus No. 39/105-74/1691r (in Russian with English translation) of 9 February 2016.

[25] The Report determined the Claimant's investments in the New Communal Facilities as USD 19,434,679. **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, p. 16.

[26] **Exhibit R-243**. Instruction of the Council of Ministers of the Republic of Belarus No. 39/105-74/1691r (in Russian with English translation) of 9 February 2016.

THE COUNCIL OF MINISTERS

OF THE REPUBLIC OF BELARUS

Following the request of the Administration of the President of the Republic of Belarus dated 4 February 2016, No. 09/124-185

To: A.V. Schorts (Ref.)

V.V. Amarin

A.B. Chernyi

Taking into account the results of the work on determination of the amount of compensation to the foreign unitary enterprise "Manolium-Engineering" for the unfinished construction facilities (Resolution dated 27 January 2016 No. 39/1078p), please inform the Government of the Republic of Belarus about resolution of the situation that has arisen and provide a draft response to the Administration of the President of the Republic of Belarus.

The deadline is 25 February 2016.

V. Matyushevskyi

9 February 2016

18. On 29 February 2016, the Minsk City Executive Committee determined Manolium-Engineering's outstanding tax liability to be **USD 19,672,686 (including land tax with the ten-fold rate applied)**,[27] although the Minsk City Executive Committee is not a tax authority,[28] and the tax audit had not yet been conducted by a tax authority.[29] This purported liability was not a legitimate tax, but rather was an artificial liability created by the State in an amount sufficient to justify its seizure of the New Communal Facilities without compensation.[30]

[27] **Exhibit R-140.** Letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-11/1084-2 (in Russian with English translation) of 29 February 2016, p. 2.

[28] Mr Nikolay Akhramenko, the Respondent's witness and currently the Head of the Investment Department of the Economic Committee of the Minsk City Executive Committee, stated during the hearings that the tax issues were outside his competence as "*there are tax authorities in the country, and they are dedicated to these matters*." **HT Day 2** (Akhramenko Cross), 390:21-25; 391:1-7.

[29] Mr. Akhramenko confirmed that at that time, *i.e.*, February 2016, there was no tax audit over Manolium-Engineering under way. **HT Day 2** (Akhramenko Cross), 438:3-15.

[30] *See* Section B.3 *infra.*

19. There is no dispute that all of these actions occurred well after the EEU Treaty's entry into force on 1 January 2015. The Tribunal thus has jurisdiction over the Tax Dispute.

B.2. The Tax Dispute Did Not Arise Until Respondent Attempted to Enforce the Purported Debt

20. Respondent appears to concede that the Tax Dispute arose after entry into force of the EEU Treaty. Respondent defines the Tax Dispute as concerning "*conflicting legal views and interests regarding Manolium-Engineering[']s liability on [sic] obligation to pay tax for the land plots it occupied.*"[31] A dispute about such an "*obligation*" could not logically arise until the alleged obligation and demand to pay the onerous tax liability had actually been imposed on Claimant.[32] The first demand to pay occurred on 17 May 2016 when Respondent issued the first tax assessment without applying the ten-fold rate to the alleged tax owed by Manolium-Engineering.[33]

21. This principle was confirmed in *Duke Energy v Peru*, which rejected a claim that a tax dispute arose when the tax was allegedly incurred and stated unequivocally "*the legal dispute arose only after Respondent imposed the Tax Assessment … It was in the Tax Assessment, and not before, that [the tax authority] decreed a tax liability… for… tax underpayments in 1996 through 1999.*"[34]

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[31] **HT Day 1** (Respondent's Opening), 157:14-16.
[32] **Exhibit RL-10.** *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para. 96 ("*The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them.*").
[33] **Exhibit C-164.** First Tax Audit Report of 17 May 2016.
[34] **Exhibit CL-150.** *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28,* Award of 18 August 2008, para. 149.

22. Despite this common sense principle, Respondent argues the Tax Dispute arose by 21 February 2014 "*when the District Tax Inspectorate demanded that Manolium-Engineering comply with its land tax obligations*".[35] In support, Respondent cites two demands from tax authorities.[36]

23. Even putting aside that the demand for tax year 2014 was issued in the same month it was allegedly due,[37] the 2014 tax assessments did not give rise to a Treaty claim. Rather, it was in 2016, when the Minsk City Executive Committee applied a ten-fold multiplier to the alleged tax liability at the direction of the Office of the President and the Council of Ministers to "*take control*" and achieve "*resolution of the situation*", that the confiscatory tax rose to the level of a Treaty claim.[38]

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[35] **HT Day 1** (Respondent's Opening), 159:19-22.

[36] **HD Day 1** (Respondent's Opening), 159:23-24. *See also* **Exhibit R-111.** Demand of the District Tax Inspectorate for 2013 of 21 February 2014. **Exhibit R-112.** Demand of the District Tax Inspectorate for 2014. **RS-19, Respondent's Rejoinder of 30 May 2019**, para. 707.

[37] **HT Day 1** (Questions from the Tribunal), 262:4-13 (Respondent's counsel, in response to a question, explaining that the tax return is due in February). **Exhibit CL-151.** Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2013), Art. 202(14).

[38] **Exhibit R-244**. Instruction of the Administrative Office of the President of the Republic of Belarus No. 09/124-185 (in Russian with English translation) 5 February 2016 (noting to "*take control over settling*" "*the existing situation*"). **Exhibit R-243.** Instruction of the Council of Ministers of the Republic of Belarus No. 39/105-74/1691r (in Russian with English translation) of 9 February 2016 (noting to inform about the "*resolution of the situation*"). **Exhibit R-140.** Letter from MCEC to the Council of Ministers No. 1/2-11/1084-2 of 29 February 2016 (noting ten-fold multiplier). **Exhibit C-343.** Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 17 of 18 March 2016. **Exhibit C-344**. Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 20 of 18 March 2016. **Exhibit C-345.** Protocol of Minsk Land Planning Service of Minsk City Executive Committee on administrative offence No. 21 of 18 March 2016. **Exhibit C-182**. Resolution of the court of the Pervomaysky district of Minsk of 17 May 2016 (operative part and statement of reasons)).
HT Day 2 (Akhramenko Cross), 438:413-15 ("*Q: So, you're saying that, at that time [in February], some kind of tax audit was underway? A: No, there was none.*").
Exhibit RL-61. *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, para. 179.

24. *Duke Energy* rejected a nearly identical argument claiming that the dispute arose either when the tax liability was incurred or the tax audit initiated: "*[W]hile the parties may have disagreed on matters prior to the entry into force of the relevant instrument… 'this does not mean that a legal dispute… can be said to have existed at the time.*"'[39] Similarly, in *Maffezini v Spain*, the Tribunal noted that various disagreements between the parties were discussed during the period of 1989-1992, but it was not until 1994, in the context of disinvestment proposals, that a legal Treaty dispute arose.[40] The result should be no different here. The Tribunal has jurisdiction over the Tax Dispute.

B.3. Respondent Ignored the Purported Land Tax for Years Only to Enforce It as Part of Its Scheme to Seize the New Communal Facilities

25. After the hearing, the Tribunal sought additional guidance from the Parties on the regulation and application of the Land Tax and the relationship between the Land Tax and the Land Permits.[41] Claimant responds to that inquiry in this section.

26. The Land Tax is similar to property taxes paid in many other jurisdictions. The main difference is that when the State owns the land, the temporary land user pays the Land Tax rather than the State as the owner. Land Permits, meanwhile, provide the right of temporary use and are issued by a municipal executive

[39] **Exhibit CL-150.** *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28,* Award of 18 August 2008, para. 148.
[40] **Exhibit RL-10.** *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paras. 95-98.
[41] The Arbitral Tribunal's Communication A22 to the Parties of 8 August 2019, paras. 3(a-b): "*The regulation and application of the Land Tax;*
The relationship between the Land Tax and the Land Permits."

committee,[42] in this case the Minsk City Executive Committee.[43] Without the right of temporary use conferred by a Land Permit, the Land Tax is multiplied by ten because the occupation is unauthorized.[44]

27. More specifically, under Belarussian law, land users may occupy land pursuant to the following rights, *inter alia*[45]:

    a) Ownership (*i.e.*, private property);

    b) Right of temporary use; or

    c) Lease.

28. In the commercial context, it is always the owner of the land that pays the Land Tax. So, for example, if a private owner of land rents the land to a tenant,[46] the landlord/owner pays the Land Tax, while the tenant solely pays rent to the landlord. Even if the tenant occupies the land illegally, it remains the landlord's obligation to pay the Land Tax.

[42] **Exhibit CL-152.** Extracts from the Land Code of the Republic of Belarus of 23 July 2008 (edition in force between 13 January 2011 and 25 April 2013), Art. 16. **Exhibit RL-119**. Excerpts from the Regulation "*On Withdrawal and Allotment of Land Plots*" enacted by the President's Decree No. 667 dated 27 December 2007, Clause 35.
[43] *E.g.*, **Exhibit C-267.** Decision of Minsk City Executive Committee of 16 September 2010. **Exhibit C-75**. Decision of Minsk City Executive Committee of 16 September 2010.
[44] **Exhibit CL-151.** Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2013), Art. 197(2).
[45] **Exhibit CL-152.** Extracts from the Land Code of the Republic of Belarus of 23 July 2008 (edition in force between 13 January 2011 and 25 April 2013), Art. 3.
[46] **Exhibit CL-152.** Extracts from the Land Code of the Republic of Belarus of 23 July 2008 (edition in force between 13 January 2011 and 25 April 2013), Art. 17, para. 4.

29. However, the situation is different when the land is owned by the State.[47] When the State grants a private entity the right of temporary use, the land user, rather than the land owner, pays the Land Tax.[48]

30. When the temporary use period expires, the land user has an obligation to return the land plot to the State.[49] The land user can also apply to extend the temporary use period, but must provide "*documents certifying the right to the land plot*" in its application.[50] Manolium-Engineering's Land Permit expired on 1 July 2011, and its last Construction Permit expired on 31 December 2011.[51] Respondent thereafter refused to extend the Investment Contract.[52] In 2012, when Manolium-Engineering attempted to obtain a Construction Permit to finish the construction, it was denied by Respondent on 21 April 2012—purportedly for insufficient documents.[53] The same happened when Manolium-Engineering attempted to

[47] **Exhibit CL-152**. Extracts from the Land Code of the Republic of Belarus of 23 July 2008 (edition in force between 13 January 2011 and 25 April 2013), Art. 12, para. 1.
[48] **Exhibit CL-151**. Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2013), Art. 192(1), 193. **Exhibit CL-153**. Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2014), Art. 193.
[49] **Exhibit CL-152**. Extracts from the Land Code of the Republic of Belarus of 23 July 2008 (edition in force between 13 January 2011 and 25 April 2013), Art. 70.
[50] **Exhibit CL-154**. Extracts from the Regulation "*On Procedure for Withdrawal and Allotment of Land Plots*" enacted by the Presidential Decree No. 667 of 27 December 2007 (edition in force since 18 March 2010), Clause 44.
[51] *See e.g.*, **HT Day 2** (Dolgov Redirect), 353:5-7, 13-16.
[52] **Exhibit R-65**. Draft Supplemental Agreement of 4 July 2011. **Exhibit R-78**. Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012. **Exhibit R-80.** Letter from Minsk City Executive Committee to the Claimant and Manolium-Engineering of 6 April 2012. **Exhibit R-81**. Letter from Manolium-Engineering to Gosstroy of 13 April 2012. **Exhibit R-83**. Letter from Manolium-Engineering to Minsk City Executive Committee of 17 April 2012. **Exhibit C-127**. Letter from Gosstroy to Manolium-Engineering of 21 April 2012. **Exhibit R-84**. Letter from Manolium-Engineering to Gosstroy of 25 April 2012. **Exhibit R-87**. Letter from Manolium-Engineering to Minsk City Executive Committee (received on 22 May 2012) of 18 May 2012. **Exhibit R-88**. Claimant's letter to Minsk City Executive Committee w/date (in response to Minsk City Executive Committee letter of 18 June 2012). **Exhibit R-90**. Letter from Minsk City Executive Committee to Manolium-Engineering of 5 June 2012. **HT Day 2** (Dolgov Redirect), 353:17-354:16.
[53] **Exhibit C-127**. Letter from Gosstroy to Manolium-Engineering of 21 April 2012.

extend the construction deadlines for the New Communal Facilities in 2012, on 5 June 2012, Respondent rejected the application for the same reason.[54]

31. If the land granted for temporary use is not returned on time or occupied without authorization then the land user must continue to pay the Land Tax during that time as well.[55] Unauthorized occupation means a construction or any other use of the land without the right to do so.[56]

32. Should the land user continue to use the land plot after the right of temporary use expires, the land user must pay a tenfold Land Tax rate.[57] Additionally, if the land user exceeds the statutory term to construct a facility on the land plot, the land user shall pay double Land Tax.[58]

33. Neither Belarusian law nor the Land Permits for the New Communal Facilities[59] provide a specific procedure for a user to terminate possession of land plots. In this case, Manolium-Engineering notified Respondent it was returning the land

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[54] **Exhibit R-90.** Letter from Minsk City Executive Committee to Manolium-Engineering of 5 June 2012; **HT Day 2** (Dolgov Redirect), 353:17-354:16.

[55] **Exhibit CL-151.** Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2013), Art. 193. **Exhibit CL-153**. Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2014). Art. 193.

[56] **Exhibit CL-152.** Extracts from the Land Code of the Republic of Belarus of 23 July 2008 (edition in force between 13 January 2011 and 25 April 2013).
Article 1:
"[…] *"Occupation of a Land Plot" means the construction of a real estate object if a land plot was provided for the construction and operation of that property, and any other development of the land plot in accordance with its intended purpose and with the terms governing its provision where the land plot has been provided for purposes not related to the construction and operation of real estate objects;* […]"
Article 72:
"*Unauthorized occupation of a land plot is the use of a land plot without a document certifying the right to it* […]"

[57] **Exhibit CL-151.** Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2013), Art. 197(2).

[58] **Exhibit CL-151.** Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2013), Art. 197(3).

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

plots on 11 June 2012, *i.e.*, before the Land Tax began to apply in 2013,[60] when it informed the Minsk City Executive Committee: "*we return the land plots to the lands of the City of Minsk in connection with non-extension of the investment contract*."[61]

34. Claimant did not use the land plots after approximately the middle of 2012, and the Pervomaysky district court in Minsk confirmed that Claimant was not illegally occupying the land plots on 23 July 2012.[62] Claimant reasonably relied on this court decision not to pay the Land Tax.[63]

35. Thus, there was no basis for Respondent's claim, when it decided to seize the New Communal Facilities in 2016, that Claimant illegally occupied the land for years and failed to pay the corresponding Land Tax (multiplied due to the lack of a Land Permit and alleged unauthorized occupation).

36. Belarusian law also requires that when a land plot is occupied without authorization, the Minsk City Executive Committee must issue a "*decision*" "*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.*"[64]

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[60] **HT Day 1** (Questions from the Tribunal), 267:2-4 ("*PRESIDENT FERNÁNDEZ-ARMESTO: And I think we agreed that the new Tax Code came into being in 2013. MS. ZAGONEK: Correct.*").
[61] **Exhibit C-336.** Letter from Manolium-Engineering to Minsk City Executive Committee of 11 June 2012.
[62] **Exhibit C-346**. Resolution of Pervomayskiy district court of Minsk of 23 July 2012.
[63] **CWS-2**. Second Witness Statement of Mr A. Dolgov of 27 July 2018, para. 6.
[64] **Exhibit CL-152.** Extracts from the Land Code of the Republic of Belarus of 23 July 2008 (edition in force between 13 January 2011 and 25 April 2013), Article 72:
"[…] *A land plot occupied without authorization shall be returned to whoever it belongs to, 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*

37. But no such "*decision*" was issued here. The Minsk City Executive Committee failed to provide Claimant with appropriate notice or a course of action as to how it must proceed for the New Communal Facilities to be formally accepted. Instead, MCEC repeatedly rejected Claimant's requests for the New Communal Facilities to be formally returned[65] until it eventually decided to impose the tax liability in February 2016—after entry of the EEU Treaty—upon the President's instruction.[66]

38. Beginning on 17 July 2012, the Minsk Land Planning Service refused to accept return of all the land plots because of the uncompleted Depot.[67] But the Pull Station had been completed since 2010[68] and the Road since 2011[69] so there was

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restored to a condition making it fit for use as designated, and the structures located on the land plot shall be demolished, for the account of the party having occupied it without authorization.
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.
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. […]"

[65] *E.g.,* **Exhibit C-119. Exhibit C-327**. **Exhibit C-106. Exhibit C-105. Exhibit R-91. Exhibit C-136. Exhibit C-137. Exhibit C-93. Exhibit R-108. Exhibit C-157. Exhibit C-158. Exhibit C-161.**

[66] **Exhibit R-244**. Instruction of the Administrative Office of the President of the Republic of Belarus No. 09/124-185 (in Russian with English translation) 5 February 2016. **Exhibit R-243.** Instruction of the Council of Ministers of the Republic of Belarus No. 39/105-74/1691r (in Russian with English translation) of 9 February 2016. **Exhibit R-140.** Letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-11/1084-2 (in Russian with English translation) of 29 February 2016. **Exhibit R-248.** Draft report to the Administration of the President of the Republic of Belarus (appended to the letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-11/1084-2 dated 29 February 2016).

[67] **Exhibit C-337.** Letter from Minsk Land Planning Service to Manolium-Engineering of 17 July 2012.

[68] **Exhibit C-100**. Acceptance Act in respect of the Pull Station of 30 July 2010; **Exhibit C-101**. Registration of the Pull Station as a permanent structure of 1 October 2010.

[69] **Exhibit C-79**. Letter from Manolium-Engineering to MCEC of 7 September 2011. **Exhibit C-91**. Order of Manolium-Engineering No. 1-C 1 July 2011. **Exhibit C-331.** General view of land plots for the New Communal Facilities (Google Earth shot) 29 May 2011. (Or, at the latest, the Road was in

no reasonable justification, even on the basis of Respondent's own reasoning, to refuse to accept those parts of the New Communal Facilities. Further, the Minsk Land Planning Service could easily accept the land not occupied by either of these buildings, but without any explanation refused to do so.

39. For the first time at the hearing, Mr. Akhramenko insisted that the Minsk City Executive Committee could not extend the Amended Investment Contract after 1 July 2011 to complete the construction of the New Communal Facilities because Mr. Aram Ekavyan's signature was not on the Schedule for Completion of the Road and Depot.[70] The idea that Claimant would simply ignore such a simple formality—if the need for such a signature had ever been actually communicated—defies logic. This is really a *post-facto* excuse to attempt to avoid liability for the seizure of the New Communal Facilities without compensation, which ultimately occurred in January 2017 further to the Secret Order of the Respondent's President.[71] The circumstances regarding the Land Permit, the Land Tax, and Respondent's longstanding refusal to accept the land show that Respondent was not engaged in a legitimate exercise of regulatory authority, but rather executed a plan to seize the New Communal Facilities without compensation. Because Respondent executed that plan after entry into force of the EEU Treaty, the Tribunal has jurisdiction over the Tax Dispute.

use in 2012.) **Exhibit C-318**. Test protocol of State Enterprise Department of road-bridges construction and municipal improvement of the Minsk City Executive Committee on pavement of the Road of 22 August 2012.

[70] **HT Day 2** (Akhramenko Cross), 406-409 (408:11-14: "*We regard it as deception, the not signing of the schedule by the investor. And the investor under the Contract is not Manolium-Engineering, but Manolium-Processing.*"); 443-444. **Exhibit R-62**. Schedule for completion of Road construction of 2011. **Exhibit R-63**. Schedule for completion of Depot construction of 2011.

[71] **Exhibit R-242.** Order of the President of Belarus (in Russian with English translation) of 20 January 2017.

C. The Tribunal Has Jurisdiction over the "Termination Dispute"

C.1. The Termination Dispute Arose Only When the Respondent's Supreme Court Issued Its Ruling Terminating the Amended Investment Contract

40. The Termination Dispute relates to the termination of the Amended Investment Contract, which permanently destroyed Claimant's rights to develop the Investment Object (a right later sold by Minsk to a third party).[72] That claim could therefore arise only when that development right was permanently destroyed.[73]

41. The contract right was not permanently destroyed until the Belarusian Supreme Court decision on 27 January 2015.[74] At that point, the judicial proceedings ended and the Claimant's rights were finally extinguished—the final judicial act is the appropriate date when the dispute regarding termination arose.[75]

[72] **Exhibit R-153.** Minutes of the results of the auction of 12 September 2017.
[73] **Exhibit RL-2**. *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, paras. 118-125, 136-37 (finding the dispute arose when the *Lesivo* Resolution was published which declared the contract null and void). **Exhibit RL-32**. *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, para. 107.
[74] **Exhibit C-152.** Decision of the Supreme Court of the Republic of Belarus of 27 January 2015.
[75] *See e.g.*, **Exhibit RL-32**, para. 107. **Exhibit RL-8**. *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2009, para. 91.

C.2. The Termination Dispute is a Series of Continuing Breaches

42. The termination proceedings also constituted a continuing, uninterrupted breach, which began with the petition to terminate the contract[76] and culminated in the Supreme Court's opinion.[77]

43. There is no dispute that the Tribunal has jurisdiction over breaches that continue after the EEU Treaty entered into force.[78] If the Tribunal finds (as it should) that the Belarusian Supreme Court's opinion, and the later sale of the right to develop the Investment Object, were part of a continuing chain of events, it should assert jurisdiction over the entire Termination Dispute even if earlier events in that chain occurred prior to entry into force of the EEU Treaty.

44. Respondent complains that the Treaty claims are "*very heavily [based] on conduct that occurred before the Treaty came into force on January 2015.*"[79] The fact that some part of the Dispute is based on actions from before entry into force is irrelevant because the Dispute *continued* after entry into force. This legal principle was confirmed by the tribunal in *Tecmed v Mexico*[80]:

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[76] The Arbitral Tribunal's Communication A22 to the Parties of 8 August 2019, para. 4(a):
"*Is Claimant arguing that it suffered duress, resulting in Claimant being forced to execute the 4th Agreement (Doc. C-66)? If this is so, what would be the applicable legal regime and which would be the legal consequences of such duress?*"
Claimant wishes to clarify that its position is that Claimant was under significant pressure to enter into the Amended Investment Contract and it was this pressure from the State, which caused it to agree to significantly worse terms at a time when the construction costs had also skyrocketed. *See also* **CS-V. Claimant's Statement of Reply of 28 February 2019**, paras. 30-38. However, Claimant acknowledges that the State's pressure did not amount to the legal definition of duress so as to invalidate the Amended Investment Contract under either international or Belarusian law.
[77] **Exhibit RL-32**. *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, para. 107.
[78] **HT Day 1** (Respondent's Opening), 165:3-15. **RS-18**, **Respondent's Statement of Defence of 19 November 2018**, paras. 417-418.
[79] **HT Day 1** (Respondent's Opening), 163:11-13.
[80] **Exhibit CL-32.** *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, paras. 67-68.

> "[*T*]*he Arbitral Tribunal will not consider any possible violations of the Agreement prior to its entry into force on December 18, 1996, as a result of isolated acts or omissions that took place previously or of conduct by the Respondent considered in whole as an isolated unit and that went by before such date. … On the other hand, conduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction*."

45. Claimant does not seek compensation for "*isolated acts or omissions*" prior to entry into force. Rather, the pre-entry actions are part of an indirect, creeping expropriation and breach of fair and equitable treatment that culminated with the January 2015 Supreme Court decision and the sale of the right to develop the Investment Object in September 2017. Because the denouement of Respondent's breaches occurred after the EEU Treaty's entry into force, the Tribunal has jurisdiction.

D. The Termination Dispute is Also Timely Because Respondent Claims the Dispute Arose after Respondent Signed the EEU Treaty

46. Finally, even on the Respondent's own case, the so-called "*Termination Dispute*" arose at the latest after *signing* of the Treaty on 29 May 2014.[81] The Termination Dispute is timely for this reason as well.

47. Article 18 of the VCLT provides that States must "*refrain from acts which would defeat the object and purpose of a treaty*" after signing.[82]

48. As confirmed in *Tecmed v. Mexico*, the Tribunal may consider actions by Respondent between signing and entry into force of the EEU Treaty in considering Claimant's Treaty claims.[83]

49. Because the appellate decision of Respondent's court was after signing,[84] the Tribunal has jurisdiction over the claims even if the Tribunal accepts Respondent's argument that the Termination Dispute "*culminated on 29 October 2014*", the date of the appellate court judgment.[85]

[81] **Exhibit C-1.**
[82] **Exhibit CL-13.** Vienna Convention on the Law of Treaties dated 23 May 1969, Art. 18.
[83] **Exhibit CL-32.** *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, paras. 70-71.
[84] The Respondent's Appellate Division of the Minsk Economic Court rendered its judgement on 29 October 2014. **Exhibit C-150.** Ruling of the instance of appeal of the Commercial court of Minsk of 29 October 2014.
[85] **RS-18**, **Respondent's Statement of Defence of 19 November 2018**, para. 409. **RS-19, Respondent's Rejoinder of 30 May 2019**, paras. 388, 703. **HT Day 1**, 163:19-22.

E. The Origin of Funds for Claimant's Investment Is Irrelevant

50. In response to the Tribunal's question regarding the relevance of Respondent's jurisdictional objection,[86] Claimant summarizes its previous submissions[87] establishing that the source of funds for Claimant's investments is irrelevant.

51. ***First***, the EEU Treaty explicitly provides that "*Incorporation within the meaning of sub-paragraph 24 of paragraph 2 of this Protocol shall constitute a form of investment.*"[88] There is no dispute that Claimant incorporated a local subsidiary, Manolium-Engineering, in Belarus.[89] This alone qualifies as an investment and the inquiry should end there.

52. ***Second***, the EEU Treaty includes in its definition of investment an assignment of "*rights to engage in entrepreneurial activities granted* […] *under a contract* […].[90] There is no dispute that Claimant assigned some of its rights under the Investment Contract to Manolium-Engineering.[91]

53. ***Third***, there is no dispute that Claimant's wholly-owned subsidiary spent millions of dollars on construction of the New Communal Facilities.[92]

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[86] The Arbitral Tribunal's Communication A22 to the Parties of 8 August 2019, para. 3(c): "*As regards Respondent's jurisdictional objection: what is the importance of the origin of the funds received by Claimant?*"

[87] **CS-V**. **The Claimant's Statement of Reply of 28 February 2019**, paras. 501-517.

[88] **Exhibit CL-3**. Protocol No. 16 to EEU Treaty, Art. 66; *see also* Art. 2(24), Art. 2(7); **Exhibit CL-98**. *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction of 30 November 2018, para. 129 ("*[I]t is in fact not unusual that an investor, who wants to make an investment abroad, uses a company as a vehicle, thereby investing in the host country.*").

[89] **Exhibits C-5-C-7**. **RS-18**, **Respondent's Statement of Defence of 19 November 2018**, para. 41; *see also* **HT Day 1** (Claimant's Opening), 27:10-20; 32:17-33:2. **HT Day 1** (Respondent's Opening), 144:16-17 ("*Claimant and its Belarussian subsidiary, Manolium-Engineering….*").

[90] **Exhibit CL-3**. Protocol No. 16 to EEU Treaty, Art. 2(7). **Exhibit C-3. Exhibits C-5-C-7**.

[91] **Exhibit C-66.** Amended Investment Contract of 8 February 2007, Art. 2.

[92] Although the exact amount is disputed by Respondent, multiple audits conducted by its agencies showed millions had been spent in Belarus by Manolium-Engineering on this project. *See* **Exhibit C-**

Construction of infrastructure within a state is, of course, the paradigmatic example of investment.

54. Nevertheless, Respondent argues that establishing the subsidiary in Belarus through which the project was implemented does not count as an investment unless Claimant itself directly funded that investment and construction costs.[93]

55. Respondent's position is untenable as a matter of both law and logic. Many tribunals, including those in *Tradex v Albania*,[94] *Saipem v Bangladesh*,[95] *Eiser v Spain*,[96] and *Wena Hotels v Egypt*,[97] have consistently concluded that the source of funds for an investment is irrelevant.[98]

56. Aside from being incorrect on the law, Respondent's narrow interpretation would lead to absurd results, as highlighted by the following exchange from the hearing[99]:

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131. Paritet-Standart Report of 5 November 2012. **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015. **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016.

[93] *See e.g.*, **HT Day 1** (Respondent's Opening), 169:8-12 ("*Ratione materiae objection is the third jurisdiction objection I would like to draw very briefly. In the notice, the Claimant seeks to create the impression that it invested into Belarus by financing the construction of the New Communal Facilities*.").

[94] **Exhibit CL-95.** Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award of 29 April 1999, paras. 108-111.

[95] **Exhibit CL-96.** *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, paras. 103, 106.

[96] **Exhibit CL-97.** *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award of 4 May 2017, para. 228.

[97] **Exhibit RL-73.** *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, para. 126.

[98] **Exhibit RL-104**. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award, 28 January 2002, para. 54. *See also* **CS-V. Claimant's Statement of Reply of 28 February 2019**, paras. 508-517. **HT Day 1** (Claimant's Opening), 91:7-92:22.

[99] **HT Day 1** (Respondent's Opening), 176:3-177:14.

"*ARBITRATOR ALEXANDROV: So, under this theory, under your argument, if Manolium-Engineering would borrow from Bank of America, then the real investor is Bank of America?*

PRESIDENT FERNÁNDEZ-ARMESTO: You can give it some thought.

MS. ZAGONEK: I'm not sure I understand, but, yeah."

57. There is ample evidence that Claimant made an investment and that it can therefore benefit from the protections of the EEU Treaty.[100]

58. In response to the Tribunal's question,[101] the Claimant hereby submits the below graphic which shows all companies that provided loans to Manolium-Engineering, ownership of such companies, the companies' affiliation with Claimant and Manolium-Engineering, the total amount of the loans from each company and the time periods of the loans provided.

59. For further details on the graphic, the Tribunal may also refer to the list of loans,[102] loan agreements and confirmation of loan transfers provided by each

[100] However, if the Tribunal disagrees and finds that the source of the funds loaned is relevant, Claimant has sufficiently established that the funds were provided by affiliated third parties at the direction, and guarantee, of Claimant. *See* **Exhibit C-389.** Financial Statement of Manolium-Engineering for 2012 of 29 March 2013 (showing charter capital and long-term credits and loans provided). **Exhibit C-215.** Loans provided to Manolium-Engineering in 2004-2013 (excel file). **Exhibits C-216 -C-220** (loan agreements). **HT Day 2** (Dolgov - Questions from the Tribunal), 357:18-22; 358:12-25. After all, as Mr. Dolgov reasonably asked at the hearing, "*how [else] can you attract such figures to the company with the statutory capital of USD 30,000?*" **HT Day 2** (Dolgov Cross), 308:11-12.

[101] The Arbitral Tribunal's Communication A22 to the Parties of 8 August 2019, para. 4(d):
"*Finally the Parties are kindly requested to provide a graphic (with cross-references to supporting documentation) which clearly shows the flows of capital and of financing of the group of companies of Claimant – i.e. a development of the charts submitted as slide 4 and 40 of Claimant's opening statement and as slide 7 of Respondent's opening statement.*"

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

company,[103] all documents confirming the structure of ownership of each company[104] and financial statement of Manolium-Engineering for 2012.[105]

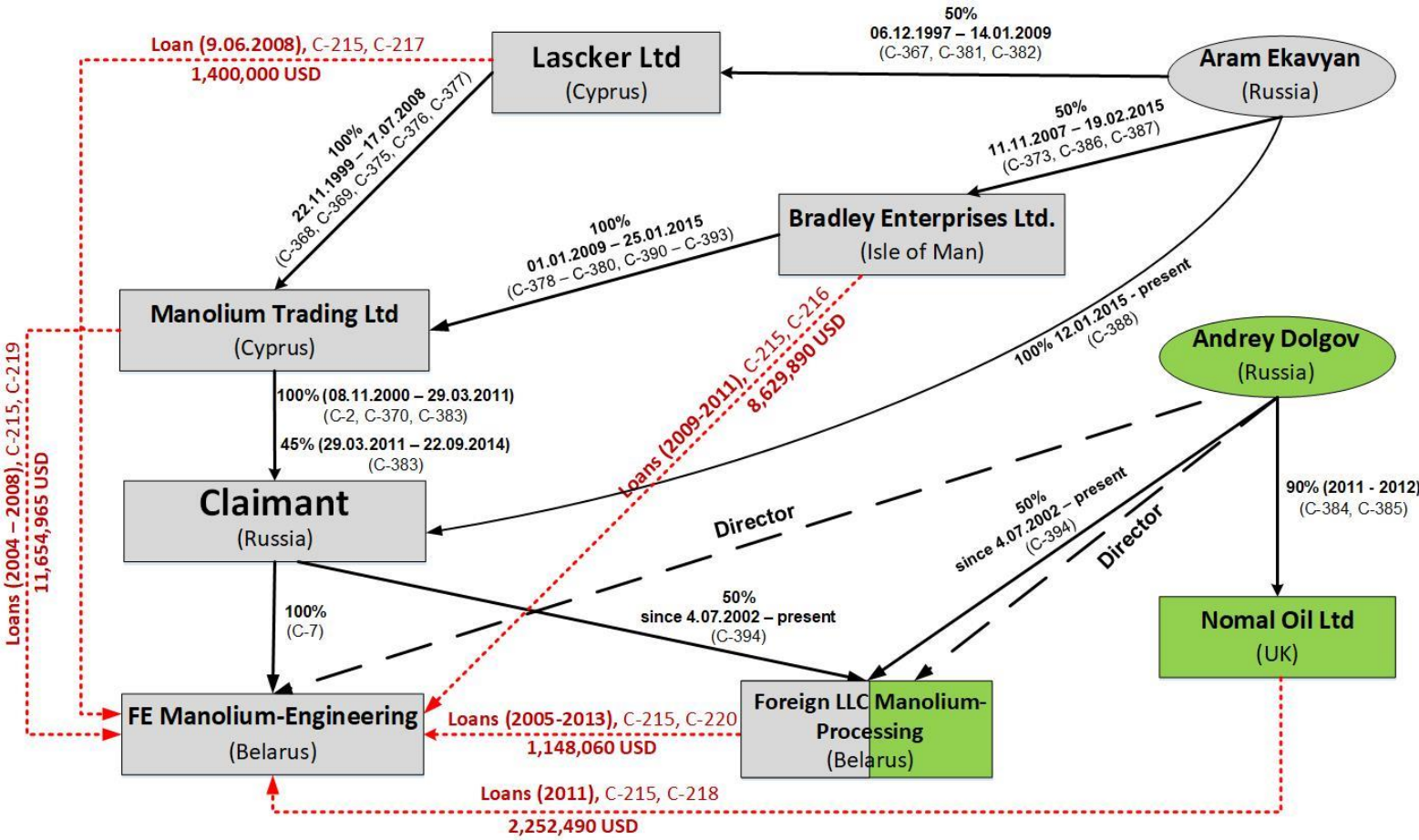
60. Claimant also respectfully requests that the Tribunal permit Claimant to submit the following additional exhibits regarding Claimant's corporate structure which are directly relevant to the Respondent's "*source of funds*" argument raised at the hearing and the Tribunal's related questions:

(i) Documents indicating that Bradley Enterprises Ltd owned Manolium Trading Ltd. until 25 January 2015[106]; and

(ii) An extract from the Belarusian Register of Companies for Manolium-Processing Foreign LLC proving that Claimant and Mr. Andrey Dolgov have jointly owned it since 4 July 2002.[107]

[103] **Exhibits C-216-C-220**.
[104] **Exhibits C-367-C-393**.
[105] **Exhibit C-389**.
[106] **Exhibit C-390**. Letter of Stateco (Nominees) Limited, Declaration of Trust, Instrument of Transfer and Share Certificate No. 11 for Manolium-Trading Ltd (1 - 125 000 shares) of 19 December 2014. **Exhibit C-391**. Letter of Stateco (Nominees) Limited, Declaration of Trust, Instrument of Transfer and Share Certificate No. 12 for Manolium-Trading Ltd (125 001 - 250 000 shares) of 19 December 2014 **Exhibit C-392**. Instrument of Transfer for Manolium-Trading Ltd (1 - 125 000 shares) of 25 January 2015 **Exhibit C-393**. Instrument of Transfer for Manolium-Trading Ltd (125 001 - 250 000 shares) of 25 January 2015.
[107] **Exhibit C-394**. Extract from the Belarusian Registry of Legal Entities for Manolium-Processing Foreign LLC of 16 September 2019.

Image 1. Extended Graphic of the Flow of Capital and Financing of the Claimant's Group of Companies[108]



[108] **Exhibit C-395**. Extended Graphic of the Flow of Capital and Financing of the Claimant's Group of Companies.

II. QUANTUM

A. Claimant Is Owed Compensation for the Termination of the Investment Contract and the Value of the New Communal Facilities Seized by Respondent

61. The Tribunal has asked about the legal consequences of terminating the Investment Contract by the Belarusian courts pursuant to Belarussian law.[109] The most direct result of termination is that Respondent must pay Claimant for the value conferred under that contract by Claimant to Respondent prior to termination (*i.e.*, the value of the New Communal Facilities). This obligation to pay compensation flows from both Belarusian and international law.

62. Pursuant to Belarusian law, when the construction contract was terminated, Respondent as the employer had an obligation to compensate Manolium-Engineering (*i.e.*, eventually Claimant) as the contractor for the construction costs for the work performed because the State utilized the New Communal Facilities.[110] This is necessary and required under Belarusian law to prevent impermissible unjust enrichment of Respondent.[111]

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[109] The Arbitral Tribunal's Communication A22 to the Parties of 8 August 2019, para. 4(b):
"*The Contract was terminated by a judgement issued by the Belarusian Courts. Under Belarusian Law, what are the legal consequences of such Contract termination?*"

[110] **Exhibit CL-155.** Extracts from the Civil Code of the Republic of Belarus of 7 December 1998 (edition in force since 2 February 2003) (the provisions provided in Exhibit CL-155 have not been changed since 2 February 2003), Article 682:
"*Should the works contract be terminated on any statutory or contractual grounds before the customer accepts the result of the contractor's works (clause 1 of article 673), 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*."

[111] **Exhibit CL-155.** Extracts from the Civil Code of the Republic of Belarus of 7 December 1998 (edition in force since 2 February 2003).
Article 971:
"*The party having acquired or saved any property (i.e. the acquirer) other than on any statutory or contractual grounds for the account of another party (i.e. the injured party) shall be obliged to return*

63. Belarusian construction accounting law—as set forth in the Audit Report of 22 February 2016 conducted by Respondent's Ministry of Finance for the specific purpose of valuing the New Communal Facilities and compensating Manolium-Engineering (*i.e.*, eventually Claimant)—explains how such costs are to be determined.[112] Specifically, Clause 2 of instruction No. 10 regarding Procedure[s] for Determining the Costs of Constructing a Facility for Accounting Purposes, as approved by Resolution No. 10 of the Ministry of Construction and Architecture of the Republic of Belarus states[113]:

> "*[T]he value of a facility subject to accounting is represented by the aggregate of its construction costs as reflected in accounting, which constitute its original value… [and] the value of a non-completed construction object … consists of the costs posted on Account 08 (Investment in Long-Term Assets) and any costs having enlarged the value of the respective object.*"

64. Moreover, under international law, investment value—or the amount actually invested prior to the wrongful acts—is a well-established method of quantifying

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to the latter the property unjustifiably acquired or saved (i.e. unjust enrichment), except as specified in Article 978 of this Code.
2. The rules set out in this chapter shall apply regardless of whether the respective unjust enrichment has resulted from the conduct of the acquirer, the injured party, or any third party or contrary to their will."
Article 974:
"*1. If it is impossible to return the unjustifiably acquired or saved property in kind, the acquirer shall compensate to the injured party for the actual value of this property at the time of its acquisition, and also for the losses, caused by the subsequent change in the value of property, if the acquirer has not reimbursed its value at once after he has known about unjust enrichment.*
2. A person who unjustifiably used the property of other people for the time being without his intention to acquire it or used the services of other people shall recompense to the injured party all that he has saved owing to such use at the price existing at the time when this use ended and in the place where the use took place."

[112] **Exhibit C-160**. CAO of the Ministry of Finance Report (as submitted to the Tribunal on 18 April 2019, extended translation) of 22 February 2016.

[113] **Exhibit C-160**. CAO of the Ministry of Finance Report (as submitted to the Tribunal on 18 April 2019, extended translation) of 22 February 2016, page 7.

compensatory damages.[114] That the EEU Treaty refers to fair market value does not alter this principle because, as explained by the *Metalclad* tribunal: "*fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project.*"[115] Indeed, both experts agree that the New Communal Facilities should be valued based on their cost.[116] Belarusian law is in accord.[117]

65. Therefore, Claimant is entitled to compensation of its costs for construction of the New Communal Facilities under any governing standard.

B. Claimant Has Established That It Suffered USD 20,434,679 in Damages Resulting from Respondent's Seizure of the New Communal Facilities and its Retention of the Library Payment

66. Respondent does not dispute that Claimant constructed the New Communal Facilities ("**NCF**") and that these were transferred "*without consideration into the ownership of Minsk* […]."[118] The only issue, therefore, is the value.

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[114] *See e.g.*, **Exhibit CL-104**. *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, Case No. ARB/97/3, Award of 20 August 2007, paras. 8.3.12-21 (awarding damages on the amounts actually invested); **Exhibit CL-15**. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 122.

[115] **Exhibit CL-15**. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 122. *See also* **Exhibit RL-75**. *MTD Equity Sdn Bhd v. Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004*, para. 125 ("[T]*he Tribunal agrees with the parties that the proper calculation of 'the market value of the investment expropriated immediately before the expropriation' is best arrived at, in this case, by reference to Wena's actual investments in the two hotels.*").

[116] **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, para. 4.2.1. **RER-1**. First Expert Report of Abdul Sirshar Qureshi of 15 November 2018, para. 220.

[117] *See* **Exhibit CL-155.** Extracts from the Civil Code of the Republic of Belarus of 7 December 1998 (edition in force since 2 February 2003), Arts. 682, 971, 974.

[118] **Exhibit R-242**. Order of the President of Belarus (in Russian with English translation) of 20 January 2017.

67. Mr. Taylor's calculation is based on three separate contemporaneous audits[119] conducted under Belarusian audit law to determine the amount invested by Claimant,[120] and is more reliable than Mr. Qureshi's pre-construction estimates based on 1991 Soviet construction cost tables.[121]

68. The first audit of actual costs, by the private accounting firm Paritet-Standart in November 2012,[122] was conducted "*in accordance with the requirements of the auditing rules of the Republic*"[123] and "*included examining the required evidence*."[124] Paritet-Standart expressly opined that its "*audit provides a sufficient basis for [its] opinion*" that "*as of 01 October 2012, the amount of investments made by FE 'Manolium-Engineering' is USD 18,313,814.90* […]."[125] Neither Mr. Qureshi nor Respondent have raised any criticisms to the methodology, conclusions, or competence of the Paritet-Standart audit.[126]

69. The second audit of actual costs, was by the Belarusian Registration and Cadastre Agency in June 2015.[127] It was conducted by at least four government employees qualified as "*forensic experts*" that had conducted audits of construction activities for years[128] and was performed to "[d]*etermine the amount of expenses*

[119] **Exhibit C-131.** Paritet-Standart Report of 5 November 2012. **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015. **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016.
[120] **HT Day 3** (Taylor Cross), 553:8-9, 16-24; 557:22-24 ("*the more appropriate thing with these audits is they went through the accounting records and actually checked what was spent*."); 561:25-562:12. **HT Day 3** (Taylor Cross), 553:19-24, 563:24-564:1. *See also* **HT Day 3** (Qureshi Cross), 571:5-9, 571:16-572:3, 572:25-3.
[121] **HT Day 3** (Qureshi Cross), 589:18-590:15, 591:15-592:5. **RER-1**. First Expert Report of Abdul Sirshar Qureshi 15 November 2018, para. 222.
[122] **Exhibit C-131.** Paritet-Standart Report of 5 November 2012.
[123] **Exhibit C-131.** Paritet-Standart Report of 5 November 2012, page 1.
[124] **Exhibit C-131.** Paritet-Standart Report of 5 November 2012, page 2.
[125] **Exhibit C-131.** Paritet-Standart Report of 5 November 2012, pages 2, 6.
[126] **HT Day 3** (Qureshi Cross), 570:10-19 ("*Q. …So far as I can tell, …you have no critique of this Audit Report whatsoever in your Reports; is that correct? A. That's correct, yes.*"); *see also id.*, 575:7-15.
[127] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015.
[128] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, pages 1-2.

incurred by the investor in the course of construction work under the terminated investment contract of June 6, 2003."[129]

70. The directive was assigned to the Belarusian Registration and Cadastre Agency further to the Parties' agreement in February 2015 to[130]:

    (i) "*[P]ropose to the investor the compensation of amounts within the sums confirmed by the documents, incurred directly in creating communal facilities (that can be used in the interests of the city) based on the opinion of a state appraisal organization (RUE Minsk City Agency for State Registration and Land Cadastre)*"; and

    (ii) "*[C]onsider the issue of compensation of costs after obtaining the results of the assessment*."

71. Respondent's forensic experts concluded the value to be USD 18,129,933.17, within rough difference of 1% with the first audit of 2012.

72. The third audit of actual costs was by the Ministry of Finance in February 2016.[131] It was performed by qualified experts consistent with Belarusian auditing standards.[132] It "*compar[ed] the records, documents, or facts of certain operations with the records, documents, or facts of other related operations*" and included sample inspection of all of the primary documents.[133] The Ministry

[129] **Exhibit C-154.** Registration and Cadastre Agency Report of 16 June 2015, page 2.
[130] **Exhibit C-153.** Minutes of the meeting attended by MCEC, Minsktrans and Claimant of 4 February 2015.
[131] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016.
[132] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, page 1.
[133] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, page 1 (such as "*sample inspection of contracts, statements of works performed and associated expenses, certificates of acceptance of construction or other special works, design and as-built documentation, primary records, waybills and consignment notes, payment orders and any other documents or information carriers kept by Foreign Enterprise Manolium-Engineering.*")

concluded Manolium had invested USD 19,434,679 in constructing the NCF.[134] As Mr. Taylor explained and Mr. Qureshi conceded, this small difference is due "*to the management costs and how they are allocated to a particular Project*" an issue subject to judgment under accounting principles.[135]

73. Despite claiming this discrepancy rendered the audits unreliable, Mr. Qureshi agreed management costs should be included pursuant to Belarusian law.[136] And despite previously criticizing the audit for a lack of reliance on primary sources (which is refuted by the audits), Mr. Qureshi agreed that sampling 14% of the value of the work is a significant percentage.[137]

74. Mr. Qureshi agreed that the audits reflect actual costs,[138] but insisted that "*there's a confusion here that costs incurred equals value. That may not necessarily be the case, and in this situation, I believe it's not.*"[139] The applicable law above makes clear that Mr. Qureshi's "*belief*" is mistaken. Under both Belarusian and

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[134] **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, page 8.
[135] **HT Day 3** (Taylor Cross), 561:1-6. *See also* **HT Day 3** (Qureshi Cross), 585:19-586:3 ("*Q. Now, your Report makes mention of the fact that the number that was found by the Cadastre Agency, 18,129, is about 1.3 million, I think it is, less than the amount that is determined by the Ministry of Finance audit in February 2016; correct? A. Correct, which I refer to as possibly because of the management fees. Q. Right. Indirect costs, one could say; correct? A. Management Fees, I think, is what it says, but anyway, okay.*").
[136] **HT Day 3** (Qureshi Cross), 586:18-588:18 (Qureshi does not dispute the Ministry of Finance's instruction and acknowledges he did not did not inquire into this issue of Belarussian law); *see also* **Exhibit C-160.** CAO of the Ministry of Finance Report of 22 February 2016, page 7 ("*According to Clause 11 of Instruction No. 10, the value of a non-completed construction object (prior to the commissioning of the objection) consists of the costs posted on Account 09 (Investment in Long-Term Assets) and any costs having enlarged the value of the respective object. According to Instruction No. 10, the following costs are relevant…, but not included in the consolidated estimate calculation:… construction management costs….*").
[137] **HT Day 3** (Qureshi Cross), 582:5-16 ("*Q. So, even though it was a small percentage of number of contracts, 14 percent is a significant percentage of the Actual Value of the works? A. Correct, yes.*")
[138] **HT Day 2** (Qureshi Cross), 573:18-20 ("*Q. …they are actually referring to 'actual' costs; correct? A. It says* "*Actual Costs,*" *yes.*"), 595:16-20 ("*Q. …none of these auditors relied on the estimate as a basis for Construction Costs; correct? A. They used the—they used it as—they did use it, but they used Actual Cost, I agree. yes.*").
[139] **HT Day 3** (Qureshi Direct), 490:13-15.

international law, an investor's compensation for the value of a construction project is equal to the costs incurred.[140]

75. Unlike Mr. Taylor's calculation, Mr. Qureshi bases his *post hoc* calculations on speculative adjustments to nearly fifteen-year old projections based on twenty-eight year old Soviet-era "s*tandard costs*". Specifically, Mr. Qureshi began his analysis with design documentation compiled in 2005 and 2006,[141] although construction began at the end of 2007.[142] Mr. Qureshi's methodology therefore does not and cannot consider any design changes.[143]

76. Even worse, Mr. Qureshi admitted that 99.97% of his total cost calculation consisted of adjustment of the 1991 prices to supposed present value.[144] While Mr. Qureshi claims inflation is only one factor for the adjustment, it is clear from his testimony that it was the predominant one.[145] Moreover, there was double

[140] *See* paras. 61-65, *supra*.
[141] **HT Day 3** (Qureshi Cross), 589:18-590:2 ("*Q. …But your methodology involved taking the original estimate for the Project that was done—as I understand it, the document itself you've been looking at was created in 2009, but you understand that the data was compiled in 2005 and '06; is that correct? Is that a fair characterization? A. Yes.*").
[142] **CWS-1**. First Witness Statement of Mr A. Dolgov of 10 May 2018, para. 41. **Exhibit C-68**. Decision of MCEC of 24 May 2007. **Exhibit C-69**. Certificate of registration of the right of temporary use granted to Manolium-Engineering in respect of the land plots for construction of the Depot in Uruchye-6 of 29 June 2007. **Exhibit C-70**. Construction permit issued by Gosstroy for constructing the Depot 15 October 2007.
[143] **HT Day 3** (Taylor Cross), 562:8-10 ("*I mean, for example, how does that original cost estimate deal with all of the changes that were made to the facilities. It can't.*").
[144] **HT Day 3** (Qureshi Cross), 591:13-592:5 ("*Q. Okay. But you don't dispute this 99.97 percent adjustment here? A. It looks right, yes, his calculation.*").
[145] **HT Day 3** (Qureshi Cross), 591:24-592:1 ("*Q. But it's a very significant factor; correct? A. It is a significant factor because of what was happening in Belarus.*"); *See also id*., 601:23-602:1, 602:12-18, 602:23-603:1 (explaining in response to President's question that 31% increase in construction costs not due to boom, but inflation of Belarusian rubles).

digit inflation in many of the twenty years for which Mr. Qureshi adjusted, and the Belarusian currency was denominated twice.[146]

77. But worst of all, Mr. Qureshi further deducted what he speculatively claimed to be the costs required to match the pre-construction design documents. This downward adjustment is legally improper because actual cost is the appropriate measure of damages. It is also factually improper because Mr. Qureshi relied on what he calls the Belcommunproject reports.[147] These reports were "*created by a state entity during this arbitration*" in February 2018 "*to record accumulated defects and structural damage to the [Depot] in the course of mothballing the unfinished business.*"[148] Based on the reports, Mr. Qureshi's team deducted significant amounts from the value of the NCF.[149]

78. The Belcommunproject inspection was conducted six years after the State took possession of the property.[150] Yet Mr. Qureshi assumed the Depot's condition

[146] **Exhibit SQ-6**. Forecasted inflation published by World Economic Outlook Database in April 2014 of 15 November 2018. **Exhibit TT-17**. NBB, Banknotes and Coins of the National Bank of the Republic of Belarus of 24 April 2017.

[147] *See e.g.*, **HT Day 3** (Qureshi Cross), 581:6-11 ("*Q. Okay. I want to focus on the Depot because you'll agree with Mr. Taylor that that's the main difference between the two of you, with respect to the Communal Facilities; correct? A. That's correct. We agree on a lot, but we disagree on that one, yes.*").

[148] **HT Day 3** (Qureshi Cross), 607:4-8 ("*Q. The purpose of this survey was to record accumulated defects and structural damage to the construction in the course of mothballing the unfinished business; correct? A. Yes.*"); *see also* **Exhibit SQ-44**. Engineering opinion on the condition of construction facilities and engineering services in respect of the facility: A trolleybus depot with 220 trolleybus in Uruchye-6 microdistrict in Minsk. Book 2. Production facility. Volume 17.051-2 (updated) of 15 November 2018, page 2. **HT Day 3** (Qureshi Cross), 605:12-606:4 (acknowledging reliance on report).

[149] **HT Day 3** (Qureshi – Question from the Tribunal), 622:16-24 ("*PRESIDENT FERNÁNDEZ-ARMESTO: …To make a long story short, there is somewhere an 85 percent number, but if your calculation, it is a 60 percent number. It is 7 over 12. THE WITNESS: Correct. PRESIDENT FERNÁNDEZ-ARMESTO: So, you say that after doing these calculations, you think it is more 60 percent than--it is closer to 60 percent than to 85 percent what has been finalized in the Depot? THE WITNESS: Correct*.").

[150] **HT Day 3** (Qureshi Cross), 607:9-14. *see also id*., 622:2-8.

remained the same since 2011.[151] Very few pages of the 172 page document on which his analysis is based have been provided.[152] Indeed, Mr. Qureshi himself did not review the document and could not show, in reference to source documents, how the alleged reconciliation between the reports and the cost estimate occurred.[153] Rather, Mr. Qureshi, who does not speak Russian, asks Claimant and the Tribunal to take his word for it that "*somewhere in… the Russian part of this Report, there is a list of items which have not been built* […]"[154]

79. Mr. Qureshi's lack of substantiation for the conclusions in his report is further belied by the contemporaneous evidence. In a letter dated 18 June 2012, Manolium-Engineering explained that "*[a]ccording to the Works and Funding Schedule, the budgeted costs for completing construction amounts to 29,887,248,974 Belarusian rubles*."[155] In another letter dated February 20, 2014, Manolium-Engineering explained that "[o]*ver 85% of construction work at the production building of the trolleybus depot has been completed as well*."[156] Mr. Qureshi admitted that he did not take either of these contemporaneous documents into account in dramatically adjusting his value for purported non-completion.[157]

80. It was also established at the hearing that the Ministry of Finance Report had utilized, in part, *the same original cost estimate methodology as Mr. Qureshi* as

[151] *See e.g.*, **HT Day 3** (Qureshi Cross), 596:1-2.
[152] **HT Day 3** (Qureshi Cross), 606:12-17 ("*Q. …this is a 172-page document; is that correct? A. Correct, yes, I knew-- Q. Of which you gave us five pages or so, six pages—correct?—in English. A. Correct.*").
[153] **HT Day 3** (Qureshi Cross), 607:15-608:23.
[154] **HT Day 3** (Qureshi – Questions from the Tribunal), 611:10-13.
[155] **Exhibit R-88**. Letter from Claimant to MCEC (in response to the MCEC Letter dated 18 June 2012) (in Russian with English translation) of June 2012, page 1.
[156] **Exhibit C-316**. Letter from Manolium-Engineering to Minsk City Executive Committee of 20 February 2014, page 1.
[157] **HT Day 3** (Qureshi Cross), 624:18-626:2; *Id.*, 626:20-628:4.

a cross-check to confirm that its valuation was reasonable.[158] In other words, to the extent that the cost estimates are relevant at all, they were considered by the audits relied on by Mr. Taylor. Mr. Taylor's USD 19,434,679 is the most reliable evidence of the value of the NCF and should be accepted by the Tribunal.

81. As the Parties agree,[159] Claimant also invested an additional USD 1 million as part of this project as a "*donation*" to the Belarusian National Library. This amount, therefore, should be returned to Claimant because it was part of the consideration provided for the terminated Investment Contract and its return is necessary to avoid unjust enrichment. Accordingly, the total value of the restitutionary damages to the Claimant is **USD 20,434,679.**

C. Claimant Has Proven Its Damages For the Investment Object To a Reasonable Degree of Certainty

82. Once the fact of damages has been established, certainty as to the amount is not required.[160] Claimant has established the fact of damages and provided a reasonable basis for its amount with Mr. Taylor's valuation.[161] Mr. Qureshi's valuation is based on the illogical premise that an investor would invest over

[158] **HT Day 3** (Qureshi Cross), 630:9-631:24, 633:9-634:5.
[159] *See* **Exhibits C-48** (Additional Agreement No. 2 of 22 October 2003)**, C-49** (Additional Agreement No. 3 of 30 October 2003)**. RER-1.** First Expert Report of Abdul Sirshar Qureshi of 15 November 2018, Chart at Para. 245. While Respondent argues that the Library Payment is not part of the value of the NCF, it has never disputed that it was actually paid and has never meaningfully disputed that it is recoverable.
[160] **Exhibit CL-147**. *Marco Gavazzi and Stegano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award of 18 April 2017, para. 124; **Exhibit RL-78**. *Amoco International Finance Corp. v. The Government of the Islamic Republic of Iran*, et al., 15 Iran-U.S. C.T.R. 189, Partial Award No. 310- 56-3, 14 July 1987, pp. 187-88; **Exhibit RL-72**. *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, para. 215 ("*it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred*."); **Exhibit RL-68**. *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 246.
[161] *See* **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, paras. 3.11.2-3, Tables 17 and 18.

USD 20 million just to lose USD 60 million[162] and is not based on the best sources of data—it underestimates sales value, overestimates construction costs, and applies an inappropriate discount rate. A summary of the experts' position is provided below.

Table 1. Lost Profits Summary of Parties' Experts[163]

Lost Profits Summary US$ 000'	Taylor	Qureshi
Residential Area	55,615	38,914
Retail Area	224,447	184,394
Office Area	11,381	11,299
Hotel and Conference Centre	88,118	56,228
Parking area	19,385	7,697
Total Selling Price	**398,946**	**298,533**
Construction Cost	(243,022)	(338,892)
Land Cost	0	(20,941)
Total Costs	**(243,022)**	**(359,833)**
Nominal Loss	**155,924**	**(61,300)**
Discount Rate	13%	15.68%
Lost Profits (Discounted)	**68,900**	**0**

83. In regards to sales value, the experts principally disagree on the income rate for the shopping mall, the sales price per square meter for the residential area, assumptions regarding the hotel, and the valuation for the retail parking.[164] The 2013 Colliers Report (on which Mr. Qureshi also relied) showed that Mr. Taylor had the more accurate income rate.[165] Mr. Taylor also relied on the most contemporaneous documents for his hotel assumptions.[166] For comparables,

[162] *See e.g.*, **H-5**, Taylor Direct Presentation, p. 18 (summarizing Investment Object valuation and showing Qureshi found USD 61,300,000 loss) *but see* **Exhibit C-35**. Letter from MCEC to the President of the Republic of Belarus of 26 May 2006, **Exhibit TT-52** (Graphic Design of Investment Object, 2010).
[163] **H-5**, Taylor Direct Presentation, p. 18.
[164] **H-5**, Taylor Direct Presentation, p. 9; **HT Day 3** (Taylor Opening), 466:1-12.
[165] **HT Day 3** (Taylor Cross), 540:25- 541:23; **HT Day 3** (Taylor Direct), 466:1-6.
[166] **HT Day 3** (Taylor Cross), 545:10-546:3.

with the limited information available, Mr. Taylor focused on hotels in the same region, rather than hotels in dissimilar developed markets as did Mr. Qureshi.[167]

84. Mr. Qureshi has conceded the parking area has value by adjusting his second report accordingly,[168] but the parties disagree on the amount of that value. As Mr. Taylor explained at the hearing, he assigned a small value to the retail parking because of its prime location and lack of parking in the surrounding area, which is modest compared to Mr. Qureshi's value for retail parking.[169]

85. One of the principal differences between the experts remains Mr. Taylor's reliance on the 2019 Colliers Report. The 2019 Colliers Report provides contemporaneous data of actual construction costs in Belarus at the relevant times, as well as sales prices for the residential area.[170] This document is like several other Colliers Reports on which both experts rely, and was cross-checked by Mr. Taylor against other sources.[171]

86. Mr. Qureshi, meanwhile, ignored this document and relied on the 2011 Schedule Graphic, which he has criticized as unreliable,[172] required significant adjustments for inflation,[173] and did not take into account design changes.[174] Mr. Qureshi also

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[167] **HT Day 3** (Taylor Direct), 468:8-16. **HT Day 3** (Taylor Cross), 534:1-7; 543:15-19.
[168] **HT Day 3** (Taylor Cross), 549:4-7 ("*And it's also worth mentioning that Mr. Qureshi didn't assign any parking value either in his First Report, and then he assigned value to the residential parking*.").
[169] **HT Day 3** (Taylor Direct), 468:24-469:12. **HT Day 3** (Taylor Cross), 550:4-552:14.
[170] **HT Day 3** (Taylor Direct), 469:16-19, 471:10-16, 471:24-472:2.
[171] **HT Day 3** (Taylor Cross), 522:12-523:12; 527:1-10 ("*Q. And there is also nothing in the 2019 Report about the methodology used by Colliers? A. Well, … it talks about their own research and using the specific properties that they identify at the back of TT-69. And, as I said, what I tried to do—and I think it is outlined in my Second Report—where there was other documents or third-party sources, I tried to make sure I corroborated the values that were used in the 2019 Colliers Report.*"), 527:11-528:13, 530:21-531:3.
[172] *See* **RER-1**. First Expert Report of Abdul Sirshar Qureshi 15 November 2018, paras. 26, 73-75, 79.
[173] **HT Day 3** (Taylor Direct), 470:6-13, 470:19-21 ("*As a result of the inflation and foreign exchange adjustments, these indexing, if you like, accounts for two-thirds of Mr. Qureshi's Construction Costs*.").
[174] **HT Day 3** (Taylor Direct), 471:17-23.

included a land lease payment which Claimant was not obligated to pay[175] and an inappropriately high discount rate that is based on an idea now debunked.[176] Mr. Qureshi's criticism of the 2019 Colliers Report was also inaccurate.[177] There is no basis to ignore the 2019 Collier's Report as Mr. Qureshi insists, and no compelling explanation for Mr. Qureshi's decision to do so was presented at the hearing.

87. Finally, and in any event, the absolute floor that Claimant should receive for the loss of its right to the Investment Object is the value another investor was willing to pay in a public auction for the same development right, USD 8.87 million.[178] The price an independent buyer was willing to pay in an arm's length transaction is the gold standard in determining fair market value. And this price is conservative because, as Mr. Taylor explained, the new investor was well-aware of the tortured past of this project and necessarily must have discounted its purchase price accordingly to account for this risk.[179] Mr. Qureshi did not address this recent sale at the hearing. If the Tribunal declines to award the full value of the Investment Object as measured by Mr. Taylor's DCF valuation, it should, at a minimum, award the USD 8.87 million recently received by Respondent for that same right.

[175] **Exhibit RL-118**. Excerpts from the President's Decree dated 27 December 2007 No. 667 "*On Withdrawal and Allotment of Land Plots*".
[176] **HT Day 3** (Taylor Direct), 472:3-25
[177] **HT Day 3** (Qureshi Direct), 493:21-25. But his view that it was prepared solely for the proceedings is based on an understanding from counsel (*see id.*, 496:4-7) and his view that there is no methodology was addressed by Taylor (*see supra* note 171 above).
[178] **Exhibit R-153**. Minutes of the results of public auction (in Russian with English translation) of 12 September 2017.
[179] **HT Day 3** (Taylor Direct), 476:23-477:10.

D. Mr. Taylor Proposes the Correct Interest Rate

88. The Parties agree the interest rate specified by the EEU Treaty[180] does not exist because there is no published Belarusian interest rate denominated in USD.[181] The National Bank of Belarus ("**NBB**") publishes interbank rates in local and foreign currencies[182] and the rates on foreign currency are described as "*Average Interest Rates … [on] Deposits in Hard Currency*" or an interbank rate.[183] Both experts agree this rate is a mix of USD and EUR currencies.[184] No information is provided as to how the two currencies are blended.[185]

89. Claimant's position is that the rate most in line with the EEU Treaty is the six-month USD LIBOR rate with a country risk premium of 6.5%.[186]

90. The 6.5% premium takes into account Belarusian country risk and is consistent with the contemporaneous rating-based default spread between Belarus and the USA, as calculated by Professor Aswath Damodaran.[187]

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[180] **Exhibit CL-3**. Protocol No. 16 to EEU Treaty dated 29 May 2014, Article 81 ("*[I]nterest shall be accrued in the period from the date of expropriation till the date of actual payment of the compensation, to be calculated at the domestic interbank market rate for actually provided loans in US dollars for up to 6 months, but not below the rate of LIBOR, or in the procedure determined by agreement between the investor and the Member State.*").
[181] **HT Day 3** (Questions from the Tribunal), 640:3-641:4. *See also*, **CER-1.** First Expert Report of Travis Taylor (Navigant) of 24 April 2017, para. 7.2.2.
[182] **Exhibit TT-29.** NBB Website (English), Interbank Rates, Oct 2003.
[183] **Exhibit TT-29.** NBB Website (English), Interbank Rates, Oct 2003.
[184] **HT Day 3** (Questions from the Tribunal), 640:18-641:4. *See also* **CER-1**. First Expert Report of Travis Taylor (Navigant) of 24 April 2017, para. 7.2.2.
[185] **HT Day 3** (Questions from the Tribunal), 641:5-9 ("*PRESIDENT FERNÁNDEZ-ARMESTO: And so, how do you--it does not—the blending is not explained how they blend it or how they-- THE WITNESS: (Mr. Taylor) No, it is not explained.*").
[186] **HT Day 3** (Questions from the Tribunal), 648:17-18; 649:24-650:17. *See also* **CER-1**. First Expert Report of Travis Taylor (Navigant) of 24 April 2017, para. 7.2.6.
[187] **HT Day 3** (Taylor Direct Presentation), 483:4-9. *See also* **CER-1**. First Expert Report of Travis Taylor (Navigant) of 24 April 2017, paras. 7.2.5-7.2.6. **Exhibit TT-30**. Damodaran – Country Risk, Jan 2014.

91. At the hearing, Mr. Taylor acknowledged it would be useful to understand the extent to which a premium, or spread, is added to interbank lending in Belarus.[188] Unfortunately, that information is not available to Claimant. Claimant notes that Mr. Qureshi's own proposed rate, while inappropriate because of the fact that it is in mixed currency and there is low trading volume, demonstrates that a risk spread is added for Belarusian interbank lending because the rate itself is higher than the risk-free 6-month LIBOR rate in all but the most recent period (when the rate impermissibly dropped below LIBOR).

92. Moreover, Claimant believes it is reasonable that such a spread would be added because it would not be economically rational for banks within a country to lend at a risk-free LIBOR rate when they are in fact lending to a riskier borrower (*i.e.*, a Belarusian bank rather than a bank in a more stable country). Because that same money could be lent out to others (*e.g.*, banks outside of Belarus) with less risk at the risk free rate, the decision to lend to a riskier Belarus bank must provide the lending bank with a higher reward.

93. Mr. Qureshi disagrees with the use of the rating-based default spread because:

    (i) It represents the average of similarly rated countries which, individually, may be more or less risky than Belarus; and

    (ii) Credit ratings published by Professor Damodaran are calculated using country default spreads with a 10-year maturity period, which he considers inconsistent with the provisions of the EEU Treaty.[189]

[188] **HT Day 3** (Questions from the Tribunal), 650:18-22; 643:23-644:21.
[189] **RER-1**. First Expert Report of Abdul Sirshar Qureshi 15 November 2018, para. 240.

94. Similarly-rated countries are assigned the same rating-based default spread. As Mr. Taylor explains, this is not a reason not to use the credit rating as an indicator of risk, or of the appropriate rating-based default spread.[190]

95. While there is likely some variation in the levels of risk between countries assigned the same credit rating, it remains a helpful indicator and any variation is likely to fall within a relatively small range.[191]

96. Further, Mr. Qureshi has provided no evidence to support his assertion that country default spreads are affected by different maturities and Professor Damodaran's calculations remain the best evidence of the relevant Belarusian risk premium.

    (i) ***First***, given the premium is calculated consistently, any maturity difference is likely to be relatively insignificant.

    (ii) ***Second***, Mr. Taylor's suggested 6.5% premium is conservative given Belarus's rating-based default spread generally increased from the Valuation Date.[192]

97. Conversely, Mr. Qureshi's approach, as revised at the hearing, is to compare the NBB rate with the six-month LIBOR rate and apply the higher of the two.[193] As

[190] **CER-1**. First Expert Report of Travis Taylor (Navigant) of 24 April 2017, para. 5.3.8.
[191] For example, at the Valuation Date, Belarus (with a credit rating of B3) is considered more at risk of default than those countries given a B2 credit rating, for which the default spread is assumed to be 5.5 percent, and is likely considered at lower risk of default than those countries given a Caa1 credit rating, for which the default spread is 7.5 percent. *See* **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, para. 5.3.8. **Exhibit TT-83**. Damodaran – Country Risk, Jan 2015. Given this range, a 6.5 percent rating-based default spread remains reasonable at the Valuation Date.
[192] **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, para. 5.3.9 (2015: 6.5%, 2016: 8.41%, 2017: 8.66%, 2018: 7.69%, and 2019: 7.34%).
[193] **HT Day 3** (Questions from the Tribunal), 648:20-649:5 ("*PRESIDENT FERNÁNDEZ-ARMESTO: … So, your approach is, you take the best available rate in Belarus, which is as closely connected as possible to the Treaty language, which you say both of you agree that the one which is*

Mr. Taylor has pointed out, the NBB rate is inappropriate for at least the following reason:

(i) A blended foreign currency interest rate is inconsistent with the EEU Treaty guidance and would represent a currency mismatch with any USD-denominated damages[194];

(ii) Interest rates are affected by expectations of inflation. The inclusion of EUR with USD currency will understate the appropriate interest rate in this matter because historical and projected inflation levels are much lower in Europe than in the US[195];

(iii) The NBB rates include a rate for terms of "*over 60 days*", which is partially consistent with the required EEU Treaty term of "*up to six-months*", but it is unclear how far these terms were above 60 days[196];

(iv) The NBB interest rate recently fell below LIBOR, which the Treaty expressly prohibits with regard to the applicable interest rate.[197]

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most closely connected is a rate for more than 60 days' deposits, interbank deposits, blended euro/U.S. dollar. You take that rate, and then you compare it with LIBOR, with six months' LIBOR, I suppose, and that is the floor, and you take the higher of the two? THE WITNESS: (Mr. Qureshi) Yes. I think that's the appropriate approach.").

[194] **Exhibit CL-3**. Protocol No. 16 to EEU Treaty dated 29 May 2014, paras. 79-81.

[195] **HT Day 3** (Questions from the Tribunal), 483:12-20; 642:15-18. **CER-2**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, Sec. 5.3. Qureshi has acknowledged that he "*hear[s] Mr. Taylor's point around inflation expectation,*" but considers that it is not "*relevant in this case*." **HT Day 3** (Questions from the Tribunal), 645:14-16.

[196] **HT Day 3** (Questions from the Tribunal), 645:18-24; 648:1-18 ("*THE WITNESS: (Mr. Taylor) It's not a six-month rate. All it says is 'greater than 60 days.' PRESIDENT FERNÁNDEZ-ARMESTO: Oh. So, it says greater than 60 days? THE WITNESS: (Mr. Taylor) Correct. PRESIDENT FERNÁNDEZ-ARMESTO: You agree with that? THE WITNESS: (Mr. Qureshi) Yes.*"). **CER-1**. First Expert Report of Travis Taylor (Navigant) of 24 April 2017, para. 7.2.2.

[197] **HT Day 3** (Qureshi – Questions from the Tribunal), 646:2-7 ("*The one point will--which I have to say, maybe I just focused on it only this week, and I'm grateful for Mr. Taylor to bring it up--is the point around dropping below LIBOR. And it has to be higher. So, I think that is not something that I had factored.*").

98. Therefore, the Tribunal should apply the interest rate most closely in line with the spirit of the Treaty, which is the LIBOR 6-month rate with a country risk premium.

99. Mr. Taylor's calculation of the accrued interest at this rate is set forth in the table below:

Table 2. Updated Pre-Award Interest Table on Loss of NCF (to 31 July 2019)[198]

Loss of New Communal Facilities	Qtly Compounding (US$ 000')	
	Taylor Interest Rate	Qureshi Interest rate
Damages before Interest	**20,435**	**20,435**
Interest from Valuation Date	8,518	3,598
Interest from Transfer Dates	17,827	9,043
Interest from Expropriation Date	4,707	1,345
Interest from Date of Expense	24,401	13,075
Total loss (from Valuation Date)	**28,952**	**24,033**
Total loss (from Transfer Dates)	**38,262**	**29,477**
Total loss (from Expropriation Date)	**25,141**	**21,780**
Total loss (from Date of Expense)	**44,836**	**33,510**

Table 3. Updated Pre-Award Interest Table on Loss of Investment Object (to 31 July 2019)[199]

Loss of Investment Object	Qtly Compounding (US$ 000')	
	Taylor Interest Rate	Qureshi Interest Rate
Lost Profits	68,918	68,918
Pre-award Interest	28,726	12,135
Total Losses	**97,645**	**81,054**

[198] **H-5**, Taylor Direct Presentation, p. 26.
[199] **H-5**, Taylor Direct Presentation, p. 26.

III. PRAYER FOR RELIEF

100. Claimant respectfully requests that the Tribunal:

I. Dismiss Respondent's jurisdictional objections and find jurisdiction to consider the Dispute;

II. Issue an arbitral award declaring that the Republic of Belarus:

a) Violated its obligations to Claimant under Belarusian law and the EEU Treaty by unlawfully expropriating Claimant's investments;

b) Violated its obligations to Claimant under Belarusian law and the EEU Treaty by violating the FET Standard toward Claimant and its investments;

c) Is obligated to compensate Claimant for:

(i) Damages caused by Respondent in the form of:

a. Lost Profits for the Investment Object of **USD 155.9 million** or any other amount the Tribunal finds justified;

b. Loss of the New Communal Facilities of **USD 20,434,679**;

(ii) **Alternatively**, damages caused by Respondent in the form of Lost Profits for the Investment Object for **USD 31.87 million or USD 8.87 million**;

(iii) Pre-award interest on the amounts awarded by the Tribunal:

a. In relation to the Lost Profits of the Investment Object, from the Valuation Date (31 January 2015) with the USD LIBOR 6-months rate with a country risk premium (6.5%) applied to the Award date[200];

b. In relation to the Loss of the New Communal Facilities with the USD LIBOR 6-months rate with a country risk premium (6.5%) applied to the Award date[201] based on one of four alternative scenarios[202]:

i. From the Valuation Date (31 January 2015);

ii. From the NCF Transfer Dates[203];

iii. From the date expenses were incurred[204]; and

iv. From the Expropriation Date (27 January 2017).

(iv) **Alternatively to (iii) above**, pre-award interest the Arbitral Tribunal deems just and appropriate for the Lost Profits of the Investment Object and Loss of the New Communal Facilities;

(v) Post-award interest on the amounts awarded by the Tribunal

[200] **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, Appendix G-1. **Exhibit TT-88.** S&P Capital IQ, USD LIBOR. **Exhibit TT-35.** Damodaran - Industry Cost of Capital, Emerging Markets, January 2014.
[201] **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, Appendix H-1. **Exhibit TT-88.** S&P Capital IQ, USD LIBOR. **Exhibit TT-35.** Damodaran - Industry Cost of Capital, Emerging Markets, January 2014.
[202] **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, para. 5.4.4, Table 21.
[203] **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, para. 5.4.4, Table 21, footnote 420. For the Trolleybus Depot, 14 November 2011. For the Pull Station, 6 July 2010. The transfer date of the Road has been updated from 2 July 2010 to 22 August 2012.
[204] **CER-3**. Second Expert Report of Mr Travis A.P. Taylor, FCA MRICS, of 28 February 2019, Appendix J.

from the Award date until the date of full payment with the USD LIBOR 6-months rate with a country risk premium for Belarus as calculated by Professor Aswath Damodaran, or in absence of publication of Professor Aswath Damodaran –with a similar rate for a country risk for Belarus[205];

(vi) **Alternatively to (v) above**, post-award interest the Arbitral Tribunal deems just and appropriate from the Award date until the date of full payment;

(vii) Arbitration costs, including legal costs; and

(viii) Grant Claimant any and all other relief the Arbitral Tribunal deems just and appropriate.

Respectfully submitted on behalf of the Claimant

V. Khvalei,

Baker McKenzie CIS Limited, Partner

[205] **Exhibit CL-3**. Protocol No. 16 to EEU Treaty dated 29 May 2014, Article 81 ("*[I]nterest shall be accrued in the period from the date of expropriation till the date of actual payment of the compensation, to be calculated at the domestic interbank market rate for actually provided loans in US dollars for up to 6 months, but not below the rate of LIBOR, or in the procedure determined by agreement between the investor and the Member State*.").

LIST OF FACTUAL EXHIBITS TO CS-VI

Exhibit C-390. Letter of Stateco (Nominees) Limited, Declaration of Trust, Instrument of Transfer and Share Certificate No. 11 for Manolium-Trading Ltd (1 - 125 000 shares) of 19 December 2014

Exhibit C-391. Letter of Stateco (Nominees) Limited, Declaration of Trust, Instrument of Transfer and Share Certificate No. 12 for Manolium-Trading Ltd (125 001 - 250 000 shares) of 19 December 2014

Exhibit C-392. Instrument of Transfer for Manolium-Trading Ltd (1 - 125 000 shares) of 25 January 2015

Exhibit C-393. Instrument of Transfer for Manolium-Trading Ltd (125 001 - 250 000 shares) of 25 January 2015

Exhibit C-394. Extract from the Belarusian Registry of Legal Entities for Manolium-Processing Foreign LLC of 16 September 2019

Exhibit C-395. Extended Graphic of the Flow of Capital and Financing of the Claimant's Group of Companies

LIST OF LEGAL EXHIBITS TO CS-VI

Exhibit CL-150. *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28*, Award of 18 August 2008

Exhibit CL-151. Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2013)

Exhibit CL-152. Extracts from the Land Code of the Republic of Belarus of 23 July 2008 (edition in force between 13 January 2011 and 25 April 2013)

Exhibit CL-153. Extracts from the Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2014)

Exhibit CL-154. Extracts from the Regulation "*On Procedure for Withdrawal and Allotment of Land Plots*" enacted by the Presidential Decree No. 667 of 27 December 2007 (edition in force since 18 March 2010)

Exhibit CL-155. Extracts from the Civil Code of the Republic of Belarus of 7 December 1998 (edition in force since 2 February 2003)