Case No. SCC (V) 172/2010 of the
Arbitration Institute of the
Stockholm Chamber of Commerce

Bilaga /.

BADPRIM Ltd (Moldova)

(*Claimant*)

v

1) Federal Customs Service of the Russian Federation

(*Respondent No. 1*)

2) Government of the Russian Federation

(*Respondent No. 2*)

before an Arbitral Tribunal composed of

Advokat Christer Söderlund

Mr Ion Buruiana

Mr Vladimir Khvalei

FINAL AWARD

Place of Arbitration: Stockholm, Sweden

Date: 21 October 2013

5903504-v12

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1 Parties to the arbitration

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Respondent No. 1 and Respondent No. 2 are jointly referred to as "Respondents".

2 Background

1. On 18 July 2007, the Claimant, Respondent No. 1[1] and the Delegation of the European Commission to Moscow entered into a Contract 2007/126-111 for the Design and Construction of the Mamonovo-Gzhechotki Border Crossing Point in the Kaliningrad Oblast (the "Contract").

2. The Contract was funded by the European Union under the so-called TACIS Cross-Border-Cooperation Programme and was governed, *inter* alia, by a Memorandum of Understanding regarding the financing of the design and construction of the Mamonovo-Gzhechotki border point entered into between Respondent No. 2[2] and the European Commission (the "Financing Memorandum"). Also of relevance is the bilateral agreement between Respondent No. 2 and the European Communities on "General Rules Applicable to the Technical Assistance of the European Communities" (the "General Rules").

3 The arbitration agreement and the applicable procedural rules

3. Article 65 of Annex D – General Conditions provides the following:

> ARTICLE 65: Amicable dispute settlement
>
> 65.1 The Parties shall make every effort to settle amicably any dispute, which may arise between them. Once a dispute has arisen, the Parties shall notify each other in writing of their positions on the dispute and any solution, which they consider possible. If either Party deems it useful, the Parties shall meet and try and settle the dispute. A Party shall respond to a request for amicable settlement within 30 days of such a request. The maximum period laid down for reaching such a settlement shall be 120 days from the commencement of the procedure. Should the attempt to reach an amicable settlement fail or a Party fail to respond in time to requests for a settlement, either Party shall be free to proceed to the next stage of the dispute-settlement procedure by notifying the other.

4. Article 65.2 of Annex C – Special Conditions provides the following:

> ARTICLE 65.2 is supplemented as follows:
>
> 65.2 If the amicable dispute-settlement procedure fails, the Parties may agree to try conciliation through the European Commission. If no settlement is reached within 120 days of the start of the conciliation procedure, each Party shall be entitled to move on to the next state of the dispute-settlement procedure.

5. Article 66 of Annex D – General Conditions provides the following:

> Article 66: Dispute settlement by litigation:
>
> If no settlement is reached within 120 days of the start of the amicable dispute-settlement procedure, each Party may seek:

[1] Respondent No. 1 is also referred to as "RCS" or the "Contracting Authority" in this Award
[2] Respondent No. 2 is also referred to as the "RF Government" in this Award.

a) Either a ruling from a national court

b) An arbitration ruling

in accordance with the Special Conditions of this Contract.

6. Article 66 of Annex C – Special Conditions contains in the relevant part the following provision:

> Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties a dispute between the Contracting Authority and the Contractor shall be referred to the Court of Arbitration of the Chamber of Commerce and Industry in Stockholm.

7. In addition hereto, Annex B – Appendix to Tender – provides, in applicable parts, the following:

	Subclauses of General Conditions (GC) or Special Conditions (SC) of Contract	
Arbitration rules	Cl. 66 of the SC	International Chamber of Commerce (ICC), Paris
Court of Arbitration	Cl. 66 of the SC	Chamber of Commerce and Industry, Stockholm, Sweden
Number of arbitrators	Cl. 66 of the SC	Three (3)
Place of arbitration	Cl. 66 of the SC	Stockholm, Sweden

4 Applicable law

8. Annex B to the Contract provides:

Law of the Contract	Cl. 2.1 of the SC	Law of Russian Federation, where not covered by the provisions of the Contract

5 Language of the arbitration

9. Annex B to the Contract provides:

Language of arbitration	Cl. 66 of the SC	English, official and Russian, unofficial translation

6 Procedural history

10. A Request for Arbitration of 8 November 2010 was initially submitted to the SCC Institute by the Claimant.

11. In its Request for Arbitration, the Claimant asked the SCC Institute to "confirm the candidacy of Mr Ion Buruiana".

12. On 22 March 2011, Respondent No. 1 on its own behalf and on behalf of Respondent No. 2 filed an Answer to the Request dated 25 February 2011 and asked "the Arbitration Institute of the Chamber of Commerce of Stockholm to give a list of candidates for arbitrators so that the Russian party could make a decision about the candidate for arbitrator".[3]

13. In a letter dated 27 June 2011 to the SCC Institute, the Respondents stated that "having considered the list of arbitrators sent by the Arbitration Institute of the Trade Chamber of Stockholm"[4] and "without prejudice to its position with regard to lack of jurisdiction of the Arbitral Tribunal"[5] nominated as co-arbitrator Mr Vladimir Khvalei.

14. On 19 July 2011 the SCC Institute informed the Parties that

> ... in accordance with Article 10 (2) of the ICC Rules, the SCC Board appointed the Arbitral Tribunal with Advokat Christer Söderlund designated as the Chairperson, and Mr Ion Buruiana and Vladimir Khvalei as co-arbitrators.

15. Exchanges between the Tribunal and the Parties concerning the drafting of the Terms of Reference were initiated by the Tribunal's letter of 21 October 2011.

16. By letter dated 23 November 2011, the Claimant submitted, *inter alia*, a Statement of Claim.

17. On 29 November 2011 a procedural conference by telephone was conducted, in which the members of the Tribunal and representatives of the Parties took part and draft Terms of Reference and other procedural issues were discussed. The Respondents raised the matter of their jurisdictional objections and requested that these be dealt with as a preliminary issue. The Claimant objected to having this matter scheduled separately.

18. Following the procedural conference, the Tribunal communicated a final version of the Terms of Reference and a Procedural Order No. 1 to the Parties on 2 December 2011.

19. In its Procedural Order No. 1 the Tribunal notified the Parties of its decision to deal with the matter of jurisdiction as a preliminary issue. It also laid down a schedule for submissions on this question.

20. On 5 December 2011, the Claimant informed that it was not prepared to sign the Terms of Reference as drafted, causing the Tribunal to forward them to the SCC Institute for approval according to Article 18(3) of the ICC Rules (without prejudice to the appropriateness or the compatibility with the Parties' arbitration agreement).

21. In the same letter of 5 December 2011 the Claimant objected to the Tribunal's decision to deal with jurisdiction as a preliminary question.

[3] Page 2 of the Answer to Request.
[4] The Tribunal's translation.
[5] *Idem*

22. On 5 December 2011 the Tribunal issued Procedural Order No 2, where it confirmed its decision to deal with the issue of jurisdiction as a preliminary matter.

23. The Board of the SCC Institute approved the Terms of Reference as communicated in a letter of 19 January 2012.

24. In the above-mentioned Procedural Order No 2, the Tribunal also communicated its decision to deal with the matter of jurisdiction under the Bilateral Agreement on Investment Protection between Russia and Moldova of 17 March 1998 in the context of the jurisdictional question.

7 The Parties' submissions on jurisdiction

25. The Parties have submitted argument on the matter of jurisdiction as directed by the Tribunal, the Respondents in its Statement on Jurisdiction of 20 December 2011 and the Claimant in a Responsive Statement on Jurisdiction of 9 January 2012.

26. Consistent with the Tribunal's *ex officio* obligation to ensure that the matter of jurisdiction was exhaustively examined, on 20 January 2012 the Tribunal invited the Parties to offer comments on certain issues.

27. On 13 February 2012 the Respondents submitted their Comments on Claimant's Responsive Statement on Jurisdiction.

28. On 14 February the Tribunal invited the Claimant to provide comments to the issues raised by the Tribunal in its letter of 20 January 2012.

29. On 27 February 2012 the Claimant filed its Objections on the Respondents' Comments on Claimant's Responsive Statement on Jurisdiction.

30. On 29 February 2012 the SCC Institute informed the Tribunal and the Parties that "pursuant to the ICC rules of arbitration Article 24 the final award shall be made by 18 July 2012".[6]

31. On 5 March 2012 the Tribunal informed the parties that proceedings on issue of jurisdiction is closed and proceeded for deliberations.

32. Based on the Parties' submissions, the Tribunal thereafter conducted deliberations and entered a decision on jurisdiction on 6 July 2012. In this decision the Tribunal declared, one arbitrator dissenting, that the arbitration was to proceed under the ICC Rules, the SCC Board performing the tasks which otherwise would be incumbent on the ICC Court to perform, and that jurisdiction vested in the Tribunal in respect of both of the Respondents.

33. In a Procedural Order No. 3 of even date, the Tribunal directed the Respondents to submit their Statement of Defense no later than on 8 August 2012.

[6] The time for giving the final award has subsequently been extended on different occasions, lastly until 31 October 2013 by the decision of 26 July 2013 by the SCC Institute.

34. In its Procedural Order No. 4 of 18 September 2012, the Tribunal noted after receipt of the Respondents' Statement of Defense that the Claimant was to submit a Reply Statement no later than on 10 October 2012 and that the Respondents were to submit a Rejoinder by 9 November 2012, all as agreed on the occasion of a conference call of 18 September 2012.

35. On the occasion of the conference call referred to in the preceding paragraph, the Parties' view was also expressed that the dispute could be determined on a documents-only basis, i.e. without convening a hearing.

36. In its Procedural Order No. 5 of 23 November 2012, the Tribunal noted that neither of the Parties had invoked oral evidence and that a documents-only review of the case should, in the view of the Tribunal, be appropriate. An opportunity to opine on this matter was given to the Parties.

37. In a Procedural Order No. 6 of 3 December 2012, the Tribunal noted that the Respondents had raised the matter of an allegedly new claim of EUR 712,578.22, introduced in Section 2.16 of the Claimant's Reply Statement, coupled with a request that this new claim not be admitted by the Tribunal.[7] The Claimant was invited to submit comments by 14 December 2012.

38. The Claimant submitted comments on 14 December 2012 as allowed by the Tribunal. In its Procedural Order No. 7 of 7 January 2013, the Tribunal decided – for reasons given in the Order – to allow the new claim.

39. In its Procedural Order No. 8 of 20 February 2013, the Tribunal invited the Respondents to adduce new arguments or evidence relating to the additional claim by 18 March 2013.

40. By Procedural Order No. 9 of 25 March 2013 the Claimant was given a final opportunity to submit a Reply to the Respondents' Statement on the new claim.

41. In a Procedural Order No. 10 of 15 April 2013, the Tribunal noted that the Claimant submitted a Reply Statement of 12 April 2013 in accordance with the opportunity offered in the preceding Procedural Order.

42. By the same Order, the Parties were invited to comment on whether the Tribunal could now declare the proceedings to be closed.

43. In its Procedural Order No. 11 of 30 April 2013, after having received the Parties' agreement on 25 April 2013 that the Tribunal proceed on rendering the Final Award, the Tribunal declared the proceedings closed pursuant to Article 22 of the ICC Rules.

44. On 14 December 2012, the Parties also submitted Bills of Costs.

45. On 14 and 15 May 2013, the Claimant and the Respondents submitted supplemental and substitute Bills of Costs, respectively.

[7] The Respondents' Rejoinder to Claimant's Reply Statement, Section 3.3.

8 Relief requested by the Claimant

46. In the Terms of Reference (Clause 7.1), the Claimant's requests for relief were formulated in the following way:

47. The Claimant requests that the Tribunal issue an award ordering the Respondents

(a) To pay the Claimant the amount of **EUR 734,923.01**, which constitutes taxes, customs duties, fees and late payment interests, according to Interim Payment Certificates approved by the Supervisor;

(b) To pay the Claimant fees for development of work drawings in the amount of **EUR 317,000.00** and compensate the late payment interests in the amount of **EUR 23.864.02;**

(c) To pay the Claimant fees for the execution of additional works in the amount of **EUR 755,700.56** and to compensate the late payment interests in the amount of **EUR 109,492.88;**

(d) To cover all expenses related to the arbitration proceedings, including the Claimant's legal fees and all other expenses related to this proceeding; and

(e) To grant the Claimant such other relief as the Tribunal in its sole discretion may deem appropriate.

48. The Claimant also reserved its right to amend and supplement its claims as appropriate during the course of the arbitration, having due regard to Article 19 of the 1998 ICC Rules.

49. In line with this reservation, the Claimant in its Reply to the Respondents' Statement of Defense of 10 October 2012 submitted an additional claim for **EUR 712,578.22,** representing Additional Exempt taxes. This claim was allowed to proceed according to the Tribunal's Procedural Order No. 7 of 7 January 2013 (as accounted for in paragraph 38 above of this this Award).

9 The Respondents' position on the merits

50. The Respondents request that the Tribunal deny the claims submitted by the Claimant and to order the Claimant to compensate the Respondents for costs of their legal representation in the arbitration together with interest, and that the Tribunal, as between the Parties, declare that the Claimant be ultimately liable for the compensation to the Arbitral Tribunal and to the SCC Institute.

10 The Claimant's position in respect of all claims

51. The Claimant submitted its Draft Final Statement of Account (C-1) to the Supervisor in compliance with Article 49 of the General Conditions as amended by the Special Conditions.

52. The Claimant submitted its claims at the meeting of 10 December 2009 (C-56) where the question of the Provisional Acceptance was discussed. These claims were reflected in item 12 of the minutes of the meeting.

53. At the meeting of 19 January 2010 (C-3) the Claimant resubmitted the dispute. Thus, the Parties and the Supervisor were given a full opportunity to consider it.

54. Subsequently, the Contractor prepared its Final Statement of Account agreed upon with the representative of the Contracting Authority, the assistant to the Supervisor, in conformity with Article 49 of the General and Special Conditions and submitted it to the Contracting Authority (C-4).

55. In sum, the Contracting Authority was provided with all necessary information and supporting documentation in order to settle the outstanding claims.

11 The Respondents' position in respect of all claims

56. In addition to the particular reasons invoked by the Respondents in rejection of the Claimant's specific requests for relief listed in paragraph 45 (a) – (j) above the Respondents have raised the following objection against all claims raised by the Claimant.

57. The basis for the Respondents' denial of *all* claims brought by the Claimant will – for reasons of practicality – be accounted for in the following.

58. The final economic settlement to be determined in relation to the Contractor on the basis of the Contract shall be carried out according to Article 49 of the General Conditions.

59. According to Article 49.1, the Contractor shall submit a draft final statement of account to the Supervisor, showing the value of the work done in accordance with the Contract "together with all further sums which the Contractor considers to be due to him". This draft statement shall enable the Supervisor to prepare a final statement of account.

60. According to Article 49.2, the Supervisor shall prepare the final statement of account within 45 days, determining the amount which, in his opinion, is finally due under the Contract and the amount of the balance, if any, due from the Contracting Authority to the Contractor (or vice versa).

61. According to Article 49.3, the final statement of account shall be submitted to the Contracting Authority (or its duly authorized representative) and the Contractor shall sign the final statement of account as an acknowledgement of the full and final value of the work performed. It is further provided in this Article that the final statement shall not include amounts in dispute.

62. Article 49.5 confirms that the Contracting Authority shall not be liable to the Contractor for "any matter or a thing whatsoever" arising out of, or in connection with, the Contract or execution of the works unless the Contractor has included a claim with respect to his final statement of account.

63. The draft final statement of account was not prepared and submitted to the Supervisor in conformity with Article 49 of the General and Special Conditions.

64. The cover letter to the Final Statement of Account is dated 9 December 2009 (C-1). However, a handwritten note on the bottom of the page says *"Received [signature], 10th September 2009, F.G. Styles, Supervisor."*[8] Besides the contradicting dates, it should be pointed out that at the time, September to December 2009, Mr Esko Pennanen was the Supervisor and not Mr F.G.Styles. This can be seen, *inter alia*, from the Supervisor's Interim Certificates of Payment (pages 52 – 67 of the Claimant's Contract Bundle).

65. Further, the draft statement is dated 9 December 2009. Table 3 therein provides information on the payments that must be reimbursed to the Contractor *"for the period from August 2007 to December 09, 2009"*. Yet, it contains a reference to Certificate No. 6 dated 17 December 2009, a reference that could not have been made on 9 December.

66. A general reference to outstanding claims as accounted for in the minutes of a meeting of 10 December 2009 (C-56) at the meetings held on 10 December 2009 or 19 January 2010 (C-3) is clearly not relevant according to the specific contractual provisions of Article 49.1 of the General Conditions.

67. As to the final statement of account, it should be noted that pursuant to Article 49.3 of the Special Conditions, the Supervisor shall issue the final statement of account showing the final amount to which the Contractor is entitled under the Contract. However, in this case the final statement of account was prepared by the Client (not the Supervisor who did not even personally countersign it) and, contrary to Article 49.3 of the Special Conditions, it contains information about disputed amounts. Furthermore, there is no approval of the Funding Agency as per the above-mentioned Article.

68. The final statement is purportedly approved by Mr Krivtsov, head of Kaliningrad Procurement Customs Office, as a representative of RCS. It should also be noted that the signatory's, Mr Krivtsov, power of attorney remained valid to 31 December 2009 only. Thus, after such date he had no authority to approve such statement. The Claimant must have been aware of this limitation since it was in possession of the power of attorney in question.

69. In sum, the Respondents deny any payment obligation in view of the fact that neither the draft final statement of account of 9 December 2009 (C-1) nor the final statement of account of 28 December 2010 (C-4) can constitute a contractual basis for the Claimant's entitlement to the sums involved having regard to, in particular, inherent contradictions in the draft statement itself.

12 The Tribunal's dicussion

12.1 Provisional and final acceptance of the works

70. The General Conditions include provisions concerning the provisional and final acceptance, respectively, of the works. Thus, Section 57 "Provisional Acceptance"

[8] See Exhibit C-1 to the Reply Statement.

provides in Article 57.1 that the works shall be taken over by the Contracting Authority when having satisfactorily passed tests on completion. Article 57 additionally provides a number of rules concerning the procedure to be adopted in this relation. The issuance of the Provisional Acceptance Certificate implies that the maintenance period commences. In this period the Contractor has a duty to remedy defects that may occur for reasons where the Contractor is considered liable. Upon expiry of the maintenance period the Contract shall, according to Article 59.2, be considered to have been performed in full. In evidence hereof, it is incumbent on the Supervisor, according to the same provision, to issue a Final Acceptance Certificate.

71. The Tribunal notes that the matter of the Provisional Acceptance was dealt with at the PSU meeting of 10 December 2009 (C-56). On that occasion it was noted that the Contractor had requested the Supervisor to issue the Provisional Acceptance Certificate by a letter of 4 November 2009 that the works were checked by "all Parties" on 24 November and 9 December 2009 and that – as there were no outstanding works and no inspections required after the issuance of the Provisional Acceptance Certificate (item 6) – the date of completion was fixed at 10 December 2009. The Minutes from the meeting also state that "all items in the breakdown of prices are payable other than the Contingencies amounting to Euro 74.657".

72. According to Article 49.1 of the General Conditions, the Contractor shall – as accounted for by the Respondents above – issue a Draft Final Statement of Account "with supporting documents showing in detail the value of the work done in accordance with the Contract, together with all further sums which the Contractor considers to be due to him under the Contract in order to enable the Supervisor to prepare the Final Statement of Account".

73. According to Article 49.2. of the General Conditions:

> Within 45 days of receiving the draft final statement of account and of all information reasonably required for its verification, the Supervisor shall prepare the final statement of account, which determines:
>
> a) the amount which, in his opinion, is finally due under the contract;
>
> b) after establishing the amounts previously paid by the Contracting Authority and all sums to which the Contracting Authority is entitled under the Contract, the balance, if any...

74. Further, according to Article 49.3:

> The Supervisor shall issue the Contracting Authority or its duly authorized representative, and the Contractor, with the final statement of account showing the final amount to which the Contractor is entitled under the contract. The Contracting Authority or its duly authorized representative and the Contractor shall sign the final statement of account as an acknowledgment of the full and final value of the work performed under the contract and shall promptly submit a signed copy to the Supervisor. However, the final statement of account shall not include amount in dispute, which are subject of negotiations, conciliation, arbitration or litigation."

75. As follows from above, the purpose of the final statement of account is to provide an exhaustive and final economic settlement between the Parties upon completion of the Contractor's undertaking under the Contract.

76. The Provisional Acceptance Certificate was signed by the Supervisor on 10 December 2009, stating that "...the whole of the Work "Design and Construction of Mamanovo-Gzhechotki Border Crossing Post, Kaliningrad Region, Russian Federation" were completed in accordance with the Article 57 of the Conditions of Contract and are ready for Provisional Acceptance as of 09th December 2009".

77. The draft of Final Statement of Account was issued on 9 December 2009 by the Claimant and sent to the Supervisor, Mr Jeff Styles, on the same date.

78. There is not in the case file any draft of the final statement of account which was to be issued by the Supervisor in accordance with Article 49.3 of the General Conditions. Thus, the procedure envisaged by the Contract was not followed.

79. On the other hand, the draft Final Statement of Account was approved by Mr Krivtsov, head of Kaliningrad Procurement Customs Office, as representative of RCS, as was acknowledged by the Respondents themselves[9]. Therefore, his approval as a representative of RCS and therefore the end user of the contract, is sufficient to overcome the condition that the Final Statement of Account be issued by the Supervisor.

80. The Respondents stated that Mr Krivtsov's authority was limited to acceptance of work under the Contract, while claims for reimbursement of taxes, working drawings and additional works as they were "not within the original scope of the Contract".

81. The Tribunal cannot agree with this logic. The Contract consists of provisions related to reimbursement of the taxes. Article 35 deals with Variations and Modifications. Therefore, all issues related to payments for the taxes, working drawings and additional works are without doubt within the original scope of the Contract.

82. Indeed, the Power of Attorney presented by the Claimant, limits Mr Krivtsov's authority with regard to the Contract by 31 December 2009. At the same time, after this date, as the Tribunal understands from the case file, Mr Krivtsov remained in his position, he continued to negotiate all issues related to the Contract with the Claimant, signed various documents, and on no occasion during this time the Respondents raised any concerns regarding the lack of Mr Krivtsov's authority or informed the Claimant about it. Therefore, the Respondents could not rely in this arbitration that acceptance of work by Mr Krivtsov was not valid due to his lack of authority.

83. On the other hand, the Final Statement of Account provides, *in fine*, a statement concerning the status of the additional claims in the following words.

> Given that the additional costs incurred by the BADPRIM Ltd. during implementation of the Contract No. 2007/126-11 from 07/18/2007 were not paid by the Contracting Authority, and given that the measures taken for the

[9] Respondents' Rejoinder of 9 November 2012to the Claimant's Reply Statement, para 2.1.8.

settlement of disputes arising between the parties in accordance with Article 65, 66 of the Special Conditions of the Contract did not lead to the positive results, we were forced to apply to the arbitration procedure.

84. For these reasons it follows from the account itself that the cost items which are disputed in this arbitration could not be considered as finally proven, taking into account that the Contracting Authority and the Supervisor, respectively, did not approve the Final Statement of Account as such.

85. In view hereof, the Tribunal will need to review the specific claims raised by the Claimant in order to determine whether a particular claim raised by the Claimant shall be awarded or not.

13 The Specific Reliefs sought by the Claimant

86. For the purpose of discussing the Claimant's requests for relief, the Tribunal will consider the Claimant's claims in the way they were presented in the Claimant's Request for Arbitration (however, noting that the originally indicated amounts of compensation for late payments have been adjusted upwards and that an additional amount, defined here as Additional Exempt Taxes, has been introduced at a later stage.

(a) Claim for taxes, custom duties and charges, and penalties paid for the import of construction materials and equipment into the territory of the Russian Federation, as well the reimburse the taxes, customs duties and charges, and penalties for paid the temporary import equipment and construction machinery in the total amount of **EUR 124,580.12** (**"Taxes on Imports"**).

(b) Claim for VAT paid on goods, services and equipment purchased on the territory of the Russian Federation in the amount of **EUR 487,730.90** (**"Taxes on Local Goods"**);

(c) Claim for costs in the amount of **EUR 22,131.53** for the storage in customs warehouses of materials, equipment and construction machinery, imported into the territory of the Russian Federation (**"Warehousing Costs"**);

(d) Claim in the amount of **EUR 6,869.35** which constitutes paid indirect taxes related to the issuance of working authorizations to citizens of the Republic of Moldova (**"Work Permits"**);

(e) Claim for personal income taxes in the amount of **EUR 6,853.97** paid on the territory of the Russian Federation (**"Personal Taxes"**);

(f) Claim for property taxes in the amount of **EUR 2,001.77** paid on the territory of the Russian Federation (**"Property Taxes"**);

(g) Claim in the amount of **EUR 317,000.00** which constitutes the costs for the elaboration of the working drawings (**"Work Drawings"**);

(h) Claim for costs in the amount of **EUR 755,700.56** for the execution of additional work (**"Additional Works"**);

(i) Claim in the amount of **EUR 84,755.37** as compensation for late payment of VAT, customs duties and other charges;

(j) Claim in the amount of **EUR 23,863.02** as compensation for late payment of Work Drawings;

(k) Claim in the amount of **EUR 133,356.90** as compensation for late payment for Additional Works;

(l) Claim in the amount of **EUR 712,578.22** representing Additional Exempt Taxes;

(m) Reimburse the Claimant for its expenses related to the arbitration proceedings, including the Claimant's legal fees and other expenses; and to

(n) Grant the Claimant such other relief as the Tribunal may deem appropriate in its sole discretion.

87. With respect to the specific reliefs sought by the Claimant, the respective positions of the Parties will be accounted for in the following sections. The Tribunal's reasoning and its conclusion in respect of each claim will be accounted for in the context of the specific claims.

13.1 Taxes on Imports (EUR 124,580.12)

13.1.1 The Claimant's position

88. The Claimant has invoked, essentially, the following circumstances in support of its request for compensation for customs charges and VAT paid on (temporary) imports.

89. The Contract exempts the EC funded part of the Contract (i.e. 100% of the Contract) from tax. This follows from the last sentence on page 2 of the Contract.

90. The Contract has the highest precedence of any of the contract documents and so it cannot be varied by anything that may be stated in other contract documents.

91. Regardless of this, there are no contradictions in the contract documents that would depart from the terms of the Contract. The matter of taxes is also addressed is the Special Conditions which state in Article 10.3 that:

(a) the Contracting Authority is responsible for ensuring exemption from taxes is obtained, and

(b) if there is any delay or impediment to the exemption from VAT and other taxes, the Contracting Authority shall pay the amount of the taxes claimed by the Contractor.

92. Article 10.3 of the Special Conditions also describes procedures and performance required of the Contracting Authority in order that exemption from or refund of tax be granted to the Contractor. Failure to discharge this obligation (i.e. to obtain exemption from or refund of taxes) constitutes a breach of contract on the part of the Contracting Authority.

93. It is also incumbent on the Respondents to ensure that international agreements prevail over local tax codes. This condition establishes the precedence of the international agreement over the RF Customs Code for the purposes of the Contract. This means that

if the Contracting Authority is for any reason unable to prevail upon the relevant Russian authorities to abide by the international agreement, it is in breach of contract and shall compensate the Contractor accordingly, irrespective of whether the Contracting Authority itself is able to recover the taxes.

94. Article 35 (j) of the Russian Federal Law "On the Customs Tariffs" No 5003-1, of May 21, 1993, states that:

> Goods imported on the customs territory of the Russian Federation as part of the gratuitous aid (assistance), as well as goods imported into or exported from such territory as part of technical assistance shall not be subject to customs duties.

95. Article 8.2, Chapter 1 of the Customs Code of the Russian Federation, No. 61-FZ of May 28, 2003, states that:

> The rules of the international treaty to which Russia is part shall prevail over the rules of the present Code if the rules of the international treaty differ from the rules of the present Code.

96. In breach of these agreements, the Kaliningrad and Bagrationovsk Customs Services have withheld taxes, customs duties and charges, and penalties from the Claimant for the import of construction materials and equipment into the territory of the Russian Federation during the years 2007 - 2008, as well as for the temporary importation of equipment and construction machinery for the implementation of the Contract in a total amount of EUR 124,580.12.

97. The Supervisor has provided to the Contracting Authority Interim Certificates of Payment ("CA"), viz. CA 01 of 4 December 2008, CA 02 of 12 March 2009, CA 03 of 7 May 2009, CA 04 of 10 August 2009, CA 05 of 30 October 2009, CA 06 of 17 December 2009, CA 07 of 5 July 2010 and CA 08 of 14 September 2010[10] for the reimbursement to the Claimant of withheld customs duties, VAT and other charges. Regardless of these agreements, the Contracting Authority has not made payments against the Interim Certificates of Payment.

98. According to the Contract, the Interim Payment Certificates should form the basis for payment of the sums claimed by the Claimant.

99. The Supervisor having signed and approved the Interim Certificates of Payment has thus recognized that it was by the Contracting Authority's fault that the Claimant did not receive exemption from taxes or reimbursement of paid taxes, and that also the obligation of the Contracting Authority to pay its indebtedness according to the Interim Certificates if Payment was recognized.

100. Respondent No 1, having failed to pay the above mentioned amounts, is in breach of the Contract, and the Claimant is entitled to reimbursement of these amounts.

[10] Pages 52 – 67 of the Claimant's Contract Bundle.

13.1.2 The Respondents' position

101. The Claimant is not entitled to compensation for customs duties, VAT or other taxes unless it has made reasonable efforts to obtain the exemption. This is not the case as regards the goods which were imported into the Russian Federation before receipt of Certificate No.6126 issued on 29 April 2008 (the "First Certificate") which provided tax exemption for goods and services supplied under the Contract. Nor is the Claimant entitled to reimbursement on goods for which it has not requested any exemption from the customs duties.

102. Neither is the Claimant entitled to reimbursement for temporary import of equipment and materials since this was not specified in their application for the First Certificate directed to the RCS. The information provided in the Claimant's application was forwarded by the RCS to the Commission on International Humanitarian and Technical Assistance under the Government of the Russian Federation ("CIHTA"). Therefore, temporary import was not included in the scope of the First Certificate as tax exempt.

103. Only on 10 November 2009 was the First Certificate amended to include temporary import of equipment and materials (the "Second Certificate").

104. Thus, the Respondents base their objection on the failure of the Claimant to make reasonable efforts to obtain exemption. Further, the Respondents deny that the Claimant is entitled to the extent that it has not made a request for exemption, and that it finally is not entitled to reimbursement in respect of temporary import of equipment and materials, not having been specified in its application to the RCS. (The First Certificate was, as stated above, amended on 10 November 2009 to include temporary imports.)

105. In addition, the Claimant has not provided satisfactory proof that it has disbursed the alleged amounts, particularly as amounts included in Interim Certificates of Payment are described as "estimates."

106. Additionally, the Respondents raise the same objections against the Claimant's request for restitution of customs charges and VAT relating to imported goods and services as in respect of "Taxes on Local Goods" (accounted for in Section [13.2] below).

13.1.3 The Tribunal's discussion

107. In respect of the Claimant's request for relief relating to "Taxes on Imports" (as defined here) the Tribunal attaches weight to the following considerations.

108. The Contract provides in its Article 4, last paragraph, the following:

> VAT shall be paid in compliance with the binding regulations, national law and international agreements concerning the execution of the programme. VAT and other exempt taxes shall not be paid on the funds originating from EC funds.

109. The "Special Conditions", Article 10 "Assistance with Local Regulations" provides a supplemental provision to sub-article 10.3 of the General Conditions of the following contents:

> The Contracting Authority is responsible for:
>
> [---]
>
> [---]
>
> The Contracting Authority shall ensure that all necessary steps are made in order to obtain exemption from customs duties, VAT and any other exempt taxes from the relevant Russian Authorities in accordance with the procedures outlined in Annex VII [Procedures for Tax/Customs Exemptions / Refund of Goods, Works and Services Imported or Purchased in Russia by the Contractor/Subcontractor within the Mamonovo - Gzhechotki Border Crossing project] and with the relevant legislation of the Russian Federation.
>
> In particular, the Contracting Authority is responsible for:
>
> - Systematic updating Annex VII [Procedures for Tax/Customs Exemptions / Refund of Goods, Works and Services Imported or Purchased in Russia by the Contractor/Subcontractor within the Mamonovo - Gzhechotki Border Crossing project] in accordance with the relevant legislation of the Russian Federation;
> - Applying for the certificate from the Commission of International Technical Assistance (CITA);
> - Providing the Contractor with certified copies of the Certificates issued by the CITA
> - Obtaining customs duty exemption;
> - Paying customs depositary fees for the imported goods to be incorporated or otherwise used in the implementation of the Works;
>
> Ensuring that in the event the international agreement, entered into between the EU and Government of the Russian Federation and under which this project is funded, is different from the rules and norms contained in the Russian Federation Tax Code, that the rules and norms of the international agreement prevail.
>
> In the case of any delay or fact which impedes the exemption from VAT and/or other taxes to be paid in the Russian Federation according to the legislation in force in the Russian Federation, the Contracting Authority shall pay the VAT, taxes and compensations claimed by the Contractor.

110. It is of particular significance to note the provisions of the penultimate paragraph of the quoted part of the Special Conditions, which stipulate the paramount importance of any rules and norms of an "international agreement" to which the EU and the RF Government are parties and on the basis of which the relevant project is funded.

111. Part of such an "international agreement" is Annex 2, "General Rules applicable to the Technical Assistance of the European Communities, concluded by the EC Commission and the RF Government on 18 July 1997". In an Annex to these General Rules, there is an "Article 11 – Taxation and Customs Duties". This article provides, among other things, that taxes and customs duties shall not be covered by any EC funding (Article

11(1)), imports shall not be subject to "any duties, taxes or fiscal charges with equivalent effect", Article 11(2), that supply contracts including those involved in products originating in the Russian Federation shall not include VAT "and taxes of analogous character". Neither shall such contracts "be subject to documentary stamp or registration duties – or fiscal charges having equivalent effect" (Article 11(3), that foreign legal persons shall be exempt from income tax, VAT, "and analogous indirect taxes on receipts arising from the EC grant" (Article 11(4)).

112. From the Contract documents as accounted for above, it follows that it is up to the Contracting Authority – i.e. Respondent No. 1 – to "ensure that all necessary steps are made in order to obtain exemption from customs duties, VAT and any other exempt taxes". In this relation, the Special Conditions referred to in Annex VII (Exhibit R-7) lay down procedures for tax/customs exemptions and the like. From Annex 3 follows (1.3, Mamonovo-Gzhechotki Border Crossing Legal Framework) that Respondent No. 1 "shall ensure that all the usual Contracting Authority's requirements are discharged" and that "[t]hese include the obtaining of customs and VAT exemptions within the Contract".

113. Consequently, it follows that it is the duty of the Respondent to ensure that necessary steps are taken to obtain these exemptions.

114. The above stated does not exclude that the Claimant has a duty to actively participate in order to facilitate the relevant procedures for obtaining exemption; this follows not the least from the quoted parts, final paragraph, providing that the Contractor has to "make all necessary practical arrangements" to ensure that such exemptions are obtained. It appears from the Claimant's account for measures undertaken by it to obtain exemption with associated documentation[11].

115. In particular, the matter of VAT and tax exemptions has been a perennial matter of attention at PSU meetings all throughout the course of the construction works from the initial meeting of 28 August 2007 (C-15) to the very last meeting of 19 January 2010 (C-3). At the first-mentioned meeting, the customs duty and tax exemption was discussed. The Supervisor confirmed that it was up to the Contracting Authority to arrange for the exemptions to be granted, but one may note that the "CA advised CC to sign subcontracts with all the suppliers which were not VAT exempted. CC replied that it was practically impossible due to a big number of such suppliers." Judging from minutes, the PSU made a categorical declaration that it was incumbent on the Contracting Authority to arrange for the exemption.

116. Again, the matter of VAT and tax exemption was discussed at further meetings of 3 September 2007 (C-27), 12 October (C-43), at a "High Level" meeting on 15 November 2007 (C-52), 8 May 2008, 5 June 2008, 29 October 2008, 26 March 2009, 12 August 2009 (a meeting exclusively dedicated to the matter of tax exemption) and 10 December 2009 (C-56).

117. In addition to discussing the VAT and tax exemption issue at a large number of meetings, the Claimant has also raised the matter in written notifications to the

[11] Reference may be made to the Claimant's Reply Statement of 10 October 2012, paragraphs N 1.3.5-1.3.14.

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Contracting Authority as well as to the Supervisor. Also the EU Delegation to Moscow has raised the issue in relation to the Contracting Authority (C-19). It appears that the Contracting Authority has made occasional attempts to regularise the situation, but appears to have finally resigned, see e.g. letters of 16 April 2009[12], 14 July 2009[13], 19 January 2010[14], 19 October 2010 and 12 November 2010, (C-25) explaining that the RCS saw no other way to solve the problem but by way of recourse to dispute resolution according to Articles 65 and 66 of the Special Conditions.

118. The Respondents have also noted[15] that the Claimant has not provided verification of "actual costs and expenses incurred for taxes [etc]".

119. However, in this respect the Claimant has invoked the above stated Interim Certificates of Payment ("CA01 – CA06"). To CA06 is attached a detailed "roll of payment", covering the period August 2007 to 10 December 2009, providing specific amounts under the headings "VAT, temporary import facilities of customs storage, "state due", personal income tax and property tax".

120. The matter of the Interim Payment Certificates is regulated by Article 48 of the General Conditions (according to Article 48.6, the Supervisor has a right to correct or modify by an interim payment certificate a previous certificate which is not, however, an issue in this case).

121. The Interim Payment Certificates provide that the amounts in question are due by the Contracting Authority, in which regard a reference is made to Article 10.3(b) of the Special Conditions. This provision imposes on the Contracting Authority the obligation to ensure that the VAT and tax exemption issue is obtained and which also provides that the Contracting Authority shall have the responsibility to ensure that such exemption is obtained.

122. According to Article 50.1. of the General Conditions:

> The Contracting Authority shall pay the Contractor sums due within 45 days of the date on which an admissible payment is registered, in accordance with Article 43 of these General Conditions. This period shall begin to run from the approval of these documents by the competent department referred to in Article 43 of the Special Conditions. These documents shall be approved either expressly or tacitly, in the absence of any written reaction in the 45 days following their receipt accompanied by the requisite documents.

123. As the Respondents admitted themselves:

> All Acts for additional works and working drawings, Interim Payment Certificates for taxes and duties, as well as the final statement of account, have been signed by Mr. Krivtsov, on behalf of Contracting Authority.

124. While the Respondents argued that Mr Krivtsov's authority expired by the end of the year 2009 (which the Tribunal has not accepted for the reasons stated above), Interim

[12] Page 132 of the Claimant's Contract Bundle.
[13] Page 134 of the Claimant's Contract Bundle.
[14] Page 152 of the Claimant's Contract Bundle.
[15] Rejoinder, paragraph 23.

Payment Certificate CA 6 (where the amount of EUR 124, 580.12 was stated) was issued on 17 December.2009, thus, within the time period where Mr Krivtsov had a formal authority to act on behalf of Respondent No. 1.

125. The Tribunal finally notes that the matter of VAT, taxes and duties has been a recurrent issue between the Parties, reviewed on a great number of occasions, at meetings and in written exchanges all through the entire period of the construction works. Not on one occasion has the amount of VAT and other been brought into cause by the Respondents (not, actually, before the filing of the Rejoinder in the present arbitration). Neither have the Respondents indicated what amounts – if not the ones alleged by the Claimant – have been paid in VAT and other exempt taxes. The Tribunal considers that this consistent course of conduct on the part of the Respondents implies that they cannot now by merely questioning the amounts indicated in the Interim Payment Certificates refute the correctness of the amounts accounted for by the Claimant during the course of the contract works.

126. The Claimant's request under this heading shall therefore be granted.

13.2 Taxes on Local Goods (EUR 478,730.90)

13.2.1 The Claimant's position

127. The requirement that no "VAT and other exempt taxes" shall be paid on the amount of the EC Contribution based on the Contract, applies equally to goods and services sourced in the Russian Federation. In this regard the Claimant adds the following to what has been submitted under "Taxes on Imports" above.

128. Article 149.2 (19) of the Tax Code of the Russian Federation provides:

> [---]
>
> 2. The sale (delivery, execution, rendering for personal needs) of the following shall not be subject to taxation on the territory of the Russian Federation:
>
> [---]
>
> 19) goods (works, services), with exception of excisable goods, sold (executed, rendered) as part of the technical aid (assistance) in the Russian Federation in accordance with the Federal Law "On Gratuitous Aid/Assistance to the Russian Federation and Amending Certain Legislative Acts of the Russian Federation on Taxes and on Introducing Privileges on Payments into State Non-budgetary Funds Relating to the Provision of Gratuitous Aid/Assistance to the Russian Federation.

129. Article 7 of the Tax Code of the Russian Federation provides:

> If an international treaty of the Russian Federation contains provisions related to taxation that are different from the rules and norms stated in the present Code and the associated regulatory and legislative acts on taxation, then the rules and norms of the international treaty of the Russian Federation shall prevail.

130. Article 10.3 of the Special Conditions to the Contract provides:

> In the case of any delay or fact which impedes the exemption from VAT and/or other taxes to be paid in the Russian Federation according to the legislation in force in the Russian Federation, the Contracting Authority shall pay the VAT, taxes and compensations claimed by the Contractor.

131. In violation of these agreements and normative acts during the entire period of the project implementation, the Claimant had not been reimbursed VAT in the total amount of EUR 487,730.90 paid on goods, services and equipment, which the Claimant purchased on the territory of the Russian Federation.

13.2.2 The Respondents' position

132. The general principle of exemption from taxes is, indeed, stated in the General Rules applicable to the Technical Assistance of the European Communities, the Financing Memorandum and the Contract. Yet, for the actual process of obtaining the exemption both the Memorandum and the Contract refer to applicable Russian law.

133. Article 42 of the Memorandum clearly states that tax exemption requires that the procedures available under Russian law are followed.

134. Also the Contract provides that Russian law shall apply in all matters not covered by the provisions of the Contract. Annex VII - Procedures for Tax/Customs Exemptions/Refund of the Goods, Works and Services Imported or Purchased in Russia by the Contractor/Subcontractor within the Mamonovo - Gzhechotki Border Crossing project which describes the required procedures for tax and customs exemptions for contractors within EC-financed projects. It provides information on the legal framework by explaining how the General Rules and the Memorandum have been implemented in the legislation of the Russian Federation. According to the procedure, requests for refund of internal VAT shall be directed to the relevant tax authority.

135. In order for the Claimant to have qualified for VAT exemption, it should have followed these rules.

136. In rebuttal of the Claimant's argument that the RF Government simply "could waive its sovereign right and exempt the Contractor from taxes", the Respondents note that allowing special procedures for exemption from taxes and duties to particular individuals would not only violate the rule of law but also constitute discriminatory conduct towards other TACIS contractors in Russia.

137. The Claimant has submitted that the Contracting Authority confirmed at the meeting on 3 September 2007 (C-27) that there was no mechanism for reimbursement of taxes in Russia. However, the minutes of this meeting include no such confirmation. On the contrary, under Item 7 the Supervisor asked the Claimant to make a full appraisal of the subcontractors "so that the consequential claims for exemption were duly processed and so that they are fully aware of what is required of them in claiming exemption".

138. In sum, the Respondents assert that during implementation of the Contract

(i) there was an established legal framework of exemption from taxes and duties in the Russian Federation; and

(ii) that the Claimant has not been subject to any discriminatory or arbitrary actions, but was treated fairly as any other legal entity.

139. Specifically, the following failings of the Claimant have disqualified it from receiving compensation for alleged payments of exempt taxes.

(i) The Claimant has failed to demonstrate that it has fulfilled the requirements outlined in the General Rules and Annex VII.

(ii) The Claimant has not fulfilled its responsibility to conclude supply contracts without VAT pursuant to Article 2.2 of the General Rules.

(iii) The Claimant's account for its efforts to obtain the exemption[16] are pertinent to the VAT for Q3 - Q4 2007 and Q1 2008 only.

140. The Respondents maintain that the Claimant intentionally neglected to provide all the information required for the CIHTA (Commission on International Humanitarian and Technical Assistance under the Government of the Russian Federation) certificate, rendering the certificate ineffective for its intended purpose.

141. In this regard the Respondents rely on the following:

(i) a letter from FCS dated 28 July 2008 (R-16) in which the Claimant is urged to provide information on all subcontractors and details of the relevant contracts; and

(ii) discussions noted in the Minutes of Meeting on 28 August 2008 (C-15). The status of exemptions of taxes and duties was discussed during this meeting and under item 4 para 6 *in fine* it is stated that

> CA [the Contracting Authority] advised CC [Contractor] to sign subcontracts with all the suppliers which were not VAT exempted. CC replied that it was practically impossible due to a big number of such suppliers.

142. So when considering and invoked by the Claimant the documents submitted to the relevant tax authorities,[17] the Tribunal should consider also these documents. In order to receive reimbursement of input VAT, the goods purchased or sub-contractors engaged in Russian Federation should have been listed in the Annex to the CIHTA certificate as technical assistance.

143. The Claimant has failed to demonstrate that the particular goods or services were listed in the Annex to the certificate. Moreover, from the Minutes of Meeting on 5 June 2008 (C-23) as well as from RCS's letter of 28 July 2008 (R-16) it follows that the Claimant

[16] Section 1.3.5 of the Reply Statement.
[17] E.g. Section 1.3.7 Reply Statement

was aware of this requirement and that, this notwithstanding, no subcontractors or suppliers were listed in the Annex.

144. It is reasonable to assume that should these suppliers have been subcontracted and listed as per the advice of the RCS, the VAT paid on goods, services and equipment purchased on the territory of the Russian Federation would have been reimbursed by the relevant tax authorities.

145. The Claimant's admission[18] that exemption was granted in an amount of EUR 514,682.14 from VAT and customs duties, for import of materials and temporary import of the Contractor's equipment should also be noted. This was allowed even before the CIHTA certificate was issued. So there can be no doubt that the legal framework for exemption from taxes and duties was in place and, if addressed with due care, worked well.

13.2.3 The Tribunal's discussion

146. In addition to the reasons which the Tribunal has accounted for in relation to "Taxes on Imports" the Tribunal – in consideration of certain specific grounds for denial submitted by the Respondents – add the following.

147. It is clear that the Claimant had displayed a high degree of due diligence by pursuing the implementation of the tax exemption issue in any possible ways, evenin fora possibly to be irrelevant. It cannot in the view of the Tribunal be required that the Claimant should have been put to the impracticable requirement to arrange for non-VAT supply contracts with each and every sub-contractor relied on for carrying out the contract works. Further, the fact that particular appeals and efforts undertaken by the Claimant – an effort exceeding what reasonably should have been required by the Claimant – for a period ending Q1 2008 is not relevant for the obligation of Respondent No. 1 to clear the customs/VAT/tax matter.

148. Neither is any purported delay of the First and Second Certificates relevant as it was for the Respondent No. 1 to ensure that the requisite formalities for exemption were duly proceeded with. It may be noted in this context that the Claimant at a PSU meeting of 8 May 2008 (C-16) noted that the delay of the Certificate had delayed the project by 16 weeks which made it necessary to ask for a time extension for completion of the works until 20 December 2009.

149. Further, the same minutes stated:

> Despite the optimism at the previous meeting concerning relief from Russian VAT the meeting considered that there was no chance of the Russian VAT being refunded without high level representation being made by the European Commission to the Russian Government.

150. Consequently, all parties involved admitted that the issue with Russian VAT should be resolved at higher level. Thus it is clear that it is the administrative handling of the issue on exempted taxes that constituted an obstacle against obtaining reimbursement of VAT

[18] Reply Statement, (Section 2.1.0)

rather than any failure by the Claimant to follow some particular procedure, as the Respondent insists.

151. From the Claimant's account and documentation invoked in support thereof, the Tribunal concludes that the Claimant has amply displayed such due diligence as could be reasonably expected of it as concerns the facilitation of the customs/VAT/tax issue.

152. In addition, the Tribunal cannot help but noting that there is no documentation available in the case which supports the assumption that Respondent No. 1 in any respect has contributed by some constructive measures to resolve the matter of reimbursement of taxes, as should, in the Tribunal's view, be consonant with its duty to assure that all necessary steps are made to obtain exemption, as was explained above.

153. The quantum of this claim was also stated in the Interim Payment Certificate CA 6 issued on 17 December 2009, which is, as held in respect of Taxes on Imports above, equally applicable here.

154. Therefore, the claim for reimbursement of VAT and Taxes on Local Goods (EUR 478,730.90) shall be granted.

13.3 Warehousing Costs (EUR 22,131.53)

13.3.1 The Claimant's position

155. The matter of storage in customs warehouses of materials, equipment and construction machinery imported into the territory of the Russian Federation was repeatedly discussed at the joint meetings with the participation of the representatives from the Funding Agency, the Contracting Authority, the Supervisor and the Contractor. However, the costs in the total amount of EUR 22,131.53 incurred due to the storage in customs warehouses of materials, equipment and construction machinery imported into the Russian Federation have not been reimbursed.

13.3.2 The Respondents' position

156. The Respondents note that the Claimant has raised a claim for warehousing costs in its Request for Arbitration. It is noted that these costs have been repeatedly discussed at joint meetings involving, *inter alii*, Respondent No. 1, but no resolution has been achieved. The Respondents contest the claim in consideration of the fact that the Claimant has not demonstrated that it has incurred any such costs.

13.3.3 The Tribunal's discussion

157. Dealing with the matter of Warehousing Costs the Tribunal notes that this item has been regularly listed in the Supervisor's Interim Certificates of Payment (CA01 – CA06)[19] without giving rise to the any objection on the part of the Respondents. However, the Claimant has not pointed to any provision of the Special or General Conditions or any

[19] Pages 52 – 67 of the Claimant's Contract Bundle.

principle of contract law that would entitle the Claimant to compensation for Warehousing Costs.

158. Thus, the Claimant's request for relief in respect of Warehousing Costs is therefore denied.

13.4 Work Permits (EUR 6,869.35)

13.4.1 The Claimant's position

159. Throughout the entire period of the project implementation, the Claimant has had to pay indirect taxes for the issuance of work permits to the citizens of the Republic of Moldova in the Russian Federation.

160. Article 11.4 of the General Rules provides that "foreign legal persons and citizens, taking part in the European Communities financed MEASURES in the Russian Federation according to these General Rules, shall be exempt from payment of income tax, value added tax and analogous indirect taxes on receipts arising from the EC Grant."

161. In violation of these agreements, the Contracting Authority did not ensure the fulfilment of all the necessary steps for the receipt of exemptions from the payment of taxes.

13.4.2 The Respondents' position

162. Charges for work permits are service fees and not taxes. Services fees are not exempted in the Contract.

13.4.3 The Tribunal's discussion

163. In respect of costs for Work Permits, the Claimant has invoked Article 11.4 of the General Rules which exempts "foreign legal persons and citizens" involved in the implementation of the Contract from taxes.

164. The Tribunal notes that Article 11.4 of the General Rules exempts, *inter alia*, "indirect taxes"; this would rather indicate that the exemption applies to benefits *received* by a taxable person and not on outgoing payments (with the exception of the specifically identified VAT and customs charges). The Tribunal therefore concludes that these payments are rather to be qualified as "service fees" as argued by the Respondents.

165. The Tribunal therefore rejects the Claimant's request for relief concerning Work Permits.

13.5 Personal Taxes (EUR 6,853.97)

13.5.1 The Claimant's position

166. Throughout the course of the construction works, the Claimant has had to pay indirect personal income taxes in the Russian Federation.

167. As explained above, Article 11.4 of the General Rules provides that "foreign legal persons and citizens, taking part in the European Communities financed MEASURES in the Russian Federation according to these General Rules, shall be exempt from payment of income tax, value added tax and analogous indirect taxes on receipts arising from the EC Grant."

168. In violation of these agreements, the Contracting Authority did not ensure the fulfilment of all the necessary steps for the receipt of exemptions from the payment of taxes.

13.5.2 The Respondents' position

169. Personal income tax and property tax are by definition levied on the income of the individuals or property owned by the individuals and not on the Claimant.

170. Additionally, the Claimant has not demonstrated costs incurred for personal income tax which is by definition levied on the income of individuals. Moreover, the Memorandum provides explicitly that

> 43. Contractors are responsible for compliance with state tax laws that apply to them in respect of the income received under the contract.

171. Therefore, the Respondents do not recognise any obligation to compensate Claimant for such costs.

13.6 Property Taxes (EUR 2,001.77)

13.6.1 The Claimant's position

172. Throughout the course of the construction works, the Claimant has had to pay indirect property taxes in the Russian Federation.

173. Citing again Article 11.4 of the General Rules, it follows that "foreign legal persons and citizens, taking part in the European Communities financed MEASURES in the Russian Federation according to these General Rules, shall be exempt from payment of income tax, value added tax and analogous indirect taxes on receipts arising from the EC Grant."

174. In the violation of these agreements, the Contracting Authority did not ensure the fulfilment of all the necessary steps for the receipt of exemptions from the payment of the taxes.

13.6.2 The Respondents' position

175. Property tax is by definition levied on property owned by the individuals and not by the Claimant. The Claimant has not demonstrated costs incurred.

13.6.3 The Tribunal's discussion concerning Personal Taxes and Property Taxes

176. As for the items Personal Taxes and Property Taxes, the Tribunal finds that the Claimant's invocation of Article 11.4 of the General Rules is apposite. Even these items

will in all circumstances fall within the scope of the wording of "other exempt taxes" as indicated in Article 4 of the Contract.

177. The amounts have been indicated in the Interim Certificate CA 05 of 17 December 2009, and have not (as far as is apparent from the materials of the arbitration) given rise to any objection on the part of the Respondents

178. Therefore, the Claimant's requests for relief involving Personal Taxes and Property Taxes shall be granted.

13.7 Work Drawings (EUR 317,000.00)

13.7.1 The Claimant's position

179. Act No 1 of 28 December 2009 (C-49), signed and approved by the Contracting Authority, serves as the basis for the reimbursement of the costs related to the elaboration of the working drawings. Act No 1 confirms that:

> Given that the Contractor included the amount of EUR 113,000.00 in the Tender documentation for the correction of the working drawings prepared by the Contracting Authority, and that the decision to reduce the volume of works to finance the elaboration of the working drawings had not been implemented, pursuant to point 4 of the Contract, the additional works for the elaboration of the working drawings in the amount of EUR 317,000.00 shall be paid by the Contracting Authority.

180. The history of this claim, which led to the issuance of the Act No. 1, is the following.

181. The agreement to reduce the design requirements (leading to a reduction of the Lump-Sum Contract Price) was reached during the meeting in Moscow on 21 June 2007 (C-39), dedicated to contract negotiations.

182. The agenda of a later meeting held at the construction site on 3 September 2007 (C-27), included in point 3, "Issues to be resolved before the commencement of works", sub-point g) "Presentation of the working drawings". During the discussion of this item, the Supervisor noted that the requirement to elaborate the work drawings and their approval by all relevant institutions had been excluded from the tender documentation.

183. The Supervisor confirmed in his letter of 27 September 2007[20] that the elaboration of the work drawings and their approval by all the relevant institutions were not part of the "Volume of works under the Contract".

184. At the Claimant's request, this matter was discussed at a "High Level Meeting" held in Moscow on 12 October 2007 (C-43). On that occasion a decision was taken to reduce the scope of certain works from the Contract in order to allocate funds to the elaboration of the work drawings.

[20] Page 86 of the Claimant's Contract Bundle

185. Pursuant to that decision, Mr V. M. Malinin, First Deputy Head of the RCS, confirmed that the Kaliningrad Customs had been given the corresponding orders in a letter No. 01-36/4075 of 6 February 2008[21].

186. Mr. I. V. Tkachenko, First Deputy Head of the RCS Administrative Office, also gave instructions to examine and resolve the issue related to the elaboration of the working drawings in the context of decisions taken at the meeting of 12 October 2007.

187. At a later meeting held on 7 May 2008 (C-46), the Contracting Authority represented by the Kaliningrad Customs proposed to resolve this issue by reducing the amount of works to be executed by the Contractor. The Contracting Authority also proposed at that meeting that the Contractor would submit a proposal of works to be reduced for review to the Contracting Authority.

188. In compliance herewith, the Claimant had repeatedly addressed the EU Delegation, the Contracting Authority and the Supervisor to resolve this issue. However, no decision was adopted, even in spite of the Kaliningrad Customs' request addressed to the Federal Customs Service of Russia to reimburse the costs for the work drawings.

189. No decision to reduce the contract works was ever implemented and, as a consequence, no reallocation of the contract sum could be carried out for purposes of paying the Claimant for work drawings that had been excluded at the outset from the contract sum.

190. In violation of these agreements and in disregard of Act No. 1 of 28 December 2009, accepted by the Contracting Authority, the Claimant is entitled to reimbursement of costs in the amount of EUR 317,000.00 for the elaboration of the working drawings.

13.7.2 The Respondents' position

191. According to the provisions of the Contract the responsibility for the work drawings clearly rests with the Contractor. The Claimant has not provided any conclusive evidence as to the contrary.

192. From the minutes of a number of meetings (on 20-21 June 2007 (C-39), 3 September 2007 (C-41), 12 October 2007 (C-43) and 7 May 2008 (C-46)) where this issue was discussed, it is clear that there was a misunderstanding on the Contractor's side as to the responsibility for work drawings. Since the very beginning the Contracting Authority, the Supervisor and the EC Delegation made clear that according to the Contract at work drawings are the responsibility of the Contractor.

193. The Respondent does not accept the Claimant's interpretation of what transpired at the meeting 12 October 2007.[22] The Parties did not adopt any unconditional decision to reduce the scope of works under the Contract. The reduction of the scope was made subject to further discussions "in the light of [Conditions of the Contract]" and the decision of the Contracting Authority. The participants at the meeting further did not agree on the price for producing the working drawings. To the contrary, the Supervisor raised a concern that the quoted price was too high.

[21] Page 98 of the Claimant's Contract Bundle)
[22] Section 3.5 of the Reply Statement.

194. In search of a constructive decision the representative of the Funding Agency noted that "it would be necessary to go beyond the contract". This statement cannot be interpreted as entailing a separate agreement with nothing in common with the Contract, as the Claimant suggests.[23]

195. There is a number of circumstances which show that there was no agreement reached between the Parties during these meetings.

(i) The Claimant sent a number of letters to the Contracting Authority after the abovementioned meetings asking to solve the issue;

(ii) In section 4 of the Draft Final Statement of Account it is stated that ["The Claimant"] developed the work drawings at its own expense in the absence of a decision regarding the financing of these drawings";

(iii) Act No.1 regarding acceptance of the elaboration of the working drawings is dated 28 December 2009, i.e. after the Provisional Acceptance Certificate signed on 10 December 2009, and wherein it is stated that all works were performed and no issues remained outstanding.

(iv) In the letter to the EC Delegation of 22 March 2010, the Claimant stated that the Supervisor had not taken any decision in the matter, nor had he considered the proposal from the Contracting Authority for reduction of the scope of works; and

(v) The dispute on elaboration of working drawings is not reflected in the Financial Audit Report, dated 24 September 2010 (C-14). The period of the audit is stated to be 29 August 2007 -10 December 2009.

196. As for the Act No. 1, of 28 December 2009, invoked by the Claimant as a basis for a payment obligation on the part of the Contracting Authority, the following applies.

197. The Act No. 1 does not correspond to an Administrative Order and the requirements of Sub-Article 35.2 b) of the Special Conditions.

198. There is no evidence that the Supervisor gave the Contractor any oral order to modify the works.

199. The Claimant must have been aware that Mr Krivtsov lacked authority to sign such document, in particular since the Claimant

(i) was aware of that the RCS had refused to accept any payment obligations as stated in the letter dated 27 July 2009 (R-15); and

(ii) was in possession of RCS's internal order (C-62) clearly outlining the project management committee and Mr Krivtsov's limited authority.

200. It should also be noted that it was the Supervisor's Representative, not the Supervisor, who signed the Act.

[23] Section 3.9 of the Claimant's Reply Statement.

201. Further, according to the Article 5.4 of the General Conditions, all instructions and/or orders issued by the Supervisor shall take the form of administrative orders which "shall be dated, numbered and entered by the Supervisor in a register".

202. In respect of the implementation of this Contract there are only two Administrative Orders – No.2 and No.4 – issued by the Supervisor. Neither of these deals with the elaboration of working drawings.

203. Since no Administrative Order was issued, the agreement on elaboration of working drawings should have been fixed in the form of an Addendum to the Contract. This has not been done.

204. In this regard the Respondents cannot understand the Claimant's assertion[24] that "the total cost of the Contract was not changed due to the signed administrative order enforced through Act no.1 of 29.12.2009" and therefore there was no need for an Addendum to the Contract. If that applies, there is no ground for claiming compensation for work drawings.

205. It should be noted that Act No.1 of 28 December 2009 is dated only a few days before Mr Krivtsov's power of attorney expired. It should be noted that this Act contains a pre-printed reference to year 2010 which was amended, by hand, to 2009, Also, as stated, the Act is issued after the Provisional Acceptance Certificate was prepared. Moreover, it is not mentioned in the subsequent letters from the Claimant to the Supervisor or in the Financial Audit Report prepared by Moore Stephens dated 24 September 2010. Its authenticity is open to doubt.

206. Based on the above, the Respondents do not admit any obligation to pay for the elaboration of working drawings.

13.7.3 The Tribunal's discussion

207. In the process of negotiating the Contract, a meeting was held in Moscow on 20 and 21 June 2007 with representatives of the Claimant, RCS, PSU and the EC Delegation.[25] When discussing an item on the agenda, "Reduction of the lump sum contract price", the Claimant offered to reduce the lump sum price in consideration of, *inter alia*, a reduction of the design requirement. In view hereof, the minutes from the meeting noted that "[i]n consideration of the works undertaken by [the RCS], the lump sum price was reduced to: [amount]".

208. At a meeting on 3 September 2007 (C-27), the matter of which of the parties were to be responsible for elaborating on the work drawings was again raised. Different views were expressed on this point, and it was agreed to examine protocols as well as "the items deducted from the Contract price" to finally determine this question.

209. The matter of the work drawings was again discussed at a "High Level meeting" of 12 October 2007 (C-43), which was mainly dedicated to this question. The minutes from the meeting account for an extensive discussion of the subject and the decision to

[24] Section 3.12 b) of the Reply Statement.
[25] Minutes from the meeting are submitted at pages 81 – 83 of the Claimant's Contract Bundle and C-39.

attempt a reduction of the scope of works and by such reduction release a part of the Contract sum for purposes of accommodating payment for work drawings. The following was stated:

> Following much discussion it was decided that the best option would be to:
>
> (i) Reduce the Scope of the Works by having the [Contracting Authority] decide on what item might be removed as to reduce the burden on the Contractor. But this has to be discussed in the light of the CoC. [---]

210. The fact that no reservation for work drawings was made in the Contract and the fact that subsequent to the conclusion of the Contract the matter of responsibility for the work drawings was again discussed by the Parties, compels the Tribunal to conclude that at least at this juncture no agreement on how to deal with the cost for work drawings from the Contract sum was agreed. However, the matter was extensively discussed between the Parties during the remainder of 2007, 2008 and 2009.

211. At a subsequent meeting on 7 May 2008 (minutes from the meeting submitted as C-46), it was held that "the working drawings were the Contractor's responsibility" (Agenda, item 8). The Contracting Authority noted, however, that it could consider a reduction in the scope of works in order to reduce the unforeseen costs to the Contractor. The Claimant was invited to propose such reduction for consideration.

212. The Claimant reverted in its letter of 19 May 2008 (C-47) with a proposal on how to settle this issue. However, the proposal did not lead to any agreement regarding a possible reallocation or exclusion of cost items.

213. The Parties met on 29 December 2009 (C-49) with participants from the Claimant, RCS, the EC delegation and the design institute. It was noted that the additional preparation of work drawings represented a cost of EUR 430,000 and that a decision had been taken on 21 June 2007 to reduce the fixed sum of the Contract (among other reasons based on a reduction of the scope of design work) in order to accommodate this cost. Based on these premises and noting that the Claimant had assigned EUR 113,000 for purposes of adjusting work drawings prepared by the Contracting Authority and "given that no decision was made to reduce the amount of works to finance the development of [work drawings]" it was agreed that additional work for elaboration of work drawings in an amount of EUR 317,000 would be subject to payment by the Contracting Authority.

214. According to the General Conditions (Article 35, Modifications), any modification of the works requires that the Supervisor so orders and only in the form of an Administrative Order (Article 35.2) and in respect of modifications to the Contract in the form of an Addendum to the Contract. Modifications not covered by an administrative order must be formalized by way of an Addendum to the Contract signed by all Parties.

215. In this case no Administrative Order or Addendum to the Contract has been issued as the Contracting Authority has not accepted that these works were originally excluded from the scope of works at the time of conclusion of the Contract.

216. It is clear, as pointed out by the Respondents,[26] that according to the tender documentation, Annex C, Article 1.5, work drawings are the responsibility of the Contractor. They fall within the scope of work for which a fixed price shall be quoted. The question is, therefore, whether the Parties have validly agreed on a departure from this agreement or the matter of work drawings.

217. One should initially note that on the occasion of a meeting on 20 and 21 June 2007, the purpose of which was "to negotiate a works contract for the construction of the [project]", it was noted that the Claimant was asked how much the Contract sum could be reduced as a consequence of, *inter alia*, "reduction of the design requirement". It was recorded that "[i]n consideration of the works undertaken by [RCS], the lump sum price was reduced to € 13,362,235.00 net of contingencies".

218. At a PSU meeting of 3 September 2007 (C-41), the matter was again discussed.

219. The minutes recorded as the Supervisor's view that the requirement to undertake design was deleted from the tender, but that the fact that the negotiations had led to an adjustment in the Contract price, it would be necessary to examine the minutes and the adjustments made by the contractor to determine this responsibility.

220. The RCS representative expressed that the work drawings were clearly the Contractor's responsibility. As a consequence, the decision was reached to examine "the items deducted from the Contract price" in order to establish whose responsibility it was to provide the work drawings.

221. The discussions were continued at a following meeting of 12 October 2007 (C-43). It was agreed, essentially, that the Contractor would "proceed as per the Contract and undertake the production of the [work drawings] at his expense and do so as soon as possible" and that the contracting authority expressed that they would assist as best they could. It was agreed to continue the discussion at the next Site Progress meeting.

222. In a letter of 23 January 2008 to the Deputy Head of the RCS, the Claimant explained that it had gone ahead and contracted for the work drawings although the Contracting Authority had not yet decided what works to be excluded from the Contract.

223. In a letter of 1 February 2008 (C-45), the RCS passed on the matter of the work drawings to the Head of the Rear Customs Service (V. Krivtsov).

224. The agenda for a Project meeting of 7 May 2008 (C-46) noted as one "area of dispute" the scope of work drawings. The meeting confirmed that the drawings were the Contractor's responsibility, but raised the possibility that the Contracting Authority could offer a reduction in the scope of works as a means of reducing the unforeseen cost of the Contractor.

225. The materials commented so far are not of a sufficiently compelling nature to rebut the clearly prescribed responsibility of the Contractor to provide work drawings within the remit of the Contract sum. The Claimant may have had good reasons to assume that the

[26] Statement of Defense, Section 2.9.

Contracting Authority would, in fact, provide compensation for the work drawings, but such an undertaking – departing from the description of the scope of works contained in the tender documentation – would have required a clear revision of the Contract terms, something which is not present. From C-46 it appears that the misunderstanding, on whichever side, would be settled by a best-efforts undertaking of Contracting Authority to examine whether some reduction in the scope of works could be achieved in order to alleviate the Contractor's burden.

226. It, therefore, remains for the Tribunal to examine whether the Act No. 1 of 28 December 2009 (C-49) entails a duty for the Contracting Authority to undertake payment for work drawings.

227. The General Conditions – as varied by the Special Conditions – provide in sub-article 35.2 in respect of variations and modifications that (if Article 35.10 does not provide otherwise) modifications may only be made by an Administrative Order.

228. The General Conditions foresee a procedure for determining any adjustment to the Contract price in case of any modification ordered by the Supervisor. The price adjustment shall follow upon a proposal by the Contractor and include a possibility for the Supervisor to decide whether the modification shall be carried out or not.

229. It is further provided in Article 35.10 of the General Conditions that "[c]ontract modifications not covered by an administrative order must be formalised through an addendum to the contract, signed by all Parties".

230. However, in the present case the issue does not concern modifications to the works or circumstances which have not been foreseen by the Contractor but a question concerning the scope of works originally agreed to be included in the Contract sum.

231. It is therefore clear from the above that the provisions concerning the issuance of administrative orders are entirely unrelated to the matter of the Act.

232. At a meeting of 10 December 2009 (C-56), the matter of the provisional acceptance of the works was addressed. It was confirmed that the implementation period of the Contract had been extended until 16 December 2009. It was further noted that no outstanding works remained and that the date of [completion] was fixed at 10 December 2009. It was confirmed (10. Payment) that "[a]ll items in the breakdown of prices are payable other than the contingencies, amounting to € 74,657".

233. A number of "disagreements" were noted, *inter alia*, the Contractor's claim for payment for work drawings.

234. One may note that the draft Final Financial Report – forwarded to the Project Director on 9 December 2009 – it was concluded that as of 9 December 2009 there was an item of EUR 317,000 relating to work drawings according to certificates of work.

235. The outstanding item of EUR 317,000 relating to work drawings was also listed in the Final Statement of Account of 28 December 2010 (C-4) forwarded under cover letter of

24 January 2011 to Respondent No. 1. In this account the item relating to work drawings was still listed. The account (last page, last paragraph) noted:

> Given that additional costs incurred by [the Claimant] during implementation of the [Contract] were not paid by the Contracting Authority, and given that the measures taken for the settlement of disputes rising between the Parties in accordance with Article 65, 66 of the Special Conditions of the Contract did not lead to [-] positive results, [the Claimant] was forced to apply to the Arbitration procedure.

236. The Tribunal notes that the matter of work drawings was raised already at the preliminary meeting of 20 - 21 June 2007 dedicated to the matter of negotiating the Contract (C-39).

237. It is therefore clear that the Claimant made its reservation on the matter of work drawings clear to Respondent No. 1 already before the entering into the Contract.

238. The Parties' discussion on the matter of payment for work drawings have from this moment and throughout the Contract implementation been the subject of on-going discussions at meetings as well as in written exchanges between the Claimant, the Supervisor and the Contracting Authority.

239. It appears clear to the Tribunal that the proposals accounted for above primarily attest to the fact that the Respondents disposed of no budgetary allocations for this particular project while at the same time the EC Contribution was for a fixed amount and could not be varied. These restrictions prompted the Parties to seek a solution whereby the Claimant was recompensed for work drawings by way of reductions of other contract works. However, in the end the Parties did not succeed in reaching an agreement on reallocation or exclusion of costs in order to accommodate the Claimant's request for payment of additional compensation for work drawings.

240. However, it is clear that Respondent No. 1 finally agreed to make an additional payment of Euro 317,000 by way of the Act No. 1 issued on 29 December 2009 (C-49). This document has been signed by representatives of the "Customer", Respondent No. 1 as well as representatives of the Claimant and the design bureau apparently involved in the elaboration of work drawings. The Act attests in an unambiguous way to the fact that the Parties have entered into an agreement of the following contents:

> Given that in the tender offer of the Contractor assigned the amount of € 113,000 on the adjustment of the work paper developed by the Contracting Authority, and given that no decision was made to reduce the amount of works to finance the development of work paper, pursuant to paragraph 4 of the Contract, the additional works on development of work paper in the amount of € 317,000 are subject for payment [by] the Contracting Authority.

241. As this document constitutes an unequivocal payment undertaking and also is consistent with the way in which this matter has been addressed by the Parties throughout the implementation of the Contract and in view of its apparent substantive justification of payment for "additional works on the development of work paper" (Act No. 1) must in the view of the Tribunal constitute a duty of the Respondents be held to pay this

amount. There is no reason to assume that the document is backdated – as assumed by the Respondents – or suffers from any other vitiating defect.

242. The Respondents have invoked a letter of RCS of 16 April 2009 (R-13), informing that the Contract shall be funded by the EC and that "co-financing from the federal budget is not foreseen". It then makes reference to the dispute resolution procedure provided in Articles 65 and 66 of the Contract.

243. However, the fact that the Respondents did not foresee additional expenses is not *per se* a valid ground for resisting payments premised on contractual undertakings.

244. Therefore, the Tribunal finds that the claim for payment of the Work Drawings must be granted.

13.8 Additional Works (EUR 755,700.56)

13.8.1 The Claimant's position

245. During the course of implementation of the contract works, the Claimant has been requested to perform additional works not foreseen in the tender documentation and therefore not included in the Contract price.

246. Article 4 of the Contract Agreement and Article 43.1 of the Special Conditions to the Contract serve as the basis for the reimbursement of costs for additional works:

> The Contracting Authority shall pay for sums payable under the Contract in excess of the limit of the EC Contribution as defined in article 4 of the Contract Agreement.

247. Article 4 of the Contract Agreement also provides that

> Any other sums in excess of the EC maximum contribution will be borne by the Contracting Authority.

248. The corresponding payment certificates for the execution of additional works under the Contract were submitted to the Supervisor and the Contracting Authority by the Claimant in accordance with Articles 19, 35 and 52 of the General and Special Conditions to the Contract.

249. The certificates of additional works signed by the representatives of the Contracting Authority, the Designing Institute and the Supervisor (No. 1 of 15 July 2008, No. 2 of 22 July 2008, No. 4 of 30 March 2009, No. 5 of 8 April 2009, No. 6 of 8 September 2009, all included in C-57) were submitted to the Respondent No. 1 for payment. However, no payment for additional works has been effected.

250. The Claimant repeatedly approached the Respondent No. 1 for assistance in the resolution of this issue, but to no avail.

251. In violation of these agreements and on the basis of the approved and signed acts by the Contracting Authority, the Claimant has the right to claim the reimbursement of costs in

the amount of EUR 755,700.56 for the execution of the additional works from the Contracting Authority.

13.8.2 The Respondents' position

252. The Respondents have denied the Claimants request for payment for additional work referring to the General Conditions.

253. In the General Conditions, there is an "Article 35: Modifications". There are a number of provisions which lay down the procedures for ordering modifications and the formal and practical procedures for carrying out modification works. Essentially, one may note that according to Article 35.1, the Supervisor is entitled to order any modification of the works. Such modifications may be made by "administrative order" only.

254. In this case only two Administrative Orders have been issued during the implementation of the contract works both of which reject the Claimant's request.

255. The Administrative Order No. 2 of 14 November 2008 (R-10) deals with additional cost arising from the adjustment of certain vertical data on work drawings provided by the Contracting Authority. It is stated that this work should be carried out by the Contracting Authority at a value of EUR 291,380.01 and that no additional costs will be incurred by the Claimant.

256. The Administrative Order No. 4 of 27 April 2009 (R-11) refers to meeting of 28 September 2008 and confirms agreement that the Contracting Authority would take over certain works as compensation for other additional works. The order notes that it does not affect any change of the Contract price.

257. All Acts for additional works as well as the final statement of account have been signed by Mr Krivtsov on behalf of the Contracting Authority. The Claimant has been provided with a power of attorney for Mr Krivtsov with a term until 31 December 2009 (C-62). Under this power of attorney Mr Krivtsov was authorised to act in relation to the performance of works under the Contract.

258. Yet, the Claimant was also in possession of the RCS's internal order dated 4 August 2008 regarding establishment of the Mamonovo-Gzhechotki project management committee (also included in C-62). By this order, a Mr Gorshenin was explicitly authorised as responsible for the project, while Mr Krivtsov was assigned the role of second deputy responsible for, *inter alia*, performance of works within the scope of the Contract and approval of payment certificates to the Funding Agency.

259. Payments requested under the Interim Payment Certificates and Acts for elaboration of work drawings and additional works are not within the original scope of the Contract.

260. RCS has contested the Claimant's claims for payment of additional works since 27 July 2009. Thus, the Claimant had no reason to rely on the approvals by Mr Krivtsov after this date, since these were contrary to the known position and interests of the principal, i.e. RCS.

261. In any case, it must have been obvious for the Claimant that Mr Krivtsov had no authority to represent RCS when he agreed to approve the Final Statement of Account on 20 January 2011.

262. No agreement on execution of additional works has been made in the form of an Addendum as provided for in the Contract.

263. Furthermore, Acts Nos. 1, 2, 4, 5 and 6 are all signed by "Supervisor", Mr Esko Pennanen with a handwritten note "From 15.03.2009". Acts Nos. 1 and 2 are dated 15 July and 22 July 2008. The Supervisor at the time was, however, Mr Thomas Boland. This means that the Acts have been backdated.

264. As previously elaborated,[27] all substantial modifications to the Contract, including modifications to the total Contract sum, must be made by means of Addenda to the Contract. Hence, the Respondents do not accept any obligation to pay for the additional works.

265. Furthermore, the Respondents note that the Claimant has failed to refute the following requests for reduction of the amount:

(a) EUR 291,380.02 – the very purpose of Administrative Order No. 2 was to settle the additional works pertaining to vertical levelling without changes to the Contract sum. The scope of works was reduced so as to free resources for additional works. This amount is thus already paid by the Funding Agency;

(b) EUR 126,657.00 – the Claimant claims that the amount for contingencies provided for in the Contract (EUR 74,657.00) was never paid by the Funding Agency. If so, then it should be claimed from the Funding Agency and not from the Contracting Authority. As to the reduction of scope of works by not installing the warm air curtains (EUR 52,000.00), the Claimant has argued that these works were executed without payment and in spite of the reduced scope of works. No evidence is provided to substantiate this statement by the Claimant is on record, and it is denied by the Respondents.

266. Thus, the Respondents maintain that the amount of compensation for additional works cannot in any circumstances exceed EUR 337,663.54.

13.8.3 The Tribunal's discussion

267. The Tribunal will commence by providing some general observations on the matter of additional payments in the context of a fixed price construction contract.

268. This is a fixed price contract, implying that the Parties have agreed that the Contractor perform a specified amount of works for a (fixed) contract sum, decided in advance. From this follows with necessity that any increase in the scope of works in relation to the scope of works on which the tendered contract sum is premised entitles the Contractor to additional compensation. It is normally so that a contractor has not only a right, but also a duty to perform such additional works. A certain procedure is normally

[27] The Respondents' Statement of Defence, Section 3.9.9.

stipulated for the purpose of raising the matter of additional works with the employer and for determining their price (in the latter respect, methods are frequently agreed such as the use of unit prices and the like).

269. It may well happen that the Parties dispute whether a certain work constitutes an additional work or is a part of the originally described scope of works. It may also be so that the fact that works are outside the originally agreed scope of works is accepted by the employer, but that the price for such works is subject to dispute. Generally, a contractor has a duty to perform such works absent any agreement on whether they constitute additional work and/or on what basis they shall be paid. Such matter is then for later settlement, ultimately by reference to contentious proceedings.

270. The matter of additional works can be raised either by the employer or by the contractor; in the latter case, because the contractor has, for instance, encountered conditions at the construction site that depart from the assumptions laid down in the tender documentation forming the basis for the fixed-price contact.

271. With respect to the Contract the following applies in the view of the Tribunal.

272. According to an Act of Handing-over of 29 August 2007 (C-54), it was confirmed that the building site was prepared in compliance with the project documentation and that there were no deviations exceeding the requirements of SNiP 3.0.2.01-887. However, in a subsequent Act of 26 September 2007 (also C-54), executed by the members of the Commission, there was a number of deviations noted in respect of vertical positioning of the foundation indicated in, *inter alia*, the Act of Handing-over as compared to the actual situation.

273. In this particular instance, i.e. a situation where "the Contractor encounters artificial obstructions or physical conditions which could not reasonably have been foreseen by an experienced Contractor", Article 19 of the General Conditions provide the requisite procedure. In such case, according to Article 19.1, the Contractor will have to notify the Supervisor, giving particulars as to the unanticipated conditions and their consequences. On receipt of such notification, the Supervisor may undertake certain steps such as asking the Contractor to provide a cost estimate and to approve such estimate (with or without modification, sub-paragraph (c)).

274. One may therefore emphasize that this procedure is different from the one where the *Supervisor* orders modifications to the works, for which situation provisions are given in Article 35 of the General Conditions.

275. Further, in Article 52 "Claims for additional payment", the General Conditions include certain provisions which address the situation where the Contractor considers that there are circumstances which "would entitle him to additional payment under the contract". In such case, a notification should be made within 15 days from his becoming apprised of those circumstances and then provide full and detailed particulars at the latest at the date of submission of the draft final statement of account. According to Article 52.2 (as amended by the Special Conditions), the Supervisor shall, after consulting the Funding Agency and the Contracting Authority (and, where appropriate, the Contractor)

determine whether the Contractor is entitled to additional payment and notify the parties accordingly.

276. The Claimant has submitted five Acts (C-57) according to the following.

Act	Date	Subject matter	Amount (EUR)
No. 1	15 July 2008	Additional work on installation of foundations of a volume of 293.85 m^3	117,510.62
No. 2	22 July 2008	Additional work on installation of inspection pits in a volume of 859.4 m^3	442,424.04
No. 4	30 March 2009	Increase of the area for parking of detained trucks	59,672.70
No. 5	8 April 2009	Additional pavement area at the check-point	40,397.13
No. 6	8 September 2009	Installation of retaining walls in a volume of 239.33 m^3	95,696.07
		In total	755,700.56

277. As follows from what has been stated in paragraphs 274 and 275 above, if and to the extent modifications of the work has been required by the Contracting Authority rather than raised by the Contractor, the question may be raised if the Acts constitute "Administrative Orders" which, in such case, are required under Article 35 of the General Conditions in order to entitle the Contractor to payment, as the "Acts" are not denominated by this term. The Tribunal considers that this is a moot point as the purpose of the administrative orders is to ensure a full opportunity to the Contracting Authority to verify – with the assistance of the Supervisor and others – that the works in question represent additional works and that they are properly priced. From the content of the "Acts" it is clear that the Contracting Authority has been ensured ofsuch opportunity. They also include a positive attestation of the fact that the relevant works are subject to payment by the Contracting Authority.[28]

278. All of the Acts specified above have been approved by Mr V. Krivtsov along with representatives of the "Customer", the Supervisor and the design institute. The Acts include a description of the works qualified as Additional Works and include a decision by the Commission to pay compensation to the Claimant in the amounts specified above with reference to Article 43.1 of the Special Conditions. There is nothing in the

[28] The English translation of the Acts (C-57) says "to the Contracting Authority" which should properly read "by the Contracting Authority".

work descriptions of these Acts which give reason to conclude that these are (already) covered by the work descriptions included in the Administrative Orders No. 2 and No. 4.

279. From the undated power of attorney issued to Mr V. Krivtsov (C-52) it does not follow that Mr V. Krivtsov's authority is limited in such a way as to render his signature on the Acts ineffective. The fact that the Acts on Additional Works may have, in some instances, been backdated – something which has not been established in this arbitration – by the Supervisor does not deprive them of their effectiveness.

280. Based on the accounts provided by the Parties in relation particularly to the description of additional works provided in the Acts of Acceptance which in addition to a description of the particular category of works also contain an unequivocal undertaking to effect payment for such works approved by the representative of Respondent No. 1, these additional cost items are subject to payment by the Respondents. It does not appear that the works discussed in Administrative Orders No. 2 and 4 have any relationship to the works described in the Acts on additional works.

281. The amount requested by the Claimant for Additional Works shall therefore be granted.

13.9 Additional exempt taxes (EUR 712,578.22)

13.9.1 The Claimant's position

282. In accordance with the General Rules, technical assistance contracts may be fully or partly financed from EU grants (Article 11, item 2). EU funding of any Project presupposes that no taxes are levied on financing originating out of EU grants. (Article 11).

283. Also, in the present case the Contract Works shall be financed on the express condition that the Contractor is exempted from paying any taxes (Article 11). The amount of the Contractor's exemption from taxes within this project shall constitute the financial contribution of the RF Government to this Project.

284. Therefore, the RF Government contribution is expressly encompassed by Article 11 of the General Rules. The RF Government assumed an obligation to finance the project from the tax revenue of the state, i.e. in the form of exemption from all kinds of taxes, charges, duties and other public charges. Consequently, the amount of exempt taxes is equal to the contribution of the RF Government.

285. Thus, the RF Government guaranteed that it would implement its obligation, which constituted a financial contribution on the part of the RF Government as quoted in Article 4 of the Contract.

286. In addition, for purposes of implementing the Contract, the RF Government assumed an obligation to pay the agreed sum irrespective of the legal framework of the Russian Federation in this sense. This is substantiated by the fact that Article 11, item 2 of the General Rules expressly provides that "imports... shall be allowed to enter the Russian

Federation without being subject to any duties, taxes or fiscal charges having equivalent effect."

287. Also, the General Rules provide that any goods or services purchased on the territory of the Russian Federation shall be paid "on the basis of the price which does not include the value added taxes and taxes of analogous character being used in the Russian Federation."

288. Article 11 of the General Rules establishes a direct legal relationship between the RF Government and the Claimant and creates a right for the latter to be paid the amount which constitutes the financial contribution of the Government of the Russian Federation in exchange for works provided under the Contract.

289. Consistent with the General Rules and the Financing Memorandum, the Contracting Authority prepared the Tender Dossier based on the above documents. The Tender Dossier later became a contract document, also including, *inter alia*, the draft Contract Form.

290. The draft Contract Form contains a provision on the financial Contribution of the RF Government.

291. Thus, the words of the draft "the contribution of the RF Government" were communicated to the Claimant and reflected the intention of the drafter (RCS as a representative of the RF Government).

292. This demonstrates that not only the representatives of the RF Government but also those of the EU interpreted the General Rules and the Financing Memorandum in the sense that this project was to be funded not only by the European Union, but also by the RF Government, the latter in the amount of EUR 1,877,428.00.

293. During the tender process, the Contractor was instructed to present a breakdown of the lump sum price (financial offer), which had to point out the amount of the RF Government's contribution separately.

294. The breakdown of the lump sum price contains a table with two columns (1 - for an amount excluding VAT and exempt taxes, and 2 - for VAT and exempt taxes). Obviously, this form was used to determine the EC's and RF Government's contributions separately.

295. On 12 April 2007, the Claimant submitted an initial financial offer, pointing out that the Total Price of the bid (Financial Offer) included:

- EC's contribution - EUR 15,892,924.00 and

- the RF Government's contribution - EUR 2,274,386.00

296. At the meeting of 20 and 21 June 2007, the Parties reached a decision to reduce the EC contribution from EUR 15,892,924.00 to EUR 13,362,235.00. Further, the Parties also

agreed to reduce the amount of the RF Government's contribution from EUR 2,274,386.00 to EUR 1,877,428.00.

297. In this regard, the Claimant changed its initial financial offer (breakdown of the lump sum price) while working out the final financial offer, where it indicated that the EC contribution constituted EUR 13,362,235.00 and the RF contribution constituted EUR 1,877,428.00.

298. Consequently, the final Financial Offer (breakdown of the overall lump sum price) was agreed and signed by the Parties and included in Article 2 item (g) of the Contract Form.

299. The amount of EUR 1,877,428.00 was separately (in relation to the EC contribution) negotiated between the Parties as an element of the lump sum price and the Claimant relied on this contribution when making its financial offer, which the RF Government accepted.

300. However, irrespective of the agreement already reached, the RF Government representative, acting in bad faith, excluded the words "RF Government's contribution" before the amount of EUR 1,877,428.00.

301. Later on, the two amounts, i.e. the EC contribution of EUR 13,362,235.00 and the RF Government contribution of EUR 1,877,428,00 (without the qualifier "RF Government Contribution") were incorporated in Article 4 of the Contract.

302. The fact that the Respondents maintain that the amount of EUR 1,877,428.00 is not the RF Government's contribution and is not part of the price of the Contract is in contradiction with their previous conduct, and thus to the principle of good faith and to the principle *venire contra factum proprium.*

303. The Contract Form has the highest precedence in the Contract. It exempts the EC funded part of the Contract from tax and states the sum of exempt taxes as contribution of the RF Government (although the latter formula was omitted from the Contract Form).

304. However, the draft Contract Form does include a provision specifying the Russian Government contribution. This draft Contract Form was integrated via the Tender Dossier in Article 2 item (h) of the Contract Form and constitutes the common will of the Parties.

305. The draft Contract Form shall be read together with Article 4 of the Contract Form from which follows that the sum of EUR 1,877,428.00 constitutes the Russian Government's contribution.

13.9.2 The Respondents' position

306. The very title of the Contract, "Design and Construction of the Mamonovo-Gzhechotki Border Crossing", demonstrates that this Contract is "financed from the EC General Budget".

307. Article 3 of the Contract provides that

> In consideration of the payments to be made by the Funding Agency to the Contractor as hereinafter mentioned, the Contractor undertakes to execute and complete the works and remedy defects therein in full compliance with the provisions of the contract.

308. Article 4 provides explicitly that the "Contract price" and the "EC Contribution" are equal amounts, i.e. EUR 13,299,979. For the avoidance of doubt, the Contract price is stated also in words.

309. The Claimant rightly points out[29] that "[t]his Contract is a tax free contract". Indeed, it has always been clear to all parties that the amount of "VAT and other exempt taxes" in Article 4 is included in order to emphasize the EC Commission's position that no taxes shall be imposed on the funds contributed by EC.

310. Notably there is no reference in the Contract to any "RCS or RF Government Contribution" or similar. On the contrary, through incorporation of Annex VII – Procedures for Tax/Customs Exemptions/Refund of the Goods, Works and Services Imported or Purchased in Russia by the Contractor/Subcontractor within the Mamonovo-Gzhechotki Border Crossing project – the Parties agreed on how the exemption or refund process for taxes and customs duties should be handled.

311. The Claimant's main argument supporting the claim appears to be that

> [...] the Contract is a lump sum one, and shall not be modified. The amount of EUR 1,877,428.00 shall be part of the Price of the Contract, and therefore, the total amount of the Contract shall constitute EUR 15,177,407.00 (rather than EUR 13,299,979.00).[30]

312. This statement seems to emanate from the Financial Audit Report, item (j), which in turn refers to Article 46.1 of the General Conditions. This article deals with Price revision and provides that

> Unless otherwise stipulated in the Special Conditions, contracts shall be at fixed prices which shall not be revised.

313. Article 46.1 of the General Conditions is supplemented by Article 46.2 of the Special Conditions, providing

> The Contract Price shall be deemed to have included amounts to cover the rises or falls in costs of labour, goods and other inputs to the Works, inflation and construction cost index in the Country and changes in currency exchange rates for the entire life of the contract. [...] and no adjustment in price will be permitted for events resulting from these effects.

314. Article 46.2 of the Special Conditions makes clear that the Contract Price is fixed and shall not be revised. The Contract Price is defined in Article 4 of the Contract Form as the EC Contribution in the amount of EUR 13,299,979.

[29] The Claimant's Reply Statement, paragraph 1.3.1.
[30] Paragraph 1 (d) of the Claimant's Comments on the Additional Claim.

315. While it is argued that actual wording of the contract is clear and unambiguous, the Respondents would like to underline that nothing in the negotiations predating the Contract could be interpreted as a common intent of the Parties that VAT and other exempt taxes should be paid by the RCS or the RF Government.

316. During the meeting held on 20 - 21 June 2007, approximately one month before the Contract was signed, the Parties were discussing "Reduction of the Lump-sum Contract Price". The Claimant was asked by how much they would reduce the lump-sum price in consequence of certain works undertaken by the RCS. The Claimant reduced the lump-sum to EUR 13,362,235.00 net of contingencies. It was agreed that this amount could be reduced even more.

317. The participants at the meeting also discussed two options on dealing with the shortfall of the offered price and the current budget of the EU Commission of EUR 13 million, the first option being that the EC Delegation would request that the RCS should fund the shortfall. If this option would prove not feasible, then

> [...] the EC Delegation could explore the possibility of increasing the budget allocated to the project or, as an alternative, deleting items from the scope of the works that would enable contract to be signed within the existing budget.

318. It is apparent from the amount of Contract Price in the Contract that the shortfall was addressed by means of increasing the EG budget and not by obtaining RCS's agreement to fund the Contract. This was confirmed at a meeting held on 10 July 2007.

13.9.3 The Tribunal's discussion

319. The Parties are in agreement that the Contract is a tax-free agreement, i.e. no VAT, customs or other taxes or charges shall be levied on any part of the contract sum, at least insofar the contract sum is financed by the Funding Agency.

320. As the Tribunal has found, this constitutes a contractual undertaking of the Respondents, meaning that there is a duty to reimburse the Contractor any such taxes or charges that have been levied on any part of the contract sum.

321. However, based on these premises, the Claimant cannot be indemnified for any amount of customs, VAT or other exempt taxes that the Claimant has not actually incurred. On this basis the Tribunal finds that the Claimant's claim relating to "the Russian Government contribution" shall be dismissed.

322. In respect of the additional claim, the Claimant has not even alleged that it has incurred the costs in the form of disbursements for taxes and other charges, but that this amount, independently hereof, constitutes a contribution by the RF Government.

323. Further, the Tribunal would consider it irrational if a fixed sum for taxes and other charges were to be paid, irrespective of to what extent the Contractor had previously enjoyed tax exemptions on works and materials; this would produce quite a random result.

324. Neither does the Tribunal believe that the expression "the Russian Government contribution", used in a prior draft version of the Contract, was deleted with any ill intent. This amendment of the Contract language can be rationally explained by the fact that no specific amount was undertaken to be paid by the Russian Federation with respect to this particular project, equivalent to an anticipated amount of VAT, taxes and other charges was to be paid, or otherwise.

325. The Tribunal, therefore, considers that the item of "VAT and other exempt taxes EUR 1,877,428" serves no other purpose than providing information on this item but does not constitute an independent undertaking to contribute economically to the project.

326. The text of the draft version rather foresees a different situation where, in fact, the Russian Federation contributes (together with the EC) a certain part of the contract price.

327. On this basis, the Tribunal finds that the Claimant's claim relating to Additional Exempt Taxes shall be dismissed.

13.10 Compensation for late payment of Taxes (EUR 84,755.37), Work Drawings (EUR 23,864.02) and Additional Works (EUR 133,356.90)

13.10.1 The Claimant's position

328. Articles 50.1 and 50.2 of the General Conditions to the Contract serve as the basis for the Claimant's claim to receive compensation for incurred costs related to late-payment for additional works:

> 50.1 The Contracting Authority shall pay the Contractor sums due within 45 days of the date on which an admissible payment is registered, in accordance with Article 43 of these General Conditions. This period shall begin to run from the approval of these documents by the competent department referred to in Article 43 of the Special Conditions. These documents shall be approved either expressly or tacitly, in the absence of any written reaction in the £5 days following their receipt accompanied by the requisite documents.
>
> 50.2 Once the deadline laid down in Article 50.1 has expired, the Contractor may, within two months of late payment, claim late-payment interest:
>
> - at the rediscount rate applied by the issuing institution of the country of the Contracting Authority where payments are in national currency;
> - at the rate applied by the European Central Bank to its main refinancing transactions in Euro, as published in the Official Journal of the European Union, where payments are in Euro, on the first day of the month in which the deadline expired, plus three and a half percentage points. The late-payment interest shall apply to the time which elapses between the date of the payment deadline (exclusive) and the date on which the Contracting Authority's account is debited (inclusive).

329. The Claimant invokes, in the alternative, the provisions of Russian law, i.e. Articles 395 and 15 of the RF Civil Code.

330. Articles 395(1) and 395(2) of the RF Civil Code provides:

> 1. Interest shall be paid for the use of someone else's funds due to their unlawful retention, evasion from their return, or late payments or due to their unfounded receipt and saving at the expense of someone else. The amount of interest payments are determined by the existing interest rate in the Creditor's place of residence or the Creditor's location in case of legal entities, on the day of execution of the financial obligation or of the part thereof. If the debt is collected through the court, the Creditor's claim can be met based on the existing interest rate on the day of filing of lawsuit or the day of court decision. These norms shall be applied unless a different interest rate is established by the law or agreement.
>
> 2. If damages caused to the Creditor due the unlawful use of his funds exceed the amount of interest payments due pursuant to point 1 of this Article, then the Creditor has the right to claim compensation for damages exceeding this amount.

331. Article 718(1) of the RF Civil Code provides:

> The beneficiary shall, in cases, amounts and order specified in the contract agreement, render assistance to the contractor during the execution of works. The contractor, in case of beneficiary's failure to fulfill this obligation, has the right to claim compensation for caused damages, including additional idle time costs or costs caused by the modification of the contract execution period or by the increase of the agreed contract price.

332. Given that the Contracting Authority failed to fulfil its contractual obligations to make the required payments under the Contract, the Claimant is entitled to claim compensation related to late payment of Taxes in the amount of EUR 84,755.37, for Work Drawings in the amount of EUR 23,864.02 and for Additional Works in the amount of EUR 133,356.90, i.e. in the total sum of EUR 241,976.29.

13.10.2 The Respondents' position

333. There are no provisions in the Contract dealing with Contracting Authority's liability for late reimbursement of taxes levied on the Contractor or late payment for additional works. The existing contractual provisions are dealing with delayed payments from the Funding Agency only.

13.10.3 The Tribunal's discussion

334. Article 50 of the General Conditions deals with delayed payments. Article 50.1 provides that the Contracting Authority shall pay sums due within 45 days from a commencement date, defined in that provision. Upon expiry of such deadline, Article 50.2 according to which the reference rate of the ECB increased by 3.5% shall apply for payments in Euro. This provision is amended by the Special Conditions, Article 50, which stipulates that the provision on late payments concerns the *Funding Agency*, i.e. the delegation of the European Commission to Russia.

335. As the reference to the "Contracting Authority" has been changed to relate to the "Funding Agency", it is reasonable to interpret this provision as meaning just that, i.e. that the computation of interest for delayed payments concern payments from the

Funding Agency only (although the Parties may well not have considered this issue in view of the exceptional nature of a payment from the Contracting Authority).

336. Thus, there are no provisions in the Contract dealing with Contacting Authority's liability for late reimbursement of taxes levied on the Contractor or late payment for additional works. The existing contractual provisions concern delayed payments from the Funding Agency only.

337. For that reason, the Tribunal finds that the applicable rules on default interest in Russian law will prevail, i.e. Article 395 of the RF Civil Code. This provision will, in respect of payments in Euro, be interpreted by the Tribunal to mean that the reference rate of the ECB increased by 3.5% shall apply.

338. The Tribunal notes that the Claimant has requested interest up to 30 September 2011, reserving its right to "amend its estimates". However, this request has not been amended and the Tribunal cannot, therefore, grant interest for any time period after 30 September 2011.

339. The Claimant has not indicated any commencement date(s) for its claim for interest payment. Additionally, the Claimant has not submitted an open-ended request for interest, but has limited its request to specific amounts.

340. Although the Respondents have not taken a position on the quantification of the interest requests, the Tribunal makes the following observations.

341. As no commencement date has been specified, the Tribunal does not feel inclined to allow interest for any period prior to the date of the Request for Arbitration, i.e. from 8 November 2010.

342. From that date, the ECB reference rate has been quoted as follows.

8 November 2010 – 12 April 2011	1.25%
13 April 2011 – 12 July 2011	1.5%
13 July 2011 – 8 November 2011	1.25%
9 November 2011 – 13 December 2011	1%
14 December 2011 – 10 July 2012	0.75%
11 July 2012 – 7 May 2013	0.5%
8 May 2013 to date of the Award	0.5%

343. As the Claimant has invoked Article 50.2 of the General Conditions, which provides for a default interest rate of 3.5% in excess of the ECB reference rate, this will represent the following amounts of accrued interest as per a date in proximity to the date of this

Award, i.e. the date is 1 October 2013.

As from	Up to and including	No. of days	Total Interest	Amount EUR	612 311.02	317 000.00	755 700.56
08 Nov 2010	12 Apr 2011	155	4.75%		12 351.07	6 394.28	15 243.41
13 Apr 2011	12 Jul 2011	90	5.00%		7 549.04	3 908.22	9 316.86
13 Jul 2011	08 Nov 2011	118	4.75%		9 402.75	4 867.90	11 604.66
09 Nov 2011	13 Dec 2011	34	4.50%		2 566.67	1 328.79	3 167.73
14 Dec 2011	10 Jul 2012	209	4.25%		14 900.97	7 714.39	18 390.44
11 Jul 2012	07 May 2013	300	4.00%		20 130.77	10 421.92	24 844.95
08 May 2013	01 Oct 2013	146	4.00%		9 796.98	5 072.00	12 091.21
		1 052			**76 698.25**	**39 707.51**	**94 659.26**

Total amount for late payment interest EUR 211 065,01

344. On this basis, the amounts requested by the Claimant, i.e. EUR 84,755.37, EUR 23,864.02 and EUR 133,350.90 –exceed the actually accrued amounts of late payment interest. Therefore, the Tribunal finds that it can only grant compensation for late payments in the amounts that appear from the above schedule in paragraph 341.

14 Summary

345. Summing up the foregoing, the Tribunal notes that Claimant has prevailed in the following claims.

Ref	Item	Amount in EUR
45. (a)	Taxes on Import	124,580.12
45. (b)	Taxes on Local Goods	487,730.90
45. (e)	Personal Taxes	6,853.97
45. (f)	Property Taxes	2,001.77
45. (g)	Work Drawings	317,000.00
45. (h)	Additional Works	755,700.56
45. (i)	Compensation for late payment of Taxes	76, 698.25
45. (j)	Compensation for late payment of Work Drawings	39,707.51
45. (k)	Compensation for late payment of Additional Works	94,659.26
TOTAL		**1,828,234.09**

346. From this summing up it follows that the Claimant shall be awarded an aggregate amount of EUR 1,828,234.09.

347. It should be added that the Claimant's request for "such other relief as the Tribunal may deem appropriate in its sole discretion" is dismissed by the Tribunal for lack of specificity.

15 The Proper Party to the Contract

348. In its Decision on Jurisdiction of 6 July 2012 the Tribunal held by a majority that it is the Government of the Russian Federation, Respondent No. 2, which is the party that is bound by the Arbitration Agreement on the respondent side and that the RCS, Respondent No. 1, in performing its functions as "Contracting Authority" has acted in its own name and on behalf of the Russian Federation. When discussing the role of the RCS, i.e. the Respondent No. 1, the Tribunal noted that none of the Parties had raised any objection regarding the *jus standi* of this Respondent; for this reason and taken into account that the RCS also represented the RF Government in this arbitration the Tribunal opined that there was no reason to deal with this issue in the context of the Decision on Jurisdiction.[31]

349. The Tribunal notes that the Parties have not discussed the matter of the *jus standi* of the RCS during the merits phase of the arbitration either. However, based on the Tribunal's (majority) conclusion that the RCS has acted on behalf of the RF Government, the conclusion necessarily follows that the RCS cannot be held to constitute a party in respect of the substantive claims that have been brought by the Claimant against the Respondents.

350. On this basis and consistent with its finding in the jurisdictional stage, the Tribunal (by majority) must conclude that such substantive claims can be exercised against the Government of the Russian Federation, Respondent No. 2, as a party to the Contract. The Tribunal's order to pay those amounts that have been awarded to the Claimant according to the Tribunal's findings above will therefore be directed against the RF Government only.

16 Costs

16.1 Party costs

351. The Claimant has specified its claim for reimbursement of party costs for legal representation of the Claimant in a bill of costs of 14 December 2012 and in additional bills of costs of 14 May March 2013.

352. The Respondents have submitted bills of costs on 14 December 2012 and 15 May 2013.

353. The Parties have been granted an opportunity to comment on each other's bills of costs in the arbitration until 8 March 2013, but have not done so.

354. The allocation of costs in the arbitration is dealt with in Article 31 of the ICC Rules which provides a broad discretion to the Tribunal in allocating of costs.

[31] Decision on Jurisdiction, paragraph 185.

355. In exercising this discretion the Tribunal – consistent with the practice under the Swedish Arbitration Act – recognizes the general principle of costs following the event, i.e. the "loser pays" principle, to the extent that costs claimed are reasonable, taking into account the other relevant circumstances of the case.

356. The Tribunal notes that the Claimant has initiated and pursued arbitration against two respondents, i.e. the Russian Customs Services and the Government of the Russian Federation. In its Decision on Jurisdiction of 6 July 2012, the Tribunal by majority concluded that the Contract under which the dispute has arisen was entered into by the Russian Customs Services in the name of the Russian Customs Services and on behalf of the Government of the Russian Federation. It, therefore, by necessity follows that substantive obligations can only be directed against the Government of the Russian Federation in view of the Tribunal's finding that the Russian Customs Services has not acted on its own behalf. The Tribunal notes, however, that the Claimant has been successful on the jurisdictional issue and that the substantive issues have not been subject to separate argument by Respondent No. 1 as compared to Respondent No. 2. Therefore, irrespective of whether one were to conclude that the substantive issues have been brought against one or two of the Respondents, the cost implications have been the same; the fact that a payment obligation cannot be imposed on Respondent No. 1 will, therefore, not affect the Tribunal's allocation of costs.

357. The Tribunal notes that the Claimant has been successful in respect of essentially all claims with the exception of the additional claim raised in its Reply of 10 October 2012 to the Statement of Defense. It is reasonable to take this circumstance into account in the way that any amount according to the additional bill of costs of 14 May 2013 will not be reimbursed, while the Respondents' additional costs (i.e. the difference between the bill of costs of 14 December 2012 and the final bill of costs of 15 May 2013), SEK 123,044, will be considered as, in principle, reimbursable by the Claimant.

358. In view hereof, the Tribunal considers that the Claimant is reasonably reimbursed for its party costs in an amount of EUR 85,000 plus expenses as requested, EUR 2,021.

359. Consistent with what has been discussed above, a cost order shall be made against the Government of the Russian Federation (Respondent No. 2) only.

360. The Tribunal finds that the legal fees and disbursements, the reimbursement of which has been requested by the Claimant, are reasonable.

16.2 Arbitration costs

361. The SCC Institute has determined the arbitration costs as follows:

Mr Christer Söderlund, Chairman		
Fee	EUR	73,228.00
Expenses	EUR	993.47

Mr Vladimir Khvalei, Arbitrator		
Fee	EUR	43,937.00
Expenses	EUR	312.44
Mr Ion Buruiana, Arbitrator		
Fee	EUR	43,937.00
Expenses	EUR	370.00
The SCC Institute		
Administrative fee	EUR	23,778.00

362. Payment of the arbitration costs will be defrayed out of the Advance on Costs made by the Claimant on the basis of the joint and several liability of the Parties for these costs.

17 The *dispositif* of the Award

363. For these reasons, the Tribunal, by majority, renders the following

AWARD

(a) THE GOVERNMENT OF THE RUSSIAN FEDERATION is ordered to pay to JV BADPRIM LTD the amount of EUR 1,828,234.09;

(b) The fees of the Tribunal and the SCC Institute are confirmed in the following amounts:

Mr Christer Söderlund, Chairman		
Fee	EUR	73,228.00
Expenses	EUR	993.47
Mr Vladimir Khvalei, Arbitrator		
Fee	EUR	43,937.00
Expenses	EUR	312.44
Mr Ion Buruiana, Arbitrator		
Fee	EUR	43,937.00
Expenses	EUR	370.00
The SCC Institute		
Administrative fee	EUR	23,778.00

(c) THE GOVERNMENT OF THE RUSSIAN FEDERATION is ordered to pay to JV BADPRIM LTD the amount of EUR 87,021.00, constituting fees and

costs and, in addition, interest according to Article 6 of the Swedish Interest Act on these amounts, from the date of this Award until payment is made.

(d) THE GOVERNMENT OF THE RUSSIAN FEDERATION is declared to be ultimately liable for the arbitration costs, determined in the total amounts of EUR 186,555.91, in the internal relationship between the Parties.

(e) Any and all other claims are dismissed.

364. Pursuant to Section 41 of the Swedish Arbitration Act (SFS 1999:116), the Parties are informed that any action against this Award regarding the payment of compensation to the Tribunal and the SCC Institute shall be brought before the Stockholm District Court within 3 months from the date on which a party received the Award.

Place of arbitration: Stockholm, Sweden

Date of Award: 21 Oct 2013

Christer Söderlund
Chairman

Ion Buruiana
Arbitrator

Vladimir Khvalei
Arbitrator

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