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

OOO MANOLIUM-PROCESSING

Claimant

v.

REPUBLIC OF BELARUS

Respondent

RESPONSE TO THE NOTICE OF ARBITRATION

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15 December 2017

WHITE & CASE
Counsel for Respondent

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I. INTRODUCTION

1. In accordance with Article 4 of the 2013 UNCITRAL Arbitration Rules (the "**Rules**") the Republic of Belarus (the "**Respondent**") hereby submits its Response (the "**Response**") to the Notice of Arbitration dated 15 November 2017 (the "**Notice**").

2. OOO Manolium-Processing (the "**Claimant**") commenced this action pursuant to Articles 84 and 85(3) of Annex 16 to the Treaty on the Eurasian Economic Union dated 29 May 2014 (the "**Treaty**"). The Claimant alleges that the Respondent, as a member state of the Treaty, has breached its obligations under Article 68 and 79 of Annex 16 to the Treaty.

3. The Claimant argues that (a) alleged breaches of the Investment Contract (as defined below) and the imposition of taxes and fines by the Belarusian authorities amount to a failure by the Respondent to treat the Claimant fairly and equitably;[1] and (b) the termination of the Investment Contract amounts to an unlawful expropriation of the Claimant's assets without fair compensation.[2]

4. The Respondent does not admit any of the allegations in the Notice save as expressly stated in this Response. The Respondent expressly reserves its right to make further submissions and applications (as permitted under, *inter alia*, Articles 21 – 24 of the Rules), including but not limited to challenges to the jurisdiction of the Tribunal and applications to bifurcate the proceedings.

II. THE PARTIES

A. THE RESPONDENT

5. The Respondent is the Republic of Belarus.

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1 Treaty on the Eurasian Economic Union dated 29 May 2014, Annex 16, Article 68.

2 Treaty on the Eurasian Economic Union dated 29 May 2014, Annex 16, Article 79.

6. The Respondent's legal representatives are:

David Goldberg (Partner)
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B. THE CLAIMANT

7. The Claimant is a limited liability company incorporated under the laws of Russian Federation having its registered address at 11 Stanislavskogo Street, Ground floor, room VII, Moscow 109004 Russia.

8. The Claimant's legal representatives are:

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III. NATURE OF THE DISPUTE AND SUMMARY OF FACTUAL BACKGROUND

9. The dispute before the Tribunal (the "**Dispute**") arises out of an Investment Contract entered into between (a) the Claimant; (b) IP Manolium-Engineering, the Claimant's subsidiary registered in the Republic of Belarus ("**Manolium-Engineering**"); (c) Minsk City Executive Committee ("**MCEC**"); and (d) Communal Unitary Enterprise "Minsktrans" (formerly Unitary Enterprise "Transport and Communication Administration of MCEC") ("**Minsktrans**") dated 6 June 2003, as amended (the "**Investment Contract**").[3]

10. Under the Investment Contract, the Claimant agreed to construct various municipal facilities in exchange for the right to develop a large-scale complex in the centre of Minsk (the "**Investment Object**").

11. The nature and location of the municipal facilities to be constructed by the Claimant under the Investment Contract were amended in various supplementary agreements.

[3] The Investment Contract (Exhibit C-34) and amendments to it (Exhibits C-47, C-48, C-49, C-66, C-72, C-76).

On 8 February 2007, the parties to the Investment Contract agreed to incorporate the amendments into a restated version of the Investment Contract, namely Additional Agreement No. 4 (the "**Amended Investment Contract**").[4]

12. According to Additional Agreement No. 6 dated 20 April 2011, the final date for the construction of the municipal facilities under the Amended Investment Contract was set for 1 July 2011.[5] The Claimant's permit to use the relevant land plots was prolonged until the same date.

13. As at 1 July 2011, the Claimant had still not completed the construction of the municipal facilities. Furthermore, the Claimant failed to make an application to the relevant authorities to prolong the permit to use the relevant land plots, as required under Belarusian law.

14. Pursuant to Clause 16.2 of the Amended Investment Contract, MCEC had to apply to the local court to terminate the Amended Investment Contract if the construction had "*not been performed* [in time] *due to the Investor's fault*".[6]

15. On 19 September 2013, after MCEC provided the Claimant with an opportunity to remedy its breach of the Investment Contract and following unsuccessful attempts to settle the dispute with the Claimant, MCEC for the last time informed the Claimant that it would submit a claim to the Economic Court of Minsk for the Amended Investment Contract to be terminated.[7] MCEC submitted the claim on 14 October 2013.[8]

16. On 9 September 2014, the Amended Investment Contract was formally terminated by the Economic Court of Minsk.[9] The Appeal Instance of the Economic Court of Minsk upheld the decision on 29 October 2014, on which date the judgment of the Economic Court of Minsk entered into legal force.[10] On 27 January 2015, the Belarusian

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4 Amended Investment Contract (Exhibit C-66).

5 Additional Agreement No. 6 to the Investment Contract between the Claimant, Manolium-Engineering, MCEC and Minsktrans dated 20 April 2011, Clause 1 (Exhibit C-76).

6 Amended Investment Contract dated 8 February 2007, Clause 16.2.1 (Exhibit C-66).

7 Letter from MCEC to the Claimant dated 19 September 2013 (Exhibit C-139).

8 Statement of claim regarding the termination of the Agreement (Exhibit C-140).

9 Decision of the Minsk court dated 9 September 2014 (Exhibit C-147).

10 Decision of the Appeal Instance of the Economic Court of Minsk dated 29 October 2014 (Exhibit C-150).

Supreme Court upheld the lower courts' decisions. To the best of the Respondent's knowledge, although the Claimant was entitled to appeal the judgment of the Economic Court of Minsk to the President of the Supreme Court or the Prosecutor General of Belarus, it did not do so.

17. Since, as stated in paragraph 13 above, Manolium-Engineering was using the land plots without valid permits, on 17 May 2016 the Pervomayskiy District Court of Minsk imposed a fine on Manolium-Engineering.[11] On 14 June 2016, the Minsk City Court confirmed the decision on appeal. On 3 August 2016, the President of the Minsk City Court denied the appeal of Manolium-Engineering against the decisions of 17 May and 14 June 2016. To the best of the Respondent's knowledge, Manolium-Engineering did not appeal the decision to the Belarusian Supreme Court.

18. On 17 May 2016, the Inspectorate of the Ministry of Taxes and Levies of the Republic of Belarus for the Central District of Minsk (the "**Tax Inspectorate**") issued an initial report setting out the results of a desk tax audit of Manolium-Engineering.[12] On 21 June 2016, the Tax Inspectorate amended its initial report in view of the litigation proceedings described in paragraph 17 above. To the best of the Respondent's knowledge, Manolium-Engineering made no objections to the initial and the updated reports, although it had a right to do so under Belarusian law.

19. On 5 July 2016, the Tax Inspectorate attached the property located on the relevant land plots.[13] On 19 July 2016, as required by Belarusian law, the Tax Inspectorate issued a formal decision to recover the amounts declared due by the Tax Inspectorate.[14] On 20 July 2016, the Tax Inspectorate applied to the Belarusian courts for a court order to recover the debts owed according to the tax assessments it had conducted.[15] On 18 August 2016, the court issued the order.[16]

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11 Judgment of the Pervomayskiy District Court of Minsk dated 17 May 2016 (Exhibit C-182).

12 Tax Inspectorate report dated 17 May 2016 (Exhibit C-164, pages 2 – 4).

13 Ruling of the Tax Inspectorate No. 1110590 dated 5 July 2016 to attach property (Exhibit C-167).

14 Decision of the Tax Inspectorate No. 2-5/465 dated 19 July 2016 (Exhibit C-164, pages 10 – 11).

15 Application of the Tax Inspectorate to the Economic Court of Minsk dated 20 July 2016 (Exhibit C-169).

16 Order of the Economic Court of Minsk dated 18 August 2016 (Exhibit C-170).

20. To the best of the Respondent's knowledge, Manolium-Engineering was aware of the Tax Inspectorate's actions and the court order described in paragraph 19 above, but did not appeal either of them.

21. On 15 November 2017, the Claimant filed the Notice against the Respondent.

IV. THE TRIBUNAL TO BE CONSTITUTED UNDER THE RULES LACKS JURISDICTION

22. The Claimant relies on the arbitration agreement set out in Articles 84 and 85(3) of Annex 16 to the Treaty, which states:

> *"84. Disputes between a recipient state and an investor of another Member State arising 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 Article 77 of this Protocol and the compensation provided for in Articles 79 – 81 of this Protocol, or the order of payment and transfer of funds as 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:*
>
> *[…]*
>
> *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); […]"*

23. The Claimant alleges that the Respondent is responsible under the Treaty for the actions of (a) MCEC; (b) Minsktrans; and (c) the Pervomayskiy District Court of Minsk, the Economic Court of Minsk and the Supreme Court of Belarus.[17] The Claimant submits that the alleged breaches by the Respondent arise from the actions of these entities.

24. The Respondent respectfully submits that the tribunal to be constituted in these proceedings (the "**Tribunal**") lacks jurisdiction, because:

A. there is no valid arbitration agreement;[18]

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[17] Notice, paragraph 366.

[18] *See* paragraphs 26 to 35 below. The Respondent submits that Article 85(3) of Annex 16 to the Treaty is only applicable to disputes which arose after the Treaty entered into force on 1 January 2015. By referring to various alleged breaches of the Investment Contract during 2004 – 2014 and by alleging

B. contractual claims under the Amended Investment Contract should be referred to the Belarusian courts pursuant to Clause 26 of the Amended Investment Contract;[19] and

C. in any event, the Tribunal has no jurisdiction in relation to the claims against Minkstrans, because Minkstrans is a separate entity which acted as any private contractor could have done in the circumstances.[20]

25. The Respondent reserves the right to supplement or amend its position in relation to jurisdiction in due course.

A. THERE IS NO VALID ARBITRATION AGREEMENT

26. The Claimant alleges that the Treaty is applicable to the Dispute pursuant to Articles 65 and 85(3) of Annex 16 to the Treaty.[21] The Respondent submits that the Treaty does not apply to disputes which arose before the Treaty came into force on 1 January 2015.[22] Furthermore, the Respondent submits that the Dispute arose before this date. Accordingly, there is no valid arbitration agreement in respect of the Dispute.

1. The Treaty does not apply to disputes which arose before the Treaty came into force

27. According to Article 65 of Annex 16 to the Treaty, the provisions of Section VII of Annex 16 apply to all investments made by investors of member states on the territory of another member state from 16 December 1991.[23]

28. The Respondent respectfully submits that, as a matter of international law, the fact that the Treaty applies to investments made prior to its entry into force does not mean that it applies to disputes which arose before it came into force.[24]

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that the Respondent expropriated the Claimant's property by terminating the Investment Contract in 2014, the Claimant appears to concede that the Dispute arose before 1 January 2015. The Respondent submits that the Dispute arose before this date. Therefore, there is no valid arbitration agreement in respect of the Dispute.

19 *See* paragraphs 36 to 41 below.

20 *See* paragraphs 42 to 48 below.

21 Notice, paragraph 1.

22 It is common ground that the Treaty came into force on 1 January 2015; see Notice, paragraph 322.

23 Treaty on the Eurasian Economic Union dated 29 May 2014, Annex 16, Article 65.

29. Article 28 of the Vienna Convention on the Law of Treaties 1969 (the "**Vienna Convention**") sets out the principle of non-retroactivity of treaties under international law.[25] According to Article 28 of the Vienna Convention, in the absence of wording to the contrary, the provisions of a treaty will not apply to a dispute which arose before the treaty came into force. [26]

30. There must be a clear and unequivocal expression of intention to dispense with the principle of non-retroactivity.[27] The silence of the text of a treaty with respect to disputes which arose prior to its entry into force does not alter the effect of the non-retroactivity principle.[28]

31. In view of this, the Respondent submits that the Treaty does not apply to disputes which arose before the Treaty came into force on 1 January 2015.

2. <u>The Dispute arose before 1 January 2015</u>

32. The Respondent respectfully submits that the Dispute arose before 1 January 2015.

33. According to the formulation in *Mavrommatis Palestine Concessions*, [29] as adopted by investment treaty tribunals,[30] the key factor in determining the existence of a dispute

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24 *See*, for example, *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraphs 61 - 66, 108 - 117, 135 – 136, **Exhibit RL-1**; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, 18 May 2010, paragraphs 115-117, **Exhibit RL-2**; *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, paragraph 193, **Exhibit RL-3**; *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, paragraph 300, **Exhibit RL-4**.

25 Vienna Convention on the Law of Treaties, 1969, Article 28, **Exhibit RL-5**.

26 Vienna Convention on the Law of Treaties, 1969, Article 28, **Exhibit RL-5**; as applied in: *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability (UNCITRAL), 28 April 2011, paragraph 434 - 442, **Exhibit RL-6**; *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraphs 59 – 68, **Exhibit RL-1**.

27 *Case Concerning Elettronica Sicula SpA (ELSI*) (*United States of America v. Italy)*, ICJ Rep 15, Judgment, 20 July 1989, paragraph 50, **Exhibit RL-7**; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* (UNCITRAL, LCIA Case No. UN 7927), Award on Preliminary Objections to Jurisdiction, 19 September 2008, paragraph 83, **Exhibit RL-8**.

28 *MCI Power Group LC and New Turbine Inc v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paragraph 61, **Exhibit RL-1**.

29 *Mavrommatis Palestine Concessions case (Greece v. Britain)*, PCIJ Rep. Series A No. 2, Judgment, 30 August 1924, p.13, **Exhibit RL-9**.

30 *See*, for example, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paragraph 96, **Exhibit RL-10**.

is the expression of a disagreement, which in time acquires a precise legal meaning, or the establishment of a "conflict of legal views and interests."[31]

34. Applying this test, the Respondent submits that the Dispute arose on 1 July 2011 after the Claimant failed to construct the municipal facilities by the deadline set out in the Amended Investment Contract. In any event, the Respondent submits that the dispute arose not later than on 19 September 2013, when MCEC notified the Claimant for the last time of its intention to submit a claim to the Economic Court of Minsk for the Investment Contract to be terminated.[32]

35. In view of this, the Respondent submits that the Dispute arose well before the Treaty came into force on 1 January 2015. Accordingly, the Treaty, including the arbitration agreement, is not applicable to the Dispute.

B. THE TRIBUNAL HAS NO JURISDICTION IN RELATION TO PURELY CONTRACTUAL CLAIMS

36. Without prejudice to the Respondent's jurisdictional objection in Section IV.A above, the Respondent submits that the Tribunal has no jurisdiction over the Claimant's purely contractual claims.

37. A tribunal constituted under an investment treaty does not have jurisdiction over purely contractual claims, unless expressly provided for.[33] The Claimant concedes that the Amended Investment Contract and the Treaty are of a different legal nature.[34] However, the Claimant alleges that in executing the Amended Investment Contract, the Respondent acted in the exercise of its public powers.[35] On this basis, the Claimant submits that an alleged breach of the Amended Investment Contract can be equated with a breach of the Treaty.[36]

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31 *Mavrommatis Palestine Concessions case (Greece v. Britain)*, PCIJ Rep. Series A No. 2, Judgment, 30 August 1924, p.13, **Exhibit RL-9**.

32 Letter from MCEC to the Claimant dated 19 September 2013, (Exhibit C-139).

33 *Compania de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paragraph 96, **Exhibit RL-11**.

34 Notice, paragraph 504.

35 Notice, paragraphs 510.

36 Notice, paragraph 512.

38. The Claimant offers no support to its argument that the Respondent acted in the exercise of its public powers in the performance of the Amended Investment Contract. For the reasons set out below in paragraphs 42 to 48, the Respondent submits that it is not responsible for the actions of Minsktrans under the Amended Investment Contract. In any event, the Respondent denies that MCEC was exercising public powers in all the circumstances to which the Claimant refers as evidence of the Respondent's breach of the Treaty.

39. The Claimant's allegations against the Respondent concern the rights and obligations of Minsktrans and MCEC under the Amended Investment Contract and the parties' compliance with those obligations. The Respondent submits that, accordingly, these allegations go to the issue of whether there has been a breach of contract, not whether there has been a breach of the Treaty.

40. Furthermore, the allegations which the Claimant directs against Minsktrans and MCEC in the Notice have already been addressed in the proceedings before the Belarusian courts. The Claimant agreed for all issues arising out of the Investment Contract to be submitted to the Belarusian courts.[37] The Respondent submits that the Claimant is referring the same contractual issues to the Tribunal dressed up as treaty claims.

41. Accordingly, the Respondent respectfully submits that the Tribunal has no jurisdiction in relation to the purely contractual allegations submitted by the Claimant.

C. THE TRIBUNAL HAS NO JURISDICTION IN RELATION TO THE CLAIMS WHICH ARE BASED ON THE ACTIONS OF MINSKTRANS

42. Without prejudice to the Respondent's jurisdictional objections above, the Respondent further submits that the Tribunal has no jurisdiction in respect of the Claimant's allegations against Minsktrans.

43. The Claimant concedes that the Respondent is not responsible for the actions of Minsktrans pursuant to Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts of the UN International Law Commission adopted by

[37] Investment Contract, Clause 21, (Exhibit C-34); Amended Investment Contract, Clause 26, (Exhibit C-66).

the UN General Assembly Resolution 56/589 of 12 December 2001 ("**Articles on State Responsibility**").[38]

44. However, the Claimant alleges that Minsktrans exercises elements of governmental authority for the purposes of Article 5 of the Articles on State Responsibility[39] because "*one of main aims of Minsktrans' activities is rendering the population with the passenger transport services*".[40] The Respondent submits that the Claimant's analysis is wrong.

45. First, the Respondent denies that the provision of passenger transport services amounts to an exercise of public authority.

46. Second, the Respondent submits that to determine whether an entity exercises public authority for the purposes of Article 5 of the Articles on State Responsibility, the applicable test is whether any private contractor could have acted in a similar manner under the circumstances.[41]

47. The Respondent submits that Minsktrans did not require any governmental authority to perform its obligations under the Amended Investment Contract. In view of this, the Respondent submits that Minsktrans acted as any private contractor could have done in the circumstances.

48. Accordingly, the Respondent submits that (a) the Respondent is not responsible for the actions of Minsktrans under Article 5 of the Articles on State Responsibility; and (b) the Tribunal has no jurisdiction over the claims against the Respondent which are based on the actions of Minsktrans.

V. BRIEF RESPONSE TO THE INFORMATION SET OUT IN THE NOTICE

49. Without prejudice to the Respondent's submission on jurisdiction, the Respondent hereby responds to the information set forth in the Notice pursuant to Article 4(1)(b)

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38 Articles on State Responsibility, Article 4, **Exhibit RL-15**.

39 Articles on State Responsibility, Article 5, **Exhibit RL-15**.

40 Notice, paragraph 377.

41 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraphs 170 – 171, **Exhibit RL-12**.

of the Rules. The Respondent reserves the right to supplement or amend its position in due course.

50. While the Respondent has characterised its claims in terms of expropriation and failure to ensure fair and equitable treatment, the Respondent submits that, in essence, the Claimant's allegations amount to a claim for denial of justice against the Respondent. The Respondent submits that the Claimant has deliberately characterised its claims in this way because it is unable to satisfy the high standard for establishing a claim for denial of justice.[42]

A. THE RESPONDENT DID NOT BREACH ARTICLE 68 OF ANNEX 16 TO THE TREATY

51. The Claimant alleges that the Respondent has breached its obligation under Article 68 of Annex 16 to the Treaty to ensure the fair and equitable treatment on its territory to investments conducted by investors of other member states.[43] The Claimant alleges that the Respondent breached Article 68 by failing to (a) act openly and transparently in relation to the Claimant;[44] and (b) act honestly and in good faith towards the Claimant.[45]

1. The Respondent acted openly and transparently towards the Claimant

52. The Claimant alleges that in 2016, the Tax Inspectorate carried out "*a series of tax inspections*" in connection with the occupation of land plots by Manolium-Engineering.[46] The Claimant alleges that changes in the Tax Inspectorate's assessment of arrears owed by Manolium-Engineering amount to a failure by the Respondent to act openly and transparently towards the Claimant.[47] On

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42 *See*, for example, *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paragraph 500, **Exhibit RL-13**; *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, paragraph 99, **Exhibit RL-14**.

43 Article 68 of Annex 16 to the Treaty; Notice, paragraphs 389.

44 Notice, paragraphs 393 – 410.

45 Notice, paragraphs 411 – 505.

46 Notice, paragraphs 400 – 410.

47 Notice, paragraph 410.

this ground, the Claimant submits that the Respondent has violated its obligation under Article 68 of Annex 16 of the Treaty.[48]

53. The Respondent denies that the alleged wrongdoings of the Tax Inspectorate amount to a violation of the Treaty.

54. First, the Respondent submits that the Claimant failed to pursue all domestic remedies provided for under Belarusian law and available to the Respondent to protect it in respect of the alleged wrongdoings by the Tax Inspectorate.

55. Second, the Respondent submits that the actions of the Tax Inspectorate in relation to the Claimant were in accordance with Belarusian law. The Tax Inspectorate would have acted in the same way towards any other investor in similar circumstances.

56. In view of this, the Respondent denies that the actions of the Tax Inspectorate amount to a violation of the Respondent's duties under Article 68 of Annex 16 to the Treaty.

2. The Respondent acted honestly and in good faith towards the Claimant

57. The Claimant submits that the actions of (a) Minsktrans;[49] (b) MCEC;[50] and (c) various alleged state bodies,[51] including the courts of Belarus,[52] towards the Claimant in the period 2014 – 2017 amount to a failure by the Respondent to act honestly and in good faith towards the Claimant.[53] The Claimant alleges that the Respondent has on this ground breached its obligation under Article 68 of Annex 16 to the Treaty.[54]

58. The Respondent denies that the alleged actions amount to a violation of the Respondent's duty to ensure the fair and equitable treatment of investments under the Treaty.

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48 Notice, paragraph 389.

49 Notice, paragraph 417(a) – (c).

50 Notice, paragraph 417(a) – (c).

51 Notice, paragraph 417(d).

52 Notice, paragraphs 477 – 479.

53 Notice, paragraphs 417.

54 Notice, paragraph 389.

59. First, as set out in paragraphs 36 to 41 above, the Respondent submits that the allegations directed against Minsktrans and MCEC go to the issue of whether there has been a breach of the Amended Investment Contract, not whether there has been a breach of the Treaty. The Respondent denies that Minsktrans or MCEC breached the Amended Investment Contract.

60. Second, the Respondent submits that the Claimant had further opportunities to appeal the court decisions under Belarusian law. However, the Claimant failed to take these opportunities.

61. Furthermore, the Respondent submits that the court decisions[55] and the actions of other state bodies[56] to which the Claimant refers were in accordance with Belarusian law. The Respondent submits that the relevant entities would have acted in the same way towards any other investor in similar circumstances.

62. In view of this, the Respondent denies that the Respondent has violated its duties under Article 68 of Annex 16 to the Treaty.

B. THE RESPONDENT DID NOT BREACH ARTICLE 79 OF ANNEX 16 TO THE TREATY

63. The Claimant alleges that the Respondent has breached its obligation under Article 79 of Annex 16 to the Treaty by illegally expropriating the Claimant's investment.[57] The Claimant alleges that the termination of the Amended Investment Contract amounts to an indirect expropriation of its investment for the purposes of Article 79.[58]

64. The Respondent denies that the termination of the Amended Investment Contract amounts to an indirect expropriation under the Treaty. The Respondent submits that the Amended Investment Contract was terminated because the Claimant had failed to comply with its obligations under the Amended Investment Contract. After it became apparent that the Claimant was not going to continue construction, MCEC was left with no choice other than to seek the termination of the Investment Contract. The

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55 Notice, paragraphs 477 – 479.

56 Notice, paragraph 417(d).

57 Notice, paragraph 518.

58 Notice, paragraph 518.

Amended Investment Contract was therefore terminated lawfully as a matter of Belarusian law.

65. In view of this, the Respondent submits that it has not violated its obligations under Article 79 of Annex 16 to the Treaty.

C. RESPONDENT'S ASSESSMENT OF DAMAGES

66. The Claimant alleges in the Notice that it has suffered damages of USD 208,200,000 or, alternatively, USD 45,550,000.[59]

67. Without prejudice to the Respondent's position on jurisdiction and the merits, the Respondent submits that the Claimant's assessment of damages is incorrect and without basis. The Respondent reserves the right to elaborate on and supplement its objections to the Claimant's assessment of damages in due course.

VI. PROCEDURAL ISSUES

A. PLACE OF ARBITRATION

68. The Respondent proposes that the selection of the place of arbitration be agreed with the arbitrators once the Arbitral Tribunal is constituted.

B. APPLICATION OF 2013 UNCITRAL RULES

69. The Claimant submits that the UNCITRAL Arbitration Rules, as revised in 2013, should apply to these proceedings.

70. Pursuant to Article 1(2) of the Rules, "[t]*he parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules.*" .

71. The Claimant refers to the arbitration agreement in Articles 84 and 85(3) of the Treaty. The Treaty came into force on 1 January 2015.

[59] Notice, paragraph 539.

72. Without prejudice to the Respondent's position on jurisdiction, the Respondent agrees to the application of the UNCITRAL Arbitration Rules, as revised in 2013.

C. NUMBER OF ARBITRATORS

73. Based on Article 7 of the Rules, the Claimant concludes that three arbitrators should be appointed in these arbitration proceedings. The Respondent agrees.

D. APPOINTMENT OF THE RESPONDENT'S CO-ARBITRATOR

74. Pursuant to Article 9(1) of the Rules, if three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

75. The Respondent hereby appoints Professor Brigitte Stern as arbitrator.

76. Professor Stern's contact details are as follows:

Professor Brigitte Stern
7, rue Pierre Nicole
75005 Paris
France
brigitte.stern@jstern.org

E. DESIGNATION OF THE APPOINTING AUTHORITY

77. In accordance with Article 6(1) of the UNCITRAL Rules, and in the event that this is required, the Respondent agrees that the Secretary-General of the Permanent Court of Arbitration in the Hague (the "**PCA**") serve as the appointing authority in this arbitration.

F. LANGUAGE OF THE ARBITRATION

78. The language of the arbitration is not provided for under the Treaty. The Claimant proposes Russian as the language of the arbitration.

79. The Respondent submits that, taking into account all the relevant facts and circumstances, it would be more appropriate to choose English as the language of the

arbitration. The Respondent reserves the right to make further submissions on the language of the arbitration in due course and if necessary.

VII. RELIEF SOUGHT

80. The Respondent respectfully requests that the Tribunal:

A. declare that it has no jurisdiction over the Dispute and order the Claimant to bear all the costs and fees incurred by the Respondent in connection with these proceedings; or

B. dismiss the claims over which the Tribunal determines that it has jurisdiction in their entirety and order the Claimant to bear all the costs and fees incurred by the Respondent in connection with these proceedings.

Respectfully submitted on
15 December 2017

White & Case LLP