

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

OOO MANOLIUM-PROCESSING

Claimant

v.

REPUBLIC OF BELARUS

Respondent

REJOINDER

30 May 2019

WHITE & CASE
Counsel for Respondent

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Respondent submits this Statement of Rejoinder (the “**Rejoinder**”) in accordance with paragraph 30 of Procedural Order No. 1 dated 17 May 2018 (“**PO1**”). Unless otherwise defined in the Rejoinder, the Respondent adopts the definitions in the Defence.

2. In the Defence, the Respondent addresses the Claimant’s position as it is formulated in the Notice.¹ Paragraph 29 of PO1 provides:

“The scope of the Statement of Reply shall be limited to replying to the argumentation set forth by the Respondent in its Statement of Defense. Absent leave from the Tribunal for good cause, no new argument shall be presented, and no new evidence shall be attached to the Statement of Reply, except if required to rebut arguments and evidence submitted by the Respondent in its Statement of Defense.”²

3. Despite being expressly required under paragraph 29 of PO1 to seek leave from the Tribunal before introducing any new argument or new evidence without good cause, the Claimant has entirely reformulated its claim in the Statement of Reply dated 28 February 2019 (the “**Reply**”).

4. Firstly, the Claimant introduces numerous new factual allegations without good cause for the first time in the proceedings. Among other things, the Claimant raises new allegations:

A. that the Claimant entered into the Amended Investment Contract under “*extreme duress*”;³

B. regarding delays allegedly caused by state authorities in the construction of the New Communal Facilities by “*unplanned deforestation*”, “*mistakes in project documents*” and “*discovered water pipes*” in the period 2007 – 2010;⁴

¹ Notice, **CS-1**; Defence, **RS-18**.

² Procedural Order No. 1 dated 17 May 2018, paragraph 29.

³ Reply, paragraph 35, **CS-5**.

- C. regarding other investment projects in Belarus which have nothing to do with the present case, seeking to support its position that “*Belarus has repeatedly deprived foreign investors of their investments*”;⁵
- D. regarding the Revolutionary Project implemented by Tekstur, which do not concern the facts of the present case;⁶ and
- E. that the Claimant “*started to face problems*” from the State Security Committee of the Republic of Belarus (the “**KGB**”) because of Mr Dolgov’s “*informal and social communications*” with members of the political opposition.⁷
5. Secondly, the Claimant changes its position on issues relevant to jurisdiction and discloses material information regarding the nature of its alleged “*investment*” for the first time.
6. In the Notice, the Claimant’s position is that it lost its contingent contractual right to develop the Investment Object when the termination of the Amended Investment Contract came into effect on 29 October 2014. The Claimant alleges:
- “On 29 October 2014, the court of appeal upheld the decision on terminating the Amended Investment Contract, for which reason the Agreement was finally terminated on the specified date”.*⁸
7. Apparently in response to the Respondent’s Ratione Temporis Objection in the Defence (the EEU Treaty entered into force on 1 January 2015), the Claimant makes a *volte-face* in the Reply, alleging that it was not until the Supreme Court rendered its

⁴ Reply, paragraphs 68 – 90, **CS-5**.

⁵ Reply, paragraphs 137(i) – (iv), **CS-5**.

⁶ Reply, paragraphs 138 – 165, **CS-5**.

⁷ Reply, paragraphs 174 – 197, **CS-5**.

⁸ Notice, paragraphs 479 (emphasis added), **CS-1**. Defence, paragraphs 263, 416, **RS-18**.

judgment on 27 January 2015 that the Claimant was “*irreversibly deprived*” of its contingent “*right to implement the Investment Object*”.⁹

8. The Claimant also seeks in the Notice to create the impression that the Claimant itself invested into the construction of the New Communal Facilities:

A. “[...] MCEC objected to the amount of **the Claimant’s** Investments into the New Communal Facilities [...]”;¹⁰

B. “Based on the analysis of documents confirming the **Claimant’s** Investments [...]”¹¹;

C. “Belarus [...] illegally and unreasonably divested the **Claimant’s** Investments”;¹² and

D. “The **Claimant** made the following Investments [...] (a) financing of the design and construction of the [...] New Communal Facilities”.¹³

9. In response to the Respondent’s submission in the Defence that the Claimant has failed to prove that the amounts spent on the New Communal Facilities were invested by the Claimant,¹⁴ the Claimant discloses for the first time in the Reply (contrary its representations in the Notice) that the Claimant did not invest anything towards the construction of the New Communal Facilities.¹⁵ Rather, the Claimant discloses that the sums invested into the construction of the New Communal Facilities were loaned

⁹ Reply, paragraph 383, **CS-5**.

¹⁰ Notice, paragraph 271, **CS-1**.

¹¹ Notice, paragraph 275, **CS-1**.

¹² Notice, paragraph 315, **CS-1**.

¹³ Notice, paragraph 343, **CS-1**.

¹⁴ Defence, paragraphs 482 – 486, **RS-18**.

¹⁵ Reply, paragraph 48, **CS-5**.

by alleged third-party “*affiliates*” of the Claimant incorporated in the UK, Cyprus and the Isle of Man, which are not protected investors under the EEU Treaty.¹⁶

10. Thirdly, the Claimant reformulates its position on the merits by:
 - A. introducing new FET claims;¹⁷ and
 - B. completely reformulating its expropriation claim.¹⁸
11. Lastly, the Claimant completely changes its damages claim, and introduces a new alternative damages claim.
12. In the Notice, the Claimant seeks damages in the amount of:
 - A. **US\$171,300,000** or, alternatively, **US\$8,650,000**, as “*lost profit resulting from losing the right to perform the Amended Investment Contract (including interest accrued)*”;¹⁹ and
 - B. **US\$36,900,000** as “*direct losses caused by the expropriation of the New Communal Facilities (including interest accrued)*”.²⁰
13. In the Reply, the Claimant seeks damages in the amount of:

¹⁶ Reply, paragraph 48, **CS-5**.

¹⁷ For example, the Claimant introduces a new claim that the imposition of a “*requirement to pay for the cost of land*” in Belarus violated the FET standard (Reply, paragraphs 657 – 662, **CS-5**). The Claimant also introduces a new claim that the decision of MCEC on 15 August 2014 to transfer certain property based on the land designated for the Investment Object from one state-owned entity to another violated the FET standard (Reply, paragraphs 668 – 671, **CS-5**).

¹⁸ In the Notice, the Claimant’s position is that the “*termination of the Investment Contract is equal to the effect of expropriation*” (Notice, paragraph 524 (emphasis added), **CS-1**). In the Reply, the Claimant alleges that it was “*totally deprived of its rights under the Investment Contract as a result of [...] (i) termination of the Investment Contract; (ii) imposition of the tax liability and seizure of the New Communal Facilities; (iii) Subsequent transfer of the New Communal Facilities to the communal ownership under the Presidential Decree; (iv) Selling the right to develop the land plot intended for the Investment Object to another investor*” (Reply, paragraph 604, **CS-5**).

¹⁹ Notice, paragraph 530(a), **CS-1**.

²⁰ Notice, paragraph 530(b), **CS-1**.

- A. **US\$68.9 million** in lost profits “*resulting from losing the right to perform the [Amended] Investment Contract (plus appropriate interest)*”;²¹
- B. **US\$31.87 million**, which the Claimant contends represents the amount which “*any other investor would pay for the right to develop an investment object on the land plot intended for the Investment Object*”;²² and
- C. **US\$20.4 million** in “*direct losses caused by the expropriation of the New Communal Facilities (plus interest)*”.²³
14. In view of the Claimant having entirely reshaped its claim in the Reply (in contravention of paragraph 29 of PO1), the Respondent has been forced to address at length an new set of allegations and claims in the Rejoinder for the first time, on the facts, jurisdiction, merits and quantum.
15. Even after reformulating its position in the Reply, the Claimant appears to reserve its right to introduce still further claims after the second round of submissions is over. In paragraph 2 of the Reply, the Claimant states:
- “For the avoidance of doubt, the Claimant emphasizes that the lack of comment regarding any of the Respondent’s statements or positions does not mean the Claimant’s agreement with such statement or position, and the Claimant reserves all rights in this regard.”*²⁴
16. The Respondent respectfully submits that the Claimant has had ample opportunity to present its case in the Notice, the Statement of Claim and the Reply. Any attempt by the Claimant to introduce further claims after the second round of submissions will be in flagrant disregard of procedural equality and a violation of due process.
17. Further, the Claimant’s deliberate strategy to either hold off what it now represents to be important factual and legal submissions or to make up new allegations and legal

²¹ Reply, paragraph 736(i), CS-5.

²² Reply, paragraphs 736(ii) and 821, CS-5.

²³ Reply, paragraph 736(i), CS-5.

²⁴ Reply, paragraph 2, CS-5.

arguments in the last round of submissions have caused the Respondent to incur significant additional legal costs. The Respondent respectfully asks the Tribunal to award the Respondent's legal costs on an indemnity basis regardless of the outcome of these proceedings.

18. The Rejoinder is structured into the following parts:
 - A. **Factual Background** (paragraphs 19 – 618);
 - B. **Jurisdiction** (paragraphs 619 – 944);
 - C. **Denial of Justice** (paragraphs 945 – 1040);
 - D. **Expropriation** (paragraphs 1041 – 1205);
 - E. **FET** (paragraphs 1206 – 1278); and
 - F. **Causation and Quantum** (paragraphs 1279 – 1463).

II. FACTUAL BACKGROUND

A. THE TENDER AND THE INVESTMENT CONTRACT

19. It is not in issue between the parties that on 24 April 2003, MCEC initiated a tender to construct a development containing business, retail, residential and public space, as well as supporting infrastructure (the “**Investment Object**”). The Investment Object was to be located on a land plot occupied at that time by a trolleybus depot, in one of the most desirable areas of Minsk.²⁵
20. The Claimant alleges in the Reply that the Tender terms and draft Investment Contract attached to the Tender Documents “*did not require that the investor invest more than USD 15 million in the New Communal Facilities*”.²⁶ This is misleading.

²⁵ Defence, paragraph 14, **RS-18**.

²⁶ Reply, paragraph 22(i), **CS-5**.

21. The Tender Documents made it clear that in consideration for the right to develop the Investment Object, the winner of the Tender would assume the obligation to design, construct, commission and transfer into municipal ownership the Communal Facilities which at the time were thought to require US\$15 million of expenditure:
- A. the Tender Documents expressly stated that the condition for construction of the Investment object was “[i]mplementation in 2003-2005, at its own expense, of the projects amounting to USD 15 million (including the value of property purchased) with their subsequent gratuitous transfer into the communal ownership: [list of the Communal Facilities] [...]”,²⁷ rather than merely injecting money into the design and construction of the Communal Facilities.
- B. in the Tender Documents, the obligation to construct the Communal Facilities was distinct from the obligation to transfer money to a state enterprise in poor financial health (which was later substituted by the Library Payment).²⁸ If, as the Claimant alleges,²⁹ the Tender Documents only required the Claimant to invest US\$15 million, there would be no distinction between payment of the US\$15 million to be made towards Communal Facilities³⁰ and the US\$1 million to be contributed as financial assistance to a communal or republican entity located in Minsk.
22. All participants of the Tender, including the Claimant, were specialists in the construction industry. The technical specification for each of the Communal Facilities was annexed to the Tender Documents.³¹ As the Respondent explains, the Technical

²⁷ Tender Documents dated 24 April 2003, clause 2.4.2, **Exhibit C-28**.

²⁸ Tender Documents dated 24 April 2003, clause 2.4.4, **Exhibit C-28**; Additional Agreement No. 1, **Exhibit C-47**; Additional Agreement No. 2, **Exhibit C-48**.

²⁹ Reply, paragraph 21(i), **CS-5**.

³⁰ Tender Documents dated 24 April 2003, clauses 2.4.2 and 2.4.4, **Exhibit C-28**.

³¹ Technical Specification for Design and Construction of the Motor Transport Base dated 29 April 2003, **Exhibit R-11**; Technical Specification for Design and Construction of Depot dated 29 April 2003,

Specifications would permit those wishing to take part in the Tender to assess, *inter alia*, how much it would cost them to construct the Communal Facilities.³²

23. Accordingly, each participant of the Tender assessed the amounts it would need to spend on each of the Communal Facilities and stated this amount in the documents submitted as part of their respective applications.³³
24. The Claimant represented in its application that it was ready to construct all three of the Communal Facilities and stated that it was going to spend US\$15 million on the Communal Facilities.³⁴ These answers resulted in the Claimant obtaining 20 out of 20 points available under the Tender Documents for this criterion.³⁵
25. A contemporaneous press report, which stated that “[the Claimant] *will be only able to commence [...] development [of the Investment Object] in 2006. This is because of the terms of the tender, which require that the winner shall, at its own expense, build and ‘gratuitously’ transfer [...] new trolleybus depot and [Motor Transport Base]*”, illustrates what was offered by the state and accepted by the Claimant.³⁶ Any suggestion by the Claimant now that it was merely required to spend a fixed amount of money in order to obtain the right to the Investment Object is fanciful.
26. The Claimant now also alleges that it was not required to make any additional payments for the lease rights on the land plot for the Investment Object.³⁷

Exhibit R-12; Technical Specification for Design and Construction of the Building at Mendeleev Street dated 2 May 2003, **Exhibit R-13.**

³² Defence, paragraph 17, **RS-18.**

³³ Tables of assessment of the applications for the Tender conducted by the tender committee and ratings, Item No. 4.1, **Exhibit R-17.**

³⁴ Other participants in the Tender were not ready to assume the obligation to construct the Motor Transport Base.

³⁵ Table of assessment of the applications for the Tender conducted by the tender committee and ratings, Item No. 4.1, **Exhibit R-17.**

³⁶ “*Russian investor to transform the centre of Minsk*”, Belarusian business newspaper dated 10 September 2004, **Exhibit R-164.**

³⁷ Reply, paragraphs 22(ii) and 23, **CS-5.**

27. This is contradicted by the evidence. The Tender Documents expressly provided that the winner would be required to make additional payments for lease of the land plot for the Investment Object. Pursuant to clause 2.4.1 of the Tender Documents and clauses 1.4 and 2.1.3 of the draft investment contract annexed to the Tender Documents, the winner of the tender would assume obligations to “[c]ompensat[e] to [MCEC] [...] cash funds spent on developing the main utilities and city roads, as well as [reimburse] [...] expenses on created engineering, transportation and social infrastructure of Minsk”.³⁸ As explained in more detail in paragraphs 87 – 103, those obligations were later substituted by a one-off fee to obtain the right to lease the land.

B. THE CLAIMANT ENTERED IN THE AMENDED INVESTMENT CONTRACT VOLUNTARILY

28. In the Notice, the Claimant alleges that the main reason for entering into the Amended Investment Contract was “*failure of the Republic of Belarus to perform its obligations*”.³⁹ The Claimant alleges that the amendments to the Investment Contract were required because:

- A. the Claimant needed to introduce Manolium-Engineering as a party to the Investment Contract, because “[u]nder relevant Belarusian laws at that time, foreign legal entities were not entitled to obtain the ownership title, have on lease or perform design and survey works [...] on the territory of Belarus”;⁴⁰
- B. MCEC failed to “*issue a permit to [prepare Design Specification and Estimate Documentation of] the Depot to Manolium-Engineering*”, because Manolium-Engineering was not a party to the Investment Contract;⁴¹ and
- C. MCEC failed to make a land plot available for construction of the Motor Transport Base.⁴²

³⁸ Tender Documents dated 24 April 2003, clause 2.5.1, **Exhibit C-28** (Respondent’s translation).

³⁹ Notice, paragraph 123, **CS-1**.

⁴⁰ Notice, paragraphs 109 – 114, **CS-1**.

⁴¹ Notice, paragraphs 115 – 118, **CS-1**.

29. In the Defence the Respondent explains that:
- A. the Claimant, as a foreign entity was entitled to have the land plots in Belarus on lease and there was nothing disallowing it from performing design and survey works. At the same time, the Claimant represented to MCEC that it had incorporated Manolium-Engineering because under Russian currency control regulations Russian legal entities were required to obtain approval from the Russian Central Bank for any transfer of assets from Russia to Belarus.⁴³ Accordingly, the Claimant incorporated Manolium-Engineering for reasons unrelated to Belarusian law;⁴⁴
 - B. MCEC expressly permitted Manolium-Engineering to prepare the Design Specification and Estimate Documentation of the Depot on 15 July 2004, approximately 2.5 years before Manolium-Engineering became a party to the Amended Investment Contract;⁴⁵ and
 - C. MCEC made efforts to arrange the transfer of the land plot partly occupied by ‘Concrete Products Factory No. 214’ for construction of the Motor Transport Base, but for reasons outside its control was unable to complete the transfer.⁴⁶ MCEC did not provide another land plot for construction of the Motor Transport Base, because, as explained in 39 – 46 below, the parties started discussing amendments to the Investment Contract. The terms of the Amended Investment Contract were much more favourable for the Claimant, because they released the Claimant from the obligation to build the Motor Transport Base and reconstruct the Building under Reconstruction.

⁴² Notice, paragraphs 119 – 122, **CS-1**.

⁴³ Letter from MCEC to the President of the Republic of Belarus dated 26 May 2006, **Exhibit C-35**. Letter from Manolium-Engineering to MCEC dated 19 May 2005, **Exhibit C-52**, Witness Statement of Mr Antonenko dated 30 May 2019, paragraphs 19 – 20, **RWS-5**.

⁴⁴ Defence, paragraphs 41 – 46, **RS-18**.

⁴⁵ Defence, paragraph 106, **RS-18**.

⁴⁶ Defence, paragraphs 50 – 52, **RS-18**.

30. In the Reply the Claimant alleges that the Amended Investment Contract “*significantly worsened the initially agreed upon terms because instead of investing a **maximum** of USD 15 million [...] the Claimant was now obligated to invest more than USD 15 million [...] if costs continued to increase*”.⁴⁷ The Claimant also alleges for the first time in the Reply that it had entered into the Amendment Investment Contract under “*extreme duress brought about through the coercive powers of the Respondent*”.⁴⁸
31. The Respondent denies that the Amended Investment Contract worsened the initially agreed terms for the Claimant or that the Claimant was under duress when entering into the Amended Investment Contract. In fact, the Claimant obtained a better deal than that initially agreed. As explained below, the Amended Investment Contract significantly reduced the scope of construction the Claimant needed to complete in order to obtain the right to develop the Investment Object. In exchange, the Claimant agreed only to clarify the wording of a particular provision, the essence of which has always been part of the deal, including in the Tender Documents. The Claimant entered into the Amended Investment Contract voluntarily.

1. The right to develop the Investment Object had always been conditional upon the transfer of the Communal Facilities into municipal ownership

32. In the Reply, the Claimant seeks to create the impression that in order to obtain the land plot for construction of the Investment Object, the Claimant only had to invest certain amount into construction of the Communal Facilities. The Claimant alleges that it “*expected to receive in return the right to develop the Investment Object in exchange for investments of USD 16 million*”.⁴⁹ This is inconsistent with the Claimant’s prior position in this arbitration and the terms of the Tender Documents and Investment Contract.

⁴⁷ Reply, paragraph 34, CS-5.

⁴⁸ Reply, paragraphs 33 – 38, CS-5.

⁴⁹ Reply, paragraphs 23 and 377 (emphasis added), CS-5.

33. In the Notice, the Claimant admits that under the Investment Contract, in order to “*obtain the right to construct the Investment Object*”, the Claimant “*was obliged to*” design, construct or reconstruct the Communal Facilities and transfer them into municipal ownership.⁵⁰ The Claimant correctly refers to clause 2 of the Investment Contract:
- “In exchange for the right to implement the investment project [for the construction of the Investment Object] the Investor shall design, construct and reconstruct the communal facilities described in clauses 2.1, 2.2, 2.3 of this contract”*⁵¹
34. As explained in paragraphs 19 – 27 above, this was in line with the terms of the Tender Documents.
35. At the same time however, the Investment Contract, also stated that the “*volume of investment*” into the Communal Facilities shall not be more than the equivalent of US\$15 million.⁵²
36. As Mr Antonenko explains, an MCEC employee who was in charge of drafting the Amended Investment Contract at the time, this wording led to the Claimant’s representatives suggesting that after investing US\$15 million into the Communal Facilities, the Claimant could abandon the construction sites and demand the land plot in the city centre for construction of the Investment Object regardless of whether the Communal Facilities had been constructed.⁵³
37. At some point in 2003 – 2004, Mr ██████, the Claimant’s representative, informed MCEC that pursuant to the Claimant’s updated estimate, US\$15 million would not be enough to design, construct and commission the Communal Facilities.⁵⁴ MCEC’s representatives explained to the Claimant that this would be contrary to the deal

⁵⁰ Notice, paragraph 76 – 77, **CS-1**.

⁵¹ Investment Contract, clause 2, **Exhibit C-34**.

⁵² Investment Contract, clause 2, **Exhibit C-34**.

⁵³ Witness Statement of Mr Antonenko dated 30 May 2019, paragraphs 16 – 18, **RWS-5**.

⁵⁴ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 15, **RWS-5**.

offered in the Tender Documents and agreed in the Investment Contract⁵⁵ and that the Claimant would have no right to develop the Investment Object.

38. As Mr Antonenko explained it, the parties realized that implementation of the Project under the Investment Contract “*was heading to a dead end*”.⁵⁶ Accordingly, the parties commenced discussions as described in more detail below.

2. The Amended Investment Contract was more favorable to the Claimant than the Tender Documents and the Investment Contract

39. The Claimant now alleges that the Amended Investment Contract “*significantly worsened the initially agreed upon terms because instead of investing a **maximum** of USD 15 million [...] the Claimant was now obligated to invest more than USD 15 million*”.⁵⁷ The Respondent disagrees.
40. As Manolium-Engineering explained to Belarusian state courts in the appeal to the Supreme Court of Belarus (the “**Termination Proceedings**”), the Claimant and Manolium-Engineering in or around 2004 “*initiate[d] a review of the conditions for the realization of the investment project, which proved to be unachievable for the investor*.”⁵⁸ Contrary to what is stated in the Reply, the Claimant initiated the negotiations which eventually resulted in the execution of the Amended Investment Contract.
41. On 18 April 2006, the Claimant once again informed MCEC that US\$15 million would not be enough to construct the Communal Facilities and proposed the following amendments to the Investment Contract:⁵⁹

⁵⁵ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 17, **RWS-5**.

⁵⁶ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 22, **RWS-5**.

⁵⁷ Reply, paragraph 34 (emphasis in the original), **CS-5**.

⁵⁸ Cassation Appeal of Manolium-Engineering dated 29 November 2014 at page 2, **Exhibit C-151**.

⁵⁹ Letter from the Claimant to MCEC dated 18 April 2006, **Exhibit R-169**.

- A. the Claimant and its subsidiary Manolium-Engineering would construct the New Communal Facilities instead of the Communal Facilities; and
- B. in the event that the Claimant spent less than US\$15 million on the New Communal Facilities, the Claimant would transfer the remaining amounts to the city budget or use it to purchase equipment for the new Depot.
42. The Claimant also represented that pursuant to its preliminary calculations, the construction cost of the New Communal Facilities “*may reach US\$ 15.0 – 17.0 million*”.⁶⁰ Contrary to what Mr Dolgov now alleges, nothing in the Claimant’s letter suggests that Mr Dolgov had any prior discussions with Mr Pavlov regarding the cost of construction of the New Communal Facilities, let alone that Mr Pavlov “*assured*” Mr Dolgov “*that the increase might tentatively be no more than 10% of the initial cost.*”⁶¹
43. It is not in issue between the parties that this was a significant reduction in the scope of work the Claimant had to undertake in order to obtain the right to develop the Investment Object.⁶² In addition, according to the Claimant’s estimate of construction costs prepared in February 2004, the construction cost of the Motor Transport Base and the Building under Reconstruction was expected to be higher than construction cost of the Depot.⁶³
44. As Mr Antonenko explains, for MCEC it was one of the first investment projects in Belarus, and MCEC was hoping to make it a success.⁶⁴ At the same time, however, MCEC certainly did not want to find itself in a position with the Claimant not completing the Communal Facilities and demanding the land plot for construction of

⁶⁰ Letter from the Claimant to MCEC dated 18 April 2006, **Exhibit R-169**.

⁶¹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 10, **CWS-5**.

⁶² Reply, paragraph 40(i), **CS-5**.

⁶³ Table of anticipated payments and costs to design, construct and reconstruct the Communal Facilities dated February 2004, **Exhibit R-163**. According to this table, the anticipated costs to construct the Depot, the Motor Transport Base and to reconstruct the Building under Reconstruction were US\$6 million, US\$5.8 million and US\$1.5 million respectively.

⁶⁴ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 27, **RWS-5**.

the Investment Object.⁶⁵ Accordingly, MCEC was minded to expressly confirm that the Claimant, as in the original deal:

- A. bore the risk that the cost of designing, constructing and commissioning of the New Communal Facilities would exceed US\$15 million;⁶⁶ and
- B. would obtain the right to construct the Investment Object only after the New Communal Facilities were constructed, commissioned and transferred into municipal ownership.⁶⁷

45. The Respondent submits that since MCEC's suggestions were in line with the original offer made in the Tender Documents and with the Investment Agreement,⁶⁸ it was reasonable for the Claimant to accept these amendments to the Amended Investment Contract.

46. As Mr Antonenko recalls that at the meeting held on or around the date the parties executed the Amended Investment Contract, Mr Dolgov was in good spirits because of the new arrangements and because the Claimant would need to construct significantly less than initially anticipated in order to obtain the right to develop the Investment Object.⁶⁹

3. The Claimant relied on its own cost estimates when entering into the Amended Investment Contract

47. The Claimant alleges that it entered into the Amended Investment Contract to "*assumption conveyed to it by the Respondent*"⁷⁰ and, in particular, Mr Pavlov, then the chairman of MCEC, that "*the increase* [in construction costs of the New

⁶⁵ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 18, **RWS-5**.

⁶⁶ Amended Investment Contract, clause 7.10, **Exhibit C-66**.

⁶⁷ Amended Investment Contract, clause 4, **Exhibit C-66**.

⁶⁸ As explained in 19 – 27 above.

⁶⁹ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 23, **RWS-5**.

⁷⁰ Reply, paragraph 40(ii), **CS-5**.

Communal Facilities] *might tentatively be no more than 10% of the initial costs*".⁷¹ According to Mr Dolgov, he discussed internally these "assurances" with Messrs ██████ and Ekavyan of the Claimant.⁷²

48. Neither Mr ██████, nor Mr Ekavyan offer their statements to corroborate this evidence and it is convenient to refer to alleged communications with Mr Pavlov, who, as Mr Dolgov is well aware, passed away in 2010.⁷³ However, Mr Antonenko, who was working on this project at the time and knew who was responsible for what within MCEC, explains,⁷⁴ that at the very least it sounds odd that Mr Pavlov could even in principle provide such assurances because:

- A. Mr Pavlov was never deeply involved in the project. He was concerned with the overall coordination of the work of MCEC's departments with different projects being allocated to his various deputies.⁷⁵ In the present case, Mr Panteley, the then deputy chairman of MCEC (later replaced by Mr Vyrko) was responsible for the project. In line with this division of responsibilities the Amended Investment Contract was signed by his deputy – Mr Vyrko,⁷⁶ and not by Mr Pavlov.
- B. it would only have been possible for an investor to meet with Mr Pavlov if a particular issue could not be resolved by any of his deputies.⁷⁷ The issues relating to the Amended Investment Contract did not fall into this category.

⁷¹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 10.

⁷² Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 11 – 12, **CWS-5**.

⁷³ Article about Mikhail Pavlov, Wikipedia // Available at: [https://en.wikipedia.org/wiki/Mikhail_Pavlov_\(politician\)](https://en.wikipedia.org/wiki/Mikhail_Pavlov_(politician)) as at 29 May 2019, **Exhibit R-234**.

⁷⁴ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 36, **RWS-5**.

⁷⁵ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 37, **RWS-5**.

⁷⁶ Amended Investment Contract, **Exhibit C-66**.

⁷⁷ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 38, **RWS-5**.

49. Mr Dolgov's allegation that Mr Pavlov "*assured*" Mr Dolgov of the amounts necessary to construct the New Communal Facilities looks even less credible in light of the fact that on 18 April 2006, the Claimant gave MCEC its own estimate.⁷⁸
50. In view of the above, the Respondent submits that in entering into the Amended Investment Contract the Claimant was relying on its own estimates and not on any "assurances" by MCEC.

4. The Claimant failed to prove that it had entered into the Amended Investment Contract under duress

51. The Claimant alleges for the first time in the Reply that it entered into the Amendment Investment Contract under "*extreme duress brought about through the coercive powers of the Respondent*".⁷⁹ The Claimant also never raised this allegation in the court proceedings before Belarusian state courts described in paragraphs 344 – 409 below.
52. The Claimant's failure to raise the issue of duress until its last written submission in this arbitration, in itself raises doubts about credibility of such allegations.
53. The Claimant explains the duress as follows:
- A. "*at that time the Claimant had already invested approximately USD 3 million into the design of the New Communal Facilities*", and it "*had no choice but to accept [the terms of the Amended Investment Contract] because otherwise the Claimant would lose the entire USD 3 million that it had already invested*";⁸⁰

⁷⁸ Letter from the Claimant to MCEC dated 18 April 2006, **Exhibit R-169**.

⁷⁹ Reply, paragraphs 33 – 38, **CS-5**.

⁸⁰ Reply, paragraph 30, 36 and 38, **CS-5**.

- B. in 2006, the Respondent “*took the position*” that the Claimant “*must either accept*” a provision that the investments be “not less than USD15 million” or “the Respondent would terminate the Investment Contract”,⁸¹ and
54. The Respondent submits that Claimant’s assertions do not stand to proof.
55. The Claimant alleges that before starting construction of the New Communal Facilities, it had already invested approximately US\$3 million “*into the design of the New Communal Facilities*”.⁸² In support of this assertion, the Claimant refers to the loans provided by various companies (the “**Lenders**”) to Manolium-Engineering.⁸³
56. However, the Claimant provides no evidence that Manolium-Engineering actually spent the funds borrowed from the Lenders solely for the design and construction of the New Communal Facilities and not on other projects affiliated with Mr Dolgov. On the contrary, the evidence, including that relied on by the Claimant itself, shows that Manolium-Engineering did not use all of the amounts received from the Lenders to construct the New Communal Facilities:
- A. according to 2016 Memorandum relied on by Mr Taylor in his Second Expert Report, the total amount of costs incurred for the design and construction of the New Communal Facilities between 2004 and October 2007 (when Manolium-Engineering allegedly started constructing the Depot)⁸⁴ was approximately US\$1.4 million,⁸⁵

⁸¹ Reply, paragraph 37, **CS-5**.

⁸² Reply, paragraphs 30, 36 and 38, **CS-5**.

⁸³ Reply, paragraph 36, footnote 38, **CS-5**.

⁸⁴ Defence, paragraphs 118 – 128, **RS-18**.

⁸⁵ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, Section 4.3, Figure 2, Appendix J, **CER-3**. According to columns ‘Ministry of Finance’ in Appendix J, in 2004 – October 2007, Manolium-Engineering spent US\$1,405,388 for the Depot, and US\$1,611 for the Road.

- B. according to the Registration and Cadastre Agency Report, the figure is even smaller – approximately US\$1 million;⁸⁶
- C. according to Manolium-Engineering’s explanatory notes to its financial statements for 2004 – 2006, the total amount spent on the Depot was 1,143,222,000 non-denominated Belarusian rubles⁸⁷ (approximately⁸⁸ US\$531,016.34⁸⁹), which is nowhere near the US\$3 million, the Claimant now alleges it has spent.
- D. Ms ██████████, who was chief accountant of Manolium-Engineering from November 2010 to August 2014, explains that almost immediately after Manolium-Engineering received funds from the lenders, Manolium-Engineering “[...] *transferred [...] funds [received from the Lenders] to other Belarusian companies [related to Mr Dolgov]*”.⁹⁰ Although Ms ██████████ speaks about periods after 2010 in her witness statement, this shows the pattern of Manolium-Engineering’s operations; and
- E. As Mr Antonenko recalls, it was clear from the reports the Claimant sent to MCEC in 2004 – 2007 that the Claimant was habitually posting as expenses

⁸⁶ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, Section 4.3, Figure 2, Appendix J, **CER-3**. According to columns ‘Registration & Cadastre Agency’ in Appendix J, in 2004 – October 2007, Manolium-Engineering spent US\$1,039,922 for the Depot, and US\$1,611 for the Road.

⁸⁷ $314,337,000 + 503,274,000 + 325,611,000 = 1,143,222,000$ non-denominated Belarusian rubles.

⁸⁸ The average official exchange rates of the National Bank of Belarus for 2004, 2005 and 2006 were 2,160.27, 2,153.71 and 2,144.57 non-denominated Belarusian rubles for US\$1 respectively.

Excel-tables with daily exchange rates for relevant years are available for downloading at the official website of the National Bank of Belarus on: <http://www.nbrb.by/engl/statistics/rates/ratesDaily.asp>.

Tables with daily exchange rates for 2004 – 2006 with the Respondent’s calculation of the average annual rates, **Exhibit R-241**.

⁸⁹ $314,337,000$ non-denominated Belarusian rubles / $2,160.27 = \text{US}\$145,508.20$;

$503,274,000$ non-denominated Belarusian rubles / $2,153.71 = \text{US}\$233,677.70$;

$325,611,000$ non-denominated Belarusian rubles / $2,144.57 = \text{US}\$151,830.44$;

$\text{US}\$145,508.20 + \text{US}\$233,677.70 + \text{US}\$151,830.44 = \text{US}\$531,016.34$.

⁹⁰ Witness Statement of Ms ██████████ dated 12 November 2018, paragraph 20, **RWS-3**.

for the design and construction of the Communal Facilities expenses which did not relate to the design and construction.⁹¹

57. In its allegation that the Respondent asked the Claimant “*either accept* [the obligation to invest not less than US\$15 million] *or the Respondent would terminate the Investment Contract*”⁹² the Claimant relies solely on Mr Dolgov’s witness statement.
58. Mr Antonenko, who took part in the negotiations of the Amended Investment Contract does not believe the representatives of the Claimant did ever say anything like this or that they could have said it⁹³ not least because the terms of the Amended Investment Contract were more favorable to the Claimant than the terms of the Tender Documents and the Investment Contract. Moreover, as explained in 40 – 41 above, it was actually the Claimant, who approached MCEC with the proposal to amend the Investment Contract and suggested to replace the Communal Facilities with the New Communal Facilities.
59. Accordingly, the Respondent submits that the idea that the Claimant signed the Amended Investment Contract under duress in the circumstances described by the Claimant is fictitious and stillborn.

5. The alleged increase in construction costs between 2003 and 2007 had nothing to do with the Claimant’s decision to start discussing the amendments to the Investment Contract

60. According to the Claimant, “*in the 2003 to 2007 period the cost of construction of [B2 class] office buildings in USD increased by 180%*”⁹⁴ The Claimant seeks to create the impression that the parties entered into the Amended Investment Contract to address

⁹¹ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 13, **RWS-5**.

⁹² Reply, paragraph 37, **CS-5**.

⁹³ Witness Statement of Mr Antonenko dated 30 May 2019, paragraphs 22 – 87, **RWS-5**.

⁹⁴ Reply, paragraph 31, **CS-5**. See also Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 13, **CWS-5**.

that increase in the construction costs. The Respondent submits that this is misleading for the following reasons.

61. The claimant refers to a document prepared by Colliers in 2019⁹⁵ at the Claimant's request in 2019⁹⁶ (the "**2019 Colliers Report**") to support its allegation that "*this dramatic increase in prices would have a serious impact on the construction costs of the New Communal Facilities*".⁹⁷ As Mr Qureshi point out, in the absence of, *inter alia*, information on the sources and methodology employed by Colliers and on what types of costs are taken into account when calculating construction costs, the reliability of the 2019 Colliers Report is questionable at best.⁹⁸
62. Second, the 2019 Colliers Report contains numbers related to the "*office building of medium quality (in terms of local market) of B2 class*".⁹⁹ However, none of the New Communal Facilities was supposed to be such "*office building of medium quality (in terms of local market) of B2 class*".¹⁰⁰ Not one of the specific cases relied on by Colliers in conducting "*the analysis of market construction costs*"¹⁰¹ is remotely comparable to the New Communal Facilities. Accordingly, the 2019 Colliers Report is not a reliable source for determining the actual increase in costs of construction between 2003 and 2007.
63. Third, as the Claimant and Manolium-Engineering represented to Belarusian courts in 2014 in the Termination Proceedings, "[i]n 2004, as a result of the development of design documentation for [the Depot] it was found that the estimated cost of the

⁹⁵ 2019 Colliers Report, page 1, **Exhibit TT-69**.

⁹⁶ Email from Baker McKenzie to White & Case dated 9 April 2019, **Exhibit R-230**. See also Letter from White & Case to Baker McKenzie dated 22 March 2019, **Exhibit R-229**.

⁹⁷ Reply, paragraph 32, **CS-5**.

⁹⁸ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 32 – 37, **RER-2**.

⁹⁹ 2019 Colliers Report, page 1, **Exhibit TT-69**.

¹⁰⁰ 2019 Colliers Report, page 1, **Exhibit TT-69**.

¹⁰¹ 2019 Colliers Report, pages 3 – 7, **Exhibit TT-69**. In particular, Colliers analysed residential, retail, hotels and office buildings in Minsk.

construction of this facility alone was about [US\$] 12 million".¹⁰² Accordingly, on the Claimant's own case, it decided to initiate the discussion of the amendments to the Investment Contract review in 2004 and, consequently, any increase in the construction costs in Belarus in general in the period between 2003 and 2007 would play no role in that decision, contrary to what the Claimant now alleges. As explained in 28 – 46 above, there were also other reasons for entering into the Amended Investment Contract.

64. The Claimant also fails to mention that in 2008 – 2010, when, on the Claimant's own case, it had incurred the majority of costs for construction of the New Communal Facilities,¹⁰³ the cost of construction of offices of B2 class decreased from US\$550 – 700 to US\$500 – 650,¹⁰⁴ i.e. on average by 8%.¹⁰⁵ Accordingly, even if, *arguendo*, the costs of constructing offices could form a basis for determining a "*serious impact on the construction costs of the New Communal Facilities*",¹⁰⁶ the Claimant could have even saved 8% from the anticipated US\$15 – 17 million,¹⁰⁷ had it honoured its obligation to complete construction of the New Communal Facilities without delay.
65. In addition, as explained in 107 – 188 below, the Respondent is not responsible for the delays in construction of the Communal Facilities.
66. In any event, the negative effects of any alleged increase in construction costs in 2003 – 2007 were neutralised by releasing the Claimant from its obligations to

¹⁰² Cassation appeal of Manolium-Engineering dated 29 November 2014, page 2, **Exhibit C-151**.

¹⁰³ Reply, paragraph 128, Chart 2, **CS-5**; Second Expert Report of Travis A.P. Taylor dated 28 February 2019, Section 4.3, Figure 2, Appendix J, **CER-3**.

¹⁰⁴ 2019 Colliers Report, page 1, **Exhibit TT-69**.

¹⁰⁵ 2019 Colliers Report, page 1, **Exhibit TT-69**. The average cost of construction of 1 sq. m. of office building in 2006 – 2007 was US\$625 (US\$550 + US\$700/2). The average cost of construction of 1 sq. m. of office building in 2008 – 2010 was US\$575 (US\$500 + US\$650/2). $US\$575/US\$625 = 92\%$, i.e. the decrease was 8%.

¹⁰⁶ Reply, paragraph 32, **CS-5**.

¹⁰⁷ Letter from the Claimant to MCEC dated 18 April 2006, **Exhibit R-169**.

construct the Motor Transport Base and to reconstruct the Building under Reconstruction.¹⁰⁸

C. BREACH OF CONTRACTUAL DEADLINES ALLOWED MCEC TO TERMINATE THE CONTRACT

67. The Claimant alleges that the Amended Investment Contract “*provided that the Claimant would lose its rights to the Investment Object **only** if the Claimant were to breach its financial obligations*”.¹⁰⁹ To support this allegation, the Claimant relies on its interpretation of Clause 17 of the Amended Investment Contract.¹¹⁰
68. The Claimant further contends that “*the question before this Tribunal is not whether there was delay in constructing the New Communal Facilities or whether the New Communal Facilities were completed because neither of these circumstances authorize termination*”.¹¹¹
69. The Respondent respectfully submits that the Claimant’s contentions are wrong, because:
- A. the Amended Investment Contract expressly allows for termination if the Claimant and Manolium-Engineering breach the contractual deadlines. Termination of the Amended Investment Contract results in the loss of the Claimant’s contingent right to develop the Investment Object; and
 - B. clause 17 of the Amended Investment Contract gives MCEC additional assurance that the Claimant will comply with its financial obligations. Breach of this obligation is not the sole ground for termination and, consequently, loss of the right to develop the Investment Object.

¹⁰⁸ Defence, paragraph 66, **RS-18**; Amended Investment Contract, Clause 2, **Exhibit C-66**; Investment Contract, Clauses 2, 2.2 and 2.3, **Exhibit C-34**.

¹⁰⁹ Reply, paragraph 24 (emphasis in the original), **CS-5**.

¹¹⁰ Reply, paragraph 24, **CS-5**; Amended Investment Contract, Clause 17, **Exhibit C-66**.

¹¹¹ Reply, paragraph 26 (emphasis added), **CS-5**.

1. The Amended Investment Contract expressly allows for termination in the event the Claimant failed to complete the New Communal Facilities within the contractual deadlines

70. Clause 16.2.1 of the Amended Investment Contract provides that MCEC may submit a claim to court to terminate the contract if, “*through the Investor’s fault, the facilities are not constructed by the deadlines stated in Sub-Clauses 6.1 and 6.2 of Clause 6 of this contract, subject to the conditions of Sub-Clause 6.3 of Clause 6 of this contract*”.¹¹² The Investment Contract contained an identical provision.¹¹³
71. Accordingly, the Claimant’s assertion that the “*delay in constructing the New Communal Facilities*” and the failure to complete them do not “*authorize termination*” is plainly wrong.¹¹⁴
72. Under Belarusian law, which governs both the Investment Contract¹¹⁵ and the Amended Investment Contract,¹¹⁶ the consequence of contractual termination is that all the parties’ obligations under that contract also terminate. Pursuant to Article 423(1) of the Belarusian Civil Code, “*by terminating the agreement, the parties’ obligations shall cease*”.¹¹⁷ Pursuant to Article 423(3) of the Belarus Civil Code, where the court terminates a contract, “[...] *the obligations shall be deemed ceased [...] from the moment [...] the court judgment on termination [...] of the agreement enters into legal force*”.¹¹⁸
73. Accordingly, on 29 October 2014, when the Appeal Instance of the Economic Court of Minsk upheld the first instance court’s judgment to terminate the Amended

¹¹² Amended Investment Contract, Clause 16.2.1, **Exhibit C-66** (Respondent’s translation).

¹¹³ Investment Contract, Clause 12.2.1, **Exhibit C-34** (Respondent’s translation).

¹¹⁴ Reply, paragraph 26, **CS-5**.

¹¹⁵ Investment Contract, Clauses 19 and 21, **Exhibit C-34**.

¹¹⁶ Amended Investment Contract, Clauses 23 and 26, **Exhibit C-66**.

¹¹⁷ Belarusian Civil Code, Article 423(1), **Exhibit RL-127**.

¹¹⁸ Belarusian Civil Code, Article 423(3), **Exhibit RL-127**.

Investment Contract,¹¹⁹ the Claimant lost its contingent right to develop the Investment Object under the Amended Investment Contract.

2. Clause 17 of the Amended Investment Contract gives additional assurance that in constructing the New Communal Facilities the Claimant will honour all financial obligations

74. Pursuant to Clause 17 of the Amended Investment Contract “[i]f the Investor or IP Manolium-Engineering breach their financial obligations under Sub-Clause 7.10 of Clause 7, Sub-Clause 8.19 of Clause 8, Clauses 11 and 12 of this Contract through the Investor’s and (or) IP Manolium-Engineering’s fault, Investor and IP Manolium-Engineering lose the right to implement the investment project.”¹²⁰
75. Clause 17 has nothing to do with contractual termination and does not set out the grounds on which the parties may terminate the Amended Investment Contract. Rather, it expressly provides for the Claimant’s liability for breach of its financial obligations. For example, if the cost of construction is less than US\$15 million, the investor must, pursuant to Clause 7.10, transfer the difference to the public purse. If it fails to do so, then, pursuant to Clause 17, it loses its contingent right to develop the Investment Object.¹²¹
76. In the event that the New Communal Facilities had been completed in accordance with the Amended Investment Contract but the cost of construction was less than US\$15 million, this clause would also prevent the Claimant from obtaining the right to develop the Investment Object until it transferred the difference between US\$15 million and the amount actually spent on the construction of the New Communal Facilities.

¹¹⁹ Ruling of the instance of appeal of the Economic court of Minsk dated 29 October 2014, **Exhibit C-150**.

¹²⁰ Amended Investment Contract, Clause 17, **Exhibit C-66** (Respondent’s translation).

¹²¹ Furthermore, this clause expressly refers, *inter alia*, to Clauses 7.10, 8.19 and 11 of the Amended Investment Contract, which do not limit the Claimant’s investments to US\$15 million. Amended Investment Contract, Clauses 7.10, 8.19 and 11, **Exhibit C-66**.

3. The right to develop the Investment Object was conditional upon the Claimant's and Manolium-Engineering's obligations to design, construct, commissioning and transfer into municipal ownership of the New Communal Facilities

77. In the Reply, the Claimant alleges that it “over performed its financial obligations for the New Communal Facilities”.¹²² The Claimant also blames the Respondent for its alleged “*extensive attempts to demonstrate that the Claimant did not perform its financial obligations under the Amended Investment Contract*”.¹²³
78. In support of its allegations, the Claimant primarily refers to the loans provided by the Lenders to Manolium-Engineering¹²⁴ and relies on the 2016 Memorandum prepared by the CAO of the Ministry of Finance.¹²⁵
79. The Claimant also submits that “*Mr Dolgov's emotional statements that he was not going to finance the project, or that some sub-contractors suspended performance of works because of a lack of funding by the Claimant*” “*mean nothing*”.¹²⁶
80. The Respondent's position is that, contrary to the Claimant's position, Mr Dolgov's “*emotional statements*” do form representations given to MCEC. MCEC reasonably relied on these representations when deciding on how to proceed with the project given the Claimant's failure to construct the New Communal Facilities within the contractual deadlines.¹²⁷ Mr Dolgov's conduct demonstrated that the Claimant and Manolium-Engineering were not willing and/or not able to finish the construction of the New Communal Facilities and to design and construct the Investment Object.¹²⁸

¹²² Reply, Section B.II.2.1.2 heading, **CS-5**.

¹²³ Reply, paragraph 42, **CS-5**.

¹²⁴ Reply, paragraphs 48 – 49, Table 1, **CS-5**.

¹²⁵ Reply, paragraphs 46 – 47, **CS-5**.

¹²⁶ Reply, paragraphs 43 – 44, **CS-5**.

¹²⁷ Defence, paragraph 568 *et seq.*, **RS-18**.

¹²⁸ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 42 – 65, **RWS-2**.

81. The Respondent also respectfully submits that the Claimant's allegations regarding 'over-performance' of its 'financial obligations' are misplaced for the following reasons.
82. First, as explained in paragraphs 21 – 25 above, the Claimant was obliged to design, construct, commission and transfer into municipal ownership the New Communal Facilities¹²⁹ and ensure proper financing of the construction.¹³⁰ It was accordingly not possible to 'over perform' the Claimant's obligations in a situation, where the New Communal Facilities remain unfinished. As described in the Defence and in paragraphs 351 – 356 below, the Claimant and Manolium-Engineering have already invoked their 'over-performance' argument in the proceedings before the Economic Court of Minsk, and the court had properly rejected it.¹³¹
83. Second, as explained in paragraphs 55 – 56 above, the fact that Manolium-Engineering received funds from the Lenders is irrelevant to the issue of whether the Claimant complied with its obligations under the Amended Investment Contract. Even if Manolium-Engineering allocated all the borrowed money to the construction of the New Communal Facilities (to which the Claimant provides no proof), this did not result in their completion and, therefore, did not make the Claimant entitled to be granted the right to develop the Investment Object.
84. Third, as demonstrated in paragraphs 56 above, Manolium-Engineering spent some, not insignificant, portion of the borrowed funds for purposes unrelated to the New Communal Facilities.¹³² The Claimant has failed to discharge its burden to prove otherwise.

¹²⁹ See e.g. Defence, paragraphs 67, 69 – 70, 77 and 99, **RS-18**.

¹³⁰ See e.g. Defence, paragraphs 79 – 8 and 92 – 98, **RS-18**.

¹³¹ Defence, paragraphs 253 and 503 – 504, **RS-18**.

¹³² Witness Statement of Ms [REDACTED] dated 12 November 2018, paragraph 20, **RWS-3**.

85. Lastly and in any event, as submitted in the Defence¹³³ and further in paragraphs 437 – 454 below, the Respondent disputes the assessment of costs in the 2016 Memorandum, because it does not represent a reliable source of information for estimating the costs incurred by Manolium-Engineering directly in constructing the New Communal Facilities.
86. For the reasons above, the Respondent respectfully submits that the alleged injection by the Claimant and Manolium-Engineering of more than US\$15 million into the construction of the New Communal Facilities did not discharge its obligations under the Amended Investment Contract so as to acquire the right to develop the Investment Object.

D. LEASE PAYMENTS FOR THE LAND PLOT FOR THE INVESTMENT OBJECT

87. In the Reply, the Claimant asserts that it “*was not required to pay any additional payments for the lease rights on the land plot where the Investment Object was to be located*”.¹³⁴ The Claimant also contends that the President’s Decree No. 101 dated 1 March 2010 (“**Decree No. 101**”) introduced the obligation to pay for the lease of a land plot, and that it “*was not part of the investment framework at the time the Claimant made its investment and therefore did not form a part of the investor’s reasonable expectations*”.¹³⁵ This is incorrect for the reasons below.

1. The Tender Documents provided that the winner would be required to make additional payments for the right to construct on the land plot for the Investment Object

88. The Tender Documents provided for a mandatory requirement that the winner pays:

¹³³ Defence, paragraphs 290 – 298 and 699 – 705, **RS-18**.

¹³⁴ Reply, paragraphs 22(ii) and 23, **CS-5**.

¹³⁵ Reply, paragraph 662, **CS-5**. See also Reply, paragraphs 657 – 661, **CS-5**.

- A. “*expenses on [...] engineering, transportation and social infrastructure of Minsk*” (the “**Compensation for Existing Infrastructure**”);¹³⁶ and
- B. “*funds [for] developing the main utilities and city roads*” (the “**Payment for the Development of Infrastructure**”).¹³⁷
89. When submitting the application to participate in the Tender, the Claimant expressly agreed to make these two payments and its application received additional 5 points for this.¹³⁸
90. As the Council of Ministers of the Republic of Belarus noted on 30 October 2003, one of the flaws of the Investment Contract was that it contained no obligation on the part of the Claimant to pay the Compensation for Infrastructure and therefore did not comply with the Tender Documents.¹³⁹ Accordingly, this omission was addressed in Additional Agreement No. 1, four months after the Investment Contract, thereby reinstating the obligation.¹⁴⁰
91. The procedure for calculation and payment of the Compensation for Existing Infrastructure was set out in the Regulation on Collection of One-Time Charges for New Constructions or Extension of Existing Objects approved by MCEC Decision on

¹³⁶ Tender Documents, Clause 2.4.1, **Exhibit C-28**; The same payment was provided in the draft Investment Contract annexed to the Tender Documents (A comparison between the draft of the investment contract attached to the Tender Documents as Annex 3 and the final version of the Investment Contract, clause 2.1.3 **Exhibit R-9**).

¹³⁷ Tender Documents, Clause 2.4.1, **Exhibit C-28**; The same payment was provided in the draft Investment Contract annexed to the Tender Documents (A comparison between the draft of the investment contract attached to the Tender Documents as Annex 3 and the final version of the Investment Contract, clause 2.1.3 **Exhibit R-9**).

¹³⁸ Table of assessment of the applications for the Tender conducted by the tender committee and rating, pages 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, line 1, **Exhibit R-17**.

¹³⁹ Resolution of the President of the Republic of Belarus to implementing the project under the Investment Contract dated 5 November 2003, **Exhibit C-45**.

¹⁴⁰ Additional Agreement No. 1, Clause 2, **Exhibit C-47**.

2 July 1992 No. 357 (“**MCEC Decision No. 357**”).¹⁴¹ Under Clause 2 of MCEC Decision No. 357, where a land plot was provided for temporary use (such as a lease), the amount of the Compensation for Infrastructure would depend on (1) the planning area in Minsk, where a particular land plot was located, (2) the size of that land plot and (3) the term of the lease.

92. As explained in paragraphs 97 – 103 below, the principles for calculating the Compensation for Infrastructure were similar to the principles for calculating the one-time payment for the right to enter into a land plot lease agreement (the “**One-Time Payment**”), which was introduced on 28 January 2006 and which, according to the Claimant, “*was not part of the investment framework at the time [it] made its investment*”.¹⁴²
93. MCEC Decision No. 357 was repealed by MCEC Decision No. 1808 on 6 October 2005, shortly before the President of the Republic of Belarus adopted a decree introducing the One-Time Payment.
94. The Payment for the Development of Infrastructure was in turn to be made in accordance with the Regulation on Collection of Funds on a Shared Basis for Development of Municipal Infrastructure approved by MCEC Decision dated 13 June 1994 No. 473 (“**MCEC Decision No. 473**”).¹⁴³ Pursuant to Clauses 1.1 and 3.1 of MCEC Decision No. 473, any developer of a new building was required to make the Payment for the Development of Infrastructure after MCEC issued a decision permitting to perform design and survey works.¹⁴⁴ Pursuant to Clause 2.1 of

¹⁴¹ Regulation on Collection of One-Time Charges for New Constructions or Extension of Existing Objects approved by MCEC Decision on 2 July 1992 No. 357, which was in force until 6 October 2005, **Exhibit RL-106**.

¹⁴² Reply, paragraph 662, **CS-5**.

¹⁴³ Excerpts from the Regulation on Collection of Funds on a Shared Basis for Development of Municipal Infrastructure approved by MCEC Decision dated 13 June 1994 No. 473, which was in force until 1 April 2007, **Exhibit RL-107**.

¹⁴⁴ By way of an example, the Claimant would have been required to make the Payment for the Development of Infrastructure after MCEC approved the land plot location selection act for the construction of the Depot on 15 July 2004 (**Exhibit C-53**), if Clause 7.3.6 of the Investment Contract

MCEC Decision No. 473, the amount of the Payment for the Development of Infrastructure was determinable by a special inter-agency commission on a case-by-case basis.

95. MCEC Decision No. 473 was repealed by MCEC Decision No. 772 on 1 April 2007.
96. For the above reasons, where the Claimant would acquire the right to develop the Investment Object before 6 October 2005, it would have to pay the Compensation for Infrastructure and make the Payment for the Development of Infrastructure. Accordingly, at the time the Claimant decided to participate in the project, it could not expect that it would be exempted from these payment obligations and be allowed to use the land plot for the Investment Object for free.

2. Manolium-Engineering was required to pay for the lease of the land plot for the Investment Object

97. As explained in paragraph 92 above, on 28 January 2006, the One-Time Payment effectively substituted the previous Compensation for Existing Infrastructure, which existed prior to that date. Contrary to what the Claimant now asserts in the Reply,¹⁴⁵ that One-Time Payment was introduced back in 2006, i.e. before the parties entered into the Amended Investment Contract (i.e. before 8 February 2007).
98. In particular, pursuant to Clause 1.10 of the President's Decree dated 28 January 2006 No. 58 "On Certain Issues Concerning Withdrawal and Allotment of Land Plots" ("**Decree No. 58**"),¹⁴⁶ land plots were to be leased to persons for the construction purpose only after they made the One-Time Payment. Decree No. 58 provided for a number of exceptions, none of which, however, apply to the Claimant or Manolium-

did not provide for an exemption from from making such payment before constructing the Communal Facilities.

¹⁴⁵ Reply, paragraph 662, CS-5.

¹⁴⁶ President's Decree dated 28 January 2006 No. 58 "On Certain Issues Concerning Withdrawal and Allotment of Land Plots", which was in force until 1 January 2008, **Exhibit RL-115**.

Engineering.¹⁴⁷ For example, legal entities, which obtained a permit for design and survey works before Decree No. 58 entered into force (i.e. before 2 May 2006), were released from the duty to make the One-Time Payment. On 27 December 2007, Decree No. 58 was replaced with the President's new Decree dated 27 December 2007 No. 667 "On Withdrawal and Allotment of Land Plots" ("**Decree No. 667**"), which provided for similar regulation.

99. As explained in the Defence,¹⁴⁸ Manolium-Engineering obtained the Investment Object Location Act, which simultaneously served as a permit for design and survey works, only on 25 March 2009,¹⁴⁹ i.e. after Decree No. 58 entered into force. Accordingly, if the Claimant or Manolium-Engineering were entitled to start developing the Investment Object in 2006 as provided for by the original Investment Contract¹⁵⁰ (which they were not), they would have had to make the One-Time Payment in relation to the land plot for the Investment Object.
100. Furthermore, the Amended Investment Contract required the Claimant to enter into a lease agreement with MCEC in relation to the land plot for the Investment Object.¹⁵¹ The Respondent respectfully submits that pursuant to Clause 23 of the Amended Investment Contract, that meant that the lease agreement would be entered into in accordance with the then effective legislation (i.e. the obligation to make the One-Time Payment).¹⁵²
101. The Amended Investment Contract also released the Claimant and Manolium-Engineering from the obligation to pay the Compensation for Infrastructure; the

¹⁴⁷ By way of example, gardeners' partnerships, state organisations, scientific and educational institutions, legal entities (if they constructed or operated state-owned immovable property or if they obtained a permit for design and survey works before Decree No. 58 entered into force) were exempted from a duty to pay for the right to enter into a land plot lease agreement.

¹⁴⁸ Defence, paragraphs 101(a), 194 – 198, **RS-18**.

¹⁴⁹ Investment Object Location Act, **Exhibit C-116**.

¹⁵⁰ Investment Contract, Clauses 5.1 and 5.3, **Exhibit C-34**.

¹⁵¹ Amended Investment Contract, Clause 7.9, **Exhibit C-66**.

¹⁵² Amended Investment Contract, Clause 23, **Exhibit C-66**. See also First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 10, **RWS-2**.

relevant provision of the original Investment Contract was excluded from the Amended Investment Contract. The Respondent respectfully submits that those amendments were to reflect the above changes in legislation.

102. The Claimant appears to suggest that it was Decree No. 101, which imposed “*a requirement to pay the cost of land*”.¹⁵³ This is plainly wrong for two reasons:
- A. the ‘user pays’ principle has been established in land-use legislation of the Republic of Belarus since 1990.¹⁵⁴ Accordingly, the Claimant was or should have been aware that it or Manolium-Engineering would not use and enjoy the land plot or the Investment Object for free;
 - B. Decree No. 101 does not impose “*a requirement to pay the cost of land*”. Instead, it is an act which sets out the procedure for calculation of lease payments. Decree No. 101 is not the first act in this regard. On 7 February 2006, shortly before enactment of Decree No. 58, the President adopted Decree No. 74, which contained similar provisions and was subsequently replaced with Decree No. 101. Similar to the Compensation for Existing Infrastructure, the amount of the One-Time Payment was dependent on the area of the land plot, its cadastral value, and the term of the lease.¹⁵⁵
103. For the above reasons, the Respondent respectfully submits that the Claimant did not have a legitimate expectation that it or Manolium-Engineering would lease the land plot for the Investment Object for free. Moreover, at the time when the Amended Investment Contract was entered into (i.e. 8 February 2007), the Claimant and

¹⁵³ Reply, paragraph 662, **CS-5**.

¹⁵⁴ Pursuant to Article 41 of Land Code of the Republic of Belarus dated 11 December 1990 No. 455-XII, possession and use of land in the Republic of Belarus are to be paid for, which was in force until 1 January 1999, **Exhibit RL-105**. The same principle was subsequently implemented in Land Code of the Republic of Belarus dated 4 January 1999 No. 226-Z, Article 60, in force between 1 January 1999 and 1 January 2009, **Exhibit RL-110**. The same principle exists in the current Land Code effective since 1 January 2009 (Articles 5 and 60). As explained in Defence, paragraph 313, **RS-18**, payment for land use may take the form of lease payments or land tax.

¹⁵⁵ Letter of Land Service of MCEC dated 16 January 2015, **Exhibit SQ-8**.

Manolium-Engineering were or should have been aware of their obligation to make the One-Time Payment.

3. The Claimant and Manolium-Engineering would have been exempted from the obligation to make the One-Time Payment if they accepted MCEC's proposal and entered into the New Investment Contract

104. The Claimant alleges that the Respondent proposed “*a corresponding tax deduction*” in one of the drafts of a new investment contract.¹⁵⁶ That was not a tax deduction. As explained in the Defence, payment for land use may take the form of lease payments or land tax.¹⁵⁷ The Respondent’s proposal therefore concerned lease payments, not land tax, as the Claimant now asserts in the Reply.
105. Nonetheless, the Claimant correctly states that MCEC offered the Claimant and Manolium-Engineering various incentives, including the exemption from the One-Time Payment. As Mr Akhramenko explains, such offer was in line with the President’s Decree dated 6 August 2009 No. 10 “On Creating Further Conditions for Investment Activity in the Republic of Belarus” (the “**Investments Decree**”),¹⁵⁸ which would govern the new investment contract.¹⁵⁹ As explained in the Defence, in response to that proposal, the Claimant and Manolium-Engineering sent amended drafts proposing the terms and conditions, which MCEC could not accept.¹⁶⁰

¹⁵⁶ Reply, paragraph 660, **CS-5**. See also Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, Clause 7.6, **Exhibit R-98**.

¹⁵⁷ Defence, paragraph 313, **RS-18**.

¹⁵⁸ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 11(A) and 66 – 67, **RWS-2**.

¹⁵⁹ Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, Preamble, **Exhibit R-98**. Pursuant to Clause 3.2 of the President’s Decree dated 6 August 2009 No. 10, an investor is exempted from the One-Time Payment for the period of implementation of the project under the investment contract governed by that Decree.

¹⁶⁰ Defence, paragraphs 230 – 245, **RS-18**.

106. The Respondent respectfully submits that the Investments Decree provides for incentives (such as the above exemption from the One-Time Payment), a default rule, which has always remained the same – a user shall pay for land. Accordingly, the Claimant’s reference to MCEC’s proposal is misplaced.

E. DELAYS IN CONSTRUCTION OF THE NEW COMMUNAL FACILITIES

107. The Claimant alleges that the Respondent is responsible for the delays in the construction of the New Communal Facilities.¹⁶¹ The Claimant seeks to create the impression that Manolium-Engineering failed to build the New Communal Facilities by the deadline set out in the Amended Investment Contract due to the Respondent’s fault. The Respondent disagrees.

108. As discussed below, (1) the Claimant failed to construct the New Communal Facilities by the deadline set out in the Amended Investment Contract due to its own fault; and (2) particular examples of alleged delays set out in the Reply do not prove the Respondent’s fault and do not explain why the Claimant and Manolium-Engineering have never completed the New Communal Facilities.

1. The Claimant and Manolium-Engineering are responsible for the delays in construction of the New Communal Facilities

109. The Claimant, on the one hand, alleges that following the conclusion of the Amended Investment Contract there had been various delays.¹⁶² On the other hand, the Claimant also alleges that “*the works on [the] New Communal Facilities never stopped at any time after July 2007*”.¹⁶³ The Respondent submits that the Claimant’s and Manolium-Engineering’s failure to complete the New Communal Facilities on time was caused not by the delays, to which the Claimant now refers,¹⁶⁴ but by the Claimant’s and Manolium-Engineering’s own actions, including the Claimant’s deliberate decision

¹⁶¹ Reply, paragraphs 50 – 122, CS-5.

¹⁶² Reply, paragraphs 64 – 117, CS-5.

¹⁶³ Reply, paragraph 128, CS-5. *See also* Reply, paragraphs 125 – 127, CS-5.

¹⁶⁴ Reply, paragraphs 64 – 117, CS-5.

not to provide finance for the construction between 2008 and 2011 and failure to timely obtain and extend permits necessary for construction.

110. The Claimant admits that at least between mid-2008 and late 2011 the Claimant decided not to finance the construction,¹⁶⁵ because Mr Ekavyan, who according to the Claimant is the “*ultimate beneficiary of the Claimant and most all of [...] companies that provided funding to Manolium-Engineering*”,¹⁶⁶ “*did not want to continue injecting money into the project in the absence of firm guarantees and protections from the Respondent*”.¹⁶⁷ The Claimant fails to explain which guarantees it required from the Respondent and why between 2008 and 2011 he had never raised these issues in negotiations relating to the project.
111. To support its allegation that “*the works on [the] New Communal Facilities never stopped at any time after July 2007*”,¹⁶⁸ the Claimant refers to the Registration and Cadastre Agency Report and 2016 Memorandum.
112. However, neither the Registration and Cadastre Agency nor the CAO of the Ministry of Finance ever considered whether there were delays in constructing the New Communal Facilities and how long they lasted:
 - A. the scope of the Registration and Cadastre Agency Report was limited to the determination of “*the amount of expenses [...] including [Manolium-Engineering’s] related expenses*”,¹⁶⁹
 - B. according to the instruction of the Council of Ministers to the Ministry of Finance and the Ministry of Architecture and Construction, the unscheduled audit was to include, in particular, a check measurement and, again, the

¹⁶⁵ Reply, paragraphs 130 – 136, **CS-5**.

¹⁶⁶ Reply, paragraph 131, **CS-5**.

¹⁶⁷ Reply, paragraph 136, **CS-5**.

¹⁶⁸ Reply, paragraph 128, **CS-5**. See also Reply, paragraphs 125 – 127, **CS-5**.

¹⁶⁹ Registration and Cadastre Agency Report, **Exhibit C-154** (Respondent’s translation).

determination of the amount of costs spent on the New Communal Facilities.¹⁷⁰

113. Even if it wanted to do so, the Registration and Cadastre Agency and the CAO of the Ministry of Finance could not verify whether Manolium-Engineering actually never “*stopped*” works on the New Communal Facilities after July 2007 because their review was limited almost entirely to reviewing paper work (such as review of Manolium-Engineering’s historical accounting records and contractual documents).
114. Historical photographs taken by Minsk citizens at that time prove that the Claimant’s allegation that “*the works [...] never stopped at any time after July 2007*” is grossly misleading.¹⁷¹ For example, the photographs below taken on 13 January 2009 and 23 April 2009 by Minsk citizens are illustrative:¹⁷²



Depot View as at 13 January 2009



Depot View as at 23 April 2009

¹⁷⁰ Instruction of the Council of Ministers of the Republic of Belarus No. 39/1078r dated 27 January 2016, **Exhibit R-137**.

¹⁷¹ Reply, paragraph 128, **CS-5**.

¹⁷² Historical photos of the Depot together with the properties of the files, **Exhibit R-235**.



Depot View as at 13 January 2009



Depot View as at 23 April 2009

115. The above photos show that construction site was abandoned at least between January and April 2009. The works were not just “*slowed down*” as the Claimant contends,¹⁷³ they virtually stopped. Despite the parties’ agreement in December 2008 to complete the construction by 3 July 2009,¹⁷⁴ with the exception of a wooden roof framing on the accommodation and administrative block (left side of the top photos) nothing had changed for more than 4 months in 2009.

2. The Respondent is not responsible for the alleged delays to which the Claimant refers

116. The Claimant does not dispute that the general overview of the regulatory requirements for construction under Belarusian law, which the Respondent set out in the Defence, is accurate.¹⁷⁵
117. Yet, as described in detail below, the Claimant continues to cherry-pick certain facts in a vain attempt to blame Belarusian public bodies or Minsktrans for the delays which protracted the construction of the New Communal Facilities. In the Reply, the Claimant also present for the first time and relies on completely new factual

¹⁷³ Reply, paragraph 129, CS-5.

¹⁷⁴ Defence, paragraph 82, **RS-18**; See also Minutes of the meeting dated 19 December 2008 which was attended by MCEC, Minsktrans and Manolium-Engineering on 10 December 2008, paragraph 2, **Exhibit R-43**.

¹⁷⁵ Defence, paragraphs 100 – 102, **RS-18**.

allegations, many of which have never been raised, either in these arbitration proceedings or in the Belarusian court proceedings or in correspondence or discussions with MCEC. The Respondent's replies to these allegations are set out below.

118. The Claimant and Manolium-Engineering had contractual protection under the Amended Investment Contract in the event that state bodies caused delays, allowing it to postpone deadlines by a proportionate amount.¹⁷⁶ Nevertheless, at the time of the alleged delays, the Claimant and Manolium-Engineering never mentioned them nor relied on these contractual protections. The Respondent submits that if the Claimant genuinely believed that these were the causes of delay, it would have relied on its contractual protections when the relevant circumstances arose, and not some 10 years later.

a) Issues with the construction before the execution of the Amended Investment Contract are irrelevant and not true

119. The Claimant alleges that “*nothing except design of the Depot was done from 2003 to 2007. This was entirely the result of the Respondent's actions (or failures to act)*”.¹⁷⁷
120. The Respondent submits that even if MCEC was responsible for the delays which occurred before the Amended Investment Contract (which is denied), the terms of the Amended Investment Contract cured any such breaches. As explained in paragraph 46 above, under the Amended Investment Contract the Claimant and Manolium-Engineering had to build significantly less before they would obtain the right to develop the Investment Object than initially anticipated. In addition, the Amended Investment Contract postponed the deadlines for construction of both the New

¹⁷⁶ Amended Investment Contract, Clause 6.3, **Exhibit C-66**.

¹⁷⁷ Reply, paragraph 51, **CS-5**.

Communal Facilities and the Investment Object to December 2008¹⁷⁸ and December 2012¹⁷⁹ respectively.

121. In the Notice, the Claimant alleged that the delays in construction before 8 February 2007 (when the parties signed the Amended Investment Contract) were caused by three factors:

A. the Claimant was not entitled, as a matter of Belarusian law, “*to obtain the ownership title, have on lease or perform design and survey works on land plots on the territory of the Republic of Belarus*”.¹⁸⁰ Accordingly, it had to incorporate a Belarusian subsidiary, Manolium-Engineering;

B. MCEC allegedly “[f]ail[ed] [t]o [i]ssue a [p]ermit [t]o [d]esign [a]nd [c]onstruct [t]he [l]and [p]lot [f]or [t]he Depot”,¹⁸¹ and

C. MCEC allegedly failed to make a land plot available for constructing the Motor Transport Base.¹⁸²

122. As explained in the Defence:

A. there was nothing preventing the Claimant from having the land plots in Belarus on lease and there was nothing disallowing it from performing design and survey works. At the same time, the Claimant represented to MCEC that it had incorporated Manolium-Engineering because under the Russian currency control regulations, Russian legal entities were required to obtain approval from the Russian Central Bank for any transfer of assets from Russia to

¹⁷⁸ Amended Investment Contract, Clause 6.1, **Exhibit C-66**.

¹⁷⁹ Amended Investment Contract, Clause 6.2, **Exhibit C-66**.

¹⁸⁰ Notice, paragraph 110, **CS-1**.

¹⁸¹ Notice, Section 4.3.2, **CS-1**.

¹⁸² Notice, paragraphs 119 – 122, **CS-1**.

Belarus.¹⁸³ Accordingly, the Claimant incorporated Manolium-Engineering for reasons unrelated to Belarusian law;¹⁸⁴

B. MCEC expressly permitted Manolium-Engineering to prepare the Design Specification and Estimate Documentation for the Depot on 15 July 2004, some 2.5 years before Manolium-Engineering became a party to the Amended Investment Contract;¹⁸⁵ and

C. MCEC could not allocate to the Claimant the land plot occupied by ‘Concrete Products Factory No. 214’.¹⁸⁶ Since the parties were discussing the possibility to remove the Motor Transport Base from the list of Communal Facilities, MCEC did not look for another land plot where the Motor Transport Base could be located.

123. According to the Claimant, because nothing except the design of the Depot was done between 2003 and 2007,¹⁸⁷ “*the Parties twice agreed on an extension of the deadlines under the Investment Contract*”.¹⁸⁸

124. This is wrong both as a matter of fact and common sense. By entering into the Amended Investment Contract, the parties postponed the deadlines both for the construction of the New Communal Facilities and of the Investment Object.¹⁸⁹ Accordingly, they had already taken into account any delays which happened between

¹⁸³ Letter from MCEC to the President of the Republic of Belarus dated 26 May 2006, **Exhibit C-35**; Letter from Manolium-Engineering to MCEC dated 19 May 2005, **Exhibit C-52**; Witness Statement of Mr Antonenko dated 30 May 2019, paragraphs 19 – 20, **RWS-5**.

¹⁸⁴ Defence, paragraphs 41 – 46, **RS-18**.

¹⁸⁵ Defence, paragraph 106, **RS-18**.

¹⁸⁶ Defence, paragraphs 50 – 52, **RS-18**.

¹⁸⁷ Reply, paragraph 51, **CS-5**.

¹⁸⁸ Reply, paragraph 52, **CS-5**.

¹⁸⁹ Amended Investment Contract, Clauses 6.1 – 6.2, **Exhibit C-66**.

2003 and 2007. These prior delays, if any, could not have caused the two further postponements of deadlines which happened in December 2008¹⁹⁰ and April 2011.¹⁹¹

125. In addition, as stated in the Defence,¹⁹² Manolium-Engineering was entitled to start preparing the Design Specification and Estimate Documentation for the Depot at least from 15 July 2004. It took Manolium-Engineering almost three years to prepare it.¹⁹³
126. In the Reply, the Claimant chooses not to address the Respondent's position as summarised in paragraph 122 above and either comes up with new factual allegations or merely repeats its unsubstantiated allegations. In particular, the Claimant now alleges that the following delays were caused by the Respondent.
127. According to the Claimant, "*6 months were lost because of the Respondent's own inactions in granting approvals to begin*" the project implementation because the parties were awaiting the President's approval until 5 November 2003.¹⁹⁴
128. Between 6 June and 5 November 2003, the parties entered into two additional agreements to address shortcomings identified in the Investment Contract, prior to which no approval from the President could be sought.¹⁹⁵ It took 2 weeks from the Additional Agreement No.2 to obtain the President's approval.¹⁹⁶
129. The Claimant asserts that "[i]n violation of the Investment Contract, [MCEC] provided the land plot for the Depot to Minsktrans and not to the Claimant or Manolium-Engineering after the [Design Specification and Estimate Documentation

¹⁹⁰ Additional Agreement No. 5 dated 16 December 2008, **Exhibit C-72**.

¹⁹¹ Additional Agreement No. 6 dated 20 April 2011, **Exhibit C-76**.

¹⁹² Defence, paragraph 106, **RS-18**.

¹⁹³ Defence, paragraph 107, **RS-18**.

¹⁹⁴ Reply, paragraph 55, **CS-5**.

¹⁹⁵ Defence, paragraphs 28 – 37, **RS-18**.

¹⁹⁶ It is true that MCEC sent a formal letter to Claimant notifying the President's approval on 19 November 2003 (**Exhibit C-224**). There is no evidence that the President's approval was attached to that letter. Nevertheless, as often in the present case, the Claimant was somehow able to obtain internal correspondence between the President and MCEC (**Exhibit C-45**).

for] *the Depot was approved.*”¹⁹⁷ The Claimant further alleges that eventually, it took until 24 May 2007 and until 15 October 2007 for Manolium-Engineering to receive the permit to the land plot and the construction permit for the Depot, respectively.¹⁹⁸

130. The Claimant repeats its allegations in the Notice¹⁹⁹ completely ignoring that Manolium-Engineering was entitled to develop the Design Specification and Estimate Documentation from 15 July 2004.²⁰⁰ It took Manolium-Engineering almost three years, until 20 March 2007, to prepare the Design Specification and Estimate Documentation.²⁰¹ Under Belarusian law, it was not possible to obtain the permit to the land plot and construction permit before Manolium-Engineering had prepared and approved the Design Specification and Estimate Documentation.²⁰² The responsibility for this delay lies with the Claimant and Manolium-Engineering.
131. In the Reply, just like in the Notice, the Claimant fails to mention that Manolium-Engineering had the right to start preparing the construction site from 16 July 2007.²⁰³ Similarly, the Claimant failed to mention that Manolium-Engineering had not applied for the construction permit before 16 July 2007.²⁰⁴ Therefore, the Claimant’s allegation that it took until 15 October 2007 to receive the construction permit is misleading.
132. According to the Claimant,²⁰⁵ (i) the Economic Committee of MCEC admitted on 28 July 2004 that “*there was no problem with Manolium-Engineering implementing the project under the Investment Contract*”; and (ii) “*on 2 December 2004, the [Chairman*

¹⁹⁷ Reply, paragraph 58, **CS-5**.

¹⁹⁸ Reply, paragraphs 58 – 59, **CS-5**.

¹⁹⁹ Notice, paragraphs 151 – 152, 154, 431(a) and 423, **CS-1**.

²⁰⁰ Decision of MCEC dated 15 July 2004, **Exhibit C-53**; Defence, paragraph 105 – 106, **RS-18**.

²⁰¹ Order of Manolium-Engineering No. 1-C dated 20 March 2007, **Exhibit C-67**; Defence, paragraph 107, **RS-18**; Notice, paragraph 151, **CS-1**.

²⁰² Defence, paragraphs 101(b) – 101(c), **RS-18**.

²⁰³ Defence, paragraphs 118 – 125, **RS-18**.

²⁰⁴ Application from Manolium-Engineering to Gosstroy dated 16 July 2007, **Exhibit R-30**; Defence, paragraph 120, **RS-18**.

²⁰⁵ Reply, paragraph 61, **CS-5**. *See* also Reply, paragraph 60, **CS-5**.

of MCEC] *instructed his Deputy to execute [an] [a]ddendum to the Investment Contract that would include Manolium-Engineering as a party*". The Belarusian state authorities, however, were constantly changing their decision, which "*resulted in at least 2.5 years of negotiations regarding an [a]ddendum to the Investment Contract.*"

133. This is misleading. First, as described in the Defence²⁰⁶ and in paragraphs 39 – 46 above, between 2004 and 2008, the parties were discussing not only the inclusion of Manolium-Engineering as a party to the Investment Contract, but also a reduced scope of construction.²⁰⁷
134. Second, as explained in the Defence,²⁰⁸ adding Manolium-Engineering as a party to the Investment Contract required approval from the relevant state authorities and the President. On 14 June 2005 and 26 May 2006, MCEC sought such approval from the Belarusian SCC and the President, respectively.²⁰⁹ On 11 July 2006, the President approved the proposed amendments to the Investment Contract.²¹⁰
135. Third, the Claimant once again misinterprets the evidence on which it relies. Contrary to the Claimant's assertion,²¹¹ the Respondent did not admit in the letter of 28 July 2004 that "*there was no problem with Manolium-Engineering implementing the project under the Investment Contract*". In fact, the Economic Committee of MCEC stated in its letter to first deputy chairman of MCEC that Manolium-Engineering could not act under the Investment Contract because it was not a party thereto, highlighting the need to amend the Investment Contract accordingly.²¹²

²⁰⁶ Defence, paragraphs 40 – 53, **RS-18**.

²⁰⁷ Decision of MCEC dated 2 December 2004, **Exhibit C-40**; Letter from the Committee for Economy to MCEC dated 28 July 2004, **Exhibit C-55**.

²⁰⁸ Defence, paragraph 55, **RS-18**. See also Defence, paragraphs 54, 56 – 62, **RS-18**.

²⁰⁹ Letter from MCEC to the State Control Committee of the Republic of Belarus dated 14 June 2005, **Exhibit R-25**; Letter from MCEC to the President of the Republic of Belarus dated 26 May 2006, **Exhibit C-35**.

²¹⁰ Resolution of the President of the Republic of Belarus dated 11 July 2006, **Exhibit C-64**.

²¹¹ Reply, paragraph 61, **CS-5**.

²¹² Letter from the Committee for Economy to MCEC dated 28 July 2004, **Exhibit C-55**.

136. The Claimant alleges that “*if the Claimant did not face a lot of difficulties in operating in Belarus (such as currency restrictions or uncertainties in VAT applications), the Claimant would never have established Manolium-Engineering in Belarus*”.²¹³ As stated in the Defence,²¹⁴ the Respondent’s position is that the Claimant incorporated Manolium-Engineering for reasons unrelated to Belarusian law. As shown in the Claimant’s own exhibit, at least at that time the Claimant represented to MCEC that it had incorporated Manolium-Engineering because under the Russian currency control regulations in force at the time, Russian legal entities were required to obtain approval from the Russian Central Bank for any transfer of assets from Russia to Belarus.²¹⁵
137. The Claimant’s failure to address the Respondent’s explanations in the Defence and attempt to introduce new unsubstantiated factual allegations without explaining why it failed to mention these facts in its prior submissions demonstrate that the Claimant’s position on the delays in construction before the execution of the Amended Investment Contract is unfounded and that the Claimant ran out of arguments.

b) Claimant’s allegations regarding the delays after the execution of the Amended Investment Contract are not true

138. Pursuant to the Amended Investment Contract, Manolium-Engineering agreed to design, construct, commission and transfer into the municipal ownership the New Communal Facilities by December 2008.²¹⁶ Subsequently MCEC and Minsktrans agreed to postpone these deadlines by almost 2.5 years: first, by 3 July 2009²¹⁷ and then by 1 July 2011.²¹⁸ Accordingly, the Claimant and Manolium-Engineering had

²¹³ Reply, paragraph 62, **CS-5**.

²¹⁴ Defence, paragraphs 41 – 46, **RS-18**.

²¹⁵ Letter from MCEC to the President of the Republic of Belarus dated 26 May 2006, **Exhibit C-35**.

²¹⁶ Amended Investment Contract, Clause 6.1, **Exhibit C-66**.

²¹⁷ Additional Agreement No. 5 dated 16 December 2008, Clause 1, **Exhibit C-72**.

²¹⁸ Additional Agreement No. 6 dated 20 April 2011, Clause 1, **Exhibit C-76**.

almost 4.5 years to construct the New Communal Facilities, instead of the initially agreed term of “*slightly over 2 years*”.²¹⁹

139. On to the Claimant’s own case, alleged delays post the Amended Investment Contract add up to slightly over 1.5 years.²²⁰ Whereas the parties postponed the original deadline for construction of the New Communal Facilities by almost 2.5 years. Accordingly, even if the delays were caused by the Respondent (which is denied as discussed in paragraphs 140 – 188 below), they could not have prevented the Claimant and Manolium-Engineering from completing the New Communal Facilities on time.

(1) Provision of the land plot for construction of the Depot

140. The Claimant alleges that MCEC “*caused a delay of more than one month in construction of the Depot*”,²²¹ because in May 2007 it granted the permit to the land plot to Manolium-Engineering within a month, and not 10 days of the date it received all necessary documents. The Respondent submits that in comparison to Manolium-Engineering’s own delay, even if a one month delay in provision of the land plot for the Depot is attributable to the Respondent (which is denied), it is insignificant.

141. There was nothing stopping Manolium-Engineering from starting to develop the land plot allocation plan for the Depot from at least 18 October 2005, when Minsk Land Planning Service sent Manolium-Engineering’s application to prepare the land plot allocation plan to the land surveyor.²²²

142. However, Manolium-Engineering asked the land surveyor to start working on the land plot allocation plan approximately 1.5 years later.²²³

²¹⁹ Reply, paragraph 50, **CS-5**.

²²⁰ Reply, paragraphs 67, 80, 90 and 91 – 98, **CS-5**.

²²¹ Reply, paragraph 67, **CS-5**.

²²² Letter from Minsk Land Planning Service to RUP Belgiprozem and Manolium-Engineering dated 18 October 2005, **Exhibit R-166**.

²²³ Letter from Manolium-Engineering to RUP Belgiprozem dated 13 February 2007, **Exhibit R-171**.

(2) Alleged amendments to the Design Specification and Estimate Documentation of the New Communal Facilities

143. The Claimant alleges that the “*construction of the New Communal Facilities [...] was delayed due to numerous mistakes in the [...] [Design Specification and Estimate Documentation] caused by the Respondent*”.²²⁴
144. In fact, it was Manolium-Engineering that was responsible for preparing the Design Specification and Estimate Documentation for the New Communal Facilities. Designing the New Communal Facilities was one of the primary obligations of Manolium-Engineering and the Claimant under (a) the Investment Contract;²²⁵ (b) Amended Investment Contract;²²⁶ and (c) Belarusian law.²²⁷
145. Moreover, it was Manolium-Engineering which (a) chose; and (b) contracted with the designers.²²⁸ Only Manolium-Engineering was in a position to give instructions to the designers. Moreover, Manolium-Engineering approved the Design Specification and Estimate Documentation before submitting it to the Architecture Committee.
146. Accordingly, the Claimant’s allegations that the delays and costs, which allegedly “*could have been avoided had the Respondent created accurate project documentation*”²²⁹ are manifestly wrong, because the Respondent was not responsible for the project documentation; it was Manolium-Engineering and the designers it hired.

²²⁴ Reply, paragraph 81, **CS-5**. See also Reply, paragraphs 82 – 86, **CS-5**.

²²⁵ Investment Contract, see e.g. Clauses 2, 5, 6.1, 6.2, 6.3, 6.7 and 6.12, **Exhibit C-34**.

²²⁶ Amended Investment Contract, see e.g. clauses 2, 6, 7.1, 7.2, 7.3, 8.1, 8.2, 8.3, 8.6, 8.7, 8.10, 8.12, 8.19 and 11, **Exhibit C-66**.

²²⁷ Regulation “On the employer in the construction” approved by the Order of Ministry of the Architecture and Construction No. 174 dated 22 June 1999, clauses 8.1.5, 8.2.3, 8.2.4 and 8.2.7, **Exhibit RL-111**.

²²⁸ At that time, there were over 1,600 entities licensed to develop Design Specification and Estimate Documentation at Belarusian market, both private and state owned. The Claimant was free to choose from any of them. Manolium’s announcement re tender for the Depot’s design, **Exhibit R-236**.

²²⁹ Reply, paragraph 86, **CS-5**.

147. Second, the Claimant’s allegation that “[w]hen announcing the tender and approving the [Design Specifications and Estimate Documentation] for the Depot, [MCEC] based the design on the old Soviet project”²³⁰ is also wrong. As already explained, MCEC did not develop the Design Specifications and Estimate Documentation. The Tender Documents contained Technical Specifications, setting out the minimal technical requirements for the Communal Facilities, including the Depot provided for in the relevant legislation.²³¹ Manolium-Engineering was free to develop its own design and to use the material and equipment which was produced at the time provided it complied with the said minimal requirements. If the Design Specification and Estimate Documentation of the Depot were based on the “old Soviet project”, this was because the Claimant and Manolium-Engineering had chosen for it to be so.
148. Finally, the Claimant fails to explain the significance of each request to amend the Design Specification and Estimate Documentation and whether Manolium-Engineering was able to continue construction of the Depot notwithstanding the minor amendments it requested to the Design Specification and Estimate Documentation.²³²

(3) Discovery of water pipes

149. Similarly misplaced are the Claimant’s new allegations regarding the alleged delays caused by discovered water pipes.²³³ The Claimant alleges that in September 2007, “Manolium-Engineering discovered water pipes [...] which were not reflected in the project documentation”.²³⁴
150. As explained in paragraphs 145 – 146 above, Manolium-Engineering and the designers it hired were responsible for the project documentation. Before preparing the Design Specification and Estimate Documentation, the developer (*i.e.* Manolium-

²³⁰ Reply, paragraph 82, CS-5.

²³¹ Technical Specifications for the Communal Facilities, attached to the tender documents as Annex 9, Exhibits R-11, R-12 and R-13.

²³² Reply, paragraph 85, CS-5.

²³³ Reply, paragraphs 87 – 90, CS-5.

²³⁴ Reply, paragraph 87, CS-5.

Engineering) usually conducts an engineering and geodesy survey. Such survey, had it been conducted properly or at all, would have discovered the water pipes. This would have allowed the designers hired by Manolium-Engineering to take into account the water pipe when preparing the Design Specification and Estimate Documentation for the Depot.

151. It is not clear from the Claimant's submission whether it was the designers fault that the water pipes "*were not reflected in the project documentation*" or whether it was because the Claimant failed to conduct an engineering and geodesy survey before instructing the designers. In either case, however, the responsibility for any delays caused by the discovery of water pipes lies wholly with Manolium-Engineering.

(4) Deforestation for the Road

152. The Claimant alleges that a 5-month delay was caused by the need to extend the Road.²³⁵ The Claimant further alleges that the reason for extending the Road "*was that some high ranking KGB officers had their personal garages in the nearest garage block*".²³⁶ This is not true. The Respondent disagrees for the following reasons.
153. First, even on the Claimant's own version of the events (which the Respondent disputes), the alleged delay was one month, not 5 months, as the Claimant alleges. As explained in the Defence,²³⁷ in order to start construction, the developer is required to obtain the land plot and a construction permit. On the Claimant's own facts, Manolium-Engineering obtained the construction permit for the Road on 29 May 2008 and started construction in July 2008. Accordingly, even if the Claimant's version were true (which the Respondent denies), the delay could not have been more than a month.

²³⁵ Reply, paragraphs 68 – 80, **CS-5**.

²³⁶ Reply, paragraph 71, **CS-5**.

²³⁷ Defence, paragraph 101(c), **RS-18**. The Claimant appears to admit this.

154. Second, the Claimant offers no proof, other than Mr Dolgov's unsubstantiated allegations that "*the reason for this change in plans was that some high ranking KGB officers had their personal garages in the nearest garage block*".²³⁸ Mr Dolgov does not have direct knowledge of the facts and even fails to explain the source of his knowledge: as Mr Dolgov explains, he "later learned that the changes to the Road [Design Specification and Estimate Documentation] had been made "on recommendations" from the officers of [the KGB]".²³⁹
155. Moreover, the Claimant has never raised the issue of extension of the Road nor the alleged involvement of the KGB before its last submission in these arbitration proceedings. This in itself undermines the credibility of the Claimant's allegations.
156. For these reasons, the Respondent respectfully submits that the Tribunal should place very limited reliance, if any, on the Claimant's allegation regarding the extension of the Road.
157. Third, Manolium-Engineering, not MCEC or Minsktrans, was responsible for preparing the Design Specification and Estimate Documentation for the Road. Mr Dolgov's allegation that Manolium-Engineering "*had no choice, as the scope of the construction works [Manolium-Engineering] had to do was determined not by [Manolium-Engineering], but by [MCEC and Minsktrans]*"²⁴⁰ is simply not true. Manolium-Engineering hired the designers,²⁴¹ who must have followed Manolium-Engineering's instructions. Therefore, the Claimant's allegation that "*the designers later decided to extend the Road*"²⁴² is misleading. As discussed in paragraph 145 above, the designers follow the instructions of the developer, in this case Manolium-Engineering, and the requirements of applicable technical regulations.

²³⁸ Reply, paragraph 71, **CS-5**.

²³⁹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 45 (emphasis added), **CWS-5**.

²⁴⁰ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 45, **CWS-5**.

²⁴¹ Manolium's announcement re tender for the Depot's design // Available at <http://www.gostorgi.ru/2004/b28/b28-24972.xml> dated 2004, **Exhibit R-236**.

²⁴² Reply, paragraph 70, **CS-5**.

158. Fourth, the Respondent submits that there had been no changes to the Design Specification and Estimate Documentation for the Road. The designers prepared the Design Specification and Estimate Documentation for the Road in line with standard practices based on the Belarusian law that any road should ensure access to real estate located near it. After the Design Specification and Estimate Documentation for the Road were prepared, there were no extensions of the Road.
159. The architectural plan, to which the Claimant refers as confirmation that Manolium-Engineering was obliged to construct the road only up to the entry to the Depot,²⁴³ is not a detailed plan or design of the road. Rather, the purpose of the document was to show to the designers, in fairly general terms, where approximately the Road was to be located.²⁴⁴
160. Pursuant to Belarusian law, construction should not violate the rights of the owners of the objects, which relate to a facility under construction.²⁴⁵
161. The Road was to be built over an old road, which the owners of garages in two garage cooperatives called Svetophor and Ritm used. Accordingly, it is not surprising that Manolium-Engineering’s designers made sure that the garage owners of the garage cooperative Svetophor retained access to their property because of the new Road.
162. Finally, to the best of the Respondent’s knowledge and as Mr Akhramenko explains,²⁴⁶ contrary to the Claimant’s allegations, there are no garages of “*high ranking KGB officers*”²⁴⁷ in the garage cooperative Svetophor. There were garages owned by the KGB officers in another garage cooperative near the Depot called Ritm. However, as shown on the image below, the entry to garage cooperative Ritm is

²⁴³ Reply, paragraphs 68 – 69, **CS-5**.

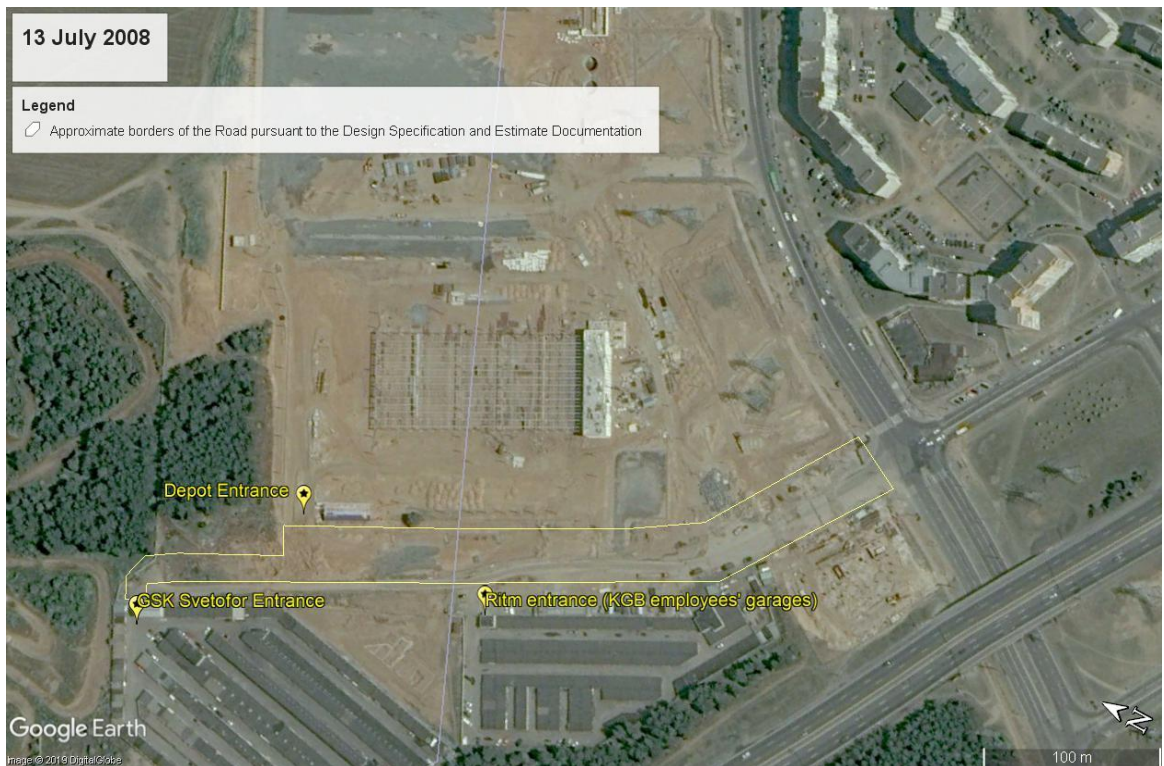
²⁴⁴ Regulations “On procedure for preparing and issuing of permit documentation for construction” approved by the Resolution of the Council of Ministers No. 223 dated 20 February 2007, clause 5, **Exhibit RL-116**.

²⁴⁵ Law of the Republic of Belarus No. 300-Z dated 5 July 2004 “On Architectural, City Planning and Construction Activities in the Republic of Belarus”, Article 53, **Exhibit RL-114**.

²⁴⁶ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 96 – 97, **RWS-4**.

²⁴⁷ Reply, paragraph 71, **CS-5**.

across the Depot and no extension for the Road was required in order to build access to it:²⁴⁸



(5) Alleged “re-allocation of contractors and materials”

163. In the Notice, the Claimant alleged that MCEC “dismiss[ed] the [...] contractors that performed the construction of the New Communal Facilities and [relocated] them”.²⁴⁹
164. The Respondent explained that as far as it was aware, no such decision was made by MCEC and the Claimant does not provide any evidence to support its allegation.²⁵⁰
165. In the Reply, the Claimant changed its position to say that the President (not MCEC, as previously alleged) “decreed that all construction resources in Belarus must prioritize work related to construction of the facilities for [the ice hockey World

²⁴⁸ The Road and entrance to Ritm, **Exhibit R-175**.

²⁴⁹ Notice, paragraph 160, **CS-1**.

²⁵⁰ Defence, paragraph 95, **RS-18**.

Championship] *above all other work*".²⁵¹ However, just as with the Notice, the Claimant provides no proof to support this. As far as the Respondent is aware, no such decree was made by the President.

166. In addition, the Respondent respectfully submits that the Claimant's own version of the event is inconsistent and should be disregarded.
167. On the one hand, the Claimant alleges that the relocation of the happened after May 2009, when "*it was announced that the city of Minsk would host the 2014 ice hockey World Championship*".²⁵² On the other hand, however, to support its position, the Claimant refers to its letter, which was sent in September 2008.²⁵³ As explained in the Defence,²⁵⁴ the Claimant provides no support to these unsubstantiated allegations, but does refer to the financial difficulties Manolium-Engineering was having at the time.
168. The Claimant also refers to its letter dated 6 September 2010, in which Manolium-Engineering sought an extension of the land permits to 1 July 2011, referring to the alleged relocation of its contractors.²⁵⁵ As explained in the Defence²⁵⁶, however, Manolium-Engineering was already aware in late May 2010 that it would be unable to finish the construction of the New Communal Facilities because of financial difficulties.²⁵⁷ The Claimant does not address this explanation in its Reply, presumably because it has nothing to say. In any event, it is not in issue between the Parties that the (a) land permits; (b) construction permits; and (c) contractual deadlines were postponed at that time until 1 July 2011.

²⁵¹ Reply, paragraph 93, **CS-5**.

²⁵² Reply, paragraph 91, **CS-5**.

²⁵³ Reply, paragraph 96, **CS-5**; Letter from Manolium-Engineering to MCEC dated 11 September 2008, **Exhibit C-71**.

²⁵⁴ Defence, paragraphs 78 – 79 and 95, **RS-18**.

²⁵⁵ Letter from Manolium-Engineering to MCEC dated 6 September 2010, exhibited both as **Exhibit C-74** and **Exhibit C-256**.

²⁵⁶ Defence, paragraphs 92 – 94, **RS-18**.

²⁵⁷ Letter from Manolium-Engineering to MCEC dated 26 May 2010, **Exhibit R-55**.

169. Finally, the Claimant alleges that from August to October 2011, a “*state-controlled contractor delayed supplying columns necessary for power wire networks because those supplies were required for work on sport facilities*”.²⁵⁸ The Claimant further alleges that the delays required “*Manolium-Engineering to make [two²⁵⁹] separate requests to speed up the delivery to the Depot*”.²⁶⁰
170. The Claimant does not explain how, even if Manolium-Engineering’s contractors were in delay, the fact that they are allegedly owned by the state makes the Respondent responsible for the delays in construction. The Respondent respectfully submits that it does not.
171. In any event, as is evident from the Claimant’s own submission, the alleged delays happened after the Final Commissioning Date.

(6) Construction permits

172. The Claimant alleges that “*Gosstroy repeatedly and unreasonably issued construction permits for shorter periods than requested by Manolium-Engineering. As a result, Manolium-Engineering was forced to continuously and unnecessarily apply to Gosstroy for new permits*”.²⁶¹ The Respondent disagrees.
173. As explained in the Defence:
- A. Manolium-Engineering has never challenged the duration of the construction permits issued by Gosstroy with the competent authorities or the court, as it was entitled to do.²⁶² The Respondent respectfully submits that this is because

²⁵⁸ Reply, paragraph 98, **CS-5**.

²⁵⁹ The Claimant alleges that Manolium-Engineering sent three letters. However, as evident from the exhibits the Claimant refers to, Manolium-Engineering sent two of those letters. Minsktrans was the one who sent the third letter.

²⁶⁰ Reply, paragraph 98, **CS-5**.

²⁶¹ Reply, paragraph 100, **CS-5**.

²⁶² Defence, paragraph 130, **RS-18**.

Manolium-Engineering recognised that there were no violations on Gosstroy’s side.

B. When issuing construction permits, Gosstroy checks that the developer is able and intends to undertake construction within a particular period of time, and takes into account all relevant circumstances such as the various deadlines set out in agreements between the developer and its contractors.²⁶³ In the Notice, the Claimant does not provide any evidence that it has (a) requested the construction permit; or (b) provided all documents necessary to obtain the construction permit.²⁶⁴

174. In the Reply, the Claimant does not explain why Manolium-Engineering did not challenge the construction permits with a competent authority or in court. Neither does it submit any evidence that Manolium-Engineering provided all documents necessary to obtain the construction permits.

175. The Claimant provides four examples, when, according to the Claimant, Gosstroy issued the construction permits “*for an arbitrarily short time*”.²⁶⁵ The Respondent submits that this is misleading.

176. The Claimant alleges that “[c]ommon sense and commercial prudence dictate that a required permit be issued for a period to match the construction that is expected to occur.”²⁶⁶ The Respondent submits that Manolium-Engineering was able, under Belarusian law, to obtain a permit for the whole period of construction.²⁶⁷ In order to

²⁶³ Defence, paragraph 101(c)(ii), **RS-18**.

²⁶⁴ Defence, paragraph 127, **RS-18**.

²⁶⁵ Reply, paragraph 121, **CS-5**.

²⁶⁶ Reply, paragraph 121, **CS-5**.

²⁶⁷ Regulation on the order of issuance of permits on performance of construction, reconstruction, expansion, restoration works, major structural repairs and object registration issued by inspections of state control over construction, enacted by the Order of the Ministry of Architecture and Construction of Belarus dated 11 October 1999 No. 307, Clause 6, **Exhibit RL-112**; Instruction on the order of issuance of construction permits by Inspections of state control over construction, enacted by the resolution of State Standardization Committee dated 28 February 2008 No. 11, Clause 5, **Exhibit RL-120**.

obtain such permit, however, Manolium-Engineering should have provided confirmation that it was able and intended to conduct construction for the whole period for which it requested the permit. This was possible, for example, if Manolium-Engineering hired a general contractor responsible for the whole period of construction and which would, inter alia, oversee work done by the subcontractors. Alternatively, Manolium-Engineering could have submitted to Gosstroy all contracts covering the whole period of construction.

177. This was possible, for example, if Manolium-Engineering hired a general contractor responsible for the whole period of construction and which would, inter alia, oversee work done by the subcontractors. Alternatively, Manolium-Engineering could have submitted to Gosstroy all contracts covering the whole period of construction.
178. For the reasons unknown to the Respondent, Manolium-Engineering was using general contractor called SM ZAO Aresa-Service-Story (“**Aresa**”) from January 2008²⁶⁸ to September 2009 only. For the rest of the period, during which, according to the Claimant’s version of events, Manolium-Engineering was conducting the construction, there was no general constructor on the construction site. From October 2007 to January 2008 and from September 2009 to December 2011 (when the last construction permit expired), Manolium-Engineering effectively assumed the role of a general contractor when it contracted directly with numerous subcontractors, each of which performed only particular and narrow aspect of work. The Respondent submits that Manolium-Engineering did not have enough expertise or even enough employees to cope with this role.
179. Manolium-Engineering was hiring numerous subcontractors, each of which performed only a particular and narrow aspect of work. That is why Manolium-Engineering had to apply to Gosstroy to obtain construction permits for each of such aspect of work. In each case, Manolium-Engineering only exhibited contracts with its subcontractors with relatively short terms.

²⁶⁸ Agreement between Manolium-Engineering and SM ZAO Aresa-Service-Stroy No. 84/08 dated 17 January 2008, **Exhibit R-173**.

180. In light of the above, Gosstroy was only able to issue construction permits for particular aspects of the works, as set out in the agreements between Manolium-Engineering and its subcontractors, and for the periods set out in such agreements. Where Manolium-Engineering was requesting to grant construction permits for works to be done by more than one subcontractor, Gosstroy had to issue permits valid to the earliest date, by which a subcontractor undertook to complete the works.
181. The initial²⁶⁹ construction term of the general contractor agreement with Aresa was September 2008.²⁷⁰ Accordingly, when on 30 January 2008 Manolium-Engineering requested Gosstroy to extend the construction permit for the Depot attaching the contract with Aresa,²⁷¹ Gosstroy was only able to grant the construction permit valid until September 2008.²⁷² Therefore, the Claimant's allegation that "*Gosstroy [...] reduced the construction period for 1 year*"²⁷³ is wrong.
182. The Claimant alleges that "*on 25 January 2010 and on 21 April 2010, Gosstroy issued a permit valid only until 31 August 2010 [...] Gosstroy had thus reduced the period for construction by 4 months*".²⁷⁴ This is again misleading.
183. The Claimant alleges that on 24 December 2009, it asked Gosstroy to extend the construction permit,²⁷⁵ but Gosstroy did not grant that request. In fact, Manolium-Engineering's letter of 24 December 2009 was not a duly made application to extend

²⁶⁹ On 1 September 2008, Manolium-Engineering and Aresa postponed the deadlines set out in the general contractor agreement until September 2009. Manolium-Engineering then applied for the extension of construction permit. Gosstroy granted the permit valid until the postponed deadline for construction. Since the Claimant does not allege that this construction permit was issued improperly, the Respondent does not address it in detail.

²⁷⁰ Agreement between Manolium-Engineering and SM ZAO Aresa-Service-Stroy No. 84/08 dated 17 January 2008, Clause 2.4 and calendar schedule attached to the contract, **Exhibit R-173**.

²⁷¹ Letter from Manolium-Engineering to Gosstroy dated 30 January 2008, **Exhibit C-261**.

²⁷² Construction permit issued by Gosstroy for constructing the Depot dated 7 February 2008, **Exhibit C-262**.

²⁷³ Reply, paragraph 105, **CS-5**.

²⁷⁴ Reply, paragraph 109, **CS-5**.

²⁷⁵ Letter from Manolium-Engineering to Gosstroy dated 24 December 2009, **Exhibit C-264**.

the permit. Manolium-Engineering filed an application to do so only 1.5 weeks later, on 5 January 2010.²⁷⁶

184. Manolium-Engineering asked Gosstroy to issue a construction permit for the works to be done by only one of Manolium-Engineering's subcontractors, OOO Profpartner, under the agreement dated 29 January 2009 No. 2/01 as amended on 1 June 2009.²⁷⁷ Pursuant to this agreement, OOO Profpartner should have completed the works by August 2010. Accordingly, Gosstroy issued a permit until 31 August 2010.
185. On 20 April 2010, Manolium-Engineering requested Gosstroy to add new contractors to the same permit.²⁷⁸ The works under one of the agreements presented to Gosstroy should have been completed by June 2010.²⁷⁹ Since at that moment the construction permit was valid until August 2010, Gosstroy did not reduce the term of the construction permit granted previously. Accordingly, contrary to what the Claimant alleges,²⁸⁰ Gosstroy did not arbitrarily reduce the term of the construction permit.
186. On 29 October 2010, Manolium-Engineering applied for another construction permit.²⁸¹ Manolium-Engineering exhibited one contract, under which the works were to be completed by August 2010.²⁸² All other contracts exhibited to the application required the subcontractors to complete the works by December 2010.²⁸³ Accordingly, Gosstroy issued the construction permit until that date.²⁸⁴

²⁷⁶ Application of Manolium-Engineering to Gosstroy dated 5 January 2010, **Exhibit R-181**.

²⁷⁷ Agreement between Manolium-Engineering and OOO Profpartner dated 29 January 2009 No. 2/01, extended by Additional Agreement No. 1 dated 1 June 2009, **Exhibit R-178**.

²⁷⁸ Letter from Manolium-Engineering to Gosstroy dated 20 April 2010, **Exhibit R-54**.

²⁷⁹ Agreement between Manolium-Engineering and UP Monolittransstroy No. 2/10 dated 5 April 2010, **Exhibit R-182**.

²⁸⁰ Reply, paragraph 109, **CS-5**.

²⁸¹ Application of Manolium-Engineering to Gosstroy dated 29 October 2010, **Exhibit R-186**.

²⁸² Agreement between Manolium-Engineering and OOO Profpartner dated 29 January 2009 No. 2/01, extended by Additional Agreement No. 1 dated 1 June 2009, **Exhibit R-178**.

²⁸³ Agreement between Manolium-Engineering and ZAO Electroservicestroy dated 21 July 2010, **Exhibit R-184**; Agreement between Manolium-Engineering and OAO Promtekhmontazh dated 28 April 2010 No. 20/10, extended by Additional Agreement No. 1 dated 30 December 2010,

187. On 29 May 2008, Manolium-Engineering requested²⁸⁵ Gosstroy to issue a construction permit for the Road exhibiting one agreement, which stated that the construction will be over by October 2008.²⁸⁶ Gosstroy again issued the permit accordingly.²⁸⁷
188. As seen from the above, the alleged “*delays caused by [...] improper approval process*”²⁸⁸ were the result of Manolium-Engineering’s own actions.

F. DESIGN OF THE INVESTMENT OBJECT

1. Manolium-Engineering’s failure to comply with the Investment Object Location Act

189. As explained in the Defence, under the Amended Investment Contract, Manolium-Engineering was entitled to prepare the Design Specification and Estimate Documentation for the Investment Object concurrently with constructing the New Communal Facilities.²⁸⁹ Pursuant to the Investment Object Location Act,²⁹⁰ which served as permission to develop the Design Specification and Estimate Documentation,²⁹¹ Manolium-Engineering was required to submit:

Exhibit R-187; Agreement between Manolium-Engineering and ODO Teplosreda No. 18/08-09 dated 18 August 2009, **Exhibit R-179**; Agreement between Manolium-Engineering and OOO Vopez-Spetsnaladka No. 27 dated 28 May 2010, **Exhibit R-183**; Agreement between Manolium-Engineering and ChUP LegoService dated 5 July 2007 No. 36/07-TN, extended by Additional Agreement No. 2 dated 30 September 2009, **Exhibit R-180**.

²⁸⁴ Construction permit issued by Gosstroy for constructing the Depot dated 20 December 2010, **Exhibit C-269**.

²⁸⁵ Summary form, information about the Road, **Exhibit R-36**.

²⁸⁶ Agreement between Manolium-Engineering and UP SSU-2 UDMSiB No. 9 dated 16 May 2008, **Exhibit R-174**.

²⁸⁷ Construction permit issued by Gosstroy dated 29 May 2008, **Exhibit C-87**.

²⁸⁸ Reply, paragraph 101, **CS-5**.

²⁸⁹ Defence, paragraph 192, **RS-18**.

²⁹⁰ Investment Object Location Act, **Exhibit C-116**.

²⁹¹ Defence, paragraph 101(a), **RS-18**.

- A. the general plan of the Investment Object – within a year from the date of MCEC’s approval of the Investment Object Location Act (i.e. until 25 March 2010);²⁹²
- B. the Design Specification and Estimate Documentation for the Investment Object – within two years from the same date (i.e. until 25 March 2011).²⁹³
190. Manolium-Engineering failed to submit those documents within the deadlines or at all.²⁹⁴ Instead, it presented a construction plan²⁹⁵ for demolishing the buildings located on the land plot for the Investment Object,²⁹⁶ which was not sufficient to proceed with the approval of the Design Specification and Estimate Documentation by the Architecture Committee.²⁹⁷
191. In the Reply, the Claimant refers to MCEC’s decision declaring the Investment Object Location Act expired²⁹⁸ and alleges that it was an exercise of MCEC’s “*authority to manage the communal property [resulted in] depriv[ation of] the Claimant[‘s] right to develop the Investment Object on the land plot intended for it*”.²⁹⁹ This is wrong.
192. As explained in the Defence,³⁰⁰ MCEC’s decision did not go beyond what it provided for – formal invalidation of the Investment Object Location Act. By adopting that decision, MCEC did not itself deprive the Claimant of the right to develop the Investment Object. Rather, it was Manolium-Engineering’s failure to comply with the Investment Object Location Act, which resulted in the loss of its right to develop the

²⁹² Defence, paragraph 199, **RS-18**; Section 6 of the Investment Object Location Act, **Exhibit C-116**.

²⁹³ Defence, paragraph 200, **RS-18**; Section 5 of the Investment Object Location Act, **Exhibit C-116**.

²⁹⁴ Defence, paragraphs 199 – 203.

²⁹⁵ The construction plan is the second part of the Design Specification and Estimate Documentation, which should be prepared based on the architectural plan.

²⁹⁶ Notice, paragraph 238, **CS-1**.

²⁹⁷ Defence, paragraphs 101(b) and 201 – 205, **RS-18**; Letter from the Architecture Committee to Manolium-Engineering dated 26 April 2011, **Exhibit C-121**.

²⁹⁸ Decision of MCEC dated 14 March 2013, **Exhibit C-138**.

²⁹⁹ Reply, paragraph 438(iv), **CS-5**.

³⁰⁰ Defence, paragraphs 201 – 204, **RS-18**.

Design Specification and Estimate Documentation for the Investment Object on the basis of that act. As explained in the Defence, that loss happened on 26 March 2011, i.e. when the deadline for submitting the Design Specification and Estimate Documentation for the Investment Object expired.³⁰¹ However, this did not cause an irreversible consequence for the Claimant: in order to become entitled to develop the Design Specification and Estimate Documentation for the Investment Object again (subject to satisfying all conditions under the Amended Investment Contract), Manolium-Engineering was required to re-apply for a new land plot location selection act (which it had never done).

2. None of the documents submitted by the Claimant in this arbitration is a reliable and sufficient evidence of what would have been the design of the Investment Object

193. In the Notice, the Claimant relies on a number of documents, which allegedly concerned the design of the Investment Object:

- A. “*preliminary key technical and economic indexes of the Investment Object*”;³⁰²
- B. “*schedule of design and construction of the Investment Object*” of December 2007;³⁰³ and
- C. “*updated schedule of designing and constructing the Investment Object*” of April 2011;³⁰⁴

194. Mr Taylor in his expert reports, he also relies on the following documents:

- A. the same schedule graphic of April 2011;³⁰⁵

³⁰¹ Defence, paragraph 201, **RS-18**.

³⁰² Notice, paragraph 213, **CS-1**; Composition and the key technical and economic indexes for the Investment Object dated 25 February 2005, **Exhibit C-110**.

³⁰³ Notice, paragraph 223, **CS-1**; Schedule of design and construction of the Investment Object dated 28 December 2007, **Exhibit C-113**.

³⁰⁴ Notice, paragraphs 232 – 233, **CS-1**; Schedule of Manolium-Engineering in respect of designing and constructing the Investment Object of April 2011, **Exhibit C-120**.

- B. graphic design of the Investment Object;³⁰⁶
- C. area calculation for the Investment Object;³⁰⁷
- D. residence area calculation for the Investment Object;³⁰⁸ and
- E. carpark area calculation for the Investment Object.³⁰⁹

195. As explained below, none of these documents constitutes reliable and sufficient evidence of what would have been the design of the Investment Object.

a) The only reliable and sufficient evidence of what would have been the design of the Investment Object was the Design Specification and Estimate Documentation

196. The Respondent respectfully submits that the only reliable and sufficient evidence of what would have been the design of the Investment Object was the Design Specification and Estimate Documentation, which, as explained above, Manolium-Engineering never prepared. The Respondent also submits that the Design Specification and Estimate Documentation is the only set of documents, which contains a comprehensive overview of a projected building, including all its parameters and characteristics as well as construction and technology solutions to be employed during construction.

197. Pursuant to Article 51 of Law of the Republic of Belarus No. 300-Z dated 5 July 2004 (as revised on 5 January 2008)³¹⁰ “On Architectural, City Planning and Construction Activities in the Republic of Belarus” (the “**Construction Law**”),³¹¹ Design

³⁰⁵ Schedule of Manolium-Engineering in respect of designing and constructing the Investment Object of April 2011, **Exhibit TT-11**.

³⁰⁶ Graphic design of the Investment Object of 2010, **Exhibit TT-52**.

³⁰⁷ Area calculation for the Investment Object, **Exhibit TT-10**.

³⁰⁸ Residence area calculation for the Investment Object, **Exhibit TT-34**.

³⁰⁹ Carpark area calculation for the Investment Object, **Exhibit TT-79**.

³¹⁰ Article 51 of the Construction Law had not changed between 16 January 2008 and 8 June 2011.

³¹¹ Construction Law, Article 51(1) – (3), **Exhibit RL-114**.

Specification and Estimate Documentation was to be usually prepared in two consecutive stages:

- A. an architectural plan; and
- B. a construction plan³¹² based on the approved architectural plan.

198. This is further confirmed by the Construction Standards approved by Decree of the Ministry of Architecture and Construction of the Republic of Belarus No. 344 dated 4 October 1996 (revision of 15 December 2009)³¹³ (“**Decree No. 344**”).³¹⁴ By way of example, Decree No. 344 specified, *inter alia*, the following sections, which any architectural plan was to include:

- A. general explanatory note;
- B. general lay-out plan;
- C. architecture and construction solutions;
- D. technology solutions;
- E. utility equipment solutions;
- F. environmental protection; an object’s environmental ID;
- G. development management; and
- H. estimate documentation.³¹⁵

³¹² A construction plan expands and elaborate on solutions included in the approved architectural plan.

³¹³ The revision of 15 December 2009 had been in force from 1 January 2010 to 31 March 2014. This revision did not materially change the previous revision of 10 November 2008, which had been in force from 1 January 2009 to 31 December 2009.

³¹⁴ Decree of the Ministry of Architecture and Construction of the Republic of Belarus No. 344 dated 4 October 1996, Section 3, **Exhibit RL-108**.

³¹⁵ Decree of the Ministry of Architecture and Construction of the Republic of Belarus No. 344 dated 4 October 1996, Clause 6.2, **Exhibit RL-108**.

199. Accordingly, the Design Specification and Estimate Documentation forms a complex set of documents. For example, a general explanatory note for the completion of the Depot, which was prepared by Belcommunproject upon Minsktrans' instructions in 2018, formed a separate volume.³¹⁶
200. By contrast, an optional conceptual design of an object³¹⁷ was a rather general overview of some, but not all, solutions, which are contemplated to be used during construction. The recommended sections for a conceptual design of an object, which could be included in the architectural plan, included, *inter alia*, the following:
- A. general explanatory note, including, in particular, reference data for design and design rationale;
 - B. master drawings; and
 - C. illustrations (panorama of an object, models, etc.).³¹⁸

b) Construction schedules and “key and technical economic indexes”

201. The construction schedules and “*preliminary key technical and economic indexes of the Investment Object*”³¹⁹ were Manolium-Engineering's internal documents and

³¹⁶ A trolleybus depot with 220 trolleybus in Uruchye-6 microdistrict in Minsk. Architectural design. General explanatory note. Volume 17.051-1, **Exhibit SQ-45**. See also a trolleybus depot with 220 trolleybus in Uruchye-6 microdistrict in Minsk. Architectural design. Cost estimate documentation. Volume 5.2, **Exhibit SQ-27**; Cost estimate. Object No. 07.126. Road along Gorodetskaya street from Gintovta street to entrance to the trolleybus depot with high-voltage cable line and trolley line, **Exhibit SQ-28**; Cost estimate. Object No. 04.93.1. Pull station on Gintovta street with high-voltage cable line, **Exhibit SQ-29**; A trolleybus depot with 220 trolleybus in Uruchye-6 microdistrict in Minsk. Architectural design. Cost estimate documentation. Volume 5.2, Book 1, **Exhibit SQ-57**.

³¹⁷ Upon a decision of relevant state authorities or a customer, the architectural plan could also include, *inter alia*, a conceptual design of an object. See Decree of the Ministry of Architecture and Construction of the Republic of Belarus No. 344 dated 4 October 1996, Section 3 **Exhibit RL-108**.

³¹⁸ Decree of the Ministry of Architecture and Construction of the Republic of Belarus No. 344 dated 4 October 1996, Exhibit D (recommended), **Exhibit RL-108**.

³¹⁹ Notice, paragraph 213, **CS-1**; Composition and the key technical and economic indexes for the Investment Object dated 25 February 2005, **Exhibit C-110**; Schedule of design and construction of the

contained very limited information on what the Investment Object would have been and what would have been its characteristics.

202. The “*preliminary key technical and economic indexes of the Investment Object*”³²⁰ were in essence limited to a list of components of the projected Investment Object and their area calculations. Indeed, as follows from this document, “[p]arameters and sizes of the buildings are provided as preliminary and therefore are subject to amendments in accordance with city planning, architectural and normative conditions”.³²¹ Furthermore, the document provided that “[t]he buildings and premises of the complex might be merged and combined in accordance with functional purpose and architectural and planning terms of construction”.³²² Accordingly, even for Manolium-Engineering the “*preliminary key technical and economic indexes of the Investment Object*” were a very rough and undetailed plan of what it was thinking of constructing.
203. The construction schedules contained even fewer details.³²³ In particular, the construction schedule of December 2007 provided no information on the components of the Investment Object at all, and formed the projected timeline.³²⁴ The construction schedule of 2011, while containing information on key facilities of the Investment

Investment Object dated 28 December 2007, **Exhibit C-113**; Schedule of Manolium-Engineering in respect of designing and constructing the Investment Object of April 2011, **Exhibit C-120**.

³²⁰ Notice, paragraph 213, **CS-1**; Composition and the key technical and economic indexes for the Investment Object dated 25 February 2005, **Exhibit C-110**; Schedule of design and construction of the Investment Object dated 28 December 2007, **Exhibit C-113**; Schedule of Manolium-Engineering in respect of designing and constructing the Investment Object of April 2011, **Exhibit C-120**.

³²¹ Composition and the key technical and economic indexes for the Investment Object dated 25 February 2005, **Exhibit C-110**.

³²² Composition and the key technical and economic indexes for the Investment Object dated 25 February 2005, **Exhibit C-110**

³²³ Schedule of design and construction of the Investment Object dated 28 December 2007, **Exhibit C-113**; Schedule of Manolium-Engineering in respect of designing and constructing the Investment Object of April 2011, **Exhibit C-120**.

³²⁴ Schedule of design and construction of the Investment Object dated 28 December 2007, **Exhibit C-113**.

Object and projected construction costs, did not elaborate, at the very least, on general characteristics of those facilities (such as area and number of floors).³²⁵

c) Graphic design of the Investment Object

204. As follows from the graphic design of the Investment Object,³²⁶ it was a conceptual design of that object and could form a part of the architectural plan for the purpose of Decree No. 344. The structure of the graphic design was in line with the recommendations set out in Decree No. 344.³²⁷
205. As explained in paragraphs 197 – 200 above, however, graphic design was one (and, in fact, least important), but not the only, part of the Design Specification and Estimate Documentation. This is further confirmed by Manolium-Engineering’s internal construction schedules, which included the development of “*conceptual design*” as a separate, one-month-long, stage prior to the developing the architectural and construction plans.³²⁸
206. The graphic design itself contains no details. Indeed, it largely quotes the basis for its development (such as topographic survey plan or Manolium-Engineering’s terms of reference for the design),³²⁹ i.e. reference data for design under Decree No. 344.³³⁰ In this sense, the graphic design does not go significantly further to Manolium-Engineering’s internal “*preliminary key technical and economic indexes of the Investment Object*”.³³¹

³²⁵ Schedule of Manolium-Engineering in respect of designing and constructing the Investment Object of April 2011, **Exhibit C-120**.

³²⁶ Graphic design of the Investment Object of 2010, page 3, Heading, **Exhibit TT-52**.

³²⁷ See paragraph 200 above; Graphic design of the Investment Object of 2010, pages 4(1) – 4(2), **Exhibit TT-52**.

³²⁸ Schedule of design and construction of the Investment Object dated 28 December 2007, lines 5, 9 and 11, **Exhibit C-113**; Schedule Graphic of April 2011, lines 1, 7 and 9, **Exhibit C-120**.

³²⁹ Graphic design of the Investment Object of 2010, page 3, **Exhibit TT-52**.

³³⁰ See paragraph 200 above.

³³¹ Notice, paragraph 213, **CS-1**; Composition and the key technical and economic indexes for the Investment Object dated 25 February 2005, **Exhibit C-110**; Schedule of design and construction of the

d) Area Calculations are internal documents, which had never been seen or approved by the Respondent

207. The same equally applies to the various area calculations for the Investment Object listed in paragraph 194 above and relied on by Mr Taylor (the “**Area Calculations**”).³³² Those were internal documents, which the Respondent had never seen or approved.
208. According to the Mr Taylor’s Second Expert Report, the Area Calculations were produced by email from ACP Architecture and Engineering Company in October 2011.³³³ The Respondent respectfully submits, however, that nothing in that email shows either (1) that the Area Calculations were produced by ACP Architecture and Engineering Company, or (2) that they were prepared or updated in October 2011.
209. First, the email of 27 October 2011 was sent from a certain “Vladimir” to Mr Dolgov.³³⁴ It contains no information on whether that “Vladimir” belonged to ACP Architecture and Engineering Company, which produced the graphic design of the Investment Object. The Claimant offers no evidence in this respect. By contrast, when an email came from ACP Architecture and Engineering Company, it was sent from an official email address.³³⁵

Investment Object dated 28 December 2007, **Exhibit C-113**; Schedule of Manolium-Engineering in respect of designing and constructing the Investment Object of April 2011, **Exhibit C-120**.

³³² Area calculation for the Investment Object, **Exhibit TT-10**; Residence area calculation for the Investment Object, **Exhibit TT-34**; Carpark area calculation for the Investment Object, **Exhibit TT-79**.

³³³ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 3.6.5(vi), **CER-3**; Email from a certain “Vladimir” to Mr Dolgov dated 27 October 2011, **Exhibit TT-77**.

³³⁴ Email from a certain “Vladimir” to Mr Dolgov dated 27 October 2011, **Exhibit TT-77**.

³³⁵ Email from ACP Architecture and Engineering Company to Vladimir Vakhtangov dated 25 January 2010, **Exhibit TT-74**.

210. Second, nothing in the email of 27 October 2011 suggested that the figures in the attachments to it were updated compared to the graphic design.³³⁶

3. The Architecture Committee was not required to review and approve the construction project for the preparatory period for demolishing buildings on the land plot for the Investment Object

211. In the Notice, the Claimant alleges that on 26 April 2011, the Architecture Committee “notified Manolium-Engineering that the construction project of the preparatory period to demolish buildings and structures on the land plot for the Investment Object was removed from consideration [...] ‘in connection with the absence of the initial approvals’”.³³⁷

212. As explained in the Defence, any attempt by the Claimant to present the Architecture Committee’s refusal to consider the construction plan for demolition as something wrong or unusual should fail, because before submitting such a plan Manolium-Engineering should have prepared the architecture plan and got it approved by the expert (which Manolium-Engineering failed to do).³³⁸

213. Furthermore, as explained in paragraphs 196 – 200 above, Manolium-Engineering was required to prepare and get approved the architectural plan for the whole Investment Object prior to submitting any construction plan, either for the whole object or for any particular phase of construction. As the Architecture Committee explained in its letter,³³⁹ pursuant to the then enacted legislation, Manolium-

³³⁶ See also Properties of the attached Excel files to the email from a certain “Vladimir” to Mr Dolgov dated 27 October 2011 (Exhibit TT-77), **Exhibit R-238**. These facts are particularly relevant to the issue of what is the best contemporaneous evidence (if any) for determining the composition and characteristics of the Investment Object – the graphic design or the Area Calculations. See Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 3.6.6, **CER-3**; Expert Report of A. S. Qureshi dated 15 November 2018, paragraphs 62 – 64, **RER-1.- 238**.

³³⁷ Notice, paragraph 238 (emphasis added), **CS-1**; Letter from the Architecture Committee to Manolium-Engineering dated 26 April 2011, **Exhibit C-121**.

³³⁸ Defence, paragraphs 202 – 203, **RS-18**.

³³⁹ Letter from the Architecture Committee to Manolium-Engineering dated 26 April 2011, **Exhibit C-121**.

Engineering’s submission of the construction plan for one preliminary phase, i.e. demolition of the buildings on the land plot for the Investment Object, was premature. This was not just a mere formality – as demonstrated in paragraph 197 above, the architectural plan approved by the state experts was a precondition for preparing a construction plan, either for the whole object or for any particular phase of construction.

G. EXAMPLES OF THE ALLEGED MISTREATMENT OF OTHER INVESTORS AND REFERENCES TO THE REVOLUTIONARY PROJECT ARE IRRELEVANT

214. The Claimant alleges that the Respondent “*has repeatedly deprived foreign investors of their investments*”³⁴⁰ and sets out “*an overview of the most well-known cases [...] where the rights of the investor were violated.*”³⁴¹ According to the Claimant, “[t]hese prior experiences demonstrate the Respondent’s *modus operandi*”³⁴² in dealings with foreign investors in the Republic of Belarus. The Claimant relies on a statement submitted by Ms Elena Tonkacheva on 25 February 2019 (“**Ms Tonkacheva’s Report**”) and press reports to support its allegations that the “*Respondent [h]as a [l]ong [r]ecord of [c]heating [f]oreign [i]nvestors.*”³⁴³
215. First of all, what the Claimant refers to as an “expert report” by Ms Tonkacheva, who is a popular Russian human rights activist based in Belarus, is a statement summarising a number of press articles, extracts from news portals and websites of various international organisations and action groups, and international conventions. Nowhere in the document does Ms Tonkacheva offer an expert opinion on any issue relevant to these proceeding; at best she gives witness evidence on the materials available in the public domain she has read and now recounts in her own words. The Respondent respectfully submits that Ms Tonkacheva’s Report, to the extent it is relevant at all, which the Respondent denies, should not be treated as an expert report.

³⁴⁰ Reply, paragraph 137, **CS-5**.

³⁴¹ Report of E. Tonkacheva dated 25 February 2019, paragraph 44, **CER-2**.

³⁴² Reply, paragraph 139, **CS-5**.

³⁴³ Reply, Section 2.3, **CS-5**.

216. The Reply is largely dedicated to matters that have no relevance to the issues in dispute in these proceedings. For instance, the Claimant's examples of the alleged mistreatment of other investors in the Republic of Belarus³⁴⁴ do not concern Manolium-Engineering, the Claimant or Mr Dolgov. Ms Tonkacheva in her Report cites, *inter alia*, press reports and extracts from news portals which describe how the Respondent "*treats [...] foreign investors*".³⁴⁵ Ms Tonkacheva's "*general assessment of the human rights situation in the Republic of Belarus, interaction with international mechanisms for the protection and promotion of human rights*"³⁴⁶ is also irrelevant to these proceedings.
217. The Claimant appears to ask the Tribunal to form a view on whether the Respondent breached the provisions of the EEU Treaty in these proceedings based on press reports about different and unrelated projects, undertaken by different and unrelated investors, in different and unrelated circumstances, some of which are being considered by other tribunals. The Claimant's evidence is of no value to the Claimant, does not support its claims and does not assist the Claimant in showing that the Respondent breached the EEU Treaty in this particular case.
218. Further, Ms Tonkacheva gives the impression that it is very difficult to do business in the Republic of Belarus because, *inter alia*, problems in the judicial system and bureaucracy costs limit economic freedom of the country. In support of this assertion, Ms Tonkacheva's Report refers to international indices and rankings, pointing out that the Republic of Belarus has low scores.³⁴⁷
219. The Respondent submits that Ms Tonkacheva's description of the indices is misleading. Although the Republic of Belarus's world rankings are not very high, the indices, including those cited in Ms Tonkacheva's Report, show a positive trend in

³⁴⁴ Reply, paragraph 138, **CS-5**; Report of E. Tonkacheva dated 25 February 2019, paragraphs 44 – 97, **CER-2**.

³⁴⁵ Report of E. Tonkacheva dated 25 February 2019, Section IV, **CER-2**.

³⁴⁶ Report of E. Tonkacheva dated 25 February 2019, Section II, paragraphs 6 – 17, **CER-2**.

³⁴⁷ Report of E. Tonkacheva dated 25 February 2019, paragraphs 18 – 43, **CER-2**.

2003 (when the Claimant executed the Investment Contract), in 2014 (when the termination of the Amended Investment Contract was upheld by the Belarusian courts and came into effect) and in 2016 (when the 2016 Administrative Proceedings came to an end). Neither Ms Tonkacheva, nor the Claimant make reference to this dynamic.

220. For example, *The Worldwide Indicators on Good Governance of the World Bank* show that all four indicators related to the business environment improved between 2003 and 2016 (that is, (i) the rule of law³⁴⁸ and (ii) control of corruption,³⁴⁹ as shown in Ms Tonkacheva's Report;³⁵⁰ (iii) government effectiveness;³⁵¹ and (iv) regulatory quality³⁵²).³⁵³

221. *The Index of Economic Freedom of The Heritage Foundation* referred to by Ms Tonkacheva³⁵⁴ also shows positive development between 2003 and 2016. The index provides that the Republic of Belarus had an overall score for economic freedom of 39.7 in 2003, 50.1 in 2014 and 48.8 in 2016. A business freedom score was 40, 73.4 and 69.0, respectively (the scores are reflected on a scale from 0 to 100, where 0 represents the lowest and 100 represents the best performance). The improvement in the overall score for economic freedom is shown in Diagram 1 of

³⁴⁸ World Bank website, *Rule of Law*, access date: 29 January 2019, **ET-18**.

³⁴⁹ World Bank website, *Control of Corruption*, access date: 29 January 2019, **ET-19**.

³⁵⁰ Report of E. Tonkacheva dated 25 February 2019, Diagram 3 in paragraph 34 and Diagram 4 in paragraph 36, **CER-2**.

³⁵¹ World Bank website, *Government Effectiveness* // Available at: <http://info.worldbank.org/governance/wgi/index.aspx#home> dated 22 May 2019, **Exhibit R-232**.

³⁵² World Bank website, *Regulatory Quality* // Available at: <http://info.worldbank.org/governance/wgi/index.aspx#home> dated 22 May 2019, **Exhibit R-233**.

³⁵³ The percentile ranks of the Republic of Belarus were as follows: (i) the rule of law – 11.39 in 2003, 20.67 in 2014 and 26.44 in 2016; (ii) control of corruption – 33.84 in 2003, 48.08 in 2014 and 48.56 in 2016; (iii) government effectiveness – 16.84 in 2003, 34.62 in 2014 and 36.06 in 2016 ; (iv) regulatory quality – 9.18 in 2003, 15.38 in 2014 and 16.35 in 2016.

³⁵⁴ Website of the *Heritage Foundation* research institution, *Database of the Economic Freedom Index*, access date: 29 January 2019, **Exhibit ET-15**.

Ms Tonkacheva's Report,³⁵⁵ although conveniently neither Ms Tonkacheva, nor the Claimant mention it.

222. In addition, positive development in the Belarusian business sector is also reported by *The Doing Business of the World Bank*.³⁵⁶ According to the index, the position of the Republic of Belarus improved in the ease of doing business ranking: while in 2006 it ranked 106th, in 2014 and 2016 it was ranked 63rd and 44th, respectively³⁵⁷ (the ranking ranges from 1 to 190, where 1 represents the lowest and 190 represents the best performance).
223. In her Report, Ms Tonkacheva gives the impression that the judicial system is not independent from the executive branch. In particular, Ms Tonkacheva alleges, *inter alia*, that “[t]he President has a wide range of powers to dismiss a judge.”³⁵⁸ Ms Tonkacheva's allegation is misleading.
224. There are limited grounds and procedure for dismissing a judge in the Republic of Belarus, set out in its Code of Judicial Procedure.³⁵⁹ Moreover, Ms Tonkacheva

³⁵⁵ Report of E. Tonkacheva dated 25 February 2019, Diagram 1 in paragraph 22, **CER-2**.

³⁵⁶ *The Doing Business* is one of the key indexes which provides objective measures of business regulations and their enforcement across 190 economies and selected cities at the subnational and regional level. “It provides quantitative indicators on regulation for starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency.” The first *Doing Business* report on the Republic of Belarus was published in 2004, *Doing business in 2016. Measuring Regulatory Quality and Efficiency* // Available at <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf>, **Exhibit R-208**.

³⁵⁷ *Doing Business in 2006, creating jobs* dated 13 September 2005. // Available at <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB06-FullReport.pdf>, **Exhibit R-165**; *Doing Business in 2014. Understanding Regulations for Small and Medium-Size Enterprises* // Available at <https://openknowledge.worldbank.org/bitstream/handle/10986/16204/19984.pdf>, **Exhibit R-200**; *Doing Business in 2016. Measuring Regulatory Quality and Efficiency* // Available at <http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf> dated 29 October 2013, **Exhibit R-208**.

³⁵⁸ Report of E. Tonkacheva dated 25 February 2019, paragraph 14(d), **CER-2**.

³⁵⁹ See Pursuant to the Code of Judicial Procedure of the Republic of Belarus dated 29 June 2006, Part 4, Article 108, the grounds for dismissing a judge in the Republic of Belarus are, *inter alia*, as follows:

conveniently forgets to mention that the President has never exercised his power to dismiss any judge without initiating disciplinary proceedings.

225. Ms Tonkacheva also alleges³⁶⁰ that there is “*administrative control over judicial decisions*” in the Republic of Belarus and that shortcomings of the legal framework “[provide] *the executive branch and the president with ample opportunities for extensive control*”. In support of her statement, Ms Tonkacheva only cites *The Amnesty International* report. Ms Tonkacheva’s allegation is misleading. Contrary to what Ms Tonkacheva alleges, the Constitution of the Republic of Belarus provides that “*any interference in judges’ activities in the administration of justice is impermissible and liable to legal action.*”³⁶¹ An individual may also be found criminally liable for exercising “*administrative control over judicial decisions*” under the Criminal Code of the Republic of Belarus.³⁶²
226. In any event, even if Ms Tonkacheva were correct with regard to her assessment of the alleged “*problems in the judicial system*”³⁶³ and economic freedom in Belarus (which she is not), this was the context in which the Claimant made its choice to enter into the Investment Contract.
227. Further, in the Reply,³⁶⁴ the Claimant purports to quote at length from the Alternative Report by the National Human Rights Coalition on Implementation of the International Covenant on Civil and Political Rights in the Republic of Belarus. In

sentence is imposed, systematic disciplinary breaches and misconduct is committed which is not compatible with state service.

³⁶⁰ Report of E. Tonkacheva dated 25 February 2019, paragraph 17, **CER-2**.

³⁶¹ Constitution of the Republic of Belarus of 1994, with amendments adopted during the republican referenda held on 24 November 1996 and 17 October 2004, *Narodnaya Gazets*, Article 110, **Exhibit CL-6**.

³⁶² See The Criminal Code of the Republic of Belarus dated 9 July 1999, Article 390.

³⁶³ Reply, paragraph 705, **CS-5**.

³⁶⁴ Reply, paragraph 706, **CS-5**.

fact, the Claimant quotes from Ms Tonkacheva's Report,³⁶⁵ not from the report by the UN Human Rights Committee.³⁶⁶ Ms Tonkacheva purports to summarise the report.

228. In light of the above, the Respondent respectfully submits that the Tribunal should give little or no regard to Ms Tonkacheva's Report and the Claimant's references to it.
229. In support of its position that the "*Claimant itself was previously a victim of the Respondent's misdeeds* [and that the Respondent] *does not honor its obligations*",³⁶⁷ the Claimant describes an investment project carried out by a Belarusian company, OOO Tekstur ("**Tekstur**"), the implementation of which was financed by Mr Ekavyan.³⁶⁸ The Claimant asserts that the problems purportedly faced by Tekstur were the real reason why the Claimant delayed financing for the construction of the New Communal Facilities.³⁶⁹
230. This project concerned the reconstruction of an old residential building located at 24a Revolutsionnaya Street, Minsk, intended to become a hotel (the "**Revolutionary Project**"). Under contract No. 427-D between MCEC and Tekstur for the exercise of the right to design and construct a facility dated 13 December 2012 (the "**427-D Contract**"), as subsequently amended, Tekstur had an obligation to design, construct and commission the Revolutionary Project by November 2015.³⁷⁰

³⁶⁵ Report of E. Tonkacheva dated 25 February 2019, paragraph 14, **CER-2**.

³⁶⁶ Official website of the Directorate of the United Nations High Commissioner for Human Rights, "*Alternative Report of the National Human Rights Coalition on the Implementation of the International Covenant on Civil and Political Rights by the Republic of Belarus*", p. 14 – 15, publication date: 13 June 2018 // Available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/BLR/INT_CCPR_CSS_BLR_31288_E.pdf, **Exhibit ET-9**.

³⁶⁷ Reply, paragraph 140, **CS-5**.

³⁶⁸ Reply, paragraphs 140 – 165, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 66 – 101, **CWS-5**.

³⁶⁹ Reply, paragraphs 130 – 136 and 166 – 169, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 65 and 102 – 105, **CWS-5**.

³⁷⁰ Contract No. 427-D between MCEC and OOO Tekstur for the exercise of the right to design and construct a facility dated 13 December 2012, Clauses 1.1, 2.1 and 2.2.2, **Exhibit R-99**; Amendment No. 1 between OOO Tekstur and MCEC dated 7 October 2014 to Contract No. 427-D between OOO

231. The Respondent submits that the Claimant's assertions regarding the Revolutionary Project are completely unrelated to this arbitration and irrelevant to the issues in dispute. Tekstur is not a party to these proceedings and its obligations with respect to the Revolutionary Project arose from a different contract. If Mr Dolgov, a shareholder of Tekstur,³⁷¹ wants to file a claim in respect of the Revolutionary Project, he should do so in an appropriate forum.
232. Further, this is the first time the Claimant asserts the problems associated with the Revolutionary Project were the real reason why the Claimant delayed financing for the construction of the New Communal Facilities. Tellingly, the Claimant has changed its position in this regard. As described in the Defence,³⁷² in 2008, the Claimant and Manolium-Engineering represented to MCEC in correspondence that the delays were caused by the Claimant's financial difficulties as a result of the crisis in Russia and Belarus.³⁷³ In the Notice the Claimant fails to refer to its and Manolium-Engineering's correspondence on this issue, but in the Reply³⁷⁴ the Claimant argues that it was a conscious decision not to invest.
233. In any event, any purported disagreement between Mr Ekavyan and Mr Dolgov about the order in which they choose to finance their projects is irrelevant to the issues in dispute. The Respondent respectfully submits that such disagreement cannot form the basis of any release of the Claimant from its obligations under the Investment Contract and the Amended Investment Contract.

Tekstur and MCEC for the exercise of the right to design and construct a facility dated 13 December 2012; **Exhibit R-205**.

³⁷¹ Articles of incorporation of Tekstur dated 25 August 2006, **Exhibit C-277**; Protocol No. 2 of an extraordinary general meeting of Tekstur dated 1 December 2014, **Exhibit C-278**.

³⁷² Defence, paragraphs 77 – 98, 533, 544 – 548 and 663, **RS-18**.

³⁷³ Letter from the Claimant to MCEC dated 22 September 2008, **Exhibit R-38**; Letter from the Claimant to MCEC dated 14 October 2008, **Exhibit R-40**; Letter from Manolium-Engineering to MCEC dated 19 November 2008, **Exhibit R-41**; Letter from the Claimant to MCEC dated 1 December 2008, **Exhibit R-42**.

³⁷⁴ Reply, paragraphs 166 – 169, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 102 – 105, **CWS-5**.

234. Moreover, had the Claimant's allegations about the Respondent's purported mistreatment of Mr Dolgov been true, other companies associated with him would have experienced problems in carrying on their activity in the Republic of Belarus. On the contrary, a Belarusian company, IP Centrobeton ("Centrobeton"), associated with Mr Dolgov at all relevant times, is a successful enterprise. It is understood that Centrobeton used to be owned by Mr Dolgov and his wife, Ms ██████████,³⁷⁵ and is now solely owned by Mr Dolgov's son, Mr ██████████.³⁷⁶ Centrobeton was recently granted approval by MCEC to perform design and survey works, and construct a facility on the land plots in Minsk.³⁷⁷ Accordingly, the Centrobeton example shows that there is no prejudice against Mr Dolgov and the companies associated with him and his relatives in the Republic of Belarus.
235. In light of the above and given that in the legal section of the Reply the Claimant does not refer to the Revolutionary Project and examples of the alleged mistreatment of other investors, the Respondent respectfully submits that the Claimant's assertions, speculative evidence and lengthy description are wholly irrelevant to these proceedings.

H. THE PRESIDENT DID NOT HAVE DIRECT INFLUENCE OVER THE IMPLEMENTATION OF THE PROJECT

236. In the Reply, the Claimant's position appears to be that the President had "*direct influence*"³⁷⁸ over the implementation of the investment project and, therefore, over

³⁷⁵ Information from the Unified State Register of Legal Entities and Individual Entrepreneurs concerning Centrobeton, **Exhibit R-224**.

³⁷⁶ Extract from the Unified State Register of Legal Entities and Individual Entrepreneurs concerning Centrobeton dated 3 August 2018, **Exhibit R-224**.

³⁷⁷ Decision of MCEC No. 786 dated 21 March 2019, **Exhibit R-228**; Note justifying a draft decision of MCEC, **Exhibit R-237**; Letter from the Architecture and Construction and the State Property Committee to Centrobeton and OOO Project-M dated 30 August 2018, **Exhibit R-225**.

³⁷⁸ Reply, paragraph 454, **CS-5**.

the actions of MCEC or Minsktrans.³⁷⁹ In particular, the Claimant asserts that this is because:

- A. the signing of the Investment Contract and its subsequent amendments were “*subject to the approval of the President*”,³⁸⁰
- B. the terms and conditions of the Investment Contract and its subsequent amendments were “*discussed and debated by numerous public bodies*”;³⁸¹
- C. allegedly, the “*actual decision to terminate the Investment Contract was taken in 2014 by the President of the Republic of Belarus, when he directed to transfer the land plots for the Investment Object from Minsktrans to another Minsk state entity [...]*”;³⁸²
- D. MCEC discussed the terms and conditions for acquisition of the incomplete New Communal Facilities based on “*internal discussions with the Belarusian authorities*” in 2015 – 2016;³⁸³
- E. “*a lot of letters of the [MCEC] directly stated that it acts ‘further to instructions’ of the Administration of the President or the President [himself]*”;³⁸⁴ and
- F. allegedly, the New Communal Facilities were “*ultimately transferred to the Minsk [municipal] ownership under the decision of the President of the Republic of Belarus on 20 January 2017*”.³⁸⁵

³⁷⁹ Reply, paragraph 435, CS-5.

³⁸⁰ Reply, paragraphs 446 – 449, CS-5.

³⁸¹ Reply, paragraph 447, CS-5.

³⁸² Reply, paragraph 450, CS-5.

³⁸³ Reply, paragraphs 451 – 452, CS-5.

³⁸⁴ Reply, paragraph 453, CS-5.

³⁸⁵ Reply, paragraph 455, CS-5.

237. The Respondent submits that every one of the Claimant's assertions is misinterpreted, for the reasons below.
238. **First**, as already described,³⁸⁶ this was one of the first investment projects announced by MCEC and therefore very important for MCEC that it went well. Once the Tender process was over and the Investment Contract was executed, MCEC decided to solicit support from the President.³⁸⁷ The President, who had no involvement in this project appears to have asked the Belarusian SCC to check that MCEC complied with all its obligations in carrying out the Tender process and entering into the Investment Contract. The Belarusian SCC discovered a number of shortcomings of the Investment Contract which did not fully reflect the terms of the Tender Documents. Consequently, the Investment Contract was amended to address these shortcomings and following confirmation by the Belarusian SCC and the Council of Ministers that the requisite amendments addressed all the shortcomings of the Investment Contract.³⁸⁸
239. The Claimant, however, fails to explain how such recommendations and support constitute "*direct influence*"³⁸⁹ over the project implementation and the actions of MCEC and Minsktrans, nor does it provide any evidence in support of its allegation.
240. Instead, the Claimant alleges that the President was personally involved in the implementation of the investment project because, according to an article of 15 November 2012 cited by the Claimant, the President "[invited] [i]nvestors to Belarus and [issued] [g]uarantees to [t]hem".³⁹⁰ The Claimant's conclusion is not logical. General assurances given by the President to potential investors long after the Tender do not show that the President was personally involved in the implementation of the investment project at issue.

³⁸⁶ Defence, paragraph 13, **RS-18**.

³⁸⁷ Letter from MCEC to the President of the Republic of Belarus dated 24 June 2003, **Exhibit R-161**.

³⁸⁸ Defence, paragraphs 28 – 37, **RS-18**.

³⁸⁹ Reply, paragraph 454, **CS-5**.

³⁹⁰ News portal BDG Newspaper, *Lukashenko Invites Investors to Belarus and Issues Guarantees to Them*, 8 February 2017, **Exhibit C-27**.

241. **Second**, as explained in more detail below,³⁹¹ as a matter of fact the President never took any decision to transfer the land plot for the Investment Object from Minsktrans into the management of a state construction entity Minskstroy (“**Minskstroy**”).³⁹² The Claimant, provides no evidence in support of its allegation. The Respondent submits that the Amended Investment Contract was terminated due to the Claimant’s and Manolium-Engineering’s failure to construct and commission the New Communal Facilities by the Final Commissioning Date.
242. **Third**, in the Reply,³⁹³ the Claimant conveniently fails to mention that, on 12 November 2015, Mr Dolgov wrote to the President seeking an in-person meeting to discuss the investment project and warning that should the President not be informed of this request, Manolium-Engineering would “*claim through Stockholm arbitration huge amounts against the Republic of Belarus*”.³⁹⁴ As a result, on the Prime Minister’s instructions,³⁹⁵ MCEC internally discussed with the Belarusian authorities a potential acquisition of the New Communal Facilities and arrangements for the reassessment of their value.³⁹⁶ Accordingly, any discussions of the terms and conditions for the acquisition of the incomplete New Communal Facilities with the Belarusian authorities were brought on by Mr Dolgov’s own correspondence.³⁹⁷
243. The evidence cited by the Claimant³⁹⁸ shows that, contrary to the Claimant’s allegation, the President was not involved in the implementation of the investment project. As already described in the Defence,³⁹⁹ MCEC wrote to the Ministry of

³⁹¹ See paragraphs 392 – 395 below.

³⁹² Reply, paragraph 450, **CS-5**.

³⁹³ Reply, paragraph 451, **CS-5**.

³⁹⁴ Letter from MCEC to Manolium-Engineering dated 4 September 2014, **Exhibit R-127**.

³⁹⁵ The Prime Minister’s Instruction to MCEC, the Ministry of Economy and the Ministry of Justice dated 23 November 2015, **Exhibit R-128**.

³⁹⁶ Letter from MCEC to the Ministry of Economy dated 26 November 2015, **Exhibit R-129**.

³⁹⁷ Defence, paragraphs 283 – 285, **RS-18**.

³⁹⁸ Letter from MCEC to the Ministry of Economy dated 26 November 2015, **Exhibit R-129**; Letter from MCEC to the Council of Ministers dated 30 December 2015, **Exhibit R-135**; Minutes of the meeting dated 30 December 2015, **Exhibit R-136**.

³⁹⁹ Defence, paragraph 285, **RS-18**.

Economy that a meeting between the President and Manolium-Engineering was premature. According to MCEC, it was first necessary to determine and agree on the costs of the New Communal Facilities and the terms and conditions of any possible acquisition within the relevant competent authorities. The Claimant conveniently forgets that Manolium-Engineering was informed of this approach by MCEC.⁴⁰⁰

244. Given that, as already described,⁴⁰¹ all prior attempts to value the incomplete New Communal Facilities had failed, on 30 December 2015, MCEC sought approval from the Council of Ministers to reassess their value. For this purpose, MCEC suggested that the Council of Ministers should instruct the Ministry of Finance and the Ministry of Architecture and Construction to undertake the reassessment, as had been discussed at a meeting between MCEC and the Belarusian authorities earlier that day.⁴⁰² Such reassessment was particularly necessary given that the acquisition of the New Communal Facilities would have been financed by the state budget.⁴⁰³
245. **Fourth**, the Claimant's statement that "*a lot of letters of the [MCEC] directly stated that it acts 'further to instructions' of the Administration of the President or the President [himself]*"⁴⁰⁴ is misleading. Such letters, including MCEC's letter to Mr Ekavyan of 18 June 2012,⁴⁰⁵ were the responses to Mr Dolgov's approaches to the President.
246. In his numerous letters, Mr Dolgov sought a meeting with the President or his "*personal involvement*"⁴⁰⁶ to solve the problems allegedly caused by MCEC. As

⁴⁰⁰ Letter from the Ministry of Economy to Manolium-Engineering dated 27 November 2015, **Exhibit R-130**.

⁴⁰¹ Defence, paragraphs 256 – 262, 266 – 282, **RS-18**; See paragraphs 410 – 436 below.

⁴⁰² Defence, paragraph 289, **RS-18**; Letter from MCEC to the Council of Ministers dated 30 December 2015, **Exhibit R-135**; Minutes of the meeting dated 30 December 2015, **Exhibit R-136**.

⁴⁰³ Letter from MCEC to the Ministry of Economy dated 26 November 2015, **Exhibit R-129**; Letter from MCEC to the Council of Ministers dated 30 December 2015, **Exhibit R-135**.

⁴⁰⁴ Reply, paragraph 453, **CS-5**.

⁴⁰⁵ Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**.

⁴⁰⁶ Letter from Manolium-Engineering to the President of the Republic of Belarus dated 30 June 2015, **Exhibit R-125** (Respondent's translation).

shown in the correspondence between the Claimant, Manolium-Engineering, MCEC and the Belarusian authorities,⁴⁰⁷ the Administration of the President forwarded Mr Dolgov's letters to MCEC asking them to deal with his requests. MCEC in turn considered Mr Dolgov's requests and took appropriate steps seeking to resolve the issues raised in such correspondence. The Claimant's allegation that the President had a "*direct influence*"⁴⁰⁸ on the project implementation is therefore unsubstantiated. It is absurd to assume that the President of the Republic of Belarus would personally be involved in managing any such project.

247. As for the letter from the Administration of the President to MCEC of 15 January 2009 cited by Mr Dolgov,⁴⁰⁹ contrary to Mr Dolgov's allegation, it does not show that the Administration of the President "*acknowledged that the obstacles to the implementation of the project under the Investment Contract had arisen through the fault of [MCEC]*".⁴¹⁰ On the contrary, it shows that MCEC was asked to "[s]peed up the implementation of the project"⁴¹¹ under the Amended Investment Contract and to deal with Mr Dolgov's approach to the Administration of the President.

⁴⁰⁷ Letter from the Administrative Office of the President of the Republic of Belarus to MCEC dated 29 March 2006, **Exhibit R-168**; Letter from the Administrative Office of the President of the Republic of Belarus to MCEC dated 10 May 2012, **Exhibit R-196**; Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**; Letter from MCEC to the Claimant dated 19 September 2012, **Exhibit C-139**; Letter from MCEC to the Claimant dated 20 January 2015, **Exhibit R-121**; Letter from MCEC to Manolium-Engineering, **Exhibit C-156**; Letter from the Administrative Office of the President of the Republic of Belarus to the State Control Committee dated 17 August 2015, **Exhibit R-206**; Letter from the State Control Committee to MCEC dated 27 August 2015, **Exhibit R-207**; The Prime Minister's Instruction to MCEC, the Ministry of Economy and the Ministry of Justice dated 23 November 2015, **Exhibit R-128**; Letter from MCEC to the Ministry of Economy of the Republic of Belarus dated 26 November 2015, **Exhibit R-129**.

⁴⁰⁸ Reply, paragraph 454, **CS-5**;

⁴⁰⁹ Fourth Witness Statement of Mr Dolgov dated 28 February 2019, footnote 42, **CWS-5**; See Internal Memorandum of Deputy Chair of the Administration of the President of the Republic of Belarus dated 13 January 2009, **Exhibit C-353**.

⁴¹⁰ Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraph 86, **CWS-5**.

⁴¹¹ Reply, paragraph 85, **CS-5**; See Internal Memorandum of Deputy Chair of the Administration of the President of the Republic of Belarus dated 13 January 2009, **Exhibit C-353** (Respondent's translation).

248. **Last**, with regard to the Claimant’s allegation that the New Communal Facilities were “ultimately transferred”⁴¹² into municipal ownership pursuant to the President’s decision on 20 January 2017, the Respondent addresses this misguided allegation in more detail in the Defence and below.⁴¹³

249. Accordingly, the Claimant’s position that the President had a “direct influence” on the implementation of the investment project and over the actions of MCEC or Minsktrans is wholly untenable.

I. KGB WAS NOT INVOLVED IN THE PROJECT

250. In the Reply, the Claimant alleges for the first time that after Mr Dolgov’s questioning by the KGB in the spring of 2011, the Claimant “started to face problems it never experienced before” because of Mr Dolgov’s “informal and social communications” with members of the political opposition.⁴¹⁴ Contrary to the Claimant’s allegations, there is no evidence (and none is offered by the Claimant) that the KGB did exert pressure on Mr Dolgov, the Claimant or Manolium-Engineering. However, even if it were true, which the Respondent denies, this is wholly irrelevant to issues in dispute.

251. Further, the Claimant fails to explain the relevance of criminal cases against other Belarusian entrepreneurs to these proceedings.⁴¹⁵ The cases the Claimant describes are wholly irrelevant to these proceedings and do not concern Manolium-Engineering, the Claimant or Mr Dolgov. Accordingly, the Claimant’s reliance on such cases is misplaced.

252. Finally, the Claimant’s story does not quite fit its own chronology of events. According to the Claimant, the Respondent deprived it of the New Communal Facilities when they were transferred on 27 January 2017 into municipal ownership

⁴¹² Reply, paragraph 455, **CS-5**;

⁴¹³ Defence, paragraphs 347 – 353, **RS-18**; See paragraphs 532 – 556, 567 – 570 below.

⁴¹⁴ Reply, paragraphs 191 – 197, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 106 – 113, **CWS-5**.

⁴¹⁵ Reply, paragraphs 177 – 181, **CS-5**.

following a “*secret instruction*” by the President to enforce against unpaid land taxes and penalties.⁴¹⁶ The alleged expropriation therefore took place, according to the Claimant, almost six years after the KGB questioned Mr Dolgov.

253. The Claimant and Mr Dolgov now allege that “*problems*”⁴¹⁷ relating to the construction and commissioning of the New Communal Facilities were caused by the KGB.⁴¹⁸ This is entirely speculative and not supported by any evidence. On the contrary, as the Respondent submits in these proceedings, MCEC and Minsktrans made every effort to help the Claimant, *inter alia*, by:

- A. negotiating with the Claimant in good faith to try to enable the project to go ahead despite having the right to terminate the Amended Investment Contract as at the Final Commissioning Date (i.e. 1 July 2011);⁴¹⁹
- B. submitting a claim to the Economic Court of Minsk seeking to terminate the Amended Investment Contract on valid grounds only on 12 November 2013;⁴²⁰
- C. negotiating a settlement during the proceedings at the Economic Court of Minsk;⁴²¹ and
- D. discussing the amounts spent on the unfinished New Communal Facilities in the context of their possible acquisition by MCEC even after the Termination Proceedings were over.⁴²²

⁴¹⁶ Notice, paragraph 497, **CS-1**; Reply, paragraphs 368(iii), 387 and 579, **CS-5**.

⁴¹⁷ Reply, paragraph 196, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 113, **CWS-5**.

⁴¹⁸ Reply, paragraphs 196 – 197, **CS-5**; Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraphs 114 – 120, **CWS-5**.

⁴¹⁹ Defence, paragraphs 206 – 245, 560 – 575, **RS-18**; *See* paragraphs 332 – 339 below; Amended Investment Contract, Clauses 6.1 and 16.2.1, **Exhibit C-66**; Additional Agreement No. 6, **Exhibit C-76**.

⁴²⁰ Defence, paragraph 246, **RS-18**; *See* paragraphs 344 below.

⁴²¹ Defence, paragraphs 256 – 262, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 106 – 123, **RWS-2**.

254. Further, as Mr Akhramenko explains,⁴²³ since it was Mr Ekavyan rather than Mr Dolgov who was the Claimant's owner, Mr Dolgov was merely an employed manager in MCEC's eyes. Accordingly, it would defy all logic for MCEC to be putting obstacles in the way of Mr Ekavyan's business activity in the Republic of Belarus because of Mr Dolgov's political views. Moreover, had the KGB exerted pressure on Mr Dolgov, other companies associated with him, such as Centrobeton and Tekstur, would also have had "*problems*" after spring 2011. Such companies, however, carried on their activity in the Republic of Belarus, as described above.⁴²⁴
255. Accordingly, the Respondent respectfully submits that the Claimant's unsubstantiated, unparticularised and contradictory allegations about the alleged involvement of the KGB are irrelevant to these proceedings.

J. REASONS WHY MCEC DID NOT EXTEND CONTRACTUAL TERMS FURTHER IN 2011 – 2012

256. In the Reply,⁴²⁵ the Claimant gives the impression that MCEC acted unreasonably in rejecting the Claimant's alternative proposals (1) to postpone the deadlines for completion of the New Communal Facilities; or (2) to transfer the incomplete New Communal Facilities into municipal ownership and for the Claimant to pay US\$3 million to Minsktrans to complete them.
257. The Respondent submits that the Claimant's position is untenable. As described below, the Claimant's proposals meant a fundamental change to the terms of the Amended Investment Contract and the whole deal and were therefore unreasonable.

⁴²² Defence, paragraphs 266 – 281, **RS-18**; See paragraph 489 below; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 125 – 126, **RWS-2**.

⁴²³ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 31, **RWS-4**.

⁴²⁴ See paragraphs 229 – 230 and 234 above.

⁴²⁵ Reply, paragraphs 215 – 243 and 564 – 569, **CS-5**.

1. The Claimant's proposals were unreasonable

258. In the Reply,⁴²⁶ the Claimant makes the following allegations:

- A. the Claimant made reasonable proposals to MCEC to postpone the deadlines for completion of the New Communal Facilities after the Final Commissioning Date. MCEC, however, “*unjustifiably*”⁴²⁷ refused to accept them on two separate occasions;
- B. MCEC made a counter-proposal on “*draconian terms*”⁴²⁸ which the Claimant could not accept; and
- C. given the Respondent’s prior behaviour, the Claimant requested a guarantee from MCEC to ensure that MCEC would honour its obligations with respect to the Investment Object. MCEC unreasonably refused to provide such a guarantee.

259. The Respondent submits that every one of these allegations is baseless.

a) The Claimant’s proposed unreasonable amendments to the Amended Investment Contract were unacceptable to MCEC

260. In the Reply, the Claimant asserts that the Respondent acted unreasonably in refusing to accept the Claimant’s two separate requests for extensions of time on 4 July 2011⁴²⁹ and on 20 March 2012.⁴³⁰ The Claimant conveniently forgets to mention that both of these requests included unreasonable changes to the Amended Investment Contract.

⁴²⁶ Reply, paragraphs 215 – 231, **CS-5**.

⁴²⁷ Reply, paragraph 223, **CS-5**.

⁴²⁸ Reply, paragraph 225, **CS-5**.

⁴²⁹ Draft Supplemental Agreement dated 4 July 2011, **Exhibit R-65**.

⁴³⁰ Draft Supplemental Agreement, not dated, received by fax on 20 March 2012, **Exhibit R-78**.

(1) The Claimant's 4 July 2011 proposal

261. On 4 July 2011, the Claimant proposed (1) to postpone the deadline for the design, construction and commissioning of the New Communal Facilities to November 2011; and (2) to remove from the Amended Investment Contract the deadline for completion of the Investment Object.⁴³¹ It is telling that in the Reply, the Claimant conceals the fact that the 4 July 2011 proposal sought to remove any deadline for the Investment Object.
262. As already explained,⁴³² this was unacceptable to MCEC because it would have meant allowing Manolium-Engineering to construct the Investment Object at its leisure without any fixed deadline for completing. Given the experience of significant delays by the Claimant and Manolium-Engineering in constructing the New Communal Facilities, such proposal was entirely unacceptable.⁴³³
263. The Claimant's suggestion that the proposal was "*neither unreasonable nor unrealistic*" and that MCEC's refusal to accept it was "*mere pretext*" is misleading.
264. **First**, the Claimant's position that the proposed 5-month extension was "*not material*"⁴³⁴ is arrogant at best. As already explained,⁴³⁵ in the circumstances there was no guarantee that a third extension would be the last one.
265. **Second**, the Claimant now suggests that the requested extension was reasonable "*taking into account that the Depot was approximately 90% complete*".⁴³⁶ This statement is misleading. As Mr Akhramenko explains,⁴³⁷ Manolium-Engineering had

⁴³¹ Draft Supplemental Agreement dated 4 July 2011, **Exhibit R-65**.

⁴³² Defence, paragraph 210, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 42, **RWS-2**.

⁴³³ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 48, **RWS-4**.

⁴³⁴ Reply, paragraph 216, **CS-5**.

⁴³⁵ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 42, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 48, **RWS-2**.

⁴³⁶ Reply, paragraph 565, **CS-5**.

⁴³⁷ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 43, 45 – 46, **RWS-4**.

the right and the opportunity to extend the construction permits and to continue the construction works at the Depot without the need to postpone the deadlines under the Amended Investment Contract. In the event, Manolium-Engineering extended the construction permits for the Depot twice after the deadline under the Amended Investment Contract had expired: to 30 September 2011 and to 30 December 2011.⁴³⁸ This shows that Manolium-Engineering could have completed the Depot after the Final Commissioning Date.

266. **Third**, the Claimant's contention that it was not required to provide any assurance because none was provided in the past when the previous two extensions were granted⁴³⁹ is blatantly untrue. The Claimant conveniently forgets that, as already described,⁴⁴⁰ in exchange for postponing the deadline for commissioning the New Communal Facilities to 1 July 2011, the parties agreed to increase the Claimant and Manolium-Engineering's contractual liability for further delays. Additional Agreement No. 6 provided that penalty would accrue if the Claimant and/or Manolium-Engineering missed the agreed deadline for performing the works set out in the schedules.⁴⁴¹
267. **Fourth**, the Claimant also asserts that there was no reason for MCEC to seek assurances in 2011 "*when the amount of financing made by the Claimant in the first half of 2011 exceeded the amounts invested in any of the previous years*".⁴⁴² This is misleading. As Mr Akhramenko describes, "[i]n 2011, [MCEC was] *not aware of how much funds were received by Manolium-Engineering and how much of them it spent on the New Communal Facilities*".⁴⁴³ As explained below,⁴⁴⁴ the Claimant fails to provide any evidence that the loaned funds were actually spent on the New

⁴³⁸ Construction permit for the Depot dated 3 October 2011, **Exhibit R-71**.

⁴³⁹ Reply, paragraphs 221(iii) and 567, **CS-5**.

⁴⁴⁰ Defence, paragraphs 97 – 98, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 23 – 24 and 27 – 30, **RWS-2**.

⁴⁴¹ Amended Agreement No. 6, Clause 2, **Exhibit C-76**.

⁴⁴² Reply, paragraph 567, **CS-5**.

⁴⁴³ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 49, **RWS-4**.

⁴⁴⁴ See paragraphs 448 – 449, below.

Communal Facilities.⁴⁴⁵ Moreover, there was no certainty at the time that the Claimant would resolve its financial difficulties.

268. Moreover, it follows from the Claimant's "*list of loans*" that Manolium-Engineering started receiving funds only three months before the Final Commissioning Date (save for a small payment of US\$499,990 on 9 February 2011 from Bradley Enterprises Ltd).⁴⁴⁶ It was not prudent on the part of the Claimant and Manolium-Engineering to have waited more than 7.5 years before attempting to complete the New Communal Facilities in just a few months before the deadline.
269. **Fifth**, as for the Claimant's assertion that a US\$20 million investment it purports to have made was "*sufficient 'assurance' that the Claimant was indeed prepared to invest further USD 3 million*",⁴⁴⁷ the Respondent submits that this is misguided. The amount that may or may not have been spent by that time by the Claimant on the New Communal Facilities did not give any assurance to MCEC that the Claimant was in fact able and willing to complete the investment project because "*there were already signs [in 2010] that the Claimant and Manolium-Engineering did not intend to construct the Investment Object*",⁴⁴⁸ as described by Mr Akhramenko.⁴⁴⁹
270. **Last**, the Claimant also appears to suggest that MCEC was unreasonable in not executing the draft supplemental agreement, when Minsktrans did.⁴⁵⁰ This suggestion is illogical. MCEC and Minsktrans are not obliged to follow each other's choices.

⁴⁴⁵ See Reply, paragraph 48, table 1, **CS-5**; and Loans provided to Manolium-Engineering in 2004 – 2013 (Excel file), **Exhibit C-215**.

⁴⁴⁶ According to the Claimant's "*list of loans*", there were in total eight payments from the Claimant-affiliated companies to Manolium-Engineering in the first half 2011 before the Final Commissioning Date. The first payment of US\$499,990 was made by Bradley Enterprises Ltd on 9 February 2011. The remaining payments were made between 6 and 25 April 2011 from Bradley Enterprises Ltd and Noman Oil Limited. See Loans provided to Manolium-Engineering in 2004 – 2013 (Excel file), **Exhibit C-215**.

⁴⁴⁷ Reply, paragraph 221(iv), **CS-5**.

⁴⁴⁸ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 19, **RWS-2**.

⁴⁴⁹ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 19 and 22(B), (C), (D), (F), **RWS-2**.

⁴⁵⁰ Reply, paragraphs 219, **CS-5**.

Moreover, it shows that, contrary to the Claimant's allegations,⁴⁵¹ Minsktrans is independent from MCEC and does not act on its instructions.

(2) The Claimant's 20 March 2012 proposal

271. On 20 March 2012, the Claimant and Manolium-Engineering proposed:⁴⁵²
- A. to postpone the deadline for the design, construction and commissioning of the New Communal Facilities to 1 June 2012;
 - B. to remove Manolium-Engineering's and the Claimant's liability for interest for delay which under the Amended Investment Agreement started running as soon as the agreed deadline was missed; and
 - C. to submit all disputes to the Court of the Eurasian Economic Union to be resolved in accordance with international law.
272. As already explained,⁴⁵³ not only did the Claimant's proposal not provide MCEC with any assurance that the project would be completed on time,⁴⁵⁴ it also prevented MCEC from recovering penalties for delayed construction. Moreover, the proposed dispute resolution mechanism and applicable law provision were defective.⁴⁵⁵ MCEC, therefore, could not consent to the signing of the draft supplemental agreement to the Amended Investment Contract.

⁴⁵¹ Statement of Claim, paragraph 126, **CS-2**; Reply, paragraphs 460 – 472, **CS-5**.

⁴⁵² Draft Supplemental Agreement, not dated, received by fax on 20 March 2012, **Exhibit R-78**.

⁴⁵³ Reply, paragraph 212, **CS-5**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 44, **RWS-2**.

⁴⁵⁴ Reply, paragraphs 222 – 223, **CS-5**.

⁴⁵⁵ As Mr Akhramenko notes: “As to the provisions on the applicable law and dispute resolution forum put forward by the Claimant and Manolium-Engineering, they made no sense. The Court of EurAsEC has no jurisdiction to resolve such disputes, since the EurAsEC court mainly considers disputes between EurAsEC member states or complaints related to the regulatory acts of the EurAsEC bodies. The reference to “international law” as the law governing the contract was misguided, and it is unclear exactly what law the Claimant and Manolium-Engineering suggested applying.” (First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 44, **RWS-2**).

273. The Claimant alleges that “*Minsktrans was again, in principle, prepared to grant this extension*”,⁴⁵⁶ referring to the letter from Minsktrans to Manolium-Engineering dated 26 January 2012.⁴⁵⁷ The letter, however, does not support the Claimant’s position since it merely shows that Minsktrans asked Manolium-Engineering to provide an updated construction and financing schedule following the meeting attended by MCEC, Minsktrans and the Claimant on 9 January 2012, as described above.⁴⁵⁸
274. In any event, MCEC was well within its rights in submitting a claim to terminate the Amended Investment Contract once the Final Commissioning Date had passed and had no obligation to accept the Claimant’s and Manolium-Engineering’s proposals or offer any further extensions. Notwithstanding the lack of obligation to do so, MCEC continued to negotiate in good faith with the Claimant and Manolium-Engineering for another three years in order to try and help the Claimant and Manolium-Engineering to perform its obligations and commence construction of the Investment Object which remained an eye sore in the centre of Minsk. “[T]here *were more advantages in reaching an agreement with the Claimant and Manolium-Engineering [...] than in terminating the [Amended Investment Contract]*”.⁴⁵⁹

b) The Claimant did not accept MCEC’s reasonable proposal to amend the Amended Investment Contract

275. The Claimant also now asserts that “*it was prepared to complete the New Communal Facilities and to provide the required financing [sic]*”.⁴⁶⁰ MCEC, on the other hand, according to the Claimant, was acting unreasonably as it “*consistently proposed adding draconian terms to the Investment Contract, and was even prepared to compel the Claimant to them*”.⁴⁶¹ These allegations are false and misleading.

⁴⁵⁶ Reply, paragraphs 223, **CS-5**.

⁴⁵⁷ Letter from Minsktrans to Manolium-Engineering dated 26 January 2012, **Exhibit C-321**.

⁴⁵⁸ See paragraph 477 below.

⁴⁵⁹ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 23, **RWS-2**.

⁴⁶⁰ Reply, paragraph 224, **CS-5**.

⁴⁶¹ Reply, paragraphs 647 and 644 – 653, **CS-5**.

276. As already explained,⁴⁶² at a meeting with the Claimant and Manolium-Engineering on 3 April 2012,⁴⁶³ MCEC proposed its own version of the supplemental agreement to the Amended Investment Contract (the “**Draft Supplemental Agreement**”) that would protect its interests, should the Claimant and Manolium-Engineering once again breach their contract obligations (e.g. Clauses 3 and 4, i.e. amended Clauses 7.1.1 and 16.2). This also follows, *inter alia*, from Clause 3 (amended Clause 7.1) pursuant to which the Claimant would have an obligation “to ensure uninterrupted and sound funding of the construction design of the [Investment Object and the New Communal Facilities] out of its own and/or raised and loan funds”.⁴⁶⁴
277. The Respondent accepts that the proposed terms would have protected the interests of MCEC by providing, *inter alia*, that in case of termination of the Amended Investment Contract by MCEC for the Claimant’s and/or Manolium-Engineering’s breach of Contract, the incomplete New Communal Facilities would be transferred into municipal ownership without consideration.⁴⁶⁵
278. As already explained,⁴⁶⁶ MCEC’s proposal of 3 April 2012 was not unusual, given the Claimant’s and Manolium-Engineering’s persistent delays and contractual breaches. Moreover, despite asserting in these proceedings that “[o]nly an insane person could accept such conditions”,⁴⁶⁷ Mr Dolgov agreed himself to a similar provision in the Investment Contract with Tekstur.⁴⁶⁸

⁴⁶² Defence, paragraph 213, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 45 – 47, **RWS-2**.

⁴⁶³ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**; Letter from MCEC to the Claimant and Manolium-Engineering dated 6 April 2012, **Exhibit R-80**.

⁴⁶⁴ Letter from MCEC to the Claimant and Manolium-Engineering dated 6 April 2012 (emphasis added), **Exhibit R-80**.

⁴⁶⁵ Letter from MCEC to the Claimant and Manolium-Engineering dated 6 April 2012, Clause 1 (i.e. amended Clause 2), **Exhibit R-80**.

⁴⁶⁶ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 46 – 47, **RWS-2**.

⁴⁶⁷ Fourth Witness Statement of A. Dolgov dated 28 February 2018, paragraph 126, **CWS-5**.

⁴⁶⁸ Investment Contract between OOO Tekstur and MCEC dated 8 September 2011, Clauses 6.7, 9.1 and 9.4, **Exhibit R-193**.

279. The Claimant’s interpretation of the provision of MCEC’s Draft Supplemental Agreement as granting the Respondent carte blanche to impede construction of the New Communal Facilities “[b]ecause the completion of the project was largely dependent on the Respondent, it was a near certainty that the Respondent would create some artificial barriers to completion so that it could seize the investment”⁴⁶⁹ is misguided. On the contrary, completion of the project was largely dependent on the Claimant and Manolium-Engineering since it was their responsibility to take the steps, *inter alia*, to obtain and extend the construction and land permits, to commission a newly built property and to apply for its registration.⁴⁷⁰ As explained in the Defence and above,⁴⁷¹ the construction delays, to which the Claimant refers,⁴⁷² were the result of the Claimant’s and Manolium-Engineering’s own actions and/or inactions. Delays, if any, caused by the state bodies were insignificant.
280. As for amended Clause 7.1.1 of the Draft Supplemental Agreement, the Claimant alleges that the amount required to complete the New Communal Facilities would be determined “by the ‘commission’ (most likely, under the aegis of the [MCEC])”,⁴⁷³ should the Amended Investment Contract be terminated. Such interpretation of amended Clause 7.1.1 is unsustainable and farfetched. The Draft Supplemental Agreement does not provide that the commission would be controlled by MCEC. In any event, there was nothing stopping the Claimant from proposing to amend Clause 7.1.1
281. As Mr Akhramenko describes,⁴⁷⁴ at the 3 April 2012 meeting, Mr Dolgov’s behaviour was far from reasonable. Contemporaneous minutes of the 3 April 2012 meeting⁴⁷⁵

⁴⁶⁹ Reply, paragraph 226, **CS-5**.

⁴⁷⁰ Defence, paragraphs 101 – 102, **RS-18**.

⁴⁷¹ Defence, paragraphs 103 – 199, **RS-18**; See paragraph 107 – 188 above.

⁴⁷² Reply, paragraphs 50 – 122, **CS-5**.

⁴⁷³ Reply, paragraph 649(ii), **CS-5**.

⁴⁷⁴ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 48, **RWS-2**.

⁴⁷⁵ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**.

cast serious doubt on Mr Dolgov's apparent account of events.⁴⁷⁶ First, the evidence shows that Mr Dolgov actually said that he was no longer going to "*report to the [MCEC] departments on the progress of the investment project*",⁴⁷⁷ meaning that he intended to build the New Communal Facilities the way he wanted.

282. Second, at the meeting, Mr Dolgov threatened MCEC, which he now conveniently forgets, that the Claimant intended to bring a claim against MCEC in an international court, seeking compensation for the cost of constructing the New Communal Facilities.⁴⁷⁸
283. Third, the Claimant's clear loss of interest in completing the Investment Object at least by 2012⁴⁷⁹ also follows from Mr Dolgov's statement made at the 3 April 2012 meeting that there was no "*commercial profit*"⁴⁸⁰ in the investment project for the Claimant.⁴⁸¹ Mr Dolgov conveniently forgets to mention his then position.
284. Further, the Respondent notes that in the Reply, the Claimant does not explain what it means when it asserts that MCEC was "*prepared to compel the Claimant*"⁴⁸² to the terms it proposed, nor does it provide any evidence in support of this statement. If the Claimant is referring to MCEC's letter to the Claimant and Manolium-Engineering

⁴⁷⁶ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 124 – 126, **CWS-5**.

⁴⁷⁷ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, Clause 1.1, **Exhibit R-79**; Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**.

⁴⁷⁸ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**.

⁴⁷⁹ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 36 and 48, **RWS-2**;

⁴⁸⁰ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, Clause 1.1, **Exhibit R-79**.

⁴⁸¹ Defence, paragraph 214, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 48 – 49, **RWS-2**; Minutes of a meeting on the implementation of the investment project dated 3 April 2012, Clause 1.1, **Exhibit R-79**; Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**.

⁴⁸² Reply, paragraph 647, **CS-5**.

dated 6 April 2012 attaching the Draft Supplemental Agreement,⁴⁸³ the Respondent submits that the Claimant's assertion is misleading.

285. As follows from 6 April 2012 letter, MCEC was giving the Claimant and Manolium-Engineering a one-month extension to sign the Draft Supplemental Agreement discussed by the parties at the 3 April 2012 meeting. This was despite the fact that by then, the construction delays had already lasted for over nine months and MCEC had the right to terminate the Amended Investment Contract.⁴⁸⁴ Accordingly, by the 6 April 2012 letter, MCEC was postponing termination of the Amended Investment Contract by another month.
286. On 18 June 2012, MCEC wrote a letter to Mr Ekavyan, bringing his attention Mr Dolgov's "*unconstructive position*".⁴⁸⁵
287. In the Reply,⁴⁸⁶ the Claimant asserts that MCEC "*consistently*"⁴⁸⁷ proposed unreasonable terms to the Claimant and Manolium-Engineering. Whatever the Claimant means to address by this allegation, the Respondent notes that there was ever only one and the same Draft Supplemental Agreement proposed by MCEC to Manolium-Engineering and the Claimant on 3 and 6 April 2012, and 18 June 2012.⁴⁸⁸

c) The Claimant's proposal would have required a fundamental change to the Amended Investment Contract

288. The Claimant alleges that "[it] *requested some guarantees from the Respondent to ensure that the Respondent would honor its obligations after the Claimant completed*

⁴⁸³ Letter from MCEC to the Claimant and Manolium-Engineering dated 6 April 2012, **Exhibit R-80**.

⁴⁸⁴ Defence, paragraphs 560 – 564, **RS-18**; See paragraphs 67 – 76 above; Amended Investment Contract, Clauses 6.1 and 16.2.1, **Exhibit C-66**; Additional Agreement No. 6, **Exhibit C-76**.

⁴⁸⁵ Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**.

⁴⁸⁶ Reply, paragraph 647 – 649, **CS-5**.

⁴⁸⁷ Reply, paragraph 647, **CS-5**.

⁴⁸⁸ Minutes of a meeting on the implementation of the investment project dated 3 April 2012, Clause 1.1, **Exhibit R-79**; Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**; Letter from MCEC to the Claimant and Manolium-Engineering dated 6 April 2012, **Exhibit R-80**; Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**.

the project".⁴⁸⁹ The Respondent submits that such "*guarantees*" would require a fundamental change to the terms of the Amended Investment Contract.

289. As described in the Defence,⁴⁹⁰ on 18 June 2012, the Claimant proposed to resume financing the New Communal Facilities in exchange for the transfer of ownership of the land on which the Investment Object was to be located. As the Respondent explains,⁴⁹¹ the Amended Investment Contract provided that Manolium-Engineering would only have the right to lease the land plot for the implementation of the Investment Object, not to acquire it. Accordingly, MCEC could not accept this proposal.
290. Further, as Mr Akhramenko explains, "*the Claimant tried, by that proposal, to unilaterally make its own side of the bargain under the Amended Investment Contract considerably more favourable. Instead of a lease to the land plot under the Investment Object, the Claimant wanted to get the ownership title to that land plot, and without any charge*".⁴⁹²
291. The Claimant now alleges⁴⁹³ that there was "*nothing unusual about this request*" because MCEC had agreed to transfer such ownership to the Claimant under the Investment Contract. This is simply untrue. Apart from necessitating a fundamental change of the terms of the Amended Investment Contract, MCEC never agreed to transfer title to the land plot on which the Investment Object was to be constructed to the Claimant.

⁴⁸⁹ Reply, paragraph 228, **CS-5**.

⁴⁹⁰ Defence, paragraph 218, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 57 – 58, **RWS-2**.

⁴⁹¹ Defence, paragraph 218, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 58, **RWS-2**.

⁴⁹² First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 58, **RWS-2**.

⁴⁹³ Reply, paragraph 230, **CS-5**; Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraph 131, **CWS-5**.

292. Since the Claimant's proposal was unacceptable to MCEC, on 26 July 2012, MCEC rejected it.⁴⁹⁴ The Claimant now alleges that at the time of the Claimant's proposal, the "*Respondent did not suggest any amendments to the draft or to propose any realistic alternative*".⁴⁹⁵ This is misleading. As already described,⁴⁹⁶ in its 26 July 2012 letter,⁴⁹⁷ MCEC informed the Claimant that it agreed to all of the Claimant's suggestions except for the transfer of title to the land for the Investment Object. MCEC invited Mr Ekavyan on two separate occasions to come to Minsk "*to discuss the issues and find constructive solutions concerning the project's further implementation*".⁴⁹⁸ The Claimant never responded to those letters.
293. Moreover, contrary to the Claimant's allegation in the Reply that the "*Respondent now asserts that it was legally impossible to transfer the land plot for the Investment Object to the Claimant*",⁴⁹⁹ no such submission was made by the Respondent, whether in the Defence or elsewhere.
294. Accordingly, the Claimant's position that MCEC "*unjustifiably*"⁵⁰⁰ refused to accept the Claimant's reasonable proposals to postpone the deadlines for completion of the New Communal Facilities is wholly untenable. Such proposals were far from reasonable and included terms which would fundamentally change the Amended Investment Contract.

⁴⁹⁴ Letter from MCEC to the Claimant dated 26 July 2012, **Exhibit R-92**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 59, **RWS-2**.

⁴⁹⁵ Reply, paragraph 652, **CS-5**.

⁴⁹⁶ Defence, paragraph 219, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 59 and 61, **RWS-2**.

⁴⁹⁷ Letter from MCEC to the Claimant dated 26 July 2012, **Exhibit R-92**.

⁴⁹⁸ Letter from MCEC to the Claimant dated 26 July 2012, **Exhibit R-92**; Letter from MCEC to the Claimant dated 28 September 2012, **Exhibit R-96**.

⁴⁹⁹ Reply, paragraph 652, **CS-5**.

⁵⁰⁰ Reply, paragraph 223, **CS-5**.

2. The Claimant’s proposal to deliver the incomplete New Communal Facilities and pay US\$3 million to Minsktrans for completion would have involved fundamental change in the Investment Object

295. In the Reply,⁵⁰¹ the Claimant gives the impression that “*on multiple occasions*”⁵⁰² MCEC unreasonably rejected the Claimant’s proposal to transfer the incomplete New Communal Facilities into municipal ownership and pay US\$3 million to Minsktrans to complete them. According to the Claimant, MCEC did so despite the fact that the “*Respondent itself had previously identified this amount as sufficient funding to finish the project*”.⁵⁰³ The Respondent submits that this is false, for the reasons set out below.

a) The Claimant made a US\$3 million proposal to MCEC and Minsktrans only in 2014

296. In the Reply, the Claimant alleges that, in 2012 and 2014, it offered “*several times [to MCEC and Minsktrans] to resume financing of the project by injecting, in particular, an additional USD 3 million to complete the [New Communal Facilities]*”.⁵⁰⁴ This is misleading.

297. The evidence the Claimant cites⁵⁰⁵ does not support this allegation. As follows from the minutes of a meeting attended by Manolium-Engineering, the Claimant, MCEC and Minsktrans on 9 January 2012, the parties were discussing “*the violation by the investor of the time limits for performing its obligation under the [Amended*

⁵⁰¹ Reply, paragraphs 232 – 243, **CS-5**.

⁵⁰² Reply, paragraph 234, **CS-5**.

⁵⁰³ Reply, paragraph 233, **CS-5**.

⁵⁰⁴ Reply, paragraphs 233, **CS-5**.

⁵⁰⁵ Reply, paragraph 233, footnote 243, **CS-5**. In support of this statement, the Claimant cites the Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 9 January 2012, **Exhibit C-125**; Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**; Letter from Claimant to MCEC w/date (in response to the Letter from MCEC to the Claimant dated 18 June 2012), **Exhibit R-88**; and Minutes of the meeting attended by MCEC, Minsktrans and Manolium-Engineering dated 9 August 2012, **Exhibit C-324**; Letter from Manolium-Engineering to MCEC dated 18 July 2014, **Exhibit C-141**.

Investment Contract], *the need to speed up the construction of the [New Communal Facilities] and for the investor to pay fines.*⁵⁰⁶ At a meeting on 13 August 2012, the parties discussed the need to calculate the costs incurred by the Claimant in constructing the New Communal Facilities.⁵⁰⁷ Accordingly, the Claimant and/or Manolium-Engineering never offered to “*make the payment of USD 3 million for completion of the New Communal Facilities*” at these meetings.

298. Further, contrary to what the Claimant now asserts, at the 9 January 2012 meeting, Minsktrans neither “*identified*”,⁵⁰⁸ nor “[agreed] *that USD 3 million was sufficient to complete the project*”.⁵⁰⁹ US\$3 million was only Minsktrans’s estimate of how much more the Claimant would need to spend in 2012 to fulfil its obligations under the Amended Investment Contract.
299. It was only on 18 July 2014 when the Claimant proposed to MCEC and Minsktrans to transfer the incomplete New Communal Facilities into municipal ownership and pay US\$3 million to Minsktrans for their completion and commissioning.⁵¹⁰
300. Accordingly, the Claimant made its proposal long after MCEC and Minsktrans filed a claim in the Economic Court of Minsk on 12 November 2013, seeking to terminate the Amended Investment Contract, and when the Termination Proceedings were almost at an end.⁵¹¹

⁵⁰⁶ Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 9 January 2012, **Exhibit C-125**.

⁵⁰⁷ Minutes of the meeting attended by MCEC, Minsktrans and Manolium-Engineering dated 9 August 2012, **Exhibit C-324**.

⁵⁰⁸ Reply, paragraph 233, **CS-5**.

⁵⁰⁹ Reply, paragraph 234, **CS-5**.

⁵¹⁰ Letter from Manolium-Engineering to MCEC dated 18 July 2014, **Exhibit C-141**.

⁵¹¹ Statement of claim in the Russian court proceedings to terminate the Investment Contract dated 12 November 2013, **Exhibit C-140**. As described in paragraph 263 of the Defence (**RS-18**), the termination of the Amended Investment Contract became legally effective on 29 October 2014, when the Appeal Instance of the Economic Court of Minsk upheld the judgement of the Economic Court of Minsk. *See* the Resolution of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, **Exhibit C-150**.

b) The Claimant conceals the fact that its proposal contained a term which was wholly unacceptable to MCEC

301. As Mr Akhramenko explains in his First Witness Statement,⁵¹² the Claimant's US\$3 million proposal on 18 July 2014 was unacceptable to MCEC because it was conditional on amending the design of the Investment Object to an "*accommodation and shopping center*".⁵¹³
302. The Claimant now contends in the Reply that the reason why it was not a significant change was "*because the initial plan also included accommodation and a shopping center.*"⁵¹⁴ This is incorrect and misleading.
303. The Claimant's contention is not supported by the documents the Claimant exhibited in the proceedings.⁵¹⁵ As shown in the composition and the key technical and economic indices of the Investment Object dated 25 February 2005⁵¹⁶ – Manolium-Engineering's internal document setting out a preliminary list of components of the Investment Object – the "*initial plan*"⁵¹⁷ did not include any "*accommodation*". Notably, in the Notice, the Claimant sets out the same list of "*preliminary*"⁵¹⁸ components of the Investment Object.
304. As for the graphic design of the Investment Object prepared by ACP Architecture and Engineering Company LLC for Manolium-Engineering in 2010,⁵¹⁹ it clearly shows

⁵¹² First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 101 – 102, **RWS-2**.

⁵¹³ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs, 100 – 102, **RWS-2**; Letter from Manolium-Engineering to MCEC dated 18 July 2014, **Exhibit C-141**.

⁵¹⁴ Reply, paragraph 240, **CS-5**.

⁵¹⁵ Composition and key technical and economic indexes of the Investment Object dated 25 February 2005, **Exhibit C-110**; Graphic Design of the Investment Object prepared by ACP Architecture and Engineering Company LLC for Manolium-Engineering in 2010, **Exhibit TT-52**.

⁵¹⁶ Composition and key technical and economic indexes of the Investment Object dated 25 February 2005, **Exhibit C-110**.

⁵¹⁷ Reply, paragraph 240, **CS-5**.

⁵¹⁸ Notice, paragraph 213, **CS-1**.

⁵¹⁹ Composition and key technical and economic indexes of the Investment Object dated 25 February 2005, **Exhibit C-110**.

that although a residential area and a retail area (which would include a shopping centre) were indeed part of the “*initial plan*”, there were also key, if not the most important components of the Investment Object. It follows from the graphic design that the Investment Object would be comprised of the following facilities:

- A. a hotel for 250 rooms;
- B. offices;
- C. a shopping centre with a hypermarket;
- D. a “[s]treet type shopping [mall] with [a] fast food restaurant chain”;
- E. a sports and entertainment facility;
- F. a conference hall with multi-functional spaces;
- G. parking, including underground parking; and
- H. four residential buildings.

305. Accordingly, had the parties agreed to amend the design of the Investment Object, as proposed by the Claimant,⁵²⁰ the number of the facilities, the Claimant would be required to build, would have been limited to accommodation and a shopping centre. This was unacceptable to MCEC. Moreover, the future sales value and projected construction costs of the Investment Object would have reduced significantly, which would certainly constitute a material change to the Investment Object.

306. The Claimant’s allegation that “*this was a much better proposal than any that the city of Minsk had at that time from others*”⁵²¹ is misplaced. Given that the parties initially agreed that the Investment Object would include a number of the facilities listed above, limiting it to accommodation and a shopping center was not “*a much better*

⁵²⁰ Letter from Manolium-Engineering to MCEC dated 18 July 2014, **Exhibit C-141**.

⁵²¹ Reply, paragraph 241, **CS-5**.

proposal". This was unreasonable and not in line with the original bargain of the parties. Further, since at the time the Claimant was experiencing financial difficulties, it appears that it was not in fact in a position to construct the Investment Object as agreed under the Amended Investment Contract and was therefore seeking to reduce the number of its facilities.

307. In any event, as described above,⁵²² MCEC and Minsktrans were interested in the New Communal Facilities being completed by the Claimant and Manolium-Engineering, as agreed under the Amended Investment Contract, rather than in receiving the funds for completion. Had MCEC and Minsktrans been interested in constructing the New Communal Facilities themselves, they would have contracted for a sum of money as consideration for the Claimant's and Manolium-Engineering's right to construct the Investment Object.

308. Accordingly, the Claimant's position that MCEC unreasonably rejected the Claimant's proposal to transfer US\$3 million in exchange for the right to "*amend the design*" of the Investment Object to an "*accommodation and shopping center*" is wholly untenable. Such proposal would have fundamentally changed the Amended Investment Contract. Even if the Claimant had made such a proposal before MCEC had applied to terminate the Amended Investment Contract, it would not have been acceptable to MCEC.

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

309. It is not in issue between the Parties that from early December 2012 to October – November 2013⁵²³ the parties to the Amended Investment Contract were discussing

⁵²² See paragraphs 21A above.

⁵²³ The Claimant alleges that on 14 October 2013, MCEC and Minsktrans submitted a claim to the Economic court of Minsk seeking to terminate the Amended Investment Contract (Reply, paragraph 261, CS-5). The Respondent submits that although the statement of claim is indeed dated 14 October 2013, it was filed with the court on 12 November 2013, approximately a month later.

an option to terminate it and agree a new investment contract⁵²⁴ and that on 5 December 2012 MCEC proposed terminating the Amended Investment Contract and executing new investment contract.⁵²⁵

310. The Claimant does not dispute that such new investment contract would be governed by the Investments Decree.⁵²⁶ As Mr Akhramenko explains, the Investments Decree grants additional privileges to investors, but also provides additional assurances to the state.⁵²⁷ By default, any investment agreement executed after 9 November 2009, when the Investments Decree entered into force, is governed by the Investments Decree.
311. It is not in issue between the Parties that on 10 December 2012, MCEC sent to Manolium-Engineering a draft Agreement on Termination of the Amended Investment Contract and a draft New Investment Contract.⁵²⁸
312. The Claimant now describes this proposal as MCEC's attempt to "*get for free all investments made by the Claimant up to that date*".⁵²⁹ This is simply untrue. Under the proposal, the Claimant would get the right to develop the Investment Object in exchange for incomplete New Communal Facilities. In addition, as described in 320 below, MCEC proposed significant benefits to the Claimant and Manolium-Engineering, including reliefs from certain tax and mandatory payments. This was very favourable proposal for the Claimant.⁵³⁰

⁵²⁴ Defence, paragraphs 229 – 245, **RS-18**. Reply, paragraphs 250 – 260, **CS-5**.

⁵²⁵ Defence, paragraph 229, **RS-18**. Reply, paragraph 250, **CS-5**. Minutes of the meeting attended by MCEC and Manolium-Engineering dated 5 December 2012, **Exhibit R-97**.

⁵²⁶ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 66, **RWS-2**. Minutes of the meeting attended by MCEC and Manolium-Engineering on 5 December 2012, **Exhibit R-97**.

⁵²⁷ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 11(A), **RWS-2**.

⁵²⁸ Defence, paragraph 230, **RS-18**. Reply, paragraph 250, **CS-5**. Letter from MCEC to Manolium-Engineering dated 10 December 2012, **Exhibit C-132**; Draft investment contract for the implementation of the Investment Object enclosed with MCEC's letter to Manolium-Engineering dated 10 December 2012, **Exhibit R-98**.

⁵²⁹ Reply, paragraph 251, **CS-5**.

⁵³⁰ Under the Amended Investment Contract, the Claimant and Manolium-Engineering had to complete, commission and transfer the New Communal Facilities into the municipal ownership before the

313. MCEC also included standard provisions protecting its rights in case the Claimant and Manolium-Engineering breach the new contract. The Claimant now describes these provisions as “*draconian*”.⁵³¹
314. As explained below these provisions either (a) had to be included pursuant to the Investments Decree;⁵³² or (b) applied as a matter of Belarusian law; or (c) copied the provisions to which a company controlled by Messrs Dolgov and Ekavyan already agreed in an unrelated project. The Claimant takes issue with the following provisions of the draft New Investment Contract.
315. First, pursuant to the draft New Investment Contract MCEC was entitled to:
- A. declare expired the Investment Object Location Act if the Claimant and Manolium-Engineering not comply with the deadlines for preparing the Design Specification and Estimate Documentation for the Investment Object; and
 - B. once the Design Specification and Estimate Documentation for the Investment Object are completed – withdraw the land plot for the Investment Object if the Claimant and Manolium-Engineering did not comply with the deadlines for its construction.⁵³³
316. As explained in the Defence,⁵³⁴ pursuant to Belarusian law, failure to submit the Design Specification and Estimate Documentation for approval within the timeframe set out in the land plot location selection act leads to a loss of permission to develop

Claimant would obtain a right to develop the Investment Object. Amended Investment Contract, clause 2, **Exhibit C-66**.

⁵³¹ Reply, paragraph 253, **CS-5**.

⁵³² The Investment Decree came into force on 9 November 2009.

⁵³³ Reply, paragraph 250(ii)(a), **CS-5**. Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, clause 9.4, **Exhibit R-98**.

⁵³⁴ Defence, paragraph 101(b), **RS-18**.

the Design Specification and Estimate Documentation.⁵³⁵ The Claimant does not dispute this. The parties could not opt-out from this provision. This provision applied in the past and would continue to apply in any event (including if the parties proceeded under the Amended Investment Contract).⁵³⁶

317. The provision described in 315.B above, was also based on paragraph 4 clause 1.4 of the Investments Decree, which prescribes that all investment contracts shall provide for Belarus' right to terminate the contract unilaterally if the investor fails to duly fulfil its contractual obligations. Accordingly, there was nothing unusual in these terms.

318. Second, pursuant to draft New Investment Contract, if the land plot for the Investment Object were to be withdrawn, the Claimant and Manolium-Engineering were required to “bring it to a condition suitable for further use, including, if necessary by [...] demolishing real estate or incomplete or permanent structures that have not been mothballed and that are owned by the [Claimant or Manolium-Engineering]”.⁵³⁷ This, again, restates the express provision of Belarusian law.⁵³⁸ In addition, the same provision was repeated in every MCEC decision granting right to use land plots.⁵³⁹ Any land user, who lost its permit to the land plot would be required to do the same regardless of whether this provision was included in its contract or not.

319. Third, pursuant to the draft New Investment Contract if the contract were to be terminated, “the costs incurred by the [Claimant and Manolium-Engineering] during

⁵³⁵ Regulation “On Withdrawal and Allotment of Land Plots” enacted by the President’s Decree No.667 dated 27 December 2007, clause 24(3) (in force between 1 January 2012 and 1 April 2014), **Exhibit RL-119**].

⁵³⁶ As explained in the Defence, in 2011 Manolium-Engineering lost right to develop Design Specification and Estimate Documentation because it failed to prepare one within two years from the Investment Object Location Act. Defence, paragraph 201, **RS-18**.

⁵³⁷ Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, clause 6.7, **Exhibit R-98**. The Claimant refers to this provision in the Reply, paragraph 250(ii)(b), **CS-5**.

⁵³⁸ Land Code of Republic of Belarus, Article 72(2) (in force from 15 February 2010), **Exhibit RL-128**.

⁵³⁹ Decision of MCEC dated 24 May 2007, **Exhibit R-29**.

the implementation of the investment project shall not be compensated by the Republic of Belarus except in cases expressly provided for under the laws of the Republic of Belarus".⁵⁴⁰ Accordingly, this provision merely restates the position as a matter of Belarusian law. The Claimant and Manolium-Engineering would only be entitled to compensation in cases expressly provided for under Belarusian law.

320. The Claimant also fails to mention that pursuant to the draft New Investment Contract the Claimant was to receive significant benefits, to which it was not entitled under the Amended Investment Contract. For example, pursuant to the draft New Investment, Manolium-Engineering was exempt from the One-Time Lease Payment⁵⁴¹ and, for a certain period of time, the land tax and lease payments for the land plots provided for construction of the Investment Object⁵⁴² and other benefits.⁵⁴³ Manolium-Engineering would also be allowed to prepare the Design Specification and Estimate Documentation of the Investment Object at the same time as undertaking construction works on the Investment Object,⁵⁴⁴ which could have increased the speed of construction.
321. The Claimant also alleges that “*no reasonable investor would*” accept these “*draconian terms*”.⁵⁴⁵ As discussed, these terms are either part of or apply to most investment contracts (both foreign and domestic) which Belarus concluded after 9 November 2009, when the Investments Decree entered into force.

⁵⁴⁰ Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, clause 27 (emphasis added), **Exhibit R-98**. The Claimant refers to this provision in the Reply, paragraph 250(ii)(c), **CS-5**. The Claimant conveniently omits the words “*except in cases expressly provided under the laws of the Republic of Belarus*” at the end of that provision, which makes the Claimant’s description misleading.

⁵⁴¹ Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, clause 7.6, **Exhibit R-98**.

⁵⁴² Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, clause 7.7, **Exhibit R-98**.

⁵⁴³ Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, clauses 7.1 – 7.12, **Exhibit R-98**.

⁵⁴⁴ Draft investment contract for the implementation of the Investment Object enclosed with MCEC’s letter to Manolium-Engineering dated 10 December 2012, clause 7.1, **Exhibit R-98**.

⁵⁴⁵ Reply, paragraph 253, **CS-5**.

322. Ironically, OOO Tekstur, one of the companies controlled by Messrs Dolgov and Ekavyan accepted the same terms back in 2011 in the investment contract concluded as part of the Revolutionary Project. The Claimant now takes issue with, *inter alia*, clauses 6.7 and 9.4 of the draft New Investment Contract. These clauses however mirror completely clauses 6.7 and 9.4 of the investment contract between MCEC and OOO Tekstur.⁵⁴⁶
323. It is not in issue between the Parties that in late 2012 and in 2013, the Parties continued to exchange drafts and comments on the New Investment Contract. However, the Respondent disagrees with the Claimant's allegation that "[t]he Respondent continued to insist on the unfair and unreasonable conditions discussed" in paragraph 310 above.⁵⁴⁷ As stated in the Defence,⁵⁴⁸ the main points of disagreement which the parties discussed at that time were completely different and related to:
- A. the rate of interest payable for delays by the Claimant or Manolium-Engineering;
 - B. the dispute resolution forum; and
 - C. the completion date for the construction of the Investment Object.⁵⁴⁹
324. It is not in issue between the Parties that on 14 March 2013 MCEC issued a formal order declaring that the Investment Object Selection Act had expired.⁵⁵⁰ The Claimant however alleges that "[t]his unilateral decision demonstrates that the Respondent was

⁵⁴⁶ Investment contract between MCEC and Tekstur dated 8 September 2011, clauses 6.7, 9.4, **Exhibit R-193**.

⁵⁴⁷ Reply, paragraph 254, **CS-5**.

⁵⁴⁸ Defence, paragraph 235, **RS-18**.

⁵⁴⁹ Letter from the Claimant to MCEC dated 31 January 2013, **Exhibit R-104**; MCEC Letter to the Claimant dated 4 February 2013, **Exhibit C-135**.

⁵⁵⁰ Defence, paragraph 239, **RS-18**. Reply, paragraph 255, **CS-5**. Decision of MCEC dated 11 March 2013, **Exhibit C-138**.

no longer interested in the Claimant's implementation of the Investment Object."⁵⁵¹

The Respondent disagrees.

325. As explained in the Defence, the land plot location selection act serves, *inter alia*, as permission to develop the Design Specification and Estimate Documentation for the building to be constructed.⁵⁵² Failure to submit the Design Specification and Estimate Documentation for approval within the prescribed timeframe, will result in the loss of permission to develop it.⁵⁵³ The Claimant does not deny that Manolium-Engineering failed to present the Design Specification and Estimate Documentation for the Investment Object within the prescribed timeframe, or at all, and that, consequently, on 26 March 2011 it lost the right to develop the Design Specification and Estimate Documentation for the Investment Object.⁵⁵⁴
326. The Respondent explained⁵⁵⁵ that MCEC's order declaring that the Investment Object Selection Act had expired⁵⁵⁶ was merely a formal confirmation of what has already happened by operation of Belarusian law.
327. Manolium-Engineering had the right and an opportunity to apply again for a new land plot location selection act, but failed to do so.⁵⁵⁷ Contrary to the impression the Claimant attempts to create,⁵⁵⁸ it is completely normal that the land plot location selection act was cancelled without first terminating the Amended Investment Contract.

⁵⁵¹ Reply, paragraph 256, **CS-5**.

⁵⁵² Defence, paragraph 101(a), **RS-18**.

⁵⁵³ Defence, paragraph 101(b), **RS-18**.

⁵⁵⁴ Defence, paragraphs 201 and 239, **RS-18**.

⁵⁵⁵ Defence, paragraph 239, **RS-18**.

⁵⁵⁶ Decision of MCEC dated 11 March 2013, **Exhibit C-138**.

⁵⁵⁷ Defence, paragraph 117, **RS-18**.

⁵⁵⁸ Reply, paragraph 256, **CS-5**.

328. It is not in issue between the Parties that on 19 March 2013, the Claimant asked MCEC to:⁵⁵⁹
- A. accept the incomplete New Communal Facilities;
 - B. transfer US\$30 million to the Claimant to compensate its costs; and
 - C. provide the right to use the territory for the Investment Object for Manolium-Engineering to use “*at its discretion*”.
329. The Claimant alleges for the first time in its Reply that the “*request for USD 30 million in compensation was a reasonable measure of the value of the New Communal Facilities*”.⁵⁶⁰ The Respondent maintains that the proposal was unacceptable and demonstrated the Claimant’s lack of intention to continue negotiation in good faith.⁵⁶¹ The Claimant fails to mention that in addition to the US\$30 million “*compensation*” the Claimant also demanded the land plot in the centre of Minsk for free (instead of obtaining the right to build the Investment Object in consideration for the New Communal Facilities).
330. Moreover, the Claimant, in essence, demanded that the Claimant be granted right to use the land plot in the centre of Minsk:
- A. and be paid for it: on the Claimant’s own case by that time Manolium-Engineering only spent US\$20.4 million,⁵⁶² i.e. almost US\$10 million less than the Claimant was to be paid under its proposal; and
 - B. to use the land plot in the centre of Minsk “*at its own discretion*”, rather than to build the Investment Object.

⁵⁵⁹ Defence, paragraph 240, **RS-18**. Reply, paragraph 258, **CS-5**.

⁵⁶⁰ Reply, paragraph 259, **CS-5**.

⁵⁶¹ Letter from MCEC to the Claimant and Manolium-Engineering dated 28 March 2013, **Exhibit R-105**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 93, **RWS-2**. Defence, paragraph 241, **RS-18**.

⁵⁶² Reply, paragraph 259(i), **CS-5**.

331. The Claimant also refers to the parties' correspondence of June 2013⁵⁶³ in support of its allegation that “[d]espite this evidence of the value [...] the Respondent insisted that the Claimant transfer to it the New Communal Facilities *for free*”.⁵⁶⁴ This is misleading. As explained,⁵⁶⁵ at that time MCEC was led to believe by the Claimant and Manolium-Engineering⁵⁶⁶ that they offered to transfer to MCEC the New Communal Facilities pursuant to the terms of the Amended Investment Contract. It turned out, however, that the Claimant wanted the New Communal Facilities be transferred for US\$30 million.⁵⁶⁷

L. REASONS WHY MCEC DECIDED TO APPLY TO THE COURT FOR TERMINATION OF THE AMENDED INVESTMENT CONTRACT

332. The Claimant argues that the decision to terminate the Amended Investment Contract was disproportionate, unreasonable and in bad faith.⁵⁶⁸ It is the Respondent's submission that this is not the case.

333. As described in the Defence and paragraphs 256 – 331 above, between July 2011 (when MCEC's right to terminate the Amended Investment Contract arose) and November 2013 (when MCEC submitted its termination claim to the court) MCEC negotiated with the Claimant in good faith and genuinely sought to find a mutually acceptable solution.

334. As Mr Akhramenko explains, “*the termination of the Amended Investment Contract through courts was still a very undesirable solution for MCEC*”, among other reasons because this would mean that “*MCEC would have to start the complex and lengthy*

⁵⁶³ Letter from MCEC to the Claimant dated 7 June 2013, **Exhibit R-108**. Letter from the Claimant to MCEC dated 27 June 2013, **Exhibit C-94**.

⁵⁶⁴ Reply, paragraph 260 (emphasis in the original), **CS-5**.

⁵⁶⁵ Defence, paragraph 243, **RS-18**. First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 96 – 97, **RWS-2**.

⁵⁶⁶ Letter from the Claimant to MCEC dated 27 May 2013, **Exhibit C-93**. Letter from the Claimant to MCEC dated 27 June 2013, **Exhibit C-94**.

⁵⁶⁷ Letter from the Claimant to MCEC dated 27 June 2013, **Exhibit C-94**. Defence, paragraph 243, **RS-18**.

⁵⁶⁸ Reply, paragraphs 5, 530(iv) and 549, **CS-5**.

*process of developing a concept of the development of the land plot in the centre of Minsk and look for a new investor all over again”.*⁵⁶⁹

335. Starting from 2010, MCEC consistently voiced its concern about Manolium-Engineering’s and the Claimant’s failure to take any steps with respect to the Investment Object. MCEC pointed out that this was in breach of the Amended Investment Contract, the primary purpose of which was implement the investment project.⁵⁷⁰ MCEC also consistently warned the Claimant and Manolium-Engineering that it would be forced to apply to court to terminate the Amended Investment Contract if the project does not get moving.⁵⁷¹
336. The fact, however, remained that by mid-2013 the parties moved nowhere in their negotiations, the land plot in the city centre had laid idle for approximately ten years by then and the prospects of Manolium-Engineering constructing the Investment Object did not move any closer.
337. The Claimant and Manolium-Engineering kept making promises and kept not delivering on them with respect to the construction of the New Communal Facilities.⁵⁷² As Mr Akhramenko explains, MCEC had serious doubts that Manolium-Engineering and the Claimant were still interested in and had the necessary resources to complete the Investment Object.⁵⁷³ However, it was not until after the Claimant

⁵⁶⁹ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 59, **RWS-4**.

⁵⁷⁰ Letter from MCEC to the Claimant and Manolium-Engineering dated 20 September 2010, **Exhibit R-57**.

⁵⁷¹ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 25, 104, **RWS-2**. Letter from MCEC to the Claimant and Manolium-Engineering dated 28 September 2012, **Exhibit R-96**.

⁵⁷² First Witness Statement of Mr Akhramenko dated 19 November 2019, paragraphs 33 – 35, **RWS-2**. Schedule to Complete Construction of the “Trolleybus Depot Accommodating 220 Trolleybuses in Urban District Uruchye-6”, Minsk, approved by MCEC Deputy Chair A.M. Borisenko on 5 August 2011, **Exhibit R-67**; Minutes of a meeting on the implementation of investment projects dated 9 January 2012, paragraph 2.2, **Exhibit C-125**; Claimant125a meeting on the implementation of investment MCEC Letter dated 18 June 2012), **Exhibit R-88**. Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit C-126**.

⁵⁷³ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 23, **RWS-2**. Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 58, **RWS-4**.

expressly informed MCEC that it was no longer interested in implementing the investment project and building the Investment Object, that MCEC initiated the Termination Proceedings.⁵⁷⁴ MCEC had no choice but to do so since it needed to get the project in the centre of Minsk implemented. It remained an eyesore for approximately a decade.

338. The Claimant argues in the Reply, that the Respondent “*could have simply sought damages from Claimant for its alleged breaches of the Investment Contract related to the delays, rather than terminating the Investment Contract as a whole*”.⁵⁷⁵ However, seeking damages from the Claimant and Manolium-Engineering would have not protected MCEC’s legitimate interests. MCEC was not interested in damages – it was interested in getting the works with respect to the Investment Object started. Only termination of the Amended Investment Contract would have made this possible in circumstances where the Claimant was clearly unable and/or unwilling to finance the construction of the Investment Object.⁵⁷⁶

339. Notably, since the Claimant and Manolium-Engineering had failed to complete the New Communal Facilities by 1 July 2011 due to their own fault, as a matter of Belarusian law, MCEC became entitled to submit a claim to terminate the Amended Investment *and* claim damages caused by the termination, however, it chose not to claim damages.

340. The Claimant further submits: “*the contractual remedy for suspension in construction provides for a penalty of 0.1% of the scheduled construction costs of the New Communal Facilities. [...] The Respondent chose to fully terminate the Investment Contract and ignore the previously agreed upon penalties*”.⁵⁷⁷ The Claimant here refers to clause 18 of the Amended Investment Contract, arguing that MCEC had

⁵⁷⁴ Defence, paragraph 244, **RS-18**. Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**. Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 60 – 61, **RWS-4**.

⁵⁷⁵ Reply, paragraph 571, **CS-5**.

⁵⁷⁶ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 57 – 61, **RWS-4**.

⁵⁷⁷ Reply, paragraph 571, **CS-5**.

other – more suitable – remedies instead of the termination of the Amended Investment Contract.

341. As with damages, claiming penalty would not have protected MCEC’s primary interest under the Amended Investment Contract, which was to get the works on the Investment Object started. In addition, the Claimant’s assertion that the Claimant had the right to seek contractual penalty is misleading.
342. As Mr Akhramenko explains,⁵⁷⁸ MCEC was deprived of the opportunity to claim any penalty for violations of contractual obligations, because clause 18 of the Amended Investment Contract provided that the Claimant and Manolium-Engineering had to pay a penalty only if the Claimant suspended or “laid-up” the New Communal Facilities or the Investment Object. From a Belarusian law perspective, suspension of construction and “laying-up” of a facility would require Manolium-Engineering to execute specific documents. Manolium-Engineering never did so. Instead, it simply abandoned works on a number of occasions without “laying-up” them.⁵⁷⁹ Accordingly, MCEC’s right to claim contractual penalty was entirely dependent on Manolium-Engineering’s actions and as a result MCEC could not claim penalties under the Amended Investment Contract.
343. When the parties negotiated Additional Agreement No. 6, they agreed to amend the penalty provision so that penalty would start accruing in case of breach of the work performance terms, such terms being set forth in the schedules attached to Additional Agreement No. 6. Only Manolium-Engineering signed these schedules eventually, but not the Claimant. The penalty provision, therefore, remained ineffective.

⁵⁷⁸ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 28, **RWS-2**.

⁵⁷⁹ See paragraphs 109 – 115 above.

M. TERMINATION OF THE AMENDED INVESTMENT CONTRACT

344. On 12 November 2013,⁵⁸⁰ MCEC and Minsktrans filed a claim with Economic Court of Minsk seeking termination of the Amended Investment Contract. The procedural history, the parties' legal positions in the court proceedings and the grounds for termination of the Investment Contract by Belarusian courts are described in detail in paragraphs 246 – 255 of the Defence.
345. In the Notice, the Claimant submits that the judgement of the Economic Court of Minsk contained “*numerous mistakes in terms of the content*”.⁵⁸¹ The Claimant, however, does not substantiate this very general allegation either in the Notice or the Statement of Claim. The Claimant also submits in the Notice that the judgement of the Economic Court of Minsk “*did not contain the statement of reasons*” or analysis of “*acts of the Claimant and Manolium-Engineering*”, Belarusian law or the Investment Contract.⁵⁸² The Respondent addressed these allegations in the Defence.⁵⁸³
346. Neither in the Notice nor in the Statement of Claim does the Claimant submit that there were any irregularities with respect to the proceedings at the appellate and the cassation courts.
347. In the Reply, the Claimant for the first time articulates its position with respect to the alleged wrongfulness of the Termination Proceedings and submits that the Belarusian Supreme Court failed to remedy the breaches of the lower courts by upholding their “*wrongful, expropriatory and illegal decisions*”.⁵⁸⁴ The alleged grounds on which the Claimant relies in support of this submission come down to the following:

⁵⁸⁰ Although the statement of claim is dated 14 October 2013, it was actually filed with the court on 12 November 2013, which is evidenced by the court stamp on the Statement of claim, **Exhibit R-201**.

⁵⁸¹ Notice, paragraph 264, **CS-1**.

⁵⁸² Notice, paragraph 264, **CS-1**.

⁵⁸³ Defence, paragraphs 246 – 255, **RS-18**.

⁵⁸⁴ Reply, paragraph 623, **CS-5**.

- A. Belarusian courts “*entirely failed to assess the issues crucial for resolution of the dispute*” when they considered the termination of the Amended Investment Contract;⁵⁸⁵
- B. The courts’ decision to terminate the Amended Investment Contract was “*pre-ordained*”⁵⁸⁶ and “*pre-determined*”⁵⁸⁷ with the purpose of justifying the President’s decision taken “*long ago*”.⁵⁸⁸

348. The allegations cited in paragraphs 347.A and 347.B are baseless as demonstrated further below.

1. The Belarusian courts did not “fail to assess” any “issues crucial for resolution of the dispute”

349. According to the Claimant, the courts “*entirely failed to assess the issues crucial for resolution of the dispute*”.⁵⁸⁹ In particular, the Claimant submits that the courts failed to take into account that:

- A. the “*Claimant provided millions more in funding than was required under the Investment Contract*”;⁵⁹⁰
- B. “[b]ecause these investments were actually made, the right to develop the Investment Object was guaranteed to Claimant”⁵⁹¹ and “*failure by the Claimant to perform [its] financial obligations*” was the only breach through which “*the Claimant could lose the rights for the Investment Project*”;⁵⁹²

⁵⁸⁵ Reply, paragraph 727, CS-5.

⁵⁸⁶ Reply, paragraph 532(iii), CS-5.

⁵⁸⁷ Reply, paragraph 734, CS-5.

⁵⁸⁸ Reply, paragraphs 733 – 734, CS-5.

⁵⁸⁹ Reply, paragraph 727, CS-5.

⁵⁹⁰ Reply, paragraph 728, CS-5.

⁵⁹¹ Reply, paragraph 546, CS-5.

⁵⁹² Reply, paragraph 532(iii), CS-5. *See also*: Reply, paragraph 624, CS-5.

- C. the “*Claimant was prepared to inject an additional USD 3 million to finish the construction of the New Communal Facilities, although legally it was not obligated to do so*”;⁵⁹³ and
- D. the “*Respondent was responsible for the increase in costs of the construction by causing delays and changing the scope of works*”⁵⁹⁴ and “*the delays in construction of the New Communal Facilities occurred primarily because of the Respondent*”.⁵⁹⁵

350. As demonstrated below the courts did not “*fail to assess*” these factual allegations.

a) Manolium-Engineering’s arguments regarding the size of its investment were assessed and rejected by the courts

351. The Claimant asserts that the courts “*failed to assess*” that the Claimant had “*provided millions more in funding than was required under the Investment Contract*”.⁵⁹⁶ These assertions are simply untrue; the courts considered and expressly rejected this argument in the Termination Proceedings.

352. As already submitted by the Respondent, in the Termination Proceedings, Manolium-Engineering argued that having invested more than US\$18 million into the design and construction of the New Communal Facilities, it had complied with its obligations under the Amended Investment Contract and, accordingly, that there were no grounds for termination.⁵⁹⁷ Manolium-Engineering repeated the same argument when it

⁵⁹³ Reply, paragraph 729, **CS-5**. See also: Reply, Paragraphs 539(ii) and 624(ii), **CS-5**.

⁵⁹⁴ Reply, paragraph 730, **CS-5**.

⁵⁹⁵ Reply, paragraph 623(i), **CS-5**.

⁵⁹⁶ Reply, paragraph 728, **CS-5**.

⁵⁹⁷ Defence, paragraph 251, **RS-18**; Manolium Engineering’s Statement of Defence regarding case No 399-3/2013, pages 2 – 3 (“*Pursuant to clause 11 of the Amended Contract dated 8 February 2007, the amount of investment for the design and construction of the communal facilities referred to in clauses 2.1 - 2.3 of this contract is equivalent to US\$15 (fifteen) million at the exchange rate set by the National Bank of the Republic of Belarus on the respective payment date. [...] Based on the results of an independent audit carried out at the initiative of MCEC, as at 1 October 2012, the costs incurred by IP Manolium-Engineering in designing and constructing the communal facilities amounted to*”).

appealed the decision of the first instance court to the Appeal Instance Court⁵⁹⁸ and the Supreme Court.⁵⁹⁹

353. The Economic Court of Minsk rejected this argument, finding that, pursuant to Clause 7.10 of the Amended Investment Contract, the Claimant's and Manolium-Engineering's obligation to complete the New Communal Facilities was not limited by US\$15 million.⁶⁰⁰ The court therefore held that since the Claimant and Manolium-

US\$18,313,841.9. Neither MCEC, nor GP Minsktrans challenge the above amounts. Thus, the Investor has performed its financial obligations under the Contract in significant excess of the announced amounts. [...] In view of the above, we believe that the arguments and substantiation of the reasons for termination of the contract presented by MCEC are not consistent with the facts, hence its claims should be dismissed"), Exhibit R-102.

⁵⁹⁸ Appeal of Manolium-Engineering dated 9 October 2014, page 3 (*"In accordance with clause 11 of the Contract in the version of 08 February 2007, the volume of investments directed to the design and construction of the communal facilities specified in sub-clauses 2.1.-2.3. of clause 2 of this Contract is equivalent to USD 15 (fifteen) million at the rate of the National Bank of the Republic of Belarus on the date of the relevant payments. [...] Based on the results of an independent audit conducted at the initiative of the Minsk City Executive Committee, as of 01 October 2012 the total costs of FE "Manolium-Engineering" for the design and construction of the communal facilities amounted to USD 18,313,841.90. Thus, the declared amounts were significantly exceeded when fulfilling the financial obligations of the Investor under the Contract"*), **Exhibit C-149.**

⁵⁹⁹ Cassation appeal of Manolium-Engineering dated 29 November 2014, page 3 (*"In accordance with Clause 11 of the Contract, in the version of 08 February 2007, the volume of investments directed to the design and construction of the communal facilities specified in Sub-Clauses 2.1-2.3 of Clause 2 of this contract is an amount equivalent to 15 (fifteen) million US dollars at the rate of the National Bank of the Republic of Belarus on the date of the relevant payments. [...] Based on the results of an independent audit (available in the case file) conducted at the initiative of the Minsk City Executive Committee, the volume of costs of FE Manolium-Engineering for the design and construction of the communal facilities as of 01 October 2012 amounted to USD 18,313,841.90. [...] Thus, the financial obligations of the Investor under the contract significantly exceeded declared volumes"*), **Exhibit C-151.**

⁶⁰⁰ Defence, paragraph 253, **RS-18**; Judgement of the Minsk Economic Court, dated 9 September 2014, pages 4 – 5 (*"The volume of investments directed to the design and construction of communal facilities was determined by the parties in the amount of USD 15 (fifteen) million at the rate of the National Bank of the Republic of Belarus at the date of the respective payments (clause 11 of the contract). However, in sub-clause 7.10 of the contract, the parties agreed that if the cost of designing and construction of communal facilities determined in accordance with the legislation of the Republic of Belarus is less than the equivalent of USD 15 (fifteen) million at the rate of the National Bank of the Republic of Belarus on the date of the respective payments, the investor shall ensure the transfer of the difference to the budget of the city of Minsk, and if the cost of design and construction of these facilities exceeds the indicated amount, the 1st respondent shall ensure that all additional expenses are covered. In connection with this, the court concludes that the respondents' breach of the time limits for the*

Engineering had: (i) failed to construct and commission the New Communal Facilities within the contractual deadlines; and (ii) failed to show that they were entitled to an extension of time under the terms of the contract, MCEC was entitled to terminate the contract under Clause 16.2.1 (regardless of the amount of investment made).⁶⁰¹

354. Both the Appeal Instance Court⁶⁰² and the Supreme Court⁶⁰³ rejected the argument (which Manolium-Engineering simply copy pasted from its Statement of Defence in the first instance proceedings⁶⁰⁴) regarding the alleged size of the Claimant's and Manolium-Engineering's investments, because they concluded that the Claimant and Manolium-Engineering had agreed to bear all costs in constructing the New Communal Facilities under Clause 7.10 of the Amended Investment Contract.⁶⁰⁵ The Appeal Instance Court and the Supreme Court therefore held that the Economic Court

implementation of the investment project are not reasonable and are not related to the actions of the claimants or third parties"), **Exhibit C-147**.

⁶⁰¹ Defence, paragraph 253, **RS-18**; Judgement of the Minsk Economic Court, dated 9 September 2014, pages 3 – 5, **Exhibit C-147**.

⁶⁰² Resolution of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, pages 4 – 5 (*"The court holds that the Respondents' argument suggesting that a considerable increase in investments prevented timely implementation of the investment project is contradictory to the Investment Contract with Clause 7.10 providing that if the cost of the Communal Facilities design and construction exceeds USD 15,000,000 at the exchange rate of the National Bank of the Republic of Belarus as of the date of the relevant payments, the Investor shall provide for the defrayment of all additional expenses. Therefore, the deadline violations committed by the Respondents in implementing the investment project are not excusable and are not associated with any Claimants' or third-party actions. The Respondents have not produced to the court any evidence to the contrary"* (emphasis added)), **Exhibit C-150**.

⁶⁰³ Resolution of the Supreme Court of Belarus dated 27 January 2015, page 5 (*"The court was justified in not taking into account the respondents' allegations that a significant increase in the volume of the investments served for the timely realization of the investment project, because in accordance with Sub-Clause 7.10 of the investment contract, all additional expenses for the facilities are to be imposed upon the investor"* (emphasis added)), **Exhibit C-152**.

⁶⁰⁴ See paragraph 352 above. Redline between Manolium Engineering's Statement of Defence regarding case No. 399-3/2013 and Appeal of Manolium-Engineering dated 9 October 2014, **Exhibit R-240**; Redline between Appeal of Manolium-Engineering dated 9 October 2014 and Cassation appeal of Manolium-Engineering dated 29 November 2014, **Exhibit R-239**.

⁶⁰⁵ Amended Investment Contract, Clause 7.10, **Exhibit C-66**.

of Minsk had correctly concluded that MCEC had grounds to terminate the Amended Investment Contract under Clause 16.2.1.⁶⁰⁶

355. In its cassation appeal to the Supreme Court, the Claimant oddly argued that Clauses 7.10 and 8.19 should not have been “*taken into account*” by the lower courts because the parties to the duly executed Amended Investment Contract had not reached an agreement with respect to these contractual provisions.⁶⁰⁷ The duty of the Supreme Court under Belarusian procedural law, however, is limited to assessing whether the decisions of the lower courts were correct as a matter of law and corresponded to the evidence submitted to and the facts established by the lower courts.⁶⁰⁸ Accordingly, it was not within the competence of the Supreme Court to consider this new allegation made by the Claimant, which in any event did not make any sense.
356. It is significant that the Claimant, represented by Mr Dolgov, during the first-instance proceedings asked the court not to investigate matters relating to “*the investor’s fulfilment of its obligations in financing the construction of the New Communal Facilities*”.⁶⁰⁹ Mr Dolgov argued on behalf of the Claimant that “*the claimants based*

⁶⁰⁶ Resolution of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, page 4 (“*Therefore, the deadline violations committed by the Respondents in implementing the investment project are not excusable and are not associated with any actions by the Claimants or third parties. The Respondents have not produced to the court any evidence to the contrary. The circumstances established and the evidence examined in this case testify to the availability of grounds for satisfying the stated claims for termination of the Investment Contract entered into by the parties. Thus, the conclusions reached by the court of first instance are consistent with the circumstances of the case, rules of the substantive and procedural law, have been applied correctly and the court has appraised all the parties’ arguments in full. Hence, there are no grounds for upholding the appeal.*”), **Exhibit C-150**; Resolution of the Supreme Court of Belarus dated 27 January 2015, page 6 (“*In accordance with Sub-Clause 16.2.1 of the investment contract, the termination of the contract is to take place at the initiative of the Minsk City Executive Committee using judicial procedures if the construction of the facilities is not carried out by the deadlines specified in Sub-Clauses 6.1 and 6.2 of the contract through the fault of the investor, taking into account the conditions specified in Sub-Clause 6.3 of the contract. In such circumstances, the Panel for Economic Cases of the Supreme Court of the Republic of Belarus considers the court’s conclusions that there are grounds for the termination of the contract to be lawful and justified*”), **Exhibit C-152**.

⁶⁰⁷ Cassation appeal of Manolium-Engineering dated 29 November 2014, page 4, **Exhibit C-151**.

⁶⁰⁸ Belarusian Code of Commercial Procedure, Article 294, **Exhibit RL-50**.

⁶⁰⁹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 159, **CWS-5**.

their claims on the termination of the [Amended Investment Contract on] clause 16.2.1 of the abovementioned contract, according to which the contract may be terminated in court by MCEC if, through the Investor's fault, the construction of the facilities is not completed within the terms set forth in sub-clauses 6.1 and 6.2 of clause 6 of the contract [...]".⁶¹⁰ Furthermore, in court Mr Dolgov insisted that "*the scope of circumstances to be proven in the [Termination Proceedings] is limited to establishing whether delayed construction of the facilities occurred through the Investor's fault*".⁶¹¹ In other words, in 2014 Mr Dolgov himself asked the court of first instance not to consider precisely the matters which he now says in these proceedings should have been considered by the Belarusian court.

b) The Claimant and Manolium-Engineering never submitted that the "*failure by the Claimant to perform [its] financial obligations*" was the only breach through which "*the Claimant could lose the rights for the Investment Project*"

357. In the Reply, the Claimant asserts that the termination of the Amended Investment Contract by the courts was wrongful, in particular, because the courts "*failed to assess*" the argument that "*because these investments [in the amount exceeding US\$15 million] were actually made, the right to develop the Investment Object was guaranteed*" to the Claimant.⁶¹² The Claimant argues that a "*failure by the Claimant to perform [its] financial obligations*" was the only breach through which "*the Claimant could lose the rights for the Investment Project*".⁶¹³ The Claimant relies on

⁶¹⁰ Paragraph 2 on page 1 of the Claimant's Application to deny the application of MCEC to appoint an audit in case № 399-3/2013 dated 29th August 2014, **Exhibit R-118**.

⁶¹¹ Paragraph 2 on page 2 of the Claimant's Application to deny the application of MCEC to appoint an audit in case № 399-3/2013 dated 29th August 2014, **Exhibit R-118**.

⁶¹² Reply, paragraph 546, **CS-5**.

⁶¹³ Reply, paragraph 532(iii), **CS-5**. *See also*: Reply, paragraph 624, **CS-5**.

Clause 17 of the Amended Investment Contract.⁶¹⁴ Such interpretation of Clause 17 is unsustainable and farfetched.

358. First of all, the Claimant itself took the opposite approach during the Termination Proceedings as described in paragraph 356 above. Neither the Claimant nor Manolium-Engineering ever raised the argument about Clause 17 being the only ground for the termination of the Amended Investment Contract in the Termination Proceedings.
359. As explained in paragraph 248 of the Defence, civil and commercial proceedings under Belarusian law are adversarial. Pursuant to the Belarusian Code of Commercial Procedure, each party to the proceedings has an obligation to substantiate its claims and objections.⁶¹⁵ The courts can only consider claims which are expressly made by the parties.⁶¹⁶ Accordingly, neither the court nor MCEC and Minsktrans as the claimants in the Termination Proceedings were required and even entitled to consider facts and arguments that Manolium-Engineering and the Claimant did not raise in their defence. The contrary would be a fundamental violation of procedural legislation and the parties' procedural rights.
360. In any event, nothing in the Amended Investment Contract provides that the only ground for its termination is stated in Clause 17. On the contrary, as set out in paragraph 75 above, Clause 17 does not set out the grounds on which the parties may terminate the Amended Investment Contract. Rather it expressly provides for the Claimant's liability for breach of its obligations. The grounds for termination are set out in Clause 16 of the Amended Investment Contract, including Clause 16.2.1 which

⁶¹⁴ Clause 17 of the Amended Investment Contract ("*If [sic] case of a failure to perform financial obligations in accordance with Sub-Clauses 7.10 and 8.19, as well as Clauses 11 and 12 hereof through the fault of the Investor or FE Manolium-Engineering, the Investor and FE Manolium-Engineering shall be deprived of the right to implement the investment project*"), **Exhibit C-66**.

⁶¹⁵ Belarusian Code of Commercial Procedure, Articles 19 (in force between 7 March 2005 and 20 July 2014, and from 21 July 2014), 100 (in force between 7 March 2005 and 20 July 2014, and from 21 July 2014) **Exhibit RL-129**.

⁶¹⁶ Belarusian Code of Commercial Procedure, Article 23 (in force between 7 March 2005 and 20 July 2014, and from 21 July 2014), **Exhibit RL-129**.

was the basis on which the courts resolved to terminate the Amended Investment Contract.

c) Manolium-Engineering’s argument that it was willing to invest further after the Final Commissioning Date had passed was only raised in the cassation appeal and was irrelevant to the issues

361. The Claimant alleges in the Reply that the courts “*failed*” to take into account that the “*Claimant was prepared to inject an additional USD 3 million to finish the construction of the New Communal Facilities, although legally it was not obligated to do so*”.⁶¹⁷ This is not so.

362. Contrary to what the Claimant now says, Manolium-Engineering never asserted in its submissions before the Economic Court of Minsk or the Appeal Instance Court that the Claimant was “*prepared to inject an additional USD 3 million to finish the construction of the New Communal Facilities*”. As described in paragraph 359 above, it is therefore unsurprising that the Economic Court of Minsk and the Appeal Instance Court did not “*assess*” this allegation of fact.⁶¹⁸

363. The first time that the Claimant argued that it was “*prepared to inject*” further funds into the New Communal Facilities was in its submissions before the Supreme Court within the cassation proceedings. As explained in paragraph 355 above, the duty of the Supreme Court, however, is limited to addressing whether the decisions of the lower courts were correct as a matter of law and corresponded to the evidence submitted to and the facts established by the lower courts. The Supreme Court therefore did not address Manolium-Engineering’s argument, raised for the first time in its cassation appeal,⁶¹⁹ that the Claimant and Manolium-Engineering had allegedly

⁶¹⁷ Reply, paragraph 729, **CS-5**. See also: paragraphs 539(ii) and 624(ii), **CS-5**.

⁶¹⁸ Manolium Engineering’s Statement of Defence regarding case No. 399-3/2013, **Exhibit R-102**; Appeal of Manolium-Engineering dated 9 October 2014, **Exhibit C-149**.

⁶¹⁹ Cassation appeal of Manolium-Engineering dated 29 November 2014, pages 4 – 5 (“*Furthermore, the offer of Manolium Processing LLC and FE Manolium-Engineering to transfer the constructed facilities under communal ownership of the City of Minsk with an additional payment of the 3.5 million US*”).

made an “offer” to transfer funds to complete the construction of the New Communal Facilities after the Final Commissioning Date.⁶²⁰

364. Moreover, even if Manolium-Engineering had raised the argument that it was “prepared to inject” further funds into the New Communal Facilities in its submission before the Economic Court of Minsk, this would not have affected the outcome of the Termination Proceedings for the following reasons.
365. As explained in the Defence, the burden in the Termination Proceedings was on MCEC and Minsktrans to prove that the Claimant and Manolium-Engineering had missed the contractual deadline for the construction and commissioning of the New Communal Facilities under Clauses 6.1 and 6.2, while the burden was on the Claimant and Manolium-Engineering to prove either that they had not missed the deadline, or that they were not at fault for missing the deadline.⁶²¹ As explained in paragraph 356, the Claimant, represented by Mr Dolgov, itself accepted that this was the scope of the dispute.
366. The Claimant’s contention that it was “prepared to inject” a further US\$3 million to construct the New Communal Facilities *after* the Final Commissioning Date, had it been made, would have been irrelevant to the question of whether Manolium-Engineering was at fault for failing to construct the New Communal Facilities *by* the Final Commissioning Date, which is what entitled MCEC to terminate the contract under Clause 16.2.1.⁶²²
367. Lastly, the Claimant’s contention both in its cassation appeal and in these proceedings that it was “prepared to inject an additional USD 3 million to finish the construction

dollars (according to calculations by SE Minsktrans) that is needed to complete the construction of the facilities, including those stated during the court proceedings, were dismissed”), Exhibit C-151.

⁶²⁰ Rather, the Supreme Court’s decision was limited to considering whether the lower courts had made any “violations of the rules of material and/or procedural law that would entail the annulment of the court decisions”, which it correctly concluded they had not (Resolution of the Supreme Court of Belarus dated 27 January 2015, page 6, **Exhibit C-152**).

⁶²¹ Defence, paragraph 248, **RS-18**.

⁶²² Defence, paragraph 248, **RS-18**.

of the New Communal Facilities” is misleading. As Mr Akhramenko explains, Mr Dolgov’s offer of US\$3 million to complete the New Communal Facilities was made under a condition that, instead of the Investment Object, Manolium-Engineering would construct an “*accommodation and shopping center*”.⁶²³ Accordingly, by raising such an argument for the first time during the cassation proceedings, the Claimant sought to mislead the Belarusian Supreme Court during the Termination Proceedings and is seeking to mislead the Tribunal now.

d) Manolium-Engineering never argued that MCEC and/or Minsktrans were responsible for an increase in costs or causing delays

368. The Claimant asserts that the courts “*failed*” to take into account that the “*Respondent was responsible for the increase in costs of the construction by causing delays and changing the scope of works*”⁶²⁴ and that “[t]he delays in construction of the New Communal Facilities occurred primarily because of the Respondent”.⁶²⁵
369. Contrary to what the Claimant now says, Manolium-Engineering never argued during the Termination Proceedings that MCEC or Minsktrans were responsible for an “*increase in costs*” by “*causing delays and changing the scope of works*” or that the delays “*occurred primarily because of the Respondent*”.⁶²⁶ In the absence of such an allegation in the Termination Proceedings, the courts were not required – and, indeed, were unable – to “*assess*” this issue, as explained in paragraph 359 above.
370. In paragraph 627 of the Reply, the Claimant submits that “*the Supreme Court failed to properly allocate fault for delays in the construction of the New Communal Facilities*

⁶²³ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 100 – 102, **RWS-2**.

⁶²⁴ Reply, paragraph 730, **CS-5**.

⁶²⁵ Reply, paragraph 623(i), **CS-5**.

⁶²⁶ Manolium Engineering’s Statement of Defence regarding case No. 399-3/2013, **Exhibit R-102**; Appeal of Manolium-Engineering dated 9 October 2014, **Exhibit C-149**; Cassation appeal of Manolium-Engineering dated 29 November 2014, **Exhibit C-151**.

between the Parties".⁶²⁷ The Claimant further submits that "*the Supreme Court merely parroted the same mistaken conclusion as the lower courts by attributing to the Claimant all fault for the delays in construction of the New Communal Facilities, despite the evidence that the delays were actually the fault of the Respondent*".⁶²⁸ This is misleading because no evidence of Respondent's responsibility for any delays was put forward in the Termination Proceedings. The list of "*examples*" presented in these arbitration proceedings by the Claimant are all new allegations never raised during the Termination Proceedings.⁶²⁹

371. In fact, the issue of who was responsible for the delays before the Final Commissioning Date – 1 July 2011 – was not discussed by the Claimant and Manolium-Engineering during the Termination Proceedings. As already explained in the Defence, the only 'failure' on the part of MCEC to which Manolium-Engineering referred in its submission to the courts was MCEC's alleged refusal to extend the permits to the land plots for the construction of the New Communal Facilities, which expired on 1 July 2011.⁶³⁰ Manolium-Engineering, however, did not explain how the alleged "*refusal*" prevented it from complying with the Final Commissioning Date.⁶³¹
372. The Respondent already explains in the Defence that save for the "*refusal to extend the permits*" argument the Claimant never argued in the Termination Proceedings that MCEC and/or Minsktrans were responsible for delays.⁶³² The Claimant, however, continues to insist that the Belarusian courts "*failed*" to examine arguments and evidence that the Claimant and Manolium-Engineering never in fact submitted. The Claimant does not provide any evidence to the contrary (which is unsurprising).

⁶²⁷ See also: Reply, paragraph 630, **CS-5**.

⁶²⁸ Reply, paragraph 628, **CS-5**.

⁶²⁹ Reply, paragraph 629, **CS-5**.

⁶³⁰ Defence, paragraph 252, **RS-18**; Manolium Engineering's Statement of Defence regarding case No. 399-3/2013, **Exhibit R-102**.

⁶³¹ Defence, paragraph 252, **RS-18**.

⁶³² Defence, paragraph 252, **RS-18**; Manolium Engineering's Statement of Defence regarding case No. 399-3/2013, **Exhibit R-102**.

373. In any event, even if Manolium-Engineering had made such an allegation, the Respondent submits that it would have been incorrect on the facts. As already explained, it was the Claimant that was responsible for “*causing delays*” in the construction of the New Communal Facilities, not the Respondent; therefore the Claimant was responsible for any increase in costs as a result of the delays.⁶³³ As for the allegation that MCEC and Minsktrans were responsible for increasing costs by “*changing the scope of works*”, this is unpersuasive given that the New Communal Facilities were less extensive in scope than the Communal Facilities, which reduced the necessary construction costs.⁶³⁴
374. The Claimant’s position in the Reply that the courts “*entirely failed to assess the issues crucial for resolution of the dispute*” is therefore wholly untenable.⁶³⁵ Either Manolium-Engineering did not raise the arguments which the Claimant now alleges that the courts “*failed to assess*”, or the courts addressed and expressly rejected them.

2. The Termination Proceedings and the courts’ decision to terminate the Amended Investment Contract were entirely in accordance with Belarusian law

375. In addition to its allegations that the courts “*entirely failed to assess the issues crucial for resolution of the dispute*”,⁶³⁶ the Claimant makes a number of further assertions in support of its submission that the Termination Proceedings were wrongful. These assertions are addressed below to show that the Termination Proceedings and the courts’ decision to terminate the Amended Investment Contract were entirely in accordance with Belarusian law.

⁶³³ Defence, paragraphs 76 – 98 and 542 – 559, **RS-18**; paragraphs 107 – 188 above.

⁶³⁴ Reply, paragraphs 730 and 539(iii), **CS-5**.

⁶³⁵ Reply, paragraph 727, **CS-5**.

⁶³⁶ Reply, paragraph 727, **CS-5**.

a) Termination of the Amended Investment Contract was not an inappropriate and disproportionate remedy and, in any event, Manolium-Engineering and the Claimant never raised this argument

376. In paragraph 623(ii) of the Reply, the Claimant submits that the courts unlawfully granted MCEC and Minsktrans’s claim in the Termination Proceedings because the termination of the Amended Investment Contract was an inappropriate and disproportionate remedy. The Claimant submits that a more appropriate remedy would have been “*to apply a penalty for delay or to award damages caused by delay, but not to terminate the contract altogether*”.⁶³⁷ This is untenable from the Belarusian law standpoint.
377. Under Belarusian law, the court may not amend the claimant’s claim at its own discretion.⁶³⁸ Accordingly, if the claim is “*to terminate the contract due to a breach (delay) by the other party*”, the court’s options are to either grant the claim or dismiss it altogether. There is no option for the court to resolve not to terminate the contract but “*to apply a penalty for delay or award damages caused by delay*”. MCEC and Minsktrans did not ask the courts “*to apply a penalty for delay or award damages caused by delay*”. The reasons for that are set out in detail in paragraphs 338 – 343 above.
378. Neither the Claimant nor Manolium-Engineering argued in the Termination Proceedings that the termination of the Amended Investment Contract was an “*inappropriate and unproportional*” measure. As already explained in paragraphs 359

⁶³⁷ Reply, paragraph 623(ii), **CS-5**.

⁶³⁸ Belarusian Code of Commercial Procedure, Article 23 (in force between 7 March 2005 and 20 July 2014, and from 21 July 2014), **Exhibit RL-129**.

and 369 above, under Belarusian law the court may not consider the arguments that have not been raised by the parties.⁶³⁹

379. In any event, there is no ground for the courts under Belarusian law to dismiss a perfectly valid claim based on it not being “*an appropriate and proportional remedy*”.

b) The courts were not required to consider the compensation issue and, in any event, the Claimant is not entitled to a compensation under Belarusian law

380. In paragraph 336 of the Reply, the Claimant submits that “[e]ven if the Respondent were entitled to terminate the Investment Contract (which it was not), the Respondent still would have been required to pay compensation to the Claimant for the New Communal Facilities”. The Claimant does not provide any further explanations as to the basis on which the Respondent would have been required to pay compensation under Belarus law. Indeed, this is entirely incorrect from the Belarusian law standpoint.

381. As explained in the Defence, as a matter of Belarusian law, upon termination of the Amended Investment Contract the parties’ mutual obligations under the Amended Investment Contract are extinguished. This means that after the termination, the Claimant and Manolium-Engineering were no longer under an obligation to complete and commission the New Communal Facilities and to transfer them into the ownership of MCEC and/or Minsktrans. MCEC and Minsktrans, in turn, were no longer under an obligation to accept the New Communal Facilities into municipal ownership if and when they were constructed and commissioned.⁶⁴⁰

⁶³⁹ Belarusian Code of Commercial Procedure, Article 19 (in force between 7 March 2005 and 20 July 2014, and from 21 July 2014), 23 (in force between 7 March 2005 and 20 July 2014, and from 21 July 2014), **Exhibit RL-129**.

⁶⁴⁰ Defence, paragraph 264, **RS-18**.

382. As further explained in the Defence, following termination of the Amended Investment Contract, Manolium-Engineering remained the owner of the New Communal Facilities.⁶⁴¹ Accordingly, any obligatory compensation was off the table. MCEC could only acquire the incomplete New Communal Facilities at an acceptable price. The Claimant’s assertion that “*even if the Respondent were entitled to terminate the Investment Contract [...], [it] still would have been required to pay compensation to the Claimant for the New Communal Facilities*” is not based on any legal obligations that existed whether contractual or otherwise.⁶⁴²
383. In its cassation appeal in the Termination Proceedings, Manolium-Engineering (for the first time in the Termination Proceedings) submitted: “*We also consider it necessary to note that when deciding on the termination of the investment contract of 06 June 2003, the issue of compensation for the costs incurred by Manolium-Processing LLC for the project was not resolved, the amount of which, taking into account interest for the use of funds, was 36,346,000 US dollars*”.⁶⁴³
384. Given that there were no grounds in Belarusian law for the Claimant to seek any compensation from MCEC and/or Minsktrans upon the termination of the contract (as explained in paragraphs 380 – 382 above), the submission made by Manolium-Engineering in the cassation appeal was misplaced. By contrast, MCEC and/or Minsktrans were entitled to seek compensation of the damage caused by such termination (since the basis for the termination was a breach by Manolium-Engineering and/or the Claimant).⁶⁴⁴ Notably, MCEC and Minsktrans chose not to claim damages in the Termination Proceedings.
385. In any event, it was not within the Supreme Court’s competence to consider the issue of compensation raised by Manolium-Engineering in the cassation appeal for the first

⁶⁴¹ Defence, paragraph 265, **RS-18**.

⁶⁴² Reply, paragraph 336, **CS-5**.

⁶⁴³ Cassation Appeal of Manolium-Engineering dated 29 November 2014, page 5, **Exhibit C-151**.

⁶⁴⁴ Amended Investment Contract, clause 18, **Exhibit C-66**; Belarusian Civil Code, Article 14, **Exhibit RL-127**.

time. If Manolium-Engineering and/or the Claimant wanted to claim for a compensation, procedurally, they could have brought a separate claim or a counterclaim against MCEC and/or Minsktrans in the Termination Proceedings. As explained in paragraphs 359 above, the courts were not entitled to assess any claims or allegations not raised by the parties.

c) Termination of the Amended Investment Contract became legally effective on 29 October 2014

386. Pursuant to Article 423(3) of the Belarusian Civil Code, where the termination of the agreement is made by court “[...] *the obligations shall be deemed ceased [...] from the moment [...] the court judgment on termination [...] of the agreement enters into legal force*”.⁶⁴⁵ Pursuant to Article 204 of the Belarusian Code of Commercial Procedure, the first instance court judgement, if appealed and upheld by the appellate court, enters into legal force as of the date of the resolution of the appellate court.⁶⁴⁶ As explained in the Defence the termination of the Amended Investment Contract became legally effective on 29 October 2014, when the Appeal Instance of the Economic Court of Minsk upheld the judgment of the Economic Court of Minsk.⁶⁴⁷
387. After the termination became legally effective, Manolium-Engineering and the Claimant had the right to further 3 rounds of challenge of the judgement of the Economic Court of Minsk and of the Resolution of the Appeal Instance of the Economic Court of Minsk. First, the Claimant and Manolium-Engineering were entitled to file a cassation appeal with the Supreme Court (which they did).⁶⁴⁸ Further to the cassation instance, the Claimant and Manolium-Engineering were entitled to apply for a supervisory review of the Supreme Court’s resolution and the lower

⁶⁴⁵ Belarusian Civil Code, Article 423(3), **Exhibit RL-127**.

⁶⁴⁶ Belarusian Code of Commercial Procedure, Article 204 (in force between 7 March 2005 and 8 August 2008, and from 21 July 2014), **Exhibit RL-50**.

⁶⁴⁷ Defence, paragraph 263, **RS-18**. Resolution of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014, **Exhibit C-150**.

⁶⁴⁸ Belarusian Code of Commercial Procedure, Article 282 (in force between 7 March 2005 and 8 August 2008, and from 21 July 2014), **Exhibit RL-129**.

courts' judgements to the President of the Supreme Court or his deputy and the Prosecutor General or his deputy.⁶⁴⁹ Manolium-Engineering and the Claimant never exercised this right.

388. In paragraph 383 of the Reply, the Claimant submits that “*until* [the Supreme Court’s dismissal of the cassation appeal] *the Claimant had not been irreversibly deprived of [its] right to implement the Investment Object in accordance with the Investment Contract*”. From the Belarusian law standpoint, this is incorrect. The termination of the Amended Investment Contract came into force – and Manolium-Engineering and the Claimant lost all contractual rights – on 29 October 2014, the date when the Appeal Instance of the Economic Court of Minsk upheld the judgment of the Economic Court of Minsk. Had there been grounds for a “*reversal*” of this judgment, contrary to the Respondent’s position, such “*reversal*” would have been available at the supervision review of the case by both the President of the Supreme Court or his deputy and the General Prosecutor or his deputy – two stages which were never reached in the Termination Proceedings because the Claimant and Manolium-Engineering chose not to proceed to challenge the termination of the Amended Investment Contract to these authorities.

3. **The President was not involved in the Termination Proceedings**

389. In the Reply, the Claimant asserts that the outcome of the Termination Proceedings had been “*decided long ago when the President [...] decided to deprive the Claimant of its rights by deciding to implement another project on the land plot intended for the Investment Object*”,⁶⁵⁰ and that “*the court had no option other than to create an appearance of legitimacy of the termination of the Investment Contract*”.⁶⁵¹
390. The Claimant’s position is based on the following arguments:

⁶⁴⁹ Belarusian Code of Commercial Procedure, Article 300 (in force between 7 March 2005 and 20 July 2014, and from 21 July 2014), Article 301 (in force between 7 March 2005 and 20 July 2014, and from 21 July 2014), **Exhibit RL-129**.

⁶⁵⁰ Reply, paragraph 733, **CS-5**.

⁶⁵¹ Reply, paragraph 734, **CS-5**.

- A. the President decided to develop another project on the land plot intended for the Investment Object and another land plot adjacent to it. The Claimant would therefore be deprived of its right to develop the Investment Object;⁶⁵²
- B. following the President’s decision, on 15 August 2014, MCEC issued a decision transferring the land plot for the Investment Object from Minsktrans into the management of **Minskstroy**.⁶⁵³ This decision was “*based solely on the President’s decision*”;⁶⁵⁴ and
- C. the Respondent decided to expropriate the Claimant’s right to develop the Investment Object before the commencement of the Termination Proceedings, which the Respondent “*completely understood*”.⁶⁵⁵

391. The Respondent submits that the Claimant’s allegations are unsubstantiated and false, for the reasons set out below.

a) The President did not decide to develop the land plot intended for the Investment Object together with neighbouring land plot as a single investment project

392. In the Reply,⁶⁵⁶ the Claimant alleges that the President decided to develop the land plot for the implementation of the Investment Object together with neighbouring land plot as a single investment project. According to the Claimant, this meant that the land plot for the Investment Object would soon be transferred to another investor or into municipal ownership. The Respondent submits that no such decision was made by the

⁶⁵² Reply, paragraphs 532(i) and 669, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 154 – 155, **CWS-5**.

⁶⁵³ Reply, paragraphs 532(ii) and 670, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 156, **CWS-5**.

⁶⁵⁴ Reply, paragraphs 450 and 670, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 158, **CWS-5**.

⁶⁵⁵ Reply, paragraph 537, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 157, **CWS-5**.

⁶⁵⁶ Reply, paragraphs 532(i) and 669, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 154 – 155, **CWS-5**.

President and that the Claimant provided no evidence in support of its empty allegation. The press reports of 4 August 2014⁶⁵⁷ and 10 March 2017⁶⁵⁸ exhibited by the Claimant do not support its allegation.

393. It follows from the articles that in or around August 2014 the land plot for the implementation of the Investment Object and the land plot adjacent to it were being considered as “*a single investment project*”⁶⁵⁹. This option was merely discussed. As Mr Akhramenko points out, this does not mean that any decision had been made about the land for the Investment Object.⁶⁶⁰
394. After the Termination Proceedings ended, MCEC was entitled to manage the land plot on which the Investment Object was supposed to be constructed. As Mr Akhramenko describes,⁶⁶¹ it took some time for MCEC to decide how to use the land plot and different options were being considered. In the end, a decision was made not to develop the land plot the neighbouring land plot as a single investment project.
395. Accordingly, the President’s decision “*to terminate the Investment Contract [...] in 2014*” was not an “*arbitrary exercise of executive authority that was issued non-transparently and without the justification of any legal procedure*”⁶⁶² as such decision was never taken.

⁶⁵⁷ News portal TUT.BY, *Lukashenko has ordered the investment project for the construction of a multi-function complex on “Gorizont” squares in Minsk to be completed*, 4th August 2014 // Available at: <https://news.tut.by/economics/409738.html>, **Exhibit C-363**.

⁶⁵⁸ News portal TUT.BY, *The “Depot” on “Gorizont” or How the authorities are planning to use two dainty land plots in the centre of Minsk?*, 10th March 2017 // Available at: <https://news.tut.by/economics/534232.html?crnd=44397>, **Exhibit C-364**.

⁶⁵⁹ News portal TUT.BY, *Lukashenko has ordered the investment project for the construction of a multi-function complex on “Gorizont” squares in Minsk to be completed*, 4th August 2014 // Available at: <https://news.tut.by/economics/409738.html>, **Exhibit C-363**; News portal TUT.BY, *The “Depot” on “Gorizont”, or How do the authorities plan to develop two tasty sites in the centre of Minsk?*, 10th March 2017 // Available at: <https://news.tut.by/economics/534232.html?crnd=44397>, **Exhibit C-364**.

⁶⁶⁰ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 67 – 71, **RWS-4**.

⁶⁶¹ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 72 – 77, **RWS-4**.

⁶⁶² Reply, paragraph 671, **CS-5**.

b) MCEC did not issue a decision transferring the land plot for the implementation of the Investment Object from Minsktrans to Minskstroy

396. In the Notice,⁶⁶³ the Claimant alleges that, on 15 August 2014, MCEC made the land plot intended for the Investment Object available to Minskstroy. The Respondent explains in the Defence⁶⁶⁴ that MCEC's decision of 15 August 2014 concerns certain buildings located on the land plot designated for the Investment Object, rather than the land plot itself. In the Reply,⁶⁶⁵ the Claimant however does not address the Respondent's position but rather continues to maintain, despite the evidence to the contrary, that MCEC transferred the land plot intended for the construction of the Investment Object from Minsktrans to Minskstroy. According to the Claimant, this decision was made after the President's decision to develop the land plot for the Investment Object and neighbouring land plot as a single investment project.
397. The Respondent maintains that an attachment to MCEC's decision dated 15 August 2014 lists "*property allocated for economic management to State Enterprise 'Minsktrans' [...] and being gratuitously transferred to State Industrial Association 'Minskstroy'*".⁶⁶⁶ The property list clearly shows that no land plot was transferred from Minsktrans to Minskstroy.
398. In any event, the alleged transfer of the land plot for the implementation of the Investment Object from one state-owned entity to another would not prevent Manolium-Engineering from leasing the land plot. Accordingly, had Manolium-Engineering and the Claimant performed their obligations in connection with the New Communal Facilities, the Amended Investment Contract would not have been

⁶⁶³ Notice, paragraph 258, **CS-1**.

⁶⁶⁴ Defence, paragraph 205, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 119, **RWS-2**.

⁶⁶⁵ Reply, paragraphs 450, 532(ii) and 670, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 156 and 158, **CWS-5**.

⁶⁶⁶ Decision of MCEC dated 15 August 2014 (emphasis added), **Exhibit C-142**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 71, **RWS-4**.

terminated and Manolium-Engineering would have been able to lease the land plot from Minskstroy.

c) The Belarusian courts' judgment in the Termination Proceedings was not “pre-ordained” or “predetermined”

399. In an attempt to create the false impression that the Belarusian courts' judgement in the Termination Proceedings was *pre-ordained*⁶⁶⁷ and *pre-determined*⁶⁶⁸, the Claimant makes the following five allegations in respect of when such judgment was made:

- A. the President decided to deprive the Claimant of its right to develop the Investment Object in the summer of 2014, before any court proceedings were initiated;⁶⁶⁹
- B. the President instructed MCEC to seize the land plot for the Investment Object before the Economic Court of Minsk issued a judgment on 9 September 2014 terminating the Amended Investment Contract;⁶⁷⁰
- C. MCEC transferred the land plot for the Investment Object from Minsktrans to Minskstroy before any court judgment on the termination of the Amended Investment Contract had been issued;⁶⁷¹
- D. MCEC had *“completely understood”*⁶⁷² that the Claimant would be deprived of its right to develop the Investment Object before the Termination Proceedings were commenced;⁶⁷³ and

⁶⁶⁷ Reply, paragraph 532(iii), **CS-5**.

⁶⁶⁸ Reply, paragraph 734, **CS-5**.

⁶⁶⁹ Reply, paragraph 532(i), **CS-5**.

⁶⁷⁰ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 158, **CWS-5**.

⁶⁷¹ Reply, paragraph 532(ii), **CS-5**.

⁶⁷² Reply, paragraph 537, **CS-5**.

⁶⁷³ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 157, **CWS-5**.

E. “the Chair of the Economic Court of Minsk” would allegedly “receive instructions” at sessions with MCEC on “how to consider cases correctly”.⁶⁷⁴

400. The Respondent submits that every one of these allegations is baseless.

401. As described in the Defence⁶⁷⁵ and above,⁶⁷⁶ the Termination Proceedings were commenced on 12 November 2013 when MCEC and Minsktrans filed a claim in the Economic Court of Minsk seeking the termination of the Amended Investment Contract. Such termination became legally effective on 29 October 2014 when the Appeal Instance of the Economic Court of Minsk upheld the judgment of the Economic Court of Minsk.⁶⁷⁷

402. Accordingly, as for the allegation (a) above, the Termination Proceedings were already ongoing for almost a year by the time the President purportedly decided to transfer the land plot for the implementation of the Investment Object from Minsktrans to Minskstroy in the summer of 2014.

403. As for the allegation (b) above, the Claimant exhibits a letter from MCEC to the Claimant dated 11 December 2014⁶⁷⁸ to support its claim that the outcome of the Termination Proceedings was predetermined by the President’s alleged instruction to seize the land plot for the Investment Object.⁶⁷⁹ However, this letter does not support the Claimant’s position. First, the letter does not show when the President instructed “to develop the land plot for [the Investment Object] using the efforts of and at the expense of [MCEC].” Second, MCEC sent the letter to the Claimant on 11 December 2014 which was after the termination of the Amended Investment Contract had become legally binding on 29 October 2014.

⁶⁷⁴ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 163, **CWS-5**.

⁶⁷⁵ Defence, paragraph 246, **RS-18**.

⁶⁷⁶ See paragraph 344 above.

⁶⁷⁷ Defence, paragraph 263, **RS-18**; See paragraphs 386 – 388 above.

⁶⁷⁸ Letter from MCEC to the Claimant dated 11 December 2014, **Exhibit C-365**.

⁶⁷⁹ Reply, paragraphs 733 – 734, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 152, **CWS-5**.

404. In any event, as Mr Akhramenko reiterates,⁶⁸⁰ there is no inconsistency between the fact that, even before the Economic Court of Minsk had handed down its judgment on the termination of the Amended Investment Contract on 9 September 2014, MCEC discussed the fate of the Investment Object’s land. Given that it was obvious from the Claimant’s behaviour that it was not in a position, nor willing to complete the construction of the New Communal Facilities or the Investment Object, there is nothing surprising in various options being discussed of using this land after the termination of the Amended Investment Contract. Mr Dolgov’s conclusion that the “*President had decided that [the Investment Object] [...] should not go on*”⁶⁸¹ is therefore entirely speculative.
405. As for the allegation (c) above, as already explained,⁶⁸² MCEC’s decision of 15 August 2014 does not concern the transfer of the land plot designated for the development of the Investment Object. It is therefore irrelevant when MCEC issued the decision.
406. As for the allegation (d) above, first, it is the Respondent’s position that the Claimant’s and Manolium-Engineering’s right to the Investment Object was contingent upon the construction, commissioning and registration of the New Communal Facilities. The Claimant and Manolium-Engineering never obtained this right because they had been unable and/or unwilling to finance the construction works and therefore failed to fulfil the obligations under the Amended Investment. Second, Mr Dolgov alleges that, “[a]s far as [he is] aware”, at a meeting held by MCEC before the 15 August 2014 decision was issued, Ms Birich, Deputy Chair of Minsk City Executive Committee, said “*What are we doing? We have not even won the case in the court*”.⁶⁸³ This statement is hearsay and not credible. This is the first time in

⁶⁸⁰ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 119, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 67, **RWS-4**.

⁶⁸¹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 155, **CWS-5**; Reply, paragraph 669, **CS-5**;

⁶⁸² See paragraphs 396 – 398 above.

⁶⁸³ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 157, **CWS-5**.

these proceedings Mr Dolgov makes this allegation. Given the weight he seeks to attach to this purported statement, had it been true, the Claimant would have raised the issue in its prior written submissions.

407. As for the allegation (e) above, according to Mr Dolgov, he “*did not nourish illusions*”⁶⁸⁴ that the judgment in the Termination Proceedings would be handled in favour of the Claimant and Manolium-Engineering, as “*the Chair of the Economic Court of Minsk*” would allegedly “*receive instructions*” at sessions with MCEC on “*how to consider cases correctly*”.⁶⁸⁵ Mr Dolgov’s allegation is false.
408. Under Belarusian law, judges may attend sessions with members of the executive and legislative branches to review and discuss draft legislation and to interpret statutes. MCEC’s sessions, however, did not concern such issues as they were held for the purpose of discussing, *inter alia*, the implementation of investment projects in Minsk. In any event, As Mr Akhramenko explains,⁶⁸⁶ “*no one from the Economic Court of the City of Minsk attended even one of [the] meetings*” held between 2012 and 2015 regarding projects being implemented by Manolium-Engineering or Tekstur, “*nor did Mr Dolgov himself*”. The Claimant’s allegation⁶⁸⁷ that the Chairman of MCEC gives “*instructions*” to the Chairman of the Economic Court of Minsk “*on ‘how to resolve cases’*” is therefore absurd and unsubstantiated.
409. Accordingly, the outcome of the Termination Proceedings was not “*pre-ordained*”⁶⁸⁸ and “*pre-determined*”.⁶⁸⁹

⁶⁸⁴ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 163, **CWS-5**.

⁶⁸⁵ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 163, **CWS-5**.

⁶⁸⁶ Second Witness Statement of N. Akhramenko dated 30 May 2019, paragraph 65, **RWS-4**.

⁶⁸⁷ Reply, paragraph 708, **CS-5**.

⁶⁸⁸ Reply, paragraph 532(iii), **CS-5**.

⁶⁸⁹ Reply, paragraph 734, **CS-5**.

N. ATTEMPTS TO VALUE THE NEW COMMUNAL FACILITIES

1. Paritet-Standart Report

410. There is no dispute between the parties that in August – September 2012, the Claimant, MCEC and Minsktrans had discussed Mr Dolgov’s proposal to terminate the Amended Investment Contract by mutual agreement and, for this reason, attempted to determine the amount of the costs incurred by Manolium-Engineering in constructing the New Communal Facilities.⁶⁹⁰ The Claimant also admits that Minsktrans calculated the amount of those costs at US\$14,743,586, while the Claimant calculated them at US\$16,287,546.⁶⁹¹
411. In the Notice, the Claimant alleges that “MCEC did not accept [Manolium-Engineering’s] proposal [to conduct the audit]”.⁶⁹² However, now, in his fourth witness statement, Mr Dolgov alleges that it was MCEC that “proposed engaging an independent auditor” and that the Claimant, “based on [MCEC’s] proposal, [...] engaged [Paritet-Standart]”.⁶⁹³ The Claimant alleges the same in the Reply.⁶⁹⁴
412. Earlier in the Reply, the Claimant goes even further alleging that “the Parties agreed to engage the independent auditor Paritet-Standart to resolve th[e] difference [between Minsktrans’ and the Claimant’s valuations]”.⁶⁹⁵ The Respondent appreciates that the Claimant seeks to retract its misleading allegation in the Notice that “MCEC did not accept the proposal [to conduct the audit]”. The Respondent respectfully submits, however, the Claimant’s most recent allegation is also misleading.

⁶⁹⁰ Defence, paragraphs 220 – 222, **RS-18**; Reply, paragraphs 244 – 246, **CS-5**.

⁶⁹¹ Defence, paragraphs 223 – 224, **RS-18**; Reply, paragraph 246, **CS-5**.

⁶⁹² Notice, paragraph 245, **CS-1**.

⁶⁹³ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 134, **CWS-5**.

⁶⁹⁴ Reply, paragraph 850, **CS-5**.

⁶⁹⁵ Reply, paragraph 247, **CS-5**.

413. As explained in the Defence,⁶⁹⁶ it was Manolium-Engineering’s proposal that “*a committee comprising of the representatives of MCEC, Manolium-Engineering and an independent audit company*” was established “*for the purpose of resolving disagreements regarding the amount of costs [...] for construction of [the Depot]*”.⁶⁹⁷ MCEC’s counter-offer was to conduct an independent audit with Minsktrans’ representatives taking part in that process.⁶⁹⁸ As explained in the Defence,⁶⁹⁹ that suggestion was in line with the purpose declared by Manolium-Engineering to resolve “*disagreements regarding the amount of costs*”.⁷⁰⁰ The Claimant appears to concur that these were the proposals made since it refers to the relevant exhibits in the Reply.⁷⁰¹
414. However, it follows from the exchange of letters between Manolium-Engineering and MCEC⁷⁰² that, contrary to what Claimant asserts in the Reply, the parties reached agreement to conduct an audit review only. No agreement was reached by the parties to engage Paritet-Standart; it was involved solely by Manolium-Engineering on its own initiative.⁷⁰³ Furthermore, despite offering to involve MCEC’s representatives in the audit review Manolium-Engineering decided to exclude them after (and equally ignored MCEC’s suggestion to invite Minsktrans).
415. As described in the Defence, Paritet-Standart’s calculation concerned “*the amount of [costs] incurred by [Manolium-Engineering] for the entire period of the investment*

⁶⁹⁶ Defence, paragraph 225, **RS-18**.

⁶⁹⁷ Letter from Manolium-Engineering to MCEC dated 20 September 2012, **Exhibit C-129**.

⁶⁹⁸ Letter from MCEC to Manolium-Engineering dated 3 October 2012, **Exhibit C-130**; Defence, paragraph 226, **RS-18**.

⁶⁹⁹ Defence, paragraph 226, **RS-18**.

⁷⁰⁰ Letter from Manolium-Engineering to MCEC dated 20 September 2012, **Exhibit C-129**.

⁷⁰¹ Reply, paragraph 247, footnote 260, **CS-5**.

⁷⁰² Letter from Manolium-Engineering to MCEC dated 20 September 2012, **Exhibit C-129**; Letter from MCEC to Manolium-Engineering dated 3 October 2012, **Exhibit C-130**.

⁷⁰³ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 81 – 82, **RWS-4**. As Mr Akhramenko explains, MCEC did not propose to engage a particular audit company.

project”, rather than the actual costs spent directly on the New Communal Facilities. Paritet-Standart also did not specify the data it had examined.⁷⁰⁴

416. Mr Akhramenko explains that Paritet-Standart delivered a 6-page document containing a short 1.5 pages long calculation. The calculation itself was a summary of Manolium-Engineering’s accounting data with little or no analysis. Accordingly, even if MCEC wanted to consider it, it would not be helpful for the purpose of resolving “*disagreements regarding the amount of costs*”.⁷⁰⁵
417. On 8 and 20 November 2012, Manolium-Engineering sent two letters referring to “*the audit review conducted by LLC “Partner-Standart” [sic]*”. Both letters confirmed that the Paritet-Standart’s calculations included not only the actual costs spent directly on the New Communal Facilities, but also “*other costs not included in the [cost estimate]*”.⁷⁰⁶ Both letters also referred to certain alleged instructions of Ms Zhanna Birich, then the deputy chairman of MCEC, while, as described in paragraph 414 above, no such instruction were given. None of these two letters contains a request to MCEC to compensate the costs calculated by Paritet-Standart. As Mr Akhramenko explains, at that time the Parties discussed various options to extend the contractual terms expired in July 2011 and to enter into a New Investment Contract.⁷⁰⁷
418. Notably, the letter of 20 November 2012 stated that as at 31 December 2011, the amount of costs incurred by Manolium-Engineering was US\$17,356,122.85,⁷⁰⁸ whilst the Paritet-Standart Report stated that as at 1 October 2012 the amount of costs incurred was US\$18,313,814.96.⁷⁰⁹ In the letter of 20 November 2012, Manolium-Engineering did not explain about this significant discrepancy between the two figures.

⁷⁰⁴ Defence, paragraph 227, **RS-18**; Paritet-Standart Report, pages 1 – 2, **Exhibit C-131**.

⁷⁰⁵ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 83, **RWS-4**.

⁷⁰⁶ Letter from Manolium-Engineering to MCEC dated 8 November 2012, **Exhibit R-197**; Letter from Manolium-Engineering to MCEC dated 20 November 2012, **Exhibit R-198**.

⁷⁰⁷ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 86, **RWS-4**.

⁷⁰⁸ Letter from Manolium-Engineering to MCEC dated 20 November 2012, **Exhibit R-198**.

⁷⁰⁹ Paritet-Standart Report, page 6, **Exhibit C-131**.

419. The Claimant alleges that “*the Respondent **accepted** the independent evaluation made by Paritet-Standart and referred to it on 28 March 2013*”.⁷¹⁰ This is not true and misleading. As Mr Akhramenko explains,⁷¹¹ by letter of 28 March 2013⁷¹² MCEC responded to the Claimant’s proposal to compensate its costs in the amount of US\$30 million.⁷¹³ MCEC’s reference to the Paritet-Standart Report was made solely for the purpose of highlighting the Claimant’s and Manolium-Engineering’s inconsistent position on the issue of the amount of costs to construct the New Communal Facilities.⁷¹⁴
420. The Claimant also alleges that “*the Respondent did not raise any objection to the independent Paritet-Standart valuation until 2015*”.⁷¹⁵ This is misleading.
421. In the course of the Termination Proceedings, Manolium-Engineering presented the Paritet-Standart Report. At the court hearing of 29 July 2014, Minsktrans, which was to participate in the audit review, expressly submitted that that report showed only the amount of funds spent by Manolium-Engineering in Belarus, which included the costs not directly relating to the construction of the New Communal Facilities (such as Manolium-Engineering’s operating expenses).⁷¹⁶
422. For the above reasons, neither MCEC nor Minsktrans ever accepted the findings of the Paritet-Standart Report.

2. Registration and Cadastre Agency Report

423. There is no dispute between the Parties that in the course of the Termination Proceedings, the Economic Court of Minsk on MCEC’s request appointed the

⁷¹⁰ Reply, paragraph 249 (emphasis in the original), **CS-5**. See also Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 148, **CWS-5**, and Reply, paragraph 852, **CS-5**.

⁷¹¹ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 84 – 85, **RWS-4**.

⁷¹² Letter from MCEC to the Claimant and Manolium-Engineering dated 28 March 2013, **Exhibit R-105**.

⁷¹³ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**.

⁷¹⁴ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 85, **RWS-4**.

⁷¹⁵ Reply, paragraph 249, **CS-5**.

⁷¹⁶ Minutes of the court hearing re case No. 399-3/2013 dated 29 – 30 July 2014, **Exhibit R-117**.

Registration and Cadastre Agency as the valuation expert.⁷¹⁷ It is also not in issue between the Parties that the Claimant ultimately asked the court to cancel this expert examination.⁷¹⁸

424. The Claimant alleges, however, that “*even if [it] had accepted the expert with the court proceedings, the result would be the same [as in the Registration and Cadastre Agency Report, i.e. US\$18,129,933.17]*”.⁷¹⁹ This is speculative and wrong.

425. First, the scope of the court-appointed expert examination differed from what the Registration and Cadastre Agency subsequently done on Manolium-Engineering’s instructions:

A. At the court hearing on 29 – 30 July 2014, the parties agreed that the Registration and Cadastre Agency (1) would “*determine the value of the actual (actually incurred [by the Claimant and Manolium-Engineering]) costs*” for constructing the New Communal Facilities, (2) would “*determine the costs of construction and installation works required to complete [the New Communal Facilities]*”, and (3) would “*determine the extent (percentage) of completion of the [New Communal Facilities]*”.⁷²⁰ Moreover, before engaging the Registration and Cadastre Agency in February 2015 (i.e. outside the Termination Proceedings), the parties agreed that it would examine issues (1) and (2) above;⁷²¹

⁷¹⁷ Ruling of the Economic Court of Minsk on scheduling an expertise and suspending court proceedings dated 30 July 2014, **Exhibit C-145**; Defence, paragraphs 256 – 259, **RS-18**; Reply, paragraphs 264 – 265, **CS-5**.

⁷¹⁸ Claimant’s motion to the Economic Court of Minsk (undated) received by the court on 29 August 2014, **Exhibit R-118**; Ruling of the Economic Court of Minsk to resume the proceedings dated 1 September 2014, **Exhibit C-146**; Defence, paragraph 260, **RS-18**; Reply, paragraph 265, **CS-5**.

⁷¹⁹ Reply, paragraph 267, **CS-5**.

⁷²⁰ Minutes of the court hearing re case No. 399-3/2013 dated 29 – 30 July 2014, **Exhibit R-117**.

⁷²¹ Defence, paragraph 273, **RS-18**; Minutes of the meeting attended by MCEC, Minsktrans and Claimant dated 4 February 2015, Clause 2.1, **Exhibit C-153**; Letter from MCEC to the Claimant dated 20 January 2015, **Exhibit R-121**; Letter from MCEC to Manolium-Engineering dated 4 September 2015, **Exhibit C-158**.

- B. By contrast, Manolium-Engineering instructed the Registration and Cadastre Agency to look much wider by carrying out a “*construction and technical audit*” examining all its costs, not only the direct costs of construction of the New Communal Facilities.⁷²² Furthermore, as the Registration and Cadastre Agency informed MCEC, Manolium-Engineering did not instruct it to “[take] into account their construction readiness”.⁷²³ As MCEC had explained on several occasions, the latter condition required a separate calculation of the costs necessary to complete the New Communal Facilities.⁷²⁴
426. Accordingly, had the Registration and Cadastre Agency conducted expert examination as part of the Termination Proceedings, it would also calculate, *inter alia*, the costs to complete the New Communal Facilities.
427. Second, Manolium-Engineering did not provide the Registration and Cadastre Agency with all the documents,⁷²⁵ which the agency had previously said it would need to carry out the court-appointed expert examination.⁷²⁶
428. In particular, once the Economic Court of Minsk appointed the Registration and Cadastre Agency as the expert, it had applied to the court with a motion to provide, *inter alia*, the following documents required to conduct the valuation:
- A. all Design Specifications and Estimate Documentation;
- B. all construction contracts, work acceptance certificates and certificates of the value of the works performed;

⁷²² Defence, paragraph 275, **RS-18**; Letter from Manolium-Engineering to the Registration and Cadastre Agency dated 24 February 2015, **Exhibit R-122**; Services agreement between Manolium-Engineering and the Registration and Cadastre Agency dated 26 February 2015, **Exhibit R-123**.

⁷²³ Letter from the Registration and Cadastre Agency to MCEC dated 26 June 2015, **Exhibit R-124**.

⁷²⁴ Letter from MCEC to the Claimant dated 20 January 2015, **Exhibit R-121**; Letter from MCEC to Manolium-Engineering dated 4 September 2015, **Exhibit C-158**.

⁷²⁵ Registration and Cadastre Agency Report, pages 2 – 4, **Exhibit C-154**.

⁷²⁶ Motion of the Registration and Cadastre Agency to the Economic Court of Minsk dated 14 August 2014, **Exhibit R-203**.

- C. all as-built documentation, including work log books, architectural supervision logs, logs of inspection of supplied materials, concealed work inspection certificates, acts of critical structures acceptance, soil compaction acts, test certificates, land survey acts.⁷²⁷
429. The Registration and Cadastre Agency specifically warned the Economic Court of Minsk that in the absence of the above documents it would conduct the examination on the basis of the available files or would not be able to deliver the expert report requested.⁷²⁸ The Economic Court of Minsk communicated the Registration and Cadastre Agency's request list and the warning to the Claimant and Manolium-Engineering.⁷²⁹
- A. The list of source documents actually analysed by the Registration and Cadastre Agency for Manolium-Engineering during the "*construction and technical audit*" was much narrower.⁷³⁰
- B. The documents given by Manolium-Engineering to the Registration and Cadastre Agency were too scant. For example, it gave only the consolidated cost estimates for the Depot and the Pull Station, and not detailed cost estimates for the particular components of the New Communal Facilities.⁷³¹ For the Road, the Registration and Cadastre Agency did not even review the consolidated cost estimate for the Road, because Manolium-Engineering just failed to provide it.⁷³² As a result, the Registration and Cadastre Agency could

⁷²⁷ Motion of the Registration and Cadastre Agency to the Economic Court of Minsk dated 14 August 2014, **Exhibit R-203**.

⁷²⁸ Motion of the Registration and Cadastre Agency to the Economic Court of Minsk dated 14 August 2014, **Exhibit R-203**.

⁷²⁹ Letter from the Economic Court of Minsk to the Claimant and Manolium-Engineering dated 21 August 2014, **Exhibit R-204**.

⁷³⁰ Registration and Cadastre Agency Report, pages 2 – 4, **Exhibit C-154**.

⁷³¹ Registration and Cadastre Agency Report, page 3, **Exhibit C-154**.

⁷³² Registration and Cadastre Agency Report, page 4, **Exhibit C-154**.

not identify how the costs to construct the Road as recorded by Manolium-Engineering related to the cost estimate for the Road.

430. Further, Manolium-Engineering did not provide the Registration and Cadastre Agency with the design documentation,⁷³³ which, along with cost estimates, forms the part of the Design Specification and Estimate Documentation. Therefore, the Registration and Cadastre Agency could not and did not verify whether the works performed by Manolium-Engineering complied with the projected design.
431. Similarly, the Registration and Cadastre Agency was not provided with any as-built documentation. Accordingly, it limited the review to contracts with contractors and suppliers, work completion certificates, certificates of the value of the works performed and consignment notes for materials and equipment supplied.⁷³⁴
432. The Respondent respectfully submits that the survey made by the Registration and Cadastre Agency on Manolium-Engineering's instructions necessarily led to highly approximate, and thus not reliable, findings, because it was solely based on bilateral documents made between a customer and a contractor (i.e. work completion certificates and consignment notes for materials and equipment). By contrast, as-built documentation, which includes, in particular, architectural supervision logs⁷³⁵ and concealed work inspection certificates,⁷³⁶ allows an expert to verify that what was declared by the contractor and supplier in various certificates and notes reflects the true state of affairs, i.e. that the works performed and goods supplied comply with the Design Specification and Estimate Documentation and meet the quality requirements.

⁷³³ Registration and Cadastre Agency Report, pages 3 – 4, **Exhibit C-154**.

⁷³⁴ Registration and Cadastre Agency Report, page 4, **Exhibit C-154**.

⁷³⁵ Architectural supervision logs certify that works, materials and equipment comply with the Design Specification and Estimate Documentation.

⁷³⁶ Concealed work inspection certificates confirm proper performance of works, which will be impossible to inspect at the time the building or structure is completed. Concealed works include, for example, works relating to foundations and soil compaction.

433. Therefore, the Registration and Cadastre Agency calculated the costs on the basis of a very limited set of documents, undertaking a task which it said itself it would not have been possible without the full set of documents for the purpose of the Termination Proceedings and as an expert appointed by the Economic Court of Minsk.
434. For the above reasons, the Claimant’s allegation that “*even if [it] had accepted the expert with the court proceedings, the result would be the same*” is speculative and wrong. As explained in paragraphs 580, 599 – 600 below, for example, the defects in the Depot identified by Belcommunproject in 2017 – 2018 demonstrate that the differences between the scope of the court-appointed expert examination and Manolium-Engineering’s later instructions to the Registration and Cadastre Agency and the narrower list of documents actually reviewed by the agency did in fact affect its findings.
435. The Claimant appears to suggest that the facts (1) that the Registration and Cadastre Agency was “*another Respondent entity*”, (2) that its report “*was prepared by ‘specifically trained [specialists]’*”, and (3) that it was “*at 235 pages*” alone make the Registration and Cadastre Agency Report fit for purpose.⁷³⁷ These are missing the point.
436. As explained in the Defence, MCEC could not use the Registration and Cadastre Agency Report for determining the acquisition price of the New Communal Facilities, because it did not take into account all relevant factors, which were agreed with the Claimant at the meeting of 4 February 2015.⁷³⁸ These factors corresponded in all relevant aspects to the questions agreed between the parties in the course of the Termination Proceedings.⁷³⁹

⁷³⁷ Reply, paragraphs 853 – 854, **CS-5**.

⁷³⁸ Defence, paragraphs 272 – 282, **RS-18**. Minutes of the meeting of MCEC, Minsktrans and Claimant dated 4 February 2015, **Exhibit C-153**.

⁷³⁹ Minutes of the court hearing re case No. 399-3/2013 dated 29 – 30 July 2014, **Exhibit R-117**.

3. 2016 Memorandum

437. In the Reply, the Claimant alleges that the Respondent’s “*own evaluation*”⁷⁴⁰ (i.e. the 2016 Memorandum) “*was done specifically for the purpose of paying compensation to the Claimant*”,⁷⁴¹ as if there was an obligation on the part of MCEC or Minsktrans to compensate the costs of construction of the New Communal Facilities. This is wholly misguided.
438. As explained in the Defence, as a matter of Belarusian law, neither MCEC nor Minsktrans were obliged to compensate the Claimant or Manolium-Engineering for their costs in constructing the New Communal Facilities.⁷⁴² Following the termination of the Amended Investment Contract, Manolium-Engineering remained the owner of the New Communal Facilities.⁷⁴³ Accordingly, the only option that could have been on the table for negotiation was acquisition of the New Communal Facilities at mutually acceptable price.⁷⁴⁴ Indeed, as the Claimant admits,⁷⁴⁵ in November – December 2015, MCEC “*was having internal discussions with the Belarusian authorities regarding the potential acquisition of the New Communal Facilities*”.⁷⁴⁶
439. The ultimate purpose of engaging the CAO of the Ministry of Finance was to assist MCEC with “*determin[ing] the value of the incomplete construction facilities (the investor’s property [i.e. the New Communal Facilities] located on the unauthorised occupied land plot)*”,⁷⁴⁷ and not “*paying compensation to the Claimant*”,

⁷⁴⁰ Reply, paragraph 843, **CS-5**.

⁷⁴¹ Reply, paragraphs 837 and 843(iii), **CS-5**.

⁷⁴² Defence, paragraph 264 – 265, **RS-18**.

⁷⁴³ Defence, paragraph 265, **RS-18**.

⁷⁴⁴ Defence, paragraph 268, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 111, 113, 125 – 126, **RWS-2**.

⁷⁴⁵ Reply, paragraph 838, **CS-5**.

⁷⁴⁶ Defence, paragraph 285 – 289 (emphasis added), **RS-18**; Letter from MCEC to the Ministry of Economy of the Republic of Belarus dated 26 November 2015, **Exhibit R-129**.

⁷⁴⁷ Letter from MCEC to the Ministry of Economy of the Republic of Belarus dated 26 November 2015 (emphasis added), **Exhibit R-129**. See also Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 93, **RWS-4**.

as the Claimant now contends.⁷⁴⁸ All previous valuations conducted by Paritet-Standart⁷⁴⁹ and the Registration and Cadastre Agency⁷⁵⁰ upon Manolium-Engineering's instructions had failed to achieve this purpose.

440. As Mr Akhramenko explains, the next step after the audit by the CAO of the Ministry of Finance would have been to discuss and agree on terms and conditions of acquisition of the New Communal Facilities with Manolium-Engineering, including the acquisition price and the removal from any calculations of certain costs and expenses, which the Claimant and Manolium-Engineering attempted to include in its previous calculations (e.g. "*expenses for work and materials not listed in the project design specifications and estimate documentation*" and "*amounts unsupported by payment documentation and work acceptance certificates*").⁷⁵¹
441. For these reasons, MCEC proposed⁷⁵² that the Council of Ministers and the Minister of Finance specifically instruct RSTC's employees and the officers of the CAO of the Ministry of Finance to undertake, in particular, a check measurement of the New Communal Facilities in order to determine the actual volume of the works performed and whether those works complied with the design documentation.⁷⁵³ This was

⁷⁴⁸ Reply, paragraph 837, **CS-5**.

⁷⁴⁹ Defence, paragraph 227, **RS-18**; Manolium-Engineering instructed Paritet-Standart to determine "*the amount of [costs] incurred by [Manolium-Engineering] for the duration of the investment project*" (emphasis added) rather than the actual costs spent on the New Communal Facilities (Paritet-Standart Report, page 1, **Exhibit C-131**).

⁷⁵⁰ Defence, paragraph 275, **RS-18**; Manolium-Engineering asked the Registration and Cadastre Agency to undertake an assessment of all its costs, not only the direct costs of construction of the New Communal Facilities (Letter from Manolium-Engineering to the Registration and Cadastre Agency dated 24 February 2015, **Exhibit R-122**).

⁷⁵¹ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 131 – 134, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 94, **RWS-4**. See also Letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-18/5437 dated 8 December 2015, **Exhibit R-133**.

⁷⁵² Letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-18/5437 dated 8 December 2015, **Exhibit R-133**.

⁷⁵³ Defence, paragraphs 290 – 291, **RS-18**; Instruction of the Council of Ministers of the Republic of Belarus No. 39/1078r dated 27 January 2016, **Exhibit R-137**; Instruction of the Minister of Finance of the republic of Belarus No. 8 dated 3 February 2016, **Exhibit R-139**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 142 – 143, **RWS-2**.

important, in particular, for the purpose of determining whether the unfinished New Communal complied with the Design Specification and Estimate Documentation.

442. The CAO of the Ministry of Finance and RSTC were performing such an audit for the first time,⁷⁵⁴ and they had only two and a half weeks to complete the audit, which, given that its scope was considerable, was not sufficient.⁷⁵⁵
443. Further, the CAO of the Ministry of Finance and RSTC failed to comply with the Council of Ministers' and the Minister of Finance's instructions and failed to conduct a comprehensive verification of check measurement and review primary documentation (such as work acceptance certificates and as-built documentation).⁷⁵⁶ Instead, the audit was primarily based on the accounting check.⁷⁵⁷
444. More specifically, the 2016 Memorandum was prepared following the Instruction on the Procedure for Determining the Costs of Constructing a Facility for Accounting Purposes approved by Resolution of the Ministry of Architecture and Construction No. 10 dated 14 May 2007⁷⁵⁸ ("**Instruction No. 10**"). Pursuant to Clause 2 of Instruction No. 10, "*the 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*"⁷⁵⁹ (emphasis added). Similarly, under Clause 11 of Instruction No. 10,

⁷⁵⁴ Letter from the Ministry of Finance to MCEC No. 3-3-16/18558 dated 28 December 2015, **Exhibit R-134**. See also First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 144, **RWS-2**.

⁷⁵⁵ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 144, **RWS-2**.

⁷⁵⁶ Defence, paragraphs 292 – 296, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 143, **RWS-2**; Letter from MCEC to the Council of Ministers No. 1/2-11/1084-2 dated 29 February 2016, **Exhibit R-140**.

⁷⁵⁷ 2016 Memorandum, pages 3 – 4, **Exhibit C-160**: "*The audit was conducted by [...] comparing the records [...] of certain operations with the records [...] of other related operations*"; "*This audit included sample inspection of contracts, statement of works performed [...]. The audit relied on the information reflected in 1C: Accounting Suite version 7.7 software, CIC integrated cost estimation system [... and] other software products*" (emphasis added).

⁷⁵⁸ 2016 Memorandum, page 15, **Exhibit C-160**.

⁷⁵⁹ Instruction on the Procedure for Determining the Costs of Constructing a Facility for Accounting Purposes approved by Resolution of the Ministry of Architecture and Construction No. 10 dated 14 May 2007, Clause 2 (in force from 24 April 2013), **Exhibit RL-117**.

“the value of a non-completed [facility] (prior to the commissioning [...]) consists of costs posted on Account 08 (Investment in Long-Term Assets) and any costs having enlarged the value of the [facility]” (emphasis added).⁷⁶⁰ For the purpose of Instruction No. 10, the latter costs also include costs, which are not reflected in the Design Specification and Estimate Documentation (such as taxes, construction management costs, etc.).⁷⁶¹

445. In essence, apart from very fragmentary, and thus not reliable, analysis of the primary documentation⁷⁶² and check measurement,⁷⁶³ the CAO of the Ministry of Finance did the same exercise as Paritet-Standart,⁷⁶⁴ i.e. analysis of accounting records of Manolium-Engineering. The 2016 Memorandum, which was intended to be an internal document produced specifically for MCEC to prepare for negotiations with the Claimant about a possible acquisition of the New Communal Facilities, ultimately became yet another paraphrase of Manolium-Engineering’s accounting records, a secondary source of information, which could not be relied on as definitive and sufficient evidence in determining the acquisition price.
446. Accordingly, the Claimant’s references to (1) the fact that the 2016 Memorandum was made by *“the special division of the Ministry of Finance and specialized agency [... RSTC]”*, (2) that it was made *“[u]nder the instruction of the Respondent’s Prime-Minister and Minister of Finance”*, (3) that that was preceded by *“a full-time audit [...] in the office of Manolium-Engineering”*, (4) that it included *“checking the results of the evaluation [...] made by the Registration and Cadastre Agency”*, and (5) that it was made *“[i]n accordance with the Belarusian laws”* are all missing the point.⁷⁶⁵ As

⁷⁶⁰ 2016 Memorandum, page 15, **Exhibit C-160**. Instruction on the Procedure for Determining the Costs of Constructing a Facility for Accounting Purposes approved by Resolution of the Ministry of Architecture and Construction No. 10 dated 14 May 2007, Clause 11 (in force from 24 April 2013), **Exhibit RL-117**.

⁷⁶¹ 2016 Memorandum, page 15, **Exhibit C-160**.

⁷⁶² 2016 Memorandum, page 4, **Exhibit C-160**.

⁷⁶³ 2016 Memorandum (partial translation), pages 9 – 13, **Exhibit SQ-91**.

⁷⁶⁴ Paritet-Standart Report, pages 4 – 5, **Exhibit C-131**. See also Defence, paragraph 228, **RS-18**.

⁷⁶⁵ Reply, paragraph 843(i), (ii), (iv) – (vi), **CS-5**.

explained above, those provisions did not form the criteria or preconditions for MCEC's acceptance of the 2016 Memorandum.

447. The Claimant also alleges that the 2016 Memorandum “*should be considered conservative*”, because, in particular, it did not take into account (1) the “*actual amount invested by the companies affiliated with the Claimant*”, (2) “*indirect costs and overheads*”, and (3) because it “[t]ook into account only actual costs based on their book value without taking into account inflation”.⁷⁶⁶ This is incorrect.
448. First, the Claimant has provided no evidence that all funds received by Manolium-Engineering from the Claimant-affiliated companies were actually spent on the construction of the New Communal Facilities. On the contrary, as Ms ██████████ recalls, upon receipt of those funds, “*Manolium-Engineering either paid for construction works or, more often, transferred those funds to other Belarusian companies*” related to Mr Dolgov (emphasis added).⁷⁶⁷ These companies have nothing to do with the project, which is the subject-matter of these proceedings.
449. Accordingly, the Claimant's allegation that “*the total amount of investments made by the Claimant into Belarus is more than USD 25 million*” is unfounded. The “*list of loans*”⁷⁶⁸ and the loan agreements followed confirmations of loan transfers⁷⁶⁹ relied on by the Claimant⁷⁷⁰ do not prove that the Claimant invested anything in Belarus in general or in the New Communal Facilities in particular. On the contrary, these documents reveal that the Claimant itself invested nothing in Belarus. These

⁷⁶⁶ Reply, paragraph 855, **CS-5**. See also Reply, paragraphs 48 – 49, **CS-5**.

⁷⁶⁷ Witness Statement of Ms ██████████ dated 12 November 2018, paragraph 20, **RWS-3**.

⁷⁶⁸ Reply, paragraph 48, table 1, **RS-18**; See also Loans provided to Manolium-Engineering (excel file) in 2004 – 2013, **Exhibit C-215**.

⁷⁶⁹ Loan agreements and confirmations of loan transfers from Bradley Enterprises Ltd. to Manolium-Engineering, **Exhibit C-216**; Loan agreements and confirmations of loan transfers from Lascker Ltd. to Manolium-Engineering, **Exhibit C-217**; Loan agreements and confirmations of loan transfers from Nomal Oil Ltd. to Manolium-Engineering, **Exhibit C-218**; Loan agreements and confirmations of loan transfers from Manolium-Trading Ltd. to Manolium-Engineering, **Exhibit C-219**; Loan agreements and confirmations of loan transfer from Foreign LLC Manolium Processing to Manolium-Engineering, **Exhibit C-220**.

⁷⁷⁰ Reply, paragraphs 48 – 49, **CS-5**.

documents also do not prove that all funds were directed specifically at the construction of the New Communal Facilities. Finally, the Claimant presented no evidence that on 28 December 2006 Manolium Processing Foreign LLC actually transferred the loan in the amount of US\$525,000 to Manolium-Engineering under Loan Agreement No. 212/06 dated 20 December 2006.⁷⁷¹

450. Second, as explained in paragraph 444 above, the 2016 Memorandum was prepared in accordance with Instruction No. 10 and included the value-added costs, which comprised, *inter alia*, costs not reflected in the Design Specification and Estimate Documentation (such as certain “*construction management costs*”, the origin of which is not explained).⁷⁷² Furthermore, it also included other “*indirect costs (such as [...] costs of construction organization and management, exchange rate differences)*”.⁷⁷³
451. Lastly, by referring to “*actual costs based on their book value*”, the Claimant appears to admit that the 2016 Memorandum contains an analysis of costs as they appear in Manolium-Engineering’s accounting records. Nonetheless, the Claimant has failed to prove that such costs do represent “*actual costs*”. Pursuant to the Council of Ministers’ and the Minister of Finance’s instructions, “*actual costs*” should have been adjusted to reflect, among other things, “*the state (actual wear-and-tear) of [the New Communal Facilities]*”⁷⁷⁴ and their (non-)compliance with the design specifications.⁷⁷⁵ MCEC had always communicated this position when discussing the

⁷⁷¹ **Exhibit C-220** (Loan agreements and confirmations of loan transfers from Foreign LLC Manolium Processing to Manolium-Engineering) relied on by the Claimant contains no payment order or similar confirmation of the actual transfer of the portion of the loan in the amount of US\$525,000 to Manolium-Engineering under Loan Agreement No. 212/06 dated 20 December 2006 or any other loan agreement.

⁷⁷² 2016 Memorandum, pages 15 – 16, **Exhibit C-160**.

⁷⁷³ 2016 Memorandum, pages 7 – 8, **Exhibit C-160**.

⁷⁷⁴ Instruction of the Council of Ministers of the Republic of Belarus No. 39/1078r dated 27 January 2016, **Exhibit R-137**.

⁷⁷⁵ Instruction of the Minister of Finance of the Republic of Belarus No. 8 dated 3 February 2016, **Exhibit R-139**.

matter both with Manolium-Engineering⁷⁷⁶ and with the Belarusian authorities.⁷⁷⁷ Yet, the CAO of the Ministry of Finance did not analyse the extent of the wear-and-tear of the New Communal Facilities and their compliance with the Design Specification and Estimate Documentation.⁷⁷⁸

452. As a result, MCEC demonstrated a good faith approach to consider acquisition of the unfinished New Communal Facilities at their true value.⁷⁷⁹ Contrary to MCEC's approach, however, the 2016 Memorandum represented the calculation, which disregarded the fact that MCEC would have to make additional significant investment before the unfinished New Communal Facilities would be ready for operation. By way of example, as Minsktrans informed MCEC on several occasions, as at 1 January 2015, the approximate costs required to correct defects of the works performed⁷⁸⁰ and to complete construction of the New Communal Facilities would have been at least 56 billion non-denominated Belarusian rubles⁷⁸¹ (i.e. at least US\$4.7 million⁷⁸²).
453. For the above reasons, MCEC could not accept and in fact never accepted the 2016 Memorandum.

⁷⁷⁶ Defence, paragraphs 268 – 269 and 273, **RS-18**; *See* also First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 126, **RWS-2**; Minutes of the meeting of MCEC, Minsktrans and Claimant dated 4 February 2015, **Exhibit C-153**.

⁷⁷⁷ Defence, paragraphs 286 – 287, **RS-18**; *See* also First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 132 – 139, **RWS-2**; Letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-18/5437 dated 8 December 2015, **Exhibit R-133**.

⁷⁷⁸ Defence, paragraph 294, **RS-18**.

⁷⁷⁹ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 111, 113 and 125 – 126, **RWS-2**.

⁷⁸⁰ *See e.g.* Letter from Minsktrans to Manolium-Engineering dated 6 July 2011, **Exhibit R-66**; Letter from Minsktrans to MCEC dated 14 November 2011, **Exhibit R-73**. *See* also paragraphs 582 – 605 below.

⁷⁸¹ Letter from MCEC to the Claimant dated 20 January 2015, **Exhibit R-121**; Letter from MCEC to Manolium-Engineering dated 4 September 2015, **Exhibit C-158**.

⁷⁸² Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 143 and 186, **RER-2**.

454. Accordingly, the Respondent respectfully submits that the 2016 Memorandum was not made “*specifically for the purpose of paying compensation to the Claimant*”⁷⁸³ and does not reflect what the Claimant and Manolium-Engineering had in fact spent on the construction of the New Communal Facilities.

O. THE CLAIMANT AND MANOLIUM-ENGINEERING WERE NOT IN A “NO ESCAPE” SITUATION

455. The Claimant alleges that the Respondent put it into a “*no escape*” situation⁷⁸⁴ because:

- A. the Claimant “*could not finish the construction, because the Respondent did not agree to extend the land rights to [Manolium-Engineering] necessary [...] to complete the construction [...]*”;⁷⁸⁵
- B. the Respondent refused to “*accept the payments offered [...] that would allow the Respondent to complete the construction [...]*”;⁷⁸⁶
- C. “*Belarusian authorities refused to formally accept the New Communal Facilities*”;
- D. the Respondent did not accept the land plots, because they were occupied by the incomplete New Communal Facilities; but
- E. the Respondent “*imposed on the Claimant taxes for the land*”.⁷⁸⁷

456. The Respondent respectfully submits that (a) it was the Claimant who had put itself in a difficult position because of its own negligence and its wilful disregard for the Belarusian law; and (b) the Claimant and Manolium-Engineering had the right and the

⁷⁸³ Reply, paragraphs 837 and 843(iii), **CS-5**.

⁷⁸⁴ Reply paragraphs 335, 342 – 344, 586 – 587, 712, **CS-5**.

⁷⁸⁵ Reply, paragraph 342(i), **CS-5**.

⁷⁸⁶ Reply, paragraph 342(ii), **CS-5**.

⁷⁸⁷ Reply, paragraph 342(iv), **CS-5**.

opportunity to rectify the situation had they taken steps to comply with Belarusian law. Instead the Claimant and Manolium-Engineering chose to ignore the requirements of the law and its own obligations. This, in turn, eventually resulted in sanctions applied against Manolium-Engineering.

457. First, as already explained, it is the Respondent's position that the Claimant and Manolium-Engineering are wholly responsible for the situation in which they found themselves as a consequence of their failure to comply with the Amended Investment Contract notwithstanding multiple postponements of deadlines for the construction, commissioning and transferral into municipal ownership of the New Communal Facilities.
458. Second, the Respondent submits that the Claimant's description of alleged "*no escape*" situation is misleading. The Claimant and Manolium-Engineering had plenty of opportunities to avoid the situation by complying with Belarusian law.
459. As described below the situation was different during the following time periods:
- A. before 1 July 2011, when the Amended Investment Contract was in force and before the expiry of permits to use land plots for the New Communal Facilities, Manolium-Engineering had the right and the opportunity to either construct, commission and transfer the New Communal Facilities or apply for extension of the permit to use the land plots or lay-up the facilities and apply for the right to use the land plots underlying the laid-up incomplete New Communal Facilities;
 - B. between 2 July 2011 and 29 October 2014, when the Amended Investment Contract was in force, but after the permits to use land plots for the New Communal Facilities had expired, Manolium-Engineering had the right and the opportunity to apply for the right to use the relevant land plots and for the requisite construction permits and either complete the construction or lay-up the facilities; and
 - C. after 29 October 2014, when the Amended Investment Contract was terminated and after the expiry of permits to use land plot for the New

Communal Facilities, Manolium-Engineering had the right and the opportunity at the very least to apply for the right to use the land plots for the New Communal Facilities.

460. The Respondent shall analyse each of the periods separately.

1. The Claimant and Manolium-Engineering failed to construct the New Communal Facilities on time, failed to apply for extension of the land plots and failed to provide all necessary information and documents to extend the construction permits

461. It is not in issue between the Parties that Manolium-Engineering had failed to complete and commission the New Communal Facilities by the Final Commissioning Date (1 July 2011) set out in the Amended Investment Contract. As explained in paragraphs 107 – 188 above, the Respondent submits that the Claimant and Manolium-Engineering failed to construct the New Communal Facilities for their own fault.

462. The Respondent submits, that in order to comply with Belarusian law, Manolium-Engineering would have to either:

- A. construct, commission and transfer into municipal ownership the New Communal Facilities before the Final Commissioning Date; or
- B. apply for extension of the permit to use the land plots for the New Communal Facilities and continue construction of the New Communal Facilities; or
- C. lay-up (i.e. conserve) the incomplete New Communal Facilities and apply for the right to use the land plots under the laid-up facilities.

463. Pursuant to Belarusian law, Manolium-Engineering had to apply for extension of the permits of rights to use the land plots no later than 2 months before the date of their

expiry, i.e. in the case at hand – by May 2011.⁷⁸⁸ As explained in the Defence⁷⁸⁹ and in paragraphs 467 – 472 below, Manolium-Engineering failed to do so within the deadline or at all.

464. The Claimant and Manolium-Engineering had the right and the opportunity to continue construction even after the contractual deadlines expired, provided that Manolium-Engineering had applied and obtained: (a) land permits; and (b) construction permits. The Claimant insinuates that the permits to use land plots for the New Communal Facilities could not have been extended beyond the deadlines for construction, commissioning and transferral into municipal ownership of the New Communal Facilities set out in the Amended Investment Contract. However, they could have.
465. The Respondent submits that even if the Claimant and Manolium-Engineering had no intention to complete or were not able to finance the construction of the New Communal Facilities, Manolium-Engineering had the right and the opportunity to lay-up (conserve) the incomplete New Communal Facilities. Pursuant to Belarusian law, in that case, Manolium-Engineering would have obtained (subject to a duly made application) the right to use the land plots under the laid-up New Communal Facilities.⁷⁹⁰ The tenfold rate of the land tax would not be applied to Manolium-Engineering. However, Manolium-Engineering choose not to lay-up the facilities.
466. Mr Dolgov alleges that Manolium-Engineering “w[as] *not able to conserve the Trolleybus Depot buildings, [because] the Facility was being used free of charge by Minsktrans [...] people were there, and conservation was impossible*”.⁷⁹¹ This is

⁷⁸⁸ Regulation “On Withdrawal and Allotment of Land Plots” enacted by the President’s Decree No. 667 dated 27 December 2007, clause 45, **Exhibit RL-119**.

⁷⁸⁹ Defence, paragraph 114 – 117, **RS-18**.

⁷⁹⁰ Land Code of the Republic of Belarus, Article 5(5), 16, 17, **Exhibit RL-128**. Regulation “On Withdrawal and Allotment of Land Plots” enacted by the President’s Decree No. 667 dated 27 December 2007, clause 35(1), (in force between 1 May 2009 and 1 January 2012; and from 1 January 2012), 35(5) (in force from 1 September 2013), **Exhibit CL-119**.

⁷⁹¹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 188, **CWS-5**.

simply not true. There is nothing under Belarusian law to prevent a developer from laying-up the unfinished facilities, because of the gratuitous use agreement. In any event, nothing prevented Manolium-Engineering from terminating gratuitous use agreements and taking steps necessary to lay-up the unfinished facilities.

a) Manolium-Engineering never applied for an extension of right to use the land plots under the New Communal Facilities

467. The Claimant alleges that Manolium-Engineering applied for extension of land permits with references to the parties' negotiations regarding the postponement of deadlines under the Amended Investment Contract and Manolium-Engineering's correspondence with Gosstroy and MCEC regarding the extension of the construction permits.⁷⁹² This is wrong as a matter of fact.

468. The Claimant deliberately seeks to muddle up:

- A. the term for the right to use the land plots for the New Communal Facilities (which expired on 1 July 2011);
- B. the term of the construction permits (the last one of which expired on 30 December 2011);
- C. the statutory term for construction set out in the Design Specification and Estimate Documentation,⁷⁹³ and
- D. contractual deadlines for commissioning and transferring the New Communal Facilities into municipal ownership (1 July 2011).

469. In fact, Manolium-Engineering never applied for an extension of the right to use the land plots for the New Communal Facilities.

⁷⁹² Reply, paragraphs 201 – 214, **CS-5**.

⁷⁹³ The designers calculate this term for each facility based on expected duration of works set out in relevant regulations and taking into account all relevant circumstances. Statutory term for construction may be relevant, for example, for calculation of property tax; and for procedure for extending the construction permits. The Claimant refers to this term in paragraph 40(ii) of the Reply, **CS-5**.

470. In the Notice, the Claimant refers to the letter from Manolium-Engineering to MCEC dated 24 November 2011.⁷⁹⁴ In that letter, however, Manolium-Engineering did not seek an extension of the permit to the land plot for the construction of the New Communal Facilities. Rather, Manolium-Engineering was asking MCEC to grant a permit for the land plot on which the Investment Object would be built in the future, once Manolium-Engineering obtained the right to do so. This is a different land plot located in another part of Minsk. When in these proceedings the Respondent asked the Claimant to provide correct exhibits,⁷⁹⁵ the Claimant responded that it was going to “*make corrections to either paragraph [242] or footnote[s] [208 and 209] of the Notice [...] in its next submission on the merits*”.⁷⁹⁶ However, no such corrections were ever made and the Claimant continues to mislead the Tribunal on this issue.
471. Neither does the Claimant exhibit any application to extend the land plots permit beyond 1 July 2011. Nevertheless, the Claimant continues to allege that Manolium-Engineering made such application, but the Respondent refused to grant it.⁷⁹⁷ The Claimant insists that the Reply “*has all necessary details*”,⁷⁹⁸ which it does not as a matter of fact.
472. In fact, Manolium-Engineering has never applied to extend the permits for the land plots for the New Communal Facilities beyond 1 July 2011. As explained in the Defence, under Belarusian law, without a formal application by Manolium-Engineering supported by the requisite documentation, the authorities were not in a position to extend the right to use the land plots.

⁷⁹⁴ Letter from Manolium-Engineering to MCEC dated 24 November 2011, **Exhibit C-122**.

⁷⁹⁵ Letters from White & Case to Baker McKenzie dated 23 and 25 July 2018, **Exhibits R-155** and **R-156**.

⁷⁹⁶ Letters from Baker McKenzie to White & Case dated 24 and 27 July 2018, **Exhibits R-157** and **R-158**.

⁷⁹⁷ Reply, see e.g. paragraphs 49(iii), 201, 214, 232, 318, 332, **CS-5**.

⁷⁹⁸ Email from Baker McKenzie to White & Case dated 9 April 2019, **Exhibit R-230**.

b) Manolium-Engineering failed to provide all necessary information and documents in order to extend the construction permits beyond 30 December 2011

473. It is not in issue between the Parties that the latest construction permit for the Depot expired on 30 December 2011.⁷⁹⁹ As explained in the Defence, on 9 January 2012, Manolium-Engineering had suspended construction until 1 April 2012 citing a “*temporary lack of funds*”.⁸⁰⁰
474. The Claimant alleges that at the meetings on 18 January 2012⁸⁰¹ and 23 March 2012⁸⁰² between Manolium-Engineering and Minsktrans, the participants reached “*agreements on the extension of the construction permit for Manolium-Engineering*”.⁸⁰³ The Claimant also describes in the same context the draft Addendum to the Investment Contract, which the Claimant sent to Minsktrans on 20 March 2012.⁸⁰⁴ This is misleading. As is evident from the documents to which the Claimant refers, these were negotiations about postponement of the deadlines set out in the Amended Investment Contract and not negotiations about construction permits.
475. First, the negotiations to which the Claimant refers took place between Manolium-Engineering and Minsktrans. The Claimant does not dispute that Gosstroy, but not Minsktrans, is an entity empowered with issuing construction permits.⁸⁰⁵ Minsktrans has no say in matters relating to the terms of construction permits. Representatives of Manolium-Engineering were well aware of this, because they have many times

⁷⁹⁹ Defence, paragraph 131, **RS-18**. Reply, paragraph 203, **CS-5**. Construction permit for Depot dated 3 October 2011, **Exhibit R-71**.

⁸⁰⁰ Letter from Manolium-Engineering to Gosstroy dated 9 January 2012, **Exhibit R-75**.

⁸⁰¹ Protocol of the meeting between Minsktrans and Manolium-Engineering of 18 January 2012, **Exhibit C-320**.

⁸⁰² Protocol of the meeting between Minsktrans and Manolium-Engineering of 23 March 2012, **Exhibit C-322**.

⁸⁰³ Reply, paragraph 206, **CS-5**.

⁸⁰⁴ Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012, **Exhibit R-78**.

⁸⁰⁵ Defence, paragraph 101(c)(ii), **RS-18**.

applied to Gosstroy and not Minsktrans for construction permits. Accordingly, no “*agreement[] on the extension of the construction permit for Manolium-Engineering*”⁸⁰⁶ could have been “*reached*”⁸⁰⁷ with Minsktrans.

476. Second, the documents to which the Claimant refers show that the parties did not discuss any “*agreement[] on the extension of the construction permit*”. The parties discussed that Manolium-Engineering should make a proper application to Gosstroy in order to extend the construction permit:

- A. the Minutes of the meeting held on 18 January 2012, approximately a week after Manolium-Engineering suspended the construction because of lack of funds state: It was “[**r**esolved: [...] 4. *Extend the construction permit. Responsible: V.V. K[o]r[o]ban*”.⁸⁰⁸ Mr Koroban, who was recorded as responsible for extending the construction permits, was Manolium-Engineering’s deputy director, and not an employee of Gosstroy. Accordingly, it was not an “*agreement[] on the extension of the construction permit*” as the Claimant suggests, but a reminder for Manolium-Engineering to make a proper application to extend the construction permits;
- B. the Minutes of the meeting held on 23 March 2012 state: “[it was decided:] 1. *FE Manolium-Engineering (V.V. Koroban) within the time period before 30 March 2012 to extend the [construction permit for the Depot]*”.⁸⁰⁹ This, again, shows that Minsktrans reminded Manolium-Engineering that it needed to extend the construction permits;

⁸⁰⁶ Reply, paragraph 206, **CS-5**.

⁸⁰⁷ Reply, paragraph 206, **CS-5**.

⁸⁰⁸ Protocol of the meeting between Minsktrans and Manolium-Engineering of 18 January 2012, **Exhibit C-320** (emphasis in the original).

⁸⁰⁹ Protocol of meeting between Minsktrans and Manolium-Engineering of 23 March 2012, **Exhibit C-322**.

477. The draft Addendum to the Amended Investment Contract which Minsktrans received on 20 March 2012 does not even mention the term of the construction permits.⁸¹⁰ Neither does the letter dated 26 January 2012,⁸¹¹ to which the Claimant refers to support its allegation that “*Minsktrans was, in principle, prepared to grant this extension*”.⁸¹² The Respondent also notes that Minsktrans sent this letter two months before the draft addendum, so it could not have been a reaction to the draft Addendum. This letter referred to the meeting held on 9 January 2012, at which the participants decided that Manolium-Engineering “*shall restore financing of the construction of the communal facilities by 25 January 2012 and shall ensure their commissioning by 1 June 2012*”.⁸¹³ In the letter Minsktrans asked Manolium-Engineering to provide an updated construction and financing schedule in light of the decision taken at 9 January 2012 meeting.
478. Accordingly, the meetings held in 18 January⁸¹⁴ and 23 March⁸¹⁵ 2012, the letter from Minsktrans dated 20 January 2012⁸¹⁶ and draft Addendum to the Investment Contract sent on 20 March 2012⁸¹⁷ are irrelevant for the question of construction permits. Similarly, the Claimant’s letter dated 22 May 2012, which the Claimant mentions in passing when it discusses Manolium-Engineering’s application to extend the

⁸¹⁰ Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012, **Exhibit R-78**.

⁸¹¹ Letter from Minsktrans to Manolium-Engineering of 26 January 2012, **Exhibit C-321**

⁸¹² Reply, paragraph 205, **CS-5**.

⁸¹³ Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 9 January 2012, **Exhibit C-125** (Respondent’s Translation).

⁸¹⁴ Protocol of the meeting between Minsktrans and Manolium-Engineering of 18 January 2012, **Exhibit C-320**.

⁸¹⁵ Protocol of meeting between Minsktrans and Manolium-Engineering of 23 March 2012, **Exhibit C-322**.

⁸¹⁶ Letter from Minsktrans to Manolium-Engineering of 26 January 2012, **Exhibit C-321**.

⁸¹⁷ Draft Supplemental Agreement to Investment Contract received by fax by Minsktrans on 20 March 2012, **Exhibit R-78**.

construction permit,⁸¹⁸ is irrelevant to the application to extend the construction permit.

479. It is not in issue between the Parties that Manolium-Engineering applied to Gosstroy in April 2012, but failed to provide all the necessary documents and information, including MCEC's consent to extend the statutory term for construction.⁸¹⁹
480. It is also not in issue between the Parties that on 22 May 2012, MCEC received a letter from Manolium-Engineering, seeking formal consent which was necessary for obtaining the construction permit.⁸²⁰ Nothing was attached to this letter.
481. As explained in the Defence, Belarusian law provides for a particular procedure to be followed for issuing such permits.⁸²¹ Under the relevant rules, Manolium-Engineering was required to provide a number of documents to enable MCEC to take an informed decision on the application. The Claimant does not deny this. Yet, the Claimant alleges that "*the Construction and Investments Committee of [MCEC] rejected the extension application [...] on an extremely formalistic ground – a purported lack of information and documents to make the decision*".⁸²² The Respondent respectfully submits that in the circumstances, where Manolium-Engineering failed to exhibit any document required by the relevant rules, the Construction and Investments Committee of MCEC was not in a position to grant the consent sought.
482. Accordingly, in reply to Manolium-Engineering's letter, MCEC explained the requisite procedure for applying for the consent and referred Manolium-Engineering

⁸¹⁸ Reply, paragraph 212, **CS-5**.

⁸¹⁹ Defence, paragraphs 133 – 135, **RS-18**. Reply, paragraphs 207 – 210, **CS-5**.

⁸²⁰ Defence, paragraph 136, **RS-18**. Reply, paragraph 211, **CS-5**. Letter from Manolium-Engineering to MCEC (received on 22 May 2012) of 18 May 2012, **Exhibit R-87**.

⁸²¹ Defence, paragraph 137, **RS-18**. Regulation on execution and enforcement of construction contracts enacted by the Resolution of the Council of Ministers of Republic of Belarus dated 15 September 1998 No. 1450, clause 17 (in force from 21 October 2011), **Exhibit RL-137**.

⁸²² Reply, paragraph 213, **CS-5**.

to the list of documents it ought to provide.⁸²³ Manolium-Engineering chose not to pursue its application for the consent further.

2. After the contractual deadlines have passed, the Claimant and Manolium-Engineering should have obtained land and construction permits and finished construction

483. Between 1 July 2011 and 29 October 2014, the Amended Investment Contract remained in force, notwithstanding the deadlines for construction, commissioning and transfer into municipal ownership of the New Communal Facilities having passed. During that period the Claimant and Manolium-Engineering retained an obligation to complete the construction of the New Communal Facilities.

484. At that time the Claimant had at least the following options under Belarusian law:

- A. to apply afresh for (i) the right to use the land permit;⁸²⁴ and (ii) construction permits (if Manolium-Engineering was not able or not willing to complete the construction by 30 December 2011, when the last construction permit expired), and complete the construction of the New Communal Facilities. In fact, as Mr Akhramenko explains, other investors, who found themselves in a similar position, applied and obtained the land permits and construction permits and continued construction beyond the deadlines set out in their respective investment contracts;⁸²⁵
- B. even if the Claimant and Manolium-Engineering were not willing or not able to finish the construction of the New Communal Facilities, they had the right and the opportunity to obtain the right to use the land permit and lay-up the facilities.

⁸²³ Letter from MCEC to Manolium-Engineering dated 5 June 2012, **Exhibit R-90**.

⁸²⁴ Land Code of the Republic of Belarus, Article 16, 17, **Exhibit RL-128**. Regulation “On Withdrawal and Allotment of Land Plots” enacted by the President’s Decree No. 667 dated 27 December 2007, clauses 35(1) (in force between 1 May 2009 and 1 January 2012; and from 1 January 2012), 35(5) (in force from 1 September 2013), **Exhibit RL-119**.

⁸²⁵ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 43, **RWS-4**.

485. Instead of applying for the land permits and construction permits, completing construction of the New Communal Facilities so as to discharge its obligations under the Amended Investment Contract, Manolium-Engineering choose to try and negotiate yet another postponement of contractual deadlines. However, as explained in 309 – 331 above, the parties did not agree on the extension because of the Claimant’s and Manolium-Engineering’s unreasonable position. As explained in 332 – 343 above, MCEC had no choice but to apply to court for termination of the Amended Investment Contract. As explained in 386 – 388 above, on 29 October 2014 the Amended Investment Contract was terminated.

3. After the termination of the Amended Investment Contract Manolium-Engineering could have applied for the right to use the land plots underlying the incomplete New Communal Facilities

486. As explained, after the termination of the Amended Investment Contract, the Claimant and Manolium-Engineering were no longer required to complete and commission the New Communal Facilities and to transfer them into the municipal ownership. MCEC and Minsktrans were no longer under an obligation to accept the completed and commissioned New Communal Facilities into municipal ownership.⁸²⁶

487. Manolium-Engineering remained the owner of the New Communal Facilities.⁸²⁷ By that time the right to use the land plots under the New Communal Facilities had long expired. As explained in paragraph 533 below, Manolium-Engineering could not return the land plots, because they were occupied by Manolium-Engineering’s incomplete New Communal Facilities.

488. The Respondent submits that Manolium-Engineering had the right and the opportunity to apply for a permit to the land plots underlying the incomplete New

⁸²⁶ Defence, paragraph 264, **RS-18**.

⁸²⁷ Defence, paragraph 265, **RS-18**.

Communal Facilities.⁸²⁸ This, *inter alia*, would relieve Manolium-Engineering from the obligation to pay the land tax at a tenfold increased rate from the date such permit to the land plots would be granted.

489. At the same time, if the Claimant and Manolium-Engineering had no intention to use or to complete the New Communal Facilities, they had the right and the opportunity to dispose of them. As explained,⁸²⁹ MCEC was prepared to consider acquisition of the unfinished New Communal Facilities and discussed this possibility with the Claimant.⁸³⁰ The parties even agreed on the approach to the assessment of the Claimant's costs spent on the unfinished New Communal Facilities.⁸³¹ However, the parties were unable to agree on the terms and conditions of the acquisition of the New Communal Facilities.

P. ADMINISTRATIVE PROCEEDINGS

490. In paragraphs 709 – 722 of the Reply, the Claimant is deliberately mixing up separate and independent procedures:
- A. the hearing of the District Court that took place on 23 July 2012 (the “**2012 Administrative Proceedings**”) and the 2016 Administrative Proceedings in relation to Manolium-Engineering for occupying land plots without permits;
 - B. the 2016 Tax Audit; and
 - C. the enforcement of Manolium-Engineering's land tax liabilities against the New Communal Facilities.

⁸²⁸ Land Code of the Republic of Belarus, Article 16, 17, **Exhibit RL-128**. 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(1) (in force between 1 May 2009 and 1 January 2012; and from 1 January 2012), 35(5) (in force from 1 September 2013), **Exhibit RL-119**.

⁸²⁹ Defence, paragraphs 266 – 282, **RS-18**.

⁸³⁰ Defence, paragraph 268, **RS-18**.

⁸³¹ Minutes of the meeting of the Claimant, MCEC and Minsktrans dated 4 February 2015, paragraphs 2.1 – 2.2, **Exhibit C-152**. Defence, paragraph 274, **RS-18**.

491. As set out in the Respondent’s Response to the Claimant’s Interim Measures Request, the subject matter of the 2012 Administrative Proceedings was Manolium-Engineering’s failure to return the land plots for the construction of the New Communal Facilities. Manolium-Engineering’s liability to pay taxes was unaffected by the outcome of the 2012 Administrative Proceedings.⁸³²
492. As explained in the Defence, the finding that Manolium-Engineering was administratively liable in the 2016 Administrative Proceedings was not the ground for the application by the District Tax Inspectorate of the increased land tax rates.⁸³³
493. Accordingly, as already explained, the 2012 Administrative Proceedings and the 2016 Administrative Proceedings had nothing to do with tax liability. In the Reply, the Claimant, however, seeks to confuse the Tribunal by insolently twisting the facts to suit its story in full disregard of documentary evidence. For example, the Claimant characterises the 2012 Administrative Proceedings as “*proceedings [...] [addressing] administrative liability of Manolium-Engineering for alleged non-payment of land taxes*”.⁸³⁴ As can be seen from paragraphs 491 – 492, this is plainly wrong.
494. The Claimant further submits in the Reply that the fact of the courts reaching different conclusions in the 2012 Administrative Proceedings and the 2016 Administrative Proceedings somehow shows that the 2016 Administrative Proceedings were wrongful.⁸³⁵ As demonstrated below, the factual circumstances considered in the 2012 Administrative Proceedings and the 2016 Administrative Proceedings were completely different. Accordingly, the argument that the different outcomes evidence “*coordination*” and conspiracy between the state authorities is untenable and must be rejected.

⁸³² Response to the Claimant’s Interim Measures Request dated 21 September 2018, paragraph 26, **RS-3**.

⁸³³ Defence, paragraph 327, **RS-18**.

⁸³⁴ Reply, paragraph 711, **CS-5**.

⁸³⁵ Reply, paragraph 722, **CS-5**.

1. The 2012 Administrative Proceedings

495. As is evident from the Resolution of the District Court, the Land Planning Service drew up administrative offence reports in March 2012 in relation to Manolium-Engineering for occupying the land plots without a permit.⁸³⁶ In accordance with the applicable procedure, the Land Planning Service submitted the reports to the District Court.
496. Pursuant to Article 3.5 of Belarusian Code on Administrative Offences⁸³⁷, the court may conclude that an entity had no intention to commit the administrative offence if it has breached a provision of law but took all measures to comply with it. Having considered the Land Planning Service's reports and Manolium-Engineering's arguments, the District Court found that Manolium-Engineering had no intention to commit the administrative offence because it was allegedly taking all the necessary measures to comply with law. The District Court, accordingly, resolved to terminate the 2012 Administrative Proceedings.
497. In paragraph 712 of the Reply, the Claimant misinterprets the resolution of the District Court rendered following the 2012 Administrative Proceedings. According to the Claimant, the court "*concluded that Manolium-Engineering was in a no-escape situation and had neither possibility to return the land plots nor transfer the New Communal Facilities to the communal ownership of Minsk*". However, it does not follow from the resolution of the District Court that Manolium-Engineering was in a "*no-escape situation*". On the contrary, the District Court concluded that Manolium-Engineering "*took measures to comply with the requirements*" and was "*at the present time using its best endeavors for resolving the situation*".⁸³⁸

⁸³⁶ Resolution of Pervomayskiy district court of Minsk dated 23 July 2012, **Exhibit C-346**.

⁸³⁷ Belarusian Code of Administrative Offences, Article 3.5, **Exhibit RL-133**.

⁸³⁸ Resolution of Pervomayskiy district court of Minsk dated 23 July 2012, **Exhibit C-346**.

498. During the court proceedings in July 2012, Manolium-Engineering referred to the following circumstances in support of its submission that it was allegedly taking all necessary measures to comply with law.⁸³⁹
- A. Manolium-Engineering applied to Gosstroy to get the construction permits extended.⁸⁴⁰ Gosstroy refused to extend the construction permits in the absence of MCEC's consent, which Manolium-Engineering was required to provide.⁸⁴¹
 - B. Manolium-Engineering then applied and was waiting for MCEC's consent necessary for obtaining the construction permit.⁸⁴²
 - C. Manolium-Engineering also applied to the Land Planning Service to return the land plots.⁸⁴³ The Land Planning Service responded that the return of the land plots was impossible because of the uncompleted construction facilities located on them.⁸⁴⁴ In that same letter, the Land Planning Service explained that the issue could be resolved once the Investment Contract was terminated and the land plot was transferred to a new developer.⁸⁴⁵
499. Manolium-Engineering, therefore, made the court believe that it was working towards obtaining the necessary permits and would either (1) eventually obtain them, finish the construction and return the land together with the completed New Communal Facilities to MCEC; or (2) negotiate termination of the Amended Investment Contract

⁸³⁹ Resolution of Pervomayskiy district court of Minsk dated 23 July 2012, **Exhibit C-346**.

⁸⁴⁰ Letter from Manolium-Engineering to Gosstroy dated 13 April 2012, **Exhibit R-81**.

⁸⁴¹ Letter from Gosstroy to Manolium-Engineering dated 21 April 2012, **Exhibit C-127**.

⁸⁴² Letter from Manolium-Engineering to MCEC dated 18 May 2012 (delivered on 22 May 2012), **Exhibit R-87**.

⁸⁴³ Letter from Manolium-Engineering to Minsk City Executive Committee dated 11 June 2012, **Exhibit C-336**.

⁸⁴⁴ Letter from Minsk Land Planning Service to Manolium-Engineering dated 17 July 2012, **Exhibit C-337**.

⁸⁴⁵ Letter from Minsk Land Planning Service to Manolium-Engineering dated 17 July 2012, **Exhibit C-337**.

and a transfer of the land with the uncompleted construction facilities to a new developer (as suggested in Land Planning Service's letter)⁸⁴⁶. The court found that this was a sufficient ground for not imposing administrative sanctions on Manolium-Engineering at the time. This of course did not mean that Manolium-Engineering was free to occupy the land plots without any legitimate basis for another four years.

500. Accordingly, the District Court, in fact, terminated the 2012 Administrative Proceedings so as to provide Manolium-Engineering with additional time to remedy the breach. As explained below, Manolium-Engineering, however, misled the court into believing that it was taking all necessary measures to comply with the law and intended to remedy the breach when it had no such intention.
501. First, Manolium-Engineering applied to all authorities mentioned in paragraph 498 after the administrative protocols were drawn up in March 2012 and in anticipation of the court hearing that took place on 23 July 2012,⁸⁴⁷ while the statutory and contractual construction terms as well as the construction permits and permits to the land plots had expired long before, as described in paragraph 468 above. Accordingly, Manolium-Engineering was not genuinely seeking to remedy the breach but undertook all these actions for the sake of keeping up appearances and only to avoid administrative liability.
502. Further, Manolium-Engineering conveniently forgot to inform the court that it had already received MCEC's response to its letter mentioned in paragraph 498.B above and the response pointing out that Manolium-Engineering had yet again failed to comply with a formal procedure for obtaining the consent, which was set out in Belarusian law.⁸⁴⁸ Accordingly, Manolium-Engineering's application was refused for the second time in a row due to its failure to submit all documents required by law and comply with the procedure, *i.e.* through Manolium-Engineering's own fault. Had

⁸⁴⁶ Letter from Minsk Land Planning Service to Manolium-Engineering dated 17 July 2012, **Exhibit C-337**.

⁸⁴⁷ Resolution of Pervomayskiy district court of Minsk dated 23 July 2012, **Exhibit C-346**.

⁸⁴⁸ Letter from MCEC to Manolium-Engineering dated 5 June 2012, **Exhibit R-90**.

the District Court been informed of this, its conclusion that Manolium-Engineering was “*using its best endeavors for resolving the situation*”⁸⁴⁹ may well have been different.

503. Lastly, as set out in paragraph 502 above, in its refusal to provide the consent necessary for obtaining the construction permit, MCEC explained to Manolium-Engineering the proper procedure for making the relevant applications.⁸⁵⁰ Manolium-Engineering, however, did not bother to reapply to MCEC and to provide all the necessary documents after the District Court terminated the administrative proceedings. It has never reapplied to Gosstroy either. Accordingly, these actions and inactions by Manolium-Engineering demonstrate that it had no intention to remedy the breach despite its submissions to the contrary in the Belarusian court.

2. The 2016 Administrative Proceedings

504. As explained in paragraph 503 above, after its failure to comply with legislative requirements when applying to MCEC and Gosstroy for an extension of the statutory construction term and construction permits in 2012, Manolium-Engineering never attempted to remedy the defects of its applications and apply again. Neither did it apply for an extension of permits to the land plots after they expired in July 2011, as explained in the Defence and paragraphs 469 – 472 above.⁸⁵¹ Unsurprisingly, in March 2016, when the Land Planning Service of MCEC discovered that this issue has never been resolved, it drew up new administrative offence reports in relation to Manolium-Engineering for the failure to return the land plots and for occupying the land plots without a permit. In accordance with the applicable procedure, the Land Planning Service submitted the reports to the District Court.

⁸⁴⁹ Resolution of Pervomayskiy district court of Minsk dated 23 July 2012, **Exhibit C-346**.

⁸⁵⁰ Letter from MCEC to Manolium-Engineering dated 5 June 2012, **Exhibit R-90**.

⁸⁵¹ Defence, paragraph 299, **RS-18**.

505. The Amended Investment Contract was terminated on 29 October 2014.⁸⁵² As set out in paragraph 265 of the Defence and paragraphs 381 and 486 above, following the termination of the Amended Investment Contract, MCEC was no longer under an obligation to accept the New Communal Facilities even if their construction was finally completed. Neither was MCEC under an obligation to accept the Claimant's and Manolium-Engineering's arbitrary proposals on the terms of the transfer of the New Communal Facilities into municipal ownership. This was one of the most important differences between the respective situations in 2012 and 2016. As set out in paragraph 488 above, however, Manolium-Engineering still had the right and the opportunity to apply for a permit to the land plots underlying the incomplete New Communal Facilities. Manolium-Engineering chose not to do so.
506. As described in paragraph 308 of the Defence, the District Court took a formalistic approach and having been led to believe by Manolium-Engineering that it was taking all steps to comply with the legal requirements (*i.e.* that it had applied for an extension of the permits to the land plots, which was a lie,⁸⁵³ and “*more than once undertook attempts to return the land plots*”),⁸⁵⁴ the court resolved not to impose administrative sanctions.⁸⁵⁵
507. According to the Claimant, “*the Respondent then intervened*”.⁸⁵⁶ In fact, it was the Land Planning Service (the applicant in the 2016 Administrative Proceedings) which filed an appeal against the first instance court resolution, as it was entitled to do under the procedural rules.⁸⁵⁷

⁸⁵² Ruling of the instance of appeal of the Economic court of Minsk dated 29 October 2014, **Exhibit C-150**.

⁸⁵³ Resolution of the Minsk City Court dated 13 May 2016, page 4, **Exhibit C-162**.

⁸⁵⁴ Resolution of the Minsk City Court dated 13 May 2016, page 4, **Exhibit C-162**.

⁸⁵⁵ Resolution of the court of the Pervomaysky district of Minsk (operative part and statement of reasons) dated 17 May 2016, **Exhibit C-182**.

⁸⁵⁶ Reply, paragraph 718, **CS-5**.

⁸⁵⁷ Decision of the Economic Court of Minsk dated 13 May 2016, **Exhibit C-162**.

508. The Minsk City Court concluded that the District Court’s finding that Manolium-Engineering had “*taken all measures as provided by law to extend the period of use of the aforementioned land plots*” was “*based on insufficient consideration of the case files*”.⁸⁵⁸ It also observed that in assessing whether Manolium-Engineering had attempted to “return” the land plots, the District Court had failed to consider whether, under the relevant legislation, MCEC was in fact able to accept the land plots back from Manolium-Engineering with the unfinished New Communal Facilities located on them.⁸⁵⁹
509. Accordingly, the Minsk City Court sent the case back to the District Court for reconsideration because the District Court had failed to investigate the circumstances of Manolium-Engineering’s occupation of the land plots.
510. The Claimant suggests there was some procedural irregularity in the case being sent back to the first instance court for reconsideration by a judge different to the one who had resolved the case for the first time.⁸⁶⁰ On the contrary, this was in accordance with Belarusian procedural legislation and standard practice. Article 33 of the Belarusian Code of Civil Procedure provides that the judge who has resolved a case in the first instance court cannot consider the same case again if the judgement was annulled and the case has been sent for reconsideration by the first instance court.⁸⁶¹ Although the codes governing commercial and administrative procedures do not contain similar provisions to this effect, in practice, Belarusian courts take the same approach in all cases. Contrary to the Claimant’s allegations, this approach ensures that the position of the judge, who has already formed a view on the case and whose judgment was subsequently set aside, remains uncompromised.

⁸⁵⁸ Decision of the Economic Court of Minsk dated 13 May 2016, **Exhibit C-162** (Respondent’s translation).

⁸⁵⁹ Resolution of Pervomayskiy district court of Minsk dated 23 July 2012, **Exhibit C-346**; Decision of the Economic Court of Minsk dated 13 May 2016, **Exhibit C-162**; Defence, paragraph 309, **RS-18**.

⁸⁶⁰ Reply, paragraphs 349 and 718, **CS-5**.

⁸⁶¹ Belarusian Code of Civil Procedure, Article 33(1) (in force between 1 July 1999 and 20 July 2018), **Exhibit RL-132**.

511. Having reconsidered the case in accordance with the higher court’s directions, the District Court found that Manolium-Engineering had: (i) “*used the plots provided to them without a document certifying the right to it*”; and (ii) “*failed to file an application for extension of the terms of use of the land plots, which was not disputed by the representatives of FE Manolium-Engineering during the course of the court hearing*”.⁸⁶² Therefore, taking account of such circumstances (which the court had failed to consider in the judgment of 5 April 2016), the District Court correctly concluded that Manolium-Engineering was administratively liable, since it had not taken all measures to comply with the relevant provisions of law.⁸⁶³
512. As for Manolium-Engineering’s argument that they “*more than once undertook attempts to return the land plots*”, the District Court held that this was “*bereft of legal significance*” because the “*property of FE Manolium-Engineering [was] located on said land plots*” and they could not have been accepted by MCEC under Belarusian law.⁸⁶⁴
513. The District Court therefore resolved to impose administrative sanctions on Manolium-Engineering for occupying the land plots without a legitimate ground. The court imposed a fine on Manolium-Engineering in the amount of 52,500,000 non-denominated Belarusian rubles (approximately, US\$2,726).⁸⁶⁵
514. As described in paragraph 312 of the Defence, Manolium-Engineering filed an appeal against the Administrative Court Resolution. On 14 June 2016, the Minsk City Court denied Manolium-Engineering’s appeal and upheld the Administrative Court Resolution.⁸⁶⁶ Manolium-Engineering further filed an appeal to the President of the

⁸⁶² Resolution of the court of the Pervomaysky district of Minsk (operative part and statement of reasons) dated 17 May 2016, **Exhibit C-182**.

⁸⁶³ Resolution of the court of the Pervomaysky district of Minsk (operative part and statement of reasons) dated 17 May 2016, **Exhibit C-182**.

⁸⁶⁴ Resolution of the court of the Pervomaysky district of Minsk (operative part and statement of reasons) dated 17 May 2016, **Exhibit C-182**.

⁸⁶⁵ Defence, paragraph 311, **RS-18**.

⁸⁶⁶ Decision of the Economic Court of Minsk dated 14 June 2016, **Exhibit C-163**.

Minsk City Court. On 3 August 2016, the President of the Minsk City Court denied the appeal.⁸⁶⁷ The Claimant does not allege that there had been any procedural or other irregularities during these appeal proceedings. Manolium-Engineering did not appeal the decision to the Belarusian Supreme Court and did not pay the fine.

Q. TAX LIABILITIES AND THEIR ENFORCEMENT AGAINST THE NEW COMMUNAL FACILITIES

515. In the Notice, the Claimant submits that “[the] *frequent and unreasonable changes to the amount of [tax] indebtedness of Manolium-Engineering either upwards or downwards without any substantiation*” are an “*indicator of the inconsistency of the Belarusian tax authorities’ acts*” and “[demonstrate] *that the mechanism of calculation of fines and penalties is totally non-transparent and arbitrary*”.⁸⁶⁸
516. In the Defence, the Respondent provides a detailed explanation as to the legal grounds and nature of the tax assessments conducted in relation to Manolium-Engineering and Manolium-Engineering’s tax liability. The Respondent demonstrates that, contrary to the Claimant’s allegations, the tax authorities’ actions were consistent and in accordance with the law, and that their decisions were always substantiated. Manolium-Engineering was always given copies of the relevant acts and orders. Moreover, various remedies were available to Manolium-Engineering under Belarusian law if it disagreed with tax authorities’ actions or considered them unlawful.⁸⁶⁹
517. In the Reply, the Claimant appears to no longer dispute the correctness of the calculation of the amount of outstanding tax liability by the tax authorities or assert that their actions were inconsistent. The Claimant, however, argues that the land tax based on Manolium-Engineering’s occupation of the land plots after the relevant

⁸⁶⁷ Resolution of the Minsk City Court dated 3 August 2016, **Exhibit C-184**.

⁸⁶⁸ Notice, paragraphs 404 – 405, **CS-1**.

⁸⁶⁹ Defence, paragraphs 313 – 362, **RS-18**.

permits expired did not apply to Manolium-Engineering at all.⁸⁷⁰ The Claimant also disputes the valuation of the New Communal Facilities for the purpose of the enforcement of the tax liabilities.⁸⁷¹

518. The Claimant, accordingly submits that non-payment of taxes by Manolium-Engineering was simply a “pretext” for the “[expropriation] *of the New Communal Facilities*” and that “*alleged non-payment [of tax by Manolium-Engineering] was caused entirely by the Respondent*”.⁸⁷²

519. It is set out in the Defence and explained in more detail below that, contrary to the Claimant’s assertions:

- A. Manolium-Engineering did have an obligation under Belarusian law to pay the land tax at the increased tax rate during the period of 2013 – 2017 and this was not “*caused entirely by Respondent*”;
- B. this obligation and the amount of the tax liability were not conditional on the administrative sanctions imposed on Manolium-Engineering as a result of the 2016 Administrative Proceedings; and
- C. the enforcement of the outstanding tax liability against the New Communal Facilities was entirely within the applicable legal framework. Manolium-Engineering was subject to land tax based on its occupation of the land plots for the New Communal Facilities during the period of 2013 – 2017 and this situation was not artificially created by the Respondent.

⁸⁷⁰ Reply, paragraphs 337 – 341, **CS-5**.

⁸⁷¹ Reply, paragraphs 357, **CS-5**.

⁸⁷² Reply, paragraph 337, **CS-5**.

1. Manolium-Engineering was subject to land tax based on its occupation of the land plots for the New Communal Facilities during the period of 2013 – 2017 and this obligation was not “caused entirely by Respondent”

a) The tax was applicable to Manolium-Engineering as a matter of Belarusian law

520. The Claimant submits that “when the time for use of the land for construction expired on 1 July 2011 [...], the Claimant had no further right to use the land, and, in fact, it did not use it. Therefore, in essence, the right to the land was automatically restored to [MCEC] by expiration of the Claimant's right of use”.⁸⁷³ This submission is wrong both as a matter of fact and Belarusian law.
521. Although, as a matter of Belarusian law, occupation of land, for the tax purposes does not require the active “use” of the land, e.g., carrying out construction works on it, Manolium-Engineering did in fact undertake construction works on the land plots until around mid-2012, as the Claimant itself admits in paragraph 126 of the Reply. Accordingly, the Claimant’s assertion that after the permit to the land plots expired on 1 July 2011, Manolium-Engineering immediately stopped “using” them is a lie.
522. Further and in any event, the fact that Manolium-Engineering “did not use” the land plots does not matter from the Belarusian law standpoint. As explained in the Defence, what matters for the tax purposes is occupation of the land plots as a matter of fact; this includes having own property on those land plots.⁸⁷⁴
523. Contrary to the Claimant’s submission, under Belarusian law, there is no such thing as “automatic restoration” of the right to land to MCEC “by expiration” of the occupant’s temporary permit to the land. There is no need in “restoring” MCEC’s right to the land because the land is owned by the state regardless of whether a

⁸⁷³ Reply, paragraph 340, **CS-5**.

⁸⁷⁴ Defence, paragraph 313, **RS-18**.

temporary right to use it has been provided to a private entity. If, however, the Claimant suggests (which appears to be the case) that the land plot is automatically returned to MCEC once the occupant's permit expires, this is also incorrect. Notably, the Claimant does not provide any substantiation to this suggestion under Belarusian law. Indeed, pursuant to the Land Code of the Republic of Belarus, the occupant of the land must "return" – by taking active steps – the land plots once the permit expires.⁸⁷⁵

524. The same obligation was stated in MCEC's decisions to grant the permits to the land plots to Manolium-Engineering. They set out that Manolium-Engineering had to return the land "in a good order allowing to use it in accordance with its purpose".⁸⁷⁶ A municipal body is unable to use a land plot "in accordance with its purpose" if private property is located on it. This is also in line with the legal principle of "single destiny" in relation to land plots and immovable property located on them pursuant to Belarusian law.⁸⁷⁷
525. Further, Belarusian Tax Code directly provides that "land plots provided for temporary use and not returned timely in accordance with law" are subject to land tax.⁸⁷⁸ Belarusian Tax Code further provides that "land plots [...] provided for temporary use and not returned timely in accordance with law [...] are taxable at the rate [...] multiplied by 10".⁸⁷⁹ Accordingly, Belarusian law directly addresses the situation where an occupant does not "return" the land plots after expiry of a temporary right to use them. The Claimant's suggestion that land plots are somehow automatically returned to a municipal body on the expiration of the occupant's right to use them is, therefore, wrong as a matter of Belarusian law.

⁸⁷⁵ Land Code of the Republic of Belarus, Article 70, **Exhibit R-128**.

⁸⁷⁶ See, e.g. Decision of the MCEC dated 3 September 2009, **Exhibit C-73**; Decision of MCEC dated 24 May 2007, **Exhibit C-68**; Decision of MCEC dated 2 May 2008, **Exhibit C-86**.

⁸⁷⁷ Defence, paragraphs 301 – 303, **RS-18**.

⁸⁷⁸ Tax Code of the Republic of Belarus, Article 193(1) (in force between 1 January 2010 and 31 December 2018), **Exhibit RL-130**.

⁸⁷⁹ Tax Code of the Republic of Belarus, Article 197(2) (in force between 1 January 2010 and 31 December 2018), **Exhibit RL-130**.

526. Manolium-Engineering knew that it had to pay land tax starting from 2013. As set out in the Defence, from 2010, Manolium-Engineering was taxed under the simplified taxation system.⁸⁸⁰ Before 2013, this meant that it had no obligation to account for and pay separately the land tax. Accordingly, from 2010 Manolium-Engineering (having previously paid land tax), stopped filing separate tax returns with respect to land tax.
527. However, from 2013, following amendments to the Tax Code, all entities taxed under the simplified taxation system, which occupied land plots exceeding 0.5 hectares in size had, inter alia, to file relevant tax returns and pay land tax.
528. Ms [REDACTED], who was the chief accountant of Manolium-Engineering at the time, says in her witness statement that in around February 2013, she explained the nature of the said amendments, to the director of Manolium-Engineering, Mr Dolgov.⁸⁸¹
529. Ms [REDACTED] also prepared tax returns with respect to land tax for filing. According to Ms [REDACTED], she made numerous attempts to persuade Mr Dolgov that Manolium-Engineering had to pay land tax from then on. Mr Dolgov, however, refused to sign the tax returns prepared by Ms [REDACTED] and directed her not to pay the tax in breach of the law.⁸⁸²
530. In February 2014, Ms [REDACTED] again prepared and submitted to Mr Dolgov a memorandum explaining Manolium-Engineering's obligation to pay the tax and the necessary tax returns.⁸⁸³ Mr Dolgov, however, failed to sign the tax returns again.
531. As set out in the Defence, since Manolium-Engineering failed to submit tax returns with respect to land tax for the year 2013 and onwards, in February 2014, the District Tax Inspectorate demanded that Manolium-Engineering comply with its obligations

⁸⁸⁰ Defence, paragraph 317, **RS-18**.

⁸⁸¹ Witness Statement of Ms [REDACTED], paragraph 30, **RWS-3**.

⁸⁸² Witness Statement of Ms [REDACTED], paragraphs 30 – 31, **RWS-3**.

⁸⁸³ Internal Memorandum of Ms [REDACTED] to Mr Dolgov dated 20 February 2014, **Exhibit R-202**.

to submit land tax returns for the years 2013 and 2014. The demands were never answered nor complied with.⁸⁸⁴

b) Manolium-Engineering’s failure to pay taxes was not “caused entirely by Respondent”

532. The Claimant argues that the “*the Respondent created the situation wherein the Claimant was unable to avoid the tax liability after expiration of the construction permission for the Depot on 1 July 2011*”.⁸⁸⁵ In particular, the Claimant submits: “*through the end of 2016, [MCEC] repeatedly rejected numerous proposals for acceptance of ownership of the land plots, even though it was obligated to accept ownership under Belarusian law. [...] [T]he true reason for this refusal was the Respondent's desire to obtain the New Communal Facilities for free by alleging non-payment of taxes as a basis to seize the property without compensation*”.⁸⁸⁶
533. First, the suggestion that MCEC “*was obligated to accept [the land plots] under Belarusian law*” is wrong as a matter of Belarusian law. To the contrary, as explained in the Defence, there was no legal basis on which MCEC could take the land plots as long as they were occupied by property belonging to Manolium-Engineering.⁸⁸⁷
534. Second, the Claimant’s allegation that “*the true reason for [MCEC’s refusal to take the land plots] was the Respondent's desire to obtain the New Communal Facilities for free by alleging non-payment of taxes*” simply does not add up to the facts. As set out in the Defence, land tax did not apply and was not levied on Manolium-Engineering after 2009 and before 2013.⁸⁸⁸ Accordingly, MCEC could not have been planning “*to obtain the New Communal Facilities for free by alleging non-payment of taxes*” in 2011 or 2012. At the same time, MCEC’s position that it could not accept the land plots from Manolium-Engineering remained the same since Manolium-

⁸⁸⁴ Defence, paragraph 321, **RS-18**.

⁸⁸⁵ Reply, paragraphs 586 and 645, **CS-5**.

⁸⁸⁶ Reply, paragraph 333, **CS-5**.

⁸⁸⁷ Defence, paragraph 302, **RS-18**.

⁸⁸⁸ Defence, paragraph 317, **RS-18**.

Engineering enquired about it for the first time in June 2012.⁸⁸⁹ It would be absurd to suggest that the entire tax reform, following which land tax began to apply to Manolium-Engineering in 2013, was conducted entirely for the purpose of “putting Manolium-Engineering in a trap” and “seizing its property without compensation”. Even the Claimant does not go this far in its allegations.

535. Further, as explained in paragraphs 483 – 489 above, after the contractual term for the construction of the New Communal Facilities expired, both before the Amended Investment Agreement was terminated and subsequently, nothing prevented Manolium-Engineering from applying for and obtaining new permits for the land plots on which the unfinished New Communal Facilities stood. It had to do so in order to continue occupying the land on a legitimate basis pending the negotiations with MCEC regarding the possible sale of the unfinished New Communal Facilities to it. Of course, in that case Manolium-Engineering would still have been liable to pay land tax but the tenfold multiplier would not have applied to the tax rate – only the twofold multiplier would still be applicable – which would have made a material difference.
536. Manolium-Engineering, however, consistently acted as if it was above Belarusian law. It appears to have been Manolium-Engineering’s unwavering position that it was not required to apply for the necessary permits, pay taxes and comply with other legal requirements. Predictably, this resulted in sanctions.
537. Accordingly, the accrual of the tax liability and Manolium-Engineering’s failure to timely settle it was not in any way “caused” by MCEC or the Respondent but was only a result of Manolium-Engineering’s own actions, inactions and failures.

⁸⁸⁹ Letter from Manolium-Engineering to Minsk City Executive Committee dated 11 June 2012, **Exhibit C-336**; Letter from Minsk Land Planning Service to Manolium-Engineering dated 17 July 2012, paragraph 2, **Exhibit C-337**.

2. There was no causal link between the administrative liability and the calculation of the amount of the tax liability of Manolium-Engineering

538. As explained in the Defence, pursuant to the Belarusian Tax Code:⁸⁹⁰
- A. where an entity continues to occupy the land plots after the expiry of a temporary right to use them (the permits to the land plots) it is liable to pay land tax on such land plots at a tenfold increased rate;⁸⁹¹ and
 - B. in relation to the land plots on which stand unfinished construction objects whose permitted (statutory) term of construction has expired, the rate of land tax doubles.⁸⁹²
539. As set out in the Defence, the finding that Manolium-Engineering was administratively liable in the 2016 Administrative Proceedings was not the ground on which the District Tax Inspectorate applied the tenfold multiplier to the land tax rate.⁸⁹³ The Administrative Court Resolution was the formal document through which the District Tax Inspectorate learnt as a matter of fact that Manolium-Engineering was occupying the land plots without the requisite permits. This, in turn, was a ground for the District Tax Inspectorate to apply the tenfold multiplier to the tax rate.
540. Notably, the fact that the permitted (statutory) term of construction of the New Communal Facilities has expired (which is the ground for doubling the land tax rate) was not even the subject matter of the 2016 Administrative Proceedings. Yet, the District Tax Inspectorate applied the double multiplier to the tax rate based on the fact that such term has expired.

⁸⁹⁰ Defence, paragraphs 314 – 315, **RS-18**.

⁸⁹¹ Tax Code of the Republic of Belarus, Article 197(2) (in force between 1 January 2010 and 31 December 2018), **Exhibit RL-130**.

⁸⁹² Tax Code of the Republic of Belarus, Article 197(3) (in force between 1 January 2012 and 31 December 2018), **Exhibit RL-130**.

⁸⁹³ Defence, paragraph 327, **RS-18**.

541. In other words, had the District Court not imposed administrative sanctions on Manolium-Engineering in the 2016 Administrative Proceedings, Manolium-Engineering would still have been liable to pay land tax at the increased tax rate. The District Tax Inspectorate also would still have applied the multipliers to the tax rate as long as it became aware of Manolium-Engineering occupying the Land Plots without permits and that the statutory term of construction of the New Communal Facilities has expired.
542. The Claimant alleges that the issuance of the First Tax Audit Report on the same day as the Administrative Resolution “*strongly suggests that the tax authorities knew exactly which decision would be reached by the new judge.*”⁸⁹⁴ This is a plain distortion of facts.
543. As set out in the Defence, the First Tax Audit Report concluded that Manolium-Engineering owed land tax payments, because Manolium-Engineering had occupied the land plots on which the New Communal Facilities were located in 2013 – 2015 and the first half of 2016.⁸⁹⁵ Notably, however, the Claimant’s deliberate description of the First Tax Audit Report as the report on “*improper use of the land plot*” is factually incorrect.⁸⁹⁶ The First Tax Audit Report used the standard rates of tax, because the District Tax Inspectorate was not aware of the fact that Manolium-Engineering had been occupying the land plots without a valid land permit and that unfinished construction facilities were located on them.⁸⁹⁷ This further demonstrates

⁸⁹⁴ Reply, paragraph 720, **CS-5**.

⁸⁹⁵ Defence, paragraph 323, **RS-18**.

⁸⁹⁶ Reply, paragraph 351, **CS-5**.

⁸⁹⁷ Defence, paragraphs 314, 315 and 325, **RS-18**. In paragraph 352 of the Reply, the Claimant submits: “*The Tax Inspectorate declared without justification that Manolium-Engineering shall pay in total approximately USD 1,189,927 for allegedly unpaid land taxes for 2013-2016, plus an associated penalty*”. The assertion that this was declared “*without justification*” is false. The Tax Inspectorate provided a detailed justification and a calculation of the amount of tax liability, as can be seen from the First Tax Audit Report dated 17 May 2016, **Exhibit C-164**. As set out in the First Tax Audit and paragraph 324 of the Defence, US\$1,189,927 is the total amount of tax liability and penalty contrary to what may appear from the Claimant’s description in paragraph 352 of the Reply.

that the District Tax Inspectorate could not have known “*exactly which decision would have been reached*” by the District Court.

544. On the contrary, only after the First Tax Audit Report was the District Tax Inspectorate notified that Manolium-Engineering:
- A. owned the Depot under construction and that the statutory term for its construction had expired; and
 - B. occupied the land plots after the expiry of the requisite permits (which was, *inter alia*, established in the Administrative Court Resolution).⁸⁹⁸
545. On 21 June 2016, the District Tax Inspectorate amended the First Tax Audit Report to address these facts.⁸⁹⁹ Manolium-Engineering never challenged the First Tax Audit Report or Amendments and supplements to it, although it was entitled to do so, as set out in the Defence.⁹⁰⁰
546. The facts described in paragraphs 539 – 545 above are set out in greater detail in the Defence. The Claimant ignores the Respondent’s submissions and evidence on this point and speculates about the shortness of time between the First Tax Audit Report, the Administrative Court Resolution and the chronology of events in general to think up a theory, which is not supported by the evidence provided in these proceedings.

⁸⁹⁸ Defence, paragraph 325, **RS-18**. Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**.

⁸⁹⁹ Defence, paragraph 326, **RS-18**. Amendments and supplements to the First Tax Audit Report dated 21 June 2016, **Exhibit C-166**. In paragraph 354 of the Reply, the Claimant submits: “*Thus, the Respondent demanded that Manolium-Engineering pay approximately USD 13,405,019 in allegedly unpaid taxes, plus penalties*”. As set out in the Amendments and supplements to the First Tax Audit Report and paragraph 330 of the Defence, US\$13,405,019 is the total amount of tax liability and penalty contrary to what may appear from the Claimant’s description in paragraph 354 of the Reply.

⁹⁰⁰ Defence, paragraph 335, **CS-18**.

3. Enforcement of the land tax liability against the New Communal Facilities was lawful

547. As explained in paragraph 490 above, the Claimant is deliberately mixing up separate and independent procedures. In particular, these are:
- A. the 2016 Administrative Proceedings that took place in April – May 2016, as described in the Defence and paragraphs 504 – 514 above;⁹⁰¹
 - B. the 2016 Tax Audit that took place in May – July 2016 as described in the Defence;⁹⁰² and
 - C. the enforcement of Manolium-Engineering’s land tax liabilities against the New Communal Facilities, which started with the Order of the Economic Court of Minsk dated 18 August 2016 and culminated in the President’s order dated 20 January 2017, as described in the Defence and paragraphs 551 – 575 below.⁹⁰³
548. In the Reply, the Claimant states that “[s]hortly after” the 2016 Administrative Proceedings, the President “*issued the instruction to transfer the New Communal Facilities gratuitously to the communal ownership*”.⁹⁰⁴ The Claimant then goes on to conclude: “*thus, the tax liability [...] was an instrument of the implementation of the President’s official instruction*”.⁹⁰⁵ The Claimant’s conclusion is misguided for several reasons.
549. First, as explained in the Defence, the President’s order was part of a formal procedure of enforcement of land tax liability against Manolium-Engineering in accordance with the Order of the Economic Court of Minsk dated 18 August 2016.⁹⁰⁶

⁹⁰¹ Defence, paragraphs 299 – 312, **CS-18**.

⁹⁰² Defence, paragraph 321 – 331, **CS-18**.

⁹⁰³ Defence, paragraph 332 – 335 and 339 – 353, **CS-18**.

⁹⁰⁴ Reply, paragraph 721, **CS-5**.

⁹⁰⁵ Reply, paragraph 592, **CS-5**.

⁹⁰⁶ Defence, paragraph 347, **CS-18**.

At the same time, as explained in paragraphs 539 – 546 above, the 2016 Administrative Proceedings, had nothing to do with Manolium-Engineering’s tax liability.

550. Second, looking at the chronology of events, the Claimant does not explain how the tax authorities were acting on the President’s “*instruction*” when the President’s order was issued many months after the tax authorities conducted their tax assessments and was the culmination of the process for enforcement of the tax liabilities, which had already been ordered by the Economic Court of Minsk as described in more detail in the Defence and below.

a) The procedure of enforcement of tax liability against Manolium-Engineering and its legal framework

551. As set out in the Defence, under Belarusian law, if a debtor does not have money or receivables to settle its outstanding tax liability (as was the case with Manolium-Engineering) tax authorities may apply to the court to enforce the tax liability against debtor’s other assets. On 20 July 2016, the District Tax Inspectorate applied to the Economic Court of Minsk for an order to enforce the land tax liabilities against the assets of Manolium-Engineering.⁹⁰⁷

552. During the court proceedings, the court established that Manolium-Engineering had been duly notified of the hearing but failed to submit a defence to the application of the District Tax Inspectorate.⁹⁰⁸ On 18 August 2016, the Economic Court of Minsk granted the order to enforce the land tax liabilities against the New Communal Facilities. The Claimant and Manolium-Engineering never challenged the court order, although this right was expressly provided for in the court order.⁹⁰⁹ As can be seen

⁹⁰⁷ Defence, paragraph 333, **RS-18**. Application of the Tax Inspectorate dated 20 July 2016, **Exhibit C-169**.

⁹⁰⁸ Defence, paragraph 335, **RS-18**. Judgement of the Economic Court of Minsk dated 18 August 2016, **Exhibit C-170**.

⁹⁰⁹ Defence, Paragraph 335, **RS-18**. Judgement of the Economic Court of Minsk dated 18 August 2016, **Exhibit C-170**.

from the court order, it gives reasoning and legal grounds for the enforcement of Manolium-Engineering's tax liability against the New Communal Facilities.⁹¹⁰

553. As set out in the Defence, there is a legislative procedure to be followed where a court has ruled to enforce tax liabilities against the taxpayer's assets. This procedure is set out in the Regulation.⁹¹¹ The Regulation is publically available and has been closely followed by the state authorities after the Economic Court of Minsk issued the order to enforce Manolium-Engineering's tax liability against the New Communal Facilities.⁹¹² Pursuant to Article 165 of the Regulation, the transfer of real property into state or municipal ownership ordered by a court is only made effective by way of the President's order.⁹¹³
554. Accordingly, the Claimant's allegation that "*the Respondent has failed entirely to justify the purported legality of the Presidential Order*" is completely unfounded.⁹¹⁴
555. Importantly, however, it was the Order of the Economic Court of Minsk dated 18 August 2016, which formed the basis for the transfer of the New Communal Facilities into the municipal ownership, not the President's order, as the Claimant submits.⁹¹⁵ As explained in the Defence, the President's order is a purely administrative document, the purpose of which was to formally complete (as required by Belarusian law) the procedure of the enforcement of the tax liabilities, which had already been ordered by the Economic Court of Minsk on 18 August 2016.⁹¹⁶ Accordingly, the Claimant's assertion that it "*has still not been provided with any legal justification purportedly supporting the transfer of the New Communal*

⁹¹⁰ Order of the Economic Court of Minsk dated 18 August 2016, **Exhibit C-170**.

⁹¹¹ Regulation "On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets" adopted by President's Decree No. 63 dated 19 February 2016, **Exhibit RL-126**.

⁹¹² Defence, paragraphs 339 – 349, **RS-18**.

⁹¹³ Defence, paragraph 341, **RS-18**.

⁹¹⁴ Reply, paragraph 672, **CS-5**.

⁹¹⁵ Reply, paragraphs 674 and 679, **CS-5**.

⁹¹⁶ Defence, paragraphs 347 – 353, **RS-18**.

Facilities to Minsk ownership” is misinformed.⁹¹⁷ Not only was a copy of the court order of 18 August 2016 sent to Manolium-Engineering as a part of the standard procedure, but its representative also familiarised himself in person with the court file, containing the order, shortly after the order was issued. This is evidenced by the application to familiarise and the power of attorney issued by Manolium-Engineering, kept on the court file.⁹¹⁸

556. Further, as set out in the Defence, in accordance with Article 167 of the Regulation, the transfer of the New Communal Facilities to Minsktrans was formalised by the Deed of Transfer dated 27 January 2017.⁹¹⁹ A representative of the District Tax Inspectorate provided this document to the representative of Manolium-Engineering and to the court on 1 February 2017 at a court hearing in Manolium-Engineering’s insolvency proceedings.⁹²⁰ A copy of the Deed of Transfer was also placed in the insolvency court file.

b) The valuation of the New Communal Facilities for the purpose of enforcement of tax liability

557. As set out in the Defence, after the court order and before the President's order and the actual transfer of the property into state or municipal ownership, various arrangements are required to be made, including a valuation of the assets by an expert.⁹²¹ It is explained in the Defence that the expert valuation of the market value of the New Communal Facilities was undertaken in November 2016 by the Registration and Cadastre Agency in accordance with the express provisions of Articles 43 and 44 of the Regulation, and not as directed by the President, as the Claimant suggests in the

⁹¹⁷ Reply, paragraph 674, **CS-5**.

⁹¹⁸ Power of Attorney dated 9 August 2016, **Exhibit R-209**; Application to familiarise with case file dated 5 September 2016, **Exhibit R-210**.

⁹¹⁹ Defence, paragraph 349, **RS-18**. Deed of transfer dated 27 January 2017, **Exhibit R-148**.

⁹²⁰ Minutes of the court hearing in relation to the case No. 40-5/B/2017 dated 1 – 8 February 2017, **Exhibit R-211**; Objections of the insolvency administrator to the Second Tax Audit Report, **Exhibit R-149**.

⁹²¹ Defence, paragraph 342, **RS-18**. Land Code of Republic of Belarus, Article 44, **Exhibit RL-128**.

Notice.⁹²² Yet, in the Reply, the Claimant continues to ignore the facts and the clear provisions of Belarusian legislation.

558. In paragraph 357 of the Reply, the Claimant submits: “*after several internal meetings, the Belarusian authorities finally came to the conclusion that the value of the New Communal Facilities was not the more than USD 19 million that they had previously calculated, but rather just USD 13,880,000 (BYN 27,287,748.05)*”. The Claimant, therefore, is seeking to create the impression that the evaluation of the New Communal Facilities was carried out in the absence of legal grounds, which is false, as explained in paragraphs 557 above.
559. The Claimant further submits that the difference in the outcomes of the calculations set out in the 2016 Memorandum (i.e. US\$19,434,679⁹²³) and the valuation by the Registration and Cadastre Agency shows that the latter valuation was somehow farfetched or improper and that the New Communal Facilities were undervalued on purpose.⁹²⁴ This is not so.
560. First, the Respondent notes that the Registration and Cadastre Agency valued the New Communal Facilities at 30,319,720.05 denominated Belarusian rubles⁹²⁵ (US\$15,432,239.04),⁹²⁶ and not at 27,287,748.05 denominated Belarusian rubles (US\$13,889,015.14) as the Claimant submits.⁹²⁷ As explained in the Defence, the price of the New Communal Facilities for the purpose of enforcement of the tax liabilities was defined, pursuant to the Regulation, as the market value of the New Communal Facilities established by the Registration and Cadastre Agency,

⁹²² Defence, paragraph 344, **RS-18**.

⁹²³ 2016 Memorandum, page 16, **Exhibit C-160**.

⁹²⁴ Reply, paragraph 357, **CS-5**.

⁹²⁵ Statement of inventory and evaluation dated 25 November 2016, column 4, **Exhibit R-147**.

⁹²⁶ As at 25 November 2015, the date of the Statement of inventory and evaluation (**Exhibit R-147**), the official exchange rate of the National Bank of Belarus (available at: <http://www.nbrb.by/eng/statistics/rates/ratesDaily.asp>) was 1.9647 denominated Belarusian rubles for US\$1, **Exhibit R-241**.

⁹²⁷ Reply, paragraph 357, **CS-5**.

decreased by ten percent, which was equal to 27,287,748.05 denominated Belarusian rubles (US\$13,889,015.14).⁹²⁸

561. Second, as explained in paragraphs 437 – 454 above, contrary to what the Claimant now asserts,⁹²⁹ the 2016 Memorandum did not present “*the value of the* [New Communal Facilities]”, but contained only a calculation of the costs as recorded by Manolium-Engineering. By contrast, as explained in the Defence⁹³⁰ and in paragraph 557 above, the Registration and Cadastre Agency determined the market value of the New Communal Facilities pursuant to the Regulation.
562. Lastly, the Registration and Cadastre Agency explained at the meeting of 17 November 2016 that it was not provided with “*the necessary documents for the technical inventory and valuation of* [the New Communal Facilities]”.⁹³¹ However, it was impossible for MCEC to provide the above documents, because they were (or should have been) in Manolium-Engineering’s possession, whose responsibility as the developer of the New Communal Facilities was to maintain those documents (including the Design Specification and Estimate Documentation and as-built documentation). Accordingly, the Registration and Cadastre Agency’s valuation was as comprehensive as possible in the circumstances. However, it may have not taken into account all relevant factors, which could have affected its findings (such as works, materials or equipment, which did not comply with the Design Specification and Estimate Documentation).
563. Notably, however, Manolium-Engineering never challenged the Registration and Cadastre Agency’s valuation despite having the right to do so, as described below.

⁹²⁸ Defence, paragraph 345, **RS-18**. Statement of inventory and evaluation dated 25 November 2016, column 12, **Exhibit R-147**. Regulation, Article 59.

⁹²⁹ Reply, paragraphs 356 – 357, **CS-5**.

⁹³⁰ Defence, paragraphs 344 -345, **RS-18**.

⁹³¹ Letter from the Department of Humanitarian Activities dated 18 November 2016 attaching draft minutes of a meeting of 17 November 2016, **Exhibit C-172** (emphasis added).

564. As set out in paragraph 556 above, the Deed of Transfer, by which the transfer of the New Communal Facilities to Minsktrans was formalised, was provided to Manolium-Engineering.⁹³² The value of the New Communal Facilities for the purpose of the enforcement of the tax liabilities was stated in the Deed of Transfer together with other information.
565. Pursuant to Article 227 of the Belarusian Code of Commercial Procedure, an entity is entitled to challenge a non-regulatory binding instrument and/or actions of a state or municipal authority in court if the entity believes that such instrument or actions are unlawful and violate its rights.⁹³³ Manolium-Engineering had the right to apply to the court in accordance with the said provision to challenge the Deed of Transfer. As part of those proceedings, Manolium-Engineering would have been entitled to submit its own evidence to prove that the valuation of the New Communal Facilities was incorrect. Manolium-Engineering chose not to do so.
566. Had Manolium-Engineering disagreed with the valuation of the New Communal Facilities, it also had the right to make an unjust enrichment claim against MCEC. Pursuant to Article 971 of Belarusian Civil Code⁹³⁴ and Item 10 of the Resolution of the Supreme Commercial Court Presidium No. 30 dated 27 April 2011,⁹³⁵ Manolium-Engineering could have substantiated the value of the New Communal Facilities that it considered correct and sought the difference between the amount of tax liability and the amount representing the actual value of the New Communal Facilities. Manolium-Engineering chose not to do so.

⁹³² Deed of transfer dated 27 January 2017, **Exhibit R-148**.

⁹³³ Belarusian Code of Commercial Procedure, Article 227, **Exhibit RL-129**.

⁹³⁴ Belarusian Civil Code, Article 971, **Exhibit RL-127**.

⁹³⁵ Resolution of the Supreme Commercial Court Presidium No. 30 dated 27 April 2011 “On certain issues of application of the Civil Code provisions on unjust enrichment by economic courts”, Item 10, **RL-124**.

c) The President's order

567. In the Reply, the Claimant misrepresents the nature of the President's instruction of 10 October 2016. According to the Claimant, *"on 10 October 2016, the President of the Republic of Belarus issued the instruction to transfer the New Communal Facilities gratuitously to the communal ownership"*.⁹³⁶ This assertion, yet again, ignores the evidence provided by the Respondent. As Mr Akhramenko explains the instruction of 10 October 2016 *"was in fact an instruction to take measures to prepare for the transfer of the New Communal Facilities into municipal ownership in accordance with the procedure prescribed by the law"*.⁹³⁷ The order for the transfer of the New Communal Facilities into municipal ownership itself was issued on 20 January 2017, *"i.e. after all the organizational measures for preparation of the transfer had been completed, as is required by the relevant legal procedures"*.⁹³⁸
568. In the Reply, the Claimant discusses at length the issue of the President's order of 20 January 2017 having not been made available to the Claimant.⁹³⁹ The Claimant submits that this demonstrates not only the disregard of the Claimant's rights by the Republic of Belarus but also the lack of respect to these proceedings.⁹⁴⁰ Notably, the Claimant never sought disclosure of the President's order in these proceedings although the UNCITRAL Rules allow this.⁹⁴¹
569. While it is true that the documents marked "for official use only" are non-disclosable to the public and cannot be disclosed to third parties under Belarusian law (unless the classification "for official use only" has been lifted in accordance with the applicable procedure), as explained in the Defence, the President's order does not contain any materially new information. As a part of the procedure of the implementation of the

⁹³⁶ Reply, paragraph 592, 721, **CS-5**.

⁹³⁷ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 154, **RWS-2**.

⁹³⁸ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 155, **RWS-2**.

⁹³⁹ Reply, paragraphs 358 – 363 and 672 – 679, **CS-5**.

⁹⁴⁰ Defence, paragraph 361, **RS-18**.

⁹⁴¹ UNCITRAL Rules, Article 27(3).

court order of 18 August 2016, it merely gives effect to the state authorities' decisions concerning the transfer of the New Communal Facilities into municipal ownership.⁹⁴² Accordingly, the fact that the President's order has not been provided to the Claimant has not been prejudicial to the Claimant.

570. In any event, the classification "for official use only" is in the process of being lifted from the President's order and the Respondent anticipates being in a position to provide this document to the Claimant and the Tribunal in the course of next week. As will be evident, the document fully supports what the Respondent's position in these proceedings. As previously asserted, it does not contain any new information; it simply:

- A. refers to the previous state authorities acts which are described in detail in the Defence, i.e. the District Tax Inspectorate's order for the attachment of the New Communal Facilities 5 July 2016⁹⁴³ and the Order of the Economic Court of Minsk dated 18 August 2016,⁹⁴⁴
- B. orders to write off the tax liability of Manolium-Engineering in the part corresponding to the value of the New Communal Facilities as per the schedule to the President's order (the figures contained in the schedule correspond to the ones in the Statement of Inventory and Evaluation dated 25 November 2016 prepared based on the on the expert evaluation of the New Communal Facilities);⁹⁴⁵ and
- C. provides technical instructions to various state bodies on the way the transfer of the New Communal Facilities has to be implemented.

⁹⁴² Defence, paragraph 347 – 348, **RS-18**.

⁹⁴³ Defence, paragraph 332, **RS-18**. Order of the Tax Inspectorate for arrest of the land plots dated 5 July 2016, **Exhibit C-167** (Respondent' translation).

⁹⁴⁴ Defence, paragraph 335, **RS-18**. Judgment of the Economic Court of Minsk dated 18 August 2016, **Exhibit C-170** (Respondent' translation).

⁹⁴⁵ Defence, paragraph 345, **RS-18**. Statement of inventory and evaluation dated 25 November 2016, **Exhibit R-147** (Respondent' translation).

d) The transfer of the New Communal Facilities to the municipal ownership

571. In paragraphs 334 – 335 of the Reply, the Claimant seeks to find contradiction between MCEC’s refusal in 2012 – 2016 to accept the land plots and the unfinished New Communal Facilities into municipal ownership and the fact that in 2017 it did accept the land plots and that Minsktrans accepted the New Communal Facilities as a result of the enforcement of the tax liability. “*The fact that the New Communal Facilities were not completed was apparently no longer of any concern*” – the Claimant submits.⁹⁴⁶ The Claimant keeps muddling things up to bring confusion. Contrary to the Claimant’s assertion, there is no contradiction in MCEC’s position.
572. First, MCEC refused to accept into municipal ownership the unfinished New Communal Facilities from Manolium-Engineering before the Amended Investment Contract was terminated in 2014, because this was contrary to the contractual terms.⁹⁴⁷
573. Second, MCEC refused to accept into municipal ownership the New Communal Facilities after the termination of the Amended Investment Contract because it was no longer MCEC’s obligation to do so – whether completed or not – because the contract was terminated. Neither was MCEC under an obligation to accept the Claimant’s and Manolium-Engineering’s arbitrary proposals on the terms of the transfer of the New Communal Facilities into municipal ownership
574. Third, MCEC never refused to accept the land plots after the expiration of the relevant permits for reasons of the New Communal Facilities located on them being unfinished. The reason for the refusal was simple: Manolium-Engineering’s property was located on the land plots and until that issue was resolved, no-one could receive the land with someone else’s property on it. As explained in the Defence and paragraph 533 above, it was legally impossible for MCEC to accept the land plots

⁹⁴⁶ Reply, paragraph 335, **CS-5**.

⁹⁴⁷ Defence, paragraph 188, **RS-18**.

while Manolium-Engineering still owned the New Communal Facilities located on them.⁹⁴⁸ It did not matter for this purpose whether the New Communal Facilities were completed or not – they were still Manolium-Engineering’s property.

575. The reason why the tax liability was enforced against the New Communal Facilities was because they were the only assets of Manolium-Engineering. It did not matter whether they were completed either – they were still assets – and the extent to which they were completed would have only mattered for their valuation. Once the Economic Court of Minsk ordered to enforce the tax liability against the New Communal Facilities on 18 August 2016, the preparations for their transfer into the municipal ownership started. As part of such preparations, among other things, documents were prepared for the acceptance of the land plots underlying the New Communal Facilities into the municipal ownership. Now that the New Communal Facilities were also being transferred into municipal ownership, the obstacles previously preventing MCEC from accepting the land plots were removed. Based on the above, the Claimant’s insinuations in paragraphs 334 – 335 of the Reply are misguided.

R. COMPLETION OF THE NEW COMMUNAL FACILITIES BY MINSKTRANS

1. Minsktrans has to incur significant costs to complete the New Communal Facilities

576. Since 27 January 2017, when the New Communal Facilities were transferred to Minsktrans,⁹⁴⁹ Minsktrans has been taking steps to complete construction of the New Communal Facilities:

A. On 13 February 2017, Minsktrans’ director ordered that its employees (1) took steps to register Minsktrans’ rights of economic management of the New

⁹⁴⁸ Defence, paragraph 302, **RS-18**.

⁹⁴⁹ Defence, paragraph 349, **RS-18**; Deed of transfer dated 27 January 2017, **Exhibit R-148**.

Communal Facilities and (2) to develop a plan for completing construction of the New Communal Facilities;⁹⁵⁰

- B. On 2 February 2017, Minsktrans applied to the Minsk City Engineering Services Centre for approval of performing design and survey works to complete construction of the Depot. On 14 February 2017, the Architecture Committee responded to Minsktrans informing that before such works be approved it was first necessary to gather baseline data and submit, *inter alia*, documents confirming the rights to the land plots for construction and the Expert Approval of the original Design Specification and Estimate Documentation⁹⁵¹ (i.e. the one prepared upon Manolium-Engineering's instructions);
- C. On 2 March 2017, Minsktrans applied to MCEC to provide it with the rights to the land plot for completion of construction of the Depot.⁹⁵² Shortly after UP Zemproject prepared documents for allocation of the land plot in June 2017,⁹⁵³ MCEC issued a decision to provide the land plot for completion of the Depot to Minsktrans.⁹⁵⁴

577. Minsktrans did not have the full set of the original Design Specification and Estimate Documentation for the Depot, which, as explained above, was necessary to obtain approval for performing design and survey works to complete construction of the Depot. For this reason, on 22 December 2017, Minsktrans asked the designer of the original Design Specification and Estimate Documentation for the Depot to provide that documentation. On 23 January 2018, UP Belpromstroyproject, a successor of GP Autorempromproject, which prepared that documentation for Manolium-

⁹⁵⁰ Order of Minsktrans' director dated 13 February 2017, **Exhibit R-212**.

⁹⁵¹ Letter from the Architecture Committee to Minsktrans dated 14 February 2017, **Exhibit R-213**.

⁹⁵² Letter from Minsktrans to MCEC dated 2 March 2017, **Exhibit R-214**.

⁹⁵³ Letter from MCEC to UP Zemproject and Minsktrans dated 30 March 2017, **Exhibit R-215**; Letter from UP Zemproject to MCEC received on 22 June 2017, **Exhibit R-216**.

⁹⁵⁴ Decision of MCEC No. 2536 dated 27 July 2017, **Exhibit R-217**.

Engineering, refused to provide Minsktrans with that documentation in the absence of Manolium-Engineering's consent (which was its client).⁹⁵⁵

578. Furthermore, Minsktrans did not have the full set of as-built documentation for the Depot. That was (or should have been) in Manolium-Engineering's possession, whose responsibility as the customer was to maintain that documentation and Minsktrans had no legal means to obtain it.⁹⁵⁶ As-built documentation was also necessary to determine the scope of remaining works required to repair and complete the Depot.
579. For the above reasons, Minsktrans had to engage another designer, Belcommunproject, in order to (1) conduct a separate survey of the technical state of the Depot and an analysis of the scope of the remaining works, including the works needed to rectify the defects caused by Manolium-Engineering, and (2) prepare the Design Specification and Estimate Documentation for completion of the Depot based on the above survey.
580. The survey of the technical state of the Depot was a time-consuming exercise. By way of example, it took 3 months – from December 2017 to February 2018 – for Belcommunproject to inspect the production facility of the Depot.⁹⁵⁷ Following the survey, Belcommunproject prepared the Design Specification and Estimate Documentation for completion of the Depot, which was approved on 15 June 2018.⁹⁵⁸ According to the Expert Approval of the Design Specification and Estimate Documentation for completion of the Depot, the total cost estimate as at 1 February 2018 amounts to 12,689,345 denominated Belarusian rubles⁹⁵⁹

⁹⁵⁵ Letter from Belpromstroyproject to Minsktrans dated 23 January 2018, **Exhibit R-219**.

⁹⁵⁶ Under Belarusian law, as-built documentation is to be prepared by a contractor, which shall transfer it to a customer. Manolium-Engineering was a customer of construction of the Depot.

⁹⁵⁷ Extracts from the Engineering Opinion of Belcommunproject. Book 2. Production Facility, page 2, **Exhibit SQ-44**.

⁹⁵⁸ Excerpts from the Expert Approval of the Design Specification and Estimate Documentation for completion of the Depot dated 15 June 2018, **Exhibit R-221**.

⁹⁵⁹ Excerpts from the Expert Approval of the Design Specification and Estimate Documentation for completion of the Depot dated 15 June 2018, **Exhibit R-221**.

(approximately US\$6,407,789).⁹⁶⁰ The statutory term for completion of the Depot is 10 months upon the commencement of construction works.

581. On 19 July 2018, MCEC issued a decision permitting Minsktrans to complete the Depot.⁹⁶¹ On 2 October 2018, Gosstroy informed Minsktrans that it registered the Depot as an object under construction.⁹⁶² On 1 November 2018, Minsktrans issued an internal order, which specified the updated construction period – from 19 November 2018 to 20 September 2019.⁹⁶³

2. The defects in the New Communal Facilities as built by Manolium-Engineering have increased costs of construction

582. As demonstrated below, in performing its obligation to construct the New Communal Facilities, Manolium-Engineering continuously deviated from the original Design Specification and Estimate Documentation by installing unauthorised and poor-quality equipment and cheaper materials. Moreover, the manner in which it undertook the works and defects that it allowed to sustain resulted Minsktrans having to incur additional and increased costs, *inter alia*, to complete the New Communal Facilities.

a) Pull Station

583. As explained in the Defence, Manolium-Engineering purchased equipment for the Pull Station, which was different from that in the Design Specification and Estimate Documentation. Furthermore, that equipment and the Pull Station had defects.⁹⁶⁴

⁹⁶⁰ 12,689,345 / 1.9803 = US\$6,407,789.22.

The official exchange rate of the Belarusian Ruble against US dollar of the National Bank of Belarus for 1 February 2018 // Available at: <http://www.nbrb.by/eng/statistics/rates/ratesDaily.asp>, **Exhibit R-220**.

⁹⁶¹ Decision of MCEC No. 2265 dated 19 July 2018, **Exhibit R-223**.

⁹⁶² Notice from Gosstroy to Minsktrans dated 2 October 2018, **Exhibit R-226**.

⁹⁶³ Internal Order of Minsktrans No. 633 dated 1 November 2018, **Exhibit R-227**.

⁹⁶⁴ Defence, paragraphs 189 – 191, **RS-18**; See also Letter from Minsktrans to Manolium-Engineering dated 6 July 2011, **Exhibit R-66**; Letter from Minsktrans to MCEC dated 14 November 2011, **Exhibit R-73**; Letter from Minsktrans to Manolium-Engineering dated 22 July 2011, **Exhibit C-78**;

584. In the Reply, the Claimant alleges that “[b]ecause these defects were caused by improper use of the Pull Station by the Respondent, the Claimant had no obligation to repair them”.⁹⁶⁵ This is plainly wrong.
585. The Respondent respectfully submits that those defects were caused by improper storage of the electrical equipment by Manolium-Engineering prior to the completion of the Pull Station (30 July 2010⁹⁶⁶). By way of an example, on 30 March 2009, AVM Amper, the manufacturer of the equipment for the Pull Station, warned Manolium-Engineering that improper storage already caused the equipment to rust, which, in turn, could lead to the breakdown of almost all components, such as switching and microprocessor units.⁹⁶⁷
586. The Claimant refers to Mr Dolgov’s witness statement, where he describes the accident, which occurred in October 2010, just 3 months after the commissioning of the Pull Station,⁹⁶⁸ which led to the breakdown of transformers. According to Mr Dolgov, the breakdown “*had been a result of its improper operation*”.⁹⁶⁹
587. The Respondent respectfully submits that the evidence referred to by Mr Dolgov⁹⁷⁰ contains no information on who and what exactly caused the breakdown. By contrast, as was explained by the chief engineer of Minsktrans’ branch at the time, the

List of works performed, which deviated from the Design Specification and Estimate Documentation, dated 30 November 2012 and submitted by Minsktrans in the course of the Termination Proceedings, **Exhibit R-199**.

⁹⁶⁵ Reply, paragraph 283, **CS-5**.

⁹⁶⁶ Pull Station commissioning act dated 30 July 2010, **Exhibit C-100**.

⁹⁶⁷ Letter from ABM Amper to Manolium-Engineering dated 30 March 2009, **Exhibit R-177**.

⁹⁶⁸ Pull Station commissioning act dated 30 July 2010, **Exhibit C-100**.

⁹⁶⁹ Reply, paragraph 284, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 26 – 27, **CWS-5**; See also Letter from Minsktrans to Manolium-Engineering dated 14 October 2010, **Exhibit C-328**; Act of technical investigation of accident on Pull Station of 29 November 2010, **Exhibit C-329**.

⁹⁷⁰ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 26, footnote 15, **CWS-5**; Letter from Minsktrans to Manolium-Engineering dated 14 October 2010, **Exhibit C-328**; Act of the technical investigation of the accident on the Pull Station dated 29 November 2010, **Exhibit C-329**; Registration and Cadastre Agency Report dated 16 June 2015, page 224, **Exhibit C-154**.

breakdown was caused by the fact that the equipment was stored outdoors for two years.⁹⁷¹ He also noted that the manufacturer of the equipment refused to extend its warranty commitments to the accident because of the improper storage.⁹⁷² Lastly, according to the chief engineer, Minsktrans experienced no issues with using similar transformers on other pull stations in Minsk during more than 40 years, while the transformer installed by Manolium-Engineering broke down just after 3 months of operation.⁹⁷³ On 30 December 2010, Minsktrans communicated this position to Manolium-Engineering.⁹⁷⁴

588. Given that the manufacturer's warning to Manolium-Engineering about the consequences of the improper storage of the equipment back in 2009,⁹⁷⁵ Mr Dolgov's explanation is implausible.
589. On 6 January 2011, RUP Minskenergo, which was in charge of energy supervision in Minsk, inspected the Pull Station and identified a number of defects, which were to be rectified by 15 February 2011.⁹⁷⁶ According to the act of inspection, Manolium-Engineering received it "*for execution*".⁹⁷⁷ However, by that deadline, Manolium-Engineering failed to rectify all defects specified in the act of inspection.⁹⁷⁸
590. Furthermore, as Minsktrans informed Manolium-Engineering, "*the load on the equipment of [the Pull Station had] not exceed 1% of its capacity. A third of the installed slots of 0.6 kW [were] used*".⁹⁷⁹ As Minsktrans explained, this was because

⁹⁷¹ Letter from the chief engineer of Minsktrans' branch to the director of Minsktrans dated 23 August 2011, **Exhibit R-191**.

⁹⁷² Letter from the chief engineer of Minsktrans' branch to the director of Minsktrans dated 23 August 2011, **Exhibit R-191**.

⁹⁷³ Letter from the chief engineer of Minsktrans' branch to the director of Minsktrans dated 23 August 2011, **Exhibit R-191**.

⁹⁷⁴ Letter from Minsktrans to Manolium-Engineering dated 30 December 2010, **Exhibit R-188**.

⁹⁷⁵ Letter from ABM Amper to Manolium-Engineering dated 30 March 2009, **Exhibit R-177**.

⁹⁷⁶ Act of inspection of the Pull Station dated 6 January 2011, **Exhibit R-189**.

⁹⁷⁷ Act of inspection of the Pull Station dated 6 January 2011, **Exhibit R-189**.

⁹⁷⁸ Act of inspection of the Pull Station dated 15 February 2011, **Exhibit R-190**.

⁹⁷⁹ Letter from Minsktrans to Manolium-Engineering dated 19 September 2011, **Exhibit C-105**.

“[the Pull Station was] *assigned for the power supply of the [Depot for 220 trolleybuses] and of a section of contact network along Gintovta street. For the period of one year only one trolleybus route has operated at this area*”.⁹⁸⁰

591. Accordingly, Manolium-Engineering installed the poor-quality equipment, which did not operate properly even under minimum load. Given that Manolium-Engineering failed to commission the Depot, it is yet to be seen how the rest of the equipment installed by Manolium-Engineering will be functioning under full load.

592. Mr Dolgov also states that “[e]ven though Minsktrans thus had been at fault, [Manolium-Engineering] replaced the burned-out equipment at our own cost”.⁹⁸¹ Mr Dolgov appears to suggest that Minsktrans should have been thankful to Manolium-Engineering for its efforts to replace the broken-down equipment. As explained above, however, the replacement of the equipment by Manolium-Engineering was not a gesture of goodwill, but rectification of its own breaches. Notably, the Claimant now seeks compensation for these expenses.⁹⁸²

593. Lastly, Mr Dolgov also contends that “[i]n July 2011, for example, Minsktrans demanded that Manolium-Engineering should provide [...] with extra spare parts, tools, and accessories – yet again for our own account, even though those supplies had not initially been included in the scope of [its] obligations”.⁹⁸³ This is misleading.

594. The reason why it was necessary to supply spare parts was Manolium-Engineering’s failure to install the equipment, which was initially specified in the Design Specification and Estimate Documentation for the Pull Station.⁹⁸⁴ When agreeing to

⁹⁸⁰ Letter from Minsktrans to Manolium-Engineering dated 19 September 2011 (emphasis added), **Exhibit C-105**.

⁹⁸¹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 28, **CWS-5**. See also Registration and Cadastre Agency Report dated 16 June 2015, page 224, **Exhibit C-154** (Respondent’s translation).

⁹⁸² Registration and Cadastre Agency Report dated 16 June 2015, page 224, **Exhibit C-154** (Respondent’s translation).

⁹⁸³ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 29, **CWS-5**.

⁹⁸⁴ Letter from Minsktrans to MCEC dated 14 November 2011, **Exhibit R-73**.

replace the specified equipment with the one proposed by Manolium-Engineering, Minsktrans as the future operator of the Pull Station issued supplemental Technical Specifications, requiring additional spare parts to be supplied at no cost.⁹⁸⁵

b) Depot

595. As with the Pull Station, the quality of the unfinished Depot as built by Manolium-Engineering has been unsatisfactory. As explained below, that contributed to deterioration of the Depot and, at the end of the day, increased the costs, which Minsktrans would have to incur to complete the Depot.
596. By way of an example, in October 2010, shortly before the winter season in Belarus, Minsktrans warned MCEC that Manolium-Engineering had failed to complete roofing works and had failed to install windows on the administrative and accommodation block of the Depot.⁹⁸⁶ On the production facility (the key facility for the Depot)⁹⁸⁷ no roofing was made at all. That resulted in deterioration of the load-bearing constructions caused by atmospheric precipitations.⁹⁸⁸ As can be seen from the

⁹⁸⁵ Letter from the chief engineer of Minsktrans' branch to the director of Minsktrans dated 23 August 2011, **Exhibit R-191**. See also Letter from Minsktrans to Manolium-Engineering dated 19 September 2011, **Exhibit C-105**; Letter from the director of Minsktrans' branch to the director of Minsktrans dated 30 August 2011, **Exhibit R-192**.

⁹⁸⁶ According to the cost estimate for the Depot, the cost estimate for the production facility (named as key construction facility) was 4,626,541,000 non-denominated Belarusian rubles (in 1991 prices). The total cost estimate for the Depot was 10,939,398 non-denominated Belarusian rubles (in 1991 prices). See A trolleybus depot with 220 trolleybus in Uruchye-6 microdistrict in Minsk. Architectural design. Cost estimate documentation. Volume 5.1, page 3 (line "Total for chapter 2") and 10 (line "Total for summary calculation"), **Exhibit SQ-44**.

⁹⁸⁷ According to the cost estimate for the Depot, the cost estimate for the production facility (named as key construction facility) was 4,626,541,000 non-denominated Belarusian rubles (in 1991 prices). The total cost estimate for the Depot was 10,939,398 non-denominated Belarusian rubles (in 1991 prices). See A trolleybus depot with 220 trolleybus in Uruchye-6 microdistrict in Minsk. Architectural design. Cost estimate documentation. Volume 5.1, page 3 (line "Total for chapter 2") and 10 (line "Total for summary calculation"), **Exhibit SQ-44**.

⁹⁸⁸ Letter from Minsktrans to MCEC dated 14 October 2010, **Exhibit R-185**.

photographs made on 29 January 2011, the situation has not significantly changed in the winter season.⁹⁸⁹

597. The above was not the only time when Manolium-Engineering demonstrated negligent approach to the performance of construction works. For example, according to the list of works, which deviated from the Design Specification and Estimate Documentation submitted by Minsktrans in the course of the Termination Proceedings.⁹⁹⁰

- A. one control panel of the supply ventilation system in the administrative and accommodation block was not installed;
- B. Manolium-Engineering installed manually-operated overhead cranes instead of the motor-driven ones;
- C. at the diagnostic station of the production facility Manolium-Engineering installed an ordinary window instead of one-chamber glass (double-glazed) window;
- D. the contact system masts installed were made of concrete instead of metal; and
- E. the width of technological sidewalks and safety spots was less than what was required by the Design Specification and Estimate Documentation.

598. The Respondent respectfully submits that the above examples demonstrate that Manolium-Engineering wilfully deviated from the original Design Specification and Estimate Document in order to save as much cost as it could to the detriment of Minsktrans and MCEC and in breach of its obligations under the Amended Investment Contract. As explained in paragraph 580 above, the current total cost estimate for Minsktrans to complete the Depot is 12,689,345 denominated Belarusian

⁹⁸⁹ Historical photos of the Depot together with the properties of the files, **Exhibit R-235**.

⁹⁹⁰ List of works performed, which deviated from the Design Specification and Estimate Documentation, dated 30 November 2012 and submitted by Minsktrans in the course of the Termination Proceedings dated 30 November 2012, **Exhibit R-199**.

rubles⁹⁹¹ (approximately US\$6,407,789).⁹⁹² Apart from the costs to complete the unfinished facilities, this also includes the costs to rectify the defects caused by Manolium-Engineering.⁹⁹³

599. As Belcommunproject confirmed in February 2018, a number of construction structures of the Depot, such as the blind area, floor slab panels of inspection pits, flooring and filling of window openings in the production facility, required repair, reinforcement or even replacement.⁹⁹⁴
600. The Respondent respectfully submits that the defects identified by Belcommunproject were solely caused by Manolium-Engineering. As demonstrated above, during the construction Manolium-Engineering did not ensure protection of the unfinished constructions from the impact of the environment. Once it left the construction site, it failed to properly ‘mothball’ the construction to avoid unnecessary deterioration of the facilities. This is especially relevant to the production facility, which was the largest and the most expensive part of the Depot,⁹⁹⁵ because Manolium-Engineering

⁹⁹¹ Excerpts from the Expert Approval of the Design Specification and Estimate Documentation for completion of the Depot dated 15 June 2018, **Exhibit R-221**.

⁹⁹² $12,689,345 / 1.9803 = \text{US}\$6,407,789.22$. The official exchange rate of the Belarusian Ruble against US dollar of the National Bank of Belarus for 1 February 2018 // Available at: <http://www.nbrb.by/engl/statistics/rates/ratesDaily.asp>, **Exhibit R-220**

⁹⁹³ See list of defects with the Depot as at 31 January 2017 in Minsktrans’ note dated 19 June 2018, **Exhibit R-222**.

⁹⁹⁴ 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, pages 2 – 3, 5 – 6, **Exhibit SQ-44**. According to the methodology employed by Belcommunproject, category IV implies that a construction is in not useable (unsatisfactory) condition; category III implies that there is no immediate danger of collapse of a construction, but it requires repairs and reinforcement.

⁹⁹⁵ According to the cost estimate for the Depot, the cost estimate for the production facility (named as key construction facility) was 4,626,541,000 non-denominated Belarusian rubles (in 1991 prices). The total cost estimate for the Depot was 10,939,398 non-denominated Belarusian rubles (in 1991 prices). See A trolleybus depot with 220 trolleybus in Uruchye-6 microdistrict in Minsk. Architectural design. Cost estimate documentation. Volume 5.1, page 3 (line “Total for chapter 2”) and 10 (line “Total for summary calculation”), **Exhibit SQ-44**.

never provided it to Minsktrans or the Respondent for free use⁹⁹⁶ before the New Communal Facilities were transferred to Minsktrans on 27 January 2017.

c) Road

601. In the Reply, the Claimant continues to insist that “*the Road was absolutely ready for use, and the only obstacle for its transfer to the communal ownership was the refusal of [MCEC] to accept it*”.⁹⁹⁷ To support this, the Claimant refers to “*the last piece of confirmation*” of readiness, i.e. the test protocols of pavements of the Road.⁹⁹⁸ This is factually wrong.
602. As explained in the Defence,⁹⁹⁹ unlike with the Pull Station, which was commissioned and registered with the real estate register,¹⁰⁰⁰ Manolium-Engineering failed to obtain the Road commissioning act signed by all members of the committee.¹⁰⁰¹ Accordingly, contrary to the Claimant’s contention, there were obstacles for the Road to be transferred into municipal ownership. For these reasons, the Claimant’s reliance on the test protocols of pavements of the Road is missing the point. Even the 2016 Memorandum, on which the Claimant heavily relies in its submissions, confirms that the Road was not commissioned at the time of the audit.¹⁰⁰²
603. Furthermore, the Road failed to comply with the Technical Specifications, on the basis of which the Design Specification and Estimate Documentation was developed.

⁹⁹⁶ According to the Agreement on gratuitous use of property between Manolium-Engineering and Minsktrans dated 14 November 2011 (**Exhibit C-82**), Minsktrans accepted for temporary use only the administrative and accommodation block of Depot and the checkpoint.

⁹⁹⁷ Reply, paragraph 869(ii)(c), **CS-5**.

⁹⁹⁸ Reply, paragraph 869(ii)(c), **CS-5**; Test protocol of State Enterprise Department of road-bridges construction and municipal improvement of MCEC on pavement of the Road dated 22 August 2012.

⁹⁹⁹ Defence, paragraphs 166 – 172, **RS-18**.

¹⁰⁰⁰ Defence, paragraphs 184 – 186, **RS-18**.

¹⁰⁰¹ See Defence, paragraph 101(d) - (e), **RS-18**, for the detailed description of the last steps of the construction of any facility in Minsk.

¹⁰⁰² 2016 Memorandum, page 9, **Exhibit C-160**.

By way of example, back in September 2011, Minsktrans informed Manolium-Engineering that the Road did not fully meet the Technical Specifications relating to:

- A. electric cables – they were not connected to the overhead contact system;
- B. masts on the line to the entry into the Depot – they were not installed; and
- C. the entry into the Depot.¹⁰⁰³

604. As the CAO of the Ministry of Finance and RSTC confirmed during the audit, from the period from 2012 to February 2016, municipal services working to complete the Road.¹⁰⁰⁴

605. Therefore, as with the Pull Station and the Depot, Manolium-Engineering failed to finish construction of the Road and abandoned it with defects.

S. ASTOMAKS IS OBLIGED TO PAY ONLY US\$8,865,432.61 FOR THE RIGHT TO DEVELOP AND CONSTRUCT ON THE LAND PLOT FOR THE INVESTMENT OBJECT

606. In the Reply, the Claimant alleges that OOO “Astomaks” (“**Astomaks**”), the winner of the auction in relation to the right for design and construction on the land plot for the Investment Object:

- A. “*undertook an obligation to pay [...] 17,050,000 [denominated Belarusian rubles] (approximately USD 8.87 million) for such right*”;¹⁰⁰⁵ and
- B. “*was to pay the lease payment under the terms of the auction*”, which was “*over USD 23 million*”.¹⁰⁰⁶

607. The Claimant therefore concludes that “*the fair market value (namely, the amount which the winner of the auction for the right to develop the land plot previously*

¹⁰⁰³ Letter from Minsktrans to Manolium-Engineering dated 20 September 2011, **Exhibit R-194**.

¹⁰⁰⁴ 2016 Memorandum, page 9, **Exhibit C-160**.

¹⁰⁰⁵ Reply, paragraph 823, **CS-5**.

¹⁰⁰⁶ Reply, paragraph 824, **CS-5**.

intended for the Investment Object had to pay) amounts to approximately USD 31.87 million (i.e. 8.87 + 23)".¹⁰⁰⁷

608. There is no dispute between the Parties that on 12 September 2017, Astomaks was declared the winner of the auction with a bid of 17.05 million denominated Belarusian rubles, which was equivalent to US\$8,865,432.61 at the official exchange rate of the National Bank of Belarus applicable on the day of the auction.¹⁰⁰⁸ It is also not in issue between the Parties that the subject-matter of the auction was "*the right for design and construction*" on the land plot, which was previously intended for the Investment Object.¹⁰⁰⁹
609. The Respondent respectfully submits that the Claimant's allegation that Astomaks was to pay the lease payment under the terms of the auction in the amount of "*over USD 23 million*" is factually wrong.
610. Indeed, as follows from Clause 5 of the Minutes of the results of the auction dated 12 September 2017, the winning bidder shall "*pay for the right to enter into a land plot lease agreement (part of such payment where MCEC grants a deferment of such payment)*" within 10 business days following the auction.¹⁰¹⁰
611. Under the relevant provisions of Belarusian law, however, the payment for the right to enter into a land plot lease agreement is made by paying the auction price for the right to design and construct. In other words, Astomaks is not obliged to make a separate payment for the right to enter into a lease agreement. It would acquire that right by discharging its monetary obligation to pay for the lot, i.e. the right to design and construct.

¹⁰⁰⁷ Reply, paragraph 825, **CS-5**.

¹⁰⁰⁸ Defence, paragraph 367, **RS-18**; Minutes of the results of the auction dated 12 September 2017, **Exhibit R-153**; Reply, paragraph 822 – 823, **CS-5**.

¹⁰⁰⁹ Defence, paragraph 365, **RS-18**; Announcement of the auction in relation to the right for design and construction on the Investment Object Land Plot // Available at: <http://mgcn.by/auctions/place/00001621.html>, **Exhibit R-152**; Reply, paragraph 822, **CS-5**.

¹⁰¹⁰ Minutes of the results of the auction dated 12 September 2017, **Exhibit R-153**.

612. Pursuant to the President’s Decree No. 667 dated 27 December 2007 “On Withdrawal and Allotment of Land Plots” (in the revision effective as at the date of the auction) (“**President’s Decree No. 667**”), the winner of an auction with conditions for the right to design and construct permanent structures (buildings, constructions) is given the land plot without having to obtain it through a separate auction for the right to enter into a lease agreement.¹⁰¹¹
613. Accordingly, pursuant to the legislation as was in force in September 2017 as applicable to the relevant auction, the right to design and construct is a special-purpose right to enter into a land plot lease agreement. This means that to acquire the right to use and enjoy the land plot for the construction purpose, the winner bidder pays only once. In the present case, Astomaks must pay only 17.05 million denominated Belarusian rubles, which was equivalent to US\$8,865,432.61 at the official exchange rate of the National Bank of Belarus applicable on the day of the auction.¹⁰¹²
614. This is further confirmed by MCEC’s decision dated 12 October 2017 deferring Astomaks’s obligation to pay for the right to enter into a land plot lease agreement. According to that decision, Astomaks must pay for “*the right to enter into a land plot lease agreement [...] in the amount of 17 050 000,0 [denominated] Belarusian rubles*” in two equal parts – one due within 10 business days following the auction, and the other due within 3 years upon the commissioning of the object, which Astomaks plans to construct.¹⁰¹³
615. For the above reasons, the Respondent respectfully submits that Astomaks has never had an obligation to make lease payments in the amount of “*over USD 23 million*”.

¹⁰¹¹ President’s Decree dated 27 December 2007 No. 667 “On Withdrawal and Allotment of Land Plots”, **Exhibit RL-118**.

¹⁰¹² Defence, paragraphs 366 – 367, **RS-18**; Minutes of the results of the auction dated 12 September 2017, **Exhibit R-153**.

¹⁰¹³ Decision of MCEC No. 3440 dated 12 October 2017, **Exhibit R-218**.

616. Furthermore, the Claimant's reliance on Mr Qureshi's calculation of the lease payments in the amount of approximately US\$23 million is misplaced. As follows from Mr Qureshi's First Expert Report, his calculation relies on fact-specific scenario and is made for the purpose of analysing the cost of land for Manolium-Engineering, not an abstract person.¹⁰¹⁴
617. In particular, Mr Qureshi relies on MCEC's calculation made (i) in January 2015, (ii) based on the cadastral value and the exchange rate effective at that time (iii) specifically for the 7.05 ha land plot (iv) on the assumption that it would have been leased since 1 January 2015 for a period of 99 years.¹⁰¹⁵ In case of Astomaks, the auction was held more than two years later, in September 2017, in relation to a 6.7675 ha land plot, which is subject to a lease of 5 years.¹⁰¹⁶
618. For these reasons, Mr Qureshi's calculation of the lease payments is not relevant and cannot be applied to Astomaks and the Claimant's submissions in this regard should be disregarded.

III. THE TRIBUNAL DOES NOT HAVE JURISDICTION

A. RATIONE TEMPORIS OBJECTION

619. In the Defence, the Respondent submits that the EEU Treaty does not have retroactive effect. Neither does the Tribunal have jurisdiction over disputes which arose before the EEU Treaty came into force on 1 January 2015, nor over claims concerning conduct which occurred before that date. The Respondent also submits that the Claimant is seeking to refer two distinct disputes to the Tribunal (the Termination Dispute and the Tax Dispute), both of which arose before 1 January 2015, and that a

¹⁰¹⁴ Expert Report of A. S. Qureshi dated 15 November 2018, paragraphs 189 – 194, **RER-1**.

¹⁰¹⁵ Expert Report of A. S. Qureshi dated 15 November 2018, paragraphs 193 – 194, **RER-1**. See also Letter of Land Service of MCEC dated 16 January 2015, **Exhibit SQ-8**.

¹⁰¹⁶ Announcement of the auction in relation to the right for design and construction on the Investment Object land plot, pages 1 – 2 // Available at: <http://mgcn.by/auctions/place/00001621.html>, **Exhibit R-152**.

large proportion of the conduct complained of by the Claimant occurred well before 1 January 2015.¹⁰¹⁷

620. In the Reply, the Claimant disagrees on both counts. The Claimant contends that the application of Protocol 16 to investments made from 1991 means that the Tribunal has jurisdiction over disputes arising from 1991, and that conduct taking place from 1991 may violate the treaty's substantive provisions. The Claimant contends in the alternative that the Termination Dispute and the Tax Dispute arose after 1 January 2015, and that the conduct complained of occurred after that date.¹⁰¹⁸

621. In paragraphs 622 – 755 below, the Respondent submits that:

- A. the EEU Treaty does not have retroactive effect (paragraphs 622 – 673);
- B. the Tribunal does not have jurisdiction over the Termination Dispute (which arose in mid-2012) or the Tax Dispute (which arose in early 2014) (paragraphs 675 – 723); and
- C. the Tribunal only has jurisdiction over claims concerning conduct which took place after 1 January 2015 (paragraphs 724 – 755).

1. The EEU Treaty does not have retroactive effect

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

622. In the Defence, the Respondent submits that the Tribunal does not have jurisdiction over disputes that arose before the EEU Treaty came into force on 1 January 2015.¹⁰¹⁹

¹⁰¹⁷ Defence, paragraphs 375 – 428, **RS-18**.

¹⁰¹⁸ Reply, paragraphs 364 – 419, **CS-5**.

¹⁰¹⁹ Defence, paragraphs 377 – 390, **RS-18**. Article 65 of Protocol 16 provides that the provisions of Protocol 16 “shall apply to all investments made by investors of the Member States on the territory of another Member State starting from December 16, 1991” (Protocol 16 of the EEU Treaty, **Exhibit CL-3**).

623. In the Reply, the Claimant contends that, notwithstanding the general rule of non-retroactivity, Articles 84 and 85(3) apply retroactively to disputes that arose before the EEU Treaty entered into force because:
- A. Article 65 of Protocol 16 is “*as straightforward of an intent [sic] for retroactivity as could possibly be imagined*”;¹⁰²⁰
 - B. “[h]ad the drafters intended to exclude such prior arising disputes, they would have specifically provided that this dispute resolution mechanism is not applicable to disputes that arose before entering into force of [Protocol 16]”;¹⁰²¹ and
 - C. the “*conscious choice of different language in the subsequent EEU Treaty by the same parties as the [EEC Investment Agreement] should be respected*”.¹⁰²²
624. The Respondent responds to the Claimant’s position below. The Respondent submits that:
- A. the application of Protocol 16 to investments made from 1991 does not demonstrate an intention to disapply the general rule of non-retroactivity;
 - B. Protocol 16 does not apply retroactively according to its ordinary, contextual meaning, read in light of the object and purpose of the EEU Treaty; and
 - C. the language of the EEC Investment Agreement is not a reliable indicator of how the EEU Treaty should be construed.

¹⁰²⁰ Reply, paragraph 394, CS-5.

¹⁰²¹ Reply, paragraph 395, CS-5.

¹⁰²² Reply, paragraph 402, CS-5.

(1) The application of Protocol 16 to investments made from 1991 does not demonstrate an intention to disapply the principle of non-retroactivity

625. The Claimant appears to agree with the Respondent that the general rule of non-retroactivity as enshrined under Article 28 of the Vienna Convention applies in the present case.¹⁰²³ However, the Claimant asserts that “[b]y its plain language, Protocol No. 16 to the EEU Treaty directly provides that all of the guarantees in the relevant Section VII (Investments), including the dispute resolution clause, are applicable to all investments made since December 16, 1991.”¹⁰²⁴ According to the Claimant, Article 65 of Protocol 16 is “as straightforward of an intent [sic] for retroactivity as could possibly be imagined”, and demonstrates a “different intention” (as envisaged under Article 28 of the Vienna Convention) for Protocol 16, including its dispute resolution provisions, to be applied retroactively.¹⁰²⁵ The Claimant’s conclusion as to the alleged retroactive effect of the EEU Treaty is misconceived.
626. There is no dispute between the parties that Protocol 16 applies to investments made since 1991. However, this does not mean that the Tribunal has jurisdiction under the EEU Treaty over disputes which arise before the EEU Treaty entered into force. Tribunals have consistently held that in the absence of express words to the contrary, the tribunal’s jurisdiction is limited to disputes which arise after the treaty enters into force, even when the treaty applies to investments made before that date.
627. In *MCI v. Ecuador*, Article XII of the BIT provided that it “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.”¹⁰²⁶ The tribunal held:

¹⁰²³ Reply, paragraph 391, **CS-5**.

¹⁰²⁴ Reply, paragraph 394, **CS-5**.

¹⁰²⁵ Reply, paragraphs 391 and 394, **CS-5**.

¹⁰²⁶ Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993, Article XII, **Exhibit RL-33**.

*“In accordance with the norms of general international law codified in the Vienna Convention, and particularly in Article 28, the Tribunal notes that because of the fact that the BIT applies to investments existing at the time of its entry into force, the temporal effects of its clauses are not modified [...]. The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force.”*¹⁰²⁷

628. In *ATA v. Jordan*, Article IX(I) of the BIT provided that the BIT “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.”¹⁰²⁸ The tribunal held:

*“In the present circumstances, Article IX(1) of the BIT expressly makes the BIT retroactive with respect to “investments existing at the time of entry into force [...]”. The provision does not make the BIT retroactive with respect to disputes existing prior to the entry into force of the BIT. Under the plain meaning of Article IX(1), the Tribunal may only exercise jurisdiction *ratione temporis* over the Claimant’s claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006.”*¹⁰²⁹

629. In *Walter Bau v. Thailand*, Article 8 of the BIT provided that it would “apply to approved investments made prior to its entry into force by investors of either Contracting Party [...]”.¹⁰³⁰ The tribunal held:

*“Whilst Article 8 makes it clear that the Treaty applies to “investments” made before entry into force of the 2002 Treaty, that does not mean that investors can claim damages retrospectively for matters which had given rise to disputes prior to that date.”*¹⁰³¹

¹⁰²⁷ *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraphs 59 – 61 (emphasis added), **Exhibit RL-1**.

¹⁰²⁸ Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey concerning the reciprocal promotion and protection of investments of 2 August 1993, Article IX(I), **Exhibit RL-31**.

¹⁰²⁹ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 98 (emphasis added), **Exhibit RL-32**.

¹⁰³⁰ Treaty between the Federal Republic of Germany and the Kingdom of Thailand made on 24 June 2002 concerning the encouragement and reciprocal treatment of investors, Article 8, **Exhibit RL-101**.

¹⁰³¹ *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, paragraph 9.68, **Exhibit RL-37**.

630. In *Société Générale v. The Dominican Republic*, Article 1 of the BIT provided that it protected assets invested “before or after the entry into force of this Agreement”, while Article 7(1) and (2) granted the tribunal jurisdiction over “[a]ny dispute relating to investments [...]”.¹⁰³² The claimant (like the Claimant in the present case) argued that both Article 1 and Article 7(1) and (2) of the BIT established a “different intention” to disapply the general rule of retroactivity for the purposes of Article 28 of the Vienna Convention. The tribunal disagreed with the claimant’s interpretation of Articles 1, 7(1) and 7(2):

“The Tribunal is of the view that the Claimant’s interpretation of the articles noted is not the correct one in respect of retroactivity of the Treaty and that no such intention can be identified in the Treaty or otherwise. Article 1 refers to “assets that shall be or shall have been invested” before or after the date of entry into force of the Treaty, but **if the intention had been to allow for retroactivity one would expect that it would require a clear and unequivocal expression of intention to that effect, which is not found in the Treaty or elsewhere.**”¹⁰³³

631. The tribunal in *Generation Ukraine v. Ukraine* also drew a distinction between Article XII(3) of the BIT, which provided that it “shall apply to investments existing at the time of entry into force [...]”, and the jurisdiction of the Tribunal over investment disputes that came into existence before the BIT came into force, which the tribunal referred to as a “separate issue”.¹⁰³⁴

632. In each of these cases, the tribunals expressly acknowledged that the treaties applied to investments made or existing before their entry into force, but found that they

¹⁰³² Agreement between the Government of the French Republic and the Government of the Dominican Republic on the Reciprocal Promotion and Protection of Investments, signed on January 14, 1999, as cited in *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraph 77, **Exhibit RL-8**.

¹⁰³³ *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraphs 81 – 82 (emphasis added), **Exhibit RL-8**.

¹⁰³⁴ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paragraphs 11.1 – 11.2, **Exhibit RL-58**.

nevertheless did not have jurisdiction over disputes arising before such a date, reinforcing an established view that, as a matter of international law, the temporal effects of a treaty will not be modified by the fact that the treaty applies to investments made before its entry into force. This approach is in accordance with the general rule of non-retroactivity set out in Article 28 of the Vienna Convention.

633. It is also notable that in *Société Générale*, Article 7(1) and 7(2) of the BIT included very similar wording to Article 84 of Protocol 16, granting the tribunal jurisdiction over “[a]ny dispute relating to investments [...].”¹⁰³⁵ In the present case, the Claimant places emphasis on the same language in Article 84,¹⁰³⁶ concluding that “[b]y its plain language, Protocol No. 16 [...] directly provides that all of the guarantees in [Protocol 16], including the dispute resolution clause, are applicable to all investments made since December 16, 1991.”¹⁰³⁷ However, the tribunal in *Société Générale*, faced with similar language, expressly rejected this argument, finding that “if the intention had been to allow for retroactivity one would expect that it would require a clear and unequivocal expression of intention to that effect.”¹⁰³⁸
634. The Respondent respectfully submits that the same logic applies in the present case. While Article 65 of Protocol 16 applies the protection of Protocol 16 to investments made before the EEU Treaty entered into force, there is nothing in Article 65 or elsewhere in Protocol 16 that points to the application of the EEU Treaty to disputes that have arisen before the EEU Treaty came into force. Accordingly, even when a

¹⁰³⁵ Agreement between the Government of the French Republic and the Government of the Dominican Republic on the Reciprocal Promotion and Protection of Investments, signed on January 14, 1999, as cited in *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraph 77, **Exhibit RL-8**.

¹⁰³⁶ Articles 84 and 85(3) of Protocol 16 grant the Tribunal jurisdiction over “disputes between a recipient state and an investor of another Member State **arising from or in connection with an investment** [...]” (Protocol 16 of the EEU Treaty (emphasis added), **Exhibit CL-3**).

¹⁰³⁷ Reply, paragraph 394, **CS-5**.

¹⁰³⁸ *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraphs 81 – 82, **Exhibit RL-8**.

dispute referred to the Tribunal has arisen “*in connection with an investment*”, this does not mean that the Tribunal should disregard the general rule of non-retroactivity.

635. In support of its position, the Claimant continues to rely solely on the decision in *Chevron v. Ecuador*, in which the tribunal found that the BIT covered any dispute so long as it was a dispute arising out of or relating to “*investments existing at the time of entry into force.*”¹⁰³⁹ This decision is to be distinguished from the present case for the following reasons.
636. Firstly, the issue of applying the BIT retroactively did not arise in *Chevron v. Ecuador*, because the tribunal found that the conduct complained of had taken place¹⁰⁴⁰ and the dispute had arisen¹⁰⁴¹ after the BIT’s entry into force. The tribunal noted that if, contrary to its finding, the conduct complained of had taken place and the dispute before it had arisen prior to the BIT’s entry into force, then “[t]o take jurisdiction in light of either of these factors would require clear retroactive application of the BIT’s respective substantive or jurisdictional provisions”.¹⁰⁴² The decision therefore does not apply to the present case, where the disputes referred to the Tribunal arose and a large proportion of the conduct complained of took place before the EEU Treaty’s entry into force.
637. Secondly, in *Chevron v. Ecuador*, the tribunal’s decision relied on the *Mavrommatis Palestine Concessions* case.¹⁰⁴³ As the Respondent explains in the Defence, *Mavrommatis* does not assist the Claimant in the present instance, because the Permanent Court found in *Mavrommatis* that an “*essential characteristic*” of Protocol XII of the Treaty of Lausanne was “*that its effects extend to legal situations dating*

¹⁰³⁹ Reply, paragraphs 396 – 397, **CS-5**.

¹⁰⁴⁰ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 34877, Interim Award of 1 December 2008, paragraph 268, **Exhibit CL-34**.

¹⁰⁴¹ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 34877, Interim Award, 1 December 2008, paragraph 269, **Exhibit CL-34**.

¹⁰⁴² *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 34877, Interim Award, 1 December 2008, paragraph 268, **Exhibit CL-34**.

¹⁰⁴³ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 34877, Interim Award, 1 December 2008, paragraph 267, **Exhibit CL-34**.

from a time previous to its own existence".¹⁰⁴⁴ This is in clear contrast to the object and purpose of the EEU Treaty, which was intended to be applied prospectively, not retroactively, as the Respondent explains in paragraphs 655 – 658 below.

638. Thirdly, the tribunal in *Chevron v. Ecuador* did not conduct a detailed interpretative analysis of the ordinary contextual meaning of the dispute resolution clause in Article VI(1)(c) of the BIT¹⁰⁴⁵ in light of the object and purpose of the BIT, in accordance with Article 31 of the Vienna Convention.¹⁰⁴⁶ In particular, the tribunal did not consider whether the words “*dispute [...] arising*” should be construed prospectively taking into account all the factors identified in Article 31 of the Vienna Convention.
639. Therefore, the Respondent submits that *Chevron v. Ecuador* should be distinguished from the present case, in which the intention of the drafters was plainly that the Tribunal should only have jurisdiction over disputes that arise after the entry into force of the EEU Treaty. This approach has been consistently approved by tribunals, as the Respondent explains above.
640. The Respondent therefore submits that the Claimant’s position is incorrect: the application of Protocol 16 to investments made from 1991 does not demonstrate an intention to disapply the principle of non-retroactivity.

¹⁰⁴⁴ Defence, paragraph 387, **RS-18**; *Mavrommatis Palestine Concessions case (Greece v. Britain)*, PCIJ Rep. Series A No. 2, Judgment, 30 August 1924, page 34, **Exhibit RL-9**.

¹⁰⁴⁵ Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, Article VI(1)(c), **Exhibit CL-83**. Article VI(1)(c) of the BIT provides that the tribunal has jurisdiction over “*a dispute ... arising out of or relating to ... an alleged breach of any right conferred or created by this Treaty with respect to an investment.*”

¹⁰⁴⁶ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 34877, Interim Award of 1 December 2008, *inter alia*, paragraphs 263 – 270 and 177, **Exhibit CL-34**.

(2) Protocol 16 does not apply retroactively according to its ordinary, contextual meaning read in light of the object and purpose of the EEU Treaty

641. As the Respondent mentions in paragraph 625 above, the Claimant appears to acknowledge the applicability of the general rule of non-retroactivity under Article 28 of the Vienna Convention. At the same time, however, the Claimant asserts that “[h]ad the drafters intended to exclude such prior arising disputes, they would have specifically provided that this dispute resolution mechanism is not applicable to disputes that arose before entering into force of Protocol No. 16 to the EEU Treaty”.¹⁰⁴⁷
642. The Claimant’s position is contradictory: on the one hand, it acknowledges the general rule of non-retroactivity; on the other hand, it appears to suggest that express language is required to stop the EEU Treaty’s dispute resolution clauses from applying retroactively.
643. Contrary to what the Claimant suggests, the general rule of non-retroactivity provides that, in the absence of express words to the contrary, treaties do not apply retroactively.¹⁰⁴⁸ As already submitted, Article 65 of Protocol 16 does not demonstrate an express “*intention*” for Protocol 16, including its dispute resolution provisions, to apply retroactively. Therefore, the Respondent submits that the general rule of retroactivity applies.
644. Even if, however, the default position under the general rule of retroactivity did not apply, the Respondent submits that its position is supported by an application of the general rule of treaty interpretation set out in Article 31(1) of the Vienna Convention, which provides that a treaty “*shall be interpreted in good faith in accordance with the*

¹⁰⁴⁷ Reply, paragraph 395, **CS-5**.

¹⁰⁴⁸ Vienna Convention on the Law of Treaties dated 23 May 1969, Article 28, **Exhibit CL-13**.

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰⁴⁹

645. The Respondent applies each limb of the general rule of interpretation below.

(a) Ordinary meaning

646. The ordinary meaning of Articles 84 and 85(3) of Protocol 16 is to grant the Tribunal jurisdiction over disputes arising after the EEU Treaty entered into force.

647. As the Respondent submits in the Defence, the use in Article 84 of Protocol 16 of the present continuous participle ‘arising’, or in Russian ‘возникающие’, clearly indicates that only disputes arising in the future (i.e. after the entry into force of the EEU Treaty) fall within the scope of the dispute resolution provisions. In order to express that the Tribunal has jurisdiction over disputes which have arisen as far back as 1991, as the Claimant contends, the drafters would have used the words ‘having arisen’, or in Russian ‘возникшие’.

648. By way of example, the drafters of the EEC Investment Agreement, which the Claimant refers to in its submissions, used the past form of the participle ‘возникшим’, translated as ‘having arisen’ or ‘that arose’, in Article 12 of the EEC Investment Agreement:

*“The Agreement does not apply to disputes **that arose** before the entry of the Treaty into force.”*¹⁰⁵⁰

649. If the drafters of Protocol 16 of the EEU Treaty had intended for the Tribunal to have jurisdiction over disputes having arisen before the entry into force of the EEU Treaty, they also would have used this past form of the participle.

650. The Claimant’s only contention regarding the ordinary meaning of Articles 84 and 85(3) of Protocol 16 is that “[h]ad the drafters intended to exclude such prior arising

¹⁰⁴⁹ Vienna Convention on the Law of Treaties dated 23 May 1969, Article 31(1), **Exhibit CL-13**.

¹⁰⁵⁰ EEC Investment Agreement, Article 12 (emphasis added), **Exhibit CL-35**.

disputes, they would have specifically provided that this dispute resolution mechanism is not applicable to disputes that arose before entering into force of Protocol No. 16 to the EEU Treaty".¹⁰⁵¹ As the Respondent explains in paragraph 643 above, this contention misrepresents the general rule of non-retroactivity under Article 28 of the Vienna Convention, pursuant to which the Tribunal does not have jurisdiction over disputes arising before the EEU Treaty entered into force unless there are clear and unequivocal words to show that this was the intention.

(b) Contextual meaning

651. The Respondent's position that the Tribunal only has jurisdiction over disputes that arise after the EEU Treaty entered into force is supported by the context of Articles 84 and 85(3) of Protocol 16.¹⁰⁵² The permissible context for the purpose of Article 31(1) of the Vienna Convention is the "*ordinary meaning to be given to the terms of treaty in their context*".¹⁰⁵³
652. As the Respondent submits in the Defence¹⁰⁵⁴ and in paragraphs 665 – 673 below, the substantive provisions of Protocol 16 are drafted prospectively to apply to the conduct of the Member States from the moment the EEU Treaty enters into force. There is nothing in the EEU Treaty to suggest that its protections extend to conduct from before it entered into force.
653. If Protocol 16 is an innovative piece of legislation whose purpose is to establish new standards of protection which were not previously in place and which applies to the conduct of Member States after its entry into force, the Respondent submits that the dispute resolution mechanism of Protocol 16 also must have been intended to apply prospectively, since, in such circumstances, a claim for breach of the substantive

¹⁰⁵¹ Reply, paragraph 395, **CS-5**.

¹⁰⁵² Vienna Convention on the Law of Treaties dated 23 May 1969, Article 31, **Exhibit CL-13**.

¹⁰⁵³ *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue, 12 June 2009, paragraph 163, **Exhibit RL-87**.

¹⁰⁵⁴ Defence, paragraph 389, **RS-18**.

protections of Protocol 16 may, in practice, only be commenced after Protocol 16 has entered into force.¹⁰⁵⁵

654. Thus, the Respondent submits that an important aspect of the relevant context for the purpose of Article 31(1) of the Vienna Convention is that: (i) Protocol 16 establishes novel substantive obligations; and (ii) these novel substantive obligations apply prospectively. This, the Respondent submits, supports its position that the Tribunal also only has jurisdiction over disputes arising after the entry into force of the EEU Treaty.

(c) Object and purpose

655. The Respondent's position that the Tribunal only has jurisdiction under the EEU Treaty over disputes that arise after the EEU Treaty entered into force is further supported by the object and purpose of the EEU Treaty.¹⁰⁵⁶ In searching for the treaty's object and purpose, tribunals have focused on the text of the treaty itself, and in particular the preamble of the treaty.¹⁰⁵⁷

656. In the present case, the EEU Treaty is a multilateral instrument signed by the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan, aimed at

¹⁰⁵⁵ As noted by Veijo Heiskanen: "If the treaty establishes novel substantive obligations that did not exist prior to its entry into force, such obligations cannot be applied to resolve existing claims or disputes, i.e., claims or disputes that arose prior to the entry into force of the treaty but that continue to exist on the date the treaty enters into force, even if the treaty does not specifically exclude them. This would amount to the retroactive application of novel substantive obligations, which runs contrary to the doctrine of intertemporal law. Conversely, if the treaty does not create any novel substantive obligations but simply requires that the State parties comply with customary international law standards, or even if it creates novel obligations but also confirms the applicability of customary international law and the existing claim in question is based on customary international law, and assuming further that the treaty does not specifically exclude existing claims, the tribunal may properly deal with such existing claims or disputes." (V. Heiskanen, 'Entretemps: Is There a Distinction Between Jurisdiction Ratione Temporis and Substantive Protection Ratione Temporis?', in E. Gaillard and Y. Banifatemi (ed.), *Jurisdiction in Investment Treaty Arbitration*, IAI Series No. 8, Extract, p. 309, **Exhibit RL-103**).

¹⁰⁵⁶ Vienna Convention on the Law of Treaties dated 23 May 1969, Article 31, **Exhibit CL-13**.

¹⁰⁵⁷ J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (2012), Extract, paragraph 3.79, **Exhibit RL-90**.

stimulating sustainable economic development through mutual cooperation and integration and the establishment of a common market between the Member States. The preamble to the EEU Treaty provides, among other things, that its object and purpose is to strengthen the “*solidarity and cooperation*”¹⁰⁵⁸ between the Member States, including “*economic integration*”,¹⁰⁵⁹ and “*driven by the urge to strengthen the economies*”¹⁰⁶⁰ of the Member States.

657. In the context of Protocol 16, this is achieved by establishing new standards of protection for investors of Member States which apply to the conduct of the Member States after the entry into force of the EEU Treaty, and by providing investors with the option to refer disputes that arise with Member States in the future to an impartial, international tribunal. As already explained, this is in contrast to the *Mavrommatis* decision relied on by the Claimant, where the Permanent Court of Arbitration found that an “*essential characteristic*” of Protocol XII of the Lausanne Treaty was that “*its effects extend to legal situations dating from a time previous to its own existence*”.¹⁰⁶¹
658. The Respondent therefore submits that the object and purpose of the EEU Treaty supports the Respondent’s position that Articles 84 and 85(3) of the EEU Treaty should not be applied retroactively.

(3) The language of the EEC Investment Agreement is not a reliable indicator of how the EEU Treaty should be construed.

659. The Claimant’s final argument relates to the drafting of the EEC Investment Agreement, which expressly provides that “[t]he Agreement does not apply to disputes that arose before the entry of the Treaty into force.”¹⁰⁶² According to the

¹⁰⁵⁸ EEU Treaty, preamble, **Exhibit RL-136**.

¹⁰⁵⁹ EEU Treaty, preamble, **Exhibit RL-136**.

¹⁰⁶⁰ EEU Treaty, preamble, **Exhibit RL-136**.

¹⁰⁶¹ Defence, paragraph 387, **RS-18**; *Mavrommatis Palestine Concessions case (Greece v. Britain)*, PCIJ Rep. Series A No. 2, Judgment, 30 August 1924, page 34, **Exhibit RL-9**.

¹⁰⁶² Reply, paragraphs 398 – 402, **CS-5**; EEC Investment Agreement, Article 13, **Exhibit CL-35**.

Claimant, the “*conscious choice of different language in the subsequent EEU Treaty by the same parties as the [EEC Investment Agreement] should be respected*”.¹⁰⁶³

660. The Claimant’s position is mistaken for the following reasons.
661. Firstly, contrary to what the Claimant asserts, the EEC Investment Agreement was not signed by the “*same parties*” as the EEU Treaty. The EEC Investment Agreement was signed on 12 December 2008 by the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Republic of Tajikistan,¹⁰⁶⁴ while the EEU Treaty was signed on 29 May 2014 by the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan only.¹⁰⁶⁵ Furthermore, it is misleading for the Claimant to state that the EEC Investment Agreement is the “*predecessor*” of the EEU Treaty given that: (i) the EEC Investment Agreement came into force on 11 January 2016, over a year after the ratification of the EEU Treaty; and (ii) both the EEU Treaty and the EEC Investment Agreement remain in force.¹⁰⁶⁶
662. Secondly, contrary to what the Claimant suggests, the construction of the EEU Treaty should be focused on the language of EEU Treaty itself (which, as the Respondent explains above, supports the Respondent’s position), rather than on different treaties agreed by different parties at a different time and drafted by different people.¹⁰⁶⁷ The Claimant fails to provide any evidence in support of its assertion that the drafters of the EEC Investment Agreement made a “*conscious choice of different language in the*

¹⁰⁶³ Reply, paragraph 402, **CS-5**.

¹⁰⁶⁴ EEC Investment Agreement, **Exhibit CL-35**.

¹⁰⁶⁵ EEU Treaty, preamble, **Exhibit RL-136**.

¹⁰⁶⁶ Reply, paragraph 339, **CS-5**.

¹⁰⁶⁷ Defence, paragraph 388, **RS-18**. The tribunal in *Walter Bau v. Thailand* found that the practice of incorporating an express provision against retrospective temporal operation into the dispute resolution provisions of treaties, including in many other treaties agreed by Thailand, was to be understood “*as states acting under an abundance of caution*”. The tribunal found that such a practice was “*not a helpful guide to interpretation of this particular Treaty*” (*Walter Bau AG (in liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, paragraph 9.70, **Exhibit RL-37**).

subsequent EEU Treaty".¹⁰⁶⁸ In the absence of any concrete evidence, the Claimant's assertion is mere conjecture.

663. Thirdly, by seeking to shift the Tribunal's attention onto the language of the EEC Investment Agreement, the Claimant is merely brushing under the carpet the absurdity of its argument in the context of the EEU Treaty. Essentially, the Claimant's position is that the intention of the EEU Treaty was to provide a dispute resolution mechanism for disputes dating back to the time of the dissolution of the Soviet Union.¹⁰⁶⁹ Nowhere in the EEU Treaty is such an intention expressed or even hinted at.

664. For all of the above reasons, the Respondent respectfully submits that the Tribunal only has jurisdiction over disputes that arise after the EEU Treaty entered into force on 1 January 2015.

b) The substantive provisions of Protocol 16 do not apply to conduct which occurred before the EEU Treaty entered into force on 1 January 2015

665. In the Defence, the Respondent submits that the substantive provisions of Protocol 16 do not apply to conduct which occurred before 1 January 2015.¹⁰⁷⁰

666. In the Reply, the Claimant does not appear to dispute the principle codified in Article 13 of the ILC Articles that a State can only be held internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach.¹⁰⁷¹ The Claimant acknowledges that the only exception to this general rule of non-retroactivity of treaties is if "*a different intention appears from the treaty or is otherwise established*", as provided by Article 28 of the Vienna Convention.¹⁰⁷²

¹⁰⁶⁸ Reply, paragraph 402, **CS-5**.

¹⁰⁶⁹ The Claimant maintains in the Reply that the Tribunal has jurisdiction over any dispute so long as it is connected with investments made after 16 December 1991 (*see, e.g.*, Reply, paragraph 402, **CS-5**).

¹⁰⁷⁰ Defence, paragraphs 391 – 396, **RS-18**.

¹⁰⁷¹ Defence, paragraph 392, **RS-18**; ILC Article 13, **Exhibit RL-15**.

¹⁰⁷² Reply, paragraph 391, **CS-5**.

667. The Respondent already explains in paragraphs 625 – 640 above that Article 65 of Protocol 16 does not establish an “*intention*” to override the default rule of non-retroactivity enshrined in Article 28 of the Vienna Convention. This applies equally to Protocol 16’s substantive provisions as it does to its dispute resolution provisions. The Claimant’s contention that Article 65 is “*as straightforward of an intent for retroactivity as could possibly be imagined*” is therefore erroneous.¹⁰⁷³
668. The Claimant’s apparent fall-back position that “[t]here is [...] *nothing in the wording of the EEU Treaty that limits retroactive application of Protocol No. 16 to the EEU Treaty*”¹⁰⁷⁴ is, as the Respondent already explains, also mistaken. According to the general rule of non-retroactivity, the substantive provisions of a treaty do not apply retroactively, unless there are clear and unequivocal words to the contrary (which there are not in the present case).¹⁰⁷⁵
669. Lastly, in response to the Respondent’s submission that the drafting of Protocol 16 reflects the intention of the parties for its substantive provisions to apply prospectively to conduct that takes place after its entry into force,¹⁰⁷⁶ the Claimant responds that the substantive provisions of the treaty to which the Respondent refers are drafted in the present tense, not the future tense.¹⁰⁷⁷ The Claimant alleges that:

“[e]nsure has a broader meaning than shall—it suggests an outright and all-encompassing obligation of protection, while shall suggests only refraining from certain actions. This obligation of the states to “ensure” the right of the investor thus covers not only future obligations, but guarantees that the state would also be responsible for any breach of the investor’s rights which were made before entering the EEU Treaty in force [sic].”¹⁰⁷⁸

¹⁰⁷³ Reply, paragraph 394, **CS-5**.

¹⁰⁷⁴ Reply, paragraph 411, **CS-5**.

¹⁰⁷⁵ See paragraphs 643 above.

¹⁰⁷⁶ Defence, paragraph 394, **RS-18**.

¹⁰⁷⁷ Reply, paragraphs 408 – 410, **CS-5**.

¹⁰⁷⁸ Reply, paragraph 410, **CS-5**.

670. The Respondent agrees with the Claimant that in the Russian version of Protocol 16, the substantive obligations are drafted in the present continuous tense, rather than in the future tense. However, the Claimant’s contention that the obligation to ensure the rights of investors extends to conduct which was carried out before the obligation entered into force is nonsense.
671. Much like in English contracts or treaties (as well as contracts or treaties in many other languages), the present continuous tense is commonly used in Russian when a party undertakes an obligation in the future from the moment the obligation enters into force. Accordingly, when the Member States agree to “ensure” fair and equitable treatment on their territory in Article 68, or agree that investments “may not be” subject to expropriation in Article 79, they are undertaking this continuing obligation in the future. They are not agreeing to be held liable for violations committed in the past, before the obligation came into force.
672. The Claimant’s contention that such language “*guarantees that the state would also be responsible for any breach of the investor's rights which were made before entering the EEU Treaty in force* [sic]”¹⁰⁷⁹ is therefore incorrect. The Respondent submits that whether the present or the future tense is used, the meaning is in practice the same: the obligation applies to future conduct from the time it comes into force. This is the reason why the substantive obligations of Protocol 16 are translated in the future tense in the version of Protocol 16 relied on and submitted by the Claimant.¹⁰⁸⁰ Notably, the Claimant also contradicts its own position by continuing to use the future tense when citing Articles 68 and 79 of Protocol 16 in the Reply.¹⁰⁸¹
673. The Respondent therefore submits that the substantive provisions of the EEU Treaty do not apply to conduct which took place before the EEU Treaty entered into force on 1 January 2015.

¹⁰⁷⁹ Reply, paragraph 410, CS-5.

¹⁰⁸⁰ Protocol 16 of the EEU Treaty, **Exhibit CL-3**.

¹⁰⁸¹ Reply, paragraphs 518 and 607, CS-5.

2. The Tribunal does not have jurisdiction over the Termination Dispute or the Tax Dispute

674. As set out in paragraphs 675 – 723 below, the Respondent maintains its position in the Defence that:

A. the Termination Dispute is distinct from the Tax Dispute (and therefore the Tribunal should conduct its analysis of when the two disputes arose separately); and

B. both the Termination Dispute and the Tax Dispute arose before the EEU Treaty entered into force.

a) The Termination Dispute is distinct from the Tax Dispute

675. In the Defence, the Respondent submits that the Claimant is seeking to refer two distinct disputes to the Tribunal: the Termination Dispute and the Tax Dispute.¹⁰⁸²

676. In the Reply, the Claimant maintains that it has referred a single dispute to the Tribunal “*comprising all of the Respondent’s wrongful actions*”.¹⁰⁸³ In support of its position, the Claimant alleges that the various actions it complains of were “*not taken in isolation*”, but were “*part of a chain of event [sic] that builds upon the prior actions in furtherance of a common goal – destruction of the Claimant’s investments.*”¹⁰⁸⁴ The Claimant concludes that “*because all of the breaches comprise*

¹⁰⁸² Defence, paragraphs 397 – 414, **RS-18**. The Respondent submits that the Tribunal should therefore conduct its analysis of when the two disputes arose separately. If the Tribunal finds that both the Termination Dispute and the Tax Dispute arose before the EEU Treaty came into force, then the Tribunal shall not have jurisdiction. If, on the other hand, the Tribunal finds that one of the disputes arose before and the other after the EEU Treaty entered into force, then the Tribunal shall only have jurisdiction over the dispute which arose after that date (*see* paragraph 687 below).

¹⁰⁸³ Reply, paragraphs 373 and 375 – 379, **CS-5**.

¹⁰⁸⁴ Reply, paragraph 379, **CS-5**.

*a single sequence of actions, they must be considered as one Dispute.*¹⁰⁸⁵ The Claimant purports to rely on *CMS v. Argentina* in support of its position.¹⁰⁸⁶

677. Contrary to what the Claimant suggests, the correct test for determining whether the Claimant has referred one or two disputes to the Tribunal is not whether the two disputes concern a “*single sequence of events*”, but whether the two disputes share the same subject-matter¹⁰⁸⁷ or real causes.¹⁰⁸⁸ If the facts or considerations that gave rise to the first dispute continue to be central to the second dispute, then the two disputes will be considered legally equivalent.¹⁰⁸⁹
678. The Respondent submits in the Defence¹⁰⁹⁰ that the subject-matter of the Termination Dispute¹⁰⁹¹ is distinct from the subject-matter of the Tax Dispute.¹⁰⁹²
679. By way of illustration, the decision in *Crystallex v. Venezuela* is also instructive. The *Crystallex* tribunal held that the relevant inquiry in determining whether it was faced

¹⁰⁸⁵ Reply, paragraph 379, **CS-5**.

¹⁰⁸⁶ Reply, paragraph 376, **CS-5**.

¹⁰⁸⁷ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. Arb/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paragraph 109, **Exhibit RL-38**.

¹⁰⁸⁸ *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

¹⁰⁸⁹ *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, paragraph 50, **Exhibit CL-36**.

¹⁰⁹⁰ Defence, paragraphs 397 – 414, **RS-18**.

¹⁰⁹¹ The subject-matter of the Termination Dispute is the disagreement between Manolium-Engineering, MCEC and Minsktrans and Manolium-Engineering over their respective rights and obligations under the Amended Investment Contract, which led to MCEC submitting a claim to terminate the Amended Investment Contract. As already submitted, the Termination Dispute concerns, *inter alia*, the performance of the Investment Contract and Amended Investment Contract by Manolium-Engineering, MCEC and Minsktrans, the submission of a claim by MCEC to terminate the Amended Investment Contract and the decision of the Belarusian courts to terminate the Amended Investment Contract (Defence, paragraphs 405 – 409, **RS-18**).

¹⁰⁹² The subject-matter of the Tax Dispute is a different disagreement regarding whether Manolium-Engineering was liable to pay tax for its occupation of the land plots for the New Communal Facilities starting from 2013. The accrual of these tax liabilities, together with penalties, ultimately led to the transfer of the New Communal Facilities into municipal ownership by way of set-off against the outstanding amounts (Defence, paragraphs 410 – 412, **RS-18**).

with two different disputes or with one dispute was whether the disagreements at issue in the two settings related to the same subject-matter.¹⁰⁹³ The tribunal held:

*“There can be no doubt, in the Tribunal’s eyes, that the two main areas of disagreements at issue in this arbitration (i.e., one relating to the Permit denial and the other relating to the MOC rescission) relate to the same dispute having the same subject-matter. **Both disagreements concern the Parties’ conflicting legal views and interests in relation to Crystallex’s claim to mine Las Cristinas and the underlying facts bear upon the effects of the MOC.**”*¹⁰⁹⁴

680. The same cannot be said in the present case. The Termination Dispute concerns the “*conflicting legal views and interests*” in relation to Manolium-Engineering’s contractual rights under the Amended Investment Contract, and in particular its contingent right to the Investment Object. The Tax Dispute, on the other hand, concerns “*conflicting legal views and interests*” regarding Manolium-Engineering’s liability to pay tax for the land plots it occupied on which the New Communal Facilities were located. The Tax Dispute is unrelated to any of Manolium-Engineering’s contractual rights under the Amended Investment Contract that are the subject of the Termination Dispute.

681. Contrary to what the Claimant contends in paragraph 376 of the Reply, the decision in *CMS v. Argentina* further supports the Respondent’s position. In *CMS*, the tribunal held:

“The argument that the background to the so-called two disputes is different is also not a deciding factor as to whether there are one or two disputes. What the Tribunal has to look at is the nature of the dispute or disputes; their background may be different but again, what counts is whether the rights of

¹⁰⁹³ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraph 449, **Exhibit CL-25**.

¹⁰⁹⁴ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraph 454 (emphasis added), **Exhibit CL-25**.

the investor have been affected or not and whether the claims arise directly out of the same subject-matter.”¹⁰⁹⁵

682. As the Respondent already explains above, the subject-matter of the Termination Dispute is distinct from the subject-matter of the Tax Dispute.¹⁰⁹⁶ Therefore, according to *CMS*, the Termination Dispute and the Tax Dispute are two different disputes.
683. Lastly, even if, as the Claimant contends, the applicable test were whether the actions complained of were part of a “*single sequence of actions*” that are “*in furtherance of a common goal*”, this would still lead to the conclusion that the Termination Dispute is distinct from the Tax Dispute.
684. Firstly, the actions complained of by the Claimant do not concern a “*single sequence of actions*”. The actions and events which form the subject-matter of the Termination Dispute culminated in the termination of the Amended Investment Contract. The actions and events which form the subject-matter of the Tax Dispute, on the other hand, culminated in the transfer of the New Communal Facilities into municipal ownership. The Termination Dispute and the Tax Dispute therefore concern two distinct sequences of action.¹⁰⁹⁷
685. Secondly, the Claimant’s allegation that all the actions it complains of in the fourteen year period from 2003 to 2017 were taken “*in furtherance of a common goal – destruction of the Claimant’s investments*” is absurd.¹⁰⁹⁸ The Claimant fails to provide any explanation or support for this serious allegation.
686. The Respondent therefore submits that, even on the tests proposed by the Claimant, the Termination Dispute is distinct from the Tax Dispute.

¹⁰⁹⁵ *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. Arb/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paragraph 111 (emphasis added), **Exhibit RL-38**.

¹⁰⁹⁶ See footnotes 1091 and 1092 above.

¹⁰⁹⁷ Defence, paragraphs 405 and 410, **RS-18**.

¹⁰⁹⁸ Reply, paragraph 379, **CS-5**.

687. As the Termination Dispute is a distinct dispute from the Tax Dispute, the Respondent submits that the Tribunal should conduct its analysis of when the two disputes arose separately. If the Tribunal finds that both the Termination Dispute and the Tax Dispute arose before the EEU Treaty came into force, then the Tribunal shall not have jurisdiction. If, on the other hand, the Tribunal finds that one of the disputes arose before and the other after the EEU Treaty entered into force, then the Tribunal shall only have jurisdiction over the dispute which arose after that date.
688. If, however, contrary to the Respondent's position, the Tribunal finds that the Termination Dispute and the Tax Dispute are one dispute, the Respondent submits that the Tribunal has no jurisdiction over this dispute, because both of its core elements (i.e. the Termination Dispute and the Tax Dispute) arose before the EEU Treaty entered into force (as the Respondent explains further below).

b) Both the Termination Dispute and the Tax Dispute arose before 1 January 2015

689. In the Defence, the Respondent submits that both the Termination Dispute and the Tax Dispute arose before the EEU Treaty entered into force on 1 January 2015.¹⁰⁹⁹
690. In response, the Claimant contends that:
- A. the "*investment Dispute*" was "*initiated*" only when the Claimant submitted its Notice of Arbitration on 15 November 2017;¹¹⁰⁰
 - B. the "*Termination Dispute* [...] *arose and ripened only after the Supreme Court of the Republic of Belarus dismissed Manolium-Engineering's cassation appeal [...] on 27 January 2015*";¹¹⁰¹ and

¹⁰⁹⁹ Defence, paragraphs 408 and 412, **RS-18**.

¹¹⁰⁰ Reply, paragraph 386, **CS-5**.

¹¹⁰¹ Reply, paragraph 383 - 385, **CS-5**.

C. the “*Tax Dispute [...] is actually part of the Dispute related to unlawful expropriation of the New Communal Facilities*”, which arose only after the “*New Communal Facilities were transferred to the Minsk municipal ownership on 27 January 2017*”.¹¹⁰²

691. The Respondent submits below that:

- A. the Claimant fails to distinguish between a dispute and a formal claim;
- B. the Supreme Court decision of 27 January 2015 did not recrystallize the Termination Dispute into a new dispute; and
- C. the transfer of the New Communal Facilities into municipal ownership on 27 January 2017 did not recrystallize the Tax Dispute into a new dispute.

(1) The Claimant fails to distinguish between a dispute and a formal claim

692. The parties agree that, as per *Mavrommatis*, a dispute is defined as a “*disagreement on a point of law or fact, a conflict of legal views or of interests between two persons*”.¹¹⁰³

693. In the Reply, however, the Claimant fails to apply this definition to the facts. Instead, the Claimant contends that the disputes referred to the Tribunal must have arisen after the EEU Treaty entered into force on 1 January 2015, because it was only in November 2017 that “[t]he Claimant initiated the investment Dispute under the EEU Treaty”.¹¹⁰⁴

694. The Respondent submits in the Defence that a distinction is to be drawn between a “*disagreement on a point of law and fact*” arising, and the submission of a formal

¹¹⁰² Reply, paragraph 387, **CS-5**.

¹¹⁰³ Statement of Claim, paragraph 35, **CS-2**; Defence, paragraph 399, **RS-18**; *Mavrommatis Palestine Concessions case (Greece v. Britain)*, PCIJ Rep. Series A No. 2, Judgment, 30 August 1924, paragraph 19 (p. 11), **Exhibit RL-9**.

¹¹⁰⁴ Reply, paragraph 386, **CS-5**.

claim to the Tribunal.¹¹⁰⁵ As the tribunal held in *Maffezini v. Spain*, “[w]hile a dispute may have emerged, it does not necessarily have to coincide with the presentation of a formal claim.”¹¹⁰⁶

695. The Claimant’s contention that the “*investment Dispute*” arose only when “[t]he Claimant initiated the investment Dispute under the EEU Treaty” is therefore incorrect.

(2) The Supreme Court decision of 27 January 2015 did not recrystallize the Termination Dispute into a new dispute

696. As far as the Respondent can understand from the Claimant’s Reply, the Claimant does not dispute the Respondent’s position that a “*disagreement on a point of law or fact*” had arisen between the Claimant, Manolium-Engineering, MCEC and Minsktrans over their respective rights and obligations under the Amended Investment Contract by mid-2012.¹¹⁰⁷

697. However, the Claimant asserts that the “*Termination Dispute [...] arose and ripened only after the Supreme Court of the Republic of Belarus dismissed Manolium-Engineering’s cassation appeal [...] on 27 January 2015*”, because “*until that*

¹¹⁰⁵ Defence, paragraph 399, **RS-18**.

¹¹⁰⁶ *Emilio Agustin Maffezini v. the Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paragraph 97, **Exhibit RL-10**.

¹¹⁰⁷ Defence, paragraph 399, **RS-18**. As set out in the Defence, it was in early 2012 that Mr Dolgov first began to insist that Manolium-Engineering was entitled to compensation for all monies spent on the New Communal Facilities exceeding US\$15 (Minutes of the meeting attended by MCEC, Minsktrans and the Claimant dated 9 January 2012, **Exhibit C-125**; Letter from Manolium-Engineering to MCEC dated 30 April 2012, **Exhibit R-85**) and asked MCEC for the land plot for the Investment Object (Letter from Manolium-Engineering to MCEC dated 24 November 2011, **Exhibit C-122**), to which Minsktrans responded that Manolium-Engineering’s entitlement to the land plot for the Investment Object was conditional upon the construction and transfer of the New Communal Facilities into municipal ownership (Letter from Minsktrans to Manolium-Engineering dated 6 December 2011, **Exhibit C-123**). On 3 April 2012, Mr Dolgov threatened to submit a claim to an “*international court [...] seeking compensation of costs for the construction of the communal facilities*” (Minutes of a meeting on the implementation of the investment project dated 3 April 2012, **Exhibit R-79**). On 18 June 2012, MCEC sent a letter to Mr Ekavyan, the director of the Claimant, requesting him to “*intervene*” and “*take all measures necessary*” to “*resolve*” the situation (Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**).

moment, the Claimant had not been irreversibly deprived of its right to implement the Investment Contract.”¹¹⁰⁸ The Claimant’s position therefore appears to be that the decision of the Supreme Court recrystallized the Termination Dispute into a new dispute, over which the Tribunal has jurisdiction because it arose after the EEU Treaty entered into force.

698. The Claimant’s position is mistaken: the Supreme Court decision of 27 January 2015 did not give rise to a new dispute, but was a continuation of the Termination Dispute between the Claimant, Manolium-Engineering, MCEC and Minsktrans, which had already arisen by mid-2012.

699. The present case is comparable to *ATA v. Jordan*, in which the claimant alleged that the decision of the Jordanian Court of Appeal (overturning an arbitration award) – rendered one day after the BIT entered into force – gave rise to a new denial of justice dispute which fell within the scope of the tribunal’s jurisdiction *ratione temporis*.¹¹⁰⁹ In response, Jordan submitted that this dispute had arisen and been the subject of arbitration and litigation before the BIT entered into force, and that the Court of Appeal’s judgment did not give rise to a new dispute.¹¹¹⁰ The tribunal found that the new dispute identified by the claimant was a continuation of the old dispute:

“The dispute over the Final Award first commenced in October 2003 when APC filed an action in the Jordanian courts for annulment under Article 49 of the Jordanian Civil Code. It was at this point that the parties first expressed disagreement over the validity of the Final Award [...].

¹¹⁰⁸ Reply, paragraph 383, **CS-5**. The Claimant’s position is contradictory. In paragraph 383, the Claimant asserts that Manolium-Engineering’s right to implement the Investment Object was “*permanently and irreversibly destroyed*” when the Supreme Court rendered its judgment (Reply, paragraph 383, **CS-5**). Two paragraphs later, however, the Claimant asserts that “*the decision of the Supreme Court did not deal with the issue whether the Claimant lost its right to the Investment Object*”, which was “*not analyzed [...] at all*” (Reply, paragraph 385, **CS-5**). On the one hand the Claimant asserts that the Supreme Court judgment deprived Manolium-Engineering of its right to implement the Investment Object, but on the other hand it says this issue was not addressed “*at all*”.

¹¹⁰⁹ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 101, **Exhibit RL-32**.

¹¹¹⁰ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 101, **Exhibit RL-32**.

[...]

*In this case, the Claimant attempts to present a denial of justice as an independent violation of the BIT and to invite the Tribunal to treat it as if it were unconnected to the dispute in order to shift the moment of its occurrence forward and to locate it in time after the entry into force of a BIT. But the attempt must fail if, as in this case, the occurrence is part of a dispute which originated before the entry into force of the BIT. For this reason, the Tribunal has concluded that the claim of denial of justice is also inadmissible for lack of jurisdiction *ratione temporis*.*”¹¹¹¹

700. In the present case, the Claimant alleges that the Termination Dispute only “*arose and ripened*” after the Supreme Court of Belarus rendered its decision on 27 January 2015, alleging that Manolium-Engineering’s contingent contractual right to the Investment Object was only then “*permanently and irreversibly destroyed*”.¹¹¹² Thus, like in *ATA v. Jordan*, by refocusing its claim on the Supreme Court decision in the Reply,¹¹¹³ the Claimant attempts to “*shift the moment*” when the Termination Dispute arose “*forward*” to shortly after the EEU Treaty entered into force on 1 January 2015, in order to bring it within the Tribunal’s jurisdiction.
701. The Respondent submits that, like in *ATA v. Jordan*, such an attempt “*must fail*”.¹¹¹⁴ Just as in *ATA v. Jordan* the decision of the Jordanian Court of Appeal was a continuation of the same dispute that had been the subject of arbitration and litigation before the BIT had entered into force, so, in the present case, the dispute before the Supreme Court is a continuation of the Termination Dispute that arose between the Claimant, MCEC, Minsktrans and Manolium-Engineering in mid-2012, and which was the subject of the statement of claim submitted by MCEC to terminate the Amended Investment Contract on 14 October 2013.¹¹¹⁵ Even if the Claimant were to

¹¹¹¹ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 103 – 108, **Exhibit RL-32**.

¹¹¹² Reply, paragraph 383, **CS-5**.

¹¹¹³ See paragraphs 6 – 7 above.

¹¹¹⁴ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 103 – 108 (emphasis added), **Exhibit RL-32**.

¹¹¹⁵ Statement of claim regarding the termination of the Amended Investment Contract dated 14 October 2013, **Exhibit C-140**.

formulate its claims as a denial of justice (which the Claimant has chosen not to do¹¹¹⁶), this does not alter the fact that the Supreme Court judgment concerns the same Termination Dispute which arose in 2012.¹¹¹⁷

702. The decision in *Eurogas v. Slovak Republic* is also instructive. In that case, the tribunal held that the decision of the Slovak courts to affirm the reassignment of mining rights did not give rise to a new dispute, because those mining rights had already been lost in 2005 before the BIT entered into force.¹¹¹⁸ The tribunal cited the PCIJ case *Phosphates in Morocco*, in which the PCIJ drew a distinction between the “*real causes of the dispute*” and “*subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts.*”¹¹¹⁹ Since the Slovak courts’ decisions were merely the confirmation or development of earlier situations or facts, the tribunal found that it had no jurisdiction over what was a “*long-standing dispute dating from well over three years prior to the entry into force of the treaty.*”¹¹²⁰
703. In the present case, as the Respondent explains in paragraphs 386 – 388 above and in the Defence,¹¹²¹ the termination of the Amended Investment Contract came into effect on 29 October 2014, when the Appeal Instance Court upheld the decision of the Economic Court of Minsk. The subsequent decision of the Supreme Court to uphold the decisions of the lower courts was therefore merely the “*confirmation or development of earlier situations or facts*”, rather than one of the “*real causes of the*

¹¹¹⁶ Defence, paragraph 488, **RS-18**; Reply, paragraph 690, **CS-5**.

¹¹¹⁷ *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, paragraph 108, **Exhibit RL-32**.

¹¹¹⁸ *Eurogas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, paragraphs 453 – 461, **Exhibit RL-84**.

¹¹¹⁹ *Eurogas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, paragraph 453, **Exhibit RL-84**; *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

¹¹²⁰ *Eurogas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, paragraph 458, **Exhibit RL-84**.

¹¹²¹ Defence, paragraph 263, **RS-18**.

dispute".¹¹²² According to the test cited in *Eurogas v. Slovak Republic*, the Supreme Court decision therefore did not give rise to a new dispute, but was a continuation of the Termination Dispute which arose before the EEU Treaty entered into force. The Tribunal does not have jurisdiction over this dispute.

704. In seeking to support its position, the Claimant contends in paragraph 384 of the Reply that the “*same logic*” as applied by the tribunal in *Rumeli v. Kazakhstan* applies in the present case. The Claimant’s contention is misguided.
705. The passage of *Rumeli* cited by the Claimant concerned when the “*final act of ‘taking’ as regards Claimants’ investment*” took place.¹¹²³ The *Rumeli* tribunal was therefore concerned with when the violation of the BIT occurred. Here, on the other hand, the question is when the Termination Dispute arose, not when the alleged violation occurred – which, as the Claimant itself notes, is a separate issue.¹¹²⁴ The passage from *Rumeli* cited by the Claimant is therefore not relevant to the question of whether the Tribunal has jurisdiction over the Termination Dispute *ratione temporis*. In any event, the facts in *Rumeli* are easily distinguishable from the present case, as the Respondent explains in further detail in paragraph 748 below.
706. For the above reasons, the Respondent submits that the Supreme Court decision of 27 January 2015 did not recrystallize the Termination Dispute into a new dispute, but was merely the continuation of the earlier dispute which arose in mid-2012. Accordingly, the Tribunal does not have jurisdiction over the Termination Dispute.

¹¹²² *Eurogas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, paragraph 453, **Exhibit RL-84**; *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

¹¹²³ Reply, paragraph 384, **CS-5**.

¹¹²⁴ The Claimant accepts in the Reply that there is a distinction between the retroactive application of a treaty’s substantive provisions and the jurisdiction of a tribunal over disputes which arose before the treaty’s entry into force (Reply, paragraph 388, **CS-5**).

(3) The transfer of the New Communal Facilities into municipal ownership on 27 January 2017 did not recrystallize the Tax Dispute into a new dispute

707. As far as the Respondent can gather from the Claimant’s Reply, the Claimant does not dispute that a “*disagreement on a point of law or fact*” had arisen between Manolium-Engineering and the Belarusian tax authorities in early 2014, when the District Tax Inspectorate demanded that Manolium-Engineering comply with its obligations to submit land tax returns for the years 2013 and 2014.¹¹²⁵ Mr Dolgov had been made aware of the requirement for Manolium-Engineering to pay land tax by the chief accountant of Manolium-Engineering as early as February 2013,¹¹²⁶ but had refused to pay.¹¹²⁷
708. In the Reply, however, the Claimant contends that the “*Tax Dispute is actually part of the Dispute related to unlawful expropriation of the New Communal Facilities*”, which arose only after the “*New Communal Facilities were transferred to the Minsk municipal ownership on 27 January 2017*”.¹¹²⁸ The Claimant’s position therefore appears to be that the transfer of the New Communal Facilities into municipal ownership recrystallized the Tax Dispute into a new dispute, over which the Tribunal has jurisdiction because it arose after the EEU Treaty had entered into force. The Claimant’s position is mistaken for the reasons given below.
709. In *Phosphates in Morocco*, the PCIJ drew a distinction between the “*real causes of the dispute*” and “*subsequent factors which either presume the existence or are merely the confirmation or development of earlier situations or facts.*”¹¹²⁹ Subsequent events

¹¹²⁵ Defence, paragraph 412, **RS-18**; Demands of the District Tax Inspectorate dated 21 February 2014, **Exhibit R-111** and **R-112**.

¹¹²⁶ Witness Statement of Ms ██████████ dated 12 November 2018, paragraphs 30 – 38, **RWS-3**; Internal Memorandum of Ms ██████████ to Mr Dolgov dated 15 March 2013, **Exhibit R-7**.

¹¹²⁷ Witness Statement of Ms ██████████ dated 12 November 2018, paragraphs 31, 32 and 37, **RWS-3**.

¹¹²⁸ Reply, paragraph 387, **CS-5**.

¹¹²⁹ *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

which merely develop or confirm earlier situations constituting the real cause of the dispute shall not give rise to a new dispute.¹¹³⁰

710. In the present case, the Claimant alleges that the following actions of the Belarusian authorities in 2016 – 2017 breach Protocol 16 of the EEU Treaty:
- A. the tax assessments in respect of Manolium-Engineering’s occupation of the land plots for the New Communal Facilities in 2016;¹¹³¹
 - B. the presidential order which formally completed the procedure for enforcing Manolium-Engineering’s tax liabilities against the New Communal Facilities in 2016;¹¹³² and
 - C. the transfer of the New Communal Facilities on 27 January 2017 to enforce against Manolium-Engineering’s tax liabilities.¹¹³³
711. None of the above actions or events recrystallized the Tax Dispute into a new dispute over which the Tribunal has jurisdiction.
712. Firstly, the administrative and tax proceedings in respect of Manolium-Engineering in 2016 did not recrystallize the Tax Dispute.
713. As the Respondent explains in the Defence¹¹³⁴ and in paragraphs 515 – 546 above, the First Tax Audit Report of 17 May 2016 (as amended) calculated Manolium-Engineering’s land tax liabilities in respect of its occupation of the land plots for the New Communal Facilities from 2013 until mid-2015, applying (in the amendments of 21 June 2016) increased land tax rates prescribed under Belarusian law to take

¹¹³⁰ *Eurogas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award, 18 August 2017, paragraph 453, **Exhibit RL-84**; *Phosphates in Morocco (Italy v. France)*, PCIJ Reports, Ser. A/B No. 74, 14 June 1938, page 24, **Exhibit RL-39**.

¹¹³¹ See, e.g., Reply, paragraphs 578 – 596, **CS-5**.

¹¹³² See, e.g., Reply, paragraphs 672 – 679, **CS-5**.

¹¹³³ See, e.g., Reply, paragraph 604(iii), **CS-5**.

¹¹³⁴ Defence, paragraphs 313 – 331, **RS-18**.

account of the fact that the New Communal Facilities were in an incomplete state and Manolium-Engineering occupied the land without extending its land permits.

714. The 2016 tax audits therefore concerned exactly the same situation and facts which had existed before the EEU Treaty entered into force, namely Manolium-Engineering's occupation of the land plots after the expiry of its land permit without paying tax. This was also the subject-matter of the Tax Dispute between Manolium-Engineering which arose in 2014, when the tax authorities' demands went unanswered by Manolium-Engineering. The 2016 Administrative Proceedings, as the Respondent explains in the Defence¹¹³⁵ and in paragraphs 538 – 546 above, have nothing to do with the accrual of Manolium-Engineering's tax liabilities.
715. Accordingly, the 2016 tax assessments or 2016 Administrative Proceedings did not give rise to a new dispute over which the Tribunal has jurisdiction, because the tax assessments merely developed or confirmed earlier situations or facts constituting the real causes of the Tax Dispute.
716. Secondly, the presidential order of 2017 did not recrystallize the Tax Dispute into a new dispute.
717. The Claimant misrepresents the nature of the presidential order in order to create the impression that the President of Belarus "*secretly instructed*" that the New Communal Facilities be transferred into municipal ownership.¹¹³⁶ By doing so, the Claimant attempts to shift the emphasis of the Tax Dispute away from its real cause – Manolium-Engineering's refusal to pay tax.
718. As the Respondent explains in the Defence¹¹³⁷ and in paragraphs 547 – 575 above, the presidential order was an administrative document required under Belarusian law in order to effect a transfer of real property into state or municipal ownership. Specifically, the purpose of the order in the present case was to formally complete the

¹¹³⁵ Defence, paragraph 593, **RS-18**.

¹¹³⁶ See, e.g., Notice, paragraph 407, **CS-1**.

¹¹³⁷ Defence, paragraphs 339 – 353, **RS-18**.

procedure for the enforcement of Manolium-Engineering’s tax liabilities against the New Communal Facilities, which resulted from the 2016 tax assessments.¹¹³⁸ As the Respondent already explains in paragraph 707 above, the dispute regarding Manolium-Engineering’s liability to pay tax arose in early 2014, before the EEU Treaty entered into force.

719. Accordingly, the presidential order did not recrystallize the Tax Dispute into a new dispute, but merely developed or confirmed earlier situations or facts constituting the real cause of Tax Dispute, namely Manolium-Engineering’s refusal to pay land tax.
720. Thirdly, the transfer of the New Communal Facilities into municipal ownership did not recrystallize the Tax Dispute into a new dispute.
721. The Claimant attempts to portray the transfer of the New Communal Facilities as the culmination of a conspiracy to “*get the New Communal Facilities for free*”.¹¹³⁹ By framing its claim in such terms, the Claimant seeks to create the impression that the transfer of the New Communal Facilities into municipal ownership was the culmination of a series of actions conducted by the Belarusian authorities in bad faith, which, when viewed together, elevate the Tax Dispute into a new dispute over which the Tribunal has jurisdiction.
722. As the Respondent explains in the Defence¹¹⁴⁰ and in paragraphs 547 – 575 above, the New Communal Facilities were not transferred into municipal ownership as part of a conspiracy to “*get the New Communal Facilities for free*”, but rather to legitimately enforce against Manolium-Engineering’s outstanding tax liabilities, which had been accruing in relation to its occupation of the land plots on which the New Communal Facilities were situated since 2013.
723. Accordingly, the transfer of the New Communal Facilities into municipal ownership did not recrystallize the Tax Dispute into a new dispute, but merely developed or

¹¹³⁸ Defence, paragraph 347, **RS-18**.

¹¹³⁹ Reply, paragraph 591, **CS-5**.

¹¹⁴⁰ Defence, paragraphs 339 – 353, **RS-18**.

confirmed earlier situations or facts constituting the real cause of Tax Dispute. The Respondent therefore submits that the Tribunal does not have jurisdiction over the Tax Dispute.

3. The Tribunal only has jurisdiction over claims concerning conduct which took place after 1 January 2015

724. In the Defence, the Respondent submits that the Tribunal does not have jurisdiction over the claims relating to the termination of the Amended Investment Contract, because the termination came into force before 1 January 2015.¹¹⁴¹
725. In the Reply, the Claimant responds that the “*retroactivity argument is irrelevant*”¹¹⁴² because:
- A. the Tribunal “*has jurisdiction over creeping expropriation as a composite act*”;¹¹⁴³ and
 - B. the Amended Investment Contract was “*irreversibly terminated on 27 January 2015*” when the Supreme Court rendered its decision.¹¹⁴⁴
726. The Claimant’s position is mistaken. The Respondent submits that:

¹¹⁴¹ Defence, paragraphs 415 – 428, **RS-18**. While some tribunals have treated the retroactive application of the substantive provisions of a treaty as a substantive issue (*See, e.g., Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004, paragraph 176, **Exhibit RL-30**), others have treated it as a jurisdictional issue (*See, e.g., Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraph 90 – 92, **Exhibit RL-8**; *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paragraph 97, **Exhibit CL-20**). For the avoidance of doubt, the Respondent’s position is that acts and/or conduct which took place before the EEU Treaty entered into force cannot amount to a substantive breach of the EEU Treaty *and* that the Tribunal does not have jurisdiction to apply the EEU Treaty to acts and/or conduct which took place before the EEU Treaty entered into force, or award damages under the EEU Treaty for losses allegedly caused by such acts and/or conduct.

¹¹⁴² Reply, paragraph 368, **CS-5**.

¹¹⁴³ Reply, section 4.4 and paragraphs 412 – 419, **CS-5**.

¹¹⁴⁴ Reply, paragraphs 368 and 383 – 385, **CS-5**.

- A. even if the Claimant formulates its claim as a creeping expropriation, the substantive provisions of Protocol 16 still cannot be applied retroactively to conduct which occurred before 1 January 2015; and
- B. the Claimant was deprived of its rights under the Amended Investment Contract on 29 October 2014, when the termination came into force under Belarusian law.

a) Even if the Claimant formulates its claim as a creeping expropriation, the substantive provisions of Protocol 16 still cannot be applied retroactively to conduct which occurred before 1 January 2015

727. In the Defence, the Respondent submits that there cannot have been a composite series of acts culminating in the violation of the Claimant's contractual rights after the EEU Treaty entered into force, because such rights were extinguished on 29 October 2014.¹¹⁴⁵ The Respondent further submits that even if a composite series of acts continues after a treaty enters into force, the obligations of the treaty still cannot be applied retroactively to the acts or events which took place before its entry into force.¹¹⁴⁶

728. In paragraphs 604 and 764 of the Reply, the Claimant alleges that the Respondent carried out a creeping expropriation by which the Claimant was “*totally deprived of its rights under the [Amended] Investment Contract*”¹¹⁴⁷ as a result of:

- A. the termination of the Amended Investment Contract in October 2014;
- B. the imposition of tax liabilities on Manolium-Engineering in 2015 – 2016;

¹¹⁴⁵ Defence, paragraphs 424 – 425, **RS-18**.

¹¹⁴⁶ Defence, paragraphs 426 – 428, **RS-18**.

¹¹⁴⁷ Reply, paragraphs 604, 412 – 419, 518 – 528 and 597 – 605, **CS-5**.

- C. the transfer of the New Communal Facilities into municipal ownership in January 2017; and
- D. the sale of the temporary right to develop the land plot on which the Investment Object was originally to be located (the “**Investment Object Land Plot**”) to another investor in September 2017.¹¹⁴⁸
729. The Claimant alleges that “*in light of the fact that actions of the Respondent shall qualify as a creeping expropriation, such actions have a continuing character and violate the EEU Treaty as long as such acts continue.*”¹¹⁴⁹ The Claimant’s position therefore appears to be that even the acts or conduct complained of which took place before the EEU Treaty came into force shall “*violate the EEU Treaty*”,¹¹⁵⁰ so long as they form part of the alleged creeping expropriation. The Claimant’s position is wrong.
730. Firstly, the Claimant’s position that it was “*totally deprived of its rights under the Investment Contract*” as a result of: (i) the tax assessments of Manolium-Engineering in 2016; (ii) the transfer of the New Communal Facilities into municipal ownership in 2017; and (iii) the sale of the right to develop the land on which the Investment Object was originally to be located in 2017, makes no sense.¹¹⁵¹ The Claimant lost its contractual rights when the termination of the contract came into effect on 29 October 2014.
731. Secondly, the Claimant’s position that even the acts or conduct complained of which took place before the EEU Treaty came into force shall “*violate the EEU Treaty*”, so long as they form part of the alleged creeping expropriation, is wrong.¹¹⁵²

¹¹⁴⁸ Reply, paragraphs 604 and 764, **CS-5**.

¹¹⁴⁹ Reply, paragraph 417, **CS-5**.

¹¹⁵⁰ Reply, paragraph 417, **CS-5**.

¹¹⁵¹ Reply, paragraphs 604, 412 – 419, 518 – 528 and 597 – 605, **CS-5**.

¹¹⁵² Reply, paragraph 417, **CS-5**.

732. The commentary to the draft ILC Articles clarifies that even where a series of acts form part of one composite act as envisaged under Article 15 of the ILC Articles, only the acts in the series which take place after the relevant obligation comes into force may engage the responsibility of the State:

*“[T]he State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the “first” of the actions or omissions of the series for the purposes of State Responsibility will be the first occurring after the obligation came into existence.”*¹¹⁵³

733. Tribunals have also consistently held that where a series of acts are linked together into one composite act, only the acts in the series which take place after the relevant obligation comes into force may engage the responsibility of the State.¹¹⁵⁴ Acts which take place before the treaty enters into force may only be taken into account as background for determining if a breach of the treaty was committed after that date.¹¹⁵⁵

734. In *Mondev v. The United States*, the tribunal held as follows:

“Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA’s claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they

¹¹⁵³ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 15, subsection 11, **Exhibit CL-87**.

¹¹⁵⁴ Defence, footnote 618, **RS-18**.

¹¹⁵⁵ See, e.g., *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paragraph 70, **Exhibit CL-20**; *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraphs 91 – 92, **Exhibit RL-8**.

*related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist Mondev.”*¹¹⁵⁶

735. Similarly, in *Société Générale v. The Dominican Republic*, the tribunal held as follows:

“The same reasoning applies to composite acts. While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found [...].

[...]

*In situations of this kind, the preceding acts might be relevant as factual background to the violation that takes place after the critical date [...]. In such a situation, the obligations of the treaty will not be applied retroactively but only to acts that will be the final result of that convergence and which take place when the treaty has come into force.”*¹¹⁵⁷

736. For the same reason, tribunals have refused to award damages in respect of acts or conduct which do not qualify as violations of a treaty because they occurred prior to its entry into force, even if they form part of a composite act continuing after that date.¹¹⁵⁸ As noted by Zachary Douglas:

“A claimant may wish to characterise the host state’s breach of an investment obligation as consisting of a composite act in order to claim damages based upon the original value of the investment before such value is diminished by the first act in the composite series that ultimately, in the aggregate, is

¹¹⁵⁶ *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paragraph 70, **Exhibit CL-20**.

¹¹⁵⁷ *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraphs 91 – 92, **Exhibit RL-8**.

¹¹⁵⁸ Defence, paragraph 426, **RS-18**.

*adjudged to be unlawful. The conception of a composite act in the ILC's Articles provides the legal foundation for this approach to the quantification of damages because the breach of obligation is deemed to extend 'over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation'. But the legal foundation for this approach falls away if the first acts of the series are alleged to have occurred before the treaty enters into force. In that situation, the intertemporal principle once again trumps all other considerations. The host state cannot be liable to pay damages for the prejudice caused to an investment by the first acts of the series if at the time of those first acts the obligation in question was not in force in the host state. This is recognised by the ILC's commentary to Article 15(2) [...]."*¹¹⁵⁹

737. In the present case, many of the Claimant's claims concern alleged actions and conduct which occurred before the EEU Treaty entered into force on 1 January 2015, including:
- A. the alleged delays caused by MCEC, Minsktrans and other alleged public authorities to the construction deadlines for the Communal Facilities under the Investment Contract in 2004 – 2007;¹¹⁶⁰
 - B. the alleged delays caused by MCEC, Minsktrans and other alleged public authorities to the construction deadlines for the Depot, Road and Pull Station under the Amended Investment Contract in 2007 – 2011;¹¹⁶¹
 - C. the refusal by MCEC and Minsktrans to accept the incomplete New Communal Facilities into municipal ownership in 2007 – 2011;¹¹⁶²
 - D. the alleged “campaign” to “punish” the Claimant for “colluding” with the political opposition in 2010;¹¹⁶³

¹¹⁵⁹ Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, paragraph 629, **Exhibit RL-42**.

¹¹⁶⁰ Notice, paragraphs 109 – 122, **CS-1**; Reply, paragraphs 53 – 63, **CS-5**.

¹¹⁶¹ Notice, paragraphs 149 – 212, **CS-1**; Reply, paragraphs 64 – 129 and 629, **CS-5**.

¹¹⁶² Notice, paragraphs 164 – 169, 186 – 190 and 199 – 212, **CS-1**; Reply, paragraphs 236 and 273 – 333, **CS-5**.

- E. the Presidential Decree No. 101 dated 1 March 2010;¹¹⁶⁴
 - F. the alleged failure by MCEC to negotiate with Manolium-Engineering in good faith after the Final Commissioning Date in 2011 – 2013;¹¹⁶⁵
 - G. MCEC’s formal decision to invalidate the Investment Object Location Act on 14 March 2013;¹¹⁶⁶
 - H. the submission by MCEC of a claim to the courts to terminate the Amended Investment Contract on 12 November 2013;¹¹⁶⁷
 - I. MCEC’s decision of 15 August 2014 regarding the transfer of property to Minskstroy;¹¹⁶⁸
 - J. the decision of the Economic Court of Minsk to terminate the Amended Investment Contract on 9 September 2014;¹¹⁶⁹ and
 - K. the decision of the Appeal Instance Court to uphold the Economic Court of Minsk’s decision to terminate the Amended Investment Contract (upon which the termination came into effect) on 29 October 2014.¹¹⁷⁰
738. To the extent that the Tribunal considers the conduct complained of by the Claimant is part of a series of events “*converging [...] towards the same result*”¹¹⁷¹ or “*leading in the same direction*”,¹¹⁷² the Tribunal may take such conduct into account as

¹¹⁶³ Reply, paragraphs 200 and 174 – 199, **CS-5**.

¹¹⁶⁴ Reply, paragraphs 661 – 662, **CS-5**.

¹¹⁶⁵ Notice, paragraphs 241 – 255, **CS-1**; Reply, paragraphs 232 – 261, **CS-5**.

¹¹⁶⁶ Reply, paragraph 438(iv), **CS-5**.

¹¹⁶⁷ Notice, paragraph 256, **CS-1**; Reply, paragraph 261, **CS-5**.

¹¹⁶⁸ Reply, paragraphs 668 – 671, **CS-5**.

¹¹⁶⁹ Notice, paragraphs 263 – 264, **CS-1**; Reply, paragraph 262 – 271, **CS-5**.

¹¹⁷⁰ Notice, paragraphs 265 – 268, **CS-1**; Reply, paragraph 272, **CS-5**.

¹¹⁷¹ *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 62, **Exhibit CL-32**.

¹¹⁷² *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on

background for determining whether the “*final acts of that convergence*” constitute a breach of Protocol 16 after it came into force on 1 January 2015.

739. However, the Respondent submits that pre-EEU Treaty conduct cannot engage the Respondent’s responsibility under Protocol 16, for the simple reason that the substantive obligations were not in force at the time the alleged acts or conduct occurred. As the tribunal held in *Mondev*, any other approach would subvert the intertemporal principle in the law of treaties.¹¹⁷³ Similarly, the Respondent submits that the Tribunal does not have competence to award damages allegedly caused by any of the acts or conduct complained of which took place before the EEU Treaty entered into force on, including the Contractual Losses (as defined in paragraph 1281 below).¹¹⁷⁴

b) The Claimant was deprived of its rights under the Amended Investment Contract on 29 October 2014, when the termination came into effect under Belarusian law

740. In the Notice, the Claimant’s position is that it lost its rights under the Amended Investment Contract, including its contingent right to develop the Investment Object, when the termination of the Amended Investment Contract came into effect on 29 October 2014. The Claimant also instructs its quantum expert to adopt 29 October 2014 as the valuation date for the alleged expropriation, which Mr Taylor refers to as the “Expropriation Date”¹¹⁷⁵ and describes in the definitions section as follows:

Preliminary Objections to Jurisdiction, 19 September 2008, paragraph 91, **Exhibit RL-8**; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, paragraphs 494 and 499, **Exhibit RL-6**.

¹¹⁷³ *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paragraph 70, **Exhibit CL-20**.

¹¹⁷⁴ Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, 2009, paragraph 629, **Exhibit RL-42**; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraph 136, **Exhibit RL-1**.

¹¹⁷⁵ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraphs 1.3.7 and 2.1.3, **CER-1** (“I understand that State did not extend the deadline for completion of the above projects, did not accept

*“The date on which the New Communal Objects and Investment Object are alleged to have been formally expropriated. I am instructed that this date corresponds to the date the Investment Contract was terminated by Minsk City Court, being 29 October 2014.”*¹¹⁷⁶

741. Apparently in response to the Respondent’s Ratione Temporis Objection, the Claimant has now made a *volte-face* in the Reply, reformulating its position as follows:

A. Firstly, the Claimant alleges that the final act of “*taking*” of its contractual rights occurred when the Supreme Court dismissed Manolium-Engineering’s cassation appeal on 27 January 2015, because “*until that moment, the Claimant had not been irreversibly deprived of its right to implement the Investment Object in accordance with the Investment Contract.*”¹¹⁷⁷ The Claimant cites *Rumeli v. Kazakhstan*, in which the tribunal held that the “*final act of ‘taking’*” was a decision of the Supreme Court affirming a redemption of shares. The Claimant argues that the “*same logic*” applies in the present case;¹¹⁷⁸

B. Secondly, the Claimant argues that the Supreme Court decision of 27 January 2015 “*did not deal with the issue whether the Claimant lost its right to the Investment Object [...] at all*”, and that it was not until September 2017, when the temporary right to develop the Investment Object Land Plot was sold to

the New Communal Objects as complete and forced the Investor to continue the construction works. As such, construction was discontinued. The Investment Contract was officially terminated on 29 October 2014 by Minsk City Court (“Expropriation Date” and “Valuation Date””, Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 1.3.7, **CER-1**) (“*I have been instructed to perform an assessment of the damages incurred by Manolium due to the termination of the Investment Contract. For the purposes of this report, I have been instructed to perform the assessment of damages as at 29 October 2014*”, Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 2.1.3, **CER-1**).

¹¹⁷⁶ Expert Report of Travis A.P. Taylor dated 24 April 2017, Definition of ‘Expropriation Date’, page 5, **CER-1**

¹¹⁷⁷ Reply, paragraph 383, **CS-5**. The Claimant now re-instructs its expert to adopt the date of the Supreme Court decision as the valuation date for the expropriation (Reply, paragraph 866, **CS-5**).

¹¹⁷⁸ Reply, paragraph 384, **CS-5**.

another investor, that the “*Claimant had finally lost even an opportunity to realize the Investment Object*”.¹¹⁷⁹

742. The Claimant’s position is vague and contradictory. On the one hand, the Claimant asserts that Manolium-Engineering’s “*right to implement the Investment Object*” was “*permanently and irreversibly destroyed*” when the Supreme Court rendered its judgment.¹¹⁸⁰ On the other hand, the Claimant asserts that “*the decision of the Supreme Court did not deal with the issue whether the Claimant lost its right to the Investment Object [...] at all*”.¹¹⁸¹

743. The Respondent submits that, in any event, both positions adopted by the Claimant are incorrect.

744. Firstly, the Respondent submits that the Claimant was deprived of its rights under the Amended Investment Contract when the termination came into effect on 29 October 2014, not on the date that the Supreme Court dismissed Manolium-Engineering’s cassation appeal.

745. The Claimant does not appear to dispute that, as a matter of Belarusian law, the termination of the Amended Investment Contract entered into effect on 29 October 2014, when the Appeal Instance Court upheld the decision of the Economic Court of Minsk to terminate the contract.¹¹⁸² In the Notice, for example, the Claimant states that:

“[o]n 29 October 2014, the court of appeal upheld the decision on terminating the Amended Investment Contract, **for which reason the Agreement was finally terminated on the specified date.**”¹¹⁸³

¹¹⁷⁹ Reply, paragraph 385, **CS-5**.

¹¹⁸⁰ Reply, paragraph 383, **CS-5**.

¹¹⁸¹ Reply, paragraph 385, **CS-5**.

¹¹⁸² See paragraphs 386 - 388 above; Defence, paragraph 263, **RS-18**.

¹¹⁸³ Notice, paragraph 479 (emphasis added), **CS-1**.

746. As the Respondent explains in paragraphs 386 – 388 above, the Claimant’s position in the Notice that the “*the Agreement was finally terminated*” “[o]n 29 October 2014” is correct. As from 29 October 2014, the Claimant and Manolium-Engineering were no longer under an obligation to complete and commission the New Communal Facilities (which remained in Manolium-Engineering’s ownership). Equally, as from 29 October 2014, the Claimant and Manolium-Engineering were deprived of the contingent right to develop the Investment Object.
747. The Claimant contends in the Reply that the present case is comparable to *Rumeli v. Kazakhstan*, in which the tribunal held that the “*final act of ‘taking’*” was a decision of the Supreme Court affirming a redemption of shares.¹¹⁸⁴ Contrary to what the Claimant alleges, *Rumeli* is readily distinguishable from the present case.
748. In *Rumeli*, the tribunal found that the Presidium of the Supreme Court of Kazakhstan had carried out the “*final act of ‘taking’*” as regards the claimants’ investment by itself placing a valuation of around US\$3000 on the claimants’ shares in Kar-Tel, which were sold on a year later for US\$350 million.¹¹⁸⁵ The tribunal held that the valuation placed on the claimants’ shares by the Presidium of the Supreme Court was “*manifestly and grossly inadequate compared to the compensation which the Tribunal [...] holds to be necessary [...]*.”¹¹⁸⁶ Therefore, the tribunal found that the valuation by the Presidium of the Supreme Court itself constituted an illegal expropriation of the claimants’ shares without adequate compensation.¹¹⁸⁷

¹¹⁸⁴ Reply, paragraph 384, **CS-5**.

¹¹⁸⁵ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, paragraphs 151 – 155, 159 and 705 – 706, **Exhibit CL-22**. The tribunal specifically took note of the fact that the “*valuation of the shares was, unusually, made by the Presidium rather than by either of the inferior tribunals*” (*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, paragraph 705, **Exhibit CL-22**).

¹¹⁸⁶ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, paragraph 706, **Exhibit CL-22**.

¹¹⁸⁷ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, paragraph 706, **Exhibit CL-22**.

749. In the present case, as the Respondent explains in paragraphs 344 – 388 above, the Supreme Court’s decision was limited to determining whether there were grounds for annulling the decisions of the lower courts. The Supreme Court concluded that the lower courts’ decisions were lawful and justified and that there had been no violations of the rules of substantive or procedural law that would justify annulling the decisions.¹¹⁸⁸ The Claimant does not allege that its rights of due process were violated.¹¹⁸⁹ Rather, the Claimant makes vague allegations that the Supreme Court “*failed to remedy the previous breaches.*”¹¹⁹⁰
750. Notably, the focus of the Claimant’s claims in the Notice was on the actions of MCEC and Minsktrans in the performance of their contractual obligations in the period 2003 – 2014, not on the decisions of the courts.¹¹⁹¹ The Claimant did not allege that the decision of the Supreme Court violated Protocol 16, nor that it had suffered a denial of justice.¹¹⁹² Even in the Reply, the Claimant states that the Respondent is attempting to “*re-characterize*” the Claimant’s claims as a denial of justice.¹¹⁹³
751. The Claimant’s suggestion that, like in *Rumeli*, the Supreme Court in the present case committed the “*final act of ‘taking’*” of its contractual rights, is therefore incorrect. The Claimant lost its contractual rights when the termination of the Amended Investment Contract came into effect on 29 October 2014. Accordingly, the Claimant’s claims relating to the performance and termination of the Amended Investment Contract fall outside the Tribunal’s jurisdiction.

¹¹⁸⁸ Resolution of the Supreme Court of Belarus dated 27 January 2015, **Exhibit C-152**.

¹¹⁸⁹ See paragraphs 344 – 374 above.

¹¹⁹⁰ Reply, paragraph 623 (emphasis added), **CS-5**.

¹¹⁹¹ See, e.g., Notice, paragraphs 61 – 255, 417 – 476 and 517 – 523, **CS-1**.

¹¹⁹² Notice, **CS-1**. The Claimant did not even mention the decision of the Supreme Court of 27 January 2015 in the legal section of the Notice.

¹¹⁹³ Reply, paragraph 680, **CS-5**.

752. Secondly, the Claimant’s contention that it “*finally lost even an opportunity to realize the Investment Object only when it was sold to the other investor in September 2017*” is nonsense.¹¹⁹⁴
753. The Investment Object was not and could not have been “*sold to another investor*”, because the Investment Object was never developed by the Claimant or by Manolium-Engineering. Instead, as the Respondent explains in the Defence¹¹⁹⁵ and in paragraphs 606 – 618 above, the temporary right to lease and develop the land on which the Investment Object was originally to be developed was sold to Astomaks on 12 September 2017.
754. Moreover, even if the 2017 sale of the temporary right to develop the Investment Object Land Plot was a consequence of the termination of the Amended Investment Contract (in the sense that Manolium-Engineering lost its contingent right to develop the Investment Object Land Plot after the contract was terminated), this does not mean that the act of terminating the contract was continuing within the meaning of ILC Article 14. The ILC Commentary expressly distinguishes between the effects of an act continuing, and the act itself continuing:

“Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act.

[...]

*An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues.”*¹¹⁹⁶

755. In the present case, the Claimant and Manolium-Engineering lost their contractual rights under the Amended Investment Contract when the termination came into effect on 29 October 2014. The termination was therefore a “*completed act*” on this date,

¹¹⁹⁴ Reply, paragraph 385, **CS-5**.

¹¹⁹⁵ Defence, paragraphs 363 – 367, **RS-18**.

¹¹⁹⁶ J. Crawford, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2002, Art 14(4) – (6), page 136, **Exhibit RL-41**.

and cannot engage the Respondent's responsibility under the EEU Treaty. The Respondent submits that the Claimant's claim to the Contractual Losses fails for the same reason.

B. CONTRACTUAL OBJECTION

756. The parties are in agreement that not every breach of contract will amount to a breach of Protocol 16 of the EEU Treaty.¹¹⁹⁷
757. In the Defence, the Respondent submits that the claims regarding the actions of MCEC and Minsktrans in the implementation of the Investment Contract and Amended Investment Contract concern purely contractual conduct that is not *prima facie* capable of constituting a breach of the EEU Treaty, because the actions complained of were not carried out in the exercise of sovereign authority – and that the Tribunal therefore has no jurisdiction over these claims.¹¹⁹⁸ Contrary to what the Claimant suggests in the Reply, the Respondent never raises a fork-in-the-road objection.¹¹⁹⁹
758. In the Reply, the Claimant shifts the emphasis of its claims away from the performance of the Investment Contract and Amended Investment by MCEC and Minsktrans in 2003 – 2014 (which the Claimant focuses on in the Notice¹²⁰⁰), and onto the decision of the Supreme Court of 27 January 2015,¹²⁰¹ in an apparent attempt to bring its claims within the temporal scope of the EEU Treaty's protections.¹²⁰²

¹¹⁹⁷ Defence, paragraphs 437 – 440, **RS-18**; Reply, paragraph 434, **CS-5**.

¹¹⁹⁸ Defence, paragraphs 437 – 440, **RS-18**.

¹¹⁹⁹ The Respondent's position is that the Claimant is repackaging its purely contractual claims – which were the subject of the dispute before the Belarusian courts – in the form of 'treaty claims' (Defence, paragraph 440, **RS-18**). The Claimant's assertion that the Respondent has "*abandoned*" its fork-in-the-road objection is therefore incorrect (Reply, paragraphs 422 – 424, **CS-5**).

¹²⁰⁰ See, e.g., Notice, paragraphs 61 – 255, 417 – 476 and 517 – 523, **CS-1**.

¹²⁰¹ See, e.g., Reply, paragraphs 539 – 540, 549, 613(i), 621 – 624, 627 – 630, 639, 640 and 723 – 734, **CS-5**.

¹²⁰² In the Notice, the Claimant does not allege that the Supreme Court decision constitutes a breach of Protocol 16 of the EEU Treaty, nor does the Claimant allege that it suffered a denial of justice from the Belarusian court system as a whole.

Nevertheless, the Claimant maintains its position that certain acts and/or omissions carried out by MCEC in the implementation of the Amended Investment Contract violated Protocol 16.¹²⁰³

759. By way of summary, in its submissions to date, the Claimant alleges that:

- A. MCEC delayed making available land plots for the construction of the Communal Facilities, New Communal Facilities and for the design of the Investment Object, and failed to postpone the relevant deadlines;¹²⁰⁴
- B. MCEC delayed the construction of the New Communal Facilities, and failed to postpone the relevant deadlines;¹²⁰⁵
- C. MCEC refused to accept the New Communal Facilities into municipal ownership while the Amended Investment Contract was in force;¹²⁰⁶
- D. MCEC refused to grant a postponement of the contractual deadline for the construction of the New Communal Facilities after the Final Commissioning Date;¹²⁰⁷ and
- E. MCEC was not contractually entitled to submit a claim to the courts to terminate the Amended Investment Contract (together, the “**Contractual Claims**”).¹²⁰⁸

760. In the Reply, the Claimant contends that the Tribunal has jurisdiction over the Contractual Claims because:

¹²⁰³ See paragraph 759 below.

¹²⁰⁴ Notice, paragraphs 419 – 446, **CS-1**.

¹²⁰⁵ Notice, paragraphs 447 – 471, **CS-1**; Reply, paragraphs 629 – 630, **CS-5**.

¹²⁰⁶ Notice, paragraphs 458, 463 and 469, **CS-1**; Reply, paragraphs 587(ii) and 655 – 656, **CS-5**.

¹²⁰⁷ Reply, paragraphs 640 – 643, **CS-5**.

¹²⁰⁸ Notice, paragraphs 472 – 476, **CS-1**; Reply, paragraphs 531 – 534, 543 – 548, 549 – 577, 631 – 632 and 633 – 639, **CS-5**.

- A. the Claimant has submitted its claims in the form of treaty claims under Protocol 16 of the EEU Treaty;¹²⁰⁹ and
- B. MCEC acted in a sovereign capacity when carrying out the acts complained of.¹²¹⁰

761. As set out below, the Respondent submits that:

- A. the Claimant's presentation of the Contractual Claims in the form of treaty claims does not bring them within the Tribunal's jurisdiction; and
- B. the Contractual Claims do not concern the exercise of sovereign authority.

1. The Claimant's presentation of the Contractual Claims in the form of treaty claims does not bring them within the Tribunal's jurisdiction

762. In the Reply, the Claimant asserts that the "*simple fact that the Claimant submitted its claim on the basis of the investment treaty, not the contract, is sufficient to establish prima facie jurisdiction over such claims.*"¹²¹¹ This is misguided.

763. The Respondent does not dispute that it is "*commonplace [...] for investment disputes [...] to originate from the contractual relations between the parties.*"¹²¹² However, as the Respondent already explains in the Defence, tribunals have declined jurisdiction over claims concerning conduct that is *prima facie* not capable of constituting a violation of international law, because it is not carried out in the exercise of sovereign authority.¹²¹³

¹²⁰⁹ Reply, paragraphs 425 and 430 – 433, **CS-5**.

¹²¹⁰ Reply, paragraphs 425, 434 – 456, **CS-5**.

¹²¹¹ Reply, paragraph 431, **CS-5**.

¹²¹² Reply, paragraph 427, **CS-5**.

¹²¹³ Defence, paragraph 433, **RS-18**.

764. For example, the tribunal in *Burlington v. Ecuador* declined jurisdiction over claims arising out of contractual guarantees, because the conduct complained of did not involve any exercise of sovereign power.¹²¹⁴
765. Similarly, the tribunal in *Impregilo v. Pakistan* declined jurisdiction over claims relating to delays caused by a State body in the course of a construction project, because the conduct complained of did not involve any exercise of sovereign authority.¹²¹⁵
766. The Respondent submits that the Tribunal should adopt the same approach as adopted by the tribunals in *Burlington v. Ecuador* and *Impregilo v. Pakistan*: if the claim concerns conduct which is *prima facie* not capable of constituting a breach of Protocol 16 because it does not involve the exercise of sovereign authority, then the Tribunal has no jurisdiction over the claim.
767. If the Tribunal disagrees and considers it more appropriate to approach the Contractual Objection as a substantive issue (as, for example, the tribunal did in *Bayindir v. Pakistan*, cited by the Claimant in the Reply¹²¹⁶), then the Respondent's position is that the Contractual Claims fail on the merits, because the conduct complained of does not involve any exercise of sovereign authority.

¹²¹⁴ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paragraph 204, **Exhibit RL-43**.

¹²¹⁵ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 266 - 267, **Exhibit RL-36**.

¹²¹⁶ Reply, paragraph 432 – 433, **CS-5**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, paragraph 183, **Exhibit CL-41** (extract) and **Exhibit RL-55** (full award). The Claimant also cites *Azurix v. Argentina*, in which the tribunal held that the fact that a BIT claim involved the interpretation and analysis of facts related to the performance of a contract did not *per se* “transform the dispute under the BIT into a contractual dispute” (Reply, footnote 447, **CS-5**; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, paragraph 76, **Exhibit CL-52**). The Respondent has never submitted that the Tribunal does not have jurisdiction over the Contractual Claims solely because they concern the performance of a contract. Instead, the Respondent's position is that the Tribunal does not have jurisdiction over the Contractual Claims because the conduct complained of does not involve any exercise of sovereign authority. Accordingly, the decision in *Azurix* is not relevant to the issues before the Tribunal.

2. The Contractual Claims do not concern the exercise of sovereign authority

768. In the Defence, the Respondent submits that in order for the Tribunal to have jurisdiction over the Contractual Claims, the Claimant must demonstrate that they concern conduct that was carried out in the exercise of sovereign authority.¹²¹⁷

769. In addition to the authorities cited in the Defence, various other tribunals have approved this principle.¹²¹⁸ In *Siemens v. Argentina*, for example, the tribunal held as follows:

*“[F]or the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its “superior governmental power”. It is not a matter of being disappointed in the performance of the State in the execution of a contract but rather of interference in the contract execution through governmental action.”*¹²¹⁹

770. When tribunals have been faced with contractual claims, they have analysed each claim separately to decide whether the conduct complained of was carried out in the exercise of sovereign authority.

771. In *Impregilo v. Pakistan*, the tribunal considered each of the claimant’s claims relating to delays under a construction contract separately, determining in each case whether the measure in question was taken by Pakistan “*in the exercise of its sovereign power*”, rather than “*in the implementation or performance of the Contracts*”.¹²²⁰

772. In *Impregilo v. Argentina*, the tribunal also addressed each contractual claim in turn, considering in each case whether the conduct concerned could “*affect Argentina’s*

¹²¹⁷ Defence, paragraph 432, **RS-18**.

¹²¹⁸ Defence, paragraphs 434 – 436, **RS-18**.

¹²¹⁹ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, paragraph 253, **Exhibit CL-102**.

¹²²⁰ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraphs 263 – 285, **Exhibit RL-36**.

*responsibility under the BIT because they were a misuse of public power or reveal a pattern directed at damaging” the investor.*¹²²¹

773. In the present case, the Claimant alleges that “*all actions of [MCEC] and Minsktrans were exercises of sovereign power in derogation of the Claimant's contractual rights.*”¹²²² The Claimant’s ‘all or nothing’ approach is of little assistance to the Tribunal, whose task, as noted above, is to analyse each of the Contractual Claims in turn, to identify whether the conduct complained of was carried out by MCEC or Minsktrans¹²²³ in the exercise of sovereign authority.¹²²⁴ If the Tribunal disagrees with the Claimant’s position that “*all actions of [MCEC] and Minsktrans were exercises of sovereign power*”, then the Claimant has failed to satisfy its burden of proving that the Tribunal has jurisdiction over the Contractual Claims.
774. In the Reply, the Claimant alleges that “*all actions*” of MCEC and Minsktrans “*were exercises of sovereign power*” because:
- A. the project concerned the “*organization of public transport*” in Minsk and the attraction of investment;¹²²⁵
 - B. the President of the Republic of Belarus had “*direct influence [...] to [sic] the project*”,¹²²⁶ and

¹²²¹ *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, paragraphs 299 and 300 – 310, **Exhibit CL-88**.

¹²²² Reply, paragraph 435, **CS-5**.

¹²²³ The Claimant addresses whether Minsktrans exercised sovereign authority when responding to the Minsktrans Objection. The Respondent therefore addresses the Claimant’s position in paragraphs 826 - 857 below.

¹²²⁴ In *Azurix v. Argentina*, for example, the tribunal reduced the amount of damages awarded to take account of the damages that were related to contractual claims (*Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paragraph 430, **Exhibit CL-81**).

¹²²⁵ Reply, paragraphs 436 and 439 – 440, **CS-5**.

¹²²⁶ Reply, paragraphs 445 – 454, **CS-5**.

C. the “*Respondent, acting through [MCEC] and Minsktrans, did not act as an ordinary contracting party*” in the implementation of the Investment Contract and Amended Investment Contract.¹²²⁷

775. The Respondent addresses each of the Claimant’s arguments below. The Respondent submits that:

A. the provision of a public service is different from the exercise of sovereign authority;

B. the President of the Republic of Belarus did not have a direct influence on the implementation of the project; and

C. the conduct complained of by the Claimant did not involve any exercise of sovereign authority.

a) The provision of a public service is different from the exercise of sovereign authority

776. In the Defence, the Respondent submits that the provision of a public service is distinct from the exercise of sovereign authority.¹²²⁸

777. In the Reply, the Claimant alleges that:

A. “*all actions*” of MCEC and Minsktrans “*were exercises of sovereign power*”, because “*the whole project was related to [...] organization of public transport in the capital of the Respondent and attraction of investment for the purpose of investment in the land belonging to the local authorities.*”;¹²²⁹ and

¹²²⁷ Reply, paragraphs 438 – 443 and 453, **CS-5**.

¹²²⁸ Defence, paragraph 447, **RS-18**.

¹²²⁹ Reply, paragraph 435-436, **CS-5**.

B. the “*public nature of the Investment Contract was evident from the very outset*”, because the “*entire project is related to the governmental transportation function.*”¹²³⁰

778. Contrary to what the Claimant suggests, the fact that the Investment Contract concerned the “*organization of public transport*” and the “*attraction of investment*” does not mean that MCEC and Minsktrans exercised sovereign authority in the context of the Investment Contract.

779. In *Jan de Nul v. Egypt*, for example, the tribunal held that a refusal to grant an extension of time in a tender did not involve the exercise of sovereign authority, even if the tender was governed by laws on public procurement. The tribunal held as follows:

“What matters is not the “service public” element, but the use of “prérogatives de puissance publique” or governmental authority. In this sense, the refusal to grant an extension of time at the time of the tender does not show either that governmental authority was used, irrespective of the reasons for such refusal. Any private contract partner could have acted in a similar manner.”¹²³¹

780. Furthermore, contrary to what the Claimant asserts, the provision of public transport is not an exclusively “*governmental [...] function*”.¹²³² Rather, it is common for private companies to be contracted to provide public transport services.¹²³³

781. Lastly, as already noted in paragraph 773 above, it is not sufficient for the Claimant to vaguely assert that “*all actions*” of MCEC and Minsktrans “*were exercises of sovereign power*”.¹²³⁴ Rather, it is necessary to analyse each of the Contractual

¹²³⁰ Reply, paragraph 439 – 440, **CS-5**.

¹²³¹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 170 (emphasis added), **Exhibit RL-12**.

¹²³² Reply, paragraph 439 – 440, **CS-5**.

¹²³³ Defence, paragraph 451, **RS-18**. In the UK, for example, public rail and bus services were both privatised over twenty years ago.

¹²³⁴ Reply, paragraph 435, **CS-5**.

Claims in turn to identify whether the conduct complained of was carried out in the exercise of sovereign authority.

782. For the above reasons, the Claimant's assertion that "*all actions*" of MCEC and Minsktrans "*were exercises of sovereign power*" because "*the whole project was related to the [...] organization of public transport in the capital*" does not satisfy the Claimant's burden of proving that the Tribunal has jurisdiction over the Contractual Claims.

b) The President of the Republic of Belarus did not have a direct influence on the implementation of the project

783. The Claimant also alleges that the President of the Republic had a "*direct influence*" on the project and that "*nothing may happen in Belarus without significant participation of the executive power*".¹²³⁵ According to the Claimant, this supports its position that "*all actions of [MCEC] and Minsktrans*" in the context of the Investment Contract and Amended Investment Contract were "*exercises of sovereign power*".¹²³⁶

784. The Respondent addresses the various factual allegations raised by the Claimant in paragraphs 445 – 456 of the Reply in paragraphs 236 – 249 above. As the Respondent explains, every one of the Claimant's assertions is misinterpreted. In particular, the Respondent notes the following:

A. Even if MCEC solicited support from the President after the Tender process was over, this does not support the Claimant's conclusion that the President had a "*direct influence*" on the project and that "*all actions of [MCEC] and Minsktrans*" in the context of the Investment Contract and Amended Investment Contract were "*exercises of sovereign power*";¹²³⁷

¹²³⁵ Reply, paragraph 445, CS-5.

¹²³⁶ Reply, paragraphs 435 and 456, CS-5.

¹²³⁷ See paragraphs 238 - 239 above; Reply, paragraphs 435 and 456, CS-5.

B. The Claimant’s allegation that the “*actual decision to terminate the Investment Contract was taken in 2014 by the President [...] when he directed to transfer the land plots for the Investment Object [...] to [...] “Minskstroy”*” is misguided and incorrect.¹²³⁸ The decision that the Claimant appears to be referring to was taken by MCEC (not the President), and concerned the transfer of property on the land that was designated for the Investment Object from one state-owned entity to another, not the land,¹²³⁹

C. Where letters of MCEC referred to the “*instructions*” of the Administration of the President, this was because the Administration was forwarding Mr Dolgov’s letters to MCEC, and asking MCEC to deal with the matter themselves.¹²⁴⁰ This supports the Respondent’s position that the President’s Administration did not have “*direct influence*” on the project.¹²⁴¹

785. The Claimant’s assertions regarding “*discussions*” between the Belarusian authorities regarding the acquisition of the New Communal Facilities in 2015¹²⁴² and the President’s Order of 20 January 2017¹²⁴³ are irrelevant to the Contractual Objection, as they relate to events which occurred long after the termination of the Amended Investment Contract. In any event, as the Respondent explains, the Claimant misrepresents the relevant facts.¹²⁴⁴

786. The Respondent therefore submits that the Claimant’s allegations regarding the “*influence*” of the President do not support its conclusion that “*all actions of [MCEC]*”

¹²³⁸ Reply, paragraph 450, **CS-5**.

¹²³⁹ See paragraphs 389 – 398 above.

¹²⁴⁰ Reply, paragraph 453, **CS-5**.

¹²⁴¹ See paragraphs 245 – 249 above; Reply, paragraph 454, **CS-5**.

¹²⁴² Reply, paragraph 451, **CS-5**.

¹²⁴³ Reply, paragraph 455, **CS-5**.

¹²⁴⁴ See paragraphs 242 - 244 and 252 - 253.

and Minsktrans” in the context of the Investment Contract and Amended Investment Contract were “*exercises of sovereign power*”.¹²⁴⁵

c) The conduct complained of by the Claimant did not involve any exercise of sovereign authority

787. The Claimant further alleges that the “*all actions of [MCEC] and Minsktrans were exercises of sovereign power*” because the “*Respondent, acting through [MCEC] and Minsktrans, did not act as an ordinary contracting party*” in the implementation of the Investment Contract and Amended Investment Contract.¹²⁴⁶ In particular, the Claimant contends that “*during the entire period of implementation of the Investment Contract*”,¹²⁴⁷ MCEC¹²⁴⁸ acted “*in its sovereign power*”¹²⁴⁹ by:

- A. documenting its actions in the form of formal decisions;¹²⁵⁰
- B. exercising its power to manage municipal property;¹²⁵¹ and
- C. carrying out obligations under 9.3.1 – 9.3.3 of the Amended Investment Contract which “*related to the exercise of governmental functions*”.¹²⁵²

788. The Respondent does not dispute that:

- A. MCEC issues formal decisions (of the type referred to by the Claimant¹²⁵³) in its capacity as a local governmental organ;¹²⁵⁴

¹²⁴⁵ Reply, paragraphs 435 and 456, **CS-5**.

¹²⁴⁶ Reply, paragraph 438, **RS-18**.

¹²⁴⁷ Reply, paragraph 438, **RS-18**.

¹²⁴⁸ See footnote 1223 above. The Respondent addresses whether Minsktrans exercised sovereign authority in paragraphs 826 - 857 below.

¹²⁴⁹ Reply, paragraph 438, **RS-18**.

¹²⁵⁰ Reply, paragraph 438(i), **CS-5**.

¹²⁵¹ Reply, paragraph 438(i) – (iv), **CS-5**.

¹²⁵² Reply, paragraphs 442 – 443, **CS-5**.

¹²⁵³ Reply, paragraph 438, **CS-5**.

¹²⁵⁴ Reply, paragraph 438(i) – (ii), **CS-5**. Belarusian Law about Local Government, Article 60.

- B. MCEC exercises powers to manage municipal property in Minsk in its capacity as a local governmental organ, for example by extending lease rights to municipal land, controlling the usage of municipal property, providing Minsk city property to municipal entities, determining grounds for the sale of municipal property and for acquisition of property into municipal ownership;¹²⁵⁵ and
- C. MCEC (Architecture and City Planning Committee) issues schemes for and approves graphic design plans and architecture (construction) plans in its capacity as a local governmental organ (as envisaged under Clauses 9.3.1 – 9.3.3 of the Amended Investment Contract).

789. The question for the Tribunal, however, is not whether MCEC is empowered to exercise some elements of sovereign authority, but whether the specific conduct of which the Claimant complains was carried out by MCEC in that capacity.¹²⁵⁶ Unless the Claimant's position is that a particular MCEC decision violated international law, or that MCEC abused its sovereign power to approve graphic design plans and architecture (construction) plans (which does not appear to be the case), then it is not relevant whether or not MCEC is empowered to exercise sovereign authority in these respects.

790. As set out below, the Respondent submits that:

- A. the termination of the Amended Investment Contract by MCEC did not involve any exercise of sovereign authority;

¹²⁵⁵ Instruction on the management and disposition of property of the city of Minsk adopted pursuant to Minsk's Council of Deputies in the Decision on the management and disposition of property of the city of Minsk № 87 dated 25 April 2000, paragraph 4.1.1.

¹²⁵⁶ See paragraphs 773 above. For example, unless the Claimant's position is that MCEC violated the EEU Treaty in carrying out its obligations under Clauses 9.3.1 – 9.3.3 of the Amended Investment Contract (which does not appear to be the case), then it is irrelevant whether MCEC was required to exercise sovereign authority in carrying out such obligations. Similarly, unless the Claimant's position is that a specific MCEC decision violated the EEU Treaty, then it is irrelevant whether such decisions were issued by MCEC in its capacity as a local governmental organ.

- B. MCEC’s alleged failure to accept the New Communal Facilities into municipal ownership while the Amended Investment Contract was in force did not involve any exercise of sovereign authority;
- C. MCEC’s alleged failure to grant a contractual postponement of the deadline for the construction of the Depot after the Final Commissioning Date did not involve any exercise of sovereign power;
- D. the claims concerning the alleged delays by MCEC, including the failure to provide land plots for construction in a timely fashion, and the alleged failure to proportionately postpone the relevant deadlines in light of the delays, did not involve any exercise of sovereign authority; and
- E. MCEC did not deprive the Claimant of the right to develop the Investment Object on the land plot intended for it in 2013 (neither in the exercise of sovereign power, nor at all).

(1) Termination of the Amended Investment Contract

791. In the Defence, the Respondent submits that MCEC’s submission of a claim to the courts to terminate the Amended Investment Contract did not involve any exercise of sovereign authority.¹²⁵⁷

792. In the Reply, the Claimant does not address the particulars of the Respondent’s position, but rather asserts that “*all actions of [MCEC] and Minsktrans were exercises of sovereign power*”.¹²⁵⁸ Furthermore, the Claimant alleges that the “*actual decision to terminate the Investment Contract was taken in 2014 by the President of the Republic of Belarus, when he directed to transfer the land plots for the Investment Object from Minsktrans to another Minsk state entity*”.¹²⁵⁹

¹²⁵⁷ Defence, paragraphs 438, 439(d) and 440, **RS-18**.

¹²⁵⁸ Reply, paragraph 435, **CS-5**.

¹²⁵⁹ Reply, paragraph 450, **CS-5**.

793. The Respondent submits above that the conduct complained falls outside the temporal scope of the EEU Treaty’s substantive protections.¹²⁶⁰ Accordingly, the Tribunal may consider it a moot issue whether these claims concern the exercise of sovereign conduct that can amount to a violation of international law. Nevertheless, the Claimant’s position is unfounded for the following reasons.
794. As the Respondent explains in the Defence, the termination of the contract was not carried out by executive decree, legislative act or by any other kind of formal decision issued in a sovereign capacity.¹²⁶¹ Rather, MCEC applied to the courts to terminate the contract by exercising its contractual right under Clause 16.2.1 of the Amended Investment Contract, having duly notified the Claimant and Manolium-Engineering of its intention (and its contractual right) to do so.¹²⁶² MCEC submitted its claim to the courts as any “*private contracting party*” could have done in the circumstances.¹²⁶³
795. Even if (contrary to the Respondent’s position) there were public policy reasons for the termination (which there were not), the Respondent submits that this would still not elevate MCEC’s termination of the contract into a sovereign act capable of violating international law, because MCEC’s contractual grounds for termination were well-founded, legitimate and exercised in good faith. This is in line with various

¹²⁶⁰ See paragraph 737 above.

¹²⁶¹ Defence, paragraph 436, **RS-18**; Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**; Letter from MCEC to the Claimant and Manolium-Engineering dated 28 September 2012, **Exhibit R-96**; Letter from MCEC to the Claimant and Manolium-Engineering dated 28 March 2013, **Exhibit R-105**; Statement of claim regarding the termination of the Amended Investment Contract dated 14 October 2013, **Exhibit C-140**.

¹²⁶² Defence, paragraph 436, **RS-18**; Letter from MCEC to the Claimant dated 18 June 2012, **Exhibit R-89**; Letter from MCEC to the Claimant and Manolium-Engineering dated 28 September 2012, **Exhibit R-96**; Letter from MCEC to the Claimant and Manolium-Engineering dated 28 March 2013, **Exhibit R-105**; Statement of claim regarding the termination of the Amended Investment Contract dated 14 October 2013, **Exhibit C-140**.

¹²⁶³ *Suez, Sociedad General de Aguas de Barcelona, S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/17, Decision on Liability, 30 July 2010, paragraph 143, **Exhibit CL-62**.

awards concerning this issue, including *Vigotop Limited v. Hungary*¹²⁶⁴ and *Gold Reserve Inc. v. Venezuela*.¹²⁶⁵

796. As the Respondent explains in paragraphs 392 – 398 above, the Claimant’s allegation that the “*actual decision to terminate the Investment Contract was taken in 2014 by the President of the Republic of Belarus*” is incorrect and unfounded. The Claimant provides no support for this allegation.

797. The Claimant asserts that a “*similar jurisdictional objection*” to the Respondent’s was rejected in *Crystallex v. Venezuela*, where the tribunal held that the termination of a mining operation contract constituted a sovereign act that engaged Venezuela’s responsibility under international law.¹²⁶⁶ Contrary to what the Claimant suggests, the decision in *Crystallex v. Venezuela* is readily distinguishable from the present case.

798. In *Crystallex v. Venezuela*:

A. the contract was terminated by way of a Resolution issued by the Minister of Mines;¹²⁶⁷

B. the tribunal found that the termination of the contract was “*terminated to give effect to the superior policy decisions dictated by the higher governmental spheres*” and to “*the Respondent’s unconcealed political agenda*”;¹²⁶⁸ and

¹²⁶⁴ *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014, paragraphs 329 – 330; **Exhibit C-111**.

¹²⁶⁵ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paragraph 667, **Exhibit CL-146**.

¹²⁶⁶ Reply, paragraph 426, **CS-5**; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, paragraphs 690 – 707, **Exhibit CL-25**.

¹²⁶⁷ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, paragraphs 51 and 698, **Exhibit CL-25**.

¹²⁶⁸ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, paragraph 701, **Exhibit CL-25**.

C. the tribunal found that the termination of the contract was not “*due to a bona fide dispute about the Parties’ obligations under the [contract] or its performance by Crystallex*”.¹²⁶⁹

799. In the present case, by contrast:

A. MCEC applied to the court to terminate the Amended Investment Contract in accordance with Clause 16.2.1;¹²⁷⁰

B. the Claimant has failed to satisfy its burden of proving that there was any political motivation behind MCEC’s termination of the Amended Investment Contract;¹²⁷¹ and

C. MCEC’s decision to apply to the court to terminate the Amended Investment Contract was the culmination of the Termination Dispute regarding the Claimant’s failure to perform its contractual obligations.¹²⁷²

800. Given these differences, there is no basis for the Claimant to arrive at the conclusion that a “*similar jurisdictional objection*” to the Respondent’s was rejected in *Crystallex*.¹²⁷³ Unlike in *Crystallex*, MCEC’s decision to apply to the court to terminate the Amended Investment Contract was purely contractual behaviour that any private party could carry out. The Respondent therefore submits that the Tribunal does not have jurisdiction over the Claimant’s claims concerning MCEC’s application to the court to terminate the Amended Investment Contract.¹²⁷⁴

¹²⁶⁹ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, paragraph 705, **Exhibit CL-25**.

¹²⁷⁰ Defence, paragraph 246, **RS-18**.

¹²⁷¹ See paragraphs 392 - 398 above.

¹²⁷² See paragraphs 696 - 706 above.

¹²⁷³ Reply, paragraph 426, **CS-5**.

¹²⁷⁴ Notice, paragraphs 472 – 476, **CS-1**; Reply, paragraphs 531 – 534, 543 – 548, 549 – 577, 631 – 632 and 633 – 639, **CS-5**.

(2) Transfer of the New Communal Facilities into municipal ownership

801. In the Defence, the Respondent submits that MCEC’s alleged failure to accept the New Communal Facilities into municipal ownership in accordance with the terms of the Amended Investment Contract did not involve any exercise of sovereign authority.¹²⁷⁵
802. In the Reply, the Claimant again does not address the Respondent’s position directly, but alleges that MCEC “acted in the framework” of its “power granted to it by the Charter of Minsk [...] to manage communal property” in “refusing to accept the New Communal Facilities into communal ownership”.¹²⁷⁶
803. The Respondent submits above that the conduct complained falls outside the temporal scope of the EEU Treaty’s substantive protections.¹²⁷⁷ Accordingly, the Tribunal may consider it a moot issue whether these claims relate to sovereign conduct that can amount to a violation of international law. Nevertheless, the Claimant’s position is wrong for the following reasons.
804. As the Respondent notes in paragraph 788 above, the Respondent does not dispute that MCEC exercises powers to manage municipal property in Minsk in its capacity as a local governmental organ, for example by controlling the usage of municipal property, providing Minsk city property to municipal entities and by determining grounds for the sale and acquisition of municipal property.
805. In the context of its relationship with the Claimant and Manolium-Engineering, however, MCEC’s obligation to accept the New Communal Facilities into municipal ownership once they were constructed and commissioned was enshrined in the Amended Investment Contract. Clause 9.3.9 of the Amended Investment Contract provides that MCEC must:

¹²⁷⁵ Defence, paragraph 439(c) and 440, **RS-18**.

¹²⁷⁶ Reply, paragraphs 438(ii) – (iii), **CS-5**.

¹²⁷⁷ See paragraph 737 above.

*“ensure that the communal facilities are transferred into the communal [municipal] ownership of Minsk within one month of the signing and approval of commissioning acts or their state registration, in the manner prescribed by law.”*¹²⁷⁸

806. Outside the context of the Amended Investment Contract (including after the contract was terminated¹²⁷⁹), MCEC had the power to determine the grounds for acquisition of property into municipal ownership, but no obligation to do so vis-à-vis the Claimant and Manolium-Engineering. Accordingly, the Claimant’s claims concerning MCEC’s refusal to accept the New Communal Facilities into municipal ownership when the Amended Investment Contract was in force concern purely contractual issues (i.e. whether MCEC was contractually required to accept the facilities into municipal ownership in an incomplete state), rather than the exercise of sovereign authority.
807. This conclusion is further supported by the fact that Manolium-Engineering had an identical obligation to “*ensure that the communal facilities are transferred into the communal [municipal] ownership of Minsk*” under Clause 8.11 of the Amended Investment Contract.¹²⁸⁰ Similarly, the Claimant had an obligation to ensure Manolium-Engineering’s “*timely and due performance*” of its obligation to transfer the New Communal Facilities into municipal ownership under Clause 8.11.¹²⁸¹
808. The fact that MCEC, Manolium-Engineering and the Claimant each had a contractual obligation to ensure that the New Communal Facilities were transferred into municipal ownership upon the fulfilment of certain conditions demonstrates that, in the context of implementing the contract, failure to comply with this obligation was a contractual issue – with contractual remedies – rather than an issue of abuse of sovereign power.¹²⁸² The tribunal in *Burlington v. Ecuador* encountered a similar

¹²⁷⁸ Amended Investment Contract, Clause 9.3.9, **Exhibit C-66**.

¹²⁷⁹ Defence, paragraphs 263 – 265, **RS-18**.

¹²⁸⁰ Amended Investment Contract, Clause 8.11, **Exhibit C-66**.

¹²⁸¹ Amended Investment Contract, Clause 7.2, **Exhibit C-66**.

¹²⁸² In this respect, the position is comparable to *Burlington v. Ecuador*, where the tribunal held that a tax indemnification guarantee did not imply the exercise of sovereign powers and that the claims relating to the enforcement of the guarantee were therefore outside of its jurisdiction (“*Thus, two private parties*”).

issue, holding that Ecuador’s sovereign power was not involved in the repudiation of the tax indemnification guarantee because “*two private parties who have no power whatsoever over taxes could enter into an indemnification clause identical to those contained in the PSCs*”.¹²⁸³

809. Furthermore, if (contrary to the Respondent’s position) there were public policy reasons for MCEC refusing to accept the incomplete New Communal Facilities into municipal ownership in breach of the Amended Investment Contract (which there were not), the Respondent submits that this would still not elevate MCEC’s actions into sovereign conduct capable of violating international law, because MCEC had plausible and well-founded contractual grounds for not accepting the New Communal Facilities into municipal ownership (because Manolium-Engineering had failed to complete them), and acted in good faith.¹²⁸⁴

810. For the above reasons, the Respondent submits that the Tribunal does not have jurisdiction over the Claimant’s claims concerning MCEC’s refusal to accept the New Communal Facilities into municipal ownership while the Amended Investment Contract was in force.¹²⁸⁵

*who have no power whatsoever over taxes could enter into an indemnification clause identical to those contained in the PSCs [...]. And if one of the parties were to seek enforcement of the indemnification clause, it would not mean that that party is challenging the tax that prompted the application of the clause; rather, it would simply invoke the tax to substantiate its claim for indemnification.”) (Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paragraphs 183 and 204, **Exhibit RL-43**).*

¹²⁸³ *Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, paragraph 183, **Exhibit RL-43**.*

¹²⁸⁴ Defence, paragraph 191, **RS-18**; Defence, paragraphs 140 – 146, 166 – 172 and 187 – 191, **RS-18**. It is undisputed that Manolium-Engineering never completed the construction of the Depot (Defence, paragraph 142, **RS-18**). As for the Pull Station and the Road, these could not have been transferred into municipal ownership separately from the Depot, because MCEC’s obligation under Clause 9.3.9 was contingent upon the commissioning and registration of *all* of the New Communal Facilities (Defence, paragraph 188, **RS-18**). Further, there were a number of defects in the Pull Station that made it impossible to accept into municipal ownership (Defence, paragraph 191, **RS-18**).

¹²⁸⁵ Notice, paragraphs 458, 463, 469, **CS-1**; Reply, paragraphs 587(ii) and 655 – 656, **CS-5**.

(3) Postponement of the contractual deadline for the construction of the New Communal Facilities

811. In the Reply, the Claimant introduces new claims that MCEC violated Protocol 16 by refusing to grant a third contractual extension (in addition to Additional Agreement No. 5 and Additional Agreement No. 6) after the Final Commissioning Date passed.¹²⁸⁶
812. The Claimant alleges, for example, that the Claimant’s request for a “*short additional extension under the Investment Contract*” on 4 July 2011 was “*imminently reasonable [sic]*”, but that MCEC “*refused*”.¹²⁸⁷ The Claimant also contends that MCEC “*rejected*” a proposal to extend the contract on 1 July 2012 “*without any basis*”.¹²⁸⁸ As the Respondent explains in paragraphs 256 – 307 above, these allegations are baseless.
813. The Respondent also submits above that the conduct complained falls outside the temporal scope of the EEU Treaty’s substantive protections.¹²⁸⁹ Accordingly, the Tribunal may consider it a moot issue whether these claims relate to sovereign conduct that can amount to a violation of international law. Nevertheless, the Respondent shall address the Claimant’s position.
814. As the Respondent notes in paragraph 788 above, the Respondent does not dispute that MCEC exercises powers to extend lease rights to municipal land in its capacity as a municipal State organ. However, the Respondent submits that MCEC’s alleged failure to grant a contractual postponement of the deadline for the construction of the Depot after the Final Commissioning Date passed does not constitute behaviour going beyond that which an ordinary contracting party could adopt.¹²⁹⁰ Rather, MCEC

¹²⁸⁶ Reply, paragraphs 564 – 568 and 640 – 643, **CS-5**.

¹²⁸⁷ Reply, paragraphs 641 – 642, **CS-5**.

¹²⁸⁸ Reply, paragraph 568, **CS-5**.

¹²⁸⁹ See paragraph 737 above.

¹²⁹⁰ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paragraph 260 (“*In order that the alleged breach of contract may constitute a violation*”).

acted as any private contracting party would have done in the circumstances.¹²⁹¹ Furthermore, MCEC's refusal to grant a further extension was entirely reasonable in the circumstances, given that it had already postponed the contractual deadline for constructing the New Communal Facilities from December 2008 to July 2011 at the Claimant's request.¹²⁹²

815. The Respondent therefore submits that MCEC did not step out of its contractual shoes when it refused the Claimant's proposed terms for a contractual postponement of the deadline for the construction of the New Communal Facilities. Accordingly, the Tribunal does not have jurisdiction over the Claimant's claims concerning MCEC's refusal to do so.¹²⁹³

(4) Delays allegedly attributable to MCEC

816. In the Defence, the Respondent submits that Claimant's claims concerning delays allegedly caused by MCEC do not involve the exercise of sovereign authority.¹²⁹⁴

817. In the Reply, the Claimant introduces new claims for the first time in the proceedings that MCEC and other State bodies violated Protocol 16 by causing delays in the construction of the New Communal Facilities.¹²⁹⁵ The Claimant alleges that:

A. Gosstroy caused "*regular delays in the provision of the construction permissions*";¹²⁹⁶

of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt."), **Exhibit RL-36**.

¹²⁹¹ *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB 03/19, Decision on Liability, 30 July 2010, paragraph 154 ("*Argentina's behaviour in ending the Concession Contract seems not unlike the behaviour of a private contracting party faced with the threatened termination of an important long-term supply contract*"), **Exhibit CL-62**.

¹²⁹² Defence, paragraphs 76 – 98, **RS-18**.

¹²⁹³ Reply, paragraphs 564 – 568 and 640 – 643, **CS-5**.

¹²⁹⁴ Defence, paragraphs 439(a) – (b) and 440, **RS-18**.

¹²⁹⁵ See, e.g., Reply, paragraphs 629 – 630, **CS-5**.

¹²⁹⁶ Reply, paragraphs 99 – 122 and 629(i), **CS-5**.

- B. MCEC delayed providing the “*land plot for the Trolley Depot from 27 March 2007 until 24 May 2007*”;¹²⁹⁷
 - C. a “*four-month delay*” was caused due to the need for “*unplanned deforestation in March 2008 – July 2008*”;¹²⁹⁸
 - D. a “*six-month delay*” was caused by MCEC not removing “*newly discovered water pipes in September 2007 – March 2008*”;¹²⁹⁹
 - E. MCEC caused “*regular and numerous delays*” because of basing the design of the New Communal Facilities on an “*old Soviet*” design;¹³⁰⁰ and
 - F. MCEC caused delays “*resulting from the relocation of the contractors*”.¹³⁰¹
818. The Respondent submits above that the conduct complained falls outside the temporal scope of the EEU Treaty’s substantive protections.¹³⁰² Accordingly, the Tribunal may consider it a moot issue whether these claims relate to sovereign conduct that can amount to a violation of international law. Nevertheless, the Respondent shall address the Claimant’s position.
819. The Respondent does not dispute that several of the Claimant’s allegations concern alleged delays caused by State bodies, such as Gosstroy, which were not parties to the Amended Investment Contract. However, the Claimant and Manolium-Engineering were specifically protected against such delays by Clause 6.3 of the Amended Investment Contract, which provided as follows:

“If the untimely (delayed) performance by Mingorispolkom [MCEC], KUP Minsktrans of their obligations under this contract, acts (omissions) by competent organizations, which are in communal [municipal] ownership of

¹²⁹⁷ Reply, paragraphs 64 – 67 and 629(ii), **CS-5**.

¹²⁹⁸ Reply, paragraphs 68 – 80 and 629(iii), **CS-5**.

¹²⁹⁹ Reply, paragraphs 87 – 90 and 629(iv), **CS-5**.

¹³⁰⁰ Reply, paragraphs 81 – 86 and 629(v), **CS-5**.

¹³⁰¹ Reply, paragraphs 91 – 98 and 629(vi), **CS-5**.

¹³⁰² See paragraphs 619 – 755 above.

*Minsk, prevent the due implementation of the investment project, the deadlines for designing, constructing and commissioning the facilities specified in Sub-Clauses 6.1. – 6.2. of this Clause shall be proportionately extended by a reasonable period necessary to properly perform the terms and conditions of this contract. At the same time, the Investor shall not be deemed to be in delay.”*¹³⁰³

820. If delays were caused by MCEC and other State bodies to the construction of the New Communal Facilities, the proper course of action would be for the Claimant and to rely on its contractual protections under Clause 6.3 of the Amended Investment Contract as soon as the delays arose. Instead, the Claimant has waited until the second round of submissions in the present arbitration proceedings to raise these allegations for the first time. Given that the Claimant was specifically protected against such alleged delays under the Amended Investment Contract, the Respondent submits that this is a contractual issue, rather than an issue concerning the exercise of sovereign power.
821. The Respondent also notes that the specific obligation for MCEC to provide the land plots to Manolium-Engineering for construction of the Communal Facilities and New Communal Facilities was set out in the Investment Contract (as amended).¹³⁰⁴ Therefore, even if MCEC exercises powers to manage municipal property in Minsk in its capacity as a local governmental organ, the Respondent submits that the alleged delays by MCEC in providing the “*land plot for the Trolley Depot from 27 March 2007 until 24 May 2007*”¹³⁰⁵ concern contractual issues – with contractual remedies – rather than an issue of abuse of sovereign power.
822. For these reasons, the Respondent submits that the Tribunal does not have jurisdiction over the Claimant’s claims relating to these alleged delays.¹³⁰⁶

¹³⁰³ Amended Investment Contract, Clause 6.3, **Exhibit C-66**; Clause 5.4 of the Investment Contract (**Exhibit C-34**) contained the same provision.

¹³⁰⁴ Investment Contract, Clause 7.2, **Exhibit C-34**; Amended Investment Contract, Clause 9.2, **Exhibit C-66**.

¹³⁰⁵ Reply, paragraphs 64 – 67 and 629(ii), **CS-5**.

¹³⁰⁶ Notice, paragraphs 419 – 446 and 447 – 471, **CS-1**; Reply, paragraphs 629 – 630, **CS-5**.

(5) MCEC did not deprive the Claimant of the right to develop the Investment Object in 2013

823. In the Reply, the Claimant alleges that MCEC’s public authority “*to manage the communal property was exercised [...] when it deprived the Claimant of the right to develop the Investment Object on the land plot intended for it in 2013*”.¹³⁰⁷
824. In the Defence, the Respondent explains that Manolium-Engineering failed to submit the Design Specification and Estimate Documentation within two years of issuance of the Investment Object Location Act, which led to the invalidation of the Investment Object Location Act on 14 March 2013.¹³⁰⁸ The Claimant is seeking in the Reply to create the impression that this MCEC decision deprived the Claimant and Manolium-Engineering of their contingent contractual right to develop the Investment Object. As explained in the Defence¹³⁰⁹ and paragraphs 192 above, this is incorrect; the implication of MCEC’s decision was merely that Manolium-Engineering would have to re-apply for the Investment Object Location Act.
825. Therefore, whilst the Respondent does not deny that MCEC invalidated the Investment Object Location Act pursuant to its powers to manage municipal property in Minsk, the Claimant’s allegation that the decision “*deprived the Claimant of the right to develop the Investment Object*” is misguided. Furthermore, the Respondent submits above that the MCEC decision in question was issued before the EEU Treaty entered into force, and so falls outside the temporal scope of its protections.¹³¹⁰

¹³⁰⁷ Reply, paragraph 438(iv), **CS-5**.

¹³⁰⁸ Defence, paragraph 239, **RS-18**.

¹³⁰⁹ Defence, paragraphs 200 – 205 and 239, **RS-18**.

¹³¹⁰ See paragraph 737 above.

C. MINSKTRANS OBJECTION

826. The parties agree that Minsktrans is not a governmental organ for the purposes of ILC Article 4.¹³¹¹
827. In the Defence, the Respondent submits that the actions of Minsktrans are not attributable to the Respondent, including under ILC Article 5.¹³¹²
828. In the Reply, the Claimant maintains that the actions of Minsktrans are attributable to the Respondent under ILC Article 5.¹³¹³ The Claimant alleges that:
- A. Minsktrans is “*empowered to perform governmental functions*”;¹³¹⁴ and
 - B. Minsktrans acted “*in its sovereign capacity in its relations with the Claimant*”.¹³¹⁵
829. Given that: (i) the Claimant has failed to substantiate its claims against Minsktrans; and (ii) the Claimant’s allegations against Minsktrans appear to concern conduct which occurred before 1 January 2015 and which therefore falls outside the temporal scope of the EEU Treaty’s substantive protections, the Tribunal may consider the Minsktrans Objection to be moot.¹³¹⁶ Nevertheless, the Claimant’s position is unfounded for the reasons given below.
830. The standard of proof for attribution of alleged breaches to a third party is very demanding. This has been recognized by multiple tribunals, including:

¹³¹¹ Defence, paragraph 442, **RS-18**.

¹³¹² Defence, paragraphs 441 – 454, **RS-18**.

¹³¹³ Reply, paragraphs 457 – 472, **CS-5**.

¹³¹⁴ Reply, paragraphs 460 – 466, **CS-5**.

¹³¹⁵ Reply, paragraphs 467 – 472, **CS-5**.

¹³¹⁶ Notice, paragraphs 415, 417, 421, 427, 429 – 430, 433, 442, 445, 447, 452, 456 – 458, 461, 468 – 471 and 519, **CS-1**.

- A. in *Hamester v. Ghana*, where the tribunal held that “[t]he jurisprudence of the ICJ sets a very demanding threshold in attributing the act of a private entity to a State [...]”;¹³¹⁷ and
- B. in *Jan de Nul v. Egypt*, where the tribunal noted that “[i]nternational jurisprudence is very demanding in order to attribute the act of a person or entity to a State [...]”.¹³¹⁸

831. The Respondent submits that the Claimant falls far short of satisfying this demanding threshold. As set out below, the Respondent submits that:

- A. Minsktrans is not empowered to exercise elements of governmental authority; and
- B. Minsktrans performed its obligations under the Amended Investment Contract as any private contractor could have done.

1. Minsktrans is not empowered to exercise elements of governmental authority

832. The Claimant alleges that Minsktrans is empowered to exercise elements of governmental authority because:

- A. it is a wholly state-owned entity;¹³¹⁹
- B. it was created through a merger of other state enterprises;¹³²⁰ and

¹³¹⁷ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 179, **Exhibit RL-46**.

¹³¹⁸ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 173, **Exhibit RL-12**.

¹³¹⁹ Reply, paragraphs 461 – 462, **CS-5**.

¹³²⁰ Reply, paragraphs 463 – 464, **CS-5**.

C. it is empowered to exercise specific elements of governmental authority by participating in negotiating transportation tariffs alongside state organs and approving tariffs once negotiated.¹³²¹

833. The Respondent submits that this is incorrect, for the reasons set out below.

834. Firstly, the fact that Minsktrans is a state-owned entity is not an “*important factor*” in determining the existence of governmental authority.¹³²² It is not clear to the Respondent what authority the Claimant relies on to assert this. The 2001 Commentary on the ILC Articles affirms that state ownership is not a decisive criterion and states that the “*true common feature*” for a decision on attribution is whether the entity is “*empowered [...] to exercise specified elements of governmental authority*”.¹³²³ The conduct of the relevant entity must “*concern governmental activity and not other private or commercial activity in which the entity may engage*”.¹³²⁴ Assessment of an entity’s powers should consider “*the content of the powers*” as well as “*the way they are conferred on an entity*”.¹³²⁵ The Claimant cannot therefore assert that the provision of passenger transport service is the exercise of governmental authority without closer examination of the specific powers that Minsktrans exercises.

835. Secondly, the fact that Minsktrans was formed by merger of unitary enterprises does not mean that it is entitled to exercise governmental authority. Minsktrans was formed in 2003 from the merger of Unitary Enterprise “Department of Transport and Communication Administration of MCEC” (the signatory to the Investment Contract), Unitary Enterprise “Minskgoelektrotrans”, Unitary Enterprise

¹³²¹ Reply, paragraph 465, **CS-5**.

¹³²² Reply, paragraphs 461 – 462, **CS-5**.

¹³²³ J. Crawford, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2002, Art 5(3), page 100, **Exhibit RL-41**.

¹³²⁴ J. Crawford, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2002, Art 5(5), page 101, **Exhibit RL-41**.

¹³²⁵ J. Crawford, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2002, Art 5(6), page 101, **Exhibit RL-41**.

“Minskpassajiravtotrans” and Unitary Enterprise “Minsk Subway”.¹³²⁶ All of these entities were unitary enterprises, which under Belarusian law are a type of commercial organisation, the principle purpose of which is to derive profit.¹³²⁷

836. Further, contrary to what the Claimant alleges, the “*name of Department of the Minsk City Executive Committee*” – a predecessor entity which merged into Minsktrans – does not demonstrate “*the governmental function*” of Minsktrans.¹³²⁸ The name of an entity does not bear upon whether it is empowered to exercise governmental authority. The Claimant conducts no analysis to show that this predecessor entity could exercise any elements of governmental authority.

837. Misleadingly, the Claimant has inconsistently translated the name of this entity to fit its arguments:

Document	Translation
Notice of Arbitration	<i>Unitary Enterprise Transport and Communication Office</i> ¹³²⁹
Translation of Investment Contract	<i>Unitary Enterprise “Department of Transport and Communications of Mingorispolkom”</i> ¹³³⁰
Translation of Amended Investment Contract	<i>Unitary Enterprise Department of Transport and Communications of Mingorispolkom</i> ¹³³¹
Statement of Reply	<i>Department of transport and communication of the Minsk</i>

¹³²⁶ Decision of MCEC dated 2 December 2004, **Exhibit C-40**.

¹³²⁷ Belarusian Civil Code, Article 46(1) and (2), **Exhibit RL-127**.

¹³²⁸ Reply, paragraph 464, **CS-5**.

¹³²⁹ Notice of Arbitration, paragraph 66, **CS-1**.

¹³³⁰ Investment Contract dated 6 June 2003, preamble, **Exhibit C-34**.

¹³³¹ Amended Investment Agreement dated 8 February 2007, clause 1, **Exhibit C-66**.

838. By contrast to previous submissions, the Claimant appears to have dropped the designation “unitary enterprise” in the Statement of Reply in order to create the impression that the entity was a governmental department. However, as explained above, unitary enterprises are commercial enterprises.
839. Thirdly, the Claimant is incorrect in asserting that Minsktrans is empowered to exercise elements of governmental authority through “*participating in the process of negotiating transportation tariffs alongside state organs*” and “*approving such tariffs once negotiated*”.¹³³³ The Claimant relies on an article from 2011 in its assertion.¹³³⁴ However, Minsktrans did not have, and does not have, the powers alleged by the Claimant.
840. According to the regulations in force at the time the article was published, MCEC, and not Minsktrans, had the authority to regulate tariffs for urban transportation.¹³³⁵ The rise in tariffs described in the article was established in MCEC Decision No. 3212 (dated 26 October 2011). The article clearly refers to elements of Decision No. 3212, *inter alia* the new fixed tariff of BYR 1,300 and the new limit of BYR 1,800 for express regular bus route tariffs.¹³³⁶ Given that the authors have relied on MCEC Decision No. 3212 to write the article, it is unclear how they confused Minsktrans with MCEC as decision maker.
841. The role of Minsktrans in the tariff rise is indirectly described in MCEC Decision No. 3212.¹³³⁷ Minsktrans was to ensure that the tariff change established in MCEC Decision No. 3212 was implemented smoothly, that passengers were informed of the

¹³³² Reply, paragraphs 463 – 464, **CS-5**.

¹³³³ Reply, paragraph 465, **CS-5**.

¹³³⁴ Interfax website, *The City Transport Tariffs in Minsk Will Increase by 38.7% up to 1.3 BYR*, **Exhibit C-349**.

¹³³⁵ Decree of the President of the Republic of Belarus No. 72 dated 25 February 2011, **Exhibit RL-123**.

¹³³⁶ Interfax website, *The City Transport Tariffs in Minsk Will Increase by 38.7% up to 1.3 BYR*, **Exhibit C-349**; Decision of MCEC No. 3212 dated 26 October 2011, clauses 1 and 2, **Exhibit R-195**.

¹³³⁷ Decision of MCEC No. 3212 dated 26 October 2011, clause 11, **Exhibit R-195**.

change and that no disruption was caused to the sale of tickets. Such activities require no governmental authority to implement.

842. There have been no significant changes to the legislation governing tariff changes since 2011; the power to authorise and approve tariffs still lies with MCEC, not Minsktrans.
843. Fourthly, the Article 5 test requires an entity to be empowered “*actually to exercise*” governmental authority,¹³³⁸ and Minsktrans is not so empowered. Powers that have been deemed by other tribunals to fall within Article 5 may be exercised without any approval or input from another body. These include powers “*to issues the decrees related to the navigation in the canal*”;¹³³⁹ to “*impose and collect charges for the navigation and passing through the canal*”;¹³⁴⁰ and to make regulations to prescribe the form of licences and to “*regulate the control of the issue of such licences or permits and determine the conditions under which they may be used, produced, revoked or returned*”.¹³⁴¹
844. By contrast, the charter of Minsktrans shows that it is a communal unitary enterprise, with a core objective of pursuing activities aimed at making a profit.¹³⁴² It has its own balance sheet and accounts, can contract on its own behalf and is liable for its obligations.¹³⁴³ Minsktrans does have the right to develop draft decisions to submit to MCEC for consideration, but it is not empowered to approve or implement such

¹³³⁸ *Tulip Real Estate and Development Netherlands B.V. V. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, dated 10 March 2014, paragraph 293 (emphasis in the original), **Exhibit RL-60**.

¹³³⁹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 166, **Exhibit RL-12**.

¹³⁴⁰ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 166, **Exhibit RL-12**.

¹³⁴¹ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 190, **Exhibit RL-46**.

¹³⁴² Minsktrans Charter dated 19 March 2009, clauses 1.1 and 2.1, **Exhibit R-176**.

¹³⁴³ Minsktrans Charter dated 19 March 2009, clauses 1.7 and 1.8, **Exhibit R-176**.

decisions unilaterally.¹³⁴⁴ Indeed, none of the rights accorded to Minsktrans under its charter show powers to exercise governmental authority.¹³⁴⁵

2. Minsktrans performed its obligations under the Amended Investment Contract as any private contractor could have done

845. In addition to demonstrating that Minsktrans is empowered to exercise governmental authority, the Claimant must establish that Minsktrans was acting in such a capacity in relation to the alleged breaches of the EEU Treaty: “*it must be shown that the precise act in question was an exercise of such governmental authority and not merely an act that could be performed by a commercial entity*”.¹³⁴⁶
846. The Claimant does not even come close to the high standard necessary to prove this,¹³⁴⁷ but has instead completely failed to apply the relevant test. Instead of focusing on “*the actual acts complained of*”¹³⁴⁸, the Claimant seeks to argue that Minsktrans acted in its sovereign capacity in its relations with the Claimant because:
- A. the subject matter of the contract related to a governmental function;¹³⁴⁹
 - a) Minsktrans received constant administrative support from MCEC, Ministries of the Republic of Belarus and the President of the Republic of Belarus;¹³⁵⁰ and
 - b) Minsktrans was the ultimate beneficiary of the New Communal Facilities and was to use them for performance of its governmental function.¹³⁵¹

¹³⁴⁴ Minsktrans Charter dated 19 March 2009, clause 3.7, **Exhibit R-176**.

¹³⁴⁵ Minsktrans Charter dated 19 March 2009, clause 3, **Exhibit R-176**.

¹³⁴⁶ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 193, **Exhibit RL-46**.

¹³⁴⁷ See paragraph 830 above.

¹³⁴⁸ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 169, **Exhibit RL-12**.

¹³⁴⁹ Reply, paragraphs 468 – 470, **CS-5**.

¹³⁵⁰ Reply, paragraph 471, **CS-5**.

847. As set out below, this is incorrect.
848. Firstly, the subject matter of the contract is irrelevant. The Claimant argues that Minsktrans' alleged "*assurance of the public transportation in the city*" and the subject matter of the Investment Contract related to the "*provision of public transportation*" shows that Minsktrans was exercising governmental authority in the present case.¹³⁵² The Respondent submits that this approach is flawed.
849. The Claimant cites *Garanti Koza v. Turkmenistan* to support its allegation that the subject matter of the Investment Contract is relevant.¹³⁵³ However, in that case, the tribunal based its conclusion on attribution on the words of the relevant contract, which clearly stated that the entity was "*acting on behalf of Turkmenistan Government*".¹³⁵⁴
850. Moreover, the tribunal in *Jan de Nul v. Egypt* explicitly stated that a link between the subject matter of the contract and the core functions of an entity does not assist in assessing the second limb of the Article 5 test. Instead, a tribunal must examine "*the actual acts complained of*".¹³⁵⁵ In the present case, the Claimant has failed to substantiate any of its claims against Minsktrans, let alone satisfy its burden of proving that the conduct complained of is "*essentially governmental rather than commercial*".¹³⁵⁶
851. Secondly, Minsktrans' role in the provision of public transportation does not constitute the exercise of governmental authority. Under Belarusian law, potential transport operators must participate in a competition for the right to carry out

¹³⁵¹ Reply, paragraph 472, **CS-5**.

¹³⁵² Reply, paragraph 470, **CS-5**.

¹³⁵³ Reply, paragraph 469, **CS-5**.

¹³⁵⁴ *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, paragraph 335, **Exhibit RL-85**.

¹³⁵⁵ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 169, **Exhibit RL-12**.

¹³⁵⁶ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (Merits), 13 November 2000, paragraph 52, **Exhibit RL-83**.

passenger transportation by road.¹³⁵⁷ MCEC delegates management of this competition to State Agency “Metropolitan Transport and Connections” (“MTC”), an entity which was created at the same time as Minsktrans. MTC is responsible for developing the transport routes, and the winner of the competition serves as a transport contractor by providing vehicles and operating the routes.¹³⁵⁸ Minsktrans has historically been the only participant in such competitions, but any commercial entity meeting the prescribed conditions (for example, holding the relevant licence) may present a tender.¹³⁵⁹ Minsktrans therefore does not exercise governmental authority; it merely operates as any other commercial entity would within the framework established by MCEC and MTC.

852. In any case, the Commentary to Article 5 explicitly states that the conduct in question must be specifically authorised by internal law; “*it is not enough that [the internal law] permits activity as part of the general regulation of the affairs of the community*”.¹³⁶⁰ Accordingly, even if one of Minsktrans’ roles is the “*the provision of passenger transport service to the general public population on urban and suburban routes*”¹³⁶¹, as the Claimant alleges, this does not lead to the conclusion that Minsktrans is empowered to exercise governmental authority, or that it exercised such authority in the particular circumstances complained of.
853. The Claimant has failed to identify even a single obligation that Minsktrans was required to perform under the Amended Investment Contract which involved the

¹³⁵⁷ Resolution No. 1398 of the Council of Ministers of the Republic of Belarus dated 24 September 2008 “On the approval of Regulations on the procedure for holding a competition for the right to carry out regular road transportation of passengers”, **Exhibit RL-121**.

¹³⁵⁸ Law of the Republic of Belarus No. 278-Z “On road transport and road transportation”, Article 24, **Exhibit RL-135**.

¹³⁵⁹ Resolution No. 1398 of the Council of Ministers of the Republic of Belarus dated 24 September 2008 “On the approval of Regulations on the procedure for holding a competition for the right to carry out regular road transportation of passengers”, clause 15, **Exhibit RL-121**.

¹³⁶⁰ J. Crawford, *The International Law Commission’s Articles on State Responsibility*, Cambridge University Press, 2002, Art 5(7), page 102, **Exhibit RL-41**.

¹³⁶¹ Minsktrans Charter dated 19 March 2009, clause 2.1, **Exhibit R-176**.

exercise of sovereign authority.¹³⁶² The Respondent submits that this is because each of these obligations “*could be performed by a commercial entity*”.¹³⁶³

854. Thirdly, Minsktrans did not receive “*constant administrative support*” from state organs.¹³⁶⁴ The Parties agree that Minsktrans will not have committed actions in the exercise of governmental authority if any private contractor could have acted in a similar manner under the circumstances.¹³⁶⁵ The Respondent reiterates that any private contractor can enter into an agreement in which it relies on administrative support from state organs to perform its obligations.¹³⁶⁶

855. Even if Minsktrans did receive administrative support from the state, this does not show that Minsktrans itself exercised governmental authority in the instant case. The Claimant’s argument has no connection to any actual acts relating to its claim that Minsktrans committed in exercise of government authority. This is what it must show to prove its case.

856. Fourthly, the Claimant’s suggestion that Minsktrans is exercising governmental authority because it is the ultimate beneficiary of the New Communal Facilities is nonsense.¹³⁶⁷ Whether Minsktrans was the beneficiary of the New Communal Facilities is irrelevant to whether Minsktrans exercised governmental authority in respect of the alleged breaches of the EEU Treaty, which is what the Claimant is required to prove.

857. In summary, the Respondent submits that the Claimant has failed to satisfy its burden of demonstrating that the actions of Minsktrans are attributable to the Respondent.

¹³⁶² Amended Investment Contract, **Exhibit C-66**.

¹³⁶³ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 193, **Exhibit RL-46**.

¹³⁶⁴ Reply, paragraph 471, **CS-5**.

¹³⁶⁵ Statement of Claim, paragraphs 117 – 118, **CS-2**; Statement of Defence, paragraph 449, **RS-18**; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 170, **Exhibit RL-12**.

¹³⁶⁶ Statement of Defence, paragraph 452, **RS-18**.

¹³⁶⁷ Reply, paragraphs 471 and 472, **CS-5**.

D. RATIONE MATERIAE OBJECTION

1. Investments by the Claimant’s affiliates are not protected by the EEU Treaty

858. Throughout this project and in its submissions, the Claimant has sought to give the impression that it was the Claimant that funded the construction of the New Communal Facilities.¹³⁶⁸

859. For example, the Claimant alleges that:

A. “**the Claimant** made the following Investments on the territory of the Republic of Belarus [...]: financing of the design and construction of the Communal Facilities, New Communal Facilities and Investment Object by the Claimant in the Republic of Belarus”;¹³⁶⁹

B. “[T]he **Claimant** still fully funded the project (and, in fact, provided millions more than required)”;¹³⁷⁰

C. “The 2016 Ministry of Finance Audit Report [i]s [t]he [m]ost [r]eliable [e]vidence of **the Claimant’s [c]osts**”;¹³⁷¹

D. “[T]he Respondent attempts to dispute the evaluation [...] of **the Claimant’s investments** (USD 19,434,679)”;¹³⁷²

E. “[T]he 2016 Ministry of Finance Audit Report remains the best evidence of **the Claimant’s costs**”¹³⁷³

¹³⁶⁸ See paragraph 8 above.

¹³⁶⁹ Notice, paragraph 343 (emphasis added), CS-1.

¹³⁷⁰ Reply, paragraph 130 (emphasis added), CS-5.

¹³⁷¹ Reply, subheading 15.1 (emphasis added), CS-5.

¹³⁷² Reply, paragraph 842 (emphasis added), CS-5.

¹³⁷³ Reply, paragraph 856 (emphasis added), CS-5.

860. In the Defence, the Respondent submits that the Claimant fails to prove that the amounts spent on the New Communal Facilities were invested by the Claimant.¹³⁷⁴
861. In the Reply, the Claimant discloses for the first time that the Claimant did not itself invest anything towards the construction of the New Communal Facilities.¹³⁷⁵ Instead, the Claimant states that the loans provided to Manolium-Engineering referred to in paragraph 48 of the Reply were made by companies “*affiliated*” with the Claimant from the Isle of Man, Cyprus, the UK and Belarus.¹³⁷⁶ Nevertheless, the Claimant continues to refer to these costs as “*investments made by the Claimant*”, even though the costs were incurred by different companies with separate legal personalities.¹³⁷⁷
862. In the Reply, the Claimant contends that the amounts invested by the Claimant’s alleged “*affiliates*” constitute ‘investments’ under the EEU Treaty because:
- A. “*all investments are subject to protection, whether the investments were made by using the investor’s own resources or not*”,¹³⁷⁸ and
- B. “*jurisprudence [...] allows a foreign investor to submit direct claims based on assets of a company it controls*”.¹³⁷⁹
863. As set out below, the Respondent submits that the amounts invested by the Claimant’s alleged “*affiliates*” are not a protected investment under the EEU Treaty, because:

¹³⁷⁴ Defence, paragraphs 482 – 486, **RS-18**.

¹³⁷⁵ Reply, paragraph 48, **CS-5**.

¹³⁷⁶ According to the Claimant, the funds were transferred to Manolium-Engineering by Bradley Enterprise Ltd (Isle of Man), Manolium Trading Ltd (Cyprus), Lasker Ltd (Cyprus), Nomad Oil Ltd (UK) and Manolium-Processing Foreign LLC (Reply, paragraphs 48 – 49 and 516 – 517, **CS-5**).

¹³⁷⁷ Reply, paragraph 49(i), **CS-5**; see also Reply, paragraphs 46 (“The **Claimant** significantly exceeded this obligation **by investing USD 19,434,679** into the New Communal Facilities, 47, 576 (“*Termination of the Investment Contract, after 11 years of performance, USD 20 million of the Claimant’s investments into the project [...]*” (emphasis added)), 828, 836, 842, 853, 856 (“[T]he 2016 Ministry of Finance Audit Report remains the best evidence of the Claimant’s costs” (emphasis added)), **CS-5**.

¹³⁷⁸ Reply, paragraphs 504 and 505 – 508 (emphasis in the original), **CS-5**.

¹³⁷⁹ Reply, paragraphs 509 and 510 – 517, **CS-5**.

- A. only an investment made by a protected investor are protected by Protocol 16 of the EEU Treaty; and
- B. the EEU Treaty does not allow a foreign investor to submit claims based on the assets of a company it controls.

864. In any event, the Respondent submits that (c) the Claimant failed to provide evidence with the Reply that such companies were “*affiliated*” with the Claimant. Following a request from the Respondent, the Claimant provided documents which purportedly prove affiliation.¹³⁸⁰ However, as explained below, the evidence provided is insufficient to constitute clear and unequivocal proof of affiliation at the time the loans were made.

a) Only investments made by a protected investor are protected by Protocol 16 of the EEU Treaty

865. The Claimant alleges in the Reply that the definition of ‘investor’ in Protocol 16 of the EEU Treaty “*is not limited to only an investor who contributed its own funds*”.¹³⁸¹ According to the Claimant, “*all investments are subject to protection, whether the investments were made by using the investor’s own resources or not*”.¹³⁸²

866. The Claimant seeks to support its position that “*all investments are subject to protection*” with reference to various decisions where tribunals have held that the origin of funds invested by an investor is irrelevant.¹³⁸³

867. The Claimant’s position that all investments are subject to protection, no matter whether or not they are made by an investor, is incorrect.

¹³⁸⁰ Letter from White & Case to Baker McKenzie dated 22 March 2019, **Exhibit R-229**; Email from Baker McKenzie to White & Case dated 30 April 2019, **Exhibit R-231**.

¹³⁸¹ Reply, paragraph 507, **CS-5**.

¹³⁸² Reply, paragraphs 504 and 505 – 508, **CS-5**.

¹³⁸³ Reply, paragraph 504 (emphasis in the original), **CS-5**.

868. Firstly, the Claimant’s interpretation is contradicted by the ordinary meaning of the definition of investment in Protocol 16 of the EEU Treaty.¹³⁸⁴

869. Article 7 of Protocol 16 of the EEU Treaty defines investments as:

“tangible and intangible assets invested by an investor of a Member State into subjects of entrepreneurial activity on the territory of another Member State in accordance with the legislation of the latter”.¹³⁸⁵

870. In turn, Article 8 of Protocol 16 defines investor of a Member State as “*any person of a Member State*” carrying out investments on the territory of another Member State in accordance with the legislation of the latter.¹³⁸⁶ Lastly, Article 10 of Protocol 16 defines person of a Member State as “*any natural person or juridical person of a Member State*.”¹³⁸⁷ The Member States of the Eurasian Economic Union (the “**EEU**”) are Belarus, Kazakhstan and Russia.

871. Article 7 of Protocol 16 of the EEU Treaty, read together with Articles 6 and 8, plainly indicates that only assets invested “*by an investor of a Member State*” may constitute a protected investment under the EEU Treaty. There is nothing in the wording of Protocol 16 to suggest that an entity incorporated in a country other than Belarus, Kazakhstan or Russia may constitute a protected investor, even if it is allegedly affiliated with an investor.

872. Accordingly, contrary to what the Claimant suggests, assets invested by entities that are not protected investors – in this case, Bradley Enterprise Ltd (Isle of Man), Manolium Trading Ltd (Cyprus), Lascker Ltd (Cyprus) and Nomad Oil Ltd (UK) – shall not fall within the scope of protected investments under Protocol 16.

¹³⁸⁴ Vienna Convention, Article 31(1), **Exhibit RL-5**.

¹³⁸⁵ Protocol 16 of the EEU Treaty, Article 7 (emphasis added), **Exhibit CL-3**.

¹³⁸⁶ Protocol 16 of the EEU Treaty, Article 8, **Exhibit CL-3**.

¹³⁸⁷ Protocol 16 of the EEU Treaty, Article 10, **Exhibit CL-3**.

873. The Claimant also asserts that “[b]ecause the money came from outside of the country [...] the entire amount of the invested funds qualify as an investment”.¹³⁸⁸ This statement is plainly incorrect: according to the table of loans at paragraph 48 of the Reply, certain loans were made by Manolium-Processing Foreign LLC (a Belarusian incorporated entity) to Manolium-Engineering.
874. According to the ordinary meaning of Protocol 16, the amounts loaned by Manolium-Processing Foreign LLC are also not protected investments.¹³⁸⁹ Article 7 of Protocol 16 defines investment as:
- “[...] assets invested by an investor of a Member State [...] on the territory of another Member State”.¹³⁹⁰
875. Since Manolium-Processing Foreign LLC is incorporated in Belarus, the funds it has loaned to Manolium-Engineering do not constitute “assets invested [...] on the territory of another Member State”.¹³⁹¹ Accordingly, the amounts loaned to Manolium-Engineering by Manolium-Processing Foreign LLC are not protected investments.
876. The Claimant’s assertion that “all investments are subject to protection” is therefore incorrect.¹³⁹²
877. Secondly, the Claimant’s interpretation is contradicted by the object and purpose of the EEU Treaty.¹³⁹³
878. As already explained, the EEU Treaty is a multilateral instrument signed by Russia, Belarus and Kazakhstan, aimed at stimulating sustainable economic development

¹³⁸⁸ Reply, paragraph 517, **CS-5**.

¹³⁸⁹ Reply, Image 16, **CS-5**.

¹³⁹⁰ Claimant’s translation of Protocol 16 of the EEU Treaty, Article 7, **Exhibit CL-3** (emphasis added).

¹³⁹¹ Claimant’s translation of Protocol 16 of the EEU Treaty, Article 7 (emphasis added), **Exhibit CL-3**.

¹³⁹² Reply, paragraph 504 (emphasis in the original), **CS-5**.

¹³⁹³ Vienna Convention, Article 31(1), **Exhibit RL-5**.

through mutual cooperation and integration between the Member States, and the establishment of a common market between the Member States.¹³⁹⁴

879. Understood in this context, the object and purpose of Protocol 16 is to promote mutual investments between the Member States by providing new substantive protections in respect of such investments. The object and purpose of Protocol 16 is not to promote or protect investments made from outside the Eurasian Economic Union.
880. Accordingly, the Claimant's interpretation that "all investments are subject to protection",¹³⁹⁵ even investments made by entities incorporated in the Isle of Man, Cyprus and the UK, is unpersuasive in light of the object and purpose of the EEU Treaty.
881. Thirdly, the case cited by the Claimant do not support its conclusion that "all investments are subject to protection".¹³⁹⁶
882. In each of the cases which the Claimant cites, it was undisputed that the investors had themselves invested into the host State. Rather, the question was whether the capital used by the investor to invest had originated or been sourced from outside the host State. In each case, the tribunal found that the origin of the capital used by the investor to invest was irrelevant.
883. In *Tradex v. Albania*, the State raised a jurisdictional objection based on the allegation that the investor had invested into Albania using funds originating from an offshore company of unspecified origin or from Greek state banks.¹³⁹⁷ The tribunal found that

¹³⁹⁴ See paragraphs 655 – 658 above; EEU Treaty, preamble, **Exhibit RL-136**.

¹³⁹⁵ Reply, paragraph 504 (emphasis in the original), **CS-5**.

¹³⁹⁶ Reply, paragraphs 504 and 508 (emphasis in the original), **CS-5**.

¹³⁹⁷ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award of 29 April 1999, paragraph 108, **Exhibit CL-95**.

the “sources from which the investor financed the foreign investment in Albania are not relevant [...]”¹³⁹⁸

884. In *Wena Hotels v. Egypt*, it again appears to have been undisputed that Wena had itself invested into the hotels.¹³⁹⁹ Rather, the issue was where the capital used by the investor to invest had originated. Both the tribunal and the *ad hoc* Committee found that the alleged origin of the funds from other investors who were not entitled to benefit from the applicable BIT was irrelevant.¹⁴⁰⁰
885. In *Saipem v. Bangladesh*, it was again not at issue that the investor had itself made the investments.¹⁴⁰¹ Rather, the issue was whether the origin of the funds was relevant, in the absence of express wording in the BIT. The tribunal held that “*in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital.*”¹⁴⁰²
886. In *Eiser v. Spain*, it was not disputed that the investor had made “*significant investments of funds in the form of share purchases, loans and injections of capital into the Spanish entities that own and operate the CSP plants at issue.*”¹⁴⁰³ However,

¹³⁹⁸ *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award of 29 April 1999, paragraph 111, **Exhibit CL-95**.

¹³⁹⁹ For example, the tribunal held that the market value of the investment was best arrived at by reference to “*Wena’s actual investments into the two hotels*” (*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, paragraph 92, **Exhibit RL-104**).

¹⁴⁰⁰ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraph 126, **Exhibit RL-73**; *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, paragraph 54, **Exhibit RL-104**.

¹⁴⁰¹ *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, paragraph 106, **Exhibit CL-96**.

¹⁴⁰² *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, paragraphs 106 and 108, **Exhibit CL-96**.

¹⁴⁰³ *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, paragraph 228, **Exhibit CL-97**.

the State contended that the funds invested were “*not the Claimant’s own*”.¹⁴⁰⁴ The tribunal held that the origins of the capital invested by an investor into an investment “*are not relevant for purposes of jurisdiction*”.¹⁴⁰⁵

887. In the present case, by contrast, the issue is not where the Claimant’s investments originated. Rather, the issue is whether amounts invested by the Claimant’s affiliates (not the Claimant) constitute protected investments under Article 7 of Protocol 16. The above decisions are not relevant to this issue, because in each case it was undisputed that the investor had itself invested into the host State. Moreover, the wording of the BITs was different in each case, and not necessarily the same as the wording in Protocol 16 of the EEU Treaty.¹⁴⁰⁶
888. Accordingly, the decisions cited by the Claimant do not support its conclusion that “*all investments are subject to protection*”, even investments made by entities incorporated in non-EEU countries.¹⁴⁰⁷

b) The EEU Treaty does not allow a foreign investor to submit claims based on the assets of a company it controls

889. In support of its claim that the amounts allegedly transferred to Manolium-Engineering by its “*affiliates*” constitute protected investments, the Claimant further contends that an investor is entitled to “*submit direct claims based on assets of a company it controls*”.¹⁴⁰⁸ The Claimant’s position is incorrect.

¹⁴⁰⁴ *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, paragraph 228, **Exhibit CL-97**.

¹⁴⁰⁵ *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, paragraph 228, **Exhibit CL-97**.

¹⁴⁰⁶ By way of example, the dispute in *Wena Hotels v. Egypt* arose out of the Agreement for the Promotion and Protection of Investments between Egypt and the United Kingdom (the “**IPPA**”). Unlike Article 7 of Protocol 16 of the EEU Treaty, Article 1(a) of the IPPA did not limit the definition of ‘investments’ to assets invested “*by an investor*” (Agreement for the Promotion and Protection of Investments between Egypt and the United Kingdom dated 11 June 1975, Article 1(a), **Exhibit RL-76**).

¹⁴⁰⁷ Reply, paragraph 504 (emphasis in the original), **CS-5**.

¹⁴⁰⁸ Reply, paragraphs 509 and 114, **CS-5**.

890. Firstly, the Claimant’s position is contradicted by the plain language of Article 7 of Protocol 16, read which provides that only assets “*invested by an investor*” shall constitute a protected investment.¹⁴⁰⁹
891. As the Respondent explains in paragraphs 869 – 872 above, funds invested by the Claimant’s affiliates incorporated in non-EEU states shall not constitute protected investments under Article 7 of Protocol 16.
892. Funds invested by Manolium-Engineering also shall not constitute protected investments, even if Manolium-Engineering is the subsidiary of the Claimant, because (as explained in paragraphs 874 – 875 above) protected investments must be made “*on the territory of another Member State*”.¹⁴¹⁰ Therefore, the costs incurred by Manolium-Engineering in constructing the New Communal Facilities do not constitute a protected investment under Article 7 of Protocol 16.
893. Second, the Claimant’s interpretation is contradicted by the object and purpose of the EEU Treaty.
894. According to the Claimant’s interpretation of Article 6, an EEU investor is entitled to claim damages in respect of losses suffered by its subsidiaries operating in the host State, regardless of whether the investor has itself invested any money into the host State. In the present case, for example, the Claimant seeks to recover all the costs allegedly incurred by its “*affiliates*” incorporated outside the Eurasian Economic Union, even though the Claimant did not itself make any investment into Belarus.
895. Such an approach does not fit with the object and purpose of Protocol 16 of the EEU Treaty, which, as the Respondent explains above, is to protect investors within the EEU.¹⁴¹¹

¹⁴⁰⁹ Claimant’s translation of Protocol 16 of the EEU Treaty, Article 7, **Exhibit CL-3**.

¹⁴¹⁰ Claimant’s translation of Protocol 16 of the EEU Treaty, Article 7, **Exhibit CL-3** (emphasis added).

¹⁴¹¹ See paragraph 879 above.

896. The Claimant’s interpretation could also lead to unfair and unintended outcomes. In particular, the Respondent submits that there is a risk of double recovery if the creditors under the loan agreements referred to by the Claimant in paragraph 48 of the Reply themselves commence investment arbitration proceedings against the Republic of Belarus to seek recovery of the amounts loaned to Manolium-Engineering.
897. Thirdly, even if (contrary to the Respondent’s position), the Tribunal considers that investments made by the Claimant indirectly through its subsidiaries are protected by Protocol 16, the Claimant should still only be entitled to recover damages to the extent of its own loss.
898. In *Azurix v. Argentina*, for example, the tribunal and the *ad hoc* Committee held that the investor was entitled to be compensated for the fair market value of a concession held by its subsidiary, ABA.¹⁴¹² However, the *ad hoc* Committee took note that the investor was only entitled to compensation for the fair market value of the concession to the extent of its own loss:

*“[T]here is no reason why a treaty cannot permit the investor to bring a claim under the treaty in respect of its own interest directly protected by the treaty, whether or not the legal owner of the rights constituting the investment may simultaneously be able to bring proceedings in respect of its own rights before the domestic courts or a different arbitration tribunal. Although more than one person may be able to claim in different fora in respect of the same damage to the same assets, **each may ultimately only be entitled to be compensated to the extent of its own loss.**”¹⁴¹³*

899. On this basis, the *ad hoc* Committee agreed with the tribunal’s reasoning that the investor was entitled to recover the US\$102.4 million additional capital contributions

¹⁴¹² *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic of 1 September 2009, paragraph 363 – 364, **Exhibit CL-101**.

¹⁴¹³ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic of 1 September 2009, paragraph 109 (emphasis added), **Exhibit CL-101**.

that the investor had made into ABA with respect to the concession.¹⁴¹⁴ Argentina had never disputed that the investor had invested this amount by way of capital contributions into ABA.¹⁴¹⁵

900. Similarly, in the present case, if the Tribunal considers that investments made by the Claimant indirectly through Manolium-Engineering are protected by Protocol 16, then the Claimant should only be entitled to be compensated to the extent of its own contributions to Manolium-Engineering. Given that the Claimant is not listed among the creditors of Manolium-Engineering at paragraph 48 of the Reply, the Claimant does not appear to have suffered any loss.

c) The Claimant has failed to evidence its claims of affiliation

901. Lastly, even if, as the Claimant contends, investments made by its alleged “*affiliates*” did constitute protected investments (which is denied), the Claimant has failed to satisfy its burden of proving that the creditors were affiliated with the Claimant at the relevant time.

902. According to Black’s Law Dictionary, an affiliate is “[a] *corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation*”¹⁴¹⁶. Control in a corporate context means “[o]wnership of more than 50% of the shares in a corporation”.¹⁴¹⁷ In order to show affiliation between the Claimant and another company, the Claimant must therefore show that at the time of the loan, either:

a) the affiliated company was a parent or subsidiary of the Claimant; or

¹⁴¹⁴ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic of 1 September 2009, paragraphs 344 (“*In then proceeding to determine Azurix’s “actual investment”, the only amounts that the Tribunal took into consideration were the Canon payment, and Azurix’s additional capital contributions.*” (emphasis added)), 357, 361, 363(3)(b) and 363(4)(b), **Exhibit CL-101**.

¹⁴¹⁵ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic of 1 September 2009, paragraph 398(n) **Exhibit CL-101**.

¹⁴¹⁶ Black’s Law Dictionary (10th ed), page 69, **Exhibit RL-80**.

¹⁴¹⁷ Black’s Law Dictionary (10th ed), page 403, **Exhibit RL-80**.

- b) the Claimant and the affiliated company were controlled by the same entity and/or person.

903. There are many issues with the evidence provided by the Claimant in this regard, including:

- gaps in the evidence provided;¹⁴¹⁸
- evidence that contradicts the Claimant's assertions;¹⁴¹⁹
- gaps in the chain of documents evidencing control via beneficial ownership;¹⁴²⁰

¹⁴¹⁸ For example, no documents provided show how Nomal Oil Limited is affiliated with the Claimant. The Claimant has provided documents showing that Mr Dolgov and Mrs [REDACTED] together controlled Nomal Oil Limited in September 2011 and September 2012 (Annual Report of Nomal Oil Ltd dated 23 September 2011, **C-384**; Annual Report of Nomal Oil Ltd dated 23 September 2012, **C-385**), but fails to show how Mr Dolgov controlled the Claimant at the same time. Similarly, no evidence has been provided showing affiliation of any kind between Manolium Processing Foreign LLC and the Claimant.

¹⁴¹⁹ For example, the Claimant seeks to evidence affiliation through the fact that Mr Ekavyan had control of both the Claimant and Bradley Enterprises Limited, a purported affiliate, in 2011 when Bradley Enterprises Limited provided loans to Manolium-Engineering (Scheme of affiliation in the Claimant's group of companies, **Exhibit C-273**; Loans provided to Manolium-Engineering (excel file), **Exhibit C-215**). However, Mr Ekavyan did not have control of the Claimant between March 2011 and January 2015. The Claimant provides evidence that Contresas Limited (a Cypriot company), which controlled 55% of the shares in the Claimant from March 2011 onwards (Resolution of Claimant dated 29 March 2011, **Exhibit C-383**), was wholly owned by a Mrs [REDACTED] and a Mr [REDACTED] at that time (Minutes of meeting of Contresas Ltd dated 15 October 2007, **Exhibit C-374**). It is not clear how these individuals, who controlled more than 50% of the Claimant, relate to the Claimant's affiliation analysis as they do not appear in the Claimant's diagram (Scheme of affiliation in the Claimant's group of companies, **Exhibit C-273**).

¹⁴²⁰ For example, the Claimant seeks to evidence affiliation through the fact that Mr Ekavyan had control of both the Claimant and Lascker Limited, a purported affiliate, in 2008 when Lascker Limited provided a loan to Manolium-Engineering (Scheme of affiliation in the Claimant's group of companies, **Exhibit C-273**; Loans provided to Manolium-Engineering (excel file), **Exhibit C-215**). Documents provided suggest that at the relevant time, the Claimant was owned by Manolium Trading Limited (Minutes of meeting of Manolium Trading Ltd dated 8 November 2000, **Exhibit C-370**; Resolution of Claimant dated 29 March 2011, **Exhibit C-383**; Extract from Register of Companies for Claimant dated 27 March 2019, **Exhibit C-388**), which in turn was beneficially owned by Lascker Limited (Share Certificate № 5 and Declaration of Trust for Manolium Trading Ltd dated 22 November 1999, **Exhibit C-368**; Share Certificate № 6 and Declaration of Trust for Manolium Trading Ltd, **Exhibit C-369**). Documents show that at this time Medwell Holdings Limited held 50% of the shares in Lascker

- evidence of shareholdings that do not represent control, which is a key aspect of affiliation;¹⁴²¹
- declarations of trust provided without the underlying share certificate, meaning no conclusions may be drawn as to the existence of a shareholding, or as to level of control;¹⁴²² and
- evidence that is nonsensical.¹⁴²³

904. The Respondent therefore submits that the Claimant has failed to satisfy its burden of proving that the creditors of Manolium-Engineering were “*affiliated*” with the Claimant at the relevant time.

Limited (Share Certificate № 1 and Instrument of Transfer for Lascker Ltd dated 6 December 1997, **C-367**). An undated transfer instrument purported to transfer these shares to Mr Ekavyan (Share Certificate № 1 and Instrument of Transfer for Lascker Ltd dated 6 December 1997, **C-367**). However, this transfer does not appear to have been effected, because said share certificate (still in the name of Medwell Holdings Limited) was cancelled on 14 January 2009 (Minutes of meeting of Lascker Ltd dated 14 January 2009, **Exhibit C-382**). The undated share transfer instrument is insufficient to evidence a beneficial holding, and so the Claimant has not shown that in 2008 Mr Ekavyan beneficially held a 50% stake in Lascker Limited (which does not represent control according to the definition – *see* paragraph 902 above). The Claimant thus has not proved that the Claimant **or** the affiliated company were controlled by the same individual at the time of the loan.

¹⁴²¹ For example, the Claimant provides documents showing that in 2009, Mr Ekavyan beneficially held 50% of the shares in Lascker Limited. A 50% shareholding does not constitute control within the meaning of the definition (*see* paragraph 902 above).

¹⁴²² For example, the Claimant alleges that Bradley Enterprises Limited was affiliated with the Claimant because it was controlled through beneficial ownership by Mr Ekavyan at the relevant time. Various declarations of trust are provided (Declaration of Trust for Bradley Enterprises Ltd dated 3 December 2001, **Exhibit C-371**; Declaration of Trust for Bradley Enterprises Ltd dated 11 October 2007, **Exhibit C-373**; Declaration of Trust for Manolium Trading Ltd (1 - 125 000 shares) dated 1 January 2009, **Exhibit C-378**; Declaration of Trust for Manolium Trading Ltd (125 001 - 250 000 shares) dated 1 January 2009, **Exhibit C-379**), but without the underlying share certificates evidencing that the shareholdings exist. Further, it is not evident what proportion the number of shares subject to the declaration of trust represents in the company, so even if an underlying shareholding is assumed, no conclusions may be drawn as to control.

¹⁴²³ For example, certain share certificates provided suggest that the relevant shareholding was greater than the number of shares in the company (Declaration of Trust for Manolium Trading Ltd (1 - 125 000 shares) dated 1 January 2009, **Exhibit C-378**; Declaration of Trust for Manolium Trading Ltd (125 001 - 250 000 shares) dated 1 January 2009, **Exhibit C-379**). This is clearly not reliable evidence of control.

2. The Library Payment is not a protected investment

905. In the Reply, the Claimant seeks to give the impression that the Claimant made the Library Payment to the Ministry of Finance of the Republic of Belarus on 30 December 2003:

A. “[t]he **Claimant** invested [...] the Library Payment”;¹⁴²⁴

B. “[t]he **Claimant** significantly exceeded this obligation by investing [...] USD 1 million for the Library Payment”;¹⁴²⁵ and

C. “[t]he **Claimant** made investments in the New Communal Facilities [...] plus the Library Payment”.¹⁴²⁶

906. Contrary to the impression the Claimant seeks to give in the paragraphs cited above, however, it was Manolium-Trading Ltd (a Cypriot entity), not the Claimant, that invested the Library Payment into Belarus.¹⁴²⁷ For the same reasons as set out in paragraphs 869 – 872 above, Manolium Trading Ltd is not a protected investor under the EEU Treaty, nor is the Library Payment a protected investment. The Claimant is therefore not entitled to seek recovery for the Library Payment in the present proceedings.

E. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER THE BELARUSIAN INVESTMENT LAW

907. In the Defence, the Respondent submits that the Tribunal does not have jurisdiction under the Belarusian Investment Law for three reasons:

¹⁴²⁴ Reply, paragraph 545 (emphasis added), **CS-5**.

¹⁴²⁵ Reply, paragraph 46 (emphasis added), **CS-5**.

¹⁴²⁶ Reply, paragraph 259 (emphasis added), **CS-5**.

¹⁴²⁷ Confirmation of the Library Payment dated 30 December 2003, **Exhibit C-50**.

- A. The Belarusian Investment Law does not apply to investments made and disputes that arose before it came into force on 24 January 2014;¹⁴²⁸
- B. The Tax Dispute and the Termination Dispute fall within the exclusive competence of Belarusian state courts pursuant to the Belarusian Code of Commercial Procedure;¹⁴²⁹ and
- C. In any event, the Termination Dispute falls within the jurisdiction of the Economic Court of Minsk, a competent forum chosen by MCEC, Minsktrans, the Claimant and Manolium-Engineering in the Amended Investment Contract.¹⁴³⁰

908. In the Reply, the Claimant contends as follows:

- A. The Belarusian Investment Law applies to “*existing investments which were made prior to entry of the law into force*”;¹⁴³¹
- B. The Belarusian state courts do not have exclusive jurisdiction over the dispute, because it does not fall in any of the categories set out in the Belarusian Code of Commercial Procedure;¹⁴³² and
- C. The dispute resolution clause inserted in the Amended Investment Contract does not exclude the jurisdiction of the Tribunal, because the dispute at hand is “*based on breaches committed by the [Respondent] as a state under the EEU Treaty, not on contractual violations alone*”.¹⁴³³

909. The Respondent responds to each of the Claimant’s contentions below.

¹⁴²⁸ Defence, paragraphs 462 – 468, **RS-18**.

¹⁴²⁹ Defence, paragraphs 469 – 478, **RS-18**.

¹⁴³⁰ Defence, paragraphs 479 – 481, **RS-18**.

¹⁴³¹ Reply, paragraphs 477 – 490, **CS-5**.

¹⁴³² Reply, paragraphs 491 – 494, **CS-5**.

¹⁴³³ Reply, paragraphs 495 – 500, **CS-5**.

1. Ratione temporis objection

910. There is no dispute between the Parties that the Belarusian Investment Law entered into force on 24 January 2014.¹⁴³⁴
911. The Claimant alleges, however, “*nothing in the Belarusian Investment Law prevents application to investments made prior to its entry into force*”.¹⁴³⁵ To support this allegation, the Claimant relies on the preamble of the law, which, according to the Claimant, “*is intended to [...] also ensure the guarantees, right [sic] and interests of investors in relation to existing investments*”.¹⁴³⁶ The Claimant asserts therefore that the Belarusian Investment Law “*must necessarily cover investments made prior to its entry into force*”.¹⁴³⁷ This is wrong.
912. As explained in the Defence, pursuant to Article 67 of the Law of Belarus “On Normative Legal Acts” dated 10 January 2000 (the “**Law On Normative Legal Acts**”),¹⁴³⁸ in order for a normative legal act, including a law, to be applied retroactively, it must contain an express provision to that effect.¹⁴³⁹ No such provision was inserted into the Belarusian Investment Law.¹⁴⁴⁰ In the Reply, the Claimant does not address the Respondent’s position in this regard.

¹⁴³⁴ Defence, paragraph 462, **RS-18**; Reply, paragraph 477, **CS-5**.

¹⁴³⁵ Reply, paragraph 480, **CS-5**.

¹⁴³⁶ Reply, paragraph 482, **CS-5**.

¹⁴³⁷ Reply, paragraphs 482 – 483, **CS-5**.

¹⁴³⁸ On 1 February 2019, the Law On Normative Legal Acts was repealed with the adoption of new Law “On Normative Legal Acts” dated 17 July 2019 No. 130-Z. The new Law is identical to the Law On Normative Legal Acts in all relevant aspects regarding retroactivity. Nonetheless, the Respondent respectfully submits that given that at the time when the Belarusian Investment Law entered into force (i.e. 24 January 2014) the Law On Normative Legal Acts remained effective, it shall be applied when determining whether the Belarusian Investment Law applies retroactively.

¹⁴³⁹ Defence, paragraph 467, **RS-18**.

¹⁴⁴⁰ Pursuant to Article 23 of the Belarusian Investment Law, Articles 1 – 21 of this law came into force in 6 months upon its official publication, whereas Article 22 of the Belarusian Investment Law came into force upon its official publication (Belarusian Investment Law, Article 23, **Exhibit RL-47**). The Belarusian Investment Law was officially published at the National Legal Internet Portal on 23 July 2013 (Information on the official publication of the Belarusian Investment Law, **Exhibit RL-48** // Available at: <http://pravo.by/document/?guid=3961&p0=H11300053>).

913. By way of example, when the Belarusian legislator intends for a law to apply retroactively, it includes express provision to that effect:
- A. *“This Decree enters into force after its official publication and applies to relationships arose since 1 January 2016.”* (Clause 2 of Decree of the President of the Republic of Belarus dated 3 March 2016 No. 85 (as amended on 25 January 2018) “On Taxation of Certain Income”);
 - B. *“Article 44 of this Code applies to land relationships arose before the entry of this Code into force and existing after its entry into force.”* (Article 98(2) of Code of the Republic of Belarus dated 23 July 2008 No. 425-Z (as amended on 24 October 2016) “Land Code of the Republic of Belarus”);
 - C. *“This Decree enters into force after its official publication [...] and applies to relationships arose since the date of entry of the Treaty on Customs Code of the customs union dated 27 November 2009 into force.”* (Clause 6 of Decree of the President of the Republic of Belarus dated 18 July 2011 No. 319 (as amended on 22 December 2018) “On Certain Issues of Customs Regulation”).
914. Given the absence in the Belarusian Investment Law of an express provision that it applies retroactively, the Respondent respectfully submits that it does not apply to the Claimant’s investments made long before 24 January 2014.
915. Moreover, since there is no express provision providing for its retroactive application, the Respondent submits that the jurisdictional provisions of the Belarusian Investment Law do not extend to disputes arising before it entered into force, nor do its substantive provisions extend to conduct which occurred before it entered into force.
916. The Claimant also alleges that *“[i]f the Respondent’s interpretation were accepted, the Respondent would be empowered to discriminate against all existing investments without recourse. This surely could not have been the result intended by a law stating*

that it was enacted to “ensure” the protection of investments”.¹⁴⁴¹ To support this allegation, the Claimant refers to other – now repealed – laws, which provided substantive protections in respect of investments:

- A. Law of Belarus “On Foreign Investments on the Territory of the Republic of Belarus” dated 14 November 1991 (the “**1991 Investment Law**”); and
- B. Investment Code of the Republic of Belarus dated 22 June 2011 (the “**Investment Code**”).¹⁴⁴²

917. The Respondent respectfully submits that these laws have no relevance to the issue of jurisdiction. As explained in the Defence,¹⁴⁴³ the Belarusian Investment Law, which replaced the Investment Code, introduced for the first time the Respondent’s consent to arbitrate disputes arising “*in the course of the making of investments*” with all foreign investors.¹⁴⁴⁴ Such consent to arbitrate did not exist in either the 1991 Investment Law or the Investment Code.¹⁴⁴⁵

918. As the Claimant itself has admitted, there is a distinction between the retroactive application of a treaty’s substantive provisions and jurisdictional provisions.¹⁴⁴⁶ The Respondent submits that the same distinction exists in domestic Belarusian legislation. Accordingly, the Respondent’s offer of substantive protections to foreign investments in the 1991 Investment Law and the Investment Code is irrelevant as far as the issue of jurisdiction under the Belarusian Investment Law is concerned.

¹⁴⁴¹ Reply, paragraph 483, **CS-5**.

¹⁴⁴² Reply, paragraphs 483 – 485, **CS-5**.

¹⁴⁴³ Defence, paragraph 465, **RS-18**.

¹⁴⁴⁴ Belarusian Investment Law, Article 13, **Exhibit RL-47**.

¹⁴⁴⁵ For example, both the 1991 Investment Law and the Investment Code provided that disputes concerning valuation of nationalised assets were subject to court proceedings. *See* the 1991 Investment Law, Articles 35 and 35-1, **Exhibit CL-92**; the Investment Code, Article 12, last paragraph, **Exhibit CL-93**.

¹⁴⁴⁶ Reply, paragraph 388, **CS-5**.

919. The substantive protections provided for in the 1991 Investment Law or the Investment Code remain applicable to investments made before the Belarusian Investment Law entered into force. Therefore, contrary to the Claimant’s assertion, the Respondent’s interpretation does not affect the purpose of the Belarusian Investment Law – to attract new investments¹⁴⁴⁷ – and does not ‘empower’ the Respondent “*to discriminate against all existing investments without recourse*”.¹⁴⁴⁸ For the same reason, the Claimant’s contention that “[i]f [the definition of “making an investment”] *is limited to future investments, the start of the investment process will lose protection, and the investment will only be partially protected*”¹⁴⁴⁹ is wrong. The Claimant’s attempt to shift the Tribunal’s attention from the temporal effect of the Belarusian Investment Law to “*long backdrop of investor protections*”¹⁴⁵⁰ should not be entertained.
920. Lastly, the Respondent respectfully submits that nothing in the Belarusian Investment Law provides or indicates that it extends to “*existing investments*”. The Claimant’s contention that the obligation or, as with the Belarusian Investment Law, the desire to ensure the rights of investors extends to conduct, which occurred before the law entered into force,¹⁴⁵¹ is wrong. The Belarusian legislator articulates the preamble and other provisions of the Belarusian Investment Law in the present tense, which, as explained in paragraph 671 above, is commonly used in Russian when one undertakes an obligation in the future from the moment the obligation enters into force. Accordingly, when adopting the Belarusian Investment Law, the Respondent has not agreed to “*ensure*” that its consent to arbitrate would extend to investments made before 24 January 2014, i.e. when that law entered into force (let alone disputes which arose before that date).

¹⁴⁴⁷ Defence, paragraph 465, **RS-18**.

¹⁴⁴⁸ Reply, paragraph 483, **CS-5**.

¹⁴⁴⁹ Reply, paragraph 489, **CS-5**.

¹⁴⁵⁰ Reply, paragraph 487, **CS-5**.

¹⁴⁵¹ Reply, paragraph 483, **CS-5**.

921. For the reasons explained in the Defence¹⁴⁵² and above, the Respondent respectfully submits that the Belarusian Investment Law does not apply to the Claimant’s alleged investment made long before 24 January 2014 and to the disputes relating to such investment.

2. Ratione personae and ratione materiae objections

922. If, contrary to the Respondent’s position, the Tribunal finds that the Belarusian Investment Law does apply retroactively, the Respondent respectfully submits that it does not apply to the Claimant and its alleged investment for two reasons:

- A. the Claimant itself invested nothing in Belarus; and
- B. The form of such ‘investment’, i.e. extending loans, is explicitly excluded from the scope of the Belarusian Investment Law.

923. The Belarusian Investment Law applies only to investment made by an investor.¹⁴⁵³ Furthermore, the Belarusian Investment Law expressly excludes relationships relating to “*extending loans, credits and repayment thereof, placement of bank deposits*” from its scope.¹⁴⁵⁴ Lastly, the Respondent’s consent to arbitrate extends only to “*disputes between a [foreign] investor and the Republic of Belarus arising in the course of the making of investments*”.¹⁴⁵⁵

924. As explained above,¹⁴⁵⁶ in the Reply, the Claimant reveals for the first time that:

¹⁴⁵² Defence, paragraphs 462 – 468, **RS-18**.

¹⁴⁵³ Under Article 1 of the Belarusian Investment Law, investors are all persons, which make investment in the territory of the Republic of Belarus. *See* Belarusian Investment Law, Article 1, **Exhibit CL-10**.

¹⁴⁵⁴ Pursuant to Article 2 of the Belarusian Investment Law, “[t]his Law applies to relationships associated with the making of investments in the territory of the Republic of Belarus with the exception of [...] *extending loans, credits and repayment thereof, placement of bank deposits*”. *See* Defence, paragraph 463, **RS-18**; Belarusian Investment Law, Article 2, **Exhibit RL-47**; Belarusian Investment Law, Article 2, **Exhibit CL-10**.

¹⁴⁵⁵ Defence, paragraph 456, **RS-18**; Belarusian Investment Law, Article 13, **Exhibit RL-47**.

¹⁴⁵⁶ *See* paragraphs 55 – 56, 447 – 449 and 858 – 864 above.

- A. all funds transferred in the territory of Belarus, including the Library Payment, were provided not by the Claimant, but by its alleged “*affiliated companies*” with separate legal personalities;¹⁴⁵⁷ and
- B. save for the Library Payment, all those funds were raised by Manolium-Engineering through loans.¹⁴⁵⁸
925. Accordingly, the Claimant itself invested nothing in the territory of Belarus. Thus, it cannot be deemed a foreign investor, which can bring a claim to arbitration under the Belarusian Investment Law.
926. Further, the above amounts are not protected by the Belarusian Investment Law, because they were made in the form of loans.
927. Therefore, the dispute brought before the Tribunal is not a dispute “*between a [foreign] investor and the Republic of Belarus arising in the course of the making of investments*”. Instead, this is a dispute between the Respondent and a third party, which did not invest a dime in Belarus, i.e. the Claimant. For the above reasons, the Tribunal does not have jurisdiction of the present dispute under the Belarusian Investment Law.

3. The Respondent’s consent to arbitrate does not cover the Tax Dispute and the Termination Dispute

928. If, contrary to the Respondent’s position, the Tribunal finds that the Belarusian Investment Law applies retroactively and that the Claimant made investments

¹⁴⁵⁷ Reply, paragraphs 48 and 855, **CS-5**. See also Confirmation of the Library Payment dated 30 December 2003, **Exhibit C-50**. The Library Payment was made by Manolium Trading Ltd.

¹⁴⁵⁸ Reply, paragraph 48, Table 1, **CS-5**. See also Loans provided to Manolium-Engineering in 2004 – 2013 (Excel file), **Exhibit C-215**; Loan agreements and confirmations of loan transfers from Bradley Enterprises Ltd. to Manolium-Engineering, **Exhibit C-216**; Loan agreements and confirmations of loan transfers from Lascker Ltd. to Manolium-Engineering, **Exhibit C-217**; Loan agreements and confirmations of loan transfers from Nomal Oil Ltd. to Manolium-Engineering, **Exhibit C-218**; Loan agreements and confirmations of loan transfers from Manolium-Trading Ltd. to Manolium-Engineering, **Exhibit C-219**; Loan agreements and confirmations of loan transfer from Foreign LLC Manolium Processing to Manolium-Engineering, **Exhibit C-220**.

protected by that law, the Respondent respectfully submits that its consent to arbitrate does not cover the Tax Dispute and the Termination Dispute.

929. The Claimant makes no objection to the Respondent’s submission that pursuant to the Belarusian Investment Law, only disputes which “*do not fall under the exclusive competence of courts of the Republic of Belarus*” may be referred to arbitration.¹⁴⁵⁹ The Claimant also admits¹⁴⁶⁰ that pursuant to the Belarusian Investment Law, “[i]f [...] a contract entered into between an investor and the Republic of Belarus provide[s] otherwise in relation to the settlement of disputes between an investor and the Republic of Belarus arising in the course of the making of investments, the provisions of such [...] a contract [...] shall apply”.¹⁴⁶¹
930. Accordingly, pursuant to the Belarusian Investment Law, the applicable test for determining whether a tribunal has jurisdiction is as follows:
- A. whether a dispute falls within the exclusive competence of the courts of the Republic of Belarus; and
 - B. if it does not, whether there is a contract between an investor and the Respondent, which provides otherwise in relation to the settlement of that dispute.
931. The Respondent shall address each of these criteria below.

¹⁴⁵⁹ Defence, paragraphs 456 and 470 – 474, **RS-18**.

¹⁴⁶⁰ Reply, paragraph 496, **CS-5**.

¹⁴⁶¹ Belarusian Investment Law, Article 13, **Exhibit RL-47**.

a) The Tax Dispute and the Termination Dispute fall within the exclusive competence of the Belarusian state courts

932. The Claimant objects to the Respondent's position that the dispute brought before the Tribunal falls within the categories of disputes under the exclusive competence of Belarusian state courts.¹⁴⁶² In particular, the Claimant contends as follows:
- A. The subject-matter of the dispute is not immovable property or rights to immovable property, but "*violation of the rights of the Claimant as a foreign investor by the Respondent*";
 - B. The dispute "*is not aimed at invalidation of any "non-regulatory legal acts" of the Respondent and does not "appeal" against the actions or omissions of state bodies*"; and
 - C. The dispute "*does not relate to the collection of taxes by the state but relates to violation of the rights of the Claimant through a stepped campaign, where the imposition of taxes was only one step in the whole process*".¹⁴⁶³
933. The Respondent respectfully submits that the Claimant attempts to repackage its claims, which are subject to the exclusive jurisdiction of the Belarusian state courts, in the form of claims under the Belarusian Investment Law. Just as when distinguishing between treaty claims and contractual claims, the Respondent invites the Tribunal to determine which of the Claimant's claims are "*inextricably linked*"¹⁴⁶⁴ to events, actions and omissions, which under Belarusian law are subject to state courts' exclusive jurisdiction.

¹⁴⁶² Reply, paragraphs 493 – 494, **CS-5**.

¹⁴⁶³ Reply, paragraph 493, **CS-5**.

¹⁴⁶⁴ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 329, **Exhibit RL-46**.

934. By seeking “*compensation for the violations of the international investment treaty by the Respondent*”¹⁴⁶⁵ which occurred, *inter alia*, as a result of the imposition of the tax liability, the Claimant effectively seeks to challenge the Belarusian tax authorities’ actions.
935. Pursuant to Article 227 of the Belarusian Code of Commercial Procedure, a person can seek invalidation of a non-regulatory act of a state body, municipal body or other bodies, if such an act: (i) is inconsistent with legislation; and (ii) violates rights and lawful interests of such a person. Subject to the same conditions, an application to appeal against actions (omissions) of the same bodies or officials can also be made.¹⁴⁶⁶ The Claimant does not deny that the Belarusian tax authorities’ actions fall within the categories of “*non-regulatory acts*” and “*actions (or omissions) of state bodies*”, the review of which is subject to the exclusive jurisdiction of Belarusian state courts.¹⁴⁶⁷
936. By asking the Tribunal to consider its claim arising out of the Tax Dispute under the Belarusian Investment Law, the Claimant effectively asks the Tribunal to determine whether the Belarusian tax authorities’ non-regulatory acts violated the rights and lawful interests of the Claimant. As explained above, however, such determination falls under the exclusive jurisdiction of the Belarusian state courts under Belarusian law.
937. Similarly, by making the claim arising out of the Termination Dispute under the Belarusian Investment Law, the Claimant seeks determination of whether Manolium-Engineering was entitled to be provided with the right to develop the Investment Object¹⁴⁶⁸ and to lease the land plot for the construction of the Investment Object,¹⁴⁶⁹

¹⁴⁶⁵ Reply, paragraph 493(ii), **CS-5**.

¹⁴⁶⁶ Belarusian Code of Commercial Procedure, Article 227, **Exhibit RL-50**.

¹⁴⁶⁷ Belarusian Code of Commercial Procedure, Articles 42 and 237, **Exhibit RL-50**. *See also* Defence, paragraph 475, **RS-18**.

¹⁴⁶⁸ Amended Investment Contract, Clause 1, **Exhibit C-66**.

¹⁴⁶⁹ Amended Investment Contract, Clause 7.9, **Exhibit C-66**.

both of which concern the use and enjoyment of the “*immovable property [...] in the territory of the Republic of Belarus*”,¹⁴⁷⁰ i.e. the land plot for the Investment Object.

938. For the above reasons, the Respondent respectfully submits that both the Termination Dispute and the Tax Dispute “*inextricably linked*” to events, actions and omissions which are subject to the exclusive competence of the Belarusian state courts, and, accordingly, are not covered by the Respondent’s consent to arbitrate in Article 13 of the Belarusian Investment Law.

b) The forum selection clause in the Amended Investment Contract extends to all disputes under that contract, including the Termination Dispute

939. The Claimant admits¹⁴⁷¹ that MCEC, Minsktrans, the Claimant and Manolium-Engineering expressly agreed that “[a]ny disputes [under the Amended Investment Contract] *shall be considered [...] by the Economic Court of Minsk*”.¹⁴⁷² The Claimant contends, however, that the dispute brought to this arbitral proceedings “*is not a dispute under the [Amended] Investment Contract*”, because it “*is based on breaches committed by the [Respondent] as a state under the EEU Treaty, not on contractual violations alone*”.¹⁴⁷³

940. It is notable that the Claimant provides no explanation as to why it invokes the Belarusian Investment Law jurisdictional provisions if the dispute is based on breaches committed by the Respondent “*under the EEU Treaty*”.¹⁴⁷⁴

941. Nevertheless, the Respondent respectfully submits that the Belarusian Investment Law makes no distinction between contractual claims and claims arising out of breaches of that law.

¹⁴⁷⁰ Belarusian Code of Commercial Procedure, Article 236, **Exhibit RL-50**.

¹⁴⁷¹ Reply, paragraph 497, **CS-5**.

¹⁴⁷² Amended Investment Contract, Clause 26, **Exhibit C-66**.

¹⁴⁷³ Reply, paragraph 498, **CS-5**.

¹⁴⁷⁴ Reply, paragraph 498 (emphasis added), **CS-5**.

942. Pursuant to Article 13 of the Belarusian Investment Law, a tribunal will have jurisdiction over “*disputes between a [foreign] investor and the Republic of Belarus arising in the course of the making of investments*”, unless “*a contract [...] between an investor and the Republic of Belarus provide(s) otherwise in relation to the settlement of disputes between an investor and the Republic of Belarus arising in the course of the making of investments*”.¹⁴⁷⁵
943. The Respondent submits that the Amended Investment Contract provides otherwise in relation to the settlement of the Termination Dispute, i.e. that it is subject to jurisdiction of the Economic Court of Minsk.¹⁴⁷⁶
944. In view of the above, the Respondent submits that the forum selection clause in the Amended Investment Contract takes precedence over the Belarusian Investment Law as far as the Termination Dispute is concerned, and, therefore, the Tribunal has no jurisdiction under the Belarusian Investment Law over the Termination Dispute.

IV. THE CLAIMANT DID NOT SUFFER A DENIAL OF JUSTICE

945. The Claimant bears the burden of proving that it has suffered a denial of justice.¹⁴⁷⁷
946. In the Defence, the Respondent submits that the Claimant has not suffered a denial of justice in: (i) the court proceedings which upheld the termination of the Amended Investment Contract (the “**Termination Proceedings**”); or (ii) the 2016 Administrative Proceedings.¹⁴⁷⁸
947. In the Reply, the Claimant contends that:

¹⁴⁷⁵ Belarusian Investment Law, Article 13 (emphasis added), **Exhibit RL-47**.

¹⁴⁷⁶ Amended Investment Contract, Clause 26, **Exhibit C-66**.

¹⁴⁷⁷ See, e.g., *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 January 2006, paragraph 70, **Exhibit RL-97**; *Rompotrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 179, **Exhibit RL-100**.

¹⁴⁷⁸ Defence, paragraphs 487 – 491, 516, 520 and 593, **RS-18**.

- A. denial of justice is “*not the exclusive way for the Claimant to present its claims*”;¹⁴⁷⁹ and
- B. the Claimant has suffered a denial of justice in the Belarusian courts.¹⁴⁸⁰

948. The Respondent submits above that the termination of the Amended Investment Contract came into effect under Belarusian law on 29 October 2014, and therefore the Claimant’s claims concerning the termination of the contract fall outside the temporal scope of the EEU Treaty’s protections.¹⁴⁸¹ The Tribunal may therefore consider the issue of denial of justice to be moot. Nevertheless, the Respondent submits that the Claimant’s position is hopeless on the merits. The Respondent submits that:

- A. the Claimant’s claims concerning court proceedings in Belarus must satisfy the demanding requirements for a denial of justice; and
- B. the Claimant has not suffered a denial of justice.

A. THE CLAIMANT’S CLAIMS CONCERNING COURT PROCEEDINGS IN BELARUS MUST SATISFY THE DEMANDING REQUIREMENTS FOR A DENIAL OF JUSTICE

949. In the Defence, the Respondent submits that the Claimant’s FET and expropriation claims concerning court proceedings in Belarus must satisfy the demanding requirements for a denial of justice.¹⁴⁸²

950. In the Reply, the Claimant does not dispute that, due to the gravity of the charge, a denial of justice claim requires an elevated standard of proof.¹⁴⁸³ The Claimant also does not dispute the tests set out at paragraphs 492 – 494 of the Defence for demonstrating a denial of justice.¹⁴⁸⁴ Nevertheless, the Claimant continues to frame

¹⁴⁷⁹ Reply, paragraphs 682 and 685 – 687, **CS-5**.

¹⁴⁸⁰ Reply, paragraphs 683 and 688 – 734, **CS-5**.

¹⁴⁸¹ See paragraph 737 above.

¹⁴⁸² Defence, paragraph 488 and 492 – 495, **RS-18**.

¹⁴⁸³ Defence, paragraph 492, **RS-18**.

¹⁴⁸⁴ Defence, paragraphs 492 – 494, **RS-18**.

its claims concerning the alleged actions and/or omissions of the courts as ordinary violations of FET and/or elements of expropriation. By way of example, with regard to the Termination Proceedings, the Claimant alleges that:

- A. the termination of the Amended Investment Contract was expropriatory, because the “*decision of the Supreme Court of the Republic of Belarus was disproportionate*”;¹⁴⁸⁵
- B. the termination of the Amended Investment Contract violated the FET standard, because the “*Supreme Court failed to properly allocate fault for delays in the construction of the New Communal Facilities between the Parties*”;¹⁴⁸⁶
- C. the termination of the Amended Investment Contract violated the FET standard, because “*termination of the Investment Contract was not an appropriate [...] remedy*”;¹⁴⁸⁷ and
- D. the termination of the Amended Investment Contract violated the FET standard, because the “*Supreme Court [...] failed to review the provisions of the Investment Contract and to apply it correctly*”.¹⁴⁸⁸

951. The Claimant seeks to support this approach with the contention that “*denial of justice is not the exclusive way for the Claimant to present its claims*”;¹⁴⁸⁹ and incorrectly asserts that the Respondent is asking the Tribunal to “*ignore the expropriation and FET claims and analyse only whether there has been a denial of justice.*”¹⁴⁹⁰

952. The Respondent is not asking the Tribunal to “*ignore*” the expropriation and FET claims. The Respondent also does not dispute that the acts and/or omissions of the

¹⁴⁸⁵ Reply, paragraph 549, CS-5.

¹⁴⁸⁶ Reply, paragraph 627, CS-5.

¹⁴⁸⁷ Reply, subheading 10.1.2, CS-5.

¹⁴⁸⁸ Reply, paragraph 639, CS-5.

¹⁴⁸⁹ Reply, paragraph 682, CS-5.

¹⁴⁹⁰ Reply, paragraph 685, CS-5.

courts may be relevant to determining whether there has been an expropriation or a violation of FET (within which the concept of denial of justice is comprised).¹⁴⁹¹ Rather, the Respondent’s position is that in order to prevail in its claims concerning the Termination Proceedings and the 2016 Administrative Proceedings, the Claimant must satisfy the demanding standard of proving that it suffered a denial of justice.¹⁴⁹² As the tribunal held in *Amco v. Indonesia*:

“[I]t is common ground in international law that the international responsibility of a State is not committed by the acts of its municipal courts, except where such acts amount to denial of justice.”¹⁴⁹³

953. The Claimant also asserts that the approach proposed by the Respondent is “*wrong*”, because the “*actions of the Belarusian courts are far from the only actions which contributed to the losses suffered by the Claimant*”.¹⁴⁹⁴
954. It is correct – and the Respondent does not dispute – that the Claimant’s claims are not limited to the actions of the Belarusian courts. However, the principle set out by the tribunal in *Azinian*, as upheld in *Liman Caspian*, is that a governmental authority cannot be “*faulted for acting in a manner that is validated by its courts*”, unless the courts themselves have acted in a way that is in violation of international law.¹⁴⁹⁵
955. Given that the Claimant bases many its claims on conduct which was “*validated*” by the courts (in particular (i) MCEC’s application to terminate the Amended Investment Contract and (ii) the enforcement of Manolium-Engineering’s tax liabilities against the New Communal Facilities), the Respondent submits that, in the interest of procedural efficiency, the Tribunal should begin by considering whether the Claimant’s claims concerning court proceedings satisfy the demanding requirements

¹⁴⁹¹ See, e.g., *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 272, **Exhibit CL-21**.

¹⁴⁹² Defence, paragraphs 492 – 494, **RS-18**.

¹⁴⁹³ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, paragraph 150, **Exhibit RL-77**.

¹⁴⁹⁴ Reply, paragraphs 686 – 687, **CS-5**.

¹⁴⁹⁵ *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 97 – 99, **Exhibit RL-14**.

for a denial of justice, before if necessary proceeding to the claims (if any) which are not disposed of.

B. THE CLAIMANT DID NOT SUFFER A DENIAL OF JUSTICE

956. In the Defence, the Respondent submits that the Claimant did not suffer a denial of justice in: (i) the Termination Proceedings;¹⁴⁹⁶ and (ii) the 2016 Administrative Proceedings.¹⁴⁹⁷

957. In the Reply, the Claimant contends that it has suffered a denial of justice, averring that:

A. the “*judicial system of the Respondent does not comply with international standards of justice*”;¹⁴⁹⁸ and

B. the “*courts denied the Claimant justice and failed to remedy the wrongs of the lower courts and actions of state bodies*”.¹⁴⁹⁹

958. The Respondent addresses the Claimant’s responses below. The Respondent submits that:

A. the Claimant must prove that it suffered a denial of justice on the specific facts of the case; and

B. the Claimant falls manifestly short of demonstrating that it suffered a denial of justice on the facts of the case.

¹⁴⁹⁶ Defence, paragraphs 496 – 511, **RS-18**.

¹⁴⁹⁷ Defence, paragraphs 512 – 520, **RS-18**.

¹⁴⁹⁸ Reply, paragraphs 697(i) and 698 – 708, **CS-5**.

¹⁴⁹⁹ Reply, paragraphs 697(ii) and 709 – 734, **CS-5**.

1. The Claimant must prove that it suffered a denial of justice on the specific facts of the case

959. In the Reply, the Claimant cites various authorities to the effect that denial of justice in international law involves the failure of a national judicial system “*taken as a whole*”.¹⁵⁰⁰ Apparently on this basis, Claimant proceeds to devote a large part of its denial of justice analysis to vague and generalised allegations regarding the “*judicial system*” of the Respondent, which have nothing to do with the specific facts of the case before the Tribunal.¹⁵⁰¹
960. In particular, the Claimant submits a so-called expert report¹⁵⁰² and cites various other sources in support of its contention that the “*judicial system of the Respondent falls manifestly short from being [...] impartial and independent*”¹⁵⁰³, including:
- A. the Index of Economic Freedom prepared by the Heritage Foundation, a think-tank based in America;¹⁵⁰⁴
 - B. the annual report on Economic Freedom of the World prepared by the Fraser Institute, a public policy think-tank based in Canada;¹⁵⁰⁵
 - C. an index on democracy and judicial independence prepared by Freedom House, an American NGO;¹⁵⁰⁶
 - D. an index for measuring the rule of law worldwide prepared by the World Bank;¹⁵⁰⁷ and

¹⁵⁰⁰ Reply, paragraphs 690 – 695, **CS-5**; Jan Paulsson, *Denial Of Justice In International Law*, Cambridge University Press, page 7, **Exhibit CL-132**.

¹⁵⁰¹ Reply, paragraphs 698 – 708, **CS-5**.

¹⁵⁰² Report of E. Tonkacheva dated 25 February 2019, **CER-2**.

¹⁵⁰³ Reply, paragraph 698, **CS-5**.

¹⁵⁰⁴ Reply, paragraph 700, **CS-5**.

¹⁵⁰⁵ Reply, paragraph 702, **CS-5**.

¹⁵⁰⁶ Reply, paragraphs 704 – 705, **CS-5**.

¹⁵⁰⁷ Reply, paragraph 703, **CS-5**.

- E. a report by the UN Human Rights Committee on civil and political rights in Belarus.¹⁵⁰⁸
961. The Claimant concludes that such “*materials [...] demonstrate a widespread recognition of the inadequacy of the judicial system of the Republic of Belarus. This demonstrates a failure to comply with international standards of due process and a corresponding denial of justice.*”¹⁵⁰⁹ The Claimant’s approach is misguided.
962. The Respondent agrees that denial of justice in international law involves the failure of a national judicial system as a whole, rather than “*individual instances of miscarriage of justice*” (such as a single court judgment).¹⁵¹⁰ For this reason, exhaustion of local remedies by an investor is “*an inherent material element*” of denial of justice, since the “*whole system of legal protection [...] must have been put to the test*” by the investor.¹⁵¹¹
963. Contrary to the Claimant’s apparent understanding, however, a denial of justice claim must rest on the specific treatment of the investor by the courts of the host state, rather than an assessment of the courts in general.¹⁵¹² It is not sufficient for the Claimant to make vague allegations regarding the “*judicial system*” of the Respondent, if it is unable to meet the elevated standard of proof necessary to demonstrate that it has suffered a denial of justice on the particular facts of the case.¹⁵¹³ As noted by one commentator:

¹⁵⁰⁸ Reply, paragraph 706, **CS-5**.

¹⁵⁰⁹ Reply, paragraph 707, **CS-5**.

¹⁵¹⁰ Jan Paulsson, *Denial Of Justice In International Law*, Cambridge University Press, page 7, **Exhibit CL-132**.

¹⁵¹¹ Jan Paulsson, *Denial Of Justice In International Law*, Cambridge University Press, pages 7 – 8, **Exhibit CL-132**.

¹⁵¹² The Claimant appears to mistake the requirement for a claimant to demonstrate that it suffered losses as a result of a failure of the State’s judicial system as a whole to mean that it can base its claims on vague allegations regarding the “*judicial system*” of Belarus which have nothing to do with the specific facts of the case before the Tribunal (Reply, paragraphs 690 – 708, **RS-18**).

¹⁵¹³ Defence, paragraph 492, **RS-18**.

*“[T]he allegation of denial of justice must be individual and on a case specific basis; systemic problems regarding the judicial system do not suffice to establish a breach.”*¹⁵¹⁴

964. Investment arbitration jurisprudence also confirms that it is not sufficient for a claimant to base its claims on generalised allegations regarding the “*judicial system*” of the State, if it is unable to prove that it has suffered a denial of justice on the facts of the case.
965. The claimant in *Jan Oostergetel v. The Slovak Republic* sought (much like the Claimant in the present case) to support its denial of justice claim by offering “*general reports about corruption in Slovak courts*”, in particular news clippings on irregularities in court procedures and reports from the European Union and the United States government mentioning that bribery was widespread in the Slovak courts.¹⁵¹⁵
966. The *Oostergetel* tribunal held that “*such general reports*” were insufficient for a denial of justice claim to succeed:

“As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law.

[...]

*While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. [...] Mere insinuations cannot meet the burden of proof which rests on the Claimants.”*¹⁵¹⁶

967. Strikingly, Ms Tonkacheva’s so-called expert report does not even attempt to address the specific treatment of the Claimant by the courts of Belarus, or show how such

¹⁵¹⁴ B. Demirkol, *Judicial Acts and Investment Treaty Arbitration*, Cambridge University Press 2018, Extract, page 174, **Exhibit RL-79**.

¹⁵¹⁵ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 302, **Exhibit CL-21**.

¹⁵¹⁶ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraphs 296 and 303, **Exhibit CL-21**.

treatment falls below “*international standards of due process*”.¹⁵¹⁷ Rather, Ms Tonkacheva’s report is limited to a high-level “*general assessment*” of third-party reports on the judicial system of Belarus,¹⁵¹⁸ as well as general assertions as to how Belarus “*treats [...] foreign investors*”.¹⁵¹⁹

968. By relying heavily on Ms Tonkacheva’s report, the Claimant’s strategy appears to be to distract the Tribunal’s attention from the manifest lack of evidence that it suffered a denial of justice on the particular facts of the case (as the Respondent addresses in paragraphs 970 – 1037 below). This strategy, however, does not assist the Claimant in satisfying the demanding standard of proof for a denial of justice claim.
969. Notably, Ms Tonkacheva also does not contend that the issues which she purports to identify in her report concerning the courts have changed since the Claimant entered into the Investment Contract (the reality, as the Respondent explains in paragraphs 219 – 222 above, is that the situation has markedly improved). Accordingly, even if Ms Tonkacheva were correct with regard to her assessment of the alleged “*problems in the judicial system*”¹⁵²⁰ in Belarus (which she is not), this was the context in which the Claimant made its choice to enter into the Investment Contract. The Claimant made this choice “*on notice of both the prospects and the potential pitfalls*” of doing business in Belarus.¹⁵²¹

¹⁵¹⁷ Reply, paragraph 707, **CS-5**.

¹⁵¹⁸ Report of E. Tonkacheva dated 25 February 2019, Section II, **CER-2**.

¹⁵¹⁹ Report of E. Tonkacheva dated 25 February 2019, Section IV, **CER-2**.

¹⁵²⁰ Reply, paragraph 705, **CS-5**.

¹⁵²¹ *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paragraph 20.37, **Exhibit RL-58**.

2. The Claimant falls manifestly short of demonstrating denial of justice on the facts of the case

970. In the Defence, the Respondent submits that the Claimant has not suffered a denial of justice in the: (i) Termination Proceedings;¹⁵²² and (ii) 2016 Administrative Proceedings.¹⁵²³
971. In the Reply, in addition to its general allegations regarding the “*judicial system*” of Belarus, the Claimant alleges that the courts “*played a huge role in the violation of the Claimant’s rights*”.¹⁵²⁴ The Claimant alleges that it:
- A. suffered a denial of justice in the Termination Proceedings;¹⁵²⁵ and
 - B. suffered a denial of justice in the 2016 Administrative Proceedings.¹⁵²⁶
972. As noted above, the Claimant does not dispute that there is an elevated standard of proof for denial of justice claims, or disagree with the tests for demonstrating denial of justice cited by the Respondent in the Defence.¹⁵²⁷ In the Reply, the Claimant does not get any closer to satisfying this demanding standard. As set out below, the Respondent submits that the Claimant:
- A. did not suffer a denial of justice in the Termination Proceedings;
 - B. did not suffer a denial of justice in the 2016 Administrative Proceedings; and
 - C. did not suffer a denial of justice in the 2016 proceedings concerning the enforcement of Manolium-Engineering’s land tax liabilities against the New Communal Facilities (the “**2016 Enforcement Proceedings**”).

¹⁵²² Defence, paragraphs 496 – 511, **RS-18**.

¹⁵²³ Defence, paragraphs 512 – 520, **RS-18**.

¹⁵²⁴ Reply, paragraph 709, **CS-5**.

¹⁵²⁵ Reply, paragraph 723 – 734, **CS-5**.

¹⁵²⁶ Reply, paragraphs 711 – 722, **CS-5**.

¹⁵²⁷ Defence, paragraphs 492 – 494, **RS-18**.

a) The Claimant did not suffer a denial of justice in the Termination Proceedings

973. In the Notice, the Claimant submits that the judgement of the Economic Court of Minsk contained “*numerous mistakes in terms of the content*”.¹⁵²⁸ The Claimant, however, does not substantiate this very general allegation either in the Notice or the Statement of Claim. The Claimant also submits in the Notice that the judgement of the Economic Court of Minsk “*did not contain the statement of reasons*” or analysis of “*acts of the Claimant and Manolium-Engineering*”, Belarusian law or the Investment Contract.¹⁵²⁹ The Respondent addresses these allegations in the Defence.¹⁵³⁰

974. In the Reply, the Claimant articulates its position for the first time with respect to the alleged wrongfulness of the Termination Proceedings and submits that the Belarusian Supreme Court failed to “*remedy*” the breaches of the lower courts by upholding their “*wrongful, expropriatory and illegal decisions*”.¹⁵³¹ The alleged grounds on which the Claimant relies in support of this submission come down to the following:

A. The Belarusian courts “*entirely failed to assess the issues crucial for resolution of the dispute*” when they considered the termination of the Amended Investment Contract,¹⁵³² and

B. The courts’ decision to terminate the Amended Investment Contract was “*pre-ordained*”¹⁵³³ and “*pre-determined*”¹⁵³⁴ with the purpose of justifying the President’s decision taken “*long ago*”.¹⁵³⁵

¹⁵²⁸ Notice, paragraph 264, **CS-1**.

¹⁵²⁹ Notice, paragraph 264, **CS-1**.

¹⁵³⁰ Defence, paragraphs 246 – 255, **RS-18**.

¹⁵³¹ Reply, paragraphs 622 – 623, **CS-5**.

¹⁵³² Reply, paragraph 727, **CS-5**.

¹⁵³³ Reply, paragraph 532(iii), **CS-5**.

¹⁵³⁴ Reply, paragraph 734, **CS-5**.

¹⁵³⁵ Reply, paragraphs 733 – 734, **CS-5**.

975. The Respondent addresses the Claimant’s factual position in paragraphs 344 – 409 above. As set out below, the Respondent submits that the Claimant did not suffer a denial of justice in the Termination Proceedings because:

- A. there were no procedural irregularities in the Termination Proceedings;
- B. the outcome of the Termination Proceedings was correct as a matter of Belarusian law;
- C. the outcome of the Termination Proceedings was appropriate and proportionate;
- D. the outcome of the Termination Proceedings was not “*pre-ordained*”;
- E. the Claimant and Manolium-Engineering did not exhaust all local remedies in the Termination Proceedings; and
- F. MCEC cannot be faulted for acting in a manner validated by the courts in the Termination Proceedings.

976. The evidential standard for proving claims of conspiracy between the executive and the judiciary is demanding.¹⁵³⁶

(1) There was no procedural irregularity or breach of due process in the Termination Proceedings

977. In the Reply, the Claimant does not expressly allege that there were any procedural irregularities or breach of due process in the Termination Proceedings. Notably, the Claimant does not dispute that it was given a sufficient opportunity to: (i) present its case; and (ii) appeal the decision of each court.¹⁵³⁷ However, the Claimant alleges

¹⁵³⁶ Defence, paragraph 492, **RS-18**.

¹⁵³⁷ Defence, paragraphs 250 – 252, 255 and 262, **RS-18**; Reply, paragraphs 727 – 731, **CS-6**.

that the “*courts entirely failed to assess the issues crucial for resolution of the dispute related to termination of the Investment Contract.*”¹⁵³⁸

978. As noted in C. McLachlan, L. Shore and M. Weiniger, denial of justice is “*above all a procedural standard*”:

*“The reason for this has been illuminatingly explained as international law’s recognition of the special deference due to an adjudicatory process as the determination of claims through reasoned arguments and decision. The result is that international law is not concerned to adjudicate the correctness of the judgment per se. It protects the institution of adjudication and only intervenes when the process itself fails to afford the basic qualities that justify its existence.”*¹⁵³⁹

979. The standard of proof for claims of alleged procedural irregularity or breach of due process in court proceedings is demanding.¹⁵⁴⁰

980. In *Arif v. Moldova*, the claimant alleged, among other things, that the Moldovan courts did not have jurisdiction over the claim, that the claimant had not had the opportunity to adequately present its case and that the court had failed to comply with various other procedural rules.¹⁵⁴¹ The tribunal agreed that the courts did commit “*procedural errors*”, but held that these “*errors do not amount to such a manifest disrespect of due process that they offend a sense of judicial propriety.*”¹⁵⁴² In particular, the tribunal noted that: (i) the alleged delays in the proceedings “*were not excessive*”; (ii) the claimant was “*at no moment prevented to lodge appeals*”; and (iii)

¹⁵³⁸ Reply, paragraph 727, **CS-5**.

¹⁵³⁹ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 7.109, **Exhibit RL-44**. Similarly, Paulsson writes that “[i]n international law, denial of justice is about due process, nothing else – and that is plenty” (Jan Paulsson, *Denial Of Justice In International Law*, Cambridge University Press, page 7, **Exhibit CL-132**).

¹⁵⁴⁰ Defence, paragraph 493, **RS-18**.

¹⁵⁴¹ *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraphs 216 – 219, **Exhibit RL-52**.

¹⁵⁴² *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraph 447 (emphasis added), **Exhibit RL-52**.

“[a]s a system, the judiciary devoted the necessary time to the applications and gave overall reasoned decisions.”¹⁵⁴³

981. The Claimant alleges that the courts “*failed to assess*” that:
- A. the “*Claimant provided millions more in funding than was required under the Investment Contract*”;¹⁵⁴⁴
 - B. the “*Claimant was prepared to inject an additional USD 3 million to finish the construction of the New Communal Facilities, although legally it was not obligated to do so*”;¹⁵⁴⁵ and
 - C. the “*Respondent was responsible for the increase in costs of the construction by causing delays and changing the scope of works*”.¹⁵⁴⁶
982. In the FET and expropriation sections of the Reply, the Claimant further alleges that the courts and/or the Supreme Court:
- A. “*failed to properly allocate fault for delays in the construction of the New Communal Facilities between the Parties*” and “*totally failed to examine and assess any of the circumstances of delays that occurred through the fault of the Minsk City Executive Committee*”;¹⁵⁴⁷ and
 - B. “*failed to assess*” that “*because these investments [in the amount exceeding US\$15 million] were actually made, the right to develop the Investment Object was guaranteed*”.¹⁵⁴⁸

¹⁵⁴³ *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraph 447, **Exhibit RL-52**.

¹⁵⁴⁴ Reply, paragraph 728, **CS-5**.

¹⁵⁴⁵ Reply, paragraph 729, **CS-5**.

¹⁵⁴⁶ Reply, paragraph 730, **CS-5**.

¹⁵⁴⁷ Reply, paragraphs 627 and 630, **CS-5**.

¹⁵⁴⁸ Reply, paragraph 546, **CS-5**.

983. The Claimant’s allegations are unfounded. As the Respondent explains in detail in paragraphs 350 – 375 above, either Manolium-Engineering did not raise the arguments which the Claimant now alleges that the courts “*failed to assess*”, or the courts addressed and expressly rejected them. By way of summary, the Respondent notes the following:

- A. Firstly, the courts considered and expressly rejected Manolium-Engineering’s argument in the Termination Proceedings that it had “*provided millions more in funding than was required under the Investment Contract*”.¹⁵⁴⁹ The courts all correctly concluded that the Claimant and Manolium-Engineering had agreed to bear all costs in constructing the New Communal Facilities under Clause 7.10 of the Amended Investment Contract.¹⁵⁵⁰ The Claimant’s allegation that the courts “*entirely failed to assess*” this argument is therefore wrong.¹⁵⁵¹
- B. Secondly, the Claimant’s allegation that the “courts *entirely failed to assess*” that the Claimant was willing to invest further to “*finish the construction of the New Communal Facilities*” is misleading and incorrect.¹⁵⁵² It was only in its cassation appeal to the Supreme Court that Manolium-Engineering raised this allegation for the first time.¹⁵⁵³ Given that the Supreme Court’s duty is limited to addressing whether the decisions of the lower courts are correct as a matter of law and checking whether the lower courts’ conclusions were borne out by the facts and evidence, the Supreme did not – and could not – address this new allegation of fact – which was in any event irrelevant to the issues in dispute.¹⁵⁵⁴

¹⁵⁴⁹ See paragraphs 353 – 354 above; Reply, paragraph 728, **CS-5**.

¹⁵⁵⁰ See paragraphs 353 – 354 above.

¹⁵⁵¹ Reply, paragraph 727, **CS-5**.

¹⁵⁵² Reply, paragraph 727, **CS-5**.

¹⁵⁵³ See paragraphs 361 – 367 above; Reply, paragraph 729, **CS-5**.

¹⁵⁵⁴ See paragraphs 361 – 367 above.

- C. Thirdly, Manolium-Engineering never argued in the Termination Proceedings that MCEC and/or Minsktrans were “*responsible for the increase in costs of the construction by causing delays and changing the scope of works*”.¹⁵⁵⁵ Since Manolium-Engineering failed to raise such an allegation in the Termination Proceedings, the courts were not required – and were unable – to “*assess*” this issue when rendering their decisions.¹⁵⁵⁶
- D. Fourthly, Manolium-Engineering never submitted that MCEC and/or Minsktrans were responsible for the alleged “*delays*” referred to in paragraph 629 of the Reply – and therefore the courts could not “*assess*” these allegations.¹⁵⁵⁷
- E. Fifthly, Mr Dolgov, representing the Claimant in the first instance proceedings, expressly asked the court not to investigate matters relating to “*the investor’s fulfilment of its obligations in financing the construction of the New Communal Facilities.*”¹⁵⁵⁸ The Claimant’s contention that the courts “*failed to assess*” the Claimant’s misguided and unsupported argument that the “*right to develop the Investment Object was guaranteed*” because “*investments were actually made*” (which the Claimant raises for the first time in the Reply) is therefore ungrounded in reality.¹⁵⁵⁹ In any event, as the Respondent

¹⁵⁵⁵ See paragraphs 368 – 374 above; Reply, paragraph 730, **CS-5**.

¹⁵⁵⁶ See paragraphs 368 – 374 above.

¹⁵⁵⁷ See paragraph 370 above; Reply, paragraphs 627 and 630, **CS-5**. The only failure on the part of MCEC to which Manolium-Engineering referred in its submission to the courts was MCEC’s alleged “*refusal*” to extend the permits to the land plots for the construction of the New Communal Facilities, which expired in July 2011. Manolium-Engineering, however, did not explain how the alleged “*refusal*” prevented it from complying with the Final Commissioning Date, given that the alleged “*refusal*” occurred after the Final Commissioning Date had already passed (see paragraph 371 above).

¹⁵⁵⁸ See paragraphs 356 above; Reply, paragraph 546, **CS-5**. Manolium-Engineering also never raised the argument (which they now rely on in the present arbitration) that “*failure by the Claimant to perform [its] financial obligations*” was the only breach through which “*the Claimant could lose the rights for the Investment Project*” (see paragraphs 357 – 360 above); Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 159, **CWS-5**.

¹⁵⁵⁹ Reply, paragraph 546, **CS-5**

explains in paragraphs 356 above and 990 below, if Manolium-Engineering had raised such an argument, it would have been rejected.

984. The Claimant’s contention that the “*courts entirely failed to assess the issues crucial for resolution of the dispute*” is therefore strongly rejected by the Respondent.¹⁵⁶⁰ The court decisions in the Termination Proceedings were clear, well-reasoned and, in procedural terms, entirely in accordance with Belarusian law.¹⁵⁶¹ Furthermore, the Claimant was given ample opportunity to present its case before the courts and to appeal each decision, if it chose to do so.¹⁵⁶² The Claimant therefore falls short of establishing even a minor breach of due process, let alone a “*manifest disrespect of due process*” which might “*offend a sense of judicial propriety*”.¹⁵⁶³

(2) The outcome of the Termination Proceedings was correct as a matter of Belarusian law

985. The Claimant alleges in the Reply that the termination of the Amended Investment Contract violates the FET standard because the “*Supreme Court of the Respondent failed to review the provisions of the Investment Contract and to apply it correctly*”.¹⁵⁶⁴

986. In modern international law, the content of a court judgment itself does not provide a ground for review, even if its application of national law is clearly erroneous; the Tribunal is not a court of appeal.¹⁵⁶⁵ Therefore, in cases such as the present one where a claimant pleads denial of justice on the substance of a court judgment, the

¹⁵⁶⁰ Reply, paragraph 727, **CS-5**.

¹⁵⁶¹ See paragraphs 977 – 991 above; Defence, paragraphs 246 – 255, **RS-18**.

¹⁵⁶² Defence, paragraphs 250 – 252, 255 and 262, **RS-18**.

¹⁵⁶³ *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraph 447 (emphasis added), **Exhibit RL-52**.

¹⁵⁶⁴ Reply, paragraph 639, **CS-5**.

¹⁵⁶⁵ Defence, paragraph 494, **RS-18**; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 7.134, **Exhibit RL-44**.

question is whether the judgment is so “*outrageously wrong*”¹⁵⁶⁶ or “*bereft of a basis in law*”¹⁵⁶⁷ that it is “*impossible for a third party to recognize how an impartial judge could have reached the result in question*”.¹⁵⁶⁸ The Claimant does not dispute this test in the Reply.¹⁵⁶⁹

987. As the Respondent explains in paragraphs 375 – 388 above, the outcome of the Termination Proceedings was entirely in accordance with Belarusian law. Nevertheless, the Respondent shall briefly address the Claimant’s position below.

988. The Claimant’s allegation that the Supreme Court “*failed to review*” and apply the Amended Investment Contract “*correctly*” appears to be based on the Claimant’s allegation (raised for the first time in the Reply) that “*the only reason that could justify termination of the right to proceed with implementation of the Investment Object is the failure of the Claimant to perform its financial obligations.*”¹⁵⁷⁰ This allegation is misguided.

989. Firstly, as the Respondent explains in paragraph 983 above, Mr Dolgov expressly asked the court not to investigate matters relating to the performance by the investor of its obligations to finance the construction of the New Communal Facilities.¹⁵⁷¹ It is therefore not surprising that the courts did not consider the Claimant’s argument (raised for the first time in the present arbitration proceedings) that “*the only reason that could justify termination of the right to proceed with the implementation of the*

¹⁵⁶⁶ *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraph 445, **Exhibit RL-52**.

¹⁵⁶⁷ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, 23 April 2012, paragraph 292, **Exhibit CL-21**.

¹⁵⁶⁸ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Ed), page 182, **Exhibit RL-45**.

¹⁵⁶⁹ Reply, paragraph 724, **CS-5**. The Claimant says that it “*concurs*” with the statement that for a denial of justice claim to succeed, “[t]here has to be a discreditable legal outcome or one that offends judicial propriety and **not merely an incorrect outcome**” (emphasis added).

¹⁵⁷⁰ Reply, paragraph 635, **CS-5**.

¹⁵⁷¹ See paragraph 356 above; Reply, paragraph 546, **CS-5**.

*Investment Object is the failure of the Claimant to perform its financial obligations.*¹⁵⁷²

990. Secondly, even if the Claimant or Manolium-Engineering had raised this argument in the Termination Proceedings, it would have been rejected. According to the plain wording of the Amended Investment Contract, MCEC became entitled to apply to the courts for termination under Clause 16.2.1 if Manolium-Engineering failed to construct the New Communal Facilities by the Final Commissioning Date through its own fault.¹⁵⁷³ The amount that the Claimant or Manolium-Engineering had or had not invested was therefore irrelevant to the issues before the court.¹⁵⁷⁴

991. The Respondent therefore submits that the Claimant falls manifestly short of proving that it has suffered a denial of justice based on the substance of the court decisions in the Termination Proceedings.

(3) The outcome of the Termination Proceedings was proportionate

992. The Claimant further contends in the Reply that the termination of the Amended Investment Contract violated the FET standard because the “*decision of the Supreme Court of the Republic of Belarus was disproportionate*”.¹⁵⁷⁵ The Claimant seeks to support its conclusion that the Supreme Court decision was “*disproportionate*” on the following basis:

“Termination of the Investment Contract was not an appropriate and proportional remedy, as at that time the Claimant had performed 90% of the work and was prepared to continue performance to complete the project. Under Belarusian law and the terms of the Investment Contract, the more appropriate remedy in such a case would be to apply a penalty for delay or to

¹⁵⁷² Reply, paragraph 635, **CS-5**.

¹⁵⁷³ Amended Investment Contract, Clause 16.2.1, **Exhibit C-66**.

¹⁵⁷⁴ See paragraphs 360 above.

¹⁵⁷⁵ Reply, paragraph 549, **CS-5**.

award damages caused by delay, but not to terminate the contract altogether.”¹⁵⁷⁶

993. The Respondent does not dispute that the principle of proportionality is comprised within the FET standard. With a claim for denial of justice, however, the test is not whether a court decision is proportionate, but whether the judiciary is responsible for “*fundamentally unfair proceedings and outrageously wrong, final and binding decisions*”.¹⁵⁷⁷ As the Respondent already explains in paragraphs 977 – 991 above, the Claimant falls short of this standard.
994. In any event, as already explained in paragraphs 376 – 379 above, the outcome of the Termination Proceedings was entirely proportionate. Under Belarusian law, the court does not have the right to change the claimant’s claim at its own discretion.¹⁵⁷⁸ Accordingly, if the claim is to terminate the contract due to a breach by the other party, the court’s options are to grant the claim or dismiss it altogether. There was no option for the Supreme Court to “*to apply a penalty for delay or award damages caused by delay*”, because this is not what MCEC and Minsktrans applied for in the statement of claim.¹⁵⁷⁹ The Claimant’s assertion that the Supreme Court decision was “*disproportionate*” is therefore unfounded.¹⁵⁸⁰
995. The Claimant also contends that the termination of the Amended Investment Contract violated the FET standard because the courts did not “*remedy*” the alleged misconduct of other State bodies. The Claimant alleges that:

“[e]ven if the Respondent could prove that the Supreme Court followed Belarusian local law (and it did not), this would not advance the Respondent’s case. As explained above, the obligation to act in good faith also includes an

¹⁵⁷⁶ Reply, paragraph 623(ii), **CS-5**.

¹⁵⁷⁷ *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraph 445, **Exhibit RL-52**.

¹⁵⁷⁸ See paragraphs 378 above.

¹⁵⁷⁹ See paragraphs 378 above.

¹⁵⁸⁰ Reply, paragraph 549, **CS-5**.

*obligation of the state to remedy itself any damage that an investor suffered from the actions of the state before.”*¹⁵⁸¹

996. Again, the Claimant’s position appears to be that the courts were required under international law to change the claimant’s claim at their own discretion and consider applying remedies other than those sought by the claimant in the statement of claim. This is nonsense. It would constitute a fundamental violation of Belarusian procedural legislation for the courts to address facts and arguments that Manolium-Engineering and the Claimant did not raise in their submissions.¹⁵⁸² This is precisely the type of due process violation that international law protects investors against. In any event, even if there had been such an obligation on the part of the courts (which there was not), the courts would have reached the same conclusion that the Claimant and Manolium-Engineering were in breach of their obligation to construct the New Communal Facilities within the agreed terms and were not contractually entitled to an extension.¹⁵⁸³

(4) The outcome of the Termination Proceedings was not “pre-ordained”

997. In the Reply, the Claimant raises several vague allegations that the Termination Proceedings were “pre-ordained”¹⁵⁸⁴ and “pre-determined”¹⁵⁸⁵ with the purpose of justifying the President’s decision taken “long ago”.¹⁵⁸⁶

998. The evidential standard for proving claims of conspiracy between the executive and the judiciary is demanding.¹⁵⁸⁷ In *Rumeli v. Kazakhstan*, the claimant claimed that a conspiracy existed between the shareholders of a company and the Kazakh judicial system to expropriate the claimant’s shares for the benefit of the Kazakh President.

¹⁵⁸¹ Reply, paragraph 622, **CS-5**.

¹⁵⁸² See paragraphs 359 above.

¹⁵⁸³ See paragraphs 109 – 115 above; Defence, paragraphs 249 – 253, **RS-18**.

¹⁵⁸⁴ Reply, paragraph 532(iii), **CS-5**.

¹⁵⁸⁵ Reply, paragraph 734, **CS-5**.

¹⁵⁸⁶ Reply, paragraphs 733 – 734, **CS-5**.

¹⁵⁸⁷ Defence, paragraph 492, **RS-18**.

The allegation was founded on evidence that was “*mainly, if not wholly circumstantial*”.¹⁵⁸⁸ The tribunal stressed that “*an allegation [of conspiracy] must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred*.”¹⁵⁸⁹

The tribunal deemed that the evidence did not reach the standard that it needed to conclude “*with the necessary degree of conviction*” that there was a wider conspiracy involving the President, or for his direct or indirect benefit.¹⁵⁹⁰

999. If the Claimant is to rely on circumstantial evidence in support of its claim that the outcome of the Termination Proceedings was “*pre-ordained*”,¹⁵⁹¹ the Claimant must therefore provide evidence which “*leads clearly and convincingly*” to this inference.¹⁵⁹² The Claimant does not come close to satisfying this test.
1000. As the Respondent explains in paragraphs 389 – 398 above, and as Mr Akhramenko explains in his Second Witness Statement,¹⁵⁹³ the Claimant’s allegation that the outcome of the Termination Proceedings “*had been decided long ago when the President [...] decided to deprive the Claimant of its rights [...] to implement another project on the land plot intended for the Investment Object*”¹⁵⁹⁴ is baseless. The media articles to which the Claimant is referring merely show that it was being considered whether to join the land plot for the Investment Object with another plot of

¹⁵⁸⁸ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paragraph 709, **Exhibit CL-22**.

¹⁵⁸⁹ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paragraph 709 (emphasis added), **Exhibit CL-22**.

¹⁵⁹⁰ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paragraph 715, **Exhibit CL-22**.

¹⁵⁹¹ Reply, paragraph 532(iii), **CS-5**.

¹⁵⁹² *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paragraph 709, **Exhibit CL-22**.

¹⁵⁹³ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 66 – 71, **RWS-4**.

¹⁵⁹⁴ Reply, paragraph 733, **CS-5**.

land – which was, in any event, not surprising given that the Claimant had lost interest in developing the Investment Object by this time.¹⁵⁹⁵

1001. As the Respondent explains in paragraphs 399 – 409 above, the Claimant’s conclusion that the Termination Proceedings were “*pre-ordained*” because of Mr Dolgov’s allegations that “*the Chair of the Economic Court of Minsk*” would “*receive instructions*” at meetings with MCEC “*on how to consider cases correctly*” is equally farfetched.¹⁵⁹⁶ According to the available meeting minutes, no one from the Economic Court of Minsk attended the meetings referred to, nor did Mr Dolgov himself.¹⁵⁹⁷ Speculation and hearsay evidence is insufficient to satisfy the demanding standard of proof required for a denial of justice claim.
1002. In short, the Claimant has failed to provide any concrete evidence that supports its contention that the outcome of the Termination Proceedings was “*pre-ordained*”,¹⁵⁹⁸ let alone evidence which “*leads clearly and convincingly*” to this serious charge.¹⁵⁹⁹ The Respondent therefore submits that this element of the Claimant’s denial of justice claim fails.

(5) Manolium-Engineering did not exhaust all local remedies

1003. In the Reply, the Claimant alleges that it was “*irreversibly deprived of [its] right to implement the Investment Object in accordance with the Investment Contract*” when the Supreme Court rendered its judgment on 27 January 2015.¹⁶⁰⁰

¹⁵⁹⁵ See paragraph 1088 below; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 92, **RWS-2**; Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**

¹⁵⁹⁶ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 163, **CWS-5**.

¹⁵⁹⁷ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 65, **RWS-4**.

¹⁵⁹⁸ Reply, paragraph 532(iii), **CS-5**.

¹⁵⁹⁹ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paragraph 709, **Exhibit CL-22**.

¹⁶⁰⁰ Reply, paragraph 383, **CS-5**.

1004. As the Respondent explains in paragraph 387 above, this is incorrect. The Claimant and Manolium-Engineering had two further opportunities to:
- A. apply for a supervisory review of the Supreme Court’s resolution; and
 - B. appeal the judgments of the Economic Court of Minsk and the Appeal Instance Court to the President of the Supreme Court or his deputy and the Prosecutor General or his deputy.¹⁶⁰¹
1005. The Claimant and Manolium-Engineering chose not to proceed to challenge the termination of the Amended Investment Contract to these authorities.¹⁶⁰²
1006. The Respondent agrees with the Claimant that denial of justice in international law involves the “*failure of a national judicial system, taken as a whole*”.¹⁶⁰³ It is for precisely this reason that exhaustion of local remedies by an investor is “*an inherent material element*” of denial of justice, since the “*whole system of legal protection [...] must have been put to the test*” by the investor.¹⁶⁰⁴
1007. This has also been confirmed in investment arbitration jurisprudence. In *Pantechniki v. Albania*, for example, the tribunal found that the claimant’s failure to pursue the final remedy to the highest court of Albania (the Supreme Court) was fatal to the success of the denial of justice claim. The tribunal held that “[d]enial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole.”¹⁶⁰⁵

¹⁶⁰¹ See paragraph 387 above.

¹⁶⁰² See paragraphs 388 above.

¹⁶⁰³ Reply, paragraph 691, **CS-5**; Jan Paulsson, *Denial Of Justice In International Law*, Cambridge University Press, page 7, **Exhibit CL-132**.

¹⁶⁰⁴ Jan Paulsson, *Denial Of Justice In International Law*, Cambridge University Press, pages 7 – 8, **Exhibit CL-132**; *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, paragraph 96, **Exhibit RL-94**.

1008. In the present case, the Claimant failed to exhaust local remedies in the Termination Proceedings, as it had two further opportunities to appeal the Supreme Court judgment. Accordingly, in addition to all the other reasons given above, the Respondent submits that the Claimant did not suffer a denial of justice in the Termination Proceedings.

(6) MCEC cannot be faulted for acting in a manner validated by the courts in the Termination Proceedings

1009. In the Reply, the Claimant does not dispute the principle that a “*governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level.*”¹⁶⁰⁶

1010. The Claimant bases part of its claims on the contention that MCEC “*wrongfully*”¹⁶⁰⁷ submitted a claim to the courts to terminate the Amended Investment Contract. Among other things, the Claimant alleges that:

- A. MCEC’s submission of a claim to the courts to terminate the Amended Investment Contract was “*disproportionate*”;¹⁶⁰⁸
- B. MCEC applied to the courts to terminate the Amended Investment Contract in “*bad faith*”;¹⁶⁰⁹ and
- C. MCEC’s claim to the courts to terminate the Amended Investment Contract “*failed to satisfy the single ground that would allow termination*”.¹⁶¹⁰

1011. Given that MCEC’s claim to terminate the Amended Investment Contract was subsequently upheld in the Termination Proceedings, the Respondent submits that

¹⁶⁰⁶ Defence, paragraph 496, **RS-18**; *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 97 – 99, **Exhibit RL-14**.

¹⁶⁰⁷ Notice, paragraph 417(d), **CS-1**.

¹⁶⁰⁸ Reply, paragraphs 554 and 559 – 557, **CS-5**.

¹⁶⁰⁹ Reply, paragraph 621, **CS-5**.

¹⁶¹⁰ Reply, paragraph 633, **CS-5**.

MCEC's submission of a claim to the courts to terminate the contract "*cannot be faulted*" unless "*the courts themselves are disavowed at the international level.*"¹⁶¹¹

1012. As the Respondent submits in paragraphs 976 – 996 above, the Termination Proceedings were irreproachable from the perspective of international law: the courts respected the Claimant's due process rights, issued clear and well-reasoned judgments and, in substantive terms, the decision to grant MCEC's claim to terminate the contract was entirely correct. Accordingly, since the Termination Proceedings comply with international law, the Respondent submits that, according to the principles set out in *Azinian*, the claims concerning MCEC's submission of a claim to the courts to terminate the contract must also fail.

b) The Claimant did not suffer a denial of justice in the 2016 Administrative Proceedings

1013. In the Defence, the Respondent submits that the Claimant has not suffered a denial of justice in the 2016 Administrative Proceedings, which were conducted in accordance with Belarusian law and procedure and respected the Claimant's and Manolium-Engineering's due process rights.¹⁶¹²

1014. In the Reply, the Claimant responds that it has suffered a denial of justice in the 2016 Administrative Proceedings because:

A. after the District Court concluded on 5 April 2016 that Manolium-Engineering had not committed an administrative offence, the Respondent "*intervened*", and "*demanded*" that the decision be "*reversed*";¹⁶¹³

¹⁶¹¹ Defence, paragraph 496, **RS-18**; *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 97 - 99, **Exhibit RL-14**.

¹⁶¹² Defence, paragraphs 517 – 520, **RS-18**.

¹⁶¹³ Reply, paragraphs 718 – 719, **CS-5**.

- B. there was “*no justification*” for the Minsk City Court sending the case back to a new judge “*other than the clear desire of the Respondent to obtain a different result*”,¹⁶¹⁴
- C. the Administrative Court Resolution of 17 May 2016 “*contradicted the two prior rulings on the same issue*”, in which, according to the Claimant, the courts arrived at the “*correct decision*” that Manolium-Engineering had not committed an administrative offence;¹⁶¹⁵
- D. the “*timing*” of the issuing of the First Tax Audit Report “*strongly demonstrates that the tax authorities knew exactly which decision would be reached by the new judge*”.¹⁶¹⁶

1015. The Claimant’s position is mistaken. The Respondent submits that:

- A. there was no intervention by the executive authorities in the 2016 Administrative Proceedings;
- B. there was no procedural irregularity or breach of due process in the 2016 Administrative Proceedings;
- C. the outcome of the 2016 Administrative Proceedings was correct as a matter of Belarusian law; and
- D. the finding that Manolium-Engineering was administratively liable in the 2016 Administrative Proceedings was not the ground on which increased tax rates were applied.

¹⁶¹⁴ Reply, paragraph 718, CS-5.

¹⁶¹⁵ Reply, paragraphs 717 and 719, CS-5.

¹⁶¹⁶ Reply, paragraph 720, CS-5.

(1) The executive did not intervene in the 2016 Administrative Proceedings

1016. In the Reply, the Claimant alleges that Belarusian state authorities “*intervened*” in the 2016 Administrative Proceedings with the “*clear desire [...] to obtain a different result*”.¹⁶¹⁷ The Claimant does not provide any evidence in support of its allegation, but appears to base its position entirely on its reading of the chronology – and, in particular, the fact that, on 13 May 2016, the Minsk City Court disagreed with the earlier decisions of the District Court and found Manolium-Engineering to be administratively liable for its occupation of the land plots for the New Communal Facilities without a permit (as the Respondent describes in paragraphs 504 – 514 above). The Claimant’s allegation that the Belarusian state authorities “*intervened*” in the 2016 Administrative Proceedings is unsupported and false.
1017. As the Respondent explains in paragraph 998 above, the evidential standard for proving claims of conspiracy between the executive and the judiciary is demanding.¹⁶¹⁸ An allegation of conspiracy “*must [...] be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred*”,¹⁶¹⁹ or, as another tribunal put it “*leave no room for reasonable doubt.*”¹⁶²⁰ It is not sufficient for a claimant to “*infer bad faith from its reading of the chronology*”, when there is “*no evidence showing bad faith.*”¹⁶²¹
1018. The fact that the Minsk City Court disagreed with the earlier decisions of the District Court does not lead to the Claimant’s far-reaching conclusion that Belarusian state

¹⁶¹⁷ Reply, paragraph 718, **CS-5**.

¹⁶¹⁸ Defence, paragraph 492, **RS-18**; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paragraph 709, **Exhibit CL-22**.

¹⁶¹⁹ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paragraph 709 (emphasis added), **Exhibit CL-22**.

¹⁶²⁰ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, paragraph 142, **Exhibit RL-55**.

¹⁶²¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, paragraph 375, **Exhibit RL-55**.

authorities must have “*intervened*” and “*acted in coordination*” with the courts.¹⁶²² Notably, the Claimant chooses to ignore the specific reasons why the Minsk City Court sent the case back to the District Court for reconsideration after the Land Planning Service appealed the District Court judgment of 5 April 2016.¹⁶²³

1019. Firstly, as the Respondent explains in paragraphs 494 – 512 above, the factual circumstances considered by the courts in the 2012 Administrative Proceedings and 2016 Administrative Proceedings were completely different. Accordingly, the fact that the two sets of proceedings reached different outcomes does not demonstrate that the outcome of the 2016 Administrative Proceedings was caused by an “*intervention*” of executive authorities.

1020. Secondly, as the Respondent explains in paragraphs 495 – 506 above, in both the 2012 Administrative Proceedings and the 2016 Administrative Proceedings, Manolium-Engineering misled the District Court into believing that it was seeking appropriate measures to remedy its breach of law in respect of its occupation of the land plots for the New Communal Facilities without the necessary permits, both by withholding relevant information from the court¹⁶²⁴ and by creating the false appearance that it had done all it could to comply.¹⁶²⁵ As a result, the District Court concluded, both in the decision of 23 July 2012, and the decision of 5 April 2016, that

¹⁶²² Reply, paragraphs 710 and 718, **CS-5**.

¹⁶²³ Defence, paragraph 309, **RS-18**.

¹⁶²⁴ In the 2012 Administrative Proceedings, for example, Manolium-Engineering did not inform the District Court that it had already received MCEC’s response pointing out that Manolium-Engineering had failed to comply with a formal procedure for obtaining the construction permit, which was set out in Belarusian law (*see* paragraph 502 above). Similarly, in the 2016 Administrative Proceedings, Manolium-Engineering misled the District Court that it had applied for an extension of the permits to the land plots (*see* paragraph 506 above).

¹⁶²⁵ In the 2012 Administrative Proceedings, for example, Manolium-Engineering appears to have applied to the relevant authorities only *after* the administrative protocols were drawn up in March 2012 and in anticipation of the court hearing that took place on 23 July 2012. Accordingly, Manolium-Engineering was not genuinely seeking to remedy the breach but undertook all these actions for the sake of appearance and only to avoid administrative liability (*see* paragraph 501 above).

Manolium-Engineering was taking or had taken all actions within its power to comply with the relevant legal requirements, and was not administratively liable.¹⁶²⁶

1021. In its decision of 13 May 2016, the Minsk City Court correctly observed that the District Court had failed to investigate or properly consider whether Manolium-Engineering had applied to MCEC for an extension of its land permits (which it had not), therefore finding that the District Court’s conclusion that Manolium-Engineering had “*taken all measures*” to comply with the law (as it was required to do under Belarusian law in order to be absolved of administrative liability) was based on insufficient evidence.¹⁶²⁷
1022. Accordingly, the reason why the Minsk City Court sent the case back to the District Court for reconsideration was not because the executive authorities “*intervened*”, as the Claimant alleges, but on purely legal grounds. The Claimant’s allegations that there was a conspiracy between the judiciary and the executive is not only unsupported, but is undermined by the clear reasoning of the Minsk City Court in its decision of 13 May 2016.
1023. The Claimant also alleges that the “*timing*” of the First Tax Audit Report – which was issued on the same day as the Resolution of the District Court of 17 May 2016 – “*strongly demonstrates that the tax authorities knew exactly which decision would be reached by the new judge.*”¹⁶²⁸ The Claimant’s vague inferences based on its reading of the chronology do not add-up.
1024. As the Respondent explains in the Defence,¹⁶²⁹ the First Tax Audit Report concluded that Manolium-Engineering owed land tax payments because Manolium-Engineering had occupied the land plots on which the New Communal Facilities were located in 2013 – 2015 and the first half of 2016. However, the District Tax Inspectorate used

¹⁶²⁶ See paragraphs 495 – 506 above.

¹⁶²⁷ See paragraph 508 above.

¹⁶²⁸ Reply, paragraph 720, **CS-5**.

¹⁶²⁹ Defence, paragraphs 323 – 326, **RS-18**.

the standard rates of tax in respect of Manolium-Engineering, because it was not aware of the fact Manolium-Engineering had been occupying the land plots without a valid land permit and that unfinished construction facilities were located on them. If the District Tax Inspectorate had been working in “*coordination*” with the courts and had known “*exactly which decision would be reached by the new judge*”, as the Claimant alleges, it would have applied the increased level of land tax to take account of the fact that Manolium-Engineering had failed to apply to extend its land permits in respect of the land plots, as required under Belarusian law. The Claimant’s reading of the chronology therefore does not add-up.

1025. For the above reasons, the Claimant’s allegations that the Belarusian state authorities “*intervened*” in the 2016 Administrative Proceedings are groundless. The Respondent therefore submits that this element of the Claimant’s denial of justice claim fails.

(2) There were no procedural irregularities in the 2016 Administrative Proceedings

1026. The Claimant does not dispute that it was given a sufficient opportunity to: (i) present its case; and (ii) appeal the decision of each instance court in the 2016 Administrative Proceedings.¹⁶³⁰ However, the Claimant places emphasis on the fact that case was sent back for reconsideration by a new judge in the District Court.¹⁶³¹ The Claimant alleges that “[t]here was no justification for this reassignment – other than the clear desire of the Respondent to obtain a different result.”¹⁶³²

1027. As noted above, the standard of proof for claims of alleged procedural irregularity or breach of due process in court proceedings is demanding.¹⁶³³ Even if procedural errors are identified, this shall not amount to a denial of justice unless the errors

¹⁶³⁰ Defence, paragraphs 307 – 312, **RS-18**; Reply, paragraphs 711 – 722, **CS-6**.

¹⁶³¹ Reply, paragraph 718, **CS-5**.

¹⁶³² Reply, paragraph 719, **CS-5**.

¹⁶³³ See paragraphs 979 – 980 above.

demonstrate “*such a manifest disrespect of due process that they offend a sense of judicial propriety.*”¹⁶³⁴

1028. As the Respondent explains in the Defence¹⁶³⁵ and in paragraph 510 above, it was entirely in accordance with Belarusian procedural legislation and practice for the case to be “*sent [...] back to a new judge on the lower court*”. Indeed, the Belarusian Code of Civil Procedure expressly provides that a judge who has resolved a case in the first instance court cannot consider the same case again if the judgement is annulled and the case is sent for reconsideration by the first instance court.¹⁶³⁶ In practice, Belarusian courts take the same approach not only in civil, but also in commercial and administrative cases.¹⁶³⁷ Accordingly, the Claimant’s conclusion that the only “*justification*” for the “*reassignment*” was “*the clear desire of the Respondent to obtain a different result*”¹⁶³⁸ is nonsense.

1029. The Respondent therefore submits that the Claimant did not suffer any procedural irregularities or breach of its due process rights in the 2016 Administrative Proceedings.

(3) The outcome of the 2016 Administrative Proceedings was correct as a matter of Belarusian law

1030. In the Reply, the Claimant alleges that the Administrative Court Resolution of 17 May 2016 “*contradicted the two prior rulings on the same issue*”, in which, according to the Claimant, the courts arrived at the “*correct decision*” that Manolium-Engineering had not committed an administrative offence.¹⁶³⁹

¹⁶³⁴ *Mr Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paragraph 447 (emphasis added), **Exhibit RL-52**.

¹⁶³⁵ Defence, paragraph 310, **RS-18**.

¹⁶³⁶ Belarusian Code of Civil Procedure, Article 33, **Exhibit RL-132**.

¹⁶³⁷ See paragraph 510 above.

¹⁶³⁸ Reply, paragraph 718, **CS-5**.

¹⁶³⁹ Reply, paragraphs 717 and 719, **CS-5**.

1031. As the Respondent explains in paragraph 986 above, where a claimant pleads denial of justice on the basis of the substance of a court judgment, the test is whether the judgment is so “*outrageously wrong*” or “*bereft of a basis in law*” that it is “*impossible for a third party to recognize how an impartial judge could have reached the result in question*”.¹⁶⁴⁰
1032. As the Respondent explains in paragraphs 504 – 514 above, the Resolution of the District Court on 17 May 2016 – and the finding that Manolium-Engineering was administratively liable for occupying the land plots for the New Communal Facilities without a land permit – were correct from the perspective of Belarusian law. The threshold for proving that an entity has no intention to commit an administrative offence under Belarusian law is high; the entity must prove that it took all measures to comply with the relevant administrative requirement.¹⁶⁴¹ In the Resolution of 17 May 2016, the District Court applied this test and correctly found that Manolium-Engineering was administratively liable because it had: (i) used the plots provided to it without a land permit; and (ii) failed to apply to extend its land permit.¹⁶⁴² The court also correctly noted that the latter issue regarding Manolium-Engineering’s failure to apply for the land permit was undisputed by Manolium-Engineering.¹⁶⁴³
1033. The Administrative Court Resolution was therefore well-reasoned, clear and correct as a matter of Belarusian law. The fact that the court’s findings were not the same as the findings of the District Court in the 2012 Administrative Proceedings does not evidence that it was in any way incorrect, because, as explained in paragraphs 494 – 512 above, the factual circumstances considered by the courts in the 2012 Administrative Proceedings and the 2016 Administrative Proceedings were completely different. The Respondent submits that the Claimant falls manifestly short

¹⁶⁴⁰ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Ed), page 182, **Exhibit RL-45**.

¹⁶⁴¹ See paragraph 496 above.

¹⁶⁴² See paragraph 511 above.

¹⁶⁴³ See paragraph 511 above.

of proving that it suffered a denial of justice in the 2016 Administrative Proceedings based on the substance of the decisions.

(4) The finding that Manolium-Engineering was administratively liable in the 2016 Administrative Proceedings was not the ground on which increased tax rates were applied

1034. The Claimant also alleges that “*when the negotiations between the Claimant and the Respondent [...] began to break down, the Respondent decided it would simply take the New Communal Facilities without any compensation.*”¹⁶⁴⁴ This, the Claimant alleges, was the reason why the Belarusian State authorities “*intervened*” in the 2016 Administrative Proceedings.¹⁶⁴⁵

1035. As far as the Respondent can understand from paragraphs 714 – 718 of the Reply, the Claimant is seeking to convey the impression that the outcome of the 2016 Administrative Proceedings was the ground on which Manolium-Engineering’s land tax liabilities were increased – and that the 2016 Administrative Proceedings and the tax assessments in respect of Manolium-Engineering were therefore coordinated. The Claimant’s suggestion that the accrual of Manolium-Engineering’s tax liabilities was linked with the outcome of the 2016 Administrative Proceedings is misguided.

1036. As the Respondent explains in paragraphs 538 – 546 above, there was no causal link between the finding that Manolium-Engineering was administratively liable in the 2016 Administrative Proceedings and the calculation of Manolium-Engineering’s tax liabilities. Even if the courts had found that Manolium-Engineering was not administratively liable for its occupation of the land plots, Manolium-Engineering would still have been liable to pay land taxes at the increased tax rate due to the fact

¹⁶⁴⁴ Reply, paragraph 714, CS-5.

¹⁶⁴⁵ Reply, paragraph 718, CS-5.

that, among other things, it had occupied the land plots for the New Communal Facilities without a valid land permit.¹⁶⁴⁶

1037. The Claimant's attempt to link the outcome of the 2016 Administrative Proceedings with the accrual of Manolium-Engineering's tax liabilities – and the transfer of the New Communal Facilities into municipal ownership to enforce against the tax liabilities – is therefore misdirected.

c) The Claimant did not suffer a denial of justice in the 2016 Enforcement Proceedings

1038. In paragraphs 578 – 596 of the Reply, the Claimant alleges that the Respondent expropriated its investment when it “*deprived [Manolium-Engineering] of the New Communal Facilities*”.¹⁶⁴⁷

1039. As the Respondent describes in the Defence¹⁶⁴⁸ and in paragraphs 547 –556 above, the New Communal Facilities were transferred into municipal ownership to enforce against Manolium-Engineering's land tax liabilities, as ordered in the 2016 Enforcement Proceedings. The Claimant does not allege that the 2016 Enforcement Proceedings violated its rights under the EEU Treaty. Furthermore, the Claimant does not dispute that it had the opportunity to: (i) submit a defence in the 2016 Enforcement Proceedings; and (ii) appeal the enforcement order in the 2016 Enforcement Proceedings.¹⁶⁴⁹

1040. Given that, even on the Claimant's own position, the 2016 Enforcement Proceedings did not violate the Claimant's rights under international law, the Respondent submits that the subsequent enforcement of Manolium-Engineering's tax liabilities against the New Communal Facilities – as ordered by the Economic Court of Minsk in the 2016 Enforcement Proceedings – also does not constitute a violation of international law.

¹⁶⁴⁶ See paragraphs 541 above; Defence, paragraph 593, **RS-18**.

¹⁶⁴⁷ Reply, paragraphs 585 and 594 – 595, **CS-5**.

¹⁶⁴⁸ Defence, paragraphs 332 – 335, **RS-18**.

¹⁶⁴⁹ See paragraph 555 above; Defence, paragraph 335, **RS-18**.

As the tribunal held in *Azinian*, a “governmental authority surely cannot be faulted for acting in a manner validated by its courts unless the courts themselves are disavowed at the international level.”¹⁶⁵⁰

V. BELARUS DID NOT EXPROPRIATE THE CLAIMANT’S INVESTMENT

1041. The Claimant bears the burden of proving that the Respondent expropriated its investment.¹⁶⁵¹

1042. In the Defence, the Respondent submits that neither the termination of the Amended Investment Contract, nor the transfer of the New Communal Facilities into municipal ownership, constituted an expropriation of the Claimant’s investment.¹⁶⁵²

1043. In the Reply, the Claimant asserts that the Respondent “*mischaracterizes the expropriation*” as “*two sequences of events*”, when in fact the Claimant “*refers to one sequence of events, which finally resulted in termination of the Investment Contract and in deprivation of the New Communal Facilities.*”¹⁶⁵³ At the same time, however, the Claimant appears to maintain its position that the termination of the Amended Investment Contract was expropriatory.¹⁶⁵⁴

¹⁶⁵⁰ Defence, paragraph 496, **RS-18**; *Robert Azinian, Kenneth Davitian and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraphs 97 - 99, **Exhibit RL-14**.

¹⁶⁵¹ See, e.g., *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 January 2006, paragraph 70, **Exhibit RL-97**; *Rompotrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 179, **Exhibit RL-100**.

¹⁶⁵² Defence, paragraphs 614 – 641, **RS-18**.

¹⁶⁵³ Reply, paragraph 521, **CS-5**. In the Notice, the Claimant’s position was that the “*termination of the Investment Contract is equal to the effect of expropriation*” (Notice, paragraph 524 (emphasis added), **CS-1**). At the same time, however, the Claimant referred separately to the “*expropriation of the New Communal Facilities*” (Notice, paragraph 530(b) (emphasis added), **CS-1**). In the Defence, the Respondent therefore addressed the termination of the Amended Investment Contract separately to the transfer of the New Communal Facilities in its analysis on expropriation (Defence, paragraphs 614 – 641, **RS-18**). It is therefore unclear how the Claimant arrives at the conclusion that the Respondent “*mischaracterizes*” the Claimant’s expropriation claim (Reply, paragraph 521, **CS-5**).

¹⁶⁵⁴ In the Reply, the Claimant continues to allege that “*the termination of the Investment Contract was a disproportional measure and [...] should be considered an expropriation*” (Reply, paragraph 577 (emphasis added), **RS-18**).

1044. The Respondent maintains that the Claimant's claims concern two distinct sequences of events.¹⁶⁵⁵ However, in order to address both positions, the Respondent shall address: (i) whether the termination of the Amended Investment Contract was the culmination of an expropriation; and (ii) whether the transfer of the New Communal Facilities was the culmination of an expropriation.¹⁶⁵⁶

1045. The Claimant also alleges in the Reply that the Respondent violated Article 12 of the Belarusian Investment Law, but entirely fails to substantiate its position.¹⁶⁵⁷ Even though the Claimant has failed to satisfy its burden of proof, the Respondent nevertheless submits in paragraphs 1185 – 1205 below that the Respondent did not breach Article 12 of the Belarusian Investment Law.

1046. As set out below, the Respondent submits that:

- a) the Claimant's claims concern two distinct sequences of events;
- a) the termination of the Amended Investment Contract was not the culmination of an expropriation;
- b) the transfer of the New Communal Facilities was not the culmination of an expropriation; and
- c) the Respondent did not violate Article 12 of the Belarusian Investment Law.

A. THE CLAIMANT'S CLAIMS CONCERN TWO DISTINCT SEQUENCES OF EVENTS

1047. In the Defence, the Respondent submits that the Claimant's claims concern two distinct sequences of events, the first culminating in the termination of the Amended

¹⁶⁵⁵ Defence, paragraphs 424 – 425, **RS-18**.

¹⁶⁵⁶ See, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraphs 345 and 348, **Exhibit CL-103**.

¹⁶⁵⁷ Reply, Section D heading, paragraphs 519 and 605, **CS-5**.

Investment Contract, and the second culminating in the transfer of the New Communal Facilities.¹⁶⁵⁸

1048. In the Reply, the Claimant asserts that “[t]he Claimant refers to one sequence of events, which finally resulted in termination of the Investment Contract and in deprivation of the New Communal Facilities”,¹⁶⁵⁹ and that the Respondent “cannot escape liability” by arguing that “different stages of expropriation were undertaken at various times by different state actors”.¹⁶⁶⁰
1049. The Respondent agrees with the Claimant that it is not necessary to “assess every [...] measure [...] separately” and that it is “sufficient to determine the cumulative effect of [...] measures”.¹⁶⁶¹ This is the reason why, in the Defence, the Respondent analyses the two cumulative sequences of events on which the Claimant bases its claims, rather than the individual acts which make up such sequences.¹⁶⁶²
1050. However, the Respondent submits that the Claimant’s characterization of its claim as referring to “one sequence of events” is artificial and incorrect.¹⁶⁶³
1051. The Claimant does not appear to dispute that the correct test for determining whether the acts complained of constitute one composite act is whether they form an action that converges “towards the same result” or is “leading in the same direction”.¹⁶⁶⁴

¹⁶⁵⁸ Defence, paragraphs 422 – 425, **RS-18**.

¹⁶⁵⁹ Reply, paragraph 521, **CS-5**.

¹⁶⁶⁰ Reply, paragraph 523, **CS-5**.

¹⁶⁶¹ Reply, paragraph 600, **CS-5**.

¹⁶⁶² Defence, paragraphs 489 – 490, **RS-18**.

¹⁶⁶³ Reply, paragraph 521 (emphasis in the original), **CS-5**.

¹⁶⁶⁴ Defence, paragraph 424, **RS-18**; *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 62, **Exhibit CL-32**; *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraph 91, **Exhibit RL-8**; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, paragraphs 494 and 499, **Exhibit RL-6**.

1052. In the present case, the acts complained of by the Claimant in the period 2003 – 2014 converged towards the termination of the Amended Investment Contract, which came into effect on 29 October 2014 and extinguished the Claimant’s and Manolium-Engineering’s contractual rights. The acts complained of by the Claimant after that date, on the other hand, converged towards the transfer of the New Communal Facilities into municipal ownership on 27 January 2017. The Respondent submits that these are two different sequences of events, converging towards different results, and giving rise to different damages claims.¹⁶⁶⁵
1053. The Claimant alleges that it is referring to “*one sequence of events*” because “*all actions were coordinated and aimed at [...] the deprivation of the Claimant’s right to develop the Investment Object without any compensation*”.¹⁶⁶⁶ This is mistaken.
1054. Firstly, the tribunal in *Tecmed* expressly noted that the “*common thread weaving together each act*” is not any “*subjective element or intent*”, but a “*converging action towards the same result*”.¹⁶⁶⁷ Whether a series of actions are “*aimed at*” a particular outcome is therefore not relevant to whether they form one composite act.
1055. Secondly, the Claimant’s allegation that “*all actions*” which it seeks to attribute to the Respondent in the fourteen year period from 2003 – 2017 were “*aimed at*” the “*the deprivation of the Claimant’s right to develop the Investment Object*” is unsupported and absurd – particularly given that the Claimant lost its contingent right to develop the Investment Object on 29 October 2014.¹⁶⁶⁸ The Claimant does not even attempt to provide any support for this serious allegation.

¹⁶⁶⁵ See paragraph 1280 below; Defence, paragraphs 424 – 425 and 489 – 490, **RS-18**.

¹⁶⁶⁶ Reply, paragraph 523 (emphasis added), **CS-5**.

¹⁶⁶⁷ *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 62, **Exhibit CL-32**.

¹⁶⁶⁸ See paragraphs 386 - 388 above.

1056. Thirdly, the Claimant’s position that it is referring to “*one sequence of events*” is based on a distortion of the facts.¹⁶⁶⁹ In paragraph 604 of the Reply, the Claimant frames its expropriation claim as follows:

“[T]he Claimant was totally deprived of its rights under the Investment Contract as a result of the following actions by the Respondent:

(i) *Termination of the Investment Contract;*

(ii) *Imposition of the tax liability and seizure of the New Communal Facilities;*

(iii) *Subsequent transfer of the New Communal Facilities to the communal ownership under the Presidential Decree;*

(iv) *Selling the right to develop the land plot intended for the Investment Object to another investor*”.¹⁶⁷⁰

1057. As the Respondent explains in the Defence¹⁶⁷¹ and in paragraphs 386 – 388 above, the termination of the Amended Investment Contract came into effect on 29 October 2014. Accordingly, the Claimant was “*deprived*” of its contractual rights on this date. The Claimant’s contention that: (i) the tax assessments of Manolium-Engineering; (ii) the transfer of the New Communal Facilities into municipal ownership; and (iii) the sale of the right to develop the land on which the Investment Object was originally to be located “*deprived*” the Claimant of its “*rights under the Investment Contract*” is therefore baseless – after the termination of the Amended Investment Contract came into effect on 29 October 2014, the Claimant no longer had any contractual rights to be “*deprived*” of.

1058. Lastly, the Claimant seeks to link the termination of the Amended Investment Contract with the transfer of the New Communal Facilities into municipal ownership

¹⁶⁶⁹ Reply, paragraph 523 (emphasis added), **CS-5**.

¹⁶⁷⁰ Reply, paragraph 604 (emphasis added), **CS-5**.

¹⁶⁷¹ Defence, paragraph 263, **RS-18**.

by alleging that it was entitled to “*compensation*” for the termination of the contract.¹⁶⁷²

1059. In paragraph 578 of the Reply, for example, the Claimant alleges that:

*“[i]nstead of making a good faith payment of compensation for the expropriation, the Respondent deprived the Claimant of the New Communal Facilities without any payment.”*¹⁶⁷³

1060. Similarly, in paragraph 590 of the Reply, the Claimant alleges that:

*“the alleged impossibility of taking back the land plots was caused by the bad faith actions of the Respondent designed to create a situation where the Claimant would be deprived of compensation for its investments through a manifest abuse of local tax law.”*¹⁶⁷⁴

1061. If the Claimant’s position is that MCEC and Minsktrans were required by Belarusian law to pay compensation to the Claimant further to the termination of the Amended Investment Contract, then this is incorrect. As the Respondent explains in paragraphs 380 – 385 above, there were no grounds under Belarusian law for the Claimant to seek any compensation from MCEC and/or Minsktrans upon the termination of the contract. This is hardly surprising given that the contract was terminated due to the Claimant and Manolium-Engineering’s breach – and the incomplete facilities remained in Manolium-Engineering’s ownership.

1062. The Claimant’s attempt to link the termination of the Amended Investment Contract with the transfer of the New Communal Facilities by alleging that it was “*deprived*” of the right to “*compensation*” by the transfer of the New Communal Facilities is therefore misguided.

1063. In any event, given that the Termination Proceedings were faultless from the perspective of international law (as the Respondent submits in paragraphs 973 – 1002

¹⁶⁷² Reply, paragraphs 578 and 590, **CS-5**.

¹⁶⁷³ Reply, paragraph 578 (emphasis added), **CS-5**.

¹⁶⁷⁴ Reply, paragraph 590 (emphasis added), **CS-5**.

above), the Respondent submits that it is irrelevant whether the Tribunal considers the termination of the Amended Investment Contract to be part of the same “*sequence of events*” as the transfer of the New Communal Facilities into municipal ownership.

B. THE TERMINATION OF THE AMENDED INVESTMENT CONTRACT WAS NOT THE CULMINATION OF AN EXPROPRIATION

1064. In the Defence, the Respondent submits that the series of acts which “*culminated in*” the termination of the Amended Investment Contract do not constitute an expropriation.¹⁶⁷⁵

1065. In the Reply, the Claimant responds that “*the termination of the Investment Contract [...] should be considered an expropriation*”¹⁶⁷⁶ because:

- A. the “*Respondent exercised and acted in its sovereign authority when terminating the Investment Contract*”;¹⁶⁷⁷
- B. the “*Respondent’s use of its own local courts cannot immunize its violations of international law*”;¹⁶⁷⁸
- C. the “*Respondent had no valid grounds for deprivation of the Claimant of the right to develop the Investment Object*”;¹⁶⁷⁹ and
- D. the “*termination of the Investment Contract was disproportional and in bad faith*”.¹⁶⁸⁰

¹⁶⁷⁵ Defence, paragraphs 616 and 619 – 636, **RS-18**.

¹⁶⁷⁶ Reply, paragraph 566, **CS-5**.

¹⁶⁷⁷ Reply, paragraph 530(i), **CS-5**.

¹⁶⁷⁸ Reply, paragraph 530(ii), **CS-5**.

¹⁶⁷⁹ Reply, paragraph 530(iii), **CS-5**.

¹⁶⁸⁰ Reply, paragraph 530(iv), **CS-5**.

1066. In paragraph 737 above, the Respondent submits that the termination of the Amended Investment Contract falls outside the temporal scope of the EEU Treaty's protections, because it came into effect on 29 October 2014.
1067. Moreover, in the paragraph 800 above, the Respondent submits that MCEC's submission of a claim to the courts to terminate the Amended Investment Contract is *prima facie* not capable of violating Protocol 16 of the EEU Treaty, because it was carried by MCEC in a purely contractual capacity.
1068. Lastly, in paragraphs 1009 – 1012 above, the Respondent submits that the Claimant's claims concerning the termination of the Amended Investment Contract are conditional upon the Claimant proving that it suffered a denial of justice, and that the Claimant did not suffer a denial of justice in the Termination Proceedings.
1069. In view of the above, the Tribunal may consider it unnecessary to proceed to determine whether the termination of the Amended Investment Contract was the culmination of an expropriation.
1070. If, however, the Tribunal disagrees with the Respondent's position, the Respondent submits that MCEC's submission of a claim to terminate the Amended Investment Contract was not the culmination of an expropriation because:
- A. MCEC acted as an ordinary contracting party in applying to the courts for termination;
 - B. a predicate for alleging judicial expropriation is activity by the courts that violates international law;
 - C. there were valid contractual grounds to terminate the Amended Investment Contract;
 - D. the termination of the Amended Investment Contract was entirely proportionate;
 - E. the termination of the Amended Investment Contract did not deprive the Claimant of its investment; and

F. the conditions for lawful expropriation under Article 79 of the EEU Treaty are in any event satisfied.

1. MCEC acted as an ordinary contracting party in applying to the courts for termination

1071. The Claimant alleges that MCEC’s submission of a claim to terminate the Amended Investment Contract involved the exercise of sovereign authority because the “*termination [...] was no ordinary exercise of [MCEC’s] contractual rights*”.¹⁶⁸¹ The Claimant does not explain what it means by this.

1072. The Respondent submits in paragraphs 791 – 800 above that MCEC acted in a purely contractual capacity in submitting its claim to terminate the contract to the courts. Accordingly, the Respondent submits that the conduct complained of by the Claimant is *prima facie* not capable of violating Protocol 16 of the EEU Treaty. 800 above, where it submits that MCEC’s application to the courts to terminate the Amended Investment Contract is *prima facie* not capable of violating Protocol 16 of the EEU Treaty, because it was carried out by MCEC in a purely contractual capacity.

2. A predicate for judicial expropriation is activity by the courts that violates international law

1073. In the Defence, the Respondent submits that a predicate for judicial expropriation is unlawful activity by the court as a matter of international law.¹⁶⁸²

1074. In paragraph 536 of the Reply, the Claimant appears to misunderstand the Respondent’s position, alleging that “[i]equality under local law is irrelevant”, and that an act by the judiciary may constitute an expropriation “*irrespective of the purported legality under domestic law of actions of the courts.*”¹⁶⁸³

¹⁶⁸¹ Reply, paragraph 532, CS-5.

¹⁶⁸² Defence, paragraphs 623 – 626, RS-18.

¹⁶⁸³ Reply, paragraph 536 (emphasis added), CS-5.

1075. Contrary to what the Claimant suggests, the Respondent’s position is not that illegal activity by the courts under domestic law is a predicate for a judicial expropriation. Rather, the Respondent’s position is that illegal activity by the courts as a matter of international law is a “*predicate for alleging a judicial expropriation*”.¹⁶⁸⁴
1076. The Claimant alleges that by adopting the above position, the Respondent is attempting to “*hide behind decisions of its local courts*”.¹⁶⁸⁵ According to the Claimant, a “*similar attempt*” to do so was rejected in *Karkey v. Pakistan*.¹⁶⁸⁶
1077. Contrary to what the Claimant suggests, *Karkey v. Pakistan* supports the Respondent’s position set out above that a predicate for a judicial expropriation is activity by the courts that is illegal as a matter of international law. As the tribunal held, “*an international tribunal may decide not to defer to an arbitrary judicial decision which is [...] incompatible with international law*”.¹⁶⁸⁷
1078. The Respondent submits in paragraphs 977 – above that the Termination Proceedings were irreproachable from the perspective of international law. For the same reasons, the Respondent submits that the Claimant’s claim of judicial expropriation fails.

3. MCEC had valid contractual grounds to terminate the Amended Investment Contract

1079. In the Reply, the Claimant repeats its mistaken argument that MCEC “*had no valid ground for deprivation [...] of the right to develop the Investment Object*”, since the “*only [...] basis which would justify the loss of the right to the Investment Object*” was “*failure to invest USD 15 million [...] and to donate USD 1 million.*”¹⁶⁸⁸ The

¹⁶⁸⁴ *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, paragraph 313, **Exhibit RL-59**.

¹⁶⁸⁵ Reply, paragraph 547, **CS-5**.

¹⁶⁸⁶ Reply, paragraph 547, **CS-5**.

¹⁶⁸⁷ *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. Arb/13/1, Award, 22 August 2017, paragraph 550 (emphasis added), **Exhibit CL-107**.

¹⁶⁸⁸ Reply, paragraph 544, **CS-5**.

Claimant concludes that the “*decision of the Belarus Supreme Court is [...] without merit*”.¹⁶⁸⁹

1080. As the Respondent already explains in paragraphs 977 – 991 above, the Claimant’s position is unfounded: MCEC had valid contractual grounds under Clause 16.2.1 to apply to the courts to terminate the Amended Investment Contract, and the outcome of the Termination Proceedings was entirely correct as a matter of Belarusian law. Clause 17 of the Amended Investment Contract, to which the Claimant now refers, does not provide a ground for terminating the contract.¹⁶⁹⁰ Furthermore, Mr Dolgov expressly asked the court not to investigate matters relating to the performance by the investor of its obligations to finance the construction of the New Communal Facilities.¹⁶⁹¹
1081. For the same reasons, the Respondent submits that this element of the Claimant’s expropriation claim fails.

4. MCEC’s application to terminate the Amended Investment Contract was entirely proportionate

1082. In the Reply, the Claimant alleges that “*even if*” there was a “*contractual ground for termination of the Investment Contract and for deprivation of the [...] right to the Investment Object*”, the termination was nevertheless “*disproportionate and in bad faith*” and should therefore “*be considered an expropriation*”.¹⁶⁹²

¹⁶⁸⁹ Reply, paragraph 548, **CS-5**; Amended Investment Contract.

¹⁶⁹⁰ See paragraph 360 above; Reply, paragraph 634, **CS-5**.

¹⁶⁹¹ See paragraph 356 above; Reply, paragraph 546, **CS-5**. Manolium-Engineering also never raised the argument (which they now rely on in the present arbitration) that “*failure by the Claimant to perform [its] financial obligations*” was the only breach through which “*the Claimant could lose the rights for the Investment Project*” (see paragraph 358 above).

¹⁶⁹² Reply, paragraphs 549 and 577, **CS-5**.

1083. If the Claimant’s position is that the “*decision of the Supreme Court [...] was disproportionate*”,¹⁶⁹³ the Respondent already explains why this is incorrect in paragraphs 992 – 996 above.
1084. If the Claimant’s position is that MCEC’s application to the courts to terminate the Amended Investment Contract was “*disproportionate and in bad faith*”, the Respondent submits above that the conduct complained of cannot constitute a violation of the EEU Treaty, because it: (i) occurred before the EEU Treaty entered into force; and (ii) did not involve any exercise of sovereign authority.¹⁶⁹⁴ Nevertheless, the Respondent shall briefly address the Claimant’s position.
1085. The Claimant seeks to compare the present case to *Occidental v. Ecuador*, in which the tribunal held that Ecuador’s termination of a participation contract through the issue of a termination decree, or caducidad, on the ground that the claimant had transferred some of its rights to a third party without obtaining prior approval (as required both by the contract and by Ecuadorian law), was disproportionate.¹⁶⁹⁵ The Respondent submits that *Occidental* is readily distinguishable from the present case.
1086. Firstly, it was common ground in *Occidental* that the termination was effected by caducidad – a form of ministerial decree – and therefore involved an exercise of sovereign power by Ecuador.¹⁶⁹⁶ In the present case, by contrast, MCEC applied to terminate the Amended Investment Contract in accordance with its contractual right under Clause 16.2.1, as any ordinary contracting party could have done in the circumstances. MCEC’s actions therefore did not involve any exercise of sovereign power, and cannot amount to a violation of international law.

¹⁶⁹³ Reply, paragraph 549, **CS-5**.

¹⁶⁹⁴ See paragraphs 737 and 800 above.

¹⁶⁹⁵ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraphs 410 – 452, **Exhibit CL-108**.

¹⁶⁹⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraph 419, **Exhibit CL-108**.

1087. Secondly, the *Occidental* tribunal carefully noted that, while the participation contract provided that caducidad could be ordered in certain circumstances, the decree had been issued pursuant to Ecuadorian law and ministerial discretion, rather than the participation contract.¹⁶⁹⁷ The tribunal therefore dismissed Ecuador’s argument that caducidad was *per se* appropriate and proportionate.¹⁶⁹⁸ In the present case, by contrast, the Claimant agreed that MCEC should have the right to apply to the courts to terminate the contract under Clause 16.2.1 if the New Communal Facilities were not constructed by the Final Commissioning Date due to the Claimant’s fault. Given that the Claimant had expressly agreed to these terms and conditions, the Respondent submits that MCEC’s enforcement of its right under Clause 16.2.1 was per se appropriate and proportionate.

1088. Thirdly, the *Occidental* tribunal noted that the measures were disproportionate to the interests involved, because: (i) approval, if sought, was likely to have been given; (ii) the conduct complained of did not appear to have occasioned economic harm to Ecuador; and (iii) there were various less severe alternatives to termination, such as insistence on payment of a fee for transfers, changes to the economic terms of the contract, the negotiation of a settlement, or doing nothing but issuing a warning that unauthorised transfers of economic interests would make caducidad proceedings inevitable.¹⁶⁹⁹ In the present case, by contrast, it was entirely proportionate for MCEC to apply to the courts to terminate the Amended Investment Contract in November 2013 because, among other reasons:

¹⁶⁹⁷ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraphs 419 and 424, **Exhibit CL-108**.

¹⁶⁹⁸ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraphs 410 and 422, **Exhibit CL-108**.

¹⁶⁹⁹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraphs 428 – 452, **Exhibit CL-108**.

- A. MCEC had, at the Claimant’s request, already postponed the contractual deadline for completion of the New Communal Facilities from December 2008 to July 2011, due to the Claimant’s delays;¹⁷⁰⁰
- B. even after the Final Commissioning Date passed and MCEC became entitled to terminate, MCEC sought various solutions to allow the project with the Claimant and Manolium-Engineering to proceed;¹⁷⁰¹
- C. the Claimant and Manolium-Engineering adopted an unconstructive approach to the negotiations, proposing drafts which were unreasonable,¹⁷⁰² involved fundamentally changing the terms of the agreed project¹⁷⁰³ or were simply unworkable in practice;¹⁷⁰⁴
- D. Mr Dolgov suggested on several occasions that the Claimant and Manolium-Engineering had no intention to proceed with the project, saying that he no longer considered the contract to be profitable for the Claimant and Manolium-Engineering,¹⁷⁰⁵ and that it no longer made any “*economic sense*” to sign a new investment contract for the development of the Investment Object;¹⁷⁰⁶ and

¹⁷⁰⁰ See paragraph 138 above; Defence, paragraphs 76 – 98, **RS-18**.

¹⁷⁰¹ See paragraphs 275 – 286 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 23 and 32 – 103, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 44 – 57, **RWS-4**.

¹⁷⁰² See paragraphs 258 – 274 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 43(b) and 44, **RWS-2**.

¹⁷⁰³ See paragraphs 288 – 307 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 57 – 58, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 54 – 56, **RWS-4**.

¹⁷⁰⁴ See paragraph 272 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 43(c) and 44, **RWS-2**.

¹⁷⁰⁵ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 36 and 48, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 24 – 28, **RWS-4**.

¹⁷⁰⁶ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 92, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 60, **RWS-4**.

E. MCEC provided several clear and unambiguous warnings to the Claimant and Manolium-Engineering that it would be left with no choice but to apply to the courts for termination if the Claimant and Manolium-Engineering did not remedy their breach of contract, which the Claimant and Manolium-Engineering ignored.¹⁷⁰⁷

1089. For the above reasons, the Respondent submits that it was entirely proportionate for MCEC to apply to the courts to terminate the Amended Investment Contract.

1090. In seeking to support its position that MCEC's application to terminate the contract was disproportionate, the Claimant alleges that (i) there was no "*legitimate aim*" in termination;¹⁷⁰⁸ (ii) termination was not "*suitable*" to achieving the "*goal of successfully completing performance under the Investment Contract*";¹⁷⁰⁹ (iii) there was no "*necessity*" in terminating, because there were "*many alternative options to achieve the assumed goal of resolving the conflict with the Claimant*";¹⁷¹⁰ and (iv) the termination was "*at the final stage of implementation, after the Claimant had entirely performed its financial obligations under the Contract*".¹⁷¹¹

1091. In view of the facts set out in paragraph 1088 above, the Claimant's contention that the termination of the Amended Investment Contract was disproportionate on these alleged grounds is divorced from reality.

1092. With regard to the Claimant's contention that there was no "*legitimate aim*" in termination, because the New Communal Facilities "*are in the same construction condition now as they were in 2011*", the Claimant's suggestion is that it was disproportionate for MCEC to apply to the courts to terminate the contract, because the New Communal Facilities are still incomplete.¹⁷¹² This argument is absurd – the

¹⁷⁰⁷ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 25 and 104, **RWS-2**.

¹⁷⁰⁸ Reply, paragraphs 557 – 560, **CS-5**.

¹⁷⁰⁹ Reply, paragraph 561, **CS-5**.

¹⁷¹⁰ Reply, paragraphs 562 – 573, **CS-5**.

¹⁷¹¹ Reply, paragraphs 574 – 577, **CS-5**.

¹⁷¹² Reply, paragraph 560, **CS-5**.

aim of terminating the Amended Investment Contract was not, and could not have been, for MCEC to complete the New Communal Facilities, because, as the Respondent repeatedly explains, the New Communal Facilities remained in Manolium-Engineering’s ownership after the termination.¹⁷¹³ As Mr Akhramenko explains, MCEC’s concern when applying for termination was to resolve the issue regarding the land plot for the Investment Object, which by that time had been lying idle for around 10 years.¹⁷¹⁴

1093. As to suitability, the Claimant contends that termination was not suitable for achieving the “*goal of successfully completing performance under the Investment Contract because, as a result of termination, the construction of the Depot was not completed, and the Claimant was deprived of its right to develop the Investment Object*”.¹⁷¹⁵ This is misleading given that, as the Respondent explains in paragraphs 1088, the Claimant itself had, as early as mid-2012, lost the intention to proceed with the project (including the implementation of the Investment Object), leaving MCEC no choice but to apply for termination.¹⁷¹⁶

1094. As to necessity, the Respondent addresses the Claimant’s allegation that there were “*many alternative options*” other than applying for termination in paragraphs 256 – 307 and 332 – 343 above. In particular, the Respondent explains that:

A. only by terminating the Amended Investment Contract would MCEC be able to find a new investor to develop the land plot for the Investment Object, which the Claimant had lost interest in doing itself;¹⁷¹⁷

¹⁷¹³ See, e.g., Defence, paragraphs 263 – 265, **RS-18**.

¹⁷¹⁴ Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 58, **RWS-4**.

¹⁷¹⁵ Reply, paragraph 561, **CS-5**.

¹⁷¹⁶ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 36, 48 and 92, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 24 – 28 and 60, **RWS-4**.

¹⁷¹⁷ See paragraph 338 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 36, 48 and 92, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 57 – 61, **RWS-4**.

- B. the proposals made by the Claimant and/or Manolium-Engineering for extending the contractual terms were not reasonable;¹⁷¹⁸
- C. the Claimant’s proposal on 18 June 2012 was to resume financing the New Communal Facilities in exchange for the transfer of ownership of the land on which the Investment Object was to be located, which would have involved a fundamental change to the terms of the Amended Investment Contract;¹⁷¹⁹
- D. it was not until 2014, long after MCEC had applied to the courts and when the Termination Proceedings were almost at an end, that the Claimant offered US\$3 million for MCEC and Minsktrans to complete the New Communal Facilities, which it conditioned upon amending the design of the Investment Object to an “*accommodation and shopping center*”;¹⁷²⁰
- E. seeking damages from the Claimant and Manolium-Engineering would have been futile given that (i) the Claimant was unable and/or unwilling to finance the construction of the New Communal Facilities; and (ii) the Claimant and Manolium-Engineering had already ignored Minsktrans’ requests to pay outstanding penalties for late construction.¹⁷²¹

1095. Lastly, the Respondent contends that termination of the contract was disproportionate *stricto sensu* because (i) the “*Investment Contract [was] at the final stage of implementation*”; (ii) the Claimant “*had complied with all of its obligations to date*”;

¹⁷¹⁸ See paragraphs 256 – 307 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 43 – 44, **RWS-2**.

¹⁷¹⁹ See paragraphs 289 – 291 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 57 – 58, **RWS-2**.

¹⁷²⁰ See paragraphs 295 – 307 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 100 – 102, **RWS-2**.

¹⁷²¹ See paragraphs 332 – 343 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 35, **RWS-2**.

and (iii) the “Respondent [...] seized the Claimant’s rights after accepting all of the benefits of the Claimant’s performance”.¹⁷²²

1096. The Claimant’s contention that it was disproportionate *stricto sensu* for MCEC to apply to the courts for termination is strongly rejected. For the reasons already given in paragraphs 332 – 343 above, it was entirely proportionate for MCEC to do so. As for the Claimant’s specific allegations, the Respondent notes that:

- A. the Investment Contract was hardly “*at the final stage of implementation*” given that the Claimant and Manolium-Engineering failed to even provide the necessary consideration to acquire the right to develop the Investment Object;¹⁷²³
- B. the Claimant and Manolium-Engineering had breached their obligations under the Amended Investment Contract by, among other things, failing to construct the New Communal Facilities as a result of their delays;¹⁷²⁴ and
- C. there were no “*benefits*” for the State as the New Communal Facilities remained in Manolium-Engineering’s ownership following the termination of the Amended Investment Contract (and the facilities were of little value in their defective and incomplete state in any event).¹⁷²⁵

1097. The Claimant’s contention that it was disproportionate for MCEC to apply to the courts to terminate the Amended Investment Contract is therefore strongly rejected by the Respondent.

¹⁷²² Reply, paragraphs 574 – 577, **CS-5**.

¹⁷²³ Defence, paragraph 532, **RS-18**.

¹⁷²⁴ Defence, paragraphs 76 – 98, **RS-18**.

¹⁷²⁵ See, e.g., Defence, paragraphs 263 – 265, **RS-18**.

5. The termination of the Amended Investment Contract did not deprive the Claimant of its investment

1098. Tribunals have found that in the context of a claim for expropriation, the analysis must be on whether the measures in question had the effect of dispossessing the investor, directly or indirectly, of the investment as a whole. In *Burlington v. Ecuador*, for example, the tribunal held:

*“The Treaty provides that “investments shall not be expropriated.” **The Tribunal understands from this formulation that the focus of the expropriation analysis must be on the investment as a whole, and not on discrete parts of the investment. Other international tribunals have adopted the same approach.**”*¹⁷²⁶

1099. The Respondent submits in paragraphs 858 – 904 above that the assets of Manolium-Engineering are not protected investments under the EEU Treaty. If, however, the Tribunal disagrees with the Respondent, the Respondent submits that the termination of the Amended Investment Contract did not substantially deprive the Claimant of its “investment as a whole”, because after the termination came into effect, Manolium-Engineering remained the owner of the incomplete New Communal Facilities.¹⁷²⁷ In addition to all the reasons given in the above paragraphs, the termination of the Amended Investment Contract therefore does not constitute the culmination of an expropriation.

6. The conditions for a lawful expropriation under Article 79 of the EEU Treaty are in any event satisfied

1100. The Respondent submits above that the termination of the Amended Investment Contract does not constitute the culmination of an expropriation. If, however, the Tribunal disagrees, the Respondent submits that the necessary requirements for a

¹⁷²⁶ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraph 257, **Exhibit CL-103**.

¹⁷²⁷ Defence, paragraphs 263 – 265, **RS-18**.

lawful expropriation under Article 79 are satisfied. Article 79 of Protocol 16 provides that an expropriation shall be unlawful unless the measures complained of are:

- A. in accordance with the legislation of the State;
- B. for the public benefit;
- C. not discriminatory; and
- D. involve prompt and adequate compensation.¹⁷²⁸

1101. The burden is on the Claimant to prove that it suffered an illegal expropriation and that the above criteria are not satisfied.¹⁷²⁹ In its submissions, the Claimant has failed to address whether the measures complained of satisfy the necessary requirements. Nevertheless, the Respondent submits that the criteria are satisfied for the following reasons.

1102. With regard to the first criterion that the measures be “*in accordance with the legislation of the State*”, the Respondent already submits above that: (i) MCEC was contractually entitled to apply for termination;¹⁷³⁰ and (ii) that the Termination Proceedings were conducted entirely in accordance with Belarusian law and procedure.¹⁷³¹ Therefore, the Respondent submits that the first requirement under Article 79 is satisfied.

1103. As for the second criterion regarding “*public benefit*”, the tribunal in *ADC Affiliate v. Hungary* held:

“[A] treaty requirement for “*public interest*” requires some genuine interest of the public. If mere reference to “*public interest*” can magically put such

¹⁷²⁸ Protocol 16 of the EEU Treaty, Article 79, **Exhibit CL-3**.

¹⁷²⁹ See, e.g., *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 January 2006, paragraph 70, **Exhibit RL-97**; *Rompotrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 179, **Exhibit RL-100**.

¹⁷³⁰ Defence, paragraphs 313 – 362 and 583 – 611, **RS-18**.

¹⁷³¹ See paragraphs 344 – 409 above; Defence, paragraphs 313 – 362 and 583 – 611, **RS-18**.

*interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”*¹⁷³²

1104. In the present case, the Respondent submits that the termination of the Amended Investment Contract was in the public interest because, among other things: (i) the Claimant and Manolium-Engineering appeared to have little intention to develop the Investment Object in the future;¹⁷³³ and (ii) the land plot in the centre of Minsk for the construction of the Investment Object had already stood idle for around ten years.¹⁷³⁴
1105. As for the third criterion that the conduct be non-discriminatory, it is an established principle that “*State conduct is discriminatory, if (i) similar cases are (ii) treated differently and (iii) without reasonable justification*”.¹⁷³⁵
1106. The Claimant does not allege that the Termination Proceedings were discriminatory, nor has it identified any similar cases where investors were treated differently to how the Claimant and Manolium-Engineering were treated.¹⁷³⁶ The Claimant has therefore failed to satisfy its burden of proof. In any event, the Respondent submits that the Termination Proceedings were conducted in respect of the Claimant and Manolium-Engineering no differently to how they would be conducted in respect of any other investor because: (i) the Termination Proceedings were conducted in accordance with Belarusian law and procedure; and (ii) the Claimant’s and Manolium-Engineering’s rights to due process were respected.¹⁷³⁷ The Respondent therefore submits the third requirement under Article 79 is satisfied.

¹⁷³² *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006, paragraph 432, **Exhibit CL-135**.

¹⁷³³ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 36, 48 and 92, **RWS-2**

¹⁷³⁴ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 68, **RWS-2**

¹⁷³⁵ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paragraph 313, **Exhibit CL-16**.

¹⁷³⁶ Reply, paragraphs 578 – 596, **CS-5**.

¹⁷³⁷ See paragraphs 344 - 388 above.

1107. With regard to the final criterion regarding “*prompt and adequate compensation*”, the Respondent explains in paragraphs 380 – 385 above that there were no grounds under Belarusian law for the Claimant to seek any compensation from MCEC and/or Minsktrans upon the termination of the contract. Furthermore, given that Manolium-Engineering remained the owner of the New Communal Facilities after the termination came into effect, the issue of compensation could never have arisen.
1108. For the above reasons, the Respondent submits that all four criteria under Article 79 of Protocol 16 of the EEU Treaty are satisfied.

C. THE TRANSFER OF THE NEW COMMUNAL FACILITIES WAS NOT THE CULMINATION OF AN EXPROPRIATION

1109. In the Defence, the Respondent submits that the series of acts which “*culminated in*” the transfer of the New Communal Facilities into municipal ownership to enforce against Manolium-Engineering’s tax liabilities do not constitute an expropriation.¹⁷³⁸
1110. In the Reply, the Claimant alleges that:
- A. the state authorities, acting on the basis of “*President’s official instruction*”, “*artificially created*” a “*trap*” with the “*sole purpose of finding Manolium-Engineering liable for tax violations*”;¹⁷³⁹
 - B. by imposing the tax liabilities on Manolium-Engineering, the state authorities “*deprived* [Manolium-Engineering] *of the New Communal Facilities*”;¹⁷⁴⁰ and
 - C. the Respondent did not provide “*prompt and adequate compensation*” for the transfer of the New Communal Facilities into municipal ownership.¹⁷⁴¹

¹⁷³⁸ Defence, paragraphs 617 and 637 – 641, **RS-18**.

¹⁷³⁹ Reply, paragraphs 587 – 588 and 592, **CS-5**.

¹⁷⁴⁰ Reply, paragraphs 594 – 595, **CS-5**.

¹⁷⁴¹ Reply, paragraphs 584 – 585 and 590, **CS-5**.

1111. As the Respondent submits in paragraphs 858 – 904 above, the assets of Manolium-Engineering, including the New Communal Facilities, are not a protected investment under the EEU Treaty. The Respondent therefore submits that the Claimant’s expropriation claim regarding the events culminating in the transfer of the New Communal Facilities into municipal ownership fails, because the New Communal Facilities are not a protected investment of the Claimant.
1112. Furthermore, for the reasons given in paragraphs 1038 – 1040 above, the Respondent submits that the claims regarding the transfer of the New Communal Facilities into municipal ownership fail unless the Claimant can prove that the 2016 Enforcement Proceedings – in which the order to enforce Manolium-Engineering’s tax liabilities against the New Communal Facilities was issued – violated its rights under international law. Given that the Claimant never appealed the 2016 Enforcement Proceedings, and does not raise any allegations in the present proceedings regarding the 2016 Enforcement Proceedings, the Respondent submits that the Claimant’s expropriation claim regarding the transfer of the New Communal Facilities must *prima facie* fail.
1113. If, however, the Tribunal disagrees, the Tribunal should proceed to determine whether the transfer of the New Communal Facilities into municipal ownership was the culmination of an expropriation.
1114. The Respondent agrees with the Claimant that: (i) an “*abuse of tax law*” might, in certain circumstances, constitute an expropriation; and (ii) the “*effect of the tax*” is key to determining whether tax measures are expropriatory.¹⁷⁴² In order to succeed in its expropriation claim, the burden is on the Claimant to prove that the alleged “*abuse of tax law*” caused the Claimant to be dispossessed or substantially deprived of its

¹⁷⁴² Reply, paragraphs 592 - 593, **CS-5**; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraph 395, **Exhibit CL-103**.

benefit investment as a whole.¹⁷⁴³ The Respondent submits that the Claimant does not come close to satisfying this test.

1115. As set out below, the Respondent submits that:

- A. the Respondent did not commit an abuse of tax law;
- B. the Claimant and Manolium-Engineering caused the accrual of the tax liabilities which were enforced against the New Communal Facilities; and
- C. the conditions for lawful expropriation under Article 79 of the EEU Treaty (including prompt and adequate compensation) are in any event satisfied.

1. The Respondent did not commit an abuse of tax law

1116. In the Notice, the Claimant alleges that the tax assessments conducted in respect of Manolium-Engineering were unsubstantiated, non-transparent and arbitrary.¹⁷⁴⁴

1117. In the Defence, the Respondent explains that the tax assessments in respect of Manolium-Engineering were conducted and calculated in accordance with Belarusian law and procedure and that Manolium-Engineering's due process rights were respected.¹⁷⁴⁵

1118. In the Reply, the Claimant fails to address the Respondent's position that the tax assessments in respect of Manolium Engineering were conducted and calculated in accordance with Belarusian law and procedure, and that Manolium-Engineering's due process rights were respected.¹⁷⁴⁶ Rather, the Claimant reformulates its claim, alleging

¹⁷⁴³ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraphs 257 and 395, **Exhibit CL-103**; *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award of 25 October 2012, paragraph 218, **Exhibit CL-123**; *Vincent J. Ryan, Schooner Capital LLC and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award of 24 November 2015, paragraph 471, **Exhibit CL-119**.

¹⁷⁴⁴ See, e.g., Notice, paragraphs 401 and 405, **CS-1**.

¹⁷⁴⁵ Defence, paragraphs 313 – 362 and 583 – 611, **RS-18**.

¹⁷⁴⁶ Reply, paragraph 583, **CS-5**.

that the state authorities “artificially created” a “trap” at the “President’s official instruction” in which Manolium-Engineering was “unable to avoid [...] tax liability”, which the Claimant describes as an “abuse of tax law”.¹⁷⁴⁷

1119. The Respondent agrees with the Claimant that an “abuse of tax law” may constitute an indirect expropriation.¹⁷⁴⁸ As the tribunal held in *RosInvestCo v. Russia*:

*“It is undisputed [...] that the normal application of domestic tax law in the host state cannot be seen as an expropriatory act. On the other hand, it is generally accepted that the mere fact that measures by a host state are taken in the form of application and enforcement of its tax law, does not prevent a tribunal from examining whether this conduct of the host state must be considered, under the applicable BIT or other international treaties on investment protection, as an abuse of tax law to in fact enact an expropriation.”*¹⁷⁴⁹

1120. In *Ryan v. Poland*, the tribunal held that measures taken by a State would not constitute an “abuse of tax law” if they were “a bona fide and a legitimate exercise of State power.”¹⁷⁵⁰

1121. In *RosInvestCo v. Russia*, the tribunal found that the tax measures were abusive because they “can only be understood to have had the aim to deprive [the investor] from its assets”.¹⁷⁵¹

1122. However, the Respondent submits that Claimant’s allegations there was an “abuse of tax law” by the state authorities with the “sole purpose of finding Manolium-

¹⁷⁴⁷ Reply, paragraphs 585 – 588 and 592, **CS-5**.

¹⁷⁴⁸ Reply, paragraph 594, **CS-5**.

¹⁷⁴⁹ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, paragraph 628, **Exhibit CL-117**.

¹⁷⁵⁰ *Vincent J. Ryan, Schooner Capital LLC and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award of 24 November 2015, paragraphs 472 – 473, **Exhibit CL-119**.

¹⁷⁵¹ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, paragraph 630, **Exhibit CL-117**.

Engineering liable for tax violations” are unfounded. As set out below, the Respondent submits that:

- A. Manolium-Engineering was liable under Belarusian law to pay land tax in respect of the land plots for the New Communal Facilities;
- B. MCEC acted reasonably and proportionately in respect of the Claimant and Manolium-Engineering;
- C. the tax authorities acted transparently in respect of the Claimant and Manolium-Engineering; and
- D. Manolium-Engineering’s tax liabilities were not imposed at the President’s instruction.

a) Manolium-Engineering was liable under Belarusian law to pay land tax in respect of the land plots

1123. In the Reply, the Claimant fails to address the Respondent’s position in the Defence that the tax assessments in respect of Manolium-Engineering were calculated and conducted in accordance with Belarusian law and procedure.¹⁷⁵² The Claimant alleges that the “*taxes imposed were arbitrary*”, but fails to provide any support for the allegation.¹⁷⁵³

1124. The Claimant alleges, however, that Manolium-Engineering should not have been liable to pay land taxes in respect of its occupation of the land plots on which the New Communal Facilities were located, because “*the time for use of the land for construction expired on 1 July 2011*” and “*no construction was possible after 1 July 2011.*”¹⁷⁵⁴

¹⁷⁵² See paragraphs 520 – 530 above.

¹⁷⁵³ Reply, subheading 3.4, **CS-5**.

¹⁷⁵⁴ Reply, paragraphs 340 and 587(iv), **CS-5**.

1125. As the Respondent explains in the Defence¹⁷⁵⁵ and in paragraphs 520 – 530 above, this submission is wrong as a matter of Belarusian law and of fact.
1126. Pursuant to Belarusian law, occupation of a land plot (and the liability to pay land tax in respect of it) is not conditioned upon active “*use*” of the land plot. If an entity owns property on a land plot (such as the incomplete New Communal Facilities), this will constitute occupation for the purposes of Belarusian law, and the entity will be liable to pay land tax in respect of that land plot.¹⁷⁵⁶
1127. The Claimant and Manolium-Engineering were also fully aware that Manolium-Engineering was required to pay land tax in respect of its occupation of the land plots for the New Communal Facilities (which Manolium-Engineering also used to pay before 2010¹⁷⁵⁷) starting from 2013 (when the amendments to the Tax Code came into force¹⁷⁵⁸), because Ms ██████████ informed Mr Dolgov of Manolium-Engineering’s obligation to pay land taxes and attempted to persuade him to pay them on behalf of Manolium-Engineering – which Mr Dolgov chose to simply ignore.¹⁷⁵⁹ The District Tax Inspectorate also demanded Manolium-Engineering to comply with its obligations in early 2014 – which, again, Manolium-Engineering ignored.¹⁷⁶⁰
1128. As a matter of fact, the Claimant’s submission is also wrong, because Manolium-Engineering continued building the New Communal Facilities until at least mid-2012.¹⁷⁶¹
1129. It is therefore misleading for the Claimant to now plead ignorance and contend that Manolium-Engineering was not liable to pay land taxes on the basis that “*the time for*

¹⁷⁵⁵ Defence, paragraphs 313 – 320, **RS-18**.

¹⁷⁵⁶ See paragraphs 520 – 530 above.

¹⁷⁵⁷ Defence, paragraph 317, **RS-18**.

¹⁷⁵⁸ Defence, paragraph 319, **RS-18**.

¹⁷⁵⁹ Defence, paragraph 584, **RS-18**; Witness Statement of Ms ██████████ dated 12 November 2018, paragraphs 30 – 38, **RWS-3**.

¹⁷⁶⁰ Defence, paragraphs 583 – 589, **RS-18**.

¹⁷⁶¹ See, e.g., Reply, paragraph 126, **CS-5**.

use of the land for construction expired on 1 July 2011” and “*no construction was possible after 1 July 2011*”.¹⁷⁶² The Claimant was, and still is, fully aware of the position under Belarusian law. As long as Manolium-Engineering continued to occupy the land plots on which the New Communal Facilities stood, it was liable to pay land taxes in respect of the land plots.

b) MCEC acted reasonably, proportionately and in good faith in respect of the Claimant and Manolium-Engineering

1130. In paragraphs 556 – 587 of the Reply, the Claimant alleges that the “*Respondent created [a] situation wherein the Claimant was unable to avoid the tax liability after expiration of the construction permission for the Depot on 1 July 2011*”¹⁷⁶³ by:

A. “*not agree[ing] to extend the land rights to the Claimant*”,¹⁷⁶⁴

G. “*refus[ing] to formally take the New Communal Facilities in order to complete construction*”;¹⁷⁶⁵ and

H. “*refus[ing] to accept the payments offered by the Claimant to complete such construction*”.¹⁷⁶⁶

1131. The Respondent submits in paragraphs 801 – 815 above that the conduct complained of did not involve any exercise of sovereign power on the part of MCEC and so cannot amount to a violation of international law. In any event, the Claimant’s position on the merits is unfounded for the following reasons.

1132. The Claimant seeks to create the impression that this so-called “*abuse of local tax law*” was the result of “*discussions of the state authorities on the issue*” – in other words, that there was a coordinated conspiracy between state bodies specifically

¹⁷⁶² Reply, paragraph 340 and 587(iv), CS-5.

¹⁷⁶³ Reply, paragraph 586, CS-5.

¹⁷⁶⁴ Reply, paragraph 587(i), CS-5.

¹⁷⁶⁵ Reply, paragraph 587(ii), CS-5.

¹⁷⁶⁶ Reply, paragraph 587(iii), CS-5.

targeting Manolium-Engineering.¹⁷⁶⁷ This is nonsense. As the Respondent submits below, the Claimant does not come close to satisfying the demanding standard of proof for allegations of conspiracy between state authorities.¹⁷⁶⁸

1133. While the Claimant disguises its true position by referring vaguely to the “*the Respondent*” without particularising which entities or bodies it is referring to,¹⁷⁶⁹ the essence of the Claimant’s claim appears to be that it was MCEC that “*artificially created*” a “*trap*” in which Manolium-Engineering was “*unable to avoid [...] tax liability*”.¹⁷⁷⁰ As follows from paragraph 587 of the Reply, the Claimant’s position appears to be that MCEC deliberately created this alleged “*trap*” by:

- A. not agreeing to postpone the contractual deadline for constructing the New Communal Facilities further;
- B. not extending Manolium-Engineering’s land rights;
- C. not accepting the Claimant’s so-called offers to finance the completion of the New Communal Facilities; and
- D. not accepting the New Communal Facilities into municipal ownership.

1134. The Claimant’s contention that MCEC intentionally took the above position in its relations with the Claimant and Manolium-Engineering in order to create a “*trap*” in which Manolium-Engineering was “*unable to avoid [...] tax liability*” is wholly divorced from the facts. As the Respondent submits in paragraphs 1135 – 1139 below, MCEC acted reasonably and proportionately in respect of the Claimant and Manolium-Engineering, seeking solutions to try to enable the project to go ahead,

¹⁷⁶⁷ Reply, paragraphs 585 and 591, **CS-5**.

¹⁷⁶⁸ See paragraphs 1243 - 1244 below; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paragraph 709, **Exhibit CL-22**.

¹⁷⁶⁹ Reply, paragraph 588, **CS-5**.

¹⁷⁷⁰ Reply, paragraphs 586 – 588, **CS-5**.

even after it was entitled to submit a claim to the courts to terminate the Amended Investment Contract.

1135. With regard to paragraph 587(i) of the Reply, the Claimant’s suggestion that MCEC did not agree to “*extend the land rights to the Claimant*” in order to create a situation in which Manolium-Engineering was “*unable to avoid [...] tax liability*” is absurd – Manolium-Engineering either failed to submit the necessary documents required under Belarusian law, or failed to apply altogether.¹⁷⁷¹ As the Respondent explains, it was also entirely reasonable and proportionate for MCEC not to agree to postpone the contractual deadlines for constructing the New Communal Facilities for a third time, because the Claimant and/or Manolium-Engineering made proposals that were either unreasonable or simply unworkable in practice.¹⁷⁷²
1136. As for the Claimant’s suggestion in paragraph 587(ii) of the Reply that MCEC should have accepted the Claimant’s and/or Manolium-Engineering’s offers of “*payments*” to complete the construction of the New Communal Facilities, the Respondent submits that it was reasonable and proportionate for MCEC not to accept the Claimant’s proposals – particularly given the Claimant’s breaches to date.¹⁷⁷³ Among other things, both offers were conditioned upon significant changes to the terms originally agreed under the Amended Investment Contract – at the expense of the State.¹⁷⁷⁴ The Claimant’s suggestion that MCEC refused these unreasonable proposals with the intention of creating a “*no-escape situation*” for Manolium-Engineering is baseless.
1137. Lastly, with regard to the Claimant’s suggestion in paragraph 587(iii) that MCEC should have accepted the New Communal Facilities into municipal ownership in order to avoid the alleged “*no-escape situation*” in which Manolium-Engineering was

¹⁷⁷¹ See paragraphs 461 – 482 above.

¹⁷⁷² See paragraphs 256 – 308 above.

¹⁷⁷³ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 57 and 100 – 102, **RWS-2**

¹⁷⁷⁴ See paragraphs 295 – 308 above.

“unable to avoid [...] tax liability”,¹⁷⁷⁵ the Respondent has already explained that it was entirely reasonable and proportionate for MCEC not to accept the New Communal Facilities into municipal ownership, because:

- A. while the Amended Investment Contract was in force, it was not possible under the terms of the contract for MCEC to accept the facilities into municipal ownership in their incomplete state;¹⁷⁷⁶ and
- B. after the termination of the Amended Investment Contract came into effect (MCEC was not obliged to accept the New Communal Facilities – either completed or incomplete – but was prepared to do so if the parties reached agreement on price¹⁷⁷⁷), the valuations in respect of the facilities were carried out contrary to the agreed instructions,¹⁷⁷⁸ did not represent the real value of the facilities in their incomplete and defective state,¹⁷⁷⁹ and did not reflect the amount that would have to be spent by the State on completing the construction of the facilities (which Manolium-Engineering had failed to do).¹⁷⁸⁰

1138. In paragraphs 588 – 589 of the Reply, the Claimant seeks to undermine the Respondent’s position by alleging that “[n]one of the arguments raised by the Respondent in this arbitration [...] played any role in 2016 – 2017” when MCEC “*did not face any problems in accepting the land plots back to the communal ownership*”. As the Respondent explains in the Defence¹⁷⁸¹ and in paragraphs 520 – 530 above, however, the position under Belarusian law was at all relevant times that the land

¹⁷⁷⁵ Reply, paragraph 712, **CS-5**.

¹⁷⁷⁶ See, e.g., Defence, paragraphs 188 and 563, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 71, **RWS-2**.

¹⁷⁷⁷ Defence, paragraphs 263 – 265, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 126, **RWS-2**.

¹⁷⁷⁸ Defence, paragraphs 266 – 298, **RS-18**.

¹⁷⁷⁹ See paragraphs 582 – 605 above.

¹⁷⁸⁰ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 126 – 127 and 129, **RWS-2**.

¹⁷⁸¹ Defence, paragraphs 300 – 302, **RS-18**.

plots could not be returned without the facilities transferring with them or without first destroying the facilities. The only change in 2017 was that the value of the incomplete facilities was set-off against Manolium-Engineering's tax liabilities to the State – meaning that the facilities finally passed into municipal ownership and the land was returned. In paragraphs 588 – 599 of the Reply, the Claimant appears to either misunderstand the position, or intentionally misrepresent it.

1139. For the above reasons, the Claimant falls demonstrably short of satisfying its burden of proving that there was an “*abuse of local tax law*” by the state authorities to create a situation in which Manolium-Engineering was “*unable to avoid [...] tax liability*”.¹⁷⁸² The Respondent submits in the above paragraphs that MCEC acted reasonably, proportionately and non-discriminatorily, engaging with the Claimant and Manolium-Engineering to seek alternative solutions to the situations encountered, while at the same time maintaining a balanced position that would not compromise the State's interests and compensate the Claimant for its own failures. The Respondent submits that the conduct complained of falls far short of violating international law standards.

c) The tax authorities acted transparently and in good faith in respect of the Claimant and Manolium-Engineering

1140. The Claimant's allegation that there was a “*bad faith*” conspiracy between state authorities to target Manolium-Engineering through “*an abuse of local tax law*” is also undermined by the transparent way in which the tax authorities conducted their activities in respect of Manolium-Engineering in the period 2014 – 2016, as the Respondent describes in the Defence¹⁷⁸³ and in paragraphs 520 – 537 above. Among other things, the Claimant does not dispute that:

¹⁷⁸² Reply, paragraphs 586 and 590, **CS-5**.

¹⁷⁸³ Defence, paragraphs 313 – 353, **RS-18**.

- A. the District Tax Inspectorate demanded that Manolium-Engineering comply with its obligations to submit land tax returns in early 2014, which Manolium-Engineering ignored;¹⁷⁸⁴
- B. the District Tax Inspectorate sent copies of the First Tax Audit Report to Manolium-Engineering setting out the grounds for and calculation of Manolium-Engineering's outstanding land taxes on 17 May 2016, to which Manolium-Engineering did not raise any objection;¹⁷⁸⁵
- C. the District Tax Inspectorate sent a document setting out the amendments and supplements to the First Tax Audit Report to Manolium-Engineering and to all known addresses of Mr Dolgov on 21 June 2016, explaining the legal and factual grounds for the amendments, to which Manolium-Engineering did not raise any objection;¹⁷⁸⁶ and
- D. the District Tax Inspectorate sent copies of the Inspectorate Decision to Manolium-Engineering and to all known addresses of Mr Dolgov on 19 July 2016, setting out the grounds for and calculation of Manolium-Engineering's outstanding land tax liabilities, which Manolium-Engineering chose not to appeal.¹⁷⁸⁷

1141. As the above facts show, the District Tax Inspectorate conducted their activities transparently and in good faith in respect of Manolium-Engineering, setting out the legal basis for the tax assessments and providing Manolium-Engineering the opportunity to raise objections at each step. Even when the Economic Court of Minsk ordered Manolium-Engineering's land tax liabilities to be enforced against the New Communal Facilities on 18 August 2016, the Claimant and Manolium-Engineering

¹⁷⁸⁴ Defence, paragraph 321, **CS-5**.

¹⁷⁸⁵ Defence, paragraphs 323 and 324, **RS-18**.

¹⁷⁸⁶ Defence, paragraph 328, **RS-18**.

¹⁷⁸⁷ Defence, paragraph 331, **RS-18**.

chose not to appeal.¹⁷⁸⁸ If the Claimant and Manolium-Engineering believed the activities of the tax authorities were an “*abuse of tax law*”, as it now contends, the Respondent submits that it should have exercised its right of appeal under domestic law at the time. The fact that they did not do so demonstrates that they did not believe that there was any ground to dispute the tax assessments.

1142. Notably, the Claimant does not dispute that the District Tax Inspectorate took measures to try to get Manolium-Engineering to voluntarily comply with its land tax obligations as early as February 2014. The Respondent submits that the District Tax Inspectorate’s transparent behaviour undermines the Claimant’s unsupported allegation that there was a state conspiracy to “*get the New Communal Facilities for free*”.¹⁷⁸⁹ The only intention of the tax authorities was to get Manolium-Engineering to comply with its tax obligations.

1143. Lastly, as noted above, it is significant that the Claimant does not appear to dispute (or address the Respondent’s position in the Defence¹⁷⁹⁰) that the tax assessments in respect of Manolium Engineering were conducted and calculated in accordance with Belarusian law and procedure. The Claimant’s failure to raise any material objection to the conduct of the tax authorities themselves (just as Manolium-Engineering did not raise any objection at the time it was notified of the tax assessments) shows the Claimant’s contention that there was an “*abuse of local tax law*” to be hollow.¹⁷⁹¹ As noted in McLachlan, Shore and Weiniger, a good faith effort on the part of state authorities to fulfil the requirements of host State law is a “*powerful indication*” that international law standards have been met.¹⁷⁹²

¹⁷⁸⁸ Defence, paragraph 335, **RS-18**.

¹⁷⁸⁹ Reply, paragraph 591, **CS-5**.

¹⁷⁹⁰ Defence, paragraphs 313 – 362, **RS-18**.

¹⁷⁹¹ Reply, paragraph 590, **CS-5**.

¹⁷⁹² C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2017 (2nd Ed.), paragraph 7.227, **Exhibit RL-44**.

d) Manolium-Engineering’s tax liabilities were not imposed at the President’s instruction

1144. In support of its contention that there was a conspiracy between state authorities specifically “*targeting*” Manolium-Engineering, the Claimant also repeats its mistaken allegation that Manolium-Engineering’s “*tax liability [...] was an instrument of implementation of the President’s official instruction.*”¹⁷⁹³
1145. As the Respondent explains in the Defence¹⁷⁹⁴ and in paragraphs 567 – 570 above, the Claimant’s contention that the tax authorities conducted their assessments of Manolium-Engineering based on the “*President’s official instruction*” is unfounded.
1146. Firstly, the “*instruction*” of the President that the Claimant appears to be referring to was issued on 10 October 2016, after the tax authorities had conducted their assessments of Manolium-Engineering’s taxes.¹⁷⁹⁵ The tax authorities therefore could not have been acting on the “*President’s official instruction*”.¹⁷⁹⁶
1147. Secondly, the President’s instruction of 10 October 2016 and the President’s order of 20 January 2017 were issued as part of the procedure for enforcing Manolium-Engineering’s land tax liabilities, and therefore merely gave effect to the earlier Inspectorate Decision of 19 July 2016 and Order of the Economic Court of Minsk of 18 August 2016, both of which Manolium-Engineering had chosen not to appeal.¹⁷⁹⁷ Accordingly, the Claimant’s allegation that the “*tax liability [...] was an instrument of implementation of the President’s official instruction*” is baseless.¹⁷⁹⁸
1148. For all of the above reasons, the Respondent submits that the Claimant has entirely failed to satisfy its burden of proving that the Respondent carried out an “*abuse of*

¹⁷⁹³ Reply, paragraph 592, **CS-5**.

¹⁷⁹⁴ Defence, paragraphs 339 – 353, **RS-18**.

¹⁷⁹⁵ See paragraph 567 above.

¹⁷⁹⁶ Reply, paragraph 592, **CS-5**.

¹⁷⁹⁷ See paragraphs 567 – 570 above; Defence, paragraphs 331 and 335, **RS-18**.

¹⁷⁹⁸ Reply, paragraph 592, **CS-5**.

local tax law” with the intention of “finding Manolium-Engineering liable for tax violations”.¹⁷⁹⁹ The Respondent submits that the Claimant’s expropriation claim therefore fails. As the tribunal held in *RosInvestCo v. Russia*: “It is undisputed [...] that the normal application of domestic tax law in the host state cannot be seen as an expropriatory act.”¹⁸⁰⁰

2. The Claimant and Manolium-Engineering caused the accrual of the tax liabilities

1149. In the Reply, the Claimant mistakenly alleges that “the Claimant no longer has title or any use of the New Communal Facilities and therefore there is no question that the Respondent’s unlawful actions fully deprived the Claimant of its investment.”¹⁸⁰¹

1150. As already noted, the Respondent agrees with the Claimant that the “effect of the tax” is key to determining whether tax measures are expropriatory.¹⁸⁰² However, in order to succeed in its expropriation claims, the Claimant must prove that the actions which the Claimant seeks to attribute to the Respondent caused the Claimant to be dispossessed or substantially deprived of the benefit of its investment.¹⁸⁰³ As the tribunal noted in *Burlington v. Ecuador*, the Claimant must prove that the conduct complained of deprived it of the investment as a whole:

“The Treaty provides that “investments shall not be expropriated.” The Tribunal understands from this formulation that the focus of the expropriation

¹⁷⁹⁹ Reply, paragraphs 585 and 588, **CS-5**.

¹⁸⁰⁰ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, paragraph 628, **Exhibit CL-117**.

¹⁸⁰¹ Reply, paragraphs 831 and 594, **CS-5**.

¹⁸⁰² Reply, paragraph 593, **CS-5**; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraph 395, **Exhibit CL-103**.

¹⁸⁰³ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraphs 257 and 395, **Exhibit CL-103**; *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award of 25 October 2012, paragraph 218, **Exhibit CL-123**; *Vincent J. Ryan, Schooner Capital LLC and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award of 24 November 2015, paragraph 471, **Exhibit CL-119**.

*analysis must be on the investment as a whole, and not on discrete parts of the investment.”*¹⁸⁰⁴

1151. In the present context, therefore, the burden is on the Claimant to prove that Manolium-Engineering’s tax liabilities that were set-off against the value of the New Communal Facilities in 2017 (i) resulted from conduct attributable to the Respondent which (ii) contravenes international law standards. The Claimant’s vague assertions that “*the Claimant no longer has title or any use of the New Communal Facilities and therefore there is no question that the Respondent’s unlawful actions fully deprived the Claimant of its investment*” do not assist the Claimant in satisfying its burden of proof.¹⁸⁰⁵
1152. In paragraphs 1116 – 1148 above, the Respondent submits that there was no “*abuse of tax law*” by the Respondent to impose taxes on Manolium-Engineering. The Claimant has therefore failed to satisfy its burden of proving that the Manolium-Engineering’s tax liabilities which were set-off against the value of the New Communal Facilities in 2017 (i) resulted from conduct attributable to the Respondent which (ii) contravenes international law standards.
1153. As the Respondent submits in the paragraphs below, the Claimant’s and Manolium-Engineering’s own negligent actions and/or omissions caused the accrual of the tax liabilities which were subsequently enforced against the New Communal Facilities, rather than a “*trap [...] artificially created*” by the Respondent.¹⁸⁰⁶ Furthermore, the “*situation*” which Manolium-Engineering found itself in after the Final Commissioning Date passed was not a “*no-escape situation*” in which Manolium-Engineering “*unable to avoid [...] tax liability*”, as the Claimant seeks to portray it.¹⁸⁰⁷ As the Respondent explains, there were a number of simple measures that the

¹⁸⁰⁴ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, paragraphs 257 and 395, **Exhibit CL-103**.

¹⁸⁰⁵ Reply, paragraphs 831 and 594, **CS-5**.

¹⁸⁰⁶ Reply, paragraphs 587 – 588, **CS-5**.

¹⁸⁰⁷ Reply, paragraphs 654 and 712, **CS-5**.

Claimant and Manolium-Engineering failed to take to avoid or mitigate the tax liabilities which subsequently accrued.

1154. For these reasons, in addition to those given above, the Respondent submits that the Claimant's expropriation claim fails, because the accrual of the taxes – and the transfer of the New Communal Facilities into municipal ownership to enforce against them – were caused by the Claimant's own negligent acts and/or omissions, rather than conduct attributable to the Respondent which violates international law.

1155. As set out below, the Respondent submits that:

- A. the Claimant and Manolium-Engineering negligently failed to complete the construction of the New Communal Facilities;
- B. Manolium-Engineering negligently failed to apply to extend its land permit, which caused a significant increase in its tax liabilities;
- C. the Claimant and Manolium-Engineering were fully aware that Manolium-Engineering was liable to pay land taxes, but chose to ignore it; and
- D. the Claimant and Manolium-Engineering chose not to raise objection to or appeal the tax assessments or enforcement order.

a) The Claimant and Manolium-Engineering negligently failed to complete the construction of the New Communal Facilities

1156. As the Respondent explains above, the Claimant's expropriation claim rests on the premise that, after the Final Commissioning Date passed, Manolium-Engineering was in a "*trap of Respondent's making*" in which Manolium-Engineering was "*unable to avoid [...] tax liability*".¹⁸⁰⁸ This is nonsense. Even if Manolium-Engineering were in a "*no-escape situation*" in which it was "*unable to avoid [...] tax liability*", (which,

¹⁸⁰⁸ Reply, paragraphs 587 and 712, CS-5.

for the reasons given in paragraphs 1161 – 1172 below, is strongly denied), the Claimant only has itself to blame for creating this “*situation*”.

1157. Firstly, as the Respondent explains in the Defence¹⁸⁰⁹ and in paragraphs 109 - 115 above, the Claimant and Manolium-Engineering failed to construct the New Communal Facilities by the Final Commissioning Date because of the Claimant’s own inability and/or unwillingness to finance the construction works. Despite MCEC agreeing to postpone the contractual construction deadline from December 2008 to July 2011 at the Claimant’s request,¹⁸¹⁰ Manolium-Engineering still failed to comply with its obligations.¹⁸¹¹ The Respondent submits that responsibility for this failure rests squarely on the Claimant’s shoulders – and so too must the Claimant bear the burden of the land tax liabilities which, from 2013, started to accrue as a result of the incomplete New Communal Facilities remaining in Manolium-Engineering’s ownership.
1158. Secondly, rather than engaging in constructive negotiations with MCEC to postpone the contractual deadline for the construction of the New Communal Facilities, the Claimant aggravated the situation by proposing terms which were either unreasonable,¹⁸¹² involved fundamentally changing the terms of the agreed project,¹⁸¹³ or were simply unworkable in practice.¹⁸¹⁴
1159. Thirdly, as the Respondent explains in paragraphs 483 – 485 above, even after the Final Commissioning Date passed, Manolium-Engineering could have completed the New Communal Facilities and transferred them into municipal ownership if it had

¹⁸⁰⁹ Defence, paragraphs 76 – 98, **RS-18**.

¹⁸¹⁰ Defence, paragraphs 76 – 98, **RS-18**.

¹⁸¹¹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 102 – 105, **CWS-5**.

¹⁸¹² First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 43(b) and 44, **RWS-2**.

¹⁸¹³ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 57 – 58, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 54 – 56, **RWS-4**.

¹⁸¹⁴ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 43(c) and 44, **RWS-2**.

extended its construction and land permits. Without justification, however, Manolium-Engineering:

- A. failed to submit the correct documents for its construction permit to be extended beyond 30 December 2011; and
- B. failed to apply to extend its land permits beyond 1 July 2011 altogether.¹⁸¹⁵

1160. The Respondent therefore submits that the “*situation*” which Manolium-Engineering found itself in (in which Manolium-Engineering remained the owner of the incomplete facilities, and, consequently, liable to pay increased land tax from 2013) was entirely of the Claimant’s and Manolium-Engineering’s own “*making*”.¹⁸¹⁶ This was not a “*no-escape situation*”,¹⁸¹⁷ as the Claimant seeks to present it, but a situation that could have been easily avoided but for the Claimant’s own failures. It is misleading for the Claimant to now suggest otherwise.

b) Manolium-Engineering negligently failing to apply to extend its land permit, which caused a significant increase in its total tax liabilities

1161. It is not in dispute between the parties that, as a result of Manolium-Engineering’s failure to extend its land permits, the District Tax Inspectorate applied a tenfold increased rate of land tax in respect of Manolium-Engineering, in accordance with the Tax Code.¹⁸¹⁸

1162. As the Respondent explains in the Defence¹⁸¹⁹ and in paragraphs 467 – 472 above, Manolium-Engineering never applied to extend its land permits after the Final Commissioning Date, despite being required to do so under Belarusian law.¹⁸²⁰ To

¹⁸¹⁵ See paragraphs 483 – 485 above.

¹⁸¹⁶ Reply, paragraph 587, **CS-5**.

¹⁸¹⁷ Reply, paragraph 712, **CS-5**.

¹⁸¹⁸ Defence, paragraphs 314 and 326, **RS-18**.

¹⁸¹⁹ Defence, paragraphs 113 – 117, **RS-18**.

¹⁸²⁰ See paragraphs 467 – 472 above; Defence, paragraphs 113 – 117, **RS-18**.

date, the Claimant has provided no credible explanation for Manolium-Engineering's failure to do so, despite the Respondent's requests for clarification.¹⁸²¹ Even if the Claimant and Manolium-Engineering were not willing or able to finish the construction of the New Communal Facilities, Manolium-Engineering had the right and the opportunity to lay-up the facilities, and so avoid the application of the tenfold rate of tax.¹⁸²² Again, Manolium-Engineering failed to do so, without reasonable justification.

1163. The Claimant's contention that Manolium-Engineering was in a "no-escape situation" in which it was "unable to avoid [...] tax liability" is therefore unfounded.¹⁸²³ Not only could the Claimant have avoided the land taxes altogether by constructing the New Communal Facilities (as it had agreed to do), but Manolium-Engineering could have easily avoided the application of the tenfold land tax rate, but for its own negligence.

c) The Claimant and Manolium-Engineering were fully aware that Manolium-Engineering was liable to pay land taxes, but chose to ignore it

1164. The Claimant does not dispute that Ms [REDACTED], who at the time was chief-accountant of Manolium-Engineering, explained to Mr Dolgov that Manolium-Engineering was liable to pay land taxes in respect of the land plots on which the New Communal Facilities were built, but that Mr Dolgov refused to file the necessary land tax returns.¹⁸²⁴ The Claimant also does not dispute that, in February 2014, Manolium-Engineering chose to ignore the District Tax Inspectorate's demands that Manolium-Engineering comply with its obligations to submit land tax returns.¹⁸²⁵

¹⁸²¹ See paragraphs 470 – 472 above; Defence, paragraphs 113 – 117, **RS-18**.

¹⁸²² See paragraph 484 above.

¹⁸²³ Reply, paragraphs 654 and 712, **CS-5**.

¹⁸²⁴ Defence, paragraph 320, **RS-18**; Witness Statement of Ms [REDACTED] dated 12 November 2018, paragraphs 30 – 38, **RWS-3**.

¹⁸²⁵ Defence, paragraph 321, **RS-18**.

1165. If the Claimant and Manolium-Engineering did not believe that they were liable to pay the land taxes, as the Claimant now contends, the proper course of action would have been to immediately raise this with the relevant authorities, in order to seek a solution. Given that Manolium-Engineering and the Claimant failed to take even this most simple and obvious measure, the Claimant's contention in the present arbitration that it was in a "no-escape situation" in which Manolium-Engineering was "unable to avoid [...] tax liability" does not rub off.¹⁸²⁶

d) The Claimant and Manolium-Engineering chose not to raise objection to or appeal the tax assessments or enforcement order

1166. Not only did the Claimant and Manolium-Engineering choose to ignore the District Tax Inspectorate in 2014, but they also failed to object to or appeal the tax assessments in respect of Manolium-Engineering in 2016, and the order for the liabilities to be enforced against the New Communal Facilities on 18 August 2016.

1167. In particular, Manolium-Engineering had opportunities to raise objections to or appeal:

- a) the First Tax Audit Report;¹⁸²⁷
- b) the amendments to the First Tax Audit Report;¹⁸²⁸ and
- c) the Inspectorate Decision.¹⁸²⁹

1168. However, Manolium-Engineering chose not to avail itself of such rights.

1169. Notably, when Manolium-Engineering (represented by the insolvency administrator) submitted objections to the Second Tax Audit Report on 21 April 2017,¹⁸³⁰ the Region

¹⁸²⁶ Reply, paragraph 712, **CS-5**.

¹⁸²⁷ Defence, paragraphs 323 and 329, **RS-18**.

¹⁸²⁸ Defence, paragraphs 328 and 329, **RS-18**.

¹⁸²⁹ Defence, paragraph 331, **RS-18**.

Tax Inspectorate accepted the objections in full and recalculated the amount of tax liability for the year 2017 to reduce it accordingly.¹⁸³¹

1170. Manolium-Engineering also chose not to:

- A. submit a defence to District Tax Inspectorate's application for a court order to enforce the tax liabilities against the New Communal Facilities;¹⁸³² or
- B. appeal the Economic Court of Minsk's order on 18 August 2016 to enforce the land tax liabilities against the New Communal Facilities.¹⁸³³

1171. Lastly, Manolium-Engineering chose not to challenge the valuation of the New Communal Facilities prepared in accordance with the Regulation for the purpose of enforcing the tax liabilities by:

- A. challenging the Deed of Transfer dated 27 January 2017 (by which the transfer of the New Communal Facilities into municipal ownership was formalised);¹⁸³⁴ or
- B. making an unjust enrichment claim against MCEC.¹⁸³⁵

1172. The Claimant and Manolium-Engineering therefore had numerous opportunities to challenge the land tax liabilities and their enforcement against the New Communal Facilities. If the Claimant and Manolium-Engineering believed that Manolium-Engineering was not liable to pay land taxes in respect of its occupation of the land plots, as the Claimant now contends, the Respondent submits that they should (and would) have done so. Given that the Claimant and Manolium-Engineering failed to exhaust the basic remedies available to them under Belarusian law to challenge the

¹⁸³⁰ Defence, paragraphs 358 – 359, **RS-18**.

¹⁸³¹ Defence, paragraphs 358 – 359, **RS-18**.

¹⁸³² Defence, paragraph 335, **RS-18**.

¹⁸³³ Defence, paragraph 335, **RS-18**.

¹⁸³⁴ See paragraphs 564 – 565 above.

¹⁸³⁵ See paragraph 566 above.

taxes, the Claimant’s contention in the present proceedings that Manolium-Engineering was in a “*no-escape situation*” rings hollow.¹⁸³⁶

3. The conditions for a lawful expropriation under Article 79 of the EEU Treaty are in any event satisfied

1173. The Respondent submits in the paragraphs above that the transfer of the New Communal Facilities into municipal ownership was not the culmination of an expropriation. If, however, the Tribunal disagrees, the Respondent submits that the necessary requirements for a lawful expropriation under Article 79 as set out in paragraph 1100 above are satisfied.¹⁸³⁷

1174. With regard to the first criterion that the measures be carried out “*in accordance with the legislation of the State*”,¹⁸³⁸ the Respondent submits in the Defence¹⁸³⁹ and in paragraphs 515 – 531 above that the assessment and enforcement of taxes in respect of Manolium-Engineering was conducted entirely in accordance with Belarusian law and procedure. Accordingly, the Respondent submits that the first criterion under Article 79 of Protocol 16 is satisfied.

1175. As for the second criterion that the measures be “*for the public benefit*”,¹⁸⁴⁰ the Respondent submits that the enforcement of domestic tax laws in accordance with the prescribed procedures and respecting the rights of the investor falls squarely within sovereign measures for the “*public benefit*”. The Respondent therefore submits that the second criterion under Article 79 of Protocol 16 is also satisfied.

1176. As for the third criterion that the measures are “*not discriminatory*”,¹⁸⁴¹ the Claimant has failed to identify any similar cases where investors were treated differently to how

¹⁸³⁶ Reply, paragraph 712, **CS-5**.

¹⁸³⁷ Protocol 16 of the EEU Treaty, Article 79, **Exhibit CL-3**.

¹⁸³⁸ Protocol 16 of the EEU Treaty, Article 79, **Exhibit CL-3**.

¹⁸³⁹ Defence, paragraphs 313 – 320, **RS-18**.

¹⁸⁴⁰ Protocol 16 of the EEU Treaty, Article 79, **Exhibit CL-3**.

¹⁸⁴¹ Protocol 16 of the EEU Treaty, Article 79, **Exhibit CL-3**.

Manolium-Engineering was treated by the tax authorities, or allege that the tax authorities discriminated against Manolium-Engineering in any way.¹⁸⁴² This is not surprising given that the assessment and enforcement of the taxes in respect of Manolium-Engineering was carried out entirely in accordance with Belarusian law and procedure, as already noted in paragraph 1174 above. Accordingly, the Respondent submits that the third criterion under Article 79 of Protocol 16 is satisfied.

1177. As for the final criterion that the measures involve “*prompt and adequate consideration*”,¹⁸⁴³ the tribunal in *Rusoro Mining v. Venezuela* held that the:

*“legality of an expropriation where the State has taken the investment but has failed to make any compensation payment, depends on whether a good faith offer for a reasonable amount of compensation was actually made.”*¹⁸⁴⁴

1178. Tribunals have consistently concluded that adequate compensation is the fair market value of the investment.¹⁸⁴⁵

1179. In paragraph 357 of the Reply, the Claimant alleges that:

“after several internal meetings, the Belarusian authorities finally came to the conclusion that the value of the New Communal Facilities was not the more than USD 19 million that they had previously calculated, but rather just USD 13,880,000 (BYN 27,287,748.05). This new value had no basis in reality”.¹⁸⁴⁶

1180. The burden is on the Claimant to prove that the valuation of the New Communal Facilities by the Registration and Cadastre Agency in 2016 had “*no basis in reality*”.¹⁸⁴⁷ The only support the Claimant provides for its allegation that the valuation had “*no basis in reality*” is that the valuation was lower than the calculation

¹⁸⁴² Reply, paragraphs 578 – 596, **CS-5**.

¹⁸⁴³ Protocol 16 of the EEU Treaty, Article 79, **Exhibit CL-3**.

¹⁸⁴⁴ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, paragraph 407, **Exhibit RL-96**.

¹⁸⁴⁵ *Teinver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, paragraph 1033, **Exhibit RL-99**.

¹⁸⁴⁶ Reply, paragraph 357, **CS-5**.

¹⁸⁴⁷ *Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 179, **Exhibit RL-100**.

of Manolium-Engineering’s costs set out in the 2016 Memorandum.¹⁸⁴⁸ However, the difference in the two valuations does not support the Claimant’s conclusion that the valuation of the New Communal Facilities by the Registration and Cadastre Agency before set-off had “*no basis in reality*”. The Claimant chooses to ignore the specific reasons why the valuation by the Registration and Cadastre Agency was lower.

1181. As the Respondent explains in paragraph 561 above, the main reason for the difference was that the 2016 Memorandum did not calculate the “*value*” of the New Communal Facilities, as the Claimant alleges in paragraph 357 of the Reply, but contained only a calculation of the costs as recorded in Manolium-Engineering’s own accounts. This was not a reliable reflection of the value of the facilities in their incomplete state because, as the Respondent already explains, the 2016 Memorandum included costs that were not spent directly on the New Communal Facilities, included increased costs that resulted from the Claimant’s delays and did not reflect the additional funds that would have to be spent on the facilities to bring them to a functioning state.¹⁸⁴⁹

1182. The Registration and Cadastre Agency, on the other hand, determined the market value of the New Communal Facilities pursuant to the Regulation, applying a ten percent reduction as required pursuant to the Regulation.¹⁸⁵⁰ The Registration and Cadastre Agency’s valuation was as comprehensive as possible given that all of the construction documents (such as the Design Specification and Estimate Documentation and as-built documentation) were (or should have been) in Manolium-Engineering’s possession – whose responsibility it was to maintain them.¹⁸⁵¹ Notably, Manolium-Engineering also had the opportunity under Belarusian law to challenge the Deed of Transfer by which the transfer of the New Communal was formalised, and which was provided to Manolium-Engineering.¹⁸⁵² As part of those proceedings,

1848 Reply, paragraph 357, **CS-5**.

1849 See paragraphs 410 – 454 above; Defence, paragraphs 266 – 298, **RS-18**.

1850 See paragraph 561 above.

1851 See paragraph 562 above.

1852 See paragraphs 564 – 566 above.

Manolium-Engineering would have been entitled to submit its own evidence to prove that the valuation of the New Communal Facilities was incorrect. However, Manolium-Engineering chose not to appeal.¹⁸⁵³

1183. Given that Manolium-Engineering failed to exhaust the local remedies provided to it under local law to challenge the valuation of the Registration and Cadastre Agency, the Claimant’s contention in the present proceedings that the valuation had “*no basis in reality*” is unpersuasive.¹⁸⁵⁴ If Manolium-Engineering believed that the valuation had “*no basis in reality*”, it should (and would) have appealed at the time.

1184. For the above reasons, the Respondent submits that the Claimant received “*prompt and adequate consideration*”¹⁸⁵⁵ for the fair market value of the New Communal Facilities by way of set-off against Manolium-Engineering’s land tax liabilities. Accordingly, the Respondent submits that the final criterion for a lawful expropriation under Article 79 of Protocol 16 is satisfied.

D. THE RESPONDENT DID NOT BREACH ARTICLE 12 OF THE BELARUSIAN INVESTMENT LAW

1185. The Respondent submits in paragraphs 908 – 924 above that the Tribunal does not have jurisdiction under the Belarusian Investment Law and that its substantive provisions cannot be applied in the present case. If, however, the Tribunal finds that it has jurisdiction under the Belarusian Investment Law, the Tribunal should proceed to determine whether there has been a violation of its substantive provisions.

¹⁸⁵³ See paragraphs 564 – 566 above.

¹⁸⁵⁴ *Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 179, **Exhibit RL-100**.

¹⁸⁵⁵ Protocol 16 of the EEU Treaty, Article 79, **Exhibit CL-3**.

1186. The Claimant bears the burden of proving that the Respondent violated the Belarusian Investment Law.¹⁸⁵⁶

1187. In the Notice and in the Statement of Claim, the Claimant did not substantiate its claim under the Belarusian Investment Law.¹⁸⁵⁷ In the Reply, the Claimant alleges that the Respondent has violated Article 12 of the Belarusian Investment Law.¹⁸⁵⁸ However, the Claimant again entirely fails to substantiate its claim.¹⁸⁵⁹ The Claimant has therefore failed to satisfy its burden of proving that the Respondent violated the Belarusian Investment Law.

1188. Nevertheless, the Respondent submits that there has been no violation of Article 12 of the Belarusian Investment Law on the present facts because:

- A. the Respondent has not nationalized or requisitioned the Claimant's investment; and
- B. even if nationalization or requisition under Belarusian law were the same as expropriation under international law (which they are not), the Respondent has not expropriated the Claimant's investment.

1. The Respondent has not nationalized or requisitioned the Claimant's investment

1189. In the Reply, the Claimant alleges that “*the Respondent expropriated the Claimant's investment in violation of [...] Article 12 of the Belarusian Investment Law.*”¹⁸⁶⁰

1190. Article 12 of the Belarusian Investment Law provides as follows:

¹⁸⁵⁶ See, e.g., *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 January 2006, paragraph 70, **Exhibit RL-97**; *Rompotrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 179, **Exhibit RL-100**.

¹⁸⁵⁷ Notice, paragraphs 365 – 526, **CS-1**.

¹⁸⁵⁸ Reply, paragraph 605, **CS-5**.

¹⁸⁵⁹ Reply, paragraphs 518 – 605, **CS-5**.

¹⁸⁶⁰ Reply, paragraph 605 (emphasis added), **CS-5**.

*“Property being investments or being created as a result of carrying out investments may not be gratuitously **nationalized** or **requisitioned**.”*

Nationalization is possible only on motives of public necessity and subject to timely and full compensation of the value of the nationalized property and other damages being caused by the nationalization.

The order and conditions of the nationalization, and also payment of the compensation of the value of property being nationalized and other damages being caused by the nationalization are determined on the basis of the law on order and conditions of the nationalization of this property adopted in accordance with the Constitution of the Republic of Belarus.

[...]

The amount of compensation provided by part two and four of this Article may be appealed by the investor in the court.”¹⁸⁶¹

1191. The Claimant appears to suggest that expropriation under international law is the same as nationalization and requisition under Belarusian law, and that its submissions on expropriation also apply to Article 12 of the Belarusian Investment Law. As set out below, the Respondent submits that this is not the case because:

- A. nationalization under Belarusian law is distinct from expropriation under international law; and
- B. requisition under Belarusian law is distinct from expropriation under international law.

a) Nationalization under Belarusian law is distinct from expropriation under international law

1192. “Nationalization” under Belarusian law is enshrined in Article 245 of the Civil Code of the Republic of Belarus (the “**Civil Code**”). Article 245 of the Civil Code provides as follows:

¹⁸⁶¹ Belarusian Investment Law, Article 12 (emphasis added), **Exhibit CL-10**.

*“The **transfer** of property owned by citizens and legal entities **into state ownership** by its nationalisation is only permissible **on the basis of a law**, which has been approved in accordance with the Constitution, **regarding the procedure and terms of the nationalisation of this property** and with timely and full compensation to the entity or person whose property is nationalised of the value of the property and other losses caused by its confiscation ”*¹⁸⁶²

1193. The Respondent submits that nationalization under Belarusian law is to be distinguished from expropriation under international law in two key respects.
1194. Firstly, as follows from the wording of Article 245 of the Civil Code, nationalization concerns the transfer of private property “*into state ownership*”.¹⁸⁶³ Nationalization under Belarusian law therefore relates to the transfer of rights *in rem* to the State, rather than rights *in personam* (such as contractual rights) – which cannot be transferred “*into state ownership*”. In this sense, the term nationalization is understood in much the same way as it is in English.
1195. As nationalization under Belarusian law concerns only the transfer of rights *in rem* to the State, it is narrower than the concept of expropriation under international law, which protects more generally against the dispossession or deprivation of an investor’s rights *in rem* or *in personam* (such as contractual rights) and does not require that such rights are transferred “*into state ownership*” for an expropriation to occur.
1196. For this reason, the Respondent submits that the termination of the Amended Investment Contract on 29 October 2014 cannot *prima facie* constitute a nationalization under Article 12 of the Belarusian Investment Law, because the termination resulted in the loss of the Claimant’s and Manolium-Engineering’s contingent contractual right *in personam* to develop the Investment Object. The concept of nationalization under Belarusian law does not cover such measures.

¹⁸⁶² Belarusian Civil Code, Article 245, **Exhibit RL-127**.

¹⁸⁶³ Belarusian Civil Code, Article 245, **Exhibit RL-127**.

1197. Secondly, as follows from the wording of Article 245 of the Civil Code, a nationalization must be carried out “*on the basis of a law [...] regarding the procedure and terms of the nationalisation of this property*”.¹⁸⁶⁴ Accordingly, a nationalization may only occur under Belarusian law upon the enactment of a specific law by Parliament, concerning the specific property in question. This is confirmed by the language of Article 245, which requires that a law must be enacted in respect of the nationalisation “*of this property*”, i.e. the specific property being nationalized in those particular circumstances.

1198. In this sense, nationalization under Belarusian law is again narrower than expropriation under international law, which protects against measures attributable to the State more generally, and does not require that a particular law be enacted by the State’s executive concerning the investor’s rights or assets. Under international law, for example, the termination of a contract may constitute an expropriation, if the contract is terminated in the exercise of sovereign authority.

1199. For this reason, the Respondent submits that neither the termination of the Amended Investment Contract on 29 October 2014, nor the transfer of the New Communal Facilities into municipal ownership on 27 January 2017, can *prima facie* constitute a nationalization under Article 12 of the Belarusian Investment Law, because neither measure was effected by the enactment of an executive decree of Parliament concerning the rights of the Claimant.

b) Requisition under Belarusian law is a distinct concept from expropriation under international law

1200. The concept of requisition under Belarusian law is enshrined in Article 243 of the Civil Code. Article 243 of the Civil Code provides as follows:

“1. In case of natural disasters, accidents, epidemics, epizootics and other circumstances of an extraordinary nature, property may be confiscated from

¹⁸⁶⁴ Belarusian Civil Code, Article 245 (emphasis added), **Exhibit RL-127**.

the owner in the public interest in the manner and on the terms established by law, with payment of the value of the property to the owner (requisition).

2. The valuation, on the basis of which the value of the requisitioned property is compensated to the owner, may be challenged by the owner in court.

3. An entity or person whose property has been requisitioned shall have the right, upon termination of the circumstances in connection with which the requisition was made, to demand the return of the property, which has been preserved.”¹⁸⁶⁵

1201. As follows from the wording of Article 243 of the Civil Code, requisition under Belarusian law concerns measures taken by the State in a very specific set of circumstances, including “*natural disasters*”, “*accidents*”, “*epidemics*”, “*epizootics*” and other “*circumstances of an extraordinary nature*”.¹⁸⁶⁶ In the present case, the Claimant does not allege that the measures complained of were taken in any such “*circumstances of an extraordinary nature*”.

1202. The Respondent therefore submits that the protection against requisition under Article 12 of the Belarusian Investment Law does not apply in the present case.

2. Even if nationalization or requisition under Belarusian law were the same as expropriation under international law (which they are not), the Respondent has not expropriated the Claimant’s investment

1203. The Respondent has submitted above that nationalization and requisition under Belarusian law are significantly narrower in scope than expropriation under international law, and that there has been no nationalization or requisition on the present facts.

1204. If, however, the Tribunal disagrees, and finds that nationalization and requisition under Belarusian law are the same as expropriation under international law, the

¹⁸⁶⁵ Belarusian Civil Code, Article 243 (emphasis added), **Exhibit RL-127**.

¹⁸⁶⁶ Belarusian Civil Code, Article 243 (emphasis added), **Exhibit RL-127**.

Respondent submits in the paragraphs above that there was no expropriation of the Claimant's investment under international law.

1205. The Respondent therefore submits that there has been no violation of Article 12 of the Belarusian Investment Law.

VI. BELARUS TREATED THE CLAIMANT FAIRLY AND EQUITABLY

1206. The Claimant bears the burden of proving that the Respondent violated the FET standard under the EEU Treaty.¹⁸⁶⁷

1207. The Respondent agrees with the Claimant that the FET standard incorporates principles of good faith, due process, non-discrimination, transparency, consistency, proportionality and legitimate expectations.¹⁸⁶⁸

1208. As to the precise standard to be applied, the Respondent submits that the terms of the EEU Treaty, including the fair and equitable treatment standard, should be construed in accordance with the norms of interpretation established by the Vienna Convention. Article 31(1) of the Vienna Convention provides that a treaty should be "*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".¹⁸⁶⁹

1209. Given that the ordinary meaning of the FET obligation under Article 68 of Protocol 16 is inconclusive as to the precise standard to be applied, the Respondent submits that the starting point for construing the fair and equitable standard should be the preamble to the EEU Treaty.

¹⁸⁶⁷ See, e.g., *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award, 31 January 2006, paragraph 70, **Exhibit RL-97**; *Rompotrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 179, **Exhibit RL-100**.

¹⁸⁶⁸ Reply, paragraphs 608 – 611, **CS-5**.

¹⁸⁶⁹ Vienna Convention on the Law of Treaties 1969, Article 31(1), **Exhibit CL-13**.

1210. The preamble to the EEU Treaty provides that its object and purpose is to strengthen the “*solidarity and cooperation*”¹⁸⁷⁰ between the Member States, including “*economic integration*”,¹⁸⁷¹ and “*driven by the urge to strengthen the economies*”¹⁸⁷² of the Member States. At the same time, the preamble notes the importance of the “*territorial integrity*”¹⁸⁷³ and “*national interests*”¹⁸⁷⁴ of the Member States, and emphasizes that one of the “[b]asic [p]rinciples of [f]unctioning of the Union” is “*respect for specific features of the political structures of the Member States*”.¹⁸⁷⁵

1211. The Respondent therefore submits that protection of foreign investments is not the sole aim of the EEU Treaty. Rather, the protection of investment is a necessary element alongside the overall aim to “*strengthen the economies*” and promote “*economic integration*” within the Eurasian Economic Union, while at the same time respecting the “*national interests*” of the Member States. As the tribunal found in *Saluka v. Czech Republic*:

*“That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations”.*¹⁸⁷⁶

1212. In this context, the Respondent submits that the Claimant’s vague assertion that the FET standard requires that a “*state itself must [...] remedy any damage that an investor suffers as a result of the consequences of actions of the state*” is of little assistance to the Tribunal.¹⁸⁷⁷ Rather, the Respondent submits that, in applying the

¹⁸⁷⁰ EEU Treaty, preamble, **Exhibit RL-136**.

¹⁸⁷¹ EEU Treaty, preamble, **Exhibit RL-136**.

¹⁸⁷² EEU Treaty, preamble, **Exhibit RL-136**.

¹⁸⁷³ EEU Treaty, Article 3, **Exhibit RL-136**.

¹⁸⁷⁴ EEU Treaty, Article 3, **Exhibit RL-136**.

¹⁸⁷⁵ EEU Treaty, Article 3, **Exhibit RL-136**.

¹⁸⁷⁶ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paragraph 300, **Exhibit CL-16**.

¹⁸⁷⁷ Reply, paragraph 619, **CS-5**.

FET standard, the Tribunal should adopt an approach that balances the private interests of the investor and the public interests of the State, exercising its discretion to take into account all the circumstances of the case before it.

1213. In the Defence, the Respondent submits that the Claimant was treated fairly and equitably at all relevant times.¹⁸⁷⁸

1214. In the Reply, the Claimant shifts the emphasis of its claims away from the performance of the Investment Contract and Amended Investment by MCEC and Minsktrans in 2003 – 2014 (which the Claimant focused on in the Notice¹⁸⁷⁹), and onto the decision of the Supreme Court of 27 January 2015,¹⁸⁸⁰ in an apparent attempt to bring its claims within the temporal scope of the EEU Treaty’s protections.¹⁸⁸¹

1215. The Claimant also appears to have shifted the emphasis of its FET claims away from the tax assessments of Manolium-Engineering in 2016 (which it focused on in the Notice¹⁸⁸²), and introduced various new allegations, including (among other things) allegations regarding the alleged introduction of a “*requirement to pay for the cost of land*”.¹⁸⁸³ Whilst the Respondent objects to the Claimant’s introduction of new claims in the second round of submissions (in contravention of PO1¹⁸⁸⁴), the Respondent nevertheless addresses the Claimant’s position in case the Tribunal considers such claims admissible.

1216. As set out below, the Respondent submits that:

¹⁸⁷⁸ Defence, paragraphs 521 – 613, **CS-5**.

¹⁸⁷⁹ See, e.g., Notice, paragraphs 61 – 255, 417 – 476 and 517 – 523, **CS-1**.

¹⁸⁸⁰ See, e.g., Reply, paragraphs 539 – 540, 549, 613(i), 621 – 624, 627 – 630, 639, 640 and 723 – 734, **CS-5**.

¹⁸⁸¹ In the Notice, the Claimant does not allege that the Supreme Court decision constitutes a breach of Protocol 16 of the EEU Treaty, nor does the Claimant allege that it suffered a denial of justice from the Belarusian court system as a whole.

¹⁸⁸² Notice, paragraphs 296 – 320, 400 – 406 and 493 – 496, **CS-1**.

¹⁸⁸³ Reply, paragraphs 657 – 662, **CS-5**.

¹⁸⁸⁴ Procedural Order No. 1 dated 17 May 2018, paragraph 29.

- A. the Claimant’s FET claims concerning court proceedings must satisfy the requirements for a denial of justice; and
- B. the Respondent treated the Claimant fairly and equitably.

A. THE CLAIMS CONCERNING COURT PROCEEDINGS MUST SATISFY THE REQUIREMENTS FOR A DENIAL OF JUSTICE

1217. In the Reply, the Claimant alleges that the Respondent violated the FET standard through the acts and/or omissions of its courts:

- A. In subheading 10.1 of the Reply, the Claimant alleges that “*Respondent’s courts breached good faith standard by terminating the Investment Contract*”;¹⁸⁸⁵
- B. In paragraphs 622 – 626 of the Reply, the Claimant alleges that the Supreme Court breached the FET standard because it “*did not analyse*” certain “*crucial facts*”;¹⁸⁸⁶
- C. In paragraphs 627 – 630 of the Reply, the Claimant alleges that the courts breached the FET standard because they “*totally failed to examine and assess any of the circumstances of delays that occurred through the fault of [MCEC]*”;¹⁸⁸⁷
- D. In paragraph 639 of the Reply, the Claimant alleges that the Supreme Court breached the FET standard because it “*failed to review the provisions of the Investment Contract and to apply it correctly*”;¹⁸⁸⁸ and

¹⁸⁸⁵ Reply, subheading 10.1, CS-5.

¹⁸⁸⁶ Reply, paragraph 624, CS-5.

¹⁸⁸⁷ Reply, paragraph 630, CS-5.

¹⁸⁸⁸ Reply, paragraph 639, CS-5.

E. In paragraph 640 of the Reply, the Claimant alleges that the “*Supreme Court [...] improperly approved the Respondent’s unreasonable and disproportionate request for termination of the Investment Contract*”.¹⁸⁸⁹

1218. As the Respondent explains in paragraph 952 above, in order to prevail in its claims concerning the Respondent’s courts, the Claimant must prove that it suffered a denial of justice.¹⁸⁹⁰ The Respondent therefore addresses each of the above claims regarding the conduct of the courts separately in Section IV (Denial of Justice) above. The Respondent addresses the claims that remain below.

B. THE RESPONDENT TREATED THE CLAIMANT FAIRLY AND EQUITABLY

1219. The Claimant contends that the Respondent violated the FET standard because:

A. the “*Respondent significantly contributed to the delays in construction of the New Communal Facilities*”;¹⁸⁹¹

B. the “*termination of the Investment Contract was not an appropriate or proportional remedy*”;¹⁸⁹²

C. the “*Respondent failed to negotiate in good faith with the Claimant and Manolium-Engineering regarding extension of the Investment Contract and an extension for the deadline for the Depot’s construction*”;¹⁸⁹³

D. the “*Respondent [...] acted in bad faith by repeatedly refusing to accept the New Communal Facilities to the communal ownership*”;¹⁸⁹⁴

¹⁸⁸⁹ Reply, paragraphs 640 and 641 – 643, **CS-5**.

¹⁸⁹⁰ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, paragraph 150, **Exhibit RL-77**.

¹⁸⁹¹ Reply, paragraphs 627 – 630, **CS-5**.

¹⁸⁹² Reply, paragraphs 631 – 632, **CS-5**.

¹⁸⁹³ Reply, paragraphs 640 – 643, **CS-5**.

¹⁸⁹⁴ Reply, paragraphs 654 – 656, **CS-5**.

- E. the “*Respondent acted in bad faith by requiring payment of the land tax for the land plot for the Investment Object*”;¹⁸⁹⁵
- F. the “*Presidential decision regarding the seizure of the land plot intended for the Investment Object was made non-transparently*”;¹⁸⁹⁶ and
- G. the “*Presidential order regarding transfer of the New Communal Facilities to the communal ownership was issued non-transparently*”.¹⁸⁹⁷

1220. The Claimant also raises new factual allegations in the Reply which the Claimant omits from its analysis of FET, including allegations that:

- A. the Claimant entered into the Amended Investment Contract under “*duress*”;¹⁸⁹⁸
- B. the signing of the Amended Investment Contract “*significantly worsened the initially agreed upon terms*”;¹⁸⁹⁹ and
- C. it was “*no coincidence that the repeated and unfair actions taken by the Respondent correspond with the involvement of the KGB*”.¹⁹⁰⁰

1221. Given that the Claimant has previously failed to raise arguments at the appropriate time, only to then introduce them at a late stage in the proceedings, the Respondent also addresses these allegations.

1222. As set out below, the Respondent submits that:

- A. the Claimant did not enter into the Amended Investment Contract under duress (paragraphs 1223 – 1233);

¹⁸⁹⁵ Reply, paragraphs 657 – 662, **CS-5**.

¹⁸⁹⁶ Reply, paragraphs 668 – 671, **CS-5**.

¹⁸⁹⁷ Reply, paragraphs 672 – 679, **CS-5**.

¹⁸⁹⁸ Reply, paragraph 35, **CS-5**.

¹⁸⁹⁹ Reply, paragraph 34, **CS-5**.

¹⁹⁰⁰ Reply, paragraph 197, **CS-5**.

- B. the signing of the Amended Investment Contract did not breach the Claimant’s legitimate expectations, or establish legitimate expectations regarding the amount of the investment (paragraphs 1234 – 1241);
- C. the KGB was not involved in the project (paragraphs 1242 – 1246);
- D. the Claimant’s attempt to attribute the construction delays to the Respondent is unfounded (paragraphs 1247 – 1250);
- E. MCEC negotiated with Manolium-Engineering in good faith after the Final Commissioning Date passed (paragraphs 1251 – 1258);
- F. it was reasonable and proportionate for MCEC to apply to terminate the Amended Investment Contract (paragraph 1259);
- G. MCEC did not artificially create a situation in which Manolium-Engineering was unable to avoid tax liability (paragraph 1260);
- H. Presidential Decree No. 101 dated 1 March 2010 did not breach the Claimant’s legitimate expectations (paragraphs 1261 – 1266);
- I. the President did not instruct for the land plot intended for the Investment Object to be seized (paragraphs 1267 – 1269); and
- J. the President’s order of did not breach the Respondent’s obligation to act transparently (paragraphs 1270 – 1278).

1. The Claimant did not enter into the Amended Investment Contract under duress

1223. In paragraph 35 of the Reply, Claimant raises an allegation (which it failed to raise in the Notice) that the Amended Investment Contract was “*signed under extreme duress brought about through the coercive powers of the Respondent*”.¹⁹⁰¹

¹⁹⁰¹ Reply, paragraph 35, CS-5.

1224. The Claimant alleges that MCEC insisted through its “*coercive powers*” on the inclusion of a term requiring that the Claimant’s investments amount to “*not less than USD 15 million*”, and that the Claimant “*had no choice but to accept*” because otherwise MCEC “*would terminate the Investment Contract*” and the “*Claimant would lose the entire USD 3 million that it had already invested.*”¹⁹⁰²
1225. The Claimant raises its allegation of “*duress*” only in the factual section of the Reply and does not expressly contend that MCEC’s alleged conduct violated the FET standard.¹⁹⁰³ The Claimant has therefore failed to satisfy its burden of proving that the alleged conduct violated the FET standard. Furthermore, the Respondent has already submitted that the alleged conduct (which took place in 2006 – 2007) falls outside of the temporal scope of Protocol 16’s protections.¹⁹⁰⁴ The Tribunal may therefore consider it a moot issue. Nevertheless, the Respondent submits that the conduct complained of would in any event fall short of violating of the FET standard for the following reasons.
1226. The burden of proof for a claim of duress is demanding in investment arbitration. The Respondent submits that *Hamester v. Ghana* is particularly instructive on the present facts.
1227. In *Hamester*, the claimant alleged that a price agreement between the joint venture in which it held a share, Wamco, and the Ghana Cocoa Board (“**Cocobod**”), was invalid because it had been concluded under duress. The claimant alleged that Cocobod had threatened to suspend the supply of cocoa beans to Wamco if the agreement was not signed.¹⁹⁰⁵ The tribunal dismissed the duress allegation, noting in particular that: (i) judged objectively, the price agreement was a “*good bargain for Wamco*”; (ii) there was not “*any protest from Wamco after the agreement was signed*”; and (iii) Wamco

¹⁹⁰² Reply, paragraphs 35 – 38, **CS-5**.

¹⁹⁰³ Reply, paragraphs 35 and 38, **CS-5**.

¹⁹⁰⁴ See paragraph 737 above.

¹⁹⁰⁵ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 207, **Exhibit RL-46**.

had relied on the agreement in its future dealings with Cocobod.¹⁹⁰⁶ The tribunal therefore held that the negotiations were “[c]learly [...] between two partners, each of them deploying its bargaining power with the aim of having its views prevail”.¹⁹⁰⁷

1228. In the present case, the Claimant alleges that MCEC, exercising “coercive powers”, left the Claimant with “no choice” but to enter into the Amended Investment Contract or else “lose the entire USD 3 million that it had already invested”.¹⁹⁰⁸ The Claimant’s allegations are not borne out by the facts.
1229. Contrary to what the Claimant now suggests, the Claimant initiated the review of the Investment Contract on its own initiative, not under the “coercive powers” of MCEC.¹⁹⁰⁹ In particular, the Claimant’s proposal was to amend the components of Communal Facilities and, instead of the Motor Transport Base and the Building Under Construction, to build the Pull Station and the Road.¹⁹¹⁰ As the Respondent explains in paragraphs 39 – 46 above, this was a good deal for the Claimant, since it significantly reduced the scope of the facilities that would have to be constructed and commissioned in order to acquire the right to develop the Investment Object¹⁹¹¹ – as the Claimant itself acknowledges.¹⁹¹²
1230. The Claimant’s assertion that the “initially agreed upon terms” were “significantly worsened” by the inclusion of the requirement for the Claimant to invest “not less than USD 15 million” is also incorrect.¹⁹¹³ Even under original Investment Contract, the deal had always been that the Claimant would only acquire the right to develop

¹⁹⁰⁶ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 252, **Exhibit RL-46**.

¹⁹⁰⁷ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, paragraph 253, **Exhibit RL-46**.

¹⁹⁰⁸ Reply, paragraphs 35 – 38, **CS-5**.

¹⁹⁰⁹ See paragraph 40 above.

¹⁹¹⁰ See paragraph 41 above; Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 31, **RWS-5**.

¹⁹¹¹ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 23, **RWS-5**.

¹⁹¹² Reply, paragraph 40(i), **CS-5**.

¹⁹¹³ Reply, paragraphs 34 and 37, **CS-5**.

the Investment Object after having constructed the Communal Facilities.¹⁹¹⁴ The removal of the cap for the Claimant's amount of investment was aimed at avoiding a situation in which the Claimant: (i) incurred US\$15 million in costs; but (ii) did not complete the construction of the Communal Facilities. In such a scenario, the Claimant would refuse to continue construction works, whilst still not acquiring the right to develop the Investment Object. Removing this ambiguity was therefore in the interests of all parties, to avoid potential misunderstandings later.¹⁹¹⁵

1231. The only evidence the Claimant has provided in support of its allegation that the Claimant “*had no choice but to accept*” because otherwise MCEC “*would terminate the Investment Contract*” is the hearsay evidence of Mr Dolgov.¹⁹¹⁶ Given that the Claimant initiated the review of the Investment Contract, and the amendments were strongly in its favour, this unsupported allegation strongly lacks credibility. Furthermore, Mr Dolgov was himself absent for most of the negotiations.¹⁹¹⁷
1232. Like in *Hamester*, the Claimant raised no protest to the Amended Investment Contract after it was signed, presumably because it was better off under the new arrangement and would have to build less to acquire the right to develop the Investment Object. Mr Antonenko even recalls that Mr Dolgov was in “*good spirits*” after the new contract was signed.¹⁹¹⁸ It is only now, in the second round of written submissions, that the Claimant raises its allegation of “*duress*” for the first time. As for the Claimant's contention that it would “*lose the entire USD 3 million that it had already invested*”, this is undermined by the fact that, even according to the Claimant's own reports, it had spent less than half this amount by this time.¹⁹¹⁹

¹⁹¹⁴ Investment Contract, Clause 2, **Exhibit C-34**.

¹⁹¹⁵ See paragraph 39 above; Witness Statement of Mr Antonenko dated 30 May 2019, paragraphs 28 – 35, **RWS-5**.

¹⁹¹⁶ Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraphs 8 – 13, **CWS-5**.

¹⁹¹⁷ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 25, **RWS-5**.

¹⁹¹⁸ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 23, **RWS-5**.

¹⁹¹⁹ See paragraph 56 above.

1233. The Respondent submits that the Claimant’s allegation of duress strongly lacks credibility and that the alleged conduct falls manifestly short of violating the FET standard.

2. The signing of the Amended Investment Contract did not breach the Claimant’s legitimate expectations, or establish legitimate expectations regarding the amount of the investment

1234. In paragraph 34 of the Reply, the Claimant alleges that the Amended Investment Contract “*significantly worsened the initially agreed upon terms because instead of investing a maximum of USD 15 million in the Communal Facilities, the Claimant was now obligated to invest more than USD 15 million to complete the New Communal Facilities if costs continued to increase*”.¹⁹²⁰

1235. The Claimant does not expressly claim that the signing of the Amended Investment Contract breached its legitimate expectations. Furthermore, the Respondent has already submitted that such claims fall outside the temporal scope of Protocol 16’s protections, because they concern conduct which took place long before 1 January 2015.¹⁹²¹ Nevertheless, the Respondent shall briefly set out why the allegation would fall far short of the mark.

1236. The Respondent already explains above that the Amended Investment Contract was a good deal for the Claimant. Manolium-Engineering would have to build less and incur lower costs in order to acquire the same right to develop the Investment Object.¹⁹²² The Respondent therefore submits that, when viewed in the round, the Amended Investment Contract improved the Claimant’s initial expectations, rather than “*worsened*” them.¹⁹²³

¹⁹²⁰ Reply, paragraph 34 (emphasis removed), CS-5.

¹⁹²¹ See paragraph 737 above.

¹⁹²² See paragraph 1229 above.

¹⁹²³ Reply, paragraph 34, CS-5.

1237. Mr Dolgov also alleges that Mr Pavlov, the chairman of MCEC at the time of the negotiations, who passed away in 2010, “*assured*” him that under the Amended Investment Contract, “*the increase [in construction costs] might tentatively be no more than 10% of the initial costs*”.¹⁹²⁴ In the Reply, the Claimant also suggests that it entered into the Amended Investment Contract on the basis of this alleged conversation.¹⁹²⁵
1238. The Respondent submits that Mr Pavlov’s alleged assurance that the costs would be “*no more than 10% of the initial costs*” falls far short of establishing a legitimate expectation regarding the amount of the Claimant’s investment.
1239. Mr Dolgov’s recollection of the alleged discussion with Mr Pavlov lacks credibility. Mr Pavlov was not involved in the day-to-day running of MCEC’s projects, and would not have been in a position to deal with a specific and technical question regarding the amount of costs that would be incurred by an investor in a particular project.¹⁹²⁶ Mr Antonenko has no recollection of such matters being discussed.¹⁹²⁷
1240. Moreover, a legitimate expectation must be objectively reasonable in the circumstances.¹⁹²⁸ Even if Mr Pavlov had “*assured*” Mr Dolgov that the costs would be “*no more than 10% of the initial costs*” (which is denied), it would have been highly unreasonable for Mr Dolgov to rely solely on such an assurance in entering into the Amended Investment Contract, particularly given that Mr Pavlov was not involved in the day-to-day running of the project and Mr Dolgov was himself meant

¹⁹²⁴ Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraph 10, **CWS-5**; Reply, paragraph 40(iii), **CS-5**.

¹⁹²⁵ Reply, paragraph 40(ii), **CS-5**.

¹⁹²⁶ See paragraphs 47 – 50 above; Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 37, **RWS-5**.

¹⁹²⁷ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 40, **RWS-5**.

¹⁹²⁸ Defence, paragraph 580, **RS-18**; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Liability, 30 July 2010, paragraph 228, **Exhibit CL-62**.

to be the ‘construction specialist’.¹⁹²⁹ Mr Dolgov also does not appear to have confirmed Mr Pavlov’s alleged cost estimate with any of the MCEC deputies, but has waited until the present arbitration before mentioning the alleged ‘conversation’ for the first time.¹⁹³⁰

1241. Lastly, by signing the Amended Investment Contract, the Claimant expressly agreed that it would construct the New Communal Facilities – whatever the cost.¹⁹³¹ In doing so, the Claimant agreed to bear the risk of the costs overrunning Mr Dolgov’s estimations. Even if Mr Dolgov himself believed that the “*the increase [in construction costs] might tentatively be no more than 10% of the initial costs*”¹⁹³², this is not sufficient to establish a legitimate expectation under international law.¹⁹³³

3. The KGB was not involved in the project

1242. In paragraph 190 – 197 of the Reply, the Claimant describes an alleged meeting between Mr Dolgov and KGB officers in 2010, alleging that “[i]t was no coincidence that the repeated and unfair actions taken by the Respondent correspond with the involvement of the KGB”.¹⁹³⁴

1243. It is undisputed that the burden of proving allegations of a conspiracy lies with the Claimant: a “*claimant before an international tribunal must establish the facts on*

¹⁹²⁹ Witness Statement of Mr Antonenko dated 30 May 2019, paragraph 41, **RWS-5**.

¹⁹³⁰ Witness Statement of Mr Antonenko dated 30 May 2019, paragraphs 38 – 39, **RWS-5**.

¹⁹³¹ Amended Investment Contract, Clauses 7.10 and 8.19, **Exhibit C-66**.

¹⁹³² Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraph 10, **CWS-5**; Reply, paragraph 40(ii), **CS-5**.

¹⁹³³ *Suez, Sociedad General de Aguas de Barcelona, S.A. and InterAgua Servicios Integrales del Agua, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, paragraph 228, **Exhibit CL-62**.

¹⁹³⁴ Reply, paragraph 197, **CS-5**.

which it bases its case or else it will lose the arbitration”.¹⁹³⁵ The standard of proof for proving allegations of State orchestrated harassment is high.¹⁹³⁶

1244. In *Rompetrol v. Romania*, the claimant alleged that it had been subjected to “*extraordinary State orchestrated harassment*”, but failed to offer sufficient proof.¹⁹³⁷ The allegations advanced rested primarily on evidence characterised by the respondent as “*self-interested*”.¹⁹³⁸ The tribunal held that where “*organized harassment*” is alleged, “*some proof is required [...] that different actions pursued on different paths by different actors are linked together by a common and coordinated purpose.*”¹⁹³⁹ It went on to state that “*sufficient weight of positive evidence [...] would be required to sustain serious allegations of sustained and coordinated misconduct, as opposed to pure probability or circumstantial inference*”.¹⁹⁴⁰
1245. In the present case, the Claimant does not explain how the alleged meeting between Mr Dolgov and the KGB in 2010 violated its rights under international law or fits into its FET or expropriation claims. In any event, as the Respondent explains in paragraphs 250 - 255 above, the Claimant’s contention that “*problems*”¹⁹⁴¹ relating to

¹⁹³⁵ *The Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 179, **Exhibit RL-100**.

¹⁹³⁶ *The Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraphs 272 – 273, **Exhibit RL-100**; *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, paragraphs 123 – 124 and 134 – 137, **Exhibit RL-134**; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paragraphs 374 – 376, **Exhibit RL-55**.

¹⁹³⁷ *The Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 272, **Exhibit RL-100**.

¹⁹³⁸ *The Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 272, **Exhibit RL-100**.

¹⁹³⁹ *The Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, paragraph 273, **Exhibit RL-100**.

¹⁹⁴⁰ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, paragraphs 272 – 273, **Exhibit RL-100**.

¹⁹⁴¹ Reply, paragraph 196, **CS-5**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 114, **CWS-5**.

the construction and commissioning of the New Communal Facilities were caused by the KGB is entirely unsupported, speculative and does not add-up on the facts.¹⁹⁴²

1246. Respondent therefore submits that the Claimant fall manifestly short of satisfying the demanding standard of proof for allegations of State orchestrated harassment.

4. The Claimant’s attempt to attribute the construction delays to the Respondent is unfounded

1247. In paragraphs 629 – 630 of the Reply, the Claimant alleges that “*bureaucratic hurdles imposed by the Respondent [...] prevented the timely completion of this project*”.¹⁹⁴³

The Claimant states as follows:

“[T]he Respondent was responsible for the following causes of delays:

(i) The regular delays in the provision of the construction permissions by Gosstroy;

(ii) The delay in the provision of the land plot for the Trolley Depot from 27 March 2007 until 24 May 2007 by the Minsk Land Management and Geodetic Service;

(iii) The four-month delay in the construction of the Road due to the need for unplanned deforestation in March 2008 - July 2008;

(iv) The six-month delay in the construction of the Trolley Depot due to newly discovered water pipes in September 2007 - March 2008;

(v) The regular and numerous delays due to the outdated construction project of the Trolley Depot since August 2007 until March 2011;

*(vi) The delay resulting from the relocation of the contractors for construction of the other objects under orders of the Minsk City Executive Committee”.*¹⁹⁴⁴

1248. If the Claimant’s position is that the delays allegedly caused by MCEC constitute independent violations of the FET standard (as was the Claimant’s position in the

¹⁹⁴² Fourth Witness Statement of Mr Dolgov dated 28 February 2019, paragraphs 114 – 120, **CWS-5**.

¹⁹⁴³ Reply, paragraph 121, **CS-5**.

¹⁹⁴⁴ Reply, paragraph 629, **CS-5**.

Notice¹⁹⁴⁵), the Respondent already explains above that these claims: (i) fall outside the scope of Protocol 16's substantive protections, because they concern conduct which occurred before the EEU Treaty entered into force;¹⁹⁴⁶ and (ii) do not involve any exercise of sovereign authority.¹⁹⁴⁷ In any event, the Respondent submits that the Claimant would fall far short of establishing a violation of the FET standard, even if the claims were within the jurisdiction of the Tribunal.

1249. As the Respondent explains in paragraphs 109 – 188 above, it was the Claimant that was responsible for causing the delays that prevented the timely completion of the New Communal Facilities. As the Respondent explains, despite MCEC having already postponed the contractual construction deadline from December 2008 to July 2011 at the Claimant's request, the Claimant and Manolium-Engineering still failed to construct the New Communal Facilities by the Final Commissioning Date because of the Claimant's own inability and/or unwillingness to finance the construction works.¹⁹⁴⁸ The Claimant's allegation that the "*Respondent [...] prevented the timely completion of this project*" is therefore unfounded.¹⁹⁴⁹

1250. In any event, even if the minor delays alleged by the Claimant in paragraph 629 of the Reply were attributable to the Respondent (which is denied), the Respondent submits that the Claimant would still not come close to establishing a breach of FET. The Claimant does not allege that the alleged delays were caused in bad faith, were discriminatory or breached its legitimate expectations.¹⁹⁵⁰ Rather, the Claimant's complaint appears to be directed more at the "*bureaucratic*" nature of the alleged delays.¹⁹⁵¹ Given that Mr Dolgov had been living and working in Belarus since the

¹⁹⁴⁵ Notice, paragraphs 447 – 451, **CS-1**.

¹⁹⁴⁶ See paragraph 737 above.

¹⁹⁴⁷ See paragraph 822 above.

¹⁹⁴⁸ Defence, paragraphs 76 – 98, **RS-18**; Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 102 – 105, **CWS-5**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 33, **RWS-4**.

¹⁹⁴⁹ Reply, paragraph 121, **CS-5**.

¹⁹⁵⁰ Reply, paragraphs 63 – 129, **CS-5**.

¹⁹⁵¹ Reply, paragraphs 63, 121, 122 and 164, **CS-5**.

early 1990s, however, he would have been well aware of any “*bureaucratic hurdles*” in Belarus – to the extent that there were any.¹⁹⁵² The Claimant therefore proceeded with the project “*on notice of both the prospects and the potential pitfalls*” – and cannot now claim that its legitimate expectations (or the FET standard more generally) have been violated.¹⁹⁵³

5. MCEC negotiated with Manolium-Engineering in good faith after the Final Commissioning Date passed

1251. In paragraphs 640 – 653 of the Reply, the Claimant alleges that MCEC acted in bad faith when it “*rejected the reasonable [...] request*” by Manolium-Engineering to extend the contractual term for construction of the New Communal Facilities after the Final Commissioning Date passed.¹⁹⁵⁴ According to the Claimant, MCEC’s “*purported justification*” for the refusal was “*mere pretext*” and constitutes a violation of the FET standard.¹⁹⁵⁵

1252. Furthermore, the Claimant alleges that MCEC “*consistently proposed adding draconian terms to the Investment Contract, and was even prepared to compel the Claimant to them*”.¹⁹⁵⁶ The Claimant alleges that MCEC’s “*refusal to provide a realistic proposal, coupled with its unjustified rejection of the Claimant’s proposal, demonstrate that it was not negotiating in good faith*”.¹⁹⁵⁷

1253. The Respondent submits in paragraph 737 above that these claims fall outside the scope of Protocol 16’s substantive protections, because they concern conduct which occurred before the EEU Treaty entered into force. The Respondent also submits in paragraph 815 above that MCEC’s decision not to postpone the contractual deadlines

¹⁹⁵² First Witness Statement of A. Dolgov dated 10 May 2018, paragraph 21, **CWS-1**; Reply, paragraph 121, **CS-5**.

¹⁹⁵³ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paragraph 20.37, **Exhibit RL-58**.

¹⁹⁵⁴ Reply, paragraph 642, **CS-5**.

¹⁹⁵⁵ Reply, paragraphs 643 and 640 – 642, **CS-5**.

¹⁹⁵⁶ Reply, paragraphs 647 and 644 – 653, **CS-1**.

¹⁹⁵⁷ Reply, paragraph 653, **CS-5**.

was carried out in a purely contractual capacity, and so *prima facie* cannot violate Protocol 16. If, however, the Tribunal disagrees, the Respondent submits that the Claimant’s allegations are in any event unfounded.

1254. As the Respondent explains in paragraphs 256 – 331 above, the Claimant’s and/or Manolium-Engineering’s proposals to further postpone the deadlines for constructing the New Communal Facilities were either unreasonable,¹⁹⁵⁸ involved fundamentally changing the terms of the agreed project¹⁹⁵⁹ or were simply unworkable in practice.¹⁹⁶⁰ The Claimant’s contention that MCEC rejected the its “*imminently reasonable* [sic]” proposals “[w]ithout any justification” is therefore baseless.¹⁹⁶¹ Further, the Claimant does not explain what it means when it asserts that MCEC was “*prepared to compel the Claimant*”¹⁹⁶² to the terms it proposed, nor does it provide any evidence in support of this statement.

1255. As for MCEC’s own proposals for postponing the deadlines, the Respondent submits that these were wholly reasonable given the Claimant’s persistent delays in the project to date.¹⁹⁶³ Given that Tekstur agreed not long afterwards to terms similar to those proposed by MCEC in its draft of 3 April 2012, the Claimant’s assertion that “*no rational investor would agree to such terms*” is also baseless.¹⁹⁶⁴

1256. Lastly, the Respondent submits that the proposals made by the Claimant and Manolium-Engineering on 18 June 2012 (to finance the estimated cost of completing the New Communal Facilities) and on 18 July 2014 (to pay US\$3 million for

¹⁹⁵⁸ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 43(b) and 44, **RWS-2**.

¹⁹⁵⁹ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 57 – 58, **RWS-2**.

¹⁹⁶⁰ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 43(c) and 44, **RWS-2**.

¹⁹⁶¹ Reply, paragraphs 641 and 642, **CS-5**.

¹⁹⁶² Reply, paragraph 647, **CS-5**.

¹⁹⁶³ See paragraphs 256 – 331 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 45 – 48, **RWS-2**.

¹⁹⁶⁴ Reply, paragraph 650, **CS-5**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 47, **RWS-2**.

Minsktrans to complete the New Communal Facilities itself) were unreasonable, because they were conditioned upon significantly changing the terms of the Amended Investment Contract – at the expense of the State.¹⁹⁶⁵ There is no reason why MCEC should have accepted such unreasonable terms given the Claimant’s delays and contractual breaches to date.

1257. The Claimant’s allegation that MCEC did not “*propose any realistic alternative*” to the Claimant’s proposals is also incorrect: MCEC informed the Claimant on 26 July 2012 that it agreed to all of the Claimant’s suggestions except its proposal to grant ownership of the land for the Investment Object, rather than lease rights (as under the Amended Investment Contract).¹⁹⁶⁶ The Claimant never replied.¹⁹⁶⁷

1258. The Respondent therefore submits that the Claimant’s allegation that MCEC was “*not negotiating in good faith*” is unfounded.¹⁹⁶⁸ Even though MCEC would have been perfectly entitled to apply to the courts to terminate the Amended Investment Contract as soon as the Final Commissioning Date passed (given that it had already agreed to postpone the contractual deadline for constructing the New Communal Facilities from December 2008 to July 2011 at the Claimant’s request), it was in MCEC’s best interest to try to find a mutually acceptable solution to enable the project with the Claimant to go ahead.¹⁹⁶⁹ It was the Claimant’s own reluctance to continue with the

¹⁹⁶⁵ See paragraphs 295 - 308 above; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 57 – 58 and 100 – 102, **RWS-2**.

¹⁹⁶⁶ Defence, paragraphs 76 – 98 and 542 – 564, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 59, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 54 – 56, **RWS-4**.

¹⁹⁶⁷ Defence, paragraphs 76 – 98 and 542 – 564, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 61, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 56, **RWS-4**.

¹⁹⁶⁸ Reply, paragraph 653, **CS-5**.

¹⁹⁶⁹ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 23, **RWS-2**.

project which finally left MCEC with no choice but to apply to the courts for termination.¹⁹⁷⁰

6. It was entirely proportionate for MCEC to apply to terminate the Amended Investment Contract, as it was contractually entitled to do

1259. In paragraphs 631 – 638 of the Reply, the Claimant alleges that the Respondent violated the FET standard because: (i) the termination of the Amended Investment Contract was not “*appropriate*” or “*proportional*”;¹⁹⁷¹ and (ii) there was “*no valid ground to terminate the Investment Contract*”.¹⁹⁷² The Respondent submits in paragraph 737 above that MCEC’s submission of a claim to the courts falls outside the temporal scope of the EEU Treaty’s protections. Moreover, as the Respondent submits in paragraphs 1082 – 1097 above, it was entirely proportionate for MCEC to apply to the courts to terminate the Amended Investment Contract, as it was contractually entitled to pursuant to Clause 16.2.1. For the same reasons, the Respondent submits that the conduct complained of does not violate the FET standard.

7. MCEC did not artificially create a situation where Manolium-Engineering was unable to avoid tax liability

1260. In paragraphs 654 – 656 of the Reply, Claimant alleges that, by refusing in “*bad faith*” to “*formally accept the New Communal Facilities to its ownership*”, MCEC “*artificially created*” a situation where Manolium-Engineering “*was unable to avoid tax liability*”.¹⁹⁷³ As the Respondent explains in paragraphs 1130 – 1139 above, the Claimant’s allegations are unfounded. For the same reasons, the Respondent submits that the conduct complained of does not violate the FET standard.

¹⁹⁷⁰ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 36, 48 and 92, **RWS-2**; Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 57 – 61, **RWS-4**.

¹⁹⁷¹ Reply, paragraphs 631 – 632, **CS-5**.

¹⁹⁷² Reply, paragraphs 638 and 633 – 639, **CS-5**.

¹⁹⁷³ Reply, paragraphs 625 and 654 – 656, **CS-5**.

8. Presidential Decree No. 101 dated 1 March 2010 did not breach the Claimant's legitimate expectations

1261. In paragraphs 657 – 662 of the Reply, the Claimant alleges that Presidential Decree No. 101 dated 1 March 2010 violates the FET standard because:

A. the “*requirement to pay for the cost of land is inconsistent with the Investment Contract*”;¹⁹⁷⁴ and

B. this requirement “*was not part of the investment framework at the time the Claimant made its investment and therefore did not form a part of the investor's reasonable expectations*”.¹⁹⁷⁵

1262. The Respondent submits in paragraphs 737 above that the Claimant's claim falls outside the temporal scope of Protocol 16's substantive protections, because the conduct complained of occurred before the EEU Treaty entered into force.¹⁹⁷⁶ If the Tribunal disagrees with this, the Respondent submits that, in any event, the claim falls well short of the mark.

1263. As the Respondent explains in detail in paragraphs 87 – 106 above, the Claimant appears to either misunderstand the relevant legal background, or intentionally misrepresent it. Even when the Claimant entered into the Investment Contract, there was a “*requirement to pay for the cost of land*” under Belarusian law.¹⁹⁷⁷ As the Respondent explains, there were simplifications to the form in which such payments were made in January 2006 (which the Claimant appears to be referring to in paragraphs 657 – 662 of the Reply), but, in practice, the obligation to “*pay for the cost of land*”, including the land on which the Investment Object was to be built, remained the same.¹⁹⁷⁸ The Claimant's suggestion that it had a “*reasonable expectation*” to use

¹⁹⁷⁴ Reply, paragraph 658, CS-5.

¹⁹⁷⁵ Reply, paragraphs 662 and 657 – 662, CS-5.

¹⁹⁷⁶ See paragraphs 87 – 106 above.

¹⁹⁷⁷ See paragraphs 87 – 106 above.

¹⁹⁷⁸ See paragraphs 87 – 106 above.

the land plot on which the Investment Object was to be developed for free is therefore nonsense.

1264. In any event, even if the Claimant were correct that a new “*requirement to pay for the cost of land*” was introduced into Belarusian law during the period of implementation of the Investment Contract (which it was not), the Respondent submits that this would still not constitute a violation of the FET standard. It is an established principle that the State has the right to regulate its affairs in the public interest, so long as it does so in good faith and respecting the rights of the investor. As the tribunal in *Saluka v. Czech Republic* noted:

“No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well”.¹⁹⁷⁹

1265. Similarly, the tribunal in *Micula v. Romania* noted:

“[T]he fair and equitable treatment obligation is not an unqualified guarantee that regulations will never change. Investors must expect that the legislation will change from time to time, absent a stabilization clause or other specific assurances giving rise to a legitimate expectation of stabilization. The BIT’s protection of the stability of the legal and business environment cannot be interpreted as the equivalent of a stabilization clause”.¹⁹⁸⁰

1266. In paragraphs 657 – 662 of the Reply, the Claimant is essentially suggesting that all regulatory requirements should have been frozen in time from the moment it entered into the Investment Contract, regardless of the impact this would have on Belarus’s right to regulate its internal affairs. As the Respondent explains in paragraph 1212 above, the FET standard does not comprise any such obligation.

¹⁹⁷⁹ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paragraph 305, **Exhibit CL-16**.

¹⁹⁸⁰ *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paragraph 529, **Exhibit RL-89**.

9. The President did not instruct for the land plot intended for the Investment Object to be seized

1267. In paragraphs 668 – 671 of the Reply, the Claimant alleges that MCEC “*issued a decision*” on 15 August 2014 to transfer the “*land plot for the Investment Object to the management of the state construction company “Minskstroy”*” based “*solely on the President’s decision*”.¹⁹⁸¹ The Claimant alleges that this “*decision*” violated the FET standard because it “*was an arbitrary exercise of executive authority that was issued non-transparently and without the justification of any legal procedure*”.¹⁹⁸²
1268. The Respondent submits in paragraphs 737 above that the Claimant’s claim falls outside the temporal scope of Protocol 16’s substantive protections, because the conduct complained of occurred before the EEU Treaty entered into force. If the Tribunal disagrees with this, the Respondent submits that, in any event, the substance of the claim is hopeless and based on wholly distorted facts.
1269. As the Respondent explains in paragraphs 389 – 398 above, neither the President, nor MCEC, took any decision to transfer the “*land plot for the Investment Object*” to Minskstroy – and, even if they did (which is denied), the transfer of the land plot from one state-owned entity to another would not prevent Manolium-Engineering from leasing the land plot or make the “*Claimant’s project [...] unavailable*”.¹⁹⁸³ The Claimant’s allegation that the so-called “*decision*” was an “*arbitrary exercise of executive authority that was issued non-transparently*” is therefore unfounded – as there was no such decision.¹⁹⁸⁴ The Respondent therefore submits that the Claimant has failed to establish a violation of FET on the basis of the alleged conduct.

¹⁹⁸¹ Reply, paragraphs 670 and 668 – 671, CS-5.

¹⁹⁸² Reply, paragraph 671, CS-5.

¹⁹⁸³ Reply, paragraph 670, CS-5.

¹⁹⁸⁴ Reply, paragraph 671, CS-5.

10. The President’s order of 20 January 2017 did not breach the Respondent’s obligation to act transparently

1270. In paragraphs 672 – 679 of the Reply, the Claimant maintains its mistaken position that the issuance of the President’s order of 20 January 2017 violated the FET standard, and, in particular, the obligation that the State act in a transparent manner.¹⁹⁸⁵
1271. As the Respondent explains in paragraphs 547 – 575 above, the Claimant’s assertion that the Respondent has “*failed to justify the purported legality of the Presidential Order of 20 January 2017*” is baseless – the Respondent already sets out the legal framework in which the President’s order was issued in detail in paragraphs 339 – 353 of the Defence. The Claimant completely ignores this. In any event, the Respondent addresses the Claimant’s contention that the President’s order of 20 January 2017 violates the FET standard below.
1272. The Respondent agrees with the Claimant that the obligation for the State to act transparently is comprised within the FET standard.¹⁹⁸⁶ The Respondent also agrees with the statement in Dolzer and Schreuer cited by the Claimant that transparency means that “*the legal framework for the investor’s operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework*”.¹⁹⁸⁷ However, for the reasons already given in the Defence, the unqualified requirement of total transparency set out in *Metalclad* (on which the Claimant continues to rely¹⁹⁸⁸) requires some qualification: the task is to determine whether the alleged failure to provide transparency is indicative of “*either a larger failure in the fair operation of*

¹⁹⁸⁵ Reply, paragraphs 663 – 667, **CS-5**.

¹⁹⁸⁶ Defence, paragraphs 576 – 577, **RS-18**.

¹⁹⁸⁷ Reply, paragraph 665, **CS-5**; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Ed), Oxford University Press, 2012, page 149, **Exhibit CL-127**.

¹⁹⁸⁸ Reply, paragraph 666, **CS-5**.

the regulatory system or a lack of good faith or arbitrary decision-making directed against the particular investor".¹⁹⁸⁹

1273. As noted in Dolzer and Schreuer, the concept of transparency under international law is also "*closely related to protection of the investor's legitimate expectations*".¹⁹⁹⁰ Accordingly, if the investor's legitimate expectations have been met, the Respondent submits that this is likely to indicate that the alleged failure to provide transparency does not violate the FET standard.
1274. As the Respondent explains in the Defence¹⁹⁹¹ and in paragraphs 551 – 570 above, the President's order which the Claimant alleges violated the FET standard is a procedural document which is required under Belarusian law for any transfer of real property into municipal ownership to enforce against tax liabilities. This requirement is expressly set out in Article 165 of the Regulation (as the Respondent describes in paragraph 339 of the Defence), which is publically available and has consistently been applied by the Belarusian state authorities. Accordingly, if, as the Claimant contends in the Reply, the transparency standard requires that "*the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework*",¹⁹⁹² then the Respondent submits that the President's order of 20 January 2017 readily complies with this standard.¹⁹⁹³
1275. The Claimant also alleges that "*irrespective of the particular content of the Presidential Order, the fact that (i) the Presidential Order served as a ground for transfer of the New Communal Facilities and, thus, affected the Claimant's rights;*

¹⁹⁸⁹ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration* (2nd Ed), Oxford University Press, 2017, paragraph 7.207, **Exhibit RL-44**.

¹⁹⁹⁰ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Ed), Oxford University Press, 2012, page 149, Exhibit **CL-127**.

¹⁹⁹¹ Defence, paragraphs 339 – 353, **RS-18**.

¹⁹⁹² Reply, paragraph 665, **CS-5**; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Ed), Oxford University Press, 2012, page 149, Exhibit **CL-127**.

¹⁹⁹³ Reply, paragraph 665, **CS-5**; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2nd Ed), Oxford University Press, 2012, page 149, Exhibit **CL-127**.

and (ii) was not made available to the Claimant even at the present time, constitutes a breach of the requirement for transparency that is part of the FET standard".¹⁹⁹⁴

1276. The Claimant's position appears to be that, in order to comply with the FET standard, the Respondent is required to disclose to the Claimant any decision that (according to the Claimant) affects its "*rights*", regardless of whether such documents are disclosable to the public under Belarusian law. For the reasons already given in paragraph 602 of the Defence, the Respondent strongly rejects this argument. Given that Mr Dolgov has spent a very significant part of his career working in Belarus, he would have been well aware that orders of the President are non-public documents under Belarusian law at the time the Claimant entered into the Investment Contract. It is misleading for the Claimant to now plead ignorance and claim that this element of the Belarusian legal regime violates its rights under international law. The Claimant entered into the Investment Contract "*on notice*" of both the "*prospects*" and the "*potential pitfalls*" of the legal regime in Belarus.¹⁹⁹⁵ If there was some aspect of this regime that was not agreeable to the Claimant, the Claimant was free to invest elsewhere. The Claimant's position is therefore unfounded.

1277. The Claimant also continues to misrepresent the President's order of 20 January 2017 as the "*legal justification purportedly supporting the transfer of the New Communal Facilities to Minsk ownership*".¹⁹⁹⁶ As the Respondent explains in paragraph 555 above, the order of the Economic Minsk dated 18 August 2016 served as the ground for the transfer of the New Communal Facilities into municipal ownership to enforce against Manolium-Engineering's tax liabilities, not the President's order of 20 January 2017 (the purpose of which was merely to complete the formal procedure of enforcing the tax liabilities, as already ordered by the Economic Court of Minsk). Given that Manolium-Engineering was provided with a copy of the Economic Court of Minsk's order of 18 August 2016, familiarised itself with it, and chose not to

¹⁹⁹⁴ Reply, paragraph 679, **CS-5**.

¹⁹⁹⁵ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paragraph 20.37, **Exhibit RL-58**.

¹⁹⁹⁶ Reply, paragraph 674, **CS-5**.

appeal it, it is highly misleading for the Claimant to now claim that it has never been provided with the “*legal justification*” for the transfer of the New Communal Facilities into municipal ownership.¹⁹⁹⁷

1278. For all of the above reasons, the Respondent submits that the issuance of the President’s order of 20 January 2017 does not constitute a violation of the FET standard.

VII. CAUSATION AND QUANTUM

1279. If, contrary to what is submitted above, the Tribunal finds that the Respondent has violated the EEU Treaty by its treatment of the Claimant, the Tribunal should proceed to assess what injury, if any, was caused by the violations.¹⁹⁹⁸ If the Tribunal finds that the Respondent’s violations caused the Claimant to suffer injury, the Tribunal should proceed to quantify damages in respect of the injury suffered.¹⁹⁹⁹

1280. In the Notice, the Claimant seeks damages in the amount of:

- A. **US\$171,300,000** or, alternatively, **US\$8,650,000**, as “*lost profit resulting from losing the right to perform the Amended Investment Contract (including interest accrued)*”,²⁰⁰⁰ and
- B. **US\$36,900,000** as “*direct losses caused by the expropriation of the New Communal Facilities (including interest accrued)*”.²⁰⁰¹

1281. In the Reply, the Claimant reformulates its position on damages, seeking:

¹⁹⁹⁷ See paragraph 555 above; Reply, paragraph 674, **CS-5**.

¹⁹⁹⁸ ILC Articles, Article 31, **Exhibit RL-15**.

¹⁹⁹⁹ ILC Articles, Article 36, **Exhibit RL-15**.

²⁰⁰⁰ Notice, paragraph 530(a), **CS-1**.

²⁰⁰¹ Notice, paragraph 530(b), **CS-1**.

- A. **US\$68.9 million** in lost profits “*resulting from losing the right to perform the [Amended] Investment Contract (plus appropriate interest)*” (the “**Lost Profits**”);²⁰⁰² or²⁰⁰³
- B. **US\$31.87 million**, which the Claimant contends represents the amount which “*any other investor would pay for the right to develop an investment object on the land plot intended for the Investment Object*”²⁰⁰⁴ (the “**Alternative Lost Profits**”, and together with the Lost Profits, the “**Contractual Losses**”);²⁰⁰⁵ and
- C. **US\$20.4 million** in “*direct losses caused by the expropriation of the New Communal Facilities (plus interest)*” (the “**NCF Losses**”).²⁰⁰⁶

1282. In the alternative, the Claimant seeks:

- A. the Lost Profits; or
- B. the Alternative Lost Profits; or
- C. the NCF Losses.²⁰⁰⁷

1283. As set out below, the Respondent submits that:

²⁰⁰² Reply, paragraph 736(i), **CS-5**.

²⁰⁰³ It is unclear from paragraph 736 of the Reply whether the Claimant seeks the Alternative Lost Profits in the alternative to the Lost Profits, or in addition to the Lost Profits. However, in paragraph 821 of the Reply, the Claimant contends that its “*alternative submission is that the Claimant is entitled to the amount which any other investor would pay for the right to develop an investment object on the land plot intended for the Investment Object*” (Reply, paragraph 821 (emphasis added), **CS-5**). Similarly, in the Notice, presents its lost profits claim as two alternative claims (Notice, paragraph 530(a), **CS-1**). Therefore, the Respondent understands that the Claimant is requesting the Alternative Lost Profits in the alternative to the Lost Profits. The Respondent submits that the Claimant would not, in any event, be entitled to the Lost Profits in addition to the Alternative Lost Profits, because this would constitute double recovery for the same loss (i.e. the loss of the right to develop the Investment Object).

²⁰⁰⁴ Reply, paragraph 821, **CS-5**.

²⁰⁰⁵ Reply, paragraph 736(ii), **CS-5**.

²⁰⁰⁶ Reply, paragraph 736(i), **CS-5**.

²⁰⁰⁷ Reply, paragraph 738, **CS-5**. The Respondent notes that the Claimant’s alternative position on quantum is not reflected in the prayer for relief at paragraph 871 of the Reply.

- A. the Claimant’s ‘all or nothing’ quantum analysis in respect of FET fails if the Tribunal finds no expropriation;
- B. the Claimant seeks double recovery for the Contractual Losses and the NCF Losses together;
- C. the Claimant is not entitled to the Contractual Losses; and
- D. the Claimant is not entitled to the NCF Losses.

1284. If the Tribunal finds that the Respondent expropriated the Claimant’s investment or committed violations of FET standard tantamount to expropriation, the Respondent submits that the Tribunal should award:

- A. the SQ NCF Losses; or, alternatively
- B. the NCF Losses, reduced to take account of the Claimant’s contributory negligence.

A. THE CLAIMANT’S ‘ALL OR NOTHING’ QUANTUM ANALYSIS IN RESPECT OF FET FAILS IF THE TRIBUNAL FINDS NO EXPROPRIATION

1285. In the Defence, the Respondent submits that where a treaty breach does not lead to the total loss of an investment, the standard of compensation should correspond to the actual losses caused by the breach.²⁰⁰⁸

1286. In the Reply, the Claimant contends that “*damages may be measured by fair market value for both its FET and expropriation claims*”.²⁰⁰⁹

1287. The Respondent agrees with the Claimant that, in the absence of an express standard of compensation for breach of FET in the EEU Treaty, the Tribunal should take guidance from principles of international law.²⁰¹⁰ The Tribunal has the discretion to

²⁰⁰⁸ Defence, paragraphs 689 – 690, **RS-18**.

²⁰⁰⁹ Reply, Section XII and paragraphs 748 – 763, **CS-5**.

²⁰¹⁰ Reply, paragraph 753, **CS-5**.

determine a measure of compensation that it considers appropriate to the circumstances of the case and in light of such principles.²⁰¹¹

1288. Further, contrary to what the Claimant suggests in the Reply, the Respondent does not dispute that in some FET cases, tribunals may consider it appropriate to adopt the ‘fair market value’ (“**FMV**”) standard of compensation.²⁰¹²
1289. In particular, if a series of FET breaches cumulatively causes a total deprivation of an investment and is tantamount to expropriation, then it may be appropriate to adopt the FMV standard of compensation in respect the investment.²⁰¹³ If, on the other hand, a breach of FET did not destroy or totally deprive the investor of its investment, but still caused loss, then only the damage caused by the unlawful act should be compensated (subject to international law principles of causation and remoteness²⁰¹⁴).²⁰¹⁵
1290. As held in the *Lusitania* case cited by the Claimant, “[t]he fundamental concept of ‘damage’ is [...] reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be **commensurate with the loss**, so that the injured party may be made whole.”²⁰¹⁶
1291. Similarly, after considering the *Lusitania* definition and the *Chorzów* dictum cited by the Claimant, the ILC Commentary concludes that the function of compensation is “to

²⁰¹¹ Contrary to what the Claimant asserts, the Tribunal is not “required” to apply a default standard of compensation (Reply, paragraph 753, **CS-5**). Rather, by not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the drafters of the EEU Treaty intended to leave it open to the Tribunal to determine a measure of compensation that it considers appropriate, taking into account the principles of international law and the provisions of the EEU Treaty (*S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, First Partial Award on the Merits, 13 November 2000, paragraph 309, **Exhibit RL-62**).

²⁰¹² Reply, paragraph 761, **CS-5**.

²⁰¹³ Defence, paragraph 645, **RS-18**.

²⁰¹⁴ See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, paragraphs 780 – 787, **Exhibit CL-137**.

²⁰¹⁵ Defence, paragraph 645, **RS-18**.

²⁰¹⁶ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 36, subsection 3 (emphasis added), **Exhibit CL-87**.

address the **actual losses** incurred as a result of the internationally wrongful act”,²⁰¹⁷ excluding “damage which is indirect or remote”.²⁰¹⁸

1292. Therefore, according to *Lusitania* and the ILC Commentary, only compensation “commensurate with” the “actual losses” should be awarded, excluding damage which is “indirect or remote”. To award an investor compensation for the FMV of an investment when the breach of FET did not destroy or totally deprive the investor of its investment would not, the Respondent submits, be a remedy “commensurate with the loss”.

1293. This approach is also reflected consistently in investment arbitration jurisprudence.

1294. In *Metalclad v. Mexico*, the tribunal held:

*“In this instance, the damages arising under NAFTA, Article 1105 [FET] and the compensation due under NAFTA, Article 1110 [Expropriation] would be the same since both situations involve the complete frustration of the operation of the landfill and negate the possibility of any meaningful return on Metalclad’s investment. In other words, **Metalclad has completely lost its investment.**”*²⁰¹⁹

1295. In *Feldman v. Mexico*, the tribunal considered the amount of compensation to be awarded for discriminatory treatment where there had been no expropriation. Like in the present case, the only detailed measure of damages specifically provided in Chapter 11 of NAFTA was for expropriation. The tribunal held:

*“It follows that, in case of discrimination [...] what is owed by the responding Party is the amount of loss or damage that is **adequately connected to the breach.** In the absence of discrimination that also constitutes indirect*

²⁰¹⁷ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 36, subsection 4 (emphasis added), **Exhibit CL-87**.

²⁰¹⁸ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 34, subsection 5, **Exhibit CL-87**.

²⁰¹⁹ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)97/1, Award, 30 August 2000, paragraph 113 (emphasis added), **Exhibit CL-15**.

*expropriation or is **tantamount to expropriation**, a claimant would not be entitled to the full market value of the investment which is granted by NAFTA Article 1110. Thus, if loss or damage is the requirement for the submission of a claim, it arguably follows that the Tribunal may direct compensation in the amount of the **loss or damage actually incurred**.*²⁰²⁰

1296. In *LG&E v. Argentina*, the tribunal found that the State had violated the FET standard and umbrella clause through its abrogation of specific guarantees provided in the gas regulatory framework. The tribunal rejected the claimants' claim for the FMV of the investment, because it "*does not reflect the actual damage incurred by Claimants*".²⁰²¹ The tribunal held that this type of valuation would only be appropriate if the claimants had "*lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of investment*."²⁰²² Rather, the tribunal found that the "*actual damage*" inflicted by the measures was a reduction in the dividends received by the claimants.²⁰²³

1297. In *Azurix v. Argentina*, the tribunal considered the FMV standard of compensation appropriate. The tribunal found that the State had violated the BIT, including the FET standard, through "*cumulative actions*" which culminated in the termination of the concession, but held that there had been no expropriation.²⁰²⁴ When determining the standard of compensation, the tribunal held that "*compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over*."²⁰²⁵

²⁰²⁰ *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paragraph 194 (emphasis added), **Exhibit RL-92**.

²⁰²¹ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paragraph 36, **Exhibit RL-64**.

²⁰²² *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paragraph 35, **Exhibit RL-64**.

²⁰²³ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paragraph 48, **Exhibit RL-64**.

²⁰²⁴ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paragraphs 418 and 442, **Exhibit CL-81**.

²⁰²⁵ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paragraph 424 (emphasis added), **Exhibit CL-81**.

1298. In *CMS Gas*, the tribunal found that there was no expropriation, because the investor had not been deprived of enjoyment of its property and retained full control and ownership of the investment.²⁰²⁶ However, the tribunal held that the State’s measures in relation to the investment had breached the FET standard, since the measures “*did in fact entirely transform and alter the legal and business environment under which the investment was decided and made*”.²⁰²⁷ In light of these circumstances, the tribunal distinguished the situation from *Feldman*, finding that “*the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value.*”²⁰²⁸
1299. The Claimant also refers to *Gemplus v. Mexico*,²⁰²⁹ *Tecmed v. Mexico*²⁰³⁰ and *Biwater Gauff v. Tanzania*.²⁰³¹ However, each of these cases also confirm the approach adopted by the Respondent and the above tribunals.²⁰³²

²⁰²⁶ *CMS Gas Transmission Company v. The Argentine Republic*, Case No. ARB/01/8, Award, 12 May 2005, paragraphs 263 – 264, **Exhibit RL-63**.

²⁰²⁷ *CMS Gas Transmission Company v. The Argentine Republic*, Case No. ARB/01/8, Award, 12 May 2005, paragraph 275, **Exhibit RL-63**.

²⁰²⁸ *CMS Gas Transmission Company v. The Argentine Republic*, Case No. ARB/01/8, Award, 12 May 2005, paragraph 410 (emphasis added), **Exhibit RL-63**.

²⁰²⁹ Reply, paragraph 766, **CS-5**. In *Gemplus v. Mexico*, the claimant compared the circumstances of its case to *Vivendi*, in which the claimant had argued that the adoption of the FMV standard of compensation to a non-expropriation case would “*turn on whether the investment has been merely impaired or destroyed*”. This is the same distinction upon which the Respondent bases its position; if the investment is destroyed as a result of cumulative violations of the FET standard, then it may be appropriate for the FMV standard of compensation to be adopted (*Gemplus S.A., et al. v. The United Mexican States*, ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, paras. 12-26, **Exhibit CL-138**).

²⁰³⁰ Reply, paragraph 767, **CS-5**. In *Tecmed v. Mexico*, the tribunal held that the claimant had violated the FET standard and expropriated the investor’s investment. Therefore, since the investor had been deprived of its investment, the tribunal considered it appropriate to apply the FMV standard of compensation.²⁰³⁰ The tribunal held that the “*market value of the Landfill [...] shall be the total compensation for all the violations to the Agreement proved in this award, which, in relation to the Claimant, have the damaging effect of depriving the Claimant of its investment.” (*Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paragraph 188, **Exhibit CL-32**).*

²⁰³¹ Reply, paragraph 760, **CS-5**. In *Biwater Gauff v. Tanzania*, the tribunal found that compensation for expropriation or any other treaty standard “*will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by BGT.*”²⁰³¹ According to this approach, if there is

1300. The Respondent therefore submits that the FMV standard of compensation shall only be appropriate in non-expropriation cases if the Tribunal finds that violation(s) of FET are tantamount to expropriation in that they cumulatively caused a total deprivation or destruction of the investment. If, on the other hand, the Tribunal finds that violation(s) of the FET standard did not totally destroy or deprive the Claimant of its investment, then the Claimant's 'all or nothing' quantum analysis is inadequate. In such a scenario, the Respondent respectfully submits that the Tribunal should calculate the "actual losses incurred as a result of the internationally wrongful act",²⁰³³ excluding "damage which is indirect or remote".²⁰³⁴

1301. By way of example, the Respondent submits that:

- A. if the Tribunal finds that the 2016 Administrative Proceedings violated the FET standard (which is denied), the Claimant should only be entitled to claim compensation for the administrative fine imposed on Manolium-Engineering in those proceedings;
- B. if the Tribunal finds that the amendments to the First Tax Audit Report on 21 June 2016 (caused, among other things, by Manolium-Engineering's failure to apply to extend its land permit after the Final Commissioning Date) violated the FET standard (which is denied), the Claimant should only be entitled to

not a "sufficient causal link" between the breach of FET and the destruction or deprivation of the investment, then the FMV standard of compensation will be inappropriate. Accordingly, contrary to what the Claimant suggests, the *Biwater* tribunal endorsed the same approach proposed by the Respondent, which is grounded in principles of international law (*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, paragraph 779, **Exhibit CL-137**).

²⁰³² See footnotes 2029 - 2031 above.

²⁰³³ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 36, subsection 4 (emphasis added), **Exhibit CL-87**.

²⁰³⁴ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 34, subsection 5, **Exhibit CL-87**.

claim compensation for the amount by which those amendments caused an increase in Manolium-Engineering's tax liabilities; and

C. if the Tribunal finds that the First Tax Audit Report of 17 May 2016 violates the FET standard (which is denied), but that the amendments to the report applied on 21 June 2016 resulted from the Claimant's and/or Manolium-Engineering's own acts and/or omissions, the Claimant should only be entitled to claim compensation for the amount of Manolium-Engineering's tax liabilities calculated in the First Tax Audit Report.

1302. If the Tribunal finds that there has been a violation of the FET standard which did not destroy or deprive the Claimant of its investment, the Respondent submits that the Claimant's submissions on quantum as currently pleaded will be of little assistance to the Tribunal. Given that the Claimant bears the burden of proving the fact and the amount of loss, the Respondent submits that, in the absence of a finding of expropriation, the Claimant's damages claim must fail.²⁰³⁵

B. THE CLAIMANT IS NOT ENTITLED TO CLAIM FOR BOTH THE CONTRACTUAL LOSSES AND THE NCF LOSSES

1303. In the Defence, the Respondent submits that the Claimant is not entitled to seek compensation for the value of the contingent contractual right to develop the Investment Object and the New Communal Facilities.²⁰³⁶

1304. In the Reply, the Claimant maintains that it is "*entitled to receive an award for both the lost profits resulting from losing the right to develop the Investment Object [the*

²⁰³⁵ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4 April 2016, paragraph 864 ("[A]s a general matter, it is clear that it is the Claimant that bears the burden of proof in relation to the fact and the amount of loss"), **Exhibit CL-25**; *Gold Reserve, Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paragraph 685 ("The Tribunal agrees with the Parties that Claimant bears the burden of proving its claimed damages"), **CL-146**.

²⁰³⁶ Defence, paragraphs 674 – 676, **RS-18**.

Contractual Losses²⁰³⁷] *and the direct losses caused by expropriation of the New Communal Facilities [the NCF Losses²⁰³⁸]*’.²⁰³⁹ The Claimant’s position is misguided.

1305. The Respondent submits in the Defence that the Claimant’s claim for the Contractual Losses and the NCF Losses ignores the fact that there could never have been a situation in which the Claimant acquired the right to develop the Investment Object and retained the New Communal Facilities.²⁰⁴⁰ By claiming the Contractual Losses and the NCF Losses, the Claimant is essentially seeking to put itself in the position it would have been in if it had acquired the contingent right to develop the Investment Object without paying any consideration.²⁰⁴¹ The Claimant does not dispute this in the Reply.²⁰⁴²
1306. The Respondent therefore respectfully submits that the Claimant is not entitled to claim for both the Contractual Losses and the NCF Losses.

²⁰³⁷ According to the way the Claimant frames its claim, both the Lost Profits and the Alternative Lost Profits constitute “*lost profits resulting from losing the right to perform the Investment Contract*” (Reply, paragraph 736(i) and (ii), **CS-5**).

²⁰³⁸ Reply, paragraph 736(i), **CS-5**.

²⁰³⁹ Reply, paragraph 737, **CS-5**.

²⁰⁴⁰ Defence, paragraphs 674 – 676, **RS-18**. Under the Amended Investment Contract, the Claimant only became entitled to develop the Investment Object if it, among other things, constructed, commissioned and transferred the complete New Communal Facilities into municipal ownership.²⁰⁴⁰ Accordingly, the *only* situation in which the Claimant could have developed and sold the Investment Object, as it contends it would have, is if it had already transferred the New Communal Facilities into municipal ownership.

²⁰⁴¹ Defence, paragraphs 674 – 676, **RS-18**. Under the Amended Investment Contract, the Claimant only became entitled to develop the Investment Object if it, among other things, constructed, commissioned and transferred the complete New Communal Facilities into municipal ownership.²⁰⁴¹ Accordingly, the *only* situation in which the Claimant could have developed and sold the Investment Object, as it contends it would have, is if it had already transferred the New Communal Facilities into municipal ownership.

²⁰⁴² Reply, paragraphs 735 – 870, **CS-5**.

C. FMV OF THE CONTINGENT RIGHT TO DEVELOP THE INVESTMENT OBJECT

1. The Claimant is not entitled to the Lost Profits

1307. The Claimant claims that it suffered the Lost Profits “*resulting from losing the right to perform the [Amended] Investment Contract (plus appropriate interest)*”.²⁰⁴³

1308. If, contrary to the Respondent’s position, the Tribunal finds that the Respondent committed an expropriation which deprived the Claimant of its contingent contractual rights under the Amended Investment Contract, or committed cumulative violations of the FET standard tantamount to the expropriation of such rights, the Tribunal should proceed to determine whether the Claimant is entitled to the Lost Profits.

1309. In the Defence, the Respondent submits that:

- A. the Claimant has failed to establish the necessary causation between the alleged breaches of the EEU Treaty and the Lost Profits;²⁰⁴⁴
- B. the Lost Profits claim is highly speculative;²⁰⁴⁵ and
- C. the Investment Object would not have been profitable.²⁰⁴⁶

1310. In the Reply, the Claimant responds that:

- A. it has “*established a sufficient causal link between the Respondent’s unlawful actions and the Claimant’s Lost Profits*”;²⁰⁴⁷
- B. it must “*be awarded Lost Profits to be made whole and erase harm from the Respondent’s breaches*”;²⁰⁴⁸ and

²⁰⁴³ Reply, paragraph 738(i), **CS-5**; Notice, paragraph 530(a), **CS-1**.

²⁰⁴⁴ Defence, paragraphs 655 – 665, **RS-18**.

²⁰⁴⁵ Defence, paragraphs 666 – 673, **RS-18**.

²⁰⁴⁶ Defence, paragraphs 680 – 685, **RS-18**.

²⁰⁴⁷ Reply, paragraphs 775 – 797, **CS-5**.

²⁰⁴⁸ Reply, paragraphs 798 – 807, **CS-5**.

C. the “*Investment Object would have been profitable*”.²⁰⁴⁹

1311. The Respondent addresses the Claimant’s position below. The Respondent submits that:

A. the Claimant would not have acquired the right to develop the Investment Object;

B. the Lost Profits are highly speculative;

C. the Investment Object would not have been profitable; and

D. interest should only be applied to past net cash flows.

a) The Claimant would not have acquired the right to develop the Investment Object

1312. It is uncontroversial that the Claimant bears the burden of proving both the fact (causation) and the amount (quantum) of its loss.²⁰⁵⁰

1313. As to the standard of proof, the parties agree that there must be a “*sufficient causal link between the actual breach of the BIT and the loss sustained*”²⁰⁵¹ and that “*the harm must not be too remote*”.²⁰⁵² The Respondent agrees with the Claimant that

²⁰⁴⁹ Reply, paragraphs 808 – 820, **CS-5**.

²⁰⁵⁰ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award of 4 April 2016, paragraph 864 (“[A]s a general matter, it is clear that it is the Claimant that bears the burden of proof in relation to the fact and the amount of loss”), **Exhibit CL-25**; *Gold Reserve, Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paragraph 685 (“The Tribunal agrees with the Parties that Claimant bears the burden of proving its claimed damages”), **CL-146**.

²⁰⁵¹ Reply, paragraph 775, **CS-5**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, paragraph 779, **Exhibit CL-137**.

²⁰⁵² Reply, 776 – 777, **CS-5**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, paragraph 785 (“The requirement of causation comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote.”), **Exhibit CL-137**.

“total certainty” is not required.²⁰⁵³ However, the causal link between the violation and the loss suffered must be computed with a “sufficient degree” of certainty; the amount of loss claimed must be “probable and not merely possible.”²⁰⁵⁴

1314. In the Defence, the Respondent cites *Burlington v. Ecuador*, *CCL v. Kazakhstan* and *Merrill Ring v. Canada*, in which the tribunals considered how to quantify damages in respect of contingent rights which had not materialised.²⁰⁵⁵

1315. In the Reply, the Claimant contends that the right to develop the Investment Object was “conditioned only on sufficient financing [of] the New Communal Facilities”.²⁰⁵⁶ Therefore, the Claimant argues that the rights deemed remote in *Burlington*, *Merrill Ring* and *CCL* were more “uncertain” than in the present case.²⁰⁵⁷

1316. The Respondent submits above that the Claimant’s contention that the Investment Object was “conditioned only on sufficient financing [of] the New Communal Facilities” is unfounded.²⁰⁵⁸ The Amended Investment Contract expressly provides that Manolium-Engineering would only obtain the right to use the land to develop the

²⁰⁵³ Reply, paragraph 776, **CS-5**.

²⁰⁵⁴ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraphs 874 and 880, **Exhibit CL-25**.

²⁰⁵⁵ Defence, paragraphs 656 – 657, **RS-18**.

²⁰⁵⁶ Reply, paragraph 779, **CS-5**.

²⁰⁵⁷ Reply, paragraph 780, **CS-5**. In the Reply, the Claimant seeks to distinguish *Burlington* and *Merrill Ring* from the present facts (Reply, paragraphs 781 – 788, **CS-5**). The Respondent acknowledges that the factual scenarios in these cases are not identical to the present case. In *Burlington v. Ecuador* and *CCL v. Kazakhstan*, the right in question was contingent upon some element of discretion on the part of the State, while in the present case, MCEC was required to grant Manolium-Engineering the right to develop the Investment Object if the Claimant and Manolium-Engineering fulfilled certain contractual obligations under Clauses 4 and 9.2 of the Amended Investment Contract. Similarly, the facts in *Merrill Ring v. Canada* differ from the present case in that the contingent right in question did not arise out of a contract. Nevertheless, the Respondent submits that the same principles relied on by the tribunals in these cases apply in the present case, which also concerns damages arising in connection with a contingent right. In short, the Claimant must prove with the reasonable degree of certainty required by international law that, but for the alleged violations by the Respondent, the contingent right to develop the Investment Object would have materialised. The Respondent submits that it would not have done.

²⁰⁵⁸ Reply, paragraph 779, **CS-5**.

Investment Object if Manolium-Engineering constructs, commissions and transfers the New Communal Facilities into municipal ownership by the Final Commissioning Date.²⁰⁵⁹ Therefore, contrary to what the Claimant alleges, Manolium-Engineering’s contingent right to develop the Investment Object never “*matured*”, because Manolium-Engineering failed to satisfy the conditions upon which this right was contingent under Clauses 4 and 9.2 of the Amended Investment Contract.²⁰⁶⁰

1317. Given that Manolium-Engineering’s contingent right to develop the Investment Object never “*matured*”, the Respondent submits that, like in *Burlington Resources*, the burden is on the Claimant to prove with “*reasonable certainty that international law requires for a lost profits claim*”²⁰⁶¹ that its right to develop the Investment Object would have matured, but for the alleged violations by the Respondent.²⁰⁶² In other words, the burden is on the Claimant to prove that, but for the alleged violations, Manolium-Engineering would have constructed, commissioned and transferred the New Communal Facilities into municipal ownership by the Final Commissioning Date.

1318. The Claimant contends that it “*would have developed the Investment Object*” but for the alleged breaches. The Claimant sets out its position as follows:

“[T]he Claimant has already set out above:

(i) *The Claimant over performed its obligation regarding amount of financing;*

(ii) *The Respondent acted in bad faith to delay the construction of the New Communal Facilities;*

(iii) *The Respondent acted in bad faith in refusing to accept the New Communal Facilities to the communal ownership and, thus,*

²⁰⁵⁹ Amended Investment Contract, Clauses 4 and 9.2, **Exhibit C-66**. See paragraphs 32 – 38 above.

²⁰⁶⁰ Reply, paragraph 784, **CS-5**.

²⁰⁶¹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paragraph 278, **Exhibit RL-65**.

²⁰⁶² Defence, paragraph 658, **RS-18**.

preventing the Claimant from formal compliance with obligation to transfer the New Communal Facilities to the communal ownership.

Thus, but for the Respondent's unlawful conduct, the Claimant has shown that it would have developed the Investment Object and that the Respondent has thus deprived the Claimant of its Investment.”²⁰⁶³

1319. The Respondent submits that:

- A. the Claimant would only become entitled to develop the Investment Object upon constructing, commissioning and transferring the New Communal Facilities into municipal ownership;²⁰⁶⁴
- B. Manolium-Engineering failed to construct the New Communal Facilities by the Final Commissioning Date, as required by the Amended Investment Contract;²⁰⁶⁵ and
- C. it was not possible under the terms of the Amended Investment Contract for MCEC to accept the New Communal Facilities into municipal ownership in their incomplete state.²⁰⁶⁶

1320. The Respondent submits that the Claimant’s own inability and/or unwillingness to finance the construction works caused the failure to construct, commission and transfer the New Communal Facilities into municipal ownership by the Final Commissioning Date.²⁰⁶⁷ The Respondent’s position is supported by

²⁰⁶³ Reply, paragraphs 789 – 790, **CS-5**. The Claimant asserts that as a result of the alleged conduct, the Claimant “*would have developed the Investment Object*”. As far as the Respondent can understand, the Claimant means that it would have become entitled to develop the Investment Object but for the alleged conduct complained of in paragraph 789. In paragraphs 1323 – 1368 below, the Respondent submits that even if the Claimant *had* become entitled to develop the Investment Object, the Lost Profits are still highly speculative.

²⁰⁶⁴ See paragraphs 32 – 38 above.

²⁰⁶⁵ See paragraphs 109 – 115 above.

²⁰⁶⁶ See, e.g., Defence, paragraphs 188 and 563, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 71, **RWS-2**.

²⁰⁶⁷ See, e.g., Defence, paragraphs 76 – 98, **RS-18**.

contemporaneous evidence from the Claimant.²⁰⁶⁸ The Respondent therefore submits that the Claimant has failed to prove with the “*reasonable certainty that international law requires for a lost profits claim*”²⁰⁶⁹ that its right to develop the Investment Object would have matured, but for the alleged violations by the Respondent.²⁰⁷⁰

1321. The Claimant contends in the Reply that the Claimant’s delays should not be taken into account for the purposes of causation, referring to Article 39 of the ILC Articles.²⁰⁷¹ This is mistaken.
1322. As noted in the ILC commentary, Article 39 “*deals with the situation where damage has been caused by an internationally wrongful act of a State [...]*” and the victim has “*materially contributed*” to the damage.²⁰⁷² This is to be distinguished from the present issue, which is whether the failure to transfer the New Communal Facilities by the Final Commissioning Date was caused by actions of the Claimant, rather than whether the Claimant contributed to the damage. For the purposes of causation, it is irrelevant whether the Claimant’s actions were wilful or negligent.

b) The Lost Profits claim is highly speculative

1323. Even if, contrary to what is submitted above, the Claimant were able to prove that it would have acquired the right to develop the Investment Object but for the alleged

²⁰⁶⁸ See paragraphs 107 – 115 above; Letter from the Claimant to MCEC dated 14 October 2008, **Exhibit R-40**; Letter from Manolium-Engineering to Gosstroy dated 20 April 2010, **Exhibit R-54**; Letter from Manolium-Engineering to MCEC dated 26 May 2010, **Exhibit R-55**; Defence, paragraphs 79 – 80, 86 – 87, 89 and 90 – 93, **RS-18**.

²⁰⁶⁹ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paragraph 278, **Exhibit RL-65**.

²⁰⁷⁰ See paragraphs 109 – 115 above; Defence, paragraphs 76 – 98, **RS-18**; Letter from Manolium-Engineering to the Economic Committee of MCEC dated 27 March 2009, **Exhibit R-47**; Letter from Manolium-Engineering to Gosstroy dated 20 April 2010, **Exhibit R-54**; Letter from Manolium-Engineering to MCEC dated 26 May 2010, **Exhibit R-55**.

²⁰⁷¹ Reply, paragraph 794, **CS-5**.

²⁰⁷² United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 39, subsection 1, **Exhibit CL-87**.

violations of the Respondent, the Claimant must also prove that the Claimant and/or Manolium-Engineering would have:

- A. constructed the Investment Object (and done so on time, and on cost); and
- B. sold the Investment Object at the significant level of profit estimated by Mr Taylor.

1324. In the Defence, the Respondent submits that the Lost Profits claim is highly speculative given that the Claimant did not even provide the necessary consideration to acquire the right to develop the Investment Object, let alone finish designing and constructing it and sell it on at a profit.²⁰⁷³

1325. In the Reply, the Claimant cites various authorities, for example *Gavazzi v. Romania*, in support of its contention that “*total certainty*” is not required in the computation of damages.²⁰⁷⁴ The Respondent agrees with the Claimant that the computation of damages is not an exact science requiring “*total certainty*”, but is subject to a degree of discretion on the part of the Tribunal, taking into account all the circumstances.²⁰⁷⁵

1326. However, tribunals have consistently found that this discretion does not extend to speculative, uncertain or hypothetical damages. By way of example:

- A. in *Amoco v. Iran*, the tribunal held that “[o]ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded”,²⁰⁷⁶
- B. in *LG&E v. Argentina*, the tribunal found that it could “*only award compensation for loss that is certain [...]. Prospective gains which are highly*

²⁰⁷³ Defence, paragraphs 666 – 673, **RS-18**.

²⁰⁷⁴ Reply, paragraphs 776, 799 – 800 and 804 – 805, **CS-5**.

²⁰⁷⁵ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paragraph 521, **Exhibit CL-135**.

²⁰⁷⁶ *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, paragraph 238, **Exhibit RL-78**.

*conjectural, 'too remote or speculative' are disallowed by arbitral tribunals”;*²⁰⁷⁷

- C. in *CME v. Czech Republic*, it was stated that the “*principle denying recovery for speculative benefits has long been recognised in the practice of international tribunals [...]*”;²⁰⁷⁸
- D. in *S.D. Myers v. Canada*, the tribunal held that “[...] *a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and to be awarded, the sums in question must be neither speculative nor too remote*”;²⁰⁷⁹
- E. in *Murphy v. Ecuador*, the tribunal held that its “*approach was consistent with the general requirement for awarding damages for violations of international obligations that any compensable damage must not be too speculative, remote, or uncertain*”.²⁰⁸⁰

1327. In particular, tribunals have been reluctant to award lost future profits based on the discounted cash flow (“**DCF**”) method of valuation where the asset or project in question (in this case, the contingent right to develop the Investment Object) was not completed or does not have a consistent track record of profitability. The commentary to the ILC Articles, for example, notes as follows:

“Tribunals have been reluctant to provide compensation for claims with inherently speculative elements. When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial and political risks, and increasingly so the further into the future

²⁰⁷⁷ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paragraphs 88 – 90, **Exhibit RL-64**.

²⁰⁷⁸ *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL Arbitration Proceedings, Separate Opinion of Ian Brownlie, 14 March 2003, paragraph 66, **Exhibit RL-82**.

²⁰⁷⁹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), Second Partial Award of 21 October 2002, paragraph 173, **Exhibit CL-140**.

²⁰⁸⁰ *Murphy Exp. & Prod. Co. – Int’l v. Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, paragraph 487, **Exhibit RL-93**.

*projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable.”*²⁰⁸¹

1328. In the Defence, the Respondent cites various cases in support of the position outlined in the ILC commentary, including:

- A. *Siag v. Egypt*, in which the tribunal rejected the claimant’s adoption of a discounted cash flow approach to calculate lost profits suffered by the claimant in respect of a resort that was still under development,²⁰⁸²
- B. *Biloune v. Ghana*, in which the tribunal rejected the claimant’s adoption of a discounted cash flow approach to calculate future lost profits in connection with a hotel resort complex, the construction of which had not been completed;²⁰⁸³ and
- C. *Wena Hotels v. Egypt*, in which the tribunal rejected the claimant’s claims for lost profits and lost opportunities in connection with a hotel venture, because the claimant had only operated the hotels for a short time and had not completed renovations.²⁰⁸⁴

²⁰⁸¹ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 36, subsection 27, **Exhibit CL-87**.

²⁰⁸² Defence, paragraph 667, **RS-18**.

²⁰⁸³ Defence, paragraph 668, **RS-18**.

²⁰⁸⁴ Defence, paragraph 669, **RS-18**. The tribunal also noted that there was “*some question whether Wena had sufficient finances to fund its renovation and operation of the hotels*” and the “*large disparity between the requested amount [...] and Wena’s stated investment in the two hotels*” (*Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraph 124, **Exhibit RL-73**).

1329. In addition to the above cases, the tribunal in *Levitt v. Iran* also rejected a lost profits claim in connection with a construction project that was at an early stage of development.²⁰⁸⁵
1330. In the Reply, the Claimant does not seek to distinguish the present case from *Biloune v. Ghana* or *Wena Hotels v. Egypt*. As for *Siag v. Egypt*, the Claimant alleges that “[c]rucially, the Respondent omits that the tribunal in that case ultimately adopted another market-based valuation method which assessed lost profits – comparable sales valuation.”²⁰⁸⁶ The Claimant mistakenly concludes that *Siag v. Egypt* “does not preclude, and in fact supports, an award of full lost profits here.”²⁰⁸⁷ The Claimant’s understanding of *Siag* is misconceived.
1331. Firstly, in *Siag*, the tribunal expressly rejected the DCF method of valuation which the Claimant uses to value the Lost Profits in the present case. In particular, the tribunal considered valuing the future profits of the resort in question too speculative and uncertain given that the resort was still under development.²⁰⁸⁸ In the present case, the Lost Profits are even more uncertain, because the construction of the Investment Object never even began. Mr Taylor’s DCF approach and the assumptions he adopts are therefore inherently speculative.²⁰⁸⁹
1332. Secondly, the Claimant appears to ignore that there are significant differences between the DCF method, in which the future profits of a project are calculated, and

²⁰⁸⁵ The tribunal noted: “*In the present instance, however, the basis of the claim for US\$19,456,100 under this head is highly speculative [...]. By the time the Contract came to an end only the initial stages of clearing and grading had been completed, and no construction work had begun on the buildings. The project had therefore reached only a very early stage [...]. For these reasons the Tribunal finds that the Claimant has not established with a sufficient degree of certainty that the project would have resulted in a profit. The claim in this respect is therefore dismissed.*” (*Levitt v. Gov’t of the Islamic Republic of Iran et. Al.*, Iran-U.S. Cl. Trib. 191, Award, 22 April 1987, paragraphs 56, 58 and 14, **Exhibit RL-91**).

²⁰⁸⁶ Reply, paragraph 802, **CS-5**.

²⁰⁸⁷ Reply, paragraph 802 (emphasis added), **CS-5**.

²⁰⁸⁸ *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paragraph 570, **Exhibit RL-70**.

²⁰⁸⁹ Defence, paragraphs 670 – 672, **RS-18**.

the comparable sales valuation method, in which the value of a project is estimated by examining data from arm's-length transactions that occurred near the valuation date involving similar assets or enterprises. Contrary to what the Claimant contends, the tribunal's adoption of a comparable sales valuation method in *Siag* does not support "an award of full lost profits" in the present case.

1333. Thirdly, Mr Taylor expressly concedes that "[f]or valuation purposes, there are insufficient comparable mixed-use properties, especially when taking into account the location and property use mix of the Investment Object."²⁰⁹⁰ Accordingly, even if (contrary to the Respondent's position), the Tribunal were to consider it reasonable to calculate the estimated value of the Investment Object in its finished state (like in *Siag*²⁰⁹¹), the comparable sales value approach would be uncertain and speculative.²⁰⁹²
1334. The Claimant also relies on *Crystallex v. Venezuela*, which it contends is "particularly instructive" in the present case. The Claimant's reliance on *Crystallex* is also misplaced.
1335. In *Crystallex*, the tribunal held that the State had expropriated the claimant's right to operate the Las Cristinas mine. In determining whether to award lost profits that might have been made had the claimant operated the mine, the tribunal adopted a two-part test, considering whether "(i) it is sufficiently certain that the Claimant would have made profits; and (ii) if yes, whether the Claimant has provided the Tribunal with a reasonable basis to assess such loss of profits."²⁰⁹³ The tribunal acknowledged

²⁰⁹⁰ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 3.1.3, **CER-3**.

²⁰⁹¹ In *Siag*, the tribunal relied on the comparable sales value of the land on which the resort was still being developed by the claimant, rather than the comparable sales value of the resort in its 'finished state' (*Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paragraph 551, **Exhibit RL-70**).

²⁰⁹² Mr Taylor attempts to "cross-check" his DCF approach with reference to the market value of other developed properties, even though the Investment Object was never developed. Mr Taylor's use of the market approach is highly speculative in the absence of reliable, detailed data as to what Manolium-Engineering actually would have constructed (Defence, paragraph 673, **RS-18**).

²⁰⁹³ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraph 876, **Exhibit CL-25**.

that a claim for lost profits must fail if is “*of speculative nature*”.²⁰⁹⁴ On the facts of the case, however, the tribunal found that it was sufficiently certain that the claimant would have made profits.²⁰⁹⁵

1336. The circumstances which led the tribunal to award lost profits in *Crystallex* are, however, readily distinguishable from the present facts.

1337. Firstly, in *Crystallex*, the tribunal emphasized that “*it cannot be cast into doubt that Las Cristinas is one of the most important mines in Latin America, and the Venezuelan authorities also clearly viewed it as such.*”²⁰⁹⁶ As such, it was evident in *Crystallex* that the mine would have been lucrative, had the claimant been able to operate it. By contrast, it is possible only to speculate as to whether the Investment Object would have been a lucrative venture for the Claimant given the lack of any detailed design documentation evidencing what Manolium-Engineering actually would have constructed,²⁰⁹⁷ and given Manolium-Engineering’s inexperience in projects of this type or scale.²⁰⁹⁸ Mr Taylor is forced to base his calculation of the Lost Profits on a set of unsubstantiated and vague assumptions based on the Claimant’s ‘hopes and dreams’, rather than on detailed and reliable data.²⁰⁹⁹

²⁰⁹⁴ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraph 875, **Exhibit CL-25**.

²⁰⁹⁵ The tribunal noted that “[the claimant] *had completed the exploration phase, the size of the deposits had been established, the value can be determined based on market prices, and the costs are well known in the industry and can be estimated with a sufficient degree of certainty*” (*Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award, 4 April 2016, paragraph 880, **Exhibit CL-25**).

²⁰⁹⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB(AF)/11/2, Award, 4 April 2016, paragraph 878, **Exhibit CL-25**.

²⁰⁹⁷ See paragraphs 193 – 213 above.

²⁰⁹⁸ Other than the New Communal Facilities (which Manolium-Engineering failed to construct) the only other experience mentioned by Mr Dolgov is the construction of “*three residential houses*” in Minsk (First Witness Statement of A. Dolgov dated 10 May 2018, paragraph 8, **CWS-1**).

²⁰⁹⁹ Defence, paragraph 671, **RS-18**. For example, Mr Taylor states that he “*understand[s] from discussions with Manolium that the Investment Object was to be constructed to very high quality specifications*” (Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 5.3.4, **CER-1**). Mr Taylor appears to base this assumption on two internal documents prepared by Manolium-Engineering in 2005 and 2008, neither of which was approved by MCEC, and which present an inconsistent picture (e.g.,

1338. The Claimant contends that its calculation of the Lost Profits is “*certain*”, because it is based on “*actual analyzes [sic] of Belarusian market at relevant periods of time*”.²¹⁰⁰ In particular, the Claimant contends that the second report of Mr Taylor is based on: (i) “[a]ctual prices for comparable property in Belarus at comparable period of time [sic]”; and (ii) “[a]ctual prices for construction for comparable property in Belarus at comparable period of time [sic]”.²¹⁰¹ Given the lack of reliable data as to what Manolium-Engineering actually would have built had it acquired the right to develop the Investment Object, and when it would have built it, the Claimant’s contention that its analysis is “*certain*” because it is based on actual costs and sales values for “*comparable property*” to the Investment Object at a “*comparable time*” is unpersuasive.²¹⁰²
1339. Secondly, in *Crystallex*, the claimant’s project had reached a significant stage of development. The claimant had completed exploration activities, including drilling and testing, produced various feasibility studies and, together with well-known consultants, had prepared technical reports confirming that the Las Cristinas mine had very significant gold reserves to be exploited.²¹⁰³ By contrast, Manolium-Engineering did not even begin to develop the Investment Object, failing even to submit the preliminary design documents and general plan required under Belarusian law.²¹⁰⁴ Moreover, it is unclear how the Claimant would have financed the construction of the

regarding the number of rooms in the hotel) (Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 3.6.7, **CER-3**; Composition and key technical and economic indexes, 23 February 2005, page 1, **Exhibit C-110**; Technical Task, 2008, page 1, **Exhibit SQ-18**). Given the lack of detailed design documentation, Mr Taylor is also forced to rely his assumptions regarding the time and cost of construction heavily on an undetailed, internal construction schedule prepared by Manolium-Engineering which was not approved by MCEC (*See*, e.g., Second Expert Report of Travis A.P. Taylor dated 28 February 2019, Appendix F-1 (Assessment of Construction Costs), **CER-3**; Construction Schedule, **Exhibit TT-11**).

²¹⁰⁰ Reply, paragraph 793, **CS-5**.

²¹⁰¹ Reply, paragraph 792 (emphasis added), **CS-5**.

²¹⁰² *See* paragraphs 193 – 213 above.

²¹⁰³ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraph 878, **Exhibit CL-25**.

²¹⁰⁴ *See* paragraphs 189 – 192 above; Defence, paragraphs 199 and 670, **RS-18**.

Investment Object, given that the Claimant was unable and/or unwilling to fund even the construction of the New Communal Facilities.²¹⁰⁵

1340. Thirdly, the tribunal in *Crystallex* noted that (i) the costs of operating the gold mine could be “*estimated with a sufficient degree of certainty*”;²¹⁰⁶ and (ii) “*predicting future income from ascertained reserves to be extracted by the use of traditional mining techniques [...] can be done with a significant degree of certainty, even without a past record of production.*”²¹⁰⁷ By contrast, it is impossible to do more than guess the level of costs that Manolium-Engineering might have incurred in constructing the Investment Object, because it is uncertain what would have been built, how long it would have taken to build (particularly taking into account the Claimant’s lack of any experience in projects of this type and scale²¹⁰⁸) and what the market conditions would have been at that time it was built. Similarly, it is impossible to predict the future sales value of the Investment Object with any degree of certainty, given that the available evidence is vague, inconsistent and unreliable.²¹⁰⁹
1341. The Respondent therefore submits that *Crystallex* is readily distinguishable from the present case, in which the Claimant’s Lost Profits claim is far too speculative to be awarded.

²¹⁰⁵ The tribunal in *Wena Hotels* took such considerations into account in rejecting the income approach proposed by the claimant, noting that “*there is some question whether Wena had sufficient finances to fund its renovation and operation of the hotels*” (*Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraph 124, **Exhibit RL-73**).

²¹⁰⁶ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraph 879, **Exhibit CL-25**.

²¹⁰⁷ *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paragraph 879, **Exhibit CL-25**.

²¹⁰⁸ Defence, paragraph 671, **RS-18**.

²¹⁰⁹ See paragraphs 193 – 213 above. By way of example, the information provided in the Graphic Design of the Investment Object prepared by ACP Architecture and Engineering Company LLC for Manolium in 2010 (**Exhibit TT-52**) regarding the estimated number of rooms that the hotel section of the Investment Object would accommodate is inconsistent with the information provided in Manolium-Engineering’s 2011 Construction Schedule (**Exhibit TT-11**) (First Expert Report of Sirhsar A. Qureshi dated 27 May 2019, paragraphs 62 – 64, **RER-1**; Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraphs 3.6.5 – 3.6.6, **CER-3**).

1342. Lastly, the Claimant relies on *Gemplus v Mexico*²¹¹⁰, in which the tribunal rejected the DCF method of valuation in circumstances where the project in question had been operating for a short period of time, but held that the claimants were entitled to damages representing ‘loss of an opportunity’ to make a profit.²¹¹¹
1343. Although some tribunals have awarded damages for loss of opportunity, such a practice is not widely accepted.²¹¹² Tribunals have been slow to exercise discretion in favour of awarding damages for loss of opportunity in case of a failure by a claimant to substantiate and provide sufficient elements for the quantification of this claim for damages.²¹¹³ Tribunals have generally only awarded damages representing the loss of opportunity to make a profit (including *Southern Pacific Properties v. Egypt*²¹¹⁴ and *Sapphire v. National Iranian Oil Company*,²¹¹⁵ cited by the Claimant in the

²¹¹⁰ Reply, paragraph 803, **CS-5**. Contrary to what the Claimant asserts, the Respondent did not “*rely on Gemplus v Mexico in substantiation of its position*” in the Defence.

²¹¹¹ The Claimant does not expressly claim for damages representing ‘loss of an opportunity’ to develop the Investment Object. However, given that the Claimant has previously failed to raise arguments and then attempted to raise them against the Respondent at a later point, the Respondent sets out its position in paragraphs 1343-1346 – 1345 below as to why awarding damages to the Claimant for loss of opportunity to develop the Investment Object would be inappropriate in the present case.

²¹¹² *Caratube International Oil Company LLP and Mr D. S. Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, paragraph 1149, **Exhibit RL-81**.

²¹¹³ *Caratube International Oil Company LLP and Mr D. S. Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, paragraph 1152, **Exhibit RL-81**.

²¹¹⁴ In *Southern Pacific Properties v. Egypt*, the tribunal awarded damages representing ‘loss of an opportunity’ to make a profit of a resort that was still under development. On the facts, the construction of the resort was still in its infancy, but the claimant had already sold various lots for the sites on which villas would be constructed. Even though only around 6% of the villa lots had been sold, the profits the claimant had made by selling the lots was already more than twice its out-of-pocket expenses. The tribunal therefore found that it was “*clear [...] that the remaining lots were a potential source of very substantial revenues*” and that awarding only an amount for the costs incurred would be insufficient (*Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, paragraphs 212 – 217, **Exhibit RL-72**).

²¹¹⁵ In *Sapphire v. National Iranian Oil Company*, the tribunal awarded damages representing ‘loss of an opportunity’ to make a profit from an oil field that was still in the initial stages of development. The tribunal was able to rely, among other things, on a geological report prepared by an expert in the prospecting and appraisal of oil-bearing concessions, which concluded that was “*highly likely that the geological characteristics common to every oil-bearing territory are to be found in the territory granted to Sapphire under the concession, which is situated in a region very rich in oil*”. Accordingly, the tribunal held that the “*plaintiff has satisfied the legal requirement of proof by showing a sufficient*

Reply²¹¹⁶), where there was enough data to conclude with a high degree of certainty that the intended project would have been profitable, had it been completed.

1344. In *Gemplus v Mexico*, the tribunal held that the concession's status as a business was "far too uncertain and incomplete to provide any sufficient factual basis for the DCF method".²¹¹⁷ However, the tribunal awarded a reduced amount of damages representing the loss of an opportunity to make a success of the business, noting *inter alia* that:

- A. even during the year-long period when the business was partially operational, the concession had been profitable;²¹¹⁸
- B. the parties' quantum experts, "whilst disagreeing with the use of the DCF method, did not dispute the accuracy of much of the underlying data";²¹¹⁹ and
- C. the claimants' "evidential difficulties in proving their claim for loss of future profits are directly caused by the breaches of the BITs by the Respondent responsible for such loss."²¹²⁰

1345. The Respondent submits that *Gemplus* is readily distinguishable from the present case, because, among other things: (i) Manolium-Engineering did not even acquire the right to develop the Investment Object, let alone construct it; (ii) the quantum experts do not agree as to the accuracy of the underlying data; and (iii) sufficient data does

probability of the success of the prospecting undertaken, if they had been able to carry it through to a finish" (*Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*, 35 ILR 136, Award, 15 March 1963, available at https://www.trans-lex.org/261600/_sapphire-award-ilr-1963-at-136-et-seq/, **Exhibit RL-98**).

²¹¹⁶ Reply, paragraphs 799 and 805, **CS-5**.

²¹¹⁷ *Gemplus S.A., et al. v. The United Mexican States*, ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, paragraphs 13-72, **Exhibit CL-138**.

²¹¹⁸ *Gemplus S.A., et al. v. The United Mexican States*, ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, paragraphs 13 – 64, **Exhibit CL-138**.

²¹¹⁹ *Gemplus S.A., et al. v. The United Mexican States*, ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, paragraphs 13 – 74, **Exhibit CL-138**.

²¹²⁰ *Gemplus S.A., et al. v. The United Mexican States*, ICSID Case. No. ARB(AF)/04/3, Award of 16 June 2010, paragraphs 13 – 92, **Exhibit CL-138**.

not exist/never existed because of the Claimant's and Manolium-Engineering's own acts and/or omissions.²¹²¹ In light of such factors, the Respondent submits that the Claimant's Lost Profits claim is far too speculative even for it to be awarded damages representing loss of an opportunity.

c) The Investment Object would not have been profitable

1346. Even if, contrary to what is submitted above, the Claimant were able to prove that it would have acquired the right to develop the Investment Object and constructed it but for the alleged violations of the Respondent, the Claimant must also prove that the Investment Object would have been a profitable venture.
1347. In his Second Expert Report, Mr Taylor assesses the Lost Profits at US\$68.9 million, decreasing his original valuation by US\$77.2 million.²¹²² By contrast, Mr Qureshi's view remains the same: the Lost Profits are equal to zero both as at the Original Valuation Date (i.e. 29 October 2014) and as at the additional valuation date used by Mr Taylor in his Second Expert Report (i.e. 27 January 2015) (the "**New Valuation Date**").²¹²³
1348. Below the Respondent briefly addresses the key weaknesses of Mr Taylor's calculation of the Lost Profits. For the reasons stated below and in Mr Qureshi's Second Expert Report, the Respondent respectfully invites the Tribunal to adopt Mr Qureshi's valuation and to find that had the Claimant and Manolium-Engineering acquired the right to develop the Investment Object and had they constructed it, it would make a loss.

²¹²¹ See paragraphs 107 – 188 and 189 – 213 above. In particular, the Claimant's evidential difficulties in proving its case is caused by Manolium-Engineering's failure to submit the preliminary design documents and general plan for the Investment Object within the time limits prescribed by law.

²¹²² US\$146.1 million – US\$77.2 million = US\$68.9 million. See Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraphs 2.1.3 and 2.3.6, **CER-3**.

²¹²³ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 17, **RER-2**.

(1) Valuation Date

1349. According to Mr Taylor’s First Expert Report, he is instructed by Claimant’s counsel to assess the Lost Profits as at 29 October 2014, when “[t]he [Amended] *Investment Contract was officially terminated*”.²¹²⁴ Notably, Mr Taylor refers to 29 October 2014 as “Expropriation Date” and “Valuation Date”.²¹²⁵
1350. Having realised that Claimant’s instructions are inconsistent with its own position on jurisdiction, in the second round of submissions the Claimant asks Mr Taylor to assess the Lost Profits as at the New Valuation Date. Notably, in his Second Expert Report, Mr Taylor refers to 27 January 2017²¹²⁶ as the “Expropriation Date”.²¹²⁷
1351. As explained below, the change in the valuation date is one of a number of examples of the Claimant’s abrupt change in position in this arbitration, which, the Respondent submits, highlight the many inconsistencies in the Claimant’s position on jurisdiction, merits and quantum.
1352. The Respondent respectfully submits that the Lost Profits (if any) “*resulting from losing the right to perform the [Amended] Investment Contract (plus appropriate interest)*”²¹²⁸ could have been incurred no later than 29 October 2014, *i.e.* when the Amended Investment Contract was finally terminated. The Supreme Court’s resolution upholding the lower courts’ rulings, which already entered into force, did not affect the date of final termination of the Amended Investment Contract.²¹²⁹
1353. If, contrary to the Respondent’s position, the Tribunal finds that the proper valuation date is the New Valuation Date, the Respondent respectfully requests the Tribunal to

²¹²⁴ First Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraphs 1.2.3 and 1.3.7, **CER-1**.

²¹²⁵ First Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 1.3.7, **CER-1**.

²¹²⁶ On 27 January 2017, the New Communal Facilities were transferred into municipal ownership. *See* Deed of transfer dated 27 January 2017, **Exhibit R-148**.

²¹²⁷ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 5.4.2(iv), **CER-3**.

²¹²⁸ Reply, paragraph 736(i), **CS-5**.

²¹²⁹ *See* paragraphs 696 – 706 above.

adopt Mr Qureshi's valuation of the Lost Profits as at the New Valuation Date.²¹³⁰ As explained in Mr Qureshi's Second Expert Report, the amount of Lost Profits as at that date remains negative.²¹³¹

(2) The 2019 Colliers Report

1354. In the Reply, the Claimant asserts that "*Mr Taylor has found [...] the 2019 Colliers Report*",²¹³² thereby introducing the 2019 Colliers Report as an independent source of information or as if it were an expert report prepared for these proceedings. However, it is neither. As the Claimant itself has admitted in correspondence and only when cornered about the source of this document, the 2019 Colliers Report was prepared at its request.²¹³³ Yet, the 2019 Colliers Report is not an expert report, and the writers of the 2019 Colliers Report are unknown and have not been offered for cross-examination. What the Claimant seeks to achieve by the 2019 Colliers Report is to create evidence for Mr Taylor, who then uses it in support of his calculations.

1355. As Mr Taylor himself explains, "[a] *significant amount of additional information has been made available to [him] subsequent to submission of [his] First Expert Report*".²¹³⁴ More specifically, he states that "*differences to [his] First Expert Report are principally due to the adoption of actual contemporaneous sales and construction cost data for Minsk, which only became available to [him] subsequent to submission of [his] First Expert Report*".²¹³⁵

1356. The Respondent submits, however, that, contrary to Mr Taylor's assertion, there is no "*significant amount of additional information*". In essence, the only additional information which has been available to Mr Taylor after his First Expert Report and

²¹³⁰ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 8(b) and 17, **RER-2**.

²¹³¹ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 17 and 40 – 158, **RER-2**.

²¹³² Reply, paragraph 811 (emphasis added), **CS-5**.

²¹³³ Email from Baker McKenzie to White & Case dated 9 April 2019, **Exhibit R-230**.

²¹³⁴ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 1.2.3 (emphasis added), **CER-3**.

²¹³⁵ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 2.3.4 (emphasis added), **CER-3**.

on which he so heavily relies in his second valuation of the Lost Profits, is the 2019 Colliers Report. As Mr Qureshi explains, the reliability of the 2019 Colliers Report is at best questionable for, in particular, the following reasons:

- A. It does not specify the instructions which the Claimant gave to Colliers International Group;²¹³⁶
- B. The source and methodology for estimation of both the construction costs and sales value is unknown. The 2019 Colliers Report only refers to the “*National Cadastral Agency [and] Colliers International*”²¹³⁷ as the sources of data and vaguely states that the analysis “*was based on both general market research and specific cases*”²¹³⁸ providing pictures of several residential, retail, hotel and office real estate assets;²¹³⁹
- C. It provides no explanation as to what types of costs are included in the construction costs, and whether they include only the cost for construction of the building(s) or other costs, such as external works, landscaping, professional fees, developer’s internal costs and finance, local authority fees, legal, finance and holding costs, site investigation, test bores, infrastructure and others;²¹⁴⁰

²¹³⁶ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 35(a), **RER-2**.

²¹³⁷ 2019 Colliers Report, stated as a source under the tables on pages 1 and 2, **Exhibit TT-69**.

²¹³⁸ 2019 Colliers Report, page 3, **Exhibit TT-69**.

²¹³⁹ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 35(b), **RER-2**.

²¹⁴⁰ As Mr Qureshi explains, other construction costs usually amount to between 20% and 30% of the total construction costs of the property. *See* Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 35(c), **RER-2**. Colliers themselves comment in the report that “*while in many countries the construction costs include the finishing, on the local market it is typical to commission and sell shell and core. In the recent years the developers of large residential projects don’t make even core*” (2019 Colliers Report, page 3, **Exhibit TT-69**).

D. It does not explain the key characteristics of the projects used as a basis of the sales prices and construction costs, and how they are comparable to the Investment Object,²¹⁴¹

E. A number of residential real estates and hotels, and all office real estate allegedly analysed by Colliers are incomparable to the Investment Object.²¹⁴²

1357. Furthermore, the Respondent respectfully submits that the data presented by the Claimant throughout the 2019 Colliers Report should have been available to the Claimant and/or its expert earlier. The fact that it has been presented together with the Claimant's last submission in these arbitration proceedings in itself undermines its credibility. Indeed, as Mr Taylor himself admits, the 2019 Colliers Report "*is not [a] contemporaneous [document]*".²¹⁴³

1358. The Claimant courteously describes Mr Qureshi's First Expert Report as "*hired gun expert work*".²¹⁴⁴ The Respondent submits that if there is any "*hired gun*" expert work in these arbitration proceedings, it was conducted by the writers of the 2019 Colliers Report and the expert willing to rely on it in his quest to find support for the Claimant's highly speculative Lost Profits claim. The Respondent respectfully invites the Tribunal to give little or no weight to the 2019 Colliers Report and to Mr Taylor's updated valuation based on that report for the reasons explained by Mr Qureshi in his Second Expert.

²¹⁴¹ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 35(d), **RER-2**.

²¹⁴² Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 35(e) – (g), **RER-2**. See also Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 36 – 37, **RER-2**.

²¹⁴³ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraphs 3.2.4, 3.3.6 and 3.8.13, **CER-3**.

²¹⁴⁴ Reply, paragraph 844, **CS-5**.

(3) Mr Taylor’s cherry-picking approach

1359. The Respondent respectfully submits that in valuing the Lost Profits as at the New Valuation Date, Mr Taylor adopts a cherry-picking approach relying on fragments of data and evidence, whilst completely ignoring the complete set.
1360. In his Second Expert Report, Mr Taylor provides a general comment that Mr Qureshi’s analysis “*fails a basic sense-check*” because an “*investor would not be willing to spend USD 15.0 million on the New Communal Facilities to obtain the right to execute a loss-making development*”.²¹⁴⁵
1361. The Respondent notes that even Mr Dolgov himself conceded in 2013 that it made no “*economic sense*” to enter into a new investment contract to develop the Investment Object. This appears to confirm Mr Qureshi’s conclusion that the Investment Object would have been a loss-making development.²¹⁴⁶
1362. Indeed, if the Investment Object were as profitable as suggested by Mr Taylor in his Second Expert Report (i.e. earning the Claimant US\$68.9 million), Mr Dolgov’s reluctance to spend additional funds to complete the New Communal Facilities so as to obtain the right to develop the Investment Object is illogical. Further, Mr Taylor’s assumption that the Claimant would have built the Investment Object using no external financing,²¹⁴⁷ i.e. additionally spending hundreds of millions of US dollars²¹⁴⁸ of its own monies is also inconsistent with the Claimant’s and Manolium-Engineering’s position prior to the termination of the Amended Investment Contract.
1363. Accordingly, Mr Taylor’s proposal to use “*basic sense-check*” misses the point – the Claimant was willing neither to complete the New Communal Facilities, nor to

²¹⁴⁵ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 2.2.4, **CER-3**.

²¹⁴⁶ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 92, **RWS-2**.

²¹⁴⁷ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 3.1.3, **CER-3**.

²¹⁴⁸ Even according to Mr Taylor’s Second Expert Report, the cost of construction of the Investment Object would have been US\$243,021,831. *See* Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 2.3.3, Table 1, **CER-3**.

develop the Investment Object, precisely because the Investment Object was no longer a profitable, let alone a lucrative project.

1364. The survey, which concerns the average hotel occupancy rate in Minsk and on which Mr Qureshi relies in the Second Expert Report, is illustrative in this regard. As Mr Qureshi explains, “*according to the JLL report on hotel intelligence from October 2014, the average occupancy rate of the Minsk hotels was at 40%*”, and “*due to a “huge number of future hotel projects” the forecast for the investors was not positive and it was advised “to be cautious who plan to enter the market” as there was not expected “sharp increase in demand that could satisfy significantly increased offer”*”.²¹⁴⁹ Mr Qureshi concludes therefore that “*as at the moment of the planned Investment Object realisation, the price and the demand for the hotel component of it could have been significantly lower*”.²¹⁵⁰
1365. The Respondent respectfully submits that the results of this survey fit squarely with Mr Dolgov’s mood at the time: his loss of appetite to develop the Investment Object.²¹⁵¹
1366. When calculating the FMV of the hotel area of the Investment Object, Mr Taylor continues to assume that the planned 5-star hotel would have had 310 rooms and relies in this respect on the Area Calculations.²¹⁵² As explained in paragraphs 207 – 210 above, these are the Claimant’s internal documents, which were neither approved nor seen by the Respondent. Accordingly, by relying on the Area Calculations, Mr Taylor bases his analysis solely on the Claimant’s ‘hopes and dreams’, rather than on reliable and verified data containing appropriate level of detail.

²¹⁴⁹ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 110, **RER-2**.

²¹⁵⁰ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 110, **RER-2**.

²¹⁵¹ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**; Minutes of the meeting dated 3 April 2012, **Exhibit R-79**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 36 and 92, **RWS-2**.

²¹⁵² Area calculation for the Investment Object, **Exhibit TT-10**.

1367. The above are only few examples of the over-simplified and cherry-picking approach employed by Mr Taylor in the Second Expert Report to accommodate the Claimant's speculative Lost Profits claim. The Respondent respectfully submits, however, that these examples alone cast serious doubt over the credibility of Mr Taylor's analysis. The fundamental weaknesses of Mr Taylor's valuation are addressed in Mr Qureshi's Second Expert Report.²¹⁵³
1368. For the above reasons, the Respondent invites the Tribunal to adopt Mr Qureshi's valuation of the Lost Profits.

d) Interest should only be applied to past net cash flows

1369. In the Reply, the Claimant instructs Mr Taylor to calculate pre-award interest on the Lost Profits from a "*Valuation Date*" of 27 January 2015 until an assumed award date of 31 January 2019.²¹⁵⁴
1370. The Claimant's position that any pre-award interest should be calculated on the Lost Profits from 27 January 2015 is misguided because:
- A. the Claimant is only entitled to interest on past net cash flows which would have been earned but for the actions of the Respondent in violation of the EEU Treaty; and
 - B. the Claimant's adoption of 27 January 2015 as the valuation date for the alleged expropriation is inconsistent with its position on the merits.

²¹⁵³ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 18 – 22 and 40 – 161, **RER-2**.

²¹⁵⁴ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 2.3.1, **CER-3**.

(1) The Claimant is only entitled to interest on past net cash flows which would have been earned but for the actions of the Respondent in violation of the EEU Treaty

1371. If the Tribunal decides to award the Claimant the Lost Profits, the Respondent submits that the Claimant is only entitled to interest on past net cash flows which would have been earned but for the actions of the Respondent in violation of the EEU Treaty.

1372. The Commentary to ILC Article 38 provides that:

*“Where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery. A capital sum cannot be earning interest and notionally employed in earning profits at one and the same time. However, interest may be due on the profits which would have been earned but which have been withheld from the original owner.”*²¹⁵⁵

1373. In *Quiborax v. Bolivia*, the tribunal also acknowledged the risk of double-counting damages by awarding interest to lost profits. Citing the ILC Commentary, the tribunal held that in order to avoid double-counting, interest should be “*applied to past net cash flows (i.e., the cash flows that would have been earned [...] but were withheld from the Claimants due to Bolivia’s expropriatory measure) as of the date on which those cash flows were due*”.²¹⁵⁶

1374. In the present case, Mr Taylor assumes that the Investment Object would have been completed and sold in parts: (1) hotel and conference centre – in September 2017; (2) residential and office areas – in March 2018; and (3) retail area – in September 2018. Accordingly, if the Tribunal decides to award the Lost Profits, the Respondent submits that interest on the Lost Profits should be calculated in respect of the

²¹⁵⁵ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 38, subsection 11, **Exhibit CL-87**.

²¹⁵⁶ *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, paragraph 514, **Exhibit RL-95**.

component parts of the Investment Object as from these dates, since these are the earliest possible dates that the Claimant and Manolium-Engineering could have sold the Investment Object or replenished cash flows on the Investment Object. Accordingly, the Respondent instructs Mr Qureshi to adopt these dates in calculating pre-award interest (should the Tribunal disagree with Mr Qureshi's primary position that the right to develop the Investment Object was unprofitable).

(2) The Claimant's adoption of 27 January 2015 as a valuation date for the alleged expropriation is inconsistent with its position on the merits

1375. Even if the Tribunal decides (contrary to the Respondent's position) to award interest on the Lost Profits from the alleged date of expropriation rather than on past net cash flows, the Respondent submits that the Claimant's calculation of interest on the Lost Profits from a valuation date of 27 January 2015 is inconsistent with the Claimant's formulation of its expropriation claim on the merits.

1376. In the Reply, the Claimant alleges that the Respondent committed a creeping expropriation, "*which finally resulted in termination of the Investment Contract and in deprivation of the New Communal Facilities*".²¹⁵⁷ According to the Claimant, this creeping expropriation concerns "*one sequence of events*", which culminated in September 2017, when the Claimant was "*totally deprived of its rights under the Investment Contract*" as a result of the sale of the temporary right to develop the Investment Object Land Plot to another investor.²¹⁵⁸

1377. Article 80 of Protocol 16 of the EEU Treaty provides that when calculating pre-award interest on damages for an expropriation, "*interest shall be accrued in the period from the date of expropriation till the date of actual payment of the compensation*".²¹⁵⁹

²¹⁵⁷ Reply, paragraph 521, **CS-5**.

²¹⁵⁸ Reply, paragraphs 521 and 604 (emphasis in the original), **CS-5**.

²¹⁵⁹ Protocol 16 of the EEU Treaty, Article 81, **Exhibit CL-3**.

1378. Accordingly, if the Tribunal (i) agrees with the Claimant that there was a creeping expropriation which culminated in September 2017; and (ii) decides to award interest on the Lost Profits from the date of the expropriation (rather than from the date cash flows accrued), then the Respondent submits that the Tribunal should calculate interest on the Lost Profits as from September 2017, not 27 January 2015 as proposed by the Claimant.²¹⁶⁰

2. The Claimant is not entitled to the Alternative Lost Profits

1379. In the Defence, the Respondent submits that the Claimant failed to substantiate its alternative lost profits claim of US\$8,650,000.²¹⁶¹

1380. In the Reply, the Claimant reformulates its claim, seeking Alternative Lost Profits in the amount of US\$31.87 million.²¹⁶² Like the Lost Profits, the Claimant contends that it suffered the Alternative Lost Profits “*resulting from losing the right to perform the [Amended] Investment Contract (plus appropriate interest)*”.²¹⁶³ The Claimant alleges that the Alternative Lost Profits represents the “*amount which any other investor would pay for the right to develop the investment object on the land plot intended for the Investment Object.*”²¹⁶⁴

1381. If the Tribunal finds that the Respondent committed an expropriation which deprived the Claimant of its contingent contractual rights under the Amended Investment

²¹⁶⁰ In addition, the Respondent notes that the Claimant adopts two different defined terms for the “*Valuation Date*” (27 January 2017) and the “*Expropriation Date*” (27 January 2017). The Claimant uses the Valuation Date for the purpose of calculating interest on the Lost Profits, and uses the Expropriation Date for calculating interest on the NCF Losses. If the Claimant’s position is that is referring to “*one sequence of events*” (rather than two distinct acts and two disputes, as the Respondent submits (see paragraphs 674 – 706 above)), it is not clear why the Claimant adopts two different valuation dates for the Lost Profits and the NCF Losses.

See Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 214 and Appendix H, **RER-2**, for calculation of interest on the Lost Profits as from September 2017.

²¹⁶¹ Defence, paragraphs 677 – 679, **RS-18**.

²¹⁶² Reply, paragraph 821, **CS-5**.

²¹⁶³ Reply, paragraph 738(ii), **CS-5**; Notice, paragraph 530(a), **CS-1**.

²¹⁶⁴ Reply, paragraph 821, **CS-5**.

Contract, or committed cumulative violations of the FET standard tantamount to the expropriation of such rights, the Tribunal should proceed to determine whether the Claimant is entitled to the Alternative Lost Profits.

1382. As set out below, the Respondent submits that the Alternative Lost Profits claim fails because:

- A. the Claimant would not have acquired the right to develop the Investment Object; and
- B. the Alternative Lost Profits claim is highly speculative.

a) The Claimant would not have acquired the right to develop the Investment Object

1383. The Respondent submits in paragraphs 1312 – 1322 above that the Claimant has failed to satisfy its burden of proving with the “*reasonable certainty that international law requires for a lost profits claim*”²¹⁶⁵ that it *would have* acquired the right to develop the Investment Object, but for the alleged violations by the Respondent.²¹⁶⁶ For the same reason, the Respondent submits that the Claimant has failed to establish the necessary causation between the alleged violations and the Alternative Lost Profits.

b) The Alternative Lost Profits claim is highly speculative

1384. The Claimant calculates the Alternative Lost Profits by adding together:

- A. the price at which the temporary right to develop Investment Object Land Plot was sold to another investor on 12 September 2017 (**US\$8.87 million**); and

²¹⁶⁵ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paragraph 278, **Exhibit RL-65**.

²¹⁶⁶ See paragraphs 1307 – 1345 above.

B. the rental costs that would have been payable by Manolium-Engineering for the Investment Object Land Plot, as calculated by Mr Qureshi and rounded down by the Claimant (**US\$23 million**).

1385. The Claimant alleges that this calculation represents the “*amount which any other investor would pay for the right to develop the investment object on the land plot intended for the Investment Object.*”²¹⁶⁷ The Claimant’s position is unfounded.

1386. The Respondent submits that the amount an investor would be willing to pay to develop a land plot is entirely dependent on the rights that they would have in respect of the land plot, including the duration of the lease and the terms of use of the land. As already explained, Astomaks acquired the temporary right to develop the land plot on which the Investment Object was to be built on different terms and conditions to those on which Manolium-Engineering would have leased the land, had it complied with its obligation to construct the New Communal Facilities.²¹⁶⁸ Accordingly, the amount that Astomaks paid at auction for the temporary right to develop the land plot is of little assistance in calculating the FMV of the Claimant’s contingent right to develop the Investment Object.

1387. As for the Claimant’s incorporation of US\$23 million in its Alternative Lost Profits Claim, Mr Qureshi’s calculation represents the one-off payment that Manolium-Engineering would have been required to pay in respect of its rights to lease the land to develop the Investment Object, not the amount that “*any other investor*” would have to pay in respect of its lease rights (which, as noted above, will differ depending on the rights that they acquire).²¹⁶⁹ Accordingly, the Respondent submits that US\$23 million does not represent the “*amount which the winner of the auction for the*

²¹⁶⁷ Reply, paragraph 821, **CS-5**.

²¹⁶⁸ See paragraphs 606 – 615 above.

²¹⁶⁹ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 159 – 160, **RER-2**.

*right to develop the land plot previously intended for the Investment Object had to pay.*²¹⁷⁰

1388. Moreover, even if Manolium-Engineering would have had to make a payment of US\$23 million to lease the land plot, this does not lead to the conclusion that the contingent right to develop the Investment Object must be worth this same amount. To the contrary, the Claimant has provided no evidence to suggest that the cost of leasing the land corresponded to the value of the right to develop the Investment Object. Notably, Mr Dolgov himself admitted in 2013 that it no longer made “*economic sense*” for the Claimant to enter into a new investment contract to develop the Investment Object.²¹⁷¹ Mr Dolgov’s admission appears to confirm that the contingent right to develop the Investment Object was no longer valuable in 2013.
1389. The Respondent therefore submits that the Alternative Lost Profits claim does not represent the FMV of the Claimant’s contingent right to develop the Investment Object.

3. The sunk costs approach is appropriate in the present case

1390. As set out above, the Respondent submits that the Lost Profits and the Alternative Lost Profits are speculative and inappropriate in the present case.²¹⁷²
1391. The Respondent therefore submits that if the Tribunal finds that the Respondent expropriated the Claimant’s rights under the Amended Investment Contract and decides to award damages for loss of the contingent right to develop the Investment Object, the Tribunal should:
- A. adopt the sunk costs approach of valuation;

²¹⁷⁰ Reply, paragraph 821, **CS-5**.

²¹⁷¹ Letter from the Claimant to MCEC dated 19 March 2013, **Exhibit C-83**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraph 92, **RWS-2**.

²¹⁷² See paragraphs 1323 – 1368 and 1384 – 1389 above.

B. adopt Mr Qureshi's calculation of Manolium-Engineering's costs in constructing the New Communal Facilities ("SQ NCF Losses").

1392. In the alternative, if the Tribunal considers it more appropriate to rely on the NCF Losses, the Respondent submits that the Tribunal should apply an appropriate reduction to the NCF Losses to take account of the Claimant's own contributory negligence.

a) The Tribunal should adopt the sunk costs approach of valuation

1393. The Respondent submits that the sunk costs approach is the most appropriate methodology for calculating the FMV of the contingent right to develop the Investment Object.

1394. It has been recognised by commentators and tribunals that the sunk costs approach is to be adopted where other valuation methods are speculative or inappropriate. As noted by Marboe:

*"[S]everal international tribunals have based their valuation on sunk investments, both for the valuation of the fair market value and for calculating damages. This was particularly so when the application of other valuation methods appeared to be too speculative."*²¹⁷³

1395. In *Biloune v. Ghana*, the *ad hoc* tribunal decided that a valuation of the fair market value of the investment on the basis of expected profits would be speculative. Due to the early termination of the project by the expropriation, the tribunal regarded the amount of investments undertaken as the best measure of the fair market value of the property.²¹⁷⁴

²¹⁷³ I. Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford University Press, 2009, Extract, paragraph 5.234 et seq., **Exhibit RL-88**.

²¹⁷⁴ *Antoine Biloune, Marine Drive Complex Ltd. v. Ghana Investments Centre, the Government of Ghana*, UNCITRAL, Award on Damages and Costs, 30 June 1990, page 229, **Exhibit RL-71**.

1396. In *Wena Hotels v. Egypt*, the tribunal held that the claimant’s claims for lost profits and lost opportunities were “*inappropriate*”, because:
- A. there was an “*insufficiently ‘solid base on which to found any profit [...] or for predicting growth or expansion of the investment made’ by Wena*”;
 - B. there was “*some question whether Wena had sufficient finances to fund its renovation and operation of the hotels*”; and
 - C. there was a “*large disparity between the requested amount [...] and Wena’s stated investment in the two hotels*”.²¹⁷⁵
1397. The tribunal held that the proper calculation of the fair market value of the investment was “*best arrived at [...] by reference to Wena’s actual investments in the two hotels*”.²¹⁷⁶
1398. In *Metalclad v. Mexico*, the tribunal rejected the application of the DCF method on the basis that the investment had “*never been operative and any award based on future lost profits would be wholly speculative*.”²¹⁷⁷ The tribunal held that the “*fair market value is best arrived at in this case by reference to Metalclad’s actual investment in the project*.”²¹⁷⁸
1399. In the present case, the Respondent submits above that the Lost Profits and the Alternative Lost Profits are both highly speculative and inappropriate given that the Investment Object was never developed – and the right to develop it was never even acquired.²¹⁷⁹ Like in the cases cited above, it is highly questionable whether the

²¹⁷⁵ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, paragraph 124, **Exhibit RL-73**.

²¹⁷⁶ *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, paragraph 125, **Exhibit RL-73**.

²¹⁷⁷ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)97/1, Award, 30 August 2000, paragraph 121, **Exhibit CL-15**.

²¹⁷⁸ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)97/1, Award, 30 August 2000, paragraph 122, **Exhibit CL-15**.

²¹⁷⁹ See paragraphs 1323 –1368 and 1384 – 1389 above.

contingent right to develop the Investment Object was profitable for the Claimant, particularly given Mr Dolgov’s own admission in 2013 that it made no “*economic sense*” to enter into a new investment contract to develop the Investment Object.²¹⁸⁰ There is also a large disparity between the amount of Lost Profits sought by the Claimant and the costs incurred by Manolium-Engineering – even on the Claimant’s own position.²¹⁸¹

1400. The Respondent therefore submits that the Claimant has failed to provide a sufficiently solid base on which to found an award of lost profits, and that the sunk costs approach is the most appropriate on the present facts.

b) The Tribunal should adopt the SQ NCF Losses

1401. If the Tribunal agrees with the Respondent that the sunk costs approach is the most appropriate method of calculating the FMV of the contingent right to develop the Investment Object, the Tribunal should proceed to determine the level of sunk costs incurred by the Claimant in constructing the New Communal Facilities. For the reasons set out in detail in paragraphs 1418 – 1450 below, the Respondent submits that the Tribunal should adopt Mr Qureshi’s calculation of the SQ NCF Losses.²¹⁸²

c) In the alternative, the Tribunal should apply an appropriate reduction to the NCF Losses to take account of the Claimant’s contributory negligence

1402. If, contrary to the Respondent’s position, the Tribunal considers it more appropriate to rely on the NCF Losses as calculated by Mr Taylor, the Respondent submits that, for the reasons submitted in paragraphs 1451 – 1463 below, the Tribunal should apply an appropriate reduction to the NCF Losses to take account of the extent to which the

²¹⁸⁰ See paragraph 1346 –1368 above.

²¹⁸¹ See paragraph 1328 above.

²¹⁸² First Expert Report of Sirshar A. Qureshi dated 15 November 2018, paragraph 202, **RER-1**. Mr Qureshi calculates the sunk costs at US\$15.9 million for the construction of the New Communal Facilities (based on the cost estimates) and US\$1 million for the Library Payment (total – US\$16.9 million).

Claimant's decision to withdraw financing of the construction works increased costs. As explained in paragraph 1459 below, Mr Qureshi estimates that the Claimant's delays caused an increase in costs of 31 percent.²¹⁸³

D. FMV OF THE NEW COMMUNAL FACILITIES

1403. The Claimant claims the NCF Losses “[are] *direct losses caused by the expropriation of the New Communal Facilities (plus appropriate interest)*”²¹⁸⁴

1404. As set out in paragraphs 1285 – 1306 above, if the Tribunal finds that the Respondent committed violations of Protocol 16 which did not cumulatively cause a total deprivation or destruction of the Claimant's investment culminating in the transfer of the New Communal Facilities, the Tribunal should proceed to calculate the actual losses resulting from the act, subject to the principles of causation and remoteness.

1405. If, on the other hand, the Tribunal finds that the Respondent committed an expropriation which deprived the Claimant of its right the New Communal Facilities, or committed cumulative violations of the FET standard tantamount to an expropriation of such rights, the Tribunal should proceed to determine how to calculate the FMV of the New Communal Facilities.

1406. In the Defence, the Respondent submits that the Tribunal should adopt Mr Qureshi's calculation of the FMV of the New Communal Facilities because:

A. the Respondent disputes the 2016 Memorandum;²¹⁸⁵

B. the Claimant is not entitled to inflated costs that occurred as a result of its own delays;²¹⁸⁶ and

²¹⁸³ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 28 and 185, **RER-2**.

²¹⁸⁴ Reply, paragraph 736(i), **CS-5**.

²¹⁸⁵ Defence, paragraphs 699 – 705, **RS-18**.

²¹⁸⁶ Defence, paragraphs 706 – 711, **RS-18**.

- C. the Library Payment should be excluded from the calculation of the FMV of the New Communal Facilities.²¹⁸⁷
1407. In the Reply, the Claimant maintains that the NCF Losses reflect the FMV of the New Communal Facilities.²¹⁸⁸
1408. In paragraphs 1410 – 1463 below, the Respondent respectfully submits that:
- A. the Tribunal should reduce any award of damages in respect of the FMV of the New Communal Facilities to take account of the legitimate interests of Manolium-Engineering’s third-party creditors; and
- B. the SQ NCF Losses reflect the FMV of the New Communal Facilities.
1409. If the Tribunal disagrees with the Respondent’s position that the SQ NCF Losses reflect the FMV of the New Communal Facilities, the Respondent submits, in the alternative, that the Tribunal should apply an appropriate reduction to the NCF Losses to take account of the increase in costs caused by the Claimant’s and/or Manolium-Engineering’s contributory negligence.

1. The Tribunal should reduce any award of damages in respect of the FMV of the New Communal Facilities to take account of the legitimate interests of Manolium-Engineering’s third-party creditors

1410. The Claimant seeks the NCF Losses on the alleged ground that they represent the “**Claimant’s costs**”.²¹⁸⁹ Similarly, Mr Taylor states that he considers the 2016 Memorandum to be “*the most reliable source of the costs **incurred by Claimant** in respect of the New Communal Facilities*”.²¹⁹⁰

²¹⁸⁷ Defence, paragraphs 712 – 714, **RS-18**.

²¹⁸⁸ Reply, paragraphs 836 – 870, **CS-5**.

²¹⁸⁹ Reply, paragraph 828 (emphasis added), **CS-5**.

²¹⁹⁰ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 4.4.2 (emphasis added), **CER-3**.

1411. In the Reply, however, the Claimant discloses for the first time that the Claimant did not incur any costs itself in the construction of the New Communal Facilities. The Claimant discloses that the funds which were invested into the construction of the New Communal Facilities were loaned to Manolium-Engineering by third-party creditors allegedly “*affiliated*” with the Claimant.²¹⁹¹ Accordingly, Mr Taylor’s assumption that the 2016 Memorandum is “*the most reliable source of the costs incurred by Claimant in respect of the New Communal Facilities*” is erroneous.²¹⁹²
1412. As the Respondent submits in paragraphs 858 – 900 above, neither are the third-party creditors of Manolium-Engineering protected investors under the EEU Treaty, nor are the costs incurred by these entities protected investments under the EEU Treaty. The Claimant therefore cannot seek recovery of such sums under the EEU Treaty.
1413. Even if, contrary to the Respondent’s position, the Tribunal finds that the Claimant can claim for losses suffered through its subsidiary, the Respondent submits that the Claimant should still only be entitled to recover damages to the extent of its own loss. In the present case, the Claimant does not appear to have suffered any loss.²¹⁹³
1414. If, however, the Tribunal disagrees with the Respondent’s position above, the Respondent submits that the Tribunal should reduce any award of damages in respect of the FMV of the New Communal Facilities, to take account of the legitimate interests of Manolium-Engineering’s third party creditors.
1415. Investment tribunals have recognised the principle that certain third-parties have priority over shareholders in respect of the company’s assets and that third-party interests may be affected by shareholder claims.²¹⁹⁴ In *CMS v. Argentina*, the tribunal noted that *in the real world, creditors would require to be paid first, one way or the*

²¹⁹¹ Reply, paragraph 855, **CS-5**.

²¹⁹² Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 4.4.2 (emphasis added), **CER-3**.

²¹⁹³ See paragraph 900 above.

²¹⁹⁴ See, e.g., *Urbaser S.A et al. v. the Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, paragraph 253, **Exhibit RL-102**.

*other, at the expense of the shareholders.*²¹⁹⁵ Similarly, the tribunal in *Hochtief v. Argentina* referred to “*the normal priority of creditors over shareholders*”.²¹⁹⁶

1416. In the present case, as the Respondent explains in paragraphs 448 and 858 – 906 above, the Claimant has failed to provide sufficient evidence that the loan set out in paragraph 48 of the Reply were made by “*affiliated*” companies of the Claimant. Accordingly, if the Tribunal awards the Claimant damages representing the FMV of the New Communal Facilities, the Respondent submits that the Tribunal should take into consideration the legitimate interests of Manolium-Engineering’s third-party creditors by reducing any award of damages pro rata to the creditors’ outstanding claims.
1417. Given that the total value of the third-party creditors’ claims (approximately US\$25 million) is larger than the FMV of the New Communal Facilities (even on the Claimant’s calculation), the Respondent submits that the Claimant’s claim for damages in respect of the FMV of the New Communal Facilities should be reduced to nil.

2. The SQ NCF Losses reflect the FMV of the New Communal Facilities

1418. In the Reply, the Claimant contends that the NCF Losses reflect the FMV of the New Communal Facilities because:
- A. the 2016 Memorandum is the “*most reliable evidence of the Claimant’s costs*”,²¹⁹⁷
- B. the Claimant is “*entitled to costs for the delays in 2007 – 2011 because they were the result of the Respondent’s wrongful actions*”,²¹⁹⁸ and

²¹⁹⁵ *CMS Gas Transmission Company v. the Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paragraph 429, **Exhibit RL-63**.

²¹⁹⁶ *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Award, 21 December 2016, paragraph 63, **Exhibit RL-86**.

²¹⁹⁷ Reply, paragraphs 836 – 856, **CS-5**.

C. the Library Payment is “*not an issue that affects Mr. Taylor’s valuation*”.²¹⁹⁹

1419. If, contrary to the Respondent’s position above, the Tribunal holds that the Claimant is entitled to recover damages in respect of the FMV of the New Communal Facilities at the expense of third-party creditors, the Respondent submits that the Tribunal should adopt the SQ NCF Losses because:

A. the 2016 Memorandum is inappropriate for calculating the FMV of the New Communal Facilities;

B. Mr Taylor fails to verify the NCF Losses; and

C. the Library Payment should be excluded from the calculation of the NCF Losses.

a) The 2016 Memorandum is inappropriate for calculating the FMV of the New Communal Facilities

1420. In the Reply, the Claimant contends that the 2016 Memorandum is “*the most reliable evidence of the Claimant’s costs*” because:

A. the “*sole fact that the Respondent is trying to dispute its own evaluation demonstrates that its position is lacking in credibility*”,²²⁰⁰

B. the 2016 Memorandum is “*consistent with and made references to two previous and separate reports for the costs incurred by the Claimant*”,²²⁰¹

C. the 2016 Memorandum “*should be considered conservative [...] because it [...] [d]id not count all indirect costs and overheads; and [...] [t]ook into*

²¹⁹⁸ Reply, paragraphs 857 – 864, CS-5.

²¹⁹⁹ Reply, paragraph 870, CS-5.

²²⁰⁰ Reply, paragraph 843, CS-5.

²²⁰¹ Reply, paragraphs 849 – 854, CS-5.

account only actual costs based on their book value without taking into account inflation”,²²⁰² and

D. the delays in 2007 – 2011 “*were the result of actions attributable to the Respondent*”.²²⁰³

1421. Contrary to what the Claimant contends, the Respondent submits that the 2016 Memorandum is inappropriate for calculating the FMV of the New Communal Facilities because:

A. MCEC never accepted the Paritet-Standart report, the Registration and Cadastre Agency Report or the 2016 Memorandum (the “**Valuation Reports**”); and

B. the 2016 Memorandum significantly overestimates the FMV of the incomplete New Communal Facilities at the valuation date.

(1) MCEC never accepted the Valuation Reports

1422. Mr Akhramenko explains that in negotiating a purchase price for the incomplete New Communal Facilities after the termination of the Amended Investment Contract, MCEC’s position was that:

A. expenses not directly related to the construction of the New Communal Facilities should not be counted,²²⁰⁴ and

B. the purchase price should reflect the amount that the State would have to pay on completing the construction works.²²⁰⁵

²²⁰² Reply, paragraph 855, **CS-5**.

²²⁰³ Reply, subsection 15.2, **CS-5**.

²²⁰⁴ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 126 and 129, **RWS-2**.

²²⁰⁵ First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 126 and 129, **RWS-2**.

1423. The Respondent has explained that, with these core objectives and conditions in mind, MCEC did not accept the Valuation Reports, among other reasons, because:

- A. the Paritet-Standart report was prepared on the basis of Manolium-Engineering’s instructions to calculate the “*amount of [costs] incurred by [Manolium-Engineering] for the entire period of the investment project*”, rather than the costs actually spent by Manolium-Engineering on constructing the New Communal Facilities;²²⁰⁶
- B. the Registration and Cadastre Agency Report included all costs incurred by Manolium-Engineering, not just the costs directly relating to the construction of the New Communal Facilities, and did not comply with Belarusian regulations regarding valuation services;²²⁰⁷ and
- C. the 2016 Memorandum did not include a check measurement of the New Communal Facilities, nor did it determine the amount of costs spent directly and lawfully on the New Communal Facilities on the basis of such check measurements.²²⁰⁸

1424. In the Reply, the Claimant states that the Respondent’s position is “*lacking in credibility*” because it is disputing its “*own evaluation*” (by which it appears to be referring to the 2016 Memorandum).²²⁰⁹ Contrary to the impression the Claimant seeks to create, however, the 2016 Memorandum has never been accepted by MCEC for the reasons given in paragraphs 437 – 454 above. As the Respondent explains above, MCEC also never accepted the Paritet-Standart report or the Registration and

²²⁰⁶ Defence, paragraphs 225 – 228, **RS-18**; See also Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 79 – 83, **RWS-4**; Paritet-Standart Report, page 1, **Exhibit C-131**.

²²⁰⁷ Defence, paragraphs 276 – 280, **RS-18**; See also Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraphs 89 – 90, **RWS-4**; Registration and Cadastre Agency Report, Conclusions, **Exhibit C-154**.

²²⁰⁸ Defence, paragraphs 283 – 298, **RS-18**; First Witness Statement of Mr Akhramenko dated 19 November 2018, paragraphs 130 – 145, **RWS-2**; See also Second Witness Statement of Mr Akhramenko dated 30 May 2019, paragraph 91 – 95, **RWS-4**; 2016 Memorandum, **Exhibit C-160**.

²²⁰⁹ Reply, paragraph 843, **CS-5**.

Cadastre Agency Report. Therefore, it does not assist the Claimant that the 2016 Memorandum is “*consistent with and made references to*” these reports.²²¹⁰

(2) The 2016 Memorandum significantly overstates the FMV of the incomplete New Communal Facilities at the valuation date

1425. If the Tribunal finds that the Respondent committed an expropriation which deprived the Claimant of its right the New Communal Facilities, the parties agree that the Tribunal should proceed to determine the FMV of the New Communal Facilities as at 27 January 2017.

1426. In the Defence, the Respondent explains that it disputes the calculation of costs in the 2016 Memorandum because:

- A. the 2016 Memorandum was calculated by comparing secondary accounting documentation with the Registration and Cadastre Agency Report, which was previously stated by MCEC to be inappropriate and unreliable evidence of such costs (among other reasons, because it included costs incurred by Manolium-Engineering which were not spent directly on the construction of the New Communal Facilities);²²¹¹ and
- B. the 2016 Memorandum did not take into account the extent to which the costs incurred by Manolium-Engineering were increased by the Claimant’s and/or Manolium-Engineering’s own actions or delays.²²¹²

1427. In the Reply, the Claimant responds that:

- A. the 2016 Memorandum “*should be considered conservative [...] because it [...] [d]id not count all indirect costs and overheads; and [...] [t]ook into*

²²¹⁰ Reply, paragraph 849, **CS-5**.

²²¹¹ Defence, paragraphs 701 – 703, **RS-18**.

²²¹² Defence, paragraphs 706 – 710, **RS-18**.

account only actual costs based on their book value without taking into account inflation”;²²¹³ and

B. the delays in 2007 – 2011 “*were the result of actions attributable to the Respondent*”.²²¹⁴

1428. The Claimant’s position is wrong on both counts.

1429. Firstly, the Claimant’s contention that the 2016 Memorandum “*should be considered conservative [...] because it [...] [d]id not count all indirect costs and overheads; and [...] [t]ook into account only actual costs*” is incorrect. As the Respondent already explains in paragraphs 437 – 454 above, the 2016 Memorandum did include “*indirect costs and overheads*”, because the 2016 Memorandum included:

A. value-added costs, which comprised, *inter alia*, costs not specified in the Design Specification and Estimate Documentation (such as certain “*construction management costs*”);²²¹⁵ and

B. other “*indirect costs (such as [...] costs of construction organization and management, exchange rate differences)*”.²²¹⁶

1430. The Claimant’s suggestion that the 2016 Memorandum took into account only Manolium-Engineering’s “*actual costs*” of construction of the New Communal Facilities is also misleading.²²¹⁷ As the Respondent explains in paragraphs 437 – 454 above, the 2016 Memorandum was based primarily on an examination of Manolium-Engineering’s accounting records and other documents which could not have assisted in determining the costs actually spent by Manolium-Engineering on constructing the New Communal Facilities.

²²¹³ Reply, paragraph 855, **CS-5**.

²²¹⁴ Reply, subsection 15.2, **CS-5**.

²²¹⁵ 2016 Memorandum, pages 15 – 16, **Exhibit C-160** (Respondent’s translation).

²²¹⁶ 2016 Memorandum, pages 7 – 8, **Exhibit C-160** (Respondent’s translation).

²²¹⁷ Reply, paragraph 855, **CS-5**.

1431. As for the Claimant’s assertion that the “*total amount of funds invested by the Claimant’s affiliated companies into Belarus*” is higher the amounts established by the 2016 Memorandum, the Respondent submits that the Claimant has failed to satisfy its burden of proving that the amounts loaned to Manolium-Engineering by third-party creditors set out in paragraph 48 of the Reply were spent by Manolium-Engineering on the construction of the New Communal Facilities.²²¹⁸ The Claimant’s reference to these loan agreements therefore cannot assist the Claimant in this regard.
1432. Secondly, the Claimant’s assertion that the delays in 2007 – 2011 “*were the result of actions attributable to the Respondent*”²²¹⁹ is false. As the Respondent explains in paragraphs 109 – 115 above, the Claimant caused the delays in the construction of the New Communal Facilities due to its inability and/or unwillingness to finance the construction works. As a result of such delays, MCEC agreed (at the Claimant’s request) to postpone the contractual deadline for constructing the New Communal Facilities by over two years, from December 2008 to July 2011. With regard to the Claimant’s alternative position that such delays may only be taken into account if they were wilful or negligent, the Respondent submits in paragraphs 1457 – 1458 below that the Claimant’s deliberate decision to withdraw financing from the construction of the New Communal Facilities readily satisfies such criteria.
1433. Accordingly, the Respondent submits that the 2016 Memorandum overestimates the FMV of the incomplete New Communal Facilities at the valuation date, because:
- A. it includes costs that were inflated as a result of the Claimant’s delays; and
 - B. it includes costs which were not spent directly on the construction of the New Communal Facilities.
1434. Mr Qureshi’s preferred approach, on the other hand, is to assess the FMV of the New Communal Facilities based on Manolium-Engineering’s original estimations of what

²²¹⁸ Reply, paragraph 855, **CS-5**.

²²¹⁹ Reply, subsection 15.2, **CS-5**.

its construction costs would be. The Respondent submits that this approach is preferable, because it excludes: (i) the amounts that were not spent directly on the New Communal Facilities by Manolium-Engineering; and (ii) the inflated costs that resulted from the Claimant's delays. Accordingly, the Respondent submits that the SQ NCF Losses are a more reasonable estimation of the FMV of the New Communal Facilities in their incomplete state as at 27 January 2017.

b) Mr Taylor fails to verify the NCF Losses

1435. Mr Taylor refers to the 2016 Memorandum on the basis of his understanding that “*the costs assessed in [the 2016 Memorandum] are undisputed between the Parties*”.²²²⁰ As Mr Taylor has admitted in the First Expert Report, he “*ha[s] not sought to verify these costs further*”.²²²¹
1436. Even after the Respondent clarifies in the Defence that the Valuation Reports (including the 2016 Memorandum) were never accepted by MCEC, Mr Taylor still fails to offer any alternative method for calculating the FMV of the New Communal Facilities, and makes no attempt to verify the costs allegedly incurred by Manolium-Engineering other than by comparing the CAO of the Ministry of Finance's findings with the Paritet-Standart Report and the Registration and Cadastre Agency Report.²²²² The Respondent submits that the Claimant has therefore failed to satisfy its burden of proving the FMV of the New Communal Facilities.
1437. Mr Qureshi, on the other hand, raises further concerns as to the reliability of the 2016 Memorandum,²²²³ including, *inter alia*, the following:
- A. The sample inspection of construction contracts and work completion certificates, to which Mr Taylor refers to support his opinion,²²²⁴ covered one

²²²⁰ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 6.2.2, **CER-1**.

²²²¹ Expert Report of Travis A.P. Taylor dated 24 April 2017, paragraph 6.2.2, **CER-1**.

²²²² Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraphs 4.3.3 – 4.3.6, **CER-3**.

²²²³ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraphs 179 – 186, **RER-2**.

²²²⁴ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 4.3.2(iv), **CER-3**.

contract for each of the New Communal Facilities, while according to the Registration and Cadastre Agency Report, there were 472 contracts entered into by Manolium-Engineering.²²²⁵ Therefore, the CAO of the Ministry of Finance inspected only three contracts for the total amount of 1,982,047 non-denominated Belarusian rubles in 1991 prices. This represents only 14% of total costs budgeted per the Design Specification and Estimate Documentation.²²²⁶ The Respondent submits that such sample inspection was not sufficient for the intended purpose of the 2016 Memorandum – to determine the costs of construction of the New Communal Facilities and the actual volume of the works performed and whether those works complied with the design documentation.²²²⁷

- C. The acts of acceptance of works²²²⁸ relating to the above three contracts do not cover the entire or significant period of construction, in particular:²²²⁹
- i) For the Depot, the sample inspection covers the period from December 2011 to March 2012, while, according to the 2016 Memorandum, the related expenses were incurred from [2004 to 2013],²²³⁰
 - ii) For the Road, the sample inspection covers September 2009 only, while, according to the 2016 Memorandum, the related expenses were incurred from [2007 to 2012],²²³¹

²²²⁵ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 179(a)(i), **RER-2**. See also Registration and Cadastre Agency Report, pages 5 – 35, **Exhibit C-154**.

²²²⁶ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 179(a)(i), **RER-2**. 14% are calculated as 1,982,047 non-denominated Belarusian rubles in 1991 prices divided by 14,545,722 non-denominated Belarusian rubles in 1991 prices of total costs per the Design Specification and Estimate Documentation for the New Communal Facilities.

²²²⁷ See paragraphs 437 – 454 above.

²²²⁸ Acts of acceptance of works are bilateral documents made between a customer and a contractor and serve for the confirmation that the customer has confirmed the acceptance of works performed by the contractor.

²²²⁹ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 179(a)(ii), **RER-2**.

²²³⁰ 2016 Memorandum, Appendix 2, pages 20 – 23, **Exhibit C-160**.

iii) For the Pull Station, the sample inspection covers August 2009 only, while, according to the 2016 Memorandum, the related expenses were incurred from [2007 to 2011].²²³²

1438. Mr Qureshi also notes²²³³ that the Registration and Cadastre Agency, whose report was used as the basis for the 2016 Memorandum,²²³⁴ explicitly confirmed the reliability of the cost estimates as the documents “*that determine[...] the cost of the construction*”.²²³⁵ Accordingly, Mr Qureshi’s approach to calculate the costs of construction of the New Communal Facilities is reasonable and consistent.

1439. As Mr Taylor himself admits, “[i]f the construction of the New Communal Facilities had not been performed, or if there was no reliable record of the costs incurred by the Claimant, Mr Qureshi’s estimation process may not have been an unreasonable approach”.²²³⁶

1440. The Respondent submits that the 2016 Memorandum does not represent the “*reliable record of the costs*” for the reasons submitted above. The Respondent also submits that the Valuation Reports also do not contain the “*reliable record of the costs*”. As explained in paragraphs 410 – 436 above, both the Paritet-Standart report and the Registration and Cadastre Agency Report are primarily based on either Manolium-Engineering’s accounting records or very scant raw data and, therefore, contain highly approximate, and thus not reliable, findings. Furthermore, as discussed in more detail in paragraphs 582 – 605 above, the Respondent is aware of the Claimant, in an attempt to save costs, using unauthorised and cheaper materials and equipment instead of the ones provided for in the Design Specification and Estimate Documentation for the New Communal Facilities. Lastly, as explained in paragraphs 416 and 430 – 436

²²³¹ 2016 Memorandum, Appendix 3, pages 24 – 26, **Exhibit C-160**.

²²³² 2016 Memorandum, Appendix 2, pages 27 – 28, **Exhibit C-160**.

²²³³ Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 192(a) – (b), **RER-2**.

²²³⁴ 2016 Memorandum, pages 14 – 15, **Exhibit C-160**.

²²³⁵ Registration and Cadastre Agency Report, page 5, paragraph 1, **Exhibit C-154** (Respondent’s translation).

²²³⁶ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 4.3.12, **CER-3**.

above, neither Paritet-Standart nor the Registration and Cadastre Agency analysed whether Manolium-Engineering complied with the Design Specification and Estimate Documentation.

1441. When comparing calculations provided in the 2016 Memorandum and the Registration and Cadastre Agency, Mr Taylor notices that the “*costs being incurred over the same time period, but the amount reported for each month was rarely consistent*”.²²³⁷ The Respondent submits that this should have raised Mr Taylor’s concerns as to reliability of the 2016 Memorandum and the Registration and Cadastre Agency Report, especially given that the 2016 Memorandum “*reconcil[ed] data of [Manolium-Engineering’s] expenses on the [construction] of [the New C]ommunal [F]acilities reflected in [the Registration and Cadastre Agency Report], and the accounting data of [...] Manolium-Engineering*”.²²³⁸
1442. Furthermore, Manolium-Engineering itself estimated its costs to construct the New Communal Facilities at US\$16,287,546 as at 11 September 2012 (which the Respondent disputes),²²³⁹ more than US\$3 million lower than in the 2016 Memorandum. According to the 2016 Memorandum (the reliability of which is disputed by the Respondent), Manolium-Engineering did not incur any significant costs after September 2012.²²⁴⁰
1443. As Mr Taylor himself explains, “[a] *significant amount of additional information has been made available to [him] [...], including, for example, [...] Respondent’s Statement of Defence, witness statements and factual exhibits*”.²²⁴¹ Accordingly, the Respondent assumes that Mr Taylor has seen or should have seen the letter from Manolium-Engineering dated 11 September 2012, in which it represented to

²²³⁷ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 4.3.5, **CER-3**.

²²³⁸ 2016 Memorandum, pages 14 – 15, **Exhibit C-160** (Respondent’s translation).

²²³⁹ Letter from Manolium-Engineering to Minsktrans dated 11 September 2012, **Exhibit R-94**.

²²⁴⁰ 2016 Memorandum, **Exhibit C-160**. See also Second Expert Report of Travis A.P. Taylor dated 28 February 2019, Appendix J, **CER-3**, for the spreadsheets of costs as calculated by the CAO of the Ministry of Finance in the 2016 Memorandum.

²²⁴¹ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 1.2.3, **CER-3**.

Minsktrans that the total amount of its expenses was US\$16,287,546. It is therefore inappropriate for the Claimant or Mr Taylor to assert now that the 2016 Memorandum represents the “*reliable record of the costs*”. Every single document – either originated from Manolium-Engineering²²⁴² or produced on the basis Manolium-Engineering’s source data²²⁴³ – provides different and, more importantly, inconsistent calculations. The Respondent therefore submits that the 2016 Memorandum is neither reliable, nor the record of the costs; it is nothing more than yet another paraphrase of Manolium-Engineering’s unreliable accounting records.²²⁴⁴

1444. As further explained in paragraphs 582 – 605 above, there are a number of defects in the New Communal Facilities caused by Manolium-Engineering, of which Minsktrans regularly informed Manolium-Engineering and the Claimant and which resulted in Minsktrans having to incur additional and increased costs, *inter alia*, to complete the New Communal Facilities. Neither the Valuation Reports, including the 2016 Memorandum, nor Mr Taylor’s Expert Reports took into account those defects and how they affected the FMV of the New Communal Facilities.

1445. The Respondent submits that the Claimant as the sole shareholder in Manolium-Engineering has (or at least should have had) access to all raw data relating to the New Communal Facilities, including all as-built documentation. After the Respondent clarifies in the Defence that the Valuation Reports (including the 2016 Memorandum) were never accepted by MCEC, the Claimant should have presented sufficient raw data or a report analysing that data to prove that the FMV of the New Communal Facilities corresponds to the figures presented in the Valuation Reports. The Claimant, however, has failed to do so. Instead, the Claimant continues substantiating its NCF Losses claim by relying solely on the 2016 Memorandum.

²²⁴² Such as Letter from Manolium-Engineering to Minsktrans dated 11 September 2012, **Exhibit R-94**.

²²⁴³ Such as Paritet-Standart Report, **Exhibit C-131**; Registration and Cadastre Agency Report, **Exhibit C-154**; 2016 Memorandum, **Exhibit C-160**.

²²⁴⁴ See paragraphs 437 – 454 above.

1446. As Mr Qureshi has opined in the First Expert Report, pursuant to the approved cost estimates, the anticipated costs, which were necessary to construct the New Communal Facilities by 1 July 2011,²²⁴⁵ would be US\$15.9 million. Having relied on the Design Specification and Estimate Documentation and having adopted the cost approach, Mr Qureshi assesses the FMV of the unfinished New Communal Facilities at US\$11.2 million.²²⁴⁶ These do not include costs, which Minsktrans would have to additionally incur to complete the New Communal Facilities (i.e. approximately US\$6,407,789²²⁴⁷), and the costs to rectify the defects caused by Manolium-Engineering.²²⁴⁸ Accordingly, if one takes into account these two categories of costs and analyses sufficient raw data from the customer, i.e. Manolium-Engineering, she or he would likely come to even lesser amount of the FMV of the New Communal Facilities.

c) The Library Payment should not be included in the FMV of the New Communal Facilities

1447. In the Defence, the Respondent submits that for the purpose of calculating the FMV of the New Communal Facilities, the Library Payment should be excluded, because the Library Payment was not one of the New Communal Facilities as set out in the Amended Investment Contract. Only the costs incurred by Manolium-Engineering in

²²⁴⁵ First Expert Report of Sirshar A. Qureshi dated 15 November 2018, paragraphs 30(b) and 202(a), **RER-1**.

²²⁴⁶ First Expert Report of Sirshar A. Qureshi dated 15 November 2018, paragraphs 222 and 232 **RER-1**; Second Expert Report of Sirshar A. Qureshi dated 27 May 2019, paragraph 27, **RER-2**.

²²⁴⁷ Excerpts from the Expert Approval of the Design Specification and Estimate Documentation for completion of the Depot dated 15 June 2018, **Exhibit R-221**.

12,689,345 / 1.9803 = US\$6,407,789.22.

The official exchange rate of the Belarusian Ruble against US dollar of the National Bank of Belarus for 1 February 2018 // Available at: <http://www.nbrb.by/eng/statistics/rates/ratesDaily.asp>, **Exhibit R-220**.

²²⁴⁸ Second Expert Report of S. Qureshi dated 27 May 2019, paragraphs 185 – 186, **RER-2**.

constructing the New Communal Facilities should be taken into account when calculating the FMV of the New Communal Facilities.²²⁴⁹

1448. Moreover, in paragraphs 905 – 906 above, the Respondent submits that the Library Payment is not a protected investment by the Claimant. Therefore, the Claimant should not be entitled to recover the Library Payment.
1449. In the Reply, the Claimant states that the inclusion of the Library Payment “*is not an issue that affects Mr. Taylor’s valuation.*”²²⁵⁰ This is incorrect; Mr Taylor continues to include the Library Payment in his calculation of the FMV of the New Communal Facilities, even though the Library Payment was not one of the New Communal Facilities (which the Claimant does not appear to dispute).²²⁵¹ For the reasons set out in the Defence and in paragraphs 905 – 906 above, the Respondent submits that Mr Taylor’s inclusion of the Library Payment in his valuation of the New Communal Facilities is mistaken.²²⁵²
1450. If, contrary to the Respondent’s position, the Tribunal considers it appropriate to rely on the NCF Losses, as proposed by Mr Taylor, the Respondent respectfully submits that the Library Payment should be excluded.

²²⁴⁹ Defence, paragraphs 712 – 714, **RS-18**.

²²⁵⁰ Reply, paragraph 870; **CS-5**. The Claimant asserts that “*as Mr Taylor points out, the Library Payment was not discussed in his First Report*” (Reply, paragraph 870, **CS-5**). Contrary to what the Claimant suggests, Mr Taylor’s point was that the Library Payment was “*not discussed in the PwC First Report*” (Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 4.2.9 (emphasis added), **CER-3**). The Claimant’s position therefore appears to be based on a misunderstanding of Mr Taylor’s second report.

²²⁵¹ Second Expert Report of Travis A.P. Taylor dated 28 February 2019, Appendix H-1, **CER-3**.

²²⁵² Defence, paragraphs 712 – 714, **RS-18**.

3. In the alternative, the Tribunal should apply an appropriate reduction to the NCF Losses to take account of the Claimant's contributory negligence

1451. If, contrary to what is submitted above, the Tribunal considers it more appropriate to rely on the NCF Losses, the Respondent submits that an appropriate reduction should be applied to take account of the Claimant's contributory negligence.
1452. There are several cases in which tribunals have adopted such this approach.
1453. In *Occidental v. Ecuador*, the tribunal held that the State's cancellation of the claimants' petroleum exploration rights was a disproportionate response to the claimants' failure to apply for certain approvals, but that the claimants' material failure to apply for the approvals had "*provoked*" this response.²²⁵³ The tribunal reduced the amount of damages by 25% to take account of the claimants' contributory negligence.²²⁵⁴
1454. In *MTD Equity v. Chile*, the tribunal held that Chile had breached its FET obligations by rejecting a real estate development which it had previously approved. The tribunal held that the claimants had failed to carry out basic due diligence before investing into Chile, and that "*the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimants took irrespective of Chile's actions.*"²²⁵⁵ Like in *Occidental*, the

²²⁵³ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraphs 659 – 685, **Exhibit CL-108**.

²²⁵⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paragraphs 659 – 685, **Exhibit CL-108**.

²²⁵⁵ *MTD Equity Sdn Bhd v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paragraph 178, **Exhibit RL-75**.

tribunal therefore reduced the damages awarded by an appropriate percentage to take account of the claimants' contributory negligence.²²⁵⁶

1455. As the Respondent submits in paragraphs 109 –188 above, the Claimant caused delays to the construction of the New Communal Facilities which led to MCEC postponing the contractual deadlines from December 2008 to July 2011 at the Claimant's request.
1456. In the Reply, the Claimant alleges that "*damages should only be reduced if the Tribunal finds that any actions by the Claimant which caused a delay were wilful or negligent (and they were not)*".²²⁵⁷
1457. The Respondent agrees that it is relevant whether the action that contributed to the injury was wilful or negligent, as set out in ILC Article 39.²²⁵⁸ In the present case, however, the Respondent submits that the delays caused by the Claimant were wilful and/or negligent, and so should be taken into account by the Tribunal when quantifying damages. Notably, Mr Dolgov expressly concedes that the delays were caused by the fact that Mr Ekavyan, the Claimant's owner, had "*apprehensions*" about financing and making "*further capital injections*" into the construction of the New Communal Facilities:

"Mr Ekavyan [...] repeatedly voiced apprehensions about the project's implementation from 2008 through its effective abandonment in the middle of 2012 [...].

That was why I had to conduct negotiations simultaneously with my partner, the principal investor in the project, and with the Belarusian side. I realized that the project could not be wound up after already absorbing our considerable investment, and continued to insist on its continued implementation.

²²⁵⁶ *MTD Equity Sdn Bhd v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paragraph 243, **Exhibit RL-75**.

²²⁵⁷ Reply, paragraph 859, **CS-5**.

²²⁵⁸ United Nations, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Commentary to Article 39, **Exhibit CL-87**.

*It is for that reason that I referred to the financial crisis and to problems with financing the project: I needed time to persuade my partner to make further capital injections, because the project was exceptionally important to me.*²²⁵⁹

1458. In short, Mr Dolgov’s position is that the delays in constructing the New Communal Facilities in December 2008 – July 2011 (and, finally, the “*effective abandonment*” of the construction works in 2012) were not caused by the financial crisis or any financial difficulties of the Claimant – which, according to Mr Dolgov, had “*enough resources for investment in a dozen projects similar to the one undertaken*”²²⁶⁰ – but rather because the Claimant’s owner had deliberately decided not to make “*further capital injections*”. In light of Mr Dolgov’s admission, the Respondent submits that there is no doubt that the actions of the Claimant which delayed the project by at least four years were “*wilful*” and therefore fall within the scope of contributory negligence under ILC Article 39.

1459. In his Second Expert Report, Mr Qureshi estimates (with reference to the average construction indexes in the period 2009 – 2011) that if the Claimant had constructed the Depot by August 2009, as originally provided by the Design Specification and Estimate Documentation, the construction costs of the New Communal Facilities would have been on average 31 percent lower.²²⁶¹ Accordingly, the Respondent submits that the Tribunal should apply a 31 percent reduction to the NCF Losses as calculated by Mr Taylor, to take account of the Claimant’s negligence in causing such delays. After such a reduction, the NCF Losses would amount to **US\$14,566,318.72**.²²⁶²

²²⁵⁹ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraphs 102 – 104, **CWS-5**.

²²⁶⁰ Fourth Witness Statement of A. Dolgov dated 28 February 2019, paragraph 62, **CWS-5**.

²²⁶¹ Second Expert Report of S. Qureshi dated 27 May 2019, paragraphs 28 and 185, **RER-2**.

²²⁶² Mr Taylor values the NCF Losses at US\$20,434,679, including (1) US\$15,704,388 for the Depot, (2) US\$1,038,631 for the Road, (3) US\$2,691,660 for the Pull Station, and (4) US\$1,000,000 for the Library Payment (which, as explained above, should be excluded from the calculation of the NCF Losses). $US\$15,704,388 * 69\%$ (excluding 31% increase caused by the Claimant’s contributory negligence) = $US\$10,836,027.72$. See Second Expert Report of Travis A.P. Taylor dated 28 February 2019, paragraph 4.2.8, **CER-3**.

$US\$10,836,027.72 + US\$1,038,631 + US\$2,691,660 = US\$14,566,318.72$.

1460. The Respondent submits that this is a conservative estimate, because Manolium-Engineering's original contractual deadline for constructing the New Communal Facilities was December 2008, not August 2009.²²⁶³
1461. In addition to the wilful delays caused by the Claimant, the Respondent submits that, like in *Occidental* and *MTD Equity v. Chile*, the Claimant should bear responsibility for its own negligence in contributing to the accrual of its tax accruals. As the Respondent explains in paragraphs 515 – 575 above, the Claimant and/or Manolium-Engineering negligently contributed to the accrual of its tax liabilities by:
- A. failing to construct the New Communal Facilities both before and after the Final Commissioning Date;
 - B. failing to apply for an extension to Manolium-Engineering's land permit after the Final Commissioning Date, which led to a tenfold increase in the land tax rate applied;²²⁶⁴
 - C. failing to lay-up the facilities after the Final Commissioning Date, by which Manolium-Engineering could have avoided the application of the tenfold increase in the land tax rate;²²⁶⁵
 - D. ignoring the warnings of the tax authorities that it was liable to pay land tax, despite being aware that this was required under Belarusian law;²²⁶⁶
 - E. failing to appeal or raise objections²²⁶⁷ to:
 - i) the First Tax Audit Report dated 18 May 2016;²²⁶⁸

²²⁶³ Amended Investment Contract, Clause 6.1, **Exhibit C-66**.

²²⁶⁴ See paragraphs 461 – 485 above.

²²⁶⁵ See paragraphs 462 and 484 above.

²²⁶⁶ See paragraphs 531 above.

²²⁶⁷ See paragraphs 1140 – 1141 above.

²²⁶⁸ Defence, paragraphs 323 – 324, **RS-18**.

- ii) the amendments and supplements to the First Tax Audit Report dated 21 June 2016,²²⁶⁹
- iii) the Inspectorate Decision dated 19 July 2016 regarding Manolium-Engineering’s tax liabilities;²²⁷⁰
- iv) the order of the Economic Court of Minsk dated 18 August 2016 to enforce Manolium-Engineering’s land tax liabilities against the New Communal Facilities;²²⁷¹ and
- v) the resolution of the District Tax Inspectorate dated 24 November 2016 to impose a fine on Manolium-Engineering for failure to submit its tax returns on time and to settle outstanding tax liabilities.²²⁷²

1462. If the Tribunal finds that the transfer of the New Communal Facilities was an expropriation (which is denied), the Respondent submits that, in addition to the 31 percent reduction referred to in paragraph 1459 above, the Tribunal should apply a further reduction to the damages awarded to take into account the extent to which the Claimant induced or contributed to such an outcome through the negligent actions set out in paragraph 1461 above. The Respondent submits that this approach is in line with that adopted by the tribunals in *Occidental v. Ecuador* and *MTD v. Chile*.

1463. In the Reply, the Claimant seeks to absolve itself from responsibility from its own negligent actions by stating that the “*Claimant could not have reasonably foreseen the steps the Respondent would take to avoid its commitments when making its investment*” and that “*the Respondent may not rely on foreseeability of its own violation of the Investment Contract*”.²²⁷³ The Respondent already submits above that it was the Claimant and Manolium-Engineering that breached the Amended

²²⁶⁹ Defence, paragraph 328, **RS-18**.

²²⁷⁰ Defence, paragraphs 330 – 331, **RS-18**.

²²⁷¹ See paragraphs 1141 above; Defence, paragraph 335, **RS-18**.

²²⁷² Defence, paragraphs 336 – 338, **RS-18**.

²²⁷³ Reply, paragraph 862, **CS-5**.

Investment Contract by failing to construct the New Communal Facilities by the Final Commissioning Date due to their own willful delays, not any actions not “*actions attributable to the Respondent*”.²²⁷⁴ The Respondent submits that the Claimant’s empty assertions should be dismissed.

VIII. RELIEF SOUGHT

1464. For the foregoing reasons, the Respondent requests the following relief:

- A. an award declining jurisdiction over all the Claimant’s claims; or, alternatively
- B. to the extent the Tribunal finds jurisdiction over all or part of the Claimant’s claims, a declaration dismissing the Claimant’s claims in full; or, alternatively
- C. to the extent the Tribunal does not dismiss all of the Claimant’s claims on the merits, a declaration that the Claimant suffered no loss; or, alternatively
- D. to the extent the Tribunal finds that the Claimant suffered some loss, an award calculating the Claimant’s loss on the assumptions and in the amounts as submitted by the Respondent; and
- E. an order that the Claimant pay the Respondent’s legal costs on an indemnity basis, regardless of the outcome of these proceedings;²²⁷⁵ and

²²⁷⁴ Reply, paragraph 858, CS-5.

²²⁷⁵ See paragraph 17 above.

- F. interest on any costs awarded to the Respondent, in an amount to be determined by the Tribunal.

Respectfully submitted on
30 May 2019

White & Case LLP

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