

PCA Case No. 2018-06:

In the matter of an arbitration under the UNCITRAL Arbitration Rules, 2013

between

OOO MANOLIUM-PROCESSING

Claimant

v.

THE REPUBLIC OF BELARUS

Respondent

FINAL AWARD

ARBITRAL TRIBUNAL

Juan Fernández-Armesto (Chairman)
Stanimir Alexandrov
Brigitte Stern

ADMINISTRATIVE SECRETARY

Krystle M. Baptista Serna

REGISTRY

Permanent Court of Arbitration
Evgeniya Goriatcheva

22 June 2021

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GLOSSARY OF TERMS AND ABBREVIATIONS

4th Amendment	Additional Agreement No. 4 to the Investment Contract of 8 February 2007
Appellate Court Decision	Judgement of the Appellate Division of the Economic Court of Minsk of 29 October 2014 confirming the Termination Decision
Arbitrators' Fees	Pursuant to Art. 40.2(a) of the UNCITRAL Rules, fees of the Arbitral Tribunal to be stated separately as to each arbitrator and to be fixed by the Tribunal in accordance with Art. 41 of the UNCITRAL Rules
Arbitrators' Expenses	Pursuant to Art. 40.2(b) of the UNCITRAL Rules, reasonable travel and other expenses incurred by the arbitrators
Art(s).	Article(s)
Attachment Order	Order for the attachment of the Facilities issued by the Tax Inspectorate on 5 July 2016
Belarus (or Respondent)	Republic of Belarus, the respondent in this arbitration
Belarusian Civil Code	Code of the Republic of Belarus No. 218-3 "Civil Code of the Republic of Belarus" of 7 December 1998
Belarusian Investment Law	Law of the Republic of Belarus No. 53-Z on Investments of 12 July 2013
BYN	New Belarusian Ruble that replaced the BYR on 1 July 2016 at a ratio of 1:10,000
BYR	Belarusian Ruble
Cassation Decision	Resolution of the Supreme Court of the Republic of Belarus of 27 January 2015 confirming the Termination Decision and the Appellate Court Decision
C I	Claimant's Notice of Arbitration of 15 November 2017
C II	Claimant's Statement of Claim of 10 May 2018
C III	Claimant's Statement of Reply of 28 February 2019

C PHB	Claimant's Post-Hearing Brief of 3 October 2019
C SoC	Claimant's Statement of Costs of 12 December 2019
Claimant (or Manolium)	OOO Manolium-Processing, a Russian company and the claimant in this arbitration
Commissioning Date	1 July 2011, date by which the construction of the Facilities had to be finalized under the Investment Contract
Construction Permit	Construction permit that must be obtained under Belarusian law in order to build on State-owned land, in addition to a Land Permit
Contractual Objection	Respondent's jurisdictional objection that the Termination Dispute is not a Treaty claim, but a contractual claim
Depot	Trolleybus depot for 220 trolleybuses in Uruchye-6 microdistrict, Minsk, which was to be built by Claimant in accordance with the Investment Contract
Dolgov II	Second witness statement of A. Dolgov (Claimant's witness) of 28 July 2018
Dolgov IV	Fourth witness statement of A. Dolgov (Claimant's witness) of 28 February 2019
Domestic Law Objection	Respondent's jurisdictional objection that the Tribunal lacks jurisdiction under the Belarusian Investment Law
EEC Investment Treaty	Agreement on Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community of 12 December 2008
EEU Treaty (or Treaty)	Treaty on the Eurasian Economic Union of 29 May 2014, which entered into force on 1 January 2015
Effective Date	1 January 2015, date of entry into force of the EEU Treaty
Enforcement Order	Ruling of the Economic Court of Minsk of 18 August 2016
Facilities	Depot, Pull Station and Road
Facilities Land Plots	Land plots in Minsk on which the Facilities were located
FET	Fair and equitable treatment

First Administrative Proceeding	Administrative proceeding filed by the Minsk Municipality against Manolium-E under Art. 23.42 of the Code of the Republic of Belarus of Administrative Offenses
Gosstroy	Inspectorate of the Department of Control and Supervision over Construction for Minsk
H2, II	Presentation of Claimant's opening statement, Part II (Jurisdiction) of 29 July 2019
H2, III	Presentation of Claimant's opening statement, Part III (Claims) of 29 July 2019
H5	Presentation of Travis A.P. Taylor (Claimant's expert) at the hearing on 31 July 2019
Ha	Hectares
HT	Transcript of the hearing held in this matter from 29 July to 1 August 2019
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts of 2001
Immovable Property Registry	Unified State Registry of Immovable Property of the Republic of Belarus
Interim Measures Request	Claimant's Interim Measures Request of 28 July 2018
Investment Contract	Investment contract between Claimant, the Minsk Municipality and Minsktrans of 6 June 2003
Investment Object (or Mall)	Construction project, including a shopping, cultural and entertainment complex, which Claimant had the right to develop under the Investment Contract
Land Tax	Tax imposed on owners or users of land under Belarusian law
Land Permit	Authorization to temporarily occupy land that must be obtained under Belarusian law in order to build on State-owned land, in addition to a Construction Permit
LIBOR	London Inter-Bank Offered Rate
M	Million

Mall (or Investment Object)	Construction project, including a shopping, cultural and entertainment complex, which Claimant had the right to develop under the Investment Contract
Mall Land Plot	Municipal land plot located in the center of Minsk and owned by the Minsk Municipality on which the Mall was to be constructed
Manolium (or Claimant)	OOO Manolium-Processing, a Russian company and the claimant in this arbitration
Manolium-E	Foreign Industrial and Commercial Unitary Enterprise “Manolium-Engineering”, Claimant’s subsidiary incorporated in Belarus
MCEC (or Minsk Municipality)	Minsk City Executive Committee
Minsk Cadaster Agency	Republican Unitary Enterprise “Minsk City Agency for State Registration and Land Cadaster”
Minsk Municipality (or MCEC)	Minsk City Executive Committee
Minsktrans	Unitary Enterprise “Transport and Communications Office of the MCEC”
Minsktrans Objection	Respondent’s jurisdictional objection that Minsktrans was not empowered to exercise government authority and performed its obligations under the Investment Contract in a private capacity
MoF	Ministry of Finance of the Republic of Belarus
MoF Report	Report issued by the MoF on 22 February 2016
NBB	National Bank of the Republic of Belarus
NBB Published Rate	Blended interbank market rate for a period of over 60 days published by the NBB
Parties	Claimant and Respondent
Parties’ Legal Costs	Pursuant to Art. 40.2(e) of the UNCITRAL Rules, legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable
Pervomaysky Decision	Resolution of the Pervomaysky District Court in the First Administrative Proceeding of 23 July 2012

PCA	Permanent Court of Arbitration
Presidential Order	Order of the President of the Republic of Belarus of 20 January 2017 ordering the transfer of the Facilities into the ownership of the Minsk Municipality
Principal Amount	Amount of USD 20,434,679 due to Claimant as compensation pursuant to this Award
Protocol	Annex 16 to the EEU Treaty
Pull Station	Pull substation to supply electricity to the Depot and trolley line along Gintovta street in Minsk, which was to be built by Claimant in accordance with the Investment Contract
Qureshi I	First expert report of Abdul Sirshar Qureshi (Respondent's expert) of 15 November 2018
Qureshi II	Second expert report of Abdul Sirshar Qureshi (Respondent's expert) of 27 May 2019
<i>Ratione Materiae</i> Objection	Respondent's jurisdictional objection that Claimant failed to prove that it owns the investment made through Manolium-E
<i>Ratione Temporis</i> Objection	Respondent's jurisdictional objection that the Termination and the Tax Disputes arose before the EEU Treaty entered into force on 1 January 2015 and that the Treaty does not apply retroactively
R I	Respondent's Response to the Notice of Arbitration of 15 December 2017
R II	Respondent's Statement of Defence of 19 November 2018
R III	Respondent's Statement of Rejoinder of 30 May 2019
R PHB	Respondent's Post-Hearing Brief of 28 November 2019
R SoC	Respondent's Statement on Costs of 12 December 2019
Respondent (or Belarus)	Republic of Belarus, the respondent in this arbitration
Road	Road for the section of Gorodetskaya street reaching from Gintovta street up to the entrance into the Depot, together with all utility networks and a trolley line, which was to

	be built by Claimant in accordance with the Investment Contract
Second Administrative Proceeding	Administrative proceeding filed by the Minsk Municipality against Manolium-E on 2 March 2016
Secretary	Administrative Secretary to the Tribunal
Taylor I	First expert report of Travis A.P. Taylor, FCA MRICS (Claimant's expert) of 24 April 2017
Taylor II	Second expert report of Travis A.P. Taylor, FCA MRICS (Claimant's expert) of 28 February 2019
Tax Dispute	Dispute between the Parties related to the payment of Land Tax
Tax Inspectorate	Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus
Termination Dispute	Dispute between the Parties related to the termination of the Investment Contract
Termination Decision	Judgement of the Economic Court of Minsk of 9 September 2014 terminating the Investment Contract
ToA	Terms of Appointment signed as of 10 May 2018
Tonkacheva	Expert report of Elena Tonkacheva (Claimant's expert) of 25 February 2019
Treaty (or EEU Treaty)	Treaty on the Eurasian Economic Union of 29 May 2014, which entered into force on 1 January 2015
Tribunal's Other Costs	Pursuant to Art. 40.2(c) of the UNCITRAL Rules, reasonable costs of expert advice and of other assistance required by the arbitral tribunal
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2013
VCLT	Vienna Convention on the Law of the Treaties of 23 May 1969

TABLE OF CASES

<i>Abaclat and Others v. Argentina</i>	<i>Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. The Argentine Republic</i> , ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated 4 August 2011
<i>Ambiente Ufficio and Others v. Argentina</i>	<i>Ambiente Ufficio S.p.A. and Others (Case formerly known as Giordano Alpi and Others) v. The Argentine Republic</i> , ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 February 2013
<i>ATA v. Jordan</i>	<i>ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan</i> , ICSID Case No. ARB/08/2, Award dated 18 May 2010 (RL-32)
<i>Azinian</i>	<i>Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United Mexican States</i> , ICSID Case No. ARB(AF)/97/2, Award dated 1 November 1999 (RL-14)
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase)</i> I.C.J. Reports 1970, p. 3
<i>Bilcon</i>	<i>William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada</i> , UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 March 2015
<i>Burlington</i>	<i>Burlington Resources Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/08/5, Decision on Liability dated 14 December 2012 (CL-103)
<i>Chorzów Factory</i>	<i>Case Concerning the Factory at Chorzów (Germany v. Poland)</i> , P.C.I.J., Series A, No. 17, Judgement dated 13 September 1928
<i>CMS</i>	<i>CMS Gas Transmission Company v. The Argentine Republic</i> , ICSID Case No. ARB/01/8, Award dated 12 May 2005 (RL-63)
<i>Edenred S.A. v. Hungary</i>	<i>Edenred S.A. v. Hungary</i> , ICSID Case No. ARB/13/21, Award dated 13 December 2016
<i>EDF</i>	<i>EDF (Services) Limited v. Romania</i> , ICSID Case No. ARB/05/13, Award dated 8 October 2009

ELSI	<i>Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)</i> , I.C.J. Reports 1989, p. 15, Merits, Judgement dated 20 July 1989 (RL-7)
Finnish Ships	<i>Finnish shipowners against Great Britain in respect of the use of certain Finnish Vessels during the war (Finland, Great Britain)</i> , R.I.A.A, Vol. III, pp. 1479-1550, Award dated 9 May 1934
Flughafen	<i>Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/10/19, Award dated 18 November 2014
Impregilo v. Pakistan	<i>Impregilo Sp.A. v. Islamic Republic of Pakistan</i> , ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005 (RL-36)
Jan de Nul	<i>Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt</i> , ICSID Case No. ARB/04/13, Award dated 6 November 2008 (CL-12)
Jan Oostergetel	<i>Jan Oostergetel and Theodora Laurentius v. The Slovak Republic</i> , UNCITRAL, Final Award dated 23 April 2012 (CL-21)
Lemire	<i>Joseph Charles Lemire v. Ukraine</i> , ICSID Case No. ARB/06/18, Award dated 28 March 2011 (RL-68)
Loewen	<i>The Loewen Group, Inc. and Raymond L. Loewen v. United States of America</i> , ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003
Mavrommatis Palestine Concessions	<i>The Mavrommatis Palestine Concessions (Greece v. Britain)</i> , P.C.I.J., Series A, No. 2, Judgement dated 30 August 1924 (RL-9; CL-33)
MCI v. Ecuador	<i>M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/03/6, Award dated 31 July 2007 (RL-1)
Mera v. Serbia	<i>Mera Investment Fund Limited v. Republic of Serbia</i> , ICSID Case No. ARB/17/2, Decision on Jurisdiction dated 30 November 2018 (CL-98)
Metal-Tech	<i>Metal-Tech Ltd. v. Republic of Uzbekistan</i> , ICSID Case No. ARB/10/3, Award dated 4 October 2013
Mondev	<i>Mondev International Ltd. v. United States of America</i> , ICSID Case No. ARB (AF)/99/2, Award dated 11 October 2002 (CL-20)

MTD	<i>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile</i> , ICISD Case No. ARB/01/7, Award dated 25 May 2004 (CL-23)
Norwegian Loans	<i>Certain Norwegian Loans (France v. Norway)</i> , I.C.J. Reports 1957, p. 34, Separate Opinion of Judge Lauterpacht dated 6 July 1957
OIEG v. Venezuela	<i>OI European Group B.V. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB/11/25, Award dated 10 March 2015
Pantechniki	<i>Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania</i> , ICSID Case No. ARB/07/21, Award dated 30 July 2009 (RL-94)
Paushok	<i>Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia</i> , UNCITRAL, Award on Jurisdiction and Liability dated 28 April 2011 (CL-29)
Pey Casado	<i>Victor Pey Casado and President Allende Foundation v. Republic of Chile</i> , ICSID Case No. ARB/98/2, Award dated 8 May 2008 (CL-82)
PSEG	<i>PSEG Global, Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey</i> , ICSID Case No. ARB/02/5, Award dated 19 January 2007
Quasar de Valores	<i>Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation</i> , SCC Case No. 24/2007, Award dated 20 July 2012 (RL-61)
Romak	<i>Romak S.A. (Switzerland) v. Republic of Uzbekistan</i> , UNCITRAL, PCA Case No. 2007-07, Award dated 26 November 2009 (RL-140)
RosInvest	<i>RosInvestCo UK Ltd. v. The Russian Federation</i> , SCC Case No. V079/2005, Final Award dated 12 September 2010 (CL-117)
Rusoro	<i>Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela</i> , ICSID Case No. ARB(AF)/12/5, Award dated 22 August 2016 (RL-96)
Ryan v. Poland	<i>Vincent J. Ryan, Schooner Capital LLC and Atlantic Investment Partners LLC v. Republic of Poland</i> , ICSID Case No. ARB(AF)/11/3, Award dated 24 November 2015 (CL-119)

Salini	<i>Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan</i> , ICSID Case No. ARB/02/13, Decision on Jurisdiction dated 9 November 2004 (RL-30)
Tecmed	<i>Técnicas Medioambientales Tecmed S.A. v. United Mexican States</i> , ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003 (CL-32)
Tza Yap Shum	<i>Señor Tza Yap Shum v. The Republic of Peru</i> , ICSID Case No. ARB/07/6, Award dated 7 July 2011 (CL-128)
UP and CD v. Hungary	<i>UP and C.D Holding Internationale v. Hungary</i> , ICSID Case No. ARB/13/35, Award dated 9 October 2018 (CL-121)

I. INTRODUCTION

1. This is an *ad hoc* investment arbitration dispute subject to the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2013 [the “**UNCITRAL Rules**”]. The proceeding concerns various alleged breaches by the State of Belarus of provisions of Annex 16 to the Treaty on the Eurasian Economic Union dated 29 May 2014, which entered into force on 1 January 2015 [the “**Treaty**” or the “**EEU Treaty**”].
2. The claimant, a Russian company, entered into an “**Investment Contract**” with the Minsk City Executive Committee [the “**Minsk Municipality**” or the “**MCEC**”] and the Unitary Enterprise “Transport and Communications Office of the MCEC” [“**Minsktrans**”], which required it to build several public facilities in order to obtain the right to develop a shopping, cultural and entertainment complex in the Minsk city center [the “**Investment Object**” or the “**Mall**”].
3. The claimant alleges that it held an investment in Belarus, protected under the Treaty, and that due to Belarus’s breach of the Treaty it was completely deprived of this investment. It therefore requests USD 20.4 million [“**M**”] in compensation for the loss of the public facilities it had built and USD 155.9 M as lost profits resulting from the loss of the right to build the Mall.

1. THE PARTIES

1.1 CLAIMANT

4. The claimant is OOO MANOLIUM-PROCESSING [“**Claimant**” or “**Manolium**”], a Russian company with its registered address at 11 Stanislavskogo Street, Ground floor, room VII, Moscow 109004, Russian Federation. Its person of contact is Mr. Aram Ekavyan, ultimate shareholder and Director.
5. Claimant is represented by:

Mr. Grant Hanessian
Baker & McKenzie LLP
452 Fifth Avenue
New York, NY 10018
United States of America

Mr. Nicholas Kennedy
Baker & McKenzie LLP
1900 N Pearl St #1500
Dallas, TX 75201
United States of America

Mr. Sergei Voitishkin
Mr. Vladimir Khvalei
Ms. Alexandra Shmarko
Ms. Anna Maltseva
Baker & McKenzie CIS Ltd
White Gardens
9 Lesnaya Street
Moscow 125047
Russian Federation

1.2 RESPONDENT

6. The respondent is the REPUBLIC OF BELARUS [**“Respondent”** or **“Belarus”**].

7. Respondent is represented by:

Ms. Julia Zagonek
Mr. Oleg Volodin
Ms. Marina Zenkova
Mr. Alexander Sysoev
Mr. William Grazebrook
Ms. Anna Boer
Ms. Sushruta Chandraker
White & Case LLC
4 Romanov Pereulok
Moscow 125009
Russian Federation

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Mr. Alexander Goretsky
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Internacionalnaya str., 20A-45
Minsk 220030
Republic of Belarus

Ms. Anna Aniskevich
Mr. Andrey Loysha
Advocate bureau “REVERA”
8 Oboynaya str.
Minsk 220004
Republic of Belarus

8. Claimant and Respondent will collectively be referred to as the “**Parties**”.

1.3 THE ARBITRAL TRIBUNAL

9. On 15 November 2017, Claimant appointed as arbitrator:¹

Mr. Stanimir A. Alexandrov
1501 K Street, N.W.
Suite C-072
Washington D.C. 20005
United States of America

10. On 15 December 2017, Respondent appointed as arbitrator:²

Professor Brigitte Stern
7, rue Pierre Nicole
Code A1672
Paris 75005
France

11. On 17 January 2018, Mr. Alexandrov and Prof. Stern appointed as Presiding Arbitrator:

Mr. Juan Fernández-Armesto
Armesto & Asociados
General Pardiñas, 102, 8º izda.
28006 Madrid
Spain

12. By letter of 1 February 2018, Mr. Armesto accepted his appointment as Presiding Arbitrator.

13. In the Terms of Appointment [or “**ToA**”], the Parties confirmed that they had no objection to the appointment of the arbitrators in respect of matters known to them, or that they should have known, at the date of signature of the Terms of Appointment.³

2. ADMINISTRATIVE SERVICES

2.1 REGISTRAR AND DEPOSITARY

14. In accordance with the Terms of Appointment, the Permanent Court of Arbitration [“**PCA**”] has provided administrative services in support of the Parties and the Tribunal, including by acting as registrar and as depositary of funds.

¹ Claimant’s Notice of Arbitration dated 15 November 2017, para. 568.

² Respondent’s Reply to the Notice of Arbitration dated 15 December 2017, p. 16.

³ ToA, para. 11.

15. The contact details of the PCA are as follows:

Permanent Court of Arbitration

Attn: Ms. Evgeniya Goriatcheva
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

16. The PCA and its officials are bound by the same confidentiality duties applicable to the Parties and the Tribunal in this arbitration.

2.2 ADMINISTRATIVE SECRETARY

17. With the consent of the Parties and his co-arbitrators, the President appointed the following Administrative Secretary [the “**Secretary**”]:

Ms. Krystle M. Baptista
Armesto & Asociados
General Pardiñas, 102
28006 Madrid
Spain

18. The Secretary works for Armesto & Asociados, the same firm of arbitrators to which the President belongs. Armesto & Asociados’ professional activity is limited to acting as arbitrators. The Parties received the Secretary’s *curriculum vitae* and declaration of independence and impartiality on 14 March 2018.
19. During Ms. Baptista’s maternity leave, Ms. Bianca McDonnell, also a member of Armesto & Asociados, was appointed Secretary with the consent of the Parties.

3. THE TREATY: DISPUTE RESOLUTION CLAUSE

20. Arts. 84 and 85 of Annex 16 to the EEU Treaty regulate the dispute settlement mechanism for any dispute that may arise between a host State and an investor of another member State:

“84. All disputes between a recipient state and an investor of another Member State arising from or in connection with an investment of that investor on the territory of the recipient state, including disputes regarding the size, terms or order of payment of the amounts received as compensation of damages pursuant to paragraph 77 of this Protocol and the compensation provided for in paragraphs 79-81 of this Protocol, or the order of payment and transfer of funds provided for in paragraph 8 of this Protocol, shall be, where possible, resolved through negotiations.

85. If a dispute may not be resolved through negotiations within 6 months from the date of a written notification of any of the parties to the dispute on negotiations, it may be referred to the following, at investor’s option:

- 1) a court of the recipient state duly competent to consider relevant disputes;

2) international commercial arbitration court at the Chamber of Commerce of any state as may be agreed by the parties to the dispute;

3) *ad hoc* arbitration court, which, unless the parties to the dispute agree otherwise, shall be established and act in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL);

4) the International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, in order to resolve the dispute under the provisions of the Convention (provided that it has entered into force for both Member States that are parties to the dispute) or under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (if the Convention has not entered into force for one or both the Member States that are parties to the dispute)".

4. PROCEDURAL HISTORY

4.1 COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

21. Claimant commenced these proceedings by Notice of Arbitration ["**C I**"] dated 15 November 2017, in accordance with Arts. 84 and 85(3) of Annex 16 to the EEU Treaty and Art. 3 of the UNCITRAL Rules.
22. On 15 December 2017, in accordance with Art. 4 of the UNCITRAL Rules, Respondent submitted its Reply to the Notice of Arbitration ["**R I**"].
23. Between November 2017 and January 2018, the Members of the Tribunal were appointed as described at paragraphs 9-12 above.
24. By letter dated 14 March 2018, having sought and received the Parties' views on the matters addressed therein, the Tribunal circulated draft Terms of Appointment and a draft Procedural Order No. 1 for the Parties' comments. In the same letter, the Tribunal proposed to appoint Mrs. Krystle M. Baptista as Secretary in this arbitration and provided her *curriculum vitae* and declaration of impartiality and independence to the Parties. The Parties submitted their written comments on the draft procedural documents on 3 April 2018.
25. On 10 April 2018, the Tribunal held a case management conference call with the Parties to discuss the draft procedural documents.
26. Following the circulation of a further draft for the Parties' comments, the Tribunal and the Parties signed the Terms of Appointment, which, *inter alia*, fixed The Hague, the Netherlands as the place of arbitration; designated the PCA as Registry for the proceedings; appointed Mrs. Krystle M. Baptista as Secretary; and recorded the Parties' agreement that the UNCITRAL Rules as revised in 2013, including the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of April 2014, would be applicable to the dispute. The final version of the Terms of Appointment signed by the Tribunal and the Parties was circulated by the Secretary on 22 May 2018.

27. Also on 22 May 2018, the Tribunal issued Procedural Order No. 1, which in its Annex included the procedural timetable.

4.2 WRITTEN PLEADINGS, BIFURCATION REQUEST AND APPLICATION FOR INTERIM MEASURES

28. Claimant filed its Statement of Claim [“C II”] on 10 May 2018, and an addendum to the Statement of Claim containing a chronology of events on 18 May 2018.
29. On 11 June 2018, Respondent filed an application for bifurcation of the proceedings between a jurisdiction and merits phase and a quantum phase.
30. On 25 June 2018, Claimant filed its observations on Respondent’s request for bifurcation.
31. On 28 July 2018, Claimant filed a request for interim measures [the “**Interim Measures Request**”], requesting that the Tribunal order Respondent to
 - refrain from initiating criminal proceedings and/or to suspend any current criminal proceedings against former and current officials of Claimant and its affiliate company Manolium-Engineering;
 - refrain from contacting employees, officers and shareholders of Claimant and Manolium-Engineering, without consent from Claimant and prior authorization from the Tribunal; and
 - avoid any other actions that could further aggravate the dispute and violate the integrity of the arbitral proceedings.
32. On 1 August 2018, the Tribunal issued its Decision on Bifurcation, deciding not to bifurcate the proceedings and reissuing Annex I to Procedural Order No. 1 with a revised procedural timetable. *Inter alia*, a hearing was scheduled to take place from 29 July 2019 to 1 August 2019.
33. On 21 September 2018, Respondent filed a response to Claimant’s Interim Measures Request.
34. On 5 October 2018 and 12 October 2018 respectively, with leave from the Tribunal, Claimant and Respondent filed further submissions regarding Claimant’s Interim Measures Request.
35. On 12 October 2018, following a request from Respondent and comments from both Parties, the Tribunal granted Respondent a two-week extension to submit its Statement of Defence, with Claimant similarly being allowed a two-week extension to submit its Statement of Reply. On 14 November 2018, at the further request of Respondent, the Tribunal granted it a further three-day extension for the filing of its Statement of Defence, with a commensurate extension for the filing of Claimant’s Statement of Reply. On 15 November 2018, the Tribunal issued an amended Annex I to Procedural Order No. 1, containing a revised procedural timetable recording these extensions.

36. On 19 November 2018, Respondent filed its Statement of Defence [**“R II”**].
37. On 7 December 2018, the Tribunal issued its Decision on Claimant’s Interim Measures Request. The Tribunal ordered the Parties to refrain from any action or conduct which could result in the aggravation of the dispute or a violation of the integrity of the arbitral proceedings, and dismissed Claimant’s other requests for interim measures.
38. On 19 February 2019, upon agreement between the Parties, the Tribunal granted a one-week extension to Claimant for the submission of its Statement of Reply, and issued an amended Annex I to Procedural Order No. 1, containing a revised procedural timetable.
39. On 28 February 2019, Claimant filed its Statement of Reply [**“C III”**].
40. On 27 May 2019, upon agreement between the Parties, the Tribunal granted a three-day extension to Respondent for the submission of its Statement of Rejoinder, and issued an amended Annex I to Procedural Order No. 1, containing a revised procedural timetable.
41. On 30 May 2019, Respondent filed its Rejoinder [**“R III”**].
42. On 31 May 2019 and 5 June 2019 respectively, Respondent and Claimant notified the Tribunal of the witnesses each wished to call for cross-examination at the hearing.
43. On 10 July 2019, following the circulation of a draft for the Parties’ comments and a conference call with the Parties on 1 July 2019, the Tribunal issued its Procedural Order No. 2, setting out the arrangements for the organization of the hearing.
44. On 19 July 2019, the Parties submitted an agreed Chronology of Events.

4.3 HEARING AND POST-HEARING SUBMISSIONS

45. As planned, the hearing was held in The Hague from 29 July 2019 to 1 August 2019. The following persons were present:

Tribunal:

Mr. Juan Fernández-Armesto (Presiding Arbitrator)

Dr. Stanimir A. Alexandrov

Professor Brigitte Stern

For Claimant:

Mr. Vladimir Khvalei
Mr. Grant Hanessian
Mr. Nicholas Kennedy
Ms. Alexandra Shmarko
Ms. Anna Maltseva
Mr. Konstantin Antonyuk
Ms. Lola Awobokun
Baker & McKenzie

For Respondent:

Mr. David Goldberg
Ms. Julia Zagonek
Mr. Oleg Volodin
Ms. Marina Zenkova
Mr. Alexander Sysoev
Mr. William Grazebrook
Ms. Sushruta Chandraker
Mr. Pavel Boulatov
White & Case LLP

Mr. Aram Ekavyan
Claimant's General Director

Witness

Mr. Andrey Dolgov
General-Director of Manolium-Engineering

Experts

Mr. Travis Taylor
Mr. Chris Lake

Mr. Alexander Goretsky
Ms. Anastasiya Pavlychenko
Ms. Oksana Kotel
Ms. Anna Aniskevich
Ms. Kseniya Filipovich
Advocate bureau "REVERA"

Mr. Eduard Martynenko
Party representative

Witnesses

Mr. Alexander Antonenko
Mr. Nikolay Akhramenko

Experts

Mr. Abdul Sirshar Qureshi
Ms. Tatiana Rukhliada

Secretary:

Mrs. Krystle M. Baptista

PCA:

Ms. Evgeniya Goriatcheva

Court Reporter:

Ms. Dawn K. Larson

Interpreters:

Mr. Sergei Mikheyev
Ms. Irina van Erkel

46. On 31 July 2019 and 15 August 2019 respectively, Claimant and Respondent provided further documents requested by the Tribunal at the hearing.
47. By letter dated 8 August 2019, the Tribunal provided guidance to the Parties regarding the content of their post-hearing submissions, including a series of questions to be addressed in those submissions. On 21 August 2019, having consulted the Parties, the Tribunal issued a procedural timetable for the filing of the Parties' post-hearing submissions. This timetable was subsequently revised on 27 September 2019 at the request of the Parties.
48. On 3 October 2019 and 28 November 2019 respectively, Claimant and Respondent filed their Post-Hearing Briefs [**"C PHB"** and **"R PHB"**].
49. On 12 December 2019, the Parties filed their respective Submissions on Costs [**"C SoC"** and **"R SoC"**].

II. APPLICABLE LAW

50. The dispute arises under Annex 16 to the Treaty on the Eurasian Economic Union (EEU Treaty), an international treaty signed by the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan,⁴ which is silent on the issue of applicable law.
51. The Parties agreed in the Terms of Appointment that the dispute should be adjudicated in accordance with the provisions of the EEU Treaty, supplemented by international law, and in accordance with Belarusian law when applicable:⁵

“59. The Tribunal shall decide this dispute in accordance with the EEU Treaty, complemented by International Law, and in accordance with Belarusian Law when applicable”.

III. FACTS

52. Claimant brings two distinct disputes before the Tribunal:
- the first, related to the termination of the Investment Contract [the “**Termination Dispute**”]; and
 - the second, related to the payment of land tax [the “**Tax Dispute**”].

Overview

53. On 24 May 2003, the Minsk Municipality tendered an investment project, granting the right to develop a shopping, cultural and entertainment complex, including housing and other facilities (referred to herein as the Investment Object or the Mall), on a specific land plot in the city center of Minsk [the “**Mall Land Plot**”].⁶
54. Manolium won the tender and, on 6 June 2003, entered into the Investment Contract with the Minsk Municipality and Minsktrans,⁷ permitting Claimant to develop the Mall by 2009⁸ with an investment of at least USD 81.7 M.⁹ In exchange, Claimant agreed to design and construct at its own cost and transfer to the city of Minsk certain facilities related to public transportation [the “**Facilities**”].¹⁰

⁴ The Republic of Armenia and the Kyrgyz Republic joined the Eurasian Economic Union on 2 January 2015 and 6 August 2015, respectively.

⁵ ToA, para. 59.

⁶ Tender Documentation of 24 April 2003 (Doc. C-28).

⁷ Investment Contract (Doc. C-34).

⁸ Investment Contract (Doc. C-34), clause 5.3.

⁹ Investment Contract (Doc. C-34), clause 3.

¹⁰ Investment Contract (Doc. C-34), clause 2; 4th Amendment (Doc. C-66), para. 3 and clause 2.2 and 2.3.

55. Subsequently, Claimant incorporated a 100%-owned Belarusian subsidiary, Foreign Industrial and Commercial Unitary Enterprise “Manolium-Engineering” [**“Manolium-E”**] – which is not a party to these proceedings.¹¹
56. The construction of the Facilities was thrown into disarray: there were delays and construction costs increased significantly.¹² According to the Investment Contract (as amended), Manolium-E had to finalize construction of the Facilities¹³ by 1 July 2011 [the **“Commissioning Date”**],¹⁴ having invested at least USD 15 M.¹⁵ However, by that date, Manolium-E had not fully completed the construction and, by June 2012, all construction activity was halted.¹⁶ Claimant never received the lease over the Mall Land Plot.
57. On 14 October 2013, the Minsk Municipality and Minsktrans jointly filed a claim to terminate the Investment Contract before the Economic Court of Minsk.¹⁷ A year thereafter, the Court rendered a judgement terminating the Investment Contract [the **“Termination Decision”**].¹⁸ The ruling was confirmed by the Appellate Division of the Economic Court of Minsk on 29 October 2014 [the **“Appellate Court Decision”**]¹⁹ and by the Supreme Court of the Republic of Belarus on 27 January 2015 [the **“Cassation Decision”**].²⁰
58. The termination resulted in all parties being discharged of their obligations under the Investment Contract.²¹ However, since the Facilities had been constructed on municipal land and the Minsk Municipality wished to use them, Manolium-E had to be reimbursed for the construction costs.
59. Different government agencies issued reports valuing the Facilities: the Republican Unitary Enterprise “Minsk City Agency for State Registration and Land Cadaster” [the **“Minsk Cadaster Agency”**] issued a report, valuing the Facilities at USD 18.1 M.²² A few months later, in February 2016, the Ministry of Finance [the **“MoF”**] conducted an audit and issued a report [the **“MoF Report”**] reaching a

¹¹ Certificates of State Registration of Manolium-E in the Unified State Register of Legal Entities and Individual Entrepreneurs of 18 March 2004 and 16 April 2014 (Docs. **C-5** and **C-6**).

¹² According to Claimant, the cost of construction works in Minsk increased by approximately 228% between 2006 and April 2011 (C I, para. 235).

¹³ Additional Agreement No. 4 of 8 February 2007 (Doc. **C-66**), clause 2.

¹⁴ Additional Agreement No. 6 of 20 April 2011 (Doc. **C-76**), para. 1.

¹⁵ Additional Agreement No. 4 of 8 February 2007 (Doc. **C-66**), clauses 7.10 and 11.

¹⁶ R I, para. 13. The Parties seem to agree that some works were done between the Commissioning Date and June 2012, when they both agree that all works were halted (See fourth witness statement of A. Dolgov of 28 February 2019 (**CWS-5**) [**“Dolgov IV”**], para. 102).

¹⁷ C I, para. 256; Statement of claim to terminate the Investment Contract of 14 October 2013, filed with the Economic Court of Minsk on 12 November 2013 (Doc. **C-140/R-201**).

¹⁸ Judgement of the Economic Court of Minsk of 9 September 2014 (Doc. **C-147**).

¹⁹ Judgement of the Appellate Division of the Economic Court of Minsk of 29 October 2014 (Docs. **C-150** and **TT-6**).

²⁰ Resolution of the Supreme Court of the Republic of Belarus of 27 January 2016 (Doc. **C-152**).

²¹ C I, para. 523; Code of the Republic of Belarus No. 218-Z “Civil Code of the Republic of Belarus” of 7 December 1998 (Doc. **RL-127**), Art. 423 and (Doc. **CL-155**), Art. 682; Transcript of the hearing held in this matter from 29 July to 1 August 2019 [**“HT”**] Day 1, 148:3-21; 263:5-12; R II, paras. 264-265; R III, paras. 381-386, 438 and 806.

²² Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. **C-154**), p. 43.

similar conclusion: the cost incurred by Manolium-E in the construction of the Facilities amounted to USD 19.4 M.²³

60. Despite these reports, the Minsk Municipality was reluctant to use the municipal budget to pay for the Facilities, which under the Investment Contract should have been delivered free of charge into municipal ownership.
61. The Minsk Municipality proposed to the Council of Ministers of the Republic of Belarus that Claimant be invited to transfer the Facilities to the Municipality for free; otherwise, the Minsk Municipality would enforce the tax imposed on owners or users of land under Belarusian law [the “**Land Tax**”] calculated at a penalty rate, which Manolium-E had failed to pay, and other outstanding liabilities, against Manolium-E.²⁴
62. The proposal was accepted and immediately executed. On 2 March 2016, the Minsk Municipality issued administrative offense reports,²⁵ and then commenced administrative court proceedings²⁶ for the delayed return of the land plots on which the Facilities were located [the “**Facilities Land Plots**”].
63. Based on these administrative offences, the Belarusian tax authorities conducted a tax audit on Manolium-E, which resulted in the imposition of the accrued Land Tax for the unauthorized occupation of the Facilities Land Plots and penalties.²⁷ In total, the tax liabilities exceeded the value of the Facilities.
64. On 5 July 2016, the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus [the “**Tax Inspectorate**”] issued an order for the attachment of the Facilities²⁸ [the “**Attachment Order**”] and started court proceedings to recover Manolium-E’s tax liability.²⁹ On 18 August 2016, the Economic Court of Minsk ordered the enforcement of the tax liability against the Facilities [the “**Enforcement Order**”].³⁰ On 20 January 2017, in execution of the Attachment Order and the Enforcement Order, the President of the Republic of Belarus ordered the transfer,

²³ Report of the Ministry of Finance of 22 February 2016 (Doc. **C-160**), p. 15.

²⁴ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**), pp. 2-3.

²⁵ Administrative Offence Reports of the MCEC Land Planning Service Nos. 17, 20 and 21 of 18 March 2016 (Docs. **C-343**, **C-344** and **C-345**).

²⁶ Resolution of the Minsk City Court of 13 May 2016 (Doc. **C-162**); Resolution of the Minsk City Court of 14 June 2016 (Doc. **C-163**); Appeal of Manolium-E against the 17 May 2016 Ruling of the Court of the Pervomaysky District of Minsk of 9 June 2016 (Doc. **C-183**); Resolution of the Minsk City Court of 3 August 2016 (Doc. **C-184**).

²⁷ Letter from the Tax Inspectorate to Manolium-E of 21 June 2016 (Doc. **C-165**); Amendments and supplements of 21 June 2016 to the desk tax audit report of Manolium-E No. 2-5/1299 dated 17 May 2016 (Doc. **C-166**).

²⁸ Order No. 1110590 on attachment and/or seizure of property of 5 July 2016 (Doc. **C-167**).

²⁹ Request of the Tax Inspectorate to institute writ proceedings for the recovery of 20,699,817.70 rubles at the expense of the payer’s property of 20 July 2016 (Doc. **C-169**).

³⁰ Ruling of the Economic Court of Minsk of 18 August 2016 (Doc. **C-170**).

without consideration, of the Facilities into the ownership of the Minsk Municipality, to set off Manolium-E's tax liability [the "Presidential Order"].³¹

65. The principal of Manolium-E's tax liability and part of the penalty were written off.³² But since Manolium-E still owed part of the tax penalty, the company was forced into bankruptcy.³³ As a result of the bankruptcy proceedings, the Tax Inspectorate conducted a second tax audit on Manolium-E, which resulted in a new tax liability.³⁴
66. These facts will be further developed in the following two sections, separating the two disputes submitted by Claimant: the Termination Dispute (1.) and the Tax Dispute (2.). Thereafter, the Tribunal will devote two short sections to Manolium-E's bankruptcy (3.), and to the personal involvement of President Lukashenko (4.)

1. THE TERMINATION DISPUTE

67. The first dispute submitted by Claimant refers to the termination of the Investment Contract. The Tribunal will analyze the terms of the Investment Contract (1.1.), and then describe the progress in the execution of the Investment Contract (1.2.), the negotiations between the Parties (1.3), the termination of the Investment Contract (1.4.) and the legal consequences of the termination of the Investment Contract (1.5).

1.1 THE TERMS OF THE INVESTMENT CONTRACT

68. On 6 June 2003, Manolium, the Minsk Municipality and Minsktrans entered into the Investment Contract.³⁵ Initially, the key terms of the Investment Contract were the following:
 - the Municipality granted the Investor (*i.e.*, Claimant) the right to develop a substantial real estate project, which included a mall and other public and residential facilities, on a municipal land plot located in the center of Minsk and owned by the Municipality (already defined as the Mall Land Plot);³⁶

³¹ Order No. 10rp-dsp of the President of the Republic of Belarus of 20 January 2017 (Doc. **R-242**).

³² R II, paras. 349-350.

³³ Letter from MCEC to Manolium-E of 14 October 2016 (Doc. **C-8**); Official portal of the system of general jurisdiction courts of the Republic of Belarus, *Information on cases in connection with economic insolvency (bankruptcy) for the period from 1 February 2017 through 28 February 2017* (Doc. **C-179**).

³⁴ Amendments of 18 May 2017 to the Unscheduled field audit report of Manolium-E No. 543 dated 24 March 2017 (Doc. **C-186**); Unscheduled field audit report of Manolium-E in connection with economic insolvency (bankruptcy) of 24 March 2017 (Doc. **C-187**); Decision of the Tax Inspectorate No. 121 of 13 June 2017 on the unscheduled desk tax audit report of Manolium-E of 24 March 2017 No. 543 with amendments of 18 May 2017 (Doc. **C-188**); Letter from the Tax Inspectorate to Manolium-E of 22 September 2017 (Doc. **C-189**).

³⁵ Investment Contract (Doc. **C-34**).

³⁶ Investment Contract (Doc. **C-34**), clause 1.

- in exchange for this right, the Investor undertook to invest up to USD 15 M in the design, construction and reconstruction of certain facilities³⁷ (a bus depot, a motor transport base and a building) on a municipal land plot and, upon construction, to transfer those facilities into municipal ownership;³⁸ and
 - the Investor also agreed to provide financial or other assistance to public companies located in Minsk that were in unsatisfactory financial standing.³⁹
69. Although the parties signed the contract in June 2003, during the next three and a half years the project stalled: the design documents for the bus depot, drawn up in 2004, showed that the estimated construction cost of that single facility exceeded USD 12 M, which made it impossible for the Investor to build the totality of the contractually-agreed facilities by investing only USD 15 M – the ceiling agreed upon in the Investment Contract.⁴⁰ The Investor and the Municipality were forced to renegotiate.
70. Thus, between 2003 and 2007, the terms of the Investment Contract were substantially changed through the signature of four amendments.⁴¹ The most relevant amendment was signed on 8 February 2007 [the “**4th Amendment**”]. This 4th Amendment reduced the scope of the facilities,⁴² but also increased Manolium-E’s investment commitments.⁴³ Two further amendments were signed in 2008 and 2011.⁴⁴
71. The following section summarizes the terms of the Investment Contract as amended in 2011.

Parties

72. Initially, the Investment Contract was executed by Manolium, the Minsk Municipality and Minsktrans. However, in 2007 Manolium-E, Claimant’s

³⁷ Initially Claimant had to design, construct and reconstruct. See Investment Contract (Doc. C-34), clause 1.

³⁸ Tender documentation of 24 April 2003 (Doc. C-28), clause 2.4.2; Investment Contract (Doc. C-34), clause 2.

³⁹ Tender documentation of 24 April 2003 (Doc. C-28), clause 2.4.4; Investment Contract (Doc. C-34), clause 6.13.

⁴⁰ Termination Decision (Doc. C-147), p. 2.

⁴¹ Additional Agreement No. 1 of 10 October 2003 (Doc. C-47); Additional Agreement No. 2 of 22 October 2003 (Doc. C-48); Additional Agreement No. 3 of 25 November 2003 (Doc. C-49); Additional Agreement No. 4 of 8 February 2007 (Doc. C-66).

⁴² Initially, Claimant agreed to construct the Depot and two other facilities: (i) a joint production base for motor cars with capacity for 450 buses on a land plot provided by the Minsk Municipality (Investment Contract (Doc. C-34), clause 2.2); and (ii) the design and reconstruction of the building located at 36 Mendeleeva St. to accommodate the administrative and management personnel of the company located on the Mall Land Plot, and a training center to prepare trolleybus and tram drivers (Investment Contract (Doc. C-34), clause 2.3). However, on 11 July 2006, the President approved changes to the list of facilities to be constructed (Resolution of the President of the Republic of Belarus of 11 July 2006 (Doc. C-64)), and on 8 February 2007, the Parties executed the 4th Amendment, by which they agreed that the facilities to be constructed would be the Depot, the Pull Station and the Road (Doc. C-66).

⁴³ 4th Amendment (Doc. C-66), clause 8.

⁴⁴ Additional Agreement No. 5 of 16 December 2008 (Doc. C-72); Additional Agreement No. 6 of 20 April 2011 (Doc. C-76).

Belarusian subsidiary, was added as a party, assuming the obligation to implement the Investment Contract, construct the Facilities and develop the Mall, with the financing and under the supervision of Claimant.⁴⁵

Object

73. The object of the Investment Contract was the construction by Manolium-E, with financing supplied by Claimant, of a Mall on a 6.5 hectare [**“ha”**] plot of land at Kiseleva – Krasnaya – Masherovala streets in Minsk.⁴⁶ The Mall Land Plot hosted the old trolleybus depot and a building located at 3 Masherovala avenue,⁴⁷ which Claimant had to buy from Minsktrans and demolish.⁴⁸
74. The Mall Land Plot was to be leased by the Minsk Municipality to Claimant.⁴⁹ Claimant agreed to spend USD 81.6 M on the design and construction of the Mall.
75. In exchange for the right to develop the Mall, Claimant agreed to payment in kind. It accepted to design, construct and finance three Facilities in Minsk:
 - the **“Depot”**: a new trolley bus station with capacity for 220 trolley buses located in the Uruchye-6 microdistrict;⁵⁰
 - the **“Pull Station”**: a complete pull station with high voltage cable lines to supply electricity to the Depot and a trolley line along Gintovta street;⁵¹ and
 - the **“Road”**: a road for the section of Gorodetskaya street reaching from Gintovta street up to the entrance into the Depot, together with all utility networks and a trolley line.⁵²
76. The Investor undertook to transfer the Facilities into the communal ownership of the city of Minsk, once the construction had been executed, the buildings commissioned and the property registered in the Unified State Registry of Immovable Property of the Republic of Belarus [the **“Immovable Property Registry”**].⁵³
77. Claimant had initially agreed to spend a maximum of USD 15 M to build the Facilities.⁵⁴ However, this contractual provision was materially changed in the 4th Amendment.⁵⁵ In exchange for a reduction in the scope of the Facilities, Claimant and Manolium-E assumed the obligation to design and build the Facilities,

⁴⁵ 4th Amendment (Doc. C-66), preamble, para. 2.

⁴⁶ 4th Amendment (Doc. C-66), clause 1.

⁴⁷ 4th Amendment (Doc. C-66), clause 10.4-6.

⁴⁸ 4th Amendment (Doc. C-66), clauses 8.15-17.

⁴⁹ 4th Amendment (Doc. C-66), clauses 7.9 and 9.3.8.

⁵⁰ Investment Contract (Doc. C-34), clause 2.

⁵¹ 4th Amendment (Doc. C-66), para. 3 and clause 2.2.

⁵² 4th Amendment (Doc. C-66), para. 3 and clause 2.3.

⁵³ 4th Amendment (Doc. C-66), clause 2.

⁵⁴ Investment Contract (Doc. C-34), clause 2.

⁵⁵ 4th Amendment (Doc. C-66), clauses 7.10, 8.19 and 11.

even if the cost exceeded USD 15 M,⁵⁶ and additionally agreed to compensate the Minsk Municipality if the required investment was less than USD 15 M.⁵⁷

78. Finally, Claimant's initial obligation to provide financial or other assistance to public companies located in Minsk that were in unsatisfactory financial standing⁵⁸ was substituted by a donation of USD 1 M to the National Library of Belarus.⁵⁹

Term

79. The deadlines for the delivery and commissioning of the Facilities were extended several times to account for delays.⁶⁰ Finally, the Facilities had to be delivered and commissioned no later than the Commissioning Date, agreed to be 1 July 2011,⁶¹ and the Mall was to be constructed by the end of 2012.⁶²

Claimant's obligations

80. Under the amended Investment Contract, Claimant agreed to fulfil *inter alia* the following duties:
- secure financing for the design and construction of the Facilities and the Mall;⁶³
 - spend at least USD 15 M on the design and construction of the Facilities,⁶⁴ or remit the difference to the city budget;⁶⁵
 - spend at least USD 81.7 M on the design and construction of the Mall;⁶⁶
 - ensure that Manolium-E fulfilled its duties under the Investment Contract, and bear responsibility for any failure to do so;⁶⁷ and
 - lease the land for the construction of the Mall from the Minsk Municipality.⁶⁸

⁵⁶ Claimant alleges that it agreed to the changes to the Investment Contract because it had already spent USD 3 M on the design of the Facilities and the Mall and did not want to risk losing this investment. C III, paras. 30-38; Loans provided to Manolium-E between 2004 and 2013 (Doc. C-215).

⁵⁷ 4th Amendment (Doc. C-66), clauses 7.10, 8.19 and 11.

⁵⁸ Tender documentation of 24 April 2003 (Doc. C-28), clause 2.4.4; Investment Contract (Doc. C-34), clause 6.13.

⁵⁹ Additional Agreement No. 1 of 10 October 2003 (Doc. C-47), para. 1; Additional Agreement No. 2 of 22 October 2003 (Doc. C-48), para. 2.5; Additional Agreement No. 3 of 25 November 2003 (Doc. C-49), p. 1; Letter from the State Control Committee of the Republic of Belarus to the President of the Republic of Belarus of 31 July 2003 (Doc. C-44), p. 2; 4th Amendment (Doc. C-66), clause 7.6.

⁶⁰ 4th Amendment (Doc. C-66), clause 6.3.

⁶¹ Additional Agreement No. 6 of 20 April 2011 (Doc. C-76), para. 1.

⁶² 4th Amendment (Doc. C-66), clause 6.2.

⁶³ 4th Amendment (Doc. C-66), clause 7.1.

⁶⁴ This amount included the cost of purchasing the building located on the Mall Land Plot. See 4th Amendment (Doc. C-66), clause 11.

⁶⁵ 4th Amendment (Doc. C-66), clauses 7.1, 8.19 and 11.

⁶⁶ 4th Amendment (Doc. C-66), clause 12.

⁶⁷ 4th Amendment (Doc. C-66), clause 7.7.

⁶⁸ 4th Amendment (Doc. C-66), clause 7.9.

Manolium-E's obligations

81. Manolium-E undertook to carry out *inter alia* the following duties:

- implement the Investment Contract, designing and constructing the Facilities and the Mall within the agreed deadlines;⁶⁹
- transfer the Facilities into communal ownership one month after their commissioning or registration in the Immovable Property Registry;⁷⁰ and
- buy the building located at 3 Masherova avenue from Minsktrans.⁷¹

Obligations of the Minsk Municipality and Minsktrans

82. Under the amended Investment Contract, the Minsk Municipality was in charge *inter alia* of the following:

- adopting decisions⁷² with regard to the design and construction of the Facilities and the Mall and controlling the progress of the work;⁷³
- making available to Manolium-E the plot of land for the construction of the Mall through a lease;⁷⁴ and
- ensuring that the Facilities were transferred into municipal ownership within one month of commissioning or registration.⁷⁵

83. Finally, Minsktrans was in charge *inter alia* of the following duties pursuant to the amended Investment Contract:

- approving the design specifications and estimates for the construction of the Facilities⁷⁶ and sending a representative to the acceptance commission;⁷⁷ and
- selling the building located at 3 Masherova avenue to Manolium-E.⁷⁸

Termination of the Investment Contract

84. The Investment Contract established that if the Facilities were not constructed within the contractual term “through the investor’s fault”, the Minsk Municipality was entitled to terminate the Contract, by filing “court proceedings”.⁷⁹

⁶⁹ 4th Amendment (Doc. C-66), clauses 8.1 and 8.6.

⁷⁰ 4th Amendment (Doc. C-66), clause 8.11.

⁷¹ 4th Amendment (Doc. C-66), clause 8.15.

⁷² 4th Amendment (Doc. C-66), clause 9.1.

⁷³ 4th Amendment (Doc. C-66), clause 9.3.

⁷⁴ 4th Amendment (Doc. C-66), clauses 9.1 and 9.3.

⁷⁵ 4th Amendment (Doc. C-66), clause 9.3.9.

⁷⁶ 4th Amendment (Doc. C-66), clause 10.1.

⁷⁷ 4th Amendment (Doc. C-66), clause 10.3.

⁷⁸ 4th Amendment (Doc. C-66), clause 10.4-6.

⁷⁹ 4th Amendment (Doc. C-66), clause 16.2.1.

1.2 EXECUTION OF THE INVESTMENT CONTRACT

85. Under Belarusian law, in order to build on State-owned land, the builder must obtain not only a construction permit [**“Construction Permit”**], but also an additional authorization to temporarily occupy the land [**“Land Permit”**].⁸⁰ Once construction is finalized, the State entity that owns the land must formally withdraw the land from the constructor and repossess title.⁸¹ The Investment Contract reflected this rule in clause 2: once the Minsk Municipality had accepted the commissioning of the Facilities, it was bound to formally accept retransfer of title.⁸²
86. The Land Permit for the Depot was issued on 24 May 2007⁸³ and the Land Permit for the Road, on 2 May 2008.⁸⁴ Actual construction began thereafter, once the Construction Permits had been secured.
87. The construction of the Facilities was thrown into disarray: there were further delays and construction costs continued to increase significantly.⁸⁵ According to

⁸⁰ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Arts. 3, 15 and 16. Art. 3 provides:

“[...] Land users may hold land plots on the basis of the following rights: state and private property rights, and also property rights of foreign states and international organizations; lifetime inheritable possession; permanent use [...]; temporary use; lease (sublease) [...]”

Art. 15(2) establishes that land plots shall be provided for permanent use to:

“[...] legal entities – for construction of apartment buildings (with the exception of increased comfort residential buildings meeting the criteria defined by legislative acts), property management of apartment buildings, construction and/or maintenance of garages and car parks; [...] in other instances in accordance with legislative acts and decisions of the President of the Republic of Belarus.”

Art. 16 reads as follows:

“Citizens and legal entities of the Republic of Belarus may possess land plots on the right of temporary use allocated to them prior to entry into force of this Code or in accordance with Part 2 of this Article, and legal entities of the Republic of Belarus may possess land plots on the right of temporary use if such right was transferred to them from other legal entities of the Republic of Belarus in the prescribed manner.

Land plots for temporary use may be allocated to: persons and for the purposes set out in Part 2 of Article 15 of this Code – for a period of up to ten years, unless otherwise provided for in this Code and other legislative acts [...].”

See also Decree No. 667 of the President of the Republic of Belarus “On Withdrawal and Allotment of Land Plots” of 27 December 2007 (Doc. **RL-118**).

⁸¹ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Art. 72.

⁸² 4th Amendment (Doc. **C-66**), clause 2.

⁸³ Decision of MCEC No. 1098 of 24 May 2007 (Doc. **C-68**); Decision of MCEC No. 1095 of 24 May 2007 (Doc. **R-29**), subsequently extended by Decision of MCEC No. 2087 of 3 September 2009 (Doc. **C-263**) and Decision of MCEC No. 2060 of 16 September 2010 (Doc. **C-267**).

⁸⁴ Decision of MCEC No. 951 of 2 May 2008 (Doc. **C-86**), subsequently extended by Decision of MCEC No. 2087 of 3 September 2009 (Doc. **C-73**) and Decision of MCEC No. 2060 of 16 September 2010 (Doc. **C-75**).

⁸⁵ According to Claimant, the cost of construction works in Minsk increased by approximately 228% between 2006 and April 2011 (C I, para. 235.)

the amended Investment Contract, by the Commissioning Date on 1 July 2011,⁸⁶ Manolium-E had to finalize construction of the Facilities,⁸⁷ having invested at least USD 15 M.⁸⁸ By that date, Manolium-E had completed the Pull Station⁸⁹ and the Road,⁹⁰ but not the Depot⁹¹ and claimed to have invested approximately USD 22 M.⁹² None of the Facilities had been commissioned and retransferred into communal ownership.⁹³ Design and construction of the Mall had not even begun.

88. The following sections detail the construction history of the Facilities and the Mall.

A. The Pull Station

89. On 30 May 2008, the Minsk Municipality granted Manolium-E the Land Permit for the Pull Station⁹⁴ and, three months later, Gosstroy – the Inspectorate of the Department of Control and Supervision over Construction for Minsk [**“Gosstroy”**] – issued the Construction Permit.⁹⁵ Thus, construction of the Pull Station started in the last months of 2008 and was completed in June 2010. In July 2010, Manolium-E and Minsktrans signed an agreement, under which Manolium-E granted Minsktrans “gratuitous temporary use” of the Pull Station, so that Minsktrans could operate and maintain it until formal transfer into the communal ownership of Minsk.⁹⁶ At the end of the month, the Pull Station was commissioned for operation,⁹⁷ and on 1 October 2010 the building was registered in the Immovable Property Registry.⁹⁸
90. Under the Investment Contract, the Minsk Municipality was obliged to accept the Pull Station into communal ownership within one month of the date of commissioning or registration in the Immovable Property Registry.⁹⁹ Thus, on 11 October 2010, Claimant requested that the Minsk Municipality accept the Pull Station into communal ownership.¹⁰⁰ Minsktrans refused to do so,¹⁰¹ stating that it

⁸⁶ Additional Agreement No. 6 of 20 April 2011 (Doc. **C-76**), para. 1.

⁸⁷ 4th Amendment (Doc. **C-66**), clause 2.

⁸⁸ 4th Amendment (Doc. **C-66**), clauses 7.10 and 11.

⁸⁹ Act of Acceptance of completed building of 30 July 2010 (Doc. **C-100**); Extract from the registry book on rights, limitations (encumbrances) of rights for permanent structure of the Immovable Property Registry of 1 October 2010 (Doc. **C-101**).

⁹⁰ Letter from Manolium-E to MCEC of 7 September 2011 (Doc. **C-79**); Order No.1-C of Manolium-E of 1 July 2011 (Doc. **C-91**); General view of Facilities Land Plots (Google Earth shot) of 29 May 2011 (Doc. **C-331**); Test Protocol of State Enterprise Department of road-bridges construction and municipal improvement of MCEC on pavement of the Road of 22 August 2012 (Doc. **C-318**).

⁹¹ R I, para. 13; C PHB, para. 30; HT Day 2 (Mr. Dolgov’s re-direct), 353:5-8; HT Day 1 (Claimant’s opening), 45:20-21; C III, para. 340; R III, para. 371; R II, para. 305.

⁹² Letter from Manolium-E to MCEC of 30 April 2012 (Doc. **R-85**).

⁹³ Letter from MCEC to Manolium-E of 28 March 2013 (Doc. **C-339**).

⁹⁴ Decision of MCEC No. 1129(2) of 30 May 2008 (Doc. **C-97**).

⁹⁵ Permission No. 2-2064-042/08 for construction and installation works of 19 August 2009 (Doc. **C-98**).

⁹⁶ Agreement on Temporary Gratuitous Use of Property between Minsktrans and Manolium-E of 6 July 2010 (Doc. **C-99**).

⁹⁷ Act of Acceptance of completed building of 30 July 2010 (Doc. **C-100**).

⁹⁸ Extract from the registry book on rights, limitations (encumbrances) of rights for permanent structure of the Immovable Property Registry of 1 October 2010 (Doc. **C-101**).

⁹⁹ 4th Amendment (Doc. **C-66**), clause 9.3.3.

¹⁰⁰ Letter from Manolium-E to MCEC of 11 October 2010 (Doc. **C-102**).

¹⁰¹ Letter from Minsktrans to Manolium-E of 17 November 2010 (Doc. **C-104**).

would only consider such acceptance once the Pull Station had been in operation for a year (*i.e.*, by July 2011).

91. Thereafter, Minsktrans continued refusing acceptance, providing different reasons (e.g. that there were outstanding defects, that the Pull Station was still working at a fraction of its capacity).¹⁰² Notwithstanding repeated attempts by Manolium-E to force acceptance of the Pull Station into communal ownership, the Minsk Municipality refused to accept the facility, and when the Investment Contract was eventually terminated, the Pull Station was still registered in the name of Claimant, while the “right of economic management for permanent construction” corresponded to Manolium-E.¹⁰³
92. In accordance with the agreement for the gratuitous use of the Pull Station, Minsktrans accepted the Pull Station for temporary gratuitous use and assumed the obligation to maintain and operate the facility until its transfer into the communal ownership of Minsk.¹⁰⁴ However, it is unclear whether after the termination of the Investment Contract *de facto* possession of the Pull Station was returned to Manolium-E, and whether Minsktrans continued to operate and maintain the Pull Station.

B. The Road

93. Manolium-E was granted the Land Permit that allowed the temporary possession of the land plot where the Road was to be constructed on 2 May 2008,¹⁰⁵ and five months later – on 31 October 2008 –the Construction Permit was granted.¹⁰⁶ On 1 July 2011, within the deadline established in the Investment Contract, Claimant completed the works on the Road, and a committee with various municipal authorities was created to supervise commissioning.¹⁰⁷
94. Under the Investment Contract, acceptance into communal ownership should have occurred within one month of commissioning. *De facto* acceptance of the Road must have happened, because by 2012 the Road was in public use.¹⁰⁸ However, formal transfer into municipal ownership never occurred. The file shows that on 13 December 2011, in preparation for such a transfer, Minsktrans requested that

¹⁰² Letter from Minsktrans to Manolium-E of 22 July 2011 (Doc. **C-78**); Letter from Minsktrans to Manolium-E of 19 September 2011 (Doc. **C-105**); Letter from Manolium-E to MCEC of 11 August 2011 (Doc. **C-106**); Letter from Manolium-E to MCEC of 11 October 2011 (Doc. **C-107**); Letter from Manolium-E to MCEC of 12 October 2011 (Doc. **C-80**); Letter from Manolium-E to the State Control Committee of the Republic of Belarus of 21 October 2011 (Doc. **C-108**); Letter from Minsktrans to Manolium-E of 27 October 2011 (Doc. **C-81**); Letter from Minsktrans to Manolium-E of 31 October 2011 (Doc. **C-109**); Letter from Manolium-E to MCEC of 28 October 2013 (Doc. **C-319**).

¹⁰³ C I, para. 212.

¹⁰⁴ Agreement on Temporary Gratuitous Use of Property between Minsktrans and Manolium-E of 6 July 2010 (Doc. **C-99**), clauses 1.1 and 6.1.

¹⁰⁵ Extract from Decision of MCEC No. 951 of 2 May 2008 (Doc. **C-86**).

¹⁰⁶ Permission No. 2-2064-034/08 issued by Gosstroy on 29 May 2008 (Doc. **C-87**).

¹⁰⁷ Order No. 1-C of Manolium-E of 1 July 2011 (Doc. **C-91**).

¹⁰⁸ General view of the Facilities Land Plots (Google Earth shot) as of 29 May 2011 (Doc. **C-331**) shows cars parked on the Road. Also, the Tests on pavement of the Road conducted on 22 August 2012 (Doc. **C-318**) rendered positive results.

Claimant provide a calculation of the costs incurred.¹⁰⁹ However, the file is silent on the subsequent communications between the Parties, and it is undisputed that, by the time of the termination of the Investment Contract, transfer of the Road into communal ownership had still not been formalized.¹¹⁰

C. The Depot

95. On 24 May 2007, the Minsk Municipality granted to Manolium-E the Land Permit for the temporary possession of the land plots to construct the Depot¹¹¹ and five months later, on 15 October 2007, Manolium-E obtained the Construction Permit.¹¹²
96. The Depot building complex was composed of three different structures:
 - a checkpoint with sewage treatment facilities and heating;
 - an administrative and accommodation block; and
 - a production block with multidisciplinary machines, a modern diagnostics station and an automatic washing machine.¹¹³
97. Manolium-E had not finalized construction of the Depot by 1 July 2011, the contractually agreed deadline.¹¹⁴ By that date, it had completed the administrative block,¹¹⁵ and soon thereafter, by October 2011, the checkpoint.¹¹⁶ The production block was never completed, Claimant arguing that the amount of money spent on the construction of the Facilities exceeded the agreed cap.¹¹⁷
98. On 14 November 2011, Manolium-E and Minsktrans entered into an agreement under which Minsktrans assumed *de facto* temporary and gratuitous possession of the two finalized buildings.¹¹⁸ For three years, Minsktrans operated the checkpoint and the administration block. However, once the Investment Contract was terminated, Minsktrans and Manolium-E decided to terminate the gratuitous

¹⁰⁹ Letter from Minsktrans to Manolium-E of 13 December 2011 (Doc. C-92).

¹¹⁰ Letter from Claimant to MCEC of 19 March 2013 (Doc. C-83); Letter from Claimant to MCEC of 27 May 2013 (Doc. C-93); Letter from Claimant to MCEC of 27 June 2013 (Doc. C-94); Letter from Claimant to MCEC of 18 July 2014 (Doc. C-95).

¹¹¹ Decision of MCEC No. 1098 of 24 May 2007 (Doc. C-68); Decision of MCEC No. 2060 of 16 September 2010 (Doc. C-75).

¹¹² Permit No. 2-206Ch-067/07 issued by Gosstroy on 15 October 2007 (Doc. C-70).

¹¹³ C I, paras. 169 and 455; Letter from Manolium-E to MCEC of 12 October 2011 (Doc. C-80).

¹¹⁴ C I, para. 164; Additional Agreement No. 6 of 20 April 2011 (Doc. C-76), clauses 1 and 2.

¹¹⁵ These facilities were completed by 29 June 2011 (Letter from Manolium-E to MCEC of 29 June 2011, (Doc. C-77)), but Minsktrans refused to transfer ownership and put them into operation as an independent facility, pointing to electric defects (Letter from Minsktrans to Manolium-E of 22 July 2011 (Doc. C-78)).

¹¹⁶ Letter from Manolium-E of 12 October 2011 (Doc. C-80); Acts of Working Commission's Facility Acceptance of 5 September 2011 and 14 October 2011 (Docs. C-314 and C-315).

¹¹⁷ Cassation appeal of Manolium-E of 29 November 2014 (Doc. C-151), p. 3.

¹¹⁸ Agreement on Gratuitous Use of Property between Manolium-E and Minsktrans of 14 November 2011 (Doc. C-82), clause 5.2; R II, para. 144.

transfer agreement, and Manolium-E regained *de facto* possession of the finalized buildings on 30 December 2014.¹¹⁹

99. When the Investment Contract was eventually terminated, the Minsk Municipality had not officially accepted any of the finished Depot buildings into communal ownership.¹²⁰

D. The development of the Mall

100. In exchange for the construction and delivery of the Facilities, Claimant was to be awarded the right to construct and operate the Mall – a shopping, cultural, residential, office and entertainment complex with a hotel and a conference center in Minsk.¹²¹
101. The completion date set in the amended Investment Contract was December 2012,¹²² with a forecast cost of approximately USD 80 M.¹²³
102. The Minsk Municipality was to lease the Mall Land Plot to Claimant, once Manolium-E had performed its obligation to construct and deliver the Facilities.¹²⁴ However, prior to the delivery of the Facilities, Manolium-E was authorized to start designing the Mall.¹²⁵
103. On 25 March 2009, Manolium-E obtained from the Minsk Municipality an initial authorization to develop design specifications and estimates (known as a “Location Act”),¹²⁶ which expired in March 2011, with Manolium-E having failed to deliver the named specifications and estimates.¹²⁷ A month thereafter, on 26 April 2011, the City’s architecture committee withdrew the provisional authorization for the demolition of the existing buildings.¹²⁸
104. Thus, by 1 July 2011, the contractually agreed deadline, Manolium-E had not finalized the design of the Mall, the Minsk Municipality had never transferred

¹¹⁹ Agreement of 30 December 2014 on termination of Agreement for the Gratuitous Use of Property dated 14 November 2011 (Doc. C-84).

¹²⁰ Letter from Claimant to MCEC of 19 March 2013 (Doc. C-83); R II, para. 145.

¹²¹ Resolution of the President of the Republic of Belarus of 11 July 2006 (Doc. C-64); 4th Amendment (Doc. C-66), clause 1.

¹²² 4th Amendment (Doc. C-66), clause 6.2.

¹²³ C I, para. 234.

¹²⁴ 4th Amendment (Doc. C-66), clause 9.3.8. Cf. Resolution of the President of the Republic of Belarus of 11 July 2006 (Doc. C-64).

¹²⁵ 4th Amendment (Doc. C-66), clause 5.

¹²⁶ Act of land plot location selection for construction of shopping, cultural and recreation center within streets Kiseleva – Krasnaya – Masherova – Nezavisimosti of 25 March 2009 (Doc. C-116).

¹²⁷ Act of land plot location selection for construction of shopping, cultural and recreation center within streets Kiseleva – Krasnaya – Masherova – Nezavisimosti of 25 March 2009 (Doc. C-116), clause 5. On 14 March 2013, the Minsk Municipality issued a formal order declaring the Mall’s location act expired (Doc. C-138).

¹²⁸ C I, para. 238; Letter from the Committee for Architecture and City Planning to Manolium-E of 26 April 2011 (Doc. C-121).

possession of the Mall Land Plot to Manolium-E and construction had not even begun.¹²⁹

105. Six years thereafter, in September 2017, the Minsk Municipality auctioned the right to develop the Mall Land Plot.¹³⁰ A company under the name of Astomaks won the auction with a bid equivalent to USD 8.87 M.¹³¹

1.3 THE NEGOTIATIONS BETWEEN THE PARTIES

106. Summing up, by 1 July 2011,¹³² the contractually agreed deadline,
- Manolium-E had finalized construction of the Pull Station and the Road, while the Depot was only partially completed;
 - Manolium-E had signed agreements transferring *de facto* possession of the Pull Station and the finalized portions of the Depot to Minsktrans,¹³³ and the Road was in public use; but
 - none of the three Facilities had been *de iure* accepted by and transferred into the ownership of the city of Minsk.¹³⁴
107. Between July 2011 and November 2013, the parties to the Investment Contract negotiated, trying to reach a settlement. The parties first tried to extend the Investment Contract (**A.**), and then considered terminating the Investment Contract and signing a new contract for the development of the Mall (**B.**) None of the solutions proved acceptable.

A. Negotiations to extend the Investment Contract

108. During the first year – July 2011 until June 2012 – the parties’ negotiations were focused on the signature of a new supplemental agreement extending the deadline to finalize the Facilities.
109. Negotiations were fraught with difficulties: the Municipality was not prepared to offer additional time periods to finish construction,¹³⁵ rejected the renewal of

¹²⁹ C I, paras. 239-240.

¹³⁰ Announcement of the public auction (under conditions) No. 09-U-17 for the right for design and construction of capital structures of 12 September 2017 (Doc. **R-152**).

¹³¹ Official website of news portal of Belarus TUT.BY, *Almost five times as much as the initial price. A-100 has purchased land plot under the trolleybus depot in the center of Minsk*, 12 September 2017 (Doc. **C-185**); R III, para. 608; Minutes of the Results of the Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. **R-153**).

¹³² Additional Agreement No. 6 of 20 April 2011 (Doc. **C-76**), clause 6.1.

¹³³ The completed parts of the Depot were also transferred to Minsktrans temporarily some months later, on November 2011.

¹³⁴ Letter from MCEC to Manolium-E of 28 March 2013 (Doc. **C-339**).

¹³⁵ Letter from MCEC to Claimant and Manolium-E of 6 April 2012 (Doc. **R-80**); R III, para. 287; Letter from MCEC to Claimant with draft Supplemental Agreement to the [Investment] Contract of 18 June 2012 (Doc. **R-89**), p. 3; Letter from MCEC to Claimant of 18 June 2012 (Doc. **C-126**).

Constructions Permits¹³⁶ and requested that if Manolium failed to complete the Facilities within the extended deadline, as a penalty the city of Minsk would receive the Facilities free of charge.¹³⁷

110. Claimant refused to sign a new agreement under such terms¹³⁸ and in July 2012, Mr. Ekavyan, Claimant's ultimate shareholder and Director, made his last offer: he proposed to invest an additional USD 3.6 M to finalize the Facilities by December 2012, but in exchange requested ownership (and not simply a lease) over the Mall Land Plot.¹³⁹ On 26 July 2012, the Minsk Municipality rejected Mr. Ekavyan's final offer.¹⁴⁰

B. Negotiations to terminate the Investment Contract by mutual consent

111. A few days later, on 2 August 2012, the Minsk Municipality met with Mr. Dolgov, a Director of Manolium-E,¹⁴¹ and this time the termination of the Investment Contract by mutual agreement, with compensation to the Investor for the costs incurred, was also discussed.¹⁴² No decision was recorded, but termination plus compensation seems to have been the preferred choice.

112. The termination of the Investment Contract by mutual consent implied that three different issues had to be settled:

- the compensation of Manolium-E's construction costs (a.);
- the fate of the Mall (b.); and
- the *de iure* transfer of the Facilities into municipal ownership (c.).

a. Compensation of Manolium-E's construction costs

113. The first issue addressed by the parties to the Investment Contract was how to establish the compensation owed to Manolium-E for the construction of the Facilities. Two different valuations were prepared.

¹³⁶ Letter from MCEC Construction and Investment Committee to Manolium-E of 5 July 2012 (Doc. **R-90**); Letter from Gosstroy to Manolium-E of 21 April 2012 (Doc. **C-127**); Letter from Manolium-E to Gosstroy of 25 April 2012 (Doc. **R-84**).

¹³⁷ Letter from MCEC to Claimant and Manolium-E of 6 April 2012 (Doc. **R-80**); Letter from MCEC to Claimant with draft Supplemental Agreement to the [Investment] Contract of 18 June 2012 (Doc. **R-89**), para. 1; Letter from MCEC to Claimant of 18 June 2012 (Doc. **C-126**), p. 3.

¹³⁸ Letter from Manolium-E to MCEC of 30 April 2012 (Doc. **R-85**).

¹³⁹ Letter from Claimant to MCEC of June 2012 (Doc. **R-88**).

¹⁴⁰ Letter from MCEC to Claimant of 26 July 2012 (Doc. **R-92**).

¹⁴¹ Minutes of the Meeting Regarding Implementation of the Investment Project by Manolium of 2 August 2012 (Doc. **R-93**).

¹⁴² Minutes of the Meeting Regarding Implementation of the Investment Project by Manolium of 2 August 2012 (Doc. **R-93**), p. 1.

114. First, Minsktrans (with the support of the State-owned Center for Pricing in the Construction Sector) estimated, using the certificates of completion, that the total costs of construction and purchase of equipment amounted to USD 14.7 M.¹⁴³
115. Manolium-E considered that the Minsktrans valuation underestimated the construction costs.¹⁴⁴ Thus, with the approval of the Minsk Municipality,¹⁴⁵ Manolium-E created a commission – formed by the Municipality, Manolium-E and the independent audit firm Paritet-Standart – to carry out an independent audit.¹⁴⁶ By early November 2012, Paritet-Standart issued a report finding that as of 31 October 2012 the amount invested by Manolium-E was equivalent to USD 18.3 M.¹⁴⁷

b. The fate of the Mall

116. Despite having agreed to the preparation of these two valuations, the Minsk Municipality was not eager to spend several million USD from its own budget to compensate Claimant for the construction of the Facilities. Its intention remained to secure the Facilities free of charge,¹⁴⁸ and in exchange to entice Claimant to develop the Mall.
117. By the end of 2012, the Minsk Municipality and Minsktrans proposed to terminate the existing Investment Contract by mutual agreement, and to execute a new investment contract for the development of the Mall,¹⁴⁹ insisting that this was the best solution.¹⁵⁰
118. The offer was not well received by Claimant. By then Manolium had lost interest in the development of the Mall under the terms of the Investment Contract and, thus, “found no economic sense in signing a new investment contract”.¹⁵¹ It was however willing to accept development of the Mall Land Plot under its own terms¹⁵² or without having to pay a lease.¹⁵³

¹⁴³ Letter from Minsktrans to MCEC of 14 September 2012 (Doc. **R-95**) and Letter from Minsktrans to Manolium-E of 14 September 2012 (Doc. **C-326**). Minsktrans initially made a valuation of USD 13.5 M (Letter from Minsktrans to Manolium-E of 28 August 2012 (Doc. **C-128**)), but Manolium-E responded to this valuation with an alternative calculation of USD 16.3 (Letter from Manolium-E to Minsktrans of 11 September 2012 (Doc. **R-94**)), and Minsktrans accepted the inclusion of certain items and updated its valuation to USD 14.7 M.

¹⁴⁴ First witness statement of A. Dolgov of 10 May 2018 (**CWS-1**), para. 81.

¹⁴⁵ Letter from MCEC to Manolium-E of 3 October 2012 (Doc. **C-130**).

¹⁴⁶ Letter from Manolium-E to MCEC of 20 September 2012 (Doc. **C-129**); Letter from MCEC to Manolium-E of 3 October 2012 (Doc. **C-130**).

¹⁴⁷ Paritet-Standart Report of 5 November 2012 (Doc. **C-131**).

¹⁴⁸ Letter from MCEC to Claimant of 7 June 2013 (Doc. **R-108**).

¹⁴⁹ Minutes of a meeting on the implementation of an investment project by Claimant of 5 December 2012 (Doc. **R-97**), paras. 4-5; Letter from MCEC to Claimant of 10 December 2012 (Doc. **C-132**) and attached draft investment contract (Doc. **R-98**); Letter from MCEC to Manolium-E of 18 January 2013 (Doc. **C-134**).

¹⁵⁰ Letter from MCEC to Claimant of 11 March 2013 (Doc. **C-137**).

¹⁵¹ Letter from Claimant to MCEC of 19 March 2013 (Doc. **C-83**).

¹⁵² Letter from Claimant to MCEC of 19 March 2013 (Doc. **C-83**).

¹⁵³ Letter from Claimant to MCEC of June 2012 (Doc. **R-88**).

119. Claimant tried to break the deadlock by appealing to the President of the Republic. On 4 September 2013, Manolium wrote directly to President Lukashenko, representing that it had invested USD 20 M in the Facilities and accusing the Minsk Municipality of refusing to accept the Facilities into municipal ownership.¹⁵⁴ Claimant asked the President to remedy the situation and offered two solutions:
- either termination by mutual agreement of the Investment Contract and compensation of Manolium-E's costs and expenses, or, as compensation for its investment,
 - the free transfer by Presidential decree of the Mall Land Plot.¹⁵⁵
120. The record does not show any reaction either from President Lukashenko or his office.

c. The Minsk Municipality's refusal to transfer the Facilities into municipal ownership

121. One of the main obligations of the Minsk Municipality under the Investment Contract was the acceptance of the Facilities into municipal ownership within one month of their commissioning or registration in the Immovable Property Registry.¹⁵⁶
122. During 2012 and 2013, when the negotiations to terminate the Investment Contract took place, Minsktrans was *de facto* in possession of the Pull Station and the completed parts of the Depot, while the Road was in public use. Thus, *de facto* possession of all completed Facilities lay with Minsktrans or the Minsk Municipality.
123. *Pro memoria*, the Pull Station was completed in June 2010 and on 6 July 2010 Manolium-E temporarily transferred *de facto* possession to Minsktrans through an agreement on gratuitous temporary use.¹⁵⁷ On 30 July 2010, the Pull Station was commissioned for operation¹⁵⁸ and, on 8 October 2010, it was registered in the Immovable Property Registry.¹⁵⁹ Having fulfilled its contractual duties, Claimant had requested that the Municipality take *de iure* possession of the Pull Station by

¹⁵⁴ Letter from Claimant to the President of the Republic of Belarus of 4 September 2013 (Doc. **R-109**).

¹⁵⁵ Letter from Claimant to the President of the Republic of Belarus of 4 September 2013 (Doc. **R-109**).

¹⁵⁶ 4th Amendment (**Doc. C-66**), clauses 2.3 and 9.3.9.

¹⁵⁷ Agreement on Temporary Gratuitous Use of Property between Minsktrans and Manolium-E of 6 July 2010 (Doc. **C-99**).

¹⁵⁸ Act of Acceptance of completed building of 30 July 2010 (Doc. **C-100**).

¹⁵⁹ Extract from the registry book on rights, limitations (encumbrances) of rights for permanent structure of the Immovable Property Registry of 1 October 2010 (Doc. **C-101**).

accepting the transfer of title on numerous occasions,¹⁶⁰ but the Municipality repeatedly refused to do so.¹⁶¹

124. As for the Road, on 1 July 2011 Claimant completed works on the Road, and created a committee to supervise commissioning by the municipal authorities.¹⁶² By 2012, the Road was in public use.¹⁶³ Thus, *de facto* possession of the Road laid with the Municipality. However, *de iure* transfer had not taken place.¹⁶⁴
125. Finally, as regards the Depot, Manolium-E completed the administrative block by 1 July 2011,¹⁶⁵ and the checkpoint, by October 2011¹⁶⁶ (the production block was never completed). On 14 November 2011, Manolium-E and Minsktrans entered into an agreement under which Minsktrans assumed *de facto* temporary and gratuitous possession of the two finalized buildings.¹⁶⁷ However, title to the Depot had not been transferred to the Minsk Municipality.
126. During the spring and summer of 2013, Manolium-E repeatedly requested the Minsk Municipality to formally accept the Facilities into communal ownership.¹⁶⁸

¹⁶⁰ Letter from Manolium-E to MCEC of 11 August 2011 (Doc. **C-106**); Letter from Manolium-E to MCEC of 11 October 2011 (Doc. **C-102/107**); Letter from Manolium-E to MCEC of 21 October 2010 (Doc. **C-103**); Letter from Manolium-E to the State Control Committee of the Republic of Belarus of 21 October 2011 (Doc. **C-108**); Letter from Manolium-E to MCEC of 28 October 2013 (Doc. **C-319**).

¹⁶¹ Letter from Minsktrans to Manolium-E of 17 November 2010 (Doc. **C-104**); Letter from Minsktrans to Manolium-E of 22 July 2011 (Doc. **C-78**); Letter from Minsktrans to Manolium-E of 19 September 2011 (Doc. **C-105**); Letter from Minsktrans to Manolium-E of 27 October 2011 (Doc. **C-81**); Letter from Minsktrans to Manolium-E of 31 October 2011 (Doc. **C-109**).

¹⁶² Order No. 1-C of Manolium-E of 1 July 2011 (Doc. **C-91**).

¹⁶³ General view of the Facilities Land Plots (Google Earth shot) as of 29 May 2011 (Doc. **C-331**) shows cars parked on the Road. Also, the Tests on pavement of the Road conducted on 22 August 2012 (Doc. **C-318**) rendered positive results.

¹⁶⁴ On 13 December 2011, in preparation for such transfer, Minsktrans requested that Claimant provide a calculation of the costs incurred (Letter from Minsktrans to Manolium-E of 13 December 2011 (Doc. **C-92**)). However, the file is silent on the subsequent communications between the parties on the Road transfer (Letter from Claimant to MCEC of 19 March 2013 (Doc. **C-83**); Letter from Claimant to MCEC of 27 May 2013 (Doc. **C-93**); Letter from Claimant to MCEC of 27 June 2013 (Doc. **C-94**); Letter from Claimant to MCEC of 18 July 2014 (Doc. **C-95**)).

¹⁶⁵ These facilities were completed by 29 June 2011 (Letter from Manolium-E to MCEC of 29 June 2011 (Doc. **C-77**)), but Minsktrans refused to transfer ownership and put them into operation as an independent facility, pointing to electric defects (Letter from Minsktrans to Manolium-E of 22 July 2011 (Doc. **C-78**)).

¹⁶⁶ Letter from Manolium-E to MCEC of 12 October 2011 (Doc. **C-80**); Acts of Working Commission's Facility Acceptance of 5 September 2011 and 14 October 2011 (Docs. **C-314** and **C-315**).

¹⁶⁷ Agreement on Gratuitous Use of Property between Manolium-E and Minsktrans of 14 November 2011 (Doc. **C-82**), clause 5.2; R II, para. 144. Once the Investment Contract was terminated, the parties terminated their gratuitous transfer agreement by mutual consent, and Manolium-E regained *de facto* possession of the finalized buildings on 30 December 2014 (Agreement of 30 December 2014 on termination of Agreement for the Gratuitous Use of Property dated 14 November 2011 (Doc. **C-84**)).

¹⁶⁸ Letter from Claimant to MCEC of 19 March 2013 (Doc. **C-83**); Letter from Claimant to MCEC of 27 May 2013 (Doc. **C-93**); Letter from Claimant to MCEC of 27 June 2013 (Doc. **C-94**). Claimant's shareholders approved the transfer in a general assembly held on 12 June 2013 (Minutes of General Participants Meeting of 12 June 2013 (Doc. **C-342**)).

However, none of its requests were accepted,¹⁶⁹ the Municipality insisting that transfer should be free of charge.¹⁷⁰

1.4 THE TERMINATION OF THE INVESTMENT CONTRACT

127. The negotiations to amend the Investment Contract or sign a new agreement being in deadlock, on 12 November 2013 the Minsk Municipality and Minsktrans filed a claim before the Economic Court of Minsk against Claimant and Manolium-E, requesting the termination of the Investment Contract.¹⁷¹
128. In essence, the Minsk Municipality and Minsktrans alleged that they had complied with their contractual obligations, while Claimant and Manolium-E had only partially performed and had ceased construction of the Facilities in June 2012.¹⁷² The Minsk Municipality asserted that Manolium had no intention to continue construction of the Facilities or to develop the Mall, and thus requested the termination of the Investment Contract.¹⁷³
129. Claimant and Manolium-E filed their statement of defense, requesting that the claim be dismissed.¹⁷⁴ Claimant and Manolium-E argued that the execution of the Investment Contract had been delayed because the Contract had to be renegotiated, and that most of the Facilities had been finalized and were in fact being used on a free-of-charge basis by Minsktrans.¹⁷⁵ Finally, Claimant and Manolium-E also explained that on 1 July 2011, the Land Permits to the Facilities Land Plots expired and thus, there was no possibility to continue construction of the Depot.¹⁷⁶
130. On 9 September 2014, the Economic Court of Minsk rendered its Termination Decision. It declared the following facts as proven:¹⁷⁷
 - the Pull Station, in operation since 30 July 2010, operated at no more than 1% of the design capacity; this facility had not been accepted into municipal ownership, because the list of equipment provided by Claimant did not correspond to the actual equipment and because technical maintenance problems had not been resolved; and

¹⁶⁹ Letter from MCEC to Claimant of 7 June 2013 (Doc. **R-108**).

¹⁷⁰ Letter from Minsktrans to Manolium-E of 26 March 2013 (Doc. **C-338**); Letter from MCEC to Manolium-E of 28 March 2013 (Doc. **C-339**); Letter from MCEC to Manolium-E of 9 April 2013 (Doc. **R-107**).

¹⁷¹ Statement of claim to terminate the Investment Contract of 14 October 2013, filed with the Economic Court of Minsk on 12 November 2013 (Doc. **C-140/R-201**).

¹⁷² Statement of claim to terminate the Investment Contract of 14 October 2013, filed with the Economic Court of Minsk on 12 November 2013 (Doc. **C-140/R-201**), p. 2.

¹⁷³ Statement of claim to terminate the Investment Contract of 14 October 2013, filed with the Economic Court of Minsk on 12 November 2013 (Doc. **C-140/R-201**), p. 3.

¹⁷⁴ Statement of defense of Manolium-E in case No. 399-3/2013 (Doc. **R-102**).

¹⁷⁵ Statement of defense of Manolium-E in case No. 399-3/2013 (Doc. **R-102**), p. 3.

¹⁷⁶ Statement of defense of Manolium-E in case No. 399-3/2013 (Doc. **R-102**), p. 3.

¹⁷⁷ Termination Decision (Doc. **C-147**), p. 4.

- construction of the Road had been completed, but the trolleybus line had not been put into operation due to the lack of an approval from the State Construction Supervision authorities.

131. No reference to the status of the Depot was made in the decision.¹⁷⁸ The Court concluded that Claimant and Manolium-E “ha[d] not fulfilled the obligation to construct and transfer the communal facilities [...] into ownership of the City of Minsk”¹⁷⁹, arguing that, under the Civil Code, Manolium-E’s obligations to design and build the Facilities could only be considered as fulfilled if all three Facilities were finalized and transferred, and not parts thereof.¹⁸⁰
132. The Court further analyzed whether the delays in the construction of the Facilities could be attributed to the Minsk Municipality, and thus, whether Manolium-E could be exonerated of responsibility or could be granted further time for completion of the works.¹⁸¹ However, since the Court found no evidence of delays in the Minsk Municipality’s performance of the Investment Contract, it concluded that no extension of the terms of construction could be granted.¹⁸²
133. As regards the Mall, the Court rejected Claimant’s argument that a significant increase in the amount to be invested prevented the timely implementation of the project.¹⁸³ The Court also found that Claimant and Manolium-E had breached the time limits to develop the Mall, and that such breaches were unreasonable and unrelated to the actions of the Minsk Municipality, Minsktrans or third parties.¹⁸⁴
134. As a result of the Court’s conclusions, it rendered a judgement terminating the Investment Contract.¹⁸⁵

¹⁷⁸ Statement of claim to terminate the Investment Contract of 14 October 2013, filed with the Economic Court of Minsk on 12 November 2013 (Doc. C-140/R-201), p. 2.

¹⁷⁹ Termination Decision (Doc. C-147), p. 4.

¹⁸⁰ Termination Decision (Doc. C-147), p. 4.

¹⁸¹ Clause 5.4 of the Investment Contract (Doc. C-34) provides that:

“In the event of untimely (delayed) performance by Mingorispolkom, Communal Unitary Enterprise Minsktrans of their obligations contained in this contract, acts (omission) on the part of competent communal bodies of Minsk preventing proper performance of the investment project, the deadlines of performing the works of designing, constructing and commissioning the facilities specified in Sub-Clauses 6.1-6.2 of this Clause shall be proportionately extended by a reasonable period necessary to properly perform the terms and conditions of this contract. Provided that the Investor shall not be deemed to be in delay in performance.”

¹⁸² Termination Decision (Doc. C-147), p. 4.

¹⁸³ Termination Decision (Doc. C-147), pp. 4-5.

¹⁸⁴ Termination Decision (Doc. C-147), p. 5.

¹⁸⁵ Termination Decision (Doc. C-147).

135. The ruling was confirmed by the Appellate Court on 29 October 2014, and on that date, pursuant to its own terms¹⁸⁶ and Art. 204 of the Belarusian Code of Commercial Procedure,¹⁸⁷ the decision became effective.
136. Claimant and Manolium-E filed a cassation appeal on 29 November 2014.¹⁸⁸ Two months later, on 27 January 2015, the Belarusian Supreme Court dismissed the appeal in its Cassation Decision:

“In such circumstances, the Panel for Economic Cases of the Supreme Court of the Republic of Belarus considers the court’s conclusions that there are grounds for the termination of the contract to be lawful and justified.

The economic court of first instance and the court of appeals did not allow any violations of the rules of material and/or procedural law that would entail the annulment of the court decisions.”¹⁸⁹

1.5 LEGAL EFFECTS OF THE TERMINATION OF THE INVESTMENT CONTRACT

137. Pursuant to the Code of the Republic of Belarus No. 218-Z “Civil Code of the Republic of Belarus” dated 7 December 1998 [the “**Belarusian Civil Code**”], upon

¹⁸⁶ Appellate Court Decision (Docs. **C-150** and **TT-6**), p. 5:

“Thus, the conclusions reached by the court of first instance are consistent with the circumstances of the case, rules of the substantive and procedural law, have been applied correctly and the court has appraised all the parties’ arguments in full. Hence, there are no grounds for upholding the appeal.

In view of the foregoing and being guided by Articles 279-281 of the Economic Procedural Code of the Republic of Belarus the Appellate Division of the Minsk Economic Court has

DECIDED that:

The September 9, 2014, decision of the Minsk Economic Court in Case No.399-3/2014, shall be affirmed and the appeal filed by foreign trade and production unitary enterprise Manolium-Engineering shall be held against.

The judgment shall come into effect since its passing and may be appealed under the cassation procedure within one month from the judgment passing.”

¹⁸⁷ Code of Commercial Procedure of the Republic of Belarus No. 219-Z of 15 December 1998 (Doc. **RL-50**), Art. 204:

“Entry into force of a judgement considering economic cases

The judgement of the court considering economic cases of the first instance, unless otherwise established by this Code or other legislative acts, enters into force upon the expiration of fifteen days from the date of its adoption, unless an appeal is filed. In case of an appeal, the judgement of the court considering economic cases, if it is not set aside and not changed, shall enter into legal force from the date of adoption of the judgement by the court considering economic cases at the appeals instance.

The judgement of the Supreme Court of the Republic of Belarus enters into legal force from the announcement of it at the court hearing”.

¹⁸⁸ Cassation appeal of Manolium-E of 29 November 2014 (Doc. **C-151**).

¹⁸⁹ Cassation Decision (Doc. **C-152**).

termination of a contract, parties are discharged of their respective obligations thereunder.¹⁹⁰

138. The termination of the Investment Contract by the Belarusian courts thus created an unstable legal situation: Manolium-E regained *de iure* possession of the Facilities constructed on municipal land,¹⁹¹ but *de facto* possession was impossible, the Facilities being a Road and two buildings (the Pull Station and the Depot) which could only be used as infrastructure for public transport; the situation was aggravated by the fact that Manolium-E's Land Permits and Construction Permits had expired, making any further construction work impossible.

139. The Belarusian Civil Code has a special rule, which regulates this type of situation:¹⁹²

“Article 682. Consequences of termination of works contract prior to acceptance of a work result.

Should the works contract be terminated on any statutory or contractual grounds before the customer accepts the result of the contractor's works (clause 1 of article 673), the customer may require that the results of the contractor's uncompleted works should still be transferred to the customer with compensation to the contractor for the costs incurred.”

140. In accordance with this provision, when a contract to construct immovable property on alien land is commenced and thereafter terminated, the owner of the land retains the right to require transfer of the facilities which have been built, but must compensate the constructor for the costs incurred.

141. The application of this general principle to this case implies that, upon termination of the Investment Contract, the Minsk Municipality, as the owner of the land, was entitled to the transfer of the Facilities, while Claimant, as constructor of the Facilities, was entitled to be reimbursed for its expenses.

142. Although Respondent in this proceeding denies any legal duty to compensate Claimant for the cost of the Facilities,¹⁹³ *in tempore insuspecto* the Minsk Municipality saw things differently: upon termination of the Investment

¹⁹⁰ Belarusian Civil Code (Doc. **RL-127**), Art. 423.1; HT Day 1, 148:3-21; 263:5-12; C I, para. 523; R II, paras. 264-265; R III, para. 381.

¹⁹¹ Minsktrans and Manolium-E finalized their gratuitous use agreement of the completed parts of the Depot on 30 December 2014 (Agreement of 30 December 2014 on termination of Agreement for the Gratuitous Use of Property dated 14 November 2011 (Doc. **C-84**)).

¹⁹² Doc. **CL-155**.

¹⁹³ R PHB, paras. 23-32. Cf. HT Day 1, 136:15-137:12.

Contract,¹⁹⁴ it requested several independent valuations and engaged in lengthy negotiations with Claimant to determine the costs of the Facilities.¹⁹⁵

2. THE TAX DISPUTE

143. Before delving into the facts of the Tax Dispute, it is necessary to establish the legal regime, under the laws of Belarus, applicable to the temporary use of land and to the Land Tax which is levied on the owners or users of land plots.

The right to temporary use of land

144. In Belarus, individuals and corporations may hold land under certain legal titles, which include ownership (private property), lifetime inheritable possession, permanent use, lease and also the right of temporary use.¹⁹⁶
145. This last right is relevant when construction activities are being carried out on public land: a constructor, such as Manolium-E, can only carry out building activities on State-owned land if it has been awarded a Land Permit, granting the beneficiary a right to temporarily use such land.¹⁹⁷ For municipal land, Land Permits are issued by the municipal Executive Committee, and these Permits are granted for a certain period of time and for a defined purpose.¹⁹⁸
146. Upon expiration of a Land Permit, the land user, in this case the construction company, must either apply to extend the Permit (with a Presidential decree regulating the procedure)¹⁹⁹ or return the land to the public owner, with the public owner accepting the return.²⁰⁰ Otherwise, the constructor becomes an unauthorized user of public lands.
147. Municipalities have the power to issue orders to recover land that is being occupied by private parties without authorization – because the permits have expired or

¹⁹⁴ Indeed, in its letter to Claimant dated 11 December 2014 (Doc. **C-365**), p. 2, the Minsk Municipality affirmed the following: “Upon consideration by the Supreme Court of the Republic of Belarus of the respondent’s cassation appeal and upon making a decision in the present case, issues relating to compensation of costs incurred by the parties under the contract may be considered in separate proceedings.”

¹⁹⁵ See section III.2.3 *infra* on negotiations regarding the valuation.

¹⁹⁶ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Art. 3.

¹⁹⁷ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Arts. 15 and 16, reproduced in note 80 *supra*. See also Decree No. 667 of the President of the Republic of Belarus of 27 December 2007 “On Withdrawal and Allotment of Land Plots” (Doc. **RL-118**).

¹⁹⁸ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Art. 16; Regulation “On Withdrawal and Allotment of Land Plots” enacted by Decree No. 667 of the President of the Republic of Belarus of 27 December 2007 (Doc. **RL-119**), clause 35; Decision of MCEC No. 2060 of 16 September 2010 (Docs. **C-267** and **C-75**).

¹⁹⁹ Regulation “On Withdrawal and Allotment of Land Plots” enacted by Decree No. 667 of the President of the Republic of Belarus of 27 December 2007 (Doc. **CL-154**), clause 44.

²⁰⁰ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Art. 70.

otherwise.²⁰¹ There is, however, no codified legal procedure for a land user who wishes to terminate possession of a land plot and return it to the appropriate authority, when such authority refuses to accept the return.²⁰²

The Belarusian Land Tax

148. The Belarusian Land Tax is a property tax on land, normally paid by the owner. But when State-owned land²⁰³ is occupied by a temporary user, it is the user who is liable for the Land Tax.²⁰⁴
149. In general, the Land Tax is calculated by multiplying the tax base – equal to the cadaster value – by a rate.²⁰⁵ However, certain exceptions apply. In particular:
 - land plots granted for temporary use, but not returned upon expiration of the Land Permit or occupied without authorization, are subject to the Land Tax rate multiplied by ten,²⁰⁶ and
 - land plots with uncompleted facilities, for which the statutory term for construction has expired, are subject to double the applicable regular Land Tax rate.²⁰⁷

²⁰¹ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Art. 72.

²⁰² C PHB, para. 33.

²⁰³ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc **CL-152**), Art. 12(1):

“Land and land plots may be in state ownership or private ownership. Lands and land plots that are not privately owned by citizens, non-state legal entities of the Republic of Belarus (hereinafter referred to as “private property”, unless otherwise stipulated in this Code), not owned by foreign states or international organizations, are owned by the state.”

²⁰⁴ Tax Code of the Republic of Belarus of 29 December 2009 No. 71-Z (edition in force since 1 January 2013) (Doc. **CL-151**), Arts. 192(1) and 193. Art. 193(1) provides that:

“The land tax payers shall include organizations and individuals who possess land plots in the Republic of Belarus under the right of permanent or temporary use, lifetime hereditary possession or private ownership.”

Art. 193 further provides:

“The properties subject to land tax shall include the following land plots in the territory of the Republic of Belarus: [...] those in private ownership, permanent or temporary use (including those granted for temporary use, but not returned on time under the law, occupied without authorization, used other than for their intended purposes) by organizations.”

²⁰⁵ Tax Code of the Republic of Belarus of 29 December 2009 No. 71-Z (edition in force since 1 January 2013) (Doc. **CL-151**), Art. 202(2).

²⁰⁶ Tax Code of the Republic of Belarus of 29 December 2009 No. 71-Z (edition in force since 1 January 2013) (Doc. **CL-151**), Art. 197(2).

²⁰⁷ Tax Code of the Republic of Belarus of 29 December 2009 No. 71-Z (edition in force since 1 January 2013) (Doc. **CL-151**), Art. 197(3).

150. Thus, if land granted for temporary use by a public authority is not returned upon expiration of the Land Permit or is occupied without authorization,²⁰⁸ the land user must continue to pay the Land Tax at a penalty rate: ten times the normal tax rate.²⁰⁹ Also, if the land user exceeds the agreed term to construct a facility on the plot, the Land Tax rate is multiplied by two.²¹⁰

* * *

151. The following sections explain the Minsk Municipality's decision to file a first administrative proceeding against Manolium-E (2.1), the accrual of the Land Tax on the Facilities Land Plots (2.2), the negotiations between the Minsk Municipality and the Investor seeking to agree the compensation due for the construction work already done (2.3), and the plan proposed by the city of Minsk to the Council of Ministers to obtain transfer of the Facilities without paying compensation (2.4), as well as that plan's implementation (2.5).

2.1 THE FIRST ADMINISTRATIVE PROCEEDING AGAINST MANOLIUM-E

152. The Facilities were to be constructed on land owned by the Minsk Municipality. Thus, Manolium-E required a Land Permit issued by the municipal Executive Committee²¹¹ granting temporary use of the land.²¹² The Land Permits were granted

²⁰⁸ Unauthorized occupation means construction or any other use of the land without the right to do so. See Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Art. 1:

"[...] 'Occupation of a Land Plot' means the construction of a real estate object if a land plot was provided for the construction and operation of that property, and any other development of the land plot in accordance with its intended purpose and with the terms governing its provision where the land plot has been provided for purposes not related to the construction and operation of real estate objects; [...]"

See also Art. 72: "Unauthorized occupation of a land plot is the use of a land plot without a document certifying the right to it [...]."

²⁰⁹ Tax Code of the Republic of Belarus of 29 December 2009 No. 71-Z (edition in force since 1 January 2013) (Doc. **CL-151**), Art. 197(2):

"The land plots making part of settlement lands, which have been granted for temporary use, but not returned on time under the law, occupied without authorization, used other than for their intended purposes, shall be subject to the land tax rates applicable to their actual functional use, but multiplied by ten. The payment of the land tax shall not legalize the land plot occupied without authorization."

See also Tax Code of the Republic of Belarus of 29 December 2009 No. 71-Z (edition in force since 1 January 2014) (Doc. **CL-153**), Art. 193, reproduced in note 204 *supra*.

²¹⁰ Tax Code of the Republic of Belarus of 29 December 2009 (edition in force since 1 January 2013) (Doc. **CL-151**), Art. 197(3): "The land plots (portions of a land plot) under uncompleted facilities in relation to which the statutory term for construction has expired shall be subject to double the applicable regular land tax rate".

²¹¹ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Art. 16; Regulation "On Withdrawal and Allotment of Land Plots" enacted by Decree No. 667 of the President of the Republic of Belarus of 27 December 2007 (Doc. **RL-119**), clause 35; Decision of MCEC of 16 September 2010 (Doc. **C-267**); Decision of MCEC No. 2060 of 16 September 2010 (Doc. **C-75**).

²¹² Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Arts. 3, 15 and 16, reproduced at note 80 *supra*. See also Decree

on 24 May 2007²¹³ and on 2 May 2008,²¹⁴ covered an area of approximately 9.5 ha and were to expire on 1 July 2011, the Commissioning Date.

153. Although Manolium-E and the Minsk Municipality had entered into negotiations, when the Commissioning Date arrived Manolium-E did not request an extension of the Land Permits. This implied that from a legal perspective Manolium-E became an unauthorized user of publicly owned land.
154. This unauthorized use²¹⁵ triggered the filing by the Minsk Municipality of an administrative proceeding under Art. 23.42 of the Code of Administrative Offenses, a provision which states that delays in the return of temporarily occupied lands constitutes an administrative offence [the “**First Administrative Proceeding**”].²¹⁶
155. A few months later, in June 2012, while the First Administrative Proceeding was pending, the negotiations to extend the term of the Investment Contract broke down.
156. Manolium-E reacted by sending a letter dated 11 June 2012 to the Minsk Municipality, in which it offered to return the land on which the Facilities had been constructed:²¹⁷

“[W]e return the land plots to the lands of the City of Minsk in connection with non-extension of the investment contract”.

157. However, about a month later, on 17 July 2012, the Municipality wrote to Manolium-E, rejecting the return of the Facilities Land Plots. The reason given was that an uncompleted facility – the Depot – was located on that land.²¹⁸ The Municipality added that the return of the Facilities Land Plots could be considered when the Investment Contract was terminated:²¹⁹

“Considering that an uncompleted construction facility is located on the land plots in question (the facility has neither been commissioned, nor transferred to the communal property), a return of the land plots is impossible.

At the same time, we hereby inform that the question of conveyancing of the land plots can be considered when terminating the investment contract of 06 June 2003 and transferring the customer’s functions to a different party”.

No. 667 of the President of the Republic of Belarus of 27 December 2008 “On Withdrawal and Allotment of Land Plots” (Doc. **RL-118**).

²¹³ Decision of MCEC No. 1098 of 24 May 2007 (Doc. **C-68**); Decision of MCEC No. 1095 of 24 May 2007 (Doc. **R-29**), subsequently extended by Decision of MCEC of 3 September 2009 (Doc. **C-263**) and Decision of MCEC No. 2060 of 16 September 2010 (Doc. **C-267**).

²¹⁴ Decision of MCEC No. 951 of 2 May 2008 (Doc. **C-86**), subsequently extended by Decision of MCEC No. 2087 of 3 September 2009 (Doc. **C-73**) and Decision of MCEC No. 2060 of 16 September 2010 (Doc. **C-75**).

²¹⁵ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL- 152**), Art. 72, reproduced in note 209 *supra*.

²¹⁶ Resolution of Pervomaysky District Court of Minsk of 23 July 2012 (Doc. **C-346**), p. 1.

²¹⁷ Letter from Manolium-E to MCEC of 11 June 2012 (Doc. **C-336**).

²¹⁸ Letter from Minsk Land Planning Service to Manolium-E of 17 July 2012 (Doc. **C-337**).

²¹⁹ Letter from Minsk Land Planning Service to Manolium-E of 17 July 2012 (Doc. **C-337**), paras. 2 and 3.

The Pervomaysky Court finds for Manolium-E

158. On 23 July 2012, the Pervomaysky District Court in Minsk issued its decision in the First Administrative Proceeding, finding that Manolium-E was not liable for failing to meet the deadline to return the Facilities Land Plots [the “**Pervomaysky Decision**”].²²⁰ The Court found that Manolium-E had taken measures to return the Land Plots and had used its best efforts to resolve the situation, yet under the circumstances – non-extension of the Investment Contract, absence of a construction permit and the Minsk Municipality’s refusal to accept the return of the Facilities Land Plots – it had no chance to discharge its duty.²²¹

Further request

159. The situation reached an *impasse*. Under Belarusian law, there is no legal procedure which permits a constructor, whose Land Permit has expired, to unilaterally return the land to the public owner.²²² A written offer (as made by Manolium-E in its letter of 11 June 2012)²²³ is insufficient; the proper procedure under Art. 72 of the 2008 Land Code of the Republic of Belarus requires that the municipality formally adopt a decision to accept the offer and withdraw the Facilities Land Plots – something which the Minsk Municipality refused to do.²²⁴
160. Four years later, when the Investment Contract had already been terminated, Manolium-E again took up the issue, insisting on the return of the Facilities Land Plots: in a letter dated 19 September 2016, Manolium-E formally requested once more that the Minsk Municipality accept the offer and withdraw the Facilities Land Plots.²²⁵
161. The Minsk Municipality again denied the return of the Facilities Land Plots by letter of 29 September 2016, explaining *inter alia* that²²⁶ the court decision to terminate the Investment Contract never considered the withdrawal of the Facilities Land Plots and that Manolium-E still had property located there, a situation that ruled out return of the Land Plots.

2.2 THE LAND TAX STARTS TO ACCRUE

162. Starting on 1 January 2013, companies using a simplified taxation system were required to pay Land Tax if they held over 0.5 hectares of land. As has been explained above, such Land Tax accrued at a penalty rate on certain plots.²²⁷

²²⁰ Resolution of Pervomaysky District Court of Minsk of 23 July 2012 (Doc. C-346).

²²¹ Pervomaysky Decision (Doc. C-346), p. 2.

²²² See paras. 144-147 *supra*.

²²³ Letter from Minsk Land Planning Service to Manolium-E of 11 June 2012 (Doc. C-336).

²²⁴ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. CL-152), Art. 72.

²²⁵ Letter from Manolium-E to MCEC of 19 September 2016 (Doc. C-340).

²²⁶ Letter from MCEC to Manolium-E of 29 September 2016 (Doc. C-341).

²²⁷ See para. 149 *supra*.

163. It is undisputed that on 1 January 2013:

- Manolium-E used a simplified taxation system and held over 0.5 ha of land;
- Manolium-E's Land Permit granting it a right to the temporary use of the Facilities Land Plots had expired on 1 July 2011;
- Manolium-E's attempt to return the Facilities Land Plots had been unsuccessful, the Minsk Municipality refusing to accept the withdrawal of such Plots; and
- the Facilities Land Plots held unfinished construction works – the Depot, for which construction permits had expired.²²⁸

164. Thus, given the new tax regulation as of 1 January 2013, the tax authorities could argue that Manolium-E was not only subject to the Land Tax, but also liable for the penalty rates (notwithstanding the fact that Manolium-E had *de facto* transferred possession of the Facilities to Minsktrans, that the company had offered to return the Facilities Land Plots to the Minsk Municipality, and that it is the Municipality which had refused to accept the withdrawal of the Facilities Land Plots).²²⁹

165. Manolium-E's chief accountant flagged the situation,²³⁰ and on 21 February 2014 Manolium-E received two notices from the Tax Inspectorate requesting that it submit Land Tax calculations for the years 2013 and 2014 and pay the outstanding amounts.²³¹ Relying on the Pervomaysky Decision, Manolium-E refused to do so.²³²

2.3 VALUATIONS OF THE COMPENSATION OWED TO MANOLIUM-E

166. On 29 October 2014, the Appellate Court issued its decision, confirming the termination of the Investment Contract (see section III.1.4 above). Claimant and the Minsk Municipality initiated a new round of negotiations; since the Contract had been terminated, the only outstanding issue was to agree the compensation due to Manolium-E for the costs incurred in the construction of the Facilities. The negotiations focused on this aspect.

²²⁸ Manolium-E's construction permits expired on 30 December 2011 (Permit No. 2-206Ch-067-07 to perform construction and assembly works issued by Gosstroy on 3 October 2011 (Doc. **R-71**) and 1 September 2011 (Site Profile 2-206Ch-034 issued by Gosstroy (Doc. **R-36**)). Manolium-E made several requests to have the construction permits renewed (Letter from Manolium-E to Gosstroy of 13 April 2012 (Doc. **R-81**); Letter from Manolium-E to Gosstroy of 25 April 2012 (Doc. **R-84**)) and the terms of construction extended (Letter from Manolium-E to MCEC of 17 April 2012 (Doc. **R-83**); Letter from Manolium-E to MCEC of 18 May 2012 (Doc. **R-87**)). All petitions were denied (Letter from Gosstroy to Manolium-E of 21 April 2012 (Doc. **C-127**); Letter from MCEC and the Construction and Investment Committee to Manolium-E of 5 June 2012 (Doc. **R-90**)).

²²⁹ Letter from Manolium-E to MCEC of 11 June 2012 (Doc. **C-336**).

²³⁰ Witness statement of [REDACTED] of 12 November 2018 (**RWS-3**), paras. 30-38; Internal Memorandum from Ms. [REDACTED] to Mr. Dolgov of 15 March 2013 (Doc. **R-7**).

²³¹ Demands of an officer of the Tax Inspectorate to Manolium-E for 2013 and 2014 of 21 February 2014 (Docs. **R-111** and **R-112**).

²³² Second witness statement of A. Dolgov of 28 July 2019 (**CWS-2**) [**"Dolgov II"**], para. 6; C PHB, para. 34.

A. Report from the Minsk Cadaster Agency

167. On 4 February 2015, Mr. Ekavyan, Claimant's Director, and Mr. Dolgov, Manolium-E's Director, held a meeting with executives of the Minsk Municipality and the General Director of Minsktrans²³³ to discuss Manolium-E's compensation due to the termination of the Investment Contract. The meeting ended with the agreement²³⁴ to have a public appraisal organization (the Minsk Cadaster Agency) calculate the direct costs incurred in the construction of the Facilities, and based on such report, to establish the investor's compensation.
168. Four months later, on 16 June 2015, the Minsk Cadaster Agency issued its report, valuing the Facilities at USD 18.1 M.²³⁵
169. Manolium-E promptly requested that the Minsk Municipality pay this amount, plus the USD 1 M paid to the National Library.²³⁶ However, on 7 August 2015, the Minsk Municipality refused,²³⁷ alleging *inter alia* that the report was not an independent assessment.²³⁸
170. Claimant reacted with surprise, explaining in a letter dated 20 August 2015 that the costs reflected in the report were those recorded in the accounting of Manolium-E, requested the Minsk Municipality to conduct its own calculation within 10 days and reserved its legal actions.²³⁹
171. The Municipality's reaction went one step further. Until then, the thrust of the discussion had been the proper quantification of the compensation owed to Manolium-E. In its 4 September 2015 reply letter, the Municipality rejected the proposition that Manolium-E was entitled to any compensation and requested the gratuitous transfer of the Facilities.²⁴⁰

²³³ Minutes of the meeting attended by MCEC, Minsktrans and Claimant on 4 February 2015 (Doc. C-153).

²³⁴ Minutes of the meeting attended by MCEC, Minsktrans and Claimant on 4 February 2015 (Doc. C-153), para. 2.

²³⁵ Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. C-154), p. 43.

²³⁶ Letter from Manolium-E to MCEC of 17 June 2015 (Doc. C-155).

²³⁷ The Minsk Municipality seems to have based its refusal on two facts:

- the State Property Committee of the Republic of Belarus informed the Minsk Municipality that the R&C Report was not an independent valuation of assets in accordance with the Decree of the President of Belarus No. 615 dated 13 November 2006 "On assessment activities in the Republic of Belarus" (Letter from State Property Committee of the Republic of Belarus to MCEC of 9 July 2015 (Doc. R-126)); and
- the Minsk Cadaster Agency confirmed to the Minsk Municipality that it had "not carr[ie]d out tasks relating to identifying individual cost items and analyzing (assessing) the method of their calculation in terms of the intended purpose for the 'design, survey, construction and installation works to construct [the Facilities]', taking into account their construction readiness" (Letter from Minsk Cadaster Agency to MCEC of 26 June 2015 (Doc. R-124)).

²³⁸ Letter from MCEC to Manolium-E of 7 August 2015 (Doc. C-156).

²³⁹ Letter from Manolium-E to MCEC of 20 August 2015 (Doc. C-157).

²⁴⁰ Letter from MCEC to Manolium-E of 4 September 2015 (Doc. C-158).

Claimant appeals to the President of the Republic

172. Claimant was shocked by this change of opinion, and decided to bring the dispute to the attention of the Presidency of the Republic. On 12 November 2015, it wrote directly to President Lukashenko bringing to his “attention all aspects of the ‘lawlessness’ that the Republic’s executive officials” were conducting against the Russian investor and requesting a personal meeting.²⁴¹
173. Claimant’s letter to President Lukashenko obtained no direct answer, but it seems to have had certain effects.
174. Thus, on 2 December 2015, acting “pursuant to instruction No 39/225-4419 of the Council of Ministers of the Republic of Belarus”, the Minsk Municipality applied to the Ministry of Architecture for the designation of an entity which could develop an appropriate methodology to establish the compensation owed to Manolium-E, and review the calculation already performed by the Minsk Cadaster Agency.²⁴²
175. And three weeks later, on 26 November 2015, the Minsk Municipality, acting “pursuant to instruction No. 39/105-726 of the Prime Minister of the Republic of Belarus”, backtracked from its position that the transfer of the Facilities should be gratuitous, and informed the Ministry of Economy that

“when the value and the terms of the acquisition of the property are clarified, [the Minsk Municipality] will meet with the investor and propose those terms and conditions”.²⁴³

B. The MoF Report

176. On 30 December 2015, a meeting was held between the Minsk Municipality and the various Ministries concerned, in order to reach a common opinion. The outcome was a request for the Council of Ministers to instruct
- the MoF;
 - the Ministry of Architecture; and
 - the Technology Center for Pricing in Construction,
- to carry out a very detailed assessment and to establish
- the value of the work actually carried out by Manolium-E;

²⁴¹ Letter from Manolium-E to the President of the Republic of Belarus of 12 November 2015 (Doc. **R-127**).

²⁴² Letter from MCEC to the Ministry of Architecture and Construction of the Republic of Belarus and the State Property Committee of the Republic of Belarus of 2 December 2015 (Doc. **R-132**).

²⁴³ Letter from MCEC to the Ministry of Economy of the Republic of Belarus of 26 November 2015 (Doc. **R-129**). The Ministry of Economy sent a letter reproducing the information obtained from the Minsk Municipality to the President on 27 November 2015 (Doc. **R-130**).

- the present state of the Facilities; and
- whether the Facilities complied with the design specifications.²⁴⁴

177. The decision added that if the Investor disagreed with this methodology, “the issue of recovery of [Manolium-E’s] losses should be settled in court.”²⁴⁵

178. A month later, on 27 January 2016, the Prime Minister accepted the request and ordered the Minsk Municipality

“to subsequently use this information in adopting a decision on the recovery of [Manolium-E’s] costs in return for the transfer of the facilities – which are to be suitable for State Enterprise Minsktrans to use (operate) them in accordance with their designated purpose – into the municipal ownership of the city of Minsk”.²⁴⁶

179. In compliance with those instructions,²⁴⁷ consultants from three government entities²⁴⁸ conducted an audit of Manolium-E’s commercial and financial activities and rendered the MoF Report.

180. The MoF Report, which was issued on 22 February 2016, came to a conclusion which was almost identical to that reached by the report of the Minsk Cadaster Agency. While the Cadaster Agency had valued the Facilities at USD 18.1 M, the MoF Report came to a slightly higher number, USD 19.4 M, by adding the construction management costs:

“documented costs of [Manolium-E] directed to the establishment of [the Facilities] amount[ed] (including construction management costs) to [...] BYR 67.271 M, which is equivalent to USD 19.4 M”.²⁴⁹

2.4 THE MINSK MUNICIPALITY SUBMITS A PROPOSAL TO THE COUNCIL OF MINISTERS

181. The outcome of the MoF Report did not satisfy the Minsk Municipality: it was reluctant to pay, out of its own budget, an amount of almost USD 20 M to Manolium-E, as compensation for the construction of the (still unfinished) Facilities. The original plan had been for these Facilities to be financed off-budget, and the Municipality’s preferred solution was for Manolium-E to transfer the Facilities to the city of Minsk for free.

²⁴⁴ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 30 December 2015 (Doc. **R-135**), pp. 2-3.

²⁴⁵ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 30 December 2015 (Doc. **R-135**), p. 3.

²⁴⁶ Instruction of the Council of Ministers of the Republic of Belarus No. 39/1078p of 27 January 2016 (Doc. **R-137**).

²⁴⁷ Instruction of the MoF No. 8 of 3 February 2016 (Doc. **R-139**); Prescription issued by the MoF No. 8 of 2 February 2016 (Doc. **C-159**).

²⁴⁸ The MoF, the Republic Science and Technology Center for Pricing in Construction of the Ministry of Architecture and the Real Estate Valuation Department, and the Complex Norms Directorate.

²⁴⁹ MoF Report (Doc. **C-160**), p. 15.

182. On 29 February 2016, the Minsk Municipality held a meeting with representatives of all agencies involved in the preparation of the MoF Report, to discuss the results of the audit and the way forward.²⁵⁰
183. As a result of that meeting, on that same day the Minsk Municipality wrote an extensive letter to the Council of Ministers and attached a draft report for the President, rejecting the use of the MoF Report because “the audit was largely performed without establishing the facts of actual works carried out”.²⁵¹ The letter concluded that the valuation established in the MoF Report “may not be used as ground for the repayment of the said amount out of the budget”.²⁵² In other words, the Municipality was not prepared to pay compensation to Manolium-E, in the amount of almost USD 20 M determined by the MoF Report, funded with its own budget.
184. The Minsk Municipality proposed an alternative solution to the Council of Ministers, which would secure the gratuitous transfer of the Facilities Land Plots into municipal ownership.
185. The Minsk Municipality had “found” that Manolium-E had outstanding liabilities to the State budget amounting to USD 24.4 M, far in excess of the compensation determined in the MoF Report.²⁵³ These liabilities resulted basically from two items:²⁵⁴
 - the accrual of the Land Tax on the Facilities Land Plots; applying the penalty rates and the other charges for late payment, the Municipality calculated that the outstanding amount had reached USD 19.6 M; and
 - the sum required to complete the construction and commissioning of the Facilities, which the Municipality estimated at USD 4.7 M.
186. Based on this information, the Minsk Municipality submitted a plan to the Council of Ministers, which was consistent with the Municipality’s long-standing objective of achieving the gratuitous transfer of the Facilities into municipal ownership. The plan had two steps:
 - first, Claimant and Manolium-E would be invited to accept the transfer for free of the Facilities into municipal ownership; and
 - second, should Claimant or Manolium-E disagree, and refuse the free transfer, the second leg of the plan would be activated: the Minsk Municipality would

²⁵⁰ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**).

²⁵¹ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**), pp. 1-2.

²⁵² Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**), p. 2.

²⁵³ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**), p. 2.

²⁵⁴ Taxes are assessed by the Tax Inspectorate; there is no evidence in the record showing how and when the Minsk Municipality obtained knowledge of Manolium-E’s tax liability. See HT Day 1, 253:10-12.

order Manolium-E to pay the outstanding Land Tax, and if Manolium-E failed to do so, it would enforce the debt through the courts and foreclose on the Facilities.²⁵⁵

187. Summing up, the thrust of the Minsk Municipality's plan was to force the investor to choose between two evils:

- transferring the Facilities free of charge; or
- paying the outstanding Land Tax and other liabilities, which amounted to USD 24.4 M, or, upon refusal to pay, being deprived of the Facilities through the judicial enforcement of the unpaid amounts.

2.5 THE IMPLEMENTATION OF THE PLAN

188. The Minsk Municipality's 29 February 2016 letter was addressed to the Council of Ministers of the Republic of Belarus. The record does not include any document formalizing the reaction of the Council. But such reaction must have been positive, and an authorization to proceed must have been granted, because the Minsk Municipality promptly enforced the plan. First it filed a fresh administrative proceeding against Manolium-E (**A.**), then the Tax Inspectorate established that Manolium-E was liable for the payment of Land Tax (**B.**), leading to the enforcement of the tax liability (**C.**). Then, there was a change of tack by the Municipality, which finally accepted the return of the Facilities Land Plots (**D.**), culminating in the issuance of a Presidential Order which formalized the transfer of the Facilities into municipal ownership (**E.**).

A. The Second Administrative Proceeding

189. *Pro memoria*, Manolium-E's failure to return the Facilities Land Plots into municipal ownership had already triggered four years before the so-called First Administrative Proceeding, in which the Minsk Municipality claimed that Manolium-E had committed an administrative offense and should be fined. But on 23 July 2012, the Pervomaysky District Court in Minsk had dismissed the Municipality's claims: the judge found that Manolium-E had taken measures to return the Land Plots and had used its best efforts to resolve the situation, but that under the circumstances – non-extension of the Investment Contract, absence of a construction permit and the Municipality's refusal to accept the return of the Land Plots – it had no chance to discharge its duty.²⁵⁶

Filing of the Second Administrative Proceeding

190. As a first step in the implementation of its plan, on 2 March 2016, only two days after the letter submitted to the Council of Ministers, the Minsk Municipality decided to file a new administrative proceeding against Manolium-E [the "**Second**

²⁵⁵ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**), pp. 2-3.

²⁵⁶ Pervomaysky Decision (Doc. **C-346**), p. 2.

Administrative Proceeding”]. The Municipality again audited the Facilities Land Plots, issued administrative offense reports,²⁵⁷ and thereafter started administrative court proceedings claiming that the delayed return of the Facilities Land Plots gave rise to an administrative offense.²⁵⁸

191. What had happened in the First Administrative Proceeding occurred again: on 5 April 2016, the Pervomaysky Court of Minsk found for Manolium-E and decided that its actions “did not constitute an administrative offense”.²⁵⁹

Appeal

192. The Minsk Municipality did not accept the decision of the Pervomaysky Court and appealed the judgement to the Minsk City Court. A month later, on 13 May 2016, a hearing was held, and shortly thereafter the appeal judge issued his decision, annulling the first instance judgement and remanding the case to the Pervomaysky Court, but to a different judge. The reason given was that the first instance judge had failed to ensure a complete and objective investigation of the circumstances of the case and had failed to properly verify all evidence.²⁶⁰

Remand

193. A new first instance trial took place four days later, before a different judge of the Pervomaysky Court, and the original outcome was reversed: in a judgement dated 17 May 2016, Manolium-E was found liable for breaching Arts. 23.41 and 23.42 of the Code of Administrative Offences.²⁶¹

“Having heard the explanations of the representative of [Manolium-E] and the representatives of [...] the [Minsk Municipality], and having studied the case file, I arrive at the conclusion that in the actions undertaken by [Manolium-E] one can perceive features of administrative offences as specified by articles 23.41 and 23.42 Code of Administrative Offences”.

194. In a statement of reasons dated 26 May 2016, the judge explained that Manolium-E had failed to apply for extension of its Land Permits, and that after expiry of the Permits, it continued to use the Facilities Land Plots without authorization. As regards Manolium-E’s argument that it had tried to return the Facilities Land Plots, the judge found that such return was impossible, because Manolium-E had property located on the Plots. Finally, Manolium-E’s submission that the issue was already *res iudicata*, due to the final judgement rendered in the First Administrative Proceeding, which had been in Manolium-E’s favor, was dismissed with the

²⁵⁷ Administrative Offence Reports of the Land Planning Service of MCEC Nos. 17, 20 and 21 of 18 March 2016 (Docs. **C-343**, **C-344** and **C-345**).

²⁵⁸ Resolution of the Minsk City Court of 13 May 2016 (Doc. **C-162**); Resolution of the Minsk City Court of 14 June 2016 (Doc. **C-163**); Appeal against the Ruling of the Court of the Pervomaysky District of Minsk dated 17 May 2016 of 9 June 2016 (Doc. **C-183**), Resolution of the Minsk City Court of 3 August 2016 (Doc. **C-184**).

²⁵⁹ This is referenced in the Resolution of the Minsk City Court of 13 May 2016 (Doc. **C-162**).

²⁶⁰ Resolution of the Minsk City Court of 13 May 2016 (Doc. **C-162**), in the translation provided by Respondent.

argument that the First and the Second Administrative Proceedings referred to different land plots (a statement which does not conform to reality).²⁶²

195. Having found that an administrative offence had been committed, the judge imposed on Manolium-E a fine amounting to 52.5 M Belarusian Rubles [“BYR”].²⁶³
196. Manolium-E appealed the first instance judgement in the Minsk City Court,²⁶⁴ but on 14 June 2016 the appeal judge dismissed the appeal, averring that the conclusions of the first instance judge had been correct.²⁶⁵ A further appeal was also denied.²⁶⁶
197. Summing up, the Minsk Municipality initiated the Second Administrative Proceeding in March 2016. Three months thereafter, by mid-June 2016, the Municipality had reached its goal: an initial judgement in favour of Manolium-E had been quashed, and substituted by a second judgement, confirmed upon appeal, which found that Manolium-E, by failing to return the Facilities Land Plots, had made an unauthorized use of such Plots and had committed an administrative offence, and imposed a fine of BYR 52.5 M.

B. Decision of the Tax Inspectorate

198. In the meantime, the enforcement of the Land Tax owed by Manolium-E was also progressing.

Tax audits

199. On 17 May 2016, the Tax Inspectorate conducted a tax audit²⁶⁷ on Manolium-E, focused on Manolium-E’s failure to submit Land Tax declarations for the years 2013 to 2016.²⁶⁸ This first tax audit concluded that, as of 17 May 2016, Manolium-E’s Land Tax liability amounted to BYR 18,538 M and late payment penalties amounted to BYR 4,380 M.

²⁶² Ruling in a case concerning an administrative offense of the Court of Pervomaysky District of Minsk of 17 May 2016, Statement of Reasons of 26 May 2017 (Doc. **C-182**), p. 1.

²⁶³ Ruling in a case concerning an administrative offense of the Court of Pervomaysky District of Minsk of 17 May 2016 (Doc. **C-182**), p. 2.

²⁶⁴ Appeal against the Ruling of the Court of the Pervomaysky District of Minsk dated 17 May 2016 of 9 June 2016 (Doc. **C-183**). In the appeal, Manolium-E alleged that: there was an absence of features of an administrative offense in the actions of Manolium-E because it had tried to return the Facilities Land Plots to the Minsk Municipality; there was a statute of limitation on the imposition of administrative penalties; and there was a ruling on the same facts by the same court on 23 July 2012 which had not been overturned.

²⁶⁵ Resolution of the Minsk City Court of 14 June 2016 (Doc. **C-163**).

²⁶⁶ Resolution of the Minsk City Court of 3 August 2016 (Doc. **C-184**).

²⁶⁷ Report on the documentary [desk] tax audit of Manolium-E No. 2-5/1299 of 17 May 2016 (Doc. **C-164**); Letter from the Tax Inspectorate to Manolium-E of 18 May 2016 (Doc. **R-141**); Letter from the Tax Inspectorate to Claimant of 18 May 2016 (Doc. **R-142**).

²⁶⁸ Appendix 1 to the Report on documentary [desk] tax audit of Manolium-E No. 2-5/1299 of 17 May 2016 (Doc. **C-164**), referring to Art. 22(4)(1) of the General part of the Tax Code of the Republic of Belarus and Art. 202 of the Special part of the Tax Code of the Republic of Belarus.

200. The calculations made by the Tax Inspectorate were communicated to Manolium-E in late May 2016.²⁶⁹

New calculation

201. However, a few weeks thereafter, on 21 June 2016, the Tax Inspectorate recalculated the amount of Land Tax owed by Manolium-E, taking into consideration “new information received”, *i.e.*, the outcome of the Second Administrative Proceeding.
202. Under the new calculation, the Tax Inspectorate multiplied the tax rate by 10 and by two (depending on the land plot areas), and reassessed the penalties. In essence, the Tax Inspectorate redistributed the amount of hectares for each land plot²⁷⁰ and applied:
- twenty times the tax rate to a land plot of 7.1407 ha, which accommodated a fenced area with uncompleted parts of the Depot;²⁷¹
 - ten times the tax rate to 2.293 ha, which partly held Manolium-E’s construction facilities;²⁷² and
 - the normal tax rate to 0.11 ha, which presumably accommodated construction materials (asphalt covering) and the Pull Station.²⁷³
203. Under the new calculation, as of 21 June 2016, Manolium-E’s amended Land Tax liability increased to BYR 200,464 M, approximately ten times more than the

²⁶⁹ Report on the documentary [desk] tax audit of Manolium-E No. 2-5/1299 of 17 May 2016 (Doc. **C-164**), p. 4; Letter from the Tax Inspectorate to Manolium-E of 18 May 2016 (Doc. **R-141**); Letter from the Tax Inspectorate to Claimant of 18 May 2016 (Doc. **R-142**).

²⁷⁰ The redistribution seems to follow the decision in the Second Administrative Proceeding (Ruling in a case concerning an administrative offense of the Court of Pervomaysky District of Minsk of 17 May 2016, (Doc. **C-182**)):

- the land plot of 7.1.407 h held a fenced unfinished construction site granted for construction and maintenance of the Depot; and
- the land plot of 0.1126 ha, which later without explanation increases to 0.1342 ha, may be formed by the addition of a land plot of 0.0438 ha (Administrative Offence Report No. 17 of the MCEC Land Planning Service of 18 March 2016 (Doc. **C-343**)), which accommodated construction materials (asphalt covering), plus a land plot of 0.0325 ha which accommodated the Pull Station, and other land plot.

²⁷¹ Ruling in a case concerning an administrative offense of the Court of Pervomaysky District of Minsk of 17 May 2016 (Doc. **C-182**); Administrative Offence Report No. 17 of the Land Planning Service of MCEC of 18 March 2016 (Doc. **C-343**).

²⁷² The land plot of 2.293 ha seems to be formed by two land plots: one of 1.4219 (Administrative Offence Report No. 20 of Minsk Land Planning Service of MCEC on administrative offence of 18 March 2016 (Doc. **C-344**)), which holds Manolium-E’s property (construction facilities), plus a land plot of 0.8624 ha (Administrative Offence Report No. 21 of Minsk Land Planning Service of MCEC of 18 March 2016 (Doc. **C-345**)), which was granted to construct the Depot and was not returned on time.

²⁷³ See fn. 271 *supra*.

previous calculation;²⁷⁴ late payment penalties increased 15 times to BYR 63,976 M.²⁷⁵

Decision

204. On 19 July 2016, the Tax Inspectorate issued its decision²⁷⁶ and confirmed the new calculation: it found that Manolium-E had breached the obligation to submit Land Tax declarations to the Tax Inspectorate for the years 2013, 2014, 2015 and 2016.²⁷⁷ Thus, applying penalty rates multiplied by 10 for land used without authorization and by two for land with uncompleted facilities, the Tax Inspectorate found that the outstanding Land Tax amounted to BYR 200,464 M and the penalties to BYR 63,976 M.
205. On 24 November 2016, the Tax Inspectorate imposed an additional administrative fine of BYR 46,000 M.²⁷⁸
206. In summary, by the end of February 2016 the Minsk Municipality submitted to the Council of Ministers its plan to enforce Manolium-E's outstanding Land Tax liabilities, if Manolium-E did not agree to transfer the Facilities gratuitously into municipal ownership. Four months thereafter, the Tax Inspectorate had completed one of the legs of the plan: it had adopted a resolution, applying the 10x and 2x penalty rates, and established that the outstanding Land Tax debt amounted to BYR 200,464 M, to which penalties for late payment in an amount of BYR 63,976 M had to be added; the penalties were further increased in November 2016 by a fine of BYR 46,000 M.

C. Enforcement of the tax liability²⁷⁹

207. On 5 July 2016, even before the Tax Inspectorate had issued its liability decision, it issued an "Order on arrest and/or seizure of property" against Manolium-E, and attached ("arrested" in the words of the Order) the Facilities (*i.e.*, the Pull Station, the Depot and the Road) constructed by Manolium-E on municipal land.
208. As a next step, the Tax Inspectorate asked the Economic Court of Minsk to recover Manolium-E's tax liability against the attached Facilities,²⁸⁰ and on 18 August 2016

²⁷⁴ Letter from the Tax Inspectorate to Manolium-E of 21 June 2016 (Doc. **C-165**).

²⁷⁵ Letter from the Tax Inspectorate to Manolium-E of 21 June 2016 (Doc. **C-165**), p. 4.

²⁷⁶ Decision of the Tax Inspectorate of 19 July 2016 (Doc. **C-168**).

²⁷⁷ Decision of the Tax Inspectorate of 19 July 2016 (Doc. **C-168**), referring to Art. 22(4)(1) of the General part of the Tax Code of the Republic of Belarus and Art. 202 of the Special part of the Tax Code of the Republic of Belarus.

²⁷⁸ C III, para. 355; Resolution of the Tax Inspectorate to impose an administrative sanction of 24 November 2016 (Doc. **R-146**).

²⁷⁹ Amounts until now have been expressed in BYR. On 1 July 2016, the New Belarusian Ruble ["BYN"] replaced the Belarusian Ruble (BYR) at a ratio of 1:10,000. Henceforth amounts will be expressed in the new currency (BYN). See R PHB, n. 218.

²⁸⁰ Application of the Tax Inspectorate of 20 July 2016 (Doc. **C-169**); Tax Code of the Republic of Belarus (general provisions) of 19 December 2002 No. 166-Z (Doc. **CL-8**), Art. 37(5):

"5. Non-fulfillment or improper performance by the payer (other obliged person) of the tax obligation is the basis to apply measures for enforcement of the tax obligation and payment

the Court accepted the request and issued the Enforcement Order – a ruling authorizing the tax authorities to collect from Manolium-E “on account” of the Facilities (which the ruling values at BYN 20.7 M).²⁸¹

209. Under Belarusian law, upon a court’s decision to enforce the payment of a tax debt, the attached assets are to be sold, unless such sale is impossible or impractical²⁸² – an exception which applied to the Facilities, which had been constructed on municipal land and were intended for public use. In such case, the asset is simply transferred into municipal ownership for free, and the tax liability is set off in an amount equal to the value of the asset.²⁸³
210. Transfer of real estate assets into municipal ownership requires a Presidential Order,²⁸⁴ which must be preceded by an inventory²⁸⁵ and an expert evaluation.²⁸⁶
211. Thus, once the Economic Court of Minsk issued the Enforcement Order in August 2016, the next procedural step consisted in a Presidential Order authorizing the transfer of the Facilities into municipal ownership.
212. On 18 November 2016, a preparatory meeting, hosted by the Administrative Office of the President, and with the participation of the affected public entities, took place, to set in motion the administrative procedure for the issuance of the Presidential Order,²⁸⁷ which included a new inventory and a new valuation of the Facilities.²⁸⁸

D. Minsk accepts the return of the Facilities Land Plots

213. While the enforcement proceedings were progressing, the legal situation of the Facilities Land Plots had remained unchanged.
214. *Pro memoria*, in 2012 Manolium-E had offered to return the Land Plots,²⁸⁹ but the Minsk Municipality had refused, alleging that an uncompleted constructed facility – the Depot – made the return impossible.²⁹⁰ The Municipality’s refusal triggered

of the according penalties, as well as for application of the sanctions to the specified person in the manner and under conditions established by the legislation.”

²⁸¹ Enforcement Order (Doc. **C-170**).

²⁸² Regulation “On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets” adopted by President’s Decree No. 63 dated 19 February 2016 (Doc. **RL-126**), Art. 17.

²⁸³ Regulation “On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets” adopted by President’s Decree No. 63 dated 19 February 2016 (Doc. **RL-126**), Arts. 17, 164, 165 and 185.

²⁸⁴ Regulation “On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets” adopted by President’s Decree No. 63 dated 19 February 2016 (Doc. **RL-126**), Art. 165.

²⁸⁵ Regulation “On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets” adopted by President’s Decree No. 63 dated 19 February 2016 (Doc. **RL-126**), Arts. 248 and 249.

²⁸⁶ Regulation “On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets” adopted by President’s Decree No. 63 dated 19 February 2016 (Doc. **RL-126**), Art. 43.

²⁸⁷ Letter from the Department of Humanitarian Activities of the Administrative Office of the President of the Republic of Belarus of 18 November 2016 (Doc. **C-172**); First witness statement of Nikolay Akhramenko of 19 November 2018 (**RWS-2**), paras. 149-156.

²⁸⁸ Deed No. 018366 of property transfer of 27 January 2017 (Doc. **R-148**).

²⁸⁹ Letter from Manolium-E to MCEC of 11 June 2012 (Doc. **C-336**).

²⁹⁰ Letter from Minsk Land Planning Service to Manolium-E of 17 July 2012 (Doc. **C-337**); Letter from MCEC to Manolium-E of 29 September 2016 (Doc. **C-341**).

the accrual of Land Tax, starting on 1 January 2013, at penalty rates of 10x and 2x the normal rate, and this tax plus the penalties ballooned into a figure which exceeded the value of the Facilities.

215. On 1 December 2016, when issuance of the Presidential Order was imminent, the Minsk Municipality decided to change tack: it issued a formal decision withdrawing the Facilities Land Plots from Manolium-E.²⁹¹ The decision is a two-page document, which does not provide any reasoning. In 2012, the Minsk Municipality had argued that the withdrawal was impossible, due to the existence of the uncompleted Depot. By 2016, the Depot was still uncompleted, no new construction activity having been performed, but the Minsk Municipality now accepted the return of the Land Plots, without raising any objection. No justification for this change of position was provided.

E. The Presidential Order

216. On 20 January 2017, the President of the Republic issued the Presidential Order that permitted the transfer of the Facilities into the ownership of Minsk, without consideration:

“To transfer without consideration into the ownership of Minsk property that is owned by [Manolium-E], said property having been attached by the [Tax Inspectorate] by way of [an order dated 5 July 2016], towards payment of [Manolium-E’s] arrears to the budget of Minsk, which are subject to collection based on a ruling [...] issued by the Economic Court of Minsk on 18 August 2016”.²⁹²

217. The Presidential Order set off Manolium-E’s liabilities²⁹³ in an amount equivalent to the value of the property, which it established at BYN 27.3 M.²⁹⁴ The principal of Manolium-E’s tax liability (BYN 20.0 M) was completely written off,²⁹⁵ but the value of the assets transferred was insufficient to extinguish the totality of Manolium-E’s outstanding debt.²⁹⁶ After the transfer, Manolium-E still owed Belarus BYN 6.3 M (a sum which included BYN 1.6 M of tax penalty plus BYN 4.6 M of administrative fine imposed in the Second Administrative Proceeding).²⁹⁷
218. The Presidential Order was not notified to Claimant or to Manolium-E.²⁹⁸

²⁹¹ Decision of MCEC No. 3539 of 1 December 2016 (Doc. **C-173**).

²⁹² Presidential Order (Doc. **R-242**).

²⁹³ Presidential Order (Doc. **R-242**).

²⁹⁴ Appendix to the Presidential Order (Doc. **R-242**), p. 5. This was consistent with Statement No. 004819 of property inventory and evaluation of 25 November 2016 (Doc. **R-147**), in which Manolium-E’s property was also valued at BYR 27,287,748.05.

²⁹⁵ R II, para. 349.

²⁹⁶ R II, paras. 349-350.

²⁹⁷ R II, paras. 349-350; Letter from the Tax Inspectorate to Manolium-E of 28 April 2017 (Doc. **R-151**).

²⁹⁸ C I, paras. 314, 409.

219. A week after the issuance of the Presidential Order, on 27 January 2017, the city of Minsk re-transferred the Facilities to Minsktrans by way of a deed of property transfer.²⁹⁹

3. MANOLIUM-E'S BANKRUPTCY AND THE SECOND TAX AUDIT

220. On 12 October 2016, Manolium-E initiated voluntary liquidation proceedings.³⁰⁰ Once the transfer of the Facilities had taken place, on 8 February 2017, the Economic Court of Minsk ordered the commencement of the bankruptcy proceedings and appointed an insolvency administrator.³⁰¹
221. As a result of the bankruptcy proceedings, in March 2017 the Tax Inspectorate conducted a second, comprehensive tax audit of all of Manolium-E's tax liabilities starting from 2010.³⁰² On 24 March 2017, the Tax Inspectorate issued its report concluding that Manolium-E owed a total tax liability of BYN 16.5 M.³⁰³
222. On 21 April 2017, the insolvency administrator filed objections to the second tax audit pointing out, *inter alia*, that the second tax audit was based on outdated information and did not take into account that as of 27 January 2017 the Facilities were no longer Manolium-E's property.³⁰⁴ The Tax Inspectorate consequently adjusted Manolium-E's tax liability to BYN 14.5 M.³⁰⁵
223. On 13 June 2017, the Tax Inspectorate issued its decision to recover from Manolium-E the tax liability due pursuant to the second tax audit.³⁰⁶ By 22 September 2017, Manolium-E's total indebtedness to the State amounted to BYN 20.9 M.³⁰⁷ There is no information on the record regarding the enforcement of such amounts against Manolium-E.

²⁹⁹ Deed No. 018366 of property transfer of 27 January 2017 (Doc. **R-148**). See also Letter from the Department of Humanitarian Activities of the Administrative Office of the President of the Republic of Belarus of 18 November 2016 (Doc. **C-172**); Statement No. 004819 of property inventory and evaluation of 25 November 2016 (Doc. **R-147**); Breakdown of Manolium-E's liabilities to the State as at 19 January 2017 of 16 November 2018 (Doc. **R-159**); Breakdown of Manolium-E's liabilities to the state as at 20 January 2017 of 16 November 2018 (Doc. **R-26**).

³⁰⁰ Application of Manolium-E to initiate the liquidation procedure of 14 October 2016 (Doc. **C-8**); Official portal of the system of general jurisdiction courts of the Republic of Belarus, *Information on cases in connection with economic insolvency (bankruptcy) for the period from 1 February 2017 through 28 February 2017*, accessed on 15 November 2017 (Doc. **C-179**).

³⁰¹ Official portal of the system of common courts of the Republic of Belarus, *Information on cases in connection with economic insolvency (bankruptcy) for the period from 1 February 2017 through 28 February 2017*, accessed on 15 November 2017 (Doc. **C-179**).

³⁰² R II, para. 356.

³⁰³ According to Doc. **R-251**, taxes in 2013 – 2015 were calculated in BYR, while taxes in 2016 – 2017 were calculated in BYN. BYN 1 = BYR 10,000.

³⁰⁴ Objections of the insolvency administrator to the Tax Audit Report of 21 April 2017 (Doc. **R-149**).

³⁰⁵ Amendments of 18 May 2017 to the Unscheduled field audit report of Manolium-E No. 543 dated 24 March 2017 (Doc. **C-186**).

³⁰⁶ Decision No. 121 of the Tax Inspectorate of 13 June 2017 on the unscheduled desk tax audit report of Manolium-E of 24 March 2017 No. 543 with amendments dated 18 May 2017 (Doc. **C-188**).

³⁰⁷ R II, para. 362; Amendments of 18 May 2017 to the Unscheduled field audit report of Manolium-Engineering No. 543 dated 24 March 2017 (Doc. **C-186**).

224. In 2017, the city of Minsk organized a public auction and awarded a lease to the Mall Land Plot and the right to design and construct a similar project on the same land plot to a different developer, against payment of USD 8.8 M.³⁰⁸

4. THE INVOLVEMENT OF PRESIDENT LUKASHENKO

225. President Lukashenko was involved in Claimant's investment project from its outset. In fact, the tender results were approved by the President on 5 November 2003 and the President subsequently issued permit No. 09/124-1298 P4723 to implement the investment project.³⁰⁹
226. The initiation of the project was plagued by difficulties, and Claimant sought the intercession of President Lukashenko to renegotiate the terms of the Investment Contract with the Minsk Municipality.³¹⁰ Indeed, on 11 July 2006, President Lukashenko approved the amendments to the list of Facilities³¹¹ and, thereafter, the Parties executed the 4th Amendment agreeing on the construction of new Facilities: the Depot, Road and Pull Station.³¹²
227. Claimant again sought the intercession of President Lukashenko in 2012 during the negotiations with the Minsk Municipality to extend the Investment Contract and in 2013 during the negotiations to terminate the Investment Contract by mutual agreement. Thus, on 7 May 2012, Claimant wrote to President Lukashenko requesting his intervention to ensure a productive dialogue with the Minsk authorities:

"The reason for addressing you personally was the unconstructive, if not untenable, policy of the Minsk authorities headed by the mayor of Minsk Mr. N.A. Ladutko in respect of its relationship with investors.

This circumstance forces us to state the fact that we are terminating all investment programs in the Republic of Belarus and will seek a court judgement (if no decision is reached as a result of a productive dialogue) for the return of invested funds".³¹³

228. On 4 September 2013, Claimant once again wrote directly to President Lukashenko, explaining that despite having invested USD 20 M in the Facilities, the Minsk Municipality refused to take them into municipal ownership, and requesting termination of the Investment Contract and compensation of Claimant's expenses, or the transfer by Presidential decree of the Mall Land Plot.³¹⁴

³⁰⁸ Minutes of the Results of Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. **R-153**).

³⁰⁹ Letter from Claimant to the Assistant to President of the Republic of Belarus of 24 March 2006 (Doc. **C-63**).

³¹⁰ Letter from Claimant to the Assistant to President of the Republic of Belarus of 24 March 2006 (Doc. **C-63**). Letter from MCEC to the President of the Republic of Belarus (Doc. **C-35**).

³¹¹ Resolution of the President of the Republic of Belarus of 11 July 2006 (Doc. **C-64**).

³¹² 4th Amendment (Doc. **C-66**).

³¹³ Letter from Manolium-E to the President of the Republic of Belarus of 7 May 2012 (Doc. **R-86**).

³¹⁴ Letter from Claimant to the President of the Republic of Belarus of 4 September 2013 (Doc. **R-109**).

229. Claimant's letters to the President did not have the desired effect and, on 13 November 2013, the Minsk Municipality and Minsktrans filed the claim before the Economic Court of Minsk against Claimant and Manolium-E, requesting the termination of the Investment Contract.³¹⁵

230. While a decision on the termination of the Investment Contract was pending before the Economic Court of Minsk, the President wrote an important message to the public administration,³¹⁶ signaling his disappointment with the treatment received by the investor, but also ordering the termination of the Investment Contract and the completion of the Depot:

"To N. A. Ladut'ko

Such dealings with investors by [the Minsk Municipality] is unacceptable!

Clean up the mess. Bring guilty ones to liability.

If [Manolium] is unable from a financial perspective to ensure the implementation of the investment project concerning the development of the territory within Kiseleva – Krasnaya Streets and Masheroova Avenue along with the movement of the trolleybus depot, then terminate the contract.

Take necessary measures to complete the construction of the new depot buildings complex.

Sort out the situation regarding the completion by OOO "Tekstur" of the implementation of the investment project concerning the reconstruction of the building at 24A Revolyutsionnaya Street into the hotel.

Report the results by 1 June 2014."³¹⁷

231. The record is unclear regarding the effects of the President's letter. But on 9 September 2014, after learning about the decision of the Economic Court of Minsk to terminate the Investment Contract, Claimant insisted on writing to President Lukashenko asking him:

"to look once more at the issues you are already familiar with which are associated with the infringement of our rights and legal interests by the Minsk City Executive Committee, and to take drastic steps in response, aimed at a compromise solution to all the existing problems in this regard, typical of the

³¹⁵ Statement of claim to terminate the Investment Contract of 14 October 2013, filed with the Economic Court of Minsk on 12 November 2013 (Doc. **C-140/R-201**).

³¹⁶ The letter is addressed to Mr. Ladut'ko; the record that does not show the specific organization to which he belongs.

³¹⁷ Instruction of the President of the Republic of Belarus No. 09/111-123 of 12 May 2014 (Doc. **R-249**), also mentioned in Draft report to the Administration of the President of the Republic of Belarus (appended to the letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-248**)).

established style and methods of your many years of leadership of the Republic of Belarus.”³¹⁸

232. No formal answer to the letter appears in the record, but the instructions issued subsequently by the President are clear: to monitor the situation and “to defend the interests of the state at all times.”³¹⁹
233. In 2015, after the termination of the Investment Contract and during the negotiations to evaluate the compensation owed, Claimant sent further letters to the President,³²⁰ requesting the transfer of the Facilities into communal ownership³²¹ and the President’s personal involvement³²² to reach an agreement on the compensation owed to Claimant.³²³
234. Once again, no answer to those letters can be found in the record. However, there is no doubt that the President of Belarus was promptly informed of the steps taken by the Minsk Municipality. In fact, on 4 February 2016, while the MoF audit was taking place, the President ordered the First Deputy Prime Minister to “take control over settling the situation” and report back by 1 March 2016.³²⁴
235. Right before this deadline, on 29 February 2016 the Minsk Municipality laid out its plan to ensure the free transfer of the Facilities through a letter to the Council of Ministers,³²⁵ which attached a draft report for the President.³²⁶
236. President Lukashenko clearly agreed with the Municipality’s plan, which was subsequently executed with the President’s support: he issued the Presidential Order which authorized the gratuitous transfer of the Facilities into the ownership of Minsk.³²⁷

³¹⁸ Letter from Claimant to the President of the Republic of Belarus of 19 September 2014 (Doc. **R-247**).

³¹⁹ Resolution No. 09/219 P1937 of 26 December 2014, mentioned in Draft report to the Administration of the President of the Republic of Belarus (appended to the letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-248**)); Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**).

³²⁰ Letter from Claimant to the Administration of the President of the Republic of Belarus of 8 January 2015 (Doc. **R-120**); Letter from Manolium-E to the President of the Republic of Belarus of 30 June 2015 (Doc. **R-125**).

³²¹ Letter from Claimant to the Administration of the President of the Republic of Belarus of 8 January 2015 (Doc. **R-120**).

³²² Letter from Manolium-E to the President of the Republic of Belarus of 30 June 2015 (Doc. **R-125**).

³²³ Letter from Manolium-E to the President of the Republic of Belarus of 12 November 2015 (Doc. **R-127**).

³²⁴ Instruction of the Administrative Office of the President of the Republic of Belarus No. 09/124-185 of 5 February 2016 (Doc. **R-244**).

³²⁵ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**).

³²⁶ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**).

³²⁷ Presidential Order (Doc. **R-242**).

IV. RELIEF SOUGHT BY THE PARTIES

237. Claimant requests the following relief in its post-hearing brief:³²⁸

- “I. Dismiss Respondent’s jurisdictional objections and find jurisdiction to consider the Dispute;
- II. Issue an arbitral award declaring that the Republic of Belarus:
 - a) Violated its obligations to Claimant under Belarusian law and the EEU Treaty by unlawfully expropriating Claimant’s investments;
 - b) Violated its obligations to Claimant under Belarusian law and the EEU Treaty by violating the FET Standard toward Claimant and its investments;
 - c) Is obligated to compensate Claimant for:
 - (i) Damages caused by Respondent in the form of:
 - a. Lost Profits for the Investment Object of USD 155.9 million or any other amount the Tribunal finds justified;
 - b. Loss of the [...] Facilities of USD 20,434,679;
 - (ii) Alternatively, damages caused by Respondent in the form of Lost Profits for the Investment Object for USD 31.87 million or USD 8.87 million;
 - (iii) Pre-award interest on the amounts awarded by the Tribunal:
 - a. In relation to the Lost Profits of the Investment Object, from the Valuation Date (31 January 2015) with the USD LIBOR 6-months rate with a country risk premium (6.5%) applied to the Award date;
 - b. In relation to the Loss of the [...] Facilities with the USD LIBOR 6-months rate with a country risk premium (6.5%) applied to the Award date based on one of four alternative scenarios:
 - i. From the Valuation Date (31 January 2015);
 - ii. From the Facilities Transfer Dates;
 - iii. From the date expenses were incurred; and

³²⁸ C PHB, para. 100. *See also* C III, para. 871; C II, para. 127; CI, para. 576.

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

- (iv) Alternatively to (iii) above, pre-award interest the Arbitral Tribunal deems just and appropriate for the Lost Profits of the Investment Object and Loss of the [... Facilities;
- (v) Post-award interest on the amounts awarded by the Tribunal from the Award date until the date of full payment with the USD LIBOR 6-months rate with a country risk premium for Belarus as calculated by Professor Aswath Damodaran, or in absence of publication of Professor Aswath Damodaran –with a similar rate for a country risk for Belarus;
- (vi) Alternatively to (v) above, post-award interest the Arbitral Tribunal deems just and appropriate from the Award date until the date of full payment;
- (vii) Arbitration costs, including legal costs; and
- (viii) Grant Claimant any and all other relief the Arbitral Tribunal deems just and appropriate.”

238. Respondent’s request for relief is as follows:³²⁹

- “a) an award declining the jurisdiction over all the Claimant’s claims; or, alternatively
- b) to the extent the Tribunal finds jurisdiction over all or part of the Claimant’s claims, a declaration dismissing the Claimant’s claims in full; or, alternatively
- c) to the extent the Tribunal does not dismiss all of the Claimant’s claims on the merits, a declaration that the Claimant suffered no loss; or, alternatively
- d) to the extent the Tribunal finds that the Claimant suffered some loss, an award calculating the Claimant’s loss on the assumptions and in the amounts as submitted by the Respondent; and
- e) an order that the Claimant pay the costs of these arbitral proceedings, including the costs of the Tribunal and the legal and other costs incurred by the Respondent as a result of the Claimant’s meritless claims, on a full indemnity basis; and
- f) interest on any costs awarded to the Respondent, in an amount to be determined by the Tribunal.”

³²⁹ R II, para. 719; R I, para. 80; R III, para. 1464; R PHB, para. 111.

V. JURISDICTIONAL OBJECTIONS

239. Respondent has raised the following jurisdictional objections:

- first, that both the Termination and the Tax Disputes arose before the Treaty entered into force on 1 January 2015 and that the Treaty does not apply retroactively [the “***Ratione Temporis* Objection**”];
- second, that the Termination Dispute is not a Treaty claim, but a contractual claim [the “**Contractual Objection**”];
- third, that Minsktrans was not empowered to exercise government authority and performed its obligations under the Investment Contract in a private capacity [the “**Minsktrans Objection**”];
- fourth, that the Tribunal lacks jurisdiction under the Belarusian law on investments [the “**Domestic Law Objection**”]; and
- finally, that Claimant failed to prove that it owns the investment made through Manolium-E [the “***Ratione Materiae* Objection**”].

240. The Tribunal will start with the *Ratione Temporis* Objection, which if accepted in respect of both the Termination and the Tax Disputes would render all other objections moot.

241. If the Tribunal finds that it does not have *ratione temporis* jurisdiction over the Termination Dispute, such finding will render the Contractual Objection and the Minsktrans Objection moot, and it will only have to analyze the Domestic Law Objection and the *Ratione Materiae* Objection.

1. **RATIONE TEMPORIS OBJECTION**

242. The Arbitral Tribunal will briefly summarize the Parties’ positions (1.1) and will then render its decision (1.2.)

1.1 POSITIONS OF THE PARTIES

A. **Respondent’s position**

243. Respondent says that the substantive provisions of the EEU Treaty do not apply retroactively to acts or facts which took place before the Treaty entered into force on 1 January 2015³³⁰ [the “**Effective Date**”] and that the Tribunal does not have jurisdiction over disputes that arose before that Date.³³¹

³³⁰ R II, para. 369; R PHB, para. 2(a).

³³¹ R II, para. 369.

244. Respondent adds that both the Termination and the Tax Disputes arose before the Effective Date.³³²
245. Belarus explains that it is a basic principle under international law³³³ that a State can only be responsible for breach of a treaty obligation if the obligation is in force at the time of the alleged breach.³³⁴ Respondent argues that the termination of the Investment Contract is a single act³³⁵ that took place before 1 January 2015,³³⁶ and thus, cannot breach the EEU Treaty.³³⁷ Belarus also submits that the substantive provisions of the Treaty do not apply to Land Tax which accrued in 2013 and 2014, because the Treaty was not in force at that time.³³⁸
246. Pursuant to the principle of non-retroactivity enshrined in Art. 28 of the Vienna Convention on the Law of Treaties [the “VCLT”], and in the absence of express words to the contrary, tribunals have consistently held that they do not have jurisdiction over *disputes* arising before the entry into force of the relevant treaty.³³⁹ The EEU Treaty lacks any indication³⁴⁰ or express provision³⁴¹ showing that the Member States of the Treaty intended for it to apply to disputes that had arisen before the Effective Date.³⁴² Thus, the Tribunal has no jurisdiction over disputes that arose before that Date.
247. Respondent agrees with Claimant’s definition of dispute as a “disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”,³⁴³

³³² R II, para. 369; R PHB, paras. 2(b), 5-9.

³³³ International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (Docs. **CL-11**, **RL-15**), Art. 13.

³³⁴ R II, para. 392.

³³⁵ R II, paras. 419-428; R III, paras. 727-739.

³³⁶ R II, paras. 415 *et seq*; R PBH, paras. 10-12.

³³⁷ R PHB, paras. 10-12; R II, para. 395, 419; R III, paras. 740-754.

³³⁸ R PHB, para. 13; Amendments of 18 May 2017 to the Unscheduled field audit report of Manolium-E No. 543 dated 24 March 2017 (Doc. **C-186**); Land tax liabilities of Manolium-E by year (Doc. **R-251**).

³³⁹ R II, paras. 377 *et seq*, citing to *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award dated 18 May 2010 [“**ATA v. Jordan**”] (Doc. **RL-32**), para. 98, and Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments of 2 August 1993 (Doc. **RL-31**); *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award dated 31 July 2007 [“**MCI v. Ecuador**”] (Doc. **RL-1**), paras. 59-61, and Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993 (Doc. **RL-33**); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction dated 9 November 2004 [“**Salini**”] (Doc. **RL-30**), para. 170, and Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments of 21 July 1996 (Doc. **RL-34**); *Impregilo Sp.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005 [“**Impregilo v. Pakistan**”] (Doc. **RL-36**), para. 300, and Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments of 19 July 1997 (Doc. **RL-35**).

³⁴⁰ *ATA v. Jordan* (Doc. **RL-32**), para. 98.

³⁴¹ *Impregilo v. Pakistan* (Doc. **RL-36**), para. 300.

³⁴² R II, paras. 382-390.

³⁴³ R II, para. 399; R III, para. 692.

and submits that both the Termination and Tax Disputes arose before the Effective Date.³⁴⁴

248. As for the Termination Dispute, Respondent says that this dispute arose on 12 November 2013, when the Minsk Municipality and Minsktrans submitted the claim to terminate the Investment Contract to the Belarusian courts.³⁴⁵ The Termination Dispute then culminated on 29 October 2014, when the Appellate Court Decision was issued and the Investment Contract was effectively terminated.³⁴⁶ Thus, the Termination Dispute arose and culminated before the Effective Date.³⁴⁷
249. As regards the Tax Dispute, Respondent argues that the dispute arose by 21 February 2014, when the Tax Inspectorate demanded that Manolium-E comply with its tax obligations to submit Land Tax returns for 2013 and 2014.³⁴⁸ Thus, the Tax Dispute also arose before the Effective Date.

B. Claimant's position

250. Claimant submits that the Tribunal has jurisdiction *ratione temporis* over its two claims:³⁴⁹ Respondent committed “material, independently actionable breaches” after the Effective Date, which is sufficient to confer jurisdiction on the Tribunal.³⁵⁰
251. Claimant says that the intention of the parties to the EEU Treaty was to include disputes which had arisen before the entry into force of the Treaty.³⁵¹
252. Claimant acknowledges that treaties generally do not apply retroactively and that the EEU Treaty does not contain a retroactivity clause.³⁵² However, Claimant avers that the circumstances of the EEU Treaty “otherwise establish” an intent of retroactivity.³⁵³ Claimant submits as evidence of such intent the parties’ approach in a prior treaty (the Agreement on Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community of 12 December 2008 – the “**EEC Investment Treaty**”),³⁵⁴ where they had specifically stated that it did not apply to disputes which had arisen before its entry into force.³⁵⁵ Since there is no similar provision in the EEU Treaty, Claimant argues that this shows that the parties to the EEU Treaty intended it to apply to pre-existing

³⁴⁴ R II, paras. 397-414.

³⁴⁵ R II, para. 408.

³⁴⁶ R II, para. 409.

³⁴⁷ R II, para. 409; R III, paras. 696-706, citing to *ATA v. Jordan* (Doc. **RL-32**), paras. 103-108, and others.

³⁴⁸ R II, para. 412; R PBH, paras. 8-9.

³⁴⁹ C PHB, section I.

³⁵⁰ C III, para. 368; C PHB, para. 8.

³⁵¹ C PHB, paras. 9-12.

³⁵² C PHB, para. 9.

³⁵³ C II, paras. 22-31; C III, paras. 390-392; C PHB, para. 9.

³⁵⁴ The EEC Investment Treaty, signed on 12 December 2008 by the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Republic of Tajikistan (Doc. **CL-35**). The EEU Treaty was signed on 29 May 2014 by three member states of the Eurasian Economic Community: the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan (Doc. **RL-136**).

³⁵⁵ C II, para. 26; C PHB, paras. 9-10.

disputes.³⁵⁶ Additional evidence of intent can be derived from the fact that Art. 84 of Annex 16 to the Treaty is drafted in present continuous, rather than future tense.³⁵⁷

253. Claimant says that, in any case, both the Termination Dispute and the Tax Dispute arose after the Effective Date, when the Treaty entered into force.
254. As regards the Termination Dispute, Claimant avers that its primary claim is for creeping expropriation,³⁵⁸ which is a composite act³⁵⁹ that gives rise to “continuing breaches.”³⁶⁰ A continuing breach extends over the entire period during which the act continues and remains in violation of the international obligation.³⁶¹ In particular, Claimant argues that the proceedings for the termination of the Investment Contract constituted a continuous, uninterrupted breach which began with the petition to terminate the Contract, and concluded with the Cassation Decision of 27 January 2015³⁶² and the sale of the right to develop the Mall in 2017.³⁶³ Thus, because the denouement of Respondent’s breaches occurred after the Effective Date, the Tribunal has jurisdiction over the Termination Dispute.³⁶⁴
255. As for the Tax Dispute, Claimant argues that it arose when Respondent first attempted to enforce the tax obligations on 17 May 2016;³⁶⁵ the Presidential Order and the Minsk Municipality’s proposal to improperly use Land Tax to seize the Facilities were made and given effect after the Effective Date.³⁶⁶

1.2 DECISION OF THE TRIBUNAL

256. This arbitration is based on the Treaty creating the Eurasian Economic Union (EEU Treaty), signed on 29 May 2014 by the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan,³⁶⁷ with the purpose of:³⁶⁸
 - establishing the Eurasian Economic Union, an international organization of regional economic integration;³⁶⁹

³⁵⁶ C III, paras. 398-402; C PHB, paras. 10-11.

³⁵⁷ C PHB, para. 12.

³⁵⁸ C III, para. 412.

³⁵⁹ C III, para. 413.

³⁶⁰ C III, para. 415, citing to commentary to the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (Doc. **CL-87**).

³⁶¹ C III, para. 416, citing to International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (Doc. **CL-11**).

³⁶² C II, paras. 43-51; C PHB, paras. 42-45.

³⁶³ C PHB, para. 45.

³⁶⁴ C II, para. 51; C III, paras. 403-419; C PBH, paras. 7, 42-45.

³⁶⁵ C PHB, paras. 20-24.

³⁶⁶ C PBH, paras. 14-19, 34-39.

³⁶⁷ The Republic of Armenia and the Kyrgyz Republic joined the Eurasian Economic Union on 2 January 2015 and 6 August 2015, respectively.

³⁶⁸ EEU Treaty, para. 1.

³⁶⁹ EEU Treaty, Art. 1(2).

- ensuring free movement of goods, services, capital and labour within the Union; and
 - ensuring a common policy in certain economic sectors.
257. The Treaty is a complex document composed of 118 articles and 33 annexes. Section XV, which encompasses Arts. 65 to 69, and Annex 16 [the “**Protocol**”], regulate “trade in services, incorporation, activities and investments in the Member States.”³⁷⁰
258. Section VII of the Protocol, encompassing Arts. 67 through 87, is devoted to investments. Arts. 84 and 85(3) of the Protocol establish a dispute resolution clause for investor-State disagreements, and afford the Tribunal jurisdiction to adjudicate
- “all disputes between a recipient State and an investor of another Member State arising from or in connection with an investment of that investor on the territory of the recipient State [...]”.
259. According to Art. 65, section VII shall apply to all investments made by investors of a Member State in the territory of another Member State “starting from December 16, 1991”. The Protocol lacks any other provision regarding its *ratione temporis* application.
260. The Tribunal is called upon to determine whether it has *ratione temporis* jurisdiction to adjudicate the claims submitted by Claimant. To do so, the Tribunal must address three separate questions:
- First, when did the EEU Treaty come into force?
 - Second, when did Claimant invest in Belarus?
 - Third, when did Belarus breach the Treaty as per Claimant’s allegations?
 - And, finally, Claimant’s additional arguments.
261. The Parties agree that the Treaty came into force on 1 January 2015 (the Effective Date). Thus, the answer to the first question requires no further discussion.
262. The other two questions and Claimant’s additional arguments will be addressed by the Tribunal in the following sections (**A.** through **C.**)

³⁷⁰ The Protocol has two annexes: one devoted to procedures for trade in telecommunication services, and another, containing a list of horizontal restrictions retained by Member States for all sectors and activities.

A. When did Claimant invest in Belarus?

263. Art. 65 of the Protocol provides that the EEU Treaty protects all investments made by investors of other Member States in Belarus after 16 December 1991:

“65. The provisions of this section shall apply to all investments made by investors of the Member States on the territory of another Member State starting from December 16, 1991.”

264. Claimant alleges that it made the following investments in Belarus:³⁷¹

- financing of the design and construction of the Facilities and the Mall, in accordance with the Investment Contract signed on 6 June 2003; and
- incorporating Manolium-E in the territory and under the laws of Belarus on 18 March 2004.³⁷²

265. (The issue of whether such alleged investments are effectively protected under the EEU Treaty is addressed in detail in section V.3 *infra*.)

266. Claimant’s alleged investments were made in 2003 and 2004. The EEU Treaty covers investments made since 1991. Thus, Claimant’s investments are covered by the EEU Treaty, so long as all other conditions are met.

B. When did the alleged breaches of the Treaty occur?

267. Indeed, the fact that Claimant’s investments can be covered by the Treaty is not sufficient. Claimant and Respondent agree that an additional temporal requirement must be complied with: the Tribunal only has jurisdiction to adjudicate breaches of the Treaty committed by Belarus *after* the Effective Date.³⁷³

268. The Tribunal concurs: as a general rule, international treaties are not to be applied retroactively to acts committed before the treaty came into effect. The prohibition of retroactivity is an obvious consequence of the principle of legality, and it is enshrined in Art. 28 of the VCLT:

“Article 28. NON-RETROACTIVITY OF TREATIES

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.” [Emphasis added]

269. The prohibition of retroactivity implies that the legality of a Member State’s actions under the EEU Treaty can only be assessed if the Treaty was in force at the time the

³⁷¹ C I, para. 343.

³⁷² Certificates of State Registration of Manolium-E in the Unified State Register of Legal Entities and Individual Entrepreneurs of 18 March 2004 and 16 April 2014 (Docs. C-5 and C-6); Charter of Manolium-E of 16 April 2004 (Doc. C-7).

³⁷³ C III, para. 391; C PHB para. 9; R II, para. 392; R III, para. 625; R PHB, para. 2(a).

act was performed. This principle – which is considered “well established”³⁷⁴ and supported by State practice³⁷⁵ – is also reflected in Art. 13 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts of 2001 [the “**ILC Articles**”]:

“Article 13: International Obligation in Force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”

270. Claimant identifies the following acts committed by Belarus that allegedly gave rise to the Termination and Tax Disputes; the measures in gray boxes relate to the Termination Dispute, those in white boxes to the Tax Dispute.

DATE	EVENT	TREATY BREACH
December 2003 – 2008	The Minsk Municipality and Minsktrans protracted the issuance of Construction Permits and the delivery of the Facilities Land Plots ³⁷⁶	Breach of good faith, transparency (Art. 69)
December 2007 – June 2009	The Minsk Municipality protracted the delivery of the Mall Land Plot ³⁷⁷	Breach of good faith, transparency (Art. 69)
2008 – July 2011	The Minsk Municipality and Minsktrans disrupted the deadlines for construction and transfer of the Facilities into communal ownership ³⁷⁸	Breach of good faith, transparency (Art. 69)
1 July 2011 – September 2013	Unreasonable requirement to continue building the Facilities ³⁷⁹	Breach of good faith, (Art. 69)
1 July 2011 – September 2014	Bad faith negotiations to extend the Investment Contract and the deadline for construction of the Depot ³⁸⁰	Breach of good faith, transparency (Art. 69)

³⁷⁴ Commentary (9) to Art. 13 of the ILC Articles (Doc. **CL-87**).

³⁷⁵ Commentary (4) to Art. 13 of the ILC Articles (Doc. **CL-87**).

³⁷⁶ C I, paras. 419-433.

³⁷⁷ C I, paras. 434-446.

³⁷⁸ C I, paras. 447-471; C III, paras. 627-630.

³⁷⁹ C I, paras. 472-473.

³⁸⁰ C I, paras. 472-476.

12 November 2013	Filing of claim to terminate the Investment Contract before the Economic Court of Minsk	Creeping expropriation/ breach of good faith (Art. 69)
15 August 2014	Non-transparent issuance of the decision regarding the seizure of the Mall Land Plot ³⁸¹	Breach of good faith, transparency (Art. 69)
9 September 2014	Termination of the Investment Contract by the Economic Court of Minsk ³⁸²	Creeping expropriation/ disproportionate response, breach of the fair and equitable treatment [“FET”] standard, breach of good faith (Art. 69)
29 October 2014	Termination of the Investment Contract as provided for in the Appellate Court Decision ³⁸³	Creeping expropriation/ disproportionate response, breach of FET, breach of good faith (Art. 69)
1 JANUARY 2015 - EFFECTIVE DATE		
27 January 2015	Cassation Decision confirming the termination of the Investment Contract	Indirect/creeping expropriation (Art. 79); disproportionate response, breach of FET, breach of good faith.
January 2015 – April 2016	Negotiations for compensation for the Facilities ³⁸⁴	Breach of good faith/FET (Art. 69)

³⁸¹ C III, paras. 668-671.

³⁸² C III, para. 604.

³⁸³ C I, paras. 512-526; C III, para. 604.

³⁸⁴ Letter from MCEC to Claimant of 20 January 2015 (Doc. **R-121**); Minutes of the meeting attended by MCEC, Minsktrans and Claimant on 4 February 2015 (Doc. **C-153**); Letter from Manolium-E to Minsk Cadaster Agency of 24 February 2015 (Doc. **R-122**); Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. **C-154**); Letter from Manolium-E to MCEC of 17 June 2015 (Doc. **C-155**); Letter from Minsk Cadaster Agency to MCEC of 26 June 2015 (Doc. **R-124**); Letter from the State Property Committee of the Republic of Belarus to MCEC of 9 July 2015 (Doc. **R-126**); Letter from MCEC to Manolium-E of 7 August 2015 (Doc. **C-156**); Letter from the Administrative Office of the President of the Republic of Belarus to the State Control Committee of the Republic of Belarus of 17 August 2015 (Doc. **R-206**); Letter from White & Case to Baker McKenzie of 25 July 2018 (Doc. **C-157**); Letter from the State Control Committee of the Republic of Belarus to MCEC of 27 August 2015 (Doc. **R-207**); Letter from MCEC to Manolium-E of 4 September 2015 (Doc. **C-158**); Letter from MCEC to the MoF of the Republic of Belarus of 26 November 2015 (Doc. **R-129**); Instruction of the Council of Ministers of the Republic of Belarus No. 39/1078p of 27 January 2016 (Doc. **R-137**); Prescription issued by the MoF No. 8 of 2 February 2016 (Doc. **C-159**); Instruction of the Council of Ministers of the Republic of Belarus No. 39/105-74/1691r of 9 February 2016 (Doc. **R-243**); MoF Report (Doc. **C-160**).

February 2016	Expropriation of the Facilities through illegitimate tax measures ³⁸⁵	Breach of good faith, transparency (Art. 69); beginning of indirect expropriation (Art. 79)
18 March 2016	The Minsk City Land Planning Service audits the Facilities Land Plots and reports that they are being illegally occupied ³⁸⁶	Breach of good faith, transparency (Art. 69)
17 May 2016	The court levies an administrative penalty for Manolium-E's unlawful occupation of the Facilities Land Plots ³⁸⁷	Breach of good faith, FET (Art. 69)
17 May 2016	The Tax Inspectorate conducts a first tax audit on Manolium-E and imposes taxes ³⁸⁸	Breach of good faith, transparency (Art. 69)
21 June 2016	The Tax Inspectorate conducts a second tax audit on Manolium-E and imposes taxes ³⁸⁹	Breach of good faith, transparency (Art. 69)
1 December 2016	The Minsk Municipality seizes the Facilities Land Plots ³⁹⁰	Breach of good faith, transparency (Art. 69)
27 January 2017	Transfer of the Facilities to Respondent ³⁹¹	Indirect expropriation (Art. 79); breach of good faith, transparency (Art. 69)

³⁸⁵ Instruction of the Administrative Office of the President of the Republic of Belarus No. 09/124-185 of 5 February 2016 (Doc. **R-244**); Instruction of the Council of Ministers of the Republic of Belarus No. 39/105-74/169 of 9 February 2016 (Doc. **R-243**); Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**); Instruction of the President of the Republic of Belarus No. 09/111-123 of 12 May 2014 (Doc. **R-249**), also mentioned in the Draft report to the Administration of the President of the Republic of Belarus (appended to the letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-11/1084-2 of 29 February 2016) (Doc. **R-248**).

³⁸⁶ Administrative Offence Reports of the Land Planning Service of the MCEC Nos. 17, 20 and 21 of 18 March 2016 (Docs. **C-343**, **C-344** and **C-345**).

³⁸⁷ Resolution of the Minsk City Court of 13 May 2016 (Doc. **C-162**); Ruling in a case concerning an administrative offense of the Court of Pervomaysky District of Minsk of 17 May 2016 (Doc. **C-182**).

³⁸⁸ Report on the documentary [desk] tax audit of Manolium-E No. 2-5/1299 of 17 May 2016 (Doc. **C-164**).

³⁸⁹ Amendments and supplements of 21 June 2016 to the desk tax audit report of Manolium-E No. 2-5/1299 dated 17 May 2016 (Doc. **C-166**).

³⁹⁰ Decision of MCEC No. 3539 of 1 December 2016 (Doc. **C-173**).

³⁹¹ Presidential Order (Doc. **R-242**); Deed No. 018366 of property transfer of 27 January 2017 (Doc. **R-148**).

12 September 2017	Respondent auctions the right to develop the Mall to a third party ³⁹²	Breach of good faith/FET (Art. 69)
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a. The Tax Dispute

271. The chronology shows that all measures related to the Tax Dispute took place *after* the Effective Date. There can be no question of retroactive application of the Treaty: when the violations allegedly occurred, the Treaty was already in force.

Respondent's counter-argument

272. Respondent says that the obligation for Manolium-E to pay Land Tax accrued in January 2013 as a result of amendments to the 2009 Tax Code of the Republic of Belarus – not in 2016. Belarus adds that the dispute arose in February 2014 when the Tax Inspectorate demanded that Manolium-E pay its Land Taxes, and Manolium-E refused to do so – well before the Effective Date.³⁹³
273. The Tribunal does not agree.
274. It is true, as Respondent asserts, that in February 2014 the Tax Inspectorate demanded that Manolium-E pay its 2013 and 2014 Land Taxes accrued on the Facilities.³⁹⁴ But these tax demands did not include a ten-fold multiplier to the alleged tax liability and did not give rise to a Treaty claim. It was in 2016, when the Tax Inspectorate applied the multiplier, that (in Claimant's allegation) the tax became confiscatory and expropriatory and rose to the level of a Treaty breach.³⁹⁵ At that time, the Treaty had already come into force.

b. The Termination Dispute

275. Under the Termination Dispute, Claimant submits that Belarus committed two composite breaches of its Treaty obligations: it committed a creeping expropriation, which began before the Effective Date, but culminated thereafter, when the Treaty had already come into effect (ii.), and it also breached the FET standard both before and after the Effective Date (iii.). Both alleged breaches must be analyzed

³⁹² Announcement of the public auction (under conditions) No. 09-U-17 for the right for design and construction of capital structures of 12 September 2017 (Doc. **R-152**); Minutes of the Results of Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. **R-153**).

³⁹³ R PHB, para. 8.

³⁹⁴ Demand of an officer of the Tax Inspectorate to Manolium-E for 2013 of 21 February 2014 (Doc. **R-111**) and Demand of an officer of the Tax Inspectorate to Manolium-E for 2014 of 21 February 2014 (Doc. **R-112**).

³⁹⁵ C PHB, para. 23; Instruction of the Administrative Office of the President of the Republic of Belarus No. 09/124-185 of 5 February 2016 (Doc. **R-244**); Instruction of the Council of Ministers of the Republic of Belarus No. 39/105-74/1691r of 9 February 2016 (Doc. **R-243**); Letter from MCEC to the Council of Ministers of the Republic of Belarus No. 1/2-11/1084-2 of 29 February 2016 (Doc. **R-140**); Protocol of Minsk Land Planning Service of MCEC on administrative offence No. 17 of 18 March 2016 (Doc. **C-343**); Protocol of Minsk Land Planning Service of MCEC on administrative offence No. 20 of 18 March 2016 (Doc. **C-344**); Ruling in a case concerning an administrative offense of the Court of Pervomaysky District of Minsk of 17 May 2016 (Doc. **C-182**); HT Day 2 (Cross-examination of Mr. Akhramenko), 438:413-15.

separately, to establish whether the Tribunal has *ratione temporis* jurisdiction. But first the Tribunal must analyze Art. 15 of the ILC Articles – the legal basis for the finding of a composite breach (i.). In a final section, the Tribunal will address Claimant’s counter-arguments (iv.)

(i) ILC Articles

276. Both Parties rely on Art. 15 of the ILC Articles:

“Article 15: Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”

277. Art. 15.1 defines the moment when a composite breach is deemed to occur and Art. 15.2 the date and extension in time of the breach. The composite act is deemed to occur when the action or omission happens which, taken together with the previous actions or omissions, is sufficient to constitute the wrongful act. And the breach starts with the date of the first act of the series and extends over the entire period.

278. The Commentary to the ILC Articles contains the following explanation:

“Article 15. Breach consisting of a composite act

Commentary

(8) Paragraph 1 of article 15 defines the time at which a composite act “occurs” as the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act, without it necessarily having to be the last in the series. [...]

(10) Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point, the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibition would thereby be undermined”.

279. The Commentary reiterates that the purpose of Art. 15.1 is to set a criterion to determine the occurrence of a composite act (i.e., when the last action has occurred, which taken with the previous ones, is sufficient for the breach to have occurred);

while Art. 15.2 determines the relevant date of the breach (*i.e.*, the date of the first act in the series).³⁹⁶

280. Although the general thrust of the ILC Articles regarding composite acts is clear, the Articles do not address every single question, and in particular do not solve the issue of how the entry into force of a treaty affects a string of acts, where some acts have occurred before and others after the entry into force of that treaty.³⁹⁷ In other words: what happens if the string of acts is divided into two parts, because the Effective Date falls somewhere within this period?
281. The appropriate solution is to break down the composite claim into individual claims related to measures prior to the Effective Date and claims related to measures after the Effective Date – the Tribunal only having jurisdiction to adjudicate those claims arising out of measures which occurred after the Effective Date.³⁹⁸ The question which the Tribunal must adjudicate is whether the portion of the composite act that takes place after the Effective Date (without taking into consideration the portion before) is sufficient to constitute a breach.

(ii) Creeping expropriation

282. Claimant avers that its primary claim is for creeping expropriation,³⁹⁹ which is a composite act⁴⁰⁰ that gives rise to “continuing breaches”,⁴⁰¹ extending over the entire period during which the act continues.⁴⁰² In particular, Claimant argues that the proceedings for the termination of the Investment Contract constituted a continuous, uninterrupted breach, which began with the petition by the Minsk Municipality in 2013 to terminate the Investment Contract, and concluded with the Cassation Decision in 2015⁴⁰³ and the sale of the right to develop a similar project in 2017.⁴⁰⁴ Thus, if the Tribunal finds that the Cassation Decision and the sale of the right to develop the Mall form part of a continuing chain of events, it should assert jurisdiction over the entire Termination Dispute, even if certain links in that chain occurred prior to the Effective Date.⁴⁰⁵

³⁹⁶ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award dated 22 August 2016 [“**Rusoro**”] (Doc. **RL-96**), para. 226.

³⁹⁷ *Rusoro* (Doc. **RL-96**), para. 227.

³⁹⁸ *Rusoro* (Doc. **RL-96**), para. 231, citing to *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability dated 17 March 2015 [“**Bilcon**”], para. 266 where the tribunal found it “possible and appropriate, as did the tribunals in *Feldman*, *Mondev* and *Grand River*, to separate a series of events into distinct components, some time barred, some still eligible for consideration on the merits.”

³⁹⁹ C III, para. 412.

⁴⁰⁰ C III, para. 413.

⁴⁰¹ C III, para. 415, citing to the commentary to the ILC Articles (Doc. **CL-87**).

⁴⁰² C III, para. 416, citing to the ILC Articles (Doc. **CL-11**).

⁴⁰³ C II, paras. 43-51; C PHB, paras. 42-45; C I, paras. 512-526; C III, paras. 528-577.

⁴⁰⁴ C PHB, para. 45.

⁴⁰⁵ C PHB, paras. 42-43.

283. Respondent disagrees. In its opinion, the termination of the Investment Contract is a single act⁴⁰⁶ that took place before the Effective Date,⁴⁰⁷ and thus, cannot breach the EEU Treaty.⁴⁰⁸

Discussion

284. The Arbitral Tribunal agrees with Respondent that it lacks *ratione temporis* jurisdiction to adjudicate the claim for creeping expropriation – regardless of whether Claimant’s expropriation claim is analyzed as a composite act (as proposed by Claimant) or as a single act (as defended by Respondent):
- Assuming Claimant’s position and considering the termination of the Investment Contract as a composite act, such composite act took place, when the last action occurred, which, taken together with the State’s previous actions, would be sufficient to provoke a breach; applying this rule, the Termination Decision by the Minsk Economic Court, which effectively terminated the Investment Contract, would be the last action, which (taken together with all prior actions, e.g. Minsk Municipality’s submission to the court) was sufficient to cause an expropriation;⁴⁰⁹
 - If the position of Respondent is preferred, and it is assumed that the termination is a single act, the single measure which would have caused the expropriation would again have been the Termination Decision issued by the Minsk Economic Court.
285. The Tribunal has already found that the Termination Decision is excluded *ratione temporis* from the Tribunal’s jurisdiction.
286. In fact, Claimant only refers in its creeping expropriation claim to two measures which occurred after the Effective Date, 1 January 2015, when the Treaty came into force:
- the Supreme Court’s Cassation Decision rejecting Manolium-E’s motion for annulment of the Appellate Court Decision, which was rendered on 27 January 2015;⁴¹⁰ and
 - the 2017 decision of the Minsk Municipality to organize a public auction to award to a third party the right to develop a similar project on the land plot that had been intended for the Mall, against payment of USD 8.8 M.⁴¹¹

⁴⁰⁶ R II, paras. 419-428; R III, paras. 727-739.

⁴⁰⁷ R II, paras. 415 *et seq*; R PHB, paras. 10-12.

⁴⁰⁸ R PHB, paras. 10-12, R II, para. 395, 419; R III, paras. 740-755.

⁴⁰⁹ This is confirmed by Prof. Crawford when discussing exhaustion of local remedies: “The breach of international law occurs at the time when the treatment occurs. The breach is not postponed to a later date when local remedies are exhausted.” Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, 1st Sess., U.N. Doc. A/CN.4/498 (1999), para. 145.

⁴¹⁰ Cassation Decision (Doc. C-152).

⁴¹¹ Minutes of the Results of Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. R-153); C III, paras. 384-385.

287. Whether the Cassation Decision and the sale of the right to develop a similar project, over which the Tribunal has jurisdiction *ratione temporis*, by themselves are sufficient to support a claim for expropriation, is a question which pertains to the merits, and will be adjudicated in section VI.2.4 *infra*.

(iii) FET

288. Claimant also includes within its Termination Dispute an allegation that Respondent breached the FET standard, by failing to act in good faith at all stages of the Investment Contract (signature, execution and termination), both before and after the Effective Date.⁴¹²

289. All alleged FET breaches committed prior to the Effective Date fall outside the *ratione temporis* jurisdiction of the Tribunal.

290. But Claimant also contends that the Cassation Decision was adopted in bad faith and gave rise to a denial of justice,⁴¹³ and that the 2017 decision to award the project to a third party also constituted a breach of the FET standard.⁴¹⁴ These breaches were allegedly committed after the Effective Date, within the *ratione temporis* jurisdiction of the Tribunal. Whether these measures amount to a breach of the FET standard is a question for the merits, which will be decided in sections VI.2.2 and VI.2.3 *infra*.

(iv) Claimant's counter-argument

291. The EEU Treaty was signed on 29 May 2014. It entered into force on 1 January 2015. Between these two dates, the Appellate Court Decision terminating the Investment Contract, and allegedly destroying Claimant's investment, was rendered (on 29 October 2014).

292. To support its contention that the Tribunal's jurisdiction also includes the Appellate Court Decision, Claimant invokes Art. 18 of the VCLT, which provides that States must "refrain from acts which would defeat the object and purpose of a treaty" after signing of the treaty but prior to its entry into force, and says that the Tribunal may consider actions by Respondent between the signing and entry into force of the EEU Treaty in considering Claimant's treaty claims.⁴¹⁵

293. Respondent counters that it did not commit any acts or omissions which defeated the object and purpose of the EEU Treaty prior to its entry into force and that no evidence has been submitted by Claimant in support of its position.⁴¹⁶

⁴¹² C I, para. 415.

⁴¹³ C III, paras. 549, 723 and 732.

⁴¹⁴ C I paras. 500-503; C PHB, para. 7.

⁴¹⁵ C PHB para. 47.

⁴¹⁶ R PHB para. 14.

Discussion

294. As a starting point, the Tribunal agrees with the finding in *Tecmed* that

“[i]n assessing the Respondent’s conduct [...] the Arbitral Tribunal shall take into account the principle of good faith, both as a general expression of the principle of international law embodied in Article 26 of the Vienna Convention and in its particular manifestation embodied in Article 18 of such Convention with respect to the Respondent’s conduct between [...] the date on which the Agreement was signed by the Contracting Parties and the date of its entry into force [...]”⁴¹⁷ [Emphasis added]

295. Good faith requires that between the signing and the entry into force of a treaty, signatory States abstain from acts which are incompatible with the treaty’s object and purpose.

296. In the present case, however, there is no evidence that the EEU Treaty was invoked before the Court of Appeal or that the Appellate Court Decision was issued in breach of the principle of good faith, with the purpose of “defeat[ing] the object and purpose” of the EEU Treaty.

C. Claimant’s additional arguments

297. Claimant says that the EEU Treaty can be applied retroactively to disputes which arose before the Treaty entered into force on the Effective Date.

298. Claimant submits two arguments:

- First, it invokes Art. 28 of the VCLT and argues that the circumstances of the EEU Treaty “otherwise establish” an intent of retroactivity;⁴¹⁸ Claimant submits as evidence of the parties’ intent of retroactive application, the approach followed in the EEC Investment Treaty,⁴¹⁹ signed in 2008 by the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan – five years before the signature of the EEU Treaty in 2008;⁴²⁰ the EEC Investment Treaty specifically stated that it did not apply to disputes that had arisen before the treaty’s entry into force;⁴²¹ since the EEU Treaty lacks an equivalent provision, Claimant argues that this shows that the parties intended the EEU Treaty to apply retroactively.⁴²²

⁴¹⁷ *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award dated 29 May 2003 [“*Tecmed*”] (Doc. **CL-32**), para.70.

⁴¹⁸ C II, paras. 22-31; C III, paras. 390-392; C PHB, para. 9.

⁴¹⁹ The EEC Investment Treaty, signed on 12 December 2008 by the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Republic of Tajikistan entered into force on 11 January 2016 (Doc. **CL-35**). The EEU Treaty was signed on 29 May 2014 by three member states of the Eurasian Economic Community: the Russian Federation, the Republic of Belarus and the Republic of Kazakhstan and entered into force on 1 January 2015 (Doc. **RL-136**).

⁴²⁰ The EEC Investment Treaty was later signed by the Kyrgyz Republic and the Republic of Tajikistan (Doc. **CL-35**).

⁴²¹ C II, paras. 26-28; C PHB, paras. 9-10.

⁴²² C III, paras. 398-402; C PHB, paras. 10-11.

- Second, Claimant submits that additional evidence of intent can be derived from the fact that Art. 84 of the Protocol is drafted in present continuous, rather than future tense.⁴²³

299. The Tribunal does not share Claimant's position.

Claimant's first argument

300. The principle of non-retroactivity of international treaties, enshrined in Art. 28 of the VCLT, is a general principle of international law: a treaty does not bind a party in relation to acts or facts which took place, or any situation which ceased to exist, before its entry into force. The VCLT only permits deviation from this principle if "a different intention appears from the treaty or is otherwise established".

301. The 2008 EEC Investment Treaty, executed between Belarus, Kazakhstan and Russia (the same parties as to the EEU Treaty), explicitly excluded its application to disputes which had arisen before its entry into force:

"The Agreement does not apply to disputes that arose before entry of the Treaty into force."⁴²⁴

302. The EEU Treaty does not include such an exception and therefore may apply to pre-existing disputes. This, however, does not bear on the application of the principle of non-retroactivity set forth in Art. 28 of the VCLT. Whether or not a dispute arose before the Effective Date, a treaty can only be applied to acts or facts which took place (or a situation which continued to exist) *after* the Effective Date.⁴²⁵

303. The general rule is thus that the EEU Treaty does not apply to acts or omissions that occurred before the Effective Date. Any acts or omissions pertaining to the Termination Dispute that took place before the Effective Date cannot constitute breaches of the EEU Treaty and, consequently, the general rule mandates that the Tribunal lacks *ratione temporis* jurisdiction.

Exception to the general rule

304. The general rule, however, knows one exception: if a dispute arises before the entry into force of the Treaty, but the State adopts additional measures after the Effective Date,

- which pertain to the same dispute and
- which imply a continuous or composite breach of the Treaty.

⁴²³ C PHB, para. 12.

⁴²⁴ EEC Investment Treaty (Doc. **CL-35**), Art. 12.

⁴²⁵ Tribunals have consistently followed this approach. See e.g. *ATA v. Jordan* (Doc. **RL-32**), para. 98; *MCI v. Ecuador* (Doc. **RL-1**), para. 59-61; *Salini* (Doc. **RL-30**), para. 170; *Impregilo v. Pakistan* (Doc. **RL-36**), para. 300. See also *The Mavrommatis Palestine Concessions* (*Greece v. Britain*), P.C.I.J., Series A, No. 2, Judgement dated 30 August 1924 [*"Mavrommatis Palestine Concessions"*] (Doc. **RL-9/CL-33**), p. 35.

If this happens, a tribunal must still assess whether the portion of that continuous or composite act, which occurred after the Effective Date, by itself constitutes a Treaty breach.

305. The exception to the general rule confirms the Tribunal’s previous finding: that it does have *ratione temporis* jurisdiction to decide Claimant’s Termination Dispute (which had arisen before the Effective Date), but only with regard to measures which the State adopted after the Effective Date (*i.e.*, the Cassation Decision and the 2017 decision to award the project to a third party).

Claimant’s second argument

306. Claimant notes that Art. 84 of the Protocol is drafted in present continuous, rather than in future tense, and argues that the choice of grammatical tense proves the Treaty parties’ intent to permit retroactive application to existing disputes.
307. Again, the Tribunal sees the matter differently. The present continuous tense is normally used to show that an action is happening now – either at the moment of speech or now in a larger sense – or is going to take place in the near future. The use of present continuous tense, by itself, does not prove that the parties’ intent was to override the general international law principle of non-retroactivity of treaties.

D. Conclusion

308. Summing up, the Tribunal finds that it has jurisdiction *ratione temporis* to decide the Tax Dispute in its entirety.
309. As regards the Termination Dispute, the Tribunal partially accepts the *Ratione Temporis* Objection, and decides:
- that it does have jurisdiction to adjudicate the alleged breaches of the Treaty (expropriation and FET standard, including denial of justice), with regard to measures which occurred after the Effective Date (*i.e.*, (i) the Cassation Decision and (ii) the auctioning in favour of a third party of the right to develop a project similar to the Mall); and
 - that it lacks jurisdiction to adjudicate all other alleged breaches of the Treaty forming part of the Termination Dispute which occurred before the Effective Date.

2. DOMESTIC LAW OBJECTION

310. Claimant initiated this arbitration under the provisions of the Protocol to the EEU Treaty and “taking into account the provisions of national laws of the Republic of Belarus.”⁴²⁶ Claimant’s intention was reflected in para. 59 of the Terms of Appointment:

⁴²⁶ C I, para. 8.

“The Tribunal shall decide this dispute in accordance with the EEU Treaty, complemented by International Law, and in accordance with Belarusian Law when applicable”.

311. Claimant submits that the Investment Law of the Republic of Belarus No. 53-Z of 12 July 2013 [the “**Belarusian Investment Law**”]⁴²⁷ is applicable to the present dispute,⁴²⁸ and asserts that:

- it is an investor pursuant to the requirements of both the EEU Treaty and the Belarusian Investment Law;⁴²⁹
- it made an investment in Belarus in accordance with both the EEU Treaty and the Belarusian Investment Law;⁴³⁰
- its claims comply with both legal instruments;⁴³¹ and
- its investment is protected by and the Tribunal has jurisdiction under both legal instruments.⁴³²

312. Therefore, it asks the Tribunal to find that Respondent has violated its obligations to Claimant under “Belarusian Law and the EEU Treaty”⁴³³ by unlawfully expropriating its investment and violating the FET standard.

313. Respondent disagrees: in this Domestic Law Objection Respondent alleges that the Tribunal lacks jurisdiction under the Belarusian Investment Law.

2.1 POSITIONS OF THE PARTIES

A. Respondent’s position

314. Respondent alleges that the Tribunal does not have jurisdiction under the Belarusian Investment Law mainly because the Belarusian Investment Law does not apply to investments made and disputes that arose before the Law came into force on 24 January 2014.⁴³⁴

315. Respondent submits that as per the preamble and Art. 2 of the Belarusian Investment Law, the scope of the law is limited to investments made after its entry into force, the purpose of the Law being to attract *new* investments, through the introduction of incentives such as the new dispute resolution provision.⁴³⁵ In addition, since the Belarusian Investment Law does not contain an express

⁴²⁷ Doc. CL-10.

⁴²⁸ C I, section 5.2.

⁴²⁹ C I, section 5.3.

⁴³⁰ C I, section 5.4.

⁴³¹ C I, section 5.5.

⁴³² C I, section 5.6.

⁴³³ C PHB, para. 100. For full text see para. 237 *supra*.

⁴³⁴ R II, paras. 459, 462-468; R III, paras. 910-921.

⁴³⁵ R II, paras. 462-465; R III, paras. 917, 920.

provision providing for its retroactive application, it cannot cover investments made or disputes that arose before 24 January 2014.⁴³⁶

316. Alternatively, even if the Belarusian Investment Law applied to the present case, Respondent contends that:

- Claimant did not make an investment under the Belarusian Investment Law;⁴³⁷
- the Tax and Termination Disputes fall within the exclusive competence of Belarusian State courts, and therefore are not covered by Respondent's consent to arbitrate provided in the Belarusian Investment Law;⁴³⁸ and
- finally, in any event, the Investment Contract takes precedence over the Belarusian Investment Law, and thus, the Termination Dispute falls within the competence of the Economic Court of Minsk.⁴³⁹

B. Claimant's position

317. In the summary position included by Claimant in the Terms of Appointment, Claimant alleged that "irrespective of the application of EEU Treaty, the Tribunal has jurisdiction based on Belarusian laws",⁴⁴⁰ because the Belarusian Investment Law also entitles foreign investors to refer disputes to international arbitration in accordance with the UNCITRAL Rules. This statement prompted Respondent's Domestic Law Objection.

318. Claimant rebuts Respondent's argument on the inapplicability of the Belarusian Investment Law by arguing that the plain terms of the preamble and Art. 2 of the Belarusian Investment Law show that its purpose is not only to attract investments but also to protect existing investments.⁴⁴¹ If the law did not apply to existing investments, Respondent would be entitled to discriminate against Claimant; an absurd result.⁴⁴² The purpose of the Law is not to withdraw the protection granted by the previous investment law,⁴⁴³ and thus the Law must apply to existing investments.

319. In response to Respondent's alternative arguments, Claimant contends that:

- Manolium-E is a wholly-owned subsidiary, which meets the requirements to be considered as an "investment" under Art. 1 of the Belarusian Investment Law, and is not subject to any of the exclusions of Art. 2;⁴⁴⁴

⁴³⁶ R II, paras. 466-468; R III, paras. 911-916.

⁴³⁷ R III, paras. 922-927.

⁴³⁸ R II, paras. 460, 469-478; R III, paras. 932-938.

⁴³⁹ R II, paras. 461, 479-481; R III, paras. 939-944.

⁴⁴⁰ ToA, para. 51(d).

⁴⁴¹ C III, paras. 477-490.

⁴⁴² C III, para. 483.

⁴⁴³ C III, paras. 484-486.

⁴⁴⁴ Presentation of Claimant's opening statement, Part II (Jurisdiction) ["H2, II"], slide 76.

- the Belarusian courts do not have exclusive jurisdiction over the Tax or Termination Disputes because these Disputes are not included in any of the categories of disputes for which the Belarusian Code of Commercial Procedure grants the Belarusian courts exclusive jurisdiction;⁴⁴⁵ and
- the present dispute does not arise under the Investment Contract, but rather under the EEU Treaty;⁴⁴⁶ hence, the dispute resolution clause in the Investment Contract does not preclude the jurisdiction of the Tribunal.⁴⁴⁷

2.2 DECISION OF THE TRIBUNAL

320. The Republic of Belarus enacted three successive laws for the protection of investments:

- the Law “On Foreign Investments on the Territory of the Republic of Belarus”, dated 14 November 1991;
- the Investment Code dated 22 June 2011; and
- the Belarusian Investment Law, which entered into force on 24 January 2014.⁴⁴⁸

321. Claimant says that the Tribunal has jurisdiction to adjudicate the present dispute, not only pursuant to the EEU Treaty, but also under the Belarusian Investment Law – an averment which is denied by the Republic of Belarus.

322. The answer to this dispute is to be found in Arts. 3 and 13 of the Belarusian Investment Law:

- Art. 3 acknowledges the *lex specialis* principle, providing that the special investment protection afforded by international treaties entered into by the Republic of Belarus prevails over the general protection set forth in the Belarusian Investment Law (A.);
- while Art. 13 of the Belarusian Investment Law permits investors to access investment arbitration, but without clarifying whether it covers investments made prior to its promulgation in 2014 (B.)

A. Art. 3: the *lex specialis* principle

323. Art. 3 of the Belarusian Investment Law deals with the law applicable to investments made in Belarus. Crucially, it provides that if international treaties signed by the Republic of Belarus provide distinct rules for the protection of investments, such rules take precedence over those contained in the Belarusian Investment Law:⁴⁴⁹

⁴⁴⁵ C III, paras. 491-493.

⁴⁴⁶ C III, para. 498.

⁴⁴⁷ C III, para. 500.

⁴⁴⁸ R III, para. 918.

⁴⁴⁹ Belarusian Investment Law (Doc. CL-10), Art. 3.

“Article 3. Law of the Republic of Belarus in the field of investments

[...]

If the international treaty of the Republic of Belarus establishes other rules, than those that are provided by this Law, then the rules of the international treaty shall apply”. [Emphasis added].

324. The EEU Treaty, signed and ratified by Russia and Belarus after enactment of the Belarusian Investment Law, protects investments made by investors of a Member State in the territory of another Member State. There is no controversy that Claimant is a Russian investor, which holds an investment in Belarus. Thus, in matters relating to investment protection, simultaneously regulated in the EEU Treaty and in the Belarusian Investment Law, the Tribunal is bound to give preference to the EEU Treaty provisions.

B. Art. 13: access to international investment arbitration

325. Art. 13 of the Belarusian Investment Law deals with the resolution of disputes between investors and the Republic of Belarus, and under certain circumstances permits that such disputes be adjudicated through international investment arbitration.

326. This provision gives rise to two distinct issues:

- the first is whether access to arbitration is afforded only to those investors which made their investments *after* enactment of the Belarusian Investment Law in 2014 (as Respondent contends)⁴⁵⁰, or if it is open to all investors, without temporal limitation (as Claimant alleges)⁴⁵¹ (**a.**);
- the second is the compatibility between the dispute resolution method defined in the Belarusian Investment Law and the methods provided for in international investment treaties entered into by Belarus (**b.**)

a. Art. 13 applies only to post-2014 investments

327. The first question to be addressed is whether the dispute resolution method provided for in Art. 13 of the Belarusian Investment Law is available to investors which made their investments before promulgation of that Law. The matter has been hotly disputed by the Parties,

- the Republic saying that investments made while the 1991 Investment Law and the 2011 Investment Code were in force are protected by those rules, while the 2014 Belarusian Investment Law only benefits investments made after its entry into force on 24 January 2014,

⁴⁵⁰ R III, paras. 910-920.

⁴⁵¹ C III, paras. 480-490.

- and Claimant averring the contrary: that the protection of the 2014 Belarusian Investment Law extends to prior investments.
328. As regards the interpretation of a domestic law which grants benefits to aliens, and in the absence of clear regulation of this question in the Law, the Tribunal, by majority, gives deference to the Respondent's reasonable interpretation of this Law.
329. First, the Belarusian Investment Law does not contain any indication that it extends to existing investments. Contrary to Claimant's argument,⁴⁵² the preamble of the Law does not address this question: the purpose of the Law is stated to be "attracting investments", "ensuring guarantees, rights and legitimate interests of investors". The phrase means that such guarantees and rights are provided to attract new investments, implicitly confirming that existing investments will continue to enjoy the protection afforded by the 1991 Investment Law and the 2011 Investment Code, which did not open up the possibility to access international arbitration.
330. Moreover, the definition of investments covered by the Belarusian Investment Law in Art. 1 refers to "any property... being invested in the territory of the Republic of Belarus in ways provided by this Law", which can only mean investments made once the law was in force.
331. In addition, the preamble and other provisions of the Belarusian Investment Law are written in the present tense, which is commonly used in Russian when one undertakes an obligation in the future.⁴⁵³
332. Second, the wording of Art. 13 of the Belarusian Investment Law limits the investor's right to access arbitration to "disputes between an investor and the Republic of Belarus in the carrying out of investments" – the expression seems to be referring to future investments, made after the promulgation of the Law and thereafter giving rise to disputes with the State.
333. Third, Belarus invokes Art. 67 of the Law "On Normative Legal Acts" of the year 2000,⁴⁵⁴ which establishes that a law, to be applied retroactively, must contain an express provision. No such provision was inserted into the Belarusian Investment Law, and consequently Claimant's investments, made long before January 2014, did not become retroactively subject to this law, but continued to be regulated by the 1991 Investment Law and the 2011 Investment Code⁴⁵⁵ – two regulations which did not afford investors the right to access international investment arbitration.⁴⁵⁶
334. Summing up, the Tribunal, by majority, finds that the better interpretation of Belarusian law is the one defended by Respondent. Claimant's investments continue to enjoy the protection afforded by the 1991 Investment Law and the 2011 Investment Code, which did not open up the possibility to access international arbitration. However, Art. 13 of the 2014 Belarusian Investment Law does not

⁴⁵² C III, para. 482.

⁴⁵³ R III, para. 920.

⁴⁵⁴ R III, para. 912, citing to Law of the Republic of Belarus No. 361-Z "On Normative Legal Acts" of 10 January 2000 (Doc. **RL-49**).

⁴⁵⁵ R III, para. 914.

⁴⁵⁶ R III, para. 917.

afford Claimant, whose investments were made before the Law was promulgated, and thus could not have been invested “in ways provided by this Law”, access to international investment arbitration, with the consequence that this Tribunal’s jurisdiction is limited to adjudicating the present dispute under the terms of the EEU Treaty.

Dissenting opinion

335. Arbitrator Alexandrov disagrees with this conclusion.
336. First, while it is correct that the Belarusian Investment Law does not contain any indication that it extends to existing investments, it does not contain any indication to the contrary either. The general rule, therefore, is that the Law protects all investments; thus, pre-existing investments would be excluded only if there was a specific provision to that effect. This is consistent with the object and purpose of the Law, which includes “ensuring guarantees, rights and legitimate interests of investors” – all investors, not only “future” investors. It is also telling that Chapter II of the Law (Articles 7-10) deals with the State regulation of investments and addresses the powers of the various State organs (the President, the Government, State agencies and organizations) in the area of investments. It is illogical, indeed absurd, that such provisions would only apply to new investments.
337. Second, the argument based on the wording of Art. 13 of the Belarusian Investment Law is unavailing. Art. 13 covers “disputes between an investor and the Republic of Belarus in the carrying out of investments.” The majority concludes incorrectly that this provision refers only to future investments. This would only make sense if the term “carrying out” is interpreted to cover solely the stage of “making” the investment rather than the subsequent operation of the investment. But there is no doubt that the Law covers the post-establishment stage of the “carrying out” of an investment. Consequently, its scope cannot exclude existing investments that are at the stage of operation or post-establishment.
338. Third, the principle of non-retroactive application of Belarusian laws is entirely irrelevant to this analysis. Claimant is not seeking the retroactive application of the Law. Claimant is asserting breaches of the Law after the Law’s entry into force with respect to an investment that exists after the Law’s entry into force. This would not be a retroactive application of the Law by any stretch of the imagination.
339. Therefore, Arbitrator Alexandrov concludes that there is jurisdiction *ratione temporis* under the Belarusian Investment Law.

b. International treaties prevail over the Belarusian Investment Law

340. There is a second argument which supports the Tribunal’s finding that it lacks jurisdiction under the 2014 Belarusian Investment Law.
341. When the 2014 Belarusian legislator promulgated the new Investment Law, permitting access to international arbitration, it was aware that certain investors were entitled (or could in the future become entitled) to a specific dispute resolution regime, defined (or to be defined) in investment treaties entered into by Belarus.

The last paragraph of Art. 13 regulates this situation, providing that, if there is an overlap between the dispute resolution method incorporated in the Belarusian Investment Law and that provided for in an international treaty, the latter will prevail:⁴⁵⁷

Article 13. Resolution of disputes between the investor and the Republic of Belarus

[...]

In case the international treaty of the Republic of Belarus and (or) the agreement concluded between the investor and the Republic of Belarus establishes otherwise with regard to the resolution of disputes between the investor and the Republic of Belarus arising when making investments, then the provisions of the international treaty of the Republic of Belarus and (or) the agreement concluded between the investor and the Republic of Belarus shall apply". [Emphasis added].

342. This is precisely what happened in the present case once the EEU Treaty entered into force.
343. The EEU Treaty, which entered into force on 1 January 2015, almost a year after the enactment of the Belarusian Investment Law, contains (in Art. 85 of the Protocol) a specific procedure for the settlement of investment disputes between a Russian investor and the Republic of Belarus, entitling the investor to access *ad hoc* arbitration under the UNCITRAL Rules and affording jurisdiction to the arbitral tribunal.
344. Art. 13 *in fine* of the Belarusian Investment Law regulates the situation where an investor has the option to access two dispute resolution methods, one provided for in a treaty and the other in the Investment Law. The solution given in the Investment Law is that the treaty procedure will prevail.
345. The implications for this case are evident. Claimant filed the notice of arbitration in 2017. At that time, Art. 13 of the Belarusian Investment Law was in force and, thus, precluded the possibility that an investor covered by the EEU Treaty could seek access to investment arbitration based on the domestic law. Even if it is assumed *arguendo* that Claimant's investment is covered by the Belarusian Investment Law (*quod non*), the last paragraph of Art. 13 of the Law provides that the jurisdictional "provisions of the international treaty [...] shall apply" in preference to those of the Law.

Dissenting opinion

346. Arbitrator Alexandrov does not share that conclusion either. During the period between 24 January 2014, when the Belarusian Investment Law entered into force, and 1 January 2015, when the EEU Treaty entered into force, there was no conflict between the two. The EEU Treaty could not apply 'in preference to' the Law prior to the EEU Treaty's Effective Date because the EEU Treaty was not yet in force.

⁴⁵⁷ Belarusian Investment Law (Doc. CL-10), Art. 13.

Therefore, no conflict existed prior to 1 January 2015, and the Belarusian Investment Law applied to Claimant's investment during that period.

* * *

347. In summary: the Tribunal, by majority, accepts Respondent's Domestic Law Objection, and declares that it lacks jurisdiction to adjudicate the Termination and Tax Disputes submitted by Claimant applying the Belarusian Investment Law. The Tribunal's jurisdiction emanates from the EEU Treaty, and is limited to adjudicating breaches of the obligations assumed by the Republic of Belarus under that Treaty.

3. RATIONE MATERIAE OBJECTION

348. Claimant alleges that it made two investments in Belarus, protected under the EEU Treaty:⁴⁵⁸

- financing of the design and construction of the Facilities and the Mall; and
- incorporation of Manolium-E to implement the Investment Contract and finance the construction of the Facilities and the Mall.

349. In the *Ratione Materiae* Objection, Respondent contests that the alleged investments meet the requirements to be considered as such under the EEU Treaty.

3.1 POSITIONS OF THE PARTIES

A. Respondent's position

350. Respondent does not contest that Claimant is an investor in Belarus, but alleges that Claimant has failed to prove that it is the beneficial owner of the sums invested through Manolium-E⁴⁵⁹ in the Facilities. Thus, Respondent considers there is insufficient evidence that the Facilities are Claimant's "qualifying investment" pursuant to the EEU Treaty.⁴⁶⁰

351. Respondent admits that the source of the funds received by Claimant is irrelevant to the question of whether the Tribunal has jurisdiction *ratione materiae*, but takes issue with the fact that the funds were not channeled through Claimant.⁴⁶¹ Instead, the funds were transferred by third parties directly to Manolium-E, with Claimant itself not contributing anything or bearing any risk in respect of the Facilities. Accordingly, the Facilities are neither an investment of Claimant according to the

⁴⁵⁸ C I, para. 343.

⁴⁵⁹ R II, para. 482.

⁴⁶⁰ RII, paras. 482-486; R III, paras. 901-904; R PHB, para. 15.

⁴⁶¹ R PHB, para. 15.

definition of the EEU Treaty, nor as that term has been discussed in investment treaty jurisprudence.⁴⁶²

352. Even if the Tribunal finds that the Facilities are an investment, Respondent argues that Claimant would not be entitled to claim damages to the extent of its own loss,⁴⁶³ since Claimant is not one of the creditors of Manolium-E and does not appear to have suffered any loss.⁴⁶⁴

B. Claimant's position

353. Claimant submits that it is an investor that made investments in Belarus, and thus, submits a direct claim based on the assets held and losses suffered⁴⁶⁵ by a company it controls: Manolium-E. Claimant avers that it owns 100% of the shares of Manolium-E and that the investment was structured through affiliate companies which provided loans to Manolium-E.⁴⁶⁶
354. Claimant argues that the Tribunal has jurisdiction *ratione materiae* for three main reasons:
355. First, the EEU Treaty explicitly provides that incorporation is a form of investment. Since there is no dispute that Claimant incorporated a local subsidiary in Belarus, Manolium-E, this alone qualifies as an investment.⁴⁶⁷
356. Second, the EEU Treaty includes in its definition of investment an assignment of “rights to engage in entrepreneurial activities granted [...] under a contract [...]”. There is no dispute that Claimant assigned some of its rights under the Investment Contract to Manolium-E.⁴⁶⁸
357. Third, there is no dispute that Claimant’s wholly-owned subsidiary, Manolium-E, spent millions of dollars on construction of the Facilities.⁴⁶⁹
358. Thus, Claimant submits it is entitled to submit direct claims based on assets of a company it controls.⁴⁷⁰

3.2 DECISION OF THE TRIBUNAL

359. Under the *Ratione Materiae* Objection, Respondent argues that the funds were transferred by third parties directly to Manolium-E, with Claimant itself not

⁴⁶² R PHB, para. 15, citing to *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. 2007-07, Award dated 26 November 2009 [“*Romak*”] (Doc. **RL-140**), paras. 180, 207.

⁴⁶³ R III, para. 897-898.

⁴⁶⁴ R III, paras. 897-900.

⁴⁶⁵ H2, II, slide 41.

⁴⁶⁷ C PHB, para. 51.

⁴⁶⁸ C PHB, para. 52.

⁴⁶⁹ C PHB, para. 53.

⁴⁷⁰ H2, II, slide 41, citing to *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction dated 30 November 2018 [“*Mera v. Serbia*”] (Doc. **CL-98**), paras. 135 and 129; HT Day 1, 92:14-22. Cf. R III, paras. 889-900.

contributing anything or bearing any risk in respect of the Facilities. Claimant counters by saying that it incorporated a company in Belarus, and that it financed that company through intra-group loans.

360. The Tribunal will first establish the relevant facts (**A.**), then the applicable law (**B.**) and finally discuss the Objection and reach a conclusion (**C.**).

A. Proven facts

361. On 6 June 2003, Claimant, the Minsk Municipality and Minsktrans signed an Investment Contract,⁴⁷¹ which authorized the Investor (*i.e.*, Claimant) to construct the Mall; in exchange, the Investor assumed the commitment to construct at its own cost certain Facilities, which were then to be transferred into the ownership of the Minsk Municipality.⁴⁷²
362. A year thereafter, on 18 March 2004, Claimant incorporated a wholly-owned subsidiary in Belarus, officially called “Foreign Industrial and Commercial Private Unitary Enterprise Manolium-Engineering” (already defined as Manolium-E), with the purpose of implementing the Investment Contract.⁴⁷³ Claimant paid-in a nominal capital of just USD 30,000 – as proven by the company’s Charter⁴⁷⁴ and an extract from the registry of legal entities.⁴⁷⁵
363. Three years thereafter, on 8 February 2007, the Investment Contract was amended⁴⁷⁶ to incorporate Manolium-E as a party and to redefine the scope of the project. Under the Amended Investment Contract, the parties assumed specific obligations:
- the investor, the Russian company Manolium, assumed the obligation to provide financing for the project, using “their own and/or borrowed cash funds”, and to “exercise control” over the proper performance by Manolium-E;⁴⁷⁷
 - Manolium-E undertook the construction of the Facilities (which now included the Pull Station, the Road and the Depot) and the development of the Mall; and
 - in exchange, the Minsk Municipality undertook to make available to Manolium-E the plot of land on which the Mall was to be constructed.⁴⁷⁸

⁴⁷¹ Investment Contract (Doc. C-34).

⁴⁷² Investment Contract (Doc. C-34), clause 1.

⁴⁷³ Certificates of State Registration of Manolium-E in the Unified State Register of Legal Entities and Individual Entrepreneurs of 18 March 2004 and 16 April 2014 (Docs. C-5 and C-6); Charter of Manolium-E (Doc. C-7), Art. 2.1.

⁴⁷⁴ Charter of Manolium-E (Doc. C-7), Arts. 6.1 and 6.2.

⁴⁷⁵ Extract from the Unified State Register of Legal Entities and Individual Entrepreneurs on Manolium-E of 22 March 2017 (Doc. C-3), p. 3, item 20.

⁴⁷⁶ 4th Amendment (Doc. C-66), preamble, paras. 2, 5, clauses 3, 5, 8.

⁴⁷⁷ 4th Amendment (Doc. C-66), clauses 3.7.1 and 3.7.2.

⁴⁷⁸ 4th Amendment (Doc. C-66), clause 3.9.2.

364. The ultimate owner of Claimant is a Russian citizen, Mr. Aram Ekavyan,⁴⁷⁹ who controls Claimant through a number of holding companies located in the Isle of Man and in Cyprus.⁴⁸⁰ The director of Manolium-E is Mr. Andrey Dolgov, also a Russian citizen. Mr. Ekavyan and Mr. Dolgov financed Manolium-E through a complex arrangement of interest-free inter-company loans, which in total amounted to approximately USD 25 M.⁴⁸¹ These funds were used by Manolium-E for the implementation of the Investment Contract, including the partial construction of the Facilities.

B. Applicable law

365. Art. 6(7) of the Protocol contains the following definition of “investment”:

“7) ‘investments’ means tangible and intangible assets invested by an investor of a Member State into subjects of entrepreneurial activity on the territory of another Member State in accordance with the legislation of the latter, including:

- funds (cash), securities and other property;

- rights to engage in entrepreneurial activities granted under the legislation of the Member States or under a contract, including, in particular, the right to exploration, development, production and exploitation of natural resources;

- property rights and other rights having monetary value”

366. The definition of “investment” in the Protocol has two elements:

- first, the protected investor must provide “tangible and intangible assets” to a “subject of entrepreneurial activity” incorporated in the territory of the host State; and
- second, the “tangible and intangible assets” which the investor must contribute include cash, rights to engage in entrepreneurial activities under a contract, and any other type of property rights or rights having monetary value.

367. Art. 66 of the Protocol reiterates that the incorporation of a company constitutes an investment:

“66. Incorporation within the meaning of sub-paragraph 24 of paragraph 2 of this Protocol shall constitute a form of investment. All provisions of this Protocol, except for the provisions of paragraphs 69-74 of this Protocol, shall apply to such investments”.

368. (Arts. 69-74 refer to National Treatment, Most Favoured Nation Treatment, the obligation to create favourable conditions for investments, the right to restrict activities of investors and the non-extension of double taxation treaties or of treaties

⁴⁷⁹ Also spelt Yekavyan.

⁴⁸⁰ Graphic of the Flow of Capital and Financing of Claimant’s Group of Companies (Doc. C-395).

⁴⁸¹ Graphic of the Flow of Capital and Financing of Claimant’s Group of Companies (Doc. C-395); Loans provided to Manolium-E between 2003 and 2013 (Doc. C-215).

on economic integration – these rules are not to be applied to investments which take the form of incorporation).

369. The Protocol defines incorporation in very broad terms, including not only the creation or acquisition of a legal entity in the host State, but also the direct or indirect control of a legal entity, the opening of a branch or representative office, and even the registration as an individual entrepreneur:

“24) ‘incorporation’:

creation and/or acquisition of a juridical person (participation in the capital of a created or incorporated juridical person) with any organisational legal form and form of ownership provided for by the legislation of the Member State on the territory of which such juridical person is created or incorporated;

acquisition of control over a juridical person of a Member State through obtaining of an opportunity to, either directly or via third persons, determine decisions to be adopted by such juridical person, including through the management of votes granted by voting shares (stakes) and participation in the board of directors (supervisory board) and other management authorities of such juridical person;

opening of a branch;

opening of a representative office;

registration as an individual entrepreneur.

Incorporation shall be carried out, among other things, for the purposes of trade in services and/or manufacture of goods.”

C. Discussion

370. The proven facts show that Claimant has indeed carried out an investment which meets the requirements set forth in the EEU Treaty:

- OOO Manolium-Processing is a Russian company, whose share capital is wholly owned (indirectly through various holding companies) by a Russian citizen, Mr. Aram Ekavyan; this Russian entity incorporated and paid-in the capital of a 100%-owned subsidiary in Belarus, Manolium-E; under Art. 66 of the Protocol, such an incorporation “shall constitute a form of investment”;
- Manolium contributed to Manolium-E, as share capital, certain “rights to engage in entrepreneurial activities granted [...] under a contract”, as required by Art. 6(7) of the Protocol: the right to implement the Investment Contract and to construct the Facilities and the Mall; this was achieved by amending, with the consent of the Minsk Municipality and of Minsktrans, the original Investment Contract;
- Manolium also contributed “fund (cash)” to Manolium-E, as permitted by Art. 6(7) of the Protocol; the contribution was made in the form of a nominal capital contribution of USD 30,000 and complemented by various shareholder

and director's loans in an amount of USD 25 M; these funds were used by Manolium-E to further its entrepreneurial activities and to partially implement the Investment Contract; the Investment Contract specifically authorizes Claimant to finance the construction of the Facilities and the Mall with "own and/or borrowed cash funds";⁴⁸² and

- as a result of its entrepreneurial activities, Manolium-E constructed and became the owner of the Facilities – another form of investment protected under Art. 6(7) of the Protocol.

371. Respondent argues, in defense of its *Ratione Materiae* Objection, that the funds used to finance the entrepreneurial facilities were transferred by third parties directly to Manolium-E, bypassing Claimant, with Claimant not contributing anything or bearing any risk.⁴⁸³

372. The Tribunal disagrees.

373. Art. 6(7) of the Protocol defines "investments" by requiring that a protected investor create a "subject of entrepreneurial activity" in Belarus and then make certain contributions to that entity. That is exactly what Claimant did: it incorporated a subsidiary in Belarus, and through that subsidiary carried out entrepreneurial activities in Belarus, consisting in the design and construction of the Facilities and the Mall, in accordance with the Investment Contract. These activities were financed by a small capital contribution and in their major part through inter-company loans, granted by companies controlled by Mr. Ekavyan, a Russian citizen, who is the ultimate owner of Claimant, and (in a smaller percentage) by Mr. Dolgov, also a Russian citizen, the director of Manolium-E.

374. Manolium-E's entrepreneurial activities have been (in their major part) financed not directly by Claimant, but by other companies controlled by Messrs. Ekavyan and Dolgov, two Russian citizens, who are Manolium-E's ultimate shareholder and director, respectively. The way in which Claimant chose to finance its investment in Belarus does not affect its status as an investment under the EEU Treaty. The Treaty, with good reason, does not impose any restriction on how investors finance the entrepreneurial activities of the Belarusian subsidiaries. This may be done through capital contributions, through financing by third parties or – as has happened in this case – through inter-company loans, from entities which belong to the same group or are related to shareholders or directors; whichever alternative is chosen, the status as protected investment under the EEU Treaty remains unaffected.

375. *Ubi lex non distinguit nec nos distinguere debemus.*

⁴⁸² 4th Amendment (Doc. C-66), clause 3.7.1.

⁴⁸³ R PHB para. 15.

Romak

376. Respondent draws the Tribunal’s attention to the award in *Romak*.⁴⁸⁴ This decision stands for the conclusion that the term “investment” has a meaning in itself, which cannot be ignored when considering the list of examples contained in the relevant treaty; the inherent meaning entails a contribution that extends over a certain period of time and that involves risk.⁴⁸⁵
377. There are marked differences between the facts underlying *Romak*, which involved a wheat supply agreement, and the present arbitration, where Claimant incorporated a subsidiary in Belarus, and where that subsidiary carried out entrepreneurial activities for a period of several years.
378. The discussion about the “inherent meaning of an investment” is relevant where (as happened in *Romak*), the alleged investment consists in a contract, and the tribunal is called upon to establish whether that contract is a commercial transaction, which cannot be protected as an investment, or whether the contract has certain “inherent characteristics” which are typical for all types of investment, and consequently merits protection under the relevant investment treaty.
379. In the present case, where Claimant
- incorporated and made a capital contribution to a subsidiary in Belarus,
 - assumed the legal and financial risk of being the 100% shareholder of a Belarusian company, and
 - secured financing from other entities of the group,
 - to enable the Belarusian subsidiary to carry out, over a period of several years, an entrepreneurial activity in Belarus, consisting in the construction of the Facilities and the development of the Mall,

the discussion is inapposite. Whatever definition of investment is applied, whatever its “inherent meaning”, there can be no doubt that foreign direct investment, where the foreign investor directly owns and manages an enterprise situated in the host country, and such enterprise carries out entrepreneurial activities in the host country, qualifies as such.⁴⁸⁶

⁴⁸⁴ Doc. **RL-140**.

⁴⁸⁵ *Romak* (Doc. **RL-140**), paras. 180 and 207.

⁴⁸⁶ *Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21, Award dated 13 December 2016 [“*Edenred S.A. v. Hungary*”], para. 177.

4. OVERALL CONCLUSION

380. In summary, the Tribunal decides as follows with regard to Respondent's jurisdictional objections:
381. First, the Tribunal partially admits Respondent's *Ratione Temporis* Objection and finds as follows:
- as regards the Tax Dispute, the Tribunal has jurisdiction *ratione temporis* to decide it in its entirety;
 - as regards the Termination Dispute, the Tribunal partially accepts the *Ratione Temporis* Objection, and decides
 - o that it does have jurisdiction to adjudicate the alleged breaches of the Treaty (expropriation and FET standard), with regard to measures which occurred after the Effective Date (*i.e.*, (i) the Cassation Decision and (ii) the auctioning in favour of a third party of the right to develop a project similar to the Mall); and
 - o that it lacks jurisdiction to adjudicate all other alleged measures, which occurred before the Effective Date.
382. Second, because the Tribunal found that all claims, which form part of the Termination Dispute and pre-date the Effective Date, fall outside its jurisdiction, the Contractual Objection and the Minsktrans Objection are moot.
383. Third, the Tribunal, by majority, accepts Respondent's Domestic Law Objection, and declares that it lacks jurisdiction under the Belarusian Investment Law to adjudicate the Termination and Tax Disputes.
384. Finally, the Tribunal dismisses Respondent's *Ratione Materiae* Objection, finding that Claimant is the owner of an investment in Belarus protected under the EEU Treaty.

VI. MERITS

385. The Tribunal has found that it has jurisdiction to decide the totality of claims which form part of the Tax Dispute (1.); but as regards the Termination Dispute, the Tribunal has decided that its jurisdiction only covers the claim for the alleged breaches that materialized after the Effective Date (2.).

1. THE TAX DISPUTE

386. The Tax Dispute gives rise to claims for expropriation (1.1) and for breach of the FET standard (1.2).

1.1 EXPROPRIATION

387. Art. 79 of the Protocol to the EEU Treaty prohibits expropriation and measures equivalent to an expropriation, except if the measures are

- (i) taken for the public benefit,
- (ii) following the legal procedure established in the legislation of the host State,
- (iii) not discriminatory and
- (iv) involve prompt and adequate compensation.

388. The Tribunal will summarize the Parties' positions (A.) and then render its decision (B.).

A. Positions of the Parties

a. Claimant's position

389. Claimant submits that Respondent indirectly⁴⁸⁷ expropriated its investment in violation of Art. 79 of the Protocol:⁴⁸⁸ Claimant was totally deprived of its investments, without prompt and adequate compensation,⁴⁸⁹ as a result of the following actions of Belarus.⁴⁹⁰

- Respondent refused to pay compensation for the Facilities;
- Respondent imposed illegitimate tax liabilities and seized the Facilities;

⁴⁸⁷ C I, paras. 513 *et seq*; Presentation of Claimant's opening statement, Part III (Claims) [**"H2, III"**], slide 9.

⁴⁸⁸ C III, para. 605.

⁴⁸⁹ C III, paras. 584, 585, 590.

⁴⁹⁰ C III, para. 604; H2, III, slide 11.

- Respondent transferred the Facilities to municipal ownership by Presidential Order;⁴⁹¹ and
 - Respondent sold the right to develop the Mall Land Plot to a third party.
390. Claimant submits that to find an indirect expropriation the acts of Respondent must be considered as a whole;⁴⁹² there is no need to assess every wrongful measure separately, but rather to determine the cumulative effect of the measures. Claimant argues that it is a common practice for States to conceal expropriations through tax measures.⁴⁹³ In such cases, tribunals have held that the guise of taxation will not save the host State from liability for actions, based on an abuse of tax laws, if such actions result in the total loss or a substantial impairment of the investment.⁴⁹⁴
391. Claimant submits that the relevant test to distinguish permissible from confiscatory taxation is whether there has been “an abuse of tax law”⁴⁹⁵ and whether the effect of the tax has been confiscatory.⁴⁹⁶

Abuse of tax law

392. Claimant contends that Respondent abused the tax law by conducting tax assessments that were unsubstantiated, non-transparent and arbitrary.⁴⁹⁷
393. Furthermore, Respondent created a situation wherein Claimant was unable to avoid tax liability after the Commissioning Date⁴⁹⁸ by:
- not agreeing to extend Claimant’s Land Permits, such that Claimant could finish the construction of the Facilities;
 - refusing to accept the transfer of the Facilities into communal ownership;
 - refusing to accept the payments offered by Claimant in order to complete the Facilities; and

⁴⁹¹ C I, para. 497; C III, para. 579; Decision of MCEC of 15 August 2014 (Doc. **C-142**); Official website of State Industrial Association Minskstroy, *On Association*, accessed on 8 February 2017 (Doc. **C-144**); Deed No. 018366 of property transfer of 27 January 2017 (Doc. **R-148**).

⁴⁹² C III, para. 600; H2, III, slide 10, citing to *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award dated 9 October 2018 [“**UP and CD v. Hungary**”] (Doc. **CL-121**), para. 331, and *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award dated 12 September 2010 [“**RosInvest**”] (Doc. **CL-117**), para. 624.

⁴⁹³ C III, paras. 580-582; H2, III, slide 20.

⁴⁹⁴ H2, III, slide 20, citing to *Vincent J. Ryan, Schooner Capital LLC and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award dated 24 November 2015 [“**Ryan v. Poland**”] (Doc. **CL-119**), para. 472.

⁴⁹⁵ C III, paras. 584-585.

⁴⁹⁶ C III, paras. 593-594; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated 14 December 2012 [“**Burlington**”] (Doc. **CL-103**), paras. 393-395.

⁴⁹⁷ C I, paras. 401-405.

⁴⁹⁸ C III, paras. 584-588.

- imposing taxes in respect of the Facilities Land Plots for a period (after 1 July 2011) when Claimant could no longer use those Plots.

394. Claimant contends that this situation was created by Respondent with the sole purpose of finding Manolium-E liable for tax violations and taking the Facilities for free. According to Claimant, this is proven by the fact that in 2016, after imposing taxes for the illegal occupation of the Facilities Land Plots, the Minsk Municipality had no problem in accepting these Land Plots back into municipal ownership.⁴⁹⁹

Effect and intent of the Land Tax

395. Claimant submits that a tax is an expropriation if the effect of the tax measure is confiscatory.⁵⁰⁰ Manolium argues that this is the case here: as a consequence of the tax measures, it has been deprived of title over and possession of the Facilities,⁵⁰¹ without receiving compensation.⁵⁰²

396. Furthermore, Claimant argues that the intent of the host State also plays a role to draw a line between permissible and confiscatory taxation.⁵⁰³ Therefore, a finding that a State measure is designed to deprive the investor of its property would tend to support a finding of expropriation.⁵⁰⁴ In this case, Claimant argues that Respondent intended to deprive Claimant of its investments, not to legitimately enforce its tax laws.⁵⁰⁵

b. Respondent's position

397. Respondent submits that the transfer of the Facilities into municipal ownership does not constitute an expropriation.⁵⁰⁶ Belarus submits:⁵⁰⁷

- that it did not commit an abuse of tax law (i);
- that Claimant and Manolium-E caused the accrual of the tax liabilities which were enforced against the Facilities (ii); and
- that in any case the conditions for a lawful expropriation under Art. 79 of the Protocol have been satisfied (iii).

⁴⁹⁹ C III, paras. 587-588.

⁵⁰⁰ C III, paras. 593-594.

⁵⁰¹ C III, paras. 594 and 831.

⁵⁰² C III, paras. 593-596; H2, III, slide 21; *Burlington* (Doc. CL-103), paras. 393-395.

⁵⁰³ H2, III, slide 22.

⁵⁰⁴ H2, III, slide 22.

⁵⁰⁵ C III, para. 595.

⁵⁰⁶ R II, para. 638.

⁵⁰⁷ R III, para. 1115.

(i) Abuse of tax law

398. Respondent agrees with Claimant that an abuse of tax law may constitute an indirect expropriation.⁵⁰⁸ However, Respondent submits that Claimant's allegations are unfounded, for the following reasons:⁵⁰⁹
399. First, Manolium-E was liable under Belarusian law to pay Land Tax for the Facilities Land Plots. Claimant has failed to support its allegations that the taxes were imposed arbitrarily:⁵¹⁰ to the contrary, Claimant was fully aware that as long as Manolium-E continued to occupy the Facilities Land Plots it was liable for the Land Tax.⁵¹¹
400. Second, Respondent alleges that the Minsk Municipality acted reasonably and proportionately:
- Manolium-E failed to request the extension of the Land Permits necessary to continue construction after the Commissioning Date;⁵¹²
 - Claimant's proposals to postpone the contractual deadlines were unreasonable or impracticable – particularly given Claimant's previous breaches;⁵¹³
 - while the Investment Contract was in force, under its terms the Minsk Municipality was prevented from accepting the Facilities in an incomplete state;⁵¹⁴ and
 - upon termination of the Investment Contract, the valuations of the Facilities were carried out in breach of agreed instructions, did not acknowledge the outstanding amounts required for finalization of the construction and did not properly represent the value of the Facilities.⁵¹⁵
401. Third, the tax authorities acted transparently, setting out the legal basis for the tax assessments and providing Manolium-E with the opportunity to raise objections at every step.⁵¹⁶ When the Economic Court of Minsk ordered the enforcement of the

⁵⁰⁸ R III, para. 1114.

⁵⁰⁹ R III, para. 1122.

⁵¹⁰ R III, para. 1123.

⁵¹¹ R III, paras. 1126-1129.

⁵¹² R III, para. 1135.

⁵¹³ R III, paras. 1135-1136.

⁵¹⁴ R III, para. 1137 (a).

⁵¹⁵ R III, para. 1137(b).

⁵¹⁶ R III, para. 1140. Respondent alleges that Claimant does not dispute that:

- the Tax Inspectorate demanded that Manolium-E comply with its obligations to submit land tax returns in early 2014, which Manolium-E ignored;
- the Tax Inspectorate sent copies of its first audit report on 17 May 2016, to which Manolium-E did not raise any objection;
- the Tax Inspectorate sent a document setting out the amendments and supplements to its first audit report of 17 May 2016 to Manolium-E on 21 June 2016, to which Manolium-E did not raise any objection; and
- the Tax Inspectorate sent copies of its decision setting out the grounds for and calculation of Manolium-E's outstanding land tax liabilities on 19 July 2016, which Manolium-E chose not to appeal.

tax liability against the Facilities, Manolium-E chose not to appeal.⁵¹⁷ Claimant's failure to object to the conduct of the tax authorities shows there was no abuse of tax law.⁵¹⁸

402. Finally, Manolium-E's tax liabilities were not imposed at the President's instruction.⁵¹⁹ Respondent explains that the President's instruction of 10 October 2016 and the Presidential Order of 20 January 2017 were issued as part of the procedure for enforcing Manolium-E's tax liabilities, and only gave effect to the Attachment and Enforcement Orders.

(ii) Claimant's and Manolium-E's own conduct

403. Respondent says that Claimant has not satisfied the burden of proving that the Land Tax liabilities that were set off against the value of the Facilities in 2017 resulted from conduct attributable to the State in breach of international standards.⁵²⁰

404. To the contrary, Respondent alleges that it was Claimant's and Manolium-E's own negligent actions and omissions which caused the accrual of the Land Tax liabilities:⁵²¹

- Claimant and Manolium-E negligently failed to complete the construction of the Facilities due to their own inability or unwillingness to finance the construction works;⁵²²
- Manolium-E negligently failed to apply for extension of its Land Permits, which caused a significant increase in its Land Tax liabilities;⁵²³
- Claimant was fully aware that Manolium-E was liable to pay Land Tax but ignored it;⁵²⁴ and
- Claimant and Manolium-E chose not to raise objections to or appeal the Tax Inspectorate's first tax assessment against Manolium-E of 17 May 2016 and its amendment of 21 June 2016, the Enforcement Order or the deed of 27 January 2017 transferring the Facilities into the communal ownership of the Minsk Municipality.⁵²⁵

(iii) Illegal expropriation

405. Respondent submits that the transfer of the Facilities did not amount to an expropriation. However, if the Tribunal were to disagree, Respondent says that the

⁵¹⁷ R III, para. 1141.

⁵¹⁸ R III, paras. 1142-1143.

⁵¹⁹ R III, paras. 1144-1148.

⁵²⁰ R II, para. 641; R III, paras. 1149-1152.

⁵²¹ R III, para. 1153.

⁵²² R III, paras. 1156-1160.

⁵²³ R III, paras. 1159-1163.

⁵²⁴ R III, paras. 1164-1165.

⁵²⁵ R III, paras. 1166-1172.

necessary requirements under Art. 79 of the Protocol were satisfied, making the expropriation lawful.⁵²⁶

406. As regards the first criterion, that the measures be carried out in accordance with the legislation of the State, Respondent submits that the assessment and enforcement of the Land Tax was conducted entirely in accordance with Belarusian law and procedure. Thus, the first criterion is fulfilled.⁵²⁷
407. As for the second criterion, that the measures be for the public benefit, Respondent alleges that the enforcement of domestic tax laws in accordance with the prescribed procedures and respecting the rights of investors, falls squarely within sovereign measures for the public benefit. Thus, the second criterion is also satisfied.⁵²⁸
408. As regards the third criterion, that the measures not be discriminatory, Claimant has failed to allege that the tax authorities discriminated against Manolium-E in any way. Accordingly, Respondent submits that the third criterion is satisfied.⁵²⁹
409. Finally, as regards the criterion that the measures involve “prompt and adequate consideration”, Respondent alleges that tribunals have consistently held that adequate compensation is the fair market value of the investment.⁵³⁰ Respondent argues that it is for Claimant to prove that the valuation of the Facilities made by the Minsk Cadaster Agency in 2016, which was used to set off Manolium-E’s tax liabilities, was not appropriate.⁵³¹ Furthermore, under Belarusian law Claimant could have challenged the deed of 27 January 2017 transferring the Facilities to the Minsk Municipality and the underlying valuation of the Minsk Cadaster Agency, but chose not to do so.⁵³²

B. Decision of the Tribunal

410. Claimant submits that Respondent adopted the following measures, which, considered as a whole, resulted in the indirect⁵³³ expropriation of the Facilities in violation of Art. 79 of the Protocol, without prompt and adequate compensation:⁵³⁴
 - Respondent imposed illegitimate tax liabilities and seized the Facilities;
 - Respondent transferred the Facilities into municipal ownership by Presidential Order;
 - Respondent refused to pay compensation for the Facilities; and

⁵²⁶ R III, paras. 1173-1184.

⁵²⁷ R III, para. 1174.

⁵²⁸ R III, para. 1175.

⁵²⁹ R III, para. 1176.

⁵³⁰ R III, paras. 1177-1178.

⁵³¹ R III, paras. 1180-1182.

⁵³² R III, para. 1182.

⁵³³ C I, paras. 513 *et seq*; H2, III, slide 9.

⁵³⁴ C III, paras. 584, 585, 590, 604 and 605; H2, III, slide 11.

- Respondent sold the right to develop the Mall Land Plot to a third party.

411. Belarus disagrees. It alleges that the transfer of the Facilities into municipal ownership does not constitute an expropriation.⁵³⁵ Furthermore, Respondent submits that it did not commit an abuse of tax law: what happened was that Claimant consented that Manolium-E accrue tax liabilities, which it failed to pay, and eventually Belarus had to enforce the outstanding debts against the Facilities.⁵³⁶ Subsidiarily, Belarus avers that the conditions for a lawful expropriation under Art. 79 of the Protocol have been satisfied.⁵³⁷

a. Prohibition of expropriation under Art. 79 of the Protocol

412. Arts. 79 to 81, within Section VII(4) of the Protocol, record the guarantees provided to investors against unlawful expropriation. Art. 79 of the Protocol reads as follows:

“79. Investments of investors of a Member State made on the territory of another Member State shall not be subject to direct or indirect expropriation, nationalisation and other measures with consequences equivalent to those of expropriation or nationalisation (hereinafter ‘expropriation’), except in cases where such measures are taken for the public benefit in the procedure determined by the legislation of the recipient state, are not discriminatory and involve prompt and adequate compensation”. [Emphasis added]

413. Art. 79 of the Protocol contains a general prohibition against three types of dispossession measures taken by the host State:

- expropriations,
- nationalizations, and
- other measures with equivalent consequences.

414. As a rule, such measures are improper; as an exception, they are licit if the host State meets four cumulative requirements:

- the measure is taken for the public benefit,
- in accordance with the procedure determined by the host State’s legislation,
- it is not discriminatory, and
- the investor receives prompt and adequate compensation.

⁵³⁵ R II, para. 638.

⁵³⁶ R III, paras. 1153-1155.

⁵³⁷ R III, paras. 1173-1184.

Measures

415. The concept of “measures” used in Art. 79 of the Protocol, is defined in Art. 6(11) of the Protocol:

“11) ‘measure of a Member State’ means the legislation of a Member State, as well as any decision, action or omission of an authority or official of that Member State adopted or applied at any level of state or local authorities or organisations in the exercise of the powers delegated thereto by such authorities.” [Emphasis added]

416. The term “legislation of a Member State” is defined by Art. 6(5) of the Protocol:

“5) ‘legislation of a Member State’ means legislation and other regulatory legal acts of a Member State.”

417. Consequently, the term “measures” encompasses all

- administrative acts taken by the Belarusian State, including its agencies and territorial bodies; and
- legislative acts of general application formalized as laws approved by Parliament or as decrees or other regulations authorized by the Government, and
- judicial decisions.⁵³⁸

Expropriation, nationalization

418. The EEU Treaty does not provide a definition of “expropriation” or “nationalization”, but the terms are well established international law concepts.

419. In an “expropriation” a State, exercising its sovereign powers, dispossesses an investor of a protected investment, depriving the investor of the use and benefit (but not necessarily of the ownership or title) of the investment. The definition of expropriation is centered on the taking suffered by the investor: there is no requirement that the investor’s loss translate into enrichment of the State (or of the State’s designee) – although typically expropriations will result in wealth passing from the investor to the state, to a public entity, or to a private beneficiary favoured by the State.

420. “Nationalization” is a concept analogous to expropriation, where control of the expropriated assets, normally complete industrial sectors of the economy or certain types of natural resources, is taken over by the State or a State controlled entity.⁵³⁹

⁵³⁸ See paras. 591-593 *infra*.

⁵³⁹ Brownlie, I., *Principles of Public International Law*, 2008, p. 532; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award dated 10 March 2015 [“*OIEG v. Venezuela*”], para. 328.

Indirect expropriation or equivalent measures

421. States have traditionally taken property from aliens by means of direct expropriations, *i.e.*, by overt administrative or legislative measures declaring the State's decision to dispossess the foreign investor. Such direct expropriations have, however, become less frequent,⁵⁴⁰ while the number of so-called "indirect expropriations" has increased:⁵⁴¹ these latter measures are characterized by State interferences, sometimes formalized as legislative acts of general application, sometimes as administrative or tax measures, which result in a destruction or significant erosion of the investor's assets, without outright taking of the property.⁵⁴²
422. Art. 79 of the Protocol acknowledges this shift and (like most bilateral and multilateral investment treaties) extends the scope of protection to cover "indirect expropriations", defined as "measures with consequences equivalent to those of expropriation or nationalization". Other treaties use similar definitions, referring to "measures equivalent to" or "tantamount to" expropriation.⁵⁴³ Whatever the precise wording, when treaties use these expressions, they refer to measures which substantially deprive the investor of the fundamental attributes of property, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.⁵⁴⁴

* * *

423. Having established the proper interpretation of Art. 79 of the Protocol, the Tribunal will now analyze expropriation through taxation, *i.e.*, the use of tax laws as a measure tantamount to expropriation (**b.**).

b. Expropriatory taxation

424. States are sovereign, and sovereignty implies the right to regulate the general welfare. The State's sovereign rights are especially intense in matters of taxation: a sovereign State, in furtherance of what it perceives to be the common good and general welfare, has the right to enact and enforce tax legislation increasing, reducing or re-distributing the financial burden imposed on taxpayers, including foreign investors. Tax inevitably results in a taking by the State of taxpayers' assets, but it does not constitute an expropriation and is not compensable.⁵⁴⁵

⁵⁴⁰ Stern, B., "In Search of the Frontiers of Indirect Expropriation" in Rovine, A.W, *Contemporary Issues in International Arbitration and Mediation*, Fordham Paper 2007, pp. 31-53.

⁵⁴¹ Hoffmann, A. K., "Indirect Expropriation" in Reinisch, A., *Standards of Investment Protection*, 2008, p. 151.

⁵⁴² UNCTAD, *Taking of Property*, Series on Issues in International Investment Agreements, 2000, p. 20.

⁵⁴³ There is widespread inconsistency in the use of concepts; but it is commonly held that indirect, creeping, *de facto*, disguised, regulatory expropriations are used interchangeably (Muchlinski, P., Ortino, F. and Schreuer, C., *The Oxford Handbook of International Investment Law*, 2008, p. 422; McLachlan, C., Shore, L. and Weiniger, M., *International Investment Arbitration: Substantive Principles*, 2007, p. 292).

⁵⁴⁴ See *e.g.* the definition contained in the Comprehensive Economic and Trade Agreement (CETA) between Canada, and the European Union and its Member States, of 30 October 2016, Annex 8-A, 1(b).

⁵⁴⁵ *Burlington* (Doc. **CL-103**), para. 391.

425. There is a general presumption that measures adopted by States are intended for the furtherance of the common good. When assessing tax measures and their enforcement, tribunals must assume that the State acted *bona fide*, unless there is convincing evidence to the contrary. In the words of the *Quasar de Valores* tribunal:⁵⁴⁶

“181. The preceding observations are not meant to suggest that international tribunals should quickly reach the conclusion that ostensible tax measures are in fact compensable takings. To the contrary, the presumption must be that measures are bona fide, unless there is convincing evidence that, upon a true characterisation, they constitute a taking”. [Emphasis added]

426. The proposition that States must be granted deference in matters of taxation cannot be misconstrued to grant States discretion whether or not to comply with their international treaty obligations.⁵⁴⁷ Indeed, the State’s sovereign right to impose taxation and enforce tax laws can also be misused, as acknowledged by the tribunal in *Rosinvest*.⁵⁴⁸

“On the other hand, it is generally accepted that the mere fact that the measures by a host state are taken in the form of application and enforcement of its tax law, does not prevent a tribunal from examining whether this conduct of the host state must be considered, under the applicable BIT or other international treaties on investment protection, as an abuse of tax law to in fact enact an expropriation”. [Emphasis added]

Limits to the State’s power to tax

427. Limits to the State’s power to tax derive (in the absence, as happens in this case, of a specific regulation in the applicable Treaty) from customary international law. In the words of the *Burlington* tribunal:⁵⁴⁹

“Customary international law imposes two limitations on the power to tax. Taxes may not be discriminatory and they may not be confiscatory.” [Emphasis added]

428. Claimant is not alleging discrimination. The Tribunal is thus only concerned with confiscatory taxes: those which impose a charge of such magnitude, that taxpayers are forced to abandon their property in the hands of the State or to sell assets at a distressed price.⁵⁵⁰ Customary international law prohibits that States impose confiscatory taxes on aliens, depriving them of their properties.

429. When a foreign investor is protected by an international investment treaty, an additional protection against abusive taxation arises. Excessive taxation or improper enforcement of tax obligations can result in an unlawful expropriation, in

⁵⁴⁶ *Quasar de Valores SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. and ALOS 34 S.L. v. The Russian Federation*, SCC Case No. 24/2007, Award dated 20 July 2012 [“*Quasar de Valores*”] (Doc. **RL-61**), para. 181.

⁵⁴⁷ *Quasar de Valores* (Doc. **RL-61**), para. 179.

⁵⁴⁸ *RosInvest* (Doc. **CL-117**), para. 628.

⁵⁴⁹ *Burlington* (Doc. **CL-103**), para. 393.

⁵⁵⁰ *Burlington* (Doc. **CL-103**), para. 393.

breach of the treaty, provided that the measures produce the effect required by any indirect expropriation: that the investor be deprived of the totality (or at least of a material part) of its investment. In the words of the *Rosinvest* tribunal, a taxation measure is expropriatory if it has

“the effect of a substantial deprivation of property forming all or a material part of the investment, and the measure is attributable to Respondent.”⁵⁵¹
[Emphasis added]

430. Confiscatory taxation (under customary international law) and expropriatory taxation (in breach of an applicable investment treaty) are in fact equivalent concepts. Both hinge on the effects of the measure, which must consist in the investor being deprived of the investment (or at least of a material part thereof). A temporary reduction in value, a loss of expected profits or similar misfortunes affecting the investment, do not cause an indirect expropriation or a confiscation. Expropriation requires that the investor prove that title or ownership over the investment has been lost, or that the investment’s capacity to generate a return has been virtually extinguished.⁵⁵²

Abuse of tax law

431. In addition to the effect of the tax measure, the State’s intent is another factor which must be considered to draw the line between the general rule and the exception, between permissible taxation and confiscatory/expropriatory taxation.
432. There are many cases where an investor may lose the investment, but the State does not carry out confiscatory or expropriatory taxation:
- an investor may lose the investment because of a reckless decision to improperly withhold payment of taxes validly imposed by the State; or
 - the tax authorities’ decision to enforce outstanding tax liabilities may provoke the demise of an enterprise which already was in financial difficulties.
433. These cases do not attract State responsibility, and they must be distinguished from situations where the State abused the tax law, using taxation not to legitimately obtain resources for the general welfare, but to deprive a foreign investor of its enterprise or other investment. To prove abuse, the investor may show that when it adopted the taxation or enforcement measure, the State acted with *mens rea*, with the objective of appropriating property rightfully belonging to the investor.

⁵⁵¹ *RosInvest* (Doc. CL-117), para. 623.

⁵⁵² *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability dated 28 April 2011 [“*Paushok*”] (Doc. CL-29), paras. 331-334; *Burlington* (Doc. CL-103), para. 399.

434. The tribunal in *Quasar de Valores* explained that the purpose of the measures adopted by the Russian Federation had been the expropriation of the investor, justifying a finding of expropriation through taxation.⁵⁵³

“Yukos’ tax delinquency was indeed a pretext for seizing Yukos assets and transferring them to Rosneft. [...] This finding supports the Claimants’ contention that the Russian Federation’s real goal was to expropriate Yukos, and not to legitimately collect taxes.”

Arbitrariness

435. Another factor which supports a finding of expropriation is arbitrariness.
436. The tribunal in *Tza Yap Shum* summarized existing case law, saying that it shows

“a considerable consensus that the imposition and application of tax measures can acquire expropriatory character if [the measures] are confiscatory, arbitrary, abusive or discriminatory”⁵⁵⁴ [Emphasis added].

437. Applying this standard, the *Tza Yap Shum* tribunal concluded that the measures adopted by the Peruvian tax administration had been arbitrary, reinforcing the finding of deprivation and of unlawful expropriation.⁵⁵⁵

* * *

438. In the next sections, the Tribunal will analyze Claimant’s claims that Respondent’s taxation and enforcement measures directed against Manolium-E resulted in an expropriation. In its enquiry the Tribunal will first establish the proven facts (**c.**), before adopting its decision (**d.**).

c. Proven facts

439. The Tribunal has examined in detail the proven facts in section III above. In this section it will summarize those aspects which are relevant for the discussion of whether Respondent committed an expropriation.
440. First, in September 2014, the Economic Court of Minsk issued its decision, declaring the Investment Contract terminated.
441. In accordance with Art. 682 of the Belarusian Civil Code, when a contract to construct immovable property on alien land is commenced and thereafter terminated, the owner of the land retains the right to require transfer of the facilities which have been built, but must compensate the constructor for the costs incurred.⁵⁵⁶

⁵⁵³ *Quasar de Valores* (Doc. **RL-61**), para. 177.

⁵⁵⁴ *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Award dated 7 July 2011 [*“Tza Yap Shum”*] (Doc. **CL-128**), para. 181, translation from original Spanish by the Tribunal.

⁵⁵⁵ *Tza Yap Shum* (Doc. **CL-128**), para. 218.

⁵⁵⁶ Doc. **CL-155**.

442. In accordance with this general principle, upon termination of the Investment Contract, the Minsk Municipality, as the owner of the land, was entitled to the transfer of the Facilities, while Manolium-E, as constructor of the Facilities, was entitled to be reimbursed for its expenses. Aware of its legal obligation, the Minsk Municipality initiated a new round of negotiations, with the aim of agreeing the compensation owed to Manolium-E.
443. Respondent has argued that the Investment Contract does not qualify as a construction contract, and that Art. 682 of the Belarusian Civil Code is not applicable, because Manolium-E was required to enter into subcontracts, obtain construction permits, engage a designer and finance the construction.⁵⁵⁷ Respondent's argument is difficult to follow: to finance the transaction, to engage subcontractors and designers and to obtain all necessary building permits are typical traits of construction contracts.
444. Second, in order to agree on the compensation due to Manolium-E, consultants from the MoF and two other public agencies conducted an audit of Manolium-E's commercial and financial activities and on 22 February 2016 rendered the MoF Report, concluding that the documented costs incurred by Manolium-E in the construction of the Facilities amounted to USD 19.4 M.⁵⁵⁸
445. Third, the outcome of the MoF Report did not satisfy the Minsk Municipality: it was reluctant to pay, out of its own budget, an amount of almost USD 20 M to Manolium-E, as compensation for the construction of the (still unfinished) Facilities.
446. On 29 February 2016, the Minsk Municipality, after a meeting with representatives of all agencies involved in the preparation of the MoF Report, wrote an extensive letter to the Council of Ministers of the Republic of Belarus and attached a draft report for the President, rejecting the conclusions of the MoF Report because "the audit was largely performed without establishing the facts of actual works carried out."⁵⁵⁹
447. The Minsk Municipality proposed an alternative solution to the Council of Ministers, which would secure the gratuitous transfer of the Facilities Land Plots into municipal ownership.
448. The Minsk Municipality averred that Manolium-E had outstanding liabilities to the State budget amounting to USD 24.4 M, far in excess of the compensation determined in the MoF Report.⁵⁶⁰ These liabilities resulted basically from two items: the accrual of the Land Tax on the Facilities Land Plots (USD 19.6 M), plus the sum required to complete the construction and commissioning of the Facilities, which the Municipality estimated at USD 4.7 M.

⁵⁵⁷ R III para. 28.

⁵⁵⁸ MoF Report (Doc. C-160), p. 15.

⁵⁵⁹ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. R-140), pp. 1-2.

⁵⁶⁰ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. R-140), p. 2.

449. Based on this information, the Minsk Municipality submitted a plan to the Council of Ministers, which was consistent with the Municipality's long-standing objective of achieving the gratuitous transfer of the Facilities into municipal ownership. The plan was comprised of two steps:
- first Claimant and Manolium-E would be invited to accept the transfer for free of the Facilities into municipal ownership; and
 - second, should Claimant or Manolium-E disagree, and refuse the free transfer, the second leg of the plan would be activated: the tax authorities would order Manolium-E to pay the outstanding Land Tax, and if Manolium-E failed to do so, the Minsk Municipality would enforce the debt through the courts and foreclose on the Facilities.⁵⁶¹
450. Fourth, the plan was implemented.
451. As a first step, the Minsk Municipality filed a Second Administrative Proceeding, to reverse the findings of the First Administrative Proceeding. The Belarusian courts eventually found that Manolium-E, by failing to return the Facilities Land Plots, had made an unauthorized use of such Plots and had committed an administrative offence
452. As a second step, the Tax Inspectorate carried out a tax audit to establish Manolium-E's Land Tax liability for the years 2013 through 2016. A first audit calculated this liability to amount to only BYR 18,538 M and late payment penalties to BYR 4,380 M, but these calculations were redone within a few weeks, and an increased tax liability was established: under the new calculation Manolium-E's Land Tax liability increased to BYR 200,464 M, approximately ten times more than the previous calculation;⁵⁶² late payment penalties increased 15 times to BYR 63,976 M.⁵⁶³ An additional administrative fine of BYR 46,000 M was added shortly thereafter.
453. Fifth, upon Manolium-E's failure to pay the Land Tax liability, the tax administration initiated enforcement procedures and on 18 August 2016 a court issued an Enforcement Order, authorizing the tax authorities to collect from Manolium-E "on account" of the Facilities.⁵⁶⁴

⁵⁶¹ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**), pp. 2-3.

⁵⁶² Letter from the Tax Inspectorate to Manolium-E of 21 June 2016 (Doc. **C-165**), p. 2.

⁵⁶³ Letter from the Tax Inspectorate to Manolium-E of 21 June 2016 (Doc. **C-165**), p. 4.

⁵⁶⁴ Enforcement Order (Doc. **C-170**).

454. Sixth, transfer of real estate assets into municipal ownership required a Presidential Order,⁵⁶⁵ preceded by an inventory⁵⁶⁶ and an expert evaluation.⁵⁶⁷
455. On 20 January 2017, the President of the Republic of Belarus issued the Presidential Order that permitted the transfer of the Facilities into the ownership of Minsk, without consideration:⁵⁶⁸
- “To transfer without consideration into the ownership of Minsk property that is owned by [Manolium-E], said property having been attached by the [Tax Inspectorate] by way of [an order dated 5 July 2016], towards payment of [Manolium-E’s] arrears to the budget of Minsk, which are subject to collection based on a ruling [...] issued by the Economic Court of Minsk on 18 August 2016.”
456. The Presidential Order set off Manolium-E’s liabilities⁵⁶⁹ in an amount equivalent to the value of the property, which it established at BYN 27.3 M.⁵⁷⁰ The principal of Manolium-E’s tax liability (BYN 20.0 M) was completely written off,⁵⁷¹ but the value of the assets transferred was insufficient to extinguish the totality of Manolium-E’s outstanding debt.⁵⁷² After the transfer, Manolium-E still owed Belarus BYN 6.3 M.⁵⁷³
457. Seventh, once the transfer of the Facilities had taken place, on 8 February 2017 the Economic Court of Minsk ordered the commencement of bankruptcy proceedings against Manolium-E and appointed an insolvency administrator.⁵⁷⁴
458. As a result of the bankruptcy proceedings, in March 2017 the Tax Inspectorate conducted a second, comprehensive tax audit of all of Manolium-E’s tax liabilities starting from 2010.⁵⁷⁵ On 24 March 2017, the Tax Inspectorate issued its report concluding that Manolium-E owed a total tax liability of BYN 14.5 M.⁵⁷⁶

⁵⁶⁵ Regulation “On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets” adopted by President’s Decree No. 63 dated 19 February 2016 (Doc. **RL-126**), Art. 165.

⁵⁶⁶ Regulation “On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets” adopted by President’s Decree No. 63 dated 19 February 2016 (Doc. **RL-126**), Arts. 248 and 249.

⁵⁶⁷ Regulation “On accounting, safekeeping, evaluation and sale of confiscated, attached or forfeited assets” adopted by President’s Decree No. 63 dated 19 February 2016 (Doc. **RL-126**), Art. 43.

⁵⁶⁸ Presidential Order (Doc. **R-242**).

⁵⁶⁹ Presidential Order (Doc. **R-242**).

⁵⁷⁰ Appendix to the Presidential Order (Doc. **R-242**), p. 5. This was consistent with Statement No. 004819 of property inventory and evaluation (Doc. **R-147**), in which Manolium-E’s property was also valued at BYR 27,287,748.05.

⁵⁷¹ R II, para. 349.

⁵⁷² R II, paras. 349-350.

⁵⁷³ R II, paras. 349-350; Letter from the Tax Inspectorate to Manolium-E of 28 April 2017 (Doc. **R-151**).

⁵⁷⁴ Official portal of the system of general jurisdiction courts of the Republic of Belarus, *Information on cases in connection with economic insolvency (bankruptcy) for the period from 1 February 2017 through 28 February 2017* (Doc **C-179**).

⁵⁷⁵ R II, para. 356.

⁵⁷⁶ Unscheduled field audit report of Manolium-E in connection with economic insolvency (bankruptcy) of 24 March 2017 (Doc. **C-187**).

459. On 13 June 2017, the Tax Inspectorate issued its decision to recover from Manolium-E the tax liability due pursuant to the second tax audit.⁵⁷⁷ By 22 September 2017, Manolium-E's total indebtedness to the state amounted to BYN 20.9 M.⁵⁷⁸

460. Manolium-E's only relevant asset had been the Facilities, which had been transferred into municipal ownership without payment of any compensation. Devoid of other assets, Manolium-E was confronted with a BYN 20.9 M tax liability vis-à-vis the Belarusian State. The value of Claimant's shareholding in Manolium-E had been reduced to nil.

d. The Respondent committed an indirect expropriation, in breach of Art. 79 of the Protocol

461. The Tribunal has already found that States are empowered to impose taxation, on citizens and aliens. Although the law assumes that the State uses its taxation powers *bona fide* in the furtherance of the common good, such powers are not unfettered: taxes may not be confiscatory nor discriminatory, nor result in the unlawful expropriation of the investor's protected assets, in breach of the treaty provisions.

462. The first requirement which a taxation or enforcement measure must meet, in order to be considered as an unlawful expropriation, is that such measure cause the effect necessary for any indirect expropriation: that the investor be deprived of the totality (or at least a substantial part) of its investment.

463. Assuming that deprivation has occurred, other factors which must be considered, to draw the line between permissible and expropriatory taxation, are whether the State committed an abuse of tax law or whether its actions were arbitrary.

464. In the present case, the Tribunal finds that the taxation and enforcement measures adopted by the Republic of Belarus caused consequences equivalent to those of an expropriation in breach of Art. 79 of the Protocol:

- the taxation and enforcement measures resulted in (i) Manolium-E being deprived of the Facilities, which were transferred to the Minsk Municipality without compensation, and (ii) Claimant being deprived of the value of its shareholding in Manolium-E, which was reduced to nil (**e.**);
- the Minsk Municipality, aided and abetted by other organs of the Belarusian State, including the President of the Republic, committed an abuse of tax law: the purpose of the tax and enforcement measures adopted against Manolium-E was to achieve transfer of the Facilities for free, without paying the compensation to which Manolium-E was entitled (**f.**); and

⁵⁷⁷ Decision No. 121 of the Tax Inspectorate of 13 June 2017 on the Unscheduled desk tax audit report of Manolium-E of 24 March 2017 No. 543 with amendments dated 18 May 2017 (Doc. **C-188**).

⁵⁷⁸ R II, para. 362; Amendments of 18 May 2017 to the Unscheduled field audit report of Manolium-E No. 543 dated 24 March 2017 (Doc. **C-186**).

- the tax and enforcement measures adopted by the Belarusian authorities against Manolium-E inflicted unnecessary damage on the investor, without serving any apparent legitimate purpose, and must therefore be considered as arbitrary (**g.**).

e. Deprivation

465. The tax and enforcement measures adopted by the Republic of Belarus resulted in the deprivation of Manolium-E and of Claimant:

Manolium-E

466. Before the adoption of the tax and enforcement measures, Manolium-E held title over the Facilities, which the company had constructed, in accordance with the Investment Contract, on land plots owned by the Minsk Municipality. Upon termination of the Investment Contract, Art. 682 of the Belarusian Civil Code afforded Manolium-E with the right to request compensation for the costs incurred in the construction.
467. The Presidential Order of 20 January 2017 gave the instruction that the Facilities be transferred “without consideration into the ownership of Minsk [...]”.⁵⁷⁹ Manolium-E was thus deprived of its title over the Facilities and of its right to receive compensation for the construction work it had performed.

Claimant

468. The taxation and enforcement measures did not stop with the Presidential Order.
469. On 8 February 2017, the Economic Court of Minsk ordered the commencement of the bankruptcy proceedings against Manolium-E and appointed an insolvency administrator.⁵⁸⁰ As a result of the bankruptcy proceedings, in March 2017 the Tax Inspectorate conducted a second, comprehensive tax audit of all of Manolium-E’s tax liabilities starting from 2010.⁵⁸¹ By 22 September 2017, Manolium-E’s total indebtedness to the State amounted to BYN 20.9 M.⁵⁸²
470. The result of the continuing taxation and enforcement measures against Manolium-E was that the company, after the termination of the Investment Contract and the expropriation of the Facilities, was still held to owe BYN 20.9 M to the Republic for outstanding tax liabilities.
471. In that situation, the value of Claimant’s shareholding in Manolium-E had been reduced to nil.

⁵⁷⁹ Presidential Order (Doc. **R-242**), para. 1.

⁵⁸⁰ Official portal of the system of general jurisdiction courts of the Republic of Belarus, *Information on cases in connection with economic insolvency (bankruptcy) for the period from 1 February 2017 through 28 February 2017* (Doc. **C-179**).

⁵⁸¹ R II, para. 356.

⁵⁸² R II, para. 362; Amendments of 18 May 2017 to the Unscheduled field audit report of Manolium-E No. 543 dated 24 March 2017 (Doc. **C-186**).

f. Abuse of tax law

472. The evidence marshalled proves, beyond reasonable doubt, that the Belarusian authorities adopted the taxation and enforcement measures with the aim of avoiding payment of the outstanding debt to Manolium-E, and securing transfer of the Facilities into municipal ownership without paying compensation.
473. There is documentary evidence showing this abuse of tax law:
474. The first piece of evidence is the letter of the Minsk Municipality to Manolium-E of 4 September 2015;⁵⁸³ in this document the Municipality brings up the proposal that Manolium-E should waive the right to be compensated for the costs incurred and accept that the Facilities be gratuitously transferred into municipal ownership.
475. Claimant was shocked by the Minsk Municipality's proposal, and wrote directly to the President of the Republic of Belarus, complaining about the "lawlessness" of the Municipality's action.⁵⁸⁴
476. The second piece of evidence is an extensive letter from the Minsk Municipality to the Council of Ministers of the Republic of Belarus, to which a draft report for the President was attached.⁵⁸⁵ The letter was issued upon receipt of the MoF Report, which had valued the compensation owed to Manolium-E at USD 19.4 M. The letter established in clear terms that the Minsk Municipality was unwilling to pay the compensation to Manolium-E, and proposed an alternative plan: to levy a Land Tax of USD 19.6 M against Manolium-E for the unauthorized use of the Facilities Land Plots, and then to invite Claimant and Manolium-E to accept the transfer for free of the Facilities into municipal ownership. Should the investor disagree, the Minsk Municipality proposed that the tax debt should be enforced through the foreclosure on the Facilities.
477. The alternative plan is not disguised through the use of embellishing terms. The letter of the Minsk Municipality is blunt, leaving no doubt about its true intentions:⁵⁸⁶

"In view of the foregoing, we consider it expedient to propose that the investor transfers the communal facilities into municipal ownership of Minsk free of charge, which would release it from any additional expenses, including those for vacating the land plot.

Should the investor disagree with the set-out proposal (fail to sign an agreement on transfer of the property on the terms and conditions specified within one month) MCEC will:

- order the investor to pay the amount of tax for the unauthorised occupation of the land plot, and where the latter fails to comply with the said demands,

⁵⁸³ Letter from MCEC to Manolium-E of 4 September 2015 (Doc. **C-158**).

⁵⁸⁴ Letter from Manolium-E to the President of the Republic of Belarus of 12 November 2015 (Doc. **R-127**).

⁵⁸⁵ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**).

⁵⁸⁶ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 29 February 2016 (Doc. **R-140**).

refer the materials to the court to hold the investor administratively liable for the unauthorised occupation of the land plot under Article 23.41 of the Code of Administrative Offences and to subsequently enforce the collection of land tax and other payments to the budget;

- take measures to take out the incomplete facilities (trolleybus depot, pull station and sector of the road) from [Manolium-E] to the state revenue by enforcement (in the procedure for enforcing outstanding liabilities of the investor against the property).” [Emphasis added]

478. The plan was discussed in a meeting held on the date of issuance of this letter between representatives of the Minsk Municipality, the MoF and other agencies, and was then carried out in the manner anticipated. The Land Tax for the unauthorized use of the Facilities Land Plots was levied, Manolium-E failed to pay, and the ensuing tax obligation was enforced through the courts and resulted in a Presidential Order, dated 20 January 2017,⁵⁸⁷ which gave instructions for the transfer of the Facilities into municipal ownership without consideration.

g. Arbitrariness

479. The conclusion that Respondent acted in abuse of tax law is reinforced by the fact that the Minsk Municipality’s stance vis-à-vis Manolium-E can only be labelled as arbitrary: Manolium-E repeatedly tried to return the Facilities to the Municipality, which dismissed the proposal and thus provoked the accrual of the Land Tax.

Proven facts

480. First, Manolium-E was perfectly aware that, upon expiration of its Land Permits and the standstill of any further construction activity, it had to devolve possession of the Facilities Land Plots to the Minsk Municipality.
481. As a first step, Manolium-E permitted Minsktrans to enjoy *de facto* possession of part of the Facilities gratuitously:
- the Pull Station from mid-2010;⁵⁸⁸ and
 - the administrative block and the checkpoint of the Depot from November 2011 (until the end of 2014).⁵⁸⁹
482. But this was not sufficient from a legal point of view. Under Belarusian law, upon expiration of a Land Permit, the constructor must return the land to the public owner, with the public owner accepting the return. Otherwise, the constructor

⁵⁸⁷ Presidential Order (Doc. **R-242**).

⁵⁸⁸ Agreement on Temporary Gratuitous Use of Property between Minsktrans and Manolium-E of 6 July 2010 (Doc. **C-99**).

⁵⁸⁹ Agreement on Gratuitous Use of Property between Manolium-E and Minsktrans of 14 November 2011 (Doc. **C-82**); Agreement of 30 December 2014 on termination of Agreement for the gratuitous use of property dated 14 November 2011 (Doc. **C-84**).

becomes an unauthorized user of public lands.⁵⁹⁰ Manolium-E was obliged to return possession of the Facilities Land Plots, and the Minsk Municipality to accept such transfer.

483. On 11 June 2012, Manolium-E sent a first letter to the Minsk Municipality in which it purported to return the land on which the Facilities had been constructed.⁵⁹¹ But a few days later, on 17 July 2012, the Municipality rejected the return of the Facilities Land Plots. The reason given was that an uncompleted facility – the Depot – was located on that land.⁵⁹² The Minsk Municipality added that the return of the Facilities Land Plots could be considered when the Investment Contract was terminated.⁵⁹³
484. Second, in the meantime the Minsk Municipality had initiated the First Administrative Proceeding, and on 23 July 2012 the Pervomaysky Court in Minsk issued its decision, finding for Manolium-E and establishing that Manolium-E was not liable for failing to meet the deadline to return the Facilities Land Plots.⁵⁹⁴ The Court found that Manolium-E had taken measures to return the Facilities Land Plots and had used its best efforts to resolve the situation, yet under the circumstances it had no chance to discharge its duty.⁵⁹⁵
485. Third, Manolium-E repeated its willingness to transfer ownership of the Facilities to the Minsk Municipality on many occasions,⁵⁹⁶ but the city of Minsk never agreed thereto, even after termination of the Investment Contract in 2014.
486. Fourth, the behavior of the Minsk Municipality provoked tax consequences: as of 1 January 2013, Manolium-E became the subject of Land Tax accrued with regard to the Facilities Land Plots. And, if Manolium-E was held to be an unauthorized user of these Land Plots, the Land Tax would be calculated at an exorbitant rate: multiplying the ordinary rate by 10 or by 20.
487. On 21 February 2014, Manolium-E received two notices from the Tax Inspectorate requesting that it submit Land Tax calculations for the years 2013 and 2014 and pay

⁵⁹⁰ Land Code of the Republic of Belarus of 23 July 2008, No. 425-3 (edition in force between 13 January 2011 and 25 April 2013) (Doc. **CL-152**), Art. 70.

⁵⁹¹ Letter from Manolium-E to MCEC of 11 June 2012 (Doc. **C-336**).

⁵⁹² Letter from Minsk Land Planning Service to Manolium-E of 17 July 2012 (Doc. **C-337**).

⁵⁹³ Letter from Minsk Land Planning Service to Manolium-E of 17 July 2012 (Doc. **C-337**), para. 3.

⁵⁹⁴ Pervomaysky Decision (Doc. **C-346**).

⁵⁹⁵ Pervomaysky Decision (Doc. **C-346**), p. 2.

⁵⁹⁶ Letter from Claimant to MCEC of 4 March 2013 (Doc. **C-136**); Letter from Claimant to MCEC of 19 March 2013 (Doc. **C-83**); Letter from Manolium-E to MCEC of 3 April 2013 (Doc. **R-106**); Letter from Claimant to MCEC of 27 May 2013 (Doc. **C-93**); Letter from Claimant to MCEC of 27 June 2013 (Doc. **C-94**); Letter from Claimant to MCEC of 18 July 2014; Minutes of General Participants Meeting of 12 June 2013 (Doc. **C-342**).

the outstanding amounts.⁵⁹⁷ Relying on the Pervomaysky Decision, Manolium-E refused to do so.⁵⁹⁸

488. Finally, four years after its initial rejection, on 1 December 2016, when issuance of the Presidential Order was imminent, the Minsk Municipality finally changed its mind: it issued a formal decision withdrawing the Facilities Land Plots from Manolium-E.⁵⁹⁹ The decision is a two-page document, which does not provide any reasoning.

Discussion

489. Professor Schreuer has defined (and the Tribunal in *EDF* has accepted) as “arbitrary”:⁶⁰⁰

“a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in wilful disregard of due process and proper procedure.”

490. The successive decisions of the Minsk Municipality to dismiss Manolium-E’s requests for the return of the Facilities Land Plots must be considered arbitrary: these measures inflicted heavy damage on the investor (Manolium-E became subject to a confiscatory Land Tax, which in three years ballooned to a liability in excess of the value of the asset), without being justified by any reasonable argument nor serving any apparent legitimate purpose.

491. By the Commissioning Date in July 2011, a significant part of the Facilities had been finalized, and Manolium-E had already permitted Minsktrans to enjoy *de facto* free possession of the Pull Station, and of the administrative block and the checkpoint of the Depot. On the Commissioning Date, the Land Permits expired and no additional construction activity was carried out thereafter. This was the overall situation when Manolium-E first requested that the Minsk Municipality accept the return of the Facilities Land Plots.

492. The Minsk Municipality refused acceptance. In the Tribunal’s opinion, no legitimate ground justifies the Municipality’s stance.

⁵⁹⁷ Demand of an officer of the Tax Inspectorate to Manolium-E for 2013 of 21 February 2014 (Doc. **R-111**); Demand of an officer of the Tax Inspectorate to Manolium-E for 2014 of 21 February 2014 (Doc. **R-112**).

⁵⁹⁸ Dolgov II (**CWS-2**), para. 6; C PHB, para. 34.

⁵⁹⁹ Decision of MCEC No. 3539 of 1 December 2016 (Doc. **C-173**).

⁶⁰⁰ *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009 [**“EDF”**], para. 303; Professor Schreuer acted as expert and his opinion was quoted and accepted by the tribunal.

493. The reason given by the Minsk Municipality to dismiss the requests varied from case to case (existence of an uncompleted Depot; terms of the Termination Decision; assets belonging to Manolium-E still being located on the Facilities Land Plots). None of these reasons is substantiated: when in 2016 the Minsk Municipality became interested in recuperating title over the Facilities Land Plots, so that the President could order transfer of the Facilities into municipal ownership, the Municipality adopted the withdrawal decision – notwithstanding the fact that the reasons which had justified earlier refusals were still prevalent.
494. A counterfactual scenario further confirms the arbitrariness of the Minsk Municipality's behavior: if the Municipality had taken the 2016 decision in 2012, reacting positively to Manolium-E's first request, Manolium-E's right to use the Facilities Land Plots would have been terminated as of 2012, with the result that no Land Tax would have accrued (accrual started in 2013), and Manolium-E would have avoided the tax and administrative liabilities which eventually resulted in the gratuitous transfer of the Facilities to the Minsk Municipality.
495. The counterfactual scenario proves beyond any doubt the arbitrariness of the Minsk Municipality's behavior.

h. Respondent's counter-arguments

496. Respondent submits various counter-arguments:
497. First, Respondent argues that under Belarusian law Manolium-E was liable to pay Land Taxes for the Facilities Land Plots. Claimant and Manolium-E were fully aware that as long as Manolium-E continued to occupy the land plots on which the Facilities stood, Land Taxes would accrue.⁶⁰¹
498. The Tribunal agrees with Respondent that Manolium-E became liable to pay Land Taxes for the Facilities Land Plots. The Tribunal also accepts that Manolium-E and Claimant were aware of this situation, which was flagged by Manolium-E's chief accountant. The crucial point is, however, that the Land Taxes accrued only because between 2012 and 2016 the Minsk Municipality refused Manolium-E's repeated requests to accept the return of the Facilities Land Plots.
499. Second, Respondent alleges that the Minsk Municipality acted reasonably and proportionately when conducting the tax assessments because:
- Manolium-E either failed to submit the necessary documents or failed to apply altogether to extend the necessary Land Permits to continue construction after the Commissioning Date;⁶⁰²
 - while the Investment Contract was in force, it was not possible for the Minsk Municipality to accept the Facilities in an incomplete state;⁶⁰³ and

⁶⁰¹ R III, paras. 1126-1129.

⁶⁰² R III, para. 1135.

⁶⁰³ R III, para. 1137 (a).

- once the termination of the Investment Contract came into force, the valuations of the Facilities were carried out against the agreed instructions, and did not represent the value of the Facilities or the amount that would need to be spent to finalize them.⁶⁰⁴

500. The Tribunal does not agree.

501. By the agreed Commissioning Date, Manolium-E's Land Permits had expired, but the construction of the Facilities was not finalized. Eventually the Investment Contract was terminated through a judicial decision, adopted at the request of Respondent. The Republic of Belarus cannot have it both ways: it cannot promote termination of the Investment Contract, and simultaneously reproach Manolium-E for not having requested new Land Permits so as to continue construction.

502. Respondent tries to justify its refusal to accept return of the Facilities Land Plots based on two arguments:

- the first argument is that, while the Investment Contract was in force, the Minsk Municipality could not accept the Facilities in an incomplete state; the reasoning does not convince: what the Minsk Municipality refused was the acceptance of the Facilities Land Plots, not of the buildings themselves; the Minsk Municipality could have accepted the Land Plots, with an express reservation of its rights under the Investment Contract; it chose not to so;
- the second argument is that, upon termination of the Investment Contract, the valuations of the Facilities by the MoF and other agencies were improperly carried out; the argument is a *non sequitur*: the Minsk Municipality could have accepted the Facilities Land Plots, reserving its rights.

503. The proof of the pudding is in the eating: when in 2016 the Minsk Municipality became interested in withdrawing the Facilities Land Plots from Manolium-E, it adopted the requisite decision, although the Facilities were still uncompleted, and although the contested valuations had not been changed.

504. Third, Respondent says that the tax authorities acted transparently in respect of Claimant and Manolium-E, setting out the legal basis for the tax assessments and providing Manolium-E with the opportunity to raise objections at every step.⁶⁰⁵ Even when the Economic Court of Minsk ordered the enforcement of the tax liability against the Facilities, Manolium-E chose not to appeal.⁶⁰⁶ Thus, Respondent contends that Claimant's failure to raise any material objections to the conduct of the tax authorities shows there was no abuse of tax law.⁶⁰⁷

505. Respondent's argument is again a *non sequitur*. The Tribunal's decision that the taxation and enforcement measures were expropriatory is not based on the argument that Manolium-E was not properly informed, or that it was deprived of opportunities to raise objections. Rather, the Tribunal has found that the measures were

⁶⁰⁴ R III, para. 1137(b).

⁶⁰⁵ R III, para. 1140. Respondent's argument is further elaborated in note 516 *supra*.

⁶⁰⁶ R III, para. 1141.

⁶⁰⁷ R III, paras. 1142-1143.

expropriatory, because they were improperly used to deprive Manolium-E of the value of the Facilities and Claimant of the value of its shareholding.

506. Finally, Respondent says that Manolium-E's tax liabilities were not imposed at the President's instruction:⁶⁰⁸ the President's instruction of 10 October 2016 and the Presidential Order of 20 January 2017 were issued as part of the procedure for enforcing Manolium-E's tax liabilities, and therefore only gave effect to the Attachment and Enforcement Orders.
507. The proven facts show that it was the Minsk Municipality that prepared the plan to expropriate the Facilities, and that various other agencies and entities within the Belarusian State cooperated in the plan's implementation. The Presidential Order – issued in fulfilment of the Attachment Order and the Enforcement Order – gave instructions for the transfer, without consideration, of the Facilities into the ownership of Minsk to set off Manolium-E's tax liabilities – and thus culminated the expropriation.⁶⁰⁹

C. Conclusion

508. In summary, the Tribunal finds that the Republic of Belarus adopted taxation and enforcement measures against Manolium-E and Claimant with consequences equivalent to those of expropriation in breach of Art. 79 of the Protocol.
509. The taxation and enforcement measures resulted in an expropriation of two separate assets:
- Manolium-E was deprived of the Facilities, which were transferred to the Minsk Municipality without compensation; and
 - Manolium-E was forced into bankruptcy, and Claimant lost the value of its shareholding, which was reduced to nil.
510. The conclusion that the Republic of Belarus committed an expropriation is confirmed by two additional findings:
- the Minsk Municipality, aided and abetted by other organs of the Belarusian State, including the President of the Republic, committed an abuse of tax law: the purpose of the tax and enforcement measures adopted against Manolium-E was to achieve transfer of the Facilities for free, without paying the compensation to which Manolium-E was entitled; and
 - the tax and enforcement measures adopted by the Belarusian authorities against Manolium-E inflicted unnecessary damage on the investor, without serving any apparent legitimate purpose, and must therefore be considered as arbitrary.

⁶⁰⁸ R III, paras. 1144-1148.

⁶⁰⁹ Presidential Order (Doc. **R-242**).

1.2 FAIR AND EQUITABLE TREATMENT

511. Art. 68 of the Protocol creates an obligation for Member States to ensure fair and equitable treatment to protected investments:

“Each Member State shall ensure on its territory fair and equitable treatment to investments and investment-related activities by investors of other Member States”.

512. Claimant seeks a declaration that the measures adopted by the Republic of Belarus, which form part of the Tax Dispute, not only resulted in the unlawful expropriation of Claimant’s investments, but also in a violation of the FET standard guaranteed by the EEU Treaty. Claimant specifically argues that the Minsk Municipality’s refusal to accept the return of the Facilities into municipal ownership, when offered by Manolium-E, was a breach of good faith, transparency and legitimate expectations and resulted in a breach of the FET standard.⁶¹⁰

513. Claimant’s requested relief regarding the FET standard is merely declaratory. The alleged breach of the FET provision does not result in a separate claim for compensation.

514. Respondent affirms that it always treated Claimant fairly and equitably and submits that the Minsk Municipality did not artificially create a situation in which Manolium-E was unable to avoid tax liability,⁶¹¹ and that the Presidential Order did not breach Respondent’s obligation to act transparently.⁶¹²

Decision of the Tribunal

515. The Tribunal has already found that the Republic of Belarus adopted taxation and enforcement measures against Manolium-E and Claimant with consequences equivalent to those of expropriation in breach of Art. 79 of the Protocol. Under Art. 80, such violation of the Treaty results in an entitlement to “prompt and adequate” compensation, which “shall correspond to the market value of investments” plus interest. The Tribunal has also concluded that the Minsk Municipality committed an abuse of tax law, and that the tax and enforcement measures adopted by the Belarusian authorities were arbitrary.

516. The Parties agree that the FET standard requires good faith, non-discrimination, transparency, consistency, proportionality, and satisfaction of the investor’s legitimate expectations.⁶¹³ The Tribunal’s findings that the Minsk Municipality committed an abuse of tax law, and that the tax and enforcement measures were arbitrary, are on their face incompatible with the FET standard. Consequently, the Tribunal will accept Claimant’s request for declaratory relief, and declare that the Republic of Belarus violated the FET standard towards Claimant and its

⁶¹⁰ C I, paras. 389, 415-418, 452-471; HT, Day 1, 108:3-8.

⁶¹¹ R III, paras. 1130-1139, 1260.

⁶¹² R III, paras. 1270-1278.

⁶¹³ H2, III, slide 24.

investments. This finding has no implication for the compensation to be awarded to Claimant.

2. **THE TERMINATION DISPUTE**

517. The Tribunal has already found in section V.4 above

- that it only has *ratione temporis* jurisdiction to adjudicate certain claims that form part of the Termination Dispute: alleged breaches of the Treaty (expropriation and FET standard, including denial of justice), with regard to measures which occurred after the Effective Date (*i.e.*, (i) the Cassation Decision and (ii) the auctioning in favour of a third party of the right to develop a project similar to the Mall); and
- that it lacks jurisdiction to adjudicate all other alleged breaches of the Treaty forming part of the Termination Dispute which occurred before the Effective Date.

518. In this section, the Tribunal will analyze whether the two measures adopted by Respondent after the Effective Date (the Cassation Decision and the auctioning of the right to develop a project similar to the Mall) constitute a denial of justice (2.2), a breach of FET (2.3) or an expropriation (2.4). Before that, the Tribunal will establish the proven facts (2.1).

2.1 **PROVEN FACTS**

519. On 12 November 2013, the Minsk Municipality and Minsktrans filed a claim before the Economic Court of Minsk, requesting that the Court declare the termination of the Investment Contract.⁶¹⁴

520. On 9 September 2014, the Court declared that Claimant and Manolium-E had breached the time limits to implement the Investment Project, and that the delays were unreasonable and unrelated to the actions of the Minsk Municipality, Minsktrans or third parties,⁶¹⁵ and rendered a judgement terminating the Investment Contract (Termination Decision).⁶¹⁶

521. Upon appeal by Claimant and Manolium-E, the Termination Decision was confirmed by the Appellate Court on 29 October 2014,⁶¹⁷ which found that

“the conclusions reached by the court of first instance are consistent with the circumstances of the case, rules of the substantive and procedural law, have been applied correctly and the court has appraised all the parties’ arguments in full. Hence, there are no grounds for upholding the appeal.”

⁶¹⁴ Statement of claim to terminate the Investment Contract of 14 October 2013, filed with the Economic Court of Minsk on 12 November 2013 (Doc. C-140/R-201).

⁶¹⁵ Termination Decision (Doc. C-147), p. 5.

⁶¹⁶ Termination Decision (Doc. C-147).

⁶¹⁷ Appellate Court Decision (Docs. C-150 and TT-6).

522. The Appellate Court Decision became effective on the date of issuance, pursuant to its own terms and as provided for in Art. 204 of the Belarusian Code of Civil Procedure.⁶¹⁸

523. Claimant and Manolium-E filed an appeal under the cassation procedure on 29 November 2014.⁶¹⁹ On 27 January 2015, the Belarusian Supreme Court rendered a Cassation Decision dismissing the appeal.⁶²⁰

“In such circumstances, the Panel for Economic Cases of the Supreme Court of the Republic of Belarus considers the court’s conclusions that there are grounds for the termination of the contract to be lawful and justified.

The economic court of first instance and the court of appeals did not allow any violations of the rules of material and/or procedural law that would entail the annulment of the court decisions.”

524. More than two years thereafter, on 12 September 2017, the Minsk Municipality held a public auction for the right to lease the Mall Land Plot, and to develop a new real estate project on that site.⁶²¹ As a result of the auction, the Municipality awarded the project to OOO Astomaks, against payment of USD 8.87 M.⁶²²

2.2 DENIAL OF JUSTICE

525. The first claim submitted by Claimant is that the Cassation Decision amounts to a denial of justice.

A. Position of the Parties

a. Claimant’s position

526. Claimant contends in its Statement of Reply that it suffered a denial of justice,⁶²³ because the whole system of the Belarusian courts failed to treat Claimant in accordance with international judicial standards:

- the Belarusian judicial system does not comply with international standards of justice; and

⁶¹⁸ Code of Commercial Procedure of the Republic of Belarus of 15 December 1998 No. 219-Z (Doc. **RL-50**). Article 204 is reproduced in note 187 *supra*. See also Belarusian Civil Code (Doc. **RL-127**), Art. 423.3.

⁶¹⁹ Cassation appeal of Manolium-E of 29 November 2014 (Doc. **C-151**).

⁶²⁰ Cassation Decision (Doc. **C-152**).

⁶²¹ Announcement of the public auction (under conditions) No. 09-U-17 for the right for design and construction of capital structures of 12 September 2017 (Doc. **R-152**); Minutes of the Results of Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. **R-153**).

⁶²² Minutes of the Results of Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. **R-153**).

⁶²³ C III, paras. 698-708, 723-734.

- the Supreme Court denied Claimant justice and failed to remedy the wrongs of the lower courts.

527. First, Claimant says that the judicial system of the Republic of Belarus falls manifestly short of being impartial and independent, and in support of this averment submits an expert report prepared by Mrs. Elena Tonkacheva, the head of the Board of the Legal Transformation Center.⁶²⁴ Claimant also submits various reports on the Belarusian judicial system, issued by the Heritage Foundation, the Fraser Institute, Freedom House, the World Bank and the UN Human Rights Committee.⁶²⁵ In Claimant's opinion, the President has almost unlimited powers in the appointment of judges, and while the independence of courts is formally guaranteed by law, in practice courts are dependent on the executive bodies.⁶²⁶ Claimant adds that the overall dependence of the courts from the executive branch played a huge role in the violation of Claimant's rights.⁶²⁷

528. Second, the Economic Court of Minsk, its Appellate Division and the Supreme Court failed to assess crucial issues for the proper adjudication of the dispute related to the termination of the Investment Contract. The courts ignored certain facts, such as, *inter alia*,

- the funding provided by Claimant;
- Claimant's readiness to invest an additional USD 3 M to finish the Facilities; and
- the Minsk Municipality's responsibility for the increase of costs and for the delay.⁶²⁸

529. Third, when the Supreme Court upheld the termination of the Investment Contract, the issue had been ruled upon long before, when the President of the Republic of

⁶²⁴ Expert report of Elena Tonkacheva of 25 February 2019 (CER-2) [**"Tonkacheva"**].

⁶²⁵ The Heritage Foundation, 2017 Index of Economic Freedom, available at: (Doc. **ET-14**); The Heritage Foundation, 2019 Database of the Economic Freedom Index, available at: <https://www.heritage.org/index/explore?view=by-regioncountry-year> (Doc. **ET-15**); The Heritage Foundation, 2018 Index of Economic Freedom, available at: https://www.heritage.org/index/pdf/2018/book/index_2018.pdf (Doc. **ET-16**); Fraser Institute, Economic Freedom of the World, 2018 Annual Report, available at: <https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2018.pdf> (Doc. **ET-17**); Freedom House, Nations in Transit Methodology of 2018, available at: [METHODODOLOGY.pdf](#) (Doc. **ET-20**); Freedom House, Nations in Transit 2017, Belarus Country Profile, available at: <https://freedomhouse.org/country/belarus/nations-transit/2017> (Doc. **ET-21**); Freedom House, Nations in Transit 2012, Belarus (Doc. **ET-22**); Freedom House, Nations in Transit 2018, Belarus Country Profile, available at: <https://freedomhouse.org/country/belarus/nations-transit/2018> (Doc. **ET-23**); World Bank website, Rule of Law, available at: <http://info.worldbank.org/governance/wgi/#reports> (Doc. **ET-18**); World Bank website, Control of corruption, available at: [wgi/Home/Documents](#) (Doc. **ET-19**); UN Human Rights Committee, General Comment No. 32. Article 14: Right to equality before courts and tribunals and to a fair trial of 23 August 2007 (Doc. **ET-12**).

⁶²⁶ C III, para. 705.

⁶²⁷ C III, para. 709.

⁶²⁸ C III, paras. 728-731.

Belarus took the decision to deprive Claimant of the project and award it to another company.⁶²⁹

b. Respondent's position

530. Respondent says that a denial of justice claim must rest on the specific treatment of the investor by the courts of the host State, rather than on an assessment of the courts in general,⁶³⁰ and that Claimant falls manifestly short of demonstrating denial of justice on the facts of the case given that⁶³¹

- there was no procedural irregularity or breach of due process in the judicial proceedings for the termination of the Investment Contract;⁶³²
- the outcome of the termination proceedings was correct as a matter of Belarusian law;⁶³³
- the outcome of the termination proceedings was proportionate;⁶³⁴
- the outcome of the termination proceedings was not pre-ordained;⁶³⁵
- Claimant and Manolium-E did not exhaust all local remedies in the termination proceedings;⁶³⁶ and
- the Minsk Municipality cannot be faulted for acting in a manner validated by the Belarusian courts in the termination proceedings.⁶³⁷

B. Decision of the Tribunal

531. Claimant submits that the Cassation Decision upholding the termination of the Investment Contract constitutes a denial of justice which violates the FET standard guaranteed in Art. 68 of the Protocol – a claim which is vigorously contested by Respondent.⁶³⁸

532. To reach a decision, the Tribunal will, first, analyze the applicable law and the requirements for the existence of a denial of justice (**a.**) and then discuss whether in the present case such requirements are met (**b.**).

⁶²⁹ C III, paras. 732 and 733.

⁶³⁰ R III, para. 963.

⁶³¹ R III, para. 973.

⁶³² R III, para. 977.

⁶³³ R III, paras. 985-991.

⁶³⁴ R III, para. 992.

⁶³⁵ R III, para. 997.

⁶³⁶ R III, paras.1003-1008.

⁶³⁷ R III, paras.1009-1012.

⁶³⁸ C III, para. 723; R II, paras. 487 *et seq.*

a. Applicable law and requirements

533. Art. 68 of the Protocol provides that the Republic of Belarus must “ensure on its territory fair and equitable treatment” to protected investments. A State can breach the FET standard by measures adopted by any of its powers:

- the legislative power can approve laws of general application, which result in improper treatment of aliens;
- the executive power can adopt discriminatory or arbitrary administrative acts, directed against protected investors; and
- the judicial power can violate the standard by making judgements which result in a denial of justice.

534. Denial of justice thus constitutes a violation of the FET standard. Tribunals have unanimously held that the FET standard subsumes the prohibition of denial of justice.⁶³⁹ The prohibition is anchored in customary international law⁶⁴⁰ – a body of law which the Parties have agreed the Tribunal must take into consideration to supplement the EEU Treaty.⁶⁴¹

535. A different issue is whether the facts of the case fulfill the requirements to be considered as a denial of justice. For this to happen, it is common ground that the claimant must prove two requirements:

- the first requirement is material, and implies that the judicial system of the host State has given the foreign investor a treatment that is clearly and manifestly illegal (i.); and
- the second criterion requires the exhaustion of local remedies by the investor (ii.).

⁶³⁹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award dated 6 November 2008 [*“Jan de Nul”*] (Doc. **RL-12**), para. 188; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award dated 23 April 2012 [*“Jan Oostergetel”*] (Doc. **CL-21**), para. 272; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award dated 8 May 2008 [*“Pey Casado”*] (Doc. **CL-82**), para. 655.

⁶⁴⁰ In the words of Professor Paulsson: “[...] the duty to provide decent Justice to foreigners arises from customary international law. Indeed, it is one of the oldest principles.” Paulsson, J., *Denial of Justice in International Law*, Cambridge University Press, 2005 (Doc. **CL-132**), p. 1.

⁶⁴¹ See para. 51 *supra*.

(i) Clear and manifest illegality

536. Domestic courts must impart justice to nationals and aliens, without impairing a minimum standard defined by international customary law. Judge Tanaka described the following clear examples of denial of justice in *Barcelona Traction*:⁶⁴²

“Conspicuous examples would be: corruption, threats, unwarranted delay, flagrant abuse of judicial procedure, a judgement dictated by the executive or so manifestly unjust that no court which was both competent and honest could have given it”.

537. The most traditional form of denial of justice occurs when a State denies a foreigner access to domestic courts.⁶⁴³ Court decisions also amount to a denial of justice when, having obtained access to local courts, the alien is subject to unwarranted delay, or having obtained a favorable decision, is prevented from enforcing it in the host State.⁶⁴⁴

538. A violation of the fundamental principles of due process, a “disregard of due process, [...] which shocks, or at least surprises, a sense of judicial propriety”,⁶⁴⁵ will also entail a denial of justice. This category may be divided into three types of breaches:

- violations of rights that affect the intrinsic fairness of the proceeding; *inter alia*, the right to be notified about the existence of a proceeding and its development,⁶⁴⁶ the right to be heard,⁶⁴⁷ or the right to marshal evidence;
- clearly arbitrary decisions that lack motivation, have no justification or are contrary to all legal logic, and which exceed a mere judicial error;⁶⁴⁸ and
- decisions rendered by tribunals that lack independence or impartiality, and whose decisions are impaired by external interferences.⁶⁴⁹

539. The violation of domestic law does not by itself constitute a denial of justice. A judicial error does not give rise to a claim for denial of justice.⁶⁵⁰ Incorrect application of the law does not constitute denial of justice – otherwise aliens would

⁶⁴² *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Second Phase) I.C.J. Reports 1970, p. 3 [“*Barcelona Traction*”]), Judge Tanaka’s Separate Opinion dated 5 February 1970, p. 159, concluding that the Spanish judicial system had not committed a denial of justice against the Canadian investors.

⁶⁴³ Paparinskis, M., *The International Minimum Standard and Fair and Equitable Treatment*, 2013, p. 190.

⁶⁴⁴ Paparinskis, M., *The International Minimum Standard and Fair and Equitable Treatment*, 2013, p. 192.

⁶⁴⁵ *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J. Reports 1989, p. 15, Merits, Judgement dated 20 July 1989 [“*ELSI*”] (Doc. **RL-7**), p. 76.

⁶⁴⁶ *Barcelona Traction*, Judge Fitzmaurice’s Separate Opinion, p. 107.

⁶⁴⁷ *Pantechniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award dated 30 July 2009 [“*Pantechniki*”] (Doc. **RL-94**), para. 100.

⁶⁴⁸ *ELSI* (Doc. **RL-7**), p. 76.

⁶⁴⁹ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award dated 26 June 2003 [“*Loewen*”], paras. 135-137.

⁶⁵⁰ *Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award dated 1 November 1999 [“*Azinian*”] (Doc. **RL-14**), para. 99.

be afforded a new opportunity to appeal, once all local remedies have been exhausted. Denial of justice requires a “clear and malicious misapplication of the law”,⁶⁵¹ a specific *mens rea*, the will to wrongfully apply the law against the alien,⁶⁵² frequently evidenced by a willful disregard of due process.⁶⁵³

(ii) Exhaustion of local remedies

540. A finding of denial of justice presupposes another requirement: the investor must have exhausted all domestic recourses available against the allegedly illegal decision. In the words of *Loewen*:⁶⁵⁴

“[...] a court decision which can be challenged through the judicial process does not amount to denial of justice.”

541. However, this general rule needs an important clarification: the alien is not required to exhaust local remedies when access to the courts is being denied, when decisions are affected by undue delays or when further recourse would be futile.⁶⁵⁵

b. Did the Supreme Court commit a denial of justice?

542. Claimant alleges that the Cassation Decision constitutes a breach of good faith and a denial of justice. It makes three main arguments:

- the courts in Belarus are not independent from the executive branch of the government (i);⁶⁵⁶
- the Supreme Court failed to assess crucial issues (ii);⁶⁵⁷ and

⁶⁵¹ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award dated 11 October 2002 [“*Mondev*”] (Doc. CL-20), para. 126.

⁶⁵² Again, Judge Tanaka: “we may sum up these circumstances [which give rise to denial of Justice] under the single head of bad faith”. *Barcelona Traction*, Judge Tanaka’s Separate Opinion dated 5 February 1970, p. 159.

⁶⁵³ Paulsson, J., *Denial of Justice in International Law*, Cambridge University Press, 2005, p. 202.

⁶⁵⁴ *Loewen*, para. 151, citing to Opinion of Prof. Christopher Greenwood, OC of 26 March 2001, para. 32.

⁶⁵⁵ *Loewen*, paras. 166 – 170; *Barcelona Traction*, Judge Tanaka’s Separate Opinion dated 5 February 1970, pp. 144-145; *Finnish shipowners against Great Britain in respect of the use of certain Finnish Vessels during the war (Finland, Great Britain)*, R.I.A.A., Vol. III, pp. 1479-1550, Award dated 9 May 1934 [“*Finnish Ships*”], pp. 1503-1505; *Certain Norwegian Loans (France v. Norway)*, I.C.J. Reports 1957, Separate Opinion of Judge Lauterpacht dated 6 July 1957, p. 34 [“*Norwegian Loans*”], p. 39; *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated 4 August 2011 [“*Abaclat and Others v. Argentina*”], paras. 582-584 and 587-588, 590; *Ambiente Ufficio S.p.A. and Others (Case formerly known as Giordano Alpi and Others) v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 February 2013 [“*Ambiente Ufficio and Others v. Argentina*”], paras. 599–611, 620; Freeman Alwyin V., *International Responsibility of States for Denial of Justice*, Kraus Reprint Co., 1970, pp. 423-434; Amerasinghe, C., *Local remedies in International Law*, 2nd edition, Cambridge University Press, 2004, pp. 204-212.

⁶⁵⁶ C III, paras. 709 *et seq.*

⁶⁵⁷ C III, para. 727.

- the decision to terminate the Investment Contract had been preordained by the President of Belarus and the courts had no option but to create an appearance of legitimacy (iii).⁶⁵⁸

(i) The lack of independence of the Belarusian judicial system

543. Claimant has marshalled the following evidence, in an effort to prove an erosion of the rule of law in Belarus, and in particular, a lack of independence of the Belarusian judicial system:

544. First, Claimant filed the expert report of Mrs. Elena Tonkacheva, which provides a general assessment of the situation of the judicial system in Belarus.⁶⁵⁹ Mrs. Tonkacheva's report points out that the best source for assessing the independence of judges in Belarus⁶⁶⁰ is the report prepared by the UN Special Rapporteur on the results of a fact-finding mission conducted in June 2000,⁶⁶¹ which concluded the following:⁶⁶²

“The Special Rapporteur acknowledges that Belarus is a country in transition and suffers heavily from economic deprivation and the after-effects of the Chernobyl accident. However, the pervasive manner in which executive power has been accumulated and concentrated in the President has turned the system of government from parliamentary democracy to one of authoritarian rule. As a result, the administration of justice, together with all its institutions, namely the judiciary, the prosecutorial service and the legal profession, are undermined and not perceived as separate and independent. The rule of law is therefore thwarted.” [Emphasis added]

545. The report made the following comments with regard to the status of the judiciary:⁶⁶³

“Executive control over the judiciary and the manner in which repressive actions are taken against independent judges appear to have produced a sense of indifference among many judges for the importance of judicial independence in the system. [...]

The existence of an independent judiciary requires not only the enactment of legal provisions to that effect but full respect for the independence of the judiciary in practice. The Special Rapporteur is of the view that the creation of an overseeing interdepartmental commission to monitor cases, or direct interference in individual cases by government officials constitutes

⁶⁵⁸ C III, paras. 732-734.

⁶⁵⁹ Tonkacheva (CER-2).

⁶⁶⁰ Tonkacheva (CER-2), para. 10.

⁶⁶¹ Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Kumaraswamy, submitted in accordance with resolution 2000/42 – Addendum report on the mission to Belarus (Doc. ET-7).

⁶⁶² Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Kumaraswamy, submitted in accordance with resolution 2000/42 – Addendum report on the mission to Belarus (Doc. ET-7), p. 2.

⁶⁶³ Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Kumaraswamy, submitted in accordance with resolution 2000/42 – Addendum report on the mission to Belarus (Doc. ET-7), pp. 4-5.

inappropriate and unwarranted interference in the judicial process. The Government must abolish this commission.

The judicial selection process should ensure that candidates are selected on the basis of objective criteria, and should be seen by the wider public to do so, otherwise the independence of the judiciary will be compromised. The Special Rapporteur considers that the placing of absolute discretion in the President to appoint and remove judges is not consistent with judicial independence. The executive may be involved in the formal appointment process, but not in the selection, promotion or disciplining of judges. [...]

The length of their tenure will play a decisive role in ensuring that judges are free to decide matters before them without any improper influences, inducements, pressures, threats or interference, direct or indirect, as too short a tenure will subject judges to pressures arising from the reappointment process. These pressures are amplified by placing the power of reappointment under the control of the executive, since the executive will frequently appear before the courts as a party or have an interest in the outcome of proceedings decided by the judges. The Special Rapporteur has previously concluded that a five-year tenure is too short to be consistent with judicial independence. Courts in other jurisdictions have expressed similar opinions.

As judges who are appointed on probation do not have the security of tenure that is so essential to ensure their independence, the system of appointing judges on probation and the award of permanent tenure should be under the exclusive control of an independent judicial council.

The substantial number of inexperienced judges compounds the problems associated with a short initial tenure. Many of the persons the Special Rapporteur met during the mission expressed concern that the significant numbers of inexperienced judges, their poor conditions of service and their dependence on the Government threatened the independence of the judiciary and exposed judges to pressure and opportunities for corruption.” [Emphasis added]

546. Second, the World Bank’s Worldwide Governance Indicators considered Belarus’s rule of law rating to be very poor, with a qualification of 22.6 over 100⁶⁶⁴ for the year 2015 (when the Cassation Decision was issued).

⁶⁶⁴ World Bank website, Rule of Law, available at: <http://info.worldbank.org/governance/wgi/#reports>. Accessed by the Tribunal on 29 January 2021 (Doc. ET-18).

547. Third, the Heritage Foundation in its Index of Economic Freedom for 2018 ranks Belarus as a “mostly unfree” economy.⁶⁶⁵ One of the reasons for this rating is that the index describes the rule of law in Belarus in the following terms:⁶⁶⁶

“The president constitutionally controls the entire government, the courts, and even the legislative process through presidential decrees that have greater legal force than ordinary legislation.”

548. Fourth, the Fraser Institute in its Economic Freedom of the World annual report for Belarus issued in 2018 assessed the impartiality of Belarusian courts – a clear indicator of the rule of law – with 4.2 out of 10. The indicator of integrity of the legal system was also low (5.83/10).⁶⁶⁷

549. Fifth, the index on judicial framework and independence of the American non-governmental organization Freedom House identified the following fundamental problems in the judicial system of Belarus for 2017:⁶⁶⁸

- the independence of the Belarusian courts is formally guaranteed by the constitution and the law, but in practice courts are dependent on the executive bodies; and
- the President and other executive bodies can exercise decisive influence on judicial appointments.

550. In the updated 2020 version of this report, the answer to the question “Is there an independent judiciary?” was the following:⁶⁶⁹

“Courts are subservient to the president, who appoints Supreme Court justices with the approval of the rubber-stamp parliament.”

Discussion

551. The evidence marshalled by Claimant shows that the judicial system in Belarus has significant room for improvement, especially as regards the independence of judges from the executive branch and the control by the President of the appointment of judges.

⁶⁶⁵ The Heritage Foundation, 2018 Index of Economic Freedom, available at: https://www.heritage.org/index/pdf/2018/book/index_2018.pdf (Doc. **ET-16**).

⁶⁶⁶ The Heritage Foundation, 2018 Index of Economic Freedom, Belarus, available at: https://www.heritage.org/index/pdf/2018/book/index_2018.pdf (Doc. **ET-16**), p. 99.

⁶⁶⁷ Fraser Institute, Economic Freedom of the World, 2018 Annual Report, available at: <https://www.fraserinstitute.org/sites/default/files/economic-freedom-of-the-world-2018.pdf> (Doc. **ET-17**).

⁶⁶⁸ Freedom House, Nations in Transit 2017, Belarus Country Profile, available at: <https://freedomhouse.org/country/belarus/nations-transit/2017> (Doc. **ET-21**), p. 20.

⁶⁶⁹ Freedom House website, Nations in Transit 2020 Report, Belarus, available at: <https://freedomhouse.org/country/belarus/freedom-world/2020>.

552. That said, a claim for denial of justice must rest on the specific treatment given by the courts of the host State to the alien, rather than on the general assessment of the host State’s judicial system. As pointed out by one scholar:⁶⁷⁰

“The allegation of denial of justice must be individual and on a case specific basis; systemic problems regarding the judicial system do not suffice to establish a breach.”

553. Investment arbitration case law also confirms that it is not sufficient for a claimant to base its claims on general allegations regarding the judicial system of the host State, if it is unable to prove that it has suffered a denial of justice on the facts of the case. In *Jan Oostergetel*, the claimants sought to support a denial of justice claim by offering general reports of corruption in Slovak courts. The tribunal held that such general reports were not sufficient for a denial of justice claim to succeed:⁶⁷¹

“296. [...] As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law.

[...]

303. While such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance. [...] Mere insinuations cannot meet the burden of proof which rests on the Claimants.”

(ii) The Cassation Decision

554. The Cassation Decision is a six-page document, approved by the Supreme Court of Belarus, which analyzes Manolium and Manolium-E’s main claim: that the lower courts’⁶⁷²

“conclusions on the existence of grounds for terminating the investment contract of 6 June 2003 were made without taking into account all the circumstances connected with the performance of the contract.”

555. Claimant says that in the Cassation Decision the Supreme Court failed to assess crucial issues regarding the termination of the Investment Contract and thus committed a denial of justice.
556. A careful review of the Cassation Decision does not support Claimant’s allegation:
557. First, Claimant and Manolium- E were granted full access to the domestic judicial system, and were able to plead their case up to the Supreme Court. The Cassation Decision declares that Manolium was duly notified of the time and place of the

⁶⁷⁰ Demirkol, B., *Judicial Acts and Investment Treaty Arbitration*, 2018 (Doc. **RL-79**), p. 174.

⁶⁷¹ *Jan Oostergetel* (Doc. **CL-21**), paras. 296 and 303.

⁶⁷² Doc. **C-152**, p. 1.

hearing, but that its representatives did not attend, and the Supreme Court was forced to review the case in Claimant's absence.⁶⁷³

558. Second, Claimant is not alleging that the Supreme Court committed any due process violation. To the contrary: the Cassation Decision reviewed the handling of the case by the first instance court and by the court of appeals, and did not find violations of the rules of material and/or procedural law that would entail the annulment of their decisions.⁶⁷⁴

559. Third, Claimant is not alleging any unwarranted delays. The Cassation Decision was rendered in a period of less than three months.

560. Finally, the content of the Cassation Decision, while simple, is still properly reasoned. In particular, the Supreme Court:

- reviewed the record, finding that Manolium and Manolium-E had only partially fulfilled their obligations under the Investment Contract:⁶⁷⁵ the Pull Station was accepted by Minsktrans but operated at no more than 1% of the design capacity; the Depot was not accepted into municipal ownership because it was not completed and the Road was complete but had not been put in operation; facts which apparently were not denied by Manolium and Manolium-E;⁶⁷⁶ the Supreme Court also analyzed and responded to several of Claimant's and Manolium-E's arguments, dismissing them one by one;⁶⁷⁷
- analyzed the evidence, referring to several documents in which the Minsk Municipality described Claimant's and Manolium-E's failure to fulfill their contractual obligations and to take remedial actions;⁶⁷⁸ and
- applied the law: according to Art. 297 of the Economic Procedural Code of the Republic of Belarus, a cassation decision must be grounded on lack of substantiation for the judicial decision or on violation or improper application of the rules of material and/or procedural law;⁶⁷⁹ the Supreme Court concluded that the findings of the lower courts were correct "based on the case record and the rules of current legislation."⁶⁸⁰

(iii) The Cassation Decision was pre-ordained by the President

561. Claimant finally says that the Cassation Decision was pre-ordained by the President of Belarus, who had taken the decision to terminate the Investment Contract long before the courts issued their judgements.

⁶⁷³ Doc. C-152, p. 2.

⁶⁷⁴ Doc. C-152, p. 6.

⁶⁷⁵ Doc. C-152, p. 4.

⁶⁷⁶ Doc. C-152, pp. 4-5.

⁶⁷⁷ Doc. C-152, pp. 5-6.

⁶⁷⁸ Doc. C-152, p. 4.

⁶⁷⁹ Doc. C-152, p. 2.

⁶⁸⁰ Doc. C-152, p. 3.

562. The Tribunal acknowledges the gravity of Claimant’s accusation: if it were true that the decision to terminate the Investment Contract was taken by the President of Belarus, and that the courts, when they issued their successive judgements terminating the Investment Contract, simply followed political instructions, such behavior would undoubtedly meet the stringent requirements of denial of justice.
563. The crux of the question is whether Claimant’s allegation is supported by convincing evidence.
564. In international law, the general principle is *actori incumbit probatio*: the party who alleges a certain fact has the burden to prove it.⁶⁸¹ The Tribunal sees no reason to deviate from this principle. Since Claimant is alleging that President Lukashenko ordained the result of the Cassation Decision, it is for Claimant to marshal the appropriate evidence.
565. Claimant has presented the following documents that it claims lead to the conclusion that the President pre-ordained the Cassation Decision:
- Mr. Dolgov’s fourth witness statement of 28 February 2019;⁶⁸²
 - a news report published on 4 August 2014 on the website TUT.BY, under the title “Lukashenko Instructed to Revise the Investment Project on the Construction of Multifunctional Center of Squares of Horizon in Minsk”;⁶⁸³
 - a decision of the Minsk Municipality transferring certain property from Minsktrans to another public entity, Minskstroy, on 15 August 2014;⁶⁸⁴
 - a letter sent by the Minsk Municipality to Claimant dated 11 December 2014;⁶⁸⁵ and
 - a news article published on 10 March 2017 on the website TUT.BY, under the title: “Depot on the Horizon or How the Authorities Are Planning to Use Two Dainty Land Plots in the Center of Minsk?”⁶⁸⁶
566. In his witness statement, Mr. Dolgov affirms that in the summer of 2014, President Lukashenko decided that the Mall Land Plot and a neighboring plot (which belonged to a company named Horizon) would be considered a single investment

⁶⁸¹ *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award dated 18 November 2014 [*“Flughafen”*], para. 136; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 October 2013 [*“Metal-Tech”*], para. 237.

⁶⁸² Dolgov IV (CWS-5), paras. 152-163.

⁶⁸³ Doc. C-363.

⁶⁸⁴ Decision of MCEC No. 1957 of 15 August 2014 (Doc. C-142); Second witness statement of Nikolay Akhramenko of 30 May 2019 (RWS-4), para. 71.

⁶⁸⁵ Letter from MCEC to Claimant of 11 December 2014 (Doc. C-365).

⁶⁸⁶ Doc. C-364.

project;⁶⁸⁷ this implied, in Mr. Dolgov's opinion, that the investment project under the Investment Contract had to be terminated.⁶⁸⁸

567. In the summer of 2014, the Minsk Municipality and Minsktrans had already started the termination proceedings against Claimant and Manolium-E, but the Termination Decision was rendered a few weeks later, on 9 September 2014. Mr. Dolgov says that the President's decision to dispose of the Mall Land Plot had been taken before the Investment Contract was terminated by the Belarusian courts.
568. Claimant seeks to confirm Mr. Dolgov's account by pointing to the fact that on 15 August 2014 the Minsk Municipality transferred certain properties from Minsktrans to another State agency, Minskstroy.⁶⁸⁹ Claimant submits that the Mall Land Plot was among these properties,⁶⁹⁰ while Respondent explains that what was transferred were certain buildings, but not the Land Plot itself.⁶⁹¹ Be that as it may, even if the Mall Land Plot was transferred, Claimant's argument is difficult to follow. The transfer of certain real estate from one public entity to another does not seem to have a direct cause-effect relationship with the termination of the Investment Contract; if the investment project had gone forward, because the courts had rejected the claim for termination, it would have been Minskstroy (instead of Minsktrans) which would have leased the Mall Land Plot to Claimant.
569. Claimant also tries to support Mr. Dolgov's statement with a contemporary news article, published on 4 August 2014 on the website TUT.BY, which described the President's plans to improve the investment project on the Horizon land plot. According to the news site, the President's plans were confirmed by several members of the executive branch, including the chairman of the Minsk Municipality, Mr. Ladutko, who is quoted as saying that the Mall Land Plot was also under consideration:⁶⁹²

"We are considering this territory [the Mall Land Plot] together with improvement of the Horizon territory. It will be a single investment project."

570. Mr. Ladutko's statement is confirmed in a letter sent by the Minsk Municipality to Claimant on 11 December 2014⁶⁹³ (after the Termination Decision and the Appellate Court Decision, but pending the Cassation Decision), which admits that the President had issued instructions affecting the Mall Land Plot:

"The right to implement the investment construction project for the shopping, cultural and recreation center within streets Kiseleva-Krasnaya-Nezavisimosti-Masherova in Minsk was granted to the investor under clause 1 of the contract dated 6 June 2003. [...]"

⁶⁸⁷ Dolgov IV (CWS-5), paras. 153-154.

⁶⁸⁸ Dolgov IV (CWS-5), para. 155.

⁶⁸⁹ Decision of MCEC of 15 August 2014 (Doc. C-142).

⁶⁹⁰ C I, para. 258.

⁶⁹¹ R II, para.205; R III, paras. 396-397.

⁶⁹² Website of news portal TUT.BY, *Lukashenko Instructed to Revise the Investment Project on the Construction of Multifunctional Center of Squares of Horizon in Minsk* of 4 August 2014 (Doc. C-363).

⁶⁹³ Letter from MCEC to Claimant of 11 December 2014 (Doc. C-365).

However, the investor did not perform its contractual obligations, as result of which the contract was terminated by a court decision.

In addition, the Head of the State issued an instruction to develop the land plot located within streets Kiseleva-Krasnaya-Nezavisimosti-Masherova in Minsk using resources of the [Minsk Municipality] and at its expense.

In this regard, a concept of development of the territory within these boundaries has been worked out, which will be taken into account during the preparation of the detailed urban planning design.” [Emphasis added]

571. The evidence clearly suggests that in the second half of 2014, at around the time when the Belarusian courts issued the Termination Decision and the Appellate Court Decision, the President ordered that the neighboring plot belonging to Horizon should be incorporated and jointly developed. But such change does not prove that the President pre-ordained the outcome of the Cassation Decision.
572. Indeed, the other news article submitted by Claimant, published in 2017, explains that a draft decision to combine the two projects had been prepared in 2015, but that it did not crystalize. The news site literally says:⁶⁹⁴

“According to our sources, the corresponding draft combining document was prepared as long ago as 2015 but all this time ‘it has been going from office to office and the state bodies could not agree on a single vision for implementation of this project’.”

573. Summing up, the evidence marshalled by Claimant does not conclusively prove that, before the Investment Contract was terminated, Respondent actually decided to amalgamate the Mall Land Plot with the Horizon land plot. But even if it is accepted *arguendo* that this is what actually happened, the proven facts would still not prove that the Cassation Decision was pre-ordained by President Lukashenko.

* * *

574. In conclusion, Claimant has been unable to prove that the Cassation Decision adopted by the Supreme Court amounted to a denial of justice.

2.3 FAIR AND EQUITABLE TREATMENT

575. In September 2017, the Minsk Municipality organized a public auction and awarded a lease to the Mall Land Plot and the right to design and construct a similar project to a different developer, against payment of USD 8.8 M.⁶⁹⁵

⁶⁹⁴ Website of news portal TUT.BY, “*Depot on the Horizon*” or *How the Authorities Are Planning to Use Two Dainty Land Plots in the Center of Minsk?* of 10 March 2017 (Doc. **C-364**).

⁶⁹⁵ Minutes of the Results of Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. **R-153**).

A. Positions of the Parties

576. Claimant says that all of Respondent's actions constitute one interlinked chain of breaches aimed at depriving Claimant of the benefits provided by the Investment Contract. These events included numerous breaches committed after 1 January 2015, including the September 2017 decision to transfer the Mall Land Plot to another investor, OOO Astomaks.⁶⁹⁶ Claimant argues that it suffered a FET violation, because the Minsk Municipality failed to perform its obligation to act in good faith, when it sold the Mall Land Plot to OOO Astomaks without notifying Claimant or offering Claimant the option to acquire the plot.⁶⁹⁷
577. Respondent acknowledges that OOO Astomaks acquired in a public auction the right to develop the Mall Land Plot for USD 8.87 M.⁶⁹⁸ Respondent explains that Claimant lost its right to develop the Mall when the Investment Contract was terminated in 2014. Once the parties' rights and obligations under the Contract were extinguished, the Minsk Municipality was free to dispose of the Mall Land Plot as it pleased.⁶⁹⁹

B. Decision of the Tribunal

578. The Tribunal must determine whether by publicly auctioning the right to develop the Mall Land Plot, Respondent violated the FET standard. The Tribunal will briefly summarize the facts (**a.**) and then discuss its decision (**b.**).

a. Facts

579. On 9 September 2014, the Economic Court of Minsk rendered a judgement terminating the Investment Contract.⁷⁰⁰ The ruling was confirmed by the Appellate Court on 29 October 2014⁷⁰¹ and by the Supreme Court of Belarus on 27 January 2015.⁷⁰²
580. On 12 September 2017, the Minsk Municipality held a public auction for the right to design and construct permanent structures on the Mall Land Plot.⁷⁰³ The Municipality awarded the right to design and construct a similar project on the same Land Plot to OOO Astomaks, against payment of USD 8.87 M.⁷⁰⁴

⁶⁹⁶ C III, para. 613

⁶⁹⁷ C I, paras. 500-503; C PHB, para. 7.

⁶⁹⁸ R II, para. 612.

⁶⁹⁹ R II, para. 613.

⁷⁰⁰ Termination Decision (Doc. **C-147**).

⁷⁰¹ Appellate Court Decision (Docs. **C-150** and **TT-6**).

⁷⁰² Cassation Decision (Doc. **C-152**).

⁷⁰³ Announcement of the public auction (under conditions) No. 09-U-17 for the right for design and construction of capital structures of 12 September 2017 (Doc. **R-152**); Minutes of the Results of Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. **R-153**).

⁷⁰⁴ Minutes of the Results of Public Auction No. 09-U-17 with Conditions for the Right for Design and Construction of Permanent Structures (Buildings, Constructions) of 12 September 2017 (Doc. **R-153**).

b. Discussion

581. The Arbitral Tribunal agrees with Respondent.
582. The Termination Decision issued on 9 September 2014 terminated the Investment Contract.⁷⁰⁵ The necessary consequence is that as of such date Claimant's right to develop the Mall in exchange for the construction of the Facilities was permanently extinguished, and that Respondent was free to dispose of the Mall and the Mall Land Plot. This is what Respondent did three years after the Termination Decision.
583. Claimant says that it was not notified of the auction, and that it was not offered a right of first refusal. But the fact is that since 2014 Claimant's rights related to the Investment Contract had been terminated, and that Claimant has not indicated any alternative source affording such rights.
584. In summary, the Tribunal dismisses Claimant's FET claim relating to the sale in public auction of the right to design and develop the Mall Land Plot.

2.4 EXPROPRIATION

585. Claimant alleges that the termination of the Investment Contract culminated Respondent's indirect expropriation.⁷⁰⁶
586. The Tribunal will briefly summarize the Parties' positions (**A.**) and then issue its decision (**B.**).

A. Positions of the Parties

587. Claimant submits that the Termination Dispute only ripened after the Supreme Court of Belarus issued the Cassation Decision on 27 January 2015. Until that moment, according to Claimant, it had not been irreversibly deprived of its right to develop the Mall in accordance with the Investment Contract: Claimant says that "only upon this ruling was the right permanently and irreversibly destroyed."⁷⁰⁷
588. Claimant also alleges that by selling the right to develop a project on the Mall Land Plot in 2017, the Minsk Municipality destroyed any capacity Claimant may have had to reclaim its right to develop the Mall.⁷⁰⁸
589. Respondent argues that under Belarusian law the termination of the Investment Contract came into force on 29 October 2014, the date of issuance of the Appellate Court Decision.⁷⁰⁹ Thus, any alleged expropriation had already taken place when

⁷⁰⁵ The ruling was confirmed by the Appellate Court Decision issued on 29 October 2014, which came into effect on the date of the issuance, pursuant to its own terms (Appellate Court Decision (Docs. **C-150** and **TT-6**), p. 5) and Art. 204 of the Code of Commercial Procedure of the Republic of Belarus No. 219-Z of 15 December 1998 (Doc. **RL-50**). Art. 204 is reproduced in note 187 *supra*. See also Belarusian Civil Code (Doc. **RL-127**), Art. 423.3.

⁷⁰⁶ C I, para. 513.

⁷⁰⁷ C III, para. 383.

⁷⁰⁸ C III, para. 532(iv).

⁷⁰⁹ R III, para. 388.

the Cassation Decision was issued and would fall outside the Tribunal's jurisdiction.

B. Decision of the Tribunal

590. The Tribunal has already decided that it lacks jurisdiction to adjudicate all alleged breaches of the Treaty related to the Termination Dispute which occurred before the Effective Date, and that for this reason the Termination Decision and the Appellate Court Decision fall outside the Tribunal's *ratione temporis* jurisdiction – the Tribunal is only entitled to review the Cassation Decision, which affirmed the decision of the Appellate Court Decision.

591. The question now before the Tribunal is whether the Cassation Decision, a judgement rendered by the Supreme Court of Belarus, constituted an indirect expropriation. Taking of property through a judicial process can indeed give rise to an expropriation, but the Tribunal⁷¹⁰ considers that the standard must be equivalent to that applied to judicial decisions which violate the FET standard: judicial expropriation must result from denial of justice. This conclusion is confirmed by case law⁷¹¹ and by scholarly opinion:⁷¹²

“[w]hile taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice.”

592. The Tribunal has already decided that the Cassation Decision did not constitute a denial of justice, and this finding precludes the possibility that the Cassation Decision gives rise to a judicial expropriation.⁷¹³

593. Furthermore, in this case, even if the Tribunal's views (as expressed by the majority) were mistaken, and judicial expropriation could be found independently of a denial of justice, the Cassation Decision merely affirmed the judgements of the lower courts. If any judgement would amount to an expropriation, it would be the Termination Decision, over which the Tribunal has already decided that it has no jurisdiction. An affirmation of that decision by a higher court, in and of itself and absent more, does not amount to an expropriation.

594. In summary, the Tribunal concludes that the Cassation Decision does not constitute an expropriation under the EEU Treaty.⁷¹⁴

⁷¹⁰ This finding is made by majority, Arbitrator Alexandrov dissenting.

⁷¹¹ *Loewen*, para. 141: “Claimant's reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen established a denial of justice under 1105.”

⁷¹² Paparinskis, M., *The International Minimum Standard and Fair and Equitable Treatment*, 2013, p. 208.

⁷¹³ This conclusion is made by majority, Arbitrator Alexandrov dissenting.

⁷¹⁴ This decision is made unanimously.

VII. QUANTUM

595. On the merits, the Tribunal has found that the Republic of Belarus adopted taxation and enforcement measures against Manolium-E and Claimant with consequences equivalent to those of expropriation, in breach of Art. 79 of the Protocol, which resulted in the taking of two separate assets:

- Manolium-E was deprived of the Facilities, which were transferred to the Minsk Municipality without compensation; and
- Claimant lost the value of its shareholding in Manolium-E, a company which was forced into bankruptcy and whose value was reduced to nil.

596. The Tribunal has dismissed Claimant's claim in respect of the termination of the Investment Contract.

597. The Tribunal must now address the issue of quantum.

1. THE PARTIES' POSITIONS

1.1 CLAIMANT'S POSITION

598. Claimant requests compensation for the construction of the Facilities (**A.**) and for the non-development of the Mall (**B.**)

A. Compensation for the construction of the Facilities

599. Claimant says that it constructed the Facilities, that these were transferred into the ownership of the Minsk Municipality and that no consideration has been paid. The only issue therefore is the value of the Facilities.⁷¹⁵

600. Claimant alleges that it incurred construction costs in an amount of USD 19,434,679. In support of this figure, Claimant submits a calculation by its expert, Mr. Taylor, which is based on three contemporaneous Belarusian audits (one by Paritet-Standart, another by the Minsk Cadaster Agency and the third by the MoF).⁷¹⁶

601. Additionally, Claimant also invested a further USD 1 M as part of this project, as a payment to the Belarusian National Library. This amount was part of the

⁷¹⁵ C PHB, para. 66.

⁷¹⁶ C PHB, paras. 68-80; First expert report of Travis A.P. Taylor, FCA MRICS of 24 April 2017 (**CER-1**) [**"Taylor I"**], paras. 6.2.1-6.2.4; Second expert report of Travis A.P. Taylor, FCA MRICS of 28 February 2019 (**CER-3**) [**"Taylor II"**], para. 5.4.4 (Table 21); Paritet-Standart Report of 5 November 2012 (Doc. **C-131**); Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. **C-154**), p. 43; MoF Report (Doc. **C-160**).

consideration provided for in the Investment Contract and its return is necessary to avoid unjust enrichment.⁷¹⁷

602. In total, under this first heading, Claimant is asking for USD 20,434,679.

B. Compensation for the non-development of the Mall

603. Claimant says that it is also entitled to compensation for the non-development of the Mall. Using again the expert evidence of Mr. Taylor, Claimant avers that if the Investment Contract had been complied with, it would have been able to build the Mall at a cost of USD 243 M, sell the real estate at a market price of USD 399 M, and on the basis of these estimates, it requests a nominal lost profit of USD 155.924 M, or alternatively a discounted lost profit of USD 68.9 M, or under an alternative calculation, of USD 31.87 M.⁷¹⁸

604. Finally, Claimant submits that, as “the absolute floor”, it should receive as compensation for the non-development of the Mall the value another investor was willing to pay in a public auction for the same development right, USD 8.87 M. The price an independent buyer was willing to pay in an arm’s length transaction is the gold standard in determining fair market value.⁷¹⁹

1.2 RESPONDENT’S POSITION

605. Respondent significantly reduces the value of the Facilities and denies Claimant’s entitlement to any compensation for the non-development of the Mall.

A. Compensation for the construction of the Facilities

606. Respondent’s first argument is that the valuation carried out by the MoF is unreliable because:

- it contradicted instructions from the Council of Ministers;
- the sampling was minimal;
- the methodology is unknown;
- it includes Claimant’s management fees, without further explanation; and
- it has not been confirmed in these proceedings on the basis of primary documents.⁷²⁰

607. Respondent prefers the methodology of its own expert, Mr. Qureshi, who applies a methodology based not on actual costs, but on the 2005 and 2006 estimates,

⁷¹⁷ C PHB, para. 81.

⁷¹⁸ C PHB, paras. 82 (Table 1) and 100(II)(c)(i)-(ii); Taylor II (**CER-3**), paras. 3.11.2-3.11.3 (Tables 17 and 18).

⁷¹⁹ C PHB, para. 87.

⁷²⁰ R PHB, paras. 90-93.

adjusted to take account of changes in market prices.⁷²¹ This methodology results in a quantum of USD 15.9 M,⁷²² to which the Tribunal should apply an appropriate reduction to take account of Claimant’s contributory negligence.⁷²³

608. Additionally, Respondent says that the payment to the Belarusian National Library should be excluded from the valuation.⁷²⁴

Exchange rate

609. Respondent agrees that the compensation owed must be paid in “freely convertible currency” under Art. 81 of the Protocol, and does not dispute that damages should be paid in USD.
610. The MoF Report converted Manolium-E’s costs from BYR into USD at the exchange rate on the final day of each calendar month on which the costs were incurred.⁷²⁵ This conversion, says Respondent, transfers the risk of currency devaluation during the course of the investment onto Respondent – contrary to the principle that currency risk is to be borne by the investor. Since the Facilities were transferred into municipal ownership on 27 January 2017, the costs incurred in BYR should be converted into USD at the exchange rate prevailing on that date.⁷²⁶

B. Compensation for the non-development of the Mall

611. As an initial argument, Respondent explains that Claimant cannot be entitled to simultaneously claim compensation for the construction of the Facilities and compensation for the non-development of the Mall. The *quid pro quo* for the right to develop the Mall was precisely Claimant’s obligation to deliver the Facilities without compensation.⁷²⁷
612. Second, Respondent submits that Claimant is not entitled to any compensation for the non-development of the Mall because:
- it lost interest in the development of an unprofitable project in the middle of an economic crisis;⁷²⁸
 - the lost profits are highly speculative, no detailed documentation, projections and assessments having been made, and construction not having begun;⁷²⁹

⁷²¹ R PHB, para. 93.

⁷²² R III, n. 2182; First expert report of Abdul Sirshar Qureshi (Respondent’s expert) of 15 November 2018 (RER-1) [“Qureshi I”], para. 202.

⁷²³ R III, para. 1402.

⁷²⁴ R PHB, para. 100.

⁷²⁵ R PHB, para. 98.

⁷²⁶ R PHB, para. 99.

⁷²⁷ R II, paras. 674-676; R III, paras. 1303-1306.

⁷²⁸ R III, paras. 1311-1322; R PHB, paras. 78-80.

⁷²⁹ R PHB, paras. 81-84; R III, paras. 1323-1345.

- the project would not have been profitable;⁷³⁰ and
- Claimant's calculations do not take into consideration the lease payments owed to the Minsk Municipality.⁷³¹

613. Third, Respondent avers that Claimant is not entitled to a minimum compensation equal to the amount paid by OOO Astomaks for the awarding of the right to develop a new project on the land ear-marked for construction of the Mall, because its right to develop the land was on different terms and conditions.⁷³²

2. DECISION OF THE TRIBUNAL

614. Arts. 80 and 81 of the Protocol provide as follows:

80. The compensation referred to in paragraph 79 of this Protocol shall correspond to the market value of investments expropriated from investors on the date immediately preceding the date of their actual expropriation or the date when it becomes known about the upcoming expropriation.

81. The compensation referred to in paragraph 79 of this Protocol shall be paid without delay, within the period provided for by the legislation of the recipient state, but not later than within 3 months from the date of expropriation and shall be freely transferable abroad from the territory of the recipient state in a freely convertible currency. [...]” [Emphasis added]

615. The Treaty only contains very few specific rules regarding damages: the expropriation must “involve prompt and adequate compensation”, based on the “market value of the investment” on the “date immediately preceding the date of their actual expropriation or the date when it becomes known”. The Treaty adds that the compensation shall be paid “in a freely convertible currency”, that “shall be freely transferable abroad”.

616. Any assessment of compensation in a complex factual situation includes some degree of estimation – the same degree which is also applied by (private and government) actors in the real world when valuing enterprises. Because of this difficulty, tribunals retain a certain margin of appreciation. This should not be mistaken with acting *ex aequo et bono*, because the Tribunal's margin of appreciation can only be exercised in a reasoned manner and with full respect of the principles of international law for the calculation of compensation (and damages).⁷³³

617. The legal standard under the Protocol which the Tribunal must apply is not disputed by the Parties: it is the market value of the investments expropriated on the date immediately preceding the date of actual expropriation or the date when the upcoming expropriation becomes known.

⁷³⁰ R III, paras. 1346-1368.

⁷³¹ R PHB, para. 85.

⁷³² R III, paras. 1382-1389; R PHB, para. 86.

⁷³³ *Rusoro* (Doc. **RL-96**), para. 642.

618. The provision of the Protocol stating that adequate compensation shall be calculated as the fair market value is in line with the principle of full reparation of the injury caused, firmly established in jurisprudence since the seminal *Chorzów Factory* decision⁷³⁴ of the Permanent Court of International Justice and subsequently codified in the ILC Articles.⁷³⁵

Evidence

619. Claimant requested Mr. Taylor, a valuations and forensic accounting expert working for Versant and Partners as Managing Partner of their London office, to prepare and submit an expert report assessing the losses and damages suffered by Claimant. Mr. Taylor presented two extensive expert reports⁷³⁶ and a presentation used as the basis for his expert testimony during the hearing.⁷³⁷
620. Respondent also availed itself of an economic expert, Mr. Qureshi, who submitted two expert reports,⁷³⁸ and also used a presentation for his expert testimony during the hearing.⁷³⁹
621. The Tribunal thanks the experts for the quality and independence of their advice.
622. Based on the provisions of the Protocol explained *supra*, Claimant requests compensation for two items:
- compensation for the construction of the Facilities amounting to USD 19,434,679, plus USD 1 M for the payment made to the National Library of Belarus, plus
 - compensation for the non-development of the Mall, of USD 155.9 M or any other amount the Tribunal finds justified.
623. The Tribunal will first address Claimant's claim for compensation for the construction of the Facilities (2.1.) and then for the non-development of the Mall (2.2.).

2.1 COMPENSATION FOR THE CONSTRUCTION OF THE FACILITIES

624. Claimant's claim under this heading is straightforward: it requests that Respondent pay the construction costs of the Facilities, as incurred by Manolium-E (A.), plus the payment to the National Library of Belarus (B.).

⁷³⁴ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, P.C.I.J., Series A, No. 17, Judgement dated 13 September 1928 [*"Chorzów Factory"*], p. 47.

⁷³⁵ ILC Articles (Doc. CL-11), Arts. 31 and 36.

⁷³⁶ Taylor I (CER-1) and Taylor II (CER-3).

⁷³⁷ Presentation of Travis A.P. Taylor at the hearing on 31 July 2019 [*"H5"*].

⁷³⁸ Qureshi I (RER-1); Second expert report of Abdul Sirshar Qureshi of 27 May 2019 (RER-2) [*"Qureshi II"*].

⁷³⁹ Presentation of Abdul Sirshar Qureshi at the hearing on 31 July 2019.

A. Valuation of the construction costs incurred

625. The task of the Tribunal is to establish the fair market value of the Facilities. Both Parties agree that the proper methodology is to make the calculation by reference to Manolium-E's actual investments: the fair market value of the Facilities is equal to the costs actually incurred by Manolium-E in their construction.⁷⁴⁰

626. The Parties diverge when trying to quantify these costs. Claimant says that the right quantification is USD 19,434,679, while Respondent submits the better figure is either USD 11.2 M (the amount of costs actually incurred according to Mr. Qureshi⁷⁴¹) or USD 15.9 M (the figure used by Respondent in its Rejoinder, which would include additional costs needed to complete the Facilities⁷⁴²).

Mr. Taylor's position

627. Claimant's expert, Mr. Taylor, on whose opinion Claimant relies, used three separate contemporaneous audits conducted under Belarusian audit law to determine the amount invested by Claimant in the construction of the Facilities:

- the first audit was conducted by Paritet-Standart in November 2012 and valued the Facilities at USD 18.3 M;⁷⁴³
- the second audit was conducted in June 2015 by the Minsk Cadaster Agency,⁷⁴⁴ and valued the Facilities at USD 18.1 M;⁷⁴⁵
- finally, the third audit report was conducted in February 2016 by consultants from the MoF and other State agencies and valued the costs incurred in constructing the Facilities at USD 19,434,679.⁷⁴⁶

628. Mr. Taylor relies on the MoF Report, the last and most official of the three reports, and confirms that the cost of the Facilities amounted to the figure established in the MoF Report.

Mr. Qureshi's position

629. Mr. Qureshi rejects the MoF Report and calculates the value of the Facilities using different approaches, depending on whether the buildings were completed or not:

- with respect to the Pull Station, Mr. Qureshi relies on costs specified in its act of acceptance dated 30 July 2010;⁷⁴⁷ and

⁷⁴⁰ C PHB, para. 64.

⁷⁴¹ Qureshi I, para. 232; Qureshi II, para. 27.

⁷⁴² Qureshi I, para. 202 and note 276.

⁷⁴³ Paritet-Standart Report of 5 November 2012 (Doc. C-131).

⁷⁴⁴ Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. C- 154).

⁷⁴⁵ Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. C-154), p. 43.

⁷⁴⁶ MoF Report (Doc. C-160), p. 15.

⁷⁴⁷ R PHB, para. 93; Qureshi I (RER-1), paras. 224(c) and 230.

- for the Road and the Depot, Mr. Qureshi calculates the costs on the basis of 2005 and 2006 cost estimates, adjusted to take into account changes in market prices during the period of actual construction;⁷⁴⁸ Mr. Qureshi then excludes the components which were not constructed.⁷⁴⁹

630. The Depot accounts for the bulk of the difference between the valuations of the experts, as shown in the following chart:⁷⁵⁰

Communal Facilities US\$ 000'	Taylor	Qureshi	Difference	Percent Δ
Trolleybus Depot	15,704	7,536	8,169	88%
Library Payment	1,000	Not Included	1,000	11%
Road	1,039	757	282	3%
Pull Station	2,692	2,869	(177)	-2%
Total Loss	20,435	11,161	9,273	100%

631. Mr. Taylor applies the cost of the Depot as calculated in the MoF Report, while Mr. Qureshi uses 2005 and 2006 cost estimates adjusted to take into account the changes in market prices during the time of construction. Such cost estimates are made in 1991 prices. Since the Depot was incomplete, Mr. Qureshi relies on the findings of the Belcommunproject to ascertain which components of the Depot were not built and deducts the estimated expenses for such components.⁷⁵¹

The Tribunal's views

632. The Tribunal finds the position of Claimant's expert more convincing:

633. First, the MoF Report is the result of an audit conducted by Respondent, which was the only potential buyer for the Facilities. The MoF Report is a contemporaneous document prepared at the request of the Minsk Municipality⁷⁵² pursuant to the instructions of the Council of Ministers and the MoF⁷⁵³ in order to determine the work performed, the current state of the Facilities, their compliance with the design specifications and their market value.⁷⁵⁴

⁷⁴⁸ R PHB, para. 93; HT Day 3, 511:13-19.

⁷⁴⁹ R PHB, para. 93; HT Day 3, 609:11-13; Qureshi II (**RER-2**), para. 190.

⁷⁵⁰ H5, slide 20.

⁷⁵¹ R PHB, para. 93.

⁷⁵² Letter from MCEC to the Council of Ministers of the Republic of Belarus of 30 December 2015 (Doc. **R-135**), pp. 2-3.

⁷⁵³ Instruction of the MoF No. 8 of 3 February 2016 (Doc. **R-139**); Prescription issued by the MoF No. 8 of 2 February 2016 (Doc. **C-159**).

⁷⁵⁴ Letter from MCEC to the Council of Ministers of the Republic of Belarus of 30 December 2015 (Doc. **R-135**), pp. 2-3. The list of audited issues included in the instruction was the following (Instruction of the MoF No. 8 of 3 February 2016 (Doc. **R-139**)):

- “[a]nalysis of costs incurred by [Manolium-E] during the construction of the facilities, ownership of which is meant to be transferred to the city of Minsk”, entrusted to the MoF and the Ministry of Architecture;
- “[c]heck measurements and other actions to establish data about the works performed. Compliance of the facilities constructed by Manolium-E with their functional use” entrusted to the MoF and the Ministry of Architecture; and

634. The audit was carried out over a period of 17 days and included the review of commercial and financial activities from April 2004 – the early stages of the Investment Contract – until January 2016.⁷⁵⁵ The audit was recorded in the book of audits and

“was conducted in accordance with the Regulations of Audit Organization and Conduct approved by Decree No. 510 of 16 October 2009 of the President of the Republic of Belarus [...]”⁷⁵⁶

635. Second, the MoF Report uses actual costs incurred, not estimates, and reflects design revisions, a fact recognized by Mr. Qureshi.⁷⁵⁷

636. Third, the MoF Report was based on a review and measurement of the physical structures⁷⁵⁸ and of documentation:⁷⁵⁹

“[The] audit included sample inspection of contracts, statements of works performed and associated expenses, certificates of acceptance of construction or other special works, design and as-built documentation, primary records, waybills and consignment notes, payment orders and any other documents or information carriers kept by [Manolium-E].”⁷⁶⁰

637. Fourth, the MoF Report was issued on 22 February 2016, only a few days before the Minsk Municipality outlined its plan to the Council of Ministers which ultimately resulted in the expropriation of the Facilities.

638. Finally, the general finding of the MoF Report is corroborated by two other independent reports:

- in a letter of 3 October 2012, the Minsk Municipality suggested that Manolium-E undertake an independent audit to determine the costs borne in relation to the Investment Contract.⁷⁶¹ Paritet-Standard’s audit report, dated 5 November 2012, confirmed costs associated with the “design and construction of the communal facilities” of USD 18,313,814.96 as of 31 October 2012.⁷⁶² additional costs of USD 308,212.72 were identified as being incurred but not paid at the date of the audit;⁷⁶³ Paritet-Standart’s report noted that there were certain costs incurred by Claimant which were not included in the valuation;⁷⁶⁴

- “[a]nalysis of space-planning parameters, design characteristics and general utilities of the facilities that have been created in order to assess whether they conform with the design documentation” entrusted to the Ministry of Architecture.

⁷⁵⁵ MoF Report (Doc. C-160), p. 1.

⁷⁵⁶ MoF Report (Doc. C- 160), p. 1.

⁷⁵⁷ HT Day 3, 573:18-20; 595:16-20.

⁷⁵⁸ MoF Report (Doc. C- 160), p. 5.

⁷⁵⁹ H5, slide 21.

⁷⁶⁰ MoF Report, p. 1 (Doc. C- 160).

⁷⁶¹ Letter from MCEC to Manolium-E of 3 October 2012 (Doc. C-130).

⁷⁶² Paritet-Standart Report of 5 November 2012 (Doc. C-131), pp. 4-5.

⁷⁶³ Paritet-Standart Report of 5 November 2012 (Doc. C-131), p. 5.

⁷⁶⁴ Paritet-Standart Report of 5 November 2012 (Doc. C-131), p. 4.

- in February 2015, in the context of the negotiations between Claimant and the Minsk Municipality for the acquisition of the Facilities, Manolium-E entered into another audit arrangement: this time the entity conducting the review was the Minsk Cadaster Agency,⁷⁶⁵ which rendered its report in June 2015⁷⁶⁶ and confirmed that the costs borne by the investor in the construction of the Facilities amounted to USD 18.1 M.⁷⁶⁷

* * *

639. In summary, the Tribunal finds that the MoF Report, prepared *in tempore insuspecto* by an agency of Respondent, at the request of the Council of Ministers of the Republic of Belarus, accurately reflects

- the costs incurred by Manolium-E in the construction of the Facilities,
- which amounted to USD 19,434,679 as of February 2016 (the date of the MoF Report).

The Tribunal also concludes that these construction costs fairly represent the market value of the Facilities, as of that date.

640. Art. 80 of the Protocol requires that the compensation awarded shall correspond to the market value of the expropriated investment on the date immediately preceding the expropriation. The date of expropriation was 27 January 2017, almost a year after the MoF Report. During this period, no additional work was carried out at the Facilities, nor is there any evidence that the Facilities suffered any particular deterioration. The Tribunal consequently accepts that the figure established in the MoF Report continued to accurately reflect market value as of the date when the expropriation was carried out.

Currency exchange methodology

641. The Protocol to the EEU Treaty requires that compensation be paid in a “freely convertible currency” and both Parties agree that damages should be paid in USD.⁷⁶⁸ However, the Parties disagree over the exchange rate that should be used for converting Manolium-E’s costs – which were incurred in BYR – into USD.⁷⁶⁹

642. Claimant follows the approach taken by the MoF Report: costs are converted to USD using the exchange rate of the National Bank of the Republic of Belarus [the “**NBB**”] on the final day of each calendar month.⁷⁷⁰

⁷⁶⁵ Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. C- 154).

⁷⁶⁶ Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. C-154), p. 43.

⁷⁶⁷ Expert Report No. 3 of the Minsk Cadaster Agency of 16 June 2015 (Doc. C-154), p. 43.

⁷⁶⁸ HT Day 3, 654:1-18; R PHB, para. 96.

⁷⁶⁹ The MoF Report establishes Manolium-E’s costs in BYR on p. 7 (Doc. C-160). On 1 July 2016, the New Belarusian Ruble (BYN) replaced the Belarusian Ruble (BYR) at a ratio of 1:10,000. See R PHB, n. 218.

⁷⁷⁰ Taylor I (CER-1), para. 6.2.1; MoF Report (Doc. C-160), pp. 7, 10-18.

643. Respondent disagrees: by converting Manolium-E's costs from BYR into USD at the exchange rate prevailing when the costs were incurred, instead of the date of expropriation, Claimant is allegedly transferring the risk of currency devaluation during the course of the investment to Respondent.⁷⁷¹
644. The Tribunal agrees with Claimant.
645. The BYR was at the relevant time a weak currency, subject to continuous devaluation against the USD.⁷⁷² The costs incurred by Manolium-E for the construction of the Facilities accrued between 2007 and 2011, while the MoF calculation was done in 2016. To provide a financially meaningful calculation, the MoF adopted the methodology of converting cost incurred in BYR into USD, at the prevailing exchange rate at the end of each month. The MoF did so with full knowledge of the currency situation in Belarus, using the approach that it considered most appropriate to provide to the Council of Ministers a figure expressed in USD which accurately reflected the true value of the construction work carried out by Manolium-E.
646. Respondent is now precluded from criticizing that methodology, and from proposing a self-serving alternative, that does not take into account the devaluation of the BYR against the USD, and which would decrease the USD 19.4 M established in the MoF Report by approximately 80%, to a mere USD 3.4 M.⁷⁷³

B. The payment to the National Library

647. Mr. Qureshi excludes the payment to the National Library from his calculation of the fair market value of the Facilities, arguing that it does not represent a proper cost.⁷⁷⁴ On the other side, Mr. Taylor includes the sum in his calculation, because it formed part of the consideration agreed upon in the Investment Contract and its exclusion would result in unjust enrichment.
648. The Tribunal agrees with Claimant.
649. The original public tender for the awarding of the Mall required the successful bidder to provide financial or other assistance to public companies located in Minsk that were in unsatisfactory financial standing.⁷⁷⁵ This provision was then included in clause 6.13 of the initial Investment Contract as an investor's obligation: Claimant assumed the obligation to provide a sum of USD 1 M for the construction of a radioelectronic laboratory in Minsk.

⁷⁷¹ R PHB, para. 98.

⁷⁷² Taylor I (CER-1), paras. 3.4.6 and 3.4.7.

⁷⁷³ R PHB, n. 223.

⁷⁷⁴ R PHB, para. 100; R III, paras. 1447-1450; R II, paras. 712-714.

⁷⁷⁵ Tender documentation of 24 April 2003 (Doc. C-28), clause 2.4.4; Investment Contract (Doc. C-34), clause 6.13.

650. A few months thereafter, clause 6.13 was amended. The beneficiary of the 1 M USD payment was no longer the Minsk radioelectronic laboratory, but the National Library of Belarus:⁷⁷⁶

“6.13. Until 30 December 2003, to credit the amount equivalent to 1 million US dollars in Belarusian rubles at the exchange rate of the National Bank of the Republic of Belarus as of the date of making the relevant payments. Such amount shall be credited to account No. 3604200001114 opened with the National Bank of the Republic of Belarus, code of the bank 042, UNN 100691903, beneficiary – the Ministry of Finance of the Republic of Belarus”.

It is undisputed that, on 30 December 2003, Claimant paid USD 1 M to the National Library of Belarus.⁷⁷⁷

651. The Library payment was not a voluntary donation – it represented a contractual obligation, and implied an ancillary, albeit obligatory cost to the construction of the Facilities, imposed by Respondent in the Investment Contract. In order to establish the fair market price of the Facilities, the totality of costs, which Manolium-E was obliged to assume, must be taken into consideration. The position adopted by Respondent is contradictory: in the Investment Contract it required Manolium-E to contribute a sum of 1 M USD towards the construction of the National Library; but now, it disputes Claimant’s right to seek compensation for that amount.
652. Thus, the National Library payment falls within the scope of costs properly and obligatorily incurred by Claimant in the construction of the Facilities and must form part of Claimant’s compensation.

C. Conclusion

653. The taxation and enforcement measures adopted by the Republic of Belarus, resulted in an expropriation,
- Manolium-E being deprived of the Facilities, which were transferred to the Minsk Municipality without compensation, and
 - Claimant being deprived of the value of its shareholding in Manolium-E, which was reduced to nil.
654. The costs incurred by Manolium-E for the construction of the Facilities amounted to USD 20,434,679. This figure fairly represents the market value of the Facilities, and is the amount which the Tribunal will order Respondent to pay to Claimant as compensation for their unlawful expropriation.

2.2 COMPENSATION FOR THE NON-DEVELOPMENT OF THE MALL

655. Claimant says that it is also entitled to compensation for the non-development of the Mall: if the Investment Contract had been complied with, the investor avers that

⁷⁷⁶ Additional Agreement No. 1 of 10 October 2003 (Doc. C-47), clause 1.

⁷⁷⁷ Confirmation of the library payment of 30 December 2003 (Doc. C-50).

it would have been able to build the Mall at a cost of USD 243 M, sell the real estate at a market price of USD 399 M, and obtain a significant profit of up to USD 156 M.⁷⁷⁸ Subsidiarily, Claimant alleges that as “the absolute floor” Claimant should receive under this heading the value, USD 8.87 M, another investor, known as OOO Astomaks, paid in a public auction for the right to develop a project similar to the Mall and located on the same premises.⁷⁷⁹

656. Respondent disagrees, saying that Claimant is not entitled to compensation under this heading,⁷⁸⁰ that the lost profits are speculative and unproven⁷⁸¹ and that the calculation is erroneous.⁷⁸² Finally, Respondent disputes that Claimant is entitled to a minimum compensation equal to the amount paid by OOO Astomaks, because that company’s right to develop the land was on different terms and conditions than those of Claimant.⁷⁸³

Discussion

657. The first element which the Tribunal must analyze is the existence of causation: it is a general principle of international law that injured claimants bear the burden of demonstrating that there is a sufficiently close relationship between the host State’s irregular conduct and the compensation which is being claimed. The duty to compensate extends only to those damages which are legally regarded as the consequence of an unlawful act.⁷⁸⁴ Art. 36.1 of the ILC Articles reflects this general principle:

“The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby.” [Emphasis added]

658. In the present case, the Republic of Belarus adopted certain taxation and enforcement measures, which resulted in the expropriation of Claimant’s investment, and is now obliged to compensate the investor, in an amount equal to the market value of the expropriated assets. In the previous section, the Tribunal has already concluded that the market value of the Facilities, as of the date of expropriation, amounted to USD 20.4 M.
659. The question which the Tribunal must now address is whether Claimant is entitled to a separate compensation, for the bankruptcy of and loss of value in Manolium-E, further to the compensation for the expropriation of the Facilities.
660. The Investment Contract, which authorized the development of the Mall, was executed in 2003, and 11 years later, in 2014, Respondent decided to approach the Belarusian courts requesting a judicial decision which would terminate the Investment Contract. The courts eventually accepted Respondent’s claim, and declared the termination of the Investment Contract. The court decisions gave rise

⁷⁷⁸ C PHB, paras. 82 (Table 1) and 100(II)(c)(i)(a).

⁷⁷⁹ C PHB, para. 87.

⁷⁸⁰ R II, paras. 674-676; R III, paras. 1303-1306.

⁷⁸¹ R PHB, paras. 81-84; R III, paras. 1323-1345.

⁷⁸² R PHB, para. 85.

⁷⁸³ R III, paras. 1382-1389; R PHB, para. 86.

⁷⁸⁴ Cheng, B., *General Principles of Law as applied by International Courts and Tribunals*, 1987, p. 322.

to the Termination Dispute, which the Tribunal analysed – as far as it had jurisdiction – and dismissed.

661. The necessary consequence of the Tribunal’s lack of jurisdiction and dismissal of the Termination Dispute is that the termination of the Investment Contract did not amount to a breach of the Treaty, that Manolium-E was judicially deprived of its contractual right to develop the Mall, and that Respondent was entitled to award the same or a similar project to a new developer (something which Respondent eventually did, in September 2017).
662. Claimant is now requesting additional compensation for the non-development of the Mall. The problem with Claimant’s claim is that there is no cause-effect relationship between the breach committed by the Republic of Belarus and accepted by the Tribunal (the expropriation of the Facilities and of the shareholding in Manolium-E) and the damage for which compensation is being sought. Claimant and Manolium-E lost their entitlement to develop the Mall, because Respondent terminated the Investment Contract without violating the EEU Treaty – and are precluded from requesting additional compensation for this reason.
663. Claimant’s claim for compensation for the non-development of the Mall fails for lack of causation.

Other grounds

664. There are other additional arguments which militate against Claimant’s entitlement to be compensated for the non-development of the Mall.
665. First, Claimant has failed to prove that the profits it expected from the development, construction and sale of the project, can reasonably be anticipated, and are not based on unfounded speculations.
666. The Tribunal’s opinion relies mainly on the following facts:
 - the calculations made by Claimant and its expert are a mere paper exercise: Claimant never obtained access to the Mall site, never developed a detailed design and precise projections, and construction never started;⁷⁸⁵ and
 - during the long period of negotiation and implementation of the Investment Contract, the Belarusian real estate market conditions for the development of a project like the Mall deteriorated;⁷⁸⁶ Respondent’s allegation that the investor lost interest in developing an unprofitable project in the middle of an economic crisis rings true.⁷⁸⁷
667. Thus, any assessment of the lost profits in this case would be highly speculative.
668. Finally, Claimant says that “the absolute floor” it should receive as compensation for the non-development of the Mall is the price of USD 8.87 M another investor,

⁷⁸⁵ HT Day 3, 488:21-23; R III, paras. 1316-1322; R PHB, para. 81.

⁷⁸⁶ HT Day 3, 489:3-14; Qureshi II (**RER-2**), para. 56.

⁷⁸⁷ R III, paras. 1311-1322; R PHB, paras. 78-80.

called OOO Astomaks, was willing to pay in a public auction for the same development right. Manolium adds that the price an independent buyer was willing to pay in an arm's length transaction is the gold standard in determining fair market value.⁷⁸⁸

669. The Tribunal agrees with Claimant's statement that a price agreed between willing buyer and willing seller is the gold standard of fair market value. But the question here is not to establish the fair market value of the right to develop the Mall, but the fair market price of Claimant's shares in Manolium-E at the time when the expropriation occurred. In this specific case, the value of the shares can be considered equivalent to the value of the company's sole asset: the Facilities, and specifically, the cost of constructing them, since Manolium-E was entitled to be compensated for these costs. But there is no reason to add an additional surcharge, to compensate for the failure to develop the Mall. There is no causal link between both magnitudes: upon valid termination of the Investment Contract, Manolium-E had no entitlement to the development of the Mall.

* * *

670. In summary, the Tribunal concludes that Claimant is not entitled to any further compensation for the non-development of the Mall.

⁷⁸⁸ C PHB, para. 87.

VIII. INTEREST

671. Art. 81 of the Protocol provides:

“In case of a delayed payment of compensation, interest shall be accrued in the period from the date of expropriation till the date of actual payment of compensation, to be calculated at the domestic interbank market rate for actually provided loans in US dollars for up to 6 months, but not below the rate of LIBOR or in the procedure determined by agreement between the investor and the Member State.” [Emphasis added]

672. The rule is straightforward: interest accrues from the date of expropriation through the date of payment, at the higher of these two rates:

- the domestic interbank market rate for loans of a maturity of up to six months; and
- the London Inter-Bank Offered Rate [**“LIBOR”**].

Claimant’s position

673. Claimant says that the rate most in line with the Treaty is the six-month USD LIBOR rate, plus a country risk premium of 6.5%, calculated in accordance with the methodology of Prof. Damodaran.⁷⁸⁹ Although the National Bank of Belarus (NBB) publishes interbank rates in foreign currencies, these rates are a mix of USD and EUR currencies, without information about the blend. Claimant explains that such a blended rate would be inappropriate for a debt denominated in USD.⁷⁹⁰

Respondent’s position

674. Respondent acknowledges that the precise rate foreseen in the Treaty (“domestic interbank market rate for actually provided loans in US dollars for up to 6 months”) does not exist, because the NBB only publishes a blended interbank market rate for a period of over 60 days [the **“NBB Published Rate”**]. Respondent says that it is therefore necessary to apply a rate that is most in line with what the Treaty provides.⁷⁹¹

675. Respondent’s position is that the NBB Published Rate is the closest to what is stipulated in the Treaty. The maturity of over 60 days complies with the up to six months period provided for in the Treaty. When the NBB Published Rate drops below the USD LIBOR rate, LIBOR should be adopted as the floor.⁷⁹²

⁷⁸⁹ C PHB, para. 90

⁷⁹⁰ C PHB, para. 88.

⁷⁹¹ R PHB, para. 102.

⁷⁹² R PHB, para. 103.

676. Respondent says that as a matter of treaty interpretation, no margin should be added to the NBB Published Rate/LIBOR, and especially not a margin which reflects the risk profile of the respondent State: Tribunals are loath to do so, because in such case the rate would reflect the country risk, rather than the investor's actual loss. This would run counter to the fundamental premise of compensation, which is to restore the position in which the claimant would have been, but for the breach.⁷⁹³

Discussion

677. Every decision on interest must distinguish the rate, calculation methodology, *dies a quo*, *dies ad quem*, and principal amount.
678. Since the Tribunal has determined that the compensation due to Claimant amounts to USD 20,434,679, that is the “**Principal Amount**”.

1. RATE

679. The Treaty provides precise guidance on the rate to be applied: interest accrues at the higher of
- the domestic interbank market rate for loans of a maturity of up to six months; and
 - LIBOR.
680. The difficulty arises because the NBB does not publish a domestic interbank market rate for loans denominated in USD with a maturity of up to six months: both Parties agree that the NBB only publishes a blended USD/EUR interbank market rate for a period of over 60 days (already defined as the “NBB Published Rate”).
681. Respondent proposes to use the NBB Published Rate as a proxy of the “domestic interbank market rate for loans of a maturity of up to six months” foreseen in the Treaty.
682. The Tribunal concurs; the NBB Published Rate is closest to what is stipulated in the Treaty:
- both rates are interbank lending rates;
 - both are applied in Belarus;
 - both relate to loans with maturities between two and six months; and
 - both are denominated in a hard currency with low inflation (USD and EUR).
683. Since the precise rate established in the Treaty does not exist, the best solution to comply with the object and purpose of the Treaty is to adopt among those rates which the NBB actually publishes, that which is closest to the Treaty rate. The rate

⁷⁹³ R PHB, para. 110.

which meets this test is the NBB Published Rate, and this is the basic rate to be applied.

684. When the NBB Published Rate drops below the LIBOR rate, the Treaty provides that LIBOR should be adopted as a floor. LIBOR is determined by the equilibrium between supply and demand, representing the interest rate at which banks can borrow funds from other banks in the London interbank market; it is fixed daily by the British Bankers' Association for different maturities and for different currencies.
685. Since the Protocol speaks of loans in USD for up to six months, and the compensation is expressed in USD, the appropriate rate of reference should be the LIBOR rates for six-month deposits denominated in USD.
686. A final caveat: Art. 81 of the Protocol foresees that "interest shall be accrued" in favour of the investor. If the NBB Published Rate and LIBOR were to become negative, the result should be that interest ceases to accrue, and that the Principal Amount would not be reduced by applying a negative interest rate.

Surcharge or spread

687. Claimant says that in accordance with the Treaty a country risk premium of 6.5%, calculated with the methodology of Prof. Damodaran, should be added to LIBOR.⁷⁹⁴
688. The problem with Claimant's position is that the wording of the Treaty does not support its position: Art. 81 of the Protocol establishes that the applicable interest rate will be the higher of the NBB Published Rate and LIBOR. The ordinary meaning of the terms used by the Treaty does not give rise to doubt: in the absence of any reference to a surcharge or spread, or of an indication that a commercial rate of interest is to be applied, the Tribunal is not empowered *sua sponte* to increase the applicable interest rate.

2. CALCULATION METHODOLOGY

689. Both Parties have applied a compound interest to their interest calculations: Claimant has calculated the interest rate quarterly⁷⁹⁵ and Respondent monthly.⁷⁹⁶
690. The question whether interest should be accumulated periodically to the principal has been the subject of diverging decisions in international investment case law.

⁷⁹⁴ C PHB, para. 90

⁷⁹⁵ H5, slide 24; Taylor I (CER-1), para. 7.2.7.

⁷⁹⁶ Qureshi II (RER-2), para. 198.

Some case law⁷⁹⁷ tends to repudiate this possibility, but other case law tends to accept annual or semi-annual capitalization of unpaid interest.⁷⁹⁸

691. The Tribunal agrees with the later decisions. Loan agreements in which interest is calculated on the basis of LIBOR usually include a provision that unpaid interest must be capitalized at the end of the interest period, and will thereafter be considered as capital and accrue interest. The financial reason for this provision is that an unpaid lender has to resort to the LIBOR market, in order to fund the amounts due but defaulted, and the lender's additional funding costs have to be covered by the defaulting borrower.
692. This principle implies that, if Claimant had taken out a LIBOR loan to pay for the construction of the Facilities, the bank would have insisted that unpaid interest be capitalized at the end of each interest period. Consequently, if Claimant is to be kept fully indemnified for the harm suffered, interest owed under the Award should be capitalized at the end of each 6-month interest period.
693. The Tribunal, thus, decides that due and unpaid interest shall be capitalized semi-annually, from the *dies a quo*.

3. DIES A QUO

694. Claimant requests that interest be calculated based on one of four alternative scenarios:⁷⁹⁹
 - from 31 January 2015;
 - from the dates of *de facto* transfer of the Facilities;
 - from the dates when expenses were incurred; and
 - from the expropriation date, 27 January 2017.
695. Respondent argues that interest on the loss of the Facilities ought to be calculated from the actual date of transfer of the Facilities into municipal ownership on 27 January 2017.
696. Paragraph 81 of the Protocol provides that interest shall accrue "from the date of expropriation". In this case the expropriation culminated on 27 January 2017, with the transfer of the Facilities into municipal ownership. Thus, the Tribunal agrees with Respondent and finds that interest on the Principal Amount should accrue from 27 January 2017.

⁷⁹⁷ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award dated 12 May 2005 ["**CMS**"] (Doc. **RL-63**), paras. 470-471.

⁷⁹⁸ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICISD Case No. ARB/01/7, Award dated 25 May 2004 ["**MTD**"] (Doc. **CL-23**), para. 251; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated 19 January 2007 ["**PSEG**"], para. 348; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award dated 28 March 2011 ["**Lemire**"], para. 361.

⁷⁹⁹ C PHB, para. 100(II)(c)(iii)(b).

4. **DIES AD QUEM**

697. The *dies ad quem* shall be the date of effective payment.

* * *

698. In summary, the Tribunal decides that the Principal Amount of USD 20,434,679 will accrue interest from 27 January 2017 through the date of actual payment, at the higher of (i) the NBB Published Rate or (ii) LIBOR for six-month deposits denominated in USD, such interest to be capitalized six-monthly in arrears.

IX. COSTS

699. In this section of the Award the Tribunal establishes and allocates the costs of this arbitration.

700. Arts. 40 to 42 of the UNCITRAL Rules govern the determination and allocation of costs.

701. Art. 40.1 of the UNCITRAL Rules provides that “[t]he arbitral tribunal shall fix the costs of arbitration in the final award [...]”

702. Art. 40.2 of the UNCITRAL Rules specifies that the notion of costs of arbitration covers the following expenses:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Art. 41 [the “**Arbitrators’ Fees**”];
- (b) The reasonable travel and other expenses incurred by the arbitrators [the “**Arbitrators’ Expenses**”];
- (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal [the “**Tribunal’s Other Costs**”];
- (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The legal and other costs incurred by the Parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable [the “**Parties’ Legal Costs**” or “**Legal Costs**”];
- (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

1. THE PARTIES’ LEGAL COSTS

703. On 12 December 2019, each Party submitted its statement on legal costs.⁸⁰⁰

704. Counsel for Claimant declared that the following Legal Costs have been invoiced to their clients in the present proceedings:

	(USD)
Lawyers’ fees and expenses	1,572,022.57
Other expenses	345,851.38
Total	1,917,873.95

⁸⁰⁰ C SoC and R SoC.

705. Counsel for Belarus have submitted the following breakdown of its Legal Costs:

	(USD)
Lawyers' fees	5,340,320.54
Expenses	413,643.40
Total	5,753,963.94

2. THE ARBITRATORS' FEES AND EXPENSES AND THE TRIBUNAL'S OTHER COSTS

706. Art. 41.1 of the UNCITRAL Rules prescribes the following:

“The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.”

707. Thus, Art. 41.4(a) of the UNCITRAL Rules provides that, when informing the Parties of the Arbitrators' Fees and Expenses, “the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated.”

708. In accordance with the ToA,⁸⁰¹ approved by the Parties, the fees of the members of the Tribunal shall be calculated by reference to work done in connection with this arbitration and will be charged at the hourly rates agreed upon in this document.⁸⁰² In addition, the Secretary to the Tribunal designated by the Tribunal with the consent of the Parties shall receive an hourly fee at an agreed rate for her participation in the Tribunal's sessions and for other work performed in connection with this arbitration.⁸⁰³ Likewise, the PCA's services as Registry were agreed to be billed in accordance with the PCA's schedule of fees.⁸⁰⁴

709. The ToA also provide that the members of the Tribunal, the Secretary to the Tribunal and the PCA shall be entitled to recover such expenses as are reasonably incurred in connection with this arbitration, and as are reasonable in amount, provided that claims for expenses (e.g. travel and accommodation costs) are supported by invoices or receipts.⁸⁰⁵

710. The Arbitrators' Fees and Expenses are the following:

	Fees	Expenses
Stanimir Alexandrov	EUR 101,400.00	EUR 8,265.27
Brigitte Stern	EUR 147,000.00	EUR 6,000.69
Juan Fernández-Armesto	EUR 341,700.00	EUR 3,948.05

⁸⁰¹ ToA, paras. 73-78.

⁸⁰² ToA, para. 74.

⁸⁰³ ToA, para. 75.

⁸⁰⁴ ToA, para. 14.

⁸⁰⁵ ToA, paras. 14, 77.

711. The Tribunal's Other Costs are the following:

(a) The Tribunal's additional expenditures amount to: EUR 65,048.44.⁸⁰⁶

(b) The Secretary to the Tribunal's fees and expenses are the following:

	Fees	Expenses
Krystle Baptista Serna	EUR 87,375.00	EUR 2,219.32

(c) The PCA's fees and expenses are the following:

	Fees	Expenses
PCA	EUR 41,697.50	EUR 195.50

712. In summary, the Arbitrators' Fees and Expenses and the Tribunal's Other Costs under Art. 40.2(a) to (c) of the UNCITRAL Rules total EUR 804,849.77.

3. DEPOSITS FOR COSTS

713. As set out in the ToA, the PCA has managed the funds deposited by the Parties as advances for the Tribunal's costs under Art. 40.2(a) to (c) of the UNCITRAL Rules.⁸⁰⁷ During the course of these proceedings, the Parties have made deposits totaling EUR 900,000. This amount was paid in equal shares by the Parties, in accordance with Art. 43 of the UNCITRAL Rules (*i.e.*, EUR 450,000 from Claimant and EUR 450,000 from Respondent).

714. The unexpended balance of the deposit, in the total amount of EUR 95,150.23, shall be returned to the Parties in equal shares in accordance with Art. 43.5 of the UNCITRAL Rules (*i.e.*, EUR 47,575.12 to each Party).

4. ALLOCATION OF COSTS

715. Each Party seeks that the counterparty be ordered to bear all costs and expenses of the present arbitral proceedings.⁸⁰⁸

716. The allocations of costs is governed by Art. 42 of the UNCITRAL Rules, which provides as follows:

“1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs”.

⁸⁰⁶ These costs include bank fees, couriers, catering, court reporting, IT/AV support, simultaneous interpretation, printing and teleconferencing costs.

⁸⁰⁷ ToA, para. 15.

⁸⁰⁸ See paras. 237-238 *supra*.

717. This provision gives the Tribunal broad discretion to allocate the costs between the Parties, the principal guideline being that the costs should be borne by the “unsuccessful parties”. Otherwise, the provision directs the Tribunal to allocate the costs as it deems “reasonable [...] taking into account the circumstances of the case.”

Success of the Parties’ claims

718. As for the outcome of this procedure, in general Claimant has been the successful party. Claimant has convinced the Tribunal that it has jurisdiction and that Claimant has suffered measures tantamount to an expropriation. The principle that costs follow the event mandates, in principle, that Respondent bear the costs of the arbitration, at least in their majority.
719. However, Claimant sought damages in excess of USD 175 M for all its claims. The Tribunal has however concluded that the damage suffered by Claimant for Belarus’ expropriation of the Facilities only amounts to USD 20.4 M plus interest⁸⁰⁹ – a quantum much lower than the one sought.
720. Thus, although Claimant has prevailed, it has obtained a compensation that is substantially below the claimed amount.

Reasonability under the circumstances

721. Turning to other guidelines for apportioning of costs, Art. 42.1 of the UNCITRAL Rules permits the Tribunal to apportion costs between the Parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. Typically, tribunals consider under this category aspects such as the conduct of each party throughout the proceedings or the complexity and novelty of the questions raised.
722. As for the conduct of the Parties, the Tribunal is pleased to report that neither Claimant nor Respondent have failed to comply with any procedural orders, fallen into unreasonable, obtrusive behavior, or acted in bad faith.
723. As to the other criterion – the complexity and novelty of the questions raised – the Parties have brought and argued complex matters of fact and law, which have required significant amounts of time and effort.

5. CONCLUSION

724. All things being considered, the Tribunal thus finds it reasonable under the circumstances that the costs be divided in the following way:
725. First, as for the Arbitrators’ Fees and Expenses and the Tribunal’s Other Costs, the Tribunal finds that these costs should be assumed by Respondent, given that Claimant has prevailed in the majority of the jurisdictional objections and the Tribunal has found a breach by Belarus of the EEU Treaty.

⁸⁰⁹ See section VII *supra*.

726. Thus, Belarus must reimburse Claimant the totality of Claimant's contribution to the Arbitrators' Fees and Expenses and the Tribunal's Other Costs (net of any final reimbursements made by the PCA), which amounts to EUR 402,424.88.⁸¹⁰
727. Second, as for the Parties' Legal Costs, the Tribunal finds that Respondent should assume 75% of these costs, given that although Claimant has prevailed in general, there is a significant difference between the compensation requested by Claimant and the one effectively awarded by the Tribunal.
728. Thus, Belarus must reimburse Claimant 75% of Claimant's Legal Costs, which amounts to USD 1,438,405.46.⁸¹¹

Interest

729. The Parties have requested that interest be applied over the amounts awarded as costs.⁸¹² And the Tribunal agrees.
730. The Tribunal has already decided that the compensation awarded to Claimant shall accrue interest at the higher of (i) the NBB Published Rate or (ii) LIBOR for six-month deposits denominated in USD, such interest to be capitalized six-monthly in arrears.
731. The same shall be applied to the amounts that Respondent is ordered to reimburse as costs.
732. The *dies a quo* shall be the date of issuance of this Award.
733. The *dies ad quem* shall be the date of effective payment.

⁸¹⁰ EUR 450,000.00 - EUR 47,575.12 = EUR 402,424.88

⁸¹¹ USD 1,917,873.95 * 0.75 = USD 1,438,405.46

⁸¹² C I, para. 576; C II, para. 127; C III, para. 871; C PHB, para. 100; R II, para. 719; R III, para. 1464.

X. SUMMARY

734. The dispute brought before the Tribunal required that the Tribunal decide on Respondent's jurisdictional objections (1.), on the breach of Respondent's obligations under the EEU Treaty (2.) and on the compensation owed to Claimant plus interest and costs (3.).

1. JURISDICTION

735. Respondent submitted the following five jurisdictional objections:

- first, the *Ratione Temporis* Objection alleging that the Tribunal lacked jurisdiction to decide both the Termination and the Tax Disputes which arose before the Treaty entered into force on 1 January 2015;
- second, the Contractual Objection alleging that the Termination Dispute was a contract claim and not a Treaty claim;
- third, the Minsktrans Objection averring that Minsktrans was not empowered to exercise government authority and performed its obligations under the Investment Contract in a private capacity;
- fourth, the Domestic Law Objection, arguing that the Tribunal lacked jurisdiction under the Belarusian Investment Law; and
- finally, the *Ratione Materiae* Objection alleging that Claimant failed to prove that it owns the investment made through Manolium-E.

736. Of the five jurisdictional objections, the Tribunal partially entertained Respondent's *Ratione Temporis* Objection, which rendered the Contractual and Minsktrans Objections moot, and found – by majority – for Respondent in the Domestic Law Objection. The Tribunal decided as follows:

- The Tribunal has jurisdiction *ratione temporis* to decide the Tax Dispute in its entirety.
- As regards the Termination Dispute, the Tribunal partially accepted the *Ratione Temporis* Objection, and decided:
 - o that it does have jurisdiction to adjudicate the alleged breaches of the Treaty (expropriation and FET standard, including denial of justice), with regard to measures which occurred after the Effective Date (*i.e.*, (i) the Cassation Decision and (ii) the auctioning in favour of a third party of the right to develop a project similar to the Mall); and
 - o that it lacks jurisdiction to adjudicate all other alleged breaches of the Treaty forming part of the Termination Dispute which occurred before the Effective Date.

- The Tribunal's decision regarding the *Ratione Temporis* Objection rendered the Contractual Objection and the Minsktrans Objection moot.
- The Tribunal lacks jurisdiction to adjudicate the Termination and the Tax Disputes submitted by Claimant applying the Belarusian Investment Law.
- Finally, the Tribunal dismissed the *Ratione Materiae* Objection and declared that it has jurisdiction over Claimant's claims, Claimant being the owner of several investments in Belarus protected under the EEU Treaty.

2. **MERITS**

The Tax Dispute

737. The Tax Dispute gives rise to claims for expropriation and for breach of the FET standard.
738. The Tribunal has found that the Republic of Belarus adopted taxation and enforcement measures against Manolium-E and Claimant with consequences equivalent to those of expropriation in breach of Arts. 79, 80 and 81 of the Protocol. The taxation and enforcement measures resulted in an expropriation: Manolium-E was deprived of the Facilities, which were transferred to the Minsk Municipality without compensation, while Claimant was deprived of the value of its shareholding in Manolium-E, which was reduced to nil.
739. The Tribunal's findings that the Minsk Municipality committed an abuse of tax law, and that the tax and enforcement measures were arbitrary, imply that the Republic of Belarus also violated the FET standard towards Claimant and its investments.

The Termination Dispute

740. The Tribunal dismissed Claimant's claims under the Termination Dispute. The Tribunal decided that:
- the Cassation Decision did not constitute a denial of justice nor a judicial expropriation, and that
 - Respondent's decision to auction the right to design and construct a project similar to the Mall did not constitute a Treaty violation.

3. **QUANTUM**

741. Manolium claimed the following:⁸¹³

- first, lost profits for the Mall of USD 155.9 M or any other amount the Tribunal finds justified;

⁸¹³ C PHB, para. 100(II)(c)(i).

- second, loss of the Facilities amounting to USD 20,434,679;
- alternatively, damages in the form of loss of profits for the non-development of the Mall for USD 31.87 M or 8.87 M;⁸¹⁴
- interest on all sums awarded to Claimant; and
- an order that Respondent reimburse all arbitration costs, including legal costs.

742. The Tribunal concluded that the proper compensation due to Claimant under the Treaty amounts to USD 20,434,679. This Principal Amount will accrue interest from 27 January 2017 through the date of actual payment, at the higher of (i) the NBB Published Rate or (ii) LIBOR for six-month deposits denominated in USD, such interest to be capitalized six-monthly in arrears.

743. Finally, the Tribunal decided that Belarus must reimburse Claimant the totality of Claimant's contribution to the Arbitrators' Fees and Expenses and the Tribunal's Other Costs, as well as 75% of Claimant's Legal Costs, plus interest from the date of this Award through the date of actual payment, at the higher of (i) the NBB Published Rate or (ii) LIBOR for six-month deposits denominated in USD, such interest to be capitalized six-monthly in arrears.

⁸¹⁴ C PHB, para. 100(II)(c)(ii).

XI. DECISION

744. For the foregoing reasons the Tribunal:

1. Declares that it has *ratione temporis* jurisdiction to decide (i) all measures related to the Tax Dispute (ii) those measures related to the Termination Dispute which occurred after the Effective Date.
2. Declares that it lacks jurisdiction to adjudicate the Termination and the Tax Disputes applying the Belarusian Investment Law.
3. Dismisses Respondent's *Ratione Materiae* Objection.
4. Declares that the Republic of Belarus adopted taxation and enforcement measures against Manolium-E and Claimant with consequences equivalent to those of expropriation, in breach of Arts. 79, 80 and 81 of the Protocol.
5. Declares that the Republic of Belarus breached the FET standard established in Art. 68 of the Protocol.
6. Orders the Republic of Belarus to pay Claimant USD 20,434,679 as compensation.
7. Orders the Republic of Belarus to pay Claimant interest on the compensation, accrued between 27 January 2017 and the date of actual payment, calculated at the higher of (i) the NBB Published Rate or (ii) LIBOR for six-month deposits denominated in USD, such interest to be capitalized six-monthly in arrears.
8. Orders the Republic of Belarus to pay Claimant (i) the totality of Claimant's contribution to the Arbitrators' Fees and Expenses and the Tribunal's Other Costs, which amounts to EUR 402,424.88, and (ii) 75% of Claimant's Legal Costs, which amount to USD 1,438,405.46.
9. Orders the Republic of Belarus to pay Claimant interest on the amounts awarded in point 8 *supra*, from the date of this Award until the date of payment calculated at the higher of (i) the NBB Published Rate or (ii) LIBOR for six-month deposits denominated in USD, such interest to be capitalized six-monthly in arrears.
10. Dismisses all other claims.

745. All Decisions are unanimous, except for decision 2 *supra*, which was taken by majority.

Place of arbitration: The Hague, the Netherlands.

Date: 22 June 2021.

ARBITRAL TRIBUNAL



Stanimir Alexandrov



Brigitte Stern



Juan Fernández-Armesto