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

OOO MANOLIUM-PROCESSING

Claimant

v.

REPUBLIC OF BELARUS

Respondent

OBSERVATIONS ON COMMENTS TO RESPONSE TO INTERIM MEASURES REQUEST

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12 October 2018

WHITE & CASE
Counsel for Respondent

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I. INTRODUCTION

1. Pursuant to communication A16 of the Tribunal dated 8 October 2018, the Respondent hereby submits its Observations on the Claimant's Comments dated 5 October 2018 (the "**Comments**") to the Respondent's Response to the Claimant's Request for Interim Measures (the "**Application**"). Unless otherwise specified, the Respondent adopts the defined terms set out in the Response to the Notice of Arbitration dated 15 December 2017.

2. The Claimant sought and was granted permission to "*prove*" that the first witness statement of Mr Koroban contained "*incorrect and misleading information regarding the circumstances of the meeting of Mr Koroban with* [MCEC] *in July 2018*".[1] However, instead of submitting "*evidence addressing* [the witness statement of Mr Koroban]"[2] as permitted by the Tribunal, the Claimant filed new submissions misleadingly titled "Comments". These submissions contain a new set of speculative allegations about the supposed use of "*criminal proceedings*"[3] to obtain an "*unfair advantage"*[4] in the arbitration and to "*pressure witnesses*"[5] and various individuals whom the Claimant calls "*potential witnesses*".[6]

3. As explained below, these new allegations are baseless. The Claimant has failed to support its Comments with any concrete evidence, having based them on hearsay and opinion evidence. Further and in any event, the new allegations concern routine matters irrelevant to this dispute. Contrary to what is asserted in the Comments, these events have not aggravated this dispute, altered the *status quo* or affected the rights of the Claimant in this arbitration in any way.

4. Accordingly, the Comments do not assist the Claimant in satisfying any of the applicable legal tests, and the Application should be dismissed.

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1 Claimant's letter to the Tribunal dated 25 September 2018, paragraphs 2 – 3, **C-25**.

2 Tribunal's letter to the Parties dated 28 September 2018, paragraph 9, **A-13**.

3 Comments, Section II, **C-26**.

4 Comments, paragraph 16, **C-26**.

5 Comments, paragraphs 6 and 15, **C-26**.

6 Comments, Section II, **C-26**.

II. [redacted] ARE UNRELATED TO THIS DISPUTE AND HAVE NEITHER AGGRAVATED IT NOR ALTERED THE STATUS QUO

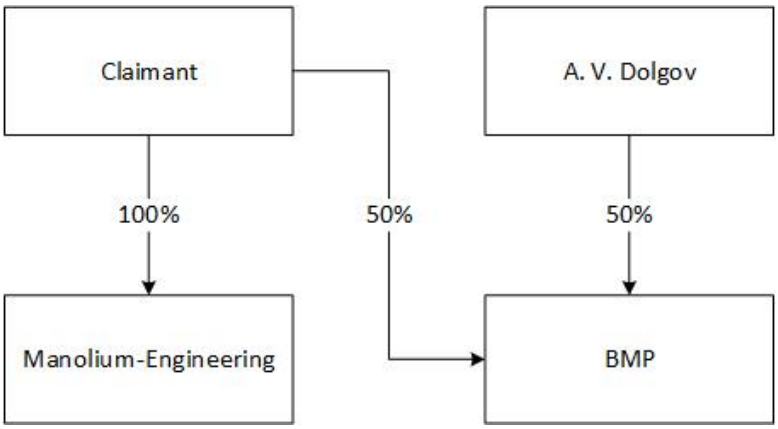
5. [redacted] in connection with the ongoing insolvency proceedings of Belarusian Foreign Limited Liability Company "Manolium-Processing" ("**BMP**").

6. BMP is a separate legal entity and is not a party to this arbitration. The Respondent understands that the business of BMP is wholly unrelated to the business of Manolium-Engineering and to this arbitration. [redacted] in the normal course of its business, in good faith and in accordance with Belarusian law. In any event, and contrary to the Claimant's assertions, [redacted] are not part of any criminal proceedings.

A. [redacted] ARE NOT RELATED TO THIS DISPUTE

7. In the short time available to respond to the Comments, the Respondent has been able to establish the following in relation to the factual matrix leading to [redacted].

8. Unlike Manolium-Engineering (which is wholly owned by the Claimant), BMP is jointly owned by the Claimant and Mr Andrey Dolgov, the Claimant's primary witness. The ownership structure is shown in the diagram below.



[7] Comments, paragraphs 11-14, **C-26**.

9. The Respondent understands that, unlike Manolium-Engineering, BMP was not created for any specific project of the Claimant in Belarus. Rather, BMP engaged in a variety of activities, primarily leasing out real property. Mr Dolgov was the general director of BMP between 2002 and June 2016.

10. In November 2016, the Claimant and Mr Dolgov, as the shareholders of BMP, appear to have resolved to commence a voluntary liquidation procedure in respect of BMP and appointed a liquidator. However, on 3 March 2017, a private third-party creditor of BMP submitted an application to the Economic Court of the City of Minsk (the "**Court**") seeking to commence the insolvency proceedings in relation to BMP. On 14 April 2017, the Court granted that creditor's application, ordered to stop the voluntary liquidation procedure and commence the insolvency proceedings. The Court also appointed an insolvency administrator (the "**Administrator**") thereby replacing the liquidator.

11. Pursuant to the Belarusian Insolvency Law, the Administrator's duties include ascertaining whether insolvency was deliberately caused by the officers of the entity.[8] The Administrator can either undertake such analysis himself/herself or ask the court to delegate this function to an independent expert.[9] In the event, BMP's creditors resolved that the Administrator should apply to the Court to appoint an expert.

12. On 19 February 2018, on the Administrator's application, the Court appointed such an expert ordering him to examine the circumstances surrounding BMP's insolvency. During the course of his analysis, the expert appears to have discovered evidence suggesting that BMP's management intentionally forced it into insolvency to the detriment of the company's creditors. The expert discovered, in particular, that BMP had entered into several transactions at an undervalue and entered into other loss-making arrangements with companies that the Respondent understands are BMP's affiliates. Such transactions and arrangements, in the opinion of the expert, decreased the value of BMP's assets. [redacted]

8 Insolvency Law of the Republic of Belarus, Article 77(1).

9 Insolvency Law of the Republic of Belarus, Article 47(2).

10 [redacted]

[redacted]

13. The expert set out his findings in a report dated 15 June 2018 (the "**Expert Report**"). The Claimant and/or Mr Dolgov will have had a copy of the Expert Report because it forms part of BMP's insolvency case file, and a representative of the Claimant actively participates in the insolvency proceedings.[12]

14. On 16 August 2018, the Court considered the Expert Report and accepted its findings. By its ruling of the same date (the "**Court Ruling**"),[13] the Court ordered the Administrator to transfer BMP's insolvency case file (which includes the Expert Report) to the Minsk Prosecutor's Office for further inquiries, as required by Belarusian law.[14]

15. Pursuant to the Court Ruling, on 30 August 2018, the Administrator sent materials from the insolvency case file, including the Expert Report, to the Minsk Prosecutor's Office.[15] On 7 September 2018, the Minsk Prosecutor's Office transmitted the files to the DDFI – the authority competent to deal with financial wrongdoings.

16. On 11 September 2018, the DDFI transferred the files to its relevant territorial office, which commenced the fact-finding process provided for under Belarusian law. [redacted]

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11 Such companies include Oktan-AZS-Service, which the Claimant confirmed is affiliated with the Claimant (Comments, paragraph 13, **C-26**).

12 Court Ruling dated 16 August 2018, **Exhibit R-10.**

13 Court Ruling dated 16 August 2018, **Exhibit R-10.**

14 Pursuant to Article 77(1) of the Belarusian Insolvency Law, an administrator must inform a public prosecutor and other competent law-enforcement authorities if he/she becomes aware of indications that the management have deliberately caused the entity's insolvency.

15 Letter of the Administrator to the Minsk Prosecutor's Office dated 30 August 2018, **Exhibit R-11**.

[redacted]

17. Importantly, the fact-finding exercise undertaken by the DDFI is not a criminal investigation. As part of this process, the relevant authorities only ascertain whether there are grounds for *commencing* criminal proceedings. Only if the DDFI conclude that, based on their inquiries, the matter should be considered within criminal proceedings could criminal investigations commence. Accordingly, contrary to the Claimant's assertions, no criminal investigations have taken place and they may well never take place. [redacted] have not affected the Claimant's rights in the arbitration, including the ability of the Claimant or its witnesses to effectively participate in it.

B. [redacted] WERE CONDUCTED IN GOOD FAITH AND WERE NOT AIMED AT INTIMIDATING WITNESSES OR GATHERING EVIDENCE FOR THIS ARBITRATION

18. [redacted] in good faith and pursuant to the directions of the Court in the context of the unrelated insolvency proceedings concerning a third party (BMP). The insolvency proceedings were, in turn, initiated (before this arbitration even began) by a private, third-party company creditor unrelated to the Respondent with no connection to the issues in this dispute.

19. As follows from the factual background described in paragraphs 7 – 24 above and from the Comments themselves, [redacted] had nothing to do with this arbitration. [redacted]

[redacted]

[redacted]

[redacted]

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16 [redacted]

17 Comments, paragraph 11, **C-26**.

18 Comments, paragraph 12, **C-26**.

19 Comments, paragraph 13, **C-26**.

[redacted]

20. All these questions arise out of the findings in the Expert Report concerning BMP's transactions at an undervalue and other loss-making arrangements with the companies which, as the Respondent understands it, are affiliated with BMP as described in paragraph 12 above. The Claimant fails to explain how these questions are relevant to this arbitration.

21. [redacted], the Claimant failed to alert the Tribunal that Mr Dolgov was BMP's general director at the relevant time (2002 – 2016) when BMP entered into all the transactions which were identified in the Expert Report as suspicious [redacted] The Claimant's assertions that [redacted] "*indicate a forthcoming attempt of Respondent to contact Mr. Dolgov directly* [and] *an effort to contact or otherwise pressure Mr. Dolgov*"[21] are therefore ungrounded and speculative.

22. [redacted]

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20 Comments, paragraph 14, **C-26**.

21 Comments, paragraphs 12 and 13, **C-26**.

22 Comments, paragraph 11, **C-26**.

23 [redacted] Comments, paragraph 12, **C-26**.

24 Comments, paragraph 14, **C-26**.

23. The Claimant and Mr Dolgov are best placed to explain why two of the three key individuals involved in suspicious transactions on the cusp of BMP's insolvency happened to be Mr Dolgov's family members.

24. [redacted]

25. The Claimant asserts that the "*Respondent will stop at nothing to obtain evidence […] to help its case*".[26] The Claimant, however, does not even attempt to explain what evidence the Respondent could obtain [redacted] were completely unrelated to this arbitration and irrelevant to the issues in dispute.[27]

26. The Claimant further asserts that the Respondent has an "*intent […] to use all powers at its disposal to pressure Mr. Dolgov through intimidation of his family members, present and former colleagues and other affiliated persons*".[28] However, the Claimant provides no evidence of such intimidation whatsoever. It is unclear how [redacted] above could be intimidating.

27. The tribunal in *Churchill Mining v. Indonesia* found that "*[a]n allegation that the status quo has been altered or that the dispute has been aggravated needs to be buttressed by concrete instances of intimidation or harassment.*"[29] The Claimant falls manifestly short of satisfying this high evidentiary burden.

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25 Comments, paragraph 13, **C-26**.

26 Comments, paragraph 15, **C-26**.

27 Even where criminal proceedings have been commenced against a claimant and have resulted in evidence that is later used by the State in the arbitration – neither of which is the case in the present instance – this is not a sufficient basis for enjoining the State from pursuing a criminal case on its territory (*See*, e.g., *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 130, **Exhibit CL-71**; *Lao Holdings N. V. v. The Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order, 30 May 2014, paragraphs 27 – 30, **Exhibit RL-27**).

28 Comments, paragraph 15, **C-26**.

29 *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, paragraph 72, **Exhibit RL-25**.

C. THE ACCUSATIONS ABOUT THE PURPOSE OF [redacted] ARE GROUNDLESS

28. The Respondent is a state which operates through dozens of executive bodies, which, in turn, consist of hundreds of departments responsible for different functions. It is not possible for those involved in this arbitration to keep track of all the state's responses to all potential wrongdoings of the Claimant's main witness and his relatives, particularly those arising from their businesses unrelated to this arbitration. Nor should the Respondent be required to interfere with the normal course of sovereign administration so as to prevent the relevant authorities from responding to legitimate reports and complaints of such wrongdoings.

29. Counsel for the Respondent was unaware of the Court Ruling and [redacted] until after the Comments were filed. This is hardly surprising given that [redacted] are unrelated to the subject matter of the arbitration. On the other hand, the Claimant has long been aware of the events allegedly giving rise to its concerns about the alleged pressure on Mr Dolgov and his relatives.

30. On 16 August 2018, Mr Dolgov's attorney, Mr [redacted],[30] attended the hearing in which the Court issued the Court Ruling as a representative of one of BMP's shareholders (either the Claimant itself or Mr Dolgov).[31] Accordingly, both Mr Dolgov and the Claimant[32] had full knowledge of the Court Ruling ordering the relevant authorities to make inquiries into BMP's management as early as 16 August 2018. The Claimant, however, chose not to inform the Tribunal or Counsel for the Respondent of the Court Ruling or any concerns it allegedly had in this regard.

31. Instead, the Claimant waited for the predictable and lawful consequence of the Court Ruling – the inquiries by the relevant authorities. Further, it was reasonable to anticipate that any inquiries involving BMP would inevitably also raise questions about Mr Dolgov as the former general director of BMP. If the Claimant had genuine concerns that the inquiries would put undue pressure on Mr Dolgov, it would have raised those

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30 Mr Dolgov says: "*According to my attorney,* [redacted]*, who currently represents me before the state courts of the Republic of Belarus, such enquiries will be carried out until approximately October 2018*" (Third Witness Statement of Mr Dolgov, paragraph 24, **CWS-4**).

31 Court Ruling dated 16 August 2018, **Exhibit R-10**.

32 It is inconceivable that Mr Dolgov would not have shared this information with the Claimant taking into account his current status as the Claimant's key witness and close associate of the Claimant's ultimate beneficial owner.

concerns in August 2018 at least with the Respondent. The Claimant however chose not to do so and had waited for the insolvency proceedings to take their course so as to accuse the Respondent of acting against the Tribunal's directions.

32. The Respondent understands that Mr Dolgov and the Claimant continue to run various businesses in Belarus, which are unrelated to one another other than through having the same beneficiaries. As the Expert Report appears to suggest, Mr Dolgov and the Claimant do not shy away from conducting their business dishonestly.

33. What the Claimant and Mr Dolgov appear to suggest in their Application is that they should be protected from any inquiries and investigations into their wrongdoings, however irrelevant and unrelated to this dispute, by virtue of these arbitration proceedings. The Respondent respectfully submits that this is an abuse of process. Interim measures cannot give a party to the arbitration immunity from any type of state control and a *carte blanche* for breaking the law. This is what the Claimant seeks to obtain for both itself, Mr Dolgov and their associates by way of the Application. As the tribunal held in *Quiborax v. Bolivia:* "*the international protection granted to investors does not exempt suspected criminals from prosecution by virtue of their being investors*". [33]

34. Moreover, the Claimant's request that the Tribunal restrict the Respondent's right to conduct the normal processes of criminal, administrative and civil justice would disproportionately harm the Respondent's sovereign interests, as it would prevent the Respondent's bodies from protecting the rights of third parties, such as BMP's creditors, in matters unrelated to this arbitration.

III. CLAIMANT'S ALLEGATIONS ABOUT MR KOROBAN ARE UNGROUNDED AND SPECULATIVE

35. Given that the Claimant's contentions about the "*grossly incorrect and misleading information*" [34] allegedly contained in Mr Koroban's witness statement were the pretext for filing an additional submission, the complaints contained in the Sections III and V of the Comments are unimpressive. The Claimant continues making sweeping

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33 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, paragraph 164, **Exhibit CL-71**.

34 Claimant's letter to the Tribunal dated 25 September 2018, paragraph 2, **C-25**.

declarations that the Respondent coerced Mr Koroban into cooperation and that Mr Koroban is afraid of criminal prosecution in Belarus.[35] These are very serious allegations that must be supported by concrete and unequivocal evidence.[36] The Claimant has not offered any such evidence either in the Application or in the Comments.

36. Rather, the Claimant appears to suggest that its assertions should be taken at face value solely on the basis of unsupported opinions and speculations offered by the Claimant's witnesses, as quoted extensively in Sections III and V of the Comments. The Respondent does not wish to waste the Tribunal's time by engaging at length with the Claimant's witnesses' implausible theories that Mr Koroban is being pressurised by the Respondent in circumstances where Mr Koroban has himself already expressly confirmed that this is not the case. The Respondent will only address the Claimant's most farfetched assertions.

37. The Claimant compares at some length Mr Koroban's first-hand account of his visit to MCEC provided in his witness statement with the content of his *subsequent conversations* with Mr Torotko and Mr Dolgov and finds that these accounts are contradictory.[37] The Claimant's conclusion is based on the assumption that Mr Koroban was under some obligation to report fully and accurately to Mr Dolgov and Mr Torotko the details of his movements, actions and discussions. The fact that Mr Koroban chose not to do so does not justify the Claimant's far-reaching conclusion that Mr Koroban is acting "*out of fear for his well-being*"[38] or call "*into serious question the veracity of his testimony*"[39]

38. The Claimant further concludes, without offering any concrete evidence, that Mr Koroban "*fears criminal prosecution in Belarus*"[40] simply because this is what his witness statement "*indicates*".[41] However, Mr Koroban in his witness statements

35 Comments, paragraphs 34 – 35 and 51, **C-26**.

36 *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Procedural Order No. 14, 22 December 2014, paragraph 72, **Exhibit RL-25**; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, 23 June 2015, paragraphs 83, 108, **Exhibit RL-28**.

37 Comments, paragraphs 20 and 21 – 33, **C-26**.

38 Comments, paragraph 35, **C-26**.

39 Comments, paragraph 35, **C-26**.

40 Comments, paragraph 51, **C-26**.

41 Comments, paragraph 51, **C-26**.

expressly confirms that he had come to MCEC "*voluntarily and without coercion*"[42] and that he is not worried for his safety.[43] Inexplicably, the Claimant invites the Tribunal to disregard the content of Mr Koroban's witness statement but at the same time to infer that Mr Koroban is afraid of prosecution because his witness statement allegedly so indicates.[44] This contention is odd at best.

39. In asserting that Mr Koroban fears being prosecuted, the Claimant ignores that only Mr Torotko, the Claimant's witness, had previously mentioned the possibility of criminal prosecution to Mr Koroban. The Claimant seeks to present Mr Torotko's "*warning*"[45] to Mr Koroban as evidence that "*carries particular weight*"[46] in favour of the Application.

40. Accordingly, in what appears to have become its *modus operandi* in this arbitration, the Claimant has yet again failed to adduce any concrete evidence in support of its accusations about the pressure on Mr Koroban. These allegations are nothing more than flimsy sophistry. They are ungrounded and speculative, and should be rejected.

IV. THE CLAIMANT'S OBSERVATIONS ABOUT THE URALKALI AND GRAND EXPRESS CASES ARE IRRELEVANT

41. The Claimant spends three pages speculating about the vagaries of criminal proceedings in unrelated cases, in an apparent effort to fill the gaping hole in its non-existent evidence.[47] These speculations are of no relevance to the arbitration, particularly given that no criminal proceedings have been initiated in respect of Mr Dolgov and/or his relatives and/or Mr Koroban.[48]

V. THE TEST FOR GRANTING INTERIM RELIEF IS STILL NOT SATISFIED

42. As detailed in the Respondent's Response to the Application, parties seeking interim measures under Article 26 of the UNCITRAL Rules as adopted in 2013 ("**UNCITRAL**

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42 First Witness Statement of Mr Koroban, paragraph 8, **RWS-1**.

43 First Witness Statement of Mr Koroban, paragraph 15, **RWS-1**.

44 Comments, paragraph 53, **C-26**.

45 Comments, paragraph 53, **C-26**.

46 Comments, paragraph 53, **C-26**.

47 Comments, paragraphs 36 – 50, **C-26**.

48 It is in any event difficult for the Respondent to assess the exact evidential value of one of the two cases referred to by the Claimant (Grand Express) because although the Claimant has promised to provide an English translation of the Greek document submitted as Exhibit C-212, it has failed to do so.

Rules 2013") must demonstrate: (a) a *prima facie* case on jurisdiction and the merits; (b) necessity (risk of harm); (c) urgency; and (d) proportionality.[49] As also explained in the Respondent's Response to the Application, these criteria are not met in the case at hand.[50]

43. Remarkably, the Claimant has also once again failed to even attempt to apply the demanding test for interim measures set out in Article 26 of the UNCITRAL Rules 2013 to the facts alleged in the Comments.

44. The Comments consist of baseless and vague accusations "supported" by hearsay and opinion witness evidence, which is in any event irrelevant. The Comments are therefore of no value for the Application and do not help the Claimant satisfy the demanding tests for granting interim measures.

VI. CONCLUSION

45. For the reasons set out above, the Respondent respectfully requests that the Tribunal dismiss the Application.

46. Irrespective of the Tribunal's decision on the merits, the Respondent reserves the right to recover costs incurred in connection with the Application and the Comments on an indemnity basis.

Respectfully submitted on
12 October 2018

White & Case LLP

[49] Respondent's Response to the Application dated 21 September 2018, paragraphs 58 – 73, **RS-3**.

[50] Respondent's Response to the Application dated 21 September 2018, paragraphs 74 – 96, **RS-3**.